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.,	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

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

JOINT 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

I. INTRODUCTION

The Texas State Conference of NAACP Branches, Juanita Wallace, Rev. Bill Lawson, and Howard Jefferson (hereinafter, "NAACP Plaintiffs"), and Congresspersons Eddie Bernice Johnson, Sheila Jackson-Lee, and Alexander Green (Congressional Plaintiffs), intervened as Plaintiffs in the above-styled action, alleging that the bills passed by the Texas state legislature for redrawing Texas' Congressional and State House districts—C185 and H283, respectively—violated the Equal Protection Clause of the 14th Amendment by intentionally discriminating against minority voters and violated Section 2 of the Voting Rights Act of 1965 by diluting the

strength of the minority vote. Trial on this issue is scheduled to begin on Tuesday, September 6, 2011. In the following brief, NAACP Plaintiffs and Congressional Plaintiffs will highlight for this Court prior to trial what they believe to be some of the key legal issues and pieces of evidence in the upcoming trial. Most specifically, NAACP and Congressional Plaintiffs would like to highlight to the court some of the relevant case law on coalition districts and the electoral races most relevant to proving political cohesion amongst minority voters.

II. ARGUMENT

In enacting C185 and H283, the Texas state legislature acted to cement Anglo control over the State House and Texas' Congressional delegation at the expense of minority voters in the state. The State will try to defend against charges of intentional discrimination by cloaking their actions in impenetrable partisan defenses, but that cannot mask the incriminating sequence of events and legislative process of this redistricting. Nor can it hide the larger context of how the state legislature's actions fit perfectly in to a pattern of racial discrimination historically unrelated to partisan affiliation. Moreover, even aside from the intentional discrimination that will be documented by the NAACP and Congressional Plaintiffs' evidence, testimony in this trial will demonstrate that the State of Texas violated Section 2 of the Voting Rights Act because it failed to create new minority opportunity in districts where it could have and where voting is racially polarized. The state's liability under both the 14th Amendment and the Voting Rights Act will become apparent in the trial, but a focus on the evidence with certain legal elements in mind will make clear to this Court how the evidence offered satisfies Plaintiffs' legal burden under both claims.

A. In Enacting C185 and H283, the State of Texas Acted with Intentional Discrimination in Violation of the Fourteenth Amendment.

The Equal Protection Clause of the 14th Amendment to the United States Constitution protects citizens from intentional discrimination on the basis of race. The present situation is the not first time a minority group has been the subject of intentional discrimination in the process of redistricting. Nor is the first time in Texas. In the 2004 decision *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004), the federal 3-judge panel considering a challenge to the state's redistricting plans noted that it was "keenly aware of the long history of discrimination against Latinos and Blacks in Texas, and recognize[d] that their long struggle for economic and personal freedom is not over." *Id.* at 473. While the burden on plaintiffs in such a case is high, proving intentional discrimination in violation of the Equal Protection is not designed to be an impossible task. Plaintiffs are not required to prove that racial considerations "predominated"—rather, they just must prove that discriminatory intent was one of the motivating factors. *Village of Arlington Height v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977),

Moreover, Plaintiffs do not need a "smoking gun" as proof of intentional discrimination. The United States Supreme Court, in *Arlington Heights*, outlined the indirect evidence necessary to establish a prima facie case of racial discrimination in violation of the Equal Protection Clause. The party alleging discrimination must first show (through use of legislative history, a pattern of events, departures from usual procedures, or evidence of disparate impact) that discrimination was a motivating factor in the decision. After making that prima facie case, the Court instructed that the burden shifts to the city to show that the same decision would have resulted even if the discriminatory motive was not present. *Id.* at 270-71, n. 21.

While "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194 (2003) (internal citations and quotations omitted), this requirement can be satisfied in a number of different ways. To prove intentional discrimination, one must show that "a challenged action was motivated by an intent to discriminate." *Elston v. Talledega County Board of Education*, 997 F.2d 1394, 1406 (11th Cir. 1993). This requires a showing that the decisionmaker was not only aware of the complainant's race, color, or national origin, but that the recipient acted, at least in part, because of the complainant's race, color, or national origin. However, the record need not contain evidence of "bad faith, ill will or any evil motive on the part of the [recipient]." *Id.* (quoting *Williams v. City of Dothan, Alabama*, 745 F.2d 1406, 1414 (11th Cir. 1984)).

