BENSON, DANIEL H.
RECORDS, 1959-1984 AND UNDATED
(2550 LEAVES)

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THIS COLLECTION CONSISTS OF THE OFFICE FILES OF ONE OF THE PLAINTIFF ATTORNEYS IN THE SINGLE MEMBER DISTRICT DISCRIMINATION SUIT FILED IN LUBBOCK, TEXAS.

BRIEFS, 1979-1983 AND UNDATED (728 LEAVES)
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- NO. 82-1630, 1982 (53 LEAVES)
- NO. 83-1196, 1983 (370 LEAVES)
- NO. 83-1502, 1983 (106 LEAVES)
- UNNUMBERED (78 LEAVES)
- CA-5-36-74 (34 LEAVES)

FIRST TRIAL, 1971-1982 AND UNDATED (1072 LEAVES)
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BENSON, DANIEL H.
RECORDS, 1959-1948 AND
UNDATED (2550 LEAVES).

BRIEFS, 1979-1983 AND UNDATED (728 LEAVES).

No. 79-2744

1979 (140 LEAVES).

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2744

REV. ROY JONES, GONZALO GARZA, JUAN ANTONIO REYES,
and Intervenor, ROSE WILSON, Individually
and as Representatives of the Black and
Mexican American Voters of
Lubbock, Texas
Plaintiffs-Appellants

VS.

THE CITY OF LUBBOCK, TEXAS, and the Mayor and City Council thereof,
DIRK WEST, ALAN HENRY, CAROLYN JORDAN, M. J. "BUD" ADDERTON,
and BILL MCALISTER, all in their official capacities as members
of the City Council of Lubbock
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
Lubbock Division

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PARTIES

NO. 79-2744

REV. ROY JONES et al. v. CITY OF LUBBOCK, TEXAS, et al.

The undersigned, counsel of record for Rev. Roy Jones, et al., certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 13(6)(1).

Rev. Roy Jones
Gonzalo Garza
Juan Antonio Reyes
Rose Wilson
William L. Garrett
Daniel H. Benson
Robert P. Davidow
Tomas Garza
Albert Perez
Lane Arthur
Mark C. Hall
The City of Lubbock, Texas
Dirk West
Alan Henry
Carolyn Jordan
M. J. "Bud" Adderton
Bill McAlister
James Brewster
Travis Shelton
Dennis McGill

William L. Garrett
Attorney of Record for Rev. Roy Jones,
Gonzalo Garza, Juan Antonio Reyes,
and Rose Wilson, Plaintiffs-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Appellants represents that Oral Argument in the above case would be helpful to the Court for the reason that the case was tried over a period of twelve days, the transcript of which is contained in eleven volumes, and there is much information contained in the stipulations of the parties, all of which could be of interest to the Court, but which was impossible to reduce and summarize in the Brief of Appellants; therefore, Counsel believes that the Court may have many questions regarding the case that could only be answered in Oral Argument. Although the law is reasonably well settled concerning dilution of minority voting, one area - responsiveness of local governments - is not clear as to the elements of proof, and Counsel would like to be heard on this issue especially.

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STATEMENT OF THE CASE

I: Statement of Jurisdiction

The Trial Court had jurisdiction of this case pursuant to 42 U.S.C. 1971, 1973, 1983, 1988, 28 U.S.C 1343(3), (4), 28 U.S.C. 2101, 2102, and the XIV, XV, and XXVI Amendments to the United States Consitution.

II: Statement of the Course of Proceedings and Disposition in the Trial Court

This suit was filed on April 1, 1976, as a class action on behalf of all Black and Mexican American citizens in the City of Lubbock to challenge the at large election system currently used to elect councilmen to the City Council in Lubbock, Texas. By order of June 1, 1977, the Court determined, on the basis of stipulations filed by the parties, that this case be certified as a class action under Rule 23(b)(2), FRCP.

Trial was held in December, 1978 and January, 1979, and by order of June 8, 1979, the Court dismissed the action on the merits and entered a judgment in favor of Defendants City of Lubbock, et al. The Honorable Halbert O. Woodward also filed a Memorandum Opinion, incorporating Stipulations and Stipulated Exhibits of the parties, on the same date.

Notice of appeal was filed by Plaintiffs-Appellants on July 6, 1979, and perfected on that date.

III. Statement of the Facts

Lubbock, Texas, a home rule city organized under the Constitution and Arts. 1165-1182, Tex. Rev. Civ. Stat.,which allows such cites to choose between at-large and single member district election systems, was organized in 1909, and adopted its first charter in 1917. It has been amended several times, the only significant change being in 1964, when the requirements for election were changed from plurality to majority. The Charter contains no geographic requirement for council seats, but does contain a place requirement.

There is no slating group which operates to propose candidates for election to the city council.

Blacks constitute 7.3% of the population, and Mexican-Americans constitute 17.3%. These groups are concentrated in the Northeast and Eastern portions of the city. A much higher proportion of their numbers are in the lowest socio-economic group than are whites. They also register to vote in lower percentages.

No black or Mexican-American has ever been elected to the city council, although in recent years several have run unsuccessfully.

The minority voters have alleged that the at-large system of elections dilutes their voting strength. Such dilution is said to be caused by their lack of access to the political system, the lack of responsiveness of the city to their particularized needs, the tenuous state policy favoring multi-member districts, and the continuing effects of general and official racial discrimination. Furthermore, the structural devices of a large voting district, requirement of a majority vote for election, an anti-single shot voting requirement, and no district residency requirement enhance opportunity for their votes

to be diluted.

SUMMARY OF THE ARGUMENT

The force of the minority voters arguments is that the Trial Court failed to consider all the required facts as to each Zimmer element and failed to apply the law properly not only to those facts found but those not found.

In considering the question of whether minorities have access to the political process, the Court considered only official barriers to access, and failed to understand that once most of the elements of access as stated in Kirksey v. Board of Supervisors, 554 F.2d 139, 143 (5th Cir. 1977) have been proved, then the inference of lack of access is compelled. The Court placed in improper burden upon the minority voters to prove a causal connection between the history of discrimination and lack of access. Kirksey, supra, 146. And then the Court improperly discounted the "subjective" feelings that minorities have that it is pointless to register and vote, even though the evidence demonstrated that their preferences have consistently been overwhelmed. Tr. p. 1486.

The Court based its consideration of the issue of responsiveness of the City to the particularized needs of minorities on the two pronged approach of David v. Garrison, 553 F. 2d 923, 928 (5th Cir. 1977) but failed to consider all of the other factors required by Bolden v. City of Mobile, Alabama, 571 F. 2d 238,244 (5th Cir. 1978). Even under the approach adopted by the Court, the evidence clearly demonstrated that the distribution of municipal jobs has been grossly discriminatory, and appointments to boards and commissions has generally followed the

requirements of a federal program for which a minority influenced board is required. As to distribution of municipal services, the proof indicates that the City spent very little in minority areas until the advent of federal monies, and that they have continued to spend federal dollars in place of local tax revenues to fulfill their obligations to minority neighborhoods. Ausberry v.City of Monroe, La., 456 F. Supp. 460, 465 (W.D. La. 1978). Otherwise, the City has responded only symbolically, but then only after a major demonstration. Where the response has been more than symbolic, a lawsuit has been required.

The Court misunderstood the burden of the minority voters in proving the existence of a "tenuous" state policy favoring multi-member districts. It required them to demonstrate intent to discriminate or to maintain discrimination. Nevett v. Sides, 571 F. 2d. 209 (5th Cir. 1978) teaches that intent is a inference that flows from the proof of the Zimmer factors, not a prerequisite to their establishment. Additionally, the Court failed to recognize the state history from which the at large scheme sprung, and that since the legislature has the duty to regulate cities, non-action can be as discriminatory as action. All the minority voters had to prove was that the state policy was weak; no legitimate reason for at large districts coupled with the choice allowed cities certainly establishes a "tenuous" policy.

The history of discrimination factor was relegated by the Court to an inquiry into the removal of official barriers; no inquiry was made into the customs and mores the effects of which still linger. Bolden, supra. Althought proof was taken, the Court did not find

significant polarized voting, lawsuits alleging discrimination, differential in registration and voting between minorities and whites, absence of elected officials from the minority groups, the depressed socio-economic position of most minorities, and the existence of present discrimination. Bolden, supra; Hendrix v. Joseph, 559 F.2d. 1265 (5th Cir. 1977); Kirksey, supra; Graves v. Barnes, 378 F. Supp. 640 (W.D.Tex. 1974).

The Court committed an error of law in finding that there is no anti-single shot voting requirement in Lubbock. David v Garrison, supra, Hendrix v. Joseph, supra, and White v. Regester, 412 US 465 (1973) clearly establish that a place system joined with a majority vote requirement and no geographic requirement have the same force and effect as an anti-single shot voting requirement.

Therefore, when all the proper evidence is considered in the aggregate and the proper law is applied, the conclusion that the voting strength of minorties in Lubbock, Texas, is diluted unconstitutionally is required.

STANDARDS OF REVIEW

The trial court in reaching a decision has several tasks: (1) analysis of the evidence to determine basic facts; (2) inferring from those basic facts the ultimate conclusions of fact; (3) determination of the applicable law; and (4) application of the law to the facts. To draw a distinction between fact and law is difficult if not impossibl to make at times, and a scientific distinction between the two is not workable. Moore's Fed. Prac., Sec. 55.05(1).

Upon each of these duties, the Court of Appeals applies a different standard to determine whether or not the trial court committed error.

Findings of fact will not be overturned unless they are "clearly erroneous". Great Atlantic & Pacific Tea Company v. Supermarket Equipment Co., 340 U.S. 147, (1950). A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. U.S. v. U.S. Gypsum, 333 U.S. 364, 395 (1947). Findings are "clearly erroneous" in the Fifth Circuit (1) where the findings are without substantial evidence to support them; (2) where the court misapprehended the effect of the evidence; and (3) if, although there is evidence which if credible would be substantia the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and the right of the case. Western Cottonoil Co. v. Hodges, 218 F.2d 158,161 (5th Cir. 1954); Neal v. U.S., 562 F.2d 338,340 (5th Cir. 1977). This Circuit has restated the proposition in 1966 that where findings are

not supported by substantial evidence, they are taken to be clearly erroneous. Freeport Sulphur Co. v. S/S Hermosa, 526 F.2d 307 (5th Cir. 1976).

Ultimate findings of fact based upon preliminary findings of fact are not binding upon the appeals court. U.S. v. Armature Rewinding Co., 124 F.2d 589, 591 (8th Cir. 1942). In that case, Judge Sanborne said that if the ultimate finding is contrary to the evidentiary findings, then it is not binding upon the appeals court. Examples of such ultimate findings of fact include: (1) that the taxpayer was not a manufacturer or producer for purposes of the federal excise tax, U.S. v. Armature Rewinding Co., supra; (2) the trial court's findings as to the difficulty of the legal problem confronting the plaintiff in an action by an attorne to recover for services on a quantum meruit basis, Kuhn v. Princess Lida of Thurn & Taxis, 119 F.2d 704 (3rd Cir. 1941); (3) that in an actio for a judgment declaring the plaintiff a citizen of the United States, the finding that the plaintiff had expatriated himself, Lehmann v. Acheson, 206 F.2d 592 (3rd Cir. 1953). Such findings have been held to be ultimate findings of fact or legal inferences. Lehman v. Acheson, supra. The Fifth Circuit has also held that the finding of non-discrimination in employment is a finding of an ultimate fact that can be reverse free of the "clearly erroneous" rule. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1382-83 (5th Cir. 1978). In reviewing the District Court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by the findings of subsidiary fact which are themselves not clearly erroneous...(W)e must (also) determine whether there are requisite subsidiary facts to undergird the ultimate facts. Causey v. Ford Motor Co., 516 F.2d 416, 420-21 (5th Cir. 1975).

Where a finding is a composite of fact and law, it is not binding where the factual finding is induced by an error of law or where although the factual finding is sound the composite conclusion is based upon an error of law. Fulton National Bank v. Tate, 363 F.2d 562 (5th Cir. 1966)

The appellate court is, of course, not bound at all by the trial court's conclusions of law. Great Atlantic & Pacific Tea Company v. Supermarket Equipment Co., supra.

In the application of the law to the facts found by the court, the appellate court is not bound by that application where the trial court had an erroneous view of the controlling legal principles. Parson, supra

Furthermore, the failure to find facts necessary to support a result is an error of law. Hendrix v. Joseph, 559 F.2d 1265, 1268 (5th Cir. 197

Regarding this appeal, it will be the minority voters' contention th the primary factors and enhancing factors stated in Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973), are ultimate findings of fact, and therefore, the appellate court is not required to use the "clearly erroneous" standard in reviewing the trial court's determination. The minori voters are aware of this Circuit's statement in Bolden v. City of Mobile, Alabama, 571 F.2d 238, 244 (5th Cir. 1978) and Nevett v. Sides, 571 F.2d 209, 226 (5th Cir. 1978) that "conclusions of unresponsiveness" and "determinations under the Zimmer criteria will stand, if supported by sufficient evidence, unless clearly erroneous." However, the determination in Nevett that these elements are findings from which inferences of "intent to dilute" and "dilution" are to be drawn make such findings clearly "ultimate findings of fact" according to other decisions within the Circuit. Nevett, supra., at 225; Causey, supra. The minority voters therefore urge that the Zimmer factors be henceforth classified as ultimate findings of fact and that the Court review them independently

of the "clearly erroneous" rule. The preliminary findings of fact made by the trial court in support of these ultimate findings are, of course, factual findings which cannot be overturned unless "clearly erroneous". The ultimate question as to whether or not the minority voters' voting strength has been diluted is a conclusion of law, and therefore, the appellate court may freely substitute its judgment for that of the trial court.

ARGUMENT AND AUTHORITIES

Section I: Access to the Political Process

The Trial Court erred in finding that the minority voters have access to the political system in Lubbock, Texas.

The issue of whether a minority group has access to the political process was stated in Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973) as whether there was a lack of access to the process of slating candidates. The concept of access, however, has been broadened to include the political process, which encompasses the election of members to representative governmental bodies. Indeed, the case from which Zimmer drew its guidance, White v. Regester, 412 U.S. 765 (1973), states that "the plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question."

The clearest structural analysis of the elements of proof in a dilution case has been by the Fifth Circuit in the case Nevett v. Sides, 571 F.2d 209, 217 (5th Cir. 1978), in which the relationship between the primary factors and the enhancing factors were discussed. Primary facto are those criteria going primarily to the issue of denial of access, or dilution; whereas, enhancing factors inquire into the existence of certain structural voting devices that may enhance the underlying di-

lution. Thus, the four primary factors are interrelated and all bear upon the question of access, or dilution, while the enhancement factors assume dilution and explore whether dilution may be enhanced by certain structural facets of a particular scheme.

Several cases have identified factual inquiries that must be made in order to draw an inference of lack of access. The Fifth Circuit in Kirksey v. Board of Supervisors of Hines County, Mississippi, 554 F.2d 139, 143 (5th Cir. 1977) cert. denied 434 U.S. 968 (1977) stated that several factors are indicative of a denial of access:

1. A history of offical racial discrimination which touched the right of minorities to register and vote and to participate in a democratic process;
2. A historical pattern of disproprotionately low number of minority group members being elected to the legislative body;
3. A lack of responsiveness on the part of elected officials to the need of the minority community;
4. A depressed socio-economic status which makes participation in community processes difficult; and
5. Rules require the majority vote as a prerequisite to nomination.

The court further stated that "by proof of an aggregation of at least some of these factors, or similar ones, plaintiff can demonstrate that the members of a particular group in question are being denied access." In 1977, the Fifth Circuit in David v. Garrison, 553 F.2d 923 (5th Cir. 1977), stated that any consideration of access to the electoral process must necessarily concerning itself with:

1. The size of the electorate;
2. The time, money and number of persons needed for a campaign; and
3. The ability of voters to know various candidates with a minimum effort.

The Court below considered the Kirksey factors, and found that

there was a history of racial discrimination in Lubbock, but that

> "for all practical purposes these discriminatory constitutional provisions and statutes have not been in effect for over ten (10) years, and the Court must conclude that this history of official racial discrimination in the registration and voting process is indeed past history with no effect on present day elections." Rec. p. 644.

The trial court erroneously focused only upon the history of official racial discrimination, discriminatory constitutional and statutory provisions. However, the District Court in Graves v. Barnes, 378 F.Supp. 640, 643, (W.D. Tex. 1974), noted that the Supreme Court had in White v. Regester, supra recognized the political and social facts of life in Texas that it had previously found crucial to understanding the operation of multi-member districts in the state.

> Political access is not a vapid phrase combined within a rigid formula, but it is frequently perpetuated by mores, folkways, and customs. It is not necessary to establish that minority voters are being legally disinfranchised. We are permitted to explore the entire environment and to measure its political pollutants. Texas has historically been a one-party state with a history pock marked by a pattern of racial discrimination that has stunted the electoral and economic participation of the black and brown communities in the life of the state.

This topic will be discussed in detail under the third primary factor of "effects of past discrimination." However, for here it is clear that the court in reaching its conclusion considered only the de jure factors and not the total discriminatory environment.

The court correctly found that there have been no members of either minority group elected to the Lubbock city council, but excused this total lack of access by noting that the Lubbock Independent School District has had one black and one Mexican-American elected to its board, and further that one Mexican-American has been elected to the state legislature in District 75B. Success in these two limited areas

proved to the Court that

> since the removal of official restrictions on voting and registrations minorities have been and continue to be elected to public office in Lubbock elections, and therefore, what has been a pattern of disproportionately low numbers of minorities being elected to public positions, has undergone and is still undergoing change. Rec. p. 644-45.

The second Kirksey factor inquires into the disproportionately low number of minorities elected; however, since Lubbock was organized in 1909, no minority has ever been elected to the Lubbock city council. Election to the school board in two recent cases is not comparable data upon which to base a finding of access. First, the school board does not have a majority vote requirement, but trustees are elected by a mere plurality. Tr. pp.1268, 69, and 71. Second, the turnout in school board races has been historically much lower than in races for city council and, therefore, the chances of a minority vote being submerged by the white majority are much less. For example, in the 1974 school board race in which the Mexican-American was elected, the total votes cast were only 8,000 and he won by a 400 vote plurality, which he attributed to heavy voting in predominantly Mexican-American and black areas. Tr. pp.1268-1270. But in the 1974 city council election, the turnout was some 28,600. Stipulation H.

The race in state legislative District 75B is also not comparable data upon which to base a finding of minority access. District 75B was originally a multi-member district which was overturned in Graves v. Barnes, supra. A Mexican-American was only then elected from the new single member district, which included a substantial portion of the minority and minority influenced areas in Lubbock. Tr. pp. 1137-1140. Furthermore, the Mexican-American that was elected had previously lost three at-large elections.

Therefore, the court's conclusion that there is real access to the election process in Lubbock is not supported by the evidence when more t surface factors are studied. As the District Court stated in Bolden v. City of Mobile, Alabama, supra, 387, the court has the duty to look deeper, rather than rely on surface appearances to determine if there is true openness in the process and determine whether the processes leading to nomination and election are equally open to participation by the group in question. One indication that local political processes are not equally open is the fact that no black person has ever been elected to the at-large city commission office. White v. Regester, supra 766.

The third Kirksey factor, the lack of responsiveness, is discussed fully in the section of the brief on responsiveness, however, here it should be noted that the conclusions the court drew as to lack of responsiveness are not supported by substantial evidence, that the court has taken a too restrictive view of the elements of responsiveness, and that it again has failed to consider more than surface data in making its inference of responsiveness.

The court recognized that minorities in Lubbock have suffered and are still suffering from a depressed socio-economic status which makes their participation in election processes difficult, however, it did not draw any inference from this fact. David v. Garrison, supra, points to the size of the electorate, the time, money and number of persons needed for an effective campaign as crucial factors regarding access. Graves, supra, at page 720 condemns such discrimination among candidates and political groups on the basis of wealth. The court further found that it simply costs more for a candidate to run and to communicate with his electorate in a multi-member district than it does in a single

member district. Therefore, the depressed socio-economic status of minorities in Lubbock is an initial barrier to an effective campaign in an at-large district. Furthermore, in looking at all the political realities, a depressed socio-economic status certainly acts as a barrie to participation in community processes in general. White v. Regester, supra, at 768.

Finally, the court found that there is a majority vote requirement for election, but excused this burden by arguing that there is no majority vote requirement as a prerequisite to nomination for any city council race. The excuse does not persuade. City council races are non partisan. Any person may file to have his name placed on the ballot. Nomination is not applicable to city council races. It is a factor only in party primaries whereby one candidate among many becomes the nominee of the party. In Lubbock, the majority vote requirement is imposed not for nomination but for election. It is very significant that the Lubbock city charter was amended in 1964 to change the system of election for city council from a plurality to a majority. Stipulatio N, Amendment No. 4. As a sidelight, on the same ballot Amendment No. 2 provided that the city should have the right to levee and collect an annual poll tax upon all male inhabitants between the ages of 21 and 60. The change from plurality to majority passed 934 to 57, and the poll tax amendment passed 895 to 89. The Fifth Circuit in Bolden v. City of Mobile, Alabama, supra, 243, stated that the court is not restricted to the Zimmer factors per se but may prove similar ones. The duty of the court is not to be bound strictly by the absolute words of an element in the doctrine of access but to examine the sense and effect of that doctrine.

The Kirksey court after enumerating the 5 factors, delineated some

13 elements that the plaintiffs had established. Kirksey, supra, 144. Listed below are those 13 factors and the place, if any, where proof of such factors appear in the record of this case.

1. No black ever been elected. Rec. p. 642
2. Poll taxes and literacy test as impediments to voting. Rec. p.
3. Segregation principles adopted by political parties. Rec. pp.6
4. Property ownership requirements to run for offices. No evidenc in record.
5. Disproportionate education. Tr. p. 961.
6. Disproportionate employment. Rec. p. 664.
7. Disproportionate income level. Rec. p. 664.
8. Disproportionate living conditions. Rec. p. 654.
9. Systematic exclusion of blacks from juries. No evidence in record.
10. Dual school system. Rec. p. 669.
11. Bloc voting. Rec. p. 646.
12. Requirement of majority for election. Rec. p. 641.
13. Prohibition against single shot voting. See discussion infra. Graves v. Barnes, 378 F.Supp. 640, 654 (W.D. Tex. 1974).

Therefore, of the 13 factors identified as proven in Kirksey, 10 of those were found by the court below and one more, the anti-single shot voting requirement, should have been found by the court below. The inference then of lack of access is inescapable. The evidence found by the court compels the finding of lack of access.

Thus as the Kirksey factors were related to the Lubbock election system, the court took a mechanistic and literal approach, and did not consider all the relevant evidence that relates to each factor, and therefore fell into error. Such error is an error of law which the appellate court may freely correct. Hendrix v. Joseph, 559 F.2d 1265, 1268 (5th Cir. 1977).

Not only was the court too restrictive in looking at history of discrimination, but it also placed upon the plaintiffs burden of demonst ing a causal relationship between the previous discrimination and denia of access to political participation by blacks and Mexican-Americans, Rec. p. 645. Kirksey, supra, at 146, teaches that the trial court shou not place upon the plaintiffs the burden of coming forward with evidenc that the long existent and recent history is still current history at t time of trial. It is error to place upon plaintiffs the obligation of proving a causal relationship between educational and economic deficien and the denial of access to political life.

The court found that many blacks and Mexican-Americans do not vote because they have an attitude that there is no use in doing so since a minority candidate could not be elected to office in any event. Howe the court minimized this belief of minorities as being "merely a subjective barrier in the minds of some of the minority group members" that has no relationship to the actual facts as they exist. The testimony of plaintiff's expert witness, Dr. Charles Johnson, Tr. p. 1481, demonstrated that in Lubbock minority candidates have consistently been overwhelmed by the vote preferences for non-minority candidates in the non-minority precincts, which fact supported his conclusion that the at-large system of elections for city councils tended to dilute the full strength of minority citizens. Furthermore, Tr. p. 1486, his study of the electoral history of Lubbock demonstrated that the at-large system apparently lowers minority participation rates in local government in terms of lower voter registration. The registration in minority precinc is 55%, whereas in non-minority precincts it is 68%. Tr. p. 1496. Because of the history of no minority ever having been elected to the city council in Lubbock and because of the demonstrated fact that

minority preferences are overwhelmed by the white majority, the feeling of minorities that it is pointless to vote has basis in reality. Johnson further pointed out however that when it appears that a minority candidate has an opportunity to win, the turnout appears to be much higher in minority precincts. A good example was the 1976 city council election and also the 1976 democratic primary. Tr. pp. 1501, 1502.

Furthermore, discrimination is essentially a psychological event as plaintiff's witness Andres Tijerina, the historian, testified. Tr. p. 829. "It is very obvious that having had the experience and neglect and discrimination, the Mexican-Americans should not even feel that they should bother to run for office or to become involved in politics." The courts have also spoken in psychological terms regarding participatio of minority candidates. For example the District Court in Bolden, supra, 389, found that the structure of the at-large election combined with strong racial polarization continues to effectively discourage qualified black candidates from seeking office or being elected, thereby denying blacks equal access to the slating or candidate selection process.

The court then proceeded to suggest that the defeat of minority candidates could very well be attributed to lack of public identification experience or other similar factors which apply to both minority and non-minority candidates. There is no evidence in the record to support such a finding and such exculpatory evidence must be based upon proof, not speculation. The court further excuses the lack of success of minority candidates by stating that in one instance a minority candidate received more money from non-minority contributors than did his non-minority opponent, and in another instance one minority candidate received more contributions from her own nationality than the successful white candidate received from the majority group. In the first

instance, it is expenditures, not contributions, that is the critical factor in running a political race. In the second instance, the court has misstated the facts regarding contributions. The candidate which the court had reference is Maria Mercado who reported cash contributions of about $900 plus a tapestry valued at $4,000, from the sale of which she only received about $240. Therefore, her actual cash contributions were some $1,140, Tr. p. 1228. The transcript on page 1260 reflects that the contributions of other candidates were: Adderton, $1,011, Bob Smith, $1,900, and Glad Norman, $1,435, all Anglo, all but one of whom received more in contributions than did Ms. Mercado. This finding is clearly erroneous.

A final element, polarized voting, found by the court, Rec. p. 646, has been characterized by the 5th Circuit in Bolden, supra, 243 as an indication of lack of access. However the court below drew no conclusion from this finding whatsoever.

Given the court's failure to look at all relevant factors, it's misinterpretation of the import of factors looked at, and its misstatement of certain facts, it is clear how the court resolved the primary factor of lack of access in favor of the defendants. However, a reading of the record as a whole compels a finding of lack of access in favor of plaintiffs, such an error is an error of law for which the appellate court may substitute its judgment free of the "clearly erroneous" standard.

Section II: Responsiveness

The trial court erred in finding that the City of Lubbock is responsive to the needs of minorities.

The Fifth Circuit has noted that the district court's task in considering evidence under the responsiveness criterion is a singularly

factual one. Bolden v. City of Mobile, Alabama, supra, 244. Two earlier cases, David v. Garrison, supra, 928, and Hendrix v. Joseph, supra, 1268, had divided the inquiry into two distinct facets: (1) the provision of municipal services to neighborhoods populated by minority group members; and (2) the distribution of municipal jobs and appointments to various boards and commissions. The court below followed this division, however, Bolden does not support limiting the inquiry to these areas alone. Bolden also considered cases of police brutality, mock lynchings and cross-burnings, failure of the city to take positive, vigorous and affirmative action in matters of concerns to blacks, suits against the city to desegregate police and fire departments and to open city facilities to allow equal access. Bolden, also considered the fact that black neighborhoods were characterized by a greater share of infant death, major crimes, TB deaths, welfare cases and juvenile delinquency. They further considered the fact that commissioners had relatively less contact with the black community, and hence were not as likely to know black citizens who were qualified and interested in serving on committees. Furthermore, the Fifth Circuit has noted in Zimmer v. McKeithen, supra, 1305 that the factor of responsiveness is significant, but it is not decisive; they reiterated this position in Nevett v. Sides, 571 F.2d 209, 229 (5th Cir. 1978).

Testimony by Plaintiff's expert witness, Dr. Charles Johnson, indicated that responsiveness should be considered under at least four catagories. Tr. pp. 1503 and 1504. Dr. Johnson based his discussion of the types of responsiveness upon an article by Harvey J. Tucker and L. Harmon Ziegler, "School Board Responsiveness," Legislative Studies Quarterly, III, 2, May, 1978, pp. 213-237, which article was based upon a prior article by Heinz Eulau and Paul D. Karps, "The Puzzle

of Representation: Specifing Components of Responsiveness," Legislative Studies Quarterly, 2, August, 1977, pp. 233 to 254.

Those types of responsiveness are: (1) "policy responsiveness" meaning an inquiry into the meaningfulness of the connection between the constituents policy preferences (demands) and the policy conduct of the governmental body. Policy responsiveness is also characterized as being congruence or concurrence between the policy demands and the policy conduct; (2) "service responsiveness" which is the advantages and benefits that a representative is able to obtain for a particular constituent through personal intervention. Such responsiveness is also known as non-legislative responsiveness; (3) "allocation responsiveness" means that which representative's efforts to obtain public goods and benefits not shared by the entire polity. Such allocation responsiveness really applies only to single member districts and has no application to at-large districts since public goods and benefits obtained on behalf of one constituent is shared by all constituents in general; (4) "symbolic responsiveness" meaning the manipulation of political symbols in order to generate and maintain support.

It is recommended that the consideration of responsiveness under the above categories will provide the broader inquiry of Bolden. The limitation of the inquiry into municipal services and distribution of municipal jobs and appointments concentrates only on "allocation responsiveness" which has no real meaning in an at-large system. Inequality of allocations could be discussed with an at-large system and such is taken to be the focus of the inquiry into responsiveness by the court below and by the Fifth Circuit in David and Hendrix. However, it is clear from a close reading of Bolden that the inquiry into responsiveness is much broader than a mere surface inquiry

into the inequality of municipal services and jobs and appointments.

First, however allowing for the purpose of argument only, that the inquiry into responsiveness is limited to those two facets, the court's conclusion of responsiveness is not supported by substantial evidence; rather, the evidence considered by the court, and ignored by the court, forces the inference that even under this limited sphere of inquiry the City of Lubbock has not been responsive to the needs of minorities.

Considering the inquiry into provision of municipal services, it is important to note that many of the municipal services quoted by the court as supportive of an inference of responsiveness have only been provided to minority areas after the advent of federal monies and are today still being provided primarily through federal funds. Such action has been condemned by Ausberry v. City of Monroe, Louisiana, F.Supp. 460, 465, (W.D. La. 1978), which said that

> "though the city has attempted to show its responsiveness to the particularized needs of black citizens in the city, it is clear that nearly all the funds expended on the project held up as examples were 100% federal funds and out of necessity had to be spent in certain blighted areas which had minority representation, all pursuant to federal regulations."

For example, the public housing administered by the Lubbock Housing Authority was financed with largely federal monies, but it is clear from the testimony that the City of Lubbock, even conceding that use of federal money indicates some degree of responsiveness, which we do not, has relegated the minorities to the oldest and most dilapidated housing projects while saving the newer, better kept housing projects for the white majority. Tr. pp.108, 110, 123, and 137. The testimony showed that the city has been reluctant to accept federal funds, for when the OEO first came to Lubbock in 1967, it attempted to get city

sponsorship but the city refused to assume this role. Tr. p. 618. This lack of interest continued in 1970 when the city refused to act as sponsor for a neighborhood youth program which served a majority of blacks and Mexican-American children. The summer program was eventually sponsored by the county. Tr. pp. 933, 934, and 950. Although not related directly to the city, but illustrative of the general atmosphere of reluctance to assist minorities in Lubbock, was the action of the Lubbock School Board in 1977, in turning down the school breakfast program, which would benefit primarily low income and black and Mexican-American students. The vote was 5 to 2 with the black and Mexican-American school board members being the only ones voting to accept the program. Tr. p. 1284. Many of the parks which were cited by the court as created for the use and benefit of minorities were financed to a large extent by federal community development funds. One of City's witnesses testified that of the 18 projects for renovation or new construction in the minority influenced areas, at least half were in the Canyon Lakes Project which is funded by revenue sharing, community development and Bureau of Reclamation money. Tr. pp. 1707, 1749. But for renovation and new construction in white areas, the money was primarily city funds. Furthermore, open space funds were used in the acquisition of the Davis, George Wood and C. W. Ratliff Parks. Greenfair Manor Park was purchased with Urban Renewal funds. Senior Citizens Centers are funded federally, Tr. p. 1711, as are nutrition sites. Tr. p. 1713. The library was built with both bond funds and federal funds.

