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

SHANNON PEREZ, et al., Plaintiffs, v. STATE OF TEXAS, et al., Defendants.	§	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), Plaintiffs, v. STATE OF TEXAS, et al., Defendants.	§	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]
TEXAS LATINO REDISTRICTING TASK FORCE, et al., Plaintiffs, v. RICK PERRY, Defendant.	§	CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated case]
MARAGARITA 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,	§	CIVIL ACTION NO.
	§	SA-11-CA-615-OLG-JES-XR
Plaintiff,	§	[Consolidated case]
	§	
v.	§	
	§	
STATE OF TEXAS, et al.,	§	
	§	
Defendants.	§	
_____	§	
	§	
EDDIE RODRIGUEZ, et al.,	§	
	§	CIVIL ACTION NO.
Plaintiffs,	§	SA-11-CA-635-OLG-JES-XR
	§	[Consolidated case]
v.	§	
	§	
RICK PERRY, et al.,	§	
	§	
Defendants.	§	
_____	§	

STATEMENT OF INTEREST OF THE UNITED STATES WITH RESPECT TO SECTION 2 OF THE VOTING RIGHTS ACT

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INTEREST OF THE UNITED STATES

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit.

This case presents important questions regarding Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. In addition to providing a private right of action, Congress gave the Attorney General broad authority to enforce Section 2. *See* 42 U.S.C. § 1973j(d). Accordingly, the United States has a strong interest in ensuring that Section 2 of the Act is properly interpreted and that it is vigorously and uniformly enforced. Indeed, the United States has participated as either a party or an amicus curiae in all of the Supreme Court's cases involving Section 2 since the provision was amended in 1982. *See, e.g., Bartlett v. Strickland*, 556 U.S. 1 (2009); *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006); *Holder v. Hall*, 512 U.S. 874 (1994); *Growe v. Emison*, 507 U.S. 25 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Moreover, the United States has a particular interest in the redistricting plans at issue in this case. It currently is defending a related declaratory judgment action filed by the State of Texas in the District Court for the District of Columbia seeking judicial preclearance for those plans under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed July 19, 2011). In the Section 5 declaratory judgment action, which presents some issues of law and fact in common with this case, the United States has answered Texas's complaint by denying that the State's proposed U.S. Congressional and State House of Representatives plans comply with Section 5 of the Voting Rights Act. *See* Answer at 2, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed Sept. 19, 2011), ECF No. 45.

SUMMARY OF ARGUMENT

In light of the considerable briefing and argument already presented by the parties to this action, the United States will not address all of the legal questions before this Court regarding the application of Section 2 of the Voting Rights Act.[1] Instead, this Statement of Interest will focus on two issues that are of particular interest to the United States.

First, the United States addresses Texas' contention that proposed District 23, which covers a large land area located in West Texas, provides Hispanic voters with the opportunity to elect their preferred candidates that Section 2 requires. It does not. The mere fact that a bare majority of the proposed district's registered voter population is Hispanic is insufficient in light of the district's failure to provide an effective opportunity for Hispanic voters to elect their preferred candidates. This Court should take into account the proposed district's likely performance, particularly in light of Texas's admission that it intentionally crafted the district not to elect Hispanic voters' preferred candidates. Moreover, with relatively minor adjustments to District 23 as drawn in the proposed plan, it can provide the opportunity for Hispanics to elect that Section 2 would require. With this change, another reasonably compact Hispanic opportunity district can be drawn in the region of South and West Texas, with the result being that Hispanics come closer to achieving rough proportionality with their share of the statewide citizen voting age population.

[1] This Court has no cause to assess the proposed plan's compliance with Section 2 unless and until such a time as that plan receives Section 5 preclearance. *Connor v. Waller*, 421 U.S. 656 (1975). Proper interpretation of Section 2 is immediately relevant, however, with respect to any interim plan this Court crafts to govern Texas elections unless and until such preclearance is received. *Abrams v. Johnson*, 521 U.S. 74, 90-91 (1997) ("On its face, § 2 does not apply to a court-ordered remedial redistricting plan, but we will assume courts should comply with the section when exercising their equitable powers to redistrict.") In a separate Statement of Interest filed on October 28, 2011 (Doc. 475), the United States offered its views as to the standards that govern development of interim plans.

