IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

Governor Mark R. Warner by substitution for Governor James S. Gilmore, III, Lt. Governor and President of the Senate John H. Hager, Acting Attorney General Randolph A. Beales, Speaker of the House of Delegates S. Vance Wilkins, Jr., Senate Majority Leader Walter A. Stosch, House Majority Leader H. Morgan Griffith, Senator Kevin G. Miller, Delegate John H. Rust, Jr., Delegate S. Chris Jones, State Board of Elections Secretary Cameron P. Quinn, all in their official capacities,	)	**RECORD NO. 021003**
Defendants and also Appellants except for Gov. Mark R. Warner, former Lt. Gov. John H. Hager, and former Acting Atty. Gen. Beales.		
v.		
Douglas MacArthur West, Albert Simpson, Nanalou Sauder, Ruby Tucker, Shirley N. Tyler, Shanta Reid, John Mumford, Sam Werbel, Collins Howlett, Ira J. Coleman, Maryann Coleman, Carl Waterford, Regina Harris, Herman L. Carter, Jr., Grindly Johnson, Rosa Byrd, Harold A. Brooks, Elijah Sharp, III, Herbert Coulton, Delores L. McQuinn, Richard Railey, Jr., Vincent Carpenter, Leslie Byrne, L. Louise Lucas, Yvonne Miller, Henry Marsh, Henry Maxwell, Mary Margaret Whipple, Bill Barlow, Bob Brink, C. Richard Cranwell, Viola Baskerville, Flora Crittenden, Mary T. Christian, L. Karen Darner, Jay W. DeBoer, R. Creigh Deeds, Franklin P. Hall, Robert D. Hull, Thomas M. Jackson, Jr., Jerrauld C. Jones, Kenneth R. Melvin, William P. Robinson, Jr., Marian Van Landingham, Mitchell Van Yahres, Clifton A. Woodrum,	)	
Plaintiffs/Appellees.		

ON APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF SALEM

REPLY BRIEF OF AMICUS CURIAE LAWYERS FOR THE REPUBLIC IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR 1

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

CONCLUSION 11

CERTIFICATE OF SERVICE 13

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Bush v. Vera, 517 U.S. 952 (1996) 3, 9

Eccles v. Gargiulo, 497 F. Supp. 419 (E.D.N.Y. 1980) 10

Elliott v. Richland County, 489 S.E.2d 195 (S.C. 1997) 10

Gangemi v. Sclafani, 506 F.2d 570 (2d Cir. 1974) 10

Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) 8

Hathorn v. Lovorn, 457 U.S. 255 (1985) 10

Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994) (three-judge panel) 3

Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 335-36 (2000) 5

Voinovich v. Quilter, 507 U.S. 146 (1993) 2

Webber v. White, 422 F. Supp. 416 (N.D. Tex. 1976) 10

Williams v. Sclafani, 444 F. Supp. 895 (S.D.N.Y. 1977) 10

STATUTES

28 C.F.R. § 51.18 10

Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, 66 Fed. Reg. 5413 (Jan. 18, 2001) 9

ASSIGNMENTS OF ERROR

Amicus hereby adopts the Assignments of Error set forth in the Opening Brief of Appellants.

QUESTIONS PRESENTED

Amicus hereby adopts the Questions Presented set forth in the Opening Brief of Appellants.

STATEMENT OF THE CASE

Amicus hereby adopts the Statement of the Case set forth in the Opening Brief of Appellants.

STATEMENT OF FACTS

Amicus hereby adopts the Statement of Facts set forth in the Opening Brief of Appellants.

SUMMARY OF ARGUMENT

Although the Lawyers for the Republic oppose the positions of all amici who have filed on behalf of the plaintiffs, this brief focuses upon the amicus brief filed by the Governor because of the following interesting concessions which his counsel have felt compelled to make.

1. The Governor admits that, for the purposes of plaintiffs' racial gerrymandering theory, the Constitution of Virginia and the Constitution of the United States should be viewed as coextensive.

2. He admits that the State had a strong basis in evidence under § 5 of the Voting Rights Act so as to require it to prevent retrogression of existing majority-minority districts.

