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

SHANNON PEREZ, *et al.*, *Plaintiffs*, v. STATE OF TEXAS, *et al.*, *Defendants*.	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants.*	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]
TEXAS LATINO REDISTRICTING TASK FORCE, et al., *Plaintiffs*, v. RICK PERRY , *Defendant.*	CIVIL ACTION NO. SA-11-CV-490-OLG-JES-XR [Consolidated case]
MARAGARITA V. QUESADA, et al., *Plaintiffs*, v. RICK PERRY, *et al.,*	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

Defendants.	)	
_____	)	
	)	
JOHN T. MORRIS,	)	CIVL ACTION NO.
	)	SA-11-CA-615-OLG-JES-XR
Plaintiff,	)	[Consolidated case]
	)	
v.	)	
	)	
STATE OF TEXAS, et al.,	)	
	)	
Defendants.	)	
_____	)	
	)	
EDDIE RODRIGUEZ, et al.	)	CIVIL ACTION NO.
	)	SA-11-CA-635-OLG-JES-XR
Plaintiffs,	)	[Consolidated case]
	)	
v.	)	
	)	
RICK PERRY, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' JOINT OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The Texas State Conference of NAACP Branches, Juanita Wallace, Rev. Bill Lawson, and Howard Jefferson; Congresspersons Eddie Bernice Johnson, Sheila Jackson-Lee, and Alexander Green; the Rodriguez Plaintiffs; the Perez Plaintiffs; the Quesada Plaintiffs; and the LULAC Plaintiffs (hereinafter, "Joint Plaintiffs"), respectfully urge that this Court deny the motion for partial summary judgment filed by Defendants on May 14, 2014 (Dkt. No. 996).

Defendants moved for partial summary judgment on five different claims: (1) all claims alleging a violation of the Fifteenth Amendment to the United States Constitution; (2) all claims alleging a violation of the Fourteenth Amendment to the United States Constitution with respect

to the 2011 and 2013 House and congressional redistricting plans; (3) all claims asserted against House District 90 in Plan H358; (4) all claims alleging a violation of Section 2 of the Voting Rights Act based on the failure to create "coalition" districts; and (5) all claims alleging a violation of Section 2 of the Voting Rights Act based on the Texas Constitution's whole-county provision. Defendants' motion with regard to claims (1), (2), and (4) implicate claims brought by Joint Plaintiffs, and will be addressed below.

I. Standard for Summary Judgment

Summary judgment should be granted only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The court considering the motion reviews the evidence and construes in favor of the nonmoving party and gives the nonmoving party every benefit of all justifiable inferences. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Facts "that might affect the outcome of the suit under the governing law" are material. *Id*. at 248.

Facts must be identified by citation to the record in support of any summary judgment motion. *See* Fed. R. Civ. Proc. 56(c)(1)(A) (movant must support motion by "citing to particular parts of materials in the record"). "[A] party seeking summary judgment *always* bears the initial responsibility of informing the district court of the basis for its motion, *and identifying* those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (emphasis added).

Summary judgment is particularly inappropriate where allegations of intentional discrimination have been made, *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999), and in "extraordinarily fact-oriented issues" implicated in cases under Section 2 of the Voting Rights

Act. *Velasquez v. City of Abilene*, 725 F.2d 1017, 1020 (5th Cir. 1984); *see also Fairley v. City of Hattiesburg*, 584 F.3d 660, 670 (5th Cir. 2009) ("[T]he need for a developed district court record is especially acute in VRA cases."). Because the instant litigation involves both claims of intentional discrimination and fact-intensive claims under the Voting Rights Act, summary judgment is not an appropriate method of resolution of the claims.

