IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case. No. 1D23-2252
L.T. Case No. 2022-CA-666

Cord Byrd, in his official capacity as Florida Secretary of State, the Florida House of Representatives, and the Florida Senate,

***Appellants*,**
v.
Black Voters Matter Capacity Building Institute, et. al,

***Appellees*.**

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During oral argument on October 31, 2023, in the above-captioned matter, this Court asked Appellees to provide support for the principle that Article III, Section 20(a)'s non-diminishment provision protects districts regardless of whether those districts were created as remedies pursuant to Article III, Section 20(a)'s non-dilution provision. In particular, given that Florida's minority protection provisions "follow almost verbatim the requirements embodied in the [federal] Voting Rights Act" such that Florida courts' interpretation of such provisions "is guided by prevailing United States Supreme Court precedent," *In re S. J. Res. of Legis. Apportionment 1176* ("*Apportionment I*"), 83 So. 3d 597, 619-20 (Fla. 2012), this Court asked Appellees for case law demonstrating that federal courts have interpreted and applied the Voting Rights Act's non-diminishment provision—Section 5—as a standalone protection.

Appellees reiterate that Florida Supreme Court precedent dictates that the non-diminishment and non-dilution provisions of the Florida Constitution operate as "dual constitutional imperatives," and the Court has accordingly set forth independent tests for claims under each provision. *Id.* Federal law supports the same conclusion.

- The U.S. Supreme Court has "consistently understood" Section 2 and Section 5 to "combat different evils and, accordingly, to impose very different duties upon the States." *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 477 (1997). Accordingly, the Court has rejected any interpretation or application of Section 5 that would "make compliance with § 5 contingent upon compliance with § 2." *Id.*

- In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the U.S. Supreme Court reiterated that "the § 2 inquiry differs in significant respects from a § 5 inquiry"; while the "'essence' of a § 2 vote dilution claim" is defined by the *Gingles* three-part test, "a retrogression inquiry under § 5, 'by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan.'" *Id.* at 478 (quoting *Reno*, 520 U.S. at 478). The Court further noted: "While some parts of the § 2 analysis may overlap with the § 5 inquiry, the two sections 'differ in structure, purpose, and application.'" *Id.* (quoting *Holder v. Hall*, 512 U.S. 874, 883 (1994)). As a result, the Court "refuse[d] to equate a § 2 vote dilution inquiry with the § 5 retrogression standard" because tying the two together "would 'shift the focus of § 5 from nonretrogression to vote dilution, and [would] change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." *Id.*[1]

- In *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977), the U.S. Supreme Court rejected the argument that Section 5 is triggered "only as a specific remedy for past unconstitutional apportionments" and held that Section 5's non-

[1] In 2006, Congress rejected *Georgia v. Ashcroft*'s conclusion that Section 5 allowed states to replace benchmark majority-minority districts with new influence districts, but otherwise left the decision intact. *See Texas v. United States*, 887 F. Supp. 2d 133, 145 (D.D.C. 2012).

diminishment standard "is not confined to eliminating the effects of past discriminatory districting or apportionment." *Id.* at 161.

Moreover, federal case law confirms that the status quo—and not any additional *Gingles*-type analysis—provides the starting point for the diminishment analysis.

- As set forth above, in *Georgia v. Ashcroft*, the U.S. Supreme Court noted that the Section 5 retrogression inquiry "'by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan.'" 539 U.S. at 478 (quoting *Reno*, 520 U.S. at 478). The Court refused to conflate the Section 5 and Section 2 standards lest it "change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." *Id.* at 479 (quoting *Reno*, 520 U.S. at 480).

- In *Holder v. Hall*, 512 U.S. 874 (1994), the U.S. Supreme Court held that under Section 5, "the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change." *Id.* at 883. The Court also emphasized that a "baseline for comparison is present by definition; it is the existing status. While there may be difficulty in determining whether a proposed change would cause retrogression, there is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur." *Id.* at 884. "For that reason, a voting practice that is subject to the preclearance requirements of § 5 is not necessarily subject to a dilution challenge under § 2." *Id.*

- The U.S. District Court for the District of Columbia has likewise explained that a diminishment claim "requires a determination of how and where minority citizens' ability to elect is currently present in a covered jurisdiction and

> how it will manifest itself in a proposed plan. This requires identifying districts in which minority citizens enjoy an existing ability to elect and comparing the number of such districts in the benchmark to the number of such districts in a proposed plan to measure the proposed plan's effect on minority citizens' voting ability." *Texas v. United States*, 831 F. Supp. 2d 244, 262 (D.D.C. 2011) (citing *Reno*, 520 U.S. at 478).[2]

Pursuant to the foregoing principles, federal courts have routinely protected districts from diminishment regardless of whether they were originally enacted to remedy Section 2 violations.

