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EASTERN DISTRICT OF TEXAS

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION, et al., #
Plaintiffs #

vs. #

RICK PERRY in his official #
capacity as Governor of #
the State of Texas, et al., #
Defendants #

Civil Action No.
2:03cv354
Consolidated

This Filing Applies to: All Actions

COMMENT ON EXPECTED TRIAL EVIDENCE & ISSUES
(PRE-TRIAL BRIEF)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION, et al.,	#	
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RICK PERRY in his official	#	Consolidated
capacity as Governor of	#	
the State of Texas, et al.,	#	
<u>Defendants</u>	#	

This Filing Applies to: All Actions

COMMENT ON EXPECTED TRIAL EVIDENCE & ISSUES 1/.2/
(PRE-TRIAL BRIEF)

by
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Introduction

The recently enacted Congressional districts (Plan 1374C) seem to be invalid because they appear to violate:

- 1) Voting Rights Act Sect 2 prohibition of vote dilution;
- 2) constitutional restrictions on partisan gerrymandering;
- 3) constitutional restrictions on racial gerrymandering; and
- 4) Voting Rights Act Sect 5 prohibition of retrogression.4/

However, the Congressional districts in effect last year (Plan 1151C) also transgress key legal requirements. Although Plan 1151C was valid when created in 2001, newly available Census data on voting age citizens indicates that Plan 1151C appears to violate Voting Rights Act Sect 2. Likewise, evolving legal standards concerning restrictions on partisan gerrymandering may also raise doubts about the legality of the districts used last year.

I. Plan 1374C (enacted in 2003) is invalid

A. Plan 1374C violates Voting Rights Act Sect. 2 by diluting the Latino vote in South Texas

A redistricting plan violates Sect 2 of the Voting Rights Act if 1) the relevant ethnic group is sufficiently numerous and geographically compact to constitute a majority in a differently drawn district, 2) the relevant ethnic group and the non-ethnic majority consistently vote for opposing candidates (polarized voting),^{5/} and 3) under the totality of the circumstances the relevant ethnic group has less opportunity to participate in the political process and elect representatives of its choice.^{6/} These conditions for legal liability have been met.

Therefore, Plan 1374C violates Sect 2 of the Voting Rights Act.

1. Latinos are sufficiently numerous and geographically compact to constitute a politically effective majority of voting age citizens in 7 districts, one more than the 6 such districts in newly enacted Plan 1374C

a. GI Forum illustrative Plan XMAL 1021C

Plan XMAL 1021C appears to create 7 effective Latino citizen voting age majority districts in South Texas, running roughly from Corpus Christi to El Paso ^{7/} Although precise data is not available, ^{fn} 8/ the 7 districts of this Plan appear to have Latino voting age citizen majorities. ^{9/} The election data in Dr. Engstrom's report appear to indicate all 7 districts permit Latinos to elect their candidates of choice in general elections. ^{10/}

b. Owens illustrative Plan 1377C

Plan 1377C also creates 7 Latino voting age majority districts in the Corpus Christi - El Paso region of South Texas. All 7 of the districts in this Plan apparently can also be won by candidates favored by Latino voters, at least most of the time.

Compared to the GI Forum illustrative Plan, the districts in the Owens illustrative Plan appear to be more compact, and split fewer communities of interest, thereby providing a somewhat higher degree of assurance against claims of racial gerrymandering. 11/ On the other hand, several of the South Texas districts in the Owens Plan appear to provide somewhat lesser electoral opportunities for relatively weak Latino candidates of choice. 12/

In any event, both of the illustrative plans (GI Forum Plan XMAL 1021C, and Owens Plan 1377C) have 7 South Texas Latino opportunity districts that are either "safe" or "highly favorable" where Latinos have the ability to elect their candidate of choice at least most of the time. 13/ On the other hand, newly enacted Plan 1374C provides only 6 such districts, all of which seem to be "safe" and appear to be able to be won by Latino candidates of choice almost all of the time. 14/, 15/

2. Texas has polarized voting along racial and ethnic lines.

Texas' racial and ethnic polarized voting is well documented in the experts' reports filed in this case. African Americans and Latinos both support Democratic candidates in general elections, with Anglos supporting Republicans. In Democratic primaries, with few exceptions, African Americans and Latinos tend to vote against each other, often joining with Anglos to vote against the candidate favored by the other ethnic group.

3. Under the totality of the circumstances, Latinos have less opportunity to participate in the political process and elect representatives of their choice.

The recently enacted Plan 1374C has only 6 Latino citizen voting age majority districts. Statewide, Latinos comprise approximately 22% of the citizen voting age population. The 7 Latino citizenship majority districts created by the GI Forum and Owens illustrative Plans constitute approximately this same percentage of of the state's 32 districts.

Similarly, approximately 60% of the state's total population growth in the last decade consisted of growth in Latino population. Texas gained two seats as a result of that population growth, yet recently enacted Plan 1374C awards them none of those two new seats.¹⁶ Both of these factors seem to indicate that recently enacted Plan 1374C give Latinos a disproportionately lesser opportunity to participate in the political process and elect their candidates of choice.

B. Plan 1374C violates federal Constitutional restrictions against partisan gerrymandering

A redistricting plan may violate the Equal Protection Clause of the 14th Amendment if it has both a discriminatory intent and discriminatory effect against an identifiable group of voters, generally those of a political party. 17/ Recently enacted Plan 1374C seems to have both of these infirmities.

