UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*, *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants*.	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants.*	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]
TEXAS LATINO REDISTRICTING TASK FORCE, et al., *Plaintiffs,* v. RICK PERRY , *Defendant.*	CIVIL ACTION NO. SA-11-CV-490-OLG-JES-XR [Consolidated case]
MARAGARITA V. QUESADA, et al., *Plaintiffs,* v. RICK PERRY, *et al.,* *Defendants.*	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

JOHN T. MORRIS, *Plaintiff,* v. STATE OF TEXAS, et al., *Defendants.*	)	CIVL ACTION NO. SA-11-CA-615-OLG-JES-XR [Consolidated case]
EDDIE RODRIGUEZ, et al. *Plaintiffs,* v. RICK PERRY, et al., *Defendants.*	)	CIVIL ACTION NO. SA-11-CA-635-OLG-JES-XR [Consolidated case]

POST-TRIAL BRIEF OF TEXAS STATE CONFERENCE OF NAACP BRANCHES, JUANITA WALLACE, REV. BILL LAWSON, HOWARD JEFFERSON, AND CONGRESSPERSONS EDDIE BERNICE JOHNSON, SHEILA JACKSON-LEE, AND ALEXANDER GREEN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

I. INTRODUCTION

The Texas State Conference of NAACP Branches, Juanita Wallace, Rev. Bill Lawson, and Howard Jefferson (hereinafter, "NAACP Plaintiffs"), and the Congresspersons Eddie Bernice Johnson, Sheila Jackson-Lee, and Alexander Green (hereinafter, "Congressional Plaintiffs"), intervened as Plaintiffs in the above-styled action, alleging that the maps passed by the Texas State Legislature for redistricting Texas' Congressional and State House districts—C185 and H283, respectively—violated Section 2 of the Voting Rights Act of 1965 by intentionally discriminating against minority voters and by diluting the minority vote, and violated the Equal Protection Clause of the 14th Amendment by intentionally discriminating against minority voters. Trial on these claims, and claims brought by 7 other plaintiff and plaintiff-intervenor groups, began on Tuesday, September 6, 2011, and concluded on Friday, September 16, 2011.

Following the delivery of the data derived from the 2010 federal decennial census, the state of Texas began redrawing the electoral districts that elect Congressional, State House, State Senate, and State Board of Education representatives. On May 23, 2011, the state legislature passed House Bill 150, which redrew the lines for State House Districts. The bill was signed by the governor on June 17, 2011. On June 24, 2011, during a special session, the state legislature passed Senate Bill 4, which redrew the lines for the state's Congressional districts and added the 4 new districts that the state gained because of population growth over the last decade. The bill was signed by the governor on July 18, 2011.

The NAACP Plaintiffs are comprised of individual NAACP members residing in districts affected by the state's redistricting plan, and the Texas State Conference of NAACP Branches, an organizational plaintiff which has members who live and vote in each of the Texas counties and districts affected by the state's redistricting plans. The NAACP and Congressional Plaintiffs

were granted intervention on July 25, 2011 (Dkt. No. 67), and the NAACP Plaintiffs' complaint, challenging the State House and Congressional redistricting plans as violations of the Equal Protection Clause and the Voting Rights Act was filed the same day. (Dkt. No. 69).

In this post-trial brief, NAACP and Congressional Plaintiffs will detail the relevant law applicable to their claims of vote dilution and intentional discrimination, and apply that law to the evidence presented to this Court in the course of trial.

II. LEGAL FRAMEWORK

In this lawsuit, the NAACP and Congressional Plaintiffs have brought claims of vote dilution under Section 2 of the Voting Rights Act, and of intentional discrimination under the Voting Rights Act and under the Equal Protection Clause of the Fourteenth Amendment. These two claims involve very distinct and precise legal analyses, as explained in the following discussion.

A. Vote Dilution under Section 2 of the Voting Rights Act

The Voting Rights Act of 1965 was designed by Congress to effectuate the Fourteenth and Fifteenth Amendments' prohibition on the denial of the right to vote "on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV. Section 2 of the Act, as amended in 1982, prohibits any "voting or standard, practice, or procedure" that would result in "a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). The statutory language specifies that a Section 2 violation occurs 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. The extent to which members of a

> protected class have been elected to office in the State or political subdivision is one circumstance which may be considered.

42 U.S.C. § 1973(b). Section 2 thus prohibits what is known as "minority vote dilution," or the undermining or minimization of minority voting strength.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the United States Supreme Court interpreted what Section 2 of the Voting Rights Act means in the context of a challenge to a redistricting plan. The Court held that in order for Plaintiffs to successfully allege vote dilution under the Section, they must prove: (1) that the minority group in question is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that the "majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Id.* at 50-51. *Gingles* involved multimember districts, but the Supreme Court has made clear that these conditions must likewise be met in actions challenging one or more single-member districts. *See Growe v. Emison*, 507 U.S. 25, 40-41 (1993). If the three *Gingles* preconditions are met, a court then must determine whether the "totality of the circumstances" indicates that minority voters have been denied equal opportunity to participate in the political process. *See Johnson v. DeGrandy*, 512 U.S. 997, 1009-12 (1994).

To satisfy the first *Gingles* precondition, plaintiffs must show "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Id.* at 1008. As discussed in detail below, numerous plans were introduced to the Texas state legislature in which the minority population constituted a majority of new districts, affording the opportunity to elect the candidate of choice of minority voters. The second and third *Gingles* prongs are usually referred together as "racially polarized voting"—that is, plaintiffs must demonstrate that minority voters support one candidate, while

white voters support an opposing and often winning candidate. Several Supreme Court-approved methods exist to determine whether racially polarized voting occurs in a given area.

1. Law Relating to the First Prong of *Gingles*

In order to establish liability under Section 2 of the Voting Rights Act, plaintiffs must prove that a reasonably compact district in which the minority population constitutes at least 50% of the voting age population can be drawn. *Bartlett* 129 S. Ct. 1231 (2009). The NAACP Plaintiffs submitted, or noted the submission by other parties during the legislative process, several Congressional and State House district maps that would satisfy the first prong of *Gingles*.

The Fifth Circuit's interpretation of the first prong of *Gingles* requires that the challengers show that minority voters in a proposed district will comprise a majority of the *citizen* voting age population in the district. *See Perez v. Pasadena Independent School District*, 165 F.3d 368 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000); *Valdespino v. Alamo Heights Independent School District*, 168 F.3d 848 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000). In the cases from which this rule derives, plaintiffs were seeking to create, and prove effective, new single-member districts (where the challenged system was an at-large system). That 50% rule does not and should not apply where plaintiffs seek to protect, under Section 2, an already existing and performing minority opportunity district.

This principle—that the bright-line 50% rule should not apply to extant, effective minority opportunity districts—is supported by precedent from other jurisdictions. For example, in *Metts v. Murphy*, 347 F.3d 346 (1st Cir. 2003), 2003 U.S. App. LEXIS 21987, *(withdrawn after reh'g), rehearing en banc granted on other grounds* 363 F.3d 8 (1st Cir. 2004), the Rhode Island state legislature, in redistricting the state senate, destroyed the state's one effective black Senate district. This district was not a majority black district, but the combined black and Hispanic population was over 50% of the voting age population, and the district elected an

African-American state senator. Id. at 6-7. The First Circuit noted that despite the African-American population making up less than 50% of the district, it was protected by Section 2, "this case presents a claim not merely of an abstract hope to electing the African-American voter's preferred candidate." *Id.* at 31.. The court found the loss "much more concrete" because of the "minority group's historical voting success." *Id.* at 31-32.

This case also requires this Court to confront directly the issue of coalition districts. In past Voting Rights Act cases, examinations of vote dilution were frequently focused on one racial minority group, but in today's increasingly diverse society, there are situations in which more than one racial group lives in close proximity, has shared interests and voting patterns, and could be drawn into a district such that the groups constitute a majority and can elect a candidate of their choosing. Texas is one such exceptionally diverse state. The decision not to draw such districts can, with the additional satisfaction of the other *Gingles* preconditions, create Section 2 liability on the part of a redistricting body.

In *Bartlett v. Strickland*, *Bartlett*, at 1237. ,, a Supreme Court plurality found that in order to satisfy the first prong of *Gingles*—to compel the drawing of a majority minority district—the minority group in question had to constitute 50% or more of the voting age population of a given district. The Court, however, noted that it was not expressing any opinion on coalition districts and whether a combined minority population of 50% or more could satisfy the first *Gingles* prong. *Id.* at 1242-1243. In this discussion, the Court was clear to clarify the terminology it was employing: what was under review by the Court in *Bartlett* was a crossover district—that is, a district "in which minority voters make up less than a majority of the voting-age population. But in a crossover district, the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.* at 1243. The court noted that such

districts have sometimes been referred to as "coalitional" districts, in "recognition of the necessary coalition between minority and crossover majority voters," but that such crossover districts should not be confused with "coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice," which was not addressed nor foreclosed by the Court in *Bartlett*. *Id.*

The Court's determination that crossover districts are not compelled under Section 2 of the Voting Rights Act should not be read to reflect on the Court's future position on coalition districts.[1] Many of the problems with crossover districts being protected under the Voting Rights Act are clearly not an issue with coalition districts. For example, the *Bartlett* Court specifically highlighted the problem with being able to satisfy the third prong of *Gingles*—the requirement that the majority votes as a bloc to defeat minority-preferred candidates—with a district that admittedly requires crossover votes from the majority group in order to elect the minority candidate of choice. *Id.* at 1244. . That is certainly not a problem implicated with a coalition district, where the aggregated minority groups are sufficient in number to elect a candidate of the minority groups' choosing, with no white crossover vote required.

Also, the *Bartlett* Court was concerned with the prospect of requiring jurisdictions to make a prediction of political performance of Anglo crossover voters in nonpartisan contests. *Id.* at 1245. Again, a coalition district comprised of more than one racial group does not implicate the same concerns—questions of partisan performance would not arise where plaintiffs could simply demonstrate that different racial minority voters were voting for the same candidate, and that candidate is different from the candidate supported by Anglo voters. Finally, while the Supreme Court has not directly addressed the issue of coalition district, the Court has previously

[1] The holding should also not be misconstrued to speak to situations where there are allegations of intentional discrimination. The Court left open the possibility that a court could invalidate a plan where a performing crossover district was dismantled with racially discriminatory purpose. *Bartlett*, 129 S. Ct. at 1246-1247.

noted in a number of cases that racial minority groups could form "coalitions with voters from other racial and ethnic groups," *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), and that assuming without deciding that coalition districts are protected under VRA, evidence of political cohesion would be "all the more essential," *Growe v. Emison*, 507 U.S. 25, 41 (1993).

