Nos. 11-713, 11-714, 11-715

In the Supreme Court of the United States

RICK PERRY, GOVERNOR OF TEXAS, ET AL., *Appellants*

v.

SHANNON PEREZ, ET AL., *Appellees.*

RICK PERRY, GOVERNOR OF TEXAS, ET AL., *Appellants*

v.

WENDY DAVIS, ET AL., *Appellees.*

RICK PERRY, GOVERNOR OF TEXAS, ET AL., *Appellants*

v.

SHANNON PEREZ, ET AL., *Appellees.*

On Appeal from the United States District Court for the Western District of Texas

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BRIEF OF CONGRESSMAN CANSECO AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the Honorable Francisco "Quico" Canseco respectfully submits this brief *amicus curiae* in support of Appellants (the "State").[1] Congressman Canseco represents Texas' 23rd congressional district ("District 23"), one of only two congressional districts identified by the U.S. Department of Justice ("DOJ") as objectionable. JA 616-620. He is also the co-sponsor of Plan C216,[2] the interim congressional plan submitted to the lower court that Fifth Circuit Judge Jerry Smith endorsed for the 2012 elections. Based on the above, *amicus* has a direct and vital interest in the issues presented to this Court.

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[1] Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this brief and the consent letters are on file with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, Congressman Canseco affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party, other than *amicus curiae* and its counsel have made a monetary contribution to the preparation or submission of this brief.

[2] See Appendix. Detailed reports and an interactive map are available at http://gis1.tlc.state.tx.us by selecting "Exhibits for *Perez* et. al" and then "Plan C216 Canseco-Cuellar Bipartisan Interim Proposal."

SUMMARY OF THE ARGUMENT

Amicus seeks to assist the Court in three unique respects:[3]

First, Congressman Canseco represents District 23, and he is well-equipped to detail how the district court majority made drastic changes to that district without any justifiable legal basis. This analysis is vital given the prominent role District 23 has played in these proceedings and because neither party addresses, in detail, the effect of the district court's interim plan for the 2012 congressional elections (the "Interim Congressional Plan") on any particular district.

Second, Congressman Canseco is the co-sponsor of Plan C216, the interim congressional plan endorsed by Judge Smith. JA 151-152. If the Court vacates the Interim Congressional Plan and does not remand with instructions to impose the State's Plan *in toto*, then the boundaries proposed in Plan C216 could be highly instructive when fashioning an appropriate remedy under severe time constraints.

Finally, Congressman Canseco uses this brief to discuss deficiencies of the Interim Congressional Plan that the State did not address or brief fully in its Opening Brief.

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[3] This brief is limited in scope to the interim redistricting plan for congressional elections; however, it inevitably raises issues and makes arguments that are also applicable to the Court's consideration of the interim legislative plans.

ARGUMENT

The district court clearly erred by refusing to grant *any* deference to Texas' legislatively enacted congressional map. Without making any finding of an actual or likely violation of law, the court simply redrew Texas' election maps based on its own notions of "neutral principles," the "collective public good," and "fairness and impartiality." JA 170–71. By so doing, the district court "broadly brush[es] aside state apportionment policy without solid constitutional or equitable grounds for doing so." *Whitcomb v. Chavis*, 403 U. S. 124, 160-161 (1971).

I. In Drawing District 23, The District Court Modified The District Without Legal Justification

A. The State's Plan Took A Court-Drawn Latino Opportunity District And Made It More Latino

Since 1991, District 23 has run along the majority of Texas' border with Mexico and has been one of the largest congressional districts, by physical size, in the United States. Despite its size, District 23 has not had an urban center, abutting the city of El Paso (historically included within District 16) in the west and the city of San Antonio (Districts 20, 21, and 28) in the east.

Notably, the current boundaries of District 23 are of recent vintage, the direct result of a court-ordered redrawing following this Court's decision in *LULAC v. Perry* five years ago. *LULAC v.* Perry, 548 U.S. 399 (2006). That case arose in part from the Texas Legislature's efforts to protect Republican

Henry Bonilla's incumbency by changing the boundaries—and hence the population mix—of District 23 in a mid-decade redistricting. In that newly drawn district, the Latino share of the citizen voting-age population ("HCVAP") had been reduced dramatically from 57.5% to 46%.