II. The Fifteenth Amendment Protects Against Intentional Discrimination on the Basis of Race—Not Just Outright Vote Denial

The Fifteenth Amendment to the United States Constitution guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV. Significantly, the Amendment prohibits not just the denial of the right to vote but the abridging of that right. This Court's prior rejection of Joint Plaintiffs' Fifteenth Amendment claims (Dkt. No. 275, August 31, 2011) misunderstood the nature of those claims. While it is true that the Supreme Court has "never held that vote dilution violates the Fifteenth Amendment," *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n. 3 (2000), the Fifteenth Amendment also prohibits intentionally discriminatory legislative actions. *Mobile v. Bolden*, 446 U.S. 55, 62 (1980). In fact, in a case involving the deliberate screening out of a group of minority voters from the electorate, the Supreme Court specifically held: "When a legislature . . . singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the *Fifteenth Amendment*." *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1961) (emphasis added).

Plaintiffs raising Fifteenth Amendment claims have alleged that the challenged laws were enacted with an intent to discriminate on the basis of race. Indeed, the case this Court relied upon for rejecting Joint Plaintiffs' Fifteenth Amendment claims, *Prejean v. Foster*, 227 F.3d 504, 519 (5th Cir. 2000), discussed the invalidation of a Hawaii law which, "because it was

intentionally discriminatory, a Fifteenth Amendment violation resulted." *Id*. This decision specifically stated that, in addition to presenting an issue under Section 2 of the Voting Rights Act, "subdistricting done for predominantly racial reasons violates the *Fifteenth Amendment*." *Id*. at 518 (emphasis added). This is consistent with the ruling of the United States Supreme Court only a few years ago that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth *and Fifteenth Amendments*." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (emphasis added). This case presents claims in the same mold as *Gomillion* and *Bartlett*. Defendants have failed to provide any explanation of why those Supreme Court decisions are inapplicable. Because the proof offered thus far in this case support claims that the Defendants acted with discriminatory intent, the decision in *Prejean* regarding vote dilution not being within the scope of a Fifteenth Amendment challenge is plainly distinguishable.

Additionally, even as to the vote dilution issue, another three judge panel considering a redistricting case this cycle noted that the answer as to whether the Fifteenth Amendment prohibits vote dilution is not clear cut. *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elec.*, Case No. 1:11-cv-05065 (N.D. Ill. Nov. 1, 2011), Dkt. 98 at 13. The court in that case stated:

> [t]he language of § 2 of the Voting Rights Act, which forbids intentional vote dilution, "track[s], in part, the text of the Fifteenth Amendment." *Bartlett*, 129 S. Ct. at 1240; *see, e.g., Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (stating that the similarity in language of two statutes is "a strong indication that the two statutes should be interpreted *par passu*."). The Supreme Court hasn't decided whether the Fifteenth Amendment applies to vote dilution claims. *Voinovich*, 507 U.S. at 159. The language the Board of Elections cites in *Bossier Parish Sch. Bd.*, 528 U.S. at 334 n.3, doesn't resolve the issue; it simply keeps the issue undecided. As one court of appeals said, "We simply cannot conclude that the [Supreme] Court's silence and reservation on these issues clearly forecloses Plaintiffs' Fifteenth Amendment claim." *Page v. Bartels*, 248 F.3d 175, 193, n.12 (3d Cir. 2001).

Id. As such, the Court's previous ruling on the Fifteenth Amendment vote dilution claim should be reconsidered and this Court should find that that Fifteenth Amendment claims are properly before this Court.

As discussed in more detail below, Joint Plaintiffs have proffered sufficient material facts and evidence to support their claims of intentional discrimination. As such, and based on the cases discussed above, Defendants are not entitled to judgment as a matter of law on Joint Plaintiffs' Fifteenth Amendment claims, on either the intentional discrimination or vote dilution claims.

