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Good morning. My name is Dale Ho, and I serve as Assistant Counsel with the NAACP Legal Defense Fund (LDF). I am honored to appear at this hearing. Founded under the direction of Thurgood Marshall, LDF is the nation's oldest civil rights law firm. The quest for the unfettered political participation of all Americans, particularly here in the State of New York, has been and remains an integral part of LDF's mission.

We know from experience that, although the right to vote free from racial discrimination is widely recognized as a constitutionally-protected right, it can be rendered meaningless by redistricting plans that do not fairly reflect minority voting strength. My testimony today will focus on the central role of Section 2 of the federal Voting Rights Act (VRA) in the redistricting process, and will also address major legal developments during the past decade concerning the scope and application of Section 2.

Section 2 of the Voting Rights Act

As amended in 1982, Section 2 prohibits not only those voting practices that were enacted with racially discriminatory intent, but also, under some circumstances, those that have racially discriminatory effects.[1]

For example, the practice known as prison-based gerrymandering – the counting of incarcerated individuals where they are held rather than at their last known addresses (where they remain legal residents[2]) – may run afoul of Section 2 because it has demonstrated discriminatory effects. Incarcerated individuals in New York are disproportionately African-American and Latino,[3] but are held in overwhelmingly white areas,[4] such that prison-based gerrymandering undeniably inflates the political power of districts with prisons at the expense of communities of color. The New York legislature therefore deserves commendation for ending that practice in advance of the coming

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[1] The amended and current version of Section 2 requires consideration of both discriminatory intent and effect, as it prohibits practices "imposed or applied ... in a manner which results in a denial or abridgment" of the right to vote...." 42 U.S.C. § 1973(a) (2000 ed.).

[2] Article II, Section 4 of the New York State Constitution provides that, "[f]or the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence . . . while confined in any public prison." *See also* N.Y. Election Law § 5-104(1) ("For the purpose of registering and voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence . . . while confined in any public prison").

[3] New York State is approximately 68% white, but 77% of its prison population is African-American (51.3%) or Latino (25.9%). *See* N.Y. STATE DEP'T OF CORR. SVCS., HUB SYSTEM: PROFILES OF INMATES UNDER CUSTODY ON JANUARY 1, 2008 i (2008), *available at* www.docs.state.ny.us/Research/Reports/2008/Hub_Report_2008.pdf.

[4] In New York, 98% of prison cells are located in disproportionately white State Senate districts. *See* PETER WAGNER, PRISON POLICY INITIATIVE, 98% OF NEW YORK'S PRISON CELLS ARE IN DISPROPORTIONATELY WHITE DISTRICTS (Jan. 17, 2005), *available at* http://www.prisonersofthecensus.org/news/2005/01/17/white-senate-districts/. When incarcerated individuals are excluded from the current districting plan, seven of New York's 62 State Senate Districts are more than 5% below the ideal average of 306,072. *See* PETER WAGNER, PRISON POLICY INITIATIVE, IMPORTING CONSTITUENTS: PRISONERS AND POLITICAL CLOUT IN NEW YORK, § V, figure 3 (April 22, 2002), *available at* http://www.prisonpolicy.org/importing/. Of those seven districts, six are over 90% white, while the seventh is more than 80% white. *See id.* figure 13.

redistricting cycle. New York has helped establish an important precedent that we hope will guide the efforts of other states around the country also looking to take corrective action in this area.

More pertinent to today's hearing, one of the chief purposes of the 1982 amendments to Section 2 of the VRA was to establish a broad prohibition on what we call "minority vote dilution." As set forth in the seminal case *Thornburg v. Gingles*,[5] minority vote dilution typically involves situations where minority voters have been denied an opportunity to elect a candidate of their choice because the majority in a given district votes as a bloc to minimize or cancel the effectiveness of minority votes, thus effectively locking minority-preferred candidates out of the political process.[6]

In the redistricting context, examples of unlawful vote dilution include "packing" and "cracking." "Cracking" refers to the act of spreading a cohesive group of minority voters across a large number of districts. Cracking can occur where a minority population that could form a majority in a single district is instead split and divided amongst two or more separate districts, thus depriving members of that community of the concentrated voting strength necessary to elect candidates of their choice. The term "packing," by contrast, refers to the act of compressing minority communities into a small number of districts, which results in districts that have unnecessarily high minority populations, essentially bleaching adjacent districts of minority influence.

Types of Effective Minority Opportunity Districts

Before turning to recent legal developments, it is worth pausing for a moment to consider what it means for minority voters to have an equal "opportunity to elect" candidates of their choice. Broadly speaking, there are essentially three types of districts – what we could call "effective minority opportunity districts" – that can be described as providing minority voters with such an opportunity:

- Majority-minority districts – where members of a minority group constitute a numerical majority of a district. Whether such a district constitutes an "effective minority opportunity district" depends, in large part, on the level of racially polarized voting in a community and racial disparities in registration and/or turnout rates;

- Crossover districts – where members of a minority group, though not a majority of a district, can elect candidates of their choice with support from a small but reliable group of non-minority voters who "cross over" to support the minority-preferred candidate; and

[5] 478 U.S. 30 (1986).

