Montana Legislative Services Division

Legal Services Office

TO: Districting and Apportionment Commission

FROM: K. Virginia Aldrich, Staff Attorney

RE: Sufficiently Large Group Determinations Under the First *Gingles* Precondition for Vote Dilution Claims Arising Under Section 2 of the Voting Rights Act

DATE: August 25, 2022

This memorandum responds to questions about how courts use datasets in analyzing a claim of a violation under section 2 of the Voting Rights Act for purposes of the first *Gingles* factor. This memo has been prepared as background information for the Districting and Apportionment Commission, and it does not represent any opinion or action on the part of the commission.

I. Overview

For the purposes of analyzing the first *Gingles* precondition under a claim of vote dilution arising under section 2 of the Voting Rights Act, courts under the jurisdiction of the Ninth Circuit are likely to analyze whether a plaintiff can prove that a district could be drawn that is comprised of a geographically compact minority group constituting a majority of the citizen voting-age population. However, in some cases, courts (generally outside of the Ninth Circuit) have analyzed this factor using voting-age population in which there was not a significant difference in citizenship rates between the majority and minority populations, in which refinement by citizenship was not raised by the parties, or in which citizenship voting-age population estimates were not available at the time of trial.

II. Discussion

A. The Relevant Legal Test

As discussed in the May 2020 legal memo and the May 2022 legal memo, section 2 of the Voting Rights Act of 1965 prohibits any state or political subdivision from imposing any voting qualification, standard, practice, or procedure that results in the denial or abridgment of any United States citizen's right to vote on account of race, color, or membership in a language minority group.[1] The abridgment of the right to vote includes a racial or language group having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[2] This may include the dilution of a minority's voting power through the districting process.[3]

[1] 52 U.S.C. § 10301.
[2] *Id.*
[3] *Allen v. St. Bd. of Elections*, 393 U.S. 544, 569 (1969) (citations omitted).

Judicial determination of whether there is a violation of section 2 of the Voting Rights Act is a two-step process. First, plaintiffs must prove the existence of three threshold conditions. These were first identified in *Thornburg v. Gingles*[4]:

> (1) The minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district;
> (2) The minority group must be politically cohesive; and
> (3) The majority group votes sufficiently as a bloc to enable it—in the absence of special circumstances—to usually defeat the minority's preferred candidates.[5]

These three factors are necessary to show that the minority group has the potential to elect a representative of its own choice in a possible district, but racially polarized voting prevents it from doing so in the district as actually drawn because it has been submerged in a larger majority voting population.[6]

If any of these three preconditions is not present, there is no section 2 violation. However, if all three of these factors are present, courts proceed to the second step of the analysis. A violation of section 2 may be found if, as a result of the challenged practice or structure:

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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. . . .[7]

Assessment of the "totality of circumstances" is discussed further in the May 2020 legal memo, but it is a fact-intensive inquiry.

B. Sufficiently Large and Geographically Compact Group

The first *Gingles* precondition requires that the minority group be sufficiently large and geographically compact to constitute a majority in a single-member district. These are two distinct elements.

Geographical compactness for purposes of a vote dilution analysis refers to "the compactness of the minority population, not . . . the compactness of the contested district."[8] An inquiry evaluating the compactness of the minority population "should take into account 'traditional districting principles such as maintain communities of interest and traditional boundaries.'"[9] The Supreme Court has noted that a district that "'reaches out to grab small and apparently isolated minority communities' is not reasonably compact."[10] It has further cautioned that a state may not assume from voters' race that they think alike, share the same political interests, or prefer the same candidates; thus, "[i]n the absence of this prohibited assumption, there is no basis to believe a district that combines two far-flung segments of a

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[4] 478 U.S. 30 (1986), 50-51.
[5] *Id.* at 51.
[6] *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017).
[7] 52 U.S.C. § 10301.
[8] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) (citations omitted).
[9] *Id.* (citations omitted).
[10] *Id.* (citations omitted).

racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates."[11]

The second element under the first *Gingles* precondition concerns a numerosity requirement. In *Bartlett v. Strickland*, the United States Supreme Court analyzed whether section 2 of the Voting Rights Act required North Carolina to draw a district when the minority group made up less than 50% of the voting-age population in the district.[12] North Carolina had drawn such a district, and in doing so, it had split two counties, violating the state's prohibition against splitting counties (a provision that could only be superseded by the requirements of section 2).[13] Thus, the case turned on the question of whether section 2 would *require* the drawing of such a district. The trial court found that although African Americans were not a majority of the voting age population, the district was a *de facto* majority-minority district because African-American voters could receive enough crossover support to elect the African Americans' preferred candidate.[14] The Supreme Court of North Carolina reversed, holding that the minority group must constitute "a numerical majority of the voting population in the area under consideration before Section 2 . . . requires the creation of a legislative district to prevent dilution of the votes of that minority group."[15] Because African Americans did not "constitute a numerical majority of citizens of voting age," the Supreme Court of North Carolina ordered the North Carolina General Assembly to redraw the district.[16] Granting certiorari, the United States Supreme Court addressed the minimum size minority group necessary to satisfy the first requirement.

