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## Shelby County and Local Governments: A Case Study of Local Texas Governments Diluting Minority Votes

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# ***Shelby County* and Local Governments: A Case Study of Local Texas Governments Diluting Minority Votes**

By Sydnee Fielkow\*

## INTRODUCTION

*And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.<sup>1</sup>*

In the 2013 case, *Shelby County v. Holder*, the Supreme Court nullified the federal government's authority to preemptively intervene to prevent discriminatory changes to local election laws.<sup>2</sup> Section 4(b) of the Voting Rights Act of 1965 (VRA) previously required state and local governments to submit proposed election law changes based on their history of discriminatory voting laws.<sup>3</sup> Section 4(b) prohibited governments with a history of discriminatory voting practices from enacting new election laws without first obtaining preclearance of the plan from the Department of Justice (DOJ). Unfortunately, in *Shelby County*, the Supreme Court held that Section 4(b) was outdated and that the DOJ could no longer enforce that provision.<sup>4</sup> Without this provision of the VRA, local governments are no longer required to submit proposed changes in election law to the Attorney General for review, regardless of whether they had discriminated against minority voters in the past.<sup>5</sup> As a result of this change, local voters are now vulnerable to discriminatory practices.

Following the Court's decision in *Shelby County*, several states acted quickly to change their election laws.<sup>6</sup> In Texas, multiple counties swiftly enacted provisions and laws that would prevent minorities from having equal access to the ballot. While the Texas state government passed statewide legislation that restricted minorities' ability to reach the ballot, local governments threatened voting rights in other significant ways.

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<sup>1</sup> Reynolds v. Sims, 377 U.S. 533, 555 (1964).

<sup>2</sup> 570 U.S. 529, 557 (2013).

<sup>3</sup> See *id.* (citing 52 U.S.C. § 10303(b) (2012)).

<sup>4</sup> 570 U.S. 529, 557 (2013).

<sup>5</sup> See 52 U.S.C. §§ 10303–10304 (2012).

<sup>6</sup> See 52 U.S.C. § 10301 (2012); see also *Shelby County*, 570 U.S. at 578 (Ginsburg, J., dissenting) (“Just as buildings in California have a greater need to be earthquake-proofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination.”).

Numerous local governments in Texas quickly created at-large election plans. These plans, though perhaps facially neutral, are used to dilute the voting strength of minority voters. Without the preemptive protections that were struck down in *Shelby County*, these local Texas governments, that Congress previously determined had a history of voter discrimination, can now pass election legislation without approval from the federal government. Today, voters must challenge these discriminatory practices only *after* they take effect. One way to do so is under Section 2 of the VRA.

This Comment provides an account of the Voting Rights Act (VRA) and how local voting rights legislation has changed since the Supreme Court’s decision in *Shelby County v. Holder*. Part I analyzes the Voting Rights Act, the provisions at question in *Shelby County*, and how VRA litigation broadly has changed since this case. Part II provides an account of at-large elections and how they can dilute minority votes. Finally, while most scholarship focuses on voting laws at the federal or state level “[d]espite . . . robust activity on the local level,”<sup>7</sup> Part III focuses on three Texas cities—Pasadena, Beaumont, and Galveston—to understand how vulnerable local voters fought back in the wake of *Shelby County*.

#### I. THE VRA AND *SHELBY COUNTY*: HOW VOTER DISCRIMINATION LEGISLATION HAS DRASTICALLY CHANGED

On August 6, 1965, President Lyndon B. Johnson signed the VRA into law, nearly one hundred years after Congress ratified the Fifteenth Amendment.<sup>8</sup> President Johnson and Congress sought to remove the barriers preventing racial minorities from participating in government through the VRA.<sup>9</sup> The VRA prohibits states from imposing any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.”<sup>10</sup> Congress expanded the law in 1975 to apply to language minorities as well.<sup>11</sup>

This Comment focuses on three provisions of the VRA: Sections 2, 4(b), and 5. Under Section 2 of the VRA, all governments are prohibited from diluting the power of

<sup>7</sup> Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1041 (2017).

<sup>8</sup> See *Voting Rights Act of 1965*, HISTORY, <http://www.history.com/topics/black-history/voting-rights-act> (last updated Nov. 9, 2009). The Fifteenth Amendment mandated that the right to vote “shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1.

<sup>9</sup> See *Voting Rights Act of 1965*, *supra* note 8; see also President Lyndon B. Johnson, Remarks at the Signing of the Voting Rights Act of 1965 (Aug. 6, 1965), <https://www.c-span.org/video/?326896-1/voting-rights-act-1965-speech-bill-signing> (“This [Voting Rights] Act flows from a clear and simple wrong. It’s only purpose is to right that wrong. Millions of Americans are denied the right to vote because of the color of their skin.”).

<sup>10</sup> 52 U.S.C. § 10301(a).

<sup>11</sup> See Press Release, Office of the White House Press Sec’y, Remarks of the President at the Signing of the Voting Rights Act (Aug. 6, 1975), <https://www.docsteach.org/documents/document/ford-voting-rights-act-1975>. Specifically, President Ford said that this expansion prohibits “discrimination against Spanish-speaking Americans, American Indians, Alaskan natives, and Asian Americans.” *Id.* The bill also allows private citizens to bring claims of voter discrimination. *Id.*

minority votes.<sup>12</sup> Section 5 requires certain state and local governments to gain preclearance from the Department of Justice (DOJ) before changing election laws.<sup>13</sup> Section 4(b) contains a coverage formula to determine which state or local governments must gain federal preclearance under Section 5.<sup>14</sup> President Johnson's advice to states wishing to remain free from federal oversight was simple: "Open your polling places to all your people. Allow men and women to register and vote whatever the color of their skin. Extend the rights of citizenship to every citizen of this land."<sup>15</sup> Unfortunately, in *Shelby County*, the Court determined that Section 4(b) of the VRA was outdated, thus effectively nullifying Section 5's preemptive power over discriminatory election law changes.<sup>16</sup> The next section outlines Section 5's protection, reviews the formula in Section 4(b) at issue in *Shelby County*, identifies what Section 2 protects, and demonstrates how the *Shelby County* decision changed the course of voting rights legislation.

#### A. Section 5 of the Voting Rights Act

Prior to *Shelby County v. Holder*, Section 5 of the VRA required states and local districts with a history of discrimination seek approval from the federal government before making any changes to voting laws and practices, which is known as the "preclearance" requirement.<sup>17</sup> The jurisdictions subject to Section 5 preclearance are those that the Section 4(b) coverage formula identified as discriminatory.<sup>18</sup> To meet the preclearance requirement, these jurisdictions could submit their proposed changes to the DOJ or to a federal court of three judges.<sup>19</sup> After receiving a proposal to change voting laws, the Attorney General had sixty days to respond, either approving the plan, rejecting the plan, or requesting more information.<sup>20</sup> The DOJ challenged an average of twenty-eight proposed voting plans per year between 1965 and 2012.<sup>21</sup>

Section 5 prohibits laws that have "the *purpose* [or] . . . the *effect* of denying or abridging the right to vote on account of race or color," or language minority group.<sup>22</sup> Here, "purpose" refers to "any discriminatory purpose."<sup>23</sup> Section 5 places the burden of proof on state or local governments to demonstrate that the election changes were "not

<sup>12</sup> 52 U.S.C. § 10301.

<sup>13</sup> 52 U.S.C. § 10304 (2012).

<sup>14</sup> 52 U.S.C. § 10303(b) (2012), *held unconstitutional* by *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>15</sup> President Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), <http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise>.

<sup>16</sup> *Shelby County*, 570 U.S. at 557. As noted later on, federal judges do have the authority to require districts to obtain preclearance prior to implementing changes to voting law in certain situations. *See infra* note 150.

<sup>17</sup> 52 U.S.C. § 10304.

<sup>18</sup> *See id.* § 10304(a). As discussed later, the Court in *Shelby County*, 570 U.S. at 557, found that the coverage formula in § 4(b) is outdated.

<sup>19</sup> *See* 52 U.S.C. § 10304(a).

<sup>20</sup> *See id.*

<sup>21</sup> *See* Charles J. Durante, *Diluting the Voting Rights Act: How the Supreme Court's Conservative Majority Upended Precedent and Ignored Congressional Intent to Empower Vote-Suppression*, DEL. LAW., Fall 2016, at 22, 24.

<sup>22</sup> 52 U.S.C. § 10304(a) (emphasis added); *see also* 52 U.S.C. § 10303(f)(2) (2012), *held unconstitutional* by *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>23</sup> 52 U.S.C. § 10304(c).

motivated by a discriminatory purpose and will not have an adverse impact on minority voters,” before the changes could be enacted.<sup>24</sup> Further, Section 5 protects minorities against retrogressive effects,<sup>25</sup> as states must show that their proposed voting plan would not have such an effect on minority communities.<sup>26</sup> In 2006, Congress amended Section 5 to address how the VRA handles retrogressive effects.<sup>27</sup> After this amendment, states must present evidence of the relative “ability [of the minority community] to elect preferred candidates” in order to prove that a proposed plan will not have retrogressive effects on minorities.<sup>28</sup>

This demonstrates that prior to the *Shelby County* decision, Section 5 protected minority voters before any election law change could take effect. Jurisdictions with a history of discrimination had the burden to prove their proposed plan had neither discriminatory intent nor effect. Additionally, Section 5 gave the federal government authority to preemptively block plans that would have retrogressive effects on minorities. Though Section 5 survived *Shelby County*, the Court significantly limited its scope by striking down Section 4(b), as is discussed below. Today as a result of *Shelby County*, the federal government no longer has authority to preemptively reject proposed election changes that have either discriminatory purpose or intent.

#### B. *Section 4(b) of the Voting Rights Act*

Section 4(b) includes the coverage formula, which determines what jurisdictions are subject to the Section 5 preclearance requirement.<sup>29</sup> Section 4(b) provides that states and districts are subject to federal preclearance if: (1) the Attorney General finds the government maintained a voting test after November 1, 1964, or (2) the Director of the Census finds that state officials registered less than 50 percent of the people of voting age or less than 50 percent of the people of voting age voted in the November 1964 presidential election.<sup>30</sup> The Attorney General and Director of the Census implemented

<sup>24</sup> *McCain v. Lybrand*, 465 U.S. 236, 247 (1984); *see also* NAACP LEGAL DEF. FUND, *THE COST (IN TIME, MONEY, AND BURDEN) OF SECTION 2 OF THE VOTING RIGHTS ACT LITIGATION 1* (2017), [https://www.naacpldf.org/wp-content/uploads/Section-2-costs-08.13.18\\_1.pdf](https://www.naacpldf.org/wp-content/uploads/Section-2-costs-08.13.18_1.pdf).

