

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, ET AL,)
Plaintiffs,)
) No. SA:11-CV-360
vs.)
) San Antonio, Texas
RICK PERRY, ET AL,)
Defendants.)
) September 15, 2011
)

VOLUME 9

TRANSCRIPT OF BENCH TRIAL

BEFORE THE HONORABLE ORLANDO L. GARCIA,
THE HONORABLE XAVIER RODRIGUEZ,
UNITED STATES DISTRICT JUDGES,
AND THE HONORABLE JERRY E. SMITH,
UNITED STATES CIRCUIT JUDGE

A P P E A R A N C E S :

FOR THE MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF
REPRESENTATIVES:

Texas Rio Grande Legal Aid
Mr. Jose Garza
1111 North Main Street
San Antonio, Texas 78212

Mr. Joaquin G. Avila
Attorney at Law
Seattle University School of Law
901 12th Avenue
Seattle, Washington 90222

Davis, Cedillo & Mendoza
Mr. Ricardo G. Cedillo
Mr. Mark W. Kiehne
755 East Mulberry Avenue
San Antonio, Texas 78212

1 FOR SHANNON PEREZ, ET AL:

2 Gray & Becker, P.C.
3 Mr. Richard Edwin Gray, III
4 900 West Avenue, Suite 300
5 Austin, Texas 78701-0001

6 Richards Rodriguez & Skeith
7 Mr. David R. Richards
8 816 Congress Avenue, Suite 1200
9 Austin, Texas 78701

10 FOR THE TEXAS LATINO REDISTRICTING TASK FORCE:

11 Mexican American Legal Defense & Educational Fund
12 Ms. Nina Perales
13 Ms. Rebecca Couto
14 Mr. Nicholas Espiritu
15 Mr. Luis Figueroa
16 Ms. Marisa Bono
17 110 Broadway Street, Suite 300
18 San Antonio, Texas 78205

19 Gale, Wilson & Sanchez, PLLC
20 Mr. Robert W. Wilson
21 115 East Travis Street, Suite 1900
22 San Antonio, Texas 78205

23 FOR LULAC:

24 Law Offices of Luis Roberto Vera & Associates
25 Mr. Luis Roberto Vera, Jr.
111 Soledad, Suite 1325
San Antonio, Texas 78205

Mr. Manuel Escobar, Jr.
Attorney at Law
201 West Poplar
San Antonio, Texas 78212

FOR TEXAS STATE CONFERENCE OF NAACP BRANCHES, ET AL:

Law Office of Robert Notzon
Mr. Robert Stephen Notzon
1507 Nueces Street
Austin, Texas 78701

24

25

1 Southern Coalition for Social Justice
Ms. Allison Jean Riggs
2 1415 West Highway 54, Suite 101
Durham, North Carolina 27707

3
4 FOR HOWARD JEFFERSON, EDDIE BERNICE JOHNSON, SHEILA JACKSON-LEE
AND ALEXANDER GREEN:

5 Law Office of Gary L. Bledsoe & Associates
Mr. Gary L. Bledsoe
6 316 West 12th Street, Suite 307
Austin, Texas 78701

7
8 FOR U.S. CONGRESSMAN HENRY CUELLAR:

9 Law Offices of Rolando L. Rios
Mr. Rolando L. Rios
10 115 East Travis Street, Suite 1645
San Antonio, Texas 78205

11 FOR EDDIE RODRIGUEZ, CITY OF AUSTIN, ET AL:

12 Law Office of Max Renea Hicks
Mr. Max Renea Hicks
13 101 West Sixth Street, Suite 504
Austin, Texas 78701

14 Perkins Cole, LLP
15 Mr. Abha Khanna
1201 Third Avenue, Suite 4800
16 Seattle, Washington 98101

17 FOR MARGARITA V. QUESADA, ET AL:

18 J. Gerald Hebert, P.C.
Mr. J. Gerald Hebert
19 191 Somerville Street, Suite 405
Alexandria, Virginia 22304

20 Goldstein, Goldstein & Hilley
21 Mr. Donald H. Flanary, III
310 South St. Mary's Street, Suite 2900
22 San Antonio, Texas 78205

23 FOR TEXAS DEMOCRATIC PARTY:

24 Brazil & Dunn
Mr. Chad W. Dunn
25 4201 FM 1960 West, Suite 530
Houston, Texas 77068

1 FOR THE DEFENDANTS, STATE OF TEXAS, ET AL:

2 Attorney General's Office
3 Mr. David J. Schenck
4 Mr. David C. Mattax
5 Mr. Bruce Cohen
6 Mr. Matthew H. Frederick
7 Mr. John McKenzie
8 Ms. Angela Colmenero
9 P.O. Box 12548
10 Austin, Texas 78711-2548

11 COURT REPORTER:

12 Karl H. Myers, CSR, RMR, CRR
13 Official Court Reporter
14 655 E. Durango Blvd., Rm. 315
15 San Antonio, Texas 78206
16 Telephone: (210) 212-8114
17 Email: karlcsr@yahoo.com

18 Proceedings reported by stenotype, transcript produced by
19 computer-aided transcription.
20
21
22
23
24
25

Chris Poage, RMR, CRR
United States Court Reporter

1 (September 15, 2011, 8:04 a.m., open court)

2 JUDGE GARCIA: Okay. Good morning. We'll proceed
3 now to the arguments presented by both sides. And the Court
4 will first recognize Mr. Garza on behalf of MALC.

5 MR. GARZA: Your Honor, before we begin, there's a
6 short housekeeping matter that Ms. Perales needs to address.

7 JUDGE GARCIA: Okay.

8 MS. PERALES: Your Honor, with some of the other
9 parties, we've added a number of exhibits. We've been keeping
10 the Court's binders up to date on the ones that we thought were
11 important. We would like to formally move the entire set
12 because the record was not clear from earlier on. So the
13 Latino Task Force plaintiffs move exhibits number Plaintiff 201
14 through Plaintiff 420.

15 JUDGE GARCIA: Any objection?

16 MS. PERALES: I'm sorry, Your Honor. Oh, Plaintiff's
17 200 through 420.

18 JUDGE GARCIA: Any objection?

19 MS. JORDAN: I have one question.

20 JUDGE GARCIA: I'm sorry?

21 MS. JORDAN: I have one question for Ms. Perales.

22 JUDGE GARCIA: Sure.

23 (Discussion off the record)

24 MS. PERALES: Your Honor, it appears that opposing
25 counsel hasn't been able to find some of the tables in Dr.

1 Engstrom's first report. So with the exception of that --
2 we'll move them, Your Honor, after the break so we can sort
3 this out. Thank you.

4 JUDGE GARCIA: Right. Why don't y'all confer on the
5 matter and resolve it?

6 Okay, Mr. Garza.

7 **CLOSING STATEMENT**

8 MR. GARZA: Good morning. May it please the Court.

9 There's a number of causes of action that the Mexican
10 American Legislative Caucus has brought before the Court, and
11 I'll try to address each one in sequence, beginning with our
12 one person, one vote claim.

13 We believe that State House plan H283, the adopted
14 plan, violates the one person, one vote principle that is
15 contained within the 14th Amendment as defined by Reynolds
16 versus Sims.

17 Reynolds versus Sims sets out that the overriding
18 objective of districting must be substantial equality of
19 population among the various districts and that deviations from
20 equal population principle are permissible only if incident to
21 the effectuation of a rational state policy.

22 With deviations of less than ten percent there's a
23 burden shift. The plaintiffs must prove that the redistricting
24 process was tainted by arbitrariness or discrimination.
25 Deviations that approach the so-called ten percent rule do not

1 provide, however, a safe harbor under the 14th Amendment for
2 the requirements of population equality. And such deviations
3 may not be justified if the variances discriminate upon race or
4 any other subset classification requiring heightened scrutiny.
5 And I would cite to Cox versus Larios for that principle, as
6 well as Moore versus Itawamba County, a Fifth Circuit case from
7 2005.

8 The evidence before the Court on this -- on this
9 issue establishes the State offered no justification for -- at
10 all, for the population variances that lead to a 9.92
11 top-to-bottom deviation. In fact, the State's witnesses
12 admitted that the sole goal with regard to population
13 distribution between districts was just to stay above -- or
14 just below ten percent.

15 The testimony of Chairman Burt Solomons, the
16 testimony of the author of the plans, Geraldo Interiano, both
17 testified before the Court and in deposition that that was the
18 sole goal, just try to reach ten percent and stay just below
19 the ten percent.

20 JUDGE SMITH: What would the law tell us, Mr. Garza,
21 if we were to determine, as a matter of fact -- and I'm not
22 suggesting that we will. But if we were to determine as a
23 matter of fact that the sole or overriding purpose was, as some
24 witnesses expressed, either to reelect as many incumbents or
25 maybe as many Republicans as possible or to maximize Republican

1 strength.

2 MR. GARZA: Right.

3 JUDGE SMITH: I'm thinking particularly of District
4 41 in Hidalgo, but it might apply to others. And we're only
5 talking about the population deviation.

6 MR. GARZA: So I would have two responses to Your
7 Honor's question. First is that the testimony is contradicted
8 by the State's own witnesses about whether incumbency
9 protection was a factor in driving the deviation.

10 JUDGE SMITH: Okay. But my question assumes if we
11 were to find that, and I'm not suggesting we will.

12 MR. GARZA: Right. And the second point that I would
13 make is that Cox versus Larios -- so that's point number one.

14 Point number two is that both -- all of the witnesses
15 for the State concede the driving force was seeking partisan
16 advantage. And the incumbents -- the evidence before the Court
17 in this case is that the incumbents that that favored,
18 generally, were Republicans.

19 That was the essence of the Cox versus Larios
20 decision. The Court found that in North Carolina the Democrats
21 had overpopulated Republican districts to the disadvantage of
22 Republicans and had underpopulated districts for Democrats, to
23 the disadvantage of Democrats. And the Court found that that
24 was an improper use of the ten percent margin, that the courts
25 allowed local jurisdictions to comply with one person, one

1 vote.

2 And the evidence in this case is even more
3 compelling, because the evidence in this case establishes that
4 not only were the population variances aimed at giving partisan
5 advantage; they were primarily aimed at providing a
6 disadvantage to Latino majority districts.

7 The evidence that Dr. Kousser examined, for example,
8 established that even though most white majority districts were
9 underpopulated, substantially -- a substantial proportion of
10 white districts were underpopulated, over 60 percent of Latino
11 majority districts were overpopulated. And, in fact, when he
12 compared how Democratic districts did versus how Latino
13 Democratic districts fared in the population distribution, he
14 found that Latino majority districts fared worse than
15 Democratic districts over-all.

16 JUDGE SMITH: But as to district -- again, I mention
17 District 41, so I'll focus on that. Maybe it's different from
18 the other situations. But in that district -- all of the
19 districts, as I understand it, were a majority Hispanic, by any
20 measure. Yet, the one where the now Republican incumbent
21 resides, the district that he holds, 41, was substantially
22 underpopulated.

23 MR. GARZA: That's correct, Your Honor. But I think
24 the -- I think the proper evaluation of this issue should look
25 at all the districts that are Latino majority districts.

1 JUDGE RODRIGUEZ: So your point is Latinos are
2 disadvantaged in the adjoining districts to 41 because they're
3 not enjoying the benefits of one person, one vote?

4 MR. GARZA: Exactly, Your Honor. So there are four
5 districts contained entirely within Hidalgo County. You can
6 balance out the population between all four of them and nobody
7 is advantaged or disadvantaged. But the State chose to
8 overpopulate three and underpopulate one. And that's the ratio
9 that concerns us, not the Democrat-Republican ratio, but what
10 happens to the Latino community. And when you look at Anglo
11 majority districts, you don't find that. You find, in fact,
12 that over 60 percent of Anglo majority districts are
13 underpopulated.

14 And the whole -- the whole notion of one person, one
15 vote is -- and the whole reason for having a rule that says you
16 must try to equate -- equalize population across districts is
17 because the Supreme Court over and over and over again has
18 determined that in terms of preventing, of managing outright
19 gerrymanders, that the best tool that it has at its disposal,
20 the one that it has applied most evenly across the decades, the
21 one that is easiest to manage in terms of legal principles, is
22 the one person, one vote, and the most effective in terms of
23 avoiding gerrymanders of all kinds, racial or partisan.

24 And so, as I said, the Cox versus Larios opinion's
25 origin is in a political gerrymander. And it clearly sets out

1 that -- as I mentioned, that with regard to any justification
2 that is -- that discriminate, requires a heightened scrutiny to
3 evaluate.

4 So that's --

5 JUDGE RODRIGUEZ: But let me stop you there. What is
6 the standard that we evaluate? Is it heightened scrutiny, or
7 does the State have to provide just some justification?

8 MR. GARZA: According to Moore versus Itawamba
9 County, the three-judge panel there indicated that if there was
10 evidence of race-based use of the one person, one vote, it
11 should be -- it should receive heightened scrutiny. And that's
12 at 431 F.3d, 257, a Fifth Circuit case from 2005.

13 And again, if I just could quickly go over and
14 summarize Dr. Kousser's analysis, because Dr. Kousser's
15 analysis looked at what sorts of things the district court in
16 Cox versus Larios looked at to evaluate the partisan advantage
17 that was being -- that was being used with the one person, one
18 vote. And he emulated the same factors that the district court
19 in Cox versus Larios examined.

20 So the first thing that he did is he examined H100,
21 the prior plan, to see the sorts of distribution in
22 populations. And he found that H283 was more skewed than the
23 current plan, H100; that while H100 had 37 of 150 districts
24 with greater than four percent variances at either end, H283
25 had 45. So it was more skewed.

1 He found that of the 37 Latino majority districts, 22
2 were overpopulated and 15 -- overpopulated and 15 are
3 underpopulated. But that -- and that's bad enough. But he
4 also examined where the State had options to overpopulate or
5 underpopulate. And so he determined that in El Paso County,
6 because of the Article 3, Section 26 whole county line rule,
7 five district -- that El Paso County was entitled to five
8 districts, and there was no way to overpopulate any of those
9 districts. So five districts required to be underpopulated in
10 the range of about four percent in order to comply with the
11 whole county line rule.

12 So if you extract those five districts from the
13 analysis, then more than double the number of -- more -- the
14 overpopulated districts are more than double the underpopulated
15 districts for Latino majority districts.

16 JUDGE SMITH: I'm sorry. Repeat that last statement
17 for us.

18 MR. GARZA: I'm sorry. That was --

19 JUDGE SMITH: It was fine. I just didn't follow it.

20 MR. GARZA: So more -- twice as many Latino majority
21 districts are overpopulated than underpopulated under the
22 State's plan.

23 He also looked at urban districts to see -- because
24 within an urban district there can't be a justification that we
25 have to comply with the whole county line rule in order -- in

1 order to avoid balancing districts. You have a total
2 population for Harris County. You divide it by 24, and you
3 have an ideal district for Harris County.

4 And what Dr. Kousser found is that within urban
5 counties, while the use of population deviations adversely
6 impact the Democratic districts, the impact on Latino districts
7 was even greater. And as we went through some of those
8 examples with Chairman Solomons, he -- we showed in Harris
9 County where there were districts that were overpopulated
10 adjacent to districts that were underpopulated, where it would
11 have been very easy to balance out the populations without
12 impacting any State justification.

13 And Dr. Kousser examined other potential
14 justifications for the discriminatory impact of the plan and
15 the population variances, and found that none provided
16 justification for adopting the variations in H283. He found
17 that the average deviation in 283 was greater --

18 Could we turn to Exhibit 19 at Page 82?

19 VIDEO TECHNICIAN: 19.82.

20 MR. GARZA: It's 83, I think, on your point.

21 So he found that the average deviation in 283 was
22 greater than in other alternative plans. He found that 283 had
23 just as few -- that there were other plans that had just as few
24 county breaks as 283. He found that other plans were more
25 compact, using measurement scores that the -- that the State

1 has adopted or the State uses. And he found that no other plan
2 split more VTDs.

3 So it wasn't done to avoid splitting precincts. It
4 wasn't done in order to provide more compact districts. It
5 wasn't done to avoid county breaks. And it wasn't done to have
6 a more -- a better average deviation between the districts.
7 And, in fact, he found that there were other alternative plans
8 that had smaller deviations than H283.

9 So Dr. Kousser found that the State's plan, H283, had
10 deviations that had an adverse effect on the Latino voters;
11 that the State could provide no justification for the
12 deviations contained in the plan; that the evidence submitted
13 to this Court was similar but more comprehensive than the
14 evidence examined by the district court in Cox versus Larios,
15 where a violation of one person, one vote was found.

16 Defendants have offered no evidence to justify a 9.92
17 deviation and have offered no evidence disputing adverse impact
18 of the deviation on Latinos in this plan.

19 JUDGE SMITH: Now, the average deviation statewide,
20 as I recall, was about two and a half percent; is that right?
21 Or --

22 MR. GARZA: It was -- the average deviation, I
23 believe, was 2.75, Your Honor, across the state. And it is the
24 highest of all the alternatives that are listed on the chart.
25 At least two of the -- and this is just the first page.

1 There's more on the next page, more comparisons, I believe.
2 There isn't? Maybe the previous page. There.

3 See if you can highlight that.

4 The Veasey plan had a slightly higher average
5 deviation and the Alonzo plan as well. But most of the other
6 plans offered had a lower average deviation from the one
7 adopted by the -- by the State.

8 So we believe the evidence is compelling and that the
9 Court should find that H283 violates one person, one vote under
10 the 14th Amendment and should be enjoined.

11 MALC also has a claim under Section 2 of the Voting
12 Rights Act for discriminatory effect. The standard under
13 Section 2 that's been announced by the Supreme Court
14 establishes a sort of two-pronged approach to evaluation of a
15 Section 2 claim.

16 The first prong is looking at the -- what's the
17 so-called threshold considerations the Court must look at. And
18 they're generally referred to as Gingles 1, Gingles 2 and
19 Gingles 3. In a redistricting context, in a challenge to a
20 single member district plan Gingles 1 essentially requires that
21 the plaintiffs produce alternative, or Gingles plans, as
22 they're sometimes referred to, that produce more opportunity
23 districts for the minority community or for the challenging
24 minority community than what the challenged plan offers.

25 So if the plan offers 30 opportunity districts, in

1 order to prevail on Gingles 1 the challenging party must
2 establish a plan that at least has 31 opportunity districts.

3 With regard to Gingles 2, that's essentially an
4 evaluation of racially polarized voting. And there are two
5 components of that. The first component is, is the challenging
6 minority community a politically cohesive community? That is,
7 does it vote together? And the second component is, is there a
8 sufficient Anglo voting bloc to usually defeat preferred
9 candidate of choice of the minority community?

10 And finally, the second -- once the Court determines
11 that the plaintiff has met its burden with regard to Gingles 1,
12 Gingles 2 and Gingles 3, then the Court's inquiry proceeds to
13 an evaluation of what's generally referred to as the totality
14 of circumstances.

15 And generally, the totality of circumstances relates
16 to factors that were listed in the Senate report to the
17 adoption of the amendments to Section 2 of the Voting Rights
18 Act. And it's not an all-inclusive list. But generally what
19 it requires is an evaluation of such things as the history of
20 voting related discrimination in the state or political
21 subdivision, the extent to which voting in the elections of the
22 state or political subdivision is racially polarized, the
23 extent to which the state and political subdivision has used
24 voting practices or procedures that tend to enhance the
25 opportunity of discrimination, the extent to which minority

1 group members bear the effects of past discrimination in areas
2 such as education, employment and health, which hinder their
3 ability to participate effectively in the political process,
4 the use of overt or subtle racial appeals in political
5 campaigns, the extent to which members of the minority group
6 have been elected to public office in the jurisdiction.

7 JUDGE SMITH: Let me ask you about that last factor,
8 which --

9 MR. GARZA: Yes, Your Honor.

10 JUDGE SMITH: -- I don't recall was specifically
11 mentioned during the trial. But I was -- I was noticing that
12 because it speaks not to the opportunity of the voters to elect
13 someone from the protected class, but it looks to who gets
14 elected. And I'm thinking specifically of Congressional
15 Districts 23 and 27 and House District 41 in terms -- and there
16 are, I'm sure, others -- in terms of the history of electing
17 Hispanic officeholders in those jurisdictions. I understand
18 it's only one factor out of many. But in terms of those three
19 districts, that history is established, is it not?

20 MR. GARZA: So to answer the Court's question
21 directly, the answer is yes. But, for instance, District 23
22 has an electoral history that -- so the district is new. So it
23 has a fairly limited electoral history. It has three elections
24 that have been conducted under that -- under that district.

25 District 27, however, was in the same general format

1 that it's been for over 20 years. And so it has a much longer
2 electoral history in terms of evaluating -- if I understand the
3 Court's question, in terms of evaluating its potential to elect
4 candidates of choice for the minority community so --

5 JUDGE SMITH: Well, but this isn't the candidate of
6 choice issue. And I understand that that's a very large issue
7 and probably much more important than this one. I'm only
8 focusing on number 7, which looks not to who's doing the
9 electing, but to who gets elected.

10 MR. GARZA: And so I think -- I think this particular
11 factor has been interpreted to evaluate, to some degree, at
12 what level the minority community has reached proportional
13 representation. So that what you look at is how many
14 minorities have been elected to the State House of
15 Representatives? How many are currently sitting? And compare
16 that to the proportion of Latinos in the population and whether
17 the new plan or alternative plans offer additional
18 opportunities.

19 So I think -- generally, that's, I think, what that
20 generally refers to, is -- has there been underrepresentation
21 for the minority community that's challenging the electoral
22 plan?

23 I might at this point -- I guess would be a good
24 point -- good time to inform the Court that depending on which
25 measure is used to evaluate proportionality, under any measure

1 Latinos are underrepresented in the current plan and in the
2 plan that was adopted by the State House of Representatives.

3 JUDGE SMITH: Statewide?

4 MR. GARZA: Statewide.

5 So the population of -- the Latino population of the
6 state is about 39 percent, 38 or 39 percent. The HCVAP
7 population of the state is about 25 percent. In order to have
8 proportional representation, you would need to have 38 members
9 of the 150 member House of Representatives have -- be Latino or
10 have Latino majority districts account for 38.

11 JUDGE GARCIA: And how many do we have now?

12 MR. GARZA: I'm sorry?

13 JUDGE GARCIA: How many do we have now?

14 MR. GARZA: Well, the current -- the adopted plan
15 provides, depending on, again, which measure the Court uses --
16 the most popular measure that's used in the Fifth Circuit is
17 HCVAP. And it provides 30 districts in which Latinos have an
18 opportunity to elect a candidate of their choice.

19 So that's sort of the standard that the Court has to
20 look at, the three Gingles factors first and then examine the
21 totality of circumstances once it evaluates the three Gingles
22 factors.

23 In the Fifth Circuit the courts have generally
24 determined that if a plaintiff fails to meet any one of the
25 first three Gingles factors, it need not consider the totality

1 of circumstances in evaluating the plan. So those are
2 requirements. We must have at least one more Gingles district
3 than the plan that's being offered by the State. We must show
4 racially polarized voting, and that, for us, the Latino
5 community's politically cohesive, and you must show that there
6 is sufficient Anglo bloc vote to defeat the Latino-preferred
7 candidate.

8 So to get at Gingles 1, evaluating the plan for
9 Gingles 1 -- could you pull up Table 19? It's on Page 79.

10 VIDEO TECHNICIAN: What exhibit?

11 MR. GARZA: It's Exhibit 19.

12 VIDEO TECHNICIAN: Okay.

13 MR. GARZA: At Page 79.

14 Before I get to -- one more page up. Before I get to
15 examining the table that we've put up there, I think it's, at
16 this point, a good time to review the competing theories that
17 have been presented to the Court for evaluation of the State's
18 obligation under Article 3, Section 26, the so-called whole
19 county line rule.

20 The testimony from the -- from the State indicates
21 that the whole county line rule requires an evaluation of
22 spillover districts or retention districts and requires an
23 evaluation of a ratio for a county to determine the number of
24 districts -- the allocation of districts per county.

25 So, for instance, Representative Solomons testified,

1 "And I was advised back in previous redistricting sessions
2 that, for example, Tarrant County, it had 10.6 -- a ratio of
3 10.6, and actually it had been rounded down, to their
4 detriment; where Harris County" -- and he's talking about today
5 -- "had not reached the 24.5 threshold and had actually been
6 rounded up" -- in the example that he was giving.

7 "And I decided it just wasn't fair to do that; that
8 they shouldn't get the extra district -- the extra legislator
9 when other parts of the state, in drawing a map and trying to
10 put that together, should get the proper representation."

11 So that's the first part of it. How many districts
12 are going to be allocated to Harris County? 25 or 26? Our
13 interpretation --

14 JUDGE SMITH: 24 or 25.

15 MR. GARZA: 24 or 25. I'm sorry. Excuse me.

16 Our interpretation of Article 3, Section 26 is that
17 the State has discretion. If they can draw 25 districts in
18 Harris County, for example, and still comply with one person,
19 one vote, they have that discretion. If they can draw 24
20 districts and still comply with the same ratio, comply with one
21 person, one vote, they have that discretion. And up until this
22 redistricting cycle, that has been the way the State has
23 interpreted Article 3, Section 26.

24 So in terms of the history of Harris County, in the
25 last four decades three of those -- before this one, three of

1 those -- in three of those decades the ratio was below .5. And
2 in all three of them they bumped it up. In one year it was
3 above .5, and, of course, they bumped it up.

4 And I think that there's two things that I would say
5 on that. So that's one. The history is that that's how the
6 State has interpreted.

7 And number two, that the State's formula for doing
8 that or the State's interpretation of Article 3, Section 26
9 just doesn't work. And it wasn't applied -- if it does work,
10 it wasn't applied evenly. Because if you take Hidalgo County,
11 Hidalgo County has a population of 774,769. The ideal district
12 for the state is 167,637. If you divide the ideal district
13 into the total population of Hidalgo County, you get a ratio of
14 4.62. But Hidalgo County gets four districts entirely within
15 Hidalgo County, not five.

16 The State's testimony was that in every instance in
17 which there is more than .5 we round up. In every instance in
18 which it is below .5 we round down. That's just not the case.

19 The second point that I would make with regard to the
20 State's interpretation of Article 3, Section 26, that
21 apparently was informed by the advice of Mr. Interiano, is this
22 spill out and spill over.

23 JUDGE RODRIGUEZ: Let me stop you here. Are you
24 inferring that Hidalgo County was rounded up to favor the ratio
25 of 41 and impact Representative Pena?

1 MR. GARZA: It was rounded down, Your Honor.

2 JUDGE RODRIGUEZ: Oh, pardon me. Okay.

3 MR. GARZA: I'm just saying that the -- that for --
4 I'm just setting out that if that's the rule, it was applied
5 inconsistently across the state. If it's always round down if
6 it's below 5 -- .5, and always round up when it's above .5, it
7 wasn't done in Hidalgo County. Hidalgo County is 4.62, and it
8 was rounded down.

9 JUDGE SMITH: Is that the only example? I mean, it's
10 an important example, but is that the only one that you --

11 MR. GARZA: Well, Your Honor, I found this one at
12 12:00 last night. So it's the only one I've found so far.

13 JUDGE SMITH: Don't worry. We'll ask the State about
14 that.

15 JUDGE GARCIA: Let me ask you, Mr. Garza, about the
16 county line rule. Does the Voting Rights Act override the
17 county line rule? In other words, is the county line set in
18 concrete that, you know, we ignore the Voting Rights Act?
19 Surely that can't be the case.

20 MR. GARZA: And in my estimation the Voting Rights
21 Act takes precedent over state laws. It's based on the 15th
22 Amendment. Its source -- the Congress' authority for enacting
23 the Voting Rights Act comes from the 15th Amendment of the
24 United States Constitution. And Constitution -- constitutional
25 law is supreme in interpreting laws in this country. We're

1 still -- Texas is still a part of the United States of America.
2 And so the Constitution overrides a conflicting provision.

3 And so if there is a conflict in the law -- if
4 there's no conflict, then the State should comply with Article
5 3, Section 26. But if there is a conflict with complying with
6 Section 2 or complying with Article 3, Section 26, then the
7 State should comply with Section 2.

8 And I might add that in a -- in the recent Supreme
9 Court case I think it is fair to infer from the description of
10 the case that in -- that that's the opinion of the United
11 States Supreme Court, in Bartlett -- Strickland versus Bartlett
12 where the Court considered how it was going to measure a
13 minority opportunity district. The inference -- it wasn't
14 directly addressed by the Court, but I think the fair inference
15 from that, a full reading of that case, is that if the
16 plaintiffs had been able to prove that the district that they
17 were offering was a Section 2 district, then North Carolina's
18 whole county line rule would have to give, would have to yield.

19 JUDGE SMITH: But in fairness, I mean, it may be a
20 matter of the extent of the violation. In other words, isn't
21 it the case that lots of the relevant authority speaks to state
22 subdivision lines as a relevant consideration? For example,
23 the Georgia four corners rule, as I recall, was recognized, and
24 there are others. I mean, it's mentioned a lot as a
25 consideration, not as a recognition there's an absolute rule

1 that state lines or state rules never matter.

2 MR. GARZA: Right. No, I think that -- I think the
3 Court's right.

4 But I think the other point on this is that we're
5 evaluating a Gingles 1 district. And a Gingles 1 district is
6 meant as a demonstration for the Court to determine whether
7 it's possible to draw a majority Latino or majority
8 African-American or majority-minority district. But it's not
9 meant as the -- as the remedy that the Court has to adopt if it
10 finds that that Gingles district complies with Gingles 1. In
11 drawing a remedy, of course the Court would -- would pay
12 attention to state rules, so long as it didn't conflict with
13 its obligation to remedy the violation.

14 And similarly, the State can adhere to state rules as
15 long as they don't have the effect of violating Section 2 or
16 the 14th Amendment requirements against discrimination against
17 protected minorities.

18 So I think the Court's -- I think that's right. It
19 is a balancing test of sorts. But if you can draw a minority
20 district that is -- that is -- that is reasonably compact,
21 then -- and there is racially polarized voting -- I mean,
22 there's different components of Section 2, right. The State
23 doesn't have to draw a Section 2 district. If there's no
24 racially polarized voting in the state, for example, it's not
25 required. So a required district would be a Section 2

1 district.

2 And if there is a Section 2 district available, then
3 that -- the state constitutional rule must give way if there's
4 a conflict, in answering your question. And I think that a
5 fair reading of Strickland -- Bartlett versus Strickland
6 supports that notion.

7 But the second point that I wanted to make in terms
8 of how you evaluate compliance with the Article 3, Section 26
9 about splitting open county lines, there was some disagreement
10 about how that's evaluated. And Mr. Interiano indicated that
11 there was only one split that he could see in the State's plan.
12 And it was his interpretation of the language in Article --

13 JUDGE SMITH: He called it a cut, didn't he?

14 MR. GARZA: Wouldn't call it a cut.

15 JUDGE SMITH: In Ellis and Henderson County?

16 MR. GARZA: Right.

17 But the State Supreme Court I think agrees with our
18 interpretation; that the way you evaluate compliance with the
19 whole county line rule is you count every time a line is split
20 open, whatever the justification, to a county in developing a
21 district for the House of Representatives.

22 If you look at Clements versus Valles at 620
23 Southwest 2d, 112, the Texas Supreme Court evaluated the
24 redistricting plan in 19 -- in 1980. And throughout its
25 analysis it talked about the wholesale cutting of county lines.

1 It added up -- cutting county lines is, as they say, et seq.,
2 right? I mean, it's everywhere in the opinion. That's how
3 they evaluated compliance with the whole county line rule. And
4 I think that's consistent with the plaintiff's interpretation
5 and consistent with Dr. Kousser's evaluation in terms of
6 evaluating the comparing plans for county cuts.

7 So now I turn to different examples of cases -- of
8 plans that were offered to the Court that we believe
9 demonstrate additional minority districts under Gingles 1. So
10 let me explain a little bit about these plans, and I'm going to
11 focus on two plans. There are a number of plans that the
12 plaintiffs -- other plaintiffs have offered that I think also
13 demonstrate this.

14 So the two plans that I'm going to focus on is -- are
15 plans 201 and 205. So in the first plan we attempted to -- in
16 plan 201 we attempted to -- using the State's interpretation of
17 how Section 2 and the whole county line meshed together, we
18 drew plan 201. And plan 201 then attempts to avoid cutting any
19 county lines or as few county lines as 283 has.

