UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION, ET AL. Plaintiffs,	§	
	§	CIVIL ACTION
VS.	§	
	§	NO. 2:03CV354
RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS, ET AL., Defendants.	§	CONSOLIDATED

TEXAS-NAACP POST TRIAL BRIEF

INTRODUCTION

The Texas NAACP asserts that Texas Congressional Redistricting Plan 1374C violates the Voting Rights Act of 1965 as amended and the Fourteenth Amendment to the United States Constitution. In regards to the latter, the plan constitutes an illegal partisan and an illegal racial gerrymander.

It would be healthy for the political system and the African-American community if both parties sought its vote. However, 1374C does just the opposite—it sets up a plan where Republicans will never need to campaign for African-American votes because they have enough other voters to guarantee that they will win 22 of the 32 Texas Congressional seats.

The plan also makes the Democratic Party into a party of minorities as contrasted to a Republican Party, which will be a party of whites. Obviously this shortsighted plan will lead to even greater racial polarity than that testified to by

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all experts in this case, including the State's expert, Dr. Gaddie, resulting in even more of a gulf between minorities and whites.

If there was a desire by individuals to create a racial conflict or to cause disharmony between the races, then they would devise a plan like 1374C. As noted in testimony during the trial, the passage of the Voting Rights Act was a bi-partisan effort that was not intended to benefit any particular political party. And as Dr. Orville Vernon Burton testified, African-Americans were primarily Republican until some time in the 20th Century. Clearly the identification with the Democratic Party is not permanent, unless of course the Republican Party decides not to embrace issues of concern for the African-American and Hispanic communities. Numerous witnesses testified to minority support of Republican candidates, and that what was needed was an embacing of minority issues and an effort to appeal to minority voters. This was what Senator Bill Ratliff did and as he testified, he received substantial African-American support. See also the testimony of witness Howard Jefferson of Houston.

Under the current plan, 1151C, there are more opportunity districts and more influence districts than under the proposed 1374C:

Table 1, 1151C Protected Districts

Performing African-American Opportunity Seats	**Performing Hispanic Opportunity Seats**	**Performing Influence Seats**	**Non-performing Opportunity Seats (Hispanic)**
18	16	1	23
30	20	2	

24	28	9	
25	27	10	
	15	11	
	29	17	

Plan 1374C pales in comparison overall to 1151C:

Table 2, 1374C Protected Districts

Performing African-American Opportunity Seats	**Performing Hispanic Opportunity Seats**	**Performing Influence Seats**	**Non-performing Opportunity Seats (Hispanic)**
30	16	15	
9	25	23	
18[1]	27		
	28		
	20		
	29		

Under the current plan there are 16 protected seats plus Bonilla, and under the new plan 1374C there are 9 protected seats plus Bonilla and Hinojosa (and Lee's seat in the 18th is made significantly less effective).

The GI Forum Plaintiffs submitted a map with 8 Hispanic opportunity seats (1385C), and the NAACP submitted a plan with 4 African-American opportunity seats and no according loss in influence seats (1251C).

Another important factor to note is that the State's expert, Keith Gaddie, illustrated in his report how our democracy would be harmed by 1374C:

> "Competition is important to students of elections because it is widely believed that competition is central to the health of a democratic system. To that end, the competitive nature of electoral districts is important

[1] It appears that the 18th will not continue and perform as an opportunity district. Please refer to the testimony of Dr. Richard Murray, Expert for Congresspersons Sheila Jackson Lee and Eddie Bernice Johnson.

> because competitive districts should encourage strong candidacies in both parties and healthy voter interest in campaigns. . . . Using the 2000 vote composite and the 45-55% definition of competitive/marginal district, the number of marginal districts changes from 6 in the Balderas court map to 3 in the map created by HB-3. Using the 2002 vote composite and the 45-55% definition of competitive/marginal, the change is from 3 marginal districts to 0."

Of course this is only compounded by the fact that with all of the safe seats involved, individuals of neither party will generally be required to reach out to other voters. And most importantly, Republicans will never need to reach out to minority voters—but particularly African-American voters.

We are concerned with several positions that the State takes in this case, including but not limited to the following (apart from the Section 2 retrogression and vote dilution issues). One issue relates to an overemphasis on the race of the candidate. See testimony of Dr. John Alford:

Q. I'm Gary Bledsoe for the Texas NAACP. I just
4 have a very few questions for you here.
5 Doctor, would it be fair to characterize
6 what you're saying to be that for an African-American voter
7 in this State that under the State's analysis that a vote
8 for a White candidate for Congress doesn't count, but a
9 vote for a minority candidate for the Congress does count
10 under the Voting Rights Act?
11 A. That's one conclusion you could draw from what I

12 think is an excessive focus on the race or ethnicity of
13 the representative rather than the voters.

Plaintiffs went on to inquire about further impact on the political system:

Q. Do you think this position or this kind of
15 construction of the law under those circumstances would
16 invite racially divisive elections?
17 A. Again, as I've said earlier I think it runs
18 counter to what I think is the broad motivating spirit for
19 the way the Court has moved in a variety of decisions since
20 the initial Voting Rights Act decisions which is in a
21 direction that makes it possible to move away from as
22 strict an attention to race and ethnicity, and this would
23 be a step in the other direction.

THE RESULTS TEST

After City of Mobile v. Bolden, 446 U.S. 55 (1980), provided the opportunity for covered jurisdictions to evade liability because of a heightened intent standard, the United States Congress created a results-based test to analyze claims of vote dilution free of the heightened intent standard. Pursuant to that change in the law, the United States Supreme Court created a test to determine whether a vote dilution claim was viable: (a) is the group sufficiently large and geographically compact so that it can constitute a majority in a single-member district; (2) the minority group(s) is/are politically cohesive; and (3) the white

majority votes sufficiently as a bloc to enable it to generally defeat the candidate of choice of the minority community. Thornburg v. Gingles, 478 U.S. 30 (1986).

