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Section 2: Discrimination

Institute of Bill of Rights Law, William & Mary Law School

COURT SHOWS VOTING RIGHTS ACT CONTRADICTIONS

By Linda P. Campbell
Tribune correspondent Steve Daley contributed to this report.

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The Supreme Court's ruling last week on the constitutionality of race-based redistricting underscores the conflicts that have dogged the Voting Rights Act since its inception - and probably exacerbated them.

Trying to make sense of it, people who consider themselves fair-minded have asked questions such as:

If everybody gets a chance to vote, why should minorities get special treatment?

If I am a white voter put into a district that has been designed to be predominantly black or Hispanic, isn't my vote diminished when I can no longer help elect a white candidate?

If the Voting Rights Act tells legislators to take race into account during redistricting, how can the court now say they can't do that without striking down the act itself?

Despite Justice Sandra Day O'Connor's idealistic goal of "a political system in which race no longer matters," as she wrote in the North Carolina case Shaw vs. Reno, race continues to pervade voting in this country. Were that not so, a Voting Rights Act would be unnecessary.

That hard-fought piece of legislation was adopted in 1965 in recognition that nearly a century after the 15th Amendment guaranteed all Americans the right to vote, lawmakers in some parts of the country continued to frustrate its promise.

Congress realized that the whites, who traditionally held power, particularly in Deep South states, were reluctant to share it with blacks. They had moved away from poll taxes and intelligence tests, but still found other ways to discourage minorities from voting or to prevent them from winning elections.

Amendments passed in 1982 took into account a subtler bias: totally arbitrary drawing of voting districts still could keep large minority populations from ever influencing elections by scattering them in a way that perpetuated white political dominance.

As might be expected, liberals consider the Voting Rights Act a powerful tool for increasing minorities' political participation, while conservative critics see it as another example of government overreaching to bestow unfair racial preferences.

For good or ill, the use of districts encompassing large minority populations has become the key method of enforcing the act.

The theory behind this is that when groups of people can be shown to vote in blocs according to their race, minorities have the best chance of electing the candidates of their choice if they are aligned in districts where they constitute more than 50 percent of the voting-age population.

Certainly, majority minority districts, as they are known in legal parlance, are not universally popular even among supporters of the Voting Rights Act.

For example, University of Pennsylvania law professor Lani Guinier, President Clinton's withdrawn choice to head the Justice Department's civil rights division, has criticized them - and been blasted herself for proposing alternatives to their use.

Sen. John Breaux (D-La.) recently complained that when such districts are overpacked with minorities, majority white districts are left with only a negligible number of minorities whose "interests get pushed to the margins."

Breaux said the U.S. House district he represented for 14 years was about 25 percent minority, similar to the statewide racial mix. "When you start out with 25 percent minorities in your district, there isn't any question you have to weigh the interests of all those folks," he said.

In 1977 the Supreme Court ruled that the Constitution does not prevent states from taking race into account in drawing voting districts. The court's opinion was written by Justice Byron White, who retired last week. He often sided with conservative colleagues on other issues, but favored giving broad

latitude to ensure that everyone has an equal chance to participate in the political process.

But last week, the 5-4 majority led by O'Connor seemed to be saying to those who are drawing boundaries - for congressional districts, city council wards, whatever - that you can consider race but not too much and not so obviously that you create a district that looks like an inkblot on a Rorschach test.

A snake-like majority black district in North Carolina was too much for the court. And it said that when map drawers appear to lump minorities together simply because they share a common race or ethnicity, there had better be a "compelling interest" to justify that handiwork.

Although the Constitution requires only that voting districts have roughly equivalent populations, not that they be compact and contiguous, at least five justices consider appearances important.

The North Carolina case, brought by white voters, was based on the Constitution's equal protection guarantees, but the legislators who were sued thought they were drawing the offending district to avoid a Voting Rights Act lawsuit by the U.S. Justice Department.

"There is a real conflict between the way the court talked about race-conscious districting (in the latest ruling) and what always has been meant by the Voting Rights Act when it talks about it," said American University law professor Binny Miller, who litigated voting rights cases in the Reagan Justice Department.

"The way the Voting Rights Act has been interpreted . . . is to make sure that minority voters have a way of . . . voting together to elect to office people of their choosing."

The harshest critics of the act contend that it perpetuates racial stereotypes - notions that whites always vote together, blacks always vote alike, that a person only represents interests of people of the same race, etc.

But that is not quite how it works.

For instance, in order to force an at-large system to adopt single-member districts or a remap of a system already employing districts, a minority group would have to prove in court that voting patterns show white voters always vote in blocs to defeat black candidates or candidates of any race supported by the majority of black voters.

In a 1986 ruling that upheld the constitutionality of the 1982 amendments to the Voting Right Act, the Supreme Court set up a three-part test. A jurisdiction violates the act if black voters tend to vote along racial lines; whites vote along racial lines to defeat candidates favored by blacks; and the jurisdiction could draw districts to enable blacks to elect their candidates but has not done so.

In the North Carolina case, White and the three justices who joined him in dissent argued that white voters could not complain that they were shut out of the political process when whites as a group still constitute a voting majority in 10 of the state's 12 congressional districts.

The individual whites who challenged the remap may dispute that logic. Nevertheless, it reflects the difficult policy choice Congress made with the Voting Rights Act.

As Miller put it: "Is it better to have some white voters in black districts with no influence . . . or is it better to have a whole class of people who have no influence across the board?

"What the Voting Rights Act says is it's the lesser of two evils."

Linda P. Campbell covers the Supreme Court for the Tribune

JUSTICES PLAN TO DELVE ANEW INTO RACE AND VOTING RIGHTS

By LINDA GREENHOUSE, Special to The New York Times

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The Supreme Court's contested ruling last month in a North Carolina redistricting case, far from being the Justices' last word on voting rights, may prove to be only one step in a prolonged and searching review by the Court of the role of race in electoral politics.

Three voting rights cases, two from Florida and one from Georgia, are already on the agenda for the Court's next term, which begins in October. The new cases give the Justices the opportunity, which some appear eager to take, to deal with sensitive and unresolved issues concerning the application of the Voting Rights Act.

Among the questions the cases pose are these:

To what degree should voting rights be seen as group rights? If a racial or ethnic minority group has the numbers to make up a majority in an additional legislative district, must that district be created? How are legislatures and courts to sort out competing, if not mutually exclusive, claims in a highly charged, multi-ethnic setting like South Florida?

To what extent does the right of equal participation at the polls incorporate a right to electoral success? If a minority group whose members register and vote in sizeable numbers is still not big enough to have a voice within a local government's traditional structure, does the Voting Rights Act require the structure to be changed?

Does a minority group's achievement of electoral success, in proportion to its share of the population, effectively bar that group from suing under the Voting Rights Act for greater representation? If so, what is the proper framework for assessing proportionality: the local area? the whole state? And what population should be counted in the equation? The voting-age population, as is usually the case? Or the population of citizens who are eligible to vote, a definition that could substantially undercut the claims of Hispanic groups to a right to greater representation?

Challenging the Foundation

The Supreme Court alluded to some of these issues but did not discuss them directly when it ruled on June 26, in Shaw v. Reno, that an oddly shaped district drawn by the North Carolina Legislature for the purpose of sending a black representative to Congress may have violated the constitutional rights of white voters who were displeased to find themselves in a majority-black district.

Unsettling as that 5-to-4 decision was to those who had interpreted the Court's precedents as precluding lawsuits by whites in such circumstances, the new cases could potentially have an even broader impact. Open for the Court's consideration is not only the fate of those districts whose bizarre shapes might evoke "the most egregious racial gerrymanders of the past," as the majority described North Carolina's 12th Congressional District, but also the philosophical underpinnings of the Voting Rights Act itself.

Congress passed the Voting Rights Act in 1965 and significantly amended it in 1982 to respond to a Supreme Court decision that interpreted the law's central provision as barring only intentional discrimination against minority voting rights. The 1982 amendment made it clear that Congress was concerned not only with intent but also with results, barring any voting practice or procedure that resulted in members of minority groups having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

How Far to Go?

But melding the concept of equal opportunity with a focus on results has built into the amended Voting Rights Act an inherent contradiction that the Court has yet to sort out. Which is the act's real promise: opportunity or outcome?

Of the cases now before the Court, the one from Georgia displays that tension most starkly. The case is from Bleckley County, which, like 14 other small counties, all in Georgia, has an unusual form of government, a single commissioner who combines all executive and legislative functions. While 20 percent of the county's 10,400 people are black, and while blacks register to vote at the same 70 percent rate as

whites, no black person has ever been elected commissioner or has any realistic prospect of being elected.

The United States Court of Appeals for the 11th Circuit, in Atlanta, ruled last year that the single-member commission violated the Voting Rights Act by diluting the ability of the black population to elect representatives of its choice. The appeals court's proposed remedy, which it ordered the Federal District Court to consider, was to increase the size of the county commission to five members, to be elected from districts.

Jackie Holder, the incumbent County Commissioner, appealed to the Supreme Court. Last winter, while the Justices were considering whether to hear the case, Holder v. Hall, No. 91-2012, the Bush Administration filed a brief asserting that the appeals court's analysis was wrong. "It is inherent in the very nature of our majoritarian democratic political system that numerical minorities lose elections," the brief said, warning that the appeals court's approach could bring single-member positions like governor, mayor or state attorney general under Voting Rights Act scrutiny.

By the time the Court took the case on March 1, the Clinton Administration was in office and informed the Justices of a new position. The notion that the failure of a small minority group to achieve success at the polls cannot indicate a Voting Rights Act violation is at odds with the theory of the act, the Government's new brief told the Court. A challenge to a government structure cannot be dismissed simply on the basis of a minority group's small size if an alternative structure exists, the brief said.

In their brief, however, lawyers for Mr. Holder argue that the Voting Rights Act "is not intended to insure that numerical minorities win elections" and does not state that "electoral success is the measure of equal opportunity to participate."

Choosing Between Groups

The Florida cases now before the Court raise another set of basic policy questions under the act. In one case, a three-judge Federal District Court found that the Florida Legislature violated the Voting Rights Act in its redistricting of seven State Senate seats in the Dade County area after the 1990 census. The court found that both the Hispanic and black populations were sufficiently numerous, compact and politically cohesive to merit an additional seat apiece -- a fourth for Hispanic residents and a third for black residents.

But it refused to order a change, declaring that one group's representation could be enhanced only at the expense of the other; the court found it preferable to leave both groups shortchanged rather than choose between them. On the surface, this case, DeGrandy v. Johnson, No. 92-593, presents a rather narrow procedural question: can a Federal court, once having identified a Voting Rights Act violation, decline to provide a remedy?

But the Justices may find it hard to resist dealing with the underlying issue of whether the District Court properly found liability in the first place, either in this case or in the companion case that presents the question more directly. In the second case, the same three-judge court found that the state reapportionment plan for the Florida House of Representatives violated the Voting Rights Act by drawing only 9 out of 20 Dade County districts with Hispanic majorities when the Hispanic population was big enough to provide majorities in 11 districts.

The state, appealing this ruling in Johnson v. DeGrandy, No. 92-519, is arguing that the distribution of State House seats in Dade County reflects almost exactly the proportion of the population that is white, black and Hispanic. In finding that this was not good enough, the state says, the District Court adopted the view that minority voting strength must be enhanced to the maximum extent possible -- a principle that the state says the Voting Rights Act itself does not contain.

Fully reflecting Florida's highly competitive and contentious ethnic mix, these cases might well increase the Supreme Court's concern that districts drawn primarily for reasons of race "may Balkanize us into competing racial factions," as Justice Sandra Day O'Connor said in her majority opinion last month.

In the Florida State Senate case, the N.A.A.C.P. filed a brief urging the Court to accommodate the interests of both black and Hispanic voters. But if that cannot be done, the brief said, "the advantage should be given to the historically most disadvantaged of the two groups, which in this case was the African-American group."

91-2012 HOLDER v. HALL

Voting Rights Act—Single county commissioner form of government—Evidence.

Ruling below (CA 11, 955 F2d 1563):

Determination of whether single commissioner form of county government violates Section 2 of Voting Rights Act should be based on totality of circumstances, which involves consideration of wide variety of factors, and is not limited to electoral evidence; however, before challenged procedure will be found to violate Section 2, there must be evidence that bloc-voting majority must usually be able to defeat candidates supported by politically cohesive, geographically insular minority group; violation of Section 2 was established by evidence of all three necessary preconditions: (i) that county's black electorate is sufficiently large and geographically compact to constitute majority in single-member district if single districts were created out of presently existing countywide district, (ii) that black voters are cohesive minority, and (iii) that white voters, who constitute 80 percent of county's electorate, vote sufficiently as bloc to enable them, absent special circumstances, to usually defeat candidates preferred by county's black voters; accordingly, district court decision that there was no Section 2 violation is reversed and case is remanded for imposition of remedy.

Question presented: Did court of appeals err in holding that governance by single county commissioner, rather than multi-member board of commissioners, is subject to challenge as dilutive under Section 2 of Voting Rights Act, as amended, 42 USC 1973?

Petition for certiorari filed 6/16/92, by R. Napier Murphy, and Martin, Snow, Grant & Napier, both of Macon, Ga., John C. Daniel III, and W. Lonnie Barlow.

92-519 JOHNSON v. DE GRANDY

Redistricting of state legislature—Voting Rights Act.

Ruling below (DC NFla, 7/17/92):

Remedy for claim that state senate redistricting plan, which created three districts with Hispanic supermajorities in each district's voting age population and two districts with black VAP majorities (out of total of 40 districts), violated Section 2 of Voting Rights Act by failing to create fourth Hispanic district, and remedy for claim that such plan violated Section 2 by failing to create third black district, are mutually exclusive; plan adopted by Florida legislature, which creates three Hispanic districts and two black districts, is compromise that properly balances competing minority interests in south Florida even though it violates Section 2; in any event, there is another senate district in south Florida that is black "influence" district, in which black VAP is 35.5 percent, that functions as third black district in south Florida without adversely affecting Hispanic minority; because Hispanic communities are characterized by large number of noncitizens and lower voter registration rates, supermajority of VAP is necessary in order to create districts in which Hispanics can elect candidates of their choice; redistricting plan for Florida's house of representatives, which creates nine (out of 20) districts in Dade County with Hispanic supermajorities of VAP and four black majority districts, dilutes Hispanic votes in violation of Section 2 of Voting Rights Act; therefore, districts suggested by De Grandy plan, which creates 11 Hispanic districts and four black districts and minimizes "ripple effect" on surrounding districts caused by redrawing district lines, best remedies dilution of Hispanic vote in south Florida while advancing interests of blacks in south Florida.

Questions presented: (1) Does state-enacted reapportionment plan violate Section 2 of Voting Rights Act, because it does not maximize electoral opportunities of class of minority plaintiffs, notwithstanding that plan provides minority class with opportunity to elect representatives in numbers at least equal to class's proportion of population? (2) When determining minority voting strength under test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), may plaintiff's case rest on estimates of voting age population that include substantial numbers of non-citizens who are ineligible to vote, or must plaintiff demonstrate voting strength on basis of eligible voters, at least when defendant has demonstrated that substantial percentage of plaintiff class are not citizens? (3) May federal court impose reapportionment plan as remedy for Voting Rights Act violation without affording state any opportunity to devise acceptable remedial plan, especially when court-ordered plan unnecessarily trenches on fundamental state policy choices? (4) Do core principles of comity and federalism require federal court to abstain from adjudicating Voting Rights Act claims when plaintiffs seeking federal court relief have previously raised, and demanded and received adjudication of, identical claims in ongoing state court proceeding?

Appeal filed 9/22/92, by Jonathan B. Sallet, Donald B. Verrilli Jr., Scott A. Sinder, and Jenner & Block, all of Washington, D.C., Richard E. Doran, George L. Waas, and Gerald B. Curington, Fla. Asst. Attys. Gen., and Kevin X. Crowley, James A. Peters, and Cobb, Cole & Bell, all of Tallahassee, Fla.

92-593 DE GRANDY v. JOHNSON

Redistricting of state legislature—Voting Rights Act.

Ruling below (DC NFla, 7/17/92):

Remedy for claim that state senate redistricting plan, which created three districts with Hispanic supermajorities in each district's voting age population and two districts with black VAP majorities (out of total of 40 districts), violated Section 2 of Voting Rights Act by failing to create fourth Hispanic district, and remedy for claim that such plan violated Section 2 by failing to create third black district, are mutually exclusive; plan adopted by Florida legislature, which creates three Hispanic districts and two black districts, is compromise that properly balances competing minority interests in south Florida even though it violates Section 2; in any event, there is another senate district in south Florida that is black "influence" district, in which black VAP is 35.5 percent, that functions as third black district in south Florida without adversely affecting Hispanic minority; because Hispanic communities are characterized by large number of noncitizens and lower voter registration rates, supermajority of VAP is necessary in order to create districts in which Hispanics can elect candidates of their choice; redistricting plan for Florida's house of representatives, which creates nine (out of 20) districts in Dade County with Hispanic supermajorities of VAP and four black majority districts, dilutes Hispanic votes in violation of Section 2 of Voting Rights Act; therefore, districts suggested by De Grandy plan, which creates 11 Hispanic districts and four black districts and minimizes "ripple effect" on surrounding districts caused by redrawing district lines, best remedies dilution of Hispanic vote in south Florida while advancing interests of blacks in south Florida.

Questions presented: (1) Upon finding of violation of Section 2 of Voting Rights Act, can district court decline to provide for complete remedy of that violation? (2) Upon establishing liability under Section 2 of Voting Rights Act, what remedial procedure and standards should district court employ to insure that Fourteenth and Fifteenth Amendment guarantees are not eviscerated by deference to state redistricting policies?

Appeal filed 9/29/92, by C. Allen Foster, Robert N. Hunter Jr., Marshall R. Hurley, and Patton, Boggs & Blow, all of Greensboro, N.C., Alberto R. Cardenas and Ferrell, Cardenas, Fertel & Morales, both of Miami, Fla., and E. Thom Rumberger, George N. Meros Jr., Daniel J. Gerber, and Rumberger, Kirk & Caldwell, all of Tallahassee, Fla.

92-767 U.S. v. FLORIDA

Redistricting of state senate—Violation of Voting Rights Act—Remedy.

Ruling below (*De Grandy v. Wetherell*, DC NFla, 7/17/92):

Remedy for claim that state senate redistricting plan, which created three districts with Hispanic supermajorities in each district's voting age population and two districts with black VAP majorities (out of total of 40 districts), violated Section 2 of Voting Rights Act by failing to create fourth Hispanic district, and remedy for claim that such plan violated Section 2 by failing to create third black district, are mutually exclusive; plan adopted by Florida legislature, which creates three Hispanic districts and two black districts, is compromise that properly balances competing minority interests in south Florida even though it violates Section 2; in any event, there is another senate district in south Florida that is black "influence" district, in which black VAP is 35.5 percent, that functions as third black district in south Florida without adversely affecting Hispanic minority; because Hispanic communities are characterized by large number of noncitizens and lower voter registration rates, supermajority of VAP is necessary in order to create districts in which Hispanics can elect candidates of their choice.

Questions presented: (1) Did district court abuse its discretion when it refused to conduct remedial proceedings concerning possibility of providing complete relief for Section 2 violations it had found, and instead summarily adopted as permanent remedy very plan it had found violated Section 2? (2) Did district court abuse its discretion in failing to provide complete relief to Hispanic voters for Section 2 violations because doing so might result in loss of African-American "influence" district?

Appeal filed 10/29/92, by Kenneth W. Starr, Sol. Gen., John R. Dunne, Asst. Atty. Gen., John G. Roberts Jr., Dpty. Sol. Gen., James P. Turner, Dpty. Asst. Atty. Gen., James A. Feldman, Asst. to Sol. Gen., and Jessica Dunsay Silver and Irving Gornstein, Justice Dept. Attys.

DE GRANDY v. WETHERELL

Nos. TCA 92-40015-WS, TCA 92-40131-WS and TCA 92-40220-WS.
United States District Court, N.D. Florida, Tallahassee Division.
July 17, 1992.

I. PROCEDURAL HISTORY

Florida currently has forty Senate districts and one hundred twenty House of Representative districts. These districts were created in 1982 and are currently malapportioned. According to the 1990 census data, the total population of the state of Florida is 12,937,926 persons. Between the census of 1980 and 1990, Florida's population increased 3,213,602 persons. To achieve equality between Florida's forty Senate districts, each district would ideally contain 323,448 persons. To achieve equality between Florida's one hundred twenty House districts, each district would ideally contain 107,816 persons.

On the opening day of the 1992 Florida legislative session, Miguel De Grandy, a member of the Florida House of Representatives, and other registered voters ("De Grandy plaintiffs") filed a complaint against the Speaker of the Florida House of Representatives, the President of the Florida Senate, the Governor of Florida, and other state officials. The De Grandy plaintiffs filed the complaint in this court challenging the constitutionality of Florida's current congressional and state legislative districts. The De Grandy plaintiffs alleged that the current districts violate both the Equal Protection Clause of the United States Constitution and the Voting Rights Act of 1965, as amended, and urged this court to assert jurisdiction in order to redistrict and reapportion the state.

On March 9, 1992, the De Grandy plaintiffs filed a second amended complaint alleging violations of Article I, Section 2 and of the Fourteenth and Fifteenth Amendments to the United States Constitution as well as violations of Sections 2 and 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. s 1973 et seq.

In short, Count I alleged that the present Florida House and Senate districts were unconstitutional inasmuch as they violated the Equal Protection Clause of the Fourteenth Amendment, Article I, Section 2 of the United States Constitution and the "one-person, one-vote" principle. Count II alleged that because these districts diluted the voting strength of minority voters, they violated the Voting Rights Act of 1965, as amended. Count III alleged that the Florida Legislature was at an impasse in adoption of state redistricting plans. Counts V and VI alleged that the time lines for redistricting set forth in Article III, Section 16 of the Florida Constitution, in conjunction with the preclearance requirements of Section 5 of the Voting Rights Act, "permit the adoption and implementation of new district lines to take place so late in the year after the decennial census" that they result in a deprivation of plaintiffs' right to participate in the 1992 elections on a fair and equal basis.[1] Count V alleged a facial challenge, while Count VI alleged an "as applied" challenge. Count VII alleged that certain defendants have "intentionally misused the time lines and procedures found in Article III ... to delay the redistricting process to the advantage of white incumbents and to the detriment of voters and would be challengers to those incumbents." On March 13, 1992, the Florida legislature ended its regular session without adopting a state reapportionment plan.

On April 7, 1992, the court consolidated this case with a similar lawsuit filed by the Florida State Conference of the NAACP Branches and many individual African-American voters. On April 17, 1992, the Attorney General of the State of Florida submitted Senate Joint Resolution 2-G concerning state legislative reapportionment to the United States Department of Justice (DOJ) for preclearance pursuant to Section 5 of the Voting Rights Act. That same day, this court issued an order bifurcating the congressional redistricting and state reapportionment hearings.

On May 13, 1992, the Florida Supreme Court validated Senate Joint Resolution 2-G. [T]he court granted the government's motion to be dismissed as a party to the litigation, but invited comments from J. Gerald Hebert of the United States DOJ.

