

**MEMORANDUM****July 13, 2011**

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This memorandum sets forth our opinions and advice concerning Section 2 of the federal Voting Rights Act of 1965 (“Section 2”) and its implications for the Latino population in Los Angeles County. This memorandum further responds to issues raised concerning how Section 2 impacts the map-drawing process with respect to portions of Los Angeles County where Latino populations are adjacent to non-Latino populations, including in the South and Southwest areas of Los Angeles County in particular.

As explained further below, Section 2 likely requires that the Commission create several Latino-majority districts in Los Angeles County in order to avoid dilution of Latinos’ effective and equal participation in the electoral process. In other words, if the Commission does *not* create several Latino-majority districts in Los Angeles County, a court might find that the Commission’s maps have resulted in Latinos having less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice, in violation of Section 2.<sup>1</sup> This is also particularly the case in the South and Southwest regions of Los Angeles County, as described in more detail below.

To the extent the Commission chooses, for whatever reason, not to draw certain Latino-majority districts in Los Angeles County (including in the South and Southwest regions), the Commission should nevertheless avoid placing a substantial Latino population in a district where racially polarized voting would usually operate to defeat the ability of Latinos to elect candidates of their choice, if an alternative configuration exists that would avoid that outcome.

**I. ANALYSIS OF LOS ANGELES COUNTY,  
LATINOS, AND SECTION 2**

Pursuant to the Commission’s request, we analyzed whether Latinos in Los Angeles County may have a potential claim under Section 2 in the event certain Latino-majority districts are not drawn. We have determined that, if the Commission does not create several Latino-majority districts in Los Angeles County, Latinos may have a colorable claim that the Commission’s maps violate Section 2.

**A. Legal Framework: Section 2 of the Voting Rights Act.**

Congress enacted Section 2 in an effort to combat minority vote dilution. Section 2 provides that no “standard, practice, or procedure shall be imposed or applied ... in a manner which results in a denial or abridgement of the right ... to vote on account of race or color”

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<sup>1</sup> The precise locations where these districts should be drawn is beyond the scope of this memorandum.

or membership in a language minority group. 42 U.S.C. §§ 1973(a), 1973b(f)(2). A violation of Section 2 “is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b).

In 1982, Congress clarified that Section 2 plaintiffs need not prove that “a contested electoral mechanism was *intentionally* adopted or maintained by state officials for a discriminatory purpose.” *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (emphasis added). Rather, a “violation [can] be proved by showing discriminatory *effect* alone.” *Id.* (emphasis added). In other words, following the 1982 amendments, a violation of Section 2 can be established where “a contested electoral practice or structure *results* in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.* at 44 (emphasis added).

The United States Supreme Court has invoked Section 2 to strike down legislative redistricting plans that result in minority vote dilution as defined by Section 2. *See generally League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (“*LULAC*”).

The Supreme Court has established a number of elements that a plaintiff must prove to establish that a redistricting plan violates Section 2. Initially, a Section 2 plaintiff must satisfy the three so-called “*Gingles* preconditions” articulated by the Court in *Gingles*. *See Growe v. Emison*, 507 U.S. 25, 37-42 (1993). The *Gingles* preconditions are as follows:

“First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.” *Gingles*, 478 U.S. at 50.<sup>2</sup>

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<sup>2</sup> A minority group is sufficiently large only where “the minority population in the potential election district is greater than 50 percent.” *Bartlett v. Strickland*, 129 S. Ct. 1231, 1246 (2009). Although the Supreme Court has not expressly defined the proper measure of “minority population,” the Ninth Circuit Court of Appeals has endorsed the use of citizen voting age population (“CVAP”) statistics. *See Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989) (“The district court was correct in holding that *eligible minority voter population*, rather than total minority population, is the appropriate measure of geographical compactness.” (emphasis added)), abrogated on other grounds, *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990) (en banc); *see also LULAC*, 548 U.S. at 429 (observing, in dicta, that CVAP “fits

“Second, the minority group must be able to show that it is politically cohesive.” *Id.* at 51.

“Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority’s preferred candidate.” *Id.*<sup>3</sup>

The second and third *Gingles* preconditions are often referred to collectively as “racially polarized voting” and considered together. Courts first assess whether a politically cohesive minority group exists, *i.e.*, “a significant number of minority group members vote for the same candidates.” *Id.* at 56. Then, courts look for legally significant majority bloc voting, *i.e.*, a pattern in which the majority’s “bloc vote ... normally will defeat the combined strength of minority support plus [majority] ‘crossover votes.’” *Id.* This analysis typically requires expert testimony. *See, e.g., id.* at 53-74 (considering expert testimony regarding minority group’s lack of success in past elections).