III. Joint Plaintiffs' Fourteenth Amendment Claims Require this Court to Consider Disputed Facts Relating to Intent

A. Failure to Identify Fact-based Record Support

The first, and most obvious, basis for denial of Defendants' summary judgment motion on Plaintiffs' intent-based discrimination claims is that the state has utterly failed to meet the basic requirement of Rule 56(c)(1)(A) that it identify the record facts supporting its bare assertion that the material facts are not in dispute with respect to the intentional discrimination claims.[1] There is not a single record fact cross-referenced or incorporated into Defendants' motion. Nothing from any part of this three-year old case—testimony from prior evidentiary hearings, discovery (including deposition testimony), or sworn declarations—is cited to support

[1] Defendants cite summary judgment evidence in connection with Part IV of their motion, but this response is not addressing that part of the state's motion. Moreover, under Rule 56 (c)(1)(A), Fed. R. Civ. P., a party moving for summary judgment and "asserting that a fact cannot be or is genuinely disputed must support the assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials[.]

the necessary element that material facts not be in dispute on the issue of intentional discrimination. This failure alone suffices to deny the motion. But there are additional reasons.

B. Establishing an intentional racial discrimination under the Constitution does not require direct proof of legislators' state of mind.

The United States Supreme Court, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), outlined the evidence necessary to establish a *prima facie* case of racial discrimination in violation of the Equal Protection Clause. The party alleging discrimination must first show (through the use of legislative history, a pattern of events, or departures from unusual procedures) that discrimination was a motivating factor in the decision. After making that *prima facie* case, the Court instructed that the burden shifts to the defendant to show that the same decision would have resulted even if the discriminatory motive was not present. *Id*. at 270-71, n. 21.

The Texas legislature is the prime actor here, and a "legislature's motivation is itself a factual question." *Cromartie*, 526 U.S. at 546; *see also Prejean*, 227 F.3d at 509 ("Legislative motivation or intent is a paradigmatic fact question"). Defendants' position appears to be that the intent issue rests entirely on whether the majority-side legislators openly confess to racial motivations as the underpinning for their redistricting actions. But "[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence." *Cromartie*, 526 U.S. at 553. And so it essentially is here.

In this context, resolution of claims of intentional discrimination is not appropriate at the summary judgment stage given the fact-sensitive nature of the Court's inquiry, and the disputes over inferences that may or should be drawn from those facts. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at

266; *see also Cromartie*, 526 U.S. at 546 ("The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor . . . ."). In *Cromartie*, the Supreme Court reversed the trial court's award of summary judgment in an intentional discrimination case, explaining that it was error to have resolved "the disputed fact of motivation" at that stage, 526 U.S. at 552, and remanded the case for trial. In the same fashion, and for basically the same reasons, this Court should deny Defendants' summary judgment motion on intentional discrimination claims and proceed to trial on the merits.

Joint Plaintiffs have proffered more than sufficient evidence, disputed though it may be by the State (although not with an identification of the dispute in its motion), to warrant a rejection of the State's motion for partial summary judgment on this ground. This Court already has recognized the credibility of Joint Plaintiffs' intentional discrimination claims, noting that the second interim plan "makes changes to CDs 9 and 18 in the Houston metropolitan area and CD 30 in Dallas to address claims that the Legislature intentionally discriminated against the three African-American plurality and majority districts (which are also represented by African Americans)." *Perez v. Perry*, 891 F. Supp. 2d 808, 830 (W.D. Tex. 2012).

Other claims by Plaintiffs warrant the same treatment. For example, in the House case for both 2011 and 2013, some plaintiffs have asserted claims, supported by evidentiary facts, under the population deviation principle recognized in *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga.), *aff'd mem. sub nom. Cox v. Larios*, 542 U.S. 947 (2004). Giving content to the Supreme Court's observation in *Roman v. Sincock*, 377 U.S. 695 (1964), that any deviations from population equality must be free of the "taint of arbitrariness or discrimination," *Larios* struck down Georgia's legislative redistricting plan on population deviation grounds because it was tainted by a partisan gerrymander. As Judge Higginbotham explained in *Henderson v. Perry*, 399

F.Supp.2d 756, 759 (E.D. Tex. 2005), the *Larios* court "held that because the legislature sought to give advantage to certain regions of the state and to certain incumbents in an effort to help Democrats and hurt Republicans, Georgia was not entitled to the 10% deviation toleration normally permitted when a state is drawing lines for the legislature." (emphasis added).

