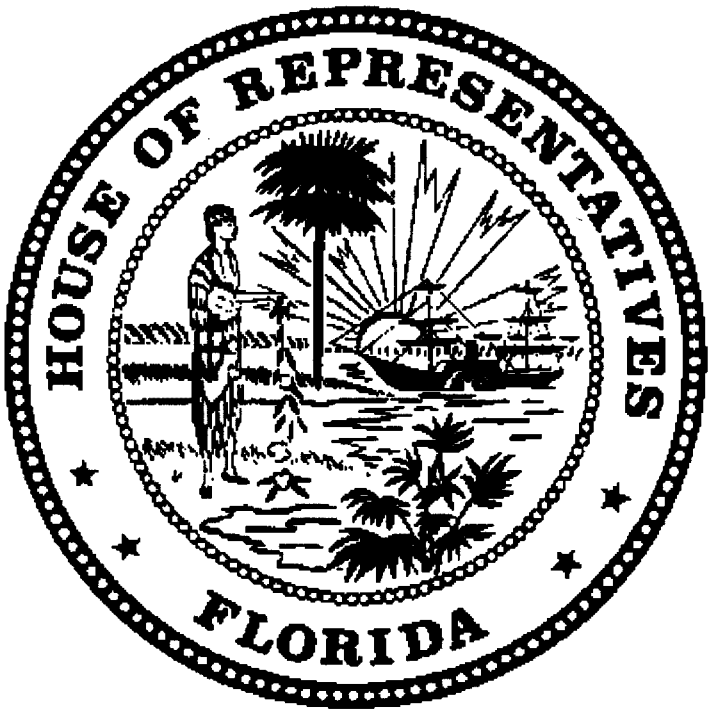

Select Committee On Redistricting

August 13, 2015
212 Knott Building

Action Packet

Steve Crisafulli
Speaker

Jose Oliva
Chair

COMMITTEE MEETING REPORT

Select Committee on Redistricting

8/13/2015 9:00:00AM

Location: Webster Hall (212 Knott)

Summary:

Select Committee on Redistricting

Thursday August 13, 2015 09:00 am

HB 1B	Favorable		Yeas: 9	Nays: 4
	Amendment 338861	Failed to Adopt		
	Amendment 306475	Not Considered		

Committee meeting was reported out: Thursday, August 13, 2015 1:17:12PM

COMMITTEE MEETING REPORT

Select Committee on Redistricting

8/13/2015 9:00:00AM

Location: Webster Hall (212 Knott)

Attendance:

	Present	*Absent*	*Excused*
Jose Oliva (Chair)	X		
W. Travis Cummings	X		
Reggie Fullwood	X		
Charles McBurney	X		
Larry Metz	X		
Jared Moskowitz	X		
H. Marlene O'Toole	X		
David Santiago	X		
Irving Slosberg	X		
Jennifer Sullivan	X		
Carlos Trujillo	X		
Barbara Watson	X		
Dana Young	X		
Totals:	**13**	**0**	**0**

Committee meeting was reported out: Thursday, August 13, 2015 1:17:12PM

COMMITTEE MEETING REPORT

Select Committee on Redistricting

8/13/2015 9:00:00AM

Location: Webster Hall (212 Knott)

HB 1B : Establishing the Congressional Districts of the State

[X] *Favorable*

	Yea	*Nay*	*No Vote*	*Absentee Yea*	*Absentee Nay*
W. Travis Cummings	X				
Reggie Fullwood		X			
Charles McBurney	X				
Larry Metz	X				
Jared Moskowitz	X				
H. Marlene O'Toole	X				
David Santiago	X				
Irving Slosberg		X			
Jennifer Sullivan		X			
Carlos Trujillo	X				
Barbara Watson		X			
Dana Young	X				
Jose Oliva (Chair)	X				
	Total Yeas: 9	**Total Nays: 4**			

HB 1B Amendments

Amendment 338861

[X] *Failed to Adopt*

Amendment 306475

[X] *Not Considered*

Appearances:

Amendment 338861
Abrams, Steven (General Public) - Information Only
Palm Beach County Commissioner
301 N Olive Ave
West Palm Beach FL

Amendment 338861
Martell, Daniel (Lobbyist) - Information Only
Economic Council of Palm Beach County
218 Datura St.
West Palm Beach FL 33401

Committee meeting was reported out: Thursday, August 13, 2015 1:17:12PM

COMMITTEE MEETING REPORT

Select Committee on Redistricting

8/13/2015 9:00:00AM

Location: Webster Hall (212 Knott)

HB 1B : Establishing the Congressional Districts of the State (continued)

Appearances: (continued)

Amendment 338861
Ryan, Tim (General Public) - Information Only
Mayor, Broward County
115 S Andrews Ave
Ft. Lauderdale FL 33312

Ausman, Jon (General Public) - Information Only
Democratic National Committee (Florida)
2202 Woodlawn Drive
Tallahassee FL 32303-3915
Phone: 850-321-7799

McClure, Bill (General Public) - Information Only
County Commissioner
6905 Richards Pl
St. Augustine FL 32080
Phone: 678-283-3538

McNeeley, Sheamus (General Public) - Information Only
3837 Arrowhead Dr
St. Augustine FL 32086
Phone: 904-239-0489

Meros, George (At Request Of Chair) - Information Only
House Special Counsel on Redistricting
301 South Bronough St.
Tallahassee FL 32301
Phone: 850-577-9090

Brown, Corrine (General Public) - Information Only
Congresswoman
611 Appian Way
Jacksonville FL 32208
Phone: 904-354-1652

Committee meeting was reported out: Thursday, August 13, 2015 1:17:12PM

89 S.Ct. 1225
Supreme Court of the United States

James C. KIRKPATRICK, Secretary
of State of Missouri, et al., Appellants,
v.
Paul W. PREISLER et al.
F. V. HEINKEL et al., Appellants,
v.
Paul W. PREISLER et al.

Nos. 30, 31. | Argued Jan. 13, 1969. | Decided April 7, 1969. | Rehearing Denied May 19, 1969. See 395 U.S. 917, 89 S.Ct. 1737.

Action respecting congressional reapportionment. On motion of defendant for approval of 1967 Missouri Redistricting Act and dismissal of the case, the three-judge United States District Court for the Western District of Missouri, Central Division, 279 F.Supp. 952, denied motion and probable jurisdiction was noted. The Supreme Court, Mr. Justice Brennan, held that Missouri congressional redistricting plan under which population variances ranged from 12,260 below to 13,542 above absolute population equality among its ten congressional districts did not satisfy the 'as nearly as practicable' constitutional standard where the population variances among the districts were not unavoidable, and Missouri failed to satisfactorily justify the population variances among the districts.

Affirmed.

Mr. Justice Harlan, Mr. Justice Stewart and Mr. Justice White dissented.

For dissenting opinion of Mr. Justice Harlan and Mr. Justice Stewart, see 394 U.S. 549, 89 S.Ct. 1239.

For dissenting opinion of Mr. Justice White, see 394 U.S. 553, 89 S.Ct. 1241.

West Headnotes (17)

[1] **United States**
Equality of representation and discrimination; Voting Rights Act

There is not a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the constitutional standard that one man's vote in congressional election be, as nearly as is practicable, worth as much as another's. U.S.C.A.Const. art. 1, § 2.

35 Cases that cite this headnote

[2] **United States**
Equality of representation and discrimination; Voting Rights Act

Whole thrust of the "as nearly as practicable" approach to the one man-one vote rule is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to circumstances of each particular case. U.S.C.A.Const. art. 1, § 2.

12 Cases that cite this headnote

[3] **United States**
Equality of representation and discrimination; Voting Rights Act

Extent to which equality in congressional district populations may practicably be achieved may differ from state to state and from district to district. U.S.C.A.Const. art. 1, § 2.

5 Cases that cite this headnote

[4] **United States**
Equality of representation and discrimination; Voting Rights Act

Since equal representation for equal numbers of people is the fundamental goal for the House of Representatives, the "as nearly as practicable" standard requires that state make a good-faith effort to achieve precise mathematical equality; and unless population variances among congressional districts are shown to have resulted despite such effort, state must justify each variance no matter how small. U.S.C.A.Const. art. 1, § 2.

111 Cases that cite this headnote

[5] **United States**
Equality of representation and discrimination; Voting Rights Act

Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives and therefore constitutional command that state create congressional districts which provide equal representation for equal numbers of people permits only limited population variances which are unavoidable despite good-faith effort to achieve absolute equality, or for which justification is shown. U.S.C.A.Const. art. 1, § 2.

57 Cases that cite this headnote

[6] **United States**
Equality of representation and discrimination; Voting Rights Act

Missouri congressional redistricting plan under which population variances ranged from 12,260 below to 13,542 above absolute population equality among its ten congressional districts did not satisfy the "as nearly as practicable" constitutional standard where the population variances among the districts were not unavoidable. U.S.C.A.Const. art. 1, § 2.

36 Cases that cite this headnote

[7] **United States**
Equality of representation and discrimination; Voting Rights Act

Where Missouri congressional redistricting plan was attacked as being in violation of the one man-one vote principle, burden was on state to present acceptable reasons for the variation among the populations of the various districts. U.S.C.A.Const. art. 1, § 2.

9 Cases that cite this headnote

[8] **United States**
Equality of representation and discrimination; Voting Rights Act

To accept population variances, large or small, in order to create congressional districts with specific interest orientations is antithetical to basic premise of constitutional command to provide equal representation for equal numbers of people. U.S.C.A.Const. art. 1, § 2.

12 Cases that cite this headnote

[9] **States**
Population as basis and deviation therefrom

Neither history alone, nor economic or other source of group interests are permissible factors in attempting to justify disparities from population-based representation. U.S.C.A.Const. art. 1, § 2.

23 Cases that cite this headnote

[10] **United States**
Judicial review and enforcement

State of Missouri whose congressional redistricting plan provided for a difference between the least and most populous congressional district of more than 25,000 people and which contended that variances were necessary to avoid fragmenting areas with distinct economic and social interests failed to satisfactorily justify population variances among the districts. U.S.C.A.Const. art. 1, § 2; V.A.M.S. § 128.010 et seq.

18 Cases that cite this headnote

[11] **United States**
Equality of representation and discrimination; Voting Rights Act

Reasonableness of population differences in congressional redistricting plan under review will not be viewed in context of legislative interplay, and the constitutional standard requiring equality among congressional districts as nearly as practicable is a rule of practicability rather than political practicality, so that problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster. U.S.C.A.Const. art. 1, § 2.

52 Cases that cite this headnote

[12] **United States**
Equality of representation and discrimination; Voting Rights Act

Population variances in congressional districts are not justified on ground they result from a state's attempt to avoid fragmenting political subdivision by drawing congressional district lines along existing county, municipal or other political subdivision boundaries. U.S.C.A.Const. art. 1, § 2.

23 Cases that cite this headnote

[13] **United States**
Equality of representation and discrimination; Voting Rights Act

Assuming, without deciding, that apportionment for congressional districts might be based on eligible voter population rather than total population, Missouri congressional redistricting plan would still be unacceptable where state made no attempt to ascertain number of eligible voters in each district and to apportion accordingly and at best made haphazard adjustments to a scheme based on total population. U.S.C.A.Const. art. 1, § 2; V.A.M.S. § 128.010 et seq.

12 Cases that cite this headnote

[14] **United States**
Apportionment of Representatives; Reapportionment and Redistricting

Where shifts in projected population from date of last census can be predicted with a high degree of accuracy, state's congressional redistricting plan may properly consider such shifts, but in order to do so findings as to population trends must be thoroughly documented and applied throughout state in a systematic, not an ad hoc, manner. U.S.C.A.Const. art. 1, § 2.

23 Cases that cite this headnote

[15] **United States**
Method of apportionment in general

Missouri congressional redistricting plan which contained unacceptable population variance fell short of standard required before taking into account shifts in population trends since last census, since there was no evidence that the General Assembly had adopted any policy of population projection in enacting statute. V.A.M.S. § 128.010 et seq.

7 Cases that cite this headnote

[16] **United States**
Apportionment of Representatives; Reapportionment and Redistricting

Modern developments and improvements in transportation and communications make, for the most part, unconvincing those arguments for allowing population deviation in order to assure effective representation for sparsely settled areas and to prevent legislative district from becoming so large that availability of access of citizens to their representatives is impaired. U.S.C.A.Const. art. 1, § 2.

7 Cases that cite this headnote

[17] **United States**
Equality of representation and discrimination; Voting Rights Act

Missouri could not justify unacceptable population deviations in congressional redistricting plan on the basis that deviations were the result of an attempt to insure geographical compactness of each congressional district where claim was based solely on unaesthetic appearance of map of congressional boundaries that would result from an attempt to effect some of the changes in district lines which would achieve greater equality. U.S.C.A.Const. art. 1, § 2.

25 Cases that cite this headnote

Attorneys and Law Firms

**1227 *527 Thomas J. Downey, Jefferson City, Mo., and David Collins, Macon, Mo., for appellants.

Irving Achtenberg, Kansas City, Mo., for appellees.

Opinion

Mr. Justice BRENNAN delivered the opinion of the Court.

In Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct., 526, 11 L.Ed.2d 481 (1964), we held that '(w)hile it may not be possible (for the States) to draw congressional districts with mathematical precision,' id., at 18, 84 S.Ct. at 535, Art. I, s 2, of the Constitution requires that 'as nearly as is practicable one man's vote in a congressional *528 election is to be worth as much as another's.' Id., at 7—8, 84 S.Ct. at 530. We are required in these cases to elucidate the 'as nearly as practicable' standard.

The Missouri congressional redistricting statute challenged in these cases resulted from that State's second attempt at congressional redistricting since Wesberry was decided. In 1965, a three-judge District Court for the Western District of Missouri declared that the Missouri congressional districting Act then in effect was unconstitutional under Wesberry but withheld any judicial relief 'until the Legislature of the State of Missouri has once more had an opportunity to deal with the problem * * *.' Preisler v. Secretary of State of Missouri, 238 F.Supp. 187, 191. Thereafter the General Assembly of Missouri enacted a redistricting statute, but this statute too was declared unconstitutional. The District Court, however, retained jurisdiction to review any further plan that might be enacted. Preisler v. Secretary of State of Missouri, 257 F.Supp. 953 (1966), aff'd, sub nom. Kirkpatrick v. Preisler, 385 U.S. 450, 87 S.Ct. 613, 17 L.Ed.2d 511 (1967). In 1967, the General Assembly enacted the statute under attack here, Mo.Rev.Stat., c. 128 (Cum.Supp.1967), and the Attorney General of Missouri moved in the District Court for a declaration sustaining the Act and an order dismissing the case.

Based on the best population data available to the legislature in 1967, the 1960 United States census figures, absolute population equality among Missouri's 10 congressional districts would mean a population of 431,981 in each district. The districts created by the 1967 Act, however, varied from this ideal within a range of 12,260 below it to 13,542 above it. The difference between the least and most populous districts was thus 25,802. In percentage terms, the most populous district was 3.13% *529 above **1228 the mathematical ideal, and the least populous was 2.84% below. [1]

The District Court found that the General Assembly had not in fact relied on the census figures but instead had based its plan on less accurate data. In addition, the District Court found that the General Assembly had rejected a redistricting plan submitted to it which provided for districts with smaller population variances among them. Finally, the District Court found that the simple device of switching some counties from one district to another would have produced a plan with markedly reduced variances among districts. Based on these findings, the District Court, one judge dissenting, held that the 1967 Act did not meet the constitutional standard of equal representation for equal numbers of people 'as nearly as practicable,' and that the State had failed to make any acceptable justification for the variances. 279 F.Supp. 952 (1967). We noted *530 probable jurisdiction but stayed the District Court's judgment pending appeal and expressly authorized the State 'to conduct the 1968 congressional elections under and pursuant to (the) 1967 * * * Act * * *.' 390 U.S. 939, 88 S.Ct. 1053, 19 L.Ed.2d 1129 (1968). We affirm.

Missouri's primary argument is that the population variances among the districts created by the 1967 Act are so small that they should be considered de minimis and for that reason to satisfy the 'as nearly as practicable' limitation and not to require independent justification. Alternatively, Missouri argues that justification for the variances was established in the evidence: it is contended that the General Assembly provided for variances out of legitimate regard for such factors as the representation of distinct interest groups, the integrity of county lines, the compactness of districts, the population trends within the State, the high proportion of military personnel, college students, and other nonvoters in some districts, and the political realities of 'legislative interplay.'

I.

[1] [2] [3] [4] We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances

of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since 'equal representation for equal numbers of people (is) the fundamental goal for the **1229 House of Representatives,' Wesberry v. Sanders, supra, at 18, 84 S.Ct. at 535, the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical *531 equality. See Reynolds v. Sims, 377 U.S. 533, 577, 84 S.Ct. 1362, 1389, 12 L.Ed.2d 506 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.

There are other reasons for rejecting the de minimis approach. We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly become de minimis. Moreover, to consider a certain range of variances de minimis would encourage legislators to strive for the range rather than for equality as nearly as practicable. The District Court found, for example, that at least one leading Missouri legislator deemed it proper to attempt to achieve a 2% level of variance rather than to seek population equality.

[5] Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes. Therefore, the command of Art. I s 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.

[6] Clearly, the population variances among the Missouri congressional districts were not unavoidable. Indeed, it is not seriously contended that the missouri Legislature came as close to equality as it might have come. The District Court found that, to the contrary, in the two reapportionment efforts of the Missouri Legislature since Wesberry 'the leadership of both political parties in the Senate and the House were given nothing better to work with than a makeshift bill produced by what has been candidly recognized to be no more than * * * an expedient political compromise.' 279 F.Supp., at 966. Legislative *532 proponents of the 1967 Act frankly conceded at the District Court hearing that resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality. The District Court found, moreover, that the Missouri Legislature relied on inaccurate data in constructing the districts, and that it rejected without consideration a plan which would have markedly reduced population variances among the districts. Finally, it is simply inconceivable that population disparities of the magnitude found in the Missouri plan were unavoidable. [2] The New York apportionment plan of regions divided into districts of almost absolute population equality described in Wells v. Rockefeller, post, at 394 U.S. 542, 89 S.Ct. 1234, 1236—1237, 22 L.Ed.2d 535, provides striking evidence that a state legislature which tries can achieve almost complete numerical equality among all the State's districts. In sum, 'it seems quite obvious that the State could have come much closer to providing districts of equal population than it did.' **1230 Swann v. Adams, 385 U.S. 440, 445, 87 S.Ct. 569, 573, 17 L.Ed.2d 501 (1967).

[7] We therefore turn to the question whether the record establishes any legally acceptable justification for the population variances. It was the burden of the State 'to present * * * acceptable reasons for the variations among the populations of the various * * * districts. * * * *Swann v. Adams, supra,* at 443-444, 87 Sct. at 572.

*533 II.

We agree with the District Court that Missouri has not satisfactorily justified the population variances among the districts.

[8] [9] [10] Missouri contends that variances were necessary to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interests in Congress. But to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people. '(N)either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes.' Reynolds v. Sims, supra, at 579—580, 84 S.Ct. at 1391. See also Davis v. Mann, 377 U.S. 678, 692, 84 S.Ct. 1441, 1448, 12 L.Ed.2d 609 (1964).

[11] We also reject Missouri's argument that '(t)he reasonableness of the population differences in the congressional districts under review must * * * be viewed in the context of legislative interplay. The legislative leaders all testified that the act in question was in their opinion a reasonable legislative compromise. * * * It must be

remembered * * * that practical political problems are inherent in the enactment of congressional reapportionment legislation.'[3] We agree with the District Court that 'the rule is one of 'practicability' rather than political 'practicality. " 279 F.Supp., at 989. Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster.

[12] Similarly, we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political *534 subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries. The State's interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering[4] is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities.

[13] Missouri further contends that certain population variances resulted from the legislature's taking account of the fact that the percentage of eligible **1231 voters among the total population differed significantly from district to district —some districts contained disproportionately large numbers of military personnel stationed at bases maintained by the Armed Forces and students in attendance at universities or colleges. There may be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, s 2. But assuming without deciding that apportionment may be based on eligible voter population rather than total population, the Missouri plan is still unacceptable. Missouri made no attempt to ascertain the *535 number of eligible voters in each district and to apportion accordingly. At best it made haphazard adjustments to a scheme based on total population: overpopulation in the Eighth District was explained away by the presence in that district of a military base and a university; no attempt was made to account for the presence of universities in other districts or the disproportionate numbers of newly arrived and short-term residents in the City of St. Louis. Even as to the Eighth District, there is no indication that the excess population allocated to that district corresponds to the alleged extraordinary additional numbers of noneligible voters there.

[14] [15] Missouri also argues that population disparities between some of its congressional districts result from the legislature's attempt to take into account projected population shifts. We recognize that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections. Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an ad hoc, manner. Missouri's attempted justification of the substantial under population in the Fourth and Sixth Districts falls far short of this standard. The District Court found 'no evidence * * * that the * * * General Assembly adopted any policy of population projection in devising Districts 4 and 6, or any other district, in enacting the 1967 Act.' 279 F.Supp., at 983.

