No. ___

IN THE

Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

---

JURISDICTIONAL STATEMENT

JOSE GARZA
JUDITH A. SANDERS-CASTRO
LAW OFFICE OF JOSE GARZA
7414 Robin Rest
San Antonio, Texas 78209
(210) 392-2856

ROLANDO L. RIOS
Counsel of Record
GEORGE KORBEL
LUIS VERA
ROLANDO L. RIOS
& ASSOCIATES
115 E. Travis Suite 1645
San Antonio, Texas 78205
(210) 222-2102

Counsel for Appellants

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the 2003 Texas Congressional Redistricting Plan (Plan 1374C), adopted and developed using outdated, inaccurate 2000 Census data and resulting in malapportioned districts, in violation of one person, one vote when measured against 2003 Census data, and when "the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage" and when such purpose is realized, is an unconstitutional political gerrymander.

2. Whether proof of racially polarized voting is overcome by evidence of partisan affiliation of minority voters in the analysis of the second prong of *Gingles* in a minority vote dilution claim.

PARTIES TO THE PROCEEDING

Appellants are the "LULAC Plaintiffs" the League of United Latin American Citizens (LULAC). Appellees are Rick Perry, Governor of Texas; Geoffrey S. Connor, Secretary of State of Texas; David Dewhurst, Lieutenant Governor of Texas; Tom Craddick, Speaker of the Texas House of Representatives; Charles Soechting, Chairman of the Texas Democratic Party; Tina Benkiser, Chairman of the Republican Party of Texas; and the State of Texas. All individual Appellees were sued in their official capacities.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	12
I. WHETHER THE STATE OF TEXAS VIOLATED THE ONE PERSON ONE VOTE RULE BY USING OUT-DATED CENSUS DATA TO CONDUCT A MID-DECADE REDISTRICTING OF CONGRESSIONAL DISTRICTS FOR PURELY PARTISIAN PURPOSES, *COX V. LARIOS*, 124 S. CT. 2806 (2004)	14
A. The Elimination of Virtually All Competitive District Violates Plaintiffs' Associational and Free Speech Constitutional Rights	18
II. THE DISTRICT COURT'S HOLDING THAT PARTISIAN VOTING NEGATES RACIALLY POLARIZED VOTING EFFECTIVELY REPEALS THE VOTING RIGHTS ACT IN TEXAS	20
CONCLUSION	28

TABLE OF CONTENTS—Continued

Page

APPENDIX A

Henderson v. Perry, Memorandum Opinion ___ F. Supp. 2d ___ (E.D. Tex. 2005 ..... 1a

APPENDIX B

LULAC Notice of Appeal 51a

APPENDIX C

LULAC Remand Exhibit No. 2 ..... 55a

APPENDIX D

Color Map of 2001 Plan (Plan 1151C) 84a

APPENDIX E

Color Map of 2003 Plan (Plan 1374C) 85a

TABLE OF AUTHORITIES

CASES

	Page
Balderas v. Texas, 536 U.S. 919 (2002)	4
Balderas v. Texas, No. 6:01-CV-158, slip op. (E. D.Texas, Nov. 14, 2001), *summarily affirmed*, 536 U. S. 919 (2002)	4, 8
Cox v. Larios, 124 S.Ct. 2806, 159 L. Ed. 2d 831 (2004)	3, 11, 15, 18, 20
LULAC No. 4434 v. Clements, 999 F. 2d 831 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071, 114 S. Ct. 878 (1994)	21
Sanchez v State of Colorado, 97 F. 3d 1303 (10th Cir. 1996)	20, 21
Session v. Perry, 298 F. Supp. 2d 451 (E. D. Tex. 2004)	*passim*
Thornberg v. Gingles, 478 U.S. 30 (1986)	3, 14, 22
Valdespino v. Alamo Heights I. S. D., 168 F. 3d 848 (5th Cir. 1999)	11, 16
Vieth v. Jubelirer, 541 U.S. 267, 124 S.Ct. 1769, 158 L. Ed. 2d 546 (2004)	10, 15, 18, 20, 22
Wesberry v. Sanders, 376 U.S. 1 (1964)	14

CONSTITUTIONAL AUTHORITY

U.S. CONST., FOURTEENTH AMENDMENT	14

STATUTORTY AUTHORITY

VOTING RIGHTS ACT, 42, U. S. C. § 1973	6

IN THE

Supreme Court of the United States

No. ___

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

---

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The three-judge District Court's majority and specially concurring opinions are reported at ____ F. Supp. 2d ___ and reprinted at pages 1a to 50a of the Appendix to this Jurisdictional Statement ("J.S. App."). The District Court's final judgment is reprinted at J.S. App. A. This case was heard on Remand and decided on June 9, 2005. The District Court's prior decision is reported at *Sessions v. Perry*, 298 F. Supp. 2d 451 (E. D. Tex. 2004). The District Court's 2004 opinion was vacated and remanded by this Court, *Sessions v. Perry*, ___ U.S. ____ (2004).

JURISDICTION

The District Court denied Appellants' claims for injunctive relief and entered judgment on June 9, 2005. J.S. App. A. Pursuant to 28 U.S.C. § 2101(b), Appellants filed timely notices of appeal on June 10, 2005. J.S. App. B. This Court's jurisdiction is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws." LULAC asserts that its associational rights and its right to equal protection of the law have been violated by the adoption and enforcement of the challenged redistricting plan in that the plan violates the one person, one vote principal and is an unconstitutional political gerrymander.

The statutory provision involved in this case is Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. LULAC asserts that the challenged redistricting plan has a discriminatory impact on the ability of Latino voters of Texas to participate in the political process and to elect candidates to the United States House of Representatives of their choice.

STATEMENT OF THE CASE

Appellants seek reversal of a ruling of a three-judge district court that upheld the congressional redistricting plan that the State of Texas enacted in October 2003. The District Court made three key errors.

First, the District Court erroneously upheld the constitutionality of the State's decision to redraw a perfectly lawful congressional districting plan, in the middle of the decade, for the sole purpose of achieving maximum partisan advantage

while using outdated census data and thus failing to comply with the requirements of the one person, one vote rule, as has been required by this Court, *Cox v. Larios*, 124 S.Ct. 2806 (2004).

