IN THE 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. 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-11-361-OLG-JES-XR [Consolidated case]
TEXAS LATINO REDISTRICTING TASK FORCE, et. al. *Plaintiffs,* v. RICK PERRY, et al. *Defendants.*	)	CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated case]
MARGARITA V. QUESADA, et. al. *Plaintiffs,* v. RICK PERRY, et al. *Defendants.*	)	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

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

QUESADA PLAINTIFFS' POST-TRIAL BRIEF

The Plaintiffs Margarita Quesada, *et al*., respectfully submit this post-trial brief in the above-captioned consolidated cases.[1]

FACTS

1. The 2010 Census

Every ten years, under 2 U.S.C. § 2a, the President of the United States must transmit to Congress a statement showing the number of persons in each state and the number of representatives to which the state is entitled. These figures are tabulated according to the federal decennial census. On or about December 21, 2010, the Secretary of Commerce of the United States reported to the President of the United Sates the

[1] The Quesada plaintiffs support the arguments and positions advanced by the Plaintiff Mexican-American Legislative Caucus (MALC), the Plaintiff Texas Latino Redistricting Task Force, LULAC, the Perez Plaintiffs, the Rodriguez Plaintiffs, and the NAACP and Congressional Intervenors.

tabulation of population for each of the fifty states, including the State of Texas, as determined in the 2010 decennial census.

Under 13 U.S.C. § 141, commonly referred to as "Public Law 94-171," the Secretary of Commerce was required, by April 2, 2011, to complete, report, and transmit to each state the detailed tabulations of population for specific geographic areas within each state. States ordinarily use the P.L. 94-171 data to redraw Congressional districts. The United States Bureau of the Census delivered to Texas Governor Rick Perry and the leaders of the Texas legislature the official Census 2010 Redistricting Data Summary File pursuant to P.L. 94-171. Those population figures show Texas' total population to be 25,145,561. The ideal population for each of the 36 congressional districts using this figure is 698,488 (25,145,561 divided by 36).

2. Demographic Data and Population Growth in Texas: 2000 to 2010

Because of demographic changes recorded in the 2010 U.S. census, Texas received four additional congressional districts during this reapportionment. The four additional seats give Texas a total allotment of 36 congressional seats. The demographic changes that occurred in Texas and recorded in the 2010 U.S. census were driven by explosive growth in the state's Hispanic and African-American populations. Hispanic growth was responsible for 65% of the state's population growth, and non-Anglo population accounted for approximately 90% of the State's overall population growth.

Since 2000, the Hispanic population in Texas grew at 41.8 percent, 10 times the rate of Anglos. The African-American population grew at 27.1 percent, more than 6 times the rate of Anglos, as reflected in the following chart:

Texas Population and Growth in Population by Race[2]

	Population		Change	
	2000	2010	Number	PCT Change
Hispanic	6,669,666	9,460,921	2,791,255	41.8%
African-American	2,493,057	3,168,469	675,412	27.1%
Anglo	10,933,313	11,397,345	464,032	4.2%

As shown in the following chart, Texas today is a majority-minority state; only 45% of its total population is Anglo.

TX Total Population by Race

	Population		Percentage Total Pop	
	2000	2010	2000	2010
Hispanic	6,669,666	9,460,921	32.0%	37.6%
African-American	2,493,057	3,168,469	12.0%	12.6%
Anglo	10,933,313	11,397,345	52.4%	45.3%

There was also dramatic minority population growth in North Texas. Over 2.1 million Latinos and African-Americans reside in Dallas and Tarrant counties combined, comprising a majority (52%) of the population. Between 2000 and 2010, the Anglo population in Dallas and Tarrant Counties decreased by 156,742 persons, while the African-American and Latino population increased by 600,000 persons, as shown here:

[2] Data for these charts is from the Census Bureau pl 94-171 data as tabulated by the Texas Legislative Council. *See* notes on classification below.
Race and Ethnicity Classification - The council groups the population data into five race and ethnicity categories for redistricting modeling and reporting: Black, Hispanic, Black+Hispanic, Anglo, and Other. "Black" encompasses all people identifying themselves as Black, African-American, or Negro on the census questionnaire, even if they also identified themselves with other racial/ethnic groups. "Hispanic" encompasses all people identifying themselves as Hispanic, Latino, or Spanish origin, whatever their race. "Black+Hispanic" is a combined total of all those identifying themselves as Black and all those identifying themselves as Hispanic, adjusted so that those identifying themselves as both Black and Hispanic are not counted twice. "Anglo" includes all people who selected "White" as their only race and did not identify themselves as Hispanic, Latino, or Spanish origin.
(http://www.tlc.state.tx.us/redist/pdf/Data_2011_Redistricting.pdf)

Dallas and Tarrant County Total Population[3]				
	Anglo Pop	Black Pop	Hisp Pop	Black and Hispanic Pop
2000	1,878,570	628,429	948,019	1,576,448
2010	1,721,828	781,254	1,388,917	2,170,171
Change	-156,742	152,825	440,898	593,723

3. Congressional Plan C100: The Current Benchmark Plan is malapportioned

Because the State of Texas has not obtained preclearance of any new congressional plan as required by Section 5 of the Voting rights Act, 42 U.S.C. 1973c, Plan C100 is the only legally enforceable congressional redistricting plan.

Plan C100 is malapportioned. For example, Congressional District 6 contains 809,161 persons, or 110,673 (15.84%) over the ideal population of 698,488. Ex. Joint Agreed Maps and Data C100. Congressional District 24, contains 792,253 persons, or 93,765 (13.42%) over the ideal. District 26 contains 915,137 persons, or 216,649 (31.02%) over the ideal. *Ibid.*

Plaintiff John Jenkins lives in overpopulated Congressional District 6. Plaintiffs Romeo Munoz, Lyman King, and Kathleen Shaw reside in overpopulated Congressional District 24. Plaintiff Marc Veasey lives in overpopulated Congressional District 26. Congressional Districts 6, 24, and 26 are overpopulated relative to other Congressional Districts in the State of Texas. The existing malapportionment of the congressional districts in Texas dilutes the voting strength of Plaintiffs Jenkins, Munoz, King, Shaw and Veasey who reside in overpopulated congressional districts, as the weight or value of

[3] Data from 2000 and 2010 Census. Black Pop is "Total population: Not Hispanic or Latino; Population of one race; Black or African-American alone" This does not count Black or African-American and another race.

each of these plaintiffs' vote is less than that of other voters residing in underpopulated congressional districts.[4]

4. Congressional Plan C100: Minority Opportunity Districts in the Benchmark Plan

Under Plan C100, the current thirty-two-district map, there are eleven districts in which minority voters had successfully elected candidates of choice within the past decade: Districts 9, 15, 16, 18, 20, 23, 25, 27, 28, 29 and 30. Joint Expert Ex 2, Kousser report, pg. 116, *see also* David Butts Trial Testimony (September 10, 2011) at 1192-93.

Of the eleven minority opportunity districts in Plan C100, seven were effective Hispanic opportunity districts. Those Districts and their current Representatives are: 15th – Hinojosa; 16th – Reyes; 20th – Gonzalez; 23rd – Canseco; 27th – Farenthold; 28th – Cuellar; and the 29th – G. Green. *Ibid.*

Although Districts 23 and 27 did not elect the Hispanic candidate of choice in the 2010 election, they did elect the Hispanic candidate of choice in every previous election under their current configuration. The court finds that Districts 23 and 27 in Plan C100 provided Latino voters with an effective opportunity to elect their preferred candidate of choice to Congress.

Of the eleven existing minority opportunity districts, three are effective African-American opportunity districts. Those Districts are: 9th – A. Green; 18th – Jackson Lee; and the 30th – Johnson. *Ibid.*

[4] The State has stipulated to the facts in this paragraph insofar as they allege in which districts plaintiffs reside and that plaintiffs are registered voters in those districts.

Of the eleven existing minority opportunity districts in Plan C100, one district (District 25-Doggett) provided an effective opportunity for a coalition of minority voters and like-minded Anglo voters to elect a candidate of choice. *Ibid.*

5. Racially Polarized Voting Patterns Exist Throughout Texas

Voting patterns throughout Texas are racially polarized. Joint Expert Ex 2, Kousser report, pg. 26. See also Quesada Exhibit 1 (Lichtman Report). In elections featuring minority candidates (African-American or Latino), African-American and Latino voters usually vote for the minority candidate, and Anglo voters usually vote as a bloc against the minority-preferred candidate. *Ibid*.