<sup>25</sup> *See Beer v. United States*, 425 U.S. 130, 141 (1976) (finding that “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”).

<sup>26</sup> *See Georgia v. Ashcroft*, 539 U.S. 461, 462 (2003), *superseded by statute as stated in* *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) (“Congress passed the 2006 amendments [to § 5 of the Voting Rights Act of 1965] in response to our attempt to define ‘retrogression’ in *Georgia v. Ashcroft*.”).

<sup>27</sup> *See* H.R. REP. NO. 109-478, at 70–71 (2006).

<sup>28</sup> *Id.*; *see also* 52 U.S.C. § 10304(b).

<sup>29</sup> 52 U.S.C. § 10303(b) (2012), *held unconstitutional by* *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>30</sup> *Id.* Voting tests included literacy tests, which tested a potential voter’s “ability to read and understand English. . . . In practice, the[se] [tests] were used to disqualify immigrants and the poor, who had less education. In the South, they were used to prevent African Americans from registering to vote.” *Literacy Tests*, NAT’L MUSEUM OF AM. HIST., <https://americanhistory.si.edu/democracy-exhibition/vote-voice/keeping-vote/state-rules-federal-rules/literacy-tests> (last visited May 19, 2019). For an example of a literacy test, *see* Rebecca Onion, *Take the Impossible “Literacy” Test Louisiana Gave Black Voters in the 1960s*, SLATE (June 28, 2013, 12:30 PM), <https://slate.com/human-interest/2013/06/voting-rights-and-the-supreme-court-the-impossible-literacy-test-louisiana-used-to-give-black-voters.html>.

similar measures in 1968 and 1972.<sup>31</sup> Jurisdictions covered under Section 4(b) could “bail out” of coverage if they proved they had not used voting tests in the last five years “for the purpose or with the effect of denying or abridging the right to vote on account of race or color.”<sup>32</sup>

Congress has reauthorized the VRA multiple times, most recently in 2006. Congress did not change the coverage formula and instead chose to extend the existing formula for fifteen more years in 2006.<sup>33</sup> This demonstrates that Congress deemed the coverage formula necessary to ensure fair voting practices in the United States and that the formula did not need to be altered.

### C. Section 2 of the Voting Rights Act

Section 2 allows private voters to enforce the public right to vote.<sup>34</sup> The language of Section 2 mirrors the Fifteenth Amendment, which prohibits states from denying or abridging the right to vote based on “race, color, or previous condition of servitude.”<sup>35</sup> Under Section 2(a), no government can enact an election law that denies or abridges “the right of any citizens of the United States to vote on account of race or color” or because he or she is a member of a language-minority group.<sup>36</sup> Unlike Section 5, this prohibition applies to all states, not just those states with a history of voter discrimination.<sup>37</sup>

Section 2(b) outlines what constitutes a violation of 2(a).<sup>38</sup> A plaintiff can establish a violation of Section 2(a) occurred if:

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.<sup>39</sup>

When reviewing a violation of Section 2(a), one of the many factors courts may consider is how many members of a protected class have been elected to political office in a specific jurisdiction.<sup>40</sup>

Section 2 also prohibits voting schemes that dilute minority votes, meaning a minority citizen’s vote does not have the same weight as a white citizen’s vote.<sup>41</sup> These

<sup>31</sup> 52 U.S.C. § 10303(b).

<sup>32</sup> *Id.* § 10303(a).

<sup>33</sup> See ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA*, 285 (2015).

<sup>34</sup> Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 138 (2010).

<sup>35</sup> U.S. CONST. amend. XV, § 1.

<sup>36</sup> 52 U.S.C. § 10301(a) (2012).

<sup>37</sup> *See id.*

<sup>38</sup> *Id.* § 10301(b).

<sup>39</sup> *Id.*

<sup>40</sup> See *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) (finding that while there is no guarantee that minorities will be elected to office, courts consider “[t]he extent to which members of a protected class have been elected to office” to determine if there has been a § 2 violation).

<sup>41</sup> 52 U.S.C. § 10301.

prohibited schemes include at-large elections in addition to other voting procedures such as appointing officials for positions that were previously elected, moving polling places to inconvenient locations, and closing polling locations.<sup>42</sup> While these procedures are typically not facially discriminatory, the election plans often have discriminatory effects on minority voters.<sup>43</sup>

The Court did not intend to eliminate Section 2 of the VRA in its *Shelby County* decision.<sup>44</sup> Even though Section 2 may still be used to challenge allegedly discriminatory voter laws, these cases remain very difficult to prove and often require years of litigation, as described in Part II. While plaintiffs can challenge election law changes, the laws may still be in place for some time before a judge can issue a ruling, which is particularly problematic when there are allegedly discriminatory laws in effect during elections.<sup>45</sup> The specific requirements for successfully proving a Section 2 violation will be discussed later, but it is important to emphasize Section 2 allows for *reactive* litigation while Section 5 gives the Attorney General power to *proactively* prevent laws with discriminatory purpose or effect from being enacted.

#### D. *The Voting Rights Act and Shelby County v. Holder*

While the VRA remains significant as one of the most expansive civil rights laws, its reach was significantly curtailed when *Shelby County v. Holder* struck down Section 4(b) of the VRA.<sup>46</sup> The Supreme Court, in a 5-4 decision, held that the formula used to determine what counties are bound by the preclearance requirement was outdated and therefore no longer constitutional.<sup>47</sup> The Court based its decision on the fact that “things have changed dramatically”<sup>48</sup> since the VRA was passed, ignoring the reality that the increase in minority voter turnout in recent years was due in large part to the existence of the VRA and its preclearance requirement.<sup>49</sup> In her dissent, Justice Ginsburg argued that by limiting the Voting Rights Act, the Court “terminate[d] the remedy that proved to be best suited to block [voting] discrimination.”<sup>50</sup>

By striking down the coverage formula in Section 4(b) that determined which state and local governments were subject to the preclearance requirement, the Court essentially eliminated the ability of the federal government to proactively prevent discriminatory state laws under Section 5.<sup>51</sup> The formula was crucial for enabling the DOJ to challenge

<sup>42</sup> NAACP LEGAL DEF. FUND, A PRIMER ON SECTIONS 2 & 3(C) OF THE VOTING RIGHTS ACT, at 1-2 (2017), <https://perma.cc/8S2F-6HAG>.

<sup>43</sup> *Id.*

<sup>44</sup> *Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013).

<sup>45</sup> See TOMAS LOPEZ, *SHELBY COUNTY: ONE YEAR LATER*, BRENNAN CTR. FOR JUST. at 2 (2014) [http://www.brennancenter.org/sites/default/files/analysis/Shelby\\_County\\_One\\_Year\\_Later.pdf](http://www.brennancenter.org/sites/default/files/analysis/Shelby_County_One_Year_Later.pdf).

<sup>46</sup> *See id.* at 1.

<sup>47</sup> *See Shelby County*, 570 U.S. at 557.

<sup>48</sup> *Id.*

<sup>49</sup> Additionally, § 5 continued to block discriminatory voting laws until *Shelby County*. Six of the nine fully covered states under the § 4 formula, including Texas, passed new legislation restricting voting from 2010 to 2013, as opposed to the one-third of states not covered by the preclearance requirement. *See* BERMAN, *supra* note 33, at 277.

<sup>50</sup> *Shelby County*, 570 U.S. at 560.

<sup>51</sup> *See id.* at 531.

discriminatory practices; without Section 4(b), no county is subject to the Section 5 preclearance requirement. Until Congress passes a new and updated test to replace Section 4(b), Section 5 will remain ineffectual. Although some members of Congress are currently gathering information to “address the Supreme Court’s concerns about that data supporting Section 4 of the [VRA] and work toward the full implementation of Section 5,” Congress still has a long way before the VRA will be fully restored.<sup>52</sup> Today, minority voters may rely on Section 2 to assert their right to vote.<sup>53</sup> But as discussed below, this substantially increases the cost of vindicating that right.

When there are discriminatory changes at the state level that cause national backlash and outrage, there are likely going to be more resources available to fight these election practices.<sup>54</sup> However, election law violations that occur at the local level may not receive the same level of national attention and resources. While there was national outrage when Texas moved forward with a statewide voter ID law, local changes did not receive the same level of national outrage. This could be due to numerous reasons, including the number of people these laws affect. Yet, these election law changes still may have discriminatory effects on minority voters.

As it stands today, Section 5 of the VRA does not provide preventative support to minority voters because *Shelby County* found the coverage formula in Section 4(b) to be outdated. Without the coverage formula, the DOJ is unable to challenge discriminatory practices under Section 5. But Section 2 remains a viable option to challenge election laws, such as at-large elections, after they have gone into effect. Part II addresses how at-large elections can be used to dilute the voting power of racial minorities.

## II. USING AT-LARGE ELECTIONS TO DILUTE MINORITY VOTERS’ VOICES

Before the VRA, at-large elections or multimember districts were used to keep legislators accountable for what happens to the entire voting population and “promote good governance.”<sup>55</sup> This changed after the passage of the VRA.<sup>56</sup> Under at-large

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<sup>52</sup> *Congress Traveling the Country to Hear Evidence of Voting Rights Violations*, BLACKPRESSUSA (Apr. 13, 2019), <https://www.blackpressusa.com/congress-traveling-the-country-to-hear-evidence-of-voting-rights-violations/>.

<sup>53</sup> See NAACP LEGAL DEF. FUND, *supra* note 24, at 1.

<sup>54</sup> On the same day that *Shelby County* was decided, Texas Attorney General Greg Abbott announced that a voter-ID law previously prevented by the preclearance requirement would immediately be implemented. See Ed Pilkington, *Texas Rushes Ahead with Voter ID Law After Supreme Court Decision*, GUARDIAN, (June 25, 2013, 3:32 PM), <https://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision>. This declaration prompted immediate backlash and lawsuits challenging the constitutionality of the law. In the consolidated case *Veasey v. Perry*, voter advocates challenged the voter-ID law. 29 F. Supp. 3d 896, 902 (S.D. Tex. 2014). This case has been in litigation since *Shelby County*, and on April 10, 2017, the district court ruled that this law was enacted with discriminatory intent against minority voters in Texas. See *Texas NAACP v. Steen (Consolidated with Veasey v. Abbott)*, BRENNAN CTR. FOR JUST. (Sept. 21, 2018), <https://www.brennancenter.org/legal-work/naacp-v-steen>. The Texas voter-ID law being challenged, SB 14, was originally created in 2011, but was challenged under § 5 of the VRA and struck down within a year. See *id.* Challenging the law under § 2 has taken five years. See *id.* Most recently, on April 27, 2018, the Fifth Circuit ruled that the voter-ID law may be implemented. *Veasey v. Abbott*, 888 F.3d 792, 804 (5th Cir. 2018).