Second, the majority misread this Court's treatment of the Voting Rights Act in *Thornburg v. Gingles*, 478 U.S. 30 (1986), in ruling that evidence of racially polarized voting can be "explained away" by proof of partisan voting in its analysis of plaintiff's claim of minority vote dilution as prohibited by Section 2 of the Voting Rights Act, 42 U.S.C. 1973.

Third, the majority improperly evaluated the impact of reducing the Latino political strength in the 23rd Congressional District, and elimination of a minority voting majority in the 24th Congressional District, and the elimination of all competitive Congressional Districts in which minority voters had previously supplied the voting difference in elections, in its analysis of plaintiff's minority vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Factual History

1. After the 2000 federal decennial census, Texas became entitled to 32 seats in Congress. The task of replacing the 30 old malapportioned districts from the 1990s with 32 new equipopulous ones fell initially to the Texas Legislature. *Session v. Perry* 298 F. Supp. 2d. 451, 457-58 (E. D. Tex. 2004) In 2001, the Governor and the leaders of the Texas Senate were Republicans and the leaders of the Texas House of Representatives were Democrats. The Legislature failed to agree on a new congressional map in its 2001 regular session, and Governor Rick Perry refused to call a special session. The State's default ultimately left the three-judge federal district court to reluctantly prepare a new, constitutional Congressional redistricting plan. *Session*, 298 F. Supp. 2d at 458. On November 14, 2001, the *Balderas* court, based on findings that Texas' 30 existing congressional districts were uncon-

stitutional, and adopted a new 32-district congressional map known as "Plan 1151C" or the "2001 Plan." *Id.*; *see also* Appendix E (color map of 2001 Plan).

The *Balderas* court plan reflected the growing strength of the Republican Party in Texas with 20 of the 32 districts offering a Republican advantage. *Session*, 298 F. Supp. 2d. at 471. Neither the State of Texas nor any other defendant appealed the court's decision. When Hispanic voters appealed, the State of Texas asked this Court to summarily affirm the district court's judgment, which it did on June 17, 2002. *Balderas v. Texas*, 536 U.S. 919 (2002). The court-drawn 2001 Plan governed the 2002 congressional elections in Texas.

2. Although the 2001 Plan, drawn by the *Balderas* court, was developed in part to recognize the growing strength of the Republican Party in Texas with 20 of the 32 seats offering Republican advantage, the plan offered no new Latino majority districts in recognition of the growing Latino population. *Session*, 298 F. Supp. 2d at 471; *Balderas v. Texas*, No. 6:01-CV-158, slip op. (E. D. Texas, Nov. 14, 2001), *summarily affirmed*, 536 U. S. 919 (2002). However, the November 2002 elections generated a congressional delegation with 15 Republicans and 17 Democrats.[1] The two new congressional districts that Texas gained from reapportionment elected Republicans, while the other 30 districts re-elected 28 incumbents and elected one freshman from each party (each of whom replaced a retiring member of the same party).

Seven of the incumbents—six Democrats and one Republican—prevailed even as their districts were voting for senatorial, gubernatorial, and other statewide candidates of the opposite party. Each of the Democrat winners in these

---

[1] When District 4's Congressman Ralph Hall switched parties in January 2004, Texas's House delegation became evenly divided, with 16 Democrats and 16 Republicans.

districts received overwhelming support from the minority voters of their districts. LULAC Trial Exhibit No. 17. Without that support, each would have lost to a challenger from the district's dominant political party. *Id.* These seven Congressmen (most of whom represent relatively rural districts) had the closest contests of any incumbents in the State. Three of them won with less than 52% of the total vote. Fourteen of the new districts voted consistently Republican and 11 voted consistently Democratic. But because six of the seven incumbents who won the relatively competitive seats were Democrats, Texas's congressional delegation had more Democrats and fewer Republicans than the statewide balance of power alone would have suggested.

At the same time that Republicans were picking up two new congressional seats, they also were making gains at the state-legislative level. As a result, Republicans won a majority of seats in the Texas House of Representatives and, with it, unified control of the state government for the first time in decades. *See Session v. Perry*, 298 F. Supp. at 458.

3. In 2003, the newly elected 78th Legislature convened and the House Redistricting Committee took the unprecedented step of considering congressional redistricting in the middle of a decade. As a critical deadline approached for passing legislation in the regular session, a group of Democratic House Members left the State and broke quorum for a week, effectively killing the redistricting measure for that session.[2] *Session*, 298 F. Supp. 2d. at 458.

Governor Perry called the Texas Legislature into special session to take up congressional redistricting. During that session, the Texas House, which had refused to hold public field hearings on redistricting in the regular session, reversed itself and decided to hold hearings across the State.[3] The

---

[2] Tr., Dec. 15, 2003, 1:00 p.m., at 76-77 (Rep. Richard Raymond).

[3] *Id.* at 73-75, 78-79 (Rep. Richard Raymond).

Texas Senate also scheduled a series of field hearings. At these public hearings, thousands of Texas voters appeared and gave their views on the propriety of mid-decade congressional redistricting. The vast majority opposed it.[4]

During the first special session, Representative Phil King, the legislation's chief sponsor, initially asked the Redistricting Committee to pass a map dismantling District 24 (in the Dallas-Fort Worth area) as a minority district.[5] The next day, he reversed course and supported a plan that left intact all 11 majority-minority districts.[6] He stated at the time that he was doing so to improve the chances of winning preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[7]

The Senate Jurisprudence Committee also took up congressional redistricting in the first special session. But the Senate failed to pass a map in that session when 11 state senators (more than a third of the 31-member chamber) announced that they were opposed to taking up congressional redistricting legislation. It has been a long-standing tradition of the Texas Senate to require that a measure receive support of a two-thirds supermajority before the full Senate will consider it.[8]

When Lieutenant Governor David Dewhurst then announced that he would abandon the two-thirds rule in any future special session on congressional redistricting, 11 Texas senators left the State to deprive the Senate of a quorum.[9] But when one of them returned to the State a month later, Governor Perry called a third special session.

