

SECTION 5 RECOMMENDATION MEMORANDUM: December 12, 2003

Re: House Bill 3 (Congressional redistricting plan enacted by the Texas Legislature) (2003-3885) and House Bill 1 (Extension of congressional candidates filing period, moving primary election date, procedures for canvassing, late counting of ballots) (2003-3917)

TIME LIMIT

Submission Received:	October 21, 2003
Supplemental Information Received:	October 23 through December 11, 2003
Due Out Date:	December 22, 2003

FACTUAL INVESTIGATION AND LEGAL REVIEW

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RECOMMENDATION: Objection

I. BACKGROUND

A. Demographics and statistics

According to the 2000 Census, the State of Texas has a total population of 20,851,820, of whom 2,399,083 (11.5%) are African American and 6,669,666 (31.9%) are Hispanic. Of the state's 14,965,061 residents of voting age, 1,639,173 (10.9%) are African American and 4,282,901 (28.6%) are Hispanic. During the past decade, the state's population increased by over ten percent. Overall, the white population percentage decreased, the black population percentage remained constant, and the Hispanic population has increased.

B. The benchmark plan

Under the apportionment resulting from the 2000 Census, the state has 32 congressional districts, an increase of two from the previous apportionment.

During its first regular session following the release of the census data, the state legislature adjourned without enacting redistricting legislation for either legislative or congressional districts. Under such circumstances, the state constitution creates the five-member Legislative Redistricting Board [LRB] to redistrict the legislature. The LRB, however, does not have the authority to reapportion congressional districts. As a result, the congressional redistricting plan enacted in 1996 after the Bush v. Vera, 517 U.S. 952 (1996), decision remained in effect.

From 2000 to 2001, several lawsuits were filed in both state and federal courts to redraw the congressional districts. As required by Grove v. Emison, 507 U.S. 25 (1993), the three-judge federal panel hearing the case issued a deadline for the state to redraw its congressional plan. When that deadline passed, the court federal panel redrew Texas' congressional districts and issued its opinion on November 14, 2001. Balderas v. Texas, Civil No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2001) (per curiam), aff'd mem., 122 S. Ct. 2583 (2002). A copy of the court's opinion is appended at Tab 7. This plan preserved the basic configuration of the 1991 plan enacted by the legislature and protected all incumbents while adding the required two seats.

In 11 of the districts, minority persons constitute a majority of the total population with Hispanics making up a majority in seven, while African Americans do not constitute a majority of the total population in any district. In the remaining four districts, a combined minority population constitutes a majority of the population. The benchmark plan also has 11 districts in which minority persons constitute a majority of the voting age population [VAP]. With regard to those districts, Hispanics are a majority of the VAP in seven, while again African Americans are a majority in none. The remaining four districts have a combined minority majority VAP. Under the benchmark plan, nine districts have a majority minority citizenship voting age population [CVAP]. In six of these, Hispanics are a majority of the CVAP, while none have a majority African American CVAP. The three remaining districts have a combined majority minority CVAP. The complete demographics for the benchmark plan are set forth at Tab 2.

This is the benchmark for our analysis.

### C. The proposed plan

On October 21, 2003, the state submitted its congressional redistricting plan. The plan changed the composition of 31 of the 32 districts.

The submitted plan results in 11 districts in which minorities comprise a majority of the total and voting age populations: Hispanics are a majority in eight of these, and in three, the combined minority population exceeds fifty percent; in none of the districts are African Americans a majority of either population. With regard to citizen VAP, black persons are a majority in one and Hispanics are a majority in six. The complete demographics for the proposed plan are set forth at Tab 2.

## II. FACTUAL ANALYSIS

### A. Information from the state

#### 1. The redistricting process

After the 2002 elections gave Republicans control over both houses of the legislature and the governorship, the new house speaker, Rep. Tom Craddick (A), appointed a Committee on Redistricting [House committee]. Supporters of mid-term redistricting argued that the current distribution of congressional seats, 17 occupied by Democrats and 15 by Republicans, did not accurately reflect the majority-Republican voting behavior of the current electorate. In response to a request by the chairman of the new Redistricting Committee, Joe Crabb (A), the Texas Attorney General provided an advisory opinion stating that the legislature could adopt a new redistricting plan based on 2000 Census data even though the Balderas court had issued a plan which would suffice for the rest of the decade. Tex. Atty. Gen. Op. GA-0063 (Apr. 23, 2003).

The House committee held hearings on redistricting May 2-4, 2003, in Austin. On May 6, 2003, it adopted a plan named 1180C<sup>1/</sup> and sent it to the House floor. Under house rules, a two-thirds quorum (100 of 150) was needed for debate. To deny the house of its quorum, 53 of 62 Democratic members traveled to Ardmore,

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<sup>1/</sup> The state adopted a sequential numbering system for identifying all redistricting plans considered in the process. For example, the 1996 plan was 1000C with the "C" denoting a congressional plan, and the benchmark plan adopted by the Balderas court is 1151C.

Oklahoma and remained there through May 15, 2003, the house's deadline for introducing new legislation for that session. Consequently, the session ended without passage of a redistricting bill. On June 26 and 28, 2003, the House committee held interim regional hearings on Plan 1180C in San Antonio, Lubbock, Brownsville, Houston, Dallas, and Nacogdoches.

On June 30, 2003, Governor Rick Perry called a special legislative session to address redistricting. The house, now with a quorum, approved Plan 1268C on July 7, 2003. The Senate Committee on Jurisprudence held hearings in Laredo, San Angelo, McAllen, Houston, Corpus Christi, Dallas, Waco, and Austin from June 28 through July 14, 2003. On July 23, the Senate Committee approved Plan 1327C and sent it to the senate floor. The bill did not advance because, under the senate's rules, it could not be debated without the consent of two-thirds, or 21 of the 31 members, a total which could not be reached.

The first special session ended on July 28, 2003, without senate action on redistricting. Later that same day, Governor Perry called a second session. Lieutenant Governor David Dewhurst, the senate's presiding officer, announced that he would not introduce a "blocker bill" in the second session. Previously, the senate often began its legislative sessions by introducing and immediately reporting out of committee a pro forma bill for the sole purpose of keeping that bill, not intended for passage, at the top of its legislative calendar. Once there, this bill prevented the senate from considering any other bills without suspending the legislative order of business by a two-thirds vote.<sup>2/</sup>

In response, 11 Democratic senators refused to attend the second special session and traveled to Albuquerque, New Mexico to deny the senate the two-thirds quorum needed to convene the body. The house again passed Plan 1268C, but the second special session ended on August 26, 2003, without action by the senate. On September 2, 2003, one of the 11 senators, Sen. John Whitmire (A), returned to Texas, declaring that he would provide the needed presence for a quorum. The state has characterized these efforts to deny a quorum in each chamber as partisan moves intended solely to keep incumbent Anglo Democratic Members of Congress in power.

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<sup>2/</sup> On August 15, 2003, Texas submitted this action for review under Section 5 as a voting change. We responded that the practice was an internal legislative parliamentary rule or practice outside of the purview of Section 5.

Governor Perry called the third special session on September 15, 2003. The house approved Plan 1268C again. The senate debated Plan 1353C, which had been approved by the Senate committee, made two amendments to it, and approved it as 1362C. To resolve differences between the two versions, a conference committee was appointed which produced a new plan, 1374C. This plan was approved by the house on October 10, by the senate on October 12, and signed by the Governor on October 13, 2003, as H.B. No. 3.

The state informs us that more hearings were held and testimony received during this redistricting process than during the 1991 or 2001 redistricting debates or in consideration of any other legislative proposal in memory. Beyond the typical notification and publicity accompanying legislative hearings, the house sent interested parties Spanish and English announcements and faxed notices in Spanish and Vietnamese to media serving the minority community. At each hearing, a Spanish-language translator was available, and at the Houston hearing, a Vietnamese-language translator was also provided. At the house field hearings, large maps were on display of the benchmark plan and proposed Plan 1180C. Similar publicity was conducted before the senate field hearings, the locations of which were decided after consulting with Democratic and Republican committee members. The state added hearings in Corpus Christi and Waco to accommodate requests by individual lawmakers.

In our discussions with legislators concerning the process, some Republican members of the House committee complained that Democrats and their supporters intentionally tried to disrupt the house field hearings, busing in supporters, providing them with meals, and allowing them to shout down people who wanted to speak in favor of redistricting. The legislators noted that even with these disruptions, the committee generally continued to hear testimony until every person who wanted to speak was allowed the opportunity, sometimes requiring that hearings continue late into the night.

## **2. The state's submission**

In addition to the census data, the state also provided voter registration information in support of its plan, including the data on Spanish-surname registered voters [SSRV].<sup>2/</sup> This is

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<sup>2/</sup> We have used this analytical tool extensively, both in our litigation and in the preclearance process. Courts have held it to be a valid measure of Hispanic voting strength. See, e.g., Garcia v. County of Los  
(continued...)

a comparison of the names of the people registered to vote compared with a list of Spanish surnames, compiled by the Census Bureau. Because the SSRV reflects a measure of the presence of non-citizens in the Hispanic population, the state presented these data as a better proxy for measuring eligible voters than VAP. Using the SSRV data, the proposed plan contains six majority Hispanic districts.

Finally, for each statewide race between 1996 and 2002 involving a minority candidate and an Anglo candidate, the state provided election returns by precinct or voting tabulation district [VTD]. This creates the ability to reaggregate the vote totals for the statewide races into the configuration of the proposed districts. Thus, through an election simulation approach, one can estimate how the proposed districts would have voted in statewide races. At our request, it also provided the results of its regression analysis of elections in the benchmark districts.

In support of its submission, the state notes it may maintain minority voting strength by either protecting "safe" minority districts or increasing the number of minority districts that are less than "safe" in order to satisfy the requirements of Section 5.<sup>4/</sup> While the submission does not explicitly identify the state's choice in this regard, the legal analysis it provided with the submission notes that the proposed plan "has increased the number of opportunities for the minority communities to elect candidates of choice." Submission, Exh. D at 15. According to the state, the proposed plan exceeds the requirements set forth in Georgia v. Ashcroft, 123 S. Ct. 2498 (2003), because it adds three districts where minority voters can elect their candidates of choice, resulting in 11 such districts in the proposed plan.

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<sup>3/</sup>(...continued)

Angeles, 756 F.Supp. 1298 (C.D. Cal.) aff'd, 918 F. 2d 763 (9<sup>th</sup> Cir. 1990); Redistricting of the Texas House of Representatives (UDDOJ file no. 2001-2431) (Nov. 16, 2001).

<sup>4/</sup> As discussed below, the Supreme Court has identified three types of districts that merit consideration as part of the Section 5 analysis. Georgia v. Ashcroft, 123 S.Ct. 2498 (2003). They are: safe districts where "it is highly likely that minority voters will be able to elect the candidate of their choice;" coalitional districts where it is "likely - although perhaps not quite as likely as under the benchmark plan - that minority voters will be able to elect candidates of their choice;" and influence districts "where minority voters may not be able to elect a candidate of choice, but can play a substantial, if not decisive, role in the electoral process." Id. at 2511-12. The state does not discuss influence districts other than to note that they are not as important here in Texas as they were in Georgia. Submission, Exh. D at 14.

Central to the state's conclusion that the proposed plan meets Section 5 standards is its judgment Benchmark 24, 25, and 29 do not provide minority voters with the ability to elect candidates of choice. Through its attorney, the state argues that these districts do not perform for African American or Hispanic voters because they are unable to elect a candidate of their same race in those districts. Benchmark 24 is located in the Dallas-Forth Worth area and Benchmark 25 and 29 are in Harris County.<sup>5/</sup>

Benchmark 24/Proposed 24: This district is comprised of portions of Tarrant and Dallas Counties. The district has a 25.7 percent black CVAP, and a 20.8 percent Hispanic CVAP. The SSRV rate is 16.0 percent. Martin Frost, an Anglo Democrat, has represented the district since 1978. The state asserted that under the benchmark configuration minority voters could not elect a minority candidate in the district.

Under the proposed plan, the district has been completely reconfigured and split into six different districts; the greatest part, approximately a quarter of the benchmark district, is located in Proposed 26. Proposed 24 occupies only a small portion of Benchmark 24 and now is comprised of relatively equal portions of Denton, Dallas, and Tarrant Counties. In the state's view neither Benchmark 24 or Proposed 24 provide minority voters with the ability to elect candidates of choice. If so, under Section 5, there is no change in the status quo. The redrawn district has no resident incumbent.<sup>6/</sup>

Benchmark 25/Proposed 9: Benchmark 25 is comprised of portions of Fort Bend and Harris Counties. Under the benchmark plan, the district has a 26.1 percent black CVAP and an 18.6 percent Hispanic CVAP for a total minority citizen VAP of 44.3 percent. The SSRV rate is 13.6 percent. Since 2002, Chris Bell, an Anglo Democrat, has represented the district.

Under the proposed plan, the district continues to be comprised of portions of Fort Bend and Harris Counties, but has

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<sup>5/</sup> The district numbers in the benchmark and proposed plans do not always correlate because the state did not maintain a geographic consistency in numbering some of the districts. As a result, when referring to a district, this memorandum will identify it by plan, whether benchmark or proposed, and then by its number.

<sup>6/</sup> Rep. Frost has been placed in Proposed 6, along with two other incumbents, Rep. Jim Turner (Benchmark 2) (A), and Rep. Joe Barton (Benchmark 6) (A). This proposed district is made up of 66.4% of Benchmark 6, 21.6% of Benchmark 24, and 4.4% of Benchmark 2.

been renumbered as Proposed 9. It has a black CVAP of 46.9 percent and a Hispanic CVAP of 16.6 percent, for a total minority citizen VAP of 63.0 percent. The SSRV rate is decreased to 13.7 percent. By reconfiguring Benchmark 25 into Proposed 9, the state counts this as a new "ability to elect" seat for black voters, thereby increasing the total number of such districts from two to three. Rep. Bell was drawn out of Proposed 9, making it an open seat.

Benchmark 29/Proposed 29: Benchmark 29 is located wholly within Harris County. Under the benchmark plan, the district has a 20.4 percent black CVAP, and a 42.8 percent Hispanic CVAP. The SSRV rate is 39.8 percent. Since 1992, Gene Green, an Anglo Democrat has represented the district.

Under the proposed plan, the district remains in Harris County. Proposed 29 has a black CVAP of 13.8 percent, and a Hispanic CVAP of 46.7 percent. The SSRV rate is increased to 45.9 percent. Rep. Green was drawn out of the district. The state argues that it has enhanced minority voting strength in Proposed 29 even though it still does not have a majority Hispanic SSRV. Further, because it is an open seat, the state views it as one where Hispanic voters can elect a candidate of choice.

The explanation with regard to each of Benchmark 24, 25, and 29 is the same; namely, that "as a result of the polarized voting patterns between African Americans and Hispanics in the Democratic primary, Anglo candidates, when they have a high Anglo component in the district, can take advantage of this polarization to defeat a minority candidate of either minority community in the Democratic primary." Submission, Exh. D at 9. Because these incumbents have not recently faced a credible minority candidate in the Democratic primary,<sup>21</sup> the state does not believe that support for these candidates from the minority community indicates the incumbent is a candidate of choice. According to the state, these three districts were drawn in 1991 as one-third Anglo, one-third Hispanic and one-third African American, to allow Anglo incumbents to control each district.

In sum, the state argues the elimination of Benchmark 24 does not alter the Section 5 balance because minorities there did

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<sup>21</sup> According to the state, a credible minority candidate has only run once in any of the three districts. In 1992, Rep. Green faced a Hispanic candidate who received a majority of the Hispanic vote and was clearly the Hispanic community's candidate of choice. Despite this support, Green defeated him because of the polarized voting in the Democratic primary.



not have an ability to elect, Proposed 9 replaces Benchmark 25 as an ability to elect district for minority voters, and Proposed 29 offers minority voters electoral ability they did not have in Benchmark 29.

Benchmark 23/Proposed 23: Benchmark 23 is comprised of 22 whole counties and portions of two other counties in the southwest portion of Texas with most of the population coming from Bexar and Webb counties. The district has an Hispanic VAP of 63.0 percent, an Hispanic citizen VAP of 57.4 percent and an SSRV of 55.3 percent. Since 1992, Henry Bonilla, a Hispanic Republican, has represented the district.

The proposed plan splits Webb County, removing an Hispanic population of 95,835 persons, and adds Anglo population from Kendall, Kerr, and Banderas Counties. Under the proposed plan, the Hispanic VAP decreases to 50.9 percent, Hispanic citizen VAP decreases to 45.8 percent, and SSRV decreases to 44 percent. Rep. Bonilla remains in the district.

The state identifies Benchmark 23 as a majority Hispanic district where Hispanic voters can elect their candidate of choice, who is Rep. Bonilla. According to the state, he receives significant Hispanic support and greater Hispanic support than most Republican candidates in Texas. The state cites to Justice White's concurrence in Thornburg v. Gingles for the proposition that a minority candidate who receives significant, although not majority minority support, should be considered a candidate of choice. Exh. D at 9.

The state also argues, alternatively, that Hispanics do not vote cohesively in Benchmark 23. Claiming that Rep. Bonilla has received "up to" 40 percent of the Hispanic vote, the state concludes that Hispanics are not able to elect their choice of candidates because they split their vote. Exh. D at 10-11.

Although the submission never identifies Proposed 23 as an "ability to elect" district for Hispanics, several of the state's statements indicate this is the state's position. First, the state notes "Plan 1374c will provide 11 districts in which the minority community can and should elect candidates of choice. In addition to the eight district described above. . . ." Exh. D at 9. District 23 is one of those eight districts "described above." The submission further notes that Proposed 23 will continue to perform in the same manner in which the district has performed under the benchmark. Id. at 14, n.31.

Benchmark 15/Proposed 15: Benchmark 15 contains eight counties, encompassing an area of approximately 180 miles, running north from Hidalgo County, in the lower Rio Grande Valley, to Goliad County. Benchmark 15 is anchored in Hidalgo County, with the district containing approximately 84 percent of the county.

Under the benchmark plan, the district has a total Hispanic population of 78.3 percent; an Hispanic VAP of 74.3 percent; a Hispanic citizen VAP of 69.3 percent; and an SSR of 68.2. Since 1996, Ruben Hinojosa (H) has represented the district. Rep. Hinojosa has not faced opposition in the general election since 1998. In its submission, the state identifies Benchmark 15 as one of the eight districts where minority voters can elect a candidate of choice.