[16] [17] Finally, Missouri claims that some of the deviations from equality were a consequence of the legislature's attempt to ensure that each congressional district would be geographically compact. However, in *536 Reynolds v. Sims, supra, at 580, 84 S.Ct. at 1391, we said, 'Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.' In any event, Missouri's claim of compactness is based solely upon the unaesthetic appearance of the map of congressional boundaries that would result from an attempt to effect some of the changes in district lines which, according to the lower court, would achieve greater equality. A State's preference for pleasingly shaped districts can hardly justify population variances.

Affirmed.

Mr. Justice FORTAS, concurring.

I concur in the judgment of the Court in these cases, but I cannot subscribe to the standard of near-perfection which the Court announces as obligatory upon state legislatures facing the difficult problem of reapportionment for congressional elections.

**1232 In Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), this Court recognized that 'it may not be possible to draw congressional districts with mathematical precision,' and it held that the Constitution requires that they be drawn so that, 'as nearly as is practicable,' each representative *537 should cast a vote on behalf of the same number of people.

The Court now not only interprets 'as nearly as practicable' to mean that the State is required to 'make a good-faith effort to achieve precise mathematical equality,' but it also requires that any remaining population disparities 'no matter how small,' be justified. It then proceeds to reject, seriatim, every type of justification that has been—possibly, every one that could be—advanced.

I agree that the state legislatures should be required to make 'a good-faith effort to achieve' a result that allocates the population or the residents [1] of the State in roughly equal numbers to each district, based upon some orderly and objective method. [2] In my view, the State could properly arrive at figures for current population by taking the latest census returns and making modifications to allow for population movements since the last census (which the Court seems to find acceptable). It could also, in my opinion, discount the census figures to take account of the presence of significant transient or nonresident population in particular areas (an adjustment as to which the Court indicates doubt). If the State should proceed on some appropriate population *538 basis such as I have suggested, producing approximately equal districts, trial courts, in my judgment, would be justified in declining to disapprove the result merely because of small disparities, in the absence of evidence of gerrymandering—the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.

In considering whether the State has 'approximated' an equal division and allocation of the population, I sympathize with the majority's view that a de minimis rule of allowable disparities tends to demean in theory and in practice the constitutional objective because it suggests that it is not necessary even to aim at equality. On the other hand, to reject de minimis as a statement of the limits on the rule of equality should not lead us to toss aside the wise recognition of the inscrutability of fact and the imperfection of man which is implicit in the Wesberry standard: 'as nearly as practicable.' This phrase does not refer merely to arithmetical possibilities. Arithmetically, it is possible to achieve division of a State into districts of precisely equal size, as measured by the decennial census or any other population base. To carry out this theoretical possibility, however, a legislature might have to ignore the boundaries of common sense, running the congressional district line down the middle of the corridor of an apartment house or even dividing the residents of a single-family house between two districts. The majority opinion does not suggest so extreme a practical application of its teaching, and I mention it only because the example may dramatize the fallacy of inflexible insistence **1233 upon mathematical exactness, with no tolerance for reality.

Whatever might be the merits of insistence on absolute equality if it could be attained, the majority's pursuit of precision is a search for a will-o-'-the-wisp. The fact is that any solution to the apportionment and districting *539 problem is at best an approximation because it is based upon figures which are always to some degree obsolete. No purpose is served by an insistence on precision which is unattainable because of the inherent imprecisions in the population data on which districting must be based. The base to which Missouri's legislature should have adhered precisely, according to the majority, is the 1960 decennial census. The legislature's plan here under review was enacted in 1967. Assuming perfect precision for the 1960 census when taken, [3] by 1967, because of the movement of population within the State as *540 well as in-and-out migration, substantial disparities had arisen between the real distribution of population in the State and that reflected in the 1960 census base here so zealously protected by the Court. [4]

Nothing that I have said should be taken as indicating that I do not believe that the Wesberry standard requires a high degree of correspondence between the demonstrated population or residence figures and the district divisions. Nor would I fix, at least at this relatively early stage of the reapportionment effort, a percentage figure for permissible variation. [5]

**1234 In the present cases, however, I agree that the judgment of the District Court should be affirmed. The history of this reapportionment and of the legislature's failure to comply with the plain and patient directions of the three-judge District Court and the failure of the legislature to use either accurate 1960 census figures or other systematically obtained figures for all the districts—these factors strongly support the District Court's refusal *541 to accept the Missouri plan. It is true that on the average, there was only a 1.6% variation from what the majority quaintly calls the 'ideal' (meaning the 1960 census figures) and in only three of the 10 districts was there

a variation of 2% or more, and it is also true that there is no finding of gerrymandering. But regardless of the possibility that variances within this range might in some situations be considered tolerable within Wesberry's standard, I agree that we should sustain the District Court's rejection of the plan in light of the history of the cases and the record of the plan's preparation.

All Citations

394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519

Footnotes

1 The redistricting effected by the 1967 Act, based on a population of 4,319,813 according to the 1960 census, is as follows:

District No.	Population.	% Variation From Ideal.
One	439,746	+1.80
Two	436,448	+1.03
Three	436,099	+0.95
Four	419,721	-2.84
Five	431,178	-0.19
Six	422,238	-2.26
Seven	436,769	+1.11
Eight	445,523	+3.13
Nine	428,223	-0.87
Ten	423,868	-1.88

Ideal population per district	431,981
Average variation from ideal	1.6%
Ratio of largest to smallest district	1.06 to 1
Number of districts within 1.88% of ideal	7
Population difference between largest and smallest districts	25,802

2 Contrary to appellants' assertion, we have not sustained the constitutionality of any congressional districting plan with population variances of the magnitude found in the Missouri plan. In Connor v. Johnson, 386 U.S. 483, 87 S.Ct. 1174, 18 L.Ed.2d 224 (1967), the only issue presented to this Court was whether the districting plan involved racial gerrymandering. Alton v. Tawes, 384 U.S. 315, 86 S.Ct. 1590, 16 L.Ed.2d 586 (1966), and Kirk v. Gong, 389 U.S. 574, 88 S.Ct. 695, 19 L.Ed.2d 784 (1968), involved situations where the lower courts themselves had reapportioned the districts on an emergency basis, and our affirmances were based on agreement with the use of the plans in that the circumstance, and not on any view that the plans in question achieved equality as nearly as practicable. DB (7) We therefore turn to the question whether the record establishes any legally acceptable justification for the population variances. It was the burden of the State 'to present * * * acceptable reasons for the variations among the populations of the various * * * districts * * *.' Swann v. Adams, supra, at 443—444, 87 S.Ct. at 572.

3 Brief for Appellants 37—38.

4 It is dubious in any event that the temptation to gerrymander would be much inhibited, since the legislature would still be free to choose which of several subdivisions, all with their own political complexion, to include in a particular congressional district. Besides, opportunities for gerrymandering are greatest when there is freedom to construct unequally populated districts. '(T)he artistry of the political cartographer is put to its highest test when he must work with constituencies of equal population. At such times, his skills can be compared to those of a surgeon, for both work under fixed and arduous rules. However, if the mapmaker is free to allocate varying populations to different districts, then the butcher's cleaver replaces the scalpel; and the results reflect sharply the difference in the method of operation.' A. Hacker, Congressional Districting 59 (1964 rev. ed.).

1 I would find it constitutionally entirely acceptable for a State to base its apportionment on numbers of residents, rather than total population, in each district at the time the districts are established. This would permit adjustments to take account, for example, of distortions resulting from large numbers of nonresidents at military installations or colleges in an area.

2 In Avery v. Midland County, 390 u.S. 474, 495, 88 S.Ct. 1114, 1125, 20 L.Ed.2d 45 (1968), I argued in a dissenting opinion that consideration of disparate local interests might be appropriate with respect to defining certain types of local government units exercising limited governmental powers. I noted there, however, that the same factors could not justify

departing from the one man, one vote theory in state legislatures—or, I might now add, congressional districts—because of the general and basic nature of the function performed.

3 The basic enumeration error in the census—that is the variation which would be observed between successive enumerations of the same area—is very low. Second surveys of selected areas, conducted by specially trained enumerators, produced counts varying by only about 1% for the whole population from the counts of the regular enumerators. For particular groups in the population, the variance was significantly larger. See U.S. Bureau of the Census, Evaluation and Research Program of the U.S. Censuses of Population and Housing, 1960, 'Accuracy of Data on Population Characteristics as Measured by Re-interviews,' Ser. ER—60, No. 4 (1964), Table 24, p. 22.

Far more significant than variations between successive enumerations are errors—virtually all undercountings—which are produced by the inherent limitations of the enumerating system. A Census Bureau estimate indicates that the 1960 census counted only 96.9% of the whole population, 3.1% of the people not being found and counted by the enumerators. Undercounting was not evenly distributed over the whole population. Instead, members of certain groups, notably young adult Negroes, were far more likely to be missed by the enumerators. For nonwhites in all age groups the census was estimated to understate the actual population by 9.5% For young adult Negro males undercounting reached nearly 20% for some five-year age groups. See generally, Siegel, Completeness of Coverage of the Nonwhite Population in the 1960 Census and Current Estimates, and Some Implications, Report, Conference on Social Statistics and the City (Washington, D.C., June 22—23, 1967) 13 (Heer ed., 1968). Because the heavily undercounted groups are not evenly distributed over the country, the differential rates of undercounting produce divergences between the actual relative populations of particular areas and those indicated by the census.

4 The Census Bureau has estimated that of Missouri's 114 counties, 50 lost population between 1960 and 1966, while 64 gained. The independent city of St. Louis lost 57,900, or 7.7%; St. Louis County gained 146,000 or 20.8%. Outside St. Louis City and County, the absolute change ranged from a 22,100 increase in St. Charles County to a 7,100 decrease in Dunklin County. The percentage change ranged from a 41.7% increase in St. Charles County to a 21.4% decrease in Holt County. Estimates of the Population of Counties: July 1, 1966 (Report No. 3), Current Population Reports, Population Estimates, Ser. P—25, No. 407 (Bureau of the Census, October 10, 1968) 11—13.

5 Cf. Reynolds v. Sims, 377 U.S. 533, 578, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506 (1964):

'For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment.'

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168 F.3d 848
United States Court of Appeals,
Fifth Circuit.

Robert VALDESPINO; Brenda Rolon, Plaintiffs–Appellants,
v.
ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT; Ethyl Wayne; In her official capacity as a member of the Board of Trustees of the Alamo Heights Independant School District, San Antonio, Texas, Harry Orem, In his official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; Stephen P. Allison; In his official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; Anne Ballantyne, In her official capacity as a member of the Board of Trustees of the Alamo Heights Independant School District, San Antonio, Texas; Thomas A. Kingman, Dr., In his official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; Terri Musselman, In her official capacity as a member of the Board of Trustees of the Alamo Heights Independant School District, San Antonio, Texas; Vicki Summers, In her official capacity as a member of the Board of Trustees of the Alamo Heights Independant School District, San Antonio, Texas, Defendants–Appellees.

No. 98–50227. | March 11, 1999.

Voters brought action against school district and related parties, alleging that at-large, by-place, majority-vote elections for positions on school district's board of trustees diluted their votes in violation of the Voting Rights Act. The United States District Court for the Western District of Texas, Edward C. Prado, J., entered judgment denying relief, and voters appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) voters had to prove that their minority group exceeded 50% of the relevant population in demonstration district as threshold requirement for claim; (2) report of school district's expert was clear and convincing in its demonstration of sufficient post-census demographic changes to erode the Hispanic majority in the demonstration district; and (3) new survey by voters' expert was excludable on grounds of unfair surprise.

Affirmed.

West Headnotes (12)

[1] **Federal Courts**
Elections, voting, and political rights

District court's findings on the threshold requirements for vote dilution claim under Voting Rights Act are reviewed for clear error. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Cases that cite this headnote

[2] **Federal Courts**
Expert evidence and witnesses

A district court's refusal to allow an expert to testify as a rebuttal witness may be overturned only for abuse of discretion.

Cases that cite this headnote

[3] **Election Law**
Vote Dilution

As prerequisite to vote dilution claim under Voting Rights Act, minority group must be able to (1) demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) show that it is politically cohesive, and (3) demonstrate that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

12 Cases that cite this headnote

[4] **Education**
Redistricting; Voting Rights Act

Vote dilution claimants had to prove that their minority group exceeded 50% of the relevant population in demonstration district as threshold

requirement for claim under Voting Rights Act challenging at-large, by-place, majority-vote elections for positions on school district's board of trustees. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

4 Cases that cite this headnote

[5] **Election Law**
Vote Dilution

Voting-age and citizenship are the factors limiting relevant population in district, in determining whether minority group can constitute a majority, as threshold showing required for vote dilution claim under Voting Rights Act. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

18 Cases that cite this headnote

[6] **Election Law**
Presumptions and burden of proof

In vote dilution suit under Voting Rights Act, census figures are presumed accurate until proven otherwise, and proof of changed figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to override the presumptive correctness of the prior decennial census. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

9 Cases that cite this headnote

[7] **Education**
Redistricting; Voting Rights Act

Report of school district's expert was clear and convincing in its demonstration of sufficient post-census demographic changes to erode the Hispanic majority in the demonstration district, in vote dilution suit challenging at-large, by-place, majority-vote elections for positions on school district's board of trustees, considering relatively simple data relied upon and rudimentary calculations involved. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

6 Cases that cite this headnote

[8] **Education**
Redistricting; Voting Rights Act

Housing stock methodology was appropriate for calculating population changes in small areas in report challenging census figures, in vote dilution suit under Voting Rights Act challenging at-large, by-place, majority-vote elections for positions on school district's board of trustees. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

Cases that cite this headnote

[9] **Education**
Redistricting; Voting Rights Act

It was appropriate to account for some apartment complexes by projecting their imminent populations at the end of ongoing lease-up periods, in report challenging census figures, offered in vote dilution suit under Voting Rights Act challenging at-large, by-place, majority-vote elections for positions on school district's board of trustees. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Cases that cite this headnote

[10] **Education**
Redistricting; Voting Rights Act

In report challenging census figures, in vote dilution suit under Voting Rights Act, municipal power company's records of new electrical hook-ups were an accurate gauge of newly developed housing in the entire school district. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

Cases that cite this headnote

[11] **Federal Civil Procedure**
Failure to respond; sanctions

Cursory reference in deposition of voters' expert could not serve as adequate notice of intent to rely on a last-minute door-to-door survey of a specific neighborhood, or provide sufficient information for school district to prepare to cross-examine expert about the survey, so as to prevent exclusion of survey on grounds of

unfair surprise, in suit under Voting Rights Act challenging at-large, by-place, majority-vote elections for positions on school district's board of trustees. U.S.Dist.Ct.Rules W.D.Tex., Rule CV–16(e).

Cases that cite this headnote

[12] Federal Civil Procedure

Failure to respond; sanctions

Claim that new report by school district's expert necessitated last-minute door-to-door survey conducted by voters' expert did not preclude excluding results of survey on grounds of unfair surprise, in suit under Voting Rights Act challenging at-large, by-place, majority-vote elections for positions on school district's board of trustees, where new report by school district's expert was also excluded. U.S.Dist.Ct.Rules W.D.Tex., Rule CV–16(e).

1 Cases that cite this headnote

Attorneys and Law Firms

***850** Jose Garza, Edinburg, TX, Mark Stanton Smith, Heard & Smith, Judith A. Sanders-Castro, Les Mendelsohn & Associates, San Antonio, TX, for Plaintiffs-Appellants.

C. Robert Heath, Amy Wellington Flinn, Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, Austin, TX, for Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas.

Before JONES, SMITH and EMILIO M. GARZA, Circuit Judges.

Opinion

EDITH H. JONES, Circuit Judge:

The panel hereby withdraws its previous opinion and substitutes the following.

Plaintiffs–Appellants claim that the at-large, by-place, majority-vote elections for positions on the AHISD board of trustees dilute their votes as Hispanics in violation of Section 2 of the Voting Rights Act of 1965. *See* 42 U.S.C. § 1973 (1994) (as amended). The district court found that the Plaintiffs failed to make out a vote dilution claim because they could not prove, under the first *Gingles* threshold factor, that Hispanics are a "sufficiently large and geographically compact [group] to constitute a majority in a single-member district." *Thornburg v. Gingles,* 478 U.S. 30, 50, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986). All the issues on appeal involve proof of the first *Gingles* factor. In particular, we reject the appellants' contention that a "majority" may be less than 50% of the citizen voting-age population. As appellants' other contentions fare no better, the judgment is affirmed.

I.

The School District conceded at trial that the Plaintiffs' demonstration district [1] did comprise a majority of Hispanic voting-age citizens according to 1990 census data. The School District, however, presented evidence that demographic changes between the 1990 census and the 1997 trial had eliminated that majority. AHISD is a small district in which a few strategic land-use changes could and did significantly alter the district's population and neighborhood ethnic mix.

The School District's evidence was presented in expert testimony by Dr. Bill Rives, a demographer. Using the 1990 census data as a baseline, Rives investigated post–1990 changes in the school district's housing stock to determine how the population had changed in the Plaintiffs' demonstration district and in the school district at large. He testified that this methodology is "by far the most popular demographic estimation technique" and is especially appropriate for small areas.

Rives testified that two main trends combined to leave the Plaintiffs' demonstration single-member district "underpopulated" in 1997. Since 1990, the demonstration district had lost population (and the proportion of Hispanics in the demonstration district declined) because a large apartment complex had closed, been renovated, and reopened with a smaller number of residents. Simultaneously, the population of the school district at large had increased because of substantial new residential development in the Lincoln Heights area (formerly a quarry and cement plant), outside the demonstration district. As a result of these changes, the Plaintiffs' demonstration district no longer approached one-

seventh of the school district's population, and thus could not be a proper single-member district.

***851** To correct for the underpopulation, Rives added territory to the demonstration district. He added a contiguous area to the north that had been included in some of the appellants' prior proposed demonstration districts. That northern area ran clear to the edge of the school district and had just about the right number of people to make a proper district. Furthermore, if it were not added to the Plaintiffs' district, the northern area would have to be attached to a different district via a mile-long, narrow strip of unpopulated land. After the northern area was added to the demonstration district population, Hispanics made up only 47.9% of the voting-age citizen population of the revised demonstration district. Even if the demonstration district were then partially depopulated (by 8.1% of the ideal population), this number would be 48.3%.

The general thrust of Rives's testimony had been clear for some time before trial. For example, in a November 1996 affidavit attached to the Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment, Rives had explained that no additions to the Plaintiffs' proposed demonstration district could sufficiently increase the Hispanic population because "[t]here are no Hispanic-majority blocks that are adjacent to the proposed district." As the trial grew nearer, Rives updated his analysis, redoing calculations based on more recent data from the apartment complexes about the ethnicity of their residents. Ultimately, the district court relied on Rives's April 1997 Report.

Much of the controversy in the case comes from Rives's August 1997 Report. In July 1997, updated rental rolls became available from The Reserve, the large apartment complex within the Plaintiffs' demonstration district that had been renovated and reopened since the 1990 census. Rives then recalculated the results in his April 1997 report after learning that The Reserve had a slightly higher proportion of Hispanic residents than he had earlier believed. But he also corrected a calculation error in his April Report that had understated population growth in the school district at large. Nevertheless, he concluded that the revised data still did not yield a majority of Hispanics among voting-age citizens within the Plaintiffs' demonstration district. The August Report was given to the Plaintiffs in early August 1997, not long before the original trial setting. On August 22, however, the district court reset the trial for Monday, September 15.

The Plaintiffs' proffered expert witness, George Korbel, claims that he was surprised by the conclusions in Rives's August Report. In response, Korbel scrambled the week before the September trial date to conduct a door-to-door survey of the residents in a small area to the south of the demonstration district. He thought he could find there a high proportion of Hispanic residents that could increase their demonstration district's population without diluting its Hispanic majority. At 4:21 P.M. on Friday, September 12, the Plaintiffs faxed to the School District's counsel a letter disclosing the existence of this new survey. At 4:13 P.M. on Saturday, September 13, the Plaintiffs faxed the data from the survey.

On the Monday morning set for trial, September 15, the School District filed a motion to strike the survey on grounds of unfair surprise. The Plaintiffs' lawyer told the district court that their case in chief would rest entirely on 1990 census data, but that if Rives testified for the School District that more current data changed the Hispanic majority, then the Plaintiffs might use the recent survey as rebuttal testimony. The district court postponed until rebuttal any ruling on the motion to strike and granted a motion in limine to prevent mention of the survey during the case in chief or cross-examination. During the Plaintiffs' rebuttal, the School District renewed its objections to the survey evidence, and the district court granted the motion to strike. The Plaintiffs filed an offer of proof as to what their expert witness would have testified about the survey.

In its findings of fact and conclusions of law, the district court reiterated that Korbel's survey constituted unfair surprise and was excluded under Local Rule CV–16(e). To accommodate the Plaintiffs' objections to the lateness of Rives's August Report, the district court decided to rely solely upon the April Report, which it found to be "thoroughly ***852** documented, [with] a high degree of accuracy," and "clear, cogent, and convincing enough to override the presumptive correctness of the prior decennial census." Relying on Rives's report, the district court found that the Plaintiffs had not proved a demonstration district with less than 10% population deviation that included more than 50% Hispanics among its voting-age citizens.

