No. 05-204

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

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APPELLANT'S BRIEF ON THE MERITS

JOSE GARZA
LAW OFFICE OF JOSE GARZA
Judith A. Sanders-Castro
7414 Robin Rest
San Antonio, Texas 78209
(210)392-2856

LUIS ROBERTO VERA, JR.
LULAC, National General Counsel
111 Soledad, Suite 1325
San Antonio, TX 78205-2260
(210) 225-3300

ROLANDO L. RIOS
Counsel of Record
GEORGE KORBEL
ROLANDO L. RIOS & ASS.
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 a redistricting plan drawn with "the single-minded purpose" of gaining additional partisan advantage, using three year old census data that overpopulates Latino districts, violates the one person one vote rule?

2. Whether a redistricting plan drawn with "the single-minded purpose" of gaining additional partisan advantage, using three year old census data that overpopulates Latino districts, eliminates a Latino majority district, Congressional District 23 (CD 23), and eliminates all competitive districts in which the minority vote had been the deciding vote under the pre-existing legal redistricting plan, is an impermissible political gerrymander in violation of the First and Fourteenth Amendment?

3. Whether partisan gerrymandering and partisan voting can be used as a subterfuge to discount evidence of minority vote dilution such as the elimination of a Latino majority district and racially polarized voting, to defeat a minority community's claim of violation of the Voting Rights Act and the First and Fourteenth Amendment?

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.

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OPINIONS BELOW AND UNOFFICIAL ADMINISTRATIVE REPORTS

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 LULAC Jurisdictional Statement ("J.S. App."). 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, *Henderson v. Perry*, 160 L.Ed.2d 252 (2004)

JURISDICTION

The District Court denied Appellants' claims for injunctive relief and entered judgment on June 9, 2005, LULAC J.S. App. A. Pursuant to 28 U.S.C. § 2101(b), Appellants filed

timely notices of appeal on June 10, 2005, LULAC 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; is an unconstitutional political gerrymander; and unconstitutionally dilutes minority voting rights.

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,[1] in the middle of the decade, for

[1] The then existing redistricting plan had been ordered into effect by a three judge court, *Balderas v. State of Texas*, 2001 U.S. Dist. LEXIS 25740 and *affirmed* by this court, *Balderas v. Texas*, 536 U.S. 919 (2002).

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 required by this Court in *Karcher v. Daggett*, 462 U.S. 725 (1983) and *Cox v. Larios*, 159 L.Ed.2d 831 (2004). Moreover, the State's use of outdated census data to accomplish the political gerrymander resulted in overpopulating Latino congressional districts and diluted their voting strength.

Second, the District Court improperly evaluated the impact of the State's excessive political gerrymander which not only used out-dated census data to replace a valid plan, but also selectively protected Republican incumbents, eliminated all competitive districts, and placed the burden of the severe partisan power grab at the expense of the Latino and Black voters. By over-populating every majority Latino district, eliminating a Latino District (CD-23), eliminating a minority District (CD- 24) and eliminating six influence districts (CD-1, 2, 4, 9, 11, 17, and 25) in which minority voters coalesced with Republican split-party voters and white Democrats to determine the outcome of the elections, the State relegated minorities, Republicans and Democrats in Texas to spectator status into the future. This severe political gerrymander, thus violates the constitutional protections against partisan gerrymander. *See Cox v. Larios*, 159 L.Ed.2 831 (2004); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

Third, the District Court 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; and that the elimination of a Latino district and of every influence district in which the minority vote determined the election outcome could be discounted simply as "partisan politics" 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 and the Fourteenth Amendment of the United States Constitution.

Factual History

1. *First Redistricting*: 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 equi-populous 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 unconstitutional, and adopted a new 32-district congressional map known as "Plan 1151C" or the "2001 Plan." *Id.*; *see also* Jackson J.S. App. E (color map of 2001 Plan).

The *Balderas* court ordered 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 Latino 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. *Election Results*: 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 containing a Republican majority, the plan contained no new Latino majority districts in recognition of the growing Latino population. *Session*, 298 F. Supp. 2d at 471; *Balderas v. Texas*, 2001 U.S. Dist. LEXIS 25740, *summarily affirmed*, 536 U. S. 919 (2002). However, the November 2002 elections generated a congressional delegation with 15 Republicans and 17 Democrats.[2] 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 districts received overwhelming support from the minority voters of their districts who voted together with Republican split-ticket voters[3] and white Democrats, JA 307. 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 are referred to as "competitive districts" throughout this brief) 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

[2] 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.

[3] Split-ticket voters are those who vote for candidates from different parties, ie, they could vote for Republican Governor or President but vote for the local Democratic Congressman.