However, despite the high Court not directly speaking on the issue, a number of lower courts, including at least five cases from the 5th Circuit Court of Appeals, have found that minority groups can be aggregated for the purpose of asserting a Section 2 claim. *See League of United Latin Am. Citizens Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (*rehearing en banc*), *cert. denied* 114 S. Ct. 878 (1994) ("[i]f blacks and Hispanics vote cohesively, they are legally a single minority group); *Overton v. City of Austin*, 871 F.2d 529, 538 (5th Cir. 1989) (concluding that Section 2 permitted the court to order as remedy a district in which Mexican-Americans, although not a majority, could be aggregated with blacks to achieve such a result, if the two groups could be shown to be politically cohesive and that Anglos voted in bloc); *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) ("minority groups may be aggregated for purposes of claiming a Section 2 violation"); *Campos v. City of Baytown*, 840 F.2d 1240, 1244-45 (5th Cir. 1988) ("a (coalition) minority group is politically cohesive if it votes together") *reh'g denied*, 849 F.2d 943, *cert denied*, 492 U.S. 905 (1989); *League of United Latin Am. Citizens Council No. 4386 v. Midland ISD*, 812 F.2d 1494, 1501-02 (5th Cir. 1987), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987) (en banc). Other circuits considering the issue have agreed, *see, e.g., Badillo v. City of Stockton*, 956 F.2d 884, 891 (9th Cir. 1992); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906 F.2d 524 (11th Cir. 1990); *Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739, 746 (D.C. Mass. 1985), aff'd, 784 F.2d 409 (1st Cir. 1986). To date, the only circuit to take a contrary position is the 6th Circuit in *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc).

Specifically, in *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989), the Fifth Circuit reaffirmed its holding in *Campos v. City of Baytown*, 840 F.2d at 1244-45, that minority groups may be aggregated for purposes of asserting a Section 2 violation and establishing the first prong of *Gingles*. *Brewer*, 876 F.2d at 453. More recently, the Fifth Circuit affirmed this position on coalition districts. In *LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (*rehearing en banc*), the Fifth Circuit noted: "we have treated the issue as a question of fact, allowing aggregation of different minority groups where the evidence suggests that they are politically cohesive, and we need not revisit this question here." *Id.* at 864 (internal citations omitted). The law in the Fifth Circuit remains that if plaintiffs can prove all the *Gingles* factors and make a case for a remedy under the totality of the circumstances, different racial minority groups can be aggregated to satisfy the first prong of *Gingles*.

2. Law Relating to Second and Third Prong of *Gingles*

The second and third prongs of *Gingles* require a showing by plaintiffs that minority voters are politically cohesive and that the majority votes cohesively to defeat the minority-preferred candidate—requirements that are typically known as racially polarized voting. Racially polarized voting can be established through a number of methods. The Supreme Court, in *Thornburg v. Gingles*, relied on two statistical methods—homogenous precinct analysis and ecological regression analysis—to determine the extent to which voting in elections is racially polarized. *Id.* at 52-53. Another method, ecological inference, has also been developed in recent years, although the Supreme Court has yet to decisively rely upon it. Finally, anecdotal evidence of political cohesion may also be considered by courts looking to analyze the extent of racially polarized voting.

Anecdotal evidence, though perhaps not as probative, can and is considered by courts examining racially polarized voting. In *Overton v. City of Austin*, 871 F.2d 529; (5th Cir. 1989)

the Fifth Circuit noted the submission by appellants of affidavits and depositions from politically active Austin citizens that reflect their perceptions of the cohesiveness between the two minority groups. *Id*. at 537. The court also recognized the counter-balancing effects of the submissions by the city of Austin, which had denied any systematic political cohesiveness. *Id.* at 536. In *Brewer v. Ham*, 876 F.2d 448 (5th 1989), the Fifth Circuit acknowledged that statistical evidence is not the only means of establishing inter-minority cohesion, noting that, "*Thornburg* does suggest that other evidence may be sufficiently probative. *Thornburg*, 106 S. Ct. at 2769-70 ("a showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim"). *Id.* at 453.

The 2nd prong of *Gingles* does not require a perfect record of political cohesion between minority groups, but rather only evidence indicating that minority voters "usually" vote together. This fact is important in a discussion over the relative weights to assign to analyses of political cohesion in primary and general elections. In primary elections, especially if candidates from more than one racial minority group are competing for the nomination, minority groups may not always vote completely cohesively. Despite this, the minority candidate that wins the primary may still have the support of other racial minority voters in the general election, particularly when running against a white candidate. The Supreme Court in *Gingles* noted that "[a] showing that a significant number of minority group members **usually** vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim and, consequently, establishes minority bloc voting with the context of § 2." 478 U.S. at 56 (emphasis added) (internal citations omitted).

Moreover, the Fifth Circuit held that "the determinative question is whether black-supported candidates receive a majority of the Hispanic and Asian vote; whether Hispanic-supported candidates receive a majority of the black and Asian vote; and whether Asian-

supported candidates receive a majority of the black and Hispanic vote in most instances in the …area." *Brewer*, 876 F.2d at 453. As such, a finding that some primaries, particularly ones in which multiple racial minority groups slate candidates, show a lack of cohesion amongst minority voters should not preclude a finding of political cohesion when general elections demonstrate that the minority voters do support the same candidate. Other courts have relied on analysis of general elections to show that the second and third prongs of *Gingles* have been met. *See, e.g., United States v. Charleston County,* 318 F. Supp. 2d 302 (D.S.C. 2002) (noting that "[t]he record considers 33 probative, endogenous, **general** elections. The Court concludes that in a legally significant portion of those elections white bloc-voting was sufficient to defeat the combined efforts of non-white voters and any white crossover votes." *Id.* at 313 (emphasis added)).

In examining whether the second and third prongs of *Gingles* are established, the question has been raised whether patterns of racial bloc voting are motivated by racial or partisan interests. In *Thornburg v. Gingles*, 478 U.S. at 74, in a plurality opinion joined by three other Justices, Justice Brennan stated: "The legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of the voters and the selection of certain candidates…In order to prove a prima facie case of racial bloc voting, plaintiffs need not prove causation or intent." Justice Brennan noted that an interpretation of Section 2 that required proof of racially discriminatory intent behind voting patterns would "thwart the goals Congress sought to achieve when it amended § 2 and would prevent courts from performing the "functional" analysis of the political process and the "searching practical evaluation of the 'past and present reality,'" mandated by the Senate Report." *Id.* at 62-63 (internal citations omitted). That is, it would keep a reviewing court from analyzing the claim under a fact-sensitive totality-of-the-circumstances approach. The concurring opinion by Justice

O'Connor distinguished Justice Brennan's opinion in that it allowed for political affiliation to rebut a case of racial bias. After *Gingles*, some courts wanted evidence of the causes of racially polarized voting, and some circuits did not.

A large number of courts subscribed to Justice Brennan's position that proof of causation of voting patterns should not be a prerequisite to establishing liability under Section 2 of the Voting Rights Act. In *Garza v. County of L.A.*, 756 F. Supp. 1298 (C.D. Cal. 1990), the court held that plaintiffs did not need to prove causation to satisfy *Gingles*. Quoting the Senate Committee Report on Section 2, the court concluded that: "[t]he 'right' question is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" *Id.* at 1248 (quoting S.Rep. at 28, U.S. Code Cong. & Admin. News 1982, p. 206.). *See also Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. Wash. 2004) (holding that plaintiffs did not need to prove that a challenged voting practice by itself caused the discriminatory result to establish liability under Section 2).

In *United States v. Charleston County*, 318 F. Supp. 2d 302 (D.S.C. 2002), that district court also embraced the totality of the circumstances test without requiring proof of voters' intent, noting:

> The United States Supreme Court in its plurality opinion has expressly stated that for purposes of § 2 of the Voting Rights Act (§ 2), 42 U.S.C.S. § 1973, the legal concept of racially polarized voting incorporates neither causation nor intent….With all said and done, the issue here is not whether the limited success of African-Americans in electing candidates of their choice to Charleston County Council is the result of either polarized racial voting or partisan politics. The issue is whether the political processes leading to nomination or election to Charleston County Council are not equally open to participation by members of the African-American community."

Id. at 325. The Second Circuit is in accord. *See Goosby v. Town Bd.*, 180 F.3d 476, 493 (2d Cir. 1999) (holding that "inquiry into the *cause* of white bloc voting is not relevant to a consideration

of the *Gingles* preconditions."). *See also Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1008 (C.D.S.D 2004) (finding that "[w]hile causation may be relevant to the totality-of-circumstances review, it is not relevant in the inquiry into the three *Gingles* factors... Accordingly, partisanship has no bearing on the *Gingles* factors."); *Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997) (holding that a "district judge therefore should not assign to plaintiffs the burden of showing *why* the candidates preferred by black voters lost; it is enough to show *that* they lost, if white voters disapproved these candidates en masse. Proving discriminatory intent is not part of the plaintiffs' case under § 2."); *Lewis v. Alamance County*, 99 F.3d 600, 615 (4th Cir. 1996) ("We think the best reading of the several opinions in *Gingles*, however, is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, but relevant in the totality of circumstances inquiry." (internal citations omitted)).

The Fifth Circuit, however, is one circuit that has not subscribed to Justice Brennan's plurality analysis and has required more from plaintiffs in distinguishing between racial and partisan correlation/causation as it relates to racial bloc voting. In *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993), the court held that where the evidence unmistakably shows that divergent voting patterns among white and minority voters are best explained by partisanship, a plaintiff has not established racial bloc voting. *Id.* at 850. The Fifth Circuit did not, however, specify what a plaintiff would have to prove in order to establish racial bloc voting where the voting patterns showed correlation with both race and partisanship.

An extreme interpretation of the Fifth Circuit's causation analysis in vote dilution cases is not consistent with Congressional intent and is not consistent with Supreme Court precedent. First, if *LULAC v. Clements* is interpreted to require that Plaintiffs prove the intent of voters in casting votes the way that they do, the Circuit has effectively undone what Congress did in 1982 when it amended Section 2. It has re-established the enormous burden of proving intent in order

to prevail in a Section 2 case. That certainly cannot be what Congress intended given that Congress amended Section 2 in 1982 in response to the Court's decision in *Mobile v. Bolden*, 446 U.S. 55 (1980), (holding that plaintiffs must prove discriminatory intent to succeed under Section 2 of the Voting Rights Act). Congress explicitly created a vote dilution remedy for Plaintiffs without requiring them to prove discriminatory purpose. Moreover, this interpretation would not be consistent with Supreme Court precedent in that it would be increasing the *Gingles* threshold burden.

