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Lessons Learned from Pasadena: *A Voting Rights Update*

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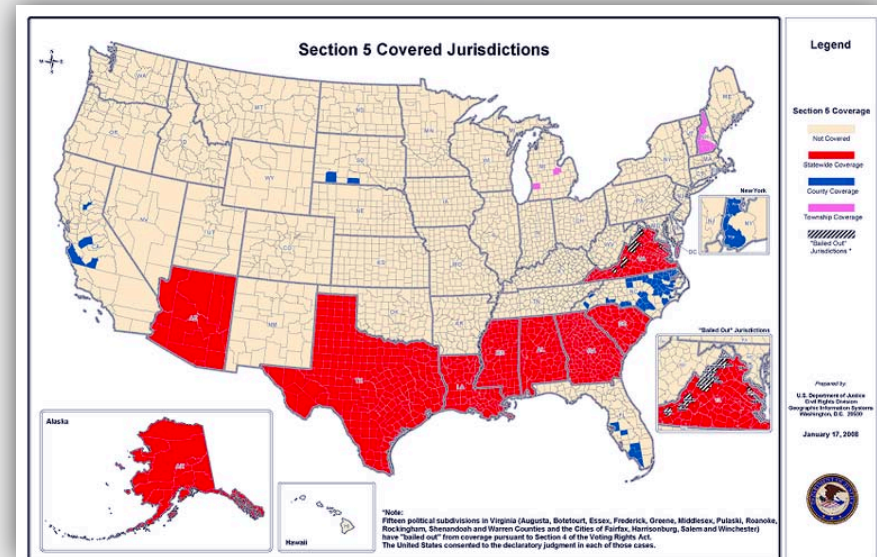
The 1965 Voting Rights Act Addressed Discrimination in Voting on the Basis of Race

- Section 2 of the Act applies ***nationwide*** and essentially prohibits voting practices that abridge the right to vote on the basis of race or language minority status.



The 1965 Voting Rights Act Addressed Discrimination in Voting on the Basis of Race

- Section 5 applied only to certain areas—originally only in the Deep South—and freezes election practices in place unless and until any change in the election practice has been approved either by a three-judge U.S. District Court in the District of Columbia or the Attorney General of the United States.



Differences between Sections 2 and 5

- Section 5 prohibits retrogression from previous system.
- Aim of Section 2 is equal opportunity of minority and majority voters to elect their preferred representatives.
- Section 2 most often comes up in the context of vote dilution.
 - Cracking
 - Packing



Shelby County

- In June 2013, the Supreme Court in a 5-4 decision, decided *Shelby County v. Holder*, which found section 4 of the Voting Rights Act (the coverage formula) unconstitutional and thus made section 5 ineffective.
- Jurisdictions previously covered by section 5 no longer need to submit election changes to the Department of Justice or the D.C. District Court for preclearance.
- Enforcement of the Act has shifted to reliance on section 2 and claims under the 14th and 15th Amendment.



Section 3 of the Voting Rights Act

- Section 3 of the Voting Rights Act was unaffected by *Shelby County*.
- In cases to enforce the 14th or 15th Amendments, it permits a court to order that a jurisdiction submit future election changes to the court or to the Attorney General of the United States for preclearance.
 - Remedy mirroring Section 5, but can be more narrowly tailored.
- Section 3 relief requires a finding of purposeful discrimination—a requirement that exists under the Constitution but not under section 2.



City of Pasadena, Texas

- Population \approx 150,000
- Charter provides for a “Mayor-Council Government”
- Mayor and Eight (8) councilmembers
- Mayor votes on matters before the council



Demographics in Pasadena

Total Population (2010 Decennial Census)

