

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	11-CA-360-OLG-JES-XR
STATE OF TEXAS, et al.,	§	[Lead Case]
Defendants.	§	

MEXICAN AMERICAN	§	
LEGISLATIVE CAUCUS, TEXAS	§	
HOUSE OF REPRESENTATIVES,	§	
Plaintiffs,	§	CIVIL ACTION NO.
v.	§	SA-11-CA-361-OLG-JES-XR
	§	[Consolidated Case]
STATE OF TEXAS, et al.,	§	
Defendants.	§	

TEXAS LATINO REDISTRICTING	§	
TASK FORCE, et al.,	§	
Plaintiffs,	§	CIVIL ACTION NO.
v.	§	SA-11-CA-490-OLG-JES-XR
	§	[Consolidated Case]
RICK PERRY,	§	
Defendant.	§	

MARGARITA V. QUESADA, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
	§	SA-11-CA-592-OLG-JES-XR
RICK PERRY, et al.,	§	[Consolidated Case]
Defendants.	§	

EDDIE RODRIGUEZ, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
	§	SA-11-CA-635-OLG-JES-XR
RICK PERRY, et al.,	§	[Consolidated Case]
Defendants.	§	

JOINT POST-TRIAL BRIEF FOR LULAC, QUESADA, AND RODRIGUEZ PLAINTIFFS ON THE 2011 CONGRESSIONAL REDISTRICTING PLAN

The LULAC plaintiffs, the Quesada plaintiffs, and the Rodriguez plaintiffs (sometimes collectively, “joint plaintiffs”) submit this post-trial brief on issues raised, and facts established, concerning the legality of the state’s 2011 congressional redistricting plan, Plan C185. The factual discussion is drawn from evidence presented in the 2011 trial (September 6-16, 2011), the interim plan hearing of October 31, 2011, and the 2014 congressional trial (August 11-16 & 26, 2014). Proposed findings of fact and conclusions of law are included as an attachment to the brief. A table of contents is provided at the outset to aid the Court’s review of the matters addressed in the brief:

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I. BASIC ARGUMENTS AND SCOPE OF BRIEFED ISSUES

A. Basic legal arguments

In an effort to blunt the growing electoral power of Texas minorities, whose growth had spurred in the 2000-2010 decade, far outpacing anemic Anglo growth, those in charge of the Texas congressional redistricting process engaged in a concerted effort to use race as a tool to divide minorities and to prevent them from realizing the electoral power that should have come with their population growth. In area after area, region after region, of the state, the evidence shows that the state used race to divvy up the state.

In Travis County, Plan C185 used race as the predominant tool to divide the county into five different congressional districts, none anchored in the county even though the county had population enough to hold one and a half congressional districts. In particular, the extreme division of Travis County eviscerated a preexisting crossover district where minorities (Latinos and African Americans) worked closely together with a critical mass of Anglo crossover voters to regularly elect the minorities' candidate of choice. This purposeful use of race to divide the county and eliminate a preexisting crossover district violates the Equal Protection Clause of the Fourteenth Amendment, as interpreted by the 2009 Supreme Court decision in *Bartlett v. Strickland*.

Separate from the constitutional violation under *Bartlett*, the use of new Latino opportunity district CD35, running from South San Antonio to north central Austin, connected by a teeny strip along IH-35, is in violation of the “no swap” Section 2 principle laid down in the 2006 Supreme Court decision in *LULAC v. Perry*. CD35 is the least compact of all the C185 districts, and it was used to try to swap out the Section 2 rights of Latinos in former CD23—a district that Plan

C185 meticulously undermined to remove it from the category of a Latino opportunity district. This was an illegitimate trade under Section 2 of the rights of those with Section 2 rights.

In Nueces County, the Legislature took the drastic, and audacious, step of simply twisting the county on its historic congressional axis in order to place it and the nearly three-quarters of a million of Latinos there in a district dominated by Anglo voters. The reason? To protect an Anglo incumbent elected by Anglo voters, but in what had been a Latino opportunity district. Only by moving him, and the county he is from (Nueces) into an Anglo-dominated area, and forsaking the Voting Rights Act-dictated southward orientation Nueces had had for a third of a century, was the Legislature able to protect the interests of the Anglo voters whose interests it hewed to.

This race-dominated treatment of Nueces and its Latino population had far-reaching consequences for the whole South and Central Texas map. It provided part of the excuse for undermining former CD23 and part of the excuse for using new CD35 as part of the tool-kit for eliminating crossover CD25. It also prevented creation of at least one, and possibly two, new Latino opportunity districts in the South Texas envelope of counties. The reorientation of Nueces County was intentionally discriminatory, and therefore violative of the Equal Protection Clause.

But is also is part and parcel of the Section 2 violation in South Texas through the failure to create additional Latino opportunity districts that, with Nueces in the mix, demonstrably could have been created. The South Texas envelope, where the most significant surge in Latino population in the state occurred, could have accommodated one, possibly two, new Latino opportunity districts. Putting Nueces into the mix, and dropping the crossover-district-destroying part of CD35 from it, establishes that the Section 2 threshold factors of *Gingles* would be satisfied in the envelope.

The treatment of Latinos and African-Americans in the Dallas Fort Worth Metroplex was particularly egregious. The growth of their populations there had been enormous over the past decade, especially in comparison to Anglo population growth. Key Republican leadership recognized and tried to do something about the longstanding representational disparity for minority voters in the area. The Governor and the head of the Texas Republican congressional delegation both pushed for creation of a new minority opportunity district in the Dallas/Tarrant area. They even knew that their effort would help other Republican congressional incumbents in the area who were fearful that their districts might become more heavily minority and, therefore, not their kind of district.

The Republican leadership got nowhere. Far from it. Instead of creating a new minority opportunity district there, the Legislature engaged in the most acute slicing and dicing of the minority community. Significant Latino and African-American populations were carefully scattered across the Metroplex, into Anglo-dominated districts. Race was explicitly used as the tool for doing this. In addition to raising significant questions about the Section 2 validity of Plan C 185 (separately addressed in briefing by the NAACP plaintiffs), this divvying up by race in the Metroplex violated the Equal Protection Clause.

B. Scope of issues briefed

To focus the issues and avoid repetitious briefing, this post-trial brief does not address every issue raised by the joint plaintiffs. Its scope will be narrower. Setting the stage for the more detailed arguments about legal issues triggered by the enacted Plan C185, the opening discussion from the record addresses the basic policy determinations embedded in the plan and their clash

with demographic realities in Texas. *See* Part II, below. From that point of departure, there are five areas addressed.

1. Travis County

First, the brief will address Plan C185's division of Travis County and dismantlement of an existing crossover district (C100's CD25),¹ with particular attention to CD35 and the other four districts (CDs 10, 17, 21, and 25) used to carve up the county and its ethnic and racial communities of interest. *See* Part III, below.

2. Nueces County

Second, the brief will turn to C185's re-location of Nueces County and its more than 200,000 resident Latinos from the southward orientation that had given its Latino population a political voice in congressional elections for the last third of a century. The new CD27, with the entirety on Nueces County at its southeastern end, was intentionally crafted to be Anglo-dominated to elect a congressional incumbent acknowledged as *not* being the candidate of choice of Latino voters. *See* IV, below.

3. The South Texas envelope

The third area addressed is the broad swath of Central, South, and West Texas, embracing territory roughly bounded by San Antonio, Corpus Christi, Brownsville, and El Paso.² The Legislature's treatment of Travis and Nueces Counties is unavoidably linked with the treatment of the large, dense population of Latinos in the South Texas envelope, including the disputed CD23.

¹ The benchmark map, Plan C100, along with its associated Texas Legislative Council ("TLC") data, is in evidence as Exh. J-1 (*see* Joint Exhibit List, Doc. 339). The exhibits on this list, all of which are congressional or state House plans or demonstration maps, along with the associated TLC data, will simply be referred to as "Exh. J-___" in the rest of the brief.

² Professor Ansolabehere used the short-hand term "envelope" for this area, Tr. 8/13/14 at 931 (S. Ansolabehere), and this brief will refer to the area as the "South Texas envelope" or simply the "envelope."

Along with other plaintiff groups—MALC, the Task Force, and the United States—the joint plaintiffs take the position that the Legislature acted illegally in its below-the-radar micro-redesign of CD23 to wrest it from its place as a Latino opportunity district in Plan C100 and instead make it a district designed to protect an incumbent who was not the candidate of choice of Latino voters. The joint plaintiffs, however, will not address the intricacies of the CD23 issue, leaving that task to other plaintiff groups. Instead, this brief will primarily address CD23 as it was affected by the Legislature’s handling of Travis-Nueces-South Texas envelope matters. *See* Part V, below.

4. The DFW area

The fourth area is the Legislature’s determined rejection of efforts across the political spectrum to create a new minority opportunity district in the Dallas-Fort Worth Metroplex area. Creating such a broadly-supported district would have recognized the large and growing minority populations there who C185 purposely left with no political voice in congressional elections. Instead, Plan C185 used race to divide Metroplex minority populations so that their voting power was diminished and diluted, in service to the Legislature’s over-arching goal of enhancing Anglo voting power. *See* Part VI, below.

5. Map-wide intentional racial discrimination

The fifth, and final, area addressed deals with the intentional racial discrimination infusing Plan C185 as a whole. The joint plaintiffs will leave it to other plaintiff groups, especially the United States, to address the “process” issues leading to C185’s passage. The focus will be on the Legislature’s pervasive use of race as a tool to achieve the partisan objectives which the state seeks to throw around Plan C185 as a protective cloak. *See* Part VII, below.

II. THE BROAD POLICIES EMBEDDED IN PLAN C185, AND THEIR INEVITABLE COLLISION WITH THE DISPROPORTIONATELY LARGE MINORITY POPULATION SURGE DURING THE 2000-2010 DECADE

Grasping the policies laid down early to govern the mapdrawing process provides a needed perspective on how minority voting power took such a beating in Plan C185. The legal violations in the areas addressed in the remaining parts of this brief (Parts IV-VIII) were largely pre-determined by the broad guidance laid down for the mapdrawers before they ever turned to their detailed handiwork. The essential contours of the constitutional and statutory violations were foreordained when that guidance collided with the demographic realities of Texas depicted in the 2010 census.

A. Summary of foundational policies guiding the mapping process

There were three early foundational policy choices. *First*, only one of the four new seats could be a Democratic district—which, since a minority opportunity district was deemed equivalent to a Democratic district, meant that only one of the new seats could be a minority opportunity district. *Second*, despite the ready availability of other locations in the state, this single new opportunity district would be situated to ensure that it caused the elimination of an existing opportunity district. *Third*, every effort would be made to protect two incumbent congressmen who were elected from minority opportunity districts in 2010 but who themselves were not the candidate of choice of minority voters in those districts. In addition to undermining the existing CD23 as a minority opportunity district, this last policy choice effectively necessitated the race-based decision to send Nueces County residents, including more than 200,000 Latinos, north- and west-ward into an Anglo-dominated district to ensure the re-election of an Anglo incumbent whose electoral survivability depended nearly exclusively on Anglo voters.

These foundational policies meant that, in spite of the massive growth (absolutely and proportionally) in Texas's minority population, the map finally presented to the Legislature went further than simply refusing to recognize and honor this growth. It actually *shrunk* the level of minority representation in Congress, both absolutely and proportionately. The 2011 Legislature actually *reduced* the number of minority opportunity districts for Texas's congressional seats from C100's eleven³ to C185's ten.⁴ It used race as the indispensable tool to achieve this remarkable feat.

1. Details of foundational guidance, policy choices, and approaches

As the 2011 legislative session began, the legislative leadership's plan was to let the Senate take the lead on congressional redistricting. Tr. 8/11/14 at 341 (G. Interiano); Tr. 8/14/14 at 1298 (B. Solomons).⁵ But toward the end of the regular session, plans changed, and the House assumed primary responsibility for the congressional plan. Tr. 8/15/15 at 1596 (R. Downton).

a. Solomons and Downton tightly control the mapping process

This switch left primary responsibility for the congressional plan with Representative Burt Solomons, Chair of the House Redistricting Committee. By his own admission, Chairman Solomons had never before done redistricting, had no experience with it, and the task "just didn't

³ CDs 9,15, 16, 18, 20, 23, 25, 27, 28, 29, and 30.

⁴ CDs 9, 15, 16, 18, 20, 28, 29, 30, 34, and 35.

⁵ Record citations in this brief are in the form used in the proposed findings of fact and conclusions of law filed as an attachment to this brief.

make a lot of difference” to him; it wasn’t a priority. Tr. 8/14/14 at 1263, 1275, 1323 (B. Solomons).⁶

Chairman Solomons largely turned the job over to his staff, mainly the principal congressional mapdrawer, Ryan Downton. Tr. 8/15/14 at 1591 (R. Downton); Tr. 8/11/14 at 327 (G. Interiano). Like Solomons, Downton had no work experience in either redistricting or demographics. Exh. J-42 (Downton Depo. at 10-11) (personal “self-study” was all he’d done).

Solomons relied on Downton and two other staff members to tell him what was legally required in the mapdrawing and passively assumed that the product they gave him was legal. Tr. 8/14/14 at 1301-02, 1305 (B. Solomons). Staff drafted his talking points for floor debate on maps, and he uncritically accepted and used those drafts. *Id.* at 1283, 1285 (B. Solomons).

Despite lacking knowledge and interest, Chairman Solomons did lay down some basic rules for Downton to follow in his mapdrawing. And early in the process, Downton himself adopted certain basic concepts about the coming congressional map. Together, Solomons’ basic instructions and Downton’s early-adopted choices dictated key elements of what ultimately became the adopted congressional map that was ultimately adopted.

b. Key instruction: three of the new seats had to be Republican

The key instruction from Solomons was that three out of the four new congressional districts apportioned to Texas had to be Republican districts. Tr. 8/15/14 at 1599-1600, 1769 (R. Downton); Tr. 8/11/14 at 350 (G. Interiano). Solomons would not allow any proposal—even one by the senior member of the Republican congressional delegation—to get past him to the committee or

⁶ Solomons had not been part of the committee that conducted some pre-session, pre-census, pre-mapping hearings in parts of the state in 2010. Tr. 8/14/14 at 1089 (T. Hunter). Nor is there evidence that Mr. Downton, his mapdrawer, attended the 2010 hearings. *Id.* at 1090 (T. Hunter).

House floor if it didn't not satisfy his up-front directive on the 3-1 split. Tr. 8/11/14 at 382 (G. Interiano).