Four important points must also be considered: first, that the Fifth Circuit moderated the *LULAC* holding in two subsequent cases, *Houston v. Lafayette County*, 56 F.3d 606 (5th Cir. 1995), and *Teague v. Attala County*, 92 F. 3d 283 (5th Cir., 1996). In both of these cases, the Fifth Circuit allowed for a more moderate application of the LULAC ruling by holding that statistical evidence indicating a correlation between race and partisan voting preference was still probative of racial bloc voting. *See*, *Houston*, 56 F.3d at 612-613*; Teague*, 92 F. 3d at 288-289. Second, and more significantly, even where there is some correlation between partisanship and race in voting patterns, contextualizing that correlation can help determine which was more significant in causing the voting behavior. In *LULAC*, the Fifth Circuit agreed that Plaintiffs in that case were correct that "courts should not summarily dismiss vote dilution claims in cases where racially divergent voting patterns correspond with partisan affiliation as "political defeats" not cognizable under §2." *LULAC*, 999 F.2d at 860-61. Third, despite the *LULAC v. Clements* ruling, the Supreme Court found as recently as 2006 that racially polarized voting sufficient to create Section 2 liability existed across the state of Texas. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (1996). Even with a stringent application of the *LULAC v. Clements* rule, proving racially polarized voting is obviously not impossible. Plaintiffs in *LULAC v. Perry* did so following redistricting in 2003. 548 U.S. at 447. Finally, evidence presented by Drs. Burton,

Murray, and Tijerina establish that given the consistent, unabated historical context of the conservative white political majority acting as a group to deny minority voters in Texas their equal right to participate in the electoral process since Reconstruction, regardless of which political party was in power, the evidence presented in this case can only be reasonably read to support the conclusion that the "divergent voting patterns among white and minority voters are best explained by" race in Texas. *LULAC v. Clements*, 999 F.2d at 903. The only expert who concluded that partisanship explained racially divergent voting patterns, the state's expert Dr. Alford, did not address or rebut the historical context evidence presented by Drs. Burton, Murray and Tijerina, and his opinion was directly contradictory to every other expert in this case.

Complex statistical analyses are best understood in historical context. They should not be divorced from qualitative evidence and testimony. It is possible to reconcile both the Fifth Circuit's holding in *LULAC v. Clements* with Justice Brennan's direction in *Gingles* that the totality of the circumstances analysis of a minority group's ability to participate in the political process be the guiding principle underlying the *Gingles'* multi-prong inquiry. By contextualizing any potential questions of partisan versus racial cause in the Senate Factors/totality of the circumstances analysis (*see infra* "Law Relating to the 'Totality of Circumstances' Analysis"), a reviewing court will be able to untangle what may superficially seem like an inextricable intertwining of racial and partisan motivations. And this fact-intensive, case-specific totality of the circumstances approach is consistent with Congressional intent and Supreme Court precedent.

3. Law Relating to the "Totality of Circumstances" Analysis

When determining whether vote dilution has occurred under the totality of the circumstances, courts generally are guided by the so-called "Senate Factors" or *Zimmer* factors identified in a United States Senate report accompanying the reauthorization of the Voting Rights Act in 1982.

A court must make a searching examination of the past and present political realities, even though it will be the rare case in which plaintiffs have established the *Gingles* preconditions that they cannot also show that in the totality of circumstances minority voters have less opportunity than Anglo voters to participate in the electoral process and to elect candidates of their choice. *See, e.g., Shirt v. Hazeltine*, 461 F.3d 1011, 1021 (8th Cir. 2006) (satisfying *Gingles* preconditions takes the plaintiff 'a long way towards shows a section 2 violation'); *Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983-984 (1st Cir. Mass. 1995) ("cases will be rare in which plaintiffs establish the *Gingles* preconditions yet fail on a Section 2 claim because other facts undermine the original inference"); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ*., 4 F.3d 1103, 1116 n.6, 1135-36 (3d Cir. Del. 1993) (finding that only in the very unusual case will plaintiffs establish the three *Gingles* factors but still fail to show a violation of Section 2.)

The Senate Factors to be considered are: the extent of any history of official discrimination that touched the minority group members' rights to register, to vote, or otherwise to participate in the democratic process; the extent to which voting is racially polarized; the extent to which potentially discriminatory practices or procedures, such as unusually large election districts, majority vote requirements, or anti-single-shot provisions, have been used; if there is a candidate slating process, whether minority candidates have been denied access to it; the extent of any discrimination against minorities in education, employment and health, which might hinder their ability to participate effectively in the political process; whether political campaigns have been characterize by overt or subtle racial appeals; the extent to which minority group members have been elected to public office; whether there is a lack of responsiveness on the part of elected officials to the minority group's particularized needs; and whether the policy supporting the use of the voting policy or practice is tenuous. *Gingles*, 482 U.S. at 36-37 (citing S. Rep. No. 97-417, at 28-29, 1982 U.S. Code Cong. & Admin. News 177).

Perhaps the most significant factor to be considered in a totality of circumstances analysis is proportionality, or lack thereof, between the minority group's percentage of the jurisdiction's relevant population and the number of minority opportunity districts. The Supreme Court confronted the issue of proportionality in *Johnson v. DeGrandy*, 512 U.S. 997 (1994). Although Section 2 of the Voting Rights Act explicitly does not guarantee proportionality, 42 U.S.C. § 1973(b) (2010), the Court noted that rough proportionality also does not automatically shield a state from liability under Section 2. *Id.* at 1020. In a concurring opinion, Justice O'Connor explained that proportionality "is *always* relevant evidence in determining vote dilution, but it is *never* itself dispositive." *Id.* at 1025 (O'Connor, J., concurring).

B. Intentional Discrimination Law

Laws that are facially neutral but that are administered in a way that discriminates against minorities or that were enacted with a discriminatory purpose are violative of the Equal Protection Clause of the 14th Amendment, which provides in part that "[n]o state shall…deny to any person within its jurisdictions the equal protection of the laws." The Supreme Court held that in order for such laws to be treated as impermissible racial or national origin classifications, there must be proof of discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 239 (1976). The Court has held repeatedly that, in order to prove violation of the Equal Protection Clause, discriminatory effect is not enough. *See Mobile v. Bolden*, 446 U.S. 55 (1980); *McCleskey v. Kemp*, 481 U.S. 279 (1987).

However, constitutional claims of intentional vote dilution do not require a showing that racial considerations "predominated" over all other considerations. Discriminatory intent need only be one of the causative factors. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977). *See also, Hunter v. Underwood*, 471 U.S. 222, 231-32 (1985) (holding that the state's additional intention of discriminating against poor whites did not negate the

intention to discriminate against blacks); *McMillan v. Escambia County, Fla.*, 688 F.2d 960, 969 n. 19 (5th Cir. 1982) (holding that incumbency protection does not justify or protect from invalidation a law that is purposefully discriminatory), *cert. denied*, 464 U.S. 830 (1983); *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) (holding many strategies used to protect white incumbents in high African-American populations are "necessarily racially discriminatory.")

Despite this significant burden of proof for plaintiffs alleging a violation of the Fourteenth Amendment, the Supreme Court has given guidance on how discriminatory purpose may be proven. In *Arlington Heights*, the Court identified the kind of indirect evidence that establishes a prima facie case of intentional discrimination. Relevant indirect evidence includes evidence of discriminatory effect, the history and events surrounding the government's action, any departure from usual procedures, and discriminatory statements in the legislative history. *Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 266-268 (U.S. 1977).

When it comes to discriminatory effect, the Court acknowledged in some cases, the impact of the challenged law may be so clearly discriminatory as to allow no other explanation than it was adopted for discriminatory purpose. *Id.* at 266. Even when not such an extreme case, the court held that disparate impact "may provide an important starting point" for an examination of impermissible intent. *Id.*

In *Rogers v. Lodge*, 458 U.S. 613 (1982), the Supreme Court looked at the evidence considered by the district court as it came to the conclusion that the county maintained a "neutral in origin" election system for invidious purposes—that is, excluding the minority community from the political process. *Id*. at 622. The district court in *Rogers*, although abiding by the instruction of the Supreme Court in *Mobile v. Bolden*, 446 U.S. 55 (1980), that a court must find

that there was intentional discrimination in order to find a violation of Section 2 of the Voting Rights, still examined the *Zimmer* Factors (later known as the Senate Factors, discussed *supra* p. 15) In reviewing the *Rogers* district court's findings for error, the Supreme Court noted that the ultimate issue in a case alleging unconstitutional dilution of the minority vote is whether the plan under attack exists because it was intended to diminish or dilute the political power of that minority group. *Rogers*, 458 U.S. at 620-621. The fact finder must determine, considering all the relevant facts, in whose favor the "aggregate" of the evidence preponderates. *Id.* The Supreme Court recognized that despite the requirement of proof of intentional discrimination, the *Zimmer* factors were still relevant inquiries in examining indirect evidence of purposeful discrimination. *Id.* In redistricting cases, these factors are even more useful and fleshed out than the *Arlington Heights* factors, and provide a useful framework for assessing the evidence before the court.

It is also instructive to look to other courts who have found intentional discrimination in the redistricting context. In *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal.), *aff'd* 918 F.2d 763 (9th Cir. 1990), a district court found that County Supervisors had intentionally discriminated against Hispanic voters. Summarizing the District Court's findings, of which there were 180, the Ninth Circuit noted that the county supervisors knew that the protection of five Anglo incumbents was going to cause continued fragmentation of the Hispanic vote, and that this fragmentation was a foreseeable consequence of the adoption of the redistricting plan. 918 F.2d at 768. The district court found that the redistricting plan split a core of Hispanic voters in half, fracturing the voting bloc. *Id.* The court also found that the Board appeared to ignore the three proposed plans which provided for a bare Hispanic population majority in the district. *Id.* Finally, the court found that, in adopting the plan, the board of supervisors acted primarily with the objective of protecting and preserving the incumbencies of five supervisors or their political

allies while knowing that the ensuing fragmentation of the Hispanic population would further impair the ability of Hispanics to gain representation on the Board. *Id.*

Most recently, the Supreme Court, a mere five years ago, in *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (U.S. 2006), found evidence of intentional discrimination in statewide redistricting in Texas. *Id.* at 440. In regards to the redrawing of Congressional District 23, Justice Kennedy noted that "[t]his bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id*. In that case, Latinos in that district were, in successive elections, voting against Representative Bonilla in greater numbers, and in 2002, he was nearly ousted. *Id.* Dramatically increased voter turnout in Webb County, with a 94% Latino population, contributed heavily to the incumbent's near defeat in 2002. *Id.* at 423. In response to this threat to Bonilla's incumbency, the State divided the cohesive Latino community in Webb County, moving approximately 100,000 Latinos to District 28, which was already a Latino opportunity district. The rest of the Latino population in Webb County was left in a district where they then had little hope of electing their candidate of choice. *Id*. at 423-425. This is the sort of purposeful action in redistricting that violates the Equal Protection Clause.

III. Application of Law to Evidence

Based on the discussion above of the Equal Protection and Voting Rights law applicable in this case, the evidence before this Court indicates that the Defendants have violated Section 2 of the Voting Rights Act and the Fourteenth Amendment in enacting plans for redrawing the State House and Congressional districts. Plans C185 and H283 dilute minority voting strength in violation of Section 2 of the Voting Rights Act. Plans C185 and H283 were enacted with racially discriminatory intent, in violation of the Equal Protection Clause.