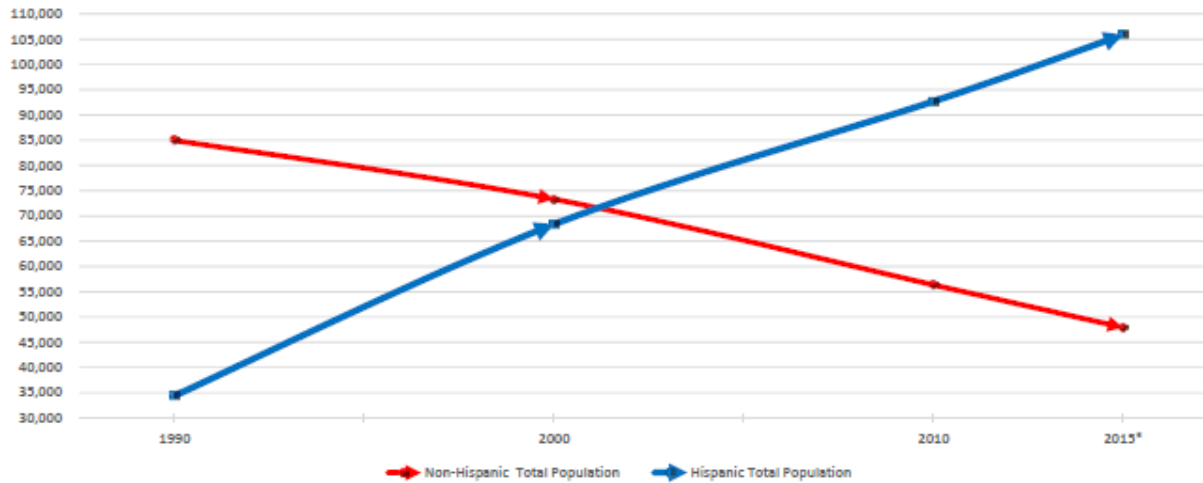
Population	Hispanic	Anglo	Black	Other
149,335	97,712 (62.08%)	48,901 (32.75%)	2,981 (2.00%)	4,736 (3.17%)

Citizen Voting Age Population (2009-2013 5 Year ACS Data)

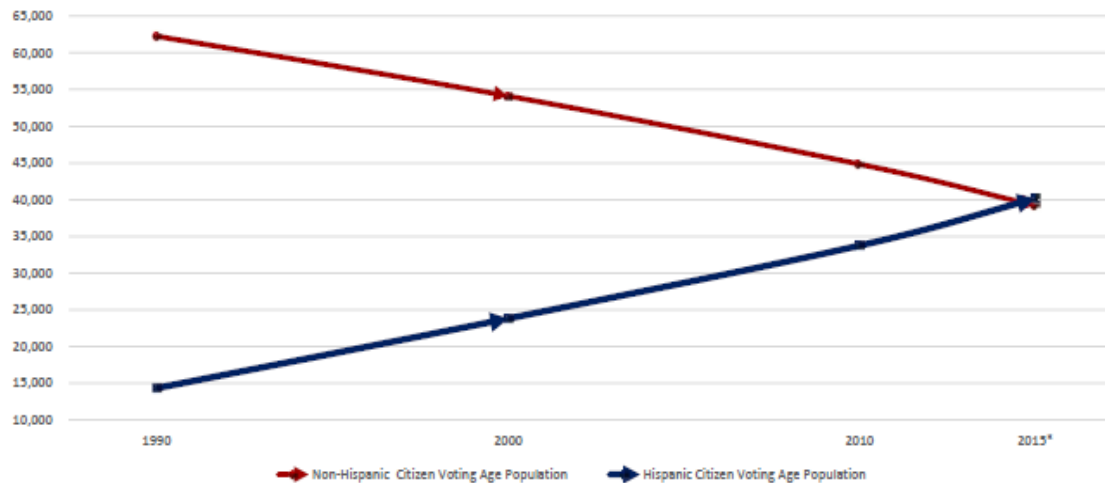
Total CVAP	Hispanic	Anglo	Black	Other
79,829	36,584 (45.8%)	38,065 (47.7%)	2,462 (3.1%)	2,812 (3.5%)



City of Pasadena
Total Population
 For Hispanics and Non-Hispanics
 1990 - 2015



City of Pasadena
Citizen Voting Age Population
 For Hispanics and Non-Hispanics
 1990 - 2015



