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 RESPONSE 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 brief in response to the state's opening post-trial brief (Doc. 1272) ("State P-T Br."):[1]

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[1] As they did in their opening post-trial brief, the joint plaintiffs will leave to other plaintiffs the detailed responses to the state's arguments about the exclusionary and discriminatory legislative process that produced Plan C185 and what it says about the exclusion of minority interests and about C185's calculated undermining of C100's CD23.

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I. THE TEXAS LEGISLATURE IS CONSTITUTIONALLY PROHIBITED FROM USING THE FACTOR OF RACE TO DILUTE MINORITY VOTING POWER EVEN IF IT IS TO FURTHER A BROAD PARTISAN OBJECTIVE.

The state's primary line of defense for Plan C185 is constitutionally insupportable. The state asserts that it was justified in using race as a tool to achieve its objectives as long as it framed the objectives in partisan terms. According to the state, if Plan C185 favored Republicans, then it follows that it "did not intentionally discriminate against Black and Hispanic voters *on the basis of race*." State P-T Br. at 1 (emphasis added). Later, the state draws its position more sharply: "[i]f the Legislature treats individuals differently because of the way they vote, it has not treated them differently because of race." *Id*. at 21.

In other words, the state's argument is that it could use race as the basis for its line drawing because, in its view, race provided the clearest path to achieve an over-arching partisan objective. The state audaciously accuses the plaintiffs of "conflating race and party." *Id*. at 22. But that is precisely what the state has done. Its core defense of C185 is that the Equal Protection Clause allows a state to further the interests of the political party in power, and enhance its strength in Congress, by purposely dividing minority voters so that their votes are minimized, submerged by a wave of Anglo voters in an ocean of racially polarized voting. It is the state, not the plaintiffs, which seeks justification for purposely using racial demographics to dilute minority voting power.

Under the state's dangerously skewed view of the Constitution, because Texas minorities are now choosing to vote largely Democratic, that makes them fair game in a partisan redistricting war. No one is forced to support any political party, and voters in Texas do not register by party, Tr. 8/12/14 at 397 (T. Arrington). Race and party are not the same, as Justice Scalia explained in his plurality opinion in the redistricting case of *Viet v. Jubelirer*, 541 U.S. 267 (2004): "a person's politics is rarely as readily discernible—and *never* as permanently discernible—as a person's race." *Id.* at 287 (emphasis in original).

This means that, if the state chooses to equate minority status with political alignment, and then diminishes minority voting power because of minority political alignment, it is blatantly using race as a basis to punish racial minorities because of wholly voluntary political choices the state, relying on statistics, assumes they have made. It is impossible to see this as anything other than race-based state action, regardless of whether the state defends it as being for the political party in power's own good. "[T]o the extent that race is used as a proxy for political characteristics, a racial stereotyping requiring strict scrutiny is in operation." *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality opinion by J. O'Connor, joined by C. J. Rehnquist and J. Kennedy).[2]

The kind of ritualized invocation of partisanship seen here does not cloak otherwise race-based state action in some kind of constitutional immunity. It has been the law at least since *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), that race-based actions to deprive minorities of voting rights are not beyond the reach of the Civil War Amendments simply because the government has invoked a generalization about the legitimacy of the action under consideration. In *Gomillion*,

[2] According to the state's position, this approach is particularly over-inclusive for Texas Latinos. Their expert testified that the level of Latino cohesion was in a broad range, running from somewhere less than 60% support for Democratic candidates in general elections to more than 75%. Tr. 9/14/11 at 1786 (J. Alford). At the lower end of the range, this would mean that the state could be wrong by more than 40% if it simply assumed that all "census" Latinos were Democrats.

the generalization was about governmental authority to align, and realign, political subdivision boundaries; here, the generalization is about the acceptability of nakedly partisan objectives.[3] As Justice Frankfurter's majority opinion explains, such generalizations are not to be applied "out of context in disregard of . . . controlling facts." *Id.* at 342. Just as the local government in *Gomillion* could not insulate race-based action because it was "cloaked in the garb of the realignment of political subdivisions," *id.* at 345, the state government here cannot insulate race-based action by cloaking it in partisan garb. Going that way would turn the Equal Protection Clause into a dead-end in redistricting cases because politics is invariably and unavoidably present.

The state's prime defense does not force the Court to choose between motivations, one racial, one partisan. *Hunter v. Underwood*, 471 U.S. 222 (1985), makes this clear. There, the state sought to erase the targeting and disenfranchisement of African-Americans by arguing that another motive—disenfranchising poor whites—was also a reason for the state constitutional amendment in dispute. The latter, the Court held, "would not render nugatory" the purposeful discrimination against African-Americans. *Id.* at 232. In the same way here, any motivation to further partisan interests through C185 does not render "nugatory" the purposeful discrimination against African-Americans and Latinos that was part and parcel of whatever partisan motivations were companion to the racial discrimination.

