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

SHANNON PEREZ, et al., Plaintiffs	§	
and	§	
EDDIE BERNICE JOHNSON, et al.,	§	CIVIL ACTION NO. 11-CA-360 OLG-JES-XR (Lead Case)
TEXAS CONFERENCE OF NAACP BRANCHES, et al., Plaintiff-Intervenors	§	
v.	§	
STATE OF TEXAS, et al., Defendants	§	

MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), Plaintiff	§	
And	§	
THE HONORABLE HENRY CUELLAR, Member of Congress, CD 28,	§	CIVIL ACTION NO. 11-CA-361 OLG-JES-XR [Consolidated Case]
And	§	
THE TEXAS DEMOCRATIC PARTY, et al.	§	
And	§	
LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), et al., Plaintiff-Intervenors	§	
v.	§	
STATE OF TEXAS, et al.,	§	

Defendants	§	
TEXAS LATINO REDISTRICTING TASK FORCE, et al., Plaintiffs	§	
v.	§	CIVIL ACTION NO. 11-CA-490 OLG-JES-XR
RICK PERRY, in his official capacity as Governor of the State of Texas, Defendants	§	[Consolidated Case]
MARGARITA QUESADA, et al., Plaintiffs	§	
v.	§	CIVIL ACTION NO. 11-CA-592 OLG-JES-XR
RICK PERRY, et al., Defendants	§	[Consolidated Case]
EDDIE RODRIGUEZ, et al., Plaintiffs	§	
v.	§	CIVIL ACTION NO. 11-CA-635 OLG-JES-XR
RICK PERRY, et al., Defendants	§	[Consolidated Case]

PLAINTIFF MALC'S REPLY TO DEFENDANTS' POST TRIAL BRIEF

Plaintiff MALC submits this brief in reply to Defendants' Post Trial Brief because the State makes a number of misstatements and mischaracterizations of the law, the facts, and the claims of the Plaintiff in this case, regarding the legal issues before this Court.

For instance, with regard to Plaintiff MALC's Texas House one person, one vote claim, the State fails to offer any non-discriminatory justification for its lack of effort to achieve equal population between districts. Instead, the State cherry picks the portions of case authority that

describes the sort of discretion jurisdictions possess to vary from simple population equality (all allowing some variance from population equality when the State is attempting to advance legitimate state redistricting goals) and relies on a presumption of validity when deviations stay below 10%. In doing so, the State simply ignores the un-rebutted evidence of intentional manipulation of population variances for racial and political gain. The evidence presented here clearly was substantial and sufficient to defeat any presumption of validity. The State's failure to address Plaintiff's evidence thus places the State in the position of seeking from this Court its approval of the "safe harbor" theory, specifically rejected by the United States Supreme Court in *Cox v. Larios*, 542 U.S. 947, 949-50 (2004)

In addition, the State mischaracterizes MALC's claim, asserting that MALC principle complaint is that population deviations primarily disadvantage Democratic voters. Yet, MALC specifically focused on the impact of deviation disparities on Latino voters, although the evidence showed partisan motives behind the population variances as well.

With regard to Plaintiff's claims under Section 2, the State misstates the law and mischaracterizes the evidence presented. For example, the State's post trial brief is internally conflicted. In one section of the brief, the State argues that Plaintiff's *Gingles I* proposed district in El Paso is improper because it would provide El Paso Latino voters greater than proportional representation in El Paso. At the same time, the Defendants also argue in a different section of their brief, that the issue of proportionality must be evaluated on a State-wide basis, not on a county by country manner. The State also seems to argue that Section 2 of the Voting Rights Act can only be read to prohibit intentional discrimination, in order to remain constitutional. Yet, such a reading of Section 2 flies in the face of the very reason it was amended in 1982: to

allow a claim under section to challenging election practices that have the effect of discriminating against minority voters.

Finally, with regard to the claims of intentional discrimination, the State simply ignores the objective *Village of Arlington Heights* and *Garza v. Los Angeles County* evidence of intentional discrimination presented by Plaintiff's witness and the analysis of its expert, to assert that no such purpose was present in the creation of H283 and C185.

On each of these issues the State is wrong.

One Person, One Vote – Texas House of Representatives

Defendants rely substantially on the notion that the State's plan enjoys a presumption of compliance with one person, one vote because the top to bottom deviation does not exceed 10%. State's Post Trial Brief (herein after, State's Brief) pp. 51-54. The Defendants, however, do not enjoy a non-rebuttable presumption on this score. *Rodriquez v. Pataki*, 308 F. Supp. 2d 346, 364 (N.D. N.Y. 2004). In *Rodriquez*, a case relied upon substantially by the Defendants, the district court explained that:

