

# Redistricting in Nevada:

## 2020 Census Triggers Statewide Redistricting Requirement

BY SCOTT G. WASSERMAN, ESQ.

A new census is upon us, which means it's time for redistricting to take center stage at the Nevada Legislature and at city and county legislative bodies. The U.S. Census Bureau will be conducting a nationwide decennial census this year in an effort to count every person in every state. The bureau's census count effort must be completed by April 1, 2020. The statewide population totals must be reported to the president no later than December 31, 2020. The population totals on the census block level, necessary for performing the redistricting tasks, must be reported back to the states no later than April 1, 2021. Those population totals will trigger the new decade's start of another round of reapportionment and redistricting.

Apportionment is the division of a given number of elected members among established political subdivisions in accordance with an existing plan or formula. On a national

### Census Blocks

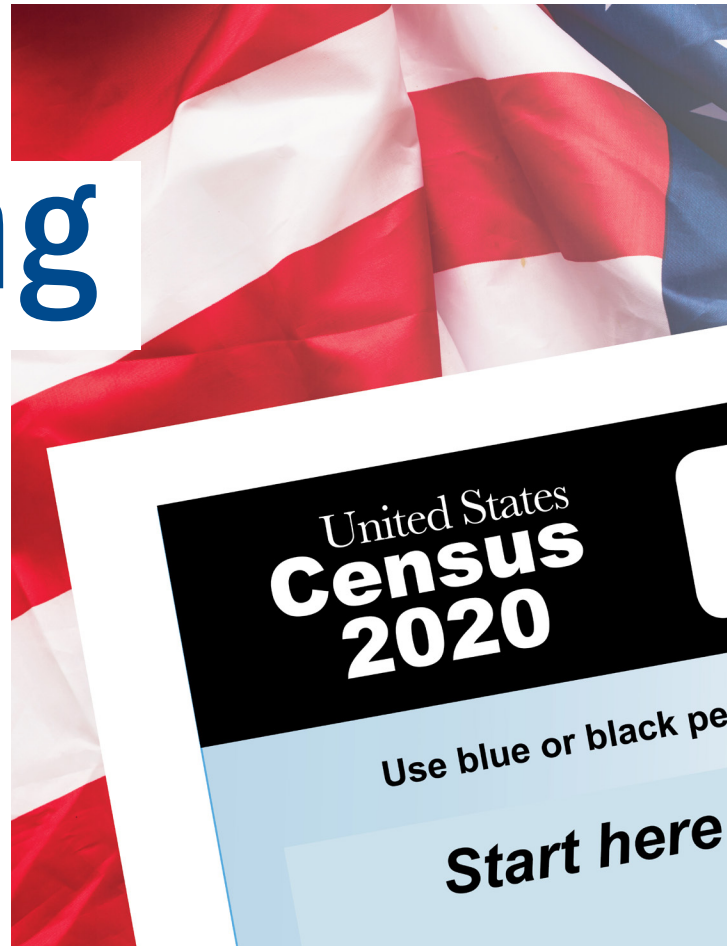
Census blocks are the smallest geographical unit that the Census Bureau reports population and demographic information to the states. In cities, they often are equivalent to city blocks, in rural areas, they can be large and bounded by a river, road or any other visible feature such as transmission lines. Census blocks are the "building blocks" of creating new voting districts with equal population.

basis, after the 2020 decennial census is reported, the total number of members of Congress is divided up among the states according to each state's population total. From now until the end of 2020 when the statewide population counts are reported, political consultants will be weighing in on which states are likely to gain and which states are likely to lose congressional seats on the basis of population shifts in the country.

On a statewide basis, the population data will require state and local election districts to be redrawn to ensure population equality among the districts. These include election districts for congressional members, legislators, Nevada System of Higher Education (NSHE) Board of Regents and the elected members of the State

Board of Education. The cities and counties in the state will be required to redistrict all local election districts such as county commissioners, city councils and local boards whose members are elected from districts within the board's jurisdiction.