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 all branches of the Texas Legislature and, with it, unified control of the state government. *See Session v. Perry*, 298 F. Supp. at 458.

3. *Second Redistricting*: 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.[4] S*ession*, 298 F. Supp. 2d. at 459.

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.[5] The 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.[6]

During the first special session, Representative Phil King, one of the legislation's chief sponsor, initially asked the

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

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

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

Redistricting Committee to pass a map dismantling District 24 (in the Dallas-Fort Worth area) as a minority district.[7] The next day, he reversed course and supported a plan that left intact all 11 majority-minority districts.[8] 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.[9]

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.[10]

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.[11] But when one of them returned to the State a month later, Governor Perry called a third special session.

In that session, each house passed a map that preserved all 11 minority districts.[12] However, 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 Latino majority district

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

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

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

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

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

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

running from McAllen (on the Mexican border) 300 miles north to Austin,[13] and eliminated the seven competitive districts. The House and Senate passed this new map, known as "Plan 1374C" or the "2003 Plan," on October 10 and 12, 2003. *See* Jackson J.S. App. H (color map of 2003 Plan, p219a). Every Latino and African-American Senator and all but two of the minority Representatives voted against the 2003 Plan.[14]

4. *Intent and effect of the Political Gerrymander*: 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.[15] 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.[16]

There is no question that the **sole intent** of the redistricting was to politically gerrymander. "There is little question but 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 at 470. Further, ". . . political gain for the Republicans was 110% of the motivation for the Plan, that it was the 'entire motivation'" quoting Republican Lieutenant Governor Bill Ratliff, *Id.* at 473. The 2003 Plan was designed to protect all 15 Republican Members of Congress and to defeat at least 7 of the 17 Democratic Members.[17] Among those targeted for defeat were the six Democrats who had won in November 2002 on the strength of cohesive minority voter support. JA 307. Each of them

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

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

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

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

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

was "paired" with another incumbent, placed in a substantially more Republican district, or given hundreds of thousands of new unfamiliar (and heavily Republican) constituents.

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*, 2001 U.S. Dist. LEXIS 25006 (E. D. Texas, Nov. 14, 2001), *summarily affirmed*, 536 U. S. 919 (2002). In general elections, the district is reliably Democratic. 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 Latino voter turnout.[18] Thus, African-American voters can consistently nominate and minorities consistently elect their preferred candidates within the 2001 Plan's District 24.[19] Yet, 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

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[18] 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.

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

Country" residents—who are heavily Anglo and roughly 79% Republican.[20] The changes to District 23, shifting significant 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. *Session*, 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 was reduced to 46%, from 57.5% in Plan 1151C; the percentage of Spanish-surnamed registered voters was reduced to 44% under Plan 1374C, from 55.3% in Plan 1151C.")

In an attempt to "offset" that loss of electoral opportunity for Latino, the Legislature drew a new, bizarrely shaped majority-Latino district stretching from the Rio Grande Valley, along the border with Mexico, all the way to the Latino neighborhoods of Austin in Central Texas. This new District CD-25 is more than 300 miles long and in some places, less than 10 miles wide. The two ends of the district are densely populated and contain more than 89% of its Latino 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. *Litigation:* 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 (under the Equal Protection Clause, the First Amendment, and Article I of the Federal Constitution and the Voting Rights Act) in the District Court for the Eastern District of Texas, asking the court to invalidate the 2003 Plan and to place the

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

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[21] 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. *Remand:* The District Court's 2004 opinion was vacated and remanded by this Court with instructions that the case be evaluated in light of *Vieth v. Jubelirer*, 541 U.S. 267 (2004). *Henderson v. Perry*, 160 L.Ed. 2d 252 (2004).

After receiving briefing and exhibits, the District Court held a hearing on January 21, 2005. The principle focus of the 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 dem-

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[21] Even though the Plan was precleared, since then, it has been disclosed that the professional staff at the Department of Justice, four (4) attorneys and two (2) analyst had recommended nonpreclearance of the plan because it violated Sec. 5 of the Voting Rights Act, 42 U.S.C. 1973c. The recommendation was overruled by a higher ranking political appointee. See http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf

onstrated 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 increased 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. [22] 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 LULAC J.S. App. A at. 45a-46a referring to under population of CD 19 ("predominately Anglo district") compared to over population of CD 28 ("predominately Latino district"). The population difference between these two districts is estimated to be 58,819.[23] See LULAC Remand Exhibit 2 located at LULAC J.S. App. C p. 83a. *See also* App. 1a.