The state argues that the proper test of discriminatory purpose is set out in the gender discrimination case of *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). State P-T Br. at 9. The state, though, fails to note two important elements of the *Feeney* test that work

[3] The Supreme Court has never validated nakedly partisan objectives in gerrymandering as constitutionally protected. Instead, it has been unable to arrive at a judicially manageable standard for measuring the constitutional validity of such actions. *See, e.g., LULAC v. Perry*, 548 U.S. at 414 (2006) (disagreement over justiciability and standards "persist"). So the state's primary, generalized defense does not rest on a legally validated premise; it rests on a premise for which no legal test has yet been developed.

against it. First, the test does not ask whether the action was baldly "because of" its effect; it asks whether the governmental course of action was "*in part*" because of it. *Feeney*, 442 U.S. at 279 (emphasis added). Here, the evidence establishes a clear awareness on the state's part that Anglos would be benefited, and minorities harmed, by the divisions it was making in the minority community.

Second, the state ignores a crucial qualification to the test that is contained in the footnote accompanying the quote. There, the Court explained that, when the adverse consequences of the law at issue on an identifiable group—here, minority voters—are virtually inevitable, "a strong inference that the adverse effects were desired can reasonably be drawn." *Id.* at 279 n.25. If, as the state says it could legitimately do, the state equated minorities with Democrats, and then used the division of minority communities as the tool to harm Democrats, then the inference is plain that the adverse effects on minorities also were intended.

In this situation, the burden shifts to the state to overcome the presumption. It is the same as in *Castaneda v. Partida*, 430 U.S. 482 (1977), where the minority plaintiffs had made a statistical showing, establishing a *prima facie* case, of discriminatory purpose and, consequently, "the burden then shifts to the State to rebut that case." *Id.* at 495.[4] The state took no steps to shoulder its burden here. The state has rested its entire case on the simple mantra that partisanship trumps race, but it has fallen well short of providing the Court with evidence to establish that this was so, and that no harm was intended toward minority voters.

[4] *Cf. Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977) (establishing that constitutionally improper factor was motivating factor shifts burden to defendant government to establish that it would have taken the same action independent of the protected conduct).

The joint plaintiffs have pressed claims of intentional vote dilution embodied in Plan C185.[5] Intentional vote dilution is not the same thing as a racial gerrymandering under the *Shaw* line of cases.[6] Intentional vote dilution is when the redistricting scheme was enacted to purposefully minimize or cancel out the voting potential of minority voters. *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

That is precisely what the state did to minority voters in Plan C185. In the Dallas-Fort Worth Metroplex area, in Travis County, in Nueces County, and in the South Texas envelope,[7] including CD23, those crafting C185 repeatedly and meticulously used race to divide minority voters from one another (both intra- and inter-minority)—and, in Travis County, from crossover Anglos. They did all this to blunt what would otherwise have been the existing and surging voting power of minorities and to aggrandize what would otherwise have been, proportionally speaking, a waning Anglo voting power.

II. THE STATE'S SUBSIDIARY EXCUSES FOR ITS REDISTRICTING ACTIONS HOLD NO WATER.

The state hedges its bets, apparently to soften the jarring boldness of its head-on claim that it can openly use race to achieve partisan objectives, regardless of its impact on minority voters. None of these hedges is grounded in the facts in evidence.

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[5] The Quesada plaintiffs have made a claim that nine of the congressional districts were unconstitutional racial gerrymanders under *Shaw v. Reno* and its progeny. *See* Quesada Plaintiffs' Amended Complaint (Doc. 84-1) at ¶61 ("The State's Plan violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because several of its districts – including, at a minimum Districts 6, 9, 18, 20, 24, 26, 29, 30 and 33 – are racial gerrymanders, drawn with excessive and unjustified use of race and racial data."). In addition to the proof of intentional discrimination by state officials in drawing the congressional districts set forth in our opening brief and that of other plaintiffs, the proof of these *Shaw* violations can be found in the exhibits which show how each district is bizarrely shaped and, when overlaid with underlying racial data, "cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 647 (1992).

[6] Vote dilution and racial gerrymandering are "analytically distinct" from one another. *Shaw*, 509 U.S. at 652.

[7] The joint plaintiffs' opening post-trial brief (Doc. 1277) extensively addresses the evidence for these areas. *See* Joint P-T Br. at 57-66 (Metroplex); 22-38 (Travis); 46-51 (Nueces); and 51-57 (South Texas envelope).