3. He concedes that the 2001 legislative plans are more compact and contiguous than the 1991 plans which they replaced.

These admissions in and of themselves are fatal to the Governor's overall position. The circuit court's opinion does not appear to apply the legal standard used by the federal courts. On the face of the circuit court's opinion, it would appear that strict scrutiny was invoked either because the State recognized the requirements of the Voting Rights Act or because the circuit court believed that the majority-minority districts had more than the level of minority voting strength necessary for a minority candidate to have a 50-50 chance of winning.[1] The Governor's amicus brief admits that a threshold level of proof is required to invoke strict scrutiny, but fails to explain the elements which would be required in order to meet the threshold level of proof necessary to invoke strict scrutiny. As explained below using the threshold standard required by Justice O'Connor, the circuit court's own factual findings would prevent the invocation of strict scrutiny in all but two of the districts even had the circuit court employed the correct standard for triggering such scrutiny. The admission that the 2001 plans are more compact and contiguous than their predecessors is tantamount to a concession that they are narrowly

[1] By using this logic, the circuit court is attempting to resurrect the legal theory unanimously rejected by the Supreme Court of the United States in *Voinovich v. Quilter*, 507 U.S. 146 (1993).

tailored. Finally, the suggestion in the Governor's brief that plaintiffs' plans prove that more compact and contiguous majority-minority districts could be drawn are manifestly false and therefore do not prove a lack of narrow tailoring in the maps passed by the General Assembly.

ARGUMENT

The proper standard in a racial gerrymandering case is that described by Justice O'Connor in her concurring opinion in *Bush v. Vera*.[2] (For a more detailed description of the standard, please see Amicus Brief of Lawyers for the Republic [hereinafter "LFTR"] at 20-26.) In order to invoke strict scrutiny, plaintiffs must show that defendants created bizarrely shaped districts (meaning districts shaped more strangely than those drawn elsewhere in the state where race could not a have been a factor) because of an improper racial intent. Simply put, if a majority-minority district does not violate the compactness and contiguity requirements of the Constitution of Virginia as delineated in *Jamerson v. Womack*, 244 Va. 506, 423 S.E.2d 180 (1992), then race could not have predominated in the drawing of that district because the other legal criteria were obeyed.[3] Once the circuit court made the factual finding that all of the majority-minority districts except two,

[2] 517 U.S. 952 (1996).

[3] Plaintiffs suggest that it is unnecessary to prove that the shape criteria was violated in order to invoke strict scrutiny. While Justice Kennedy, in dicta, has suggested this might be the case, Justice O'Connor, who is the deciding vote on the Court in matters pertaining to redistricting law, has specifically rejected this theory. (Please *see* Amicus Br. Lawyers for the Republic at 18-19 n.72 and 22-23 n.86.) Furthermore, no court, including the district court in *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994) (three-judge panel), has ever invoked strict scrutiny without first finding that the majority minority districts were "bizarrely shaped."

Senate District 2 and House District 74, complied with the compactness and contiguity requirements of the Constitution of Virginia, dismissal of the racial gerrymandering challenges to those districts was legally compelled. As described more fully in the Reply Brief of Sen. Nick Rerras, these two districts also clearly comply with this Court's decision in *Jamerson*. If this Court agrees that these two districts also comply with *Jamerson*, then plaintiffs, as a matter of law, would have been unable to satisfy a threshold issue in proving that race predominated in the construction of any of the majority-minority districts.

Even if a district were bizarrely shaped, plaintiffs would be obliged to prove that neither political gerrymandering nor other redistricting criteria could explain the bizarre shape as well or better than race before strict scrutiny could be applied. Plaintiffs' only evidence in this regard was the self-serving and conclusory testimony of expert and lay witnesses who were not involved in the legislative process that created these districts.