The predecessor to the Community Development Program was the Urban Renewal Program. Urban Renewal was two-thirds federal funded and one-third city funded. However, the city's share was generally in-kind

contributions. These in-kind credits which do not necessarily have to come from the city, but can come from school districts and other authorities. For instance, the city only put $3,400 cash into a project that cost over 12 million dollars. The Neighborhood Development Project, which cost 18 million dollars in Urban Renewal dollars, the city's share being primarily non-cash credits, was primarily to recover from the 1970 tornado. Tr. pp. 1847 to 1859.

The Community Development Coordinator for the city testified that maintenance costs are available through Community Development funds and that the City of Lubbock has not chosen to apply for them, in contrast to the court's statement that the city has many obligations regarding the use of CD funds. Rec. p. 657. She further testified that the city provided some 250-300 sq. ft. of office space for herself and her assistant in return for about 20 million dollars worth of CD federal funds. Thus it is obvious that many of the municipal services which the court cites as being indicative of the responsiveness of the city government are in fact financed with federal monies and are required to be spent in minority areas. Spending federal funds which according to law are to benefit minorities can hardly be characterized as responsiveness to the particularized needs of minorities. And it certainly is not the vigorous, affirmative action contemplated by Bolden.

The Court cited the use of Community Development funds by the city as an example of responsiveness. However, it is clear from an examination of the areas of expenditures that the city has been spending CD funds in place of city funds for parks, street lights, traffic signals, street paving, utilities and water in minority areas. The obligation of the city is to distribute local tax dollars equitably, then spend federal dollars in the mandated areas. Ausberry, supra, 465.

One federally assisted program cited by the court as beneficial to minorities is the Lubbock Civic Center, which is a convention hall rented by the city to various groups. Any benefit to minorities is only very indirect. Tr. pp. 1840-1841.

Upon a closer examination of the evidence, distribution of municipal jobs and appointments also found by the court to be indicative of responsiveness are not distributed as even handedly as the court would have us believe.

The court found that "it is obvious that many minorities are in low paying job classifications." Rec. p. 664. The teaching of Bolden, supra, is that such a finding is certainly one element in inferring lack of responsiveness, but the inquiry in Bolden is to employment of minorities by the city in the higher levels, rather than in the lowest levels. The court's conclusion that the city is making some progress in the area of hiring is not supported by the record. Stipulation MM reveals that whites and Mexican-Americans have about the same average job longevity, however, there is a significant difference in average salary. As a whole, the percentage of minorities employed by the city are roughly equivalent to the percentages in the work force, but 42% of the whites are earning above $13,000, while 37.4% of the blacks earn less than $8,000 and 47.1% of the Mexican-Americans earn less than $10,000. If minority distribution in all pay grades were equal to the white distribution, then there would be 15 blacks and 52 Mexican-Americans in the top two pay grades. The chart reveals that there are no blacks and only two Mexican-Americans in those grades.

As to the supposed increased employment of minorities, a study of Stipulation FF and EE reveals:

YEAR	WHITE	BLACK	MEXICAN-AMERICAN
	PERCENTAGE OF ALL EMPLOYEES BY ETHNIC GROUP IN TOP TWO CATEGORIES OF EMPLOYMENT		
1973	24.5%	2.1%	1.9%
1978	24.7%	1.5%	2.6%
	PERCENTAGE OF ALL EMPLOYEES BY ETHNIC GROUP IN LOWEST CATEGORY OF EMPLOYMENT		
1973	8.6%	29.2%	63.6%
1978	12.1%	62.6%	61.5%
	PERCENTAGE OF NEW HIRES BY ETHNIC GROUP IN THE TOP TWO JOB CATEGORIES OF EMPLOYMENT		
1974	9.6%	2.7%	1.5%
1978	10.8%	2.2%	-0-
	PERCENTAGE OF NEW HIRES BY ETHNIC GROUP IN THE LOWEST CATEGORY OF EMPLOYMENT		
1974	16.4%	59.5%	67.6%
1978	25.1%	66.7%	70.1%

It is clear that minorities have not progressed at all, but have continue to be hired in the lowest job category in ever increasing percentages.

The court excuses the failure of the city to make any progress whatsoever by stating that it agrees with the defendants that minority groups in professional skills categories are sought after on a very competitive basis by private industry. There is absoluetly no support in the record for such a finding other than the bald-faced ascertion of city's witnesses. No evidence whatsoever was offered as to what efforts the city has made to recruit minorities into the higher paying jobs with the city. The teaching of the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, p. 802, is that once a complainant has established a prima facie case of discrimination, the burden shifts to the defendant employer to articulate some ligitimate non-discriminator reason for the situation. Scott v. City of Anniston, Alabama, 430 F.

Supp.508, (N.D. Ala. 1977) notes that statistical comparions make a prima facie case of racial discrimination in employment, and then defendants must offer evidence to justify the failure to hire minorities The Fifth Circuit has said in U.S. v. Hays International Corporation, 456 F.2d 112, 120 (5th Cir. 1972) the inference of racial discrimination arises from the statistics themselves and no other evidence is required to support it. It is not necessary to show the availability of skilled minorities in the community to perform the jobs in question because the burden of going forward and showing the lack of qualified minorities is upon the defendant. Therefore, the city totally failed in their burden, and the court erroneously concluded as a matter of law that the City of Lubbock has been non-discriminatory in its hiring practices. Such discrimination is a strong indication of lack of responsiveness. Bolden, supra, David, supra, Hendrix, supra.

As to the appointment of minorities to boards or commissions, the testimony clearly shows that minorities are primarily members of those boards and commissions which have as their responsibility participation in some federal project. For instance, one black witness was a member of the Community Advisory Board which deals with a federal grant, Tr. p. 72, but there are no minorities whatsoever on the Electric Utilities Board, the Zoning Board of Adjustments, the Plumming Board, the Building Board of Appeals and the Cemetery Board. Tr. p. 217 The Board of Civic Development, also a city board, had no minority members until last year. However, an inquiry into its history is very interesting. The Board of Civic Development and the Chamber of Commerce which is predominantely a white organization, are approximately one and the same. Tr. p. 2147. Those that are elected to the Chamber of Commerce Board are the same people elected to the Board of Civic

Development, Tr. p. 2179. The Board of Civic Development receives a city budget of $550,000, Tr. pp. 2147-48 which because of the interlocking directorates of the two boards is equivalent to the white Chamber of Commerce being funded in equal amounts. The Mexican-American Chamber of Commerce receives absolutely nothing from the city. Tr. p. 2148. Furthermore, the Urban Renewal Agency is located in a building that is owned by the Chamber of Commerce, which in turn leases the land that the building is on from the city. The Urban Renewal Agency pays rent to the Chamber of Commerce, $1,337.50 a month, and it is paid out of CD funds, whereas the city leases it to the Chamber of Commerce for a dollar a year. Tr. pp. 1872-74.

In other areas, the city has waited for lawsuits and major demonstrations before beginning to respond to minority needs. The "March of Faith" in 1970, which was the minority community's response to repeated cases of overuse of force by the police department, Tr. p. 621, resulted in the city saying that they disagreed with the grievances as presented by the community and a few days later buying heavy riot equipment. Tr. p. 671.

The court's example of the installation of a traffic light fails to mention the fact that it was installed one hour prior to the time in which minorities had threatened to block the intersection with bodies in frustration over the city's delay. Tr. pp. 28, 52; Rec. 648-49.

The symbolic response of the naming of a park with a name important in Mexican-American heritage is not indicative of responsiveness of the City of Lubbock, but rather is indicative that it takes threat of a federal lawsuit and a major demonstration to get the city to respond. Tr. pp. 1012-27.

The garbage strikes of 1968 and 1972 provide another example of the lack of responsiveness of the city. Ninety-nine percent of garbage workers were then Mexican-Americans. In 1968, after the employees had tried to convey their problems to the city through heads of departments and the city manager and never received any response, they engaged in a work stoppage. The city responded by firing all of them and they organized a protest march from Guadalupe Park to city hall. They were eventually rehired. The 1972 strike is even more indicative of the lack of response. At this time after going through many procedures to request pay increase, the response of the city was to go ahead and approve the budget without any pay increase whatsoever. At the public hearing on the budget, about 250 to 300 people showed up at the city council's chamber and the response of the city was to line it with police and police dogs. Finally, intervention by the federal government in the form of a representative from the Justice Department persuaded the city council to meet with the strikers, rehire them, but with no pay increase. Tr. pp. 1068-1091.

The only response to any of these mass demonstrations was symbolic, the creation of a "Human Relations Commission" with black, brown and anglo participants. Every witness that testified regarding the Human Relations Commission felt that it was a make-work group, was not respondent to the needs of the community and in the words of one witness it was "a bone for the blacks and browns without the meat." Tr. p. 582. The chairman of the Human Relations Commission, a city employee, testifie that in his opinion the Human Relations Commission was not responsive. Tr. p. 455. He gave one example that when the city was in 1978 considering a public accommodations ordinance, the chairman was told by his supervisor that "we will have to do what the people upstairs want

us to do. We will try to block." Tr. p. 429. The public accommodations ordinance was finally passed by the city council in a weakened version from that proposed by the Human Relations Commission. Tr. p. 455 ff.

Several lawsuits have been filed against the city to make them treat minorities equally. One of the most dramatic is the suit filed by the original plaintiff in this cause, a black attorney, in 1969 against the City of Lubbock in order to allow him to bury his deceased wife in the Lubbock cemetery. (Autrey Gene Gaines v. City of Lubbock Cemetery Board, et. al., CA5-687 November 11, 1969). This was long after the city had taken over management of the cemetery beginning in 1948 and ending in 1958. Tr. p. 2027, Rec. p. 650. The court's conclusion that the inequalities in administration were removed as quickly as possible after the city take over is not supported by the facts. The court took judicial notice of two suits filed against the city and county U.S. v. Lubbock Independent School District, 455 F.Supp. 1223, (N.D. Tex. 1978), remanded 8-9-79 #78-2526, in which vestiges of discrimination were found; Vest v. Lubbock County Commissioner's Court, 444 F.Supp. 824 (N.D. Tex. 1977), in which the county was ordered to stop segregating prisoners by race. The city was also subject to a suit in 1976 alleging discrimination in the hiring of police officers. Furguson v. Alley, Chief of Police, #CA-5-818. The trial court also heard a Title VII case against unions in the area in 1971. U.S. v. T.I.M.E.-D.C., Inc, 335, F.Supp. 246 (N.D.Tex. 1971), 517 F.2d 299 (5th Cir. 1975), 431 U.S. 324 (1977), 517 F.2d 299 (5th Cir. 1975). These last two cases were not noted by the court on the record, but were heard by Honorable Halbert O. Woodward. A employment discrimination suit, EEOC v. Johnson Mfg. Co., CA #5-74-54 is pending in the same court.

Thus the situation in Lubbock is similar to that in Bolden, supra, p. 400, in which the District Court noted that it took orders from the court in order to desegregate and allow access to minorities.

One of plaintiff's witnesses, a historian, testified that in his study of the history of Mexican-Americans in Lubbock he had never found an instance in which the city unilaterally initiated improvement for Mexican-Americans. It always took some demand upon the city in order to get them to act. Tr. p. 830. The District Court in Graves v. Barnes, 378, F.Supp. 640, 653 (W.D. Tex 1974) noted that:

> "not unlike the blacks in the deep south, the Mexican-Americans in Lubbock County were received by most of the dominant anglo population not as a fellow human being, but - in the words of one historian - as a species of farm implement that comes mysteriously and spontaneously into being coincident with the maturing of the cotton, that requires no upkeep or special consideration during the period of its usefulness, needs no protection from the elements, and when the crop has been harvested vanishes into limbo or forgotten things - until the next harvest season rolls around."

The court made much of the fact that the City Health Department's budget had been increased dramatically over the last few years, but the record indicates that most of this improvement has been made within the last ten months, after the filing of this lawsuit, and was a direct result of the hiring of one of plaintiff's witnesses, as a Health Director. She testified that the annual budget for the Health Department now is $1,100,000 but that it is inadequate; that based on studies it should be at least $1,750,000. She noted the one thing very unusual about the Lubbock budget is that it includes some $225,000 for vector control, an unusually large amount. The city of Waco, Texas, similar in size to Lubbock has a budget of only $15,000 for vector control. The history of the Health Department indicates: that in 1954 there were 31 employees, today there are only 52; that the

program for pre-natal care was stopped in 1976 and only recently renewed; it has 9 nurses and should have 16; the department should have 15 health inspectors but only has 10. The more revealing fact, considering that the Health Department serves primarily blacks and Mexican-Americans, is that plans initiated in 1954 for the creation of out-patient facilities for the indigent, also known as well-child clinics, were never implemented. It is the only Health Department that the witness knew of which did not have well-child clinics. Tr. pp. 724 to 755. As the court recognized, Rec. p. 650, Lubbock has the seventh highest infant mortality rate of cities its size in the country, and many of these deaths have been within the minority communities. The court failed to draw the inference that the lack of pre-and post-natal child clinics could be directly responsible for this infant mortality rate. The example of the Health Department is one of long neglect and the beginning of attempts to clear up the situation only after this lawsuit was filed.

Regarding the living conditions of minorities, the court found that they were generally bad, Rec. p. 654, but it did not place responsibility for such conditions upon the city. The testimony of witnesses concerning the Lubbock Housing Authority and the horrible conditions of two of the older units directly under the authority of the city contradicts the court's finding. Tr. pp. 108 and 123. Additionally, violations which the court characterized as violation of deed restrictions that could not be remedied by the city are so remediable according to the City Manager, yet he chose to refer the minority complainants to private enforcement. Tr. p. 1361. Such a response is in fact no response at all, since most minorities are so poor that they cannot afford to hire attorneys to enforce covenants. This lack of respon

is an area in which the city is capable of acting, is indicative of their attitude in general toward the needs of minorities.

The lack of contact with the minority community has been criticized by the District Court in Bolden, supra, 400, especially as it relates to lack of knowledge of potential appointees to boards and commissions. The court below, however, took such lack of knowledge and subsequent request for a list of names to be an example of responsiveness, Rec. p. 665. This lack of contact was illustrated in two other events: a city councilman testified that he regularly read minority publications, yet identified one that had not been published for two years, Tr. p. 2171 and the reaction of the city council to the report of the Human Relations Commission as to the need for a public accommodations ordinance was one of surprise. Tr. p. 431.

The so-called responsiveness of the city, in many cases required either by the federal government through grants or lawsuits, or a symbolic response after major demonstrations, when combined with a history of discrimination in employment, schools, housing, burial, instances of police brutality, current discrimination and the failure of the city ever to take voluntary, vigorous action on behalf of minorities, compels a finding of lack of responsiveness. The court's inference in this area is not supported by substantial evidence. The only inference is lack of responsiveness.

Section III: Tenuous State Policy Underlying Preference for Multi-Member Districts

The court erred in finding that the state policy underlying multi-member district was not "tenuous".

The court stated the question regarding this primary factor as follows: "Is the weight of the state policy behind the use of an at-

large election system weak or strong in comparison to the alleged infringement on the voting franchise?" Rec. p. 667. The court has misstated the test to determine the existence or non-existence of this primary factor. Zimmer v. McKeithen, supra, 1305, states the test as: "Is there a 'tenuous' state policy underlying the preference for multi-member or at-large districting?" This statement of the test was reiterated in Hendrix v. Joseph, supra, 1270, as "whether the state policy for multi-member districts can be characterized as tenuous" is what the plaintiffs must demonstrate under Zimmer. The Fifth Circuit in Nevett v. Sides, supra, 224 states that a tenuous state policy in favor of at-large districting may constitute evidence that other improper motivations laid behind the enactment or maintenanc of the plan. It later quotes a law review article to state that the relevance of this inquiry is that "a conscientious decision maker, however, considers the cost of the proposal, its conduciveness to the end sought to be obtained and the availability of alternatives less costly to the community as a whole or to the particular segments of the community. That a decision obviously fails to reflect these considerations with respect to any legislative objective supports the inference that it was improperly motivated. Brest, "Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive," 1971 Sup. Ct. Review 95, 121-122. The court, quoting the District Court, says that in view of this original dicotomy (the options of city to choose ward or at-large systems), it cannot be said that there is a state policy favoring at-large or multi-member districts for city councils in preference to single member ward or election districts. (Proof that there is no such state policy should suffice to establish that any such state policy is tenuous). Nevett, supra, 230.

The word "tenuous" seems to be misunderstood by several courts in discussing the issue. The word is defined in Webster's New Collegiate Dictionary,G.C. Merriam & Co. 1977, as being synonymous with weak. Therefore, all the plaintiffs need demonstrate is that there is a weak state policy underlying the preference for multi-member at-large districts.

Lubbock is a home rule city which is allowed by the State Constitution, Art. 11, Sec. 5, and also the Tex. Civ. Code Ann., Art. 1175, to adopt through its charter either a ward or an at-large form of municipal government. The at-large plan was adopted by Lubbock in 1917 and has been amended several times, the most significant amendment being in 1964 which changed the requirements for election from plurality to majority. Rec. p. 667; Stipulation N.

In situations in which the state law regarding the question of single member or multi-districts allows the city a choice, the courts have often found this to be a neutral factor and not one to be found in favor of either the plaintiffs or the defendants. Bolden, supra, 393.

The court below, however, stated that there is no evidence to support that at-large system was created with the intent to discriminate nor was there any evidence that such a system was maintained for the purpose of dilution. Rec. p. 668. The court erred in placing the burden upon the plaintiffs to establish direct evidence of intent. The Fifth Circuit has dealt with the intent requirements of Washington v. Davis, 426 U.S. 240; Nevett v. Sides, supra. The trial court erred in applying the intent requirement to the individual Zimmer factors. Rather, the Zimmer factors are circumstantial evidence of intent, not conclusions which flow from the establishment of intent. As Nevett

stated at 225, "we hold today that a finding of dilution under Zimmer raises an inference of intentional discrimination."

Were this a Whitcomb case, Whitcomb v. Chavis, 403 U.S. 124 (1971), the court should test whether or not the use of multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination. However, as Zimmer points out at 1305, Whitcomb is not controlling if the state policy favoring multi-member or at-large district is rooted in racial discrimination. Such roots can be found best in the statutory and judicial history of the stat in question. Hendrix, supra, 1269. Such a history is told in Graves v. Barnes, 343 F.Supp. 704, 725-6, (W.D. Tex. 1972).

> Texas is a state with a history of rather active segregation and is a state which has always been a one party state. The underlying rationales of the Texas tradition of multi-member districts in metropolitan area might well be precisely those rationales condemned in recent constitutional decisions. In contrasting Texas to the situation in Indiana in Whitcomb, the same court noted that Texas has a rather colorful history of racial segregation that exists numerous instances governing virtually the entire gamut of human relationships in which this state has adopted and maintain an official policy of racial discrimination against the Negro. Indeed even the Negro's right to vote and participate in the electoral process has not remained untouched by the state's policy. Therefore it is not unlikely that Texas' use of multi-member districts taken in the entirety of Texas electoral laws and of Texas history unconstitutionally infringes the voting rights of racial and political minorities in all Texas cities that are now districted as multi-member.

The same court later stated that there does not exist any rational state policy explaining the present use of multi-member districts. Graves v. Barnes, 378 F.Supp. 640, 643 (W.D. Tex. 1974)

Furthermore, the Fifth Circuit has pointed out that in states in which the legislature is responsible for passing acts to determine the form of city and county governments, then inattention of the state legislature is as effective as intentional state action referred to in Washington v. Davis, supra; such inattention has been held

sufficient to support a finding of unconstitutionality. Kirksey v. Board of Supervisors, supra. The long history of discriminatory Texas statutes attached to the court's judgment, Rec. pp. 674-680, in combination with the "rather colorful history of Texas segregation statutes and the treatment of Mexican-Americans in Texas" certainly supports an inference of intentional discrimination both in the initiation and maintenance of the multi-member district system in Texas.

Therefore the court's finding that the question of a tenuous state policy should be resolved in favor of defendants is clearly erroneous because not only did the court use the wrong question but it applied improper reasoning to its decision regarding intent, and, assuming even for the purpose of argument that intent is a factor which applies to each Zimmer factor, then the history of Texas discrimination in both its law and politics would require a finding of intentional discrimination. Furthermore, this history denies the possibility that there is a strong state policy, divorced from racial discrimination, favoring at-large districts. The facts and the case law compel a finding of this factor in favor of the plaintiffs, or at minimum a finding that the factor is neutral and not in favor of either plaintiffs or defendants.

Section IV: Effects of Past Discrimination

The court erred in finding tht the effects of past discrimination had been eradicated and do not preclude access of minorities to the political system.

The inquiry regarding the effects of past discrimination has been stated in Zimmer v. McKeithen, supra, 1305, as whether the existence

of past discrimination in general precludes the effective participation in the election system. This test has been explained in later cases, particularly Bolden v. City of Mobile, supra, in which the Fifth Circuit stated that it is not enough that the less subtle means of diminishing black participation have been removed; discriminatory official action is often clandestine and politic. This Circuit has also noted that there are certain indicators of the continuing effects of past discrimination: disproportionate educational, employment and income level in the living conditions tend to operate to deny access to political life. They have said that inequality of access is an inference which flows from the existence of economical and educational inequalities. The District Court in Graves v. Barnes, supra, 732, found that when a minority group is invidiously disadvantaged by the concomitance of poverty, past and continuing discrimination, a restrictive electoral system and a peculiar districting scheme which gives it less opportunity to participate successfully, the court should void such an apportionment scheme. This Circuit stated in Hendrix v. Joseph, supra, 1270, that such debilitating effects of past discrimination have usually been shown by relatively large discrepancies between the size of the black population and the number of registered voters. The finding of that court that voting was polarized along racial lines and that no black had ever been elected to the commission made it seem apparent that the system suffers from lingering effects of previous racial discrimination.

The court below made two significant omissions from its statement of the question. First, it failed to note that the past discrimination into which the court must inquire is not only legal but in general.

Second, it failed to understand that the question is as to minorities effective participation in the election system, not just simply their participation.

The effects of past discrimination in Lubbock has been demonstrated in several matters: the existence of polarized voting, Rec. p. 646, Bolden, supra, Hendrix, supra; lawsuits against the city and county alleging racial discrimination, Tr. pp. 1155-1161, Bolden, supra; differential in registration of voters between white and minority groups, Tr. p. 1496, Bolden, supra, Hendrix, supra; the absence of minority elected officials, Rec. p. 642, Kirksey, supra, 642; depressed socio-economic status of minorities, Rec. p. 646, Graves II, supra, 643 ff; and the existence of present discrimination, Tr. p. 580-81, Graves, II, supra, 643 ff.

Polarized voting and the failure to register to vote may very likely be linked in the minority group's behavior. Bolden, supra, stated that failure to register may be an example of a residual effect of past non-access, disproportionate education, employment and income levels or living conditions, or it may be attributable to bloc voting.

The absence of minority elected officials on the city council is undisputed, and the three that have been elected to the School Board and Legislature are not truly comparable as explained above in Section I: Access.

Kirksey, supra, 145, teaches that the significance of the fact that officials stop discriminating as a result of court orders and federal legislation is that litigation and legislation was necessary to remove discrimination, and that it has proved somewhat effective.

The District Court in Graves, II, supra, 643 ff, examined the

history of Mexican-Americans in Lubbock, and a sampling of their findings are:

> ...the all white primary system, the poll tax and the most restrictive voter registration system in the nation have left behind them a pattern of political apathy that continues to hinder the participation of minority groups...
>
> ...the current electoral system while no longer marked by the flagrantly discriminatory practice of the past retains many features found in the original procedures to facilitate minority exclusion.
>
> ...Blacks and browns residing in Lubbock have long suffered from and continue to suffer from the effects of racial discrimination. A dual system officially ignored until the 1970 federal court order (316 F.Supp. 1310) coupled with the obvious language barrier has made a significant impact upon the education level of Mexican-Americans. Approximately 60% of the Mexican-Americans drop out of school before the eighth grade and less than 10% finish high school, although one-fourth of the public high school students are brown. Only 18 Mexican-American graduates of the Lubbock Independent School District have received a college degree and fewer than three-tenths of 1% of the entire brown population are college graduates.
>
> ...the testimony was uncontradicted that one-fourth to one-half of the Anglo population still stereotypes the Mexican-American as lazy, emotional and unmotivated.
>
> ...the median family income is $3,500 lower than that in other areas of the county and over 28% of these families have income below the poverty level.
>
> ...Political awareness in the Mexican-American community is generally low.
>
> ...Twenty-five percent of the Anglo population in the district would vote against a Mexican-American solely on the basis of race.

The evidence indicates that the situation that existed in 1974 as outlined in Graves II has changed very little, if at all. One witness, chief of social actions for the nearby Air Force Base, stated that he had noted a pervasive attitude in Lubbock toward minorities that he characterized as demeaning, one that he would have expected 15 to

20 years ago but not in the 70's, and he had heard the use of many racial slurs. Tr. p. 628.

Another example of the attitudes still current in Lubbock is the instance regarding the 1978 city council race by a Mexican-American. An Anglo who was running in a race for city council in another place was willing to appear with her in minority areas and lend his support to her there. However, he was unwilling for her to appear with him in Southwest Lubbock, an Anglo area, for fear that doing so would be equal to committing political suicide. Tr. pp. 1143-44.

The trial court callously cast off the concerns of minority members of their lack of access in the political process by noting that

> "the court does find that there is an imagined impediment to complete minority participation in the election process. But, this barrier exits only in the subjective feelings of minority group members that they cannot participate in the election process. The subjective feeling can very well be explained by past discriminatory treatment afforded these people but this past action is no longer a real or objective barrier today." Rec. p. 671.

One feeling of minorities that the court calls subjective, restriction of blacks to a certain part of town, was based on a city ordinance making it a criminal offense to live outside of the area or to rent or sell to blacks outside of the area. This ordinance was admitted into evidence. Tr. p. 1140-41. The court misstated that evidence is its opinion. Rec. p. 670.

Many witnesses testified that one of the reactions of minorities is fear. Tr. pp. 577, 889. Another common feeling was that of frustration as to their dealings with city hall. Tr. pp. 1322-24. The Fifth Circuit in Bolden, supra, 145, Fn. 13 takes seriously such feelings: a black may think it futile to register. Such feelings are subjective, but discrimination, apart from the more blatant legally

imposed forms of the past, often manifests itself in what could be characterized as subjective form, such as feelings of inferiority and lack of power imposed through psychological and structural means. For the court to waive off such feelings as being merely subjective or imagined is not to examine the evidence presented in a true attempt to find out whether past discrimination still has effects today. The feelings of blacks and browns of frustration and powerlessness are based on facts so far as their ability to influence elections for the Lubbock City Council. As plaintiff's witness, Dr. Charles Johnson, testified, minority preferences have always been overwhelmed by the white majority and the only time that blacks and browns have voted in significant numbers is when they felt they had a chance to win. Tr. pp. 1501-02.

The at-large system corrected in Graves, II, supra, by instituting a single member district system for the Texas Legislature in fact resulted in a Mexican-American being elected to the Legislature. Had a single member district system been in effect in Lubbock in the 1978 city council race, a Mexican-American would have been a member of the city council today. Tr. pp. 1487-88.

The court's finding that the failure of minorities to be elected is not the result of past or present discrimination was not based upon the evidence, but pure speculation. The fact that legal impediments have been removed does not provide access for minorities, given the history of discrimination. The constitution forbids sophisticated as well as simple minded means of discrimination. Gomillion v. Lightfoot, 364 U.S. 339, 342 (1960).

The court's finding that defendants had met their burden of proving

past discrimination had been dissipated was based primarily upon the court's finding that the city had been responsive to minority needs. The city has not been responsive as discussed above in Section II: Responsiveness.

The inference of the court that the effects of past discrimination have been eradicated and do not inhibit access is not supported by substantial evidence. Rather when all of the evidence is considered in its proper light, the inference that access is still affected by discrimination, past and present, is compelled.

Section V: Anti-Single Shot Voting Requirement

The court erred in finding that there is no anti-single shot voting requirement.

The trial court found that there is no anti-single shot voting requirement in the City of Lubbock. However, it did find that candidates in the city elections run for numbered positions. It cited Bolden, supra, that in certain situations candidates running for numbered places could be disadvantages to minority candidates. The court then resolved this enhancing factor in favor of the defendants since it found no anti-single shot voting requirement in the city elections.

In so finding, the court committed an error of law, for it is clear from not only the Supreme Court but many Fifth Circuit decisions that the combination of a place requirement along with a majority vote requirement has the same force and effect as an anti-single shot voting requirement.

Strictly speaking, an anti-single shot voting requirement is a provision requiring that each elector cast votes for as many candidates as there are positions. Such a rule has application only in the context

of an electoral scheme that selects winners by ranking all candidates in the order of the number of votes they received. Nevett v. Sides, supra, 217,Fn. 10.

Since Lubbock does not have a pure at-large system, then the Supreme Court has recognized in White v. Regester, supra, 766, that the majority vote requirement linked with the so-called place rule has the effect of reducing the race for each position to a head-to-head contest in which the racial element is emphasized. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhance the opportunity for racial discrimination. Furthermore, where there is no requirement that candidates reside in subdistricts, all candidates may be selected from outside minority areas. This Circuit in Bolden, supra, 245, holds that in a situation in which candidates run for numbered positions such a factual finding will support the ultimate finding that there is an anti-single shot voting requirement. This holding was reiterated in David v. Garrison, supra, 930, "the system which assigns each candidate to a place on the ballot and puts him against a single opponent presumably precludes the use of single shot voting." Hendrix v. Joseph, supra, 1270, concluded that a majority vote requirement and the place system on the ballot precludes single shot voting.

Lubbock has all of these requirements. The place requirement, Rec. p. 672, no residency requirement, Rec. p. 672, and a majority vote requirement, Rec. p. 672, therefore,for the court to hold that there is no anti-single shot voting requirement, is an error of law which the appeals court may freely correct.

Section VI: The Aggregate Test

The Fifth Circuit in the recent case of Nevett v. Sides, supra, has stated that the ultimate issue to be determined in a case alleging unconstitutional dilution of the votes of racial groups is whether the district plan under attack exists because it was intended to diminish or dilute the political advocacy of that group. Intent, now that the more blatant forms of discrimination have been eradicated is usually not proveable by direct evidence, but is proved circumstantially. The establishment of the factors outlined in Zimmer raises the inference of intentional discrimination. The duty of the court then is to examine each of the Zimmer factors and the weight to be accorded each and then consider the evidence as a whole as to whether or not it raises the inference of dilution. Nevett, supra, 224-226.

There is no need to prove all of the Zimmer factors, rather as stated in Bolden, supra, 243, "by proof of an aggregation of at least some of the Zimmer factors, or similar ones, a plaintiff can demonstrate that the members of a particular group in question are being denied access." Therefore, not only does the plaintiff not have to prove every Zimmer factor, but he is not limited to those factors per se, but may prove similar factors which have the same effect and which would raise the inference of dilution. Again it is the evidence as a whole which controls, and even if some elements could be explained in terms of legitimate state objectives, still the conclusion that dilution exists can be drawn from all factors including those that are explainable in otherwise legitimate terms. Nevett, supra, 224.

As the Fifth Circuit pointed in David v. Garrison, supra, 925, dilution is an illusive concept and it is concerned with a sociological

realities of the election process, and for that reason the court is permitted to explore the entire environment and to measure all its political pollutants. See also Graves, II, supra, 643.

Kirksey, supra, states that by proof of an aggregate of at least some of these factors, or similar ones, the plaintiff can demonstrate lack of access. For example, Zimmer, supra, 1305 noted that the Supreme Court in White held the following findings to be sufficient to warrant relief in Dallas County:

(1) blacks had suffered a history of official discrimination which affected their right to participate in the democratic process;

(2) Texas requirements for majority vote is a prerequisite to nomination in a primary, though not in itself improper enhanced the opportunity for racial discrimination; and

(3) that black candidates had merely nominal success in the past in electing representatives due to the indifference of the Democratic party which controls the slating process in Dallas County.

The court further found that as to Bexar County the following facts supported a finding of dilution:

(1) a history of discrimination against Mexican-Americans;

(2) the unresponsiveness of the Bexar County legislative delegation to the interests of Mexican-Americans.

