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

WALTER SESSION, ET AL.	§	
vs.	§	CIVIL ACTION NO. 2:03-CV-354
RICK PERRY, ET AL.	§	Consolidated

TRIAL BRIEF OF THE
JACKSON PLAINTIFFS AND DEMOCRATIC CONGRESSIONAL INTERVENORS

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115

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

I. Minority Vote Dilution under Section 2 of the Voting Rights Act and the Equal Protection Clause 5

A. The Legal Standards 5

1. The Statute 5

2. The *Gingles* Preconditions 6

3. The "Totality of Circumstances" 7

a. *De Grandy* Proportionality 7

b. Senate Report Factors 8

4. Intentional Minority Vote-Dilution Claims under the Equal Protection Clause 9

5. Section 5 Preclearance and Section 2 Liability 10

B. Tarrant/Dallas Counties and District 24 11

1. *Gingles* Prongs 1 and 2 – The Potential to Elect Candidates Preferred by Minority Voters 11

2. *Gingles* Prongs 2 and 3 – Plan 1374C Thwarts the Distinctive Minority Vote 17

3. The "Cracking" of Minorities in the Fort Worth Area Was Intentional 17

C. The Rio Grande Region and District 23 18

1. *Gingles* Prongs 1 and 2 – The Potential to Elect Candidates Preferred by Hispanic Voters 19

2. *Gingles* Prongs 2 and 3 – Plan 1374C Thwarts the Distinctive Minority Vote 21

3. The "Cracking" of Hispanics in the Rio Grande Region Was Intentional 22

D. Minority Influence Districts 23

E. *De Grandy* Proportionality Statewide 25

F. Senate Report Factors in Texas 26

II. Racial Gerrymandering 27

A. The Legal Standard 27

B. The South Texas-Based "Bacon Strip" Districts 30

C. District 29 in Harris County 33

D. District 30 in Dallas County 34

III. Partisan Gerrymandering 34

A. Evidence of Partisan Intent 36

1. Direct Evidence of Intent 36

2. Circumstantial Evidence of Intent 37

B. Evidence of Partisan Effects 38

1. Evidence of Inherent Bias 38

2. Treatment of Incumbents 39

Conclusion 41

TABLE OF AUTHORITIES

Page

CASES

Bush v. Vera, 517 U.S. 952 (1996) ..... *passim*

Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989) 14

City of Mobile v. Bolden, 446 U.S. 55 (1980) 9

Davis v. Bandemer, 478 U.S. 109 (1986) 34

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) 9, 16

Georgia v. Ashcroft, 123 S. Ct. 2498 (2003) 10, 23

Growe v. Emison, 507 U.S. 25 (1993) 7

Holder v. Hall, 512 U.S. 874 (1994) 9

Johnson v. De Grandy, 512 U.S. 997 (1994) 8

Metts v. Murphy, 347 F.3d 346 (1st Cir. 2003) 16

Miller v. Johnson, 515 U.S. 900 (1995) 28, 29, 35

People ex rel. Salazar v. Davidson, Nos. 03SA133, 03SA147, 2003 WL 22833085 (Colo. Dec. 1, 2003) 34

Perez v. Pasadena Independent School District, 165 F.3d 368 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000) 14

Reno v. Bossier Parish School Board, 520 U.S. 471 (1997) 10-11

Rogers v. Lodge, 458 U.S. 613 (1982) 9

Shaw v. Hunt, 517 U.S. 899 (1996) 30

Shaw v. Reno, 509 U.S. 630 (1993) 27-28

Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*

Valdespino v. Alamo Heights Independent School District, 168 F.3d 848 (5th Cir. 1999) 2, 14

Vieth v. Jubelirer, 123 S. Ct. 2652 (2003) 2

Voinovich v. Quilter, 507 U.S. 146 (1993) 16

OTHER FEDERAL AUTHORITIES

U.S. Const. amend. XV 6

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ..... *passim*

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c 10, 23

28 C.F.R. § 51.49 (2003) 11

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TRIAL BRIEF OF THE
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The Jackson Plaintiffs[1] and the Democratic Congressional Intervenors[2] (collectively, "Plaintiffs") will press at trial three main challenges to Plan 1374C, the congressional redistricting plan that the Texas Legislature enacted in October. First, we will show that the plan intentionally dilutes the voting strength of minorities in violation of Section 2 of the Voting Rights Act and the Equal Protection Clause. Second, we will show that certain districts – especially Districts 15, 25 and 28 running from the border all the way to central Texas, as well as District 29 in Harris County – are "racial gerrymanders" because their shape betrays an excessive focus on race or ethnicity in the district design. Third and finally, we will show that Plan 1374C as a whole is a classic partisan gerrymander, designed to guarantee that the Republicans will win a supermajority of the seats even if the Democrats were to win half or more of the votes statewide.

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[1] The term "Jackson Plaintiffs" includes all plaintiffs included in the Amended Complaint filed on November 7, 2003, on behalf of the existing Jackson, Mayfield, and Manley plaintiffs and some additional plaintiffs included there for the first time.

[2] The "Democratic Congressional Intervenors" were plaintiff-intervenors in the *Balderas* litigation in 2001.

Defendants, for their part, appear not to be contesting the factual basis of the partisan-gerrymandering claim. Their own expert, Dr. Ronald Keith Gaddie, will confirm that Plan 1374C disparately "packs" and "cracks" Democratic voters, targets Democratic incumbents for defeat, and virtually assures a majority-Republican congressional delegation regardless of future voting patterns. He will also undercut any partisan-fairness argument for abandoning Plan 1151C drawn by the Court two years ago, confirming that Plan 1151C is itself mildly biased in favor of the Republicans. Defendants appear to be placing their hopes in a prediction that this Court, and the Supreme Court in *Vieth v. Jubelirer*, 123 S. Ct. 2652 (2003), will hold that a partisan gerrymander as brazen and egregious as Plan 1374C is not unconstitutional unless it is accompanied by independently unconstitutional barriers to organizing, campaigning, and voting imposed on Democrats. *See* Defs.' Mot. to Dismiss. *But see infra* pp. 34-40.

Indeed, Defendants appear to have decided to trumpet their own partisanship as a defense to allegations of intentional discrimination based on race. As to racial vote *dilution*, they will argue that they did not eliminate any district in which a single minority group constituted 50 percent or more of the potential voters and thus that they avoided liability under the effects test of Section 2 of the Voting Rights Act. *See Valdespino v. Alamo Heights Indep. School Dist.*, 168 F.3d 848 (5th Cir. 1999). For the reasons stated below, we think that argument is wrong as a matter of law and, in any event, irrelevant because of Defendants' *intentional* elimination of districts they knew were actually providing minorities with the opportunity to elect candidates of their choice. We expect that Defendants' answer to the allegations of intentional vote dilution will be to say that their real goal was to create more safe Republican seats, not to injure the minorities whose interests had to be sacrificed to achieve that partisan goal. Similarly, Defendants will say that the strange shapes of some of the majority-Hispanic districts, including

a new District 25 that combines Hispanic populations in McAllen and Austin by means of a long string of rural counties, were just a means to achieve their ultimate *political* objectives.

But racial and political motivations cannot be so easily divorced from one another. There is no doubt that the primary reason the Texas Legislature decided to replace a perfectly lawful congressional map this year was to produce a Republican-dominated congressional delegation. Majority Leader Tom DeLay made it clear that was what he wanted and he and the other Republican leaders in the State overcame innumerable barriers and overwhelming hostility on the part of the public and the press to achieve that goal. But in achieving their political objectives, they quite consciously sacrificed the rights and interests of minority voters. First, in order to defeat a substantial number of Democratic incumbents, they had to redraw a series of majority-Anglo districts in which minority voters held the balance of power and were accordingly wielding substantial influence. The testimony at the legislative hearings last spring and summer left little doubt about how the minority community felt about such a strategy.

Then there were the 11 districts in which minority voters currently have the opportunity to elect candidates of their choice.[3] Two of these districts presented specific problems for the map drawers. First, there was a desire to eliminate any district that Democratic Congressman Martin Frost could carry. This could only be accomplished by taking the extreme step of carving up the African-American community in Tarrant County – the third largest concentration of

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[3] The evidence will show that these districts include the two African-American plurality districts (18 and 30) in the Houston and Dallas areas held by Congresswomen Sheila Jackson Lee and Eddie Bernice Johnson, respectively; two other districts in those areas in which African-Americans have the ability to nominate and elect candidates of choice, District 24 held by Congressman Martin Frost and District 25 held by Congressman Chris Bell; and seven majority-Hispanic districts in Houston, in San Antonio, and along the border (Districts 15, 16, 20, 23, 27, 28, and 29, represented by Congressmen Ruben Hinojosa, Silvestre Reyes, Charlie Gonzalez, Henry Bonilla, Solomon Ortiz, Ciro Rodriguez, and Gene Green, respectively).