In regards to this test the Texas NAACP adopts the arguments in the Post-Trial Brief of the League of United Latin American Citizens (LULAC). Further, it would offer the following additional evidence:

a. The Texas NAACP submitted 1251C, a map supported by the Legislative Black Caucus, including Ron Wilson, that created an additional opportunity seat for African-Americans in the Houston area without eliminating six African-American influence seats; and

b. The American GI Forum has tendered a map with 8 Hispanic opportunity districts, 1385C.

Further, the NAACP would ask the court to note the testimony of experts Dr. John Alford, Dr. Keith Gaddie (the State's expert), Dr. Allan Lichtman, Dr. Jerry Polinard and Dr. Vernon Burton which supports the position that there is sufficient numerosity and compactness in order to establish the districts in question. Both Dr.Lichtman and Dr. Burton testified that in order to achieve parity for African-Americans the State should have at least 4 African-American opportunity seats (contrasted to the 3 under proposed plan 1374C). In the NAACP Plan 1251C, CD24 is an existing district with reasonable compactness, and CD25 is the same compact district essentially that was created by Attorney General (now Senator) John Cornyn and Judge Morris Overstreet and the Texas Coalition of Black Democrats in the Balderas litigation. As to the impact districts, they are

essentially the same under 1251C as they currently exist in plan 1151C and were court-created and one of the most compact plans in recent history according to the State's own expert—Mr. Giberson.

The second component of the Gingles test is whether minorities are politically cohesive. Dr. Vernon Burton, Dr. Allan Lichtman and Dr. John Alford all reached this conclusion. Further, there was an abundance of testimony on this subject during the trial:

- Former Houston NAACP President and Texas NAACP State Political Director, Howard Jefferson, testified that there was a great deal of cohesion between African-Americans and Hispanics in Houston and around Texas;
- NAACP Austin Branch President Nelson Linder testified that African-Americans and Hispanics vote cohesively in Austin.
- Former NAACP National Board Member Robert Starr and State Representative Glenn Lewis testified about cohesion and cooperation between African-American and Hispanic voters in the 24th Congressional District;
- State Representative Joe Deshotel of Beaumont testified that African-Americans and Hispanics voted cohesively in Jefferson County elections;
- Travis County Judge Sam Biscoe and County Commissioner Margaret Gomez testified that in Travis County African-Americans and Hispanics vote cohesively;
- Congresswoman Sheila Jackson Lee testified about cohesion between African-Americans and Hispanics; and
- The arguments put forth by LULAC on this subject are hereby expressly adopted.

The third Gingles prong relates to whether the white majority votes sufficiently as a bloc vote to defeat the candidate of choice of the minority community. The aforementioned expert reports reach this conclusion as does

State's witness Representative Ron Wilson. Further, we adopt the arguments in the Post-Trial Brief of LULAC.

There is a new category of protected seats under Sections 2 and 5 of the Voting Rights Act called influence districts. Georgia v. Ashcroft, 123 S.Ct. 2498 (2003). Under this opinion the districts are protected even if minorities themselves do not constitute an effective majority. These seats are provided in order to try and mainstream ideas of the minority community and cause individuals of different races and ethnicities to try and work more effectively together. This opinion requires the following: (a) the minority community is able to form an effective majority with members of other groups to elect the candidate of their choice; (b) the minority vote was crucial to the outcome of the election; and (c) the candidate is responsive to the needs of the minority community. The testimony was clear that in regards to electing the white democrats at issue, each was elected with a substantial minority vote that was essential to their election. However, in regards to the third prong of this test the evidence seems to suggest that the Democratic candidates except for Congressman Hall are responsive. If minority ideas are out of the mainstream then this would possibly lead to a shift in the particular electoral district. This would help allay any fears that essentially all seats of white democrats would be protected for all time. Dr. Gaddie produced an exhibit indicating that nearly all African-Americans voted for the challenged white democrats, while we know that Senator Ratliff, Senator Kay Bailey Hutchison and

other Republicans have made inroads into the African-American vote so we know that it can be done.

Though Ashcroft may have come up to the Supreme Court under Section 5, it is clear that the influence district concept has applicability to the Section 2 context. Clearly in citing Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994) in its opinion, the Supreme Court intended to convey that the kind of Section 5 retrogression or vote dilution analysis in Ashcroft would apply under Section 2. See Ashcroft, supra at 2513-14.

Ironically, the current plan 1151C is a Republican Plan. According to the experts there are 20 Republican seats currently (see the testimony of Dr. John Alford), but according to Dr. Alford "you can't beat somebody with nobody." Dr. Alford went on to explain that 5 of the current seats held by democrats were Republican seats but that the Republicans had not selected effective candidates and a number were not well-funded.

The Ashcroft opinion also directed us to look at the total map as we have above. Under the current map there are 10 effective minority opportunity districts and 6 effective influence districts with 1 non-effective minority opportunity district. Under the proposed map there are 9 effective minority opportunity districts, two possible minority influence district and no non-effective minority opportunity districts. This means the effective districts where the person of choice of the minority community is elected is reduced from 16 to 9 (maybe 11), clearly

evidencing retrogression and vote dilution. This is a net loss of 1 effective opportunity district and 6 influence districts.