Latino and African-American voters in Texas are politically cohesive in that both voter groups overwhelmingly choose to participate in Democratic rather than Republican primaries. Quesada Ex. No. 1 (Lichtman Report at pg. 4). Latino and African-American voters in Texas are additionally cohesive in that they overwhelmingly unite in support of candidates emerging from Democratic Primaries, regardless of the race of successful primary candidates. *Ibid*. Voting is racially polarized in these general elections in that Anglo voters usually unite in opposition to the candidates of choice of Latino and African-American voters. Joint Expert Ex 2, Kousser report, p. 26. Such racially polarized voting impedes opportunities for minorities to elect candidates of their choice and fully participate in the political process. *Id.*

6. Congressional Plan C185: the State of Texas' Proposed Plan

Plan C185 was enacted by the Texas Legislature on or about June 15, 2011. The Court finds that the State's enacted plan (C185) was not drawn to ensure that population

gains in minority communities from 2000 to 2010 would not result in any increased electoral opportunities for Latino or African-American voters.

Although minority communities accounted for nearly 90% of Texas' population growth between 2000 and 2010, and Texas received four additional congressional seats because of that explosive population growth, under Plan C185 the number of minority opportunity districts fell from 11 of 32 (34.4%) to only 10 of 36 (27.7%), and the number of districts controlled by Anglo voters rose from 21 of 32 (65.6%) to 26 of 36 (72.2%). Joint Expert Ex 2, Kousser report, pg. 80 and 116. Even though the Anglo population now comprises only 45% of Texas' total population, Anglo voters control 72% of Texas' congressional districts under Plan C185.

7. Plan C185 Reduces The Numbers Of Effective Minority Districts

Minority voters in Texas under the benchmark plan (C100) were able to elect their preferred candidate of choice in 11 of the 32 districts (or 34.4%). Even if the State of Texas had maintained all eleven of these effective minority districts, minorities would only be able to elect their preferred candidate of choice in 11 of 36 districts (or 30.5%). Under Plan C185, however, minority voters will only be able to elect the candidate of choice in ten congressional districts, or 27.7% of the districts. Joint Expert Ex 2, Kousser report, pg. 26. See also Quesada Exhibit 1 (Lichtman Report).

8. **Plan C185's Effect on North Texas**

Plan C185 failed to create any new Latino or African-American opportunity districts in the Dallas Fort Worth region, despite the dramatic growth of the minority population in that area between 2000 and 2010. Downton Trial Testimony at 975-977. In Dallas and Tarrant Counties, 2.1 million Hispanics and African-Americans comprise 52%

of the population. Joint Expert Ex 2, Kousser report, pg. 114, citing Veasey Testimony Despite the dramatic size and growth of the minority population in Dallas/Tarrant, under the State's plan C185, Anglo voters would control seven of the eight districts (87.5 percent) that are wholly or partially contained within those two counties. *Ibid.* In this entire large metropolitan area, Plan C185 creates only one minority opportunity district: current CD30 (Eddie Bernice Johnson). Tarrant County has more than 745,000 Hispanics and African-Americans. None of the five districts that are all or partially within Tarrant County provides an effective electoral opportunity for Hispanic or African-American voters.

Under the benchmark plan C100, District 30 (represented by Congresswoman Eddie Bernice Johnson) was an effective African-American opportunity district. Under the State's proposed plan C185, some of the Dallas-Fort Worth area's 1.4 million Hispanics are packed into District 30 while the rest of the Hispanic population in that region is fractured among seven different congressional districts. Joint Expert Ex 2, Kousser report, pg. 116

Packing Latinos into an already effective African-American opportunity district wastes the votes of these Latino voters. Moreover, Plan C185 also splits the Hispanic population in this region between Districts 6 and 30 and in addition, other Hispanic neighborhoods are shifted and fractured into heavily Anglo-dominated Districts 24, 26, and 33. Joint Expert Ex 2, Kousser report, pg. 116 and 118

Over the last decade, the African-American population in Dallas and Tarrant counties grew from 628,429 persons to 781,254, a net increase of over 150,000. Tarrant

County contains the third largest concentration of African-American voters in Texas. Joint Expert Exhibit List Ex.12 Burton Report pg 57.

Under C185, African-American neighborhoods in the southern part of Dallas County are included in the region's lone minority opportunity district (CD30, Eddie Bernice Johnson). Ex. Kousser trial testimony pg. 255. African American voters in Tarrant County are fractured among Anglo-controlled Districts 6, 12 & 26. Ex. Kousser 118. The growing African-American neighborhoods in northern Dallas County are fractured among districts 5, 24, 30 & 32. Quesada Ex.41, 42, 43 and Joint Agreed Maps and Data C185.

9. State's Explanation for North Texas Configuration Is Not Credible

To effect the disenfranchisement and dilution of Hispanic and African-American voters, the State's Plan C185 twists electoral boundaries of the Districts in North Texas into incoherent configurations. Quesada Ex 24, 32, 44. The narrow appendage of Denton County-based District 26 jutting north to south into Tarrant County-based District 12 illustrates the degree to which the State relied upon race to configure tortured district boundaries in North Texas in order to prevent the creation of districts where minority voters can elect their candidate of choice. Quesada Ex. 24-27and 32-35.

In his expert report, Dr. Morgan Kousser stated that the configuration of District 26 and District 12 "tell stories about discrimination and racial gerrymandering." Dr. Kousser described the District 26 incision as a "jagged lightning bolt" that cuts into Fort Worth to carefully remove Hispanic voters. The careful separation of minority voters with mostly Hispanic voters placed into District 26 and African-American voters into

District 12 holds the minority population in both low enough to retain them as Anglo controlled districts. The result of the "lightning bolt" configuration is that in District 12 the Hispanic VAP is held to 21 percent and the B+H VAP to is held to 35.5 percent, while in District 26 the Hispanic VAP is held to 24.7 percent and the B+H VAP is held to 32 percent. Dr. Kousser stated, "Had the 12th District not been sundered, it could well have had a BHVAP majority, perhaps a substantial one, and another minority opportunity district could be created" Joint Expert Ex 2, Kousser report pg. 119 – 121.

An examination of the district map with precincts shaded to indicate Hispanic and African-American voters separately confirms Dr. Kousser's report. Quesada Ex. 24-27and 32-35. The District 26 lightning bolt extends southward from Denton County in a narrow path until it reaches the heavily Hispanic neighborhoods in Fort Worth's historic North Side where it immediately widens to encompass virtually every heavily Hispanic neighborhood north of downtown Fort Worth. The lightning bolt then narrows dramatically and juts to the west skirting around African-American neighborhoods to the east but picking up a narrow band of growing Hispanic precincts in the Lake Como area of Fort Worth. Then, the lightning bolt appendage widens and plunges southward to pick up the largest concentration of Hispanic voters south of downtown Fort Worth. By carefully attaching Hispanic voters to Anglo-dominated District 26 and African-American voters to Anglo-dominated District 12, the State has destroyed any ability of minority voters to unite with other Hispanics or African-Americans, as individual ethnic groups or as a coalition, to elect their candidate of choice. Quesada Ex. 24-27and 32-35.

The testimony provided by the State's witness to justify the District 26 lightning bolt is simply not credible when considered in the context of Tarrant County

demographics and geography. State witness Ryan Downton, who drew the State's congressional map, testified that the jagged District 26 appendage resulted from the State's desire to include an economic development area known as Trinity Vision within District 12 and not any desire to capture Hispanic voters.

In his testimony, Downton stated:

> So in making this change, and I can't do the racial shading, but we took out this area essentially and replaced it with this area. And in response to the comment that we had split that Hispanic population. Now, it got a little more complicated, because this area in here is the Trinity River Project in downtown Fort Worth. There aren't many people that live in there, but there is a river that winds its way through, and Congresswoman Granger felt it was very important to keep that project, as much of it as possible, within her district, so we tried to draw the line in a way that left as much of the Trinity River Project in her neighborhood. This area has very few people in it, but it does create a very strange shape."

Downton Trial Testimony pgs 914-915.

However, neither the size nor the precise location of the Trinity River Vision[5] development sufficiently account for the severely contorted boundaries between Districts 12 and 26. Further in the hundreds of email exchanges between Staff, Legislators and Members of Congress, there is not a single mention of any imperative that the Trinity River Vision development remain located within District 12. Clearly the "very strange shape" acknowledged by Mr. Downton was the result of the State's desire to use District 26 to capture and absorb Hispanic neighborhoods that would have more logically remained in District 12 or become part of a new minority opportunity district. Quesada Ex.27 and 35, Hispanic Shading maps.

[5] The Trinity River Vision Uptown Development is located within District 12 in benchmark Plan C100 and is located within District 12 in alternative plans C192 & C202 without requiring bizarre or contorted district boundaries. See http://www.developmentexcellence.com/tools/docs/TRWD/TrinityUptownDevelopmentStandardsGuidelines.pdf

Mr. Downton was aware of the racial composition of the precincts that make up the District 26 lightning bolt appendage when he drew the map. Downton Trial Testimony at 975-976. He had become familiar with the demographics of the precincts while working on the configuration of a Hispanic opportunity district in the DFW area that he ultimately abandoned. Downton Trial Testimony at 977-978. His work on the abandoned district, though, made it possible for him to easily identify and separate Hispanic from African-American precincts in Fort Worth.