State Defendants mistakenly imply that evidence of racially discriminatory impact is irrelevant to establishing discriminatory intent. This is simply not the case. Evidence of discriminatory intent may be direct or circumstantial. Such evidence can be derived from a variety of sources, including statements by decisionmakers, the historical background of the events in issue, the sequence of events leading to the decision in issue, a departure from standard procedure (*e.g.*, abnormal enactment processes or failure to consider factors normally considered), legislative or administrative history (*e.g.*, minutes of meetings), a past history of discriminatory or segregated conduct, and evidence of a substantial disparate impact on a protected group. *See Arlington Heights*, 429 U.S. at 266-68 (evaluation of intentional discrimination claim under the Fourteenth Amendment); *Elston*, 997 F.2d at 1406.

The so-called "*Arlington Heights*" factors, when considered in the present case, indicate the presence of discriminatory intent in the enactment of C185 and H283.

The NAACP and Congressional Plaintiffs will introduce evidence and testimony that supports a finding of intentional discrimination based on the presence of each of the *Arlington Heights* factors discussed above. The Plaintiffs will also show that, in enacting C185 and H283, the Texas State Legislature continued the decades-long trend in cementing Anglo control of elected bodies. Throughout Texas' history, that determination to minimize the political voice of minority voters has been to the benefit of differing political parties. But in historical context, partisanship alignment has been mercurial when compared to the constant results—dilution of minority voting strength.

B. In Enacting C185 and H283, the State of Texas Diluted the Voting Strength of Minority Voters, in Violation of Section 2 of the Voting Rights Act.

Over the years, the United States Supreme Court has refined the elements necessary for a plaintiff to prove a violation of Section 2 of the Voting Rights Act—that is, to prove a voting practice or procedure has had the effect of diluting minority voting strength. NAACP and Congressional Plaintiffs can easily establish the three threshold conditions set forth by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), as necessary to make out a prima facie case of vote dilution under Section 2 of the Voting Rights Act. The NAACP and Congressional Plaintiffs must and can establish that: (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 a multimember district, 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* conditions 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. De Grandy*, 512 U.S. 997, 1009-12 (1994). The NAACP and Congressional Plaintiffs can also establish that the C185 and H283 plans dilute minority votes under the "totality of circumstances."

To satisfy the first *Gingles* precondition, NAACP and Congressional Plaintiffs must and can 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 the district, 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, minority voters support one candidate, white voters support an opposing and often winning candidate. Several Supreme Court-approved methods exist to determine whether polarized voting occurs in a given area. All the experts who have offered reports thus far in the present case have indicated voting is racially polarized in Texas, and that Hispanic and African-American voters usually vote as a bloc. NAACP and Congressional Plaintiffs can and will produce evidence to satisfy this Court's inquiry into each element of a Section 2 violation.

1. NAACP and Congressional Plaintiffs Will Produce Evidence to Establish that the First *Gingles* Pre-Condition Is Met

In order to establish liability under Section 2 of the Voting Rights Act, Plaintiffs must first prove that the first so-called *Gingles* factor or pre-condition can be satisfied. That is, Plaintiffs must prove that a reasonable compact district in which the minority population constitutes at

least 50% of the citizen voting age population can be drawn. The NAACP Plaintiffs submitted or noted the submission by other parties during the legislative process several maps that would satisfy the first prong of *Gingles*, both for the Congressional and State House plans.

Coalition districts can satisfy the first *Gingles* pre-condition. In past Voting Rights Act cases, examinations of vote dilution were frequently focused on one racial 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. *See* Expert Report of Dean William Piatt, p. 2. 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*, 129 S. Ct. 1231 (2009), a Supreme Court plurality found that in order to satisfy the first prong of *Gingles*, 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 1242-43. While the Supreme Court has not directly addressed the issue, the Court has previously noted that racial minority groups could form "coalitions with voters from other racial and ethnic groups," *Johnson v. DeGandy*, 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, 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 LULAC 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); *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); *LULAC 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, and, 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).

The NAACP and Congressional Plaintiffs will present unmistakable evidence that the Texas state legislature could have drawn new minority districts—easily enabled by the immense growth in the minority population over the last decade—but chose not to do so. During the legislative process, the Texas State Conference of NAACP Branches and the Texas Legislative Black Caucus introduced proposed plans that would create new compact and viable African American opportunity districts for Congress and the State House. These plans also respected the ability of new Latino Hispanic opportunity districts to be drawn. This evidence from the legislative process is proof that such districts could be drawn. The Texas NAACP submitted congressional district plans that created 2 new African American opportunity districts in Travis County and in the Dallas-Fort Worth area, and these proposed districts respected the ability of new Latino opportunity districts to be drawn as well. 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. The NAACP drew a proposed Congressional District 34 that would be, of voting age population, 31.47% Black and 25.68% Hispanic. Of the Citizen Voting Age Population, the proposed Congressional District 34 would be 32.34% Black and 15.22% Hispanic and only 45.1% Non-Hispanic White.