The League of United Latin American Citizens and others challenged that new plan, and this Court subsequently invalidated the drawing of District 23, finding that it diluted the voting power of Latinos in violation of Section 2 of the Voting Rights Act ("VRA"). Upon remand, the three-judge redistricting panel "ma[de] District 23 an effective Latino opportunity district, consistent with the Supreme Court's direction." *LULAC v. Perry*, 457 F.Supp.2d 716, 718-19 (E.D. Tex. 2006).

In the newly drawn district, which at the time had a 57.5% HCVAP, Democrat Ciro Rodriguez was able to defeat Bonilla in the 2006 special runoff election and easily win re-election in 2008 with 55.6% of the vote. In 2010, Congressman Canseco defeated Rodriguez with 49.39% of the vote during a "wave" election that resulted in Republicans picking up a net total of 63 seats nationwide.

Under the State's Plan, the Texas Legislature made changes to District 23 to protect the incumbent, Congressman Canseco, by including Republican-leaning areas—as is its prerogative. By all objective measures, including HCVAP, which was increased from 58.4% to 58.5%. and Spanish Surname Voter Registration ("SSVR"), which was increased from 52.6% to 54.8%, the State's Plan increased the opportunity of Latino voters to elect a

candidate of their choice. Nevertheless, as detailed next, the district court majority made significant and unjustified changes to District 23 that decreased these objective measures while increasing the political opportunities for a Democrat to be elected in the district.

B. In Drawing District 23, The District Court Made Changes For Political Gain, Not To Correct Actual Or Likely Violations Of The Law

Despite the increase in HCVAP and SSVR in the State's Plan, the district court majority nevertheless made, by its own admission, "significant changes" to District 23. JA 142. It did so without making concomitant findings of any possible violation of federal law.

The district court was correct that the changes to District 23 are "significant." District 23 in the Interim Congressional Plan has only a 61.2% population overlap with its benchmark population. Yet the district court did not provide, nor can the appellees provide, a colorable justification for disturbing 38.2% of the district. Additionally, the district court's map actually *decreased* HCVAP levels in District 23 from 58.5% to 57.3%.

Beyond these changes, which are reflected by objective criteria, the district court made the following significant compositional changes to District 23:

First, the Interim Congressional Plan unjustifiably swaps Republican-leaning Anglo voters

for Democrat-leaning Anglo voters in Bexar County.[4] While the population growth in Texas over the past decade requires some Bexar County residents to be moved out of District 23, the Court did not simply carve out the excess population necessary to accommodate this growth (if it had, then the population overlap between the Interim Congressional Plan and the benchmark would have far exceeded 61.2%). Instead, the majority "move[d] the lines by swapping Republican-leaning Anglo voters in northwest Bexar County for Democrat-leaning Anglo voters in west-central San Antonio." JA 154.

No legal principle requires a district court to swap Republican voters for Democrat voters. The majority plainly subrogated political affiliation for legal reasoning while radically altering the Texas political landscape, eliminating core constituencies from Districts 20 and 23, and severing a large number of citizens' historical ties to their current congressional districts.

Second, the interim map places Democrat-voting Maverick County wholly within District 23. If Maverick County was to be made whole, placing it within District 28 was the more logical choice given the significant population growth in the San Antonio and El Paso areas, both of which already comprise a

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[4] In the benchmark map, the area north of Loop 1604 between State Highway 16 and U.S. Highway 281 in Bexar County (a Republican-leaning area) is in District 23, whereas the area of west-central San Antonio east of Loop 1604 and south of State Highway 16 (a Democrat-leaning area) is in District 20.

significant portion of District 23. Moreover, the inclusion of Maverick County in District 28 would promote the preservation of communities of interest because Eagle Pass, the only incorporated city in Maverick County, shares more commonalities with the neighboring border city of Laredo than the sprawling urban areas of San Antonio or El Paso. Again, no *legal* justification exists for this change—the change results only in an increase in Democratic votes in District 23.

