TABLE OF CONTENTS

IMLA TELECONFERENCE Session VI

Election law, Voting Rights and One Person, One Vote: Legal Issues & Developments for Local Governments

Introduction ........................................................................................................................................ 1

Discussion ....................................................................................................................................... 2-20

Section 5 ........................................................................................................................................ 21

South Carolina v. Katzenbach, 383 U.S. 301 (1966) ........................................................................ 22

City of Rome v. United States, 446 U.S. 156, 183 (1980) ................................................................. 22

Lopez v. Monterey County, 525 U.S. 266, 282-83 (1999) ................................................................. 22


City of Boerne v. Flores, 521 U.S. 507, 520 (1997) ........................................................................... 24-25

House Hearing, 109th Cong. 1134 (Oct. 18, 2005) ................................................................. 26

*Beer v. United States*, 425 U.S. 130 (1976).................................................................................26


Senate Hearing, 109th Cong. 8 (May 16, 2006) (Arrington statement).................................27

House Hearing, 109th Cong. 49 (Nov. 9, 2005) (McDonald statement).................................27

Senate Hearing, 109th Cong. 39 (May 17, 2006) (Days responses)...........................................27


House Hearing, 109th Cong. 2 (Nov. 9, 2005) (Rep. Conyers statement)..............................28

42 U.S.C. § 1973c(b), (d)..............................................................................................................28

II. **One Person, One Vote and Election Delay** [**Hancock County v. Ruhr**]

*Hancock County Board of Supervisors v. Ruhr, et al.*, Cause No. 1:10CV564-LG-HW (consolidated cases) (S.D. Miss. May 16, 2011).................................................................30-36


*Fairley v. Patterson*, 493 F.2d 598, 604 (5th Cir. 1974) and *N.A.A.C.P. v. City of Kyle, Tex.*, 626 F.3d 233, 237 (5th Cir. 2010)........................................................................................................31

*Hanson v. Veterans Admin.*, 800 F.2d 1381, 1385 (5th Cir. 1986) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984))........................................................................................................31

*Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 484-85 (1968).........................................................32

*Martinolich v. Dean*, 256 F. Supp. 612 (S.D. Miss. 1966).........................................................32

*Moore v. Itawamba County, Miss.*, 431 F.3d 257, 259-60 (5th Cir. 2005).................................32


Fairley v. Forrest County, Mississippi, 814 F. Supp. 1327 (S.D. Miss. 1993)..................32

Reynolds v. Sims, 377 U.S. 533 (1964)..............................................................................34

Political Action Conference of Illinois v. Daley, 976 F.2d 335 (7th Cir. 1992)..................34

French v. Boner, 963 F.2d 890 (6th Cir. 1992)................................................................34-35

Fairley v. Forrest County, Mississippi, 814 F. Supp. 1327, 1343, 1346
(S.D. Miss. 1993) ...........................................................................................................35-36

Summit Office Park v. U.S. Steel Corp., 639 F.2d 1278, 1282 (5th Cir. 1981)..................36

Aetna Cas. & Surety Co. v. Hillman, 796 F.2d 770, 774 (5th Cir. 1986)......................... 36


III. Alternatives to Single-Member Districts as Remedy [U.S. v. City of Port Chester]........36-39


Cane v. Worcester County, Maryland, 35 F.3d 921, 928 (4th Cir. 1994).........................37

Dillard v. Baldwin County Comm’rs, 376 F.3d 1260 (11th Cir. 2004).............................37-38


Nipper v. Smith, 39 F.3d 1494, 1532 (11th Cir. 1994) (en banc)........................................37

White v. Alabama, 74 F.3d 1058, 1072 (11th Cir. 1996)...................................................37

Shawna C. MacLeod, One Man, Six Votes, and Many Unanswered Questions - Cumulative Voting as a Remedial Measure for Section 2 Violations in Port Chester and Beyond, 76 Brooklyn L. Rev. 1669, 1710 (2011).................................................................38-39

IV. Citizen Voting Age Population [Lepac v Irving; Benavidez v. Irving].......................38-41

Chen v. City of Houston, 206 F.3d 502, 505, 523 (5th Cir. 2000) .......................................................38-39

Daly v. Hunt, 93 F. 3d 1212, 1227 (4th Cir. 1996) .................................................................39

Garza v. County of Los Angeles, 918 F. 2d 763, 775-76 (9th Cir. 1990) ..................................................39

Reynolds v. Sims, 377 U.S. 533, 542 n.7 (1964) .................................................................39

V. Prison-Based Gerrymandering [Little v. New York State Task Force on Demographic Research and Reapportionment] .................................................................41-43

Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) .........................................................................42

Part XX of Chapter 57 of the N.Y. Laws of 2010 ........................................................................42

VIII. Minority Influence Districts and Crossover Districts ..........................................................44-45

Cousin v. Sundquist, 145 F.3d 818, 828 (6th Cir. 1998) ............................................................44

McNeil v. Springfield Park Dist., 851 F.2d 937, 947 (7th Cir. 1988) .................................................44-45

Dillard v. Baldwin County Comm’rs, 376 F.3d 1260, 1268 (11th Cir. 2004) .......................................45


Illinois Legislative Redistricting Comm’n v. LaPaille, 786 F. Supp. 704, 715-17 (N.D. Ill. 1992) (three-judge panel) .................................................................44-45


Shaw v. Reno ........................................................................................................... 46

Miller v. Johnson ................................................................................................... 46

Perry v. Perez ....................................................................................................... 47
Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice
DEPARTMENT OF JUSTICE

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice

AGENCY: Office of the Assistant Attorney General, Civil Rights Division, Department of Justice.

ACTION: Notice.

SUMMARY: The Attorney General has delegated responsibility and authority for determinations under Section 5 of the Voting Rights Act to the Assistant Attorney General, Civil Rights Division, who finds that, in view of recent legislation and judicial decisions, it is appropriate to issue guidance concerning the review of redistricting plans submitted to the Attorney General for review pursuant to Section 5 of the Voting Rights Act.

FOR FURTHER INFORMATION CONTACT: T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Division, United States Department of Justice, Washington, DC 20530, (202) 514-1416.

SUPPLEMENTARY INFORMATION: Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, requires jurisdictions identified in Section 4 of the Act to obtain a determination from either the Attorney General or the United States District Court for the District of Columbia that any change affecting voting which they seek to enforce does not have a discriminatory purpose and will not have a discriminatory effect.

Beginning in 2011, these covered jurisdictions will begin to seek review under Section 5 of the Voting Rights Act of redistricting plans based on the 2010 Census. Based on past experience, the overwhelming majority of the covered jurisdictions will submit their redistricting plans to the Attorney General. This guidance is not legally binding; rather, it is intended only to provide assistance to jurisdictions covered by the preclearance requirements of Section 5.


Following release of the 2010 Census data, the Department of Justice expects to receive several thousand submissions of redistricting plans for review pursuant to Section 5 of the Voting Rights Act. The Civil Rights Division has received numerous requests for guidance similar to that it issued prior to the 2000 Census redistricting cycle concerning the procedures and standards that will be applied during review of these redistricting plans. 67 FR 5411 (January 18, 2001). In addition, in 2006, Congress reauthorized the Section 5 review requirement and refined its definition of some substantive standards for compliance with Section 5. In view of these developments, issuing revised guidance is appropriate.

The “Procedures for the Administration of Section 5 of the Voting Rights Act,” 28 CFR Part 51, provide detailed information about the Section 5 review process. Copies of these Procedures are available upon request and through the Voting Section Web site (http://www.usdoj.gov/crt/voting). This document is meant to provide additional guidance with regard to current issues of interest. Citations to judicial decisions are provided to assist the reader but are not intended to be comprehensive. The following discussion provides supplemental guidance concerning the following topics:

• The Scope of Section 5 Review;
• The Section 5 Benchmark;
• Analysis of Plans (discriminatory purpose and retrogressive effect);
• Alternatives to Retrogressive Plans; and
• Use of 2010 Census Data.

The Scope of Section 5 Review

Under Section 5, a covered jurisdiction has the burden of establishing that a proposed redistricting plan “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in [Section 4][f] of the Act” [(i.e., membership in a language minority group defined in the Act), 42 U.S.C. 1973c(a). A plan has a discriminatory effect under the statute if, when compared to the benchmark plan, the submitting jurisdiction cannot establish that it does not result in a “retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” Beer v. United States, 425 U.S. 125, 141 (1976)]. If the proposed redistricting plan is submitted to the Department of Justice for administrative review, and the Attorney General determines that the jurisdiction has failed to show the absence of any discriminatory purpose or retrogressive effect of denying or abridging the right to vote on account of race, color or membership in a language minority group defined in the Act, the Attorney General will interpose an objection. If, in the alternative, the jurisdiction seeks a declaratory judgment, the United States District Court for the District of Columbia, that court will utilize the identical standard to determine whether to grant the request; i.e., whether the jurisdiction has established that the plan is free from discriminatory purpose or retrogressive effect. Absent administrative preclearance from the Attorney General or a successful declaratory judgment action in the district court, the jurisdiction may not implement its proposed redistricting plan.

The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person one-vote principle, on the grounds that it violates Shaw v. Reno, 509 U.S. 630 (1993), or on the grounds that it violates Section 2 of the Voting Rights Act. The same standard applies in a declaratory judgment action. Therefore, jurisdictions should not regard a determination of compliance with Section 5 as preventing subsequent legal challenges to that plan under other statutes by the Department of Justice or by private plaintiffs. 42 U.S.C. 1973c(a); 28 CFR 51.49.

The Section 5 “Benchmark”

As noted, under Section 5, a jurisdiction’s proposed redistricting plan is compared to the “benchmark” plan to determine whether the use of the new plan would result in a retrogressive effect. The “benchmark” against which a new plan is compared is the last legally enforceable redistricting plan in force or effect. Riley v. Kennedy, 553 U.S. 406 (2008); 28 CFR 51.54(b)(1). Generally, the most recent plan to have received Section 5 preclearance or to have been drawn by a Federal court is the last legally enforceable redistricting plan for Section 5 purposes. When a jurisdiction has received Section 5 preclearance for a new redistricting plan, or a Federal court has drawn a new plan and ordered it into effect, that plan replaces the last legally enforceable plan as the Section 5 benchmark. McDaniell v. Sanchez, 452 U.S. 130 (1981); Texas v. United States, 785 F. Supp. 201 (D.D.C. 1992); Mississippi v. Smith, 541 F. Supp. 1329, 1333 (D.D.C. 1982), appeal dismissed, 461 U.S. 912 (1983).

A plan found to be unconstitutional by a Federal court under the principles of Shaw v. Reno and its progeny cannot serve as the Section 5 benchmark, Abrams v. Johnson, 521 U.S. 74 (1997), and in such circumstances, the benchmark for Section 5 purposes will be the last legally enforceable plan predating the unconstitutional plan. Absent such a finding of unconstitutionality under Shaw by a Federal court, the last legally enforceable plan will serve as the benchmark for Section 5 review. Therefore, the question of whether the
The proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters’ “effective exercise of the electoral franchise” when compared to the benchmark plan. 

A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters’ “effective exercise of the electoral franchise” when compared to the benchmark plan. Beer v. United States at 141. In 2006, Congress clarified that this means the jurisdiction must establish that its proposed redistricting plan will not have the effect of “diminishing the ability of any citizens of the United States” because of race, color, or membership in a language minority group defined in the Act, “to elect their preferred candidate of choice.” 42 U.S.C. 1973(c)(b) & (d). In analyzing redistricting plans, the Department will follow the congressional directive of ensuring that the ability of such citizens to elect their preferred candidates of choice is protected. That ability to elect either exists or it does not in any particular circumstance.

In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department’s view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. As noted above, census data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact on the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change.

Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any Section 5 analysis, additional demographic and election data in the submission is often helpful in making the requisite Section 5 determination. 28 CFR 51.28(a). For example, census population data may not reflect significant differences in group voting behavior. Therefore, election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan.

The Section 5 Procedures contain the factors that the courts have considered in deciding whether or not a redistricting plan complies with Section 5. These factors include whether minority voting strength is reduced by the proposed redistricting; whether minority concentrations are fragmented

---

Discriminatory Purpose

Section 5 precludes implementation of a change affecting voting that has the purpose of denying or abridging the right to vote on account of race or color, or membership in a language minority group defined in the Act. The 2006 amendments provide that the term “purpose” in Section 5 includes “any discriminatory purpose,” and is not limited to a purpose to retrogress, as was the case after the Supreme Court’s decision in Reno v. Bossier Parish (“Bossier II”), 528 U.S. 320 (2000). The Department will examine the circumstances surrounding the submitting authority’s adoption of a submitted voting change, such as a redistricting plan, to determine whether direct or circumstantial evidence exists of any discriminatory purpose of denying or abridging the right to vote on account of race or color, or membership in a language minority group defined in the Act.

Direct evidence detailing a discriminatory purpose may be gleaned from the public statements of members of the adopting body or others who may have played a significant role in the process. Busbee v. Smith, 549 F. Supp. 494, 508 (D.D.C. 1982), aff’d, 459 U.S. 1166 (1983). The Department will also evaluate whether there are instances where the invidious element may be missing, but the underlying motivation is nonetheless intentionally discriminatory. In the Garza case, Judge Kozinski provided the clearest example:

Assume you are an Anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don’t matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.


In determining whether there is sufficient circumstantial evidence to conclude that the jurisdiction has not established the absence of the prohibited discriminatory purpose, the Attorney General will be guided by the Supreme Court’s illustrative, but not exhaustive, list of those “subjects for proper inquiry in determining whether racially discriminatory intent existed,” outlined in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977). In that case, the Court, noting that such an undertaking presupposes a “sensitive inquiry,” identified certain areas to be reviewed in making this determination:

1. The impact of the decision;
2. The historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent;
3. The sequence of events leading up to the decision;
4. Whether the challenged decision departs, either procedurally or substantively, from the normal practice; and
5. Contemporaneous statements and viewpoints held by the decision-makers. Id. at 266–68.

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.

Retrogressive Effect

An analysis of whether the jurisdiction has met its burden of establishing that the proposed plan would not result in a discriminatory or “retrogressive” effect starts with a basic comparison of the benchmark and proposed plans at issue, using updated census data in each. Thus, the Voting Section staff loads the boundaries of the benchmark and proposed plans into the Civil Rights Division’s geographic information system [GIS]. Population data are then calculated for each district in the benchmark and the proposed plans using the most recent decennial census data.
Alternatives to Retrogressive Plans

There may be circumstances in which the jurisdiction asserts that, because of shifts in population or other significant changes since the last redistricting (e.g., residential segregation and demographic distribution of the population within the jurisdiction, the physical geography of the jurisdiction, the jurisdiction’s historical redistricting practices, political boundaries, such as cities or counties, and/or state redistricting requirements), retrogression is unavoidable. In those circumstances, the submitting jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn.

In considering whether less-retrogressive alternative plans are available, the Department of Justice looks to plans that were actually considered or drawn by the submitting jurisdiction, as well as alternative plans presented or made known to the submitting jurisdiction by interested citizens or others. In addition, the Department may develop illustrative alternative plans for use in its analysis, taking into consideration the jurisdiction’s redistricting principles. If it is determined that a reasonable alternative plan exists that is non-retrogressive or less retrogressive than the submitted plan, the Attorney General will interpose an objection.

Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle. 52 FR 488 (Jan. 6, 1987). Similarly, preventing retrogression under Section 5 does not require jurisdictions to violate Shaw v. Reno and related cases.

The one-person, one-vote issue arises most commonly where substantial demographic changes have occurred in one or more districts of a jurisdiction. Generally, a plan for congressional redistricting that would require a greater overall population deviation than the submitted plan is not considered a reasonable alternative by the Department. For state legislative and local redistricting, a plan that would require significantly greater overall population deviations is not considered a reasonable alternative.

In assessing whether a less retrogressive plan can reasonably be drawn, the geographic compactness of a jurisdiction’s minority population will be a factor in the Department’s analysis. This analysis will include a review of the submitting jurisdiction’s historical redistricting practices and district configurations to determine whether the alternative plan would (a) abandon those practices and (b) require highly unusual features to link together widely separated minority concentrations.

At the same time, compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria. For example, criteria that require the jurisdiction to make the least possible change to existing district boundaries, to follow county, city, or precinct boundaries, protect incumbents, preserve partisan balance, or in some cases, require a certain level of compactness of district boundaries may need to give way to some degree to avoid retrogression. In evaluating alternative or illustrative plans, the Department of Justice relies upon plans that make the least departure from a jurisdiction’s stated redistricting criteria needed to prevent retrogression.

The Use of 2010 Census Data

The most current population data are used to measure both the benchmark plan and the proposed redistricting plan. 28 CFR 51.54(b)(2) (Department of Justice considers “the conditions existing at the time of the submission.”); City of Rome v. United States, 446 U.S. 156, 186 (1980) (“most current available population data” to be used for measuring effect of annexations); Reno v. Bossier Parish School Board, 528 U.S. 320, 334 (2000) (“the baseline is the status quo that is proposed to be changed: If the change ‘abridges the right to vote’ relative to the status quo, preclearance is denied * * *.”).

For redistricting after the 2010 Census, the Department of Justice will, consistent with past practice, evaluate redistricting submissions using the 2010 Census population data released by the Bureau of the Census for redistricting pursuant to Public Law 94–171, 13 U.S.C. 141. The purpose of the proposed redistricting plans includes a review and assessment of the Public Law 94–171 population data, even if those data are not included in the submission or were not used by the jurisdiction in drawing the plan. The failure to use the Public Law 94–171 population data in redistricting does not, by itself, constitute a reason for interposing an objection. However, unless other population data used can be shown to be more accurate and reliable than the Public Law 94–171 data, the Attorney General will consider the Public Law 94–171 data to measure the total population and voting age population within a jurisdiction for purposes of its Section 5 analysis.

As in 2000, the 2010 Census Public Law 94–171 data will include counts of persons who have identified themselves as members of more than one racial category. This reflects the October 30, 1997, decision by the Office of Management and Budget (OMB) to incorporate multiple-race reporting into the Federal statistical system. 62 FR 58782–58790. Likewise, on March 9, 2000, OMB issued Bulletin No. 00–02 addressing “Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Enforcement.” Part II of that Bulletin describes how such census responses will be allocated by Federal executive agencies for use in civil rights monitoring and enforcement.

The Department will follow both aggregation methods defined in Part II of the Bulletin. The Department’s initial review of a plan will be based upon allocating any multiple-item response that includes white and one of the five other race categories identified in the response. Thus, the total numbers for “Black/African American,” “Asian,” “American Indian/Alaska Native,” “Native Hawaiian or Other Pacific Islander” and “Some other race” reflect the total of the single-race responses and the multiple responses in which an individual selected a minority race and white race.

The Department will then move to the second step in its application of the census data to the plan by reviewing the other multiple-race category, which is comprised of all multiple-race responses consisting of more than one minority race. Where there are significant numbers of such responses, we will, as required by both the OMB guidance and judicial opinions, allocate these responses on an iterative basis to each of the component single-race categories for analysis. Georgia v. Ashcroft, 539 U.S. 461, 473, n.1 (2003).

As in the past, the Department will analyze Latino voters as a separate group for purposes of enforcement of the Voting Rights Act. If there are significant numbers of responses which
report Latino and one or more minority races (for example, Latinos who list their race as Black/African-American), those responses will be allocated alternatively to the Latino category and the minority race category.


Thomas E. Perez,
Assistant Attorney General, Civil Rights Division.

[FR Doc. 2011–2797 Filed 2–8–11; 8:45 am]

BILLING CODE 4410–13–P
IMLA TELECONFERENCE Session VI

Election law, Voting Rights and One Person, One Vote: Legal Issues & Developments for Local Governments

February 28, 2012

Vincent R. Fontana and Benjamin E. Griffith

Introduction

This teleconference will highlight some of the most recent legal issues and developments in the case law, regulations and legislation relating to electoral access and equal opportunity to participate in the political process under Section 2 and Section 5 of the Voting Rights Act. We will take a examine how the judiciary has dealt with elections held by states and local governments in years that coincide with the release of 2010 Census data and how the one person, one vote doctrine has been applied to cities, counties and other units of local government. We will evaluate the most recent challenges to the constitutionality of Section 5 of the Voting Rights Act as amended in 2006, and analyze the complex, federalism-laced interplay between the judicial branch and governmental entities during the liability and remedy phases of redistricting litigation. Finally, we will consider the role of citizen voting age population in that litigation, the response of several states to prison gerrymandering, the role of influence districts and crossover districts in vote dilution litigation, and an overview of the Justice Department’s 2011 procedures for reviewing Section 5 submissions.

We will also address how municipalities, cities, counties, towns and villages can be proactive in evaluating their present electoral method in light of the 2010 census. It is critical to evaluate the data generated by the 2010 census and how it may impact on minority representation before a challenge is made to the method of electing local legislators.

If it is too late to take preemptive action because a lawsuit has been filed by the Justice Department or a private plaintiff, we will also provide a general overview of how to defend such a lawsuit.
Discussion

Each legislative body is either elected at-large, or by single-member district. In at-large voting, all the voters in a community vote for each “seat.” Under a single-member district plan, each “seat” is filled only by the voters within a specific geographical area and not the community at large.

A community, such as a county with a Commission form of government, may have at-large voting but the candidates are selected to run for numbered posts. For example, assume a County Commission of five members. Each member must live within a specific geographical area. The purpose being to ensure that the entire county, not just one area, will have a representative living in their community. However, the electorate in the county will vote for each candidate. So while the candidate selection process may be by specific districts, the election process would be county-wide.

Where a Section 2 violation has been found in a city, county, town or village, and elections are at-large, the remedy available to correct the violation has been to adopt a single member district plan where each candidate is selected by the voters within that district and the winner is selected solely by the voter within that district.

Recently, however, in a relatively small community, the remedy adopted to correct a violation of Section 2 of the VRA has been to maintain at-large voting but have voters cast and cumulatively. For example, if three seats are to be filled, each voter can cast up to three votes. The voter can use all three for one candidate or split the three votes over one, two or three candidates. Cumulative voting has been adopted in the Village of Port Chester to cure a Section 2 violation. The candidates are still being elected at-large. See U.S. v. Village of Port Chester, 704 F. Supp. 2d 411 (S.D.N.Y. 2010).

In conducting a pre-emptive evaluation of your community’s exposure to suit, it must be remembered that at-large elections do not per se violate the Voting Rights Act or the United States Constitution. U.S. v. City of Euclid, 580 F. Supp. 2d 584, 591 (N.D. Ohio 2008). The central issue is the extent to which members of the minority community are successful at the polls. The reason they are unsuccessful is irrelevant. It is the fact of their lack of success that carries the day for a plaintiff.