Plaintiffs also cite the fact that the Census Bureau provides racial data for redistricting as evidence that race was the predominant motive. As to the information provided by the Census Bureau, it is important to note that Virginia also had political data available when creating the districts. The evidence in this case is perfectly consistent with a situation where the districts were initially constructed on the basis of political data and then appropriately examined, using the racial data, for possible retrogression, which was then corrected within the compactness and contiguity criteria as described by this Court in *Jamerson*. Such conduct has been used in virtually every covered jurisdiction in

this redistricting cycle and has not triggered strict scrutiny in any jurisdiction. **Furthermore, no state which has had both political and racial data available in its redistricting database has ever had its redistricting plan invalidated for racial gerrymandering**.

Finally, plaintiffs make reference to the redistricting criteria that recognize the supremacy of federal law as further evidence of an improper racial motive. But they ignore that fact that the Commonwealth of Virginia is obliged to recognize its obligations under the Voting Rights Act; that is all the criteria recognized. In short, when the appropriate legal standard is applied, it is clear that plaintiffs simply could not meet their burden of proof as to the predominance of race in the legislature's motives.

Even if the Court agreed that Senate District 2 and House District 74 violate the compactness and contiguity provisions of the Constitution of Virginia, and then went on to uphold the circuit court's finding that race predominated in the drawing of those two districts, the admission that defendants had a strong basis in evidence for compliance with the non-retrogression provisions of § 5 of the Voting Rights Act would have permitted the construction of these two districts. Because the 1991 redistricting plan had never been successfully challenged under state or federal law, it became the benchmark for measuring retrogression under § 5.[4] Plaintiffs and the Governor were obliged to challenge the 1991 plan prior to the passage of the 2001 plan if they did not want the

[4] *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 335-36 (2000). For a more detailed discussion of the proper benchmark, *see* LFTR at 5-8.

1991 plan to become the benchmark plan under § 5. Both Plaintiffs and the Governor suggest in their briefs that it was the Commonwealth's obligation to attack its own 1991 plan prior to construction of the 2001 plan in order to be able to rely upon the 1991 plan as the established legal benchmark. Plaintiffs' theory would require the Commonwealth to engage in a sham lawsuit in order to obtain an advisory opinion to which it would not be legally entitled. The obligation was actually on plaintiffs to challenge the plan prior to the passage of the 2001 plan if they wanted to prevent the plan from becoming the benchmark.

Under § 5, the most significant issue is retrogression. As a result, "safe" majority minority districts are required to remain "safe" and not to retrogress into "toss-up" districts. The Commonwealth properly attempted to avail itself to the legal safe harbor for retrogression under § 5. Its success is certified by the rapid preclearance granted to the 2001 legislative redistricting Virginia plan. Its having successfully completed the preclearance process, plaintiffs are asking this court to throw Virginia into the preclearance abyss. A similar strategy employed by Democrats in the Arizona redistricting litigation has had just such an unfortunate result. In that state, a Democrat-backed initiative created new compactness and contiguity requirements as well as a competitiveness requirement. Because of these requirements, the Democrats successfully convinced the redistricting commission to alter the configurations of majority-minority districts and retrogress the percentage of minority population contained in the majority-minority districts. The Department of Justice in May 2002 objected to this retrogression. (Please *see* attached objection letter in Appendix A.) As a result, a federal court imposed

a temporary plan for Arizona for the 2002 elections and the commission will have to try again in 2003.[5] Plaintiffs in this case want Virginia courts to force the Commonwealth to play the same guessing game of "how low can we go" with the Department of Justice, probably with the same results.

The Governor suggests that plaintiffs' alternative plans prove that more compact and contiguous non-retrogressive districts could have been constructed. An examination of the proposed alternative for Senate District 2 proves the falsity of this statement. (*Compare* map of Senate District 2 in the 2001 plan found in the Amicus Brief of Sen. Nick Rerras at Appendix Map O, *with* map of plaintiffs' proposed Senate District 2 found in the Reply Brief of Sen. Nick Rerras at Appendix Map 2.) As the maps indicate, the precleared 2001 version of Senate District 2 is more compact and contiguous than plaintiffs' proposed map and allows for road travel throughout the district unlike plaintiffs' map. The visual impression is confirmed by the objective measurements introduced to the court by both plaintiffs and defendants. The Reock score for the precleared Senate District 2 is 0.42 as opposed to 0.29 in plaintiffs' proposed plan. The Polsby-Popper score is 0.29 for the precleared Senate District 2, and 0.20 in plaintiffs' proposed plan.