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 Professors. 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. LULAC J.S. App. A at. 35a. 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

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[22] At the remand hearing, LULAC had timely filed three exhibits in support of our brief. The District Court took the exhibits under advisement and never ruled on admissability; nevertheless, the district court opinion refers to the submitted exhibits. See J. Ward concurring opinion, LULAC J.S. App. A at 45a-46a.

[23] Using the population projections made by the State of Texas, this deviation from the ideal would be 8.4%.

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. LULAC J.S. App. A at. 35a-36a. 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 gerry-mander 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,* 159 L. Ed. 2d 831 (2004) to the facts of this case. LULAC J.S. App. A at. 37a.

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, LULAC J.S. App. A at. 41a.

SUMMARY OF THE ARGUMENT

Political gerrymanders have existed since colonial times. The father of our Nation warned of the dangers of the extremes of partisan rancor. In *Reynolds v. Sims*, 377 U.S. 533, 579 (1964), the Court identified imprecise election rules as "an open invitation to partisan gerrymandering." One of the reasons offered for courts to enter the "political thicket" was to provide meaningful constraints on the temptation to engage in gerrymanders of all kinds. Up until this case, redistricting rules have not provided meaningful constraints on partisan gerrymandering. However, with the unique circumstances of the Texas redistricting experience, the Court can use existing redistricting rules to slow the unseemly practice of sacrificing all semblance of fair-play to garner raw political power.

The State's decision to redraw a perfectly lawful congressional districting plan, with three-year old and inaccurate census data, without any effort to accommodate for population shifts and changes, for the sole purpose of achieving maximum partisan advantage fails to comply with the requirements of the one person, one vote rule, as required by this Court in *Karcher v. Daggett*, 462 U.S. 725 (1983) and *Cox v. Larios*, 159 L.Ed.2d 831 (2004). Moreover, the State's use of outdated census data to accomplish the political gerrymander resulted in overpopulating Latino congressional districts and diluted their voting strength.

The three-judge court also improperly evaluated the impact of the State's excessive political gerrymander. Not only did the State fail to accommodate for the population changes throughout the State, but it also selectively protected Republican incumbents, eliminated all competitive districts, and placed the burden of the severe partisan power grab on the

backs of the Latino voters. By failing to account for the substantial population growth in the Latino population; by over-populating every majority Latino district; by eliminating a Latino District (CD-23); by eliminating a majority-minority District (CD- 24); and by eliminating six influence districts (CD-1, 2, 4, 9, 11, 17, and 25) in which minority voters coalesced with Republican split party voters and Anglo Democrats to determine the outcome of the elections, the State relegated minorities and Democrats in Texas to spectator status into future elections. This severe political gerrymander, thus violates the constitutional protections against severe partisan gerrymanders. *See Cox v. Larios*, 159 L.Ed.2 831 (2004); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

Finally, the three-judge court 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; and that the elimination of a Latino district and of every influence district in which the minority vote determined the election outcome could be discounted simply as "partisan politics" in its analysis of plaintiff's claim of minority vote dilution.

ARGUMENT

I. Whether a redistricting plan drawn with "the single-minded purpose" of gaining additional partisan advantage, using three-year-old census data, that overpopulates Latino districts, violates the one person, one vote rule?

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. Once the qualification of voters is established by the State, there is no constitutional way to evade equality of voting power. *Gray v. Sanders*, 372 U.S. 368, 381-382 (1963). With regard to Congressional districts, absolute population equality is the paramount objective, even while state and local districting plans may have greater flexibility. *Karcher v. Daggett*, 462 U.S. 725, 733-34 (1983).

Article I, § 2 establishes a "high standard of justice and common sense" for the apportionment of congressional dis tricts: "equal representation for equal numbers of people." *Wesberry*, 376 U.S. at 18. While precise mathematical equality may be impossible to achieve, a state must achieve population equality "as nearly as is practicable." *Karcher*, 462 U.S. at 731. This standard requires the State make a good-faith effort to achieve precise mathematical equality. *Id.* In evaluating a one person, one vote claim involving congressional districts the court should determine whether population differences among the districts could have been avoided or reduced by a good-faith effort by the State. *Id.* If the plaintiffs are able to establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some **legitimate goal**. *Id.* (emphasis added)

The one person, one vote rule is a 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 . . ."). Generally, jurisdictions have been given wider latitude to comply with population equality when developing state and local redistricting plans. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983). However, the pre-

sumption of validity in such "minor" deviations disappears when the jurisdiction uses partisan gain as its justification for the variances. *Cox v. Larios*, 159 L.Ed. 2d at 834. To dilute the strength of the State's obligation to develop districts of equal population, at the altar of a partisan gerrymander, would result in an unconstitutional redistricting plan. *Id.* ("the drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents (but not incumbents as such) did not justify the conceded deviations from the principle of one person, one vote.") Thus, in *Larios*, the State of Georgia was not allowed the presumption of validity local plans normally have when deviations do not exceed 10%. *Id.* Similarly, any presumption of validity of census data that normally may be accorded a state, should not provide a safe-harbor for blatant political gerrymanders. 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, when measured against current and updated census data.

