[ms-0398.030.008.005]

the above legislation, the California state legislature clearly views CPUC enforcement of safety regulations as a significant public benefit. Furthermore, the United States Supreme Court has noted that "the question of safety ... is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives." *Bhd. of Locomotive Firemen and Eng'rs v. Chicago, Rock Island and Pacific R.R. Co.*, 393 U.S. 129, 138, 89 S.Ct. 323, 328, 21 L.Ed.2d 289 (1968) (upholding numerical requirements for train crew members against Commerce Clause and equal protection challenge).

Additionally, in *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978), the Supreme Court declared:

> [T]he Court has been most reluctant to invalidate under the Commerce Clause "state legislation in the field of safety where the propriety of local regulation has long been recognized." ... In no field has this deference to state regulation been greater than that of highway safety regulation.... Thus, those who would challenge state regulations said to promote highway safety must overcome a "strong presumption of [their] validity."

Id. at 443–44, 98 S.Ct. at 795 (citations omitted).[4]

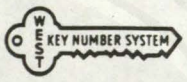
In the instant case, the court finds that plaintiffs have not overcome the strong presumption of the validity of the CPUC regulations.

CONCLUSION

Plaintiffs have failed to carry their burden of proof with regard to their interstate commerce argument. On the other hand, defendants have shown that the CPUC regulations do not constitute an unreasonable burden. Defendants are therefore GRANTED summary judgment on the interstate commerce clause issue. Plaintiff's motion for summary judgment is DENIED.

There being no remaining issues, this case is hereby DISMISSED.

IT IS SO ORDERED.



Andrea SKOREPA, on behalf of herself and all others similarly situated, Plaintiff,

v.

CITY OF CHULA VISTA; Chula Vista Mayor Gregory R. Cox; Gail McCandliss, Chula Vista City Councilmember; David Malcolm, Chula Vista City Councilmember; Leonard Morre, Chula Vista City Councilmember; Tim Nader, Chula Vista City Councilmember; Jeannie Fulasz, Chula Vista City Clerk; and Does 1 through 200, inclusive, Defendants.

No. 88–0464–R(M).

United States District Court,
S.D. California.

Oct. 6, 1989.

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CPUC does not duplicate, but complements activities of these other agencies. *See, e.g.*, Cal. Pub.Util.Code § 3631.5 (requiring liability insurance for motor carriers hauling hazardous materials, who have been licensed by the CHP); Cal.Pub.Util.Code § 3553 (requiring new holders to show that they can meet CHP safety standards).

4. State highway regulations merit special deference because the burden of nondiscriminatory regulations generally falls on local economic interests, and because the states bear primary responsibility for policing highway conditions. *Raymond Motor Transp.*, 434 U.S. at 444 n. 18, 98 S.Ct. at 795 n. 18. Nevertheless, in *Raymond Motor Transp.*, the Court invalidated Wisconsin's regulations governing the length and shape of trucks. The Court found uncontradicted evidence that the regulations did not contribute to highway safety and concluded that the regulations significantly raised costs, slowed transportation, and prevented transfers from any of the thirty-three states where the prohibited trucks were legal. *Id.* at 444–445, 98 S.Ct. at 795–96. The record here is completely lacking in such evidence, regarding both the burdens and benefits of the regulations.

as violative of antidilution provisions of Voting Rights Act and of their Fourteenth and Fifteenth Amendment rights. The District Court, Rhoades, J., held that: (1) minority group's potential to elect candidate had to be measured, for purpose of unlawful dilution claim, based not on total minority population but on number of eligible minority voters; (2) minority which could comprise no more than 26.1% of eligible voters in any voting district was not sufficiently numerous to successfully challenge at-large election scheme under Voting Rights Act; and (3) minority which was unable to challenge at-large scheme under Voting Rights Act was likewise unable to challenge scheme under equal protection clause or Fifteenth Amendment.

Defendants' motion for summary judgment granted.

1. Elections ⇐12(3)

Minority group's potential to elect candidate must be measured, for purpose of unlawful dilution claim under the Voting Rights Act, based not on total minority population but on number of eligible minority voters. Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

2. Municipal Corporations ⇐80

In deciding whether minority voters were sufficiently numerous to constitute majority in any municipal voting district, district court before which unlawful dilution claim was pending could not increase size of elected body in order to decrease size of districts, but was limited by number of seats and districts under challenged plan. Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

3. Municipal Corporations ⇐80

Minority which could comprise no more than 26.1% of eligible voters in any municipal voting district was not sufficiently numerous to successfully challenge at-large election scheme as violative of antidilution provisions of Voting Rights Act. Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

4. Municipal Corporations ⇐80

District court before which unlawful dilution claim was pending had to rely on data from most recent census, and could not consider alleged census undercounts or future demographic trends, in deciding whether minority voters were sufficiently numerous to constitute majority in any municipal voting district. Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

5. Elections ⇐12(3)

"Minority group," for purpose of unlawful dilution claim under § 2 of the Voting Rights Act, may consist of members of two or more different minorities. Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

6. Municipal Corporations ⇐80

Minorities which, even together, would not comprise more than 35.2% of eligible voters in any municipal voting district were not sufficiently numerous to successfully challenge at-large election scheme as violative of antidilution provisions of Voting Rights Act. Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

7. Elections ⇐12(3)

Minority which is not sufficiently numerous to constitute majority in any voting district may not maintain antidilution claim under Voting Rights Act, on theory that election scheme impermissibly interferes with right to "influence" election. Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

8. Constitutional Law ⇐225.3(1)

Minority which was not sufficiently numerous to challenge at-large election scheme under antidilution provisions of Voting Rights Act was, per se, not sufficiently numerous to demonstrate that at-large scheme had any actual discriminatory effect upon it for equal protection purposes. U.S.C.A. Const.Amend. 14; Voting

Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

9. Elections ⇐12(3)

Fifteenth Amendment is not relevant to question of racial vote dilution unless claim concerns purposeful denial of minority rights to register to vote and to cast ballots. U.S.C.A. Const.Amend. 15.

10. Constitutional Law ⇐42.2(1)

Minority which was not sufficiently numerous to challenge municipality's at-large election scheme under Voting Rights Act or Fourteenth Amendment was likewise too small to bring claim under the Fifteenth Amendment. U.S.C.A. Const.Amends. 14, 15; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

Patricia A. Meyer, Aguirre & Meyer, San Diego, Cal., for plaintiff.

John E. McDermott, McDermott, Will & Emery, Los Angeles, Cal., for defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

RHOADES, District Judge.

Defendants' motion for summary judgment in the captioned case came before the Honorable John S. Rhoades, on April 17, 1989. Patricia A. Meyer, of Aguirre & Meyer, appeared on behalf of the plaintiffs and John E. McDermott, of McDermott, Will & Emery, appeared on behalf of the defendants. Based on the Court's oral statements from the bench, the motion for summary judgment is granted. This order summarizes the basis for the Court's ruling.

I. INTRODUCTION

This case concerns the City of Chula Vista's at-large system for electing representatives to its City Council. Plaintiff alleges that the at-large system violates the rights of the City's Hispanic citizens under § 2 et seq. of the Voting Rights Act (42 U.S.C. § 1973 et seq.) and under the Fourteenth and Fifteenth Amendments to the United States Constitution. Plaintiff seeks an order requiring Chula Vista to elect its representatives from districts only.

In its motion for summary judgment, Chula Vista argues that plaintiff is foreclosed from relief by the United States Supreme Court's decision in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Under *Thornburg*, a minority group challenging an at-large election system must prove that it is sufficiently large and compact to form a majority in a district if a single-member district system were used. *Id.* at 50–51, 106 S.Ct. at 2766. The City contends that plaintiff cannot prove this precondition and, consequently, that the complaint must be dismissed.

II. THE STANDARDS APPLICABLE TO THE MOTION

Federal Rule of Civil Procedure 56(c) provides that a motion for summary judgment shall be granted if the papers "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To establish a genuine factual issue, and thereby defeat the motion, the party opposing the motion must show more than some factual dispute. The question is whether "reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). "Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 254, 106 S.Ct. at 2513.

The Court must deny the motion if genuine factual issues are raised. In this regard, the Court also must construe the evidence in a manner that provides the non-moving party with all reasonable inferences that may be drawn from the evidence. *Admiralty Fund v. Tabor*, 677 F.2d 1297, 1299 (9th Cir.1982).

III. STATEMENT OF FACTS

The City of Chula Vista uses an at-large electoral system to select the members of its City Council. The at-
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its City Council. The at-large system allows every registered voter to participate in every councilmanic election, without regard to the voters' place of residence within the City. Thus, each voter has a say in the election of every candidate for office.

There are four City Council seats in the City, excluding the mayor, who also is elected citywide. City Council elections are held every two years at which time two of the four numbered seats on the Council are filled.