1. Plan 1374C was created with the intent to minimize the power of the Democratic voters

Numerous factors corroborate the intent of the creators of newly enacted Plan 1374C to discriminate against Democratic voters. Control of redistricting was solely in the hands of the Republicans. 18/ Apparently little attempt was made to compromise with the Democrats in fashioning a redistricting plan. The most significant, however, appears to be in the structure of Plan 1374C itself. Legitimate traditional redistricting standards such as compactness, respecting communities of interest, and minimizing division of counties, cities, etc. appear to have been subordinated to the overriding goal of unfairly maximizing political advantage. A cursory review of the map shows numerous serpentine districts linking unrelated areas. 19/ In addition, the lines appear to be carefully designed to extinguish the careers of key Democratic Congressmen. 20/

2. Plan 1374C consistently degrades Democratic voters' influence on the political process as a whole

a. Analysis of elections shows consistent discriminatory impact against Democratic voters

Dr. Alford's analysis of the elections during 1992-2002 is particularly telling. They demonstrate a consistent pattern of Republicans carrying the lion's share of the seats even in circumstances where the Democrats get approximately half of the statewide vote.^{21/} In some instances, Republican candidates losing statewide still carry a majority of the districts. Equally sobering is Dr. Alford's finding that the share of seats carried by Republican candidates is relatively impervious to significant shifts in the statewide vote. All of this seems to demonstrate that Plan 1374C's pernicious partisan impact has the potential to continue year after year.^{22/}

b. Democrats' lack of electoral success at the statewide and state legislative level compounds the discriminatory impact of Plan 1374C

For a detailed discussion of this issue, please see pp. 8-9 of the author's "Response to Motions for Summary Disposition of Case", filed in this case Nov. 24.

3. Possible clarification of legal standards might significantly strengthen the case against Plan 1374C

The law concerning partisan gerrymandering may be clarified by an upcoming ruling from the U.S. Supreme Court.^{23/} This might remove doubts created by prior precedent concerning the unrealistically high level of proof required in partisan gerrymandering cases.^{24/} A partisan gerrymandering claim concerning Texas Congressional redistricting after the 1990 Census was rejected under circumstances fairly analogous to the circumstances in our case.^{25/}

C. Plan 1374C violates federal Constitutional restrictions on racial gerrymandering

A redistricting plan is presumptively unconstitutional if it elevates race above "legitimate traditional redistricting standards" such as compactness, respecting communities of interest, and not dividing counties, cities, and other subdivisions. 26/ A presmptively unconstitutional Plan can be upheld only if it is narrowly tailored to further a compelling state interest, such as compliance with the Voting Rights Act. 27/

1. Plan 1374C is presumptively unconstitutional because it subordinates "legitimate traditional redistricting standards" to race

Plan 1374C has 3 relatively long narrow twisting districts running from the Mexican border to the Austin metropolitan area that appear to subordinate "legitimate traditional redistricting standards" to race. 28/ All 3 districts are "majority-minority" Latino "opportunity districts". All 3 are far from compact, split key communities of interest, and connect unrelated distant regions. 29/ Two of the 3 districts link distant communities whose only similarity is the ethnicity of the inhabitants. 30/

2. Plan 1374C's focus on racial factors is not narrowly tailored to further a compelling state interest

Plan 1374C's bizzare districts are not narrowly tailored to further a compelling state interest, such as compliance with the Voting Rights Act. As previously shown in the discussion concerning Plan 1374C's non-compliance with Section 2 of Voting Rights Act, it is possible to create more electoral opportunities for Latino candidates of choice in South Texas through the use of districts which are considerably more compact and respectful of communities of interest than the corresponding districts in Plan 1374C. 31/

Nor can the disregard of "legitimate traditional redistricting standards" and elevation of the use of race in Plan 1374C's convoluted South Texas' Latino opportunity districts be justified by non-racial objectives, such as protecting incumbents in nearby districts. 32/ That same argument was squarely raised and rejected in Texas' failed attempt to defeat a racial gerrymandering claim concerning the Congressional districts created after the 1990 Census. 33/

D. Plan 1374C violates Voting Rights Act Sect. 5 by causing a retrogression in the effectiveness of ethnic minorities' voting power

A redistricting plan violates Voting Rights Act Sect. 5 if it causes a retrogression in the effectiveness of ethnic minorities' voting power.^{34/} In assessing a redistricting plan's overall impact, all relevant factors must be considered, including but not limited to, ethnic minorities' opportunity to:

- 1) elect candidates of choice, in "opportunity districts",
- 2) influence the election of other candidates sympathetic to ethnic minorities' political goals in "influence districts", and
- 3) exercise influence by enhancing the political effectiveness of the legislators representing "opportunity districts".^{35/}

1. Plan 1374C's creation of additional opportunities for minorities to elect their candidates of choice probably does not offset its reduction of minorities' influence on the political process as a whole.

It is a close case, but Plan 1374C's creation of additional ethnic "opportunity districts" probably does not compensate for its reduction in minorities' electoral influence by its elimination of "influence districts" and reduced opportunities for legislators elected from "opportunity districts".

Compared to the previously existing districts (Plan 1151C), the newly enacted Plan 1374C creates one new African-American "opportunity district".^{36/}, ^{37/}, ^{38/}, ^{39/} However, it eliminates at least 3 "influence districts" contained in the previously existing Plan 1151C ^{40/}

It also has the effect of reducing the the likelihood of Congressional Democrats' obtaining a legislative majority, 41/ thereby decreasing the power and influence of the legislators elected from Texas' "opportunity districts", who are all Democrats.42/

Unfortunately, the law is rather subjective concerning the relative weight to be given to increased electoral opportunities for candidates of choice, on the one hand, versus the reduction in ethnic minorities' overall political influence, on the other hand.43/ However, the history of Texas' Congressional redistricting after the 1980 Census may provide some guidance. This history suggests that creation of 1 new "opportunity district" would permit the elimination of 2 "influence" districts.44/ Our case involves the elimination of at least 3 "influence" districts weighed against the creation of 1 "opportunity district". This, coupled with evidence on decreased power and influence of legislators elected from Texas' "opportunity districts" and the nearly unified opposition to Plan 1374C by Texas' ethnic minority interest groups, probably tips the scales slightly against Plan 1374C.45/

II. Plan 1151C (used in 2002 elections) is also invalid

A. Plan 1151C (like Plan 1374C) also violates Voting Rights Act Sect 2 by diluting the Latino vote in South Texas

For reasons already discussed, the conditions required for liability under Voting Rights Act Sect 2 are satisfied in the case of newly enacted Plan 1374C. 46/

Under Sect 2 of the Voting Rights Act, there is only one remaining unresolved issue that impacts the legality of Plan 1151C (the districts used last year). This issue turns on whether Plan 1151C offers greater electoral opportunities for Latino candidates of choice in South Texas than does newly enacted Plan 1374C.