THE SENATE FACTORS

The State apparently has conceded the existence of the Senate factors. They put on no evidence on the matters covered hereunder, and even their witness Representative Ron Wilson gave strong testimony in favor of the Senate factors. He acknowledged the needs of the African-American community and racially polarized voting during cross-examination. Dr. Burton, Dr. Lichtman, Dr. Flores, Dr. Tijerina and Dr. Kousser clearly established the necessary points. And as Judge Higginbotham noted, they are matters of court decisions that are of record specifically related to the historical existence of these factors in Texas. Further, it is important to note that evidence was elicited during trial to show the current existence of each of the Senate factors.

Dr. Burton found that there were numerous examples in the current day of the prohibited types of disenfranchising activities. One example related to the use of or changes to polling places. Another was voter intimidation. In regards to the polling place issue, it was ironic during trial that Congressman Max Sandlin testified that the minority box in Marshall had been eliminated only the day before his testimony in this trial and the number of voting sites reduced from 29 to 7 for the upcoming special election to replace Senator Bill Ratliff. The circumstances surrounding the removal of this historically placed African-American box in the oldest African-American college west of the Mississippi River was clearly racially

motivated as the box was placed in the white Baptist college clear on the other side of town.

Numerous other witnesses talked about voter intimidation or harassment. Howard Jefferson of the NAACP, Congressman Frost and Representative Lewis among others testified about current problems with voter intimidation/harassment around the State. According to the testimony election officials were openly engaging in disenfranchising tactics. The second Senate factor relates to racial polarization, and this is clearly not a matter in dispute. Not only did the Plaintiffs' experts find this, but Defendant's expert Dr. Keith Gaddie found it as well. And State's witness Ron Wilson also testified to this. Other current examples included:

- the unusually large election districts, majority vote requirements and the like;
- current problems in education, employment, health, hate crimes, homeownership, transportation, language, etc. (this category includes problems with graduation, college attendance, health ailments, lack of economic development and many other items as testified to by Dr. Burton and others. Dr. Burton included a 1994 NAACP statewide survey and the NAACP report for Texas regarding the economic status of African-Americans in Texas;
- numerous campaigns have been characterized by overt or subtle racial appeals, including the 2002 races for United States Senate and Governor, the City Council race between Terry McConn and M.J. Khan (See Jackson Plaintiff's Exhibit 138), the three recent races in Tarrant County testified to by Representative Glenn Lewis among a number of other races[2];

[2] Partisan Races: (focus on opposed races in the Republican Primary), see http://www.sos.state.tx.us/.

Dr. Burton testified that Xavier Rodriguez was soundly defeated in the Republican Party by Stephen A. Smith. Rodriguez, originally appointed by Governor Perry, spent over $700,000.00 and had the support of the GOP establishment of Texas and still lost. See www.tpj.org/press. What is significant is that partisan politics are constant and thus they defeated against him solely because of his race.

In 1992, Judge Pete Benavides and Lena Guerrero who were previously appointed and were running as incumbents were the only identifiable minorities by name (with Spanish Surname) running state-wide on the Democratic ticket and they both lost. Lena Guerrero was defeated by Barry Williamson the Republican

and Pete Benavides was defeated by Lawrence Meyers. In that same election a vast majority of the Anglo Democrats won election at the state wide level. Interestingly, Morris Overstreet, was the only African American on the statewide ballot and he had the lowest percentage of any Democrat who won for office on the statewide ballot.

In 1994 Tony Garza lost in Republican primary to an Anglo, Don Wittig and was the lowest vote getter.

Attorney General

Tony Garza	REP	87,042	17.47%
Patricia (Pat) Lykos	REP	145,922	29.29%
John Marshall	REP	123,618	24.81%
Don Wittig	REP	141,488	28.40%

	Race Total	498,070	

Howard Jefferson testified that Mamie Proctor (African American) judicial candidate was the only Republican African American judicial candidate to lose in Harris County in 1994. Out of seven contested court of appeals races (1st and 14th courts) in Harris County the only Republican candidate to lose was the only African American, Mamie Proctor.

Justice, 1st Court of Appeals District, Place 3

Michol Mary O'Connor(I)	DEM	422,763	50.84%
Mamie Proctor	REP	408,704	49.15%

	Race Total	831,467	

Justice, 14th Court of Appeals District, Place 1

Bob Moore	DEM	368,686	45.17%
Harvey Hudson	REP	447,486	54.82%

	Race Total	816,172	

Justice, 14th Court of Appeals District, Place 2

Ross Sears(I)	DEM	357,023	43.56%
Wanda McKee Fowler	REP	462,500	56.43%

	Race Total	819,523	

Justice, 14th Court of Appeals District, Place 3

George Ellis(I)	DEM	354,124	41.77%
Richard Edelman	REP	493,492	58.22%

- the continued under-representation of racial and ethnic minorities in the Texas Congressional Delegation to the current time;
- Voter intimidation transcripts for NAACP Voter Hearings in Texas, 1 in Texarkana, 2 in Houston and 1 in Fort Worth; TX-NAACP Exhibit 1 and
- Recent reports to or for the Texas NAACP on such issues as racial profiling and even hate crimes in the Jasper area.

These matters are to be established by a totality of the circumstances. And according to Dr. Burton, even if number 4 did not exist because of a change

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	Race Total	847,616	

Justice, 14th Court of Appeals District, Place 4			
Joe L. Draughn(I)	DEM	392,068	48.71%
Maurice Amidei	REP	412,672	51.28%

	Race Total	804,740	

Justice, 14th Court of Appeals District, Place 5			
Ed Cogburn	DEM	357,594	43.82%
John S. Anderson	REP	458,435	56.17%

	Race Total	816,029	

Justice, 14th Court of Appeals District, Place 6 (Unexpired)			
Patrice Barron(I)	DEM	345,049	42.21%
Leslie Ann Brock	REP	472,389	57.78%

	Race Total	817,438	

Glenn Lewis (D) from Fort Worth, State Representative from District 95, testified about a non-partisan city council race where Anglos would not support and elect the African American candidate.