On June 16, 1992, the DOJ issued its preclearance decision, noting that its review and determination addressed the plans only insofar as the five preclearance counties were affected. The Attorney General of the United States did not interpose any objection to the Florida House of Representatives redistricting plan. The DOJ refused to preclear the Senate plan stating: We are unable to reach the same conclusion with regard to the Senate redistricting plan. With regard to the Hillsborough County area, the state has chosen to draw its senatorial districts such that there are no districts in which minority

persons constitute a majority of the voting age population. To accomplish this result, the state chose to divide the politically cohesive minority populations in the Tampa and St. Petersburg areas. Alternative plans were presented to the legislature uniting the Tampa and St. Petersburg minority populations in order to provide minority voters an effective opportunity to elect their preferred candidate to the State Senate.... [T]he information before us, including the economic and other ties between Tampa and St. Petersburg, as well as the political cohesiveness of minority voters in those two cities, demonstrates that the two areas do share a commonality of interest. Finally, we have examined evidence, including evidence in the legislative record, which suggests that the state's approach to senatorial redistricting in the Hillsborough area was undertaken with an intent to protect incumbents. Such a rationale, of course, cannot justify the treatment of minority voters in this area by the State Senate plan.

Jurisdictional questions were raised both in this court and in the Florida Supreme Court. The De Grandy plaintiffs filed their action in this court on January 14, 1992, and have continually asserted that jurisdiction to correct the Department's Section 5 objection lies only in this court. The Florida Supreme Court, however, without discussing the propriety of concurrent federal jurisdiction, held that [T]he reapportionment of state legislative bodies is not a power delegated by the Constitution of the United States to the federal government. Under the provisions of the Tenth Amendment to the United States Constitution, this is a power reserved to states. Of course, this Court is obligated to apply any applicable federal constitutional provisions and any federal statutes implementing these provisions. The Florida Constitution places upon this Court the responsibility to review state legislative reapportionment. Art. III, s 16, Fla. Const. Pursuant to that authority, we approved the original legislative reapportionment and retained jurisdiction to entertain subsequent objections thereto. Consistent with the provisions of article III, section 16 of the Florida Constitution, we believe that it is our obligation to redraw the plan to satisfy the objection of the Justice Department now that the Legislature has declared that it is not going to do so. In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 601 So.2d 543, 545 (Fla.1992). Defendants have consistently maintained that because Article III, Section 16 of the Florida Constitution specifically conferred jurisdiction over legislative redistricting to the Florida Supreme Court, this court should abstain in deference to the principles of comity and federalism. This court has declined the invitation to abstain.

On June 25, 1992, the Florida Supreme Court adopted a Senate redistricting plan which it felt complied with the DOJ's objection to Hillsborough County. After reviewing the six submitted plans, the Supreme Court adopted the plan submitted by Gwen Humphrey, et al., and supported by Representative Darryl Reaves, et al. ["Humphrey-Reaves plan"]. Constitutionality of SJR-2G, 601 So.2d at 546. Chief Justice Shaw wrote separately to indicate his opinion that the overall plan--including the present revision--does not comply with Section 2 of the Voting Rights Act: Because this Court's review in the present proceeding is limited in scope to DOJ's section 5 preclearance inquiry, I concur in the majority opinion. I believe the present revision in the plan meets the objection evinced in DOJ's admittedly restricted review. I write to note, however, that I still conclude that the overall plan, including the present revision, fails under Section 2 of the Act because it does not provide an equal opportunity for minorities to elect representatives of their choice to the Florida legislature, as noted in my earlier dissent. Constitutionality of SJR-2G, 601 So.2d at 548 (Shaw, C.J. specially concurring).

The focus of this litigation has continually shifted. Plaintiffs' first amended complaint alleged that the delay inherent in Article III, Section 16 of the Florida Constitution (and the fact that the legislature was not expected to pass a reapportionment plan in time for the scheduled 1992 elections) resulted in an unconstitutional intrusion in a citizen's right to vote. When the legislature passed SJR 2-G, plaintiffs asserted that this plan would not be precleared by the DOJ, and then when the Senate plan was, indeed, not precleared, plaintiffs asked this court to adopt a plan which complied with Section 5 of the Voting Rights Act.

On June 23, 1992, the DOJ filed in this court its own lawsuit[2] against the State of Florida and several elected officials alleging that (1) the redistricting plans for the members of the Florida Legislature dilute the voting strength of African-American and Hispanic citizens in several areas of the state in violation of Section 2 et seq. of the Voting Rights Act, 42 U.S.C. s 1973, et seq. and (2) the state's proposed Senate plan in the Hillsborough County area divides the politically cohesive minority populations in the Tampa and St. Petersburg areas such that there are no senatorial districts in which minority persons constitute a majority of the voting age population.[3]

The De Grandy plaintiffs were also permitted to amend their complaint to allege Section 2 violations in both the House and Senate plans. On June 26, 1992, this court commenced its hearing on legislative reapportionment. At the outset, the court ruled on several pending motions and heard argument on the others. After argument, the court granted Alberto R. Cardenas' and Alan K. Fertel's Motions for Leave to Appear Pro Hac Vice and the United States' Motion to Consolidate its lawsuit into the pending litigation. The court then turned to the Florida Senate redistricting plan.

The DOJ indicated its belief that the Florida Supreme Court's modification to the Hillsborough County area Senate districts satisfied its previous objection. The Department stated that a preclearance decision would be made within days of the State's submission of the plan to the Department. The same day, this court imposed the Florida Supreme Court plan as its own plan for section 5 purposes. The effect of this was to eliminate the need for preclearance. "Plans imposed by court order are not subject to the [preclearance] requirements of s 5." At the same time, however, the court indicated its intention to entertain Section 2 challenges on both the Florida Senate and Florida House plans.[4]

In Count VIII of the De Grandy plaintiffs' fourth amended complaint, plaintiffs allege that both the Florida House and Senate redistricting plans encompassed in joint resolution of legislative reapportionment, SJR 2-G, violate Section 2 et seq. of the Voting Rights Act, Title 42, United States Code, Section 1973, et seq. Specifically, plaintiffs contend that "[t]he joint resolution of apportionment ... unlawfully fragments cohesive minority communities and otherwise impermissibly submerges their right to vote and to participate in the electoral process." Plaintiffs attack both the Dade County districts in the Senate plan and the Dade and Escambia County districts in the House plan as violative of Section 2, alleging that

The African-American population in Escambia County was split into two districts, one of 30% black population and one of 14% black population. SJR 2-G deliberately fractures Escambia County's African-American population in order to protect white, incumbent representative, Speaker-designate Bo Johnson. Alternative plans encapsulate the black population in a relatively compact, cohesive, 40% black community of interest.

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In Dade County, black citizens were fragmented in District 118 and District 119. Many African-American seats were also packed with many Hispanic citizens which dilutes the ability of African-Americans to elect candidates of choice.

* * * * * *

Hispanic voters are packed in Districts 110 (82.1%), 111 (75.7%), and 114 (77.5%) and further submerges Hispanic voters in black minority districts, specifically, District 103 (62% black, 27.8% Hispanic), District 109 (63.0% black, 34.5% Hispanic), and District 118 (34.5% black, 27.1% Hispanic). Less egregious examples of packing, but still having the same dilutionary effect, are District 104 (57.8% black, 16.1% Hispanic), Anglo District 105 (19.2% Hispanic), Anglo District 106 (32.3% Hispanic), District 108 (66.2% black, 16.0% Hispanic). SJR 2-G appears to purposefully pack, fracture and submerge Hispanic population deliberately to dilute Hispanic voting strength; Nine Hispanic-American majority districts were created in SJR 2-G; however, other plans submitted to the Legislature show that eleven majority Hispanic-American seats can be created in the Dade County area. This dilution of Hispanic voting strength is accomplished by the aforementioned packing, fracturing, and submergence with the intent and purpose of protecting white incumbents;

* * * * * *

With respect to the plan for apportionment for the Florida State Senate, ... the redistricting plan enacted by the State of Florida creates 7 Senate districts in the Dade County area. The state's plan fragments the Hispanic population concentrations such that Hispanics comprise a majority of the voting age population only in three districts. The racial and ethnic population concentrations existing in the Dade County area are such that, if the Dade County area of the state is divided into equally populated legislative districts which respect communities of interest and follow other non-discriminatory plan-drawing criteria, Hispanics would constitute a significant voting age majority of the population in one additional Senate district in Dade County. The complaint also alleges that the creation of these districts was both intentional and willful, and for the purpose of preserving white incumbent legislators and discriminating against African-American and Hispanic candidates and electorate.

The entire trial lasted five days--from Friday, June 26, 1992 through Wednesday, July 1, 1992, excluding Sunday, June 28, 1992. The court first heard testimony concerning the Senate Plan. At the close of plaintiffs' case in chief, defendants orally moved for a directed verdict, which was denied by

the court. The Senate defendants then presented their case. The court next turned to the attack upon the Dade County portion of the House plan.

The parties advised the court that they were attempting to settle the Escambia portion of the lawsuit by redrawing the Escambia County House districts. After hearing the testimony of one of plaintiffs' Escambia County witnesses, the court ruled from the bench that the "plaintiffs [had] established a prima facie case on the constitutional violation in the Escambia County area of Florida." Before the close of plaintiffs' prima facie case, the court was notified that the parties, except for plaintiff-intervenor Darryl Reaves, had reached a settlement agreement as to the Escambia County House districts. Upon the granting of the House defendants' oral motion to dismiss Reaves for lack of standing as to Escambia County,[5] the court considered and approved the proposed consent judgment.

On July 1, 1992, at the close of all testimony and oral argument, the court ruled from the bench that the plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the [Thornburg v.] Gingles [478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25] standard, but the plaintiffs[6] have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida.... Consequently, under Supreme Court precedent, this court must give deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court.

After hearing closing argument as to the Dade County portion of the Florida House plan, the court ruled from the bench that "under the totality of the circumstances, the plaintiffs have shown a violation of Section 2 in that the plaintiffs have shown that more than nine Hispanic districts may be drawn without having or creating a regressive effect upon black voters in South Florida and in Dade County." The court indicated its intention to immediately proceed into the remedy phase of this case. The court later imposed the Modified De Grandy Plan as its own plan. On July 2, 1992, the court entered judgment as to the 1992 Florida Senate Plan and as to the 1992 Florida House Plan, the latter supplemented on July 6, 1992. Following the trial, the House and Executive defendants moved for reconsideration. These motions were denied. The House defendants also moved for reconsideration, rehearing and for a stay the court denied.

This opinion memorializes and explains the court's rationale for its July 2, 1992 rulings.

II. FINDINGS OF FACTS AND CONCLUSIONS OF LAW[7]

A. Section 2 of the Voting Rights Act

As amended and in pertinent part, Section 2 of the Voting Rights Act of 1965 provides as follows: (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b). (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance' which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. 42 U.S.C. s 1973.

As originally passed, Congress intended for the language of Section 2 to parallel the language of the Fifteenth Amendment. Because Section 2 parallelled the Fifteenth Amendment, the plurality of the Supreme Court held that a plaintiff was required to prove discriminatory intent to establish a violation of Section 2. Bolden, 446 U.S. at 62, 71, 100 S.Ct. at 1497, 1502. In response to the Supreme Court's ruling in Bolden, Congress amended Section 2 in 1982 to include a "results" or "effects" test to determine whether racial vote dilution has occurred.

In Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court received its first opportunity to review the 1982 Section 2 amendments. Gingles involved a Section 2 challenge to the use of multi-member districts in North Carolina. The Court held that "[t]he essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and

historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Gingles, 478 U.S. at 47, 106 S.Ct. at 2765. Additionally, the law is clear that Section 2 extends coverage to "language minorities" including Hispanics.

In determining whether a Section 2 violation has occurred, "a court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.' " Gingles, 478 U.S. at 44, 106 S.Ct. at 2763 (quoting Senate Report at 27). The Supreme Court in Gingles reiterated the list of "typical" factors which may be relevant to, and probative of, a Section 2 claim as set forth in the Senate Report. These "Senate factors" include: 1. The 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 election of the state or political subdivision is racially polarized; 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process; 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; 6. whether political campaigns have been characterized by overt or subtle racial appeals; 7. the extent to which members of the minority group have been elected to public office in the jurisdiction. Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. And whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

This list is not exhaustive--it is not required that any number of the factors be proved and other factors may be relevant. Gingles, 478 U.S. at 45, 106 S.Ct. at 2763. The Court did note, however, that "the most important Senate Report factors bearing on Section 2 challenges to multi-member districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.' " Gingles, 478 U.S. at 49 n. 15, 106 S.Ct. at 2765-66 n. 15 (quoting U.S.C.C.A.N.1982 at 206).

The Court, however, set forth the following important limitations on the extent to which these factors establish liability under Section 2: [W]hile many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Gingles, 478 U.S. at 48, 106 S.Ct. at 2765.

The Court then listed three circumstances which "are necessary preconditions for multi-member districts to operate to impair minority voters' ability to elect representatives of their choice." Gingles, 478 U.S. at 49-50, 106 S.Ct. at 2766. These preconditions are: 1) the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district; 2) the minority group must be able to show that it is politically cohesive 3) the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed--usually to defeat the minority's preferred candidate.

The purpose of the first requirement is to determine whether "minority voters [would] possess the potential to elect representatives in the absence of the challenged structure or practice." Gingles, 478 U.S. at 50 n. 17, 106 S.Ct. at 2766 n. 17. As the Gingles court noted, because a minority population which is spread evenly throughout the district "cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure," they cannot maintain that the multimember electoral system itself dilutes the voting strength of the minority voters. Gingles, 478 U.S. at 50 n. 17, 106 S.Ct. at 2766 n. 17.

Thus far, the Supreme Court has not spoken as to whether the Gingles analysis applies when a court is faced with a challenge to single member districts. District courts are divided on this issue [some]

holding that the Gingles preconditions do not apply to a single-member district plan, and [some] holding that they do. We find the approach taken by Hastert and DeBaca to be persuasive and accordingly turn to examining the Gingles factors.

Of course, the effect of proving these three preconditions is an open question in this circuit. In Solomon v. Liberty County, Florida, 899 F.2d 1012 (11th Cir.1990) (en banc), cert. denied, 498 U.S. 1023, 111 S.Ct. 670, 112 L.Ed.2d 663 (1991) this circuit divided 5-5 as to the legal effect of proving the three Gingles factors. Because we find a Section 2 violation under either Judge Kravitch's or Judge Tjoflat's approach, the court need not address the conflict raised in Solomon. In other words, this court concludes that the plaintiffs have satisfied each of the three elements Gingles requires and that when considered together with the Senate factors, the "totality of the circumstances" show that with respect to Florida's Senate Plan, Hispanic and African-American vote dilution exists in Dade County in violation of s 2 of the Voting Rights Act. Additionally, under the totality of the circumstances, Hispanic vote dilution exists in Dade County under Florida's House Plan.

B. Application of the Gingles Factors

1. Sufficiently Large and Geographically Compact
   a. Sufficiently Large (Citizenship)

The Gingles court stated that in order to state a claim under Section 2, the minority group must show that it is sufficiently large to constitute a majority in a single member district. There is some dispute as to whether the term "majority" as used in Gingles refers to a numerical majority or a voting majority, and therefore, whether a court should focus on voting age population or total population as the measure of opportunity within a given district. Although the Burton court noted that the Ninth Circuit has held in Garza v. County of Los Angeles, 918 F.2d 763, 774-76 (9th Cir.1990), cert. denied, 498 U.S. 1028, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991) that total population may be an adequate measure of minority opportunity, it followed the holdings of both McDaniel and McNeil v. Springfield Park District, 851 F.2d 937, 944-45 (7th Cir.1988), cert. denied, 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989) and concluded that "political opportunity is best measured in terms of minority voting age population." Burton, 793 F.Supp. at 1354.

This court has previously indicated its view that the VAP is the relevant inquiry as concerns redistricting, and we adopt the rationale and conclusion of the Burton court that voting age population (VAP) rather than total population provides a better measure of opportunity within a given district to elect a candidate of choice. Creating districts containing a bare majority VAP of minority groups such as African-Americans and Hispanics, however, will not necessarily remedy a Voting Rights Act violation because, even if minorities constitute fifty percent of the overall population or voting age population in a district, they may not make up fifty percent of the voters. The court found in Ketchum that "minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice." Ketchum, 740 F.2d at 1413. According to the experts, there are four key reasons why a supermajority of minority VAP is necessary to create effective minority districts:

(a) there are typically more aliens among minority (especially Hispanic) populations; (b) the voting age population is typically a lower proportion of the total population among minorities; (c) registration rates are often lower among minorities; and (d) turnout rates are often lower among minorities.

An Hispanic supermajority of the VAP is necessary to account for the fact that many Hispanics are noncitizens and have lower voter registration rates. This fact is not disputed by any party and is confirmed by the testimony of Dr. Moreno: "[t]he nature of tripartite politics in Dade means that only when Hispanics have a supermajority can a Latin candidate win." Affidavit of Dr. Dario Moreno Because the issues in this case were whether a fourth majority Hispanic Senate district and whether a tenth and eleventh majority Hispanic House district could be drawn in Dade County, much of the testimony revolved around what constituted a "supermajority" of Hispanic VAP sufficient to enable Hispanics to elect a candidate of their choice.

Much of the testimony addressed the "65 percent rule" and the impact of citizenship on the voting age population. The 65 percent rule states that "barring exceptional circumstances, a district should contain a black [or Hispanic] population of at least 65 per cent (or a voting age population of at least 60 percent) to provide blacks [or Hispanics] with an opportunity to elect a candidate of their choice." Brace, supra at 44. The origin of this rule has been traced to the United States Supreme Court case of United Jewish

Organizations, Inc. v. Carey, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) and has been subsequently addressed in Ketchum and Neal v. Coleburn, 689 F.Supp. 1426 (E.D.Va.1988). According to Kimball Brace, the foundation of the rule is suspect: Legend has it that the rule came about because someone in the Justice Department took 50 percent and simply added 5 percent to compensate for the higher proportion of Hispanic noncitizens, 5 percent for lower Hispanic voting age population (VAP) and 5 percent for lower Hispanic registration and turnout. Brace, supra, at 44.

In his testimony before the court in Ketchum, 740 F.2d at 1415, Mr. Brace stated the rule in a slightly different way: [The 65 percent rule] is derived from the 50 percent total population, adding five percent for each of the three factors that are voting age population, because minorities tend to have a lower voting age population, lower registration patterns and a lower turnout pattern. Whereas in Clinton and Ketchum, Mr. Brace would supplement the 50 percent majority figure by five percent each for low voter registration and low voter turnout (for a total of ten percent), in his law review article, he would supplement the 50 percent majority figure by five percent total for low registration and turnout.

For this and other reasons, the 65 percent rule is not universally accepted by experts and has been modified or rejected by some courts. The court in Rybicki v. State Board of Elections, 574 F.Supp. 1147, 1149 (N.D.Ill.1983) stated that:

The 65% figure is a general guideline which has been used by the DOJ reapportionment experts and the courts as a measure of the minority population in a district needed for minority voters to have a meaningful opportunity to elect a candidate of their choice. The 65% guideline, which the Supreme Court characterized as "reasonable" in [Carey], takes into account the younger median population age and the lower voter registration and turnout of minority citizens. The court in Coleburn noted that [T]he general 65% guideline for remedial districts is not a required minimum which the plaintiffs must meet before they can be awarded any relief under s 2 of the Voting Rights Act. Rather, the 65% standard is a flexible and practical guideline to consider in fashioning relief for a s 2 violation. Coleburn, 689 F.Supp. at 1438. The Coleburn court noted that the 65% figure is an "approximation of the type of corrective super-majority that may be needed in any particular case" which may have to be "reconsidered and adjusted in light of 'new information' and changing circumstances." Coleburn, 689 F.Supp. at 1438 (citing Ketchum, 740 F.2d at 1416 nn. 20, 21).

In his affidavit, Dr. Arrington indicates why he and other experts have modified the 65% rule insofar as it affects African-Americans: [B]ecause minority communities are now better organized and minority citizens more likely to register and vote than was true in an earlier era [,i]t is not always necessary to have a 60% [African-American VAP district] to assure blacks the opportunity to elect candidates of their choice. Although a 60% black VAP is probably still a good goal, 55% black VAP is almost always enough for black citizens to have an opportunity to participate in the political process and elect candidates of their choice. Affidavit II of Dr. Arrington (exhibit to document 474). The court in Ketchum similarly concluded that a 65% supermajority of African-American VAP might no longer be necessary to ensure African-Americans a chance to elect a candidate of their choice and advised district courts to reconsider that figure in light of new information and statistical data: For example, we note that the Rev. Jesse Jackson's 1984 presidential candidacy has apparently stimulated black registration and turnout nationally. More specific to Chicago, we understand that the November 1982 gubernatorial election in Illinois and the 1983 Chicago mayoral election indicated a marked increase in black registration and turnout. If these and other elections should demonstrate a significant and consistent change in voting behavior in Chicago applicable to aldermanic elections, there would have to be a corresponding change in redistricting practices and legal standards[.] Ketchum, 740 F.2d at 1416 n. 21. The testimony in this case also showed that African-Americans turn out in much higher rates than Hispanics.

The effectiveness of the African-American majority districts created by the Florida House and Senate plans is not in dispute. The African-American VAP in these districts ranged from 50.96% to 57.24% in the House districts and from 51.7% to 52.5% in the Senate and no party has attempted to argue that these districts would not result in an African-American candidate of choice being elected.[8] Thus we find that a district with an African-American majority VAP is an effective district which gives African-Americans a potential for electing candidates of their choice. Accordingly, the NAACP's proposed three African-American districts satisfy the "sufficiently large" requirement. The only question, therefore, is whether the VAP in the proposed one additional Hispanic Senate district and two additional Hispanic House districts would enable Hispanic voters in these

districts to elect candidates of choice without impairing the VAPs in the surrounding 3 Hispanic Senate and 9 Hispanic House districts.

Plaintiffs' own witness testified that an Hispanic Senate district containing 55% Hispanic VAP would be "problematic" inasmuch as the VAP would be too low to guarantee that the district would result in the election of the Hispanic candidate of choice. Plaintiffs submitted evidence, however, that a district containing 59 percent Hispanic VAP would enable Hispanics to elect a candidate of choice.[9] Specifically, Dr. Lichtman testified that

Once the Hispanic concentration reaches a certain point, then all those districts seem to elect Hispanics, but below that given point, none of the districts seem to elect Hispanics.... [N]o candidate of choice of the Hispanic ... has been elected in districts below a 59 percent Hispanic level, and in districts at 59 percent and above, those districts have in every instance elected Hispanic candidates. Dr. Lichtman concluded that the Hispanic VAP of 62.1 percent in district 40 provided Hispanics a "realistic opportunity" to elect a candidate of choice in that district.[10] Dr. Lichtman's assessment included adjusting for the lower Hispanic voter turnout. Although Dr. Lichtman had previously recommended to the Dade County commission that they attempt to create "rock solid" majority Hispanic districts containing 65% Hispanic VAP and "rock solid" majority African-American districts containing 55% African- American VAP, these districts were created "for an entirely different purpose" and he "erred on the side of making sure that [these] seats would be safe." He then reaffirmed his conclusion that "a 62 percent district, while not an absolute lock ... certainly comes well within the range to provide Hispanic voters a realistic potential to elect candidates of their choice."