Second, the United States addresses Texas' erroneous contention that there cannot be a cognizable claim under Section 2 of the Voting Rights Act for the failure to create a minority coalition opportunity district. The requirement that minority voters constitute more than 50 percent of a district's population as a precondition for this type of Section 2 claim, see *Bartlett v. Strickland*, 556 U.S. 1 (2009), can be met by aggregating the population of more than a single minority group. So long as the minority population is sufficiently cohesive in its voting patterns, is subject to a common practice that adversely affects its members' voting rights in the same way, and otherwise meets the requirements of a Section 2 claim, this type of claim is plainly encompassed by Section 2's plain language and readily analyzed under existing Section 2 jurisprudence.

ARGUMENT

I. Texas's Failure to Draw Seven Congressional Districts in South and West Texas that Provide Hispanic Voters the Opportunity to Elect Violates Section 2

The State errs in contending that its proposed Congressional Plan provides the requisite opportunity for Hispanic voters in South and West Texas to elect their preferred candidates to office. As framed by the parties, the dispute in this area has centered around District 23. Though the Hispanic population concentrations in the region in which District 23 was drawn readily could support another reasonably compact district that permits Hispanics to elect a candidate of their choice, Texas drew the district in such a way that Hispanics have no such opportunity. Moreover, under the totality of the circumstances, it is appropriate for Hispanic voters to control Congressional districts in Texas in rough proportion with their share of the statewide citizen voting age population.

The parties have provided considerable briefing as to the preconditions for a Section 2 claim set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and its progeny. It is the view of

the United States that these preconditions have been met with respect to the area in which District 23 is located, including a showing of the requisite racially polarized voting. Accordingly, Texas's failure to include an additional district in this area that will provide Hispanic voters an opportunity to elect their preferred candidate violates Section 2.

A. In the area of South and West Texas, seven reasonably compact majority Hispanic districts can be drawn.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court established a framework for proving a vote dilution claim under Section 2 of the Voting Rights Act. Part of any such claim involves establishing that the minority community "is sufficiently large and geographically compact to constitute a majority in a single-member district . . . ." *Id.* at 50-51. A plaintiff challenging the failure to draw a sufficient number of majority-minority districts, *see Growe v. Emison*, 507 U.S. 25, 39-41 (1993), must show "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. DeGrandy*, 512 U.S. 997, 1008 (1994). In *Bartlett v. Strickland*, 556 U.S. 1, 12 (2009), the Supreme Court clarified that the minority group must establish through its illustrative district(s) that it can constitute more than 50 percent of the population in one or more additional districts.

Applying this threshold numerosity requirement to the area of South and West Texas using the most recent demographic data available, one clearly can create seven reasonably compact congressional districts in the region that are majority Hispanic as measured by citizen voting age population. By its own standards, Texas considers each of the seven majority Hispanic districts in the region to be "Voting Rights Act districts" consistent with and responsive

to Section 2 of the Voting Rights Act.[2] *Cf.* Defendants' Post-Trial Brief at 26-27 (Doc. 411). At bottom, the State does not dispute that the region can accommodate seven reasonably compact majority Hispanic districts, effectively conceding the first *Gingles* precondition for this number of Hispanic districts in this geographic area.

B. As Drawn, Proposed District 23 Is Not An Effective Minority Opportunity District.

In defending its Congressional plan, Texas acknowledges proposed District 23 as one of the seven Hispanic opportunity districts that the region reasonably can accommodate based on the explosive growth of the State's Hispanic population. The State contends that the district qualifies simply because Hispanics constitute a majority of its citizen voting age population and registered voters. Hispanics thus will control elections in the district if they are politically cohesive and vote at the same rate as Anglo voters, the State reasons, and it is immaterial that the proposed district would not, in fact, elect Hispanics' preferred candidate. *See* Defendants' Post-Trial Brief at 6.