Howard Jefferson from Houston testified about the racial polarization in city elections in reference to Lee Brown when he ran and won in his mayoral bid as Mayor of the City of Houston against Orlando Sanchez.

Ric Godinez, City Commissioner of McAllen, testified that no longer are Hispanics viewed immediately as Democrats and that party affiliation is not a proxy for race.

regarding slating and number 7 because of the proportion of Congressional representation, he would still find that the Senate factors were found affirmatively as a complete analysis and that therefore it was likely that inappropriate vote dilution was in existence. See Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973).

Again, we must re-emphasize some of the most dangerous and problematic positions taken by the State:

- In a district where minorities are able to elect the candidate of their choice, a district is not protected if it elects a white candidate;
- Republicans can engage in retrogressive redistricting if they do so because minorities vote for Democrats;
- In looking at the whole map, it is acceptable if you replace a district with with another across the state, even though the circumstances were still such that you continue with a viable or effective district where minorities elect a person of their choice;
- It is acceptable to say that race was not a factor in redistricting because all of the players say they were motivated by party and not race—though the record indicates they were clearly cognizant of the racial and voting rights components.

PARTICULAR DISTRICTS

The Texas NAACP adopts the arguments of LULAC in regards to Hispanic opportunity districts and would say the following in regards to the Voting Rights Districts. As Dr. Gaddie admitted in his deposition, he advised the State to preferably leave the district alone or compensate for the loss of both the 24th and 25th. He also advised them of the problem of getting race intertwined with party issues (p.106 lines 5-12). In fact he thought losing it could mean retrogression. P. 16 lines 21 to 27. Dr. Gaddie said in fact there were versions of the proposed

changes that created the new Houston district but also maintained CD24. (p. 106 line 18 to p. 107 line 2). This is consistent with the testimony or Representative King that House Bill 1268 reflected just that, and also with the testimony of Representative Glenn Lewis regarding his conversation with King and the memo of Jim Ellis (note that Gaddie admits to meeting with him, apparently sometime in July). There simply was no need for the State decisionmakers and/or the Republican Congressional Delegation from Texas to get as obviously greedy, aggressive and discriminatory as they did and attempt to take nearly all the seats. The State relies on the testimony of Representative Ron Wilson on the issue of whether an African-American can be elected in the 24th. Wilson said no, but admitted he was not familiar and had not reviewed any data. After admitting that Glenn Lewis and Royce West knew more about the politics in their area, Wilson said that if a minority group could join with others up to 51% then they may be able to control the district. Of course, the credible evidence of the data establish that CD 24 is in fact currently controlled by African-Americans in the primary and the general election. Wilson said that if a minority group could join with others up to 51% then they may be able to control the district. Ironically, Dr. Gaddie had already provided the information sought by Representative Wilson had suggested would be needed before an African-American could be elected. Representative Wilson's allegation that African-Americans needed to constitute a majority of the primary voting bloc before one could win has actually been occurring. ON p. 32,

lines 6-14 of Dr. Gaddie's deposition, he indicates that African-Americans provide 60 to 70 percent of the Voting population in CD24 primaries.

This idea of transferring votes is clearly horrific. What does an African-American Congressman do for an African-American in Fort Worlth? Nothing, absolutely nothing. African-Americans who have worked for years to attract enough white voters so that polarized voting doesn't always frustrate their desires are now confronted with the clear prospect that the coalitions they have established around the State have been destroyed with one felt swoop of a pen. African-Americans in Texarkana, Jasper, Newton, Nacogdoches, Fort Worth, Killeen, Austin, Beaumont, Galveston, Abilene and other places now have Congresspersons and district majorities that are hostile to their issues. And as expert after expert and elected official after elected official testified during the trial, this will undermine minority participation in elections because there will be nothing anymore at stake. This court must look those individuals in the eye and say that it agrees with Tom Delay and others that because they generally vote democratic the Voting Rights Act does not protect their rights. Of course Congresswoman Sheila Jackson Lee, Dr. Vernon Burton and Dr. John Alford testified this would not be an appropriate interpretation of the Voting Rights Act. The NAACP looks at the 218 votes needed in Washington to pass matters of importance to the African-Americana community, and recognizes that the Congresspersons in Congressional Districts 1,2,9,10,11,17, 24 and 29 have been our allies all along but their votes will not be present during the next Congress.

CD9 under 1374C may perform better but it will probably not increase the realm of individuals who could be elected from that district out of the African-American community. There are enough non-polarized voters in the current district to elect an African-American candidate. And since there is no super majority the candidate most likely to be elected will be someone who appeals across racial lines.

The Texas NAACP is very pleased with the passing grades that many of the Reps receive on our report card, and particularly the white democratic congresspersons except for Hall. This report card, along with the testimony elicited at trial, shows that in the aforementioned influence districts African-Americans are receiving responsive representation. 50 years ago, African-Americans voted Republican, but with the support of civil rights legislation by the Democrats and the outward support for civil rights by the Johnson administration this all changed. As King, Ratliff and others testified this does not have to be permanent, but under 1374C it will be!