> Compliance with Brown's "ten percent rule" does not end the inquiry. There is still a question of how the "ten percent rule" dovetails with Reynolds and its progeny, which require a "good faith effort" by the state to achieve "as nearly of equal population as is practicable." Reynolds, 377 U.S. at 577. For example, a three-judge court in Hastert v. State Board of Elections, 777 F. Supp. 634, 645 (N.D. Ill. 1991), suggested that "minute population deviations remain legally significant. "The court in Corbett v. Sullivan, 202 F. Supp. 2d 972,987 n.7 (E.D. Mo. 2002) (citing Karcher, 462 U.S. at738-40), held that "even deviations smaller than the census margin of error must be the result of a good faith effort to achieve population equality." …
>
> We think that Brown, Mahan, Gaffney, and Abate v. Mundt, 403 U.S.182, 187, 29 L. Ed. 2d 399, 91 S. Ct. 1904 (1971), lend support to the proposition that the "ten percent

> rule" is not meant to protect a state that is systematically disadvantaging groups of voters with no permissible rational justification for the disproportion.

Id.

With regard to the evidence presented at trial, the Plaintiff's evidence on this score was substantial. The Defendants attempt to discount the Plaintiffs' evidence by suggesting that incumbency protection was a legitimate goal of the redistricting process and by ignoring evidence on these issues altogether. State's Brief at pp. 54-55. Thus, for example the Defendants claim that Plaintiff produced no evidence that traditional principles of redistricting such as compactness and incumbency protection did not justify the deviations in the plan. *Id.* ("The **undisputed** evidence shows, to the contrary, that the House plan approved by the Legislature was drawn with specific, legitimate goals: "to make sure that it was a member-driven process and that we paired the least number of members, while abiding with both state and federal law"; to maintain compactness and contiguity; to keep counties whole; and to preserve communities of interest." emphasis added) Yet, as noted in MALC's post trial brief, each of these claimed justifications were in fact specifically controverted using objective criteria and analysis by MALC's expert, Dr. Morgan Kousser.

Dr. Kousser examined potential non-discriminatory redistricting criteria that might explain the population variances found here. He reviewed the so called whole county rule to see if compliance with Article III, Section 26 of the Texas Constitution explained the variances found here. Tr. Vol. 1, pp. 242-244; Plaintiff MALC's Exhibit 19, p. 81-84. However, Dr. Kousser found and the record shows that large deviation variances exist even within whole counties such as Harris and Dallas, and so he concluded that population variances were not explained by attempts to comply with the Texas Constitution. Tr. Vol. 1, pp. 236-237; Plaintiff

MALC's Exhibit 19, p. 66-69. Moreover, Dr. Kousser found that the whole county rule was not evenly applied and that alternative plans with the same number of county cuts, had a lower deviation that the State's new plan. Plaintiff MALC's Exhibit No. 19, p. 81-83.

Dr. Kousser also examined whether attempts at drawing compact districts might justify the population variances found here. Tr. Vol. I, p. 242-244; Plaintiff MALC's Exhibit 19, pp. 81-84. However, as Dr. Kousser examined the various plans submitted during the legislative process, the plan adopted here was among the least compact. Plaintiff MALC's Exhibit 19, pp. 82-86. Dr. Kousser also examined whether on average the deviations in H283 were lower than other alternatives, but found that the State's new plan had larger average deviations than all but three of the eight other plans examined. Plaintiff MALC's Exhibit 19, pp. 82-83. Sometimes population variances are necessitated by the desire to keep voting precincts intact. Here, plan H283 split more precincts than any other plan examined by Dr. Kousser – 412 precinct – which should have facilitated lower population deviations and cannot justify or explain the 9.92% deviation in plan H283. Plaintiff MALC's Exhibit 19, pp. 82-83; *See also*: Tr. Vol. 3 p. 674 (Korbel testimony). Rather than being undisputed as alleged by the Defendants in their Brief, the evidence was substantial and objective in nature.

The Defendants' experts did not attempt any analysis of these issues and so it is Plaintiff's evidence that goes undisputed by any objective analysis. Rather than analyze the record, the Defendants rely only on the testimony of the State's redistricting staff that that was what they did.

The Defendants also assert that Plaintiff produced **no evidence** of systematic disparate effect on the use of the population deviation variances. State's Brief, at p. 53. On the contrary, however, the evidence was compelling and was not contradicted. The Texas House plan

systematically overpopulated Latino majority districts while under populating majority Anglo districts. Plaintiff MALC Exhibit No. 19 (Kousser Report, p. 64). Plaintiff's expert Dr. Kousser testified that of the 80 Anglo majority districts in the Texas House plan, 34 were overpopulated and 46 were under populated. *Id.* By contrast, of the 37 Latino majority districts, 22 are overpopulated and 15 were under populated. *Id.* Moreover, of the 15 Latino majority districts that were under populated in the Texas House plan, 5 are in El Paso County, where the State had no discretion but to under populate the districts. *Id.* Discounting the districts in El Paso, more than twice as many Latino majority districts were overpopulated than under populated or, stated another way, almost 70% of Latino majority districts are overpopulated. *Id.* Moreover, the Texas Legislature was aware of the systematic overpopulation of Latino and minority-majority districts since the Chairman of the Redistricting Committee was confronted during floor debate on the State House plan regarding that issue. *Id.* at 66.