African-Americans in the State – and placing the largest chunk into a district dominated by Denton County residents with whom they have little in common. Second, there was the reality that Republican Congressman Henry Bonilla in District 23 was rapidly heading toward defeat, having won only 8 percent of the Hispanic vote in 2002. The only solution was to eliminate the Hispanic voting majority in that district by excising half of Webb County and replacing Hispanics with Republican-voting Anglos from suburban Bexar County and the Hill Country northwest of San Antonio.

The Republican leaders knew, of course, that these measures were legally risky. Throughout the legislative process they toyed with maps that eliminated the Frost district and buttressed Congressman Bonilla, but they simultaneously considered maps that maintained all 11 minority districts untouched and thus would have achieved somewhat more modest partisan gains. Ultimately, both the House and the Senate passed maps in the latter category. But then the Conference Committee – with the crucial "encouragement" of Congressman DeLay – voted out a map in the former category, Plan 1374C. Thus, the legislators made a conscious decision to injure minority voting opportunities in order to maximize Republican gains.

There is a comparable linkage between partisanship and the examples of racial gerrymandering in the map. Because of the transformation of Congressman Bonilla's District 23 into one dominated by Anglos, there was an apparent need to produce new electoral opportunities for Hispanics elsewhere. This was accomplished by insertion into the border region of one more majority-Hispanic district, new District 25. But because District 23 would still contain about 350,000 "wasted" Hispanic voters, the addition of a new Hispanic district could only be accomplished by drawing District 25 as linking part of McAllen with the heavily Hispanic portion of Travis County 300 miles to the north – and comparably elongating the

adjoining districts. Because of their peculiar shapes, Districts 15, 25, and 28 have been termed the new "bacon strip" districts. Thus, the racial gerrymandering of South Texas was an intentional and direct result of the legislators' pursuit of their maximal partisan goals.

These largely undisputed facts establish that the Defendants acted with *both* partisan intent and racial intent. Indeed, the Supreme Court in *Bush v. Vera*, 517 U.S. 952 (1996), expressly rejected a closely analogous effort to justify the excessive consideration of race in congressional redistricting as really reflecting a *political* agenda. The defenders of the 1991 Texas congressional map had argued that the irregular minority districts in the Dallas and Houston areas were really motivated by politics because they were necessary to protect incumbents while simultaneously creating the new minority districts. But Justice O'Connor resoundingly rejected such a simplistic "either/or" analysis of intent, holding instead that the plaintiffs had established unconstitutional *racial* discrimination by showing that "political gerrymandering was accomplished in large part by using race as a proxy." *Id.* at 969 (plurality opinion). Similarly, here, it simply will not do for the Defendants to say that they deliberately diluted the influence of minority voters but should be given a pass because that was the only way they could figure out to guarantee the creation of 22 Republican seats.

I. Minority Vote Dilution under Section 2 of the Voting Rights Act and the Equal Protection Clause

A. The Legal Standards

1. The Statute

In 1965 and 1982, Congress passed and then amended Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall "be denied or abridged . . . on account of race, color, or previous condition of

servitude." U.S. Const. amend. XV. Section 2 prohibits what is referred to as "minority vote dilution" – the minimization or canceling out of minority voting strength.

Section 2(a) of the Act prohibits any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color [or membership in a language-minority group]." 42 U.S.C. § 1973(a). Section 2(b) specifies that the right to vote has been abridged or denied if,

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [racial or language-minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. § 1973(b). Section 2 thus prohibits any practice or procedure that, interacting with social and historical conditions, impairs the ability of a racial minority to elect its candidates of choice on an equal basis with other voters.

2. The *Gingles* Preconditions

In the context of redistricting, Section 2 dictates when and how a State must draw district lines to enhance a racial or language minority's voting power. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court established three threshold "preconditions" that Section 2 plaintiffs challenging a redistricting plan must satisfy. First, plaintiffs must show that their minority group is "sufficiently large and geographically compact" to constitute an effective voting majority in a reasonably drawn alternative district. *Id.* at 50. Second, plaintiffs must show that their minority group is "politically cohesive." *Id.* at 51. And third, plaintiffs must show that the white majority votes "sufficiently as a bloc to enable it – in the absence of special circumstances . . . – usually to defeat the minority's preferred candidate." *Id.*

As Justice Scalia has explained, satisfying *Gingles*'s first and second prongs together "establish[es] that the minority has the potential to elect a representative of its own choice in some single-member district," and satisfying the second and third prongs together "establish[es] that the challenged districting [plan] thwarts a distinctive minority vote by submerging it in a larger white voting population. . . . Unless these points are established, there neither has been a wrong nor can be a remedy." *Growe v. Emison*, 507 U.S. 25, 40-41 (1993) (citations omitted).

Thus, if Anglos (non-Hispanic whites) and minority group members were residentially integrated, Section 2 would not apply to redistricting because no minority voter could prove *Gingles*'s first prong. And if Anglos and minority voters consistently preferred the same candidates, Section 2 would not apply because the third prong could never be established. To the extent, therefore, that housing and politics become more racially integrated, Section 2 will diminish as a factor in redistricting.

3. The "Totality of Circumstances"

Even if plaintiffs satisfy all three *Gingles* preconditions, Section 2 may not require a State to redraw districts to enhance minority voting strength. Only if, under the "totality of circumstances," the minority group has less opportunity than Anglos to participate in the political process and to elect representatives of its choice must such districts be created.

a. *De Grandy* Proportionality

Once plaintiffs have met the *Gingles* preconditions, perhaps the most important circumstance to examine under the "totality" inquiry is the "proportionality," or lack thereof, between the number of minority districts and the minority's share of the State's relevant population. It would be very difficult, for example, for a minority group to win a Section 2 case if it constituted 20% of the population but effectively controlled 30% of the State's districts.

In *Johnson v. De Grandy*, 512 U.S. 997 (1994), the Supreme Court held that the totality of circumstances did not support a finding of dilution where the "minority groups constitute effective voting majorities in a number of . . . districts substantially proportional to their share in the population." *Id.* at 1024. Although rough proportionality does not automatically protect a State from liability under Section 2, it is a strong "indication that minority voters have an equal opportunity, in spite of racial polarization, 'to participate in the political process and to elect representatives of their choice.'" *Id.* at 1020 (quoting Section 2). As Justice O'Connor explained, proportionality "is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive." *Id.* at 1025 (O'Connor, J., concurring).

b. Senate Report Factors

In the "totality of circumstances" inquiry, courts sometimes consider the following list of factors, derived from the Senate report accompanying the 1982 amendments to the Voting Rights Act: 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 voting 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 characterized by overt or subtle racial appeals; the extent to which minority group members have been elected to public office; whether there is a lack of responsiveness on the part of elected officials to the minority group's particularized needs; and whether the policy supporting the use of the voting policy or

practice is tenuous. *Gingles*, 478 U.S. at 36-37 (citing S. Rep. No. 97-417, at 28-29, 1982 U.S. Code Cong. & Admin. News 177).

4. Intentional Minority Vote-Dilution Claims under the Equal Protection Clause

While minority vote-dilution claims under Section 2 are based purely on a "results" test, *see Gingles*, 478 U.S. at 35, minority vote-dilution claims under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution require proof that the racial or ethnic discrimination was *intentional*. *See Rogers v. Lodge*, 458 U.S. 613, 617-18 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 61-62, 65-66 (1980) (plurality opinion). When plaintiffs can prove that vote dilution was *intentional*, courts typically demand less of a showing of discriminatory effects. *See, e.g., Garza v. County of Los Angeles*, 918 F.2d 763, 769-71 (9th Cir. 1990) (finding for plaintiffs, even though they could not quite satisfy the numerosity test under the first prong of the *Gingles* test), *cert. denied*, 498 U.S. 1028 (1991); *cf. Holder v. Hall*, 512 U.S. 874, 885 (1994) (remanding the case for consideration of plaintiff's constitutional claim, even though the plaintiff had no valid vote-dilution claim under Section 2 of the Voting Rights Act).