A. Incumbents were not "generally" protected and certainly not by legal means

The state qualifies its partisanship argument by saying that it "favor[ed] incumbents generally, and Republicans in particular." State P-T Br. at 1. The evidence in the record provides no support for the statement that Plan C185 favored "incumbents generally."

The enacted plan removed incumbent Congressman Gonzalez's residence and district office from his district (CD20). Tr. 10/31/11 at 347, 358 (C. Gonzalez). It moved incumbent Congressman Doggett's residence into a new district (retaining little of his existing district beyond the number 25) to supplant him with a Republican. Tr. 8/13/14 at 844 (E. Rodriguez) (residence location in new CD25); Tr. 8/15/14 at 1785 (R. Downton) (wanted a Republican from new CD25). It removed CD30's incumbent's home, as well as her district office, from her district, an action separately addressed by the NAACP plaintiffs. NAACP P-T Br. at 2324 (Doc. 1280). Its refusal to draw a new minority opportunity district in the DFW area threatened two area-Republican incumbents, Congressmen Marchant and Sessions. Task Force Exh. 1114, 2nd page.

The state did go to extraordinary lengths to protect two Republican incumbents, former Congressman Canseco and Congressman Farenthold, but it used illegal tools to do it. It transfigured their districts, wresting the districts of these two incumbents from the category of minority opportunity districts. Protecting incumbents may be an accepted redistricting principle in general, but eliminating minority opportunity districts to protect specific incumbents who are the candidates of choice of Anglo (not minority) voters renders these forms of protection constitutionally and statutorily invalid. *See LULAC v. Perry*, 548 U.S. at 428-29 (holding that Texas violated Section 2 when it eliminated an emerging Latino opportunity district in order to protect an incumbent).

B. The state's mapdrawers did not use political data when they worked at the block level.

It is well-established in the record that data showing voting behavior at the block level is not available since votes are collected and tabulated only at the VTD (precinct) level. *See, e.g.,* Tr. 8/12/14 at 397 (T. Arrington). Hence, block level data reveals racial population data but not whether the populations being looked at are Democrats or Republicans. *Id.* In other words, in redistricting, population and race are the focus of mapping work at the block level.

This is a problem for the state since it says it was concerned with politics not race. So, buried in its argument about split precincts is a misleading effort by the state to wriggle free of the uncomfortable fact that the state's mapdrawers had to rely on racial data, and only racial data, in their widespread efforts to split precincts (VTDs) to scatter minorities (and, in Travis, their crossover Anglo supporters) across the new districts so that minority voting power was diminished. The state says: "The allegation that RedAppl provides only racial data, not political data, at the block level is false." State P-T Br. at 36. Pointing to testimony by TLC's Clare Dyer, the state carefully tiptoes through its explanation, explaining that "RedAppl *allows* a user to display political information . . . in a statistics bar on the RedAppl screen." *Id.* (emphasis added).

What the state leaves unsaid is that no state mapdrawer ever actually used this capability and data. There is no testimony or evidence whatever that Mr. Downton (or any other state mapdrawer, including Mr. Interiano, for that matter) ever used the data capability about which Ms. Dyer testified.

The *only* source of block level election data is a TLC statewide document called a "Red 720" report. Tr. 8/13/14 at 759 (C. Dyer). Essentially no one used it because of its unwieldiness as a data set. *Id.* (915,000 blocks with numbers). Even Ms. Dyer did not know how to use it. *Id.* at 760.

And, regardless of Red 720 data's theoretical availability, Ms. Dyer pointed out that "you cannot shade data by block. You cannot label election data by block." *Id.*

In short, notwithstanding the state's insinuations otherwise, the mapdrawers viewed only racial data when they dived beneath the VTD level, to the block level—which they regularly did as they split precincts in places such as Dallas, Tarrant, Travis, and Bexar Counties.

C. The evidence supports the obvious inference that state mapdrawers drew ideas from Eric Opiela.

In an apparent effort to avoid liability for the "smoking gun" evidence of intentional discrimination, the state seeks to distance itself from Mr. Eric Opiela by arguing that there is no "smoking gun" evidence that ideas proffered in his e-mail memos were used to draw Plan C185. State P-T Br. at 29-35. The state focuses on two Opiela e-mails, one sent to Mr. Interiano on November 19, 2010, U.S. Exh. 75, and the other, dated November 20, 2010, U.S. Exh. 76, which also reached Mr. Interiano. The November 19th e-mail is the "nudge factor" memo, detailing a way to shore up Canseco and Farenthold by weakening Latino turnout—and thereby undermining the minority opportunity status of a district—while outwardly maintaining Latino population numbers. The November 20th e-mail is the "find Anglos" memo, which discussed the need to search for Anglo voters—notably, not "Republican" voters—to help Canseco and Farenthold.