The proposed plan increases the geographic size of the district, expanding it to 13 counties and extending it over 320 miles from Hidalgo and Cameron Counties, in the lower Rio Grande Valley, to Bastrop County, which is adjacent to Travis County and the City of Austin. Approximately 26 percent of Cameron County, including the City of Harlingen and the town of Indio, is added to Proposed 15 while 57 percent of Hidalgo County remains in Proposed 15. The proposed district splits the City of McAllen, assigning 78,412 of its residents to Proposed 25 and leaving 28,002 residents in Proposed 15. Rep. Hinojosa remains in the proposed district. In its submission, the State contends that Proposed 15 remains an ability to elect district.

Proposed 25: The state presents Proposed 25 as one of the "new" minority districts it created. The district has majority Hispanic CVAP and SSRV of 55.0 percent and 55.6 percent respectively. From 2000 to 2002, the SSRV in the proposed district increased by 2.2 percentage points from 53.4 percent to 55.6 percent. The state notes that Proposed 25 is "safely Democratic," with a weighted Democratic Index of 62.2 percent, and a weighted Republican Index of 37.8 percent.

The district includes Hidalgo and Starr Counties near the Mexican border and moves in a northerly direction to the southeastern part of Travis County, encompassing a distance of approximately 300 miles. Although a total of nine counties comprise Proposed 25, the counties that provide over 500,000 of the district's total population of 651,619 are Hidalgo and Travis. Proposed 25 draws approximately 25 percent of its population from Benchmark 15, approximately 25 percent from Benchmark 28, and approximately 40 percent from Benchmark 10. The southeastern part of the City of Austin, in Travis County,

and most of the City of McAllen, in Hidalgo County, are placed in Proposed 25. The state notes that in "[n]o other congressional district in Texas [that has had] a Spanish-surname registration as high," have minorities failed to elect their candidate of choice. Exh. D at 13.

B. Information from other sources

We have received a significant number of comments regarding this submission. Tab 6 contains a compilation of these comments.

Of the 55 African American and Hispanic legislators in the legislature, 53 voted against the redistricting plan. We have either met with or spoken to 22 state house representatives and 13 state senators, of whom 14 are Hispanic, 11 are African American, and nine are Anglo. Of the minority legislators to whom we talked, all but two opposed the redistricting plan. We have either met with, or spoken to, 13 county or city officials from Texas, of whom seven are Hispanic, five are African American, and one is Anglo. Of the local minority elected officials to whom we spoke, all but one opposed the redistricting plan.

The Section has met with fifteen members of the United States House of Representatives, of whom two are African American, four are Hispanic, and nine are Anglo. They all oppose the proposed plan. They also submitted a comment letter, which can be found at Tab 6.

We have met with attorneys and advisors for the League of United Latin American Citizens [LULAC], the Mexican American Legal Defense and Education Fund [MALDEF], the Texas branches of the National Association for the Advancement of Colored People [NAACP], and its Dallas County, Travis County, Webb County, and Hidalgo County branches. LULAC, MALDEF, and the NAACP also provided multiple comment letters, which are contained at Tab 6.

We also have received comment letters from six other state legislators who did not attend any meetings or speak on the telephone with any staff. Of these legislators, four are Hispanic and two are Anglo. Thirty-six (36) locally-elected officials from around the state sent comment letters. In total, the Section received 335 comments against the proposed plan, none in favor of it.

1. Comments regarding the redistricting process

The redistricting process was harshly criticized by some opponents of the plan as unreceptive to the views of minorities. We also met with two of the chief legislative architects of the plan who explained how criticism of the process was unwarranted, and opponents unfairly attempted to disrupt the process.

a. Comments from opponents

When the house first took up the issue of redistricting in 2003, the House committee had not planned to hold field hearings and, when asked about conducting hearings in Laredo or other heavily Hispanic areas of the state, Chairman Crabb allegedly denied the request, telling Rep. Richard Raymond (H) (D) that "there are only two people that I know of on the Committee who speak Spanish. The rest of us would have a very difficult time if we were out in an area other than Austin or other English-speaking areas to be able to have Committee hearings to be able to converse with the people that did not speak English." This comment prompted Rep. Raymond to file a complaint with this Department, which was later withdrawn when he filed suit in federal district court. Subsequently, the House committee agreed to conduct statewide field hearings.

The Redistricting Committee was separated into subcommittees to hold hearings, meaning that the entire committee would not hear all testimony. No Spanish translations of the hearing transcripts were available. None of the hearings were chaired by any of the six minority members of the Committee, including vice-chair Rep. Mike Villareal, an Hispanic.<sup>2/</sup>

Democratic members of the house and senate and their supporters did not deny claims that some people had attempted to inflate opposition to redistricting by busing in persons to testify at the hearings. They claimed, however, that Republicans attempted, but failed, to produce an equal number of supporters at the hearings. In addition, we received information alleging that the Harris County Republican Party distributed a flier with a photo of Rep. Sheila Jackson-Lee (B), the local congressional representative, accompanied only by the caption "She will be

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<sup>2/</sup> There was also one allegation of a more serious nature. Lauren Kasprzak, a staff member on the House Redistricting Committee, upon leaving the committee expressed in a letter that "seemingly racist remarks" had been made, and Crabb laughed and nodded at remarks made about how the League of Women Voters is the "plague of Women Voters." A copy of the letter is contained at Tab 6.

there to express her views . . . will you be there to express yours?"

We also received comments concerning the senate's decision not to require consent of two-thirds of the senate before debating redistricting. The comments criticized this action as enabling the senate to ignore minority views of redistricting. The rationale of the blocker bill and/or the requirement for a vote to suspend the rules was to require the senate to enact legislation only when there was general consensus so that the majority would not ride rough-shod over the process. According to minority legislators, this device was a traditional practice for almost all legislative sessions and particularly with regard to redistricting. According to the information provided for the litigation challenging this decision, this tradition was broken for the first time to pass the proposed redistricting plan.

Opponents of the plan also called attention to the reversal by the Republican majority of alleged minority gains made in earlier drafts of the redistricting plan. After criticisms by the minority community of any decrease in their voting strength, and concerns for retrogression apparently voiced by at least one person advising the house, both bodies repaired what minorities felt were the most egregious flaws in their plans by restoring benchmark voting strength to several areas of the state. Both plans passed by the house and senate before the final plan had maintained majority minority or influence districts in the Dallas/Fort Worth, San Antonio, and Austin areas.

The final plan drawn by the conference committee, however, reinstated the most criticized changes to the plans. In the eyes of these commentators, this is clear evidence that the state had one map it intended to pass from the beginning, and the process was a sham. Opponents also suggest that the legislators who passed the final plan understood its adverse effects and understood it would disadvantage minorities, even after the house and senate had agreed to more ameliorative plans. Commonly heard among opponents of the plan was criticism of the role played by Rep. Tom DeLay (A) and the director of his political action committee, Jim Ellis. Included in these comments were allegations that the house plan, which provoked the greatest concern for minorities, was brought into a committee hearing room by Jim Ellis and that Rep. DeLay prodded conference committee members to return to these more drastic changes after their respective chambers had eliminated many of them.

The only Hispanic on the conference committee, Sen. Juan Hinojosa (H) (D), reported to us that he had "zero" participation

in the work of the committee and was not even asked to sign off on the conference report. In addition, he said that none of the minority members of the House committee were named to the conference committee. Opponents of the plan also noted that proposed maps were sometimes not disclosed until after any opportunity for comment had passed or that maps were provided with insufficient time before hearings to discover what changes were proposed. The letter from Ms. Kasprzak, a staff member on the House committee, stated that "[t]he public was excluded in any real decision calculus of the committee . . . . we held public hearings . . . on a plan that we never intended to go to the floor. And then we introduced a new plan . . . while someone was writing the other map that we actually intended to be voted out of committee in a back room. . . . With no idea what is to come of their districts, there is no way for the citizens of Texas to truly be heard."

b. Comments from supporters

Rep. Phil King (A), a member of both the redistricting committee and the conference committee, defended the redistricting process as open and fair. The house followed the format of public hearings it had used when considering past redistricting bills. One significant obstacle to receiving public comment was the behavior of opponents of the plan who attempted to disrupt the public comment process and, in the case of the hearing in Brownsville, succeeded in shutting down a public hearing. Complaints that the conference committee had not solicited public comments were based on a misunderstanding of the legislative process. The conference committee is not open to the public, and a special rule would have been needed in order to allow testimony on the conference committee's plan. It is rare that a bill leaving conference committee looks the same as the legislative proposals coming from the two houses of the legislature. It was the conference committee, and not outsiders, which drew the final map, according to Rep. King.

Sen. Todd Staples (A), a member of both the Senate committee and the conference committee, noted that the legislature provided a greater opportunity for public participation in the redistricting process than it does for other legislation. Sen. Staples took exception to allegations of racial animus or racist comments on the part of any legislator. Members of the Senate committee sought and encouraged the input of Spanish-speakers and listened carefully to all comments before drafting any maps. Once the first maps were drawn, additional hearings received more comments and later maps addressed concerns raised. Almost every change made by the conference committee reflected a feature of

some prior map that the committee wished to incorporate into the final plan. The abandonment of the 2/3 rule in the senate was in keeping with the process used to pass prior redistricting bills, according to Sen. Staples.

Rep. Kenny Marchant (A), a member of the House committee, commented that he had never seen a more rigorous process of public hearings for any piece of legislation. The process employed was more comprehensive than that followed in the 1991 and 2001 redistricting cycles. Minority voters had equal access to the process, which was well publicized in minority communities. Opponents of redistricting did not tolerate anyone testifying in favor of redistricting, booing them and not letting them speak at the hearings. Democrats bused supporters to the public hearings for the purpose of disrupting them. The views of more people could have been heard if the hearings had not been disrupted, according to Rep. Marchant. Rep. Ken Grusendorf (A), another member of the House committee, added that the process they followed was more open than that used by the Democrats in passing the 1991 redistricting plan.

## 2. Comments regarding specific districts

Benchmark 24/Proposed 24: Minority legislators have told us that Benchmark 24 provides African American voters with the ability to elect their candidate of choice and that Martin Frost is the candidate of choice in Benchmark 24, even though he is an Anglo, because he is very responsive to the minority community. If Benchmark 24 were an open seat, minority legislators believe that it is highly likely that a black candidate would prevail.

On October 29, 2003, we met with several Democratic members of the Texas congressional delegation to discuss the proposed redistricting plan. Rep. Frost told us that African American voters controlled elections in Benchmark 24 because they control the vote in the primary. Frost believes that, if he were to retire tomorrow, the district would elect an African American candidate as his successor. Black voters continue to vote for him because he has been responsive to their issues and needs in the communities, according to Frost.

Some Anglo Republican legislators also appear to view Benchmark 24 as a district where African American voters have an ability to elect. State Rep. Phil King (A), a member of both the House Redistricting Committee and the conference committee, expressed concern for decreasing minority electoral strength in Benchmark 24. In his recent deposition, he characterized the district as a "minority district" which legal counsel had advised

him to approach "with caution" due to concerns for Voting Rights Act compliance. King Dep. at 79, 112-17. In a statement to the redistricting committee, he commented on why he had withdrawn his original plan: "[I]n the hopes of trying to respond to the concerns that [Rep. Raymond (H)] and others voiced and in the hope of trying to expedite the DOJ preclearance process, I moved [District] 24 back into its original district."<sup>2</sup> In addition, in the press a few days before the final plan came out of conference committee, King said that attorneys were concerned that there would be a violation of the Voting Rights Act because the Proposed 9 would not "offset the loss of Martin Frost's district."<sup>10</sup> Republican Sen. William Ratliff (A) also stated, "I do recall conversation about creating the long skinny districts in order to - to overcome the loss of the district in the Dallas/Fort Worth area." Ratliff Dep. at 16.<sup>11</sup>

The NAACP and other groups have told us that Rep. Frost is the candidate of choice of minority voters in Benchmark 24. According to the "scorecards" of minority groups, he has been exceptionally responsive to the needs of the minority community.

Minority and Anglo legislators agree that the proposed plan creates no new district in the Dallas-Forth Worth area offering minorities the ability to elect. According to the persons to whom we have talked and comment letters we have received, the minority population there has been fragmented. Rep. Frost has been drawn out of Proposed 24, which has become an open seat where Anglo Republican voters will dominate. State Rep. Kenny Marchant (A) has announced he will run for the open seat. Comments from minority contacts indicate that Rep. Marchant is not considered a minority candidate of choice, having voted against a hate crimes bill strongly favored by the minority community, and having a score of "F" on the most recent NAACP scorecard for Texas state legislators.

Benchmark 25/Proposed 9: Most of the people who have commented believe that Benchmark 25 is a district that provides

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<sup>2</sup>/ Redistricting Committee Hearing, July 3, 2003. Contemporaneous news accounts reported similar comments by Rep. King.

<sup>10</sup>/ During our meeting with Rep. King, he admitted making such comments after staying up all night and not reviewing a press release before it went out. He sought to assure us that he did not believe, contrary to anything he may have said earlier, that Proposed 9 was retrogressive. In correcting the record, however, he made no remarks concerning Proposed 24.

<sup>11</sup>/ R.G. Ratcliffe, New map targets Anglo Democrats, Houston Chronicle, October 5, 2003 at 1



black voters with the ability to elect their candidates of choice. Everyone agrees that the black community is generally cohesive, and that in primaries, black voters are a majority of the voters in the election. The one exception is the 2002 Democratic congressional primary. In that election, black voters were not cohesive and split their votes between Carroll Robinson (B) and Chris Bell (A).

Rep. Bell, the Democratic incumbent in Benchmark 25, told us that there really is no substantial difference in electoral behavior between Benchmark 25 and Proposed 9. He argued that while black voters have been added to Proposed 9, Benchmark 25 already provides black voters with the ability to elect a candidate of choice. He further stated that African Americans usually vote cohesively, but that his race with Robinson was an anomaly. Both he and Robinson served in at-large positions on the Houston City Council, and faced each other in the 2002 Democratic primary. Had black voters followed their usual pattern of cohesive voting, Robinson would have won.

The Texas NAACP, minority legislators, and local elected officials from the Houston area believe that the minority vote was not cohesive because Carroll Robinson was not a strong enough candidate. The consensus is Robinson failed to achieve the usual level of black voter cohesion because of conflicts he had with Houston's Mayor Lee Brown (B). As a result, the mayor and other high-ranking black elected officials joined in a public endorsement of Bell, leading to the unusual splintering of the black vote.

As an open seat, most commentators said Proposed 9 is not substantially more likely to elect a black-preferred candidate than Benchmark 25. The core three areas of Benchmark 25, Sunny Side, Missouri City, and Hiram Clark, have been retained, and that is where the strength of black voters in the district lies. These areas have very high turnout rates and are politically active. New black voters drawn into the proposed district live in apartment complexes and have very low turnout.

Commentators note that Rep. Bell is very responsive to the black community as has received high scores on the NAACP report card. Further, Kent Bentsen (A), who previously represented Benchmark 25, was also mentioned repeatedly as a candidate of choice for black voters.

We have spoken with two black elected officials who disagree with the statements described above. They are State Rep. Ron Wilson, the only black legislator to vote in favor of the

proposed redistricting plan, and candidate Carroll Robinson. Each has told us that Benchmark 25 has historically elected an Anglo representative, and that this person has not been a candidate of choice for black voters. They believe that Proposed 9 will have the capability of electing a black representative, noting that the black voters added to Proposed 9 from Rep. Delay's district have high turnout rates. Robinson said that while there might not be a big difference between Benchmark 25 and Proposed 9, it will be easier for a black person to win the Democratic nomination. Rep. Wilson stated to us his belief that a white person, regardless of party affiliation, can not represent black persons as effectively as someone who is black. Kyle Janek, an Anglo state senator from the Houston area, agreed with this assessment.

Benchmark 23/Proposed 23: All the minority legislators with whom we spoke told us that the proposed plan eliminates the ability of Hispanic voters to elect their candidate of choice in District 23. Both minority and Anglo legislators view Benchmark 23 as a district where Hispanic voters have an ability to elect. Their view is that it is unlikely an Anglo candidate would be able to win in Benchmark 23, demonstrated by the fact that an Anglo has not been able to win a primary since 1990. Minority legislators believe that if incumbent Henry Bonilla did not run in the next election, the voters would elect a Democratic Hispanic candidate.

According to these commentators, Rep. Bonilla is not the candidate of choice of Hispanic voters in Benchmark 23. LULAC gave him an 18 percent rating on issues concerning Hispanic voters, and the NAACP gave him an F. Rep. Bonilla has been steadily losing Hispanic support in the district because he has been nonresponsive to the Hispanic community and currently is able to retain his seat only through force of incumbency.

Extreme polarization of the vote could be seen in the 2002 election, which Rep. Bonilla nearly lost. Some commentators believe that Rep. Bonilla used to receive as much as 25 percent crossover vote in Webb County, but a unified Democratic party supported Bonilla's challenger Cuellar in 2002. Anglo voters in northwest San Antonio turned out in record numbers to vote for Rep. Bonilla. Others have argued that Cuellar, despite being Governor Perry's former Secretary of State, ran a race that appealed to the Hispanic voter base at the expense of Anglo voters.

With a drop in the Hispanic citizen VAP in Proposed 23 of 12 percentage points to 47 percent, both minority and Anglo

legislators agree that Hispanic voters would no longer decide who is elected in the district. Minority legislators also cite the splitting of Webb County as evidence of retrogression. Webb County has a greater percentage of Hispanic residents than any other county, and it is the fastest growing county in Texas.

MALDEF, LULAC, NAACP, and officials from Webb and Hidalgo Counties agree that Hispanic voters have lost the ability to elect a candidate of choice in Proposed 23. Their comment letters and presentations at our meetings explain that Anglo Republicans were added to the district to ensure that Rep. Bonilla would be able to get re-elected in the future. The proposed plan does this by fracturing Hispanic communities of interest, particularly in Webb County, and placing them in other districts. They note that maps have been drawn which would have preserved the district at the same Hispanic CVAP.

Although we extended an invitation to Rep. Bonilla to speak with us, he declined to respond.

