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Chris Poage, RMR, CRR  
United States Court Reporter

1 (September 16, 2011, 8:09 a.m., open court)

2 JUDGE GARCIA: Okay. You may proceed.

3 **CLOSING STATEMENT**

4 MR. SCHENCK: Good morning, and may it please the  
5 Court.

6 Your Honors, I'd like to start by talking about how  
7 many Latino opportunity districts Texas created or maintained  
8 under the new congressional plan.

9 JUDGE SMITH: You're doing only the state plan; is  
10 that right?

11 MR. SCHENCK: The congressional plan.

12 JUDGE SMITH: You're doing the congressional?

13 MR. SCHENCK: Yes.

14 MR. MATTAX: We switched the order.

15 JUDGE SMITH: Okay. All right.

16 MR. SCHENCK: Before we start talking about the  
17 particulars of each one of these new districts or the existing  
18 districts, the question that comes up -- that has come up  
19 repeatedly, what exactly Texas did here with respect to Latino  
20 opportunity on the congressional map.

21 We need to distinguish here between opportunity and  
22 the assurance of an electoral victory. The State of Texas  
23 can't make a district perform. Only the voters in the district  
24 can do that. The State can draw districts legally, under  
25 certain circumstances, that will provide an increased

1 opportunity for Latino voters to elect their candidate of  
2 choice.

3           What did Dr. -- let's look at, in fact, what we have  
4 in terms of districts under the new and the old map in which  
5 the Hispanic citizen voting age population constitutes a  
6 majority within a district. Under the old plan we had 15, 16,  
7 20, 23, 27, 28 and 29. Now, those were all districts in which  
8 the Latino population constituted a majority of citizen voting  
9 age population. If, in fact, the Latino voters in that  
10 district vote cohesively and turn out at anything equal to the  
11 rate of the other voters in the district, there is no way that  
12 they could be defeated in an election.

13           But that's separate from the question of whether they  
14 have historically turned out in those numbers or voted in the  
15 way that we, experts or anyone else would have predicted they  
16 voted. That's a separate question which becomes relevant under  
17 Section 5 of the Voting Rights Act. Under the new plan we have  
18 15, 16, 20, 23, 28, 29, 34 and 35.

19           Now, let's talk for a minute about what Dr. Alford  
20 told us about those districts, because I think there's some  
21 confusion about that. And I believe Ms. Perales quoted his  
22 deposition testimony to you yesterday as well. What Dr. Alford  
23 said is: An opportunity district is a district in which there  
24 is an opportunity for Hispanics to constitute the majority of  
25 the turned-out vote in the district, in which Hispanics are

1 sufficiently cohesive, that they, when they vote cohesively,  
2 can control the outcome of the district.

3 We increased the number by one in which that is true.

4 There's a separate question of what is a performing  
5 district, which becomes an important legal question in a  
6 Section 5 case. Again, Dr. Alford testified about that as  
7 well, both in the trial and in deposition.

8 Performing district is a somewhat -- a looser term  
9 that indicate the degree to which either the candidates in the  
10 district themselves or other statewide reconstituted elections  
11 of the district show that the district would produce to the  
12 degree, what degree, would the district produce safe Democratic  
13 results.

14 Now, Dr. Alford said under the benchmark  
15 congressional plan there were seven districts that were  
16 intended to be Latino opportunity districts. But, in fact,  
17 there were only five that were performing.

18 The fact of the matter is we have a distinction here  
19 between districts that are drawn with an opportunity for Latino  
20 voters to elect a candidate of their choosing and a district in  
21 which Latino voters, in fact, are electing a candidate of their  
22 preference.

23 Dr. Alford told you that his approach here, as well  
24 as ours, was not to waste time on things that don't matter or  
25 things that people don't really disagree on. He was trying to

1 focus on things that were genuinely in dispute before the  
2 Court.

3 His testimony, in fact, was -- the idea was that --  
4 was to try to get -- to make as clear as possible what it is  
5 that everyone agrees on so that there's a constant matter of  
6 moving -- it's not a constant matter of moving between reports.  
7 The aim here is to provide as broad as possible a set of  
8 factual data on which everyone in the case agrees, to  
9 distinguish clearly what the remaining district disagreements  
10 of interpretation are.

11 THE REPORTER: I'm sorry. "The remaining"?

12 MR. SCHENCK: -- disagreements of interpretation are.

13 JUDGE SMITH: Yeah. You're reading just a little bit  
14 too fast.

15 MR. SCHENCK: In essence, Dr. Alford says water is  
16 wet, and the plaintiffs like that because they think water is  
17 wet. But Dr. Alford also says we're in a barrel. We're in  
18 water, and we have gravity. And we heard yesterday from two of  
19 the defense counsel that we know that there's a significant  
20 legal problem with the plaintiffs' case. In fact, from a  
21 Section 2 perspective this case was really over from the moment  
22 the plaintiffs filed their expert reports.

23 The Fifth Circuit has addressed the question at  
24 length and en banc of why we do racially-polarized voting  
25 analysis under the Gingles test. We're looking for racial

1 discrimination in the electorate and resulting dilution of the  
2 vote.

3           The problem here stems back from the early cases,  
4 Whitcomb, Bolden versus City of Mobile, and the major problem  
5 with multimember districts in the South. There was a time when  
6 white voters simply refused to vote for a black candidate,  
7 regardless of the party.

8           If you listen to the transcript of the arguments in  
9 Bolden, and I would encourage anyone to do that, the concern  
10 that Justice Marshall and the rest of the Court had when we  
11 were talking about multimember districts was clear and it was  
12 obvious. You had circumstances where you had a compact and  
13 cohesive black population captured within a jurisdiction where  
14 all the votes were tabulated at the same time. And there was  
15 racism in the electorate. And as a result of that, white  
16 voters would go to the polls and overwhelm any black candidate  
17 for office.

18           And the candidates running for office in those  
19 districts who were white and wanted to increase their potential  
20 for electoral victory would actually pursue interests  
21 antithetical to the minority population. And in result, we  
22 ended up having representation that was just not even  
23 responsive, but hostile to those votes.

24           And as Justice Marshall put it, the problem was black  
25 voters would go to the poll and they would cast a meaningless

1 ballot. That was a pernicious and pervasive problem across the  
2 South. The Voting Rights Act and the amendments to it in 1982  
3 were a response to that problem. We are a long, long way from  
4 that problem in this case.

5 When we're doing racially-polarized voting analysis,  
6 we're looking for the potential for voters to be harmed as a  
7 result of some kind of discrimination. And let's keep in  
8 context what exactly we're doing here. We're having experts  
9 come into the court, pull back the curtain on the voting booth  
10 and tell you what they think people were doing when they were  
11 in there.

12 And on the basis of that evaluation, we're going to,  
13 under certain very narrow circumstances, draw district lines on  
14 the basis of race to take people and separate them from each  
15 other. That is an extreme remedy, and it has substantial  
16 constitutional implications that the Supreme Court has  
17 recognized over and over again, that require a very careful and  
18 narrow reading of Section 2 to reach conduct that would justify  
19 the extreme remedy of race-based gerrymander.

20 We have nothing like that shown in this case. And  
21 really, it's to the credit of the voters and the people of the  
22 State of Texas that we've seen this shift. Twenty years ago it  
23 would not, even -- more like 30 years ago we would not have  
24 seen what we see in the plaintiffs' expert reports.

25 And the Fifth Circuit in LULAC makes clear what

1 exactly we're looking for. This is the en banc majority  
2 opinion. The scope of the Voting Rights is, indeed, quite  
3 broad, but its rigorous protections, as the text of Section 2  
4 suggests, extend only to defeat experience by voters on account  
5 of race or color. Without an inquiry to the circumstances  
6 underlying unfavorable election returns, courts lack the tools  
7 to discern results that are in any sense discriminatory, and  
8 any distinction between deprivation and mere losses at the  
9 polls becomes untenable.

10 I'm continuing now from the LULAC opinion. Unless  
11 the tendency among minorities and whites to support different  
12 candidates and the accompanying losses by minority groups at  
13 the polls are somehow tied to race, plaintiffs attempts to  
14 establish legally significant white bloc voting, and thus their  
15 vote dilution under Section 2 must fail.

16 If we don't read Section 2 that way, we raise serious  
17 constitutional problems about its reach. Plaintiffs are  
18 ignoring that entirely. It's not just the Fifth Circuit that's  
19 addressed this -- or identified the risks of ignoring race as a  
20 cause for electoral defeats. This is the Supreme Court's  
21 decision in LULAC versus Perry from five years ago. The  
22 ultimate right of a Section 2 equality of opportunity is not a  
23 guarantee of electoral success for minority-preferred  
24 candidates of whatever race.

25 Now, what's going on here is that the plaintiffs have

1 run through the first three Gingles preconditions. And I would  
2 submit to you they haven't satisfied any of them, even if we're  
3 not controlling for the cause of the voting patterns.

4 But they've ignored both the purpose for Justice  
5 Brennan's plurality opinion and the vote count. There were  
6 five votes in Gingles with respect to the question of whether  
7 we would look at race to determine -- the race of the  
8 candidate, I should say, to determine whether there's any  
9 justification for the federal courts redrawing district  
10 boundaries on the basis of race.

11 If we don't do that, as Judge Higginbotham wrote for  
12 the en banc court in LULAC, we run the risk of redrawing --  
13 turning the loss at the polls into a -- I'm sorry.  
14 Discrimination into a mere euphemism for loss at the polls.

15 And what do the experts say about this? This is not  
16 Dr. Alford's opinion -- I'm sorry. This is not Dr. Alford's  
17 data that's showing this. This is the plaintiffs' own expert  
18 reports. When we look at the Texas voting patterns in this  
19 state, we see something quite striking. Hispanic voters will  
20 vote for a Democratic candidate in the general election at  
21 about, according -- this is from I believe Dr. Engstrom's  
22 tables -- an 80 percent bench. Now, of course, Dr. Engstrom is  
23 looking at largely urban and heavily Democratic counties.

24 If we switch not the race of the candidate but the  
25 party affiliation, Hispanic voters will still vote 80 percent

1 or, in fact, 82 percent for the Democrat in that election.  
2 Likewise, black voters will support a Democrat in the high --  
3 in the mid to high 90 percent range. But if you switched the  
4 party affiliation of the candidate, what we get is the same  
5 result in the opposite direction.

6 And with respect to the white voters or other or  
7 Anglo we see 73 percent supporting a Republican who happens to  
8 have a Hispanic surname and 27 percent flipped the other  
9 direction, supporting the Democrat who has a Hispanic surname,  
10 meaning that the Anglo in the race they're supporting at 73  
11 percent, the same rate. It's striking across the data.

12 Now, Mr. Hicks, yesterday, indicated that he'd gone  
13 through LULAC versus Clements and indicated that it was unclear  
14 where the burden lied -- or if it was a shifting burden scheme  
15 back and forth to prove the effect or the cause of the voting  
16 patterns. But I don't think we need to worry about where the  
17 burden lies here, because the patterns are so clear from all of  
18 the plaintiffs.

19 And it's not just my expert saying it. It's their  
20 experts. Let's see what Dr. Kousser says in his report. He  
21 said: Voting in recent Texas elections has been ethnically  
22 polarized. But his conclusion on that is based only on his  
23 review of races in which a Latino Democrat is running.

24 Eventually, he comes down to the conclusion: Latino  
25 voters in Texas overwhelmingly favor Democratic nominees, even

1 when Republican nominees have Spanish surnames.

2 Dr. Ansolabehere: Areas that are overwhelmingly  
3 Hispanic or black vote overwhelmingly Democratic. Hispanic  
4 areas mirror white areas, with 70 to 80 percent voting  
5 Democratic. As a practical matter, it is difficult to untangle  
6 party and race because the racial groups themselves have  
7 considerable influence inside the parties.

8 JUDGE RODRIGUEZ: But how do you respond to the  
9 plaintiffs' argument, you're focusing on the general elections,  
10 and the real focus should be the primaries?

11 MR. SCHENCK: Well, the primary, the voters aren't  
12 faced with a choice between race and party affiliation. So  
13 there's no test there for which of these two could be the cause  
14 to explain any pattern of ethnically significant voting  
15 patterns.

16 And, in fact, when we look to the Democratic primary,  
17 I believe it was Dr. Kousser that was the only one that tried  
18 to give the opinion that race explained the results of the  
19 election in the primary, and that's the Democratic primary.  
20 And he looked at a grand total of two races in the 2010  
21 Democratic primary.

22 And when we look at his data, what they show is  
23 there's a significant degree of white support for the  
24 Democratic candidate who happens to be Hispanic in that  
25 primary. So I don't think that it's a very good test for -- to

1 determine what exactly is the explanation for voting behavior  
2 in Texas.

3 In fact, he ignored the one race for governor in  
4 which the Hispanic voters were presented with two choices of  
5 Hispanic-surnamed candidates, but they showed no proclivity  
6 toward supporting either one of them. So there's something  
7 other than race that explains what's going on in those -- in  
8 those contests.

9 Now, in -- I remember that Mr. Garza was the one who  
10 selected those races. But we have a sample of two. And if we  
11 look back at the governor's race, a sample of three. And what  
12 we don't find there is anything other than the conclusion that  
13 Democrats tend to support -- or Hispanic Democrats in the  
14 Democratic primary tend to support a candidate that Mr. Garza  
15 considered to be significant enough to merit analysis.

16 JUDGE RODIRUGEZ: And the references to the Carrillo  
17 race?

18 MR. SCHENCK: I'm sorry?

19 JUDGE RODIRUGEZ: And the references to the Carrillo  
20 race?

21 MR. SCHENCK: In the Republican primary? All of the  
22 experts agree that there wasn't a significant --  
23 racially-polarized voting in those elections. And when we go  
24 back to 2004, to Mr. Carrillo's primary there, it's -- the  
25 support is consistent across the racial groups. Now, we only

1 have bivariate analysis there, but I think we're looking at  
2 substantial support from both Hispanic and from white  
3 candidates.

4           And it's -- it goes even beyond the plaintiffs'  
5 expert reports under conclusions there. Dr. Murray tests it in  
6 another way. Dr. Murray, if I'm remembering correctly, looks  
7 at the pattern of straight party voting. And he finds exactly  
8 the same correlation between race and partisan preference.

9           And then Dr. Lichtman comes to the same conclusion,  
10 and his report is equally clear. Dr. Lichtman says: Latinos  
11 and African-American voters in Texas are additionally cohesive  
12 and that they overwhelmingly unite in support of candidates  
13 emerging from the Democratic parties, regardless of the race of  
14 the successful primary candidates.

15           All of the data --

16           JUDGE SMITH: But in -- in LULAC versus Perry the  
17 Supreme Court spoke, it seems to me, approvingly of what the  
18 district court found when it said, the district court found  
19 racially-polarized voting in south and west Texas, focusing on  
20 District 23. The court -- the Supreme Court didn't seem to  
21 disagree with that finding.

22           MR. SCHENCK: Right. And I -- and I -- we pulled the  
23 briefs in that case. Nobody cited the Supreme Court to LULAC  
24 versus Clements for the proposition that we're going to control  
25 for the cause of any apparent distinction in the voting

1 patterns of the people -- of the voters in CD 23 or anywhere  
2 else, on account of race or party affiliation.

3 The record in that case is the record in that case.  
4 The record in this case is very clear, and nobody appears to  
5 disagree --

6 JUDGE SMITH: Well, okay. I understand you're trying  
7 to answer the question. But, I mean, this is the Supreme Court  
8 in 2006 apparently accepting -- it's not that long ago --  
9 apparently accepting the finding that, at least as to the area  
10 involving District 23, there's racially-polarized voting in  
11 south and west Texas and, indeed, they say, throughout the  
12 state. I mean, I just -- I don't know how we can overlook that  
13 based on whether the briefs refer the Court back to something  
14 else.

15 MR. SCHENCK: Well, I recall that the data that the  
16 Court was looking at there showed 92 percent Hispanic voting  
17 preference for the Democratic candidate and 12 percent  
18 crossover vote. So I think the data in that case supported the  
19 conclusion that the Supreme Court drew.

20 We got -- we have to decide each one of these cases  
21 on the facts that are presented. And the record in this case  
22 is clear and overwhelming. So the Court is confronted with a  
23 question that the Supreme Court was not confronted with in  
24 LULAC versus Perry. And the Court is confronted with a record  
25 which is different from the one the Court addressed in LULAC

1 versus --

2 JUDGE SMITH: Okay. So refine for us how it is  
3 specifically that the question today is different from the  
4 question there.

5 MR. SCHENCK: The question is whether there is a  
6 sufficient type of polarization or bloc voting that the  
7 Constitution would support or that Section 2 would require the  
8 drawing -- a redrawing of district lines on the basis of race.

9 In LULAC versus Perry we had a dramatically different  
10 fact pattern that went along with the data that the Supreme  
11 Court was looking at, and the record. And, again, the briefing  
12 speaks for itself, and the record speaks for itself. But in  
13 LULAC versus Perry what the legislature had done is taken a  
14 majority Hispanic district in which the Latino voters appeared,  
15 at least from the record the Court had before it, to be about  
16 to kick out Henry Bonilla. And what the legislature did was  
17 they destroyed the district, turned it into a majority Anglo  
18 district and tried to replace it with a non- -- a non-compact  
19 district in which the Hispanic voters had nothing in common  
20 with each other. This is a very, very different setting.

21 JUDGE RODRIGUEZ: Okay. With regard to just that  
22 district, what did the enacted map do that's different this  
23 time than from the last?

24 MR. SCHENCK: Well, for one, it increased the number  
25 of minority opportunity districts. We had an excess of

1 population that needed to be moved around. And one thing  
2 that -- one thing that we did, which is different, is we  
3 created CD 35. CD 35 is a majority Latino district. The  
4 reconstituted election analysis in that district indicates that  
5 the Democrat can be expected to win 10 out of 10 races in which  
6 we've had candidates of different racial background running.

7 Now, I heard for the first time yesterday, I think,  
8 an argument from two of the plaintiffs that Texas exceeded its  
9 authority and violated the Constitution by drawing a district  
10 here somehow predominantly on the basis of race. And I'll tell  
11 you that is not right. Texas had the right to draw CD 35. The  
12 Supreme Court's been clear that even if we're not compelled to  
13 draw a district in which Latino voters will have an opportunity  
14 to elect a candidate of choice, we have the leeway to do so.  
15 And it's leeway we exercised here.

16 JUDGE RODRIGUEZ: Well, how do you respond to Dr.  
17 Alford and Giberson, who are both your experts -- or your  
18 witnesses, that CD 35 is not compact?

19 MR. SCHENCK: Doesn't have to be compact. The State  
20 can draw districts in circles, tarantulas, anything else that  
21 it wants to so long as it's not violating the equal protection  
22 clause or Section 2 of the Voting Rights Act.

23 To the extent Texas wants to draw a district in which  
24 it has the opportunity to -- the Latino population with an  
25 opportunity to elect a candidate of their choice, they can do

1 so, so long as race does not predominate or traditional  
2 redistricting principles are not overwhelmed by racial  
3 considerations.

4 Nobody testified -- not Dr. Alford, not Dr. Giberson,  
5 anybody else -- that CD 35 is non-compact for purposes that  
6 would suggest that race predominated over traditional  
7 redistricting principles. And, in fact, CD 35 is more compact  
8 than any of the alternative districts in north Texas, for  
9 instance, that the plaintiffs -- draw.

10 And before we leave this point entirely, what we  
11 didn't hear yesterday, despite I think something like seven  
12 hours of argument, was anybody pointing to evidence under this  
13 statute that anybody, on the basis of this redistricting, was  
14 denied an equal opportunity to vote on account of their race or  
15 color, on this redistricting plan.

16 What we saw was a trot through a lot of counties,  
17 particularly El Paso, Hidalgo, Cameron County, Dallas County.  
18 We're getting to the point in this state, based on our  
19 diversity, which is a good thing, that we have a very awkward  
20 question, to the extent we start applying exotic applications  
21 of Section 2. Who's the minority in El Paso County? Can  
22 anybody say that the voters in El Paso County are -- right now,  
23 who are Latino, denied an equal opportunity to elect a  
24 candidate of their choice? The same thing in Cameron County.

25 All of those counties are overwhelmingly electing

1 Democratic candidates in local elections and statewide  
2 elections, to the extent we're looking at the voting patterns  
3 within the county. The same thing's true in Dallas County.  
4 And if we don't start controlling or maintaining the limits on  
5 Section 2 to actually cure something that looks like real  
6 discrimination, we end up drawing districts in which we have  
7 exactly the problem that the Supreme Court and Congress was  
8 trying to address in the amended Section 2.

9 And this is what we hear from the Supreme Court: The  
10 message that such districting sends to elected representatives  
11 is equally pernicious. When a district obviously is created  
12 solely to effectuate the perceived --

13 THE REPORTER: Mr. Schenck.

14 MR. SCHENCK: -- one racial group, elected officials  
15 are more likely to believe that their primary obligation is to  
16 represent only the members of that group, rather than their  
17 constituency as a whole.

18 JUDGE RODRIGUEZ: Well, going back to your slide up  
19 there that had the statute and the denial of equal opportunity,  
20 given the increase in population, especially for minorities in  
21 Dallas/Fort Worth, apart from El Paso that you're talking  
22 about, the State has no obligation under that language of that  
23 section to create a district for minorities in the Dallas/Fort  
24 Worth area?

25 MR. SCHENCK: I'm looking --

1 JUDGE RODRIGUEZ: That's not a denial or abridgement?

2 MR. SCHENCK: To the extent there is  
3 racially-polarized voting that would prevent the Hispanic  
4 voters in that district to have the opportunity to elect a  
5 candidate of their choice, there would be, potentially, if we  
6 then go to totality of circumstances. We don't have that.

7 If you're asking, because of the rates of increase of  
8 population, whether there's a requirement to create  
9 proportionally an increase in the number of districts, the  
10 statute says otherwise. And I'm looking for the text here but  
11 --

12 JUDGE RODRIGUEZ: And I know what section you're  
13 talking about. And that seems to be the big philosophical  
14 difference between the plaintiffs and your side, is that even  
15 though 66 percent of the population growth has been attributed  
16 to Hispanics, under that exception clause the State feels no  
17 compunction to create a new opportunity district?

18 MR. SCHENCK: Well, the fact of the matter is the  
19 State did create a new opportunity district in CD 35. And that  
20 would be --

21 JUDGE GARCIA: But that was the swap for 33, right?

22 MR. SCHENCK: No, sir. No, sir. It was not a swap.  
23 It would be a swap if you had said that CD 23 was a performing  
24 district. Dr. Alford's testimony and the data itself shows CD  
25 23 was not a performing district, neither was CD -- old CD 27,

1 as the former Democratic congressmen in both of those districts  
2 could tell you. The voters on the ground spoke. And that's  
3 where I think we have the most substantial Section 2  
4 disagreement.