Others have discussed the November 19th e-mail in great detail. *See, e.g.*, U.S. P-T Br. at 12 (Doc. 1279); Task Force P-T Br. at 75 (Doc. 1282).[8] The joint plaintiffs also discussed the November 20th e-mail in some detail, especially as it relates to Nueces County. *See* Joint Plaintiffs P-T Br. at 16, 46-49. These discussions are not repeated here.

[8] In a minor clerical glitch, the Task Force gives November 17th as the date.

Instead, the joint plaintiffs focus on the state's effort to avoid any implication that what Mr. Opiela said or suggested ever made its way into the minds of the mapdrawers and from there into the map itself. The simple point is that the Opiela suggestions in these two telling e-mails did make their way into the adopted *map*. CD23 precincts *were* manipulated as he outlined; Nueces County and Congressman Farenthold's fortunes *were* sent north and east to embrace overwhelmingly Anglo areas. And the Court, of course, is allowed to draw reasonable inferences of intentional discrimination from such evidence. *See, e.g., Hiltgen v. Sumrall*, 47 F.3d 695, 700 (5th Cir. 1995) (jury as factfinder); *see also Century Indemnity Co. v. Serafine*, 311 F.2d 676, 679 (7th Cir. 1963) ("drawing of reasonable inferences from the evidence is a function of the Trial Court").

It is not, as the state suggests, "pure speculation," State P-T Br. at 34, that there were links between Opiela and the mapdrawers such that his suggested concepts found their way into the enacted plan. Rather, it is the rather obvious, and only reasonable, inference to be drawn. Mr. Opiela, Mr. Interiano, and Mr. Downton worked hand-in-glove in developing Plan C185. They were in constant contact. Just because every single idea floated by Mr. Opiela did not make its way fully into the enacted plan does not mean that many—including those in U.S. Exhs. 75 and 76—did not take root there. The inference is compelled, and should be drawn, that the "nudge factor" and "find Anglos" e-mails are reflected in state policies adopted in Plan C185.

III. SPECIFIC AREAS OF THE MAP

The joint plaintiffs address four specific areas of the state's argument in the sections below. Part III.A addresses the CD25 argument concerning Travis County, State P-T Br. at 124-26. Part III.B addresses the CD27 argument concerning Nueces County, State P-T Br. at 127-30. Part III.C addresses the Dallas-Fort Worth argument, State P-T Br. at 130-136. Part III.D addresses

the population growth argument, focusing on the South Texas envelope, State P-T Br. at 110-14. All of these areas are covered in detail in the joint plaintiffs' opening post-trial brief.

A. CD25 and Travis County

Most glaring in the state's generally flaccid defense of what Plan C185 did to Plan C100's minority opportunity, crossover CD25 is the complete failure to grapple with the constitutional warning in *Bartlett v. Strickland*, 556 U.S. 1 (2009), against deliberate elimination of a preexisting crossover district. *Id.* at 24. The state warmly embraced *Bartlett*, citing it many times as the main authority, in its argument against Section 2 recognition of coalition districts. State P-T Br. at 25-29. But the state doesn't even mention or cross-reference *Bartlett* in addressing the CD25 issue. Nor does it let the term "crossover district" pass its brief-writing lips in the CD25 discussion—even though the state, along with this Court, has already put C100's CD25 into the "crossover district" column, *see* Joint Plaintiffs P-T Br. at 24-25 (citing pertinent parts of record from 2011 trial round).

In the coalition district section of its opening post-trial brief, the state did go to the trouble to affirmatively mis-state what *Bartlett* said about crossover districts, mischaracterizing the decision as having "rejected crossover districts." *Id.* at 29. The state simply turns a blind eye to the *Bartlett* passage that is anything but a "rejection" of crossover districts—the passage that warns against precisely the step the state took with benchmark CD25.

The state brief's gingerly treatment—indeed, complete disregard—of *Bartlett* and CD25 as a crossover district is certainly understandable, given its concession at closing argument that dismantling a crossover district would raise a "serious question" if minority voters were targeted.

See Tr. 8/26/14 at 2101 (M. Frederick in colloquy with Judge Rodriguez). The evidence is that this is exactly what happened.

The state provided no rebuttal to Dr. Ansolabehere's report and testimony that race, not party, best explains the five-way division of Travis County and its evisceration of the core of the tri-ethnic coalition and the minority voting communities that made it work. *See* Joint Plaintiffs P-T Br. at 33-34. The state provides no convincing, record-based counter to Dr. Ansolabehere's conclusion.