The Defendants' experts did not examine the population deviations variances based on race or partisanship. Thus, the only evidence that went unchallenged on this score was Plaintiff's evidence.

Defendants also suggest that since only two of the fourteen paired incumbents in plan H283 were Democrats, and since the plan attempted to protect incumbents, no discrimination in the deviation variances was possible. State's Brief, p. 55. However, the targeting of members of one party for pairings was only one of the factors considered by the *Cox* court and certainly cannot be dispositive. Moreover, the decision to round down in Harris flies directly against any claim by the State to be acting to protect incumbents and prevent "pairing" – when two incumbents have to run against each other. By rounding down, pairing was mandated, and in this case the State choose to pair two representatives have been candidates of choice of minority

voters. Moreover, population changes almost certainly dictated the pairings of Republican House members. For instance, in Dallas County, the only Democratic districts were minority protected VRA districts. Since Dallas lost a seat, a pairing was required and the only choice was to pair two Republicans in a Republican district. In Nueces County, the State chose to eliminate a district and required a pairing. While two Republican were paired in Nueces County, the State chose to pair the only Latino Republican in the County and with an Anglo female Republican in the Latino majority district.

Finally, the Defendants argue that the protection of incumbents may justify the deviation variances. State's Brief at p. Yet, incumbency protection when used was applied unevenly and in fact done for an illegitimate purposes. In Harris County for example, the State reduced the Latino population in an emerging Latino majority district (HD 149) to make it safer for the Anglo Republican incumbent, substantially under populating the district. At the same time as a result of under populating the Anglo Republican's district adjacent Latino majority districts (HD 145 and 147) were substantially overpopulated, Tr. Vol. 7, pp. 1596-98 (Solomons' testimony). In Hidalgo County, where incumbency protection was specifically referenced as a reason for the population variances regarding Republican House member Aaron Pena, it was used as an excuse for not only severely under populating HD 41, but also dramatically and unnecessarily altering its constituency. By contrast the adjacent districts, HD 39 and 40, held by incumbent Latino Democrats, were drastically altered in geography and constituency and substantially overpopulated. Plaintiff MALC's Exhibit 19, pp.92-95 (Kousser Report); Tr. Vol. 1, pp. 246-7 (Kousser Testimony); Tr. Vol. 6 p. 1478 (Interiano Testimony)("Q. District 36 in Hidalgo County is over 4,000 overpopulated. District 39 in Hidalgo County is over 7,700 overpopulated. District 40 in Hidalgo County is over 5,800 overpopulated. And the district that you drew for Mr.

Pena, District 41, is 7,399 under populated. **Was that intentional? A. Yes, sir**.")(emphasis added)

Defendants' characterization of the evidence, description of the law and analysis of Plaintiff's one person, one vote claim is simply wrong.

Section 2 - Effect

Defendants assert that Plaintiff has failed to establish a Section 2 violation with regard to the Texas House. First, Defendants charge that Plaintiffs failed to establish legally significant racial bloc voting and because they contend that Plaintiff seeks through Section to maximize race base districts. State's Brief, p. 38. The Defendants ignore the overwhelming evidence of racial bloc voting submitted by Plaintiff MALC's expert as well as the evidence of racial bloc voting submitted by other Plaintiffs' expert. Moreover, the Defendant mischaracterizes the essence of Plaintiff's claims under Section 2 and misunderstands Plaintiff's burden under Section 2's *Gingles I* precondition.

A. Plaintiff MALC's Evidence of Racial Bloc Voting Establishes Latino and Minority Voter Cohesion and Anglo Bloc Voting to Defeat Minority Preferred Candidates

Gingles adopted a straightforward definition of racial bloc voting provided by the expert witness upon whom the district court had relied. Racial polarization or bloc voting "exists where there is a consistent relationship between the race of the voter and the way in which the voter votes ... or to put it differently, where black voters and white voters vote differently." *478 U.S. at 53, n.21* (internal quotation marks omitted). The Court's focus was twofold: to determine whether the minority group votes cohesively and "whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 56. The extent to which this bloc voting impairs the minority's ability to elect candidates of their choice, however, must be "legally significant," a sliding scale that varies with the district and a variety of factual

circumstances and may emerge more distinctly over a period of time. *Id.* While the Court offered no "simple doctrinal test for the existence of legally significant racial bloc voting," *Gingles*, 478 U.S. at 58, it urged a flexible approach, noting that the isolated success of a minority candidate in a district that usually exhibits vote polarization will not alone negate plaintiffs' showing.