The requirement for reapportionment and redistricting after each decennial census is grounded in state and federal law. Section 13 of Article 1 of our state's constitution requires that representation be apportioned according to population. Section 5 of Article 4 mandates that the Legislature at its first session after each decennial census,





**YOUR RESPONSE IS REQUIRED BY LAW**



fix by law the number of senators and assemblymen, and apportion them among legislative districts. Under federal law, the principle of “one person, one vote,” requiring election districts made up of equal population so that each person has an equal vote with the same voting strength, was mandated by the U.S. Supreme Court in the seminal case of *Reynolds v. Sims*, 377 U.S. 533 (1964).

### **Legislature to Reapportion and Redistrict Statewide Election Districts**

The Nevada Legislature is responsible for reapportionment and redistricting of the state legislature. While there are currently 63 legislative seats, 42 in the assembly and 21 in the senate, the 2021 Legislature could choose to change that number. While lowering the number of legislative districts in a state whose population is growing seems rather unlikely, the Nevada Constitution also allows the Legislature to expand the number of

seats to a total of (but not to exceed) 75 members. The Constitution also specifies that the number of senators shall not be less than one-third nor more than one-half of that of the members of the assembly. Under these provisions, it is possible that the current 42-member assembly could be increased to 50 members, while the current 21-member senate could be increased to 25 members.

In addition to redistricting itself, the state Legislature is also charged with redistricting the state’s congressional districts, the Board of Regents election districts and the districts of the elected members of the State Board of Education. While the Legislature is constitutionally required to conduct these redistricting tasks, it is possible that it

is unable to complete the task. During the last round of redistricting, the Legislature, whose assembly and senate was controlled by Democratic Party majorities, passed two bills to enact legislative and congressional districts. Both of those bills were vetoed by then Republican Governor Brian Sandoval. The Legislature did not override either of these vetoes. Thus, the Legislature adjourned the 2011 session without laws enacted to redistrict the legislative and congressional election districts. Since the governor had indicated that he would not call a special session to continue the redistricting effort, the task, through litigation, fell to the state courts. Ultimately, the First Judicial District Court appointed a panel of special masters to draft redistricting plans for congress and the Legislature (and in effect, the four elected members of the State Board of Education who, pursuant to NRS 385.021(1)(a), are currently elected from the state’s four congressional districts). With some minor adjustments by the court, the court issued an order adopting the

special masters’ proposed redistricting plans for the Legislature and the state’s congressional members. Those court-mandated legislative and congressional districts remain the election districts in use through the 2020 election. During the 2011 Legislative Session, the Legislature also separately considered and approved, and the governor signed into law, legislation enacting a redistricting plan for the nonpartisan Board of Regents.

### **Legal Considerations in Redistricting**

#### *Equal Population*

Equal population standards as applied to redistricting has a different meaning depending on the districts to which it is applied. With regard to congressional districts, the population of congressional districts must be as nearly equal as practical, and any population deviation, no matter how small, could render a plan unconstitutional. In Nevada, in the 2001 round of redistricting, there was only an overall population deviation of four people in the (then) three congressional districts drawn by the Legislature. In 2011, there was only a one-person deviation among the four congressional districts drawn by the district court. With regard to state and local election districts, a plan can withstand a constitutional challenge if it has only “minor deviations,” which has been defined by the courts to be a maximum population deviation of under 10 percent. In Nevada, the rules adopted by the Legislature in 2011 set this maximum population deviation at under

### **Measuring Population Equality – Terminology**

“**Ideal population**” – is determined by dividing the state’s total population by the total number of districts being redistricted. That number is the ideal district population.

“**Deviation**” – is the degree by which a single district’s population varies from the ideal population.

“**Overall range or maximum population deviation**” – is the difference in population of the largest district and the smallest district.

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10 percent overall, and each district at a +/- 5 percent deviation from the ideal district population. Court-drawn plans have been held to higher standards, and consistent with this practice, in 2011 when the district court took over the redistricting effort, the court directed the special masters to draw a plan with a maximum population deviation of under 2 percent.

## Racial and Ethnic Discrimination

Because a challenge under Section 2 of the Voting Rights Act of 1965 as amended does not require proving the element of intent, the majority of claims of racial and/or ethnic discrimination are brought under Section 2. Section 2 of the Voting Rights Act prohibits a state from imposing any voting qualification, standard, practice or procedure that results in the denial or abridgement of any citizen's right to vote on account of race, color or status as a member of a language minority group. Section 2 claims need only establish a discriminatory effect or result; intent is not a required element.