[5] The letter also notes that possible political motivations such as seeking to assist the election of white Democrats could constitute an impermissible retrogressive purpose. That is the undisguised political motivation of this litigation and similarly could constitute an illegal retrogressive purpose.

House District 74 is only slightly less compact in the precleared plan than in Plaintiffs' proposed plan. The Reock score is the same in both plans 0.16, compared to a Polsby-Popper score of 0.10 in the precleared plan and 0.18 in the proposed plan. However, plaintiffs' proposed plan creates a retrogression in District 74 in excess of 10 percentage points.[6] Furthermore, plaintiffs' plan dramatically reconfigures the districts in the Richmond-Petersburg metropolitan area, creating additional retrogression in surrounding majority minority districts. House District 70 was retrogressed by more than seven percentage points. District 71 was retrogressed by only two percentage points and District 69, which was held by a white Democrat incumbent, was retrogressed by nearly 15 percentage points.

This retrogression appears to have been included in plaintiffs' proposed plan in order to aid the incumbent white Democrat, which could constitute an illegal retrogressive purpose sufficient to deny preclearance to the plan.[7] Likewise, plaintiffs' radical reconfiguration of the Richmond and Petersburg area districts resulted in an additional House District that lacked road transportation across a river (District 72). The difference between the two plans has nothing to do with Virginia's criteria; the distinguishing characteristic is the retrogression of the minority districts. The State took

[6] House District 74 was 69.15 % APBlk. (This is the census designation for any percent black for the total population. This category includes any census respondent who selected "black" on their census form even if it was in combination with another race. This is the census category used by the Department of Justice in order to measure retrogression.) The precleared plan lowered this percentage to 64.09 %. Plaintiffs' proposed plan would have retrogressed District 74 to 58.44 %.

[7] *See Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

the allowable course of availing itself of the preclearance safe harbor. The State did not enhance the minority voting strength in the districts as in *Vera*, nor did it produce any district which was less compact and contiguous than its 1991 predecessor district. Furthermore, the legislature's plans did not produce a single district that was less compact and contiguous than Senate District 18, which was a district upheld by this Court in *Jamerson*. As long as the State was within these discernable criteria, the districts were narrowly tailored.

The Plaintiffs' principal argument that the majority minority districts are not narrowly tailored is dependent upon Plaintiffs' novel theory that any level of minority voting strength in excess of that required to create a "toss-up" election is a violation of narrow tailoring. Neither Plaintiffs nor their supporting Amici has or is able to produce any authority that efforts to avoid retrogression are limited in this manner. All limitations in prior cases regarding narrow tailoring have referred to the geographic shape of the district, essentially referencing the compactness prong of *Thornburg v. Gingles*, 478 U.S. 30 (1986).[8]

Furthermore the reversal of the burden of proof in the construction of remedial plans should allow a jurisdiction to err on the side of ensuring that there was sufficient minority voting strength to elect the minority communities' candidate of choice.[9] Justice O'Connor's purpose in allowing states to avoid liability under the Voting Rights Act

[8] *See Vera*, 517 U.S. at 994 (O'Connor, J., concurring); LFTR at 27.
[9] Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, 66 Fed. Reg. 5413 (Jan. 18, 2001).

based on "a strong basis in evidence" was to allow the state to take action "without awaiting judicial findings."[10] Such a fine-tuned rule as the one suggested by plaintiffs in this case would totally eviscerate the policy consideration embodied in Justice O'Connor's "strong basis in evidence" rule.