Defendants, on the other hand, submitted evidence that after accounting for the lower level of citizenship for Hispanics, some of the newly created Hispanic districts would not be effective. In other words, although the Hispanic VAP might indicate that these districts would tend to elect a Hispanic candidate of choice, because the number of Hispanic citizens (as opposed to voting age residents) did not constitute a majority, Hispanics would not be able to elect a candidate of choice without relying on a certain percentage of white-crossover votes. According to defendants, the creation of these two additional Hispanic districts would do nothing more than dilute the Hispanic citizen VAP in the remaining nine districts and would result in a decrease in safe Hispanic districts.

In support of their argument, defendants cite De Grove's testimony that after adjusting for citizenship, a district containing 66% Hispanic VAP would have less than 50% Hispanic voters.[11] Defendants further note that citizenship levels vary among Hispanic districts--older, settled Hispanic neighborhoods in the central part of the city will have higher citizenship levels than the neighborhoods which attract more recent arrivals.[12] Whereas according to Dr. Weber, Cubans have a higher citizenship rate than other groups. Dr. Moreno testified that due to the high number of recent Hispanic arrivals tending to settle in the South Beach area, there was a "higher level of [Hispanic] non-citizenship and a higher level of [Hispanic] non-registration" in South Beach than in other areas of the city. Because of this, plaintiffs' proposed 35th Senate district would not be an effective district. Plaintiffs responded by noting that their proposed 35th district does not consist entirely of South Beach; rather, the lack of Hispanic citizens in South Beach is balanced by the highly concentrated Hispanic areas of Little Havana.

Defendants also argued that plaintiffs were changing their position. According to defendants, in the congressional redistricting hearings, plaintiffs had contended that a 65% supermajority was necessary for Hispanics to elect a candidate of choice, but now they contend that a 59% or 62% supermajority would allow them to do so. Plaintiffs explained that the reason why plaintiffs advocated such a high VAP for the Hispanic congressional districts was because only two districts were being formed.[13] Because everyone agreed that only two Hispanic districts would be drawn, "it ma[de] sense to hedge your bet and make those districts as Hispanic as possible." Furthermore, according to Dr. Arrington, a higher minority VAP is necessary for congressional districts to perform than for state legislative districts to perform:

One would certainly want a somewhat higher black VAP for Congressional districts than for the state legislature because of the greater organization and financing necessary to conduct a campaign at that level. Arrington Aff. at 6. Although his analysis specifically applies only to African-Americans, there is no reason to suspect it would not also apply to Hispanics.

The court finds that because minority groups have a younger population than majority groups, a supermajority of Hispanic and African-American total

population is necessary in order to create an opportunity for these groups to elect candidates of their choice. Because Hispanics communities are characterized by a large number of non citizens and a lower voter registration and turnout rates, a supermajority of Hispanic VAP is necessary to create districts in which Hispanics can elect candidates of choice. Like Hispanics, African-Americans must also constitute a supermajority of the total population of the district in order to elect a candidate of choice; however, because of the recent increase in African-American turnout and registration, a supermajority of African-American VAP is not necessary in order to elect an African-American candidate of choice. Furthermore, although the court finds that both a supermajority of Hispanic and African-American total population and a supermajority of Hispanic VAP are necessary, we decline to express these requirements as exact percentages.

The court further finds that both the Senate districts proposed by plaintiff- intervenors Reaves/Brown/Hargrett and the House districts proposed by the De Grandy plaintiffs would create districts containing effective Hispanic voting majorities. Each of the proposed Senate districts in the Reaves/Brown plan and House districts in the De Grandy plan contains an Hispanic VAP of at least 60%. Because the 65 percent rule already accounts for citizenship, making another adjustment for citizenship would overstate its importance and lead to double counting.[14] Finally, the fact that the plaintiffs themselves are satisfied with these percentages also tends to indicate the effectiveness of the proposed districts. Coleburn, 689 F.Supp. at 1438.

b. Geographical Compactness

Plaintiffs have shown that the Dade County's Hispanic population is sufficiently large and geographically compact to constitute a majority in four Senate and eleven House districts. Hispanics constitute nearly one million persons in the Dade County area, and the county has sufficient concentrations of Hispanic population that can be easily combined to create four Senate and eleven House districts that contain effective Hispanic voting majorities. Hispanics have primarily settled in three sections of Dade: the Little Havana section of the City of Miami, the "West Dade area" comprising the communities of Sweetwater, Village Green, Westchester and West Kendall, and the Northwest section of the county consisting of the cities of Hialeah, Miami Springs, and their surrounding neighborhoods. There is also a sizeable Hispanic (mostly Mexican) farm-worker community in the Homestead area. The Cuban migration patterns went from east to west--as Cubans improved economically, they moved out of the Little Havana area into the suburbs. With the exception of the Miami airport, which separates Little Havana from Hialeah and Miami Springs, the Hispanic population forms a compact and contiguous line from Hialeah to Kendall. The two most dramatic areas of Hispanic growth in Dade County area along Miami Beach[15] and the Kendall/West Kendall area.

The African-American population is also sufficiently large and geographically compact to constitute a majority in two Senate and four House districts in Dade County.[16] The concentrations of the African-American population essentially rest in the north central portion of urbanized Dade County including Opa-Locka, Liberty City and Carol City. There are also pockets of non-Hispanic African-Americans in downtown Miami (including Overtown), Coconut Grove, and Richmond Heights. Finally, there are African-American neighborhoods in Florida City, Homestead, Goulds, and South Miami. The Allapattah area is the border zone between African-American neighborhoods (to the east) and Hispanic areas (to the west).

The court in Hastert v. State Bd. of Elections, 777 F.Supp. 634 (N.D.Ill.1991), noted that the Gingles geographical compactness requirement is not "an aesthetic concept." Hastert, 777 F.Supp. at 649. In that case, most of Chicago/Cook County's Hispanic population was "clustered into two dense enclaves, one on Chicago's near northwest side and the other on the near southwest side," but that the two enclaves were "less than a mile from each other at their closest points." Hastert, 777 F.Supp. at 649. Concluding that Chicago's Hispanic community was geographically compact within the meaning of Gingles despite the fact that the clusters were separated, the court held that "[t]he separation of /clusters is not indicative of the existence of two distinct communities, but appears to have occurred as a result of exogenous physical and institutional barriers." Hastert, 777 F.Supp. at 649. Despite the fact the Hispanic community existed in two separate enclaves, the court in Hastert concluded that the Chicago/Cook County Hispanic community was sufficiently large and geographically compact to constitute a single district majority. Hastert, 777 F.Supp. at 649.

Other courts have echoed the fact that compactness

is not an aesthetic concept. In Dillard v. Baldwin County Board of Education, 686 F.Supp. 1459, 1465-66 (M.D.Ala.1988), the court held that "[a]n aesthetic norm, by itself, would be not only unrelated to the legal and social issues presented under Section 2, it would be an unworkable concept, resulting in arbitrary and capricious results, because it offers no guidance as to when it is met." The court in Wilson v. Eu, 1 Cal. 4th 707, 4 Cal.Rptr.2d 379, 823 P.2d 545 (1992), held that the compactness requirement should be used to promote the creation of functional voting districts that allow for effective representation. Specifically, the court held that Compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Eu, 4 Cal.Rptr.2d at 387, 823 P.2d at 553.

In this case, plaintiffs testified that the primary difference between their House plan and the Florida House plan was that the De Grandy House plan attempted to draw the Hispanic districts from north to south while the state drew the districts from east to west. The De Grandy/Reaves/Humphrey plaintiffs and the DOJ argue that Florida's House plan fragments and dilutes the Hispanic vote. Dr. Moreno testified that House District 116 of the Florida plan has an Hispanic VAP of 48 percent. Additionally, Dr. Moreno pointed out that the line of District 116 separates heavily Hispanic neighborhoods in District 112 from the rest of the heavily hispanic Kendall Lakes area and the Kendall area. Dr. Moreno concluded that the Florida plan erects a barrier between "neighbors making up the same, basically what is the same housing development in Kendall Lakes." Additionally, Dr. Moreno testified that in order to protect a white incumbent the Florida plan packs District 114 with an Hispanic VAP of over 78 percent. Dr. Moreno also pointed out that in District 102 and District 109 the State repeated the process of fragmenting Hispanic communities. This court does not find that the districts drawn by the De Grandy plaintiffs are significantly less geographically compact than those drawn by the state of Florida.[17] Nor are these districts "so unreasonably irregular, 'bizarre,' or 'uncouth' as to approach obvious gerry-mandering." Coleburn, 689 F.Supp. at 1437. Furthermore, these districts are "relatively compact and are in line with the configuration of electoral districts that have been approved in other cases." Finally, the court finds that the districts as drawn in the De Grandy House and Senate plans would create functional voting districts that allow for effective representation.

2. Political Cohesiveness

The testimony showed that the Hispanics and African-Americans were each politically cohesive among themselves but were not at all cohesive--and were often at odds--in relation to each other. There is a high degree of tension in Dade County between the African-American population and the Hispanic population. Furthermore, while African Americans tend to vote Democratic, Hispanic voters tend to vote Republican. The focus of this Gingles prong, however, is not the joint cohesiveness of two separate minority groups, but rather whether "Hispanics" as a group and/or "African-Americans" as a group are politically cohesive.

a. Hispanic

The total Hispanic population of Dade County is 953,407 of which 55 percent is Cuban American. Moreno Aff. at 5. It is estimated that during the 1980's, over 300,000 Latin Americans moved into Dade County. Of these, the Mariel boatlift in 1980 brought in 125,000 Cuban refugees, while Nicaraguans fleeing the Sandinista regime and civil war in 1986 and 1987 numbered approximately 79,000.[18] Thousands of Colombians, Peruvians, Hondurans, Guatemalans and Puerto Ricans also melded into Dade's flourishing Hispanic community during the 1980s. According to the 1990 census, non-Cuban hispanics account for 40.7% of the Hispanic voters in Dade County.

The testimony showed that there is a high degree of political cohesiveness among Cuban voters in Dade County although the testimony was less clear about the cohesiveness of non-Cuban Hispanics. Because Dr. Moreno focused on Hispanics as a group and not on the individual Hispanic subgroups, he was not able to form any conclusions as to voting preferences of these individual subgroups.[19]

In general, "the Hispanics in Dade County are distinguished from Hispanics in the other part of the country by being more conservative and much more Republican." The strong loyalty Cuban-Americans have to the Republican party is seen by their voting patterns in several elections. In 1986, Republican Bob Martinez carried the Hispanic precincts of Dade over his Democratic opponent, receiving 79 percent of the vote. In 1988, President George Bush carried the Hispanic precincts of Dade County with over 85 percent of the vote, while Senator Connie Mack carried the same districts with about 80 percent of the vote. Between 1980 and 1990, Democratic party

registration among Hispanics in Dade County decreased from 49 to 24 percent, while Republican registration increased from 39 to 68 percent. The Cuban vote stands in stark contrast to that of other Latinos across the United States who have consistently supported the Democratic ticket by two-to-one margins. The cohesiveness of Dade's Hispanic community has also been buttressed by the idealogical affinity of its two largest groups--Nicaraguans and Cubans. These two groups continually work together for a conservative foreign policy agenda. According to Representative Miguel De Grandy,[20] there is a union between Cuban-Americans, Nicaraguans and other Central Americans in basic philosophy, first to form policy because ... they are basically political and not economic migrations, unlike other Hispanic sectors of the United States; they generally have a very conservative, very anti-communist political philosophy on the foreign affairs.

Dade County has a significant amount of Hispanic African-Americans including immigrants from the Dominican Republic and Puerto Rico.[21] Although Dr. Moreno testified that Dominicans identified more with the Hispanic culture than that of the African Americans, the cohesiveness of the 70,000 Dade County Puerto Ricans is less clear. According to Dr. Moreno, Dade County Puerto Ricans seem to identify with the language minority stronger than with the racial minority. Furthermore, Dade County Puerto Ricans tend to be more Republican and more conservative than their Puerto Rican counterparts in New York.[22] Nonetheless, the statistical evidence shows that Puerto Ricans tend to register more as Democrats (50%) than Republicans (40%). According to Dr. Moreno, the fact that Puerto Ricans and Cubans do not share the same party affiliation does not mean that the two groups are not cohesive; rather, Hispanic Democrats tend to vote for Hispanic Republicans when they have that opportunity.

According to Representative De Grandy, the various Hispanic groups tend to have very similar views in the areas of education, housing, medically needy programs among others. Furthermore, the various Hispanic groups tend to have the same political philosophy in areas such as civil rights and discrimination. These groups have united to actively oppose the English only initiative. According to Dr. Moreno, "[t]he fear of language based discrimination [both in the form of English only initiatives and otherwise] has served to united Dade's Hispanic communities."

We conclude that there is a sufficient degree of political cohesiveness among Hispanics to satisfy the second Gingles prong, although there might be differences between the several Hispanic subgroups.

b. African-Americans

All of the evidence indicated that Dade County's African-American community is cohesive. Dr. Weber testified that African-Americans are "generally" cohesive and tend to vote for Democratic candidates in general elections. Dr. Lichtman similarly testified that "blacks are politically cohesive, ... unite in large numbers behind candidates of their choice and ... prefer to elect black candidates when there are elections with black candidates competing against candidates of other races." Both this court and Florida Supreme Court Chief Justice Leander Shaw have previously held that the approximately 590,000 African-American residents in the Broward/Dade/Monroe county area[23] are politically cohesive[24]:

Black voters in Florida generally vote as a cohesive racial block for the black candidate when there is a black versus white choice on the ballot for a given office. Furthermore, the testimony received in the legislative hearings underscore this conclusion. Accordingly, we conclude that both African-Americans and Hispanics are politically cohesive groups within the meaning of the second Gingles prong.

3. White Block Voting

Dr. Allan J. Lichtman,[25] defines "racially polarized voting" as "the extent to which members of distinct racial or ethnic groups support different candidates of their choice." Racially polarized voting can be subdivided into two parts: minority cohesion, which is the extent to which minority voters support candidates of their choice, and white bloc voting, which is the extent to which whites support different candidates. According to Dr. Lichtman, "[r]acially polarized voting is politically significant if, under a given electoral system, it impedes the opportunities for minority voters to elect candidates of their choice."

There was a substantial amount of testimony--both during the Congressional redistricting hearings and the state legislative hearings--that voting in Dade County is racially polarized. The court notes Chief Justice Leander Shaw's conclusion in In re

Constitutionality of Senate Joint Resolution 2G Special Apportionment Session 1992, 597 So.2d 276, 290 (Fla.1992) (Shaw, C.J., dissenting) that "[t]he results of Florida's legislative elections over the past ten years established the presence of racially polarized voting." Likewise, Dr. Arrington stated that "most elections involving both Afro- Americans and Hispanics are racially polarized." Furthermore, according to Dr. Lichtman The results reported in Table 1 [exhibit to government exhibit 46] show a clear pattern of racially polarized voting, Hispanic cohesion, and white bloc voting. It also shows that black voters united with white voters in opposition to Hispanic candidates for Senate and House positions[26].... The results reported in Table 1 likewise show a pattern of strong bloc voting by whites for non-Hispanic candidates [... and] indicate that blacks joined with whites in opposing Hispanic Senate and House candidates.... These findings of Hispanic cohesion and white bloc voting are supported by the analyses of additional local elections in Dade County.

Furthermore, The high degree of racially polarized voting documented for legislative elections in Dade County indicates that Hispanic voters would have an opportunity to elect candidates of their choice only in Districts with Hispanic voting-age majorities. Otherwise white bloc voting would usually be sufficient to defeat the candidate of choice of Hispanic voters. Finally, the reports prepared by consultants for the state also recognize that because of the strong polarization between Hispanics and non-Hispanics in Dade County, opportunities for Hispanics to elect candidates of their choice are impeded.

According to Dr. Moreno, Dade County is profoundly divided by the competing interests of three distinct and separate ethnic groups--African American, Hispanic, and Non-Hispanic White--each of whom has different social and economic interests. According to Dr. Moreno, "[t]he division of Dade along ethnic lines has made Miami the contemporary symbol of racial upheaval in America." There is a "high degree of tension in Dade County between the Afro-American population and the Hispanic population." Furthermore, the division of the three major ethnic groups has led to the development of tripartite politics in Miami; that is, ethnic factors between the three communities predominate over all other factors in Dade politics.

According to Dr. Moreno, "[m]inorities are usually only able to elect their candidates when they are firmly in the majority." Furthermore, "white candidates are aided by the deep cleavages between Republican Hispanics and Democratic Blacks." According to Dr. Moreno, there are four types of racially polarized elections in Miami: First, [there] are races featuring a Hispanic candidate versus a White candidate with Black[s] supporting the White candidate; Second, a Black candidate versus a White candidate with Hispanic voters supporting the White candidate; third, a Black candidate versus a Hispanic candidate with White voters holding the balance of power, and finally the[re] are races between two candidates of the same ethnic group in which voters from the other two group[s] support the least ethnic of the two candidates.

Dr. Moreno cites specific examples of recent races in which ethnic factors predominated over all others including the congressional race between Gerald Richman and Ileana Ros-Lehtinen where "[t]he campaign strategies of both campaigns were based purely on ethnic calculations." Cuban-Americans, offended by the perceived racism of Richman, voted for Ros- Lehtinen by a margin of 88 to 12 percent. Although Richman carried all of the other blocs of voters--Jewish, Anglo, and Black--because these voters represented only 47 percent of the electorate, Richman lost the race. According to Dr. Moreno, "Ros-Lehtinen won simply because more Cubans voted and almost all of them voted for Ros-Lehtinen."

In 1990, two Hispanic incumbents almost lost their seats in the state legislature to non-Hispanic White challengers. Javier Souto was barely re-elected to the State Senate from the 40th district when Tom Easterly won 74 percent of the non-Hispanic White vote and 92 percent of the Black vote.[27] Souto was able to defeat his Anglo opponent by winning over 80 percent of the Hispanic vote. State Representative Al Gutman also nearly lost his 105 district seat to a non-Hispanic White candidate. His challenger, Steve Leifman, won 42 percent of the vote in this heavily Hispanic district by carrying two-thirds of the non-Hispanic White vote and 83 percent of the African-American vote. Gutman survived by winning 92 percent of the Hispanic vote. In another race, Hispanic challenger Orlando Cruz was easily defeated by incumbent Art Simon in an ethnically polarized election in the 116th District despite the fact that Cruz carried 77 percent of the Latin vote. According to Dr. Moreno, "this pattern of ethnic polarized voting against Hispanics was not restricted to the 1990 elections." Rather, "[t]he pattern of bloc voting by non-Latin Whites and Blacks against Hispanics is found in elections at all levels against both Latin

challengers and incumbents."

African-Americans have also been the victims of block voting. According to Dr. Moreno, "Black candidates faced with a White-Hispanic coalition and lacking adequate finances have largely been limited to running in the three state House districts (106, 107, 108) and in the one state Senate district (36) where Blacks comprised an overwhelming majority." In 1986, Bob Starks, a White Republican, barely beat Nathaniel Edmond, an African-American Democrat in the general election for state House district 118. Despite the fact that Democrats out-registered Republicans in this district 21,202 to 9,968, Stark won by carrying nearly all of the White votes in the district. This occurred despite the fact that Edmond had the support of almost all of the African-American voters.[28] In 1990, Darryl Jones, a African-American Democrat won the election despite losing the white vote. Jones beat John Minchew 64 to 36 percent because more African-Americans turned out at the polls and he carried enough of the White vote (24 percent) to put him over the top. According to Dr. Moreno, block voting is not limited to legislative races, for "Black[ ] candidates have also fared poorly in seeking county-wide office."

4. Additional Findings

The history of discrimination against African-Americans in Florida was addressed in depth in our order of May 29, 1992 and will not be restated here. The court also finds sufficient evidence of language based discrimination against Dade County Hispanics. According to Dr. Moreno, "[t]he fear of an anti-Spanish backlash has been reinforced by English only initiatives, at both the county and state level, which seem to be specifically aimed at Miami's Latin population." In his affidavit, Dr. Moreno also cites specific examples of language based discrimination including the suspension of a supermarket clerk for speaking Spanish in front of customers and the refusal of a personnel agency to refer people with foreign accents to job openings at a Miami bank.

The record clearly established that Florida's minorities have borne the social, economic and political effects of this discrimination. This is true despite the fact that Cubans have fared relatively well in South Florida. Although Miami has a Cuban mayor and South Florida is the home of three Cuban state senators, language based discrimination still exists in South Florida. While the witnesses disagreed as to whether Hispanics or African-Americans bore more of the brunt of discrimination, everyone agreed that both groups had suffered.[29] In fact, as a result of this discrimination, the United States DOJ must preclear five Florida counties pursuant to Section 5 of the Voting Rights Act, as amended. Section 1973 et seq. Those counties are Collier, Hardee, Hendry, Hillsborough and Monroe.[30]

In this case, the DOJ and the De Grandy/Reaves/Humphrey plaintiffs have established that Florida's Senate reapportionment plan dilutes the voting strength of Hispanics in Dade County and the surrounding areas. Additionally, plaintiff NAACP has established that Florida's Senate reapportionment plan dilutes the voting strength of African-Americans in Dade County and the surrounding areas. With respect to Florida's House reapportionment plan, all of the parties have agreed that Florida's plan fragments the African-American community in Escambia County.[31] The DOJ and the De Grandy/Reaves/Humphrey plaintiffs have also established that Florida's House reapportionment plan dilutes the voting strength of Hispanics in Dade County. We must now fashion a remedy.

III. REMEDY

A. The Senate

Florida's new Senate plan (Plan 330) creates five minority- majority districts of which two have African-American voting age population (VAP) majorities and three have Hispanic VAP majorities. The three Hispanic VAP majority districts and one of the African-American VAP majority districts are contained wholly within Dade County. The other African-American VAP majority district is contained in the South Florida counties of Broward and Palm Beach. In the three Hispanic VAP majority districts, Hispanics constitute the following percentages of the VAP: (1) District 34--66.3 percent; (2) District 37--64.3 percent; and (3) District 39--76.1 percent. African- Americans constitute 52.5 percent of the VAP of District 36 in Dade County, and 51.7 percent of the VAP in the Broward/Palm Beach district, District 30. The Senate reapportionment plan creates seven Dade County districts of which five districts are wholly within Dade County and two additional districts are comprised of portions of Dade County and the surrounding areas.

The DOJ and the De Grandy/Reaves/Humphrey plaintiffs take exception to Florida's Senate reapportionment plan as it pertains to Dade

County because the state's proposed plan fragments the Hispanic population concentrations such that Hispanics comprise a majority of the VAP only in three districts. Specifically, the DOJ and the De Grandy/Reaves/Humphrey plaintiffs point out that as a result of Florida's Senate reapportionment plan 28.55 percent of the Hispanic population of Dade County will reside in state Senate districts that Hispanics will have no possibility of winning. See Moreno Aff. at 32-38. The DOJ and the De Grandy/Reaves/Humphrey plaintiffs contend that if the racial and ethnic population concentrations existing in the Dade County area are divided into equally populated Senate districts which respect communities of interest and follow other non-discriminatory plan drawing criteria, Hispanics would constitute a significant voting age majority of the population in an additional Senate district. In our order dealing with congressional redistricting, we held that "the voting age population (VAP) is the relevant number to be used in determining whether minorities in a particular district will be able to elect a candidate of their choice." De Grandy v. Wetherell, Nos. TCA 92-40015-WS, 92- 40131-WS, slip op. at 16 (N.D.Fla. May 29, 1992) (citing Solomon, 899 F.2d at 1018). The court in Ketchum explained that VAP is the best measure of minority voting strength because age is a legal prerequisite to voting and minority groups generally have a younger population which comprise a large proportion of the individuals who are ineligible to vote. Ketchum, 740 F.2d at 1412-1413. Because minority groups generally have a younger population than majority groups, the use of VAP as the relevant number for creating minority- majority districts requires that minority groups constitute a supermajority of the total population of an electoral district. See Ketchum, 740 F.2d at 1412-1413.