Equal Protection Clause of the 14th Amendment – Intentional Discrimination Against Minority Voters in Texas – Plan 1374C is a Illegal Racial Gerrymander

Quite apart from the §2 Voting Rights Act analyses of the harmful "effects" on minority voters of State action(s) altering elections policies and procedures, a claim for impermissible/illegal racial gerrymander finds its basis in the Equal Protection Clause of the 14th Amendment to the U.S. Constitution which requires of showing of intentional

discrimination.[3] Intentional discrimination may be established through either a showing of direct and/or circumstantial evidence. Circumstantial evidence may be further broken down into substantive and pretextual evidence; with substantive evidence being circumstantial evidence related to the State's action in question and pretextual evidence being evidence that the State's justifications for its actions rather than the actions themselves are false or incredible.

The evidence provided at trial on this issue is predominantly circumstantial. The Panel's task of review of the evidence is made more difficult by the initially daunting fact that in some instances the race of the voter is difficult to "tease out" as a factor as compared with the same voter's partisan affiliation as expressed by the members of the panel on a few occasions during the trial. Of course, the best way to "tease out" information of a circumstantial nature, whether it be related to the race or partisan affiliation of the voter or the racial or partisan intent of the State actors is on the margins between the differences and similarities between the polar possibilities.

Direct Evidence

Districts 9 and 25 were drawn with race as the predominant factor. The State admits that Districts 9 and 25 in plan 1374C were drawn as minority Opportunity Districts in "compensation" for the loss of minority opportunities in 23, 24 and 25. Despite any other protestations or contentions by the State, the fact may not be altered that race played a dominant role in the creation of these two Districts.

[3] The TX-NAACP adopts Prof. Alford's testimony at trial regarding the distinction between intent and motivation in assisting the Court in establishing the illegality of the State's action in drawing districts with race as a predominant consideration. In short, the State's intent or the unavoidable outcome, of the State's action may be derived from facts, direct and circumstantial, surrounding the action quite apart from any alleged or stated "motivation," partisan or otherwise.

Given that the State eliminated performing Minority Opportunity Districts from the existing legal plan, 1151C (23, 24, 25 and 15) without exigent reasons, there is no legitimate justification for the undue consideration of race through the cracking of the minority populations in those Districts nor for the undue consideration of race through packing of the minority populations in CD 9 and 25 in 1374C. As Prof. Alford testified, it is putting the cart before the horse to state that the State is justified in racially gerrymandering CD 9 and 25 in 1374C, as a necessity to compensate for the losses elsewhere in the State (never mind that at least four CDs require compensation instead of two) which were not "necessary" losses and were themselves racial gerrymanders. Jackson Exhibit 136 is a recitation of what different legislators wanted, and it includes a reference to a new African-American district for Representative Ron Wilson. In fact, Wilson actually acknowledged this and said everyone knew that is what he wanted. Though the NAACP believes that the configuration of the district would be helpful, it does not believe that it can justify the loss of numerous influence seats or an opportunity seat altogether in Fort Worth and Dallas.

Circumstantial Evidence

Substantive Circumstantial Evidence

TX-NAACP will chronicle the various examples of substantive circumstantial evidence as defined above which supports the conclusion that the State of Texas intended to harm the minority voter in Texas as a motivating factor in its decisions to alter the existing legal plan 1151C. The evidence shows that the drawing of certain districts as well as policies and practices engaged in by members of the State Legislature were outside of the norm and/or otherwise support a finding of invidious racial discrimination on the part of the State decisionmakers.

Policies and Procedures outside the norm: These include the following:

- First mid-decade redistricting attempted while there is an unchallenged and/or legal map in place that has been used in an election cycle,
- No public hearings called for by the Republican majority despite this unique policy deviation until the Democrats publicly demanded hearings, Raymond,
- No hearings set for any locations south of San Antonio until the Democrats publicly complained, Raymond,
- Chairman Joe Crabb made a racially ignorant, insensitive, derogatory and discriminatory comment evidencing racial prejudice against Hispanic voters by suggesting that any hearings on the border would be inhibited by an absence of English speakers in those areas of the state, Raymond,
- Public hearings were delayed and then held open overnight for no legitimate legislative reasons when there were large numbers of minority voters present to testify at these public hearings, Raymond,
- Democratic members of the legislative committees were not allowed to attend or preside over hearings in their house districts or geographic areas of the state while every Republican was allowed to attend and/or preside over the public hearings in their areas or districts, Raymond,
- Doors to the Capitol building were locked during the pendency of the public hearings thus keeping out citizens that would have wished to participate but couldn't gain entrance, Raymond,
- The public hearings were held without a proposed plan for review and comment, Raymond, Deshotel,
- Despite the fact that the overwhelming majority of the response from white, black, latino, Democrat and Republican citizens that testified at these public hearings were against redistricting the Republican majority for the first time ever acted in disregard for such response, West,
- No minorities included in the plan drawing process or decisionmaking process during the drawing, Davis and Wilson,
- Three Special Sessions to redistrict despite the lack of effort during the regular session to pass a redistricting plan,
- Suspension of the two-thirds rule for only the second time in Texas history (the first described in testimony by Rodney Ellis was actually the event that engendered the beginning of the two-thirds rule since the "segregation forever" effort in approximately 1957 was such a horrendous outcome) in direct response to actions taken by the vast majority of the minority legislators in Texas, Ellis and West,
- Congressman Delay was generating and driving force behind the redistricting effort in Texas (Jackson Exhibit 136, and Jim Ellis deposition designation by Jackson plaintiffs) and this same Congressman Delay has received a horribly failing grade from the NAACP down to and including zeros out of 100 by not voting on such key legislation such as the 1991 Civil Rights Act Amendments. TX-NAACP exhibit 5. Delay also, while in the Texas House voted against the incorporation of Title VII of the

Civil Rights Act in Texas Law under the Texas Commission on Human Rights Act, Wilson.