If a district was not legally "required"—and Solomons relied on Downton to tell him what was "required"⁷—then it couldn't be made part of a proposed plan. *Id.* at 1600 (R. Downton). Solomons took the view that, if he was told a particular proposal for a district was not legally required, then "we really couldn't" incorporate the proposal into the map. Tr. 8/14/14 at 1301-02. From there, he simply assumed that what he was given by staff was legal. *Id.* at 1305 (B. Solomons). He wouldn't propose anything to the House that was not "required," and he relied on Downton to tell him what was "required." *Id.* at 1323 (B. Solomons).

Inextricably linked to the instruction that the new districts had to have a 3-1 partisan split was Solomons' view equating a district compelled by the Voting Rights Act to a Democratic district. As related by Interiano, Solomons' position was that "we should not be giving a Democratic district *unless we were required by the Voting Rights Act* to do it." Tr. 8/11/14 at 381 (G. Interiano) (emphasis added). The House Chair's view was matched on the Senate side by its redistricting committee chair, Senator Seliger (who, like his House counterpart, lacked any redistricting experience. Tr. 8/11/14 at 262 (K. Seliger). Senator Seliger makes it clear that he did not want to create any additional Democratic districts unless legally required to do so by the Voting Rights Act. *Id.* at 277 (K. Seliger). This policy position, of course, directly equates minority opportunity districts with Democratic districts.

Downton thus seized on a fundamental principle for the congressional map. Only one of the four new districts could be a Democratic district and that district, if required at all, would be a minority opportunity district. Added to this was another basic principle: that, despite the prob-

⁷ Downton used the term "mandatory draw" to describe a required district. Tr. 8/15/14 at 1603 (R. Downton).

lems recognized as “inherent” in such an effort, U.S. Exh. 76, the map should protect two Republican incumbents, Congressmen Farenthold (CD27) and Canseco (CD23). Senator Seliger wanted to help Canseco hold onto his seat, even though he understood benchmark CD23 to be a Latino opportunity district. Tr. 8/11/14 at 220 (K. Seliger). He likewise knew that Farenthold was not the candidate of choice of Latino voters in benchmark CD27, conceded to be a Latino opportunity district. *Id.* at 220, 228-29 (K. Seliger).

The importance of doing this was emphasized early on, before the 2011 session even convened. On November 20, 2010, shortly after the 2010 general election where both Farenthold and Canseco had prevailed in what were acknowledged to be Latino opportunity districts, Eric Opiela sent Interiano an e-mail discussing the importance, and difficulty, of protecting Canseco and Farenthold in the upcoming redistricting. U.S. Exh. 76; Tr. 8/11/14 at 343 (G. Interiano).⁸

c. Sending Nueces County, and its huge Latino population, north into an Anglo-dominated district

This concern was the occasion for a second basic instruction from Solomons to Downton. Downton testified that he had gotten a pre-session idea for re-orienting all of Nueces County north. Tr. 8/15/14 at 1761-62 (R. Downton). His boss, Chairman Solomons, definitively settled the matter when he directed at the beginning of the mapdrawing process that Nueces County definitively would be in a northward-lying district. *Id.* at 1773 (R. Downton).

⁸ The inference is obvious that Downton was aware of this Opiela e-mail or at least the substance of the conversation it recounts between Opiela and Interiano. Even though Downton improbably said that he and Interiano, though officing near each other, were in separate offices, Tr. 8/15/14 at 1728 (R. Downton), Interiano testified unequivocally that he and Downton “shared” an office in the Capitol and that it was the primary office for both of them, Tr. 8/11/14 at 315 (G. Interiano).

d. Using the only new minority opportunity district as a smokescreen

One more important piece of the basic building block of the map concerns what became CD35 in Plan C185. Early in the session, MALDEF⁹ had made public two alternative proposals, Plans C122 and C123. Neither was a complete statewide map; each was proposing ideas about possible configurations for Latino opportunity districts. Plan C123 had seven Latino opportunity districts in the South Texas envelope; none went northward into either Hays or Travis Counties. Plan C122, though, had a district running from South San Antonio along I-35 into eastern and north-central Travis County. C122 drew no other Travis County districts; it just left the rest of the county blank. Tr. 8/15/14 at 1759 (R. Downton).

Downton knew that the CD35 location was not the only place a new Latino opportunity district could be located. Tr. 8/15/14 at 1773-74 (R. Downton). Still, in early May, he nonetheless seized on C122's I-35 district concept as a basic building block for the map he was developing behind closed doors. He decided that if he included that district in his map, then the other three new districts could be Republican (and not minority opportunity districts) because that I-35 district could be the one "new" opportunity district he would draw. Tr. 8/15/14 at 1604 (R. Downton).

2. The foundational policies ultimately determine most of the map

The detail work on the congressional map did not kick into gear until toward the very end of the 2011 regular session. Tr. 8/15/14 at 1591, 1596 (R. Downton); Tr. 8/14/14 at 1270 (B. Solomons). Plan C125 was the first new congressional map publicly unveiled, and that didn't happen

⁹ MALDEF itself, not the Task Force plaintiffs, submitted the proposals discussed in the text during the regular legislative session. See Exhs. J-3 (Plan C122) and J-4 (Plan C123). See also Exh. J-42 (R. Downton Depo.) at 114 ("general idea came from MALDEF"). (As reflected in Doc. 367, twenty-two depositions were admitted as joint exhibits at the end of the 2011 trial. Citations to these deposition exhibits will be in the form "Exh. J-__ (___ Depo.).")

until the afternoon of May 31, 2011, the day after the regular session had adjourned, when Seliger and Solomons jointly proposed it. Tr. 8/11/14 at 255-56 (K. Seliger).

Three important concepts had been laid down by Chairman Solomons, and they were all incorporated into this first map, C125; all three of these concepts carried through the rest of the iterations of the congressional map and ended up in the enacted map, C185. Even as work continued on torturing the detailed lines of CD23, the essentials developed at the outset by Solomons and Downton remained in place:

- Only one of the “new” districts¹⁰ was a minority opportunity district. Despite urging from both the head of the Republican congressional delegation and the Governor, not a single new minority opportunity district was created in the DFW area.
- Nueces County, and its more than 200,000 Latinos, were re-directed northward, into an Anglo-dominated district designed to protect an incumbent who was *not* the candidate of choice of Latino voters.
- The I-35 district linking South San Antonio with north-central Austin was pre-designated the “new” minority opportunity district.

Combined with (as other plaintiffs’ briefing will discuss in greater detail) the elimination of CD23 as a Latino opportunity district, the adoption of Chairman Solomons’ principles meant that Texas had not added a single new minority opportunity district in 2011, when it went from thirty-two to thirty-six seats. And, topping things off, the enacted plan used the one “new” minority opportunity district—CD35—as a way to destroy yet another minority opportunity district, benchmark CD25, which (as discussed further below) had been a crossover district where minority voters could, with some assistance from Anglo voters in the only place in the state

¹⁰ Counting what is a “new” district is not as straightforward as simply determining whether the map assigned one of the four new district numbers (33-36) to any given district. CD35 was treated as a new district. CD 34 was, too, but the real “new” district along the Gulf Coast and Coastal Bend areas actually was re-oriented CD27, running for the first time all the way to the Travis County line. *See* Order of March 19, 2012 (Doc. 691) (“Congressional Interim Map Order”) at 4 n.4.

where such support existed at meaningful levels, elect their candidate of choice. In short, Texas added four new congressional seats, but managed to actually *lower* the real number of minority opportunity districts by one.

B. Demographics and racially polarized voting: basics

1. Huge surge in Texas's minority populations

This absolute reduction in minority voting power happened, of course, against the well-known fact that the huge growth of Texas's minority population was the only reason Texas was apportioned four new congressional seats in the first place. In fact, if the minority community in Texas had grown at the same rate as the Anglo community did in the decade leading up to the 2010 reapportionment, Texas likely would have actually *lost* a seat in Congress. Tr. 8/14/14 at 1208 (G. Korbel); Rod. Exh. 907 (S. Ansolabehere Rep. at 11).

In the 2000-2010 decade, Texas's population grew by 4,293,741, to a total of 25,145,561. P-T Stips. 73-74. Among Latinos, African-Americans, and Anglos, no single group constitutes a majority of Texas's population. P-T Stips. 75-76; Rod. Exh. 907 (S. Ansolabehere Rep. at 10). Texas population is 45.3% Anglo, 37.6% Latino, and 12.2% African-American. Rod. Exh. 912 (S. Ansolabehere Rep. at 8). About 65% of the state's population growth in the 2000-2010 decade was due to Latino growth; about 10.8% were Anglo. P-T Stips. 81-82; Rod. Exh. 912 (S. Ansolabehere Rep. at 9). In the same decade, total Anglo population grew by only 457,000 compared to 526,000 for African-Americans, and 2.8 million for Latinos. Rod. Exh. 907 (S. Ansolabehere Rep. at 10-11).

Population is the measure used for apportionment and redistricting to meet the one person-one vote constitutional rule for equal representation. Citizen voting age population ("CVAP")

has come to be the measure for purposes of meeting the first *Gingles* factor.¹¹ Use of CVAP as a referent has been confined to this one statutory element of under *Gingles*. Total population, *not* CVAP, is the proper measure for the equal representation principle of the Equal Protection Clause. *See Chen v. City of Houston*, 206 F.3d 502, 505, 528 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001).

Texas CVAP increased by 2,591,265 in the 2000-2010 decade. Rod. Exh. 912 (S. Ansolabehere Rep. at 9).¹² During this same period, Anglo CVAP as a percentage of total CVAP dropped by 6.1%, to 56.4%, and Latino CVAP increased by 4.1%, to 26.5%. *Id.* at 43 (Table 1). Yet, as a percentage of seats in the Texas delegation, Latino opportunity districts *dropped* from 21.9% to 19.4%. African-American opportunity district percentages also dropped, from 9.4% to 8.3%. Remarkably, even in the face of the minority population growth surge, the Legislature's Plan C185 managed to actually *increase* the number of districts in which Anglos are a majority of the voting age population, from 20 in C100 to 23 in C185. Joint Exhibit 15 (*see* Doc. 341) S. Ansolabehere Rep. of Aug. 8, 2011 ("Ansolabehere 2011 Rep."), at 11.¹³

Despite the fact that Anglos are only a plurality of the state's population, they are an outright majority of the population in 20 of the 36 districts in Plan C185, plus a plurality in three more. Rod. Exh. 907 (S. Ansolabehere Rep. at 20). Despite the fact that Latinos and African-Americans outnumber Anglos in the state, Anglos are the majority or a plurality of the population in 64% of the congressional districts. *Id.* The level of different treatment of minorities and Anglos in Tex-

¹¹ *Thornburg v. Gingles*, 427 U.S. 30, 50-51 (1986)

¹² These CVAP estimates come from the ACS 2008-2012 survey, which is superior to the survey period used by the Legislature in its 2011 redistricting cycle. Rod. Exh. 912 (S. Ansolabehere Rep. at 4-6.) It comes closer to describing the on-the-ground status of CVAP as of 2010, the same timeframe as the decennial census. Tr. 8/13/14 at 933 (S. Ansolabehere); Tr. 8/14/14 at 1209 (G. Korbel).

¹³ Further references to "Joint Exhibit ___" are to the exhibits listed in Doc. 341.

as's congressional plan is starkly presented in this statistic: 88% of Anglo adults live in districts where most people are of the same racial group as they are. Although voting age Latinos and African-Americans are nearly as numerous as Anglos of voting age—8.4 million versus 9.1 million—over half of them live in districts where Anglos are the majority. *Id.* at 24-25. This sorting out is crystallized in this summation of what happened:

White Non-Hispanics are overwhelmingly represented by Congressional Districts in which the majority are White Non-Hispanics. However, a minority of the Hispanic and Black population lives in districts that are Majority Hispanic or Majority Black.

Joint Exhibit 15 (Ansolabehere 2011 Rep. at 14) (discussing data from Table 3, p. 53, of report). The upshot is that the districts drawn by C185 “run counter to the notion of plurality and majority rule.” *Id.* at 16.

2. Pervasive racially polarized voting

This would be merely an interesting set of statistics but for one fundamentally important fact: voting in Texas is polarized along racial lines. The state has conceded this fact. Tr. 8/26/14 at 2168-69 (colloquy between Judge Rodriguez and M. Frederick).¹⁴ As Dr. Ansolabehere explained in the first round of this trial, racially polarized voting is pervasive in Texas and constitutes the fundamental reason that race matters in redistricting. Joint Exhibit 15 (Ansolabehere 2011 Rep. at 37); Tr. 9/10/11 at 1115-16 (S. Ansolabehere).

The basic point in this discussion is that the state had to work very hard, and manipulate the lines it was drawing to a remarkably fine-tuned degree, to achieve the results it did in Plan C185—that is, to actually put minority voters in the state in a worse position after the 2010 cen-

¹⁴ The record is replete with testimony from experts on racially polarized voting. *See, e.g.*, Tr. 8/12/14 at 594 (L. Handley). Further discussion below focuses on elements of racially polarized voting pertinent to the specific issues addressed there. Included is refutation of the state's reservation of its polarized voting concession as to Nueces County. That county, in fact, has one of the most extreme levels of polarized voting in the whole state.

sus than they were before. Even though faced with across-the-board significant racially polarized voting and huge gains in minority population (as well as comparative increased growth in citizen voting age), the state acted to ensure that Anglos could maintain, and even enhance, their superior political power in congressional elections. It didn't simply stumble into success in meeting this objective. Those spearheading the redistricting effort had to artfully manipulate lines, precincts, and residents. The evidence is overwhelming that race was the main tool they used, working with an underlying racial purpose, to achieve a result enhancing Anglo political power by undermining the political power of surging minority populations.

III. TRAVIS COUNTY AND CD35: A DELIBERATE, RACE-BASED DISMANTLEMENT OF EXISTING CROSSOVER DISTRICT; AND A MISPLACED DISTRICT FOR RECOGNITION OF SECTION 2 RIGHTS.

C185's carve-up of Travis County, with its elimination of benchmark CD25 and incursion of the northern extension of new CD35, was illegal for two independent reasons. One is under the Equal Protection Clause of the Fourteenth Amendment, as explicated in *Bartlett v. Strickland*, 556 U.S. 1 (2009). *See* Part III.B, below. The other is under Section 2 of the Voting Rights Act, as applied in *LULAC v. Perry*, 548 U.S. 399 (2006). *See* Part III.C, below. Each suffices to establish C185's illegality in the Travis County portion of the map. But understanding the extremes to which the Legislature went to eviscerate communities of interest in Travis County provides crucial context for evaluating the underlying legal flaws of this part of Plan C185. So those extremes are briefly explored first.