---

[4] Tr., Dec. 17, 2003, 1:00 p.m., at 115 (Sen. Royce West).

[5] Tr., Dec. 18, 2003, 1:00 p.m., at 149 (Rep. Phil King).

[6] *Id.* at 149-51 (Rep. Phil King).

[7] *Id.* at 148-50 (Rep. Phil King).

[8] Tr., Dec. 15, 2003, 8:30 a.m., at 7-8 (Sen. Bill Ratliff).

[9] Tr., Dec. 17, 2003, 1:00 p.m., at 119 (Sen. Royce West).

In that session, each house passed a map that preserved all 11 minority districts.[10] But the conference committee instead produced a map that dismantled as minority districts both District 24 in the Dallas-Fort Worth area and District 23 in South Texas, while adding a new Hispanic majority district running from McAllen (on the Mexican border) 300 miles north to Austin.[11] The House and Senate passed this new map, known as "Plan 1374C" or the "2003 Plan," on October 10 and 12, 2003. *See* J.S. Appedix E (color map of 2003 Plan). Every Hispanic and African-American Senator and all but two of the minority Representatives voted against the 2003 Plan.[12]

4. The new map shifted more than eight million Texans into new districts and split more counties into more pieces than did the court-drawn 2001 Plan.[13] And the 32 districts in the new map were, on average, substantially less compact than their predecessors, under either of the two quantitative measures of compactness that the Legislature uses.[14]

The 2003 Plan was designed to protect all 15 Republican Members of Congress and to defeat at least 7 of the 17 Democratic Members.[15] Among those targeted for defeat were the six Democrats who had won in November 2002 on the strength of cohesive minority voter support. Each of them was "paired" with another incumbent, placed in a substantially more Republican district, or given hundreds of thousands of new, unfamiliar (and heavily Republican) constituents.

---

[10] Tr., Dec. 15, 2003, 1:00 p.m., at 83 (Rep. Richard Raymond).

[11] Tr., Dec. 18, 2003, 1:00 p.m., at 148-49, 157 (Rep. Phil King).

[12] Tr., Dec. 15, 2003, 1:00 p.m., at 85 (Rep. Richard Raymond).

[13] Jackson Pls. Ex. 141 (Gaddie expert report) at 5-6; Jackson Pls. Ex. 89.

[14] Jackson Pls. Ex. 141 (Gaddie expert report) at 6-7.

[15] Jackson Pls. Ex. 44 (Alford expert report) at 30.

The seventh Democrat targeted for defeat was Congressman Martin Frost, an Anglo Democrat who represents District 24 in the Dallas-Fort Worth area. Under the court-drawn 2001 Plan, District 24, a majority-minority district whose total population is roughly 23% black, 38% Hispanic, 35% Anglo (*i.e.*, non-Hispanic white), and 4% Asian or "Other" was drawn in a way that increased the Latino voting strength in the district. *Balderas v. Texas*, No. 6:01-CV-158, slip op. (E. D. Texas, Nov. 14, 2001), *summarily affirmed*, 536 U.S. 919 (2002). In general elections, the district is reliably Democratic. And in the Democratic primary elections, where the ultimate winners are nominated, blacks typically constitute more than 60% of the electorate, because the district's Anglo voters are much more likely to participate in the Republican primary and because of low Hispanic voter turn-out.[16] Thus, African-American voters can consistently nominate and minorities consistently elect their preferred candidates within the 2001 Plan's District 24.[17] But the new 2003 Plan dismantled District 24 and splintered its minority population into five pieces, each of which is then submerged in an overwhelmingly Anglo Republican district.

The one Republican incumbent who had won narrowly in November 2002—District 23's Congressman Henry Bonilla (the only Mexican-American Republican in the House of Representatives)—had his district made substantially safer for a Republican candidate, as nearly 100,000 Latinos from the Laredo area—who are roughly 87% Democratic—were removed and replaced with a similar number of "Hill Country" residents—who are heavily Anglo and roughly 79% Republican.[18] The changes to District 23, shifting significant

---

[16] Tr., Dec. 11, 2003, 1:00 p.m., at 73-75 (Prof. Allan J. Lichtman); Jackson Pls. Ex. 140 (Gaddie expert deposition) at 32-33.

[17] Jackson Pls. Ex. 1 (Lichtman expert report) at 23-26.

[18] Jackson Pls. Ex. 44 (Alford expert report) at 15.

Anglo Republican voters into the district and shifting out significant Latino Democratic voters, intentionally resulted in eliminating District 23 as a Latino majority voting age population district in order to make Congressional District 23 **more** Republican. *Sessions,* 298 F. Supp. 2d at 496 ("Congressional District 23 is unquestionably not a Latino opportunity district under Plan 1374C. . . . the Hispanic citizen voting age population is 46%, reduced from 57.5% in Plan 1151C; the percentage of Spanish-surnamed registered voters is 44% under Plan 1374C, reduced from 55.3% in Plan 1151C.")

In an attempt to "offset" that loss of electoral opportunity for Hispanics, the Legislature drew a new, bizarrely shaped majority-Hispanic district stretching from the Rio Grande Valley, along the border with Mexico, all the way to the Hispanic neighborhoods of Austin in Central Texas. This new District 25 is more than 300 miles long and in places less than 10 miles wide. The two ends of the district are densely populated and contain more than 89% of its Hispanic population, as the six intervening rural counties serve primarily to "bridge" the two population centers. This district elected an Anglo Democrat over Latina candidates in the primary and the general election.

5. Faced with this plan, several dozen individual voters and officeholders, as well as the NAACP, the League of United Latin American Citizens (LULAC), and other minority and civil-rights organizations filed suits in the District Court for the Eastern District of Texas, asking the court to invalidate the 2003 Plan and to place the 2001 Plan into effect. The court consolidated the cases (including the 2001 *Balderas* lawsuit) and set an expedited discovery schedule, culminating in a trial in December 2003. The court held the expedited trial in mid-December, and the Department of Justice precleared the 2003 Plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, after the parties had rested but before closing arguments.