Unlike the standard in racial gerrymandering cases (discussed below), the standard for constitutional claims of minority vote dilution does not require a showing that racial considerations "predominated" over all other considerations. An intent to dilute minority voting strength can violate the Constitution even if it was secondary to some political or partisan motive. What matters is that the state decisionmakers *knew* that their proposed redistricting plan would needlessly undermine minority political power, yet they went ahead and enacted it anyway. That alone suffices to prove unconstitutionally discriminatory intent in the vote-dilution context. *See Garza v. County of Los Angeles*, 918 F.2d at 770 (holding that "plaintiffs

have made out a claim of intentional dilution of their voting strength" because "the County had adopted its current reapportionment plan *at least in part* with the intent to fragment the Hispanic population" (emphasis added).[4]

5. Section 5 Preclearance and Section 2 Liability

Preclearance of a redistricting plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, in no way determines liability under Section 2 of that Act. As the Supreme Court reaffirmed just last Term, the two Sections "'combat different evils and, accordingly, . . . impose very different duties upon the States.'" *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2510 (2003) (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997) (*Bossier Parish I*)). "While some parts of the § 2 analysis may overlap with the § 5 inquiry, the two sections 'differ in structure, purpose, and application." *Id.* (quoting *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion)). Just as a violation of Section 2 is not an independent reason to deny preclearance under Section 5, *see Bossier Parish I*, 520 U.S. at 477, preclearance under Section 5 is not an independent reason to find compliance with Section 2. Indeed, even in States where preclearance is required and has been obtained, neither private plaintiffs nor the U.S. Department of Justice has hesitated to file subsequent Section 2 claims. *See, e.g.*, *Gingles*, 478 U.S. at 34 (invalidating districts in a state-legislative plan that had been precleared); 42 U.S.C. § 1973c (preclearance shall not "bar a subsequent action to enjoin enforcement" of the precleared voting

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[4] An analogous hypothetical may help clarify the point. Suppose a State intentionally created artificial barriers to voting in black neighborhoods such as a requirement that voters pay a fee. Such intentional discrimination could not be defended on the ground that the real ultimate goal was to diminish the impact of voting in the black neighborhoods and thus assure the election of Republicans. Singling out black areas for interference with the franchise would be intentional racial discrimination regardless of some ultimate political goal. The same is true if a State needlessly dismantles a district that gives an under-represented minority group a real opportunity to elect its preferred candidates.

change); 28 C.F.R. § 51.49 (2003) (preclearance "does not constitute the certification that the voting change satisfies any other requirement of the law beyond that of section 5"); *see also Bossier Parish I*, 520 U.S. at 485 ("Of course, the Attorney General or a private plaintiff remains free to initiate a § 2 proceeding if either believes that a jurisdiction's newly enacted [and precleared redistricting plan] . . . may violate that section."). And, for much the same reasons, preclearance of a districting plan under Section 5 does not prevent plaintiffs from bringing a successful claim of *intentional* minority vote dilution under the Equal Protection Clause.

B. Tarrant/Dallas Counties and District 24

The Dallas-Fort Worth metropolitan area is home to more than two million minority group members, many of whom reside in current Districts 24 and 30, both of which are effective minority opportunity districts. But Plan 1374C destroys District 24 as a minority district, slicing its minority population into five pieces and submerging each piece in an overwhelmingly Anglo, Republican district. That intentional cracking of the minority population – especially the African-American community of east Fort Worth, which is the State's third largest concentration of black citizens – violates Section 2 of the Voting Rights Act and the Equal Protection Clause.

1. *Gingles* Prongs 1 and 2 – The Potential to Elect Candidates Preferred by Minority Voters

At trial, plaintiffs will satisfy the first and second prongs of the three-pronged *Gingles* test by establishing that African-American and Hispanic voters in and around Fort Worth have the potential to elect – and indeed have elected – a Representative in Congress of their own choice in current District 24 (under Plan 1151C). In District 24, no single racial or ethnic group constitutes an outright majority of the citizen voting-age population (CVAP).[5]

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[5] Under Plan 1151C, blacks plus Hispanics constitute just under half of District 24's citizen voting-age population (CVAP). At trial, Plaintiffs will present, for demonstrative purposes, a (Cont'd . . .)

Based on bivariate ecological regression analysis of voting patterns and demographics at the precinct level, Professor Allan J. Lichtman of American University will testify that in general elections pitting an Anglo candidate against a minority candidate in this part of the Metroplex, minority voters have given nearly unanimous support to the Democratic candidates. That finding holds regardless of whether Professor Lichtman analyzed votes cast by two groups (Anglo voters and non-Anglo voters) or three groups (African-American voters, Hispanic voters, and all other voters). His analysis of biracial (or bi-ethnic) general elections covered contests for the following offices: U.S. Representative (2002); U.S. Senator (2002, 1996); Attorney General (1994); Land Commissioner (1998); Railroad Commissioner (1998, 1996); and Court of Criminal Appeals Judge (2000).

Professor Lichtman will testify that the near-unanimous minority support for Democratic candidates in this majority-minority district makes it solidly Democratic in the general elections. This district (and its predecessors) have been represented by Democratic Congressmen since Reconstruction. And in statewide elections, Democratic candidates routinely carry the votes cast within current District 24 even when losing badly statewide. For example, in the last two general elections (2000 and 2002), Professor Lichtman will testify that every Democratic candidate who has been strong enough to carry at least 34% of the vote statewide has prevailed within current District 24. On average, the 20 statewide Democratic candidates in those two election cycles garnered more than 56% of the vote in current District 24.

Because nomination in the Democratic primary in current District 24 is therefore tantamount to election, Professor Lichtman also will testify about voting patterns in the

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(. . . cont'd)
slightly modified version of that plan, in which blacks plus Hispanics constitute just *over* half of District 24's CVAP; but functionally, these two versions of District 24 are substantially identical.

Democratic primary and runoff elections. Professor Lichtman will testify that African-American voters consistently dominate these elections in current District 24. Again, he will describe the results of his bivariate ecological regression analyses and will focus primarily on elections pitting at least one Anglo candidate against at least one minority candidate. Professor Lichtman will testify that the Democratic primary electorate in current District 24 in the last four cycles (1996 to 2002) has been roughly 64% African American, and that the Democratic runoff electorate has been roughly 59% African American. He will further testify that the black fraction of the primary and runoff electorates in this district has been rising in recent years and now sometimes exceeds 70%. Thus, blacks – either alone or in combination with Hispanics – can determine which candidates will win the Democratic nomination in this solidly Democratic district.

Professor Lichtman will testify that this African-American primary majority is politically cohesive. For example, in the 2002 Democratic primary for U.S. Senate, which featured strong candidates from all three major demographic groups (African-American Ron Kirk, Hispanic Victor Morales, and Anglo Ken Bentsen), 99% of the votes cast by African-Americans in Tarrant and Dallas Counties went to Kirk. In the 2002 runoff with Mr. Morales, Mr. Kirk received 98% of the black vote in Tarrant and Dallas Counties. Likewise, in the 1998 Democratic primary for Attorney General, African-American candidate Morris Overstreet won 66% of the black vote in Dallas County and 76% of the black vote in Tarrant County even though his Anglo opponent, unlike Overstreet, was from the Metroplex.

Although African-Americans and Hispanics exhibit extremely high cohesion in the general elections, and African-Americans are highly cohesive in the Democratic primaries and runoffs (where they constitute a clear majority of the electorate), the State may attempt to

highlight the lack of cohesion between Metroplex African-Americans and Hispanics in the Democratic primaries. Under that theory, the absence of Democratic-primary cohesion between the two minority groups would prevent plaintiffs from combining the two groups to form a "majority black-plus-Hispanic" district. Having a district where blacks plus Hispanics constitute a literal, mathematical majority, the theory would go, is important under the Fifth Circuit's precedents in *Perez v. Pasadena Independent School District*, 165 F.3d 368 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000), and *Valdespino v. Alamo Heights Independent School District*, 168 F.3d 848 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000). The *Perez* and *Valdespino* courts rejected Section 2 challenges to at-large election systems because the Hispanic plaintiffs had failed to present any "demonstration district" in which Hispanics exceeded 50.0% of the citizen voting-age population (CVAP). But as a matter of law, the absence of black-Hispanic cohesion in the Democratic primaries is irrelevant here, for three reasons.

First, this defense theory does not comport with Fifth Circuit caselaw on the "50% rule." The cases requiring plaintiffs to show that blacks plus Hispanics constitute at least 50% of a demonstration district's citizen voting-age population (CVAP) demand minority political cohesiveness only in the elections that actually determine the ultimate winners. For nonpartisan offices, such as school board members, the electoral process involves a single election. Because every adult citizen in the jurisdiction can vote in that election, it makes sense to require that the plaintiffs represent a group or groups that comprise an outright majority of the jurisdiction's citizen voting-age population.[6] The same is true for *general* elections for partisan offices such as Representatives in Congress. But in a partisan *primary* election, the demographic composition

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[6] *See, e.g., Campos v. City of Baytown*, 840 F.2d 1240, 1245, 1248 (5th Cir. 1988) (requiring creation of a district where "Blacks and Hispanics, as one minority," form a politically cohesive majority), *cert. denied*, 492 U.S. 905 (1989).

of the entire jurisdiction's citizen adult population is irrelevant as much of that population is ineligible to participate precisely because they are participating in the *other* political party's primary. Current District 24 provides a good example of this point. Because most Anglo primary voters opt to participate in the Republican rather than Democratic primary, a district that is nearly half Anglo in CVAP has an overwhelmingly minority electorate in the Democratic primaries. The Republican primary electorate in current District 24 is almost entirely Anglo, but the candidates they nominate are almost certain to lose in November, given the extremely cohesive Democratic voting behavior of the district's black and Hispanic voters in the general elections. But in the all-important Democratic primary, the electorate is predominantly black and minority-preferred candidates routinely prevail.