20 And the way we did that is that we included seven
21 districts between the Hidalgo and Cameron County geography,
22 splitting only one county line, the line between Hidalgo and
23 Cameron County, creating seven districts entirely within
24 Hidalgo County.

25 Now, we don't agree -- in this plan we don't agree

1 with the State that the whole county line rule trumps Section
2 5. We're only assuming, for purposes of this plan, that it
3 trumps Section 2. But we don't agree that it trumps Section 5.
4 So we reinserted the Latino majority citizen voting age
5 population majority district in Nueces County.

6 And so as a result of that we had additional cuts to
7 the state there -- to the counties there. But we had fewer
8 cuts because of the -- of the manner in which we treated
9 Hidalgo and Cameron County.

10 JUDGE SMITH: Did that go into San Patricio? Where
11 did that district go?

12 MR. GARZA: It did not go into San Patricio. It
13 created two Latino majority districts entirely within Nueces
14 County and then took the Anglo district north. That's the one
15 that divided Galveston County, that Mr. Interiano was -- had
16 focused on.

17 So the ripple effect of putting the protected Section
18 5 district back in Nueces County was that we split about --
19 took 6,000 people out of Galveston County to fill up the
20 District 32. So District 33 and 34 remained majority CVAP, as
21 they are in H100.

22 Aside from that, the plan was essentially the same
23 across the state. And so by doing it -- adhering to the
24 State's criteria, MALC plan 201 has one additional district
25 measured by CVAP -- HCVAP, than the State's plan.

1 And I believe I'm correct in that no expert for the
2 State and no witness for the State challenged the compactness
3 of that additional district that we drew in Hidalgo and Cameron
4 County or the district that we drew in Nueces County.

5 Plan 205, however, didn't adhere to the whole county
6 line rule, as the State interprets it. And so in that plan we
7 were able to draw four additional districts above and beyond
8 the districts that are -- that are shown in 283, if HCVAP is
9 the measuring stick.

10 Now, one of the -- and the witnesses have varied in
11 terms of the -- of the factors --

12 Could we go to Table 70? I'm sorry. Exhibit 70 at
13 Page 3 of the exhibit.

14 In terms of measuring minority opportunity districts,
15 there's been some discussion that perhaps we should use Spanish
16 surname voter registration data as the baseline data, or
17 whether it should be HCVAP. So the first table that we showed
18 you had HCVAP. If that's the benchmark, 201 has one more, 205
19 has four more. If SSVR, Spanish surname registration, is the
20 benchmark, then the plan adopted by the State has 30 such
21 districts. 205 has 34 such districts. And the whole county
22 line plan that cuts the same number of counties as the State
23 has 32, two additional districts above and beyond what the
24 State has offered.

25 And there are other measures that each of these

1 plans, if you look at them in total, improve the opportunities
2 for Latinos in Texas to elect a candidate of their choice and
3 meet the standards announced by the Supreme Court for
4 evaluating the Gingles 1 factor.

5 As I mentioned, plan 201 has 31 HCVAP districts, but
6 it has 37 HVAP districts. It has 50 black and Hispanic CVAP
7 districts. It has 59 black and Hispanic VAP districts. And as
8 I mentioned, it has 32 Spanish surname registration districts.
9 Plan 205 has 34 HCVAP districts, 42 HVAP districts, Hispanic
10 voting age population districts, 53 black and Hispanic citizen
11 voting age population districts, 62 black and Hispanic VAP
12 districts and 34 SSVR districts, compared to plan 283 with 30
13 HCVAP districts, 34 HVAP districts, 47 B and HCVAP districts,
14 54 B and HVAP districts, 30 SSVR districts.

15 And the State's primary map drawer, and apparently
16 the adviser on the legal standards, Mr. Interiano, in
17 cross-examination did not dispute the obvious differences in
18 the manner in which we drew the plans and the State drew its
19 plan.

20 In addition, none of the defendant's experts, not Mr.
21 Alford -- Dr. Alford, none of the defendant's experts provided
22 any testimony disputing whether these districting plans had the
23 number of districts that we've described. And only one of
24 their experts testified that there was a problem.

25 Could we put up 1.1?

1 So the only -- at least, you know, when I was looking
2 through the record, the only testimony that I found in
3 depositions or in this trial that challenged any of those
4 districts as Gingles 1 districts was Mr. Giberson, the State's
5 employee, the State's statistician that is a full-time staff
6 member of the State of Texas, testified that there were two
7 districts in plan 205 that he had problems with.

8 One of them was District 81, which is a majority SSVR
9 district, I think 53 or 54 percent Hispanic -- Spanish surname
10 registration, and District 84. And there's been some testimony
11 about District 84's non-compactness or odd shape. There's been
12 no testimony challenging the compactness of District 81.

13 And Mr. Giberson, if I understand his deposition
14 correctly, only problem that he had with 81 was that it split
15 counties. That was the problem. So if we're correct about
16 Section 2 overriding the State's requirement for splitting
17 counties, then the only district in all of the districts that
18 we've offered that has any evidence at all that challenges it
19 as a Gingles 1 district, and the challenge was that it wasn't
20 sufficiently compact to meet the requirements of Gingles 1
21 district, was District 84.

22 JUDGE RODRIGUEZ: So assuming we believe Mr.
23 Giberson, give him credit for that, Gingles 1 in your
24 estimation still doesn't -- that it goes from 30 to 32?

25 MR. GARZA: That's correct.

1 JUDGE RODRIGUEZ: I'm not sure we've discussed time.

2 MR. GARZA: I've gone over the time.

3 JUDGE GARCIA: Well, I would think that --

4 MR. GRAY: I'll be giving time back to the Court, and
5 I'm the next one.

6 JUDGE GARCIA: I was going to say, since not every
7 plaintiff is taking his or her 45 minutes --

8 MR. VERA: I'll be giving back time, Your Honor. He
9 could have 15 or 20 minutes of my time.

10 JUDGE GARCIA: Okay. Go ahead. Okay.

11 MR. GARZA: So we believe we've met Gingles 1 in
12 establishing our Section 2 violation. And we don't believe
13 that there is any credible evidence contradicting the evidence
14 that we provided to the Court.

15 With regard to Gingles 2 and Gingles 3, as I've
16 mentioned, the requirement is the Court to evaluate the
17 evidence of racial bloc voting.

18 Dr. Kousser defined racial bloc voting as it is
19 defined in Thornburg versus Gingles. He articulated that
20 you -- that racially polarized voting exists when racial groups
21 vote differently and that difference is significant. In other
22 words, where votes -- groups vote differently and that
23 difference matters in the election.

24 Can we go to Table 2? That's exhibit -- I'm sorry.
25 Exhibit 19 on Page 19.29.

1 VIDEO TECHNICIAN: 29?

2 MR. GARZA: So Dr. Kousser used a number of
3 statistical methodologies in evaluating elections in Texas.
4 And all the experts have testified, and all the experts have
5 used similar methodologies in evaluating the data.

6 Now, I'm not going to go through every table. And
7 the Court has these tables in the exhibit. And essentially,
8 the results don't change, don't alter, depending on the
9 methodology that Dr. Kousser uses or the methodology that Dr.
10 Engstrom uses or any of the experts. And, in fact, Dr. Alford
11 doesn't dispute the results. He disputes the interpretation of
12 the results.

13 And so what we have is Dr. Kousser saying that if
14 minority voters are voting at 75.9 percent for a particular
15 candidate, that they are politically cohesive; that they vote
16 sufficiently as a bloc to meet the requirements of Gingles 2.

17 And he further says that if non-Latinos are voting
18 for the same candidate at a rate of 27 percent, that that is
19 not sufficient crossover to negate racially polarized voting.
20 The difference between 76 percent and 27 percent is racial bloc
21 voting. Every expert that has testified for the plaintiff --
22 for the plaintiffs has similar ranges of support for the
23 Latino-preferred candidate and similar ranges of support from
24 the non-Latino voters for that candidate. And all of those
25 experts have testified that that is racial bloc voting.

1 Dr. Alford disputes that that's racial bloc voting.
2 He suggests that it should be more in the range of 90 percent
3 at one end and ten percent at the other end; that only in an
4 extreme way do you have racial bloc voting; although he did
5 admit that there was racial bloc voting in Texas. So I'm --
6 I'm -- in his deposition I think there is some contradiction in
7 his -- in his analysis.

8 I think -- more salient I think in his criticism is
9 that -- is that this voting behavior is better explained by
10 partisan affiliation as opposed to racial identification. And
11 the manner in which he does that is he identifies Latino
12 candidates that ran as Republicans in which there does not seem
13 to be any increase in support from other -- from other
14 candidates, either Republican or Democrat, that pull Latino
15 votes for that -- for that candidate. And, therefore, he
16 concludes, as a result of that, that these election results can
17 be explained by partisan affiliation.

18 Dr. Kousser testified that there is a question of
19 whether the election results are driven by race or by
20 partisanship, and that the standard methodology in the
21 profession, in this field is to attempt to statistically
22 identify whether partisanship is, in fact, the driving force
23 behind the elections.

24 And traditionally, the way you do that is you measure
25 an election in which partisanship cannot be the explainer for

1 the differential in voting, cannot be the reason people are
2 voting differently. You can look at a school board election,
3 for example, that is nonpartisan, or you can look at a city
4 election that is nonpartisan.

5 In this circumstance he chose to look at party
6 primary. If you look at a party primary, the way people vote
7 cannot be explained by partisanship. And traditionally, that's
8 the way you identify whether partisanship is the driving force
9 behind the voting behavior.

10 So if we can look at 19.42. And if you can focus in
11 on the first race.

12 So here we have an election between a Latino
13 candidate and two non-Latino candidates. And you have a range
14 of support for these candidates of 83 percent in the Latino --
15 from the Latino voters, compared to five and seven percent from
16 the Latino voters for the two Anglo candidates, in the
17 Democratic primary. Ms. Linda Chavez-Thompson is not more
18 Democratic than Ronnie Earle. They are both Democrats. This
19 cannot be explained by partisanship.

20 And looking at the non-Latino vote, which includes
21 African-Americans and Anglos, the level of support that Ms.
22 Chavez-Thompson received was 36 percent, and the majority of
23 the non-Latino vote went for Mr. Earle and candidate Katz.
24 Clearly, racially polarized voting in the Democratic primary
25 cannot be explained by partisanship, a statistical approach to

1 evaluating the degree to which partisanship influences
2 elections. And that's the standard, and that's the manner in
3 which political scientists and sociologists measured this
4 factor.

5 Dr. Alford did not do a multivariate analysis to
6 factor in for race and partisanship. He simply looked to see
7 if there was a roll-up of support for a Latino Republican
8 candidate. He did no statistical analysis. It's almost
9 intuitive what he did, rather than statistical and empirical.
10 Dr. Kousser did an empirical study to evaluate the role of
11 partisanship in elections, and he found that partisanship was
12 not the explainer that race was.

13 So we believe that on the question of Gingles 2 and 3
14 the plaintiffs have met their burden. We have established that
15 Latinos are politically cohesive and that non-Latinos vote
16 sufficiently as a bloc to usually defeat the Latino-preferred
17 candidate.

18 Dr. Kousser testified that levels of polarization
19 were legally significant, and I think the tables that he
20 produced, the analysis that he did, supports that.

21 Dr. Alford's rebuttal or response I don't think
22 measures -- measures up to disputing that empirically.
23 Moreover, in his deposition Mr. -- Dr. Alford admitted that he
24 knew of no authority that defined polarization to be limited at
25 the extremes. And finally, Dr. Alford testified that the LULAC

1 versus Perry decision in 2006, merely five years ago, the
2 Supreme Court found evidence sufficient to conclude that
3 elections in Texas were polarized.

4 So turning to a brief discussion of the totality of
5 circumstances, again, the evidence on totality of circumstances
6 is largely unchallenged by the State. Dr. Tijerina described a
7 severe history of discrimination in voting and other areas that
8 impacted on voting. As we've discussed, racially polarized
9 voting is clear from every expert that testified. The
10 continuing effects of discrimination was probably the most
11 challenged of the plaintiffs' evidence on a totality of
12 circumstances. But I think the evidence that plaintiffs
13 provided was more compelling, and I think the evidence that the
14 State provided on that issue, primarily on the educational
15 question, was spotty at best.

16 JUDGE SMITH: Can you -- I agree there was
17 substantial evidence about disadvantages in terms of the
18 poverty issue and education. Can you muster for us what
19 evidence there is in the record that shows that those
20 disadvantages directly impact the opportunity to participate in
21 the electoral system?

22 MR. GARZA: So in his deposition Dr. Chapa was asked
23 about that, what there -- what link there was between the
24 factors that he noted. And he referred to empirical studies
25 that have shown that lower educational levels, lower income

1 levels, all of those factors continue to this day to impact the
2 ability of those individuals from participating in an equal way
3 with those that have more benefits, to make more -- have higher
4 education, have more income. So that's the evidence that I --
5 that I can point to, Your Honor.

6 JUDGE SMITH: Well, okay. I mean, that sounds
7 generalized, and maybe that's all there is. But I'm trying to
8 understand, let's take an individual voter or a group of voters
9 in a given community who have substantially lower levels of
10 education, who are below the poverty line. How is it that
11 they're less able to be encouraged to register and encouraged
12 to go vote and otherwise participate or run for office or
13 whatever it might be?

14 MR. GARZA: So I think that -- I would have a
15 two-pronged answer to the Court -- to the Court's question.
16 Number one, I think it's -- it's generally acknowledged that
17 overt obstacles to registration and participation in the
18 electoral process are a thing of the past, with the exception
19 of recently adopted measures such as the voter ID bill. And I
20 think there's still -- the evidence on that is still being
21 developed to determine if that's going to have a negative
22 impact on the ability of minority and poor voters to access the
23 polls.

24 JUDGE SMITH: And there was reference to some ballot
25 security measures, as well, I believe.

1 MR. GARZA: That's right.

2 And the second thing that I would point the Court to
3 is that there was testimony from a lay witnesses about those --
4 about those socioeconomic characteristics having an impact on
5 voter turnout and voter participation, about how it's much more
6 difficult to focus on elections when you -- when you're holding
7 down two jobs and those sorts of things. So I think there is
8 evidence of the continuing impact of low socioeconomic status
9 in the -- in the population to -- that impacts on the ability
10 to participate in the electoral process.

11 JUDGE RODRIGUEZ: But is there anything in the record
12 or will be in the record that correlates education and income
13 with actual voting habits?

14 MR. GARZA: So again, the -- Dr. Chapa provided a
15 list of studies that he relied on that had done empirical
16 research, and that -- his testimony in his deposition was that
17 he had reviewed those and that he showed that there was a
18 continuing relationship between those factors and the ability
19 to participate.

20 JUDGE RODRIGUEZ: Thank you.

21 MR. GARZA: With regard to voting practices and
22 procedures that tend to enhance the opportunity for
23 discrimination against a minority, we believe that the evidence
24 that's before the Court on the use of the one person, one vote
25 principle fits into that; that is, the manner in which the

1 population variances were manipulated is -- fits into the
2 formula for evaluating the totality of circumstances. The
3 State continues to use majority vote requirements in the
4 primaries, and that is one of the procedures and practices that
5 has been identified by the courts to have an adverse impact on
6 Latinos and minorities generally.

7 We believe that a review of the evidence leads to the
8 conclusion that plaintiffs have met their burden with regard to
9 claims of violation of Section 2 with regard to the Texas House
10 plan 283, and this Court should enjoin that plan.

11 I'll limit my discussion on the congressional plan
12 because I think my colleagues and brethren on the plaintiffs'
13 side can more -- in more detail describe those violations.

14 I would -- and I believe that the evidence that's
15 presented in the totality of circumstances in the Section 2
16 case with regard to the use of the -- of the one person, one
17 vote issue, the evidence that this was a, quote, unquote,
18 member-driven process that meant protection of -- and the
19 testimony that this was a plan that was driven for protecting
20 incumbents and gaining partisan advantage. When taken all
21 together -- not alone, but when taken all together the
22 evidence, I think, proves a violation of intentional
23 discrimination, both under Section 2 of the 14th Amendment --
24 and I would point the Court to, of course, Arlington Heights,
25 the standard for circumstantial -- the kind of circumstantial

1 evidence that proves an intent case, which I believe in this
2 case a lot of that evidence has been presented. But also, to
3 Garza versus Los Angeles County, both the Ninth Circuit and the
4 district court opinion, in which the Court found that where the
5 requirements of incumbency were so closely intertwined with the
6 need for racial dilution, that an intent to maintain a safe,
7 primarily white district for, in this case Senator Joyce, is
8 virtually coterminous with a purpose to practice racial
9 discrimination, is indicative of an intent to discriminate.

10 JUDGE SMITH: Do you have a citation on that?

11 MR. GARZA: Yes, I do, Your Honor. 756 Fed. Supp. at
12 1298. I didn't bring with me the circuit court citation.

13 JUDGE SMITH: That's okay.

14 MR. GARZA: The circuit court adopted that standard
15 and certiorari was not accepted, was denied. That concludes my
16 presentation.

17 JUDGE GARCIA: Thank you, Mr. Garza.

18 Mr. Gray.

19 MR. GRAY: Thank you, Your Honor.

20 **CLOSING STATEMENT**

21 MR. GRAY: May it please the Court. Rick Gray on
22 behalf of the Perez plaintiffs.

23 First, Your Honors, we have virtually identical
24 claims to the MALC plaintiffs. And in order to abbreviate the
25 argument, we hereby adopt Mr. Garza's closing argument.

1 I have been asked to limit my comments to the one
2 person, one vote issues, our constitutional claim under the
3 14th Amendment.

4 I'd like to put in context what we're dealing with.
5 Justice Stevens, joined by Justice Breyer, of the Supreme Court
6 in their summary affirmance of the Larios case makes the
7 following statement, "In challenging the district court's
8 judgment appellant invites us to weaken the one person, one
9 vote standard by creating a safe harbor for population
10 deviations of less than ten percent within which districting
11 decisions could be made for any reason whatsoever.

12 "The Court properly rejects the invitation. After
13 our recent decision in Vieth, the equal population principle
14 remains the only clear limitation on improper districting
15 practices and must be careful -- and we must be careful not to
16 dilute its strength."

17 That is what I believe is squarely before this Court.
18 The evidence is absolutely undisputed that there are
19 unjustified deviations in House plan 283 and that the
20 deviations were intended for political and racial purposes.

21 First, I want to start with the plan as a whole. The
22 deviation in House plan 283, undisputed, is 9.92 percent.
23 There are 14 counties in the state containing 93 districts,
24 wholly contained within those counties, no spill-over, no
25 county cuts, just a county that contains whole districts. Not

1 one single one of those is drawn to zero deviation.

2 There are eight counties that have 75 districts,
3 State House districts, one-half of the entire State House of
4 Representatives that contained deviations from as low as 3.62
5 percent to a high of 9.74 percent.

6 It gets worse. There are 52 districts, one-third --
7 more than one-third of the entire Texas House that have
8 deviations ranging from a low of 8.88 percent to a high of 9.74
9 percent. We have a situation here where we have one-third of
10 the Texas House districts wholly within counties, no problem
11 whatsoever by drawing, for example, in Harris County 24 equal
12 districts. But do they? They don't even make an effort.
13 Harris County's deviation is 9.74 percent.

14 Next, I want to turn the Court's attention briefly to
15 the deposition of Mr. Jeffrey Archer. Mr. Archer's deposition
16 is before the Court. Segments of his deposition, or excerpts
17 of his deposition are before the Court as Plaintiff's Exhibit
18 123.

19 But on Page 56, line 11 of that deposition, when
20 asked, is there any compelling reason he can think of for
21 drawing districts wholly within the counties that don't have
22 equal population within them, his answer is no. Mr. Archer is,
23 admittedly, the -- one of the two senior people in the Texas
24 Legislative Council who has the most knowledge on redistricting
25 and is an adviser to the legislature in that regard.

1 I next want to briefly turn the Court's attention to
2 the State's main witnesses in the one person, one vote issue.

3 JUDGE SMITH: Would you say that that would always
4 hold true? For example, wouldn't it be justifiable under the
5 existing case law in some cases to recognize, for example, a
6 city boundary wholly within a county to produce some sort of
7 deviation? I'm talking about what the case law says.

8 MR. GRAY: That's absolutely true, Your Honor. In
9 fact, I have that laid out later in the argument, but I'll go
10 to it right now.

11 One of the core principles in redistricting is
12 preservation of communities of interest, city boundaries,
13 things of that sort. Plan 283 exhibits none of that. They
14 have cut county -- cut city lines, school district lines, cut
15 precincts. It is a wholesale cut across the board with no --
16 no attempt at all to preserve any of those interests.

17 JUDGE SMITH: That's certainly an adequate answer,
18 and thank you for that. I just want to be sure you're not
19 arguing that in every case within a county that there has to be
20 absolute equality among districts even if they can be drawn
21 that way.

22 MR. GRAY: No, I'm not. What I'm saying is if there
23 is some justification that falls within the purview of the --
24 what the Supreme Court has laid out as justifications for
25 deviation, absolutely. There's zero evidence of that before

1 this Court. The State had every opportunity to come before
2 this Court and say, the deviation in Harris County of 9.74
3 percent is because of this reason or that reason, show you some
4 legitimate reason. None.

5 But what we have brought forward, through the
6 testimony of both Mr. Martin and Dr. Kousser, is that it was
7 done for political and racial purposes. That testimony of Mr.
8 Martin and Dr. Kousser sits before this Court unrebutted, not
9 even an effort to rebut it.

10 And, in fact, the State's two primary witnesses as
11 far as drawing the maps both, when pushed a little bit,
12 particularly as to District 41, ultimately had to admit it was
13 done to protect a Republican incumbent.

14 JUDGE SMITH: Is it your position -- and I'm taking
15 the racial element out of it now for purposes of my question.
16 Speaking purely in terms of partisan advantage, whether that
17 means reelecting incumbents from the majority party or
18 reelecting -- or electing as many as possible from the majority
19 party statewide. If that -- if that were the consideration and
20 not race, are you saying that that can never be balanced
21 against the need to equalize the districts under the existing
22 case law?

23 MR. GRAY: That's exactly what I'm saying, Your
24 Honor. If you read the Larios opinion, it clearly says that
25 protecting incumbents is a traditional redistricting practice

1 as recognized by the courts only in the circumstance where it
2 is to avoid pairings. They make the specific point of saying
3 that protecting incumbents when it's not to avoid pairing of
4 incumbents is not a traditional redistricting practice, and
5 that is one of the very reasons the Larios court struck down
6 the Georgia plan.

7 So what -- I'm going to briefly go through some
8 examples. But first, I'm going to set the stage. My primary
9 witness, Ed Martin, which was -- seems like an eternity ago
10 that he testified before the Court, walked the Court through
11 Dallas County, Harris County, Hidalgo County and El Paso
12 County, and then concluded by saying, what I've laid out is
13 just examples of what is statewide, all through the state map.

14 But what he said was --

15 JUDGE SMITH: I'm sorry. This is which witness?

16 MR. GRAY: Ed Martin.

17 JUDGE SMITH: Martin. Okay.

18 MR. GRAY: But what Mr. Martin said was that there
19 was a pattern of using deviation to protect or assist where
20 Anglo incumbents were seeking re-election.

21 And two, there was a pattern of taking minority
22 population, primarily Latino population, and overpopulating it
23 in districts, such that there -- such that two things were
24 accomplished. One, there was the inability to create
25 additional Latino districts. And two, you put all that vote in

1 districts so they lose their voice in any other adjacent
2 district. That testimony, which came very early in this trial,
3 has been unrebutted. Not one single witness in deposition, in
4 live testimony, not one single witness has rebutted that
5 testimony as we sit here right now.

6 Now, I want to very briefly remind the Court of some
7 facts that are before the Court. Texas grew at a rate of 20.6
8 percent this last decade. That growth was made up of -- 41.8
9 percent of it was Latino population. 22.1 percent was
10 African-American population. 71 percent of the growth rate was
11 Asian population, and the Anglo population grew at 4.2 percent.
12 The record is clear and undisputed that 89.2 percent of the
13 growth in this state over the past decade is growth of the
14 minority populations.

15 If you will, I'm going to turn to Dallas County
16 briefly. In Dallas County the record is clear that the Anglo
17 population actually was reduced by 198,000 people in Dallas
18 County. Hispanic population grew by 243,211. Black population
19 grew by 73,016. And the Asian population grew by 30,302. The
20 Anglo population in Dallas County, as we sit here today, is 33
21 percent of the total county.

22 The undisputed testimony is -- under plan 283 Anglos
23 will control 58 percent of the Texas House seats in Dallas
24 County, 8 of 6.

25 If you will, the younger Mr. Gray, put up Exhibit 105

1 for me.

2 I'm pointing this back out to the Court as an example
3 of Mr. Martin's testimony and an example of where -- how
4 deviation is used. District 105 is 8,091 people overpopulated.
5 And the undisputed testimony is it's overpopulated for two
6 reasons. First, the large amounts of Hispanic population are
7 taken out by the fingers that protrude into it from 103. And
8 then that population is replaced, plus some, with exceedingly
9 large amounts of Anglo population from the finger that runs
10 south, overpopulating district 105 by Anglos, thereby diluting
11 the voting strength of the minorities in 105.

12 If you would, now I want to turn you briefly to
13 Harris County. In Harris County the Anglo population was also
14 in the -- on the decline, and there's 82,000 less Anglos in
15 Harris County today than there were at the beginning of the
16 decade. The Hispanic population grew by 552,000. The
17 African-American population grew by 134,000. The Asian
18 population grew by 76,827.

19 But what happened? Was that growth recognized? In
20 Dallas County the growth was not recognized. In Harris County
21 not only is the growth not recognized, but one minority seat,
22 in fact, is eliminated, completely eliminated. So after this
23 redistricting process, although the Anglos in Harris County
24 consist of 33 percent, again, of the population, Anglos will
25 dominate 54 percent of the seats under House plan 283. 13 of

1 24 seats will be Anglo. And yet, they are -- under the census
2 they are 33 percent of the population.

3 If you will, turn briefly to Exhibit 109. And I want
4 to refresh the Court's memory briefly. How does deviation play
5 into that, into Harris County? District 144. If the Court
6 will recall, Hispanic population for -- that had previously
7 been in 144 was taken and put in 145 and in 147, and leaving
8 144 underpopulated.

9 JUDGE GARCIA: Is that the paired district?

10 MR. GRAY: Pardon?

11 JUDGE GARCIA: Is that Representative Vo's district?

12 MR. GRAY: No, Your Honor. That's Representative --
13 an Anglo Republican's district, Representative Legler.

14 JUDGE SMITH: This is in east Harris County.

15 MR. GRAY: This is east Harris County.

16 JUDGE SMITH: And Vo's district is in west Harris
17 County.

18 MR. GRAY: And the Vo district is 129 in southwest
19 Harris County, and I'll get to that in a second.

20 The testimony is, again, undisputed in this record,
21 east Harris County didn't grow. East Harris County, in fact,
22 was on the decline. They take population -- Latino population
23 out of District 144. District 144 is 5,759 people short of
24 ideal deviation. Yet, the adjacent districts where they took
25 the population from -- where they put population in, excuse me,

1 145, a Latino district, 3,184 people overpopulation --
2 overpopulated; added population into 147, 8,236 people
3 overpopulated. The undisputed testimony is they underpopulated
4 144 to enhance Anglo voting strength at the expense of the
5 Hispanic community by overpopulating the adjacent Hispanic
6 districts.

7 If the -- if you would, and I don't have it cued up
8 for you, but can you go to the southwest Harris County blow-up
9 for me?

10 Your Honor, this is where, under House plan 283, this
11 is where the Vo district used to exist. If you will, go to
12 plan 283 in Harris County. I apologize for my lack of vision.
13 No, this is 283. I'm sorry. I mean, 100.

14 This is, under the current plan, the district in
15 which Representative Vo serves, the only -- the first elected
16 Vietnamese member of the Texas House. And despite the fact
17 that the minority population in Harris County is responsible
18 for more than a hundred percent of minority growth because
19 Anglos are actually in decline, the only district that is
20 eliminated in this plan is the minority opportunity district
21 currently being served by a minority member of the Texas House
22 of Representatives.

23 JUDGE SMITH: That was the only -- as I recall, the
24 only Democratic pairing in the whole state; is that right?

25 MR. GRAY: I believe that's correct.

1 Now, in response to that, Your Honor, a couple of
2 things need to be pointed out. The population in west Texas
3 where there are pairings, as the Court is aware, is vastly on
4 the decline. That entire west Texas delegation is Republican,
5 so they had no opportunities but -- choices but to pair members
6 from west Texas, all of which were Republican.

7 Two, the other set of pairs -- or group of pairs are
8 in Dallas County. Dallas County lost two seats. There are six
9 seats that are currently protected in Dallas County under the
10 Voting Rights Act that could not be eliminated under federal
11 law. So they had no choice but, in Dallas County, to pair two
12 sets of Anglos because that's the population that was lost and
13 that had to be paired.

14 The only discretionary pair in the entire state that
15 was not mandated by either maintaining existing voting rights
16 districts or the reduction of population in west Texas, the
17 only discretionary pair this legislature had before it was in
18 Harris County.

19 And they chose, for reasons that I believe I know,
20 but I'm not going to get -- argue before the Court, they chose
21 to pair a minority member with an Anglo member, both Democrats,
22 and give the minority member three precincts of his existing
23 district, and then disperse the remainder of what you heard
24 from Ms. Winkler and Ms. Calvert -- disperse the rest of the
25 coalition in districts in which they will have zero voice

1 whatsoever.

2 Now, Hidalgo County is kind of my poster child. And
3 I'm not going to go back through it in huge detail, but I am
4 going to point out to the Court that you have heard, again,
5 undisputed testimony that roughly one-half of the entire Anglo
6 population in Hidalgo County is somehow or another,
7 coincidentally or not, put in District 41.

8 Two -- if you will, bring up Exhibit 116.

9 Two, you have heard that every single district in
10 Hidalgo County is overpopulated but for District 41 which is
11 7,399 underpopulated.

12 Three, you have heard from Mr. Interiano and to a
13 fairly large degree Mr. Downton that that underpopulation was
14 intentional and was done to provide an election benefit for
15 Representative Pena.

16 Four -- and this goes to a question you raised,
17 Justice Smith or Judge Smith -- as far as core redistricting
18 practices, one of the core principles that has been recognized
19 by the courts evermore is maintaining constituent member
20 relationships.

21 What happens in Hidalgo County? 99.5 percent of Mr.
22 Pena's current constituents are moved to another district, and
23 99.5 percent of Representative Gonzales' constituents are moved
24 to another district. In other words, they just flipped the
25 members.

1 If there is any effort by this -- by the legislature
2 to comply with traditional redistricting practices, I would
3 suggest to the Court that moving 99.5 percent of constituents
4 from one district to another is certainly not consistent with
5 any effort to follow traditional redistricting principles.

6 JUDGE GARCIA: And the State of Texas didn't offer
7 any explanation for a 98 -- 98, 99-percent switch, right?

8 MR. GRAY: No, Your Honor. No, Your Honor. The only
9 explanation, the only explanation offered by anybody from the
10 State of Texas is our explanation. It was done for political
11 purposes, pure and simple. And that is the very thing that the
12 Larios court says you cannot do. You cannot do that. One
13 person, one vote is sacrosanct.

14 There are -- the Court will recognize de minimus
15 deviations for legitimate purposes. But doing it for political
16 advantage, whether it be for the Democrats or the Republicans,
17 is specifically not a legitimate purpose.

18 Next, I want to go to El Paso County, Exhibit 120.
19 And part of, I think, our burden, and Mr. Garza stated it, is
20 to establish that this plan is arbitrary or discriminatory. In
21 Larios that standard was met by the very facts we have offered
22 to this Court, the effort to enhance political power of one
23 party over the other. And in Larios they had the extra claim
24 of regional political power enhancement.

25 But what they didn't have in Larios, which is

1 screamingly clear here, is we have using deviations and drawing
2 of lines to disenfranchise and hurt minority citizens. That
3 was not the facts in Larios. But we have in this map, like you
4 saw in Dallas in 103, you see it in El Paso in 77, you have
5 these goofy arms that are reaching up, grabbing Hispanic
6 population and taking them out of districts in which they
7 otherwise would be able to make a significant impact on the --
8 on that district.