A. C185's extreme departure from traditional districting principles in Travis County

Twelve Texas counties have enough population to form at least half the population of an ideally-populated district. Rod. Exh. 927. In fact, all of them actually do in Plan C185 except one:

Travis County, the fifth most populous county in the state. *Id.* Even though it has enough population to have one and a half congressional districts fit “comfortably” within it, Tr. 9/10/11 at 1137 (S. Ansolabehere), it does not anchor—that is, form at least half the population of—even one district. Rod. Exh. 927; Tr. 8/13/14 at 881 (D. Dukes) (Travis County “the sole, urban county in Texas that did not have one congressional seat anchored in it”).

Even witnesses for a party that had at one time been roughly aligned with the state on the CD35/Travis County issue¹⁵ couldn’t stomach what happened. Former State Senator Gonzalo Barrientos, himself a successful 30-year beneficiary of significant Anglo crossover support in Travis County, characterized the five-way split of the county as “obscene” and “ridiculous.” Tr. 8/14/14 at 1166, 1167 (G. Barrientos). Another witness had told the Senate redistricting committee at its one public hearing in June 2011 that she was “personally outraged at the fractioning” of Travis County. Tr. 8/14/14 at 1140 (C. Villarreal). And the fracturing extended beyond just Travis County itself. The state capital, Austin, is divided into *six* congressional districts, with 23.8% being the highest percentage of its population in any one of those districts. Rod. Exh. 941 (Red-135 Rep. at 2). The mapdrawer for Chairman Solomons was indifferent to what his handiwork did to Austin, testifying that, in contrast to his attention to the integrity of other cities, he paid no attention in Austin. Tr. 8/15/14 at 1782 (R. Downton).

¹⁵ At closing argument, the Task Force stated support for the Rodriguez plaintiffs’ effort to hold together a Travis County district that includes like-minded Anglos with Latinos and African-Americans. Tr. 8/26/14 at 2136 (N. Perales). This narrows the litigation differences between the Task Force and the joint plaintiffs on this particular matter.

B. *Bartlett v. Strickland* and the purposeful dismantlement of a preexisting crossover district

1. Crossover districts as exemplars of electoral cooperation to be encouraged, not punished as C185 does

Bartlett's lead opinion¹⁶ directly addresses the constitutional status of electoral districts it describes as "crossover districts":

[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under . . . the Fourteenth . . . Amendment[.]

556 U.S. at 24. Plan C185's evisceration of benchmark CD25 and Travis County violates this constitutional principle.¹⁷

The Court defined a crossover district to be "the result of white voters joining forces with minority voters to elect their [that is, minority voters'] preferred candidate." 556 U.S. at 25. Far from questioning the *bona fides* of these kinds of districts and the voting rights lexicon which recognizes them, the Court lauded them as exemplars of what political society and the electorate should be moving toward. The very purpose of the Voting Rights Act, said the Court, was to "foster" precisely the kind of electoral cooperation existing in crossover districts. *Id.*

2. *Bartlett* rule against purposeful dismantlement of crossover districts and the closely-related *DeGrandy* anti-trade-off principle

The groundwork for the *Bartlett* principle barring dismantlement of preexisting crossover districts had been laid in *Johnson v. DeGrandy*, 512 U.S. 997 (1994). *DeGrandy* interpreted Section 2 to discourage the legislative design of electoral districts as majority-minority districts when

¹⁶ This is the plurality opinion authored by Justice Kennedy.

¹⁷ It is important that the Court keep in mind that this anti-dismantlement principle rests on a constitutional, not a statutory, foundation. In its 2012 interim plan ruling, the Court cited *Bartlett* for the proposition that "§ 2 does not mandate preserving crossover districts." Congressional Interim Map Order at 42 (emphasis added). However accurate that may be as a Voting Rights Act principle, the *constitutional* principle of *Bartlett* remains. The Fourteenth Amendment does prohibit the purposeful destruction of preexisting crossover districts.

such a design was not necessary to achieve equal political and electoral opportunity. 512 U.S. at 1019. The Court characterized the approach it rejected as the “politics of the second best.” *Id.* Minority voters, the Court found, are “not immune from the obligation to pull, haul, and trade to find common political ground.” *Id.* In a passage especially pertinent to what happened in Travis County, *DeGrandy* warned that the rights of “some minority voters” are not supposed to be “traded off against the rights of other members of the same minority class.” *Id.* at 1019.¹⁸

Working from this anti-trade off principle, *Bartlett* pointedly warned redistricters against purposely dismantling existing crossover districts because doing so would present “serious” constitutional problems. 556 U.S. at 24.¹⁹ This constitutional principle remains intact²⁰ and operative, and it requires invalidation of C185’s deliberate dismantlement of the crossover district, CD25, that had been centered in Travis County in the heart of the tri-ethnic coalition in the benchmark plan drawn by another federal court in 2006.

3. Dismantled benchmark CD25 was a crossover district.

a. State conceded, and Court agreed

In the 2011 trial round, after presentation of evidence, the state conceded that former CD25 was a crossover district. *See* Doc. 457 at 19 & n.9. All three members of the Court panel also concluded that benchmark CD25 was a crossover district. *See* Order of Nov. 26, 2011) (Doc. 554) at

¹⁸ This Court countenanced such a trade-off for Travis County African-American voters in its 2012 interim plan ruling, counter-balancing their loss against the gain for Tarrant County African-American voters under Plan C235. *See* Congressional Interim Map Order at 49 (noting “potential[] offset”). *DeGrandy*’s warning against legal recognition of such trade-offs means that, outside the interim plan context, such a potential offset cannot play a role in the analysis of Plan C185’s legality. And, in any event, Plan C185 has no such offset as between Travis and Tarrant.

¹⁹ Since the Court has dismissed all Fifteenth Amendment claims, the joint plaintiffs focus here on the Fourteenth Amendment.

²⁰ *Perry v. Perez*, 132 S.Ct. 934 (2012), leaves the *Bartlett* anti-dismantlement principle in place. *Perez* cites *Bartlett* only in connection with the question whether a court can invalidate a plan for failing to *create* certain kinds of districts. *Id.* at 944. Nothing about *Bartlett*’s no-dismantlement constitutional rule is called into question.

11-12 n.24 (preserving CD25 “as a crossover district”); 16 n.32; at 20 (J. Smith dissenting) (identifying CD25 as a “crossover district”). The Supreme Court’s *Perry v. Perez* opinion contains no criticisms of this unanimous determination—which was factually accurate.

b. Tri-ethnic coalition

The county and city have remained marginally majority Anglo,²¹ but, since 2000, as shown in Rod. Exh. 901, minority candidates—both Latino and African-American—have been elected *forty-one times* to public positions in county- and city-wide elections in Travis County and Austin.²² Rod. Exh. 901; Tr. 9/10/11 at 1188-90 (D. Butts). This same testimony details other examples of operation of the tri-ethnic coalition in the county and city electing minority-preferred candidates (who themselves are minorities) to school district and state senate races in Anglo-dominated districts, including former Senator Barrientos, a Latino state senator elected, with minority and Anglo support, over a twenty-two year time span. *Id.* at 1189-191; *see also* Tr. 8/14/14 at 1161-65 (G. Barrientos) (describing the building of this coalition of voters in the 1970s and his reliance on the coalition in the many elections he won in majority-Anglo districts).

c. Travis County: lowest levels of Anglo cohesion, and highest levels of Anglo crossover

Concerning Travis County, there has been essential unanimity among the experts in this case who analyzed racially polarized voting across the state: Travis County was different because there were significant levels of Anglo crossover voting for the same candidates preferred by mi-

²¹ The 2010 census data, of which the Court may and should take judicial notice as provided by Federal Rule of Evidence 201(b), shows that the voting age population of Travis County is 55.2% Anglo, 29.3% Hispanic, and 7.8% Black. The voting age population for the City of Austin is 53.6% Anglo, 30.6% Hispanic, and 7.5% Black. For county data, see <http://txsdc.utsa.edu/Resources/Decennial/2010/Redistrict/pl94-171/profiles/county/table3.txt>. For city data, see <http://txsdc.utsa.edu/Resources/Decennial/2010/Redistrict/pl94-171/profiles/wholeplace/table4.txt>.

²² City council elections in Austin have been at-large. Tr. of Sept. 10 at 1189 (D. Butts testimony). A successful citizen initiative has resulted in a switch to single-member council districts in the upcoming election.

nority voters. Dr. Ansolabehere found racially polarized voting across the state, but for one place: “Travis County, where whites show a high rate of cross-over voting, is a notable exception to this pattern of racial polarization.” Joint Exh. 15 (*see* Doc. 341) Ansolabehere 2011 Rep. at 7; *see also id.* at 33 (“Travis County breaks the pattern observed elsewhere in the state”); Tr. 9/10/11 at 1120-21 (S. Ansolabehere) (Travis County an exception to rest of state in the level of Anglo crossover voting, concluding that, in Travis County, “[v]ery low level of block voting by whites and a fairly high number of crossover voting,” so that “whites in Travis County appear to . . . vote for the same candidates preferred by black and Hispanic” voters at significant levels). He concludes that “[w]hites do not appear to vote as a cohesive bloc in opposition to minorities in this county.” *Id.* at 34. Using two different methods (ecological regression and homogeneous precinct analysis), Dr. Ansolabehere concluded that the Anglo crossover vote in Travis County is in the 47%-52% range. *Id.* at 55 (Table 5). This compares to the predicted statewide crossover Anglo vote as being only about 28%. *Id.*

In the recent trial round, Dr. Ansolabehere contrasted the levels of Anglo cohesion in Travis and Nueces Counties. Travis County, he concluded, has the “lowest level of Anglo cohesion in the state.” Tr. 8/13/14 at 943 (S. Ansolabehere). That translates into a 40-45 percent crossover vote of Anglos to vote for minority preferred candidates. *Id.* (By contrast, Nueces County has “quite high White cohesion,” where only 10 to 15 percent of Anglos crossover to vote for minority-preferred candidates. *Id.*)

Other experts also adopt the basic point made by Dr. Ansolabehere. Dr. Lichtman, expert for the Quesada plaintiffs, found Anglo crossover voting at about fifty percent in Travis County, twice as high as in the rest of the state. Joint Exhibit 3 (Lichtman Rep. at 8, Table 2). He conclud-

ed that “[i]n every county *with the exception of Travis County* a substantial majority of Anglo voters voted against the candidates of choice of African-American and Latino voters.” *Id.* at 7 (emphasis added); *see also* Tr. of 9/10/11 at 1221-22 (S. Ansolabehere) (Travis County exception to Anglo block voting pattern across rest of state); 1260 (A. Lichtman) (same). Dr. Engstrom, expert for the Task Force plaintiffs, reported an Anglo crossover rate for Travis County in a range from 41.3% to 49.89%, significantly higher crossover than in the other counties he analyzed. Joint Exhibit 7 (Engstrom Rep. at 35-36). Dr. Kousser, MALC’s expert, characterized Plan C185’s treatment of Travis County as “part of an effort to break up the long-successful tradition of coalition politics in Travis County, in which Latinos, African-Americans, and liberal Anglos had often joined together in both partisan and non-partisan contests.” Joint Exhibit 2 (Kousser Rep. at 129). Dr. Murray, the NAACP plaintiffs’ expert, found that “a sizeable part of Travis County shares” the pattern in which Anglo voters crossover in significant numbers to support the same candidates supported by minority voters. Joint Exhibit 4 (Murray Rep. at 21). Even the state’s expert, Dr. Alford, saw the distribution of Anglo votes in Travis County to be “unique.” Exh. J-43 at 271 (J. Alford Depo.). He testified that, in Travis County, “Anglo crossover is substantially higher than it is in the other counties in Texas.” Tr. 9/14/11 at 1787 (J. Alford). Anglo crossover in those other counties is in the high 20s. *Id.* at 1786 (J. Alford).

In his most recent testimony, Dr. Ansolabehere reiterated his opinion that benchmark CD25 was a crossover district under the *Bartlett* rubric. Tr. 8/13/14 at 954 (S. Ansolabehere). In benchmark CD25, “the minority-preferred candidates are winning against a majority of white votes. But there’s a sufficient white vote to help that minority-preferred candidate win.” *Id.*

d. On-the-ground, practical operation of the tri-ethnic coalition

The analysis of the experts, reporting an Anglo crossover vote roughly two times higher in Travis County than in the rest of the state, is buttressed by the on-the-ground knowledge of experienced politicians and political operatives based in the county. Representative Eddie Rodriguez, a plaintiff (in his capacity as a voter) in this lawsuit and former executive director of the Travis County Democratic Party, explained in detail the operation of the tri-ethnic (that is, Latino, African-American, and a significant component of Anglo) voting coalition in Travis County in recent years in both the Democratic primary and general elections. Exh. J-54 at 18-20 (E. Rodriguez Depo.). “I just know . . . the coalition exists here in Travis County.” *Id.* at 18. He testified, for example, about two victories of a Latino judicial candidate over Anglo opponents in the Democratic primary, and about the “very strong coalition” of African-Americans, Latinos, and Anglos that formed to help elected former Senator Gonzalo Barrientos in an Anglo-dominant district. *Id.* at 19-20. As he explained, the situation is “unique” in the state: “you don’t see this as often in other places.” *Id.* at 19. He also explained that, in benchmark CD25, non-Latino voters support the Latino-preferred candidate in the Democratic primary. *Id.* at 46.

At the 2011 trial, David Butts, a long-time political operative in the county and one of the moving forces in the origination of the tri-ethnic coalition, testified in detail about how the tri-ethnic coalition works in city and county politics. He identified the geographic “heart” of the coalition, Tr. 9/10/11 at 1191-92 (D. Butts), and he explained how the substantial portion of benchmark CD25 which is in Travis County overlays probably 70% of the coalition’s core area, *id.* at 1192. He further explained how the CD25 incumbent “absolutely” had the support of the coalition, had the support of minority voters in the part of Travis County where the district lies, and

how he would have been defeated in the last election but for the minority voters of Travis County. *Id.* at 1192-93. Mr. Butts further detailed how Plan C185 effectively eviscerates the operation of the coalition in the county. *Id.* at 1193-95. In that testimony, he detailed how the division of the county into five congressional districts scattered minority voters in a way that diminishes their ability to form coalitions as they historically have done. On cross-examination, he succinctly explained the difference in voting patterns and electoral coalitions in Travis County as compared to the rest of the state:

Well, you can look at polarized voting in the state of Texas and see, you know, where those forces don't come together. And they do and they're present in today's Texas, I assure you. But it's not – I said they're present in today's Texas, but in Travis County, you know, there is a working coalition. It's not that we always agree. It's politics we're dealing with here.

9/10/11 at 1200 (D. Butts).