The racial and ethnic composition of the City of Chula Vista, based on 1980 boundaries and 1980 census data, is as follows:

Anglo (non-Hispanic Whites)	68.1%
Black (non-Hispanic)	2.1%
Hispanic	23.3%
Other (includes Asians, Pacific Islanders, American Indians)	6.5%

Using its current boundaries, Chula Vista has a total 1980 population of 107,000. Of this number, 26.5 percent are Hispanic. These statistics include the 1980 population of the so-called Montgomery area which was annexed to Chula Vista in 1985.

Chula Vista's expert demographer, Dr. Peter Morrison, evaluated the demography in Chula Vista to determine whether Hispanic persons or voters could form a majority in any district of a four district system given a best case compactness assumption. To estimate the hypothetical upper limit of geographic compactness among the entire Hispanic population in Chula Vista, Dr. Morrison combined the City's most heavily contiguous Hispanic census block groups into an area containing one-fourth of Chula Vista's total population. The ideal population for each district in a four district plan is 26,750.

For a district of 26,750 persons, Dr. Morrison estimated that no more than 42.7 percent would be Hispanic. When the factors of age and citizenship are considered, Hispanics who are eligible to vote constitute only 26.1% of the eligible voters in the hypothetical district.

Plaintiff's expert demographer, Dr. Bruce Cain, also conducted a demographic analysis. He was able to construct a 45.9% Hispanic population district assuming the use of four districts. By including all of the minorities in this hypothetical Hispanic district, he determined that the percentage of minorities in the district was 55% of the total population. Dr. Cain did not consider the factors of age or citizenship in his analysis.

Dr. Cain also reviewed population growth projections for 1990 by the U.S. Census, which showed that the Hispanic population has grown at a faster rate than the white population since 1980. He concluded that it is highly likely that the estimates of Hispanic population for the districts mentioned above are underestimates.

IV. SECTION 2 OF THE VOTING RIGHTS ACT

A. *In General*

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, provides that:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....
>
> (b) A violation of subsection (a) of this section 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.... *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

By its terms, § 2 establishes a "results" test to determine whether minority voters' electoral power has been unlawfully diluted as a result of an electoral procedure. As a threshold to this analysis, however, the

United States Supreme Court has established three "necessary preconditions" for § 2 challenges to at-large electoral systems. *Thornburg v. Gingles*, 478 U.S. 30, 50–51, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986). Plaintiffs cannot succeed in § 2 challenges to at-large electoral systems unless they prove the existence of each of the three preconditions. *Gomez v. City of Watsonville*, 863 F.2d 1407, 1413 (9th Cir. 1988), *cert. denied*, — U.S. —, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989); *McNeil v. Springfield Park District*, 851 F.2d 937, 939 (7th Cir.1988), *cert. denied*, — U.S. —, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989); *Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir.1987); *Buckanaga v. Sisseton Independent School District*, 804 F.2d 469, 472 (8th Cir.1986). If these preconditions are not met, there is no need to consider the presence of other factors within the totality of circumstances analysis. *McNeil*, 851 F.2d at 942.

Only the first of *Thornburg*'s three preconditions is implicated by the City's motion. The first precondition requires the minority group to prove that it "is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the [at-large] form of the district cannot be responsible for minority voters' inability to elect its candidates." 478 U.S. at 50–51, 106 S.Ct. at 2766 (citations and footnotes omitted, alterations added). The *Thornburg* Court explained the purpose of this precondition as follows:

> "The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure."

478 U.S. at 50 n. 17, 106 S.Ct. at 2766 n. 17.

B. *The Minority Group's Potential To Elect*

[1] The parties present sharply divided positions on the appropriate standard by which to measure the minority group's potential to elect. Plaintiff contends that the Court must measure the minority group's size by looking at total population figures. In contrast, the City contends that the Court must measure the group's size by looking at the number of eligible Hispanic voters (i.e., voting age citizens).

The *Thornburg* Court did not expressly resolve this issue. This Court finds, however, that the population of eligible voters appears to be the standard intended by the Supreme Court. The *Thornburg* Court established the first precondition for the purpose of determining whether the minority group has the ability to independently elect its own candidate. 478 U.S. at 50–51 & n. 17, 106 S.Ct. at 2766 & n. 17.

Looking at the question from another perspective, the express language of § 2 makes it clear that only "citizens of the United States" and "members of the electorate" are entitled to protection. 42 U.S.C. § 1973. As the Seventh Circuit held in *McNeil*, "those ineligible to vote have not experienced a dilution of their vote. They are not parties to a section 2 claim." 851 F.2d at 945.

In the *McNeil* case, for example, the black plaintiffs showed that the black population could form a 50.4% majority in a single-member park district and a 50.2% majority in a single-member school district. Plaintiffs argued that these population ma-

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jorities satisfied *Thornburg*'s size requirement. *McNeil*, 851 F.2d at 944. The Seventh Circuit disagreed, however, because the use of simple population majorities undermines the *Thornburg* Court's emphasis on minority voters' "potential to elect candidates of their choice. Because only minorities of voting age can affect this potential, it is logical to assume that the Court intended the majority requirement to mean a voting age majority." *McNeil*, 851 F.2d at 945. The *McNeil* court also recognized that non-citizens must be excluded from the analysis. *Id.* (citing *Romero v. City of Pomona*, 665 F.Supp. 853, 854 (C.D.Cal. 1987), *aff'd*, 883 F.2d 1418 (9th Cir.1989) (excluding non-citizens from *Thornburg* size analysis)).

Based on this analysis, the Court concludes that plaintiffs must demonstrate that Hispanics could comprise the majority of the voting age citizens in one district of a district election system.

C. *The Number Of Districts*

[2] The parties also present sharply conflicting positions on the number of districts the Court must use to determine whether the minority group satisfies *Thornburg*'s first precondition. Plaintiff contends that the Court may increase the size of the City Council to a reasonable extent to make this determination and suggests an increase of one or two seats. In contrast, the City contends that the Court must use the number of districts under the challenged plan, which would be four districts in this case.

Plaintiff places strong emphasis on the Court's broad remedial powers in matters involving equitable remedies. The Court recognizes the breadth of its equitable powers, but finds the reasoning of the Seventh Circuit in *McNeil* persuasive. In addressing this issue, the Seventh Circuit held that:

> "Although courts have broad remedial powers, plaintiffs must first show injustice. Here the purpose of the *Gingles* precondition is to determine, as a preliminary matter, whether [the electoral structure] illegally dilutes minority voting strength. Since we have found that it does not, we cannot fashion a remedy. Adding seats to the boards would create a voting rights violation where none presently exists by enabling appellants to meet the necessary precondition of their section 2 claim. This is a sort of bootstrapping we cannot accept."

851 F.2d at 946 (alterations added).

Where courts have changed the size of an elected body, they have done so with extreme caution. *McNeil*, 851 F.2d at 946–47; *Romero*, 665 F.Supp. at 864; *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 198–200, 92 S.Ct. 1477, 1484–1486, 32 L.Ed.2d 1 (1972). In *Beens*, a reapportionment case where a three-member district court reduced the size of Minnesota's State Senate by one-half and cut the size of Minnesota's House of Representatives by one-fourth, the Supreme Court strongly encouraged district courts to make no more than "minor deviations" in the size of state elective bodies. 406 U.S. at 198–200, 92 S.Ct. at 1484–1486.

Plaintiff cites *Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547 (11th Cir.1987), *cert. denied*, 485 U.S. 936, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988), for the proposition that the Court has the authority to enlarge the size of an elected body to ensure that minorities will be able to elect candidates of their choice. *Carrollton*, however, involved the intentional decrease in membership in a county commission from five to three to one in order to hinder the ability of blacks, whose percentage in the county's voting age population had increased, to elect candidates of their choice. 829 F.2d at 1551. Because plaintiff has made no similar showing here, the Court believes that *Carrollton* is distinguishable on its facts.

Therefore, given the authorities cited above, the Court will not increase the size of the Chula Vista City Council. Any other result would create a violation of § 2 where one did not previously exist.

D. *The One Man, One Vote Requirement*

The Court also recognizes that any plan minority voters submit must meet constitu-

tional standards; minority voters cannot violate the "one man, one vote" requirement to satisfy the *Thornburg* size prerequisite. *Romero*, 665 F.Supp. at 864; *see Reynolds v. Sims*, 377 U.S. 533, 567–68, 84 S.Ct. 1362, 1384–85, 12 L.Ed.2d 506 (1964). The Court may deviate by up to 10% in evaluating the population of a hypothetical district without violating the one man, one vote requirement. *Brown v. Thomson*, 462 U.S. 835, 842, 103 S.Ct. 2690, 2695–2696, 77 L.Ed.2d 214 (1983).