9 There is no testimony whatsoever to the contrary.
10 Mr. Martin explained to the Court what they were -- what they
11 were doing here, the populations they were removing and the
12 impact it had on the voting strength of the Hispanic community
13 in District 78, which, by the way, is represented by an Anglo
14 Republican.

15 Now, next, I'm going to finish up and then sit down
16 and give time back.

17 JUDGE SMITH: So in El Paso -- so 78 is the only
18 Anglo representative?

19 MR. GRAY: Correct. Well, no. 78 is the only
20 Republican representative. I think there is an Anglo Democrat,
21 Representative Pickett. And I don't recall his district
22 number. But if it's important to the Court, I'll get -- I'll
23 get that for you.

24 JUDGE SMITH: And whose district is 77?

25 MR. GRAY: 77 is --

1 JUDGE SMITH: That's all right. We can look. I
2 don't mean to take time away. That's all right.

3 MR. GRAY: I know 78 is Dee Margo, but I can't tell
4 you -- Marquez is Hispanic member of 77.

5 JUDGE SMITH: Okay. Thanks.

6 MR. GRAY: Now, I want to finish up briefly with
7 comments on Dr. Kousser. Mr. Garza covered Dr. Kousser
8 exceedingly well, and I'm not going to duplicate that, but I do
9 want the Court to focus on two statistics. It is unrebutted
10 from Dr. Kousser that of the districts in which Anglos control,
11 are a majority in the district, in the State House district,
12 57.5 percent of those districts are underpopulated.

13 It's also undisputed in the record, of the districts
14 in which minorities are a majority in the district, if you back
15 out the five in El Paso that have to be underpopulated because
16 the population in El Paso is less than five -- if you back out
17 the El Paso districts, the minority districts, 68.75 percent of
18 them are overpopulated.

19 What that means in real world politics is that you
20 have excess Anglos, because you're underpopulating the Anglo
21 districts so that you can use those to dominate other
22 districts. And what it means in real world politics is you
23 overpack or overstuff, whatever language you want to use, the
24 minority -- the minority districts with minority members,
25 minority citizens, so that vote gets swallowed up and lost,

1 pure and simple. And these percentages scream out at you.
2 This is not happenstance. This is not coincidence. This is
3 intentional and knowingly, and it was done for political
4 purposes. And the record is undisputed in that regard.

5 JUDGE SMITH: Do you happen to know what the 67.5
6 percent figure is if you include El Paso? I understand why you
7 exclude it but --

8 MR. GRAY: Sure. No, I haven't calculated it, but I
9 can tell you how it is. There's 37 majority-minority districts
10 all total, and 22 of them are overpopulated. And if you add
11 the El Paso districts that have to be underpopulated in, 15
12 would be underpopulated. So whatever the calculation is of 15
13 into 37 would be that calculation. It's still going to be a
14 high number, but it's not going to be as high.

15 (Discussion off the record)

16 MR. GRAY: Mr. Garza said I may have misspoken. If I
17 did, I apologize. 22 were overpopulated, and 15 would be
18 underpopulated, counting El Paso, because that's
19 underpopulated. The analysis I did was using 22 overpopulated
20 and ten underpopulated because El Paso has to be
21 underpopulated.

22 JUDGE GARCIA: And how many Anglo districts --
23 representative districts were underpopulated? Do you know?

24 MR. GRAY: Pardon, Your Honor?

25 JUDGE GARCIA: How many Anglo state representative

1 districts were underpopulated?

2 MR. GRAY: 34. Of the 80 majority Anglo districts,
3 34 of them were underpopulated, and 46 percent of them were
4 overpopulated.

5 (Discussion off the record)

6 MR. GRAY: I'm sorry. I'm reading my -- I'm going
7 blind. 34 of the 80 were overpopulated, and 46 percent -- 46
8 of the 80 were underpopulated.

9 JUDGE GARCIA: All right.

10 MR. GRAY: In conclusion, there has been no effort by
11 this -- by the State whatsoever to comply with traditional
12 redistricting practices.

13 Judge Smith, the ones that are traditionally
14 recognized and have been set forth in the Carter versus Daggett
15 case are compactness, keeping the core districts intact,
16 protecting and recognizing political subdivisions, and
17 protecting incumbents only to the extent of avoiding pairs.
18 None of those, not one single one of those was met and even an
19 effort made to meet it in House plan 283.

20 What is clear and what has been testified to by the
21 main map drawers, Mr. Downton and Mr. Interiano, what their
22 instructions were, were to draw maps to protect Republican
23 incumbents, pure and simple.

24 JUDGE GARCIA: How many precincts in Hidalgo County
25 were split, if you know?

1 MR. GRAY: I do not know. I know the number is
2 exceedingly large. And that testimony is before the record.
3 But I do not believe there is a precise number in the record.

4 JUDGE GARCIA: And in Harris County?

5 MR. GRAY: I do not know that precise number either,
6 Your Honor.

7 JUDGE GARCIA: All right.

8 MR. GRAY: Lastly, and in conclusion, the technology
9 and the ability to play games in redistricting has reached an
10 all-time high. And we are seeing in House plan 283 a superb
11 effort at gamesmanship. As the Justice Stevens and Justice
12 Breyer recognized, there are woefully little power the courts
13 have now to control this kind of gamesmanship. But the last
14 vestige of control is the 14th Amendment and giving real
15 substance to the meaning one person, one vote.

16 And when, as here, that 14th Amendment was trampled
17 on for -- obviously clear, to disadvantage racial minorities
18 and to enhance the political voting strength of a party,
19 irrespective of what party, that has to be stopped. And it has
20 to be stopped somewhere. And y'all have drawn the black bean,
21 so to speak, to stand up and be the stop sign. Thank you.

22 JUDGE GARCIA: Thank you.

23 Ms. Perales.

24 MS. PERALES: Good morning, Your Honor. I believe my
25 staff is setting up at the table here.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JUDGE GARCIA: Ms. Perales, we're going to take a
brief break.

(Recess at 9:45 a.m., change of reporters)

1 *-*-*-*-*-*-*-*

2 MS. PERALES: Good morning, Your Honor. Two quick
3 things. First, we would like to move into evidence without
4 objection Exhibits 200 through 420.

5 MR. MATTAX: No objection.

6 JUDGE GARCIA: All right. Those are admitted.

7 MS. PERALES: And also, Your Honor, with the Court's
8 permission, I would like to move one of my staff, Mr. Matt
9 Garcia. He is not an attorney, but I would like to move him
10 here in front of the rail, because he knows the exhibit list
11 very, very well.

12 JUDGE GARCIA: Sure. Of course.

13 MS. PERALES: Thank you.

14 MR. MATTAX: I have nothing.

15 MS. PERALES: Good morning again. The Latino Task
16 Force plaintiffs present claims under the Voting Rights Act
17 and the Fourteenth Amendment for Latino voters. The Court is
18 already familiar with our claim under Section 5 that the plans
19 at issue are not enforceable until Texas obtains preclearance.
20 Defendants don't dispute this claim and I won't elaborate on
21 it here.

22 The first claim for the Latino Task Force that I
23 want to discuss today is one of vote dilution, in violation of
24 Section 2 of the Voting Rights Act.

25 Section 2 permits plaintiffs to establish liability

1 by showing disparate impact. The main case is Thornburg
2 versus Gingles. Thornburg sets out a four-step test that
3 plaintiffs must meet to establish a Section 2 violation.

4 Aside from our disparate impact case, Section 2 and
5 the Fourteenth Amendment allow a plaintiff to prevail by
6 showing disparate treatment, intentional racial
7 discrimination.

8 In a redistricting context, intentional
9 discrimination can be shown in either of two ways, intentional
10 vote dilution or improper use of race in redistricting. Taken
11 together, the evidence in the case demonstrates that Texas
12 violated Section 2 by not creating additional Latino
13 opportunity districts in the House and congressional plans.

14 Quite simply, all of the preconditions for creating
15 additional Latino opportunity districts are there, but the
16 State did not create a single additional district in either
17 the State House or the congressional plan. In addition, there
18 is enough direct and circumstantial evidence to support a
19 finding of intentional discrimination in the drawing of the
20 two plans.

21 I will start first with vote dilution in the State
22 House plan. The Latino Task Force plaintiffs focus on
23 three areas, Nueces County, Cameron-Hidalgo, and El Paso.
24 This is the benchmark plan for Nueces County. In the
25 benchmark, Nueces County has three House districts. Two of

1 them are wholly contained in Nueces County, 34 and 33, and
2 they are both Latino majority districts.

3 The percentages you see there are Hispanic citizen
4 voting age population. HD-34 fully contains 58.2 percent
5 HCVAP. HD-33, which is the small orange district,
6 60.4 percent Hispanic CVAP.

7 The third district that involves Nueces County is an
8 Anglo majority district that flows from Nueces County out into
9 San Patricio and Aransas Counties, and that is the way it is
10 drawn in the benchmark.

11 In the adopted plan, one of the Latino majority
12 districts is deleted. You will see the small orange district
13 is now gone, and the Anglo majority district pulls down into
14 Nueces County. That is District 32.

15 The boundary for the Nueces County Anglo district
16 pushes Latinos westward into one district, eliminating the
17 second Latino majority district, so there is no orange
18 district here.

19 This district has pulled down and is now pushing
20 Latino population over here, and you will see the HCVAP is
21 significantly higher in the one remaining Latino majority
22 district.

23 JUDGE SMITH: But there is no county cut, right?

24 MS. PERALES: That is correct, Your Honor. There is
25 no county cut in the adopted plan here.

1 There is no fact dispute with respect to the
2 elimination of the Latino majority House District 33. If you
3 look for 33 now in the adopted map, you will find it be
4 located to Rockwall County, where it is not a Latino majority
5 district.

6 JUDGE SMITH: And that is in the Dallas area?

7 MS. PERALES: Yes, Your Honor.

8 You have heard some talk about the Gingles
9 preconditions. Thornburg versus Gingles provides for these
10 three preliminary preconditions before the Court moves to the
11 totality of the circumstances.

12 So moving through the preconditions, the first one
13 asks whether the Latino population is sufficiently large and
14 geographically compact to comprise the majority of a district.
15 This has been flushed out fairly recently by the Supreme Court
16 in 2009 in Bartlett versus Strickland, setting out the
17 standard that a majority means 50 percent plus one.

18 And also, there has been case law here in the Fifth
19 Circuit for some time that the relevant standard is citizen
20 voting age population. That is Campos versus City of Houston,
21 and also subsequent cases most recently in the Fifth Circuit,
22 I think it is Reyes versus Farmers Branch.

23 We know that the Latino population in Nueces County
24 is sufficiently numerous and compact to comprise a majority of
25 citizen voting age population of two districts, because Nueces

1 County does have those two districts right now in the
2 benchmark.

3 As you can see from the Latino Task Force
4 demonstration map, H-292, with the new deviations and the new
5 requirements following the census, two districts can be drawn
6 with at least 50-percent Hispanic citizen voting age
7 population. The small orange district has returned.

8 You will see now that the third district, there is a
9 portion of Nueces County now that flows northward, as it did
10 in the benchmark plan, and that is House District 30.

11 And, yes, Your Honor, that is a county cut there in
12 this proposed demonstrative.

13 With respect to racially polarized voting, the
14 second and the third Gingles preconditions have to do with
15 racially polarized voting. And they ask, first, in this
16 context, do Latinos vote cohesively? And do Anglos vote as a
17 block normally to defeat the Latino-preferred candidate?

18 You heard Mr. Garza speak earlier that there is
19 general consensus that racially polarized voting is a majority
20 difference in candidate preference. Dr. Alford came and
21 suggested that the standard could be quite -- much higher than
22 that, meaning 90 percent-ten percent as his standard for very
23 clearly demonstrated racially polarized voting.

24 I simply wanted to point the Court's attention to
25 the Gingles case 478 US at 58-59, where the Court is

1 discussing the findings at the district court level, and
2 finding white crossover vote between eight and 50 in the
3 primary and 28 percent and 49 percent in the general election.
4 These levels were found to be racially polarized voting in the
5 seminal case.

6 In this case, Dr. Engstrom studied the levels of
7 polarization between Latinos and nonLatinos in Nueces County
8 and concluded that voting is racially polarized. And those
9 tables are in his report.

10 Latinos voted cohesively for their candidate of
11 choice, and Anglos typically voted as a block against the
12 Latino-preferred candidate in Nueces County.

13 There also has been some mention of Senate factors,
14 and I won't go through each one of them here, but the Senate
15 factors, also known as the Zimmer factors, were adopted by the
16 Court in the Gingles decision and basically assist this Court
17 in making a finding under the totality of the circumstances.

18 And the question is whether here under the totality
19 of the circumstances minority voters in the new plan have less
20 opportunity to elect their candidate of choice, with all of
21 this taken into consideration.

22 And so to sum up with respect to Nueces County, the
23 two districts, both over Hispanic voting age population,
24 racially polarized voting findings, Dr. Tijerina, which found
25 a history of discrimination and a legacy of past

1 discrimination in Texas; and finally, one of the nine lay
2 witnesses that we did not present live, but whose declaration
3 has been offered, lay witness and Nueces County resident
4 Dr. Robert Bezdek talked about both racially polarized voting
5 in his declaration, as well as Senate factors.

6 Next, Cameron and Hidalgo. In the two counties of
7 Cameron and Hidalgo, now, the upper map is the Latino Task
8 Force map, and the lime green district here is one way to draw
9 the additional district that bridges Cameron and Hidalgo
10 County.

11 Down here is the adopted plan. You will see two
12 districts in Cameron, and then it is still going north from
13 Cameron. And then you will see one, two, three, four
14 districts in Hidalgo, with the spill going into Starr County
15 and outwards like that. These are the differences between the
16 two maps.

17 Certainly, it is -- I think it is also, again,
18 undisputed that the State's adopted plan does not create the
19 additional district which essentially organically grew in this
20 location.

21 If you just spill the overpopulation with Cameron
22 and Hidalgo toward each other, you get this lime green
23 district or some iteration of it. Instead, the State spilled
24 northwards here and northwards there and did not create the
25 district that essentially grew in place.

1 The end result is that there is no additional Latino
2 majority House district created in the Valley or anywhere
3 else. The spill that the State creates does not resolve
4 itself into another Latino majority additional district
5 anywhere else in the map.

6 The preconditions under Gingles are also met in
7 Cameron and Hidalgo Counties. We have also introduced
8 evidence that under the totality of the circumstances, Latinos
9 in this area do not have any equal opportunity to elect
10 representatives of their choice without the creation of this
11 new district, where the population warrants it.

12 The Court heard live from Judge Ramon Garcia from
13 Hidalgo County. There is also the declaration of an
14 additional lay witness, a former Catholic priest working in
15 Cameron County in the colonias of Cameron Park, and his name
16 is Michael Seifert.

17 So here it is. The legal issue, we believe, has
18 been well teed up. What happens when there is a conflict
19 between the Texas county line rule and the obligations under
20 the Voting Rights Act to create a Latino opportunity district?

21 We believe the facts are fairly clear that Chairman
22 Solomons, as he described his thought process, he said in his
23 mind, he was going to follow the Texas Constitution when
24 confronted with a conflict.

25 And he also mentioned that he felt that he needed

1 direction from the Court, preferably, the United States
2 Supreme Court, to be able to cut a county line for the
3 purposes of complying with the Voting Rights Act.

4 We believe that the Voting Rights Act does prevail
5 in a conflict with the county line rule. Always in these
6 situations, it doesn't mean that the county line rule would go
7 away completely.

8 The State always has interests when it is
9 redistricting, and it has rules like this, and the State had
10 rules before White vs. Regester to have multimember districts
11 inside counties.

12 States will always have strong interests in their
13 redistricting criteria, but we believe that where there is a
14 direct conflict, such as the areas that we showed you a moment
15 ago, that the county line rule has to yield and that the
16 federal Voting Rights Act does prevail, and it is a basic
17 preemption principle.

18 In terms of the numbers of cuts, the demonstration
19 map that was offered -- and I do stress demonstration, because
20 a remedial map could be drawn in a very different way. The
21 demonstration map offered by the Latino Task Force, according
22 to Mr. Interiano's testimony, had five cuts that were in
23 addition to the required cuts. We believe that five cuts in
24 254 counties in order to comply with the Voting Rights Act is
25 reasonable.

1 JUDGE SMITH: What is your -- you cited several
2 authorities, but if you were to focus on one, what is your
3 strongest case law authority for this issue of the county line
4 rule versus the VRA?

5 MS. PERALES: I would starts with Katzenbach vs.
6 Morgan, which was a case involving whether New York state had
7 to give up on its English literacy requirement when confronted
8 with a federal requirement to provide language assistance in
9 voting, so it is in the voting context.

10 It is an older case. It is from around the time I
11 was born, 1965, 1966, but it is an oldie but a goody. And I
12 found it last night at about 2:00 in the morning, because I
13 just knew that I was going to get this question. I think
14 there are probably others, and we would be happy to provide
15 them in our post trial brief.

16 Next, moving to El Paso County. The Gingles
17 preconditions are also met in El Paso County, where the State
18 created four districts as Latino opportunity districts and one
19 district that is not.

20 In addition to the information provided by the
21 expert witnesses, we have the testimony of two lay witnesses
22 from El Paso County supporting the necessary findings under
23 the totality of circumstances.

24 The district that is not the Latino opportunity
25 district is less than 50-percent Spanish surname voter

1 registration. The other districts are all at 65 percent or
2 higher.

3 There were some questions earlier about whether the
4 two -- I guess that we referred to them as claws or arms of
5 District 77, following whole precincts. We prepared this
6 demonstrative for the Court to show that it does not.

7 These arms split precincts here, in the more eastern
8 portion. They split precincts in here. And then moving down
9 along here, there are split precincts in the western arm as
10 well. So the boundaries of HD-78 do not consistently follow
11 precinct boundaries. That is, of course, a traditional
12 redistricting criteria.

13 Another question that came up from the Court -- and
14 this one might be harder to see with the lights, but I think
15 we will try our best. There was a question whether the two
16 arms of -- you could call them the arms of 77 wrapping around
17 78.

18 We are following the edges of a mountain range. And
19 you can see in this area here that the arms do not follow the
20 edge of the mountain range. The mountain range goes all the
21 way down here and comes all the way back up and around, and
22 you will see here that the arms do not follow along the edge
23 of the mountain range, and then the district boundary cuts
24 across the mountains there.

25 What the arms do line up with very well is theme

1 shading for Hispanic citizen voting age population, but it
2 doesn't line up perfectly. We think it lines up fairly well,
3 compared to some of the other possible criteria that the lines
4 could have been following.

5 The boundary follows denser populations of Hispanic
6 citizen voting age population. The shapes that you see there
7 with the shading are block groups. They are not precincts, so
8 we believe that this boundary follows census block groups.
9 And at that level, of course, election data is not available.
10 The only thing that is available is at the block group level
11 that would be relevant here, race, age, and certain other
12 demographic characteristics.

13 Our lay witness Carmen Rodriguez testifies in her
14 declaration regarding the lack of traditional redistricting
15 criteria in the creation of HD-78.

16 In the Latino Task Force demonstration plan, we show
17 that it is very possible to even out the Latino population and
18 create five Latino opportunity districts in El Paso County.
19 The districts are compact. The Latino Task Force proposal is
20 on the left. The districts are compact, and they have a
21 Spanish surname voter registration of 88 percent, 90 percent,
22 67 percent, 68 percent, and 65 percent. So they are all
23 65 percent or higher.

24 JUDGE GARCIA: And that is four of them, right?

25 MS. PERALES: That will be all five.

1 JUDGE GARCIA: Oh. All five?

2 MS. PERALES: All five.

3 JUDGE GARCIA: How many are currently Latino
4 districts?

5 MS. PERALES: Four.

6 JUDGE GARCIA: Four. Okay.

7 MS. PERALES: So there is the creation of the fifth
8 district, simply by rearranging the boundaries, smoothing out
9 the claws, following neighborhood lines. It is a very
10 natural -- this is a very Latino county.

11 Overall, the impact of the House plan is to
12 eliminate a Latino opportunity House district, that one being
13 in Nueces County, and then create no new Latino opportunity
14 House districts. The new plan subtracts political
15 opportunities, despite the dramatic growth of Latinos in
16 Texas.

17 In addition to the disparate impact, the evidence
18 presented at trial included testimony that the redistricting
19 process for the House plan did not take into account the
20 concerns of minority legislators.

21 It is both a substantive and procedural departure
22 for legislative leadership to abdicate their role as
23 supervisors of this process. You heard a lot of witnesses
24 testify: Once I got the drop-in county, I never looked.

25 The lawyer responsible for advising the Speaker and

1 the Chairman didn't look once he got the drop-in county. The
2 Chairman didn't look, once he got the drop-in county. He
3 said: I was depending on my lawyers to tell me.

4 But basically, everybody turned their back on these
5 counties. They got them. They dropped them in. And that is
6 not normal, either substantively or procedurally.

7 There should have been an inquiry, certainly a much
8 more vigorous inquiry into compliance with the Voting Rights
9 Act.

10 And then also, in certain instances, as I pointed
11 out in HD-78, the new district boundaries represented
12 departures from the normal substantive considerations, such as
13 respecting existing precinct boundaries or neighborhoods.

14 I would like to move now to the congressional
15 redistricting plan and begin with South Texas.

16 Here we are in the South Texas benchmark. There are
17 six opportunity districts in the benchmark. Congressional
18 District 16 in El Paso, big West Texas, 23. We have the
19 incumbent labels on at the moment, but we are going to also
20 show some additional information. Congressional District 20
21 in San Antonio, Congressional District 28, Congressional
22 District 15, and Congressional District 27.

23 Here are the districts again, with labels showing
24 their Hispanic citizen voting age population. All of these
25 districts have a majority Hispanic citizen voting age

1 population, and all of them have elected the Latino-preferred
2 candidate in either every recent election or in two-thirds of
3 the elections since their revision in 2006, following the
4 Supreme Court decision.

5 These districts meet the definition used by John
6 Alford for Latino opportunity districts. He offered two
7 variations on a very well-accepted theme. There is an
8 opportunity for Hispanics to comprise the majority of
9 turned-out vote. Hispanics are sufficiently cohesive, that
10 when they vote cohesively, they can control the outcome. All
11 of these districts meet that description.

12 Similarly, majority Spanish surname voter
13 registration, Latinos are voting cohesively, electing a
14 Latino-preferred candidate a majority of the time. Again, all
15 of these districts meet Dr. Alford's definitions of Latino
16 opportunity district.

17 And very importantly, they were all overpopulated.
18 As mentioned in opening argument, there was enough
19 overpopulation across the Latino majority districts in South
20 Texas to comprise three quarters of an additional district.
21 That would be the seventh district in this region.

22 If you add them all up together, we put the labels,
23 and then we added, you get about -- a little over half a
24 million people, and the new ideal is 698,000.

25 Not only did these Latino congressional districts

1 increase in their overall population, they became more
2 concentrated in their Latino population. So for each of these
3 districts, District 15, this is the Latino population in the
4 district in 2000, under the 2000 census, for Hispanic citizen
5 voting age.

6 And then the second bar, the bar behind, is the
7 Latino citizen voting age population in the benchmark, and
8 under the 2005 to 2009 HCS estimates for Hispanic citizen
9 voting age population. So they became more numerous. They
10 became more densely Hispanic.

11 But the State's adopted congressional plan creates
12 only six Latino opportunity districts in South Texas, the same
13 number that are there already.

14 I am not sure why this is the redistricting year for
15 Nueces County, but it plays a very important role in both the
16 House map and the congressional map. Nueces County, in the
17 congressional plan, is removed from its traditional location
18 anchoring a Latino majority district in the Gulf Coast. That
19 is benchmark 27.

20 Nueces County is majority Hispanic citizen voting
21 age population. Nueces County is almost half the size of a
22 congressional district, and in the benchmark contains the
23 majority of registered voters in Congressional District 27.

24 So when you look at 27 in the benchmark, most of the
25 registered voters are in Nueces County. And perhaps as a

1 reflection of that, Nueces County has hosted the home of the
2 incumbent, whether it was Solomon Ortiz or Blake Farenthold,
3 for the 30 years since its creation. It was clearly a very
4 important part of benchmark 27.

5 What happens now is that Nueces County is placed in
6 a district where Latinos cannot elect their candidate of
7 choice. That is not in dispute. And Dr. Alford testified
8 very succinctly that the creation of Congressional District 34
9 is a swap for 27.

10 But the problem created by the removal of Nueces
11 County from the South Texas configuration of districts is not
12 cured by simply drawing a replacement district.

13 When you remove a piece of geography like Nueces
14 County that is Latino majority, and almost half the size of a
15 congressional district by itself, you make it impossible to
16 draw seven Latino opportunity districts in this region.

17 This is the demonstration plan showing Hispanic
18 citizen voting age population, and this is offered by the
19 Latino Task Force.

20 In the Latino Task Force demonstration plan, there
21 are seven Latino opportunity districts in this part of the
22 state, and, of course, Nueces County is a vital part of that.
23 We need Nueces County's population, being almost half a
24 congressional district and being majority Hispanic, in order
25 to draw the seven opportunity districts.

1 And their Hispanic citizen voting age populations
2 are very healthy, the new district here, and we dropped the
3 State's version of CD-35 into our map to show that whatever
4 considerations the State had in drawing this additional
5 district, the way that they did it, because it didn't look
6 like the way that we had originally proposed it in the
7 session, whatever the considerations are leading to this
8 district, we can accommodate that and still create seven
9 Latino opportunity districts.

10 This, by the way, is a performing district, a Latino
11 opportunity district. It meets all of the criteria under
12 Thornburg versus Gingles. And in terms of its location, it is
13 a reflection, essentially, on the south side of I-35 from a
14 current district that has been there for some time,
15 Congressional 21. It is represented by Lamar Smith, and it
16 connects San Antonio and Austin.

17 Ryan Downton, the State's congressional mapper,
18 testified that these districts proposed by the Latino Task
19 Force, are all opportunity districts, and he testified it was
20 certainly possible to draw the districts this way, if you
21 didn't make a political choice to do it otherwise.

22 JUDGE SMITH: You are saying that District 35 in
23 C-190 is identical to District 35 in C-185?

24 MS. PERALES: Yes, Your Honor. It is identical.

25 JUDGE SMITH: All right.

1 MS. PERALES: And the testimony of Ryan Downton,
2 although I don't have it on the slide, is transcript 947 to
3 950.

4 JUDGE GARCIA: Now, we heard testimony that district
5 twenty -- that the south side of San Antonio was split into
6 three congressional districts; was that true?

7 MS. PERALES: It is, Your Honor. It doesn't have to
8 be, but it is in this particular version of seven opportunity
9 districts.

10 JUDGE GARCIA: Okay. So under your plan, is the
11 south side under one district now?

12 MS. PERALES: No, Your Honor, because the State's
13 version of CD-35, that we dropped into our map as a
14 demonstration, does make that cut through the south side, but
15 in the original plan that we offered, which is called plan
16 C-122, which is in the Court's map binder, keeps the south
17 side more or less together.

18 JUDGE GARCIA: But you prefer this map?

19 MS. PERALES: No, Your Honor. We simply prefer a
20 configuration that creates seven opportunity districts.

21 JUDGE GARCIA: Okay.

22 MS. PERALES: We had originally offered an I-35
23 district that did look a little bit different from this, that
24 kept the south side more intact, but it was important for us
25 at this stage, with an adopted map, to demonstrate that

1 deferring even to what the State did with the new I-35
2 opportunity district, we could still create the remaining six.

3 JUDGE RODRIGUEZ: This is just your Gingles map, to
4 satisfy that element. This is not necessarily your
5 remediation map?

6 MS. PERALES: That is correct, Your Honor, but
7 simply to show that if we had dropped our original I-35
8 district in here, we thought there might have been questions
9 from the Court regarding some of the State's concerns,
10 motivations, criteria, so we wanted to show that it was
11 possible to do it this way as well.

12 JUDGE GARCIA: All right. Thank you.

13 MS. PERALES: In the State's adopted plan -- if I
14 can go back -- Dr. Alford testified yesterday that he does not
15 count District 23 as among the effective minority districts in
16 the new plan. Here he is saying, in various ways: I
17 certainly wouldn't count and don't -- in all of this
18 discussion, I haven't counted the 23rd as an effective
19 minority district in the newly adopted plan.

20 And then later on, a couple of pages, some pages
21 later: I don't count 23 as one of the seven performing
22 districts when I evaluate C-185.

23 So what did happen to Congressional District 23? It
24 is undisputed that the numbers of Spanish surname registered
25 voters went up slightly, approximately two percent. It is

1 also undisputed that the election performance of Congressional
2 23 was changed so that now, according to the State's analysis,
3 it elects only one out of ten Latino-preferred candidates.

4 There is some dispute about how many elections
5 should have been looked at in the original set. We talked
6 with Mr. Downton on the stand. But if you include all
7 thirteen racially contested elections, generals since 2002,
8 Congressional District 23 was performing about six out of
9 thirteen times in reaggated elections.

10 What is more important to Dr. Engstrom, and to the
11 Latino Task Force plaintiffs, is that it had successfully
12 elected itself on all four selections the Latino-preferred
13 candidate in 2006 and 2008.

14 It isn't really even that important whether it was a
15 performing district or not in the benchmark. It is a more
16 important issue, I think, for Section 5.

17 For Section 2, the question is, how many districts
18 ought to be drawn to provide a fair opportunity to Latinos?
19 And there is simply no question that in this new plan, CD-23
20 is not an opportunity district.

21 And there are many, many commonalities between what
22 was done to 23 here and what was done to 23 in the year 2003
23 which led to the Supreme Court finding a vote dilution
24 violation.

25 For example, the changes were made, without dispute,

1 were made to protect an incumbent who was not the Latino
2 preferred candidate of choice. That is Mr. Canseco. That is
3 just the same as the changes being made in 2003 to protect the
4 incumbent, Mr. Bonilla, who was also not the Latino candidate
5 of choice.

6 In both cases, there was a concern that because of
7 the very Hispanic nature of the district that the
8 not-preferred incumbent would lose in the upcoming election.

9 There was a concern that Mr. Bonilla would lose in 2004.

10 There is a concern here that Mr. Canseco will lose in 2012.

11 Geographically, there are also several similarities.
12 In 2003, 23 split the city of Laredo and Webb County. Here,
13 23 splits the city of Eagle Pass and Maverick County, both of
14 them very strong bases for Latino political participation.

15 And you heard the testimony of County Judge David
16 Saucedo, talking about the struggle that they have had over
17 years to increase registration and voting, so that Maverick
18 County can have a strong voice in its congressional district.
19 Now, of course, it has been sliced in two, much the way that
20 Webb County and Laredo were in 2003.

21 Also, in 2003, heavily Anglo counties from the Texas
22 Hill Country were moved into the district to dilute Latino
23 voting strength. Here, we have seven West Texas counties
24 being moved into Congressional District 23 for no reason.
25 Congressional 23 was overpopulated significantly, especially

1 because it had to shed the overpopulation from 16.

2 If you count from 16 and 23, it was over 200,000
3 people that they needed to release from 23 in order to bring
4 it into deviation. Instead, here come in West Texas counties,
5 Lubbock, Ward, Winkler, Schleicher, part of Sutton. It is
6 very similar to what happened in 2003.

7 And then finally, Dr. Alford noted in his report in
8 2003 that he found it very suspect that the State was
9 underutilizing Latino majority geography in the new
10 congressional redistricting plan.

11 And that is certainly the case here. Nueces County
12 is underutilized in that sense, because it has been set adrift
13 into an Anglo majority district, and then the whole vast area
14 of Congressional District 23 and those counties are also under
15 utilized, because the district does not offer the opportunity
16 to elect.

17 We would point the Court to Exhibits 235 and 236.
18 Dr. Alford also testified, when talking to the Court
19 yesterday, that District 35 is the swap for 23.

20 The reason that we think that there is indicia of
21 intent here, and we are queuing very closely now to the
22 Supreme Court's decision in LULAC vs. Perry. In court there,
23 Justice Kennedy wrote that reducing the Latino electorate of a
24 district to shore up the election chances of the incumbent who
25 is not the Latino-preferred candidate bears the mark of

1 intentional discrimination that could give rise to an equal
2 protection violation.

