SUBJECT: Congressional redistricting

COMMITTEE: Redistricting — favorable, as substituted

VOTE: 11 ayes — Solomons, Aycock, Branch, Eissler, Geren, Harless, Hunter, Keffer, Madden, Peña, Phillips

5 nays — Villarreal, Alonzo, Alvarado, Pickett, Veasey

1 absent — Hilderbran

SENATE VOTE: On final passage, June 6 — 18-12 (Davis, Ellis, Gallegos, Hinojosa, Lucio, Rodriquez, Uresti, Van de Putte, Watson, West, Whitmire, Zaffirini)

WITNESSES: (*On House companion, HB 4:)*
For — None

Against — Rep. Carol Alvarado, on behalf of Congresswoman Jackson Lee; Eliza Alvarado, on behalf of Dolly Elizondo, Hidalgo County Democratic Chair; Yannis Banks, TX NAACP; Joey Cardenas III, TX-LULAC / Latino Community; Russell Coleman, Texans For Redistricting Reform; Deece Eckstein, Travis County; Sen. Mario Gallegos; Cynthia Garza, on behalf of Congressman Rubén Hinojosa, TX 15; Reynaldo Guerra, Greater Houston Civic Coalition; Sandra Haltom, Texas Democratic Party; Rep. Jose Menendez; Rep. Elliott Naishtat, Voters of District 49; Gus Peña; East Austin Concerned Hispanics; Anita Privett, League of Women Voters of Texas; Stewart Snider, Austin League of Women Voters; Rep. Armando Walle, Constituents of HD 140; and 15 others representing themselves

On — Bill Burch, The Grass Roots Institute of Texas (GRIT); Rep. James White, TX House District 12.

BACKGROUND: The U.S. Constitution, Art. 1, sec. 2 requires an "actual enumeration" or census every 10 years to apportion the number of representatives each state will receive in the U.S. House of Representatives. The release of population figures from the census also triggers redistricting – or redrawing of political boundaries – of the state's congressional and

legislative districts as well as the State Board of Education (SBOE) districts. Texas Constitution, Art. 3, sec. 28, requires the Legislature to apportion the state into House and Senate districts "at its first regular session after the publication of each United States decennial census," but neither the Texas Constitution nor Texas state statutes address the standards or procedures for congressional redistricting.

Redistricting deadline. No federal or state statute dictates when the state must draw new congressional districts. Release of federal census data triggers redistricting because federal court rulings require that district boundaries must be altered to reflect population changes under the one person, one vote principle. New congressional districts also must be drawn if the state is apportioned additional seats due to its population growth relative to the other states.

If the Legislature fails to draw new districts following the census, or if the district lines are invalidated for failure to meet one of the many legal requirements, the task falls to a court. The Legislative Redistricting Board, which may redistrict state House and Senate districts if the Legislature fails to do so in the regular session following release of the census figures, does not have jurisdiction to draw new congressional districts. Under federal law (42 U.S.C., sec. 2284), a three-judge court hears any actions challenging the apportionment of congressional districts and state legislative bodies.

When the Legislature did not enact a congressional redistricting plan in 2001 following the 2000 census, a federal court drew the lines, which were used for the 2002 election. The Legislature in 2003 redrew the congressional districts, and that map was used for the 2004 elections. When the U.S. Supreme Court in *LULAC v. Perry*, 548 U.S. 399 (2006) invalidated certain congressional districts in Legislature's 2003 map, a federal district court modified those districts, and the revised districts were used in 2006 and subsequent elections.

Legal requirements for redistricting congressional districts. The legal standards for congressional redistricting fall into three general areas:

- federal constitutional standards, such as one-person, one-vote and not allowing population deviations among congressional districts;

- application of federal Voting Rights Act (VRA) requirements for challenging discriminatory plans under sec. 2 and requirements for advance federal approval ("preclearance") under sec. 5; and
- U.S. Supreme Court decisions during the 1990s prohibiting "racial gerrymandering," beginning with *Shaw v. Reno*, 509 U.S. 630 (1993).

Each standard must be considered in conjunction with the other requirements. The interaction can be complex and contradictory, especially in applying VRA protections to avoid diluting minority voting strength and adhering to the *Shaw* standard that race cannot be the predominant factor in redistricting.

Federal requirements. The Legislature will have to consider several aspects of federal law, such as permissible deviations in district population equality, VRA requirements, and court decisions on racial and political gerrymandering, in drawing new congressional districts.

District population equality. A key requirement for redistricting plans is that districts have approximately equal population, or "one person, one vote." In 1962, the U.S. Supreme Court reversed its long-standing position that apportionment and redistricting were political issues not appropriate for judicial review. In its landmark decision, *Baker v. Carr*, 369 U.S. 186 (1962), the court held that federal courts could consider challenges to state legislative redistricting plans. In 1963, the court established a requirement for population equality among districts in *Gray v. Sanders*, 372 U.S. 368. The case established the equal-population doctrine of "one person, one vote."