[6] *Id.* at 58. Since *Gingles*, the Court has explained that actionable minority vote dilution can occur in both an at-large voting system and a districting plan involving single-member districts, where election lines have been drawn in such a way that has the same effect of canceling minority votes. *See, e.g., Growe v. Emison*, 507 U.S. 25 (1993).

- Coalition districts – where no single minority group constitutes 50% of the district by itself, but where members of multiple minority groups vote cohesively and, together, constitute a majority in the district.

These "effective minority opportunity districts" stand in contrast to another type of district, which can be termed an "influence district" – one where minority voters cannot elect a candidate of their choice, but where they can be described as having a sufficiently large presence so as to have some influence on the political process.

Although some commentators have used the terms "crossover," "coalition," and "influence" districts interchangeably, it is important to note that there are crucial differences between crossover and coalition districts, on the one hand, and influence districts, on the other. While crossover and coalition districts afford minority voters with an opportunity to elect candidates of their choice, so-called "influence districts" provide no such opportunity. Indeed, the term "influence district" is actually quite nebulously-defined – how to define or measure "influence" on the political process short of an actual ability to elect candidates remains an open question. Such "influence" districts, therefore, are not and cannot be seen as an effective substitute for effective minority opportunity districts,[7] which have long been and remain the benchmark for providing minority voters meaningful access to the political process in our country.

Bartlett v. Strickland

Even within the universe of effective minority opportunity districts, however, there are important differences between various types of districts, both in terms of how they operate as a practical matter and how they are treated by courts, as the Supreme Court made clear in decision last year, titled *Bartlett v. Strickland*.[8]

The *Bartlett* decision addressed the applicability of Section 2 in the context of crossover districts. The lawsuit concerned a state legislative district in the North Carolina House of Representatives, in which African Americans comprised 39 percent of the voting age population and were able, with crossover support from a limited number of white voters, to elect candidates to the state legislature over the last two decades. The Court ruled, in a 5-4 decision, that Section 2 of the Voting Rights Act does not require the creation of crossover districts. Beyond this immediate holding, however, it is important to recognize several other aspects of the *Bartlett* decision:

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[7] Indeed, when reauthorizing Section 5 of the VRA in 2006, Congress made clear that "influence districts" cannot be a substitute for effective minority opportunity districts, by amending the statute to overrule the Supreme Court's contrary holding in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). *See, e.g.*, Nathaniel Persily, The Promises and Pitfalls of the New Voting Rights Act (VRA), 117 YALE L.J. POCKET PART 139, 165 (2007) ("*Ashcroft* opened the possibility that under the cloak of influence districts, jurisdictions would create districts in which minorities had not influence at all.... [I]t is clear that the bill's ability-to-elect language attempted to remove the possibility of a tradeoff with influence districts."

[8] 129 S. Ct. 1231 (2009).

First, the Supreme Court in *Bartlett* expressly recognized that, even after the election of President Obama, "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have an equal opportunity to share and participate in our democratic processes and traditions."[9] These observations underscore the continuing need to adhere to the requirements of the Voting Rights Act, and should guide the Senate as it approaches the upcoming round of redistricting.

Second, given this continuing reality of racial discrimination, *Bartlett* is not an open invitation to dismantle an existing effective minority opportunity district – whether the district is a majority-minority district, a crossover district, or a coalition district. As the Court made clear, such efforts could be deemed motivated by discriminatory purpose and, in turn, could become subject to future challenge under Section 2 as well as the Fourteenth and Fifteenth Amendments. [10]

Third, *Bartlett* did not address the application of Section 2 in the context of coalition districts: whether, for instance, a coalition of African-American and Latino voters – who, when aggregated constitute a majority of a proposed district – could be entitled to protection under Section 2.[11] To be clear, however, the established law of the Second Circuit, which governs New York, holds that such coalition districts are in fact required by Section 2 under some circumstances.[12]

Fourth, although *Bartlett* held that the creation of crossover districts is not, strictly speaking, *required* by Section 2 of the VRA, the decision expressly held that state legislatures throughout the country remain free to satisfy their Section 2 obligations by creating such districts.[13] In other words, *Bartlett* does not prohibit states from creating

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[9] 129 S. Ct. at 1249.

[10] *Id.* ("[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments."). This observation is particularly pertinent in light of another Supreme Court case from the last decade, *League of United Latin American Citizens v. Perry* ("*LULAC*"), 548 U. S. 399 (2006), which clarified that neither partisan justifications, nor to traditional districting principles serve as viable explanations for redistricting plans that result in minority vote dilution. *Id.* at 440-41. Justice Kennedy's opinion noted that the dismantling of a district just as it appeared that Hispanic voters were on the verge of exercising political power had "the mark of intentional discrimination." *Id.* at 440.

[11] 129 S.Ct. at 1242-43 ("This Court has referred sometimes to crossover districts as 'coalitional' districts, in recognition of the necessary coalition between minority and crossover majority voters.... But that term risks confusion with coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice. We do not address that type of coalition district here.").