5 JUDGE SMITH: Do you agree that under LULAC versus  
6 Clements, the Fifth Circuit en banc case, we need to look at  
7 whether it's necessary to create coalition districts?

8 MR. SCHENCK: It is not necessary to create coalition  
9 districts. And the Supreme Court, in fact, has spoken to that.

10 JUDGE RODRIGUEZ: Well, as opposed to not necessary,  
11 under the slide that's up there right now, is that precluded?

12 MR. SCHENCK: Well, the Supreme Court spoke to that  
13 in Bartlett versus Strickland. There's the opportunity for us  
14 if we want to draw districts in which the minority population  
15 is not the majority population to do that. We have no  
16 obligation to draw a district where there's less, for example,  
17 than 50 percent of the majority-minority voting population  
18 within the districts.

19 JUDGE SMITH: But Bartlett was a crossover case,  
20 right?

21 MR. SCHENCK: Correct.

22 JUDGE SMITH: And the Court specifically said that it  
23 was a crossover case?

24 MR. SCHENCK: That is correct.

25 JUDGE SMITH: So my earlier question went to, aren't

1 we -- aren't we bound by what the Fifth Circuit said en banc?  
2 There was a special concurrence, as you know, that specifically  
3 highlighted what the majority had said en banc, which  
4 recognized the validity of the concept of the coalition  
5 districts.

6 MR. SCHENCK: The Fifth Circuit hadn't said that en  
7 banc. In fact, nobody has cited you to the subsequent history  
8 of the case that they're citing, which is Campos versus City of  
9 Baytown. In that case there was a request to go en banc, but  
10 Judge Higginbotham wrote a dissent, joined by a significant  
11 number of members of the Court, on the question of whether or  
12 not we should have a legal recognition of coalition districts.

13 Judge Higginbotham points out, and Judge Jones points  
14 out in the concurrence to LULAC versus Clements, where this  
15 issue comes up again, which, Judge Smith, I would remind you  
16 that you joined, that Campos versus City of Baytown was  
17 addressing the wrong question.

18 The way the issue was put in Campos versus City of  
19 Baytown was whether there was anything in Section 2 that would  
20 prevent the establishment of coalition districts. Subsequent  
21 to that, in Session versus Perry, the 2003 case that ultimately  
22 became LULAC versus Perry, Judge Higginbotham, and a  
23 three-judge court addressed that case, rejected coalition  
24 districts again.

25 And what ends up coming out of Baytown, assuming it

1 stands for a valid proposition that you could ever have  
2 coalition districts, is that we have to have proof that  
3 there's, in fact, cohesive voting among the majority --  
4 minority population. All of the experts in this case have said  
5 that there is not cohesive voting among the minority population  
6 in a Democratic primary, which is the only place where we could  
7 see the opportunity for this coalition to take root. And  
8 that's been true over and over again.

9           So there's -- there's two problems with it. One is a  
10 factual problem because there just is not cohesion among the  
11 minority voters, which is why -- how the issue's been resolved  
12 over and over again in the Fifth Circuit, and to the  
13 plaintiffs' detriment.

14           And second, the Supreme Court in logic, if not by  
15 name, has said that these districts create serious problems.  
16 In LULAC versus Perry, Justice Kennedy writing for the Court,  
17 said: The potential for these influenced districts would -- is  
18 that they would infuse race into every redistricting question  
19 because -- and that's particularly true in a state as diverse  
20 as Texas now.

21           JUDGE SMITH: Well, but influence districts and  
22 coalition districts are two different things.

23           MR. SCHENCK: That's right.

24           JUDGE SMITH: I agree with you that the case law  
25 doesn't support influence districts.

1           MR. SCHENCK: But if we were to recognize coalition  
2 districts as a matter of law -- and there's -- we'll brief this  
3 question to you substantially. You've not been cited to lots  
4 of authority on this.

5           The Supreme Court in Bartlett says this: Nothing in  
6 Section 2 grants special protection to minority groups' right  
7 to form political coalitions.

8           That's pretty clear language to me. Now, the logic  
9 of that is that -- and the logic coming out of LULAC versus  
10 Clements -- I'm sorry -- LULAC versus Perry is that if we start  
11 looking for places where people tend to vote Democratic,  
12 regardless of any indication of discrimination, the entire  
13 state starts becoming the potential for coalition districts.  
14 And that's -- and if any place presents a problem, it would be  
15 Texas where we have the most diverse population in the history  
16 of the United States. We would have to start doing Section 2  
17 analysis all over the state. And there's -- it makes no legal  
18 sense in the first instance, and there's certainly not a  
19 factual record to support it.

20           JUDGE SMITH: Where are we in this case or what is  
21 your position if, hypothetically -- I'm not suggesting what  
22 we're going to do because we, obviously, haven't decided. But  
23 if we decide that there is, in fact, racially-polarized voting  
24 in Texas, then what is -- what is the State's position as to  
25 the congressional districts?

1           MR. SCHENCK: We would not see any need to adjust  
2 either of these maps on the basis of the existence of  
3 racially-polarized voting. There's a separate question of  
4 the -- beyond causation, there's the question of the extent of  
5 the racially-polarized voting here.

6           Angela, can you reload the slides, please?

7           What the data have shown here is we have something  
8 between 60 and 75 percent cohesion around something in the  
9 Hispanic voting tendencies. At the same time we have something  
10 between 25 and 30 percent for crossover voting.

11           Even if we're just running through the Gingles  
12 preconditions on a formulaic basis, that's not a sufficient  
13 level to require the redrawing of districts on racial lines.

14           And I would remind the Court that in the history of  
15 the Voting Rights Act we have seen the Supreme Court, in one  
16 issued opinion, one, require the redrawing of districts in a  
17 single-member district on the basis of dilution. That was  
18 LULAC versus Perry, and that was CD 23. And that CD 23 was one  
19 that was crushed and turned into a majority Anglo district.  
20 That's not what we have here. That's the cohesion that we had  
21 in Gingles. And remember, Gingles was a multimember district  
22 case.

23           In LULAC versus Perry the evidence before the Supreme  
24 Court at Page 427 of the opinion is that 92 percent of Latinos  
25 were voting against Henry Bonilla, and 12 percent of

1 non-Latinos were voting for the Democratic opponent.

2           That's a very different factual record. Then we have  
3 the question of getting the totality of the circumstances. And  
4 if we were to go there, what we would find is Texas at this  
5 point, not only are we not voting on race in our general  
6 elections, but on simply partisan preference, the state as a  
7 whole is electing people to office at a record rate.

8           If you look at Defendant's Exhibit 65, both  
9 chambers -- this is -- now we're talking about the Texas  
10 legislatures. Both chambers have become more diverse racially  
11 and ethnically. In the 38 years between the 62nd legislature  
12 and the 82nd, from 1971 to 2011, the percentage of  
13 Mexican-Americans in the House rose from 7.3 percent to 20.7  
14 percent. Meanwhile, the percentage of African-Americans in the  
15 House rose from 1.3 percent to 12 percent.

16           Similar changes are evident in the Senate. The  
17 membership in 1971 included only one Mexican-American and one  
18 African-American, 3.2 percent each of the total membership. By  
19 2011 those numbers rose to seven, that's 22.6 percent, and two,  
20 6.5 percent respectively.

21           We have the Supreme Court -- this Court knows it --  
22 that's the most diverse nine-member terminal court in the  
23 country. We have an African-American Chief Justice, and we  
24 have three other minorities on that Court. They're elected at  
25 large in this state.

1           We simply don't -- and we have, effectively,  
2 proportional representation among our congressional district.  
3 If we look at the actual proportion of citizen voting age  
4 Hispanic population to the minority-majority opportunity  
5 districts in this state.

6           So we simply don't have the factual or record basis  
7 on which we would start redrawing any of these districts on the  
8 basis of race to remedy something. And that something needs to  
9 be intentional discrimination, or we risk pushing Section 2  
10 beyond the possible constitutional limits in which it could  
11 operate.

12           JUDGE SMITH: As I understand what you're saying --  
13 and this is something I brought up yesterday, so I'll bring it  
14 up with you as well. As I understand your argument under the  
15 totality test, you're saying that all of this supports the  
16 seventh factor, the extent to which members of the minority  
17 group have been elected to public office in the jurisdiction?

18           MR. SCHENCK: Yes, sir.

19           JUDGE SMITH: So as to, for example, Congressional  
20 District 23, even though the parties can differ about whether  
21 the voters were able to elect the candidate of their choice,  
22 there's no dispute that the winning congressional candidate in  
23 every case has been Hispanic.

24           MR. SCHENCK: In CD 23?

25           JUDGE SMITH: In CD 23.

1           MR. SCHENCK: Yes, in two elections. But that's not  
2 really the question. The question is what was that district  
3 doing?

4           JUDGE SMITH: Well, no. What I mean is Canseco  
5 satisfies the seventh prong. I mean, this is -- this is a  
6 friendly question. I'm just -- you're disagreeing with me.

7           MR. SCHENCK: This is exactly where I was hoping we  
8 were going to go. CD 23 is the best example of the misuse or  
9 misapplication of the Voting Rights Act in this case.  
10 Representative Canseco was elected in the district that was  
11 drawn by the courts. There's no possibility that Texas did  
12 something to manipulate that district to create the need for a  
13 Section 2 remedy. It was the voters that voted Representative  
14 Canseco into office.

15           Now the plaintiffs are coming into court and they're  
16 telling you, no, no, no. That was a mistake. We want you to  
17 fix the results of that election. And how do we want that  
18 fixed? We want it redrawn on the basis of race.

19           If Texas had done that, we already are facing a Shaw  
20 argument with respect to our having configured CD 35 to perform  
21 in probably ten out of ten elections for a Democrat, with a  
22 majority of the Hispanic citizen voting age sitting within that  
23 district.

24           In District 23 we had a majority Hispanic population  
25 there. And they -- and notwithstanding that, and

1 notwithstanding the fact that it was drawn by the courts, that  
2 district elected Kiko Canseco to Congress. And if Texas had  
3 not protected him as the incumbent in that district, here's  
4 what we would have ended up with as the fix. This is Ms.  
5 Perales' proposed remedy to this district.

6 Now, we're faced with an incumbent in office. And if  
7 we don't protect him, and we draw the district to load it up in  
8 terms of Hispanic citizen voting age population, and her  
9 remedy -- I'm not sure I can find the slide. I'm sorry. My  
10 slide is not working better for me. Ends up 80 percent citizen  
11 voting age population. Or I'm sorry. Not citizen voting age  
12 population. Total population Hispanic, and something like 77  
13 percent Hispanic citizen voting age.

14 JUDGE SMITH: Yeah. 123, under the proposal? Is  
15 what you're saying?

16 MR. SCHENCK: Yes, under her proposal.

17 And let's look at that district. If Texas had said,  
18 we're not going to protect the incumbent in that district  
19 because we understand somehow he's not the right candidate,  
20 that the voters just made a mistake. They were supposed to  
21 vote on the basis of race for somebody other than the  
22 Republican Hispanic winner in that race and we'd drawn this  
23 district, then we'd have a real Shaw problem.

24 Look at that thing. It runs from urban San Antonio,  
25 down to Webb County in Laredo, then it runs literally halfway

1 to California, into urban El Paso, to link up all of these  
2 rural voters who are not voting for the Democratic candidate in  
3 seven out of ten reconstituted elections. That would be an  
4 excessively racial gerrymander, and it would probably be  
5 unconstitutional.

6 JUDGE RODRIGUEZ: Then what about, if we didn't adopt  
7 the map on CD 23, the State's inclusion of more white counties  
8 to the north? Was that permissible?

9 MR. SCHENCK: Yes, sir. It was permissible.

10 JUDGE RODRIGUEZ: And why?

11 MR. SCHENCK: Because over-all, the Hispanic  
12 population in that district actually increases.

13 Here's the history of that district. Before the Tom  
14 DeLay mid-district last decade, it was 57.5 percent Hispanic  
15 citizen voting age population. Nobody could tell you that that  
16 was not a Latino opportunity district. Now, whether it was  
17 performing or not is another question.

18 So then we get up to the Supreme Court because Texas  
19 redrew the district and crushed it. They turned it into a 46  
20 percent Hispanic citizen voting age population district. It  
21 was majority Anglo. And all they did there was run the  
22 district up north into those predominantly Anglo counties.  
23 And, by the way, swap it or contend to have swapped it for a  
24 district that ran all the way from Austin, connecting urban  
25 Hispanic voters to Laredo, with more urban Hispanic voters,

1 with a bunch of rural voters in between, and apparently -- that  
2 no one could show had anything in common with each other.

3 JUDGE SMITH: Which is the same criticism that you're  
4 making of C190 as to District 23, if I hear you right?

5 MR. SCHENCK: Absolutely. Absolutely. We can't just  
6 assume that these voters, just because of their race, are  
7 voting the same way. Obviously, they're not.

8 Dr. Murray suggested that to you with respect to  
9 Houston. As the Latino population goes through demographic  
10 evolutions, they're leaving neighborhoods and going to what he  
11 called gated communities in Fort Bend County. These voters --  
12 rural voters do not act in the same way as urban voters.  
13 Farmers are not the same people that people who work in big  
14 cities are.

15 After we got back from the Supreme Court, the federal  
16 court redraws CD 23 into a majority Hispanic voting age  
17 population district, 58.4 percent.

18 Then, as, Judge Smith, you point out correctly, the  
19 voters eventually elect Representative Canseco. So what does  
20 Texas do with that district, when we've got a Section 5  
21 analysis that requires us, on the whole, not to retrogress the  
22 positions of Latino voters in the state? We create CD 35,  
23 which was within every right and opportunity for Texas do that.

24 But the same time, we increased the opportunity, if  
25 we're talking about pull, haul and trading opportunity for

1 Hispanic voters if, in fact, they are cohesive, as we're told,  
2 to elect a candidate of their choice in that district. We now  
3 are up to 58.5 percent of Hispanic citizen voting age  
4 population and 54.8 percent of the registered vote.

5 It's simply not possible to say that's not an  
6 opportunity district, despite the fact that it's not performing  
7 because the Latino voters who live in that district aren't  
8 going along with the stereotype that the experts expect them to  
9 engage in. And that's why when we see the attempt to propose a  
10 district that would fix the results of the election, almost  
11 Chicago style from the '20s, we see the racial gerrymander  
12 getting extreme. We're moving up over 70 percent of the  
13 Hispanic population. And in order to fix the result, we're  
14 connecting up Hispanics who have nothing in common with each  
15 other.

16 Where was there any testimony in this record --

17 JUDGE SMITH: And you're referring to C190 --

18 MR. SCHENCK: Yes, sir.

19 JUDGE SMITH: -- in that regard?

20 MR. SCHENCK: Or any district that would be  
21 configured on the basis of race to corral people who happen to  
22 be Hispanic because the evidence tends to show that they vote  
23 as a bloc for a Democrat. Well, we've heard -- now Ms. Perales  
24 has said, well, they're not a monolithic population group.  
25 Well, that's fine. I agree with her. But that's not the basis

1 to redraw districts on the basis of race. Voters have the  
2 right to vote for the candidate that they want in any  
3 particular election.

4 Unless and until we see some evidence of racism,  
5 there's not a basis for a Section 2 remedy. And if someone  
6 were to read Section 2 to require it, that would render Section  
7 2 unconstitutional. Section 2 is either a remedy for  
8 discrimination, or it's some kind of a quota program for  
9 additional districting. And if it's the latter, it violates  
10 the 14th Amendment. And it also potentially exceeds Congress'  
11 power under the enforcement clause.

12 And the Supreme Court keeps saying that and keeps  
13 cabining the construction. And that's why the only time we've  
14 ever seen a district redrawn on the basis of race in a  
15 single-member district, in its issued Supreme Court decision,  
16 is LULAC versus Perry. And when you see what the legislature  
17 did to CD 23 in this round of redistricting, it looks nothing  
18 like that. And that's exactly what Dr. Alford testified to.  
19 So the basis we have here for any race-based districting just  
20 doesn't exist.

21 JUDGE SMITH: Now, what about under C185, the new  
22 District 35 that I recall -- at least I believe the plaintiffs  
23 pointed out in its far northwest stretch goes out of its way to  
24 pick up a heavily Hispanic district that might seem to have  
25 really nothing in common -- an Hispanic area, I should say,

1 that seems to have nothing in common with, for example, the  
2 Hispanics in that district who would be from the San Antonio  
3 area?

4 MR. SCHENCK: Well, again, let's remember who is  
5 primarily responsible for doing redistricting. It's the  
6 states. And the states are entitled, as the Supreme Court has  
7 put in in Miller versus Johnson, to a degree of discretion and  
8 leeway in drawing these districts.

9 If Texas had the opportunity to draw a district for  
10 Latino voters in which they would have an opportunity to elect  
11 a candidate of their choosing, without subordinating  
12 redistricting principles, traditional redistricting principles,  
13 to race, it's not subject to strength scrutiny. And I would  
14 suggest to you, based on the population growth patterns that  
15 we're seeing in Texas, that the legislature was well within its  
16 right to reach out and to create a district in which Latino  
17 voters would have an opportunity to elect their candidate of  
18 choice there.

19 It didn't require any great leap. We are not  
20 connecting up voters from Austin to Laredo. If you -- I mean,  
21 let's -- we know this state. If -- the people who live in  
22 between Austin and San Antonio, along I-35, are one of the  
23 highest growth corridors in the state. If you keep going past  
24 Austin on I-35, driving down to Webb County, you're looking at  
25 a very different population down there. You're looking at

1 basically farming, hunting and ranching going anywhere from San  
2 Antonio, south.

3 That's not the case with this district. This was  
4 well within the legislature's discretion and judgment to  
5 create, and nobody has produced the kind of evidence that would  
6 suggest that there's a Shaw problem here. If you look at the  
7 shape of the district, for example, it's not especially  
8 irregular. Compact, it doesn't need to be compact. It's not  
9 so compact that it would suggest by its mere configuration that  
10 it's overly relying on race for its drawing.

11 MALDEF proposed that district. We're prepared to  
12 defend that district fully. We think it's well within our  
13 discretion, and there's nothing consistent with it -- or  
14 nothing paralleling it to the district that was drawn in LULAC  
15 versus Perry.

16 JUDGE SMITH: At some point -- you can do it now or  
17 later. I don't know what your sequence of argument is. But I  
18 hope you'll go back and focus a little bit more on Dallas/Fort  
19 Worth and why it is that you believe that nothing needs to be  
20 done in that area under Section 2.

21 MR. SCHENCK: Well, Your Honor, Mr. Mattax will  
22 address that.

23 MR. MATTAX: I'll address that.

24 MR. SCHENCK: I'll tell you, briefly, the legislature  
25 looked at that. The testimony before you from Mr. Interiano

1 and Mr. Downton and Congressman Smith was that they -- the  
2 legislature looked and tried to draw a district there. If we  
3 had drawn that district, we would be facing the Shaw problem  
4 that we would also face if we tried to reconfigure Congressman  
5 Canseco's district.

6 JUDGE SMITH: Okay. Well, to avoid duplication, Mr.  
7 Mattax is going to cover it. That's fine. I thought you were  
8 doing all the congressionals.

9 MR. SCHENCK: I'm sorry, Your Honor. But the main  
10 point here is we have two very different and competing  
11 constructions of Section 2. The plaintiffs view Section 2 as  
12 an entitlement to districts whenever they can run through the  
13 formulaic application of Gingles. They also think that there's  
14 an obligation to create coalition districts under Section 2.  
15 There is not. If the record evidence supported something like  
16 evidence of cohesion between black and Hispanic voters in the  
17 Democratic primary, which it does not, then we would be --

18 JUDGE RODRIGUEZ: Well, there is some testimony from  
19 fact witnesses.

20 MR. SCHENCK: Well, yes. And let's think about what  
21 those fact witnesses really told you. When we had the members  
22 of Congress come here, what did they say about the voting  
23 patterns in those districts? There's comfort with the idea of  
24 a coalition district so long as the partnership is not one  
25 between full equals. If this were a law firm, we would be

1 talking about non-equity partnership.

2 As Congressman Green put it, when we get close to  
3 something like equilibrium, we get tension. And if you're  
4 going to draw these districts, it's not fair to a Latino  
5 population that's put in them to be stuck with a candidate  
6 that's not of their first choosing.

7 So if we're going to start drawing these districts on  
8 the basis of race and if we get down to the point where we're  
9 even hearing in this case a tri-ethnic coalition of people who  
10 happen to support the Democrat in any election, what are we  
11 doing? What is Section 2 for? Is this curing some kind of  
12 discrimination, or are we just grabbing people who happen to be  
13 able to be described by some ethnic label and saying, you  
14 people vote for a common candidate in the general election.  
15 Let's staple you together, and we're going to call you a  
16 performing district under Section 2 of the Voting Rights Act.

17 Talk about subordinating race to any traditional  
18 redistricting principle. All we're doing there is turning  
19 everything upside-down and saying, can we elect a Democrat by  
20 simply grabbing people who have a race? There's no way that we  
21 can read Section 2 to support that result. The Constitution  
22 simply wouldn't permit it.

23 JUDGE SMITH: I was hearing -- I was hearing  
24 Congressman Green's testimony the same way you were. And I  
25 found it troubling because he really did seem to be concerned

1 about the increase in Hispanic voting strength in his district,  
2 coupled with a pretty apparent resentment of the possibility  
3 that there would be further development in more or less vacant  
4 areas of what might appear to be Anglo population in that  
5 district. So it did seem to me that it was -- as you say, that  
6 as the population becomes more mixed in the district, he  
7 expressed dislike for that.

8 MR. SCHENCK: And it's not just the district. It's  
9 the state. If you want a totality of circumstances  
10 consideration to factor in here, look what's happened with the  
11 population. There's a world outside that door, and the people  
12 are speaking with their feet in massive numbers. And it isn't  
13 in any way consistent with the remedy that is being proposed  
14 here. There are massive numbers of Hispanic and black people  
15 moving into Texas. That's a good thing.

16 JUDGE RODRIGUEZ: But if that's the case and you're  
17 only -- by your argument, only creating one new Latino  
18 opportunity district, where's the equality in that?

19 MR. SCHENCK: Well, if the question -- well, where's  
20 the equality is we have to put the population someplace where  
21 we can draw a district without violating the Constitution. And  
22 I would submit to you we did that in CD 35. They're not even  
23 close to proving, to the extent we're hearing these new  
24 arguments that there's a Shaw violation in our creating CD 35,  
25 in which we'll have a majority Hispanic population.

1           Had we drawn the districts in Dallas, that are being  
2 proposed here, we would have a serious constitutional problem.  
3 Those districts are enormously irregular. And on top of it,  
4 they don't perform. The problem is there's just not enough  
5 citizen voting age population in that area to create a  
6 district. And if we tried right now to create a Hispanic  
7 opportunity district in Houston, now we're violating  
8 potentially Section 5 because we're retrogressing other  
9 districts that are potentially opportunity districts for Sheila  
10 Jackson-Lee and Congressman Green.