The U.S. Supreme Court has interpreted the U.S. Constitution as setting a stricter population-equality standard for congressional districts than for legislative districts. The court has held that a state's congressional districts must contain equal populations "as nearly as practicable," (*Westberry v. Sanders*, 376 U.S. 1, 7-8 (1964)), requiring a state to make a good-faith effort to achieve absolute equality. If it can be shown that a state's plan falls short of precise population equality, to the extent that such is practicable, the state must show that the variances — no matter how small — were necessary to achieve some legitimate state objective. The disputed plan could be proved deficient by introduction of an alternative plan with a smaller range of population deviation or introduction of evidence that minor changes would bring the disputed plan closer to

equality. In 1983, the Supreme Court in *Karcher v. Daggett*, 462 U.S. 725, reconfirmed its standard that "absolute population equality [is] the paramount objective" in congressional redistricting.

Federal Voting Rights Act (VRA). A new congressional redistricting plan will be subject to the VRA, which Congress enacted in 1965 to protect the rights of minority voters to participate in the electoral process in southern states. Sec. 5 of the act was broadened to apply to Texas and certain other jurisdictions in 1975. Amendments enacted in 1982 expanded the remedies available to those challenging discriminatory voting practices anywhere in the nation under sec. 2 of the VRA.

Sec. 5 of the VRA (42 U.S.C., sec. 1973c) requires certain states, including Texas, and their political subdivisions with a history of low turnout and discrimination against certain racial and ethnic minorities to submit all proposed policy changes affecting voting and elections to the Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice (DOJ) or to the U.S. District Court for the District of Columbia for "preclearance." The judicial preclearance process requires a jurisdiction covered by the VRA to file for a declaratory judgment action, with the U.S. Department of Justice serving as the opposing party. The DOJ reports that almost all preclearance requests follow the administrative preclearance route through the DOJ.

Under sec. 5, state and local governments bear the burden of proving that any proposed change in voting or elections is neither intended, nor has the effect, of denying or abridging voting rights on account of race, color, or membership in a language-minority group. No state or local voting or election change may take effect without preclearance. In effect, changes in election practices and procedures in the covered jurisdictions are frozen until preclearance is granted.

Retrogression. A proposed plan is retrogressive under the sec. 5 "effect" prong if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" (as defined in *Beer v. United States*, 425 U.S. 130 (1976)) when compared to a benchmark plan. Generally, the most recent plan to have received sec. 5 preclearance (or to have been drawn by a federal court) is the last legally enforceable redistricting plan. For CSSB 4, the benchmark plan would be the 2003 map enacted by the Legislature, as modified by the federal district court in 2006 following the U.S. Supreme Court's *LULAC v. Perry* decision.

The effective exercise of the electoral franchise is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice. The presence of racially polarizing voting is an important factor considered in assessing minority voting strength. The DOJ or the D.C. district court may object to a proposed redistricting plan if a fairly drawn alternative plan could ameliorate or prevent that retrogression.

In *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), the U.S. Supreme Court ruled that redistricting plans that are not retrogressive in purpose or effect when compared with the jurisdiction's benchmark plan must be precleared even if they violate other provisions of the VRA or of the Constitution. However, plans precleared under sec. 5 still can be challenged under sec. 2 of the VRA or on 14th Amendment grounds, even by the DOJ that granted sec. 5 preclearance. The burden of proof shifts from the jurisdiction creating the plan to those challenging the proposed redistricting.

Sec. 2 challenges. Sec. 2 of the VRA offers a legal avenue for those who wish to challenge existing voting practices on the grounds that they are discriminatory. Sec. 2 became a major factor in redistricting in 1982, when Congress amended it to make clear that results, not intent, are the primary test in deciding whether discrimination exists, based on the "totality of the circumstances."

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the U.S. Supreme Court, in upholding a sec. 2 claim against multimember legislative districts in North Carolina, established a three-part test that plaintiffs must meet when charging invidious vote dilution. The three standards are:

- the protected group is "sufficiently large and geographically compact to constitute a majority in a single-member district";
- the group is politically active; and
- the majority votes in a bloc to the extent that the minority's preferred candidate is defeated in most circumstances.

In *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009), the Supreme Court did not rely on citizenship information when determining if a protected group was large enough to constitute a majority in the district. However, both citizenship and voting age population may be factors for voting eligibility under sec. 2 lawsuits designed to protect the rights of voters.