E. *The Evidence On Size And Compactness*

[3] Based on 1980 Census data, Chula Vista's population is 107,000. Using a system comprised of four districts, the ideal population in each district would be 26,750. The City's expert found that the maximum Hispanic population district would be 42.7% Hispanic and plaintiff's expert found that it would be 45.9% Hispanic. The City's expert adjusted these total population figures by using Census data regarding age and citizenship. Use of these data show that when age and citizenship are considered, the 42.7% Hispanic population district only is 26.1% in voting age Hispanic citizens. According to the City's expert, this difference results from the sizable number of aliens in the Hispanic population in Chula Vista. Only in a district that is much smaller would the plaintiffs be able to satisfy the first prong of *Gingles*.

Accordingly, the Court finds that the 26.1% number is far too low to meet the first *Thornburg* precondition. This conclusion remains true even if the Court deviates from the equal population requirement by 10%.

F. *Census Projections And Undercounts*

[4] Plaintiff also argues that the Court should use 1987 estimates and future demographic trends rather than 1980 Census data. This argument was rejected by the Seventh Circuit in *McNeil*, which held that 1980 census data must be used unless someone comes forth with more reliable data. 851 F.2d at 946. The *McNeil* court specifically rejected projections and estimates (as opposed to an enumeration which is what the Census conducts), such as those presented by Dr. Cain. The Seventh Circuit noted that the plaintiff there would have to wait until the 1990 Census data became available. *Id.*

Plaintiff also asserts that the Court should consider 1980 Census undercounts. This assertion is made by plaintiff's counsel not by plaintiff's expert, Dr. Cain. This assertion also was rejected in *Cuomo v. Baldridge*, 674 F.Supp. 1089, 1104–05 (S.D. N.Y.1987). As the City's expert points out, no factual or statistical basis exists for consideration of Census undercounting in any specific jurisdiction. Plaintiff's expert did not contradict this conclusion.

Accordingly, because plaintiff's arguments either prematurely consider the totality of the circumstances and are not based on the kind of concrete evidence necessary to override the presumption of accuracy of the census data, the court rejects the evidence concerning projections and undercounts.

G. *Adding Other Minority Groups*

[5] Plaintiff also argues that the Court should allow her to add all of Chula Vista's minority groups together into a single minority group for the purpose of considering *Thornburg's* first precondition. The Court does recognize that the minority group for a § 2 case may consist of members of two or more different minority groups. *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir.1988), *cert. denied*, — U.S. —, 109 S.Ct. 3213, 106 L.Ed.2d 564 (1989). However, even if the Court allowed plaintiff to add Asians and blacks to the Hispanic group, the combined minority group could not satisfy the first *Thornburg* precondition.

[6] As noted above, plaintiff's expert found that a maximum Hispanic population district would be 45.9% Hispanic. He then added other minorities to this maximum Hispanic district to derive a maximum minority population district of 55%. Thus, the other minorities make up 9.1% of the total population in this most heavily His-

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The Court accordingly finds that it would accomplish nothing to allow plaintiff to amend the complaint by adding new minorities since such an amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

H. *The Influence Claim*

[7] Plaintiff's final argument is that Hispanics do not need to satisfy *Thornburg*'s first precondition at all. Plaintiff argues that the Court may grant relief if Hispanics have a high enough percentage of individuals, whether in terms of voting age citizens or total population, to influence an election. Plaintiff bases this argument on footnote 12 of the *Thornburg* opinion where the Court states that "We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections." 478 U.S. at 46–47 n. 12, 106 S.Ct. at 2764 n. 12.

The Supreme Court has not yet expanded on this concept and the Court is unwilling to do so here. This Court finds the Seventh Circuit's analysis in *McNeil* persuasive. The Seventh Circuit expressly rejected "influence" claims because the courts would be "flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections." *McNeil*, 851 F.2d at 947.

Plaintiff has not cited any case recognizing an influence claim or finding a § 2 violation upon proof other than the three preconditions specified in *Thornburg*. The *Thornburg* trial court provided a persuasive explanation of why § 2 must be limited to proof of an impairment to elect:

"There is, first off, the fact that principle cases authoritatively developing the vote dilution concept have involved the impact of districting upon effective voting majorities. Confined to such measurable aggregations, the concept has a principled basis which permits rational and consistent, albeit sometimes difficult, application; not so confined, it lacks any such basis. That it to say, at the effective voting majority level it is possible to say with substantial assurance that to submerge or fracture such an aggregation in a racially polarized voting situation effectively deprives it of the presumptive capability to elect, solely by its group voting strength, representatives 'of its choice.' ... The raw power of such an aggregation 'to elect' provides a clear measure of its voting strength, hence a fair and workable standard by which to measure dilution of the strength. Short of that level, there is no such principled basis for gauging voting strength, hence dilution of that strength. Nothing but raw intuition could be drawn upon by courts to determine in the first place the size of those smaller aggregations having sufficient group voting strength to be capable of dilution in any legally meaningful sense and, beyond that, to give some substantive content other than raw power-to-elect to the concept as applied to such aggregations."

"We are doubtful that either the Supreme Court in developing the dilution concept, in constitutional voting rights litigation, or the Congress in embodying it in amended Section 2 of the Voting Rights Act intended an application open-ended as to voter group size. There must obviously be some size (as well as dispersion) limits on those aggregations of voters to whom the concept can be applied. We do not readily perceive the limit short of the effective voting majori-

ty level that can rationally be drawn and applied."

Gingles v. Edmisten, 590 F.Supp. 345, 381 (E.D.N.C.1984) (three judge panel), *aff'd in part, rev'd in part sub nom., Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *see also Latino Political Action Committee v. City of Boston*, 784 F.2d 409, 412 (1st Cir.1986) (rejecting influence claim because "it would require courts to make the very finest of political judgments about possibilities and effects—judgments well beyond their capacities").

The *Thornburg* preconditions for "election" cases give courts a measurable and judicially manageable test for determining the existence of unlawful vote dilution. Absent the requirement for a district majority, every segment of the population, no matter how small, would have a claim under § 2. Accordingly, the Court finds that there exists no legally cognizable "influence" claim under § 2 that would require a lesser standard of proof than set forth in *Thornburg*.

V. THE FOURTEENTH AMENDMENT CLAIM

[8] Plaintiff also challenges Chula Vista's at-large system under the Equal Protection Clause of the Fourteenth Amendment. For the reasons set forth below, the Court also finds that the equal protection claim must be dismissed.

Section one of the Fourteenth Amendment provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., 14th Amend., § 1. To succeed on the equal protection claim, plaintiff must "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Davis v. Bandemer*, 478 U.S. 109, 127, 106 S.Ct. 2797, 2808, 92 L.Ed.2d 85 (1986) (citing *Mobile v. Bolden*, 446 U.S. 55, 67–68, 100 S.Ct. 1490, 1499–1500, 64 L.Ed.2d 47 (1980)); *Rogers v. Lodge*, 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982). Accordingly, when an at-large electoral system is challenged, the plaintiff must prove both that "(1) [the at-large system] was adopted and/or maintained with the intent of purposefully discriminating against the minority voters, and (2) [the at-large system] result[s] in diluting minority votes." *Romero*, 665 F.Supp. at 868 (alterations added); *Terrazas v. Clements*, 581 F.Supp. 1329, 1342 (N.D.Tex.1984).

In its motion, the City argues that the effects prong of the equal protection claim is coextensive with the results test under § 2. According to the City, if plaintiff cannot establish that a dilutive result occurs under § 2, plaintiff's equal protection claim also fails. Plaintiff did not contest this argument and the Court finds it persuasive for the following reasons.

First, the two prong "intent, plus results" standard is more rigorous than the pure results test under § 2 of the Act. Indeed, it was because the intent, plus results standard imposed too great a burden on minority voters that Congress amended § 2. In *Thornburg*, the Court noted that:

> "The amendment was largely a response to this Court's plurality opinion in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which had declared that, in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the "results test," applied by this Court in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and by other federal courts before *Bolden*...."

Thornburg, 478 U.S. at 35, 106 S.Ct. at 2758; *see also id.* at 84, 106 S.Ct. at 2784 (O'Connor, J., Concurring in the Judgment) ("Whereas *Bolden* required members of a racial minority who alleged impairment of their voting strength to prove that the challenged electoral system was created or maintained with a discriminatory purpose and led to discriminatory results, under the

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478 U.S. at 50 n. 1

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It is clear that "section 2 of the Voting Rights Act demands a less exacting burden of proof." *Terrazas*, 581 F.Supp. at 1342. If plaintiff cannot satisfy the lesser of two standards, it follows that she cannot satisfy the greater.

Second, the *Thornburg* size and compactness analysis is as equally applicable to a Fourteenth Amendment analysis as it is to a § 2 analysis. The *Thornburg* size and compactness test defines, as a matter of law, minority voters' ability to link the at-large system to a voting related injury. At footnote 17 of the *Thornburg* decision, the Court wrote:

> "The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure."