Plan 1374C and Plan 1151C both have the same number (6) of "opportunity districts" with Latino voting age citizenship majorities. However, as will be demonstrated, these 6 districts in Plan 1151C result in even fewer electoral opportunities for Latino voters in South Texas than do the corresponding 6 districts of newly enacted Plan 1374C.

Plan 1374C has already been shown to be invalid under Voting Rights Sect 2. Therefore, Plan 1151C likewise is invalid under Voting Rights Act Sect 2. This is because, as will be shown below, Plan 1151C offers even fewer electoral opportunities for Latinos than does the invalid Plan 1374C.

1. Plan 1151C has even fewer electoral opportunities for candidates of choice of Latino voters in South Texas than does newly enacted Plan 1374C

Plan 1151C (used last year) and newly enacted Plan 1374C both have only 6 districts where Latinos are a majority of voting age citizens.

As previously discussed, all 6 of those districts in newly enacted Plan 1374C seem to be "safe" Latino opportunity districts and appear to be able to be won by Latino candidates of choice almost all of the time. 47/

On the other hand, the 6 corresponding districts of Plan 1151C (used last year) consist of only 5 such "safe" Latino opportunity districts. Plan 1151C's other South Texas Latino opportunity district is "highly favorable" where Latinos have the ability to elect their candidate of choice at least most of the time. 48/

Admittedly this is a small difference. However, it is a difference favorable to the newly enacted Plan 1374C, not to Plan 1151C (districts used last year). As previously shown earlier in this brief, Plan 1374C cannot withstand an attack based on a Voting Rights Act Sec. 2 claim. Therefore, Plan 1151C must likewise fall before such a claim of illegality.

B. Plan 1151C may also violate federal constitutional proscriptions against partisan gerrymandering

1. Summary of argument

As will be discussed in more detail below, Plan 1151C appears to be closely based on the Congressional redistricting plan enacted in 1991. That 1991 Plan was highly partisan and enacted under circumstances strikingly similar to those of the enactment of Plan 1374C in 2003. Plan 1151C (used last year) also appears to be based on extensive use of incumbent protection.

These factors all apparently work together to create an improper discriminatory impact on Republican voters. This discriminatory impact can be demonstrated by a review of the results of Congressional elections. Plan 1151C's disparate political impact might also possibly be shown by an appropriate modification of Dr. Alford's analysis of statewide election results. Such a modification would explicitly account for the greater electoral clout of incumbents.

Upon superficial examination, Plan 1151C's partisan impact may seem more subtle than that of newly enacted Plan 1374C. However, Plan 1151C's political effect is no less real or pernicious. Plan 1151C thus clearly violates the spirit, if not the letter, of the law based on Constitutional restraints against partisan gerrymandering. In addition, the U.S. Supreme Court is currently re-examining the relevant legal standards. Therefore, Plan 1151C's continuing validity may be seriously in doubt.

2. Plan 1151C appears to be a slightly modified version of the redistricting Plan enacted in 1991.

The Congressional redistricting Plan enacted in 1991 was only slightly modified in 1996 by the Courts.49/ Plan 1151C appears to follow this modified 1996 Plan rather closely. On average, each district of Plan 1151C holds over 80% of the persons who resided in the corresponding district of the 1996 Plan.50/ The basic geographic contours of 1996 Plan's districts were continued in Plan 1151C, including those of many districts which did not adhere closely to "legitimate traditional standards" of compactness and respect for communities of interest.51/, 52/

3. Texas' 1991 redistricting Plan was highly partisan, both in intent and effect.

Texas' 1991 redistricting was highly partisan, and has many striking similarities to the latest redistricting round earlier this year. The only key difference is a difference in the identity of the perpetrators and the victims.53/, 54/ Then, as now, the national Congressional leadership of the majority party was heavily involved in Texas' redistricting process.55/ Then, as now, the minority party was largely shut out from participating in the redistricting process.

Many of the districts in the 1991 Plan totally disregarded "traditional legitimate redistricting standards" in order to maximize partisan advantage by using incumbent protection.56/, 57/ This strategy proved to be quite effective.58/

4. Plan 1151C appears to be based on extensive use of incumbent protection

Plan 1151C appears to facilitate incumbents' easy re-election by its making minimum changes from the 1996 Plan. 59/ In addition, Plan 1151C seems to have other characteristics which are particularly helpful to incumbents in general, and Democrats in particular. Plan 1151C put only one incumbent in each district, thereby insulating each incumbent from the need to oppose another incumbent. Plan 1151C permitted Democratic incumbents to retain, on average, a higher % of constituents in their newly drawn districts than it did for Republican incumbents. 60/ Plan 1151C also did not increase, on average, the number of potentially hostile voters the incumbent might have face when campaigning for re-election. 61/

5. Plan 1151C's close adherence to the highly partisan 1991 Plan and excessive use of incumbent protection work together to cause an improper discriminatory impact on Republican voters

Plan 1151C's close adherence to the highly partisan 1991 Plan 62/ and Plan 1151C's protection of the incumbents produced by that 1991 Plan 63/ naturally would be expected to give Democrats a continuing unfair electoral advantage. It has done exactly that. This is confirmed by the actual results of Congressional elections and possibly by an appropriate modification of Dr. Alford's analysis of a Plan's partisan impact. Such a modification would explicitly account for the power of incumbency.