Maximizing minority-controlled districts. The U.S. Supreme Court's analysis in *Johnson v. De Grandy*, 507 U.S. 25 (1993), addressed the key sec. 2 issue of proportionality or the ratio of minority-controlled districts and the minority's share of the state population. The *De Grandy* plaintiffs objected to a Florida redistricting plan because it was possible to draw additional Hispanic majority districts in Dade County. Even though the Supreme Court seemed to accept the contention that *Gingles* standards had been met, it rejected claims that additional majority-minority districts were required to meet sec. 2 claims. According to the court, "Failure to maximize cannot be the measure of Section 2." In other words, the court seemed to reject the contention previously raised in sec. 2 challenges, and adopted by DOJ in sec. 5 preclearance reviews in the early 1990s, that if a majority-minority district can be drawn, then it must be drawn, assuming the *Gingles* criteria are met.

The Supreme Court has held both that sec. 2 can require the creation of a "majority-minority" district, in which a minority group makes up a numerical, working majority of the voting-age population, *Voinovich* v. *Quilter*, 507 U.S. 146 (1993), and that sec. 2 does not require the creation of an "influence" district, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected, *LULAC* v. *Perry*.

Gerrymandering. The word "gerrymandering" was coined in 1812, when a Massachusetts redistricting plan designed to benefit the party of Gov. Elbridge Gerry resulted in a district that a political cartoonist drew to resemble a salamander. Traditionally, gerrymandering has been considered a technique to maximize the electoral prospects of one party while reducing that of its rivals.

Racial gerrymandering. In a series of redistricting challenges during the 1990s, the U.S. Supreme Court grappled with guidelines on how to resolve the tension between race-conscious VRA requirements and the constitutional restraints against race-based actions under the 14th Amendment. In the original *Shaw v. Reno* opinion, the Supreme Court rejected redistricting legislation with districts alleged to be so bizarrely shaped that on their face they were considered unexplainable on grounds other than race. In *Miller v. Georgia*, 515 U.S. 900 (1995), the court held that those challenging a redistricting plan need not necessarily show that a district was bizarrely shaped in order to establish impermissible race-based gerrymandering.

In *Bush v. Vera*, 517 U.S. 900 (1995), a case challenging the Texas congressional redistricting plan, the Supreme Court recognized that the state could consider race as a factor, but found the Texas congressional plan unconstitutional because race was the predominant factor motivating the drawing of district lines and traditional, race-neutral districting principles were subordinated to race.

In the *Shaw* line of cases, courts have identified certain traditional, race-neutral redistricting criteria. These include:

- compactness;
- contiguity;
- preserving counties, voting precincts, and other political subdivisions;
- preserving communities of interest;
- preserving the cores of existing districts;
- protecting incumbents; and
- achieving legitimate partisan objectives.

Under the *Shaw* cases, a redistricting plan will survive a challenge only if it proves that race was not the predominant factor in drawing its challenged minority districts.

Partisan gerrymandering. In 1986, the U.S. Supreme Court in *Davis v. Bandemer*, 478 U.S. 109, established a two-pronged test for invalidating a politically gerrymandered plan under the Equal Protection Clause of the Fourteenth Amendment. Challengers must show (a) an actual or projected history of disproportionate results and (b) that the electoral system is arranged so that it consistently degrades a voter's or a group of voters' influence on the political process as a whole to the point where the individual or group "essentially [has] been shut out of the process."

In 2004, the Supreme Court, in *Vieth v. Jubelirer*, 541 U.S. 267, reaffirmed that claims of political gerrymandering still can be made, but the court, either rejecting the argument of political gerrymandering altogether or believing the *Bandemer* standards were unworkable, could not agree on how to evaluate such a claim. In *LULAC v. Perry*, in reviewing the Texas Legislature's 2003 congressional redistricting plan, the Supreme Court again considered an attempt to invalidate a redistricting plan on the claim that the plan was enacted with the sole purpose of advancing a partisan agenda. The court rejected the claim. It noted that

evaluating a charge of partisan gerrymandering is problematic because there always are multiple motivations in line drawing. The court also could not find a workable standard to evaluate charges of partisan gerrymandering. In this case, the court rejected partisan gerrymandering as a claim because the court could not find a workable standard.

Challenges to a redistricting plan on the basis that it is an illegal partisan gerrymander likely will be ineffective until the Supreme Court establishes a standard to evaluate such a claim.

Residency. The U.S. Constitution requires that a member of Congress be a resident of the state, but not necessarily of the congressional district the person is elected to serve.

DIGEST:

CSSB 4 would adopt Plan C149. Exact data on district population and other demographic information on Plan C149 and other data are available at http://gis1.tlc.state.tx.us/. The plan would apply starting with the primary and general elections in 2012 for congressional seats in the 113th Congress in 2013.