478 U.S. at 50 n. 17, 106 S.Ct. at 2766 n. 17.

If minority voters lack sufficient size and concentration, this dilutive result cannot be established, just as it cannot be established under § 2 of the Voting Rights Act. The *Thornburg* Court's reasoning cannot be distinguished in this regard.

Because the voting age Hispanic citizen population is not large enough to constitute a majority in any district, the Court finds that plaintiff's Fourteenth Amendment claim also must be dismissed.

VI. THE FIFTEENTH AMENDMENT CLAIM

[9, 10] Plaintiff's final claim is under the Fifteenth Amendment to the United States Constitution. The Fifteenth Amendment prohibits the denial to any citizen of the right to vote. It is not relevant to a question of racial vote dilution unless the claim concerns the purposeful denial of minority rights to register to vote and to cast ballots. *Mobile v. Bolden*, 446 U.S. 55, 65, 100 S.Ct. 1490, 1498–1499, 64 L.Ed.2d 47 (1980) ("Having found that Negroes in Mobile 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that appellants invaded the protection of that Amendment"); *Buchanan v. City of Jackson*, 708 F.2d 1066, 1069 (6th Cir.1983) ("Absent any allegation of actual interference in the voting or registration processes, plaintiffs have failed to state a claim under the Fifteenth Amendment"); *Romero*, 665 F.Supp. at 869. Even if the Fifteenth Amendment did apply to this case, the applicable standards would be the same as those under the Fourteenth Amendment, *McCarty v. Henson*, 749 F.2d 1134, 1136 (5th Cir.1984); *Romero*, 665 F.Supp. at 869, in which case plaintiff's Fifteenth Amendment claim suffers from the same infirmity as the Fourteenth Amendment claim. Thus, the Court finds that the Fifteenth Amendment claim also must be dismissed.

VII. CONCLUSION

Based on the foregoing analysis, the Court hereby orders that defendants' motion for summary judgment is granted and that plaintiff's claims under § 2, the Fourteenth Amendment and the Fifteenth Amendment are dismissed.

IT IS SO ORDERED.

WEST KEY NUMBER SYSTEM

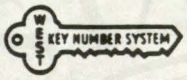
Vacated decision 8/1/86

Call attorney find out why no published opinion

ment was breached.[3] As a result, we hereby deny the Tribune's motion to dismiss for failure to state a claim.

CONCLUSION

In accordance with the above opinion, the Court hereby denies the Tribune's motion to dismiss both on the grounds of subject matter jurisdiction and on the purported failure to state a claim. It is so ordered.



LEAGUE OF UNITED LATIN AMERICAN CITIZENS, COUNCIL NO. 4836 and the Black Advisory Council, organizations incorporated under the laws of the State of Texas, all members acting individually and on behalf of all others similarly situated

v.

MIDLAND INDEPENDENT SCHOOL DISTRICT, Joseph Golding, Ronald Britton, Fred Newman, Parker Humes, Billy Jackson, all in their official capacities as Trustees of the Midland Independent School District of Midland, Texas.

No. MO-85-CA-001.

United States District Court,
W.D. Texas,
Midland-Odessa Division.

Sept. 10, 1986.

Hispanic and black residents brought voting rights action against school district and board of trustees. The District Court, Bunton, J., held that: (1) school district's previous at-large election scheme of electing trustees to school district violated Constitution, and (2) school district's proposed redistricting plans violated Voting Rights Act.

Ordered accordingly.

1. Elections ⇐12(2)

In making determination, under totality of circumstances, as to whether Voting Rights Act violation exists, factors to be considered are extent of any history of racial discrimination, extent to which voting in elections is racially polarized, extent to which voting has enhanced opportunity for discrimination, whether there is candidate slating process and whether minority group has been denied access to that process, extent to which minority group bears effects of discrimination, whether political campaigns have been characterized by overt or subtle racial appeals, and extent to which minority groups have been elected to public office. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

2. Schools ⇐53(1)

By creating a 76% minority district consisting of at least two separate minority groups, school district board of trustees' proposed plan for election of trustees impermissibly diluted votes of Hispanic and black residents. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

3. Elections ⇐12(3)

For denial or abridgment of right to vote on account of race or color through

3. The Tribune argues that it had the right to hire "permanent replacements" for the striking employees since the employment guarantee was not in effect during the work stoppage. "Permanent replacements" is a specialized term in the field of labor law referring to workers who are hired to replace employees engaged in an "economic strike." *Belknap, Inc. v. Hale*, 463 U.S. 491, 493, 103 S.Ct. 3172, 3174, 77 L.Ed.2d 798 (1983). These replacements do not *have* to be discharged when striking employees return to work, although they *can* be dismissed if the employer so agrees with the collective bargaining agent for the striking employees. *See, e.g., id.* at 503, 103 S.Ct. at 3179. In any event, this argument is entirely inappropriate at this stage of the litigation on a 12(b)(6) motion where the Court is confined to reviewing the complaint purely for legal sufficiency based on the allegations contained therein. Accordingly, we do not address this question.

voting qualifications or prerequisites to be present, minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute majority in single-member district, minority group must be able to show that it is politically cohesive, and minority group must be able to demonstrate that majority votes sufficiently as a block to enable it in the absence of special circumstances to defeat minority's preferred candidate. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

4. Schools ⇐53(1)

School district's previous at-large election scheme of electing school board trustees violated Constitution; there was racially polarized voting, legacy of official discrimination in voting matters, education, housing, and employment, persistence of past purposeful discrimination in concert with multimember districting scheme which impaired ability of geographically insular and politically cohesive groups of black and Hispanic voters to participate equally in political process and to elect candidates of their choice. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973; U.S.C.A. Const. Amends. 14, 15.

5. Schools ⇐53(1)

School district's proposed redistricting plans, under which three of seven trustees would be elected on at-large basis or two of seven members would be elected from single-member districts with minority populations, violated Voting Rights Act section prohibiting denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amends. 14, 15.

Rolando L. Rios, San Antonio, Tex., for plaintiff.

Charles Tighe, Midland, Tex., for defendant.

MEMORANDUM OPINION

BUNTON, District Judge.

This Court has been requested by a panel of the Fifth Circuit [1] to determine whether or not *Thornberg, et al. v. Gingles, et al.* has any application to the situation that exists in the attempt by Appellees to have School Trustees in the Midland Independent School District elected in a manner other than at-large. In other words, the Court has been requested to "Gingleize" (pronounced gin-gull-eyes) its previous decision.

At the outset, the Court recalls a song fairly popular in the late 30's or early 40's that went in part as follows:

> I've got spurs that jingle, jangle, 'Gingle,'
> As I go riding merrily along,
> And they say 'Oh ain't you glad you're single,'
> And that song's not so very far from wrong.

I.

FACTUAL BACKGROUND

"I'VE GOT SPURS"

The appellees, Mexican American and Black residents of the Midland Independent School District (MISD) instituted this action on January 3, 1985 pursuant to 42 U.S.C. §§ 1971, 1973, 1983 and 1988 to redress the denial, under color of state law, of rights secured to them under the Fourteenth and Fifteenth Amendments to the United States Constitution.

Specifically, the appellees requested this Court to declare that the existing at-large election scheme of the MISD violated their constitutional rights. They alleged that members of the class which they represent have less opportunity than other members of the electorate to participate in the political process and to elect representatives of

1. The judgment of the District Court is vacated and remanded to the District Court for reconsideration in the light of *Thornberg v. Gingles, et al.*, — U.S. —, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

their choice to the position of School Board Trustee. The appellees' Complaint also sought a permanent injunction prohibiting the holding of any future school board elections under the at-large election scheme and a formation of a board of trustees whose members are elected from seven single-member districts. Finally, the appellees requested the Court to award them attorneys' fees and costs expended in the prosecution of this action.

The appellants initially denied all allegations of the appellees' Complaint and contended that the at-large election scheme of the MISD Board of Trustees was not violative of the United States Constitution and was in the best interest of all residents of the MISD.

By way of compromise, the parties agreed to an Order of this Court, entered on October 10, 1985, whereby the at-large election scheme was eliminated. Exercising their legislative prerogative, the appellants then submitted a proposed "3–4 Plan" whereby four school board trustees would be elected from single-member districts and the remaining three would be elected at-large. The appellees voiced and filed their objections to the appellants' proposed "3–4 Plan," and contended that the "3–4 Plan" plan diluted their voting strength.

"OUR SPURS JINGLE, JANGLE, GINGLE"

It is noted that the School Board did not on its own initiative offer to any minority the opportunity to elect one of their number to the School Board from a so-called "safe district" until "spurred" to do so by the instant suit. This in spite of the fact that in the years between 1954 and 1984 there had been *only* three minority members elected to the MISD: one Hispanic (who lived on the west side and did not live where most Hispanics did, i.e., the east side) and two Blacks. One Black was elected without any opponent. This also in spite of the fact that in 1984 Hispanic children constituted 25.39% of the school population and Blacks constituted 10.68%.