Experience tells us however, that at-large elections, as opposed to pre-existing single member district plans, usually are the ones that do not stand up to judicial scrutiny. If a single member district plan is determined to violate the VRA and/or the constitution, it is usually caused by how the boundary lines for each district are drawn. If they are drawn in such a way as to unfairly diffuse the minority community over several districts (called “cracking”) and would be problematic. Also, if the minority community is
excessively concentrated within a single district, (called “packing”) that too can be problematic. See *U.S. Village of Port Chester*, 704 F. Supp. 2d at 421.

There are two key sections in the VRA that we are addressing in this teleconference. Section 2 deals with circumstances where a court is asked to determine if the existing system has the effect of denying the relevant minority of a meaningful opportunity to elect candidates of their choice. Section 5 comes into play after a violation has been found and the municipality subsequently seeks to change the procedures for elections.

**Part I. Section 2 of the Voting Rights Act**

Our initial discussion will address Section 2 as it involves developing a pre-emptive analysis before a suit is brought or a trial strategy once suit is brought.

**Section 2 of the VRA Provides:**

(a) No voting qualification or pre-requisite 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 the United States to vote on account of race or color.

(b) A violation of subsection (a) of this section is established if, based on the totality of the 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 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.

*U.S. v. Village of Port Chester*, 704 F. supp. 2d 411, 417 (S.D.N.Y. 2010); 42 U.S.C. § 1973. The seminal case interpreting Section 2 of the VRA is *Thornberg v. Gingles*, 478 U.S. 30 (1986). In that case, the United States Supreme Court set forth the burden of proof to be established by a plaintiff in order to
prevail. That decision, and all those cases that followed it, also describe what the municipal defendant must offer is proof to avoid an adverse determination and it is with respect to the defensive side of Gingles that we are stressing here.

A. THE GINGLES PRECONDITIONS

In evaluating whether a particular system of election violates the Voting Rights Act, a plaintiff must first establish each of the Gingles pre-conditions. They are:

1. the racial group must be sufficiently large and geographically compact to constitute a majority in a single member district;
2. the relevant minority must be politically cohesive;
3. the white majority must vote sufficiently as a block to enable it in the absence of special circumstances usually to defeat the minority preferred candidate.

Once the three Gingles factors are met, the court must consider whether, under the Totality of the Circumstances, minorities have been denied an equal opportunity to participate in the political process and to elect representatives of their choice. Etheredge, 2009 U.S. Dist. LEXIS at 15. However, failure to establish any one of the Gingles factors by a preponderance of the evidence precludes a finding of vote dilution. Benavidez, 2009 U.S. Dist. LEXIS at 6; NAACP v. City of Columbia, S.C., 850 F. Supp. at 410.

Many circuits have acknowledged that it would be the very unusual case in which plaintiffs can establish each of the three Gingles pre-conditions but still have failed to establish a violation of Section 2 under the Totality of the Circumstances. Benazidez v. City of Irving, Texas, 2009 U.S. Dist. LEXIS 63079 *8 (N.D. Tex); U.S. v Village of Port Chester, 2008 WL 190502 *2 (S.D.N.Y.); NAACP V. City of Niagara Falls, 65 F. 3d 1002, 1019 n. 21 (2d Cir. 1995); Thompson v Glades County Bd. of County Commissioners, 493 F. 3d 1253, 1261 (11th Cir. 2007); Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F. 3d 1103, 1116 n. 6 (3rd Cir. 1993); U.S. v. City of Euclid, 580 F. Supp. 584, 593 (N.D. Ohio 2008); Clark v. Calhoun County, 121 F. 3d 92, 97 (5th Cir. 1994); Teague v. Attala County, 92 F. 3d 283,

However, failure to meet any one of the Gingles pre-conditions will result in dismissal of the lawsuit. Overton v. City of Austin, 863 F. 2d 538 (5th Cir. 1989); Gomez v City of Watsonville, 863 F. 2d 1407, 1413 (9th Cir. 1988), cert. denied, 489 U.S. 1080, 109 S. Ct. 1534 (1989); McNeil v. Springfield Park District, 851 F. 2d 937 (7th Cir. 1988), cert. denied, 490 U.S. 1031, 109 S. Ct. 1769 (1989); Dillard v. Baldwin County Commissioners, 376 F. 3d 1260, 1265 (11th Cir. 2004).

Furthermore, no specific showing of discriminating intent is required to prove a Section 2 violation. No specific showing of discriminatory intent is required to prove a Section 2 violation. Coleman v. Board of Educ. of the City of Mr. Vernon, 990 F. Supp. 221, 227 (S.D.N.Y. 1997) (internal citation omitted); Goosby v. Bd. of the Town of Hempstead, 180 F. 3d 476, 498-504 (2d Cir. 1999).

**B. THE SENATE FACTORS**

In addition to establishing each of the three Gingles pre-conditions a court must conduct an analysis of seven additional factors frequently referred to as the “Senate Factors”, and two additional factors. They are:

1. The extent of historical, official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, vote, or otherwise participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that might enhance the opportunity for discrimination against the minority group;

4. If there is a candidate-slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination - in such areas as education, employment, and health – which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by racial appeals;
7. The extent to which members of a minority group have been elected to public office in the jurisdiction.

The two additional factors are:

8. Whether there is a lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

9. Whether the policy underlying the state or political subdivision’s use of voting qualification, prerequisite to voting, or standard practice or procedure is tenuous.


However, it should be noted that this list is not comprehensive or exclusive and that there is no requirement that any particular number of factors be proven, or that a majority of these point one way or another. Rather, courts are to engage in a searching, practical evaluation of the past and present reality and take a functional view of the political process. Gingles, 478 U.S. at 45; U.S. v. Osceola County, 475 F. Supp. 2d 1220, 1228 (M.D. Fla. 2006); U.S. v. Village of Port Chester, 2008 WL 190502*3; see also, U.S. Village of Port Chester, 704 F. Supp. 2d 411, 419 (S.D.N.Y. 2010); NAACP v. City of Columbia, S.C., 850 F. Supp. at 404, 426 (D.S.C. 1993) (the Senate Report factors are neither comprehensive nor exclusive). The court must consider all evidence that reasonably bears upon the opportunity that the challenged system in fact provides for minorities to participate and elect candidates of their choice.

The court in NAACP v. City of Columbia, 850 F. Supp. 404 (D.S.C. 1993) added two additional factors to the Totality of the Circumstances analysis beyond the seven original Senate Factors and two supplemental factors. Factor 10 considered by the court addressed the minority’s support for the 4-2-1 system adopted by the voters to elect members of the City Council (four were elected in SMD, two at-large, and the Mayor also elected at-large). The court found that the black community had endorsed the 4-2-1 plan at issue in the lawsuit. 850 F. Supp. at 426. The eleventh factor considered by the court was that the 4-2-1 Plan provided “genuine influence for blacks than the system proposed by the plaintiffs, while also ‘deracializing’ matters that come before the council of particular concern to the black community.” Id. This case seems to be the only one whereby the nine Totalities of the Circumstances factors were expanded upon by a court.
C. ANALYSIS OF THE GINGLES PRE-CONDITIONS

1. The minority must be sufficiently large and geographically compact enough to constitute a majority in a single member district.

If the relevant minority cannot meet this requirement as in the case where the minority population is too small or they are substantially integrated in the community, the challenged system (usually at-large) cannot be responsible for minority voters’ inability to elect its candidates of choice. *U.S. v. Osceola County*, 475 F. Supp. 2d at 1227-1228. To satisfy this requirement one must first determine what the relevant minority is. In some cases it would be African-Americans only, in other communities it would involve Hispanics only, and still in others it could be a combination of African-Americans and Hispanics. In a few communities the relevant minority would be American Indians or Asians.

The next inquiry is what percentage of the total population; voting age population and citizen voting age population are the relevant minority. Also relevant is the percentage of the total registration that are white and the relevant minority community.

Question: What data do you use to determine the statistics necessary to analyze whether a minority is sufficiently large and geographically compact to satisfy the first Gingles pre-condition? Clearly the voting age population as refined by citizenship set forth in the latest census data, is the most reliable. *U.S. v. Village of Port Chester*, 2008 WL 190502 *8 (S.D.N.Y.); *U.S. v. Osceola County* 475 F. Supp. 2d at 1229. In addition to census data, registration data can be used if such data are sufficiently reliable. See, *U.S. v. Osceola County*, 475 F. Supp. 2d at 1230; *U.S. v. Village of Port Chester*, 2008 WL 190502*7; *Johnson v. DeSoto County Bd. of Comm.*., 204 F. 3d 1335, 1341-2 (11th Cir. 2000).

Once the relevant statistics have been established the parties must determine what percentage of the minority community must be included within a single member district to satisfy the first Gingles pre-condition. Where the Hispanic community is the relevant minority, citizenship becomes an issue, more so than when the minority community consists of blacks.

This issue was squarely addressed by the United States Supreme Court in *Bartlett v. Strickland*, 2009 U.S. LEXIS 1842.

The case began in a rather odd way. State officials contended that they were required to draw election districts in such a way as to allow a racial minority to join with other voters to elect the minority’s candidate of choice, even where the racial minority was less than 50% of the voting age population in the district to be drawn. Also involved is the relevance of the state’s constitutional
requirement that in any districting plan, the state constitution’s “Whole County Provision” must be considered.

The relevant district was District 18 which, under the Whole County Provision would have a black voting age population of 35.33%; and if blacks were split among two counties they would have a voting age population of 39.30%. In neither case could a district be drawn with a black voting age population of more than 50%.

At the trial level the court considered whether the defendant state officials had established each of the Gingles pre-conditions. Id at *14. As to the first Gingles requirement, the trial court concluded that, although blacks were not a majority of the voting age population in the district, the district was a “de facto” majority-minority district because blacks could get enough support from cross-over majority voters to elect their candidates of choice. Id.

Without detailing the Supreme Court’s analysis, the bottom line is that a minority must be able to show a district containing at least 50.1% of the voting age population to satisfy the first Gingles pre-condition in a Section 2 case. The Court noted, but did not decide that in a Section 5 context it would be appropriate to create a district with less than a 50.1% minority voting age population. Nor did the Court preclude a political subdivision from creating a cross-over district. The Court held, however, that a state is not required to create a cross-over district in a Section 2 challenge. Id at *38-39.

Another question is raised by Strickland. Does this analysis change if two minorities, blacks and Hispanics, can be combined to satisfy the first Gingles pre-condition? If the two minorities can meet a four part test, theoretically they may be combined to satisfy the first Gingles factor:

(1) whether the members have similar socio-economic backgrounds resulting in common social disabilities and exclusion;

(2) whether the members have similar attitudes toward significant issues affecting the challenged entity;

(3) whether the members have consistently voted for the same candidates;

Based on the Strickland analysis, presumably the combined minorities must total 50.1% of the citizen voting age population in at least one district. Not relevant to this analysis, however, is whether the two minorities must be of equal strength or would it be appropriate for one minority to constitute a larger percentage.

The next topic relevant to the first Gingles pre-condition addresses the question, what size legislature must be used to determine if the relevant minority can create at least one district wherein they could constitute a majority. The short answer is that the analysis must be based on a district plan with the same number of legislators as presently exists. For example, if the county commission maintains an at-large system of seven commissioners, the court must use seven districts to determine if the first Gingles pre-condition has been met.

Furthermore, in deciding whether the first Gingles pre-condition has been satisfied, the court must determine if the theoretical district is “compact” and “contiguous”. If in order to create a majority-minority district a plaintiff must violate all rules concerning compactness and contiguity, the proposed district should be rejected and the first Gingles pre-condition not satisfied. See also, U.S. Village of Port Chester, 704 F. Supp. 2d 421 (S.D.N.Y. 2010) (population equality and compactness are two of the most relevant redistricting principles).

This aspect of the first Gingles pre-condition would also impact on any potential remedy once a violation has been found. If no remedy can be fashioned, plaintiff loses even though, theoretically, each of the Gingles pre-conditions has been met. See, Marylanders for Fair Representation, Inc. v. Schaefer, 849 F. Supp. 1022, 1052-3 (D. Md. 1994).

In U.S. v. Village of Port Chester the court held that to demonstrate the existence of the first Gingles precondition in an at-large system, plaintiffs must be able to draw illustrative single-member districts following traditional districting principles to show that the minority population is sufficiently large and compact to constitute a majority in a single-member district. 704 F.Supp. 2d at 420. In Port Chester, plaintiff’s expert drew the proposed districts on the basis of total population, because, in his view total population is the accepted standard method. Id. at 421.

Defendants made an interesting argument in Port Chester, their plaintiff’s expert used total population (which would include citizens and non-citizens) instead citizen voting age population. Defendants contended that the votes of citizens in one district would be devalued where their members in one district are greater than where the numbers of citizens in a second proposed district are less, yet that second district has the same political power as the first district. Although the district court thought the issue
raised “important legal questions, the court chose not to address the issue because the parties had already agreed to establish cumulative voting to elect the Village Board of Trustees. Id at 421.

Of course this problem will rise again when cumulative voting is not adapted as a way to cure of Section 2 violation. But doesn’t this put the cart before the horse when you are trying to determine if the plaintiff has satisfied the first Gingles pre-condition?

Whatever plan is proposed to satisfy the first Gingles precondition, a plaintiff must still establish that the plan must provide an “effective” majority for the minority community. Id at 425. In Port Chester defendants argued that voting age population (“VAP”) or citizen voting age population (“CVAP”) are unreliable. Id. They preferred to use voter regulation and voter turnout. Id. However, the court rejected that argument because voter registration can overstate the number of eligible voters in a given location because registration dates are only scrutinized and updated periodically. Id.

Turnout, based on a Spanish Surname Analysis of voter sign-in sheets is also inherently unreliable as some individuals may be Hispanic but have no Hispanic surname whereas someone with a Hispanic surname may not be Hispanic as where a non-Hispanic white person marries a Hispanic man. Id.

2. and 3. Whether the minority community and white community engage in racially polarized voting that would “usually” defeat a minority preferred candidate.

Rather than concentrate on the technical aspects of establishing the existence of racially polarized voting, we will address the more procedural aspects of establishing these two Gingles pre-conditions. A showing that a significant number of minority group members usually vote for the same candidate is one way of proving the political cohesiveness necessary to a vote dilution claim and consequently establishes minority bloc voting within the context of Section 2. Gingles, 106 S. Ct. at 2769-70.

The first issue to resolve is what elections are to be reviewed to determine whether racial polarized voting exists. Local elections, i.e., for the relevant village, town, city or county, in which a member of the minority community is a candidate, would be of primary relevance. These elections are referred to as “endogenous/interracial” elections. (Jamison v. Tupelo, 471 F. Supp. 2d at 710)); and while they may be deemed more probative of racial polarized voting, “exogenous” elections, i.e. those not involving the relevant municipality, but where a minority candidate ran, do have some probative value. Id.; see also, U.S. v. Village of Port Chester, 2008 WL 190502 *13; U.S. v. City of Euclid, 580 F. Supp. 2d 584, 589 ( N. D. Ohio 2008); U.S. Village of Port Chester, 704 F. Supp. 2d at 427 (S.D.N.Y. 2010).
In *NAACP v. City of Thomasville*, 401 F. Supp. 2d 489, 497 (M.D.N.C. 2005) the court held that the elections to be reviewed should be limited to those elections in which a minority candidate was on the ballot, and should include a sample of elections large enough to enable the court to determine whether minority voters have had success in electing representatives of their choice.

Next the court must determine the degree of success by minority candidates, or do white voters “usually” defeat minority preferred candidates. What “usually” happens must be determined on a case-by-case basis. In City of Thomasville, the court noted that when the candidates of choice of black voters were black, the candidate won three out of eight times. When a second candidate of choice was identified in that same election, that candidate won four out of five elections. 401 F. Supp. at 499. Under these circumstances, the court noted, the use of at-large elections does not “usually” result in the candidates of choice of black voters losing. Id.

Although there was no apparent consensus in *Gingles* concerning the issue of “causation”, i.e. why voters voted the way they did, Justice O’Connor and three other Justices stated that while “causal factors” may not be relevant to the existence of racially polarized voting, they should be admitted on the question whether white bloc voting will consistently or usually defeat minority candidates. *Gingles*, 114 S. Ct. at 2792. In *City of Euclid*, the court rejected the City’s argument that the reason for the minority group’s lack of success at the polls was due to apathy and low voter turnout. 580 F. Supp. 2d at 591. In *Reed v. Town of Babylon*, 914 F. Supp. 843, 877-8 (E.D.N.Y. 1986), the court rejected defendant’s argument that minority losses was due to partisan voting rather than racial basis. See also, *Goosby v. Town of Hempstead*, 180 F. 3d 476 (2d Cir. 1999); *City of Tupelo*, 471 F. Supp. 2d at 713-714. In the *City of Holyoke* case, 72 F. 3d 973 (1st Cir. 1995), the court held that plaintiff’s cannot prevail on a Section 2 case if there is significant prevalent evidence that whites voted as a block for reasons wholly unrelated to racial animus. However, the court cautioned that if partisan affiliation is nothing more than a proxy for illegitimate racial considerations, the argument will fail.

D. THE SEVEN SENATE FACTORS

Once each of the three *Gingles* pre-conditions have been met a plaintiff must be prepared to address each of the seven Senate Factors and two additional factors. However, as noted above, there is no requirement that plaintiffs satisfy each factor; nor is it clear what degree of proof would be required. For our purposes we will discuss each Factor in light of the evidence usually proffered by plaintiffs. *Gonzales v. City of Aurora*, 2006 WL 681048*5; U.S. v. City of Euclid, 580 F. Supp. 2d at 587.
FACTORS 2 and 7 address the extent to which voting is racially polarized (Factor 2), and the extent to which members of the minority group have been elected to public office (Factor 7). The issue of racially polarized voting (Factor 2) is included in an analysis of the Second and Third Gingles pre-conditions as is Factor 7. The courts have universally held that the Second and Seventh Senate Factors are the most important Factors in a Section 2 Vote Dilution case. The remaining Senate Factors are supportive of, but not essential to a minority voter’s claim. Gingles, 478 U.S. at 48 n. 15; U.S. v. City of Euclid, 580 F. Supp. 2d at 591; U.S. v. Osceola County, 475 F. Supp. 2d at 1232; Gomez v. City of Watsonville, 863 F. 1407, 1412 (9th Cir. 1988), cert denied, 489 U.S. 1080, 109 S. Ct. 1534 (1989); Goosby v. Town of Hempstead, 180 F. 3d 476 (2d Cir. 1999); Gonzales v. City of Aurora, 2006 WL 681048*7 (N.D. Ill.); U.S. v. Charleston County, 365 F. 3d 341, 345 (4th Cir. 2004).

In City of Aurora, the court noted that Hispanic citizen voting age population was 18.9% of the City’s total and had two of 12 aldermen, one elected and one appointed. Although Hispanics have not been elected to office in direct proportion to the citizen voting age population, they have not been shut out of office. Id at *8.

Although no group has a right to proportionate representation, if it has elected representatives at a rate proportionate to its numbers that would generally nullify any attempt to declare an electoral system violative of Section 2 Buchanon v. City of Jackson, 683 F. Supp. 1515, 15221 (W.D. Tenn. 1988); Collins v. City of Norfolk, 679 F. Supp. 551, 562 (E.D. Va. 1988).

However, even where there is minority success at the polls that does not necessarily negate other evidence that racial polarized voting does exist. For example, when a successful minority ran as an incumbent or unopposed or if elected after the institution of litigation or when there were less white candidates than the number of seats to be filled thus guaranteeing a minority to be elected, those successes are less persuasive than a head-to-head contest between a minority and white in which the minority candidate prevails with sufficient support from all races. Gingles, 106 S.Ct. at 2779-80. A key element in the analysis is “sustained” success of minority candidates “over time” resulting in “nearly proportionate representation” Id at 2779.

FACTOR 1.

The extent of historical, official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, vote, or otherwise participate in the democratic process.
The history of discrimination in any given community can be established by an analysis of several factors.

They would include a review of prior litigation in which it was alleged there was discrimination in housing and education. For example, in *City of Euclid*, in 1976 (20 years before the filing of this Voting Rights Act case), the United States Department of Housing and Urban Development informed city officials that Euclid was not in compliance with Title 8 of the 1968 Civil Rights Act, which prohibited racial discrimination in the sale or rental of housing units. *City of Euclid*, 580 F. Supp. 2d at 591. The court also noted that private organizations filed a lawsuit against the City for its failure to comply with the fair housing requirements of federal law. *Id.* As part of the settlement of that case, in 1981 the City agreed to retain the services of the Cuyahoga Plan of Ohio, which is a fair housing group, to investigate unfair real estate practices in Euclid. *Id.* Audit testing of that group revealed that Euclid continued to experience a significant level of racial steering. *Id* at 591. In addition, there was evidence that many citizens and city officials complained about “block-busting”, i.e., efforts of realtors to urge white homeowners in a particular area of the City to sell their property quickly because blacks were moving into the neighborhood. *Id.*

The court in *City of Euclid* also heard testimony on the degree of racial segregation in the City that lead to racial segregation in the City’s schools. *Id* at 591-2.

In the 2006 VRA case brought against the City of Port Chester the court referenced a 2005 Consent Decree between the U.S. and Westchester County pertaining to language assistance at the polls. 2008 WL 190502*16. The court also considered the 1985 *City of Yonkers* housing and desegregation case as evidence of a history of discrimination against minorities in the County. *Id.* Plaintiff’s expert also testified that Port Chester failed to provide sufficient Spanish language assistance at polling places in the City during the period 2001-2006. *Id.*

Other examples of a history of discrimination in Port Chester included testimony that Hispanic voters were treated differently from white voters; that there were no Spanish speaking employees at city hall who would be able to take a complaint from a Spanish speaking voter; in a 1991 campaign for a seat on the school board, more than 40 Hispanic voters were turned away from the polls during the election because of poll workers’ inability to locate their names on voter lists.

In *U.S. v. Osceola County*, 475 F. Supp. 2d 1220, 1235 (M.D. Fla. 2006), the court took note of problems with registering Hispanic voters because information was not available in Spanish and there were no Spanish speaking workers available to answer questions or provide assistance; and the election
process in the 1990’s was conducted in English, with ballots, voter guides, signs and forms available only in English and no effort had been made to recruit bilingual poll workers or have bilingual elections staff. During the 2000 elections, Hispanics suffered from discrimination at the polls when they were turned away without being allowed to vote, refused assistance, forbidden to use their own interpreters, asked for multiple forms of identification (unlike non-Hispanic voters) and treated in a hostile manner by poll workers. Id.