Under cross examination during trial, Downton acknowledged his familiarity with the area that ultimately comprised the lightning bolt appendage of District 26 into District

> Downton: There was an arm coming down in the map that was initially released, which was either right at the end of the regular session or right at the beginning of the special session.
> Q. You did it after you had looked at Congressman Smith's effort to create a district there, right?
> Downton: Yes.
> Q. So regardless of whether you turned on the racial profile for that area, you knew where the Hispanic population was in Dallas-Fort Worth during that time, didn't you, if you had taken a serious look at this question only a month before?
> Downton: Yeah. I had some awareness of that --
> Q. You couldn't help but know, could you?
> Downton: I think it is fair to say I had some awareness of that.
> (Ryan Downton Testimony page 977 – 978)

Finally, Ryan Downtown testified that while he attempted to draw a majority HCVAP district in Dallas and Tarrant County, he admitted during cross examination that he never attempted to create a minority coalition district or districts in the Dallas-Fort Worth region. Downton Testimony Page 1011-1012.

10. <u>Quesada Plaintiffs' Demonstration Plan C121</u>

Various statewide alternative plans offered by the plaintiffs in these consolidated cases show that three or four new minority opportunity districts can be drawn consistent

with traditional redistricting principles. These alternatives create new effective minority opportunity districts without adversely impacting any of the existing minority opportunity districts. Moreover, these plans do not disrupt the overall partisan balance of Texas.

For example, the "Fair Texas Plan", Plan C121, creates three new effective minority opportunity districts. Quesada Ex.18. The Fair Texas Plan was proposed by African-American State House Representative Marc Veasey who offered the plan in the House Redistricting Committee. Quesada Ex.18. The Fair Texas Plan received near unanimous support from Hispanic and African-American members of the House but was rejected by the Anglo majority. Quesada Ex.10. In the Texas Senate, the Fair Texas Plan was offered as a substitute to the State's plan by African-American State Senator Royce West, where it received unanimous support from Members of the State Senate who represent minority opportunity districts, but was rejected by the Anglo majority. Defendant's Ex. 18, pg. 3 -4

Statewide, the Fair Texas Plan includes 13 minority opportunity districts. The plan creates two new Latino opportunity districts, resulting in a total of nine districts that provide reasonable opportunities for Latino voters to elect their candidate of choice to office. One of these additional Latino opportunity districts is located in Dallas and Tarrant counties, while the other is located in the South Texas-border region, between the Rio Grande and South Central Texas. The Fair Texas Plan also creates one new African-American opportunity district in the Dallas-Tarrant County region, while preserving all three existing African-American opportunity districts for a total of four districts in the statewide plan that provide reasonable opportunities for African-American voters to elect their candidate of choice to office. Veasey Deposition pg 64-65 and 82-85

District 34 would be a new Hispanic district located in Dallas/Fort Worth. The district has a Hispanic voting age population of 66.2 percent, an African-American voting age population of 11.4 percent, a B+H VAP of 77.1 percent and a B+H Citizen Voting Age population of 62.3 percent. Joint Exhibit of Maps and Data, Plan C121. The district would be based in the traditional and growing Hispanic neighborhoods in the North Oak Cliff, East Dallas, Pleasant Grove and Grand Prairie neighborhoods in Dallas County and extend west to include growing Hispanic neighborhoods in east Arlington as well as Fort Worth's north side and south side Hispanic neighborhoods. *Ibid*

The Fair Texas Plan (C121) includes four districts in which African-American voters have an effective opportunity to elect their preferred candidate of choice. Quesada Ex. 69. District 30 would contain an African-American voting age population of 40.4 percent, a Hispanic voting age population of 29.3 percent, a Black plus Hispanic voting age population of 69.2 percent and a Black plus Hispanic citizen voting age population of 60. 3 percent. Joint Agreed Maps and Data: C121 The district would retain its core South Oak Cliff and South Dallas neighborhoods but would extend north to include the growing African-American neighborhoods along the east and north Interstate Highway 635 corridors.

District 35 would be a new African-American opportunity district. The district would contain an African-American voting age population of 35.9 percent, a Hispanic voting age population of 24.2 percent, a Black plus Hispanic of 59.5 percent and a Black plus Hispanic Citizen Voting Age Population of 51.2 percent. *Ibid.* District 35 would be based in the large and growing African-American neighborhoods in southeast, southwest,

and east Fort Worth. Joint Agreed Maps and Data: C121. It would extend east through growing minority neighborhoods in Arlington and into Dallas County to include African-American neighborhoods in the southwest Dallas County cities of Cedar Hill and DeSoto. *Id.*

The nine Hispanic opportunity districts and four African-American opportunity districts within the Fair Texas Plan will elect the candidate of choice of minority voters as the table below indicates.

Number of Minority Opportunity Districts in State's Plan (C185)

and Fair Texas Plan (C121)

	African-American Opportunity	Hispanic Opportunity Districts	Coalition Opportunity Districts
Plan C185	3	7	0
Plan C121 (Fair Texas)	4	9	1

Moreover, the Fair Texas Plan does not disrupt the partisan make up of the current benchmark plan. Under the Fair Texas Plan, current districts that consistently support statewide Republican candidates – Districts 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 17, 19, 21, 22, 24, 31 & 32 would retain the electoral base of the current incumbents. Veasey Deposition pg 64-65 pg 70 and pg 82-85.

11. <u>Quesada Plaintiffs' Demonstration Plans C192 and C202</u>

Two other alternative congressional redistricting plans have been drawn by the Quesada plaintiffs as demonstration maps that also rectify the diminution and dilution of minority voting strength in the State's proposed Plan C185. As set forth in the chart below, alternative Plans C192 and C202 include nine Hispanic opportunity districts, four African-American opportunity districts and one majority-minority coalition district for a

total of 14 districts that would provide minority citizens the opportunity to elect their candidate of choice. Exhibits Quesada 66, 67, and 70.

Number of Minority Opportunity Districts in State's Plan (C185) and Alternative Plans (C192 and C202)

	African-American Opportunity	Hispanic Opportunity Districts	Coalition Opportunity Districts
Plan C185	3	7	0
Plan C192	4	9	1
Plan C202	4	9	1

In North Texas, like Fair Texas Plan C121, alternative Plans C192 and C202 retain District 30 as a Dallas-based African-American opportunity district and creates District 34, a new Hispanic opportunity district in Dallas/Fort Worth and District 35, a new African-American opportunity district in the Dallas/Fort Worth area. Quesada Ex. 66, 67, and 70.

While Plan 192 replicates the configuration of CD34 and CD35 exactly as they are drawn in the Fair Texas Plan C121, Plan C202 draws both districts more compactly, while maintaining them as minority opportunity districts, effective for Hispanic and African-American voters, respectively. Exhibits Quesada 70.

While Districts 34 and 35 under Fair Texas Plan C121 and alternative plan C192 are reasonably compact, the very compact configuration of these districts in Plan C202 disproves the State's contention that it is not possible to configure additional compact Latino or African-American opportunity districts in north Texas.

Under Plan C202, District 34 is an effective Hispanic opportunity district in the Dallas Fort Worth region with a Hispanic voting age population of 56.2 percent, an

African-American voting age population of 13.0 percent, a combined Black and Hispanic voting age population of 68.6 percent and a combined Citizen Voting Age Black and Hispanic population of 53.6 percent. Moreover, District 34 under Plan C202 is more compact than districts 2, 5, 9, 12, 15, 18, 20, 22, 28, 29, 32, 33 & 35 under the State's plan C185. Exhibits Quesada 70 and Joint Agreed Maps and Data C185.

Under Plan 202, District 35 is an effective African-American opportunity district with an African-American voting age population of 36.3 percent, a Hispanic voting age population of 27.0 percent, a combined Black and Hispanic voting age population of 62.6 percent and a combined Citizen Voting Age Black and Hispanic population of 53.8 percent. District 35 under plan C202 is more compact than districts 2, 5, 9, 12, 15, 18, 22, 28, 29, 32, 33 & 35 under the State's plan C185. *Ibid*

12. The Process Followed by Texas to Draw Plan C185 Was Intentionally Discriminatory

Plan C185 was drawn with the purpose, and has the effect, of minimizing and reducing the strength of minority populations in Texas. Joint Expert Ex 2, Kousser report, pg. 132-133. When the Republican leadership of the Texas Legislature engaged in the process of congressional redistricting in 2011, they did not extend opportunities for meaningful and effective participation in redistricting to those Representatives elected by communities of color. Thus, the process followed to create the plan was racially discriminatory. Joint Expert Ex 2, Kousser report, pg. 108-As Eric Opiela, legal counsel to the Republican Congressional Delegation admitted at deposition, the Republican Congressional delegation heavily influenced the process in which Opiela, along with other various legislative aides, drew the map behind closed doors and secretly

communicated their changes to congressional districts. Opiela Deposition at pgs. 16-17. *See* also Latino Task Force Ex.311

During this time the Republican leadership, led by Anglo Congressman Lamar Smith and the Republican Congressional Delegation, and also including Anglo Senator Kel Seliger and Anglo Representative Burt Solomons, secretly corresponded with Eric Opiela, Gerardo Interiano and Ryan Downtown and others to develop the plan outside the scope of legislative or public review. Latino Task Force Ex.311

On the last day of the regular session (on May 31, 20110), an Anglo lawyer (Eric Opiela), who had hundreds of secret contacts with legislative staffers drawing the congressional plan, wrote a note to an Anglo Congressman (Rep. Kenny Marchant), saying "the house and senate have reached a compromise between their redistricting maps today." Latino Task Force Ex.311, Email from Eric Opiela, May 31.