A. Vote Dilution in the Congressional Plan

The evidence and testimony offered by the NAACP Plaintiffs demonstrated that all the *Gingles* preconditions were satisfied and that, under a totality of circumstances, the Voting Rights Act compelled the drawing of additional minority opportunity districts in order to avoid minority vote dilution. The Texas State Conference of NAACP Branches introduced plan C193, a plan for congressional redistricting that preserved according to Section 5 of the Voting Rights Act Congressional Districts 9, 18, and 30, which currently elect African-American members of Congress. Plan C193 also preserved Congressional District 25, an important multi-ethnic coalition district in Travis County. Finally, Plan C193 created 2 new minority opportunity districts in the Dallas/Fort Worth area. The intentional dismantling of Congressional District 25, and the changes that were made to Congressional Districts 9, 18 and 30 will be discussed below, in the section on intentional discrimination. The NAACP Plaintiffs assert that given the applicable law, discussed earlier in this brief, Section 2 of the Voting Rights Act compels the drawing of Congressional Districts 34 and 35, as drawn in Plan C193, in the Dallas/Fort Worth region, in order to remedy vote dilution.

For each congressional district that the NAACP Plaintiffs allege that the Voting Rights Act compels, this brief will address the three preconditions of *Gingles* relevant to the individual district. The same will apply for the discussion of minority State House Districts that the NAACP Plaintiffs allege are compelled by the Voting Rights Act. The discussion of the Senate Factors/totality of the circumstances evidence will be addressed after the individual districts are discussed.

An interpretation of the first prong of *Gingles* that compels the creation of coalition districts is not only consistent with Supreme Court and Fifth Circuit precedent, but is also fitting with the intent of the Voting Rights Act, which was designed to provide a remedy when a discrete political group is kept from participating in the political process. The reality in Texas is

that there are a multitude of examples where multi-racial coalitions exist and operate together electorally. These coalitions are quite effective, according to the state's expert Dr. John Alford. Dr. Alford explicitly agreed that Hispanic and African-American voters in Congressional Districts 9, 18, and 30, where the black population is substantially below 50%, were voting in coalition in general elections. Tr., Sept. 14, 2011, p. 1906, lines 15-20. Multi-racial coalitions, especially in urban areas, have achieved significant electoral success. An interpretation of the first prong of *Gingles* that recognizes coalition districts serves to accommodate Texas' current political reality and fits with the intent of the Voting Rights Act.

1. Congressional District 35 in Plan C193

In Plan C193, the NAACP Plaintiffs preserved the existing minority opportunity district, CD 30, and created two additional minority opportunity districts in the Dallas/Fort Worth region. One of those districts was Congressional District 35, a coalition district that would function as a Latino opportunity district.

The NAACP Plaintiffs demonstrated that Congressional District 35 complies with the first prong of *Gingles* and is a legal and fair district. Proposed Congressional District 35 is a Latino and African American coalition district that would perform as a Latino opportunity district. District 35 is, by voting age population, 64.0% Hispanic, 11.2% Black, and 22.1% Anglo. By Citizen Voting Age Population, District 35 is 44.6% Hispanic, 15.0% Black, and 37.0% Anglo. Thus, the coalition of Hispanic and Black voters makes the district above 50% minority in citizen voting age population. Ex. Joint Maps J-14, Red-100., Red-106.

Expert cartographer Anthony Fairfax reviewed the plan offered by the Texas NAACP. He reviewed proposed Congressional District 35. He found that it was a majority-minority district and that it was predominantly Latino. *See*, Ex. EX-13, Supp., p. 18. Mr. Fairfax found that it was reasonably compact and would not raise any racial gerrymandering problems. *See*,

Ex. J-25, p. 37, line 13-19. Finally, he found that it was contiguous, respected political subdivisions, and could be legally enacted by the state legislature. Tr., Sept. 8, 2011, p. 837, line 25, p. 838, lines 1-11.

This Court should further take note of the extensive testimony at trial from numerous experts identifying the problems with the preciseness of the citizen voting age population data produced by the American Community Survey ("ACS"). The ACS is a 5-year sampling, meaning, in effect, the numbers that are produced in 2010 are more akin to accurate 2007 data. Tr. Sept. 10, 2011, p. 1100, line 19-22. The ACS citizenship numbers are certainly an undercount of the number of eligible minority voters in any given area. *Id.* at p. 1102, line 12. Dr. Stephen Ansolabehere testified that since ACS data was akin to a sampling from 2007, one could project the data 3 years forward to align it with 2010 realities. Tr., Sept. 10, 2011, p. 1107, line 14-18; *see also*, Ex. EX-15, Supp. p 18, Table 5, p. 19, Table 6. This testimony from the assorted experts should be taken into consideration when this Court is assessing whether the first prong of *Gingles* has been satisfied. While the Supreme Court in *Bartlett v. Strickland* saw the 50% requirement as an easy-to-follow brightline rule, that Court has never addressed the issue when complicated by the imprecision in citizen voting age population data, especially as produced by the American Community Survey. *Bartlett*, at 1237.

Through the evidence and testimony presented, the NAACP Plaintiffs also established the existence of the second and third prongs of *Gingles* as it applies to the new districts in the Dallas area and across the state. The record in this case is replete with expert analysis of the racially polarized voting patterns of the Texas electorate. These experts were hired by a variety of parties, used a variety of methods, and examined a variety of elections, but the end result is always the same: minority voters are supporting the same candidate, and the white majority in most Congressional and state House districts is supporting a different, and winning, candidate.

Even the state's expert acknowledges the legitimacy of the findings of the plaintiffs' experts, although he came to a different conclusion. Tr., Sept. 14, 2011, p. 1859, lines 1-13; p. 1904 lines 4-25.

The NAACP Plaintiffs and the Black Congressional Plaintiff-Intervenors, Congresspersons Eddie Bernice Johnson, Sheila Jackson-Lee, and Alexander Green, retained and rely on two principal experts on racially polarized voting and political cohesion between African-American and Hispanic voters: Dr. Richard Murray and Dr. Orville Vernon Burton. The findings of these experts, along with the larger assertions of the NAACP Plaintiffs, were also supported by the findings of other experts retained to give testimony in this case, including Dr. Richard Engstrom, Professor J. Morgan Kousser, Dr. Stephen Ansolabehere and Dr. Alan Lichtman. All of these experts testify to the fact that racially polarized voting is still a defining characteristic in Texas electoral politics, enabling this Court to find that, based on indisputable material facts, the 2nd and 3rd prongs of *Gingles* have been satisfied. *See*, Ex. EX-2, p. 3 (Kousser); Ex-EX-15, p. 7 (Ansolabehere); Ex-EX-3, p. 1 (Lichtman). Even the State's expert, Dr. Alford, while attempting to provide data and an expert opinion as to an alleged lack of racially polarized voting in Texas, admitted that he has seen no difference in the voting behavior of the various racial groups in Texas. Tr. Sept. 14, 2011, p. 1904, at lines 7-19. Coupling Dr. Alford's admission with the Supreme Court's finding of racially polarized voting in Texas in 2006 supports the finding of continued racial polarization in Texas electoral politics.

In his Expert Report, Dr. Murray discussed how the election of a black president did not lessen electoral polarization along ideological and racial lines. Rather, he observes the opposite with the emergence of the Tea Party movement within a month after Barack Obama took office. The impact of the Tea Party movement, and its effects on racial polarization, has been even more prominent in Texas. Given its exploding African-American and Latino populations, Texas was a

perfect breeding ground for stoking and honing the racial resentments of members of the Tea Party movement. *See* Ex. EX-4, Murray Report, p. 12-13.

In his Expert Report, Dr. Burton examined recent racially polarized voting analyses conducted by experts in voting rights litigation in Texas. He concluded that the data showed racial bloc voting by Anglo voters and strong cohesion among African-American and Latino voters. *See* Ex. EX-12, Burton Report, p. 26-27. After a survey of available data and research, he found that African American and Latino voters supported the same candidates in general elections and often during primaries. He noted that research done by Dr. Lichtman and the state's own regression analysis in 2003 show that African-Americans and Latinos were politically cohesive within each group and with each other, and that Anglos generally voted as a bloc to defeat minority-preferred candidates absent a minority opportunity district.

Plaintiffs' experts were incredibly consistent in their findings of racially polarized voting across the state. Dr. Kousser found that Latino, African-American, and Asian American voters supported Latino Democratic candidates in general elections. *See* Ex. EX-2, Kousser Report, p. 3. Dr. Engstrom's analysis of Dallas County showed that Latinos are very cohesive in support of Latino candidates, and that this preference is shared by African-American voters. *See* Ex. EX-7, Engstrom Report, p. 9. Dr. Lichtman's report indicated that Latino and African-American voters statewide are cohesive both in the fact that these groups overwhelmingly choose to participate in the Democratic primary and overwhelmingly unite in support of the candidates emerging from those primaries—African-American and Latino candidate alike. *See* Ex. EX-3, Lichtman Report, p. 1.

Moreover, racially polarized voting analyses more specific to the Dallas metro region were performed. Dr. Murray performed a homogenous precinct analysis (also known as an extreme case analysis) of 2008 elections for Sheriff and 2010 elections for District Attorney in

Dallas County. In the 5 precincts with an African-American population above 85%, Black voters overwhelmingly supported Lupe Valdez, a Hispanic candidate for Sheriff in 2008, with her garnering an average of 95.7% of the Black vote. Ms. Valdez was also strongly supported by Latino voters, getting an average of 77.4% of the Latino vote in precincts with 85% or higher Latino population. Likewise, in the 5 precincts with a Latino population of over 85%, Craig Watkins, an African American candidate for District Attorney received an average of 70.7% of the Latino vote. In Black homogenous precincts, Mr. Watkins received 97.8% of the Black vote. *See* Ex. EX-4, Murray Report, p. 33.

In these same races, Dr. Murray noted precincts with an Anglo population above 90%, Ms. Valdez and Mr. Watkins received only 24.0% and 22.0% of the vote, respectively. The Anglo voters were cohesive in their support of the candidates opposing these minority candidates of choice. *Id.* The method of analysis performed by Dr. Murray is a method of analyzing racially polarized voting that has been relied upon by the United States Supreme Court in *Gingles* 478 U.S. at 52-53, and it indicates obvious and indisputable racially polarized voting, with minority voters supporting the Anglo candidate. Moreover, it is reaffirmed by the statewide and local trends noted by other experts in this case. *See*, Ex. EX-2, p. 3 (Kousser); Ex-EX-15, p. 7 (Ansolabehere); Ex-EX-3, p. 1 (Lichtman).