<sup>55</sup> Sarah Childress, *After Shelby, Voting-Law Changes Come One Town at a Time*, PBS (Aug. 8, 2013), <http://www.pbs.org/wgbh/frontline/article/after-shelby-voting-law-changes-come-one-town-at-a-time/>.

<sup>56</sup> See *id.*

election plans, “all voters cast their ballots for all candidates in the jurisdiction.”<sup>57</sup> Politicians began using these systems as a method of diluting the minority vote.<sup>58</sup> At-large systems can be used to discriminate against all minority groups, including racial, ethnic, economic and political groups.<sup>59</sup> When a city is divided into districts or wards, some of these districts are likely to have a concentrated number of racial minority voters.<sup>60</sup> This concentration gives minorities who vote as a bloc an opportunity to elect the representatives of their choice.<sup>61</sup> However, when governments operate under an at-large election, voters select at least one of their representatives through a majority vote. This means that the majority voters will outnumber minority voters, allowing “the political majority to elect *all* representatives of the district.”<sup>62</sup> In other words, a white majority that votes as a bloc will often elect candidates that represent only the white majority.

#### A. *How At-Large Systems Are Created*

When jurisdictions move to at-large elections, they also often eliminate one or more districts, which keeps the number of representatives constant. For example, a city moving from a 5-district system to three single-member districts and two at-large electors (referred to as a 3-2 system) eliminates two districts. The three new districts also need to be redrawn, which places them in a vulnerable position to the negative effects of gerrymandering.<sup>63</sup>

The party in power “gerrymanders” when it draws district lines not to reflect geography or neighborhoods, but instead to maximize that party’s political advantage. The politicians in power often pack voters who favor the opposition into districts that the opposing party is likely to win (referred to as “packing”) or crack those who will vote for the opposition into many different districts so they constitute a minority (“cracking”).<sup>64</sup> When people in positions of power want to dilute minority votes, moving to an at-large system allows them to both create seats elected by the majority as well as minimize the impact of the minority votes by creating new districts using packing and cracking.

Gerrymandering is not discriminatory on its face; rather, there must be evidence of discriminatory purpose or effect.<sup>65</sup> Gerrymandering and at-large elections are closely related because jurisdictions may use gerrymandering efforts with discriminatory purpose

<sup>57</sup> NAACP LEGAL DEF. FUND, AT-LARGE VOTING FREQUENTLY ASKED QUESTIONS (2014), <https://www.naacpldf.org/wp-content/uploads/At-Large-Voting-Frequently-Asked-Questions-1.pdf>.

<sup>58</sup> *See id.*

<sup>59</sup> *See* *Rogers v. Lodge*, 458 U.S. 613, 616 (1982).

<sup>60</sup> *See* James Scott McClain, *The Voting Rights Act and Local School Boards: An Argument for Deference to Educational Policy in Remedies for Vote Dilution*, 67 TEX. L. REV. 139, 140 (1988).

<sup>61</sup> *See id.*

<sup>62</sup> *Rogers*, 458 U.S. at 616.

<sup>63</sup> Gerrymandering, a term coined in 1812, is named after Massachusetts Governor Elbridge Gerry, who created a redistricting plan—frequently referred to as a salamander because of its unique shape—that was intended to give his party an advantage. *See* MICHAEL WALDMAN, *THE FIGHT TO VOTE* 37 (2016).

<sup>64</sup> *See* Evan Hall, *Texas Two Step: The Texas Legislature’s Mid-Decennial Redistricting Plan of 2003*, *League of United Latin American Citizens v. Perry, and Their Impact on the Future of the Political Gerrymander*, 59 BAYLOR L. REV. 485, 487 (2007).

<sup>65</sup> *Shaw v. Reno*, 509 U.S. 630, 649 (1993).

or effect when creating an at-large election. As such, understanding how districts can be broken up through gerrymandering to achieve voter dilution is important to at-large elections.

*B. Bringing Claims Against At-Large Election Schemes under Section 2 of the VRA*

After Congress passed the VRA in 1965, voters began challenging at-large voting schemes under Section 2.<sup>66</sup> The VRA prevented new at-large elections from taking place through Section 5, and provided a method of relief under Section 2. The Supreme Court has never ruled that all at-large elections are unconstitutional and has in fact found that at-large plans “may not be considered *per se* violative of § 2” of the VRA.<sup>67</sup> However, the Court has found discrimination in individual cases.<sup>68</sup> In *Thornburg v. Gingles*, Justice Brennan, writing for the majority, stated that the Supreme Court “has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities] in the voting population.”<sup>69</sup>

Before *Shelby County*, jurisdictions with a chronic history of discriminatory election laws trying to implement at-large voting plans needed to seek preclearance under Section 5.<sup>70</sup> Therefore, the Attorney General could reject plans that had either discriminatory purpose or effect prior to the plan taking effect.<sup>71</sup> When at-large plans were implemented, voters historically challenged them under Section 2. However, it can be very difficult and expensive to prove that an at-large voting scheme has discriminatory effects under Section 2.<sup>72</sup>

In *Gingles*, the Court created a two-step system for addressing a Section 2 claim.<sup>73</sup> First, the plaintiff must establish a *prima facie* case of vote dilution. To do so, the challenger must prove that: (1) the minority group is sufficiently large and geographically compact such that they could comprise a majority of the district voters; (2) the minority group is politically cohesive; and (3) racially polarized voting exists so that it is likely that whites would vote as a bloc to defeat candidates favored by minorities.<sup>74</sup> These three factors are commonly known as the “*Gingles* factors.”<sup>75</sup>

After establishing the *prima facie* case, the court must consider “whether plaintiffs have established that, ‘based on the totality of circumstances,’ minority voters ‘have less opportunity than other members of the electorate to participate in the political process

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<sup>66</sup> See NAACP LEGAL DEF. FUND, *supra* note 57.

<sup>67</sup> *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986). In *White v. Regester*, 412 U.S. 755 (1973), the Supreme Court held that the Texas multimember district was unconstitutional because it had a discriminatory effect towards Mexican-Americans, as the plan “invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives.” *Id.* at 769. However, the Supreme Court has also upheld multimember districts when the plaintiff is unable to prove that the district “unconstitutionally operate[s] to dilute or cancel the voting strength of racial or political elements.” *Whitcomb v. Chavis*, 403 U.S. 124, 144 (1971).

<sup>68</sup> See *Thornburg*, 478 U.S. at 47.

<sup>69</sup> *Id.* (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (1966)).

<sup>70</sup> 52 U.S.C. § 10304 (2012).

<sup>71</sup> *Id.*; see also *City of Richmond v. United States*, 422 U.S. 358, 362 (1975).

<sup>72</sup> See *Durante*, *supra* note 21; see also NAACP LEGAL DEF. FUND, *supra* note 24, at 1.

<sup>73</sup> *Thornburg*, 478 U.S. at 50–51.

<sup>74</sup> *Id.* at 31, 50–51 (establishing that a “bloc” can occur when “a significant number of minority group members usually vote for the same candidate”).

<sup>75</sup> NAACP LEGAL DEF. FUND, *supra* note 42, at 2.

and to elect representatives of their choice.”<sup>76</sup> Courts should then consider many factors in the second step of the analysis.<sup>77</sup> This part of the test is flexible, allowing courts to consider factors they deem relevant to the particular case, including the history of the particular jurisdiction being challenged.<sup>78</sup> Many courts consider widespread private discrimination, or discriminatory acts by someone other than the government, as a factor in Section 2 litigation.<sup>79</sup>

Unlike Section 5 claims, individuals must bring Section 2 claims *after* the regulation is enacted.<sup>80</sup> This automatically creates a financial barrier to blocking laws with allegedly discriminatory purposes or effects because Section 2 claims require litigation, an expensive and often long process.<sup>81</sup> Litigating these claims can be time consuming—it is common for these cases to last more than five years.<sup>82</sup> Section 5 claims place the burden of proof on the state or local government to prove to the Attorney General that the election law change is non-discriminatory. Comparatively, Section 2 claims put the burden of proof on the plaintiff, often requiring intense labor to prove the *Gingles* factors.<sup>83</sup> Section 2 claims are also significantly more expensive than Section 5 claims; one town spent over \$2 million defending Section 2 claims, while Section 5

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<sup>76</sup> *Id.*

<sup>77</sup> A non-exhaustive list of factors can be found in the Senate Judiciary Committee’s report from the VRA’s 1982 amendments and includes: (1) “[T]he extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process”; (2) “the extent to which voting in the elections of the state or political subdivision is racially polarized”; (3) “[t]he extent to which the state or political subdivision has used unusually large election districts, majority vote requirements . . . or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group”; (4) “whether the members of the minority group have been denied access to” the candidate-slating process; (5) “the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process”; (6) “whether political campaigns have been characterized by overt or subtle racial appeals”; and (7) “the extent to which members of the minority group have been elected to public office in the jurisdiction.” S. REP. NO. 97-417, at 206–07 (1982).

<sup>78</sup> See generally LOPEZ, *supra* note 45.

<sup>79</sup> See *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 685 (S.D. Tex. 2017); see also *Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988); *United States v. Marengo Cty. Comm’n*, 731 F.2d 1546, 1567 n.36 (11th Cir. 1984) (stating that “pervasive private discrimination should be considered” in § 2 litigation “because such discrimination can contribute to the inability of blacks to assert their political influence and to participate equally in public life”).

<sup>80</sup> See generally Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961, 1963 (2018).

<sup>81</sup> See Brief for Joaquin Avila et al. as Amici Curiae Supporting Respondents at 16, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96) (emphasizing that “Section 2 actions have become increasingly complex and resource-intensive in recent years”).

<sup>82</sup> See NAACP LEGAL DEF. FUND, *supra* note 24, at 5–6. For example, in Fayette County, Georgia, voters battled a discriminatory at-large election for over five years. See *id.* at 5. Voters challenged Texas’s photo-ID law under § 2 for over six years. *Id.* at 6.

<sup>83</sup> See *Beer v. United States*, 425 U.S. 130, 141 (1976). In one case, a town procured more than 340,000 pages of documents and deposed more than fifty people to meet its burden of proof. See NAACP LEGAL DEF. FUND, *supra* note 24, at 2.

claims only cost states an average of \$500.<sup>84</sup> This demonstrates that challenging laws under Section 2 takes more time, money, and labor than gaining preclearance approval under Section 5.

At-large elections can have a discriminatory impact on minority voters and challenging these schemes under Section 2 can be costly and burdensome for all parties. Immediately after *Shelby County*, many local governmental bodies in Texas enacted at-large elections that diluted the voting strength of racial minorities. Part III focuses on three Texan cities that created at-large election schemes following *Shelby County*: Pasadena, Beaumont, and Galveston. Pasadena was able to successfully bring a Section 2 challenge and should serve as a model for voters challenging at-large elections after *Shelby County*. Beaumont voters did not bring a Section 2 claim but bringing one may have improved their chances of success. Meanwhile in Galveston, voters failed to win their Section 2 claim. These case studies highlight the challenges that voters face post-*Shelby County*, while also shining a light on a case that can serve as an example for similarly situated voters.