Third, the interim map unjustifiably severs the El Paso community of interest while encroaching District 23 into historical sections of District 16. JA 154.[5] In the benchmark, 100% of the city of El Paso and 95% of El Paso County are in District 16, with only the remaining 5% of El Paso County in District 23. While the population growth in El Paso County over the past decade requires approximately 8% of El Paso County to be moved from District 16 to District 23,[6] the district court could have accommodated this population growth in District 23 by (1) maintaining the 5% of El Paso County that is currently in the district and (2) simply carving out

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[5] The district court attempted to justify its modifications by arguing that the interim map (i) kept HCVAP above 50%; (ii) did not decrease SSVR; and (iii) did not lower performance. Instead, the district court argued that its District 23 was an effort to "generally maintain[] the status quo." JA 139. The district court's justifications might be acceptable if it were sitting as the Texas Legislature in the first instance, but they cannot justify a *departure* from the policy choices made by the Legislature as represented in the either the enacted plan or, alternatively, in the benchmark plan.

[6] JA 141-142. *See also* MJA 6.

the additional 8% from District 16 without severely encroaching on the city of El Paso. Rather than utilizing this simple draw that closely adheres to the benchmark's boundaries, the district court unnecessarily split the city of El Paso between Districts 16 and 23.[7]

Thus, the district court majority made several material modifications that could substantially increase the probability of a Democratic candidate winning an election. As Judge Smith recognized, such extreme modifications were not required by any applicable legal authority or by the facts before the court:

> In District 23, Plan C220 decreases the HCVAP from 58.5% in the enacted plan to 57.3%. Yet the court redraws the district to ensure that it qualifies as a Latino opportunity district, relying on "performance" (i.e., probability of electing a Democrat) rather than HCVAP as the factor defining a Latino opportunity district. Ironically, the court increases the "performance" of this Latino district by making it less Latino—doubling the black population and trading Republican-leaning Anglos for Democratic-leaning Anglos. The contradiction that decreasing HCVAP makes a district more Latino demonstrates the

[7] Both the State's Plan and Plan C216 split a small portion of the city of El Paso along the Texas-Mexico Border, but both plans take the smallest portion possible (by both population and geography) to reach zero deviation.

> error in using "performance" as the defining factor of a Latino opportunity district.

JA 153. The district court's draw of District 23, like the map as a whole, is not supported by any colorable legal or factual claim and should be vacated.

II. Plan C216 Is Highly Instructive For Districts Where Actual Or Likely Violations Must Be Remedied

Amicus agrees with the State that this Court should vacate the Interim Congressional Plan and remand to the district court with instructions to impose Texas' legislatively enacted map as the interim plan while preclearance is pending. If this Court determines that the State's Plan cannot be adopted on an interim basis, however, then Plan C216 will aid the Court with fashioning an appropriate remedy under severe time constraints. Specifically, the proposed boundaries contained in Plan C216 would be highly instructive for determining relevant changes to districts where there may be findings of actual or likely constitutional or statutory violations.

Since Judge Smith endorsed Plan C216, the district court majority found it necessary to attack it as being "largely driven by political ambition." JA 148. This criticism is both ironic and incorrect. This Court has held that use of political considerations for redistricting is a non-justiciable political question. *Vieth v. Jubelirer*, 541 U.S. 267 (2004). As shown above, the Interim Congressional Plan emphasizes partisan performance over VRA and Constitutional

considerations. The irony of the district court's criticism, of course, is the fact that the Interim Congressional Plan is the only map discussed herein that decreases HCVAP in District 23 from the benchmark. In contrast, Plan C216 actually *increases* the HCVAP in District 23.

The majority also criticized Plan C216 as a "thinly disguised version of the State's unprecleared plan." JA 149. *Amicus* does not dispute that Plan C216 defers to the State's Plan in districts that were not the subject of plaintiffs' objections. In doing so, it is Plan C216, rather than the Interim Congressional Plan, that adheres to this Court's precedent. *See Upham v. Seamon,* 456 U.S. 37, 43 (1982).