Additionally, our congressional order held that "because Hispanic communities are characterized by a large number of noncitizens and lower voter registration rates, a supermajority of the VAP is necessary to create districts in which Hispanics can elect candidates of their choice." In determining whether a fourth district can be created in which Hispanics constitute a supermajority of the VAP, we must consider "emerging changes in sociological and electoral characteristics of minority groups and broad changes in political attitudes." Ketchum, 740 F.2d at 1416. These changes may alter, or eliminate the need for a supermajority corrective figure. Ketchum, 740 F.2d at 1416.

In this case, the DOJ and the De Grandy/Reaves/Humphrey plaintiffs have established that Hispanics can elect candidates of their choice in Dade county and its surrounding areas when the Hispanics constitute at least 59 percent of an electoral district's VAP. Dr. Lichtman testified that in Dade County and its surrounding areas "[n]o Hispanic candidates have been elected in districts below a 59 percent Hispanic level, and in districts at 59 percent and above, those districts have in every instance elected Hispanic candidates." Based on the record as a whole, we find that the electoral characteristics of Hispanics in Dade County indicate that 60 percent is an appropriate guideline for determining if a fourth Hispanic VAP supermajority district can be created in the Dade County area. We note, however, that in areas with high concentrations of recent Hispanic arrivals, such as the South Beach area of Miami, an effective VAP supermajority district must have a VAP higher than our 60 percent guideline level.

The De Grandy/Reaves/Humphrey plaintiffs have established that four geographically compact districts can be drawn in which Hispanics in Dade County would have the potential to elect candidates of their choice. Plaintiff Reaves submitted Plan 180 which creates four Hispanic VAP supermajority districts. In Plan 180's four majority Hispanic districts, Hispanics constitute the following percentages of the VAP: (1) District 33--66.8 percent; (2) District 34--65.0 percent; (3) District 35--65.7 percent; and (4) District 40--62.1 percent.[32] Although this plan remedies the dilution of the Hispanic vote, we must examine the extent to which the plan addresses the African-Americans' vote dilution claim.

Plan 180, like Florida's Senate plan, creates two African-American VAP majority districts. Nevertheless, these two districts do not fully address the vote dilution claim of African-Americans. The NAACP takes exception to Florida's Senate reapportionment plan as it pertains to Dade County and the surrounding areas because the state's proposed plan fragments the African- American population concentrations such that African-Americans comprise a majority of the VAP in only two South Florida districts. Specifically, the NAACP contends that if the racial and ethnic population concentrations existing in the Dade County area are divided into equally populated Senate districts which respect communities of interest and follow other non-discriminatory plan drawing criteria, African-Americans would constitute a voting age majority of the population in an additional Senate district.

Like Hispanics, African-Americans must also constitute a supermajority of the total population of a district in order to be able to elect candidates of their choice due to a young population. See Ketchum, 740 F.2d at 1412- 1413. African-Americans, however, may not need a supermajority of the VAP of a district because the minority group has experienced changes in its electoral characteristics. We take judicial notice of the fact that Jesse Jackson's 1984 and 1988 presidential campaigns stimulated African-American registration and turn-out nationally. See Ketchum, 740 F.2d at 1416 n. 21. Thus, we find that because of changing African-American electoral characteristics, a simple majority of the VAP is an appropriate guideline for determining if a third African-American majority VAP district can be created in the Dade County area.

The NAACP has established that three geographically compact districts can be drawn in which African-Americans in Dade County would constitute a majority of the VAP and have the potential to elect candidates of their choice. The NAACP submitted a plan which creates three African-American VAP majority districts. Two of the African-American VAP majority districts consist of Dade County area residents with one district spilling over into areas of Broward County. The other South Florida African-American VAP majority district is in the Broward/Palm Beach area and is comparable to the Broward/Palm Beach district in Florida's Senate reapportionment plan. In the NAACP plan's three African- American VAP majority districts, African-Americans constitute the following percentages of the VAP: (1) District 39 in Dade--51.7 percent; (2) District 37 in Dade and Broward--53.6 percent; and (3) District 35 in Broward and Palm Beach--51.6 percent. This plan's creation of three African-American VAP majority districts remedies the dilution of the African-American vote in the South Florida, however, it fails to address the vote dilution claim of Hispanics in Dade County because the plan only creates three Hispanic VAP supermajority districts.

This court is faced with two independent, viable Section 2 claims in South Florida and our remedy must address both of those claims. An ideal solution would be to order the drawing of four supermajority VAP Hispanic districts and three majority VAP African-American districts in South Florida. The evidence in this case, however, established that the ideal remedy for the Section 2 violations in this case is not a viable option. During the course of the examination of John Gutherie, Staff Director of the Senate Committee on Reapportionment, the court inquired about the possibility of creating a plan containing four Hispanic and three African-American districts. JUDGE HATCHETT: Yes, he has the answer. I have a question, though. From all of your experience working in South Florida, is it possible to draw four VAP majority Hispanic districts and three majority black districts? .... THE WITNESS: It's amazing, Your Honor, what you can do with these computers.... If you ask me would I believe that you could do it, I would believe that. But it gets to the notion of--because of numerosity--of how thin you're willing to cut your margins on both the African-American and the Hispanic seats, cutting them down to a bare VAP majority in order to accomplish that. JUDGE HATCHETT: You've answered my question. In trying to create a plan with four Hispanic supermajority VAP districts and three African-American majority VAP districts, the NAACP was confronted with Gutherie's "numerosity" concern and his concern over how much of a margin is necessary to insure that minorities have opportunities to elect candidates of choice.

Counsel for the NAACP, Charles Burr, informed the court that "it is technically feasible to draw a four and three, but we were completely unable to get the percentages of the districts up to a level that I believe the parties will find acceptable." Thus, the NAACP concluded that in order to create four Hispanic supermajority VAP districts and three African-American majority VAP districts, the number of minorities found in each district can be no more than our bare VAP majority guidelines. Additionally, the NAACP realized that these districts would contain an insufficient level or margin to ensure that minorities would have the opportunity to elect candidates of their choice.

After realizing that the NAACP had also established a Section 2 violation with respect to African-Americans, in that a third African-American VAP majority district could be created, plaintiff Reaves argued to the court that Plan 180 is in fact a "four-three plan." To establish that Plan 180 does in fact create three African-American VAP majority districts in addition to its four Hispanic VAP supermajority districts, plaintiff Reaves compared his African-American districts to those found in the NAACP's plan. Plaintiff Reaves contends that the NAACP's District 37, which is comprised of Broward and Dade Counties, is comparable to Plan 180's District 32 which also covers Broward and Dade County. Additionally, Reaves points out that

the NAACP's District 39 which is wholly within Dade County, is comparable to Plan 180's District 36 which is also wholly within Dade County. Finally, Reaves argues that District 35 in the NAACP plan, a Broward/Palm Beach Senate seat, is comparable to Plan 180's District 28 which goes through Broward and St. Lucie County. Thus, plaintiff Reaves asserts that Plan 180 creates, in essence, three African-American VAP majority districts without diluting the Hispanic vote.

Contrary to the assertions of plaintiff Reaves, we find that Plan 180 does not create three African-American majority VAP districts, and in fact, dilutes the African-American vote. Plan 180's third "African-American seat," District 28, does not contain an African-American majority VAP. African-Americans in District 28 of Plan 180 only constitutes 47.1 percent of the VAP. Gutherie describes this less than majority seat as follows: What is sometimes referred to as an access or influence seat begins in the Pompano Beach area north of Ft. Lauderdale, proceeds up to West Palm Beach and then across the Everglades into--the Everglades agricultural area--into Ft. Myers and northward through St. Lucie County, Ft. Pierce into Vero Beach and Indian River County. Gutherie also points out that the configuration of District 28 is the result of Plan 180's inclusion of African-Americans in Ft. Lauderdale and the adjoining communities into District 32, the Plan's second African- American majority district which is comprised of portions of Dade and Broward Counties. Specifically, Gutherie notes that: Because this large concentration population in downtown Ft. Lauderdale is not available for a further access seat or majority society north of Dade County, what Plan 180 has to do in order to accomplish that end is string a district as we discussed earlier, District 28, going from Pompano Beach north to Vero Beach and Indian River County, and west of Ft. Myers on the Gulf Coast. Thus, based on the record as a whole we find that Plan 180 does not create three African-American VAP majority districts.

Not only does Plan 180 fail to create a third African-American majority VAP district, Plan 180 is retrogressive to African-Americans in Dade County and the surrounding areas. With respect to the two African-American majority VAP districts and Plan 180, Dr. Weber testified that after analyzing the turnout for those particular districts, that it was his opinion that based upon that analysis of turnout, the same kind of analysis I did for the Hispanic districts, that those districts are designed--and I'm sorry to use these words, and they may be offensive to some people in the courtroom, but they are designed to waste African-American votes.... They are packed, and there are more African-Americans than are necessary to provide a realistic opportunity for African-Americans to elect candidates of choice. Additionally, with respect to District 28, Dr. Weber testified that his turnout test for that district indicated that it would "fail miserably in terms of [its] ability to put African-Americans in control on the general election day." Thus, Dr. Weber concluded that Plan 180's packing of African-Americans into District 32 and 36 in order to facilitate the creation of four Hispanic supermajority VAP districts, had a "decimating effect" on the possibility of creating an additional African-American majority seat in South Florida. Based on the record, we find that plan 180 creates only two African-American majority VAP districts and its third African- American access district has tested to be ineffective. Thus, Plan 180 is in essence a four/two plan which continues to dilute the African-American vote.

After considering all of the evidence, this court came to the conclusion that the remedy for the Hispanics' Section 2 claim in South Florida and the remedy for the African-Americans' Section 2 claim in South Florida were mutually exclusive. The state of Florida, faced with the competing interests of Hispanics and African-Americans in Dade County, sought to strike the fairest balance in its Senate reapportionment plan with respect to all the Dade County ethnic communities. The Supreme Court has held that: Reapportionment is primarily a matter for legislative consideration and determination ... state legislatures have 'primary jurisdiction' over legislative reapportionment.... A federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the state, as expressed in statutory and constitutional provisions, or in the reapportionment plans proposed by the state legislative, whenever adherence to state policy does not detract from the requirements of the federal Constitution. Upham v. Seamon, 456 U.S. 37, 41, 102 S.Ct. 1518, 1521, 71 L.Ed.2d 725 (1982) (quoting White v. Weiser, 412 U.S. 783, 795, 93 S.Ct. 2348, 2354, 37 L.Ed.2d 335 (1973)). Because state legislatures have primary jurisdiction over legislative reapportionment, we must examine the state of Florida's policy choices and preferences as we determine the proper remedy for balancing the competing minority interests in South Florida. Realizing that the creation of a fourth Hispanic VAP supermajority district would adversely affect African-

Americans in South Florida and that the creation of a third VAP majority district would adversely affect Hispanics in Dade County, the Florida Senate plan reaches a compromise in that it creates three supermajority Hispanic VAP districts and two majority African-American districts with a strong African- American influence district in the Dade County area.

The influence district in the Florida plan, as Gutherie describes, commences in the Liberty City/Overtown area, proceeds south through the Black Grove, Black Coral Gables, and south in Dade County through Leisure City, Richmond Heights, down and through Homestead and finally ending in Florida City. That district also includes Monroe County. The overall African-American VAP of that district is 35.5 percent. The district includes, by the way, most of current House District 118. House District 118 is a district which has 26 percent African-American VAP, 30 percent Hispanic VAP. In 1990, Tom Easterly, a white incumbent, left a seat in order to run for the Florida Senate. There was a primary, a democratic primary, which was contested by two African-Americans. Those were the only two people on the ballot. And the winner of that primary, Daryl Jones, won the general election by a margin of 65 percent over the Republican opponent. This influence district, District 40, in the Florida Senate reapportionment plan, creates in essence a district in which African-Americans can elect a candidate of their choice because of strong minority coalitions between the African-Americans and the Mexican-Americans, as well as white cross-over votes. Representative Willie Logan, Chairman of the Florida Caucus of Black State Legislators, testified that: The Joint Resolution as adopted by the Supreme Court better represents the black community not only in Dade County, but in south Florida. And the reasons for that are very simple: first of all, the seat that's in south Dade, which is only a thirty- some-odd-percent voting age population seat, also includes non-Cuban Republican Hispanics, that which are the Mexican community, which have proven over a period of time that they support not only Democratic candidates, but they are willing to support black candidates. And that was an example in the Daryl Jones House seat that also was testified at the south Dade hearing by the American-Mexican community, that they prefer to be in the district that would be represented by a black versus being in a district that would was being Republican. Additionally, Representative Logan testified that the Florida Senate reapportionment plan comported closely with the desires of African-Americans with respect to having an African-American district based in the Ft. Lauderdale area of Broward County, and two African-American districts based in Dade County. Thus, this court finds that the Florida Senate Reapportionment Plan's Dade County African-American influence district performs as a third African-American district without adversely affecting Hispanics in the Dade County area. The court in DeBaca, noted in discussing balancing the interest between two minority groups that Federal courts have recognized that these political questions do exist and that the best means to resolve them is in the process of give-and-take between citizens and their elected officials. Political questions necessarily require that policy choices be made before they can be resolved. This is not a task federal courts are equipped to handle. They have recognized their shortcomings in this area, and will, whenever possible, defer to legislative policy choices, even if the choice is perceived to be unwise or is simply not the optimum choice. DeBaca, 794 F.Supp. at 992-93 (citing Strange, Application of Voting Rights Act to Communities Containing Two or More Minority Groups--When is the Whole Greater than the Sum of the Parts?, 20 Tex.Tech.L.Rev. 95, 124- 125 (1989)). We find that between all the plans presented to the court, the Florida Senate Reapportionment plan is the fairest to all the ethnic communities in Dade County and the surrounding areas, and is the proper remedy in this case. Consequently, this court gives deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court and imposes that plan as the remedy in this case.

B. The House

Florida's House plan creates thirteen minority-majority districts of which nine have Hispanic VAP supermajority districts and four have African- American VAP majority districts. Eight of the nine Hispanic districts are contained in Dade County and the ninth Hispanic district is in Collier County. The four districts containing an African-American majority VAP are contained in Dade County. In the nine Hispanic supermajority VAP districts, Hispanics constitute the following percentages of the VAP: (1) District 102--65.68 percent; (2) District 107--63.85 percent; (3) District 110 is 83.64 percent; (4) District 111 76.56 percent; (5) District 112--68.67 percent; (6) District 113--75.70 percent; (7) District 114--78.38 percent; (8) District 115--65.28 percent; and (9) District 117--69.18 percent. African- American constitute the following percentages of the VAP in the four

African- American districts: (1) District 103--55.73 percent; (2) District 104--50.96 percent; (3) District 108--57.24 percent; and (4) District 109--55.21 percent. Florida's House reapportionment plan creates twenty Dade County districts of which seventeen are wholly within Dade County and two share populations with other counties. District 102 joins population in Dade County with Collier County, and District 120 joins population in southern Dade County with Monroe County.

The De Grandy/Reaves/Humphrey plaintiffs and the DOJ take exception to Florida's House reapportionment plan as it pertains to Dade County because Florida's House plan fragments the Hispanic population concentrations such that Hispanics constitute a majority in only nine House districts. The plaintiffs contend that if the Dade County area of the State is divided into equally populated House districts which respect communities of interests and follow other nondiscriminatory plan-drawing criteria, Hispanics would constitute a supermajority of the VAP in two additional House districts.

For reasons already discussed in connection with the Senate, we hold that VAP is the relevant number for creating minority-majority House districts and that a supermajority of the VAP is necessary to create districts in which Hispanics can elect candidates of their choice. Additionally, we note that a supermajority VAP of 60 percent is an appropriate guideline for determining if two additional Hispanic districts can be created in the Dade County area. In this case, the DOJ and the De Grandy/Reaves/ Humphrey plaintiffs have established that eleven geographically compact districts can be drawn in which Hispanics in Dade County would have the potential to elect candidates of their choice.

The De Grandy/Reaves/Humphrey plaintiffs submitted the De Grandy plan which creates eleven Hispanic supermajority VAP districts. Hispanics constitute the following percentages of the VAP in the De Grandy plan's eleven Hispanic districts: (1) District 105--71 percent; (2) District 108--78.2 percent; (3) District 109--64.6 percent; (4) District 110--66.2 percent; (5) District 111--65.8 percent; (6) District 112--64.5 percent; (7) District 113-66.6 percent; (8) District 114--65.8 percent; (9) District 115--68.2 percent; (10) District 116--65.8; and (11) District 117--65.6 percent. This plan remedies the dilution of the Hispanic vote and does not adversely affect African-Americans because it creates four African-American districts. In the four African-American districts, African-Americans constitute the following percentages of the VAP: (1) District 102--57.6 percent; (2) District 103-- 57.8 percent; (3) District 106--57.7 percent and (4) District 107-- 57.3 percent.

Pursuant to Upham v. Seamon and White v. Weiser, this court sought to limit its intrusion upon state policy to what was necessary to correct the Section 2 violation. Accordingly, we allowed the State of Florida to present another House plan which remedied the dilution of the Hispanic vote and preserved its policy choices. The Florida House defendants initially presented a remedy containing only ten Hispanic districts which this court rejected as not fully remedying the dilution of the Hispanic vote. After warning the court to be very careful and deliberate in considering any changes to the Florida House plan, the Florida House defendants presented another remedial plan.

The Florida House defendants' second remedial plan contained eleven Hispanic supermajority VAP districts and four African-American VAP districts. In the House defendants' second remedial plan, the changes were confined to Dade County. The eleven Hispanic districts in the Florida House defendants' second remedial plan contain the following Hispanic VAP percentages: (1) District 102--65.78 percent; (2) District 106--61.34 percent; (3) District 107--61.05 percent; (4) District 110--77.66 percent; (5) District 111--77.39 percent; (6) District 112--62.77 percent; (7) District 113--62.22 percent; (8) District 114--65.23 percent; (9) District 115--65.29 percent; (10) District 116--65.60; and (11) District 117 at 63.81 percent. With respect to African-Americans, the second remedial plan created four African-American districts containing the following African-American VAP percentages: (1) District 103--61.51 percent; (2) District 104--55.10 percent; (3) District 108--55.25 percent; and (4) District 109--64.60 percent.

Because the Florida House defendants arbitrarily confined its changes to Dade County, the House defendants' second remedial plan does not create eleven effective House districts which give Hispanics the potential to elect the candidates of their choice. The second remedial House plan creates two House districts in the Miami beach area which as we noted earlier has high concentrations of recent arrivals and non-citizens. Additionally, these two districts, District 106 and District 107, have Hispanic VAP of 61 percent. We noted in our discussion of Florida's Senate plan that areas with high concentrations of recent Hispanic arrivals must have a VAP

significantly higher than our 60 percent guideline level. Because these two 61 percent districts are located in areas with high concentrations of recent Hispanic arrivals, we find that these districts do not give Hispanics a reasonable opportunity to elect candidates of their choice. Hence, we reject the Florida House defendants' second remedial plan because it failed to remedy the dilution of the Hispanic vote in South Florida.

The De Grandy/Reaves/Humphrey plaintiffs presented the modified De Grandy plan which sought to respect the policy choices of the state of Florida by merging the De Grandy remedy for South Florida into the existing Florida plan. The eleven Hispanic South Florida districts in the modified De Grandy plan contain the following Hispanic VAP percentages: (1) District 105--71.62 percent; (2) District 108--81.89 percent; (3) District 109--63.74 percent; (4) District 110--62.56 percent; (5) District 111--66.19 percent; (6) District 112--65.10 percent; (7) District 113--66.06 percent; (8) District 114--66.39 percent; (9) District 115--68.52 percent; (10) District 116--65.83 percent; and (11) District 117--66.24 percent. With respect to African-Americans in South Florida, the modified De Grandy plan creates four African-American districts containing the following African-American VAP percentages: (1) District 102-- 55.12 percent; (2) District 103--59.54 percent; (3) District 106--57.93 percent; and (4) District 107--56.46 percent. The modified De Grandy plan also creates a strong African-American access district in South Florida with an African-American VAP of 40.34 percent.

The modified De Grandy plan of course contained minor adjustments to district lines outside of Dade County in order to comply with the rule of "one person, one vote." Plaintiff De Grandy testified that: What we tried to do in the De Grandy Modified was to as much as possible enhance a little more the--a couple of the African-American seats while at the same time not impacting and trying to fit in the plan not impacting any other county than that which was impacted by Dade. That includes Dade; Monroe, which had a district in the Florida plan coming into Dade; Collier, which had a district in the Florida plan coming into Dade and Broward County. When you fit the plan, you have to not only fit the configuration, but also in terms of half the population of each district you have to deviate to comport with the plan you are fitting into. And while doing that, we also, when we were deviating that population tried to in effect, you know, boost our seats or minority seats more than they are in the De Grandy plan. So, basically, Your Honor, what we are really arguing is, Your Honors, please accept the De Grandy plan and accept it in the manner we have inserted it. That's what we are really arguing. The plaintiffs are correct that in adopting a South Florida remedy adjustments must be made between what is in the Florida plan north of Dade and what the court adopts. The total enfranchisement of the minority populations in Dade County through creating a fair plan, causes a "ripple effect" into other counties leaving the problem of how to adjust the affected districts. The modified De Grandy plan minimized this "ripple effect" to eleven districts outside of Dade County. We find that the modified De Grandy plan best remedies the dilution of the Hispanic vote in South Florida while advancing the interests of African-Americans in South Florida. Accordingly, this court adopted the modified De Grandy plan as the court's plan and imposed that plan.

IV. CONCLUSION

This court issued orders following the completion of this case which carried out the conclusions expressed in this opinion. We held in our order imposing the 1992 Florida Senate Plan that the Florida Senate plan does not violate Section 2 of the Voting Rights Act of 1965, as amended. This language should be read as holding that the Florida Senate plan does not violate Section 2 such that a different remedy must be imposed. In other words, although the Florida Senate plan violates Section 2 of the voting rights act, it nevertheless is the best remedy to balance the competing minority interests in Dade County and the South Florida area. With respect to Florida's House of Representatives Districts we adopted the Modified De Grandy House of Representative Plan, Plan 268, as the court's plan and also impose that plan.

VINSON, District Judge, concurring.

I join in the opinion, but set out separately my rationale for the result.

(1) Section 2 claims under the Voting Rights Act must meet the three- part test of Thornburg v. Gingles, 478 U.S. 30, 50-51, 106 S.Ct. 2752, 2766-67, 92 L.Ed.2d 25, 46-47 (1986): (a) a minority population that "is sufficiently large and geographically compact to constitute a majority" in a district; (b) a "politically cohesive" minority group; and (c) a white majority that "votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."