Implicit in Texas's argument is the proposition that Section 2 requires no more than the creation of a district with a bare majority of Hispanic registered voter or citizen voting age population. This argument appears to misconstrue the Supreme Court's decision in *Bartlett.* In that case, the Court imposed a bright line requirement on plaintiffs attempting to meet the first *Gingles* precondition. It required plaintiffs to meet a threshold showing that the minority group can constitute a numerical majority in an illustrative district to establish a Section 2 claim. *See Bartlett,* 129 S. Ct. at 1248.

Bartlett did not hold that the creation of a district in which that fifty percent threshold is met necessarily satisfies a jurisdiction's remedial obligations under Section 2. Rather, Section 2

[2] Specifically, these seven districts in the proposed plan are Congressional Districts 15, 16, 20, 23, 28, 34, and 35.

requires whatever level of minority population is needed to provide the group with a reasonable and fair opportunity to elect its preferred candidates, a level that may in some circumstances exceed a bare majority. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) ("*LULAC v. Perry*") (observing that "it may be possible for a citizen voting-age majority to lack real electoral opportunity"); *Ketchum v. Byrne*, 740 F.2d 1398, 1412-13 (7th Cir. 1984) (discussing circumstances in which minority group must be more than 50 percent of the voting age population in order to have an opportunity to elect); *cf. United States v. Dallas Cnty. Comm'n*, 850 F.2d 1433, 1441-42 (11th Cir. 1988) (quoting S. Rep. No. 417, 97th Cong., & 2d Sess. 26, reprinted in 1982 U.S. Code Cong. & Admin News 177,208) *vacated on other grounds*, 220 F. 3d 1297 (11th Cir. 2000)(a court must "exercise [its] equitable powers to fashion . . . relief so that it *completely* remedies the prior dilution of minority voting strength and *fully* provides equal opportunity for minority citizens to participate and to elect candidates of their choice") (emphasis in original).

The population level required to ensure the opportunity to elect guaranteed by Section 2 can vary based on age, citizenship, registration, and turnout rates. *See* Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev., 1383, 1391-93 (2001); *cf.* Department of Justice's Guidance Concerning Redistricting under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) ("In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district.").

In characterizing proposed Congressional District 23 as a Hispanic opportunity district, Texas nonetheless suggests that *Bartlett*'s fifty percent *minimum* for the illustrative district used to make out a Section 2 claim necessarily satisfies the State's obligation to create a district which provides minority voters with the requisite opportunity to elect. Such an approach conflates the *Gingles* precondition with the standard governing remedial districts and has no basis in the Voting Rights Act or the case law interpreting it. Moreover, the facts of this case amply demonstrate why the law is not as Texas suggests.

Proposed Congressional District 23 does *not* provide Hispanic voters with a reasonable opportunity to elect their preferred candidates. The United States' expert in the Section 5 declaratory judgment action, Dr. Lisa Handley, examined the district's likely performance using recompiled election results from five statewide contests involving Hispanic candidates. According to Dr. Handley's report, attached hereto as Attachment A for this Court's reference, the Hispanic-preferred candidate lost in proposed District 23 in all five contests. *See* Handley Report at 7, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C., Oct.25, 2011), ECF No. 79-16. Moreover, even the State's expert in this case, Dr. John Alford, has concluded that proposed Congressional District 23 fails to provide Hispanic voters with an opportunity to elect their preferred candidates. *See* Expert Report of Dr. John Alford (Doc. 223-2) at 5-6; Trial Transcript at 1839.