It is further noted that these statistics reflect a combined minority of 36.07% of the student population of MISD. The Court is further aware that it was stipulated by the parties that MISD was sued by the U.S. Government to desegrate its schools and that at one time MISD maintained segregated schools. Further stipulations were, at one time, schools were segregated and so were theatres, pools, and restaurants. Needless to say, the poll tax inflicted by the State of Texas was enforced in Midland County.

The appellees voiced and filed their objections to the appellants' proposed "3–4 Plan" and contended that the "3–4 Plan" diluted their voting strength.

A trial on the merits was initially held on January 13, 1986 and January 14, 1986.

Then on January 17, 1986, this Court entered its opinion stating "that the appellants' proposed "3–4 Plan" impermissibly diluted the votes of the appellees in violation of the Constitution and the amended version of Section 2 of the "Voting Rights Act." The Court determined that, in its opinion, the appellees' "7–0 Plan" would best insure equal representation and participation of the entire community in the affairs of the MIDLAND INDEPENDENT SCHOOL DISTRICT. The Court then adopted the two minority districts as drawn by the appellees and allowed the appellants to draw the remaining single-member district lines.

On February 28, 1986, this Court reconsidered its original opinion and again rendered judgment in favor of the appellees' "7–0 Plan." On August 22, 1986, the record in this cause was augmented to aid the Court's reconsideration of the case. The Court's Findings of Fact and Conclusions of law are incorporated in this opinion.

"AS WE GO–O–O–O RIDING"

Before "riding" any further and before "Gingleizing", the appellees contend that the "3–4 Plan" is impermissible because it is contrary to Texas law.

II.

STATE LAW ISSUES

The appellees assert that appellants' proposed "3–4 Plan" and "5–2 Plan" are in violation of § 23.024(b) of the Texas Education Code. This statute provides that "[t]he board of trustees of a school district, *on its own motion*, may order that trustees of the district are to be elected from single member districts or that not fewer than 70% of the members ... are to be elected from single member trustee districts." *Id.* (emphasis supplied)

The state statute is not relevant to the proceedings before the Court. In *McDaniel v. Sanchez*, 452 U.S. 130, 152, 101 S.Ct. 2224, 2237, 68 L.Ed.2d 724 (1981), the Supreme Court held that the Voting Rights Act and its preclearance requirements are applicable to a proposed plan without a showing that a legislative body has the authority to enact a plan in issue.

> The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic. The applicability of § 5 to specific remedial plans is a matter of federal law that federal courts should determine pursuant to a uniform federal rule.

Id. at 152–53, 101 S.Ct. at 2237–38.

The Fifth Circuit's decision in *Calderon v. McGee*, 584 F.2d 66 (5th Cir.1978) is in accord with *McDaniel*. Without mention of the effect of state law upon a plan being considered by a federal district court, the Fifth Circuit in *Calderon* stated that the applicable standard of review for court-approved plans was whether the particular plan is constitutional.

Accordingly, the Court concludes that the state statute in issue has no effect upon the instant proceedings. Rather, this Court's sole interest, and standard, in reviewing or formulating an acceptable plan is to insure that such plan comports with the requirements of the United States Constitution and the laws passed by Congress.

"MERRILY ALONG"[2]

III.

In determining whether appellants "3–4 Plan" or "5–2 Plan" meets constitutional muster, the Court, as mandated by the Fifth Circuit, must apply the criteria set forth in *Thornburg v. Gingles, et al.*, —— U.S. ——, 106 S.Ct. 2752, 92 L.Ed.2d 25. The *Gingles* case involved a challenge to the North Carolina General Assembly's redistricting plan for the State's Senate and House of Representatives. The appellees in that case, black citizens of North Carolina who were registered to vote, challenged seven districts, one single-member and six multimember districts. Appellees there alleged that the redistricting scheme impaired black citizens' ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution, and in violation of § 2 of the Voting Rights Act.

The *Gingles* case is a significant decision in many respects. First, the case sets forth the criteria to be applied in determining whether there is a violation of § 2 of the Voting Rights Act of 1965, as amended June 29, 1982, 42 U.S.C. § 1973. Second, appellees need not prove that a discriminatory intent exists. Third, trial courts are to apply a "results tests" and are to consider the "totality of circumstances."

[1] In making a determination under the "totality of circumstances" aspect as to whether a § 2 violation exists, the Senate Judiciary Committee Majority Report accompanying the bill that amended § 2 elaborates on circumstances that might be probative of a § 2 violation. These factors listed by Justice Brennan are:[3]

2. No relation to "Merrily, Merrily" in the old song "Row, Row, Row Your Boat." This is not an admiralty case.

3. In setting out the seven factors at Footnote 4 the *en banc* decision in *Zimmer v. McKeithan*, 485 F.2d 1297, aff'd sub nom. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), decided by the Fifth Circuit was favorably cited by Justice Brennan for refining and developing *White v. Register*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

1. The 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 to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which voting in the elections of 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;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of the elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, or practice, or procedure, is tenuous.

S.Rep. No. 417, 97th Cong., 2d Sess. 28–29, reprinted in 1982; U.S.Code Cong. & Admin.News 177, 206–207 (footnotes omitted).

Although *Gingles* set forth a tripartite test to aid courts in determining whether a § 2 violation exists, the Supreme Court stated that factors as listed in the Senate Report are to be accorded appropriate weight. *Id.*, at —— n. 7, 106 S.Ct. at 2763. Thus, the Court will begin its inquiry by examining the situation in light of the relevant seven factors.

A. *The Extent of Any History of Official Discrimination*

The appellants contend that past discrimination is of "little relevance" when determining the intent behind the decision in 1985. As previously discussed, the "intent" requirement for establishing dilution has been eliminated by the amended version of § 2.

It is clear to this Court through the stipulations of the parties and an examination of the state statutes attached hereto as Appendix 1, that Midland County, not unlike countless other counties across the nation, has in the past been the victim of oppressive discrimination.

Of the 113,600 persons living in the County of Midland,[4] 79,439 or 69.9% are of voting age. Mexican-Americans are 11.9% of the county's voting age population while Blacks make up 7.8%. Together, Mexican-Americans and Blacks constitute 19.7% of the total voting age population. As of April, 1985 there were 49,658 persons registered to vote in Midland County. Sixty-two point five percent (62.5%) of the county's eligible population is registered to vote. Thirty-eight point one percent (38.1%) of the Mexican-American population is registered to vote compared to 65.8% of the remaining population. Of the 49,658 registered voters in the county, 3,614 or 7.3% are Mexican-Americans. There is an unregistered potential of 5,882 Mexican-Americans in the county.

4. The MISD does not include all of Midland County. There are 80,685 people in MISD; of these, 12,238 are Hispanic (15.17%) and 7,002 are Black (8.68%).

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It bears repeating that only three persons that were Hispanic or Black were elected to the Midland School Board; the rest were Anglo.

The percentages stated *supra*, coupled with the past record of minority representation on the MISD Board indicates that past discrimination has lingering effects on the election system.

The stipulations and the facts developed during the trial conclusively show that the past discrimination has touched the rights of Hispanics and Blacks to register, to vote, and to otherwise participate in the democratic process.

As just stated, there is clear evidence of present political disadvantage resulting from past discrimination. The Senate Report notes that the Voting Rights Act serves "not only to correct an active history of discrimination, the denying to negroes of the right to register and vote, but also to deal with the accumulation of discrimination." *Id.* at —— n. 9, 106 S.Ct. at 2763.

B. *Racially Polarized Voting*

In considering the issue of whether racial polarization exists in the voting patterns of the MISD *vel non*, the Court examines elections over the past two decades under a "totality of the circumstances" approach as the District Court did in *Gingles* and such was approved by the Supreme Court and allowed by § 2(b).

Between April, 1964 and April, 1974 ("the first decade"), prior to the implementation of the numbered place system and majority rule requirement which existed between April, 1974 and April, 1984 ("the second decade"), a total of 23 seats on the MISD were up for election. Of the 52 candidates bidding for these contested seats, six were minority candidates. Of these six minority candidates running for a contested seat during the first decade, three were elected to the school board.

During the second decade, with the numbered place system and majority rule requirement in effect, a total of 19 seats on the MISD Board were up for election. Of the 47 candidates bidding for these contested seats, eight were minority candidates. Of these eight minority candidates running for a contested seat during the second decade, one was elected to the school board.