(2) For Dade County, the second and third parts of the test are established by the overwhelming weight of the evidence in this case, subject to some variations among Hispanics from different counties of origin, and subject to the distinction that the Hispanic minorities are generally diametrically opposed to the voting preferences of the African-American minorities.

(3) Thus, the issue in both the challenge to the Florida Plan for the state Senate districts and for the state House districts in Dade County is a very narrow one: Have the plaintiffs established that the minority populations are sufficiently large and geographically compact to constitute a voting age majority in a district?

(4) Regarding the Senate challenge, the Hispanic plaintiffs established that they could have a fourth Hispanic-majority district that would be geographically compact, but only by either diluting the voting strength of African-American majority districts or by preserving such strength in districts that are not geographically compact. The African-American plaintiffs established that they could create a third African-American majority district only by using a district that was not geographically compact and which would also greatly dilute the voting strength of Hispanics. Moreover, it is impossible to accommodate both four Hispanics and three African-American majority districts in any acceptable manner. Therefore, while the plaintiffs have established a Section 2 violation as to the four Hispanic districts, any remedy implementing the fourth district would violate Section 2 as to African-Americans. Thus, the existing Florida Plan for the Senate districts best accommodates the competing interests of both Hispanics and African-Americans.

(5) Regarding the House challenge, the plaintiffs have established in the De Grandy plan that eleven districts can be established in which Hispanics constitute over 64% of the voting age population and which are geographically compact. Further, these districts can be drawn without any dilution of African-American voting strength. Therefore, plaintiffs have 75 established all requisites of their Section 2 claim as to the Dade County districts for the House of Representatives.

(5)(a) The defendants have attempted to show that it is the citizen Hispanic voting age population that is determinative. That Hispanic citizenship data is not available, however. Despite the lack of available data, the defendants presented estimates of Hispanic citizenship and attempted to apply them to the individual districts. Those estimates are unreliable. For example, William De Grove's analysis was based on a somewhat unorthodox regression analysis methodology that gave a range of non-citizenship rates of 9.5% for precincts with no Hispanics to 55% for precincts with 100% Hispanic voters. (Acknowledging, of course, that there is no such precinct.) He recognized that the error in that analysis was greatest at the extremes, i.e. at the 9.5% and 55% intercepts. Nevertheless, he used the 55% as the basis of all his citizenship calculations. Plainly, his estimated Hispanic citizenship ratios for the eleven districts must be viewed with low confidence and with a large range of error.

(5)(b) A better gauge of eligible voters within a district is the analysis of past election results. Those statistics established that Hispanics would be able to elect Hispanic candidates of choice in all eleven districts proposed by plaintiffs, and those statistics automatically account for voter citizenship, registration, and turn out. Thus, in the absence of any better data, the plaintiffs' evidence is sufficient. Further, Dr. Allan Lichtman's calculations for the plaintiffs, based in part on the defendants' citizenship data estimates, reflected an Hispanic voting age citizenship of 50% or more in all of the questioned eleven districts. This is a more relevant calculation, for the supermajority percentages are merely designed to account for, inter alia, citizenship.

(5)(c) Equally important, it is unrefuted that Hispanics have been able to elect the Hispanic candidate of choice in every district in which Hispanics constitute 59% or more of the voting age population (without regard to citizenship). It is not necessary to target anything greater than that. Nor is it necessary, although it may be desirable, to create a supermajority of 65% Hispanics (or 55% African Americans) to accomplish Section 2's purposes. Additionally, the growth trends in Dade County's Hispanic population indicates that the percentage of Hispanics will continue to increase, but the plaintiffs' Section 2 claims have been evaluated only on the basis of the 1990 census data. That data clearly establishes that the eleven districts meet the Gingles test.

(6) The remedial aspect of this court's adoption of the modified De Grandy plan presented a major challenge. In recognition of the respect due to the state's own policy and plan for redistricting, this court considered the defendants' two submitted plans,

neither of which was even close to meeting Section 2's requirements and incorporating eleven Hispanic districts in Dade County in accordance with this court's findings on liability. At plaintiffs' suggestion, this court then requested that the defendants draw a plan that incorporated the De Grandy plan for Dade County into the rest of the state. The defendants refused, however, and the court recessed to consider all of the alternatives available and make a decision. Because of the severe time constraints and the upcoming July 4th holiday weekend, it was critical that a plan be adopted without further delay. It was also apparent that the defendants were intent on delaying the adoption of any plan that implemented a true eleven-Hispanic districts House plan for Dade County. Accordingly, this court adopted the modified De Grandy plan. It does, of course, have a "ripple effect," but that effect is relatively minor and simply cannot be avoided. The defendants' belated change of position and announcement that they would attempt to draw a plan incorporating the eleven Hispanic districts from the De Grandy plan into the rest of the state came too late.

ENDNOTES

1. Article 3, Section 16(a) of the Florida Constitution provides that: Senatorial and representative districts. The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory. If the legislature should fail at its regular session to apportion themselves into the legislative districts as required by Article 3, Section 16, the governor is required to reconvene the legislature within thirty days in a special apportionment session not to exceed thirty consecutive days. Fla. Const. Art. 3 s 16(a). During this time, no other business shall be transacted and it shall be the mandatory duty of the legislature to adopt a joint resolution. Fla. Const. Art. 3 s 16(a). If the legislature adopts a reapportionment plan, the constitution requires the attorney general to petition the Florida Supreme Court for a declaratory judgment determining the validity of the apportionment. Fla. Const. Art. 3 s 16(c). The Supreme Court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment. If the Supreme Court determines that the apportionment made by the legislature is invalid, the governor shall reconvene the legislature within five days thereafter in an extraordinary apportionment session which shall not exceed fifteen days, during which the legislature shall adopt a joint resolution of apportionment conforming to the judgment of the Supreme Court. Fla. Const. Art. 3 s 16(d). If the Supreme Court determines that the legislative apportionment is valid, the plan must be precleared by the Department of Justice before it may be considered validly enacted. Until the plan is precleared, it may not be used in any election. The Florida constitution is silent as to what occurs if the Department of Justice fails to preclear a plan previously validated by the Supreme Court. In its order dated May 13, 1992, the Florida Supreme Court explicitly "retain[ed] exclusive state jurisdiction to consider any and all future proceedings relating to the validity of this apportionment plan." In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 597 So.2d 276, 286 (Fla.1992).

2. United States v. State of Florida, et al., TCA 92-40220-WS.

3. This lawsuit was not entirely unexpected, for in its letter refusing to preclear the Florida Senate plan, the Justice Department indicated its belief that both the Senate and House plan contained Section 2 violations: Finally, we understand that there are challenges under Section 2 of the Voting Rights Act presently being considered in the consolidated cases of De Grandy v. Wetherell, No. 92-40015-WS and Florida State Conference of NAACP Branches v. Chiles, No. 92-40131-WS (N.D.Fla.). In addition, some of the comments we received alluded to various concerns involving the adequacy of the plans in non-covered counties. Because our review of these plans is limited by law to the direct impact on geographic areas covered by Section 5, we did not undertake to assess the lawfulness of the legislative choices outside of Collier, Hardee, Hendry, Hillsborough and Monroe counties. We do note, however, that allegations have been raised regarding dilution of minority covered jurisdictions, for example in the Pensacola-Escambia County area and the Dade County area. Because these and other legislative choices did not directly impact upon the five covered counties, they cannot be the basis of withholding preclearance of either plan. Exhibit 1 to document 447 at 6. Because the Department's "preclearance" jurisdiction is limited to reviewing Florida's five covered counties, it could not reject either the House or Senate plan on the basis that it did not comply with Section 2 of the Voting Rights Act.

5. Reaves is a resident of Dade County.

6. The court specifically noted that its ruling applied to all plaintiffs and not just the De Grandy plaintiffs. Tr. VIII at 60.

7. The court specifically noted that its ruling applied to all plaintiffs and not just the De Grandy plaintiffs. Tr. VIII at 60.

8. There was testimony that because districts containing a simple majority of African-American VAP would elect an African-American candidate of choice, districts containing 57 or 58 percent African-American VAP are designed to waste African-American votes and are, therefore, "packed." Tr. VI-135-36.

9. Javier Souto had repeatedly been reelected in district containing 59% Hispanic VAP. Tr. II-153.

10. The fourth proposed Hispanic district in the De Grandy plan contained 55% Hispanic VAP. The De Grandy plaintiffs seemed to agree that the Reaves/Brown plan (where the fourth proposed Hispanic district contained 62.1% Hispanic VAP) would be more effective.

11. De Grove testified that 32% of the population (Anglo, African- American and Hispanic combined) in Dade County are not citizens. Tr. VII- 20-1. Furthermore, he testified that in a hypothetical tract containing a 100% Hispanic population, 55% of the tract's population would be non- citizens. Tr. VII-23.

12. Although it would be possible to estimate the citizenship levels on a tract by tract basis, the smaller sample size (district versus county) would present statistical problems. Tr. VII-52.

13. In our order dated May 29, 1992, however, this court found that a supermajority was necessary. The congressional inquiry was different from the inquiry in this Section 2 case because in the former, we were merely "considering" Section 2 when formulating districts, while here we are presented with a specific challenge to the Florida plan.

14. Specifically, the 65 percent rule is premised on the fact that many Hispanics are non-citizens and have lower voter registration and turnouts. If this were not the case, there would be no reason to create districts containing more than 50.1% Hispanic VAP. No one disagrees that because of the lower citizenship and registration/turnout rates, Hispanic districts must contain a supermajority of Hispanic VAP. As previously stated, the 65 percent rule was "arbitrarily" created to account for these problems. Thus, this court must either (1) accept or modify the 65 percent rule or (2) formulate its own methodology for estimating the number of non-citizens reflected in the Hispanic VAP for the various districts. Because each of the districts contains a 60% Hispanic VAP and, therefore, "satisfies" the 65 percent rule, the court need not further inquire as to the Hispanic citizenship levels in each proposed district.

15. In 1980, Miami Beach was 30 percent Hispanic. In 1990, it is 49 percent Hispanic. Tr. II-14.

16. The African-American population can also support another majority district in Broward/Palm Beach counties.

17. As the court in Jeffers v. Clinton, 730 F.Supp. 196, 207 (E.D.Ark.1989), stated: [S]ome of the districts [proposed by the plaintiffs] look rather strange, but we do not believe this is fatal to plaintiffs' position. Their alternative districts are not materially stranger in shape than at least some of the districts contained in the present apportionment plan. The one-person, one-vote rule inevitably requires that county lines and natural barriers be crossed in some instances, and that cities and other political and geographic units be split in others.

18. According to Dr. Moreno, this number is believed to be undercounted by 30,000.

19. It was unclear whether this data is not available or if the appropriate analysis was not done. Tr. II-112.

20. Mr. De Grandy is not testifying as an expert.

21. This is significant, for example, in the 36 district where the non- Hispanic African American VAP is 49%, but the total African-American VAP is 52%. Thus, there is approximately three percent Hispanic African-American VAP in this district.

22. In fact, "[a]ll the Hispanic ethnic groups by nationality tend to be more conservative than their counterparts in other large U.S. metropolitan areas." Tr. II-18.

23. Affidavit of Thomas B. Hoeffler, document 472 at 8.

24. African-American registration in Dade County is 90 percent Democrat. Moreno Aff. at 19. "The antipathy of Black voters to Republican candidates is illustrated in recent presidential and state-wide races [where] no GOP candidate received more than 12 percent of the Black vote." Id. African-Americans also vote heavily for Democrats in state legislative elections. Id.

25. Dr. Lichtman is a professor of history and formerly Associate Dean of the College of Arts and Sciences at The American University in Washington, D.C.

26. "In every election studied, Hispanics vote for Hispanic candidates in greater proportion than either whites or blacks. The results reported in Table 1 show a pattern of strong political cohesion. By

generally overwhelming majorities, Hispanic voters preferred to elect Hispanic candidates to state legislative positions. In 11 of 13 elections for the Senate of House, ecological regression results show that more than 75 percent of Hispanic voters opted for the Hispanic candidates." Government Exhibit 46 at P 6.

27. In his live testimony, Dr. Moreno stated that even fewer African- Americans crossed over (3.7%). Tr. II-95.

28. Although blacks comprise only 29 percent of the population of this district, they exert greater influence because most of the Hispanics in this district are not United States citizens. Thus, African-Americans represent over one third of the registered voters in this district.

29. Representative Burke felt that African-Americans have suffered greater discrimination than Hispanics. Tr. VII-126. Dr. Weber similarly testified that "African-Americans have had greater difficulty than Hispanic Americans" in achieving political empowerment in South Florida. Tr. VI-145. Likewise, Dr. Moreno testified that Blacks are also the most disadvantaged of the three major ethnic groups that live in the Greater Miami area. In all social-economic indicators [,] Afro-Americans are the worst off of Dade [C]ounty's citizens. ... Miami's Black community facing discrimination, poverty, and not participating in local decision-making has erupted in violence four times during the 1980's. Moreno Aff. at 11-12. Plaintiff Darryl Reaves testified that there was discrimination against both Cubans and African-Americans and could not state which group has been most victimized. Tr. V-132.

30. These five counties are subject to the Section 5 preclearance requirement because they provided election information only in the English language when more than five percent of the voting age citizens were Spanish-speaking, and fewer than fifty percent of them were registered to vote or voted in the 1972 Presidential Election. See 41 Fed.Reg. 34329 (August 13, 1976); 40 Fed.Reg. --- (September 23, 1975).

31. All plaintiffs and the defendants agreed that voting is racially polarized in Escambia County, and that the African-American population in Escambia County is large, compact, and concentrated in the Pensacola area. Additionally, the parties agreed that Florida's House plan split the politically cohesive community in Escambia County into several districts. Thus, the parties agreed to a consent judgment which formulated new House districts in the Escambia County area uniting the African-American population of the Pensacola area. (Doc. 548).

32. Plaintiff De Grandy, on the other hand, submitted plan 275 which also contains four Hispanic voting age population majority districts. In plan 275's majority Hispanic districts, Hispanics constitute the following percentages of the voting age population: (1) District 33--71.5%; (2) District 34--66.1%; (3) District 35--55.0%; and (4) District 40--66.2 (Plan 275). District 35 in this plan falls short of our 60 percent guideline and De Grandy's own expert, Dr. Moreno, admitted that district 35 was "problematic" because its 55 percent VAP was probably too low for Hispanics to be able to elect candidates of their choice. Tr. II-66. Additionally, this district includes the South Beach area of Miami which contains a large number of recent arrivals who are noncitizens. Tr. IV- 158. This additional fact makes this 55 percent district unacceptable and we reject plan 275 as a viable option.

Biggins Leaves ADEA Issues Unresolved

BY JAMES R. BEYER
Special to The National Law Journal

ON APRIL 20, the U.S. Supreme Court decided the case of Walter Biggins, an employee who claimed that all he wanted was a "damn raise."[1] Whether Mr. Biggins will get his raise is still in doubt. But in *Biggins v. Hazen Paper Co.*,[2] the high court has made it more difficult for plaintiffs to prevail in actions under the Age Discrimination in Employment Act.[3]

The court in *Biggins* found that an employer's termination of an employee to avoid paying pension benefits to the employee does not automatically constitute age discrimination. If an employee establishes a violation of the ADEA, however, the employer will be found to have willfully violated the ADEA. Accordingly, it will be liable for double the amount of actual damages awarded to the employee for the ADEA violation.[4]

The plaintiff in the case, Mr. Biggins, started working for the Hazen Paper Co. in 1977. He was 52 when he was hired and had spent his entire career as a chemist in the paper industry.

Hazen Paper manufactures coated, foil-laminated and printed paper and paperboard. The company is privately owned and operated by two cousins, Robert and Thomas Hazen.

While working at Hazen Paper, Mr. Biggins developed a water-based paper coating, referred to as "Biggins Acrylic." It exceeded the requirements of a federal law that called for companies to eliminate hazardous emissions from paper coatings and resulted in a superior product in terms of gloss and durability.

Hazen Paper's sales increased substantially as a result of its use of Biggins Acrylic. In 1983, Mr. Biggins learned of the sales increases and felt they resulted from his development of Biggins Acrylic. He sought a pay increase, and the Hazens agreed to give him a 10 percent raise.

Dissatisfied, Mr. Biggins sought another increase in 1984, asking that his pay go from $44,000 to $100,000. The company refused, but Mr. Biggins claimed that Thomas Hazen had promised him stock in the company equal to his salary demand. Thomas Hazen "denied emphatically" that he had promised to give Mr. Biggins any stock.[5] Apparently, Mr. Biggins continued to work during the next two years for $44,000 per year.

In 1986, the Hazens discovered that Mr. Biggins, in a private business venture with his son, was cleaning up hazardous wastes and recovering dirty solvents produced by paper companies and automobile repair shops. When Thomas Hazen learned of this cleanup business, he concluded that Mr. Biggins had taken personal advantage of his employment at Hazen Paper and that there was a great risk that Mr. Biggins would disclose company secrets to competitors. The Hazens told him his moonlighting activity was "outrageous."[6]

Sometime in the spring of 1986, the Hazens asked Mr. Biggins to sign a confidentiality agreement that would restrict his outside activities during his employment with the company and for a limited time thereafter. No other Hazen Paper employee was subject to a confidentiality agreement.[7] Mr. Biggins said repeatedly that he would not sign the agreement unless the Hazens increased his salary to $100,000. Negotiations on the agreement continued for weeks without resolution.

Finally, on June 13, 1986, Thomas Hazen told Mr. Biggins that he would not receive a pay increase and that he would be terminated unless he signed the confidentiality agreement. Mr. Biggins refused and was terminated that day. He later said, "[My termination] wasn't a surprise, really, because I had become a pain to the Hazens."[8]

At the time of his termination, Mr. Biggins had worked for Hazen Paper for more than 9½ years. He would have become vested in the company's pension plan and eligible for $93,000 in pension benefits after 10 years of employment.[9]

Mr. Biggins filed suit against the Hazen Paper Co. in the U.S. District Court for the District of Massachusetts. He alleged that in terminating his employment, the company had violated the ADEA and ERISA, the Employee Retirement Income Security Act.[10]

He also asserted state-law claims contending wrongful discharge by the company in order to deprive him of the promised stock compensation, fraud for the company's alleged failure to give him stock, breach of contract based on violation of procedures in the company's employee handbook, and a violation by the company of the Massachusetts Civil Rights Act that interfered with his rights under that act.

The case was tried before a jury in July 1990. After a week of testimony, the jury returned a verdict of slightly more than $2 million for Mr. Biggins. The jury found the company had vio-

.ted the ADEA and had discriminated gainst Mr. Biggins because of his age. assessed actual damages at $560,775 ad doubled this amount because it ound the company's violation of the atute to be willful. The jury also ound that Mr. Biggins had been disharged to prevent him from vesting i his pension and awarded him 100,000 for this violation."

The defendants filed a motion pursunt to Rule 50(b) of the Federal Rules f Civil Procedure for a judgment notithstanding the verdict or, in the alrnative, for a new trial. U.S. District udge Frank H. Freedman called Mr. iggins' case a "bit thin" and exressed "doubt about whether a penion-law violation implies age discrimnation when eligibility for benefits is riggered by a certain amount of time n the job, not age." The judge found nat the violation of the ADEA was not rillful and therefore reduced the mount of the damages for the ADEA iolation to $560,775."

BOTH SIDES appealed to the 1st U.S. Circuit Court of Appeals. The circuit court's decision, issued Jan. 8, 1992, by Judge Hugh H. Bownes, found that the jury's verdict was supported by the evidence. The circuit court stated:

> [T]he jury could have reasonably found that Thomas Hazen decided to fire Biggins before his pension rights vested and used the confidentiality agreement as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting."

The court then addressed the issue of whether Hazen Paper's violation of the ADEA was willful.

In the 1985 case of *Trans World Airlines v. Thurston*," the Supreme Court adopted a standard of willfulness that holds that an employer commits a willful ADEA violation "if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."

Thurston, however, involved a formal and publicized employment policy rather than an ad hoc employment decision." Several courts of appeals have refused to apply *Thurston* to ad hoc employment decisions, instead requiring some greater burden to prove "willfulness."

In *Biggins*, the 1st Circuit listed all the circuits' applications of the willfulness standard to cases involving ad hoc employment decisions," thereby highlighting to the Supreme Court the need for guidance on this issue. The 1st Circuit held that it would continue to apply the *Thurston* willfulness standard to ADEA actions. The court stated: "We realize that in many cases this will result in a willful violation following hard on the heels of an ADEA violation, but that is the nature of the beast in a disparate treatment case, at least until either the Congress or the Supreme Court changes the definition of willfulness."

The circuit court then had no trouble finding that Hazen Paper's violation of the ADEA was willful. The court said: "The principal owner of the company, Thomas Hazen, testified that he was 'absolutely' aware that age discrimination was illegal. This is as strong evidence of a knowing violation of ADEA as a plaintiff could wish."

Justice Sandra Day O'Connor authored the Supreme Court's unanimous decision in *Biggins*. She began by stating that the court had granted certiorari to decide two questions:

> First, does an employer's interference with the vesting of pension benefits violate the ADEA? Second, does the *Thurston* standard for liquidated damages apply to the case where the predicate ADEA violation is not a formal, facially discriminatory policy, as in *Thurston*, but rather an informal decision by the employer that was motivated by the employee's age?"

The court answered the first question by holding that interference with the vesting of pension benefits does not automatically constitute age discrimination. It stated:

> The courts of appeals repeatedly have faced the question whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age. . . We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age. . . When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age-based."

Thus, the court held that in a disparate treatment case, "whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless [age] actually played a role in that process and had a determinative influence on the outcome."

But the Supreme Court refused to decide whether there was sufficient evidence for the jury to find an ADEA violation. It remanded the case to the 1st Circuit to make this determination."

THE SUPREME Court next addressed the issue of the meaning of the word "willful" in the ADEA. The court remarked that it already had stated the meaning of the word in *Thurston* — defining it as an employer's knowing or reckless disregard for whether its conduct was prohibited by the act.

The court then stated:

> Surprisingly, the courts of appeals continue to be confused about the meaning of the term "willful" in Sec. 7(b) of the ADEA. A number of circuits have declined to apply *Thurston* to what might be called an informal disparate treatment case — where age has entered into the employment decision on an ad hoc, informal basis rather than through a formal policy...The chief concern of these circuits has been that the application of *Thurston* would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age discrimination knows or recklessly disregards the illegality of its conduct. We believe that this concern is misplaced."

Justice O'Connor said that a two-tiered system of liability still exists in ADEA cases because an employer who knowingly relies on age in reaching its decision does not invariably commit a knowing or reckless violation of the ADEA. For example, she cited the statutory defense that would allow an employer to bar individuals from employment because of their age if it is a bona fide occupational qualification, such as with the federal regulation concerning the age of airline pilots. She also pointed out that there are certain exemp-

tions from ADEA coverage, such as for certain bona fide corporate executives and highly placed policy-makers."