From 1994 through 2002 Republican Congressional candidates have received more votes on a statewide basis than have their Democratic counterparts. At the same time, Democrats have consistently won a majority of the seats, ranging upwards to over 60% of the districts. This clearly demonstrates that Plan 1151C and its similar clones, the 1991 Plan and the 1996 Plan, are having a continuing unfair partisan impact.64/

An appropriate modification of Dr. Alford's analysis may also confirm the partisan impact of Plan 1151C. Dr. Alford's report indicated that, on average, the power of incumbency increases an incumbent's share of the vote by approximately 10% from that received by other candidates of the incumbent's party.65/ If that "incumbency advantage factor" were explicitly considered in Dr. Alford's analysis of statewide elections, Plan 1151C might be shown to be more biased than it otherwise appears to be when no adjustment is made for this "incumbency advantage factor".66/

6. Plan 1151C's continuing validity may be seriously in doubt since Plan 1151C clearly violates the spirit, if not the letter, of the relevant legal standards.

As previously discussed, Plan 1151C's continuing unfair partisan bias and impact can be demonstrated by a review of the relevant history and background as well as by an appropriate analysis of election results. Admittedly, much of Plan 1151C's partisan bias is not apparent to a casual observer. However, it is nonetheless very real. The stark outlines of Plan 1151C's continuing pernicious effect is revealed by a suitably penetrating analysis.

Plan 1151C therefore violates the spirit, if not the letter, of the law reflected in the Constitutional constraints against partisan gerrymandering. Many of the parties in our case have already argued quite eloquently about the evils flowing from abuse of the redistricting process to gain unfair political advantage. 67/ Those arguments apply with equal force to the continuing unfair partisan impact of Plan 1151C 68/

Admittedly, the partisan 1991 Plan forming the basis of Plan 1151C has withstood an attack based on partisan gerrymandering. 69/ However, the relevant facts have changed since then. 70/ In addition, the U.S. Supreme Court is currently reviewing the applicable law. 71/ The facts concerning Plan 1151C's continuing unfair partisan impact cry out for relief. These factors should create significant doubt about Plan 1151C's continuing legality.

Conclusion

We now stand at a crossroads. The facts in our case vividly illustrate the evils of unrestrained gerrymandering. Some are urging this Court to perpetuate for another 10 years the unfair partisan advantage of Democratic gerrymander of 1991. Others implore this Court to ratify the Legislature's recent replacement of that prior Democratic gerrymander with the new gerrymander enacted in 2003 by the Republicans. The only real difference between the two gerrymandered maps is the identity of the perpetrators and the victims.

The history of redistricting law shows a continuing trend of courts' attempting to reign in some of the most egregious evils of gerrymandering. The principles of "one man, one vote", the Voting Rights Act, justiciability of partisan gerrymandering, and finally, restraints on racial gerrymandering all have one common thread: attempts to ameliorate the unfairness of unbridled gerrymandering.

The parties and players may change, but in the end there is always one common victim - the ordinary citizen whose vote is degraded and often rendered meaningless by unfair line drawing. Many races are often determined by the skill in which district lines are drawn before even a single vote is cast. Gerrymandering for any purpose is therefore the moral and functional equivalent of stuffing the ballot box. Like ballot box stuffing, it should be made illegal once and for all.

The facts of our case and the pending change in the relevant law provide a unique opportunity to take a big step in the right direction. We should not let this opportunity pass us by.

This Court should strike down both of the unfair maps currently before it, Plan 1374C, and Plan 1151C. It should replace them with a new map free of any taint of unfairness, including partisanship and incumbent protection. Such a map would make maximum use of the "legitimate, traditional redistricting standards" of drawing compact districts linking obvious communities of interest with minimum division of counties, cities, and other political subdivisions. 72/

Respectfully submitted,

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Date: Dec. 3, 2003

Footnotes

1. As an amicus curiae pro se, the author will not be formally submitting evidence in this case. The purpose of this brief is to comment on the evidence and arguments expected to be tendered by the other parties, and to point out other relevant evidence easily obtainable from the Texas Legislative Council or from other well-known and readily accessible information sources such as books and periodicals.

2. This brief is intended to be limited to discussion of relevant facts and arguments not covered by the expert witness reports and motion papers served on the author by the other parties. In addition to the items referenced in the author's November 24 "Response to Motions for Summary Disposition of Case", the materials served on the author are:

Expert Witness ReportsParty

Dr. Jorge Chapa	Amer. GI Forum (MALDEF)
Dr. Henry Flores	"
Dr. Richard Engstrom	"
Dr. J. Morgan Kousser	"
Dr. Andres Tijerina	"
Dr. John Alford	Various Plaintiffs (Dem. ints.)
Dr. Allan J. Lichtman	"
Dr. Jerry Polinard	Valdez-Cox Pltfs (Latino ints.)
Dr. Orville Burton	NAACP
Dr. David Falk	State Defendants (Repub. ints.)
Dr. Ronald Gaddie	"
Dr. Todd Siberson	"

Other Items

Jackson Pltfs.' Opposition to Defendants' Motion to Dismiss the Mid-Decade and Partisan Gerrymandering Claims
 State Defendants' Consolidated Brief in Response to Motions for Summary Judgment and LULAC's Motion for Preliminary Injunction
 Motion for Summary Judgment (and Supplement to Motion) by Travis Co. and the City of Austin
 (inadvertently omitted from author's November 24 list)
 Pltf-Intervnrs, Valdez-Cox, Montalvo, and Leo's Response in Opposition to the State's Motion to Dismiss
 (inadvertently omitted from author's November 24 list)

To the extent other expert witness reports and other materials are used in this case, the indulgence of this Court is requested to permit a later response by William C. ("Bill") Owens, Jr., amicus curiae pro se to respond to such reports and materials if deemed necessary.