Actions brought under Section 2 often involve claims of diluting the voting strength of a minority group by the practice of "packing" or "fracturing" the population of minority groups among election districts. "Packing" would occur if it were possible to create two election districts with a minority population consisting of 65 percent in each, but instead the minority group is "packed" into one district: for example, creating a district whose population consists of 90 percent of the minority group, and then creating the other district consisting of a minority population of only 40 percent. Thus, rather than having two majority-minority districts, there is only one supermajority-minority district and the minority group's voting power is diluted.

"Fracturing" or "cracking" occurs when a minority group is broken off into several districts. For example, if a minority group could be included in one district and would constitute 66 percent of the population of that district, thereby creating a majority-minority district, but instead the minority group is split up into three districts thereby consisting of only 22 percent of the population in those three districts and is not a majority-minority group in any single district, the minority group's voting power is diluted.

Establishing that a minority group could constitute a majority of the population in a given district is only one element of proving a claim that a redistricting practice violates Section 2 of the Voting Rights Act. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the U.S. Supreme Court established a three-prong test to prove a violation of Section 2 of the Voting Rights Act:

- (1) The minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district;
- (2) the minority group must be politically cohesive; and
- (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority group's preferred candidate.

In 2009, the court held in *Bartlett v. Strickland*, 556 U.S. 1 (2009), that the first prong was satisfied only if the minority group constitutes a majority of the voting age population.

## Racial Gerrymandering & Traditional Districting Principles

While race must be considered to ensure compliance with the Voting Rights Act and to ensure against racial or ethnic discrimination (race conscious redistricting), race should not become

the dominant and controlling rationale of a districting plan. Racial gerrymandering exists when race is the dominant and controlling rationale in drawing district lines and race-neutral traditional districting principles are made subordinate to racial considerations. Judicially recognized traditional districting principles include compactness of

districts, contiguity of districts, preservation of political subdivisions (such as counties and cities), preservation of communities of interest, preservation of cores of prior districts, protection of incumbents (to allow continuation of representation by avoiding pairing of incumbents in a proposed district) and compliance with Section 2 of the Voting Rights Act.

Compactness of a district cannot be overemphasized. The U.S. Supreme Court uses an "eyeball approach" to evaluate compactness of districts and has noted that redistricting is one area in which appearances do matter. A circle, square or rectangle would be examples of the most compact districts. Drastic departures from compactness are a signal something is amiss. Racial gerrymandering cases often involve issues of districts failing to comply with the principle of compactness.

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### Partisan Gerrymandering

The issue of partisan gerrymandering has seen the biggest change in the last 10 years of redistricting litigation.

Partisan gerrymandering was not justiciable in federal courts prior to 1986. In 1986, the U.S. Supreme Court held that political gerrymandering cases are justiciable under the equal protection clause (*Davis v. Bandemer*, 478 U.S. 109 (1986)). However, the plaintiff had to show intentional discrimination and an actual discriminatory effect. In *Davis*, the U.S. Supreme Court held that unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade the influence of a group of voters on the political process as a whole. This is a standard no case had ever satisfied. After years of struggling with attempts to find a method to measure and determine when an unconstitutional level of partisan gerrymandering had occurred, the U.S.

Supreme Court last year held that partisan gerrymandering claims present political questions beyond the reach of the federal courts. *Rucho v. Common Cause*, No. 18-422, 588 U.S. \_\_ (2019). However, the court specifically stated that its conclusion does not condone excessive partisan gerrymandering, noting that provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply. In essence the Supreme Court's holding kicked the issue of partisan gerrymandering to state courts, where redistricting litigation this past decade has resulted in state courts striking down redistricting plans on the basis that such plans of partisan gerrymandering have violated various state constitutional provisions.

### Public Participation

Public participation is encouraged in all aspects of redistricting. Consistent with this principle, in the last round of redistricting, the Legislature adopted

joint rules that required the redistricting committees to seek and encourage public participation in the redistricting process and made available redistricting workstations for the use of the public. Such requirements should be anticipated again in this round of redistricting.

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