The best that the Governor can suggest is that: "[I]n the context of this case, what these principles mean is that avoiding retrogression did not necessarily require preserving particular percentage figures within previously created majority-black districts . . . ."[11] The Governor cannot state that a redistricting plan drawn according to the requirements of the circuit court could obtain preclearance. This is of crucial importance, since any opinion of this Court upholding the decree and any subsequent redistricting plan drawn in accordance with that opinion would have to be precleared. Unlike federal court decisions, state court decisions which constitute a change in voting are required to be precleared.[12] In 2001, the General Assembly prudently chose the safe harbor of avoiding retrogression. Under Virginia's traditional standard of review, that decision should obviously be permitted to stand. Not only would a contrary ruling violate the separation of powers doctrine within the state system, it would invite state and federal collisions.

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[10] *Vera*, 517 U.S. at 994 (O'Connor, J., concurring).

[11] (Amicus Br. Gov. Warner at 41-42.)

[12] The Supreme Court of the United States has held that state court changes in voting practices are subject to preclearance. *Hathorn v. Lovorn*, 457 U.S. 255 (1985). *See also* 28 C.F.R. § 51.18. Prior to this decision, a number of lower courts treated state court decisions the same as federal court decisions. *See Webber v. White*, 422 F. Supp. 416 (N.D. Tex. 1976); *Gangemi v. Sclafani*, 506 F.2d 570 (2d Cir. 1974). *See also Eccles v. Gargiulo*, 497 F. Supp. 419 (E.D.N.Y. 1980); *Williams v. Sclafani*, 444 F. Supp. 895 (S.D.N.Y. 1977). State courts in covered jurisdictions are now submitting state court ordered voting changes to the Department of Justice for preclearance. *See, e.g.*, *Elliott v. Richland County*, 489 S.E.2d 195 (S.C. 1997).

Because no authority compels – or even countenances – this result, both principle and prudence counsel that this Court reverse the activist opinion below.

CONCLUSION

The Commonwealth of Virginia engaged in the Herculean task of avoiding multiple possible grounds for legal challenge. It did not seek to skirt the bounds of the law for partisan gain. Instead, it carefully sought to remain safely within every discernible criteria previously employed by a court or the Department of Justice. No plaintiff or amicus in this action has suggested that the Commonwealth drew a district which was less compact and contiguous than those used; nor has it been asserted that the Commonwealth drew a district which was less compact than that which was upheld by this court in *Jamerson*. Likewise, no plaintiff or amicus has asserted that the Commonwealth significantly enhanced a majority-minority district's voting strength above that in the benchmark plan.

Quite to the contrary, most of the majority-minority districts experienced some reduction in minority voting strength. The only basis asserted by plaintiffs or amicus for invalidating the Commonwealth's 2001 redistricting plan is their novel theory establishing minimalist quotas for minority voting strength in majority-minority districts. The federal law recognizes no such theory and there is no reason why a state should wish to announce a regime contrary to federal law in an area where federal law is supreme.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:30(c) of the Rules of Supreme Court of Virginia, I hereby certify that Rule 5:26(d) has been complied with, that twenty copies of this amicus brief were sent by certified mail, postage prepaid, this _____ day of August, 2002 to the Office of the Clerk of the Supreme Court of Virginia for filing, and that three copies of this amicus brief were mailed by first-class mail, postage prepaid, this _____ day of August, 2002 to the following opposing counsel and counsel *amicus curiae*:

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Dear Ms. Hauser and Mr. Rivera:

This refers to the 2001 legislative redistricting plan for the State of Arizona, submitted by the Arizona Independent Redistricting Commission [AIRC] to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your responses to our March 26, 2002, request for additional information through May 16, 2002.

We have considered carefully the information you have provided, as well as census data, comments and information from other interested parties, and other information. As discussed further below, I cannot conclude that the Arizona Independent Redistricting Commission has sustained its burden under Section 5 in this instance. Therefore, on behalf of the Attorney General, I must object to the 2001 legislative redistricting plan for the State of Arizona.

The 2000 Census indicates that the state has a total population of 5,130,632, of whom 25.3 percent are Hispanic, 4.9 percent are Native American, and 3.2 percent are African American. The state's voting age population [VAP] is 3,763,685, of whom 21.3 percent are Hispanic, 4.1 percent are Native American, and 2.8 percent African American. One of the most significant changes to the state's demography has been the increase in the Hispanic population. Between 1990 and 2000, the Hispanic share of the population increased from 18.8 percent to 25.3 percent.