Benchmark 15/Proposed 15: Elected officials and community organizations unanimously characterize Benchmark 15 as a safe district where Hispanic voters are able to elect their candidate of choice. Most, but not all, commentators believe that the district moves from a safe seat to a toss-up seat, where it is unclear whether Hispanic voters will continue to elect their candidate of choice.

According to the district's incumbent, Rep. Hinojosa, Proposed 15 does not provide Hispanic voters with the ability to elect candidates of choice to office. Hinojosa notes that the proposed redistricting plan takes traditional areas of high turnout Hispanic voting strength, such as the Cities of McAllen, Pharr, and Mission, out of the district and places them in Proposed 25, thus splitting Hidalgo County in two. He points out that a high turnout Anglo population, which is overwhelmingly Republican, is added to Proposed 15. This would cause future elections to be a "toss-up." As Rep. Hinojosa argues, in order for a Democrat to win in this part of Texas, the statewide election index must be at least 56 to 57 percent Democratic. The rating in Proposed 15 has been dropped to 55 percent in 2002 and 50.2 percent in 2000. Rep. Hinojosa notes that Vice-President Gore easily won Benchmark 15 with 68 percent of the vote but would have lost with 48 percent of the vote in Proposed 15. Various state and local officials have submitted comments echoing Congressman Hinojosa's sentiments with respect to Proposed 15.

State Rep. Lionel Pena, who represents a legislative district in south Texas, shares Rep. Hinojosa's concern about Proposed 15. In his recent deposition in the Sessions v. Perry litigation, Pena stated that in a race for an open seat in Proposed 15, an Hispanic-preferred candidate would "more than likely" lose. Pena's opinion was based on the inclusion in Proposed 15 of Anglo areas in the south like Harlingen and counties in the north such as Bastrop, combined with low Hispanic turnout compared to that of the added Anglo population. Pena Dep. at 10-11, 16-19. Other elected officials have expressed similar concerns.

Several Hispanic advocacy organizations, such as LULAC, MALDEF, and MALC, have submitted comments pertaining to Proposed 15. LULAC and MALC submit that the proposed district is not a safe district for Hispanic voters. During a meeting with LULAC officials, State Rep. Jim Solis (H), who represents areas of Cameron County, referred to McAllen as the "anchor for Hispanic power in the Valley," and to Harlingen as the "anchor for Anglo power and wealth in the Valley." Benchmark 15 keeps McAllen together and excludes Harlingen; Proposed 15 retains less than a third of McAllen and includes all of Harlingen.

In contrast, MALDEF contends that Proposed 15 will continue to perform for Hispanic voters. At a meeting with us, Nina Perales, MALDEF's representative, expressed the view that Proposed 15 remains a seat where Hispanics can still elect their candidate of choice. Several weeks later Perales called us to offer further comment on Proposed 15. In this conversation, Perales had a different emphasis, saying that MALDEF still maintained that, as proposed, the district provided an opportunity for Hispanic voters to elect, but MALDEF was not weighing in on whether this remained a "safe" seat. Perales noted that citizenship, registration, and turnout levels are crucial in order to adequately assess Hispanic voting strength; she emphasized that Hidalgo and Cameron Counties have always had lower turnout than other Texas counties.

Most commentators agree that Hispanic voters will not comprise the majority of Proposed 15's electorate, despite the fact that it has an SSVR level of 57.5 percent. Several persons have submitted information discussing the relevance of turnout and registration to the ability of Hispanic voters in the valley to elect their candidate of choice.<sup>15</sup>

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<sup>15</sup> We have received expert reports from Dr. Henry Flores, Dr. Andres Tigerina, and Dr. Jorge Chapa which discuss the present day and historical

(continued...)

Proposed 25: A majority of the comments, including those from elected officials, advocacy groups, including MALDEF and LULAC, and most experts consider Proposed 25 a safe district where Hispanic voters have an ability to elect their candidates of choice. At the same time, some have questioned whether Proposed 25 would be "highly likely to elect" a minority-preferred candidate.

These concerns focus mainly on the geographic configuration of Proposed 25. Given the sheer size of the district, some contend that the district pits two very different Hispanic communities against each other: one in South Texas and one in Austin with a resulting decrease in the potential for Hispanic electoral ability. One elected official noted the proposed configuration was like "putting Washington and New York City into one Congressional District."

Rep. Lloyd Doggett (A), the Democratic representative from Benchmark 10 in Austin, describes Proposed 25 as "a dumbbell district" where half of the population is located in Travis County and the other half is located "down in the Valley" in Hidalgo County. Rep. Doggett and State Senator Gonzalo Barrientos (H), who also represents the Austin area, fear that the proposed district will create significant geographic tension between Hispanic voters in the Valley and Hispanic and other voters in Austin.

Hispanic commentators have noted that the concerns of the residents of the Valley are very different from those of residents of central Texas. There are significant differences between the socio-economic levels of Hispanic voters in the two areas. State Rep. Eddie Rodriguez (H) stated that he finds Proposed 25 "offensive" because two Hispanic communities like those are paired, simply to create a new majority Hispanic district, without regard for the interests of those who live there.

These individuals and groups have also raised concerns with respect to how the proposed district's tremendous size will affect the ability of Hispanic-preferred candidates to wage a competitive campaign against any well-funded Anglo opponent.

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12/ (...continued)

impediments that affect the turnout and voter registration rates of Hispanic voters in South Texas. In addition, congressional and state representatives from south Texas, as well as Hispanic advocacy groups, including LULAC and MALDEF, have emphasized the role that turnout and voter registration play with respect to the viability of Hispanic opportunity districts there.

Commentators have pointed out that the candidates who run in Proposed 25 will have five different media markets with which to contend, including two of the most expensive markets in Texas: Austin and San Antonio. A district this size will have the effect of preventing Hispanic candidates from mounting an effective campaign, because Hispanic candidates are generally not well-funded, and often experience difficulty raising funds. The one previously announced Hispanic candidate from the Valley, King Flores (H), recently dropped out of the race for Proposed 25 on December 4, 2003, saying that he would be unable to raise sufficient funds to compete with Congressman Doggett.

Benchmark 29/Proposed 29: Several sources have commented that Benchmark 29 is a district in which Hispanic voters can elect a candidate of choice and that its incumbent, Rep. Gene Green, is the minority candidate of choice. None of the comments indicated that the district needed to have its Hispanic population increased in order to elect Hispanic-preferred candidates.

Rep. Green claims he is currently the Hispanic candidate of choice and pointed to his scorecards from minority organizations. LULAC gave him a grade of 72 percent and the NAACP rates him at 55 percent. He noted that he has lost the Anglo vote in his district, so his re-election has only been possible due to Hispanic support.

We also have received a large number of comments concerning these districts in which voters believe that the minority community exerts a significant, if not decisive, influence in congressional elections.

Benchmark 9/Proposed 2: Minority elected officials and advocacy groups consider Benchmark 9 to be an influence district. Benchmark 9 is comprised of the following whole counties: Chambers, Galveston and Jefferson. About four percent of Harris County is also in the district. The district's black CVAP is 31.3 percent, and the Hispanic CVAP is 9.7 percent. The combined minority CVAP is 31.0 percent. The SSRV for the district is 8.5 percent. Since 1996, the district has been represented by Anglo Democrat Nick Lampson.

Under the proposed plan, the majority of Benchmark 9, 47.7 percent, is placed into Proposed 2 with the remainder in Proposed 14 and 22. Proposed 2 is made up of all of Jefferson County, approximately 72 percent of Liberty County, and ten percent of Harris County. Galveston and Chambers Counties have been completely removed. The district's black CVAP is 19.2 percent,

and the Hispanic CVAP is 8.1 percent. The combined minority CVAP is 27.3 percent. The SSRV for the district is 6.7 percent. While Rep. Lampson has remained in the district, he has been paired with fellow Anglo Democrat, Rep Gene Green, the incumbent in Benchmark 29. It is assumed that Rep. Green will move back into his district, and Rep. Lampson will face a Republican challenger.

Rep. Lampson expressed his objection to the proposed redistricting plan. He said that he is elected to office in large part because of the support of black voters. He stated that the new map deprives minority voters of responsive representation, and over 100,000 minorities in Jefferson County have been placed into Proposed 2, where they will have no influence due to that district's heavily Anglo Republican character.

Minority and Anglo legislators and local officials have noted that black voters in the Cities of Beaumont, Galveston, and Port Arthur are placed in districts where their needs and concerns will not be met. Under the proposed plan, black voters from Galveston County have been removed, and in their place are black voters from Liberty County. According to residents of Benchmark 9, African Americans in Jefferson and Galveston Counties have formed a long-standing community of interest. They share similar needs, industries, and lifestyles while black residents of the largely rural Liberty County have nothing more in common with the black residents of Jefferson County than skin color. They told us that black voters are now placed into districts where their voices will go unheard, and their influence will be lost. Many black voters have been placed into Proposed 14 and 22, which are represented by Anglo Republican Reps. Ron Paul and Tom DeLay, both of whom repeatedly receive an F on the NAACP score card, while Rep. Lampson routinely receives a B.

Benchmark 10: Benchmark 10 is comprised of Travis County. The district has a 11.7 percent black CVAP, and a 21.9 percent Hispanic CVAP. The SSRV rate is 17.9 percent. Lloyd Doggett, an Anglo Democrat, has represented Benchmark 10 since 1994. Under the proposed plan, District 10 is split into several adjacent districts, dividing up Travis County for the first time and in essence eliminating the district as it has existed.

Rep. Doggett has stated to us that the electorate in Benchmark 10 is a coalition of black, Hispanic, and liberal Anglo voters, who unite to elect their candidate of choice. This coalition has supported him in each election. In the 1994 general election, he had opposition from an African American

candidate. Rep. Doggett was unopposed in the 1996 primary, but ran against another African American candidate in the general. He believes that both elections show that he is the candidate of choice of minority voters. He has had nominal opposition from 1998-2002.

State and local elected officials tell us that Rep. Doggett is the candidate of choice of both black and Hispanic voters. It is their view that if he did not have the support of black and Hispanic voters, he would not win the general election. In the 1994 general election, Teresa Doggett (B) opposed Lloyd Doggett. In that election, African American voters overwhelmingly supported Lloyd Doggett. In Benchmark 10, minority and Anglo voters come together on "issues," as opposed to race. There is an unofficial slating process whereby Anglo, black and Hispanic leaders coalesce their support behind a particular candidate. This explains in part the long history of electoral successes that black and Hispanic candidates have enjoyed. Senate District 14, which includes Benchmark 10, is presently electing an Hispanic, and black officials are also elected countywide.

The advocacy groups also weighed in with respect to the categorization of Benchmark 10. MALDEF refers to benchmark 10 as an influence district for Hispanic voters. LULAC's comment letter mirrors the views of their expert, Dr. Polinard, that Benchmark 10 is a safe "minority" district. The LULAC letter adds that African American, Hispanic, and progressive Anglos have "established a tri-ethnic coalition," which selects candidates and votes together as a bloc. They usually elect minority candidates of their choice in "central Austin."

Benchmark 1, 2, 4, 11, and 17: The consistent theme found in the comments concerning these districts is that the minority vote in these districts, overwhelmingly in support of each of the white Democratic incumbents there, in every instance put the Democratic incumbent "over the top" in his election in 2002. This is so because the white vote in these districts was split fairly evenly between the Democratic incumbent and the Republican challenger. Thus, they claim that the minority vote plays a "substantial if not decisive" role in electing these individuals to Congress. These comments also claim that all the Anglo representatives from these districts are responsive to the needs of their minority constituents as reflected in their votes in



Congress, thus satisfying another Ashcroft factor for determining minority influence.<sup>13/</sup>

We have received written comments with regard to some or all of these alleged influence districts from, among others, the Texas State NAACP, MALDEF, Reps. Turner and Edwards, and several minority state legislators. We have also heard these comments in meetings with several Democratic representatives, including Reps. Sandlin, Turner, Edwards, and Stenholm, representatives of the state NAACP and several minority state legislators. In addition, we have received reports of Drs. Allan Lichtman and Richard Engstrom, prepared for pending litigation involving the proposed plan, alleging that some or all of these benchmark districts are minority influence districts.<sup>14/</sup>

### C. Factual analysis

#### 1. Analytical standard

Section 5 inquires into the effect of proposed voting changes on the "ability of minority groups to participate in the political process and to elect their choices to office." Beer v. United States, 425 U.S. 130, 141 (1976) (internal quotation marks omitted).

In the past, the United States District Court for the District of Columbia and the Attorney General both understood that when reviewing redistricting plans, the level of minority voting strength protected under Section 5 consisted only of those

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<sup>13/</sup> This information has been relayed to us in written comments as well as in meetings. Both the NAACP and Hispanic organizations have given to us their "report cards" for Texas congressional representatives, which grade Members of Congress based on their votes on issues of importance to the respective minority communities. Reps. Sandlin (Dist. 1), Turner (Dist. 2) and Edwards (Dist. 11) all receive very high grades. Rep. Stenholm (Dist. 17) receives moderate, but passing grades. Congressman Hall (Dist. 4), however, consistently receives very low grades from both the NAACP and Hispanic organizations that are only slightly better than the lowest-scored Texas Republican representative. Thus, claims as to minority influence in this district would appear to be weaker than those for the other four districts.

<sup>14/</sup> Dr. Lichtman's report points to Benchmark 1, 2, 4, 11, and 17 as minority influence districts, while Dr. Engstrom's report appears to make this claim only for Benchmark 11 and 17 and only as to Hispanic voters. MALDEF's position on influence districts is consistent with and relies on Engstrom's report. Both of these reports, as well as other information we have gathered, lend credence to the claims that minority support for the Anglo incumbents in these districts is overwhelming and important to their reelection in 2002. However, none of the experts has done a similar analysis for elections prior to 2002.

districts in which minority voters could reasonably be expected to elect their candidates of choice.<sup>15</sup> Minorities' ability to elect their preferred candidates has been judged primarily by whether historically they have been able to control election outcomes. If so, that ability is protected by Section 5 from "backsliding." Georgia v. Ashcroft, 123 S. Ct. at 2510.

Georgia has substantially expanded the factors that must be assessed in the Section 5 inquiry in order to determine whether or not there has been "backsliding" of minority voting strength. The Court defines this expanded inquiry as a "totality of circumstances" test, a test that requires a three-prong assessment involving an "examination of all the relevant circumstances" which are described as (1) the "ability of minority voters to elect their candidate of choice;" (2) "the extent of the minority group's opportunity to participate in the political process;" and (3) "the feasibility of creating a non-retrogressive plan." Id. at 2511.

We believe that the type of analysis that prong one requires with regard to "safe" or "ability to elect" districts - districts in which "it is highly likely that minority voters will be able to elect the candidate of their choice" - is the same type of analysis we have traditionally done in our Section 5 analyses. How this has been done and will continue to be done in examining the first category of districts described in Georgia is set forth below.

a. Ability to elect or "safe" districts

To control election outcomes, (1) minority voters need generally to unite behind a preferred candidate; and (2) the chosen candidates must usually prevail. If both are true, the voters possess the electoral ability protected by Section 5 from retrogression. If either element is missing, minority population can be reduced without violating Section 5, even in the case of a district in which members of a minority group(s) constitute a majority of the population. Both elements depend upon the past behavior of voters.<sup>16</sup>

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<sup>15</sup> Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, [Guidance] 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001).

<sup>16</sup> Cf. 28 C.F.R. 51.28 (using election returns and voter registration data in Section 5 determinations); Guidance, 66 Fed. Reg. at 5413 ("election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an  
(continued...)

The first, and more difficult, question is whether minority voters in a particular district usually unite behind a single candidate. While the candidate's race is irrelevant to the question of whether the individual is the minority communities' candidate of choice, most experts examine contests featuring candidates of different races or ethnicities because it is in those elections that the behavior of voters is most easily ascertained. If minorities normally splinter their vote among different candidates, they usually will not be able to control the outcome of an election. A unified minority vote is often referred to as "cohesive."<sup>17/</sup> Courts have not found it necessary to establish a threshold level for legally significant cohesion.

Because of the secrecy of the ballot, whether minority voters are cohesive and at what level cannot be determined by election results alone and must be estimated statistically. There are several accepted methodologies. The appropriateness of each depends in large part upon the data that are available and the jurisdiction's demographics. The most preferable and most widely-used is ecological regression, either bi-variate or multi-variate, again depending upon the particular circumstances presented.<sup>18/</sup> By plotting the relationship between the actual vote for a particular candidate in a precinct and the precinct's demographics, the regression estimates the level of support, by race or ethnicity, that the identified candidate received within the district. Regression analysis cannot predict the behavior of the non-voting population because results are based exclusively upon the behavior of actual voters. When selecting the relevant

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<sup>16/</sup> (...continued)  
assessment of the actual effect of a redistricting plan").

<sup>17/</sup> Despite differences between Sections 2 and 5 of the Voting Rights Act, minority cohesion under Section 5 is similar to that required by the first precondition for Section 2 claims that minorities are "politically cohesive." Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). See also Georgia 123 S. Ct. at 2514 ("[I]t is of course true that evidence of racial polarization is one of many factors relevant to assessing whether a minority group is able to elect a candidate of choice or to exert a significant influence in a particular district.").

<sup>18/</sup> In most areas of social science, regression analysis deals with data based on individuals. In the ecological regression of election results, analysis is based upon the data of aggregate behavior, namely election results. The methodological assumption underlying both is the same. The Supreme Court has noted that regression analysis is one of the standard methodologies identified in the literature to assess the cohesiveness of the minority vote. Thornburg, 478 U.S. at 52-3, n.20. Other statistical methods of analyzing group behavior that have been used in voting cases include homogenous precinct or extreme case analysis, probit or logit analysis, or ecological inference.

precinct demographics against which to plot the vote total in that precinct, the more accurate portrait one can get of the actual electorate, the more accurate the estimate of voter behavior.<sup>18</sup> For that reason, experts seek to utilize voter turnout data by race and/or ethnicity. When such data are not available, the judicially-accepted practice is to estimate the turnout rate as part of the regression analysis.