Moreover, the Texas Legislative Black Caucus proposed new State House districts that would act as African-American opportunity districts. In State House plan H202, the Legislative Black Caucus drew four new minority opportunity districts—House District 72, House District 107, House District 114 and House District 132. House District 72 was a Hispanic opportunity district located in Hidalgo County. House District 107, located in Northeast Dallas County, was a coalition opportunity district. House District 114 was also a coalition opportunity district and was located in Southeast Tarrant County. Finally, in H202, House District 132 was a coalition district in West Harris County.

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, but these districts perform reliably in enabling African-American voters to elect the candidates of their choice.

Expert demographer Anthony Fairfax analyzed the districts and plans proposed by the Texas NAACP and by the Texas Legislative Black Caucus. After examining the congressional districts produced by the Texas NAACP, he concluded that they were all majority minority districts and that they satisfied the requirements of equal population and contiguity. After examining the state

house districts produced by the Texas Legislative Black Caucus in H202, he concluded that the H202 plan created 65 districts that were majority minority, and that there were 12 districts that were predominantly African American. The plan satisfied the requirements of acceptable deviation for equal population and contained no non-contiguous areas. His final conclusion was that all of the maps and districts drawn by the Texas NAACP and the Texas Legislative Black Caucus met standard redistricting criteria and could be adopted by the state legislature. These districts could have been legally drawn in order to enable the enormous increase in minority voters that Texas saw over the last decade elect the candidates of their choice. In failing to do so, the state of Texas violated Section 2 of the Voting Rights Act.

2. NAACP and Congressional Plaintiffs Will Produce Evidence to Establish that the Second and Third *Gingles* Pre-Conditions Are Met

Taken together, the last two prongs of Gingles require that Plaintiffs prove the existence of racially polarized voting—that is, that the minority population is politically cohesive and usually defeated by white majority bloc voting absent a majority-minority district. For establish Section 2 liability for a coalition district, Plaintiffs must show that the various minority groups in the coalition district are politically cohesive. The second 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. Further, the joint cohesion must be shown in the elections that determine the ultimate winners—that is, the general elections. Primaries do not produce ultimate winners. In a district where one minority group controls the outcome of the Democratic primary, for example, but can only win the general election by gaining the support of a coalition of minority voters whose total membership outnumbers Anglo voters, political cohesion such as to satisfy the second prong of *Gingles* is present.

In primary elections, especially if candidates from more than one racial minority group are competing for the nomination, minority groups may not always vote 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 member **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, particular 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.

The record in this case is replete with expert analysis of polarization of the Texas electorate, and all of those experts have found polarization along racial lines. Testimony presented at trial will further cement those conclusions. These experts have been hired by a variety of parties, have used a variety of methods, and have 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.

The NAACP and Congressional Plaintiffs retained and rely on three principal experts on racially polarized voting and political cohesion between African-American and Hispanic voters: Dr. Richard Murray, Dr. Orville Vernon Burton, and Dean William Piatt. The findings of these experts, along with the larger assertions of the NAACP Plaintiffs, are also supported by the findings of other experts retained to give testimony in this case, including Dr. Richard Engstrom, Professor J. Morgan Kousser, and Dr. Stephen Ansolabehere. 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.

In his Expert Report, Dr. Richard 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.

Dr. Murray performed homogenous precinct analysis (also known as an 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. 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 53-54, and it indicates obvious and indisputable racially polarized voting, with minority voters supporting the Anglo candidate.

In his Expert Report, Dr. Orville Vernon Burton examined recent racially polarized voting analysis 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* Expert Report of Dr. Orville Vernon Burton, 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. Alan Richtman 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.

In his Expert Report done at the behest of the NAACP Plaintiffs, Dean William 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 Piatt 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.

Beyond this issue-focused political cohesiveness, Dean Piatt described a more historical, personal and permanent cohesiveness between the two groups—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 disparities that will be discussed in detail 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.