Furthermore, the NAACP and other parties presented vast amounts of evidence in support of the viability of proposed Congressional District 35 as a minority opportunity district and of the cohesion of multi-racial coalitions in the Dallas/Fort Worth area. In his Expert Report, Dean Piatt explained the history of cohesiveness between African-Americans and Hispanics in Texas. He noted that in recent history, Black and Latino voters have exhibited political cohesiveness on a number of issues. Dean Piat0t pointed out that the NAACP and LULAC recently worked together on education matters in Texas including funding, curriculum,

and graduation rates. The two groups are aligned in the current immigration debate in both urging overall immigration reform that would address the country's enforcement needs along with fairness to individuals. The current economic downtowner has hit African-Americans and Latinos harder than it has Whites. *See* Ex. EX-14, Piatt Report, p. 2-3

Beyond this issue-focused political cohesiveness, Dean Piatt described a more historical, personal and permanent cohesiveness between African-Americans and Latinos—he terms it "corporal" cohesiveness. Representatives from both groups arrived in Texas significantly before Non-Hispanic Europeans arrived. Their histories in Texas are intertwined, and both groups have suffered from socioeconomic disparities detailed below. Ultimately, this deep cohesiveness is not one that varies from election-to-election. For all of these reasons, Dean Piatt concluded that African-American and Latino voters were cohesive in Texas and could be aggregated for the purposes of asserting a violation of Section 2 of the Voting Rights Act. *Id.* at 3.

Testimony from lay witness supported this high level of political cohesion among minority voters in the Dallas area. Representative Eddie Bernice Johnson testified to the incredibly diversity of her district, Congressional District 30, and how she has Asian American and Latino advisory committees. Tr., Sep. 12, 2011, p. 1274, line 4-6, 11-13.

Juanita Wallace, one of the NAACP Plaintiffs in this case and a resident of Dallas for over twenty years, testified about various types of coalitions that have developed between African-Americans and Latinos in the Dallas area. *See* "Sworn Statement of Juanita Wallace," Dkt. No. 317-1, p. 23-34. Ms. Wallace has served as president of the Dallas County NAACP, and under her leadership, Latino and African-Americans worked together to deal with a series of police shootings in the areas. *Id.* at 24. She also testified to how African-American and Latino voters worked and voted together to get Dr. Elba Garcia, a Latina woman, elected as a Dallas

County Commissioner. The NAACP worked hard to support Dr. Garcia and to get people registered and turned out to vote in that election. *Id.*

Anthony Bond, the founder of the Irving Branch of the NAACP, testified as to political and issue coalition between African-American, Asian-American and Latino voters in Dallas County. *See*, "Sworn Statement of Anthony Bond," Dkt. No. 317-1, p. 3. Specifically, Mr. Bond highlighted the work of the Irving Education Coalition, which he heads. Id. That coalition involved Hispanic, Asian and Black members, and worked with the Irving Independent School District and the U.S. Department of Justice to, among other things, ensure the school district was hiring enough minority teachers and was applying proper and equal discipline for children of color. *Id.* Like Juanita Wallace, Mr. Bond highlighted the Dallas County Commissioner's race involving Dr. Elba Garcia, a Latina candidate. Mr. Bond served as a campaign consultant for Dr. Garcia, and worked diligently to help her garner the multi-racial coalition support she needed to win the election. *Id.* at 4.

In a sworn statement, Federico "Lico" Reyes testified about his campaign for election in Congressional District 26, in the Dallas-Fort Worth metroplex area. *See* "Sworn Statement of Federico "Lico" Reyes," Dkt. No. 318-1, p. 2-4. Mr. Reyes, a Latino who is a District Director with LULAC, ran for Congress in 2004. He testified that he received strong African-American support in his campaign. *Id.* at 3.

In conclusion, both statistical analysis and lay testimony support the conclusion that voting in the larger Dallas area is racially polarized, that African-American and Latino voters are politically cohesive, and that Anglo voters will vote to defeat minority candidates of choice.

2. Congressional District 34 in Plan C193

The second new minority opportunity district in the Dallas/Fort Worth area created by the NAACP in Plan C193 is Congressional District 34, an African-American, Latino, and Asian

American coalition district that would perform as an African-American opportunity district. The NAACP Plaintiffs have demonstrated that Congressional District 34 complies with the first prong of *Gingles* and is a legal and fair district. District 34 is, by voting age population, 32.6% Black, 25.7% Hispanic, 7.3% Other, and 35.3% Anglo. By Citizen Voting Age Population, District 35 is 32.4% Black, 15.8% Hispanic, 4.2% Asian, and 46.0% Anglo. Thus, the coalition of Hispanic and Black voters comprises 48.2% of the district's citizen voting age population, and the coalition of the three ethnic groups (Hispanic, African-American and Asian American) make the district above 50% minority in citizen voting age population (52.4%). Ex. Joint Maps J-14, Red-100, Red-106.

Mr. Fairfax reviewed the plan offered by the Texas NAACP. He reviewed proposed Congressional District 34. He found that it was a majority-minority district. *See*, Ex. EX-13, Supp. p. 18. Mr. Fairfax found that it was reasonably compact and would not raise any racial gerrymandering problems. In fact, he found that it was within the range of compactness of districts in C185, the plan passed by the state legislature. See, Ex. J-25, p. 26, line 19-25, p. 27, line 1-2. Finally, he found that it was contiguous, respected political subdivisions, and could be legally enacted by the state legislature. Tr, Sept. 8, 2011, p. 834, lines 19-22. Again, as with new Latino opportunity district that the NAACP proffered, the inaccuracies in the CVAP data should be taken into account by this court. *See*, Ansolabehere Testimony, Tr., Sep. 10, 2011, p. 1100, line 19-22, 24-45. There is no likelihood that the citizenship percentages are any lower than what is determined by the American Community Survey data. In all likelihood, the minority citizenship rates are significantly higher. Thus, a district that is 48.2% Black and Hispanic in citizenship voting age population is almost certainly well above 50% when the errors in the data are accounted for. A district that is 52.4% Latino, African-American and Asian-American in citizen voting age population is, likewise, going to be even higher after the data is corrected. The

NAACP Plaintiffs have thus satisfied the first prong of *Gingles* with the creation of this second coalition district in the Dallas-Fort Worth region.

The racially polarized voting analyses discussed above and applicable to proposed Congressional District 35 are also applicable to proposed Congressional District 34. Moreover, Dr. Kousser performed an ecological regression analysis that also incorporated Asian American voters. He found that Asian-American were cohesive with African-American and Latino voters in general elections. *See*, Ex. EX-2, Kousser Report, p. 3. This level of political cohesion is significant, both statistically and effectively, and would enable minority voters a reasonable opportunity to elect a candidate of their choosing in the proposed Dallas-Fort Worth district.

As discussed above, several lay witnesses testified to political cohesion among minority groups in the Dallas-Fort Worth region. Congresswoman Eddie Bernice Johnson testified to the political cohesion and effective coalitions between African-American, Hispanic and Asian American voters in the Dallas metro region. She confirmed that African-American, Hispanic and Asian-American voters had worked together in coalition to elect Latino, African-American and Asian-American candidates. Tr., Sep. 12, 2011, p. 1283, line 22-25; p. 1284, line 1-24. Anthony Bond confirmed this tri-ethnic coalition in his sworn statement. *See*, "Sworn Statement of Anthony Bond," Dkt. No. 317-1, p. 3. Additionally, Charlie Chen testified on the stand about how similar obstacles and history of discrimination bond Asian-Americans in the Dallas/Fort Worth area with African-Americans and Latinos, and that these groups constitute a recognizable community of interest. Tr., Sep. 9, 2011, p. 1079, line 1-7. All of this testimony, in addition to the statistical analyses performed by Dr. Kousser and Dr. Murray, confirm that, in the Dallas area, there is an effective tri-ethnic coalition of minority voters, and that these voters would have a reasonable opportunity to elect a candidate of choice in proposed District 34.

B. Vote Dilution in the State House Plan

During the legislative process, the Texas Legislative Black Caucus introduced a plan that would create new compact and viable African American and Asian opportunity districts, and not at the expense of Latino districts. This evidence from the legislative process is proof that such districts could be drawn. Plan H202 was introduced by Representative Sylvester Turner, chair of the Legislative Black Caucus. Tr. Sept. 8, 2011, p.803 at line 22-23. This plan created additional minority opportunity districts in Dallas, Fort Bend, and Bell Counties, and preserved two minority opportunity districts in Harris County that the state merged into one district in Plan H283, the enacted plan.

1. House District 137 and House District 149 in Plan H202 (Harris County)

Prior to the 2011 round of redistricting Texas, House Districts 137 and 149 in the Houston area (Harris County) were both majority-minority districts. Ex. Joint Maps J-21, Red-100. House District 137 was a multi-ethnic coalition district that elected a Democrat, Scott Hochberg. Ex. Joint Maps J-21, Red-350. House District 149 was a multi-ethnic coalition district, predominantly Asian-American, that elected Hubert Vo, the first and only Vietnamese American officeholder in the Texas State House of Representatives. Tr., Sept. 7, 2011, p. 422, lines 14-18, 21. During the 2011 redistricting process, the leadership in the State House decided to reduce the Harris County delegation from 25 representatives to 24 representatives. Tr., Sept. 12, 2011, p.1419, lines 22-25, p. 1420, lines 1-9. The loss of one district resulted in the combining of these two majority-minority districts, and the drawing together of the two incumbents from those districts. Ex. Joint Maps J-29, Red-350.

Because the plan offered by the Texas Legislative Black Caucus maintains both of these districts as majority-minority districts, it creates one more minority district in the Houston area when compared to H283, the plan passed by the state legislature. In the Legislative Black Caucus plan, House District 137 is, by voting age population, 58.5% Latino, 16.6% Black,

11.7% Other, and 14.4% Anglo. By citizen voting age population, House District 137 is 25.0% Hispanic, 29.4% Black, 10.4% Asian, and 34.4% Anglo. Ex. Joint Maps J-25, Red-100, Red-106. House District 149 is 28.0% Black, 38.0% Hispanic, 21.9% Other, and 13.1% Anglo by voting age population. In citizen voting age population, House District 149 is 34.7% Black, 22.3% Hispanic, 18.5% Asian, and 23.4% Anglo. Ex. Joint Maps J-25, Red-100, Red-106.

Mr. Fairfax reviewed these districts and found them to be within the range of compactness of districts in the enacted plan, H283. *See*, Ex. EX-13, Supp. p. 5. He testified that they were majority-minority districts, complied with traditional redistricting criteria, including compactness, contiguity, and respecting political subdivisions, and could be legally enacted by the state legislature. Tr., Sept. 8, 2011, p. 843, lines 4-25, p. 844, lines 1-3.

Much of the expert testimony presented in this case confirmed that voting is racially polarized in Harris County. Dr. Murray performed homogenous precinct analysis (extreme case analysis) of the 2008 general Presidential election in Harris County. In precincts with a black voting age population above 85%, Barack Obama received 98.3% of the vote. In precincts with a Hispanic voting age population above 85%, Barack Obama received approximately 71.85% of the vote. In precincts with an Anglo voting age population above 80%, Barack Obama received only 26.8% of the vote. Ex. EX-4, Murray Report, p. 20. This a method of analyzing racially polarized voting that has been relied upon by the United States Supreme Court in *Gingles*, 478 U.S. at 52-53, and it indicates obvious and indisputable racially polarized voting, with minority voters supporting the Anglo candidate.