Petitioners defending North Carolina's plan argued that although crossover districts do not include a numerical majority of minority voters, the first *Gingles* requirement[17] was satisfied because the districts were still effective minority districts. While noting that the *Gingles* requirements "cannot be applied mechanically,"[18] Justice Kennedy, writing for Justice Alito and the Chief Justice, noted that the first *Gingles* requirement shows that minority voters possess the *potential* to elect a representative of their own choice.[19] Justice Kennedy characterized the objective, numerical test as follows: "Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?"[20] Holding that section 2 did not require the drawing of crossover districts, the Supreme Court stated that the first *Gingles* requirement was met only when "a geographically compact group of minority voters could form a majority in a single-member district."[21]

Justice Thomas, joined by Justice Scalia, wrote separately to concur only in the judgment, not in the reasoning, stating that it was his belief that section 2 did not authorize vote dilution claims and disagreeing with the *Gingles* framework.[22]

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[11] *Id.* (citations omitted).
[12] 556 U.S. 1 (2009).
[13] *Id.* at 7.
[14] *Id.* at 9.
[15] *Id.* citing *Pender County v. Bartlett*, 361 N.C. 491, 502 (2007).
[16] *Id.* citing *Pender County*, 361 N.C. at 503-510.
[17] *Id.* at 26.
[18] *Id.* at 15 (citing *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993)).
[19] *Id.*
[20] *Id.* at 18.
[21] *Id*. at 26.
[22] *Id.*

Because a majority did not concur in the reasoning for the holding, the practical implications are difficult to discern. However, it seems clear that the Supreme Court has clarified that a majority of the voting-age population (VAP) is *necessary* to fulfill the first *Gingles* precondition, but it may not be *sufficient* to fulfill the *Gingles* precondition. For instance, writing for the four dissenting justices, Justice Souter characterized the plurality as requiring "only a district with a minority population making up 50% or more of the citizen voting age population (CVAP) [to] provide a remedy to minority voters lacking an opportunity 'to elect representatives of their choice.'"[23] Although the Supreme Court of North Carolina addressed the refinement of voting-age population data by citizenship to ensure "a numerical majority of the voting population," Justice Kennedy's plurality opinion did not directly address whether VAP should be further refined by citizenship data to ensure that "minority voters" make up a majority in the district. However, in *dicta* in a later case concerning compactness of a minority group under the first *Gingles* precondition, Justice Kennedy, writing for the majority, noted that in one plan, Latinos were "a bare majority of the voting-age population . . . but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates."[24]

Likewise, in the Ninth Circuit, this question has been addressed. In *Romero v. City of Pomona*, the district court concluded that "after taking into consideration factors such as eligible voting age and citizenship, the evidence conclusively establishes that neither Hispanics nor blacks can constitute a majority of the voters of any single member district."[25] On appeal, the plaintiffs argued that the district court had erroneously measured geographic compactness by comparing eligible voters rather than raw population totals.[26] The Ninth Circuit held that "the district court was correct in holding that eligible minority voter population, rather than total minority population, is the appropriate measure of geographical compactness."[27] In this situation, "eligible minority voter population" was refined by both voting age and citizenship.

It is important to note that *Romero* was decided in 1989, well before *Bartlett v. Strickland*, although *Bartlett* did not necessarily overrule *Romero's* holding concerning eligibility of voters with respect to the first *Gingles* precondition. In the Fifth Circuit Court of Appeals, plaintiffs argued that only voting-age population mattered under the first *Gingles* condition after *Bartlett*; therefore, plaintiffs argued, applying a citizen voting-age population was too stringent for that purpose.[28] The Fifth Circuit found that the question of citizenship was not before the Supreme Court in *Strickland* and characterized the question in that case as follows: "If a minority population in a demonstration district comprises less than 50% of the possible voters, can it still meet the first *Gingles* test by showing that it can win elections with the help of a reliable crossover vote?"[29] Noting that this question was quantitative rather than qualitative, the Fifth Circuit also noted that the "voting majority" language of the opinion likely evidenced a citizenship requirement, the Supreme Court would be unlikely to overrule several other

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[23] *Id.* at 27.
[24] *Perry*, 548 U.S. at 429.
[25] *Romero v. Pomona*, 883 F.2d 1418, 1421 (9th Cir. 1989), overruled in part on other grounds by *Townsend v. Holman Consulting Corp*., 914 F.2d 1136, 1141 (9th Cir. 1990).
[26] *Id.*
[27] *Id.* at 1426.
[28] *Reyes v. City of Farmers Branch Tex.*, 586 F.3d 1019, 1023 (5th Cir. 2009).
[29] *Id.*

circuits[30] that also required evidence of a majority of citizen voting-age population under the first *Gingles* precondition, and the Supreme Court issued only a judgment, not a binding opinion.[31] The Fifth Circuit held that its "rule requiring an inquiry into citizenship under the first *Gingles* test remains good law."[32] While not binding on the Ninth Circuit, the Fifth Circuit's opinion gives a sister circuit's opinion on whether *Bartlett* overruled previous circuit precedent requiring that voting-age population be refined by citizenship for purposes of determining whether a minority group was sufficiently large under the first *Gingles* precondition.