Thus under the rather minimal requirements of White, supra, the minority voters are entitled to a finding of dilution, and it is their position here that they are entitled to a finding under each of the Zimmer factors. The court's analysis lacked depth and breadth as to the history of discrimination, the realities of access to the election process, the history out of which grew the state policy favoring single member districts, and the supposed responsiveness of the city to minority needs. Its analysis of the anti-single shot voting requirement was simply wrong.

CONCLUSION

The minority votes respectfully request that this Court REVERSE the decision of the District Court, and RENDER a decision in their favor that the at-large system of elections for the City Council of Lubbock, Texas, unconstitutionally dilutes their voting strength, and REMAND the case to the District Court with instructions to fashion a remedy of a single member district system that will not dilute their voting strength and will provide them an opportunity to elect minority representatives to the City Council. They further request that this Court stay any future elections until such a remedy has been fashioned.

Respectfully submitted,

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(817) 336-3943

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Brief has been furnished to Appellees' attorneys of record, Mr. James P. Brewster, Lubbock City Hall, 916 Texas Avenue, Lubbock, Texas, 79401, and Travis D. Shelton & Associates, 1507 13th Street, Lubbock, Texas, 79401, by certified mail, return receipt requested, on this 28th day of September, 1979.

WILLIAM L. GARRETT
Attorney at Law

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-2744

REV. ROY JONES, GONZALO GARZA,
JUAN ANTONIO REYES, and Intervenor,
ROSE WILSON, Individually and as
Representatives of the Black and
Mexican American Voters of Lubbock,
Texas

Plaintiffs-Appellants

VS.

THE CITY OF LUBBOCK, TEXAS and the
Mayor and City Council thereof,
DIRK WEST, ALAN HENRY, CAROLYN JORDAN,
M.J. "BUD" ADDERTON, and BILL MCALISTER,
all in their official capacities as
members of the City Council of Lubbock

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLEES

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November 26, 1979

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December 4, 1979

Clerk, United States Court
of Appeals
600 Camp Street
New Orleans, Louisiana 70130

Attention: Harry Adams

Re: No. 79-2744 - Rev. Roy Jones, Et Al,
vs. City of Lubbock, Et Al

Dear Clerk of the Court:

I have enclosed with this letter the Summary of the Argument, which is to be attached to the above-referenced brief. By conversation of Ms. Susan Tom an attorney for the City of Lubbock, with Mr. Harry Adams, this Summary was to be attached to the inside front cover of the brief. We certainly appreciate your assistance and cooperation in this matter.

Yours very truly,

TRAVIS D. SHELTON & ASSOCIATES

BY: _____
Dennis W. McGill

DWM/drk
Enclosure
cc: Albert Perez
Tomas Garza
Lane Arthur
Daniel H. Benson
Robert P. Davidow
Mark C. Hall

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certify that no person, association of persons, firm, partnership, corporation or other legal entity has a financial interest in the outcome of this case other than those listed in Brief of Appellants (p. i), which list is accordingly adopted for brevity.

The undersigned do note that this was a class action on the part of the Appellants (as Defendants and Intervenor below) with two classes, being the Mexican-American citizens of the City of Lubbock and the black citizens of the City of Lubbock. Any more detailed list of the parties affected by this cause would be practically impossible.

This representation is made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Of Counsel for Appellees

REQUEST AS TO ORAL ARGUMENT

The undersigned counsel of record for Appellees herein believe that oral argument in the above case would be helpful to the Court due to the length of the record, and for such reason respectfully request that they be allowed oral argument upon submission of this cause.

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SUMMARY OF ARGUMENT

It is the contention of Appellees herein that the trial court did in fact consider all necessary matters in determining its decision following trial on the merits in this case, that the trial court not only considered all of the Zimmer factors, but it also considered all of the enhancing factors from Zimmer. Page numbers referred to in this summary of argument are those page numbers in Appellees' brief wherein the statements contained in this summary are more fully explained and elaborated upon.

The Plaintiffs bring their case alleging that the at-large system of government present in the City of Lubbock, Texas, is unconstitutional, and have the burden of proof to show that the application of this system unconstitutionally deprives the Appellants of their rights. The Appellees say that the at-large system is not per se unconstitutional, and that the at-large system as it exists may not be stricken by judicial decision absent a finding that all of the facts taken in the aggregate show dilution of minority voting rights. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Such a finding can only be predicated upon a consideration of the primary Zimmer factors, which are access to the political process, responsiveness of elected officials, weight of state policy regarding at-large elections, and effect of past discrimination. These four factors taken in conjunction with various enhancing factors are the criteria to be used for determination of dilution or not.

All of this must be considered in light of previous case holdings wherein it has been stated that the constitutional touchstone is whether the system is open to full minority participation and not whether proportional representation is achieved. Dove v. Moore (Page 6).

The evidence in the trial court below, when taken in the aggregate, and when considered under the applicable standards as set forth in the case law, more than support the conclusion that the Plaintiffs have failed to establish by a preponderance of the evidence that the trial court improperly found that the minorities have access to the political system in Lubbock, Texas (Page 5 - 16), and that the City of Lubbock is responsive to the needs of the minorities (Pages 16 - 31), that the State policy underlying multi-member districts is not tenuous (Pages 31 - 36), and that the effects of past discrimination have been eradicated and do not preclude access of minorities to the political system (Pages 36 - 43).

Consideration of all of the evidence brings about the conclusion that is evident that in the aggregate, the evidence dictates that the at-large system in Lubbock, Texas, did not dilute the voting strenghts of the minorities (Pages 44 - 49), and that anti-single-shot voting restrictions were not applicable in this case. Indeed, the at-large system permits the perfect one-person, one-vote goal, and to replace an at-large system with several single-member districts invites variance from that goal, and would forever compartmentalize the electorate, reinforcing the block voting syndrome, and preventing members of a minority class from ever exercising influence on the political system beyond the bounds of their single-member districts. David v. Garrison (Pages 6, 7, 16, 38, 45, and 47).

The District Court was correct in its conclusions as set forth in its opinion, and this Court should affirm that decision.

TOPICAL INDEX

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CASES — PAGE

ISSUES STATEMENT (INDEXED)

STATEMENT OF THE CASE

The Statement of the Case including both the Statement of Jurisdiction and Statement of the Course of Proceedings and Disposition in the Trial Court, as set out on p. 1 of Brief of Appellants, is not here challenged by the Appellees, and is here adopted.

STATEMENT OF THE ISSUES

In substance in this Brief the Appellees have adopted the order of argument of the issues set forth in the Brief of Appellants to which it responds. We have adopted the form of their Statement of Issues appearing on p. viii of the Brief of Appellants earlier herein changing the language of each as by them stated to the negative. Our response hereinafter follows the order of that adopted by Appellants, with the exception that our presentation of applicable facts are incorporated under that subject to which they are most applicable rather than being consolidated at one point.

It is the position of the Appellees that the court below correctly rendered judgment upon proper determination of each issue raised in law and upon a preponderance of the evidence. That upon those very issues raised by Appellants the Judgment below is proper and should be upheld in all particulars.

STANDARDS OF REVIEW

This cause now on appeal was a case tried before the Trial Court without a jury. When reviewing the findings of the Trial Court with respect to the evidence presented to it, this Court is bound by Rule 52(a) of the Federal Rules of Civil Procedure.

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses".

This sentence is to be read in the conjunctive, and the statement concerning the opportunity of the trial court to judge the credibility of the witnesses is extremely significant. Indeed, it has been previously stated that "facts, when seen through the eyes of Judges familiar with the context in which they occurred, may have special significance that is lost on those with only the printed page before them. Sometimes a word, a gesture, or an attitude, tells a special story to those who are part of the surrounding milieu." Mayor of the City of Philadelphia v. Educational Equality League, 415 U.S. 621, 94 S. Ct. 1323 (1974).

The findings of the trial court are not to be set aside unless they are determined erroneous. Valley Cement Industries, Inc. v. Midco Equipment Company, 570 F.2d 1241 (5th Cir., 1978). This Circuit previously held that trial court findings are clearly erroneous when:

1. The findings are without substantial evidence to support them;
2. Where the Court misapprehended the effect of the evidence
3. And, if, although there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of credible testimony that it does not reflect or represent the truth and the right of the case.

Neal v. United States, 562 F.2d 338 (5th Cir. 1977).

Where findings are not supported by substantial evidence, they are taken to be clearly erroneous. Freeport Sulphur Company v. S/S Hermosa, 526 F.2d 307 (5th Cir. 1976). In applying the clearly erroneous test, the question is not simply one of whether the reviewing Court would have found otherwise, but whether the trial court could permissibly find as it did. Brown v. Aggie and Millie, Inc., 485 F.2d 1293 (5th Cir. 1973). For purposes of applying the clearly erroneous test, the rule is that, findings of the trial court shall not be set aside unless clearly erroneous. A finding is clearly erroneous when, although there is evidence supporting it, the reviewing court on the basis of the entire evidence is left with the definite and firm conviction that a mistake has been committed. Casner v. C. I. R., 450 F.2d 379 (5th Cir. 1971)

Clearly, the placement of the burden of proof has been long established in that the Plaintiffs are required to come forward and to produce sufficient evidence to support findings that the political processes leading to a nomination and election under the at-large system were not equally open to participation by the group in question and that its members have less opportunity than did other residents in the district to participate in the political processes and to elect the legislators and representatives of their particular choices. White v. Register, 93 S. Ct. 2332, 412 U.S. 753 (1973), Kirksey v. Bd. of Super. of Hinds Cty., Miss. 554 F.2d 139 (5th Cir. 1977).

Appellees herein acknowledge the Appellants' stated position at page 8 of their brief that they are suggesting that the "Zimmer factors" as stated in Zimmer v. McKeithen, 485 F.2d 1297 (5th

Cir. 1973), are to be henceforth considered as ultimate findings of fact and accordingly, the appellate court would not be required to use the clearly erroneous standard in reviewing the trial court's determination. Appellee is obviously diametrically opposed to this proposition and concurs with this Court's previously stated position in Bolden v. City of Mobile, Alabama, 571 F.2d 238 (5th Cir. 1978) and Nevitt v. Sides, 571 F.2d 209 (5th Cir. 1978) that conclusions pertaining to responsiveness and determination under the Zimmer criteria will stand if supported by sufficient evidence unless "clearly erroneous".

Conclusions with respect to the sufficiency of the evidence must be determined in light of all of the circumstances as they now exist and are to be taken as a whole. Nevitt v. Sides, supra.

Appellant also takes the position that in construing the current conditions as a whole, the effects of past discrimination, if any, can be taken to have been erased due to the passage of time. Kirksey v. Bd. of Super. of Hinds Cty., Miss., supra, and Wilson v. Vahue, 403 F. Supp. 58 (N. D. Tex. 1975).

ARGUMENT AND AUTHORITIES

The fundamental determination to be made by this Court is whether the at-large and multi-member districting scheme as is utilized in the City of Lubbock is proper under the circumstances. It is well settled that such an at-large and multi-member districting scheme is not per se unconstitutional. Zimmer v. McKeithen, supra.

In determining whether or not such a system in its application is unconstitutional, the ultimate issue is whether the

districting plan under attack exists because it was intended to diminish or dilute the political efficacy of the minority group in question. Nevitt v. Sides, supra.

This Court, in Zimmer v. McKeithen, supra, has approved certain criteria to be examined to decide whether or not there is an unconstitutional dilution in any particular scheme. The criteria set out in that case consists of four primary factors which generally speak to the issues of denial of access or dilution and a number of enhancing factors which inquire into the existence of certain other matters which may suggest the existence of the primary factors.

The primary factors are (1) access to the political process; (2) responsiveness of the elected officials to the particularized interest of the minority communities; (3) weight of state policy regarding at-large elections, and (4) effects of past discrimination.

A number of enhancing factors were set forth in the Zimmer case, including the size of the district, the requirement of plurality or majority vote for election, anti single-shot voting requirement, and district residency requirement. The Court is not limited to the enhancing factors as set forth in Zimmer. The Court may consider other and similar matters which tend to show the minority access to the political process or the lack thereof.

PRIMARY ZIMMER FACTORS

A. Access to the Political Process

This primary factor is an extremely important factor and in determining the accessibility of the minority group in question

to the particular political process, the constitutional touchstone is whether the system is open to full minority participation, not whether proportional representation is achieved. Dove v. Moore, 539 F.2d 1152 (8th Cir. 1976). The Dove case continues with the proposition that the at-large system is not designed to maximize the number of minority candidates, but it is not an unconstitutional means of implementing the democratic process. Clearly, then, we must consider other areas to determine whether or not the maintenance of such a system is an unconstitutional deprivation to the minority of their right to access to the political process. In considering these matters, the fact that city-wide representation is a legitimate interest and at-large districting is ordinarily an acceptable means of preserving that interest is another matter to be considered. Wise v. Lipscomb, 98 S. Ct. 2493 (1978).

Another basic principle in determining accessibility is the fact that no one particular minority group is constitutionally entitled to elect representatives from that group. David v. Garrison, 553 F.2d 923 (5th Cir. 1977), Kirksey, supra, Turner v. McKeithen, 490 F.2d 191, (5th Cir. 1973). David v. Garrison continues with the comment that to replace an at-large system with several single-member districts invites variance from the perfect one-person, one-vote goal, and forever compartmentalizes the electorate, reinforces the block voting syndrome, and prevents members of a minority class from ever exercising influence on the political system beyond the bounds of their single-member districts. They remain forever a minority in their representative influence. The

determination of dilution vel non must either rise or fall on the facts of individual cases. Turner v. McKeithen, supra, Dallas County v. Reese, 421 U.S. 477, 95 S. Ct. 1706 (1975).

In making the decision concerning dilution, we must also be careful that we do not enfranchise a diluted minority while disenfranchising the majority. David v. Garrison, supra.

While it is clear that there may have been activities within the State of Texas which restricted the rights of minority's access to the voting process, it is also clear that even if it were found that past racial discrimination was pervasive, it must also be demonstrated that such racial discrimination is recent. Kirksey v. Bd. of Super. of Hinds Ct., Miss., supra. In considering what is recent, one must first define "recent". Webster's New Collegiate Dictionary, Page 714, defines recent to be "of or relating to a time not long past" or (b) "having lately come into existence", with synonyms being "new" and "fresh". It is Appellees' position that in considering all of the facts surrounding this particular case the Appellants certainly failed to show that there has been any "recent" discrimination within the City of Lubbock, itself. Certainly, if the Appellants had met that burden of proof, we must follow the teaching of Kirksey, and the Appellees must show that the incidents of the past have been removed and that the effects of past denial of access have been dissipated and that there is presently equality of access to the Political Process. Clearly, Appellees did so show as is described in later materials on this particular point. Hendrix v. Joseph, 559 F.2d 1265 (5th Cir. 1977), and David v. Garrison, supra, give

us the proposition that the very fact that there have been minority candidates is suggestive of the fact that there is minority access to the nomination process. Certainly, the ready accessibility of the ballot position to any citizen of the City of Lubbock without the necessity of filing fee, Petitions, and other such restrictive matters brings the conclusion that the minorities can easily avail themselves of the nomination process and the election process. It is the ability of the minorities to get on the ballot itself which is the core of the inquiry as to the slating or nomination process and the accessibility thereby by any individual or group. Hendrix v. Joseph, supra.

Appellants are quick to cite to the Court a quotation from White v. Register, supra, at page 11 of their brief concerning the environment to be considered in determining political access. They do fail to note, however, that contained within that definition is the mandate to "explore the entire environment".

The final element to be considered in applying the law to the facts hereinafter set forth is that the Appellants have improperly construed the findings of the trial court with respect to polarized voting. They state at page 18 of their brief, and properly so, polarized voting has been characterized by the Fifth Circuit in the Bolden case as an indication of lack of access. While their statement of the law appears to be correct, the statement concerning the finding as to polarized voting in this case by the trial court is incorrect, as may be observed in a close reading of the Court's opinion.

While the original Zimmer v. McKeithen, supra, and White v. Register, 412 U.S. 755 (1973), pre-occupation with the slating

process has indeed been expanded by more recent cases, to include some other related elements of the whole election process, the primary focus of the inquiry has not been changed. It remains today the law that the Constitution does not demand that each cognizable element of a constituency elect representatives in proportion to its voting strength. White v. Register, supra. Nor has the Supreme Court retreated from its rejection of the contention that at large elections are unconstitutional merely because fewer minority candidates are elected, even when due to polarized voting, than would correspond to the minority's position in the district population. Whitcomb v. Chavis, 403 U.S. 124 (1971).

Lubbock, present and past, has been characterized by an absence of the arbitrary devises limiting access to the ballot.

All that is required by the City Charter is that the candidate for Mayor or City Council file a written request to have his or her name placed on the official ballot with the City Secretary, designating the position desired, at least 30 days before the election. Stipulations 48, 49 and 50. No petitions are required, the ballot does not designate the candidates by parties or organization. There are no fees or charges for any candidate, either to get on the ballot or for the election. Stip. 51. There are no property ownership requirements. Stip. 52. The City government as a corporate entity does not itself endorse or support any candidate. Stip. 53. The evidence below disclosed no restrictive selection or endorsement practices. Both the form of the candidates request, Stip. "R" and the actual form of ballots used, Stip. "S", are non-restrictive and not challenged below. Positions on the

ballot itself are drawn in an open "pure chance" drawing, Stip. 56, and no claims of any irregularity in this process appears either in Stip. 57, or in the evidence.

There is no impediment whatsoever to any candidate of any race reaching a position on a City ballot on equal footing with any other candidate. The absence of these candidacy limitations we submit is as indicative of the racial climate in Lubbock, Texas. What is even more significant is that when we review the original proposed Charter of 1917, Stip. "Q", as adopted initially, Stip. "L" as amended, Stips. "M", "N", and "O", and as it now exists, Stip. "P", and consider the customs and practices of those early years, is that these candidacy barriers never have existed.

Not only has the way to the election process been open to minority candidates, but they have been utilizing the passage as well. Out of some 61 candidates on the Municipal General Elections from and including the April 1970 elections through date of trial, 5 or 8.2% have been identifiable Blacks and 3 or 4.92% have been identifiable Mexican-Americans. Stip. 30.

At the two most recent Municipal General Elections out of 20 total candidates, 2 or 10% were identifiable Blacks and 2 or 10% were identifiable Mexican-Americans. Stip. 31.

This all compared with 1970 Census tabulations, Stip. "X", that indicate that the population of the City of Lubbock as 114,190 White (76.59%), 10,912 Black (7.32%), 23,010 Mexican-American (15.43%) and other minorities 989 (0.66%). Stip. 67.

The same electorate, Stip. "T", have elected one identifiable

Mexican-American and one identifiable Black to the Board of Trustees of the Lubbock Independent School District. Stip. 63.

An identifiable Mexican-American has been elected State Representative from a district including part of the City of Lubbock.

It was freely stipulated that neither an identifiable Black or Mexican-American has ever been elected either to the Council or as Mayor of the City of Lubbock. Stips. 34 and 36. It is upon this that appellants have seized, first by improperly equating election with participation, and then by over-emphasis of the inferences that may be drawn from this fact. The absence of an elected minority official from an area with a substantial minority population has a significance properly; but the lower the minority population, the less indicative this factor becomes to support any inference.

The minute minority percentages of population in Lubbock prior to 1960 and even until 1970 in substance upon mathematical considerations alone adds little to persuade an inference. Stip. "X". The current percentages of 7.32% and 15.43% or even if combined to 22.76% do not escape the area of mathematical improbability alone. Ignoring racial considerations entirely the pure mathematical odds are 92.68% to 7.32% against an elected official being Black and 84.57% to 15.43% against this official being a Mexican-American, respectively nearly 13⅓ to 1 and 6⅔ to 1.

When we turn to consider candidates since 1970, Stip. 30, only 5 of 61 were Black and 3 of 61 Mexican-American. The pure mathematical odds against a minority candidate alone being the elected official are respectively 12⅓ to 1 and 20⅓ to 1.

Appellants seize upon the Charter Amendment of 1964 as to majority vote and poll tax matters as indicative of lack of access.

Appellants' brief at p. 14, notes a "sidelight" that at this very election the ballot provided for the levy of a poll tax. This is an absolutely erroneous misinterpretation of statement. A reading of Amendment No. 2 at this election, see Stip. "N", shows that this Amendment was for REPEAL of the existing poll tax provisions. It is interesting that the poll tax provision was not effectively removed from the State Constitution until seven years later.

The majority vote requirement of Amendment No. 4 in the 1964 Charter Amendment also supports no inference in this case. In Stip. 40, it was noted that four year terms of office for members of the City Council had been approved by the electorate in the Charter Amendment election of 1961. Stip. "M"! This change from the historic Texas limitation of two-year terms for elected officials had been authorized or enabled by the adoption on Nov. 4, 1958, of an amendment of Article XI, §11, Texas Constitution. Under this 1958 constitutional amendment any municipality providing a term exceeding two (2) "must elect all the members of its governing body by majority vote of the qualified voters."

An examination of the 1964 Charter Amendment election will show that all of its subject matter was dedicated to the elimination of obsolete provisions and removal of inconsistencies. Stip. "N".

Nothing upon the face or history of the 1958 Amendment of Article XI, §11, Texas Constitution even suggests racial motivation.

Appellants' ignored the Charter Amendment election of 1978,

which would have imposed residency upon three members of an expanded council. These changes were repudiated in the Mexican-American precincts and lost City wide. Stip. "SS".

We next fail to follow the contention that the Court erroneously placed upon Plaintiffs the burden to come forward with evidence that past discriminatory statewide statutes and practices continued and the burden of proving causal connection between these past practices and educational and economic deficiencies and the denial of access to political life. The trial court found only at the point of complaint as to defined discriminatory constitutional and state statutory provisions. All the evidence in the case as to current minority candidates, election, registration and voting clearly supported that finding. At p. 33 of the Memorandum of Opinion it was specifically noted that the past discrimination burden had shifted to the Appellees (Defendants) and that we "have met this burden by a preponderance" of the evidence. The language which Appellant condemns was of a general nature briefly mentioned in connection with another factor.

Appellants then turn to voting registration and participation records as support for their contention as to both access and the effects of past discrimination. They claim a registration in minority precincts of only 55% whereas in non-minority precincts it is 68%. There are four considerations against which to judge the significance of this difference. First, it is not in line of the considerations of deviation discussed at length in the record, a significant difference. The witness never established whether it was within the standard deviation which should be anticipated or

not. Second, even assuming a significance the fact of existence does not establish its cause. Third, the efforts to secure minority voter registration by a wide cross-section of community groups is spread at length across the record. Fourth, minorities in Lubbock are actually turning out to vote significantly above the average for other cities in the State regardless of the system of government. The average for turnouts for municipal elections in Texas runs from only 10% to 20% of registered voters. Tr. 2284. The average for Lubbock over the elections since 1970 is nearly 41%. Tr. 2286. In 1978, the predominantly Black precincts turned out 38.4% of their registered voters, while the key white precincts only reached 24.3% and the Mexican-Americans reach 19.2%. The City-wide voter turnout was 32.7%. Tr. 2287-2288. Voting turnouts were "clustered about the mean." Tr. 2280, and the total turnout for each race was higher than most cities in Texas. Tr. 2285. All minority precincts came fairly close and within the standard deviation. Tr. 2279-2280.

Appellants' protestations as to the psychological effects of their experience and neglect simply go aground on the voter turnout records, and find insubstantial support even upon the registration figures. It is no comfort to Appellants to tie these contentions to those cases combining diverse factors with strong racial polarization, such as Bolden, supra. Strong racial polarization was not found in this case. The Memorandum Opinion found only "some evidence of polarization", a conclusion consistent with the testimony of Dr. Taebel, who traced all elections in the 70's and concluded that "very little, almost insignificant polarized

voting" based on Dr. Johnson's own data. Tr. 2270-2271.

Wealth or lack of campaign contributions was not shown to be related to minority status of the candidate. Nearly all admitted receiving contributions and assistance from the majority community. Some received more than losing white candidates. Some white candidates received less. Exh. D41-D44.

The effectiveness of the minority candidates belies the inferences. Mr. Richards (Black) in 1970 ran third in a five candidate race, far beyond two white candidates on the ballot, even in the white precincts! In 1972 he did better across all precincts. In 1974 Mr. Cleveland (Black) ran second in a four man race against three white candidates, receiving more votes than the two losing white candidates combined. Ms. Mercado (Mex.-Amer.) in 1978 received more votes than one white candidate even across many of the so-called white key precincts. Stip. Exhibit "H".

There is no guarantee in practical politics that anyone may quickly and surely reach election any more than there is constitutional entitlement to election based on race. One does not "will" election, it must be earned like any attainment. The Lubbock "at large" system offers all credible candidates unlimited access to the opportunity for success. It is not enough to contend that the findings that the defeat of minority candidates could well be attributed to lack of public identification, experience or other non-racial factors as being based only on speculation not fact. The fact is that the status of the prior candidate witnesses as virtual unknowns and political novices who wrote off a vast segment of the voters was developed upon cross-examination from each. It was developed that all were young, making an initial jump into

city politics and with little, if any, prior exposure to the electorate. The Trial Court's findings as to access were proper, and supported by a preponderance of the evidence.

B. Responsiveness

The cases of David v. Garrison, supra, and Hendrix v. Joseph, supra, set forth the method to judge the level of responsiveness of a particular form of government to the people. Responsiveness is determined by (1) provision of municipal services to neighborhoods populated by minority group members, (2) distribution of municipal jobs and appointments to various boards and commissions. The Court in Bolden v. City of Mobile, Alabama, supra, went on to say that these matters are determined by an examination of the facts surrounding the particular case. We do not believe that Bolden changed the methodology of approach in determining the presence or absence of responsiveness.

Appellants claim that Ausberry v. City of Monroe, Louisiana, 456 F. Supp. 460 (W. D. LA. 1978), stands for the proposition that the use of Federal funds does not demonstrate responsiveness. This is an attempt to present in a "sterile" manner a proposition and to remove it from reality. The source of funds spent is important, but, likewise, the whole picture of the obligation incurred through the expenditure of said funds is equally important. It is clear from the testimony presented by the witnesses for the Appellees that the City incurred significant liabilities at the time that they expended the Federal funds herein complained about by the Appellants. Indeed, even the expenditure of Federal funds themselves demonstrates responsiveness to an acknowledged need of the minorities.

The Court at page 30 of its opinion stated that, after considering all of the evidence, "the Court is of the opinion that the City of Lubbock and its elected officials are now, and have been in the past decade, fully responsive to the particularized needs of the minority communities in Lubbock." Such a finding, based upon the Court's own statement of the consideration of all of the evidence considered as a whole is one that cannot be overturned in the absence of a finding that the trial court could not permissibly find as it did. Brown v. Aggie and Millie, Inc., supra.

The Appellants cite Graves v. Barnes, 343 F. Supp. 704 (W. D. Tex. 1972) for the proposition that there is a history of discrimination against Mexican-Americans in Lubbock County. Clearly, that statement speaks to the County government and not to the responsiveness of the City of Lubbock. The City of Lubbock was not a party to that suit, and any such findings should not be held as binding against the City, in view of the affirmative testimony elicited from the witnesses in this case, clearly showing the responsiveness of the City of Lubbock to the needs of the minority communities.

Appellants only now stress that responsiveness is not the controlling or decisive element in this cause. That is correct legally and has always been so. But the four primary factors of dilution can not practically be "sorted" into neatly separated stacks. The attitudes and efforts under "responsiveness" also give insight into the true attitudes and efforts and effects under the other primary areas of inquiry as well.

The only substantive reason or justification for judicially

imposed change in any case is where the existing system has in fact failed by its actual violation of constitutional precepts.

Municipal Services

Has the City of Lubbock been responsive to the needs and aspirations of the minority citizens? Yes, by the very examples of facilities and services actually raised by the witnesses for the Appellants.

We might question whether parks and activities related thereto were the priority area for judgment of the performance of the City, but this was the area chosen for complaint by the most significant number of the Appellants' witnesses.

They claim initially, that the City never provided the minority areas anything. Yet Def. Exh. D6 through D11 overwhelmingly belie that contention. When "minority areas" (38% or more minority population) which composed only 25.13% of the total City population are shown to geographically enjoy 76.26% of the developed parks in the City of Lubbock, the inference of neglect from the witnesses rapidly loses substance. Def. Exh. D6. When this disproportionate advantage continues without exception through Renovation and New Construction (Parks), Senior Citizens Activity Sites, Summer Nutrition Sites, Community Centers, Swimming Pools, Wading Pools, Youth Pools, Supervised Summer Recreation Programs, Volleyball Courts, Basketball Courts, Tennis Courts, Playgrounds, Party Houses, Park Shelters, Picnic Units, Baseball Diamonds, Softball Fields, Football Fields (flag), Fishing Docks and Piers and Golf Course, the inference of neglect becomes ludicrous!

This same status of equal, and almost always <u>better</u> than

equal treatment for "minority influenced," "minority," "Black" and "Mexican-American" areas continued unabated through the record. (1)

This reflection of responsiveness included: Municipal Facilities, Def. Exh. D11; libraries and bookmobile sites and services, Def. Exh. D12; fire station locations and five minute response zones, Def. Exh. D13; fire department responses, Def. Exh. D14; police responses, Def. Exh. D15; signal and traffic lighting, etc., Def. Exh. D16; Urban Renewal Projects and expenditures, Def. Exh. D17; Community Development funding, etc., Def. Exh. D18, D19, D20, D21, D22 and D23; bus routes and ridership surveys, Def. Exh. D25, D26 and D27; paving improvements, Def. Exh. D28; water distribution, Def. Exh. D29; Sanitary sewers, Def. Exh. D30; street paving, Def. Exh. D31; water distribution, Def. Exh. D32; sanitary sewer lines, Def. Exh. D33; and storm sewers, Def. Exh. D34.

Other city services, activities and facilities poured across the record during the presentations of 21 witnesses for the Appellees and with substantial frequency upon cross-examination of Appellants' witnesses. Sensing, that their first inference of

(1) By stipulation the parties defined terms of reference for use in trial. These definitions are included in stipulations 16, 17, 18, 19, 20 and 21, and visually defined in Stipulation Exhibit "B". In summary this was based upon 1970 Census data broken down by census tract. As stipulated, "Minority Influenced Areas" included those identified census tracts in which at least one of the minorities exceeded their City wide percentage of population by any percentage. "Minority Areas" included those identified census tracts in which either minority alone, or both combined, constituted at least 38% of the population in such tract. "Black Areas" included those identified census tracts in which the Blacks alone exceed 38% of the population in such tract. "Mexican-American Areas" included those identified census tracts in which Mexican-Americans exceed 38% of the 1970 census population. Census Tract 9 was treated as either a "Black Area" or a "Mexican-American Area". Stipulation Exhibit "B" best reflects the geographical distribution and meaning of these phrases.

neglect might be subject to question, the next bloc of Appellants' witnesses modify the inference, stating that which the minorities have received in response to their needs and demands have come in recent years, only from Community Development funds and only after this case was filed.

Here again the inference of neglect was factually destroyed. From the witness Alford, as but one example on the record, without contest or challenge, we learned that one of seven parks acquired in the 1920's was in a then minority area, one of nine in the 1930's, two of nine in the 1950's, two of ten in the 1960's and seven of twenty-one in the 1970's. Indeed, of the twelve park sites acquired in and since the 1975 creation of the Community Development program, only one park has been acquired out of Community Development funds. This time-table of park acquisition also discredits the inference that this pending suit served as any "prod" to the activities of the City. Tr. 1743-1750.

Witness after witness for the Appellants admitted their unfamiliarity with the actual numbers of facilities and services even after they had characterized them as inadequate.

They stressed in their testimony Arnett-Benson, Guadalupe and black census tract 12.02, but upon the charts these specific areas glisten with symbols reflecting the services and facilities provided by the City. They reveal also visually and graphically the fact that no other areas of the City of equivalent size enjoy even a fraction of such services and facilities.

Only from Community Development funds? Witness Alford testified to the expenditure of approximately 45% of the bond,

general tax revenue and revenue sharing contributions to park funds in these same minority areas and in addition to Community Development and other federal funding. Tr. p. 1754. Witness Wahl and D31 through D34 reveal this same enjoyment by the minority areas of a fair share or greater of facilities financed from other than C.D. funds such as street paving, water lines, sanitary sewer lines and storm sewer improvements. The same witness and D29 and D30 show a trunk water and sewerage system as adequate to ultimate development as present in the minority areas as any other area of the City, and existing long before this lawsuit was filed!