11           But the testimony you're hearing in this case about  
12 tension and things of that nature is not the only thing that's  
13 disturbing. The whole point of this case from the other side  
14 is we're -- they want to take people on the basis of race and  
15 separate them from each other. And in CD 23 they want to do it  
16 because they assert that the wrong candidate, who happens to be  
17 Hispanic, was elected there, and they want to fix the results.

18           That should be very disturbing. And the way they  
19 want to fix the results is to load it up with something close  
20 to 80 percent of Hispanic citizen voting age population, which  
21 is a tacit admission that there's something wrong with these  
22 numbers.

23           These voters, who happen to be Hispanic, who live in  
24 the area from central Texas, out west, are simply not voting  
25 cohesively or turning out to vote in the numbers that people

1 expected them to. And you can't blame that on Texas. And now  
2 that we have an incumbent in place, who deserves to be  
3 protected just like any other incumbent would -- we can't throw  
4 out that traditional redistricting principle and just lard up  
5 the district with enough Hispanic population that we find  
6 enough Democrats in there somewhere to assure that we have a  
7 Democrat winning the election.

8           So the legislature did the only thing it could there,  
9 which was increase the opportunity for the Hispanic, at the  
10 same time it was increasing the opportunity for Congressman  
11 Canseco to win at the polls. Everybody has an equal  
12 opportunity in CD 23. Everybody has an equal opportunity in  
13 Texas to vote for their candidate of choice and to have the  
14 candidate win.

15           We're not in a position on either the House map or  
16 the congressional map, based on the data that we've seen in  
17 this case or a proper reading of Section 2, to keep it within  
18 its constitutional limits that would support the idea that  
19 we're going to start putting people into different districts on  
20 the basis of their race.

21           And if we start going down to those narrow county  
22 analyses, we're going to have very awkward questions about who  
23 is the minority and where in this state. And if we start going  
24 into tri-ethnic coalitions and trying to staple people together  
25 on that basis, the whole state is a Voting Rights Act problem.

1 It will be impossible for a legislature ever to draw a district  
2 again in this state.

3 That's not what Section 2 is addressing. Section 2  
4 is addressing real discrimination. It's imposing a race-based  
5 solution where we have a race-based problem. And that's what  
6 the 14th Amendment, with its limited application, did.

7 And so our suggestion here is based on the evidence  
8 that you've seen before you, based on the record here and based  
9 on a proper reading of the law, including the Fifth Circuit's  
10 decision in LULAC versus Clements; that these districts be left  
11 alone; that Latino voters be allowed to have their opportunity  
12 in CD 35, CD 23 and everywhere else where they constitute a  
13 majority; that the election results will be the election  
14 results, and that the state will be allowed to vote on the  
15 basis of the partisan preference or anything else, and all the  
16 voters in the state will have the ability to pull, haul and  
17 trade and work together and vote for Democrats if they so wish,  
18 Republicans if they so wish, Libertarians or anybody else.  
19 That's where we are today.

20 We see it in our courts. We see it in our  
21 legislature. And I'll say it. With respect to our  
22 legislature, a substantial amount of that success that we've  
23 seen in making the legislature look more like the state as a  
24 whole is a result of the Voting Rights Act. And we want to  
25 make sure that we're continuing that success.

1           But at the same time we need to make sure that the  
2 Voting Rights Act is being read in a way that's consistent with  
3 the Constitution, by making sure that we limit the remedy of  
4 race-based districting so we don't end up with districts where  
5 people are thinking they represent people of only one race.

6           If we -- if we go there, we get right back to where  
7 we were in the 1960s and addressing a problem which, as Judge  
8 Wiener put it in Hays versus Louisiana quite well, we've ended  
9 up confusing the disease with the cure, drawing districts on  
10 the basis of race, installing people in them who think they  
11 don't represent the voters in that district, but just one race  
12 of voters. Nobody wants that. We're well beyond that in this  
13 state.

14           If there are any further questions, I'd be happy to  
15 address them. Mr. Mattax will go through the House plans and  
16 the remaining issues in the case.

17           JUDGE GARCIA: Thank you.

18                           **CLOSING STATEMENT**

19           MR. MATTAX: Sorry. Good morning, Your Honors.

20           Let me start by addressing the questions the Court  
21 had with respect to drawing additional Latino opportunity  
22 districts in the congressional map and why, as a matter of  
23 geography and population growth, that was impossible.

24           Slide 18. This shows the rate of growth in Texas.  
25 And you can see that the darker yellow and that the more green

1 it gets shows the areas of concentration of the population.  
2 And so you can tell from that map that certainly around the  
3 Houston area, around central Texas and around Dallas, when the  
4 congressional map drawers were engaged in this -- in this  
5 exercise to create four new districts, they had to look at  
6 those areas.

7 Next slide, please.

8 This map shows the Hispanic percent of citizen voting  
9 age population. Now, as you'll see, the light colors are .1 to  
10 30 percent. Pretty much everything in the Houston area and  
11 everything in north Texas has a lot of Hispanics by growth but  
12 not a lot of citizens. In order to create a district under  
13 Section 2, at least it's my understanding, you look at citizen  
14 voting age population. Did anyone try to do that? Yes, a lot  
15 of people.

16 Slide 55. You'll recall yesterday testimony, and I  
17 think throughout this trial -- not testimony but argument  
18 yesterday, and testimony with regards to Representative Lamar  
19 Smith suggesting that the legislature should look at drawing an  
20 additional district in north Texas. And, in fact, a map was  
21 proposed. There was some discussion of the map that Mr. Korbel  
22 had. That's slightly different than the map the State has. We  
23 can supplement the record. But regardless, that was looked at  
24 by everyone.

25 Now, you haven't heard testimony from the senate map

1 drawer. That, we thought, would be cumulative. But that is in  
2 the record. And the Senate map map drawer went on for page  
3 after page about everything he tried to do to draw a map in  
4 north Texas with a greater than 50 percent citizen voting age  
5 population.

6 In short, he says: I tried. There was -- I was no  
7 more successful than the models that I saw.

8 Likewise, Ryan Downton, the map drawer for the  
9 House -- on the House said he tried to draw a district in north  
10 Texas with 50 percent -- above 50 percent and he couldn't do  
11 it.

12 And let me go through these maps and say, at the end,  
13 there's one that does it. But there's a problem with it.

14 Next slide.

15 This is the district that was attempted to draw by  
16 the Quesada plaintiffs. It has an HCVAP of 45.6 percent. They  
17 couldn't get it over 50.

18 JUDGE RODRIGUEZ: So you're discounting the coalition  
19 theory as well?

20 MR. MATTAX: Correct. I think that that was -- for  
21 purposes of Gingles, at least my understanding is, we're  
22 looking at a majority -- districts of a minority, not multiple  
23 minorities, and we're looking at over 50 percent.

24 Next one is C122. This was an early version by  
25 Latino Task Force. As you can see, all these districts run

1 very far -- from Fort Worth all the way to east Dallas. Again,  
2 45 percent HCVAP.

3 Next, C166, Rodriguez plaintiffs. Again, long and  
4 narrow, only 45 percent.

5 C192, same issues, long and narrow, only 45.6  
6 percent.

7 So all of the maps that were attempted to be drawn --  
8 I have one more, C193 by the NAACP, and again 45 -- 44.6  
9 percent.

10 All the maps that were attempted to be drawn by  
11 everyone were around 45 percent Hispanic citizen voting age  
12 population, not a majority.

13 JUDGE RODRIGUEZ: And how do you address the lagging  
14 theory and that there should have been extrapolation?

15 MR. MATTAX: Two issues there, Your Honor. I think  
16 that we're now getting into the realm of speculation and  
17 estimation. What we have to go on and what the courts have  
18 said, in my understanding, that you use the census data --  
19 census data as we have it.

20 The issues we have in Texas with respect to, and  
21 under the Fifth Circuit, determining citizenship, we have two  
22 areas of data to use.

23 JUDGE RODRIGUEZ: But the HCVAP is not true census  
24 data. That's HCS data.

25 MR. MATTAX: Correct. It's generated by the census

1 and is a proxy for that, and we check it with respect to SSVR.  
2 And you may recall my questioning of Dr. Ansolabehere, when he  
3 had indicated that this -- somehow the new data that had been  
4 used, you know -- in the past you had more data, now you have  
5 less. And, therefore, the Hispanic citizen voting age  
6 population data is less accurate than it used to be.

7 And I said yes, but people will continue to register  
8 to vote. And if, in fact, you had additional citizens in that  
9 area, you would see an increase in Spanish surname voter  
10 registration. And yet, when you look at the data, the sort of  
11 gap that necessarily exists didn't close. In other words, the  
12 proposition wasn't borne out by the facts.

13 So the data this Court has to look at in order to  
14 draw these maps, without just speculating or extrapolating,  
15 without any basis for that, is SSVR and HCVAP. And you can't  
16 draw a district in north Texas -- everyone looked. Everyone  
17 tried. It was the intent of the legislature to draw an  
18 additional Latino opportunity district in the State of Texas.  
19 From the outset, that was always the intent.

20 So, I mean, to sort of say, well, we had no concern  
21 for that, we didn't recognize the Hispanic increase of  
22 population, simply isn't true. Everyone recognized the  
23 increase in the population, but you have to draw a map where  
24 the citizens are.

25 JUDGE SMITH: But what if we decide, as a matter of

1 law, that under LULAC versus Clements we need to look at the  
2 possibility of coalition districts, at least in the DFW area?

3 MR. MATTAX: Well, I think that if you're talking  
4 about coalition districts, then you are at 45 percent. I would  
5 have to look at a map to --

6 JUDGE RODRIGUEZ: At 45 or above 45?

7 MR. MATTAX: Excuse me. I'm sorry, Your Honor. 45  
8 percent Hispanic. Then we would have to look at a map to make  
9 sure if you included African-Americans, you're not ending up,  
10 you know, retrogressing one of their districts.

11 JUDGE RODRIGUEZ: But would you concede that if  
12 coalition districts were taken into account, that all these  
13 proposed maps would exceed 50 percent?

14 MR. MATTAX: I would not know that. I would not know  
15 that by adding up the voting age population. That could  
16 certainly -- those numbers will speak for themselves. I do not  
17 know that today.

18 JUDGE SMITH: Well, the only district that you'd be  
19 concerned about retrogressing on would be District 30; is that  
20 right?

21 MR. MATTAX: Correct. I believe that's the only  
22 district.

23 JUDGE SMITH: My recollection of what was presented  
24 on the plaintiffs' side was that it was pretty easy to create a  
25 coalition district over 50 percent without messing up 30 in

1 any -- in any way.

2 MR. MATTAX: I don't disagree. I mean, I think if  
3 the Court goes down the road of coalition districts, you're  
4 increasing -- you're going down a completely different road.  
5 And that issue gets back to, I think, what Mr. Schenck said,  
6 and I'm not going to repeat that, this concept of in the State  
7 of Texas you suddenly will make -- have coalition districts  
8 everywhere, and you're basically going to be separating all the  
9 Republicans and all the Democrats into all these different  
10 districts. But we do not think that that's the law.

11 JUDGE SMITH: Well, that needs to be thoroughly  
12 briefed.

13 MR. MATTAX: Yes.

14 JUDGE SMITH: To me -- I don't mean to be repetitious  
15 or waste anyone's time. But to me LULAC versus Clements, the  
16 majority opinion, as highlighted by the concurrence, seems to  
17 say that in the Fifth Circuit en banc case that coalition  
18 districts are recognizable. So I --

19 MR. MATTAX: Well, and I think, Your Honor -- we'll  
20 thoroughly brief that, but I think -- the fact they are  
21 recognizable and, therefore, you can draw one without being  
22 unconstitutional does not mean they are required under the  
23 Gingles. So I think that is an issue that needs to be briefed.

24 But I think what we have to keep in mind is that once  
25 you start drawing districts based on race, you are implicating

1 the Constitution. And fundamentally, it's unconstitutional to  
2 do that except in limited areas.

3 So I think it would be one thing to say it wouldn't  
4 be unconstitutional if the legislature chose to do that. But  
5 that is separate and apart from the question, are they required  
6 to do that under Section 2? And that's the issue before this  
7 Court, and that's the issue that will be fully briefed.

8 Let me conclude this by just showing you the one  
9 district, Slide 61, that -- which is the Latino Task Force  
10 CD -- excuse me -- their CD 6, which does get over HCVAP of  
11 50.4 percent. But their parameter to area score, and this is a  
12 compactness measure, is 55.56, which is frankly just off the  
13 charts.

14 If we go to Slide 63, this is an excerpt from the  
15 report of Mr. Todd Giberson whose testimony and report are in  
16 evidence. He is the State's -- one of the statisticians who  
17 did compactness scoring. This will explain to the Court  
18 exactly how one does compactness scoring and what his measures  
19 are.

20 And the next chart then will show sort of the wide  
21 variation of the least compact districts. Now, this 37.4,  
22 which is very, very high, that was drawn. There were no racial  
23 issues with it. Whereas, other districts of those high numbers  
24 will run into a Shaw versus Reno problem.

25 And here's where I think we need to understand that,

1 and I should have put Page 1 of Mr. Giberson's report in, where  
2 he explains the difference between a reasonably compact  
3 district and extreme non-compactness. And that's where I think  
4 there's been some confusion on the plaintiffs' side with  
5 respect to CD 35.

6 CD 35 is not reasonably compact. And, therefore, it  
7 is not required to be drawn under Section 2. But it is not  
8 extremely non-compact such that it would violate Shaw versus  
9 Reno. There's a distinction between those two things. When  
10 you look at this map -- or excuse me -- going back -- you don't  
11 have to go back on the chart -- to plan 190, it had a score of  
12 55.56. That is so extreme as to result in extreme  
13 non-compactness raising Shaw versus Reno problems.

14 23 on that measure has 18.4. Now, in the testimony  
15 of Todd Giberson, which we'll point out to the Court, he said  
16 10 was sort of where he started getting concerned. Anything  
17 above that 10 number, you have to start looking at and seeing  
18 why are you doing that? So in --

19 JUDGE RODRIGUEZ: Is there a balancing of interest  
20 that could be made weighing the interest of creating a new  
21 opportunity district against compactness, and would case law  
22 allow for that balancing?

23 MR. MATTAX: Certainly. I think so. I think this is  
24 one measure to look at.

25 But what the issue here is, you could -- you can look

1 at that and you have some flexibility. But if you get so far  
2 down the road of non-compactness, you run into the Shaw versus  
3 Reno problem. And here, what I'm suggesting is with respect to  
4 CD 35 and the map, the congressional map for the State of  
5 Texas, it is not the most compact district. That's obvious.  
6 But it is not sufficiently non-compact that it cannot be drawn.  
7 It is a district that the legislature can draw if they choose.

8 And continuing on 35, since I'm on that topic, there  
9 was testimony from the Latino task force with respect to the  
10 fact that there are interests in San Antonio, and I believe  
11 Judge Rodriguez had mentioned north Austin. There was  
12 testimony that that was a type of interest that the Hispanic  
13 population shared. This is unlike the situation the last time.

14 In addition, as you'll recall, there was testimony  
15 with respect to some of the changes that were drawn to that  
16 district that were requested by members of the legislature who  
17 were Latinos. And that had its effect. I'm not going to go  
18 through all that testimony. It's in the record. But what that  
19 had the effect of was you pulled some voters out of 23, out of  
20 20, to put into 35, because you wanted to have 35 based in San  
21 Antonio. So when you did that, you pulled some voters out of  
22 23.

23 Well, in order to keep the SSVR and the Hispanic  
24 citizen voting age population high enough not to be accused of  
25 retrogressing 23, you had to increase the voter participation

1 there. So that had a counterclockwise effect all around the  
2 map, which resulted in having to take some voters out of  
3 Maverick County. I think it is important to recall where that  
4 request was generated from.

5 So I think on the congressional side what we see is,  
6 with respect to the Hispanic citizen voting age population, the  
7 State drew all of the Latino minority opportunity districts  
8 that they could draw that exceeded 50.1 percent Hispanic  
9 citizen voting age population.

10 Let's move back to -- I guess it would be Slide 3.

11 Now, that would be my conclusion on discussions of  
12 congressional. Unless there are any further questions on  
13 congressional, I'll move to the State house.

14 Now, one of the things that has confused me a little  
15 bit in this case, and I have to admit I'm not a master of the  
16 law in this case. But in looking at this concept of the county  
17 line rule and other issues -- I'm looking at -- that's fine.  
18 And my reading of Bush v. Vera says this -- or I'm quoting from  
19 it. It's not my reading.

20 The states retain a flexibility that federal courts  
21 enforcing Section 2 lack, both insofar as they may avoid strict  
22 scrutiny all together by respecting their own traditional  
23 redistricting principles.

24 It goes on to say: Nothing that we say should be  
25 read as limiting a state's discretion to apply traditional

1 redistricting principles.

2           And the final part of the quote: The constitutional  
3 problem arises only from the subordination of those principles  
4 to race.

5           Which is exactly the way I view what the plaintiffs  
6 are asking this Court to do. In other words, the county line  
7 rule is a neutral rule. It has been in the Constitution for  
8 decades. It seeks to try to create counties -- keep counties  
9 together as much as possible and provides guide stones for the  
10 legislature to follow.

11           JUDGE RODRIGUEZ: But doesn't that have to be  
12 subordinate to one person, one vote?

13           MR. MATTAX: One percent, one vote is somewhat --  
14 yes. And I will discuss the one person, one vote momentarily.  
15 That's a separate issue than what I'm discussing right now.

16           JUDGE RODRIGUEZ: But I guess my question, though,  
17 is -- and I appreciate that distinction you're trying to make.  
18 But does one person, one vote still trump the county line rule?

19           MR. MATTAX: I think if you were to get to the -- to  
20 the -- yes. Let me explain why. And here's the distinction.  
21 The point about trying to follow traditional redistricting  
22 principles is if you follow your traditional redistricting  
23 principles, then you have evidence that you had no intent to  
24 discriminate.

25           The issues arise when, for example, if I'm doing --

1 I'll get to your question in a minute. Let me get the first  
2 part out first. If I'm drawing my map, following my county  
3 line rule and I run across a district that has sufficient  
4 amount of minorities in it to draw. I say, I don't want to  
5 draw it. I'm going to break the county line rule and now do  
6 something different so I don't have to draw it, that's a  
7 violation. That's a Section 2 remedy.

8 If you follow the county line rule explicitly and  
9 don't end up with those districts, you don't violate the  
10 Constitution, there is no Section 2 remedy. That's distinct  
11 from the one person, one vote analysis.

12 So in that sense, when we're suggesting that Section  
13 2 trumps the county line rule, I think that analysis is wrong.  
14 I think the point about the county line rule is so long as you  
15 follow it, then you don't have a Section 2 issue.

16 With respect to one person, one vote, that's separate  
17 and distinct. But that's not a Section 2 issue. And I'll  
18 address with respect to the data that's out here momentarily --  
19 why don't we just go to that right now?

20 (Change of reporters at 9:28 a.m.)  
21  
22  
23  
24  
25

1                   \*-\*-\*-\*-\*-\*-\*

2                   MR. MATTAX: Why don't we just go to that right now.  
3 Let's go to 38. What -- we have heard a lot of data in this  
4 case, and what I will try to focus the Court on today is more  
5 facts on the ground, because statistics are statistics, and we  
6 can look at them in a lot of different ways.

7                   But, basically, what I thought I heard the testimony  
8 to be, fundamentally, was that if you look in the urban  
9 counties, there was no reason not to equalize all of the  
10 population, and that is a problem, because Democrats or  
11 minorities were disadvantaged.

12                   So what I have done in these charts, I am not going  
13 to go through them all, is county by county to see exactly,  
14 was it the Democrats that were underpopulated or the  
15 Republicans that were underpopulated or a minority group?

16                   And the answer is, it is a mixture. It just  
17 depends. There is no intent, one way or another, to put  
18 someone in a different district.

19                   And why did that happen? We have to remember the  
20 testimony, and let's start with Houston.

21                   JUDGE RODRIGUEZ: But if we are talking about one  
22 person, one vote, does it really matter who is being targeted?  
23 The whole principle is one person, one vote.

24                   MR. MATTAX: For example -- and I don't have all of  
25 this data in here, but let's look at just, for example,

1 Houston. So Houston, if I look at the district that is  
2 overpopulated the most, that is Representative Coleman's,  
3 whose percentage black voting age population was 32 --  
4 38.2 percent.

5 Well, why would he be overpopulated that much?  
6 Because you needed to get that black voting age population as  
7 high as possible, so you wouldn't be accused of retrogressing  
8 that district.

9 Likewise, the second most populated is  
10 Representative Turner, at 42 percent black voting age  
11 population. I apologize. This chart doesn't have this data  
12 on there. I can submit that.

13 But this is just the data showing why things are  
14 populated. If you look at the bottom, which is Representative  
15 Dutton, he is the least populated, and the reason for that is  
16 because his black voting age population was 44.8 percent.

17 So there are two things going on here. One is, you  
18 have to comply with Section 5, so you have to make sure that  
19 you are not retrogressing in different ways. That is point  
20 number one.

21 Point number two, if there is a nondiscriminatory  
22 reason for this, then we do have -- we can call it a safe  
23 harbor, but the courts have recognized there is some leeway  
24 after this ten percent.

25 What the plaintiffs are trying to do is to show,

1 well, because you had an intent to discriminate, and they try  
2 to show this through statistics, then you can't really rely on  
3 that plus or minus ten percent.

4 The evidence doesn't really show that, though. This  
5 is just one aspect of it when you go county by county. The  
6 second aspect is, we need to remember how those maps were  
7 drawn.

8 And let me focus on Houston, particularly. Now, the  
9 evidence was, the request was made for the delegations  
10 throughout the state: Come up with some sort of map. We will  
11 look at it. To the extent you can come up with one, we will  
12 drop it right in.

13 I am going to talk about drop-in districts in a  
14 minute. But you will recall El Paso is one, San Antonio is  
15 one. Houston was not a drop-in district. One reason was  
16 because the Democrats never came forth with a map. The  
17 delegation never came forward with a map.

18 So what happened? Well, the Republicans had to come  
19 forward with a map, so they did. Then based upon that map,  
20 the Democrats got together, and they worked, as Mr. Interiano  
21 said, worked with them to draw maps amongst themselves.

22 There, within those Democratic districts, that  
23 presumably were overpopulated or underpopulated, they were  
24 drawn by the representatives in those districts. And there  
25 would be tradeoffs, but the point is, that is the evidence

1 that shows there was not a racial discriminatory intent by the  
2 legislature in drawing those portions of the districts.