3 This portion of LULAC vs. Perry, we believe, is very
4 informative on this point of reducing the ability of the
5 district to elect a Latino-preferred candidate directly in
6 response to the concern that the incumbent, who is not
7 Latino-preferred, may lose his seat.

8 We also believe that it is yet another violation to
9 use race, consciously use race to swap precincts in and out of
10 a district to ensure lower Latino turnout and create a facade.

11 And here is the conversation that we had with Ryan
12 Downton, the State's congressional mapper, who when asked,
13 when he was making changes to Congressional 23, and he had in
14 his mind these two goals, make it safer for Mr. Canseco, who
15 he knew was not Latino-preferred, and also try to keep Spanish
16 surname voter registration at or slightly above the benchmark
17 levels.

18 He systemically went precinct by precinct and
19 discussed, when confronted with two precincts that were both
20 60-percent Spanish surname voter registration, he would pick
21 the precincts that had higher vote count for Senator McCain in
22 the presidential election, knowing that that could have been
23 the result of lower, relatively lower Latino turnout. And
24 that is part of his testimony.

25 And we believe that that kind of race-conscious

1 redistricting does constitute a violation of the Fourteenth
2 Amendment and Section 2.

3 JUDGE SMITH: Do you have a record cite or page cite
4 for that last statement?

5 MS. PERALES: No, but I will put it in my post-trial
6 brief, Your Honor.

7 JUDGE SMITH: It's okay.

8 MS. PERALES: The exhibits that we would point the
9 Court to are Plaintiff's Exhibits 235 and 236, which were the
10 plan overlap analysis that we did to demonstrate that we
11 believe that these precincts were swapped out systemically to
12 create a district where Latino Spanish surname voter
13 registration might have been a point or two higher. The
14 actual Latino participation was lower.

15 Finally, moving to other portions of the map that
16 the Latino Task Force plaintiffs have proposed. In Dallas,
17 there has been some testimony whether or not it is possible to
18 draw a Latino citizen voting age majority district in the
19 Dallas-Fort Worth area.

20 The Latino Task Force demonstration map has such a
21 district. It is over 50-percent Latino citizen voting age,
22 and includes areas of Dallas County and Tarrant County.

23 In summary, with respect to the Dallas-Fort Worth
24 proposed district, there is certainly a lot of interest in the
25 Latino community to see a Dallas-based congressional district.

1 Latinos are aware that they are the plurality of total
2 population in Dallas County.

3 And there is also interest from Representative Smith
4 and at least portions of the congressional delegation.

5 Representative Smith advocated for a Latino majority district
6 in the Dallas-Fort Worth area; that was approximately
7 61-percent Hispanic voting age population. And the exhibit
8 for that plan is in Exhibit 311.

9 Dr. Engstrom found that voting is racially
10 polarized, and we had lay witness testimony from Alex Jimenez,
11 who is from the Tarrant County end of the district, and also a
12 declaration submitted from Mr. Hector Flores, who is on the
13 Dallas County end of the district, regarding the Senate
14 factors and the need for a district.

15 With respect to Harris County, the -- this is
16 Exhibit 410, and it is also showing on the screen right now.
17 The Latino -- again, very strong interest on the part of the
18 Latino community to see additional political representation in
19 Harris County.

20 What is done here is that Congressional District 36
21 is a Hispanic citizen voting age population, majority
22 district, flowing towards the east in Harris County, and then
23 the old Congressional District 29 has been flipped around to
24 the west.

25 It is now a coalition district. It has a combined

1 black and Hispanic majority of citizen voting age population.
2 Here is the summary information about the two districts. The
3 Latino population growth in Harris County total population
4 growth was almost half a million.

5 Lay witness Mary Ramos of Houston testifies in her
6 declaration regarding Senate factors and also Latino and
7 African-American political coalitions in Harris County.

8 I am ready to conclude, but I did want to show a
9 demonstration to answer a question that came from the bench
10 yesterday from Judge Rodriguez. He wanted to know what the
11 number of growth was in terms of citizen voting age population
12 in Texas from 2000 to 2010.

13 The number of growth is 700, a little over 700,000
14 more Latinos of citizens of voting age from 2000 to 2010. The
15 Anglo population, somewhat under half a million, new citizens
16 of voting age in the population. African-Americans, 273,000.
17 Others, which is Asians or, as Chairman Solomons mentioned,
18 native Hawaiians, that group altogether, about 133,000.

19 So we provided that to the Court. That is
20 Exhibit 409 for the Court's information. Or it could be
21 Exhibit 336. I am not sure. I have both written here. I'm
22 sorry. I know it is in there somewhere.

23 In conclusion, we have a state in which the Latino
24 population is growing significantly, and where Latinos can
25 comprise the majority of districts in several places around

1 the state, whether these are House districts or congressional
2 districts, but the State created not a single new Latino
3 opportunity district in either plan.

4 As you have heard throughout trial, Latinos will
5 vote for candidates who appeal to their values and their
6 concerns, and Dr. Alford testified that Latinos can't be
7 pigeonholed and they show flexibility in their voting, even
8 with respect to partisanship.

9 It is not accurate or fair to stereotype Latinos as
10 robotic voters for one political party for the purpose of
11 denying them new districts or to say: Well, there are no new
12 districts here because of partisanship. It is not fair and it
13 is not right.

14 Latinos deserve the opportunity to elect candidates
15 of their own choosing and to have candidates of all races and
16 all political parties compete for their vote.

17 Thank you for your careful attention, as well as
18 your patience with the attorneys and the witnesses during
19 trial.

20 JUDGE GARCIA: Thank you, Ms. Perales.

21 Mr. Vera.

22 MR. VERA: Thank you, Your Honor. With the Court's
23 permission, I will use Mr. Korbelt for help with the Elmo, with
24 the Court's permission.

25 JUDGE GARCIA: Okay.

1 MR. VERA: Well, while Mr. Korbelt is setting up,
2 Your Honor, there was a housekeeping matter. There was a
3 question asked, when Mr. Korbelt was on the stand, and he did
4 want to respond.

5 The question asked to him was: How many Travis
6 County -- what was the actual breakdown of precinct splits in
7 Bexar County? And Mr. Korbelt did an analysis of that, of the
8 new congressional plan 185.

9 And the most serious cuts were found in the
10 predominantly minority areas. And the actual breakdown is
11 this way. In the overall population, 30 percent of the
12 Anglo's precincts were split. 46 percent of the African --
13 I'm sorry. 46 percent of the Anglo population are in split
14 precincts. 46 percent of the African-American population in
15 Travis County is now in split precincts, almost half. And
16 43 percent of the Latino or Hispanic population of Travis
17 County is now in split precincts.

18 So that was a question. I am not sure which of the
19 Justices asked that question, but we did want to get it
20 answered, and we will submit that to the Court and the State
21 for their review.

22 JUDGE GARCIA: Okay.

23 MR. VERA: Thank you, Your Honors. First, we are
24 going to adopt, of course, all of the legal arguments that
25 have been done by the Mexican American Legislative Caucus, the

1 Perez plaintiffs, and the Latino Task Force, and we will try
2 not to repeat that to the Court.

3 The very first thing that stood out in our mind --
4 and, again, focusing predominantly on the congressional
5 districts, and the many questions that were asked of 23 and
6 35, and the question I asked Dr. Alford, and his response, how
7 he saw all of these parallels between 2003 and 2011 with
8 respect to CD-23 and 35.

9 What I put up on the board is what came out of LULAC
10 vs. Perry. The State had eliminated a performing Hispanic
11 majority congressional district, District 23, and replaced it
12 with a Hispanic majority district in a different geographical
13 area of the state, District 25.

14 In the end, the Court found that District 25 was not
15 required to be drawn under Section 2 as a district
16 concentrated minority communities, were geographically widely
17 separated. Thus, District 25 could not serve as a replacement
18 district for the eliminated Hispanic majority in District 23.

19 And I just put that one quote, because you actually
20 see his reasoning between pages 428 and 435. And it is the
21 whole totality of circumstances argument. It is not that
22 Travis County and where it ended in 25 was 300 miles apart.
23 That was one great factor. But he goes into all of this
24 reasoning of how the communities are different. Sure, all of
25 the numbers were there. Remember, he did not find it

1 unconstitutional. He didn't find that legally they could not
2 draw that.

3 But we did his analysis, and the majority court
4 agreed with him, it could not be a replacement for a Latino
5 district that you got rid of, or even come close to it,
6 because even though they are Latinos, the communities are
7 different. He went into this whole community of interest
8 argument and all of those things.

9 Now, why do I say that?

10 Go to the next number 2, George. Number 2. It is
11 our number 2, George. It should be -- I'm sorry. You are
12 right.

13 JUDGE SMITH: While he is getting that, let me just
14 say, I am not disagreeing with anything you just said, but I
15 also recall that the rationale is that the rights are not the
16 rights of a group as a whole, but the rights of the voters in
17 those groups, so that if you disadvantage voters in one part
18 of the state but create a district in another part of the
19 state, that doesn't help the voters that are being
20 disadvantaged in the first --

21 MR. VERA: Well, we discussed, Judge Smith -- and
22 you are absolutely right. What he discussed was, is that
23 there are different interests. The political interests in
24 this case, of people who live down in South Texas, along the
25 border, are politically different than the interests of the

1 Latino groups who live in central Texas.

2 And there was a lot of that discussion, but also a
3 discussion again of the communities themselves, of how they --
4 everything from performing that block voting to, again, this
5 discussion of just how they interact with each other, the
6 entire totality of circumstances arguments he makes.

7 And the reason that is important is because when you
8 come back -- he did that, of course, to then get back and say
9 23 was unconstitutional, that it did violate Section 2 because
10 of the voter dilution.

11 Now, I bring you this map, which is -- I know it is
12 part of one of our LULAC exhibits that Ms. Perales was talking
13 about. This was the old 23 -- I'm sorry -- 23, as you can
14 see, as it existed in 2006. And if you could see the overlay,
15 the line that comes across, is what has been adopted by the
16 legislature now in 2011.

17 They have added, as Ms. Perales stated a while ago,
18 ten new counties along -- all along the top. There are seven
19 up there, and then three down in the bottom, of Atascosa,
20 La Salle, and --

21 JUDGE GARCIA: Zavala.

22 MR. VERA: What they did, Judges -- I think you have
23 heard these arguments before -- by splitting Maverick County,
24 by removing the very core portion of the south side of San
25 Antonio, they took out the strongest, highest voting

1 precincts, or some of them, and replaced them, yes, with more
2 population, but with Latino populations that vote lower than
3 the ones they took out.

4 There was no need for that, no need for that
5 whatsoever. As Ms. Perales stated, the district was already
6 overpopulated. They could have done a number of things, a
7 number of things.

8 JUDGE SMITH: When you say "vote lower," you don't
9 mean percentage returns? You mean turnout; is that right? Or
10 which do you mean when you say --

11 MR. VERA: The turnout. They replaced them with
12 precincts that were lower performing, Latino precincts that
13 were lower performing, where the turnout was actually lower,
14 even though -- again, the numbers -- you can do anything with
15 numbers. You know that.

16 You can make all of these numbers the same, but you
17 take out -- and if you have got a precinct where the turnout
18 is 40 percent for the registered voters, and you replace it
19 with the same number of voters, but the turnout is only 15,
20 20 percent, you accomplish your goal, and that is what they
21 did here. One of the things they did, I should say.

22 Going to the next -- let me see what we have. We
23 will go to -- go to the next one, George, number 3.

24 What you see there on the right is CD-25. This is
25 the one that Justice Kennedy is criticizing. To your left is

1 the new CD-35. Now, this is not cut to scale, because of the
2 size of the paper. Of course, CD-35 -- I mean, 25, to the
3 right, is actually about 150 miles longer.

4 So what the legislature does, in my opinion, they
5 know how to read. They read Justice Kennedy. So they
6 thought, well, but it is the same shape almost, almost the
7 same, exact shape, but they shortened it by about 125,
8 130 miles, but they did the same, exact thing.

9 Now, they took out from -- I mean, you are at the
10 southernmost point of Travis County, right before you get to
11 Pflugerville, north of Austin, and you take it to the
12 southernmost point of San Antonio.

13 You have got the Latino communities in the south
14 side of San Antonio, a few inbetween, and you have got the
15 Latino communities -- I don't know if this works or not. You
16 have got the Latino communities in the northern part of
17 Austin, some on the southeast part, but that northern part is
18 overwhelmingly Latino.

19 That is what they did when they did 35 -- I mean,
20 25. There is no difference. And the same arguments that
21 Justice Kennedy made, 25, exist in 35.

22 So let's go to the next one, number 4.

23 Now, the reason we put this up here again -- let's
24 look at what they did before. In 2003, to accomplish their
25 goal for Congressman Bonilla, they split Webb County down the

1 middle, right here. Okay? I'm sorry. I am looking at it
2 wrong. Right here.

3 And now in 2011, they split Maverick County right
4 down the middle, only to accomplish their goal. Counties that
5 are overwhelmingly Latino, overwhelmingly come out in a block
6 for the candidate of their choice, to accomplish their goal,
7 they split.

8 They did the same thing. This is why when Dr.
9 Alford was talking about -- even though we -- I didn't ask him
10 all of the questions, he told this Court that he had concerns
11 because of the parallels.

12 I asked him: Would you draw that map?

13 He said: No. I wouldn't have drawn 35 like that.

14 The other thing I want you, the Court to consider
15 is, remember, even though 25 was not unconstitutional, when it
16 went back to the Court, Judge Higginbotham -- he knows how to
17 read, and that Court undid 25 themselves, put it back in
18 Austin, in the Austin area, where it belonged. Those are the
19 parallels. It hadn't changed.

20 Go to the next slide, George.

21 Ms. Perales talked earlier about -- and the question
22 was asked of Harlandale, here it is, this line -- there are
23 three congressional districts now. Harlandale has always been
24 in one congressional district, whether it was 23 or 28.

25 You asked about history earlier. You can go back to

1 Congressman Kazen, Congressman Bustamante, Congressman Tejeda,
2 going on to Congressman Rodriguez --

3 JUDGE GARCIA: That is about --

4 MR. VERA: And now Congressman Canseco --

5 JUDGE GARCIA: That is about 35, 40 years worth of
6 history of being in the same district, right?

7 MR. VERA: These congressional districts, the
8 communities involved, especially the south side of San
9 Antonio, has always remained together.

10 JUDGE GARCIA: Right.

11 MR. VERA: Maverick County has always remained
12 together. For only the political purpose in 2003, undisputed,
13 they did it only to try to benefit Congressman Henry Bonilla,
14 who is a Latino Republican. And now they have done it again,
15 undisputed, to benefit Congressman Canseco. But,
16 unfortunately, when they do it, they do it on the backs of the
17 Latino voter.

18 So you see there, this is Harlandale -- the line
19 there is Harlandale. There is 23, 20, and 35, just cut up
20 into three different congressional districts.

21 George, go to the next one, 5-A. 5-A and 5-B, the
22 two maps.

23 Can the districts be drawn differently? Yes. This
24 is just a larger version of it.

25 George, where is the 5 -- that is 5-B. Put 5-A

1 there first, if you can find it there.

2 I know it is hard to see here, Judge. This is
3 actually LULAC Exhibit 12, 12-D, I think.

4 MR. KORBEL: 12-1-D.

5 MR. VERA: 12-1-D. So you will find it in the
6 exhibit book as a demonstration map of what could be done,
7 12-1-D.

8 And show the next one, George, the one you had up
9 there before.

10 And this gives you a better idea of what it will
11 look like. It puts back all of -- it puts back Maverick
12 County and puts back all of the south side in Congressional
13 District 23.

14 And when you look at the Exhibit 12-1-D, it gives
15 you all of the data to show that it can actually be done and
16 comply with the Voter Registration Act, with the Gingles
17 factors and everything else.

18 JUDGE GARCIA: What does it do to District 35?

19 MR. VERA: I'm sorry, Judge?

20 JUDGE GARCIA: What does it do to District 35?

21 MR. VERA: District 35, we have not, Your Honor,
22 drawn -- District 35 will be moved up. Okay? We don't have
23 that map for you. What -- we have drawn a statewide map. We
24 are waiting for the Court to decide whether or not it finds
25 objections or violations, I should say, and we will submit

1 that to the Court as a remedy as to what we would do.

2 We would actually draw, I believe, what is a
3 minority district that can wholly be encompassed in Travis
4 County, between Commissioners 1 and 2.

5 Is that correct, George?

6 MR. KORBEL: (Nods head.)

7 JUDGE GARCIA: All right.

8 MR. VERA: Using those two, you can actually draw a
9 congressional district there that is majority-minority. It
10 would be a coalition district.

11 JUDGE SMITH: So this is only a demonstration map,
12 not a remedial map?

13 MR. VERA: Yes, Your Honor. Right now, these are
14 just demonstration maps. The question was asked earlier,
15 could it be fixed? The Latino Task Force presented that one
16 map, as a demonstration, of how it could be done. It could be
17 done this way too.

18 JUDGE GARCIA: Okay.

19 MR. VERA: Go to the next one, George, number 6.

20 I am going to take you up to Dallas County now. The
21 Dallas-Tarrant County, you see the majority community in
22 Dallas and Tarrant County is cut into eight different
23 congressional districts. There they are.

24 Go to the next slide, George.

25 JUDGE SMITH: When you say "now," you mean --

1 JUDGE GARCIA: The current law?

2 JUDGE SMITH: -- the 2010 election?

3 MR. VERA: Yes. I'm sorry. The plan as drawn now,
4 they want you to adopt in 2011, cuts the minority communities
5 into eight different congressional districts.

6 This is a demonstration, which, again, it is already
7 submitted as part of our package that shows that you can
8 actually draw three combined minority-majority districts in
9 the Dallas-Tarrant County area.

10 You take just the minorities, a combination with
11 African Americans and Latino Americans, and you can draw one
12 district. The numbers are all right there, and they are part
13 of our package. This district here, which is majority African
14 American, this district here, and this district here would be
15 majority Latino.

16 But when you combine all three -- now, each three is
17 a combination to take it over the 50-percent mark.

18 Go to the next slide, George.

19 This is a much talked-about District 12 and 26.
20 Remember? They totally -- this red, again, are the Latino
21 communities and the African-American communities, and then it
22 also -- this right here is the middle part.

23 If you were to put this back in here, then the
24 minority group would have a majority, but they don't. That's
25 why they cut this district the way they did, just took that --

1 some people call it a lightning bolt. Other people called it
2 a knife. Just took it straight out of the middle, to separate
3 and put it in District 26.

4 You take that out, put it right back in there and
5 combine. This right here is part of that majority combination
6 district that we demonstrated in the private map.

7 Go to the next slide, George.

8 This Latino, heavily-dominated Latino community in
9 Dallas is taken out from everybody else and put in this
10 District 6, combining it with all of this Anglo population
11 community to itself, where they can take that section of
12 Dallas and combine it with the rest of the Latino and
13 African-American communities that they cut out and form a
14 majority-minority district, with the African-American
15 population being the majority.

16 Instead, they cut it out and combined it with all of
17 these Anglo communities to the south.

18 Go to the next slide, George.

19 We think this is the map that Congressman Lamar
20 Smith gave them. It is our Exhibit 15.

21 JUDGE RODRIGUEZ: What do you mean --

22 MR. VERA: And it meets all of the criteria --

23 JUDGE RODRIGUEZ: Mr. Vera, what do you mean by "you
24 think that is the map he gave"?

25 MR. VERA: I'm sorry?

1 JUDGE RODRIGUEZ: You said you think that was the
2 map he gave?

3 MR. VERA: I'm sorry. That's the map that he sent
4 to the legislators. How do we know? Because Mr. Korbelt here
5 drew the map. You heard all of the testimony. If it is all
6 the criteria for being a majority-minority district -- they
7 had all of the data. They had everything, but yet they
8 totally ignored it.

9 Judges, you released to us 400-and-some-odd e-mails.
10 You know the conversations that were taking place, or at least
11 the e-mails. That is the district they could have drawn, and
12 they just went by the wayside.

13 JUDGE GARCIA: And Congressman Smith wanted that
14 district?

15 MR. VERA: Yes. This is Congressman Lamar Smith's
16 proposed district to the legislature for Dallas.

17 JUDGE GARCIA: Right.

18 JUDGE SMITH: Which would have the two --

19 MR. VERA: Well, this one is majority Latino
20 district. That is what that one is here right here.

21 MR. KORBEL: 33.

22 MR. VERA: I'm sorry. 33.

23 JUDGE SMITH: 33. And then 30 would be what?

24 MR. VERA: It would just be a normal district, Your
25 Honor. This would have been the majority Latino district that

1 Congressman Lamar Smith proposed to them as being a voting
2 rights district. That's the way he labeled it.

3 JUDGE RODRIGUEZ: Mr. Vera, can you go back to your
4 CD 6, that northern part? I am curious, that northern part
5 that you claim could have been put into an area --

6 MR. VERA: CD 6?

7 JUDGE RODRIGUEZ: Yes. -- and made a combined
8 opportunity district? What I am curious about is, that
9 northern part, where does it fit into this map of Congressman
10 Smith in 33? Where is it?

11 MR. VERA: Show them CD 6. Can you show them that,
12 George?

13 Well, you see this area here that has been cut out?
14 You can probably see it and show them better than I can.

15 MR. KORBEL: This is a larger presentation of the
16 Smith map. And instead of using primarily Hispanic
17 population, this combines all of the minority populations.

18 JUDGE RODRIGUEZ: Right. Correct. My question is
19 not clear. Go back to that map that you just showed us that
20 showed CD 6.

21 JUDGE SMITH: The one that goes down into Ellis
22 County.

23 MR. VERA: CD 6, the one that goes down to the
24 south --

25 JUDGE RODRIGUEZ: There we go. That northern part

1 of that exhibit, where does it fit in Congressman Smith's map?
2 Or does it? That's my question.

3 JUDGE GARCIA: Where is it in relation to it,
4 Congressman Smith's map?

5 MR. KORBEL: Judge, that would be part of this area
6 here. You can see it comes -- it would come out here.

7 JUDGE RODRIGUEZ: So Congressman Smith does include
8 that area that you all suggest should have been put into an
9 opportunity district?

10 MR. KORBEL: Yes, Judge.

11 JUDGE RODRIGUEZ: That was my question. Thank you.

12 MR. VERA: Yes. What he put in was that northern
13 portion.

14 JUDGE RODRIGUEZ: Thank you.

15 MR. VERA: Let's jump forward to number 11, George.
16 That would be the next one --

17 During my opening, Your Honor, I talked to you about
18 this Austin being the mother of all cities, I guess.
19 Everybody has got an umbilical cord going to Austin. This is
20 district, coming out of Houston, CD-10. There is downtown
21 Houston way on the right, and there is Lake Travis on the
22 northwest.

23 All of these are fractured Latino communities, where
24 you see the red, done for the sole purpose of keeping the
25 Latino communities from being together.

1 See there? And look what they put inbetween, all of
2 the white Anglo population. Here, here. All of this is white
3 Anglo. And they put the minorities up here, right here, and
4 right here. That is CD-10.

5 Of course, you have already seen Austin and San
6 Antonio, and I am not going to go over them again. But you
7 have all of them, Dallas, Fort Worth, Corpus Christi,
8 everybody has to head to Austin.

9 Why? That reasoning is beyond, I think, everybody's
10 imagination.

11 Go to the next one, George.

12 Staying in the Houston area, this is where they drew
13 Congressional District 36, removing -- this is the South
14 Pasadena ship channel area, a very high concentration of
15 Latino voters.

16 Instead of connecting them to the congressional
17 districts here that were also Latino, they took it all -- this
18 is Congressional District 36, very high concentrations, you
19 can see, of Anglo white community voters.

20 They could have taken this and combined it with the
21 Latino and African-American population to form an additional
22 majority-minority district, with the majority being African
23 American, but they don't. They fracture it.

24 Go to the next one, George.

25 The next one shows, this is the Galveston, Jefferson

1 County map. I don't know what else to call it. What they did
2 again, they took all of these Latino communities here, or
3 African-American communities, these little pockets, high
4 concentrations, could have been connected to the --

5 Show where it can be connected, George. Show them
6 on the map.

7 MR. KORBEL: In here. Jefferson County sits right
8 in here, and you have a heavy minority population in Jefferson
9 County that could easily have been connected with them.

10 MR. VERA: Instead of joining them together to form
11 another majority-minority congressional seat -- again, it
12 would be majority African American -- they purposely fracture
13 it away.

14 JUDGE SMITH: So this map that you are showing us is
15 what could have happened? It is not the proposed -- it is not
16 the State's 36?

17 MR. VERA: No. This is what they have actually
18 done.

19 MR. KORBEL: This is, I believe, 12, Judge.

20 JUDGE SMITH: Okay. Because it says -- all right.
21 Fractured from 36. I see what you are saying. Okay. So this
22 is 12.

23 MR. KORBEL: This is, essentially, a noncontiguous
24 district. This is essentially a sandbar on Galveston Island.

25 JUDGE SMITH: Yes. There is not even a highway

1 there anymore. It is all washed out.

2 MR. VERA: And the last one, George. I believe it
3 is number 14.

4 This is in the southwestern part of Houston, Judges.
5 Again, this is part of CD-7, again, where they take these
6 pockets of heavy concentrated Latinos, and instead of
7 combining them with other minority communities, again, to form
8 a majority-minority community -- again, the majority would be
9 African-American -- they break them away and put them in this
10 CD-7 with a very, very high concentration of white Anglo
11 voters.

12 JUDGE SMITH: Now, on that one, I would have some
13 difficulty understanding your argument, because I think it is
14 common knowledge that in north and west Harris County the
15 Hispanic population is fairly dispersed, and that shows that.
16 In other words, those pockets don't connect with each other.

17 It seems to me that it would be pretty difficult to
18 include those in one district without fragmenting the
19 community of interest, which is the Anglo population,
20 particularly in the northwest part of the county. I am
21 just -- that's a long-winded question, but I want to give you
22 an opportunity to respond to it.

23 MR. VERA: Judge, and you are absolutely right, but
24 that is exactly what they have done all over the Latino
25 communities. We are not saying they should do that. We are

1 just showing you how they do it.

2 It is selective rationale when it comes to breaking
3 a community, especially minority communities, because what you
4 are saying, for the most part, I agree with you. It would
5 require them fracturing some Anglo communities, but they don't
6 have -- look at the shapes of these things. That is what we
7 should be calling the deer. There are the legs and the tail
8 and the head.

9 JUDGE SMITH: Well, as compared to a lot of the
10 districts, that's a pretty good-looking district to me.

11 (Laughter.)

12 MR. VERA: You are right, compared to some. And
13 George had all of these little toys that we cut out that I
14 think we were going to use, but I didn't.

15 Judges, you know, again, I am not going to repeat
16 everything that has been said so eloquently by Mr. Garza,
17 Ms. Perales and Mr. Gray, but I think, you know, two things
18 are important, to my mind, and what I am going to close with.

19 This whole argument of Democrats versus Republicans,
20 that same argument has been used for 40 years. It is the same
21 argument every time we do a district. It is not about race.
22 It is about politics.

23 The law allows, as you well know, always give a
24 neutral reason. Well, the reason I find that sometimes -- it
25 is not amusing, but I have been before you several times, both

1 Justice Garcia and Justice Rodriguez, and you sit in this
2 courtroom every day listening to people who do some of the
3 most hideous, horrible things, but they all have an excuse.
4 They all have a neutral reason to why they did what they did.
5 It is never their fault, but they knew what the outcome was
6 going to be, and they got caught, but they still have a
7 neutral reason to do it.

8 In this case, I guess what bothers me the most is
9 two things that I was thinking about. You know, when I did
10 the Miss San Antonio case -- I was smiling a while ago,
11 because she actually walked in to watch us.

12 She is very young. She is only -- I guess she just
13 turned 18. She was 16 when we started this mess. It turned
14 out great. So she just went through a big, massive fight of
15 her own, because she was discriminated against.

16 And I was worried to death during that whole case,
17 and I was reading all of this law. I was going back to the
18 old English law trying to find a way to convince the judge
19 that we were entitled to specific performance. She was
20 entitled to her crown.

21 And I said, what am I going to do? And I was
22 reading one of these old English cases and it was talking
23 about equity, and I will never forget the judge, the lord that
24 was overseeing and hearing the case. He looks at the
25 barrister and he says: Justice is blind, but it is not

1 stupid.

2 And that stood out in my mind like, wow. You know,
3 people are always going to come up with a reason to do
4 something. It doesn't mean we have to believe it.

5 I have always believed that we have a higher calling
6 in doing what we do. When I was little, my dad would make us
7 stand every time the Pledge of Allegiance or -- I'm sorry --
8 the Star-spangled Banner, he would make us stand up and salute
9 while they were playing the Star-spangled Banner.

10 He was very proud. But I would question him and
11 say: Dad, why is this happening? When we see all of these
12 riots and police beating up on Black Americans and Latino
13 Americans and turning the dogs on them. Why is that
14 happening?

15 And my dad would always tell me: That is my
16 generation, son. It will end by the time you grow up.

17 Well, I am 55 now, and my grandson, who is now 18,
18 when we fought, all of us here together, in Balderas and LULAC
19 back in 2003, in the Supreme Court, 2006, when Ms. Nina
20 Perales eloquently argued the case for us. And my grandson
21 was telling me, he says: Grandpa, why are we doing this?

22 And now he is 18, going to be 18, getting ready to
23 graduate from high school. And the other day he says:
24 Grandpa, when is this going to end?

25 I can't give him an answer. I believe my dad, that

1 it was going to end by the time I grew up, and it didn't
2 happen.

3 So I think this is what this case is all about. It
4 has been 40 years. The State has never, ever been able to
5 completely preclear a plan, either through the Department of
6 Justice or through this Court, and it has been the same
7 argument for 40 years that has never been accepted, when it
8 comes to racial gerrymandering, and it should not be accepted
9 by this Court.

10 The League of United Latin American Citizens urges
11 you to find all of the constitutional violations and the
12 voting rights violations in the congressional redistricting
13 plan and to give us an opportunity to give you a remedy, a
14 statewide remedy for the plan. Thank you.

15 JUDGE GARCIA: Thank you, Mr. Vera.

16 Mr. Rios.

17 MR. RIOS: Thank you, Your Honors. Rolando Rios for
18 Congressman Henry Cuellar.

19 Our claims are related to the congressional district
20 plan, and they are limited to Section 2 claims under the
21 federal Voting Rights Act.

22 As I mentioned to the Court in my opening statement,
23 the federal courts have been the sole vehicle for minorities
24 in Texas to gain access to the political process. The Equal
25 Protection Clause of the United States Constitution has been

1 interpreted by Congress through the Voting Rights Act and by
2 the courts through Thornburg vs. Gingles to prohibit the use
3 of any election system or device that has the effect -- and I
4 underline the word "effect" -- of prohibiting the minority
5 community from being able to elect candidates of their choice.

6 The State has attempted, as it has done in the past,
7 to defend themselves by claiming that what they did was simply
8 politics. They were simply trying to maximize their political
9 power and diluting the voting strength of minorities has
10 nothing to do with it.

11 This is nothing new. Both political parties in
12 Texas have used it. In 1990, when the Democrats controlled
13 both Houses of the legislature and the governor's, 1990
14 redistricting led to litigation as well, and their excuse was
15 partisan politics.

16 Again, I emphasize the word "effects," because
17 partisan voting is not an excuse or a safe harbor to hide
18 racially polarized voting. Dr. Alford's example, when I
19 talked to him here, and his example of at-large voting
20 statewide would lead to all Republicans being elected.

21 He agreed with me on two facts in that hypothetical.
22 Number one, that the choice of the minority communities would
23 be defeated; and number 2, that whites vote as a block to
24 defeat the choice of the minority community. So partisanship
25 is no excuse.

1 Elections in Texas continue to be racially
2 polarized. The case law is clear that plaintiffs must prove
3 that polarized voting exists and it is a cornerstone to any
4 voting rights claim under Thornburg vs. Gingles.

5 The word "polarized voting," what is polarized
6 voting? It has been defined by a number of experts as where
7 minorities and nonminorities vote differently.

8 Dr. Engstrom's tables, at tables 4 and 5, make it
9 clear that Texas continues to have a high degree of racially
10 polarized voting.