[12] *See Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275 (2d Cir. 1994) *rev'd on other grounds*, 512 U.S. 1283 (1994) (upholding the district court's determination that "[c]ombining minority groups to form [majority-minority] districts is a valid means of complying with § 2 if the combination is shown to be politically cohesive").

[13] 128 S.Ct. at 1248. ("[A] legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal. The option to draw such districts gives legislatures a choice that can lead to less racial isolation, not more.... § 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts.... States that wish to draw crossover districts are free to do so where no other prohibition exists.")

affirmative opportunities for minorities to elect a candidate of choice in areas where members of a single minority group do not reach the 50 percent threshold – either by creating crossover or coalition districts.

Redistricting Reform Proposals

This last point bears emphasis in light of a recent development in the Illinois State Senate, which this month passed a statute requiring the creation of crossover, coalition, and influence districts under some circumstances.[14] There is nothing in the *Bartlett* decision that would prohibit states from creating districts along these lines, but I offer several observations about that legislation and other redistricting reform proposals.

First, the touchstone for minority voting rights is an effective opportunity to elect candidates of choice, and not necessarily a hard numeric target in terms of the minority population of a district.[15] Certainly, the law is clear that Section 2 will require the creation of majority-minority districts in many circumstances. But, in those parts of the state where there may not be sufficient population to support the creation of a majority-minority district, it may be appropriate to create effective crossover or coalition districts under appropriate circumstances. Rather than focus solely on specific numeric targets (which are not necessarily meaningful), it is important to determine whether such districts are *effective* by assessing whether minority voters in those districts would be afforded an equal opportunity to elect candidates of their choice. That analysis requires a careful assessment of minority registration rates, levels of racially polarized voting and general voting patterns within the boundaries of the district.

Second, because the determination of whether or not a particular district will afford minority voters an equal opportunity to elect candidates of their choice is, by necessity, a fact-intensive inquiry that will depend on numerous variables on the ground, the adequate protection of minority voting rights during the coming redistricting cycle demands a certain degree of flexibility and discretion for line-drawers. Thus, if the State were to consider legislation specifically requiring the establishment of crossover and coalition districts, those requirements should stand above other statutorily-mandated redistricting criteria that could potentially prevent the promise of broader protections for minority voting rights from becoming a reality.

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[14] *See* Illinois Voting Rights Act of 2011, SB 3976.

[15] Empirically, the 50% threshold is not a magic number – indeed, in many early cases, 50% was insufficient to provide an equal opportunity to elect because minority voters typically lagged in registration and turnout rates. Although the Supreme Court in *Bartlett* held that a bright-line numerical threshold makes sense in the context of future litigation as a gatekeeping function, it makes little practical sense for line-drawers in the legislative process to treat 50% as talismanic. Whether or not a district provides minority voters a meaningful opportunity to elect candidates of choice turns not on a particular threshold but rather on registration and turnout rates between minority and majority voters and levels of racially polarized voting.

The Senate should therefore exercise caution when considering legislation that would create a new redistricting body and/or set forth strict redistricting criteria.[16] While increasing transparency in the redistricting process is a worthy goal, the adoption of stringent statutorily-mandated redistricting criteria – for instance, a stricter standard for population deviation than is currently required under federal law – could deprive the State of the flexibility that it may need to protect minority voting rights. One need look no further than the previous redistricting cycle and the experience of Arizona and its redistricting commission – whose redistricting plan ultimately drew an objection from the Department of Justice under Section 5 of the VRA – to see how strict adherence to such criteria may result in violations of federal law and costly litigation.[17] This is not to say that commissions or new redistricting criteria are necessarily a bad idea. Rather, experience has shown that compliance with the Voting Rights Act and the adequate protection of minority voting rights in the redistricting context requires a degree of flexibility, and that a focus on process without equal attention to fair results is not a panacea.

Conclusion

In conclusion, I offer three observations. *First*, given the Supreme Court's recognition of the persistence of racial discrimination in voting, legislatures must remain mindful of their obligations under the VRA during the redistricting process.

Second, the Senate should avoid redistricting plans that do not maintain existing effective minority opportunity districts – regardless of whether those districts are majority-minority, crossover, or coalition districts. The dismantling of any type of effective minority opportunity district could invite liability under Section 2.

Third, the Senate should be mindful of opportunities to create new effective minority opportunity districts where there has been population growth in minority communities, even if a particular minority population does not reach a 50% threshold of a proposed district. Coalition districts are of course required by law in the Second Circuit under certain circumstances; and crossover districts will often constitute an effective way to provide minority communities with an equal opportunity to participate in the political process and elect candidates of their choice.

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[16] LDF has produced a report on Independent Redistricting Commissions which contains a series of recommended principles to govern the creation and operation of such commissions. That report is appended to this testimony as Appendix A, and is available online at http://naacpldf.org/files/publications/IRC_Report.pdf.

[17] In general, redistricting plans that violate the VRA could be subject to litigation. Section 2 cases may be brought by the Attorney General of the United States, who bears primary enforcement responsibility under the Act, or by private individuals and organizations. Redistricting-related litigation can prove both costly and protracted, preventing the implementation of a final plan for several years. Thus, line drawers should seek to comply with this important federal law during the course of redistricting.