At one point Appellants claim that streets, water lines, lights, sewer lines, etc., are purchased out of tax and bond funds in white areas but only out of C.D. and other federal funds in minority areas. This is a misstatement of the record. These facilities were shown to be so-called "new sub" projects, that is, the developer pays a deposit or puts up the facility and then recovers his costs from this first buyer of the developed property. Tr. 1986-1988. This is true for all areas of Lubbock. The citizen pays directly and this method accounted for the construction of substantially all these types of facilities in the majority areas apart from governmental funding. Other methods of paying such an assessment program and resolution paying (Tr. 1991-1992) 90% paid by the landowner and only 10% by the City; all these are also available to minority areas. Federal funds are used in the minority areas in addition to these other procedures.

It should be kept in mind that C.D. funds are designed

primarily for low or moderate income families not specifically minorities. Tr. 1932, 1933 and 1935. 1970 census data shows such families to reside in all areas of Lubbock. Stip. "X".

The recognition of the needs and aspirations of the minority area continues from massive examples such as C.D., Urban Renewal and Canyon Lakes, down to the more mundane services such as library services, bus line subsidy, animal pound, fire responses, police responses, etc. In each case almost without exception, the needs of those minority areas at least in proportion to population is met or normally exceeded. What dictated those services and facilities? Witness Cunningham answered that each was in response to the request of the citizens! Tr. 2133.

These daily mundane activities of the City of Lubbock are perhaps more indicative of its concern than the more spectacular activities. It is easy to do the "grand" for there is glory there, credit to be claimed and its absence easily recognized. To day by day deliver the services that win no plaudits and make no headlines, as the City of Lubbock under the direction of its "at large" council has historically done, is the basis for a true judgment of motives.

Does the memory of past discrimination keep the minority citizens from coming forward with requests? Almost without exception the minority witnesses had been to city hall, repeatedly and usually successfully. Most had participated by service on boards or commissions. They allege a "mental barrier" yet their own actual conduct and experience disprove it.

Are minorities "conditioned" by the so-called early "reputa-

tion" the Lubbock area is supposed to have had among the Mexican-Americans? One need only compare the growth of the Mexican-American population as reflected between the 1960 and 1970 census to factually doubt how significant such "reputation" could possibly have been. That the Mexican-American chose in such numbers during that period to make Lubbock their home is a fact, a vote of free choice, not any support for an inference of "conditioning."

The same census figures show a dispersal of minority citizens out of the old minority areas throughout the entire City. School attendance figures since 1970 would strongly persuade that the migration is accelerating. Stip. "NN", "OO", "PP" and "QQ".

Consistent approval by minority precincts of proposed bond propositions also indicates that the aims of the City and the minority areas followed a common goal. Massive approval in the Black precincts are highly significant. Def. Exh. D 37.

Would running 10 buses to the Health Department each day to serve a total of less than 20 riders show concern by the City? Or utter fiscal mismanagement? Could the Health Department do more? Certainly it could, but what cities in Texas under either "ward" or "at large" of comparable size are really doing better. Lubbock ranked 11th in Texas in expenditures last year and this was before the 38% increase. Appellants condemn us for not unilaterally repealing Vernon's Ann.Civ.St., Art.4494q, an act relating to the creation of the Lubbock County Hospital District which in Sec. 18 thereof provides that this separate entity from city control shall be deemed to have assumed full responsibility for the furnishing of medical and hospital care for the needy and

indigent, and neither Lubbock County nor any city therein "shall after the creation of such hospital district levy any tax for hospital purposes."

Housing? The federal government has virtually taken over this area, and minorities occupy substantially all of the public housing units available. The limitations of the Texas Constitution against the "donation" of public funds and "lending of credit" by the governmental entity eliminates the personal benefit level of assistance apparently favored by Appellants, Art. III, §52, Texas Constitution.

Appellants state that the minorities are "relegated to the oldest and most dilapidated housing projects. This is a misstatement. There is no testimony whatsoever in the record of assignment or "relegation" by race. In fact testimony shows that there were no restrictions on the Urban Renewal relocations with which he was involved. Tr. 153. Minority areas received the first housing units and by virtue of that fact the two oldest are in minority areas. (Tr. 108).

The same witness felt that the newer units were not effective to minority needs because they were far from minority areas. (Tr. 111); yet subsequently admitted the existence of federal restrictions against placing such housing units in minority areas. Tr. 129-130. He also acknowledged that the public housing situation is not a sole burden on minorities but hits all low income families of all races. Tr. 138. It was further developed that the goals submitted by the City of Lubbock to the U.S. Department of Housing and Urban Development over the last two

years was for 172 newly constructed units. Tr. p. 141.

Of some 480 low income housing units 278 are occupied by Black households and 130 by Mexican-American households, Tr. 137, the result is that minority citizens have the benefit of 85% of the public housing units available! It takes rather tormented logic to reach racially motivated non-response from all this.

They call Canyon Lakes a federal money project and ignore the massive local bond funds in the amount of $2,800,000.00 for Canyon Lakes approved by the citizens as Prop. 4. Stip. "TT".

They question findings as to the City's obligations upon acceptance of C.D. funds and would lead you to believe the only local burden was in providing some office furniture and a little space. The evidence shows more accounting, data processing, rent, utilities, legal services, etc., and this is only the start for once the project is completed then the full costs of staffing, operation, heating, cooling, repairs, maintenance and upkeep, all the costs of operation fall to the sole burden of the City. Tr. 1880-1883.

They belittle in-kind credits but never quite bother to explain how if you build a minority-responsive facility and claim a grant credit you have done a more reprehensible act than putting the money in a pot first and then building the same facility out of the combined pot. In either event the same number of local dollars are spent and the same facility is constructed!

Federal funds instead of city funds? The record shows them to be in addition to city funds, and the city fund allocations geographically to minority areas are in a greater percentage than

either population or even geographic area would alone justify.

Municipal Employment

In employment we deal with "work force" considerations. The pool from which the City must compete for emloyees is not the general population percentages, but the work force percentages. In Lubbock it is 6.4% Black, 13.1% Mexican-American and 80.4% White. The City work force itself for all employees at time of trial was 7.6% Black and 19.9% Mexican-American, well above the available percentages of the County work force. Stip. "AA". These same figures over the identical period are reflected for the Permanent Full-Time City work force as being in June 1978, as 6.0% Black and 20.7% Mexican-American.

From June 1971 to June 1978, the percentage of change of employees by race was White -5.9%; Black, +3.77%; and Mexican-American, +2.0%. It should be noted that the 1971 figures were not suspect.

That same conclusion is re-inforced by the new hire by race for the years 1974 through 1978. That record shows that the percentage of all new hired employees were Black 11.4%, 11.1%, 9.8%, 10.3% and 13.4%; Mexican-Americans; 20.9%, 27.6%, 20.5%, 25.7% and 20%. Compare these percentages with the workforce of only 6.4% Black and 13.1% Mexican-American.

The only blemish upon an otherwise exceptional record would be, a heavier concentration of minorities in lower classifications (and usually lower paying) jobs. Stip. "EE", "FF", "GG" and "MM".

To avoid waiver of any argument here we do note that statistics alone only "may" make out a prima facie case and shift the burden.

It is not automatic. Int. Brotherhood of Teamsters v. U.S., 431 U.S. 324, 52 L. Ed.2d 396, 97 S. Ct. 1843 (1977). The Supreme Court has cautioned that the probative value of statistics depend on all the surrounding facts and circumstances, including the accuracy of the data samples and the statistical significance of the disparities under consideration. Int. Brotherhood of Teamsters v U.S., supra; Hazelwood School Dist. v. U.S., 429 U.S. 1037, 53 L. Ed.2d 768, 97 S. Ct. 2736 (1977). Under those standards the sparse statistics upon which Appellants rely enjoy little probative value. It is also of significance that the very statistic to which they rely came in by stipulation with other stipulations containing our "answering" matter in part. This further weakened the statistical data from the start.

The Appellees did assume the burden and secured a favorable finding from the Trial Court.

It was shown that because of the execptional low unemployment rate (2.8%). Stip. "Y", we are dealing with actual "zero unemployment" in terms of the real unemployment picture. Tr. 2100. So employment practices become a competitive area for there are simply fewer people to recruit among. Tr. 2100. The City as an employer must compete with every other employer, private and public. Tr. 2100. The City operates from a position of weakness because it cannot be competitive in wage level. Tr. 2101. This wage disadvantage continues its effects as to turnover. Tr. 2107. The primary or "trackable" reason for turnover is people leaving for better paying jobs. Tr. 2108.

"Upward mobility" within the workforce is a part of our

affirmative action efforts. Tr. 2105-2106. But this effort is also hampered by the non-competitive wage situation. As soon as any employee, white or minority, gains work skills and a work history they move on to better-paying jobs elsewhere. Tr. 2107.

That salary considerations within the City relate responsibility to classification. Salary follows classification. As the job becomes more responsible there are other credentials or educational requirements that support the job being at a higher level. Tr. 2108.

Minority applicants for these higher (better paying) responsibility jobs are not available in a 2.8 unemployment rating market at city salary levels. Tr. 2109. The Texas Employment Commission ACTIVE FILE, reflects how terribly few people, even minorities, were available on the labor market in the higher, better-paying, occuptional categories. Stip. 82, Stip. "LL". There was no evidence of any specific refusal by the city to hire any single qualified applicant.

The honest dedication of the City to its Affirmative Action Plan, testified to by the witnesses Witt and Minkley was not even seriously challenged on cross-examination.

All the above and more, was not "baldface assertion" as categorized in Appellants' Brief but hard facts from witnesses personally active and experienced in the area of testimony, from their personal knowledge, admitted without objection (or even by stipulation) and not for the greater part not even touched upon on cross-examination. It wholly supports the findings of the Court.

It is difficult to respond to the challenge raised in Appellants' Brief as to membership by minorities upon Boards and Commissions. The greatest problem was in finding minority people to serve, not in ignoring minorities. Requests for names from minority groups went unanswered. All in all 12.5% of all board members appointed were Black and 9.4% were Mexican-American. Stip. "RR". We drop rapidly into subjective considerations when we reach trying to define "important" boards. The board that affects my interests is important. The balance of Appellants' Brief on this subject is a collection of unrelated actions brought in briefly in evidence.

They speak of "overuse of force" by the Police Department, but the record contains not one instance established by factual evidence. A minority citizen is arrested and searched, but later states that it was 1:30 a.m. and the Officer told him his car matched the description of one just used in a robbery in the vicinity. One witness had police pointing rifles at women and children in the so-called March of Faith, but another of their own witnesses (a Priest) saw no such incidents and subsequent testimony revealed the police didn't even have such weapons then. They complain of police officers and dogs at City Council meeting, but it develops that bomb threats were present.

They complain about traffic lights but ultimately got all they requested, even one subject to control exclusively by the State.

They speak of the naming of a minority park to meet minority wishes but say it took a threat of a federal lawsuit and a major demonstration, but the record shows massive response without either.

They complain of the garbage strikes but evidence shows these

were management not racial disputes. All were re-hired and that over a period of about three years through the normal budgetary process virtually all their demands were met. Compare that with the San Antonio sanitation workers under its new "ward" system, where the workers lost their jobs.

They complain that the Human Relations Commission is not as effective as it should be, but it was created by the City and efforts for improvement goes on. They complain of the Public Accomodations Ordinance but it was passed. They complain that the form passed weak, but it is still one of few in Texas and being enforced.

They raise a suit filed in 1969 relating to the cemetary, but testimony shows the subject of the suit was buried in the City cemetary in fact and another minority witness freely testified that on a more recent visit to the cemetary she was shown lots in all areas and in the old so-called white areas first.

The City of Lubbock has no control over School District or County or suits against them.

They then go outside the record to mention Furguson v. Alley, alleging discrimination in the hiring of police officers. If we may stay outside the record this suit was dismissed with prejudice upon motion of the Plaintiff's counsel. Discovery in that case included a letter from the applicant's own mother that he was so unstable that he should not be trusted with a weapon. Since one of applicart's counsel in that case was also one of counsel for the Appellants at trial, that may explain why this early case was not felt worthy to bring on the record at the proper time and manner.

They complain about the portion of the Health Department budget allocated to vector control. Evidence shows the existence of an unusual number of still water playa lakes to justify the added expense, and it was in response to requests from the citizens. Tr. 2017.

Other evidence shows that of 67 local Health Departments in Texas only 11 provide more funds and 55 provide less. That this ranking did not take into account subsequent supplements and substantial increases. Tr. 2018.

They complain of failure to enforce deed restrictions by the City, but it has long been held in Texas that a city had no power to enforce deed restrictions. Gulf Ref. Co. v. Dallas, 10 S.W.2d p. 151 (Tex.Civ.App., 1928, writ dism'd). That authority has only been since granted by statute only to those cities which, unlike Lubbock, have enacted no zoning regulations.

The record in this case shows massive response to the needs and requests of the minority citizens. The record and the exhibits support the Trial Court's findings in all particulars.

C. Tenuous State Policy Underlying Preference For Multi-member Districts

The City of Lubbock is a home-rule city, pursuant to Art. 11, §5 of the Constitution of the State of Texas. This Article and Section of the Texas Constitution were expanded upon in Art. 997 and Art. 1175, Texas Civil Codes Ann. These particular Articles allow the individual city at the time of the adoption of their charter or a future amendment, to either select a ward or an at-large system of municipal government. This Statute was enacted in 1913 and continues in full force.

No evidence during the trial was admitted which would imply or determine that the at-large system for the City of Lubbock was developed with the intention of discriminating against any minority.

Certainly a plan neutral at its inception would be sustained unless it was maintained for the purposes of discrimination. Bolden v. City of Mobile, Alabama, supra, Kirksey v. Bd. of Super. of Hinds Cty., Miss., supra. The burden of proof was upon the Appellants to come forward with affirmative evidence to show that a particular plan under the circumstances of this case operates to minimize or cancel out the voting strength of the minorities in the City of Lubbock. As previously stated, at-large and multi-member districting schemes are not per se unconstitutional, and the Plaintiff must demonstrate that the members of its minority had less opportunity than did other residents in the District to participate in the political process and to elect legislators of their choice. Zimmer v. McKeithen, supra.

Intent is, a prerequisite to applicability of the Fourteenth Amendment to claims of racial discrimination, Nevitt v. Sides, supra, and the Plaintiff has the burden of demonstrating the requisite intent.

Indeed, the Appellees' position that the at-large program in the City of Lubbock has not been maintained to discriminate against any particular group is bolstered and sustained by the fact that a charter amendment was submitted to the voters of Lubbock suggesting the change of the voting procedures to a system that would include the use of wards. The proposed change was defeated. The voting totals are significant, especially when

and purpose and at both the state and local level.

There was not even a suggestion or hint of any racial motivations in or relating to the adoption of the at large system in Lubbock in 1917. The number of Blacks at such time in Lubbock even by the time of the 1920 census were minute. The records of the City failed to disclose any motivations other than a concern for taxes. Stip. "Q". Neither the Charter proposed nor initially adopted reflect any limitations upon race in such earlier time. At large has remained the Lubbock System at all times since. No efforts were made to amend it by anyone until 1978, when a modified "ward" system submitted by the City Council itself failed, and failed heavily in the Mexican-American precincts. Both the Charter itself and the State Statutes provide the avenue for amendment to the dissatisfied. V.A.C.S., Arts. 1165 and 1170.

The at-large system of elections was a feature of reform governments. Tr. 2211. Its well-documented motivation was as a back lash to corruption machine government and the inability of people to influence their government. Tr. 2211 and 2353. Other features included professional managers, overlapping (staggered) terms, small City Councils, etc. Tr. 2211-2212. Most of all these features as stated in the record appear in the Charter of the City.

From these factors, it is obvious that motivation locally as to the Charter of City of Lubbock had no racial connotations.

Strong state policies for at large or any other cause need not be established by the legislature alone, but as well by the people. The reform movement as reflected by the studies of Drs.

Taebel and Mac Manus, did not reach only Lubbock. This same spirit of motivation gave rise to the home rule movement among other cities. It was reform from the people even more than the legislature. These reform era pressures culminated in 1912 by the home rule amendment to the Texas Constitution authorizing cities having more than 5,000 inhabitants to adopt new charters or amend existing charters. Prior to this adoption all cities in Texas were required to look to the Legislature for both their creation and all their authority. O'Quinn, History, Status, and Function, Title 28, Cities, Towns and Villages, 2A Vernon's Texas Civil Statutes, pgs. XIII-XXXVIII. Even before the Legislature had passed the home rule enabling Act of 1913, more than a score of Texas cities had undertaken the formation of home rule charters. O'Quinn, supra at p. XXV. For the first time in Texas the level of government nearest and most subject to the control of the people was subject to the control of the citizens.

The original home rule enabling act provided:

"Art. 1175. Enumerated powers.

"Cities adopting the charter of amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainity:"

"1. The creation of a commission, aldermatic or other form of government; the creation of officers, the manner and mode of selecting officers and prescribing their qualifications, duties, compensation and tenure of office."

Also in the original enabling act, now codified as Art. 1176 was:

"The enumeration of powers hereinabove made shall never be construed to preclude, by implication or otherwise, any such city from exercising the powers incident to the enjoyment of local self-government, provided that such powers shall not be inhibited by the State Constitution."

The reform movement of the people from control by the State Legislature was without racial motivation. It is doubtful that many minority citizens were then serving in the legislature, and little in our history would justify any fear of the legislature of those years becoming a bastion of civil liberties.

Fear of minority influence through a ward system also appears not to have been a motivation for even the Texas Legislature in Vernon's Ann.Civ.St. arts. 977 and 979 (adopted in 1895) and art. 978 (adopted in 1881 and amended in 1905) specifically recognized municipal "wards" at least under the aldermatic system.

The theory and practice of the home rule enabling act freed all citizens locally from arbitrary state "at large" control. The home rule municipality can choose its system and not have it imposed by the state legislature.

The evidence in this case and the authorities before this court shows a strong state policy in favor of local selection of election system by those most closely subject to being affected by it. The home rule system in itself is contrary to statewide white majority control ideals.

The policy is "strong", the prohibited motivation is non-existent. The Trial Court findings were clearly proper.

D. Effects of Past Discrimination

Appellants say that the proper inquiry with respect to the effects of past discrimination is whether the existence of past discrimination in general precludes the effective participation of minority in the election system. Such an inquiry is set forth in Zimmer, supra, and Bolden, supra. Certainly, Appellants

cannot be contending that effective participation means election, for this is diametrically opposed to the holding in Turner v. McKeithen, supra, that there is no constitutional entitlement to an apportionment structured designed to guarantee the election of an official from a particular minority group. The constitutional touchstone is whether the system is open to full minority participation, not whether proportional representation is achieved. Whitcomb v. Chavez, 91 S.Ct. 858 (1971), Dove v. Moore, supra. Indeed, it is not nearly enough to prove a mere disparity between the number of minority residents and the number of minority representatives. Whitcomb v. Chavez, supra. We must, necessarily, take "effective participation" to mean the opportunity to participate in the governmental process. Clearly, witness after witness testified as to the accessibility of the City Council, the fact that candidates regularly came to minority functions to campaign, the fact that one City Council person to-wit Carolyn Jordan, in fact, would not have been elected on two occasions but for the vote of the minorities. All of these factors indicate and show that the minorities can be successful and decisive participants in the election process. There was no finding in this case that minorities were afraid to vote or campaign and, in fact, had turned out and voted in the elections of the City of Lubbock. These items were stated as being significant in McGill v. Gadsden County Commission, 535 F.2d 277, (5th Cir. 1976). Certainly an absence of these findings which have previously been held to be significant is indicative of the fact that minorties do have and are able to effectively participate in the election system.

Appellants say that the Court found polarized voting in the City of Lubbock. Appellees state that this is an incorrect statement, and the actual statement by the Court was that "there was some evidence that minorities tend to vote for members of their own race, which signifies polarized voting," but there was no finding concerning significant polarized voting. Indeed, it is contrary to the testimony of Dr. MacManus and Dr. Taebel, who stated that as a result of their analysis of the voting and election results, there was not any significant polarized voting in Lubbock. Indeed, even if minority candidates failed to be elected because of polarized voting, this is not in and of itself, sufficient to invalidate an apportionment plan. Bolden v. City of Mobile, Alabama, supra. The Court did find that the primary factor, to-wit: effects of past discrimination must be found in favor of the Defendants. This Court, in David v. Garrison, supra, reconfirmed its previous position stated in Paige v. Gray, 538 F.2d 1108 (5th Cir. 1976), that the weighing factors to be considered in making a decision with respect to matters such as those at bar is ordinarily a trial court function which will not be undertaken by the appellate court unless the record is so clear as to permit only one resolution. Clearly, a consideration of all of the factors as they exist and as they are important at this time clearly and properly permits the trial court to resolve this primary factor as well as the first three primary factors in favor of the Defendant-Appellees.

We mentioned before the difficulty of separation of the facts in this case into distinct units. For the burden here

covers not only current discrimination, if any, but the lingering effects, if any, of that which admittedly existed years before in the State. But the time of judgment is now.

It is impossible to view the services, facilities, and activities which are and for years have been provided in the minority areas of Lubbock as reflected under the factor of "responsiveness" above and reach a conclusion of either covert or subjective purpose of current discrimination, or residue of that purpose from the past. It is possible to mask the mind but not the deed.

The Appellants speak of "symbolism" as a matter of substance, but the purpose of government is not to posture and prance but to serve. To provide the services, facilities and activities that the citizens need and want. The mechanics of election, ward or at large, is but a mechanism to that end. The change of the procedure is justified only when it detracts from the attaining of that end. The true end is that all citizens shall share and participate equally in that which government can and should accomplish. The distribution of services, facilities and activities reflected in the record under "responsiveness" shows that participation and allocation and motivated by need. This distribution geographically into minority areas destroys the suggestion of hidden vile motive, as does the lack of any relationship of the location of these services and facilities in majority areas or the areas of residence of elected officials. Stip. "W".

The effect of past discrimination would be to create the current motive in the white majority. The outlet of this motive would be reflected in the performance to the disadvantage of the minorities. When this manifestation at the performance end does

not occur, as in Lubbock it has not, then the existence of the motive or its cause drops from the area of even rational possibility.

As to the past, witness after witness for the Appellees told of discriminations in Texas and Lubbock in the distant past. All placed the time frame for the termination of those practices as starting in the late 40's, across the 50's and finally into the 60's, they ceased.

One witness tells of difficulties of buying a home years ago, but adds that the real estate people are "chasing" him now to buy anywhere. Evidence earlier discussed shows a massive migration by minorities out of the minority areas (Stip. "C" and "D"). This spread continues unabated (See Stip. "NN", "OO" and "PP"). Another had no difficulty in buying in a white area.

Old records of Lubbock show a refreshing absence of ordinances that appeared in many areas and at State level, i.e., water fountains, pool segregation, restrooms, separate dining facilities. We find bus segregation statements but they are gone in 1940. Tr. 1587-1632. Appellants waive a proposed ordinance but the evidence reveals it was never enacted and surely never enforced!

They claim the Trial Court "misstated" the evidence as to this alleged ordinance, but the misstatement is theirs. The evidence on this "ordinance" primarily appears in the testimony of the witness Gaffga (Tr. 1587-1643). We find an unsigned ordinance in the official file but a signed one in a collateral file. We find in the original and current charter and in all between that the legislative power of the City is vested in the council. Stip. "L", "M", "N", "O", "P" and "Q". We find in the municipal records no consideration of any such ordinance by the

council other than a notation that the City Attorney on one hearing date was requested to prepare such an ordinance. Tr. 1612-1613. Examination of the minutes both before and after this one mention failed to reflect any passage or consideration once prepared. Tr. 1614-1615. It was further developed that the original and current Charters and all in between required that an ordinance be "in written or printed form" when introduced and could not be passed on the date introduced unless unanimously passed. All this "ordinance" activity dates back to January 1923!

The poll tax was eliminated from the Lubbock Charter years before it was accomplished by the State. We have in evidence from recommendation, to adoption, to current form a Charter utterly lacking any racial limitations and restrictions.

It does not speak from the written words in this record but it was manifest at trial from the minority witnesses brought forward by the Appellants below. One by one, minority citizens testified who long ago made their home in Lubbock and rose to the positions of honor, accomplishment and achievement here. Many are respected leaders in this community. They have accomplished, they have achieved, they have been honored, recognized and some even elected. But all have participated fully and freely and successfully.

They claim because of this past that minorities are subjectively blocked from the at large government. All have come forward and repeatedly and successfully, and all found City employees, officers and officials accessible and willing to serve them. They speak of a lingering fear to come forward, but by their own words some come forward not with "requests" or "suggestions" but

with "demands" and at times "demands" accompanied by threats. This is a strong indication of a non-submissive subjective state of mind.

What is even a greater significance as one scans this massive record is that as each witness describes some 3, 4 or 5 specific requests, suggestions or even demands of the City with which they were personally involved, we find in their subsequent statements that in nearly each of these instances the suggestion was followed, the request was granted, the demand was satisfied.

The evidence further shows massive efforts by the City both as to Community Development and all municipal expenditures to seek the input of the minority community and then act in accordance with that input. Each of these services and facilities outlined earlier was a response to a request. The extent of the response proves the extent of the requests. These requests are effective participation.

Sometimes the City response must be a "no". Some things we cannot do by constitutional or statutory limitation. The record reflects few negatives to minority requests.

Sometimes the City said "yes" but did not move with sufficient speed to satisfy. The limitations of the budgetary process and bidding requirements, all in evidence, justifies practically all this delay and these burdens are shared by all.

Registration discrepancies still slightly exist but not outside the standard deviation and the minority citizens as all citizens in Lubbock are voting in muncipal elections far beyond the average. The Black turnout as noted in 1978 far exceeded the white turnout of registered voters.

We dispute the contention that the Trial Court only considered past legal but not general lingering discrimination. The subjects actually considered in the Memorandum Opinion disprove this.

They rely upon one witness (Major Micucchi, Tr. 618-647) as to his conclusions of a current racist atmosphere in Lubbock. We find in the testimony primary basis for this resting upon the conduct of a few "night clubs". Even in those scattered instances the complaint was acted upon, remedied and not repeated. That in these efforts the City was accommodating and helpful. In his reports (Plaintiff's Exhibit 4) was his own statement that the primary discrimination conclusion could not be "validated".

The findings by the Court that the Appellees carried our burden on the absence of lingering effects of past discrimination is supported by competent record in the evidence.

E. Enhancing Factors

There are a number of enhancing factors which have been previously recognized and described elsewhere in this brief and will not at this time be reviewed except to the extent that it must be admitted by Appellees that the Court did find the City of Lubbock to be a large district. It did find the requirement of a majority vote be cast before a candidate can be elected to the City Council or as Mayor. In considering this matter, it must be remembered that it does not take any kind of a vote to attain a position on the ballot. Merely a signing up and registration of the candidate at the proper time at the City Secretary's Office is required with no requirement of Petition or fee.

Next, it must be admitted that the candidates for the City Council for the City of Lubbock are not required to reside in any

particular section or district of the City.

Finally, with respect to the anti-single-shot voting requirement, the Appellants are now apparently reversing their trial court position. At the trial court level, all six of the attorneys for the Appellants agreed that there was no anti-single-shot voting requirement in the City of Lubbock elections. An anti-single-shot rule is only applicable when there is a provision requiring each elector to cast votes for as many candidates as there are positions. The anti-single-shot rule has application only in the context of an electoral scheme which selects winners by ranking all candidates in the order of the numbers of votes which they received, and the rule invalidates all ballots which do not show votes for as many candidates as there are positions, the winners of the election being elected by a plurality. Clearly, it has been agreed that the City of Lubbock is a place system requiring a majority vote. Indeed, there is no requirement that the voter vote for a person to be elected for each individual place, nor, obviously, is there any election by plurality vote. Appellees clearly disagree with Appellants' position that the system existing in Lubbock constitutes a finding that there is anti-single-shot voting requirement. See Nevitt v. Sides, supra.; White v. Register, supra.; Bolden v. City of Mobile, supra.

F. In the Aggregate

The Court's duty in determining the outcome of a case such as the one at bar is to consider the facts of each case against the backdrop of a blend of history and an intensely "local" appraisal of the design and impact of the at-large district in the light of past and present reality, political and otherwise.

White v. Register, supra, Nevitt v. Sides, supra, Ausberry v. City of Monroe, Louisianna, supra.

Certainly, the trial court as set forth in its opinion found each of the four primary Zimmer factors in favor of the Defendants, and, in addition, one of the enhancing factors. While it is true that there is no need to prove all of the Zimmer factors, Bolden v. City of Mobile, Alabama, supra, there is a need to prove at least some of the Zimmer factors. In this case, the Plaintiffs wholly failed to meet their burden of proof and prove any of the primary Zimmer factors and only part of the enhancing factors. On the one primary factor in which the burden had switched the Appellees properly prevailed.

Clearly, it was proper for the Court, under the facts, stipulations and testimony as elicited during the trial to find the factors in favor of the Appellees as the Court so stated.

Although generally found in multi-member or at-large voting systems where the same voting majority controls the balance of governmental power, the evil is not necessarily cured by single-member districts, and with the cure uncertain, the Courts must be careful to upset the legislative plan adopted by the people only when the constitution clearly dictates that such plan is unlawful. David v. Garrison, supra. Appellees believe that the Appellants have wholly failed to meet this burden of proof.

CONCLUSION

There is a structural weakness in any responding brief, for we are "answering" and by that circumstance have allowed the Appellants to establish the priorities of subject. The appeal, however, as

the trial below, must and should turn upon all the areas of legal and factual significance. The decision must rest upon the "aggregate" of the factors for consideration, not the exception.

The best rational test of any idea or activity is the examination of that which it has accomplished, not the mere words of either praise or condemnation that may be ascribed to it. It is so easy, as we have seen in so many of the earlier cases on this very subject, to cry "good faith"; but all the protestations in the world are no substitute for accomplishment. Conversely, all the allegations of failure not verified by fact and all the assumptions of vile intention contrary to actual accomplishment, sound not half so loud as those achievements actually attained.

The best test of the "at large" system in the City of Lubbock is not by its judgment of against some ideal but mythical possibility of perfection, but by a judgment of that which it has in fact accomplished for its minority citizens.

Remember that Zimmer v. McKeithen, supra, stated its proclamation first affirmatively, that a holding of no dilution would be required where the minority is afforded the opportunity to participate in the slating of candidates, and where the representatives slated and elected provide representation responsive to minority needs, and where the at large system is rooted in a strong state policy divorced from the maintenance of racial discrimination.

We should remember that the "ward" system is not a panacea, but a remedy for application only where the previously existing system failed to meet the constitutional challenge.

> "The Court is trying to find its way in this developing area of the law. To enfranchise the diluted minority, care must be taken not to disenfranchise the majority. Any action with this result merely re-

> places one evil with another. To replace an at-large system with several single member districts invites variance from the perfect one person-one vote goal, and forever compartmentalized the electorate, reinforces the bloc voting syndrom, and prevents members of a minority class from ever exercising influence on the political system beyond the bounds of their single member districts. They remain forever a minority in their representative influence. In the final analysis, therefore, the determination of dilution vel non must either rise or fall on the facts of the individual cases." David v. Garrison, supra.

These are not the only evils of the remedy here sought.

Appellants seek to judicially impose a system of election upon the electorate. This is a dangerous precedent at best under any circumstance, and not one to be "automatically" imposed or based upon inference on top of inference or "slogans" and "cliches"!

It is an imperfect remedy, for under the evidence below the new minority in any possible new minority ward, will still be one of the historic minorities.

The remedy penalizes those that have left the minority areas. All branches of government have strived by many policies to "diffuse" minority populations. Barriers to this migration have been prohibited or removed and the minority citizens in Lubbock have spread and are spreading. By the ward we penalize the aspirations of those that have moved. The remedy would perpetuate the "ghetto" environment, as we strive in so many policies to dismantle them.

Perhaps most shocking of all, is that by imposition of the ward we make a minority <u>of every citizen</u>, all to be ruled and governed by both a majority and a quorum of a city council upon whom they will never have the opportunity to vote!

The <u>only</u> judicially recognizable evil exists where dilution exists <u>and</u> a showing of racially motivated discrimination is a

necessary element in a voting dilution claim such as presented here.

In no case in this area of controversy has any governmental entity been able (or willing) to bring forward the massive compilations of its services, facilities and activities undertaken and accomplished by the Appellees below. This we exposed for the record in this case in candor and without adversary "editing".