### III. CASE STUDIES OF AT-LARGE ELECTIONS

After the *Shelby County* decision in June 2013, many state and local governments acted quickly to implement election changes that the DOJ could have originally blocked under Section 5. Texas officials expressed their approval of the *Shelby County* decision because the Court held that “preclearance under the Voting Rights Act was no longer required in many states, including Texas.”<sup>85</sup> On the same day that *Shelby County* was decided, then-Attorney General of Texas Greg Abbott famously tweeted, “Eric Holder can no longer deny #VoterID in #Texas after today’s #SCOTUS.”<sup>86</sup> Politicians began passing election law changes after June 2013, often at the local level. In Texas, many local governments passed election law changes that either were previously denied by the federal government or would have been subject to the preclearance requirement. In the words of the Supreme Court:

Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. . . . The history of official discrimination in the Texas election process – stretching back to

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<sup>84</sup> See NAACP LEGAL DEF. FUND, *supra* note 24, at 3 (“Lawmakers in Charleston County, South Carolina, spent \$2 million unsuccessfully defending itself from a Section 2 claim. On the contrary, under Section 5, it cost an average of \$500 for states and localities to submit paperwork for preclearance of changes to voting practices.”). See also *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the Sen. Comm. on the Judiciary*, 109th Cong. 20 (2006); Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 675 (2014).

<sup>85</sup> *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 681 (S.D. Tex. 2017).

<sup>86</sup> Greg Abbott (@GregAbbott\_TX), TWITTER (June 25, 2013, 8:02 AM), [https://twitter.com/gregabbott\\_tx/status/349543005931311104](https://twitter.com/gregabbott_tx/status/349543005931311104).

Reconstruction – led to the inclusion of the State as a covered jurisdiction under Section 5 in the 1975 amendments to the Voting Rights Act.<sup>87</sup>

The following section is a case study of three Texas cities that made election law changes immediately after *Shelby County*: Pasadena, Beaumont, and Galveston. These three cities also have “a long, well-documented history of discrimination” affecting the rights of minority voters and would have been subject to Section 5 preclearance.<sup>88</sup> After *Shelby County*, each city adopted or attempted to adopt a redistricting plan without federal oversight. Independent plaintiffs challenged these laws, alleging the election changes have discriminatory effects on minority voters. The following is an analysis of which challenges worked for these cities, and recommendations for what can be done to improve Section 2 litigation.

### A. Pasadena

Pasadena is a city located within the greater Houston metropolitan area, with a population of approximately 150,000.<sup>89</sup> Approximately 55% of Pasadena is white, 33% is Latino, and 13% is African-American, while the remaining population identifies as American Indian, Alaska Native, or other race.<sup>90</sup> Shortly after the *Shelby County* decision, Pasadena enacted an at-large voting system for its City Council.<sup>91</sup> This at-large plan changed the election map from eight single-member districts to six single-member districts and two at-large representatives.<sup>92</sup> Latino voters challenged the at-large election plan under Section 2 of the VRA and the U.S. District Court for the Southern District of Texas invalidated the plan, finding it had a discriminatory impact on minority voters.<sup>93</sup>

#### 1. Pasadena Before *Shelby County*

Pasadena has a long history of acting with discriminatory intent, both generally and specifically surrounding voting practices.<sup>94</sup> According to an expert report presented to the Southern District of Texas Court, “Latinos continue to lag behind politically and economically in the face of persistent racial prejudice and a structure of discrimination.”<sup>95</sup> This discrimination extends back to at least the 1800s, when Tejanos (the Spanish word for Texan used to describe Latino settlers) established a legitimate

<sup>87</sup> *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439–40 (2006) (quoting *Vera v. Richards*, 861 F.Supp. 1304, 1317 (S.D. Tex. 1994)).

<sup>88</sup> *Id.*

<sup>89</sup> *QuickFacts: Pasadena City, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/4856000> (last updated July 1, 2018).

<sup>90</sup> *About Pasadena*, CITY OF PASADENA, <https://www.cityofpasadena.net/about-pasadena/> (last visited May 19, 2019).

<sup>91</sup> *See Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 673 (S.D. Tex. 2017).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 724–25.

<sup>94</sup> *See generally* Mike Snyder, *Voting Rights Case Part of Long History of Pasadena Ethnic Strife*, HOUS. CHRON., <http://www.houstonchronicle.com/news/columnists/greater-houston/article/Voting-rights-case-part-of-long-history-of-9178135.php> (last updated Aug. 22, 2016, 7:19 PM).

<sup>95</sup> Report of Andrés Tijerina at 3, *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2016) (No. 138-1).

Texas government but were soon outnumbered by Anglo Americans.<sup>96</sup> Around this time, Pasadena was growing and attracted a vibrant working Latino population. But a shift in the mid- to late-twentieth century set the stage for increased voter dilution. As the white population of Pasadena declined slowly, the Latino population grew by 50% in the late 1900s.<sup>97</sup> As demonstrated below, the strong conservative values of the blue-collar white workers became more problematic and volatile in the following decades.

By the 1980s, Pasadena was the headquarters of the Texas Ku Klux Klan and politicians were pushing to keep the white voters in power, despite the changing demographics.<sup>98</sup> At this time, Pasadena had an at-large voting system, which was not uncommon in Texas. Approximately 85% of large Texas cities used at-large systems through the 1980s.<sup>99</sup> As the city grew, Pasadena maintained its at-large district scheme and the majority of the city was still white.<sup>100</sup> However, as the Latino population expanded, they fought for equal representation in elections. In the 1990s, Pasadena Latinos filed a lawsuit under Section 2 of the VRA, claiming that the at-large system for electing the school board denied Latinos the opportunity for equal representation in school board elections.<sup>101</sup> Although the judge found the plaintiffs could not prove that their votes were diluted, this case illustrates that the city's minority population was struggling to find their voice in political representation.<sup>102</sup>

Pasadena also has a history of diluting minority votes that predates *Shelby County*.<sup>103</sup> For example, officials previously discarded ballots from Latino citizens before they could be counted.<sup>104</sup> Pasadena also used color-coded ballots to distinguish white voters from minority voters.<sup>105</sup> In fact, federal reports found that some white officials were not even aware that their actions were discriminatory because it was simply the norm.<sup>106</sup> This was not the only Pasadena voting practice that had discriminatory effects; Latino citizens were routinely required to show identification before voting and often were told they could not vote, without any explanation provided.<sup>107</sup>

Today, Latinos make up approximately 62% of Pasadena, a significant increase from 48% in 2000.<sup>108</sup> With a growing Latino population, one would expect to see more Latino-favored candidates in power in Pasadena. However, actions taken after *Shelby County* suggest there may be continued discriminatory intent to dilute the voting power of Latinos. For instance, in 2011, Pasadena's City Council adopted a redistricting map that created eight districts.<sup>109</sup> Half of these districts were "majority Spanish-surname

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<sup>96</sup> *Id.* at 4.

<sup>97</sup> *Id.* at 29.

<sup>98</sup> *Id.* at 29–30.

<sup>99</sup> *Id.* at 33.

<sup>100</sup> *Id.*

<sup>101</sup> *Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368, 369 (5th Cir. 1999).

<sup>102</sup> *See id.* at 374.

<sup>103</sup> *See* Report of Andrés Tijerina, *supra* note 95, at 35.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 50.

<sup>107</sup> *Id.*

<sup>108</sup> Sen. Sylvia Garcia & Larry Peacock, *Redistricting Proposal Targets Hispanic Gains*, CHRON., <http://www.chron.com/opinion/outlook/article/Garcia-Peacock-Redistricting-proposal-targets-4947300.php> (last updated Nov. 1 2013, 5:23 PM).

<sup>109</sup> *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 681 (S.D. Tex. 2017).

registered-voter districts” and the other half were majority Anglo registered-voter districts.”<sup>110</sup> The city only held one election using this map in May 2013—just under two months before *Shelby County*.<sup>111</sup> In the May 2013 election, Latinos, voting as a bloc, elected their preferred candidates in three of the four districts that were Latino-majority.<sup>112</sup>

## 2. After *Shelby County*: Pasadena’s At-Large Election System

Two days after *Shelby County*, Pasadena Mayor Johnny Isbell<sup>113</sup> called for a committee hearing for an upcoming November 2013 special election. He proposed a redistricting plan that disproportionately affected the influence of Latino voters in municipal government.<sup>114</sup> This plan cut two of the eight seats from Pasadena’s city council, creating six single-member districts and two at-large seats (the “6-2 plan”). If Section 5 were in place, Pasadena would have been required to submit this plan to the DOJ and it likely would have been blocked.<sup>115</sup>

While the committee rejected the at-large plan, Mayor Isbell nevertheless moved ahead with the proposal.<sup>116</sup> Isbell brought the plan to the City Council in August 2013, where it was put to a vote.<sup>117</sup> Mayor Isbell cast the tie-breaking vote, resulting in citizens of Pasadena voting on the plan in a November 2013 special election.<sup>118</sup> In the special election, voters narrowly approved (by only seventy-nine votes) an amendment changing the districts from eight districts (8-0) to six districts with two at-large districts (6-2).<sup>119</sup> The two eliminated districts were predominantly Latino,<sup>120</sup> who make up approximately 50% of the voting population in Pasadena.<sup>121</sup> Almost every Latino who voted in the special election opposed the new districting plan; approximately 99.6% of Latinos rejected the plan.<sup>122</sup> However, the redistricting plan was passed, possibly due to low voter

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 706. Although a white-preferred candidate won one of the four districts, the three Latino-preferred candidates testified that due to “District B’s strong majority of Latino citizen voting-age population and Spanish-surnamed registered voters, the District was likely to elect a Latino-preferred candidate in” future elections. *Id.* Further, the district court found “that Mayor Isbell and the Pasadena City Council believed this as well.” *Id.*

<sup>113</sup> Mayor Johnny Isbell has been actively involved in Pasadena politics for over thirty years. His second term ended in 2017, and he cannot run again due to term-limit laws. *Id.* at 678.

<sup>114</sup> *See id.* at 681.

<sup>115</sup> *See* LOPEZ, *supra* note 45, at 4.

<sup>116</sup> *See Patino*, 230 F. Supp. 3d at 681.

<sup>117</sup> *See id.*

<sup>118</sup> *See id.* at 682.

