As published in

New York Law Journal

Government and Election Law

April 10, 2015

Alabama and Albany Minority Voters Get Wins

By  Jerry H. Goldfeder and  Myrna Pérez

Minority voters in Alabama and Albany, N.Y., recently scored courthouse victories in challenges to redistricting plans, drawn, in the first case, by Republicans, and, in the second, by Democrats. Each case required the reviewing court to assess plans of redrawn legislative lines under certain provisions of the Voting Rights Act, and in both instances the courts maintained the unbroken line of cases upholding the constitutionality of the implicated provisions.

Alabama

In *Alabama Legislative Black Caucus v. Alabama*, the U.S. Supreme Court evaluated whether a state redistricting plan constituted an unconstitutional racial gerrymander. In a 5-4 decision, the court instructed the three-judge trial court to re-examine Alabama's 2012 state legislative redistricting plan to determine whether the lines were impermissibly manipulated by racial politics.[1] The appellants, African-American state legislators, contended that the 2012 redistricting plan was a ploy by the white Republicans controlling the Alabama Legislature to dilute the electoral power of black voters and blame the Voting Rights Act for compelling them to do so.[2] They alleged that the map drawers concentrated—or "packed"—African-American

[1] *Ala. Legislative Black Caucus v. Alabama*, No. 13-895, 2015 WL 1310746, *17 (U.S. March 25, 2015).

[2] *See id.* at *5 (noting how the state had added significantly more minority voters than white voters in underpopulated districts alleging a desire to comply with the Voting Rights Act).

Jerry H. Goldfeder is special counsel at Stroock & Stroock & Lavan, LLP and teaches at Fordham Law School and University of Pennsylvania Law School. Myrna Pérez is the director of the Voting Rights and Elections Project at the Brennan Center for Justice at NYU School of Law.

voters into black majority districts, creating minority population percentages that were so high that their voting strength across the state was improperly reduced.

The state of Alabama defended its handiwork by arguing that the map drawers' hands were tied by Section 5 of the Voting Rights Act, forcing them to create these "super majority" districts. Section 5, the preclearance provision, prohibits certain jurisdictions with a history of discrimination from enacting any change to election laws or regulations that diminishes the electoral influence of minority voters. Although Section 5 is currently inoperative because the Supreme Court in *Shelby County v. Holder* struck down the formula for determining which jurisdictions are subject to Section 5's obligations,[3] it was in force at the time this legislative map was drawn. Thus, the state argued, in that Section 5 prohibits a covered jurisdiction from "substantially reduc[ing] the relative percentages of black voters in [redrawn] districts,"[4] it was required to maintain all of the minority population in a district. So, for example, if a district had been 70 percent African-American before redistricting, it had to be 70 percent African-American after redistricting.[5]

This meant, according to Alabama, that because the black population in certain parts of the state had decreased, coupled with their having to draw districts with equal population and maintain the minority population in certain districts, its map drawers were forced to remove African-American voters from the districts they had long been a part of in order to pack them into other, often far away districts to meet the state's preset demographic targets. This resulted in some creative line-drawing.[6] In one example, where map drawers needed to add approximately 16,000 people into what had been an African-American majority Senate district, they redrew lines to move 15,549 African-Americans into the district and, "remarkabl[y]," only 36 whites.[7]

Although the Supreme Court did not strike down Alabama's legislative maps, it did remand the matter after finding that the trial court erred in several important ways. For example, the high court noted that Section 5 did not require a mechanical imposition of fixed minority percentages. Instead, it required scrutiny as to whether existing minority percentages had to be

---

[3] See generally *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); Jerry H. Goldfeder and Myrna Pérez, "After *'Shelby County*' Ruling, Are Voting Rights Endangered?" *NYLJ*, Sept. 23, 2013.

[4] *See Ala. Legislative Black Caucus*, 2015 WL 1310746 at *15 (citing *Ala. Legislative Black Caucus v. Alabama*, 989 F.Supp.2d 1227, 1311 (M.D. Ala. 2013)).

[5] *Id*. at *16 ("The record makes clear that…the Legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression [under Section 5].").

[6] *Id*. at *5.

[7] *See id*. at *14.

preserved in a particular district in order to maintain the minority community's ability to elect a candidate of choice.[8]

In a case where minority voters could not continue to elect a candidate of choice unless more minority voters were added to a district, then packing in additional minority voters to create a "super majority district" might be constitutionally justified. On the other hand, if minority voters in a district could continue to elect candidates without adding far-away minority voters or splitting natural communities, then packing minority voters into a particular district was not required by Section 5, and, moreover, could constitute an unconstitutional racial gerrymander.[9] The trial court will have to evaluate all the voter shifts made by the map drawers within this framework.