On appeal, the Plaintiffs present three arguments: that they were not required to meet a "bright line" test of 50% Hispanic voting-age citizens in their demonstration district; that the School District's evidence did not adequately overcome the

presumed accuracy of the 1990 census data; and that the district court abused its discretion in excluding Korbel's proposed rebuttal testimony about the last-minute, door-to-door survey.

II.

[1] [2] This court reviews district court "findings on the *Gingles* threshold requirements for clear error." *League of United Latin Am. Citizens v. Roscoe Indep. Sch. Dist.,* 123 F.3d 843, 847 (5th Cir.1997). *See also Gingles,* 478 U.S. at 77–79, 106 S.Ct. at 2780–81. A district court's refusal to allow an expert to testify as a rebuttal witness may be overturned only for abuse of discretion. *See Tramonte v. Fibreboard Corp.,* 947 F.2d 762, 764 (5th Cir.1991); *Bradley v. United States,* 866 F.2d 120, 124 (5th Cir.1989).

III.

[3] The Supreme Court has established a three-part threshold inquiry when a racial or ethnic minority group asserts that its distinctive votes have been submerged by the racial majority in a multimember legislative district. The minority group must be able to (1) "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) "show that it is politically cohesive," and (3) "demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances ...—usually to defeat the minority's preferred candidate." *Gingles,* 478 U.S. at 50–51, 106 S.Ct. at 2766–67.

[4] The Plaintiffs here argue that the district court erred in applying the first *Gingles* factor as a "bright line" requirement. The Plaintiffs advert to the general purpose of the *Gingles* factors, which is to provide a framework for showing that there could be "a single-member district in which they could elect candidates of their choice." This is intended to support the proposition that the Plaintiffs need only show generally their electoral *potential.* The Plaintiffs further argue that the Supreme Court has disavowed "mechanical[ ]" application of the *Gingles* factors.[2] And they complain that the district court did not evaluate evidence of vote dilution under the totality of the circumstances test.

All of these complaints are baseless. In reality, this court has interpreted the *Gingles* factors as a bright line test. Each factor must be proved before it is necessary to proceed to the totality of the circumstances test. We have repeatedly disposed of vote dilution cases on the principle that "[f]ailure to establish any one of these threshold requirements is fatal." *Campos v. City of Houston,* 113 F.3d 544, 547 (5th Cir.1997); *accord Rangel v. Morales,* 8 F.3d 242, 249 (5th Cir.1993); *Overton v. City of Austin,* 871 F.2d 529, 538 (5th Cir.1989). *See also Growe v. Emison,* 507 U.S. 25, 40–41, 113 S.Ct. 1075, 1084, 122 L.Ed.2d 388 (1993) ("Unless [the three *Gingles* factors] are established, there neither has been a wrong nor can be a remedy.").

Furthermore, contrary to the Plaintiffs' suggestion, this court has required vote dilution claimants to prove that their minority group exceeds 50% of the relevant population ***853** in the demonstration district. In *Gingles,* the Supreme Court required plaintiffs to demonstrate "a majority." 478 U.S. at 50, 106 S.Ct. at 2766. Both of the Fifth Circuit cases cited by the Plaintiffs assumed that 50% was the threshold for "majority" and simply addressed what evidence could be used to prove that the 50% threshold was met. In *Brewer v. Ham,* the court acknowledged that a super-majority of black residents could be used to prove that blacks constituted a majority of *voting-age* residents. *See* 876 F.2d 448, 452 (5th Cir.1989) (citing cases with raw super-majorities of 65.9%, 71.5%, and higher). In *Westwego II,* this court repeated *Brewer 's* holding and expanded on it in a footnote. The footnote, much cited by the Plaintiffs, explained that those plaintiffs "unable to produce hard data" on voting-age population because of the way census data are collected and reported would be able to submit "other probative evidence" to prove voting-age population. *See Westwego Citizens for Better Gov't v. City of Westwego,* 906 F.2d 1042, 1045 n. 3 (5th Cir.1990). In context, *Westwego II* 's statements did not alter what must be proved, only what can be used to prove it. The Plaintiffs still must meet their burden of proving that Hispanics constitute more than 50% of the relevant population in their demonstration district.

[5] Finally, this court has already determined what factors limit the relevant population in the district: voting-age and citizenship. This was made clear in *Campos v. City of Houston,* 113 F.3d 544, 548 (5th Cir.1997) (courts "must consider the citizen voting-age population" in evaluating the first *Gingles* factor). *See also Perez v. Pasadena Indep. Sch. Dist.,* 165 F.3d 368 (5th Cir.1999). Given that the Supreme Court has avoided the issue of what population to use for the first *Gingles* factor,[3] and that other circuits have used the

same approach as *Campos,* [4] the district court used the correct legal test here.

IV.

In this case, evaluating the district court's application of that test involves two questions: whether the School Board's evidence was adequate to counter the Plaintiffs' census data, and whether the district court abused its discretion in excluding the Plaintiffs' proposed rebuttal evidence.

A.

[6] Except for a cavil, the parties and the district court essentially agree about what standard should be required to overcome census data. [5] As the district court summarized it:

> [C]ensus figures are presumed accurate until proven otherwise. Proof of changed figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to override ***854** the presumptive correctness of the prior decennial census.
>
> This standard appears to be an elaboration on one used by the Seventh Circuit. *See McNeil v. Springfield Park Dist.,* 851 F.2d 937, 946 (7th Cir.1988). Two Fifth Circuit cases are relevant. [6] The first is *Westwego II,* which, as mentioned above, opened the door to the use of non-census data when census data are not sufficiently probative of the voting-age proportion of a population. *See Westwego,* 906 F.2d at 1045 n. 3. The second is *Perez,* in which this court affirmed a district court's decision that the plaintiffs' population projections were too unreliable to overcome 1990 census data. *See Perez,* 165 F.3d at 371. Based on *Westwego* and *Perez,* the district court properly acknowledged the persuasiveness of census data while admitting evidence that demonstrated its inaccuracy in this case. Because the district court found that the School Board's 1997 population data overcame the 1990 census figures, the question is whether that finding was clearly erroneous.

[7] The Plaintiffs present a laundry list of purported problems concerning the methodology of Rives, the School Board's demographics expert. The School Board's responses as well as Rives's cross-examination at trial suffice to show that the Plaintiffs' challenges are generally misdirected, exaggerations of hypothetical problems, based upon criticisms of assumptions that played no role in Rives's methodology, or based on the analysis in Rives's superseded 1995 reports. The Plaintiffs' most emphatic argument—that Rives himself admitted his April Report was "wrong"—is overstated, because Rives did so only in the context of explaining how the August Report was based on more current data and corrected a calculation error. Rives's admissions did not affect the underlying finding of both the April and August Reports: the Plaintiffs' demonstration district did not contain a majority of Hispanic voting-age citizens.

The general description of Rives's methodology given above reveals that the *Gingles I* issues in this case do not involve any complicated statistical formulae or tests of significance that might bedazzle or bamboozle an unwary district court. *Cf. Overton v. City of Austin,* 871 F.2d 529, 544–45 (5th Cir.1989) (Jones, J., concurring) (discussing some district courts' ill-founded assumptions about the levels at which correlation coefficients become statistically significant). The data here were relatively simple; their manipulation involved only rudimentary arithmetic.

[8] **[9]** **[10]** Under these circumstances, the district court did not clearly err in deciding that Rives's report was clear and convincing in its demonstrated of sufficient post-census demographic changes to erode the Hispanic majority in the Plaintiffs' demonstration district. In doing so, we take special note of the School Board's responses to the Plaintiffs' three weightiest methodological criticisms, each of which the district court could have credited without committing clear error: (1) the housing stock methodology can be appropriate for calculating population changes in small areas, (2) it was appropriate to account for some apartment complexes by projecting their imminent populations at the end of ongoing lease-up periods, and (3) despite some lapses, the municipal power company's records of new electrical hook-ups were an accurate gauge of newly developed housing in the entire school district. Further, the School Board's methodology was much more sophisticated than the crude straight-line population projection that was rejected in ***855** *Perez. See Perez v. Pasadena Indep. Sch. Dist.,* 958 F.Supp. 1196, 1212–13 (S.D.Tex.1997), *aff'd* 165 F.3d 368 (5th Cir.1999).

B.

Even if the district court properly credited the School Board's post-census demographic evidence, the Plaintiffs argue that

it abused its discretion by excluding their proposed rebuttal evidence about post-census populations.

The district court excluded any evidence from Korbel's last-minute survey "because it unfairly surprised the Defendants," citing W.D. TEX. R. CV–16(e), under which the district court may, "upon the showing of good cause," permit a party to supplement the written summary of an expert's proposed testimony. [7]

On appeal, the Plaintiffs offer two reasons why their evidence was not an unfair surprise: (1) Korbel had testified in his deposition that Hispanic population was available south of the demonstration district; and (2) the survey was done in response to "new methodologies and numbers" in Rives's August Report and was made available as soon as it was completed.

[11] The Plaintiffs' first reason fails to account for how modern discovery handles expert witnesses. The Local Rule required a "written summary of [Korbel's] proposed testimony." It further required that summary to include "the basis of the opinions which purport to be the testimony of the witness" and "specific references to any exhibits that will be used by the witness in support of any opinions." W.D. TEX. R. CV–16(e) & note. It can scarcely be maintained that Korbel's cursory reference in a deposition could serve as adequate notice of his intent to rely on a door-to-door survey of a specific neighborhood. Nor could that deposition response have provided sufficient information for the School Board to prepare to cross-examine Korbel about the survey. *Cf. Sierra Club v. Cedar Point Oil Co.,* 73 F.3d 546, 571 (5th Cir.1996) (initial expert disclosures not sufficiently "complete and detailed" to meet discovery order).

[12] The Plaintiffs' second reason takes no account of the fact that the district court relied only upon Rives's April Report, the admissibility of which the Plaintiffs never contested. If the survey was made necessary only by the novelty of the August Report, then apparently it could not have been detrimental to the Plaintiffs to exclude both.

In sum, the court did not abuse its discretion by excluding this evidence for unfair surprise when the proffering party failed to meet its duty to supplement its expert disclosures. *See Alldread v. City of Grenada,* 988 F.2d 1425, 1436 (5th Cir.1993) (no error in excluding expert witness' testimony when information crucial to understanding it was not provided until two weeks prior to trial); *Mills v. Beech Aircraft Corp.,* 886 F.2d 758, 764 (5th Cir.1989) (proper use of discretion to exclude results from tests conducted by plaintiffs' expert the week before trial). [8]

Because it was not an abuse of discretion to exclude the survey results on the grounds of unfair surprise, we need not address whether Korbel's survey would have constituted proper rebuttal testimony.

***856 V.**

For the foregoing reasons, the district court properly placed the burden on the Plaintiffs to prove a majority of Hispanics among voting-age citizens in their demonstration district; the district court did not clearly err in finding the School Board presented sufficient evidence to prove demographic changes since the census; and the district court did not abuse its discretion in excluding the Plaintiffs' proposed rebuttal testimony for unfair surprise.

The judgment of the district court is AFFIRMED.

All Citations

168 F.3d 848, 132 Ed. Law Rep. 718

Footnotes

1 The "demonstration district" is the hypothetical single-member district used by voting rights plaintiffs to demonstrate that they can satisfy the first *Gingles* factor (*i.e.,* that their group could constitute a majority in a single-member district). Because the AHISD Board of Trustees has seven members, the Plaintiffs must propose a demonstration district that would be appropriate if the at-large district were divided into seven single-member districts.

2 In *Voinovich v. Quilter,* the Supreme Court did say, "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." 507 U.S. 146, 158, 113 S.Ct. 1149, 1157, 122 L.Ed.2d 500 (1993). The Court did so, however, because it was adapting the *Gingles* test, which was designed for challenges to multimember districts, so that it could be used for challenges to the packing of minority voters into existing single-member districts. Because that

changed context is not relevant to this case, which challenges a multimember district, plaintiffs have no need to invoke non-mechanical application of the *Gingles* factors.

3 *See Johnson v. De Grandy,* 512 U.S. 997, 1008–09, 114 S.Ct. 2647, 2656–57, 129 L.Ed.2d 775 (1994); *Growe v. Emison,* 507 U.S. 25, 38 n. 4, 113 S.Ct. 1075, 1083 n. 4, 122 L.Ed.2d 388 (1993).

4 *See Negron v. City of Miami Beach,* 113 F.3d 1563 (11th Cir.1997) (using citizen voting-age population for first *Gingles* factor); *Romero v. City of Pomona,* 883 F.2d 1418 (9th Cir.1989) (same), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.,* 914 F.2d 1136, 1141 (9th Cir.1990). *Cf. Barnett v. City of Chicago,* 141 F.3d 699, 704 (7th Cir.1998) (Posner, C.J.) (using citizen voting-age population to determine proportionality for Section 2 challenge to gerrymandering of single-member districts), *cert. denied sub nom. Bialczak v. Barnett,* 524 U.S. 954, 118 S.Ct. 2372, 141 L.Ed.2d 740 (1998).

5 The cavil is that Plaintiffs attempt to articulate a two-step test: "The decennial census is controlling unless there exists 'clear, cogent and convincing evidence' that the decennial figures are no longer valid *and* that other figures *are* valid." For this proposition, however, they cite only *Garza v. County of Los Angeles,* 756 F.Supp. 1298, 1345 (C.D.Cal.1990). In fact, the *Garza* court specifically rejected the notion of a two-step test:

> 17. In order to overcome the presumption in favor of the 1980 census data, plaintiffs need not demonstrate that the census was inaccurate.
>
> 18. It is sufficient to conclude that there has been significant demographic changes [*sic*] since the decennial census and that there exist [ ] post-decennial population data that more accurately reflect[ ] evidence of the current demographic conditions.

Id.

6 The only Supreme Court authority on this matter is indirect. *See Karcher v. Daggett,* 462 U.S. 725, 732 n. 4, 103 S.Ct. 2653, 2659 n. 4, 77 L.Ed.2d 133 (1983) (in reapportionment, a state cannot "correct" census figures "in a haphazard, inconsistent, or conjectural manner"); *Kirkpatrick v. Preisler,* 394 U.S. 526, 535, 89 S.Ct. 1225, 1231, 22 L.Ed.2d 519 (1969) (a state can consider post-census population shifts in redistricting if its findings are "thoroughly documented and applied throughout the state in a systematic, not an *ad hoc,* manner"). The Ninth Circuit refused to apply the Seventh Circuit's "high standard" of "clear and convincing" evidence "in a case where intentional discrimination has been proved, and the data is merely to be used in fashioning a remedy." *Garza v. County of Los Angeles,* 918 F.2d 763, 773 n. 3 (9th Cir.1990).

7 Alternatively, in a footnote, the district court noted that the methodology and execution of Korbel's survey were too flawed for the results to overcome the presumptive correctness of the 1990 census. Although it appears quite compelling, the School Board does not press this line of argument, and we need not pursue it since we hold that the evidence was properly excluded due to unfair surprise.

8 The survey evidence was also unnecessary once the district court excluded the District's August Report. This satisfies the first factor of a four-factor test that has sometimes been applied in evaluating a district court's exercise of discretion: "(1) the importance of the witness's testimony; (2) the prejudice to the opposing party of allowing the witness to testify; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to identify the witness." *Bradley v. United States,* 866 F.2d 120, 125 (5th Cir.1989). *See also Sierra Club,* 73 F.3d at 572 (using same four factors in evaluating exclusion of evidence as sanction for violating discovery order). The Plaintiffs would also appear to fare quite poorly on the fourth factor, since it was obvious from the beginning that the School District would present evidence of 1997 population. Neither party addresses the four-factor test on appeal, though the School District discussed it in its original motion to strike.

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918 F.2d 763
United States Court of Appeals,
Ninth Circuit.

Yolanda GARZA; Salvador Ledezma; Raymond Palacios; Monica Tovar, Guadalupe De La Garza, Plaintiffs–Appellees,
v.
COUNTY OF LOS ANGELES, Board of Supervisors, Los Angeles County; Deane Dana; Peter F. Schabarum; Kenneth F. Hahn, Defendants–Appellants.
UNITED STATES Of America, Plaintiff–Appellee,
and
Lawrence K. Irvin; Sarah Flores, Intervenors–Appellees,
v.
COUNTY OF LOS ANGELES, Board of Supervisors, Los Angeles County; Deane Dana; Peter F. Schabarum; Kenneth F. Hahn, et al., Defendants–Appellants.

Nos. 90–55944, 90–55945 and 90–56024.
| Argued and Submitted Oct. 10, 1990.
| Decided Nov. 2, 1990. | Certiorari Denied Jan. 7, 1991. | See 111 S.Ct. 681.

Hispanic residents of county, joined by the United States, filed voting rights action seeking redrawing of county supervisor districts. The United States District Court for the Central District of California, David V. Kenyon, J., denied county supervisor candidate's motion to intervene, found intentional discrimination in present districting, and imposed districting plan, which created district in which majority of voting age citizen population was Hispanic. County appealed from decision entered in main case, and candidate appealed denial of motion to intervene. The Court of Appeals, Schroeder, Circuit Judge, held that: (1) fragmentation of Hispanic voting population to perpetuate incumbencies amounted to intentional discrimination; (2) noncensus data could be considered in adopting new districting plan; (3) apportionment in new plan was properly based on total population rather than on number of voting age citizens; (4) proposed redistricting plan offered by some supervisors was properly rejected; and (5) candidate was not entitled to intervene.

Affirmed in part; vacated in part and remanded.

Kozinski, Circuit Judge, filed separate opinion concurring and dissenting in part.

West Headnotes (14)

[1] **Election Law**
Apportionment and Reapportionment
Election Law
Vote Dilution

Voting Rights Act can be violated by both intentional discrimination in drawing of district lines and facially neutral apportionment schemes that have effect of diluting minority votes. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

4 Cases that cite this headnote

[2] **Constitutional Law**
Electoral districts and gerrymandering
Election Law
Vote Dilution

To extent redistricting plan deliberately minimizes minority political power, that may violate both Voting Rights Act and the equal protection clause. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

[3] **Election Law**
Compactness and cohesiveness of minority group

Minority voters challenging districting system need not show that they could constitute voter majority in single-member district if there is evidence of intentional dilution of minority voting strength. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

20 Cases that cite this headnote

[4] **Counties**

Nature and constitution in general

District court's findings that county supervisors intended to perpetuate their incumbencies in adopting districting plan and chose fragmentation of Hispanic voting population as avenue by which to achieve this self-preservation supported district court's conclusion of intentional discrimination in voting rights action. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[5] **Election Law**

Discriminatory practices proscribed in general

Even where there has been showing of intentional discrimination, plaintiffs in voting rights action must show that they have been injured as result; although showing of injury in cases involving discriminatory intent need not be as rigorous as in discriminatory effects cases, some showing of injury must be made to assure that district court can impose meaningful remedy. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

14 Cases that cite this headnote

[6] **Constitutional Law**

Electoral districts and gerrymandering

Counties

Nature and constitution in general

There was sufficient showing that Hispanic voters were injured by county supervisors' intentional discrimination in districting plan to establish violations of Voting Rights Act and equal protection clause, inasmuch as supervisors' intentional splitting of Hispanic core resulted in situation in which Hispanics had less opportunity than did other county residents to participate in political process and to elect legislators of their choice. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b); U.S.C.A. Const.Amend. 14.