In *Gingles*, the district court had relied on expert testimony offered by Dr. Bernard Grofman, who used two methods of analysis of voting patterns, "bivariate ecological regression analysis" and "homogeneous precinct analysis," also called "extreme case analysis." Bivariate ecological regression analysis determines the degree of relationship between two variables - the relationship between the racial composition in each political unit (the independent variable) and the support provided a particular candidate within that political unit (the dependent variable). *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1119 n.10 (3d Cir. 1993), *cert. denied*, 129 L. Ed. 2d 891, 114 S. Ct. 2779 (1994). In an ecological regression analysis, the correlation coefficient shows which data points fall on the straight line. The linear relationship created by the two variables ideally then will pack closely together on a line. The inferences that arise from the analysis are often graphically demonstrated by the statistical method. P's Exhibit 19, pp. 11-16 (Kousser report).

Plaintiff MALC presented evidence of racial polarized voting using the traditional statistical methods approved by the United States Supreme Court in *Gingles*. Plaintiff MALC's Exhibit 19, pp. 7-53. Dr. Kousser, Plaintiff MALC's expert reviewed a number of state-wide and local elections employing ecological regression statistical methodologies in three different ways: least squares, weighted least squares and ecological inference or King's EI. Plaintiff MALC's Exhibit 19, pp. 26-53; Tr. Vol. 1, pp. 214-217. Regardless of the method employed

Dr. Koussers' conclusion was that the data was driving the result, so regardless of the method employed the same results were achieved – elections in Texas continue to be polarized and Latinos are politically cohesive and Anglos vote sufficiently as a bloc to defeat the Latino preferred candidate in Texas General Elections. Tr. Vol. 1, pp. 217, 229, 249-250; Plaintiff MALC's Exhibit 19, pp. 26-52. Moreover, Latinos and African American voters vote together and are politically cohesive in the General Elections in Texas. Tr. Vol. I, pp. 229; Plaintiff MALC's Exhibit 19, pp. 51-52. All of the other Plaintiffs' experts on polarized voting came to the same conclusions since the results of their statistical analysis were remarkably similar.

The Defendants suggested two counter points to the evidence presented by the Plaintiffs' experts: one that levels of voting together did not approach the 90% level and therefore were not statistically significant; and two, even if they were partisan voting more clearly explained the voting behavior. Tr. Vol. 7, pp. 1796, 1846. (Alford testimony).

On the first question raised by Dr. Alford, that levels of cohesion in the 70% to 80% for Latino voters together with Anglo and non-Latino voter cohesion of 80% to 60% were insufficient to show legally significant polarized voting, he offered no scholarly support for this limit; such a limit is inconsistent with the levels of polarization found in *Gingles* and *LULAC v. Perry*; and was inconsistent with the testimony of every other expert in the case.

On the second question raised by Dr. Alford, that voting behavior had more to do with partisan voting than racial voting was not based on any empirical analysis and ignores the analysis done by Dr. Kousser that eliminated partisan voting as an explainer of voting behavior in Texas elections. Dr. Kousser examined primary elections for the existence of racial bloc voting and determined that the levels of Latino voter cohesion exceeded the Latino voter cohesion found in the General Elections, found elections in the Democratic Primary to be

racially polarized and that since all the candidates and all the voters were Democrats, partisanship simply could not explain the voting behavior. Tr. Vol. 1, p. 230; Plaintiff MALC's Exhibit 19, pp. 36-40.

The clear weight of the evidence establishes that elections in Texas continue to be polarized; that Latinos are politically cohesive and that non-Latinos and in particular Anglo voters vote sufficiently as a bloc to usually defeat Latino preferred candidates and that in General Elections Latinos and African Americans are politically cohesive. Plaintiff MALC has met its burden with regard to the three *Gingles* pre-conditions.

B. Plaintiff's *Gingles I* Districts Are Not Attempts to Secure Maximization and Are Reasonably Compact.

Defendant contends that Plaintiff's *Gingles I* districts are simply an effort to maximize race based districts at the expense of traditional redistricting principles such as the whole county line rule. State's Brief, p. 38. The Defendants' position is a straw man defense.

First, the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit have established that in order to meet its burden of a violation of Section 2, a plaintiff must first present to the court proof that a remedy is available to its claim of a violation of Section 2, i. e. that it can produce more majority minority districts than the existing plan. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1244 (2009). ("We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration"). The Court defined majority-minority district as those that contain at least a majority of minority **voting age population**. *Strickland*, 129 S. Ct. at 1242 ("In majority-minority districts, a minority group composes a numerical, working majority of the **voting age population**. Under present doctrine**, § 2 can require creation of these districts**.")(emphasis added). In the Fifth Circuit "a working majority of the voting age population" has been

determined to mean a district in which the minority group is at least 50% of the citizen voting age population of a single member district. *Valdespino v. Alamo Heights I.S.D.*, 168 F.3d 848 (5th Cir. 1999) cert. denied, 528 U.S. 1114 (2000).