The second question is whether minority-preferred candidates usually prevail in the district in question. For endogenous elections - in this case congressional elections - this is easy: success is measured by whether the minority-preferred candidate won. For exogenous elections - in this case elections other than congressional races<sup>19</sup> - "winners" are candidates who capture the majority of the vote within the voting precincts contained in a particular congressional district. For example, by totaling the votes in statewide contests for those precincts that constitute a benchmark congressional district, we can estimate, based upon past performance, how the electorate in that district has behaved.

We then turn to the proposed plan, reaggregating the precincts into the new configuration to determine whether the minority-preferred candidates identified by regression analysis would prevail in the proposed districts. Congressional election results are confined to the voting precincts that remain from the old district. Where there has been a significant change in the configuration of a district in the proposed plan, the past congressional elections would not be useful for predicting future results. For the exogenous elections, results are available for all, or in the case of local elections, a significant portion of, the voting precincts included in the new districts. As with benchmark districts, future electoral success is predicted on the basis of the behavior of voters in past elections. The focus is also on behavior of voters in the district as a whole and not

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<sup>18</sup> Registration by race is the most accurate base. The next most reliable are estimates of racially identifiable registration figures, such as in Texas, Spanish-surnamed registration, followed by voting age population, and then total population. But, the further one gets away from the actual composition of the electorate on election day, the less confidence there will be in the estimates.

<sup>19</sup> Exogenous elections can include contests for United States Senator, governor, etc., for which voters in every voting precinct across the state cast their ballots and results can be isolated for any current or proposed district. Exogenous elections also include local contests for city, county, or state senate/house where the jurisdiction (e.g. Houston) encompasses all or a majority of the current and/or proposed congressional district.

whether the past electoral performance of an incumbent indicates probable re-election.

With all of this data in place, a picture emerges of how changes in redistricting will affect the ability of minority voters to elect their candidates of choice by comparing past performance of minority-preferred candidates in the benchmark district with the anticipated behavior of minority voters in the proposed district. These assessments are tempered by an understanding of the unique circumstances that may accompany some elections and can skew some results. The opinion of the minority community can also play a significant role in judging whether a candidate is preferred by the minority community, particularly when election results are ambiguous.

b. The expanded analysis required by Georgia

The totality of circumstances inquiry established by the Court in Georgia has considerably broadened the traditional Section 5 inquiry. First, in prong one, the Court adds a new category of districts that are somewhat different from "safe" or "ability to elect" districts discussed above. The Court describes this kind of district as "a district in which it is likely - although perhaps not quite as likely as under the benchmark plan - that minority voters will be able to elect candidates of their choice." Id. at 2511. This definition includes districts where the ability to elect candidates of choice is maintained, and thus is similar, if not exactly the same, as districts that we have considered as "safe" or "ability to elect" districts in that minority voters will be able to elect candidates of choice, albeit with more risk. By this definition, many of the districts we have examined in our traditional analysis fit this description.

The Court also includes in this category districts in which minorities coalesce around certain candidates but with uneven results, winning but also losing.<sup>21/</sup> By this definition, such

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<sup>21/</sup> These districts are described as having the promise of increasing "substantive representation" because they will create "coalitions of voters who together will help to achieve the electoral aspirations of the minority group." The Court went on to note that in such districts there is a "risk that the minority group's preferred candidate may lose," but that despite this risk, such districts may be advantageous:

(T)here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order  
(continued...)

districts are somewhat different from what we have considered as safe or ability to elect districts. Nonetheless, we believe they should be assessed in a manner similar to the way we analyze districts which are highly likely to elect minority voters' candidate of choice, although they are not entitled to the same weight as "safe" districts.

Prong 2 requires examination of yet another category of districts in which "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." Georgia, 123 S. Ct. at 2512. Although such minority "influence" districts are not further explained by the Court, the addition of an unspecified number of these districts can provide an offset for the loss of a safe seat. Id. at 2513. Therefore, we address whether Texas has added any districts in this category which could offset any loss in the "safe," ability to elect, or coalition districts.

The inquiry required under prong 2 also requires consideration of two other factors: changes in legislative positions of power held by minority voters' representatives of choice and whether representatives elected from districts protected by Section 5 support the proposed plan. We also address these considerations.

Finally, prong 3 requires examination of the "feasibility of creating a non-retrogressive plan." We have considered this factor as part of our retrogression analysis in the past.<sup>22</sup> By specifically noting this as a separate prong in the totality of circumstances analysis, we believe the Georgia decision increases the importance of this factor. Thus, we also specifically consider this factor.

## 2. Analysis

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<sup>22</sup> (...continued)

to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning racism in American politics.

123 S. Ct. at 2512 (quoting Johnson v. De Grandy, 512 U.S. 997, 1020 (1994)).

<sup>23</sup> See Guidance, 66 Fed. Reg. 5413. ("If a retrogressive redistricting plan is submitted, the jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot be reasonably drawn.")

Our examination of the proposed plan indicates that it will lead to an impermissible retrogression in the position of minorities with respect to their effective exercise of the electoral franchise. The primary focus of our analysis has been on the safe and coalitional districts to be considered under prong one of the Georgia decision. In the proposed plan, the number of districts in which minority voters are a majority of the VAP remains the same, and there is an increase of one district where minority voters are a majority of the citizen VAP. However, with regard to minority voters' ability to elect the candidate of their choice - the so-called "safe" seats -- there is a net reduction of two seats. There is an increase in one coalitional district, but we do not consider this increase as effectively offsetting the loss of one safe seat and certainly not two safe seats, as here.

With regard to majority Hispanic districts, there is an increase of one majority VAP district, but no change in the number of majority citizen VAP districts. However, as compared to the benchmark plan, the net result of the proposed plan reduces by one the number of districts in which the Hispanic minority community can "safely" elect candidates of their choice to office. In the benchmark plan, Hispanic voters have the ability to elect the candidates of their choice in the following districts: 15, 16, 20, 23, 27, 28, and 29. In the proposed plan, Hispanic voters can no longer elect their candidate of choice in Proposed 23, and it is no longer "highly likely" that they will be able to elect their candidate of choice in Proposed 15. The state offsets the loss of one district in the proposed plan by creating a new majority Hispanic district in Proposed 25, which appears to allow Hispanic voters the ability to elect their candidate of choice. Moreover, while Proposed 15 is no longer a "safe" district, it is not a total loss; it moves from the "safe" category to the "coalitional" category. The state, however, has not created any additional coalitional seats besides Proposed 15 to offset the net loss of one safe district.

With regard to majority black districts, there are no majority VAP districts in either the benchmark or proposed, but there is one majority black citizen VAP district in the proposed. However, as compared to the benchmark plan, the net result of the proposed plan reduces by one the number of districts in which the black minority community can "safely" elect candidates of their choice to office. In the benchmark plan, black voters have the ability to elect the candidates of their choice in 18, 24, 25, and 30. In the proposed plan, black voters can no longer elect their candidate of choice in Proposed 24. The loss of Benchmark 24 has not been offset. There has been an enhancement of the

black population in Proposed 9 when compared to Benchmark 25, which makes it "safer;" but this enhancement has not changed the fundamental ability of black voters to elect their candidate of choice in benchmark 25.<sup>23/</sup>

Below in part (a), we examine in detail the districts pertinent to the first prong of the Georgia decision. These include both the Benchmark and Proposed 15, 23, 24, and 29; Benchmark 25/Proposed 9, which are in the same area of Houston; and the new majority Hispanic district, Proposed 25.<sup>24/</sup>

We have also carefully considered the second and third prongs of the Georgia decision. In part (b) below, we address the factors making up the second prong of the Georgia totality of circumstances analysis. We first consider the proposed plan's impact on influence districts. Our review shows that there has been a net reduction of two influence districts in the proposed plan. We view Benchmark 9 and 10 as influence districts, which have been eliminated in the proposed plan, and no new influence districts are created. We next consider the view of minority lawmakers, and then the gain or loss of seniority and power in Congress of legislators who are representatives of choice for

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<sup>23</sup> We note here - and as is evident in our detailed discussion of the individual districts below -- that the districts that were most difficult to analyze and categorize were Benchmark 25 and Proposed 15. As discussed, our final conclusion, after very careful analysis of all pertinent factors, is that Benchmark 25 is a safe district and Proposed 15 is a coalitional district. When categorized in this way, we find the retrogression described above. However, there is a similarity in one aspect of the election results analyzed in Benchmark 25 and Proposed 15 - in both districts the minority voters' candidate of choice in statewide elections is receiving a similar margin of victory. This factor would argue that both districts should be categorized the same - either as safe districts or as coalitional.

Viewed in this manner, the proposed plan nonetheless would still be retrogressive under prong one of the Georgia decision. If both Benchmark 25 and Proposed 15 are viewed as safe districts, there would be a reduction of safe black districts from four (18, 30, 24, and 25) to three (18, 30 and 9). The number of Hispanic safe districts would remain the same (creation of Proposed 25 would offset the loss of Benchmark 23). There would be no loss or gain of coalitional districts for either group. If both districts are viewed as coalitional, there would be a net loss of a safe Hispanic seat (loss of Benchmark 23 and 15, offset only by Proposed 25) and the addition of only one coalitional district (Proposed 15). For blacks there would be no net loss of safe black seats (18, 30 and 24 under the benchmark as opposed to 18, 30 and 9 under the proposed plan); but there would be a loss of a coalitional seat (Benchmark 25 would not be replaced).

<sup>24/</sup> Our review of the evidence presented by the state with respect to other "safe" districts leads us to believe that districts 16, 18, 20, 27, 28, and 30 elect candidates of choice in both the benchmark and proposed plans.



minority voters. In sum, it appears each of the prong 2 factors weighs against the proposed plan and supports the conclusion that the proposed plan is retrogressive.

Finally in part (c), we examine prong 3 of the totality of circumstances analysis -- the feasibility of non-retrogressive alternative plans. This factor also supports a conclusion that the plan is retrogressive.

a. The First Prong: Safe and coalitional districts

Benchmark 24/Proposed 24: Benchmark 24 in the Dallas-Fort Worth metropolitan area is a "safe" minority ability district. The combined black and Hispanic VAP is 54.6 percent; combined black and Hispanic citizen VAP is 46.3 percent. Proposed 24 is fractured into six districts, none of which provide minority voters with the ability to elect their candidate of choice. Proposed 26 has the highest minority population of these six districts, with black and Hispanic VAP of 27.4 percent and black and Hispanic citizen VAP of 23.5 percent.

We begin with the Balderas litigation, which created the benchmark plan. In examining Rep. Frost's district, as it existed in 2000, the court determined it was not one of the eight required to be protected under the Voting Rights Act. However, the court did determine that Rep. Frost was the dean of the Texas delegation and, given the powerful positions he held in Washington, believed it was important to provide him with a district in which he could reasonably get re-elected. Therefore, the court altered the 1996 plan, increased both the black and Hispanic voting populations in the district, and took out Anglo population that tended to vote Republican.

The state claims that no minority group is large enough to control the Democratic primary in Benchmark 24. Exh. D at 8. However, the state concedes in its submission that "a district with a Black plurality and a Democratic Party majority will typically be winnable for a serious Black candidate." Ibid. (citing Dr. John Alford). The status of Benchmark 24 rests, then, on whether blacks constitute at least a plurality of the electorate in the Democratic primary.

Evidence from all sources indicates that blacks currently constitute a majority of the electorate in the Democratic primary in Benchmark 24. Black voters generally vote cohesively and therefore, can elect the candidate of their choice in the primary. Anglo crossover voting allows black candidates of choice to win consistently in the general election. All experts,

including one retained by the state, agree that black voters control the Democratic primary and can elect their candidate of choice.<sup>25</sup>

The state's evidence does not support its claim that blacks do not constitute at least a plurality of voters in the Democratic primary. Indeed, the election data it provided us suggest a contrary result, with minority-preferred candidates winning exogenous elections in Benchmark 24 voting precincts and losing the same elections under Proposed 24. These data also show that the only time Rep. Frost faced a minority challenger in the general election, he was the overwhelming choice of the minority community. The relevant regressions provided by the state indicate that in the 2002 general election, 52.6 percent of the vote for the winning incumbent Frost came from black voters.

Our regression analysis shows, contrary to the state's claim, that black voters do constitute a majority of the electorate in the Democratic primary.<sup>26</sup> Because the state admits that voting is racially polarized and that Anglos crossover to vote with minorities in the general election to allow the Democratic nominees to prevail, minority electoral ability in District 24 depends upon whether black voters control the Democratic primary. The available information uniformly demonstrates that they do. All other experts addressing the issue agree that black voters currently control the primary election in Benchmark 24 and, therefore, determine the winner of the general election.

Our estimates showed that black voters likely constitute at least 66 percent of the voters in the Democratic primary elections analyzed, and currently can control the Democratic primary and elect their candidate of choice. Regression estimates for the 2002 primary elections show minority voters

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<sup>25</sup> "Blacks do control the primary in [benchmark] District 24 and the candidate of choice usually prevails." Testimony of Dr. Keith Gaddie to the Senate Committee on Jurisprudence, (July 22, 2003). In recent deposition testimony, Dr. Gaddie reaffirmed that "District 24 was a district where minority voters were in control of the Democratic party primary." Deposition of Dr. Keith Gaddie, (Nov. 22, 2003) [Gaddie dep.] at 16. Gaddie also admits that there is no occasion where black voters' candidate of choice has lost in the general election in Benchmark 24. *Id.* at 39.

<sup>26</sup> Due to low Anglo voter turnout in primaries, low Hispanic turnout in general elections, and a limited range of percentages of Hispanic population across precincts, our regressions combined black and Hispanic populations. Within the minority vote in the Democratic primaries, population and turnout levels clearly showed that blacks constituted a majority of voters.

clearly in control of election outcomes. Black voters are cohesive in each election.

We also analyzed primary elections from earlier years such as the 1996 Democratic primary and runoff for Texas House of Representatives District 90, and the 1998 Democratic primary for Texas Attorney General. Where black voters are cohesive, they control the primary.<sup>27/</sup> In general, we find that black voters are cohesive in the primary, and they can control the election results. In endogenous general elections between 1992 and 2002, our regression analysis showed that virtually all minorities who cast ballots in those elections voted for Rep. Frost. Likewise, in exogenous general elections, the estimate of minority support for minority-preferred candidates within Benchmark 24 is 100 percent.

In addition to the election data, all other available evidence indicates that Rep. Frost is the minority communities' candidate of choice in Benchmark 24. Minority leaders state that he is their preferred candidate and that, if some day he were to fall into disfavor, blacks have the power to elect someone else. The "scorecards" of minority groups give him exceptionally high marks, providing some indication of his responsiveness to minority concerns. Two influential Republican legislators, Rep. Phil King (A), a member of both the House redistricting committee and the conference committee, and Sen. Bill Ratliff (A), recall concerns expressed during the redistricting process for the preservation of the ability that Benchmark 24 provided to minority voters to elect a candidate of choice.

Both the final house and senate-passed plans were non-retrogressive alternatives.<sup>28/</sup>

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<sup>27/</sup> The 1998 Democratic primary for attorney general was between Kelly (A), Mattox (A), and Overstreet (B). The black candidate did not enjoy the overwhelming support of the black community, failing to win a majority of the black vote in neighboring majority-minority District 30. The 1996 Democratic primary in District 90 was between Brooks (B), Burnam (A), Deleon (H), Hernandez (H), Hernandez (H), Ramirez (H), and Zapata (H).

<sup>28/</sup> The plans passed by the house and senate and sent to the conference committee restored black voting age population to benchmark levels; the final plan lowered black population to the level criticized in earlier plans:

Benchmark (24 (1151C)	21.4%
Plan 1268C (House passed plan):	21.9%
Plan 1362C (Senate passed plan):	21.7%
Plan 1180C (early House Comm. plan):	10.4%
Proposed 24 (1374C):	9.3%

Benchmark 25/Proposed 9: The state has redrawn Benchmark 25, in the southern portion of the City of Houston, renumbered it as Proposed 9, and presents it as an additional safe seat for black voters. However, Benchmark 25 appears to be a safe minority district where minority voters have the ability to elect candidates of choice. The black VAP in Proposed 9 increases that in Benchmark 25 from 22 percent to 36.5 percent, the black citizen VAP increases from 26.1 percent to 46.9 percent, and combined black and Hispanic citizen VAP increases from 44.3 percent to 63 percent. But, because our analysis leads to a conclusion that Benchmark 25 already is a district where it is highly likely for black voters to elect their candidate of choice, Proposed 9 merely enhances that ability and there is no gain. If one assumes that black voters are not "highly likely," but only "likely," to elect a candidate of choice in Benchmark 25, then there is a gain from a coalitional seat to a safe seat in the Houston area.

Evidence from all sources indicates that blacks currently constitute a majority of the electorate in the Democratic primary for Benchmark 25. The black voters usually vote cohesively and therefore, can elect the candidate of their choice in the primary. Anglo crossover voting allows for the black candidate of choice to win consistently in the 2002 general election and in prior elections. Experts for both sides in the pending litigation against proposed redistricting plan in court, agree that blacks have the ability to control the Democratic primary, but they did not do so in the 2002 primary race for Congress.

As before, our review starts from creation of Benchmark 25 in the Balderas litigation. The court, in devising the district, made it safer for Democrats and for the black candidates of choice when it redrew it in 2001. Although the court did not find the existing district a "safe" district, it did find that minority voters basically could elect their candidates of choice in the primary. The court held that "in the practical world, this percentage [52.3 combined Hispanic and African American] will dominate the Democratic primary in a district that has consistently elected a Democratic congressman. This is, then, in a real sense, a minority district produced by our process that enhances the elective prospects of a minority, albeit not wholly the district sought." Balderas, at 14.

The state makes the same argument that it made with regard to Benchmark 24 to support its claim that Benchmark 25 does not perform. It says that in 1991, the district was drawn to ensure that the black and Hispanic voters would split their vote in the primary and an Anglo would be elected. The state claims that the

factors of no single minority community being capable of dominating the Democratic primary and the lack of cohesiveness of black and Hispanic voters in the primary continue to exist in Benchmark 25. As a result, black and Hispanic candidates of choice cannot win.