<sup>119</sup> *See id.*; *see also* Alvaro Ortiz, *Five Hispanics Sue the Pasadena City Counsel, Municipal Districts Redesign*, CHRON., <https://www.chron.com/neighborhood/pasadena-news/article/Five-Hispanics-sue-the-Pasadena-City-Council-5890631.php> (last updated 12:56 PM, Nov. 13, 2014).

<sup>120</sup> Ari Berman, *Voter Suppression Backfires in North Carolina, Spreads in Texas*, THE NATION (Nov. 7, 2013), <https://www.thenation.com/article/voter-suppression-backfires-north-carolina-spreads-texas/>.

<sup>121</sup> *See Patino*, 230 F. Supp. 3d at 686. The court cites two different surveys and both estimate that the Latino citizen voting-age population is around fifty percent. *See id.* at 686–87.

<sup>122</sup> *Id.* at 669.

turnout.<sup>123</sup> In the following 2015 election, the 6-2 plan was utilized, which resulted in one less Latino-majority single-member district than previously under the 8-0 single member district plan.<sup>124</sup>

Pasadena Latinos of voting age, along with the Mexican American Legal Defense and Education Fund, filed a lawsuit against the City of Pasadena, alleging the redistricting plan resulted in Latino vote dilution.<sup>125</sup> On January 6, 2017, the Southern District of Texas found that the election change diluted Latino voting strength and violated the VRA.<sup>126</sup> The court analyzed the case under the Section 2 two-step analysis outlined in *Gingles*.<sup>127</sup> Again, the first step is establishing a *prima facie* case of vote dilution—both parties agreed that the first two conditions of the *Gingles* step one were satisfied.<sup>128</sup> These two conditions are that the minority is both large and geographically compact so that they could comprise a majority of the voters in a district and the minority group is politically cohesive, meaning the group votes as a bloc.<sup>129</sup>

The third condition to establish the *prima facie* case—that majority votes as a bloc to defeat the minority preferences—was also met.<sup>130</sup> Representing nearly half of voting eligible citizens, Latinos should have proportional representation and should have been able to elect four of the eight representatives. Yet, in all elections considered by the court, “Anglo or other non-Latino bloc voting usually defeated the Latino-preferred candidate.”<sup>131</sup> Under the old 8-0 plan, eligible Latino voters were the majority in four districts; but under the new 6-2 plan, they were the majority in only three districts.<sup>132</sup> Further, Latinos were nearly the majority in a fifth district under the 8-0 plan, meaning they could very well be the majority in most districts in the near future.<sup>133</sup> If Latino candidates of choice win the majority of votes in a fifth district, Mayor Isbell would no longer have the deciding vote when the City Council was split between Latino-majority districts and white-majority districts.<sup>134</sup> The court found this change, “by simple arithmetic,” constituted dilution.<sup>135</sup>

Since the first *Gingles* step establishing a *prima facie* case of vote dilution was met, the court then moved onto the second step,<sup>136</sup> which requires courts to consider the “totality of the circumstances.”<sup>137</sup> Taking Pasadena’s history of discrimination into account, Latinos suffered lingering effects that prevented them from full involvement in

<sup>123</sup> See Ortiz, *supra* note 119. Out of a city of over 150,000 people, only 6,429 people voted on this measure. *Id.*

<sup>124</sup> See *Patino*, 230 F. Supp. 3d at 709.

<sup>125</sup> *Id.* at 671, 673.

<sup>126</sup> *Id.* at 674. The court also held that the at-large plan violated the Fourteenth and Fifteenth Amendments. *Id.*

<sup>127</sup> See *id.* at 675; see also *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

<sup>128</sup> *Patino*, 230 F. Supp. 3d at 709.

<sup>129</sup> *Gingles*, 478 U.S. at 50–51.

<sup>130</sup> See *id.* at 51; *Patino*, 230 F. Supp. 3d at 713.

<sup>131</sup> *Patino*, 230 F. Supp. 3d at 694.

<sup>132</sup> *Id.* at 710.

<sup>133</sup> See Kira Lerner, *Voters Sue Texas Town for Diluting Hispanic Vote*, THINKPROGRESS (Jan. 5, 2015, 8:04 PM), <https://thinkprogress.org/voters-sue-texas-town-for-diluting-hispanic-vote-40af01178ab8>.

<sup>134</sup> See *id.*

<sup>135</sup> *Patino*, 230 F. Supp. 3d at 710.

<sup>136</sup> *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

<sup>137</sup> *Id.* at 46.

the political process.<sup>138</sup> Latino success in Pasadena politics was slow, but they have gained victories in recent years. Under the 8-0 district map, two Latino candidates won, while only two Latino candidates were ever elected before 2009.<sup>139</sup> Only one Latino candidate was elected under the 6-2 plan.<sup>140</sup> It is important to note that one reason for the lack of Latino candidates and Latino victories is low Latino voter turnout, and many scholars attribute low minority voter turnout to years of discriminatory actions.<sup>141</sup>

Under a “totality of the circumstances”<sup>142</sup> test set out in Section 2, the court found that the at-large plan had a discriminatory effect on the voting strength of Pasadena Latinos.<sup>143</sup> The court said that the extensive history of discrimination in Pasadena provided a framework for analyzing this new plan.<sup>144</sup> This history weighed in favor of the plaintiffs because Latinos had been systematically prevented from participating in Pasadena elections.<sup>145</sup> Pasadena’s elections were also racially polarized, evidenced by “Anglo bloc voting usually defeat[ing] Latino preferences in districts in which Latinos do not make up the majority of citizen voting-age population . . . .”<sup>146</sup> Perhaps one of the most critical pieces of evidence was the reduction in proportionality that occurred as a result of the redistricting plan. The court emphasized that the move from the 8-0 plan to 6-2 plan reduced the number of Latino-majority districts from four to three.<sup>147</sup> In other words, Latinos were the majority in 50% of the districts before *Shelby County*, but were the majority in only 38% of the districts after *Shelby County*. Given the fact that Latinos make up approximately 50% of the voting population, “that is dilution.”<sup>148</sup>

The court ordered Pasadena officials to gain preclearance under Section 5.<sup>149</sup> Although Section 5 is no longer automatically applied to governments with a discriminatory past, judges do have the authority to require districts to obtain preclearance from the DOJ prior to making any election changes.<sup>150</sup> Because the voters successfully proved that Pasadena acted with intent to discriminate under Section 2, the court required Pasadena to gain preclearance under Section 5 prior to making election changes for at least five years.<sup>151</sup> This relief is significant because for at least the next five years, Pasadena voters no longer need to rely on bringing Section 2 claims against the city. Instead, the government must seek preclearance prior to enacting any changes.

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<sup>138</sup> See *Patino*, 230 F. Supp. 3d at 710–11.

<sup>139</sup> See *id.* at 715.

<sup>140</sup> See *id.*

<sup>141</sup> See generally WALDMAN, *supra* note 63.

<sup>142</sup> 52 U.S.C. § 10301(b) (2012); *Gingles*, 478 U.S. at 50–51.

<sup>143</sup> *Patino*, 230 F. Supp. 3d at 718.

<sup>144</sup> *Id.* at 718–19.

<sup>145</sup> See *id.*

<sup>146</sup> *Id.* at 714.

<sup>147</sup> See *id.* at 710.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 729–30.

<sup>150</sup> See *id.* Under § 3(c), a federal court may “order a jurisdiction to obtain the Justice Department’s preclearance of its election changes under § 5 of the Voting Rights Act.” *Id.* at 729. Plaintiffs should also bring a § 3(c) request to require preclearance for the government action they are challenging under § 2.

<sup>151</sup> See *id.* at 729–30.

### 3. Why Latino Voters were Successful in Pasadena

Pasadena certainly has “a long, well-documented history of discrimination that has touched upon the rights of [Latinos] to register, to vote, or to participate otherwise in the electoral process.”<sup>152</sup> The Pasadena government wasted no time after *Shelby County*. In an interview with SCOTUSblog, Mayor Isbell said that he proposed the district map immediately after *Shelby County* “because the Justice Department can no longer tell Pasadena what to do.”<sup>153</sup> Without VRA preclearance protection, Latino voters turned to Section 2 for protection.<sup>154</sup> While there are many reasons why the court found Isbell’s plan violated Section 2 of the VRA, the court’s focus on the pervasive nature of local discrimination was critical to the Latino voters’ success. There are two key factors that contributed to the success of Latino voters in *Patino v. Pasadena*. First, the court considered the disparate impact of the new plan within the context of the greater history of discrimination Latinos have faced in Pasadena, as well as in Texas more broadly. Second, the court relied on evidence of intentional discrimination, enabling Latino voters to find broader relief.

The court could have ended its analysis of the third condition of *Gingles* step one by finding that Latinos made up the majority of voters in four districts under the 8-0 plan and they were only the majority in three districts under Isbell’s plan.<sup>155</sup> However, the analysis continued and the court also considered Pasadena’s discrimination in the context of this dilution.<sup>156</sup> For example, the City argued that two Latino-preferred candidates won under the new plan.<sup>157</sup> But this was not persuasive because both Latino-preferred candidates had Anglo surnames, which the evidence suggested significantly helped their campaigns.<sup>158</sup> The court said, “If Latinos in Pasadena can – barely – elect their candidates of choice only if those candidates are incumbents with Anglo surnames, then Latinos in those districts do not have an equal opportunity to elect candidates of their choice.”<sup>159</sup>

Second, the court separated its Section 2 analysis from the intentional discrimination claim. In doing so, the Latino voters were given a broader remedy. The Latino voters did not need to prove intentional discrimination for the court to find that Pasadena violated Section 2 of the VRA.<sup>160</sup> The court found that Pasadena did act with discriminatory intent in diluting Latino votes because “the intent was to delay the day when Latinos would make up enough of Pasadena’s voters to have an equal opportunity to elect Latino-preferred candidates to a majority of City Council seats.”<sup>161</sup> Under the original 8-0 plan, the day when Latinos could elect the majority of City Council seats

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<sup>152</sup> *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439–40 (2006).

<sup>153</sup> *Patino*, 230 F. Supp. 3d at 698.

<sup>154</sup> *See id.* at 674.

<sup>155</sup> *See id.* at 710. The court did make this finding, holding that Latinos were the majority in “one fewer than under the single-member district plan, and that is dilution.” *Id.*

<sup>156</sup> *See id.*

<sup>157</sup> *See id.* at 711.

<sup>158</sup> *See id.*

<sup>159</sup> *Id.* at 712.

<sup>160</sup> *See id.* at 718–19. “Courts need not reach a finding on intentional discrimination unless ‘the remedy to which Plaintiffs would be entitled for a discriminatory intent violation is potentially broader than the remedy the district court may fashion for the discriminatory impact violation.’ ” *Id.* (quoting *Veasey v. Abbott*, 830 F.3d 216, 230 n.11 (5th Cir. 2016)).