Footnotes (cont.)

3. For reasons detailed in the author's November 24 "Response to Motions for Summary Disposition of Case", limitations of time and expense sometimes precluded detailed citations to legal and/or factual authorities in this brief.

In that regard, the author wishes to clarify a comment in that Nov. 24 filing. Page 4 of the Nov. 24 filing's discussion of the 1980's redistricting of Dallas area districts states "Instead of reinstating the 1981 legislatively drawn lines, the U.S. Supreme Court [in the Upham v. Seamon case] ruled instead that the Legislature should be given its own opportunity to re-draw the lines." Subsequent information obtained by the author indicates that the U.S. Supreme Court did not make that precise ruling. Instead, the case was remanded to the lower court, which ultimately gave the Legislature the opportunity to re-draw the lines. The Legislature did in fact re-draw the lines in mid-decade.

4. As explained later, the retrogression issue appears to be a close one. However, it may become moot in the near future as a result of the U.S. Justice Department's response to Texas' petition for preclearance.

5. See Thornburg v. Gingles, 478 U.S. 30 (1986), and Grove v. Emison, 507 U.S. 25, 40 (1993). In the 5th Circuit, it is also necessary to show that the relevant ethnic group constitutes a majority of voting age citizens in a differently drawn district. (See Valdespino v. Alamo Heights Ind. Sch. Dist., 168 F.3d 848, 852-53 (5th Cir. 1999) cert. den., 528 U.S. 1114 (2000))

6. See Johnson v. DeGrandy, 512 U.S. 997 (1994).

7. This discussion relates to "Plan XMAL 1021C" as described in the report of Dr. Richard Engstrom submitted by Amer. GI Forum. The author assumes this Plan is the same as Plan 01384C, which appears on the Tex. Legisl. Council ("TLC") website REDVIEWER section as "GI Forum Proposal to Federal Ct.", or words to that effect. The discussion in this brief about such Plan is limited to the data appearing in Dr. Engstrom's report as well as that appearing on the TLC website.

8. See fn. 7 above.

9. This conclusion is based on the Hispanic surnamed voter registration statistics and voting age population information available on the TLC website, coupled with the author's own experience in drafting and analyzing redistricting plans.

10. Dr. Engstrom's report contains no data on the results of Democratic primary elections which are equally important in assessing the ability of Latinos to elect their candidates of choice. Based on the author's own experience, this probably does not present an issue, with the possible exception of District 28 in Plan 01384C. This district runs in a relatively narrow strip between San Antonio and Austin. Districts in that general region in other redistricting plans appear to have some difficulty in supporting some Latino candidates of choice in Democratic primaries, particularly in the 2002 U.S. Senate race & run-off.

Footnotes (cont.)

11. Owens illustrative Plan 1377C, available on Tex. Legisl. Council website REDVIEWER, has districts uniting the following South Texas communities of interest:

Corpus Christi - Coastal Bend	(Dist. 27)
Lower Rio Grande Valley	(Dist. 25)
South San Antonio area	(Dist. 28)
West Side San Antonio	(Dist. 20)
Laredo - El Paso border region	(Dist. 23)
and El Paso	(Dist. 16)

Owens Plan Dist. 15, anchored in the border region between Laredo and the Lower Rio Grande Valley, does pick up necessary population in the more Anglo - oriented agricultural region between Houston and San Antonio. However, this district appears to be significantly more compact than the corresponding district(s) in most other public plans, including those in the recently enacted Plan 1374C, and the Plan used last year (Plan 1151C).

GI Forum illustrative Plan 1384C, unlike the Owens Plan, does not have a district totally contained in either the Lower Rio Grande Valley, or in El Paso. In addition, the Midland-Odessa community appears to be split by GI Forum Plan Dist. 23. Of particular concern is GI Forum Plan Dist. 28, which runs in a narrow corridor near Interstate # 35, connecting pieces of the southeast San Antonio area with pieces of the southeast Austin area. Nevertheless, GI Forum Plan 1384C appears to be a significant improvement in compactness and respect for South Texas communities of interest than the recently enacted Plan 1374C or an earlier GI Forum Plan (Plan 1066C).

12. Of the 7 Latino citizenship majority districts in Owens illustrative Plan 1377C, 3 seem "safe" and appear to be able to be carried by Latino favored candidates virtually all of the time. The other 4 districts seem to be "highly favorable" to Latino candidates of choice and appear to be winnable by Latino favored candidates approximately 80% of the time in general elections, and virtually all of the time in primary elections.

On the other hand, in GI Forum Plan XMAL 1021C, at least in general elections, 6 of the 7 districts appear to be "safe" for candidates favored by Latino voters, with the other district seeming to be "highly favorable" for such candidates.

This analysis is based on data readily available to the author at the time of this writing (For the Owens Plan, the 21 statewide general elections during 1998-2002 which can be printed out at the individual workstations at the Texas Leg. Council's redistricting computer, and 6 key Democratic statewide primaries during 1996-2002. For the GI Forum Plan, the 7 statewide general elections during 1996-2002 discussed in Dr. Engstrom's report. All such elections involved Latino candidates of choice running in races with at least some degree of polarized voting, with the Latino candidate of choice winning statewide in only two elections, the 2002 Democratic U.S. Senate primary, and the 1996 general election for Attorney General. Although the elections used by the author to compare the two Plans are not identical, there is some overlap, and the author believes the results are largely comparable). In addition to review of election results, the author's analysis also took into account trends in election results and rising Latino voter registration in the affected districts. More details on this analysis will be supplied on request.