The influence of Congressman Smith and the Republican Members of the Texas Congressional delegation over the development Texas's map was incestuous. Members of Congress got to draw their own districts and 'cherry pick' the voters they wanted included or excluded from their districts. For example, on April 14, 2011, Congressman Smith sent a confidential redistricting proposal to state officials outlining a proposed redistricting plan that would include "[o]ne new Voting Rights Act district in the Dallas-Fort Worth area." Latino Task Force Ex.311Smith Memorandum, Dkt. # 117-8; *See also* Opiela Deposition at 13-14. According to Opiela, this secret confidential memo was distributed to Governor Rick Perry's office, the Lieutenant Governor's office, the Speaker of the House's office, and to the chairs of the Senate and House redistricting committees and their key staff persons. Quesada Ex 68, Opiela Deposition at 13-15. In

the end, however, the Texas Legislature failed to enact a plan with any new minority opportunity or "Voting Rights Act district[s]" in the Dallas-Ft. Worth area. Downton Trial Testimony at 1102 or 96.

Plan C185 was developed without any meaningful input from the minority population's representatives of choice or the general public. State Representative Marc Veasey, who is African-American and a member of the House Redistricting Committee, expressed precisely these concerns about being excluded from the process. Veasey Deposition at 22-23. During the regular legislative session, only one hearing on congressional redistricting was convened in the House Redistricting Committee and only one hearing was convened in Senate Redistricting Committee. Quesada Ex 5. Thus, there were no opportunities for members of the general public or representatives of communities of color to have any input into the development of the Plan C185. Veasey Deposition at 22-23. Having no public hearings on a proposed plan is especially egregious inasmuch as the congressional map drawing process, done in collaboration by the Republican members of the Congressional delegation and House staffers, was done secretly behind closed doors. Veasey testified:

> Q. … Now it says in the next sentence [of the Quesada amended complaint] that Republican leadership did not extend meaningful opportunities for meaningful and effective participation in redistricting. Now, define "meaningful" as it's used here.
> Veasey: I would say that meaningful redistricting would be, you know, first having hearings in the major areas and allowing African-American and Latino citizens to be able to come and testify for or against these plans. And I don't think that those hearings were done favorably so that African-American and Latino candidates would be able to, you know, voice, whether or not they thought the plans were fair. The second thing I would say is that I also believe that the way that the committee, the way that the redistricting committee, and I was a member of the redistricting committee as a state legislator, I would say that a lot of the map drawing and a lot of the changes that were done were done in secret. They were done to keep the African-American and Latino members of the redistricting

> committee sort of discombobulated and not really knowing what's going on. And I thought that that was also unfair, and made the process of -- and then the participation part of being able to draw fair maps for all races impossible. (Veasey Deposition at 22-23.)

At trial, Rep. Trey Martinez Fischer, who is Hispanic, testified that there was concern amongst minority members towards the end of the regular session that there had not been any public hearings on a congressional map. He stated their "antennas were up" because none of the "issues that accompany any piece of legislation were being demonstrated by the state and led us to believe that somebody was writing the map, but the public wasn't involved." Rep. Martinez Fischer testimony, page 92, lines 1-10.

Senator Kel Seliger, who sponsored the Senate version of the congressional map, admitted that no minorities were involved in developing the plan. Kousser Report at 108 & n.81 (citing Senate Journal, 82nd Legislature, First Called Session, Proceedings, Addendum (June 6, 2011), at A2-3, 12-15, 17 (hereinafter SJ Special)). Those members of the House and Senate legislative redistricting committees whose districts are majority minority or who represent large minority communities, never saw the plan until it was made public on Tuesday, May 31, 2011. As State Representative Marc Veasey testified:

> Q. Do you know if any Democratic legislators saw the plan before it was made public, any other Democratic legislators?
> Veasey: I have not heard any of the Democratic legislators say that they saw any of the plans before they were made public. Veasey Deposition at 27.

Senator Judith Zaffirini, a Latina Senator who has served in the Senate since 1987, expressed her frustration and distress about being left out of the process, saying, "Senator Seliger, I've been on every redistricting committee since my election in 1986 and I must say that I have never had less input into the drawing of any map until this

session." Quesada Ex.3. Similarly, Senator Royce West, an African-American State Senator who has served since 1992, made clear on the senate floor that he too "did not have any input into the map." *Ibid*. Indeed, those with access to the congressional map kept it so secret that even the outside lawyers hired by the Senate Redistricting Committee were not even shown the map until the day it was introduced and so could not offer opinions on whether it complied with the Voting Rights Act. *See id.* at 108 (citing SJ Special at A-11, A20-21). During the June 3rd Committee hearing, outside counsel Mr. Morrison all but pleaded with the committee to take more time and provide an opportunity to give the public a meaningful opportunity to comment on the map, stating:

> "this process has been quite different from what we've *See*n in the past. We didn't get to Congressional; we didn't *See* a plan until the regular session ended. Nobody has had the opportunity to study it the way it has been done in the past or the way you do it ideally. And the question for ya'll is do you proceed with that amount of information or do you give up a chance to do it at all and let the governor put it to another call in a special? There has been a very finite amount of time. You recall how we did it in 2003 and there's not been the time." *Ibid*

Contemporaneous press reports show that the Texas Legislature would be called back into special session if the Republican members of the congressional delegation could agree upon a new congressional map. In other words, the process of developing the congressional map was so closed from public view that once a deal was struck behind closed doors, Governor Perry would only then call the Legislature back into session. Thus, on May 28, 2001, the Texas Tribune reported that Governor Perry would only call legislators back "when they get to an agreed bill."[6] Governor Perry called the Legislature

[6] http://www.texastribune.org/texas-redistricting/redistricting/perry-session-on-congressional-maps-possible/

into special session on or about June 1, 2011. By that time, Anglo legislative leaders and Republican Members of the Texas Congressional Delegation had already reached agreement on what a new congressional map would look like.

Unlike Anglo legislative leaders and the staff who worked for them, and unlike the Republican members of the Texas Congressional delegation, minority members of the House and Senate, and minority Members of the two legislative redistricting committees, never saw the proposed congressional plan until it was made public on Tuesday, May 31, 2011. Veasey Deposition at 27

The failure of state officials to provide a meaningful opportunity to participate effectively in the redistricting process was a procedural and substantive departure from past practices in Texas. In previous redistricting cycles, Texas legislative redistricting committees went around the State with proposed redistricting plans and permitted members of the public, as well as elected representatives of minority communities, to have input into the redistricting process and to comment on proposed plans. Joint Expert Ex 2, Kousser report, pg. 108. Instead of holding hearings throughout the State, as had been the practice during previous redistricting years, the legislature held a single hearing in Austin. *Ibid*.

The hearings held during the Special Session did not provide a meaningful opportunity for participation by representatives of minority communities or by the public. For example, when the state Senate took up the congressional map in its special session, members of the public had just two days to prepare for a hearing in the Senate redistricting committee. When they appeared at the Senate redistricting hearing to comment on the proposed Congressional plan that had been unveiled just two days

earlier, the redistricting committee did not conduct a hearing on the proposed plan and instead conducted a hearing on a substitute plan that had not been made public until just before the hearing. Archer Deposition at 159 *see also* Davis Deposition at 42:25-44:12. The press reported on this bait and switch by Senator Seliger, the chair of the Senate Redistricting committee: "Seliger indicated that he plans to substitute the revised map (Plan C130) sometime during the hearing and vote it out later today." Quesada Ex. 15, Quorum Report, July 3, 2011.

Of those members of the public who were able to testify in regards to the map and the substitute map, they testified almost entirely against either one. As Senator Zaffirini stated on the Senate Floor during debate, "All I recall is that 1 [one] who testified in favor for parts of the map, not the entire map, he had not reviewed it and everybody else- every African-American, every Anglo American, every Mexican American, Hispanic American more generally speaking- every single witness testified against the plan." Quesada Ex. 4

Moreover, when the Senate Redistricting Committee passed the new substitute map, the House Redistricting Committee held a hearing just a few days later, but the House Committee permitted *no public testimony* at that hearing. Archer Deposition at 160. *See also* Veasey Deposition at 22:18-23:17; 24:11-27:10. Thus, members of the public, particularly minority members of the Redistricting Committee and their constituents, were denied an opportunity to effectively participate in the hearing or the plan's development, and further were denied any meaningful opportunity to participate effectively in the political process. Veasey Deposition at 22:18-23:17; 24:11-27:10.