- Senator Ratliff indicated that the Legislators were aware of the damage to be done to by minorities as a result of the new map.
- Representative Joe Deshotel testified that the Legislators were aware of the damage to be done to minorities as a result of the passage of the new map.
- Representative Glenn Lewis testified that the Legislators were aware of the damage to be done to minorities as a result of personal conversations, public hearings and debates on the floor among other reasons.
- The State hired Bob Davis to give it legal and demographic advice on the new map, so the State was aware of what was happening racially in the plans it was drawing; and
- The fact that plan 1374C was much more aggressive than the two plans that went into the conference committee despite several aspects of plan 1374C having been specifically rejected by the House in earlier version as a direct result of the potential preclearance issues of eliminating CD 24.

Districts 1, 2, 4, 9, 10, 11, 17, 15, 18, 23, 25, 26, 27, 28, 29 and 30 in 1374C were drawn with race as a predominant factor (or, alternatively stated, the minority populations in the following CD's in 1151C were negatively impacted by the State decisionmakers: 1, 2, 4, 9, 10, 11, 15, 18, 23, 25, 27, 28, 29, 30). These Districts may be logically broken out into different issues: minority influence districts are eliminated, minority opportunity districts are weakened or eliminated, race and not party is the driving factor and Democrat hostile to minorities is protected.

Minority Influence Districts are Eliminated

Dr. Lichtman testified that in his professional opinion, the definition of an influence district was one in which a minority population in a districts while not in a majority in a CD provides a decisive component in election of the candidate of choice of the majority of the minority population. The TX-NAACP as argued in opening statements, suggests that a slightly narrower construction would provide a fair result for all sides. This recommendation should be established by a case-by-case analysis of a

weighing of various factors. Specifically, the factors to consider in a totality of circumstances type analysis would include: 1) the Zimmer factors which establish the negative presence of race in the jurisdiction historically and currently, 2) the minority population and their candidate of choice have a responsive relationship, 3) the majority of the minority vote provides either the decisive margin of victory in the election, and/or 4) without the majority of the minority vote the successful candidate would be reasonably concerned for success of subsequent elections absent that majority of the minority vote.

With test in mind, TX-NAACP asserts that the State acted intentionally by removing the clear African-American influence in the following CD's in plan 1151C: 1, 2, 9, 10, 11 and 17. There is ample evidence that the Zimmer factors have been established from multiple experts and lay witnesses. There was overwhelming evidence of the responsiveness of the relationship between the five Congressman and the minority communities in these CD's from the Congressmen themselves, State Legislators, lay witnesses, TX-NAACP Exhibit 5, report cards, and the Hispanic Coalition report cards. The only attempt by the State to controvert this wealth of evidence was through the testimony of Rep. Ron Wilson, however, on cross-examination, Wilson admitted that the majority of the issues scored by the NAACP were relevant to the African-American community, and that he had no personal knowledge of the conduct and interactions of the five Congressmen in question with their staff or constituencies. The way in which these minority influence CD's were eliminated was by cracking and packing the minority communities, by splitting African-American communities (like that in Travis County), by splitting communities of interest to immerse the minority population in heavily Republican Districts (like in CD 1 and 2 where rural and small town blacks are lumped

with suburban Dallas and Harris County whites, respectively; compact black community in Galveston County is split and run with Harris County suburban voters; cohesive tri-ethnic electorate split in two to include the splitting of an African-American community within a single high school feeder geography and running one half down to the border of Texas and the other to suburban Harris County; of an historic core of minority voters in central Texas are split in CD 11)

Minority Opportunity Districts are Eliminated

As a result of the 2002 election under plan 1151C, the following CD's under 1151C were clearly found to have been performing minority opportunity districts, which were also eliminated as minority opportunity CD's as a direct result of 1374C which itself was a direct result of the success of the minority communities to elect the candidates of their choice in the primaries and the general elections: specifically, CD 15, 23, 24, 25.

The uncontroverted testimony of the experts in the case was that in general a "performing" minority opportunity district for Hispanic voters would need to be about 60% and for African-American voters the cut-off is generally 40% (of course, other factors in the CD are important but these were agreed to be generally applicable percentages). CD 15 dropped from 55% to 44% Hispanic. This drop, besides being a direct result of a direct attempt to spread Hispanic voters across several CD's in south and central Texas to assist in the creation of the "compensation" CD 25, will result in the elimination of an effective Hispanic opportunity district given the fact that Hispanic turnout is historically low, there is no reasonable way for the Hispanic population to form

a majority in the general if not also fail to reach a majority in the primary. Either way, this is the very definition of CD that is not a minority opportunity CD.

It is uncontroverted (other than by the conflicting evidence presented by the State in their DOJ submission as compared with their experts report and deposition) that CD 23 was a Hispanic opportunity CD that happened to not elect a candidate of choice of the Hispanic community given the low turnout of the Hispanic population and a high turnout of white republican voters in urban Bexar County. It is also uncontroverted that CD 23 was altered by the predominant attention to the racial make-up of the voters in Laredo/Webb County, splitting them in two and spreading half over to CD 28 to assist in the creation of CD 25, the "compensation" CD. The evidence reasonably establishes that there were other ways to achieve the protection of Bonilla without either splitting Webb County or eliminating the Hispanic opportunity district. For example, redraw Bonilla into CD 11 with his strong Bexar County Republican constituency and shift other voters from the hill country into CD 23; and leave CD 23 alone and have Bonilla begin to respond to the Hispanic community to court their vote. The evidence also reasonably establishes that the only reason to leave Bonilla in a "border" district is the racial symbolism of having a Hispanic politician "representing" a predominantly Hispanic region. This symbolism is confirmed by the State's DOJ submission which lists CD 23 as a minority opportunity both before and after 1374C by specifically listing the fact that Bonilla is Hispanic as evidence that he is the Hispanic candidate of choice despite the State's knowledge that in the last election, Bonilla received only about 8% of the Hispanic vote in the CD. As Dr. Alford said over and over, the State is pre-occupied with the race of the candidate rather than the race of the voters.