15 Cases that cite this headnote

[7] **Counties**

Nature and constitution in general

Voting rights action challenging underrepresentation of Hispanics in districting for county supervisors was not barred by laches, despite delay in bringing suit since institution of last reapportionment plan and short time before next regularly scheduled reapportionment, inasmuch as violation was ongoing and each election deprived Hispanics of more and more of power accumulated through increased population. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[8] **Counties**

Nature and constitution in general

District court could order redistricting of county supervisor districts at point between regularly scheduled decennial reapportionments, upon finding unlawful vote dilution directed toward Hispanics; decennial redistricting was not constitutional maximum frequency for reapportionment, but rather was floor below which such frequency could not constitutionally fall. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[9] **Counties**

Nature and constitution in general

District court could use noncensus population data in remedying Hispanic vote dilution caused by county supervisor districting; district court was not required to rely on dated data from last census or to wait until next census before providing remedy. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

6 Cases that cite this headnote

[10] **Election Law**

Method of apportionment

While states apparently may consider distribution of voting population as well as that of total population in constructing electoral districts, they are not required to do so. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

11 Cases that cite this headnote

[11] **Counties**

Nature and constitution in general

Districting plan established by district court to remedy Hispanic vote dilution was properly based on total population rather than voting population, despite county's claim that many Hispanics in county were not citizens and that redistricting plan based upon population alone, in which Hispanics were concentrated in one district, weighted votes of citizens in that district more heavily than those of citizens in other districts; to consider only voters in adopting redistricting plan would be to deny aliens and minors their rights under the Constitution and would amount to denial of equal protection to Hispanic voters and rejection of valued heritage. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

18 Cases that cite this headnote

[12] **Counties**

Nature and constitution in general

District court could reject county supervisors' proposed districting plan and instead formulate its own plan, upon finding Hispanic vote dilution, though supervisors' plan included district with Hispanic majority, where supervisors' plan was not approved by enough supervisors to be regarded as board plan, and supervisors' plan used unnatural configurations in order to place Anglo incumbent in new Hispanic district, and fragmented some Hispanic communities in other districts in same manner in which board deliberately diluted Hispanic influence in past. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[13] **Counties**

Nature and constitution in general

District court's creation of county supervisor district with Hispanic majority, to remedy vote dilution, did not amount to unlawful reverse discrimination, absent any suggestion that redistricting plan somehow diluted voting strength of Anglo community in county; deliberate construction of minority controlled voting districts was exactly what Voting Rights Act authorized, and such districting, whether worked by court or by political entity in first instance, did not violate the Constitution. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

[14] **Federal Civil Procedure**

Time for intervention

Candidate for county supervisor was properly precluded from intervening, as of right or permissively, in voting rights action challenging Hispanic vote dilution in election of county supervisors, where candidate knew that lawsuit was pending at time she decided to run in election and that part of relief sought in action was districting plan that could affect outcome of election, and candidate did not petition to intervene until four months after she declared her candidacy and almost two years after proceedings were instituted; candidate's delay could not be excused on ground that trial entered into "new stage," where that new stage came about in general progression of case to close, rather than as result of change in law or factual circumstances. Fed.Rules Civ.Proc.Rule 24(a)(2), (b)(2), 28 U.S.C.A.; Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

22 Cases that cite this headnote

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Appeal from the United States District Court for the Central District of California.

Before SCHROEDER, NELSON, and KOZINSKI, Circuit Judges.

SCHROEDER, Circuit Judge:

INTRODUCTION

Hispanics in Los Angeles County, joined by the United States of America, filed this voting rights action in 1988 seeking a redrawing of the districts for the Los Angeles County Board of Supervisors. They alleged that the existing boundaries, which had been drawn after the 1980 census, were gerrymandered boundaries that diluted Hispanic voting strength. They sought redistricting in order to create a district with a Hispanic majority for the 1990 Board of Supervisors election in which two board members were to be elected.

[1] The Voting Rights Act, 42 U.S.C. § 1973, forbids the imposition or application of any practice that would deny or abridge, on grounds of race or color, the right of any citizen to vote. In 1980, a plurality of the Supreme Court held that this provision prohibited only intentional discrimination, and would not allow minorities ***766** to challenge practices that, although not instituted with invidious intent, diluted minority votes in practice. *City of Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). In response to this decision, Congress amended the Voting Rights Act in 1982 to add language indicating that the Act forbids not only intentional discrimination, but also any practice shown to have a disparate impact on minority voting strength. *See* 42 U.S.C. § 1973(b). Thus, after the 1982 amendment, the Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes.

[2] To the extent that a redistricting plan deliberately minimizes minority political power, it may violate both the Voting Rights Act and the Equal Protection Clause of the fourteenth amendment. *See Bolden,* 446 U.S. at 66–67, 100 S.Ct. at 1499. The plaintiffs in this case claimed that because the County had engaged in intentional discrimination in the drawing of district lines in 1981, the resulting boundaries violated both the Voting Rights Act and the Equal Protection Clause. They further claimed that, whether or not the vote dilution was intentional, the effect of the County's districting plan was the reduction of Hispanic electoral power in violation of the newly amended Voting Rights Act.

The district court held a three-month bench trial. At its conclusion the district court found that the County had engaged in intentional discrimination in the 1981 reapportionment, as it had in prior reapportionments, deliberately diluting the strength of the Hispanic vote. It also found that, regardless of intentional discrimination, the County's reapportionment plan violated the Voting Rights Act because it had the effect of diluting Hispanic voting strength. Finally, it found that, based on post-census data, it was possible to grant the remedy that the plaintiffs sought, which was a redistricting in which one of the five districts would have a Hispanic voting majority. It ordered the County to propose such a redistricting.

In its findings, the district court detailed the recent history of the Los Angeles County Board of Supervisors and the voting procedures by which it has been elected. At least since the beginning of this century, the Board has always consisted of five members, elected in even-numbered years to serve four-year terms. These elections are staggered so that two supervisors are elected one year, and three are elected two years later. Supervisors are elected in non-partisan elections, and a candidate must receive a majority of the votes cast in order to win. If no candidate receives such a majority, the two candidates who receive the highest number of votes must engage in a runoff contest.

The district court found persuasive the evidence showing that the Board had engaged in intentional discrimination in redistrictings that it undertook in 1959, 1965 and 1971.

The district court further found that the 1981 redistricting was calculated at least in part to keep the effects of those prior discriminatory reapportionments in place, as well as to prevent Hispanics from attaining a majority in any district in the future. The findings of the district court on the question of intentional discrimination are set forth in the margin. [1] After ***768** entering these findings and conclusions of law, the district court gave the County the opportunity to propose a new plan, as required by *Wise v. Lipscomb,* 437 U.S. 535, 540, 98 S.Ct. 2493, 2497, 57 L.Ed.2d 411 (1978).

Under the Los Angeles County Charter, any redistricting must be approved by four of the five members of the Board. In response to the court's order directing the County to propose a plan, three Board members submitted a proposal. The district court rejected that proposal with findings to support its conclusion that the proposal was less than a good faith effort to remedy the violations found in the existing districting. The court considered other proposals. On August 6 it accepted and imposed a plan which creates a district in which the majority of the voting age citizen population is Hispanic. The County then appealed and this court ordered the matter handled on an expedited basis.

There is a second appeal before us. It is from the district court's denial of a motion ***769** to intervene in the main case. During the course of the proceedings, there was a primary election under the existing districting plan. The incumbent supervisor, Edmund Edelman, received a majority of the votes in District 3, and thereby won that seat. In the District 1 contest, the incumbent did not seek reelection. No candidate received the required majority of the votes; therefore, the two front runners, Sarah Flores and Gregory O'Brien, were scheduled to compete in a runoff election on November 6, 1990.

During the remedial phase of these proceedings, one of those candidates, Sarah Flores, sought to intervene in this action in order to oppose any redistricting plan which would result in the need for a new primary election in which additional candidates could run for the seat she was seeking in District 1. The district court denied her petition to intervene and she appeals from that denial. We have jurisdiction of her appeal pursuant to 28 U.S.C. § 1291. *See California v. Block,* 690 F.2d 753, 776 (9th Cir.1982) (denial of motion to intervene is an appealable order).

I. *The County Appeal—Liability*

Plaintiffs filed this action in order to require the imposition of new district lines for the 1990 election of supervisors. The record shows without serious dispute that at the time of the decennial redistricting in 1981, it was not possible to draw a district map, with roughly equal population in each district, that contained a district with a majority of Hispanic voters. The district court found, however, that the County in 1981, as part of a course of conduct that began decades earlier, intentionally fragmented the Hispanic population among the various districts in order to dilute the effect of the Hispanic vote in future elections and preserve incumbencies of the Anglo members of the Board of Supervisors. The evidence in the record also shows that at the time that this action was filed it was possible to draw lines for five districts of roughly equal population size, as required by state law, with one single-member district having a majority of Hispanic voters.

The district court found the County liable for vote dilution on two separate theories. It found that the County had adopted and applied a redistricting plan that resulted in dilution of Hispanic voting power in violation of Section 2. It also found that the County, by establishing and maintaining the plan, had intentionally discriminated against Hispanics in violation of Section 2 and the Equal Protection clause of the fourteenth amendment.

In this appeal, the County's threshold argument is that districts drawn in 1981 are lawful, regardless of any intentional or unintentional dilution of minority voting strength, because at the time they were drawn there could be no single-member district with a majority of minority voters. The County asks us to extract from the Supreme Court's leading decision in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), and subsequent cases in this and other circuits, the principle that there can be no successful challenge to a districting system unless the minority challenging that system can show that it could, at the time of districting, constitute a voter majority in a single-member district.

In response to this position, the appellees argue that no majority requirement should be imposed where, as here, there has been intentional dilution of minority voting strength. The County thus also challenges the sufficiency of the district court's findings with regard to intent.

We hold that, to the extent that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength. We affirm the district court on the basis of its holding that the County engaged in intentional discrimination at the time the challenged districts were drawn.

A. The Background and Effect of Gingles

[3] In 1982, Congress amended Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, to provide minority groups a remedy for vote dilution without requiring a showing that the majority engaged in intentional ***770** discrimination. Congress set forth a non-exhaustive list of factors to guide courts in determining whether there had been a Section 2 violation. S.Rep. No. 417, 97th Cong., 2d Sess., pt. I at 28–29, U.S.Code Cong. & Admin.News 1982, pp. 206–207. Congress indicated that in applying these factors, courts should engage in a "searching practical evaluation of the 'past and present reality' " of the political system in question. *Id.* at 30, U.S.Code Cong. & Admin.News 1982, p. 208. Creation of this "results" test for discrimination under Section 2 did not affect the remedies under Section 2 for intentional discrimination. *Id.* at 27.

In *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court discussed the meaning of the new amendment. While noting the factors the Senate had set out as indicators of impermissible vote dilution, it stated that a court must look to the totality of the circumstances in considering a vote dilution claim. It also established three preconditions for liability under the amendment to Section 2 for claims based only on discriminatory effects: (1) geographical compactness of the minority group; (2) minority political cohesion; and (3) majority block voting. 478 U.S. at 50–51, 106 S.Ct. at 2766–67.

The *Gingles* requirements were articulated in a much different context than this case presents. Although the *Gingles* Court was aware of the history of discrimination against blacks, which was the minority there in question, the Court did not consider any claim that the disputed districting plan had been enacted deliberately to dilute the black vote. *See* 478 U.S. at 80, 106 S.Ct. at 2760–61. The claim at issue was that the multi-member districts that were being used, regardless of the intent with which they were created, had the effect of diluting the black vote. 478 U.S. at 39–41, 106 S.Ct. at 2781–82. Thus, the court instituted the "possibility of majority" requirement in a case in which it was asked to invalidate a political entity's choice of a multi-member district system, and impose a system of single-member districts, and was not asked to find that the multi-member scheme had been set up with a discriminatory purpose in mind.[2] An emphasis on showing a statistically significant disparate impact is typical of claims based on discriminatory effect as opposed to discriminatory intent.

In contrast, the district court in this case found that the County had adopted its current reapportionment plan at least in part with the intent to fragment the Hispanic population. *See* Findings at 44 No. 81. The court noted that continued fragmentation of the Hispanic population had been at least one goal of each redistricting since 1959. Thus, the plaintiffs' claim is not, as in *Gingles,* merely one alleging disparate impact of a seemingly neutral electoral scheme. Rather, it is one in which the plaintiffs have made out a claim of intentional dilution of their voting strength.

***771** The County cites a number of cases in support of its argument that *Gingles* requires these plaintiffs to demonstrate that they could have constituted a majority in a single-member district as of 1981. None dealt with evidence of intentional discrimination. *See, e.g., Romero v. City of Pomona,* 883 F.2d 1418, 1422 (9th Cir.1989); *McNeil v. Springfield Park,* 851 F.2d 937 (7th Cir.1988), *cert. denied,* 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989); *Skorepa v. City of Chula Vista,* 723 F.Supp. 1384 (S.D.Cal.1989).

To impose the requirement the County urges would prevent any redress for districting which was deliberately designed to prevent minorities from electing representatives in future elections governed by that districting. This appears to us to be a result wholly contrary to Congress' intent in enacting Section 2 of the Voting Rights Act and contrary to the equal protection principles embodied in the fourteenth amendment.

B. The Findings of Intent

[4] We therefore turn to the appellants' challenge to the district court's rulings with respect to the intent of the supervisors in 1981. The County contends that the district court did not make sufficient findings on intentional discrimination. Focusing on language in Finding 177, quoted *supra* in note 1, the County claims that the district court found only that the supervisors in 1981 intended to perpetuate

their own incumbencies. This is a mistaken reading of what the district court found. Although the court noted that "the Supervisors appear to have acted primarily on the political instinct of self-preservation," the court also found that they chose fragmentation of the Hispanic voting population as the avenue by which to achieve this self-preservation. Finding No. 181. The supervisors intended to create the very discriminatory result that occurred. That intent was coupled with the intent to preserve incumbencies, but the discrimination need not be the sole goal in order to be unlawful. *See Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Accordingly, the findings of the district court are adequate to support its conclusion of intentional discrimination, and the detailed factual findings are more than amply supported by evidence in the record.

[5] [6] Even where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result. Although the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases, *some* showing of injury must be made to assure that the district court can impose a meaningful remedy.

That intent must result, according to the Voting Rights Act, in the

> political processes leading to nomination or election ... [not being] equally open to participation by members of a [protected] class ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b). This language is echoed in the intentional discrimination case of *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). There, in addition to intent, the Supreme Court required proof that "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 766, 93 S.Ct. at 2339. *See also Whitcomb v. Chavis,* 403 U.S. 124, 149, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363 (1971).

Applying that standard to this case of intentional discrimination, we agree with the district court that the supervisors' intentional splitting of the Hispanic core resulted in a situation in which Hispanics had less opportunity than did other county residents to participate in the political process and to elect legislators of their choice. We conclude, therefore, that this intentional discrimination violated both the Voting Rights Act and the Equal Protection Clause.

*772 C. Laches

[7] The County claims that, because four rounds of elections have occurred since the 1981 reapportionment plan was instituted, and because a regular reapportionment is scheduled to occur in 1991, the plaintiffs' claim for redistricting relief is barred on the ground of laches. It argues that substantial hardship will result from a redistricting now, when another regularly scheduled one is set to occur so closely on its heels. Furthermore, the County contends that the plaintiffs had no excuse for their delay in bringing suit. Therefore, it concludes, the suit should have been dismissed.

Although plaintiffs could have filed an action as early as 1981 in order to enhance their ability to influence the result in a district in which they were then still a minority, their failure to do so does not constitute laches. The record here shows that the injury they suffered at that time has been getting progressively worse, because each election has deprived Hispanics of more and more of the power accumulated through increased population. Because of the ongoing nature of the violation, plaintiffs' present claim ought not be barred by laches.

II. *The County Appeal—Remedy*

A. Redistricting Between Decennial Redistrictings

[8] The County contends that the district court erred in requiring it to redistrict now, at a point between regularly scheduled decennial reapportionments. Citing *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, *reh'g denied,* 379 U.S. 870, 85 S.Ct. 12, 13 L.Ed.2d 76 (1964), the County claims that decennial redistricting based upon census data is a "rule," and that that case "was intended to avoid" the confusion that might be associated with more frequent reapportionments.

The County misreads *Reynolds*. The Court in *Reynolds* instituted a requirement of periodic reapportionment based upon current population data. It stated that decennial reapportionment "would clearly meet the minimal requirements," and less frequent reapportionment would "assuredly be constitutionally suspect." 377 U.S. at 583–84, 84 S.Ct. at 1393. The Court further noted, however, that while more frequent apportionment was not constitutionally required, it would be "constitutionally permissible," and even "practicably desirable." *Id.* Thus, *Reynolds* did not institute a constitutional maximum frequency for reapportionment; rather, it set a floor below which such frequency may not constitutionally fall.

B. Use of Post–1980 Population Data

[9] The County further claims that the district court erred in considering any data other than data from the 1980 census. Since the 1980 census data does not suggest the possibility of creating a Hispanic majority district, the County claims that the plaintiffs must lose in their 1988 claim to redistrict to provide for such a district. This claim, too, misinterprets the case law on which it purports to rest.

Since *Reynolds* would permit redistricting between censuses, it appears to assume that post-census data may be used as a basis for such redistricting. Furthermore, in a subsequent opinion the Court noted with approval the possibility of using predictive data in addition to census data in designing decennial reapportionment plans. The court stated that "[s]ituations may arise where substantial population shifts over such a period [the ten years between redistricting] can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them." *Kirkpatrick v. Preisler,* 394 U.S. 526, 535, 89 S.Ct. 1225, 1231, 22 L.Ed.2d 519, *reh'g denied,* 395 U.S. 917, 89 S.Ct. 1737, 23 L.Ed.2d 231 (1969). *See also Burns v. Richardson,* 384 U.S. 73, 91, 86 S.Ct. 1286, 1296, 16 L.Ed.2d 376 (1966) ("the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which ... substantial population equivalency is to be measured."). The Court has never hinted that plaintiffs claiming present Voting Rights Act violations ***773** should be required to wait until the next census before they can receive any remedy.

The Fifth Circuit has held that non-census data may be considered in reapportionments between censuses if the relevant information cannot be obtained through census data. *Westwego Citizens for Better Government v. Westwego,* 906 F.2d 1042, 1045–46 (5th Cir.1990). Such a practice makes sense not only where, as in *Westwego* itself, census data on the population in question was unavailable because of the limited nature of the compilations and manipulations performed by the census; it is also logical where, as here, the census data is almost a decade old and therefore no longer accurate. [3]

The County contests the validity of the population statistics that the court employed. The district court's findings, however, present an extensive review of the data itself and of the methodology that produced it, coupled with an inquiry into its validity. The County has not offered any reason why the district court should have rejected this data, other than the fact that it does not come from the census. Since it was permissible for the district court to rely on non-census data, we find that the district court did not err in its assessment of the size and geographic distribution of the Hispanic population in Los Angeles.

The district court's findings concerning vote dilution may be set aside only if they are clearly erroneous. *Gingles,* 478 U.S. at 79, 106 S.Ct. at 2781. The findings at issue here were amply supported by the evidence that was before the district court.

C. Apportionment Based on Population Rather than Voting Age Citizen Data

[10] [11] The County contends that because the district court's reapportionment plan employs statistics based upon the total population of the County, rather than the voting population, it is erroneous as a matter of law. The County points out that many Hispanics in the County are noncitizens, and suggests that therefore a redistricting plan based upon population alone, in which Hispanics are concentrated in one district, unconstitutionally weights the votes of citizens in that district more heavily than those of citizens in other districts.

The district court adopted a plan with nearly equal numbers of persons in each district. [4] The districts deviated in population by sixty-eight hundredths of one percent. (Findings and Order Regarding Remedial Redistricting Plan and Election Schedule, 4). The variance is larger when the number of voting age citizens in each district is considered. [5]

The County is correct in pointing out that ***774** *Burns v. Richardson,* 384 U.S. 73, 91–92,86 S.Ct. 1286, 1296–97, 16 L.Ed.2d 376 (1966), seems to permit states to consider the distribution of the voting population as well as that of the total population in constructing electoral districts. It does not, however, *require* states to do so. In fact, the *Richardson* Court expressly stated that "[t]he decision to include or exclude [aliens or other nonvoters from the apportionment base] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." 384 U.S. at 92, 86 S.Ct. at 1296–97. *Richardson* does not overrule the portion of *Reynolds v. Sims,* 377 U.S. 533, 568, 84 S.Ct. 1362, 1385, 12 L.Ed.2d 506 (1964), that held that apportionment for state legislatures must be made upon the basis of population.

In *Reynolds,* 377 U.S. at 560–61, 84 S.Ct. at 1381, the Supreme Court applied to the apportionment of state legislative seats the standard enunciated in *Wesberry v. Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), that "the fundamental principle of representative government is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state." This standard derives from the constitutional requirement that members of the House of Representatives are elected "by the people," *Reynolds,* 377 U.S. at 560, 84 S.Ct. at 1381, from districts "founded on the aggregate number of inhabitants of each state" (James Madison, The Federalist, No. 54 at 369 (J. Cooke ed. 1961)); U.S. Const. art. I, § 2. The framers were aware that this apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the insane, and, at a later time, aliens. *Fair v. Klutznick,* 486 F.Supp. 564, 576 (D.D.C.1980). Nevertheless, they declared that government should represent *all* the people. In applying this principle, the *Reynolds* Court recognized that the people, including those who are ineligible to vote, form the basis for representative government. Thus population is an appropriate basis for state legislative apportionment.

Furthermore, California state law requires districting to be accomplished on the basis of total population. California Elections Code § 35000. No part of the holding in *Richardson,* or in any other case cited by the appellants, suggests that the requirements imposed by such state laws may be unconstitutional. In fact, in *Gaffney v. Cummings,* 412 U.S. 735, 747, 93 S.Ct. 2321, 2328, 37 L.Ed.2d 298 (1973), the Court approved a redistricting based on total population, but with some deviations based upon consideration of political factors. In approving that plan, the Court expressly noted that districting based upon total population would lead to some disparities in the size of the eligible voting population among districts. These differences arise from the number of people ineligible to vote because of age, alienage, or non-residence, and because many people choose not to register or vote. *Id.* at 746–47, 93 S.Ct. at 2328. The Court made no intimation that such disparities would render those apportionment schemes constitutionally infirm.

Even the limited latitude *Gaffney* affords state and local governments to depart from strict total population equality is unavailable here. The Supreme Court has held that unless a court ordering a redistricting plan can show that population variances are required by "significant state policies", that court must devise a plan that provides for districts of equal population. *Chapman v. Meier,* 420 U.S. 1, 24, 95 S.Ct. 751, 764, 42 L.Ed.2d 766 (1975). Since California law requires equality of total population across districts, there are no locally relevant contrary policies.