Despite being denied the opportunity to participate effectively in the political process, minority citizens and their elected representatives did criticize the process and

the proposed congressional plan. However, the State officials refused to make any changes in the congressional plan or to make them fairer to minority voters in the face of criticism at these hearings. Defendants ignored testimony that the plan impermissibly packed and cracked minority communities. Joint Expert Exhibit List Ex.2 Kousser Report at 114-15 (citing statements made by Representative Veasey during the debates and a memorandum inserted into the legislative record by Representative Roberto Alonzo regarding this issue).

When the Committee substitute between the differing congressional maps passed by the State House and Senate finally emerged, it was immediately criticized by Republican Congressman Joe Barton's District Director, Dub Maines. Latino Redistricting Task Force Exhibit No. 311, Email from D. Maines (June 9, 2011 5:39 PM), Document Dkt. # 117-6; *See also* Opiela Deposition at 53-59. In an email on June 9, 2011, Mr. Maines noted that the Committee passed substitute "badly retrogresses CD 20 without creating a new VRA district." *Id*. Maines also noted that new proposed CD 35 was "in no way a VRA district[.]" *Id*, Email from D. Maines (June 9, 2011 5:39 PM), Document Dkt. # 117-6. Mr. Maines further observed that the Committee substitute "has next to no chance of pre-clearance—either by Justice [Department] or the DC … court." *Id*.

The Republican leader of the Congressional Delegation, Representative Lamar Smith, recognized the potential legal damage done to the State's proposed plan by Republicans asserting the map was violative of the Voting Rights Act. In an email to Congressman Pete Sessions, Congressman Smith asked Sessions to call Congressman Barton (Maine's boss). *Id*., Email from L. Smith (June 9, 2011 5:26 PM), Document Dkt.

117-9, *See also* Opiela Deposition at 96. Congressman Smith warned Sessions that "Dub Mains (sic) sending emails criticizing cd 20. May be used against us in court." Email from L. Smith (June 9, 2011 5:26 PM), Document Dkt. # 117-9.

13. Anglo Republican's Intimately Involved In Map Drawing

The evidence shows that the Anglo Republican members of the Congressional delegation were intimately involved in the configuration of the congressional districts throughout Texas. Latino Task Force Exhibit 311 (the emails of congressional members and their attorneys to state officials). Members of Congress repeatedly, and on numerous occasions, communicated their suggestions to state officials for how to revise their congressional districts. *Ibid*. Some of these communications came directly from the Members of Congress themselves, especially Congressman Lamar Smith. Other communications to state officials were passed along by the Republican congressional delegation's legal counsel, Eric Opiela. For example, in a May 30, 2011 email from Congressman Lamar Smith to legal counsel Eric Opiela, Smith asks, "Wld(sic) it help quico [Congressman Canseco] on the margin if I gave him 3k more in bexar (either gop or hispanics) and took edwards co in exchange." (May 30, 2011 at 7:13pm), Document 117-5. Opiela later makes it clear that the end goal was to make CD 23 more Republican when he wrote an email saying "Gentlemen -This is the best I could do. Only 17,360 in Maverick -For CD 23. 52.4% McCain….Quico [Congressman Canseco]has not yet *See*n/signed off on this, but could you please run the election performance on this one (June 13, 2011 7:23 AM. Document 117-6)

Anglo Members of Congress were able to make changes to their proposed congressional districts, no matter how large or small their requests. Minority Members of

congress were treated completely differently and without respect. For example, State officials removed the district offices of all three African-American Members of Congress (Jackson-Lee, Al Green, and Johnson)(C185). See, *e.g.*, Cong. A. Green Deposition pg 25 *See also* Jackson-Lee Deposition pg 42 *See also* Bernice-Johnson pg 22. While the state removed the district offices of the three African American Members from their new districts, the state granted at least three trivial and mundane requests of three Anglo members of Congress to place certain territory in their districts. For example, on June 8, 2011, a representative of Anglo Congresswoman Kay Granger's office made this request in an email to Eric Opiela:

> "Our office that is located on 7th and Jones street in downtown Fort Worth was drawn out. There is no population there. We told [Rep.] Charlie Geren about this problem and he said he would work on this today but this has to be corrected." LRTF Ex. 311, Document 117-6, filed 8/5/2011, page 12 of 62.

Another example is Anglo Congressman Kenny Marchant, who on May 31, 2011, asked Opiela:

> "one change, it's easy, no population. My grandbabies go to Hockaday School on forest lane AND Inwood. I have the north side of forest, Pete [Sessions] has the south side. Please go across the street and pluck the campus out of Pete and put in my district…I will ask Burt [Solomons] to do it." LRTF Ex. 311, Document 117-5, filed 8/5/2011, page 31 of 81.

The third example came from Anglo Congressman Lamar Smith (R), who sent this email request on June 8, 2011 directly to a House staffer (Ryan Downton) working on the redistricting plan

> "There is one precinct which includes two condo buildings with many GOP supporters and the [San Antonio] country club adjacent to my district. Would really like to get it. Joe Straus would approve!" LRTF Ex.311, Document 156-2 filed 8/9/11 page 19 of 31.

Each of these requests by Anglo Members or their offices was granted, but African-American members were unable to retain even their official offices within their districts. Similarly, Congressman Charlie Gonzalez, a Latino, had the area where his district office is located removed from his newly drawn district under Plan C185.

Despite the absence of meaningful participation by officials representing minority communities, and with almost no opportunity for public input on the proposed congressional plan, the Texas Legislature enacted the plan into law on or about June 16 2011. Joint Expert Exhibit List Ex.2 Kousser Report at 108.

There is ample evidence that Plan C185 was enacted with intent to discriminate against minority voters. Joint Expert Exhibit List Ex.2 Kousser Report, Dkt. # 128, at 108-33 (summarizing the evidence supporting a finding of intentional discrimination in Texas's Plan); Joint Expert Exhibit List Ex.12 Burton Report, Dkt. # 150, at 2-3, 12-26, 31-33, 52-54, 58, 59-63 (describing the legacy of official discrimination and the current racial climate); Joint Expert Exhibit List Ex.4, Richard Murray Report, Dkt. # 148, (summarizing the history of discrimination, the current racially charged elections, and the closed redistricting process); Joint Expert Exhibit List Ex.8, Henry Flores Report, Dkt. # 149, at 7-8, 9-10 (concluding that race was the predominant factor and highlighting how this intent hurt minority voters in the redrawn Districts 23 and 27). *See* also Gerardo Interiano Deposition, at Vol. I, 86:6-87:5 (admitting that he did not examine whether Canseco was the Latino voters' candidate of choice even though he claimed that retrogression analysis was done analyzing minority voters' candidates of choice); and *id.* at 102:5-110:8 (admitting that the goal of the redistricting was to shore up Republican incumbent Representative Canseco, who was not the Latino voters' candidate of choice);

and Representative Marc Veasey Deposition at 20:20-21:7, 32:21-33:8 (testifying to racial animus of those conducting congressional redistricting).

14. Racial Considerations Played Too Much of a Role in Creating Congressional Districts

In creating bizarre, non-compact districts in Plan C185, State officials allowed race to predominate the redistricting process and subordinate traditional redistricting principles, such as compactness and respect for communities of interest. *See* Downton transcript 912. ("we were conscious of the [racial] numbers, and so we would look at them throughout the process before moving forward with the map.") Even districts that are not highly irregular in shape were drawn expressly to place additional minorities into an already effective minority opportunity district. *See* Cong. Eddie Bernice Johnson Trial Testimony at 1276.

These actions by State officials were undertaken with an intent to pack minority voters and to allow racial or language minority group membership to be the predominant factor in the drawing of the Districts. For example, an examination of the email exchanges between the Republican Members of Congress and state officials, as well as email exchanges between state officials themselves, are replete with references to race and ethnicity and expressly mention achieving a certain racial or ethnic "matrix" as the paramount consideration. LRTF Ex.311 at (Document 117-10 Document 117-6) Examples of congressional districts where race played the predominant role in creating the district include District 6, 9, 12, 18, 20, 25, 29, 30, and 33, among others.

That race played the predominant role in the configuration of districts is illustrated in the following passage that Opiela, counsel for the Republican Members of

Congress, who openly discussed the racial impact of a proposed change in a communication to a state legislative staffer:

> "I had a voice in the back of my head how they were able to find enough Hispanics to jack Quico [Cong. Canseco] up from 52.8 to 54.1. I knew they couldn't do it alone with just 10k more in Maverick. They stole them from CD 20. This was the whole point behind this exercise. I gave them the tools to fix this, and it was used for this."
>
> LRTC Ex. 311, Email from E. Opiela (June 12, 2011 10:29 PM), Document Dkt. # 1179.