It is upon these facts in this case, as brought forward in the findings of the Court below that the determination of dilution vel non must either now rise or fall. Not upon circumstances elsewhere or in an earlier time.

The final weakness of the "remedy" which appellants seek is that it is seldom proving to be any remedy at all. This is not raised to suggest the sickness be ignored where it exists, but rather, that in blind promotion of one "cure" we ignore another remedy that might actually work, if any be needed.

The correlation between the system of government (at large v. single member) and minority underrepresentation has never been statistically or academically established. Tr. 2216-2231.

Further all at large systems don't operate the same way so that some single-member cities have far greater underrepresentation of minorities than some at large cities. Tr. 2351. Indeed, the cities that have changed to an at-large system are more equitable toward minorities than cities which have changed to single-member districts. Tr. 2355.

The testimony of Dr. Taebel (Tr. 2189-2337) and Dr. MacManus (Tr. 2338-2374) both point out the failure to establish at large as the cause or the ward as the remedy. This reinforces the

judicial restraint that we should only take the extreme remedy of modifying the system where it is clearly necessary and only as shown upon the facts of the specific case. Those facts simply do not here exist.

For all such reasons Appellees respectfully pray that the remedy and relief here sought by Appellants be in all things denied and that the Judgment below be in all things affirmed.

Respectfully submitted,

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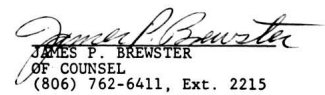
CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Brief for Appellees were served upon William L. Garrett, Attorney at Law, 100 Main, Fort Worth, Texas 76102 and one copy to each associated counsel listed below, all attorneys of record for Appellants, by placing same in the United States Postal Service, postage prepaid and properly addressed on this the 30th day of November, 1979.



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2744

REV. ROY JONES, GONZALO GARZA, JUAN ANTONIO REYES,
and Intervenor, ROSE WILSON, Individually
and as Representatives of the Black and
Mexican American Voters of
Lubbock, Texas
Plaintiffs-Appellants

VS.

THE CITY OF LUBBOCK, TEXAS, and the Mayor and City Council thereof,
DIRK WEST, ALAN HENRY, CAROLYN JORDAN, M.J. "BUD" ADDERTON,
and BILL MCALISTER, all in their official capacities as members
of the City Council of Lubbock
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
Lubbock Division

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No. 79-2744

REV. ROY JONES et al. v. CITY OF LUBBOCK, TEXAS, et al.

The undersigned counsel of record for Rev. Roy Jones, et al. certifies that those persons listed in the Certificate of Interested Parties in Appellants' Brief are those that have an interest in the outcome of this case. There have been no changes since the filing of that Brief.

WILLIAM L. GARRETT

Attorney of Record for Rev. Roy Jones, et al., Plaintiffs-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Appellants represent that oral argument would be beneficial for the reasons stated in Appellants' Brief filed herein, and for the additional reason that the question of intent raised by this Circuit in Cross v. Baxter, 604 F.2d 875 (5th Cir. 1979) should be fully argued.

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STATEMENT OF THE CASE

For the purposes of this Reply Brief, Appellants adopt the Statement of Case as it appears on pages 1 through 3 of Appellants' Brief, filed herein.

SUMMARY OF THE ARGUMENT

The Appellees have failed to recognize the requisites of proof for lack of access. Barriers to access may be both legal and sociological, and even though the former have been eliminated, their effect may still prevent equal access to the political system. Furthermore, if statistical analysis is to be employed, then it must follow accepted mathematical methodology. The Appellees have engaged in mathematical nonsense.

The Appellee Brief argues that the City has been responsive in the allocation of City services. A closer examination reveals that they long neglected minority areas and have used recently available federal funds to attempt to fill in the gaps. Additionally, their claim that jobs and appointments have been distributed equitably will not stand scrutiny. What is revealed is a systematic discriminatory process of hiring and appointments.

To require plaintiffs in dilution cases to prove intent to discriminate in City hiring is to impose an insurmountable burden upon them in violation of the purpose of the Zimmer factor inquiry.

The effects of past discrimination are evident under a proper inquiry, and the tenuous state policy supporting the at-large system does not necessarily require proof of initial motivation, rather it may be inferred from the existence of the policy.

ARGUMENT AND AUTHORITIES

SECTION I: ACCESS

The Court erred in finding that the minority voters have access to the political system in Lubbock, Texas.

Appellees, hereinafter the City, have taken a simplicistic and diversionary approach to the question of access of minority voters in their brief. First, they have cited cases that stand for the proposition that proportional representation is not required, Dove v. Moore, 539 F.2d 1152(8th Cir. 1976), and that no particular minority group is constitutionally entitled to elect representatives from their group. David v. Garrison, 553 F.2d 923 (5th Cir. 1977). The minority voters have never argued that either of these propositions is true or applies to their case. Rather they have argued that the question of access entails a broad based inquiry into the openness of the political process including nomination, campaigning, voter registration and voting. Cross v. Baxter, 604 F.2d 875, 879, (5th Cir. 1979).

Cross teaches that denial of equal access may take two forms: 1) legal barriers which encompass government sanctioned exclusions from the political process such as, the poll tax, the white primary and private slating groups using racist tactics; 2) social barriers, less concrete but no less effective, such as, cultural and language differences, and disproportionate levels of education, income, employment and living conditions. Cross, supra, at 880.

The legal barriers to access, which existed in Lubbock in the past, have now been removed either through legislation or court action: the white primary in 1927, Rec. P. 648; but the poll tax was not removed until

1964 in the City of Lubbock and 1968 in the State of Texas. Rec. P. 643.

The court's finding, however, Rec. P. 644, that "for all practical purposes, these discriminatory constitutional provisions and statutes have not been in effect for over ten years, and the court must conclude that this history of official racial discrimination in the registration and voting process is indeed past history, with no effect on present day elections," is a conclusion of the court unsubstantiated by sufficient factual data. Such a conclusion is in violation of Federal Rules of Civil Procedure 52(a) which requires the court to make detailed findings of fact and conclusions of law. As the Fifth Circuit stated in Cross, supra, at 879, it is a general rule that if the district court reaches a conclusion on one of the Zimmer inquiries without discussing substantial relevant contrary evidence, the requirements of Rule 52 have not been met and remand may be called for if the court's conclusion on the other Zimmer inquiries are not sufficient to support a judgment. The only support for the district court's conclusion is that the passage of at least ten years since the final repeal of the rather lengthy list of legal barriers to the vote for minorities eradicated their effect. The Fifth Circuit, en banc, Kirksey v. Board of Supervisors of Hinds Co., Miss., 554, F.2d 139, 144-146 (5th Cir. 1977) cert. denied 434 U.S. 968 (1977), rejected this approach for four reasons: 1) it requires plaintiffs to come forward with evidence that the record of the past continues to be representative of the present; 2) it imposes an improper burden of proof of causal relationships between economic and educational inequalities and inequality of access; 3) it fails to recognize that removal of barriers may have been a result of court orders or legislation; and 4) it fails to recognize the lasting impact of historical policies of racial discrimination

and official unresponsiveness. Time is a neutral factor which heals nothing. The impact of such racially discriminatory statutes must be remedied by vigorous activities positively calculated to remove the barriers constructed by these statutes over their rather lengthy history.

Regarding social barriers to access, the court made no findings as to the cultural and language difficulties of the minority voters although there was evidence in the record to establish their existence. Tr. Pp.814-872, 1335.

The court did find that the minority voters suffered from disproportionate levels of income, Rec. P. 664, living conditions, Rec. P. 654, employment, Rec. P. 664, and evidence was offered, but the court made no finding, regarding disproportionate education. Tr. P. 961. This court in Cross, supra, at 881, quoting Kirksey, supra, at 144-145, says that "evidence of socio-economic inequities gives rise to a presumption that the disadvantaged minority group does not enjoy access to the political process on an equal basis with the majority. Inequality of access is an inference which flows from the existence of economic and educational inequalities."

The district court made the same mistake that was condemned by Cross, supra, at 880, in that its inquiry into equality of access came to a halt simply because the evidence showed that there are no longer any barriers imposed by law to minority access. (emphasis added)

Another sociological factor, found by the court but ignored, and minimized by the City in their brief, is the concept of polarized voting. The court found, Rec. P. 646, that "there is evidence that minorities tend to vote for members of their own race which signifies polarized voting." The finding of the court was based upon the testimony of the

minority voters' expert witness. Tr. Pp.1487, 1519. If such testimony were not considered sufficient to support such a finding then Nevett v. Sides, 571 F.2d 209, 223, n. 18, teaches that block voting may be indicated by a showing under Zimmer of the existence of past discrimination in general, Rec. P. 669, large districts, Rec. Pp. 671-72, majority vote requirements, Rec. P. 672, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical sub-districts, Rec. P. 672. All of these factors were found by the court as indicated, except the existence of the anti-single shot voting requirement, which should have been found in favor of the minority voters. Appellants' Brief, Pp.42-3. Nevett further states that block voting may be demonstrated by more direct means such as statistical analysis which was done by the plaintiffs' expert witness, Tr. P. 1487 ff, or by the consistent lack of success of qualified Black candidates, Rec. P. 644. Polarized voting is a strong indication of lack of access. Bolden v. City of Mobile, Alabama, 571 F.2d 238, 243 (5th Cir. 1978), prob. jur. noted 436 U.S. 902 (1978), scheduled for reargument U.S. , 99 S.Ct. 2048 (1979).

One additional area of the City's Brief requires comment. On Page 11, the City argues that the odds against a minority being elected to the City Council are 12 1/2 to 1 for Mexican-Americans and 20 1/2 to 1 for Blacks. Such calculations are not based upon any acceptable mathematical theory. See Mathematical Statistics, 2nd ed., Freund, John E., Prentice-Hall, Inc., Englewood Cliffs, N.J., 1971. A correct calculation, based on mathematics alone would reveal the following: Stipulation "H"

Year/Race	Candidates Black	M/A	White	Total	Chance of a minority being elected.
1970/Place 3	1	0	4	5	20%
1972/Place 2	0	1	6	7	14%
/Place 4	1	0	2	3	33%
1974/Place 3	1	0	3	4	25%
1976/Place 1	1	0	1	2	50%
/Place 2	1	1	2	4	50%
1978/Place 3	0	1	3	4	25%

Furthermore, the probability that an all White City Council would result (which it did) in the years 1970 through 1978 is .065, or 65 out of 1,000.

The second assertion of the City that the difference in registration of whites and minorities (68% vs. 55%) is not statistically significant is without mathematical foundation. A significance test reveals that the difference is significant at the .01 level; that is, such differences would occur by chance only one time out of a hundred. Or in other words the confidence level of the statement that the 13% difference in rate of voter registration is not due to chance is 99%.

SECTION II: RESPONSIVENESS

The Court erred in finding that the City of Lubbock is responsive to the needs of minorities.

The City has argued that it has been responsive to minority needs both in the area of municipal services, and distribution of jobs and board apointments.

The minority voters reiterate their claim that the City has been unresponsive as to City services in that it has spent a large amount of federal funds in minority areas in place of City funds and to fill the gap caused by past neglect. The district court's listing of the expenditure of CD funds for the years 75 through 78 clearly indicate that many normal City services such as parks, street lights, traffic signals, street pavings, utilities and water have been paid for primarily

in minority areas through these CD funds. Rec. P. 658-59. These expenditures coupled with the testimony that prior to the advent of federal funding and prior to the Lubbock tornado in 1970, minority areas were generally neglected would be an indication that prior to the availability of federal funds, the City had been very unresponsive to minority needs. Expenditures of federal monies in these areas only indicates that the City is following a federal requirement, not that it is necessarily responsive to the needs of minorities. Furthermore, as Cross, supra, at 884, n. 17, pointed out the fact that current expenditures are greater in minority neighborhoods does not necessarily show responsiveness. For example, if 95% of the need for street improvements is for streets in the Black area, allocating only 60% of street improvement funds for works in that area is evidence of unresponsiveness, not responsiveness.

The City has re-stated that the problem of appointments to City Boards and Commissions was not a result of neglect but a result of the difficulty in finding qualified minorities, but such difficulty is evidence of non-responsiveness as pointed out by the court in Bolden, supra, at 400. Furthermore, the court found that "admittedly, on some of the Boards to which minorities have been appointed, such appointments have been required by the federal government because of partial funding by federal money" and then went on to point out that out of the total membership on Boards and Commissions 12.5% where the members were Black and 9.4% were Mexican-Americans. Rec. P. 665. However, an analysis of Stipulation "RR" reveals that once the Boards and Commissions that have a federal component are removed (Community Development Board, Community Services Board, Housing Authority and Urban Rehabilitation coupled with the Human Relations Commission, which is not federally

funded but out of necessity has minority members) the statistics would indicate that of 153 total members, 134 are White (88%), 11 are Black (7%) and 8 are Mexican-American (5%). Thus, although Black appointments are roughly equivalent to the Black population, the Mexican-American appointments fall short by a factor of 3.5 (5% vs. 17.3%). When federal requirements are eliminated, then as to Mexican-Americans, appointments fall into that category condemned by the Supreme Court in Yick Wo v. Hopkins, 118 U.S. 356 (1886); that is, the disparity is not explainable on grounds other than racial.

The minority voters are now aware of this Court's statement in Cross v. Baxter, supra, at 884, that Title VII principles cannot be wholesale imported into voting rights cases. However, that is not to say that the statistical data concerning employment in Lubbock is meaningless or does not raise any inference whatsoever. Washington v. Davis, 426 U.S.229, 242 (1976), held that "disproportionate impact is not irrelevant, but it is not the sole touchstone of invidious racial discrimination forbidden by the Constitution. However, it is not infrequently true that the discriminatory impact may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on non-racial grounds." Washington, supra, at 242. Systematic exclusion of a minority is itself such unequal application of the law as to show intentional discrimination. A prima facie case of discriminatory purpose may be proved as well by the absence of minorities in a particular area combined with the failure of the governmental body to be informed of eligible minorities in the community. Washington, supra, at 241.

The employment statistics certainly indicate that in the higher

levels there is a grossly disproportionate number of Blacks and Mexican-Americans, (1.5% of Blacks; 2.6% of Mexican-Americans) and in the lowest category, the proportion is reversed (62.6% of Blacks; 61.5% of Mexican-Americans). (See Stipulations "EE" and "FF" and Appellant's Brief P.25). Such disproportionate numbers is exactly what one would expect to see were the City operating with a purpose of racial discrimination. The excuse offered by the City for the lack of minorities in the top jobs that the Lubbock area has such a low unemployment rate that it is equivalent to full employment system fails to recognize that the relevant employment pool for a City the size of Lubbock is the nation, not just Lubbock County, Texas. The argument that the City is not able to compete with private industry in the hiring of minorities in the upper echelon jobs is not based on any data other than the assertion of the Director of Personnel of the City of Lubbock. There were no studies or statistics offered by the City to support this argument.

The Supreme Court in Arlington Heights reaffirmed the holding in Washington but noted that the plaintiff is not required to prove that the challenged action rests solely on racial discriminatory purposes or even that a particular purpose was a dominant or a primary one. When there is proof that a discriminatory purpose has been a motivating factor in the decision, then the action is unconstitutionally discriminatory. Since discriminatory purpose is usually not plainly evident, then inquiry into such circumstancial evidence of intent as may be available is required. Inquiry should include the impact of the official action and the historical background of the decision. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-67 (1977).

The import of those elements are clear in the case of employment by the City of Lubbock. One, the impact of the employment practices is that Whites get the good high paying jobs while minorities get the low paying ones. Two, the historical background is one of pervasive official discrimination, which is presently manifested by a disproportionate income, employment, education, and living conditions for minorities. Rec. Pp. 646, 655, 664.

The impact is more dramatically demonstrated, and is not explainable on other than racial grounds, by a comparison of the four largest categories of employment by the City.

Category	Total Number of Employees	Whites	Blacks	Mexican-Americans
Police Dept.	269	257 (95.7%)	5 (1.8%)	7 (2.5%)
Fire Dept.	250	249 (99.6%)	0 (0%)	1 (.4%)
Parks & Recreation Dept.	117	54 (46.2%)	16 (13.7%)	46 (39.3%)
Sanitation Dept.	110	11 (10%)	3 (2.7%)	96 (87.3%)

Source: Stipulation "GG".

It is clear that of the four largest departments the two offering the highest pay and most upward mobility are almost exclusively White. The Director of Personnel admitted that he had no idea of the availability of persons for the higher echelon jobs. Tr. P. 2109. Apparently, the City believes it is responsive to minorities by allowing them to pick-up garbage and mow grass, but that they are not qualified to carry guns or live together with Whites in close quarters at the fire station. These statistics are the result of an "affirmative action plan" in effect since 1972. Rec. P. 663. One must wonder what the statistics would show were employment practices racially motiviated, or were there no affirmative action plan.

The determination of the Fifth Circuit in Cross that discriminatory

intent is a necessary element in proving racial discrimination in employment for the purpose of a dilution case imposes upon plaintiffs a double level of proof of intent. First of all, Washington and Nevett require that invidious discriminatory intent to dilute be proved. However, Nevett clearly states that the proof of an aggregate of the Zimmer elements raise an inference of discriminatory intent. However, now the Fifth Circuit in Cross has gone one step further to require that intent is an element of proof to establish one of the sub-categories of a Zimmer factor: disproportionate distribution of municipal jobs as an element of unresponsiveness. To require proof of intent to establish a Zimmer factor is to misunderstand the nature of inquiry. Zimmer requires a factual determination be made as to whether the City is responsive to particularized needs of minorities. Responsiveness has been defined in terms of provision of governmental services to the minority community and distribution of municipal jobs and appointments. The question to be determined is the factual one of whether municipal jobs have been distributed to minorities in an equitable manner. There is no requirement in Zimmer and its earlier progeny that the motivation of the City in distributing these jobs be determined. Motivation is relevant to the question of whether the City is maintaining a particular election system for the purpose of diluting minority votes. Such motivation is inferred from an aggregate of the Zimmer factors. To require that plaintiffs in a dilution case prove intent on two levels: 1) intent to dilute and 2) intent under each Zimmer factor, is to put an insurmountable burden upon plaintiffs. It is therefore recommended that the statement in Cross that intent to discriminate as to distribution of municipal jobs be established as a sine qua non of proof of unresponsiveness be reexamined.

SECTION III: EFFECTS OF PAST DISCRIMINATION

The Court erred in finding that the effects of past discrimination have been eradicated and do not preclude access of minorities to the political system.

The City has argued that ability of minorities to speak to the council, White candidates campaigning in minority neighborhoods, and the appearance of minorities on the ballot is proof that past official discrimination has no effect in the present.

These arguments are contrary to the proof and to the law. Cross, supra, at 881-82, holds that "once plaintiffs have demonstrated a history of pervasive discrimination (Rec. P. 669) and a present disproportion in voting registration (Tr. P. 1496)and election of minority representatives (Rec. P. 642),they have carried their burden of proving that past discrimination has present effects... The defendants must then come forward with rebutting evidence proving that current disproportions are not an effect of the past." There is no evidence in the record whatsoever to justify the disproportionate registration of voters. The fact that no minority has ever been elected to the City Council speaks for itself. As Chief Judge Brown said in a 1962 voter registration case: "In the problem of racial discrimination, statistics often tell much and courts listen." Alabama v. U.S., 304 F.2d 583, 586 (5th Cir. 1962).

SECTION IV: TENUOUS STATE POLICY

The court erred in finding that the state policy underlying multi-member districts was not "tenuous".

The City has argued that there is no evidence to prove that Lubbock's at-large system was adopted with improper intent. This begs the question. The proper inquiry is whether there is a tenuous state policy underlying the preference for multi-member or at-large districting. Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973). Cross, supra,

at 884-85 reiterates that once the policy is shown to be tenuous, "weak", then an inference of invidious intent may be drawn. See plaintiffs' Brief, Pp. 32-36 for discussion of why Texas state policy is tenuous.

CONCLUSION

The minority voters reiterate their position that they are entitled to a finding under each of the Zimmer factors. Nothing in the City's Brief convinces otherwise. Therefore they renew their request that this Court reverse the decision of the district court and render a decision in their favor.

Respectfully submitted,

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ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Reply Brief has been furnished to Appellees' attorney of record, Mr. James P. Brewster, Lubbock City Hall, 916 Texas Avenue, Lubbock, Texas, 79401, and Travis D. Shelton & Associates, 1507 13th Street, Lubbock, Texas, 79401, by certified mail, return receipt requested, on this 14th day of December, 1979.

WILLIAM L. GARRETT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1630

MARIA VELASQUEZ, ISAIAH MORELAND, AMELIA AGUIRRE, BEN AGUIRRE, and JOHN McCOWAN, Individually and on behalf of all Black and Mexican American citizens of the City of Abilene, Texas

Plaintiffs-Appellants

VS.

THE CITY OF ABILENE, TEXAS, E. HALL, B. PROCTOR, K. WEBSTER, L.D. HILTON, J. BRIDGES, A.E. FOGLE, JR., and J. RODRIQUEZ, the Mayor and City Councilmen of the City of Abilene, Texas, all in their official capacities

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
Abilene Division

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CERTIFICATE OF INTERESTED PARTIES

NO. 82-1630

MARIA VELASQUEZ, et al. v. CITY OF ABILENE, TEXAS, et al.

The undersigned, counsel of record for Maria Velasquez, et al., certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 13(6)(1).

Maria Velasquez
Isaiah Moreland
Amelia Aguirre
Ben Aguirre
John McCowan
William L. Garrett
Gale Patterson
The City of Abilene, Texas
Elbert Hall
Betty Proctor
Kathy Webster
L. D. Hilton
John Bridges
A. E. Fogle, Jr.
Juan Carlos Rodriquez
Harvey Cargill
Gary Landers
Ronald Clark

William L. Garrett
Attorney of Record for
Maria Velasquez, Isaiah Moreland
Amelia Aguirre, Ben Aguirre, and
John McCowan, Plaintiffs-Appellants.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Appellants represents that Oral Argument in the above case would be helpful to the Court for the reason that the case was tried over a period of six days, the transcript of which is contained in 1,374 pages, and there is much information contained in the stipulations of the parties, all of which could be of interest to the Court, but which was impossible to reduce and summarize in the Brief of Appellants; therefore, Counsel believes that the Court may have many questions regarding the case that could only be answered in Oral Argument.

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CITATIONS

STATEMENT OF JURISDICTION

The Trial Court had jurisdiction of this case pursuant to 28 U.S.C. 1343(3) and (4), upon causes of action arising under 42 U.S.C. 1971, 1973, 1983, 1988, and the XIV and XV Amendments to the United States Constitution. Relief was sought under 28 U.S.C. 2201, 2202 and Rule 57, F.R.C.P.

This court has jurisdiction to hear the appeal by virtue of 28 U.S.C. 1291, in that the decision appealed is a final decision of the United States District Court for the Northern District of Texas.

STATEMENT OF THE ISSUES

STATEMENT OF THE CASE

I.

Statement of the Course of Proceedings and Disposition in the Trial Court

This suit was filed on October 15, 1980 as a class action on behalf of all black and Mexican-American citizens in the City of Abilene to challenge the at-large election system currently used to elect councilmen to the City Council in Abilene, Texas. By order of July 14, 1981, the Court determined that this case be certified as a class action under Rule 23(b)(2), F.R.C.P.

Trial was held in May, 1982 and June, 1982 and by order of October 22, 1982, the Court dismissed the action on the merits and entered a judgment in favor of Defendants City of Abilene, et al. The Honorable Halbert O. Woodward also filed a Memorandum Opinion, incorporating Stipulations and Stipulated Exhibits of the parties, on the same date.

Notice of Appeal was filed by Plaintiffs-Appellants on November 17, 1982 and Notice of Conditional Appeal was filed by the Defendants-Cross Appellants on December 1, 1982.

II.

Statement of the Facts

Abilene, Texas, a home rule city organized under the Constitution and Arts. 1165-1180, Tex.Rev.Civ.Stat., which allows such cities to choose between at-large and single member district

election systems, was organized as a general law city in 1885. From 1890-1892, Aldermen were elected at-large, but in 1892, the city was divided into four single member districts, and aldermen were elected from these districts in 1893 and 1894. In 1895, the city resumed at-large elections, pursuant to an Attorney General's ruling, which was later invalidated by the Texas Supreme Court. The city adopted its first Home Rule Charter in 1911, and adopted its present charter in 1962. Both of those charters provided for at-large election of city councilmen.

The present charter provides for a seven member council, all elected at-large and for three year terms, which are staggered with two councilmen elected each year and the mayor every three years. Also provided for are the place system and a modified residency requirement by which three councilmen must at the time of election live North of the Texas and Pacific main line, and three south. The mayor may reside anywhere within the city. There is a majority vote requirement for election.

Blacks constitute 6.7% of the population, and Mexican-Americans constitute 12.6%. These groups are concentrated in one section of the city. A much higher proportion of their numbers are in the lowest socio-economic group than are whites. They also register to vote in lower percentages.

There is operative in Abilene a white dominated slating group, Citizens for Better Government, known locally as CBG, which proposes a slate of candidates for election to City Council.

The success rate of CBG has been 92.5% since 1966, and 100% since 1974.

One black and two Mexican-Americans have been elected to the City Council since 1973 after sponsorship by the white dominated slating group. None had ever been elected prior to that time; none ran prior to 1970. No independent black or Mexican-American has ever been elected although several have run unsuccessfully.

The minority voters have alleged that the at-large system of elections unconstitutionally dilutes their voting strength. Such dilution is said to be caused by their lack of access to the political system, the lack of responsiveness of the city to their particularized needs, the tenuous state policy favoring multi-member districts, and the continuing effects of general and official racial discrimination. Furthermore, the structural devices of a large voting district, requirement of a majority vote for election, an anti-single shot voting requirement, and modified district residency requirement enhance opportunity for their votes to be diluted.

Further, the minority voters allege that the present at large system results in a denial or abridgement of their right to vote in that the political processes leading to nomination or election are not equally open to their participation in that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives

of their choice in violation of the Voting Rights Act, 42 U.S.C. 1973.

SUMMARY OF THE ARGUMENT

The Plaintiffs-Appellants, the minority voters, have alleged three grounds of error: (1) the Court erred in deciding the case upon the constitutional ground when a statutory basis for decision was available; (2) the Court violated Rule 52(a), F.R.C.P. in failing to make detailed findings of fact to support its decision that the Voting Rights Act, 42 U.S.C. 1973, was not violated; and (3) the Court also violated Rule 52(a) in failing to discuss the minority voters' extensive evidence that the 1962 Charter change retaining the at-large scheme and adding the majority vote requirement was in part motivated by an invidious racial reason.

The Court held that the Abilene at-large election scheme does not violate either the 14th or 15th Amendment, based upon its finding that the minority voters had failed to prove any direct evidence of discriminatory intent either in the inception or in the maintenance of the scheme, and that they had also failed to prevail under an aggregate of the Zimmer factors. The minority voters argue that the Court should have considered their statutory basis for relief, the Voting Rights Act, rather than basing denial of relief upon the constitutional question, and that in any case, the proof under the Constitution and the statute is not identical, as the Court asserted.

Secondly, under the Voting Rights Act, the findings of the Court do not meet the "detail" requirement of Rule 52(a) in the

two pages of the decision that the Court devoted to this issue. The facts to be proved are contained in the Senate Report, No. 97-417, 97th Cong., 2d Sess., U.S. Code Cong. & Ad. News, July, 1982, pp.206-207. The Court actually found a history of discrimination, large election districts, majority vote requirements, anti-single shot provisions, lower minority education, employment, health, income and living conditions, and lower minority voter registration. The court's findings as to polarized voting, minority access to slating, present effects of past discrimination, racial campaign tactics, minority election to public office, lack of responsiveness, and tenuous state policy favoring multi-member districts are clearly erroneous.

Finally, the Court violated Rule 52(a) in holding that the 1962 Charter change was not racially motivated. The Court did not even discuss the minority voters' extensive evidence concerning racial motivation behind the maintenance of the at-large scheme and the addition of the majority vote requirement.

For the above reasons, the minority voters assert that a reversal and remand are required both under Rule 52(a) and under Cross v. Baxter, 604 F.2d 875 (5th Cir.1979).

STANDARDS OF REVIEW

The Trial Court in reaching a decision has several tasks; (1) analysis of the evidence to find the facts; (2) determination of the applicable law; and (3) application of the law to the facts.

Upon each of these duties, the Appellate Court applies a different standard to determine whether or not the Trial Court has committed error.

Findings of fact will not be overturned unless they are "clearly erroneous." Great Atlantic & Pacific Tea Company v. Supermarket Equipment Co., 340 U.S. 147 (1950). A finding is "clearly erroneous", when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. U.S. v. U.S. Gypsum, 333 U.S. 364,395 (1947). Findings are "clearly erroneous" in the Fifth Circuit (1) where the findings are without substantial evidence to support them; (2) where the Court misapprehended the effect of the evidence; and (3) if, although there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and the right of the case. Western Cottonoil Co. v.

Hodges, 218 F.2d 158, 161 (5th Cir.1954); Merchants Nat. Bank v. Dredge Gen. G.L. Gillespie; 663 F.2d 1338 (5th Cir.1981), cert. denied ___U.S. ___, 102 S. Ct. 2263, (1982).

Mixed questions of fact and law, and questions of law are reviewable free of the clearly erroneous standard. Pullman-Standard v. Swint, ___U.S. ___, 102 S.Ct. 1781, 1790 and Footnote 19.

The U.S.Supreme Court has determined that the Trial Court's finding of maintenance of the at-large system for discriminatory purposes, as well as its subsidiary findings of fact, are reviewable under the clearly-erroneous standard. Rogers v. Lodge, ___U.S. ___, 102 S.Ct.3272, 3278 (1982).

The basis of this determination is indicated to be the recent prior decision in Pullman-Standard, supra, at 1788-91. The question there was whether a finding of intentional discrimination was a purely factual finding subject to Rule 52(a), or was an ultimate fact not so subject.

Since that case was pursued under sec.703(h) of Title VII, 42 U.S.C. 2000e-2(h), the Court determined that sec. 703(h) as interpreted in Teamsters v. U.S., 431 U.S. 324 (1977) meant that there must be a finding of actual intent to discriminate on racial grounds and that such was a pure finding of fact. Pullman v. Standard, supra, at 1790. The Court specifically noted that the question was not a mixed question of law and fact that "in some cases may allow an Appellate Court to review the facts to see if

they satisy some legal concept of discriminatory intent." Pullman-Standard, ibid. Discriminatory intent there meant actual motive, not a "legal presumption to be drawn from a factual showing of something less than actual motive." Pullman-Standard, supra, at 1791.

Rogers, supra, however, makes it clear that actual motive need not be shown;"...discriminatory intent need not be shown by direct evidence. 'Necessarily, an invidious discriminatory purpose may often be inferred from the totality of relevant facts...'." Rogers, supra at 3276, quoting Village of Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252, 265 (1977) and Washington v. Davis, 426 U.S. 229 (1976). See also Nevett v. Sides, 571 F.2d 209, 224 (5th Cir. 1978).

The Rogers Court concluded that "none of the District Court's findings underlying its ultimate finding of international discrimination appears to us to be clearly erroneous..." Rogers, supra, at 3281.

A close reading of Pullman-Standard would disclose that a finding of intentional discrimination to be purely a factual one is limited to the interpretation of sec.703(h). Rogers, although it asserts that such a finding in the vote dilution cases is a purely factual finding, indicates that a finding of intentional discrimination is a mixed question of law and fact; that is, there is a legal definition of discriminatory

intent which can be met by inferential reasoning from a set of proven facts. Thus, the Rogers finding of discriminatory intent is, in fact, based upon the exception noted in Pullman-Standard, supra, at 1791: "Discriminatory intent... is a legal presumption to be drawn from a factual showing of something less than actual motive." Rogers' reading of the Pullman-Standard determination fails to limit Pullman-Standard to its own terms.

Rule 52(a) requires detailed findings of fact. Hendrix v. Joseph, 559, F.2d 1265 (5th Cir.1977). Failure to find facts necessary to support a result is an error of law. Hendrix, supra, at 1268.

The Court's failure to make detailed findings under the Voting Rights Act is such an error of law that requires a remand. Pullman-Standard, supra, 1791-92.

ARGUMENT

I.

The Trial Court erred in deciding the case upon the constitutional issue when the case could have properly been decided upon statutory grounds.