Moreover, particularly in House District 149, a multi-ethnic coalition has a proven track record of being politically cohesive and electing a candidate of choice of minority voters. Asian voters in that district do not comprise a plurality of voters in that district. The election of Hubert Vo quite obviously required the support of other minority voters in the district. Tr., Sept. 7,

2011, p. 420, line 10-17. Additionally, Rogene Calvert supplied this Court with specific evidence of how this multi-ethnic coalition in the larger Houston area faces some of the same issues, is a community of interest, and worked together to ensure the election of Representative Vo. Tr., Sept. 7, 2011, p. 421, line 7-10. Congresspersons Sheila Jackson Lee and Al Green also testified to political cohesion among different racial groups in the area. Tr., Sept. 12, 2011, p. 1521 at line 17, p. 1522, line 12 (Jackson-Lee); Tr., Sept. 12, 2011, p. 1333, lines 15-23 (Green).

2. House District 107 in Plan H202 (Dallas County)

Plan H202 introduced by the Texas Legislative Black Caucus also created a new African-American opportunity district in Dallas County. This district is a Black and Latino coalition district. In that plan, House District 107 is 21.0% Black, 48.2% Hispanic, and 25.3% Anglo in voting age population. In citizen voting age population, House District 107 was 26.5% African-American, 23.9% Hispanic, and 42.8% Ango. Ex. Joint Maps J-25, Red-100, Red-106. Mr. Fairfax analyzed this district, and found it to be a majority-minority district. *See*, Ex. EX-13, Supp. p. 11. He found that it was reasonably compact, contiguous, respectful of political subdivisions, and capable of being legally enacted by the state legislature Tr. Sept. 8, 2011, p. 840, lines 19-25, p. 841, lines 1-10. Thus, this is a coalition district that is above 50% in citizen voting age population and satisfies the first prong of *Gingles*.

As for the second and third prong of *Gingles*, all of the briefing applicable to the creation of new minority Congressional districts in the Dallas area is equally applicable to the creation of a new minority State House District in that area. Voting in Dallas County is racially polarized. Dallas County has historically demonstrated high levels of political cohesion amongst minority voters, particularly Latino and African American voters. Lay witnesses provided many examples of Latino and African Americans working together to elect both Latino and African American

candidates. Anglo voters in the county are not supportive of the candidates of choice of minority voters. *See* supra p. 25-28

3. House District 26 in Plan H202 (Fort Bend County)

Plan H202 also created an additional coalition district in Fort Bend County, in the larger Houston area. This district would be an Asian American opportunity district. The district is 14.1% Black, 17.0% Hispanic, 33.8% Other, and 35.5% Anglo in voting age population. In citizen voting age population, House District 26 is 23.8% Asian, 14.5% Black, 12.9% Hispanic, and 47.7% Anglo. Ex. Joint Maps J-25, Red-100, Red-106. Thus, the tri-ethnic coalition is more than 50% of the citizen voting age population in the district and satisfies the first prong of *Gingles*. Mr. Fairfax found this district to comply with all traditional redistricting criteria, including compactness, contiguity, and respecting political subdivisions Tr. Sept. 8, 2011, p. 841, lines 15-25, p. 842, lines 1-7. As for the second and third prong of *Gingles*, all of the evidence applicable to the discussion of the maintaining of House Districts 137 and 149 in Harris County is equally applicable to the creation of a new minority State House District in this area. Voting in the larger Houston metro area is racially polarized, and the area has historically demonstrated high levels of political cohesion amongst minority voters, particularly Latino, African American, and Asian voters. This tri-ethnic coalition successfully elected a Vietnamese-American House Representative in neighboring Harris County. Lay witnesses provided many examples of Asian-American, Latino and African-Americans working together elect Asian-American, Latino and African-American candidates. Anglo voters in the county are not supportive of the candidates of choice of minority voters. *See* supra p. 32.

4. House District 54 in Plan H202 (Bell County)

Finally, Plan H202, introduced by the Legislative Black Caucus, created a new African American opportunity district in Bell County. This district is a coalition district in which Anglo

voters are a minority of the district's citizen voting age population. In voting age population, House District 54 is 43.7% Anglo, 30.8% Black, 19.5% Hispanic, and 7.6% Other. In citizen voting age population, House District 54 is 46.4% Anglo, 28.7% Black, 17.7% Hispanic, 3.2% Asian, and 0.8% Indian American. Ex. Joint Maps J-25, Red-100, Red-106. Mr. Fairfax reviewed this district, and found it to be a majority-minority district. *See*, Ex. EX-13, Supp. p. 10. He determined that it was compact, contiguous, respected political subdivisions, complied with traditional redistricting criteria, and could be adopted by the state legislature. Tr., Sept. 8, 2011, p. 842, lines 8-25, p. 843, lines 1-3.

In relation to the second and third prongs of *Gingles*, the statewide analyses performed by Dr. Kousser, Dr. Ansolabehere, and Dr. Lichtmann finding racially polarized voting in Texas are all applicable to Bell County. That is, minority voters and Anglo voters support opposing candidates. *See*, Ex. EX-2, p. 3 (Kousser); Ex-EX-15, p. 7 (Ansolabehere); Ex-EX-3, p. 1 (Lichtman). Additionally, in a proffer, lay witness Phyllis Jones, a long-time resident of Bell County, spoke to the political cohesion between minority voters in the county. *See* "Sworn Statement of Phyllis Jones," Dkt. No. 317-1, p.28-29. Ms. Jones, a 17-year resident of Bell County, offered the example of Timothy Hancock, an African-American candidate for mayor in 2010 who had Hispanic and Asian-American community members working on his campaign. She also supplied anecdotal evidence of multi-racial coalition support for Juan Rivera, a Hispanic candidate for the Killeen City Council, and for Barack Obama in the 2008 presidential election. She spoke to her experiences with the Korean community in Bell County supporting African-American candidates. *Id.* at 29.

With regard to coalition districts, it is also very relevant that districts with similar demographics to the districts proposed by the Texas NAACP and the Texas Legislative Black Caucus have been performing as opportunity districts for African American voters for some

time. Congressional Districts 9, 18, and 30 are, and have been for some time, plurality districts. The African-American population in these districts is usually between 35-45% of the voting population, while the total minority population is usually around 70% of the voting age population. Even the state's witnesses acknowledged that coalition districts with populations of 40% or less of African-American voters could be effective African-American opportunity districts. Interiano, Tr. Sept. 12, 2011, p. 1484, lines 6 – p. 1486, line 2; Alford, Tr., Sept. 14, 2011, p. 1906, lines 15-20. This political reality should inform this Court's examination of whether coalition districts satisfy the *Gingles* preconditions.

C. Totality of Circumstance Evidence

The factors that the Senate Report directed reviewing courts to consider in their Section 2 totality of circumstances analyses supports the creation of all the new minority Congressional and State House districts described above. In his Report, Dr. Burton detailed the history of racial discrimination in Texas and examined the Senate Factors relevant to a judicial finding that, under the totality of the circumstances, minority vote dilution had occurred in Texas in this latest redistricting cycle. Additionally, many of the exhibits submitted to this Court by the NAACP Plaintiffs and the Black Congressional Intervenor Plaintiffs further demonstrate why the totality of the circumstances requires a Section 2 remedy in both the Congressional and State House redistricting plans.

1. The History of Official Discrimination Against Minority Voters in Texas

In his expert report, Dr. Burton documented Texas' long history of racial discrimination, dating backing back to the first Anglo settlements. *See* Ex. EX-12, Burton Report, p. 14. One of the first acts the state of Texas took after winning its independence from Mexico was to expel all free blacks. *Id.* at 15. Texas joined the Confederacy in 1861 as an act to defend slavery. *Id.* In the 1920's, the state instituted the "white man's primaries" as a means of preventing blacks and

Mexican-Americans from exercising their right to vote. *Id.* at 18. Dr. Burton noted that the marked history of official discrimination against blacks and Mexican-Americans in Texas fostered a community of interest between the two groups. *Id.* at 20.

In the mid-twentieth century, the state relied on poll taxes to keep blacks and Latinos from voting. *Id.* at 22. When the 24th Amendment was ratified and the Voting Rights Act was passed, the state could no longer impose poll taxes. *Id.* Instead, the state legislature imposed a restrictive voter registration system requiring annual registration of all voters months before elections were to be held. *Id.* at 23. A federal court struck down that system in 1971. *Id.* at 23, n. 31. After that invalidation, the state began purging minority voters off the rolls. *Id.* at 23. By 1975, Texas' egregious attempts to disenfranchise minority voters induced Congress to extend coverage of Section 5 of the Voting Rights Act to the state. *Id.* Between 1975 and 1990, the Department of Justice interposed 131 objections to retrogressive voting changes in the state. *Id.* In 2008, the United States District Court for the District of Columbia cited several Texas vote dilution cases where federal courts found intentional discrimination as supporting the need for Section 5. *Northwest Austin Mun. Utility Dist. Number One v. Mukasey*, 573 F. Supp. 2d 257 (D.D.C., 2008).

Official discrimination has continued into the new millennium. In 2008, Harris County Tax Assessor-Collector and Registrar of Voters Paul Bettencourt used his position to slow the registration of young minority applicants. *See* Ex. EX-4, Murray Report, p. 17. The Houston Chronicle documented that his office was rejecting thousands of voter registration applications because of minor errors that would not disqualify registrants in other counties. *Id.* Thousands of provisional ballots had to be cast on Election Day in November because Mr. Bettencourt's office had not processed timely-filed registration cards and those voters' names were not on the rolls on Election Day. The Texas Democratic Party sued Mr. Bettencourt in federal court alleging,

among other things, violation of the Voting Rights Act. Mr. Bettencourt resigned prior to appearing in court, despite having just been reelected to a 4-year term.

Moreover, in 2004, Waller County Criminal District Attorney Oliver Kitzman threatened to criminally prosecute students at Prairie View A&M University, a historically black state university, if they registered to vote in Waller County. *See* "Sworn Statement of Brian Rowland," Dkt. No. 317-1, p. 11. Five students and the local NAACP chapter sued the District Attorney, demanding the right to vote in the 2004 election without improper prosecution. Eventually, the County settled the lawsuit and agreed to let the students vote. *Id.* This is just further evidence of the modern-day persistence of official acts of discrimination in Texas.

2. Racially Polarized Voting in Texas

Racially polarized voting is both one of the Senate Factors to consider under the totality of circumstances analysis, and it is also key to establishing Section 2 liability with the *Gingles* preconditions. The broad analysis of elections in Texas, to ascertain the presence of racially polarized voting, was discussed above in detail above, as part of the second and third prongs of the *Gingles* analysis for each of the proposed districts. The irrefutable conclusion based on the large number of studies conducted was that elections in Texas are highly polarized along racial lines.