There is an even more important consideration. Basing districts on voters rather than total population results in serious population inequalities across districts. Residents of the more populous districts thus have less access to their elected representative. Those adversely affected are those who live in the districts with a greater percentage of non-voting populations, including aliens and children. Because there are more young people in the predominantly Hispanic District 1 (34.5% of the L.A. County Hispanic population (Findings of ***775** Fact and Conclusions of Law re: County's Remedial Plan, 5–6)), citizens of voting age, minors and others residing in the district will suffer diminishing access to government in a voter-based apportionment scheme.

The purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure "equal representation for equal numbers of people." *Kirkpatrick,* 394 U.S. at 531, 89 S.Ct. at 1229. Interference with individuals' free access to elected representatives impermissibly burdens their right to petition the government. *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137, 81 S.Ct. 523, 539, 5 L.Ed.2d 464, *reh'g denied,* 365 U.S. 875, 81 S.Ct. 899, 5 L.Ed.2d 864 (1961). Since "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives", this right to petition is an important corollary to the right to be represented. *Id.* Non-citizens

are entitled to various federal and local benefits, such as emergency medical care and pregnancy-related care provided by Los Angeles County. California Welfare and Institutions Code §§ 14007.5, 17000. As such, they have a right to petition their government for services and to influence how their tax dollars are spent.

In this case, basing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district. Such a plan would dilute the access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative. For over a century, the Supreme Court has recognized that aliens are "persons" within the meaning of the fourteenth amendment to the Constitution, entitled to equal protection. *See Yick Wo v. Hopkins,* 118 U.S. 356, 368, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886). This equal protection right serves to allow political participation short of voting or holding a sensitive public office. *See Bernal v. Fainter,* 467 U.S. 216, 104 S.Ct. 2312, 81 L.Ed.2d 175 (1984) (law that would have denied alien the right to become a notary public and thereby assist in litigation for the benefit of migrant workers struck down under strict scrutiny equal protection analysis); *Nyquist v. Mauclet,* 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 63 (1977) (state's interest in educating its electorate does not justify excluding aliens from state scholarship program, since aliens may participate in their communities in ways short of voting). Minors, too, have the right to political expression. *Tinker v. Des Moines Community School Dist.,* 393 U.S. 503, 511–13, 89 S.Ct. 733, 739–40, 21 L.Ed.2d 731 (1969). To refuse to count people in constructing a districting plan ignores these rights in addition to burdening the political rights of voting age citizens in affected districts.

The principles were well expressed by the California Supreme Court in its opinion in *Calderon v. City of Los Angeles,* 4 Cal.3d 251, 258–59, 93 Cal.Rptr. 361, 365–66, 481 P.2d 489 (1971), in holding that the United States Constitution requires apportionment by total population, not by voting population.

> Although we are, of course, constrained by the supremacy clause (U.S. Const., art VI, cl. 2) to follow decisions of the Supreme Court on matters of constitutional interpretation, we emphasize that we do so here not only from constitutional compulsion but also as a matter of conviction. Adherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government.
>
> Thus a 17–year–old, who by state law is prohibited from voting, may still have strong views on the Vietnam War which he wishes to communicate to the elected representative from his area. Furthermore, much of a legislator's time is devoted to providing services and information to his constituents, both voters and nonvoters. A district which, although large in population, has a low percentage of registered voters would, under a voter-based apportionment, have fewer representatives to provide such assistance ***776** and to listen to concerned citizens. (footnote omitted).

Judge Kozinski's dissent would require districting on the basis of voting capability. Adoption of Judge Kozinski's position would constitute a denial of equal protection to these Hispanic plaintiffs and rejection of a valued heritage.

D. Rejection of the Supervisors' Proposal

[12] After it found that the County's districting plan was statutorily and constitutionally invalid, the district court gave the County 20 days to develop and propose a remedial plan of its own. The County submitted a plan, but the district court rejected it because, although it did create a district that had a Hispanic majority, it unnecessarily fragmented other Hispanic populations in the County. The district court found that such fragmentation posed an impediment to Hispanic political cohesiveness. Furthermore, the district court objected to the placement of the Hispanic majority district in a section controlled by a powerful incumbent, rather than in the one section that had a naturally occurring open seat, an open seat that was "in the heart of the Hispanic core." For these reasons, the district court found that the County's plan did not represent a good faith effort to remedy the violation.

The County objects to the district court's rejection of its proposal. It argues that the district court may not substitute "even what it considers to be an objectively superior plan for an otherwise constitutionally and legally valid plan," citing *Wright v. City of Houston,* 806 F.2d 634 (5th Cir.1986); *Seastrunk v. Burns,* 772 F.2d 143, 151 (5th Cir.1985).

However, there appear to be at least two fundamental reasons why the district court was not required to defer to the plan put forward by the supervisors in this case. First, as two of the supervisors themselves point out in their separate

brief on the issue, the plan that the Board submitted to the district court could not, under the County's charter, have been considered a *Board* Redistricting plan, because only three members voted in favor of it, not the four required for such matters. Los Angeles County Charter, Art. II, Sec. 7 (1985). Thus, the proposal was not an act of legislation; rather, it was a suggestion by some members of the Board, entitled to consideration along with the other suggestions that had been received. Second, the district court found that it did not constitute a good faith attempt to remedy the violation because, *inter alia,* it used unnatural configurations in order to place an Anglo incumbent in the new Hispanic district, and it fragmented some Hispanic communities in other districts in the same manner in which the Board had deliberately diluted Hispanic influence in the past.

E. The County's Claim of Reverse Discrimination

[13] The County argues that, by deliberately creating a district with a Hispanic majority, the district court engaged in discrimination in favor of a minority group of the type forbidden by *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). It claims to have had a valid defense based upon the district court's "creation of an equal protection violation in order to establish a Section 2 claim." The district court erred, it contends, in refusing to address this constitutional defense.

The County makes no suggestion, however, that the redistricting plan somehow dilutes the voting strength of the Anglo community. The deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes. Such districting, whether worked by a court or by a political entity in the first instance, does not violate the constitution. *United Jewish Organizations v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). For that reason, the district court properly refused to consider the appellants' constitutional defense.

III. *The Flores Appeal*

[14] Sarah Flores appeals from the district court's denial of her petition to intervene. Her petition was based upon her *777 interest in the outcome of the suit as a candidate in the election that stood to be invalidated. Under the plan adopted by the district court, she would be eligible to run for election in the new Hispanic district. Under the status quo, she was scheduled to participate in a runoff election against one other candidate. The district court dismissed her petition to intervene because it was untimely and because, in any event, the interests that she claimed to advocate either were already represented in the case or had not been proven to exist.

A party is entitled to intervene as of right under Fed.R.Civ.Pro. 24(a)(2) if that party moves to do so in a timely fashion and asserts an interest in the subject of the litigation, shows that the asserted interest stands to be impeded or impaired if the litigation goes forth without intervention, and demonstrates that the interest is not adequately represented by the parties to the litigation. *Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d 525, 527 (9th Cir.1983). In determining whether a motion to intervene is timely, a court must consider whether intervention will cause delay that will prejudice the existing parties. *United States v. Oregon,* 745 F.2d 550, 552 (9th Cir.1984).

Where a would-be intervenor does not demonstrate interests sufficiently weighty to warrant intervention as of right, the court may nevertheless consider eligibility for permissive intervention under Fed.R.Civ.Pro. 24(b)(2). Courts will allow such intervention where the intervenor raises a claim that has questions of law or fact in common with the main case, shows independent grounds for jurisdiction, and moves to intervene in a timely fashion. *Venegas v. Skaggs,* 867 F.2d 527, 529 (9th Cir.1989), *aff'd,* 495 U.S. 82, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990). The decision to grant or deny this type of intervention is discretionary, subject to considerations of equity and judicial economy. *Id.* at 530–31. Sarah Flores sought both intervention as of right and, in the alternative, permissive intervention in the proceedings below. The district court denied intervention on either ground.

This ruling was correct. Flores knew that this lawsuit was pending at the time when she decided to run in the election, and knew that part of the relief sought was a redistricting plan that could affect the outcome of that election. She did not petition to intervene until four months after she declared her candidacy, which was almost two years after the proceedings had been instituted. While Flores points out that the entry of a trial into a "new stage" may be the appropriate point for intervention, such is only the case where the new phase develops as a result of a change in the law or the factual circumstances. *See United States v. Oregon,* 745 F.2d 550 (9th Cir.1984). Here, the new phase came about in the general progression of the case to a close. It was a foreseeable part of a chain of events. Therefore, Flores' delay cannot be excused

on this ground. Introduction of a new party at that late stage could have resulted in irreversible prejudicial delay in a case where time was of the essence.

IV. *The Election*

A motions panel of this court entered an order which had the effect of staying the County's election procedures pending our decision. Because the time schedule originally contemplated by the district court's order can no longer be followed, we REMAND for the district court to impose a new schedule pursuant to which the primary, and if necessary, a general election can be conducted. Because it is imperative that such election procedures go forward as soon as practicable, the opinion of this panel shall constitute the mandate.

The judgment of the district court on liability and its decision as to remedy are AFFIRMED. The scheduling provisions of the district court's order of August 6, 1989 are VACATED and the matter is REMANDED for the purpose of determining the schedule for elections under the district court's redistricting plan. We issue the mandate now because 42 U.S.C. § 1971(g) requires that voting rights cases "be in every way expedited."

***778** AFFIRMED IN PART; VACATED IN PART AND REMANDED. THE MANDATE SHALL ISSUE FORTHWITH.

KOZINSKI, Circuit Judge, concurring and dissenting in part:

I. Liability

A determination by a federal court that elected officials have intentionally discriminated against some of their constituents is a matter of no little moment. While I join the liability portion of Judge Schroeder's opinion without reservation, I write briefly to explain, for the benefit of those not conversant with the esoterica of federal discrimination law, what today's ruling means—and what it does not.

First the good news. Nothing in the majority opinion, or in the district court's findings which we review and approve today, suggests that the County supervisors who adopted the 1981 reapportionment—all of whom are still in office—harbored any ethnic or racial animus toward the Los Angeles Hispanic community. In other words, there is no indication that what the district court found to be intentional discrimination was based on any dislike, mistrust, hatred or bigotry against Hispanics or any other minority group. Indeed, the district court seems to have found to the contrary. *See Garza v. County of Los Angeles,* Nos. 88–5143 & 88–5435, at 7 (C.D.Cal. June 4, 1990) ("The Court believes that had the Board found it possible to protect their incumbencies while increasing Hispanic voting strength, they would have acted to satisfy both objectives."). [1]

Which brings us to what this case *does* stand for. When the dust has settled and local passions have cooled, this case will be remembered for its lucid demonstration that elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities. The careful findings of the district court graphically document the pattern—a continuing practice of splitting the Hispanic core into two or more districts to prevent the emergence of a strong Hispanic challenger who might provide meaningful competition to the incumbent supervisors. The record is littered with telltale signs that reapportionments going back at least as far as 1959 were motivated, to no small degree, by the desire to assure that no supervisorial district would include too much of the burgeoning Hispanic population.

But the record here illustrates a more general proposition: Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for political challengers; incumbents greet the emergence of such power bases in their districts with all the hospitality corporate managers show hostile takeover bids. What happened here—the systematic splitting of the ethnic community into different districts—is the obvious, time-honored and most effective way of averting a potential challenge. Incumbency carries with it many other subtle and not-so-subtle advantages, *see* Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency,* 49 Ohio St.L.J. 773, 774–81 (1988), and incumbents who take advantage of their status so as to assure themselves a secure seat at the expense of emerging minority candidates may well be violating the Voting Rights Act. Today's case barely opens the door to our understanding of the potential relationship between the preservation of incumbency and invidious discrimination, but it surely ***779** gives weight to the Seventh Circuit's observation that "many devices employed to preserve incumbencies are necessarily racially discriminatory." *Ketchum v. Byrne,* 740 F.2d 1398, 1408 (7th

Cir.1984), *cert. denied,* 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985).

The Supreme Court in *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986), left open whether and under what circumstances political gerrymandering may amount to a violation of the Voting Rights Act. *Id.* at 118 n. 8, 106 S.Ct. at 2803 n. 8. The record before us strongly suggests that political gerrymandering tends to strengthen the grip of incumbents at the expense of emerging minority communities. Where, as here, the record shows that ethnic or racial communities were split to assure a safe seat for an incumbent, there is a strong inference—indeed a presumption —that this was a result of intentional discrimination, even absent the type of smoking gun evidence uncovered by these plaintiffs. State and local officials nationwide might well take this lesson to heart as they go about the task of decennial redistricting.

II. The Remedy

While I enthusiastically join the majority as to liability, I have two points of disagreement as to the remedy. The first is really just a quibble: I agree with the majority that the County's proposed plan was not entitled to any deference. The Los Angeles County Charter requires at least four supervisors to pass a reapportionment plan. Los Angeles County Charter Art. 2, § 7. Since two of the five supervisors opposed the plan proposed by the County, *see* maj. op. at 776, it is obvious that the "proposal was not an act of legislation; rather, it was a suggestion by some members of the Board," *id.,* not entitled to the special deference afforded apportionment plans that are the legislative act of the apportioning body.

The majority's alternative reason for upholding the district court's rejection of the plan, contained in the last sentence of part II.D of the opinion, is therefore dicta, and dicta about which I harbor some doubt. It is not at all clear to me that, had the Board of Supervisors adopted the apportionment plan proposed by the County, the reasons relied on by the district court for rejecting the plan would be sufficient. Certainly the issue is far more difficult than the majority's casual reference acknowledges. I would prefer to see a more detailed discussion of the issue before adopting the majority's conclusion as the law of the circuit, but a more extensive discussion is inappropriate, as it's all dicta anyhow. The more prudent course would be to reserve the issue for a day when it is squarely presented to us.

My second disagreement is more substantive; I cannot agree with the majority's conclusion, contained in part II.C of the opinion, that the district court's reapportionment plan complies with the one person one vote principle announced by the Supreme Court in *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). While the majority may ultimately be vindicated, its conclusion is hard to square with what the Supreme Court has said on this issue up to now.

A. Before plumbing the doctrinal waters in this murky area of constitutional law, it is worth stating exactly what the County is complaining about. In drawing the remedial plan in this case, the district court adhered closely to state law which calls for supervisorial districts that are equal in population. In doing so, the court wound up with two districts where the numbers of voting age citizens are markedly lower than those in the three other districts. [2] The disparity is particularly ***780** great between Districts 1 and 3. District 1 has 707,651 eligible voters while District 3 has 1,098,663, a difference of 391,012, about 55% of the eligible voters in District 1. Since it takes a majority in each district to elect a supervisor, this means that the supervisor from District 1 can be elected on the basis of 353,826 votes (less than the *difference* between the two districts), while the supervisor from District 3 requires at least 549,332 votes. Put another way, a vote cast in District 1 counts for almost twice as much as a vote cast in District 3.

B. Does a districting plan that gives different voting power to voters in different parts of the county impair the one person one vote principle even though raw population figures are roughly equal? It certainly seems to conflict with what the Supreme Court has *said* repeatedly. For example, in *Reynolds,* the Court stated: "Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." 377 U.S. at 563, 84 S.Ct. at 1382. The Court also stated: "With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live," *id.* at 565, 84 S.Ct. at 1383; and "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State," *id.* at 568, 84 S.Ct. at 1385; [3] and "the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives," *id.* at 567, 84 S.Ct. at 1384.

Almost identical language appears in numerous cases both before *Reynolds, see, e.g., Wesberry v. Sanders,* 376 U.S. 1, 8, 84 S.Ct. 526, 530, 11 L.Ed.2d 481 (1964) ("To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People.' "); *Gray v. Sanders,* 372 U.S. 368, 379, 83 S.Ct. 801, 808, 9 L.Ed.2d 821 (1963) ("Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote —whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." [4]); and after, *see, e.g., Hadley v. Junior College Dist.,* 397 U.S. 50, 56, 90 S.Ct. 791, 795, 25 L.Ed.2d 45 (1970) ("[W]hen members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."); *Chapman v. Meier,* 420 U.S. 1, 24, 95 S.Ct. 751, 764, 42 L.Ed.2d 766 (1975) ("All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group."); *Lockport v. Citizens for Community Action,* 430 U.S. 259, 265, 97 S.Ct. 1047, 1052, 51 L.Ed.2d 313 (1977) ("[I]n voting for their legislators, all citizens have an equal interest in representative democracy, and ... the concept of equal protection therefore requires that their votes be given equal weight.").

The Court adhered to the same formulation as recently as two Terms ago: "In calculating the deviation among districts, the relevant inquiry is whether 'the vote of any citizen is approximately equal in ***781** weight to that of any other citizen.' " *Board of Estimate v. Morris,* 489 U.S. 688, 109 S.Ct. 1433, 1441, 103 L.Ed.2d 717 (1989) (quoting *Reynolds,* 377 U.S. at 579, 84 S.Ct. at 1390).

Despite these seemingly clear and repeated pronouncements by the Supreme Court, the majority's position is not without support, as the Court has also said things suggesting that equality of population is the guiding principle. *See, e.g., Reynolds,* 377 U.S. at 568, 84 S.Ct. at 1385 ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."); *Mahan v. Howell,* 410 U.S. 315, 321, 93 S.Ct. 979, 983, 35 L.Ed.2d 320 (1973) ("[T]he basic constitutional principle [is] equality of population among the districts."); *Kirkpatrick v. Preisler,* 394 U.S. 526, 530, 89 S.Ct. 1225, 1228, 22 L.Ed.2d 519 (1969) (" '[E]qual representation for equal numbers of people [is] the fundamental goal for the House of Representatives.' " (quoting *Wesberry,* 376 U.S. at 18, 84 S.Ct. at 535)).

In most cases, of course, the distinction between the two formulations makes no substantive difference: Absent significant demographic variations in the proportion of voting age citizens to total population, apportionment by population will assure equality of voting strength and vice versa. Here, however, we *do* have a demographic abnormality, and the selection of an apportionment base does make a material difference: Apportionment by population can result in unequally weighted votes, while assuring equality in voting power might well call for districts of unequal population.

How does one choose between these two apparently conflicting principles? It seems to me that reliance on verbal formulations is not enough; we must try to distill the theory underlying the principle of one person one vote and, on the basis of that theory, select the philosophy embodied in the fourteenth amendment. Coming up with the correct theory is made no easier by the fact that the Court has been less than consistent in its choice of language and that, as Justice Harlan pointed out in his *Reynolds* dissent, "both the language and history of the controlling provisions of the Constitution [have been] wholly ignored" by the Court, 377 U.S. at 591, 84 S.Ct. at 1397 (Harlan, J., dissenting), making it impossible to rely on the Constitution for any meaningful guidance. Still we must try.

C. While apportionment by population and apportionment by number of eligible electors normally yield precisely the same result, they are based on radically different premises and serve materially different purposes. Apportionment by raw population embodies the principle of equal representation; it assures that all persons living within a district—whether eligible to vote or not—have roughly equal representation in the governing body. [5] A principle of equal representation serves important purposes: It assures that constituents have more or less equal access to their elected officials, by assuring that no official has a disproportionately large number of constituents to satisfy. Also, assuming that elected officials are able to obtain benefits for their districts in proportion to their share of the total membership of the governing body, it assures that constituents are not afforded unequal government

services depending on the size of the population in their districts.

Apportionment by proportion of eligible voters serves the principle of electoral equality. This principle recognizes that electors—persons eligible to vote—are the ones who hold the ultimate political power in our democracy. This is an important power reserved only to certain members of society; states are not required to bestow it upon aliens, transients, short-term residents, persons convicted of crime, or those considered too young. *See* ***782** J. Nowak, R. Rotunda & J.N. Young, Constitutional Law § 14.31, at 722–23 (3d ed. 1986).

The principle of electoral equality assures that, regardless of the size of the whole body of constituents, political power, as defined by the number of those eligible to vote, is equalized as between districts holding the same number of representatives. It also assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location. Under this paradigm, the fourteenth amendment protects a right belonging to the individual elector and the key question is whether the votes of some electors are materially undercounted because of the manner in which districts are apportioned.

It is very difficult, in my view, to read the Supreme Court's pronouncements in this area without concluding that what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation. To begin with, the name by which the Court has consistently identified this constitutional right—one person one vote—is an important clue that the Court's primary concern is with equalizing the voting power of electors, making sure that each voter gets one vote—not two, five or ten, *Reynolds,* 377 U.S. at 562, 84 S.Ct. at 1381; or one-half.

But we need not rely on inferences from what is essentially an aphorism, for the Court has told us exactly and repeatedly what interest this principle serves. In its most recent pronouncement in the area, the Court stated: "*The personal right to vote is a value in itself, and a citizen is,* without more and without mathematically calculating his power to determine the outcome of an election, *shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two;* or to put it another way, if he may vote for one representative and the voters in another district half the size also elect one representative." *Morris,* 109 S.Ct. at 1440 (emphasis added).