3 Similarly, in Dallas County -- Mr. Hanna, could you  
4 go ahead and pull up --

5 JUDGE SMITH: Are you leaving Harris County?

6 MR. MATTAX: Yes.

7 JUDGE SMITH: Well, then, let me ask you, and I  
8 don't have the maps in front of me --

9 MR. MATTAX: Put it up there, 285.

10 MR. SCHENCK: 283.

11 MR. MATTAX: 283. I apologize.

12 JUDGE SMITH: So while that is coming up, so there  
13 was concern expressed about the low population growth, or it  
14 may have even been declining, in far east Harris County, and  
15 the fact that one of the Republican districts is greatly  
16 underpopulated, and I believe the question was being raised by  
17 the plaintiffs and some of their witnesses as to why there was  
18 no effort made to equalize that by bringing more residents  
19 into -- is it 128 that we are talking about is underpopulated?  
20 I am not sure.

21 MR. MATTAX: 144 is Representative Legler, and he is  
22 underpopulated by 3.44, three and a half percent.

23 JUDGE SMITH: All right.

24 MR. MATTAX: For example, Representative Dutton is  
25 ununderpopulated by five percent.

1 JUDGE SMITH: All right. I mean, you remember the  
2 testimony --

3 MR. MATTAX: Yes.

4 JUDGE SMITH: -- I am talking about, because it was  
5 referred to several times.

6 JUDGE RODRIGUEZ: I believe it was 144 and 145 being  
7 underpopulated, to the detriment of 147 being overpopulated.

8 MR. MATTAX: And the deviation for 145 is  
9 1.9 percent. And that is one of the issues you are looking  
10 at. Basically, the Democrats or the Hispanics in Houston, you  
11 have two districts that are slightly overpopulated, 145, and  
12 140, which is 1.9 and 1.85, and yet you also have Democratic  
13 districts that are underpopulated.

14 So I think the answer to your question is, it is not  
15 that great a deviation at 3.4 percent, but no one drew a map  
16 with 24 districts in it -- and we are going to get to the 24  
17 versus 25 in a moment -- that would create an additional  
18 Hispanic district.

19 And so what I am suggesting is, there is no racially  
20 based intent in how those lines were drawn. As a matter -- if  
21 we move up on -- I think it is 131. If you could close up on  
22 the -- enlarge that. Okay. Right to -- there it is. Right  
23 there.

24 As the Court will recall, I believe it was Professor  
25 Kousser who went through this map and said the way it was

1 drawn proves racial discrimination to him. And, of course, he  
2 didn't recognize that the parts of the Democratic -- these  
3 were drawn by the Democrats, which defeats that.

4 But then we have this area here, which he found very  
5 curious and said that was evidence of something. Well, we  
6 found out from testimony that was because one of the  
7 representatives of the districts was not drawn in their  
8 district, and we have heard a lot of testimony about --

9 JUDGE SMITH: You mean --

10 MR. MATTAX: The district office --

11 JUDGE SMITH: Okay.

12 MR. MATTAX: -- was outside of the district, and we  
13 have heard a lot of testimony about, "Oh, well, they drew my  
14 district out."

15 Well, one thing that hasn't been presented to the  
16 Court is that, the district offices don't show up on Red Appl,  
17 so there is no way for a map drawer to know, if they are  
18 drawing someone's district out of a district or not, unless  
19 they are told, and that is precisely what happened here in  
20 Houston.

21 They didn't know that this was the issue. The  
22 representative said: Can you accommodate me? It was an  
23 eleventh-hour change to the map. And granted, you get this  
24 strange configuration here, but as opposed to Professor  
25 Kousser's conclusion that that proves racial intent, we are

1 trying -- the Republicans, the majority was trying to  
2 accommodate a Democratic legislator, because they didn't know  
3 that they had put the district outside the --

4 JUDGE SMITH: Whose district is 131? That's the one  
5 you are talking about.

6 MR. MATTAX: Alma Allen.

7 JUDGE SMITH: A Democrat?

8 MR. MATTAX: A Democrat, African-American Democrat.

9 JUDGE SMITH: And is that area, if you know, that  
10 area that you brought in there, is that the Fondren, southwest  
11 area? Does anyone -- I mean, we can look it up, but is  
12 that --

13 MR. MATTAX: You got too close for me to recognize  
14 it.

15 JUDGE SMITH: That is Fondren. That is Fondren.  
16 All right. I mean, that is a heavily Democratic voting area,  
17 so it would be logical that that representative would not only  
18 have perhaps an office there, but would want that area in the  
19 district.

20 MR. MATTAX: Exactly. And I guess my point I am  
21 trying to make on that is, when you look at the explanations  
22 for how these lines were drawn, other than speculation by  
23 statisticians, there is no evidence before this Court that any  
24 of those lines were drawn for racial reasons. And, therefore,  
25 looking at the variation --

1 JUDGE RODRIGUEZ: But isn't there circumstantial  
2 evidence, just because of the population numbers alone, that  
3 that's the case?

4 MR. MATTAX: Well, again --

5 JUDGE RODRIGUEZ: How is it that -- if I have got my  
6 numbers right -- 144 and 145 are overpopulated in minority and  
7 147 is, I might have this backwards, underpopulated, I believe  
8 I have this backwards, but is Anglo, I mean, isn't that just  
9 circumstantial evidence that we can take into account?

10 MR. MATTAX: Well, but I would suggest you also  
11 look, take into account the circumstantial evidence that other  
12 minority districts were underpopulated as well, just because  
13 of the nature of where the people were, and you have to try to  
14 maintain districts that people want.

15 And if the Democrats are drawing districts they want  
16 and they decide, well, we need -- we don't have any problem  
17 with this one being overpopulated, then what more is there to  
18 do? And I think that --

19 JUDGE RODRIGUEZ: I know you are talking about  
20 Harris County, but do we take this broader picture, and do we  
21 take into account 41, what was done there?

22 MR. MATTAX: Yes. I think we need to talk about 41  
23 in a different way, in a different light, but it is the same  
24 concept with respect to 41.

25 This -- let me back up, because 41 was not a

1 delegation map. This, at least from a Democratic standpoint,  
2 Harris County was a delegation map. And getting back to  
3 Dallas County, we had explanations of why the lines had to be  
4 drawn that way, so as to not to -- to avoid regression or  
5 retrogression or to split communities of interest, which we  
6 will get to.

7 What I think is important to conclude on Houston is  
8 that ultimately what happened was -- and I think Mr. Turner  
9 didn't vote for it or wasn't there, but all the members of the  
10 delegation, except for Mr. Turner, apparently got together in  
11 a room and agreed on the district, those lines in Houston, and  
12 they were voted on.

13 And so I am having a hard time understanding that  
14 you have one Republican district overpopulated by 3.4 percent  
15 and you have a Democratic district over -- underpopulated by  
16 three percent and by five percent, that this is showing some  
17 sort of sign of racial animus or lines drawn based on race.  
18 It just doesn't prove it and the effects of it don't establish  
19 that statewide.

20 Now, in Harris County, if we could -- excuse me. In  
21 Dallas-Fort Worth -- let's pull up Dallas-Fort Worth.

22 JUDGE GARCIA: Mr. Mattax, you were going to address  
23 the 24, 25 districts. I think you were.

24 JUDGE SMITH: Harris County going to 24 instead of  
25 25.

1 MR. MATTAX: Yes, yes, yes. Let me just address  
2 that right now. When we look at the Constitution, there is a  
3 provision in the Constitution that says "as close as may be."

4 And, actually, if you could find that and pop it up.  
5 That is great. Thank you. There you go.

6 And "as nearly as may be." And that is the line in  
7 the Texas Constitution the Court has to focus on. When you  
8 divide the ideal population into the population of Harris  
9 County, you get 24.41. Is 24 as nearly as may be or is 25 as  
10 nearly as may be?

11 It seems to me that 24 is as nearly as may be, and  
12 if you were to draw it with 25, you raise a serious  
13 constitutional issue on the Texas Constitution.

14 Now, the evidence was, well, last time, the  
15 Legislative Redistricting Board drew it at 25. That doesn't  
16 mean that didn't raise a serious constitutional question. It  
17 just means that wasn't addressed.

18 Secondly, at that time frame, in the last  
19 redistricting cycle, with a similar number, the Democrats  
20 voted --

21 And I don't know, Angela, if you have this.

22 The Democrats voted for 24, recognizing that -- and  
23 you have 76, 71 ayes, and this was for a vote for 24 districts  
24 in Houston. Now, why the LRB did what they did, I don't know.  
25 Whether it was constitutional, I suspect it would have

1 suffered from a constitutional challenge.

2 JUDGE RODRIGUEZ: No one is raising this, but I  
3 mean, "as nearly as may be" means that you try to do 24.5 and  
4 you break the county line and you reconcile the two provisions  
5 that way?

6 MR. MATTAX: Well, I think the county line rule is  
7 much more explicit with respect to keeping counties whole, so  
8 you do have to read them in concert, but I think that the way  
9 this has been done traditionally, and I think it makes sense  
10 to do it this way, is that you are trying to keep counties  
11 intact.

12 If you were to say, well, you have 24.5, so let's  
13 just make it another county -- split a county in half to get  
14 that extra person in there, you defeated the whole purpose of  
15 the county line rule and you should do away with it entirely,  
16 because you can do that all over the map, and then you are not  
17 keeping counties intact anywhere else on the map.

18 So I think that that is not a question of  
19 reconciling two constitutional provisions. That would be one  
20 provision swallowing up the other one, in my view, so I don't  
21 think you can do that. I think you have to go with "as nearly  
22 as may be" --

23 JUDGE SMITH: Well, the Supreme Court has been  
24 pretty strong, as I recall, on numerous instances as referring  
25 to respect for, specifically mentioning county lines and other

1 municipal boundaries.

2 MR. MATTAX: And those are traditional redistricting  
3 principles that should be followed, because those principles  
4 are what shows or evidences whether the State was acting with  
5 some discriminatory intent or not. It is when they violate  
6 those or change them around that we raise these questions.

7 JUDGE RODRIGUEZ: Well, weren't there violations  
8 here by impacting city lines and other boundaries that were  
9 traditionally respected?

10 MR. MATTAX: There are two things there. Number  
11 one -- let me back up. A lot -- you have to change boundaries  
12 sometimes just to draw a map. In other areas --

13 JUDGE RODRIGUEZ: So why can't you change county  
14 lines sometimes to draw a map?

15 MR. MATTAX: There is a difference there. One is  
16 the constitutional import, and the other one has to do with  
17 politics and where you draw the lines. Now, the Dallas County  
18 area is a very good example where you were trying to keep --  
19 was it Grapevine?

20 COUNSEL Grand Prairie.

21 MR. MATTAX: -- Grand Prairie together, which if you  
22 all recall, there is -- excuse me, Your Honors, there was this  
23 line going off on the left side of Dallas County.

24 And it looked like why are you doing that? Well,  
25 that was following a city line. So, yes, you try to follow

1 city lines, where you can. You are not guaranteed to follow  
2 city lines wherever you can.

3 For example, Grapevine splits right between Tarrant  
4 and Dallas County, so you couldn't draw that altogether  
5 without violating the county line rule. Certainly, there are  
6 tradeoffs, and where you start with is something of  
7 constitutional importance, which is the county line rule.  
8 Then you have to worry about Section 5, making sure you don't  
9 retrogress situations.

10 And then, for example, in Dallas County, there was  
11 discussion that they spoke with some of the representatives  
12 there, and they tried to increase the Hispanic representation  
13 of certain districts.

14 They couldn't create any new Hispanic districts up  
15 there, but they looked at it and they tried and they tried to  
16 increase those. And then the State is, you know, being  
17 faulted for that attempt.

18 So you don't get pristine lines when you have to  
19 take into account, you know, these issues.

20 The other point about Dallas County is, if the Court  
21 will recall, there was a long skinny part of that, because  
22 they had two Republicans, and they were going to pair those  
23 two Republicans.

24 And one of the issues was to try to give everyone on  
25 the map -- excuse me -- all of the legislators a fair

1 opportunity to be reelected, so they drew that to combine  
2 that, but that was Anglo districts.

3 We are getting faulted in somehow saying, well,  
4 because you drew it that way, it is evidence of racial intent.  
5 It is not evidence of racial intent at all. The reality is,  
6 you are drawing that to pair two Republican incumbents.

7 Let me go back up to 37, because I think that what  
8 we are talking about in this area is the Larios vs. Cox  
9 distinction, and I think there is a real difference here that  
10 the Court should be aware of.

11 The whole point about what was going in Georgia was  
12 an attempt to eliminate or disadvantage one party and to  
13 advantage one geographic area or two geographic areas of the  
14 state, and that was intentional at the expense of other  
15 geographical areas of the state of the other party.

16 Here, clearly, there is an intent to protect the  
17 incumbency of the Republicans, but there is also a concerted  
18 effort to draw the districts that the Democrats currently had  
19 to protect their incumbency as well.

20 And, in fact, they only had to pair two Democrats in  
21 the whole map, and everything else was Republican pairing.  
22 That is an attempt to protect incumbency throughout the map,  
23 completely contrary to what was at issue in Larios vs. Cox.  
24 Likewise, there is no issue in this map of trying to favor one  
25 area of the state over another. So Larios vs. Cox is

1 distinguishable.

2 Now, I did want to talk briefly about the different  
3 maps that were offered.

4 JUDGE SMITH: Well, now, Mr. Garza pointed out  
5 yesterday that by his reading of the record, over 60 percent  
6 of the Anglo majority districts in Texas are underpopulated.  
7 Is that an accurate representation of the record? I assume it  
8 is.

9 MR. MATTAX: I apologize for not knowing that  
10 statistic. We will verify those exactly. I don't know the  
11 numbers on that.

12 JUDGE SMITH: Does the State acknowledge, one way or  
13 the other, whether overall there were more underpopulated  
14 Anglo districts?

15 MR. MATTAX: Well, I think that if you look at the  
16 urban areas, I didn't see that in the urban areas. I saw,  
17 versus looking at it from a Democratic-Republican standpoint,  
18 it did not look that way to me.

19 Let's go back to the slide and just run through them  
20 real quick one by one. But I think if you are talking about  
21 the rural areas, which may tend, in West Texas, may tend to  
22 vote more Republican, it would seem logical to me that they  
23 would be underpopulated, because there is less growth out  
24 there.

25 So it doesn't surprise me that that would be the

1 case. But in focusing on the urban areas, which was, I think,  
2 the basis for their claim of discrimination, if you look at  
3 the over and underpopulated districts, they are really split  
4 up evenly.

5 So which number is this?

6 TECHNICIAN: 38.

7 MR. MATTAX: I'm sorry?

8 TECHNICIAN: 38.

9 JUDGE SMITH: So the underpopulated districts are  
10 split three and three in Harris County by party?

11 MR. MATTAX: Correct.

12 JUDGE SMITH: I haven't counted up the other column,  
13 but --

14 MR. MATTAX: And looking at Dallas County, it is  
15 four and three?

16 JUDGE RODRIGUEZ: But those charts are kind of  
17 meaningless to me, unless they show numbers and percentages.  
18 I mean, it could be overpopulated by two, for all I know, by  
19 looking at that screen.

20 MR. MATTAX: In Dallas, you have -- and I think the  
21 testimony you will recall with respect to Representative  
22 Anchia, was that there was an attempt to try to create the --  
23 increase the Hispanics in that particular area, so that is  
24 overpopulated for that reason.

25 And your deviation, though, on the bottom, your most

1 underpopulated is 3.88, which is Republican, 3.87 is a  
2 Democrat. Then you have .263, a Republican.

3 So what I can do, and I apologize for not having  
4 these maps in there, is I will provide these charts to the  
5 Court, which will show, exactly what you are suggesting, what  
6 those numbers are, to see the degree of magnitude, but let me  
7 not waste the Court's time on that issue.

8 What I do want to do now is go to the issue of the  
9 different maps that were proposed and the county cuts on those  
10 maps, so let's turn to 49.

11 JUDGE SMITH: Don't forget that we want to talk  
12 probably quite a bit about Hidalgo at some point.

13 MR. MATTAX: I was going to save that until the end,  
14 because I assumed you probably had a few questions.

15 JUDGE SMITH: We will be sure there is plenty of  
16 time to talk about Hidalgo.

17 MR. MATTAX: But once I do this, I am going to run  
18 to El Paso, and then we will end up in the south.

19 JUDGE SMITH: Okay.

20 MR. MATTAX: Because I think what this reflects is  
21 actually going to show -- let's talk about El Paso first and  
22 then we will do this and then we will go to Hidalgo, and I  
23 think we will be in good shape.

24 I apologize, Angela. It should be at the very  
25 beginning. 29. I'm sorry.

1           One of the things that is interesting about El Paso,  
2 as you will recall, this was a drop-in district, and this was  
3 proposed by the delegation and simply dropped into the map.  
4 And it was Joe Pickett, a Democrat, who prepared the map and  
5 dropped it in.

6           And the complaint is that one of the districts  
7 should have been drawn to elect an Hispanic, and that is  
8 District 78, Representative Margo's district. And if we look  
9 at the Hispanic citizen voting age population in that  
10 district, in H-100, the benchmark, it was 56.2; in H-283, it  
11 is 55.2, both significantly majority Hispanic CVAP districts.

12           But more significantly, if you look with respect to  
13 these races, a Republican is the incumbent. There was a  
14 Democrat in '08, a Republican in '06, a Republican in '04, and  
15 I didn't have the rest of the chart, but a Republican in '02.

16           Here is the question, I think, in El Paso for the  
17 Court to decide. Are the Gingles factors, Section 2 to  
18 provide an opportunity for, in this case, Latinos, or a  
19 guarantee?

20           Here, they have over 56-percent -- excuse me -- over  
21 55-percent Hispanic citizen voting age population. They had  
22 that in C-100, and yet they have only won one of the races in  
23 that time period.

24           So the request, though, now is, you need to increase  
25 that Hispanic population. It seems to me that is a request to

1 guarantee an election result, which is going to raise serious  
2 questions.

3 Let's finish up by comparing --

4 JUDGE SMITH: And so you are showing there that the  
5 deviations are fairly even among the five districts --

6 MR. MATTAX: Right.

7 JUDGE SMITH: -- in El Paso?

8 MR. MATTAX: Correct. Thank you for pointing that  
9 out. The population deviations within those districts are  
10 almost -- you know, very, very minor with each other. And, of  
11 course, it was an underpopulated district, and so one had to  
12 underpopulate all of them.

13 JUDGE SMITH: In fact, if you look at the  
14 deviations, they are sorted of listed in order there, so 78 is  
15 right -- is sort of right in the middle of the numbers --

16 MR. MATTAX: Correct.

17 MR. MATTAX: -- as I read it.

18 MR. MATTAX: Correct. If there are no further  
19 questions about El Paso, let's move on. And getting back to  
20 that chart, which is 49.

21 What this chart is, and I am not going to belabor  
22 it, is a comparison of all of the demonstration maps that were  
23 proposed, where we went through and talked about the county  
24 cuts.

25 And as you will recall, Gerardo Interiano went

1 through and identified the different county cuts and explained  
2 where they were. That is in the record. This is just a  
3 summary of that.

4 But what I want to point out is, there is only one  
5 plan, the Perez plan, that doesn't have any unnecessary county  
6 cuts, and yet it reduces the majority Hispanic citizen voting  
7 age populations, and this is a map prepared to try to create  
8 coalition districts.

9 And, again, this is a different issue for the Court  
10 to raise. It is sort of the flip side of Judge Smith's -- the  
11 question you raised: If we are going to create coalition  
12 districts, does that mean we can eliminate majority districts?  
13 And that is what this map is trying to do.

14 If you look, then, at MALC H-201, which is the MALC  
15 plan, I can't remember the terminology, but it was the no cuts  
16 or the same amount of cuts as the State map. Mr. Interiano  
17 testified there were two, and the argument is, under Clements  
18 vs. Valles, that was an incorrect interpretation.

19 So let's get the next -- let's show the next slide.  
20 There we go.

21 The relevant parts, to me, at least, of Clements vs.  
22 Valles is this section. Three counties, Nueces, Denton and  
23 Brazoria, which are entitled to one or more representatives,  
24 are cut so that their surplus populations are adjoined to two,  
25 rather than one adjoining district.

1           And when you have a surplus population, it is the  
2 understanding, or the testimony of Gerardo, that because the  
3 Constitution says you join them in a county, "a" means one  
4 county, not two counties.

5           And this is what I think the Supreme Court is saying  
6 right here is, that is the problem with that plan, is you join  
7 it to two rather than one district, and that is what plan 201  
8 does.

9           It goes -- it places Galveston County into three  
10 districts. So, therefore, it does exactly what, at least in  
11 my view, of what Clements vs. Valles says you can't do. You  
12 take the surplus from one county and put it in two districts.

13           So what we have here is a situation of, does the  
14 county line rule have any effect or not? Or is it simply  
15 trumped? If anyone can draw a district based on race, forget  
16 the county line rule. I think that is precisely the  
17 opposite --

18           JUDGE RODRIGUEZ: But in looking at that second line  
19 there, this had the effect of fragmenting counties more than  
20 is necessary. I mean, doesn't the Supreme Court seem to imply  
21 that the county line rule can be broken?

22           MR. MATTAX: Well, you have to -- when you are  
23 cutting these lines, you have to -- the whole point of it is  
24 to minimize the necessary cuts. And as you will recall, what  
25 Gerardo said is, there was one necessary cut in the map. And

1 what they are saying is there, you are not supposed to make  
2 unnecessary cuts. If you have a necessary cut, you make it.  
3 Otherwise, don't make any.

4 That is what the House plan does. It makes one cut,  
5 and we believe, based on that, it should be affirmed.

6 Let us now go down to Hidalgo County. Briefly, let  
7 me just -- go to 54 real quick, and then we will just --

8 JUDGE SMITH: Okay. So the first question for  
9 Hidalgo is --

10 MR. MATTAX: We will skip --

11 JUDGE SMITH: The first question for Hidalgo is  
12 about the rounding up or down, and was it consistent with what  
13 was done in Harris County and perhaps elsewhere.

14 MR. MATTAX: Let me get my map out that I did this  
15 morning. Yes. Here is the issue with that, is that maybe the  
16 simplest way is to start with one district.

17 JUDGE SMITH: First, tell us whether what was  
18 represented yesterday is accurate about the rounding for  
19 Hidalgo, so we will know what the facts, and then you can  
20 comment on it.

21 MR. MATTAX: Correct. The number of districts based  
22 upon the ideal district size is 4.6 in Hidalgo County, and it  
23 was rounded down to four. And the reason for that is that if  
24 you would have rounded it up to five, you would have had a  
25 population deviation of 7.2 percent, which is outside of the

1 plus or minus range of five percent, so then you are  
2 implicating one person, one vote, because you are exceeding  
3 that limitation.

4 So the reason it is not done with respect to those  
5 types of -- in other words, this is sort of an automatic way  
6 things are done. You don't make a decision in one county or  
7 another.