This result is no accident. The problem is not, as the State would have it, that "the voters refuse to behave as expected by consistently electing Democrats," *see* Defendants' Post-Trial Brief at 29, but that it performs exactly as Texas expected. The State asserts that it intentionally drew the district to incorporate Hispanic majority precincts that voted the most Republican in the last Presidential election. *See id.* These precincts favored Republican candidates not because

Hispanic voters in these precincts voted for Republican candidates at a significantly greater rate than Hispanic voters did elsewhere, but rather because Hispanic voters in those precincts tended to turn out in unusually low numbers. The effect of this line drawing is evident in the racially polarized voting analysis provided by the State.

	Benchmark Estimated Hispanic Votes for Anglo Candidate	Proposed Estimated Hispanic Votes for Anglo Candidate	Benchmark Estimated Hispanic Votes for Hispanic Candidate	Proposed Estimated Hispanic Votes for Hispanic Candidate
2002	**7,614**	**8,572**	**59,861**	**48,455**
2004	**13,421**	**13,923**	**74,156**	**57,621**
2006	**8,614**	**9,254**	**42,891**	**31,970**
2008	**6,805**	**9,445**	**83,907**	**67,650**
2010	**755**	**3,812**	**45,291**	**33,503**

See State of Texas's Racially Polarized Voting Analysis for Congressional District 23, United States' Identifications of Elections Considered, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed Oct. 3, 2011), ECF Nos. 58-9 at 9-12 & No. 58-10 at 9-12).[3] As the table comparing recompiled election results in the benchmark and proposed district shows, despite a very slight increase in its Hispanic citizen voting age population (from 58.4 to 58.5), proposed District 23 is likely to yield between 10,000 and 16,000 fewer Hispanic votes than its predecessor did.

In proposed District 23, Texas deliberately included precincts in which Hispanic voters have a significantly lower voter turnout. It did so in order to create a district that it could proffer as satisfying its Section 2 obligations notwithstanding that the district does not provide Hispanic

[3] In making this argument, the United States relies on the data provided by the State. The United States has conducted no independent analysis to assess its accuracy.

voters an opportunity to elect. And Texas now argues that the district's "failure to elect Latino candidates of choice does not result from bloc voting but rather from lack of cohesion or low turnout" that it has no obligation to "cure," see *id.* at 26-27 – ignoring the fact that its plan drawers selected the district's population to achieve such results. Whatever obligations Section 2 otherwise imposes on States and courts to take into account a minority group's level of turnout in a district, *cf. Salas v. Southwest Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992), the State surely is responsible for the voting patterns it has deliberately created.[4]

The facts of this case demonstrate why courts always have looked to the actual performance of a district, and not simply to its composition, in assessing whether it fulfills Section 2's remedial purposes. Texas would turn Section 2's protections into a simple numbers game that, in the hands of increasingly sophisticated map-makers, would offer racial minorities rights existing on paper only.

C. A Seventh Hispanic Opportunity District Can be Created with Relatively Minor Changes to District 23.

Congressional District 23 in Texas's proposed plan can be turned into a Hispanic opportunity district with relatively minor changes to its current configuration. As demonstrated in Dr. Handley's Report at 9-10 & Appendix E (Attachment A) and her declaration in

[4] Even if Texas had not manipulated the lines so that the district would perform in this fashion, the legacy of the State's well-documented history of intentional discrimination against Hispanics would justify accounting for disparate turnout rates between Anglo and Hispanic voters in formulating a remedial district under Section 2. *Cf. Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1212 (5th Cir. 1989) ("Congress and the courts have recognized that 'political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination.'" (quoting *Gingles*, 478 U.S. at 69)); *Vecinos de Barrio Uno v. City of Holyoke*, 72 F.3d 973, 986 (1st Cir. 1995) ("[L]ow voter turnout in the minority community sometimes may result from the interaction of the electoral system with the effects of past discrimination, which together operate to discourage meaningful political participation.").

Attachment B, redrawing the district's lines to raise slightly the number of Hispanic voters increases the district's performance significantly.