The mean number of votes cast in races with minority candidates during the first decade totaled 3,919. The mean number of votes cast in races with no minority candidates during this same period totaled 2,663. Likewise, during the second decade (1974–1984), the mean number of votes cast in races with minority candidates totaled 6,807. The mean number of votes cast in races with no minority candidates during this same period totaled 5,315. This pattern suggests that a larger percent of the total population, i.e., all segments of society, is likely to vote in an election wherein a minority is running.

In 1978 the MISD expanded the number of polling places from two to six. Precincts two through five are predominantly Anglo ("the Anglo Precincts"); precincts one and six are predominantly minority ("the Minority precincts").

In April of 1978 an election was held with a Black candidate running against an Anglo candidate for a position on the MISD Board. The Black candidate won approximately 22.48% of the vote from the Anglo precincts and approximately 22.74% of the vote from the minority precincts. Because the Black candidate won approximately the same percentage of votes from both the Anglo and minority precincts, racial polarization likely played no role in the 1978 election. The Plaintiffs, however, contend that the 1978 election was unique in that the Black candidate was not taken seriously by any segment of the society, Anglo or minority, and thus cannot be taken as evidence of no polarization. The elections following 1978 seem to support the Plaintiffs' evidence on this point.

In the April, 1979 election, four candidates were running for a position on the MISD Board. Two of these four candidates were Hispanic and two were Anglo. The Anglo precincts cast 34.90% of their

vote for the Hispanic candidates; the minority precincts cast 61.13% of their vote for the Hispanic candidates.

Likewise, in the April, 1980 election two candidates, a Black and an Anglo, ran for a contested seat on the MISD Board. Thirty-four point ninety percent (34.90%) of the Anglo precincts voted for the Black candidate, whereas 57.96% of the minority precincts voted for the Black candidate. An Anglo and Black were also running against each other for another position in the 1980 race for the MISD Board. From the Anglo precincts 21.69% of the votes were cast for the Black candidate; from the minority precincts 42.52% of the votes were cast for the Black candidate.

Again in the April, 1984 election, a Black and Anglo were running for the same position on the MISD Board. The Black candidate received 59.88% of the votes cast from the minority precincts as opposed to 33.37% from the Anglo precincts.

The following chart depicts the equity of representation of minorities on the MISD Board:

Year	% of Representation of Minorities on School Board	% of Minority of School District Population	Equity Measure
1964	0%	21%	-21%
1965	0%	21%	-21%
1966	0%	21%	-21%
1967	0%	21%	-21%
1968	0%	21%	-21%
1969	0%	21%	-21%
1970	14%	21%	- 7%
1971	14%	21%	- 7%
1972	14%	21%	- 7%
1973	14%	21%	- 7%
1974	28%	21%	+ 7%
1975	14%	25%	-11%
1976	14%	25%	-11%
1977	14%	25%	-11%
1978	14%	25%	-11%
1979	14%	25%	-11%
1980	0%	25%	-25%
1981	0%	25%	-25%
1982	0%	25%	-25%
1983	0%	25%	-25%
1984	0%	25%	-25%

From an examination of the voting patterns and what the Court perceives to be the credible evidence in the case, it appears that in each case in which a minority candidate ran for the MISD Board the voting has been polarized along racial lines.

As has been previously stated, the appellants have agreed to an elimination of the at-large scheme of electing trustees to the MISD Board. The appellants have proposed a "3–4 Plan" whereby four candidates would be elected from single-member districts and three at-large, the at-large members to be elected by numbered posts and staggered. The appellants' proposed "3–4 Plan" creates only one minority district (District 2), which is made up of 76.42% of minority group members. The remaining districts as proposed by the appellants are predominantly Anglo.

Should the "3–4 Plan" be placed in effect by this Court, it is obvious that the minority population of the MISD would be able to elect but one representative.

The appellants argue that by conducting at-large elections as part of their proposed "3–4 Plan" as well as the staggering of those positions, thereby allowing the

electorate an annual opportunity to vote, the efficiency and public responsiveness of the MISD Board will be enhanced. The appellants also state, through the testimony of their superintendent that, as the administrative head of the board, the superintendent will have decreased efficiency if required to respond to and manage seven members elected from single-member districts. The Court is unpersuaded by these arguments.

[2] While recognizing that no minority group is constitutionally guaranteed a proportional number of representatives, the Court must conclude that by creating a 76% minority district consisting of at least two separate minority groups, the appellants' proposed plan impermissibly dilutes the votes of the appellees. Although there is no anti-single shot provision in the appellants' proposed plan, the requirement that the at-large candidates run for numbered posts may have an adverse impact on the appellees.

C. *Voting Procedures That May Enhance the Opportunity for Discrimination Against the Minority Group*

Since it was formed, all trustees have been elected in at-large elections. Surely this is an "unusually large election district." It couldn't be any larger. It was not until September 1973 that the School Board went to the election of trustees by numbered positions. Prior to that, terms were staggered so that trustees ran three one year, and two each the next two years. All trustees whose terms expired could run, or whoever wished could also run, and the three or two with the most votes (no majority was required) were duly elected.

In January 1976, for the first time the School Board went to the requirement that there must be a majority vote for a candidate. It is interesting to note that the person who seconded the motion to adopt the provisions of § 23.11 of the Texas Education Code (which provided among other things for a majority vote) was made by one of the three minority members[5] to serve on the Board, and he was himself defeated at his next election by an Anglo.

Since the adoption of the majority vote requirement not one member of a minority who had Anglo opposition has been elected a trustee.

Under the at-large system, only three minority candidates have been elected to the MISD Board of Trustees since its inception. The paucity of minority candidates which have been elected to the board is a likely result of past purposeful discrimination.

D. *Candidate Slating Process*

There was no proof that there ever was a slating process in the election of school trustees, hence there was no proof that any minority group was denied access to that process.

E. *The Effects of Discrimination in Areas of Education, Employment and Health*

Midland County is no different from other counties in Texas. Minority members are at the low end of the spectrum. Whether this is the cause or effect of being hindered from participating effectively in the political process is difficult to determine. While the statistics developed in this trial were several years old, there is no doubt that our economic down turn has accentuated the differences. The per capita income as reflected in P.Ex. 17 reflects that Anglos earn almost three times as much as Blacks and more than twice what Hispanics earn. Those below the poverty level comprise 5.9% of the Anglo population, but 26.7% of the Black population and 17.7% of the Hispanic.

The percent of high school graduates reflect that three-fourths of the Anglos graduated, only one-half of the Blacks and three-eighths of the Hispanics.

5. The Trustee's name on the ballot was Roger Robles. His Spanish name would have been Rogelio Robles but for obvious reasons he preferred the Anglicized name for ballot purposes.

Housing characteristics and unemployment rates reflect the same thing. Minorities are the deprived even though they have made great strides in the last two decades.

Indeed these statistics bear out exactly what was found in North Carolina. Again quoting *Gingle* as stated by Justice Brennan:

> ... members of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth. See, e.g., Butler 902 (Minority group "members' shared concerns, including political ones, are ... a function of group status, and as such are largely involuntary.... As a group blacks are concerned, for example, with police brutality, sub-standard housing, unemployment, etc., because these problems fall disproportionatly upon the group"); S. Verbia & N. Nie, Participation in America 151–152 (1972) (hereinafter Verba & Nie) ("Socioeconomic status ... is closely related to race. Blacks in American society are likely to be in lower-status jobs than whites, to have less education, and to have lower incomes.") Where such characteristics are shared, race or ethnic group not only denotes color or place of origin, it also functions as a shorthand notation for common social and economic characteristics. Appellants' definition of polarized voting is even more pernicious where shared characteristics are causually related to race or ethnicity. The opportunity to achieve high employment status and income, for example, is often influenced by the presence or absence of racial or ethnic discrimination. A definition of racially polarized voting which holds that black bloc voting does not exist when black voters' choice of certain candidates if most strongly influenced by the fact that the voters have low incomes and menial jobs—when the reason most of those voters have menial jobs and low incomes is attributable to past or present racial discrimination—runs counter to the Senate Report's instructions to conduct a searching and practical evaluation of past and present reality, S.Rep. 30, and interferes with the purpose of the Voting Rights Act to eliminate the negative effects of past discrimination on the electoral opportunities of minorities.

Id. at ——, ——, 106 S.Ct. at 2772–73, citing Verbia and Nie, *Participation in America*, at 5, 40.

The situation in Midland though involving two groups is no different.

F. *Overt or Subtle Racial Appeals in Political Campaigns*

There was no proof that this existed in any school board election.

G. *The Extent to Which Minorities Have Been Elected*

Repeating, only three minority candidates have been elected since its formation. Few minority members have dared to try to be elected. Since the adoption of majority vote requirement, *no* minority member has been elected.

In the last hearing there was proof offered that in an at-large election in the *City* of Midland a minority candidate was defeated in his quest for city councilman. In a race for council, a person from a place (a geographic division which included the east side of town), a minority member was elected.

"ALO–O–NG"

IV.