Second, the State's requirement to maintain county lines where feasible does not prohibit the creation of district required by Section 2. Article III, Section 26 of the Texas Constitution cannot be used as a shield from its obligations to draw any new Latino opportunity districts that involve cutting county lines and Defendant's misconstrue the law on this point. The chairman of the Redistricting Committee, Chairman Solomons was unequivocal that in a conflict with the Voting Rights Act obligations the Texas constitutional requirement would control. Tr. Vol. 7, pp. 1592-95. Only a ruling from the United States Supreme Court would alter his judgment on this point. Tr. Vol. 7, p. 1593 Similarly, the main architect of the State's redistricting strategy, Mr. Interiano, testified that unless the county lines could be maintained, Latino opportunity districts would not be drawn. Tr. Vol. 6, p. 1447. Yet, the United States Supreme Court has clearly set out that state election-law requirements such as the whole county line provision may be superseded by federal law. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1239 (2009). In an analogous situation federal courts developing court ordered interim plans, are instructed to follow state redistricting principles so long as they do not conflict with federal constitutional or statutory requirements. *Abrams v. Johnson*, 521 U.S. 74, 79 (1997) (citing Upham, 456 U.S. at 43) ("When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.") Here, when faced with the choice of complying with Section 2 of the Voting Rights Act and the development of viable, reasonably compact Latino opportunity districts or maintaining a county line, the State

chose the county line. The Defendants' position that the State's obligation to the county line rule forecloses the creation of additional minority majority districts thus subordinates federal law to state law.

Third, the plans submitted by Plaintiff MALC were not efforts to maximize the creation of race based districts. As mentioned previously, MALC and other Plaintiffs are obligated under current Section 2 standards to produce majority minority districts. With regard to the plans and majority minority districts contained therein submitted by MALC, the Defendants only evidence at trial suggested that the West Texas district, HD 84, contained in some of the plans, was not reasonably compact. No other district was specifically challenged as non-compact at trial. In contrast, Dr. Kousser did a statistical analysis comparing the compactness of various plans submitted by MALC and the other Plaintiffs in the case. His analysis demonstrated that H283, the State's new Texas House plan was less compact than the MALC plans and less compact than plans included in the analysis. Plaintiff MALC Exhibit 19, p. 84 In addition, a review of the new Latino majority districts submitted by MALC and compared to the districts in those regions of the state show that MALC's districts were compact generally and certainly more compact than the districts in H283.

1. El Paso

The Defendants use contradictory positions on how to measure proportionality to argue that Plaintiff's *Gingles I* district in El Paso is an attempt to secure maximization or greater than proportional representation. In their attack on Plaintiff's new El Paso district the Defendants argue that creating 5 Latino majority districts is foreclosed because it would provide Latinos with greater than proportional representation and therefore maximization. State's Brief, p. 41. Yet, the Supreme Court has determined that proportional representation is to be measured on a state-

wide basis. *LULAC V. Perry*, 548 U. S. 399, 437 (2004). In addition, the Defendants' brief recognizes and uses this authority in a different section of its argument. State's Brief, p. 48. Yet, the Defendants make no effort to evaluate the additional El Paso Latino majority district as a part of the state-wide plan evaluation of proportionality because Latinos continue to be under represented in the Texas House.

Lastly on this point, if 5 Latino majority districts is foreclosed to the Plaintiff in El Paso because 5 districts exceeds proportionality, how can the Defendants justify Anglo majority districts in Dallas and Harris Counties that exceed proportional representation and creating a plan in Nueces County where Anglo majority district proportionality went from 33% to 50%, even while Latinos comprised over 60% of the Nueces County population.

2. Nueces County

The State argues that in Nueces County Plaintiff failed to meet its burden because in creating restoring district 33 to where it was under the benchmark plan H100, Plaintiff subordinated traditional redistricting principles to race base district. State's Brief, p. 43. As discussed above, state redistricting principles must give way when in conflict with the Voting Rights Act. Section 5 of the Voting Rights Acts prohibits a retrogression in the voting strength of minority voters. *Beer v. United States*, 425 U.S. 125, 141 (1976). MALC plan 205 restored district 33, a Latino opportunity district in Nueces County eliminated by the state in Plan H283. Tr. Vol. I, pp. 79-80; Plaintiff MALC's Exhibits 1 and 2. In MALC's plan H205 district 33 in Nueces County contains 60.3% HVAP, 56% SSVR, and 58% HCVAP. *Id.* MALC plan 201 also restored district 33 as a Latino opportunity district as contained in the benchmark plan H100. MALC plan 201 also maintained county lines across the State at the same level as the State did in H283. Plaintiff MALC's Exhibits 5 and 6; Tr. Vol. 1, pp. 87-91. In the state's plan

H283 district 33 is removed from Nueces County and transferred to Rockwall County in north Texas and is no longer a Latino opportunity district.