8 If you have a county that if you were to increase  
9 it, it would exceed the population variation, then you keep it  
10 at four, and then you put the surplusage in one county.

11 JUDGE SMITH: I was wondering what your answer would  
12 be to that today, and I appreciate your answer. That makes  
13 sense to me, because as I was -- I am not saying, one way or  
14 the other, whether it was justified, but it makes sense to me  
15 that if you have a large county, such as Harris, you are  
16 changing from 24 to 25 or 25 to 24, you would not -- because  
17 there are so many districts involved, you are not changing the  
18 deviation that much, but if you have a much smaller county  
19 dealing with smaller numbers, obviously, adding or subtracting  
20 a district is going to mathematically affect the percentages a  
21 lot more. Is that what you are --

22 MR. MATTAX: Exactly.

23 JUDGE RODRIGUEZ: But where is the evidence in the  
24 record that that was a substantiation for that being done?  
25 The evidence, as I understood it, was some people met in a

1 back door and started going through lines and saying: You  
2 carve out here and you carve out this block and you carve out  
3 here.

4 MR. MATTAX: Well, those are two separate issues.  
5 When the population, census population is done, and it is  
6 given to the Legislative Review -- excuse me -- the  
7 Legislative Council, what they do then -- and I don't know  
8 that we have that map here that has the difference. I don't  
9 think we have the map in this spreadsheet.

10 There is a map in the record that then shows  
11 throughout the state the proportionality, the difference. Is  
12 it 1.2, 1.5? You know, whatever -- however many districts  
13 each one gets. Then based upon that number determines whether  
14 you get four or five or, in the case of Houston, because there  
15 was debate about it, 24, 25.

16 JUDGE RODRIGUEZ: Where is the evidence in the  
17 record, with regard to Hidalgo County, when all of this was  
18 done in relationship to the testimony that we heard about how  
19 the lines were actually drawn?

20 MR. MATTAX: The lines are drawn after -- the issue  
21 of how the lines were drawn comes after the fact that only  
22 four counties can be placed -- excuse me -- only four  
23 districts can be placed in Hidalgo County. Then the issue  
24 becomes, within those four districts in Hidalgo, how are the  
25 lines drawn?

1           And that is where the discussion was with respect to  
2 the question of, how do you draw those lines? So there are  
3 two separate questions. The decision of four versus five is  
4 made based on a map. The decision of how you draw the lines,  
5 as was discussed extensively, was based on politics.

6           JUDGE SMITH: So is there anywhere in the state  
7 under the enacted map where there is a deviation of more than  
8 the five percent you described --

9           MR. MATTAX: No.

10          JUDGE SMITH: -- that was the limit?

11          MR. MATTAX: No.

12          JUDGE SMITH: So at least that rule was followed  
13 consistently?

14          MR. MATTAX: Yes.

15          JUDGE GARCIA: If Harris County had gone to 25, what  
16 would the average deviation have been?

17          MR. MATTAX: I will do the math later. I don't have  
18 that in my mind.

19          JUDGE GARCIA: Okay. Go ahead.

20          MR. MATTAX: So let's talk briefly about Hidalgo. I  
21 think the facts are relatively clear, and let's talk about  
22 what they mean.

23                 The situation here is you had a Hispanic with -- who  
24 was the incumbent, and for whatever reason, he decided -- and  
25 I think the testimony shows that there was sufficient

1 Republican base down there that Republicans should have the  
2 opportunity to elect a Republican, if they so choose.

3 It had nothing to do with any racial motivation.  
4 And so that district was redrawn to provide Representative  
5 Pena the opportunity to be elected. It is still -- I don't  
6 have the numbers off the top of my head, but it is still  
7 majority Hispanic citizen voting age population.

8 Now, I think the testimony was from the stand that  
9 the intention was to draw that district based upon finding  
10 Republican voters. I know that, as the Court saw, as you  
11 superimposed maps showing ethnicity that they lined up a  
12 little bit. So, then, of course, the plaintiffs jump to the  
13 conclusion, it is drawn based on race.

14 And I think this is where the whole case sort of  
15 gets convoluted. Because things are based on politics and, at  
16 least in South Texas, Hispanics tend to be highly Democratic,  
17 if you do something based on politics, that means it is based  
18 on race.

19 I don't follow that logic. If you are basing a map  
20 drawing based on the politics of who won to try to give a  
21 particular party an ability to retain that seat as an  
22 incumbent, that cannot be based on race, and that is what was  
23 done in Hidalgo County.

24 That county is underpopulated. There is no dispute  
25 about -- excuse me. That district, compared to the others, is

1 underpopulated. There is no dispute about that.

2 JUDGE RODRIGUEZ: And there is nothing in the record  
3 that correlates that the race of most of the Republicans in  
4 Hidalgo County happen to be white?

5 MR. MATTAX: No. There is speculation, but it is  
6 sort of -- basically, the characterization by the plaintiffs  
7 is this. If you are Anglo, you are Republican. If you are  
8 Hispanic, you are a Democrat. Therefore, if I am looking for  
9 Republicans, I am looking for whites.

10 Now, I think what was done here in the case was to  
11 superimpose the map based upon -- I don't know if it was the  
12 Republican McCain election, but a Republican map on that  
13 district to show -- it didn't line up exactly anywhere near  
14 that, but there was obviously a large proportion of  
15 Republicans there, and then they superimpose an ethnicity map  
16 on top of it, and it was very similar.

17 JUDGE SMITH: Now, there is another issue here too.  
18 It is not just the underpopulation of 41. It is the fact  
19 that -- and correct the facts if you think it is different  
20 from the record, but that 90 or 95 percent of the area was  
21 swapped in terms of what areas the elected representatives are  
22 representing.

23 MR. MATTAX: And I don't --

24 JUDGE SMITH: Is that accurate? Is that fair?

25 MR. MATTAX: Yes. 95 percent. It was a very high

1 percentage, yes, Your Honor. I agree. And I guess my  
2 question there would be that if that is not based on race,  
3 what is the constitutional violation?

4 JUDGE RODRIGUEZ: What about the one person --

5 JUDGE SMITH: There is all sort of discussion --  
6 excuse me.

7 JUDGE RODRIGUEZ: I'm sorry. Go ahead.

8 JUDGE SMITH: There is all sorts of discussion, as I  
9 recall it, in the Supreme Court decisions about traditional  
10 representation in communities of interest and maintaining  
11 those concepts as part of redistricting.

12 And here, if you swapped out 95 percent of a  
13 district, then it seems to me the will of the voters certainly  
14 is not being maintained in any meaningful way. It just seems  
15 to me to defy those general concepts of democratic  
16 representation.

17 JUDGE RODRIGUEZ: My related question to that is,  
18 are we really doing incumbency protection when it is a whole  
19 new district that is created?

20 MR. MATTAX: Well, I think, looking at it from the  
21 standpoint of who the incumbent is. I think, I believe the  
22 question, I believe, you asked was --

23 JUDGE RODRIGUEZ: But an incumbent of what?

24 MR. MATTAX: Excuse me?

25 JUDGE RODRIGUEZ: But an incumbent of what?

1 JUDGE GARCIA: An incumbent is an incumbent.

2 MR. MATTAX: Correct. He is a member of the  
3 legislature.

4 JUDGE RODRIGUEZ: Okay. Well, could the State then  
5 have created something for Representative Pena in Dallas-Fort  
6 Worth and call him the incumbent, entitled to incumbency  
7 protection?

8 MR. MATTAX: Well, he is the incumbent in the sense  
9 that he lives in the district that has been drawn, which makes  
10 him the incumbent.

11 Now, it was clearly drawn based upon politics, and  
12 the question is, that was -- I don't think anyone can dispute  
13 that was a political gerrymander. That is what it was done  
14 for. Our position is, that is not unconstitutional.

15 JUDGE RODRIGUEZ: What about the one-person,  
16 one-vote implications to the undercount and overpopulation --  
17 overpopulation and underpopulation of the adjoining districts?

18 MR. MATTAX: Well, the adjoining districts would --  
19 are within that variation, the difference in variations.  
20 Let's go ahead and put that chart up --

21 JUDGE RODRIGUEZ: So, then, does this go back to the  
22 State's point that as long as we are under ten percent, we are  
23 fine? It is a safe harbor? Is that the State's position?

24 MR. MATTAX: Unless there is evidence you did it for  
25 a racial reason.

1 JUDGE RODRIGUEZ: So the overlay of the map showing  
2 the white population of 41 is not enough evidence?

3 MR. MATTAX: Because the map drawer said he drew it  
4 based on who the Republicans were, not based on race in the  
5 county.

6 JUDGE RODRIGUEZ: The map drawer drew it on the  
7 basis of what they told him to draw. He didn't know what the  
8 intent was of the people whispering in his ears.

9 MR. MATTAX: But the evidence in this case is the  
10 overlay of the Republican voters on top of that district, and  
11 the testimony was that it was drawn to allow Representative  
12 Pena to have an opportunity to be reelected, based upon  
13 drawing that district based upon who was a Republican. There  
14 is no testimony it was drawn based upon that someone was an  
15 Anglo or someone is Hispanic.

16 I have a lot more charts --

17 JUDGE SMITH: We talked a lot about the rounding  
18 down in Paris and the rounding down, in this case, in Hidalgo.

19 Are you aware of any other situations, other than  
20 Hidalgo, in which the rounding was done contrary to whether it  
21 was past the .5 level?

22 MR. MATTAX: I'm sorry. I apologize, Your Honor.  
23 Could you repeat the question?

24 JUDGE SMITH: That is not a problem. We talked  
25 about Hidalgo being rounded down, even though the percent was

1 above the .5 dividing line.

2 Are you aware of any other situations around the  
3 state in which the rounding up or down was contrary to whether  
4 it was above or below the .5?

5 MR. MATTAX: I have been advised Collin County. I  
6 am not aware of that personally.

7 JUDGE SMITH: Collin County, the county just north  
8 of Dallas?

9 MR. MATTAX: Yes.

10 JUDGE GARCIA: Went up or down?

11 MR. MATTAX: Please, if you don't mind.

12 JUDGE GARCIA: No. Of course not.

13 JUDGE SMITH: That's okay.

14 MR. COHEN: May it please the Court, Bruce Cohen.  
15 Your Honor, Collin County was at 466.69, which is to say 4.67.  
16 Hidalgo County was at 462.17. Those are really within  
17 hundredths of a point. Both of those were declared four plus  
18 spillover. In fact, Collin County is where Chairman Solomons'  
19 district -- formerly -- he is now fully in Denton.

20 JUDGE SMITH: So what happened, then, in Collin? So  
21 Collin --

22 MR. COHEN: Collin carried over to Rockwall, Your  
23 Honor.

24 JUDGE SMITH: Collin what?

25 MR. COHEN: In order to take the surplus --

1 JUDGE SMITH: Right.

2 MR. COHEN: -- the additional population in Denton  
3 County, it was formed with Rockwell County, which is just  
4 south, and that formed a fifth district. That is a spillover,  
5 the term we have heard. That is not a county cut -- Collin  
6 got four, plus spillover, just as Hidalgo --

7 JUDGE SMITH: So it got four, plus part of another  
8 district?

9 MR. COHEN: Exactly, Your Honor.

10 JUDGE SMITH: Okay. All right. Thank you. I asked  
11 a factual question and I got an answer from the record.

12 So there wasn't any consideration of the possibility  
13 of spillover for Hidalgo, or does the situation in Hidalgo not  
14 lend itself to spillover into, I guess --

15 MR. MATTAX: No. The population was spilled over to  
16 another district. So that population was used, and so that  
17 population is spillover, just like it did in Collin County.  
18 So when you have those type of districts that you can't put,  
19 you know, a complete number of districts in -- for example --  
20 Houston, in those situations, like Collin and Hidalgo, where  
21 you have that extra, that is spillover, and that is placed  
22 into an adjoining district.

23 JUDGE SMITH: All right.

24 MR. MATTAX: If the Court has no further questions?  
25 Thank you for your attention.

1 JUDGE GARCIA: Thank you.

2 JUDGE GARCIA: Do you want to take a brief recess?

3 JUDGE SMITH: Yes.

4 JUDGE RODRIGUEZ: Yes.

5 JUDGE GARCIA: Let's take a recess, and then I guess

6 Mr. Garza.

7 (Brief recess.)

8 (Change of court reporters.)

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1 that the State's position is that with regard to potential  
2 conflicts between the whole county line rule, state  
3 constitutional requirements in compliance with Section 2, it is  
4 the State's position that Section 2 must give way if there is a  
5 conflict.

6           And the court -- we've had a discussion about this over  
7 the last two days and I would like to start with, then, a quote  
8 from Bartlett versus Strickland, a recent Supreme Court case in  
9 2009, 129 S.Ct. 1231. And it says, "It is a common ground that  
10 state election law requirements like the whole county provision  
11 may be superceded by federal law."

12           When I said yesterday that if you read Strickland  
13 versus -- Bartlett versus Strickland it was fair to read the case  
14 as requiring compliance with federal law over state law over the  
15 whole matter, I suspect that what it means by "may be superceded  
16 by federal law" is if the plaintiffs can prove that the federal  
17 law requires it then it must -- state law must give way. So I  
18 begin with that.

19           And then in terms of the argument I'd like to begin  
20 with a look at Hidalgo County and some of the questions the court  
21 had regarding Hidalgo County. And the first thing is there  
22 are -- the State has identified one other county in which there  
23 has been a round down when the county proportion or ratio is  
24 above .5. We pointed to Collin County in which it was -- the  
25 ratio was 4.67 and rounded down and spilled over into Rockwell

1 [sic] creating District 33.

2           And there is a distinction between the way Hidalgo  
3 County was treated and the way Rockwell [sic] and Collin County  
4 were treated in that decision. The spillover in Rockwell [sic]  
5 and Collin County created a brand-new district that didn't exist  
6 in North Texas before, District 33. And, in fact, it was a  
7 district that was moved from Corpus Christi, from Nueces County  
8 to Collin County, when they eliminated a majority Latino district  
9 in Nueces County.

10           In Hidalgo County the spillover was included into an  
11 existing Latino majority district, so no new districts in  
12 South Texas.

13           Moreover, I think that neither example, however,  
14 explains the deviation from where the inconsistency of the  
15 application of the interpretation of Article 3, Section 26 in  
16 terms of rounding up and rounding down.

17           All of the witnesses testified that that -- that that  
18 was the -- their interpretation, their requirement for the state,  
19 was if it was below .5 you rounded down, if it was above .5 you  
20 rounded up.

21           Neither -- in neither Collin County nor Hidalgo County  
22 were they rounded up. The State's argument is that it had to do  
23 that in terms of complying with one person/one vote. That's  
24 not -- that's not the case.

25           If you draw five districts in Hidalgo County the

1 argument from the State is that the deviation then is 7.2 within  
2 the five -- the average deviation within -- so you can draw five  
3 districts in Hidalgo County at an underpopulated deviation of  
4 7.2.

5           Now, we all know that the 10 percent rule that was  
6 announced in White versus Regester is not a hard and fast cap on  
7 what the State can do. The Supreme Court explained in Mahan  
8 versus Howell that if the State is strictly adhering to a  
9 redistricting principle it has some leverage, some gap within  
10 which to work on one person/one vote.

11           In Mahan versus Howell the Supreme Court specifically  
12 approved a plan that was 16.4 top to bottom deviation. So that  
13 complied with one person/one vote so long as the State was  
14 strictly complying with legitimate redistricting principles such  
15 as the whole county line rule.

16           If Hidalgo County districts are at 7.2 percent  
17 underpopulated and the top district in the State is no more than  
18 five percent, then the State has a total top to bottom deviation  
19 of 12 percent within the range that has been approved by the  
20 United States Supreme Court to comply with one person/one vote,  
21 so that the upper limits of this deviation of 10 percent is not a  
22 hard cap on the state.

23           The critical issue is are you complying with -- are you  
24 applying a legitimate required State redistricting principal  
25 evenly across your redistricting plan. And obviously with regard

1 to Hidalgo County that was not the case. Now, with regard to  
2 the --

3 JUDGE SMITH: But that would have opened up, would it  
4 not, the greater chance that some voter in some far-flung area of  
5 the state could have claimed that he or she was -- was  
6 substantially under-represented as compared to a 12 plus percent  
7 deviation; in other words, it sort of opens up Pandora's box in a  
8 way, doesn't it, if the discipline of the 10 percent is not  
9 maintained across the state?

10 MR. GARZA: Well, I think by doing it the way in which  
11 the State did it it invited litigation. I mean, I think that's  
12 right, Your Honor. I think that there is this potential to  
13 challenge it, but the State's burden would be the same as it is  
14 here. It would have to show that it was applying the State's  
15 principles evenly across the state.

16 I don't believe that in this case it has demonstrated  
17 that it's applying a legitimate state redistricting principle  
18 across the state and therefore it doesn't justify the manner in  
19 which Hidalgo County was treated.

20 That would be the same burden on a plaintiff that was  
21 challenging a 12 percent deviation as opposed to a 9.9 percent  
22 deviation as -- as we're challenging here.

23 So I think any decision that the State makes with  
24 regard to redistricting could invite legal challenge. That  
25 doesn't absolve it of the necessity to do the right thing. And

1 in this case it didn't do the right thing with regard to Hidalgo  
2 County.

3           Moreover, it could have avoided this argument entirely  
4 if it had, instead of splitting two county lines, split only one  
5 county line and kept the districts entirely intact between  
6 Hidalgo and Cameron County and created seven districts between  
7 the two counties.

8           JUDGE SMITH: And instead it did what? It went into  
9 Starr or what county?

10           MR. GARZA: It went into Starr to the west and Hidalgo  
11 County and it went north in Cameron County, thus splitting two  
12 distinct county boundaries.

13           Now, with regard to the over and underpopulation of  
14 districts none of the argument that's been made by the State  
15 disputes and none of the testimony that's been presented to this  
16 case -- to this Court disputes the analysis that was done by  
17 Dr. Kousser in which he examined total populations for minority  
18 or Latino majority districts and Anglo majority districts and  
19 found that proportionally Anglo majority districts were favored  
20 by the manner in which it distributed population.

21           Now, we can go across the state and pick out and  
22 isolate specific districts and show that there are minority  
23 districts that are underpopulated and we can find Anglo districts  
24 that are overpopulated, but over the -- over the spectrum of the  
25 Texas districts more than 60 percent of Anglo majority districts

1 were underpopulated. And with El Paso included over 50 percent  
2 of Latino majority districts are overpopulated. And if you  
3 exclude El Paso County, almost 70 percent of Latino majority  
4 districts are overpopulated. A clear showing, I think, of  
5 disparate treatment.

6           Now, with regard to the examples that counsel put on  
7 the -- on the chart dealing with Harris County and Hidalgo  
8 County, I think it's important to point out that four out of the  
9 six African American districts in Harris County were  
10 overpopulated and three out of the four majority Latino districts  
11 were overpopulated.

12           Proportionally -- if you look at it in a proportional  
13 fashion as opposed to raw numbers it's clear that the Latino  
14 population, the Latino districts were treated differently than  
15 the Anglo districts when you measure compliance with one  
16 person/one vote. They were more overpopulated than the Anglo  
17 majority districts.

18           And it's fair to look at proportions because, after  
19 all, there are many more Anglo majority districts in the state  
20 than there are majority Latino districts.

21           In terms of the manner in which the districts were  
22 drawn in Hidalgo County I don't -- I don't believe the State  
23 adequately responded to the Court's inquiries regarding the  
24 manner in which Districts 41 and 40 were drawn. I think the  
25 questions that the Court asked regarding how is it incumbents

1 need protection if 90 percent of the incumbents are  
2 attempting -- 90 percent of the districts in which the current  
3 incumbent lives that you're trying to protect is no longer in his  
4 district.

5           The fact of the matter is that Mr. Pena has an  
6 electoral history in Hidalgo County. And if you were seeking to  
7 protect his interests you would keep the district as close to  
8 what he currently resides in as possible.

9           But if your motive was different, if it was  
10 more about partisanship and more about race, then you would have  
11 to alter his district. And to suggest that a configuration such  
12 as what they've drawn -- this is Dr. Kousser's analysis putting  
13 out the highest concentrations of white votes or the district  
14 attempts to include those in --

15           If we could go to the -- to the exhibit before that.  
16 Now, if you could zoom in on that section -- no, further down.  
17 Furtherest --

18           TECHNICIAN: Further down?

19           MR. GARZA: Yeah, right in here.

20           TECHNICIAN: Right in --

21           MR. GARZA: Right in here.

22           Now, Mr. Interiano did testify that he only had the  
23 racial -- I'm sorry, the political data up on the red viewer on  
24 the Red Appl operation he was working under.

25           But I think, Judge Rodriguez, you asked how can you

1 possibly determine what part of a precinct is more Republican or  
2 more Democratic when you're splitting a precinct because there is  
3 no such data, there is no political data for a split precinct.  
4 The only thing that you have for a split precinct is racial data,  
5 is what concentration of Anglos live there, what concentration of  
6 Hispanics live there.

7           And there are split precincts in this map all over the  
8 place. There is a split precinct there. If you go throughout  
9 going down the line there are split precincts everywhere picking  
10 up different voters. And it can't be political at that level of  
11 geography because there is no political data for split precincts.

12           JUDGE RODRIGUEZ: And this map, again, is found in  
13 Kousser?

14           MR. GARZA: Yes. This is -- this is Kousser Exhibit 19  
15 at pages 96 and 97.

16           JUDGE RODRIGUEZ: Thank you.

17           JUDGE SMITH: So your argument -- I mean I'm inclined  
18 to think it's a good argument, but I want to be sure I understand  
19 it. Your argument as to the 95 percent swap in the area in the  
20 precinct is that the voters in 41 chose Representative Pena in  
21 2010 and that's their choice. But if 95 percent of them are  
22 taken out of the district then the whole idea of incumbency, that  
23 is protecting the choice of the voters to the extent possible in  
24 a future election, is completely eliminated.

25           So it just focuses on whether the right is the right of

1 the incumbent to stay in office in whatever district or some kind  
2 of concept of the choice of the voters being maintained.

3 I don't know whether the case law speaks to that in  
4 terms of protection of incumbents, but it seems to me that the  
5 choice of the voters is the more important consideration. Is  
6 that --

7 MR. GARZA: That's -- I believe that that's the correct  
8 interpretation of the courts when they talk about incumbency  
9 protection as being a viable, legitimate redistricting principle  
10 that a state can use when engaging in redistricting. And that's  
11 exactly right.

12 So then the only alternative that we have -- and by the  
13 way, Representative Pena didn't just get elected in 2010. He's  
14 been consistently elected in his current district over a wide  
15 array of elections with different sorts of opponents. And so he  
16 has established himself as a legitimate candidate and the choice  
17 of those voters in the current district. That district doesn't  
18 exist anymore under this plan. If it was incumbency protection  
19 it seems to me you would want to preserve that district as much  
20 as possible.