It says that the Governor wanted to target Congressman Doggett and move him into a Republican district. State P-T Br. at 125. There is no explanation of why doing that required the racial divisions used to carve up Travis County generally and benchmark CD25 in particular. Nor is there any explanation of the direct clash between that ostensible purpose and the fact that the 2013 legislature re-enacted precisely the same map for Travis County even though its supposed target, Congressman Doggett, had just overwhelmingly won election anyway. *See* Rod. Exh. 912 at 32-33 (S. Ansolabehere Rep.) ("no statistical evidence that the redrawing of districts in Travis County had the effect of reducing the vote share received by Congressman Doggett, let alone defeating him").[9]

The state says that it wanted to create a new Latino opportunity district running from north central Travis County along the I-35 strip to South San Antonio, State P-T Br. at 124,[10] but fails

[9] The state complains about having to deal with issues concerning 2011's Plan C185, saying it is a "statute[] that no longer exist[s]." State P-T Br. at 4. Twenty-eight (77.8%) of C185's districts are unaltered in C235. The only districts from Plan C185 whose lines were altered in any way by interim Plan C235 were: (a) in South-West Texas, CDs20, 23, and 28; and (b) in the DFW area, CDs6, 12, 26, 30, and 33. None of the Travis County districts were altered, nor was CD35.

[10] The state can summon nothing stronger to support linking these two areas than generic testimony based on a former legislator's experience from two decades or more ago. State P-T Br. at 125. It also cites deposition testimony from Mr. Downton about keeping Latino communities of interest together this way, *id.*, even though he has testified

to come to terms with three particularly pertinent facts about that objective. One is that it used the CD35 configuration as a way to destroy an already existing opportunity district, benchmark CD25, where African-Americans and Latinos already were electing their candidate of choice. A second is that, as even Mr. Downton acknowledged, *see, e.g.*, Tr. 8/15/14 at 1773-74, there was no legal or factual compulsion forcing the location of a new Latino opportunity district in Central Texas and the South Texas envelope to be where CD35 is, requiring dismantlement of a preexisting opportunity district. A third is that creating a new Latino opportunity district, even if it were one making some modest incursion into Travis County, did not require the devastatingly effective division of the African-American communities of Austin and the county into Anglo-dominated districts running all over the state (to Tarrant County, to Harris County, and to Brazos and McLennan Counties).

The state appears to indirectly try to insinuate that the Anglo crossover vote in Travis County is nothing special. *See* State P-T Br. at 124-25. But it fails to explain that it is not citing or discussing Anglo crossover voting data at all. (*Recall that, as Justice Kennedy explained in* Bartlett*, crossover voting of this sort occurs when Anglos vote to support the same candidates as minority voters are supporting.*) At this point, the state cites data from a Dr. Engstrom report and says that it shows that "Anglo support for Latino candidates" in Travis is only slightly higher than the statewide average but also slightly lower than in Bexar. *Id*. The problem is that Anglo support for Latino candidates (which is the data the state is actually discussing) is quite a different metric than Anglo support for Latino-*preferred* candidates. The Engstrom data is about the former, not the lat-

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that he does not know anything about Harlandale ISD or whether South San Antonio is a community of interest. Tr. 8/15/14 at 1752 (R. Downton). And, however dubious the proposition that Mr. Downton was interested in linking Latino communities of interest, he agreed he showed no interest whatever in keeping the African-American communities of interest in Travis County together. *Id*. at 1778.

ter[11]—and the latter is what counts in voting rights analysis. Across the board, the experts in this case have concluded that the Anglo crossover vote in Travis County is about twice as high as anywhere else in the state. *See* Joint Plaintiffs P-T Br. at 27-28.

Finally, the state takes it on itself to recraft the *Bartlett*-based complaints of the plaintiffs by mis-asserting that the "primary complaints . . . have nothing to do with race." State P-T Br. at 126. The unbroken line, from the filing of the Rodriguez plaintiffs' complaint through the most recent trial and post-trial briefing, is that the "primary complaints" most certainly are about race, specifically the race-based division of the benchmark CD25 crossover district which had been providing minority voters the opportunity to elect candidates of their choice. In addition, the state mistakenly casts this part of its argument as being about CD35, even though the complaint is about the dismantlement of benchmark CD25, in which CD35 played only a part.

When it comes right down to it, the state's brief fails to meet, much less rebut, the argument that Plan C185's dismantlement of C100's CD25 violates the Equal Protection Clause as explained in *Bartlett*.