The court also made note of the fact that in 2002 the County signed a consent decree to provide information and assistance to voters in Spanish. Id.

**FACTOR 3.**

The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that might enhance the opportunity for discrimination against the minority group.

Although the courts have recognized that at-large methods of electing local legislators is not per se unconstitutional or a violation of the VRA, at-large elections coupled with other practices or procedures does impact on a minority’s ability to elect their candidates of choice. *NAACP v. City of Thomasville*, 401 F. Supp. 2d 489, 497 (M.D.N.C. 2005).

In *U.S. v. Osceola County* the court found Factor 3 was present because the County Commissioners were elected to staggered terms and are based on residency districts or numbered posts. This practice, in essence, imposes majority vote requirements which are one-on-one elections for each available seat, a system which makes it very difficult, if not impossible, for a minority to elect its preferred candidate. 475 F. Supp 2d at 1233-34. The court’s suggestion was for all commissioners to run at once without numbered posts, so that a minority group could all vote cohesively for a single candidate, and if the non-minority split their votes among various candidates, the minority would have a reasonable chance to elect its preferred candidate. Id. at 1234.

The court was also critical of the requirement for run-off elections for primary elections, which allows non-minorities to run more than one candidate in the primary election, and then, in the run-off, to solidify their votes to defeat the minority candidate. Id. According to the court, the solution to the problem would be a single member district plan. Id.
In *Village of Port Chester*, the court was concerned with Village elections being held in March, rather than November. 2008 WL 190502*18.

In *City of Euclid*, the court found fault with the at-large system in conjunction with a numbered post system because it deprives minority voters of the opportunity to elect a candidate by single-shot voting. 580 F. Supp. 2d at 592; see also *City of Rome v. U.S.*, 446 U.S. 156, 184 n. 19, 185 n. 21 (1980); *Collins v. City of Norfolk*, 679 F. Supp. 557, 564 (E.D. Va. 1988).

**FACTOR 4.**

*If there is a candidate-slating process, whether the members of the minority group have been denied access to that process.*

The salient question for purposes of Senate Factor 4 is, where there is an influential official or unofficial slating organization, what is the ability of minorities to participate in that slating organization and to receive its endorsement. *City of Euclid*, 590 F. Supp. 2d at 592; *Village of Port Chester*, 2008 WL 190502*18-19.

**FACTOR 5.**

*The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination – in such areas as education, employment, and health – which hinder their ability to participate effectively in the political process.*

Statistically minorities, whether Hispanic or African-American have a lower socio-economic level than whites, whether in education, home ownership or any of the other statistics maintained by the census bureau.

For the most part, courts have determined that it is not necessary for a plaintiff to demonstrate that these disparities have been the proximate cause of low minority participation and success. In fact, low turnout and success is presumed to be exacerbated by these socio-economic disparities. *Buckanaga v. Sisseton Indep. School District* No. 54-5, 804 F. 2d 469 (11th Cir. 1986); *U.S. v. Osceola County*, 475 F. Supp. 2d at 1233; *U.S. v. City of Euclid*, 590 F. Supp. 2d at 592. In *U.S. v. Village of Port Chester*, 2008 WL 190502*19-20, plaintiff’s expert acknowledged that, although lower socio-economic status leads to lower levels of political participation, he agreed that the Hispanic community is on average younger and more recently arrived in the United States, and that that could contribute to lower Hispanic voter turnout.
See also, Jamison v. Tupelo, 471 F. Supp. 2d at 715 (voter turnout is affected by socio-economic status); Gonzales v. City of Aurora, 2006 WL 681048 *8-9.

FACTOR 6.

Whether political campaigns have been characterized by racial appeals.

Courts rarely spend a great deal of time describing racial appeals in elections in their decisions. The testimony at trial on this issue will often come from an expert historian who would peruse decades of newspaper articles and campaign literature to find any hint of a racial appeal within a given campaign or community. See Gonzales v. City of Aurora, 2006 WL 681048*9.

Racial appeals have taken the following forms: using photographs of African-American opponents in their campaign literature; using campaign literature that preyed on fears that African-American students would be bussed to town schools and warning that urban encroachment from New York City would occur. U.S. v. City of Euclid, 580 F. Supp. 2d at 593; Goosby, 956 F. Supp. At 342; U.S. v. Village of Port Chester, 2008 WL 190502*20-22.

E. OTHER FACTORS

In addition to the seven Senate Factors, courts will generally review two other issues. They include:

FACTOR 8. Whether there is a lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority community; and

FACTOR 9. Whether the policy underlying the state or political subdivision’s use of voting qualification, prerequisite to voting, or standard practice or procedure, is tenuous.

In Gonzales the court rejected plaintiff’s claim that whites were unresponsive to Hispanics needs when there was only one example of one alderman’s behavior that was demonstrably indifferent to the minority group’s concerns. 2006 WL 681948*10.

The significance of the responsiveness/non-responsiveness issue is really up to the plaintiff to raise. Defendants can always proffer evidence that the community is responsive to the needs of the minority community but responsiveness will not trump a defendant’s failure to prevail on the seven Senate Factors. See Village of Port Chester, 2008 WL 190502*30.
In *Tupelo, Mississippi* the defendants had created a bi-racial committee to address the needs of the minority community. However, the fact that this committee was created two weeks before trial negated its value on the issue of responsiveness. 471 F. Supp. 2d at 715.

In *City of Euclid*, the court found the defendant unresponsive to the minority community on housing issues, and the absence of minority participation in employment by the City. The court found that where blacks were employed by the City, they were consigned to locker and toilet facilities. 580 F. Supp. 2d at 593.

The last issue to be addressed is the tenuousness of adopting and maintaining the at-large system. This issue is often given short shrift by the courts. Furthermore, this is more relevant to the issue of intent rather than impact or effect, which is the standard of proof under Section 2 of the VRA. However, tenuousness may be relevant to an inquiry as to whether the existing policy is unfair. *Houston v. Haley*, 663 F. Supp. 346, 355-6 (N.D. Miss. 1987). There are also circumstances where state policy mandates a particular electoral system.

In *Buchanan v. City of Jackson*, 683 F. Supp. 1515, 1536 (W.D. Tenn. 1988) the court acknowledged that at-large elections are a necessary consequence of a commission form of government and therefore their use is not tenuous.

Assuming the court concluded that an at-large system of election had a dilutive effect on a minority group’s ability to elect candidates of choice, the next question is what would be an appropriate remedy. The short answer would be a single member district plan. However, that may be easier said than done.

The first question asked is who has the initial obligation to develop a plan that would correct a Section 2 violation? Generally, the courts give the municipal defendant the first opportunity to develop a plan which would then be reviewed by the court. *Cottier v. City of Martin*, 475 F. Supp. 2d 932, 935 (D.S.D. 2007). If a defendant refuses to propose a plan, or fails to prepare a plan that remedies a Section 2
violation, then the court must do so. Id. See also, *Williams v. City of Texarkana*, 32 F. 3d 1265, 1268 (8th Cir. 1994).

If the court develops a plan it is generally obligated to use a strict SMD plan. However, a defendant can prepare a combination system as long as the proposed remedy does in fact remedy the violation.

In *City of Martin*, the court adopted an at-large plan using cumulative voting. The City would have six city council members elected in a staggered cycle of 3 and 3. Furthermore there would be no designated positions or numbered posts and candidates could be from any part of the City. 475 F. Supp. 2d at 936. Under a cumulative voting scheme each voter will have up to three votes which can be cast for one, two, or three candidates. Id. The winners would be the three candidates with the highest number of votes. Id.

In *City of Euclid*, the district court also acknowledged that the defendant should have the first opportunity to prepare a remedial plan. 523 F. Supp. 2d 641, 644 (N.D. Ohio 2007); *Reynolds v. Sims*, 377 U.S. 533, 586, 84 S. Ct. 1362 (1964)) but that plan must correct the Section 2 violation. See also, *Bone Shirt v. Hazeltine*, 461 F. 3d 1011, 1022-23 (8th Cir. 2006).

In *City of Euclid*, a single member district plan was adopted by the court. To create a SMD plan, the court or defendant must ensure that there are sufficient members of the minority community within a district and roughly match the minority group’s percentage of the electorate. *City of Euclid*, 523 F. Supp. 2d at 644-45; Cottier, 475 F. Supp. 2d at 938. Furthermore, the plan must comply with the Fourteenth Amendment’s one-person-one-vote requirement. *Cottier*, 475 F. Supp. 2d at 939. That requires that a deviation from the largest district to the smallest be less than 10%. *Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321 (1973); *Voinovich v. Quilter*, 507 U.S. 146, 113 5 Ct. 1146 (1993); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1030-33 (M.D. Md. 1994).
Finally, any proposed SMD plan proposed by the defendant should reflect county lines, natural
boundaries and precinct lines, to the extent possible and be compact and contiguous.

PART II- Section 5 of the Voting Rights Act

II. Deference to state and local governmental interests in crafting redistricting plans [Perry v. Sanchez]

With the addition of over four million residents to the State of Texas based on the 2010 Census, a
state in which nearly of third of the population is Hispanic, the Texas legislature made sweeping changes
to its congressional and legislative districts in an effort to comply with the population equality dictates of
the one person, one vote requirement, and the interrelated requirements of Section 2’s vote dilution
prohibition and Section 5’s non-retrogression requirement. The plans were attacked by minority
organizations, mounting attacks both in the district court in Texas and in the D.C. District Court in the
Section 5 judicial preclearance proceedings.

While the state was mid-stream in the process of seeking judicial preclearance of its
congressional and legislative redistricting plans in a separate action filed in the U. S. District Court for the
District of Columbia under Section 5, various groups challenging the plans persuaded the U.S. District
Court of the Eastern District of Texas in San Antonio to formulate its own interim election plan for the
upcoming April 2012 primary elections. The U.S. Supreme Court granted certiorari and scheduled
briefing and oral argument on an extraordinarily expedited basis. At issue was whether the district court
errored in drafting an interim election plan for the 2012 Texas elections that did not sufficiently defer to
legitimate state governmental policies and interests embodied in the existing districting legislation and the
proposed legislation enacted by the state legislature. The Supreme Court vacated the district court’s
orders implementing the interim maps, concluding that it was unclear whether the standards had been
followed where

(1) The district court exceeded its mission to draw interim maps that do not violate the
constitution or the VRA and substituted its own concept of “the collective public good”
for the Texas legislature’s determination of which state policies serve the interests of the
citizens of the state;
(2) The district court had neither the need nor the license to cast aside the “vital aid”
provided by the state’s recently enacted plans to assist it;
(3) The district court had no basis to modify the state’s plan in the absence of any legal flaw
in that plan with respect to any unlawful population variations in the state House districts
in north and east Texas. Specifically, even though there was no serious allegation that the
district lines in north and east Texas had a discriminatory intent or effect, the district
court chose not to take guidance from the state’s plan in drawing the interim maps for
those regions, but instead altered those districts to achieve de minimis population variations;

(4) The district court erroneously refused to split voting precincts in drawing the interim plans and failed to follow the lead of the state’s enacted plan, which freely split precincts in many areas where the plans details were not subject to legal challenges. While the state had chosen to accept the burden of changing its precincts and the state’s plan accepted the costs of splitting precincts in order to accomplish other legitimate goals, and while state law expressly allowed recasting precincts when redistricting, the district court erroneously ignored the state’s decision.

(5) The district court unnecessarily ignored the state’s plans in drawing certain individual districts that did not resemble any legislatively enacted plan, even though the district court did not say that the allegations of constitutional violations regarding one particular district were plausible or those claiming such violations were likely to succeed on the merits of their challenge, nor did the district court make any finding that relevant aspects of the state plan would probably fail to gain Section 5 preclearance;

(6) The district court’s drawing of one of the congressional districts disregarded aspects of the state’s plan that appeared subject to strong challenges in the Section 5 proceedings and drew that district as a “minority coalition apportionment district” in which two different minority groups were expected to band together to form an electoral majority. The district court had no basis for creating a minority coalition district rather than drawing a district that simply reflected population growth.

*Perry v. Perez* was a unanimous decision, with a familiar concurrence by Justice Clarence Thomas. In it, the Supreme Court referred to its language used in the NAMUDNO, where it found that "intrusions on state sovereignty" brought by Section 5 raised "serious constitutional questions." In his concurring opinion in *Perry v. Perez*, Justice Clarence Thomas restated his position in NAMUDNO that "The extensive pattern of discrimination that led the Court to previously uphold [Section 5] as enforcing the 15th Amendment no longer exists."

The U.S. Supreme Court’s January 20, 2012 decision in *Perry v. Perez* has suggested to some observers that the Supreme Court may be ready to reconsider a this key part of the VRA and that it has Section 5 “on its mind.” In vacating the district court’s orders for an interim electoral plan for the 2012 Texas elections, the Supreme Court in *Perry v. Perez* referred to its language used in NAMUDNO, the 2009 case in which it found that “intrusions on state sovereignty” brought on by Section 5 raised "serious constitutional questions." In this context some election law experts have identified *Shelby County v. Holder* as the potential vehicle for the Supreme Court to take another look at the constitutionality of Section 5 of the VRA. In short, while Section 5’s constitutionality was not at issue in *Perry v. Perez*, as the Chief made clear when the case was orally argued on January 9, 2012, the Supreme Court’s decision on January 20 has been seen by some as a signal that the Court is ready to consider the issue. We will turn now to those pending constitutional challenges.
I. **Continuing challenges to Section 5 of the Voting Rights Act** [Shelby County, AL v. Holder and Laroque v. Holder]

Section 5 requires certain states and localities to submit changes in voting to the Department of Justice or a federal court to ensure the changes do not have a discriminatory purpose or effect on minority voting power.

Section 5 is one of the most potent federal laws that make up a major component of the formidable arsenal of the United States to combat racial discrimination in voting. The other component, Section 2, is the “results” test-based provision of the VRA designed to prohibit vote dilution and applies nationwide to redistricting plans and other components of the electoral process leading to the nomination and election of minority-preferred candidates vote dilution.

Section 5 has long been considered the “shield” that applied to prevent covered jurisdictions from enacting redistricting plans that fragmented minority population concentrations, packed minority voters into election districts in order to “bleach” adjacent non-minority districts, or used various mechanisms such as anti-single shot voting, unusually large election districts, runoff requirements, or exclusionary candidate slating processes to deny minority voters equal electoral access and equal participation in the political process. At its core is the goal of preventing voting-related changes “that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” Retrogression as used in this context means reduction in the realistic opportunity of minority voters to elect minority-preferred candidates, and as applied to redistricting plans prepared and submitted by covered jurisdictions, non-retrogression means that a new plan cannot have the purpose or effect of providing minority voters with less opportunity to elect candidates of choice, or minority-preferred candidates, than did the previous plan.

Section 5 requires certain states and localities with a history of voting rights violations and racial discrimination in voting to submit changes in voting to the Department of Justice or the U.S. District Court for the District of Columbia to ensure the changes do not have a discriminatory purpose or effect on minority voting power and the ability of minority voters to participate effectively in the electoral process and to enjoy equal access to the political process. It has not been without its share of controversy, and its unique federalism implications and its singling out of southern states for “special treatment” have placed it at the center of a constitutional firestorm for decades. Several states have mounted constitutional challenges to Section 5 on the ground that it interferes with their right to govern elections under the powers that the 10th Amendment reserves to them. The Supreme Court has rejected or bypassed those challenges thus far.
The first challenge to the constitutionality of Section 5, the preclearance provision of the Voting Rights Act, was decided in 1966 when the Supreme Court held in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), that the legislation was constitutional remedial legislation, its rationale being that Section 5 was based on a strong legislative record of official discrimination that virtually excluded blacks from the electoral franchise primarily in southern states that were in the former Confederate States of America and was an appropriate exercise of Congress’ 15th Amendment enforcement power. In *Katzenbach*, the Supreme Court found that the coverage formula under Section 5 was constitutionally sound as a theoretical matter because its trigger, “the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average” effectively tied coverage to the specific problem to be addressed by the Fifteenth Amendment, namely, the “widespread and persistent” use of intentionally discriminatory tactics to prevent minorities from voting. 383 U.S. at 330-31.

Since that 1966 challenge, Congress has reauthorized the Voting Rights Act four times, and legal challenges were rejected in 1973, 1980 and 1999 when the Supreme Court upheld the constitutionality of Section 5. In *City of Rome v. United States*, 446 U.S. 156, 183 (1980), the Court upheld Section 5 after its 1975 reauthorization, and in *Lopez v. Monterey County.*, 525 U.S. 266, 282-83 (1999), the Court upheld Section 5 after its 1982 reauthorization in a narrow as-applied challenge.


In 2009, in *Northwest Austin Municipal Utility District No. One v. Mukasey*, 573 F. Supp. 2d 221, 235-82 (D.D.C. 2008) (upholding the constitutionality of Congress's 2006 reauthorization of section 5), rev'd on other grounds, 129 S. Ct. 2504 (2009), commonly known by the unflattering acronym, NAMUDNO, the U.S. Supreme Court noted that “serious constitutional questions” were raised by Section 5’s intrusion on state sovereignty in light of the dramatic changes that had taken place in covered jurisdictions since the Voting Rights Act was first enacted in 1965, but invoked the doctrine of constitutional avoidance to bypass the constitutional issue. The Court held that the availability of a bailout provision in the VRA for covered jurisdictions provided an adequate and independent statutory basis for affirmance of the lower court’s decision. While the Supreme Court avoided the constitutional question by finding that the utility district was statutorily eligible for bailout, it did note that "the Act imposes current burdens and must be justified by current needs." Id. at 2512. In light of the unquestioned improvement in
minority voter registration and turnout since the Voting Rights Act's passage in 1965, the Court warned that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions." Id. at 2513. While a majority of the Court chose to sidestep the constitutional issue, Justice Clarence Thomas, in a separate opinion, said he would have ruled that Section 5 of the VRA was unconstitutional.

Following NAMUDNO, two more constitutional challenges were mounted by covered jurisdictions, Kinston, North Carolina and Shelby County, Alabama. In both cases the plaintiffs contended that the preclearance requirement under Section 5 of the Voting Rights Act, as extended and reauthorized by a nearly unanimous Congress in 2006, is an outdated infringement on the equal sovereignty of the states, and that Congress lacked the authority to renew it under the Fifteenth Amendment’s express grant of power to enforce the constitutional prohibition on racial discrimination in voting. Both constitutional challenges were rejected at the district court level in companion decisions by the same district judge, The Honorable John Bates, District Judge of the U.S. District Court for the District of Columbia, and both were appealed to the D.C. Circuit Court of Appeals. In one of those cases, Shelby County v. Holder, oral argument was heard on January 19, 2012 by the U.S. Court of Appeals for the D.C. Circuit, and that case may ultimately provide the Supreme Court with another opportunity to address the constitutional issue it deftly avoided in NAMUDNO under the doctrine of constitutional avoidance. In the other, Laroque v. Holder, on remand from the D.C. Court of Appeals, the U.S. District Court for the District of Columbia upheld Section 5’s constitutionality in a December 22, 2011 decision. With oral argument before the D.C. Circuit on February 27, 2012, although an eleventh hour decision by the Justice Department to reconsider its preclearance decision may render the controversy moot.

In Shelby County, Alabama v. Holder, ___ F. Supp. 2d ___, No. 10-651, 2011 WL 4375001 (D.D.C. Sept. 21, 2011), the district court found that "despite the effectiveness of Section 5 in deterring unconstitutional voting discrimination since 1965, Congress in 2006 found that voting discrimination by covered jurisdictions had continued into the 21st century, and that the protections of Section 5 were still needed to safeguard racial and language minority voters." The district court upheld Section 5 of the VRA, concluding that Congress did not exceed its enforcement powers in reauthorizing Section 5's preclearance procedure in 2006. Its ruling was hailed by minority organizations and civil rights advocates as an affirmation that strong evidence supported the 2006 reauthorization and extension of Section 5 for another 25 years, and that the Court has effectively preserved the effectiveness of the Voting Rights Act and one of the nation’s most important means for preserving the right to vote and preventing discrimination in the electoral process.
Much of the district court’s analysis was devoted to articulating the correct legal standard to be applied to this constitutional standard. Shelby County successfully argued that the correct standard was set forth in the three-prong test first articulated in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Under *Boerne’s* three-prong test, the Court in deciding the constitutionality of a statute enacted by Congress under its enforcement powers under Section 5 of the Fourteenth Amendment, must (1) identify the constitutional right the legislation seeks to protect, (2) determine whether there is a history and pattern of unconstitutional state conduct, and (3) assess whether the legislation is congruent and proportional to that conduct.

Although the district court agreed with Shelby County on the fundamental question of what legal standard should be used to determine whether Congress had exceeded its authority in reauthorizing Section 5 for 25 years in 2006, based on *Boerne’s* requirement that with respect to certain Fourteenth Amendment legislation “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,” the dire warnings of amici, including the Lawyers Committee for Civil Rights Under the Law that such a standard would effectively preclude Congress from renewing effective antidiscrimination laws, never came to fruition. Instead, the district court concluded that *Boerne’s* “congruence and proportionality” standard should be applied, but that this legal standard was part and parcel of the same basic legal standard articulated by the Supreme Court in its previous rulings in 1966 and 1980 that upheld Section 5, namely, that Congress may “use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”

The district court in *Shelby County* concluded that the judicial branch owed substantial deference to the determinations of Congress in enacting and reauthorizing Section 5, since that key provision of the Voting Rights Act protected the fundamental right to vote and prevented discrimination based on a constitutionally suspect classification.

In *Shelby County’s* Brief of Appellant filed in the D.C. Circuit, it concludes that by the logic employed by the district court,

Congress could dispense entirely with its obligation to build a legislative record upon which to tailor its exercise of enforcement authority and randomly select jurisdictions for coverage, but then immunize such random selection from constitutional scrutiny through bailout. This cannot be the law. The “fundamental principle” of “equal sovereignty” is surely more than a mere platitude. *Nw. Austin*, 129 S. Ct. at 2512. Bailout and bail-in cannot relieve Congress of its duty to demonstrate that Section 4(b)’s “disparate geographic coverage is sufficiently related to the problem that it targets.” Id.²

In *Laroque v. Holder*, the City of Kinston, North Carolina, sought to enjoin the Attorney General from enforcing Section 5 with respect to a referendum switching city elections from partisan to
nonpartisan. Laroque, a candidate for public office claiming a state-law entitlement to run under the suspended nonpartisan system, together with other plaintiffs, sought to enjoin the Attorney General from enforcing section 5 against the city, contending in count one that Section 5, as reauthorized in 2006, exceeded Congress's Fourteenth and Fifteenth Amendment enforcement powers and contending in count two that the amendments made to Section 5 in 2006 erected a facially unconstitutional racial-preference scheme. Following the district court's dismissal for lack of standing and failure to state a cause of action, Laroque v. Holder, 755 F.Supp.2d 156 (2010), the D.C. Court of Appeals reversed the district court's dismissal of count one, vacated its dismissal of count two, and remanded for further proceedings. Laroque v. Holder, 650 F. 3d 777 (D.C. Cir. 2011). On December 22, 2011, the district court denied the plaintiffs' motion for summary judgment, and granted the motions for summary judgment filed by the Attorney General and the defendant-intervenors.