The state's evidence does not support this claim. To the contrary, its regressions show that during the 2002 Democratic primary, black voters accounted for 58 percent of those who voted and 67 percent of the runoff electorate.<sup>22/</sup> Thus, black voters in Benchmark 25 are already able to control the primary, largely because the Anglo and Asian voters are overwhelmingly Republican. During that 2002 Democratic primary election, Anglos accounted for 42 percent of the voters. From 1996-2002, black voters comprised a majority of the Democratic primary with a mean of 55 percent. Dr. Gaddie found that in the 2002 Democratic primary for the congressional seat, black voters accounted for a majority of voters. Hispanic voters, moreover, constitute no more than five percent of the Democratic primary or runoff, rendering any alleged split between black and Hispanic voters irrelevant.

Moreover, in most instances, the black majority electorate exhibits a high level of cohesiveness. Dr. Gaddie states that black voters are generally cohesive. Gaddie dep. at 35. The state's regressions also demonstrate that black voters are cohesive in their voting patterns. It appears that black voters often vote together at a rate that is nearly 100 percent. The anecdotal information that we received from both black and Anglo contacts supports the claim that black voters are highly cohesive in their voting patterns in Benchmark 25.

We analyzed nine statewide primary and general election contests in 2002 in which we reviewed the results for precincts in Benchmark 25/Proposed 9. Our analysis determined that black voters are "often very cohesive" in Benchmark 25 and can elect most candidates of choice. Minority voters are able to impact election outcomes despite racial polarization.

While agreeing that black voters are cohesive, the state appropriately notes that black voters did not elect their candidate of choice in the 2002 Democratic Primary. Thus, the state questions whether black voters can elect their candidate of choice in Benchmark 25.

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<sup>22/</sup> The state's regressions show that in the 2002 Democratic Primary race between Bell and Robinson, Anglos accounted for 42% of the voters and black voters were 58% of the electorate.

In 2002, Benchmark 25 was an open seat. Chris Bell (A) faced Carroll Robinson (B), and Robinson won a majority of the black vote in the primary.<sup>24</sup> Unlike most other elections we examined in connection with this and other submissions, the analyses conducted by various experts present somewhat differing views of voter behavior in this election. The range of estimates of black voter support for Bell is from 32.5 to 37 percent while the range is greater for Robinson, 51 to 62.4 percent.<sup>25</sup>

There are two inherent problems with the state's regressions. The state does a uni-variate regression rather than a multi-variate regression, which erroneously separates multiple variables, i.e., Anglos, Hispanics and African Americans. By not setting estimates of under zero percent or over one-hundred percent at the bounds, the state's regressions also greatly overestimate votes for candidates.

In this case, using the state's regression estimates, Bell received 31.4 percent of the vote, but in actuality he received 35.0. Likewise, the state's regression estimated the vote of Robinson at 31.2 percent, while in actuality he received 26.5 percent of the vote. If you correct the state's error by using a simple mathematical equation, Bell's black support would now be 36.8 percent, and Robinson's support would be 53 percent.

Our review of both analyses is that, based on the percentages of actual vote, Dr. Lichtman's statistics are probably the closest to being accurate. There are, however, some notes of concern about the reliability of the regression. There is an "other" category of VAP with 30,000 voters. Lichtman ignores this group, believing them to be Asian and more likely to

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<sup>24</sup> Rep. Bell's deposition testimony regarding the 2002 Democratic primary is consistent with the views that he expressed to us at the meeting. He considers himself to be the candidate of choice of the African American community because he received a "significant percentage" of the black vote. Bell Dep., December 6, 2003 at 13-18.

<sup>25</sup> The table below shows the percentage breakdown of the black vote:

	State	Lichtman	Justice
Bell	33%	37%	32.5%
Robinson	62.4%	51%	58%

vote Republican and not in the Democratic primary.<sup>12/</sup> While this could make a difference of a few percentage points, it would not change the result. The outcome is roughly the same.

There was a run-off in 2002 between Bell and Robinson. Inexplicably, the state does not run this regression. Black voters provided Bell with 31 percent of the vote and Robinson with 69 percent of the vote.<sup>13/</sup>

The anecdotal information that we obtained as part our investigation provides some context. The most significant backdrop to the election was a feud between Robinson, who like Bell was an at-large member of the Houston City Council, and Houston Mayor Lee Brown (B). A consequence of this dispute was that Mayor Brown and several other black elected officials supported and campaigned for Bell over Robinson. This resulted in what most persons familiar with politics in the Houston area called an uncharacteristic split in the black community. Bell obtained the support of the mayor, a black state senator, a black state representative, and a black county commissioner. He used this support to win enough of the black vote to carry the election. State Senator John Lindsay (W) said that it has been his electoral experience that black voters in the Houston area are at least 95 percent cohesive. State Senators Tommy Williams (W) and Kyle Janek (W), also of the general Houston area and both of whom support the redistricting in the legislature, confirmed that black voters are typically very cohesive.

Also noteworthy in Proposed 25's electoral history is Rep. Kent Bentsen (W), who represented the benchmark district prior to Rep. Bell. He received overwhelming black support when he ran as shown in the results of the 1998 congressional race. This same evidence of black support is evident in the 2002 senatorial Democratic primary, where Bentsen had higher black support than Ron Kirk (B), the popular former Dallas Mayor. Bentsen's support

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<sup>12/</sup> According to the Chair of the Vietnamese Advisory Committee of Harris County, Michael Nguyen, while Asian voters do not tend to have strong political party preferences, most vote Republican. They overwhelmingly support white candidates over Hispanic or African American candidates. Thus, it seems appropriate to discount the Other/Asian populations from regressions done on Democratic primaries, as Dr. Lichtman did.

<sup>13/</sup> More than likely our estimate of more than 75 percent support for Robinson is inflated because if Robinson did receive that level of support, he should have received a bigger share of the actual votes. It is likely that the black voters were more split than the regression data suggests and black support for him may be less than indicated.

was estimated at 53 percent, where Kirk received 43 percent of the vote.

We found that a black candidate in the 1994 congressional race was initially the preference of black voters over Bentsen. The estimate for white turnout rate for the 1994 election, however, is significantly higher than for the other primary contests the Department reviewed in Benchmark 25. The results from 1994 in general appeared to raise a question about whether black voters back in 1994 could elect their candidates of choice. We determined that this could be attributed to the possibility that the racial composition of the precincts in the district were different from today and that there likely were many more black voters in later contests.

The 2002 election cycle is the most probative to examine in Benchmark 25, not only because it is the most recent, but also because it is the only one using the benchmark configuration. Equally as important to our analysis is that the 2002 general elections have four black-Anglo races whereas the earlier general elections had none. Because the analysis of Benchmark 25 seeks to examine the differences in black voter performance, elections with a significant number of black and Anglo candidates prove the most relevant.<sup>12</sup>

The state also suggests that Benchmark 25 is not a protected district because it has an Anglo representative. This is contrary to the views of Dr. Gaddie, who has testified that the loss of Benchmark 25 must be offset in the proposed plan. Gaddie at 19-20; 34-36. State Representative and redistricting bill sponsor Phil King (A) also stated during his deposition that even if an Anglo is elected, a district can still be considered a majority minority district. Deposition of Phil King (Nov. 23, 2003: [King dep.] at 53-54. In fact, he counted Benchmark 25 as a minority district. *Id.* at 16, 97. State Senator John Lindsay, a Republican who voted in favor of the plan, told us that Anglo elected officials such as Bell are fully capable of representing minority communities. Since he has been in office, Congressman Bell has had the support of the black community. The Texas NAACP gives him a high score, and minority-elected federal and local officials contend that the Congressman is doing an excellent job of responding to the needs of the black community.

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<sup>12</sup> In 1998, the black voters' candidates of choice lost some close contests. The state analyzed Anglo-Hispanic races, which are not as probative in the instance of Benchmark 25/Proposed 9 as are Anglo-black races.



With the black CVAP increasing 20.8 percent in Proposed 9, it would appear that it is a more effective district. According to the state's expert report, Proposed 9 will be controlled by African American voters, and will elect their candidate of choice. Expert Report of Ronald Keith Gaddie (Nov. 21, 2003) at 13. His figures show that when the Democratic primary in 2002 was rerun using the demographics for Proposed 9, black voters made up 97 percent of the turnout. Dr. Gaddie admits that the state's reaggregated results show the same black-preferred candidates win in Benchmark 25 and Proposed 9, with one exception from 1998. He cites the increase in black voter turnout as the reason that Proposed 9 will be a "certain" performer for black voters' candidates of choice. When asked what would happen if we disregarded voter turnout, Dr. Gaddie told the Department that the turnout factor cannot be disregarded. He explained his results are predicated on turnout.

Our analysis also concluded that proposed 9 is a stronger district. Whereas Benchmark 25 is a Democratic district with minority cohesion and sufficient white support to elect minority-preferred candidates, Proposed 9 would be a very safe, majority minority district where minority-preferred candidates of choice are likely to win by very wide margins. In the configuration of precincts comprising Proposed 9, the minority-preferred Democrats all win, and, usually, by a very wide margin, up to 15 points. There is no doubt that the proposed district is a very safe majority minority district.

We also determined that Proposed 9 is comprised of a black population that appears to turn out at higher rates than the black population in Benchmark 25. In Proposed 9, there are no homogeneous white precincts, and the white voters appear to turnout at a lower rate than do white voters in Benchmark 25 and at a lower rate than black voters in Proposed 9. The consequence of this is that black voters clearly are in control.

In sum, Benchmark 25 is a district where minority voters have an ability to elect; it is simply weaker than the very safe Proposed 9. The difference is one of degree of ability to elect rather than of kind or character. In fact, it appears that Proposed 9 is much stronger than it needs to be to provide minority voters with the ability to elect.

Benchmark 23/Proposed 23: Hispanic voters in Benchmark 23, located in 25 counties mostly located along the border from El Paso to Webb County and including a portion of San Antonio, will lose the ability to elect their candidates of choice in the proposed plan. The Hispanic citizen VAP decreases from 57.4

percent to 45.8 percent, and the SSRV decreases from 55.3 percent to 44.0 percent. The extreme polarized voting that occurs in Benchmark 23, when combined with the fact that Anglo voters comprise a majority of the electorate in the new district, will mean that Hispanic voters will not be able to elect their candidate of choice.

Benchmark 23 currently affords Hispanic voters the ability to elect a candidate of choice. The court in Balderas determined that the precursor to the benchmark district here was one of eight majority minority districts from the 1990s plan that was protected under the Voting Rights Act. Moreover, the state in its original submission, all of the experts, and every person or group who provided comments, agree that Benchmark 23 is a district where Hispanic voters can elect their candidate of choice.

The state contends that Rep. Bonilla is the Hispanic voters' candidate of choice, and because he will be able to be elected in the proposed district, there is no loss of a Hispanic district. For support, it cites one expert's conclusion in the Balderas trial that in one election in the 1990s, Bonilla received "up to" 40 percent of the Hispanic support.

However, our review of the state's evidence does not support this claim. For example, in the 2002 election, which is the only election for which the state did a regression analysis, it estimates that Rep. Bonilla won 6.6 percent of the Hispanic vote and 90.5 percent of the Anglo vote. Further, Dr. Gaddie is of the view that Rep. Bonilla is not the Hispanic voter candidate of choice. Gaddie Dep. at 43.

As a part of our analysis, we conducted regressions for every congressional race since 1994, finding that Rep. Bonilla has never been the choice of the Hispanic community. Further, the level of electoral support that he receives from the Hispanic community has declined from 24.9 percent in 1996 to 18.8 percent in 2000 and then dropped to 3.5 percent in 2002.<sup>25</sup>

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<sup>25</sup> Rep. Bonilla won the 2002 election by only a few thousand votes, and that voting was extremely polarized. Our analysis of voter turnout in the 2002 races showed that Hispanic voter turnout by itself was not sufficient to elect candidates of choice in any general election. The state's regressions show that Hispanic voters accounted for 41.3 to 44% of the electorate (depending on the election reviewed), Anglo voters accounted for 51.1 to 54% of the electorate, and black voters ranged from 4.4 to 4.8% of the total voters. In contrast, Hispanic voters account for more than 90% of the electorate in the Democratic primary.

(continued...)

We found that in almost every election in 2002, black voters are cohesive with Hispanic voters, and Anglo voters provided enough crossover voting to elect the Hispanic candidate of choice in the general election; the exception being the congressional contest. Similarly, the state analyzed 15 statewide races for 2002 in their regressions under both the benchmark and proposed districts. Under Benchmark 23, candidates who are Hispanic voters' candidates of choice win 13 of 15 races. Gaddie Dep. at 128-129. The state's expert admits that Hispanic voters can elect their candidate of choice in Benchmark 23. Gaddie dep. at 129-131. Likewise, our analysis along with that of Dr. Lichtman and Dr. Engstrom all conclude that Benchmark 23 provides Hispanic voters the ability to elect their candidates of choice.

We discussed Benchmark 23 with Dr. Gaddie, who repeated his previous statements that Hispanic voters can elect a candidate of choice in the district. He says that, with the exception of the congressional race, the results in 2002 show the district really does perform for Hispanic voters. He believes, however, that Benchmark 23 is a weaker performer than the Proposed 25.

Dr. Lichtman asserts that only Rep. Bonilla's incumbency is allowing him to win in Benchmark 23 and even that will not be able to keep him in the seat in 2004. He points to the trend showing that an increasing number of Hispanics are registering to vote and more Hispanic registrants are going to the polls and voting. On average there has been an increase in Spanish-surname registrants of one percent per year in the district, which, in his view, means that Rep. Bonilla will be even more vulnerable in 2004.<sup>36/</sup>

The state has provided updated Spanish-surname registration information for this year. This confirms that as of the end of September 2003, Spanish-surname registration increased from 55.3 percent to 56.2 percent in the district.<sup>37/</sup>

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<sup>35/</sup> (...continued)

<sup>36/</sup> Our review of election behavior in Benchmark 23 also shows a continuing rise in Hispanic voter turnout. In the 1998 general election, Hispanic voter turnout ranged between 33.7 and 36.3% in the races we reviewed.

<sup>37/</sup> There also is an increase in Spanish-surname registered voters in the precincts comprised by Proposed 23 from 44.0 to 44.6%. The increase is not as high as in Benchmark 23 because a large portion of Webb County has been split out of it.

As previously noted, all persons and groups who commented believe that Benchmark 23 provides Hispanic voters with the ability to elect a candidate of choice. Minority and Anglo legislators alike say that, in Benchmark 23, Hispanic voters control who wins the race, and one must be a Hispanic candidate in order to win the district. No Anglo candidate has won when running in a primary since 1990. Elections for municipal, county, and state offices show that Hispanic-preferred candidates dominate most of the populous areas with the exception of the northwest portion of San Antonio. Moreover, comments from both minority and Anglo legislators suggest that if this were an open seat, it is reasonably certain that a Hispanic Democrat would be elected.

Anecdotal evidence also suggests that Cuellar, the Hispanic Democrat who ran against Bonilla in 2002, ran a polarizing race, exacerbating the racial polarization in voting behavior. Both Anglo and Hispanic commentators expressed no surprise that the election results showed that Cuellar did not do as well as the average Hispanic Democrat in attracting crossover Anglo votes. If Cuellar had attracted the average crossover vote, he would have been elected in Benchmark 23.

MALDEF and LULAC agree that Benchmark 23 is a majority Hispanic district, which provides Hispanic voters with the ability to elect their candidate of choice. Nina Perales for MALDEF stated that Benchmark 23 only recently has allowed Hispanic voters to control who can be elected. She explained that the former incumbent, Rep. Bustamante, stated that he did not need as many Hispanic voters in his district because he felt he would be able to win. Thus, in 1991, the legislature decreased the number of Hispanic voters in the district. Following the redistricting, Rep. Bustamante was indicted and later sent to jail. These factors facilitated Henry Bonilla's successful challenge. Anglo voters have been happy with Rep. Bonilla's record, and he receives a strong incumbency boost from them. In the last several years, there has been significant growth in the Hispanic population, particularly in Webb County, which has allowed the district to become dominated by Hispanic voters again.

The state contends that Proposed 23 will allow Hispanic voters to elect their candidate of choice. The attorney for the state concedes that this position is based on the assumption that Rep. Bonilla is the candidate of choice, and the assumption that he can continue to be elected under the proposed plan means that Hispanic voters will be able to elect their candidate of choice. The state's regressions do not find that Hispanic voters can

otherwise elect their candidates of choice in the proposed district. Dr. Gaddie finds that under Proposed 23, candidates who are Hispanic voters' candidates of choice win zero of 15 races. Dr. Gaddie conceded at deposition that Hispanic voters will not be able to elect their candidate of choice in Proposed 23. Gaddie dep. at 129-131.

Rep. King has stated that because he believes Rep. Bonilla to be the Hispanic voters' choice, then Hispanics will be able to elect their candidate of choice in Proposed 23. In May, 2003, Dr. John Alford, in a memorandum and testimony before the Texas House, indicated that what the House was doing with a plan then under consideration and which did something similar to what the proposed plan does to south Texas, was "moving a Hispanic incumbent, who can presumably win in a non-Hispanic district, to allow a new Hispanic representative to be elected . . . . The focus in other words, is on the ethnicity of the Representative, not the ethnicity of the voters and their ability to elect candidates of choice - the test under the Voting Rights Act." Memorandum from John Alford to Senator Barrientos, (May 8, 2003) at 6-7.

LULAC notes that even if Rep. Bonilla could be considered the candidate of choice, he is likely to lose the Republican primary. Few Hispanic voters vote in the Republican primary and without the perception that the candidate in Proposed 23 needs to be Hispanic, Anglo candidates will feel comfortable in opposing Rep. Bonilla. LULAC also pointed to a popular Hispanic incumbent on the Texas Supreme Court, Xavier Rodriguez, who would have lost to an Anglo in the precincts comprising Proposed 23 despite the support of all of the elected Republican officials in the state. LULAC and Anglo leaders agree that once Rep. Bonilla retires or leaves, the Republican candidate will be an Anglo.

Our regressions show very few Hispanic voters casting ballots in the Republican primary. While it is possible that the power of incumbency may allow Bonilla to win, it seems relatively certain that polarized voting would prevent another Hispanic Republican from winning in the Republican primary in Proposed 23.

We have also considered whether Benchmark 23 should be classified as a coalitional district based on some close general election results in minority versus Anglo races in 2002. Election results for the precincts located in Benchmark 23 show that Kirk (B) (D) won with 53.2 percent of the vote, Sanchez (H) (D) won with 54.3 percent, Yanez (H) (D) won with 55.5 percent, and Mirabal (H) (D) won with 56.8 percent. These numbers are similar to the numbers in Proposed 15, thus leading to a

suggestion that District 23 should be classified as a coalitional district.