The reports of Dr. Richard Engstrom, Dr. J. Morgan Kousser, and Dr. Stephen Ansolabehere, retained by other plaintiffs, all support the presence of racially polarized voting in Texas and a high level of political cohesion between African American and Hispanic voters in general elections and many primary elections. Additionally, NAACP and Congressional Plaintiffs will be offering a number of documents and pieces of evidence that demonstrate racially polarized voting in Texas and political cohesion between minority groups, not just limited to African American and Hispanic voters.

3. NAACP and Congressional Plaintiffs Will Present Evidence Showing, Under the Totality of Circumstances, the Need for a Section 2 Remedy to Correct Minority Vote Dilution

After proving that the *Gingles* pre-conditions are present, a plaintiff in a Section 2 lawsuit must still prove that, under the totality of the circumstances, a remedy under Section 2 is required because the minority vote is being diluted. When determining whether vote dilution has occurred under the totality of the circumstances, courts generally are guided by the so-called "Senate Factors" or "Senate Report Factors" identified in a United States Senate report accompanying the reauthorization of the Voting Rights Act in 1982. These factors include: 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 (proportionality); 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).

NAACP and Congressional Plaintiffs will offer expert and lay testimony that shows minority vote dilution under the totality of circumstances. In his Expert Report, Dr. Orville Vernon Burton detailed the history of 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. Dr. Burton and Dr. Murray documented historical evidence of official discrimination in Texas, but noted that official discrimination has continued into the new millennium. For example, 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* Expert Report of Dr. Richard Murray, p. 17. The Houston Chronical 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.

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 the *Gingles* second and third prong analyses, and the irrefutable conclusion based on the large number of studies conducted was that elections in Texas are highly polarized along racial lines.

Dr. Burton also examined the extent to which potentially discriminatory practices or procedures have been used. He 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.

Slating problems are another totality of the circumstances factor present in Texas. Historically, African-Americans in particular were excluded from slating, going back to the existence of the White Primary. *See* Expert Report of Dr. Orville Vernon Burton, 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.

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* Expert Report of Dr. Richard Murray, 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.*

NAACP and Congressional Plaintiffs will present a number of lay witnesses who will testify about discrimination and disparities facing minorities in Texas in education, employment, health, and other arenas. These witnesses will testify to the lack of responsiveness of Anglo representative to the needs of minority communities. These lay witnesses will have a number of first-hand accounts to share indicating the presence of overt and subtle racial appeals in campaigns in Texas. Several of the exhibits offered by NAACP Plaintiffs will corroborate this testimony.

The evidence presented in this trial will show that 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* Expert Report of Dr. Richard Murray, 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.*

Finally, one of the most important aspects to examine under the "totality of circumstances" inquiry is proportionality, or lack thereof. In *DeGrandy*, Justice O'Connor explained that proportionality "is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive. 512 U.S. at1025 (O'Connor, J., concurring). African Americans, though comprising over 12% of the citizen voting age population, are only able to election candidates of choice in 3 out of Texas 36 Congressional districts (8.3%). African Americans are likewise able to elect candidates of choice in a disproportionately small number of State House seats. This lack of proportionately is a factor in determining that, under the totality of circumstances, African American and all minority voters are suffering from a dilution in their voting strength because of the enacted redistricting plans.

III. CONCLUSION

NAACP Plaintiffs respectfully submit this Trial Brief to aid this Court in identifying key legal issues and facts relevant those issues during this trial.

Dated: September 6, 2011.

Respectfully Submitted,

/s/ Allison J. Riggs

Anita S. Earls
N.C. State Bar No. 15597
(Admitted Pro Hac Vice)
Allison J. Riggs
N.C. State Bar No. 40028
(Admitted Pro Hac Vice)
Southern Coalition for Social Justice
1415 West Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380
Fax: 919-323-3942
Anita@southerncoalition.org
Allison@southerncoalition.org
Attorneys for Texas State Conference of NAACP Branches, Juanita Wallace and Bill Lawson

/s/ Gary L. Bledsoe
Gary L. Bledsoe
Law Office of Gary L. Bledsoe and Associates
State Bar No. 02476500
316 West 12th Street, Suite 307
Austin, Texas 78701
Telephone: 512-322-9992
Fax: 512-322-0840
Garybledsoe@sbcglobal.net
Attorney for Howard Jefferson

Robert Notzon
Law Office of Robert S. Notzon
State Bar Number 00797934
1507 Nueces Street
Austin, TX 78701
512-474-7563
512-474-9489 fax
Robert@NotzonLaw.com
Attorney for Texas State Conference of NAACP Branches, Juanita Wallace and Bill Lawson