The district court in Laroque relied extensively upon the Shelby County decision in rejecting the plaintiffs’ contention that the 2006 amendments could not be a congruent and proportional response to discrimination in voting, regardless of the evidence Congress amassed during the 2006 reauthorization, because "any 2006 expansion of the 1965 preclearance standard would be unconstitutional given the dramatic improvements in the covered jurisdictions." In rejecting this line of attack, the district court stated:

The Court rejects this simplistic argument for several reasons. First, even if the amendments are an expansion of Section 5's preclearance standard, that does not ipso facto make them unconstitutional. Congress has previously expanded substantive provisions of the Voting Rights Act, even in the face of unquestionably improved voting conditions, without thereby rendering the VRA unconstitutional. In 1982, for instance, Congress significantly expanded the VRA by providing that acts related to voting that were discriminatory in effect, as well as those that were discriminatory in purpose, violated Section 2 of the Act. Presumably employing Katzenbach's rationality review, the Supreme Court summarily affirmed that the post-1982 Section 2 was constitutional. Miss. Republican Exec. Comm. v. Brooks, 469 U.S. 1002, 1003 (1984).

The district court also rejected the argument that there is a bright-line rule that any expansion of Section 5 is now per se unconstitutional under the three-prong test announced in City of Boerne v. Flores, 521 U.S. 507, 520 (1997). In support of its ultimate holding that the amendments were proper enforcement legislation under the three-part test laid out in City of Boerne v. Flores, the district court stated as follows:

Plaintiffs' bright-line argument does not make sense even as a theoretical matter. Congress has amassed substantial evidence of discrimination in voting; it therefore has a range of options for remedial legislation that would be congruent and proportional to the problem. In evaluating the 2006 reauthorization, the question before this Court is whether the legislative response Congress chose is within that range, not where it falls in the range relative to past legislation. See Boerne,
521 U.S. at 530-32. So long as current needs justify the current legislation, see *Nw. Austin II*, 129 S. Ct. at 2512, it does not matter whether Congress is legislating more or less assertively than it has in the past. This is particularly true because Section 5 now responds primarily to "second generation" voting problems, rather than to the "first generation" problem of outright denials of the vote. House Hearing, 109th Cong. 1134 (Oct. 18, 2005) (Chandler Davidson and Bernard Grofman, eds., *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* (Princeton University Press 1994)). Congress could reasonably decide that a different preclearance standard is necessary to respond to a different set of problems, and that decision would be acceptable so long as the remedy is congruent and proportional to the problem. *Boerne*, 521 U.S. at 530-32.

Finally, the district court in *Laroque* addressed the plaintiffs’ argument that the 2006 amendments actually represented an unconstitutional expansion to Section 5's preclearance standard and an unwarranted rejection of the non-retrogression standard as articulated in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Under the original version of Section 5(a) of the Voting Rights Act, no change to voting procedures could be precleared if it "will have the effect of denying or abridging the right to vote on account of race or color[.]") 42 U.S.C. § 1973c(a). The meaning of "the effect of denying or abridging the right to vote on account of race or color" was first addressed by the Supreme Court in *Beer v. United States*, 425 U.S. 130 (1976), where the Court held that the purpose of Section 5 was 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." Id. at 141. The Court in *Beer* added that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." Id. The effects prong of Section 5 was thus solely concerned with retrogression, i.e., changes in voting practices or procedures that made the situation of minority voters worse, according to the Court in *Beer*. This meaning of the “effects” prong of Section 5 was not addressed by the Supreme Court until *Georgia v. Ashcroft*, 539 U.S. 461 (2003).³

As the district court explained in *Laroque*, the Supreme Court in *Ashcroft* made it clear that Section 5 does not dictate that a State must pick one of these methods of redistricting over another, and that either option will present the minority group with its own array of electoral risks and benefits, and presents hard choices about what would truly maximize minority electoral success. In addition to the choice between fewer completely "safe" districts and more less safe districts, the Court wrote that the analysis should include whether a plan added or subtracted "influence districts" — districts "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Ashcroft* at 482. Finally, the Court in *Ashcroft* added two additional considerations to its totality of the circumstances test: "the comparative position of legislative leadership,
influence, and power for representatives of the benchmark majority-minority districts" and whether minority-preferred representatives supported the plan. *Ashcroft* at 483-84.

The Civil Rights community was up in arms over this holding in *Ashcroft* and engaged in a very effective effort to persuade Congress during the VRA extension and reauthorization hearings to legislatively overrule *Ashcroft* and return to the retrogression analysis of *Beer*. They succeeded.

As the district court in *Laroque* pointed out in its lengthy discussion of *Ashcroft* and *Beer*, proponents of making a wholesale revision to the language of Section 5, in an ostensible effort to return to the *Beer* retrogression standard, attacked *Ashcroft* with gusto. They argued that the standard laid out in *Ashcroft* was impossibly challenging to administer, particularly within the 60-day period in which the Department of Justice must make preclearance decisions; that is was "an unworkable standard," Senate Hearing, 109th Cong. 8 (May 16, 2006) (Arrington statement), that it was "subjective, abstract, and impressionistic," House Hearing, 109th Cong. 49 (Nov. 9, 2005) (McDonald statement), that it was "amorphous [and] easily manipulable . . . an open invitation to mischief . . . [and] poorly defined and virtually impossible to meaningfully administer." Senate Hearing, 109th Cong. 39 (May 17, 2006) (Days responses). One former Deputy Chief of the Voting Section of the Justice Department's Civil Rights Division testified that *Ashcroft* had "introduced factors into the retrogression analysis that make the Section 5 process more complicated and burdensome for everybody, not just for the Department of Justice but for the jurisdictions that have to comply with it as well." House Hearing, 109th Cong. 889 (Oct. 18, 2005) (statement of Robert A. Kengle). This same former official in the Civil Rights Division worried that *Ashcroft* would make preclearance decisions "less predictable and more open to subjective judgments, individual preconceptions and even political biases." Id. A hearing in the House opened with the question, "*Georgia v. Ashcroft*: can it be made workable?" House Hearing, 109th Cong. 2 (Nov. 9, 2005) (Rep. Conyers statement).

The district court in *Laroque* clearly agreed that *Ashcroft* was a great leap backward, and it went to great lengths to explain how unworkable and chaotic the *Ashcroft* retrogression standard was in theory and in practice. It quoted extensively from the legislative history of the 2006 extension and amendments to Section 5 of the Voting Rights Act in explaining what it considered to be an acceptable justification and need for tossing out the *Ashcroft* standard and replacing it with what was represented to be a return to the *Beer* standard.

When Congress took up the matter of extending and reauthorizing Section 5 for an additional 25 years, it reacted to *Ashcroft* in 2006 by adding subsections (b) and (d) to Section 5. Those amendments provide that
(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

\ldots

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

42 U.S.C. § 1973c(b), (d).

The district court in Laroque concluded that subsections (b) and (d)'s modifications to the Beer and Ashcroft tests represented a congruent and proportional response to the problem of intentionally discriminatory dilutive techniques. It bottomed its conclusion on a prolonged discussion drawn from the 2006 legislative history that revealed how influence districts would fare in comparison to crossover districts and opportunity districts under the Ashcroft standard.

The district court’s narrative revealed the ambiguity of the amended language inserted into Section 5, and frankly acknowledged the widespread uncertainty over the “Ashcroft fix.”

The district court in Laroque ultimately concluded that the amended version of Section 5 was a congruent and proportional response to the problem of intentionally discriminatory dilutive techniques. It echoed the queries of witnesses over when and whether majority-minority districts or other opportunity districts could be traded for influence districts and whether amended Section 5 was needed to protect influence districts from racially-driven legislators.

It quoted at length from the 2006 legislative history in an effort to demonstrate the dangers of Ashcroft's holding that states are free to choose among the various ways of ensuring that minorities have an equal opportunity to participate politically, that is, that states may choose between majority-minority districts, influence districts, crossover districts, and other types of participation. The dangers were not apparent.

The district court’s Boerne-driven discussion, like the post-enactment House and Senate reports that were inserted into the Congressional record long after the 2006 legislation was voted on by the House and Senate, lacked clarity and was just as the court claimed the Ashcroft standard for retrogression to be. The district court dwelled at length on how many influence districts would make up for the loss of an opportunity district. It argued that that there was a true lack of clarity about how to define influence districts and uncertainty about when influence districts could be traded for opportunity districts.
It noted concerns that consideration of influence districts would inject undue partisanship into the Voting Rights Act, and pointed out what many (apparently also including the court) considered the most significant problem with Ashcroft, namely, that it “might allow jurisdictions to substantially dilute minority voting strength under the guise of creating more influence districts. In the most extreme scenario, a jurisdiction could carve up every opportunity district into a series of influence districts where minorities might actually have no influence at all.” The district court, as if to buttress its conclusion, even quoted a west coast law professor’s quip that in enacting the “Ashcroft fix” Congress “did not so much reverse Ashcroft as remand it to the courts with equivocal instructions."

The district court believed that the 2006 amendments permitted the Section 5 analysis to include crossover districts and permitted tradeoffs between crossover and majority-minority districts, looking solely to the text of the amendments.

In reaching its conclusion that the 2006 amendments satisfied Boerne’s congruent and proportional” test, the district court provided an extended discussion, drawn largely from the legislative history, regarding influence districts, opportunity districts, coalition districts and cross-over districts. As the district court noted in Laroque, Congress explained in the House Report accompanying the Section 5 extension and reauthorization bill that the amendments quoted above were meant to return to the analysis articulated in Beer. See H.R. Rep. No. 109-478, at 71.

By jettisoning Ashcroft, according to the district court, it would now be clear under this amended and enhanced version of Section 5 that instead of allowing courts and the Department of Justice to take into account a wide variety of potential indicators of minority voting effectiveness in conducting the preclearance analysis, it was the intent of Congress that Section 5 be focused on minorities' ability "to elect their preferred candidates of choice."

The mootness doctrine may actually be the central issue when Laroque is ultimately decided by the D.C. Circuit following February 27, 2012 oral argument. The D.C. Circuit may not reach the merits of LaRoque’s challenges in light of the Justice Department’s decision on February 10, 2012, to reconsider its denial of Section 5 preclearance that led to LaRoque’s challenge to the Voting Rights Act in the first place. That preclearance decision, one will recall, was the Attorney General’s refusal to preclear a referendum supported by LaRoque and others that would have changed the local elections in Kinston, North Carolina from partisan to nonpartisan. According to the Justice Department, its decision to reconsider was prompted by a review of a new voting change submitted in September 2011 by Lenoir County, North Carolina, in which Kinston is located and where Laroque and other challengers reside. Based on what the Justice Department now said was “substantial change in operative fact” and based on
new demographic data that Lenoir County had submitted, showing a substantial increase in the percentage of African Americans in the local voting age population, the proposed change to nonpartisan elections in Kinston should now be precleared. According to the Justice Department, this new data revealed that “the black electorate is now large enough to successfully elect its preferred candidates in either partisan or nonpartisan elections,” and on the basis of this new evidence, the Justice Department has concluded that referendum changing local elections from partisan to nonpartisan was entitled to preclearance under Section 5, as amended in 2006. While the Justice Department now contends that the case should be dismissed in view of its February 10, 2012 preclearance decision, Laroque’s position is that the case should proceed and that the Justice Department’s actions constitute a “desperate, brazen, and outrageous effort to manipulate the scope of this Panel’s already-pending review of Section 5’s facial constitutionality.”

II. One Person, One Vote and Election Delay [Hancock County v. Ruhr]

Hancock County Board of Supervisors v. Ruhr, et al., Cause No. 1:10CV564-LG-HW (consolidated cases) (S.D. Miss. May 16, 2011)

Consolidated cases concerning the redistricting of ten counties in the Southern District of Mississippi were initiated by local chapters of the NAACP in early 2011, just a few days after release of the 2010 census data and shortly before the March 1, 2011 qualifying deadline for candidates for county office. Plaintiffs in each case sought a declaration that it would be unconstitutional to conduct elections using the current district lines, and that a sufficient delay in the statutory March 1, 2011, qualifying deadline for supervisor candidates would allow the board of supervisors in each county to complete the redistricting process. Plaintiffs challenged the state’s election statutes on the grounds that the deadlines imposed would cause violation of the “one person, one vote” principle of the Equal Protection Clause of the Fourteenth Amendment.

Under Mississippi’s election law, the County Board of Supervisors in each of the party counties had the statutory duty to draw the lines for its districts. The election cycle for county supervisors began January 1, 2011, when candidates could begin submitting qualification fees and paperwork. The qualifying period ended March 1, 2011. On or around February 4, 2011, near the middle of the qualifying period, the counties received the United States decennial census data. Having analyzed the census data, the Plaintiffs alleged that the present districts within each of the counties would have more than 10% variance from one another, and that this deviation constituted a prima facie case of invidious discrimination. The ten counties were at various stages of redistricting at the time these consolidated actions were filed, with some counties having adopted and presented a redistricting plan to the United
States Department of Justice for preclearance, while others were in the preliminary stages of formulating redistricting plans. At the time of the district court ruling, the Court acknowledged that it had been “provided only vague assertions that Justice Department preclearance may occur by May 27, 2011.”

Appearing as Intervenor, Jim Hood, The Attorney General for the State of Mississippi, argued that the Court lacked subject matter jurisdiction over this matter because Plaintiffs did not have standing to bring challenges based on “one person, one vote” violations and that the Plaintiffs’ claims failed on the merits.

Addressing the jurisdictional issues before it assessed the merits of Plaintiffs' claims, the Court reasoned that the “irreducible constitutional minimum of standing contains three elements”, each of which must be demonstrated by the plaintiff at the time the complaint is filed: “[T]he plaintiff must have suffered an injury in fact;” “there must be a causal connection between the injury and the conduct complained of;” and “it must be likely ... that the injury will be redressed by a favorable decision.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Failure to establish any one element would deprive the federal courts of jurisdiction to hear the suit. Id.

Further, in order to meet the minimum constitutional standards for individual standing under Article III, a plaintiff must show (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc ., 528 U.S. 167, 180-81 (2000).

The Court found that certain individual plaintiffs resided in over-represented rather than under-represented districts, and thus each failed to allege an injury-in-fact and lacked standing under Fairley v. Patterson, 493 F.2d 598, 604 (5th Cir. 1974) and N.A.A.C.P. v. City of Kyle, Tex ., 626 F.3d 233, 237 (5th Cir. 2010).

The Court further noted that the redressability prong of the standing analysis presented a much closer question, in that the requirement of redressability is designed to bar disputes that will not be resolved by judicial action, whereby the Court must inquire whether “‘the prospect of obtaining relief from the injury as a result of a favorable ruling is too speculative.’” Hanson v. Veterans Admin ., 800 F.2d 1381, 1385 (5th Cir. 1986) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).

With respect to the Plaintiffs’ request for a modification or extension of the qualifying deadline, the Court found that it was far from certain that this would give the plaintiffs relief from their potential
Fourteenth Amendment injuries in those counties where the county officials lagged behind in the approval and preclearance process. In this case, the qualifying deadline set by state law was only the first for the 2011 county elections. After June 2, 2011 it would be too late to use any new plan for the August 2, 2011 primary elections, as changes to existing lines must be accomplished at least two months prior to any election, and absentee ballots must be printed and available by June 18.

The Court found that these dates, established pursuant to State law, were rapidly approaching, that the date for Justice Department preclearance remained nebulous, and that due to the obvious time constraints, the prospect of obtaining effective relief was not likely and was too speculative to satisfy the redressability prong of the standing analysis.

The complaints essentially focused on the potential violation of the “one person, one vote” rule if the county supervisor primary elections stay on schedule in the party counties. The 14th Amendment’s Equal Protection Clause requires “no substantial variation from equal population in drawing districts for units of local governments having general governmental powers over the entire geographic area served by the body.” *Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 484-85 (1968). Further, the one person, one vote rule applied to apportionment of county supervisor districts in Mississippi. *Martinolich v. Dean*, 256 F. Supp. 612 (S.D. Miss. 1966). Moreover, district plans with population deviations of more than ten percent from one district to another create a prima facie case of discrimination under the Fourteenth Amendment. *Moore v. Itawamba County, Miss.*, 431 F.3d 257, 259-60 (5th Cir. 2005) (citing *Brown v. Thompson*, 462 U.S. 835, 842-43 (1983)). Finally, preliminary analysis of the 2010 census data indicated deviations greater than ten percent in all of the party counties. Plaintiffs allege that it would be unconstitutional to conduct 2011 elections for supervisors using district lines drawn prior to the 2010 census.

Under the above factual predicate and in light of these legal standards, the Attorney General in motions to dismiss, joined in by the counties, argued that no constitutional injury would result from allowing supervisor elections to go forward using the current district lines, which were drawn after the 2000 census and precleared by the Department of Justice.

This argument was supported by two Mississippi cases that followed the 1990 census, *Bryant v. Lawrence County, Mississippi*, 814 F. Supp. 1346 (S.D. Miss. 1993) and *Fairley v. Forrest County, Mississippi*, 814 F. Supp. 1327 (S.D. Miss. 1993).

In *Bryant*, the plaintiffs challenged an election held in 1991 (after the decennial census), contending that redistricting had not taken place before the election, and therefore the supervisors’ terms
should have been cut short and a special election held using the redistricting plan that was cleared after the election. The court disagreed, because the board of supervisors had not had an adequate opportunity to redistrict in time for the 1991 regular elections. *Bryant*, 814 F. Supp. 1353 (S.D. Miss. 1993). The court stated that after receiving census data, the Defendants had to analyze same and draw maps. They had to balance competing interests and take into account other valid considerations in regard to redistricting. They had to prepare materials to submit to the Justice Department under the Voting Rights Act. All of this took time. The Board submitted the Plan to the Justice Department for approval, however, it was not pre-cleared in time to be implemented for the regular elections held every four years (in 1991). *Bryant*, 814 F. Supp. at 1352. Examining the question of “how long should a legislative body have to redistrict after decennial census information becomes available,” id. at 1353, the court held that when there was a constitutional district plan in place, a board of supervisors “must have a reasonable time after each decennial census in order to develop another plan and have it pre-cleared by the Justice Department.” Id. at 1354.

The court in *Bryant* relied on language from the United States Supreme Court case of *Reynolds v. Sims*, 377 U.S. 533 (1964), that “legislative reapportionment is primarily for legislative consideration” and “judicial relief would only be appropriate when a legislative body fails to reapportion ‘in a timely fashion after having had an adequate opportunity to do so.’” *Bryant*, 814 F. Supp. at 1353 (emphasis in original). The court found that Lawrence County supervisors had not had an adequate opportunity to redistrict before the 1991 election, and therefore the court should not intrude into legislative matters. The court denied the request for a special election for the board of supervisors. With no Fifth Circuit law on point, the court found support from the Sixth and Seventh Circuits.

The Seventh Circuit case, *Political Action Conference of Illinois v. Daley*, 976 F.2d 335 (7th Cir. 1992), addressed the slightly different question of whether “a system that locks into place elected officials for four years, shortly before a redistricting on the basis of new census data becomes possible, can[ ] pass muster.” Id. at 338.

The 1990 census figures became available only two weeks before the February 26, 1991 election. Redrawing Chicago's ward for that election using the new census data was not possible. Redistricting is complex; obtaining new census data is merely the first step toward developing and approving a new map for the City. Therefore, the critical question in *Daley* was whether the 1991 election, which was based on a ward map approved in 1985 using 1980 census data, was valid under Reynolds. The explicit language in *Reynolds* concerning the probable “imbalance” in the map toward the end of the decennial period demonstrates that Chicago’s 1991 election represents no constitutional violation. We hold that the district court properly dismissed the plaintiff’s constitutional claims for failure to state a claim. The four-year terms that Chicago aldermen serve merely indicate that every fifth election (i.e. when the election year falls on the same year that the new census data becomes available) likely will result in a four-year delay in
using the new census data. But this simple consequence of the two different schedules (i.e. census every ten years, elections every four) does not diminish the voting power of any protected minority; there is merely a four-year time lag that occurs every other decade between redistricting and elections. *Daley*, 976 F.2d at 340-41.

The Seventh Circuit concluded in *Daley* that the Illinois elections conducted after census figures were available but before redistricting was accomplished did not violate constitutional requirements or the Voting Rights Act. Id.

The *Bryant* court also cited a Sixth Circuit opinion, *French v. Boner*, 963 F.2d 890 (6th Cir. 1992). In that case, there were large deviations from the average in many districts “that the parties agree will not pass constitutional muster if the council districts currently in effect must be tested against the 1990 census rather than the 1980 census under which the plan was drawn.” *French*, 963 F.2d at 891. In *French*, the Sixth Circuit stated:

The question before us is whether the City has a constitutional duty to rerun elections held just after the new decennial census data became available in 1991 but before the old apportionment plan could be changed and a new one put into effect prior to the impending election... In any system of representative government, it is inevitable that some elections for four-year or longer terms will occur on the cusp of the decennial census. The terms inevitably will last well into the next decade; and, depending on shifts in population in the preceding decade, the representation may be unequal in the sense that the districts no longer meet a one-person-one-vote test under the new census.

... The Supreme Court has never drawn hard and fast rules about the length of terms or how long after a decennial census year new elections under the new census must be conducted. The principles of mathematical equality and majority rule are important, but we should not allow them to outweigh all other factors in reviewing the timing of elections. In *Reynolds v. Sims*, 377 U.S. 533, 583, 585, 84 S.Ct. 1362, 1392-93, 1393-94, 12 L.Ed.2d 506 (1964), Chief Justice Warren wrote that the Court was not imposing a rule that “decennial reapportionment is a constitutional requirement,” although less frequent apportionment “would assuredly be constitutionally suspect.” The Court also noted that where “an impending election is imminent and a state's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediate relief in a legislative reapportionment case, even though the existing apportionment scheme was found invalid.” *Reynolds*, 377 U.S. at 585, 84 S.Ct. at 1394.