To be clear, *amicus* does not submit this brief to argue for the wholesale adoption of Plan C216.[8] It was created with Democratic Congressman Cuellar as a bipartisan compromise to "assist the [district] Court in its efforts to prepare a possible interim plan that may be implemented as a fair and workable alternative." Plan C216 modifies the State's Plan to address specific objections made by plaintiffs and makes other concessions in an effort to obtain bipartisan support, not because their claims were legally valid. As such, Plan C216 suffers from the same deficiency as the Interim Congressional Plan in that it does not limit modifications to specific, identifiable violations of law.[9] Nevertheless, because

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[8] *Amicus* does not believe that any aspect of the State's Plan is unconstitutional.

[9] Plan C216 was originally created and submitted to the lower court to "assist the Court in its efforts to prepare a possible interim plan that may be implemented as a fair and workable

Plan C216 gives deference to the State's Plan while attempting to address objections made by plaintiffs, it offers a practical template from which the Court (and the district court) can prepare an interim map for the 2012 elections. JA 152 ("Although far from perfect, [Plan C216] goes a long way toward achieving a fair and legally defensible plan for the 2012 elections.") (Smith, J., dissenting).

Plan C216 made the following modifications, among others, to the State's Plan:

A. Plan C216 Makes Maverick County Whole

The State's Plan split Maverick County between Districts 23 and 28, which was a significant source of contention for the appellees. In order to address this concern, Plan C216 places Maverick County wholly within District 28 for the two reasons discussed *infra*: (1) the inclusion of Maverick County in District 28 is a logical result of the significant population growth in the San Antonio and El Paso areas; and (2) the inclusion of Maverick County in District 28 promotes the preservation of communities of interest because Eagle Pass, the only incorporated city in Maverick County, shares more commonalities with the neighboring border city of Laredo than the sprawling urban areas of San Antonio or El Paso.

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alternative," which is a different procedural posture than "addressing likely constitutional or statutory infirmities."

B. Plan C216 Makes Harlandale Independent School District Whole

The State's Plan split Harlandale Independent School District in San Antonio into Districts 20, 23, and 35. In order to address this concern, Plan C216 places Harlandale Independent School District wholly within District 23.

C. Plan C216 Places Downtown San Antonio in Bexar County Back Into District 20

The State's Plan moved the downtown core of the city of San Antonio from District 20 into the newly created District 35. The incumbent congressman in District 20, in particular, objected to moving this area out of its historic district. In contrast, Plan C216 maintains more of the downtown core of San Antonio, including the Alamo and the San Antonio Federal Complex, in District 20.

D. Plan C216 Splits Nueces County While Maintaining A Community Of Interest

The State's Plan places Nueces County wholly within District 27. Plan C216 splits Nueces County between Districts 25 (more analogous to District 27 in the State's Plan) and 27 (more analogous to District 34 in the State's Plan), but keeps the city of Corpus Christi whole in order to maintain that community of interest.[10]

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[10] In contrast, the Interim Congressional Plan splits the city of Corpus Christi as well as the Port of Corpus Christi.

E. Plan C216 Adds A New Coalition District In The Dallas-Fort Worth Area

During trial, plaintiffs expressed concern that no coalition district was created in the Dallas-Fort Worth area. While section 2 of the VRA does not require the State to create a multi-racial coalition district when no single, geographically compact minority group is large enough to make up a majority of the district,[11] Plan C216 creates a new coalition district in this area in which Latinos and African Americans combine to make up 79.1% of the voting age population.[12] *See Bartlett v. Strickland*, 129 S. Ct. 1231, 1243 (2009) ("Nothing in § 2 grants special protection to a minority group's right to form political coalitions.").

III. The District Court's Other Errors

The parties devote substantial discussion to the various infirmities and strengths of the Interim Congressional Plan and the district court's

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[11] The creation of this coalition district was included in Plan C216 despite Congressman Canseco's strong contention that the State's Plan complies with all constitutional requirements and laws *even in the absence* of a new coalition district in the Dallas-Ft. Worth area. *See* JA 152, ("Plan C220 creates District 33 as a new "coalition" district, yet as even some of the plaintiffs recognize, there is no evidence of voting cohesion, heightened or otherwise, among Latino, Black, and Asian minority groups so as to justify creation of a coalition district, even if such districts could be created by a court. Latinos and Blacks do not vote cohesively in the Democratic primaries in the area of proposed District 33.") (Smith, J. dissenting).