Moreover, the State has interpreted its obligation under Article III, Section 26 inconsistently and unevenly across the State and in a manner that deprives Latinos an equal opportunity to elect candidates of their choice. Thus the Defendants made and allowed an unnecessary cut in Henderson County involving only Anglo majority districts (Tr. Vol. 6, p. 1423), made unnecessary additional cuts in Cameron and Hidalgo Counties to avoid having to include an additional Latino majority district (Plaintiff MALC's Exhibits 5 and 6; Tr. Vol. 1, pp. 87-91) and refused to make necessary cuts to Nueces County to maintain a Latino opportunity district. (Tr. Vol. 6, p. 1447)

3. Cameron/Hidalgo

With regard to the Latino opportunity district developed by Plaintiff in Hidalgo County and Cameron County, the Defendants argue that an additional district is not merited because the Counties currently have eight districts between them are majority Latino, the State made an effort to preserve all the incumbent in the Counties, creation of such a district would result in additional county line cuts and polarization does not prevent the ability to elect candidates of their choice. State's Brief, p. 44. Interestingly, the Defendants do not dispute the district created by MALC meets Plaintiff's single purpose for creating an additional Latino opportunity district: Plaintiff's burden under Section 2. Rather the Defendants offer yet one more straw man defense to its failure to meet its obligation under Section 2.

Even its choice of facts to support its defense, however are wrong or misapplied. Thus while eights district in fact include Hidalgo or Cameron County populations, only six are wholly contained within the Counties. In addition, as discussed above the level of polarization across

the State is significant and in fact does show that Anglos, absent a majority minority district do vote sufficiently as a bloc to usually defeat the Latino preferred candidate. The whole county line is in fact violated when the State brings in a district from the west into Hidalgo County and from the north into Cameron County rather than keeping the outer boundaries of the counties intact. *See Clements v. Valles*, 620 S. W. 2d 112, 114-5 (Tex. 1981). According to the *Clements* analysis, in Hidalgo and Cameron Counties the State's plan, H283, cuts four county lines and creates no new Latino opportunity districts. Yet, had the Defendants recognized and respected the rapid growth of the Latino population of the area, a new district could have been created between Hidalgo and Cameron Counties with only two county line cuts. Plaintiff MALC's Exhibits 5 and 6, Tr. Vol. 1, pp. 88. The inconsistent use of the whole county line rule to avoid drawing new Latino opportunity districts, in this case, is pretextual and simply does not shield the Defendants from their obligations under Section 2.

4. Harris County

Defendants assert that Plaintiff has failed to provide any authority for the proposition that the State was free to place 25 districts in Harris County, and that the creation of an additional Harris County Latino opportunity district was necessary. State's Brief, p. 45. The Defendants mischaracterize Plaintiff's claim with regard to Harris County. The Plaintiff never suggested that the State was required to place 25 districts in Harris County. Rather Plaintiff MALC's position has always been that the State had the discretion to use either 24 or 25 but chose 24 to avoid drawing an additional Latino opportunity district in Harris County. The evidence supports Plaintiff's claim.

In Harris County MALC plan 205 maintains the current Latino opportunity districts, but also enhances the Latino population in district 144 so that it goes from an emerging Latino

district to a true Latino opportunity district. Tr. Vol. I, pp. 79-81; Plaintiff MALC's Exhibits 1 and 2. In MALC's plan 205, Harris County district 144 contains 72% HVAP, 53% HCVAP and 51.3 % SSVR. Plaintiff MALC's Exhibits 1 and 2. In the state's plan H283, Defendants no new Latino opportunity districts in Harris County are created. Instead, the Defendants suggest that their obligation under the Voting Rights Act was met when they raised the SSVR numbers of an existing Latino opportunity district HD 145. Tr. Vol. I, pp. 80-81; Plaintiff MALC's Exhibit 19, p. 71 n. 33; Farrar supplemental proffer declaration, Docket # 331-3 (Exhibit C). Thus no comparable district to MALC's plan H205, district 144, exists in Harris County under H283.

Plaintiff's *Gingles I* evidence supports a Section 2 violation and the Defendants' arguments regarding the new Latino opportunity districts provide no justification for the State's lack of compliance.

C. Plaintiff's Evidence Establishes that in the Totality of Circumstances, Latino Voters and Minority Voters Do Not Have an Equal Opportunity to Elect Candidates of Their Choice.

The Defendants next argue that by their estimation Latinos in Texas have attained proportional representation with regard to the State's new Congressional redistricting plan C185 and the State's new Texas House districting plan H283. Therefore, the State argues, regardless of the un-contradicted evidence on the Senate factors and other evidence of lack of equal opportunity to elect candidates of choice, Plaintiff is foreclosed from making a case of vote dilution under Section 2. State's Brief, pp. 47-51. Yet, Latinos have not attained proportionality under either plan.