On January 6, 2004, the District Court issued a divided opinion upholding the 2003 Plan. The dissenting judge explained that he would have held the 2003 Plan in violation of Section 2 of the Voting Rights Act and ordered elections to be held under the 2001 Plan, "a plan that is beyond dispute a legal one." *Session*, 298 F. Supp. 2d at 528.

6. The District Court's 2004 opinion was vacated and remanded by this Court with instructions that the case be evaluated in light of *Veith v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004).

After receiving briefing and exhibits, the District Court held a hearing on January 21, 2005. The principle focus of the evidence and argument concerned the question of whether the Texas 2003 Congressional redistricting plan was a political gerrymander when evaluated in light of *Veith v. Jubelire* and its progeny. Plaintiff LULAC argued that use of outdated 2000 Census data to develop a new redistricting plan, whose sole purpose was to gain additional partisan advantage, violated the one person, one vote principle and was a political gerrymander. LULAC submitted briefing, argument and exhibits that demonstrated that between 2000 when the census was conducted and 2003 when the new redistricting plan was adopted the State had grown by over 6% and the Latino population of Texas had increase from 32% to 34% of the total. Individual districts had changed so that the difference in population between the largest and smallest districts exceeded 88,000 persons. LULAC Remand Exhibit No. 2. Moreover, as noted by the concurring opinion of Judge Ward, the failure to account for the change in population in development of the 2003 plan weigh most heavily on the Latino population. Memorandum Opinion, Ward, J., specially concurring at pp. 5-6; Appendix A, pp. 45a-46a.

The District Court discounted the arguments of LULAC and the similar positions of the Plaintiffs City of Austin and Travis County and the *amicus* of the University Law Pro-

fessors. The District Court felt that whatever population disparities existed in the challenged plan, would also be prevalent in the previously drawn plan and in any remedy plan almost immediately after its adoption. Memorandum Opinion, pp. 41-42. However, the District Court misstates the requirements of *Cox* and the argument advanced by LULAC. Only when the challenged plan was developed for no legitimate state purpose and instead developed with "the single minded purpose" of gaining partisan advantage would the plan lose the presumption of validity it would otherwise receive using the last available decennial census.

The District Court also expressed doubts that reliable replacement population data existed to use in any new redistricting thus foreclosing entirely mid-decade redistricting or that if such data could be developed it would lead to more not fewer mid-decade challenges to plans that had relied on the decennial census. Memorandum Opinion pp. 40-43. Again, the District Court ignores the core of the one person, one vote argument advanced by LULAC. A strict adherence to one person, one vote as advocated by LULAC, the Law Professors and Travis County/City of Austin, and required by *Cox* would only give rise when there was no justification for the voluntary redistricting except to secure additional political gain. Finally, with regard to whether replacement data could have been developed, the courts in Texas and the 5th Circuit have already determined that in fact replacement data can be developed and used to redistrict when census data has become outdated as was the case here. *See Valdespino v. Alamo Heights Independent School District*, 168 F. 3d 848 (5th Cir. 1999). Here, the State simply made no effort to insure compliance with one person, one vote except to use out dated census data that would facilitate the political gerrymander it intended. The District Court, therefore, simply refused to "apply an established doctrine in a novel way" and thus failed to apply the requirements of *Cox v. Larios*, 124 S. Ct. 2806,

159 L. Ed. 2d 831 (2004) to the facts of this case. Memorandum Opinion, p. 44; Appendix A, p. a.

The specially concurring opinion of Judge Ward differed from the majority in that he expressed the opinion that *Cox* would have required a finding of unconstitutionality except that he felt such an analysis was outside the appellate mandate and therefore could not be addressed. Memorandum Opinion, Ward, J., specially concurring at pp. 9-10; Appendix A, pp. a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The growth of the Latino population in Texas accounted for a significant portion of the total growth in the State during the 1990's and therefore for the concomitant gain by the State of two additional Congressional seats after the release of the 2000 Census. Between April 2000 and July of 2003 the State's population continued to grow at a substantial rate due again in large part to the growth of the Latino population. In 2003 Texas congressional redistricting was revisited for the "single minded purpose" of securing commanding partisan advantage of the Texas Congressional delegation. The fact that this "single-mined purpose" was accomplished with outdated census data; that facilitated securing the partisan advantage; that resulted in significant deviations between districts when measured against updated data; when a legal plan already existed (which had been itself drawn purposefully to favor the dominant party); and when securing the partisan advantage was accomplished in large part at the expense of Latino voters, presents the Court with an opportunity to at long last establish at least one standard of evaluating the Constitutionality of a severe partisan gerrymander that is manageable and objective.

Texas's state government was mired for months in partisan fights over passage of a map that was drawn for only one purpose—to replace a legal, more competitive map with a

severely biased, noncompetitive one. Although it soon became clear that full achievement of that partisan goal would require depriving minority voters of an equal opportunity to participate in the political process and to elect their preferred candidates, Appellees not only plowed ahead but sought to transform their avowed partisanship into a justification for diluting minority rights.

The majority below endorsed this strategy at every turn. It denied liability for mid-decade redistricting designed to lock in partisan control. It then pointed to the map-drawers' partisanship as a reason for denying liability for their intentional elimination of minority districts. It went on to severely limit the protections of Section 2 of the Voting Rights Act. And finally, it refused to evaluate the partisan gerrymander in light of the malapportionment that resulted from the use of outdated census data.

This combination of rulings, if upheld, will unleash an orgy of partisan gerrymandering without limits. Even the rights of racial and ethnic minorities will be at risk if they get in the way of partisan goals. The resulting maps will resemble Texas's 2003 Plan, which takes racial and political balkanization to new depths.

As we show, a partial answer to these problems would be to put some meaningful limit on partisan gerrymandering such as a bar to unnecessary mid-decade line changes unless strict adherence to one person, one vote requirements. But regardless of how the Court addresses that issue, it must correct the erroneous rulings below rejecting claims of racial vote dilution. Those rulings not only leave minority voters unprotected from the kind of deliberate mistreatment shown in this record but will actually encourage line-drawers to continue to segregate our society along racial lines unnecessarily in the service of a nakedly partisan agenda.