13. See fn. 12 above.

Footnotes (cont.)

14. Plan 1374C has 6 South Texas districts which appear to be winnable by the Latino favored candidate at least 90% of the time in general elections and virtually all of the time in primary elections. This conclusion is based on analysis of the same elections used to analyze Owens illustrative Plan 1377C, as discussed in fn. 12 above.

15. Some may argue that Plan 1374C creates a new Latino opportunity district, Dist. 25. However, there is no net gain for Latinos. Offsetting this is the elimination of Dist. 23 as an opportunity district caused by the recent change of lines. In the 21 statewide general elections during 1998-2002 reviewed by the author (See fn. 12 above), the candidate favored by Latino voters carried none of them in Plan 1374C's Dist. 23, while such candidate carried approximately 76% of such elections in the corresponding district in the Plan used last year (Plan 1151C) as well as in Owens illustrative Plan 1377C.

16. See fn. 15 above.

17. See Davis v. Bandemer, 478 U.S. 109 (1986)

18. Republicans held both legislative chambers and the Governorship as a result of the 2002 elections.

19. See, e.g., Dists. 2, 5, 6, 10, 17, & 26.

20. See, e.g., Dist. 6 (Two Democratic incumbents paired with a Republican in a heavily Republican district).

21. This occurs both in where the figures are adjusted to reflect the results in a hypothetical election where each candidate is assumed to receive 50% of the statewide vote, as well as in actual elections where the candidates almost tied in the statewide vote. See, e.g., the results of 1998 election for Comptroller and for Lt. Gov., where the Republican candidates received 50.3% and 50.9% of the statewide vote, respectively, but carried, respectively, 69% and 66% of the districts of Plan 1374C.

Footnotes (cont.)

22. Dr. Alford's graphs all involve the results for the candidates of a single political party. Perhaps a more revealing analysis would involve a graph showing the % of districts carried as a function of the % of the statewide vote received by the candidates of both political parties. Such a graph should separately identify the results for the candidates of each political party, such as representing the results for Democratic candidates with little circles and the results for Republican candidates with little squares.

By putting the results for candidates of both political parties on a single graph, it is possible to determine whether a particular redistricting plan treats Democratic candidates differently from Republican candidates. For example, it might show that a Democratic candidate receiving, say, 45% of the statewide vote in a given election would carry 30% of the districts, while a Republican candidate receiving that same 45% of the statewide vote in a different election would carry 60% of the districts. Such a graph could vividly demonstrate the partisan bias of a redistricting plan by showing that the candidates of one party consistently win more districts than the corresponding candidates of the other party who receive the same share of the statewide vote.

The author is indebted to John Milem for introducing this method of analysis to him. John Milem has worked for many years to promote a nonpartisan citizens' approach to fair redistricting.

Limitations of time have precluded the author's applying this analysis comprehensively to all the elections reviewed by Dr. Alford. However, application of this approach to a few of the elections confirms Dr. Alford's findings of significant partisan bias in Plan 1374C.

23. A ruling in Vieth v. Jubelirer, 123 S.Ct. 2652 (2003) is expected in mid to late Spring.

24. See, e.g., Badham v. Eu, 694 F.Supp. 664, 670 (N.D. Cal. 1988), summarily aff'd., 488 U.S. 1024 (1989).

25. See Terrazas v. Slagle, ___ F.Supp. ___ (___ D. Tx. circa 1991). The author regrets limitations of time and resources have precluded his obtaining the citation to this case. However, he anticipates it likely will be cited by one of the parties. The author is unaware of the precise facts relied on by the court for its ruling. He is aware, however, of the general facts underlying the redistricting which was the subject matter of that case.

The 1990's Texas Congressional redistricting involved similar players and passions equally as intense as those in the current round, with only the identities of **the perpetrators and victims being changed**. The Congressional districts created by that redistricting were even more bizarre and flouting of legitimate traditional redistricting standards than those created by the latest round. However, a key difference appears to be the relative position of the minority parties. The Republicans were clearly on the ascendancy in 1991, having won a number of statewide offices in 1990, and had only narrowly lost the governorship. This contrasts significantly with the much more precarious position of the Democrats in Texas politics in 2003.

Footnotes (cont.)

26. See Shaw v. Reno, 509 U.S. 630 (1993);
see also Bush v. Vera, 116 S.Ct. 1941 (1996)

27. See Bush v. Vera, 116 S.Ct. 1941, 1960 (1996)

28. They are Dists. 15, 25, and 28.

29. Dist. 15 winds from the Lower Rio Grande Valley, splits off a piece of the Corpus Christi metropolitan area, winding up in Bastrop Co., chopping off a portion of the Austin. It is significantly less compact than the corresponding district in Plan 1151C (used in 2002).

Dist. 25, the least compact of the three districts in question, twists and turns in a narrow one county wide corridor on its way from the Lower Rio Grande Valley to downtown and southeast Austin.

Dist. 28 splits Laredo right down the middle, chops off a piece of San Antonio, and then extends a narrow finger into the Austin suburb of San Marcos. This district is significantly less compact and splits more communities, particularly the Laredo area, than the corresponding district in Plan 1151C (used in 2002).

30. Dist. 25 connects a portion of the heavily Latino Lower Rio Grande Valley with the Latino community in southeast Austin

Dist. 28 links another portion of the Lower Rio Grade Valley with with the Latino community in San Marcos, an Austin suburb.