A plaintiff who establishes all three *Gingles* preconditions has not yet established that a challenged district violates Section 2. Instead, once the *Gingles* preconditions have been shown, a court must then consider whether, “based on the ‘totality of the circumstances,’ minorities have been denied an ‘equal opportunity’ to ‘participate in the political process and to elect representatives of their choice.’” *Abrams v. Johnson*, 521 U.S. 74, 90 (1997) (quoting 42 U.S.C. § 1973(b)).

The following is a non-exhaustive list of factors (the so-called “Senate Report Factors,” based on the Senate Report accompanying the 1982 amendments to Section 2) that courts use to determine whether, based on the totality of circumstances, a Section 2 violation exists:

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the language of § 2 because only eligible voters affect a group’s opportunity to elect candidates”).

<sup>3</sup> The “majority” does not actually have to be white (as opposed to some other racial group), or even comprised of a single racial group, in order to satisfy the third *Gingles* precondition. *See Gomez v. City of Watsonville*, 863 F.2d 1407, 1417 (9th Cir. 1988) (“Although the court did not separately find that Anglo bloc voting occurs, it is clear that the non-Hispanic majority in Watsonville usually votes sufficiently as a bloc to defeat the minority votes plus any crossover votes.”); *Meek v. Metropolitan Dade County, Fla.*, 805 F. Supp. 967, 976 & n.14 (S.D. Fla. 1992) (“In order to prove the third prong in *Gingles*, Black Plaintiffs must be able to demonstrate that the Non-Black majority votes sufficiently as a bloc .... Non-Blacks refer to Hispanics and Non-Hispanic Whites.”), affirmed in part, reversed in part on other grounds by *Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471 (11th Cir. 1993).

1. “[W]hether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area.” *LULAC*, 548 U.S. at 426. “[T]he proper geographic scope for assessing proportionality is ... statewide.” *Id.* at 437.
2. “[T]he extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise participate in the democratic process.” *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, 97th Cong., 2nd Sess. at 28-29 (1982), U.S. Code Cong. & Admin. News 1982, at 177, 206-07)).
3. “[T]he extent to which voting in the elections of the state or political subdivision is racially polarized.” *Id.* at 37.
4. “[T]he extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.” *Id.*
5. “[I]f there is a candidate slating process, whether the members of the minority group have been denied access to the process.” *Id.*
6. “[W]hether political campaigns have been characterized by overt or subtle racial appeals.” *Id.*
7. “[T]he extent to which members of the minority group have been elected to public office in the jurisdiction.” *Id.*
8. “[W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group” *Id.*
9. “[W]hether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.” *Id.*

**B. First *Gingles* Precondition: Latinos in Los Angeles County Are a Sufficiently Large and Geographically Compact Minority Group.**

We have concluded that, as to a number of regions in Los Angeles County, Latinos comprise a sufficiently large and geographically compact group such that they could constitute a majority in a single-member district.

This was not a close call. With respect to the “sufficiently large” inquiry, the Latino CVAP population in Los Angeles County as a whole is approximately 1.8 million. The ideal size of an Assembly District is 465,674; the ideal size for a Senate District is 931,349; and the ideal size for a Congressional District is 702,905. Moreover, any suggestion that the Latino population in Los Angeles County is not “geographically compact,” especially in the South and Southwest regions of the county, would not be viable.<sup>4</sup> Accordingly, several Assembly, Senate, and Congressional Districts may be formed in which Latinos constitute a majority of the CVAP in a geographically compact area.

**C. Second and Third *Gingles* Preconditions: There is Significant Evidence of Racially Polarized Voting in Los Angeles County.**

We have concluded that racially polarized voting likely exists in Los Angeles County. The evidence we have reviewed indicates that a significant number of Latinos vote together for the same candidates, while non-Latinos vote in significant numbers for different candidates. Moreover, the evidence is sufficiently abundant that we believe it is reasonable to infer that a sophisticated plaintiff’s expert could develop evidence to persuade a court that the second and third *Gingles* preconditions have been met in Los Angeles County.