Further supporting Mr. Butts's observations, the incumbent County Judge of Travis County, Sam Biscoe, testified about the existence and operation of the tri-ethnic coalition in the county and how he took advantage of it in his successful runs for county-wide office. David Butts had previously testified about the contest between Judge Biscoe, who is African-American, and an Anglo opponent for the position of Travis County Judge in the 2002 general election. Tr. 9/10/11 at 1185-1187 (S. Biscoe) (explaining that he won most or all of the minority voters' support, but could not have won without Anglo support, which he got). Judge Biscoe testified about that contest, but also about his first effort to seek the county judgeship, in which he was opposed in the Democratic primary by a formidable Anglo opponent. *Id.* at 1203-05. As explained by Judge Biscoe, he won because of the tri-ethnic coalition, which he had been cultivating since his days as a county commissioner in a precinct that was predominantly white. And he further testified that

he would not have been able to win without a significant percentage of the Anglo vote. *Id.* at 1205. The coalition among Anglo, Latino, African-American, and now Asian voters, Judge Biscoe explained, still exists. *Id.* at 1206. But, as he also testified, Plan C185 does damage to the coalition's functioning by the way it carves up the county: "[F]rom an African American's perspective if you started out with us being 10 percent of Travis County and cut us into five pieces we really are very, very small. And I think the same thing would be true for Hispanics and Asians. Not so much the case but they would be adversely affected to some degree." *Id.* at 1208.

Testimony in the more recent trial round from Representatives Rodriguez and Dukes confirms this earlier evidence in the strongest terms. Representative Rodriguez explained that the coalition is of voters, not organizations or groups. Tr. 8/13/14 at 861 (E. Rodriguez). Representative Dukes said essentially the same thing. Tr. 8/13/14 at 920 (D. Dukes) ("tri-ethnic coalition are the African Americans, Hispanics and like-minded Anglos that vote together on election day").

Representative Rodriguez further testified to his certainty about the existence of the coalition and even found it most dominant in the Democratic primary. Tr. 9/13/14 at 818 (E. Rodriguez). Representative Dukes, too, was confident of the coalition's operation in general elections and primaries. Tr. 9/13/14 at 877-880 (D. Dukes). Consistent with these practical understandings and the experts' testimony, Senator Barrientos himself described Austin as "kind of a special place, even today." Tr. 8/14/14 at 1154 (G. Barrientos). Representative Dukes echoed his sentiment. Tr. 8/13/14 at 877 (D. Dukes).²³ And, as Representative Rodriguez made clear, it's not a situation of behind-the-scenes string-pulling by Anglos to give a false appearance: "I believe

²³ "Austin readily, and Travis County readily support African American and Hispanic candidates countywide, more so than anyplace else[.] . . . [T]here's not . . . label that is placed upon a person based upon the color of their skin. African Americans and Hispanics are readily supported in Travis County."

there's a real sharing there." Tr. 8/13/14 at 819 (E. Rodriguez). Consistent with this testimony, the past president of the Austin branch of the NAACP recited a series of racial cooperation across the community, even though it is residentially segregated. Tr. 8/13/14 at 1018, 1021-22 (J. Travillion).

4. Crossover CD25 purposely destroyed, using race as the key to dismantlement.

a. Factual testimony and visuals depict the racial basis used to divide Travis

As Representative Dukes testified, dividing Travis County into five different congressional districts was done on racial lines: "[T]hey chose to separate the African-American community, the Hispanic community, but left the Anglo community intact" —at least, those Anglos that vote differently than African-Americans and Latinos. Tr. 8/13/14 at 881 (D. Dukes). The former NAACP leader in Austin saw the same thing in the linedrawing. According to him, C185 split the minority community by tortured lines, and the use of race is "inescapable" in terms of what was done. Tr. 8/13/14 at 1032, 1034 (J. Travillion). These divisions, he said, diminished the influence of minority communities in the area. *Id.* at 1027-28.

The visuals alone of how Travis County was carved up reveal divisions along starkly racial lines in C185. The opportunity district, HD51, of Representative Rodriguez ends up in three different congressional districts. Rod. Exh. 921. The opportunity district, HD46, of Representative Dukes ends up split into five districts. *Id.*

The densest concentrations of African-Americans of voting age are purposely split into two different congressional districts. Rod. Exh. 923. One of those concentrations is a main, if not *the* main, historical black neighborhood in Austin, and it is sent off into an Anglo-dominated district than runs up the Texas Hill Country all the way to Tarrant County. Tr. 9/13/14 at 844 (D.

Dukes); *see also* Tr. 9/13/14 at 1031 (J. Travillion) (explaining how African-American area called Colony Park in East Austin is sent into the new CD25 running to Tarrant County). As to Latinos in Travis County, most—60%—are distributed across districts in which they are the minority—even while 91% of Anglos in the county are in districts that are majority Anglo. Joint Exhibit 15 (Ansolabehere 2011 Rep. at 26).

The principal mapdrawer for C185 offered the pretense that these divisions were for partisan reasons. Tr. 9/15/14 at 1674 (R. Downton). But his description of *how* he did it belies this facile explanation. He said that “*Anglo* Democrats needed to be divided” among the districts. *Id.* (emphasis added). In other words, after dividing up Latinos and African-Americans, which he automatically assumed were Democrats based on their race, he then went looking for Anglos—not simply Democrats—that he also could sever from the minorities. And he did this even though he had been advised that dividing up minority neighborhoods was not a good policy and even though he (Downton) claimed adherence to that principle—keeping minority neighborhoods together—is a traditional districting principle. Tr. 8/15/14 at 1524 (D. Hanna) (advised to keep minority neighborhoods whole); Tr. 8/15/14 at 1622 (claiming that keeping minority neighborhoods together is a traditional districting principle).²⁴

b. Dr. Ansolabehere’s unrebutted analysis shows race is a better indicator of division than party

Dr. Ansolabehere’s analysis bears out what the visuals depict and what even Downton admitted he did. Dr. Ansolabehere analyzed the divisions of both Travis County and the benchmark

²⁴ Downton also dishonored another traditional districting principle in the Austin part of the map. Senator Seliger described not splitting precincts as a traditional districting principle, Tr. 8/11/14 at 249 (K. Seliger). But Downton split 64 precincts in Travis County, proportionately more in terms of population than in any other of the five major urban counties. Rod. Exh. 944. This helped accommodate the 100 precinct splits used to draw CD35, Rod. Exh. 945, plus the divisions of the other four districts into which Travis was carved.

CD25 crossover district and concluded that those divisions more closely tracked racial lines than other lines. Rod. Exh. 912 at 7. As he put it in testimony, he was trying to determine “whether the division of Travis County [in C185] is primarily racial or partisan.” Tr. 8/13/14 at 946.

To reach this conclusion, Dr. Ansolabehere performed a statistical analysis to determine the correlations between racial composition of a Voting Tabulation District (“VTD”) and inclusion of such a VTD into a given district in the county.²⁵ He did the same thing but based on party vote. Rod. Exh. 912 at 38. His conclusion: “The racial indicators are statistically significantly correlated with inclusion of VTDs in specific CDs.” *Id.* at 39. Finally, he determined that “race is a stronger predictor than party vote of which VTDs are put in which CDs.” *Id.* His trial testimony was to the same effect, for both Travis County *and* benchmark CD25. Tr. 9/13/14 at 947-49 (S. Ansolabehere):

[L]ooking at all the districts that divided Travis or all the districts that divided old CD25, *race is a stronger predictor of where the lines fell than party.*

Id. at 950 (S. Ansolabehere) (emphasis added).

The conclusion is unavoidable that C185 is constitutionally invalid in its destruction of CD25 and the concomitant division of Travis County. There was a preexisting crossover district; it was purposely destroyed; and its destruction was along racial lines. *Bartlett* says this is constitutionally forbidden.

Moreover, it is clear that in this instance the destruction was hardly *compelled* by Section 2. *Cf. Bush v. Vera*, 517 U.S. 952, 977, 991-92 (plurality opinion) (compelling state interest in com-

²⁵ Dr. Ansolabehere used VAP, not CVAP, to perform this analysis. His un rebutted testimony is that he didn’t think using CVAP instead would change the result. Tr. 8/13/14 at 948 (S. Ansolabehere). As already explained, the concept of CVAP does not have legal roots in any area of redistricting law than the statutory application of the first *Gingles* factor.

plying with § 2 results test assumed).²⁶ The state’s witnesses agreed, and numerous demonstration maps in this case establish, that C185’s CD35 was anything but required as the location of a new Latino opportunity district.

5. Travis County’s Democratic primary is no barrier to minority electoral success

The proper focus of election analysis for determining the legality of a redistricting scheme is the general election. Undoubtedly because the general election data so strongly confirms the crossover district status of benchmark CD25, there has been some effort to shift the focus from general elections to primary elections insofar as the crossover status of CD25 is concerned. The effort is misplaced, but even if it weren’t, shifting the focus changes nothing in terms of the crossover status of CD25: it remains a crossover district.

a. General elections are the proper focus

In *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997), the appeals court determined that the focus of election analysis for purposes of voting cohesion should not be shifted from general elections to primaries. The court found such a view grounded in the mistaken (and judicially unshared) belief that “minority voters essentially take their marbles and go home whenever the candidate whom they prefer most in the primary does not prevail.” *Id.* at 615. The Fifth Circuit, too, has focused voting rights analysis on general elections. *See, e.g., LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 886 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 1071 (1994) (“undisputed facts . . . are that a majority of Hispanic voters always supported the same candidate favored by black voters in every *general election*”) (emphasis added); *Campos v. City of Baytown*, 840 F.2d 1240, 1245-46 (5th Cir. 1988) (using general election da-

²⁶ Justice Scalia’s partial concurrence also treated compliance with the Voting Rights Act as a compelling state interest. *LULAC v. Perry*, 548 U.S. at 518 (J. Scalia, concurring in part and dissenting in part) (concerning Section 5 compliance).

ta to review cohesion in a coalition district and holding that cohesion between African-American and Latino voters is shown if they vote together for the same candidate).

This is consistent with what the Task Force's expert stated in his most recent report:

[T]he most important estimates for assessing polarized voting . . . are those for the General Election because much larger numbers of Latinos voted in this election than in the Republican nomination contests.

Task Force Exh. 967 (Engstrom Rep. at 5).

b. In any event, the Democratic primary does not screen out minority voter preferences in Travis County

The only purpose for reviewing primary elections in this situation is to determine if the primary somehow serves as a "screen" to sift out and prevent minority-preferred candidates from even reaching the general election stage. As Dr. Ansolabehere explained, the question is whether the primary is a "filter" preventing minority-preferred candidates from emerging at all. Tr. 8/13/14 at 955 (S. Ansolabehere). That is, the issue is can minorities actually get their candidates to the general election where they have a chance to prevail. *Id.* Dr. Engstrom agreed. His reason for looking at primary elections was only to see if they filter out minority-preferred candidates over time. Tr. 8/12/14 at 487.

There is no evidence that the Democratic primary serves to filter out, or screen, minority-preferred candidates from reaching the general election. The only way to assess the question is to examine the outcomes of primary elections. Tr. 8/13/14 at 957 (S. Ansolabehere).²⁷ Neither Dr. Engstrom nor Dr. Alford performed this necessary piece of the analysis. *Id.* (S. Ansolabehere) (noting that they had only looked at polarization, not outcomes). Dr. Engstrom agreed that he

²⁷ "Q. Can you perform the analysis of whether the primary functions as a screen . . . without determining outcome?
A. You mean just looking a racial polarization?
Q. Yes.
A. No."

had not evaluated outcomes in this part of his analysis. Tr. 8/12/14 at 488 (R. Engstrom). (answering “no” to the question whether he looked at outcomes because “[w]e are not looking at the outcomes”).

No one proffered any evidence on this issue other than the Rodriguez plaintiffs through Dr. Ansolabehere. He concluded that African-Americans and Latinos in Travis County show a high rate of cohesion because in most primary elections large majorities of the two groups vote for the same candidate, and candidates preferred by minority voters won 75% of the time in Travis primaries. Rod. Exh. 914 at 24-25. Considering the different patterns of group coalitions, “no one group dominates the primary process,” and, importantly, “[p]ower is shared equally and in such a way that the racial groups succeed in nominating their preferred candidates 75 percent of the time.” *Id.* In his follow-up analysis, he concluded that the primary election process “in Travis County *and* under old CD25 did not prevent minority-preferred candidates from reaching the general election contests.” Rod. Exh. 913 at 4 (emphasis added).

As further explained in his testimony, Dr. Ansolabehere analyzed forty-three Democratic primary races— “[w]e pulled down every election we could get our hands on.” Tr. 8/13/14 at 974-75 (S. Ansolabehere). His data, summarized in Attachment 6 of Rod. Exh. 914, show that the Anglo-preferred candidate was winning a third of the time in the primary, the African-American-preferred a third, and the Latino-preferred a third. *Id.* at 959. “[T]he three groups are actually coalescing inside the primaries.” *Id.* at 960.

This analysis, un rebutted by any testimony, is directly supported by other testimony. Former Senator Barrientos, whose district then encompassed all of Travis and Hays Counties, defeated three Anglo incumbents in the 1984 primary. Tr. 8/14/14 at 1162 (G. Barrientos). As he said, he

could not have won the primary without substantial support from Anglo voters. *Id.* at 1162-63. Representative Dukes, who must rely on support from all three parts of the tri-ethnic coalition to win her House district, faced an Anglo opponent in the Democratic primary more recently, in 2008, and and defeated him. Tr. 8/13/14 at 874-75 (D. Dukes). Representative Rodriguez, familiar with the whole of Travis County and Democratic primaries in particular from his days as executive director of the county Democratic Party, testified that the coalition comes together in every election, and “is most dominant in the Democratic primary.” Tr. 8/13/14 at 818 (E. Rodriguez). When asked whether African-American and Latinos tend to divide from each other in the primaries, said that “generally, no,” they “will generally support the same candidate.” *Id.* at 821.²⁸

To the extent the Democratic primary comes into play at all in the analysis of whether CD25 is a crossover district, the only plausible evidence is that the result of the analysis remains the same: benchmark CD25 was a *Bartlett*-style crossover district—one that was purposely dismantled using race as the main tool.

C. Under *LULAC v. Perry*, trading CD35 for CD23 was improper under Section 2.

1. The *LULAC* decision warned against swapping Section 2 rights this way.

Part of the Legislature’s design was the ostensible replacement of an existing Latino opportunity district which the policymakers carefully undermined—that is, CD23—with the new CD35 in Plan C185. In *LULAC v. Perry*, the Supreme Court held that a “noncompact district cannot . . . remedy a violation elsewhere in the State.” 548 U.S. at 430. The opinion explains:

²⁸ When asked to focus on only one of the many Democratic primary races—one in 2006 when an African-American and a Latino candidate vied for the same primary nomination to a judgeship—he said that, even standing alone, it did not suggest that the coalition was frayed or gone. Tr. 8/13/14 at 825 (E. Rodriguez) (noting the closeness of the vote, 51%-49%).