Finally, the lower court essentially eviscerated application of the § 2 of the Federal Voting Rights Act in Texas by holding that racially polarized voting could be "explained away" by partisan voting. Essentially, even though the minority plaintiffs proved the existence of high degrees of racially polarized voting as required by this Court in *Thornberg v. Gingles*, 478 U.S. 30 at 63, Texas was able to rebut the evidence by "offering evidence that the divergent racial voting patterns may be explained in part by causes other than race." Justice O'Connor specifically stated that statistical evidence of divergent racial voting offered solely to establish the minority group's political cohesiveness **may not be** rebutted by evidence indicating that there is "an underlying divergence in the interests of minority and white voters.' *Id.* at 100. [Emphasis added]

I. WHETHER THE STATE OF TEXAS VIOLATED THE ONE PERSON ONE VOTE RULE BY USING OUT-DATED CENSUS DATA TO CONDUCT A MID-DECADE REDISTRICTING OF CONGRESSIONAL DISTRICTS FOR PURELY PARTISIAN PURPOSES, *COX V. LARIOS*, 124 S. CT. 2806 (2004).

Article I, § 2 of the United States Constitution requires congressional districts to be of equal population. *Wesberry v Sanders*, 376 U. S. 1 (1964). The fundamental principle of representative government is one of equal representation for equal numbers of people, one-person, one-vote. *Id.* The principle of population equality assures that, regardless of the size of the whole body of constituents, political power is equalized between districts by equalizing the number of people in each district. In fact, Congressional districts are held to a zero deviation standard, even while state and local districting plans with maximum deviations of 10% or less have been held presumptively valid.

The one person, one vote rule is a principled and well-accepted rule of fairness that governs districting and formulates the legislator's duty in drawing district lines. *Cox v. Larios*, 159 L. Ed. 2d 831, 833 (2004)("the equal population principle remains the only clear limitation on improper districting practices . . . ."). To dilute its strength at the altar of a partisan gerrymander would result in an unconstitutional redistricting plan. *Id.* ("had the Court in *Vieth* adopted a standard for adjudicating partisan gerrymandering claims, the standard likely would have been satisfied in this case"). The facts of this case establish quite clearly that the one person, one vote principle was indeed sacrificed, even used, to further a radical political gerrymander.

First, there is truly no question but that the motivation and result of the 2003 Congressional redistricting plan was to make a substantial change in the partisan alignment of the Texas delegation to the United States House of Representatives. As the District Court thoroughly documented, "[t]here is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage". *Sessions v. Perry*, 298 F. Supp. 2d 451, 470 (E. D. Tex. 2004) (vacated and remanded *Sessions v. Perry*, __ U.S. __ (2004). The District Court recognized the intent of the partisan gerrymander was to achieve a quota of electing 22 Republican Texans to the U. S. House of Representatives. *Sessions*, 298 F. Supp. 2d at 471. In fact, the 2004 election results show a gain from 15 to 21 Republican members of the Texas delegation to the U. S. House of Representatives. (Affidavit of Dr. John Alford, Jackson Plaintiffs' Remand Brief, herein after "Alford Affidavit"). In addition, the District Court recognized the very strong affiliation between Latinos and African Americans in Texas with the Democratic Party and the political influence achieved by these groups as a result of this affiliation. *Sessions* 298 F. Supp. 2d at 471, 483, 484, 488-89. Therefore, any misuse of Census data by

Texas to gain Republican Party partisan advantage would also clearly disadvantage Latino and African American voters.

Second, the 2003 plan violates the "one person, one vote" rule in a substantial way. As the District Court determined, after the publication of the 2000 census the State of Texas was initially unable to fashion a redistricting plan for the Texas Congressional delegation. *Sessions* 298 F. Supp. 2d at 471. Therefore, the District Court was compelled to develop a congressional redistricting plan for Texas. *Id.* The plan developed by the District Court "reflected the growing strength of the Republican Party in Texas, with 20 of the 32 seats offering Republican advantage." *Id.* Nevertheless, after Republicans gained control over both houses of the Texas Legislature, as well as control over all prominent Executive Branch positions, redistricting was revisited in 2003. *Id.*

According to the United States Census Bureau, in 2003 the population of Texas had increased from 20,851,820 to 22,118,509, an increase of over 6% since April of 2000.[19] In addition, the population of Texas Latinos had increased from 32% to 34% of the total. Yet, the 2003 redistricting plan adopted by the State of Texas was based the outdated, inaccurate 2000 census. No effort was made by the State to secure more accurate data even though the State's own demographers had data that showed the State's growth over the three years since the conduct of the 2000 census count.[20] By using

---

[19] Although the decennial census data is generally presumed accurate figures that have a high degree of accuracy and are clear, cogent and convincing override the prior decennial census numbers. The methodologies used by the Census Bureau to update its 2000 numbers exceed the accuracy of the numbers approved by the Fifth Circuit in *Valdespino v. Alamo Heights Independent School District* 168 F. 3d 848, 854 (5th Cir. 1999) to overcome this presumption of accuracy.

[20] *See* http://txsdc.utsa.edu/download/pdf/estimates/2003_txpopest_county.pdf (Table 1). According to the state's demographer, by July of

the outdated 2000 census data the Defendants were able to have the 2003 plan manipulate the one person, one vote principle to political advantage. By overpopulating Democratic leaning inner city districts and Democratic leaning minority rural districts the State was able to minimize the influence of Democratic voters and minority Democratic voters in particular. On the other hand, by underpopulating Republican leaning suburban and Republican leaning Anglo rural districts the State was able to maximize the political advantage of Republican and primarily Anglo Republicans. By using the inaccurate 2000 census data, all this was achieved even while appearing to achieve equal population between districts.