Second, the Fifth Circuit's strict 50% rule was enunciated in *Perez* and *Valdespino*, both of which were challenges to systems that elected school board members through at-large (non-district-based) elections. In those cases, plaintiffs claimed that replacing the at-large elections with district-based elections could create at least one single-member district where minority voters would have a realistic opportunity to elect their preferred candidates. Because that assertion was necessarily speculative (since district-based elections had never been held), the courts demanded proof that the minorities would actually constitute majorities of the adult citizen population in the proposed single-member districts. That proof served as a reasonable proxy for plaintiffs' assertion that a single-member district would "perform" for the minority groups in question. Here, plaintiffs' claim involves no speculation or conjecture. Plaintiffs are asking not for change, but rather for maintenance of a status quo that has well served minority voters in Tarrant and Dallas Counties. Plaintiffs here can be distinguished from those in *Perez* and *Valdespino* not only because they challenge a single-member districting plan (rather than an

at-large scheme), but also because they simply seek the restoration of a district that has already proven effective for minority voters – current District 24. To the best of Plaintiffs' knowledge, the Texas Legislature's decision to completely wipe out an effective minority district is almost unprecedented. The one exception we have found is *Metts v. Murphy*, 347 F.3d 346 (1st Cir. 2003), in which the Rhode Island legislature wiped out the State's one effective black state-senate district. In rejecting the 50% rule there, the First Circuit explained: "[T]his case presents a claim not merely of an abstract hope to elect the African-American voters' preferred candidate . . . . [The] loss is much more concrete. . . . [T]he minority group's historical voting success makes this an easier case." *Id.* at 357; *see also Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (noting that the first *Gingles* prong "cannot be applied mechanically and without regard to the nature of the claim"). A rigid rule denying plaintiffs relief because blacks alone do not constitute an outright majority of the district's CVAP would give States a license to wipe out *all* effective minority districts that are less than 50% black and less than 50% Hispanic. But in a Nation that is becoming increasingly diverse demographically, districts like Texas's current District 24 – where no demographic group constitutes an outright majority – are critically important to ensuring the further integration of American electoral politics.

Third, as mentioned above, when the discriminatory effects of a districting scheme are shown to be intentional, they may be challenged under both the Voting Rights Act and the Equal Protection Clause. As explained in more detail below, Professor Lichtman and a host of lay witnesses will testify that the destruction of current District 24 was purposeful. In such cases, strict adherence to the 50% rule should be waived. Indeed, that is exactly what the Ninth Circuit did in the seminal case of *Garza v. County of Los Angeles*, 918 F.2d at 969-71.

2. *Gingles* Prongs 2 and 3 – Plan 1374C Thwarts the Distinctive Minority Vote

Plaintiffs also will present evidence showing that Plan 1374C will thwart the distinctive minority vote in and around Fort Worth. Professor Lichtman will testify that the State's Plan 1374C fragments, or "cracks," the entire minority population from current Plan 1151C's District 24 among five heavily Anglo, heavily Republican districts. African-Americans and Latinos will form ineffective minorities in each of these five districts. Anglo adult citizens constitute at least 71% of the CVAP – and outnumber black adult citizens by at least five-to-one – in each of these five districts. Professor Lichtman will testify that a majority of these Anglo voters routinely vote against minority-preferred candidates in the general elections; indeed, in the statewide general elections involving minority candidates, the minority-preferred candidates typically win only a quarter to a third of the Anglo vote in Tarrant and Dallas Counties. Thus, no Democratic statewide candidate has carried any of these five districts in the last nine years. Professor Lichtman will further testify that the TLC's statewide Democratic indices for 1998, 2000, and 2002 range between 29.5% and 41.0% in each of these five districts. Because African-American and Hispanic voters in Tarrant and Dallas Counties are nearly unanimous in supporting Democratic candidates, there is no realistic chance that African-Americans or Hispanics will elect Representatives of their choice from any of these five districts. Thus, Plaintiffs will easily satisfy the third prong of *Gingles* by showing that Anglos in these five districts vote sufficiently as a bloc to enable them usually to defeat the minorities' preferred candidates.

3. The "Cracking" of Minorities in the Fort Worth Area Was Intentional

Although Section 2 does not require proof that racially discriminatory districting was intentional, the Equal Protection Clause does. Here, the dilution of minority voting strength in and around Fort Worth was knowing and purposeful.

Professor Lichtman will testify as to both circumstantial and direct evidence of intentional vote dilution. As for circumstantial evidence, he will show that Plan 1374C's districting in and around Tarrant and Dallas Counties cannot be justified by traditional, nonracial districting principles such as geographic compactness, preservation of communities of interest, protection of influential incumbents, maintenance of cores of existing districts, or respect for county lines. As for direct evidence, he will summarize statements made during the legislative process by State Representative Phil King (the leader of the congressional redistricting effort in the House), by State Senator Chris Harris of Tarrant County, and by Professor Gaddie (the State's lead expert) – all of whom readily admitted that dismantling current District 24 would undermine minority voting strength in the Metroplex and likely trigger serious Voting Rights Act problems.

C. The Rio Grande Region and District 23

Under either the Court-drawn Plan 1151C or the State's proposed Plan 1374C, District 23 covers the bulk of the region that runs along the Rio Grande River from the outskirts of El Paso to Laredo in Webb County, and ranging as far north as Interstate 10 and San Antonio. Both versions of the district are majority-Hispanic in total population. And more than 81% of the population of either version also resides in the other version. But by dramatically altering the remaining 19% of the district's population – removing Hispanic Democrats from Webb County and replacing them with Anglo Republicans from the San Antonio suburbs and Hill Country – the State has completely undermined the opportunity for Hispanic citizens in this region of Texas to elect their preferred candidates to Congress. That intentional cracking of the Hispanic population violates Section 2 of the Voting Rights Act and the Equal Protection Clause.

1. *Gingles* Prongs 1 and 2 – The Potential to Elect Candidates Preferred by Hispanic Voters

At trial, Plaintiffs will satisfy the first and second prongs of the three-pronged *Gingles* test by establishing that Hispanic voters in the Rio Grande region have the potential to elect a Representative in Congress of their own choice in current District 23, under Plan 1151C. In current District 23, Hispanics constitute 66.8% of the total population and 57.5% of the citizen voting-age population, according to the Texas Legislative Council (TLC). As of last year, 55.3% of the district's registered voters have Spanish surnames – and that figure is climbing rapidly. As the district has become more Hispanic, it has become increasingly likely not only to nominate Hispanic-preferred candidates in the Democratic primaries (which attract the participation of the vast majority of Hispanic primary voters); but it also has become increasingly likely to elect those Hispanic-preferred Democratic nominees in the November general elections.

Based on bivariate ecological regression analysis of voting patterns and demographics at the precinct level, Professor Lichtman will testify that in general elections pitting an Anglo candidate against a Hispanic candidate in this region, minority voters have given anywhere from 70% to 99% of their votes to Democratic candidates. His analysis of bi-ethnic general elections covered contests for the following offices: U.S. Representative (2002, 2000, 1998, 1996); U.S. Senator (1996); Governor (2002); Attorney General (1994); Land Commissioner (1998); Railroad Commissioner (1998, 1996); Supreme Court Justice (2002); and Court of Criminal Appeals Judge (2002, 2000). In the 2002 contests, Hispanic support for Hispanic Democrats consistently ran between 92% and 99%, as Hispanic cohesion, which was strong throughout the period Professor Lichtman examined, has become even stronger.

Professor Lichtman will testify that the increasing support that Hispanics in current District 23 have given to Democratic candidates – in combination with the rapid growth in the

percentage of registered voters who have Spanish surnames – has made this district increasingly Democratic. In November 2002, 14 of the 16 Democratic candidates in statewide general elections carried this district. Indeed, Professor Lichtman will testify that every Democratic candidate who was strong enough to carry at least 39% of the vote statewide prevailed within current District 23. On average, the 2002 statewide Democratic candidates won 52.5% of the major-party vote.