<sup>161</sup> *Id.* at 725.

would have been in 2015.<sup>162</sup> The Anglo majority acted with intent to delay this outcome by changing the voting districts.<sup>163</sup> In addition to correcting the Section 2 violation and requiring that Pasadena conduct its next City Council elections using the 8-0 plan, the court also ordered all future plans to undergo preclearance.<sup>164</sup> This broader remedy was possible because the court considered the intentional discrimination claim in addition to the Section 2 claim, bolstering the plaintiff's Section 2 claim.<sup>165</sup>

*Patino v. Pasadena* is a model for voters fighting discriminatory voting practices at the local level after *Shelby County*. However, it is important to recognize that the voters likely prevailed because of the strength of their evidence of intentional discrimination. Section 2 “was designed to prohibit voting rules and restrictions that not only have a disparate impact on minorities but also interact with current and past patterns of discrimination and continuing inequalities to cause that disparate impact.”<sup>166</sup> While Section 2 claims can be litigated without proving intentional discrimination, evidence of discriminatory intent can strengthen the voters' claims and provides the opportunity for greater relief. Without the protection of Section 5, governments like Pasadena are able to implement discriminatory election laws, despite their history of discriminatory voting practices. Until the preclearance protection under the VRA is reestablished, voters should look to Pasadena as an example of how to successfully bring Section 2 litigation.

### B. *Beaumont*

Beaumont—another Texas jurisdiction with a long history of discriminatory voting practices—enacted an at-large system for electing the school board which the DOJ had previously blocked.<sup>167</sup> Unlike Pasadena, there are more black citizens than white citizens in Beaumont.<sup>168</sup> Beaumont's racial tensions culminated in a battle for the Independent School District Board of Trustees. Before *Shelby County*, white conservatives tried to take the board back from a black-controlled majority, but this move was blocked by the DOJ. After *Shelby County*, the white conservatives tried a new approach that likely would have been prohibited under Section 5. However, a Texas court found this new plan permissible under Texas law.

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<sup>162</sup> *See id.*

<sup>163</sup> *See id.*

<sup>164</sup> *Id.* at 730–31.

<sup>165</sup> *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 441 (2006) (finding that evidence of intentional discrimination weighed in favor of the voters' claims against Texas).

<sup>166</sup> Danielle Lang & J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J. F. 779, 793 (2018).

<sup>167</sup> Thomas E. Perez, Dep't of Justice, Office of the Assistant Attorney Gen., Voting Determination Letter (Dec. 21, 2012), <https://www.justice.gov/crt/voting-determination-letter-41>.

<sup>168</sup> *See generally* Patrick Michels, *Race to the Bottom: How Beaumont's Racial Divisions Created the Most Dysfunctional School District in Texas*, TEX. OBSERVER (Nov. 14, 2014, 8:00 AM CST), <https://www.texasobserver.org/beatmont-isd-race-to-the-bottom>; Zachary Roth, *Breaking Black: The Right-Wing Plot to Split a School Board*, MSNBC, <http://www.msnbc.com/msnbc/blacks-texas-town-fear-return-old-days> (last updated Jan. 30, 2014, 2:06 PM).

## 1. Beaumont Before *Shelby County*

One of the most pervasive illustrations of Beaumont's discrimination is within the Beaumont Independent School District (BISD). Beaumont public schools remained segregated well after *Brown v. Board of Education*.<sup>169</sup> In 1964, a court declared that Beaumont's school segregation was unconstitutional and approved a desegregation plan.<sup>170</sup> In a report on school desegregation eighteen years after *Brown*, the United States Department of Health, Education & Welfare found that Beaumont failed to comply with constitutionally mandated desegregation standards.<sup>171</sup> Even after courts found that "freedom of choice" plans were inadequate repairs for segregation, Beaumont continued using this plan.<sup>172</sup>

Beaumont's segregated schools were also very clearly unequal. One all-black high school was intended to hold 500 students, but hosted over 1000 students in the 1970s.<sup>173</sup> Students complained of rats, cockroaches, and outdated heating and plumbing systems.<sup>174</sup> While white schools received new books, black schools only received the leftovers.<sup>175</sup> Students protested the inequality.<sup>176</sup> The Beaumont black community lacked faith in the school board, for "the actions of 'their' school board have given them little reason to believe things will be different in Beaumont."<sup>177</sup> Today, BISD continues to perpetrate inequality through the BISD Board of Trustees. In 1985, a federal judge created seven single-member districts after the DOJ found that Beaumont's previous plan of five single-member districts and two at-large districts diluted black votes.<sup>178</sup> Under this single-district plan, black voters had the opportunity to elect up to four minority-preferred members to the Board.<sup>179</sup>

In 2011, the city voted to replace two of the seven districts with "at-large" representatives; white voters overwhelmingly voted in favor of the proposal while black voters rejected it.<sup>180</sup> White voters attempted to remove the four-person black majority by

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<sup>169</sup> 347 U.S. 483 (1954).

<sup>170</sup> See *Brown v. Hendrix*, 228 F. Supp. 698, 700 (E.D. Tex. 1964), *vacated on other grounds sub nom* *Richard v. Christ*, 377 F.2d 460 (5th Cir. 1967).

<sup>171</sup> ALA. COUNCIL ON HUMAN RELATIONS ET AL., *IT'S NOT OVER IN THE SOUTH: SCHOOL DESEGREGATION IN FORTY-THREE SOUTHERN CITIES EIGHTEEN YEARS AFTER BROWN* 31 (1972), <http://files.eric.ed.gov/fulltext/ED065646.pdf>.

<sup>172</sup> *Id.* at 32.

<sup>173</sup> See *id.*

<sup>174</sup> See *id.*

<sup>175</sup> See Roth, *supra* note 168.

<sup>176</sup> See ALA. COUNCIL ON HUMAN RELATIONS ET AL., *supra* note 171, at 33.

<sup>177</sup> *Id.* at 34.

<sup>178</sup> See William Bradford Reynolds, Dep't of Justice, Office of the Assistant Attorney Gen., Voting Determination Letter (Oct. 20, 1983), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-1990.pdf>; see also Perez, *supra* note 167.

<sup>179</sup> Perez, *supra* note 167. In addition to the at-large election for the BISD Board having discriminatory effects, the Department of Justice found that other at-large elections in Beaumont prevented African-Americans from being able to participate fully. From 2002 to 2012, numerous black-preferred candidates ran for city government, but only one candidate was elected. This is partially due to extreme racial polarization in Beaumont. *Id.*

<sup>180</sup> See Roth, *supra* note 168.

creating at-large districts.<sup>181</sup> After voters narrowly approved the proposal, the Beaumont government submitted it to the DOJ for review.<sup>182</sup> The DOJ blocked this plan under Section 5 of the VRA because they found the 5-2 plan would reduce minority voters' political power in Beaumont.<sup>183</sup> Using statistical evidence, the DOJ found that Beaumont suffered from extreme racial polarization.<sup>184</sup> The DOJ also found that white voters were overall unwilling to support a black-preferred candidate.<sup>185</sup> In order to enact the 5-2 plan in a nondiscriminatory manner, Beaumont would need to draw five districts so that three candidates elected would be the choice of black voters, and provide sufficient evidence to prove that the at-large system would not hinder the success of a black-supported candidate.<sup>186</sup> Beaumont failed to provide this evidence in 2012.<sup>187</sup>

After the DOJ blocked the 5-2 plan, supporters of the plan tried other methods to prevent black-preferred candidates from winning.<sup>188</sup> In February 2013, BISD adjusted the existing districts based on the 2010 Census and staggered the terms of these districts.<sup>189</sup> In a unique and unprecedented move, white conservatives submitted their candidate filings for board positions, declaring their intent to run for the three districts that were not up for reelection.<sup>190</sup> The incumbents of these three districts rightfully believed their seats were safe for the May 2013 election, as their terms were not set to expire until 2015.<sup>191</sup> The school district rejected the white challengers' paperwork, so the voters sued.

In March 2013, a Texas judge allowed the three white conservative candidates to effectively replace three black members on the board.<sup>192</sup> The conservatives argued that board members have to run after a redistricting and that the black incumbents were ineligible for running against the conservatives because they did not file for reelection.<sup>193</sup> The judge allowed the white conservatives to run unopposed.<sup>194</sup> One month later, the DOJ intervened under its Section 5 authority.<sup>195</sup> They found this practice had discriminatory effects on black voters because the terms of three black-preferred

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<sup>181</sup> See William Yeomans et al., *The Voting Rights Amendment Act of 2014: A Constitutional Response to Shelby County*, AM. CONST. SOC'Y FOR L. & POL. ISSUE BRIEFS, May 2014, at 17, [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=7916&context=journal\\_articles](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=7916&context=journal_articles).

<sup>182</sup> See *id.*

<sup>183</sup> See Perez, *supra* note 167.

<sup>184</sup> See *id.*

<sup>185</sup> See *id.*

<sup>186</sup> See *id.*

<sup>187</sup> See *id.*

<sup>188</sup> Yeomans et al., *supra* note 181, at 17.

<sup>189</sup> See *In re Rodriguez*, 397 S.W.3d 817, 819 (Tex. App. 2013); see also Thomas E. Perez, Dep't of Justice, Office of the Assistant Attorney Gen., Voting Determination Letter at 2 (Apr. 8, 2013), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_130408.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_130408.pdf) (state court found that this February 2013 plan was constitutional, meeting the one-person, one-vote requirements).

<sup>190</sup> *Id.* at 5.

<sup>191</sup> See *id.* at 6.

<sup>192</sup> *Rodriguez*, 397 S.W. 3d at 823.

<sup>193</sup> See Roth, *supra* note 168.

<sup>194</sup> *Rodriguez*, 397 S.W. 3d at 823; see also *In re Jones*, No. 09-13-00107-CV, 2013 WL 1803626, at \*1 (Tex. App. Mar. 15, 2013) (refusing to delay the May 2013 election because of the February 2013 redistricting plan); *In re Neil*, No. 09-13-00144-CV, 2013 WL 3929230, at \*1 (Tex. App. Mar. 28, 2013) (again holding that the May 2013 election would not be rescheduled).