21 And it certainly doesn't explain the variance in  
22 population distribution between the four districts in Hidalgo  
23 County. Three of those districts are overpopulated and only one  
24 district is underpopulated substantially at -- at a substantial  
25 level approaching five percent under.

1           So -- and the other point that I would make in terms of  
2 the Cox versus Larios argument that we have made is that if, in  
3 fact, the purpose of creating the district in which -- that  
4 they've created, 40 and 41, was to enhance the electoral  
5 opportunities of a Republican as opposed to Mr. Pena, or if it  
6 was in order to enhance the opportunities of Anglo voters in  
7 Hidalgo County to elect a candidate of their choice, in either  
8 case Cox versus Larios says that's an -- illegitimate purposes  
9 for purposes of one person/one vote distribution of population.  
10 You cannot use population distribution in order to gain advantage  
11 either for partisanship or for race.

12           One more point on the whole notion of rounding up and  
13 rounding down. And again, this goes to the -- to the notion of  
14 whether the principle has been evenly applied. And I believe  
15 that the cases are talking about evenly applied throughout  
16 history. In other words, that this has been an important  
17 consideration for the jurisdiction not in this redistricting but  
18 over time in its redistricting.

19           And I think that the evidence shows that with regard to  
20 Harris County in 1972 the proportion of -- the ratio in 1972 was  
21 23.3 and the State rounded up to 24. And in 1982 the ratio was  
22 25.4 and it rounded up to 26. In 1992 was the only time where it  
23 was -- exceeded .5. It was 24.8 and they rounded up to 25. And  
24 in 2002 -- and those were the legislative actions. Not the LRB,  
25 not the courts. That's the enactments of the State.

1           JUDGE SMITH: But we were pointed today and we've been  
2 pointed before to the redistricting of 10 years ago in which  
3 Representative Turner and other minority representative were in  
4 favor of rounding down.

5           MR. GARZA: So -- and I don't really have a response  
6 for that except that I'm not sure what the relevance of it is.  
7 It was an amendment that was being offered during the legislative  
8 process. There's no evidence about whether that was -- how that  
9 was taken. There was no plan. In other words, there's no  
10 relevance because there was no plan to attach it to.

11           I'm not sure what the plan was that Representative  
12 Turner was voting for that included 24 or 25 districts. I don't  
13 know if it enhanced African American opportunities. I don't know  
14 if it enhanced Latino opportunities.

15           We do believe that the State -- and it is our argument  
16 that the State has the discretion to go to 24 or to 25, so I'm  
17 not sure what the relevance of that particular vote is without  
18 knowing what the impact of the districting plan was.

19           But what is important with regard to the 2002  
20 redistricting is that nothing came out of the legislature  
21 regarding the State House of Representatives' plan. And to  
22 suggest that Legislative Redistricting Board's actions are  
23 irrelevant doesn't make any sense either because the  
24 redistricting of the State House of Representatives by  
25 constitution is turned over to the LRB in situations where the

1 Texas House and the legislature have not passed a bill.

2           So it clearly shows the State's intent and the State's  
3 action. It is not non-state action because it was the LRB that  
4 adopted it versus the legislature. So I'm not sure what the  
5 relevance of that particular vote was since it had no impact on  
6 the plan that was actually adopted. And it is not our argument  
7 that the State couldn't use 24 if it wanted to, but it's our  
8 argument that they could have used 25.

9           And by choosing 24 you have to look in terms of the  
10 context of that. By choosing 24 it made it more difficult to  
11 draw a majority Latino district in Harris County.

12           And that just makes sense because the districts now  
13 have to be larger in population. If it's 24 districts all of  
14 them should be underpopulated. If it's 24 all of them should be  
15 overpopulated.

16           Well, that's not the way the State drew the plan  
17 anyway. They were all over the map in terms of the population  
18 variances at 24, but...

19           So that's the point is that it's linked to the ability  
20 of the minority community to secure an additional district --

21           JUDGE SMITH: And it was also --

22           MR. GARZA: -- in Hidalgo County.

23           JUDGE SMITH: It was also in Harris County a convenient  
24 way of pairing two Democrats in the west part of the county --

25           MR. GARZA: That's right.

1 JUDGE SMITH: -- by going from 25 to 24.

2 MR. GARZA: That's right.

3 And I know I'm jumping around a little bit, but I'm  
4 still within the context of the Larios or Larios claim and the  
5 interpretation of Article 3, Section 26. Counsel put up a quote  
6 from -- from Clements versus Valles, but I think it's the only  
7 one in the whole case that talked about the surplus population.

8 Almost the entire case evaluated compliance  
9 with -- with Article 3, Section 26, not on the interpretation  
10 that Mr. Interiano has offered the Court, but in terms of  
11 counting the number of county cuts across the plan. House Bill  
12 960 cuts the boundaries of 34 counties as compared to 33  
13 boundaries cut in the Smith versus Craddock.

14 For its wholesale cutting of county lines in violation  
15 of 26, the boundaries of 33 counties were cut under the terms of  
16 the statute, 18 of which had less than sufficient population to  
17 form separate representative districts. Article 3, Section 26 of  
18 the constitution -- the statute violates Article 3, Section 26 of  
19 the constitution by cutting county lines. The proponents were  
20 then required to justify the redistricting plan by presenting  
21 evidence that the cutting of county lines was necessary,  
22 et cetera, et cetera, et cetera.

23 Throughout the opinion the Court evaluated compliance  
24 with the Article 3, Section 26 in terms of counting the number of  
25 county lines that were divided. The only evidence that this

1 Court has in terms of measuring compliance with Article 3,  
2 Section 26 in terms of counting county lines is the report by  
3 Dr. Kousser in which he followed the example of Clements versus  
4 Valles and found that Plan 201 had 16 cuts and the State's plan  
5 had 16 cuts, exactly the same number of cuts.

6           The difference between the two plans is that Plan H 201  
7 had 31 Hispanic citizen voting age population majority districts  
8 compared to 30 in the adopted plan. The difference was H 201 had  
9 32 Spanish surname registration majority districts compared to 30  
10 in -- in the adopted plan.

11           So compliance with -- with -- even if the State's  
12 position that Section 2 must give way to the whole county line  
13 rule, even if that's the case, the plaintiff MALC has produced a  
14 plan that complies with their -- with the interpretation -- with  
15 our interpretation of Valles versus Clements in Article 3,  
16 Section 26 and has more Latino opportunity districts measured  
17 either by CVAP or SSVR majority districts.

18           The State also argues that you can't have  
19 discrimination in Harris County either under Larios or Section 2  
20 because the minority districts and the Democratic districts were  
21 drawn by the Democrats and the minorities in the delegation. But  
22 I think that ignores the testimony that was presented to this  
23 Court under questioning from this Court that that -- allowing the  
24 Democratic delegation and the Latino members of the delegation to  
25 draw their own districts was conditioned within certain

1 parameters. And they resisted that over and over again.

2           And, in fact, I think the telling sign is that all the  
3 Latinos for Harris County who ultimately voted against the plan  
4 and moreover testified against the plan on the House floor,  
5 including engaging in dialog, in Q&A, between the chairman who  
6 was the sponsor of the State's plan, Chairman Solomons -- and the  
7 various members of the delegation, Representative Alvarado,  
8 Representative Walle, all -- Representative Farrar, all  
9 challenged Representative Solomons on a number of points  
10 including including only 24 districts in Harris County, including  
11 the notion that raising District 148 above 50 percent Spanish  
12 surname registration somehow created a new district which, of  
13 course, it didn't because Jessica Farrar had represented that  
14 district for over 16 years and had been -- the Latino community  
15 in that district had consistently elected the candidate of their  
16 choice over that 16-year period.

17           So it was not a delegation map for Hidalgo County. And  
18 suggesting that the -- that the cuts that were made in  
19 North Texas in various plans were -- can be legitimized because  
20 they were attempting to keep Grand Prairie whole or that somehow  
21 keeping Grand Prairie whole shows that the State had an interest  
22 in maintaining local boundaries just doesn't make any sense when  
23 the testimony before this Court is that in Hidalgo County cities,  
24 school districts, voting precincts were all annihilated by this  
25 plan. So that certainly wasn't a traditional principle that was

1 followed evenly across the state.

2 JUDGE SMITH: When you were talking about the MALC plan  
3 five minutes ago or so were you talking about 205?

4 MR. GARZA: 201, Your Honor.

5 JUDGE SMITH: 201.

6 MR. GARZA: There were two plans. The Court's correct.  
7 We submitted two plans showing different things.

8 JUDGE SMITH: All right.

9 MR. GARZA: 201 was meant to comply with or interpret  
10 the whole county line rule as being supreme over Section 2 of the  
11 Voting Rights Act, so we maintained the same number of county  
12 cuts as the State.

13 JUDGE SMITH: That's the one that put Galveston County,  
14 though, in three --

15 MR. GARZA: That's correct. That's correct. But it  
16 had 16 county cuts the same as the State.

17 And two final points, Your Honor. There is  
18 evidence in the Court responding to the Court's question about  
19 the Dallas congressional plan and about whether there is evidence  
20 that showed that combining the citizen voting age population of  
21 African Americans and Hispanics raises the total minority CVAP  
22 over 50 percent. And I'm going to point to the -- at least as to  
23 the plans that were submitted by MALC. And I believe this is  
24 also true of the plans that have been submitted by the other  
25 plaintiffs. But at Exhibit 46, table 8, the analysis done by

1 Dr. Chapa regarding HCVAP and CVAP, analysis of different plans,  
2 it includes a column at the end of the chart that measures  
3 Hispanic citizen voting age population and African American  
4 citizen voting age population. And it shows that District 5 in  
5 plan C 183, which is a district that crosses between Dallas and  
6 Tarrant County, is 59 percent Hispanic and African American  
7 citizen voting age population.

8                   And in District Plan 164, the second page of  
9 the table, I believe, also shows that District 5 in that plan is  
10 over 59 percent African American and Hispanic citizen voting age  
11 population. And I think those are just two examples.

12                   JUDGE SMITH: So the last one you gave us would be a  
13 coalition?

14                   MR. GARZA: Yes. Those are both -- those are both  
15 coalition.

16                   JUDGE SMITH: Both coalition. Okay.

17                   MR. GARZA: Right. I believe that was Judge  
18 Rodriguez's question whether the coalition analysis of the  
19 Dallas/Fort Worth plan showed that combined minorities were over  
20 50 percent of citizen voting age population. And I think  
21 all -- I won't say all but certainly most of the plans of the  
22 Gingles plans--and these aren't remedy plans, these are Gingles  
23 plans--that have been submitted to the Court and are in evidence  
24 in this case demonstrate that when you look at it in that manner  
25 they are over 50 percent minority citizen voting age population.

1           And the last point that I would make is, again, going  
2 back to the State's notion that somehow some of these lines were  
3 justified by adhering to the State principle of keeping local  
4 boundaries intact. Even the city of Grand Prairie was split five  
5 ways in the State House of Representatives' plan.

6           JUDGE GARCIA: Thank you, Mr. Garza.

7           Ms. Perales.

8           MS. PERALES: Thank you, Your Honor. We'd like to  
9 switch back and forth at different points between the legislative  
10 council plans and the ELMO.

11           Can you set that up?

12           The first thing that I'd like to address with the Court  
13 is a number of statements about Section 2, the law, that we think  
14 there is a difference of opinion on and explain why we think that  
15 we're right.

16           You heard a lot of statements implying during the  
17 State's closing that the plaintiffs have to show that there is  
18 some kind of invidious racial intent in voting in order to prove  
19 racially polarized voting.

20           You heard references to voting because of race or  
21 racial discrimination in voting. There was even a slide that  
22 sort of summarized the State's position about racial  
23 discrimination voting. There was no case citation at the bottom  
24 of that slide because there is no legal support for that  
25 contention.

1           Gingles and the cases that have come after it, the  
2 cases that discuss racially polarized voting, talk about a  
3 difference in candidate preference that can be matched up with  
4 race or associated with race. There is no case supporting the  
5 contention that the plaintiffs have to demonstrate that people  
6 are casting their votes because of invidious racial  
7 discrimination.

8           There was a further implication in the State's closing  
9 that Section 2 remedies have to be justified by a finding of  
10 racial intent somewhere in the process, either in the plan or in  
11 the way that people are voting. It got very broad there for a  
12 while.

13           And we'd like to point out that there was in -- in the  
14 early 1980s a Supreme Court opinion that did say that Section 2  
15 requires showing of intent. And that case was then subsequently  
16 legislatively overturned by Congress in the 1982 amendments to  
17 Section 2. And then you see the cases beginning with Thornburg  
18 versus Gingles in the Supreme Court making very, very clear that  
19 there is no need, no requirement to prove intent in Section 2.

20           You heard a lot of talk about Congressional 23. And  
21 I'll get into that a little bit more, but you heard talk that,  
22 you know, faced with a dilemma about incumbency protection in  
23 the State had to act to protect incumbency and that that was  
24 appropriate and right under the law. It certainly isn't under  
25 these facts which are so similar to the ones in LULAC versus

1 Perry with respect to 23.

2           You also heard the State contend that Section 2  
3 remedies or Section 2 claims aren't appropriate in Latino  
4 majority areas of the state. There's no requirement to create an  
5 additional Latino opportunity district in El Paso because El Paso  
6 is a Latino area.

7           Well, that's just not the case. We have a statewide  
8 vote dilution case here alleged for both Congress and the State  
9 House. And when you allege vote dilution statewide the remedies  
10 may be appropriate in a number of areas including Latino majority  
11 areas. Not just in El Paso, but frankly much of the bottom  
12 portion of the state where Section 2 remedial districts have been  
13 drawn by the legislature and by the courts have been Latino  
14 majority areas.

15           You also heard an opinion that Section 2 remedies are  
16 pernicious in and of themselves because they separate on the basis  
17 of race. We'll, we're working within the context of federal law.  
18 And federal law here is stringent. It makes many requirements on  
19 the plaintiffs to prove their case, but if the plaintiffs are  
20 allowed -- are able to prove vote dilution, a race-conscious  
21 remedy of creating a Latino majority district is required by  
22 federal law.

23           There was also some discussion about compactness and  
24 compactness requirements for Section 2 demonstrative districts.  
25 It was hard for me to follow or understand what the State was

1 trying to say here and how the Section 2 compactness standards  
2 might relate to Shaw, but there is certainly no case law  
3 supporting the idea that there is a compactness standard for  
4 Section 2 demonstrative districts that is somewhere short of  
5 Shaw. So I just wanted to get that out there.

6           Moving to the facts and touching briefly first on  
7 El Paso. The claim of the Latino Task Force plaintiffs in  
8 El Paso is that the district that is not at this point, we claim,  
9 a Latino opportunity district, District 78 -- if you balance the  
10 Latino population better in that county you'll get a Spanish  
11 surname voter registration majority district and an opportunity  
12 district.

13           We're not asking for the guarantee of a result because  
14 that's not what Section 2 requires and that's certainly not what  
15 we're asking for.

16           Our claim is really more revolving around the fact that  
17 this district as it's currently drawn is irrational. This is a  
18 very Latino place and this is a district where it seems that  
19 special steps have been taken to make sure that the Latino  
20 population is minimized. It's certainly not rational in terms of  
21 how its lines, boundaries follow neighborhoods, geographic  
22 features like the mountain range or even whole precincts.

23           The district carries a great deal of indicia of  
24 intentional voting indicia. And, you know, you heard a lot  
25 coming from the State's mappers that they used as a default

1 measure 50 percent Spanish surname voter registration. This is  
2 obviously not the standard under Section 2, but you heard  
3 testimony from the State's House mapper saying, well, we looked  
4 at Spanish surname voter registration at 50 percent as a kind of  
5 a rule of thumb for whether something was an opportunity  
6 district, but then you can see here that steps were taken to make  
7 sure that this particular district did not meet that rule of  
8 thumb.

9           With respect to racially polarized voting there was  
10 some discussion that kind of wondered over into the 2003  
11 litigation and the case that ultimately was decided as LULAC  
12 versus Perry. So I decided to bring the binders with the expert  
13 reports there so that the Court can see that there was really no  
14 difference in the levels of racially polarized voting in the 2003  
15 record as there was here. The patterns in the 2003 record were  
16 very similar to the patterns that have been observed in recent  
17 elections.

18           Alex, can you get that thing on? And that's binder two  
19 with the tab for Dr. Flores.

20           MR. SCHENCK: Is this in the record here?

21           MS. PERALES: No, I don't, but I believe there were  
22 some fact statements -- fact statements made by the State that we  
23 would like to counter.

24           JUDGE RODRIGUEZ: Do you intend to introduce it to the  
25 record?

1 MS. PERALES: We certainly can. We have put in some  
2 materials from 2003, Dr. Alford's expert report and deposition  
3 and we --

4 JUDGE RODRIGUEZ: If you're going to argue from it it  
5 needs to be in the record.

6 TECHNICIAN: Dr. Flores's statement?

7 MS. PERALES: Yes. Maybe I can just discuss this one  
8 particular exhibit and we can work on getting the next one up.

9 This is a page from the deposition of Dr. Henry Flores  
10 who did a racially polarized voting analysis in the 2003  
11 litigation. He looked at endogenous elections, which were  
12 Mr. Bonilla's elections from 1992 to 2002, and then he also  
13 looked at a couple of endogenous races like Sanchez versus Perry  
14 in 2002. And what he found was that Latino voter support had  
15 ranged from about an estimated high of 22 percent for Mr. Bonilla  
16 and then down into that 15 percent range that counsel was  
17 discussing a few moments ago.

18 So the polarization that -- the cohesion for Latinos  
19 there was somewhere between 80 and 85 percent. On the side of  
20 the non-Hispanics in the district there was a crossover -- or  
21 rather the non-Hispanic support had ranged as low as 80 percent,  
22 81 percent. And those numbers are quite similar to the numbers  
23 that we have reported by Dr. Engstrom in this case. And that is  
24 in the record. Dr. Engstrom did look at racially polarized  
25 voting in Congressional District 23. He ran an EI analysis of

1 the 2010 election.

2 I'm going to have to -- please hand me Dr. Engstrom's  
3 report while I read that to the Court. It's loose.

4 In this case Dr. Engstrom found that with respect to  
5 the District 23 -- actually he ran -- he ran a lot of elections  
6 and they include Latino cohesion of about 77 -- sorry. This I'm  
7 going to have to skip, Your Honor, because it's on a different  
8 page. Okay. Here we go.

9 With respect to the endogenous election analysis that  
10 Dr. Engstrom did in CD 23, he found that Latinos were voting  
11 cohesively at approximately 85 percent and that the white  
12 crossover was 18 percent. And that's on page 25 of his corrected  
13 rebuttal report. And those are about the same levels of cohesion  
14 that were observed in the 2003 litigation.

15 The State I think implied to the Court that somehow  
16 primary elections are not very relevant in looking at the  
17 question of racially polarized voting, but of course primary  
18 elections are very, very important when you look at polarized  
19 voting because they don't carry a partisan queue. And we can see  
20 how people of various races tend to vote when they don't have a  
21 partisan queue.

22 Dr. Engstrom in his report found polarization in the  
23 Democratic and the Republican primary. And I would commend the  
24 Court to page 35 of 60 of Dr. Engstrom's report just as an  
25 example, his analysis of racially polarized voting in the

1 Democratic and the Republican primaries in South Texas. It's  
2 just as an example and it's table 3, but it shows polarization in  
3 the 2006 Democratic primary runoff, in the 2008 Democratic  
4 primary, in the 2010 Democratic primary.

5           And it also shows racially polarized voting in the 2010  
6 Republican primary involving Mr. Carillo where the estimated  
7 support of Latinos in South Texas for Mr. Carillo in the  
8 Republican primary was 70 percent and the estimated support for  
9 Anglos in that primary was 26 percent.

10           I think really what the State is trying to do here is  
11 set up some kind of catch-22 on racially polarized voting. If  
12 Latinos vote cohesively in the general election, which they do,  
13 the State will point to that and say, "Well, it's all party.  
14 There's nothing going on here about race. There's nothing to see  
15 here with respect to race. Look, they are voting for a party.  
16 It must all be partisanship." It assumes what's going on with  
17 respect to race. If Latinos don't vote cohesively in the general  
18 election then the State will say there's no cohesion. So there  
19 is no fulfillment of the second Gingles precondition.

20           It seems to me that regardless of how Latinos are  
21 voting in the general election, either cohesively or  
22 non-cohesively, the State says they win. And that can't possibly  
23 be the legal standard here.

24           With respect to certain other stray facts I believe the  
25 State said that in Plan C 190, which is a proposed plan for the

1 Task Force that Congressional District 6, which is the Dallas  
2 district, does not perform. It's absolutely not true. Behind  
3 tab -- Plaintiff's Exhibit 200 makes that clear.

4 And then there were a lot of references to separating  
5 people on the basis of race and lots of implications that  
6 proposed, you know, alternative demonstrations violated Shaw.

7 And is it possible for you to toggle back to show  
8 C 190?

9 MR. HANNA: I think so.

10 MS. PERALES: No? Okay. Maybe we can get back to the  
11 ELMO then. We'll just use the demonstrative here. I think the  
12 Court is probably able to see it, Plan C 190.

13 I think there was some talk even that Congressional  
14 District 23 was perhaps a Shaw violation in the way that it had  
15 been presented in Plan C 190.

16 Perhaps one of the most important things to point out  
17 about the area that is shown there in C 190 for South Texas  
18 districts is that this whole area is majority Latino and the  
19 overriding point is that there's enough Latino population here to  
20 make seven districts, which are compact.

21 We don't separate people on the basis of race when we  
22 draw Latino majority districts in South Texas because this is a  
23 majority Latino area, so I'm not really sure where the Shaw  
24 argument was going there.

25 Alex, if you could show the compactness score for

1 C 190 in Congressional District 23. There's a way to zoom in.

2 So here you see for Plan C 190 -- and there's an auto  
3 focus button that's the AF button or not.

4 And there you see -- you see the compactness scores for  
5 Congressional 23 in the proposed plan, .597 on one score and  
6 .134.

7 Go ahead and put the next sheet up.

8 TECHNICIAN: I'm sorry. This is for 190 or 195?

9 MS. PERALES: This is for 190. Now I would like you to  
10 put 185, please.

11 TECHNICIAN: Okay.

12 MS. PERALES: If there is some kind of compactness  
13 issue with Congressional 23 as it's proposed, then the State's  
14 district -- starting at the top, Alex, if you can pull it down --  
15 the following State-drawn districts would have worse compactness  
16 scores: 2, 5, 7, 9, 12, 14, 15, 18 -- let's go down to the  
17 bottom -- 28, 32, 34 and 35 on one measure or another would fail  
18 or compare worse to the proposed CD 23.