... [T]here must be some tolerances in the machinery of majority rule under the Equal Protection Clause in order to take into account the values outlined above, as well as the practicalities of the local electoral processes established by states and cities for their own self-government. *French*, 963 F.2d at 891-92.
In *Fairley v. Forrest County, Mississippi*, 814 F. Supp. 1327, 1343, 1346 (S.D. Miss. 1993), a companion case to *Bryant*, the district court considered a request for a special election for supervisors and election commissioners in Forrest County, Mississippi. The court examined much of the same precedent and concluded:

The voters of Mississippi are situated in an analogous situation as the voters of Illinois (*Ramos* case) and probably many other states. One election every 20 years (1971, 1991, 2001, etc.) will be held so close to the taking of the decennial census that decision makers acting in good faith may be unable to devise a constitutionally-acceptable reapportionment in time for the regularly scheduled elections. Does that mean that the Constitution requires the holding of special elections in every state in which this occurs once every 20 years? This Court thinks not.

...  

The Constitution does not require anything that is impossible of performance. The performance of the Forrest County Board of Supervisors in this case was reasonable. The Constitution, under the facts of this case, requires no more. No special elections, under the one-man one-vote principle, will be ordered. *Fairley v. Forrest Cnty, Miss.*, 814 F. Supp. 1327, 1343, 1346 (S.D. Miss. 1993).

Based on its analysis of *Bryant*, *Fairley* and similar precedent from the Sixth and Seventh Circuits, the Court in the *Hancock* consolidated cases denied the relief requested by Plaintiffs, reasoning that

The parties do not dispute the need for the counties to redistrict based on 2010 census data. But each county’s board of supervisors must have adequate time to formulate a redistricting plan and obtain preclearance from the Department of Justice before its failure to do so results in a declaration that elections held using the existing plan are unconstitutional. Courts have generally accepted that some lag-time between release of census data and redistricting is both necessary and constitutionally acceptable, even when it results in elections based on malapportioned districts in the years that census data is released. The time frame here was a matter of weeks between the counties’ receipt of new census information and the qualifying deadline. The Constitution requires “reasonableness” from the boards of supervisors. None of the counties has been able to complete the redistricting process prior to expiration of the qualifying deadline, despite some having made advance preparations to do so.

There is simply an insufficient amount of time for the County Boards of Supervisors to receive and evaluate the 2010 decennial census data, to redistrict each County in order to remedy any malapportionment, and to comply with State election statutes. Under the circumstances, and absent Justice Department preclearance of the submitted plans, the 2011 elections in the affected Counties must be conducted as they are presently configured.

Having determined that Plaintiffs lacked standing and that the allegations fail to state a claim in any event, the Court in *Hancock County* denied a motion to amend filed by the Plaintiffs for the purpose of adding additional parties plaintiff, reasoning that

Plaintiffs without standing may not amend their complaint. *Summit Office Park v. U.S. Steel Corp.*, 639 F.2d 1278, 1282 (5th Cir. 1981) (“where a plaintiff never had standing to assert a
claim against the defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs.”); *Aetna Cas. & Surety Co. v. Hillman*, 796 F.2d 770, 774 (5th Cir. 1986) (Rule 15 does not allow a plaintiff to amend his complaint to substitute a new plaintiff in order to cure the lack of subject matter jurisdiction). Moreover, in exercising its discretion in considering a motion to amend a complaint, the Court may consider, among other factors, the futility of amendment. *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 872-73 (5th Cir. 2000). An amendment is futile if “the amended complaint would fail to state a claim upon which relief could be granted.” Id. at 873.

Plaintiffs’ claims in these consolidated cases were accordingly dismissed, and appeals were immediately taken to the Fifth Circuit Court of Appeals, where the appeals have been fully briefed and are awaiting a decision on the merits.

**III. Alternatives to Single-Member Districts as Remedy [U.S. v. City of Port Chester]**

Cumulative voting is an electoral system under which each voter has as many votes as there are posts to be filled, and each voter may either divide his or her votes between candidates or concentrate those votes on a single candidate. See *Holder v. Hall*, 512 U.S. 874, 910 n.15, 114 S. Ct. 2581, 2601 n. 15, 129 L. Ed. 2d 687 (1994)(Thomas, J., conc.) ("The system thus allows a numerical minority to concentrate its voting power behind a given candidate without requiring that the minority voters themselves be concentrated into a single district.")

In *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010), appeal dismissed, No. 06-CV-15173 (2d Cir. Aug. 25, 2011), following the liability phase in a Section 2 proceeding in which the Village of Port Chester's existing electoral system for the election of Village Trustees was determined to dilute the voting strength of Latino voters, the U.S. District Court for the Southern District of New York over plaintiffs objections mandated that a cumulative voting remedy. *Port Chester* is significant in that it is the first the first reported decision in which a district court expressly held that cumulative voting was an available remedial alternative in a Section 3 case. It is also the first case in which a district court has ordered cumulative voting into effect as a remedy for a judicially determined violation of Section 2 of the Voting Rights Act.

Cumulative voting has not fared well in other circuits, however, at least when the defendant governmental entity declined to accept it voluntarily as a remedial alternative. In *Cane v. Worcester County, Maryland*, 35 F.3d 921, 928 (4th Cir. 1994), the Fourth Circuit Court of Appeals vacated the district court’s imposition of a cumulative voting remedy following a determination that a county’s electoral system violated Section 2 on the ground that the district court abused its discretion in adopting a cumulative voting system. The Fourth Circuit noted that it was "not called upon to outline whether facts and circumstances might justify the imposition of a cumulative voting plan on a political subdivision." In
adopting the cumulative voting plan submitted by the plaintiffs, the district court failed to give due deference to the county’s clearly expressed legislative preference for residency requirements that would ensure Board members were knowledgeable of and responsive to the diverse interests of the various regions of the county. By abolishing the county’s residency districts and 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 under the cumulative voting scheme, the district court failed to adequately defer to the "variety of political judgments about the dynamics of [the] overall electoral process that rightly pertain to the legislative prerogative of" the County.

In *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260 (11th Cir. 2004), the district court in the landmark *Dillard* litigation vacated its remedial consent decree entered two decades earlier on the ground that it had modified the size of an elected governing body to remedy a Section 2 violation by increasing from four to seven the number of seats on the county commission, with one being a 63% African-American seat. The original remedial consent decree fifteen years previously was challenged on the basis that there was no legal basis for Section 2 liability. During the intervening years, the Supreme Court had held in *Holder v. Hall*, 512 U.S. 874, 881, 114 S. Ct. 2581, 2586, 129 L. Ed. 2d 687 (1994), that a court cannot modify the size of an elected governing body to remedy a section 2 violation, the Eleventh Circuit held in *Nipper v. Smith*, 39 F.3d 1494, 1532 (11th Cir. 1994) (en banc) that under *Holder*, federal courts may not mandate that state or political subdivisions alter the size of their elected bodies as a remedy for Section 2 violations, and also held in *White v. Alabama*, 74 F.3d 1058, 1072 (11th Cir. 1996) that based on *Holder* and *Nipper*, federal courts lacked authority under Section 2 to require the state to increase the size of its appellate courts.

In *Dillard v. Baldwin County Comm'rs*, minority voters had declined over the years to less than 10% of the county’s voting age population, but in lieu of the single-member district system, they requested the district court to implement a cumulative voting scheme. The district court denied the minority voters' request and held that since they represented a minority group that now comprised less than 10 percent of the relevant electorate, they could not possibly satisfy the first *Gingles* precondition to relief, i.e., the establishment of an available remedy. Affirming the district court, the Eleventh Circuit found that cumulative voting schemes simply did not occupy a traditional and accepted place in Alabama's legislatively enacted voting schemes. Since the group of minority voters was too small to elect candidates of its choice in the absence of a challenged structure or practice, then it was the size of the minority population that resulted in the voter's injury, and not the challenged structure or practice. The minority voters could not establish that the African-American population in the county was large enough to control the outcome of elections, hence the district court correctly concluded that "the political weakness of the
African-American community in Baldwin County results from its being less than 10% of the voting age population and the fact that it does not live in a geographically compact community.”

The Eleventh Circuit’s rejection of the proposed cumulative voting system sought by the minority voters was unequivocal. Affirming the district court vacature of the consent decree and rejection of the minority voters’ proffered cumulative voting proposal, the Eleventh Circuit concluded in Dillard v. Baldwin County Comm’rs at 1268-69:

[1] As an initial matter, we question whether the "cumulative voting" system that Dillard seeks to impose on the Commission is truly less "intrusive" than compelled redistricting. Implicit in the first Gingles requirement "is a limitation on the ability of a federal court to abolish a particular form of government and to use its imagination to fashion a new system."


[3] [W]e agree with the district court's finding that cumulative voting schemes simply do not occupy "a traditional and accepted place in Alabama's legislatively enacted voting schemes." … The federal courts have no authority to conjure up such an election scheme and impose it on a state government, regardless of the theoretical prospect of increasing minority voting strength.

Shawna C. MacLeod provides a strong argument that “cumulative voting should still constitute a judicially enforceable and imposed remedial measure when the political subdivision at issue desires it.” Shawna C. MacLeod, One Man, Six Votes, and Many Unanswered Questions - Cumulative Voting as a Remedial Measure for Section 2 Violations in Port Chester and Beyond, 76 Brooklyn L. Rev. 1669, 1710 (2011). MacLeod notes that up until the Port Chester decision, the Justice Department had “not specifically advocated for cumulative voting as a cure for violations” of Section 2 of the Voting Rights Act, and indeed had initially objected to the Village of Port Chester’s cumulative voting plan, “although it ultimately signed the consent decree after a court order, which established the new cumulative voting system.” Id. at 1670. Such reluctance was understandable in light of the Justice Department’s consistent and sometimes single-minded reliance on a presumption that only single-member districts could be considered for purposes of remedying Section 2 violations.

There is a problematic side to the Justice Department’s failure to embrace cumulative voting fully and without equivocation as an acceptable remedial alternative for Section 2 violations:

The DOJ’s failure to readily sanction cumulative voting as a remedy for section 2 violations is problematic; it has led to public misconception and confusion within political subdivisions about how best to approach implementation of alternative voting systems like cumulative voting. And,
in the wake of a recent Supreme Court decision, the DOJ's refusal to identify cumulative voting as a cure narrows still the availability of potential remedies for section 2 violations. Id. at 1671.

Given the wariness of the Justice Department over using cumulative voting to remedy Section 2 violations, the case can be made for more flexibility in assessing acceptable remedies for Section 2 violations and more elasticity in considering alternative, non-district alternatives when appropriate. Id. at 1672.

MacLeod urges the Justice Department to establish clear guidelines regarding the implementation of cumulative voting. In light of Bartlett and the national attention Port Chester has received, it is an optimal time for the Justice Department to define the circumstances under which cumulative voting should be considered an appropriate remedy for a Section 2 violation. Voter education should also be given top priority:

Undoubtedly, the DOJ should provide guidance about the educational program that should be implemented along with the cumulative voting system, which should be comprehensive. … The DOJ might consider devising its own educational manual about cumulative voting, so that voters are aware that it is currently a system in use in a number of jurisdictions, and so that voters can become familiar with alternative voting systems uniformly. Id. at 1712-13. …

Remedial schemes for section 2 violations are again in limbo after Bartlett. The Department of Justice should be more elastic in its acceptance of alternative voting schemes, and should be clearer about its position regarding cumulative voting and other alternative voting schemes. From the DOJ's litigation strategy in Port Chester, we know successful implementations require, at the very least, education and assurance that the minority voters will have the potential to elect a seat once the remedial scheme is up and running. Id. at 1715.

IV. Citizen Voting Age Population [Lepac v Irving; Benavidez v. Irving]

In Lepac v. City of Irving, Texas, 2011 U.S. Dist. LEXIS 15157 (N.D. Tex. 2011), aff’d, 5th Cir. No. 11-10194, December 14, 2011 (unpublished opinion). the district court was confronted with the issue of whether a city was constitutionally permitted to draw districts based on equal populations as opposed to equal numbers of voters. Stated another way, is a redistricting plan with districts whose sizes are based on total population rather than citizen voting age population (CVAP) violative of the one person, one vote principle under the Fourteenth Amendment’s Equal Protection Clause?

This issue or the analogous issue regarding choice of population for redistricting purposes had been addressed by the Fourth, Fifth Circuit and Ninth Circuits in Chen v. City of Houston, 206 F.3d 502, 505, 523 (5th Cir. 2000) (the use of total population to track the size of districts did not under the circumstances of this case violate the Equal Protection Clause, but in the absence of more definitive guidance from the U.S. Supreme Court, the eminently political question as to the choice of population figures – CVAP vs.
TPOP - is a choice left to the political process); *Daly v. Hunt*, 93 F. 3d 1212, 1227 (4th Cir. 1996) (when dealing with districting when people below the voting age are unevenly distributed, the choice between total population or a measurement of potential voters must be left to the legislative body); *Garza v. County of Los Angeles*, 918 F. 2d 763, 775-76 (9th Cir. 1990) (total population recognized as a permissible method for measuring population when known significant concentrations of those not eligible to vote exist).

In *Lepac*, after the City of Irving was held to have violated Section 2 of the Voting Rights Act by electing its city council members on an at-large basis, in that the at-large system was found to effectively deny Hispanic voters an equal opportunity to elect representatives of their choice, the case entered the remedial phase. Following the Section 2 liability ruling, the parties agreed on a new election plan dividing the City of Irving into six single-member districts, two at-large districts, and a single mayor, dividing the city into six districts relatively equal in total population.

Disagreement arose with respect to the fact that, while the total population numbers were roughly equal as between the districts, the citizen voting age population (CVAP) in District 1 was much less than the CVAP in the other districts. Plaintiffs argued that the election plan violated the one person, one vote principle because the size of the districts was based on total population rather than CVAP, their rationale being that

1. District 3 had approximately half the CVAP of at least two other districts,
2. the council member from District 1 could be elected with approximately half as many votes as council members representing other districts,
3. District 1’s voters had nearly twice as much voting strength as the voters in the other districts, and
4. the City was thus impermissibly weighing the votes of citizens differently merely because of where they resided.

Addressing the CVAP issue, the district court noted that while the U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 542 n.7 (1964) had indeed recognized that total population was an appropriate baseline to use and satisfied the one person, one vote principle, the *Reynolds* Court had used the terms “citizens” and “persons” interchangeably, but was not dealing with whether the one person, one vote principle required citizen voter equality or representational equality, but was dealing with situations in which total population was presumed to be an acceptable proxy for potentially eligible voters.
The district court in *Lepac* then turned to *Chen*. There the Fifth Circuit addressed the argument that the City of Houston violated the one person, one vote principle when it designed its districts to equalize total population rather than CVAP, at a time when the City knew certain districts had extremely high ratios of noncitizens. While the Fifth Circuit recognized that the Supreme Court had been “somewhat evasive” regarding which population must be equalized, and that there was “ample language” in the Supreme Court’s opinions strongly implying that it is the right of the individual voter that must be protected, other language could be found that implied that the ideal was representational equality. The Fifth Circuit concluded in *Chen* that the choice between using total population or CVAP should be left to the legislative body for determination.

*Lepac* was appealed to the Fifth Circuit, which affirmed December 14, 2011 in an unpublished opinion.

V. *Prison-Based Gerrymandering* [*Little v. New York State Task Force on Demographic Research and Reapportionment*]

Convicted felons can lose their right to vote in 48 of the 50 states. As a result of the Census Bureau’s inclusion of incarcerated persons in the census count and counting them where they are imprisoned, a practice developed over 200 years ago, the phenomenon known as prison-based gerrymandering has begun to receive substantial attention.

By not counting prisoners in the community of their residence, many states, counties and other local jurisdictions that have large regional correctional centers, penitentiaries, jails and prison populations, can and do receive enhanced representation. A serious distortion of the democratic process can result when prisoners are included in the census count even though they have no voting rights in the prison community and are not treated as legal residents of the district in which they are counted for any purpose. In a nutshell, prison-based gerrymandering can result in districts that arguably dilute the voting power of primarily urban communities comprised of persons of color, while rural, suburban and predominantly white districts in which large prison populations are located are over-represented.

State legislatures have begun to listen and respond to the arguments of prison-based gerrymandering opponents, particularly claims that this practice can lead to vote dilution and can have a more significant and extreme impact on districts with the highest incarceration rates. Communities that bear the most direct costs of crime are the biggest victims of prison-based gerrymandering, and inaccurate census counts of prison populations can distort local representation in rural areas.
Among the states that have addressed the prison-based gerrymandering, New York enacted legislation in 2010 to ban this practice by requiring that census data be corrected through collection of home addresses of people imprisoned in the state, with adjustments then made to the official U.S. Census counts prior to redistricting. Similar legislation is under consideration in Florida and Maryland. The New York legislation has been called a potential model for other states, since it upholds the one person, one vote principle for the benefit of citizens throughout the state and ends the practice of counting prison inmates as “residents” to pad the size of legislative districts, while putting prisoners back into their rightful residential communities. A bill is under consideration by the Wisconsin legislature to exclude incarcerated prisons from the census count for apportionment purposes, and state laws requiring or encouraging the removal of prison populations for local redistricting are now on the books in Colorado, Virginia and New Jersey. California’s legislature recently enacted A.B. 420, a bill to end prison-based gerrymandering, with provisions that will go into effect in the 2020 redistricting cycle mandating the State Department of Corrections and Rehabilitation to report the last known addresses of incarcerated persons to the Citizens’ Redistricting Commission. The data can then be used to count incarcerated individuals as members of their home communities. A.B. 420 is an important reform that brings California’s redistricting practices into conformity with the state’s own residency laws, under which a person does not gain or lose a domicile solely by reason of incarceration.

The Second Circuit in an 8–5 decision, Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006), recognized the negative impact on voting rights resulting from the Census Bureau’s practice and methodology for counting prisoners, and raised concerns over the use of prison population data for legislative reapportionment, questioning whether minority citizens in New York City could assert a cognizable claim under the Voting Rights Act of 1965 that the use of the erroneous census data diluted their representation in state and local government. Arguments supporting a vote dilution challenge should not be dismissed as frivolous, especially when one considers the possibility that prison-based gerrymandering could plausibly result in the drawing of district boundaries that effectively reapportioned large parts of what would otherwise have been urban population to rural counties. The 8-member majority then concluded that Congress did not intend for the Voting Rights Act to apply to felony disenfranchisement laws.

The 5 dissenting judges, including then Judge Sonia Sotomayor concluded that Section 2 did apply to New York's felony disenfranchisement law, since the state’s felony disenfranchisement law was clearly a "voting qualification" under the plain language of Section 2, and since there was no reason for the majority to turn to the legislative history in view of the clear statutory language. In her separate dissenting opinion, Judge Sotomayor emphasized that the Voting Rights Act applied to all "voting
qualifications" and that a felony conviction was clearly a voting qualification under New York's election law. She concluded that "[t]he duty of a judge is to follow the law, not to question its plain terms."

Similar issues were raised in Little v. New York State Task Force on Demographic Research and Reapportionment, Index No. 2310-2011, County of Albany, State of New York, Supreme Court (N.Y. Sup. Ct. Dec. 1, 2011), a challenge to New York’s 2010 legislation banning prison gerrymandering. That legislation was enacted to end the practice of prison-based gerrymandering that distorted the democratic process and undermined the principle of one person, one vote. In Little, the court was faced with the fact that 98% of the prisons in the state of New York were located in predominantly white Senate districts, and it as readily apparent that where incarcerated people were counted could have huge implications for how the census reflects African-American and Latino populations and how redistricting could impact such communities. In a decision and order handed down on December 1, 2011, the Supreme Court of the State of New York granted summary judgment in favor of the New York State Legislative Task Force on Demographic Research and Reapportionment (LATFOR), upholding the constitutionality under the state and federal constitutions of recently enacted state legislation, Part XX of Chapter 57 of the Laws of 2010, which requires that inmates be counted for reapportionment purposes in their last known residence prior to their imprisonment rather than in the location of their assigned correctional facility. The court rejected a claim that the legislation violates the one person, one vote principle and also dismissed equal protection challenges and claims that the legislation constituted partisan gerrymandering. The court’s action in upholding New York’s state law that counts inmates in their home communities rather than in the districts where they are incarcerated for the purpose of drawing legislative district lines, was heralded as a victory for fundamental fairness and equal representation.

The impact and extent of utilization of the Census Bureau’s revised approach to counting prison populations will not be manifest until the 2020 census, but jurisdictions with significant levels of this problematic population group now have legislative models for guidance and will have more effective tools at their disposal to minimize the risks and potentially dilutive effect of prison gerrymandering. That incentive may be heightened as cases like Little v. New York State Task Force on Demographic Research and Reapportionment are ultimately decided.

Having seen how the selection of a certain statistical methodology or other evidentiary approach to counting relevant population plays such a vital role in constructing or altering electoral districts in the redistricting process, and having considered how certain problematic population groups are included or not included in the official count for redistricting purposes, we now turn to the most difficult issue of safe districts and how the courts and all stakeholders should address the role and continued existence of majority or super-majority concentrations of minority voters in the massively changed political landscape that has developed in the United States since 1965.
VI. Minority Influence Districts and Crossover Districts

“Minority influence dilution” claims have been given short shrift at the Circuit Court and Supreme Court level, and the possibility of including crossover districts to mount a Section 2 vote dilution claim on behalf of minority voters in a hypothetical “Section 2 district” has been foreclosed by recent Supreme Court precedent, in the absence of a clear, numerical majority of such voters in the Section 2 district. We will examine influence districts, then crossover districts in light of these developments.

Several circuits have rejected influence district claims as the basis for a vote dilution action under Section 2. See Cousin v. Sundquist, 145 F.3d 818, 828 (6th Cir. 1998) (claim was not cognizable under the Voting Rights Act where it alleged "an impairment of the minority's ability to influence the outcome of the election, rather than to determine it"); McNeil v. Springfield Park Dist., 851 F.2d 937, 947 (7th Cir. 1988) ("We cannot consider claims that . . . districts merely impair plaintiffs' ability to influence elections. Plaintiffs' ability to win elections must also be impaired.");

In a case of first impression in the Eleventh Circuit, Dillard v. Baldwin County Comm'r's, 376 F.3d 1260, 1268 (11th Cir. 2004), minority plaintiffs argued that “numerically small minority groups can bring claims under section 2, so long as the group can point to a structure or practice that theoretically impairs its ability to influence electoral outcomes”. The Eleventh Circuit rejected this claim of "influence dilution" on the ground that it is not enough for minority voters who are unable to elect a candidate of choice to claim that the court should create an “influence district: through which they can play a substantial, but not decisive, role in the electoral process, and that the “influence dilution" concept “has consistently been consistently rejected by other federal courts,” citing Rodriguez v. Pataki, 308 F. Supp. 2d 346, 378 (S.D.N.Y. 2004) (three-judge panel), Illinois Legislative Redistricting Comm'n v. LaPaille, 786 F. Supp. 704, 715-17 (N.D. Ill. 1992) (three-judge panel); Turner v. Arkansas, 784 F. Supp. 553, 568-72 (E.D. Ark. 1991) (three-judge panel), aff'd, 504 U.S. 952, 112 S. Ct. 2296, 119 L. Ed. 2d 220 (1992); Hastert v. State Bd. of Elec., 777 F. Supp. 634, 652-54 (N.D. Ill. 1991) (three-judge panel).