In 1936, Justice Brandeis summarized the series of rules under which Courts have imposed restraints in passing on constitutional questions. One of these rules is stated:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. Thus, if a case can be decided upon either of two grounds, one involving a constitutional question, the Court will decide only the latter.
> -Ashwander v. T.V.A.
> 297 U.S. 288, 346-8 1936

This rule was based in part upon the decision of the Supreme Court in Siler v. Louisville & N.R. Co., 213 U.S.175, 192 (1909) and Light v. U.S. 220 U.S. 523, 538 (1911). This rule of judicial decision making has been followed by the Fifth Circuit in Peltier v. Assumption Parish Police Jury, 638 F.2d 21, 22 (5th Cir.1981). District Courts are also to apply this rule. Eckerd v. Indian River School Dist., 475 F.Supp.1350, 1357 (D.C. Del.1979).

The Trial Court in this case, in a 31 page decision, allocated less than 2 pages to the statutory claim asserted by the minority voters that the Abilene at large election system violated the Voting Rights Act, 42 U.S.C. 1973, and devoted over 21 pages to the constitutional claim that the at large system violated the 14th and 15th Amendments to the U.S. Constitution.

The Court attempted to justify such short shrift handling of the statutory claim by asserting that the analysis under both claims is identical Rec. p.714. This is an error of law as will be demonstrated in Section II below.

II.

The Trial Court erred in not making detailed findings of fact in accordance with Rule 52(a) F.R.C.P. in its resolution of the minority voters claims under 42 U.S.C. 1973, The Voting Rights Act.

The Fifth Circuit has been adamant that the Trial Court must make very detailed findings of fact in voting dilution cases.

> Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, see Corder v. Kirksey, 585 F.2d 708, 712-713 (5th Cir.1978), and because the decision of such a case has the potential for serious interference with state functions, see Hendrix v. Joseph 559 F.2d 1265, 1271 (5th Cir.1977), we have strictly adhered to the rule 52(a) requirements in voting dilution cases and have required district courts to explain with particularity their reasoning and their subsidiary factual conclusions underlying their reasoning... Perhaps in no other area of the law is as much specificity in reasoning and fact finding required, as shown by our frequent remands of voting dilution cases to district courts.
>
> -Cross v. Baxter
> 604 F.2d 875,879 (5th Cir.1979)

The factual inquiry required to support the conclusion that the Voting Rights Act is or is not violated by a particular election scheme is detailed in Senate Report No. 94-417, 97th Cong., 2d Sess., reprinted in July 1982, U.S. Code Cong. & Ad. News. Pages 29-30 in the Senate Report. Pages 206-208 in U.S.C.C. & A.N. See Appendix I, p. 42.

Whereas, the factual inquiry required to support a conclusion that the Constitution is violated is set out in Rogers v. Lodge, __U.S.____ , 102 S.Ct.3272 (1982), which essentially adopted the Zimmer, supra standards as interpreted in Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), cert. denied 446 U.S. 951 (1980). See Appendix II, p. 45.

In determining whether or not the Constitution is violated, the Court is not limited to these factors, but should make all relevant inquiries. The purpose of these factors is, however, two-fold. They must show that the effect of the multi-member system is to dilute minority power and they must show discriminatory intent. Cross v. Baxter, 604 F.2d 875, 880 n.9 (5th Cir.1979). Although effect is certainly a threshold consideration, these factors are primarily examined from the viewpoint of whether there can be inferred a discriminatory intent in either the establishment or maintenance of the at large system. The process is not a mechanical one. The existence or non-existence of the factors do not automatically infer discriminatory intent or the lack of it. Rather these factors must be evaluated and then a legal presumption drawn regarding discriminatory intent.

Under the Voting Right Act, however, the inquiry is purely factual. "To establish a violation, plaintiffs could show a variety of factors ..." Senate Report, supra, p.28, U.S.C.C. & A.N., p. 206. If these objective factors are shown, then based upon the totality of circumstances, a statutory violation is shown.

Although it is true that the factors listed in the Senate Report are drawn from White and its progeny, the importance of certain of those factors has been changed. For example, the issue of responsiveness is a primary factor under Zimmer, whereas it is listed as an "additional factor" which may be shown in the Senate Report, and as Footnote 116 indicates, proof of responsiveness does not necessarily weigh in favor of the challenged election scheme. (The same is true regarding the question of whether the state policy favoring at large districts is tenuous.)

Secondly, under Zimmer, past discrimination had to have present effects. The Senate Report divides the inquiry: (1) Was there past discrimination touching the right to vote, and (2) does the minority group bear present effects. Footnote 114 makes it clear that there are objective standards for determining present effects. Additionally, the "enhancing factors" under Zimmer are now grouped into a primary factor in the Senate Report.

None of these factors listed in the Senate Report is required to do the double duty of the Zimmer factors. Rather, they and other relevant factors are to be considered as guides to determine if the totality of circumstances indicate that the minority group has less than equal access to the political processes. The burden of proof of the minority voters is only to establish that they have "less than equal access." The fact that they may have some access is not a defense, if in fact, their access is less than the white majority.

Given the difference in emphasis of the Senate Report factors and the Zimmer factors, and given the requirements related to finding discriminatory intent versus discriminatory result, it is entirely possible, if not likely, that an inquiry based upon Zimmer could result in a decision favorable to the City, whereas an inquiry based upon the Senate Report "relevant factors" could result in a decision favorable to the minority voters.

In this area, the Trial Court found that under Zimmer there was a history of discrimination but that it had no present effect on political participation, Rec. p.702-706, and therefore resolved this factor in favor of the City. However, under the Voting Rights Act, the finding of a history of discrimination would resolve the first Senate Report "typical factor" in favor of the minority voters since the question of present effect is a separate factor.

If findings of fact had been made according to the list of typical factors in the Senate Report, under the record in this case, the totality of circumstances would certainly show a violation of the Voting Rights Act. Each of these factors and the Court's finding thereunder is discussed below:

The first factor, the extent of any history of official discrimination, as discussed above, was found in favor of the minority voters. Rec. p.702-706.

Second, the extent to which voting is racially polarized was found in favor of the City, Rec. p.704-706. "The plaintiffs were unable to prove that a history of racially polarized voting patterns has existed in the City of Abilene" Rec. p.706. The basis for this finding was the Court's discussions of plaintiff's Exhibits 16 and 17, which are studies of racially polarized voting in one council race, and in a charter change election to adopt single member districts. The Court held these studies to be insufficient to establish a pattern of racially polarized voting, and further that the election of minorities to City Council seats refuted any theory of bloc voting.

The Court violated its duty under Rule 52(a) that all relevant evidence must be discussed. The Court totally ignored the minority voters' evidence offered through one of their expert witnesses, Dr. Chandler Davidson, which revealed no less than fourteen (14) separate instances of polarized voting from 1956-1981. They are as follows:

1.	1956 Referendum exempting white children from compulsory attendance at integrated schools	Rec.Vol.6, p.732(515)
2.	1956 Referendum strenghtening anti-miscegenation laws	Rec.Vol.6, p.732(516)
3.	1956 Referendum favoring interposition	Rec.Vol.6, p.732(516)
4.	1963 Poll Tax Repeal Referendum	Rec.Vol.6, p.732(516)
5.	1962 School Board Race Mexican-American vs. White	Rec.Vol.6, p.732(517)

6.	1968 School Board Race Mexican-American vs. White	Rec.Vol.6, p.732(518)
7.	1968 School Board Race Black vs. White	Rec.Vol.6, p.732(518)
8.	1970 School Board Race Mexican-American vs. White	Rec.Vol.6, p.732(519)
9.	1970 School Board Race Black vs. White	Rec.Vol.6, p.732(519)
10.	1970 City Council Race Mexican-American vs. White	Rec.Vol.6, p.732(520)
11.	1970 City Council Race Black v. White	Rec.Vol.6, p.732(520)
12.	1971 City Council Race Mexican-American vs. White	Rec.Vol.6, p.732(520)
13.	1979 City Council Race Mexican-American vs. White	Rec.Vol.6, p.732(521-532)
14.	1981 Single Member District Election	Rec.Vol.6, p.732(532-535)

All of these studies over a 15 year span show polarized voting. Certainly a pattern is established. Under Rule 52(a), the Court was required to discuss each of these races if it were going to hold that no such pattern exists. "Under the Rule 52(a) standard, as strictly applied in voting dilution cases, this seemingly contrary evidence was required to be discussed and considered." Cross v. Baxter, 604 F.2d 875,880, (5th Cir.1979). The failure to discuss this evidence is an error of law which the Court is free to correct by a remand. Furthermore, since this extensive evidence of polarization is uncontradicted, the Court's finding that there is no pattern of polarization is "clearly erroneous," and the Appellate Court can make a contrary finding.

Further, the Trial Court has ignored the teaching of White, supra, and Graves v. Barnes (I), 343 F.Supp.704,731 (W.D.Tex.1972) that white support of a minority candidate can still be indicative of racially polarized voting.

Additionally, the Fifth Circuit has held that bloc voting may be proved circumstantially by proof of (1) large districts, (2) majority vote requirements (3) anti-single shot voting provisions, (4) the lack of provisions for at-large candidates running from particular geographic sub-districts, and (5) existence of past discrimination in general. Nevett v. Sides, 571 F.2d 209,223, Footnote 18 quoting Zimmer, supra, 485 F.2d at 1305.

Each of these elements were found to exist in Abilene by the Trial Court: Large districts, Rec. p.711; Majority vote requirements, Rec. p.711; Anti-single shot voting provisions, Rec.p.712; Lack of geographical sub-districts, Rec. p.712, and Existence of past discrimination in general, Rec. p.702. The Court, however, failed to consider these findings as they bear upon the question of racially polarized voting. Such failure is another error of law.

Turning to the Third Senate Report "typical factor," the Court found each of these factors to exist in Abilene. Rec. p.711-712. (See paragraph above for each factor.)

The next question to be answered is whether there is a

candidate slating process and whether members of the minority group have been denied access to that process.

The District Court erred under section 2 of the Voting Rights Act, as amended, and under case law interpretations of the 15th Amendment, when it found that there are "no barriers to access to the slating process in Abilene politics." Rec.p.704. In finding that it is only the subjective opinion of plaintiffs that keeps them from participating in the Abilene slating process, the Court considered only official or formal barriers to access, and ignored the testimony of plaintiff's expert witness, Dr. Chandler Davidson, Rec. p.732(552 ff), as to other barriers to access. On this issue, the Court ignored as well the testimony of plaintiffs' witnesses Robert English, Rec. p.732(269), Rev. Isaiah Moreland, Rec. p.732(290), Amelia Aguirre, Rec. p.731(327), and Marie Velasquez, Rec. p.731(382), all of whom testified to the virtual exclusion of interested minorities from influence in the slate-making process of Abilene's only slating group, the white-dominated, business-oriented Citizens for Better Government (hereinafter referred to as CBG).

As a factual matter, Abilene is a one-party city, with the CBG being that one party. The white-dominated CBG selects the candidates that run for city office, slates them, and provides them with a significant amount of their campaign expenses. Rec. p.732(552). Since its inception in 1964, CBG candidates have been over 92.5% successful in having their candidates elected to

the Abilene City Council, and under ordinary circumstances, it is virtually impossible to win a city election in modern-day Abilene without CBG backing. Rec.p.732(555). At trial, testimony revealed that white candidates endorsed by CBG in either primaries or general elections can and do win city-wide races without the necessity of appealing to minorities for votes or contributions. Rec.p.732 (507), and it was further shown that where CBG has slated minority candidates in the past, it did so without the assistance of minority community leaders. Rec. p.732(269,290-293,580,581). The whites of CBG unilaterally determine whether a black or Mexican-American will be slated; how many will be slated; and who will be slated in city government elections, Rec. p.731(270). It is significant that the CBG makes its decisions about whether and which minorities should be slated without regard to whether the minority persons slated are sympathetic to the problems of the minority community, or whether the candidates even have a relationship with the minority community. Rec. p.731(294,386,387). Graves v. Barnes, 343 F.Supp. 726 (1972). The District Court ignored the fact that in at least one instance, the successfully elected minority slated by CBG, Joe Alcorta, was not even a resident of the City of Abilene when selected to run, and in any case, two of the CBG minority nominees did not even reside in minority-dominated neighborhoods. Rec. p.734(148), 731(294). Further, in Abilene, minorities had no meaningful opportunity to participate in the CBG recruitment process for candidates. Where minorities did

attempt to participate in the CBG slating scheme, witnesses testified that either they were ignored at CBG meetings, Rec. p.731(270, 290,323), or their suggestions for potential candidates were discounted as somehow inappropriate by CBG. Rec. p.731(269,270, 290).

In particular, one black witness, Robert English, testified that in 1978 he served on CBG's nominating committee and found the experience to be "very bad." Rec.p.731(270). He testified that the nominating committee was powerless to the extent that what he perceived as CBG's "three-man Executive Committee" could veto any suggestions for candidates that the nominating committee came up with, regardless of their qualifications. Rec.p.731(270). He testified that during the time he served on the committee, none of the potential candidates the nominating committee suggested, including potential minority candidates, were ever found to be acceptable by the Executive Committee. Rec.p.731(272). Additionally, he revealed that candidates who were eventually chosen by CBG to run were selected by the Executive Committee themselves, and afterwards the nominating committee was told to "strongly consider" them. Both of the nominees the Executive Committee finally found to be acceptable were white businessmen. Rec.p.731 (273).

Reverand Isaiah Moreland, another witness, testified that he too had attempted to work through CBG, sometime during 1970-1975, to obtain the nomination of a black candidate for city

council. He stated that upon attempting to nominate a black, CBG refused to do so. Rec.p.731(290). He testified that he eventually quit working with CBG because "...it seemed that we couldn't get anything done through the CBG organization for blacks." Rec. p.731(291). Of the black candidate, Leo Scott, whom CBG successfully ran for City Council in 1978, Reverend Moreland indicated that Mr. Scott had never been especially active in the minority community, and that his responsiveness to the black community of Abilene was characterized by a "...nonchalant attitude. His concern was not a vivid and outstanding one." Rec. p.731(293). He also stated that it was his opinion that CBG's nomination was an example of white people making decisions for black people. Of a Mexican-American who was slated by CBG and elected to City Council, a witness who has been very active in Abilene Mexican American civic affairs testified that prior to Mr. Alcorta's nomination, she had "...never (seen) him at any meetings that we had, and we had formed coalitions with the blacks and other organizations with the church, and he was never present." Rec.p.731(386). Of Leo Scott, this Mexican American witness stated that she had "...never heard of him." This witness too indicated at trial that she had not voted for any Mexican American slated by CBG for the reason that "...somebody else took it upon themselves to make that decision for me and pick the candidate." Rec. p.731(382).

Even where a strong minority candidate has attempted to

challenge a CBG-backed candidate for election to office, it was found that the problems and expenses associated with such a task were insurmountable due to the superior financial resources of CBG. Rec.p.731(323,324). And historically, plaintiffs' expert found, "There has never been a case of a black actually opposing a white candidate who won in the case of Abilene. Rec. p.732(506).

What the District Court failed to recognize in its evaluation of the accessibility of CBG's slating process to minorities is that even if CBG had consulted the minority community regarding the minority candidates it did slate (which it did not), the operations of the Abilene political system, which is almost totally synonymous with CBG party procedures, the system would still have not met either judicial standards, or section 2 standards of "effective participation" by minorities in the process. Graves, supra, said that, "The requirement for effective participation can be answered only by showing that the interests of the black ghetto, like those of the white areas, are taken into consideration in the formulation of the entire slate." It is clear from the evidence at trial, that in Abilene no such consideration ever occurs. In essence, minorities in Abilene are permitted to enter the political process in any meaningful manner only through the benevolence of the dominant white majority. This has been held over and over again by the courts to be an unacceptable state of affairs. "If participation (by minorities) is to be labeled 'effective', then it certainly

must be a matter of right, and not a function of grace." Graves, supra.

At trial, when Dr. Chandler Davidson, plaintiffs' expert, was asked his opinion as to whether blacks and Mexican Americans have access to CBG's nomimating process, his testimony indicated that minorities have less access to CBG's nominating procedures than do whites. Rec.p.732(571). In support of his opinion, Dr. Davidson cited the following examples from his research:

(1) The Chairman of the Board of Directors of CBG is not democratically elected. According to Dr. Davidson's research, a vice-chairman is chosen each year by the Board of Directors and simply succeeds to the chairmanship automatically in the next year. Rec. pp.732(565, 566) and (571a-573).

(2) The nominating committee of CBG has no power. Dr. Davidson found it to be simply a group selected by the Board of Directors without input from other participants. These committeemen are often not told as members about the formal structure whereby persons may be nominated, and are usually informed that their input will only be of an advisory nature. Dr. Davidson concluded that the nominating committee had no power beyond making suggestions to the Board. Rec. pp.732 (573,574).

(3) The procedure for participation in CBG's slating process is vague, and there is a great deal of leeway for manipulation. For example, Dr. Davidson found that even persons who had sat on CBG's Board of Directors gave differing accounts of how the slating process actually worked, and it was his opinion that there was much confusion and ignorance about the process not only on the part of minority participants, but also on the part of "the average person going into an annual meeting." Rec. p.732(575).

(4) Dr. Davidson observed that the CBG slating process excluded "self-starters" and "independent-minded" minorities. He testified that he was "struck over and over...again in (his) conversations with people all the way from those who have been active back in the middle '60's up to people that had been involved on the board in the last two or three years who used the phrase, 'We don't want people who have an axe to grind.' ... 'People who have some goal they want to accomplish in office'..." Rec. p.732(577,579). Dr. Davidson further testified that he had found that such an ideological preference tended to work to exclude the most popular minority group members from winning the nomination of CBG. Rec. p.732(580).

(5) Dr. Davidson also testified that he found that the choices of candidates of the minority community were frequently rejected by the CBG for reasons that CBG later found perfectly acceptable when a white-approved minority candidate was found. He cited the specific example given to him by a well-respected black minister in Abilene, Rev. Ollifat (sic), regarding the circumstances of the selection of the former black City Councilman, Leo Scott. Rec. p.732(580,581).

(6) Dr. Davidson found that the reasons for the success of CBG candidates was directly related to the amount of money they had available out of CBG largesse to mount their campaigns. In effect, that high spenders equaled winners in Abilene politics. Rec. p. 732(552). Since minorities generally lack access to an equal amount of funds to launch campaigns, it has had the effect of discouraging them from trying to run against CBG-backed candidates.

(7) Dr. Davidson testified the phenomenal success of CBG at the polls could be attributed to a self-fulfilling prophecy mechanism at work in the City of Abilene. That is, "...people become convinced that there is no really good reason to oppose CBG... and, consequently, you don't get nearly the money spent by competitors..." and people express

"...discouragement over the possibility of being able to successfully win against a CBG candidate." Rec. p.732(555,556).

(8) Access to participation in CBG is limited by its operations. Dr. Davidson found barriers to participation such as noon meetings of short duration, lack of opposing factions among the small group of attendees, lack of representation from all precincts, the pro forma nature of the proceedings, and variation in the selection process from year to year, all of which tended to hinder participation. Rec.p.732(562-570).

Point 5 under the Senate Report asks the extent to which members of the minority group bear the effects of discrimination in the areas of education, employment and health. Footnote 114 adds the areas of income level and living conditions. The Court found that "minorities still suffer from depressed socio-economic conditions in Abilene which make participation in the election process more difficult" Rec.p.703. Specifically, the Court found that minorities in Abilene are less well educated and poorer than whites, that there are far more black and Hispanic families below the poverty line, that the median family income was also much lower for minority families; fewer minorities were employed as professionals, managers, and administrators. Rec.p.690. (See also Plaintiff's Exhibit #38, a socio-economic profile of

Abilene.) Additionally, the Court found that two-thirds of the sub-standard housing units in the city are in the minority areas. Rec.p.690-691. (See also Plaintiff's Exhibit #3.)

The requirement of Footnote 114, to show depressed minority participation, was amply demonstrated and found by the Court. Rec.p.703. Plaintiff's Exhibit #33 showed that as late as 1979, 63.5% of the white voting age population was registered to vote, while only 29% of the Mexican-American voting population was registered, and only 17.8% of the black voting age population was registered. The disparity in which whites are registered at more than twice the rate of Mexican-Americans and at over 3-1/2 times the rate of blacks certainly meets the test of Footnote 114 concerning depressed minority participation. As pointed out in the footnote, and as taught by Kirksey v. Board of Supervisors, 554 F.2d 139,145 (5th Cir.1977), "It is not necessary in any case that a minority prove such a causal link. Inequality of access is an inference which flows from the existence of economic and educational inequalities." The residual impact of this history (of discrimination) reflected itself in the fact that Mexican-American voting registration remained very poor..." White v. Register, 412 U.S. 755,768 (1973).

It is clear that the Court's finding that minorities no longer bear the burden of discrimination is clearly erroneous.

The sixth factor of overt or subtle racial appeals was not found to exist by the Court. Rec.p.708. The Court limited its discussion regarding this factor to whether the local white-

dominated slating group had relied upon such tactics. The inquiry is broader. The Court did not discuss the evidence of plaintiffs that in 1970 and 1971, the Mexican American candidate for City Council, Mrs. Amelia Aguirre - the first minority to run for council in the history of Abilene - suffered a series of threats and abuses. Rec.p.731(325,360-366). Another of the plaintiffs, Mrs. Marie Velasquez, had difficulty in filing to run for a Justice of the Peace post in Taylor County (Abilene). Later she had to retain an attorney to go with her to the County Clerk's Office in order to file an amendment to an election report. Rec.p.731(376-380). The failure of the Court to discuss this evidence violates its duty under Rule 52(a). The evidence clearly points to the existence of both overt and subtle racial tactics in Abilene elections.

As to whether minorities have been elected to the City Council in Abilene, the seventh Senate Report factor, since 1973 they certainly have: A Mexican American in 1973, and re-elected in 1976, a black, unopposed, in 1978, and another Mexican American in 1980. Rec.p.691. The Court placed great emphasis on these elections. "The election of minorities during the past 10 years on the Abilene City Commission (sic), under the at-large system, is strong - if not conclusive evidence - that that at-large system in Abilene does not result in either dilution of or denial to minorities their full right to participate in the electoral processes of that city. Rec.p.715.

The Court failed to heed the warning in Footnote 115, Senate Report, p.29, U.S.C.C. & A.N. p.207: "However, the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the black vote in violation of this section. Zimmer, 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade this section e.g. by manipulating the election of a 'safe' minority candidate." The very words of the statute emphasize that minorities must have equal opportunity "to elect representatives of their choice." 42 U.S.C. 1973b.

All of these elected minority representatives were slated by the white dominated CBG. Two of them were elected after demands were placed upon the Abilene City Council to change the election system from at large to single member district. Only one of these elected minority councilmen lived in the minority districts of Abilene, Mr. Rodriquez, elected in 1980 well after this suit was filed.

Had independent minority candidates been elected, then certainly this factor would weigh in favor of the city. But in Abilene all minority candidates were selected not by the minority electorate, but first by the white-dominated slating group, and then by the white electoral majority in a city whose elections are characterized by pervasive polarized voting. Properly considered, this factor weighs in favor of the minority voters.

The Court discussed the issue of responsiveness, a Senate Report additional factor, for nine pages of a thirty-one page opinion, and resolved the issue in favor of the City, both as to the provision of municipal services and as to distribution of municipal jobs and appointments to bonds and commissions. Footnote 116 of the Senate Report, p.29, U.S.C.C. & A.N. p. 207, clearly states that "unresponsiveness is not an essential part of plaintiff's case." Accord: Rogers v. Lodge ___U.S. ___, 102 S.Ct. 3272,3280, Footnote 9 (1982). The minority voters would point out that the Trial Court in its discussion of the use by the city of federal funds has ignored the teachings of Ausberry v. City of Monroe, 456 F.Supp. 460 (W.D. La.1978). It is important to note that many of the municipal services quoted by the Court as suggestive of a finding of responsiveness have only been provided to minority areas after the advent of federal monies and are today still being provided primarily through federal funds. Rec.p.696. The obligation of the city is to distribute local tax dollars equitably, then spend federal dollars in the mandated areas. Ausberry, supra, at 465. The Court found that the use of federal dollars "frees more city bond and revenue funds for other segments of the city." Rec.p.696.

As to the municipal jobs, it is clear from the record that minorities are grouped in the lowest job categories. See Defendants' Exhibit 32. It is also clear, that despite an

affirmative action plan, that tellingly has no goals or time tables, Rec.p.733(792-793), the percentage of minorities in the top three job catagories has remained relatively constant at about 5% total employees. The statistics on new hires, Plaintiff's Exhibit 37, shows the lack of results of the so-called affirmative action plan: From 1974 - 1981, there were no minorities hired into the top job category, only 15 of 72 into the second highest category, only 5 of 74 into the third highest category, and only 16 of 200 into protective services. As to this latter, the inference could certainly be drawn that blacks and Mexican Americans were hired into the police and fire departments in anticipation of trial, many being hired within weeks of trial, Rec.p.732(701).

The Court placed an improper burden upon the minority voters by requiring them to prove that the disparity in employment was the result of the at large system, Rec.p.701, and then speculated that things would not likely have been better under a ward system. The minority voters burden is to demonstrate that disparity in employment is traceable, directly or inferentially, to acts of the local governmental body, not to the at-large election scheme. Cross v. Baxter, 604 F.2d 875, 883 (5th Cir. 1979).

The Court also found that from 1968 through 1982, 48% of the boards and commissions appointed by the City Council did not have even one minority member. Of 1,710 positions to be

filled during this time period, minorities were appointed to 10.6% of the vacancies, but only on one-half of the total boards and commissions. Rec. p.701. Yet the Court found the city responsive in this area.

The Court's findings under this factor, especially as to equal employment and appointments to boards and commissions, is clearly-erroneous.

Finally, the last additional factors noted in the Senate Report, p.29, U.S.C.C. & A.N. p.207, is whether the policy underlying the at-large scheme is "tenuous." The Court found this factor in favor of the city on the erroneous theory that the minority voters had to prove that the state policy behind the at-large system was rooted in discrimination. This factor, drawn directly from Zimmer, supra, at 1305, is correctly stated, "(Is there) a tenuous state policy underlying the preference for multi-member or at large districting?"

The word "tenuous" seems to be misunderstood by several courts that have discussed the issue. The word is defined in Webster's New Collegiate Dictionary, G.C. Merriam and Co., 1977, as being synonymous with "weak." Therefore, all the minority voters need prove is that there is a weak state policy underlying such preference.

This is precisely the case in Texas. Abilene is a home rule city allowed by the state constitution, Art. 11, Sec.5, and also by state law, Art. 1175, to adopt through its charter either

a ward or an at-large election system. In situations in which the state law regarding the election system allows cities a choice, then the courts have held that the factor is neutral. Bolden v. City of Mobile, 423 F.Supp.384 (S.D. Ala.1976) affirmed 571 F.2d 238 (5th Cir.1978) reversed on other grounds, 446 U.S. 55 (1980). Accord: Cross v. Baxter, 604 F.2d 884-85; Hendrix v. Joseph, 559 F.2d 1265, 1270 (5th Cir.1978). The Nevett Court, 571 F.2d 209,224 (5th Cir.1978) has held that "a tenuous state policy in favor of at-large districting may constitute evidence that other, improper motivations lay behind the enactment or maintenance of the plan." Graves II held that there was no "rational state policy explaining the present use of multi-member districts in any county." Graves v. Barnes, 378 F.Supp.640, 643 (W.D. Tex.1974). Graves I noted that "Texas' use of multi-member districts, taken in the entirety of Texas electoral laws and of Texas history, unconstitutionally infringes the voting rights of racial and political minorities in all Texas cities that are districted as multi-member." Graves v. Barnes, 343 F. Supp.704,724 (W.D. Tex.1972).

Even if the minority voters' burden was to demonstrate that the at large scheme was rooted in a state policy of discrimination, they have met that burden. As Hendrix, supra, at 1269, teaches,"The manifestation of a state's policy toward the at-large concept can most readily be found in the sum of its statutory and judicial pronouncements." The appendix to

The at large election scheme was continued, and a majority vote requirement was added. Stipulations 17 and 21, Rec.p.591; Rec.p.711. The minority voters' expert witness, Dr. Chandler Davidson, presented extensive evidence as the basis for his opinion that an impermissable racial motivation was one factor behind the adoption of the majority vote requirement. He detailed the historical context, both in the nation, Rec. p.732(586-587) and in Abilene, Rec.p.732(587-597), in which the decision was made. In summary, it was a period of high racial tensions. Furthermore, it was well known in 1962 that at-large elections, majority vote requirements and staggered terms had a negative impact upon minority participation in the electoral process. Rec.p.732 (591-593). Additionally, he noted that all the nominees for the Charter Commission were white; and those elected were white, Rec.p.732(599), and that the publicly stated reason for the adoption of the run-off requirement was not factually accurate. Rec.p.732(600).

A statement at the time of the adoption of the majority vote requirement by the Chairman of the Charter Commission was that one reason for its adoption was to insure that a minority could not gain control of city government. Rec.p.732(605). Under the criteria for proving discriminatory intent delineated by the Supreme Court in Village of Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252, 266-268 (1977), this evidence regarding the historical context, impact, and

contemporary statements of the participants must be examined if a valid finding of intent is to be made. The Trial Court made no such examination.

Additionally, the minority voters presented evidence through their expert that the at large system was maintained in 1962 for an invidious racial reason. Rec.p.732(606-607). Again, none of this evidence was discussed.

Rule 52(a) was clearly violated in holding contrary to the impact of this evidence without discussing each piece of evidence presented. A remand is required to consider these facts as they bear upon the question of discriminating intent in 1962.

CONCLUSION

The minority voters, appellants herein, pray the Court to reverse and remand this cause to the Trial Court for failure to follow the dictates of Rule 52(a) F.R.C.P.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Brief has been furnished to Appellees' attorney of record, Mr. Harvey Cargill, P.O. Box 60, Abilene, Texas, 79604, by certified mail, return receipt requested, on this __ day of February, 1983.

WILLIAM L. GARRETT
Attorney at Law

APPENDIX NO. I

Typical factors include:

1. (T)he extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. (T)he extent to which voting in elections of the state or political subdivision is racially polarized;

3. (T)he extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. (I)f there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. (T)he extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process.

(Footnote 114) The Courts have recognized that disproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation, e.g. White, 412 U.S. at 768; Kirksey v. Board of Supervisors, 554 F.2d 139,145. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal connection between their disparate socio-economic status and the depressed level of political participation.

6. (W)hether political campaigns have been characterized by overt or subtle racial appeals;

7. (T)he extent to which members of the minority group have been elected to public office in the jurisdiction;

> (Footnote 115) The fact that no members of a minority group have been elcted to office over an extended period of time is probative. However, the election of a few minority candidates does not "necessarily forclose the possibility of dilution of the black vote," in violation of this section. Zimmer, 485 F. 2d at 1307. If it did, the possibility exists that the majority citizens might evade the section, e.g. by manipulating the election of a "safe" minority candidate. "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution ... Instead, we shall continue to require an independent consideration of the record." Ibid.

Additional factors that is some cases have have probative value as part of the plaintiffs' evidence to establish a violation are:

(W)hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

> (Footnote 116) Unresponsiveness is not an essential part of plaintiff's case. Zimmer; White (as to Dallas). Therefore, defendant's proof of some responsiveness would not negate plaintiff's showing by other more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process. The amendment rejects the ruling in Lodge v. Buxton and companion cases that unresponsiveness is a requisite element, 639 F. 2d 1375 (5th Cir. 1981), (an approach apparently taken in order to comply with the intent requirement which the Supreme Court's plurality opinion in Bolden imposed on the former language of Section 2.) However, should plaintiff choose to offer evidence of unresponsiveness, then the defendant could offer rebuttal evidence of responsiveness.

(W)hether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting or standard, practice or procedure is tenuous.

(Footnote 117) If the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact. But even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.

While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.

The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.

(Footnote 118) The courts ordinarly have not used these factors, nor does the Committee intend them to be used, as a mechanical "point counting" device. The failure of plaintiff to establish any particular factor, is not rebuttal evidence of non-dilution. Rather, the provision requires the court's overall judgment based on the totality of circumstances and guided by those relevant factors in the particular case of whether the voting strength of minority voters is, in the language of Fortson and Burns, "minimized or canceled out."