The reality is quite different when measured by 2003 population data however. For example the predominately Republican and Anglo west Texas district in Lubbock, District 19, appears to have equal population with all other districts in the plan when measured by the outdated 2000 Census data. However, according to the United States Census Bureau, in 2003 District 19 had a population of 651,316 persons or—5.8% below the 2003 ideal of 691,203. (LULAC Remand Exh. 2) By contrast District 27 a predominantly Latino and Democratic district in South Texas, in 2003 had a population of 696,692 persons or +.79% above the 2003 ideal population. *Id.* The total population disparity between just these two districts is well over 6%, hardly the zero population deviation required of Congressional districts. In addition, in Congressional District 23, the State's 2003 plan purposefully removed half of a high growth Latino County (Webb County is over 90% Latino, grew by over 22,000 persons between 2000 and 2003 and half its population was removed from

---

2003, when the legislative redistricting effort was underway, the state had added 1,266,689 people to its official 2000 census population. Harris County alone had added 190,343 people. Bexar County had added 70,606; Hidalgo County had increased by 66,388; and Jefferson County had lost 1,344 people.

District 23 by the State's 2003 plan) and replaced with three moderate growth, predominantly Anglo Counties (Bandera, Kerr and Kendall Counties have a combined Latino population of 18.7%, and had a combined population growth of 6,856 people between 2000 and 2003) to form a safe Republican District.

This sort of manipulation of population created disparity in population between districts that necessarily fell most prominently on the fast growing Latino population of Texas, but was done nevertheless because it facilitated the goal of achieving partisan advantage and therefore violates the equal protection and associational guarantees of the United States Constitution. *Cox v. Larios*, 159 L. Ed. 2d 831, 833-34. The District Court was wrong in refusing to apply the *Cox* requirements to the analogous facts of this case.

A. The Elimination of Virtually All Competitive Districts Violates Plaintiffs' Associational and Free Speech Constitutional Rights.

The elimination of all competitive districts, whether Democratic or Republican leaning, from a redistricting plan and replacing them with overwhelmingly safe districts for the dominant political party would assure that future elections would burden the disfavored party's rights to fair and effective representation even into the future and thus violate the constitutional protections from unfair political gerrymanders. *Vieth v. Jubelirer* 158 L. Ed. 2d 546, 579 (2004) (Kennedy concurring) ("If a State passed an enactment that declared 'All future apportionments shall be drawn so as most to burden Party X's rights to fair an effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated").

The facts concerning the influence of minority democrats on competitive districts under the 2000 court ordered plan was well documented at the initial trial and was recognized

by the District Court. *See: Sessions*, 298 F. Supp. 2d at 485-86, 488-89. LULAC Trial Exh. 17. The elimination of that influence in the 2003 redistricting plan is established by the 2004 elections.

The record of this case establishes that Latino and/or African American Democratic voters had significant influence in the outcome of Congressional elections in districts 1, 2, 4, 9, 10, 11, 17, and 23. *Id.* In the Districts 1, 2, 4, 9, 10, 11, and 17 the minority vote was the deciding factor in the outcome (LULAC trial Exh. 17) and in District 23 the Latino vote made the election close *Sessions*, 298 F. Supp. 2d at 487-89. Although the Latino vote in District 23 had shifted with each successive election away from the Republican incumbent, (in 2002 only 8% Latino support), Mr. Bonilla continued to win. Therefore, the intent of the changes to District 23 in shifting significant Anglo republican voters into the district and shifting out significant Latino democratic voters was to "make Congressional District 23 **more** Republican." *Sessions*, 298 F. Supp. 2d at 488 (emphasis added). In each of these districts, the 2003 plan not only diminished the influence of the minority democratic vote, but rather it devastated that influence to the level of making it inconsequential. (LULAC Exh. 17). These changes were meant to further the State's efforts to reach its partisan quota of 22 permanent Republican Congressional districts. *Sessions*, 298 F. Supp. 2d at 485-86, 488-89. This result was largely achieved. By transforming each of these competitive Republican leaning districts, where the normal course of political discourse could alter the results, to super-safe Republican districts, the changes result in permanently eliminating the ability of minority democrats from any political influence outside safe Democratic districts. Such a devaluation of associational and free speech rights where democratic voters' (minority democratic voters in particular) influence is relegated to 10 safe democratic districts and one competitive district out of 32 total districts

rises to the level of unconstitutionality. *Veith*, 158 L. Ed. 2d 546, 579. When these facts are taken together with the fact that such a result was achieved with the use of inaccurate 2000 census data, which undervalued the population of minority voters, the 2003 plan fails violates the constitutional protections against partisan gerrymanders. *Cox v. Larios*, 159 L. Ed. 2d 831, 833 (2004).

The District Court's treatment of these issues is inconsistent with this Court's teachings in both *Veith* and *Cox*.

II. THE DISTRICT COURT'S HOLDING THAT PARTISIAN VOTING NEGATES RACIALLY POLARIZED VOTING EFFECTIVELY REPEALS THE VOTING RIGHTS ACT IN TEXAS.

The court below dispatched the claims of racial and ethnic discrimination brought by the NAACP, the League of Latin American Citizens (LULAC) and the American GI Forum in what must be a record in such a case using only ninety-nine (99) words. (App p. 45) No evidence was discussed, no cases were cited and no statutes or constitutional provisions were mentioned. Rather the court found that these issues were "beyond the scope of the mandate" on remand. In the earlier action by the district court that was vacated, the Voting Rights Act § 2 claims were ignored because of a Fifth Circuit precedent which is at odds with the other circuits[21] and the legislative history of the changes to the Section 2 of the act in 1981.

---

[21] *Sanchez v State of Colorado*, 97 F. 3d 1303, 1311 (10th Cir. 1996).