In Dr. Handley's illustrative plan in her report, she modified district boundaries only in the general area of proposed District 23, reassigning certain areas between Districts 11, 16, 20, 21, 23, and 28, and leaving the other districts in the State's proposed plan unchanged. *See* Handley Report at 10. Dr. Handley then revised her first illustrative plan because Rep. Canseco did not reside in the illustrative District 23, and she has constructed a second illustrative plan in which he is a resident of District 23. In District 23 in her second illustrative plan, the Hispanic voting age population increases from 62.8 to 73.0 percent, while the Hispanic citizen voting age population of the district increases from 58.4 to 67.1 percent. *See* Attachment B at 2. Most importantly, in her analysis of recompiled election results, Dr. Handley found that Hispanic voters generally would be able to elect their candidate of choice in her illustrative districts. *See* Attachment B at 2. [5] In addition, her illustrative plan better respects communities of interest than does Texas's proposed District 23; for example, it does not split Maverick County or the city of Eagle Pass. In short, Dr. Handley's illustrative District 23 would create a seventh reasonably compact Congressional district in South and West Texas in which Hispanic voters would have an opportunity to elect their preferred candidates.

D. Hispanic Voters Are Proportionally Underrepresented in Texas's Proposed Plan.

After a plaintiff establishes the three *Gingles* preconditions, a court must also consider plaintiff's claim under the "totality of the circumstances." *See Johnson v. DeGrandy*, 507 U.S. 997, 1011 (1994). As part of this analysis, one especially significant factor is whether there is proportionality between the number of minority opportunity districts in a State and the minority

[5] Dr. Handley was able to revise District 23 so that it will afford Hispanics an opportunity to elect their preferred candidates without affecting their electoral ability in Districts 16, 20, and 28.

group's share of the relevant statewide population. *See LULAC v. Perry*, 548 U.S. at 436-37. Texas asserts that 8 of its 36 congressional districts (22%) are Hispanic opportunity districts, that this proportion is close to the Hispanic share of the citizen voting age population (24.7%), and that the State therefore has no obligation to create additional such districts, no matter how readily they can be drawn. *See* Defendants' Post-Trial Brief at 3. For the reasons described above, Texas errs in counting District 23 as one of those eight. And in any event, there is no merit to its contention that creating eight Hispanic opportunity districts necessarily would satisfy its obligations under Section 2.

Indeed, the Supreme Court has rejected already a very similar argument by Texas. In *LULAC v. Perry*, the Court invalidated the State's Congressional plan after finding that District 25 in that plan was not reasonably compact and therefore did not count as one of the six Hispanic opportunity districts that could readily be drawn. *See LULAC v. Perry*, 548 U.S. at 435. At the time of the *LULAC v. Perry* decision, the Hispanic citizen voting age population of Texas was estimated to be 22 percent. *See id.* at 438. The five opportunity districts that had been properly drawn, out of 32 (or 15.6%), left Hispanics two districts short of proportional representation.

In light of the plaintiffs' strong showing of a Section 2 violation, the Court found it unnecessary to decide to what extent this underrepresentation favored their claim. *LULAC*, 548 U.S. at 438. But it squarely rejected Texas's argument that the State had come close enough to proportional representation as to "overcome the other evidence of vote dilution for Hispanics in District 23." *Id.* It also rejected Texas's argument that, so long as the State achieved proportional representation in certain regions, it was irrelevant whether it achieved proportionality statewide. The Court reasoned that the plaintiffs "ha[d] alleged statewide vote dilution based on a statewide plan," and that the electoral success of Hispanics across the state

was relevant in assessing whether their lack of success in the particular geographic area was a consequence of line drawing. *See id.* at 438.

Texas's argument that its plan achieves sufficient proportionality to overcome the other evidence of dilution fails now just as it did in 2006. Making that same comparison – between the number of Hispanic opportunity districts in Texas's proposed Congressional plan and current demographic data for the State – Hispanics would be underrepresented by roughly two districts.