Under the Voting Rights Act, a jurisdiction seeking to implement a proposed change affecting voting, such as a redistricting plan, must establish that, in comparison with the benchmark standard, practice, or procedure, the proposed change does not "lead to a retrogression" in the position of minority voters with respect to the "effective exercise of the electoral franchise." See Beer v. United States, 425 U.S. 130, 141 (1976). In addition, the jurisdiction must establish that the change was not adopted with an intent to retrogress. Reno v. Bossier Parish School Board, 528 U.S. 320, 340 (2000). Finally, the submitting authority has the burden on demonstrating that the proposed change has neither the prohibited purpose nor effect. Id. at 328; see also Procedures for the Administration of Section 5 (28 C.F.R. 51.52).

The constitutional requirement of one-person, one-vote mandated that the state reapportion the legislative districts in light of the population growth since the last decennial census. We note that the state's redistricting plan was devised by the Arizona Independent Redistricting Commission [AIRC], which had assumed reapportionment responsibilities under Proposition 106 of the Arizona Constitution.

The Arizona Legislature consists of a House of Representatives and Senate. There are sixty representatives, two from each of the state's thirty legislative districts. There are thirty senators, one from each legislative district. Senators and representatives serve two-year terms. Under the benchmark plan, there is one district (District 3) in which American Indians are a majority of the population and seven districts (Districts 5, 7, 8, 10, 11, 22, and 23) in which Hispanic persons are a such majority; in five of these districts (3, 10, 11, 22, and 23), a majority of the voting age population are minority individuals. In these eight district our analysis indicates the minority voters within the district have the ability to elect their candidate of choice. This is the benchmark plan for our analysis. Because retrogression is assessed on a state-wide basis, the State may remedy this impermissible retrogression either by restoring three districts from among these problem areas, by creating three viable new majority minority districts elsewhere in the State, or by some combination of these methods.

According to your submission, the AIRC claims the proposed plan contains ten districts (Districts 2, 13-16, 23-25, 27, and 29) in which minority voters will be able to elect candidates of their choice. However, based on the information provided, we have determined that the AIRC has not met its burden of establishing that minority voters will continue to be able to elect candidates of their choice in five districts (Districts 13, 14, 15, 23, and 29). As a result, the proposed plan, which results in a net loss of three districts from the benchmark plan in which minority voters can effectively exercise their electoral franchise, is retrogressive. We detail those five instances below. Because retrogression is assessed on a state-wide basis, the State may remedy this impermissible retrogression either by restoring three districts from among these problem areas, by creating three viable new majority minority districts elsewhere in the State, or by some combination of these methods.

Proposed Districts 13 and 14

In southwest Phoenix, Hispanic voters from benchmark District 22 will lose their present ability to elect their candidate of choice. Under the proposed plan, the majority of the benchmark district is split between proposed districts 13 and 14. The Hispanic voting age population in the benchmark district (65.0%) decreases to 51.2 and 50.6 percent in proposed Districts 13 and 14, respectively. Historically, a district with an Hispanic voting age population percentage of that level, which is virtually identical to benchmark District 20, has not been one in which Hispanic voters have been able to elect a candidate of their choice.

The AIRC has not shown that a level of Hispanic voting age population, which has been inadequate to afford Hispanic voters with the ability to elect their candidate of choice in benchmark District 20, is sufficient to afford that opportunity in either proposed District 13 or 14. Thus, the fragmentation of benchmark District 22 into two districts eliminates one district where Hispanic voters had consistently elected their candidates of choice. Further, the AIRC also has failed to show that the proposed plan creates another district, either in the southwest Phoenix area or elsewhere in the state, to compensate for the loss of Hispanic electoral opportunity in the benchmark district.

Proposed District 15

The AIRC has designated proposed District 15 in central Phoenix with a 43.6 percent Hispanic voting age population, as a district in which Hispanics could elect a candidate of their choice. However, our

analysis is unable to confirm that this is case. The proposed district was created from benchmark Districts 18, 20, 23, 25, and 26.