The clear message of the above cases, according to the Eleventh Circuit in Dillard, was that a minority group cannot be awarded relief on a Section 2 vote dilution claim" unless it can demonstrate that a challenged structure or practice impedes its ability to determine the outcome of elections.” Dillard , supra at 1268.

Crossover districts as a possible component of Section 2 liability were dealt a serious blow in Bartlett v. Strickland, 129 S. Ct. 1231, 1242 (2009), where the Court held that there is no cause of action under
Section 2 of the Voting Rights Act for minority voters who do not constitute a majority in a geographically compact single-member district. It is not enough for a cohesive group of minority voters that amount to less that 50% of the VAP of a geographically compact single-member district to be able to elect minority-preferred candidates but only with white crossover votes. In other words, for purposes of the first Gingles precondition, a hypothetical or benchmark single-member district drawn for purposes of establishing liability under Section 2 must comprise over 50% minority voting population.

One writer had provided an interesting analysis of what may be one of the unintended consequences of the Supreme Court’s decision in Bartlett v. Strickland, 129 S. Ct. 1231, 1242 (2009). First, it is clear that a majority of the Supreme Court in Bartlett agreed that requiring crossover districts for Section 2 violations would breed even more race-conscious district drawing, Bartlett, 129 S. Ct. at 1249 (“It would be an irony, however, if section 2 were interpreted to entrench racial differences by expanding a statute meant to hasten the waning of racism in American politics. Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate. The Voting Rights Act was passed to foster this cooperation. We decline now to expand the reaches of section 2 to require, by force of law, the voluntary cooperation our society has achieved.”). Second, Bartlett has eliminated the availability of crossover districts to enlarge the scope of section 2 claims, even though coalition districts foster “coalitional unity between minority and majority voters” in order to facilitate the election of minority-preferred candidates. Id. at 1678.

Given Bartlett’s narrowing of the scope and availability of potential remedies for section 2 violations, it has been argued that “it is time again to explore alternative forms of democratic representation that can cure section 2 violations. Cumulative voting can be used as such a remedy.” Id. at 1679. The argument may well have appeal for a potentially liable governmental entity in a Section 2 vote dilution case, with an informed willingness to consider non-district electoral systems as remedial alternatives.

There is a clear impetus for such non-district remedial alternatives to be considered, notwithstanding the Justice Department’s initial reluctance to support the cumulative voting remedial proposal in Port Chester, and notwithstanding the heavy presumption it relies on favoring single-member districts for Section 2 remedial purposes. As the above writer notes, Bartlett may also give rise to Shaw-based concerns over race-predominant redistricting, in light of its emphasis on drawing single-member districts to include no less that an exact numerical majority of minority voters to satisfy the first Gingles precondition. Id. at 1679. These concerns, grounded on precedent relating to race-conscious redistricting, could vanish if cumulative voting were to be implemented as an alternative form of democratic representation during the remedial phase of a Section 2 suit.

On February 9, 2011, the U.S. Department of Justice through the Office of the Assistant Attorney General for the Civil Rights Division, published its 2011 Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76. Fed. Reg. 7470 (Feb. 9, 2011). Its express purpose was to provide assistance to jurisdictions covered by the preclearance requirements of Section 5. While its guidance is not legally binding, the Justice Department set forth a detailed analytical format for covered jurisdictions to follow in their efforts to satisfy what were now two separate and necessary components of the Section 5 standard of review in light of the 2006 VRARA, discriminatory purpose and retrogressive effect. Under the discriminatory purpose component, the 2011 guidance states:

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.

The 2011 Guidance was followed by publication of the Revision of Voting Rights Procedures, 76 Fed. Reg. 21239, 28 C.F.R. Parts 0-51, AG Order No. 3262-2011 (Apr. 15, 2011). The April 15, 2011 Revision of the Justice Department’s Procedures for the Administration of Section 5 of the Voting Rights Act was promulgated for the purpose of clarifying “the scope of section 5 review based on recent amendments to section 5” and to “provide better guidance to covered jurisdictions and interested members of the public concerning current Department practices.” It purported to revert to the legal standards that had been suspended following two controversial decisions over the scope and application of Section 5, Bossier II and Georgia v. Ashcroft. Let’s take a quick look at both decisions.

Reno v. Bossier Parish (Bossier II), 520 U.S. 320 (2000), held that a redistricting plan enacted with a discriminatory purpose does not violate Section 5 so long as it is not retrogressive in purpose or effect, and that a proposed change must still be precleared under Section 5 so long as it improves or maintains the status quo with respect to the electoral influence of voters of color in the jurisdiction, even if there is evidence that it was enacted with an intent to discriminate. The April 15, 2011 Revision appears to abandon Bossier II, suggesting that the Justice Department will now insist more vigorously on exacting compliance with both prongs of Section 5, a newly defined version of retrogression and a separate test for discriminatory purpose.
Georgia v. Ashcroft, 539 U.S. 461 (2003), held that Section 5 did not prohibit covered jurisdictions from reducing the proportions of a minority voting age population in some majority-minority districts “even if it means that in some of those districts, minority voters will face a somewhat reduced opportunity to elect a candidate of their choice.” The April 15, 2011 Revision, tracking the language of amended Section 5, makes clear the rejection of the retrogression definition of Georgia v. Ashcroft and also makes it clear that the intent of Congress in authorizing and extending Section 5 in this manner and with this modified and more extensive language was to repudiate what that Ashcroft stood for. Rejection of Ashcroft would logically mean that covered jurisdictions will dismantle majority-minority districts and reduce minority voting age population in majority-minority districts at their peril. The 2011 Guidance and 2011 Revision may signal a renewed emphasis upon racial maximization, although most likely under a different formulation, or perhaps camouflaged to escape the wrath of Shaw v. Reno, Miller v. Johnson and their progeny. For example, the April 15, 2011 Revision of Voting Rights Procedures specifically provides that a Section 5 submission may be found to have a discriminatory purpose if the Justice Department finds upon review an indeterminate number of “relevant factors” and “additional factors” for redistricting plans. Covered jurisdictions will have to carry a heavy burden of proof to convince the Justice Department that apparently safe districts containing a reduced minority voting age population can and do provide a fair and equal opportunity for minority voters in concert with white crossover voting possess the requisite ability to elect candidates of their choice.

The April 15, 2011 Revision’s provision applicable to redistricting plans is Section 51.59. This section in subsection (a) sets forth a number of factors in addition to those “relevant factors” listed in Section 51.57 that the Attorney General will consider in making determinations with respect to Section 5 submissions. The additional factors listed in Section 51.59(a) include “[t]he extent to which minorities are over concentrated in one or more districts.”

Section 51.59 (b) is entitled “Discriminatory purpose” and contains a provision strikingly similar to the 2011 Guidance with respect to maximization. Under this provision, “[a] jurisdiction’s failure to adopt the maximum possible number of majority-minority districts may not be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose.” With the ongoing saga with the State of Texas’ efforts to seek judicial preclearance of that state’s congressional and legislative redistricting plans, and the ongoing remand proceedings in Perry v. Perez, supra, we are only at the threshold of understanding the scope, effect and meaning of this regulatory mirror of Congress’s legislative reversal of Ashcroft. Until more guidance and perhaps some pragmatic pruning of the regulation’s complex and detailed provisions takes place through judicial construction and application of common sense in the reality of a federal courtroom, it may be that covered jurisdictions will have to err
on the side of extreme caution when communicating with the Section 5 Unit of the Voting Section, particularly on the sensitive issue of maximization.

More precisely, on the issue of whether failure to maximize “plus” one or more other “relevant factors” and “additional factors” may trigger an administrative determination of “discriminatory purpose.” Indeed, it was on the assumption that the Justice Department would seek to reinstate another form of racial maximization that the State of Texas gave up on the more economical route of seeking Section 5 preclearance via an administrative submission to the Justice Department, and instead filed a declaratory judgment action in the United States District Court for the District of Columbia. Texas’ effort to obtain judicial approval of its state congressional and legislative redistricting plans is now pending in the D.C. District Court, after it summary judgment motion was denied, and the state has already completed one lap around the Supreme Court track with respect to an interim election plan for the 2012 elections.

One can faintly recall Justice O’Connor’s observation in Ashcroft that the purpose of the Voting Rights Act is “to foster our transformation to a society that is no longer fixated on race.” That transformation may be an ephemeral one if the Justice Department moves further to the left by crafting a race-based standard for Section 5 review based on an explicit rejection of Ashcroft. Chief Justice Roberts made a pragmatic observation that the most effective way to prevent discrimination on the basis of race is to stop propagating laws that discriminate on the basis of race, but his words may be held for naught if the Justice Department begins to telegraph to covered jurisdictions a predisposition to preclear more race-conscious redistricting and promote more and more non-competitive majority-minority districts, regardless of the need for such districts to ensure equal electoral opportunity for minority voters and even without regard to traditional districting principles.

The 2011 Guidance may signal to some that race has become less of a factor in political, social, economic and electoral life. It may also signal a tendency for preclearance to be withheld unless a covered jurisdiction adopts the “maximum possible number” of majority-minority districts. The 2011 Revision can be a multifactored analytical tool that allows a finding of purposeful discrimination to be made at the administrative level upon identification of one or more of the dozens of “relevant” factors and “additional” factors enumerated in its April 15, 2011 Revision.

Vincent R. Fontana
Law Office of Vincent R. Fontana, P.C.
1010 Franklin Avenue, Suite 200
Garden City, New York 11530
(516) 640-4505
Fax: (516) 640-4983
vfontana@vrflaw.com
The district court in Laroque discussed at length the evolution of the retrogression standard as originally formulated in Beer and as restricted in Georgia v. Ashcroft, where the Supreme Court had considered what it meant to make the situation of minority voters worse. Ashcroft arose following the 2000 redistricting in Georgia. A substantial majority of black voters voted Democratic, and all elected black representatives in the General Assembly were Democrats. In the 2000 round of redistricting, the Democratic leadership’s goal was to maintain the number of majority-minority districts and also increase the number of Democratic Senate seats. To do this the Democratic leadership agreed to a plan "unpacking" certain majority-minority districts with very high concentrations of black voters. The concentration of black voters was thereby reduced in some districts, and black voters, a "substantial majority" of whom reliably voted Democratic, were spread to other districts to increase Democratic candidates' chances of success. Georgia instituted an action in the D.C. District Court seeking judicial preclearance, and a three-judge panel denied preclearance on the grounds that the plan would diminish African American voting strength in the unpacked districts, and that the State of Georgia had failed to present any evidence that the retrogression in those districts would be offset by gains in other districts. Georgia v. Ashcroft, 195 F. Supp. 2d 25, 88 (D.D.C. 2002). On direct appeal to the Supreme Court, the task before the Court was to divine whether the districting plan, based on a complex mix of partisanship, incumbency protection, and compliance with the Voting Rights Act, "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 539 U.S. at 462 (quoting Beer, 425 U.S. at 141). In answering that question, the Supreme Court set out a lengthy "totality of the circumstances" test that courts evaluating retrogression should consider. 539 U.S. at 480-84. It emphasized that the ability of a minority group to elect a candidate of its choice remains an integral feature in any § 5 analysis," id. at 484, but said it "cannot be dispositive." Id. at 480. Rather, [i]n order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely — although perhaps not quite as likely as under the benchmark plan — that minority voters will be able to elect candidates of their choice.
Witnesses were particularly concerned about the introduction of "influence" districts into the Section 5 calculus. "Influence" districts, as previously explained, are those where "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." Ashcroft, 539 U.S. at 482. Congressional witnesses testified that a key problem with the Ashcroft opinion was the lack of a standard that would allow courts and the Justice Department to determine which districts were "influence" districts. Theodore Shaw explained that "[w]e don't know what 'influence districts' really mean[s]." … House Hearing, 109th Cong. 13, 25 (Nov. 9, 2005) (statements of Theodore M. Shaw). …

Several witnesses also testified that they were troubled by the fact that the Ashcroft opinion gave no guidance as to when and whether majority-minority districts or other opportunity districts could be traded for influence districts, and how many influence districts would make up for the loss of an opportunity district. … The lack of clarity about how to define influence districts, along with the uncertainty about when influence districts could be traded for opportunity districts, combined to create what several witnesses saw as the most significant problem with Ashcroft: the opinion might allow jurisdictions to substantially dilute minority voting strength under the guise of creating more influence districts. In the most extreme scenario, a jurisdiction could carve up every opportunity district into a series of influence districts where minorities might actually have no influence at all. …

Even in less extreme scenarios, a jurisdiction could substantially dilute the voting power of minorities through substitution of influence districts for opportunity districts. … Senate Hearing, 109th Cong. 12 (May 17, 2006) (statement of Nathaniel Persily) ("The risk of Georgia v. Ashcroft is that . . . under the cloak of influence districts, a jurisdiction would then break up a cohesive minority community into much smaller districts in which they really had no influence at all."). Professor Richard Pildes, who "agree[d] with the Court on the Georgia facts" and did not support the "fix," noted that even supporters of the Ashcroft decision were "sometimes worried about the possible implications of the decision down the road," and thought that the hearings should clarify that a jurisdiction could not trade every opportunity district for influence districts. Senate Hearing, 109th Cong. 116-17 (May 16, 2006) (Pildes responses).

Congress also heard testimony about Ashcroft's holding that states are free to choose among the various ways of ensuring that minorities have an equal opportunity to participate politically — in other words, that states may choose between majority-minority districts, influence districts, crossover districts, and other types of participation. …

One final concern expressed by several witnesses was that consideration of influence districts would inject undue partisanship into the Voting Rights Act. …
Indeed, one of the Justice Department's rare attempts to apply the Ashcroft standard before it was overturned was laid out in a 73-page memo that was later leaked, and voting rights scholars were highly critical of the Justice Department's efforts. See, e.g., Abigail Thernstrom, Section 5 of the Voting Rights Act: By Now, a Murky Mess, 5 GEO. J.L. & PUB. POL’Y 41, 59-61 (2007) ("Throughout the memo, the career attorneys attempted to read political tealeaves, predicting the race or political sympathies of candidates who would be elected from various districts under the new plan. It was a practice invited by the Ashcroft Court, but . . . attorneys in Washington were (inevitably) not very good at it."). Summarizing the problem, Robert Kengle testified:

Finally, in my view the Ashcroft decision makes its greatest departure from the Supreme Court's other voting rights jurisprudence by introducing explicit partisan calculations into the Section 5 review process. Creating influence and coalition districts with partisan allies may in fact be the best way to maximize minority voting strength in particular cases, and I think minority citizens and legislators should be allowed considerable latitude to do so.

But to embody partisan calculations and tradeoffs into the Voting Rights Act itself has not been well thought out and provides a means and motive not only to politicize enforcement of Section 5, but also to undermine confidence that the Act will be enforced in a way that transcends party politics.

House Hearing, 109th Cong. 143 (Nov. 9, 2005) (Kengle prepared statement). . .

. . . A striking feature of the Ashcroft "fix," however, was the widespread uncertainty about what it meant. As one law professor put it, "Congress did not so much reverse Ashcroft as remand it to the courts with equivocal instructions." J. Morgan Kousser, The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007, 86 TEX. L. REV. 667, 755 (2008). One of the effects of the amendments is undisputed: they made clear that influence districts could not be substituted for opportunity districts. Persily, Promise and Pitfalls 235-37, 247. What the amendments did not resolve, however, was whether crossover districts were protected from retrogression and what sort of tradeoffs between majority-minority and crossover districts were appropriate. Some witnesses concluded that the Ashcroft fix was a simple return to the status quo ante, i.e., the Beer test, while others disagreed. . . .But as Nathaniel Persily has explained, "[t]he problem is that there is disagreement about what the standard under Beer was." Persily, Promise and Pitfalls 234.

The text of Beer certainly does not answer questions about crossover districts and tradeoffs, and the Supreme Court had never attempted to clarify the issue until Ashcroft. Nor does the text of the amendments obviously answer that question. The House and Senate reports vividly illustrate the amendments' ambiguity. The House report provides that "[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5." H.R. Rep. No. 109-478, at 71. Hence, according to the
House report, crossover districts as well as majority-minority districts are protected under the amendments. The Senate report presents a truly bizarre situation. The Senate unanimously voted to renew Section 5 on July 20, 2006. S. Rep. 109-295, at 54-55. A draft Senate report had been circulated, but instead of accepting it, the Republican members of the Senate Judiciary Committee produced their own report six days after the passage of the bill, over the vehement protests of the Democratic members of the Committee. Id. According to that Report, subsections (b) and (d) were intended only "to protect naturally occurring majority-minority districts," not crossover districts. Id. at 19. Moreover, the Republican Senate Report specifically stated that "coalition or influence districts" could never be substituted for naturally occurring majority-minority districts. Id. Although this Court will not rely on a one-party, post hoc report as evidence of what the amendments actually mean, the report does reflect disagreement among members of Congress as to their meaning.

In the context of this facial challenge, then, the Court must construe the amendments, bearing in mind that they should not be found unconstitutional unless there is no plausible constitutional construction. … The key interpretive question, as previously explained, is whether the amendments permit the Section 5 analysis to include crossover districts and whether they permit any tradeoffs between crossover and majority-minority districts. Looking solely to the text of the amendments, the Court believes that they permit both. Subsection (b) provides that "Any ... that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color ... to elect their preferred candidates of choice denies or abridges the right to vote." 42 U.S.C. § 1973c(b). Subsection (d) further clarifies that "[t]he purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice." 42 U.S.C. § 1973c(d). Nothing in the phrase "elect their preferred candidates of choice" specifies that voters must do so only from majority-minority districts.

Influence districts do not fit within the terms of the amendments because voters who only "influence" an election are not able to choose, and then elect, the candidates who best represent them. Instead, they can only choose between candidates preferred by other groups. In any event, the legislative history makes overwhelmingly clear that influence districts are no longer a factor in the Section 5 analysis under the amendments. See H.R. Rep. No. 109-478, at 70. In crossover districts, however, minority voters form a sufficiently large percentage of the registered voter population to select a "preferred candidate of choice" in the primary, and to elect that preferred candidate — with crossover voting from those who are not part of the minority group — in the general election. ... Hence, the Court finds that crossover districts fit within the statutory scheme. Moreover, the Court sees nothing in the text of the amendments that would prevent a certain amount of tradeoff between majority-minority districts and crossover districts, assuming that minority voters indeed have the ability to elect preferred candidates of their choice in the crossover districts.
But the amendments did more than just remove influence districts from the preclearance analysis: they also affirmed that minorities' "ability to elect," not the "totality of the circumstances," is the critical issue in the preclearance of any proposed voting change. Hence, courts and the Justice Department can no longer consider many of the factors that the Ashcroft Court identified as relevant to the totality of the circumstances test. Specifically, the preclearance analysis can no longer consider minority-preferred politicians' views of the proposed change, nor can it consider whether the position or power of a particular minority-preferred politician could substitute in some way for the ability to elect. More generally, any factor that is not related to minorities' "ability to elect" is off the table. This principle is not limitless, of course: courts and the Justice Department are required to consider certain constitutional mandates, including compliance with the one person one vote principle and equal protection principles, and caselaw and history have established that the preclearance analysis includes consideration of population growth and decline. Infra at 89-90. But the universe of rationales that can justify a change to voting procedures is now considerably smaller than it was under Ashcroft.


6 Id.

7 Shawna C. MacLeod, One Man, Six Votes, and Many Unanswered Questions - Cumulative Voting as a Remedial Measure for Section 2 Violations in Port Chester and Beyond, 76 Brooklyn L. Rev. 1669 (2011).
The sale, distribution, and use of this device are restricted to prescription use in accordance with § 801.109 of this chapter.
(2) The labeling must include specific instructions regarding the proper placement and use of the device.
(3) The device must be demonstrated to be biocompatible.
(4) Mechanical bench testing of material strength must demonstrate that the device will withstand forces encountered during use.
(5) Safety and effectiveness data must demonstrate that the device prevents hemorrhoids in women undergoing spontaneous vaginal delivery, in addition to general controls.

Dated: April 11, 2011.
David Dorsey,
Acting Deputy Commissioner for Policy, Planning and Budget.

DEPARTMENT OF JUSTICE
26 CFR Parts 0 and 51
[CRT Docket No. 120; AG Order No. 3252-2011]
Revision of Voting Rights Procedures
AGENCY: Civil Rights Division, Department of Justice.
ACTION: Final rule.

SUMMARY: The Attorney General finds it necessary to revise the Department of Justice’s “Procedures for the Administration of section 5 of the Voting Rights Act of 1965.” These procedures are necessary to clarify the scope of section 5 review. Revised procedures were published for comment on June 11, 2010, and a 60-day comment period was provided.

DATES: The rule will be effective on April 15, 2011.

FOR FURTHER INFORMATION CONTACT: T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Division, United States Department of Justice, Room 7254–NWB, 950 Pennsylvania Avenue, NW., Washington, DC 20530, or by telephone at (800) 253-9913.

SUPPLEMENTARY INFORMATION:

Discussion
Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, requires certain jurisdictions (listed in the Appendix) to obtain “preclearance” from either the United States District Court for the District of Columbia or the United States Attorney General before implementing any new standard, practice, or procedure that affects voting.