Because District 23 is not a Hispanic opportunity district in Texas's proposed plan, for the reasons described above, the proposed plan contains a total of 7 Hispanic opportunity districts: the six located in South and West Texas (Districts 15, 16, 20, 28, 34 and 35), plus District 29 in the Houston metropolitan area. This means that Hispanic voters have an opportunity to elect their preferred candidates in approximately 19.4 percent of Texas's 36 Congressional districts. In contrast, Hispanics now make up 24.7 percent of the State's citizen voting age population. Adding one more Hispanic opportunity district would increase the percentage of districts that provide Hispanic voters with an electoral opportunity to 22.2 percent, closer to proportionality but still with underrepresentation. Creating two additional Hispanic districts would in fact bring about rough proportionality, with 9 of the State's 36 districts (or 25 percent of the total) providing Hispanics with a reasonable opportunity for electoral success. *Cf. Stabler v. County of Thurston*, 129 F.3d 1015, 1022 (8th Cir. 1997) (district court properly required the creation of an additional Native American opportunity district, after which the proportion of such districts "more closely approximate[d]" Native Americans' share of the population and voting age population).

While nothing in the Voting Rights Act guarantees the right to proportional representation, proportionality remains a "relevant fact in the totality of the circumstances,"

LULAC v. Perry, 548 U.S. at 436 (quoting *DeGrandy*, 512 U.S. at 1000). Indeed, as Justice O'Connor explained in her concurring opinion in *DeGrandy*, proportionality "is *always* relevant evidence in determining vote dilution," though it "is *never* itself dispositive." *See DeGrandy*, 512 U.S. at 1025 (O'Connor, J., concurring). As with respect to the plan at issue in *LULAC v. Perry*, the lack of proportionality under the proposed plan in this case supports a finding of vote dilution under an analysis of the totality of the circumstances. [6] It certainly cannot support Texas's contention that this Court should overlook other evidence of vote dilution.

II. Section 2 Can Require The Creation of Minority Coalition Opportunity Districts

As the Fifth Circuit correctly has held, Section 2 of the Voting Rights Act, under certain circumstances, requires the drawing of a district that is majority-minority, notwithstanding that this majority is comprised of people who belong to two or more racial groups. *See Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir.), *reh'g denied*, 849 F.2d 943 (1988); *see also League of United Latin Am. Citizens Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc). Such districts must be drawn only in those instances when the minority groups are cohesive enough to vote – and be opposed by the Anglo majority – as a unified group. Where those preconditions are met (and the totality of circumstances establishes a violation), Section 2 by its terms applies to such a district in precisely the same way as it does to a single-race majority-minority district: Failure to draw the district can constitute a practice that has the result of denying or abridging the right to vote "on account of race or color," and thus is

[6] Like the appellants' allegations of statewide vote dilution in *LULAC v. Perry*, 548 U.S. at 436-37, here, the MALC amended complaint (Doc. No. 50) and the Latino Redistricting Task Force amended complaint (Doc. No. 68) allege that minority voters do not have an opportunity to elect candidates of their choice commensurate with their proportion of the population on a statewide basis.

forbidden. 42 U.S.C. § 1973(a). Indeed, a Section 2 claim premised on a coalition of multiple minority groups is conceptually identical to any other Section 2 redistricting claim.

Nothing in Section 2's text or its legislative history supports Texas's argument that the broad protections of Section 2 do not apply to discriminatory redistricting practices that are aimed against two or more minority groups rather than against one. Nor, finally, does a claim brought on behalf of two or more minority racial groups that collectively constitute the majority of a district implicate any of the doctrinal and practical concerns articulated by the Supreme Court in *Bartlett v. Strickland*, 556 U.S. 1 (2009), which addressed the application of Section 2 to so-called "crossover" districts in which minorities constitute less than a majority of the population. Rather, such a claim fits comfortably into the traditional Section 2 analysis articulated in *Gingles* and its progeny.

In short, *Campos* was correctly decided, and its foundations have not been eroded by subsequent decisions of the Supreme Court or the Fifth Circuit. This Court should reject Texas's invitation to contradict it.