GINGLES FACTORS

[3] Although the factors set out by the Senate are relevant, *Gingles* set forth that for a violation of § 2 to be present, there must be a conjunction of three factors. 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. Second, the minority group must be able to show that it is politically cohesive. If the minori-

ty group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the Anglo majority votes sufficiently as a bloc to enable it in the absence of special circumstances, such as the minority candidate running unopposed, to defeat the minority's preferred candidate.

Succintly stated, the bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group. *Id.*, at —, —, 106 S.Ct. at 2764–65.

The *Gingles* opinion requires courts to apply the tripartite test set forth above; however, the Supreme Court recognized that the factors listed in *Gingles* will not be dispositive in every situation. The Court stated:

> As must be apparent, the degree of racial bloc vote voting that is cognizable as an element of a § 2 vote dilution claim will vary according to a variety of factual circumstances. Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting.

Id., at —, 106 S.Ct. at 2770.

Thus, the principles elucidated in *Gingles* are general principles that are to provide trial courts with guidance. The factors listed are not an ironclad test that must be rigidly met.

The situation in *Gingles* is factually distinguishable from our situation. Whereas, the situation in *Gingles* involved Anglo and Black voters, the cause before this Court involves Anglo, Black, and Hispanic voters. This additional fact complicates application of the *Gingles* tripartite test in that *Gingles* addresses a § 2 violation involving a minority group, and the situation at hand involves two minority groups. Furthermore, although the invidious nature of discrimination carries with it a certain degree of similarity wherever it may occur, the discrimination which occurred in West Texas has characteristics that are unique to this part of the world. Thus, the political reality in West Texas is not the same as the political reality in North Carolina.

Accordingly, as the indigenous political and social reality differs from that found in North Carolina, the Court will apply the *Gingles* factors as best it can, using a "totality of the circumstances" approach. The Court keeps in mind that "the essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by ... voters to elect their preferred representatives." *Id.*, at —, 106 S.Ct. at 2764. The Court also recognizes that multimember districts and at-large voting schemes are not per se illegal, and that proportional representation is not a constitutional guarantee.

The first factor of the *Gingles* test provides that a minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. Midland's population is broken down ethnically as follows: 74% of the population is Anglo; 15.9% of the population is Hispanic; and 9.6% of the population is Black.

The evidence presented demonstrates that Blacks and Hispanics live predominantly in the eastern and southeastern portions of Midland. The "Racial Breakdown of 1985 City Voting Precincts by Census Tract, 1980 Census" [Plaintiffs' Exhibit 19] demonstrates the actual population breakdown. The geographical area where Blacks and Hispanics in Midland live roughly correlates with the areas encompassed by City Precincts 1, 2, and 3. The Court notes that, of Midland's total Black population, 92.43% of that population lives within one of the three districts mentioned above. With regard to Midland's Hispanic population, 73.7% of that total live within the same aforementioned precincts. Interestingly, only 7.6% of Midland's majority population live in this area.

The actual ethnic breakdown of the population living in Precincts 1, 2, and 3 is as follows: 34% of the population is Black; 44% is Hispanic; and 22% is Anglo.

Accordingly, the evidence shows that the Blacks and Hispanics in Midland constitute a sufficiently large and geographically compact group to constitute a majority in a single-member district.

"AND THEY SAY"

V.

Appellants argue and they say that the appellees' proposed "7–0 Plan" by its very structure prevents the possibility of having a Black population sufficiently large and geographically compact enough to constitute a majority in a single-member district. Appellants argue that the population of Blacks in Appellees' proposed District 1 only constitutes 45.81% of the population. Therefore, appellants argue that appellees' case failed prong one of the *Gingles* test. This argument is not convincing. Although the Black population in District 1 totals 45.81%, a closer look at that district reveals that, when combined with the 25.68% Hispanic population, District 1's total minority representation constitutes 71.5% of the District's population. Thus, in actuality, the District is overwhelmingly populated by minorities. For this reason, appellants' argument fails.

As the Court noted earlier, the situation which occurred in North Carolina and the situation in Midland are factually distinguishable. *Gingles* did not involve a situation where two minority groups live in the same area. Thus, *Gingles* says nothing about the possibility of aggregation or coalition by and between two minority groups.

For the purpose of applying prong one of the *Gingles* tripartite test, this Court is of the opinion that the minority populations living within a geographically compact area must necessarily be aggregated. The Court cannot conceive of the Supreme Court's decision leaving room for any other interpretation. If an aggregation of the minority population is sufficiently large enough to constitute a majority in a single-member district, the first prong is satisfied. Should the Plaintiffs fail to prove that the minorities cannot form coalitions, this would go to the query presented by prong two. Thus, to not allow an aggregation for the satisfaction of prong one would be inherently unjust. Therefore, from the evidence presented, appellees did satisfy prong one of the *Gingles* test.

As appellees' proof reflects that the minority groups living in Midland are sufficiently large and geographically compact to constitute a majority in a single-member district, the Court's inquiry turns to whether the group is politically cohesive.

The Court recognizes that Blacks and Mexican-Americans are racially and culturally distinct. However, it is also clear that the two groups share common experiences in past discriminatory practices. Whereas the two groups may not always have the same political goals, it is clear that the two groups have political goals that are inseparable. As such, coalition formation will often prove to be mutually beneficial to the two groups. The evidence presented bears out this fact. Testimony presented showed that Blacks and Hispanics worked together and formed coalitions when their goals were compatible. Additionally, the bringing of this lawsuit provides evidence that Blacks and Hispanics have common interests that induce the formation of coalitions.

Appellants argue that Blacks and Hispanics are not politically cohesive. The appellants offered into evidence a survey conducted by the University of Texas at Austin. The survey measured the attitudes of Midland residents vis a vis the MIDLAND INDEPENDENT SCHOOL DISTRICT. About certain things, appellants argue that the survey demonstrates that Blacks and Hispanics have mutually exclusive interests, and that the two groups are politically distinct. The Court is unpersuaded by this argument. Although the survey is an impressive accumulation of data, the survey simply is not relevant to the situation before the Court. The survey is useful only for the purpose for which it was designed; to measure attitudes in Midland vis a vis the Midland School Board. The survey is not relevant to how cohesive people will be, nor is it

relevant to predict voting behavior. The survey itself contains a caveat about using the survey for purposes for which it was not intended to be used. Chapter III of the survey sets forth limitations on the interpretation of data found within it. One of the limitations states as follows:

> Attitudes expressed in response to a question may not determine the action that would result in the actual situation; one can say that he favors increased expenditures in education yet vote to defeat the next bond proposal.

This Court does not believe the information in the survey is relevant to the issue before the Court; furthermore, the very terms of the survey itself set limits on how the data should be used. Thus, the Court is unpersuaded by any arguments counsel presented based on information from the survey.

From the evidence presented, the Court is of the opinion that appellees have satisfied the requirements of prong two of the *Gingles* rubric. The Court now turns its attention to the third requirement.

The third prong of the *Gingles* rubric requires that the appellees be able to demonstrate that the Anglo majority votes sufficiently as a bloc to enable it in the absence of special circumstances to defeat the minorities' preferred candidate. As discussed supra, in the portion of this opinion dealing with racially polarized voting, this Court stated that past voting for the MISD Board has been polarized along racial grounds. When this fact is reviewed in light of the fact that only three minority candidates have been elected to the MISD Board since its inception, it is clear to this Court that appellees have satisfied the requirements of prong three.

"AND THEY FURTHER SAY"

Appellants argue that appellees have in fact elected their preferred candidate over 70% of the time.

The Court is again unpersuaded by appellants' argument. The evidence presented by appellants does not tell the whole story. Appellants cite results that have occurred since 1978. Of these results, three of the elections should not be counted, as the winning candidate ran unopposed. Furthermore, the results do not consider those candidates who may have considered running, but due to past discrimination may have perceived running for office to be an exercise in futility. The Court must look at more than just the results of a few elections. The Supreme Court recognized this fact in *Gingles*, when Justice Brennan held:

> The concern is necessarily temporal and the analysis historical because the evil to be avoided is the subordination of minority groups in American politics, not the defeat of individuals in particular electoral contests. Also for this reason, in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one of a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting may explain minority electoral success in a polarized contest.

Id., at ——, 106 S.Ct. at 2769.

From the "totality of the circumstances" this Court is of the opinion that racially polarized voting in Midland has served to prevent minorities in Midland from electing the candidate of their choice. This district experiences legally significant bloc voting that prevents fair minority participation; thus, the Court is of the opinion that appellees have satisfied prong three of *Gingles* tripartite test.

"AIN'T YOU GLAD YOU'RE SINGLE"

VI.