19 I believe also the State pointed out several  
20 characteristics of CD 23 that would imply that it was a Shaw  
21 violation, that it has a piece of San Antonio in it. Well, in  
22 the State's plan Congressional District 23 has San Antonio in it  
23 because that's where the incumbent lives so there's no difference  
24 there.

25 The fact that it goes to the border -- it goes to the

1 border in the State's plan as well and it goes to El Paso. Of  
2 course it goes to El Paso and perhaps it is almost the length of  
3 halfway to California, but that's the way the district is built  
4 in one way or the other.

5 So none of those characteristics we think undermine the  
6 compactness of the proposed alternative or demonstration showing  
7 in the Task Force plan.

8 Moving now right into 23. In the benchmark plan  
9 Dr. Alford's definition of a performing district would apply to  
10 23. There's no way an -- an opportunity district. Dr. Alford  
11 was asked a couple of times about an opportunity district and he  
12 gave a definition that it was Latino majority, that it had  
13 elected the preferred candidate either a majority of times or two  
14 out of three times. To them that's an opportunity district.  
15 There's no dispute about that.

16 On all fours it elected the preferred candidate two out  
17 of three times since its creation in 2006. And it was created in  
18 2006 by a federal court as an opportunity district.

19 Alex, do you have that piece of paper that's folded up?  
20 This is from Exhibit 200 and the State --

21 JUDGE SMITH: Well, now, Dr. Alford testified, as I  
22 recall, that it was created as an opportunity district, but that  
23 it, in fact, did not become a performing district. History shows  
24 it was not a performing district.

25 MS. PERALES: What he said was that it was trending.

1 You know, he knows that it elected the Latino preferred candidate  
2 in 2006 and 2008. He knows that's two out of three elections.

3 What he was suggesting is that his examination of it in  
4 2010 suggested that it was trending in a direction that it would  
5 not be. And then he looked at some reaggregated elections. He  
6 didn't tell us which ones, but he said he looked at some  
7 reaggregated elections and felt like it wasn't really performing  
8 as opposed to whether or not it was an opportunity district.

9 Now, with Mr. Downton we went over 13  
10 racially-contested general elections that have occurred  
11 since -- well, all the way back to 2002, most of which the State  
12 used in its own analysis and three additional ones that we found.  
13 And we talked about how the district had performed.

14 And here are the stats for it. It was right on the  
15 borderline in terms of reaggregated elections. On the all fours  
16 elections it had elected the Latino preferred candidate two out  
17 of three times. On the reaggregated it was almost a 50/50  
18 district. Out of 13 elections it had elected the Latino  
19 preferred candidate six times so it was right on the edge.

20 What I was going to point out next, Your Honor, is that  
21 the State made very systematic changes to this district to make  
22 sure that the win-loss record became two elections out of 13. So  
23 the win-loss goes from six -- winning six out of 13 to winning  
24 two out of 13 and losing 11.

25 And those are -- that is a very important part of our

1 claim, that the changes that the State made, although it slightly  
2 bumped up the Spanish surname voter registration, these changes  
3 were conscious and they were purposeful and they were intended to  
4 protect the incumbent who is not the Latino preferred candidate.

5           If the State had intended the new Congressional  
6 District 23 to be an opportunity district it would have left it  
7 alone where it might even have increased the Latino population of  
8 the district, add Latino voters, do something to be -- as  
9 Dr. Alford said or just leave it alone and let it naturally  
10 evolve. But that's not what the State did. They made quite a  
11 few changes, swapping in and out hundreds of thousands of people  
12 to get this desired result. It was Texas that changed this  
13 district and it was out of a concern for the incumbency of  
14 Mr. Conseco.

15           With respect to the proposed alternative by the Task  
16 Force, I don't -- I don't really know what to say in response to  
17 phrases like "lard it up" or "load it up." This is a very Latino  
18 area of the state. It runs right along the border. Of course,  
19 this is going to be -- if you -- if you reconfigure it and you  
20 bring in these other similar border counties you do get a more  
21 Latino district, but I don't think there's anything wrong with  
22 that and it's largely built out of whole counties.

23           JUDGE SMITH: I think that was Mr. Schenck's comment  
24 that he said it was loaded with up to 80 percent.

25           MS. PERALES: On the total population, yeah. The

1 Spanish surname voter registration in the proposed alternative is  
2 71.7. But mind you, this is in the context of creating seven  
3 Latino opportunity districts in this region. The fact that  
4 23 can be with these numbers and six other districts also be  
5 opportunity districts simply shows the enormous strength of the  
6 Latino population in this part of the state.

7           This is not packing because it doesn't -- it doesn't  
8 deprive other areas of having Latino opportunity districts. It's  
9 a big district. There's no doubt about it. But there are no  
10 Shaw indications here and there are no packing indications.

11           With respect to the general shape of it we would urge  
12 the Court to take a look at our Exhibits 304, 305 and 306, which  
13 are the historical configurations of this district back into the  
14 90s. Exhibits 304, 305 and 306 show a Congressional District 23  
15 that looks very similar to the one that we're proposing. It's a  
16 traditional configuration that we are proposing as a  
17 demonstration district.

18           With respect to Congressional 23 back in 2003, I  
19 believe the Supreme Court opinion notes that 23 at that time had  
20 not elected a Latino preferred candidate at all for the past  
21 decade. And the Court still found that it merited attention and  
22 protection. They said that it was on the verge. It was about to  
23 elect a Latino preferred candidate.

24           What we have here is an even stronger set of facts  
25 where a Latino preferred candidate was elected in two out of

1 three elections. I don't believe that anything in LULAC versus  
2 Perry or the prior facts of 23 suggests that the kind of  
3 alterations that the State made here that pretty much guarantee  
4 Latino electoral failure -- I don't believe that the case  
5 supports those kinds of changes.

6           Back in 2003 it was found that after the State had made  
7 these changes to 23 it only could elect in 13 out of 15  
8 elections. And according to our reaggregated elections analysis  
9 it will only elect in two out of 13, so these are very similar  
10 facts to what happened in 2003.

11           Your Honor, Judge Smith asked yesterday about Ryan  
12 Downton and his testimony regarding how he made the changes.

13           Alex, are you able to bring up the Downton testimony on  
14 swapping precincts, please? We can give a copy of this to the  
15 clerk. The first page, please. Can you zoom it out a little  
16 bit so we can -- oh, there we go, so we can see the trial  
17 transcript at 955, 956.

18           He didn't look for political races that would indicate  
19 whether a Latino preferred candidate could be elected, but he did  
20 try to make the district safer for Mr. Conesco and at least  
21 maintain Latino percentages by moving precincts in and out.

22           Next page, please.

23           He moved precincts in and out by looking at political  
24 performance data but was also working towards keeping those race  
25 numbers in a particular place.

1           Next page, please.

2           He was constantly, as he was swapping these precincts  
3 in and out, looking at Spanish surname voter registration and  
4 political performance.

5           Next page.

6           Here we have a discussion about the fact that he  
7 admitted that it was certainly possible that the precincts that  
8 he was bringing in had lower Latino turnout, so he could have  
9 been swapping out more-participatory Latinos for  
10 less-participatory Latinos.

11           The next page because it goes on from there.

12           Then he finally admits that in his deposition that  
13 that's exactly what he said and that it was also true that the  
14 possibility was that he was swapping in precincts that were more  
15 polarized or that had higher Anglo turnout than the precincts  
16 that he was swapping out.

17           Is there a next page, Alex?

18           So finally he admitted that precinct by precinct if a  
19 majority Hispanic area tended to have more votes for the  
20 Republican candidate he would be more likely to include it.

21           This is the testimony, Your Honor, that we believe  
22 supports our contention that the changes were systematic and race  
23 conscious at every turn.

24           And then finally returning to this question of  
25 incumbency protection. What the Court said in LULAC versus Perry

1 is that incumbency protection may be a very legitimate concern  
2 but that you cannot preserve incumbency at the cost of Latino  
3 political opportunity. Those were the facts presented in 2006  
4 for the Supreme Court decision and those are exactly the facts  
5 that we have here.

6 The Court -- the State tried a partisan incumbency  
7 protection argument in LULAC versus Perry, and on these facts and  
8 with what was happening with respect to Congressional 23 it was  
9 rejected.

10 Does the court have any questions? I'm finished moving  
11 through.

12 JUDGE GARCIA: I don't.

13 MS. PERALES: Thank you.

14 JUDGE SMITH: I'm sorry. Is that the end of your  
15 presentation?

16 MS. PERALES: Yes, Your Honor, unless you have any  
17 questions.

18 JUDGE SMITH: Well, I just wanted to ask you about  
19 coalition districts and I'm thinking particularly of Dallas/Fort  
20 Worth. And I hope and trust this will be briefed thoroughly by  
21 both sides, but what do you -- what do you do with the statement  
22 from Bartlett, Supreme Court, where it says, "Nothing in Section  
23 2 grants special protection to a minority's group right to form  
24 political coalitions"?

25 MS. PERALES: Well, I know that the facts in Bartlett

1 were dealing with crossover districts, so I'm not sure what the  
2 Court was saying there, whether the Court meant coalitions with  
3 Anglos to create what are known as crossover districts, which  
4 were the districts that issue in Bartlett or whether the Court  
5 was implying something else.

6 I think we have case law in the 5th Circuit that does  
7 talk about coalition districts being appropriate when Latinos and  
8 African Americans, for example, vote together.

9 JUDGE SMITH: Yes, I think we do. And of course this  
10 was after that is the reason -- it's the most recent statement  
11 that I can find from the Supreme Court on that. And I'm sure the  
12 parties will deal with it in briefing, so okay.

13 MS. PERALES: It's not my recollection that the court  
14 really addressed minority coalition districts in that case but  
15 perhaps only crossover districts, but it's been a while since I  
16 read it.

17 JUDGE SMITH: It was a crossover case and the Court  
18 said that. I was just focusing on that one statement which is  
19 pretty strong.

20 MS. PERALES: Thank you.

21 JUDGE SMITH: Okay.

22 JUDGE GARCIA: Thank you, Ms. Perales.

23 MS. PERALES: I have to leave now for the airport, Your  
24 Honor. I have to give a speech in Los Angeles, but I know that  
25 my colleagues will do an able job with the rest of the hearing.

1 JUDGE GARCIA: Okay. You're excused.

2 MS. PERALES: Thank you.

3 JUDGE GARCIA: Thank you. Anyone else on this side?  
4 Okay. Anything from the State?

5 MR. MATTAX: Thank you, Your Honor. Very briefly on  
6 the statistics. The PowerPoint I had--that's where we were  
7 trying to show the Democratic and the Republicans in the  
8 different counties--as Judge Rodriguez pointed out, was very  
9 insufficient to prove the point I was trying to make. The other  
10 chart I have is also insufficient so I'm afraid I'll have to give  
11 the Court a chart like this. But let me make my point.

12 I'm looking at just two districts in Dallas County.  
13 The testimony of Ryan Downton was, "I worked with Representative  
14 Anchia"-- he's in 103--"to increase the SSVR percentages over  
15 50 percent." He went on to explain he couldn't do that, that  
16 Representative Anchia was a Democrat and they were trying to  
17 increase as much as possible in Dallas the Hispanic citizenship  
18 in his district by looking at SSVR. Now, if you look at 103 it  
19 is overpopulated by five percent, the maximum. And it has 67.7  
20 percent Hispanic voting age population, but only 44.6 percent  
21 citizen voting age population.

22 So what does that tell us? In an effort to try to  
23 increase a district to try to get it as Hispanic as possible we  
24 went to the maximum deviation. Just the opposite of what the  
25 plaintiffs are saying we're doing.

1           Let's look at another district in Dallas, 104. I  
2 believe this is Representative Alonzo's. His percentage of  
3 Hispanic voting age population is 69.2 percent, but his HCVAP is  
4 only 51.7. And, again, his deviation is slightly less because  
5 the State was able to get his HCVAP over 50 percent, but his  
6 deviation is 3.07 percent.

7           My point is merely relying on raw statistical numbers  
8 like Professor Kousser did without any analysis of what they mean  
9 doesn't prove discriminatory intent. And, in fact, if you dig  
10 deeper into these numbers to see how they're split up across the  
11 state and the different counties, I think it proves just the  
12 opposite. And we will perform an analysis with a better chart  
13 for the Court.

14           JUDGE RODRIGUEZ: If I can interject here, Mr. Mattax,  
15 C 190, I think earlier you told us, does get to an HCVAP of 50.4  
16 percent.

17           MR. MATTAX: Correct.

18           JUDGE RODRIGUEZ: But a district could not be created  
19 there because of compactness issues?

20           MR. MATTAX: It had like a 55 percent compactness  
21 score. It was like off the charts.

22           JUDGE RODRIGUEZ: So in light of what we just heard  
23 here about the criticism of compactness issues on other areas,  
24 how did that C 190 fare compared to the other alleged  
25 deficiencies?

1           MR. MATTAX: Well, the testimony of Todd Giberson -- it  
2 basically was far worse than any other map that was presented. I  
3 mean, it was way over. It was way above. I think most of them  
4 for the --

5           JUDGE RODRIGUEZ: But I think the criticism, if I  
6 understood correctly, that the plaintiffs were articulating was  
7 not the proposed maps but the enacted map.

8           MR. MATTAX: Oh, correct. And the score in 190 was  
9 way, way much worse than any other map in the State plan. Far  
10 worse than any of those. I mean, it was off the charts, if you  
11 will.

12           Let me turn briefly to Houston. And I'm not going to  
13 pull up anything on there because there's not enough time. But  
14 if we look at the House journal, regular session, this session,  
15 April 27th, 2011. This is an exhibit. It's debate on HB 150.

16           This is Representative Coleman and this is talking  
17 about the map the Democrats got together and created in the  
18 Houston area. And again, as I said, they're the ones that drew  
19 the lines with respect to the population deviations.

20           This is what he says: "What we've all worked together  
21 in the affected districts that are a part of Speaker Woolley's  
22 amendment and have agreed to a substitute amendment that the  
23 members believe is a good part of the plan to put into HB 150."

24           JUDGE RODRIGUEZ: Well, let me stop you here though.  
25 That acknowledgement or acquiescence, was that after the

1 direction that they couldn't do anything to alter Republican  
2 maps?

3 MR. MATTAX: Well, the instructions that were given, as  
4 testified by Mr. Interiano, was that with respect to one district  
5 there had been a request earlier on to increase the SSVR by  
6 50 percent, that that request needed to be honored, but that  
7 there were changes to Republican districts. And he testified he  
8 worked on the floor, they went off the floor for three hours,  
9 they worked on the floor, they did make changes to Republican  
10 districts.

11 And what I'm suggesting though is at the end of the day  
12 obviously the members didn't like the whole map, but at least  
13 with respect to the map that they had worked on with the  
14 Democratic portions of Harris County, that was what was stated on  
15 the floor.

16 Let me talk briefly about the Collin County, Hidalgo  
17 County increasing to five. And I think the argument that's being  
18 made is, well, even though you have a population deviation  
19 of -- I believe I said 7.2 percent, if you increased Hidalgo  
20 County to five. Well, it seems to me if that's the way you're  
21 going to interpret it, the county line rule, you have to do that  
22 in Collin County too. So then you have an additional 7.2  
23 percent. And so what you see is ripple effects throughout the  
24 map where you're widening your population deviations.

25 The only way I could see you could try to justify that

1 because then you would be not following your county line rule.  
2 So then you have to explain to the Court why didn't I do it and  
3 it would be because I wanted to draw a district based on race.

4 And that's the issue we have here because that's  
5 essentially what we said. We're not going to follow what we  
6 normally do, but let's try to draw an additional district there.

7 Now, I think there was also testimony, and we've  
8 talked, I think, quite often--I'm not going to get into this any  
9 further--about trying to draw an additional district in the  
10 Hidalgo/Cameron area. And we talked about the county cuts and  
11 how every map would increase the county cuts. And again when you  
12 get to Galveston Island, like I had suggested, or Galveston  
13 County, excuse me, you end up splitting that surplus between two  
14 counties which I think is prohibited by the constitution.

15 Now, one last thing on Hidalgo County. I think this is  
16 a question Judge Rodriguez asked is that when you're looking at  
17 the maps that were up there showing the Republican vote and  
18 drawing a map based on Republican vote, I think the argument was  
19 if you look at the split precincts, well, how could you decide  
20 what to do.

21 The testimony was is you had the representatives in the  
22 room from that area. And I would suggest to the Court they knew  
23 where the voters were, not based on race but based on where the  
24 voters were that would vote for them. And so when you're in  
25 there drawing it on those levels it's -- again, no evidence it is

1 based on race. It is based upon politics and trying to put  
2 voters that will vote for you based on a political issue. So I  
3 think that explains how those lines were drawn ordinarily in  
4 Hidalgo.

5 Anything further?

6 Thank you, Your Honor.

7 JUDGE GARCIA: Thank you.

8 MR. SCHENCK: On the Section 2 question I'm glad we're  
9 finally talking about something important, really important, and  
10 I'm sorry that Ms. Perales can't be here.

11 I know we're going to address this further in brief,  
12 but there is a basic and profound statutory construction question  
13 that the Court has to answer. The Supreme Court has identified  
14 it over and over again with respect to the amendments to Section  
15 2 in 1982.

16 And there are at least two constitutional problems  
17 hanging heavily over a broad reading of Section 2 that would call  
18 for it to be read to mandate race-based separation of voters into  
19 districts without some -- real discrimination, something that  
20 looks a whole lot like intentional discrimination.

21 We'll brief this more fully but the two of them are  
22 the 14th amendment, which Justice Kennedy has been very clear  
23 about in his decisions. For example, in Miller versus Johnson  
24 where Georgia was attempting to defend a race-based gerrymander  
25 as required by Section 5, this is Justice Kennedy: The Justice

1 Department's implicit command that States engaged in  
2 presumptively unconstitutional race-based districting brings the  
3 Act -- not Georgia's statute, but the Act -- once upheld as a  
4 proper exercise of Congress's authority under Section 2 of the  
5 15th amendment into tension with the 14th Amendment.

6           As we recall in Katzenbach itself, Congress's exercise  
7 of its 15th Amendment authority, even when otherwise proper,  
8 still must be consistent with the letter and spirit of the  
9 constitution.

10           If we're running through Gingles in order to draw a  
11 redistricting -- redistrict on the basis of race, and we're not  
12 fixing something that looks like discrimination in the electorate  
13 where we have a real legitimate concern that people are -- and  
14 people have every right to vote on whatever basis they want, but  
15 if the racial polarization in voting is based on race,  
16 particularly in a multi-member district, but even potentially in  
17 a single-member district, there is the risk that the officeholder  
18 that gets elected in that situation is -- is acting on the basis  
19 of race. Finally we've got a state actor. Something short of  
20 that turns Section 2 into something very problematic.

21           JUDGE RODRIGUEZ: Well, give me a concrete example of  
22 that. If your interpretation is correct, and further the State's  
23 interpretation that they were engaged in political gerrymandering  
24 is correct, then what's left of Section 2? And give me a  
25 concrete example of what would be left.

1           MR. SCHENCK: Well, there's lots of potential to show  
2 polarization on the basis of race. There's still multi-member  
3 districts out there all over the place at various places. The  
4 Texas Supreme Court --

5           There's also the potential for proof as apparently  
6 Ms. Perales was identifying in LULAC versus Perry that there's  
7 race or race-based voting that's involved in the -- in  
8 the -- explaining the block voting patterns. But where we don't  
9 have that proof and we don't have it here, in fact, partisan  
10 affiliation, whether we're talking about the rates at which  
11 people of different ethnicities vote for particular candidates  
12 controlling only -- switching in and out the partisan preference,  
13 whether we're talking about the propensity to vote in one of the  
14 two primaries or the propensity to straight-party ticket vote,  
15 it's all showing the same thing: It's voting on the basis  
16 of -- of partisan -- of preference.

17           JUDGE RODRIGUEZ: And so again under your  
18 interpretation then how would anyone develop the evidence to  
19 establish this absent, I guess, some kind of survey after the  
20 vote?

21           MR. SCHENCK: Well, that's exactly what we're doing in  
22 every Section 2 case, right? That's what the Gingles proof here  
23 was. The problem was the plaintiffs originally--well, at least  
24 Dr. Engstrom--only wanted to look at Latino surname candidates.  
25 That's why I asked him to also run some races where Latinos were

1 faced with a choice between two white candidates or a case where  
2 Latinos were faced with a choice between a white and a black  
3 candidate, or where blacks were faced with a choice between white  
4 and black Democrats.

5           And what we saw when we actually did that analysis is  
6 there's no movement. When they're faced with -- when voters are  
7 faced with a choice of a preference based on a partisan  
8 affiliation or race, it's a lot solid that they're voting on the  
9 basis of partisan affiliation.

10           JUDGE RODRIGUEZ: And that was your general election  
11 data?

12           MR. SCHENCK: Yes. And that's the only election we  
13 have where they're compelled with this -- this decision of which  
14 preference they're going to express.

15           Now, it's possible that you could rebut that. The  
16 plaintiffs in this case haven't even tried it. They just say we  
17 don't have to do it. We ran through Gingles one, two, three;  
18 we're entitled to a race-based districting remedy.

19           And I'm sorry if I said something about loading up the  
20 district, but the problem is once we turn the switch on to we're  
21 going to start separating people on the basis of race -- and  
22 Justice O'Connor, Justice Kennedy, everyone at the Supreme Court  
23 is uncomfortable for a reason. And I'll take you back to how we  
24 started all this, back around Baker versus Carr. Take a look at  
25 South versus Peters. This is Georgia's attempt -- what do they

1 call that thing?

2 MR. COHEN: The county unit.

3 MR. SCHENCK: The county unit system. It looked  
4 ridiculous. It ended up having way over -- there was one  
5 person/one vote problems, race problems, something else.

6 Justice Douglas says this in his dissent from denial of  
7 relief in this case. "The creation by law of favored groups of  
8 citizens and the grant to them of preferred political rights is  
9 the worst of all discriminations under a Democratic system of  
10 government."

11 Okay. At the time Gingles was decided four votes would  
12 have not looked to the race of the candidate. Five votes would  
13 have done at least that. That's the Engstrom refusal to control  
14 for what do we look at when we get different races of candidates  
15 involved.

16 And if we're not fixing something that looks like  
17 racism in the electorate, why are we separating people on the  
18 basis of race under Section 2? What we're doing is we're  
19 carrying up the equal protection problem from what Texas is  
20 dealing with and we're pushing it into the text of a statute that  
21 the Supreme Court says itself is manifestly ambiguous.

22 I mean, that's the whole point of Gingles. We're  
23 looking at senate factors. We're not looking to the text. The  
24 text says where has somebody been denied the equal opportunity to  
25 participate in the electoral process or elect a candidate of

1 choice. If there's not a race-based problem why are we running  
2 to a race-based separation of people as a remedy at the  
3 time -- and this is another thing, we'll brief this, but bear in  
4 mind -- 1985 Gingles is decided? '86?