However, when considering all the information we have gathered, we do not believe that is a proper categorization of Benchmark 23. As explained above, there is a perception by all Hispanic and Anglo persons who commented or were contacted that Benchmark 23 is a majority Hispanic seat, and the candidates need to be Hispanic. Candidates in Benchmark 23 must appeal to and win some of the Hispanic vote to be elected. This perception has been true even back in the mid 1990s when the statewide races showed Anglo Republicans winning in Benchmark 23.

One reason for this perception is that Hispanic candidates have done very well in local races in Benchmark 23 as a whole, and in particular in the two areas that have most of Benchmark 23's population. In San Antonio, elections have been dominated by Hispanic candidates in large portions of the city (some in Benchmark 23) beginning in the 1990s. Seven of the ten council members now are Hispanic. Hispanic participation has increased significantly and has been increasing since the city instituted single member districts. All of the office holders in Webb are Hispanic. As the population in the county has exploded, there also has been an increase in the county's desire to use its clout to elect regional candidates.

The numbers in the election results in statewide races do not take into account the reality that Benchmark 23 has been viewed as a majority Hispanic district, and changing the demographics so significantly will alter that view. Benchmark 23 should be classified as a safe seat.

Benchmark 15/Proposed 15: This district, whose population is anchored in Hidalgo county and the Valley, changes from a "safe" district under the benchmark plan, where Hispanic voters are "highly likely" to elect their candidate of choice, to a coalitional seat where Hispanic voters are "likely, although perhaps not quite as likely," to elect their candidate of choice. The proposed district runs over 300 miles to central Texas. In Proposed 15, the Hispanic citizen VAP drops from 69.3 percent to 53.5 percent under the proposed plan and the SSRV level drops from 65.5 percent to 56.7 percent. When combined with the high levels of racially polarized voting occurring in the district, this reduction is apt to result in Hispanic voters being less likely to elect a candidate of choice even though the district remains over 50 percent SSRV.

The Balderas court identified the 1996 district as one in which Hispanic voters had the ability to elect candidates of choice and drew what is now Benchmark 15 to preserve that ability. The state agrees with this assessment. Likewise, every expert who has reviewed Benchmark 15 agrees that Hispanic voters are electing their candidates of choice.

Proposed 15 is a dramatic change in the district's character. Forty percent of its former population is moved out of the district, and the district no longer appears centered in the Valley. The population moved into Proposed 15 is from five predominantly Anglo counties to the north in central Texas - Bastrop, Lavaca, Fayette, Colorado, and De Witt. These counties consist largely of Anglos who turn out to vote at higher rates than the rest of the population of the proposed district. The state's analysis shows that turnout in these counties ranges from 50.5 percent to 56 percent for the 2002 election. Moreover, high turnout Hispanic portions of Benchmark 15 have been selectively gerrymandered out of the district by splitting the City of McAllen and taking portions of Hidalgo County, with odd configurations that pick up higher turnout Hispanic areas. These precincts are placed in Proposed 25.

Some lower turnout Hispanic areas also appear to be deliberately gerrymandered into Proposed 15. For example, the plan uses an elongated finger to add the Town of Indio to Proposed 15. Indio is an unincorporated town with a substantial Hispanic population, which according to elected officials from the Valley, is extremely poor and has very low voter turnout. Proposed 15 includes the City of Harlingen, which has a much lower Hispanic population. Several sources describe Harlingen as "the Anchor of Anglo wealth and power" in Cameron County and in the Valley. Alternative plans are available where the decreases in Hispanic citizen VAP and SSR in proposed 15 are unnecessary. For example, neither the final house or senate plans caused this type of a decrease.

These changes will exacerbate the difference in turnout rates between Hispanic and Anglo voters in the new district in the general election. According to the state's regressions in the 2002 general election, Hispanic voters comprised between 52.5 percent to 56.8 percent of the actual voters in Benchmark 15 for the statewide elections (Hinojosa had no opposition in the election). Hispanic voters composition of the electorate drops to between 37.5 percent to 39.1 percent for these same elections in the Proposed 15.

The contrast is just as stark when you look at the 1998 elections. Hispanic voters comprised between 44.9 percent to 47.5 percent of the actual voters in Benchmark 15 for the statewide elections. In Proposed 15, Hispanic composition drops to between 28.0 percent to 30.7 percent. Our analysis found similar numbers for 1996-2002.

The experts' regressions also show significant polarized voting in the statewide elections in Anglo versus Hispanic races. In Proposed 15, the state's regressions estimate that between 75 percent and 79 percent of Anglo voters supported the Anglo candidate. Our analysis showed similar levels of polarization.

Overall, the state's expert concludes that there is just enough Anglo crossover vote to elect Hispanic candidates of choice. Dr. Gaddie notes that Hispanic voters are able to elect candidates of choice in five of six general elections between Hispanic and Anglo candidates in Proposed 15.<sup>18'</sup>

During his deposition, Dr. Gaddie acknowledged that Proposed 15 could be characterized as a district that has "changed" from "one in which Hispanics have unilateral control in the general elections (sic) to one in which they have to count on coalitions of others in order to have their candidate of choice elected." Gaddie dep. at 47. Dr. Gaddie also acknowledged that the percentage of the Hispanic electorate in Proposed 15 drops by more than ten percentage points; consequently, he asserts, Hispanic voters now constitute less than 50 percent of the persons actually voting in Proposed 15.<sup>19'</sup>

After analyzing 15 races, including statewide races, in Benchmark 15 as well as Proposed 15, we have concluded that Hispanic candidates of choice probably would have been elected in most races for both districts. However, given the drop in Hispanic voters, margins are much lower and electing Hispanic candidates of choice is less likely in Proposed 15. The levels of racial polarization, coupled with the differences in participation rates between Hispanic and Anglo voters in the proposed district, shift the balance more than the simple reduction in Hispanic registration would indicate. As a result of the changes, Hispanic voters will no longer have the advantage of being the majority of the actual voter turnout, and are likely to be only 40 percent or less of the turn out. As additional evidence of the changed electoral dynamics of the district,

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<sup>18'</sup> Gaddie rep. at 8.

<sup>19'</sup> Id. at 119-120.



Hidalgo County Republican Chairman Hollis Rutledge has stated that the GOP has a "fighting chance" of winning Proposed 15.

This concern regarding the change in the character of Proposed 15 is noted both by Dr. Lichtman and Dr. Polinard, LULAC's expert. Dr. Polinard concludes that Proposed 15 does not operate as a secure district for Hispanic voters. Deposition of Dr. Polinard at 119-20.

The state has highlighted the position of MALDEF and its expert, Dr. Engstrom, who maintain that Proposed 15 remains a safe seat. In her meeting with us, Nina Perales stated that MALDEF believes that the district provides an opportunity for Hispanic voters to elect the candidate of their choice. MALDEF's expert also finds that Proposed 15 elects Hispanic candidates of choice in seven out of the seven races he reviews, and at his deposition, he says the district allows Hispanic voters an ability to elect candidates of choice. In a subsequent telephone call, Perales said that she stood by everything she told us, but she said she wanted to make sure that we knew that MALDEF was not weighing in on whether Proposed 15 was a safe district, only that it appeared to be a district where Hispanic voters had an equal opportunity to elect candidates of choice.

The shift in the composition of the electorate in Proposed 15 also has an effect on the district's political index. The state's submission shows that Proposed 15 has a Republican Index of 44.3 in 2002 and 49.8 in 2000. By comparison, Benchmark 15's Republican Index is 38.3 in 2002 and 46.0 in 2000.

The loss of significant numbers of Hispanic registered voters in what have been relatively high Hispanic turnout areas in Benchmark 15 raises issues similar to those that led to our decision to interpose an objection to District 38 in the proposed redistricting plan for the Texas House in 2001. There, we found that a decrease in the SSRV from 70.8 to 60.7 percent, where much of the reduction was in areas of high Hispanic turnout, violated Section 5 standards. Past election history in this area had shown that the same configuration had been used in the previous decade and Anglo candidates continuously defeated Hispanic candidates because of the low Hispanic turnout. District 38, represented by Jim Solis, is part of Proposed 15. What happens to District 15 here is similar to what led to our objection to House District 38. High performing Hispanic areas are removed from the benchmark district, and even though the proposed district remains significantly above 50% Hispanic CVAP, the ability of Hispanic voters to elect their candidate of choice is

put in question because those Hispanic voters remaining turn out in lower numbers.<sup>40</sup>

As a result of the reduction of the SSRV, the high levels of racially polarized voting, and the significant differences in turnout and political party preferences between Hispanic and Anglo voters, Hispanic voters are less likely to control the general election in Proposed 15. The district decreases from safe to coalitional.

As discussed above with respect to District 23, we have considered the view that Proposed 15 should be considered a safe district because the exogenous statewide elections show a margin of victory that is the same or slightly higher than those in Benchmark 23.<sup>41</sup> Our concerns about the changes in the district's composition, polarized voting, and turnout differentials have caused us to reject this view.

Proposed 15 has geographic tension where the voters from the north will be pitted against those in the Valley. While Anglo voters in the north may be willing to cross over to vote for Hispanic candidates in statewide elections, we have our concerns that this will happen in the context of this district. The voters are in a different region with different interests. Voters will want a congressman from their area, not from an area 300 miles away. Of course, the small number of Anglo voters in Hidalgo also may feel the same way and be more likely to crossover to elect a candidate from their area.

There is a large turnout differential between those voters in the north and those in the Valley. Sixty percent of benchmark 15 remains in Proposed 15, and these Hispanic voters turned out at a rate of only 34.5 percent in 2002. Newly added Hispanic and Anglo voters in Cameron County appear to have a little higher turnout at 38 percent. The predominantly Anglo counties turn out

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<sup>40</sup> As we have indicated in previous memoranda on this subject, we believe that the level of participation within an electorate is a mandatory component of any analysis of that electorate's voting behavior. In addition, in the pending litigation involving this plan, there is evidence concerning the causes of the depressed turnout in the Valley. Experts have testified and submitted reports regarding the significant economic and educational differences between Anglos and Hispanics, and a two-hundred year history of discrimination against Hispanics in Texas and its negative impact on the ability of Hispanics to participate effectively in the electoral process.

<sup>41</sup> We have also considered whether Proposed 15 should be considered a safe district because the margin of victory in the 2002 general election results in District 25 are similar to those in Proposed 15. As noted above, we consider District 25 to be a safe district.

at a rate of about 52 percent. Overall, Hispanic voters' turnout rate ranged from 37 to 39 percent of the electorate in the Proposed 15. While it is possible that turnout rates in Hidalgo could dramatically increase, nothing in past election behavior would suggest a dramatic jump up.

The Hispanic voters in this district must depend on Anglo crossover voting with the low Hispanic turnout. Our analysis of Proposed 15 has revealed that the rate of general election Anglo crossover voting would be higher in the northern counties than in the Valley. A number of these predominantly Anglo counties do not appear to have any Hispanic elected officials even though Hispanic population in the counties ranges from 19 to 27 percent<sup>42/</sup>. Similarly, Anglo voters may be less likely to vote for a Hispanic congressman in an open seat where geographic proximity of the candidate matters. Traditional Anglo Democratic voters in the north also could be more likely to vote for the "northern candidate", and this is critical where the Republican and Democratic indices have split 50/50 in presidential election years. Even so, the number of actual voters (Hispanic and Anglo) is greater in the Valley than in these northern areas, which is why we believe the Hispanic candidate from the Valley will be more likely to be elected. Therefore, in Proposed 15 it appears "likely", although not "highly likely," that the Hispanic voters' candidate of choice will be elected in Proposed 15.

Proposed 25: Proposed 25, a newly created, 320 mile long, district that goes from Austin to the Mexican border, is probably a safe district in which it is "highly likely" that Hispanics will be able to elect a candidate of their choice. Proposed 25 has a Hispanic citizen VAP of 64.6 percent, and SSR of 55.6 percent. There are two population centers in the district - the Austin area and Hidalgo County in the Valley. Proposed 25's political performance index is highly Democratic, meaning that the Democratic primary will control who is elected in the district.

In its submission, the state notes that in no other congressional district in Texas that has had a Spanish-surname registration rate as high, have minorities failed to elect their candidate of choice. As further support, the state includes regressions that show that in the 2002 statewide Democratic primaries and statewide general election, Hispanic candidates of choice prevailed in five of six primaries, and all fifteen

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<sup>42/</sup> A review of county officials in Bastrop, Fayette, De Witt, and Colorado counties showed no Hispanic elected officials. In Lavaca County, there is one Hispanic constable and one Hispanic official in a JP district.

general elections.<sup>13/</sup> Moreover, the state's regressions show that between 70 and 75 percent of the voters in the primary elections are Hispanic.

Whether the statistical evidence means anything is unclear. Anecdotal information suggests that traditional statistical methods will have difficulty taking into account the geographic tension that will arise when Austin is pitted against the Valley. The overriding influence in the election may be that voters want a representative from their area and not one based 300 miles away. The geographic tension could sublimate racial preferences.<sup>14/</sup>

There is a scenario in which an Hispanic candidate of choice will not win in the Democratic primary. The proposed district's geographic configuration may be such that either 1) Hispanic voters from the Valley and Austin areas end up pitted against each other, splitting their votes for multiple Hispanic candidates in the Democratic Primary and allowing Anglo voters to decide the primary winner; or 2) a well-financed Anglo candidate will overwhelm a severely underfunded Hispanic candidate to win the Democratic primary.

The reality of the situation here may be the second scenario. Lloyd Doggett, the incumbent in Benchmark 10 from Austin, has announced he is running in Proposed 25. Kino Flores, a representative from the Valley, had also announced he was going to run in this district. On December 3, Flores announced that he decided not to run in Proposed 25 because he could not raise sufficient funds to compete in the five media markets that cover the district.

Even though Proposed 25 is an open seat, it is difficult to conceive of a scenario where Rep. Doggett (with \$2.5 million allegedly in his reelection account) would not defeat an Hispanic-preferred candidate in the Valley. Rep. Doggett currently attracts a sizeable Hispanic vote from the Austin area as well as virtually all of the non-Hispanic vote in the Austin portion of the proposed district.

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<sup>13/</sup> The only primary race in which the Hispanic candidate of choice lost was for the office of Railroad Commissioner, in which the Hispanic vote was almost evenly split among two candidates (race unknown), 53% to 46%.

<sup>14/</sup> Dr. Lichtman and Dr. Polinard make this argument and believe there is a good possibility that in Proposed 25, Hispanic voters will not have the ability to elect their candidate of choice.

It is also possible that a well-known Hispanic incumbent can and will run in that area and gain the support of the majority Hispanic voting population in the Democratic primary. For example, State Senator Barrientos, also from Austin, has not said whether he will run in the new congressional district.

Ultimately, our goal is to determine whether the seat itself presents an ability for Hispanic voters to elect their candidate of choice. Rep. Doggett is an incumbent, even though he is the current representative for only 38 percent of the district.<sup>45/</sup> If Doggett were to choose not to run tomorrow for whatever reason, this race likely would be considered wide open, and a Hispanic candidate like Senator Barrientos would be favored to win.

Even though the most likely scenario is that Rep. Doggett, the Anglo candidate, will win, we think that presents a unique circumstance. We do not have sufficient evidence to show that Hispanic candidates do not have adequate funds to run for proposed 25. Recent electoral history shows that there are Hispanic candidates that can raise significant sums of money.<sup>46/</sup>

The initial scenario raised above, that voters in the northern parts (the Austin area) of Proposed 25 will have higher turnout than the Hispanic voters in the Valley, seems unlikely. We conducted regression analyses to determine whether in Democratic primaries the voters in the urban area of Travis County included in Proposed 25 would submerge the voting preferences of voters in Hidalgo County, which is about 75

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<sup>45/</sup> Of course, the possibility exists that Lloyd Doggett could be the Hispanic candidate of choice in the Proposed 25 primary election if he runs. State Senator Hinojosa has admitted as much. Moreover, as set forth in our discussion of Benchmark 10, both MALDEF and LULAC view Rep. Doggett as the Hispanic candidate of choice in that district. LULAC states in its comment letter that Rep. Doggett has been "extremely responsive to the interests and concerns of minority voters." Indeed, Hispanic organization and NAACP "report cards" give him high marks for his votes on issues important to their constituencies. On the other hand, we have heard anecdotal testimony that while Doggett is the candidate of choice in Austin, he likely would not be the candidate of choice 300 miles away in Hidalgo County.

<sup>46/</sup> For example, in the 2000 election for Congressional District 5, Hispanic Democrat Regina Montoya Coggins was able to raise enough money to almost equal the amount spent by incumbent Pete Sessions (Montoya - \$1.64 million; Sessions - \$1.83 million). Similarly, incumbent Henry Bonilla in 2000 and 2002 was able to raise millions in outspending his opponents by an almost 3 to 1 margin. In his race against Henry Cuellar in 2002, Rep. Bonilla spent over \$2.4 million to defeat Cuellar, who spent the not so paltry amount of \$875,000. Even running unopposed in 2002, incumbent Hispanic Congressmen Reyes in District 16 and Gonzalez from District 20 were able to raise enough money to spend, respectively, \$413,000 and \$633,000.

percent Hispanic. We examined results from eight Democratic primaries for the Travis, Hidalgo, and Starr County<sup>17</sup> precincts in Proposed 25. First, we determined that, in general, voting in those areas tends to be polarized along racial lines. Second, our analysis showed that, in three of the elections, the candidate who would have won in Travis was different from the winning candidate in the other two counties. However, totaling over all three counties, the prevailing candidate was the same candidate who won in Hidalgo. Of significance, in each contest, there were more votes cast in Hidalgo than in Travis county, even though the total population is higher in Travis. The data indicates that while rolloff may be higher in Hidalgo County, voters in Hidalgo County turn out for the primaries at a higher rate than those in Travis so that the resulting number of voters is greater. Our analysis shows that ten Starr precincts are nearly 95 percent Hispanic and their voting behavior parallels that of precincts in Hidalgo County.<sup>18</sup>

Given these findings from past elections, we concluded that Austin voter preferences would not overshadow Hidalgo voter preferences if patterns of turnout and voter support retain the same characteristics. It is possible that voter turnout in Austin has been lower given the unofficial slating process that may occur with black, Hispanic, and Anglo leaders, and this could change when there is something at stake in the primary. It would appear, however, that the Austin Anglo vote simply will not be numerous enough to outvote the Valley because it appears that Hispanic voters in the Austin area just do not turn out in sufficient numbers.<sup>19</sup>

Thus, while Proposed 25 does give us some concern, it appears that the best category for this district is a safe seat. Dr. Gaddie argues that Proposed 25 more than offsets the loss of benchmark 23 because Proposed 25 is a certain performer whereas

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<sup>17</sup> In addition to Travis and Hidalgo Counties, Starr County comprises a large part of Proposed 15 along with small parts of other counties. In the case of large differences in voting patterns between Travis and Hidalgo precincts, Starr precincts could serve to tip the balance in one direction or the other. Thus, we included Starr in this examination of election results.