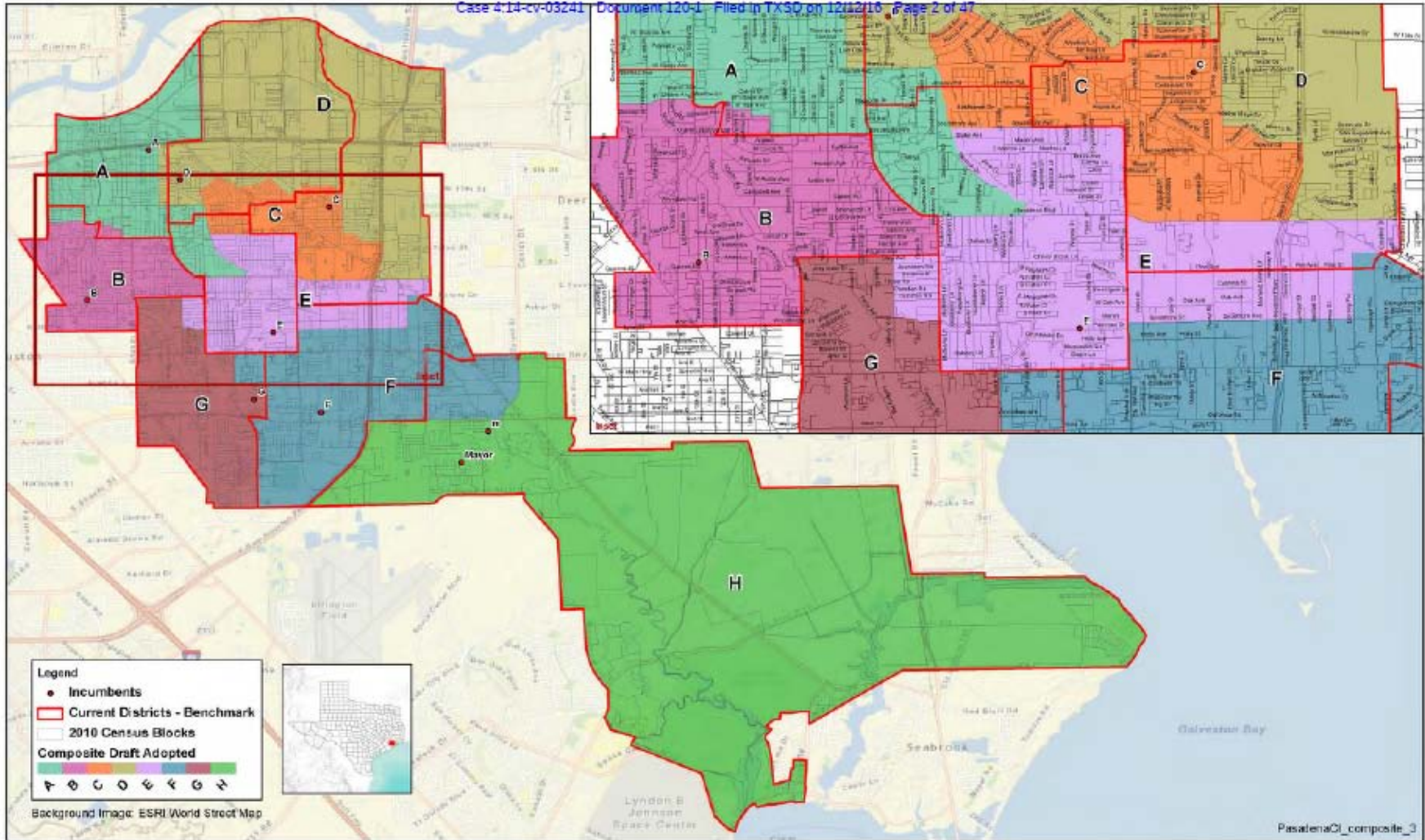
City Council

- City charter in 1964 provided for a mayor and six-member council, all elected at large.
- In 1992, City amended its charter to adopt an eight-member council, elected from single-member districts.
- Before 2009 only 2 Latino candidates were elected to the City Council.