5 At that moment in time the equal -- at that moment in  
6 time the equal protection clause was held to be directly  
7 applicable to the states which is clearly correct. The due  
8 process component of the Fifth Amendment to the Constitution  
9 includes an equal protection component.

10 However, in 1986 the Supreme Court had read it  
11 consistently to leave Congress a much broader rein when drawing  
12 affirmative action or benign discrimination programs such as the  
13 type that is being proposed here as a reading for Section 2.

14 Fast forward to 1995. Adarand Constructors. The  
15 Supreme Court tires of differential treatment of the states and  
16 Congress for purposes of race-based discrimination, even  
17 race-based discrimination for a benign purpose.

18 So now what we're doing by pushing on Section 2, by  
19 pushing it beyond fixing something that can look like racial  
20 discrimination, we're making Section 2 survive strict scrutiny.  
21 That's why the Supreme Court keeps pulling back on Section 2.

22 The second problem that an overly liberal and loose  
23 reading of Section 2 would create is that the Supreme Court  
24 already had decided in Boldon that the 15th Amendment, by which  
25 Congress derives the authority to draw Section 2 and to cure

1 something that looks like vote dilution, reaches only to  
2 intentional invidious discrimination.

3           That is the type of thing that we saw in these  
4 multi-member districts. For instance, White versus Regester  
5 where we were running elections in the state of Texas in  
6 multi-member units where people were being oppressed on the basis  
7 of their race. It was invidious discrimination and it was wrong  
8 and it was fixed.

9           Now fast forward to 1982. Congress, using its  
10 enforcement powers, writes compromised legislation which  
11 ultimately causes the Court to fracture around this opinion in  
12 Gingles.

13           The question remains unanswered whether a  
14 statute -- whether the Supreme Court, having decided the scope of  
15 the 15th Amendment, whether Congress was free to overrule it.  
16 That's the Boerne versus Flores.

17           Either of those problems can and should be avoided here  
18 by constraining this case and constraining the proof to something  
19 that looks like discrimination before we say, for instance, to  
20 Congressman Conesco, I know the courts drew this district with a  
21 majority of Hispanic voting population so that they would have a  
22 chance, the chance they were denied in 2006, to elect a candidate  
23 of their choice. I know you ran a hard campaign. I know you  
24 won. But sorry, you weren't supposed to. And you know what  
25 we're going to do to make sure that doesn't happen? We're going

1 to take white and African American people and we're going to put  
2 them someplace else, and we're going to take Latinos and we're  
3 going to increase their population in the district in which  
4 you're going to run. Sorry you're the incumbent. We're going to  
5 ignore your incumbency and we're going to try to turn that  
6 district into something else. That's the problem.

7           And Ms. Perales misunderstands my concern about her  
8 demonstration map. It's not that it's physically non-compact.  
9 It's conceptually racially non-compact.

10           The problem that Justice Kennedy, I think, was trying  
11 to describe with this 25 district, which ran all the way from  
12 Austin down to Webb County, was that it was relying on something  
13 like racial essentialism. You're just assuming because you can  
14 hang the same racial label on these people that they all think  
15 the same way and are going to vote the same way. That's a  
16 stereotype that we don't want to engage in.

17           So you had urban voters in east Austin, urban voters in  
18 Laredo and everybody in between stapled together. Her district  
19 out in 27 pushes up the Hispanic citizen voting age population to  
20 77 something percent.

21           We're being accused of packing in this case on numbers  
22 way below that. And yet she is saying we were supposed to kick  
23 Congressman Conesco to the curb so that she could take the voters  
24 from downtown San Antonio to downtown Laredo and to downtown  
25 El Paso and corral everybody else in the middle and say start

1 doing what we want you to do.

2           And the reason we had to get those numbers so high is  
3 that the Hispanic citizens and the Anglo citizens and the African  
4 American citizens who live in the middle of the state don't think  
5 and don't vote the same way as people in downtown Laredo or  
6 downtown San Antonio or anywhere else. Everybody has an equal  
7 right to vote.

8           So we're going to have to -- we're going to brief this  
9 some more. It's an interesting and very important legal  
10 question. And to be clear, the Voting Rights Act has been  
11 successful. That's a good thing. Texas has been successful. We  
12 have drawn all kinds of population into this state map. That is  
13 something to be rejoiceful about and we are.

14           And we look for opportunities on this map without  
15 subordinating traditional redistricting principles to put  
16 together a district that is reasonably compact, not overly  
17 compact to be sure, but that connects up Austin and San Antonio  
18 with plenty of evidence that those voters have a lot in common in  
19 a higher-growth area and we did that. Sure enough. And we are  
20 within our rights to do it.

21           And lastly with respect -- one evidentiary point. With  
22 respect to Ryan Downton and his attempt to make that district  
23 both more Hispanic--when I say "that district" I mean CD 23--and  
24 to perform better for the incumbent, he did both things.

25           The opportunity, equal opportunity in that district, is

1 there. If Hispanic or Latino voters in the district want to get  
2 together and knock on doors, nobody can stop them from electing  
3 anybody on the basis of those numbers.

4 He did not have -- and she ran through that testimony  
5 very quickly. She did not linger on what he actually said.  
6 She's talking about the question that she asked him and not his  
7 answer.

8 Judge Smith, you asked the question while he was here  
9 on the stand: Did you have the data -- as you were looking for  
10 highly Hispanic districts that voted for McCain, did you have the  
11 data that would show you whether there was low Hispanic turnout  
12 or what ethnic numbers were there? He didn't. All he was doing  
13 was trying to find people that would both have the opportunity to  
14 elect whoever they wanted to in terms of Hispanic population and  
15 also tended to vote Republican. Those voters have the same right  
16 to vote however they want. People can knock on their doors and  
17 turn them out however they want.

18 And lastly on the reconstituted election analysis in  
19 that district, D-2, Exhibit D-2, which is in your record, is the  
20 State's reconstituted election analysis. We didn't cherry-pick  
21 races to run. We ran the same 10 races in every district on  
22 every map across the state.

23 CD 23, as Dr. Alford testified, was electing the  
24 Democrat three out of 10 races. Three out of 10. That's not  
25 performing. It went down to one out of 10, still not performing

1 I would agree, but it is an opportunity district nonetheless.  
2 The voters in that district are being treated fairly as they are  
3 all over both of these maps. Thank you.

4 JUDGE GARCIA: Thank you.

5 MR. GARZA: Just a couple of points. First, in  
6 response to Mr. Mattax's suggestion that the reason District 103  
7 is overpopulated was because of Mr. Anchia's insistence of  
8 getting his district -- keeping his district at over 50 percent  
9 of SSVR, I would point the Court to Plaintiff's Exhibit 6 at page  
10 17 of the statistics that shows -- sorry. That shows that in  
11 the -- in Plan H 201 developed by MALC, the plan that is meant to  
12 reduce or maintain county cuts equivalent to what the State drew,  
13 District 103 has maintained over 50 percent of SSVR and has a  
14 deviation of 1.02 above the -- above the ideal as opposed to over  
15 four percent in the State's plan.

16 And moreover, we're working with the State to develop  
17 and -- look to submit a declaration from Representative Anchia in  
18 which he has a different recollection of the discussion between  
19 himself and the -- and the State's map drawer that we will offer  
20 as an offer of proof.

21 In terms of the argument regarding interpretation of  
22 the Voting Rights Act, let's be very clear. The interpretation  
23 and the manner in which plaintiffs have gone about proving  
24 Section 2 violations in this case is consistent with the manner  
25 in which courts have interpreted Section 2 since its amendment in

1 1982.

2           And let's be very clear that the amendments in 1982  
3 were meant specifically to remove intent as a requirement of  
4 proving racial discrimination in voting. That was the intent of  
5 the Congress. The interpretation, in fact, that the State is now  
6 arguing is -- would be a complete alteration of the manner in  
7 which Section 2 has been consistently applied since 1982 and  
8 since the pronouncements in Thornburg versus Gingles in 1986,  
9 meant to remove proof of intent as a requirement for the  
10 plaintiffs. And, again, we'll -- we'll also brief those issues.

11           And I might say that Perry versus -- LULAC versus  
12 Perry, and every case that has been decided up until this point  
13 after Thornburg versus Gingles, announced the standards for  
14 proving a violation of Section 2 would have been unconstitutional  
15 interpretations of Section 2 under the interpretation that is  
16 being offered by the State for how we should view Section 2  
17 violations.

18           And let's also be clear about what is going on with  
19 District 23. The question is not did the voters make a mistake  
20 with Mr. -- with the election of Mr. Conesco. Let's be clear.  
21 The State did not maintain District 23 in the fashion that it was  
22 when it elected Mr. Conesco. They altered it. They're the ones  
23 that think that the results were wrong in 2010 and want to ensure  
24 that the results are different henceforward. They're the ones  
25 that have made the change in the opportunity of the Latino

1 community to develop a plan for District 23. They're the ones  
2 that altered the electoral history of District 23.

3           The districts that were offered by Ms. Perales on  
4 behalf of the Task Force and on behalf of other plaintiffs for  
5 District 23 are Gingles opportunity districts. They are -- and  
6 as Ms. Perales indicated, should be viewed in terms of the  
7 totality of the number of districts that we produced on a  
8 congressional plan. These are not remedy plans and they're  
9 certainly not plans that have the imprimatur of the State. These  
10 are plans that we are required to present to the --(coughing in  
11 background)-- because Thornburg versus Gingles has said that you  
12 have to submit a plan that has at least one more majority  
13 minority district than what's been developed by the State.

14           The Gingles one requirement is we are not free from  
15 meeting that burden. I mean, we are caught in a catch-22  
16 under -- under the interpretation of Section 2 that is offered by  
17 the State. If we produce a plan that complies with Thornburg  
18 verses Gingles, Gingles 1 requirement, then we are -- we're being  
19 told that's a racial gerrymander and we're asking the Court to  
20 apply and adopt a racial gerrymander. If we don't then we don't  
21 meet the requirement under Gingles 1 that we produce a district  
22 that is at least 50 percent citizen voting age population of a  
23 minority and is one more than what the State's developed. There  
24 would be no way to prove a Section 2 violation under the State's  
25 interpretation.

1           JUDGE GARCIA: Thank you. Anything here? Okay. First  
2 I want to thank the parties for presenting an excellent  
3 presentation of their case. Both parties have done a magnificent  
4 job narrowing the issues. And by cooperating fully I think we  
5 only had two or three, if any, objections to exhibits.

6           I also want to thank, of course, the Legislative  
7 Council for an extraordinary good job which is the usual manner  
8 for them.

9           What is the time-line in presenting proffers of  
10 evidence for depositions? Have you-all agreed on that? And I  
11 hope it's one week or 10 days or less.

12           MR. MATTAX: I think that we have one deposition we  
13 need to take from one of the experts and I think his first  
14 availability was next Saturday. So although we're all tired I  
15 guess we'll do that next Saturday. And so I think that hopefully  
16 may be the last time. I'll turn it over to you guys for the  
17 proffers. So a week from this Saturday, so --

18           JUDGE GARCIA: Okay.

19           MR. MATTAX: I'm thinking that may be -- let's just  
20 make that the end date.

21           MR. GARZA: (Indicating.)

22           JUDGE GARCIA: Okay. And then thereafter you'll have  
23 two weeks, both parties to simultaneously file their trial brief  
24 or brief specifically, of course, citing the law, referring to  
25 the record if necessary, referring to exhibits and the specific

1 page in the exhibit, that is volume exhibit or anything else.

2 I know that one document was filed either yesterday or  
3 today containing 6,000 pages. Obviously we're not going to look  
4 at all 6,000. Be certain to precisely identify any document  
5 specifically so that we can expedite this matter.

6 And again I suppose you haven't heard anything about  
7 the pre-clearance matter? Is that right? The State would  
8 rather -- the DOJ is reaching some --

9 MR. COHEN: Your Honor, the DOJ is to file its answer  
10 on Monday.

11 JUDGE GARCIA: Okay. That's an answer or  
12 recommendation?

13 MR. GARZA: No, that's their answer.

14 MR. SCHENCK: This is the answer in which it will be  
15 the equivalent of their position on pre-clearance.

16 JUDGE GARCIA: Okay. And thereafter then the time-line  
17 for the Court?

18 MR. COHEN: There's a Wednesday pretrial conference by  
19 telephone that should set dates for that, and we'll obviously --

20 JUDGE GARCIA: Okay. What is your thinking about when  
21 they might reach a decision, late October, early November?

22 MR. SCHENCK: Yes, Your Honor. We've been pushing for  
23 that.

24 JUDGE SMITH: So specifically on this deadline for the  
25 briefing, as I understand it, the deposition is going to be on

1 Saturday the 24th. So could we agree that the deadline for the  
2 first simultaneous briefs would be two Fridays from then, which I  
3 believe is Friday, October 7th? Would that -- I mean it's two  
4 weeks minus a day.

5 JUDGE GARCIA: And then --

6 JUDGE SMITH: And then two weeks later which would be  
7 the 21st would be simultaneous replies? Is that --

8 JUDGE GARCIA: Okay. Did you get those dates down?

9 MR. SCHENCK: Yes, sir.

10 JUDGE SMITH: Is that consistent with what we talked  
11 about?

12 JUDGE GARCIA: Mr. Garza, you got those dates down?

13 The reply --

14 MR. GARZA: Yes, Your Honor. And may I suggest that  
15 perhaps we set a time limit as well, maybe the end of the  
16 business day on Friday, each of those Fridays, or 6:00 o'clock so  
17 that we don't have to be looking at our computer till midnight to  
18 see if something's comes in.

19 JUDGE SMITH: 6:00 p.m. sounds reasonable.

20 JUDGE GARCIA: Or midnight.

21 (LAUGHTER.)

22 JUDGE SMITH: 6:00 p.m.

23 JUDGE RODRIGUEZ: Can we have a specific date for the  
24 proffers just so we're all clear on the dates? And what I heard  
25 was there was going to be a deposition on September the 24th.

1 MR. MATTAX: Correct.

2 JUDGE RODRIGUEZ: So proffers by the 26th? Is that --

3 MR. MATTAX: I think the 23rd would be this Friday and  
4 that might be best. Well, actually the problem with the  
5 proffers -- we need those in earlier because until I see them I  
6 don't know if I have to take any depositions. So perhaps if we  
7 made it next Wednesday and then -- because I didn't want to push  
8 off depositions and then push this whole thing down the road.

9 MR. GARZA: Let me just say that MALC has submitted all  
10 our proffers to the State. We did that several days ago. We  
11 haven't heard back.

12 MR. MATTAX: Right.

13 JUDGE RODRIGUEZ: So the deadline for proffers is what?

14 MR. MATTAX: I would suggest --

15 MR. VERA: We gave you our proffers two days ago.

16 MR. MATTAX: Yeah. Well, then let's just say when all  
17 the proffers are in then all the proffers are in. And we can --  
18 I'll look at them this weekend and we'll decide what depositions  
19 we need to take, get those done next week, and the cutoff will be  
20 next Saturday -- a week from Saturday on the latest deposition,  
21 so --

22 JUDGE GARCIA: And you got the trial brief dates?

23 MR. GARZA: Yes, Your Honor.

24 JUDGE GARCIA: Okay. Anything else?

25 JUDGE RODRIGUEZ: I would suggest -- I would personally

1 be benefited by receiving copies of the various PowerPoints that  
2 were used for closing. It's not evidence so I would not submit  
3 those as exhibits, but if you-all could provide the three of us  
4 courtesy copies of all the PowerPoints used during closing, I  
5 would appreciate that.

6 MR. SCHENCK: May I suggest -- I'm sure we're serving  
7 them on each other because it would be helpful for me to have --

8 JUDGE RODRIGUEZ: Okay. And in regard to the DOJ  
9 issue -- I mean at some point in the event that the District  
10 Court of the District of Columbia doesn't timely issue a  
11 decision, I'm assuming that the various parties are all going to  
12 confer with each other and make advisories or recommendations to  
13 us on how to proceed in the absence of a ruling?

14 MR. GARZA: Absolutely, Your Honor. I mean, I think at  
15 some point it becomes -- it reaches a critical stage. And we've  
16 talked among ourselves on the plaintiffs' side and we're glad to  
17 make an announcement publicly before the Court that we  
18 haven't -- we haven't decided on a specific date, but at some  
19 point we intend to come to the Court seeking an injunction from  
20 any election activities going forward with these plans unless it  
21 appears that pre-clearance will be forthcoming.

22 The way the case law stands now the State cannot  
23 enforce these plans in any way and any attempt to enforce them  
24 would be a violation of Section 5. And I believe all of the  
25 plaintiffs or most of the plaintiffs have included a Section 5

1 cause of action within our -- our complaints against the State.  
2 And I think -- I think that we may not be there today, but I  
3 think we're approaching that critical stage fairly soon.

4           And one of the things that will for us that is -- that  
5 is critical to that issue is, number one, what the United States  
6 responds in their answer to the complaint that's been filed by  
7 the State, that's critical.

8           If the State -- if the United States is not going to  
9 argue that there's a Section 5 violation then that means we act  
10 in one way. If they -- if they are actively going to challenge  
11 the viability of at least the two plans that are before this  
12 Court then that alters our -- our perception.

13           And the second critical date that's approaching is  
14 there is, as I understand it, a pretrial scheduled conference  
15 with the Court on Wednesday next week. And depending on how the  
16 Court reacts both to the motion for summary judgment that has  
17 been filed by the State and to DOJ's answer to the complaint will  
18 also trigger a response or a discussion among the plaintiffs  
19 about what the next critical point is.

20           And the further we get into September, of course, then  
21 we start bumping up against the election schedule and potential  
22 enforcement of the unprecleared plans by the State.

23           MR. SCHENCK: If I might add, I think Judge Collier is  
24 a little ahead of us. She made pretty clear her understanding  
25 that Article 3 invested in her some abilities that if we get

1 close to the filing deadline on November 12th we may have -- that  
2 Court is -- may be issuing an order that would move back the  
3 filing deadline as well. So I think --

4 JUDGE RODRIGUEZ: All of which would stay our ability  
5 to rule on certain issues.

6 MR. SCHENCK: It would, which is why frankly I'm  
7 perfectly content to assume in a state as diverse and with as  
8 many districts as Texas has that the DOJ will take whatever  
9 position it takes. This is why we filed a summary judgment  
10 motion in advance of their answer. We want the issue tee'd up.  
11 We want a decision quickly.

12 So we're in a position, I think, to do that. It's a  
13 legal question. I want -- we would like to see legal answers.  
14 We would like to get the case resolved. So we don't need that  
15 order out of either this court or that court, but the DC District  
16 Court is clearly aware of the deadlines in this. It already has  
17 expressed some interest in doing what is necessary to advance --  
18 and in the meantime, of course, we'll try to push as hard as we  
19 can to get a decision.

20 JUDGE RODRIGUEZ: Mr. Garza, if I could impose on you  
21 the responsibility to provide the three of us a copy of the DOJ  
22 answer so at least we have some idea among our own  
23 chambers -- we've got a lot of research and potential writing to  
24 do and in a lot of ways our hands are tied for some period of  
25 time. So I'd like to be personally apprised of what's going on

1 so I can allocate my workload accordingly.

2 MR. GARZA: Absolutely. I'd be glad to do that.

3 The other thing that I would add to what Mr. Schenck  
4 has related to the Court is we weren't involved in the initial  
5 pretrial conference that was held. We are now -- that is the  
6 Mexican American Legislative Caucus has now intervened in that  
7 litigation. We intend to participate in the next one.

8 But my reading of the law is that it's this Court that  
9 has the authority to modify election schedules, to order in  
10 court-ordered plans, et cetera. Not the DC court. The DC court  
11 has a limited jurisdictional authority and that is to determine  
12 pre-clearance and to determine whether the plans should be  
13 pre-cleared. And similarly, as this Court's hands are confined  
14 in terms of Section 5, that it can't review the substance of a  
15 Section 5 violation, but it must act based on the determinations  
16 there.

17 Similarly the DC court is constrained, it seems to me  
18 at any rate, from ordering a plan in Texas or ordering  
19 modifications of elections scheduled here. But this Court is  
20 free to do that if a viable plan is not in place by a date  
21 certain that -- and the critical test is whether it gets into a  
22 situation where the election schedule is going to be disrupted or  
23 if it is viable to move forward with an election absent the  
24 forthcoming pre-clearance that is required.

25 MR. SCHENCK: I'll let Mr. Garza explain that to

1 Judge Collier.

2 JUDGE RODRIGUEZ: I'd be glad to.

3 (LAUGHTER.)

4 MR. SCHENCK: Yeah.

5 JUDGE GARCIA: Okay.

6 JUDGE RODRIGUEZ: Well, at some point I guess the State  
7 could acquiesce with the plaintiffs in requesting that this panel  
8 move forward with the drawing of a map.

9 MR. SCHENCK: Correct.

10 JUDGE RODRIGUEZ: So all I'm asking personally is just  
11 I'd like to be kept apprised because we have a lot of work to do.  
12 And the 5th Circuit is busy but Judge Garcia and I are incredibly  
13 busy here. We're short a judge. It's been short now three and a  
14 half, four years, but who is counting, and we have work to do.

15 MR. GARZA: And we would offer -- MALC would offer to  
16 assist the court and develop a plan for the Court's  
17 consideration.

18 JUDGE GARCIA: I'm sure you would.

19 (LAUGHTER.)

20 MR. VERA: We'll offer to draw the whole map for you.  
21 Don't worry.

22 JUDGE SMITH: And if at any point the parties feel that  
23 a hearing is -- is necessary, we don't want to waste people's  
24 time and everything but, I mean, I think --

25 JUDGE GARCIA: Let us know what we need to do.

1           JUDGE SMITH:  -- that this Court anticipates that that  
2 might be available just rather doing things on paper if we need  
3 to.

4           JUDGE RODRIGUEZ:  Perhaps a status report.  We could  
5 know what is going on at either DOJ or the district court.  We  
6 could do something telephonically as well.

7           JUDGE GARCIA:  Okay.  All right.  Thank you.

8           MR. BLEDSOE:  One more item, Your Honor, if I might.  
9 Is it possible to keep the deadline open on the offers of proof?  
10 I think we've got ours in yesterday, but they were not being  
11 filed from here but remotely.  So if we could keep them open  
12 until Monday just in an abundance of caution to make sure that we  
13 get all --

14           JUDGE GARCIA:  Okay.  That's fine, Mr. Bledsoe.  Thank  
15 you.

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1 UNITED STATES DISTRICT COURT.)  
2 WESTERN DISTRICT OF TEXAS )

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5 I certify that the foregoing is a correct  
6 transcript from the record of proceedings in the above-entitled  
7 matter. I further certify that the transcript fees and format  
8 comply with those prescribed by the Court and the Judicial  
9 Conference of the United States.

10 Date signed: September 16, 2011.

11 /s/ Karl H. Myers

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