Significantly, the Supreme Court also found that the trial court erroneously required the challengers to prove that the legislative map as a whole was improperly motivated by racial concerns rather than simply showing that a specific district had been drawn "predominately on the basis of race."[10]

In light of the trial court's errors, the Supreme Court remanded the matter for analysis as to whether the map drawers had equalized the population of any of the challenged districts "predominately on the basis of race" rather than "other 'traditional' factors," such as maintaining traditional political or neighborhood boundaries. [11] If the trial court ultimately concludes that the state had relied predominately on race in drawing any of the challenged district lines, it must then ultimately determine whether such race-conscious redrawing of district lines was necessary to preserve the ability of African-American voters to elect their candidates of choice.

Albany

Closer to home, U.S. District Judge Lawrence E. Kahn ruled in *Pope v. Albany* that Albany County's 2011 redistricting plan diluted minority voting power in violation of Section 2 of the Voting Rights Act.[12] The court ordered Albany County and its Board of Elections to draw a new redistricting plan and prohibited any elections from taking place until the new plan was complete.[13]

---

8 *Id*. at *16.

9 *See id*. at *15-16 (stating that "Alabama's mechanical interpretation of §5 can raise serious constitutional concerns").

10 *Id*. at *7-10.

11 *See id*. at *13-14.

12 *Pope v. Cnty. of Albany*, No. 1:11-cv-0736 (LEK/CFH), 2015 WL 1311064, *41 (N.D.N.Y. March 24, 2015).

13 *Id*. at *42.

Plaintiffs, African-American and Latino voters and residents of Albany County, claimed that the 2011 redistricting of the Albany County Legislature was illegal because it diluted minority voting strength. Specifically, they alleged that, given the strong minority population growth in the area, Section 2 of the Voting Rights Act required the creation of an additional—a fifth—majority-minority district.[14]

Instead, the plan adopted by the county packed minorities into districts that were already heavily minority and created a new predominately white district, anchored in suburban parts of the county. Unlike Section 5, which pertains only to certain jurisdictions, Section 2 of the Voting Rights Act applies nationwide, prohibiting voting practices or procedures that discriminate against minority voters, such as voter registration policies, redistricting plans, polling place locations or at-large elections.[15] Thus, Albany County, not covered by Section 5's pre-clearance procedure, must comply with the prescriptions of Section 2.

Albany County argued that the legal standards for creating a fifth majority-minority district had not been met. Specifically, it disputed that plaintiffs had proven racial bloc voting, a requirement for finding a violation of Section 2.[16] Albany County also argued that the totality of the circumstances demonstrated that the redistricting plan did not discriminate against minority voters.[17] Although Albany County offered some convincing arguments pertaining to the court's totality-of-the-circumstances analysis, it failed to persuade the court that plaintiffs had not satisfied their burden.[18]

Specifically, the court held that, given the "persistence" of white voters in Albany County voting as a bloc to thwart the electoral success of the candidate preferred by minority voters, the county's redistricting plan violated Section 2 of the Voting Rights Act.[19] Indeed, this was the third time in three decades that a federal court has found that Albany County's gerrymandering of legislative districts had violated the Voting Rights Act.[20]

---

[14] *See id*. at *5-10 (detailing the county's plan, the concern expressed by constituents that it lacked a fifth majority-minority district, and the alternative plans that indicated that creating five such districts was possible).

[15] *See id*. at *1-2.

[16] *See id*. at *25-26.

[17] *See id*. at *31-41 (describing the defendants' challenges to the plaintiffs' claims about each of the factors that can be considered when weighing whether a redistricting plan dilutes minority voting strength under the totality of the circumstances).

[18] *See, e.g., id*. at *31, 33 (finding that such factors like the history of voting-related discrimination and diluting-enhancing voting practices and procedures weighed in the defendants' favor).

[19] *Id*. at *41.

[20] *See id*. at *4-5 (citing and describing *NAACP v. Albany County*, No. 91–CV–1288 (CGC) (N.D.N.Y. filed Nov. 7, 1991)—which was settled by a consent decree, *see Pope*, 2015 WL 1311064 at *4—and *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany*, No. 03–CV–502, 2003 WL 22139798 (N.D.N.Y. Sept. 17, 2003)); *see*

Given that the courts, in a few instances, failed to stop discriminatory laws from going into effect before the 2014 election,[21] these cases are an encouraging reminder that the Voting Rights Act exists, and in some instances, can still effectively protect voters. Challenges to the remaining provisions of the Voting Rights Act are no doubt coming, but as long as we as a nation have not eradicated racial discrimination at the ballot box, courts will be called upon to keep our elections free, fair and accessible.

Reprinted with permission from the April 10, 2015 edition of the NEW YORK LAW JOURNAL © 2015 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com.

also Editorial, "A county's map to failure," *Albany Times Union*, March 29, 2015, available at http://blog.timesunion.com/opinion/a-countys-map-to-failure/32101/.

[21] *See, e.g.*, *Veasey v. Perry*, 135 S. Ct. 9 (2014) (upholding the Fifth Circuit's stay of the district court's order enjoining Texas' strict voter ID law from being enforced before the 2014 elections); *Husted v. Ohio Conference of the NAACP*, 135 S. Ct. 42 (2014) (staying the lower courts' decisions enjoining Ohio from enforcing its voter ID law).