The Commission retained an expert with experience evaluating whether racially polarized voting exists, Professor Matt A. Barreto, Ph.D., of the University of Washington. The Commission instructed Dr. Barreto to work with counsel and to analyze certain areas of Los Angeles County, at our direction and under our supervision, to make a preliminary determination of whether racially polarized voting exists in Los Angeles County. Dr. Barreto has considered available information and has concluded that (i) strong evidence of political cohesiveness exists among Latinos and (ii) there is strong and substantial evidence of racially polarized voting throughout Los Angeles County.

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<sup>4</sup> Courts take a flexible approach to evaluating *Gingles* compactness. See *Sanchez v. City of Colorado*, 97 F.3d 1303, 1311 (10th Cir. 1996). A minority population may be “geographically compact” for *Gingles* purposes even if it is not strictly contiguous. That is, two non-contiguous minority populations “in reasonably close proximity” could form a “geographically compact” minority group if they “share similar interests” with each other. *LULAC*, 548 U.S. at 435 (“We also accept that in some cases members of a racial group in different areas—for example, rural and urban communities—could share similar interests and therefore form a compact district if the areas are in reasonably close proximity.... We emphasize it is the enormous geographical distance [*i.e.*, 300 miles] separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes.”).

A high-level summary of Dr. Barreto's analysis is attached to this memorandum as Attachment A. As the summary makes clear, Dr. Barreto has concluded that in Los Angeles County, "[w]ith almost no exceptions, when Latino candidates run for office, they have received strong and unified support from Latino voters." (Attachment A at 1-2.) He also determined that "analyses of voting patterns in Los Angeles [from 1997 through 2010] have demonstrated statistically significant differences in candidate choice, between Latinos and non-Latinos." (*Id.* at 2.) Dr. Barreto thus has preliminarily found "that polarized voting exists countywide throughout Los Angeles, as well as in specific regions such as the city of Los Angeles, the eastern San Gabriel Valley area, northern L.A. County and central/southwest region of L.A. County." (*Id.* at 3.)

**D. The "Totality of the Circumstances" Supports Drawing Latino-Majority Districts in Los Angeles County.**

Because the three *Gingles* preconditions likely are satisfied in certain regions of Los Angeles County, whether a Latino plaintiff could establish a Section 2 violation will depend on whether, based on the totality of the circumstances, Latinos have been denied an opportunity to participate in the political process and to elect representatives of their choice. The public testimony and organized group submissions provide ample evidence that the "totality of the circumstances" weigh in favor of a Section 2 claim in Los Angeles on behalf of Latinos, which can be avoided by the Commission drawing several majority Latino districts.

For example, the testimony of Arturo Vargas, Executive Director of NALEO, to the Commission, dated June 28, 2011, discusses "Barriers to Latino Participation and Representation in California." (Attachment B at 10.) Mr. Vargas explains that "[f]or much of the 20th century, gerrymandering, vote dilution, and voter intimidation were primary factors in keeping Latinos underrepresented." (*Id.*)

Mr. Vargas's testimony also discusses a survey that highlights the discrimination against Latinos in the electoral process: "The most prevalent types of discrimination identified by these respondents included problems with: voter assistance (59%); polling locations (56%); provisional ballots (56%); and unwarranted challenges to voters based on citizenship status or ID requirements (53%). Several respondents specifically mentioned the lack of bilingual pollworkers and other adequate language assistance at polling sites." (*Id.* at 12.)

Further, Mr. Vargas's testimony discusses the educational disparities between Latinos and non-Latino whites in Los Angeles County—46.6% of Latino adults in Los Angeles County have not completed high school, compared with just 6.8% of non-Latino white adults. (*Id.* at 14.)

Moreover, 40.8% of the Latino population in Los Angeles County is not fully proficient in English; the corresponding figure for non-Latino whites is only 7.8%. (*Id.* at 15.) The percent of Latinos in Los Angeles living below the poverty level is more than 10% *higher* than the percentage of non-Latino whites. (*Id.* at 17.) And nearly one-third of Latinos in Los Angeles have no health insurance, compared with around 10% of non-Latino whites who are uninsured. (*Id.*)

In addition to Mr. Vargas's testimony, we reviewed the 2002 expert witness report of Albert M. Camarillo, professor of history at Stanford University. (Attachment C.) Professor Camarillo's report provides abundant support for the conclusion that a history of discrimination exists against Latinos in California and Los Angeles in particular.

For example, Professor Camarillo discusses Propositions 187 (to restrict public services and education to illegal immigrants and their children) and 209 (an anti-affirmative-action initiative) contributing to an anti-Hispanic climate in California. "Both of these propositions revealed how polarized issues resulted in an increasingly polarized electorate with Hispanics strongly against these propositions while Anglos were strongly in support." (*Id.* at 17.)