Numerous congressional districts in Plan C185 with bizarre shapes were also drawn so as to excise minority voters. Joint Expert Exhibit List Ex.2 Kousser Report at 117-133; Joint Expert Exhibit List Ex.8, Flores Report at 9-10. Just an initial look at these districts reveals their extraordinary shapes. Quesada Ex 20, 24, 28, 32, 36, 40, 44, 48, Plan C185. MALC expert witness Dr. Morgan Kousser's report describes new District 12 as having a lightning bolt that cleaves the district almost in half. Joint Expert Exhibit List Ex.2 Kousser Report at 119. Dr. Kousser also explains how attempts to dilute central city minorities' voting power were accomplished by "thrusting long arms of districts from suburban and urban counties" in new Districts 6 and 33. *Id.* at 123.

Other internal correspondence between Texas legislative staff and Republican Members of Texas' Congressional Delegation contain numerous references to the racial impact of various proposed changes to the congressional map. LRTF Ex.311. Indeed, though the State now tries to portray the redistricting process as all about politics, not race, numerous references in the hundreds of emails unsealed by this Court show that racial data and minority performance figures were considered at each step along the way. *Ibid.* The emails below are a sample of the focus on racial statistics and the predominant role that race played in the configuration of the districts.

- Wld it help quico on the margin if I gave him 3k more in bexar (either gop or hispanics) and took edwards co in exchange. LRTC Ex. 311, Email From Congressman Lamar Smith, May 30, 2011 DKT# 117-5 pg 25

- Just read in todays natl journal that quico drops from 66 to 63 hisp pop. Hope not true or dangerous. LRTC Ex. 311, Email From Congressman Lamar Smith June 1, 2011, DKT# 117-5 pg. 40

- Why do this to me? I get the stats to benchmark in 20 and look at the report tonight and yall dropped them to 55! Please, please say this whole exercise was not for naught. LRTC Ex. 311, Email From Eric Opiela June 13, 2011, DKT# 117-6 pg. 53

- No, just I think it's not good to not have all the stats at benchmark when we know its possible. Yes, I know CD 20's 10 of 10 performance and agree taking it below benchmark on SSVR can be justified by the creation of the new district. LRTC Ex. 311, Email From Eric Opiela June 14, 2011, DKT# 117-6 pg. 55

Texas has a long history of racial discrimination and discrimination on the basis of language minority group status that has touched the right to vote. Joint. Ex. 12, Burton Report pg 64. Jt. Ex.1 Chappa Report at 4. Voting discrimination in Texas continues to this day. As the report of expert witness Dr. Vernon Burton notes, in Waller County, there were recent repeated attempts to intimidate African-American students at the local

college and to deny them the right to vote, leading to repeated DOJ intervention to enforce and protect minority voting rights. Joint Expert Exhibit List Ex.12, Burton Report at 61-62. In addition, Dr. Richard Murray's expert report noted instances of intimidation of minority voters at polling places by the Tea Party in Texas in 2010 and improper rejections of voter registration in Harris County in 2008. Joint Expert Exhibit List Ex.4, Murray's Report at 17. Indeed, just five years ago, the Supreme Court recognized the "long history of discrimination against Latinos and Blacks in Texas." *LULAC*, 548 U.S. at 439 (internal quotations omitted).

ARGUMENT

1. The State's Enacted Plan Has Not Received The Requisite Preclearance Under The Voting Rights Act And Is Legally Unenforceable.

Because the state's enacted congressional map has not received the requisite Section 5 preclearance, it is legally unenforceable unless and until it is precleared. It is now axiomatic that "[a] new reapportionment plan enacted by a State, including one purportedly adopted in response to invalidation of the prior plan by a federal court, will not be considered 'effective as law,' *Connor v. Finch*, 431 U.S., at 412 *Connor v. Waller*, 421 U.S. 656 (1975), until it has been submitted and has received clearance under § 5. Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure. *Connor v. Finch, supra; Connor v. Waller, supra*." *Id.*, at 542, 98 S.Ct., at 2498 (footnote omitted)." *McDaniel v. Sanchez,* 452 U.S. 130, 146 (1981). Moreover, as *McDaniel v. Sanchez* makes clear, federal courts cannot approve plans enacted by State or local governments that are subject to the preclearance requirements of Section 5 of the Voting Rights Act because such plans

“”reflect[ ] the policy choices of the elected representatives of the people[.” *Id*. at 153. The Court’s later decision in *Lopez v. Monterey County*, 519 U.S. 9 (1996), confirms *McDaniel*, holding that it was error for a district court to order an election under a proposed legislative plan before the plan was precleared and made permanent. *See* also *infra* at 9-10.

2. <u>The Current Congressional Benchmark Map (Plan C100) Is Malapportioned In Violation Of Article 1, Section 2 Of The United States Constitution.</u>

Article 1, Section 2 of the United States Constitution, which governs population equality for congressional districts, provides: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States. . . . Representatives . . . shall be apportioned among the several States . . . according to their respective numbers.” The Supreme Court has interpreted this clause to mean that only no amount of deviation is acceptable within a State’s congressional districting plan. See *Karcher v. Daggett*, 462 U.S. 725 (1983).

In this case, it is undisputed that the current congressional map, which contains only 32 districts, is severely malapportioned. Because there are now, as a result of the 2010 census, 36 congressional districts in Texas, four districts contain no population under the benchmark map. Given Texas’s total population according to the 2010 census of 25,145,561, the ideal population for each of the new 36 districts is 698,488 (25,145,561 divided by 36). The overall population range in Plan C100 from the most underpopulated district (District 32) to the most overpopulated district (District 10) is 340,948, or a total population deviation of 48.81%.

Plaintiff John Jenkins lives in overpopulated Congressional District 6, which is 15.84% over the ideal. Plaintiffs Romeo Munoz, Lyman King, and Kathleen Shaw reside

in overpopulated Congressional District 24, which is 13.42% over the ideal. Plaintiff Marc Veasey lives in overpopulated Congressional District 26, which is 31.02% over the ideal. Congressional Districts 6, 24, and 26 are overpopulated relative to other Congressional Districts in the State of Texas. The existing malapportionment of the congressional districts in Texas dilutes the voting strength of Plaintiffs Jenkins, Munoz, King, Shaw and Veasey who reside in these overpopulated congressional districts, as the weight or value of each of these plaintiffs' vote is less than that of other voters residing in underpopulated congressional districts. These districts are malapportioned in violation of Section 2 of Article 1 of the United States Constitution.

3. The State Of Texas Enacted Plan C185 In 2011 With A Racially Discriminatory Intent.[7]

Texas's process for creating a new congressional map in 2011 was cloaked in secrecy and backroom dealing and done in a way that excluded any meaningful participation by racial or language minorities. While redistricting is always political and many deals are struck among officeholders and legislators in creating a map, often out of public view, the process used to draw a congressional plan in Texas was, simply put, racially discriminatory and racially exclusionary. The above facts show that Plan C185 was drawn with the purpose, and has the effect, of minimizing and reducing the strength of minority populations in Texas. See pp. 7-9, *supra*.

When the Republican leadership of the Texas Legislature engaged in the process of congressional redistricting in 2011, they did not extend opportunities for meaningful

[7] In the unlikely event that the state's proposed congressional map (C185) receives Section 5 preclearance from the DC Court (the United States Attorney General and numerous intervenors in the DC action have opposed section 5 preclearance), we address its merits here.

and effective participation in redistricting to those Representatives elected by communities of color. Thus, the process followed to create the plan was racially discriminatory. *Ibid*. The congressional map was drawn largely by a handful of Members of the Texas Congressional delegation, all of whom were Anglo, working largely through their counsel (also Anglo) with legislative staff (nearly all Anglo). The chairs of the Senate and House redistricting committees were also Anglo and Members of Congress worked secretly with them to draw the new map.

The secrecy of drawing the new map and the lack of any opportunity for the public to comment on the proposed maps stands in sharp contrast to how Texas has conducted congressional redistricting in the past. As the facts cited above show, Texas has typically conducted hearings across the state to permit meaningful input. And Members of the legislative redistricting committees on both sides of the aisle have been given an opportunity to participate in the process of drawing the map. The facts show quite clearly that Plan C185 was developed without any meaningful input from the minority population's representatives of choice or the general public. There were no opportunities for members of the general public or representatives of communities of color to have any input into the development of the Plan C185.

Senator Kel Seliger, who sponsored the Senate version of the congressional map, admitted that no minorities were involved in developing the plan. Those members of the House and Senate legislative redistricting committees whose districts are majority minority or who represent large minority communities, never saw the plan until it was made public on Tuesday, May 31, 2011. Indeed, those with access to the congressional map kept it so secret that even the outside lawyers hired by the Senate Redistricting

Committee were not even shown the map until the day it was introduced and so could not offer opinions on whether it complied with the Voting Rights Act. See pp. 18 -28, supra.