Application of the *Larios* principle is fully warranted here, and the state has proffered nothing to the contrary. Testimony in the earlier phase of this case, particularly from Downton and Interiano, has now been supplemented by further evidence of a *Larios* violation. In it responses to interrogatories from the Perez plaintiffs, the state has admitted that "protecting Republican incumbents was a partisan goal" of the 2011 House map. *See* Exhibit A, attached (Defendant State of Texas' Objections and Responses to Perez Plaintiffs' Requests for Admissions and First Set of Interrogatories, Nos. 3 and 4). Here, of course, the State has conceded that reapportionment of the Texas House proceeded on the assumption that a 10% deviation was completely acceptable and plans were enacted that pursued the 10% target. The most notable examples are Dallas and Harris Counties were the total deviation is at the 10% range and irrational lines were drawn with the express purpose of protecting Republican office holders, to the detriment of the minority communities.

Plaintiffs also have presented substantial facts of the deliberate fracturing of minority populations in various geographic areas of the state which would establish a violation of constitutional principles of intentional discrimination announced in such decisions as *Gomillion v. Lightfoot* and *Robinson v. Commissioners Court, Anderson County*, 505 F.2d 674, 678 (5th Cir. 1975). Facts have been provided the Court of similar fracturing along racial lines in other areas of the state, including Travis County, where the constitutional principles of *Bartlett v. Strickland* are brought to bear, and the question is whether the facts show that the legislature has used race

as a tool to further what it defensively asserts are partisan aims. *See* Exhibits B and C (Ansolabehere Reports of Feb. 26 and April 28, 2014). Similarly, the Parties have offered evidence that the Defendants' intentional packing and cracking of minority population concentrations in the Dallas-Fort Worth region were not fully remedied by the 2012 interim plan that was adopted without change by the Texas Legislature in 2013, including Dr. Murray's opinion that the mapdrawers intended to discriminate against African-Americans and Latino where, in C235, CD30 was drawn in such a way to prevent the drawing of two naturally occurring districts in the Dallas and Fort Worth Area that would benefit both the African-American and Latino communities.

As previously stated, this Court has already found "significant circumstantial evidence that the plan [2011 congressional] was enacted with the purpose of denying or abridging [the minority] community's right to vote." Order of March 19, 2012 (Dkt. No. 691), at 9.[2] The same necessarily holds true for the 2013 congressional plan since it continues in place many of the challenged actions from the first legislative round.[3] Moreover, several of the Joint Plaintiffs have alleged that the 2013 legislative process, including alleged opportunity for public input, was highly irregular. For example, in discovery, parties obtained a letter from Greg Abbott to Speaker Joe Straus, advising the House not to permit any modification to the interim plans. See

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[2] Such an example includes email exchanges between Eric Opiela, Gerardo Interiano and Lisa Kaufman (who were involved in drawing the various maps at issue). *See* Exhibit D. Mr. Opiela provided the following guidance to shore up districts where the candidate of choice of the white community would win:

> These metrics would be useful in identifying a 'nudge factor' by which one can analyze which census blocks, when added to a particular district (especially 50 + 1 minority majority districts) help pull the district's Total Hispanic Pop and Hispanic CVAPs up to majority status, but leave the Spanish Surname RV and TO the lowest. This is especially valuable in shoring up Canseco and Farenthold."

Beyond being just evidence of the State treating minorities and whites differently, this email demonstrates an intent to disguise white-dominated districts as opportunity districts, with full knowledge that the desires of the minority community would be thwarted by the likely election outcomes.

[3] Joint Plaintiffs attach as Exhibit E to this Memorandum the expert report of Dr. Allan Lichtman detailing evidence that the 2013 congressional plan was motivated by a racially discriminatory intent. The Quesada Plaintiffs have alleged that CD 33 in the interim plan is a black opportunity district, *i.e.*, a district in which black voters enjoy an effective opportunity to elect the candidate of their choice. Several of the Joint Plaintiffs have contended that the creation of CD 33 did not fully cure the packing and cracking in the Dallas-Fort Worth Metroplex. *See* Exhibit E.