B. CD27 and Nueces County

The state's defense of its stranding of the Latinos of Nueces County in an Anglo-dominated district begins with the assertion that the main goal was to create a district "anchored" in Nueces County and another district "anchored" in Cameron County. State P-T Br. at 127. But C185 did not accomplish the first of these and, in fact, reversed the *status quo ante* situation in Plan C100's

[11] The races reviewed in Tables 4 and 8 of the Engstrom report reflect that he drew his statistics on "Anglo support for Latino candidates" from an analysis of: general election races, in at least two of which the Latino candidate was on the Republican ticket and *not* the candidate of choice of Latino voters; of Democratic primary races; and of Republican primary races. In short, insofar as the purpose for which the state is seeking to use it, this data tells the Court nothing at all about whether Anglos in Travis County cross over at a higher than normal rate in the state to support the candidate of choice of minority voters.

CD27. Nueces accounted for less than 40% of the votes cast in the 2012 CD27 general election. Rod. Exh. 956. The Anglo-dominated counties to the north and east accounted for by far the most (more than 60%) votes in the 2012 election. *Before* the reorientation of Nueces County, in the 2010 general election, the converse was true for Nueces; its votes had accounted for more than 60% of the votes cast. Rod. Exh. 955. The mapdrawers, who were quite adept at finely calibrating district lines and dividing minority communities to disperse them into Anglo-dominated districts, managed to fail in meeting what was said to be the main goal driving the new CD27. This suggests the pretextual nature of the goal.

The state also identifies the 2010 field hearing in Nueces County as an inspirational source for its reorientation of Nueces County and the concomitant electoral isolation of nearly one-quarter of a million Latinos. State P-T Br. at 127-28. This source of inspiration went wholly unremarked upon by Mr. Downton in his 2011 testimony, and, in any event, it is doubtful that the testimony could fairly be said to be the reason that all of Nueces was moved out of its historical alignment to the south for the last third of a century. As the joint plaintiffs already have pointed out, there were forty-two witnesses at the Corpus hearing. *See* State Exh. 574. For those willing to undergo the tedium of actually reviewing the full transcription—and Mr. Downton does not appear to have been in that category—it will be revealed that there was no "consensus" on what should happen to Nueces and Cameron. Certainly, there was some testimony in favor of dividing the districts and giving Nueces a stronger voice. But there was even more testimony on the need for any new map—and at this point there was no map, no data, nothing remotely specific—to recognize the explosive growth of the Latino population in the region. Hugo Berlanga in particular, said to be one of the principal inspirations for Mr. Downton's re-working of Nueces and

CD27, State P-T Br. at 128, specifically highlighted this concern and urged the state to "double" the number of Latino districts. State Exh. 574 at 26. It is especially telling that the state chose to heed the part of Mr. Berlanga's advice that had nothing to do with Latino voting rights, while completely disregarding the part of his advice that would benefit Latino voting power. Instead, it heeded the advice of Representative Hunter, advice that did not contain a kernel of deference or concern for Latino voting rights.

One other source that the state claims is a basis for its handling of the dilemma it faced with trying to save Congressman Farenthold is Representative Oliveira from Cameron County. The state says that it did what it did in Nueces in part because Representative Oliveira "supported the separation of Nueces and Cameron Counties." State P-T Br. at 128. But the most concrete indication that this was not so by the time of the 2011 redistricting is found in the congressional map Representative Oliveira sponsored: Plan C188. In that map, CD33 contains all of Cameron County and nearly all of Nueces County in a single district. There is no "separation." Here, again, the pretext for C185's treatment of Nueces Latinos fades away to nothing.

The state goes so far as to claim that the plaintiffs presented "no evidence" that Plan C185's CD27 was created for the purpose of discriminating against Latino voters in Nueces County. *Id.* at 129. But there *is* the matter of moving 200,000 or more Latinos out of a Latino opportunity district. And there *is* the matter of Mr. Opiela's "find Anglos" e-mail urging the state mapdrawers to go in search of Anglo voters to shore up Mr. Farenthold, uniformly recognized as *not* being the candidate of choice of Latino voters. And there *is* the further matter than Chairman Solomons picked up on the Opiela suggestion from the beginning and instructed that Nueces County be reoriented northward. Racially polarized voting in Nueces County is extraordinarily high, with

only about 10-15% of its Anglos voting for the Latino-preferred candidate. Tr. 8/13/14 at 943 (S. Ansolabehere). Especially working in the framework provided by *Arlington Heights*,[12] the evidence of intentional racial discrimination in the deliberate stranding of Latinos living in Nueces County is much more than "no evidence." It is compelling evidence.

C. Dallas-Fort Worth

With regard to CD12 and CD26, the state makes two admissions. First, it concedes that "race was a factor in creation of CD12 and 26" and that it was considered "to correct the inadvertent fracturing of minority communities." State P-T Br. at 130. These concessions not only undermine the state's contention that partisan politics alone explains the configuration of districts in the DFW area, but further that the state's mapdrawers were fully aware of the fracturing of minority communities that existed under the benchmark plan, but that they felt compelled to "correct" it.