Justice O'Connor said the only difference between *Thurston* and *Biggins* was that *Thurston* involved a "formal and publicized policy" and *Biggins* involved an employment decision made on "an ad hoc basis." This distinction was insufficient to persuade the court to use a more stringent standard to find a willful ADEA violation. She continued:

> But surely an employer's reluctance to acknowledge its reliance on the forbidden factor should not cut against imposing a penalty. It would be a wholly circular and self-defeating interpretation of the ADEA to hold that, in cases where an employer more likely knows its conduct to be illegal, knowledge alone does not suffice for liquidated damages. We therefore reaffirm that the *Thurston* definition of "willful"...applies to all disparate treatment cases under the ADEA. Once a "willful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision."

As a result of *Biggins*, plaintiffs attempting to establish age discrimination will have a more difficult burden. Evidence of an employer's decision to terminate an employee based on factors that are empirically correlated with age — such as pension, high salary or seniority — will not automatically establish an ADEA violation. Plaintiffs claiming age discrimination will have to come up with some other evidence to establish that their age had a determinative influence on the employer's decision. Normally, however, plaintiffs are not able to obtain direct evidence of discrimination, and they often have little indirect evidence to rely upon.

As mentioned above, the *Biggins* case was sent back to the court of appeals to reconsider whether there was enough other evidence to establish an ADEA violation. This is likely to cause the lower courts to grapple with the issue of what evidence will be required for ADEA liability without clear guidance from the Supreme Court.

It is probable that employers will increasingly move for summary judgment in age discrimination cases, and they may prevail more often. But if plaintiffs' cases survive summary judgment, employers need to face the possibility that they could be required to pay liquidated damages.

Mr. Biggins claimed his wish for the Supreme Court's decision was that "we win, I get the money [and] the whole thing is finally over."[27] He didn't get his wish, the whole thing is not over and he may not get any money on his age-discrimination claim. But if he does succeed on his claim, he will surely get liquidated damages. Regardless of what happens, the case could end up right back at the Supreme Court's doorstep.

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(1) Barrett, "How One Man's Fight for a Raise Became a Major Age-Bias Case," Wall St. J., Jan. 7, 1993, at 1.

(2) 1993 U.S. Lexis 2978 (April 20, 1993).

(3) The ADEA states, "It shall be unlawful for an employer...to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1).

(4) The ADEA provides "[t]hat liquidated damages shall be payable only in cases of willful violations" of the act. 29 U.S.C. 626(b). The ADEA adopts the definition of liquidated damages established in the Fair Labor Standards Act, 29 U.S.C. 216(b), an amount equal to the pecuniary losses suffered by the discharged employee by way of lost wages, salary increases and other benefits.

(5) Biggins v. Hazen Paper Co., 953 F.2d 1405, 1411 (1st Cir. 1992).

(6) Id. Mr. Biggins claimed he had received the Hazens' permission to engage in the outside business venture with his son. See Barrett, Wall St. J., Jan. 7, 1993.

(7) The court of appeals did not state whether any other Hazen Paper employees were engaged in outside business activities. 953 F.2d at 1411.

(8) Barrett, Wall St. J., Jan. 7, 1993.

(9) 953 F.2d at 1411-1412.

(10) Sec. 510 of ERISA prohibits interference with pension plan rights.

(11) 953 F.2d at 1408.

(12) Id. at 1414.

(13) 963 F.2d at 1412.

(14) 469 U.S. 111 (1985).

(15) In Thurston, Trans World Airlines had a policy under which pilots older than 60 could become flight engineers, but they had to go through a "bidding" procedure and were not guaranteed a flight engineer position. Federal aviation regulations prohibit people older than 60 from remaining as pilots. Conversely, pilots younger than 60 who were disqualified from being pilots — because of medical disability or job elimination, for example — were not required to resort to the bidding procedure. Accordingly, the policy was held to discriminate against employees on the basis of their age.

(16) At least one circuit refuses to impose liquidated damages in such a case unless the employer's conduct was "outrageous." Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 57-58 (3d Cir. 1989). Another requires that the underlying evidence of liability be direct rather than circumstantial. Neufeld v. Searle Laboratories, 884 F.2d 335, 340 (8th Cir. 1989). Still others have insisted that age be the "predominant" rather than simply a determinative factor. Spulak v. Kmart Corp., 894 F.2d 1150, 1159 (10th Cir. 1990); Schrand v. Fed. Pac. Elec. Co., 851 F.2d 152, 158 (6th Cir. 1988).

(17) 953 F.2d 1412-1415.

(18) Id. at 1415.

(19) Id.

(20) 1993 U.S. Lexis 2978 at 8.

(21) Id. at 8-14 (citations omitted).

(22) Id. at 12. The Supreme Court defined the difference between a disparate-treatment claim and a disparate-impact claim, stating: "Disparate treatment is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics]. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Claims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under a disparate-impact theory." Id. at 9-10. The court, however, refused to decide whether a disparate-impact theory of liability is available under the ADEA.

(23) The court stated: "Besides the evidence of pension interference, the Court of Appeals cited some additional [indirect] evidentiary support for ADEA liability...In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision...is 'unworthy of credence.' But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present. This issue is now before us in the Title VII context (Hicks v. St. Mary's Honor Center, 970 F.2d 487 (8th Cir. 1992), cert. granted, 113 S. Ct. 954 (1993)) and we will not address it prematurely. We therefore, remand the case for the Court of Appeals." Id. at 17-18.

(24) Id. at 20-22.

(25) 29 U.S.C. 631(c).

(26) 1993 U.S. Lexis 2978 at 24.

(27) Barrett, Wall St. J., Jan. 7, 1993.

WHY WORKERS FEAR THE HIGH COURT

TAKING ISSUE by James C. Harrington
James C. Harrington is a civil rights attorney in Austin,
where he practices and teaches law.
His column appears regularly in Texas Lawyers.

Texas Lawyer
July 5, 1993

Over the past decade or more, it has become customary for civil rights lawyers to hold their collective breath every June at the end of the U.S. Supreme Court's term in anticipation of decisions that will erode anti-discrimination laws.

Alas, this term has turned out no differently. On June 25, the court issued a ruling that significantly increases the burden of workers to prove unlawful job bias in cases under Title VII of the 1964 Civil Rights Act, and it is an opinion that has the anomalous result of allowing employers to get away with lying in anti-discrimination litigation. (Of course, the court has yet to rule that workers may lie; that possibility is about as real as summertime snow in Rio Grande City.)

Since 1973, the law regarding proving a Title VII violation has evolved into a three-stage process. First, the employee must show that discrimination was at least a likely reason for dismissal or failure to win a job or promotion (that is, a qualified minority person or woman is passed over in favor of a non-minority individual or a male.)

In stage two, the employer then has the burden of producing evidence of a legitimate, non-discriminatory reason for the action. In the third and final step, the employee must show that the employer's reason is not credible, but a pretext for unlawful discrimination.

Justice Antonin Scalia, writing in June for the five-justice majority in St. Mary's Hope Center v. Hicks, No. 92-602, addressed the third stage in a case in which a qualified African-American prison supervisor had been dismissed. Melvin Hicks had made it through stage one in his suit and, in stage two, had shown that the reasons proffered by the state of Missouri (disciplinary infractions) were pretextual (the prison administration disregarded similar or more serious infractions by white supervisors). The 8th U.S. Circuit Court of Appeals ruled that Hicks was entitled to prevail without further proof of what the prison officials' real, undisclosed reasons might have been.

The 8th Circuit opinion was consistent with the solid body of law that Title VII litigation had developed in recognition of the fact that employees rarely possess direct evidence of an employer's intent to discriminate. Indeed, no halfway intelligent employer will leave a paper trail to that effect or make similar utterances. Thus, the rule of presumptive pretextual discrimination had come into effect.

Under the new rule announced by Justice Scalia, an aggrieved employee now will have to prove that the real reason for losing a job or promotion was actual discrimination, even when the employer offers false justifications for the actions.

Thus, the court continued its trend of rendering anti-discrimination law nearly impossible for plaintiffs, without overruling the law outright. Four years ago, the justices made disparate impact cases (detrimental effect on women and minority workers) virtually impossible to win: Congress since has overturned those decisions for the most part with the Civil Rights Restoration Act.

In St. Mary's Hope Center, Justice Clarence Thomas joined Scalia, as he usually does, to provide the majority. Thomas is a former head of the Equal Employment Opportunity Commission; if anyone should understand the problem of employees proving illegal discrimination, he should. But apparently he does not, being more content in his role as "border watchdog," as sociologists call it, for majoritarian interests.

Dissenting Justice David Souter, often described as a recluse in the New England woods, had a more realistic appraisal of the world: "[Common] sense tells us that it is more likely than not that the

employer who lies is simply trying to cover up the illegality alleged by the plaintiff."

Congress again should act to repair this damage to 20 years of "stable law," as Souter wrote, that results in a decision "unfair to plaintiffs, unworkable in practice, and inexplicable in forgiving employers who present false evidence in court."

TEXAS TO THE RESCUE

In the meantime, Texas law may provide its own relief, more protective than that contemplated by the Scalia majority.

Gov. Ann Richards has signed into law an anti-discrimination statute that creates the state's own body of equal employment law. The new statute, effective Sept. 1, takes federal laws as a model and incorporates them into a separate and distinct cause of action in state court, along with entitlement to equitable relief, compensatory and punitive damages, court costs and attorneys' fees. Essentially, the new Texas law creates state employment statutes parallel to Title VII, the federal Civil Rights Restoration Act and Title I of the federal Americans with Disability Act. The new Texas law, which amends and expands the Commission on Human Rights Act, is clearly one of the most comprehensive anti-discrimination employment statutes in the nation.

Not only does the new Texas law mean that workers can litigate in state court without the fear of removal to less-than-friendly federal courts, but in Texas case law it is clearly settled that state judges apply precedent in effect when the comparable law was enacted, despite its subsequent construction by courts of other jurisdictions.

Thus, Texas judges are not bound in any fashion, even as a matter of persuasive precedent, by St. Mary's Hope Center. They are free to effectuate the broad purposes of the Commission on Human Rights Act, continuing to rely on the traditional three-prong test that federal courts had used until June 25.

Texas has a less-than-honorable history in employment discrimination. With the passage of the state's 1972 Equal Rights Amendment banning discrimination on account of race, sex, color, creed or national origin, and passage of the new anti-discrimination employment law adding a prohibition on discrimination against workers with disabilities, we should insist that Texas courts develop the legal tools needed to root out discrimination in our society. In that way, we can become the fair and just people our state's founders intended and that our citizens time and again have indicated through constitutional amendment and statutory enactment they want to be.

EXPANDED CIVIL RIGHTS COVERAGE URGED
BIAS: REVERSING A BUSH ADMINISTRATION POSITION, THE JUSTICE DEPARTMENT ASKS THE SUPREME COURT TO APPLY A 1991 LAW TO CASES PENDING BEFORE PASSAGE.

By DAVID G. SAVAGE, TIMES STAFF WRITER

Los Angeles Times
May 1, 1993

The Justice Department, reversing a position adopted by the George Bush Administration, urged the Supreme Court on Friday to apply the Civil Rights Act of 1991 to the thousands of job discrimination cases that were pending when the measure became law.

That issue will be resolved by the justices in two cases to be heard in October.

If the high court were to adopt the Clinton Administration's view, employers could have to pay costly damage claims for discrimination that occurred years ago. Job discrimination suits often take five years or more to come to trial, which means cases that began in the early 1980s could still be pending on appeal.

The 1991 law reversed a series of Supreme Court rulings that had made it harder for employees to prove they had suffered discrimination. It also, for the first time, permitted victims of sex discrimination to win damages from employers.

The measure became law on Nov. 21, 1991, after a prolonged and bitter fight between congressional Democrats and the Bush White House. Bush vetoed two versions of the bill, contending that they would force employers to hire by quotas to avoid lawsuits.

A few days after the Senate narrowly confirmed Supreme Court Justice Clarence Thomas, Bush announced that he would sign the pending civil rights bill that became law.

The legislation did not spell out whether the law should apply retroactively, but then-White House counsel C. Boyden Gray drafted a statement for Bush insisting that its provisions -- such as the damage remedies for women -- would apply only to cases that arose after that date.

Lawyers for the Justice Department and the U.S. Equal Employment Opportunity Commission had adhered to that position until it was reversed last week by the Clinton White House.

"We have reexamined our position and have concluded that it is incorrect," the Justice Department said in its brief to the high court.

The Supreme Court itself has been confused over the years on whether new laws apply retroactively to pending cases. In a 1964 school case, the court said that judges should apply the law as it exists when a case reaches them, even if it was different when the case first arose.

But in a 1988 case involving reimbursements for hospitals, the court said retroactivity is not favored in the law unless Congress clearly says that new provisions should apply to old cases still pending.

Not surprisingly, lower courts have been divided recently on whether the 1991 law should apply retroactively. Most have taken the view that the new law does not cover cases that arose before 1991, but the U.S. 9th Circuit Court of Appeals in California has taken the opposite view and applied the law retroactively.

That split finally forced the high court to announce that it would resolve the issue.

92-757 LANDGRAF v. USI FILM PRODUCTS

Sexual harassment—Application of 1991 Civil Rights Act to cases pending at time of enactment.

Ruling below (CA 5, 968 F2d 427, 59 FEP Cases 897):

Although employee suffered sexual harassment sufficiently severe to support hostile environment sex discrimination claim under Title VII of 1964 Civil Rights Act, district court's findings that she voluntarily left her employment because of her other conflicts and unpleasant relationships with co-workers and that level of sexual harassment was insufficient to support finding of constructive discharge were not clearly erroneous, and thus she was not entitled to any relief; jury trial and compensatory and punitive damages provisions of Section 102 of 1991 Civil Rights Act do not apply retroactively to conduct occurring before effective date of act, given lack of clear congressional intent on issue and manifest injustice that would result from upsetting case that was properly tried by court under procedures applicable at time or from charging employer with anticipating seachange in employer liability effected by compensatory and punitive damages provisions.

Question presented: Does 1991 Civil Rights Act apply to cases pending when act became law, so as to entitle petitioner to full redress provided in Section 102 of act, when both lower courts found that she was victim of unlawful sexual harassment in violation of Title VII, but was not entitled to any relief whatsoever?

Petition for certiorari filed 10/28/92, by Paul C. Saunders, and Cravath, Swaine & Moore, both of New York, N.Y., Timothy B. Garrigan, and Stuckey & Garrigan, both of Nacogdoches, Texas, and Richard T. Seymour, Michael Selmi, and Sharon R. Vinick, all of Washington, D.C.

BARBARA LANDGRAF v. USI FILM PRODUCTS

No. 91-4485

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

968 F.2d 427; 1992 U.S. App. LEXIS 17414; 59 Fair Empl. Prac. Cas. (BNA) 897; 59 Empl. Prac. Dec. (CCH) P41,662

July 30, 1992, Decided

HIGGINBOTHAM, Circuit Judge:

Barbara Landgraf brought suit against her employer asserting sexual harassment and retaliation claims under Title VII. After a bench trial, the district court entered judgment in favor of the defendants. Although the district court found that sexual harassment had occurred, it concluded that Landgraf had not been constructively discharged and therefore was not entitled to any relief under Title VII. Landgraf asserts on appeal that the district court clearly erred in finding that she was not constructively discharged and that the district court erred in failing to make factual findings on her retaliation claim. She also argues that she is entitled to nominal damages even if she is unable to demonstrate a constructive discharge. Finally, she asserts that the damage and jury trial provisions of the Civil Rights Act of 1991 should be applied retroactively to her case. We affirm the district court's judgment in all respects and find that the Civil Rights Act of 1991 does not apply to this case.

I.

Landgraf worked for USI Film Products in its Tyler, Texas production plant on the 11:00 p.m. to 7:00 a.m. shift. From September 1984 to January 1986, she was employed as a materials handler operating a machine which produced several thousand plastic bags per shift. While she worked at the plant, fellow employee John Williams subjected her to what the district court described as "continuous and repeated inappropriate verbal comments and physical contact." The district court found that this sexual harassment was severe enough to make USI a "hostile work environment" for purposes of Title VII liability. The harassment was made more difficult for Landgraf because Williams was a union steward and was responsible for repairing and maintaining the machine Landgraf used in her work.

Landgraf told her supervisor, Bobby Martin, about Williams' harassment on several occasions but Martin took no action to prevent the harassment from continuing. Only when Landgraf reported the harassment to USI's personnel manager, Sam Forsgard, was Williams' behavior investigated. By interviewing the other female employees at the plant, the investigation found that four women corroborated Landgraf's reports of Williams engaging in inappropriate touching and three women reported verbal harassment.

Williams denied the charges, contending that "they are all lying." Williams was given a written reprimand for his behavior, but was not suspended, although the written policies of USI list sexual harassment as an action "requiring suspension or dismissal." He was technically transferred to another department, however, USI officials conceded that he would still be in Landgraf's work area on a regular basis. This transfer was not a form of discipline against Williams; as soon as Landgraf resigned he was transferred back to the original department.

The investigation dealt not only with Williams' behavior but also involved questioning employees about their relationship with Landgraf. On January 13, 1986, Forsgard, Wilson, and Martin met with Landgraf. According to Wilson's notes describing the meeting, Forsgard first told Landgraf that her claim had been investigated and that USI had taken the action it deemed appropriate. The meeting then turned to focus on Landgraf's problems in getting along with her co-workers. She was told that she was very unpopular and was "among [her] own worst enemies." When Landgraf asked whether anything was going to happen to Williams she was told that USI had taken what it considered appropriate action and to notify them if Williams attempted to take revenge.

After working just two more shifts, Landgraf left her job at USI. She left a letter addressed to her colleagues stating that "the stress that each one of you help [sic] to put on me, caused me to leave my job." The letter did not refer to the sexual harassment or to Williams by name. Approximately two days later, Landgraf spoke to her supervisor about her decision to resign and specifically attributed it to the harassment by Williams.

II.

It is uncontested that Barbara Landgraf suffered significant sexual harassment at the hands of John Williams during her employment with USI. This harassment was sufficiently severe to support a

hostile work environment claim under Title VII. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). She reported this harassment to her employer through supervisor Bobby Martin on several occasions and no corrective action was timely taken.

Because Landgraf voluntarily left her employment at USI, however, she must demonstrate that she was constructively discharged in order to recover back pay as damages. In order to demonstrate constructive discharge, she must prove that "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Bourque v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980); Jurgens v. EEOC, 903 F.2d 386, 390-91 (5th Cir. 1990). The district court found that the sexual harassment by Williams was not severe enough that a reasonable person would have felt compelled to resign. This conclusion was strengthened by the district court's finding that at the time Landgraf resigned USI was taking action reasonably calculated to alleviate the harassment. The district court further found that "as evidenced by the language in her resignation letter, Landgraf's motivation for quitting her employment with USI was the conflicts and unpleasant relationships she had with her co-workers."

Landgraf argues first that the district court clearly erred in finding that USI had taken steps reasonably calculated to end the harassment. We disagree. Our review of the district court's factual finding is limited. As the Supreme Court has recently described the scope of our review: "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. Bessemer City, 470 U.S. 564, 573-74, 84 L. Ed. 2d 518 , 105 S. Ct. 1504 (1985). There was evidence that USI had given Williams its most serious form of reprimand and acted to reduce his contact with Landgraf at the workplace. Landgraf testified that Williams continued to harass her after his reprimand, however, she did not report these incidents to USI before resigning. Title VII does not require that an employer use the most serious sanction available to punish an offender, particularly where, as here, this was the first documented offense by an individual employee. The district court did not clearly err in concluding that USI took steps reasonably calculated to end the harassment.

Landgraf argues that the finding of no constructive discharge was clearly erroneous. We disagree. The district court, after hearing all the testimony in this case, concluded that Landgraf resigned for reasons unrelated to sexual harassment. The evidence in this case presented two possible reasons for Landgraf's decision to resign: problems with her co-workers, as evidenced by her note or sexual harassment as stated in conversation with Bobby Martin. Landgraf testified at trial that the sexual harassment was the reason for her resignation. She also stated that the reference to "the devil [who] has been your leader so far" in her resignation note was actually a reference to Williams. The district court concluded based upon this testimony and the note itself that the problems with her co-workers actually caused her resignation. Given these two plausible interpretations of the evidence, we must affirm the district court's finding. Landgraf also asserts that the conflicts she had with her co-workers were as a result of her problems with Williams. There was conflicting evidence on this question and the district court specifically found that Landgraf's conflict with her co-workers was unrelated to the sexual harassment by Williams. The district court did not clearly err in finding that Landgraf left her employment at USI for reasons unrelated to sexual harassment.

Moreover, even if the reason for Landgraf's departure was the harassment by Williams, the district court found that, particularly in light of the corrective actions taken by USI immediately before Landgraf resigned, the level of harassment was insufficient to support a finding of constructive discharge. To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment. Pittman v. Hattiesburg Municipal Separate School District, 644 F.2d 1071, 1077 (5th Cir. 1981) (constructive discharge requires "aggravating factors"). The harassment here, while substantial, did not rise to the level of severity necessary for constructive discharge. Although USI's investigation of this incident may not have been overly sensitive to Landgraf's state of mind, the company had taken steps to alleviate the situation and told Landgraf to let them know of any further problems. A reasonable employee would not have felt compelled to resign immediately following the institution of measures which the district court found to be reasonably calculated to stop the harassment. We cannot say that the district court clearly erred in rejecting the claim of constructive discharge.

III.

Landgraf asserts that the district court erred in failing to make findings of fact and conclusions of law with regard to her retaliation claim against USI. USI argues that no findings on the retaliation claim are necessary because Landgraf failed to prevail on her claim of constructive discharge. We agree.

An adverse negative employment action is a required element of a retaliation claim. Collins v. Baptist Memorial Geriatric Center, 937 F.2d 190, 193 (5th Cir. 1991). The only possible adverse employment action that Landgraf suffered after she complained to Martin about the sexual harassment would be the alleged constructive discharge. Because the district court found that the reason Landgraf resigned her position was her trouble getting along with her co-workers, she cannot prove constructive discharge on the basis of retaliation. As noted above, Landgraf asserts that her troubles with her co-workers were as a result of her complaints about Williams' harassment. However, the district court explicitly found to the contrary and we cannot say that that finding was clearly erroneous. Accordingly, Landgraf's retaliation claim cannot prevail because she suffered no adverse employment action as a result of her complaints. Collins, 937 F.2d at 193.

IV.

Landgraf argues that even if she fails to demonstrate that she was constructively discharged, she may still be awarded nominal damages which would carry with them an award of attorneys' fees. We recognize that some confusion may have arisen from our statement in Joshi v. Florida State Univ., 646 F.2d 981, 991 n.3 (5th Cir. Unit B 1981), indicating in dicta that in some cases an employee who suffered from illegal discrimination but was ineligible for back pay might be entitled to nominal damages. Several circuit courts have explicitly held that such nominal damages are available under Title VII in some cases. Only the Seventh Circuit has directly rejected the award of nominal damages as relief in Title VII cases. Bohen v. City of East Chicago, Indiana, 799 F.2d 1180, 1184 (7th Cir. 1986).

We conclude that the Bohen court's rejection of nominal damages as a Title VII remedy is the correct interpretation of the statutory scheme.[1] Title VII provides that where a court finds that an employer has engaged in unlawful employment practices, it may order action "which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . .or any other equitable relief as the court deems appropriate." 42 U.S.C. @ 2000e-5(g). We have consistently interpreted this provision to mean that "only equitable relief is available under Title VII." Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988). Nominal damages such as those awarded in Huddleston and Baker are legal, not equitable relief and are therefore outside the scope of remedies available under Title VII. Bohen, 799 F.2d at 1184 (damages unavailable to redress Title VII violations that do not result in discharge).

