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	§	**CONSOLIDATED**
STATE OF TEXAS, ET AL.,	§	
Defendants.	§	

INITIALBRIEF OF THE TEXAS-NAACP ON REMAND

INTRODUCTION

During the original trial of this matter, the Texas NAACP asserted that Texas Congressional Redistricting Plan 1374C violated the Voting Rights Act of 1965 as amended and the Fourteenth Amendment to the United States Constitution. The NAACP and other groups appealed the decision of the three judge panel that upheld the actions of state authorities in adopting the new plan.

The remand to this court is obviously made for the purpose of providing all parties an opportunity to determine if there may be "workable standards" to measure the burden a gerrymander imposes on representational rights. Justice Kennedy's concurring opinion in *Vieth v. Jubelirer*, 124 S.Ct. 1769 (2004), makes this very clear as his opinion is the crucial one for our purposes. The plurality in *Vieth*, *supra* held that the issue of political gerrymandering is not a justiciable issue because of the lack of any manageable standard in assessing whether or not there might be constitutional violations. Clearly this suggests

that by sending this matter down for a remand, the Court is desirous of attempting to bring finality to this issue. Justice Kennedy's opinion makes it clear that we are not necessarily looking for just one standard, but possibly more than one if such were shown to exist.

Since the four members of the plurality believe that such issues are not justiciable, the remand must focus on the concurring opinion of Justice Kennedy and the opinions of the four dissenting justices. Notably, all 5 believe that political gerrymandering may violate the United States Constitution, but Justice Kennedy, unlike the four dissenters, has not been convinced that there is a test or a standard that is manageable by the courts that can be utilized in such cases. The task at this level then would seem therefore to be the need to come up with a standard or a test that is workable. This would appear to be at least one of the reasons why the case was remanded. Since we are primarily concerned with the issue of discrimination our submission will primarily focus on that issue.

In regards to this charge and focus from the Supreme Court, it would appear that a hearing or adversarial arrangement to test various proposals would be in order.

Even the members of the plurality acknowledge that issues of racial gerrymandering must be placed in a different category and are more easily discernable than general political gerrymandering. As a result, it is clear than one analysis that might be done relates to the issue of race. Importantly, the opinions seem to make it clear than even matters that may be legal on their face could still be found to be in violation. This would suggest some relaxation of any intent standard under the Fourteenth Amendment.

Justice Kennedy says the following: "The Fourteenth Amendment standard governs, and there is no doubt of that. My analysis only notes that if a subsidiary standard could show how an otherwise permissible classification, as applied, burdens representational rights, we could conclude that appellants' evidence states a provable claim under the Fourteenth Amendment standard." The key word here is applied, suggesting that there need not be culpability from the time of a plan or proposal's inception. Justice Kennedy is clearly advising us that though there may be arguably legal motives in place, that to go forward and implement a plan that transgresses the rights of citizens still might be objectionable. In this case, though it may be appropriate, for example, to decide to generate a certain number of Republican seats, it is the other matter relating to the impact on racial and ethnic minorities that raises the important issue.

Justice Kennedy also says that "the possibility suggests that in another case a standard might emerge that suitably demonstrates how an apportionment's de facto incorporation of partisan classifications burdens rights of fair and effective representation (and so establishes the classification is unrelated to the aims of apportionment and thus is used in an impermissible fashion." In looking at the issue of race, one possibility exists that one can observe the number of majority minority and minority influence districts combined and then determine whether there is such a substantial variation in the numbers as to (i) show a burden on the representational rights of African-Americans; and (ii) permits us to infer that it was done knowingly—to the extent such may be necessary. Of course, at this point the government would then have an opportunity to determine if there

was a compelling need for the classifications at issue. In the instance where strict scrutiny is applied, it is clear that the plan should be narrowly tailored, unlike the plan here. In other words, it has already been shown that it is possible to enhance Republican Representation without eliminating minority impact or influence districts. Not every district held by a democrat was an influence or a majority district, and of course it is our position that the State had wider latitude to deal with those districts. And as far as providing additional minority majority districts, the plan proposed by the Texas NAACP, 1251C, did exactly that, providing an additional African-American Congressional Seat in Houston and a likely Hispanic majority seat predominately in Tarrant and Dallas Counties.

Since we are concerned with the issues relating to minority voting rights, we will not attempt to address all possible tests that might be workable and put in place in the context of these cases. However, one such test or analysis that we do suggest be undertaken is an effort to determine in all such cases if the political gerrymandering leads to illegal retrogression, vote dilution or a violation of the Voting Rights Act. Notably, the opinion by Judge Higginbotham seemed to indicate that even if the numbers were problematic under the new plan, there was no illegal intent so the plans must survive. However, in light of what has been suggested in *Vieth*, *supra*, we must revisit this issue. Current standards can illustrate this. Notably, African-Americans continued to vote for Democrats by a 90 percent or greater number, though President Bush did more than

double the number of African-American voters he received in Texas during the past election.

Under the plan in place prior to 1374C--1151C-- there were more opportunity districts and more influence districts than under the newly adopted plan:

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	27		
	28		
	20		
	29		

[1]Under the old plan there were 17 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).

One could take these factors and analyze them in light of the same type analysis that is done for Grand Juries and Grand Jury Forepersons under *Swain v. Alabama*, 380 U.S. 202 (1965), and see also *Batson v. Kentucky*, 476 U.S. 79 (1986). and make determinations about whether or not the statistical changes are so substantial as to permit one to conclude that there may be something illegal about the plan. Expert witnesses can look at the plan and taking minority representation as a whole, view these matters and determine how or if the changes have changed or undermined minority voting rights. 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

[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.

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). Even the plurality in *Vieth*, *supra*, talk about a predominant intent test. What the panel majority's decision has done here is to fully and completely jeopardize the Voting Rights Act. Unless a standard that does not require the smoking gun and that permits proper inferences from facts can be adopted, a State only need to redistrict and disenfranchise African-Americans by saying that it was only coincidental since they vote Democratic.

The statistical analysis under Swain could simply assess the total number of influence and majority districts under each plan as provided by *Georgia v. Ashcroft*, 123 S.Ct. 2498 (2003). If the variation is such under the new plan as to suggest something illegal, then the State would have an obligation to come forward with evidence to show a compelling need for such a plan.

Justice Kennedy also indicates in his opinion that one action that might be taken in assessing a potential constitutional violation is whether there is a lack of comprehensive and neutral principles for drawing electoral boundaries. *Vieth*, *supra*. In this case, the map is replete with the packing, cracking , splitting of communities of interest and providing for a method where it is the candidates who chose the voters and not the other way around. This turns democracy on its head and should not be permitted to stand. It would be easy to assess such a standard.

CONCLUSION

TX NAACP adopts the argument contained in Part I of the Initial Brief of the Jackson Plaintiffs and the Democratic Congressional Intervenors. TX-NAACP urges this panel to conduct a hearing or other adversarial proceeding to determine if there is an appropriate standard for assessing political gerrymandering, and additionally that the court determine that there is a test that may be applied to determine whether the rights minority citizens have been abridged, and where race and political gerrymandering merge and or overlap. We support part I of their original brief.

PRAYER

TX NAACP respectfully asks the Court to invalidate in its entirety the 2003 Texas House Bill 3, 78th Leg., 3d C.S. (Oct. 12, 2003), and the mid-decade congressional redistricting Plan 1374C that it established. By so ruling, the Court would effectively reinstate the Congressional Plan 1151C, which it drew and unanimously adopted in 2001.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the above and foregoing instrument was served via email delivery on December 6, 2004 to the following individuals:

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