[T]he state’s creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right. And since there is no § 2 right to a district that is not reasonably compact, . . . the creation of a noncompact district does not compensate for the dismantling of a compact opportunity district.

Id. at 430-31.

Applying this legal principle, the *LULAC* Court concluded that the 2003 version of CD23 was illegal (because it deprived Latino voters of equal voting opportunities) and that the illegality was not cured by a non-compact CD25 running from Austin to the Rio Grande River. Acting on the Supreme Court’s direction on remand, the district court acted redrew *both* CD23 and CD25 to the C100 configuration.

In C185, the Legislature repeated the same kind of legal error marked by the Supreme Court’s 2003 *LULAC* decision. On remand, the 2006 judicially-crafted Plan C100 had restored a legally viable CD23 and repaired the Austin-to-McAllen CD25 problem. The 2011 Legislature jettisoned these legal repairs and reverted to its invalidated 2003 ways. Plan C185 deliberately undermined CD23 as a viable Latino opportunity district. After *LULAC*, it cannot cure this Section 2 violation by pointing to new CD35 as a “make-up” Section 2 district.

2. New CD35 was a swap for the undermined CD23

The mapdrawer Downton had doubts about whether CD35 was required under Section 2. Tr. 9/9/11 at 987 (R. Downton); Exh. J-42 at 114 (R. Downton Depo.) (“all the other districts *except 35* were required to have,” stating court could conclude “no, we didn’t have to create it”) (emphasis added). The state’s own expert, Dr. Alford, testified on the relation between CD23 and CD35. He considered it a “swap;” questioned on whether it was a legal swap or not, he summoned nothing more than: “I don’t know.” Exh. J-23 at 194 (J. Alford Depo.). In a 2011 col-

loquy with Judge Garcia, Dr. Alford testified that CD35 was an intended “offset” to the Legislature’s weakening of CD23 to render it less likely to elect the candidate of choice of Latino voters. Tr. 9/14/11 at 1840 (J. Alford); *id.* at 1875 (agreeing that CD35 was a “swap” for CD23).

In 1994, the Supreme Court already had warned legislatures away from the concept of trading off voting rights of those in one part of the state for the voting rights of those in another. *DeGrandy*, 512 U.S. at 1019. *LULAC* took the next logical step and held that, when the swap ended with a non-compact opportunity district, the action was inconsistent with Section 2:

[T]here is no § 2 right to a district that is not reasonably compact[.] . . . [T]he creation of a noncompact district does not compensate for the dismantling of a compact opportunity district.

548 U.S. at 430-31. C185’s new CD35 was not reasonably compact.

3. CD35 is not reasonably compact.

A district is not rendered compact because of a mere “mathematical possibility” of pulling a critical mass of voters into it. *LULAC*, 548 U.S. at 435. Even the state’s experts are unanimous that CD35 is not a reasonably compact district.

Todd Giberson, the state’s compactness expert,²⁹ ranked CD35 the least compact district in the C185 plan by each of the three technical compactness measures he used. Joint Exh. 18 (T. Giberson Rep.) at App. “Compactness Measures” for Plan C185. *See also* Rod. Exh. 943 (showing CD35 to be far and away the least compact district on both compactness measures). accurately characterized CD35’s “perimeter-to-area” score of .054 as “very low.” Tr. 8/14/14 at 1214 (G. Korbel).

Consistent with Mr. Korbel, Mr. Giberson’s testimony expanded on the compactness measures for CD35: to him, the scores for CD35 did not establish its compactness. Exh. J-42 at 33

²⁹ Exh. J-42 at 61 (T. Giberson Depo.) (holding himself out as expert on compactness measures).

(T. Giberson Depo.).³⁰ He testified that “if that district were just drawn in by itself or someone was trying to propose that that district should be drawn like that, I would say no.” *Id.* Consistent with Mr. Downton’s testimony, he did not believe its shape was such that a court would compel the state to actually create such a district. *Id.* at 64. In fact, he described the district as composed of parts of Austin and San Antonio with nothing but “a *line* connecting them.” Tr. 8/15/14 at 1674 (R. Downton) (emphasis added).

Dr. Alford also concluded that CD35 is not a reasonably compact district: “[I]t’s definitely not a compact district.” Exh. J-43 at 43 (J. Alford Depo.). He continued: “[T]hat district caught my eye as being a non compact district.” *Id.* at 44. And further as to CD35, he admitted that “if I was drawing districts, it’s not a district I would be proud of.” *Id.* at 97. Mr. Downton’s description could come no closer than merely “borderline.” Tr. 9/9/11 at 988 (R. Downton). The Senate-side’s mapdrawer saw it as “not particularly compact.” Exh. J-58 at 90 (D. Davis Depo.).

4. Other related indicia of CD35 as an insufficient substitute

The question is not whether CD35 functions as a Latino opportunity district; it does.³¹ But so did 2003’s unduly elongated CD25. And the issue here is not whether there should be another South-Central Texas Latino opportunity district. Section 2 requires it, *see* Part V, below, and such a district was uniformly supported in testimony—not to mention demonstration maps, including Plan C220—by those questioning CD35 itself. *See* Tr. 8/13/14 at 84243 (E. Rodriguez)

³⁰ “Q. 18.4, 2.7 and 10.5, right?

A. Yes.

Q. Do you consider those scores compact?

A. No, I don’t.”

CD35 is assigned a “reciprocal calculation” on compactness of 18.4 on Perimeter to Area, of 2.7 on Area to Rubber Band, and of 10.5 on Area to Smallest Circle. The closest any other C185 district comes in terms of measured non-compactness is 15.6 for CD18 (on Perimeter to Area), 2.4 for CD28 (on Area to Rubber Band), and 6.9 for CD15 (on Area to Smallest Circle).

³¹ *See, e.g.*, Tr. 8/13/14 at 842 (E. Rodriguez) (no reason to doubt it).

(“false choice” to pose issue as CD35 or nothing); *id.* at 892 (D. Dukes) (multiple other options); 9/8/11 at 753 (G. Korbel) (supporting alternative of South Texas configuration). Rather, the issue is whether C185’s CD35 can legally be that district. *Bartlett* identifies the constitutional problem. *See* Part III.B, above. *LULAC* identifies the statutory one.

a. Attenuated linkage between two different communities

Beyond compactness (but related to it), Plan C185’s CD35 is an attenuated, and tenuous, district in the way it links different communities of interest, as well in its disregard of traditional districting criteria.³² The configuration linking Austin and San Antonio is itself unusual. Tr. 9/8/11 at 725 (G. Korbel).³³ It spans two of the most expensive media markets in the country. *Id.* at 725.³⁴ In its Travis County extension, the district was drawn in such a way as to require 55 precinct splits, apparently mostly in minority precincts. *Id.* at 675, 689, 708. In all, CD35 has the largest number of split precincts in Plan C185: 100. *Id.* at 685; *see also* Rod. Exh. 943.

The key link between South San Antonio and north central Austin was a 50-mile long, 3-mile wide strip running along Interstate 35 between the two extremities of the district.³⁵ MALC’s ex-

³² A Court 2011 colloquy with the state’s counsel highlighted the unusual nature of CD35. 9/8/11 at 788-89. The best former Senator Barrientos could do was say it was an “improvement” on the 2003 version. Tr. 8/14/14 at 1166 (G. Barrientos).

³³ Mr. Korbel’s testimony on this point is broad but seems intended to refer to the linkage of the two *minority* communities in the cities. More affluent, Anglo communities in the two cities have been linked through CD21, but that is along a different, more coherent geographic connection along the west sides of the two counties, linked by something more substantial than a mere strip or line.

³⁴ Elsewhere in Plan C185, media market *separation*, not forced media market linkage, was said to be a redistricting principle worthy of following. Tr. 8/14/14 at 1073 (T. Hunter) (discussing Nueces County and the Valley). Representative Hunter was a source of inspiration and information for Downton in his treatment of Nueces County. Tr. 8/15/14 at 1725 (R. Downton). It appears that this is yet another instance of Downton’s redistricting policies shifting and being applied in diametrically opposed ways, depending on which part of the state and which communities were under his microscope at any given time.

³⁵ The strip was kept narrow in part at the insistence of Representative Kuempel, who did not want the district to come into Guadalupe County. Tr. 9/9/11 at 919 (R. Downton). Mr. Downton did not have reason to doubt that the strip was only three miles wide. *Id.* at 991.

pert said that CD35 runs between Latino population concentrations in San Antonio and Austin “with not much in between.” Joint Exhibit 2 (M. Kousser Rep. at 129). As to this connecting strip along the interstate, it was blithely explained that “[i]f you wanted a district that included part of San Antonio and part of Travis, you had to connect them somewhere.” Tr. 9/9/11 at 992 (R. Downton). Chairman Solomons was fine with the I-35 linkage strip, but acknowledged that, despite that highway being the basis for the linkage, the principal part of CD35 in San Antonio was not even along I-35. Exh. J-60 at 145 (B. Solomons Depo.).

Using such connectors to link two different areas of highly-concentrated minority voters is legally questionable. *See Sensley v. Albritton*, 385 F.3d 591, 597 & n.4 (5th Cir. 2004) (questioning linkage through 15-mile “narrow corridor” of land in district resembling an “electoral barbell”).

b. Travis end of district

At the Travis County end of the district, the Legislature went to extreme lengths to gather in Latino population. It cut off part of the black population in East Austin to reach Latino population, splitting precincts to reach more heavily Latino precincts (but low voting) in north central Austin about two and a half miles north of the State Capitol. Tr. 9/10/11 at 1194-97 (D. Butts).³⁶ In another part of Austin, the map splits a precinct to isolate the dormitories of St. Edward’s University from the university’s administration building in order to place the Latino population of students in CD35. *Id.* at 1197-99. Elsewhere in Austin, the map splits another precinct to separate Latino population into CD35, with Anglos going into CD21. *Id.* at 1199. Representative Rodriguez, House district largely overlaps the Travis County part of CD35, sees CD35 as a “potential dissolution of the community” in Travis County, diluting the “growing Latino strength” in the county. Exh. J-54 at 11-12 (E. Rodriguez Depo.).

³⁶ Downton agreed that CD35 extends into North Central Austin. Tr. 9/9/11 at 989 (R. Downton).

c. Bexar end of district

On the extreme southern end of the district in Bexar County (where CD35 and its swap-mate, CD23, meet up), the Legislature divided longstanding communities of interest in south San Antonio in order to buttress its CD35 design.³⁷ As an expert well-versed in San Antonio politics testified, Plan C185 divides “a traditional voting community on the South Side of San Antonio” by cracking it three ways and moving the “vast majority” of its population into new CD35 and a new configuration of CD20. Joint Exhibit 8 (H. Flores Rep. at 10-11); *see also* Tr. 8/12/14 at 554 (H. Flores) (CD35 took 21% from CD20 and 12.5% from CD23). Another expert with firm ties to San Antonio testified about how CD35 cuts up South San Antonio communities of interest. Tr. 8/14/14 at 1225 (G. Korbel).

The mapdrawer performing the South San Antonio surgery did not even know about such a thing as the Harlandale school district. Tr. 8/15/14 at 1752 (R. Downton). But former Congressman Ciro Rodriguez knew it well. He, too, testified about Plan C185’s fracturing of South San Antonio, explaining how the Harlandale district was cut into three pieces, due in part to CD35’s far southern extension. Tr. 9/8/11 at 784 (C. Rodriguez).³⁸ Historically, this high performing Latino voting area in the Harlandale district had been kept unified. *Id.* at 784-85. The former Congressman further testified about the importance of keeping that community of interest intact. *Id.* at 786. Still another San Antonio-based congressman, Congressman Gonzalez, recalled how the Harlandale district and South San Antonio had always been kept together in a single congressional district. Tr. 10/31/11 at 364 (C. Gonzalez).

³⁷ Two San Antonio state representatives asked that, “*if*” CD35 was going to be drawn from Austin to San Antonio, they would prefer it be based more in San Antonio. Tr. 8/15/14 at 1673 (R. Downton) (emphasis added).

³⁸ The other two districts coming into the school district were CD20 and CD23.

The southern extension of non-compact CD35 also disrupted the “historic Latino district,” CD20, from central moorings it had had for a half century. *Id.* at 346, 349.³⁹ The district’s incumbent at the time, Congressman Gonzalez, was Chair of the Congressional Hispanic Caucus—yet C185 removed both his residence and his district office from CD20. *Id.* at 347, 358.

Now-former Congressman Gonzalez saw the same problems Mr. Korbel saw in terms of the Austin-San Antonio split in CD35. He saw it as creating “split allegiances” and “competing interests” that would make it more difficult for the district’s constituency. *Id.* at 349-50 (providing examples).⁴⁰

The disruption of CD20 was unnecessary and occurred only because of what the Legislature determined to do *to* CD23 and *with* the new CD35. *See* 9/911 at 946 (R. Downton) (moving only three or four precincts in CD20 would have remedied the equal population problem there); *id.* at 985 (south San Antonio changes involved trio of districts and manipulation of them).

5. The coupled CD23 and CD35 should be repaired together under Section 2

Under the Section 2 principles laid down in *LULAC* in 2006, CD23 and CD35 are effectively joined at the hip, statutorily-speaking. Even aside from the constitutional issues raised by *Bartlett* as to CD35’s role in destruction of an existing, viable crossover district centered in Austin, CD35’s oddities, combined with the undermining of CD23, require a Section 2-mandated repair.

³⁹ CD20 was the first congressional district in Texas to elect a Latino congressman. Tr. 10/31/11 at 346-47 (C. Gonzalez) (referring to his father).

⁴⁰ Countervailing testimony on the community of interest between South San Antonio and the Austin area embraced by CD35 was slight. Former State Senator Joe Bernal, who had last served in the legislature well over two decades ago, testified quite broadly to a linkage but it was based on his time in Austin as a legislator. 9/7/11 at 557-58 (J. Bernal). Former Senator Barrientos, who had testified that Austin remained a “special place,” offered his broad observation that there is “not that much difference” between the two cities. Tr. 8/14/14 at 1160 (G. Barrientos).

IV. NUECES COUNTY: THE LEGISLATURE PURPOSELY SETS NUECES'S LATINOS ELECTORALLY ADRIFT

A. Farenthold's unexpected win precipitates a search for Anglo voters

By 2011, it had been a third of a century since Nueces County had been oriented northward in a congressional district. Tr. 8/14/14 at 1212 (G. Korbel). Since 1980, resulting from Voting Rights Act protections for minority voters, the residents of the county had been in congressional districts going southward toward the Valley. *Id.* Except for a little over 35,000 people in part of San Patricio County, C100's benchmark CD27 ran southward along the Gulf Coast to the southern edge of Cameron County. It had been 69.2% Latino VAP during the 2000-2010 decade. Rod. Exh. 929, 6th page. Its Latino CVAP was 63.8% (using 2005-2009 ACS tabulation) or 65.9% (using 2008-2012 ACS tabulation). Rod. Exh. 930.