What the district court in *Session* found was that because minority voters support Democratic Candidates by overwhelming margins and because White or Anglo voters support Republican candidates in similar levels, racially polarized voting could not be shown. Rather, the district court, along with the Fifth Circuit require minority plaintiffs "to disprove partisanship as the driving force behind racial [block] voting." *Sessions v Perry*, 298 F. Supp. 2d 451, 478 n. 88 (E.D. Tex. 2004). [22] In doing so, the District Court along with the Fifth Circuit has voided the application of § 2 of the Voting Rights Act to Texas.[23] In Texas, Hispanics, Blacks and Whites consistently vote along partisan lines; overwhelmingly, Hispanics and Blacks vote Democrat and Whites vote Republican. Evidence in this case demonstrated severe racially polarized voting as required by this Court in *Gingles* to prove a violation of § 2 of the Voting Rights Act. The District Court disregarded the evidence as explained by partisan voting, *Id.* The facile response to this is that Hispanics and Blacks would do well to abandon the Democratic Party and become Republicans. But that would effectively void their First Amendment Rights to Associate Politically.

---

[22] The decision that is the subject of this appeal adopted the prior opinion, *Sessions v Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) that had been vacated by this court. The three judge court states: "Ultimately, we will adhere to our earlier judgment that there is no basis for us to declare the plan invalid." See page 1 of **Appendix A**

[23] In *League of United Latin American Citizens Council (LULAC)l No. 4434 v. Clements*, 999 F. 2d 831, 853-54 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071, 114 S. Ct. 878 (1994) the Fifth Circuit, on an *en banc* hearing empanelled *sua sponte*, reversed a three judge panel opinion that upheld a § 2 Voting Rights Act claim against at large judicial elections. In that case, the three judge panel held, consistent with *Gingles*, that evidence of racially polarized voting cannot be rebutted by evidence of partisan voting, *LULAC*, 986 F. 2d 728, 738. *See also Sanchez v State of Colorado*, 97 F. 3d 1303, 1311 (10th Cir. 1996) for the same interpretation as asserted by LULAC in this case.

According to a majority of the Justices in *Gingles*, to satisfy the second threshold factor minority voters need not prove the **reason** they vote for the same candidates. Justice Brennan, writing for three other Justices, would have held that "the reasons [minority] and white voters vote differently have no relevance to the central inquiry of § 2." *Gingles*, 478 U.S. at 63 (Brennan, J, joined by Marshall, Blackmun, and Stevens, JJ.). Although not entirely agreeing with Justice Brennan, Justice O'Connor, writing on behalf of three other Justices, agreed that defendants cannot rebut statistical evidence of a minority group's political cohesiveness by "offering evidence that the divergent racial voting patterns may be explained in part by causes other than race." *Gingles,* 478 U.S., at 100 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring in the judgment). Justice O'Connor specifically stated that statistical evidence of divergent racial voting offered solely to establish the minority group's political cohesiveness may not be rebutted by evidence indicating that there is "an underlying divergence in the interests of minority and white voters.' *Id.*

While it is true that *Session* was remanded for further consideration in light of *Veith*, this Court vacated *Session* and no part of it was affirmed. We will detail some of the problems faced by minority Texans because of the dead serious fight between Republicans and Democrats.

Intentional Discrimination

No one denies and the district court found in *Session* that "the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage." *Session v. Perry*, 298 F. Supp. 2d 451, 470 (D. Tex., 2004) By even the most charitable descriptions this special redistricting session that produced the Texas Congressional reapportionment of 2003 was a concerted intentional effort by Republicans to defeat Democratic candidates by gerrymandering districts so that they could not win. Gerrymander is a word that

was coined to describe intent and over the years, it has become probably the most recognizable icon of intent in the area of redistricting.

Foreseability

The possibility of illegal or unconstitutional adverse effect on minority voting interests was entirely foreseeable. In the redistrictings after the 1970 Census, the 1980 Census and the 1990 Census, all or significant parts of what the district court refers to as Democratic gerrymanders were found to violate either the Constitution or the Federal Voting Rights Act. This was because of the consequent effect that those plans had on minority voting interests. As recently as the 2001 redistricting of the Texas House of Representatives by the all Republican State Legislative Redistricting Board, a similar attempt to reduce democratic elected officials was the subject of a Department of Justice Objection because of the effect it had on minority voting interests.

This intentional discrimination was aided by the mid-decade nature of the apportionment. The gerrymanders had access to the 2002 election results which demonstrated the strengths and weaknesses of the candidates. It was like having the opponent's play book.

In this desperate fight between the Democratic and Republican parties, the minority interests were savaged.

District 24 becomes District 32 in Dallas County: Not usually thought of as Democratic, Dallas County has actually become one of the most Democratic Counties in Texas. This is due, in large part because it has one of the fastest growing Latino populations in the country. Currently Hispanics and Blacks outnumber Whites in the county.

In the 2004 presidential election the President Bush carried only 50.3% of the Dallas County vote.[24] In addition, the County elected a Democratic Sheriff, a State Appellate Judge and more than half of the contested District Court positions. Yet, Dallas County was carved up into five congressional districts, four (80%) of which are locked up for Republican candidates. This was accomplished for three congressional districts (3, 24 and 5) by running them into surrounding suburban areas. District 30, the "Black District" established in the 1990 redistricting and located entirely in Dallas County was left pretty much in tact presumably to avoid problems with Section 5 of the Federal Voting Rights Act. District 32, located entirely within the County was gerrymandered to appear to be a hand extending from the point where Collin, Denton and Dallas Counties come together. It curves around to enclose Highland park, University Park and the North Dallas County suburbs[25] with the heavily minority and blue collar Oak Cliff and Cockrell Hills. These two areas have almost nothing in common. The so called "park cities" have virtually no black and just 3% Hispanic population The Oak Cliff/Cockrell Hills area of Dallas contains the County's most heavily concentrated and fastest growing Hispanic population. This was conceded to be a district drawn to defeat Congressman Frost (the chief Democratic fund raiser for the Democratic Congressional effort and a long time nemesis of Congressman Delay). The former district in this area was District 24. Instead of tying the minority Oak Cliff area of Dallas to Highland Park, it in-

---

[24] http://www.dalcoelections.org/archivedresults/nov22004/Final_Cumlative.html All references to voting in Dallas County are from this official Dallas County source.