2011 Redistricting

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Demographics of the 2011 8-0 Districts

District	1	2	3	4	5	6	7	8
Population	17915	18362	18353	17986	19002	19449	19426	18550
Deviation from Ideal 8	-715	-268	-277	-644	372	819	796	-80
% Deviation	-3.84%	-1.44%	-1.49%	-3.46%	2.00%	4.40%	4.27%	-0.43%
Hispanic Population	15017	14585	14811	12541	12391	8386	11778	3183
Hispanic % of Total Pop	83.82%	79.43%	80.70%	69.73%	65.21%	43.12%	60.63%	17.16%
Voting Age Population	11827	12231	11907	12051	13189	14455	13733	13874
Hispanic VAP	9456	9017	9087	7723	7546	5360	7462	2059
Hispanic % of VAP	79.95%	73.72%	76.32%	64.09%	57.21%	37.08%	54.34%	14.84%
Citizen Voting Age Population	7367.0	8727.2	7859.6	9624.9	10031.3	12388.3	10143.6	13562.2
Hispanic CVAP	4823.1	5420.5	5108.0	5877.8	4597.0	4253.9	4043.3	2437.5
Hispanic % of CVAP	65.47%	62.11%	64.99%	61.07%	45.83%	34.34%	39.86%	17.97%

- 4 Districts with Hispanic CVAP Majority
- An election under this plan resulted in the election of two councilmembers who identified as Hispanic, and two others, although Anglo, were the preferred candidate among Hispanic voters.



Change to a 6-2 System

- In the Summer of 2013 the City convened a citizen bond review committee to consider bond propositions for a November special election.
- Added four charter amendments to their agenda, including change to a 6-2 system.
- Committee recommended some bond propositions, but did not recommend charter change because they felt it would detract from bond election.