Proposed District 15 contains 31,729 people from benchmark District 23, of whom 72.2 percent are Hispanic. Since at least 1996, minorities in benchmark District 23 were consistently able to elect their candidates of choice. After the 2000 general election, this district's three legislative representatives were all candidates of choice of benchmark District 23 minority voters. However, the majority of proposed District 15 comes from benchmark District 25, which contained a Hispanic voting age population of 33.7 percent. We have not been able to conclude, based on the information provided by the AIRC concerning the electoral behavior of the Hispanic voters from benchmark District 25, that the addition of these voters to those from benchmark district 23 will not result in the elimination of the electoral ability currently enjoyed by minority voters in benchmark District 23.

District 23

Proposed District 23 was created out of parts of six benchmark legislative districts in the greater Phoenix area, encompassing parts of Maricopa and Pinal Counties. More than 74 percent of the proposed district comes from benchmark District 7. Hispanics are the largest minority group in both the benchmark and the proposed districts. They constitute 34.2 percent of the population in the benchmark District 7 and 29.5 percent in proposed district 23. Our information is that Hispanics voters were able to elect candidates of their choice in benchmark District 7. In benchmark District 7, 30.2 percent of the voting age population was Hispanic. As proposed, the Hispanic voting age population in District 23 is 25.7 percent. Over the past decade, this district's Hispanic community elected their candidates of choice for state senator and state representative.

In creating the proposed district, the AIRC made several adjustments. For example, the towns of San Manuel (46.2% Hispanic) and Oracle (38.3% Hispanic), both of which had been in existing District 7 were removed while the entire city of Casa Grande (39.1% Anglo) and virtually all of Apache Junction (87.9% Anglo) were placed into proposed District 23.

We have attempted to analyze the electoral behavior in both the benchmark and proposed districts but have been unable to determine whether the Hispanic voters will continue to exercise their electoral franchise effectively in the proposed district.

In addition, the circumstances surrounding the removal of these two towns and the resulting drop in the Hispanic voting age population percentage, has raised concerns regarding the ability of the AIRC to establish that this action, which had a retrogressive effect, may also have been taken, at least in part, with a retrogressive intent.

District 29

We also have not been able to conclude that proposed District 29, located in central and south Tucson, provides Hispanic voters with the ability to elect a candidate of their choice. The proposed district combines benchmark Districts 9, 10, 11, and 14 with a Hispanic voting age population of 45.1 percent. A majority of proposed District 29's population is from benchmark District 10, which had a Hispanic voting age population of 55.3 percent. The AIRC has presented no credible evidence by which we could conclude that this drop of eight percentage points in the Hispanic voting age population percentage will result in the continued ability of voters in proposed District 29 to elect candidates of their choice.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also Procedures for the Administration of Section 5 (28 C.F.R. 51.52). Because the AIRC has failed to demonstrate the proposed plan is not retrogressive, either in purpose or effect, it is necessary to interpose an objection. However, some of the concerns identified result from our inability to reach the conclusion that it met the requisite Section 5 burden. Thus, if the AIRC can present evidence that satisfactorily establishes the absence of both the prohibited purpose or effect, we would be willing to reconsider this objection pursuant to the applicable provisions of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c 28 C.F.R. 51.45.

We note that under Section 5 you have a right to seek a declaratory judgement from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a minority language group. See 28 C.F.R. 51.44. However, until the objection in withdrawn, or a judgement from the District of Columbia Court is obtained, the 2001 legislative redistricting plan for the State of Arizona continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Arizona plans to take concerning this matter. If you have any questions, you should call Mr. Robert Berman (202/514-8690), Deputy Chief of the Voting Section.

We are aware the issue of the AIRC's compliance with Section 5 regarding implementation of the state's legislative redistricting plan is pending before a three judge court in Navajo Nation v. Arizona Independent Redistricting Commission, (D. Ariz). Accordingly, we are providing the Court as well as counsel of record in that case with a copy of this letter.

Sincerely,

Ralph F. Boyd, Jr.
Assistant Attorney General