Landgraf also asserts that she is entitled to equitable relief in the form of a declaratory judgment, relying on the Eighth Circuit's opinion in Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985). We conclude that no declaratory judgment is appropriate in this case. The purpose of equitable relief under Title VII is "to restore the victim of discrimination to fruits and status of employments as if there had been no discrimination." Bennett, 845 F.2d at 106. Here, because Landgraf voluntarily left her employment she was not deprived of any fruits of employment as a result of the sexual harassment. Her argument that she is entitled to a declaratory judgment for purposes of vindication because she prevailed on the issue of whether sexual harassment occurred must also fail. See Laboeuf v. Ramsey, 503 F. Supp. 747 (D. Mass. 1980) (allowing declaratory judgment for purposes of vindication). USI did not dispute at trial the fact of Landgraf's sexual harassment. The only issues disputed were the propriety of USI's reaction to the harassment and Landgraf's reason for resigning. Landgraf did not prevail on either of these issues and the district court did not err in refusing to grant a declaratory judgment.

V.

Finally, we address the question of whether any provisions of the Civil Rights Act of 1991 apply to this case. Two provisions of the Act would affect this case if applicable: the addition of compensatory and punitive damages and the availability of a jury trial. Civil Rights Act of 1991, Pub. L. No. 102-166, @ 102(a)(1), 102(c), 105 Stat. 1072-73 (1991).

We recently addressed the issue of the Act's retroactivity in Johnson v. Uncle Ben's, Inc., ____ F.2d ____, 1992 WL 147678 (5th Cir. July 1, 1992), where we joined the other circuit courts which have ruled on the issue in holding that @ 101(2)(b) of the Act does not apply to conduct occurring before the effective date of the Act. See Luddington v. Indiana Bell Telephone Co., ___ F.2d ___, 1992 WL 130393 (7th Cir. June 15, 1992); Fray v. Omaha World

Herald Co., 960 F.2d 1370 (8th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992). We need not repeat here our discussion of the legislative history of the Act. For the reasons explained in Johnson, we conclude that there is no clear congressional intent on the general issue of the Act's application to pending cases. We must therefore turn to the legal principles applicable to statutes where Congress has remained silent on their retroactivity.

As we noted in Johnson the legal principles surrounding the retroactive application of statutes are somewhat uncertain in light of the Supreme Court's decisions in Bradley v. Richmond School Board, 416 U.S. 696, 40 L. Ed. 2d 476 , 94 S. Ct. 2006 (1974) and Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988). We need not resolve the recognized tension between the Bradley and Bowen cases, however, in order to resolve the issue facing us here. See Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 837, 110 S. Ct. 1570, 1572, 108 L. Ed. 2d 842 (1990). Even under the standard set forth in Bradley we conclude that these two provisions of the Act should not be applied retroactively to this case.

The rule set forth in Bradley is that a court must "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley, 416 U.S. at 711. [**15] In determining whether retroactive application of a statute will wreak injustice, we consider "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." Belser v. St. Paul Fire and Marine Ins. Co., ___ F.2d ___ (5th Cir. July 9, 1992), citing Bradley, 416 U.S. at 717, 94 S. Ct. at 2019.

We turn first to the provision allowing either party to request a jury trial. When this case was tried in February 1991, the district court applied the law in effect at that time when it conducted a bench trial on the Title VII claims. We are not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial. See Bennett v. New Jersey, 470 U.S. 632, 105 S. Ct. 1555, 84 L. Ed. 2d 572 (1985) (Court would not presume that Congress intended new grant regulations to govern review of prior grants). To require USI to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources. We apply procedural rules to pending cases, but we do not invalidate procedures followed before the new rule was adopted. Belser, ___ F.2d ___ at _____.

We now turn to whether the Act's provisions for compensatory and punitive damages apply to pending cases. We conclude that they do not. Retroactive application of this provision to conduct occurring before the Act would result in a manifest injustice. The addition of compensatory and punitive damages to the remedies available to a prevailing Title VII plaintiff does not change the scope of the statute's coverage. That does not mean, however, that these are inconsequential changes in the Act. As Judge Posner notes in Luddington, "such changes can have as profound an impact on behavior outside the courtroom as avowedly substantive changes." Unlike allowing prevailing plaintiffs to recover attorneys' fees as in Bradley, the amended damage provisions of the Act are a seachange in employer liability for Title VII violations. For large employers, the total of compensatory and punitive damage which they are potentially liable can reach $ 300,000 per claim. Civil Rights Act of 1991, @ 102(3)(b)(3).

The measure of manifest injustice under Bradley is not controlled by formal labels of substantive or remedial changes. Instead, we focus on the practical effects the amendments have upon the settled expectations of the parties. There is a practical point at which a dramatic change in the remedial consequences of a rule works change in the normative reach of the rule itself. It would be an injustice within the meaning of Bradley to charge individual employers with anticipating this change in damages available under Title VII. Unlike Bradley, where the statutory change provided only an additional basis for relief already available, compensatory and punitive damages impose "an additional or unforeseeable obligation" contrary to the well-settled law before the amendments. 416 U.S. at 721. We conclude that the damage provisions of the Civil Rights Act of 1991 do not apply to conduct occurring before its effective date.

The judgment of the district court is AFFIRMED.

ENDNOTES

1. We note, of course that under the amendments to Title VII in the Civil Rights Act of 1991, remedies will no longer be limited to equitable relief. However, for the reasons discussed below, those amendments do not apply to this case.

92-938 RIVERS v. ROADWAY EXPRESS INC.

Race—Discharge—1991 Civil Rights Act—Retroactivity.

Ruling below (*Harvis v. Roadway Express Inc.*, CA 6, 973 F2d 490):

1991 Civil Rights Act does not apply retroactively to claims pending at time it was enacted; *Patterson v. McLean Credit Union*, 491 U.S. 164, 57 LW 4705 (1989), which held that right to make contracts protected by 42 USC 1981 does not apply to conditions of employment but covers only discrimination in formation of employment contract or right to enforce contract, was properly applied retroactively to Section 1981 claims that were untried and pending on date it was decided.

Question presented: Does 1991 Civil Rights Act apply to cases that were pending when act was passed?

Petition for certiorari filed 12/2/92, by Charles Stephen Ralston, Julius L. Chambers, and Eric Schnapper, all of New York, N.Y., Ellis Boal, of Detroit, Mich., and Cornelia T. L. Pillard, of Washington, D.C.

RIVERS v. ROADWAY EXPRESS, INC.

No. 91-3348

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

973 F.2d 490; 1992 U.S. App. LEXIS 19436; 61 Fair Empl. Prac. Cas. (BNA) 91; 59 Empl. Prac. Dec. (CCH) P41,699

May 4, 1992, Argued
August 24, 1992, Decided
August 24, 1992, Filed

BOGGS, Circuit Judge.

In this race discrimination case, the appellants originally claimed they were discharged because of racial discrimination and now state that the claim was also for retaliatory discharge for winning a grievance, exercised for racial reasons. The claim was dismissed by the district court based upon the United States Supreme Court ruling in Patterson v. McLean Credit Union, 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989). On appeal, appellants argue that the district court misapplied Patterson, but that even if their claim had been properly dismissed, this court should reinstate their claim by retroactively applying to this case the new Civil Rights Act of 1991 (CRA of 1991), Pub. L. No. 102-166, 105 Stat. 1071-1100, 42 U.S.C. @ 1981, which explicitly enacted the interpretation of @ 1981 rejected in Patterson. We reverse on the grounds that the district court misapplied Patterson to dismiss appellants' retaliatory discharge claim. We affirm the district court's dismissal of the race discrimination in firing claim, and hold that the CRA of 1991 should be not applied retroactively to this case.

I

Plaintiffs-appellants Maurice Rivers and Robert C. Davison are Black garage mechanics who were employed by defendant Roadway Express, Inc. since 1972 and 1973 respectively. On the morning of August 22, 1986, Roadway verbally informed Rivers and Davison that they were required to attended disciplinary hearings that same day related to their accumulated work record. Both plaintiffs refused to attend, alleging inadequate notice. Roadway was contractually required to provide prior written notice of such hearings and allegedly routinely did so for white employees. The hearings resulted in two-day suspensions for both appellants. Appellants filed grievances with the Toledo Local Joint Grievance Committee (TLJGC), which granted the grievances based on "improprieties" and awarded each appellant two days of back pay.

Shortly after these initial hearings, disciplinary hearings were again called by Roadway's Labor Relations Manager, James O'Neil, who announced that he would hold disciplinary hearings against Rivers and Davison within seventy-two hours. Rivers and Davison again refused to attend, claiming inadequate notice. As the result of the hearings, both Rivers and Davison were discharged on September 26, 1986, for refusing several direct orders to attend the hearings and for their accumulated work record.

In February 1987, Rivers and Davison, along with James T. Harvis, filed this suit, alleging that Roadway discriminated against them on the basis of race, in violation of 42 U.S.C. @ 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. @ 2000e. They also alleged that Roadway violated the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. @ 185(a), and brought an unfair representation claim against their union. Both of these latter claims were dismissed on summary judgment by the district court.

The district court then separated Harvis's case, which went to trial and ended in a jury verdict on the @ 1981 claim for Roadway. The district court ordered judgment against Harvis on his @ 1981 and Title VII claims. Harvis's appeal to this court was denied and the trial court's judgment affirmed. Harvis v. Roadway Express, Inc., 923 F.2d 59 (6th Cir. 1991).

On June 15, 1989, shortly after Harvis's verdict and before appellants went to trial, the Supreme Court decided Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), which held that the right to make contracts protected by @ 1981 does not apply to conditions of employment, but only covers discrimination in the formation of the employment contract or the right to enforce the contract. The district court, while holding that Patterson was not retroactive with respect to Harvis's jury verdict, held it did have retroactive

effect on the untried and pending @ 1981 claims of Rivers and Davison. The district court concluded that appellants' claims were for discriminatory discharge and thus, based on Patterson, could not be maintained under @ 1981. Rivers and Davison argued that their claims were not simply for discriminatory discharge, but rather for retaliation for their success in enforcing contract rights in a grievance hearing. However, the district court held that these were only basic breach of contract claims, and not claims based on the right to enforce contracts, which would fall under @ 1981. After dismissing the @ 1981 claims, the district court held a bench trial on plaintiffs' Title VII claims and ruled in favor of Roadway, holding that Rivers and Davison failed to establish that their discharge from employment was based upon their race.

Rivers and Davison appeal the district court's dismissal of their @ 1981 claims on two grounds. First, they argue that Patterson does not preclude this action, as it is not an action for discriminatory discharge, but rather an action based on retaliation for attempting to enforce the labor agreement, thus [**6] squarely falling under @ 1981. Second, while this appeal was pending, the CRA of 1991 was enacted, explicitly contradicting the Patterson decision. Appellants argue that the CRA of 1991 should be applied retroactively to their @ 1981 claims, thus invalidating the district court's decision. The case, they argue, should be remanded for a new determination under this new legislation.

II

42 U.S.C. @ 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The Patterson court limited the scope of @ 1981 actions by holding that @ 1981 does not apply to discrimination in conditions of employment, but only prohibits discrimination in the formation of the employment contract or the right to enforce the contract. Patterson, 491 U.S. at 176. Thus, under Patterson, @ 1981 "covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." Id. at 179.

While Patterson did not directly address the issue of whether @ 1981 applied to discriminatory discharges, this court, along with a majority of other courts, has held that claims of discriminatory discharge are no longer cognizable under @ 1981 because discharge does not involve contract formation. See Prather v. Dayton Power & Light Co., 918 F.2d 1255 (6th Cir. 1990), cert. denied, 115 L. Ed. 2d 1054, 111 S. Ct. 2889 (1991); Hull v. Cuyahoga Valley Bd. of Educ., 926 F.2d 505 (6th Cir. 1991), cert. denied, 111 S. Ct. 2917, 115 L. Ed. 2d 1080 (1991). The plaintiffs, below and on appeal, argue that theirs were not discriminatory discharge claims, but rather, claims of retaliatory discharge where plaintiffs were punished for attempting to enforce their contract rights to be treated equally with white people. The district court rejected this claim as "bootstrapping" and held that this was solely a discriminatory discharge case.

Before deciding whether or not Patterson was correctly applied, we must first address whether the district court was correct in retroactively applying Patterson to the claims of Rivers and Davison. Our circuit has twice held that Patterson does apply retroactively to pending cases. In Prather v. Dayton Power & Light Co., supra, we applied Patterson retroactively to a pending discriminatory discharge case based on three factors used to determine whether an exception mandating non-retroactivity exists, as discussed by the Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971). Under these factors, a decision will not be applied retroactively if, first, it establishes a new principle of law, either by overruling clear past precedent on which litigants have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Id. at 106 (citations omitted). The second retroactivity factor is the "prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Id. at 106-07. Finally, the [**9] third factor involves weighing "the inequity imposed by retroactive application" to avoid "injustice or hardship." Id. at 107.

Weighing these factors, the Prather court held that applying Patterson retroactively would not "retard its operation," nor would it produce "substantial inequitable results" that might otherwise be avoided and concluded that applying Patterson would not

unduly prejudice the plaintiff. Prather, 918 F.2d at 1258. This decision was reaffirmed in Hull v. Cuyahoga Valley Bd. of Educ., supra. The district court correctly found that Patterson applied retroactively to the pending @ 1981 claims of Rivers and Davison.

III

Appellants argue that, even if Patterson is applied retroactively to their case, their claims still survive Patterson and the district court wrongly dismissed the claim as a discriminatory discharge complaint not recognized under @ 1981. We agree.

Appellants contend that Patterson only eliminates those claims of retaliation for exercising rights that are unrelated to the specific @ 1981 right to "make and enforce contracts." But, they argue, Patterson does not eliminate a cause of action for exercising rights that do relate to the enforcement of contract rights. Appellants maintain that they are not making discriminatory discharge claims, but rather are claiming retaliatory discharge that punished them for enforcing their contract right to receive notice equal to that received by whites.

Roadway counters that Rivers and Davison were not punished for enforcing their contract rights as the right to enforce contracts does not however extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.

Patterson, 491 U.S. at 177-78.

However, the prohibited conduct of impairing the ability to enforce contract rights is exactly what appellants are complaining about here. Rivers and Davison were punished, they contend, for trying to utilize the established legal process for their grievances. The fact that Roadway allowed formal "access" to legal process does not imply that it could never be impairing the employee's "ability to enforce through legal process." An employer's intimidation and punishment conducted inside formal legal process may impair an employee's contract rights just as much as intimidation and punishment conducted outside formal legal process. See Carter v. South Central Bell, 912 F.2d 832, 840 (5th Cir. 1990), cert. denied, 115 L. Ed. 2d 1079, 111 S. Ct. 2916 (1991) (court emphasized that the alleged conduct must have impaired the plaintiff's ability to enforce contractual rights either through court or otherwise on the basis of race).

Appellants' claims are similar to those in Von Zuckerstein v. Argonne National Lab., 760 F. Supp. 1310, 1318 (N.D. Ill. 1991), where plaintiffs were permitted to proceed to trial on their @ 1981 claims that "defendants specifically retaliated against them for pursuing (or intending to pursue) their contract claims in the internal grievance forum." Id. at 1318 (emphasis in original). We do not agree with appellee's argument that Von Zuckerstein is distinguishable because it involved an employer who impaired or impeded the plaintiffs from using the available legal process to enforce a specific anti-discrimination contract right. However, @ 1981 speaks of the right to "enforce contracts," which includes any contract rights, not just anti-discrimination contract rights. The key here is that plaintiffs were impaired from enforcing contract rights, not the kind of contract right they were impaired from enforcing. Just because Rivers and Davison were allowed to use the available legal process does not mean the employer did not discriminate against them through retaliation for the very act of using that legal process. Retaliation is defined more broadly than mere access to legal process. McKnight v. General Motors Corp., 908 F.2d 104, 111 (7th Cir. 1990), cert. denied, 113 L. Ed. 2d 241, 111 S. Ct. 1306 (1991), held that retaliation "is a common method of deterrence." We hold that appellants have articulated this essential element of @ 1981, that their ability to enforce claimed contract rights was impaired because of their race.

Roadway argues that even if retaliatory discharge did occur, the plaintiffs never alleged retaliatory discharge in either their first or amended complaints. However, upon examination of the record, we find that sufficient allegations exist to form the basis of a retaliatory discharge claim. While appellants admit that their pre-Patterson complaint was not specifically structured as a "right to enforce a contract" claim as opposed to a "condition of employment" claim, the very basis of their complaint has always stemmed from retaliatory discharge. They allege, in their amended complaint, that "Rivers' [sic] and Davison's discharges were taken without just cause. More particularly Roadway scheduled a hearing for them for September 26, 1986, based on conduct for which a grievance committee had previously exonerated them with backpay." We find that the appellants' claims fall within the Patterson definition of permissible @ 1981 actions, as the claims involve discrimination in the right to enforce a contract. We hold that the district court wrongly dismissed appellants' @ 1981 claims and the case should be

remanded for further proceedings on the @ 1981 claims.

IV

Our holding that the case should be remanded for further proceedings on appellants' @ 1981 claims raises potential collateral-estoppel problems. The district court has already had a bench trial on the appellants' Title VII claims, finding that Rivers and Davison were not discharged from employment based on their race.

A similar situation existed in Lytle v. Household Mfg., Inc., 494 U.S. 545, 108 L. Ed. 2d 504, 110 S. Ct. 1331 (1990), where Lytle, a Black machinist for a subsidiary of Household Manufacturing, was dismissed for unexcused absences. Lytle filed a complaint with the EEOC, alleging that he had been treated differently than white employees who missed work. He then brought discriminatory discharge and retaliation claims under @ 1981 and Title VII. The district court dismissed Lytle's @ 1981 claims, concluding that Title VII provided the exclusive remedy for his racial discharge and retaliation claims. At a bench trial on the Title VII claims, the district court dismissed Lytle's discriminatory discharge claims pursuant to Rule 41(b), Fed. R. Civ. P., and granted defendants summary judgment on the retaliation claim.

The Fourth Circuit affirmed, ruling that the district court's findings with respect to Title VII claims collaterally estopped Lytle from litigating his @ 1981 claims because the elements of a cause of action under @ 1981 are identical to those under Title VII. Lytle, 494 U.S. at 549; see also Washington v. Brown & Williamson Tobacco Corp., 756 F. Supp 1547, 1555 (M.D. Ga. 1991). The Supreme Court reversed, based on plaintiff's seventh amendment right to trial by jury in "suits at common law," noting that:

> When legal and equitable claims are joined in the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact."

Lytle, 494 U.S. at 550 (citations omitted).

The Supreme Court distinguished the Lytle situation, where the equitable and legal claims were brought together, from the situation in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979), where the Supreme Court held that "an equitable determination can have collateral-estoppel effect in subsequent legal action and that this estoppel does not violate the Seventh Amendment." Lytle, 494 U.S. at 550-51 (citing Parklane Hosiery Co., 439 U.S. at 335) (emphasis added).

We find that our situation falls squarely under the Lytle precedent and hold that collateral estoppel does not preclude relitigation of issues decided by the district court in its bench trial resolution of the equitable claims of Rivers and Davison under Title VII. As in Lytle, the purposes served by collateral estoppel do not justify applying the doctrine in this case. Id. at 553. Collateral estoppel is designed to protect parties from multiple lawsuits and potentially inconsistent decisions, as well as to conserve judicial resources. Ibid. Although remanding for further proceedings certainly will expend greater judicial resources, such litigation is essential in preserving Rivers's and Davison's seventh amendment rights to a jury trial.

V

While this case was pending on appeal, the United States Congress passed the Civil Rights Act of 1991. Appellants now argue that the district court should also be reversed in light of the 1991 Act, which amends @ 1981 to change the result in Patterson. The 1991 Act states that:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Pub. L. 102-166, @ 101(b); 42 U.S.C. @ 1981(b).

Both this Circuit and the Eighth Circuit have addressed whether this act should apply retroactively to @ 1981 claims that were pending on appeal at the time of enactment. Both circuits have ruled that the CRA of 1991 does not apply retroactively. Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992); Mozee v. American Commercial Marine Service Co., 963 F.2d 929 (7th Cir. 1992).

Both Vogel and Fray examine the history of judicial treatment of retroactivity as applied to new legislation. Building upon both Roman civil law and English common law, up to 1969 it was a

well-established principle in American jurisprudence that legislation must be applied only prospectively unless the legislature specifically decreed a retroactive application. Fray, 960 F.2d at 1374. However, in Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 21 L. Ed. 2d 474, 89 S. Ct. 518 (1969), and in Bradley v. Richmond School Bd., 416 U.S. 696, 40 L. Ed. 2d 476, 94 S. Ct. 2006 (1974), the Supreme Court held that a new statute must be retroactively applied to a case that was pending on appeal at enactment "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley, 416 U.S. at 711.

Later, in Bowen v. Georgetown University Hospital, 488 U.S. 204, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988), the Supreme Court reiterated the principle that "retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires the result." Id. at 208. While the Supreme Court acknowledged this tension in the case law in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990), the court did not have to resolve the issue, as congressional intent was found to be clear in that case.

Given these conflicting rules of construction, both the Vogel and Fray courts examined the language and legislative history of the CRA of 1991 and concluded that it should not be applied retroactively. For example, @ 402 of Pub. L. 102-166 states that "except as otherwise provided, this Act and the Amendments made by this Act shall take effect upon enactment." While appellants argue that this indicates retroactivity, the Vogel court correctly noted that this language could mean that the Act applies to pending cases or it could mean it should be applied only to conduct occurring as of that date of enactment. Vogel, 959 F.2d at 597-98.

Both the Vogel and Fray courts also agree that the legislative history sheds little light on the matter, as Senators expressed conflicting views and no legislative committee reports exist explaining the bill. Fray, 960 F.2d at 1376-77. Appellants argue that retroactivity is implied because two sections are expressly made prospective. However, the Fray court notes that a bill that specifically changes the result in Patterson retroactively was vetoed by the President in 1990 and Congress failed to override the veto. The court concluded that:

We think a rather clear picture emerges from this review of the Act and its legislative history. Proponents of retroactively overruling Patterson commanded a majority in both houses of Congress, but they could not override the President's veto of a 1990 bill that contained express retroactive provisions. Thus, proponents could do no better than send an ambiguous law to the judiciary. On the other hand, opponents of retroactivity who favored enactment of a prospective law (including the President) were also willing to hand this controversial issue to the judiciary by passing a law that contained no general resolution of the retroactivity issue. However, when a congressional majority could be marshalled, retroactivity opponents "hedged their bets" by expressly making specific provisions, such as @ 109, prospective only.

Fray, 960 F.2d at 1377.

Given the ambiguous legislative history and language of the act, this court held in Vogel that Bradley should be read narrowly and should not be applied in contexts where "substantive rights and liabilities", broadly construed, would be affected. Clearly, retroactive application of the 1991 Act would affect "substantive rights and liabilities" of the parties to this action.

Vogel, 959 F.2d at 598, citing United States v. Murphy, 937 F.2d 1032, 1037-38 (6th Cir. 1991).