References to the personal nature of the right to vote as the bedrock on which the one person one vote principle is founded appear in the case law with monotonous regularity. Thus, in *Hadley v. Junior College District,* the Court stated: "[T]he Fourteenth Amendment requires that the trustees of this junior college district be apportioned in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the junior college district." 397 U.S. at 52, 90 S.Ct. at 792. The Court further explained: "[A] qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted," *id.* (footnote omitted); and "This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's," *id.* at 54, 90 S.Ct. at 794 (footnote omitted); and "once a State has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded,' " *id.* at 59, 90 S.Ct. at 797 (quoting *Gray v. Sanders,* 372 U.S. at 381, 83 S.Ct. at 809).

Reynolds itself brims over with concern about the rights of citizens to cast equally weighted votes: "[T]he judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote." 377 U.S. at 561, 84 S.Ct. at 1381. Again: "Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature." *Id.* at 565, 84 S.Ct. at 1383.[6] And yet again: "And the right of suffrage can be denied by a debasement or ***783** dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555, 84 S.Ct. at 1378. *Reynolds* went so far as to suggest that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Id.* at 567, 84 S.Ct. at 1384.

While the Court has repeatedly expressed its concern with equalizing the voting power of citizens as an ultimate constitutional imperative—akin to protecting freedom of speech or freedom of religion—its various statements in support of the principle of equal representation have been far more conditional. Indeed, a careful reading of the Court's opinions suggests that equalizing total population

is viewed not as an end in itself, but as a means of achieving electoral equality. Thus, the Court stated in *Reynolds:* "[T]he overriding objective must be substantial equality of population among the various districts, *so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579, 84 S.Ct. at 1390 (emphasis added). This language has been quoted in numerous subsequent cases. *See Gaffney,* 412 U.S. at 744, 93 S.Ct. at 2327; *Mahan v. Howell,* 410 U.S. 315, 322, 93 S.Ct. 979, 984, 35 L.Ed.2d 320 (1973); *Burns,* 384 U.S. at 91 n. 20, 86 S.Ct. at 1296 n. 20. In *Connor v. Finch,* 431 U.S. 407, 416, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465 (1977), the Court stated the proposition as follows: "The Equal Protection Clause requires that legislative districts be of nearly equal population, *so that* each person's vote may be given equal weight in the election of representatives." (emphasis added). [7]

Particularly indicative of the subservience of the representational principle to the principle of electoral equality is *Gaffney v. Cummings,* 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), on which the majority mistakenly relies. *Gaffney* deals with the question of how much variation in population is permissible in effectuating the one person one vote principle of *Reynolds.* The Supreme Court held that absolute mathematical precision is not necessary. Total population, the Court pointed out, is only a proxy for equalizing the voting strength of eligible voters. But, the Court noted, it is not a perfect proxy; voters might not be distributed homogeneously throughout the population, for example. Therefore, "it makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted." *Gaffney,* 412 U.S. at 745–46, 93 S.Ct. at 2327–28. The Court continued:

> What is more, it must be recognized that total population, even if absolutely accurate as to each district when counted, is nevertheless *not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan.* The United States census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing, often at different rates in either direction, up or down. Substantial differentials in population growth rates are striking and well-known phenomena. So, too, *if it is the weight of a person's vote that matters,* total population—even if stable and accurately taken—may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because "census persons" are not voters.

Id. at 746, 93 S.Ct. at 2328 (emphasis added, footnotes omitted).

Finally, there is the teaching of *Burns v. Richardson,* 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966), which the majority dismisses far too lightly. Because it is the only Supreme Court case applying the one person one vote principle in a situation ***784** where there were large numbers of residents not eligible to vote—it being the only case where there was a divergence between the representational principle and the principle of electoral equality—the case deserves a more careful examination. While *Burns* does not, by its terms, purport to require that apportionments equalize the number of qualified electors in each district, the logic of the case strongly suggests that this must be so. As noted earlier, in a situation such as ours—as that in *Burns*—one or the other of the principles must give way. If the ultimate objective were to serve the representational principle, that is to equalize populations, *Burns* would be inexplicable, as it approved deviations from strict population equality that were wildly in excess of what a strict application of that principle would permit. [8]

Burns can only be explained as an application of the principle of electoral equality; the Court approved the departure from strict population figures because raw population did not provide an accurate measure of whether the voting strength of each citizen was equal. Thus, while *Burns* spoke in permissive terms, its logic is far more categorical.

The only other way to explain the result in *Burns* is to assume that there is no principle at all at play here, that one person one vote is really nothing more than a judicial squinting of the eye, a rough-and-ready determination whether the apportionment scheme complies with some standard of proportionality the reviewing court happens to find acceptable. I am reluctant to ascribe such fluidity to a constitutional principle that the Supreme Court has told us embodies "fundamental ideas of

democratic government," *Wesberry,* 376 U.S. at 8, 84 S.Ct. at 530. [9]

When considered against the Supreme Court's repeated pronouncements that the right being protected by the one person one vote principle is personal and limited to citizens, the various arguments raised by the majority do not carry the day. Thus, the Court's passing reference in *Kirkpatrick v. Preisler,* 394 U.S. 526, 531, 89 S.Ct. 1225, 1229, 22 L.Ed.2d 519 (1969), to "prevent[ing] debasement of voting power and diminution of access to elected representatives" suggests only that the Court did not consider the possibility that the twin goals might diverge in some cases. As *Kirkpatrick* contains no discussion of the issue, it provides no clue as to which principle has primacy where there is a conflict between the two.

Similarly unpersuasive is the majority's citation of cases that hold that aliens and the young enjoy many constitutional rights on the same basis as citizens. Maj. op. at 775. One right aliens and children do not enjoy is the right to vote. Insofar as the Court views its one person one vote jurisprudence as protecting the right to vote enjoyed only by citizens, *see* pp. 780–781 *supra,* it's entirely beside the point what other rights noncitizens may enjoy. If, as I suggest, one person one vote protects a right uniquely held by citizens, it would be a dilution of that right to allow noncitizens to share therein. [10]

***785** Finally, I understand my colleagues to be suggesting that, as a matter of policy, the principle of equal representation is far wiser than the principle of electoral equality. Were I free to disregard the explicit and repeated statements of the Supreme Court, I might well find this argument persuasive. But I am not free to ignore what I regard as binding direction from the Supreme Court, so my own policy views on this matter make no difference.

All that having been said, I must acknowledge that my colleagues may ultimately have the better of the argument. We are each attempting to divine from language used by the Supreme Court in the past what the Court would say about an issue it has not explicitly addressed. While much of the language and some of the rationale of the Supreme Court's decisions clearly support my view, other language, as well as tradition, supports my colleagues. Were the Supreme Court to take up the issue, I would not be surprised to see it limit or abandon the principle of electoral equality in favor of a principle of representational equality. But the implications of that decision must be considered by those who have the power to make such choices, not by us. My colleagues may well be looking into the future, but controlling guidance comes from the past.

D. Having concluded that it is the principle of electoral equality that lies at the heart of one person one vote, we must address whether the district court's plan nevertheless falls within acceptable limits. While the Supreme Court has not been completely consistent in its methodology, usually it creates hypothetical ideal districts (i.e., districts that contain precisely the same number of people) and then determines, in percentage terms, the degree of deviation between each of the actual districts and the ideal one. The maximum deviation is calculated by adding the percentage points that the largest district is above the ideal, to the percentage points the smallest is below. *See, e.g., Brown v. Thomson,* 462 U.S. at 839, 103 S.Ct. at 2694, *Mahan,* 410 U.S. at 319, 93 S.Ct. at 982. While the Court has always used raw population figures, not electors, there seems to be no reason to apply a different methodology when comparing numbers of electors.

Here, a hypothetical ideal district would contain 979,594 electors. *See* note 2 *supra.* Compared to this ideal district, the districts under the plan adopted below deviate as set forth in the following table:

District	# Electors	Raw Deviation	% Deviation
1	707,651	-271,943	-28%
2	922,180	-57,414	-6%
3	1,098,663	+119,069	+12%
4	1,081,089	+101,495	+10%
5	1,088,388	+108,794	+11%

As this table demonstrates, the districts in the court-ordered plan contain very significant deviations from the ideal district. As expected, the greatest spread is between Districts 1 and 3, and it amounts to 40%. Equally significant are the individual deviations. Only one district, number 2, has a number of electors close to the norm, i.e., a deviation within single digits. Three of the districts have deviations between 10% and 20% and one district has a deviation nearly three times that amount —28%.

If I am right that it is qualified electors, not raw population figures, that count, these deviations fall far outside the acceptable range. The Supreme Court's cases in this area have defined three ranges of deviation that bear on the constitutionality of the plan. A maximum deviation of less than 10% is considered de minimis and will ***786** be acceptable without further inquiry. *White v. Regester,* 412 U.S. 755, 763, 93 S.Ct. 2332, 2338, 37 L.Ed.2d 314 (1973). Deviations somewhat above 10% may be acceptable if justified by compelling and legitimate interests. *See, e.g., Abate v. Mundt,* 403 U.S. 182, 184–85, 91 S.Ct. 1904, 1905–06, 29 L.Ed.2d 399 (1971). And, the Court has stated quite clearly that deviations above this buffer range will not be acceptable at all, even if justified by the most compelling and legitimate interests. The Court has not precisely identified the upper range for this buffer category, but does not appear to have approved any plans having a maximum deviation over 20%. [11]

It should be noted that, in discussing the range of possible deviations, the Court in all of these cases was comparing total population figures. *Gaffney,* however, tells us that deviation in total population figures is permissible, to some extent at least, because raw population is only an approximation of the number of electors. 412 U.S. at 746, 93 S.Ct. at 2328. It may well be that where, as here, the comparison is between the number of electors, the permissible range of deviation is much narrower.

Even if we apply to this case the ranges established by the Court in cases involving raw population figures, it is clear that the district court's plan falls far outside the permissible range. As far as I am aware, no plan has ever been approved with a maximum deviation of as much as 40%. If I read the Court's cases correctly, a deviation that large could not be justified even by the most compelling reasons. Nor, do I believe, has the district court even advanced reasons that would permit it to go beyond the 10% de minimis range. Such reasons may exist, but they are not articulated in the record. Four out of the five districts therefore fall outside the acceptable range for purposes of one person one vote.

E. Having concluded that the district court's plan runs afoul of the one person one vote principle, we arrive at the single most difficult issue in this case: To what extent, if any, this principle may have to give way when it collides with a remedial plan designed to cure the effects of discrimination.

There is, as far as I am aware, little or no guidance on this issue. All prior cases alleging violations of one person one vote involved a conflict between that constitutional principle and various interests advanced under state law. *See, e.g.,* pp. 785 786 *supra.* Under such circumstances, even if the state is found to have a rational and compelling interest in deviating from substantial district equality, this interest may not justify more than a small range of deviations; beyond that, the state's interest gives way to the constitutional imperative.

The balance may well be different where, as here, the competing interest is itself grounded in the fourteenth amendment or its derivative, the Voting Rights Act. What seems absolutely clear to me, however, is that the district court cannot simply ignore one person one vote in seeking to create a remedy. The Supreme Court has cautioned that district courts have "considerably narrower" discretion than state legislatures to depart from the ideal of one person one vote, and that "the burden of articulating special reasons for following [policies that would result in a departure are] correspondingly higher." *Connor v. Finch,* 431 U.S. 407, 419–20, 97 S.Ct. 1828, 1836, 52 L.Ed.2d 465 (1977). Moreover, "it is the reapportioning court's responsibility to articulate precisely why a ***787** plan of single-member districts with minimal population variance cannot be adopted." *Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975).

At the very least, it seems to me, the district court must make a determined effort to eliminate or minimize the electoral disparities within the districts, consistent with achieving the remedial purposes of the plan. In so doing, I should think the district court would have latitude of up to 20% maximum deviation from the ideal district, providing, of course, that it supplies an adequate explanation of why its purposes cannot be achieved within a narrower range.

What if the district court determines that it cannot construct an adequate remedial plan without going beyond the 20%

maximum deviation range? Under one view of the matter, one person one vote would not provide an absolute constraint on the court's remedial powers, as the competing interest here is not state law—which necessarily takes a back seat to a constitutional imperative—but an interest of equivalent dignity, itself growing out of the same constitutional roots as one person one vote. Under this paradigm, the district court would be allowed, under certain circumstances, to go beyond the 20% buffer allowed by the earlier cases. The district court would have to make very specific findings on how it has sought to achieve substantial equality among the districts and why it has been unable to do so without sacrificing the remedial purpose of the plan. If supported by the record (i.e., if no one comes forward with a plan that can do what the district court says can't be done), I should think that a much greater deviation from the ideal plan would be permissible, quite possibly as much as the 40% maximum deviation here.

There is, however, another paradigm: A plausible case could be made that the district court gets no greater latitude when it acts pursuant to the Voting Rights Act because its remedial powers are absolutely constrained by the principle of one person one vote. The argument in support of this position grows not out of some hierarchy of values, but out of the nature of the remedial process. A reapportionment plan designed to remedy unlawful discrimination can have one purpose and one purpose only: To put the victims of discrimination in the position they would have enjoyed had there been no discrimination. Here, for example, the object would be to create the type of district that would have existed had the supervisors not continually split the Hispanic core.

Even if we make the most favorable assumptions about what might have been, we cannot conclude that the supervisors would have come up with a district that violated the constitutional constraint of one person one vote. Since we know that, in the normal course of events and in the absence of discrimination, no such district could have been created, no legitimate remedial purpose would be served by creating such a district now. Under this view of the matter, there would be no tension between the court's remedial power and the principle of one person one vote, and therefore no justification for going beyond the 20% buffer. Even departures beyond the 10% de minimis buffer could, under this paradigm, be justified only upon a showing that compelling circumstances in the county would, in the absence of discrimination, have resulted in districts of greater than de minimis disparity. [12]

It is unnecessary to explore this conundrum, however, as it seems absolutely clear that we must remand to the district court on this issue. To begin with, the district court constructed the remedial plan under the mistaken impression that it was constrained by the state law requirement that supervisorial districts be equal in population. It is clear, however, that where state law runs up against a constitutional constraint such as one person one vote, state law must yield. It is most emphatically ***788** *not* the case, as the majority suggests, that a district court, in drafting a remedial plan, is constrained by state apportionment law where that law would violate the Constitution.

Remand is also appropriate because the district court was apparently not aware that it was, required to try—if at all possible—to construct a remedial plan that avoided the conflict between the two interests. Since the district court did not try, we do not know whether it is possible to reconcile both interests. A remand is necessary in order to find out. Only if it turns out that an effective remedial plan that also satisfies one person one vote cannot be constructed would I venture an opinion on the difficult question whether, to what extent and under what circumstances the principle of one person one vote must yield when the district court exercises its equitable powers to remedy the effects of past discrimination.

III. Expedited Issuance of the Mandate

Reluctantly, I must also part company with my colleagues in their decision to issue the mandate forthwith. As it is clear from this action that this panel will not grant a stay, we place an unnecessary burden upon the parties, the district judge, our own colleagues and the Justices above us.

I well understand the reason for haste; delaying an election any longer than absolutely necessary should not be done lightly. Consistent with that imperative, we have issued a significant opinion in an important and difficult case about three weeks after submission. No one can justly accuse us of sitting on our thumbs. Were the opinion unanimous, or were I convinced that our differences are relatively trivial, I would go along with expediting the mandate.

But we do not all agree. Moreover, our disagreement goes to the heart of the district court's remedial plan. Should there be further review, any steps taken by the district court and the parties in implementing the majority opinion would be wasted. The more prudent course, is seems to me, would be to let the parties consider their options in a sober, unhurried

fashion, as contemplated by the Federal Rules of Appellate Procedure.

My able colleagues have advanced very compelling arguments as to why the one person one vote rule should be construed as embodying the principle of equal representation. I have suggested that much of the Court's language and rationale supports the opposite view, that it is the principle of electoral equality that lies at the heart of one person one vote. We are not in a position to resolve this issue, which grows out of a lack of meaningful guidance in a long series of Supreme Court opinions. Yet this issue will have immediate and growing significance as large populations of aliens are taking up residence in several of our largest states. [13] The Supreme Court may deem it prudent to take up the issue before large-scale redistricting gets underway in 1991.

Given these considerations, I would preserve the opportunity to have the matter considered in a deliberative fashion, unhurried by the pendency of an election. For better or worse, the election was stayed, which allowed us to consider the case without the sword of Damocles hanging over our heads. I would offer the same opportunity for unhurried deliberation to our colleagues and to any of the Justices who might wish to consider the matter.

IV. Conclusion

This is a fascinating case. It poses many new questions which required the district court to sail into uncharted waters. For the most part, the district court—and the majority—got it right. But close is not close enough when important constitutional rights are at stake. I would order a limited remand for the district court to apply the teachings of *Reynolds v. Sims* and its progeny.

All Citations

918 F.2d 763, 59 USLW 2317

Footnotes

1 The relevant findings with regard to the 1959 Redistricting are as follows:

64. Prior to 1959, District 3 included Western Rosemead and did not include any portion of the San Fernando Valley, Beverly Hills, West Hollywood, West Los Angeles, or Eagle Rock.

65. The 1959 redistricting occurred less than six months after the November 1958 general election for the open position of District 3 Supervisor. Ernest Debs, a non-Hispanic, defeated Hispanic candidate Edward Roybal, by a margin of 52.2 percent to 47.8 percent.

66. Debs received 141,011 votes. Roybal received 128,974 votes. There were four recounts before Debs was finally determined to be the winner.

67. In 1959, Debs reported in a Supervisorial hearing that he and District 4 Supervisor Burton Chace agreed to shift Beverly Hills, West Hollywood, and West Los Angeles from District 4 to District 3.

68. The Board's action transferred between 50,000 to 100,000 voters from District 4 into District 3 and had the effect of substantially decreasing the proportion of Hispanic voters in District 3.

69. Dr. Kousser testified it was his opinion that Debs and Chace agreed to the transfer for two reasons. First, Chace was receptive to the agreement because it enabled him to eliminate Los Angeles City Councilwoman Rosaline Wyman as a possible opponent in his upcoming 1960 bid for reelection. Debs welcomed the change because the move west allowed him to make District 3 more easily winnable against Roybal or another candidate who might appeal to Hispanic voters in the next election.

The findings with regard to the 1965 Redistricting are as follows:

88. The Boundary Committee rejected a proposal to move Alhambra and San Gabriel, areas adjacent to growing Hispanic population, from District 1 to District 3. Instead, the committee recommended a complicated two-stage change which moved Alhambra and San Gabriel from Supervisor Bonnelli's District 1 to Supervisor Dorn's District 5, moved a section of the San Fernando Valley from District 5 to Supervisor Debs' District 3, and moved Monterey Park and unincorporated South San Gabriel from District 1 to District 3.

89. Dr. Kousser testified that, in his opinion, the Board avoided transferring Alhambra and San Gabriel directly to District 3 because those areas were adjacent to areas of Hispanic population concentration and were becoming more Hispanic. The more complicated two-stage adjustments permitted the addition of heavily Anglo areas from the San Fernando Valley and offset the much more limited addition of Hispanic population gained by moving Monterey Park and the unincorporated area of South San Gabriel to District 3.

The court's findings with regard to the 1971 Redistricting are as follows:

109. In 1971, District 3 lost some areas with substantial Hispanic population on its eastern border. Western Rosemead was transferred from District 3 to District 1. A census tract in the City of San Gabriel was also transferred from District 3 to District 5.

110. George Marr, head of the Population Research Section of the Department of Regional Planning testified that he was surprised by the proposal to move a substantial portion of the San Fernando Valley from District 5 to District 3. Marr described the portion of the San Fernando Valley ultimately added to District 3 from District 5 as looking like "one of those Easter Island heads." Marr developed the general feeling that Debs' representative on the Boundary Committee had requested the additional area in the San Fernando Valley because the residents of the area were regarded as "our kind of people."

The court's findings on the Overall Intent of Past Redistrictings are as follows:

112. The Court finds that the Board has redrawn the supervisorial boundaries over the period 1959–1971, at least in part, to avoid enhancing Hispanic voting strength in District 3, the district that has historically had the highest proportion of Hispanics and to make it less likely that a viable, well financed Hispanic opponent would seek office in that district. This finding is based on both direct and circumstantial evidence, including the finding that, since the defeat of Edward Roybal in 1959, no well-financed Hispanic or Spanish-surname candidate has run for election in District 3.

113. While Hispanic population was added to District 3 during the 1959–1971 redistrictings, the Court finds that the proportion of Spanish-surname persons added to District 3 has been lower than the Hispanic population proportion in the County as a whole. No individual area added was greater than 15.1 percent Spanish-surname.

114. Dating from the adoption of the County's Charter in 1912 through the 1971 redistricting process, no Los Angeles County redistricting plan has created a supervisorial district in which Hispanic persons constituted a majority or a plurality of the total population.

The court's findings with regard to the 1981 Redistricting are as follows:

125. The individuals involved in the 1981 redistricting had demographic information available of population changes and trends in Los Angeles County from 1950 to 1980. It was readily apparent in 1980 that the Hispanic population was on the rise and growing rapidly and that the white non-Hispanic population was declining.