APPENDIX NO. II

THE ZIMMER FACTORS

PRIMARY FACTORS:

1. **Whether there is equality of access of the minority group members to the political process**
2. **Whether past discrimination has the present effect of discouraging minority members' participation in the electoral process**
3. **Whether the governmental policy underlying the use of multimember districts is tenuous**
4. **Whether the governmental body is responsive to the needs of the minority community**

ENHANCING FACTORS:

1. **Existence of a large electoral district**
2. **A majority vote requirement**
3. **An anti-single shot provision**
4. **Lack of residency requirements in geographical subdistricts**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83-1502

THE CITY OF LUBBOCK, TEXAS, and the
Mayor and City Council thereof
BILL McALISTER, ALAN HENRY, JOAN BAKER,
M. J. "BUD" ADERTON and E. JACK BROWN
all in their officials capacities as
members of the City Council of Lubbock, Texas

Defendants-Appellants

VS.

REV. ROY JONES, GONZALO GARZA, EUSEBIO MORALES
and Intervenor, ROSE WILSON, individually and
as Representatives respectively of the Black and
Mexican-American Voters of the City of Lubbock, Texas

Plaintiffs-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION
HONORABLE HALBERT O. WOODWARD, JUDGE PRESIDING

BRIEF FOR APPELLANTS

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September 23, 1983

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September 23, 1983

CERTIFICATE OF INTERESTED PARTIES

NO. 83-1502

CITY OF LUBBOCK, TEXAS, et al vs. REV. ROY JONES, et al

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

DEFENDANTS-APPELLANTS:

The City of Lubbock, Texas
Alan Henry, Mayor
Joan Baker, City Council
M. J. "Bud" Aderton, City Council
E. Jack Brown, City Council

ATTORNEYS FOR DEFENDANTS-APPELLANTS:

Travis D. Shelton
T. Dale Jones
(SHELTON & JONES)
John C. Ross, Jr., City Attorney
James P. Brewster

PLAINTIFFS-APPELLEES:

Rev. Roy Jones
Gonzalo Garza
Eusebio Morales
Rose Wilson
All respectively as representatives for the Black and Mexican-Amercian voters of the City of Lubbock, Texas.

ATTORNEYS FOR PLAINTIFFS-APPELLEES:

Mark C. Hall
Lane Arthur
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Tomas Garza
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James P. Brewster

JAMES P. BREWSTER
Attorney of Record for the City of Lubbock and Lubbock City Council, Defendants-Appellants

STATEMENT REGARDING ORAL ARGUMENT

This appeal deals solely with the issue of attorneys' fees awarded to the plaintiffs-appellees in a voting rights case under the provisions of 42 U.S.C. §§ 1973ℓ(e) and 1988. The case was bifurcated by the Trial Court, and the main case is presently before this Court for argument on October 24, 1983, under Cause No. 83-1196. Appellants would ask that argument in this appeal on attorneys fees be combined with the main case and all handled at one time by the Fifth Circuit. The two appeals are directly related, and considerable time and expense could be saved for the Court and the parties by arguing all issues together in one appearance before the Court.

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LIST OF AUTHORITIES

IN THE
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NO. 83-1502

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as Representatives Respectively of the Black and
Mexican-American Voters of the City of Lubbock, Texas

Plaintiffs-Appellees.

BRIEF FOR APPELLANTS

TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Appellants, the City of Lubbock, Texas, its Mayor Alan Henry, Joan Baker, M. J. "Bud" Aderton and E. Jack Brown all in their official capacities as members of the City Council of Lubbock, Texas, Defendants in CA-5-76-34A, in the United States District Court for the Northern District of Texas, Lubbock Division, the Honorable Halbert O. Woodward, Judge Presiding, respectfully submit this brief in appeal of the judgment of the District Court in favor of Plaintiffs-Appellees, Rev. Roy Jones, Gonzalo Garza, Eusebio

Morales, and Intervenor, Rose Wilson, individually and as representatives of the Blacks and Mexican-Americans of the City of Lubbock, Texas. This appeal arises as the second half of a bifurcated trial in the District Court below. The main case (CA-5-76-34 in the trial court) is currently on appeal in the United States Court of Appeals for the Fifth Circuit under Cause No. 83-1196 awaiting oral argument. Because of time factors involved in the appellate process, the Trial Court separated the issue of attorneys fees for the plaintiffs into a separate cause of action under the same style, but with the District Court Cause No. CA-5-76-34A. This appeal is from the judgment awarding attorneys fees to plaintiffs' attorneys in the second cause of action. Upon completion and filing of all briefs in Cause No. 83-1502, Defendants-Appellants ask the Fifth Circuit to recombine Cause No. 83-1196 and Cause No. 1502 into one suit and schedule argument for the two cases at the same time.[1]

STATEMENT OF THE ISSUES

1. Whether Plaintiffs-Appellees were the "prevailing parties" at all stages of the litigation entitling them to an award of attorneys fees for both trials held in this case or only for the second trial.

2. Whether the amount of the award of attorneys' fees to Plaintiffs-Appellees in this case is excessive and an abuse of discretion by the Trial Court because improper standards were used,

[1] The defendants have changed since the bifurcation order was entered by the Trial Court. Bill McAlister, Mayor, died unexpectedly, and Alan Henry was elected mayor in a special election held August 13, 1983. A special election to fill the vacancy on the council created by the movement of Alan Henry to the mayor's job has been scheduled for November 8, 1983.

and duplication of effort was not properly discounted.

STATEMENT OF THE CASE

JURISDICTION

The Trial Court had jurisdiction of the main case (83-1196 in this Court) pursuant to the provisions of 42 U.S.C. §§ 1791, 1973, 1983, and 1988, 28 U.S.C. § 1343(3) and (4), and the Fifteenth Amendment to the United States Constitution. This appeal from an award of attorneys' fees comes to the Court under 42 U.S.C. § 1973l(e) and 42 U.S.C. § 1988.

PROCEEDINGS AND DISPOSITION IN COURT BELOW

The original suit was filed on April 1, 1976, and certified as a class action under Rule 23(b)(2), F.R.C.P. on June 1, 1977. The suit was brought on behalf of all Black and Mexican-American citizens in the City of Lubbock, Texas, to challenge the at-large election system used to select the Mayor and City Council. This appeal represents the second appearance of the case before the Fifth Circuit.

After the first trial the District Court dismissed the action on the merits and entered judgment in favor of the Defendants City of Lubbock, et al. Appeal was perfected by Plaintiffs on July 6, 1979. The Fifth Circuit, without ruling on the merits, issued an Opinion, withdrew it, and then reversed and remanded for "reconsideration in light of the U.S. Supreme Court's intervening decision in City of Mobile v. Bolden, 446 U.S. 55(1980)," and with instructions to "give appropriate consideration to the teachings contained in Rogers v. Lodge, 102 S.Ct. 3277 (1982)." Jones v. Lubbock, 682 F.2d 504 (5th Cir. 1982).

On June 29, 1982, Congress amended Section 2 of the Voting Rights Act of 1965, 42. U.S.C. §§ 1973 et seq. Although the amendment was not mentioned in the Fifth Circuit remand, Plaintiffs were allowed to amend their complaint and incorporate allegations of Section 2 violations. The District Court apparently concluded that the "reconsideration" should take the form of a second complete trial on the merits. The second trial began on January 10, 1983, and lasted four days. To avoid duplication, the entire record from the first trial was introduced by stipulation for consideration along with new evidence and stipulations admitted for the first time at the second trial. In a Memorandum Opinion dated March 4, 1983, the Trial Court reversed the position taken in the first trial, held that the at-large system violated Section 2 of the Voting Rights Act and the Fifteenth Amendment to the Constitution, and entered judgment against the Defendants. As a part of the judgment, the Trial Court imposed a new election system which established six single-member districts with a Mayor elected at-large.

Defendants perfected their appeal from the judgment of the Trial Court on April 1, 1983. At the time the appeal was perfected, no arguments had been presented and no decision had been made regarding an award of attorneys' fees to the Plaintiff-Appellees. Rather than interfere with the appellate schedule for the main case or force a hurried decision on the award, the Trial Court entered an Order of Bifurcation on April 1, 1983, separating the attorneys' fee issue from the rest of the case and renumbering the new case as CA-5-76-34A. Judgment awarding attorneys' fees was entered by the Trial Court on July 7, 1983, and Appellants perfected this appeal from that judgment on July 18, 1983.

STATEMENT OF FACTS

This appeal arises out of a voting rights case first tried in December, 1978, and January, 1979. After judgment was entered on behalf of the Defendants (The City of Lubbock, et al), Plaintiffs perfected their appeal. Without ruling on the merits, the Fifth Circuit reversed and remanded the case for reconsideration in light of Mobile v. Bolden, 446 U.S. 55 (1980) and Rogers v. Lodge, ____U.S.____, 102 S.Ct. 3277 (1982).

Prior to the second trial, Plaintiffs were allowed to amend their pleadings to incorporate the 1982 amendments to Section 2 of the Voting Rights Act. Following the second trial on the merits, the Trial Court reversed the prior decision and entered judgment for Plaintiffs on March 4, 1983. The Defendants-Appellants perfected their appeal from that judgment on April 1, 1983. On the same date, by stipulation and agreement, the Trial Court entered an Order of Bifurcation which separated the issues regarding attorneys' fees from the main voting rights case. (R.I, p. 1) The parties did not want to delay the appeal of the main case while the evidence was developed and arguments presented to the Trial Court on attorneys' fees. The bifurcation was necessary to allow the main case to enter the appellate process while the attorneys' fee argument was being developed before Judge Woodward.

Although requested by both parties, the Trial Court refused to allow any oral hearing on attorneys' fees. [R.II, p. 68(3)] and required the Defendants-Appellants to respond to Plaintiffs requests by written brief. [R.II, 68 (16-17)] Evidence regarding

hours spent on the case and qualifications of counsel for Plaintiffs was all submitted by affidavit (R.I, pp. 3-38) with no opportunity for cross-examination of the affiants. [R.II, p. 68(1)] Following consideration of the affidavits, stipulations and briefs, the Trial Court entered judgment for Plaintiffs-Appellees and awarded attorneys' fees in specific individual amounts to each of the eight attorneys who had represented the Plaintiffs. (R.I, p. 63) The Judgment was accompanied by a Memorandum Opinion and Order setting out the Court's method of arriving at the final amounts awarded (R.I, pp. 51-62), and both the Judgment and Memorandum were dated July 6, 1983. Appellants perfected this appeal from the Judgment on July 18, 1983. The award for attorneys' fees totaled $186,961.75.

SUMMARY OF ARGUMENT

It is apparent that if Appellees prevail on appeal in the main case now before this Court as Cause No. 83-1196, an award of attorneys' fees in some amount will be inevitable under the provisions of 42 U.S.C. § 1973*l*(e) and/or § 1988 and existing case law. It is equally obvious that Appellees are not entitled to any attorneys' fees under the law if the City of Lubbock prevails on appeal. Because of the statutory link between the two appeals, it is necessary to combine the two portions of the case back into one so that the results of the main appeal can be applied directly to the issue of attorneys' fees. In order to present arguments on the issue of the amount of attorneys' fees, if awarded, Appellants assume for purposes of argument only that Appellees will prevail in the main case. No waiver of any argument against the payment of attorneys' fees in the event Appellants prevail on

the main case is intended, and Appellants would specifically object to such payment under those circumstances.

First, Appellees were not the prevailing parties at the first trial on any issue before the Court, and the reversal on appeal resulted from intervening actions by the United States Supreme Court. Also, subsequent to the reversal, Appellees were allowed to amend their pleadings before the second trial to incorporate amendments to Section 2 of the Voting Rights Act which were made by Congress while the case was on appeal.

The Trial Court's erroneous interpretation of the amended Section 2, together with the introduction of limited additional evidence, created the victory for the Appellees at the second trial, not anything done at the first trial or on appeal. The Trial Court changed positions because of the apparent change in the statutory test to be applied, not because the original decision was held to be incorrect under the original standard used at the first trial.

Appellants' second argument deals with the application of the standards and the number of hours credited and paid by the Trial Court. Appellees were represented at various stages of the two trials by as many as eight attorneys. When new attorneys were added to the list, none of the others dropped out. If the trial fee requested by Appellees had been allowed by the Trial Court, each day of trial would have accrued attorneys fees of $6,000 or more. Fifteen and one half days were necessary for the two trials. There was nothing so complicated about the case that six attorneys were required in the courtroom at one time during

the trial. The Trial Court expressed concern about the likelihood of duplication of effort and reduced the fees awarded somewhat on that basis. However, the reduction was not sufficient and the fees awarded are too high, even if appellants prevail on appeal. The standard applied in determining the amount of the fees was incorrect, and the award of $186,961.75 is an abuse of discretion.

ARGUMENT

THE TRIAL COURT ABUSED HIS DISCRETION IN AWARDING EXCESSIVE AND UNWARRANTED ATTORNEY'S FEES TO PLAINTIFFS

I. Appellees Were Not the Prevailing Parties at All Stages of of the Case Below.

Plaintiffs-Appellees in this suit ask for an award of attorneys' fees under either 42 U.S.C. § 1973ℓ(e) or 42 U.S.C. § 1988. To qualify for an award, a party must have "prevailed on an important matter in the cause of litigation, even [though] he ultimately does not prevail on all issues." Panior v. Iberville Parish School Bd, 543 F.2d 1117, 1119 n. 2 (5th Cir. 1976) (quoting the legislative history of 42 U.S.C. § 1973ℓ(e)). "The proper focus is whether the plaintiff has been successful on the central issue. . .as exhibited by the fact that he has acquired the primary relief sought." Iranian Students Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979).

> It is clear that if the plaintiffs had ultimately lost on the merits that their three examples of procedural success would not entitle them to an award of attorneys' fees. . . In order to recover attorneys' fees and costs, plaintiffs must show at least some success on the merits. Bly v. McLeod, 605 F.2d 134, 137 (4th Cir. 1979).

If Appellees are ultimately unsuccessful on the main case,

they are not entitled to an award of attorneys' fees in any amount. As previously indicated, Appellants' arguments here are presented for consideration only in the event that Appellees do prevail on appeal in Cause No. 83-1196 before this Court.

In this case, Appellees ask for attorneys' fees from the inception of the suit in 1977. Consequently, they ask for fees for work done by counsel in connection with the first trial and first appeal of the case, as well as the second trial. Appellants would respectfully show that appellees did not prevail on any important matter raised by their pleadings prior to their amended complaint filed after the case was remanded by the Fifth Circuit.

> If, as in this case, there is initially a genuine dispute as to whether the plaintiff fee claimant is a "prevailing party," inquiry on that question might well proceed first. This inquiry is properly a pragmatic one of both fact and law that will ordinarily range outside the merits of the basic controversy. Its initial focus might well be on establishing the precise factual/legal condition that the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden. With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition. Bonnes v. Long, 599 F.2d 1316, 1319 (4th Cir. 1979).

A. Trial

Appellees filed this suit in 1977, before the 1982 amendment to Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The "precise factual/legal condition" sought to be changed involved alleged violations of Section 2, as then in effect, and of the Fourteenth and Fifteenth Amendments to the U.S. Constitution resulting from the origination and maintenance of the at-large

system of electing the City Council in Lubbock, Texas. At the conclusion of the first trial, the Court entered a take-nothing judgment against plaintiffs on all issues and ordered that the defendants recover their costs from the plaintiffs.

We submit that the legal standard applied by the Court, as reflected in the first opinion, was correct under the law in existence at the time of the opinion. While the opinion did not explicitly recognize that the plaintiffs had to prove discriminatory intent in order to prevail on their constitutional claims, nevertheless, the Court specifically found that the plaintiffs had failed to prove any discriminatory intent in either the inception or maintenance of Lubbock's election system. Jones v. City of Lubbock, 682 F.2d 504 (5th Cir. 1982). (Jones I). In addition, the Court cited Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), cert. denied 446 U.S. 951 (1980), in the original opinion showing that the Trial Court was aware of the Fifth Circuit's requirement of actual discriminatory intent to establish a violation of the Fourteenth and Fifteenth Amendments. Since Nevett was decided and published prior to the first trial in this case, the appellees should have been aware of the requirements and adjusted their proof accordingly. They did not.

The Trial Court also made a thorough and correct application of the standards taken from White v. Regester, 412 U.S. 755 (1973) and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), aff'd on other grounds sub. nom East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). These were the standards which the 1982 amendment to Section 2 of the Voting Rights Act was intended to

codify. Applying the White/Zimmer standard, the Court concluded that ". . .There is no barrier to the minority groups in voting or otherwise participating in the election process, . . .[and] there is no real and valid support for a finding that the effect of past discrimination precludes minorities from participation in the election system." Jones I at 36.

In summary, after a full and fair opportunity to present their allegations and evidence in support thereof, the appellees did not prevail on any important matter litigated at the first trial. Furthermore, appellees' counsel failed to offer any evidence to show discriminatory intent, although the first trial was after the Fifth Circuit decided Nevett v. Sides, supra.

B. APPEAL

Appellees' counsel did perfect an appeal from the first judgment. However, that appeal did not result in a ruling by the Fifth Circuit that Lubbock's election system was unconstitutional or in any manner unlawful. Nor did it result in any ruling that the Trial Court had applied an erroneous standard. Rather, the reversal and remand was for "reconsideration in light of the Supreme Court's intervening decision in City of Mobile v. Bolden, . . .[and] to give appropriate consideration to the teachings contained in Rogers v. Lodge." Jones v. Lubbock, 682 F.2d 504 (5th Cir. 1982).

Bolden and Rogers made it clear that discriminatory intent is required to establish a constitutional violation, and Rogers approved the Fifth Circuit's decision in Nevett v. Sides. Neither case was decided under Section 2 of the Voting Rights Act, and the

Fifth Circuit made absolutely no mention of the 1982 amendment to Section 2 when it remanded this case to the trial court. Plaintiffs' counsel did not obtain a ruling from the Fifth Circuit as to whether the 1982 amendment required a reversal and remand, although the amendment had been enacted and was effective before the Fifth Circuit issued its mandate.

In short, the plaintiffs were not "prevailing parties" with respect to any "important matter" at the time this case was remanded by the Fifth Circuit. Plaintiffs obtained no finding that Lubbock's election system was anything other than legitimate. Because the Court's second judgment appears to be based entirely on the effect of the 1982 amendment to Section 2 of the Voting Rights Act, a ground which was not specifically asserted for relief by the plaintiffs until after the case was remanded, the Fifth Circuit's decision in Jones I effectively closed the "course of litigation" begun by the plaintiffs in 1977.

Keeping in mind the "precise factual/legal condition" as a benchmark, it can be readily seen that the "plaintiff fee claimant[s'] efforts" did not contribute in any "significant way" so as to involve an "actual conferral of benefit or relief from burden when measured against the benchmark condition" in either the first trial or the initial appeal of this case. See Bonnes v. Long, supra; Bly v. McLeod, 605 F.2d 134-139 (4th Cir. 1979).

Furthermore, the United States Supreme Court, in the recent case of Hensley v. Eckerhart, ____U.S.____, 103 S.Ct. 1933 (1983), held that "The extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees

under 42 U.S.C. § 1988." The Court went on to say that while it may be a useful starting point,

> [if]. . .a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. . . That the plaintiff is [ultimately] a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved. . . A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole. Id at 1941-1943.

"[T]he court must consider the relationship of the claims that resulted in judgment with the claims that were rejected and the contribution, if any, made to success by the investigation and prosecution of the entire case." Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981).

Moreover, even if the Fifth Circuit's decision did not effect a break in the "course" of this litigation, plaintiffs' counsel should not be awarded a fee for the first round. Plaintiffs' counsel, though aware that the Fifth Circuit held in Nevett v. Sides that a showing of discriminatory intent is required to establish a violation of the constitution, did not offer "any evidence" of discriminatory intent at the first trial. Nor did they obtain a ruling, from either the trial court or the Fifth Circuit, that Lubbock's election system violates either the constitution or the Voting Rights Act. Finally, plaintiffs' counsel did not urge the 1982 amendment to Section 2 of the Voting Rights Act as a basis for reversing and remanding this case. Indeed, it was the Fifth Circuit's sua sponte motion for rehearing the produced the mandate reversing and remanding the case. In short, plaintiffs'

counsel did not fulfill their role as "private attorney general" until after the case was remanded, if they did then, and therefore, they should not be awarded attorney fees for any work performed prior to the remand. See Panior v. Iberville Parish School Bd, 543 F.2d 1117 (5th Cir. 1976).

II. The Trial Court Erred in Applying the Standards Governing Attorney Fee Awards

In determining the amount of any fee to be awarded in this litigation, the Court obviously must consider the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). However, there are other factors to be considered as well. While the purpose of providing adequate fees in civil rights cases is to attract competent counsel for those who might not otherwise be properly represented, it was not the purpose of Congress to provide windfalls to attorneys involved in civil rights litigation. Hensley v. Eckerhart, ____U.S.____, 103 S.Ct. 1933 (1983); Senate Report No. 94-1011, p. 6 (1976).

A useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate. However, the Supreme Court, in elucidating some of the Johnson factors, explicitly listed several circumstances in which it would be appropriate to reduce the recovery below this initial amount. Hours which are "excessive, redundant, or otherwise unnecessary" should be excluded from a fee request. Hensley v. Eckerhart, at 1939-1940. Duplication of efforts should be closely scrutinized. Johnson v. Georgia Highway Express, Inc., supra at 717. "Cases

may be overstaffed, and the skill and experience of lawyers varies widely." Hensley, supra at 1939. The district court has discretion in determining the amount of a fee award, and there is "no precise rule or formula for making these determinations." The trial court must still determine the amount of the fee on the facts of each case, and the "product of reasonable hours times a reasonable rate does not end the inquiry." Hensley at 1940.

From the Appellants' perspective in the case now before the Court, the word "reasonable" is the key. The number of hours must be reasonable in relation to the amount and difficulty of the work performed. Appellees have the burden of proof in all areas of their claim. Appellants submit that the proof is deficient, and the claims and award are excessive in several respects. An application of the Johnson factors to the facts of this case reveals that the fee award is far out of line with the reasonableness standard required by statute and appellate decisions. While no particular Johnson factor should be stressed to the exclusion of others, Appellants wish to highlight certain specific areas for the Court.

Leaving aside for the moment consideration of the number of hours claimed, determination of the appropriate hourly and/or daily trial rate to be applied involves several important considerations. Among these are the customary fee for similar work in the community and the experience, reputation and ability of the attorneys involved.

From the beginning Appellants would point out to the Court that the Appellees themselves originally requested $80 per hour

for preparation and $750 per day trial fee after the first trial. They later increased their fee request to an across-the-board figure from beginning to end. The requested increases from $80 to $125 per hour and from $750 to $1,000 per trial day result in an increase in the first trial request of some $49,800. Nothing occurred after the first trial which would justify such an increase even assuming that the lower fees were justified.

With one exception the trial attorneys for the Appellees were young, newly licensed and relatively inexperienced at the time of the first trial. By comparison outside counsel for the Appellants during the first trial, although far more experienced than plaintiffs' counsel, charged an hourly rate of $60 for less experienced counsel and $75 per hour for counsel with almost thirty years of experience and recognized skill in the courtroom. Appellants would submit to the Court that in the 1977-1979 period, few, if any, attorneys in Lubbock, Texas, were receiving more than $75 per hour, regardless of experience, and beginning attorneys or those with limited experience were receiving significantly less in private practice. Likewise, $750 per day trial fee was uncommon at that time for anyone.

The Trial Court obviously recognized the accuracy of Appellants' contentions when he set an hourly rate of $75 and a trial fee of $600 per day in the Judgment.

Moving forward to the present time, a fee of $125 per hour and/or $1,000 per day per attorney is unreasonable for the second trial and related activites. In the present day marketplace in Lubbock, Texas, these are the types of fees commanded only by the

most skilled and experienced trial attorneys where all of the trial work is handled by one or two attorneys. Again, the Trial Court recognized the validity of Appellants' position by setting the award below the levels requested by the Appellees.

Appellants' contentions on appeal are twofold. First, there were too many attorneys representing the Appellees. In this case the Appellees were represented by five trial attorneys at the first trial and seven at the second trial. Participation in the trial by several was minimal. It is unfair to ask the taxpayers of the City of Lubbock to pay Appellees $5,000 to $7,000 per day for trial fees, or even $3,000 to $3,600 as awarded by the Court. There was no rational requisite benefit to the Appellees, and they were overrepresented at trial. The Fifth Circuit has long recognized the propriety of paying less to lawyers who did not serve as lead counsel at trial, even where only two lawyers were involved on the side of the plaintiffs. Neely v. City of Grenada, 624 F.2d 547, 551 n. 4 (5th Cir. 1980).

There are three distinct Plaintiffs or groups of Plaintiffs involved in this case. While the Trial Court found that the various Plaintiffs did not necessarily have exactly the same needs or interests, the presentation of evidence and the strategy for trying the case would not have varied significantly from one to the other. In point of fact, the attorneys all worked together as a group for both trials. One lead counsel for each group should have been sufficient. To pay all seven attorneys the same rate for trial, regardless of their participation and direct involvement goes against the principles set forth in Neely v. Grenada, supra.

Another factor to be considered is the type of work being performed by the attorney requesting the fee. Work done by an attorney which is not of a strictly "legal nature" should not be compensated at the same rate as time spent on activities requiring the training and expertise of an attorney. In Neely v. City of Grenada, supra at 552, the Fifth Circuit approved the district court's award of $30 per hour for such work, even though the trial fee and legal preparation was compensated at a higher rate.

Much of the time submitted in the affidavits of Appellees' attorneys in this case involves searching of newspaper records, deed records, and city council minutes. Most of this work could have been done by a non-lawyer, was generally unproductive in terms of the litigation, and should be compensated, if at all, at a lower rate. The information actually used at trial came largely from stipulations prepared by employees of the defendant City of Lubbock from municipal records. The two out-of-town attorneys submitted requests which included 75 hours of travel time. In spite of assurances from Appellees' counsel in the affidavits filed, Appellants contend that there must have been at least some unnecessary duplication of effort in the areas of research and document preparation with all eight lawyers having to study the same law and cases. It is appropriate for the Court to discount hours for duplication. Neely, supra at 552.

The Appellees have made much about the "undesirability" of the case and requested additional compensation for that reason. In support of their position, Appellees have submitted numerous newspaper editorials. A careful reading of those editorials,

however, will show that they are not vindictive in nature and deal with disagreement over the proper method of electing the city council. They do not make personal attacks on the attorneys involved. The two attorneys from out-of-town claim to be specialists in this type litigation. Their appearance in this case would tend to promote rather than damage their employment opportunities in future litigation. Two others were full-time faculty members at the Texas Tech law school. The "undesirability" factor would certainly not be a factor in their job status or in activities outside their regular employment.

Only the four local private attorneys were potentially affected by any adverse publicity, and it is at least debatable whether they were hurt or helped in their private practice by participation in this case. Appellants would also point out to the Court that much of the publicity in this case resulted from meetings and press conferences called by plaintiffs' attorneys and from press releases which they submitted. It was a situation mostly of their own making.

Finally, Appellants feel that the nature of this case is different from most of the others which have been litigated in the past. There was no finding of present discrimination on the part of any city officials or in the maintenance of the present election system. The Court specifically found a real responsiveness on the part of the city and its elected officials to the particularized needs of the minority residents of Lubbock. Under the circumstances, the attorneys' fees awarded by the Court should not be increased in any way as a punitive measure against the City of

Lubbock. The payments, if any, must come from the taxpayers, including the Appellees themselves. The fees should be reasonable in amount and scope in relationship to the facts of this case.

CONCLUSION

For the reasons stated, the United States Court of Appeals for the Fifth Circuit should reverse the Judgment below, and as then may appear appropriate, render Judgment on behalf of Appellants, or remand for further consideration under the proper standards of law, with all costs taxed against the Appellees.

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September 23, 1983

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true copies of the foregoing Brief for Appellants were served upon William L. Garrett, Attorney at Law, 8300 Douglas, Suite 800, Dallas, Texas 75225, at the request and as designated by Appellees' attorneys, and one true copy each on the other counsel for Appellees, as hereafter named, by placing same in the United States Postal Service, postage prepaid and properly addressed, on this the 22nd day of September, 1983.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83-1502

THE CITY OF LUBBOCK, TEXAS, and the
Mayor and City Council thereof
BILL McALISTER, ALAN HENRY, JOAN BAKER,
M. J. "BUD" ADERTON and E. JACK BROWN,
all in their official capacities as
members of the City Council of Lubbock, Texas

Defendants-Appellants

VS.

REV. ROY JONES, GONZALO GARZA, EUSEBIO MORALES,
and Intervenor, ROSE WILSON, individually and
as Representatives respectively of the Black and
Mexican-American Voters of the City of Lubbock, Texas

Plaintiffs-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION
HONORABLE HALBERT O. WOODWARD, JUDGE PRESIDING

EXCERPTS FROM RECORD IN LIEU OF APPENDIX

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September 23, 1983

EXCERPTS FROM RECORD IN LIEU OF APPENDIX

NO. 83-1502

CITY OF LUBBOCK, TEXAS, ET AL VS. REV. ROY JONES, ET AL

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

LUBBOCK DIVISION

REV. ROY JONES, ET AL Plaintiffs	)	USDC NO. CA 5-76-34-A
V.	)	FIFTH CIRCUIT NO. 83-1502
THE CITY OF LUBBOCK, ET AL Defendants	)	

CLERK'S CERTIFICATE

I, NANCY HALL DOHERTY, Clerk of the United States District Court for the Northern District of Texas, Lubbock Division, do hereby certify that the attached instruments numbered from one through sixty-eight are the originals and/or certified copies of originals of all instruments filed and the docket sheet is a certified copy of all docket entries in the above styled and numbered cause.

GIVEN under my hand and seal of office at Lubbock, Texas, this 9th day of August, 1983.

NANCY HALL DOHERTY, Clerk

By: Linda Brookshire
Deputy Clerk

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PLAINTIFFS

REV. ROY JONES , ET AL

CLOSED 7-7-83

APPEAL- 7-18-83

Cross Appeal 7-27-83

DEFENDANTS

NON STATISTICAL

THE CITY OF LUBBOCK
THE MAYOR AND CITY COUNCIL OF SAID CITY,
BILL McALISTER, Mayor
ALAN HENRY, JOAN BAKER,
M. J. "BUD" ADERTON and
E. JACK BROWN, as members of
The City Council of the City of
Lubbock, Texas

Intervenor, ROSE WILSON

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

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Certified a true copy of instrument on file in ... District Court ...
By [signature] Deputy

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CHECK HERE CASE WAS ... IN ... THIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
	7/18/83	# 53067 ($70.00) Appeal Fee		JS-5	
	7/27/83	# 53086 ($70.00) Cross Appeal Fee		JS-6	

UNITED STATES DISTRICT COURT DOCKET

DATE	NR.	PROCEEDINGS
4/1/83	1	Filed ORDER OF BIFURCATION; ordering that all issues in the case concerning attorneys' fees to be awarded, if any, are bifurcated and separated from all other issues and such attorneys' -fees issue shall be litigated and tried under Civil Action No. CA 5-76-34A. Therefore, the court's judgment of 3/4/83 is the final judgment of this case on all issues and constitutes the final judgment for the purposes of any appeal that any party might perfect; copies to attorneys hand delivered to attorneys by Nancy Koenig; Law Clerk, in Judge Woodward's chambers.
12/83	3	Filed AFFIDAVIT OF LANE ARTHUR ON EXPENSES; cert. of serv.
4/14/83	6	Filed PLAINTFFS AND PLAINTIFF-INTERVENOR ATTORNEYS' TIME CHART; cert. of serv.
1/83	10	Filed AFFIDAVIT OF ATTORNEYS FEES (Attorney E. Warren Goss)
	17	Filed AFFIDAVIT OF Daniel H. Benson w/ attached copies of newspaper stories and editorials
	33	Filed AFFIDAVIT ON THE TIME EXPENDED BY CITY by Pltf-Intervenor Atty Lane Arthur
22/83	39	Filed DEFENDANTS' BRIEF IN OPPOSITION TO THE AWARDING OF ATTORNEYS' FEES TO ATTORNEYS FOR PLAINTIFFS; cert. of serv.
7/83	51	Filed MEMORANDUM OPINION AND ORDER; copies to counsel
	63	Filed JUDGMENT ordering that the plaintffs and intervenors recover attorneys' fees against the defts in the amount of $186,961.75 and such attorneys' fees are here assessed as costs against the defts; copies to counsel (signed by Judge Woodward 7/6/83) (Dkt'd 6/7/83)
18/83	65	Filed Defts' NOTICE OF APPEAL Mailed certified copy to Fifth Circuit w/ certified copy of docket sheet and transmittal letter; copy of letter and Notice of Appeal to attorneys of record
27/83	66	Filed Pltfs' & Intervenor's NOTICE OF CROSS APPEAL; cert. of serv. Mailed certified copy to Fifth Circuit w/ certified copy of docket sheet and transmittal letter; copy of letter and Notice of Cross Appeal to attorneys of record
8/9/83	68	Filed REPORTER'S TRANSCRIPT OF PROCEEDINGS(June 1, 1983)- 1 Vol. Mailed original record on appeal to Fifth Circuit (1 Vol w/ 1 Vol of Transcript)-w/ transmittal letter, Clerk's Certificate and certified copy of docket sheet; copy of letter, certificate and docket sheet to attorneys

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

REV. ROY JONES, ET AL	§	
	§	
VS.	§	CIVIL ACTION NO. 5-76-34
	§	
CITY OF LUBBOCK, TEXAS	§	

PROPOSED PRE-TRIAL ORDER

Following personal conferences by and between counsel for the parties in the above entitled and numbered cause, the following Proposed Pre-trial Order is submitted by the parties and has been jointly prepared by counsel for the parties.