Professor Camarillo also explains that there is a large gap between Hispanics and all other groups regarding the percentage of eligible population who register to vote and who actually cast their votes on election day. (*Id.* at 20.)

As far as we are aware, the discussions and evidence in Mr. Vargas's testimony and Professor Camarillo's report have not been contradicted by any testimony received by the Commission.

**E. Conclusion: The Commission Should Draw Several Latino-Majority Districts in Los Angeles County.**

In sum, Latinos in Los Angeles County likely represent a sufficiently large and geographically compact group that would constitute a majority in several single-member districts. In addition, there is strong evidence suggesting the existence of racially polarized voting affecting Latinos in areas of Los Angeles County. Finally, the totality of circumstances indicates that Latinos would be denied an equal opportunity to participate in the political process and elect candidates of their choice, if such majority districts are not drawn.

Accordingly, after reviewing and considering the available evidence, we have concluded that the Commission should create several Latino-majority districts in Los Angeles County. If the Commission does not create these districts, Latino plaintiffs in subsequent litigation challenging the Commission's maps may be successful in proving a violation of Section 2. While there may not be a specific maximum or minimum number of

districts that must be drawn, we will continue to evaluate the various iterations of draft visualizations that the Commission develops over the next few weeks and until the final maps are determined.

## II. RECOMMENDATIONS FOR SOUTH AND SOUTHWEST PORTIONS OF LOS ANGELES COUNTY

As requested by the Commission, with Section 2 in mind, we have taken a closer look at the South and Southwest portions of Los Angeles County in particular.

The Latino community in these regions appears to satisfy the first *Gingles* precondition. There is a significant Latino population in this area. For instance, Latinos make up a majority of the CVAP in several prior visualizations for a potential Congressional district referred to as “COMP.” Latinos in these regions thus appear to constitute a sufficiently large and geographically compact group such that they could constitute a majority in a single-member district.

Dr. Barreto considered whether racially polarized voting exists in Los Angeles County, and also focused on the areas that include the South and Southwest regions of Los Angeles County. In those regions, Dr. Barreto preliminarily reported significant levels of racially polarized voting, including evidence of racially polarized voting between Latinos and non-Latinos.

Dr. Barreto’s summary includes a review of several studies reflecting polarized voting between Latinos and African Americans in Los Angeles County. In particular, he notes that there have been significant population shifts among cities that were formerly majority African American that are now majority Latino. (Attachment A at 3.) In one study, he observes that there were large differences in voting preferences between Latinos and African Americans in the 2008 Democratic primary presidential election. (*Id.*) He also refers to extensive analysis included in an expert report by Morgan Kousser, a noted historian and voting rights expert, finding strong differences in voting patterns between African Americans and Latinos in Compton city council elections. (*Id.*) In the recent Attorney General election, there was again strong evidence of racial bloc voting between Latinos and African Americans, with African American voters favoring Harris overwhelmingly and Latino voters favoring Delgadillo and Torrico. (*Id.*)

The summary by Dr. Barreto also considers data from a 2007 special election for the 37th Congressional district. (*Id.* at 3-4.) In the primary election, 82.6% of Latinos favored a Latino candidate while 92.6% of the black vote went to the African-American candidates. (*Id.* at 4.)

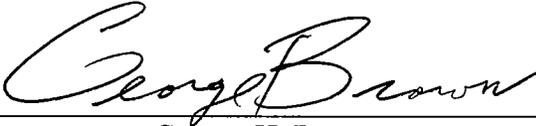
Consequently, in light of the fact that Section 2 likely requires the Commission to draw some number of Latino-majority districts in Los Angeles County (as discussed above in

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Section I(E)), and given the strong evidence of racially polarized voting in the South and Southwest regions of Los Angeles County, we recommend that the Commission consider drawing a Latino-majority district in areas adjacent to Latino populations in the South and Southwest regions of Los Angeles County—including the current visualization districts labeled “AD LAWBC” and “CD COMP.”

Alternatively, if the Commission chooses not to draw a Latino-majority district in the South or Southwest regions of Los Angeles County, or if the Commission determines it is not feasible to do so, the Commission should nevertheless avoid placing a substantial Latino population in a district where racially polarized voting would usually operate to defeat the ability of Latinos to elect candidates of their choice, if an alternative configuration exists that would avoid that outcome and that could be drawn in compliance with the U.S. and California Constitutions.



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George H. Brown

GHB  
cc: Kirk Miller

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