Plaintiffs in the case were united with the State's expert, Dr. Gaddie, against the unsupported position of the State throughout the trial, in the characterization of CD 24 as a functioning African-American minority opportunity district in 1151C. The State's attorney attempted on multiple occasions during the trial to insist that a pronouncement by Dr. Lichtman in 2001 regarding CD 24 from the 1000C plan not being a functioning minority opportunity CD should somehow be taken by the Court to equate with performance of CD 24 in plan 1151C in contravention of the election demographics and their own expert's report and testimony. That is, the African-American population in CD 24 in plan 1151C formed a majority of the Democratic primary electorate and a majority of the general electorate resulting in the election of the candidate of choice for the African-American community in that CD. This effort by the State to mislead the Court as to the performance of this district should provide pause to the Court in reviewing the credibility of the State's case and representations to the Court. Gaddie could not cite one example of the African-American communities candidate of choice losing in CD24. Somehow they want to mention that an African-American candidate lost, but of course the fact someone is African-American does not mean they will be the candidate of choice of the African-American community. As Representative Lewis pointed out in the new 26th, it is possible that Justice Clarence Thomas could run and win that district but he would not be supported by the African-American community.

Again, the plaintiffs and the State's expert, Dr. Gaddie, united in the characterization of CD 25 in plan 1151C as a functioning African-American opportunity CD. The State's attempted attack on these conclusions by these several experts in the field including their own was to point to the primary as evidence that the African-

American candidate of choice was not Bell, the white successful candidate, but Robinson, the African-American candidate. However, the data and testimony from lay witnesses establishes that although Robinson received more than half of the African-American vote in the primary, there were other factors involved in this election which took the support of a substantial 40% of the African-American vote from Robinson and gave it to Bell. The record is clear that African-Americans normally vote more cohesively than this number, so explanations like those from Howard Jefferson of Houston about the friction between Robinson and members of the African-American political leadership in Houston like Lee Brown are what spelled the difference in that campaign. As established by the demographic evidence in most other elections analyzed in this case, the African-American community typically votes much more cohesively than the 60-40 split demonstrated in that election. The testimony was uncontroverted that Robinson had public and ugly disputes with the African-American Mayor of Houston, Lee Brown, a very well regarded politician in the African-American community in CD 25. The testimony is also uncontroverted that in the general election the African-American community formed the majority of the electorate, which threw its support overwhelmingly toward Bell, the white candidate.

The State attempts to justify the elimination of CD 24 and 25 from 1151C by the formation of CD 9 in 1374C by stating that CD 9 performs better. To reach this conclusion, the State only relies on numbers and not upon the situation on the ground in that District. Save for Wilson, who only testified in conclusory fashion without explanation that an African-American candidate would win (and not that CD 9 performs better than CD 24 and 25), all other lay witnesses and politicians to include Rodney Ellis,

CD 9 in 1374C includes some very transient populations of African-American community which do not participate in the same fashion as communities in CD 25 under 1151C and that this may result in CD 9 not performing for African-American communities. Additionally, if CD 24 and 25 are already performing under 1151C and African-Americans are already electing the candidate of their choice, what does it mean that CD 9 under 1374C performs better as contended by the State? Practically, it of course means nothing since you can't elect more than a single person at a time. The only other practical effect would be support of an allegation of packing African-Americans unnecessarily into CD 9 under 1374C. Make no mistake, the TX-NAACP supports the creation of an additional black opportunity district in and around Harris County, but not at the great expense of CD 18 as is the case in plan 1374C.

Minority Opportunity Districts are Weakened

CD 18 and 30 are weakened by the removal of high participating African-American voters from the existing districts under 1151C in exchange for transient and Hispanic voters who are noted for their low participation in elections. In CD 18, if not also in CD 30, there is a very real possibility that these historical CD's may not continue to elect African-American candidates of choice as an African-American opportunity CD by 2010 according to Dr. Murray. This testimony is uncontroverted by any equally credible and analytical evidence as that provided by Dr. Murray.

These actions by the State are unexplained by necessity and show a definite attempt to harm the historic African-American CD's by chipping away at their base and inserting high growth populations which may or may not be aligned with the African-American candidates of choice in the future.

Race and Not Party is the Driving Factor

Prof. Alford testified to the drawing of CD 26 in 1374C where the line dips into Fort Worth and only picks up the African-American communities in southeast but leaves the Hispanic population just west of the line. If the State was only interested in parsing out democrats, then they would not have regard for the African-American and Hispanic line like they did in this instance. The State tried to fix this problem by having Mr. Gibberson testify that the southern and eastern portions of CD 26 track the 95th Texas House District as a favor to Rep. Glenn Lewis. However, this does not explain the western boundary where the Hispanic population abuts the African-American population and Lewis testified that the adjacent House District was split partly within CD 26 and the other part in CD 12 under 1374C. The State's stated reason doesn't jive with the facts.