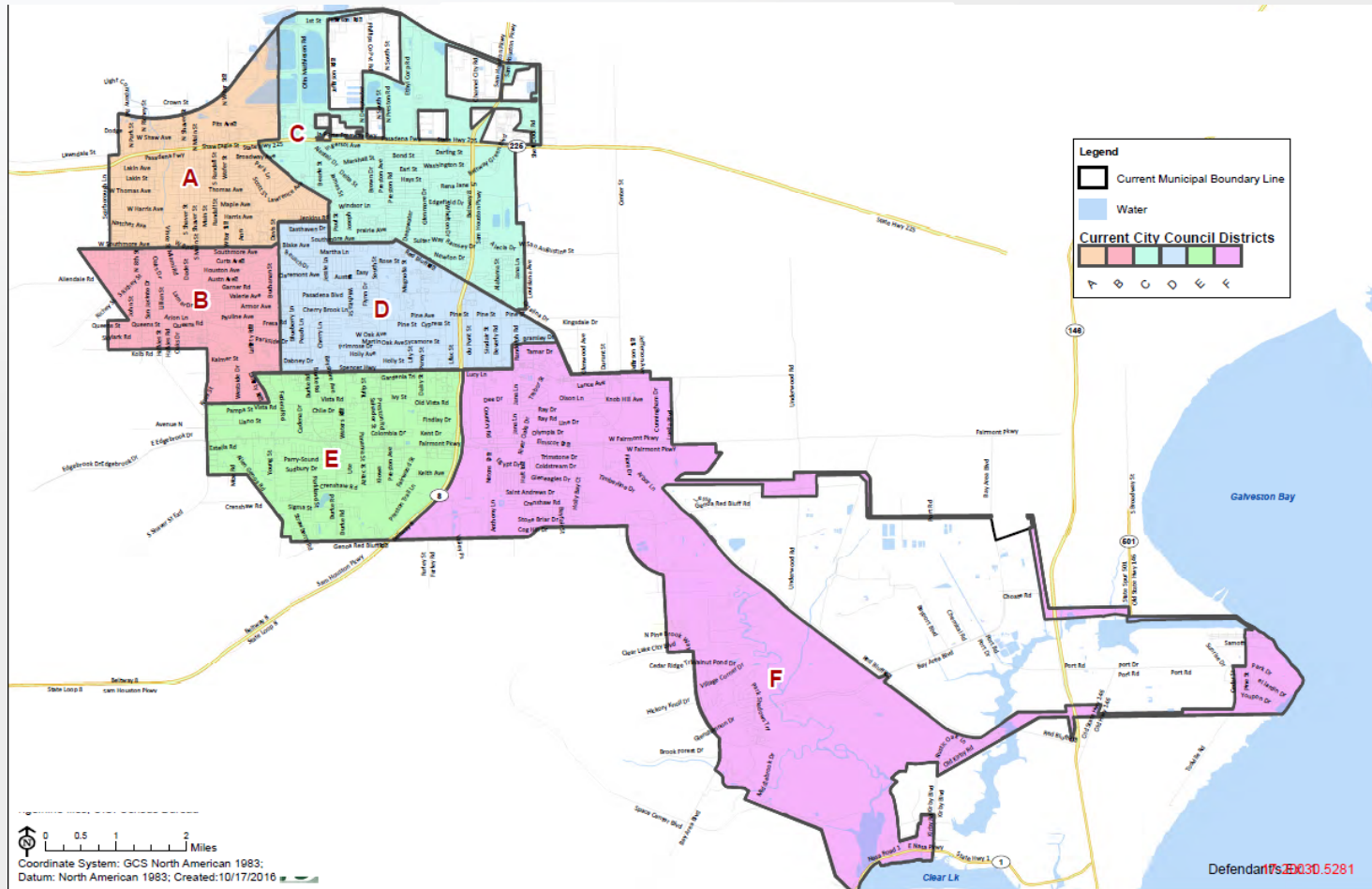


Change to a 6-2 System

- Due to a perceived lack of support for bonds, the Council did not move forward with a bond election but voted 5-4 to have a charter amendment election on a 6-2 system.
- The vote split between councilmembers representing the northern part of the City and those from South Pasadena.
 - North Pasadena is the older part of the City and has greater infrastructure needs
 - High percentage of Latino residents
 - South Pasadena is newer, higher tax base
- Charter election passed by a thin margin



The City's 6-2 Map



Demographics of the 6-2 Plan

City of Pasadena Current 6-2 Plan									
District	2010 Census						2009-2013 ACS		September 2016
	Persons	% of Total Hispanic Population	% of Total Non-Hispanic Population	Total VAP	% of Total Hispanic VAP	% of Total Non-Hispanic VAP	% Hispanic CVAP	% Non-Hispanic CVAP	% SSRV
A	24,607	86.4%	13.6%	15,962	82.8%	17.2%	71.5%	28.6%	71.0%
B	24,997	78.0%	22.0%	16,551	72.5%	27.5%	58.0%	42.0%	59.5%
C	24,719	70.6%	29.4%	16,599	65.2%	34.8%	61.4%	38.7%	56.5%
D	24,800	66.5%	33.5%	17,068	59.1%	40.9%	45.3%	54.7%	45.9%
E	24,752	47.4%	52.6%	18,460	41.2%	58.8%	35.2%	64.7%	33.0%
F	25,460	24.6%	75.4%	18,860	21.2%	78.8%	22.3%	77.6%	16.7%
Totals	149,335	62.1%	37.9%	103,500	55.8%	44.2%	45.8%	54.2%	42.0%
							50.6%*		

- 3 Majority Hispanic CVAP districts, one just below 50% and 2 at large seats of at or near 50% CVAP.

2015 Election under 6-2 Plan

- Elected four Hispanic-preferred candidates out of eight-member council.
- Three councilmembers who identify as Hispanic—one more than under single-member district system.
- Elected one Hispanic-preferred candidate of choice at large.
- Significant cross-over voting in many races



The Lawsuit

- After the adoption of the 6-2 System, various Hispanic citizens in Pasadena brought suit against the City and its officials.
- They alleged:
 - Vote dilution under Section 2 of the Voting Rights Act
 - Intentional Discrimination on the basis of race and national origin in violation of the Fourteenth Amendment; and
 - Intentional Discrimination on the basis of race and national origin in violation of the Fourteenth Amendment