[12] While Latinos comprise 61.3% of the voting age population in the proposed district, the HCVAP is only 39.5%.

underlying order. However, *amicus* offers the following analysis to further highlight the deficiencies of the Interim Congressional Plan.

A. The District Court Did Not Justify Its Failure To Provide Findings To Support Equitable Relief

In entering equitable relief, the district court failed to provide any guidance within its order as to the decisions it was making and affirmatively refused to engage in the prerequisites for imposing preliminary relief. As the State makes clear, the district court's rule—which eschews any analysis of the merits of the underlying claims in exchange for sweeping relief—is in fatal tension with this Court's precedents requiring a party to meet the traditional four-factor test for equitable relief. Appellants Br. 50-52; *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010) ("An injunction should issue only if the traditional four-factor test is satisfied."); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 29 (2008); *eBay Inc. v. MercExchange, L.L.C.* 547 U.S. 388, 391 (2006).

Not discussed in the State's Opening Brief is the district court's failure to follow the Federal Rules of Civil Procedure, which apply equally to lawsuits alleging violations of the VRA or the Constitution as they do to any other suit brought in federal district court. *Georgia v. Ashcroft*, 539 U.S. 461, 476 (2003) ("Section 5 does not limit in any way the application of the Federal Rules of Civil Procedure to this type of lawsuit."). By failing to include the findings and conclusions justifying the issuance of the injunction, the district court's order runs afoul of Federal Rule

52(a) (requiring a court to "state the findings and conclusions that support" its interlocutory injunction) and Rule 65(d) ("Every order granting an injunction . . . must (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail . . . the act or acts restrained or required.").[13] This makes meaningful review nearly impossible. This, too, is reversible error.

The district court proffered three justifications for its failure to abide by traditional equitable considerations: (1) no motion for a preliminary injunction was on file; (2) factual findings would intrude on the preclearance process; and (3) that analysis would stretch judicial resources. The State adequately discusses the fallacies of the district court's second[14] and third[15] justification. Appellants Br. 50-52.

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[13] Although there is some interplay with Federal Rule 65 and the powers granted to three-judge panels pursuant to 28 U.S.C. § 2284, they are not in conflict. Indeed, 28 U.S.C. § 2284 also requires specific findings based on evidence submitted before temporary equitable relief is afforded. *Id.* ("[A single judge] may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted. . . .").

[14] The State adequately discusses the failure of the district court's second justification: that a preliminary decision on the merits would intrude on the preclearance process. JA 93-94. Additionally, *amicus* would point out that while the district court has no jurisdiction over Section 5 proceedings, *United States v. Bd. of Supervisors of Warren County, Miss.*, 429 U.S. 642, 646 (1977), factual findings or legal conclusions as to Section 2 or other constitutional claims have no necessary bearing on the Section 5 preclearance proceeding in front of the

Unaddressed is the first stated justification: the district court's contention that the failure to have a pending motion for a preliminary injunction eliminated the court's need to follow standards accompanying preliminary injunctive relief. JA 96-100. This contention suffers from multiple defects. *First*, this fails as a matter of procedure: no motion is required by the Federal Rules to order injunctive relief—only notice to the affected party and an opportunity to defend against its issuance. Fed. R. Civ. P. 65(a); *Cannon v. U.S. Acoustics Corp.*, 532 F.2d 1118, 1120 (7th Cir. 1976) (rejecting argument that injunction was invalid because it was not made in response to a motion). *Second*, it fails as a matter of fact: the plaintiffs requested a preliminary injunction in their various complaints while specifically requesting the drawing of an interim electoral map. *Perez* Complaint (Doc. 1) at 4; *NAACP* Complaint (Doc. 69) at 11; *MALC* Second Amended Complaint (Doc. 50) at 18. *Third*, it fails as a matter of logic: the implication of a true procedural deficiency would prohibit the district court from

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D.C. Circuit Court. *See Georgia v. Ashcroft*, 539 U.S. 461, 477-78 (2003) ("Section 5 of the Voting Rights Act has a limited substantive goal . . . no matter how unconstitutional it may be, a plan that is not retrogressive should be precleared under § 5.").