31. See discussion of GI Forum Illustrative Plan XMAL 1021C (Plan 1384C) and Owens Plan 1377C in p. 2-4 of the text and accompanying footnotes.

Footnotes (cont.)

32. There is significant evidence that the bizzare configurations of Dists. 15, 25, and 28 of Plan 1374C resulted from an attempt to comply with the Voting Rights Act while protecting the Republican incumbent in nearby Dist. 23. For example, the State has consistently argued that any loss of electoral opportunities for Latino favored candidates caused by Plan 1374C's reconfiguration of Dist 23 was more than offset by the creation of a new Latino opportunity district, Dist. 25.

33. See Bush v. Vera, sub. nom. Vera v. Bush, 861 F.Supp. 1304, 1342 (1996), where the Court stated: "Defendants contend, however, that these [far more compact, contiguous, ethnic opportunity] districts [in the alternative redistricting plans] probably would have sacrificed one or two incumbent Congressmen [in nearby districts], but they cannot and do not contend that preserving incumbents rests on the same compelling interest footing as compliance with the Voting Rights Act." (emphasis supplied).

34. See Georgia v. Ashcroft, slip op., at 15 (Jun. 26, 2003)

35. See Georgia v. Ashcroft, slip op., at 15-20 (Jun. 26, 2003)

36. Dist. 9 of Plan 1374C.

37. However, Plan 1374C creates no net new Latino "opportunity dists". See fn. 15 above.

38. Except for Dist. 23 discussed earlier, Plan 1374C does not eliminate any other ethnic opportunity dists. of the benchmark Plan 1151C. Contrary to the assertion of some, Plan 1151C's Dists. 24 and 25 are not African-American "opportunity districts". In order to be elected, the African American candidate of choice must be able to win both the Democratic primary as well as the general election.

The 2002 Democratic U.S. Senate primary is not a proper test of an African-American candidate of choice's ability to win a Democratic primary, at least in the Dallas area, the location of Dist. 24. Dr. Lichtman's own analysis indicates that in the Dallas area, Mr. Kirk, the African-American candidate of choice, also received more Anglo votes than any other candidate in this multi-candidate race. This is also confirmed by analysis of the district-by-district results of that election which shows Mr. Kirk winning a clear majority in many heavily Anglo Dallas area districts of Plan 1151C.

A more illuminating test of an African American candidate's ability to win a contested Democratic primary would be the 1998 Attorney General race. In that multi-candidate race, Mr. Overstreet, the African-American candidate of choice, carried Plan 1151C's two clearly African-American dists (# 18 & 30), while losing in Dists. 24 & 25, as well as in heavily Anglo dists across the state.

For similar reasons, Plan 1151C's Dists. 10, 24, 25 are not Latino opportunity dists. The Latino candidate of choice failed to carry these dists. in all 6 statewide Democratic primaries involving such a candidate during the 1996-2002 period.

Footnotes (cont.)

39. As far as Plan 1374C's significantly African-American districts are concerned, Mr. Overstreet, the African-American candidate of choice in the 1998 Democratic primary for Attorney General, carried Plan 1374C's Dists. 9, & 18, while narrowly trailing in Dist. 30.

40. Dists. 10, 24, and 25 of Plan 1151C.
Plan 1151C also may contain a number of relatively marginal influence dists (e.g., Dists. 9, perhaps Dists. 1, 2, 11)

41. Most observers believe that Plan 1374C will result in a net gain of 7 Republican Congressmen. This is significant since the national Congress is closely divided between the parties.

42. Although the Republican Congressman from Dist. 23 is technically a legislator elected from a Latino "opportunity district", the expert witness evidence seems to indicate he is not the candidate of choice of the Latino voters.

43. See Georgia v. Ashcroft, slip op., at 18 & 21 (Jun. 26, 2003)

44. See Upham v. Seamon, 456 U.S. 37 (1982).

In 1981, the Legislature created one African-American "opportunity district" and eliminated two "influence districts" in the Dallas area. In 1982, the federal 3-judge panel ruled this violated the Voting Rights Act. However, this ruling was apparently reversed on appeal.

45. See Georgia v. Ashcroft, slip op., at 18 (Jun. 26, 2003)

46. These See p. 2-4 of the text and accompanying footnotes.

47. See fn. 14 above. See also fn. 12 above.

48. Plan 1151C's "safe" South Texas Latino opportunity districts appear to be Dists. 15, 16, 20, 27, & 28. The "highly favorable" district is Dist. 23. This conclusion is based on analysis of the same elections used to analyze Owens illustrative Plan 1377C, as discussed in fn. 12 above. See also the discussion concerning Plan 1151C's Dist. 23 in fn. 15 above.

49. The 1996 court action left unchanged 17 of the 30 districts of the 1991 Plan. The remaining districts were modified only to the minimum extent necessary to comply with the relevant legal standards (See Bush v. Vera, 116S.Ct. 1941 (1996) and connected cases).

50. This statistic of course does not involve the 2 new seats Texas gained as a result of its population growth over the decade.

51. See, e.g., Dists. 4, 5, 24, and 25 of Plan 1151C for examples of districts not adhering closely to "legitimate traditional redistricting standards".

Footnotes (cont.)

52. Plan 1151C does eliminate some of the most egregious features of the 1996 Plan. However, Plan 1151C still retains most of the basic features of the 1996 Plan. Indeed, the State Defendants in our case assert that one of avowed objectives of the drafters of Plan 1151C was to create a "least change Plan". In this context, a "least change plan" is one which makes the fewest changes possible in the 1996 Plan consistent with equalizing the population of all the districts.

53. See Bush v. Vera, sub nom. Vera v. Richards, 861 F.Supp. 1304 (1994) for a good background description of Texas' 1991 Congressional redistricting.

54. The Democrats had seized control of the redistricting process as a result of their unexpected victory in the 1990 Governor's election.