Ex. F, Letter from Attorney General Abbott to Speaker Strauss (Darby Deposition Ex. 23). This suggests that the whole process of obtaining public input into the 2013 plans was simply a ruse. And the same is no less true of the two House plans, from 2011 and 2013. This is simply not a case for summary judgment, and Defendants have provided nothing to the Court which shows otherwise.

IV. Claims for Coalition and Crossover Districts Under Section 2 Do Not Fail as a Matter of Law and Are Fact-Intensive Claims

Contrary to Defendants' assertion, the Supreme Court did not answer the question of whether coalition districts might be compelled under the Voting Rights Act in *Perry v. Perez*, 132 S. Ct. 934 (2013). Rather, the Court established new guidelines for the implementation of court-drawn interim plans where the enacted plans could not be used. The Court directed that district courts engaged in such activities must make findings akin to preliminary injunction findings—that plaintiffs must demonstrate a likelihood of success on the merits. *Id*. at 941-42. This Court had purposely avoided making such findings, believing that it was constrained from making such findings until the Section 5 proceedings had been completed. Order, Dkt. 528, at 4 (Nov. 23, 2011).

In its decision, the Supreme Court was not commenting on the legal theories underpinning the claims, but rather the articulated basis for districts changed in the interim plan, noting that "[s]ome specific aspects of the District Court's plans seem to pay adequate attention to the State's policies, others do not, and the propriety of still others is unclear." 132 S. Ct. at 943. The Supreme Court's fault with the first interim plans was that "the court did not say that those allegations were plausible, much less likely to succeed." *Id*. at 944. "Without such a determination, the District Court had no basis for drawing a district that does not resemble any legislatively enacted plan." *Id*. Thus, with regard to the CD 33 coalition district, when the Supreme Court said that the District Court "had no basis" for purposely drawing that district as a

coalition district, it was referring to the lack of findings that plaintiffs were likely to succeed on their coalition district claims. *Id*.

The dissents in *Bartlett v. Strickland* buttress the above interpretation of the *Perry* decision. In *Bartlett*, the dissenting judges were Souter, Stevens, Ginsberg and Breyer—of whom, Ginsberg and Breyer sat on the Court when the *Perry* decision was issued. Souter drafted the principal dissent in *Strickland*, with which the other three joined. Justices Ginsburg and Breyer also wrote separate dissents. The dissenters strongly rejected the plurality's judgment that Section 2 of the Voting Rights Act did not compel a crossover district, noting that "[t]here is nothing in the statutory text to suggest that Congress meant to protect minority opportunity to elect solely by the creation of majority-minority districts." *Bartlett*, 556 U.S. at 31. *Perry* was a *per curiam* decision—if *Perry* is to be interpreted the way that Defendants posit, then two Supreme Court justices had a radical change of position in only 3 years. A much more plausible interpretation is the one described above—that coalition districts must be supported by findings on the merits or a likelihood of success on the merits.

Indeed, even in *Bartlett*, the Supreme Court plurality noted explicitly that it was not expressing any opinion on coalition districts and whether a combined minority population of 50% or more could satisfy the first *Gingles* prong. 556 U.S. at 1242-1243. The Court's determination that crossover districts were not compelled under Section 2 of the Voting Rights Act should not be read to reflect on the Court's future position on coalition districts. Many of the problems with crossover districts being protected under the Voting Rights Act are clearly not an issue with coalition districts. For example, the *Bartlett* Court specifically highlighted the problem with being able to satisfy the third prong of *Gingles*—the requirement that the majority votes as a bloc to defeat minority-preferred candidates—with a district that admittedly requires

crossover votes from the majority group in order to elect the minority candidate of choice. *Id.* at 1244. That is certainly not a problem implicated with a coalition district, where the aggregated minority groups are sufficient in number to elect a candidate of the minority groups' choosing, with no white crossover vote required.

Finally, while the Supreme Court has not directly addressed the issue of coalition district, the Court has previously noted in a number of cases that racial minority groups could form "coalitions with voters from other racial and ethnic groups," *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), and that assuming without deciding that coalition districts are protected under VRA, evidence of political cohesion would be "all the more essential," *Growe v. Emison*, 507 U.S. 25, 41 (1993).