- In *Texas v. United States*, the U.S. District Court for the District of Columbia applied Section 5 to districts that were never enacted as remedial districts, including a congressional district that had a "twenty-seven year history of representation by a Hispanic Democrat," 887 F. Supp. 2d at 153, and state legislative districts in which minority voters "attained an ability to elect their preferred candidates" during the preceding decade, *id.* at 168.

- On a motion for summary judgment in that same case, Texas argued that only districts that were majority-minority districts in the benchmark plan were protected under Section 5. *Texas*, 831 F. Supp. 2d at 258-59. The court rejected the argument, *id.* at 260 ("Texas urges this Court to rely solely on voter demographic data to identify majority-minority districts and to count only such districts as minority ability districts. This Court cannot oblige."), and went on to note that how minority voters obtained an ability to elect is irrelevant to the Section 5

[2] Under Section 5, covered jurisdictions must obtain preclearance of any voting changes either from the U.S. District Court for the District of Columbia or the Attorney General. *See* 52 U.S.C.A. § 10304(a) (formerly cited as 42 U.S.C.A. § 1973c).

analysis. Section 5 "states no preference for *how* the minority group is able to elect its preferred candidate, whether by cohesive voting by a single minority group or by coalitions made up of different groups." *Id.* at 266 (emphasis added). Although states have no obligation to create a *new* crossover district (in which minorities comprise less than 50% of the voting age population but are still able to elect their preferred candidates) under Section 2, that "does not equate to freedom to *ignore* the reality of an existing crossover district in which minority citizens are able to elect their chosen candidates under Section 5." *Id.* at 267. "Thus, 'being able' or 'having the power' to elect—in the past (the benchmark) and the future (a proposed redistricting plan)—is what matters under Section 5. This Court concludes that a review of redistricting plans under Section 5 must be concerned with the functioning of the electorate, *i.e.*, whether minority voters will be 'effective [in their] exercise of the electoral franchise.'" *Id.* at 261 (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

- In *Smith v. Cobb County Board of Elections & Registrations*, 314 F. Supp. 2d 1274 (N.D. Ga. 2002), the district court applied Section 5 to a district that was never created as a remedial district and was not a majority-minority district, but had a substantial increase in Black voting age population in the preceding decade. After the court was charged with drawing a new redistricting map in the first instance due to a failure of the political branches to enact a new map, the court rejected the contention that it "consider, as a benchmark, what the population . . . looked like twelve years ago, when all parties agree that the population and demographics of the County are very different today," *id.* at 1298, and instead considered the ability to elect that had developed over the course of the decade, *id.* at 1299.

Finally, federal courts have applied Section 5's non-diminishment standard to a wide range of voting changes—not just redistricting plans—which belies any notion that a remedial district is a prerequisite for a diminishment claim.

- In *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), the U.S. Supreme Court held that Section 5 "is expansive within its sphere of operation" and applies to "all changes to rules governing voting," including "any qualification or prerequisite or any standard, practice, or procedure with respect to voting." *Id.* at 501-02 (internal quotation marks omitted).

- In *Florida v. United States*, 885 F. Supp. 2d 299 (D.D.C. 2012), the U.S. District Court for the District of Columbia found that Section 5 "squarely" applied to voting changes that "impose[d] additional restrictions on early voting and polling place procedures for inter-county movers" because "it is plain that laws that make it difficult for minority voters to register to vote or cast a ballot can just as readily—if not more readily—lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 313 (internal quotation omitted).

- Notably, in *McCain v. Lybrand*, 465 U.S. 236 (1984), the U.S. Supreme Court held that, under Section 5, the Attorney General should have had the opportunity to evaluate whether election changes that were enacted in 1966 "were discriminatory in purpose or effect when compared to the 1964 practices." *Id.* at 253. The Voting Rights Act itself was enacted in 1965, underscoring that the "benchmark" need not itself be remedying a Voting Rights Act violation.

In sum, "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in *the position of racial minorities with respect to their effective exercise of the electoral franchise*." *Beer*, 425 U.S. at 141 (emphasis added). The U.S. Supreme Court has *never* required that minorities' ability to elect is only protected where it was established to remedy vote dilution. To the contrary, it has consistently maintained that diminishment under Section 5 is examined independent and irrespective of Section 2.

Dated: November 6, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 6, 2023 I electronically filed the foregoing using the State of Florida ePortal Filing System, which will serve an electronic copy to counsel in the Service List below.

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I HEREBY CERTIFY that the foregoing brief is in Bookman Old Style 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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