Procedures for the Attorney General’s Administration of section 5 were first published in 1971. Proposed Procedures were published for comment on May 28, 1971 (36 FR 7971), and the final Procedures were published on September 10, 1971 (36 FR 18186). As a result of a review of the Department’s experience under the 1971 Procedures, changes mandated by the 1975 Amendments to the Voting Rights Act, and interpretations of section 5 contained in judicial decisions, proposed revised Procedures were published for comment on March 21, 1980 (45 FR 18990), and final revised Procedures were published on January 5, 1981 (46 FR 870) (corrected at 46 FR 9571, Jan. 29, 1981). As a result of further experience under the 1981 Procedures, specifically with respect to reviewing plans adopted following the 1980 Census, changes mandated by the 1982 Amendments to the Voting Rights Act, and judicial decisions in cases involving section 5, revised Procedures were published for comment on May 6, 1985 (50 FR 19122), and final revised Procedures were published on January 5, 1987 (52 FR 486). In the twenty-four years since the previous revisions became final, the Attorney General has had further experience in field reviewing voting changes; the courts have issued a number of important decisions in cases involving section 5, and Congress enacted the 2006 amendments to the Voting Rights Act. This new revision reflects these developments.

Comments
In response to the Notice of Proposed Rulemaking (“Notice”) published on June 11, 2010 (75 FR 33205), we received comments from or on behalf of two national public interest organizations, one research and educational institution, one national political organization composed of attorneys, and one individual. All comments received are available for inspection and copying at www.regulations.gov and at the Voting Section, Civil Rights Division, Department of Justice, Washington DC 20530.

The comments received expressed diverse views and were of great assistance in the preparation of these final revisions to the Procedures. The final revised Procedures reflect our consideration of the comments as well as further consideration of sections or topics that were not the subject of comments.

Section 51.2 Definitions
The purpose of the revision to the definition of “change affecting voting” or “change” is to clarify the definition of the benchmark standard, practice, or procedure. One commenter recommended we revise this section to reflect that the benchmark is the standard, practice, or procedure in force or effect at the time of the submission or the last legally enforceable standard, practice, or procedure in force or effect in the jurisdiction. We have concluded that no further revision of this section is warranted. The Voting Section’s practice is to compare the proposed standard, practice, or procedure to the benchmark. Generally, the benchmark is the standard, practice, or procedure that has been: (1) Unchanged since the jurisdiction’s coverage date; or (2) if changed since that date, found to comply with section 5 and “in force or effect,” Riley v. Kennedy, 553 U.S. 406, 421 (2008); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 26 CFR 51.54. Where there is an unsupplied intervening change, the Attorney General will make no determination concerning the submitted change because of the prior unsupplied change. In such instances, it is our practice to inform the jurisdiction there is a prior related change that has not been submitted and that simultaneous review is required. A standard, practice, or procedure that has been reviewed and determined to meet section 5 standards is considered to be in force or effect, even if the jurisdiction never implements the change because the change is effective as a matter of federal law and was available for use.

Section 51.3 Delegation of Authority
The purpose of the revisions to the delegation of authority is to make technical corrections to the delegation of authority from the Attorney General to the Assistant Attorney General, and from the Chief of the Voting Section to supervisory attorneys within the Voting Section, and to conform the Procedures to other parts of Title 26. Two commenters objected to the revisions, expressing concern that the delegation of the functions of the Chief to supervisory attorneys in the Voting Section results in the delegation of section 5 legal review authority to non-politically appointed attorneys subordinate to the Section Chief.
The concerns of these commenters are unfounded. The delegation of authority in these Procedures is similar to existing delegations. For example, pursuant to 28 CFR Part 2, Subpart J, the Chair may authorize the Deputy Chief to act on his or her behalf. Moreover, under the revised Procedures, the Chair needs the concurrence of the Assistant Attorney General, who is a presidential appointee, to designate supervisory attorneys to perform section 5 functions. Accordingly, we decline to revise the section further.

Section 51.19 Computation of Time

The purpose of the revisions to this section is to clarify that the review period commences when a submission is received by the Department officials responsible for conducting section 5 reviews and to clarify the date of the response.

One commenter objected to the commencement of the 60-day review period upon receipt of the submission by the Voting Section or the Office of the Assistant Attorney General of the Civil Rights Division as an unwarranted extension of the 60-day review period. The Federal Rules of Civil Procedure provide for the designation of a Department clerical employee to receive summons on behalf of the Attorney General. Fed. R. Civ. P. 4(f)(1)(A)(ii). Similarly, for the same purpose of prompt and efficient routing, the Attorney General has designated both the Voting Section and the Office of the Assistant Attorney General of the Civil Rights Division as the proper recipients for section 5 submissions. The Department has made one additional edit to this section. As set forth in the Notice and as described below, a second paragraph is being added to § 51.37 (Obtaining information from the submitting authority). To ensure consistency, the reference to § 51.37, contained in previous versions of the Procedures, is amended to § 51.37(b).

Section 51.13 Examples of Changes

The purpose of the revision is to clarify that the dissolution or merger of voting districts, de facto elimination of an elected office, and reallocations of authority to adopt or administer voting practices or procedures are all subject to section 5 review.

One commenter suggested that we add the extension of a term of office for an elected official as an example of a covered change in paragraph (l). We concluded that including this example would provide additional clarity. To the extent that the extension of an elected official’s term is a discretionary change that affects the next regularly scheduled election for that office, there is no question that it constitutes a “change affecting voting” covered by section 5. Additionally, extending the term of a particular office affects the ability of voters to elect candidates of choice at regularly scheduled intervals.

The commenter also suggested that paragraph (l), which provides that changes affecting the right or ability of persons to participate in “political campaigns” are covered under section 5, be expanded to include “campaigns or other pre-election activity.” We agreed that the phrase “political campaigns,” without any elaboration, may carry partisan connotations not envisioned by the statute. Additionally, “political campaigns” may not include all pre-election activities that are at the core of voting, and a somewhat broader construction is consistent with the broad scope given to “changes affecting voting” covered under section 5. Such changes include any “voting qualification or prerequisite to voting or standard, practice, or procedure” related to the right to vote, 42 U.S.C. 1973(a), and the Supreme Court has recognized that voting includes “all action necessary to make a vote effective.” Allen v. State Board of Elections, 393 U.S. 544, 566 (1969) (quoting 42 U.S.C. 1973). As a result, section 5 coverage extends to “subtle, as well as the obvious,” changes affecting voting. Allen, 393 U.S. at 565.

Using the phrase “pre-election activity,” by itself, however, is too general and nebulous. As a result, we have revised the paragraph to reflect that any change affecting the right or ability of persons to participate in pre-election activity, such as political campaigns, is subject to review under section 5.

Another commenter objected to the inclusion of paragraph (l) as an example of changes affecting voting, stating that this change did not fall within the scope of section 5 coverage. A change in the voting-related authority of an official or governmental entity does alter election law and change rules governing voting. Thus, such changes meet the test of voting-relatedness at the core of the Court’s decision in Presley v. Etowah County Commission, 502 U.S. 491 (1992). In addition, a conclusion that such changes are not covered arguably would be inconsistent with the well-established rule that section 5 covers state enabling legislation that transfers authority to adopt a voting change from the state to its subjurisdictions. See Allen v. State Board of Elections, 393 U.S. 544 (1969) (holding that section 5 covered a Mississippi statute that granted county boards of supervisors the authority to change board elections from single-member districts to at-large voting).

Section 51.18 Federal Court-Ordered Changes

The purpose of the revisions to this section is to clarify the principle that section 5 review ordinarily should precede other forms of court review, that a court-ordered change that initially is not subject to section 5 may become covered through subsequent actions taken by the affected jurisdiction, and that the interim use of an covered change before it is established that such change complies with section 5 should be ordered by a court only in emergency circumstances.

One commenter opposed the changes contained in the section stating that the revisions appear to grant federal courts greater authority than the case law recognizes to implement voting changes that are subject to, but not yet reviewed under, section 5 on an emergency basis. Although that was not the intent of the revisions, we have modified § 51.18(a) to clarify that it reflects existing judicial precedent. After further consideration, we believe that, other than renumbering the paragraph as § 51.18(d), it is appropriate not to make any change to § 51.18(c) as it currently exists in the Procedures.

Section 51.28 Supplemental Contents

The proposed revision to paragraph (a) was omitted from the June 11, 2010, Notice of Proposed Rulemaking. The purpose of the revision is to make purely technical changes to the format in which information may be submitted to the Attorney General electronically. In addition, since the publication of the Notice, the Census Bureau has renamed the 15-character geographic identifier specified in paragraph (b); the final Procedures reflect this change in nomenclature.

Section 51.29 Communications Concerning Voting Changes

The purpose of the revisions to this section is to clarify the circumstances in which the Department may withhold the identity of those providing comments on section 5 submissions.
where confidentiality can reasonably be implied are within the scope of information that "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. 552(b)(7). Accordingly, this determination about confidentiality is within the scope of Section 552(b) concerning exemptions under both the Freedom of Information and the Privacy Acts.

Section 51.37 Obtaining Information From the Submitting Authority

The purpose of the revisions to this section is to clarify the procedures for the Attorney General to make oral and written requests for additional information regarding a section 5 submission.

One commenter recommended that we revise the paragraph concerning oral requests to make clear that the Attorney General reserves the authority to restart the 60-day review period upon receipt of material provided in response to the Attorney General's first such request made with respect to a submission, and that responses to an oral request do not affect the running of the 60-day period once a written request for information is made.

We declined to amend the proposed language regarding responses to an oral request because the procedures currently exist the Attorney General may request further information within the new 60-day period following the receipt of a response from the submitting authority to an earlier written request, but such a request shall not suspend the running the 60-day period, nor shall the Attorney General's receipt of such further information begin a new 60-day period. Moreover, §51.39 provides that we may determine that information supplied in response to an oral request in the initial review period materially supplements the pending request such that it does extend the 60-day period.

We did conclude, however, on the basis of the comment that we received, that a reordering of the paragraphs would add clarity to the section and make it more useful.

Section 51.40 Failure To Complete Submissions

As described above, the paragraphs of §51.37 are being reordered. To ensure consistency, the reference to §51.37(a) in previous versions of the Procedures is amended to §51.37(b).

Section 51.48 Decision After Reconsideration

The purpose of the revisions to this section is to clarify the manner in which the 60-day requirement applies to reconsideration requests and revise language to conform to the substantive section 5 standard in the 2006 amendments to the Act.

One commenter objected to the revisions in paragraph (a), expressing a concern that the revisions permit the Attorney General to exceed 60 days for the reconsideration of an objection. Section 51.48 provides that the 60-day reconsideration period may be extended to allow a 15-day decision period following a conference held pursuant to §51.47. Moreover, the courts have held that when a submitting jurisdiction deems its initial submission on a reconsideration request to be inadequate and decides to supplement it, the 60-day period is commenced anew. The purpose of this interpretation is to provide the Attorney General time to give adequate review to materials submitted in piecemeal fashion. City of Rome v. United States, 446 U.S. 156, 171 (1980).

Section 51.50 Records Concerning Submissions

The purpose of the revision to this section is to clarify the procedures regarding access to section 5 records. One commenter opposed the changes to paragraph (b) and conveyed concerns that these changes will result in the removal of record keeping with regard to objection files.

Under paragraph (a), the Voting Section continues to maintain a section 5 file for each submission, including objection files. Accordingly, all appropriate records continue to be maintained with regard to all section 5 submissions.

Section 51.52 Basic Standard

The purpose of the revision to this section is to clarify the substantive standard so as to reflect the 2006 amendments to the Act and the manner in which the Attorney General will evaluate submissions under section 5.

One commenter suggested that paragraph (a) be amended further to reflect the fact that the Attorney General shall apply the same standard of review, instead of "shall make the same determination," that would be made by a court in an action for a declaratory judgment under section 5. The section refers to making a "determination" as the activity that both the Attorney General and the district court undertake, i.e., deciding whether the change complies with section 5, as opposed to the resulting substantive decision. Therefore, we concluded that no further revision to the paragraph is warranted.

Another commentator suggested we replace "purpose and effect" with "purpose or effect" in paragraph (c). Although we decided not to incorporate the commentator's exact change, we did decide that further refinement of the paragraph would provide more clarity. Therefore, the paragraph will reflect that in those situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of both the prohibited discriminatory purpose and effect, the Attorney General will incorporate an objection. Evers v. State Board of Election Commissioners, 327 F. Supp. 640 (S.D. Miss 1971).

Section 51.54 Discriminatory Purpose and Effect

One commenter suggested various minor edits to the proposed language. We declined to make these changes. The proposed language reflects our extensive experience gained over the years in our administrative review of section 5 changes, while avoiding redundancy.

We did edit the language of paragraph (c) to reflect that the statutory language refers to a change in a standard, practice, or procedure affecting voting, not only a practice or procedure.

Section 51.57(e) Relevant Factors

One commenter suggested that we include "contemporaneous statements and viewpoints held by decision-makers" in the list of relevant factors. Such statements are an evidentiary source cited by the Court in its opinion in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977), and therefore we have revised the section to reflect the Court's holding more completely.

Section 51.58(b)(3) Background Factors

One commenter suggested that this paragraph be revised to state that whether "election-related activities," instead of "political activities," are racially segregated or exclusionary constitutes important background information when making section 5 determinations. The proposed paragraph provided that the Attorney General will consider the "extent to which voting in the jurisdiction is racially polarized and political activities are racially segregated." Courts in cases assessing whether the constitutional guarantees afforded to persons to exercise the franchise without discrimination have infringed have often used the words "electoral" and "political" as synonyms for each other. See, e.g., Harper v. Virginia State Board of Elections, 383 U.S. 663, 667–68
(1966); see also Johnson v. Miller, 864 F. Supp. 1354, 1386–87 (S.D. Ga. 1994) (considering a claim under section 2 of the Voting Rights Act). These terms are similarly synonymous with respect to section 5, which also concerns the ability of voters to participate in the electoral process. After careful consideration of the comment, we determined that “election-related activities” provides greater clarity than “political activities” and revised the paragraph accordingly.

Section 51.59 Redistricting Plans

Two commenters recommended various additions or deletions to paragraph 51.59(a). Because these factors are not intended to be exhaustive, not all factors are listed. Redistricting principles that are illustrative, intended to provide guidance to jurisdictions regarding redistricting plans.


One commenter suggested we amend paragraph 51.59(a)(7) to focus on whether a proposed plan is inconsistent with the jurisdiction’s “long-held” redistricting standards, instead of the jurisdiction’s “stated standards.” The commenter believes that by adding the term “long-held,” jurisdictions will be discouraged from adopting ad hoc redistricting principles to insulate a redistricting plan during section 5 review. The current factors, particularly with regards to discriminatory purpose, encapsulate scenarios where a jurisdiction adopts pretextual or unusual redistricting criteria. The Procedures should not be interpreted to discourage jurisdictions from considering traditional redistricting principles such as one-person, one-vote, or maintaining natural political or geographic boundaries, even if they have not been so in the past. Bush v. Vera, 517 U.S. 952, 980–81 (1996). Therefore, we decline to revise these factors further.

Section 51.59(b) Discriminatory Purpose

Several commenters suggested this paragraph be revised in the interest of clarity. After reviewing the language, we agreed that it did not clearly reflect the relevant case law on this point and that some clarification would be helpful. We revised the paragraph accordingly.

Additional Provisions

One commenter suggested the addition of several provisions related to the substantive standards to be employed during the review of redistricting procedures. The proposed revisions go beyond the scope of these Procedures.

Administrative Procedure Act

This rule amends interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice and therefore the notice requirement of 5 U.S.C. 553(b) is not mandatory. Although notice and comment was not required, we nonetheless chose to offer the proposed rule for notice and comment.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 603(b)), has reviewed this rule and by approving it certifies that this rule will not have a significant economic impact on a substantial number of small entities because it applies only to governmental entities and jurisdictions that are already required by section 5 of the Voting Rights Act of 1965 to submit voting changes to the Department of Justice, and this rule does not change this requirement. It provides guidance to such entities to assist them in making the required submissions under section 5. Further, a Regulatory Flexibility Analysis was not required to be prepared for this rule because the Department of Justice was not required to publish a general notice of proposed rulemaking for this matter.

Executive Order 12866

This rule has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is not a “significant regulatory action” under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has not been reviewed by the Office of Management and Budget. The amendments made by this rule clarify the scope of section 5 review based on recent amendments to section 5, make certain technical clarifications and updates, and provide better guidance to covered jurisdictions and citizens. In many instances, the amendments describe longstanding practices of the Attorney General in his review of section 5 submissions.

Executive Order 13132—Federalism

This rule does not have federalism implications warranting the preparation of a Federalism Assessment under section 6 of Executive Order 13132 because the rule does not alter or modify the existing statutory requirements of section 5 of the Voting Rights Act imposed on the States, including units of local government or political subdivisions of the States.

Executive Order 12988—Civil Justice Reform

This document meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

List of Subjects in 28 CFR Parts 0 and 51

Administrative practice and procedure, Archives and records, Authority delegations (government agencies), Civil rights, Elections, Political committees and parties, Voting rights.

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301, 28 U.S.C. 509, 510, and 42 U.S.C. 1973b, 1973c, the following amendments are made to Chapter I of Title 28 of the Code of Federal Regulations:

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

1. The authority citation for Part 0 continues to read as follows:


Subpart J—Civil Rights Division

In § 0.50, revise paragraph (h) to read as follows:
§ 0.50 General functions.

(h) Administration of sections 3(c) and 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. 1973c(a), 1973c).


§ 51.1 Purpose.

(a) A declaratory judgment is obtained from the U.S. District Court for the District of Columbia that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, or

§ 51.2 Definitions.


§ 51.5 Termination of coverage.

(a) Expiration. The requirements of section 5 will expire at the end of the twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA), which amendments became effective on July 27, 2006. See section 4(a)(8) of the VRARA.

(b) Bailout. Any political subunit in a covered jurisdiction or a political subdivision of a covered State, a covered jurisdiction or a political subdivision of a covered State, or a covered State may terminate the application of section 5 ("bailout") by obtaining the declaratory judgment described in section 4(a) of the Act.

§ 51.6 Political subunits.

All political subunits within a covered jurisdiction (e.g., counties, cities, school districts) that have not terminated coverage by obtaining the declaratory judgment described in section 4(a) of the Act are subject to the requirements of section 5.

§ 51.9 Computation of time.

(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting for which a response on the merits is appropriate (see § 51.35, § 51.37).

(b) The 60-day period shall commence upon receipt of a submission by the Voting Section of the Department of Justice’s Civil Rights Division or upon receipt of a submission by the Office of the Assistant Attorney General, Civil Rights Division, if the submission is properly marked as specified in § 51.24(f). The 60-day period shall recommence upon the receipt in like manner of a resubmission (see § 51.39), information provided in response to a written request for additional information (see § 51.37(b)), or material, supplemental information or a related submission (see § 51.39).

(c) The 60-day period shall mean 60 calendar days, with the day of receipt of the submission not counted, and with the 60th day ending at 11:59 p.m. Eastern Time of that day. If the final day of the period should fall on a Saturday, Sunday, or any day designated as a holiday by the President or Congress of the United States, or any other day that is not a day of regular business for the Department of Justice, the next full business day shall be counted as the final day of the 60-day period. The date of the Attorney General’s response shall be the date on which it is transmitted to the submitting authority by any reasonable means, including placing it in a postbox of the U.S. Postal Service or a private mail carrier, sending it by telefacsimile, email, or other electronic means, or delivering it in person to a representative of the submitting authority.

§ 51.10 Requirement of action for declaratory judgment or submission to the Attorney General.

(a) Obtain a judicial determination from the U.S. District Court for the District of Columbia that the voting change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

§ 51.11 Right to bring suit.

Submission to the Attorney General does not affect the right of the
submitting authority to bring an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change affecting voting neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

12. Revise §51.12 to read as follows:

§51.12 Scope of requirement.
 Except as provided in §51.18 (federal court-ordered changes), the section 5 requirement applies to any change affecting voting, even though it appears to be minor or indirect, returns to a former practice or procedure, seemingly expands voting rights, or is designed to remove the elements that caused the Attorney General to object to a prior submission. The scope of section 5 coverage is based on whether the generic category of changes affecting voting to which the change belongs (for example, the generic categories of changes listed in §51.13) has the potential for discrimination. NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985). The method by which a jurisdiction enacts or administers a change does not affect the requirement to comply with section 5, which applies to changes enacted or administered through the executive, legislative, or judicial branches.

13. In §51.13, revise paragraphs (e), (l), and (k) and add paragraph (i) to read as follows:

§51.13 Examples of changes.

- Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, dissolution, merger, reapportionment, changing to at-large elections from districts, or changing to districts elections from at-large elections).

- Any change in the term of an elective office or an elected official, or any change in the offices that are elective (e.g., by shortening or extending the term of an office; changing from election to appointment; transferring authority from an elected to an appointed official that, in law or in fact, eliminates the elected official's office; or staggering the terms of offices).

- Any change affecting the right or ability of persons to participate in pre-election activities, such as political campaigns.

- Any change that transfers or alters the authority of any official or governmental entity regarding who may authorize or seek to implement a voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting.

14. Revise §51.18 to read as follows:

§51.18 Federal court-ordered changes.

(a) In general. Changes affecting voting for which approval by a Federal court is required, or that are ordered by a Federal court, are exempt from section 5 review only where the Federal court has made the change and the change has not been subsequently adopted or modified by the relevant governmental body. McDaniel v. Sanchez, 452 U.S. 130 (1981). (See also §51.22.)

(b) Subsequent changes. Where a Federal court-ordered change is not itself subject to the preclearance requirement, subsequent changes necessitated by the court order but decided upon by the jurisdiction remain subject to preclearance. For example, voting precincts and polling changes made necessary by a court-ordered redesigning plan are subject to section 5 review.

(c) Alteration in section 5 status. Where a Federal court-ordered change at its inception is not subject to review under section 5, a subsequent action by the submitting authority demonstrating that the change reflects its policy choices (e.g., adoption or ratification of the change, or implementation in a manner not explicitly authorized by the court) will render the change subject to review under section 5 with regard to any future implementation.

(d) In emergencies. A Federal court's authorization of the emergency interim use without preclearance of a voting change does not exempt from section 5 review any use of that practice not explicitly authorized by the court.

15. Revise §51.19 to read as follows:

§51.19 Request for notification concerning voting litigation.

A jurisdiction subject to the preclearance requirements of section 5 that becomes involved in any litigation concerning voting is requested to notify the Chief, Voting Section, Civil Rights Division, at the addresses, facsimile number, or email address specified in §51.24. Such notification will not be considered a submission under section 5.

16. In §51.20, revise paragraphs (b) through (e) and add a new paragraph (f) to read as follows:

§51.20 Form of submissions.

- The Attorney General will accept certain machine readable data in the following electronic media: 3.5 inch 1.4 megabyte disk, compact disc read-only memory (CD-ROM) formatted to the ISO-9660/Joliet standard, or digital versatile disc read-only memory (DVD-ROM). Unless requested by the Attorney General, data provided on electronic media need not be provided in hard copy.