The state fails to rebut our contention that the configuration of CD33 also demonstrates how state mapdrawers deliberately fractured minority communities in Tarrant County. *See* Quesada Exh. 73. Under Plan C185, CD33 is anchored and controlled by an Anglo voter base in Parker County but then protrudes into Tarrant County from the west to shear off African-American growth neighborhoods in southwest Fort Worth. CD33 then snakes further eastward with a nar-

[12] 429 U.S. 252 (1977). The state offers a rather perplexing discussion about *Arlington Heights*' meaning, State P-T Br. at 37-38, arguing that the plaintiffs are treating the *Arlington Heights* factors as "elements of the claim." None of the plaintiffs has done this. Intentional discrimination is an element of an Equal Protection Claim. *Arlington Heights* provides a list of evidentiary inquiries that may be used to uncover whether such intentional discrimination was at work in government actions that are not facially race-based. All the plaintiffs understand this well-established framework, and all have used it to aid the Court in uncovering what the state really did and intended in enacting Plan C185. That *Arlington Heights* is the proper guide for inquiring into whether racial motivations were present in the 2011 redistricting should come as no surprise to the state. The TLC told the legislature that *Arlington Heights* would be its guide on questions of intentional discrimination. Tr. 8/12/14 at 103 (J. Archer).

row extension to absorb and nullify the voting strength of both African-American and Latino growth areas in the City of Arlington.

In its attempts to justify the failure to create a new minority opportunity district in the DFW area, despite the explosive growth of the African-American and Latino communities in that region, the state relies principally on the argument that, because an HCVAP majority district could not be drawn in that area, the state could essentially fracture and divide minority voters throughout the region without any legal consequences. That is wrong for several reasons.

First, the state never offered any evidence that all of the plans that proposed the creation of new minority congressional districts in the DFW area would not perform for minority voters. Moreover, plaintiffs' evidence showed that virtually all of the plans that created a new minority district or districts in that region were effective opportunity districts for minority voters.

Second, a plan that created a new minority district in that region by combining African-American and Latino population—such that minority voters were a supermajority of the voting age population in such a district—provided minority voters with an effective opportunity to elect a candidate of choice. Texas willfully adopted the self-serving, mistaken position that coalition districts (or districts combining African-American and Latinos into supermajority minority districts) were not required under the Voting Rights Act, despite direct Fifth Circuit precedent to the contrary. *See* Joint Plaintiffs P-T Br. at 62-63. The state's mapdrawer also admitted at trial that the state never examined the voting patterns in the DFW area to see if a minority voters were politically cohesive or if any of the proposed new minority districts in the region were effective opportunity districts for minority voters. Tr. 8/15/14 at 1766-67 (R. Downton).

Third, the state's post-trial brief does not dispute the fact that several minority members of the Legislature introduced congressional plans that created two new effective minority districts in the DFW region, among them being then-Representative Veasey (Plan C121), Representative Oliveira (Plan C188), and Senator West (Plan C149).

Finally, even assuming *arguendo* that, notwithstanding governing Fifth Circuit precedent, Texas' mapdrawers had been legally correct that the state was under no obligation to even consider the creation of coalition districts in the DFW region, the state cannot rely on such an argument to excuse the intentional massive fracturing of minority population concentrations in the DFW area and their decision to separate minorities from Anglos, and to separate African-Americans and Latinos from each other. As noted above, the state was fully aware when it drew Plan C185 that minority voters in the DFW area had been fractured under the benchmark plan (C100) and there was a need to "correct" it. The state's post-trial brief admits that the state's mapdrawers received advice from TLC attorneys to "keep communities of interest together," State P-T Br. at 133, that the mapdrawers equated keeping "communities of interest together" with examining "whether African American and Hispanic communities had been divided in Tarrant County," *id.* at 134, and learned from a blog that the state's map split minority communities in the DFW area and used racial shading to review the extent of the splitting of minority communities, *id.* at 135. The state also concedes that the mapdrawers intentionally split African-American and Latinos from each other in the creation of CDs 12 and 26 in the DFW area, with "areas of more concentrated black population . . . joined in CD 12 . . . and Hispanic communities . . . joined in CD 26[.]" *Id.* at 135.

This manipulation of racial data in the configuration of the districts in the DFW area proves beyond doubt that Texas intentionally assigned voters to districts on account of their race. It also establishes that the state knowingly cracked and fractured minority population concentrations in congressional districts throughout the region of Dallas and Tarrant Counties. Such intentionally discriminatory conduct violates the Fourteenth Amendment to the United States Constitution and Section 2 of the Voting Rights Act.