11 Racially polarized voting, Your Honor, doesn't mean
12 that people are racists. What it means is that people vote
13 their interests, and often, when an Anglo goes to vote and
14 sees on the ballot a Hispanic name and an Anglo name, the
15 Anglo will vote for the Anglo name, not because they are a
16 racist, but because they perceive that person or that
17 candidate to represent their interests.

18 We vote along what we perceive to be our interests.
19 Conversely, when a Latino goes to vote and sees a Hispanic
20 name and an Anglo name, they may vote for the Hispanic,
21 because they perceive that the Hispanic will represent their
22 interests.

23 And this is voting along what a person thinks is
24 their interests. And that is what is beautiful about this
25 country and the democratic process. You can vote along racial

1 lines, if you want.

2 And there are a lot of reasons to vote along racial
3 lines, and this country is built upon defending the right to
4 vote, however you want. However, when the effect of that
5 pattern or the way people vote creates the effect that the
6 minority community will not be able to elect candidates of
7 their choice, and their voting conceivably is frustrated by a
8 white voting block, then the Court must intervene and issue an
9 injunction.

10 The number of minorities continue to increase in
11 Texas. Because of the increased growth in Texas, Texas was
12 entitled to four new congressional districts. Four new
13 congressional districts in Texas, 32 and 36, that is the
14 largest increase in the country.

15 Approximately four million people was the increase
16 here in Texas, 90 percent due to the growth of the minority
17 population. As Congressman Cuellar testified, nonminorities
18 caused ten percent of the growth, yet they got four new
19 congressional districts.

20 The facts show that the increase in the minority
21 population results in the citizen voting age population in
22 Texas to be approximately 25 percent of the total population.
23 Proportionately, if we use CVAP, we would be entitled to nine
24 of the 36 congressional districts. 25 percent, nine.

25 The main line drawer for the State of Texas, Mr.

1 Downton, testified that the State had given him direction to
2 try and draw a CVAP district in Dallas. He said he couldn't
3 do it and he stopped.

4 In cross-examination, I asked him: Isn't it
5 possible you could have drawn a combined minority district in
6 Dallas that would be over 50-percent CVAP? He admitted that
7 that was true.

8 The State claims we have created some additional
9 Latino districts, CD-23. In their plan, they claim it is a
10 minority district. However, when we look at the way those
11 three congressional districts performed, they do not allow the
12 Latino community to elect candidates of their choice.

13 And when asked to characterize -- duplicitous of the
14 State's claims, they claim that Cameron, Nueces County -- the
15 Nueces County district is a new Latino district, when
16 everybody knows that that district was represented by
17 Congressman Ortiz for 28 years.

18 And the other Latino district that they claim in
19 Austin, everybody knows that Congressman Doggett has been the
20 choice of the Latino community for many, many years, so there
21 are no new Latino districts, even though they gave them new
22 numbers.

23 Congressman Cuellar's main testimony was the
24 process. Being involved in Texas politics for at least four
25 redistrictings, Secretary of State, et cetera, he was well

1 aware of the process that Texas normally uses for
2 redistricting congressional district.

3 And there has always been some deference to the
4 congressional delegation on how the districts should be drawn.
5 And, indeed, the Dallas district that was reflected in Lamar
6 Smith's proposal was one that we worked with with Congressman
7 Cuellar and Lamar Smith.

8 We were very excited at that time, because it seemed
9 possible that we might, for the first time in the history of
10 Texas, get two new Latino districts, because the leadership,
11 the Republican leadership was for it. So we were very excited
12 and completely disappointed when we saw what came out.

13 We would urge this Court to issue an injunction on
14 the State's congressional redistricting plan and find that
15 there is a Section 2 violation.

16 We would ask the Court to restore the process that
17 should have been in place and allow the congressional
18 leadership to provide input, should the Court find violations,
19 so that we can pose what we think is a fair remedy. Thank
20 you.

21 JUDGE GARCIA: Thank you, Mr. Rios.

22 Ms. Riggs.

23 MR. RIGGS: Good morning, Your Honors. May it
24 please the Court. In this case, the NAACP plaintiffs have
25 brought claims of intentional discrimination under the Equal

1 Protection Clause and vote dilution under Section 2 of the
2 Voting Rights Act.

3 Rather than being repetitive and going through
4 elements checklists, in an unnecessarily formalistic way, I
5 would like to bring the Court's attention to three legal
6 issues that I think are fundamental to the NAACP's case, and
7 then contextualize the evidence we offered, in light of my
8 discussion of those issues.

9 First, though, I would like to set out that in this
10 trial, we have through the evidence established intentional
11 discrimination in violation of the Equal Protection Clause and
12 violation of Section 2 of the Voting Rights Act.

13 We have established the existence of all of the
14 Gingles preconditions and that under the totality of the
15 circumstances, the votes of African Americans and other
16 minority groups will be diluted if the enacted House and
17 congressional plans are allowed to stand as is.

18 But to go back to my specific goal for this short
19 time that I am up here, the three issues that I would like to
20 discuss are coalition districts, explanations for political
21 cohesion and polarized voting, and evidence of intentional
22 discrimination.

23 In past Voting Rights Act cases, examinations of
24 vote dilution have been frequently focused on one racial
25 group, but in today's increasingly diverse society, and

1 especially in Texas, there are situations in which more than
2 one racial group living in close proximity have shared
3 interests in voting patterns and could be drawn into a
4 district, such that the groups would constitute a majority and
5 could elect a candidate of their choosing.

6 The decision not to draw such districts can, with
7 the additional satisfaction of the other Gingles
8 preconditions, create Section 2 liability on the part of the
9 redistricting body.

10 JUDGE SMITH: You are talking about coalition
11 districts?

12 MR. RIGGS: Yes.

13 JUDGE SMITH: I thought Bartlett said that the state
14 can't be required to draw coalition districts.

15 MR. RIGGS: I think Bartlett was specifically
16 answering the question of crossover districts and reserved
17 judgment on coalition districts. And let me get to that.

18 The Supreme Court has not directly addressed the
19 issue of whether coalition districts, that is, combined
20 minority populations of 50 percent or more, could satisfy the
21 first Gingles prong, but the Court has previously noted that
22 racial minority groups could form coalitions with voters from
23 other racial and ethnic groups. That was in Johnson v.
24 DeGrandy in 1994.

25 Additionally, in Growe vs. Emison, in 1993, the

1 court, for purposes of discussion of political cohesion,
2 assumed without deciding that coalition districts are
3 protected under the Voting Rights Act.

4 However, decisions from a number of lower courts,
5 including at least five cases from the Fifth Circuit Court of
6 Appeals, have accepted the proposition that minority groups
7 can be aggregated for the purpose of asserting a Section 2
8 claim.

9 Those cases include LULAC v. Clements, which said
10 that if blacks and Hispanics vote cohesively, they are legally
11 a single minority group; Overton v. City of Austin; Brewer v.
12 Ham; Campos v. City of Baytown, which said that a coalition
13 minority group is politically cohesive if it votes together;
14 and LULAC v. Midland Independent School District.

15 Other circuits considering the issue have agreed,
16 and to date, the only circuit to take a contrary position is
17 the Sixth Circuit in Nixon v. Kent County in 1996.

18 This interpretation of the first prong of Gingles is
19 fitting with the intent of the Voting Rights Act, which was
20 designed to provide a remedy when a discrete political group
21 is kept from participating in the political process.

22 The reality in Texas is that there are a multitude
23 of examples where multiracial coalitions exist and operate
24 together electorally, and quite effectively, even according to
25 Dr. Alford.

1 Congressional Districts 9, 18 and 30 are excellent
2 examples. In their testimony, Gerardo Interiano and Dr.
3 Alford both acknowledge that African-American voters were
4 electing candidates of their choice from these districts,
5 where the black population was substantially below 50 percent.

6 Dr. Alford explicitly agreed that Hispanic and
7 African-American voters in those districts were voting in
8 coalition in general elections.

9 Multiracial coalitions in Texas, particularly in
10 urban areas, have achieved significant electoral success, and
11 an interpretation of the first prong of Gingles that
12 recognizes coalition districts serves to accommodate Texas'
13 current political reality and fits with the intent of the Act.

14 In light of this discussion of the ability of
15 coalition districts to satisfy the first prong of Gingles, I
16 would like to turn to some of the coalition districts that the
17 NAACP plaintiffs presented to the State legislature and to
18 this Court.

19 First, I would like to discuss the two new proposed
20 congressional districts in the Dallas-Fort Worth area. In
21 plan C-193, the effectiveness and integrity of Congressional
22 District 30, currently represented by Congresswoman Eddie
23 Bernice Johnson, is maintained.

24 Additionally, NAACP plaintiffs proposed a new
25 African-American opportunity district and a new Latino

1 opportunity district for the area.

2 Congressional District 34 is the African-American
3 opportunity district. Like Congressional District 30, it is a
4 coalition district.

5 CD-35 is the Latino opportunity district. Again,
6 like CD-30 -- like CD-30 and proposed CD-34, it is a coalition
7 district. That district is a Latino and African-American
8 coalition district.

9 The NAACP plaintiffs and other parties introduced
10 extensive evidence in support of the viability of these
11 districts and of the cohesion of multiracial coalitions in the
12 Dallas-Fort Worth area.

13 The performance of the existing coalition district,
14 CD-30, provide some -- from which Eddie Bernice Johnson was
15 elected, provide some of the strongest support in favor of our
16 argument that coalitions exist and perform electorally in that
17 area.

18 Mr. Fairfax testified that the districts drawn in
19 this area were compact, complied with traditional
20 redistricting criteria and could be enacted by a state
21 legislature.

22 Dr. Murray's homogeneous precinct analysis in Dallas
23 County showed very high levels of racially polarized voting,
24 with African Americans and Latinos preferring one set of
25 candidates and Anglo voters preferring different candidates.

1 Dr. Kousser's statewide analysis of 2010 general
2 elections indicated that Latinos, African Americans and Asian
3 Americans supported Latino Democratic candidates.

4 Evidence presented by Congresswoman Johnson
5 powerfully describe the communities of interest formed by
6 multiracial groups in her district and how they have voted for
7 her and for other minority candidates in the area.

8 Congresswoman Johnson spoke extensively to
9 black-brown coalitions and black-brown-Asian coalitions in the
10 area. The testimony of Mr. Chin addressed how Asian Americans
11 work with other minority groups in the Dallas metroplex area.

12 A proffer from Dr. Juanita Wallace describes a
13 black-brown coalition, and a proffer from Anthony Bond
14 described local electoral successes that the coalitions of the
15 three minority groups have achieved.

16 Now, if I can move on to the new opportunity
17 districts for the State House. The Texas Legislative Black
18 Caucus introduced a plan H-202, which created several new
19 opportunity districts that satisfied the Gingles first
20 precondition.

21 First, I would like to look at Harris County and
22 districts 137 and 149. H-202 maintains those two minority
23 districts in Harris County, which, because H-283 combined them
24 into just one, provides one additional minority opportunity
25 district.

1 In the benchmark H-100 and the proposed H-202, both
2 of these districts were coalition districts in which the
3 minority coalition comprised a majority of the voters. These
4 districts were electing candidates of choice of coalition
5 voters, Representatives Hochberg and Vo.

6 JUDGE SMITH: You are talking about -- yes, that was
7 my question. You just said it, Hochberg and Vo. Okay.

8 MR. RIGGS: Yes.

9 In H-202, House District 31 is an African-American
10 and Hispanic coalition district. These two groups meet the
11 first prong of Gingles. House District 147 is an
12 African-American, Hispanic and Asian coalition district with a
13 history of electing an Asian candidate, the candidate of
14 choice of each of these groups.

15 This Court has been presented with extensive
16 evidence in support of why the Voting Rights Act compels the
17 drawing of these districts. Mr. Fairfax testified that these
18 districts were compact, comply with traditional redistricting
19 criteria and could be enacted by a state legislature.

20 Like with Dallas County, Dr. Murray's homogeneous
21 precinct analysis showed astonishingly high levels of racially
22 polarized voting, with African Americans and Latinos voting
23 together.

24 Congresspersons Sheila Jackson-Lee and Alexander
25 Green testified about multiracial coalitions in the districts

1 they represent and the racially polarized voting in the Harris
2 County area.

3 Rogene Calvert testified to the powerful Asian-
4 American, Latino and African-American coalitions in the
5 greater Houston area.

6 During the cross-examination of Gerardo Interiano,
7 we learned how certain members of the Harris County delegation
8 were very opposed to the combining and, thereby, the
9 demolishing of these two important minority districts, and
10 this, in addition to the fact that Ryan Downton tried to
11 assert that Democrats from Harris County approved the plan
12 from Harris County.

13 H-202 also created a new African-American
14 opportunity district in Dallas County, House District 107. It
15 is a Hispanic and African-American coalition district. Much
16 of the same evidence that would support the drawing of a new
17 congressional district in the Dallas-Fort Worth area supports
18 the drawing of this district.

19 Like with the other districts I have discussed, Mr.
20 Fairfax was of the expert opinion that the district was
21 compact, complied with traditional redistricting criteria, and
22 could be enacted by the state legislature.

23 Finally, the plan H-202 offered by the Texas
24 Legislative Black Caucus created two new -- two additional
25 minority districts, House District 26, an Asian opportunity

1 district in Fort Bend County, and House District 54, an
2 African-American opportunity district in Bell County.

3 Both of these districts are coalition districts, and
4 both were evaluated by Mr. Fairfax and were found to be
5 compliant with traditional redistricting criteria.

6 In a proffer, lay witness Phyllis Jones documents
7 her experience working with multiracial coalitions in Bell
8 County to get the candidates of choice of the coalition
9 elected into public office. She also speaks anecdotally to
10 the continuing problems with racially polarized voting and
11 racial discrimination in Bell County.

12 With regards to the district in Fort Bend County,
13 much of the evidence supporting the creation of minority
14 opportunity districts in neighboring Harris County also
15 support the creation of a new Asian opportunity district in
16 Fort Bend County.

17 Now to my second topic, reasons for political
18 cohesion and polarized voting. Every plaintiffs' expert that
19 has testified in this matter has found significant levels of
20 racially polarized voting in Texas.

21 Obviously, different methods and different --
22 different methods of analyses and different data examined led
23 to slight variations and interpretations, but several experts
24 testified that despite the methodological variation, the data
25 was in agreement.

1 In his report, Dr. Alford didn't dispute a lot of
2 that evidence, instead, disputing all of the other experts'
3 interpretation of that evidence, and instead of explaining it
4 in terms of race, he explained it in terms of partisanship.
5 Where we find the distinction between these two explanations
6 for variations in voting is in the rest of the evidence, the
7 historical and qualitative evidence.

8 Starting generally and working our way into that
9 distinction, the second prong of Gingles does not require a
10 perfect record of political cohesion between minority groups
11 but, rather, evidence indicating that minority voters usually
12 vote together.

13 The Supreme Court in Gingles noted that a showing
14 that a significant number of minority group members usually
15 vote for the same candidate is one way of proving political
16 cohesiveness necessary to a vote dilution claim and
17 consequently establishes minority block voting within the
18 context of Section 2.

19 Moreover, the Fifth Circuit has held that the
20 determinative question is whether black-supported candidates
21 receive a majority of the Hispanic and Asian vote, whether
22 Hispanics-supported candidates receive a majority of the black
23 and Asian vote, and whether Asian-supported candidates receive
24 a majority of the black and Hispanic vote in most instances in
25 the area.

1 In *Gingles*, in a plurality opinion joined by three
2 other justices, Justice Brennan stated the legal concept of
3 racially polarized voting, as it relates to a claim of vote
4 dilution, refers only to the existence of a correlation
5 between the race of the voters and the selection of certain
6 candidates.

7 In order to prove a prima facie case of racial block
8 voting, plaintiffs need not prove causation or intent.
9 Justice O'Connor's concurrence distinguished Brennan's opinion
10 in that it would allow for political affiliation to
11 potentially rebut a case of racial bias.

12 After *Gingles*, some courts wanted evidence of the
13 causes of racially polarized voting and some did not. The
14 Fifth Circuit was one of the districts, one of the circuits
15 that wanted to talk about causation.

16 However, even in the *LULAC v. Clements* decision,
17 where the Fifth Circuit said that where evidence on the
18 state -- shows that divergent voting patterns among white and
19 minority voters are best explained by partisanship, a
20 plaintiff hasn't established racial block voting, the Fifth
21 Circuit didn't explain exactly what a plaintiff would have to
22 prove in order to establish racial block voting.

23 An extreme interpretation of the Fifth Circuit's
24 causation analysis in both dilution cases is not consistent
25 with congressional intent and is not consistent with Supreme

1 Court precedent.

2 First, if LULAC v. Clements is interpreted to
3 require that plaintiffs prove the intent of voters in casting
4 votes the way that they do, the circuit has effectively undone
5 what Congress did in 1982, and reestablished the enormous
6 burden of proving intent in order to prevail in a Section 2
7 case.

8 That certainly cannot be what Congress intended,
9 given that Congress amended Section 2 in 1982, in response to
10 the Supreme Court's decision in Mobile versus Bolden.
11 Congress explicitly created a vote dilution remedy for
12 plaintiff without requiring them to prove discriminatory
13 purpose.

14 Moreover, this interpretation would not be
15 consistent with the Supreme Court precedent, in that it would
16 be increasing the Gingles threshold burden. The argument
17 advanced by Dr. Alford yesterday that where there are both
18 racial and partisan patterns of voting, you just have to stop
19 there and there can be no successful Section 2 claim doesn't
20 fit.

21 All that being said, when there is some correlation
22 between partisanship and race when it comes to voting,
23 contextualizing that correlation can help determine which is
24 more significant in causing the voting patterns.

25 Even when we are requiring more than mere

1 correlation in *LULAC v. Clemens*, the Fifth Circuit agreed that
2 plaintiffs in that case were correct in arguing that courts
3 should not summarily dismiss vote dilution claims in cases
4 where racially divergent voting patterns correspond with
5 partisan affiliation.

6 Statistics need to be placed in historical context.
7 They should not be divorced from the qualitative evidence and
8 testimony. This sort of contextualization is what will
9 instruct the Court on untangling what may superficially seem
10 like an inextricable intertwining of racial and partisan
11 motivations, and this fact-intensive, case-specific,
12 totality-of-the-circumstances approach is consistent with
13 congressional intent and Supreme Court precedent.

14 The contextual facts significant to teasing apart
15 racial and partisan motivation in the instant case are the
16 pieces of evidence relating to the long history of racial
17 discrimination in voting in Texas, as documented in
18 Dr. Burton's expert report and as expected to be covered in
19 his post-trial deposition, and as also discussed by Dr. Murray
20 on the stand and in his report.

21 Racial appeals in voting, as discussed by Ms.
22 Guerra, documented in Dr. Burton's expert report, and in
23 Mr. Turner's offer of proof provide more context. The
24 enormous disparities between white and minority residents in
25 the state, in the areas of employment, education and health

1 and other fields is yet more context.

2 These disparities, again, are documented in Dr.
3 Burton's expert report. These disparities don't fall along
4 partisan lines. They fall along racial lines. There are a
5 multitude of pieces, of other pieces of evidence that help
6 contextualize why race provides a much better explanation for
7 voting polarization than does politics.

8 The best evidence is the consistent, uninterrupted
9 use of minority voting rights by the conservative white
10 political establishment in power since Reconstruction,
11 regardless of partisan affiliation.

12 The only way to conclude that partisan affiliation
13 is indistinguishable from race is to disregard this
14 historical, uninterrupted racial discrimination recounted by
15 Dr. Burton, Dr. Murray and Dr. Tijerina.

16 Finally, in my discussion of intentional
17 discrimination, I not only want to discuss how the -- address
18 how the evidence presented in trial fits into the requirements
19 for proving intentional discrimination under the Fourteenth
20 Amendment, but I also want to explain how intentional
21 discrimination affects the other two subjects I have already
22 discussed; that is to say, Texas is where it is today because
23 of the historical and continuing intentional acts of
24 discrimination designed to dilute and minimize the voice of
25 minority voters.

1 This has affected the formation of political
2 coalitions amongst minority groups and it has affected the
3 findings of political cohesion in the Fifth Circuit. But
4 first, plaintiffs do not need a smoking gun to prove
5 intentional discrimination and violation of the Fourteenth
6 Amendment.

7 Plaintiffs are not even required to prove that
8 racial considerations predominated. Rather, they just must
9 prove the discriminatory intent was one of the motivating
10 factors.

11 The Supreme Court, in Village of Arlington Heights,
12 offered some examples of -- evidence sufficient to establish a
13 prima face case of intentional discrimination. These examples
14 include troubling legislative history, a pattern of
15 discriminatory events, departures from usual procedures and
16 evidence of disparate impact.

17 Evidence presented in this case met every item on
18 the Arlington Heights list. Even beyond that case, it is
19 instructive to look to other courts who have found intentional
20 discrimination in voting rights and redistricting, examine
21 what kind of -- what kinds of evidence those courts found
22 persuasive and then compare those to the evidence of
23 intentional discrimination in this case.

24 JUDGE SMITH: Do you agree with Mr. Rios' statement
25 that racially polarized voting doesn't mean that people are

1 racist?

2 MR. RIGGS: Yes. And neither does saying that there
3 was -- discriminatory intent cannot -- can't be simplified to
4 name calling either, that this is a complicated factual
5 analysis guided by lots of court precedent, and teasing out
6 improper intent from that is what the Court should be focused
7 on, rather than assigning terms.

8 In *Garza v. County of Los Angeles*, a district court
9 found the county supervisors had intentionally discriminated
10 against Hispanic voters. The Ninth Circuit upheld this
11 decision.

12 Specifically, the district court noted that the
13 county supervisors knew that the protection of their five
14 Anglo incumbencies was going to cause continued fragmentation
15 of the Hispanic vote, that that fragmentation was a
16 foreseeable consequence of the adoption of the redistricting
17 plan.

18 The district court found that the plan split a core
19 of Hispanic voters in half, fracturing the voting block. The
20 Court also found that the board appeared to ignore the three
21 proposed plans which provided for a bare Hispanic population
22 majority in the district.

23 Finally, the Court found that the board of
24 supervisors in adopting the plan acted primarily with the
25 objective of protecting and preserving the incumbencies of

1 five supervisors or their political allies, all while knowing
2 the plan would continue to fragment the Hispanic population
3 and further impair the ability of Hispanics to gain
4 representation on the board.

5 There is lot of evidence in this case that parallels
6 the evidence that the Garza court found persuasive.

7 In a little older, but still relevant case, the
8 United States Supreme Court reviewed a district court's
9 finding of intentional discrimination in a county's method of
10 election in the case Rogers v. Lodge from 1982.

11 In finding that the county maintained the quote,
12 unquote neutral in origin election system for invidious
13 purposes, that is, to exclude the minority community from the
14 political process, the district court looked at a number of
15 factors.

16 They looked at what are known as the Zimmer factors,
17 which later became known as the Senate factors after the 1982
18 amendments.

19 Zimmer factors include the history of official
20 discrimination, the extent to which voting is racially
21 polarized, voting practices or procedures that may enhance
22 opportunities for discrimination, disparities in education,
23 employment and health and other areas, racial appeals in
24 voting, the record of election of minority candidates, and the
25 responsiveness of elected officials to minority needs.

1 The ultimate issue in a case alleging
2 unconstitutional dilution of the votes of a racial group is
3 whether the districting plan under attack exists because it
4 was intended to diminish or dilute the political power of that
5 group.

6 The task for the fact finder is to determine under
7 all of the relevant facts in whose favor the aggregate of the
8 evidence preponderates.

9 Even though the Court in *Mobile v. Bolden* held that
10 proof of intentional discrimination is necessary to prove a
11 violation of the Equal Protection Clause, the Court in *Rogers*
12 *v. Lodge* indicated that the Zimmer factors were still relevant
13 inquiries in examining indirect evidence of purposeful
14 discrimination.

15 In many ways, in voting rights and redistricting
16 cases, these factors are even more useful and flushed out than
17 the Arlington Heights factors and provide a useful framework
18 for assessing the evidence before the Court.

19 For example, evidence of historical discrimination
20 is relevant to drawing an inference of purposeful
21 discrimination, particularly in cases where the evidence shows
22 that discriminatory practices were commonly utilized, that
23 they were abandoned when enjoined by courts or made illegal by
24 civil rights legislation, and that they were replaced by laws
25 and practices which, though neutral on their face, surface to

1 maintain the status quo.

2 Section 2 liability found in the state of Texas in
3 the last redistricting cycle further supports this. In
4 assessing whether there was intentional discrimination, this
5 Court is, of course, not limited to the Zimmer factors, but
6 they help factor in relevant facts into the analysis.

7 The evidence presented in this case in support of a
8 finding of intentional discrimination is extensive under both
9 the Arlington Heights factors and the Zimmer factors.

10 From Representative Turner and Representative
11 Martinez Fischer, we heard about the racial tensions of this
12 legislative session. We heard about the racial animus
13 manifesting itself in bills that the Latino and
14 African-American caucuses were united in opposition to, such
15 as the voter ID and the voter assistance bills.

16 We heard from Representative Turner how different
17 this redistricting cycle was from the ones before it, two of
18 which he was involved in. He testified to the rush process,
19 the lack of transparency, the lack of public involvement. He
20 testified that the concerns of minority representatives,
21 especially those in the Legislative Black Caucus, were not
22 actively sought out.

23 Moreover, we heard the numerous contradictions
24 between what the leaders and map drawers in the state
25 legislature said they were doing versus what they actually

1 did.

2 According to them, it was a member-driven process,
3 unless a minority member of the legislature had a question for
4 Ryan Downton, then it wasn't an open-member process. It was a
5 process open to suggestions from members, but only if those
6 suggestions were minor tweaks that were just a nod to
7 inclusion, as Representative Turner testified.

8 Ryan Downton testified that Representative Turner's
9 suggestions for his districts couldn't be accommodated because
10 they had to keep his numbers up, but Representative Turner was
11 the one who suggested tweaks to raise his numbers after the
12 plan came out -- after the plan that came out of committee
13 didn't do so.

14 Ryan Downton also admitted to the fact that
15 traditional redistricting -- that a traditional redistricting
16 criteria or principle is to take the protected districts and
17 maintain the core and integrity of those districts.

18 He denied having failed to use this traditional
19 principle, but in his deposition, he specifically testified
20 that he did just that, simply redrawing the protected
21 districts without regard to their historic force on the
22 communities of interest.

23 Downton also testified that the Harris County
24 delegation agreed to the State House plan, including
25 Representative Turner. He then changed his testimony to say

1 that Democrats acquiesced in support of the Harris county plan
2 after they were instructed they could not touch the Republican
3 districts.

4 And then he again changed his testimony to afford
5 that Representative Turner was not happily -- happy initially,
6 but that he was satisfied with the map, and then he changed
7 his testimony again to admit that Turner did not want areas
8 across 290 and also wanted a Hispanic neighborhood back in his
9 district, and that when the Republicans would not give him
10 those things, he was very unhappy with the result.

11 Ryan Downton also admitted that he had some
12 awareness of the location of Hispanic populations in the
13 Dallas-Fort Worth area, and that he was aware that the
14 northern squiggly part of CD-35 is a Hispanic area, but then
15 he went on to say that he didn't know in the state of Texas,
16 as we currently sit, Anglos overwhelmingly vote for Republican
17 candidates and minorities overwhelmingly vote for Democratic
18 candidates.

19 And he denied any knowledge that in Hidalgo County
20 that drawing -- in drawing Congressional District 41 that the
21 majority of the highest concentrations of white voters in the
22 county were included in 41, since he claimed to only look at
23 election results.

24 Finally, there was a contradiction in testimony of
25 Ryan Downton, Gerardo Interiano and Chairman Solomons about

1 whether map drawers were instructed to draw maps that would
2 reelect incumbents or reelect Republicans, with both Ryan
3 Downton and Gerardo Interiano testifying to that, to that
4 fact, and Chairman Solomons denying that he gave that
5 instruction to anyone.

6 We have heard that the state legislature had -- we
7 heard from the congresspeople about the very specific changes
8 made to their district that could have no other explanation
9 but to undermine -- but being intended to undermine the
10 ability of voters in the district to continue electing the
11 candidates of choice.

12 All three congresspersons testified that their
13 districts lost business centers, that their offices were drawn
14 out of their districts, and Dr. Murray in his report detailed
15 the changes to Congressional Districts 9 and 18 and how it was
16 detrimental to the future performance of those districts.

17 JUDGE SMITH: I can sort of understand the argument
18 about moving the headquarters out of the district, for
19 certainly the convenience of the constituents, but I don't
20 understand -- I can understand why a member of Congress would
21 not want to lose a business center or something like the
22 Astrodome or the rail line, but I don't understand how that
23 affects the ability of the voters in that district to elect
24 the member of Congress of their choice.

25 MR. RIGGS: It certainly --

1 JUDGE SMITH: Can you elaborate on that a little
2 bit?

3 MR. RIGGS: Of course. I'm sorry. It certainly
4 affects their relationship with whoever does get elected, and
5 it can affect their ability to relate to the elected
6 individual.

7 So, for example, Congresswoman Lee testified about
8 how her office had been in a federal building, a regularly
9 identifiable place, for a very long time, and that the
10 community had come to depend on that availability and that
11 centrality of that location, and given the move, a disconnect
12 between the voters and their accessibility to the candidate
13 that they want to elect; that could affect --

14 JUDGE SMITH: Well, I can understand that, and it
15 was also called the Mickey Leland Building, which was very
16 important, because he formerly held that position. I can
17 understand that as to the headquarters, but, again, I don't
18 understand the argument as to the business centers, as to the
19 ability of the voter or a set of minority voters to elect a
20 candidate of their choice. I don't see how those two things
21 are connected.

22 JUDGE RODRIGUEZ: Yes. The claim was that economic
23 engines were taken out of certain districts. And so the
24 question is, how does that affect the ability to elect a
25 candidate of your choice?

1 MR. RIGGS: I think it goes to the core and the
2 integrity of the district and the folks who live in the
3 district, and that if a district loses economic generators and
4 jobs and employment, that is going to have an impact on how
5 folks live and work and move within the district, and it can
6 drive folks out and break up the integrity of that district.
7 So I think that is one example of that.

8 We have heard that the state legislature had before
9 it numerous plans that expanded the ability of minority voters
10 to elect candidates of their choice, and they ignored those
11 plans, like in the Garza case.

12 Dr. Burton's report goes through the Zimmer factors
13 in great detail and finds that all of them are present in this
14 case. All of this evidence and more supports a finding of
15 intentional discrimination on the basis of race.

16 It explains why minority coalitions develop on the
17 basis of shared experiences of being discriminated against,
18 and it explains why race is the most -- most and more possible
19 explanation for polarized voting patterns between whites and
20 nonwhites.

21 All of the evidence supporting a finding of an equal
22 protection violation and a Section 2 violation in this case
23 will be detailed and briefed in post-trial briefing for the
24 NAACP plaintiffs, but I wanted to flag these three issues for
25 your consideration as you begin going through all of the

1 evidence before this Court.

2 Thank you for your time.

3 JUDGE GARCIA: Thank you.

4 Mr. Bledsoe.

5 MR. BLEDSOE: May it please the honorable members of
6 this panel. What I attempted to do is listen to the direction
7 that we received from you in reference to possibly citing
8 matters in the record that might be important.

9 One of the things that I wanted to -- starting out,
10 though, in reference to one of the questions that was just put
11 to Ms. Riggs, to add to her statement, I agreed with all that
12 she said, but would also say that one of the things, when you
13 take an economic engine out of a district, is you compromise
14 the ability of a minority candidate, particularly to fund
15 raise, especially someone like an incumbent congressperson
16 like we have now.

17 And we saw the issues that were involved in the
18 other -- the issues with the South Texas district that, of
19 course, that Mr. Vera and Mr. Korbelt talked about this
20 morning, in terms of, if you have got one well-funded
21 candidate and another one that is not well-funded, and I think
22 it is very clear that the minority candidates would have more
23 difficulty in obtaining the funding.

24 Now, the other thing I think that was clear from the
25 testimony was that there would be jobs that would be provided

1 as a result of the economic engine. And what that relates to
2 directly is voter apathy, because, obviously, if you have an
3 underemployed community, that is going to drive down the
4 interests of the voter and the ability of the voters to join
5 together and vote to elect a person of their choice. So I
6 think that removing the economic engine does have a major
7 impact on a district.