<sup>18</sup> Our analysis indicates that the percent of total primary votes from Hidalgo and Starr counties for the eight elections examined was, with one slight 1996 exception, over 61%.

<sup>19</sup> It is possible that Anglo turnout in Austin could increase in the Democratic primary in order to assure the election of an Anglo candidate from the Austin area more responsive to that area's needs than a candidate from the Valley. But such speculation does not override what current data indicates about the voting performance of Proposed 25.

Benchmark 23 not only is not a certain performer, but it currently does not elect the Hispanic candidate of choice. Gaddie dep. at 113-14. But, it appears Proposed 25 is no more safe than Benchmark 23, because it is likely Doggett, the Anglo incumbent, will win Proposed 25. As the anecdotal evidence has pointed out, Doggett is the Hispanic candidate of choice in Austin, but there is a good chance he would not be in the Valley. If both seats were open, they both appear to be highly likely to elect the Hispanic voters' candidate of choice. Proposed 25 is an offset for Benchmark 23, but there is no corresponding offset for the loss of the safe seat in Benchmark 15.

Benchmark 29/Proposed 29: Benchmark 29, in the City of Houston, is a safe Hispanic district and will remain so under the proposed plan. The Hispanic citizen VAP increases under the proposed plan from 42.8 percent to 46.7 percent while the SSR increases from 39.8 percent to 45.9 percent. The black and Hispanic citizen VAP decreases from 63 percent to 60.3 percent. Under the benchmark plan, Hispanic voters control the electoral outcomes of the district's races, and elect their candidates of choice. The proposed plan does not enhance this already existing ability.

The state's claim that Benchmark 29 does not perform for Hispanic voters as it is currently configured is in direct opposition to its own regression figures, statements of a plan sponsor, and expert reports. According to Dr. John Alford, another one of the state's experts, Benchmark 29 is already one of the seven Hispanic districts under the benchmark plan. State's submission, Exhibit 7, Report of Dr. John Alford at 3. State Rep. Phil King (A), who sponsored the redistricting bill in the Texas House and led the House team in conference committee, said during his deposition that Benchmark 29 is already a majority minority district. King dep. at 16, 97. Dr. Gaddie said that Benchmark 29 performs for Hispanic voters and is thereby protected under the Voting Rights Act. Gaddie dep. at 17.

With regard to Benchmark 29, the state claims that 1) no one minority community would be capable of dominating the Democratic primary; and 2) Anglo candidates take advantage of polarized voting patterns to defeat a minority candidate of choice in the Democratic primary. These claims are refuted by the election data.

In Benchmark 29, Hispanic voters comprised 76 percent of the voters in the 2002 Democratic primary for the United States Senate race, and 88 percent of the voters for the governor's

race.<sup>51</sup> For the 2002 Democratic runoff for the U.S. Senate race, Hispanic voters accounted for 62 percent of the voters. For the 2002 Congressional Democratic primary, also under the benchmark plan, Hispanic voters were 89.1 percent of the voters, and voted 100 percent for Rep. Green. Hispanic voters control the Democratic primary as the district currently exists.

The anecdotal evidence we received from federal and local elected officials in the Houston area is consistent with this information. John Lindsay, an Anglo Republican state senator, has pointed to Rep. Green as an example of an Anglo able to represent minority communities. This view was echoed by other elected officials. Houston City council member Gabriel Vasquez noted that Green grew up in Hispanic neighborhoods, went to a Hispanic high school, knows the Hispanic culture, and is "basically Hispanic himself". His congressional website is one of few with a link to an all-Spanish version.

With the recrafting of Proposed 29, the state claims to have "enhanced" electoral opportunities for Hispanic voters. Such is not the case. Benchmark 29 actually performs better than Proposed 29. From 1996 to 2002, in five of six Hispanic versus Anglo Democratic primary or runoff elections, and in six of six general elections pitting a Hispanic Democrat against an Anglo Republican, the Hispanic candidate received a higher percentage of the vote in Benchmark 29.<sup>52</sup> Thus, while the state claims to have "enhanced" the Hispanic ability of the district, it has indeed done the opposite. Rep. Green also believes this to be the case because, while Hispanics are added to the plan, Proposed 29 also receives a high income Anglo area that has high turnout rates.

The state's intentional removal of the Anglo incumbent to increase the likelihood of a Hispanic representative is moot, as Rep. Green has announced that if the plan is approved, he will move back into Proposed 29. It is highly likely that as the Hispanic candidate of choice, and as a strong incumbent, he will run and win in the new seat. Even the state's expert witness, Dr. Gaddie, conceded during his deposition that Rep. Green would probably win in Proposed 29. Gaddie dep. at 68.

Thus, the information gathered from other sources, coupled with the State's own election analyses, shows that Benchmark 29

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<sup>51</sup> Ecological Regression Results, submitted by the state. (Nov. 24, 2003). Analysis of Statistical Findings Submitted to the United States Department of Justice by the State of Texas. Dr. Allan Lichtman, p. 3.

<sup>52</sup> Lichtman rep. at Table 37, p. 66.



is a Hispanic-controlled district, and will remain so under the new plan. The new plan will maintain, but not enhance, this safe Hispanic district.

b. The Second Prong: Equal opportunity to participate

i. Influence districts

Benchmark 10: The state's submission does not acknowledge Benchmark 10 as a district - either a safe, coalitional or influence district - which should play any role in the determination of minority voting strength. Dr. Gaddie indicates that the state does not view this district as falling within any of the categories set forth by the Supreme Court in Georgia as deserving of Section 5 protection.

According to Dr. Gaddie, Benchmark 10 is a Democratic district in which the overwhelming Anglo voting participation in both the Democratic primary and the general election dominates any substantial effect minority voting power might have on elections. The statistical analyses submitted by the state seems to bear this out, indicating that Anglo participation in the Democratic primary is around 70 percent since 1996 and that Anglo participation in the general elections since 1996 has been between 85 and 92 percent.

Our analysis of Benchmark 10 indicates that the state's submission presented an accurate picture of the voting patterns in the district. It is clear that the winners in the general election contests in the district are Democratic and that the majority of the support for these candidates is from white voters. Because minority voters in Benchmark 10 are predominantly Democrats and vote Democratic in general elections, minority-preferred candidates are being elected in general elections.

To get a better picture of minority voting strength in Benchmark 10, we analyzed several Democratic primary elections between 1996 and 2002. Comparing primarily Hispanic voter registration numbers against all other voters, we found that, while Hispanic voters provide overwhelming support to Hispanic candidates, they cannot control the primary. Hispanics in general did not vote for black candidates and a combined minority population in the district could not elect a candidate of choice against an Anglo candidate. In sum, Hispanic-preferred candidates won only when they were the preferred candidates of non-Hispanics, most of whom were white. Thus, although Benchmark 10 is a strong Democratic district, minority voters appeared to

have little impact on who is selected to run as Democratic candidate.

On the other side of the statistical analysis is the extensive anecdotal information we have gathered which paints Benchmark 10 as a district where minority voters can form a coalition with each other and with Anglo voters to elect a candidate of choice. As indicated above, the clear and consistent message from persons we have talked to is that Benchmark 10 is a unique district where coalitions have been formed and minority voters play an important part in the voting calculus for the district. Incumbent Rep. Lloyd Doggett is universally viewed as a candidate of choice of the minority community and statistical analysis bears this out. As has been commented on time and again, Rep. Doggett is more than willing to take the interests of his minority constituents into account. His responsiveness to such interests is and has been very high. In addition to receiving high marks from minority groups on his votes in Congress, comments we have received have been uniform that Rep. Doggett pays close attention to the needs of the minority communities in his district and acts accordingly.

In Georgia, the Supreme Court stated that, in making a Section 5 retrogression determination, "a court must examine whether a new plan adds or subtracts 'influence districts' - where minority voters may not be able to elect a candidate of choice, but can play a substantial, if not decisive, role in the electoral process." Georgia, 123 S. Ct. at 2512. The Court goes on to say that "[i]n assessing the comparative weight of these influence districts, it is important to consider 'the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account.'" Idid. (internal citation omitted).

Benchmark 10 appears to be the very type of district envisioned by the Court as an "influence" district. As our analysis demonstrates, the minority population in the district is not capable in and of itself of electing a candidate of choice. The black and Hispanic populations there, although totaling 39.2 percent VAP and 33.3 percent CVAP in the benchmark district, do not control the primary election separately or combined. Nevertheless, these populations vote almost unanimously for the incumbent white Democrat. With the combined Benchmark 10 minority population as high as it is, this vote contributes substantially to Doggett's ability to be elected. Minority influence appears to be reflected in Doggett's responsiveness to minority concerns. Moreover, unlike in the other alleged influence districts analyzed elsewhere, the Democratic

performance numbers for Benchmark 10 are and have been very high. This is one of the factors viewed as important by the Ashcroft Court in determining the influence of minority groups in a district.

In sum, although the minority population in Benchmark 10 does not appear able to alone elect candidates of choice or to control the primary elections, their substantial population numbers, coupled with the ability to form coalitions with other groups in the district, render them an influence in the district. Under the Georgia rubric, we would label this district as an influence district, albeit a weak one. As indicated above, the proposed plan effectively dismantles Benchmark 10 from a minority population and Democratic performance point of view, thus removing any minority influence Benchmark 10 possessed.

Benchmark 9: Benchmark District 9 appears to be a weak influence district. While it has been the contention of both the expert for the Congressional Democratic Interveners and numerous elected officials from federal to local levels that Benchmark 9 is a district in which African American voters exert a considerable amount of influence, the electoral analyses show only minimal support for this conclusion.

Although the state's submission is largely silent on Benchmark 9, it conducted electoral analyses on many congressional districts for 2002. The state's reports provide that black voters exert some varying form of electoral influence in Benchmark 9.<sup>52/</sup>

In our electoral analyses, we determined that black voters have minimal influence on elections in the district. They tend to turn out at rates higher than Anglos in Democratic primaries, and almost as high in general elections. However, many of the general elections were won by Republican candidates who clearly were not the preference of black voters. The state's estimate that black voters make up about 40 percent of the total voters in

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<sup>52/</sup> The state's regressions show that during the 2002 Democratic primary, Rep. Lampson received 100 percent of the black vote. He was elected with 59.3 percent of the vote. Black voters accounted for 41.0 percent of the votes during that congressional primary election, and 32.6 percent of the votes during that general election. Further regressions conducted by the state show that black voters accounted for 38.2 percent of the vote in the 2002 Democratic primary for United States Senate, and 38.3 percent of the votes cast for that election's gubernatorial races. Black voters cast 20.4 percent of the votes in that senate race, and 52.5 percent of that gubernatorial race.

most contests is reasonable.<sup>11</sup> Nevertheless, both approaches suggest higher black than white turnout, but unless that turnout were substantially higher, minority voters would remain the minority.

With regard to primary elections, although estimates suggest few Hispanic voters actually vote, as the state indicates in its tables, and as our analyses show, there is indication across contests that Hispanic voters support Hispanic candidates. Black voters, however, do not consistently support them. White voters were not cohesive behind any one candidate.

A quick look at outcomes for the general election contests in 2002 indicates that Republican candidates were the winners. Minority voters had little effect on the outcomes of those contests even though they overwhelmingly supported the Democratic candidates.

The incumbent in Benchmark 9, Nick Lampson, has had little minority opposition in recent years. In 1996, Sam (B) ran against him in a field of five. The analysis of the election indicates that Sam was not a preferred candidate. Black voters supported Lampson in that race.

Overall, the analysis of voting in Benchmark 9 suggests that in some elections, voting is polarized between black and Anglo voters when there are candidates of different races. Anglo voters appear to be in control of the Democratic primary and the general election. In only one contest, in which white voters were not cohesive, did minority voters seem to influence the election outcome. Thus, when minority-preferred candidates are elected, it is only because they are also the Anglo-preferred candidates.

When looking at the totality of circumstances in Benchmark 9, there are several important factors which cannot be ignored. First, the district's general characteristic is altered under the proposed plan. It changes from an 47.8 percent Democratic district to a 39.4 percent Democratic district using 2002 elections. Second, Anglo Democrats, who have formed coalitions with black voters, have been removed, and replaced with high performing Anglo Republicans. Therefore, the responsiveness of the district's incumbent to minority voters will change. Under the benchmark plan, the incumbent is very popular with black

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<sup>11</sup> We were was able to replicate these estimates using the state's turnout estimates. However, our estimates varied somewhat, yielding somewhat higher Anglo turnout rates.

voters, has consistently received their electoral support, and has received high marks from minority organizations. In fact, Rep. Lampson gets 100 percent black voter support. Under the proposed plan, it is highly likely that a Republican will be elected, and Republicans have not generally scored well in terms of being responsive to minority issues or concerns.

Benchmark 1, 2, 4, 11, and 17: These districts, located in rural east Texas and along the border with Louisiana, Arkansas, and Oklahoma, are represented by, respectively, Anglo Democrats Max Sandlin, Jim Turner, and Ralph Hall. Benchmark 11 is located in central to north central Texas and is represented by Chet Edwards, also an Anglo Democrat. Finally, Benchmark 17 is located in west to northwest Texas and is represented by white Democrat Charles Stenholm. The demographics indicate that in none of the benchmark districts are minority voters a significant presence. Under the proposed plan, each undergoes substantial changes both in its geography and in its voting population.

Analysis of election data dating back to 1992 indicates that the individual and combined minority group populations in these districts do not control the Democratic primary election. The election statistics over the past decade indicate a consistent theme - each of the districts has changed from majority or heavily Democratic to majority and increasingly heavily Republican. Weighted averages for statewide elections show this dramatic change away from a Democratic electorate. During that same time, the number and proportion of general election contests for statewide offices in each district won by Democrats has decreased significantly.

Analyses of these districts in light of Georgia and the above claims of minority voting influence all lead to the same result - each district is not a minority influence district. The information available to us does indicate that minority support for each of the white Democratic incumbents is overwhelming. However, while minorities may play a substantial role in electing these particular Democrats, it does not appear that the minority vote plays or can play a substantial role in electing any other candidate besides these popular incumbents. In other words, minorities have little influence on the overall electoral process in the districts, and incumbency, not the minority vote, is the decisive factor which puts minority preferred candidates "over the top." In fact, given the unmistakable trend in voting behavior change in each of these Districts over the past decade or so from Democratic to Republican, it is very possible that several of the incumbents, in particular Edwards and Stenholm, would not be reelected in their benchmark districts in 2004.

With regard to the standard imposed by Georgia, the purpose of our Section 5 analysis here is to judge the ability of minorities to influence election to an office as opposed to election of the current office holder. It appears highly likely that an election for an open seat in each of these districts would result in victory for the Republican candidate and not for the candidate of choice of the respective minority population. Thus, our conclusion must be that Benchmark 1, 2, 4, 11 and 17 are not influence districts and that any changes to these districts cannot have a retrogressive effect.

ii. Positions of leadership and influence of minority candidates of choice

To determine the extent of minority group opportunity to participate in the political process under Georgia v Ashcroft, in addition to looking at influence districts, the Court instructs us "to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts." Georgia at 2513. "The ability to exert more control over th[e legislative] process is at the core of exercising political power... Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under Section 5." Id.

In light of our analysis above, the submitted congressional plan would have a negative impact on positions of legislative leadership and influence of minority candidates of choice. Four of the five minority-preferred candidates who would lose their seat under the proposed plan have substantial seniority and experience in the House and serve on influential House Committees. Rep. Martin Frost (Dist. 24) is the senior Member of Congress from Texas, currently serving in his 13<sup>th</sup> term. He is the Ranking member of the influential House Rules Committee. Rep. Gene Green (Dist. 29) has served in the House since his election in 1992. He is a member of the Committee on Energy and Commerce, the Subcommittee on Health, the Subcommittee on Environment and Hazardous Materials, and the Subcommittee on Commerce, Trade and Consumer Protection. Rep. Lloyd Doggett (Dist. 10), was first elected to the House in 1994 and has served continuously since then. He is a member of the Committee on Ways and Means, the Health Subcommittee and the Select Revenue Measures Subcommittee. He is also a member of the Committee on Standards of Official Conduct. Rep. Nick Lampson (Dist. 9) is a four-term Member of Congress who serves on the Committee on Transportation and Infrastructure and the Committee on Science.

Anecdotal evidence shows that constituents in these districts believe there would be a significant loss because these members of Congress likely would lose their seats. Moreover, minority commentators have said that these members of Congress use their positions to support issues that are important to the minority community.

- iii. Whether minority legislators from majority minority districts support the plan

In Georgia v. Ashcroft, the Court said it was significant but not dispositive whether the representatives elected from the districts protected by the Voting Rights Act support the new redistricting plan. "The representatives of districts created to ensure continued minority participation in the political process have some knowledge about how voters will probably act and, whether the proposed change will decrease minority voters effective exercise of the electoral franchise." Id.

Given that this is a congressional redistricting, the exact circumstances that existed in Georgia do not exist here. Members of Congress do not vote on their own redistricting. However, of the Members of Congress that we talked to who currently represent a minority district, all ten opposed the proposed redistricting plan. We were unable to speak with Rep. Bonilla about Proposed 23.