In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977), the United states Supreme Court established a framework for determining whether direct and/or circumstantial evidence of racially discriminatory intent exists. The Court's *Arlington Heights* decision listed factors for courts to consider, though it not these factors were illustrative, not exhaustive. These factors included: (1) The impact of the decision; (2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; (3) the sequence of events leading up to the decision; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5) contemporaneous statements and viewpoints held by the decision-makers. *Id.* at 266–68.

Applying these factors to the evidence in this case is relatively straightforward. The "impact" of Plan C 185, as the above facts show, see pp. 7-9, supra, is that the plan adopted does not fairly reflect the minority population growth in Texas from 2000 to 2010, and further, actually makes minority voters in Texas worse off than they were under the benchmark map. The facts show that Latino and African-American voters in the benchmark map had an effective opportunity to participate in the political process in 11 of 32 districts under the benchmark plan. By contrast, in Plan C 185, minority voters in Texas have an effective opportunity to participate in only 10 of 36 districts.

With regard to whether "the historical background of the decision" reveals a series of decisions undertaken with discriminatory intent, it is clear such historical background exists. The facts in this case show that Texas has a long history of

discriminatory voting practices aimed at harming African-Americans and Latino voters. As recently as 2006, the United States Supreme Court determined that the state of Texas had violated minority voting rights when it enacted a congressional map in 2003. See *LULAC v. Perry*. That racial discrimination is not yet spent.

The sequence of events that led up to the enactment of Plan C185 is some of the most powerful evidence of how the process was tainted by invidious discrimination. The process of developing the plan was done almost entirely by Anglos and intentionally done to exclude minority communities and their duly elected representatives from participating. The Governor called a special session only after a new congressional map had been agreed upon, again an agreement reached almost exclusively by Anglo Members of Congress and their Anglo counterparts in the Texas Legislature. Minority Representatives on the legislative redistricting committees were shut out of the process from beginning to end, leading one long-time serving Latina state senator (Sen. Judith Zaffirini) to remark that "I have never had less input into the drawing of any map until this session." See pp. 21-22, *supra*.

In terms of measuring whether the enacted plan (C 185) departs, either procedurally or substantively, from the normal practice, there can be little doubt that the process followed in 2011 was dramatically different from the past. And it was different in a way that harmed the public and members of the minority community. Unlike past redistricting cycles, the Texas Legislature did not conduct public hearings across the large state of Texas to provide an opportunity for members of the public to voice their views on redistricting plans. Indeed, the senate's own outside counsel urged that the process of drawing new redistricting plans be slowed, and noted that it had not been this

rushed in the past. See pp. 22, supra. The State failed to produce a single minority member of the Legislature or congressional delegation as a witness who actively participated in the redistricting process in some meaningful way. The testimony in the record shows a number of minority legislators and Members of Congress were excluded from any significant involvement in the process, and they noted that such treatment was a departure from past redistricting cycles.

Contemporaneous statements made by those who drew the map also provide circumstantial evidence of racially discriminatory intent. The numerous email exchanges between the congressional delegation and the legislative staff drawing the maps show little sensitivity to protecting minority voting strength. While the evidence shows that those drawing the map were fully aware of the racial and ethnic consequences of their map drawing, and they established percentages or benchmarks as a guide to maintain minority districts at certain levels, their goal was not to improve the opportunities for minority voters overall. Indeed, their clearly stated goals were to draw districts in a manner that entrenched those elected in 2010 who were not the candidates of choice of minority voters (Congressmen Canseco and Farenthold), even if doing so meant that the dramatic increase in minority population growth from 2000 to 2010 would not be recognized and respected in the new congressional new map.

Thus, all of the factors set forth in the Supreme Court's *Arlington Heights* decision are present in this case. Plan C 185 was enacted with a racially discriminatory intent in violation of the Fourteenth Amendment to the United States Constitution.

4. **Plan C 185 Will Dilute the Voting Strength of Minority Voters in Texas**

Section 2 prohibits what is referred to as "minority vote dilution"—the minimization or canceling out of minority voting strength. Section 2(a) of the Act prohibits any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen . . .to vote on account of race or color [or membership in a language minority group]."[8] Section 2 (b) specifies that the right to vote has been abridged or denied if,

> based on a totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [racial or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice.[9]

Section 2 thus prohibits any practice or procedure that, interacting with social and historical conditions, impairs the ability of a protected minority group to elect its candidates of choice on an equal basis with other voters.

In 1986, in *Thornburg v. Gingles*,[10] the Supreme Court articulated a framework for vote dilution. Under the test created in *Gingles*, the first step in determining whether a minority opportunity district is mandated by Section 2 is to ask the following three questions:

> (1) Is the minority group "sufficiently large and geographically compact to constitute a majority" in a single-member district?[11]
> (2) Is the minority group "politically cohesive"?

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[8] 42 U.S.C. § 1973(a).
[9] *Id.* § 1973(b).
[10] 478 U.S. 30, 50 (1986).
[11] The test enunciated in *Gingles* originally applied only to challenges brought against multi-member districting plans. In 1993, however, the Court made clear that the three-pronged *Gingles* test applies to single-member districting schemes as well. *See Growe v. Emison*, 507 U.S. 25, 40 (1993).

> (3) Does the white majority vote "sufficiently as a bloc to enable it—in the absence of special circumstances…—usually to defeat the minority's preferred candidate"?[12]

In this case, the record evidence shows that Latino and African-American voters could constitute an effective voting majority in more districts than those drawn by the State in Plan C185. In North Texas, for example, alternative plans offered by Plaintiffs (*e.g.*, Plans 121, 192, and 202) show that minority voters in Dallas and Tarrant Counties are sufficiently large and geographically compact to constitute a majority in two additional congressional districts. And in South Texas, additional effective Latino districts can be drawn, and yet the state declined to do so.

Numerous expert witnesses in this case agreed that voting patterns throughout Texas are racially polarized. See pages 6-7, *supra*. Thus, the second and third prongs of *Gingles* are satisfied, as they were in *LULAC v. Perry*.

The *Gingles* requirements do not complete courts' Section 2 inquiries. Even if the answer to all three *Gingles* questions is "Yes," the court must still determine whether, under the "totality of circumstances," the minority group has less opportunity than Anglos to participate in the political process and to elect representatives of its choice. Only when all these conditions are met must a new effective minority opportunity district be created. Although courts have considered a variety of circumstances in making this determination,[13] one factor is particularly important: the "proportionality" or lack

[12] *Gingles*, 478 U.S. 30, 51.

[13] For example, courts sometimes consider the following factors, derived from the Senate report accompanying the 1982 amendments to the Voting Rights Act: the extent of any history of official discrimination with respect to the minority's right to vote; the extent to which potentially discriminatory voting practices or procedures, like majority voting requirements or anti-single shot provisions, have been used; if there is a candidate slating

thereof, between the number of minority opportunity districts and the minority's share of the State's relevant population.

The Supreme Court analyzed the proportionality factor in 1994 in *Johnson v. De Grandy.*[14] The Court assumed for the purposes of deciding *De Grandy* that all three of the *Gingles* factors were satisfied, yet it rejected the plaintiffs' Section 2 claim. As the Court explained, the totality of circumstances did not support a finding of dilution because the "minority groups constitute effective voting majorities in a number of…districts substantially proportional to their share in the population."[15] Section 2, in other words, does not mandate that a state create the maximum possible number of majority-minority districts.[16] Although rough proportionality does not automatically protect a State from liability under Section 2, it is a strong "indication that minority voters have an equal opportunity, in spite of racial polarization, 'to participate in the political process and to elect representatives of their choice.'" [17] As Justice O'Connor explained in a separate opinion, proportionality "is *always* relevant evidence in determining vote dilution, but it is *never* itself dispositive."[18]

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process, whether minority candidates have been denied access to it; the extent of any discrimination against minorities in education or other areas, which might hinder effective participation in the political process, whether political campaigns have been characterized by racial appeals; the extent to which minority group members have been elected to public office; whether there is a lack of responsiveness on the part of elected officials to the minority groups' particularized needs; and whether the policy supporting the use of the voting policy or practice is tenuous. *Gingles,* 478 U.S. 30, 36-38 (citing the Senate report).

[14] 512 U.S. 997 (1994).

[15] *Id.* at 1024.

[16] *Id.* at 1017.

[17] *Id.* at 1020 (citing Voting Rights Act, 42 U.S.C. § 1973).