But Congressman Henry Bonilla, the Representative from current District 23, is not the candidate of choice of Hispanic voters. He won initially in 1992 against a scandal-tainted Hispanic Democratic incumbent and has held on to office ever since. But as the district has become increasingly Hispanic, and the Hispanic vote has become increasingly cohesive, Congressman Bonilla's winning margins have been cut closer and closer. In November 2002, despite heavily outspending his Hispanic Democratic challenger, Congressman Bonilla won with only 51.5% of the total vote. Professor Lichtman will testify that Congressman Bonilla's Hispanic support in that election slipped to a new low, as only 8% of Hispanic voters supported him. If present trends continue, Congressman Bonilla will likely soon be replaced by a Hispanic-preferred Democratic challenger.

Professor Lichtman will also testify that the Democratic nominee will likely be the candidate chosen by a cohesive Hispanic Democratic-primary electorate. In the 2002 Democratic primaries, three statewide elections (for U.S. Senator, Land Commissioner, and Agriculture Commissioner) pitted one Hispanic candidate against at least one credible non-Hispanic candidate. On average, 78% of Hispanic voters in current District 23 supported the Hispanic candidate. Although none of these three Hispanic candidates was strong enough to win the Democratic nomination statewide, each prevailed within current District 23 by at least 25

percentage points. Thus, Hispanics in current District 23 are politically cohesive in both the Democratic primaries and the general elections and have a realistic opportunity to elect their preferred candidate to Congress – even if he or she has to run against an incumbent Representative such as Congressman Bonilla.

2. *Gingles* Prongs 2 and 3 – Plan 1374C Thwarts the Distinctive Minority Vote

Plaintiffs also will present evidence showing that Plan 1374C will thwart the distinctive minority vote in the Rio Grande region. Professor Lichtman will testify that the State's Plan 1374C "cracks" the bulk of the Hispanic population from current Plan 1151C's District 23 by placing it in the same district as northwestern suburbs of San Antonio and Hill Country communities in Bandera, Kendall, and Kerr Counties. Although these newly added areas constitute less than 19% of the total population of the State's proposed District 23, they are relatively high in turnout and they are overwhelmingly Anglo and Republican. Moreover, they replace the eastern half of Laredo and Webb County, which is 96% Hispanic and 86.5% Democratic (according to TLC's 2002 statewide index). The net effect of the swap is to transform District 23 from a competitive, but Democratic-leaning district where Hispanic voters have an excellent opportunity to nominate and elect their preferred candidate into a noncompetitive, solidly Republican district where Hispanic voters will be deprived of that opportunity. Although the district becomes 9 points more Republican and 13 percentage points less Hispanic, it remains majority-Hispanic in total population (though not in citizen voting-age population or in registered voters). Thus, more than 359,000 Hispanic residents are stranded in a district where they have no realistic hope of electing their preferred Representative any time in this decade.

Professor Lichtman will testify that anywhere from 79% to 88% of Anglo voters in the Rio Grande region vote against Hispanic-preferred candidates in the general elections. Congressman Bonilla, for example, has consistently garnered between 83% and 88% of the non-Hispanic vote, while his Hispanic Democratic challengers have handily carried the Hispanic vote. And in the three statewide elections in November 2002 that involved Hispanic Democrats running against Anglo Republicans, Anglo voters in this region cast between 79% and 85% of their votes for the latter candidates. Professor Lichtman and Professor John R. Alford of Rice University will testify that this overwhelming Anglo support for Republican candidates has prevented the last 42 Democratic statewide candidates from carrying Plan 1374C's proposed District 23, dating back all the way to 1996. The TLC's statewide Republican indices for 1998, 2000, and 2002 range between 56.8% and 63.5% in proposed District 23. Because Hispanic voters in this region overwhelmingly support Democratic candidates, there is no realistic chance that Hispanics could elect Representatives of their choice from this district. Thus, Plaintiffs will easily satisfy the third prong of *Gingles* by showing that Anglos in this district vote sufficiently as a bloc to enable them usually to defeat the minorities' preferred candidates.

3. The "Cracking" of Hispanics in the Rio Grande Region Was Intentional

The dilution of Hispanic voting strength in the Rio Grande region was knowing and purposeful. Professor Lichtman will testify as to both circumstantial and direct evidence of intentional vote dilution. As for circumstantial evidence, he will show that Plan 1374C's version of District 23 (and of neighboring Districts 21 and 28) cannot be justified by traditional, nonracial districting principles such as geographic compactness, preservation of communities of interest, maintenance of cores of existing districts, or respect for county or municipal lines. The only traditional, nonracial districting practice fostered by these changes was the protection of one

incumbent Representative – Congressman Bonilla. But as described above, he has never been the candidate of choice of Hispanic voters, and in November 2002 his Hispanic support dropped to an all-time low of 8%. As for direct evidence, Professor Lichtman will summarize statements made during the legislative hearings by State Senator Jeff Wentworth and by Professor Gaddie (the State's lead expert). They admitted that these changes were made to bolster Congressman Bonilla's reelection prospects by protecting him from the growing, and growingly hostile, Hispanic vote in current District 23.

D. Minority Influence Districts

Defendants have also violated the Equal Protection Clause and Section 2 of the Voting Rights Act by intentionally destroying seven minority influence districts (current Districts 1, 2, 4, 9, 10, 11, and 17) and placing most of their minority constituents in new districts where they will have only a minimal role in the electoral process. The Equal Protection Clause and Section 2 protect the rights of minority voters "to participate in the political process," as well as "to elect representatives of their choice." 42 U.S.C. § 1973(b). Therefore, it is appropriate to consider not only the districts where minorities have the potential to nominate and elect their preferred candidates, but also the "influence districts" where minority voters "can play a substantial, if not decisive, role in the electoral process." *Georgia v. Ashcroft*, 123 S. Ct. at 2512. In *Georgia v. Ashcroft*, a recent case interpreting Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the Supreme Court held that States may choose to draw *fewer* districts where minority voters have a realistic opportunity to elect their preferred candidates if that allows them to draw *more* influence districts and thereby achieve greater substantive representation for African-Americans and Hispanics "by increasing the number of [Anglo] representatives sympathetic to the interests of minority voters." 123 S. Ct. at 2513. Here, the State has simultaneously eliminated two effective minority opportunity districts (Districts 24 and 23, both described above) *and* seven

minority influence districts (Districts 1, 2, 4, 9, 10, 11, and 17). For minority voters in Texas, the State's map offers a lose-lose proposition.

At trial, Professor Lichtman will testify that these seven influence districts contain black plus Hispanic population percentages ranging from 21.4% to 44.4%, and that with one exception (current District 10) these districts generally vote Republican in statewide contests. Anglo Democratic congressional incumbents in these districts (Congressmen Max Sandlin, Jim Turner, Ralph Hall, Nick Lampson, Lloyd Doggett, Chet Edwards, and Charlie Stenholm, respectively) have generally garnered roughly half of the Anglo vote in these districts; but when faced with even moderately well-financed or serious challengers, they have usually lost the Anglo vote. But they have prevailed districtwide on the strength of near unanimous support from black and Hispanic voters. Not surprisingly, these candidates have paid considerable attention to their most loyal constituents and have generally earned high "marks" on the legislative report cards issued by minority organizations such as the NAACP and the Hispanic Leadership Conference.

But, as Professor Lichtman will show, Plan 1374C scrambles these voters, placing most of them – and all seven of their Democratic Representatives – in new districts where the average Democratic statewide candidate (between 1996 and 2002) has received only 32.3% to 40.5% of the vote. Three of these seven incumbents have been "paired" with other incumbents, and the other four have been placed in districts where at least three out of five constituents are new and unfamiliar and therefore more likely to vote along party lines. Members of Congress and local leaders will supplement this expert testimony with their own testimony relating first-hand electoral experiences in these districts.

E. *De Grandy* Proportionality Statewide

Defendants might claim that Plaintiffs' Section 2 claims fail under the proportionality standard enunciated in the Supreme Court's *De Grandy* case. That would be incorrect, as to both African-Americans and Hispanics.

African-Americans constitute roughly an eighth of the statewide population, which is the equivalent of 4 districts out of 32. Defendants cannot possibly contend – and do not even try to contend – that they have drawn four congressional districts where African-American citizens constitute effective voting majorities. Rather, their Plan 1374C attempts to create three such districts – proposed Districts 18 and 9 in the Houston area and proposed District 30 in the Dallas area – while destroying a fourth such district in the Fort Worth area (District 24). The three black districts in Plan 1374C have black citizen voting-age population (CVAP) percentages ranging from 46.8% to 50.6%. The other 29 districts in that plan range from 2.1% to 19.3% black CVAP, as the remainder of the State's African-American population is "cracked" and rendered politically ineffective. Indeed, outside of the three black districts, Plan 1374C submerges the vast majority of the State's black adult population in overwhelmingly Republican districts.