Despite the high Court not directly speaking on the issue, a number of lower courts, including at least five cases from the 5th Circuit Court of Appeals, have found that minority groups can be aggregated for the purpose of asserting a Section 2 claim. *See League of United Latin Am. Citizens Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (*rehearing en banc*), *cert. denied* 114 S. Ct. 878 (1994) ("[i]f blacks and Hispanics vote cohesively, they are legally a single minority group"); *Overton v. City of Austin*, 871 F.2d 529, 538 (5th Cir. 1989) (concluding that Section 2 permitted the court to order as remedy a district in which Mexican-Americans, although not a majority, could be aggregated with blacks to achieve such a result, if the two groups could be shown to be politically cohesive and that Anglos voted in bloc); *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) ("minority groups may be aggregated for purposes of claiming a Section 2 violation"); *Campos v. City of Baytown*, 840 F.2d 1240, 1244-45 (5th Cir. 1988) ("a (coalition) minority group is politically cohesive if it votes together") *reh'g denied*, 849 F.2d 943, *cert denied*, 492 U.S. 905 (1989); *League of United Latin Am. Citizens Council*

No. 4386 v. Midland ISD, 812 F.2d 1494, 1501-02 (5th Cir. 1987), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987) (en banc). Other circuits considering the issue have agreed, *see, e.g., Badillo v. City of Stockton*, 956 F.2d 884, 891 (9th Cir. 1992); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906 F.2d 524 (11th Cir. 1990); *Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739, 746 (D.C. Mass. 1985), aff'd, 784 F.2d 409 (1st Cir. 1986). To date, the only circuit to take a contrary position is the 6th Circuit in *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc).

Specifically, in *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989), the Fifth Circuit reaffirmed its holding in *Campos v. City of Baytown*, 840 F.2d at 1244-45, that minority groups may be aggregated for purposes of asserting a Section 2 violation and establishing the first prong of *Gingles*. *Brewer*, 876 F.2d at 453. More recently, the Fifth Circuit affirmed this position on coalition districts. In *LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (*rehearing en banc*), the Fifth Circuit noted: "we have treated the issue as a question of fact, allowing aggregation of different minority groups where the evidence suggests that they are politically cohesive, and we need not revisit this question here." *Id.* at 864 (internal citations omitted). The law in the Fifth Circuit remains that if plaintiffs can prove all the *Gingles* factors and make a case for a remedy under the totality of the circumstances, different racial minority groups can be aggregated to satisfy the first prong of *Gingles.*[4]

[4] Defendants incorrectly state that "Plaintiffs' section 2 challenges to the 2013 Congressional Plan are focused on the creation of additional minority opportunity districts in Dallas and Tarrant Counties." State Motion at 23. Several sets of the plaintiffs continue to assert that Section 2 violations continued in the 2013 congressional enactment insofar as South and Central Texas are concerned. Congressional District 23 remains in question as to whether it functions as a performing Latino opportunity district. If the constitutional claim about the deliberate dismantlement of a crossover district centered in Travis County is established. then Section 2 claims remain at the forefront for the area of South and Central Texas running from Hays County to the Rio Grande Valley to Corpus Christi and back to San Antonio. As Plan C220 demonstrates, it is easily possible to restore a Travis County-based crossover district *and*, at the same time, create a new—and open—Latino opportunity district in that area, especially through restoration of the historic orientation of the more than 200,000 Latinos in Nueces County so that it becomes linked, and linkable, with significant concentrations of Latino population to the south and west of Nueces, running all the way to the Hays-

V. Conclusion

For all of the foregoing reasons, Joint Plaintiffs respectfully request that this Court deny Defendants' motion for partial summary judgment.

Dated: June 9, 2014

Respectfully submitted,

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Travis County line. This refutes the state's assertion in Part V.C,1, at pages 23-25 (which fails to even reference Plan C220).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via the Court's electronic notification system or email to the following on June 9, 2014:

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