The Standard for Proving a Section 2 Claim

- In order to maintain a section 2 suit a plaintiff must meet a three-part threshold standard. Specifically, the plaintiff must prove:
 - That the minority group is sufficiently large and geographically compact to be able to constitute a majority of the citizen-voting-age population in a potential single-member district
 - That the minority group is politically cohesive
 - That the white majority votes a bloc to enable it—in the absence of special circumstances—usually to defeat the minority's preferred candidate



The Standard for Proving a Section 2 Claim

- If the plaintiff satisfies all three parts of the threshold test, then the court must examine the totality of the circumstances to determine if “it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [racial or language minority group] 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.”



The Court's Judgment

- The Court found a Section 2 violation based on the fact that the 8-0 System had 4 majority-minority districts, while the 6-2 System only had 3.
- The Court found that the City intended to dilute Hispanic voting power.
 - Was persuaded by the fact that there was increasing Hispanic electoral success
 - Change was recommended shortly after the decision in *Shelby County* and the Mayor's testimony that he didn't think the change would have been pre-cleared.
 - Campaign statements that without change city would "Turn Blue"
 - Suggestion of removing Hispanic names from mailers
- Court ordered section 3 "bail in" such that further election changes would have to be pre-cleared through the DOJ or the Court.
- The City has appealed and briefing has been completed.



Lessons Learned from the Case

- The impact of *Shelby County*?
 - Now that the Supreme Court has rendered section 5 ineffective, Plaintiffs are seeking bail in under Section 3.
 - Because section 3 has an intent requirement, Voting Rights cases are likely to become more complicated, more fact intensive and more expensive to defend.
 - Councilmembers need to be aware that their official actions are going to be subject to greater scrutiny.



Standard for Intentional Discrimination

Factors to be considered in evaluating a claim of intentional discrimination include:

- 1) the discriminatory impact of the governmental decision;
- 2) the decision's historical background;
- 3) the specific sequence of events leading up to the challenged decision;
- 4) departures from the normal procedural sequences; and
- 5) departures from normal substantive criteria.”

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265–66, 97 S. Ct. 555, 50 L.Ed.2d 450 (1977)).



Are Majority-Minority Districts required for proportionality? Can they be legally drawn?

- The Court in the Pasadena case found dilution even though the 6-2 election system allowed Hispanic voters to elect their candidates of choice in 50% of the council seats—a proportion commensurate with their share of CVAP.
- The Pasadena Court reasoned that a district was not a true opportunity district where white-crossover vote secured the victory.
- But, the Supreme Court has stressed, and recently affirmed, that “in areas with substantial crossover voting, a plaintiff would not be able to establish white bloc voting and majority-minority districts would not be required.”
 - *Cooper v. Harris*, ____ S.Ct. ____ (May 22, 2017).
 - The notion that because a legislative body *can* draw a majority-minority district it *must* do so, even if a cross-over district allows minority group to elect its favored candidate “is at war” with Section 2 jurisprudence.
- Easier with a longer history of electoral success in a crossover district.



Partisan Politics May Not Be a Proxy for Race

- While political gerrymandering is legal, it may not be achieved by race-based re-districting.
- In *Cooper*, Justice Kagan wrote for the majority:
 - Sorting voters on the basis of their race remains suspect even if race is meant to function as a proxy (including political) characteristics.



Section 3 Bail-in Remedy

- More and more claims are seeking bail-in as a remedy.
- Probably more of an issue for the state than cities.
 - Cities generally only pre-clear change of precincts, annexations, and re-districting, which are not terribly onerous.
- Remains to be seen how difficult pre-clearance will be under the new administration.
- Amici briefs have argued that Section 3 is not available without a record of voting abuses and therefore cannot be awarded based on a single violation.



Best Practices for Re-districting

- Involve specialized counsel early in the process.
- Build a solid record for proposed and adopted changes.
- Evaluate the need for majority-minority districts—
Are they truly necessary to comply with section 2?
- Adhere strictly to established procedures and gather and address community input.
- Have a good relationship with the local paper and media.
- Traditional Districting Principles