3. The Extent to Which Potentially Discriminatory Practices or Procedures, Such as Unusually Large Election Districts, Majority Vote Requirements, or Anti-Single-Shot Provisions, Have Been Used

Dr. Burton noted that the shift from district and ward elections to at-large elections for local jurisdiction is well-documented, as is the dilutive effect that such practices have on the minority vote. He pointed to research conducted by Dr. Chandler Davidson in the Houston area, and how the numbered place requirements discriminated against minorities. Finally, Dr. Burton discussed the strategy of the Republican National Committee, in place since 1991, of using the

Voting Rights Act to further racially polarize politics by "bleaching" white districts and "packing" minority districts, particularly African-American Districts. *See* Ex. EX-12, Burton Report, p. 32.

Discriminatory practices and procedures continue to be enacted by the Texas state legislature. In this past legislative session, the legislature passed two laws that will have a discriminatory effect on minority voters: the Voter ID Bill and the Voter Assistance Bill. *See* Exhibits 607 and 630. These bills were strongly opposed by minority representatives in the state legislature. Tr. Sept. 8, 2011, p.811, line 24, p. 812, line 23.These laws will make it harder for minority voters to participate in the political process, by making it harder for those less likely to have photo identification to cast a ballot and by limiting the assistance that could be provided to voters, including those for whom English is a second language. *See* Exhibit 630.

4. Problems with Minority Candidate Slating in Texas

Historically, African-Americans in particular were excluded from slating, going back to the existence of the White Primary. *See* Ex. EX-12, Burton Report, p. 32. African-Americans and Latinos now have influence in the Democratic Party, but not as much in the Republican Party. When the Republican Party does slate Latino or African American candidates, those candidates have generally not been able to win. In the 1994 statewide Republican primary for State Treasurer, Black candidate Grady Yarborough received a plurality but lost in the run-off after his opponent used Yarborough's picture as part of a racially-charged campaign. *Id.* at 33.

The office of Railroad Commissioner is startling evidence of racially polarized voting and slating problems in Texas. Hispanic incumbent Victor G. Carillo had been appointed by Governor Perry as a part of the Texas GOP's efforts to avoid appearing anti-Latino. In the March 2004 Republican Primary, incumbent Carillo had 3 Anglo competitors. Carillo garnered 49.6% of the vote, and with the support of Governor Perry and the Republican establishment,

Carillo handily defeated his opponent Robert Butler in the April 2004 runoff. The 2004 Republican primary and runoff were, of course, normal low-turnout events where established party support was effective. Something dramatically different happened in 2010, in large part because of the Tea Party movement. *See* Ex. EX-4, Murray Report, p. 16. In the March 2010 Republican primary, Victor Carillo was crushed by a little known opponent, David Porter, by 60.7% to 39.3%. In the 2010 primary, twice as many votes were cast, turnout largely attributable to the Tea Party movement. And those voters preferred an Anglo candidate over an establishment-supported Latino Republican. *Id.* Thus, even if minority candidates are slated by the Republican party, racially-motivated voting will defeat them.

5. Disparities in Education, Employment and Health between Minorities in Anglos

Minority groups in Texas continue to suffer from enormous disparities in education, employment, health, and number other areas, all of which has been shown to decrease the ability of these groups to participate in the political process. *See* Ex. EX-12, Burton Report, p. 33. Research has shown that these disparities are directly correlated with demonstrably lower registration and turnout rates for Latinos and African-Americans in Texas. *Id.* at 33-35. Using the 2009 American Community Survey data, Dr. Burton determined that just 8.8% of Anglos are below the poverty line, while 24.0% of African-Americans and 25.8% of Latinos were below the poverty line. *Id.* at 36. In education, Dr. Burton noted that the 2010 drop-out rate for Latinos was 4.2% and was 4.9% for African Americans, but was only 1.4% for Anglo students. *Id.* at 38-39. He also noted that Black and Hispanic students are more likely to be the recipients of extreme disciplinary actions or repeat disciplinary actions in school. *Id.* at p. 41. Another indicator of educational opportunity is college admission testing. Dr. Burton found that the average SAT score for Anglo students in the class of 2009 was 1064, whereas the average for

Latino and black students in that same class was 899 and 858, respectively—a substantial disparity. *Id.* at p. 42.

Phyllis Jones, the NAACP state education chair, testified how education cuts made in the last legislative session will disproportionately affect minority and low-income students. *See* "Sworn Statement of Phyllis Jones," Dkt. No. 317-1, p. 29. She testified that all school districts lost between 8 and 50 million dollars of their budget, and that a program called Communities in Schools, aimed at helping Title I schools, will now likely have to shut down in some areas because of lack of funding. The loss of this program will hurt minority students. *Id.* at 29-30.

Education and poverty are not the only areas in which extreme disparities exist in Texas. Dr. Burton examined information produced in the 2005-2009 American Community Survey and noted that 72.4% of Anglo heads of households own their homes, while only 45.6% of African-American heads of households and 57.9% of Latino heads of households own their homes. *Id.* at 44-45. Dr. Burton also presented data showing that because African-Americans and Latinos in Texas are generally poorer and more likely to be unemployed than Anglos, they are less likely to have health insurance and regular visits with primary care doctors. *Id.* at 47. All of this data reaffirmed Dr. Burton's research that indicates that those "who reap the fewest benefits from our economy and society are least inclined to participate in an electoral process that serves as an affirmation of the efficacy of the political economy. The marginal return on investment of time and energy for poor persons has proven to be lower than for those better off in society." *Id.* at 51.

6. Overt or Subtle Racial Appeals in Political Campaigns.

The NAACP Plaintiffs introduced several pieces of evidence that demonstrate how overt and racial appeals are still used in political campaigns in Texas. *See*, Exhibit Nos. 609, 621. Dr. Alford, the state's expert, even agreed that some of the campaign mailings shown to him while

on the stand, including mailings about welfare recipients driving luxury vehicles, were obvious racial appeals. Tr., Sept. 14, 2011, p. 1946, lines 13-17 Terrysa Guerra testified regarding a recent case of the use overt racial appeals in a political campaign. Ms. Guerra served as a campaign manager for Representative Chris Turner of in his campaign to represent State House District 96. Tr., Sept. 10, 2011, p. 1146, lines 2-5. Ms. Guerra identified for the Court pieces of campaigning material sent out in that campaign by Mr. Turner's opponent. *Id.* at at p. 1148, line 10- 25 – p. 1149 line 21. She testified that the opponent had darkened the skin of Mr. Turner, an Anglo, and had inserted a gap between his teeth. *Id.* at p. 1149 lines 1-10..

Furthermore, former Representative Chris Turner testified about his opponent's obvious intent to conjure up racial fears and stereotypes amongst Anglo voters in the election. See "Sworn Statement of Chris Turner," Dkt. No. 317-1, p. 37. Mr. Turner described how his opponent, Bill Zedler, had photo-shopped a Mexican flag button onto a picture of Mr. Turner. In a separate mailing, he placed a picture of Mr. Turner next to a picture of President Obama, and the piece stated that Mr. Turner "voted to allow Cadillac drivers to receive welfare." *Id.*

The rise of the Tea Party movement also revived some of the discriminatory election-day strategies that minority voters had suffered in earlier years in Texas. *See* Ex. EX-4, Murray Report, p. 17. The King Street Patriots, a Houston-area Tea Party affiliate, engaged in "ballot security" programs that were aimed at suppressing black and Hispanic vote—strategies that had been described by scholars in the 1980s. *Id.* All of the King Street Patriots mobilized to make sure that the 2010 election was not "stolen" were mobilized to inner-city minority neighborhoods. The King Street Patriots uncovered no examples of voter fraud, but they did cause tense confrontations with voters and election officials at many minority polling places. *Id.* *See also,* "Sworn Statement of Bob Lydia," Dkt. No. 317-1, p. 7-8.

7. <u>The Extent to Which Minority Group Members Have Been Elected to Public Office</u>

Significant disparities between minority population and representation in Congress and the State House continue to plague Texas elections. *See* Ex. EX-12, Burton Report, p. 54-55. The 2010 federal decennial census indicated that Non-Hispanic Blacks make up 12.01% of the state's population. Despite this fact, African-Americans will only have an opportunity to elect a candidate of their choosing in 3 out of Texas' 36 Congressional districts (8.33%). *See* Ex. EX-4, Murray Report, p. 10.

8. Lack of Responsiveness on the Part of Elected Officials to the Minority Group's Particularized Needs

When minority voters are unable to elect their candidates of choice, they generally suffer from a marked lack of responsiveness to their particularized needs from elected officials. The NAACP Report cards, issued every year by the National NAACP, report on the responsiveness of individual congresspersons to the needs of the African-American residents in the district. The NAACP Plaintiffs submitted to this Court the Report Cards from the last decade. *See* Exhibit Number 606. The Report Cards identify legislation that is of particular importance to the African-American community, and notes how each congressperson voted on that legislation. These pieces of legislation can vary from the confirmation of minority federal judges to hate crime legislation. For example, in the last Congressional session (2009-2010), a vast majority of conservative Anglo representatives in the Texas delegation received a score of "F" for their votes on issues that mattered to black voters. *Id.* p. 313. This trend was consistent throughout the last decade.

9. Tenuous Policy Supporting the Enacted Congressional and State House Redistricting Plans

There is no asserted state policy that can support the egregious intentional and dilutive acts taken toward minority voters in the state's enacted Congressional and State House plans. Partisan gains do not justify the blatant vote dilution that C185 and H283 represent. The

population growth achieved by the state was not due to an influx of Anglo voters, and yet those are the voters that the Congressional plan benefits. Moreover, the whole of the Senate Factors analysis support that a Section 2 remedy is required by the Voting Rights Act and is an appropriate means of ensuring that minority voters have a meaningful opportunity to participate in the political process.

D. Intentional Discrimination in Congressional Redistricting Plan

In enacting C185, the state of Texas acted with intentional discrimination in violation of the Fourteenth Amendment and Section 2 of the Voting Rights Act. The best evidence of impermissible and intentional racial discrimination in Texas redistricting is the consistent, uninterrupted abuse of minority voting rights by the conservative white political establishment in power since Reconstruction, regardless of partisan affiliation. See, Ex. J-65, p. 61, lines 19-25, p. 62, lines 1-25. The only way to conclude that voters and government officials are motivated by partisan affiliation rather than by race is to disregard this historical, uninterrupted discrimination documented by Dr. Burton, Dr. Murray, and Dr. Tijerina. *Id.*

Racial tensions were prominent in this most recent legislative session. Both Representatives Martinez-Fisher and Turner testified to the racially charged issues being considered by the state legislature this session, including the Voter ID Bill and the bill that would limit Voter Assistance. Tr. Sept. 8, 2011, p.811, line 24, p. 812, line 23. Both testified that these measures were opposed by both Latino and African-American members of the state legislature.