Nevertheless, in some circumstances, courts have employed alternate measures to analyze the first *Gingles* precondition. In 2002, in a federal California Central District Court case, *Cano v. Davis*, CVAP was unavailable at the district level and precinct level, and it was only available statewide. Because of this, the plaintiff's expert had testified that extrapolating from this number to the CVAP percentage at the district level or precinct level would be unreliable.[33] The District Court addressed the issue as follows:

> The question, therefore, is whether, because CVAP figures are not available, plaintiffs may rely on another measure, such as VAP, to establish Gingles pre-condition one. Courts have, in some circumstances, employed such alternate measures. See, e.g., *Old Person v. Cooney*, 230 F.3d 1113, 1121 (9th Cir. 2000) (noting that parties did not dispute Gingles pre-condition one figures based on Native American voting age population); see also *DeGrandy*, 512 U.S. at 1014, 1021, n. 18 (noting that citizen voting age population figures were not available at the time of trial, and using voting age population figures to assess proportionality).[34]

However, because of the posture of the case, the District Court did not resolve the question, holding only that the use of VAP was sufficient to raise a genuine issue of material fact as to the first pre-

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[30] *See e.g., Barnett v. City of Chi.,* 141 F.3d 699 (7th Cir. 1998) ("We think that citizen voting-age population is the basis for determining equality of voting power that best comports with the policy of the statute. It is true that some cases, including one of our own, use voting-age population rather than citizen voting-age population. But they are cases in which, as far as appears, noncitizens were not a significant part of the relevant population" (citations omitted); *Negron v. City of Miami Beach*, 113 F.3d 1563 (11th Cir. 1997) ("We agree with the Ninth Circuit that . . . the proper statistic for deciding whether a minority group is sufficiently large and geographically compact is voting age population as refined by citizenship. Of course, the requirement that voting age population data be further refined by citizenship data applies only where there is reliable information indicating a significant difference in citizenship rates between the majority and minority populations. As we have previously indicated, such a disparity is unlikely except in areas where the population includes a substantial number of immigrants" (citations omitted)). Specifically, in *Negron*, the Eleventh Circuit upheld the District Court's consideration of CVAP, noting that "[t]he use of sample data is a long-standing statistical technique, whose limits are known and measurable. We will not reject the citizenship statistics solely because they are based on sample data without some indication that the sample was tainted in some way. There were no arguments before the district court that the sample was skewed in a statistically significant way due to improper sampling method, small sample size, or sheer random error. The plaintiffs contend that the sample's underestimation of the Hispanic population should cause the sample data to be rejected, but plaintiffs fail to show that that underestimation is statistically significant." *Negron*, 113 F.3d at 1571.

[31] *Reyes,* 586 F.3d at 1023-1025.

[32] *Id.* at 1025.

[33] *Cano v. Davis*, 211 F. Supp. 2d 1208, 1233 (C.D. Cal. 2002), aff'd, 537 U.S. 1100, 123 S. Ct. 851, 154 L. Ed. 2d 768 (2003).

[34] *Id.* at 1234.

condition; in doing so, it did not determine whether plaintiff's figures, using VAP, would have been sufficient, if established at trial, to meet the requirements of the first *Gingles* precondition.[35]

In 2012, the Second Circuit applied a simple majority rule using VAP in analyzing the first *Gingles* precondition. Because the parties' arguments discussed VAP rather than CVAP, the Second Circuit noted that they "did not here consider the alternative of employing citizen voting-age population ('CVAP') in evaluating a Section 2 claim."[36]

Thus, for the purposes of analyzing the first *Gingles* precondition under a claim of vote dilution arising under section 2 of the Voting Rights Act, courts in the Ninth Circuit are likely to analyze whether a plaintiff can prove that a district could be drawn that is comprised of a geographically compact minority group constituting a majority of the citizen voting-age population. However, in some cases, such as a prior case arising in Montana case, *Old Person v. Cooney*,[37] courts have used a voting-age population dataset for analysis under this factor in lieu of a citizen voting-age population dataset.[38] In other federal circuits, courts have occasionally used voting-age population for analysis of the first *Gingles* precondition under section 2 in which the use of CVAP was not at issue between the parties or there was not a significant difference in citizenship rates between the majority and minority populations.[39]

[35] *Id.*
[36] *Pope v. Cnty. of Albany*, 687 F.3d 565, n. 6 (2d Cir. 2012).
[37] *See* the May 2020 legal memo for a general discussion of the case history *Old Person v. Cooney*.
[38] In its discussion of the first *Gingles* factor, the district court in *Old Person* did not opine on the distinction between VAP and CVAP, although it used VAP for its analysis. *Old Person v. Cooney*, No. CV-96-04-GF-PGH (D. Mont. Oct. 27, 1998).
[39] *See* n. 30, *supra.*