It is undisputed that benchmark CD27 was a Latino opportunity district; *see, e.g.*, Tr. 8/11/14 at 229 (K. Seliger);⁴¹ however, in November 2010, the congressional candidate who was *not* the preferred candidate of Latino voters—now Congressman Blake Farenthold—unexpectedly won the district in a close race. *Id.* at 228-29 (K. Seliger); Joint Exhibit 15 (Ansolabehere 2011 Rep. at 35) (Farenthold won 48%-47%, but without strong support from Latinos). Farenthold won about 71% of the Anglo vote, but only 26% of the Latino vote. *Id.* at 36.

Immediately, concerns were expressed about how to protect Farenthold and avoid the legal problems that would come with trying to do so: “It will be INCREDIBLY difficult to not have a packing claim and enhance Farenthold's reelectability.” U.S. Exh. 76 (emphasis in original). The

⁴¹ As Mr. Opiela put it in a November 2010 e-mail forwarded to staff, including Mr. Interiano, for the Texas House leadership, “CD27 electing an Anglo does not change the VRA protection afforded to CD27 as a minority majority district---it's not the ethnicity of the candidate elected rather if that candidate was the ‘candidate of choice’ of the minority community.” U.S. Exh. 76.

Republican congressional delegation implored the Senate redistricting chair to help Farenthold. Tr. 8/11/14 at 229 (K. Seliger).

The problem with protecting Farenthold while also protecting Latino voting rights was, to use Opiela's term, "inherent." U.S. Exh. 76. More than 206,000 Latinos live in Nueces County, constituting 60.6% of its population, Rod. Exh. 938, 6th page, and the already substantial Latino population south of Nueces had grown even larger.

Opiela immediately latched onto using race as the solution for Farenthold. Benchmark CD27 was overpopulated but only by 43,500, U.S. Exh. 690. Nonetheless, he could go north "to pick up *Anglo voters*" because there weren't "enough *Anglo voters*" south of Nueces. U.S. Exh. 76 (emphasis added). And even this, he worried, would could have a ripple effect that, to protect the other Anglo-supported incumbent they were trying to protect (Canseco), would send him all the way to Midland in West Texas where he could "pick up *Anglo voters*." *Id.* (emphasis added).

B. The state redistricters pursue the Nueces-north concept, aware of its voting rights implications for the rest of Texas's southern half

At the inception of their redistricting work, Chairman Solomons and Downton adopted the northward strategy Opiela had discussed. At the outset, Solomons instructed that Nueces County would be oriented northward. Tr. 8/15/14 at 1773 (R. Downton). Borrowing the "concept" from a map from the Republican congressional delegation Opiela represented, Downton began work on a map that sent Nueces north, separating it from Cameron County. *Id.* at 1594, 1632.

Downton undertook this effort even though he was aware that keeping Nueces County oriented the way it had been in recent history—southward—meant that he was eliminating one of the available alternatives for creating a new Latino opportunity district. *Id.* at 1774 (R. Downton) (acknowledging that a Nueces-based district could have been the locus of a Latino opportunity

district that would have made the CD35 configuration unnecessary). He even acknowledged that, but for the re-orientation of Nueces in C185, Nueces could have been the locus of a county split instead of it being Maverick County. *Id.* at 1775.

C. More than 200,000 Latinos in Nueces are intentionally stranded, their vote diminished

The “new direction” for Nueces County placed it and its more than 200,000 Latinos in an Anglo-dominated district that ran from the southern boundary of Nueces County northward then hooking eastward in a dog-leg all the way to the county line between Bastrop County and Travis County. The eastern counties are, as Opiela had highlighted at the onset of the idea, overwhelmingly Anglo and the new CD27 is as long as the 2003 version of CD25 (running from Austin to McAllen) which the court on remand *LULAC* re-configured to bring back into the crossover CD25. Tr. 8/14/14 at 1230-32 (G. Korbel). Nueces is the only county in the district with more than 50% Latino VAP. Rod. Exh. 938, 6th page. Nueces County Latinos have gone from being in a district with about 65% Latino CVAP to being in a district that has dropped to 43.0 Latino CVAP. Rod. Exh. 939, 3rd page (2008-2012 ACS survey).

They are no longer in a Latino opportunity district and are unable to play a role in electing their candidate of choice.⁴² CD27 “clearly switch[es] from minority opportunity district[] to White district[.]” Rod. Exh. 907 at 33 (Ansolabehere Rep.). But Nueces Anglos can. Anglo voters in Nueces County maintain, in Dr. Ansolabehere’s words, “quite high White cohesion.” Tr. 8/13/11 at 943 (S. Ansolabehere). Only about 10%-15% of Nueces Anglos vote for the Latino-preferred candidate. *Id.*

⁴² “This single shift in a county from one district to another greatly reduced the opportunity of the sizable Hispanic population in Nueces County to elect candidates of their choice.” Joint Exhibit 15 (Ansolabehere 2011 Rep. at 27).

D. The state's pretextual explanation doesn't hold up

The state proffered evidence trying to counter the apparent racial basis underpinning the newly drawn CD27. It is hardly persuasive.

In the most recent trial round, Mr. Downton had occasion to recollect events about the drawing of CD27 and the treatment of Nueces County that had gone unremarked upon by him or anyone else in 2011. This time, he testified about having heard of legislative hearings having been conducted in 2010, with one of them held in Corpus Christi. Tr. 8/15/14 at 1633 (R. Downton).⁴³ He claimed that he'd reviewed "interim plan reports" from the 2010 hearing in Corpus and that there was a "consensus" request for a Nueces-anchored district and a Cameron-anchored district. *Id.* at 1633-34.⁴⁴ Mr. Interiano also testified that he recalled pre-census hearings at which "one of the testimonies" was in favor of a Nueces-anchored district. Tr. 8/11/14 at 344 (G. Interiano).

One problem for the state is that, if the idea was to switch so that Nueces instead of Cameron controlled a congressional district to help Farenthold, C185 did things backwards. Nueces County voters controlled the outcome in the CD27 2010 election *before* the redistricting switch. *See* Rod. Exh. 955 (63.3% of votes cast in 2010 general election in benchmark CD27 were from Nueces County). *After* the switch, to the new CD27, Nueces lost control of the election and the

⁴³ The question from the state on direct used the terms "interim plan hearings" and "interim plan reports." Tr. 8/15/14 at 1633. But there was no "interim plan" to hold a hearing or issue a report about. The 2010 census data had not even been released at the time of the hearing in Corpus Christi. Tr. 8/14/14 at 1089 (T. Hunter). And there is no evidence that there was any "report" for the hearing until the Attorney General's office had it transcribed. *See* State Exh. 574 at 141 (showing court reporter's certification date of November 9, 2010). This was only a few days before the Opiela "find Anglos" memo of November 20, 2010, *see* U.S. Exh. 76. It is highly unlikely that Downton would have seen this transcription *before* the Opiela memo came out.

⁴⁴ Downton testified that Representative Lucio requested a Cameron-anchored district. Tr. 8/15/14 at 1634-35.

northern, predominantly Anglo counties had most of the votes. Rod. Exh. 956 (61.1% of votes cast in the CD27 2012 election were from outside Nueces).

Another problem is that the subsequently-produced transcript of the Corpus hearing in 2010 does not bear out the belated recollections of Mr. Downton and Mr. Interiano. Forty-two witnesses testified at the hearing. State Exh. 574. It cannot fairly be said that there was any “consensus” from these witnesses’ testimony, much less that there was a consensus on splitting Nueces and Cameron into two completely separate districts. There most certainly was no consensus to isolate Nueces Latinos in an Anglo-dominated district. One dominant theme in the witnesses’ testimony is of the need for any new map to recognize the growth of the Latino population. *See, e.g., id.* at 26 (H. Berlanga) (Latino districts “should double”); at 47 S. Luna-Saldana (urging re-districting recognition of 70-80% Latino growth); at 95 (R. Meza-Harrison) (urging recognition of Latino growth). But that theme was ignored, and Mr. Downton mentioned nothing about *it* in his testimony.

It is clear that, if anything at all really was gathered, only through the most selective cherry-picking could Mr. Downton or Mr. Interiano have gleaned from this 2010 hearing that Nueces Latinos should have been cut electorally adrift. And this leaves nothing much beyond the plain fact that Nueces and its large Latino population was sent northward, cut-off from being in a Latino opportunity district, so that it would be in a district controlled by Anglo voters.

E. The stranding of Nueces votes is best explained as an intentional diminution of Latino voting opportunities

The realignment of Nueces County northward and eastward into an Anglo-dominated congressional district had far-reaching implications. It was used as an excuse to unconstitutionally dismantle the crossover district of benchmark CD25 centered in Travis County. It was used to

avoid creation of an additional Latino opportunity district in the South Texas envelope, thereby violating Section 2. But it also stands alone as the intentional race-based diminution of Latino representation in Congress and of Latino voting power. This is a violation of the Equal Protection Clause.

V. SOUTH TEXAS ENVELOPE: VIOLATION OF SECTION 2

A. The positive voting rights consequence of putting Nueces County back in the South Texas envelope

Had the Legislature not re-oriented Nueces County's place in the congressional districting map and, instead, maintained the location of some or all of Nueces County in its most recent (and historic) southern orientation, there would have been beneficial voting rights consequences in addition to avoiding the constitutional violation just addressed in Part IV, above. It would have enabled the state to meet the requirements of Section 2 in the South Texas envelope.

Nueces County is 55.87% Latino CVAP; total Latino CVAP in the county is estimated to be 133,370. State Exh. 177 (Alford Rep. at App., 14th page). As shown by the various alternative demonstration maps discussed in sub-part B, below, the ripple effect from including this population in the envelope would have enabled the state to avoid the unconstitutional elimination of an existing crossover district and still have formed more Latino opportunity districts in the South Texas envelope than is done in Plan C185.

B. Complying with *Bartlett* in maintenance of a Travis-based crossover district still allows ample leeway for seven, and possibly eight, Latino opportunity districts in the South Texas envelope.

Plan C185—with its stranding of Nueces County Latinos and dismantlement of the existing Travis-based crossover district—creates only five Latino opportunity districts entirely in the South Texas envelope, plus one (CD35) partially in the envelope and partially out. Rod. Exh. 907

(Ansolabehere Rep. at 33). They are CDs 15, 16, 20, 28, 34, and 35. *Id.* With four fewer total districts in the map as a whole and with a smaller Latino population, benchmark Plan C100 already included six Latino opportunity districts in the envelope, plus one opportunity district (crossover CD25) outside the envelope in the Travis area partially covered by C185's CD35. The Latino districts were CDs 15, 16, 20, 23, 27, and 28. *Id.*

As argued above, *see* Part III.B, C185's destruction of the preexisting crossover CD25 is unconstitutional. It also is invalid as a Section 2 swap for the former CD23, *see* Part III.C. As a result of the invalid elimination of the crossover district, CD35 will have to be dropped out of its Travis County incursion. But that does not mean that the state congressional map then would be required to have only five Latino opportunity districts in the South Texas envelope. Section 2 still would require it to have at least seven such districts.

Numerous maps demonstrate that it is a false choice to claim that, without CD35's use as a tool destroy the benchmark crossover CD25, sufficient Latino opportunity districts cannot be created in the South Texas envelope to comply with the requirements of Section 2. One such map, used by Dr. Ansolabehere as a demonstration map in his February 2014 report, Rod. Exh. 912, is Plan C220, the interim map initially drawn by this Court in November 2011 and vacated on grounds unrelated to the issue addressed here in *Perry v. Perez*. Under Dr. Ansolabehere's analysis, Plan C220 created seven performing Latino opportunity districts in the South Texas envelope, even as it maintained one crossover opportunity district. *See* Rod. Exh. 912 (Ansolabehere Rep. at 16). The Latino opportunity districts in the envelope were CDs 15, 16,

20, 23, 27, 28, and 35. *Id.*⁴⁵ Another way of stating this is that undoing the constitutional violation in elimination of C100's crossover CD25 still leaves the state's C185 in violation of Section 2 in the South Texas envelope. Plan C220 demonstrates, as far as the envelope is concerned, that compliance with the *Bartlett* constitutional rule and compliance with Section 2 would require adding two Latino opportunity districts there beyond the five existing under Plan C185.

Other maps, using varying districting configurations, demonstrate the same legal point. The Dukes Plan C166 creates a new Latino opportunity district in the Rio Grande Valley, Tr. 8/13/14 at 898-99 (D. Dukes), bringing the total of such Latino districts in the South Texas envelope to seven, while maintaining the Austin-based crossover district. In 2011, Dr. Ansolabehere had reviewed Plan C166 and concluded that it provides an example that it was "possible to construct legal districts that offered more opportunities [than C185] for minority voters to elect candidates of their choosing," finding two additional Latino districts beyond C185. Joint Exhibit 15 (Ansolabehere 2011 Rep. at 39). One was in the envelope.

The Quesada plaintiffs' Plan C205 has seven South Texas Latino opportunity districts, plus a Travis-based crossover district. So does the LULAC/NAACP Plan C218. And so does MALC's Plan C164. MALDEF's Plan C123 had seven South Texas Latino opportunity districts without encroaching on the core of the Travis-based crossover district.⁴⁶

The most recent LULAC demonstration map, Plan C262, has *eight* Latino opportunity districts in the envelope (extending to the Midland-Odessa area), without touching a Travis-

⁴⁵ Responding to questions from the state, Dr. Ansolabehere indicated that Plan C220's CD23 was a very close call as to being a performing Latino opportunity district because it technically fell four-tenths of a percentage point short of the 50% threshold he used as his performance standard. Tr. 8/13/14 at 966 (S. Ansolabehere).

⁴⁶ The variety in these maps bear out Dr. Alford's vague comment that there are "lots of different ways to configure in the Valley." Tr. 8/16/14 at 1845 (J. Alford). But they also demonstrate that some ways give more protection to Latino voting opportunities than others.

centered crossover district. Tr. 8/14/14 at 1232 (G. Korbel). Described by Mr. Korbel as his “best plan,” *id.* at 1211, Plan C262 in particular demonstrates how far Plan C185 falls short of the requirements of Section 2.

C. C185 went in the opposite direction from where Latino CVAP growth was greatest

In furtherance of its underlying policies, fundamentally designed to short-change creation of minority opportunity districts, the state turned a blind eye to Latino population growth. This is seen most clearly in C185’s treatment of growth in South and Central Texas.