As for Hispanics, Plan 1374C also fails to reach substantial proportionality. Of the State's total population (including children and noncitizens), nearly a third is Hispanic – roughly the equivalent of 10.6 districts out of 32. Even if one excludes children and noncitizens and focuses solely on CVAP, the State is nearly one quarter Hispanic, or roughly the equivalent of 7.4 districts out of 32. Although Plan 1374C establishes eight districts that are technically "majority-Hispanic" in total population, only six are majority-Hispanic in their adult citizen population or in their registered-voter population. And, as discussed above, one of the other two

majority-Hispanic districts (proposed District 23) is so overwhelmingly Republican that it cannot elect a Hispanic-preferred candidate.

Because Plan 1374C achieves proportionality for neither blacks nor Hispanics, it is not surprising that it falls short for the combined minority group, too. Again depending on which population base one uses, the combined black-plus-Hispanic population of the State is equivalent to somewhere between 11 and 15 districts out of 32. But substantial proportionality for Texas's growing minority population was out of the question once the Legislature decided to create 22 safely Republican districts and only 10 Democratic districts.[7]

F. Senate Report Factors in Texas

Professor Lichtman will also testify about some of the Senate report factors that are most relevant in the context of congressional redistricting. First, as already outlined, he will testify that voting in Texas is significantly racially polarized. Second, he will testify that African-Americans and Hispanics are under-represented in the Texas congressional delegation, the Texas

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[7] The State takes every opportunity to trumpet its creation of three new open-seat (*i.e.*, incumbent-less) "minority" districts, as if these gains could somehow cure the harms that Plan 1374C would inflict on minority voters elsewhere in the State. But upon closer inspection, these supposed gains melt away. District 29 in Plan 1374C is functionally indistinguishable from District 29 in Plan 1151C; both will likely reelect Congressman Gene Green and, if he were to retire, would likely replace him with another Hispanic-preferred Democratic Congressman. If anything, the State's proposed version of District 29 is slightly *less* hospitable to Hispanic-preferred candidates than Plan 1151C's version. Plan 1374C's majority-Hispanic District 25 is merely the State's effort to offset the loss of current District 23 as an effective Hispanic opportunity district, described above. But it cannot possibly offset *both* that loss *and* the loss of current District 10 as a minority influence district, also discussed above, not to mention the potential weakening of District 15 as an effective Hispanic opportunity district. (Professor Lichtman will testify, and the State's expert, Professor Gaddie, will confirm that Plan 1374C transforms District 15 from a district with a majority-Hispanic electorate into a district where only 38% of the voters in the general elections are Hispanic.) And finally, Plan 1374C's proposed District 9 in the Houston area will likely function as current District 25 does – reelecting Congressman Chris Bell so long as he retains his ability to work across racial lines and attract substantial support from every demographic group within the diverse communities of southern Harris County and eastern Fort Bend County.

Senate, the Texas House of Representatives, and at all other levels of public officeholding, even when compared with their percentages of the citizen voting-age population, much less with their percentages of the total population. Third, he will testify that Members of Congress elected from the most heavily Anglo districts are substantially less responsive to the particularized needs of the African-American and Hispanic communities. And fourth, he will testify that the relatively poor socioeconomic status of African-Americans and Hispanics in Texas – in terms of education, income levels, unemployment, and percentages of households with telephones and vehicles – correlates with low levels of turnout and participation in the political process. (Expert and lay witnesses called by other plaintiffs in the case will further testify to Texas's history of official discrimination as it affected minority group members' rights to register, to vote, and otherwise to participate in the democratic process.)

Thus, under the totality of circumstances, Plaintiffs will prove that Plan 1374C illegally abridges African-American and Hispanic citizens' rights to vote for Representatives in Congress.

II. Racial Gerrymandering

Plan 1374C also contains at least five unconstitutional racial gerrymanders: proposed Districts 15, 25, and 28, stretching from the Mexico border all the way to central Texas; proposed District 29 in the Houston area; and proposed District 30 in the Dallas area. Each of these districts violates the Equal Protection Clause because racial considerations were the predominant motive in their creation.

A. The Legal Standard

In 1993, in *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court announced a new constraint on the redistricting process, declaring that the Equal Protection Clause prohibits the excessive and unjustified use of race in drawing district lines. Equal-protection claims of racial gerrymandering under the *Shaw* doctrine are "analytically distinct" from equal-protection claims

of minority vote dilution. *Id.* at 652. While a vote-dilution claim alleges that the State's districting plan disempowers voters of a particular race or ethnicity, a racial-gerrymandering claim alleges that the State has used race as the basis for separating voters into districts. *See Miller v. Johnson*, 515 U.S. 900, 911 (1995). In *Miller v. Johnson*, the Court explained that the "plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 916. To make that showing, plaintiffs must prove that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Id.* The Court has identified five key traditional principles: (1) contiguity; (2) compactness; (3) respect for political subdivisions such as counties and municipalities; (4) respect for communities defined by actual shared interests; and (5) avoiding the needless pairing of two or more incumbent Representatives in a single district. *See Bush v. Vera*, 517 U.S. 952, 964 (1996) (plurality opinion); *Miller v. Johnson*, 515 U.S. at 916; *Shaw v. Reno*, 509 U.S. at 646-47. A district's bizarre shape can be "relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller v. Johnson*, 515 U.S. at 913.

In the *Shaw* and *Vera* cases, the Supreme Court struck down congressional districts in North Carolina and Texas, respectively, that were bizarrely shaped, as they meandered through metropolitan areas, picking up African-American or Hispanic population literally on a block-by-block basis. These districts generally were peculiar looking not because they were elongated, but

rather because their edges were dramatically irregular and jagged. As the *Vera* Court put it, these "'districts are so finely "crafted" that one *cannot* visualize their exact boundaries without looking at a map at least three feet square.'" 517 U.S. at 973 (plurality opinion) (citation omitted). But in *Miller v. Johnson*, the Court invalidated a Georgia congressional district whose edges were not particularly jagged. The Georgia district had concentrations of black voters in the three "corners" of the district, in Savannah, Augusta, and the Atlanta suburbs; the "middle" of the district was relatively unpopulated and served primarily to hold together the three far-flung population centers, in one contiguous district. *See Miller v. Johnson*, 515 U.S. at 928 (Appendix B) (color map showing population densities within the district). Although its edges lacked the finely serrated appearance of the North Carolina and Texas districts, the Georgia district was nonetheless invalidated as an unconstitutional racial gerrymander because it was held together, at least figuratively, by race. Indeed, the district's elongated appendages reaching to Savannah and Augusta could not be explained on any basis other than race. *See id.* at 917.

Political scientists have developed two quantitative measures of compactness to capture both the jaggedness of districts like those struck down in North Carolina and Texas and the elongation or dispersion of districts like the one struck down in Georgia. The Texas Legislative Council (TLC) calculates these compactness scores for all districts in plans publicly released on their web-based computer system. The TLC's "Perimeter to Area" measure captures the irregularity or jaggedness of the district's border by calculating the ratio of the area of a circle with the same perimeter as the district to the area of the district. A circular district would get a perfect score of 1.0; but as the district's perimeter becomes more convoluted, that score would increase. The TLC's "Smallest Circle" measure captures how tightly packed or spread out a district is by calculating the ratio of the area of the smallest circle enclosing the district to the

area of the district. Again, a circular district would get a perfect score of 1.0, but as the district is stretched into a long, thin oval or string-bean shape, that score also would increase.[8] As discussed below, the most notable racial gerrymanders in Plan 1374C are the elongated districts stretching north from the Mexico border all the way to central Texas. Their peculiarly elongated shapes give them extremely poor scores under this Smallest Circle measure.

Relying on circumstantial evidence such as compactness scores or on direct evidence of legislative purpose, a court may find that race predominated over traditional race-neutral districting principles. If so, the district is *presumptively* unconstitutional. Defendants can overcome that presumption only by showing that the use of race was narrowly tailored to serve a compelling state interest in complying with the Voting Rights Act or otherwise remedying past discrimination. *See Bush v. Vera*, 517 U.S. at 976-77 (plurality opinion); *Shaw v. Hunt*, 517 U.S. 899, 908-16 (1996).