First, there is truly no question 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 *Henderson v. Perry*, 160 L.Ed.2d 252 (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 an increase 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. *Session*, 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.[24] In

[24] The State argues that data and estimates submitted by LULAC are insufficient to replace or stand-in for the decennial census. Generally, the decennial census data is presumed accurate, and only figures that have a high degree of accuracy and are clear, cogent and convincing override the prior decennial census numbers. This presumption should not apply here, however, since no legitimate state goal exists for the redistricting. *See Larios v. Cox*, 159 L.Ed.2d 831, 833-34 (2004) Nevertheless 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. Finally, assuming the new census numbers, together with the estimates used by LULAC's experts in exhibits to LULAC's Brief on Remand, to show the

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 on 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 2000 the census count. [25] By using the outdated 2000 census data for the 2003 plan the Defendants manipulated the one person, one vote principle for 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 under-populating Republican leaning suburban and Republican leaning Anglo rural districts, the State was able to maximize the political advantage of Republicans and primarily Anglo Republicans. By using the inaccurate 2000 census data, the State was able to maintain the appearance of equal population between districts.

However, the reality is quite different when measured by 2003 population data however. For example, the predominately Republican and Anglo west Texas district in Lubbock,

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current population of the Texas Congressional districts, fall short of clear, cogent and convincing, since the only reason for the 2003 redistricting was partisan gain, the estimates submitted by LULAC for each of the districts, suffice to establish the one person, one vote violation. *See Garza v. County of Los Anglels*, 918 F. 2d 763, 772-73 (9th Circuit, 1990) *cert. denied*, 498 U.S. 1028 (1991)("the [Suprem]Court noted with approval the possibility of using predictive data in addition to census data in designing decennial reapprotionment plans.")

[25] *See* http://txsdc.utsa.edu/download/pdf/estimates/2003_txpopest_county.pdf (Table 1). According to the state's demographer, by July of 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 19, appears to have equal population with all other districts in the plan when measured by the outdated 2000 Census data. However, using projections from the United States Census Bureau for 2003 population of Texas counties, District 19 had a population of about 651,316 persons or –5.8% below the 2003 ideal of 691,203. (LULAC Brief on Remand, Exhibit 2) By contrast, District 27, a predominantly Latino and Democratic district in South Texas, in 2003 had a population of about 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. *See: Karcher v. Daggett*, 462 U.S. 725, 733-34 (1983).

Finally, these population variances could have been avoided altogether because the State was under no obligation to redraw its congressional districts. A valid plan existed at the time the State began its redistricting efforts in 2003 and the State had no legitimate goal in redrawing the lines. However, once the State undertook to develop a new plan, its paramount constitutional obligation was to make a good faith effort to provide equal representation for equal numbers of persons. This obligation is not a one-time requirement that, once satisfied, can be ignored for the remainder of the decade through the enactment of new legally unnecessary partisan districting plans based on increasingly inaccurate census data.

The sort of manipulation of population used by the State in its 2003 plan 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. Therefore, the 2003 plan for Texas Congressional districts violates the one person, one vote principle of the equal protection 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.

II. Whether a redistricting plan drawn with "the single-minded purpose" of gaining additional partisan advantage, using three year old census data that overpopulates Latino districts, eliminates a Latino majority district (District 23) and eliminates all competitive districts in which the minority vote had been the deciding vote, under the pre-existing legal redistricting plan, is an impermissible political gerrymander in violation of the First and Fourteenth Amendment?

The principles of one-person, one-vote were not the only traditional standards of map drawing that Texas drafters disregarded in their quest for partisan superiority. These departures mirror some of those found in *Larios* and some that are unique to the Texas 2003 experience. Together they yield the manageable standards sought by the majority of the Court in *Vieth.* The State's 2003 Congressional map constitutes an unconstitutional political gerrymander because the State's use of political classifications in drawing the map was unrelated to any legitimate legislative purpose. The State failed to make a good faith effort to comply with the one person, one vote principle, it selected incumbents in one party for protection while targeting the incumbents of the disadvantaged party for defeat, and because it eliminated all but one competitive district.