Victor L. Goode
Assistant General Counsel

NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
Telephone: 410-580-5120
Fax: 410-358-9359
vgoode@naacpnet.org
Attorney for the Texas State Conference of NAACP Branches

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via the Court's electronic notification system or email to the following on August 17, 2011:

DAVID RICHARDS
Texas Bar No. 1684600
Richards, Rodriguez & Skeith LLP
816 Congress Avenue, Suite 1200
Austin, TX 78701
512-476-0005
davidr@rrsfirm.com

RICHARD E. GRAY, III
State Bar No. 08328300
Gray & Becker, P.C.
900 West Avenue, Suite 300
Austin, TX 78701
512-482-0061
512-482-0924 (facsimile)
Rick.gray@graybecker.com
ATTORNEYS FOR PLAINTIFFS PEREZ, DUTTON, TAMEZ, HALL, ORTIZ, SALINAS, DEBOSE, and RODRIGUEZ

JOSE GARZA
Texas Bar No. 07731950
Law Office of Jose Garza
7414 Robin Rest Dr.
San Antonio, Texas 78209
210-392-2856
garzpalm@aol.com

MARK W. KIEHNE
mkiehne@lawdcm.com
RICARDO G. CEDILLO
rcedillo@lawdcm.com
Davis, Cedillo & Mendoza
McCombs Plaza
755 Mulberry Ave., Ste. 500
San Antonio, TX 78212
210-822-6666
210-822-1151 (facsimile)

ATTORNEYS FOR MEXICAN AMERICAN LEGISLATIVE CAUCUS

GERALD H. GOLDSTEIN
State Bar No. 08101000
ggandh@aol.com
DONALD H. FLANARY, III
State Bar No. 24045877
donflanary@hotmail.com
Goldstein, Goldstein and Hilley
310 S. St. Mary's Street
29th Floor, Tower Life Bldg.
San Antonio, TX 78205-4605
210-226-1463
210-226-8367 (facsimile)

PAUL M. SMITH
psmith@jenner.com
MICHAEL B. DESANCTIS
mdesanctis@jenner.com
JESSICA RING AMUNSON
jamunson@jenner.com
Jenner & Block LLP
1099 New York Ave., NW
Washington, D.C. 20001
202-639-6000
Served via electronic mail

J. GERALD HEBERT
191 Somervelle Street, # 405
Alexandria, VA 22304
703-628-4673
hebert@voterlaw.com
Served via electronic mail

JESSE GAINES
P.O. Box 50093
Fort Worth, TX 76105
817-714-9988

ATTORNEYS FOR PLAINTIFFS QUESADA, MUNOZ, VEASEY, HAMILTON, KING and JENKINS

NINA PERALES
Texas Bar No. 24005046
nperales@maldef.org
MARISA BONO
mbono@maldef.org
REBECCA MCNEILL COUTO
rcouto@maldef.org
Mexican American Legal Defense
and Education Fund
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
(210) 224-5382 (facsimile)

MARK ANTHONY SANCHEZ
masanchez@gws-law.com
ROBERT W. WILSON
rwwilson@gws-law.com
Gale, Wilson & Sanchez, PLLC
115 East Travis Street, Ste. 1900
San Antonio, TX 78205
210-222-8899
210-222-9526 (facsimile)

ATTORNEYS FOR PLAINTIFFS TEXAS LATINO REDISTRICTING TASK FORCE, CARDENAS, JIMENEZ, MENENDEZ, TOMACITA AND JOSE OLIVARES, ALEJANDRO AND REBECCA ORTIZ

ROLANDO L. RIOS
Law Offices of Rolando L. Rios
115 E Travis Street
Suite 1645
San Antonio, TX 78205
210-222-2102
rrios@rolandorioslaw.com

ATTORNEY FOR INTERVENOR-PLAINTIFF HENRY CUELLAR

JOHN T. MORRIS
5703 Caldicote St.
Humble, TX 77346
(281) 852-6388
johnmorris1939@hotmail.com

LUIS ROBERTO VERA, JR.
Law Offices of Luis Roberto Vera, Jr. &
Associates
1325 Riverview Towers
111 Soledad
San Antonio, Texas 78205-2260
210-225-3300
irvlaw@sbcglobal.net

GEORGE JOSEPH KORBEL
Texas Rio Grande Legal Aid, Inc.
1111 North Main
San Antonio, TX 78213
210-212-3600
korbellaw@hotmail.com