Appellants argue that Vogel is not determinative here since it deals with @ 108, which is written differently from @ 101, the section at issue here. They also argue that the Fray opinion, which does deal specifically with @ 101, is wrong. However, appellants' arguments are not well taken on either count. Their distinction between @ 101 and @ 108 is immaterial, as both Fray and Vogel examined the retroactivity of the 1991 CRA as a whole, not in terms of specific sections, and both courts concluded that applying the Act retroactively would adversely affect substantive rights and liabilities.

We agree with the Fray and Vogel decisions and hold that the 1991 CRA does not apply retroactively. However, as we also find that the district court misapplied Patterson, the case can be reversed on those substantive grounds alone. We REVERSE and REMAND for further proceedings under @ 1981, as we hold that Patterson does not exclude @ 1981 claims based on retaliation for attempting to enforce contract rights.

DISSENT: SILER, Circuit Judge, concurring in part and dissenting in part.

I concur with the majority opinion in full, except that which is listed in part III. It is my opinion that Patterson v. McLean Credit Union, 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989), does not permit a claim for retaliation pursuant to 42 U.S.C. @ 1981 under the facts of this case. It may be that Patterson precludes any retaliatory claims under @ 1981, but this court need not go that far.

First, I have much more of a problem than the majority in determining whether the plaintiffs ever alleged retaliatory discharge in either their first or amended complaints. However, for purposes of this analysis, I will assume that they did.

The majority relies upon the decisions in McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990), cert. denied, 113 L. Ed. 2d 241, 111 S. Ct. 1306 (1991); and Von Zuckerstein v. Argonne Nat'l Lab., 760 F. Supp. 1310 (N.D. Ill. 1991). However, McKnight did not hold that @ 1981 allows a claim for retaliation. Instead, it assumed that it was so actionable "provided that the retaliation had a racial motivation." McKnight, 908 F.2d at 111. Then, the court went on to find that the plaintiff in that case "might be guilty of violating section 1981." Id. at 112 (emphasis added). It further stated that the question need not be pursued, "because General Motors did not interfere with contractual entitlements." Id.

Moreover, the court in Von Zuckerstein held at 1319 that the plaintiffs in that case would have to establish "that they sought to use the internal grievance procedure to vindicate their contractual right to be free from discrimination." That is unlike the present case, which apparently does not have an antidiscrimination provision in the collective bargaining agreement.

Instead, I would follow the decision in Carter v. South Cent. Bell, 912 F.2d 832, 840 (5th Cir. 1990), cert. denied, 115 L. Ed. 2d 1079, 111 S. Ct. 2916 (1991), which held that @ 1981 no longer extends to retaliatory termination. Although that case is somewhat different from this one, in that the plaintiff asserted that he was retaliated against because of filing a charge with the EEOC, which was a statutory right, not a contractual right, nevertheless, the court stated:

> Were we to hold that section 1981 still encompasses retaliatory discharge, we would be encouraging litigation to determine what the employer's subjective motive was when he fired the employee: was it to retaliate or "merely" to discriminate? This would be pointless. Both motives are equally invidious, and the employee suffers the same harm. Because section 1981 no longer covers retaliatory termination, all suits for discriminatory dismissal must be brought under Title VII.

Id. at 840-841. Accord Overby v. Chevron USA, Inc., 884 F.2d 470, 472-473 (9th Cir. 1989), cited with approval in Hull v. Cuyahoga Valley Joint Vocational School Dist. Bd. of Educ., 926 F.2d 505, 509 (6th Cir.), cert. denied, 111 S. Ct. 2917, 115 L. Ed. 2d 1080 (1991), for the proposition that retaliatory discharge claim is conduct not cognizable under @ 1981.

Moreover, this court has, by unpublished decisions, followed that rule from Carter. Although they have no precedential value, see Sixth Cir. R. 24(c), they were cited by Roadway Express in its brief. I am not inclined to completely ignore opinions of other judges on this court, even if they are not binding. In Christian v. Beacon Journal Publishing Co., No. 89-3822, 1990 U.S. App. LEXIS 12080 (6th Cir. July 17, 1990) (unreported), the court held that claims of retaliatory discharge may not be brought pursuant to @ 1981 under Patterson, citing Singleton v. Kellogg Co., No. 89-1073, 890 F.2d 417, 1989 U.S. App. LEXIS 17920 (6th Cir. Nov. 29, 1989) (per curiam) (unreported). See also Bohanan v. United Parcel Serv., No. 90-3155, 1990 U.S. App. LEXIS 20154 (6th Cir. Nov. 14, 1990) (unreported) (Wellford, J., concurring). Therefore, I would affirm the district court in all respects.

Peremptory Challenges: The End of the Road? How to Pick a Jury in the Post-'Batson' World

LAWRENCE S. ROBBINS AND DORANN E. BANKS

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WILL THE peremptory challenge remain an available tool in picking a jury?

In 1986, the U.S. Supreme Court held in Batson v. Kentucky[1] that the use of the peremptory challenge in criminal trials to exclude jurors on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment. Batson thus ushered in a new era in the use and effectiveness of the peremptory challenge.

Under Batson, a defense lawyer need no longer show a pattern of discriminatory jury challenges, over a range of cases, in order to object to the use of a peremptory challenge. It is now sufficient to show that the prosecution has used its challenges, in that case alone, in a facially discriminatory way.

The Supreme Court has since extended Batson in a variety of new directions. And just last May, the court granted review in a case raising the question whether Batson should be extended still further, to cover challenges based on gender.[2]

Even in its original context, the principle adopted in Batson raised as many questions as it answered, and it certainly made the process of picking a jury a more complex and sensitive exercise. The extension of that principle, however, and the prospect of still additional extensions in the future, greatly complicate the picture. At the end of the day, there may be little left of the peremptory challenge as we know it.

Before ' Batson'

Over a century ago, in Strauder v. West Virginia,[3] the Supreme Court held that a state may not constitutionally prosecute a black defendant before a jury from which all members of his race had been excluded by statute. In 1965, the court returned to the issue in Swain v. Alabama,[4] expressly in the context of peremptory challenges.

In Swain, the prosecutor had, through the use of peremptory challenges, stricken all six black members of the jury venire. The Supreme Court rejected the plaintiff's claim of a denial of equal protection, holding that "the record in this case is not sufficient to demonstrate that the rule has been violated by the peremptory system."[5]

The court explained that the experience of one case was insufficient to show systematic discrimination. Rather, the court stated, a defendant must point to the exclusion of qualified black jurors "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be . . . with the result that no Negroes ever serve on petit juries. "[6]

Under Swain, a constitutional challenge required a showing of repeated exclusion of one race, by the same prosecutor, over a period of time. Naturally, this standard was difficult to meet, and by 1986, when Batson reached the Supreme Court, nearly every attempt to satisfy the requirements of Swain had failed.[7]

The Supreme Court's decision in Batson dramatically recast the law of peremptory challenges.

In Batson, using his peremptory challenges, the prosecutor struck all four black jurors from the panel. The all-white jury thereafter convicted the black defendant of second-degree burglary and receipt of stolen goods.

The Supreme Court held that "[purposeful] racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."[8] The court explained that individuals on a venire "must be 'indifferently chosen' to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.'" [9]

The court also recognized that the harm of racial discrimination affects not only the accused but the potential juror as well because by "denying a person participation in jury service on account of his race, the State unconstitutionally [discriminates] against the excluded juror. "[10] Indeed, the court noted, the "harm from discriminatory jury selection extends

beyond that inflicted on the defendant and the excluded juror to touch the entire community."[11]

The Batson court went on to describe the procedural showing that must be made to show discriminatory use of a peremptory challenge.

To establish a prima facie case of purposeful discrimination, the court stated, the defendant, as a member of a cognizable racial group, must be able to raise an inference that the prosecution used its peremptory challenges to exclude from the venire potential jurors of the defendant's race, and that it did so on the basis of race.

Once the prima facie case has been made, the burden shifts to the prosecution to provide a neutral explanation for challenging those jurors. The prosecution may not satisfy that burden simply by advancing a blanket affirmation of good faith or by relying on the stereotypical assumption that jurors of a particular race will more likely favor a defendant of the same race.[12]

' Batson' Progeny

Since 1986, the Supreme Court has revisited the principle in Batson and several times expanded its contours.

In 1991, for example, in Powers v. Ohio,[13] the court clarified the constitutional right at stake when Larry Joe Powers, a white man accused under Ohio law of two counts of aggravated murder and one count of attempted aggravated murder, challenged the exclusion of black jurors from his panel under the Batson rationale. The Supreme Court held that under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors obtained through peremptory challenges, whether or not the defendant and the jurors are members of the same race.

Also in 1991, in Edmonson v. Leesville Concrete Co.,[14] the Supreme Court extended the rule in Batson to private litigants in civil cases. In both Powers and Edmonson, the court emphasized that, separate and apart from the rights of the litigants themselves, a race-based peremptory challenge "violates the equal protection rights of those excluded from jury service." [15]

Just last year, in Georgia v. McCollum[16] the Supreme Court expanded the Batson rationale again, holding that the Constitution prohibits a criminal defendant, as well as a prosecutor, from engaging in purposeful discrimination on the basis of race in exercising peremptory challenges.[17]

Beyond Race

The Supreme Court has not yet considered a Batson claim outside the ambit of race.[18] Read broadly, however, Batson could well encompass gender claims, as well as claims involving other traditionally protected groups.

The Batson court explained that "[in] view of the heterogenous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."[19] The same, broad rationale might well support extending Batson to peremptory challenges based on any protected characteristic.

Although the Batson court viewed the purposeful striking of jurors on the basis of race as plainly harmful and wrong, it may be just as harmful and wrong to exercise peremptory challenges for other reasons, such as gender, age, disability, religion or sexual orientation.

Next term, the Supreme Court will have its first opportunity to explore these implications of Batson. On May 17, 1993, the court granted certiorari in J.E.B. v. T.B. to address the question whether Batson applies to gender-based peremptory challenges.

In J.E.B., a civil paternity action, Alabama, acting on behalf of the mother, struck makes from the prospective jury. The alleged father challenged the state's strikes, contending that the principle in Batson forbids such gender-based decisions. The Alabama Court of Civil Appeals disagreed, holding that Batson does not apply to gender-motivated challenges.

How the justices come out in the case depends, of course, on where they come in.

To the extent that the right in Batson is broadly conceived as, for example, the right of potential jurors to equal treatment under the Fourteenth Amendment, there is no apparent stopping point. The Equal Protection Clause, after all, is broadly framed. It provides that no "person" shall be denied "the equal protection of the laws." Under this interpretation of the clause, even opticians are entitled to at least rational scrutiny of classifications that discriminate against them.[20]

Wide Swath

Read for all it is worth, then, the rule in Batson cuts a wide swath, entitling all "persons" to be free of irrational discrimination in the process by which they are selected as jurors.

But peremptory challenges are, by their very nature, irrational. They are often no more than a barely informed hunch or instinct, and stereotypical thinking is almost inevitably involved. A peremptory challenge, the Supreme Court noted in Swain, "is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'"[21]

And as Justice, now Chief Justice, William H. Rehnquist stated in his dissent in Batson, "[the] use of group affiliations, such as age, race, or occupation, as a 'proxy' for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the . . . exercise of peremptory challenges."[22]

In short, the Batson rule, unless cabined on somewhat artificial grounds, runs headlong into the very concept of peremptory challenges. The Supreme Court's decision next term may well decide which right will give way first: the right articulated in Batson, or the statutory right, enshrined in years of practice, to exercise peremptory challenges.

Practical Impact

Batson has a powerful impact on practitioners selecting a jury. Under Batson, the trial lawyer should consider the following issues, among others, in making or attacking a peremptory challenge.

* What level or scrutiny applies? If the Supreme Court extends the Batson rule beyond the realm of the race-based challenge, litigants may be faced with disparate burdens of proof, depending upon the nature of the underlying classification. As Chief Justice Warren E. Burger explained in his dissent in Batson.

[Under] conventional equal protection principles some uses of peremptories would be reviewed under "strict scrutiny and . . . sustained only if . . . suitably tailored to serve a compelling state interest," . . . others would be reviewed to determine if they were "substantially related to a sufficiently important government interest," . . . and still others would be reviewed to determine whether they were "a rational means to serve a legitimate end."[23]

It is not clear how these varying standards might apply in practice.

Moreover, the traditional view of peremptories as, by their nature, "an arbitrary and capricious right,"[24] suggests that no defense might be good enough under any standard requiring a modicum of rationality.

* When to make a Batson challenge? Although technically a Batson challenge may be made as soon as the first facially discriminatory challenge has been made, as a matter of proof, it may be difficult to assign discriminatory intent on the basis of a pattern of one. Therefore, it is usually advisable to wait until a sufficient number of strikes have been made to constitute a more convincing pattern of discrimination.

This problem of proof, however, is at odds with language in some of the post-Batson decisions, which suggests that the right at stake belongs to the individual prospective jurors. Under that view, it seems anomalous, to say the least, that an individual's rights are not violated until there is a pattern of violations involving other similarly situated individuals.

* Whether to made the challenge at all? Making this kind of challenge should always be a conscious and deliberate decision, because an objection based on Batson is, by its nature, a highly charged motion, automatically and irretrievably inserting the issue of race bias into the proceedings and implicitly accusing the opposing attorney of bigotry.

* What are the remedies for a violation? In the event that a Batson challenge succeeds, there remains the question of the appropriate remedy.[25] Does the court start over again with a new jury panel or simply seat the wrongfully challenged jurors? If the latter option is chosen, should the court seat all of the struck jurors who are members of the protected category, or simply the particular juror whose rejection precipitated the Batson motion? These and other practical questions remain unresolved.

Read broadly, Batson and its progeny are at odds with the continued vitality of the peremptory challenge. It may be difficult to articulate a

principled basis for restricting the rule in Batson simply to race cases, and it is therefore unclear whether there is any logical stopping point to the doctrine. Although Batson itself went some distance toward dismantling the traditional peremptory challenge, the questions now facing the Supreme Court may tell us whether there will be any such challenge left at all.

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ENDNOTES

1. 476 U.S. 79 (1986).

2. J.E.B. v. T.B., 606 So.2d 156 (Ala. Civ. App. 1992), cert. granted, 61 USLW 3759 (May 17, 1993).

3. 100 U.S. 303 (1880).

4. 380 U.S. 202 (1965).

5. Id. at 224.

6. Id. at 223.

7. See McCray v. Abrams, 750 F3d 1113, 1120 (2d Cir. 1984) ("Not surprisingly, almost no other defendants in the nearly two decades since the Swain decision have met this standard of proof.").

8. 476 U.S. at 86.

9. Id. at 87.

10. Id.

11. Id.

12. Id. at 96-98.

13. 111 S.Ct. 1364 (1991).

14. 111 S.Ct. 2077, 2079 (1991). In this case, the Supreme Court held that although the "conduct of private parties lies beyond the Constitution's scope in most instances, Leesville's exercise of peremptory challenges was pursuant to a course of state action and is therefor subject to constitutional requirements."

15. Id. at 2081; see also 1112 S.Ct. at 1368-70.

16. 112 S.Ct. 2348 (1992).

17. Id. at 2353-59.

18. The federal appellate courts have reached conflicting results in the context of gender-based challenges. Compare United States v. De Gross, 960 F2d 1433 (9th Cir. 1992) (en banc) (extending Batson to gender -based challenges) with United States v. Broussard, 987 F2d 215 (5th Cir. 1993) (refusing to extend Batson to gender) and United States v. Hamilton, 850 F2d 1038 (4th Cir. 1988) (same ad Broussard). State courts have also divided on the issue. Compare State v. Culver, 444 NW2d 662 (Neb. 1989) (declining to extend Batson to gender claims) and State v. Olivera, 534 A2d 867 (RI 1987) (same as Culver) with People v. Irizarry, 560 NYS2d 279 (NY App. Div. 1990) (applying Batson to gender claims).

19. 476 U.S. at 99.

20. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

21. 380 U.S. at 220 (citations omitted).

22. 476 U.S. at 138 (Rehnquist, J., dissenting).

23. Id. at 124-125 (Burger, C.J., dissenting) (citations omitted).

24. 380 U.S. at 219.

25. The Batson court specifically declined to formulate particular procedures for trial courts to follow upon a timely objection to peremptory challenges. 476 U.S. at 99. While emphasizing that the state and federal trial courts were free to follow their own jury selection practices, the Supreme Court did note the possibilities of "[discharging] the venire and [selecting] a new jury from a panel not previously associated with the case" and [disallowing] the discriminatory challenges and [resuming] selection with the improperly challenged jurors reinstated on the venire." Id. at 99-100 n. 24 (citations omitted).

92-1239 J.E.B. v. T.B.

Paternity action—State's use of peremptory strikes to exclude all males from jury.

Ruling below (Ala CtCivApp, 606 So2d 156):

In light of controlling Alabama Supreme Court precedent, principle of *Batson v. Kentucky*, 476 U.S. 79 (1986), forbidding racially motivated peremptory jury strikes, will not be extended to forbid gender-based strikes in civil action to establish paternity and recover child support.

Question presented: Does male defendant in paternity action brought by state have right, under Fourteenth Amendment's Equal Protection Clause, to challenge state's use of its peremptory jury strikes to exclude all males from jury?

Petition for certiorari filed 1/21/93, by John F. Porter III, and Livingston, Porter & Paulk P.C., both of Scottsboro, Ala.

J.E.B. v. State of Alabama ex rel. T.B.
2910210
COURT OF CIVIL APPEALS OF ALABAMA
606 So. 2d 156; 1992 Ala. Civ. App. LEXIS 257
June 5, 1992, Released

WRIGHT, Retired Appellate Judge

The State of Alabama, on behalf of T.B. (mother), filed a complaint for paternity and child support against J.E.B. (father) in the District Court of Jackson County. After a hearing the district court entered an order adjudicating paternity and ordered the father to pay child support. The father filed notice of appeal to the circuit court. A jury trial was held. The jury returned a verdict in favor of the mother. The trial court entered an order accordingly. The father appeals.

Initially the father asserts that the trial court erred in overruling the father's objection to the State's peremptory jury strikes based on his allegation that the State's strikes were based entirely on gender.

The father insists that the State improperly used its peremptory strikes to purposefully eliminate men from the jury. He suggests that such actions were in violation of his rights to equal protection and due process. He requests that this court extend the Batson v. Kentucky, 476 U.S. 79 (1986), principle, which prohibits peremptory strikes based solely upon race, to include gender-based strikes.

This issue has previously been addressed by the court of criminal appeals and the supreme court. Fisher v. State, 587 So. 2d 1027 (Ala. Crim. App.), cert. denied 587 So. 2d 1039 (Ala. 1991); Daniels v. State, 581 So. 2d 536 (Ala. Crim. App. 1990), cert. denied 581 So. 2d 541 (Ala. 1991); Dysart v. State, 581 So. 2d 541 (Ala. Crim. App. 1990), cert. denied 581 So. 2d 545 (Ala. 1991). The supreme court recently revisited the issue in Ex parte Murphy, [Ms. March 20, 1992] 596 So.2d 45 (Ala. 1992), and declined to extend the Batson principle to gender-based strikes. We must follow the decisions of the supreme court. @ 12-3-16, Code 1975.

The father next contends that the blood test results should have been excluded because the State failed to establish a proper chain of custody. He specifically asserts that the phlebotomist's failure to testify was fatal to the admissibility of the blood test results.

Dr. Leigh Ann Harman, the supervisor of the University of Alabama at Birmingham Immunogenetics/DNA Diagnostic Laboratory, testified that along with the blood samples she received an Immunogenetics/DNA Diagnostic Laboratory Paternity Chain of Custody Document. The document was developed in order to allow the supervisor to confirm the chain of custody without having to bring numerous laboratory personnel to court. Dr. Harman thoroughly discussed the document and its safety devices. She testified in detail as to her laboratory's procedures for drawing blood samples and assuring proper identification of both the individuals having the test and the blood samples drawn from those individuals. She testified that once the blood samples were received by the laboratory they were checked for any sign of tampering. She stated that there was no sign of tampering, that the box was taped, the tape was intact, and the tape was initialed by the person who sealed and delivered it.

We find that a proper chain of custody was sufficiently established by Dr. Harman's testimony. Lyle v. Eddy, 481 So. 2d 395 (Ala. Civ. App. 1985).

The father asserts that the trial court erred in allowing into evidence the results of the DNA test without first establishing that the test "met the requirements of the recent supreme court holding in the case of Ex parte Perry, 586 So. 2d 242 (Ala. 1991)."

Ex parte Perry pertains to the admissibility of DNA test results in a forensic setting. That case clearly distinguishes between forensic testing and clinical testing (which we have in this case). The strict admissibility requirements of Ex parte Perry are not applicable in a paternity action.

The judgment of the trial court is affirmed.

The foregoing opinion was prepared by Retired Appellate Judge L. Charles Wright while serving on active duty status as a judge of this court under the provisions of @ 12-18-10(e), Code 1975, and this opinion is hereby adopted as that of the court.

AFFIRMED.

All the judges concur.

91-1523 FLORENCE COUNTY SCHOOL DISTRICT FOUR v. CARTER

Individuals with Disabilities Education Act—State reimbursement of parents who place their learning disabled child in private school that does not meet state standards.

Ruling below (CA 4, 950 F2d 156, 60 LW 2400):

Parents who place child with learning disability in private school that is not approved by state are entitled to reimbursement of education expenses under Individuals with Disabilities Education Act; district court did not clearly err in concluding that public school system's individualized education program for such child, which had goal of four months' progress over period of more than one year, failed to satisfy IDEA's requirement of more than minimal or trivial progress.

Question presented: Are learning disabled child's parents entitled to state reimbursement under IDEA, when they unilaterally place her in private school that does not meet state educational standards or in other respects satisfy criteria of "free appropriate public education," which state is required under 20 USC 1401(a)(18) and 1412(1) to provide as condition of receiving federal funding under act?

Petition for certiorari filed 3/23/92, by Donald B. Ayer, Beth Heifetz, David A. Yalof, and Jones, Day, Reavis & Pogue, all of Washington, D.C., and Bruce E. Davis, of Camden, S.C.

Civil Rights

92-833 ALBRIGHT v. OLIVER

Actionability of malicious prosecution claim under 42 USC 1983.

Ruling below (CA 7, 975 F2d 343):

Malicious prosecution unaccompanied by incarceration or other deprivation of liberty or property is not actionable as constitutional wrong under 42 USC 1983; harms from malicious prosecution that was dismissed prior to trial are like those from defamation, which, under *Paul v. Davis*, 424 U.S. 693 (1976), are not actionable under Section 1983; facts that Section 1983 plaintiff chose to post non-refundable sum in lieu of bail and was required to obtain permission from court prior to leaving state during pendency of prosecution are not sufficient to make out claim of constitutional tort.

Question presented: Does baseless prosecution, initiated and pursued without objectively reasonable belief in existence of probable cause to suspect accused of criminal wrongdoing, infringe liberty protected by Fourteenth Amendment's Due Process Clause and thereby permit action pursuant to Section 1983 even in absence of incarceration or other accompanying loss or alteration of "protected status" such as that recognized in *Paul v. Davis*?

Petition for certiorari filed 11/12/92, by John H. Bisbee, of Macomb, Ill.