[4] Any proposed election scheme which the Court reviews or formulates must comport with what it perceives to be the re-

quirements of the Constitution and laws of the United States. The Court in this case has carefully considered the totality of the circumstances, and has found that racially polarized voting; the legacy of official discrimination in voting matters, education, housing, and employment; and the persistence of that legacy of past purposeful discrimination has acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of Black and Hispanic voters to participate equally in the political process and to elect candidates of their choice. Thus, the Court finds that the previous at-large election scheme of electing trustees to the MIDLAND INDEPENDENT SCHOOL DISTRICT is in violation of the Constitution.

Appellants have asked the Court to adopt their "3–4 Plan" or "5–2 Plan" in accordance with "legislative prerogative."

The appellees complain that the appellants' proposed dual election system ("5–2 Plan") places the board trustees from the minority districts in a special category and distinct disadvantage because they would be the only two members elected by a single-member district. Appellants counter that the appellees should have no objection to this proposed remedy because the plan acts to insure two "safe" minority districts.

The Court is in agreement with the appellees that, while the Defendants' *sui generis* Proposed "5–2 Plan" allows for minority representation, the nature of the plan places them in a special category which would make it inherently difficult to effectively represent their constituency. The implicit coercion in such a plan is readily apparent to the Court. No one wants to be an illegitimate child at a family reunion or a "south of the tracks' person crashing a party at a "north of the tracks" location. Indeed, it is evident that such a scheme would doubtless "send[ ] a message to [the trustees elected from the two single-member minority districts] that they are outsiders, not full members of the political community, and an accompanying message to the trustees elected at-large from the predominantly Anglo community] that they are insiders, favored members of the political community." *Wallace v. Jaffree*, 472 U.S. 38, 69, 105 S.Ct. 2479, 2497, 86 L.Ed.2d 29, 52 (1985) (O'Connor, J., concurring), citing *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1982) (O'Connor, J., concurring). Although borrowed from a different constitutional context, the Court finds the analogies to be poignant as well as the analogy in *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601. After a searching practical evaluation of past and present reality, it is clear that the legacy of past discrimination is still at work in the minds and hearts of minorities in Midland. In politics, where the distinction between image and reality is often clouded, image more often than not reigns supreme over reality. To find the appellants "3–4 Plan" or "5–2 Plan" acceptable would serve to send the wrong message to minority voters in Midland. Such a message would serve to perpetuate the legacy of discrimination in this fair city.

There is no doubt that such apportionment plans result in discrimination against the trustees (and ultimately against the constituency) who happen to be elected from the two minority districts. Such resulting discriminatory impact would dilute the appellees' right to vote and participate effectively in the political process.

"AND THAT SONG AIN'T SO VERY FAR FROM WRONG"

VII.

"The only limits on judicial deference to state apportionment policy ... [are] the substantive constitutional and statutory standards to which such state plans are subject." *Seastrunk v. Barnes*, 772 F.2d 143, at 151 (citations omitted). While mindful that it is the function of the legislature to make basic political policy, this Court is unable to accept the appellants' proposed apportionment plans due to their resulting discriminatory impact upon the appellees' right to vote and effectively participate in the political process.

[5] After reviewing the plans submitted by appellants, the Court is of the opinion that both proposed plans offered by the appellants, exercising their legislative prerogative, are violative of the amended version of § 2 of the Voting Rights Act of 1965 and, as such, are unacceptable to the Court, and would be unacceptable under the dictates of the *Gingle* case.

The Court is of the opinion that appellees met the requirements of a § 2 voting dilution claim. Furthermore, the Court is of the opinion that the appellants' "3–4 Plan" and "5–2 Plan" do not meet constitutional muster. The Court is of the firm belief that the single-member district plan is in the best interest of all members of the community, and will insure equal and fair participation in the political process.

The Court finds no alternative but to mandate a Court-drawn plan which provides for the election of trustees to the MIDLAND INDEPENDENT SCHOOL DISTRICT by seven single-member districts.

The Court is ever mindful that some people are opposed to judicial activism and indeed current federal judicial appointees are supposedly screened as to one's ideas on this issue. This opinion, however, does not fit in this category. Congress in 1982 mandated that no citizen be "saddled" with any standard, practice or procedure which denies them their constitutional guarantee. It further mandated that our election processes be open to equal participation by *all* citizens and as much opportunity be given to minorities as majorities to elect representatives of their choice.

Our Supreme Court, in construing this Congressional mandate, held among other things that it could not say that a District Court that was made up of local judges that were well acquainted with the political realities of the State, clearly erred in reaching the conclusion that multimember electoral structure caused some minority voters to have less opportunity than Anglo voters to elect representatives of their choice.

This Court holds that any at-large election in MISD violates the provisions of our Constitution and the Voters Right Act.

This Court is attempting to abide by what our elected representatives passed into law, our President signed into law, and our courts have decreed that it *is* the law. The solution herein set out does just this.

The Court apologizes for the delay in entering this Order at this late date. This case has been on file much too long. Minority representation on the Midland School Board has been too long delayed. Each passing day aggravates an already existing bad situation. Another school year has begun. Trustees elected for a three-year term have been held over for at least another half year. The wheels of justice move slowly, but they move. Hopefully, the matter will be resolved shortly but until the Fifth Circuit has an opportunity to pass on the appeal and the appropriate mandate entered, this Court will stay any further elections but with the exception of the date set for election, in the event of affirmance, the elections will be held in accordance with the "7–0 Plan" previously ordered.

While this Memorandum Opinion might be unduly lengthy, it was solely an attempt to abide by the directions of the Appellate Panel. While some references and headnotes might appear to be flippant, no disrespect was meant to either the Appellate Court or parties to this litigation. This is serious business affecting the lives of all who are fortunate enough to either attend, are parents of pupils, are taxpayers of a fine School District or just persons interested in our political process.

Having "ridden" and having "written" far enough, accordingly, the Court finds that the appellees are "prevailing parties" for purposes of 42 U.S.C. § 1973*l*(e) and that an award of attorneys' fees and costs is appropriate.

All Conclusions of Law and Findings of Fact set forth in the Memorandum Opinion and Order filed January 17, 1986 and the Supplemental Memorandum and Order

filed February 28, 1986 are referred to and incorporated herein.

Having so concluded, the Court shall enter a separate Order contemporaneous herewith.

JUDGMENT

In accordance with the Memorandum Opinion and Order entered contemporaneously herewith, which is hereby incorporated for all purposes, the Court's Judgment is as follows:

IT IS ORDERED, ADJUDGED, and DECREED that the Defendants' Proposed "3–4 Plan" is unacceptable as it is violative of the amended version of Section 2 of the Voting Rights Act of 1965.

IT IS ORDERED, ADJUDGED and DECREED that the Defendants' Proposed "5–2 Plan" is unacceptable as it is violative of the Amended version of Section 2 of the Voting Rights Act of 1965.

IT IS ORDERED, ADJUDGED, and DECREED that the MIDLAND INDEPENDENT SCHOOL DISTRICT ("MISD") immediately implement a seven-member district plan for election of trustees as the Court has drawn, which is attached hereto as Exhibit A and made a part hereof.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that elections for MISD trustees are stayed, pending further action by the Fifth Circuit Court of Appeals.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED, that commencing with the next MISD trustee election, each Trustee of the MISD must reside within the district from which elected. Such members shall be elected as follows:

(A) The MISD shall be divided into seven single-member districts, being Districts 1, 2, 3, 4, 5, 6, and 7 as shown on the map attached hereto as Exhibit A.

The Court points out that it was unavoidable to draw the boundaries as reflected in Exhibit A without splitting at least two voting precincts. The manner in which the boundaries are drawn, however, provide for the least disruptive voting procedure as possible. Attached hereto, and made a part hereof, is Exhibit B, an explanation of why it was necessary to divide two voting precincts. Exhibit B also sets out the boundaries within the two voting precincts that were split so that the residents of those two districts will know whether to vote in the district in which they reside.

Exhibit C, attached hereto and made a part hereof, is a map of the seven single-member districts as they relate to the entire County of Midland, Texas.

Exhibit D, attached hereto and made a part hereof, sets out the seven single-member districts by county voting precinct population. The minority populations for Districts 3, 4, 5, 6, and 7 are not shown because the percentage of minorities residing in those five districts are miniscule and would have no significant effect upon any election insofar as minorities are concerned.

(B) There shall be seven positions on the School Board with:

Position No. 1 being filled by the representative from District 1;

Position No. 2 being filled by the representative from District 2;

Position No. 3 being filled by the representative from District 3;

Position No. 4 being filled by the representative from District 4;

Position No. 5 being filled by the representative from District 5;

Position No. 6 being filled by the representative from District 6; and

Position No. 7 being filled by the representative from District 7.

(C) There shall be a majority vote requirement in each single-member district election.

(E) Qualified voters in each district can vote only for candidates from such district.

The Court shall enter an Order on Attorneys' Fees as soon as practicable.

IT IS SO ORDERED.