CSSB 4 would create 36 districts, including four new districts apportioned to Texas as a result of its population growth relative to other states as measured by the 2010 census. The ideal size of a congressional district is 698,488 based on the 2010 census. Under CSSB 4, 698,488 also would be the mean average size of congressional districts. No district deviates from the ideal size by more than one person.

The bill states legislative intent that if any county, tract, block group, block, or other geographic area was erroneously omitted, a court reviewing the bill should include the appropriate area in accordance with the Legislature's intent. It also would repeal the congressional redistricting plan enacted by the Legislature in 2003.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect August 29, 2011.

CSSB 4 United States House District Demographics

Ideal Population Deviations and Racial / Ethnic Breakdown

		# Deviation	---------- Percentage ----------				
	Population	from Ideal*	Anglo	Black	Hisp	B + H**	Other
DISTRICT 1	698,488	-	64.2	18.6	15.5	33.8	1.9
DISTRICT 2	" "	-	48.5	14.1	30.7	44.1	7.3
DISTRICT 3	" "	-	62.4	9.3	14.5	23.4	14.2
DISTRICT 4	" "	-	73.8	11.5	12.2	23.5	2.7
DISTRICT 5	" "	-	57.3	14.9	25.2	39.6	3.1
DISTRICT 6	" "	-	39.5	12.8	44.2	56.5	4.0
DISTRICT 7	" "	-	49.2	11.7	28.9	40.0	10.8
DISTRICT 8	" "	-	68.4	8.9	19.7	28.2	3.4
DISTRICT 9	" "	-	11.1	38.3	38.8	75.9	13.1
DISTRICT 10	698,487	(1)	57.5	11.2	26.3	36.9	5.6
DISTRICT 11	" "	-	61	4.3	33.3	37.1	1.9
DISTRICT 12	" "	-	55.5	14.9	25.1	39.5	5.0
DISTRICT 13	" "	-	67	6.1	24.1	29.8	3.2
DISTRICT 14	" "	-	53.8	21.0	21.7	42.1	4.1
DISTRICT 15	" "	-	16.9	2.1	79.7	81.4	1.7
DISTRICT 16	" "	-	13	3.9	82.2	85.2	1.8
DISTRICT 17	698,487	(1)	57.7	14.5	23.3	37.2	5.2
DISTRICT 18	" "	-	18.2	40.7	36.4	76.1	5.6
DISTRICT 19	698,487	(1)	57.4	6.9	33.9	40.2	2.4
DISTRICT 20	" "	-	23.7	6.9	66.7	72.6	3.7
DISTRICT 21	" "	-	64.9	4.1	27.0	30.6	4.5
DISTRICT 22	" "	-	47.9	12.3	23.6	35.4	16.7
DISTRICT 23	" "	-	28	3.1	67.3	69.8	2.2
DISTRICT 24	" "	-	53.4	11.0	23.4	33.9	12.6
DISTRICT 25	" "	-	70.3	8.3	17.3	25.1	4.6
DISTRICT 26	" "	-	57.8	8.5	27.9	36.0	6.2
DISTRICT 27	698,487	(1)	42.8	6.0	49.5	54.9	2.3
DISTRICT 28	" "	-	14.8	3.8	80.8	84.1	1.1
DISTRICT 29	" "	-	10.9	12.3	75.3	86.8	2.4
DISTRICT 30	" "	-	13.1	45.7	40.4	85.2	1.7
DISTRICT 31	698,487	(1)	59.5	12.9	22.5	34.5	6.0
DISTRICT 32	698,487	(1)	54.4	13.1	24.3	37.0	8.7
DISTRICT 33	" "	-	53.8	17.3	23.4	40.0	6.1
DISTRICT 34	698,487	(1)	14.9	1.6	83.0	84.2	1.0
DISTRICT 35	" "	-	26.3	11.6	60.8	71.1	2.6
DISTRICT 36	" "	-	62.6	9.6	25.7	35.0	2.4

Source: Texas Legislative Council

*Ideal District Population is 698,488

**Total number of persons who identify as racially black, ethnically Hispanic, or both.

NOTES:

Legal challenges to use of 2010 census data in redistricting. At least eight lawsuits challenging the use of 2010 census data in redistricting have been filed in Texas thus far. These cases generally fall into four different categories:

- challenges to the inclusion of undocumented immigrants in the census counts;
- challenges to the population distribution in the census based on alleged undercounts of certain minority groups;
- challenges to the population distribution in the census based on counting prisoners where they are housed; and
- challenges to the congressional redistricting process in the event the Texas Legislature did not pass a congressional redistricting map.

Legal challenges to sec. 5 preclearance. In *Shelby County, Alabama v. Holder*, in the federal district court for the District of Columbia, plaintiffs are challenging the constitutionality of sec. 5 preclearance, specifically the use of the formulas used in the Voting Rights Act to determine which states, local governments, and districts are required to pre-clear their redistricting maps.