B. The South Texas-Based "Bacon Strip" Districts

Plan 1374C's most glaring racial gerrymanders are the three long, narrow "bacon strip" districts that start along the Rio Grande River in South Texas and snake their way north toward Austin. Each district is roughly 300 miles long and in some places less than 10 miles wide. Rice University political science Professor John R. Alford will testify that the formation of these three districts was driven by the legislative leaders' frequently announced desire to "beat" the court-drawn Plan 1151C by creating eight majority-Hispanic districts rather than seven. But as

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[8] The Supreme Court has repeatedly relied on these two measures in adjudicating racial-gerrymandering claims, although the study they have cited uses the reciprocal of the TLC scores (so 1.0 is a perfect score but a poor score is closer to zero). *See, e.g., Bush v. Vera*, 517 U.S. at 960, 973 (plurality opinion) (citing Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 554 & n.200, 555 & n.203 (1993)).

explained above, one of those eight districts – Congressman Bonilla's District 23 – had to be majority-Hispanic in total population yet sufficiently Anglo and Republican to thwart Hispanic voters' desire to replace him with a Hispanic Democrat. Having "stranded" more than 350,000 Hispanics in a district where Hispanic voters could not elect their preferred candidates, Plan 1374C's designers then set out to squeeze an extra, compensatory district out of South Texas. But under Plan 1151C, the four border counties in the southernmost part of the State (Cameron, Hidalgo, Starr, and Zapata) already form the base of three majority-Hispanic districts (current Districts 27, 15, and 28, represented by Congressmen Ortiz, Hinojosa, and Rodriguez, respectively). By squeezing one additional district (proposed District 25) in between Districts 15 and 28, Plan 1374C's drafters had to make each of the three existing districts narrower. And to satisfy one-person, one-vote, these narrower districts then had to become longer and stretch further north.

From east to west, the four districts based in South Texas are Districts 27, 15, 25 (the new one), and 28. District 27 gave up part of Cameron County (which the *Balderas* Court had intentionally kept whole) and instead pushed north into San Patricio County. District 15 pushed eastward into Refugio County and northward into DeWitt, Lavaca, Colorado, Fayette, and Bastrop Counties – reaching 300 miles all the way to the eastern edge of Travis County. Just as Districts 27 and 15 were pushed north and east to accommodate District 25, District 28 was pushed north and west. In order to make District 23 less Hispanic and more Republican, District 28 picked up the eastern half of Laredo and Webb County. And rather than stopping its northward march in Bexar County, the redesigned District 28 winds its way along Interstate 35 all the way to the southern edge of Travis County. Along the way, it splits two additional counties and three additional municipalities to pull the bulk of the Hispanic population out of

Comal and Hays Counties. But the award for the oddest district would have to go to the new District 25, which starts in McAllen, in Hidalgo County, slides over to Starr County, and then snakes up through six barely contiguous and very sparsely populated counties before reaching into Travis County and pulling out Austin's most Hispanic neighborhoods. Demographically, the district is like a barbell, with 253,000 residents at the northern end in Travis County, 301,000 at the southern end in Hidalgo and Starr Counties, and less than 96,000 in the six intervening counties. But the more pertinent analogy is not to a barbell, but rather to the Georgia district invalidated in *Miller v. Johnson*.

Professor Alford will testify that the three "bacon strip" districts – Districts 28, 15, and 25 – rank as the 29th, 31st, and 32nd least compact districts in Plan 1374C, using the Smallest Circle measure. District 28 ties the worst score in Plan 1151C and Districts 15 and 25 score significantly worse than any of the Court-drawn districts. Indeed, the Smallest Circle score of District 25 – the new McAllen-to-Austin district – is worse than any of the districts in Texas's 1991 congressional plan (including the three that were struck down as racial gerrymanders in *Bush v. Vera*), any of the districts in the current Texas Senate plan, any of the districts in the current Texas House plan, and any of the districts in the current Texas State Board of Education plan. Had proposed District 25 been drawn in the early 1990s – in the heyday of bizarre districts, before the worst abuses were struck down as racial gerrymanders under the new *Shaw* doctrine – it would have rated among the ten least compact districts in the United States according to the Smallest Circle measure, as Professor Alford will testify.

All three of these "bacon strip" districts trigger strict scrutiny because, in each case, ethnicity predominated over traditional principles of compactness, respect for counties and municipalities, and respect for communities defined by actual shared interests (as opposed to

"communities" defined by nothing but ethnicity). Furthermore, these districts could not possibly survive strict scrutiny because the Voting Rights Act did not require their creation. Indeed, Plan 1151C (unlike Plan 1374C) complies with the Voting Rights Act because it does not strand 359,000 Hispanics in an utterly ineffective District 23. Thus, there was no compelling state interest that drove the odd formations of the three long, skinny districts emanating from South Texas.

C. District 29 in Harris County

Proposed District 29 in Harris County is also an unconstitutional partisan gerrymander. Professor Alford will testify that the desire to maximize the Hispanic percentage in District 29, while also maximizing the African-American percentages in proposed Districts 18 and 9, drove the State to build District 29 from two noncontiguous pockets of Hispanic population that are separated by a pocket of black population. In order to maintain contiguity, District 29 contains an "arm" or "neck" that sweeps around to the northeast, bypassing the black neighborhoods that were placed in District 18. The "arm" is relatively unpopulated, but serves as a "land bridge" connecting the two Hispanic pockets of District 29. All of this was unnecessary, of course, because current District 29 in Plan 1151C was already consistently electing the candidate preferred by Hispanic voters.[9]

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[9] Professor Alford will also testify that the State was overly concerned with the ethnicity of the incumbents, as opposed to that of the voters. Plan 1151C contains two majority-Hispanic districts that are not currently represented by Hispanic Democrats. District 29 has consistently reelected an Anglo Democratic incumbent (Congressman Gene Green) who is the candidate of choice of Hispanic voters; and District 23 has consistently reelected a Hispanic Republican incumbent (Congressman Bonilla) who is *not* the candidate of choice of Hispanic voters. Yet the Legislature opted to make District 29 *more* Hispanic and District 23 *less* Hispanic because it was fixated on the ethnicity of the incumbents rather than the preferences of Hispanic voters. That alone turns the Voting Rights Act on its head and violates the Equal Protection Clause.

D. District 30 in Dallas County

Proposed District 30 in Dallas County is also based on an excessive and unjustified use of race. The district is not particularly jagged or elongated, but it appears to have been drawn with the overriding intent to create a district in which blacks constitute a mathematical majority of the citizen voting-age population (CVAP). Plan 1151C contains no such districts, yet its District 30 had proven effective in electing Congresswoman Johnson, the black-preferred candidate. Other than meeting the arbitrary goal of 50% black CVAP, there appears to be no good reason for the State to have redrawn this district.

III. Partisan Gerrymandering

The Court has already had the benefit of extensive briefing by the parties on the legal standards governing partisan gerrymandering.[10] Plaintiffs have argued that it is sufficient – under the Equal Protection Clause as interpreted in *Davis v. Bandemer*, 478 U.S. 109 (1986), and under the arguably stricter standards governing congressional redistricting derived from Article I of the Constitution – for them to show that Plan 1374C (1) was the product of a predominant *intent* to achieve unfair partisan advantage, and (2) will have the *effect* of so skewing electoral outcomes that Democrats would have no chance of winning a majority of the seats in the Texas congressional delegation even if they repeatedly won a narrow majority of the votes statewide. This two-part test, which matches the one being proposed to the Supreme Court in *Vieth v. Jubelirer*, is built on the language of *Bandemer* itself. *See id.* at 127 (plaintiffs must "prove both

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[10] Plaintiffs have also extensively briefed the related issue of whether Article I of the Federal Constitution prohibits States from replacing perfectly lawful congressional districting plans in the middle of a decade merely in order to maximize one political party's share of congressional seats. *See People ex rel. Salazar v. Davidson*, Nos. 03SA133, 03SA147, 2003 WL 22833085 (Colo. Dec. 1, 2003) (invalidating mid-decade congressional redistricting on state-constitutional grounds, and raising prudential concerns that also support the Article I argument Plaintiffs raise here).

intentional discrimination against an identifiable political group and an actual discriminatory effect on that group"). But Plaintiffs propose to heighten the intent requirement by adding the concept of a "predominant" intent subsequently developed by the Court in the *Shaw v. Reno* line of cases. *See, e.g.*, *Miller v. Johnson*, 515 U.S. at 916. We also propose to sharpen the effects test by focusing on whether the redistricting plan is very likely to guarantee one party a substantial majority of the seats even if the other party wins a narrow majority of the votes.

Defendants argue that Plaintiffs should have to show, in addition, that as Democrats they are being prevented from organizing, campaigning, or voting. But while that test finds support in the post-*Bandemer* caselaw in the lower courts, it ultimately makes no sense. Those other burdens would themselves be unconstitutional regardless of whether the redistricting plan were fair or unfair. They will also never be inflicted by a State on a major political party. So under Defendants' interpretation of *Bandemer*, the Supreme Court's ruling that partisan gerrymandering is justiciable is meaningless because (1) such a claim could never be won and (2) no amount of bias in a districting map (*i.e.*, no amount of "gerrymandering") could by itself be unconstitutional.