[25] The state expert Dr. Gaddie's studies showed that Martin Frost received considerable less than half of the White vote in 2002 election but won only because of the minority vote that Dr. Gaddie's studies showed voted almost entirely for him Frost.

cluded the heavily minority Southeast part of neighboring Fort Worth which is the fastest growing Hispanic area of Fort Worth. As a result District 24 which had a Hispanic and Black population of more than 60% was reduced to just above 44% in District 32. This changed a district which was currently electing an incumbent White Democrat,[26] but clearly on the way to becoming a minority district into one in which a democrat let alone a minority democrat would have no chance for election.

District 1 in East Texas: In the former plan and for as long as records have been kept, this has been a district representing East Texas. Over the years, Blacks and Whites have had serious problems but recently have been able to create coalitions to elect members of Congress. In the 2002 elections, as shown by the studies of the State's expert, longtime Congressman Max Sandlin lost among White voters but was elected by carrying almost all of the Black vote. The plan at issue here carved eight of the East Texas Counties out of the district replacing them with suburban Dallas fast growing areas in Collin and Rockwall Counties. In the 2004 Election Congressman Sandlin was not only defeated but able to garner less than 40% of the vote. When a party or a candidate wins with such overwhelming margins, the possibility to form meaningful coalitions is negligible. This changed what had been a real minority impact district—one in which the Black vote accounted for the victory into one in which the Black voters are observers in a district dominated by overwhelmingly White suburban Dallas Voters.

District 9 becomes District 2: In the former District 9, Congressman Lampson was elected with only 45% of the White vote and virtually all of the Black vote. This district was composed of the Costal Counties of Jefferson, Chambers

---

[26] This and all other references to the November 2004 General Election are from the official records maintained by the Texas Secretary of State at http://elections.sos.state.tx.us/elchist.exe

and Galveston Counties together with a portion of Harris County. In the plan at issue, this became District 2 and Galveston and Chambers Counties were removed and replaced with virtually all the suburban Houston area contained in the Northeastern portion of Harris County. In this District Congressman Lampson lost with just over 40% of the vote. Again, this changed what had been a real minority impact district—one in which the Black vote accounted for the victory into one in which the Black voters are observers in a district dominated by overwhelmingly White suburban Houston Voters.

District 10 is Split in Half: In the former plan District 10 was an almost perfect square area containing half of Travis County. It was a District that elected a long time White Congressman Lloyd Doggett. Although it has functioned as a Hispanic Impact District it is at a level in which Hispanics have been able to elect candidates in Travis County. In fact, State Senator Gonzalo Barrientos which is slightly larger but otherwise almost identical to that which elected Congressman Doggett. The northern half of old District 10 was tied into suburban Houston which is more than 200 miles away through a series of rural counties. The balance of the former congressional District is tied into a portion of Hidalgo County located on the Rio Grande River again through a series of rural counties more than 200 miles away. Travis County has almost nothing to do with suburban Harris or Hidago counties.

District 23: Dr. Gaddie testified that former District 23 was on the cusp of being controlled by Hispanic voters. The District 23 in the plan at issue is very close in appearance to the old 23 but it splits Webb County (Laredo) Texas in half. Webb County is not only almost entirely Hispanic but also contains the most politically active Hispanic community in the state. The predominantly Hispanic voters in Webb County were exchanged for predominantly Anglo Voters in the

Northside of San Antonio and in three suburban San Antonio counties. As a result, the Spanish Surnamed voters were reduced from 55% in the former District 23 to 44% in the District 23 in the plan at issue. This move was described by Dr. Gaddie as an effort to prevent losing a Republican Congressman. The balance of the Webb County split was added to a heavily Hispanic district anchored by the Southwest side of San Antonio and Bexar County. In other words, the splitting of Laredo moved half of the voters into a district in which Hispanics would be unable to elect the representatives of their choice and the other half into a district which was already heavily Hispanic.

District 17 becomes District 19: This is another loss of a Hispanic impact district. In many ways it very much resembles District 1 in East Texas. Dr. Gaddie, the state's expert indicated that Congressman Stenholm, the dean of the Texas Congressional Delegation Congressman Stenholm was elected in 2002 with less than half of the Anglo vote but virtually all of the Hispanic vote. District 17 was a West Texas District which was logically shaped contained comparatively homogenous West Texas Counties. Its replacement, District 19 is a 59 sided snake shaped monstrosity that wanders from the Panhandle around West Texas and is at one point only a few miles wide. Congressman Stenholm lost with only 40% of the vote.

The district court bemoans the fact that computers have given gerrymanders the power to create districts that are intended to and actually do discriminate. The district court does nothing because it claims it can do nothing. But the district court is wrong on this point. As this Court can see from the maps of what happened here, the gerrymandering that was done is simple and straight forward. It always is. There are no new or novel tricks here. It could have been done on the backs of old envelopes using adding machines the way we use to do it. Computers are simply adding ma-

chines. The gerrymandering is done by the people operating the adding machines or the computers. The solution is not to shrink from intentional discrimination but to eliminate it root and branch. Luckily the remedy is easy, districts can be drawn which are regular in shape and contain relatively homogenous populations. Fairness cannot be accomplished through gerrymandering. Intentional discrimination

In some districts, the impact of inner city areas is diluted with suburban area such as Districts 24/30 and 23. In any parlance, inner city translates into minority and suburban translates into White.

In other districts, incumbents who have been reelected with coalitions between minority voters and some white groups are split apart and either diluted with suburban voters as in District 1 or drawn and split into crazy quilts such as in Districts 19 and 10/10 and 25.

In still others where minority voters were in a good position to elect members of Congress when the current ones move on or retire, the districts have been radically redrawn so that will be extremely unlikely.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

JOSE GARZA
JUDITH A. SANDERS-CASTRO
LAW OFFICE OF JOSE GARZA
7414 Robin Rest
San Antonio, Texas 78209
(210) 392-2856

ROLANDO L. RIOS
Counsel of Record
GEORGE KORBEL
LUIS VERA
ROLANDO L. RIOS
& ASSOCIATES
115 E. Travis Suite 1645
San Antonio, Texas 78205
(210) 222-2102

Counsel for Appellants

August 9, 2005