Vieth set out some general redistricting principles that control a review of a claim of unconstitutional political gerrymander. First, severe political gerrymanders are incompatible with democratic principles. *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004). Moreover, an "excessive" amount of politics in redistricting is unlawful. *Id. at* 293 (Kennedy, J. concurring in the judgment). Second, Justice Kennedy in his concurrence in

the judgment, specified that a determination that a redistricting plan was an unconstitutional political gerrymander "must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner **or in a way unrelated to any legitimate legislative objective."** *Vieth*, 541 U.S. at 307 (emphasis added). The Court determined in *Larios* that partisan motivation is not a legitimate legislative objective for purposes of population deviation. *Larios*, 159 L.Ed.2d at 833 ("The District Court correctly held that the drafters' desire to give an electoral advantage to certain regions of the State and certain incumbents (but not incumbents as such) did not justify the conceded deviations from the principle of one person, one vote.")

First, the record of this case very clearly sets out that the single-minded purpose of the 2003 redistricting plan was unrelated to any legitimate legislative objective but rather to achieve partisan advantage. In its initial January 6, 2004 memorandum opinion, the three-judge court below explicitly found partisan gain as the *sole* motivational goal behind the 2003 plan. *See, e.g., Session v. Perry*, 298 F. Supp. 451, 471 (E.D. Tex. 2004) (vacated, *Henderson v. Perry*, 160 L.Ed.2d 252 (2004) ("There is little question but the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage"); *Session*, 298 F. Supp. at 473 ("Plaintiffs' expert supports **our conclusion** that politics, not race, drove Plan 1374C.") (emphasis added). Moreover, the former Lieutenant Governor of Texas, Republican Bill Ratliff, testified that political gain for Republicans was 110% of the motivation for the Plan, that it was "the entire motivation." *Session*, 298 F. Supp. at 474.

In its current decision reexamining the State's 2003 plan pursuant to this Court's remand, the three-judge court did not revoke its prior findings that the sole goal of the 2003 plan

was to maximize partisan advantage. J.S. 3a ("The history of this case and of the efforts of the Texas legislature to draw lines for its thirty-two congressional districts is set out in our previous opinion, and we will not repeat it here.")

Second, population deviations were a sign that an unconstitutional political gerrymander had taken place in Georgia[26], so too are they here. As discussed above, use of the 2000 census insured a plan that overpopulated Latino (Democratic) districts. Thus, all of the majority Latino districts were overpopulated. *See LULAC* Brief on Remand, Exhibit 2.

Third, the plan selectively protected Republican incumbent and target select Democratic incumbents as did the plan in *Larios. Session* 298 F. Supp. 2d at 471-72. Justice Stevens pointed, specifically, to the practice of pairing incumbents[27] as one that should be scrutinized by the Court.[28] In drawing the lines that would elect the Texas Congressional Dele-

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[26] *Larios v. Cox*, 159 L.Ed.2d 831, 832-33. (Justice Stevens in his concurring opinion described the efforts to use the population disparities between districts to advantage Democrats over Republicans, then concluded ". . . had the Court in *Vieth* adopted a standard for adjudicating partisan gerrymandering claims, the standard would likely have been satisfied here.")

[27] In *Larios*, the District Court found that "a Republican senator had been 'drawn into a district with a Democratic incumbent who ultimately won the 2002 general election.'" *Id.* at 832 (quoting the District Court opinion). It also found that two of the most senior Republican senators had been drawn into the same district. *Id.*

[28] Justice Stevens argued that "drawing district lines that have no neutral justification in order to place two incumbents of the opposite party in the same district [was] probative of the same impermissible intent as the 'uncouth twenty-eight-sided figure' that defined the boundary of Tuskegee, Albama, in *Gomillion v. Lightfoot*, 364 U.S. 339, 340, 5 L. Ed. 2d 110, 81 S. Ct. 125 (1960)." *Id.* at 833.

gation, the Republican controlled state legislature sought to protect Republican incumbents while unseating Democrats.[29]

The Latino and minority population was particularly burdened by Texas' effort to protect select incumbents. 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 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.

Finally, 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, assures that future elections will 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 Part 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

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[29] Republican map drawers targeted five to seven Democrats in east and west Texas and were able to eliminate all but 1 (Chet Edwards). The two with the most seniority (both Congressman Martin Frost and Charles Stenholm had served 26 years in the House) were matched up against Republican incumbents. See *Perry v. Session* 298 F. Supp. at 473.

was well documented at the initial trial and was recognized by the three-judge trial court. *See: Session*, 298 F. Supp. 2d at 485-86, 488-89, JS 307. 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, JS 307 and in District 23, the Latino vote made the election close *Session*, 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." *Session*, 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. JS 307. These changes were meant to further the State's efforts to reach its partisan quota of 22 permanent Republican Congressional district. *Session*, 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 State eliminated the ability of minority Democrats to influence the results of congressional elections 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 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.*

George Washington in his farewell address saw the danger of partisan mischief to the fledging democracy: ". . . the common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of wise people to discourage and restrain it." *George Washington*, Farwell Address to the People of the United States, September 17, 1796. The political gerrymander that occurred in Texas was not born out in the give and take of normal political discourse, but in the callous disregard for traditional notions of fairness in the redistricting process and in the blatant disregard for the rule of law. This is the case, the straw, that has broken the camel's back and this Court should restrain politicians attempting to choose their constituents.