The chief mapdrawer claimed to be putting new districts were there had been population growth. Tr. 8/15/14 at 1598 (R. Downton). But the facts belie that broad statement in connection with determining whether to, and where, to draw minority opportunity districts. Latino CVAP in Nueces County had grown by 22% over the decade. State Exh. 177 (Alford Rep. at App., 6th and 14th pages). In the C100 Latino districts in South Texas envelope as a whole, there was sufficient Latino CVAP growth to create another majority Latino CVAP district entirely within it. Rod. Exh. 913 (Ansolabehere Rep. at 8); Tr. 8/13/14 at 938 (S. Ansolabehere). In contrast, the C100 district with the *least* decline in Anglo CVAP (relative to CVAP) was crossover CD25. Rod. Exh. 913 (Ansolabehere Rep. at 7 & 14 (Table 3)); Tr. 8/13/14 at 938 (S. Ansolabehere).⁴⁷ Total CVAP increased faster in C100’s CDs 15, 16, 20, 23, 27, and 28—all in the South Texas envelope—than in the rest of Texas. Rod. Exh. 913 (Ansolabehere Rep. at 9); Tr. 8/13/14 at 939 (S. Ansolabehere). “Hispanics account for almost all the growth in the CVAP in the districts in the envelope.” *Id.*

⁴⁷ Travis “is the one area where the Anglo growth roughly kept pace with minority growth in the area.” Tr. 8/13/14 at 936 (S. Ansolabehere).

C185 took the exact opposite tack that this data would suggest if growth, particularly Latino growth, were an important policy. Instead of adding a new Latino district somewhere in the South Texas envelope, it undermined CD23, removed more than 133,000 Latinos of citizen voting age from the envelope entirely, then went into Travis County, where (unlike anywhere else in the map) *Anglo* citizen voting age population had actually kept pace with other citizen voting age population growth, to link it to South San Antonio for the one new opportunity district in the map.

D. With the crossover district restored, Section 2 still would obligate the state to create at least one new Latino opportunity district in the South Texas envelope.

The foregoing facts establish that, if the constitutional flaw in C185's destruction of crossover CD25 is remedied, the state will still be in violation of Section 2 of the Voting Rights Act unless it creates at least one new opportunity district in the South Texas envelope.⁴⁸

Under the first *Gingles* precondition for a Section 2 case, it must be demonstrated that the minority group at issue is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 427 U.S. at 50; *Rodriguez v. Bexar County*, 385 F.3d 853, 859 (5th Cir. 2004).⁴⁹ The relevant measurement for meeting the "sufficiently large" component is citizen voting age population, which must reach a 50% threshold. *Valdespino v. Alamo Hts. ISD*, 168 F.3d 848, 853 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000).

⁴⁸ Plan C262 and Mr. Korbel's testimony about it demonstrates that Section 2 actually should require the state to slightly expand the envelope into the Midland-Odessa area and create two new Latino opportunity districts.

⁴⁹ This first precondition is inapplicable to a claim of *intentional* vote dilution. *Garza v. County of Los Angeles*, 918 F.2d 763, 769 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) (*Gingles* requires a majority showing "only in a case where there has been no proof of intentional dilution of minority voting strength").

Through any of the seven demonstration maps already discussed—*see* Part V.B, above⁵⁰—the joint plaintiffs have established that the first *Gingles* factor is established with respect to the state’s Section 2 obligation to create at least one more Latino opportunity district in the South Texas envelope than has been created in C185, outside the unconstitutional elimination of benchmark CD25 through the careful division of the core of the tri-ethnic community in Travis County. The 50% Latino CVAP and reasonable compactness requirements of the *Gingles I* test are met by each of the maps.

The other two *Gingles* threshold requirements effectively collapse into the requirement that racially polarized voting be demonstrated. In closing argument, the state conceded that factual prerequisite in light of all the expert testimony and, to the extent it left any door potentially open to dispute the point for small pockets of the state, experts for the various parties have closed the door through unrebutted reports and testimony. *See* Part II.B.2, above; *see also LULAC, supra*, 548 U.S. at 427-28 (upholding Texas-based federal district court’s finding of racially polarized voting, and satisfaction of the second and third *Gingles* factors, in south and west Texas, as well as “throughout the State”).

In the usual case, satisfaction of the first three *Gingles* factors will carry the day for a Section 2 claim. *Clark v. Calhoun County*, 21 F.3d 92, 97 (5th Cir. 1994); *see also Teague v. Attala County*, 92 F.3d 283, 293 (5th Cir. 1996). Still, if the *Gingles* factors are met, then plaintiffs are to establish facts concerning the so-called Senate, or *Zimmer* factors. *See, e.g., Magnolia Bar Ass’n, Inc. v. Lee*, 994 F.2d 1143, 1146 (5th Cir. 1993).

Other plaintiff parties will be addressing these factors in further detail, and the joint plaintiffs will defer to that discussion. Suffice it to say for present purposes that at as recently as 2006, the

⁵⁰ Plans C262, 220, 205, 218, 164, 166, and 123

Supreme Court took note of the long history of discrimination in Texas against African-Americans and Latinos and the adverse impact that history had, and still has, on the ability of minorities to participate equally in the electoral and political process. *LULAC*, 548 U.S. at 439-40 (citing a list of such findings by federal courts in Texas in redistricting cases). Witnesses testifying or providing evidence to the Court on these factors include Dr. Tijerina who testified at length in 2011 on the history of discrimination against Latinos in this state and the adverse impact it has had on their electoral participation. Tr. 9/7/11 at 578-96 (A. Tijerina). Dr. Burton reported on the state's discrimination against African-Americans and the adverse impact on their participation in the political process. Exh. J-65 (Orville Burton Depo.). In the most recent trial round, former Senator Barrientos added facts further fleshing out what Dr. Tijerina had testified to. Tr. 8/15/14 at 1142-52 (G. Barrientos). Mr. Korbelt provided an extensive examination of the *Zimmer* factors as they applied to Texas minorities. Joint Exhibit 11 (Korbelt Rep. at 16-29). Together, this evidence establishes that, under the totality of the circumstances, Texas minorities continue to be denied an equal opportunity to participate in the political process.

Plan C185 violates Section 2 in the South Texas envelope by failing to create at least one additional Latino opportunity district that it could have created—and created *constitutionally*. In short, the constitutional problem with what C185 did to the crossover district in Travis could have been readily avoided by the state and, at the same time, it could have honored the Section 2 rights of Latino voters in South Texas by creating one or two more Latino opportunity districts.

VI. THE DALLAS-TARRANT COUNTY DISENFRANCHISEMENT OF MINORITY VOTERS

It is easier to get to the nub of what Plan C185 did to purposely fracture and diminish the voting power of the African-American and Latino voting communities in the Dallas-Fort Worth area

than to sort through the intertwined complexities of the map's treatment of Travis, Nueces, and the other counties in the South Texas envelope. For one thing, the pretext of partisanship as a driving force is more openly stripped away; the use of racial linedrawing as a tool to disenfranchise minority voters, more obviously at the forefront of what happened.

A. C185 maximizes Anglo representation while minimizing minority representation in Dallas and Tarrant Counties, even in the face of Anglo population shrinkage and surging minority population growth.

Dallas and Tarrant Counties in North Texas are adjacent to one another and, combined, contain approximately the same land area as Harris County. Tr. 8/16/14 at 1920 (J. Alford). The combined total population of Dallas and Tarrant roughly equals Harris County's total population.⁵¹ The combined African-American and Latino population of Dallas and Tarrant is nearly the same as in Harris.⁵² Under Plan C100, there were three districts in Harris County where Texas minorities could elect their candidate of choice: CDs 9 (Cong. A. Green); 18 (Cong. S. Jackson-Lee); and 29 (Cong. G. Green). But in Dallas and Tarrant together, only one such minority opportunity district existed—CD30 (Cong. E. B. Johnson)—while seven districts controlled by Anglo voters in the region were either wholly within, or contained significant population within, the two counties.

The 2010 census results held promise for minority voters in the Metroplex area. It reported that Latino and African-American populations in Dallas and Tarrant grew significantly while, by contrast, the Anglo population actually shrank in raw numbers. African-American population in the two counties grew by 179,319, to 834,517; Latino population, by 440,898, to 1,388,917. To-

⁵¹ Dallas + Tarrant = 4,177,173; Harris = 4,092,459. See TLC website: http://www.tlc.state.tx.us/redist/pdf/census_2010/2010_Co_Pop.pdf

⁵² Dallas + Tarrant = 2,186,100; Harris = 2,447,032. See U.S. Census website: <http://www.census.gov/2010census/popmap/ipmtext.php?fl=48>.

gether, the population of these two minorities in the two counties increased 605,455 in the decade leading up to 2010. Anglo population decreased by 156,742. Quesada Exh. 297 at 3-4. In the face of this disproportionately large minority population growth, and even though the Dallas/Tarrant area already lagged well behind Harris County in terms of minority opportunity districts, the Legislature created no new minority opportunity districts in the area.

Latinos are the single largest racial or ethnic group in Dallas County, yet none of the nearly one million Latino residents of the county was assigned to a congressional district in which Latinos were a majority or even plurality of either total or voting age population. Joint Exhibit 15 (Ansolabehere 2011 Rep. at 22). Forty-two percent of African-Americans in Dallas County were assigned to districts in which they are a minority. *Id.* In contrast, over 90% of the Anglos in Dallas County are in congressional districts in which they are the majority. *Id.* at 23. Unlike Dallas County, Tarrant County is—marginally—majority Anglo. *Id.* at 24 (Tarrant, 52% Anglo). None of the three-quarters of a million African-Americans and Latinos in Tarrant County was assigned in Plan C185 to a district in which they are either a plurality or a majority. *Id.* In short, Plan C185 combines Anglo population in Dallas and Tarrant in a way that maximizes its representation and divides the minority population in a way that minimizes its representation.

B. Race, not partisanship, is the real explanation for C185’s careful diminishment of minority congressional representation in the DFW area.

1. Republican partisans actively *supported* a new minority opportunity district in the area.

The state has claimed that partisanship, not race, drove what the Legislature did in the DFW area. But this line of defense doesn’t square with the facts in the record. The evidence is replete with requests—specific ones—from leading Texas Republican figures to create a new minority

opportunity district in the Dallas/Tarrant area. African-American and Latino members of the Legislature spoke out against the plan and offered alternative redistricting plans that more accurately reflected the size and growth of the Latino and African-American populations, a number of which created two new congressional districts (in addition to CD30) that provided minority voters with an effective ability to elect a candidate of choice. These included Plan C121 proposed by Representative Veasey, Plan C149 proposed by Senator West, and Plan C188 proposed by Representative René Oliveira.⁵³ State leaders blocked all alternative plans and allowed no significant amendments during the process leading to passage of C185. *See, e.g.*, Tr. 8/13/14 at 899-900 (D. Dukes).

(This is an appropriate point to note that, in support of their Section 2 claim, the NAACP plaintiffs presented expert testimony in the 2014 trial that NAACP demonstration Plan C193 created two minority opportunity districts (besides CD30) with 50% minority CVAP as of 2014 in the DFW area. Tr. 8/13/14 at 792-806 (A. Fairfax); *see also* NAACP Exh. 656 (Fairfax Rep.). The NAACP plaintiffs' post-trial brief addresses the issue, and the joint plaintiffs support the argument—in Parts IV-F and IV-G—without repeating it here.)

The leader of the Texas congressional delegation, Congressman Smith, also requested a new minority opportunity district in the DFW area, providing a map describing specific contours for the new district. *See* State Exh. 573; Tr. 8/11/14 at 243-44 (K. Seliger); Tr. 8/14/14 at 1272-75 (B. Solomons); Tr. 8/15/14 at 1594 (R. Downton). Congressman Smith began pushing the idea in early April 2011 and was still pursuing it in mid-May. Tr. 8/11/14 at 305-06 (G. Interiano). It never made it past the tight inner circle of Chairman Solomons and his staff. *Id.* at 382 (G. Interiano) (Solomons did not even hold hearing on Smith proposal). The Chairman even went so far to actively hide the existence of the Smith map. He made a public misrepresentation on the floor of

⁵³ These maps can be found at <http://gis1.tlc.state.tx.us/>.

the House to then-Representative Veasey, claiming that he had never seen Congressman Smith's proposal even though he had. Tr. 8/14/14 at 1277-78, 1309 (B. Solomons).

The Governor—also Republican—tried, too, for a new minority opportunity district in Dallas and Tarrant Counties. His office sent Chairman Solomons a map proposal in early May, containing a new DFW-area opportunity district. Tr. 8/14/14 at 1304, 1365 (B. Solomons); Tr. 8/15/14 at 1602, 1760 (R. Downton). The Governor's proposal suffered the same fate as the Smith proposal; Solomons and Downton didn't allow it to go anywhere. *Id.* at 1603 (R. Downton) (not presented to House because not, in his view, "mandatory draw").

Partisanship does not explain (or justify) these rejections. It wasn't as though these proposals would harm congressional Republican interests in the DFW area. In other parts of the state, the mapdrawers faced a legally-fraught problem, scrambling to find a way to protect Anglo-supported incumbents Canseco and Farenthold. Tr. 8/11/14 at 343 (G. Interiano). In distinct contrast, creating a new minority opportunity district in Dallas and Tarrant could actually *help* Republican incumbents. It would relieve them from threats that they perceived coming from the accelerating minority population in their districts. Tr. 8/14/14 at 1363 (B. Solomons); Tr. 8/15/14 at 1703 (R. Downton).⁵⁴ Chairman Solomons and his mapdrawers, in fact, knew this. *Id.*⁵⁵ But even in the face of this knowledge, they adhered to racial division as the preferred course.

⁵⁴ Chairman Solomons testified: "I always thought that probably if there was a Hispanic opportunity district in North Texas it would probably *strengthen all of the districts on the Republican side*[" Tr. 8/14/14 at 1363 (emphasis added).

⁵⁵ A mid-May e-mail from Eric Opiela to Mr. Interiano made the same point, explaining that one reason to add the proposed new opportunity district in the DFW area was that "if a new Democratic district is not created in DFW, the long-term prospects of Cong. Sessions and to some extent, Cong. Marchant's districts as a Republican majority districts becomes unlikely in the out years of this decade." Task Force Exh. 1114, 2nd page.