8 There are several things I would like to mention in
9 reference to the congresspersons, starting out, and then I
10 would like to go over some of the additional items and add
11 some additional commentary of what has occurred, to give you
12 some cites in the record.

13 But in reference to one of the things that is
14 common, and I think this goes to the issue of intentional
15 discrimination, we look at three African-American
16 congresspersons, the only three in the state of Texas, and we
17 see that each one of them sought to work with leadership.

18 You can tell that they all have respect for
19 Congressman Smith. And after having a meeting, they were
20 assured that they would be able to have subsequent meetings to
21 sit down with leadership and help draw their districts, and
22 they all said that the meeting that was promised never came
23 forward.

24 So there was never a meeting, even though they met
25 in good faith, wanted to work with others. And they did make

1 suggestions to people in the state of Texas about how their
2 districts would look.

3 Both Congressman Green and Congresswoman Lee
4 traveled to Austin, and Congresswoman Johnson actually
5 tendered a district for herself and a new Latino district in
6 the Dallas-Fort Worth area, and they all said that what
7 ultimately came out looked nothing like what they had wanted
8 or recommended. So that happened to all three of them.

9 Now, each one of them, I don't know what the -- if
10 we did the mathematics on this and tried to find out what the
11 likelihood would be for this to happen at random, but three
12 out of three had their offices removed from their districts,
13 three out of three. I think that is a pretty, pretty awesome
14 fact.

15 Now, they were -- (Coughing in background) -- given
16 courtesy copies of the map. I think what is clear is that
17 they were all surprised by the map when it came out. And the
18 other thing that you all have just talked about is the
19 economic engine being removed from the districts.

20 Now, it might be one thing that might have happened
21 to one, maybe even two. We have three out of three. So,
22 basically, and I think the term that at least two of them used
23 on the witness stand was that they -- I am trying to think of
24 the term.

25 Basically, they just blanked the districts and took

1 out all of the economic power within the district, and that
2 greatly harmed them.

3 All of them said that important and vital
4 communities of interest were removed. Not one, but all three.
5 And all of them have said that pressure was placed on their
6 district because there were needed, necessary and legally
7 allowed voting rights districts that should have been created
8 in adjacent areas, so that individuals within their districts
9 would have a voice. We know that --

10 JUDGE SMITH: Could you just help us a little bit
11 with, as between Congresswoman Jackson Lee's district and
12 Congressman Al Green's district, any of those important
13 elements of the districts, such as downtown or MacGregor or
14 any of those that were mentioned in the testimony, were any of
15 them moved from one of those to the other, from the other to
16 the one?

17 I mean, were they swapped between those two, or were
18 they moved to some third person's district?

19 MR. BLEDSOE: It was a combination of --

20 JUDGE SMITH: Could you fill us in on that?

21 MR. BLEDSOE: The Third Ward, MacGregor area was
22 split, and some of that did go into Congressman Green's
23 district. The downtown area, I believe, went into Congressman
24 Poe's district. So there was -- basically, there were
25 different things that happened. One of the -- and I am trying

1 to think if there was a --

2 JUDGE SMITH: The medical center, what happened?

3 MR. BLEDSOE: The medical center was split in three.

4 So the medical center was given, a part to Green, a part to
5 Lee, and a part to Poe, but I think primarily to Poe.

6 JUDGE SMITH: What about the Astrodome, Reliant
7 Stadium?

8 MR. BLEDSOE: That went from Green to Lee.

9 JUDGE SMITH: And the --

10 MR. BLEDSOE: That is very close to where his office
11 is, actually, in fact.

12 JUDGE SMITH: And the South Main Street rail line
13 that was referred to?

14 MR. BLEDSOE: That would have gone from Green to
15 Lee.

16 And so if we look at the configuration of each one
17 of the districts, to follow along with this commentary, I
18 think we can see the problem that we have. I think there was
19 some apparent acknowledgment by the State that we have three
20 protected seats that would elect an African American that
21 should be created.

22 And so there was an attempt to create, but not to
23 really make them performing districts in the way that they
24 needed to be performing districts, but the packing, the
25 unnecessary configurations were pretty enormous.

1 Now, Dr. Murray details this, but each one of them
2 talks about this in their testimony. Now, with Congresswoman
3 Johnson, I think it is very clear that there have been a
4 number of legitimate plans.

5 NAACP plans clearly meet the legal muster in terms
6 of numbers, effectiveness and all of that, according to the
7 testimony, compact, et cetera, so we know that additional
8 minority districts could have been created in that area, but
9 they pack everything that looked like a minority into
10 Congresswoman Johnson's district, depriving people of the
11 ability to go and have another seat, and that limits their
12 voice, because it limits what the votes will be in favor of
13 those same people in Washington, D.C.

14 Besides the packing that went into 30, you know,
15 important communities of interest were eliminated there. You
16 know, Balch Springs, there was a problem with, areas of people
17 that have politically aligned with and worked with the other
18 communities of interest within that district, to get things
19 done, they were eliminated.

20 So there were a number of things that were taken
21 from that district that greatly compromised that district, and
22 it really undermines African Americans and Latinos and Asians
23 in the Dallas-Fort Worth area.

24 Now, I think it is important to note that Dr. Murray
25 testifies that, number one, Asians vote with African Americans

1 and Latinos in Harris, Fort Bend and Dallas, Dallas-Fort Worth
2 areas.

3 And also, that the anti -- and one of the things
4 that is occurring now is this sentiment that is driving all
5 minorities into the Democratic Party is also affecting Asians,
6 because of the issues that are occurring in reference to the
7 Tea Party animosity also includes anti-Asian sentiment, so
8 that also impacts what has occurred in that area.

9 So if you add the Asian population, you are probably
10 looking at about 90 percent in Congresswoman Johnson's
11 district. And when we showed it the other day on the screen,
12 and asked for the B and H to be colored and shaded, we could
13 see that there was a little white spot in the middle of the
14 district that is clearly unnecessary and is not needed.

15 Now, if we look at Harris County, what we can see
16 about Harris County is the configurations were greatly
17 changed.

18 What Dr. Murray says is they basically, with CD-9,
19 Congressman Green's district, that that one was different from
20 the other two, in that they violated the traditional
21 redistricting principle, and that traditional redistricting
22 principle was to try to keep the shape and follow the contours
23 of an existing district, so you could keep the core in place,
24 but what he stated is that they gutted that core and they
25 truly created a new district, creating a different core. So

1 CD-9 was greatly changed in that regard, and it greatly -- it
2 varied greatly from the original configuration.

3 JUDGE SMITH: Now, one of the things that
4 Congressman Green mentioned several times in his testimony
5 that I want to ask you about, because -- and my question is
6 going to be whether any of the case law supports what he said.

7 He expressed considerable concern that in the newly
8 drawn district, there were a couple of areas, Sienna
9 Plantation, I believe, and another one that he mentioned,
10 where he was worried that there would be new housing
11 development there that would be -- this is my word -- upscale,
12 but I believe he used a word similar to that.

13 And I assume part of his concern was that those
14 might develop into heavily Anglo areas that might dilute
15 minority strength in the district. He didn't specifically say
16 that, but that is part of what I inferred from it.

17 Is there any case law or are there any other factors
18 that we should look at to tell us that we can properly
19 consider that kind of future development in undeveloped areas?

20 Because it seemed to me to be kind of an unusual
21 theory that he was presenting there, and one that involves
22 some real sensitivity in terms of an incumbent from one race
23 expressing concern that members of another racial group might
24 be ultimately moving into a, more or less, vacant area of the
25 district.

1 MR. BLEDSOE: I do know that the Supreme Court has
2 talked about those kind of issues, in dictum, you talk about a
3 district and additions, that a district is changing or
4 evolving.

5 I know in the LULAC case, I guess they did talk
6 about that as well. I can't cite a specific case where that
7 same issue is directly involved, but I definitely can brief
8 that.

9 JUDGE GARCIA: Right.

10 MR. BLEDSOE: But what I would say is clearly that
11 that undermines the effectiveness of Section 2, because it is
12 almost like a slight of hand or a wicked gesture, because if
13 you are entitled to have a district created in a certain way
14 to guarantee that the minorities in that community will have
15 an opportunity to elect a person of their choice, and then you
16 set it up to where you know in years hence that growth will
17 change the impact of that district, I think that clearly is
18 not what Section 2 envisions.

19 I think Section 2 meant for districts to be drawn so
20 that, to the extent practicable, in the future, if there is a
21 continuation and the act is extended, that that community
22 still has an ability to elect a person of their choice and not
23 include unnecessary growth areas that will undermine the
24 integrity of that district.

25 JUDGE GARCIA: Perhaps you can include that in your

1 trial brief.

2 MR. BLEDSOE: Thank you.

3 The other thing I would say in reference to the
4 districts is the idea, I want to make it very clear in our
5 mind that there is no contradiction between saying a district
6 provides for tension and that there is a coalition between
7 African Americans and Latinos, because I think the evidence is
8 overwhelming, I think, in that regard, that the tension that
9 was talked about was prospective tension, not necessarily
10 existing now.

11 And the idea is, as the witnesses said, who were
12 very candid on the witness stand, was that individuals, in a
13 group, if the numbers are there, quite naturally will want to
14 start saying: Well, maybe someone from our community might
15 want to run as well. Even though we are partners over here,
16 and we are having an effective partnership, that doesn't mean
17 that we shouldn't have a representative.

18 And there is a second complement to that. You get a
19 second vote in Congress, the legislature, wherever you might
20 be. Because if you look at like our voting record, where you
21 can see so many gaps with so many individuals that -- Anglo
22 Texans on the NAACP report card, but you see passing grades,
23 usually high grades with the Latino members of Congress from
24 Texas, so there is a clear partnership there.

25 So there is an extra vote that benefits those

1 individuals, so there is an additional need to want to have
2 that district created, so that we don't have so few votes in
3 Congress.

4 So I think, very clearly, it is important that we
5 recognize there is no problem saying that there is tension,
6 but when you -- and I think with Dr. Murray, what he indicated
7 is, it is kind of a wicked design.

8 When you set that up, you know, with Congressman
9 Green's district, there are actually more, a larger Hispanic
10 population than an African-American population, and dynamics
11 relating to that population will change over time.

12 That population, there will be more citizenship, the
13 voter registration numbers, et cetera, will change, and that
14 was unnecessary.

15 What Congressman Green said is that the big problem
16 with that is not that you join the two together to form a
17 district, because he thought that you could and should, but
18 that when you didn't have to do that, and you put all of those
19 unnecessary numbers in there, that is the problem.

20 Now, on the issue of a coalition, one of the things
21 I wanted to point out to you is that Congresswoman Lee was a
22 member of the Judiciary Committee, and both Congressman Green
23 and Congresswoman Johnson were members of Congress when the
24 Act was extended, and they clearly think that coalition
25 districts were something that were contemplated by them when

1 the Act was adopted.

2 So not only do we have our interpretation of
3 Bartlett that we think would -- was trying to distinguish
4 possibly from voting rights purposes, between crossover
5 districts and coalition districts, but we have members of the
6 United States Congress who believe that it is proper to join
7 African Americans and Latinos together as a group to form a
8 district.

9 Now, one of the things that we have heard,
10 obviously, is that the explanation for polarization is party,
11 and we think the evidence indicates clearly that that is not
12 the case.

13 Now, first of all, there was no disaggregation or
14 any specific kind of analysis done by Dr. Alford, and I think
15 clearly, if one looks at the totality of his testimony, he
16 would be deferring to Dr. Murray on such issues.

17 But I think it is clear -- now, one of the things
18 that, like Mr. Garza talked about this morning, was the
19 prospect of looking at races, where party didn't matter, and
20 to use those races to take a look and see if there was
21 polarized voting.

22 And I wanted to call your attention to several of
23 that Dr. Murray discussed that are in the outline. I think
24 that the Victor Carrillo race is clear, when you have a
25 well-funded Latino candidate who is an incumbent in the

1 Republican primary, and he loses overwhelmingly in that
2 primary to an individual who is not known, but has an Anglo
3 name and doesn't have funding.

4 And then you have Leo Vasquez, a tax assessor
5 collector who is up for reelection in Harris County, and
6 during this great wave in 2010, he also loses to what appeared
7 to be an inferior candidate as well. So it wasn't a party
8 issue in those situations.

9 But it occurs with Democrats as well, because if we
10 look at the Democratic sweep, basically, in Harris County in
11 2008, there was enough support for those democratic candidates
12 to win, except for those handful, and you have the new Exhibit
13 632 that has been put into evidence, and you heard the
14 testimony from Dr. Murray, Congressman Green, about the fact
15 that the individuals who appeared to be African American, at
16 least two of whom were, or who had the foreign-sounding names,
17 that they lost.

18 So that is a situation where all people on the
19 Democratic side are getting support, except this particular
20 core group. So that is -- party does not explain that
21 distinction.

22 So I think there are clearly races here that defy
23 that explanation. But the only true analysis that was done on
24 this issue was done by Dr. Murray. And first of all, we can't
25 say -- we can't take a result in this case and say the result

1 is going to undermine showing causation.

2 There is no interpretation of why there is that
3 divide, and Dr. Murray indicated that 15 years ago in his
4 report, because of actions that were being taken against
5 African Americans and Latinos, you basically ended up with
6 this divide for the last 15 years, where Anglos vote in the
7 Republican primary and minorities vote in the Democratic
8 primary.

9 And he said that this goes all the way back to the
10 time of Barry Goldwater, and finding out that you can use
11 wedge issues to divide minorities from others. And because of
12 that, you -- and because of the same types of activities that
13 we are complaining about that continue to infect our process,
14 because of -- well, let's see here.

15 If I might, Dr. Alford admitted that there has been
16 no change in voting behavior in Texas in the last decade. And
17 so one of the things I want to point out here is in reference
18 to this issue that we are discussing now, in reference to
19 whether or not there continues to be racially polarized
20 voting, that there is some other explanation. As Dr. Murray
21 has indicated, this all goes back to 1964, and the continued
22 efforts to divide and put minorities in one party.

23 You know, I asked very pointedly a couple of
24 questions of Dr. Alford. I said: Dr. Alford, has there ever
25 been a defining moment or something that occurred that changes

1 whether or not we have racially polarized voting?

2 He said: No. He couldn't point to anything that
3 occurred. So if we have a 2006 finding that this is the case,
4 then I don't know what has occurred between 2006 and today
5 that means there is no racially polarized voting.

6 I want to point out a couple of things here to you
7 that are in the -- that are things I want you to direct your
8 attention to that you asked for.

9 Dr. Murray discusses the Southern Strategy and how
10 this is all part of the Southern Strategy on page 863, line 8.
11 And he says that the mistreatment by the State of Texas of
12 minorities under the -- in reference to the congressional
13 plan, that that mistreatment is a result more of racially
14 polarized voting than it is of partisanship. He makes that
15 specific declaration.

16 He goes on further and indicates that 80 percent of
17 Latinos vote for a Democratic candidate, over 90 percent of
18 African Americans, and the Anglos vote predominantly for
19 Republican candidates. There is clearly a divide.

20 Now, he says this problem that he has identified has
21 been ramped up, because of what is called the Obama effect, to
22 be very honest and real about that. So not only do we have a
23 racial divide in 2008, that showed only one out of four white
24 Texans voted for President Obama, but we also -- what we found
25 is that this has infected the new process.

1 Now, he stated that one of the issues and the
2 problems that this Court is looking at is obviously the 2010
3 election, how this 2010 election allowed people, who would
4 normally not have won an election, to win in districts that
5 have been performing districts.

6 And what he has indicated was that we had a
7 different electorate at that time, because of the Tea Party
8 involvement. And because of the Tea Party involvement and the
9 anti-Obama effect that occurred, that 85 to 90 percent of
10 conservative white voters that were older actually turned out
11 to vote and they skewed the electorate and voted in great
12 numbers against minority candidates.

13 In reference to -- one of the items I know that we
14 want to be -- that we need to prove to you is that, of course,
15 there has been a continuation of race being injected into the
16 campaign.

17 And I wanted to show you, I wanted to go over here,
18 there has been some discussion -- I think the Court can even
19 go to a web site, that I want to make it very clear, one of
20 the things we are going to have is an offer of proof from the
21 person who is the subject of this, and talk about exactly what
22 the circumstances are in reference to this.

23 Now, we take this one, and when you say Mercedes and
24 received welfare, I think one of the things that we saw
25 yesterday was, Dr. Alford, to him, that clearly indicates

1 race.

2 He said: I don't know about the others, but to me,
3 that clearly indicates race.

4 So we have the State's expert acknowledging that
5 this is clearly a racial appeal. And we have Representative
6 Turner, we have -- obviously, his skin is darkened, more on
7 others than this one. But you have the car and the Cadillac,
8 and those are clear code words.

9 Absolutely, they are code words intending to tell
10 whites that this guy is going to help minorities have a good
11 time on your tax money, and that is clearly what this is.

12 The next one.

13 And this is the same thing with the car, that he
14 would love to have the car associated next to him.

15 Now, this one here, you see the eyebrows. That is
16 one thing that he will point out. You see how the eyebrows
17 were changed, and you see in the back the Chinese flag? That
18 is clearly a racial appeal, and you see his skin is definitely
19 darkened in this one.

20 So it is clear that they are trying to make a racial
21 appeal in this situation here, even changing what the
22 candidate looks like. And obviously darkened, in bed with
23 President Obama.

24 The next one, show me the one with the flag on the
25 lapel. There it is.

1 And in this one, we heard him acknowledge too that
2 if you -- with the Mexican flag, that that is -- so the State
3 may want to debate a gap. We don't think he has a gap that
4 has increased in size, but we wanted to show this, because
5 this does impact the area that we are talking about.

6 This is a race that was there in Arlington, Tarrant
7 County, and so it is one of the areas that we are asking this
8 Court to draw the district, and I think you can see a direct
9 racial appeal that obviously occurred during that time.

10 I mean, that is clear with the Chinese flag in the
11 back and the Mexican flag there on the lapel. That is a
12 straight-up, direct appeal, just like the welfare issues that
13 were on the previous ones.

14 I do want to say, in reference to -- when you look
15 at the issue of credibility, I want to just briefly visit
16 that. I don't think it is credible. I think that Ms. Riggs
17 covered that in great detail.

18 But I think that -- it was Mr. Interiano, for
19 example, when he says that he goes to sit down with
20 legislators that are seeking to preserve their seats,
21 including like Mr. Pena, for example, and so you are trying to
22 preserve your seat, that you don't talk about race, that you
23 go down to the block level and you are trying to draw it up,
24 and you have such familiarity with a county the size of
25 Hidalgo County, that you can look at a -- you can just look at

1 blocks and start saying, take this part and map that part, and
2 race not be a consideration.

3 I think that defies logic. I think that is clearly,
4 clearly not credible, and I think that would impact his
5 testimony otherwise.

6 I think the other matter relates to Interiano and
7 Representative Turner. I want to make it very clear to the
8 Court, I think Representative Turner was very clear that he
9 did not like his district, and we have five separate answers
10 for Mr. Downton about what the position was with Mr. Turner.

11 If you go through and look at that, and I guess it
12 is -- let's see here. It starts on page 935 to 939, where
13 they discuss that, but you get five different answers that
14 will suggest whether or not Turner was with the proposal,
15 against the proposal, or if he was against the proposal why he
16 was against the proposal. So I think that, again, shows the
17 lack of credibility.

18 JUDGE SMITH: Chairman Solomons mentioned that he
19 had heard from Turner in the hallway also, did he not?

20 MR. BLEDSOE: He did.

21 JUDGE SMITH: That Turner said he didn't like the
22 district?

23 MR. BLEDSOE: He did. He did. He indicated that
24 Chairman Turner was not happy with the bill.

25 And one of the offers of proof they were going to

1 tender is from Representative Dawnna Dukes, and Ms. Dukes will
2 talk about what actually happened, this little back room
3 meeting and what did take place, and that Representative
4 Turner was not a part of that, and he was always displeased
5 with what was going on with his district. So I think that is
6 important to note that.

7 But also, one of the things that when we start
8 talking about whether or not this was intentional, start
9 talking about whether or not this is intentional, and we look
10 at all of those things that happened with the African-American
11 congresspersons, and then let's talk about the issues that
12 occurred with the members of the legislature.

13 I think it is clear, when we look at what happened
14 with the members of the legislature, that this was clearly
15 extraordinary. This was so different from what occurred in
16 the past.

17 And one thing Chairman Solomons did acknowledge was
18 that there was no public testimony after the maps came out.
19 Now, I mean, that is kind of incredible, to me, that you put
20 out the House map and then there is no public testimony.

21 There was time for it. You couldn't say the end of
22 the session would make a difference, in the sense that the map
23 passed out with a month or so left in the session. So there
24 time for the public to have input.

25 But what Representative Dukes will say, and you

1 heard Representative Turner say, this was just given to us.
2 It wasn't like: Take it or leave it. It was: Take it. And
3 that's exactly what we are talking about.

4 The same thing with the congressional map with the
5 level of input.

6 I would like to direct your attention to several
7 items, that we started talking about what could have been done
8 and some Gingles proffers. One thing that -- in C-194, there
9 are two maps that would provide for Latino opportunity in the
10 Harris County area, one that would be a continuation of 29,
11 and an additional one, to show that that could be done.

12 There is, in C-201, a proffer that actually shows
13 Travis County, and actually shows where you can take an item
14 from Mr. Garza's C-164, where there is a map that would allow
15 a San Antonio person to win and become a member of Congress,
16 but not split the community in Austin, to disenfranchise
17 minorities, or especially African Americans in the Austin
18 area.

19 And then in the Austin area, to do something -- I
20 think Mr. Korbels plan might be better, but it actually would
21 be a district that would be majority African-American and
22 Latino, except when you add the citizenship numbers, it is
23 only about 45 percent or so, but still, it would be an
24 effective coalition district, in our opinion.

25 So what we would ask this Court to do would be, we

1 think that all three of the current African-American
2 congressional districts should be changed. We think that if
3 you start looking at fairness that there should be at least an
4 additional African-American opportunity district.

5 Further, I think you heard what Dr. Murray said, 14
6 to 16 for African Americans or Latinos would be a fair number,
7 if one is trying to be fair. The next question --

8 JUDGE SMITH: So the additional -- excuse me. The
9 additional African-American opportunity district, would that
10 be Harris or Dallas? It would have to be just one or the
11 other, right?

12 MR. BLEDSOE: Yes, Your Honor. Dallas-Fort Worth.

13 JUDGE SMITH: Well, it could be in Harris or it
14 could be in DFW; is that right?

15 MR. BLEDSOE: I think Dallas-Fort Worth would be the
16 appropriate --

17 JUDGE SMITH: All right.

18 MR. BLEDSOE: We tried to draw one, and we know
19 there needs to be a new Latino district in Harris County, so I
20 don't think those two would mesh.

21 JUDGE SMITH: All right.

22 MR. BLEDSOE: So our position is that there should
23 be one in Dallas-Fort Worth.

24 JUDGE SMITH: Okay.

25 MR. BLEDSOE: We also would ask that the Court take

1 a look at the overriding factor of -- and I know that maybe
2 there is not strong case law to support this, but --

3 JUDGE GARCIA: Try the best you can.

4 MR. BLEDSOE: Thank you, Your Honor.

5 If we end up with a map, we know the Southern
6 Strategy, and this would be kind of like an extension of the
7 Southern Strategy.

8 If you do end up with 26 districts that are
9 dominated by white voters, and all -- and ten districts
10 dominated by minority voters, and you end up with all
11 Democrats that are minorities and all whites that are
12 Republicans, I don't think that is something that we want to
13 see.

14 And I think that clearly you look at the value of
15 the vote. Over 50 percent of this state is African-American
16 or Latino, yet it only would have influence over 28 percent.
17 And the other factor that I think is really crucial and
18 important to look at is, right now, with the influence
19 district in Travis County that eleven out of 32 seats are
20 seats that were minority, either can dominate the election or
21 can influence the outcome of the election.

22 So under anyone's math, if you have eleven out of
23 32, and you move to ten out of 36, you are much worse off.
24 Once you get inside that ten out of 36, and you see that there
25 are some real issues, specifically with CD-9 and CD-30 down

1 the road, that is not a good thing.

2 So we think clearly that there has been overwhelming
3 evidence that the plaintiffs have presented in this case. We
4 think that, both in terms of the House map and the
5 congressional map, that they should be eliminated.

6 And we would point your attention to one thing that
7 shows the consequence of these -- that Judge Smith said
8 earlier, and Judge -- that Dr. Burton talks about the
9 connection between the problems facing minority communities in
10 voting, and that is tied up in his expert report.

11 But if you look at the voting record from ten years
12 past on NAACP issues, and the United States Congress for the
13 Texas delegation that are included in our exhibits, you will
14 see a whole lot more Fs today than you saw before.

15 That is because we have a more hostile Congress.
16 They are not supportive of our issues, and that is why this is
17 so important to members of the minority community to try to
18 get people that will be responsive to their needs.

19 Thank you.

20 JUDGE GARCIA: Thank you.

21 We will recess now and reconvene at 2:15, and when
22 we return, we will begin with Mr. Hicks. Okay? Thank you.

23 (Brief recess.)

24 (Change of court reporters.)

25 *-*-*-*-*-*-*

1 JUDGE GARCIA: Okay.

2 MR. HICKS: May it please the Court, Your Honors.
3 Renea Hicks for the Rodriguez plaintiffs.

4 We have statutory and constitutional claims concerning
5 just congressional districts and the claims that run across the
6 state more or less. We have a claim for the creation of an
7 additional Hispanic opportunity district in the Dallas/Fort Worth
8 area. We have a claim for a creation of an additional Hispanic
9 opportunity district in Harris County. We have a claim to
10 restore District 23 as it is under 185 to restore it to a viable
11 Hispanic opportunity district.

12 We have a claim to add an additional Hispanic
13 opportunity district coming out of the Rio Grande Valley, and do
14 that by reuniting Nueces County, this historic base. That's the
15 basic idea there.

16 And then we have a constitutional claim to reunite the
17 operating tri-ethnic voting coalition in Travis County in current
18 congressional District 25 that is -- the part that's in that
19 county, in Travis County. So that's where our claims are.

20 What I want to do is address two broad areas and then
21 one more particular area that's different for us than anywhere
22 else I think. I want to address the Gingles two and three
23 factors with respect to racially polarized voting and then I want
24 to address the citizen voting age population data and the
25 testimony that Dr. Ansolabehere provided with respect to ACS

1 2005/2009 survey being out of sync with the census and how to --
2 ways to bring it into sync. And then the last part will be
3 about -- briefly about the tri-ethnic voting coalition in Travis
4 County and the constitutional claims we have there.

5 With respect to racially polarized voting I think
6 we--everybody here on our side of the "v"--have established
7 racially polarized voting across the board sufficient to satisfy
8 the second and third Gingles factors.

9 The one exception where there hasn't been racially
10 polarized voting, at least as to the third Gingles factor with
11 regard to crossover voting, is in Travis County.

12 Again, I think it's nearly uniform across the spectrum
13 of the plaintiffs' experts that Travis County is different than
14 the other counties in Texas with respect to that matter, and that
15 Anglo block voting is, especially by Texas standards anyway,
16 fairly significant. And it is significant; in fact, approaching
17 the 50 percent mark. There are variations on a continuum from
18 somewhere in the low 40s to somewhere in the low '50s. We're
19 happy -- we think it's sufficient that it's in the high 40s. We
20 think that's clearly established in the record and unrefuted by
21 the state.

22 So Travis County -- put that aside for now and I'll
23 come back and talk to that at the end when I talk about the
24 broader issues of racially polarized voting.

25 I believe Dr. Alford offered an opinion based on any

1 data and analysis that really disagrees with the fact that we've
2 established racially polarized voting as it's understood under
3 the traditional second and third Gingles factors.

4 He hypothesized -- I think that's all he did. He
5 hypothesized that there might be an alternative explanation, that
6 is partisan voting patterns, but I don't think -- and he offered
7 a broad opinion that he thought that might better explain it, but
8 there is no detailed evidence working across the spectrum
9 establishing that -- a better explanation for the voting patterns
10 everybody on our side has found than a better explanation or
11 intervening explanation has to do with partisanship. Instead
12 it's just a hypothesis.

13 And I believe that at the end of his testimony he
14 essentially admitted that, first, that hypothesis that he
15 has -- he has laid out there -- and the way to look at this is a
16 new way that no court has adopted of looking at the issue of
17 racially polarized voting.

18 And I think he said at the end that he
19 basically -- it's either a dead end or it's going down a street
20 which he doesn't know the end of because he said he knew no way
21 out of this at this point. He hasn't come up with a way to
22 reconcile his view of racially polarized voting, his intervening
23 cause idea and section two of the Voting Rights Act. I believe
24 that's the sum and substance of the concluding exchange he and I
25 had when I cross-examined him. He said it's a new world.

1 But that doesn't help much frankly. It doesn't help
2 Your Honors a bit. And that new world would take the Supreme
3 Court saying here's the new world. It doesn't take this Court
4 which is bound to follow the Gingles factors and the decision,
5 the 1986 landmark decision in Gingles.

6 In fact, the problem with Dr. Alford's hypothesis seems
7 to me to be clearly exposed for the problem it presents. If you
8 go back and look at the white primary cases of Texas, under his
9 explanation and his approach it seems to me that the white
10 primaries and the doctrine the Democratic party set up would
11 never have been knocked out because the basis -- the ultimate
12 cause and reason for the exclusion and all of these mechanisms to
13 exclude black voters at the time from participating in the
14 Democratic primary was to maintain the hegemony of the Texas
15 Democratic Party.

16 It wasn't race. It was the only way that they
17 could -- we all know it was race at some level, but they could
18 have defended saying Dr. Alford has said it's partisanship over
19 race because we're trying to protect the hegemony of our party.
20 And they could have gotten away with it under that hypothesis.

21 So I think that exposes the hypothesis for the problem
22 it presents. It effectively in the south -- in every area of the
23 south where the Voting Rights Act has strongest sway and
24 strongest application it effectively allows an escape hatch from
25 section two by telling legislature -- legislators, state, any

1 partisan election process and redistricting process -- it tells
2 them you can get away with this if you just emphasize everything
3 you do is for partisan reasons. You can get away with it because
4 there's no standards for partisan gerrymandering as this court
5 has concluded earlier. We've been unable to offer Your Honors
6 one under your view of the standards.

7 There's no standards for partisan gerrymandering so
8 they can say we're home free on partisan gerrymandering. Oh, by
9 the way, because it's such strong partisan gerrymandering you
10 can't ever make out section two plan. That can't be the law. It
11 just can't be the law.

12 I don't think, though, Your Honors have to test the
13 hypothesis in this case. And the reason is, as I've said, there
14 is no proof to support the hypothesis. In county after county
15 after county there is no proof that establishes this hypothesis.
16 It stays a hypothesis through the whole process.

17 And this, in fact, is what distinguishes the situation
18 here from the matters that were addressed in the LULAC v Clements
19 en banc decision to the 5th Circuit, which I suspect is the one
20 Mr. Schenck popped up about to object yesterday when I had asked
21 a question of Dr. Alford.

22 This situation is -- the situation I described
23 distinguishes this situation from the one that was present there.
24 And I know something about that case because I was the state's
25 lead lawyer in that case and I was the one that argued the case

1 en banc to the 5th Circuit. I was the one that briefed the case
2 for the state. And there's a big difference between this case
3 and that case, and that is there the court concluded that it had
4 been established that there was causation.

5 Now, put aside whether -- for a second the
6 elements that Ms. Riggs discussed about how you have to unravel
7 this through the totality of the circumstances analysis. Put
8 that aside for a second, although I think that's an excellent
9 alternative or additional way to look at this situation.

10 But in that case if you read the opinion, and it
11 is a hundred and some odd pages long going through nine -- the
12 analysis of nine counties. And what they conclude -- after the
13 broad discussion about the role of partisanship versus race in
14 these analyses what the Court concludes is they do a detailed
15 county-by-county analysis--Jefferson County, Baylor County,
16 Harris County, Tarrant County, Dallas County, Travis County --
17 there are nine counties. I've forgotten -- Midland County, Ector
18 County. They go through a detailed analysis and conclude that I
19 think in every one of those counties -- some of them may go a
20 little further, but they conclude the proof had been that
21 partisanship better explained the outcomes there than race did.
22 There was proof in that situation.