[15] The State adequately addresses the incongruity of the district court's attempt to avoid stretching judicial resources too thin by consciously ignoring avenues that would *reduce* the burden on the court. *Amicus* would add that the district court's decision was also odd because it eschewed an application of law to facts—an analysis that a court is inherently equipped to handle—for a political inquiry that, to say the least, is not within the court's traditional skill set.

entering injunctive relief *at all*, not render a party's burden to achieve relief superfluous. The district court had the implication exactly backwards. *Finally*, the argument fails as a matter of common sense: the district court's proposed rule would put the power to avoid the burdens of equity in the hands of the party seeking preliminary relief. No plaintiff challenging a newly enacted electoral map would file a formal motion for a preliminary injunction while knowing that the combination of upcoming elections and a delayed preclearance proceeding could allow the plaintiff to avoid its burden. This cannot be so.

B. The District Court Made Unnecessary Modifications To Districts 10, 27, 31, And 34

In failing to provide any deference to the State's Plan, the district court ignored countless policy decisions made by the Texas Legislature after careful discussions and input among stakeholders. Those decisions reflected the myriad interests of thousands of communities and took into account historic representation, commonality of interests, closeness of geography, and other similar factors. The district court was in no position to have knowledge of those interests, nor is it in a better position to supplant the multitude of decisions with its own notions of the "collective public good." By creating an interim map from whole cloth without knowledge or deference to the Texas Legislature, the district court has recklessly split cities, counties, and school districts from their traditional bases of support.

Below, *amicus* outlines some of the practical effects that the Interim Congressional Plan will have on various communities in Texas contained within Districts 10, 23, 27, 31, and 34 of the Interim Congressional Plan and on the general election as a whole.[16]

1. Districts 10 and 31

The city of Round Rock and Williamson County, both near the city of Austin, have been in District 31 since 1996.[17] Nevertheless, the Interim Congressional Plan splits these communities into Districts 10 and 31 even though neither DOJ nor any plaintiff in the lower court action entered an objection to the configuration of either district.[18]

2. District 27

The city of Corpus Christi (Nueces County) and Nueces County have anchored District 27 since its inception in 1982. The Interim Congressional Plan fractures Nueces County into two congressional districts, neither of which will be anchored in the

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[16] The districts listed and discussed herein are representative, not exclusive, instances of the district court's unnecessary modifications to the State's Plan.

[17] These areas include Round Rock West, the Oaklands, portions of Brushy Creek MUD, Fern Bluff MUD, Avery Ranch, Milwood, the city of Cedar Park, and the city of Leander.

[18] Similarly, neither the United States nor any plaintiff in the lower court action has entered any objection to the configuration of the area generally covered by District 34 in the Interim Congressional Plan. Yet it fractures the communities of Spring Cypress and Tomball in Harris County between Districts 10 and 34.

county. Moreover, Corpus Christi and Nueces County will be the largest Texas city and county, respectively, that do not anchor their own congressional district. JA 152.

The Port of Corpus Christi is split three ways in the Interim Congressional Plan and is now a part of Districts 27, 34, and 15. The new District 27 is anchored in Brownsville, the home of a competing port. District 34 is anchored in Harris County, the home of the competing Port of Houston. District 15, an inland district, is anchored on the Texas-Mexico border and has no coastal interests whatsoever. The conscious (or unconscious) splitting of the Port of Corpus Christi three ways is another cautionary example of the dangers caused by a judicial panel substituting its own political judgment for that of the Texas Legislature, which is eminently more knowledgeable and qualified to make such decisions.