<sup>195</sup> See Perez, *supra* note 189, at 1.

representatives would be cut short; the three white conservatives had all run previously and none of them had gained more than 10.9% of black voters' support.<sup>196</sup> Furthermore, the March 2013 decision was made after the candidate filing period closed, precluding those who relied on the original policies from filing.<sup>197</sup> As a result, Beaumont rescheduled its election from May 2013 to November 2013.<sup>198</sup>

## 2. After *Shelby County*

Just months after the DOJ found that BISD election practices violated Section 5, *Shelby County* nullified Section 5 and Beaumont immediately reinstated the 5-2 voting scheme.<sup>199</sup> In August 2013, the District Court for the District of Columbia dismissed a suit over preclearance of the 5-2 plan because the preclearance litigation pertained to the May 2013 election.<sup>200</sup> The federal court no longer had jurisdiction over the case, finding that it was “a matter of Texas election law.”<sup>201</sup> A Texas state trial court ruled that BISD could move forward with the 5-2 plan in the November 2013 election.<sup>202</sup> Litigation over whether Beaumont could use the 5-2 plan in the November 2013 election reached the Texas Court of Appeals in October 2013.<sup>203</sup>

The appellate court found that the 5-2 voting scheme was permissible.<sup>204</sup> The court held that Section 5 was no longer the appropriate governing law because *Shelby County* prevented federal oversight.<sup>205</sup> Texas state law provides that a trial court cannot “enjoin an election ordered by a co-equal branch of government, even if that election is subject to being later determined that it was in violation of Texas law.”<sup>206</sup> Therefore, the court found that the 5-2 voting scheme was permissible, but allowed the black incumbents to file for re-election.<sup>207</sup>

## 3. Outcome

Ultimately, the November 2013 election was canceled. The BISD was under the close supervision of the Texas Education Agency, which intervened because it found the election was chaotic and tainted by corruption.<sup>208</sup> The legal battle continued for months,

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<sup>196</sup> *Id.* at 6.

<sup>197</sup> *Id.*

<sup>198</sup> *Rodriguez v. Beaumont Indep. Sch. Dist.*, 413 S.W.3d 524, 528 (Tex. App. 2013).

<sup>199</sup> *See id.*

<sup>200</sup> *See id.* at 527.

<sup>201</sup> *Id.* at 529.

<sup>202</sup> *See id.* at 528.

<sup>203</sup> *Id.* at 529.

<sup>204</sup> *See id.* at 527.

<sup>205</sup> *Id.* at 529.

<sup>206</sup> *Id.* at 535.

<sup>207</sup> *Id.*

<sup>208</sup> The Beaumont school district caused so much chaos that the Texas Commissioner of Education appointed a board of managers to oversee BISD and named a new superintendent for the district. *See Commissioner Williams to Appoint Beaumont ISD Board of Managers*, TEX. EDUC. AGENCY (Apr. 14, 2014), [https://web.archive.org/web/20141117113526/http://tea.texas.gov/About\\_TEA/News\\_and\\_Multimedia/Press\\_Releases/2014/Commissioner\\_Williams\\_to\\_appoint\\_Beaumont\\_ISD\\_Board\\_of\\_Managers/](https://web.archive.org/web/20141117113526/http://tea.texas.gov/About_TEA/News_and_Multimedia/Press_Releases/2014/Commissioner_Williams_to_appoint_Beaumont_ISD_Board_of_Managers/); *see also* Liz Teitz, *Beaumont ISD Trustees: Who Plans to Run in May Election?*, BEAUMONT ENTER., <http://www.beaumontenterprise.com/news/education/article/Beaumont-ISD-trustees-Who-plans-to-run-in->

and voters raised challenges under Section 2.<sup>209</sup> Even though the 5-2 plan was not used in the 2013 election, Beaumont officials were ready to move forward with a voting plan similar to the one blocked by the DOJ for having discriminatory effects.<sup>210</sup> The DOJ gave Beaumont guidelines on how to improve the plan and, to their credit, the BISD attempted to comply.<sup>211</sup> However, the DOJ lost their Section 5 authority before they issued a determination letter on whether BISD had met its burden to remove all discriminatory effects. The Texas state court did not rule on whether the plan had either discriminatory effects or purpose because the burden was now on voters to bring a Section 2 claim.<sup>212</sup> However, because the election was cancelled, voters were unable to bring their Section 2 claim against the government.

Beaumont voters may have succeeded on a Section 2 claim following the model used by Pasadena's Latino voters. First, Beaumont voters could likely prove the 5-2 plan had a disparate impact in the context of this city's history of racial discrimination. Beaumont voters could also likely prove the 5-2 plan also had a disparate impact on minority voters. After all, the DOJ found the 5-2 plan had discriminatory effects because the new election cut the black-preferred representatives' terms short and the new plan was implemented after the candidate filing period closed.<sup>213</sup> Additionally, the white conservative candidates had historically run and failed, and never gained more than 10% of black voters' support.<sup>214</sup> The DOJ also established that Beaumont suffers from extreme racial polarization.<sup>215</sup> Utilizing this evidence, voters likely could have proven disparate impact and that the 5-2 plan diluted black votes. Beaumont's unique history of racial discrimination in schools should have bolstered that claim. Moreover, voters had evidence of intentional discrimination, which could have strengthened the Section 2 claim. While the intentional discrimination claim may have been more challenging to prove in Beaumont than in Pasadena, it is likely that the city could have succeeded. If Beaumont voters were successful on this claim, the court may have ordered Beaumont to submit future plans to the DOJ for preclearance, thus protecting minority voters from dilution. By pursuing this relief, Beaumont voters could have the added protection of federal oversight in their election process.

### C. Galveston

Galveston—an island off the coast of Texas—has a similarly long history of diluting minority votes. Galveston's minority population fluctuates, but for the past

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May-10860961.php (last updated Jan. 17, 2017). The Board of Trustees will be elected by a 5–2 voting plan, adopted in November 17, 2016. Beaumont Indep. Sch. Dist., Order Approving Redistricting of Trustee Dists. and Establishing New Trustee Dist. Boundary Lines (Nov. 17, 2016), <https://v3.boardbook.org/Public/PublicItemDownload.aspx?ik=39638796>.

<sup>209</sup> Roth, *supra* note 168.

<sup>210</sup> *Id.*

<sup>211</sup> *See Rodriguez*, 413 S.W.3d at 532.

<sup>212</sup> *See id.* at 534.

<sup>213</sup> *See Perez*, *supra* note 189, at 5.

<sup>214</sup> *See id.*

<sup>215</sup> *See id.* at 2.

twenty years has remained approximately 50% to 60% white.<sup>216</sup> The other half of the county is primarily Latino and black.<sup>217</sup> Historically, Galveston attempted to enact numerous voting rights changes that violated the VRA, but the Attorney General prevented these plans from coming to fruition using Section 5 preclearance requirements.<sup>218</sup> Galveston also attempted to change the voting system from single-district members to at-large schemes multiple times before *Shelby County*.<sup>219</sup> Shortly after *Shelby County* was decided, Galveston rushed to change its voting system to one that the DOJ had previously declared discriminatory.<sup>220</sup>

### 1. Galveston Before *Shelby County*

Galveston has attempted to dilute minority votes throughout its history. Before 1992, Galveston elected one mayor and six councilmembers through an at-large election.<sup>221</sup> Minority plaintiffs filed an action against the city of Galveston claiming this at-large scheme violated Section 2 of the VRA.<sup>222</sup> Galveston officials then sought preclearance under Section 5.<sup>223</sup> Fortunately, the DOJ found their voting system violated Section 5, forcing Galveston to change to a single-member district plan.<sup>224</sup>

In 1998, Galveston again attempted to change their city council composition from six single-member districts to four single-member districts and two at-large representatives.<sup>225</sup> At this time, the city was approximately 28% black and 21% Latino.<sup>226</sup> The DOJ found the change would dilute minority votes, given that two of the six single-member districts had black majorities who had elected black representatives to the

<sup>216</sup> *QuickFacts: Galveston City, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/4828068> (last updated July 1, 2018).

<sup>217</sup> *Quick Facts: Galveston County, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/galvestoncountytexas/PST045218?> (last updated July 1, 2018).

<sup>218</sup> Between 1976 and 2012, Galveston received six letters, significantly more than most cities. In comparison, Texas received eighteen letters between 1975 and 2012 for statewide legislation proposals. *See Voting Determination Letters for Texas*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/voting-determination-letters-texas> (last updated Aug. 7, 2015) (collecting letters).

<sup>219</sup> *See generally* Bill Lann Lee, Dep't of Justice, Office of the Assistant Attorney Gen., Voting Determination Letter, (Dec. 14, 1998), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2890.pdf>.

<sup>220</sup> In addition to moving forward with redistricting plans proven to have a discriminatory intent, Galveston County closed sixteen percent of their voting locations. Limiting the number of convenient polling locations often has discriminatory effects, and this change would have been subject to preclearance prior to *Shelby County*. *See* Elena Mejia Lutz, *Report: Texas Has Closed Most Polling Places Since Court Ruling*, TEX. TRIB. (Nov. 4, 2016, 4:00 PM), <https://www.texastribune.org/2016/11/04/report-texas-holds-highest-number-polling-place-cl/>.

<sup>221</sup> *See* Thomas E. Perez, Dep't of Justice, Office of the Assistant Attorney Gen., Voting Determination Letter at 2 (Oct. 3, 2011), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_111003.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_111003.pdf).

<sup>222</sup> *See id.* (citing *Arceneaux v. City of Galveston*, No. G-90-221 (S.D. Tex. 1993)).

<sup>223</sup> *See* John R. Dunne, U.S. Dep't of Justice, Office of the Assistant Attorney Gen., Voting Determination Letter at 1 (Dec. 14, 1992), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2600.pdf>.

<sup>224</sup> *See id.*

<sup>225</sup> *See id.*

<sup>226</sup> *Id.* at 2; *see also* Lee, *supra* note 219, at 2.

Galveston city council in the past.<sup>227</sup> Eliminating two of the six districts would significantly reduce the impact of minority votes.

Again in 2011, Galveston had eight single-member districts and it attempted to enact a 4-2-1 plan, where the city council would have four single-member districts, two at-large districts, and one mayor voted at large.<sup>228</sup> This plan was similar to the one the DOJ blocked in 1998, therefore Galveston requested that the DOJ rescind their 1998 determination letter.<sup>229</sup> According to the 2010 Census, Galveston's black population had decreased to 19% and its Latino population had increased to 31%.<sup>230</sup> The DOJ found that the plan would have a retrogressive effect on minority voting strength and therefore violated the VRA.<sup>231</sup> The VRA prohibits election laws with discriminatory effect, but Section 5 also prohibits changes that cause retrogressive effects on racial minorities.<sup>232</sup> On October 3, 2011, the DOJ refused to grant approval for Galveston's proposal.<sup>233</sup>

On October 14, 2011, Galveston submitted another plan to the DOJ, seeking preclearance.<sup>234</sup> As noted earlier, Section 5 of the VRA requires the Attorney General to respond within sixty days of a jurisdiction submitting a letter, either approving or rejecting the new plan.<sup>235</sup> One month after Galveston submitted this plan, Galveston voters and elected officials brought a lawsuit against the county, alleging that this plan should be judicially declared unconstitutional because Galveston did not request preclearance in a timely manner.<sup>236</sup> The DOJ did not make a preclearance determination before the deadline for filing to run for office for the next election passed.<sup>237</sup>

The Southern District of Texas ruled that they could not make a decision until the Attorney General's sixty days lapsed because the DOJ had authority over this Section 5 claim.<sup>238</sup> However, the court issued an injunction in favor of the plaintiffs until the DOJ responded, allowing any person who wanted to run for a position to do so under the unapproved plan, "with the understanding that if the U.S. Department of Justice . . . disallow[s] preclearance by the end of the day on December 15, 2011, their filing fees will be refunded, and this three-judge court will determine what temporary remedy to adopt at that time."<sup>239</sup> The DOJ finally issued a formal objection to the redistricting plans in 2012.<sup>240</sup> Again in 2013, the DOJ found that Galveston voters did not seem to vote along racial lines in the mayoral election.<sup>241</sup> However, the DOJ also stated that this was

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<sup>227</sup> Perez, *supra* note 221, at 2.