III. Whether partisan gerrymandering and partisan voting can be used to discount evidence of minority vote dilution such as the elimination of a Latino majority district and racially polarized voting to defeat a minority communities claims of violation of the Voting Rights Act and the First and Fourteenth Amendment?

The court below dispatched the claims of minority vote dilution brought by the NAACP, the League of United 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. (LULAC S.J. 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. This court's discussions on partisan gerrymandering has clearly included minority vote dilution as a factor indicating possible illegal partisan gerrymandering (*Veith* at 291 discussion of Justice Powell's suggested test in *Davis v Bandemer*, 478 U.S. 109, (1986): "[Factor which] bear directly on the fairness of a redistricting plan . . . evidence concerning **population disparities** and statistics tending to show **vote dilution**,"[emphasis added])

In this case, the minority appellants might appear to be in the same corner as the Democratic party. It is easy to dismiss the claims of the Blacks and Latinos as just another rah rah for the Democrats. That is clearly not the case. In the long and tortured history of Texas redistricting, minority plaintiffs or their allies have usually been adverse to the Democratic party.[30] In many of these cases LULAC has been shoulder to shoulder with the Republican plaintiffs. For example, *see White v. Regester*, 412 U.S. 755 (1973) where the argument

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[30] *Kilgarlin v. Martin*, 252 F. Supp. 404 (S.D. Tex. 1966)(three-judge court)*,*, *rev'd sub nom., Kilgarlin v. Hill*, 386 U.S. 120 (1967)*; Regester v. Bullock*; *Mariott v. Smith*; *Archer v. Smith* cited *Gaves v. Barnes*, 405 U.S. 1201 (U.S. 1972); *Smith v. Craddick*, 471 S.W. 2d 375 (Tx 1971); *White v. Weiser*, 412 U.S. 783 (1973); *Weiser v. White*, 505 F.2d 912 (5th Cir.-OLD 1975); *Mauzy v Legislative Redistricting Board*, 471 S.W. 2d 570 (Tx 1971); *Graves v. Barnes*, 343 F.Supp. 704, 720-721 (WD Tex. 1972) *affd sub nom White v. Regester*, 412 U.S. 755 (1973); *Graves v. Barnes*, 446 F. Supp. 560 (W.D. Tex. 1977); *Graves v. Barnes*, 378 F. Supp. 640, 648 (W.D. Tex. 1974); *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981); *Terrazas v. Clements*, 537 F. Supp. 514 (D. Tex. 1982); *Seamon v. Upham*, 536 F. Supp. 931 (D. Tex. 1982); *Terrazas v. Clements*, 581 F. Supp. 1329 (D. Tex. 1984); *Mena v. Richards*, unreported D. Tex. Cause No. C-454-91-F October 11, 1991; *Quiroz v. Richards* unrepoprted D. Tex .Cause No. C-4395-91-F, October 7, 1991; *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991)

before this Court was evenly split among Republican, Black and Latino plaintiffs.[31] The legislative history which led to the application of the special provisions of the Federal Voting Rights Act to Texas in 1976, is a tour de force of electoral discrimination of a Texas dominated by the Democratic party.

Neither political party wears a white hat in Texas politics. Historically, whichever party is in charge has taken power through redistricting to the disadvantage of the minority voters. The minority position in coordination with one political party or another is nothing more than a marriage of convenience. In Texas political parlance it is nothing more than the enemy of my enemy is my friend.

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 as required by the second prong of the *Gingles* decision. Rather, the district court, require minority plaintiffs "to disprove partisanship as the driving force behind racial [block] voting." *Session v Perry*, 298 F. Supp. 2d 451, 478 n. 88 (E.D. Tex. 2004). [32] In doing so, the District Court along with the Fifth Circuit has added causation to plaintiffs burden and in effect voided the application of § 2 of the Voting Rights Act to Texas.[33] In

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[31] The Current Republican Speaker of the Texas House of Representatives, Tom Craddick was a plaintiff in *Graves v. Barnes*, 343 F.Supp. 704, 720-721 (WD Tex. 1972) *affd sub nom White v. Regester*, 412 U.S. 755 (1973) and the named plaintiff in one of the precursor state cases in *White*. *Smith v. Craddick*, 471 S.W. 2d 375 (Tx 1971).