3. District 34

The Interim Congressional Plan includes two examples of water-only contiguity in District 34.[19] Contiguity has long been a requirement in congressional apportionment. *See* Apportionment Act of 1842, 5 Stat. 491 (providing that Representatives must be elected from single-member

[19] Nueces and Aransas counties are linked via the intercoastal waterway and barrier islands only, as are Aransas County and Calhoun County. The two examples of water-only contiguity in the Interim Congressional Plan are not even functionally contiguous, as they have no ferry service or bridges linking the two separated areas, making it impossible for Congressman Blake Farenthold to reach the rest of his district outside his home county except by boat via the Gulf of Mexico.

districts "composed of contiguous territory."); Apportionment Act of 1862, 12 Stat. 572; Apportionment Act of 1872, 17 Stat. 28, § 2. While water-only contiguity has been used before in extreme cases, it is disfavored. *See Larios v. Cox,* 300 F. Supp. 2d 1320, 1350 (N.D. Ga. 2004) (criticizing water contiguous and point contiguous districts as "marginally contiguous"). It surely has no place in a court-drawn plan.

C. The Interim Congressional Plan Contains Unlawful Population Deviations

The Interim Congressional Plan has a top-to-bottom population deviation of 794 persons (.11%), an average deviation of 148 persons between congressional districts. While small, these deviations are unacceptable for a court-drawn plan. *See Karcher v. Daggett*, 462 U.S. 725, 731-734 (1983) ("Adopting any standard other than population equality . . . would subtly erode the Constitution's ideal of equal representation."). The district court attempts to justify its population deviations by "exigent circumstances" and a desire to avoid precinct splits. JA 150. This argument falls flat.

The district court had multiple zero-deviation plans before it to choose from, including Plan C216, as viable options for interim plans. With the modern redistricting software at the district court's disposal, which easily locates the appropriate blocks to achieve zero deviation, a lack of time is not a legitimate justification for the population deviations contained in the Interim Congressional Plan. Moreover, many Texas counties had already changed

their precinct lines—and precleared those changes—to match those in the State's Plan before the district court released the Interim Congressional Plan. The adoption of this plan, therefore, forced these counties to change their adopted precincts yet again while the district court provided faint justification for maintaining whole precincts.

D. The District Court's Interim Plan Added Coalition Districts In A Misguided Effort To Achieve Proportionality That Was Already Present In The Enacted Plan

The district court incorrectly concluded that the number of Latino opportunity districts in the enacted plan were not reflective of statewide Latino population growth. JA 173. It is undisputed that minority population growth, especially in the Latino community, accounted for much of the population increase in Texas over the past decade. Specifically, the Latino population in Texas grew by 2,791,255 and the African-American population grew by 522,570, while the Anglo population increased by fewer than 465,000 people. JA 133. However, because the bulk of that growth has been in either non-citizen Latinos or those younger than voting age, the growth in total Latino population is not reflected in the HCVAP or in its subset, SSVR. Thus, Texas had a statewide SSVR of 19.5% in 2000 and 21.6% in 2010, an increase of only 2.1% over the last decade.

Nevertheless, the district court conflated large Latino total population growth with the small growth in eligible Latino voters and sought to draw a

certain preordained number of new Latino opportunity districts—even to the extent of drawing so-called coalition districts in which Latinos do not comprise the majority of the citizen voting age population, in proportion to Latinos' share of the total population. They did this despite the fact that 8 of the 36 districts in the State's Plan, or 22%, are Latino opportunity districts. This percentage is directly proportional to the HCVAP in the state of Texas, despite the fact that the VRA expressly does not provide any basis for proportional representation. *See* 42 U.S.C. § 1973(b). Regardless, the district court wrongly applied *both* the facts and the law in a failed attempt to achieve its own goals with regard to proportionality.

CONLUSION

Amicus respectfully requests that this Court vacate the Texas district court's interim redistricting plan for congressional elections in 2012 and remand with instructions to impose the State's Plan *in toto* on an interim basis. If the Court vacates the Interim Congressional Plan but determines that the State's Plan cannot be adopted *in toto* on an interim basis, then *amicus* urges the Court to use the proposed boundaries in Plan C216 as a practical template from which it can provide specific instructions for the drawing of a new interim map. This guidance will help ensure that the district court does not make the same errors on remand.