ATTORNEYS FOR INTERVENOR-PLAINTIFF LEAGUE OF UNITED LATIN AMERICAN CITIZENS

DAVID MATTAX
david.mattax@oag.state.tx.us
DAVID J. SCHENCK
david.schenck@oag.state.tx.us
MATTHEW HAMILTON FREDERICK
matthew.frederick@oag.state.tx.us
ANGELA V. COLMENERO
angela.colmenero@oag.state.tx.us
ANA M. JORDAN
ana.jordan@oag.state.tx.us
Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, TX 78711
(512) 463-2120
(512) 320-0667 (facsimile)

ATTORNEYS FOR DEFENDANTS STATE OF TEXAS, RICK PERRY, HOPE ANDRADE, DAVID DEWHURST, AND JOE STRAUS

DONNA GARCIA DAVIDSON
PO Box 12131
Austin, TX 78711
(512) 775-7625
(877) 200-6001 (facsimile)

Served via electronic mail

JOHN T. MORRIS, PRO SE

MAX RENEA HICKS
Law Office of Max Renea Hicks
101 West Sixth Street
Suite 504
Austin, TX 78701
(512) 480-8231
512/480-9105 (fax)
rhicks@renea-hicks.com

ATTORNEY FOR PLAINTIFFS CITY OF AUSTIN, TRAVIS COUNTY, ALEX SERNA, BEATRICE SALOMA, BETTY F. LOPEZ, CONSTABLE BRUCE ELFANT, DAVID GONZALEZ, EDDIE RODRIGUEZ, MILTON GERARD WASHINGTON, and SANDRA SERNA

CHAD W. DUNN
chad@brazilanddunn.com
K. SCOTT BRAZIL
scott@brazilanddunn.com
Brazil & Dunn
4201 FM 1960 West, Suite 530
Houston, TX 77068
281-580-6310
281-580-6362 (facsimile)

ATTORNEYS FOR INTERVENOR-DEFENDANTS TEXAS DEMOCRATIC PARTY and BOYD RICHIE

STEPHEN E. MCCONNICO
smcconnico@scottdoug.com
SAM JOHNSON
sjohnson@scottdoug.com
S. ABRAHAM KUCZAJ, III
akuczaj@scottdoug.com
Scott, Douglass & McConnico
One American Center
600 Congress Ave., 15th Floor
Austin, TX 78701
(512) 495-6300
donna@dgdlawfirm.com

FRANK M. REILLY
Potts & Reilly, L.L.P.
P.O. Box 4037
Horseshoe Bay, TX 78657
512/469-7474
512/469-7480 (fax)
reilly@pottsreilly.com

ATTORNEYS FOR DEFENDANT STEVE MUNISTERI

DAVID ESCAMILLA
Travis County Asst. Attorney
P.O. Box 1748
Austin, TX 78767
(512) 854-9416
david.escamilla@co.travis.tx.us
Served via electronic mail

ATTORNEY FOR PLAINTIFF TRAVIS COUNTY

KAREN M. KENNARD
2803 Clearview Drive
Austin, TX 78703
(512) 974-2177
512-974-2894 (fax)
karen.kennard@ci.austin.tx.us
Served via electronic mail

ATTORNEY FOR PLAINTIFF CITY OF AUSTIN

JOAQUIN G. AVILA
P.O. Box 33687
Seattle, WA 98133
206-724-3731
206-398-4261 (facsimile)
jgavotingrights@gmail.com
Served via electronic mail

ATTORNEYS FOR MEXICAN AMERICAN LEGISLATIVE CAUCUS

512/474-0731 (fax)

ATTORNEYS FOR PLAINTIFFS CITY OF AUSTIN, TRAVIS COUNTY, ALEX SERNA, BALAKUMAR PANDIAN, BEATRICE SALOMA, BETTY F. LOPEZ, CONSTABLE BRUCE ELFANT, DAVID GONZALEZ, EDDIE RODRIGUEZ, ELIZA ALVARADO, JOSEY MARTINEZ, JUANITA VALDEZ-COX, LIONOR SOROLA-POHLMAN, MILTON GERARD WASHINGTON, NINA JO BAKER, and SANDRA SERNA

/s/ Allison J. Riggs
Allison J. Riggs
Attorney for Texas NAACP, Bill Lawson, and Juanita Wallace

/s/ Gary L. Bledsoe
Gary L. Bledsoe
Attorney for Howard Jefferson