The Defendants recognize that Latinos comprise about 25% of the Citizen Voting Age Population of the State. State's Brief, p. 49. With regard to the Texas House plan, to achieve proportional representation Latinos should have 37 or 38 Latino opportunity districts. Using the number of HCVAP majority districts as a measure of Latino opportunity districts, Latinos are under-represented in the State's new House plan H283. H283 has only 30 such districts. If Plaintiff successfully establishes a Section 2 violation and the all the *Gingles I* districts submitted are deemed required that would increase the number of new HCVAP districts across the State to about 34 or 35, still less than proportional. Proportionality does not foreclose a Section 2 claim as to the Texas House.[1]

With regard to the Congressional districts and again using HCVAP of about 25% in the State, as the measuring point for proportionality, of 36 total districts, Latinos would need to have at least 9 Latino opportunity districts to achieve proportionality. Plan C185, the State's plan contains 8 HCVAP districts. Yet, the Defendant's expert, Dr. Alford testified as did all the Plaintiff's experts that new CD 23, while a majority HCVAP district is not a Latino opportunity district the way the State configured the district. Therefore, the State's plan C185 does not provide proportional representation to Latinos in Texas and therefore Plaintiff is not foreclosed from its Section 2 cause of action.

Section 2 and 14th Amendment – Intent

Defendants also assert that Plaintiff has failed to establish that the adopted plans were adopted in violation of Section 2 and the 14th Amendments as intentional racial gerrymanders. Defendants assert that Plaintiffs' claims of intentional discrimination are not supported by any evidence and that the only evidence proffered by the Plaintiffs shows partisan

[1] Under the State's theory of the law on proportionality and the Voting Rights Act, the Anglo population would be guaranteed and entitled to always having representation of greater than proportionality.

bias not racial bias. First, Defendants seem to assert that only purposeful denial of the vote is legally recognized under the Fourteenth Amendment to the United States Constitution. That of course is not the case.

The Fourteenth and Fifteenth Amendments protect against purposeful vote dilution generally and minority vote dilution in particular. *Reynolds v. Sims*, 377 U.S. 533, (1964); *White v. Regester*, 412 U. S. 755 (1973); *Rogers v. Lodge*, 458 U.S. 613, 617 (1982). The Defendants' assertion that no evidence exists of intentional discrimination simply ignores the evidence offered by the Plaintiffs.

The standard of proof required for determining intent or discriminatory purpose is the same as that used in resolving cases under the Fourteenth Amendment's Equal Protection Clause. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265 (1977). Discriminatory purpose may be inferred from the totality of the relevant facts, including the fact that the law bears more heavily on one race than another. *Washington v. Davis*, 426 U.S. 229, 240, (1976). Factors that may be probative of a discriminatory purpose include: (1) impact of the official action; (2) historical background of the decision, "particularly if it reveals a series of official actions taken for invidious purposes"; (3) specific sequence of events leading up to the challenged decision; (4) departures from normal procedural sequences; (5) substantive departures . . . "particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 266-67.

In *Rybicki v. State Board of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982), the court found that where the requirements of incumbency "were so closely intertwined with the need for racial dilution that an intent to maintain a safe, primarily white, district for Senator Joyce is

virtually coterminous with a purpose to practice racial discrimination," is indicative of an intent to discriminate. *See Garza v. County of Los Angeles*, 918 F. 2d 763, 771-2 (9th Cir. 1990) *cert. denied* 111 S. Ct. 681 (1991).

The evidence in this case, as set out by Dr. Kousser, establishes facts regarding intent and establishes and supports a finding of intentional discrimination in the development of the challenged plans.

First, the Defendants acknowledge that Dr. Kousser's assessment concludes that racial motive was behind the development of the challenged plans. (Defendants' Motion for Partial Summary Judgment, page 9)("In his report, Dr. Kousser reaches the following conclusions: ….[E]vidence from maps of both State House and congressional districts, as well as patterns of racial composition of the districts, and remarks during the legislative debates makes clear an intent to discriminate against minorities during the redistricting.") In addition, Dr. Kousser's 134-page report details facts that establish discriminatory motive both in the adoption of the Texas House plan as well as the Texas Congressional plan, with 25 tables and 13 figures - many with multiple graphs or maps - as well as his extensive citations of comments indicating discriminatory intent drawn from the debates on the redistricting plans in both houses of the Texas legislature. The State fails to confront this extensive direct and circumstantial evidence of the discriminatory intent of the legislature and the discriminatory effect of its State House and Congressional redistricting plans should be taken as an admission that it cannot refute that evidence.

Rather the record shows an extensive examination of the plans, evidence and record of the adoption of the challenged plans, voting patterns of Texas voters and other evidence that supports Dr. Kousser's assessment. Dr. Kousser provided evidence that:

1. Using various statistical methodologies, voting in recent statewide and selected state House and Congressional elections was markedly racially polarized: Latinos voted overwhelmingly for Latino candidates in Democratic primaries; majorities of all others voted for non-Latino candidates. In general elections, African-Americans joined Latino voters in overwhelmingly supporting Latino Democratic candidates, even when Republicans nominated candidates who had Spanish surnames. Plaintiff MALC's Exhibit 19, pp. 9-54, Figures 1-4; Tables 1-16.