. . . . .

127. From a political perspective, since Hispanic population growth was most significant in Districts 1 and 3, if the 1971 boundaries were changed in any measurable way to eliminate the existing fragmentation, the incumbency of either Supervisor Schabarum or Supervisor Edelman would be most affected by a potential Hispanic candidate.

. . . . .

136. An analysis of the 1978 Supervisor election in District 3 was conducted after the Boundary Committee recommended a plan with an Hispanic population majority in District 3. The actual results of the analysis were never produced. Mr. Seymour did not rule out the possibility that he requested such an analysis and Supervisor Edelman testified that he "most probably" discussed the results of the 1978 election analysis with Mr. Seymour.

137. Peter Bonardi, a programmer with the Urban Research Section of the Data Processing Department in 1981 and a participant in the data analysis requested by Supervisor Edelman, stated that he was directed not to talk about the analysis of voting patterns and that an "atmosphere of 'keep it quiet' " pervaded.

138. Supervisors Hahn and Edelman sought to maintain the existing lines. To this end, the Democratic minority agreed to a transfer of population from District 3 to District 2. Supervisor Edelman acknowledged that he and Supervisor Hahn had worked out a transfer of population from the heavily Hispanic Pico–Union area on the southern border of District 3 to the northern end of District 2.

139. Supervisor Edelman knew that if the 1971 boundary lines were kept intact, the Hispanic community was going to remain essentially the same in terms of its division among the districts.

140. The Board departed from its past redistricting practice in 1981 and approved a contract with The Rose Institute for State and Local Government, a private entity, to perform specialized services and produce redistricting data at a cost of $30,000.

. . . . .

157. [Boundary Committee Members] Smith and Hoffenblum opposed the CFR [Chicanos for Fair Representation] plan because the plan proposed increasing the Hispanic proportion in District 1 from 36 to 42 percent. Both Boundary Committee members perceived the CFR effort as intended to jeopardize the status of Supervisor Schabarum as well as that of the conservative majority.

158. Hoffenblum testified that one of the objectives of the Republican majority was to create an Hispanic seat without altering the ideological makeup of the Board. According to Hoffenblum, it was "self-evident" that if an Hispanic district was created in Supervisor Schabarum's district it would impact on the Republican majority.

159. The proponents of the Smith and Hoffenblum plans sought to gain areas of Republican strength such as La Mirada, Arcadia, Bradbury in Districts 4 and 5, while losing increasing Hispanic areas such as Alhambra or the predominantly black Compton and other liberal areas of Santa Monica and Venice.

. . . . .

162. Supervisor Edelman would not rule out the possibility that ethnic considerations played at least some part in the rejection by the Board majority of the CFR Plan. Moreover, the fact that CFR proposed a plan in which District 1 had a 42 percent Hispanic population was a possible basis for the rejection of the plan by the majority. Supervisor Schabarum would not accept a 45 or 50 percent Hispanic proportion in his district in 1981.

. . . . .

165. On September 24, 1981, prior to the Board's adoption of the challenged plan, Board members met, two at a time in a series of private meetings in the anteroom adjacent to the board room, where they tried to reach agreement on a plan.

. . . . .

175. The plan adopted in 1981 retained the boundary between the First and the Third Supervisorial Districts, the districts that contain the largest proportions of Hispanics. In doing so, the 1981 Plan continued to split the Hispanic Core almost in half.

176. The Board appeared to ignore the three proposed plans which provided for a bare Hispanic population majority.

177. The Court finds that the Board of Supervisors, in adopting the 1981 redistricting plan, acted primarily with the objective of protecting and preserving the incumbencies of the five Supervisors or their political allies.

178. The Court finds that in 1981 the five members of the Board of Supervisors were aware that the plan which they eventually adopted would continue to fragment the Hispanic population and further impair the ability of Hispanics to gain representation on the Board.

179. The continued fragmentation of the Hispanic vote was a reasonably foreseeable consequence of the adoption of the 1981 Plan.

180. The Court finds that during the 1981 redistricting process, the Supervisors knew that the protection of their five Anglo incumbencies was inextricably linked to the continued fragmentation of the Hispanic Core.

181. The Supervisors appear to have acted primarily on the political instinct of self-preservation. The Court finds, however, that the Supervisors also intended what they knew to be the likely result of their actions and a prerequisite to self-preservation—the continued fragmentation of the Hispanic Core and the dilution of Hispanic voting strength.

2 *Gingles* has spawned confusion in the lower courts. The opinion explicitly reserved the question of whether the standards it set forth would apply to a claim in which minority plaintiffs alleged that an electoral practice impaired their ability to *influence* elections, as opposed to their ability to elect representatives. 478 U.S. at 46 n. 12, 106 S.Ct. at 2764 n. 12. Nevertheless, it has been applied to preclude such "ability to influence" claims, based upon plaintiffs' failure to demonstrate such an ability to elect representatives under the *Gingles* criteria. *See, e.g., McNeil v. Springfield Park,* 851 F.2d 937 (7th Cir.1988), *cert. denied,* 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989). *See generally* Abrams, *"Raising Politics Up": Minority Political Participation and Se ction 2 of the Voting Rights Act,* 63 N.Y.U.L.Rev. 449 (1988). On the other hand, some courts have dealt differently with the criteria articulated in *Gingles* when facing "ability to influence" claims. They have done so in opinions that "range from virtually ignoring the electoral standard or ignoring it entirely, to considering it a prerequisite to the application of the totality of the circumstances test [specified in the statute itself], to treating it as a, if not the, central element of the test." Abrams, 63 N.Y.U.L.Rev. at 465 (citing *United Latin Am. Citizens v. Midland Indep. School Dist.,* 812 F.2d 1494, 1496–98 (5th Cir.1987), *Buckanaga v. Sisseton Indep. School. Dist.,* 804 F.2d 469, 471–72 (8th Cir.1986); *Martin v. Allain,* 658 F.Supp. 1183, 1199–1204 (S.D.Miss.1987)) (footnotes omitted). "[T]he language from *Gingles* that creates the 'ability to elect' standard may prove to be *Gingles* ' more enduring and problematic legacy." Abrams, 63 N.Y.U.L.Rev. at 468.

3 In *McNeil v. Springfield Park District,* 851 F.2d 937, 946 (7th Cir.1988), *cert. denied,* 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989), the Seventh Circuit found that in order to prove an effects violation from post-census data, the data used must be of a clear and convincing nature, and that "estimates based on past trends are generally not sufficient to override 'hard' decennial census data." We see no reason to impose this high standard in a case where intentional discrimination has been proved, and the data is merely to be used in fashioning a remedy.

4

District	Total Pop.	White	Black	Hispanic	Other

1	1,779,835	12.4	2.1	71.2	14.3
2	1,775,665	15.0	38.6	35.3	11.1
3	1,768,124	60.9	3.9	25.5	9.7
4	1,776,240	53.9	4.3	26.6	15.2
5	1,780,224	57.1	5.9	24.3	12.6
Total	8,880,109	39.8	11.0	36.6	12.6

5

District	Total	White	Black	Hispanic	Other
1	707,651	25.4	3.5	59.4	11.6
2	922,180	23.8	50.8	17.1	8.3
3	1,098,663	77.0	4.3	13.9	4.7
4	1,081,089	67.5	4.4	19.7	8.4
5	1,088,388	69.8	6.2	18.1	5.9
Total	4,897,971	55.8	13.4	23.3	7.5

1 The lay reader might wonder if there can be intentional discrimination without an invidious motive. Indeed there can. A simple example may help illustrate the point. 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.

2 The district court's remedy finding No. 5 sets forth the relevant figures for the districting plan it adopted:

District	Total	White	Black	Hispanic	Other
1	707,651	25.4	3.5	59.4	11.6
2	922,180	23.8	50.8	17.1	8.3
3	1,098,663	77.0	4.3	13.9	4.7
District	Total	White	Black	Hispanic	Other
4	1,081,089	67.5	4.4	19.7	8.4
5	1,088,388	69.8	6.2	18.1	5.9
TOTAL	4,897,971	55.8	13.4	23.3	7.5

Findings and Order Regarding Remedial Redistricting Plan and Election Schedule 4 (filed Aug. 6, 1990).

3 This language is also quoted in *Gaffney v. Cummings,* 412 U.S. 735, 744, 93 S.Ct. 2321, 2327, 37 L.Ed.2d 298 (1973).

4 This language is also quoted in *Moore v. Ogilvie,* 394 U.S. 814, 817, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969), and *Reynolds,* 377 U.S. at 557–58, 84 S.Ct. at 1379.

5 It is established, of course, that an elected official represents all persons residing within his district, whether or not they are eligible to vote and whether or not they voted for the official in the preceding election. *See Davis v. Bandemer,* 478 U.S. 109, 132, 106 S.Ct. 2797, 2810, 92 L.Ed.2d 85 (1986) (plurality).

6 This language is also quoted in *Whitcomb v. Chavis,* 403 U.S. 124, 141, 91 S.Ct. 1858, 1868, 29 L.Ed.2d 363 (1971).

7 The Court has continued to justify the requirement of equality of populations as a means of assuring that "each citizen's portion [is] equal." *Morris,* 109 S.Ct. at 1438; *see also Lockport v. Citizens for Community Action,* 430 U.S. 259, 264, 97 S.Ct. 1047, 1051, 51 L.Ed.2d 313 (1977) ("[I]t has been established that the Equal Protection Clause cannot tolerate the disparity in individual voting strength that results when elected officials represent districts of unequal population....").

8 In *Burns,* the ninth and tenth districts contained 28% of Oahu's total population, yet were entitled to only 6 representatives. The fifteenth and sixteenth districts, on the other hand, contained only 21% of the population, but were entitled to 10 representatives. *Burns,* 384 U.S. at 90–91 & n. 18, 86 S.Ct. at 1295 & n. 18. Thus, in districts 9 and 10, there was one representative for every 4.67% of Oahu's total population, whereas in districts 15 and 16, there was one representative for every 2.1% of the population. This deviation of well over 100%—122%, in fact—far exceeds the population deviations held permissible by the Supreme Court in the line of cases discussed below. *See* pp. 785–786 *infra.*

9 One's resolve in this regard is put to the test by *Brown v. Thomson,* 462 U.S. 835, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983). *See id.* at 850, 103 S.Ct. at 2700 (Brennan, J., dissenting); note 11 *infra.*

10 My colleagues also rely on the fact that apportionment for the House of Representatives is based on whole population figures. But for reasons explained by the Supreme Court in *Reynolds,* 377 U.S. at 571–77, 84 S.Ct. at 1386–89, arguments based on the "federal analogy" are "inapposite and irrelevant to state legislative redistricting schemes," *id.* at 573, 84 S.Ct. at 1387, and therefore are not particularly persuasive in the context of state and local apportionment cases. Congressional apportionments are governed by section 2 of the fourteenth amendment, which makes total population the apportionment

base; it says nothing about state apportionments. If this provision were meant to govern state legislative apportionments, the principle of one person one vote, based on a separate part of the fourteenth amendment, would be superfluous.

11 The only contrary authority seems to be *Brown v. Thomson,* as to which it is not clear at all what the relevant deviation was. The only deviation mentioned by the majority and concurring opinions is 89%, which was the degree of deviation of one particularly small county. But the majority and concurrence go to great lengths to assure us that that is *not* the relevant figure; the two concurring Justices expressed "the gravest doubts that a statewide legislative plan with an 89% maximum deviation could survive constitutional scrutiny...." 462 U.S. at 850, 103 S.Ct. at 2700 (O'Connor, J., joined by Stevens, J., concurring). Because of the peculiar procedural posture of the case, it is hard to tell just what the court viewed as the relevant deviation; it might have been 23%, *see id.* at 860 n. 6, 103 S.Ct. at 2705 n. 6 (Brennan, J., dissenting), although, for the reasons explained by the dissent, this figure, like the theory of the majority, seems to make little sense.

12 The Court has been somewhat vague as to what interests justify departure beyond the 10% de minimis buffer, but the only one clearly identified has been a long-standing and genuine desire to maintain the integrity of political subdivisions. *Reynolds,* 377 U.S. at 578–81, 84 S.Ct. at 1390–91; *Abate,* 403 U.S. at 183, 187, 91 S.Ct. at 1905, 1908.

13 *See, e.g.,* Suro, *Behind the Census Numbers,* N.Y. Times, Sept. 16, 1990, § 4, at 4 col. 1.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLOIRDA
TALLAHASSEE DIVISION

CONGRESSWOMAN CORRINE BROWN,

Plaintiff,

vs. **Case No.:**

KEN DETZNER, in his official capacity as Secretary of State of the State of Florida, THE FLORIDA SENATE and THE FLORIDA HOUSE OF REPRESENTATIVES,

Defendants.

VERIFIED COMPLAINT

INTRODUCTION

This is a redistricting lawsuit. This action is brought pursuant to §2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. and the Fourteenth and Fifteenth Amendments to the United States Constitution pursuant to 42 U.S.C. §1983. Plaintiff seeks declaratory and injunctive relief against continued use of any congressional redistricting plan that dilutes the voting strength of African Americans. The drawing and redrawing of Congresswoman Brown's district, as required by the Florida Supreme Court's opinion, carries with it the very real and imminent possibility of Congresswoman Brown's constituents being deprived of the ability to elect a representative of their choice. Her district – often criticized for its shape – is a minority access district – a district where minorities have the greatest chance of electing representatives of their choice. The 5th Congressional District's contours trace the historic settlement of Black citizens along the St. Johns River. Like the St. Johns River, Congresswoman Brown's district

extends from Jacksonville, Florida to just north of Orlando, Florida. Black citizens settled along the St. Johns River because redlining and restrictive covenants prevented Black citizens in North-Central Florida from living elsewhere. Thus, despite its shape, which roughly traces the shape of the St. Johns River, Florida's 5th Congressional District contains within it a distinct Black population with a shared history. The Florida Supreme Court has ordered the district redrawn (and has effectively redrawn) in a manner that would undo its historic configuration and disperse the community contained within it. *League of Women Voters of Florida v. Detzner*, 40 Fla. L. Weekly S432 (Fla. July 9, 2015) (requiring the Florida Legislature to redraw the district with an east-west configuration). To do so is improper and contrary to law.

JURISDICTION

1. Plaintiff's complaint arises under the United States Constitution and federal statutes. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(a)(3) and (4) and 42 U.S.C. §§ 1983 and 1988.

2. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b).

3. Plaintiff requests a three-judge court under 28 U.S.C. §2284(a), as Plaintiff's action "challenge[s] the constitutionality of the apportionment of congressional districts" in Florida.

4. Plaintiff seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

PARTIES

5. Plaintiff, Congresswoman Corrine Brown, is an African American voter from Duval County. She is a United States Congresswoman who has been a strong advocate for the African American community.

6. Defendant, Ken Detzner, is the Florida Secretary of State. Plaintiffs sue Secretary Detzner in his official capacity only. In his official capacity, Secretary Detzner serves as Florida's Chief Elections Officer, and custodian of the Florida Constitution. *See, e.g.,* Fla. Stat. §§ 15.01, 97.012, 100.371.

7. Defendant, the Florida Senate ("Senate"), is one house of the Legislature of the State of Florida. Defendant Florida Senate is responsible for drawing reapportionment plans for the Senate that comply with the Florida Constitution.

8. Defendant, the Florida House of Representatives ("House"), is the other house of the Legislature of the State of Florida. Defendant Florida House of Representatives is responsible for drawing reapportionment plans for the Senate that comply with the Florida Constitution.

FACTUAL BACKGROUND

A. Florida History

9. Florida has a long, sad history of racial discrimination in voting. *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992)

10. Florida quite successfully evaded the intent of the Fifteenth Amendment for decades by enacting facially neutral laws, such as white primary laws, poll taxes, literacy tests, and other tactics to bleach the voter rolls, ensuring that black voters could not participate in the political process.

11. Florida took other actions to exclude black voters, such as giving the governor the authority to appoint members of county commissions so that white voters would retain control even in majority-minority "Black Belt" counties.

12. Likewise, the legislature provided for the appointment of school board members by the State Board of Public Instruction so as to avoid the possibility of electing African Americans.

13. The state employed other methods to ensure that black children received substandard educations, and the ramifications of this are still felt today.

14. In North-Central Florida, this history was especially vicious. When the white primary was found to be unconstitutional in the 1940s, the city of Jacksonville switched to at-large elections to prevent the election of black candidates from predominantly black wards.

15. African-Americans were faced with physical violence when trying to register or to vote, from Reconstruction up through the 1900s.

16. The Ku Klux Klan was particularly strong in the region encompassed by Congressional District 5.

17. After the passage of the Voting Rights Act in 1965, the effective enfranchisement of black voters was slow in coming. Florida did not send its first African American member to Congress until court intervention in 1992.

18. During that redistricting cycle, Democrats were in control of the House and Senate, but could not agree on a congressional plan. In the hands of a federal court, two majority-black districts (Congressional District 3 in North-Central Florida and Congressional District 17 in South Florida) and one near-majority black district (Congressional District 23 in South Florida) were drawn, and Florida sent three African-American Congresspersons to Washington, D.C. for the first time in over 120 years.

19. The state continues to erect electoral impediments for black voters even today. In Duval County, a post-2000 election study found that as many as one out of five ballots cast by black voters did not count in that election, compared to one out of fourteen white ballots.

20. Prior to the 2000 election, the state contracted with a private company to purge felons from the voter rolls, and black voters felt the disproportionate impact from these poorly-conducted purges.

21. In 2011, the state of Florida moved to dramatically cut the early voting period, despite the fact that black voters were twice as likely to vote early when compared with white voters.

22. Finally, the state of Florida implements the country's most stringent and racially discriminatory felony disenfranchisement laws. In 2010, nearly one in four African Americans was disqualified from voting due to a felony conviction – more people are disenfranchised in Florida on these grounds than in any other state.

23. African-American voters sill encounter numerous obstacles in the region encompassed by Congressional District 5 that detrimentally affect their ability to participate in the political process. African Americans disproportionately face challenges in education, housing, and access to public services. Economic disparities, including trouble finding jobs, disproportionately plague black voters in Congressional District 5.

1. History of Sanford

24. Sanford was established in the 1870s by Henry Shelton Sanford. Sanford was a diplomat who bought the land to establish it as a transportation hub, only twenty years after African Americans established a neighboring town named Goldsboro.

25. The town had post offices, business, and basic infrastructure that a town needs to function. As Sanford developed, it eventually swallowed up Goldsboro as well as the other surrounding predominantly African American neighborhoods. As the surrounding towns, including Goldsboro, merged with Sanford, minority groups did not enjoy the same commodities as their white counterpart.

26. Sanford's motto "The Friendly City" is not an accurate representation of the city's inequitable treatment of its minority groups. In 1947, baseball hall of famer Jackie Robinson and another black player, Johnny Wright, were shuttled from Sanford to Daytona Beach due to numerous death threats that they faced. In 1997, the city of Sanford issued a public apology regarding the events that occurred with Robinson and proclaimed April 15, 1997 as Jackie Robinson Day.

27. Over 65 years later, 17 year old Trayvon Martin was gunned down for wearing a hoodie in a gated community by the neighborhood's community watch coordinator.

28. Beside these two infamous situations, Sanford also dealt with deep-seated issues regarding a sub-par education system, income inequalities, and inadequate housing for minorities.

2. History of Eatonville

29. Eatonville is one of the first self-governing all-black municipalities in the United States.

30. The town is named after Josiah C. Eaton, one of a small group of white landowners who were willing to sell sufficient land to African Americans to incorporate as a black town.

31. Noted African-American author Zora Neale Hurston grew up in Eatonville and featured it in many of her stories. Hurston's novel *Their Eyes Were Watching God* presents an overview of the founding of the town through the eyes of Janie Crawford, the protagonist.

B. History of District 5

32. The creation of District 5 was the direct result of years of litigation to remedy decades of vote dilution experienced by African Americans that denied them the opportunity to elect representatives of their choice.

33. After the 1990 decennial census, Florida was apportioned four additional Congressional seats, for a total of 23 members of Congress. *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1078 (N.D. Fla. 1992).

34. Prior to the 1992 election, Florida had not had a federal African American Congressperson since Josiah Thomas Walls in 1871.

35. Nationally, prior to the passage of the Voting Rights Act in 1965, between the years of 1832-1965, there were only 28 elected African Americans. From 1965-present, there were/are 103 elected African Americans.

36. When the state legislature reached an impasse on drawing a new congressional plan, the Florida NAACP filed a Voting Rights Act lawsuit, asking a federal court to draw a majority-black district in North-Central Florida to remedy the vote dilution present in the state for decades. The congressional district at stake in this litigation was the result of that lawsuit.

37. In response to *Johnson v. Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996), the Jacksonville-to-Orlando configuration was created with almost unanimous support in 1996, when Democrats controlled the House of Representatives and the Governor's Office, and it has received bipartisan support ever since.

38. After the 2000 census, Florida was again apportioned additional congressional seats, and the Florida NAACP again pushed the legislature to keep an African-American district in North-Central Florida.