D. Population growth and the South Texas envelope

The first major flaw in the state's argument pooh-pooing the idea that the huge surge, both in raw numbers and proportionately, in minority population during the 2000-2010 decade should have led to an increase in minority opportunity districts is its omission of the Travis County crossover and Nueces County stranding issues and the impact they had on the creation of additional minority opportunity districts in the South Texas envelope. The state posits that the plaintiffs have failed to establish in their proffered maps that it is possible to draw more "HCVAP-majority congressional districts" than were created in Plan C185. State P-T Br. at 110. This formulation, of course, sets up a mistaken equivalency between districts that are "HCVAP-majority" and districts that are effective Latino opportunity districts. This mistaken equivalency then treats C185's CD23 as just as much a minority opportunity districts as C100's CD23. But the two districts are not the same; one (C100's) is an opportunity district, and the other (C185's) is not.

Focusing on the one big flaw, the state assumes away the existence of the preexisting benchmark CD25, which, as a viable crossover district, performed as a minority opportunity district in which Latino and African-American voters elected their candidate of choice. The state also as-

sumes away the emptying out of eligible Latino voters from the South Texas envelope when it transplanted more than 133,000 in Latino CVAP from the envelope into the Anglo-dominated areas north and east of Corpus Christi. As evidenced by Mr. Opiela's "find Anglos" memo, the state's mapdrawers well understood that the effect of their Travis County and Nueces County maneuvers was to significantly draw-down the pool of Latino CVAP available in the envelope from which could be formed viable Latino opportunity districts.[13]

Contrary to what the state says, many of the demonstration maps establish that, with Nueces County's Latinos returned from their CD27 exile, and with crossover CD25 maintained, there was sufficient population growth for at least one additional Latino opportunity district in the South Texas envelope. *See* Joint Plaintiffs P-T Br. at 52-54 (identifying as examples Plans C220, C166, C205, C218, C123, and C262).

The state recognizes that one demonstration map in particular, Plan C262, showed that *two* new Latino opportunity districts could be created in an only slightly-expanded envelope (bringing in parts of Ector and Midland Counties), without dismantling a Travis County-based crossover district. State P-T Br. at 113 (acknowledging that C262 "created 9 HCVAP-majority districts). Its only criticism of that map is that one of its districts, CD28, is not reasonably compact because it "goes from Webb County to northern Travis County." *Id.* This argument should carry little water, coming as it does from the party that created C185's CD27 which runs in a lengthy dog-leg from the southern county line of Nueces County to the eastern county line of Travis County. And the state's credentials in the "reasonable compactness" sphere are not any further en-

[13] The state's mapdrawer certainly understood that Nueces County could easily have formed the basis for a new Latino opportunity district in the envelope. Tr. 8/15/14 at 1774 (R. Downton).

hanced by its steadfast defense of CD35. The state has provided nothing beyond mere assertions to attack the districts of Plan C262 as lacking in reasonable compactness.

Beyond this emphasis on creating minority opportunity districts, though, lies another problem unaddressed by the state in its discussion of the impact of population growth on the 2011 redistricting. The state continues to assume, as the principal formulators of C185 did, that minorities are little more than fodder—"filler people"—in any situation in which a reasonably compact minority district, for a *single* minority, could not otherwise be formed. This is most keenly displayed in the DFW area. There, the viability of coalition districts is willfully ignored, with the consequence that the huge minority population explosion in the Dallas-Fort Worth Metroplex became the occasion for excruciatingly fine-tuned, state-initiated racial divvying up to ensure that minorities would be deprived of any opportunity to work together in congressional elections.

In essence, the surging minority population growth was actually the spark that set off the state's use of race to entrench the reigning political powers. The growth really left the state with no other way to do this than to purposely diminish minority voting power by using racial division in its linedrawing. The state's argument about population growth provides no refutation of this fundamental fact.

CONCLUSION

The Court should enter judgment for the plaintiffs that Plan C185 intentionally dilutes the votes of minority voters in violation of the Equal Protection Clause and Section 2 of the Voting Rights Act. It should also conclude that Plan C185's deliberate destruction of an existing crossover district, Plan C100's CD25, in which minority voters could elect their candidate of choice violates the Equal Protection Clause as delineated by *Bartlett v. Strickland*. The Court should fur-

ther find, as contended by the Quesada plaintiffs, that CDs 6, 9, 18, 20, 24, 29, 30, and 33 are unconstitutional racial gerrymanders. Then, the Court should convene a hearing for a determination of whether the state should be brought under the preclearance regime of Section 5 of the Voting Rights Act through Section 3(b) of that Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 2014, I filed a copy of the foregoing for service on counsel of record in this proceeding through the Court's CM/ECF system.

__*/s/ Renea Hicks*_____
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