[32] 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 **LULAC J. S. Appendix A**

[33] 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

Texas, Latinos, Blacks and Anglos consistently vote along partisan lines; overwhelmingly, Latinos and Blacks vote Democrat and Anglos vote Republican. *Id*. 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 Latinos and Blacks would do well to abandon the Democratic Party and become Republicans. That would effectively void their First Amendment Rights to associate politically.

A majority of the circuits disagree with the lower court and the Fifth Circuit on this issue. **Compare** *Sanchez v State of Colorado*, 97 F. 3d 1303, 1311 (10th Cir. 1996); *Alamance County*, 99 F. 3d at 615-16 n. 12; *Goosby v. Town Bd.*, 180 F. 3d 476, 493 (2d Cir. 1999) (treating causation under the totality of circumstances analysis rather than the third *Gingles* precondition); *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194 (7th Cir. 1997);*Uno*, 72 F. 3d at 980-81; *Nipper v. Smith*, 39 F.3d 1494, 1524-25 & n. 60 (11th Cir. 1994) (en banc) ***with*** the district court finding that ". . . Plaintiffs have failed to meet their burden the disprove partisanship as the driving force behind the block voting." *Sessions*, 298 F. Supp. 2d 451, 478 n88.

According to a majority of the Justices in *Gingles*, to satisfy the second threshold factor minority voters need not prove the **reason** (causation) they vote for the same candi-

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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.

dates. 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 blood feud 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 political concept that implies intent and over the years, it has become probably the most recognizable icon of intent in the area of redistricting.

Foreseability

In the case as issue, the possibility of illegal or unconstitutional adverse effect on minority voting rights was entirely foreseeable. In the redistrictings after the 1970 Census, the 1980 Census and the 1990 Census, all or significant parts of what the three judge court refers to as Democratic gerrymanders, were found to violate either the Constitution or the Federal Voting Rights Act. *See, White, Terrazas* & *Mena* at fn 30 above. 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 rights.

The intentional discrimination in the case at hand was aided by the mid-decade nature of the apportionment. In gerrymandering congressional District lines the Republican legislative majority 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 Latinos and Blacks outnumber Anglos in the county.

In the 2004 presidential election President Bush carried only 50.3% of the Dallas County vote.[34] In addition, the County elected the following Democratic officials: Sheriff, 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. Does this not beg the question of why the Republican majority wanted to comply with the Voting Rights Act in one Congressional District but not in another. 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[35] 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% Latino 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. Jackson Exh. 140 at 71, II 3-4, 72, II 12-24. The former district in this area was District 24. Instead of tying the minority Oak Cliff area of Dallas to Highland park, it included the heavily minority Southeast part of neighboring

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

[35] 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 Martin Frost. Jackson Exh. 140.

Fort Worth which is the fastest growing Latino area of Fort Worth. As a result District 24 which had a Latino 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 Anglo Democrat,[36] 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 Anglo 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 Anglo 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 garnered less than 40% of the vote. [37] 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 influence of Black votes accounted for the victory into one in which the Black vote is cancelled in a district dominated by overwhelmingly Anglo suburban Dallas Voters.

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[36] The state expert Dr. Gaddie's studies showed that Martin Frost received 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 Martin Frost. Jackson Exh. 140.

[37] 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

District 9 becomes District 2: In the former District 9, Congressman Lampson was elected with only 45% of the Anglo vote and virtually all of the Black vote. This district was composed of the Costal Counties of Jefferson, Chambers 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 Anglo 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.[38] 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 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 Latino voters, Jackson Exh 140, 129, II 19-25, 130-135. The District 23 in the plan

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[38] *See* State Senate Districts 1188S http://gisl.tlc.state.tx.us/

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 Latino but also contains the most politically active Latino community in the state. The predominantly Latino 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. *Id*. This move was described by Dr. Gaddie as an effort to prevent losing a Republican Congressman. *Id.* The balance of the Webb County split was added to a heavily Latino 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 Latinos would be unable to elect the representatives of their choice and the other half into a district which was already heavily Latino.

District 17 becomes District 19: This is another loss of a Latino 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, was elected in 2002 with less than half of the Anglo vote but virtually all of the Latino 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. *See* App. 1a.

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 machines. 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.

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 declare Plan 1374C as an unconstitutional partisan gerrymander that violates the one person one vote rule and dilutes the voting strength of the minority community and enjoin any further use of the plan for elections.