The minority legislators that voted on this plan and reside in these same protected Congressional districts overwhelmingly opposed the redistricting plan. Of the 55 minority legislators in the state legislature, 53 voted against the plan. We talked to, met with or received comments from 30 of the 55 legislators, and 28 of 30 opposed the plan.

c. Prong 3: Non-retrogressive alternative plans

The third prong in the "totality of circumstances" retrogression test established in Georgia is the feasibility of creating a nonretrogressive plan. During the course of the redistricting process in 2003, there were several plans considered by both the house and senate that did not appear to retrogress from the level of minority voting strength in the benchmark plan. Indeed, the final plans passed by each body that went into conference committee - 1268C (House plan) and 1362C (Senate plan) - both maintained, in our view, the benchmark level of minority voting power, or were at the least considerably less retrogressive. The chart below demonstrates that the

retrogression caused by the loss of Districts 23 and 24 in the proposed plan do not occur in the House or Senate plans:

Comparison of Districts 9 (proposed), 10, 15, 23, 24, 25 (benchmark) in Final Senate Plan (1362), Final House Plan (1268), and the Proposed Plan 1374. Figures below are VAP and SSRV percentages.

	Senate 1362				House 1268				Proposed 1374			
	B	H	B+H	SSR	B	H	B+H	SSR	B	H	B+H	SSR
POB									8.0	63.4	71.1	55.6
10	10.5	28.9	39.2	18.7	10.6	29.3	39.5	19.1	9.0	16.8	25.7	9.1
15	1.8	74.3	75.9	67.0	1.6	77.3	78.8	71.2	3.3	64.0	67.1	56.7
23	3.1	61.4	64.3	55.0	1.8	63.0	64.6	55.3	1.9	50.9	52.7	44.0
24	21.7	33.5	54.9	18.0	21.9	35.5	57.1	19.9	9.3	15.8	24.9	8.8
POB-P9	22.7	32.5	54.7	16.0	36.0	30.7	66.1	13.9	36.5	30.3	66.2	13.7

The state's expert did a ranking of the alternative plans on the basis of which plans would be at the greatest and lowest risk of being rejected for violating the Voting Right Act. He concluded that the proposed plan was among the worst in risk for its potential to be rejected for a violation of the Voting Rights Act. Gaddie dep. at 102-104.

Jim Ellis, Executive Director of Americans for Republican Majority, produced memoranda and a chart at his deposition which states that the proposed plan carries some risk of meeting Section 5 standards. The three other plan options that were considered, including the house and senate configurations, ranged from "most certain to preclear" to "very minimal risk." Ellis' Memorandum on October 5, 2003, adds, "we need our map, which has been researched and vetted for months. The pre-clearance and political risks are the delegation's and we are willing to assume those risks, but only with our map."

Alternative plans that addressed all of the state's other criteria show that it was not necessary to reduce Hispanic citizen VAP or SSRV in Benchmark 15 or 23 as significantly as was done in the proposed plan. The plan passed by the house maintained the Hispanic citizen VAP and did not split Webb County. Contrary to the assertion that splitting Webb County was unavoidable in order to create Proposed 25, a new majority Hispanic district, we have drawn a plan that keeps Webb County



whole and keeps the same Hispanic citizen VAP as in Benchmark 23 while preserving Proposed 25.

It does not appear possible to add an extra majority Hispanic district and to also maintain the Hispanic citizen VAP in Proposed 15. The most that can be done is to maintain Proposed 25, while restoring Hispanic CVAP to the benchmark level in Proposed 23. It is not also possible to raise the Hispanic CVAP in Proposed 15 to its benchmark level.

Likewise, alternative plans that addressed all of the state's other criteria demonstrate that it was not necessary to eliminate the electoral ability in Benchmark 24. Both the final house and senate-passed plans maintained that district. In addition, our illustrative plan, a least-change plan based on the proposed plan which makes changes to a minimum number of districts, restores the district to a "safe" level of minority voting opportunity and results in a level of minority voting strength under the proposed approximately equal to the benchmark. See Tab 8.

### III. DISCUSSION

Section 5 requires the Attorney General to determine that the submitted change affecting voting does not have the purpose or effect of denying or abridging the right to vote on account of race. 42 U.S.C. 1973c. A voting change has a discriminatory effect under Section 5 if it will lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

#### A. Retrogressive effect

An assessment of retrogressive effect must consider the "totality of the circumstances." Georgia v. Ashcroft, 123 S. Ct. 2498, 2511 (2003). These include "the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." Ibid. The analysis progresses sequentially. First, it calculates whether there has been any change in the number of districts in which minority voters can elect candidates of their choice. Id. at 2511-2512. Two types of districts count toward the total: (1) "'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice," and (2) "districts in which it is likely -- although perhaps not quite as likely as under the benchmark plan -- that minority voters will be able to elect candidates of their choice." Id. at

2511. Section 5 permits jurisdictions to create a greater number of the "less-likely" districts to offset the loss of a "safe" district. Ibid.

The inquiry then moves to determine whether there has been any alteration in "the minority group's opportunity to participate in the political process." The relevant factors here are (1) changes in the number of "'influence districts'-- where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process[;]" (2) differences in "the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts[;]" and (3) "whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan." Ibid.

The burden is on the jurisdiction to show the changes are not discriminatory. Reno v. Bossier Parish School Board, 528 U.S. 320, 329 (2000). The State of Texas has not met its burden in showing that the proposed congressional redistricting plan does not have a discriminatory effect.

The state notes that under Georgia v. Ashcroft, it may choose to either protect "safe" districts or increase influence and coalitional districts. The state says it has increased "safe" or ability to elect districts by either two or three when comparing the proposed plan to the benchmark, although its submission does not explicitly choose one method or the other outlined by Georgia.

With regard to the first step in the analysis, the state argues, in part, that the proposed plan adds three safe seats when it reconfigured Benchmark 24, 25, and 29, replacing them with proposed 9 and 29. It claims the Anglo incumbents in these district have not "faced a credible minority candidate in the Democratic primary, results which indicate support from the minority community are not indicative of whether any of these incumbents are candidate of choice of any of the minority communities." Exh. D at 9. The submission does not elaborate on this point, citing only to Collins v. City of Norfolk, 816 F.2d 932 (4th Cir. 1987), without a page reference. That case discusses a different scenario whereby ballots were marked for multiple candidates in at-large elections and the minority vote for certain white candidates did not necessarily indicate a

minority preference.<sup>54/</sup> That case is inapposite to the situation here. The evidence for Benchmark 24 and 25 show black voters control the primary and in Benchmark 29, there is Hispanic voter control of the primary. In all three districts, the minority candidates of choice prevail in the general election. Under these facts, an unopposed incumbent would more likely be evidence of minority support rather than minority helplessness.

The state has failed to meet its burden of demonstrating that it will maintain the level of voting strength for black voters and continue to provide them with the same ability to elect the candidates of their choice as they enjoyed under the benchmark plan. There are either four safe or ability to elect districts in the benchmark or three safe seats and one coalitional seat. In the proposed there are only three safe seats.

In Benchmark 24, black voters currently have the ability to elect their candidate of choice, and both anecdotal and statistical evidence suggest that Rep. Frost is the black candidate of choice. The state admits that the minority community in Benchmark 24 is splintered and submerged into majority Anglo districts in the Dallas-Fort Worth area in the proposed plan. This is a loss of a "safe" or ability to elect seat.

The state has failed to make up for this loss elsewhere in the proposed plan. While Proposed 9 increases the level of black population when compared to Benchmark 25, this only has made a safe seat for black voters safer. Even if one finds that Benchmark 25 was only "likely" to elect black candidates of choice and the enhancement in Proposed 9 makes it "highly likely" that black voters will elect a candidate of choice, the state still has not met its burden because if Proposed 9 acts as an offset to the loss of Benchmark 24 as the replacement of a highly likely district, then it has failed to offset the loss of

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<sup>54/</sup> The court noted that

[t]he mere election of a candidate who appears to have received votes from more than fifty percent of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred by a significantly higher percentage of the minority community, who were defeated in the same election, then it cannot fairly be said that the minority community has successfully elected representatives of its choice.

Id. at 937.

a Benchmark 25, a district that is "likely" to elect black candidates of choice.

The state's expert attempts to resolve this problem by suggesting that the loss in Benchmark 24 and 25 can be offset solely by the creation of the safe seat in proposed District 9. The expert views Proposed 9 as "certain" to elect while Benchmark 24 is "less than certain" to elect and Benchmark 25 is less likely to elect than Benchmark 24.

This approach finds no support in the case law. Georgia v. Ashcroft does not create a category for "certain." The court only creates categories of "highly likely" and "likely." 123 S. Ct. at 2311. The Court suggests only that a state may create a greater number of "likely" districts to offset the loss in "highly likely" districts. Ibid. The Court does not suggest that the creation of one district that is "highly likely" to elect a minority candidate of choice will offset the loss of two benchmark districts that are highly likely to elect minority candidates of choice. Similarly, the creation of one "highly likely" district would not offset the loss of one "highly likely" district and another "likely" district.

We also find that the state has failed to sustain its burden to show that it will maintain districts where Hispanic voters previously elected their candidates of choice. There are seven safe or ability to elect seats in the benchmark. There are six safe seats and one coalitional seat in the proposed.

There is classic retrogression in the benchmark District 23. The district loses 12 percentage points to go from majority Hispanic to a majority Anglo district. With the extreme level of polarization in the district, Hispanic voters simply no longer have any ability to elect their candidate of choice.

It has been suggested that the recent elections should not be used here because the Hispanic turnout skews higher in this election with Sanchez running for Governor in 2002. First, recent elections are more probative of racial voting patterns. See, e.g., Uno v. City of Holyoke, 72 F.3d 973, 990 (1st Cir. 1995) ("elections that provide insights into past history are less probative than those that mirror the current political reality"); LULAC v. Clements, 999 F.2d 831, 891 (5th Cir. 1993) (requiring "practical and searching appraisal" of current voting situation). Second, given the trend showing an increase in voter turnout here, there is no basis to claim that the people who are voting here will fail to vote in the future. The trend shows

that there has been a greater participation for Hispanic voters in recent elections.

We also find a loss of a Hispanic safe seat in Proposed 15. While it is still "likely" that Hispanic voters can elect their candidate of choice, it does not appear "highly likely."

The proposed plan offsets one of the losses with the addition of a safe district in Proposed 25. The geographic tension in this district between Austin and the Valley likely will split Hispanic voters where they will have a candidate of choice in Austin and a different one in the Valley. Even so, it appears that a Hispanic-preferred candidate would prevail in an open seat. The reality of this seat is that it likely will elect the current Anglo incumbent in Benchmark 10, who likely would be the Hispanic candidate of choice in the Austin area but not in the Valley.

In sum, the proposed plan reduces the level of minority voting strength because it eliminates the ability that minority voters have in Benchmark 15, 23, and 24 to elect candidates of choice. In each of these districts, the state failed to follow its traditional redistricting principles preserving communities of interest and forbidding fragmentation or packing of minority voters. The proposed plan offsets only one of these losses with a creation of a new safe seat in Proposed 25 and adds an enhanced, but not a different, ability in Proposed 9 than was available in Benchmark 25. As a result, the level of minority strength has been retrogressed. Even if one assumes that Proposed 9 results in a change in kind or character rather than only of degree, the proposed plan still drops minority voting strength by two districts.

Finally, alternative plans passed by the senate and House maintained the current levels of minority voting strength and did not pack any majority minority district or split it into multiple Anglo majority districts. United Jewish Organizations of Williamsburg v. Carey, 430 U.S. 144, 158-59 (1977). These non-retrogressive alternatives comply with the state's redistricting principles. As such, the plan does not pass scrutiny under Section 5 because it has a retrogressive effect. Beer v. United States, supra.

#### B. Intent

The principle evidence of retrogressive intent alleged by opponents of the plan is (1) the awareness of legislators, particularly in the conference committee, that the proposed plan

would have a retrogressive effect; (2) the denial of minority access to the legislative process; (3) the availability of less retrogressive alternatives; and (4) remarks considered racist.

Under normal circumstances, these facts, if true, would constitute strong evidence of retrogressive purpose. On each, the state has presented contrary evidence to refute these claims. As discussed above, the State claims that the proposed plan provides more, not fewer, minority ability districts, that the legislative process permitted extraordinary opportunities for minorities and others to comment and participate, and that alleged racist remarks were never made or harmless when viewed in context.

The greater obstacle to proving retrogressive intent, however, is that both proponents and opponents of the plan appear to agree that the main objective in redistricting was to increase substantially the number of Texas congressional seats held by Republicans. Even minority leaders opposed to the redistricting plan recognize that partisan gain drove the redistricting process and its result, at times consciously overriding other considerations.

Accordingly, the most opponents could prove by their intent evidence was that the state sacrificed compliance with Section 5 in its attempt to advance partisan goals. Though many alternative plans were available, which would have benefitted minorities more than the proposed plan, we have found no alternative plan which would have secured the exact same partisan advantage as the proposed plan while giving more benefit to minorities. Under these circumstances, we do not believe there is sufficient evidence to preclude the state from meeting its burden that its intent was not retrogressive.

#### IV. RELATED FILE

House Bill 1 provides for changes in candidate qualifying for congressional races, changes to the primary dates, procedures for canvassing the ballot, and the late counting of certain ballots. We will issue a no determination to the two changes that depend on the redistricting - 1) temporary changes to candidate qualifying for congressional seats; and 2) temporary change to the primary election date. The remainder of the changes have been analyzed in File No. 2003-3917, and those changes will be precleared.

#### V. RECOMMENDATION

For the reasons set forth above, we recommend that you interpose an objection to H.B. 3, which provides for the redistricting of the congressional districts in Texas and make a no determination on House Bill 1 for those matters that depend on the redistricting.

AGREE:

DISAGREE:

COMMENTS:

I concur in the recommendation to object.

This is the Division's first review which has required careful consideration of the new Section 5 standard set by Georgia v. Ashcroft and application of the standard to a statewide redistricting plan. The decision now requires us to apply a three-prong "totality of circumstances" test, a test that raises several issues of first impression. Our review indicates that the factors identified as relevant to each prong of the totality of circumstances test demonstrates that the plan is retrogressive.

As discussed in the memo, the first prong of the test to a large extent incorporates the traditional principles of retrogression that we have applied for many years and are set forth in Department regulations and a guidance memorandum, i.e. whether on a statewide basis the plan maintains or decreases districts in which minority voters have the ability to elect their candidates of choice. This inquiry into comparative ability to elect candidates of choice is no longer "dispositive or exclusive," but remains very important to the inquiry. The Georgia decision's discussion of the first prong adds a new element to this aspect of the analysis by creating two types of districts to be considered - "safe" districts which are "highly likely" to elect minority voters' candidates of choice and what we have termed as "coalitional" districts where "it is likely - although perhaps not quite as likely as under the benchmark plan - that minority voters will be able to elect candidates of their choice." The Court speaks of giving states a choice between these two approaches, but in the end a comparison of both categories of districts in the benchmark and proposed plans is required under the first prong of the totality test, and a determination then must be made as to whether the net result of this comparison is a maintenance (or increase) in minority voting strength, or in a reduction of such strength.

Our analysis has focused on this prong and has been intense and careful. Some districts raised especially difficult categorization issues - particularly benchmark 25 and proposed 15. But, in the end we concluded there was a net reduction of one "safe" Hispanic seat and one "safe" black seat, offset only by a net increase in one "coalitional" Hispanic seat. This result quite plainly indicates a reduction in minority voting strength. Even if we consider the difficult districts as falling into different categories, we still see a net reduction in minority voting strength, albeit not as great as in our final analytical conclusion. The state's argument that it has increased minority voting strength by three simply does not stand up under careful analysis and is based on an analytical approach different than what the Georgia decision identifies as the pertinent inquiry - identifying and comparing districts under the respective plans according to whether minority voters maintain their ability to elect their candidates of choice. Indeed, the state expert's discussion of the plan appears to be inconsistent with the state's analytical approach in the submission. In sum, the first prong of the new standard indicates the plan is retrogressive.

The second prong of the totality of circumstances test requires a review of three factors: (1) "whether a new plan adds or subtracts 'influence districts' - where minority voters may not be able to elect a candidate of choice, but can play a substantial, if not decisive, role in the electoral process;" (2) "the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts;" and (3) whether the representatives elected from the districts protected by the Voting Rights Act support the new redistricting plan. All three factors indicate the plan is retrogressive. First, although we disagree with arguments of opponents of the plan that it reduces the number of influence districts by seven, we do conclude that there is a loss of two influence districts. The fracturing and elimination of District 10 - the district we conclude is most akin to the Georgia decision's definition of an influence district - is particularly noteworthy. The state made no arguments whatsoever concerning the existence, or lack of influence districts. Thus, it essentially ignored this factor. Second, the loss of several safe, coalitional, or influence minority districts will reduce the legislative influence for representatives of the benchmark majority-minority districts. This is especially evident in the fracturing and elimination of District 24, thus ensuring that the senior member of the Texas congressional delegation and ranking member of the House Rules Committee, and a candidate of choice of minority voters, will not be re-elected. Third, the overwhelming



opposition of the minority legislators who voted on the plan - 53 of 55 of such members - is especially stark. This opposition is almost the flipside of the situation the court examined in Georgia, where the overwhelming support of minority legislators for the plan should be considered an important factor weighing against a determination of retrogression. As with influence districts, the state made no contentions with respect to either of these factors.

Finally, the third prong of the totality of circumstances test presents compelling evidence that the plan is retrogressive. Not only are non-retrogressive alternatives to the proposed plan feasible, but two of these alternatives were the very plans that were passed by the House and Senate. These plans were essentially scrapped in the conference committee that produced the plan eventually adopted. The plan adopted in committee made substantial changes to the House and Senate plans, changes that resulted in a significant part of the retrogression that we have found. For instance, the House and Senate plans left Districts 24 and 10 essentially unchanged when compared to the benchmark plan; but the committee plan completely fractures and eliminates each of them. Similarly, Districts 23 and 15 remain essentially the same under the House and Senate plans as under the benchmark plan. Offsetting this is only new District 25 which was not included in either the House or Senate plans. The evidence shows an awareness of the possibility and risk of creating a retrogressive plan in abandoning the House and Senate plans and adopting the committee plan. One of the important participants in the conference committee negotiations which led to the final plan, as well as the state's expert, have testified that the final plan ran a far higher risk of being retrogressive than either the House or Senate plan. Yet, even in face of these concerns it was adopted.

APPROVE:

DISAPPROVE:

COMMENTS: