I. Q I

A. Procedural Issues

The Chairman and potential candidates do not have right to challenge the AG's decision to preclear (Gressette). Even if AG colludes with a state or party, as it has here, P's can't challenge that decision. Instead, they must bring separate actions—either constitutional or under VRA—and may do so before their local 3-judge federal district court. Three-judge panels are used to defray the federalism costs implied if a single judge overturns the state legislature's redistricting plan. The Supreme Court has mandatory appellate review of these decisions.

B. §2 Claims

The AA candidate claimants (who are residents of their districts) have §2 vote dilution claims that redistricting has resulted in its members being less likely to elect candidates of their choice. Gingles established a 3-prong test for proving a §2 vote dilution claim and Growe extended that test to challenges of SMD's, like Plan B. P's will have to prove based on the totality of the circumstances: (1) Group is sufficiently large and geographically compact to constitute a majority in a SMD; African-Americans in Alasippi can prove this since they were large and compact enough to constitute majorities in 2 districts under the previous scheme. Prove: (2) Group is politically cohesive; since Alasippi A-A voters almost always vote Democratic, requirement is fulfilled. And (3) must prove racially polarized voting—a white majority can vote as a bloc to defeat a minority's preferred candidate. Here, AA's are now minority in all districts and whites

vote to defeat AA candidates,[1] so we can prove racial bloc voting. Past and present discrimination against AA's reflected through the economic and political system so §2 challenge likely successful. Although proportionality of majority-minority districts is not required (DeGrandy), good example of a political famine.

C. §5 Claims

The 7 claimants have strong §5 claims. D Ct will find a violation of §5 if either retrogressive purpose or intent (Bossier Parish). Plan A had 2 maj-min districts, but Plan B has no maj-min districts. Although intent of Republicans was to maximize their representation, effect was to make AA's worse off than. If Reps had added Districts 5 & 6, and left other Districts as is, would have been no retrogressive effect, as Miller held §5 doesn't require each new district be a maj-min district.

D. Constitutional Vote Dilution—Suspect Classification

The 3 AA candidates might also bring a constitutional claim of vote dilution under Bolden. However, likelihood of success is small. Under Bolden, P must prove not only discriminatory effect, but also prove jurisdiction purposefully discriminated. AA voter strength is diluted, but the purpose question is more difficult. To prove purpose, must prove that district selected the scheme because of adverse effects on an identifiable group. Not enough to show that scheme adopted "in spite of" adverse effects on group, must show adopted "because of" those adverse effects. Here, line-drawers spread AA's to maximize Republican representation. Arguably, they selected the means because it had the effect of diluting the black vote, but there is no evidence that the State conceived

[1] The fact pattern only says that whites vote to defeat AA candidates, not AA *preferred* candidates. Although this shows that AA preferred candidates won't always lose, AA candidates will always lose and this should be enough to prove racial bloc voting prevents AA's from electing their preferred candidates. Otherwise, AA's could only ever prefer white candidates, if they hoped to influence a win.

of the plan to further racial discrimination—a requirement cited in Bolden. This is a weak claim.

E. Shaw Claims—Suspect Classification

The P's who reside in Districts 1-5 (Hays) have a Shaw claim that the scheme violates the EPC. But they carry a "demanding" burden (Hunt II). A Shaw claim is distinct from a traditional vote dilution claim in that effect is irrelevant. Instead, the "expressive harm" is that shape of the district itself causes injury—a strange shape suggests members of the same racial group, regardless of age, education, etc., share same political interests. Court fears this view will result in "political apartheid." Under Miller/Hunt II, strict scrutiny is triggered when race has served as the predominant factor in the drawing of district lines. P's must prove that legislature subordinated traditional race-neutral districting principles, including compactness, contiguity, and respect for political subdivisions.

Although not a traditional Shaw district, where AA voters have been joined by long-reaching district lines, argue the districts are now wildly contorted and admitted spreading of AA voters indicates race was the predominant consideration. Traditional districting principles have been ignored and incumbents pitted against each other. Courts rely heavily on irregularity of district shape to show a predominance of racial consideration. But State will claim it drew those lines solely to strengthen chances of Republicans. Manifestly unfair that race is predominant factor when used to group AA's, but not when used to split them up. We would argue that white Democrats are now stacked in District 6, giving them a voice—suggests Reps not averse to white Dem's representation. The predominant consideration was submerging the AA voter, which

happens to be strongly Dem. Obstacle: race not predominant factor just b/c it's highly correlated with party affiliation (Hunt II). Don't know if whites as highly loyal Reps (as blacks were to Dems in Hunt) so legis could justify considering race. Challenger must also show legis could have achieved its legitimate political objectives consistent with traditional districting principles and alternatives would have brought significantly greater racial balance. We argue legis could have achieved legit political objective of maximizing Republicans by packing AA and white Dems into 2 or 3 districts, which brings about greater racial balance. Difficult claim but very interesting.

F. Fundamental RTV Prong

Candidate from District 6 has a strong constitutional claim that fundamental RTV has been violated because the 250,000 voters in district only elect 1 representative—100,000 voters in Districts 1-5 elect 1 rep. Reynolds holds Equal Protection requires districts of nearly equal population—this variation between districts is violation of 1P-1V (Karcher).

G. Partisan Gerrymandering

All P's can bring a justiciable claim of partisan gerrymandering (Bandemer), although PG claims rarely successful. Once Dem's had majority in 75% of Districts and were 50% of population, but now have maj in 16.6% of Districts but still 50% of population. The Q is whether Dems have been unconstitutionally denied their chance to effectively influence the political process. Unconstitutionality must be proved by evidence of continued frustration of will of a majority of voters or effective denial to a minority of voters a fair chance to influence the political process. The Party must also show that it has no chance of doing any better in next Census reapportionment.

Difficult for Alisippi Dem's to prove. No allegations that Dem's shut out of political process. No charges of interference with Dem organizing, campaigning, or voting; Dems still able to participate in public debate and Dem's still potent political force (in country). But decimation of Dem voting strength is favorable. In Badham, Rep's received 50% of vote but 40% of seats; in Bandemer, Dem's got 51.9% of vote but 43% of seats. Here, Dem's get 50% of vote but only 16.6% of seats. A Ct could see this stark drop in Dem power as consistently degrading Dem's influence on the political process and unlikely to change in next election.

H. §5: DOJ Should Have Denied Preclearance

Covered jurisdiction and redistricting is a covered change (Allen). DOJ must compare new plan to benchmark plan—last legally enforceable redistricting plan. Plan A unconstitutional because it violated 1P-1V. SCt held a redistricting plan found by a federal court unconstitutional under Shaw can't serve as §5 benchmark (Abrams—p.605). Without finding of unconstitutionality under Shaw *by a federal court*, last legally enforceable plan will serve as benchmark. As Plan A never found unconstitutional, proper benchmark to Plan B.

Although Plan B violates 1P-1V, §2, Shaw (possibly), DOJ will not deny preclearance unless the change has either retrogressive purpose or effect (Bossier Parish & DOJ Guidelines). Although Plan B is less violative of 1P-1V, dilution of AA vote is much worse, i.e., retrogressive. A-A voters can prove all 3 Gingles prongs (discussed prior). Since "strong basis in evidence" §2 claim will be brought (Bush), DOJ should have denied.

II. Q 2

A. EO1 Violates 14th A & Possibly Art. II §1

By mandating some voters use optical scanner (more likely vote counted), but other voters use butterfly ballot (screw up more likely), EO1 has violated the fundamental RTV. The fundamental RTV, guaranteed by EPC of 14th A, is implicated when state values vote of one voter over that of another, especially in context of presidential election (Bush v. Gore). The Bush plurality cited Harper and Reynolds as requiring that any presidential voting system meet the standards of EP, so that all votes be weighed equally and fundamental RTV be protected through procedural and substantive measures. EO1 does not ensure voters in §5 covered jurisdictions will receive same protections. Arguably, Bush v. Gore applies only to its precise facts—where county canvassing boards are discerning the intent of the voter and each board has different rules. But it seems the Court could not condemn differing standards for counting votes just where people are concerned and not where machines are concerned. Uniformity in voting standards may be the outgrowth of controversial opinion.

EO1 also possibly violates Art. II, §1, which provides electors be appointed, "in the Manner as the Legislature thereof may direct." Bush concurrence and McPherson make clear the legislature, not Governor Reno, may prescribe who appoints presidential electors. By changing voting machines, Reno could be "significantly departing from the legislative scheme for appointing presidential electors." Could be changing the scheme the legislators determined, as they wrote scheme based on their understanding of voting procedures. However, Reno is not departing to the extent the Fla S Ct did, since she is

not extend protest period and strip contest period of strength, thereby departing from legislative scheme. The Art. II argument is not as strong as the EP argument.

B. EO2

EO2 interferes with voter's fundamental right to vote, protected by the EPC of 14th A (Harper, Kramer)—fundamental because preservative of other rights. Basically, EO2 is a literacy test, which is constitutionally permissible (Lassiter). Not constitutional where administrator has unfettered discretion, but not a problem with EO2. Where FRTV is infringed on Strict Scrutiny applies and classification must be narrowly tailored so the exclusion is necessary to achieve a compelling state interest. Here, excluded class will be people who failed test and state interest will be "intelligent use of the ballot." Is the state's interest compelling? After 11/00 fiasco in Florida, state clearly has strong interest in people voting properly, maybe even compelling interest. Issue turns on whether classification is narrowly tailored. Here, the voter is denied the RTV on the day he fails the exam. No provisions for re-testing, slip-ups, etc. and one failure completely strips a voter of her RTV on that day. Difficult call but not surprised if a court found EO2 violates the EPC because not narrowly tailored and those who can take test several times more likely to pass.

Arguably, since poverty adversely affects literacy this regulation will primarily impact poor people. In Harper, Douglas suggested that economic status is a suspect classification, however, this is isolated case law and not followed after '66 opinion.

C. EO3

A **§4** VRA claim can be brought, as EO2 is unquestionably a "test or device" and there are 5 covered counties in Florida where the test is being administered (Reno did not

get declaratory judgment and Fla hasn't bailed out). A court should find a violation of §4.

§5 claim because Reno didn't get EO2/3 preclearance or declaratory judgment for 5 covered counties in Florida. Covered counties, in uncovered states, still require preclearance (Lopez). EO1 didn't apply to covered counties, so won't be challenged under §5. But EO2/3 did apply to covered counties and didn't preclear. Question: is EO2/3 a covered change "with respect to voting" under §5? EO2 is a covered change since it's a "voting qualification" (you can't vote unless you pass this test), even under Justice Harlan's interpretation of the VRA in Allen. EO3 takes ballot propositions away from voter. DOJ Guidelines cite covered change, "Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum." EO3 affects the necessity of ballot initiatives—it removes the necessity completely. [Assuming ballot initiatives and referenda same thing]. Reno could argue the elimination of the ballot initiative doesn't have a direct relation to, or impact on voting—this is a change in governmental authority (Presley). As Presley merely removed power from reps, this merely removes power of initiative. But elimination has bearing on substance of voting power—it doesn't increase/diminish the # of officials voter can elect, but diminishes # of issues can address on ballot. Likely court will find EO3 a covered change.

§2 violation if suitable benchmark (Holder) and procedure results in denial of RTV because less oppt'y to participate in political process. EO2 might result in fewer AA's voting because lower education and poverty correlated. Benchmark since previous plan was: no test (unlike Bleckley/Hazard County, where nothing besides single

commissioner). EO3 results in less oppt'y to participate in political process since remove procedure by which popular will is expressed. Doubtful EO1 result in less oppt'y, so no claim against Reno there.

III. Q3

A. DNC Rule

If find state action, claim against DNC would be violation of 1P-1V—Ark and Ten have disproportionate strength at Convention. Question is: DNC's decision state action? Does Convention perform function traditionally reserved to the state? Although may not be traditionally reserved to state, is Convention basically the de facto election (like Terry)? Unlikely this is de facto election, since Rep's and independents (Nader) wield force, and could just get on those ballots. And, convention is not s.a (Dietz—TX SCt). But argue de facto election for Democrats—if want to get on Dem ticket, only store in town. Also, Morse held party's requirement of filing fee was state action. Very similar to Morse, as party changing requirement: # of delegates. Very close but I would say this is state action, but only b/c of Morse.

B. Arkansas Rule

Have state action since a primary is an integral part of election machinery (Allright). Here, the voter's 1st A right to associate with the party—since only those registered for last 2 elections can vote—clash with party's right to determine its membership. However, this is almost an extra determination of membership—party is excluding people who have already registered or may register. Not excluding someone like Nader who doesn't want to register, nor requiring voter to have registered 30 days in advance

(Rosario). Instead, excluding voters who registered less than 8-9 years ago. Must weigh character and magnitude of injury of rights protected against justification (Takushi). In comparison to the party/state's interest in ensuring staunch/older (less radical) Democratic voters vote, is significant injury to more recent Democrat of being denied RTV in your party primary. This is a severe burden on voter, so apply strict scrutiny (Timmons). Is there a compelling state interest, narrowly tailored? It doesn't appear that even the compelling interest in determining membership is narrowly enough tailored here. Voters, no matter how strongly Democrat, cannot vote unless they've been registered for years.

Claim that Arkansas contribution limits violate the 1st & 14th A's. Buckley is authority for state limits (Shrink MO) and distinguishes between contributions and expenditures. Limits on latter subject to strict scrutiny but limits on former subject to "Buckley Scrutiny:" contribution limits must be well tailored to further state's interest in preventing actual or apparent corruption and limit doesn't prevent candidate from amassing enough money to campaign effectively. Here, contribution limit is $20 m.—probably sufficient to finance a campaign. A court's decision on this matter might be affected by what contributions an effective campaign received before limit. But unlike Shrink, this is a limit on total contributions, not on individual contributions. A rationale for allowing limits in Shrink was candidate could just expand contributor base, so may weigh in favor of violation. Another question: was the state's interest preventing actual or apparent corruption or excluding candidates with large contributors? We don't have info on state's interests but it will probably cite the one recognized interest (corruption). Although state's evidentiary burden of proving corruption is low (Shrink affidavits and

articles), no evidence that corruption was state interest. Does write-in possibly cure the defect? Possibly since candidate trying to appear on primary ballot and receipt of $ doesn't completely exclude from primary. In sum, the lower Buckley scrutiny, possibly of write-in, and significant amount allowed to a candidate suggests the limit doesn't violate 1st and 14th A, but state has shown no interest so may very well have 1st & 14th A violations.

C. Tennessee Rule

Dem's have weak claim their 1st A right to associate has been violated. Non-members of the party will vote for party candidates, possibly raiders with adverse motives, so party has right to exclude (Jones). Where heavy burden on party's associational freedom, law is unconstitutional unless narrowly tailored to serve a compelling state interest. This case is weak, however, because Scalia cited nonpartisan presidential primaries as type of law narrowly tailored to serve state's interests of ensuring greater choice, greater participation, increased privacy and sense of fairness. Constitutionally crucial characteristic is primary voters aren't choosing party's nominee—as law states, "state committee empowered to determine nomination."

Have stronger claim that 2nd part of law violates 1st A associational rights of voters and candidates. Law effectively bans candidates who ran in '00 and didn't get 10%. Although states may condition access to the ballot on a showing of a modicum of support (Monro), this law would burden candidates who ran previously and 9.9% of vote. Very similar to Williams law that placed a heavy burden on minor party (15% signature requirement) and gave established parties a decided edge. Court upheld 5% voter

signature requirements (White), but stated 10% requirement potentially problematic.

Regulation of the ballot burdens the 1st A right to associate and must be balanced against the state's compelling interest. As the state lost in Williams, so it should lose here as this law cements the influence of the 2 parties.