23 So what LULAC v. Clements -- if you read what you
24 might call the theoretical introduction to the detailed analysis
25 where there is a discussion about Justice O'Connor's concurrence

1 in Gingles and what that means -- if you read that carefully you
2 will see it sets up a shifting burden of proof situation.

3 And what it basically says is if we come in and
4 prove what we've proved here, which is there is racially
5 polarized voting under what everybody understands to be the
6 established analysis under Gingles -- if we come in and prove
7 that then if the State wants to say, well, there's a better
8 explanation, an alternative explanation, we can trump you on that
9 somehow, the burden shifts to them to prove it as they -- I think
10 the phrase is, "The state's parrying must be to establish this."

11 And Justice -- the section of LULAC v. Clements
12 that has this discussion has a long excerpt from Justice
13 O'Connor's concurrence. And in that--I wish I had it with me,
14 but I forgot to bring it up--she starts off saying, in the event
15 such and such, then it must be proved such and such.

16 Now, they didn't have to get into the shifting
17 burdens there because the state shouldered the burden. Here it's
18 just like in every -- really in just about every major civil
19 rights statute of this era that establishes an effects test as
20 this statute does under section two. In every one of those the
21 court seemed to, for some reason, feel very uncomfortable with
22 the effects test in the context of race.

23 And what the courts do is -- it's happened in
24 Title VII. I know Title VII. That's the easiest one -- is they
25 set up these very complicated shifting burdens of proof. If you

1 establish this the burden shifts over here and then the burden
2 shifts to fact. And that's exactly what the situation would be
3 here if LULAC v. Clements were the law of this country.

4 Now, it's the law in the 5th Circuit. It's an
5 en banc decision. I think, though, if you look at it there's a
6 big question about whether LULAC v. Clements, or the principle
7 that's established there anyway, should be the law of this
8 country.

9 If you look at the 2006 decision in LULAC v.
10 Perry, the Supreme Court, Justice Kennedy's majority opinion says
11 there's racially polarized voting across the length and breadth
12 of Texas basically. I'm sure that's not it. That's a
13 paraphrase, but that's essentially what he said.

14 And what kind of proof did they rely on? It's
15 exactly the same kind of proof we've had here of racially
16 polarized voting. They referenced Dr. Lichtman's very proud of
17 his record and his citation by the Supreme Court based on his
18 analysis in that case. It's the identical analysis. It's the
19 same way.

20 And I think the Supreme Court would have known enough
21 to say, well, it may look like that but there's a partisan
22 possibility. Instead they said there is racially polarized
23 voting.

24 And it is impossible to reconcile the approach that the
25 State seems to be taking through Dr. Alford's testimony with that

1 conclusion. The State was a party in that lawsuit. It didn't
2 raise any claim that partisanship better explained things in the
3 Supreme Court decision there.

4 So they're changing -- they want to change the
5 rules but they don't want to have to prove their case under those
6 changed rules. Anyway, I think that's very important for the
7 Court to understand.

8 Another matter about this is, regardless, we have
9 established that the explanation is racially polarized voting and
10 racial voting. Not racism so much. That is a very complex term
11 and a very complex behavior to attack. That's the reason they
12 moved to the effects test in so many of these things because it
13 is so complex. And it's so intrusive, I guess you could say. So
14 instead the effects test has been set up.

15 But here, put aside everything else, we've shown
16 racially polarized voting kind of in the sense that Dr. Alford
17 was saying we ought to have to get at, putting aside the effects
18 test.

19 For instance, the testimony about the different
20 racial voting patterns that are in the primaries -- put aside
21 whether they established racially polarized voting at that level.
22 There might be some debate county by county or statewide about
23 what happens in the individual primary, say Democratic primary in
24 the different counties. There might be some debate about it,
25 but what is clear is there is different racially positioned or

1 directed voting in the primaries. That's not partisanship, of
2 course, as somebody has said.

3 Well, those people go vote in the general
4 election. And when they go to the general election they don't
5 suddenly drop whatever those attitudes were that were there in
6 the primary that led to those different voting patterns.
7 There -- there -- there in -- they're in the general electorate
8 too.

9 They aren't the only general electorate. In fact,
10 there's another major general electorate that establishes part of
11 the general electorate that establishes that it isn't partisan
12 voting patterns. Dr. Alford testified that 40 percent of voters
13 across the country -- it may be voters or population, I don't
14 know which one for sure. 40 percent identified themselves as
15 independents.

16 If they want to vote for one of the two major
17 party candidates it may look on paper like it's a partisan vote,
18 but they're independents. And whether they may choose a Democrat
19 on the lieutenant governor race and a Republican on the
20 governor's race -- it's just like Ms. Winkler testified, one of
21 Mr. Gray's witnesses, the lady from Alief School District -- or I
22 think she was on the Alief school board or she had been. She
23 testified that she votes for the person. And I know every one of
24 us have been -- there have been a lot of people in dinner
25 conversation or at a bus stop or wherever where they say "I vote

1 for the person, not the party." And the general electorate is
2 full of people like, full of people like that.

3 So to say just because there appears to be some
4 patterns that align with the individ -- with the parties in the
5 racially polarized voting analysis, it ignores -- and to say that
6 trumps everything, it ignores the fact that there's tons of
7 independents voting there.

8 And that's the reason we have uncertain -- a lot
9 of uncertainty in who is going to win an election, presidential
10 elections. In Texas we've never had much uncertainty anymore who
11 it's going to be gubernatorially, unfortunately, from my
12 perspective, but there is a lot of uncertainty when it comes to
13 general elections.

14 If it was partisan and it was as locked in as
15 Dr. Alford says at one point in his testimony then we would know
16 the answer every time, but we don't know the answer every time.

17 So my point is there are several reasons why the
18 State's apparent effort to say let's sneak partisanship in to
19 trump the racially polarized voting analysis -- why that must
20 fail. And, of course, given -- if that argumentative is
21 accepted, the argument I just made is accepted, then across the
22 board -- put aside Travis County. It's a special case. And I
23 know it drives people crazy when I say Travis County is a special
24 case, but I think the facts establish it. Putting that aside, we
25 have -- everybody on our side has established racially polarized

1 voting at a legally significant level across the board in every
2 place where somebody is trying to get a district established
3 under section two of the Voting Rights Act. And to say that
4 Plan C 185 in my case--H 283 in the House case--that -- that it
5 is insufficient within section two of the Voting Rights Act.

6 And so I think, again, Travis County, exception
7 under the Gingles three factor, we've established the first two
8 Gingles factors at every spot where we have a claim.

9 Next I want to turn to the citizen voting age
10 population issue and this goes to the first Gingles factor. This
11 is somewhat of an odd situation that's been created because the
12 Supreme Court in Bartlett versus Strickland of course establishes
13 this bright-line rule, 50 percent. They don't say what precisely
14 there -- citizen voting age population, but they never quite get
15 to the holding that it's citizen voting age population. The 5th
16 Circuit and several other circuits have said it's citizen voting
17 age population that you have to use to meet the bright-line rule.

18 But what we have here -- and you-all have heard
19 Dr. Ansolabehere's testimony and it's unrefuted. Dr. Rives
20 didn't refute anything in his testimony having to do with the
21 merits of this particular argument in his opinion.

22 Dr. Ansolabehere said that data for citizenship that's been used
23 by the legislature and apparently completely unexamined by the
24 legislature -- this is not casting any aspersions on the Texas
25 Legislative Council. They gave the legislature the data they had

1 and the legislature didn't say maybe we should look at this to
2 see if we can improve it, bring it into sync or whatever. They
3 didn't do anything. They just said we'll use it and it was very
4 convenient.

5 So that meant that they were taking data -- I
6 don't know if they knew it, but they should have known it. They
7 were taking data that was three years or so lagging behind the
8 census data. And then they were hanging their hat on the claims
9 in Dallas/Fort Worth and Harris County, those two places in
10 particular, that, gee, we would love to create a district like
11 Congressman Smith has -- has proposed or we'd love to create a
12 district in Harris County akin to what the Texas Latino
13 Redistricting Task Force or Representative Dukes in Plan 163 has
14 proposed. We'd love to do that but we just can't quite get there
15 on the citizen voting age population.

16 Now, in Dallas/Fort Worth the Texas Latino
17 Redistricting Task Force did propose a district that got past the
18 50 percent threshold even using the ACS data. They got past
19 50.4 or something like that. I don't remember the exact number
20 so they got past it. They showed you could do it even using the
21 ACS data.

22 But the state is not confined and we aren't
23 confined to that data to establish that we've met this Gingles 1
24 threshold set in Bartlett versus Strickland and fleshed out by
25 the citizenship requirement added in Valdespino versus Alamo

1 Heights and similar cases like that.

2 Dr. Ansolabehere --

3 JUDGE SMITH: So to what extent then is the choice of
4 which numbers to use one of those things that's allowed to the
5 State as part of its legislative or policy judgment -- what have
6 the cases said about that?

7 MR. HICKS: Well, I don't know. They say the State can
8 rely on the safe harbor of the census. That much is clear and
9 that was -- actually LULAC versus Perry said that because in that
10 my clients had a claim on one person/one vote, trying to use
11 mid-census -- mid-decade census -- but -- mid-decade
12 redistricting with old census numbers. And the Supreme Court
13 said -- they rejected that. So they said it's a safe harbor to
14 use the census numbers for drawing lines.

15 JUDGE RODRIGUEZ: So why isn't it safe harbor to use
16 the old HCVAP numbers?

17 MR. HICKS: Because those aren't census numbers. The
18 Census Bureau can analyze -- collects that data, but it's not the
19 safe harbor and it's not -- I'm sorry. It's not the enumeration
20 that the census does every 10 years that the Supreme Court has
21 said you can use.

22 I think the Court has also said the State's -- Burns
23 versus Richardson is a 1966 U.S. Supreme Court case and they said
24 the states can use something else. But remember this is for one
25 person/one vote that they're using something else. It's not for

1 purposes of the section two. It's another difference that I
2 should have mentioned upfront, but they said states can use some
3 other numbers for purposes of one person/one vote, some other
4 measure than the census, but it requires them to prove that it's
5 valid.

6 JUDGE RODRIGUEZ: So for this Gingles 1 what are you
7 proposing should have been used? The SSVR?

8 MR. HICKS: No. The Court -- the State -- this is the
9 reason I started this section with saying it's somewhat
10 complicated because --

11 JUDGE RODRIGUEZ: I'm confused. Go ahead.

12 MR. HICKS: Because the data that has been used is
13 wrong. We've established the citizenship data that's being used
14 by the state to say you can't meet the 50 percent CVAP threshold,
15 we've established that that is wrong. It's three years out of
16 whack.

17 And the trends, as Dr. Ansolabehere testified, are a
18 linear trend straight up. And he can trace it where you add
19 nearly 400,000 additional Hispanic citizen voting age population
20 in the whole state of Texas if you bring it into sync with the
21 census.

22 JUDGE RODRIGUEZ: So the numbers you claim then should
23 be extrapolated HCVAP numbers?

24 MR. HICKS: He said you could do that. He testified it
25 could be done. He hasn't done that yet because he can't go knock

1 on the door of the census as an individual and say, would you
2 give me those numbers down to the levels sufficient to do
3 redistricting. He hasn't been -- you know, he can't do that.

4 And one of the points he made -- it might have been odd
5 for a professor to suggest to the Court that they could do
6 something like that, but one of the points he made in his
7 testimony was the Texas Legislative Council could go ask. The
8 Census has that -- has those numbers now. They won't release
9 them until December -- in the updated 2006 to 2010 level, they
10 won't release them until sometime in December when they redo
11 this. So they won't release them until then, but they can be had
12 before then. And there also can be an analysis done that
13 extrapolates to get them more in sync using this linear trending
14 analysis. He did do the trending down to the county level.

15 But to have the bright-line rule established and then
16 to say we are changing things so you can never approve this in
17 sync with the current data is to disenfranchise minority voters.
18 It's the direct -- there's a direct relationship between, say, we
19 don't have better -- we know they're wrong, but we don't have
20 better numbers than the ACS old survey numbers, so we'll just use
21 those. And if you can't meet that bright-line rule using those
22 inaccurate numbers then you're flat out of luck.

23 That seems a pretty harsh way to approach this whole
24 very serious inquiry on the Gingles 1 factor. Dr. Ansolabehere
25 here testified when he had taken the numbers in Dallas and

1 Tarrant and Harris County, taken the numbers from statewide down
2 to the county level, he added, if I remember right, roughly
3 55,000 people of Hispanic citizen voting age population in the --
4 into Harris County.

5 He added -- it added -- he didn't add. The analysis
6 added around 25,000--but I may be off on the numbers--additional
7 Hispanic citizen voting age population in Dallas and Tarrant
8 counties together.

9 Now, that doesn't -- that doesn't put them into the
10 district, the demonstration districts that every one of us, I
11 believe, have drawn on those two areas, but he did say he was
12 confident that given the lag and given the trend, the Plan C 166
13 numbers, for instance, in the Harris County -- the demonstration
14 district in Harris County and the demonstration district in
15 Dallas/Fort Worth, he was confident that they were over
16 50 percent Hispanic citizen voting age population at this time,
17 now.

18 And to say that because the census has yanked their old
19 approach away, the Supreme Court has set a new rule, and we in
20 the 5th Circuit have added a citizenship requirement and we set
21 this up so you cannot prove your case on that issue is harsh.
22 It's seems wrong to me and it seems that, if nothing else, his
23 expert opinion with respect to our two demonstration districts
24 that they are over 50 percent citizen voting age population
25 suffices. It wasn't rebutted. There is no rebuttal of it.

1 JUDGE SMITH: So you're not -- are you saying wait for
2 the new numbers or are you saying use the -- what I'll call the
3 linear projection?

4 MR. HICKS: The best thing would be to wait for the new
5 numbers, but I know this Court doesn't want to wait. We've got
6 an election coming up.

7 JUDGE SMITH: No. I'm just asking you what you're
8 asking for.

9 MR. HICKS: I know. I know. I don't know what to tell
10 you. I would say use the linear trending.

11 JUDGE SMITH: And what about -- there has been some
12 suggestion here, not a lot, about the phenomenon of out-migration
13 since '08. Is that something that needs to be considered in your
14 view?

15 MR. HICKS: Dr. Ansolabehere testified that his trend
16 analysis -- basically he rejected that testimony. He said he
17 thought it was wrong and he thought that in his -- his
18 analysis took that -- whatever that was that happened into
19 account. His testimony was that it took whatever that phenomenon
20 was was taken into account in his trending analysis. So my point
21 is this Court --

22 JUDGE SMITH: I guess I don't under -- I mean maybe --
23 perhaps he understands what he's doing, but it's not linear
24 anymore, is it? If -- if there was an out-migration then it
25 can't be linear from '07 --

1 MR. HICKS: He testified that -- he disagreed with
2 Dr. Murray on that particular point. And so he said there's a
3 trend and it goes -- a linear trend as he's projected and that
4 this testimony about the out-migration does not affect the
5 projection of that linear trend.

6 I don't have, you know, the very words of his testimony
7 in front of me, notwithstanding the fact we get daily copy. I
8 just don't have that in front of me to quote it back to Your
9 Honors. Of course in the post-trial briefing and I will address
10 that in more detail.

11 But I believe we can take that testimony and say that
12 we have met the 50 percent rule based -- because it is
13 unrebutted, with respect to our demonstration districts in both
14 Harris and in Dallas/Fort Worth. We don't even have a 50 percent
15 CVAP problem with respect to our demonstration district coming
16 out of the Valley in Plan C 166 because it's already over.

17 Plan C 190, the demonstration plan, in particular the
18 Dallas/Fort Worth part of it for the Texas Latino Redistricting
19 Task Force, I think it's congressional -- they label it District
20 6 -- District 6 in their demonstration map. They're already over
21 50 percent. So they -- they've cleared the hurdle for all of us
22 so to speak with that demonstration district even if the Court
23 rejects what I've talked about about the ACS and says it will
24 just use numbers that everybody knows are bad numbers.

25 Now, I want to turn to the part of our case that is, I

1 guess, unique to us: Our constitutional claim with respect to
2 Travis County and the disruption of what Justice Kennedy in
3 Bartlett versus Strickland described as a crossover district.

4 And he was very careful, Judge Smith. He kind of
5 complained about the messy nomenclature and the inexact
6 nomenclature being used as coalition districts and so on. And so
7 he bore down in his opinion -- the court bore down in -- no, wait
8 a minute. It was Justice Kennedy's opinion, lead opinion for the
9 court. Justice Kennedy bore down and gave a very specific
10 definition of a crossover district, just kind of nearly like a
11 statutory definition. And he basically said it's a district in
12 which there is such a significant level of Anglo crossover
13 voting--he said white crossover voting--that those voters cross
14 over and vote in coalition with minority voters, both black and
15 in our case Hispanic. I don't remember in Bartlett versus
16 Strickland if Hispanic voters were involved. But they vote in
17 coalition with those minority voters so -- to support the
18 preferred candidate of the minority votes. So that's the short
19 version or maybe it's the long version of a cross -- of what a
20 crossover district is.

21 In Travis County our evidence is established that that
22 is exactly what exists in Travis County and in particular with
23 respect to current District 25, which is primarily located in
24 Travis County in the very area that Mr. Butts testified and that
25 Judge Biscoe from the Travis County Commissioner's Court

1 testified is where this tri-ethnic voting coalition exists. That
2 is where that part of District 25, the current District 25, is.

3 And the congressional redistricting plan that was
4 drawn in Plan C 185 dec -- completely decimates those -- those --
5 that coalition in terms of congressional voting. It isolates
6 Hispanic and black voters across the whole county into
7 different -- four or five -- five different congressional
8 districts. Stratifies them, sends them off to Tarrant County,
9 Harris County, Texas A&M, the western side of San Antonio and
10 also the south side of San Antonio.

11 60 percent -- Dr. Ansolabehere testified
12 60 percent of the Hispanic population in Travis County is not in
13 District 35. So that shows -- and then the black population is
14 completely chopped up. Completely chopped up.

15 And you saw the testimony of Dr. -- of Dr. Butts. He
16 seemed like a professor. -- of Mr. Butts, and he showed you how
17 the lines were drawn, how the precincts were split to carve
18 people in and out of these districts. You saw what happened at
19 St. Edwards University with respect to the administration
20 building on one side, the dorm on the other. The dorm was put in
21 CD 35. The administration building with no voters--and that's a
22 split precinct--in CD 21. He showed you the arrowhead district
23 where they kept black voters and Anglo voters separate from each
24 other by splitting a precinct.

25 And those were just examples. I think

1 Mr. Korbel's expert report talked about how 100 precincts are
2 split there through congressional redistricting. They've
3 completely carved up that coalition.

4 And Justice Kennedy's opinion in Bartlett versus
5 Strickland says -- he says you can't -- as Judge Smith said in
6 questioning somebody earlier, he said that the state is not
7 obligated to create col -- crossover districts, but Justice
8 Kennedy said -- specifically said a serious question under the
9 14th Amendment, the equal protection clause of the 14th
10 Amendment -- and he also mentioned the 15th amendment but you-all
11 have thrown that out of the case. Under the 14th Amendment a
12 serious constitutional question would be raised if the State
13 deliberately destroyed a crossover district.

14 And you can see why that presents a major
15 constitutional question because a crossover district is really
16 what section two of the Voting Rights Act is aspiring to. It's
17 hoping the country can get to this. Johnson versus De Grandy
18 talked about this. We want to have districts where people vote
19 in coalition and work with each other. And to have the State
20 deliberately destroy that is what has led Justice Kennedy to say
21 that's a serious constitutional question. And I think that
22 question is raised here and there is -- there is as blatant a
23 violation as you can get of it. There's no district in Travis
24 County that has more than 35 percent of its population in Travis
25 County.

1 JUDGE SMITH: But under the old district that exists
2 today, which one is it that you're saying is being destroyed?

3 MR. HICKS: The particular congressional district is
4 District 25.

5 JUDGE SMITH: The current 25.

6 MR. HICKS: It's the one that was put in place on
7 remand from the Supreme Court in LULAC versus Perry when the
8 court redrew that district. It essentially pulled -- that was
9 the district that in the Tom Delay redistricting -- redistricting
10 had gone down to basically the Rio Grande River on the other side
11 of McAllen from a place similar to where this one is, where CD 35
12 is in Travis County here.

13 And so the new CD 25 that we're talking about that's on
14 the remedy, the Supreme Court pulled that back up as far as it
15 could and back into Travis County. Not entirely. I mean, there
16 are parts of the district right into Bastrop and some other
17 east -- south -- counties southeast of there, but 60 percent of
18 its population is in the very heart of where this tri-ethnic
19 coalition voting group operates and it has been destroyed.

20 And there's no question if you look at the 450 pages of
21 the congressional e-mails going back and forth about the planning
22 here, there's no question that it was intended directly to
23 destroy that coalition. That was the purpose of it, is to make
24 sure, you know, weird Travis County was made even more weird so
25 to speak by chopping it up this way.

1 JUDGE RODRIGUEZ: Well, I don't recall a specific
2 reading of all those e-mails, but if there was an intent wasn't
3 that intent by his colleagues in the federal congress as opposed
4 to the state legislature or were there e-mails --

5 MR. HICKS: No, I understand, right.

6 JUDGE RODRIGUEZ: I mean, because here we're dealing
7 with intent of the state legislature.

8 MR. HICKS: That's a fair question. I agree. There
9 was pressure to do it is a better way to say it. And the
10 intent -- it couldn't be clearer. The intent could not be
11 clearer. You couldn't draw a better plan to chop up the
12 coalition than was done in this particular case.

13 JUDGE GARCIA: Right. And regardless of the
14 congressional intent the legislature adopted it.

15 MR. HICKS: It did it.

16 JUDGE GARCIA: Right.

17 MR. HICKS: And there was -- and Representative Dukes
18 for one -- there were others, but Representative Dukes, Donna
19 Dukes from Travis County, offered Plan C 166 which didn't do it.

20 So they were on notice that it didn't have to be done
21 essentially by offering this statewide amendment, a request that
22 it not be done, and they did it anyway.

23 Let me add one more very minor point about District 35
24 and it's only because the Court has not heard live testimony on
25 this.

1 to measure compactness the least compacted of all of those
2 districts.

3 So he said -- the State has basically said that's a
4 non-compact district. And so I just wanted to close with that.
5 Thank you.

6 JUDGE GARCIA: Thank you, Mr. Hicks.

7 Mr. Hebert.

8 MR. HEBERT: May it please the court.

9 The Congressional and State House redistricting cases
10 such as these often present complicated intent questions. And
11 I'm going to address the two major ones that usually come up in
12 these cases. So I'm going to try to cover topics that haven't
13 been addressed before by people on my side.

14 The first intent issue is under the Shaw v. Reno,
15 Johnson v. Miller, Vera v. Bush line of cases that talk about
16 whether race can be used in redistricting and whether it can be a
17 predominant factor when the state draws maps.

18 So we start with Vera v. Bush and the Supreme Court
19 says that "strict scrutiny will not apply merely because
20 redistricting is performed with consciousness of race." In other
21 words, race can be taken into account by the state and not
22 violate the constitution.

23 Where strict scrutiny comes into play is when the
24 plaintiffs rely on race and subordinate traditional redistricting
25 principles such as compactness, respect for political

1 subdivisions, respect for communities of interest, things like
2 that, that when it becomes a predominating factor then the
3 district is subject to strict scrutiny. And as we know, strict
4 scrutiny is usually fatal in these cases.

5 In Vera v. Bush -- and I put the slide up. I don't
6 know if you can lower it at all, but it's the Supreme Court --
7 and I tried to give you pin cites for the members of the Court.
8 I think that is 517 U.S. 952.

9 Like this case, where the State says that they desired
10 to engage in partisanship where they had tried to protect
11 incumbents, it's a mixed motive case because clearly they also
12 tried to use race to create some minority opportunities
13 districts. We contend not enough, but they -- it's a mixed
14 motive case just like it was in Vera versus Bush.

15 And in that case the State of Texas conceded that they
16 had -- one of their goals was to create three districts that were
17 heavily minority, but they also cited evidence to the Supreme
18 Court that incumbency protection was also a factor in what they
19 did in the drawing of district lines, so the Supreme Court had to
20 untangle that.

21 The State also conceded in that case that the three
22 districts at issue were created for the purpose of enhancing
23 minority opportunities. And what that means is that Texas
24 used -- the means that Texas used to make its redistricting
25 decisions provides further evidence of how important race was

1 back then.

2 And if you look at what the Supreme Court of the
3 United States said Texas did, they said that the primary tool
4 that they used in drawing districts was a computer program
5 called--you guessed it--Red Appl.

6 Red Appl permits redistricters to manipulate district
7 lines on computer maps on which racial data can be superimposed.
8 And at each change -- when you draw maps on Red Appl, on each
9 change Red Appl displays the updated racial composition.

10 Now, Judge Rodriguez probed this question when
11 Mr. Downton was on the stand. And he said, "Well, at what point
12 did you turn on the race" -- this is in the trial transcript
13 9-12. "At what point did you turn on the race or ethnicity
14 feature." And then he talked about, you know, "At any point did
15 you turn on the race?" "Yes," he says.

16 "And at what point did you turn on the feature?" Well,
17 the answer was, "As far as the feature we were always -- we were
18 conscious of the numbers so we would look at them throughout the
19 process before moving forward with the map."

20 So let's not pretend that the State didn't know exactly
21 what the racial implications were of what it was doing. It knew
22 it at every click of the mouse in drawing the map.

23 Now, there were many incumbent protection boundaries
24 the Supreme Court said in 1991 that were sabotaged by dividing
25 counties. And I put this up here because I think if you read it

1 it sounds exactly like what we have going on in this case. For
2 the sake of maintaining the winning seats in the House,
3 congressmen or would-be congressmen shed hostile groups and
4 potential opponents by fencing them out of their districts. And
5 the legislature obligingly carved out districts of apparent
6 supporters of incumbents as suggested by the incumbents.

7 And here we have 463 pages of e-mails from
8 congressional members passed to the legislature and back to them.
9 And almost in every single one there's a reference to either
10 race, SSVR, Latino population. It's rampant throughout that
11 exhibit, 311. It's Exhibit 311 of the Latino Task Force. So
12 exactly what was happening in Vera v. Bush seems to have happened
13 here.

14 Now, there's been a lot of talk about, well, it's
15 partisan gerrymandering. Well, of course that's what the Supreme
16 Court was faced with in Vera v. Bush. The State said we were
17 just trying to protect the incumbents. And they said, well, yes,
18 you were but you also allowed race to play too much of a role in
19 the way you created these districts. And they said that it
20 had -- it had the effect of basically -- in large part the
21 political gerrymandering was largely accomplished by the use of
22 race as a proxy for partisanship.

23 So what they're doing here is they're saying, okay,
24 we'll go to any precinct that has Obama carrying 60 percent -- a
25 minority precinct -- well, we know that's a minority precinct so

1 we're going to shift it over either to the minority district or
2 take it out of an Anglo district.

3 And again in that case you had people talking
4 about -- in Vera v. Bush -- again throughout the course of the
5 congressional process the lines were continuously reconfigured to
6 assist in protecting the Democratic incumbents in the Dallas/Fort
7 Worth Metroplex by spreading the black population to increase the
8 Democratic Party index in those areas. Now, they're quoting the
9 district court, the Supreme Court is, in this case.

10 Now, if you substitute spreading the black and add
11 Latino population in the Metroplex to include -- to increase the
12 Republican Party index in the other areas you have exactly what
13 happened here. They packed District 30, Congressman Eddie
14 Bernice Johnson's district, and notwithstanding the growth in
15 Dallas/Fort Worth they didn't draw a single new minority
16 opportunity district. Not a single one.

17 And I think it was Judge Garcia yesterday asking Mr. --
18 Dr. Alford -- and, again, you're right, Judge Rodriguez. We were
19 relying pretty heavily on Dr. Alford. Dr. Alford testified for
20 the State in Balderas. He testified for us in 2003 when we
21 challenged the 2003 map. Now he's back with the State. Maybe
22 the next round he'll be back on our side.

23 But, in any event, the point is we've got a situation
24 where you've got Republicans making requests, individual
25 requests, and getting them granted. And you don't have

1 minority -- Anglos rather. And you don't have Democratic
2 minority members making those kinds of requests either.

3 Now, I want to just show you because in the Shaw v.
4 Reno case is what Justice O'Connor says that in redistricting
5 appearances matter. So let's look at some of these. And you
6 looked at these when Mr. Vera was here and he showed you how that
7 arm went up into Dallas. And then, of course, it creeps over
8 into the Arlington area of Tarrant County at the very -- at the
9 very far left.

10 And then we have District 9, another district that has
11 a bizarre shape. And shape matters in redistricting cases, in
12 these kind of cases.

13 District 12. We've heard about that, the finger or
14 lightning bolt that comes down into Tarrant County. It snakes
15 along here.

16 And by the way, there was some testimony -- I think
17 somebody asked Mr. Downton--it might have been the State's
18 lawyer--about, well, wasn't that bizarre, a little cut here and
19 there, wasn't that the Trinity River project made at the request
20 of Senator Granger -- I mean Congresswoman Granger.

21 Check out Exhibit 311, those 463 pages, which I just
22 did a moment ago. The word "Trinity" doesn't appear in any of
23 those pages. That's post-talk rationalization for trying to
24 engage in the racial and ethnic splitting of the Latino and
25 African American population in Tarrant County. And I'm going to

1 show you in a couple of minutes exactly how that was done.

2 Here's Congressional District 18, Sheila Jackson-Lee's
3 district. There is no reason that this African American
4 opportunity district has to have a shape like that unless you
5 really want to bleach out black voters or Latino voters from
6 adjoining Anglo districts and pack them all in so that they can
7 have no impact anywhere else.

8 And then I think there may be one more, Congressional
9 District 29. And by the way, this is a district basically almost
10 identical to what it was before. It's a little worse now. But
11 this was a district in the 2003 trial that Dr. Alford testified
12 was an unconstitutional racial gerrymand.

13 And then the last one, Congressional District 33,
14 again, a district that comes down, snakes around and picks up
15 minority voters. And we have exhibits in the Quesada exhibit
16 book which overlay these districts into -- with race and
17 ethnicity so that you can see how the cuts go.

18 And largely what happens is -- you know, I started my
19 legal career in the school desegregation area a long, long time
20 ago when I was with the Justice Department. And the rule was,
21 you know, you couldn't assign students to schools on the basis of
22 race or ethnicity.

23 Well, basically what's happened here is they've
24 assigned voters to these districts on the basis of race or
25 ethnicity. And what they've done is they've carefully crafted

1 the Anglo Republican districts in such a way as to put just
2 enough minority voters in there so that they can't pose any
3 threat to the Anglo incumbent, and then the rest of them get
4 packed into one district.

5 JUDGE SMITH: In your view all of these are packed, all
6 seven of them are packed?

7 MR. HEBERT: They're not packed. They're racial
8 gerrymanders. The only district that I'm contending is packed is
9 Eddie Bernice Johnson's district, which was already an
10 African American performing district. And they loaded it up. In
11 fact, that was her own testimony.

12 So that's the -- that's the evidence of racial
13 gerrymandering. And again we have, you know, a lot of exhibits
14 that I think will flesh that out and I will certainly cite those
15 in my post-trial brief.

16 The other issue of intent that comes up in these
17 cases is whether or not they engaged in a racially discriminatory
18 purpose aimed at Latino and African American voters when they
19 created the districts.

20 Now, I would argue that if you just start out with
21 the fact that -- and I know Dr. Alford hedged on this as much as
22 he could, but at the end of the day -- certainly the San Antonio
23 Express this morning picked it up. But at the end of the day he
24 conceded that not one new district for Latinos or African
25 Americans was created under the State's map.

1 He talked about the swap which Judge Garcia on
2 number 27 and 34, and then he talked about 35 replacing 23, but
3 at the end of the day if you take out two and you put two in,
4 where's the new district? Well, it ain't there. That's the
5 answer.

6 And the fact of the matter is that in a State that
7 gained four seats on the backs of minority voters -- as I said in
8 my opening statement, it's inconceivable. It's tragic that
9 Latinos don't get one new seat and African Americans don't get
10 any new opportunities. It's tragic and it violates the Voting
11 Rights Act, and it's intentional.