In any event, as we have argued, it is essential in this situation to have the largely undisputed facts relating to this claim put in the record so that the Supreme Court can rule on the likely emergency application for a stay or injunction pending appeal that will be filed there by whichever side loses here. As the Court is aware, the Supreme Court has before it the *Vieth v. Jubelirer* case in which it may well clarify the standards that apply under *Bandemer*. That Court may well know, by the end of this trial, where it is headed with those standards and may well be convinced to intervene here if the relevant evidence has been presented by the parties and analyzed by this Court.

We summarize the anticipated evidence on partisan gerrymandering below.

A. Evidence of Partisan Intent

A predominant discriminatory intent in the drawing of district lines can be shown both through direct evidence and through circumstantial evidence. Here, there is substantial evidence in both categories establishing that partisan advantage predominated over any other consideration in the design of Plan 1374C as a whole.

1. Direct Evidence of Intent

The first indication of discriminatory intent, of course, is the fact that Defendants decided to redraw an existing congressional districting map that was both perfectly legal and quite fair. As Defendants' own expert Professor Gaddie will testify, the lines drawn in *Balderas* slightly favored the Republicans, but there remained a majority of Democrats in the congressional delegation largely because sufficient Republican voters in half a dozen Republican-leaning districts chose to "cross over" and support incumbents they trusted. Their goal was to disrupt the relationships between these incumbents (Congressman Stenholm, Hall, Edwards, Sandlin, Turner, and Lampson) and their constituents. They further hoped that, in the process, they could dismantle two existing Democratic-leaning districts. One was District 24 in Tarrant and Dallas Counties, which ultimately was obliterated altogether because it had the temerity to keep electing Martin Frost to Congress for a quarter century. The other was District 10 in Travis County, long held by Lloyd Doggett, which was carved up three ways – although one of those districts was the new Democratic-leaning, majority-Hispanic District 25 stretching south to Hidalgo County. The goal was a map that would reliably elect 22 Republican Members of Congress regardless of how voting patterns might evolve in the State through the rest of the decade. The intent behind this whole unnecessary project of mid-decade redistricting speaks for itself.

But there is more. The Republican leadership, apparently betting that the courts will never actually rein in partisan discrimination, have openly admitted what they were up to. In public statements, Congressman Tom DeLay admitted that the goal was to maximize Republican seats. Presumably he will be just as forthcoming if the Court allows his deposition to go forward later in the litigation. Similarly, the House sponsor of the key maps, State Representative Phil King, so acknowledged in his deposition, stating:

> A. . . . my objective was to elect as many Republicans as I thought we reasonably could do.
>
> Q. And that would necessarily defeat as many Democrats as possible; is that fair?
>
> A. That's fair.

King Dep. at 85. Much the same point was made by the actual line-drawer hired on the Senate side, Robert Davis, in his deposition testimony.

2. <u>Circumstantial Evidence of Intent</u>

Circumstantial evidence of predominant discriminatory intent arises from a showing that the line-drawers sacrificed other neutral and legitimate criteria to that overriding goal. There is plenty of such evidence here as well. As Defendants' expert Professor Gaddie will testify, Plan 1374C increases the number of split counties by five, from 23 to 28. Gaddie Report at 4-6. It also decreases the compactness of the districts. Using the Texas Legislative Council's standard measures of compactness – the Perimeter-to-Area measure and the Smallest Circle measure – Professor Gaddie calculated the extent of these changes. With respect to the former, he reports that the average compactness score increases from 5.065 to 6.416 while the median increases from 4.65 to 6.55. Using the latter measure, he reports that the average increases from 2.750 to 3.516 while the median increases from 2.60 to 3.10. *Id.* at 6-7.

Additional circumstantial evidence comes from Plan 1374C's obvious disregard for communities defined by actual shared interests. No map-drawer concerned about that criterion could combine much of the African-American community in Southeast Fort Worth with Denton County in a district stretching to the Oklahoma border, or combine two population centers in Travis and Hidalgo Counties using a string of rural counties hundreds of miles long. Then there is the map's clear disregard of Texas's longstanding commitment to maintaining its senior Representatives in Congress. As Professor Gaddie reports, Plan 1374C needlessly "pairs" nine incumbents in four districts while displacing, on average, more than 48% of the constituents currently represented by each incumbent in the State. Gaddie Report at 23-24. Republicans, Professor Gaddie notes, retain 61% of their "core" constituents, while Democrats retain only 43%. *Id.* at 24.

B. Evidence of Partisan Effects

The evidence of partisan effects is just as clear. It falls into two categories. First there is the bias inherent in the lines themselves, caused by disparate "packing" and "cracking" of Democratic voters. Then there are effects revealed only when one considers other circumstances, such as the treatment of incumbents.

1. Evidence of Inherent Bias

Both sides' experts agree that, looking just at Plan1374C's distribution of Democratic and Republican voters among the districts, without considering particular incumbent effects or other factors, the map is remarkably biased. It packs Democrats into only 10 districts while drawing the other 22 as safe Republican districts.

As both Professor Alford and Professor Gaddie will explain, the key test for measuring distributional bias is how the map performs in a 50-50 election statewide. Professor Gaddie applied that test using one prior statewide election as the measure. Using the 2002 Lieutenant

Governor's race as a litmus test, Professor Gaddie found that under Plan 1374C, the victor in that race, Republican Lt. Governor David Dewhurst, carried 22 of 32 districts (69%) with his 52.9% share of the vote. Gaddie Report Figure 1. He further found that if Dewhurst's share were reduced to 50%, he would still have carried 20 of 32 districts (62.5%). *Id.*

Professor Alford reports that the 2002 Dewhurst/Sharp race actually *understates* the bias in Plan 1374C. He will testify that he conducted the same test used by Professor Gaddie – "normalizing" the vote shares of each candidate in a prior statewide election to 50% and counting the districts each would have carried – but did so for all 64 statewide general elections conducted since 1992. His more comprehensive study found that in 59% of the elections he used to assess Plan 1374C, the Republicans carried 69% of the districts – 22 of 32 – *even with only 50 percent of the vote*. In 19% of the elections studied, they carried 21 of 32 districts with 50 percent of the vote. Not one of the 64 elections studied suggests that the Democrats have of chance of carrying half the seats with half the votes cast – and that skew flows solely from the way the map disparately packs and cracks Democratic voters. So the anti-majoritarian nature of the lines in Plan 1374C is deeply engrained.

2. Treatment of Incumbents

Both Professor Alford and Professor Gaddie will say that Plan 1374C uses the techniques of pairing and disparate retention of core constituencies to further reinforce the substantial bias caused by disparate packing and cracking. All four of the districts in which incumbents are "paired" (proposed Districts 2, 6, 7, and 19) are very likely to be carried by the Republican incumbent. In addition, as noted above, Plan 1374C consistently severs the connections between Democratic incumbents and their core constituencies. And this effect is much more pronounced with the Anglo incumbents specifically targeted for defeat. Lay witnesses will confirm the deliberate impact on a number of Democratic incumbents who have longstanding relationships

with voters who otherwise lean Republican in particular regions of the State. Recognizing that reality, the map-drawers did everything they could to deprive those voters of the right to continue reelecting Chet Edwards or Charlie Stenholm or others, by fragmenting the cores of their current districts and attaching each piece to distant pockets of unfamiliar population.

There will be some disagreement at trial about exactly how many Democratic Representatives will be left standing after the 2004 election if Plan 1374C is allowed to go into effect. The bottom line is that Plan 1374C is a 22-to-10 map and would remain so even if the Democrats were to close the gap that has existed in recent years and get half the votes for Congress in 2004. The Senate's map drawer, Robert Davis, predicted in deposition that 21 of the 22 Republican-leaning seats would be filled by Republicans in the first election under the map, meaning that six incumbents would lose their seats. That may be true, but the seventh incumbent he predicted would win – Ralph Hall – is 80 years old (making him the oldest of the 435 Representatives in Congress) and occupies a district the Republicans can be sure of adding to their collection if and when he retires. Thus, very soon, if not in 2004, the Republicans' stranglehold over 69% of the delegation will likely be complete – and will then be all-but-invulnerable to the changes in voting patterns statewide that many expect as Hispanic participation in the political process continues to grow.

Plan 1374C is a textbook example of a severe partisan gerrymander and should be struck down.

CONCLUSION

For the reasons set forth above, the Jackson Plaintiffs and the Democratic Congressional Intervenors urge this Court to invalidate Plan 1374C and to order Defendants to continue implementing Plan 1151C until the State of Texas can enact a new congressional redistricting plan after the 2010 federal decennial census.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing document has been served in accordance with the Federal Rules of Civil procedure via facsimile and/or facsimile on all attorneys of record on this 3rd day of December, 2003:

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