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

WALTER SESSION, *et al.*,	§	
Plaintiffs,	§	
	§	
vs.	§	Civil Action No. 2:03-CV-354
	§	
RICK PERRY, *et al.*,	§	
Defendants.	§	

REPLY BRIEF ON REMAND OF
TRAVIS COUNTY AND THE CITY OF AUSTIN

The question that Travis County and Austin presented to the Supreme Court in their appeal[1] from this Court's 2003 decision upholding Plan 1374C was:

> Does the legal fiction of inter-censal population accuracy provide a safe harbor from the stringent one person, one vote constitutional rule for congressional districts when the state voluntarily redistricts mid-decade only to advance partisan objectives and not out of any judicial or other legal necessity?

Even though the Supreme Court remanded the appeal, and the issue it presented, for further consideration following the *Vieth* decision, the state's opening brief on remand ignores the question. In past filings, the state has given some attention, limited though it was, to the one person, one vote issue. The central argument is addressed below.

Burden-shifting, not the use of non-census population estimates, is what's at issue

In its summary judgment response in this Court, the state characterized the one person, one vote argument as one that would "require the State to use population estimates to draw any congressional plan."[2] That, of course, is *not* the import of the one

[1] *See Travis County v. Perry*, No. 03-1400, Juris. Statement, at i. Gus Garcia, an Austin voter and former Mayor of Austin, was co-appellant with the county and city.

[2] State Defendants' Consolidated Brief in Response to Motions for Summary Judgment and LULAC's Motion for Preliminary Injunction, Nov. 24, 2003, at 30.

person, one vote argument pressed in this case. The county and city are not arguing that the state must redraw congressional lines in mid-decade using current population estimates instead of the census in meeting equal population requirements. The argument is that, *if* the state redraws those lines in mid-decade out of partisan choice instead of legal necessity, it has the burden of establishing that it satisfies the one person, one vote requirement – but, to meet its burden, cannot rely on the usual presumption that the census numbers are an accurate measure.[3]

The Court may recall the discussion on this point during argument on summary judgment, when a member of the Court asked counsel for the county and city to explain the implication for this argument of the decision in *Valdespino v. Alamo Heights ISD*, 168 F.3d 848 (5th Cir. 1999) (noting the significantly higher burden when non-decennial census data is used in the first *Gingles* factor in a Section 2 Voting Rights Act case). The response was that, besides the difference between a vote dilution and an equal population case, *Valdespino* is best read as a case about the government's burden in justifying its use of population numbers.

The county and city explain this in their opening brief on remand (at page 11). When, as here (because of the long passage of time since the census), the state does not as a factual matter meet absolute equality when it redraws congressional lines, the state then has to show either that: (a) it has updated the census numbers with sufficient technical rigor, *see Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969); or (b) the deviations from strict equality were to achieve some otherwise legitimate goal, *see Karcher v. Daggett*, 462 U.S. 725, 731 (1983). This construct says nothing about

[3] Use of the official census numbers is not constitutionally *required* in the one person, one vote context. *See Burns v. Richardson*, 384 U.S. 73, 91 (1966) (equal protection case involving state legislative seats).

whether the state must use updated numbers; it says when the state cannot use outdated numbers without bothering to explain or justify.

So, the Court's focus in this argument should be on the burden-shifting rules under the equal population doctrine for congressional districts, not on the worrisome prospect of precisely what population numbers the state is expected to use if it cannot blindly rely on the official census numbers. The state simply made no effort – and stipulated to the fact establishing this very point[4] – to meet its constitutional burden. Instead, it established a Potemkin village of equality, temporarily rolling out the façade of the census while knowing all along that, behind the façade, the population realities were different.

Population, not power, is the measure of constitutional equality

The reality of the state's approach to redistricting in 2003 is plain and unavoidable. Its precise purpose was to reallocate the power among voters so that a subset of voters – in this case, those who vote for Republican congressional candidates – would have a greater impact on congressional election outcomes than they had had in previous elections. Plan 1374C is bottomed on state policies about voting power and electoral outcomes, not voting *population*. In *Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989), the Supreme Court considered a similar legislative exercise premised on voting power and electoral outcomes and invalidated it under the equal population doctrine. The city in that case argued that its method of allocating seats for an elected municipal executive board met the one person, one vote constitutional

[4] The state agreed that it "did not make any effort to determine the current populations of the congressional districts … as of October 12, 2003," which is when Plan 1374C was enacted. *See* Joint Final Pretrial Order Stip. E.85.

requirement because it equalized "power" among voters even if it did not equalize population. 489 U.S. at 697 (discussing the Banzhaf index). The Supreme Court reiterated that its one person, one vote doctrine is a "population-based approach." 489 U.S. at 698. It rejected the equality alternative proffered by the city – that it was allocating voter power equally, thereby satisfying the equality doctrine. The Court concluded that the governmental interests the city offered for departure from population equality were insufficient justifications. 489 U.S. at 703.[5]

Under the *New York Board of Estimate* decision, creating an imbalance in population among districts in order to equalize power among voters and encourage different electoral outcomes is an invalid approach to redistricting. Realistically, that is precisely what happened in 2003, as embodied in Plan 1374C. It's no more valid here, for congressional districts, than it was in New York for board of estimate seats.

Conclusion: Constitutional principles may not be subordinated to political ones

The 2003 Texas legislature's redistricting effort, by its own admission, tried to capture *current* voting alignments for partisan advantage while seeking refuge in *prior* population and voting alignments for all other legal purposes (such as equal population and sections 2 and 5 of the Voting Rights Act). Surely the Constitution, and its equal population command for congressional districts, does not permit this open subordination of constitutional principles to political ones. The two-Justice concurrence in *Cox v. Larios* and Justice Kennedy's solo concurrence in *Vieth* point to this very principle as a

[5] The Court also noted its disagreement with the argument that the debasement of franchise equality is justified because of the "exigencies of history or convenience." 489 U.S. at 703 n.10. Similarly, this Court should reject any suggestion that, because the state's 2003 redistricting was nothing more than a corrective action for partisan gerrymanders in the 1990s, undisputed population deviations are nonetheless acceptable.

place for common ground in establishing a constitutionally clear stopping point for unbridled partisanship in modern redistricting.

Given these principles, and the firmly established doctrine of strict equal population rules for congressional line-drawing, this Court should invalidate Plan 1374C. The state has not met – hasn't even *tried* to meet – its constitutional burden.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing **REPLY BRIEF ON REMAND OF TRAVIS COUNTY AND THE CITY OF AUSTIN** was served electronically and (except for those marked *) by regular U.S. mail on the 14th day of January, 2005, on each of the following counsel of record:

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