2. The legalistic dodge based on what was legally “required” is baseless and applied only to disenfranchise minorities to benefit Anglos.

a. One-way application of “requirement” policy favoring Anglo voters

The repeated refrain offered at trial for rejecting a new Republican-supported minority opportunity district in the DFW area was that such a district was not legally “required.” Tr. 8/11/14 at 351 (G. Interiano); Tr. 8/14/14 at 1300 (B. Solomons); Tr. 8/15/14 at 1603. But that legalistic dodge itself is baseless. First, it is certainly permissible for minorities to benefit from the drawing of district lines, even if the precise lines are not legally required. After all, the mapdrawers plainly saw it as permissible for *Anglos* to benefit from their linedrawing. Dr. Ansolabehere’s analysis, recounted above, shows Plan C185 readily accomplishing that particular objective in the DFW area. Following a racial double-standard—that is, purposely drawing Anglo-dominant districts when they are permitted, but refusing to draw minority-dominant districts unless they are required—violates a core equal protection principle. Under our Constitution, it cannot be that beneficial linedrawing is acceptable for Anglos but not minorities.

b. Intentional refusal to follow legal principle aiding minority voters

Second, the legalistic dodge was not even based in law. At the time Chairman Solomons and Mr. Downton deployed it to dilute minority voting interests in Dallas and Tarrant Counties, governing law supported the rebuffed efforts of Congressman Smith and Governor Perry. Downton knew about this law, but rejected it. Tr. 9/8/11 at 1010 (R. Downton).⁵⁶ Fundamental to the rejectionist approach of Solomons and Downton was the position that coalition districts are not required by Section 2. Tr. 8/14/14 at 1324 (B. Solomons). But Texas is governed by Fifth Circuit law, and Fifth Circuit law in 2011 was that, as long as minorities are politically cohesive, coalition

⁵⁶ The specific words he used in his testimony was that he had a “different interpretation” of the cases. The cases, though, are clear on the rule, and Downton is really saying that he chose not to follow that case law.

districts are required.⁵⁷ See *LULAC v. Clements*, *supra*, 999 F.2d at 864; see also *Campos*, *supra*, 840 F.2d at 1245.

Mr. Downton and Chairman Solomons were on explicit notice of these legal requirements. The Texas Legislative Council's redistricting guide cited *Campos* and other Fifth Circuit decisions validating coalition districts in Section 2 analysis and told the Legislature that coalition districts would likely continue to be addressed on a case-by-case basis. U.S. Exh. 357 at 64.

Whatever subsequent Supreme Court pronouncements may mean about the legal viability of an obligation to create coalition districts,⁵⁸ the law in 2011 in Texas required Section 2 recognition of coalition minority opportunity districts. But the policymakers and mapdrawers devising Plan C185 simply disregarded the law, a disregard most acutely felt in the congressional context in the DFW area. The choice to disregard extant but inconvenient law protecting minority voting rights has no other plausible explanation than that it is race-based insofar as Dallas and Tarrant minority voting rights are concerned.

It is important to understand that the point being made here is not that, as of today, Section 2 necessitates recognition of coalition districts—even though the joint plaintiffs see nothing in the case law that has rejected that principle. Rather, the point is that the law in 2011 did require

⁵⁷ Nothing in the record suggests that the factual question of political cohesiveness played any role in the mapdrawers' rejection of coalition districts. The combined Latino and African-American VAP in the Smith proposed district for DFW (CD33) was 78%. State Exh. 573, 2nd page.

⁵⁸ Voting rights parlance differentiates between coalition and crossover districts. As *Bartlett* explains, coalition districts are those in which two minority groups are able act cohesively to elect their candidate of choice, even without significant crossover support from Anglos. 556 U.S. at 13. *Perry v. Perez*'s enigmatic "*cf.*" citation to *Bartlett*—which dealt with crossover, not coalition, districts—in connection with whether a court-drawn interim plan could craft a *new* coalition district, 132 S.Ct. at 944, should not be read as a rejection of governing Fifth Circuit law on coalition districts under Section 2. At the time C185 was being drawn, the guidance from TLC was that *Bartlett* "does *not* address the creation of a coalition district using two or more minority groups under Section 2." U.S. Exh. 357 at 64 (emphasis added). The arguments of the joint plaintiffs in this brief do not require addressing the status of coalition districts under Section 2; however, the joint plaintiffs have no reason to disagree with the discussion in Part II.C of the NAACP plaintiffs' brief.

recognition of coalition districts—but that use of that existing legal doctrine to consider and create a widely supported minority opportunity district in Dallas and Tarrant Counties was rejected. Chairman Solomons may have testified that “[t]hings that were required, we would do,” Tr. 8/14/14 at 1301, but that does not describe what, in fact, he did. This goes to intent under the constitutional analysis.

C. The redistricters opted to dissect minority neighborhoods in Tarrant and Dallas Counties, dispensing them into Anglo-dominated districts on the basis of race.

Legislative leaders rejected all the options offered that would both benefit Republicans and recognize minority population gains and, instead, further fractured Latino and African-American neighborhoods across the two counties.

In CDs 24 and 32, for example, legislative leaders carefully carved out the neighborhoods with the most minority growth and attached them to Anglo-controlled CD6. In Dallas County, heavily Latino North Oak Cliff and parts of South Irving were removed from Cong. Sessions’ CD32 and moved into Anglo-controlled CD6. Also, heavily Latino and African-American neighborhoods in Grand Prairie and South Irving were removed from Cong. Marchant’s CD24 and put in CD6. Thus, all these minority communities of interest have been stranded in districts controlled by Anglo voters. Mr. Downton acknowledged in his testimony that he split precincts along racial and ethnic lines in this region. Tr. 8/15/14 at 1715-16 (R. Downton).

In Tarrant County, legislative leaders separated the Latino neighborhoods in Fort Worth from nearby African-American neighborhoods by drawing the bizarrely shaped “Lightning Bolt” protrusion into Tarrant County from Anglo-controlled, Denton County-based CD26. Chairman Solomons—who had never stated any interest in having a minority opportunity district in the DFW area and who ultimately instructed that there not be one, Tr. 8/15/14 at 1786, 1772 (R.

Downton)—professed to being uninformed about why the Lightning Bolt looked the way it did as it shot through Tarrant County. Tr. 8/14/14 at 1306 (B. Solomons). But his mapdrawer did; he had carefully crafted it on the basis of race.

Using racial shading at both the block and precinct level, *id.* at 1710, Mr. Downton shifted and narrowed the existing Tarrant County portion of CD26 from east to west to carefully pick up the most Latino portions of CD12 (including the north side) and then down in a winding, twisting fashion to pick up the south side of Fort Worth and other growing Latino neighborhoods. CD12 was then looped underneath and around the Lightning Bolt to add African-American neighborhoods in southeast Fort Worth into CD12. Both Latino and African-American neighborhoods were also fractured in the Tarrant County region. Quesada Exhs. 26, 34, 73, 294, and 340 (demonstrating fracturing by CDs 12 and 26).

At first, the state explained this bizarre configuration by claiming a need to retain the Trinity Vision development project in CD12. Tr. 8/11/14 at 212 (opening statement). The story shifted, however, after plaintiffs offered proof that the Trinity Vision project was already squarely within CD12, and the need for the jagged twists and turns with respect to CDs 12 and 26 could have been avoided by simply not shifting CD26 westward. *See* Quesada Exhs. 114, 115. The state then switched explanations for the Lightning Bolt, claiming a need to wrap around it with CD12 because of a desire to include the city of North Richland Hills in CD12. Tr. 8/15/14 at 1614, 1709 (R. Downton). But that city could have been easily added to CD12 without creating the Lightning Bolt or by moving it westward in Tarrant County to avoid fracturing minority population. Quesada Exh. 340.

Downton also testified that he used Latino shading when drawing the Lightning Bolt, which explains why Latino population in Tarrant County has been deliberately separated. He also testified that he intentionally assigned African-American neighborhoods to CD12 on the basis of race (and the only way he would have known these areas were African-American is by resorting to racial shading when drawing the boundaries).⁵⁹

Beyond the state's fracturing of the traditional core minority neighborhoods in Tarrant County by drawing CDs 12 and 26, state leaders configured CD33 under Plan C185 to fracture other Tarrant County neighborhoods that have concentrations of African-American and Latino population. Under plan C185, CD33 is an Anglo-controlled district anchored in Parker County west of Tarrant. Quesada Exhs. 294 (at 4) and 340. The district protrudes eastward into Tarrant County from Parker County and absorbs the growing African-American neighborhoods in southwest Fort Worth (Meadow Creek), and then extends narrowly eastward across the county to absorb growing African-American and Latino neighborhoods in Arlington. Quesada Exhs. 73, 294 (at 4), and 340.

In sum, legislative leaders packed minority voters into existing CD30 and then dissected and shifted remaining Dallas/Tarrant Latino and African-American neighborhoods. As a result, minorities in the DFW region are stranded within the Anglo-voter-controlled districts that C185 had purposely, and carefully, sorted them into. In this way, they were denied effective participation in the political process and the ability to elect their congressional candidates of choice.

⁵⁹ In his trial testimony, Downton also admitted being fully aware of the racial concentrations in the DFW area as he drew the congressional map, stating that he resisted widening the Lightning Bolt of CD26 because that would have required taking in more African-American population. Tr. 8/15/14 at 1789 -1790 (R. Downton).

VII. MAP-WIDE INTENTIONAL DISCRIMINATION

A. Legal standards for determining racially discriminatory intent

In the view of the joint plaintiffs, the evidence recounted in the foregoing discussions of what the state did through Plan C185 in the various parts of the state establishes that Plan C185 violates the Equal Protection Clause of the Fourteenth Amendment. The state acted purposely to adversely affect minorities, both Latino and African-American, across the length and breadth of the state in terms of their ability to effectively participate in congressional elections, and be represented, on an equal basis with Anglos in the state.

It is established that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. *Arlington Hts. v. Metrop. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977).⁶⁰ Proving the requisite intent, though, does not require proof of openly invidious actions or words directed at racial minorities. In his majority opinion in *Rice v. Cayetano*, 528 U.S. 495 (2000), Justice Kennedy recognized that “manipulative devices and practices,” constituting “subtle” instances of invidious racial discrimination, also run afoul of the equal protection’s intent element. 528 U.S. at 513. Included in the lengthy citation list to support this principle were the notorious Texas white primary cases from the 1950s. The Court has been clear that statutes can be *covertly* discriminatory. *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (“[i]f the classification itself, *covert* or overt, is not based upon gender . . .”) (emphasis added).

Arlington Heights identified a series of factors to aid courts in uncovering whether governmental action that, while race-neutral on its face, is nonetheless motivated by racially discriminatory animus. They are:

⁶⁰ The joint plaintiffs also join in the discussion of intent in Part I of the NAACP plaintiffs’ brief.

- (1) whether a clear pattern of discrimination emerges from the effect of the state action;
- (2) the historical background of the decision, which may take into account any history of discrimination by the decisionmaking body;
- (3) the specific sequence of events leading up to the challenged decision, including departures from normal procedures; and
- (4) the legislative or administrative history of the state action, including contemporary statements by decisionmakers.

Lewis v. Ascension Parish School Bd., 662 F.3d 343, 363 (5th Cir. 2011). TLC advised the Legislature that it should be guided by these *Arlington Heights* factors in connection with racially discriminatory purpose. Tr. 8/12/14 at 103 (J. Archer).

These factors mean that intent may be inferred from effect. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). Indeed, in a little-discussed post-*Arlington Heights* decision finding an equal protection violation, the Supreme Court held that, once adverse impact is established (underrepresentation of a minority group in that instance), a *prima facie* case of discriminatory purpose has been made out, and “the burden then shifts to the State to rebut the case.” *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977).

Finally in the survey of legal standards, the state cannot hide behind a permissible purpose—say, partisan objectives in redistricting—if an impermissible one also motivates its actions. The discriminatory intent element of a violation of the Equal Protection Clause can be established under *Arlington Heights*, even if another motivation also was present. *Hunter v. Underwood*, 471 U.S. 222, 232 (1985).

B. Plan C185 violates the Equal Protection Clause

The dilutive effects of Plan C185, and its disparate treatment of minorities in comparison to Anglos is widespread. In the Dallas-Fort Worth area, the plan carefully divided Latinos and African-Americans, parceling them out to Anglo-dominated districts. At closing arguments, there

was some discussion of the meaning of the term “naturally occurring” when used in reference to minority areas being divvied up by district lines. *See* Tr. 8/26/14 at 2071 (Judge Smith inquiry). One aspect of this issue was addressed by a carefully-wrought concurrence (and partial dissent) in *Garza v. County of Los Angeles, supra*, 918 F.2d 763. This was a case involving single-member districting that was under constitutional attack for the way it carved up minority communities. The court found a constitutional violation. Judge Kozinski agreed on this point. He identified the problem as being the “systematic splitting of the ethnic community into different districts,” with the apparent purpose being to prevent emergence of Latino voting power from a “burgeoning Hispanic population.” *Id.* at 778. He wrote:

Where, as here, the record shows that ethnic or racial communities were split to assure a safe seat for an incumbent, there is a strong inference—indeed a presumption—that this was a result of intentional discrimination[.]

Id. at 779.

That description largely captures what Plan C185 did in Dallas and Tarrant Counties. The harm—the adverse effect—is that rather than being able to emerge as a political force, minorities in the DFW area were effectively cut off at the pass by C185.

The meticulous divisions of minority communities, both Latino and African-American, have carefully traced and recounted. *See* Part VI.C. The unexplained decision to reject governing case law—and TLC direction—that would have barred such actions throws the racial reason for what happened into painfully obvious relief.

The departure from historical alignment and deliberate stranding of more than 200,000 Latino Nueces residents in a district designed to ensure Anglo control is perhaps even more obvious than what happened in DFW in terms of deliberate, invidious racial action. Setting those resi-

dents adrift didn't just keep them from "emerging." They'd already done that, and *arrived*, in former CD27. Instead, it submerged them. And the tool and motivation was racial: there was a deliberate search for *Anglo* voters to attach Nueces Latinos to.

Travis County also reveals race-based actions. The Latino and African-American communities that already had a strong—even determinative, given the Anglo crossover vote they could count on—voice in choosing their congressional representative were divided and sent flying to distant areas—*five* of them. Dr. Ansolabehere's analysis stripped the action down and found that the better explanation of how the divisions were made was race over partisanship.

The state provided no meaningful evidence to overcome the adverse racial presumption that *Partida* and Judge Kozinski's concurrence indicate attaches to C185's treatment in these areas. The mapdrawer, Mr. Downton, did not identify one consistent policy or theme (beyond race) in how he decided to draw the congressional lines around the state. In the DFW area, he and his boss, Chairman Solomons, rejected urgent requests from leaders of their own political party. This does not jibe with his claim to be adhering to Republican leadership requests on partisanship in drawing Travis lines. In Nueces County, he determined that media markets should not be combined into a district (separating Nueces and Cameron), but in CD35 he determined to combine two of the most expensive media markets in the state (San Antonio and Austin) into a district. In South San Antonio and Austin, he paid no attention to well-established, traditional communities of interest but elsewhere in the state he claimed that it was important to keep cities and communities together.

The only concept that gives coherence to the actions leading to the drawing and enactment of Plan C185 is race. It was the tool that brought all the concepts together into a workable whole.

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