[18] *Id.* at 1025 (O'Connor, J., concurring). In *LULAC,* the Court reaffirmed that proportionality mitigates against finding a Section 2 violation, while making clear that the proportionality inquiry does not allow a State to "trade off the rights of some

Here, the Latino and African-American voting age population is not proportionally represented in the new plan.[19] According to the 2010 Census, Latinos comprise 36.6 percent of the voting age population in Texas; African-Americans comprise 11.4 percent of the voting age population. Under Plan C185, Latinos have an effective opportunity to elect their candidates of choice in 7 of 36 districts (19.4%) and African-Americans have an effective opportunity to elect their preferred candidate of choice in 3 of 36 (or 8.3%) districts. Under *DeGrandy, supra*, this lack of proportionality is relevant evidence of vote dilution.

There has been some question in this case as to whether the first prong of *Gingles* can only be shown by demonstrating that one minority group, either blacks or Hispanics, must comprise a majority in a single-member district, or whether such groups may be combined. While the Supreme Court has not resolved this question, the Fifth Circuit has done so and has determined that minority voters may be combined to meet the first Gingles precondition. For example, in *Westwego Citizens for Better Government v. City of Westwego,* 906 F.2d 1042, 1046 (5th Cir. 1990) (*per curiam*), the Fifth Circuit recognized that "[m]inority voting-age population data, minority voter registration data and evidence of success by minority preferred candidates is relevant to the first Gingles factor." The Fifth Circuit also observed "[t]he appropriate method of establishing the

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members of a racial group against the rights of other members of that group." *LULAC*, 548 U.S. 399, 437. In other words, the proportionality inquiry does not allow a State to remedy vote-dilution injuries suffered by minorities in one part of a State simply by creating a majority-minority district elsewhere in the State.

[19] Before the *LULAC v. Perry* and *Bartlett v. Strickland,* 129 S Ct 1231 (2009) decisions, a few lower courts had used the overall minority population in assessing the first *Gingles* prong *See, e.g., New Rochelle Voter Defense Fund v. City of New Rochelle,* 308 F. Supp. 2d 152 (S.D.N.Y. 2003). The Supreme Court has not directly resolved which population base should be used in measuring proportionality in a Section 2 claim.

first *Gingles* factor is a 'matter of fact' which the plaintiff must prove, but there is no 'uniform method.'" Id. at 1046-47 (quoting *Brewer v Ham*, 876 F.2d at 452). See also Perez v. Pasadena ISD,

The Fifth Circuit decision in *Westwego* also noted the resolution of the first *Gingles* factor "depends upon a searching practical evaluation of the 'past and present reality' [and] a 'functional' view of the political process." *Id.* at 45, 106 S.Ct. at 2764 (citations omitted)." Because of frequent difficulties of proof and in light of the fact that vote dilution cases often become "prohibitively expensive," the Court espoused a "flexible, fact intensive test." *Id*. at 46, 73, 106 S.Ct. at 2764, 2778; see also *Citizens for a Better Gretna*, 834 F.2d at 502 (*Gingles* "suggests flexibility in the face of sparse data."). Similarly, in *Campos v. City of Baytown*, 113 F.3d 544, 547 (5th Cir. 1997), the Fifth Circuit held that minority groups may be aggregated for purposes of asserting a Section 2 violation. See also, *Brewer v. Ham*, 876 F.2d 448, 452 (5th Cir. 1989).

Perez v. Pasadena ISD, 751 F.2d1472 (5th Circuit 1999), is not to the contrary. First, the decision in *Perez* did not overrule *Campos*, *Brewer* or *Westwego*. Second, Perez was not a coalition case; it involved the questions of whether Latinos alone could establish that they constituted greater than 50% of the citizen voting age population in a hypothetical single-member district. Third, plaintiffs were unable to make this showing in *Perez* because their proof was simply that the Hispanic population represented a growing, but not the actual, percentage of the total population in the district, and that Hispanic candidates had succeeded in similar districts, not the hypothetical district they had drawn.

Here, the demonstration districts drawn by plaintiffs in North Texas (Dallas-Tarrant County area) show that minority voters combined exceed 50% of the citizen voting age population and would provide an effective opportunity for Latino and African-American voters to elect their preferred candidate of choice. Such coalition districts can be used to establish the first prong of *Gingles*.

2. Plan C185 Violates *Shaw v. Reno* and Its Progeny

In 1993, in *Shaw v. Reno*,[20] the Supreme Court created a new constraint on the redistricting process, declaring that the excessive and unjustified use of race in redistricting is prohibited by the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court has phrased the test for a plaintiff bringing a *Shaw* claim in a number of different ways. In 1995, in *Miller v. Johnson*,[21] the Court struck down a Georgia districting plan on the ground that race had been "the *predominant factor* motivating the legislature's decision to place a significant number of voters within or without a particular district."[22] That conclusion will generally follow, the Court explained, where "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations."[23] The test thus requires a court to determine, and then compare, how much the state legislature considered race and how much it considered "traditional race-neutral districting principles." Only if the former considerations outweighed the latter is the district presumptively unconstitutional under the *Miller v. Johnson* test.

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20 509 U.S. 630 (1993).
21 515 U.S. 900 (1995).
22 *Id.* at 916 (emphasis added).
23 *Id.*

One year later, Justice O'Connor reaffirmed that test, but explained it in slightly different terms: "[S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. . . . Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race" is the district presumptively unconstitutional.[24]

District shape is one of the principal categories of evidence upon which courts have relied in determining the role that race played in redistricting. The Supreme Court opinions in this area are replete with descriptions of "finger-like extensions," "serpentine district[s]," "narrow and bizarrely shaped tentacles," "hook-like shape[s]," "spindly legs," and "ruffled feathers," to name just a few. As the Supreme Court explained in *Shaw v. Reno* itself, "reapportionment is one area in which appearances *do* matter."[25]

Here the shape of the congressional districts contain "finger-like extensions," "serpentine district[s]," "narrow and bizarrely shaped tentacles," "hook-like shape[s]," "spindly legs," and "ruffled feathers," These descriptions could easily be used to describe the 6th, 12th and 26th districts in Dallas-Tarrant County region, for example. See pp. 8-11, *supra*. The same could be said of the 18th and 29th congressional districts. See Quesada Ex. 19, 24, 32, 28, 36 for silhouettes of these districts illustrating these bizarre shapes. A "bizarre" or "irregular" shape, in conjunction with certain racial and population-density data, may be "persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." Miller v. Johnson, 515 U.S. 900, 913 (1995)

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24 *Bush v. Vera*, 517 U.S. 952, 993 (1996) (O'Connor, J., concurring).

25 *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

Moreover, if one overlays the congressional district boundaries onto a map that is shaded for black and Hispanic population concentrations, it is clear that race drove the process in creating these districts and that racial considerations subordinated traditional redistricting principles such as compactness, protecting communities of interest, and respecting political subdivision lines. For example, as noted above (see page 11-12), the

> "District 26 lightning bolt extends southward from Denton County in a narrow path until it reaches the heavily Hispanic neighborhoods in Fort Worth's historic North Side where it immediately widens to encompass virtually every heavily Hispanic neighborhood north of downtown Fort Worth. The lightning bolt then narrows dramatically and juts to the west skirting around African-American neighborhoods to the east but picking up a narrow band of growing Hispanic precincts in the Lake Como area of Fort Worth. Then, the lightning bolt appendage widens and plunges southward to pick up the largest concentration of Hispanic voters south of downtown Fort Worth. By carefully attaching Hispanic voters to Anglo-dominated District 26 and African-American voters to Anglo-dominated District 12, the State has destroyed any ability of minority voters to unite with other Hispanics or African-Americans, as individual ethnic groups or as a coalition, to elect their candidate of choice. Quesada Ex. 24-27and 32-35.

Another example is the minority communities in Travis County, where the minority communities are split among several districts and breaking apart the coalition of minority voters who live there. Plan C158 is replete with such examples of where parts of Latino and African-American communities were consciously scooped up and placed in Anglo-controlled districts to a level where they could not threaten an Anglo incumbent's re-election chances. In other instances, minority voters were taken and packed into an already effective minority opportunity district where their votes would be wasted and unable to be effective in an adjoining district. This type of packing occurred in CDs 18 and 30, for example, among others. Assigning voters to districts on the basis of race and ethnicity in these ways violates the United States Constitution, and is an excessive and unjustified use of race under the *Shaw v. Reno* line of cases cited above.

CONCLUSION

For the reasons set forth above, this Court should declare the current benchmark congressional map (C100) unconstitutional under Article 1, Section 2 of the United States Constitution. Further, the Court should declare that Plan C185 is legally unenforceable because it has not received the requisite preclearance under Section 5 of the Voting Rights Act. Finally, if preclearance of the congressional plan is forthcoming, this Court should declare the plan in violation of Section 2 of the Voting Rights Act, and the Fourteenth Amendment to the United States Constitution. In any event, this Court should order a remedial plan into effect that meets the requirements of the United States Constitution and federal law.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2011, I served a copy of the foregoing Post-trial Brief on counsel who are registered to receive NEFs through the CM/ECF system. All attorneys who have not yet registered to receive NEFs have been served via first-class mail, postage prepaid and addressed as follows:

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