- All electronic media shall be clearly labeled with the following information:

- Submitting authority.
- Name, address, title, and telephone number of contact person.
- Date of submission cover letter.
- Statement identifying the voting change(s) involved in the submission.
- Each magnetic medium (floppy disk or tape) provided must be accompanied by a printed description of its contents, including an identification by name or location of each data file contained on the medium, a detailed record layout for each such file, a record count for each such file, and a full description of the magnetic medium format.

- Text documents should be provided in a standard American Standard Code for Information Interchange (ASCII) character code; documents with graphics and complex formatting should be provided in standard Portable Document Format (PDF). The label shall be affixed to each electronic medium, and the information included on the label shall also be contained in a documentation file on the electronic medium.

17. Revise §51.21 to read as follows:

§51.21 Time of submissions.

Changes affecting voting should be submitted as soon as possible after they become final, except as provided in §51.22.

18. Revise §51.22 to read as follows:
§ 51.22 Submitted changes that will not be reviewed.

(a) The Attorney General will not consider on the merits:

(1) Any proposal for a change submitted prior to final enactment or administrative decision except as provided in paragraph (b) of this section.

(2) Any submitted change directly related to another change that has not received section 5 preclearance if the Attorney General determines that the two changes cannot be substantively considered independently of one another.

(3) Any submitted change whose enforcement has ceased and been superseded by a standard, practice, or procedure that has received section 5 preclearance or that is otherwise legally enforceable under section 5.

(b) For any change requiring approval by referendum, by a State or Federal court, or by a Federal agency, the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken.

(See also §51.16.)

§ 51.24 Delivery of submissions.

(a) Delivery by U.S. Postal Service. Submissions sent to the Attorney General by the U.S. Postal Service, including certified mail or express mail, shall be addressed to the Chief, Voting Section, Civil Rights Division, United States Department of Justice, Room 7254—NW, 950 Pennsylvania Avenue, NW, Washington, DC 20530.

(b) Delivery by other carriers. Submissions sent to the Attorney General by carriers other than the U.S. Postal Service, including by hand delivery, should be addressed or may be delivered to the Chief, Voting Section, Civil Rights Division, United States Department of Justice, Room 7254—NW, 950 G Street, NW, Washington, DC 20530.

(c) Electronic submissions. Submissions may be delivered to the Attorney General through an electronic form available on the website of the Voting Section of the Civil Rights Division at www.justice.gov/crt/voting/. Detailed instructions appear on the website. Jurisdictions should answer the questions appearing on the electronic form, and should attach documents as specified in the instructions accompanying the application.

(d) Telefacsimile submissions. In urgent circumstances, submissions may be delivered to the Attorney General by telefacsimile to (202) 616–9514. Submissions should not be sent to any other telefacsimile number at the Department of Justice. Submissions that are voluminous should not be sent by telefacsimile.

(e) Email. Submissions may not be delivered to the Attorney General by email in the first instance. However, after a submission is received by the Attorney General, a jurisdiction may supply additional information on that submission by email to vot1973c@usdoj.gov. The subject line of the email shall be identified with the Attorney General’s file number for the submission (YYYY—NNNN), marked as “Additional Information,” and include the name of the jurisdiction.

(f) Special marking. The first page of the submission, and the envelope (if any), shall be clearly marked: “Submission under Section 5 of the Voting Rights Act.”

(g) The most current information on addresses for, and methods of making, section 5 submissions is available on the Voting Section website at www.justice.gov/crt/voting/.

§ 51.25 Withdrawal of submissions.

(a) A jurisdiction may withdraw a submission at any time prior to a final decision by the Attorney General. Notice of the withdrawal of a submission must be made in writing addressed to the Chief, Voting Section, Civil Rights Division, to be delivered at the addresses, telefacsimile number, or email address specified in §51.24. The submission shall be deemed withdrawn upon the Attorney General’s receipt of the notice.

§ 51.27 Required contents.

(a) A copy of any ordinance, enactment, order, or regulation embodying the change affecting voting for which section 5 preclearance is being requested.

(b) A copy of any ordinance, enactment, order, or regulation embodying the voting standard, practice, or procedure that is proposed to be repealed, amended, or otherwise changed.

(c) A statement that identifies with specificity each change affecting voting for which section 5 preclearance is being requested and that explains the difference between the submitted change and the prior law or practice. If the submitted change is a special referendum election and the subject of the referendum or a proposed change affecting voting, the submission should specify whether preclearance is being requested solely for the special election or for both the special election and the proposed change to be voted on in the referendum (see §§51.16, 51.22).

(d) The name, title, mailing address, and telephone number of the person making the submission. Where available, a telefacsimile number and an email address for the person making the submission also should be provided.

§ 51.28 Supplemental contents.

(a) * * *

(5) Demographic data on electronic media that are provided in conjunction
with a redistricting plan shall be contained in an ASCII comma delimited block equivalency import file with two fields as detailed in the following table. A separate import file shall accompany each redistricting plan:

<table>
<thead>
<tr>
<th>Field No.</th>
<th>Description</th>
<th>Total length</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>PL94–171 reference number: GEOID10</td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>District Number</td>
<td>3</td>
<td>No leading zeroes.</td>
</tr>
</tbody>
</table>

(i) **Field 1:** The PL 94-171/GEOID10 reference number is the state, county, tract, and block reference numbers concatenated together and padded with leading zeroes so as to create a 15-digit character field; and

(ii) **Field 2:** The district number is a 3 digit character field with no padded leading zeroes.

*Example: 482979501002099,1 482979501002100,3 482979501004010,1 482979501004030,23 482979501000530,101*

(b) Demographic data on magnetic media that are provided in conjunction with a redistricting can be provided in shapefile (.shp) spatial data format.

(i) The shapefile shall include at a minimum the main file, index file, and dBASE table.

(ii) The dBASE table shall contain a row for each census block. Each census block will be identified by the state, county, tract and block identifier [GEOID10] as specified by the Bureau of Census. Each row shall identify the district assignment and relevant population for that specific row.

(iii) The shapefile should include a projection file (.prj).

(iv) The shapefile should be sent in NAD 83 geographic projection. If another projection is used, it should be described fully.

(c) **Annexations.** For annexations, in addition to that information specified elsewhere, the following information:

(1) The present and expected future use of the annexed land (e.g., garden apartments, industrial park).

(2) An estimate of the expected population, by race and language group, when anticipated development, if any, is completed.

(3) A statement that all prior annexations [and deannexations] subject to the preclearance requirement have been submitted for review, or a statement that identifies all annexations [and deannexations] subject to the preclearance requirement that have not been submitted for review. See §51.61(b).

(4) To the extent that the jurisdiction elects some or all members of its governing body from single-member districts, it should inform the Attorney General how the newly annexed territory will be incorporated into the existing election districts.

24. In §51.29, revise paragraphs (b) and (d) to read as follows:

§51.29 Communications concerning voting changes.

(b) Comments should be sent to the Chief, Voting Section, Civil Rights Division, at the addresses, telefacsimile number, or email address specified in §51.24. The first page and the envelope (if any) should be marked: "Comment under section 5 of the Voting Rights Act." Comments should include, where available, the name of the jurisdiction and the Attorney General's file number (YYYY–NNNN) in the subject line.

(d) To the extent permitted by the Freedom of Information Act, 5 U.S.C. 552, the Attorney General shall not disclose to any person outside the Department of Justice the identity of any individual or entity providing information on a submission or the administration of section 5 where the individual or entity has requested confidentiality; an assurance of confidentiality may reasonably be implied from the circumstances of the communication; disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy under 5 U.S.C. 552; or disclosure is prohibited by any applicable provisions of federal law.

26. Revise §51.37 to read as follows:

§51.37 Obtaining information from the submitting authority.

(a) **Oral requests for information.**

(1) If a submission does not satisfy the requirements of §51.27, the Attorney General may request orally any omitted information necessary for the evaluation of the submission. An oral request may be made at any time within the 60-day period, and the submitting authority should provide the requested information as promptly as possible. The oral request for information shall not suspend the running of the 60-day period, and the Attorney General will proceed to make a determination within the initial 60-day period. The Attorney General reserves the right as set forth in §51.39, however, to commence a new 60-day period in which to make the requisite determination if the written information provided in response to such request materially supplements the submission.
(2) An oral request for information shall not limit the authority of the Attorney General to make a written request for information.

(3) The Attorney General will notify the submitting authority in writing when the 60-day period for a submission is recalculated from the Attorney General's receipt of written information provided in response to an oral request as described in §51.37(a)(1), above.

(a) Notice of the Attorney General's receipt of written information pursuant to an oral request will be given to interested parties registered under §51.32.

(b) Written requests for information.

(1) If the Attorney General determines that a submission does not satisfy the requirements of §51.27, the Attorney General may request in writing from the submitting authority any omitted information necessary for evaluation of the submission. Branch v. Smith, 538 U.S. 254 (2003); Georgia v. United States, 411 U.S. 526 (1973). This written request shall be made as promptly as possible within the original 60-day period or the new 60-day period described in §51.39(a). The written request shall advise the jurisdiction that the submitted change remains unenforceable unless and until preclearance is obtained.

(2) A copy of the request shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

(3) The Attorney General shall notify the submitting authority that a new 60-day period in which the Attorney General may interpose an objection shall commence upon the Attorney General's receipt of a response from the submitting authority that provides the information or states that the information is unavailable. The Attorney General can request further information in writing within the new 60-day period, but such a further request shall not suspend the running of the 60-day period, nor shall the Attorney General's receipt of such further information begin a new 60-day period.

(4) Where the response from the submitting authority neither provides the information requested nor states that such information is unavailable, the response shall not commence a new 60-day period. It is the practice of the Attorney General to notify the submitting authority that its response is incomplete and to provide such notification as soon as possible within the 60-day period that would have commenced had the response been complete. Where the response includes a portion of the available information that was requested, the Attorney General will reevaluate the submission to ascertain whether a determination on the merits may be made based upon the information provided. If a merits determination is appropriate, it is the practice of the Attorney General to make that determination within the new 60-day period that would have commenced had the response been complete. See §51.40.

(5) If, after a request for further information is made pursuant to this section, the information requested by the Attorney General becomes available to the Attorney General from a source other than the submitting authority, the Attorney General shall promptly notify the submitting authority in writing, and the new 60-day period will commence the day after the information is received by the Attorney General.

(6) Notice of the written request for further information and the receipt of a response by the Attorney General will be given to interested parties registered under §51.32.

27. Revise §51.39 to read as follows:

§51.39 Supplemental information and related submissions.

(a) Supplemental information. When a submitting authority, at its own instance, provides information during the 60-day period that the Attorney General determines materially supplements a pending submission, the 60-day period for the pending submission will be recalculated from the Attorney General's receipt of the supplemental information.

(b) Related submissions. When the Attorney General receives related submissions during the 60-day period for a submission that cannot be independently considered, the 60-day period for the first submission shall be recalculated from the Attorney General’s receipt of the last related submission.

28. Revise §51.40 to read as follows:

§51.40 Failure to complete submissions.

If after 60 days the submitting authority has not provided further information in response to a request made pursuant to §51.37(b), the Attorney General, absent extenuating circumstances and consistent with the burden of proof under section 5 described in §51.32(a) and (c), may object to the change, giving notice as specified in §51.44.

29. Revise §51.42 to read as follows:

§51.42 Failure of the Attorney General to respond.

It is the practice and intention of the Attorney General to respond in writing to each submission within the 60-day period. However, in the event of the Attorney General's failure to make a written response within the 60-day period constitutes preclusion of the submitted change, provided that a 60-day review period has commenced after receipt by the Attorney General of a complete submission that is appropriate for a response on the merits. (See §51.22, §51.27, §51.35.)

30. Revise §51.43 to read as follows:

§51.43 Reexamination of decision not to object.

(a) After notification to the submitting authority of a decision not to interpose an objection to a submitted change affecting voting has been given, the Attorney General may reexamine the submission if, prior to the expiration of the 60-day period, information comes to the attention of the Attorney General which would otherwise require objection in accordance with section 5.

(b) In such circumstances, the Attorney General may by letter withdraw his decision not to interpose an objection and may by letter interpose an objection provisionally, in accordance with §51.44, and advise the submitting authority that examination of the change in light of the newly raised issues will continue and that a final decision will be rendered as soon as possible.

31. In §51.44, revise paragraph (c) to read as follows:

§51.44 Notification of decision to object.

(c) The submitting authority shall be advised further that notwithstanding the objection it may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change objected to by the Attorney General neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

32. In §51.46, revise paragraph (a) to read as follows:
§ 51.46 Reconsideration of objection at the instance of the Attorney General.

(a) Where there appears to have been a substantial change in operative fact or relevant law, or where it appears there may have been a misinterpretation of fact or mistake in the law, an objection may be reconsidered, if it is deemed appropriate, at the instance of the Attorney General.

33. In § 51.46, revise paragraphs (a) through (d) to read as follows:

§ 51.48 Decision after reconsideration.

(a) It is the practice of the Attorney General to notify the submitting authority of the decision to continue or withdraw an objection within a 60-day period following receipt of a reconsideration request or following notice given under § 51.46(b), except that this 60-day period shall be recommenced upon receipt of any documents or written information from the submitting authority that materially supplements the reconsideration review, irrespective of whether the submitting authority provides the documents or information at its own instance or pursuant to a request (written or oral) by the Attorney General. The 60-day reconsideration period may be extended to allow a 15-day decision period following a conference held pursuant to § 51.47. The 60-day reconsideration period shall be computed in the manner specified in § 51.9. Where the reconsideration is at the instance of the Attorney General, the first day of the period shall be the day after the notice required by § 51.46(b) is transmitted to the submitting authority. The reasons for the reconsideration decision shall be stated.

(b) The objection shall be withdrawn if the Attorney General is satisfied that the change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

(c) If the objection is not withdrawn, the submitting authority shall be advised that notwithstanding the objection it may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that the change objected to by the Attorney General neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

(d) An objection remains in effect until either it is specifically withdrawn by the Attorney General or a declaratory judgment with respect to the change in

question is entered by the U.S. District Court for the District of Columbia.

34. Revise § 51.50 to read as follows:

§ 51.50 Records concerning submissions.

(a) Section 5 files. The Attorney General shall maintain a section 5 file for each submission, containing the submission, related written materials, correspondence, memoranda, investigative reports, data provided on electronic media, notations concerning conferences with the submitting authority or any interested individual or group, and copies of letters from the Attorney General concerning the submission.

(b) Objection letters. The Attorney General shall maintain section 5 notification letters regarding decisions to interpose, continue, or withdraw an objection.

(c) Computer file. Records of all submissions and their dispositions by the Attorney General shall be electronically stored.

(d) Copies. The contents of the section 5 submission files in paper, microfiche, electronic, or other form shall be available for obtaining copies by the public, pursuant to written request directed to the Chief, Voting Section, Civil Rights Division, United States Department of Justice, Washington, DC. Such written request may be delivered to the addresses or facsimile number specified in § 51.24 or by electronic mail to Voting.Section@usdoj.gov. It is the Attorney General's intent and practice to expedite, to the extent possible, requests pertaining to pending submissions. Those who desire copies of information that has been provided on electronic media will be provided a copy of that information in the same form as it was received. Materials that are exempt from inspection under the Freedom of Information Act, 5 U.S.C. 552(b), may be withheld at the discretion of the Attorney General. The identity of any individual or entity that provided information to the Attorney General regarding the administration of section 5 shall be available only as provided by § 51.29(d). Applicable fees, if any, for the copying of the contents of these files are contained in the Department of Justice regulations implementing the Freedom of Information Act, 28 CFR 16.10.

35. Revise § 51.52 to read as follows:

§ 51.52 Basic standard.

(a) Surrogate for the court. Section 5 provides for submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under section 5: whether the submitted change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance, as it would be if the proposed change were the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. South Carolina v. Katzenbach, 383 U.S. 301, 326, 335 (1966).

(b) No objection. If the Attorney General determines that the submitted change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, no objection shall be interposed to the change.

(c) Object. An objection shall be interposed to a submitted change if the Attorney General cannot determine that the change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. This includes those situations where the evidence is as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of both the prohibited discriminatory purpose and effect.

36. Revise § 51.54 to read as follows:

§ 51.54 Discriminatory purpose and effect.

(a) Discriminatory purpose. A change affecting voting is considered to have a discriminatory purpose under section 5 if it is enacted or sought to be administered with any purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The term "purpose" in section 5 includes any discriminatory purpose, 42 U.S.C. 1973c. The Attorney General's evaluation of discriminatory purpose under section 5 is guided by the analysis in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

(b) Discriminatory effect. A change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than
they had been before the change) with respect to their effective exercise of the electoral franchise. * * * * * * * *

(c) Benchmark. (1) In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting standard, practice, or procedure in force or effect at the time of the submission. If the existing standard, practice, or procedure upon submission was not in effect on the jurisdiction's applicable date for coverage (specified in the Appendix) and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and, except as provided in paragraph (c)(4) of this section, the comparison shall be with the last legally enforceable standard, practice, or procedure used by the jurisdiction.

(2) The Attorney General will make the comparison based on the conditions existing at the time of the submission.

(3) The implementation and use of an unprecleared voting change subject to section 5 review does not operate to make that unprecleared voting change a benchmark for any subsequent change submitted by the jurisdiction.

(4) Where at the time of submission of a change for section 5 review there exists no other lawful standard, practice, or procedure for use as a benchmark (e.g., where a newly incorporated college district selects a method of election) the Attorney General's determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups.

(d) Protection of the ability to elect. Any change affecting voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race, color, or membership in a language minority group to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of section 5. 42 U.S.C. 1973c.

■ 37. In §51.55, revise paragraph (a) to read as follows:

§51.55 Consistency with constitutional and statutory requirements.

(a) Consideration in general. In making a determination under section 5, the Attorney General will consider whether the change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th Amendments to the Constitution, 42 U.S.C. 1971(a) and (b), sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.

■ 38. Revise §51.57 to read as follows:

§51.57 Relevant factors.

Among the factors the Attorney General will consider in making determinations with respect to the submitted changes affecting voting are the following:

(a) The extent to which a reasonable and legitimate justification for the change exists;

(b) The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change;

(c) The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change;

(d) The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change; and


(1) Whether the impact of the official action bears more heavily on one race than another;

(2) The historical background of the decision;

(3) The specific sequence of events leading up to the decision;

(4) Whether there are departures from the normal procedural sequence;

(5) Whether there are substantive departures from the normal factors considered; and

(6) The legislative or administrative history, including contemporaneous statements made by the decision makers.

■ 39. In §51.58, revise paragraph (b) to read as follows:

§51.58 Representation.

* * * * * *

(b) Background factors. In making determinations with respect to these changes involving voting practices and procedures, the Attorney General will consider as important background information the following factors:

(1) The extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction.

(2) The extent to which voting in the jurisdiction is racially polarized and election-related activities are racially segregated.

(3) The extent to which the voter registration and election participation of minority voters have been adversely affected by present or past discrimination.

■ 40. Revise §51.59 to read as follows:

§51.59 Redistricting plans.

(a) Relevant factors. In determining whether a submitted redistricting plan has a prohibited purpose or effect the Attorney General, in addition to the factors described above, will consider the following factors (among others):

(1) The extent to which malapportioned districts deny or abridge the right to vote of minority citizens;

(2) The extent to which minority voting strength is reduced by the proposed redistricting;

(3) The extent to which minority concentrations are fragmented among different districts;

(4) The extent to which minorities are overconcentrated in one or more districts;

(5) The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered;

(6) The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and

(7) The extent to which the plan is inconsistent with the jurisdiction's stated redistricting standards.

(b) Discriminatory purpose. A jurisdiction's failure to adopt the maximum possible number of majority-minority districts may not be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose.

■ 41. In §51.61, revise paragraphs (a) and (b) to read as follows:

§51.61 Annexations and deannexations.

(a) Coverage. Annexations and deannexations, even of uninhabited land, are subject to section 5 preclearance to the extent that they alter or are calculated to alter the composition of a jurisdiction's electorate. See, e.g., City of Pleasant Grove v. United States, 479 U.S. 462 (1987). In analyzing annexations and deannexations under section 5, the Attorney General considers the purpose and effect of the annexations and
deannexations only as they pertain to voting.


* * * * *

42. Revise the Appendix to Part 51 to read as follows:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Applicable date</th>
<th>Federal Register citation</th>
</tr>
</thead>
</table>

coverage and the date after which changes affecting voting are subject to the preclearance requirement. Some jurisdictions, for example, Yuba County, California, are included more than once because they have been determined on more than one occasion to be covered under section 4(b).
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Applicable date</th>
<th>Federal Register citation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Volume and page</td>
</tr>
<tr>
<td>South Dakota:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The following political subdivisions in States subject to statewide coverage are also covered individually:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Applicable date</th>
<th>Federal Register citation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Volume and page</td>
</tr>
<tr>
<td>Arizona:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4022

Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.


PBGC uses the interest assumptions in Appendix B to Part 4022 to determine whether a benefit is payable as a lump sum and to determine the amount to pay. Appendix C to Part 4022 contains interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology. Currently, the rates in Appendices B and C of the benefit payment regulation are the same.

The interest assumptions are intended to reflect current conditions in the financial and annuity markets. Assumptions under the benefit payments regulation are updated monthly. This final rule updates the benefit payments interest assumptions for May 2011.

The May 2011 interest assumptions under the benefit payments regulation will be 2.50 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for April 2011, these interest assumptions are unchanged.

PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect current market conditions as accurately as possible.

Because of the need to provide immediate guidance for the payment of benefits under plans with valuation dates during May 2011, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

PBGC has determined that this action is not a “significant regulatory action” under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects in 29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

In consideration of the foregoing, 29 CFR part 4022 is amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

2. In appendix B to part 4022, Rate Set 211, as set forth below, is added to the table.

Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments

<table>
<thead>
<tr>
<th>Rate</th>
<th>Before</th>
<th>On or after</th>
<th>Immediate annuity rate (percent)</th>
<th>Deferred annuities (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>211</td>
<td>6-1-11</td>
<td>5-1-11</td>
<td>2.50</td>
<td>4.00</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>n1</th>
<th>n2</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>8</td>
</tr>
</tbody>
</table>

3. In Appendix C to part 4022, Rate Set 211, as set forth below, is added to the table.

Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments

| *     | *     | *     | *     | *     |

1 Appendix B to PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) prescribes interest assumptions for: valuing benefits under terminating covered single-employer plans for purposes of allocation of assets under ERISA section 4044. Those assumptions are updated quarterly.

TTY/TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-260-4024.