2. The Texas Legislative Council and other publications about redistricting made clear that since the 2004 case of *Larios v. Cox*, brought by Georgia Republicans to overturn a Democratic redistricting, population disparities among state legislative districts had to be justified by a rational state policy, and that a pattern of overpopulating districts on the basis of race or party was legally questionable. The TLC also set out the generally understood principle that in redistricting, equal population and adherence to the Voting Rights Act take precedence over all other goals. In particular, it reminded legislators in papers and presentations that according to decisions of the Texas Supreme Court, the "county line rule" should be waived when it conflicted with equal population requirements. And indeed, the legislature split county lines 17 times in H283, the plan for the State House that was

finally adopted. Plaintiff MALC's Exhibit 19, pp. 54-57, 59.

3. Nonetheless, across the State, H283 overpopulated a higher proportion of districts containing a majority of Latinos than it did districts containing a majority of Anglos. Plaintiff MALC's Exhibit 19, pp.64-69, Figures 5 and 6.

4. As in *Larios*, there was considerable evidence in Texas in 2011 of bias against minorities and Anglo Democrats in the legislative process. Minority legislators were not proportionately represented on redistricting committees, they were not consulted about redistricting by the legislative leadership, and their plans were uniformly rejected. Their criticisms of the majority's plans were unceremoniously rejected, when they were deemed worthy of any attention whatsoever. Analysis of the debates on the redistricting plans and of maps of particular districts show that the legislature applied strikingly inconsistent principles when drawing districts, protecting incumbent and other districts that are extremely unlikely to elect the candidates of choice of minority voters, but splitting or packing districts where the candidates of choice of minority voters could be elected. Tables of statistics about these plans on the State House and Congressional levels substantiate the comments on the legislative floor. Maps make the racially discriminatory – not just partisan -- intentions of the legislature graphically apparent. Plaintiff MALC's Exhibit 19, pp.

70-134.

5. Texas is a state with two substantial, underrepresented minorities who sometimes live in close proximity to each other and who regularly vote together in general elections. To consider their proportions separately, distorts the realities of state politics and society and would deprive minorities of an equal opportunity to elect candidates of their choice. Election returns from State House districts in 2008 and 2010 show that over 80 percent of the districts in which African-Americans and Latinos together composed the majority of voting age persons (not just citizens) elected Latino, African-American, or Anglo Democratic candidates, even in an election that was a landslide for the Republicans. Plaintiff MALC's Exhibit 19, pp. 73-77, Tables 18-20.

6. Plans proposed by minority legislators or offered during the legislative session are equally or more compact, have no more "county cuts," and split fewer precincts than the plans finally adopted. The legislature could not have chosen H283 or C185 because they were more aesthetically pleasing or because they caused voters less confusion or registrars, less administrative inconvenience. And compared to the alternative plans, H283 and C185 offer markedly fewer districts where combined minorities can elect candidates of their choice. Plaintiff MALC's Exhibit 19, pp. 80-83, Tables19-23.

7. Traditional racial gerrymandering techniques such as packing, cracking and stacking were used to fence in or fence out in minority voters to avoid providing districts that would afford an equal opportunity to elect candidates of their choice. Plaintiff MALC's Exhibit 19, pp. 92- 105, 117-123.

8. The process used to enhance the electoral opportunities of some incumbent state house and congressional members while knowingly diminishing Latino voting strength in those districts is strong evidence of racial bias. Plaintiff MALC's Exhibit 19, p. 95-98 (HD 41); Tr. Vol. 6, pp. 1456-58 (CD 23)

This record and this evidence is the type of evidence that has been recognized as probative on the issue of intent in a minority vote dilution and redistricting case. *White v. Regester*, 412 U. S. 755 (1973); *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265 (1977); *Garza v. County of Los Angeles*, 918 F. 2d 763, 771-2 (9th Cir. 1990) *cert. denied* 111 S. Ct. 681 (1991). Taken together with the evidence of continued effects of discrimination presented by Plaintiffs' experts Chapa and Gonzales-Baker and with the evidence of the history of discrimination presented by Plaintiffs' expert Tijerina, Dr. Kousser's evidence establishes the existence of intentional discrimination in the development of the challenged plans.

Conclusion

The Defendants' post trial brief simply does not identify any defense or theory of the case or contradictory evidence that would defeat Plaintiff MALC's claims in this case. The record is clear that the Texas House plan adopted by the State H283 violates the one person, one vote

requirement of the United States Constitution's 14th Amendment. In addition, plans H283 and C185 violate Section 2 of the Voting Rights Act both as to discriminatory effect and discriminatory intent and the 14th Amendment's prohibition against racial gerrymanders. This Court should enter Judgment for Plaintiff, enjoin the use of H283 and C185, and order a remedial plan that addresses the violations found by the Court and make an award to prevailing plaintiffs of reasonable attorney's fees and costs of litigation, including the cost associated with expert witnesses.

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Respectfully submitted,

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CAUSE NO. 5:11-CV-361-OLG-JES-XR

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent by the Court's electronic notification system October 21, 2011, to counsel of record registered with the court to receive same and to those not so registered the foregoing document has been sent by email as agreed by the parties for each of the cases referenced above,.

/s/ Jose Garza
Jose Garza