Respectfully submitted,

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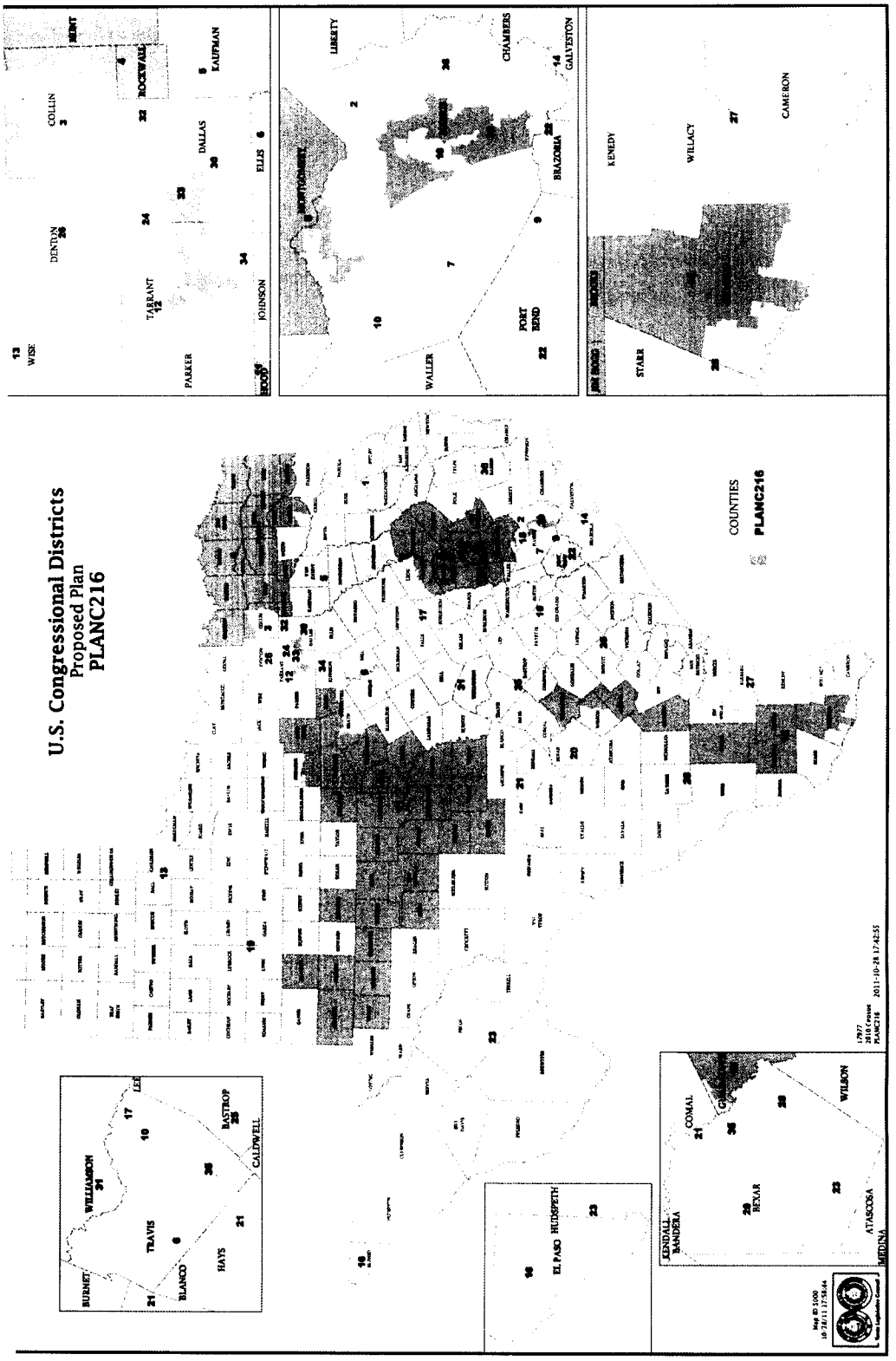
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