Prof. Alford also testified that CD 29 was drawn specifically to cut out Congressman Green for no other reason than he is not Hispanic and the lines were drawn to specifically increase the Hispanic portion of CD 29. This could only be done being cognizant of the race of the voters while drawing the map.

Prof. Kousser testified that CD 23 was an undeniable illegal racial gerrymander in that it retrogressed the Hispanic vote.

Protection of Democrat Hostile to Minorities

Perhaps the most glaring example that the State's contention that their sole purpose was the creation of more Republican seats is a pretext for intentional racial discrimination lies within the State's preferential treatment of Congressman Hall and his CD 4 resulting in the State's admission that Hall is not removed from office under plan

1374C. This is significant since Hall has a demonstrated hostility to his African-American constituents.

Specifically, Hall has a long reputation of a lack of responsiveness, if not down-right hostility, to the African-American population in his CD 4. The NAACP report card, TX-NAACP exhibit 5, shows that Hall has received the following scores: 01-02, 36% (lowest Dem. tied with highest Rep.); 99-00, 47% (highest Rep. 33%); 97-98, 25% (highest Rep. 16.7% - Rep. had six at 0%); 95-96, 18% (highest Rep. 36% - twice that of Hall!); 93-94, 30% (highest Rep. 20%); 91-92, 40% (highest Rep. 35%); and 89-90, 20% (highest Rep. 30% - Rep. had three at 0% - additionally, Hall was the only democrat to have voted against the Civil Rights Act amendment of 1991 with everyone of the Republican members of the Texas delegation).

As a general proposition, Hall typically votes just higher than the highest Republican from Texas, but will dip below the highest Republican scorer on occasion. It is also clear that Hall performs well below that of the other Democrats especially over the last six years. Given this slightly better record than Republicans it is understandable that the African-Americans in his District vote for him, however, the TX-NAACP does not support Hall as a responsive representative and there is no testimony in the record to the contrary. You may also refer to Dr. Lichtman's report Table 30 for a comparison of Hall's voting record with the NAACP and the Hispanic coalition report cards against the other white Democratic Congressmen. Hall's record stands in stark contrast to the others whose votes range from a low of 60 to a high of 89.

Evidence presented at trial of the State's admission of preferential treatment of Hall includes the Jim Ellis chart, page 16 in Jackson Exhibit 136, where the four ranked

plans are described using a number of seats that the Republican's will recover from the Democrats and then it specifically lists Hall as retaining his seat. Additionally, in Jackson Exhibit 129, there is a specific reference to Hall retaining his seat. Additionally, from Dr. Lichtman's analysis of the data, he determined that of all the white Democratic congressmen, Hall is the only one whose percentage Democratic voter in his 1374C CD 4 is increased.

In short, there is no legitimate explanation to justify why every one of the white Democratic Congressmen are expected to lose in the next election except Hall if the Republican's sole intent was the increase in Republican seats.

Pretext

The TX-NAACP only adds to the presentation of pretext already included where appropriate above in an effort to eliminate repetition.

The State witnesses, Davis and King suggest or assert that they didn't consider race in drawing districts. This position is incredible given the circumstances surrounding the process and the timing of events. The following facts argue strongly for a finding of pretext by the State which provides additional circumstantial evidence of intentional racial discrimination. The State must have taken race into account in eliminating the minority voting rights in plan 1151C and in creating plan 1374C, given the following:

- experienced map drawers who obviously knew of the existence of racial data on red apple and had access to it during the entire drawing process, Davis,
- ranking of plans early in the process in terms of potential preclearance issues, which would only be related to race voting retrogression,
- efforts to create majority minority districts requires that race had been considered in the drawing of at least those CD's, and
- the suggestion that certain majority minority districts were created in compensation for minority voting losses elsewhere in the state requires that the State decisionmakers were specifically aware of the racial effect of their actions.

Additional pretext includes the suggestion that CD 9 in 1374C was drawn in compensation of the loss of CD 24 in 1151C. That is, since CD 9 had already been drawn in earlier versions of the House plan (1268C) without CD 24 having been eliminated as an effective minority opportunity CD. Therefore, at that time CD 9 in 1374C would only be compensating for the loss in CD 25 in 1151C. The State simply attempts to load onto CD 9 the additional and subsequent burden of the loss to CD 24 with an unjustifiable two for one swap.

As testified to and argued at trial the State cannot be legitimately allowed to hide behind blanket statements of purely partisan goals, an absence of racial characteristics in drawing CD's and compliance with the Voting Rights Act through compensation to the minority communities for losses sustained in multiple parts of the state under 1151C (four opportunity CD's – 15, 23, 24, 25 and six influence CD's – 1, 2, 9, 10, 11, 17) with only two marginally supported and highly questionable alleged minority opportunity CD's – 25 and 9 under 1374C.

While plaintiffs do not have evidence of one decisionmaker or more stating that plan 1374C was intended to retrogress or otherwise harm the minority communities, there is substantial circumstantial evidence of intentional racial gerrymandering or discrimination sufficient for this court to rule that the partisan goals, although certainly present were joined and supported by racial animus. This racial animus may clearly be understood and derived by the Court from the testimony of the African-American and Hispanic lay witnesses, politicians and experts that testified regarding the negative effects that plan will certainly have on the future of their communities and their political access and participation. There is no other word for this effect that RETROGRESSION. We

will loose the ground that had been gained in terms of the Voting Rights Act and race relations in general.

CONCLUSION

TX-NAACP urges this panel to strike down the State of Texas's effort labeled plan 1374C to illegally harm the voting rights of the minority communities across the State of Texas and to illegally remove the republican form of government by removing all sense of competitive and responsive representation.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

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