12 And the way it's intentional is under the Village
13 of Arlington Heights versus Metropolitan Housing Corporation
14 case, the leading case on how to prove racial intent. It's still
15 the case relied upon by the Justice Department in Washington in
16 voting rights cases.

17 And they say, first of all, that you have to look
18 at the totality of circumstances here. You have to look at
19 whatever evidence you have that's available, both direct and
20 circumstantial.

21 And the first place to start is what's the effect
22 of the action. And I just told you what the effect was. The
23 effect is they didn't create any new opportunity districts.

24 Then you look at the historical background of the
25 decision. That's another evidentiary source. What's the

1 historical background in Texas? Every decade they litigate and
2 they lose. That's a historical background. They have a long
3 history of discrimination against African Americans and members
4 of language minority groups too when they had information only in
5 English, for example, and many, many other examples. So there's
6 a history here.

7 So if the State had never engaged in discrimination,
8 the white crime area, the poll tax -- and we could go on and on.
9 If the State had never engaged in any discrimination and then
10 suddenly we were contending they would, you'd say, well, wait a
11 minute, they never did that before. But as I said in my opening
12 statement, it's like they're addicted to vote dilution here.
13 They do it over and over again. And it happened again this
14 decade.

15 The other factors you look at are the sequence of
16 events leading up to the decision. Well, let's look at the
17 sequence of events. There's an exhibit that we have called a
18 congressional time-line. I commend it to you. I don't have a
19 slide for it.

20 But in the congressional time-line, which is
21 Exhibit 6, a Quesada plaintiff's exhibit, they did a bait and
22 switch when they first put the congressional map up. First of
23 all, even though Congressman Smith gave the map to the
24 legislature in April, it never came out publicly. Nobody knew
25 that there was a map out there, you know, certainly for the

1 minority community. It was kind of done -- and they kept it
2 there and they didn't introduce it. And then at the end of the
3 session they introduced the map.

4 When the map came out in the senate they scheduled
5 a hearing 48 hours later on the map. So everybody gets ready to
6 testify and 48 hours they show up. And what happens? Before the
7 hearing starts the chairman announces that he's got a committee
8 substitute. So everybody is prepared to talk about map A and the
9 hearing is on map B. And everybody says, wait a minute, we
10 didn't have an opportunity to do that.

11 And they really never did because then the map got
12 passed, it went over to the House, and in the House they had one
13 hearing and then they had one where the public wasn't allowed to
14 speak. They wouldn't allow any public testimony. And as I think
15 I'm going to show you in a moment with some slides, we're going
16 to see how that all played out.

17 Now, I talked about the effect and I want to just
18 come back to that for a minute. And if we could pull up Exhibit
19 26. There it is. It's going to take a minute to load. But what
20 you see here is you see the district coming down from the -- this
21 is Burgess's district, Anglo, comes in, makes this narrow here,
22 picks up. What we have happening, going on here, is that we
23 actually have six congressional districts, six in Tarrant County
24 that take a piece of the minority population.

25 David Hanna, from TLC, could you pull up the

1 districts in Tarrant/Dallas County for a minute?

2 You have this coming down and picking up Latinos
3 and snaking around down here. These are black and Latino
4 population concentrations. So you have that on 26.

5 Then you've got 12 over here which comes around,
6 snakes around narrowly, then comes up the other side. That's a
7 totally different configuration of that district.

8 You have District 33 over here which comes in,
9 moves around, comes to pick up some population.

10 You have District 6, Joe Barton's district,
11 picking up some population, minority population all the way up
12 through there.

13 You've got 24 coming down and picking up some
14 growth. This is the DFW Airport area, but coming down into this
15 area here and picks up some.

16 And then you've got this little piece here
17 which -- actually there is a shading there, not on this map, but
18 there is a minority population in that top precinct right there.
19 And guess where that district goes? It goes to Austin, Texas.
20 It goes to Hays County actually and it even goes further than
21 that.

22 Now, when you slice and dice the minority
23 community like that -- and again we're looking at a huge -- if
24 you look at the two-county area--David, if you could pull back
25 and just show a county area--and you start slicing and dicing

1 that many hundreds of thousands of 1.2 million people, the Latino
2 and black people in that area, you're absolutely -- you have to
3 go out of your way not to create another minority opportunity
4 district.

5 So let's go back to the issue of intent because I
6 want to finish up and move on to a couple of examples -- I want
7 to give you specific examples of racially discriminatory intent.

8 So we saw that. Let's move on to -- that's just
9 one example.

10 Now, minority senators in the senate, Senator
11 Zaffirini, a Latino, and Royce West, an African American from up
12 in Dallas -- here are quotes and this is Quesada Exhibit 3. And
13 West says, "For purposes of the record I didn't have any input
14 into the map 125." This is the early version of C 185. This was
15 kind of the first version that came out. "I never saw the map
16 before you published it."

17 Senator Zaffirini says to Senator Seliger, who's
18 the Anglo chairman of the redistricting committee, "I've been on
19 every redistricting committee since my election in 1986 and I
20 must say that I have never had less input into the drawing of any
21 map until this session."

22 And Zaffirini continues, and she says, "Were any
23 of the staff members involved in drawing this map either Latino
24 or African American?" And he says, "Well, not on the senate
25 staff but I think there might have been one in the speaker's

1 office's people and that's Mr. Interiano, who is Hispanic."

2 And she says, "Well, were any members of the legal
3 team that you had hired, outside counsel, in the senate, were
4 they either Latino or African American?" "No," is the answer.

5 So then we have testimony from another
6 redistricting committee member here, Mark Veasey, who says, "I
7 can tell you from being a resident, a life-long resident of the
8 Metroplex, this is at his deposition at pages four and five, that
9 it's clear the census numbers back me up. The Metroplex is two
10 of the fastest-growing areas in the entire country for African
11 Americans and Latinos. And as a matter of fact, you could easily
12 draw a district, a Hispanic opportunity district and an
13 additional African American district in addition to Eddie Bernice
14 Johnson's.

15 And then he concludes and says, "And the state,
16 with the way the map was drawn, absolutely didn't afford minority
17 voters increased opportunities to elect a candidate of their
18 choice."

19 And he continues -- I'm not going to read all of
20 this, but if you check his deposition at page 5 he talks about
21 the most glaring example being what happens to minorities in this
22 area. And that would be one example, he says, of minorities not
23 being given an increased electoral opportunity.

24 He also says -- and I want to pause for a minute
25 on this. He says -- he's asked about whether or not they had

1 meaningful participation. And he said, well -- and what would
2 that be? And he said, well, when you have hearings in --
3 throughout the state allowing African Americans and Latinos to be
4 able to come and testify for or against the districts.

5 They never did that here. That was a change from
6 even 2003 when the special session ran through what is called the
7 DeLay redistricting map. They did at least go around the state
8 and solicit people's views. And 91 percent of the people back
9 then said don't do re-redistricting, but they did it anyway, but
10 the fact is they gave people their due process.

11 And then he says, "I don't think those hearings
12 were done favorably so that African Americans and Latinos would
13 be able to have a voice in the proceedings."

14 And then he says and here's the critical thing.
15 This gentleman -- this is our client. This is our Quesada
16 plaintiff. He says, "I was a member of the redistricting
17 committee in the state legislature in the House. I would say
18 that a lot of the map drawing and a lot of the changes were done
19 in secret. They were done to keep the African American and
20 Latino members of the committee sort of discombobulated and not
21 really know what was going on. And I thought that was so unfair
22 and made the process and then the participation part of being
23 able to draw fair maps for all races impossible."

24 Now, we have two examples. I think Mr. Bledsoe
25 brought this out. This is further evidence of intentional

1 discrimination and I'm going to get to this now.

2 We know that Congressman Al Green -- can you take
3 a look and tell us what impact C 185 has? And he says, "Well, my
4 district office, it's no longer there. It's been removed from
5 the district."

6 And then he says, "We tried to work
7 through" -- and these are trial transcript cites. "We tried to
8 work through some of the staff members to get that restored."
9 And at the end of the day he went to Congressman Smith--next
10 page--and he says, "By the time we got there time wasn't on our
11 side and I might add there was a reality we weren't going to get
12 a lot of our desires addressed anyway."

13 And I'm going to come to Judge Smith's question in
14 a minute because what impact does this have on voting.

15 "And so you made a proposal for modification that
16 was not accepted?" "Well, we tried to work out a proposal. I
17 did submit what I thought would work through Congressman Smith
18 and his indication was it just wasn't the time, it didn't get
19 done."

20 The next slide -- go back.

21 We also know that Congresswoman Eddie Bernice
22 Johnson testified that not only was her district office taken out
23 of her district, her home was taken out of her district.

24 Now, those are two African American members of
25 Congress. Sheila Jackson-Lee is the only other member of

1 Congress who's African American and she testified that her
2 district was not -- district office was taken out, I believe.

3 So you have all three, which I think Mr. Bledsoe
4 referenced in his closing statement as something like
5 "remarkable." I'll say.

6 Do you know who else didn't get their district office
7 and have their district office taken out? Where we're sitting
8 right now: Congressman Charlie Gonzales' district. He had his
9 taken out too.

10 No, isn't it odd that four minority members had
11 their district offices taken out? Well, you can say that it's,
12 you know, serendipity, happenstance. Let's take a look.

13 Congressman Marchant. Here's an e-mail to Eric Opiela.
14 Again, this is -- you know, from -- and I cite it actually here.
15 It's a document that's been filed in the case but it's also in
16 Exhibit 311 of the Task Force. Oh, one change, it's easy -- this
17 is Anglo Republican. No population involved. My grandbabies go
18 to Hockaday school on Forest and Inwood. I have the north side
19 of Forest. Pete Sessions -- that's Republican Anglo
20 congressman -- has the south side. "Please go across the street
21 and pluck the campus out of Pete and put it in my district. I
22 will ask Burt to do it."

23 Mr. Hanna, can you drill down on that for us just
24 to show? Do you have the address of the Hockaday school? I
25 thought I gave it to you.

1 While he's pulling that up let me just say in
2 response to Judge Smith, I tend to agree with you that it
3 really -- it's hard to imagine when somebody's district office
4 gets moved out what effect that has on the ability of minorities
5 within the district to actually go to the polls and elect the
6 candidate of their choice. I think it's hard to draw that
7 connection.

8 Ms. Riggs' answer I think gave a good answer in terms
9 of the constituent-representative relationships where people know
10 where they're going and the building is important and it's often
11 historic as you pointed out.

12 But the fact is that what -- why it's important
13 here is because it shows that -- and these e-mails, I think, are
14 going to show this--that when it came to Anglo members of
15 Congress they were willing to make the most absurd, is what
16 Chairman Solomons called, nickel and dime changes. That's what
17 he called them in Defendant's Exhibit 23. Nickel and dime
18 changes at the request of members of Congress. But a member of
19 Congress can't get their congressional district moved into their
20 office?

21 So here's the area here that we've been discussing.
22 Here is Forest Lane and here is Inwood Parkway and here is the
23 area. This is the campus in this area and this is Marchant up
24 here. And so he scoops down and gets this area right here just
25 because his grandbabies go to that school. Now, that's a petty

1 change in my view and in the grand scheme of things it doesn't --
2 you know, it's not going to be like that one exhibit that makes
3 or breaks the case.

4 But let's go back to the next one because this
5 one -- this one is outrageous. Here's one from Congressman
6 Granger's office to Mr. Opiela saying, "Our office is located on
7 7th and Jones in downtown. There's no population there. We told
8 Charlie Geren about this problem and he said he'd work on this
9 today, that this has to be corrected."

10 Well, it was corrected. I'm not going to take the
11 time to pull up the map. It was corrected. And get this. It
12 wasn't her congressional office. She wanted her campaign office
13 in the district and she got it. Her campaign office. I mean,
14 that's just secondary compared to a member's district office
15 where you have your relationships.

16 And then a third one, Congressman Smith, he's
17 not -- he's not an innocent party in this. He says, "There's one
18 precinct which includes two condo buildings with many GOP
19 supporters and the San Antonio Country Club adjacent to my
20 district would really like to get it. Joe Straus would approve."
21 And of course he got it.

22 Let's go to the next -- now I want to move on from
23 those things because I think that shows the disparate treatment
24 of Anglo incumbents versus minority incumbents.

25 I want to talk a little bit about the population

1 of the state and finish up in my closing. The percent of Texas's
2 population. It's 45 percent Anglo and somebody said majority
3 minority. 72 percent of the districts will now be dominated by
4 Anglos, 8 percent by blacks and 19 percent by Hispanic.

5 Let's go to the next slide.

6 If you look at VAP as opposed to total pop it's
7 still a disparity there. Now, 72, 49, 811, 1933. Next.

8 Now, as we said throughout this case, minority
9 population is responsible for 89 percent of the growth. Now,
10 probably the biggest joke in the entire transcript and record is
11 Chairman Seliger, the Anglo chair of the senate committee, where
12 he says -- and this is in Exhibit D-22 at page A-1, he said, "I'm
13 proud of the congressional plan because," quote, "the map
14 accommodates the population growth throughout the state."

15 I almost can't say it without bursting out
16 laughing frankly because this map does anything but respect the
17 population growth in the state.

18 Now, in North Texas between 2000 and 2010 -- and
19 I'm going to come back also to a question that I believe it
20 was -- that came up with Judge Rodriguez about HCVAP because I
21 want to talk about that and particularly as it affects North
22 Texas. But between 2000 and 2010 the Anglo population decreased
23 in this two-county area while the African American and Hispanic
24 population increased by 600,000. This is the DFW area. And only
25 42 -- 41 percent of the Dallas/Tarrant population is now Anglo so

1 it's less than the state, but the Republican map, the Anglo-drawn
2 map, seven of the eight districts in North Texas are going to be
3 controlled by Anglos, 87 percent.

4 Now, Ms. Perales asked a question here about
5 C 122. She said -- this was of Mr. Downton. She asked him about
6 a map that had been created. And he said, "You know, I do recall
7 a map coming from the Latino Task Force, MALDEF," he says. And
8 she said, "You recall saying that you remember it was
9 approximately 45 percent HCVAP?" The Hispanic citizen voting age
10 population. And he says "Correct."

11 Then there was a time when Judge Rodriguez came in
12 and said -- and proposed a question: So what was the fallacy in
13 Congressman Smith's drawing? Did he not take HCVAP into
14 consideration or what was the mistake he allegedly made? And
15 Downton says, "Well, I don't know he made any mistake. I don't
16 think his district was a required district. It may have been a
17 permissible district, but there wasn't the legislative will to
18 pass that district unless it was a required district."

19 Then I asked in my one question -- I tried to do a
20 one-question cross-examination, but I said, "Did you ever attempt
21 to create a district in that area"--and Mr. Rios mentioned it in
22 his closing--"that combined African Americans and Latinos in the
23 DFW area to create a new Latino opportunity district?" He said,
24 "No, I never drafted that on my own."

25 Now, why is all that important? Well, the reason

1 is because when they establish a 50 percent threshold and say if
2 you can't get over 50 percent HCVAP we don't have to draw the
3 district, that's a legally flawed argument. There is no such
4 rule that says you have to have 50 percent from the Supreme Court
5 of the United States, 50 percent CVAP. In fact, relying -- and
6 they get that from Bartlett by the way.

7 Now, Bartlett -- as we said before, Bartlett was a
8 district in which blacks were about 40 percent. There were no
9 Latinos in the district. And whites crossed over, just enough of
10 them with the black voters to elect their preferred candidate.
11 And the state tried to -- North Carolina tried to argue in that
12 case that that district was protected under section two. And the
13 Supreme Court said no, it's -- you have to get over 50 percent.
14 And they used the term "voting age population" pretty much
15 exclusively throughout.

16 Now, the 5th Circuit has interpreted that to mean
17 citizen voting age population. The Supreme Court, what I was
18 referring to earlier, has never decided this issue. And as
19 someone pointed out, there isn't language in Gingles itself that
20 talks about putting minorities together.

21 Now, nothing in Bartlett -- so that was a white
22 crossover. And the reason the Supreme Court said that is not
23 required under section two is because if you have whites voting
24 with the minority preferred candidate in sufficient number to
25 elect that person, then that affects the third prong of Gingles,

1 the white block vote. That undermines that third prong. And so
2 the Supreme Court said that's not going to be a district that you
3 can say is required to be drawn under section two. You can draw
4 it if you want to but you don't have to.

5 Now, the 5th Circuit, as Ms. Riggs said, has held
6 that two minority groups can be combined to elect their preferred
7 candidate in Campos v. City of Baytown. I know it's a long quote
8 from Campos but I wanted to put it up. 840 Fed 2nd, 1240 to
9 1244. There is nothing in the law that prevents the plaintiffs
10 from identifying the protected aggrieved minority to include both
11 blacks and Hispanics. So you can combine them.

12 And it goes on with the rest of the quote. And it
13 says, "If together they are such numbers residing geographically
14 so as to constitute a majority in a single-member district, they
15 cross the Gingles threshold as potentially disadvantaged voters."

16 Now, when Mr. Hicks was just up here somebody
17 asked him--I think it was Judge Rodriguez--what about this, you
18 know, HCVAP, and he was talking about the unreliability of the
19 data. What is the standard that you suggest?

20 Well, here's the standard that I suggest, but I'm
21 going to cite a case for it. I'm going to cite a case called
22 Perez versus Pasadena ISD.

23 Now, this was a case -- Mr. Garza, I believe was
24 the plaintiff's lawyer in this case and went up to 5th Circuit.
25 And the 5th Circuit said that they did not prove -- they could

1 not get over the first prong of Gingles in the case because they
2 couldn't get over the 50 percent CVAP issue.

3 But what 5th Circuit also said is that there are
4 ways to get around that. There are other ways to prove that you
5 are over 50 percent CVAP that don't rely on CVAP data because the
6 CVAP data is too imprecise. It's a small sample, smaller than
7 2000. And you could look at three things. You could look at
8 whether the district is a super majority.

9 So, in other words, if it happens to be 90 percent
10 minority with black and Latino it doesn't really matter if
11 Latinos are 45 percent of the citizen voting age population and
12 blacks fill up the rest and then there's a handful of whites.
13 That district is going to provide minority voters with an
14 effective opportunity. So if you can get to the super majority
15 that's one way.

16 Number two is SSVR. Perhaps Latinos are 48, 49
17 percent of the citizen voting age population, but maybe they have
18 a bump in registration and they can get themselves over 50. They
19 ought to be able to take advantage of that in a section two case.

20 And then third, and this is -- and by the way,
21 we've got all these in our demonstration districts. It's whether
22 the district performs electorally or not. Well, we've done
23 reconstituted election returns in which we've shown that
24 Chavez-Thompson, Noriega -- the list goes on and on. Yanez and
25 Uribe and everybody -- Obama, they're all carrying these heavily

1 minority opportunity districts that the state dismisses and says
2 they're not 50 percent CVAP so we don't have to consider them.

3 It's a legally flawed argument and I think it was
4 used to hold the head of Latino voters just below the waterline
5 so they would be drowned out from getting their fair share of the
6 districts.

7 Downton also testified -- and I'll tell you why
8 it's a factually flawed argument. And I just put up a
9 hypothetical district. So if we've got a 45 percent HCVAP
10 district here -- well, it's 45 percent HCVAP. Maybe it's
11 45 percent black, 10 percent Anglo CVAP. Is there any doubt that
12 district can provide an effective opportunity for minorities to
13 elect their preferred candidate? Of course not. So the 50
14 percent rule has to be a functional one. It has to be a -- it
15 has to be -- that has to be a part of the analysis.

16 I wanted to go back and this is the last area.
17 This is the congressional plan -- this is Tarrant County, Dallas
18 County and this is the old map before the DeLay redistricting.
19 This district right here is Congressman Frost's old district and
20 this is Eddie Bernice Johnson's old district right here.

21 Let's go to the next slide.

22 And here's what was done to that area. And I
23 showed this. It came down just similar to what it does now
24 although it's much wider and smoother. And as you can see it
25 became so much more jagged in the current round of

1 redistricting. So this is a benchmark map right here. And
2 Congresswoman Johnson's district continues, you know, to take in
3 all this minority population here.

4 But what happens to the rest of the minorities -- and
5 again, not as dramatically as it happened when Mr. Hanna pulled
6 up the map a few moments ago, but I bring this out to show you
7 that even here there was a fracturing of the minority community.
8 But when you consider the growth of Latinos and African Americans
9 of 600,000 more people than were in this map, because this was
10 the 2000 census, the minority population has exploded there and
11 you have to go out of your way not to create a new minority
12 opportunity district.

13 Now, I'm not going to show you Exhibit 42. I will
14 say that over 1.4 million Latinos reside in Dallas and Tarrant
15 County, but C 185 cracks them into five districts, denying them
16 the opportunity to be in a district where they could combine with
17 other minority voters and elect their preferred candidate.

18 The core Dallas County Latino community is also
19 split between District 30, Eddie Bernice Johnson, and District 6,
20 Joe Barton.

21 And that was, by the way, the area, I believe, Judge
22 Rodriguez, that you asked about when you were asking about the
23 Lamar Smith plan in that area that comes up into western Dallas
24 County. That's some of the area we're talking about. It
25 actually comes up through southwest Dallas County through

1 Grand Prairie, through Irving and up into that area. And other
2 Hispanic neighborhoods are placed in suburban districts.

3 Now, we have several alternative plans. C 121.
4 Here's an alternative plan we created. 66.2 percent HVAP, 71.8
5 percent total pop, Anglos are only 20 percent in the district.
6 Obama carries it with 66 percent. Noriega carries it with 66
7 percent.

8 In the second district we drew two in the area.
9 That's how many minorities are up there. We could create two
10 effective minority opportunity districts that are new and do no
11 damage to Eddie Bernice Johnson's district by the way. She, in
12 fact, supports this map.

13 Next.

14 Recall that there was a map, C 121. It was
15 called -- in the legislature it was called the Fair Texas Plan.
16 It was offered by Representative Veasey and it created, as I
17 said, not only the Latino opportunity district but it created a
18 new African American opportunity district also. And I want to
19 show you how it compares to what the state has already done.

20 This is Al Green's district. When they drew it in
21 2003 this is the population that was in it right here. 20
22 percent Anglo, 35 -- -6 percent black, 30 percent HVAP, and they
23 claimed that that was a black opportunity district.

24 In this CD 35 that we drew in 121 it's very
25 similar to that and it creates such a sizeable minority

1 percentage of minority voters that clearly whoever merges from
2 the primary is going to -- the minority is going to prevail in
3 the general election.

4 We have another map. That's C 192. Look at the
5 Anglo VAP percentages in that. Again, 66.2 percent. This
6 fulfills in our view -- along with the election returns that back
7 up that show these are performing districts, these districts
8 show -- meet that Perez versus Pasadena ISD case, 165 F.3d, by
9 the way, 368. 165 F.3rd 368.

10 Next plan.

11 And then the final map we put up was 202.

12 And could you pull that up, David Hanna, because I
13 want to show -- this is another one where it's a majority HVAP in
14 District 34, but I want to show it because I made such a point
15 about shapes of districts.

16 Take a look at how clean these are. This is the
17 new African American opportunity district. This is southeast
18 Fort Worth. It comes up and around here. And District 34. This
19 is the new Latino -- a combination of black and Latino majority
20 minority district that takes into account a lot of the minority
21 population growth in the Metroplex.

22 And then finally the only other point I want to
23 make is about proportionality because the State made a point
24 about this. If we could just scroll through until we get -- here
25 we go.

1 Now, in his opening statement counsel for the
2 State quoted you that language out of section two of the Voting
3 Rights Act that says nothing herein guarantees the right to
4 proportional representation in section two, but we all know that.
5 That was put in there as part of the compromise between Bob Dole
6 and Ted Kennedy back in 1982.

7 The Supreme Court, however, has interpreted this
8 language and has talked about what it truly means. And what it
9 says is rough proportionality doesn't automatically give you
10 protection under section two. It doesn't automatically -- it's
11 not an indication -- it's an indication that minority voters have
12 an equal opportunity in spite of racially polarized voting to
13 participate in the political process.

14 And Justice O'Connor in her concurring opinion said --
15 explained proportionality is always relevant evidence in
16 determining vote dilution and it is never itself dispositive.

17 Now, this issue came up in the Supreme Court in
18 LULAC V Perry about proportionality. And there is language in
19 there by the way that the issue didn't get decided because it
20 wasn't briefed in the Supreme Court and so it hasn't been decided
21 yet. But they did indicate that the relevant proportionality
22 might be CVAP, but it hasn't been decided. They used it for
23 purposes of that case.

24 But what they did say was that -- in LULAC v.
25 Perry they said that proportionality mitigates against a finding

1 that there's been a violation of section two while making clear
2 that proportionality doesn't allow the state to trade off the
3 rights of some members of a racial group against the rights of
4 other members of that group.

5 Now, isn't that exactly what's happening here with
6 regard to 35 and 23? Isn't that exactly what's happening with
7 regard to 27 and 34? Aren't they trading off the rights of
8 minority voters in South Texas to create, you know,
9 Anglo-dominated districts for incumbents? That's exactly what I
10 think is happening.

11 JUDGE SMITH: This is a quote, I'm sorry, from where?

12 MR. HEBERT: It's a quote from LULAC versus Perry in
13 the Supreme Court. Now, the rest of it is not a quote. The rest
14 of it is mine. LULAC holds -- and I think if you read the case,
15 and I know you already have, Judge Smith, but if you read the
16 case it says that the appropriate question is not whether the
17 line drawing in the plan as a whole dilutes minority voting
18 strength but whether the line drawing through particular
19 districts that are under challenge dilutes minority voting
20 strength. And that's why they looked at District 23 and they
21 looked at that long District 25.

22 In other words, I would argue the proportionality
23 inquiry does not allow the state to remedy vote dilution in one
24 part of the state suffered by minorities by creating a majority
25 minority district in another part of the state when they're

1 entitled to both.

2 JUDGE SMITH: Now, they're on a trade-off -- I'm not
3 necessarily disagreeing with anything you've said. Obviously the
4 quotations are accurate. But weren't they talking about trading
5 off for a non-compact district?

6 MR. HEBERT: Well, you know, they did talk about the
7 non-compactness of District 25, the district that went from
8 Austin all the way to the Rio Grande River. And they did talk
9 about how that was a bizarre-shaped district. And if you read --
10 you read it you think that Justice Kennedy is going to conclude
11 that it violates Shaw v. Reno but he never gets there. He does
12 point out that it connected two far-flung areas that seemingly
13 had nothing in common: Latinos in southeast Austin and Latinos
14 literally at the very border of the state. And he criticized
15 that district as not only being obviously not compact but putting
16 together two areas that really had nothing in common.

17 But he invalidated District 23 not on the basis of
18 District -- necessarily 25. What he said was that is not a
19 trade-off because what they did in 23 was that they took away the
20 opportunity that minorities were just about to exercise by taking
21 out Congressman Bonilla and electing a candidate of their choice.

22 And so if you read Chief Justice Roberts' dissent
23 in the case he really takes apart Justice Kennedy on that issue
24 by saying nobody contends that District 25, this elongated
25 district, is not an effective district for minorities. So he

1 would have said it was okay to go ahead and do that and do what
2 you did to 23 and replace it, but five justices said you could
3 not.

4 My time has just about elapsed. Thank you for the
5 opportunity to participate today in the oral argument and thank
6 you for your patience throughout the trial. We look forward to
7 assisting the Court in any way we can. We are all involved I
8 think in a case up in DC and I guess the State will have the
9 primary duty of keeping you informed.

10 JUDGE GARCIA: All right. Thank you, Mr. Hebert.
11 Mr. Mattax?

12 JUDGE RODRIGUEZ: We're sort of putting you on the
13 podium right at the -- on the spot here. How long do you
14 anticipate your oral argument will be and --

15 JUDGE GARCIA: And we'd like you to take as long as
16 necessary.

17 MR. MATTAX: Certainly.

18 JUDGE GARCIA: But we're not trying to limit you.

19 JUDGE SMITH: But we're trying to decide whether to go
20 tomorrow, which we're willing to do. I mean -- but we don't want
21 to crowd you but we don't want to be inefficient. So this is
22 not -- again, as someone said, we're not trying to put you on the
23 spot.

24 MR. MATTAX: I appreciate that. As the Court will
25 recall, we had discussed that we were going to sort of split the

1 oral argument between myself and Mr. Schenck. I was going to
2 focus primarily on the House. And so I would ask Mr. Schenck to
3 chime in and see whether he thinks we should adjourn for the day
4 or try to complete it.

5 JUDGE RODRIGUEZ: Begin one of you -- that's another
6 option. Begin one of you and pick up with the other.

7 MR. MATTAX: That actually -- we could work on the
8 House issues and then leave the congressional for tomorrow.

9 JUDGE RODRIGUEZ: And I guess more comment than
10 anything else, but in light of all the arguments you've heard
11 from plaintiffs -- because we really would want a full, fair and
12 complete oral argument. We would certainly consider you breaking
13 today, evaluating all the arguments you had. But if you're
14 prepared then we can take that into account as well.

15 JUDGE SMITH: Two other things. We have to finish at
16 5:15 today because of scheduling issues and we're assuming there
17 will be some rebuttal arguments. So that all needs to be
18 factored in.

19 MR. MATTAX: I think given the lateness of the day it
20 would be advisable to adjourn and reconvene tomorrow morning.
21 And then we can give the court a full argument and I can adjust
22 some of the things I was going to say and try to address the
23 issues.

24 JUDGE GARCIA: Okay. 8:00 o'clock. And also will each
25 plaintiff be offering rebuttal or how many will be just so we can

1 get a -- of course, you may not be able to make that decision now
2 not having heard the State.

3 MR. GARZA: As we indicated before, we were willing to
4 limit our rebuttal time to about 30 minutes. The arguments have
5 gone pretty long so it may be a little bit more than that but not
6 much more, but we are willing to work within those bounds and
7 split the argument if there are folks that want to --

8 JUDGE GARCIA: You mean split among yourselves?

9 MR. GARZA: Yes, Your Honor.

10 JUDGE GARCIA: So that each one would not consume
11 30 minutes?

12 MR. GARZA: The whole package would be about 30
13 minutes.

14 JUDGE GARCIA: 30 to 45. Okay.

15 MR. VERA: 30 total, Judge.

16 JUDGE GARCIA: Total. Okay. Let's do that and
17 reconvene at 8:00. Keep in mind that tomorrow because of other
18 scheduling matters we will recess and adjourn at 1:00 o'clock.

19 JUDGE SMITH: At the latest.

20 JUDGE GARCIA: At the latest, very latest.

21 MR. SCHENCK: If I might, Your Honor.

22 JUDGE GARCIA: Yes.

23 MR. SCHENCK: We'll probably get a transcript final
24 late tonight. I think we're planning a substantial game of whack
25 a mole on our side over here. We've got a lot of arguments. I

1 think it's probably -- we're going to do a more complete job in
2 the morning than we would do right now in responding to it, but I
3 think we're still going to be doing a lot of briefing
4 addressing --

5 JUDGE GARCIA: That's fine.

6 JUDGE RODRIGUEZ: We understand that.

7 MR. SCHENCK: There's no way we can possibly go through
8 every one of those.

9 JUDGE RODRIGUEZ: Speaking personally, I just wanted to
10 provide you as much opportunity by giving you a break tonight to
11 be better prepared for tomorrow, but that's not going to
12 foreclose post-trial briefing.

13 JUDGE GARCIA: Right. Right. Okay. We're in recess.
14
15
16
17
18
19
20
21
22
23
24
25

1 UNITED STATES DISTRICT COURT.)
2 WESTERN DISTRICT OF TEXAS)

3

4

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 15, 2011.

11

12

/s/ Karl H. Myers

13

14

KARL H. MYERS
United States Court Reporter
655 East Durango Blvd., Suite 315
San Antonio, Texas 78206
(210) 212-8114

15

16

17

18

/s/ Chris Poage

19

20

21

CHRIS POAGE
United States Court Reporter
655 East Durango Blvd., Suite 314
San Antonio, Texas 78206
(210) 244-5036

22

23

24

25

/s/ Jerry Anderson

JERRY ANDERSON, CSR, RPR, CRR
Freelance Court Reporter
8705 Mystic Trail
Fort Worth, Texas 76118
(817) 891-6249