<sup>228</sup> *Id.* at 1.

<sup>229</sup> *Id.* at 2.

<sup>230</sup> *Id.* at 1.

<sup>231</sup> *See id.* at 4.

<sup>232</sup> *See* 52 U.S.C. § 10301 (2012); *see also* Beer v. United States, 425 U.S. 130, 141 (1976) (noting that an important purpose of § 5 is to prevent laws with retrogressive effects on minorities).

<sup>233</sup> *See generally* Perez, *supra* note 221, at 4.

<sup>234</sup> Petteway v. Henry, No. 11-511, 2011 WL 6148674, at \*1 (S.D. Tex. Dec. 9, 2011).

<sup>235</sup> 52 U.S.C § 10304 (2012).

<sup>236</sup> *See Petteway*, 2011 WL 6148674, at \*1.

<sup>237</sup> *See id.*

<sup>238</sup> *See id.* at \*2.

<sup>239</sup> *Id.* at \*3.

<sup>240</sup> *See* Petteway v. Henry, 738 F.3d 132, 136 (5th Cir. 2013).

<sup>241</sup> *Petteway*, 2011 WL 6148674, at \*1.

unusual for Galveston, as the city typically did vote along racial lines.<sup>242</sup> The DOJ found that moving to the mixed single-member and at-large election system “would lead to a retrogression in minority voting strength prohibited by Section 5.”<sup>243</sup> This conflict in Galveston seemed to quiet down—until *Shelby County* removed the preclearance requirement.

## 2. Galveston After *Shelby County*

The same year *Shelby County* was decided, Galveston moved to re-enact the redistricting map the DOJ had previously rejected due to discriminatory effects. In August 2013, Galveston “adopted a map for Justice of the Peace Districts that reduced the number of Justice of the Peace districts from eight to four.”<sup>244</sup> There are some slight differences between the August 2013 map and the map denied by the DOJ. Yet voters alleged the boundary revisions would still pose a significant challenge to a minority-preferred candidate to be elected in three of the four new districts because the slight changes to the boundaries did not negate the discriminatory impact of the at-large elections.<sup>245</sup>

In response to these changes, minority plaintiffs attempted to bring a lawsuit under Section 2 of the VRA.<sup>246</sup> The plaintiffs alleged that the 2013 redistricting maps were “hastily conceived and . . . adopted with minimum public input.”<sup>247</sup> Under the totality of the circumstances, the plaintiffs asserted that minority voters would be “denied an equal opportunity to participate effectively in the political process” with the new at-large plan.<sup>248</sup> The plaintiffs requested a temporary restraining order and injunction.<sup>249</sup> However, the Section 2 claim was unsuccessful and the temporary restraining order was vacated.<sup>250</sup> This meant that Galveston could move forward with its redistricting plan, despite the DOJ’s prior finding of retrogressive effects.<sup>251</sup> The plaintiffs appealed and all parties swiftly worked with one another to ensure that Galveston had a working map for their election.<sup>252</sup> After “direct discussions with the DOJ in an attempt speedily to obtain preclearance for a new set of maps,” the County and Plaintiffs agreed to revert back to the 2001 map.<sup>253</sup> While it is true that the County’s plans were not able to take effect, the court failed to fully address the plaintiffs’ Section 2 claim.<sup>254</sup>

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at \*4 (citing *Beer v. United States*, 425 U.S. 130, 141 (1976)).

<sup>244</sup> Plaintiff’s Original Complaint at 27, *Petteway v. Galveston County*, No. 3:13-cv-00308 (S.D. Tex. Aug. 26, 2013).

<sup>245</sup> *See id.* at 8, 29.

<sup>246</sup> *See id.* at 3 (minority voters “file[d] suit again challenging these redistricting changes as intentionally discriminatory and as violative of Section 2 of the VRA”).

<sup>247</sup> *Id.* at 9.

<sup>248</sup> *Id.* at 14.

<sup>249</sup> *See id.* at 16.

<sup>250</sup> *Petteway v. Henry*, 738 F.3d 132, 136 (5th Cir. 2013).

<sup>251</sup> *Id.*

<sup>252</sup> *See id.*

<sup>253</sup> *Id.* at 136.

<sup>254</sup> It is also important to note that the 2001 map did not take into account the population changes that occurred between when the plan was created and 2013.

It is important to again note that Section 2 does not protect minorities against retrogressive effects, as Section 5 does.<sup>255</sup> This means that minority plaintiffs in Galveston faced an uphill battle to bring a successful Section 2 claim without relying on the retrogressive effects the plan would have on minority voters. Though this may be a factor in a judge's consideration of the totality of circumstances, evidence of retrogression is not sufficient to warrant a judicial decision in favor of the plaintiffs. Without Section 5, minority voters in Galveston are susceptible to election law changes that may lead to negative and retrogressive effects. The only reason they were able to convince a court to revert back to the 2001 plan was because of lengthy, time consuming litigation that required the DOJ to step in anyway.

### 3. Outcome

*Shelby County* significantly impacted the strength of minority voters in Galveston County. As black and Latino populations were making gains in Galveston, officials enacted a plan that the DOJ found had negative effects on minority population.<sup>256</sup> Before 2012, Galveston received numerous Voter Determination Letters from the DOJ that prevented Galveston officials from creating at-large voting districts.<sup>257</sup> Two months after the Supreme Court struck down the preclearance requirement in *Shelby County*, Galveston moved forward with these plans.<sup>258</sup> Though there has not been any proven discriminatory intent from Galveston officials, the discriminatory effects should be sufficient to suggest voting violations.

The state court should have considered Galveston's history of discrimination. Within this context, the court could also have considered the retrogressive effects of the plan. Although the Pasadena court did not explicitly consider the retrogressive effects of the redistricting plan, the fact that the court considered the new plan through the lens of the city's history of discrimination essentially allowed the court to see how the plan would have retrogressive effects. If the court had considered Galveston's history of discrimination in this case, it then should have found a remedy for the retrogressive effects of the new plan under Section 2.

### CONCLUSION

Without the DOJ's ability to proactively prevent discriminatory voting laws, minorities in local jurisdictions are at serious risk of voter dilution. Proving a claim under Section 2 of the VRA is significantly more challenging than proving a Section 5 claim, largely due to the fact that Section 2 claims are brought *after* the law is enacted. Section 2 claims are also expensive and time consuming.<sup>259</sup> Voting rights litigation is not only

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<sup>255</sup> See Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1286 (2015); Georgia v. Ashcroft, 539 U.S. 461, 462 (2003), *superseded by statute as recognized in, e.g.,* Shelby County v. Holder, 679 F.3d 848 (D.C. Cir. 2012); Beer v. United States, 425 U.S. 130, 141 (1976); William Roth, *Judicial Diversity After Shelby County v. Holder*, 112 MICH. L. REV. FIRST IMPRESSIONS 151, 152 (2014).

<sup>256</sup> Petteway v. Galveston County, No. 3:13-cv-00308, at \*2 (S.D. Tex. Aug. 26, 2013).

<sup>257</sup> See Rodriguez v. Beaumont Indep. Sch. Dist., 413 S.W.3d 524, 528 (Tex. App. 2013).

<sup>258</sup> *Id.*

<sup>259</sup> See generally NAACP LEGAL DEF. FUND, *supra* note 24.

cumbersome for the litigants, but for the courts as well.<sup>260</sup> As Representative John Lewis put it, the only costs that Section 5 imposes on states “is the paper, postage and manpower required to send copies of legislation to the federal government for review, hardly a punishment.”<sup>261</sup> Without Section 5’s preventative measures, voters are currently at a significant disadvantage.

Pasadena, Beaumont, and Galveston all implemented at-large elections following *Shelby County*, which led to intense litigation lasting for years in some instances. Within just a few months of the Supreme Court’s holding that the coverage formula of the VRA was outdated, each of these cities moved forward with plans that had discriminatory effects on minority voters. The cities all had a long history of voter discrimination and had unsuccessfully tried to pass similar legislation before *Shelby County*. Minority voters in counties with similar discriminatory pasts are at risk for voter dilution. Since Section 2 claims are difficult and expensive to litigate, minority voters will continue to suffer serious repercussions of *Shelby County v. Holder* at the local level. Until Congress revives Section 5 and the coverage formula in 4(b), voters challenging local practices should use *Patino v. City of Pasadena* as a guide for successful Section 2 litigation.

These case studies highlight the difficulties of bringing Section 2 claims, suggesting that the rights of minority voters are most at risk at the local level. Challenging legislation after it goes into effect is an uphill battle and is a particularly difficult one for people fighting at local levels that are not drawing national attention. These battles take a lot of effort and resources, so it seems logical that seemingly smaller voting violations will be overlooked. At-large elections are going to continue to have discriminatory effects at local levels. Without federal oversight and protection, minority voters are continually at risk for losing legal battles against local counties redistricting to create at-large elections. Section 2 cannot take the place of Section 5, but until the preclearance requirement is restored for municipalities with a discriminatory past, voters must rely on it. Until then, minority voters should look to Pasadena as an example of how to bring a successful Section 2 claim against a government that inappropriately enacted an at-large election scheme.

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<sup>260</sup> *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act: Hearing Before the Sen. Comm. on the Judiciary*, 113th Cong. 8 (2013) (testimony of Prof. Justin Levitt, Loyola Law School, Los Angeles).

<sup>261</sup> John Lewis, *Why We Still Need the Voting Rights Act*, WASH. POST. (Feb. 24, 2013), [https://www.washingtonpost.com/opinions/why-we-still-need-the-voting-rights-act/2013/02/24/a70a930c-7d43-11e2-9a75-dab0201670da\\_story.html?noredirect=on&utm\\_term=.dd2cb1254b14](https://www.washingtonpost.com/opinions/why-we-still-need-the-voting-rights-act/2013/02/24/a70a930c-7d43-11e2-9a75-dab0201670da_story.html?noredirect=on&utm_term=.dd2cb1254b14).