Respectfully submitted,

JOSE GARZA
LAW OFFICE OF JOSE GARZA
Judith A. Sanders-Castro
7414 Robin Rest
San Antonio, Texas 78209
(210)392-2856

LUIS ROBERTO VERA, JR.
LULAC, National General Counsel
111 Soledad, Suite 1325
San Antonio, TX 78205-2260
(210) 225-3300

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

Counsel for Appellants

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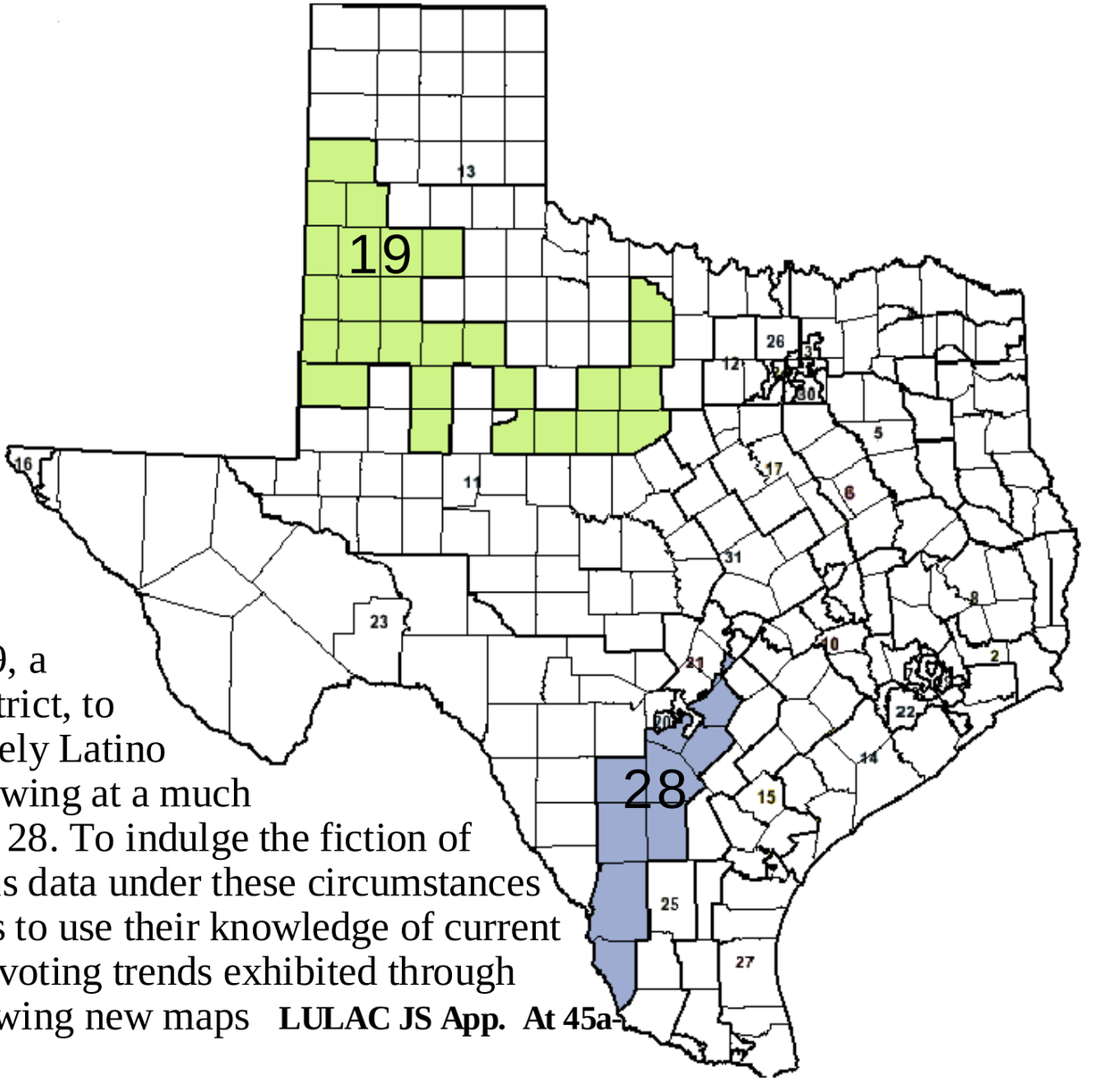

[C]ompare the estimated populations of District 19, a predominately Anglo district, to District 28, a predominately Latino district. District 19 is growing at a much slower pace than District 28. To indulge the fiction of the accuracy of the census data under these circumstances encourages cartographers to use their knowledge of current demographics as well as voting trends exhibited through election cycles when drawing new maps **LULAC JS App. At 45a-46a**