1. The basis for jurisdiction is: 28 U.S.C. §§1331, 1343, 1344, 2201 and 2202, and 42 U.S.C. §§1971(d) and 1973j(f). There are no jurisdictional questions pending.
2. There are no pending motions.
3. The following claims, counterclaims, third party claims, cross claims, defenses, etc. have been filed:
   a. By the Plaintiffs and Plaintiff-Intervenors:
      (1) Plaintiffs and Intervenors allege in their complaint that the at-large/by-place (with majority rule and staggered terms requirements) method of elections used by Defendants results in a denial or abridgement of the right of Plaintiffs and Intervenors to vote on account of race or language minority status as set forth in Section 4(f)(2) of the Voting Rights Act of 1965,

as amended, and as a result, Black and Mexican-American citizens have less opportunity than Whites to participate in the political process and to elect candidates of their choice, all in violation of the rights of Plaintiffs secured by Section 2 of the Voting Rights Act of 1965, as amended, Pub. L. No. 97-205, 96 stat. 134 (1982).

(2) Plaintiffs and intervenors further allege in their complaint that the at-large/by-place (with majority rule and staggered terms requirements) method of elections has been adopted and maintained by Defendants for the discriminatory purpose of diluting, minimizing, and cancelling out Black and Mexican-American voting strength in violation of the rights of Plaintiffs secured by the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

b. By the Defendants:

(1) Defendants deny that the present election scheme and ordinances of the City of Lubbock, Texas, cause an unconstitutional dilution, cancellation, or minimization of force, effect, and voting strength of Plaintiffs and the classes represented by Plaintiffs, (the Black population of the City of Lubbock, Texas, and the Mexican-American population

of the City of Lubbock, Texas), or of the Plaintiff-Intervenor and the class represented by the Plaintiff-Intervenor (the Black population of the City of Lubbock, Texas).

(2) Defendants deny that the election system of the City of Lubbock, Texas, violates the XIV and/or XV Amendments to the Constitution of the United States, and the Defendants further deny that the election system violates Section 2 of the Voting Rights Act as amended.

(3) Defendants further deny that Plaintiffs, Plaintiff-Intervenor, and the classes represented by them respectively as set forth above are denied membership on the City Council or the opportunity to participate effectively in the political process that leads to the election to the City Council by reason of the election system of the City of Lubbock, Texas.

(4) Defendants deny that by reason of the election system of the City of Lubbock, the Plaintiffs, Plaintiff-Intervenor, and the classes they represent respectively, are deprived of seats on the City Council in proportion to their voting potential and deny that their voting potential is unconstitutionally diluted or cancelled by the present election scheme. Defendants deny that the present at-large election system unconstitutionally prevents

Plaintiffs, Plaintiff-Intervenor, and the classes they represent respectively, from ever electing any member of their minority groups (Black persons and Mexican-American persons) to the Lubbock City Council, and deny that there is a requirement of obtaining a majority of the White votes of the population of the City of Lubbock in order to be elected to the membership on the City Council.

(5) Defendants deny that the representation afforded the Plaintiffs, Plaintiff-Intervenor, and the classes they represent respectively, by members of the Lubbock City Council is constitutionally inadequate. Defendants deny that such representation has ever been constitutionally inadequate, and deny that such representation will be constitutionally inadequate at any time in the future as a result of the present election scheme.

(6) Defendants further deny that the present election scheme is arbitrary and capricious and deny that such scheme completely shuts out Blacks and Mexican-Americans from having a role in the governing body under which they live in Lubbock, Texas.

(7) Defendants deny that the right to vote is rendered meaningless for all practical purposes by

the election scheme now in effect. Defendants further deny that Plaintiff, Plaintiff-Intervenor, and the classes they represent respectively have no remedy other than this court to correct any lack of representation on the City Council of Lubbock, Texas, assuming for the sake of argument only that such lack of representation exists, which assumption Defendants specifically deny.

(8) Defendants deny that the voting system now in effect in the City of Lubbock, Texas, causes any geographic area in which Blacks or Mexican-Americans live in the City of Lubbock, Texas, and deny that the existence of any segregated geographic area in the City of Lubbock prevents residents of such areas from moving to other areas of the City of Lubbock.

(9) Defendants deny that Blacks and Mexican-Americans have, as a result of the voting system now in effect in the City of Lubbock, suffered from the results and effects of invidious discrimination and treatment in the fields of education, employment, health, politics, economics, and other similar areas of life in the City of Lubbock, Texas.

(10) Defendants further deny all other evidentiary allegations by Plaintiff and Plaintiff-Inter-

venor not expressly admitted within the stipulations and exhibits thereto on file in this cause.

(11) Defendants deny that the election system of the City of Lubbock was created or is being maintainted for a racially discriminatory purpose.

4. An itemized list of all stipulations which have been agreed upon by the parties will be filed separately when completed. Because of its length such list is not set forth at this point in the proposed pre-trial order, but is hereby incorporated by reference and made a part of this proposed pre-trial order. There are no admissions of law, and all agreed upon facts are set forth in the stipulations of the parties.

5. The following is a concise summary of the ultimate facts as claimed by:

a. Plaintiff and Plaintiff-Intervenors:

(1) This is a class action on behalf of all Mexican-American and Black citizens in the City of Lubbock.

(2) The City of Lubbock is a home rule city governed by a Mayor and four city councilpersons, all of whom are elected at-large by place in city-wide voting.

(3) Whites constitute a majority of the total population, voting age population, and registered voters of the City of Lubbock.

(4) The at-large by-place with number posts, staggered terms election system for the City of Lubbock results in the exclusion of Mexican-American and Black representation in city government, denies Mexican-American and Black voters the opportunity to elect municipal officials of their choice, and denies Mexican-American and Black candidates the opportunity to win election in municipal elections.

(5) Voting in Lubbock is racially polarized with voters generally voting along racial/ethnic lines; minorities voting for minority candidates and nonminorities voting for nonminority candidates. Polarized voting in Lubbock has thus denied the representation of minorities in the Lubbock City Council.

(6) The City of Lubbock municipal elections requires a majority vote to win election to the City Council.

(7) The State of Texas and the City of Lubbock have a long history of racial discrimination against Mexican-American and Black citizens which has denied and continues to deny Mexican-American and Black citizens in Lubbock equal access to the political and electoral processes.

(8) The Mexican-American and Black population of Lubbock is sufficiently numerous and sufficiently concentrated in particular areas of

the City that if members of the City Council were elected from single member districts, one or two districts would be majority minority in population.

(9) At-large/by-place voting in Lubbock perpetuates a past intentional and purposeful discriminatory denial to Mexican-American and Black citizens of equal access to the political process.

(10) The State of Texas and Lubbock County has in the past used at-large election or multimember district systems to dilute the voting strength of minorities.

(11) Because of long standing social, legal, economic, political, educational and other widespread and prevalent restrictions, biases and prejudices, minorities in the City of Lubbock have historically suffered and continue to suffer from the results and effects of discrimination in all areas of life. As a result, a major portion of the minorities in Lubbock reside in neighborhoods with substandard housing, high unemployment, lower educational achievement, etc.

(12) No minority has ever been elected to the Lubbock City Council.

a. Defendants:

(1) Whether or not the at-large system here in question prevents the Black and Mexican-American

citizens of the City of Lubbock from enjoying full access to the processes of nomination and election, including,

(2) Whether or not the Black or Mexican-American citizens of the City of Lubbock are denied the opportunity for participation in the candidate selection process; and,

(3) Whether or not the elected officials of the City of Lubbock are responsive to the particular concerns of the Black or Mexican-American citizens of the City of Lubbock; and,

(4) Whether or not the continuing effects of past discrimination, if any, effects the ability of the Black or Mexican-American citizens of the City of Lubbock in their participation in the political process; and,

(5) Whether or not the policy underlying the preference for multimember or at-large voting was designed or is used with a motive of effecting the political participation of the Black or Mexican-American citizens of the City of Lubbock; and,

(6) Whether or not any structural devices exist that could enhance whatever dilution potential as may be found; and,

(7) All such facts being viewed in the aggregate.

6. The following findings of fact are proposed:

a. By the Plaintiffs and Plaintiff-Intervenors:

(1) The State of Texas, and the City of Lubbock have a history of official discrimination against minorities which has denied and continues to deny Lubbock's minority citizens equal access to the political process.

(2) Racial bloc voting generally prevails in Lubbock elections; minority voters generally vote for minority candidates and nonminority voters generally vote for nonminority candidates.

(3) The minority community of Lubbock has long suffered from and continues to suffer from, the results and effects of invidious discrimination and treatment in education, employment, economics, politics and other fields.

(4) The State of Texas and Lubbock has in the past used multimember election districts to dilute the voting strength of minorities.

(5) There has existed in Lubbock a slating process that denied minorities access to that process.

(6) There has never been a minority elected to public office for the City of Lubbock.

(7) The City of Lubbock has no compelling or rational interest in maintaining the at-large election system.

(8) Besides the at-large election system, the City of Lubbock also employs the following devices in its elections: staggered terms, numbered electoral posts, majority vote requirement and elected official need not reside in any

particular geographic area of the City.

(9) The majority vote requirement has the effect of submerging the will of the minority and thus denies minorities access to the political system.

(10) The numbered post requirement enhances the minorities lack of access because it prevents a cohesive political group from concentrating on a single candidate.

(11) Because Lubbock has no residency requirement, the lack of access is enhanced because all candidates could reside in nonminority neighborhoods.

(12) The staggered terms requirement enhances the lack of access by reducing the number of available election positions in any one election and thus reduces the opportunity for a cohesive political group to concentrate on a single candidate.

(13) The Lubbock area has a history of maintaining a "dual" school system--a segregated school system.

(14) The State of Texas and the Lubbock area has a history of imposing a poll tax system.

(15) Minorities in Lubbock register to vote and turn out to vote in lower rates than nonminorities.

(16) The minority community in the City of Lubbock is concentrated in a certain geographic area of the City.

(17) It is possible to draw single member districts for the City of Lubbock.

(18) It has been demonstrated that if single member districts existed in past elections, minorities would have been elected to the Lubbock City Council.

b. By the Defendants:

(See separate document of suggested findings of fact and conclusions of law).

7. The following conclusions of law are proposed:

a. By the Plaintiffs and Plaintiff-Intervenors:

(1) This Court has jurisdiction of this action pursuant to 28 U.S.C. §§1331, 1343, and 2201 and 42 U.S.C. §§1971(d) and 1973j(f).

(2) The present system of at-large city-wide voting for the members of the Lubbock City Council results in the dilution and abridgement of the minority voting strength and thus denies minorities the right to meaningful participation in the municipal election process in violation of Section 2 of the Voting Rights Act of 1965, as amended, Pub. L. No. 97-205, §3, 96 Stat. 134 (1982).

(3) The present system of at-large city-wide voting for members of the Lubbock City Council was conceived and/or is being unconstitutionally maintained for the invidious purposes of diluting the voting strength of the minority community in violation of Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

b. By the Defendants:

(See separate document containing proposed conclusions of law).

8. The parties estimate that trial of this case will require four to five days.

9. Additional materials which are expected to aid in the disposition of the case are contained in the numerous and lengthy stipulations entered into by the parties and will be filed separately. Counsel for the parties will designate and exchange exhibit and witness lists prior to trial.

10. Certificate of Counsel: This is to certify that all attorneys have personally conferred prior to the date of the submission of this proposed pre-trial order, that the stipulations, to be filed, have been agreed upon, and that this proposed pre-trial order is submitted to the Court for entry.

Respectfully Submitted,

Attorneys for Plaintiffs:

Albert Perez

Tomas Garza

Mark Hall

William L. Garrett (?1.R.?)

Rolando L. Rios

Attorneys for Defendants:

James P. Brewster

Travis D. Shelton

Dale Jones

Attorneys for Plaintiff-Intervenors:

Arthur & Arthur

Lane Arthur

Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

REV. ROY JONES, et al.,
Plaintiffs,
v.
CITY OF LUBBOCK, et al.,
Defendants.

CIVIL ACTION NO. CA-5-76-34

ORDER OF BIFURCATION

The above-entitled and numbered cause has been tried and a decision has been reached and the final judgment has been entered by the court on March 4, 1983, which judgment adjudicated all of the contested issues between the parties except the questions concerning attorneys' fees to be allowed, if any, to the prevailing party.

By agreement of counsel, and consent of the court, it was stipulated that the question of attorneys' fees,including the amount and reasonableness thereof, would be determined separate and apart from the trial of the issues concerning the merits of the lawsuit. It is contemplated that attorneys' fees would be determined at an appropriate time after the judgment in the case had become final.

Therefore, pursuant to the stipulation and agreement of the parties, it is here ordered that all issues in the case concerning attorneys' fees to be awarded, if any, are bifurcated and separated from all other issues and such attorneys'-fees issue shall be litigated and tried under Civil Action No. CA-5-76-34A.

Therefore, the court's judgment of March 4, 1983 is the final judgment of this case on all issues and constitutes the final judgment for the purposes of any appeal that any party might perfect.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 1st day of April, 1983.

Halbert O. Woodward

HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

Rec. 7-8-83

City Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL - 7 1983
NANCY HALL DOHERTY, CLERK
By _____ Deputy

REV. ROY JONES, et al.,)
)
Plaintiffs,)
)
v.) CIVIL ACTION NO. CA-5-76-34A
)
CITY OF LUBBOCK, et al.,)
)
Defendants.)

JUDGMENT

The above-entitled and numbered cause concerning the assessment of attorneys' fees as costs in favor of the plaintiffs and intervenors against the defendants has been heard and the court has determined by memorandum opinion of even date herewith that attorneys' fees are to be assessed against the defendants.

It is accordingly Ordered, Adjudged and Decreed that the plaintiffs and intervenors recover attorneys' fees against the defendants in the amount of $186,961.75 and such attorneys' fees are here assessed as costs against the defendants. The recovery shall be allowed to the attorneys in the following amounts:

Lane Arthur	$ 54,605.00
Mark Hall	23,702.50
Tomas Garza	26,220.50
Albert Perez	24,892.50
Dan Benson	15,202.50
Robert Davidow	7,623.75
Bill Garrett	14,780.00
Rolando Rios	15,435.00
West Texas Legal Services	4,500.00
TOTAL	$186,961.75.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 6th day of July, 1983.

HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL - 7 1983
NANCY HALL DOHERTY, CLERK
By _____ Deputy

REV. ROY JONES, et al.,)
)
Plaintiffs,)
)
v.) CIVIL ACTION NO. CA 5-76-34-A
)
CITY OF LUBBOCK, et al.,)
)
Defendants.)

MEMORANDUM OPINION AND ORDER

This voting rights case was tried first on December 11, 1978, and following dates, for a total of twelve days. Pursuant to an appeal from a judgment entered by this court denying relief to the plaintiffs in the first trial, the United States Court of Appeals for the Fifth Circuit reversed and remanded this case to this court for "reconsideration in light of the Supreme Court's intervening decision in City of Mobile v. Bolden,[1/] . . . [and] to give appropriate consideration to the teachings contained in Rogers v. Lodge.[2/] Jones v. Lubbock, 682 F.2d 504 (5th Cir. 1982). Before the case was remanded, the Congress of the United States passed an Extension of the Voting Rights Act in June of 1982 which presented additional issues to be determined in this suit.

In this posture the court conducted a second trial on the 10th, 11th, 12th, and 13th days of January, 1983. Final judgment on behalf of the plaintiffs was entered on the 4th day of March, 1983. Subsequently, this court entered an order on April 1, 1983, pursuant to a stipulation and agreement by the parties, bifurcating and separating from all other

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1/ 446 U.S. 55 (1980).

2/ _____ U.S. _____ (1982) (50 U.S.L.W. 5041, June 29, 1982).

issues in the case the question of the award of attorneys' fees to the prevailing parties.

It is the purpose of this memorandum to award and set the attorneys' fees which the court has determined to be proper, but any costs, such as costs of transcripts, depositions, etc., will be assessed in the manner provided by the Federal Rules of Civil Procedure and not by this order.

Pursuant to 42 U.S.C. § 1973l(e), the prevailing party may, in the court's discretion, be awarded a reasonable attorney's fee. Although this statute provides that the award of attorney's fees is within the court's discretion, successful plaintiffs in voting rights cases are generally awarded and allowed the recovery of their attorneys' fees. However, the amount is to be determined by the court. In this circuit, this amount is to be determined after a consideration of the factors set forth in Johnson v. Georgia Highway Express, 488 F.2d 614 (5th Cir. 1974).

Each plaintiff's attorney involved in this litigation has submitted a sworn affidavit as to the time expended and the charges therefor and has asked for reimbursement in the amounts set forth in the affidavits. The court has considered these affidavits, as well as the briefs and positions of all of the parties, and makes the following findings of fact and conclusions as to the proper amount of attorneys' fees.

First of all, the final judgment entered by this court granting the relief sought by the plaintiffs clearly establishes that the plaintiffs are the prevailing parties and they are entitled to recover attorneys' fees. Defendants strenuously argue that the initial judgment of this court was reversed and remanded for additional consideration, as indicated above, and that plaintiffs should not be determined as the prevailing

parties in the first trial in 1978-79. This position is not tenable as this court considered in its final judgment, not only the record in the second trial, but considered all of the record in the first trial. The plaintiffs were not only successful in having this case remanded to this court for further consideration after the first trial, but they, on the basis of the first trial, as well as the additional evidence presented at the second trial, prevailed by final judgment awarding the relief sought. Without the record in the first trial, the second trial would have been much longer, and it was largely on the basis of the evidence introduced at the first trial that the court supported its findings of fact and conclusions of law in the final memorandum and judgment that were entered. Under these facts, the plaintiffs were the prevailing parties at all stages of the trials and are entitled to recover their attorneys' fees for both trials. Hensley v. Eckerhart, 51 U.S.L.W. 4552, 4554 (May 17, 1983).

Recently, the Fifth Circuit Court of Appeals and the United States Supreme Court have provided additional guidelines to the application of the Johnson factors. Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983); Hensley, supra.[3/] In Graves and Hensley, the district court is instructed to determine a lodestar, the number of hours reasonably expended in the suit multiplied by the prevailing hourly rate in the community for similar work; the fee may then be adjusted either upward or downward after a consideration of other important factors.

Plaintiffs seek recovery for a total of 1,603.48 hours in pre-trial preparation plus 81 trial days expended by eight attorneys. The

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3/ Graves, supra at 222; Hensley, supra at 4554.

reasonableness and the necessity of these hours have been supported by the testimony of a local practicing attorney. Other than findings hereinafter discussed relating to duplications and certain reductions outlined below, the court finds that this number of hours was reasonable and necessary.

The next step in the "lodestar" approach is to determine the prevailing hourly rate. Plaintiffs assert that $125 per hour for pre-trial work and $1,000 per day during the actual trial should be awarded. The court recognizes that plaintiffs' affidavits support the position of plaintiffs that their charges are reasonable, necessary, and customary. However, plaintiffs have also introduced a letter from the defendant City of Lubbock that states that during the first trial lead defense counsel Travis Shelton was paid $75 per hour and Dennis McGill was paid $60 per hour. West Texas Legal Services asserts that $60 per hour is reasonable for Mr. Garrett's time on the appeal. Based upon these affidavits and the court's own knowledge,[4/] the court finds that the prevailing hourly rate in Lubbock, Texas, ranged from $50 - $75 per hour at the time of the first trial. Subsequently, customary fees have increased and range from $60 - $125 per hour. Based on factors discussed below, the court finds that the proper rate for all pre-trial work done by the plaintiffs' attorneys up to the first trial is $75 per hour, and pre-trial work for the second trial should be compensated at the rate of $100 per hour. Further, the court does not find that the attorneys should be paid at the rate of $1,000 per day during the trial. Rather, the court finds that the proper fee based upon the prevailing rate ($500 - $1,000 per day) as modified by the factors discussed below is $600 per day.

[4/] Plaintiffs agree that the court may consider his own knowledge of prevailing rates. Plaintiffs' Memorandum of Law on Award of Attorneys Fees, pages 6 and 7, filed January 24, 1979 and reurged in Plaintiffs' Letter Brief dated June 2, 1983.

This case did present unusual issues. It was not only an extensive class action but there were difficult fact situations requiring lengthy investigation and the issues were further complicated by the intervening decision by the United States Supreme Court (supra) and the action of the Congress in extending the Voting Rights Act in the interval between the two trials. The issues presented by these two factors had not heretofore been considered or presented to the court and, of course, were necessary to determine this litigation.

As indicated above, this case was not a simple case but was sufficiently complicated to require competent legal expertise. Lawyers with trial and investigative experience were necessary to present the issues to the court and to ultimately prevail. The attorneys in this case, from observation by this court, had the necessary expertise and used it skillfully. The court recognizes that several of plaintiffs' attorneys were young with relatively limited legal experience. These same attorneys carried the major responsibility for trial preparation and presentation; therefore, the court will not make a reduction in the hourly or daily fee based upon the fact that they had less experience than other attorneys. The court has considered that defense counsel, Mr. Shelton, is more experienced than any of the other attorneys in this case; he is a past president of the State Bar of Texas and is recognized as one of the leading attorneys in the state. The court finds that an award of fees in excess of his hourly charge in this case[5/] would not be justifiable.

Two of the attorneys, Honorable Dan Benson and Honorable Robert Davidow, are professors at the Texas Tech University School of Law and

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5/ This finding in no way implies that the fee of defense counsel is in any way a controlling factor in this or any other case except that in these circumstances, under these facts, the court finds that the prevailing fee at the time of trial is more accurately reflected by Mr. Shelton's fee than by the $125 fee claimed by plaintiffs' counsel.

they were not precluded from taking on additional work but this does not preclude them from recovering fees. The other counsel, with the exception of West Texas Legal Services and perhaps Mr. Rios, were in private practice and it is obvious that for the time required in this case they were precluded from doing other legal business because their undivided attention was required by this case during the time claimed.

Other than Mr. Arthur who was paid by the intervenors at the rate of $30 per hour, for which he must reimburse them out of his recovery, and the other attorneys on a fixed rate of compensation, all other attorneys were on a contingent fee basis alone.

Although this case did have extremely important constitutional questions involved, there was no pressure from either party or from the court for early disposition of the case. The court recognizes that the attorneys did give priority to this case at times, but does not find that there were any time limitations imposed that present any unusual factor with respect to the amount of attorneys' fees.

There was no monetary recovery by the plaintiffs in this case and none was sought, but this does not in any way limit the amount of attorneys' fees under this case.

As indicated above, the court finds that the attorneys in this case were competent in trial matters, and based upon the court's observation, they handled this case with the requisite expertise.

This case was an unpopular and undesirable one from the lawyers' standpoint. The case has generated and still is generating a great deal of interest. Widely divergent views concerning this case and the attorneys' participation therein exist.

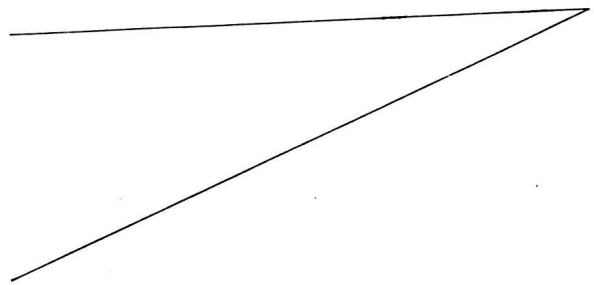
The nature and length of the professional relationship between the attorneys and the plaintiffs in this case is not a factor one way or the other as it is not indicated that future business can be obtained by the attorneys as the result of their representation of the plaintiffs. Probably only one-time representation of the clients in this case will result.

Attorneys' fees in similar cases have ranged upwards to the neighborhood of $1 million dollars. Graves v. Barnes, supra. None of the cases awarding attorney's fees are particularly helpful because the amount of fees must necessarily be determined upon the particular circumstances of each case. However, the court has considered the wide range of fees allowed by other courts, Parker v. Anderson, 667 F.2d 1204 (5th Cir. 1982) (award $21,980.50); Hensley v. Eckerhart, 51 U.S.L.W. 4552, 4553 (award $133,332.25); Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975) (award $175,000.00), and finds that the fees hereinafter allowed and awarded are within the range permitted in these other similar cases.

From the court's observations and an examination of the record of both trials, the court has come to the conclusion that there are two factors that should be carefully considered in setting the fees. First of all, this was a contingent fee case, and the court is of the opinion that had there not been additional evidence submitted at the second trial and further had the Voting Rights Extension Act not been amended, the plaintiffs may well have been the losing instead of the prevailing party and their attorneys would recover nothing. In other words, the contingency of their fee made their recovery of fees very uncertain and the risk great. However, balancing this determination that the contingency fee perhaps requires the imposition of a multiplying factor over the normal, customary cash fee or agreement, is the question of duplication of attorneys' efforts. The court recognizes that plaintiffs have revised and reduced their

original claims for attorneys' fees in order to eliminate any duplication of effort. However, this case did not require the services of eight lawyers plus that of the West Texas Legal Services on appeal. Although each attorney may have handled a separate phase of this case, the court notes that some of the attorneys did not participate actively in the trials of the case although they were present as indicated. Further, even though there was a separation of these responsibilities between the attorneys, it was of course necessary that each attorney familiarize himself with all of the background in the case and conduct the necessary legal research with respect to same. This effort alone constituted a great amount of duplication. In other words, fewer attorneys could have done the same amount of work and not have expended the total number of hours that the eight attorneys did expend in this case. The court has no quarrel with the number of hours that these attorneys state that they have expended, but the court does find that some of these hours, in spite of their volunteer representation of the class in this suit, is duplication. The court is of the opinion that the contingency factor, which would justify the imposition of a multiplier, is offset by the finding of duplication of efforts.

Further, the court recognizes that the delay in receiving fees may justify an award higher than the prevailing fee at the time of trial. Indeed, considerable time has passed since the first trial. However, the court finds no justification for enhancing the $75 per hour fee because the fee selected is not only at the top of the fee range for the first trial but also within the range for the second trial. In addition, the court considers the $75 fee to be somewhat higher than that normally charged by attorneys of the experience of plaintiffs'



counsel. On balance, the court finds the $75 fee to be reasonable for the first trial. The $100 per hour award for the second trial is within the top of the range of currently prevailing fees; therefore, no adjustment should be made on that figure either.[6/]

Considering all of the above factors, and from the court's observation during the pretrial conferences and trials of this case, as well as considering all of the submissions of the parties, the court finds that the reasonable and necessary fee to be awarded to the attorneys should be as follows:

6/ A further factor considered by the court is that many hours searching files, records and newspapers might have been done by clerks or secretaries instead of these attorneys. Also, several hours' travel time have been charged.

	ATTORNEY	PRETRIAL PREPARATION TIME IN FIRST TRIAL AT $75 PER HOUR	TRIAL DAYS IN FIRST TRIAL AT $600 PER DAY	PRETRIAL PREPARATION TIME IN SECOND TRIAL AT $100 PER HOUR	TRIAL DAYS IN SECOND TRIAL AT $600 PER DAY	TOTAL
1.	LANE ARTHUR	253.4 hours ($19,005.00)	12 days ($7,200.00)	263 hours ($26,300.00)	3-1/2 days ($2,100.00)	$54,605.00
2.	MARK HALL	81.9 hours ($ 6,142.50)	12 days ($7,200.00)	82.6 hours[1*] ($ 8,260.00)	3-1/2 days ($2,100.00)	$23,702.50
3.	TOMAS GARZA	103.7 hours ($ 7,777.50)	12 days ($7,200.00)	91.43 hours[2*] ($ 9,143.00)	3-1/2 days ($2,100.00)	$26,220.50
4.	ALBERT PEREZ	126.7 hours ($ 9,502.50)	12 days ($7,200.00)	60.9 hours[3*] ($ 6,090.00)	3-1/2 days ($2,100.00)	$24,892.50
5.	DAN BENSON	106.7 hours ($ 8,002.50)	12 days ($7,200.00)	0.0 hours ($ 0.00)	0.0 days ($ 0.00)	$15,202.50
6.	ROBERT DAVIDOW	101.65 hours ($ 7,623.75)	0.0 days ($ 0.00)	0.0 hours ($ 0.00)	0.0 days ($ 0.00)	$ 7,623.75
7.	BILL GARRETT	0.00 hours ($ 0.00)	0.0 days ($ 0.00)	126.80 hours[4*] ($12,680.00)	3-1/2 days ($2,100.00)	$14,780.00
8.	ROLANDO RIOS	0.00 hours ($ 0.00)	0.0 days ($ 0.00)	133.35 hours[5*] ($13,335.00)	3-1/2 days ($2,100.00)	$15,435.00
9.	WEST TEXAS LEGAL SERVICES Attorneys' Fees on appeal of first case, $4,500.00					$ 4,500.00

NOTE: The court recognizes that Mr. Arthur and West Texas Legal Services are claiming certain costs, but these should be taxable as costs in the manner provided by the Federal Rules of Civil Procedure concerning the final judgment heretofore entered by the court and is not to be determined by this opinion.

TOTAL AWARD OF ATTORNEYS' FEES UP UNTIL FILING OF NOTICE OF APPEAL $186,961.75

Notes to Chart 1*, 2*, 3*, 4*, and 5* on following page.

NOTES TO CHART INDICATED BY *

(1) Deduction of 6.5 hours billed for preparation for, scheduling and holding news conference.

(2) Deduction of 2 hours billed for press conference.

(3) Deduction of .5 hour billed for press conference.

(4) After comparing Mr. Garrett's personal affidavit and chronology, the court is unable to determine which of the 449.85 hours Mr. Garrett claims in the chronology comprise the 179.65 hours claimed by Mr. Garrett as pretrial preparation for Trial #2. Clearly, those hours prior to 1982 relate to the appeal and are included in West Texas Legal Services' statement. Therefore, beginning in 1982 the court has totalled all hours submitted by Mr. Garrett that are not obviously related to the appeal or the actual trial days. This total is 154.80 hours. Next the court has totalled all hours listed in blocks -- some as long as 2-1/2 months -- as trial preparation. Hours designated only as trial preparation total 112.95. Pursuant to Hensley, supra, at 4556 n.13 the court has reduced those hours by 25% because of Mr. Garrett's failure to furnish a detailed chronology. See also Cooper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1094-95 (5th Cir. 1982); Parker v. Anderson, 667 F.2d 1204, 1214 (5th Cir. 1982).

(5) The court has deducted 9.5 hours. On December 2, 1982 and December 27, 1982 Mr. Rios has claimed a total of 25.5 hours. The court finds that $2,550 for these two days that involved only 9 hours of actual legal services is unreasonable, but will compensate Mr. Rios at a rate of $100 per hour for a full 8-hour day.

A Judgment will be entered accordingly.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 6th day of July, 1983.

HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the foregoing Excerpts from Record in Lieu of Appendix, has been served upon Appellees by causing a copy of same to be mailed by United States Postal Service simultaneously with and in the same container with the Brief of Appellees' in this cause, to all attorneys of record named in the Certificate of Service to said Brief for Appellants, on this the 22nd day of September, 1983.

James P. Brewster

JAMES P. BREWSTER
Of Counsel

ATTORNEYS FOR APPELLANTS

BENSON, DANIEL H.
RECORDS, 1959 - 1948 AND
UNDATED (2550 LEAVES).

BRIEFS, 1979 - 1983 AND
UNDATED (728 LEAVES).

No. 83-1502

1983 (106 LEAVES).

CONTINUED ON
ANOTHER
REEL