39. In a racial gerrymandering challenge to that 2002 drawing of what was, in this redistricting round, the benchmark for Congressional District 5, a federal court found that the district was a reasonably compact district that ensured black voting strength in the region was not diluted. *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1307-1309 (S.D. Fla. 2002).

40. In 2010, Florida voters approved two new constitutional provisions governing redistricting in the state. Amendment 5, now codified as Article III, Section 20, of the Florida Constitution, established criteria for drawing congressional districts and Amendment 6, now codified as Article III, Section 21, established criteria for state legislative redistricting.

41. After the decennial census data was received, the Florida NAACP worked to develop redistricting maps that would fully comply with the new amendments. With regard to Congressional District 5 (then numbered Congressional District 3), the Florida NAACP, informed by its members who live and struggle every day with conditions on the ground in North-Central Florida, drew the district in a way it believed necessary to avoid vote dilution and retrogression. That map was submitted to the legislature on November 1, 2011.

42. The legislature conducted numerous hearings across the state. In late January, the legislature introduced plan H000C9047, the final proposed plan for Florida's congressional districts. Congressional District 5 in the legislatively-proposed plan followed the advice for the district presented through the NAACP's submission.

43. Communities within the district that were accustomed to the benefits of having representation of their choice were not stranded in districts where they would not be able to elect

candidates of choice. The ability of black voters in the region to elect their candidates of choice was not lessened.

44. Following the enactment of the congressional redistricting plan in early 2012, the League of Women Voters of Florida, Common Cause, and several individual voters filed lawsuits challenging that congressional plan as violating the new state constitutional redistricting criteria. *See Romo v. Detzner*, 2014 WL 3797315 (Fla.Cir.Ct. July 10, 2014).

45. Specifically, the state Plaintiffs alleged that Congressional District 5 unnecessarily packed black voters into the district and, as such, compliance with minority voting protections in the constitution did not justify the district's non-compact shape.

46. On July 10, 2014, the trial court ruled that Congressional District 5 violated Art. III, Section 20 of the state constitution, and that it would need to be redrawn. The Court declined to give the legislature any specific directions on how compliance should be achieved.

47. After the trial court's instructions to the legislature to swiftly draw a remedial map, the legislature called a special session on August 7, 2014.

48. Tallahassee NAACP president Dale Landry testified that taking the district out west instead of south was simply not an option. He detailed how Congressional District 5 still served as a much needed voting rights remedy in North-Central Florida.

49. He also offered the unique perspective of an African American resident of Tallahassee – one who personally understood that an East-West configuration of the district could not adequately replace a North-South configuration.

50. NAACP leaders also testified to the shared history of their communities and the increased responsiveness of elected officials when their communities were included in a district in which black voters have the opportunity to elect their candidate of choice.

51. After the special session, state Plaintiffs challenged the remedial map, arguing that the changes made to Congressional District 5 did not correct the constitutional problems identified by the trial court. The trial court disagreed, finding that "the remedial plan adequately addresses the constitutional deficiencies [] found in the Final Judgment."

52. Recognizing that what the Plaintiffs were asking the court to do was to find that a North-South configuration of the district was unconstitutional, the trial court declined to do so. Instead that court found that there were "legitimate, non-partisan policy reasons for preferring a North-South configuration for this district over an East-West configuration, and the Plaintiffs have not offered convincing evidence that an East-West configuration is necessary in order to comply with tier-one and tier-two requirements of Article III, Section 20."

53. On October 23, 2014, the Florida Supreme Court accepted jurisdiction and on July 9, 2015, the court ordered that District 5 be redrawn in an East-West configuration. *See League of Women Voters of Florida v. Detzner*, 40 Fla. L. Weekly S432 (Fla. July 9, 2015).

COUNT I
VOTING RIGHTS ACT OF 1965

54. The allegations contained in paragraphs 1 through 53 above are re-alleged as if fully set forth herein.

55. The election practices and procedure used to apportion Congressional District 5, violate the rights of African American voters in violation of Section 2 of the Voting Rights Act of 1965.

56. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, prohibits any electoral practice or procedure that "results in a denial or abridgment of the right of any citizen...to vote on account of race or color." 42 U.S.C. §1973(a).

57. In the redistricting context, this is a prohibition against what is known as "minority vote dilution," and Section 2 is violated where, "Based on the totality of circumstances, it is shown that the political processes leading to nomination or election...are not equally open to participation by members of a [racial or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice." 42 U.S.C. §1973(b).

58. The "totality of the circumstances" of redrawing the district will dilute African American voting strength, resulting in "less opportunity than other members of the electorate to participate in the political process and to elect the representatives of their choice." 42 U.S.C. §1973.

59. Unless enjoined by this Court, Defendants will continue to violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by enforcing standards, practices, or procedures that deny African American voters opportunity to participate effectively in the political process on an equal basis with other members of the electorate.

WHEREFORE, Plaintiff respectfully requests that this Court enter Judgment granting:

A. A declaratory judgment that Defendants' actions violate the rights of Plaintiff as protected by Section 2 of the Voting Rights Act, 42 U.S.C. §1973 et seq.

B. Preliminary and permanent injunctive relief requiring Defendants, their successors in office, agents, employees, attorneys and those persons acting in concert with them and/or at their discretion – to develop and implement redistricting plans that do not dilute African American voting strength for the United States House of Representatives, and also enjoining and forbidding the use of a redistricting plan that dilutes the voting strength of minorities;

C. Reasonable attorney's fees and costs;

E. An order of this Court retaining jurisdiction over this matter until all Defendants have complied with all orders and mandates of this Court; and

E. Such other and further relief as the Court may deem just and proper.

COUNT II
42 U.S.C. §1983

60. The allegations contained in paragraphs 1 through 53 above are re-alleged as if fully set forth herein.

61. The East-West configuration of District 5 was adopted with an intent to, and it does, deny or abridge the right of African American citizens residing in District 5 to vote on account of their race and color.

62. This intentional discrimination is in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

WHEREFORE, Plaintiffs respectfully request that this Court enter Judgment granting:

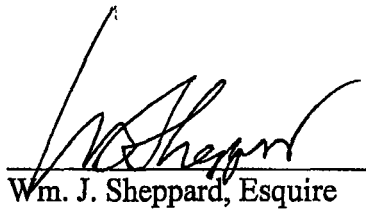
A. A declaratory judgment that Defendants' actions violate the Fourteenth and Fifteenth Amendment to the United States Constitution and 42 U.S.C. §1983;

B. Reasonable attorney's fees and costs;

C. An order of this Court retaining jurisdiction over this matter until all Defendants have complied with all orders and mandates of this Court; and

D. Such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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VERIFICATION

STATE OF FLORIDA }
} ss.
COUNTY OF DUVAL }

BEFORE ME, the undersigned authority, this day personally appeared **The Honorable Corrine Brown, Congresswoman,** who first being duly sworn, says she is the Plaintiff, in the above-sought cause; she has read the foregoing Complaint and Demand for Jury Trial; she has personal knowledge of the facts and matters set forth and alleged; and attests that each and all these facts are true and correct.

Corrine Brown

Corrine Brown, Congresswoman
Fifth District of Florida

The foregoing instrument was acknowledged before me this 11th day of August, 2015 by **Corrine Brown, Congresswoman**, who is personally known to me and who did take an oath.

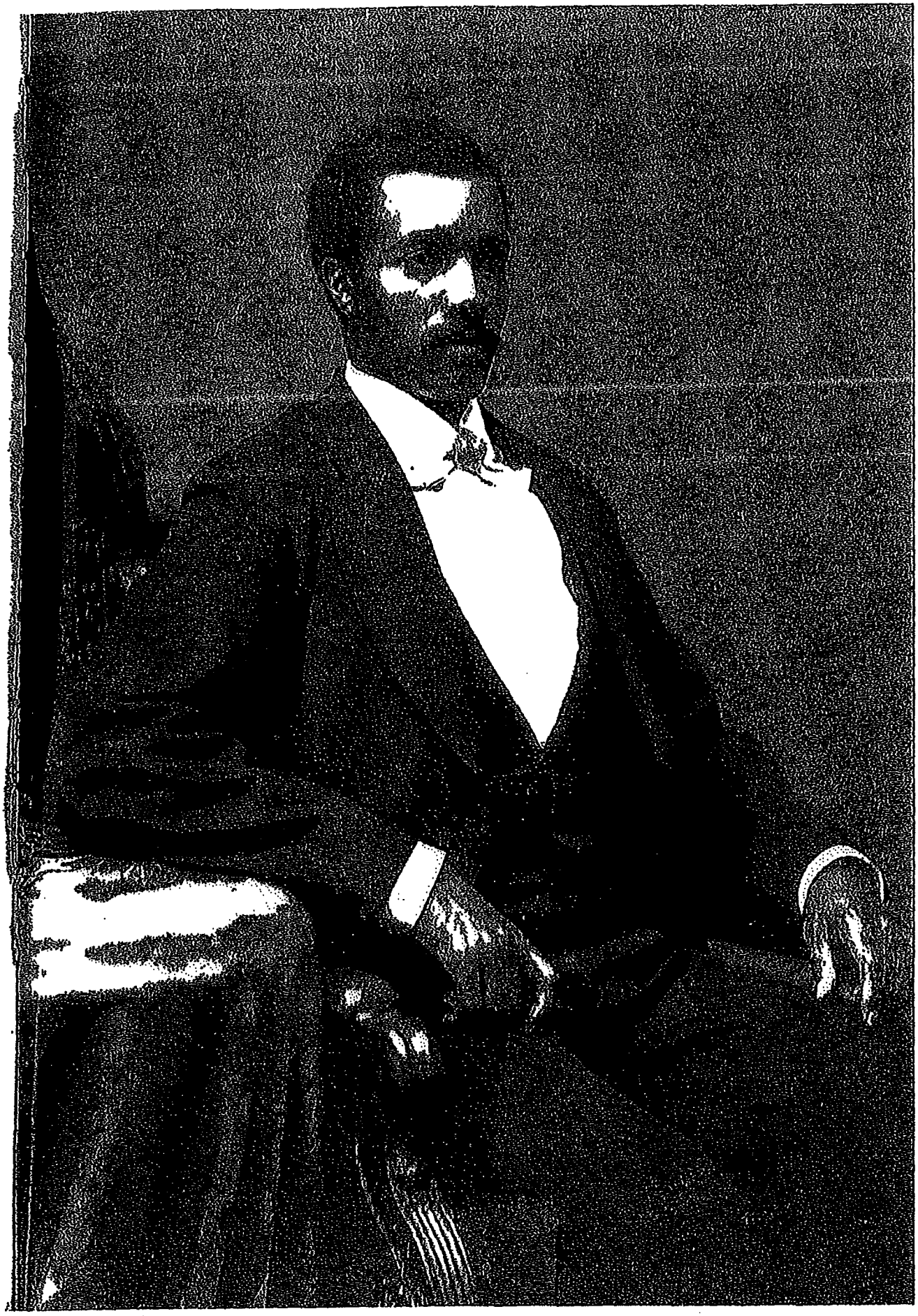
Amanda Woods

Signature of person taking oath
Notary Public - State of Florida

AMANDA WOODS
Commission # FF 211298
Expires March 17, 2019
Bonded Thru Troy Fain Insurance 800-385-7019

Name typed, printed or stamped

ldh[brown.corrine.verification]



Josiah Thomas Walls
1842–1905

UNITED STATES REPRESENTATIVE ★ 1871–1873; 1873–1876
REPUBLICAN FROM FLORIDA

Overcoming deep political divisions in the Florida Republican Party, Josiah Walls became the first African American to serve his state in Congress. The only black Representative from Florida until the early 1990s, Walls was unseated twice on the recommendation of the House Committee on Elections. When he was not fiercely defending his seat in Congress, Walls fought for internal improvements for Florida. He also advocated compulsory education and economic opportunity for all races: "We demand that our lives, our liberties, and our property shall be protected by the strong arm of our government, that it gives us the same citizenship that it gives to those who it seems would . . . sink our every hope for peace, prosperity, and happiness into the great sea of oblivion."[1]

Josiah Thomas Walls was born into slavery in Winchester, Virginia, on December 30, 1842.[2] He was suspected to be the son of his master, Dr. John Walls, and maintained contact with him throughout his life.[3] When the Civil War broke out, Walls was forced to be the private servant of a Confederate artilleryman until he was captured by Union soldiers in May 1862. Emancipated by his Union captors, Walls briefly attended the county normal school in Harrisburg, Pennsylvania. By July 1863, Josiah Walls was serving in the Union Army as part of the 3rd Infantry Regiment of United States Colored Troops (USCT) based in Philadelphia. His regiment moved to Union-occupied northern Florida in February 1864. The following June, he transferred to the 35th Regiment USCT, where he served as the first sergeant and artillery instructor. While living in Picolata, Florida, Walls met and married Helen Fergueson, with whom he had one daughter, Nellie. He was discharged in October 1865 but decided to stay in Florida, working at a saw mill on the Suwannee River and, later, as a teacher with the Freedmen's Bureau in Gainesville. By 1868, Walls had saved enough money to buy a 60-acre farm outside the city.

One of the few educated black men in Reconstruction-Era Florida, Walls was drawn to political opportunities available after the war. He began his career by representing north-central Florida's Alachua County in the 1868 Florida constitutional convention. That same year, Walls ran a successful campaign for state assemblyman. The following fall, he was elected to the state senate and took his seat as one of five freedmen in the 24-man chamber in January 1869. Josiah Walls attended the Southern States Convention of Colored Men in 1871 in Columbia, South Carolina.

After gaining traction in 1867, the Florida Republican Party disintegrated into factions controlled by scalawags and carpetbaggers—each group fighting for the loyalty of a large constituency of freedmen. The disorganized GOP faced another grim situation when their nominating convention met in August 1870. The three previous years would be remembered as the apex of anti-black violence in the state, orchestrated by the well-organized Jacksonville branches of the Ku Klux Klan.[4] In the face of such unrestrained intimidation, Florida freedmen were widely expected to avoid the polls on Election Day. Fearing conservative Democrats would capture the election in the absence of the black vote, state GOP party leaders—a group made up entirely of white men from the scalawag and carpetbagger factions—agreed that nominating a black man to the state's lone At-Large seat in the U.S. House of Representatives would renew black voters' courage and faith in the Republican Party. Passing over the incumbent, former Union soldier Representative Charles Hamilton, the state convention delegates advanced the names of their favorite black candidates. Fierce competition between the nominees led to unruly debate as well as attempts to cast fraudulent votes, and almost resulted in rioting. Walls's reputation as an

New York Times

Drawing Lines

You Can't Draw Unbiased Districts in Florida Even if You Try

JULY 14, 2015

Kim Soffen

Is it even possible to draw congressional districts in Florida that do not favor Republicans?

Last week, the Florida Supreme Court ruled by 5-2 that eight of Florida's 27 congressional districts were drawn with "partisan intent" favoring the Republican Party.

The districts in question, drawn after the 2010 census, were used in the 2012 House elections. In those elections, the Republicans drew 51 percent of the vote yet won 63 percent of Florida's House seats. In a perfectly unbiased electoral system, a party winning 50 percent of the statewide votes would earn 50 percent of the congressional seats.

But the legislature that drew the districts might not be completely at fault. In 2013, Jowei Chen, an assistant professor of political science at the University of Michigan, and Jonathan Rodden, a professor of political science at Stanford, published a study that came to that conclusion. It found that because of the population geography of Florida — where Democrats and Republicans happen to live — it is nearly impossible to draw districts that don't have a Republican bias.

In Florida, as is common around the country, Democrats are highly concentrated in urban centers like Miami; Republicans are more spread out around the state. This means residents of Democratic-leaning precincts are far more likely to have similarly voting neighbors than red-leaning precincts are. And since Florida's congressional districts must by law be contiguous and compact, Democrats are more likely to be packed into districts that are overwhelmingly Democratic than Republicans are. Nate Cohn, my colleague at The Upshot, has written about the phenomenon of "wasted votes" and how it hurts Democrats in states like Pennsylvania.

In Florida, unlike in most other states, this Democratic concentration is so extreme that even in partisan-blind districts drawn by a computer, the Republican bias cannot be eliminated. In Mr. Chen and Mr. Rodden's simulations, they found that when the Florida vote was evenly split between Democrats and Republicans, Republicans would still win 61 percent of the House seats, on average. If compactness were not considered, the Republicans won 63 percent of seats, the same percentage won in the 2012 election.

One more argument for changing the house to a proportional vote. Besides allowing smaller parties to have a voice, it would eliminate the...

Yes, Democratic voters are "naturally" more compactly located in Florida. Wouldn't it be nice, though, to see districts that don't...

Through all of their simulations, not a single neutral or Democrat-biased plan was generated. But this result isn't found only in simulations.

Even the districting plans proposed by Democratic state legislators for the 2002 redistricting, which were presumably drawn favorably for Democrats, carried a Republican bias. The most Democratically favorable of these plans gave Republicans 56 percent of House seats when the statewide vote was split evenly between the parties. The most biased plans proposed by Democrats gave Republicans 68 percent of the seats.

In other words, a partisan-blind, or even a Democrat-drawn, districting plan has similar levels of Republican bias to the plan struck down by the court. So while the districts may have been drawn with "partisan intent," the election results might have ended up just as tilted without it.

Please Provide Completed Form To:

House Select Committee on
Redistricting
selectcommitteeonredistricting@myfloridahouse.gov
Mail to: Select Committee on Redistricting
418 The Capitol
402 South Monroe Street
Tallahassee, FL 32399-1300

Florida Congressional Redistricting Suggestion Form

By submitting this form, I acknowledge that my comments and suggestions may be displayed on www.floridaredistricting.org or other public websites maintained by the Florida Legislature.

Note: the entirety of this form is a public record.

*Field is required.

Prefix _____ *First Name RICHARD *Last Name KLEID Suffix _____

Organization Name (If applicable) PRES PRO TEM - PALM BEACH TOWN COUNCIL

*Your Address 2660 S OCEAN BLVD *City PALM BEACH *State FL *Zip 33480

Your County PALM BEACH Your Email KLEID561@AOL.COM

*May we follow up with you if we have questions about your suggestion? NOTE: In accordance with the Florida Supreme Court's ruling regarding political intent, answering NO may prevent your suggestion from be considered by the House.

☑Yes ☐No

*Are you a part of any political groups or organizations that have an interest in redistricting?

☐Yes ☐No

*If Yes, Please list them below:

_____

*If you are submitting a comment, is your suggestion solely your own? ☑Yes ☐No

*If you are submitting a drawn map, was the map drawn solely by you? ☐Yes ☐No

*If you answered NO to either of the previous two questions, Please list the name of every person you collaborated with on your suggestion or map:

_____

Please provide detailed comments regarding your suggestion, including why you feel your suggestion is a lawful change to the Florida Congressional District Map. Comments should be able to provide a non-partisan and incumbent-neutral justification for the proposed configuration of each district and how the proposal satisfies all of the constitutional and statutory criteria applicable to a Congressional redistricting plan.

_____

_____

_____

GOOD MORNING. MY NAME IS DICK ICKLEIGH AND I AM THE PRESIDENT PRO TEM OF THE P. B TOWN COUNCIL I WANT YOU TO KNOW THAT OUR COUNCIL IS UNANIMOUSLY IN FAVOR OF A NORTH-SOUTH CONFIGURATION FOR DISTRICT 22

[redacted]

~~Summary of points regarding the Supreme Court opinion:~~

LET ME POINT OUT DISTRICT

1. The Court found no evidence of any improper conduct in connection with the drawing of District 22 (That has existed in similar form for over 30 years). The reversal of the trial court as to this District was solely due to the improper standard applied by the trial court. The Supreme Court held the burden had shifted to the legislature to justify the drawing of the District

22 THIS

2. Even those challenging District "conceded that the vertical configuration for district could pass constitutional muster". There was no claim by the challengers that the vertical drawing of this District was improper. In fact, the Challengers configured District 22 (~~and 21~~) in a vertical manner.

3. The Court left it to the Legislature to redraw the District and provide a justification for why it was proper. WE ARE HERE TODAY TO PROVIDE THAT JUSTIFICATION!

~~List reasons why the Coastal district 22 is proper~~:

BE TO

1. The District was drawn after the 1980 census to ~~have~~ a coastal district. It has worked well due the commonality of interest, such as:
   - -coastal erosion issues BEING A TOURIST DESTINATION
   - -funding from Federal Gov for beach projects
   - -one representative to deal with USACE
   - - BMA agreements
   - ~~-(list all the factors you have dealt with-- you know this area better than me.~~ THE INTRACOASTAL WATERWAY
2. The district since early 1980s has had two Republican and two Democrats in office--it is not a gerrymandered district.

~~Summary~~: Unlike the situation in the North Florida districts--5 and 10-- there is NO claim of any improper conduct and there are MANY good reasons to join together coastal towns in one district and have one representative dealing with the Federal government on all coast issues affecting southeast Florida.

~~Gail, these are points I would make. Let me know if you have questions. God bless!~~

~~Mike~~

WE RESPECTFULLY ASK THAT YOU AMEND THE BASE MAP AND RESTORE THE DISTRICT'S POLITICAL BOUNDARIES IN A NORTH SOUTH CONFIGURATION