Gerardo Interiano's testimony in deposition directly implicated the intent to minimize the voting power of minority voters in Texas. He testified that map-drawers were instructed to create three new Republican districts with the four districts gained in Texas after the 2010 federal decennial census. See, Ex. J-41, Vo1., p. 68, line 11-14. Even beyond that, the state's expert Dr. Alford acknowledged that the end result of the Congressional redistricting process

was ten minority opportunity districts. Tr., Sept. 14, 2011, p. 1833, lines 6-10. No new opportunity districts were created, irrespective of the fact that the vast majority of population growth in the state since 2000 was due to minority population growth. Moreover, as the Court did in *Rogers v. Lodge*, this Court should consider all the evidence discussed in the Totality of Circumstances discussion above as indirect evidence that can be considered in support of claims of intentional discrimination.

1. Intentional Discrimination in the Drawing of Congressional Districts 9, 18, and 30

The way that Congressional Districts 9, 18, and 30—the districts currently represented by African-American congresspersons—were drawn in C185 can only be explained by the fact that they were drawn with the intention to discriminate against minority voters and make it more difficult for them to elect their candidates of choice. In his expert Report, Dr. Richard Murray noted the changes made to these three Congressional districts that indicated intent to discriminate against minority voters and undermine the viability of the districts. *See*, Ex. EX-4, Murray Report, p. 27-37. In the 9th Congressional District, Dr. Murray noted that a number of traditional redistricting criteria were ignored, including communities of interest, member-constituent relations, and population dynamics. By adding a large swatch of undeveloped suburbia to the district, C185 endangers the viability of the district to perform as an African-American district throughout the decade. *Id.* at 28. In the 18th Congressional District, Dr. Murray noted that C185 pulled the most valuable economic asset out of the district—the Central Business District of Houston. That area had been part of the 18th District since Barbara Jordan was in office. Rapidly gentrifying areas were added, and the plan split the Ward-McGregor area, a traditional black community that has been in the 18th District since 1972. Id. at 29-30. Likewise, Dr. Murray found that C185 cut through communities of interest in Congressional District 30 and

damaged opportunities for the low-income inner city residents by removing important economic assets from the district. *Id.* at 37.

The African-American members of the Texas Congressional delegation testified to some of the specific changes made to their districts that indicated intent by map-drawers to weaken these effective black opportunity Districts. Congresswoman Eddie Bernice Johnson, who represents District 30 in Dallas, testified that her house and her district office were drawn out of the district in C185. Tr., Sep. 12, 2011, p. 1276, lines 6-7. She noted how the drawers went out of their way to include a large federal prison, which falsely increased the African-American population of the district. *Id.* at line 8-9. She noted the intentionality with which areas in which she worked hard to promote economic development were removed from the district, including the downtown area and areas served by the Dallas area rapid transit system. *Id.* at lines 10-16. She concluded that this kind of design could not have been done accidentally. *Id.* at line 17-20.

Congressman Alexander Green, who represents Congressional District 9 in Houston, testified that his district office was also drawn out of the district in C185. Tr., Sep. 12, 2011, p. 1335, at lines 5-6. He noted that the Hiram Clarke area, a significant African-American voting bloc, was removed from the district." *Id.* at lines 3-5. Finally, he notes that "C185 extracts the rail line, the Medical Center, the Astrodome. It leaves it as a bedroom community for the most part. And as a bedroom community, it has to be represented and will be represented, but it does not have the same prowess that it would have with the Astrodome, the Medical Center and the rail line." P. 1357, at lines 2-7.

Finally, Congresswoman Sheila Jackson Lee, who represents District 18 in Houston, testified that her district office had been removed. Indeed, all of the black Congresspersons' district offices were removed from their districts. Tr., Sep. 12, 2011, p. 1515, lines 18-19. She testified that the "input that we tried to give didn't seem to be accepted, and we had no input into

what ultimately -- and that is very unusual – what ultimately was the final result." P. 1517, lines 4-7.

2. Intentional Discrimination in the Drawing of Congressional District 25

In Plan C185, Travis County is divided into a number of counties, effectively dispersing the Hispanic and Black populations so that these groups will have difficulty electing their candidates of choice to Congress. *See*, Ex. EX-15, Ansolabehere Report, p. 25-26. Currently, a diverse group of voters in Congressional District 25 elect Lloyd Doggett. *See*, Ex. EX-2, Kousser Report, p. 128-129. The carving up of Austin to add minority population to Congressional District 35 represents not only an attack on Lloyd Doggett, but also an intentionally discriminatory attack on the historically successful tradition of coalition politics in Travis County—a coalition that embraced African-American, Latino, and liberal Anglo interests. *Id.* at 129.

The NAACP drew a proposed Congressional District 25 in Travis County that would be, of Voting Age Population, 11.8% Black and 41.55% Hispanic. Of the Citizen Voting Age Population, proposed Congressional District 25 would be 14.21% Black and 28.49% Hispanic. Ex. Joint Maps J-14, Red-100, Red-106. This district maintained the core of the district and preserved it as a functioning multi-ethnic coalition district. Mr. Fairfax examined this district and found it to be in compliance with traditional redistricting criteria and that it could be legally enacted by the state legislature. *See*, Ex. EX-13, p. 10.

Moreover, evidence offered by lay witnesses confirms the impermissible intention and effect of the destruction the effective multi-ethnic coalition district in Travis County. Representative Dawnna Dukes testified in sworn statement as to some of the procedural problems with the redrawing of CD 25 that indicated improper intent. *See* "Sworn Statement of Dawnna Dukes," Dkt. No. 317-1, p. 32. Representative Dukes testified that no input was

requested from members of the Travis County Delegation, and certainly not from the members from East Austin. *Id.* The members of that delegation were not presented with that map until it was too late to make any adjustments. She noted that the way Austin was carved up indicated an intent to discriminate against minority voters. *Id.* at 33. Minority communities of interest in East Austin were split, but the Anglos in West Austin were large left intact as a community of interest. East Austin is now lumped in with Burnet County, and these areas have nothing in common. Additionally, she noted the high number of precinct splits in East Austin, and how, from previous experiences, she believed this would lead to voter confusion and, eventually, voter apathy, reducing African-American voting. *Id.*

Representative Dukes noted that for more than 40 years, East Austin was represented by one Congressperson. This strong African-American community is now broken up into 5 Congressional districts, and would for the next decade, be unable to elect its candidate of choice or have any meaningful voice in who represents the community. *Id.* at 34. She noted that a Bexar County-based Congress person would have a hard time focusing on the small sliver of Austin that was part of his or her district, and that Austin would suffer for it. *Id.*

Wilhelmina Delco, a former member of the state legislature from Austin, testified that she believed that the purpose of creating Congressional District 35 was to remove the candidate of choice of African American voters, Lloyd Doggett, from political office. *See* "Sworn Statement of Wilhelmina Delco," Dkt. No. 317-1, p. 42. She shared the historical reasons why the African-American community in Travis County should be kept intact and able to influence the outcome of elections. *Id.* Additionally, Jeffrey Travillion described in detail the Austin-based African-American voting bloc that is divided up in the newly passed Congressional redistricting plan. *See* "Sworn Statement of Jeffrey Travillion," Dkt. No. 317-1, p. 19. Mr. Travillion could testify from personal experience as to the difficulties of represented by a

Congressperson who was not based in Austin is like. *Id*. Mr. Travillion also pointed out all the differences between Austin and San Antonio, including different housing and transportation issues, and how these differences make it very inappropriate for these two communities to be drawn into the same district. *Id.* at 20.

All of this testimony supports the conclusion that Congressional District 25, including the active African-American voting bloc in that district, was dismantled with the intent of breaking up a powerful and influential minority voting group and limiting their ability to elect their candidate of choice. The Supreme Court's opinion in *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009), does not preclude the invalidation of a plan under Section 2 of the Voting Rights Act that, with discriminatory purpose, dismantles a performing and effective cross-over district. This is precisely what happened to Congressional District 25 in C185.

E. Intentional Discrimination in State House Plan

In enacting H283, the State of Texas acted with intentional discrimination in violation of the Fourteenth Amendment and Section 2 of the Voting Rights Act. Representative Sylvester Turner presented testimony in support of this claim. Representative Turner testified how the leadership effectively shut out involvement from the Legislative Black Caucus. Tr. Sept. 8, 2011, p.819, lines 6-18. Testimony from the two state map-drawers, Gerardo Interiano and Ryan Downton, revealed conflicting stories about how the leadership treated minority members of the Harris County State House delegation, and how decisions were made regarding State House redistricting in Harris County. Initially, Mr. Downton's testimony made it seem as if the Democratic delegation from Harris County, including minority members, supported the drop-in plan adopted by the legislature. Tr., Sept. 9, 2011, p. 933, lines 16-25, p. 934, lines 1-7. He later admitted that there was significant disagreement within the delegation, and that many minority members of the delegation did not support the county's plan. Tr., Sept. 9, 2011, p. 1015, line 15,

p. 1021, line 6. The bottom line was that the leadership was made aware of that the Harris County delegation viewed the combining of Districts 137 and 149 as the intentional destruction of performing minority opportunity districts, and the leadership intentionally did just that. Tr., Sept. 9, 2011, p. 1009, lines 2-23. Finally, Dr. Murray noted that it was inexplicable on any other grounds besides racial discrimination that the two districts were consolidated in the rapidly-growing part of Harris County, but the eastern, slow-growing part of Harris County was able to retain its four Anglo representatives. Tr., Sept. 8, 2011, p. 892, line 3-25, p. 893, lines 1-21. This is all indirect evidence that can only be reasonably interpreted at intent to discriminate against minority voters in the redistricting process.

II. Remedy

If the Court finds any aspect of plans C185 or H283 illegal, the Court should produce a legally valid map. Given the rapidly approaching filing deadlines for Congressional and State House elections in 2012, there is no time for the state legislature to reconvene and produce legal plans. Neither is there time for the Texas Legislative Redistricting Board to convene as directed by the Texas Constitution. Thus, this Court must order a plan to be put into place. While this Court may be guided by the information presented to it in the course of developing an interim plan until it rules on the claims in this lawsuit, there are different legal standards in place for development of an interim plan as compared to a remedy plan for a Section 2 or Constitutional violation.

In a remedy plan, the NAACP and Congressional Plaintiffs respectfully request that this Court, should it find that the Plaintiffs have met their burden under *Gingles*, draw each of the minority districts described in the foregoing briefing.

III. Conclusion

For the reasons set forth above, NAACP and Congressional Plaintiffs respectfully urge this Court to invalidate Plans C185 and H283 and order the state to implement a legal plan devised by this Court for the upcoming 2012 elections.

Dated: October 7, 2011.

Respectfully Submitted,
/s/ Allison J. Riggs

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