55. Texas' redistricting was closely supervised and monitored by Congressman Frost, then head of the Democrats' national Congressional redistricting organization. The exact lines of the 1991 redistricting plan were even personally drafted by Cong. Frost's key aide.

56. Some of the districts of the 1991 Plan were even more bizarre and less compact than the most egregious districts of recently enacted Plan 1374C.

57. Protection of the relatively few Republican incumbents then existing in 1991 was quite consistent with the Democrats' overall goal of maximizing partisan advantage. Protection of those incumbents allowed the Democrats to "pack" Republican voters into a few districts. This permitted the Democrats to win the lion's share of all the districts, despite the substantial growth in Republican voters over the decade of the 1980's.

58. The Democrats were consistently able to retain a majority of Texas' Congressional delegation despite the Republicans' achieving undisputed dominance in the state. As will be discussed in more depth later, this was due to the partisan impact of the 1991 Plan.

59. Maximizing the number of constituents retained in an incumbent's newly drawn district is particularly advantageous to incumbents. This practice is called retaining the "cores" of the districts. This minimizes the number of new constituents an incumbent needs to introduce himself to, thereby maximizing the advantages of the use of franked mail and other free publicity not available to potential election opponents.

Retention of district "cores" also maximizes the number of constituents who are beholden to the incumbent because of incumbents' vast power to bestow or withhold the many governmental favors (or penalties) available to them. Concern over the abuse of this power to bestow or withhold governmental favors is one of the key factors fueling the drive for campaign finance reform. This particular power of incumbency is also one of the key reasons incumbents rarely receive serious election opposition and are so easily re-elected.

Retention of district "cores" is particularly helpful to incumbents in districts that do not adhere to "legitimate traditional redistricting standards" of compactness, respect for communities of interest, and minimization of division of counties, cities, and similar units. (See Bush v. Vera, 861 F.Supp. 1304, 1334-5 at fn. 43)

Footnotes (cont.)

60. On average, Democratic incumbents retained approximately 90% of their constituents, while Republican incumbents retained approximately 70% of theirs. This discrepancy is the same, even when adjusted for the Democrats' larger number of "ethnic opportunity districts".

61. On average, there was no decrease in the per cent of the vote received by incumbent's party in the relevant district caused by the redrawing of the lines. This conclusion is based on analysis of the results of the 1998 state Comptroller's race, a 50%-50% race statewide.

62. Plan 1151C is quite similar to the 1996 court-drawn plan, which in turn closely resembles the highly partisan 1991 Plan. See fn. 49 above.

63. Even those incumbents elected after the 1996 court action can be considered to have been aided at least indirectly by the partisan features of the 1991. This is because the 1996 court-drawn lines are quite similar to those of the 1991 Plan.

64. Contrary to the assertions of some, this continuing sizeable discrepancy between the statewide vote received by Republican Congressional candidates and the seats won by them is not due to Republican voters choosing to "split their tickets" to support popular Democratic incumbents. The elections in question concern only Congressional candidates. If the power of incumbency were the sole explanation for the Democrats' success, their Congressional candidates should have won more votes on a statewide basis than their Republican counterparts. This is because the Democrats have more incumbents statewide.

65. See Dr. Alford's report of Nov. 14, 2003, p. 20, fn. 1

66. The author has attempted to modify Dr. Alford's analysis for this "incumbency advantage" factor. A preliminary review of a few elections has indicated that Plan 1151C is significantly more biased toward the Democrats than is shown in Dr. Alford's report.

67. See, e.g., the briefs filed by those wishing to prohibit mid-decade redistricting. Those arguments are misplaced. The evils they seek to prohibit are not caused by the frequency of redistricting. Instead, the horrors they denounce are the result of lack of effective restraints on gerrymandering.

68. Texas' ethnic minorities, like the Republicans, are also unfairly disadvantaged by Plan 1151C's continuing pernicious effects. Despite the great growth of Texas' ethnic minorities in the last decade, Plan 1151C created no new ethnic "opportunity districts" where ethnic voters would have the opportunity to elect candidates of their choice. Instead, Plan 1151C appears to continue the partisan 1991 Plan's practice of fracturing ethnic voters in serpentine districts in order to maintain safe seats for Anglo Democratic incumbents.
See, e.g., Plan 1151C's dists. # 24 & 25

69. See Terrazas v. Slagle, _____ F.Supp. _____ (___ D. Tx. circa 1991)

Footnotes (cont.)

70. For example, the Terrazas Court obviously did not know about the subsequent history of 1991 Plan's continuing partisan impact.

71. See Vieth v. Jubelirer, 123 S.Ct. 2652 (2003)

72. The author believes that Owens' illustrative Plan 1377C applies such fairness standards, while at the same time, complying with the Voting Rights Act. This map may be implemented with minimum disruption to the election process since it does not split a single voter precinct used in the 2002 elections (VTD's).

These same fairness standards also appear to be reflected in the following redistricting Plans by private citizens: Pate Plan 1160C, Milem Plan 1056C, and Lindell Plan 1355C.

These fairness standards are also reflected in somewhat lesser degree in the following Plans by elected officials: Ratliff Plans 1047C & 1049C, and Armbrister Plan 1008C

CERTIFICATE OF SERVICE

I hereby certify that on or before December 4, 2003 a true and correct copy of the attached Response to Motions for Summary Judgment of William C. ("Bill") Owens, Jr. Amicus Curiae Pro Se has been served or has attempted to have been served by fax, by hand, or by mail to the following counsel of record:

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In cases where service has not actually been completed by the above date, diligent efforts will be made to effectuate service as reasonably as soon as possible thereafter.

William C. Owens, Jr.

William C. Owens, Jr.

Date: December 3, 2003