A. Section 2's Text and Legislative History Support Minority Coalition Opportunity Districts.

Section 2, in relevant part, forbids a jurisdiction from establishing a voting practice or procedure that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). It further provides that a violation is established upon a showing that "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

It is by now well established that a redistricting plan can violate Section 2 when it avoids creating a district that is readily drawn to give a minority racial group majority status in the district. That is because, where a "geographically compact minority group has been split between two or more single-member districts," the result is the dilution of that group's vote and the deprivation of the minority citizens' ability to "elect representatives of their choice." *See Bartlett v. Strickland*, 129 S. Ct. at 1241; *Growe v. Emison*, 507 U.S. 25, 40-41 (1993). As the Court has explained, "it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district." *Bartlett*, 129 S. Ct. at 1245.

By its terms, Section 2 encompasses a claim brought on behalf of multiple racial minority groups challenging a single policy that affects them both equally. Section 2 protects all citizens from infringements on their right to vote "on account of race or color." 42 U.S.C. § 1973(a). This broad protection is not limited to discrimination against individuals of a single race or color. For example, a "Whites only" primary discriminates simultaneously against blacks and Hispanics (and, indeed, individuals of any other race), and may be attacked by either, or both in concert.[7]

Moreover, a claim on behalf of a coalition of minority groups is fully consistent with *Bartlett*'s analysis of Section 2's text. In that case, the Court held that a State would not violate

[7] There is no textual basis for the assertion in *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc), that Section 2 only "protects a citizen's right to vote from infringement because of, or 'on account of,' that *individual's* race or color." *Id.* at 1386 (emphasis in original). The italicized word "individual," which in that context would suggest that Section 2 can protect only groups that share the same race or color, does not appear in the statute. Far from demonstrating that Section 2's text is inconsistent with a claim on behalf of a coalition of minority groups, *Nixon*'s mischaracterization of the text shows that Congress readily could have – but did not – exclude such a claim.

Section 2 by failing to create a district in which a majority of the population was Anglo, but many members of the Anglo population regularly crossed over to form a successful political coalition with the substantial black minority. Declining to draw such a district generally does not deprive minority citizens of the opportunity to "elect representatives of their choice" because they had no such opportunity to begin with, no matter how cohesive the minority group may be. *Bartlett*, 129 S. Ct. at 1243. Rather, both before and after the redistricting, minority citizens in a majority Anglo district must form a coalition with part of the majority racial group for political success, and so they "have the same opportunity to elect their candidate as any other political group with the same relative voting strength." *Id.* at 1246-47. Moreover, a political coalition that combines a minority racial group with members of the majority racial group is not "a class of citizens protected by subsection (a)." 42 U.S.C. § 1973(b). By definition, the majority racial group cannot deprive such a class of the right to vote "on account of race or color." 42 U.S.C. § 1973(a).

Bartlett's reasoning illustrates why this claim, unlike the one at issue there, is compatible with Section 2. Unlike a coalition of Anglo and non-Anglo citizens in a majority-Anglo jurisdiction, a coalition comprised entirely of non-Anglo citizens in such a jurisdiction can, and sometimes does, experience common subordination of its members' voting power on account of their non-Anglo racial status. Because they all are non-Anglo citizens subjected to common discrimination on account of race, they are a cognizable "class of citizens protected by subsection (a)." So long as the members of a group experience such common racial discrimination at the hands of the majority racial group, nothing in the text of Section 2 distinguishes a group comprised of one race from one comprised of multiple races. The statute

does not require the disaggregation of a class that is unified with respect to the relevant discrimination into sub-classes by racial group.

To be sure, Section 2 does not explicitly mention the protection of multi-racial majority-minority districts. *See Nixon v. Kent County*, 76 F.3d 1381, 1386 (6th Cir. 1996). But neither does it specifically mention many other applications of its broad mandate. Section 2 is phrased in terms of general principles and protections rather than specific applications.

Texas does not point to any language in Section 2 that supports its contention that this claim is foreclosed. Instead, it relies upon a mischaracterization of the claim at issue and snippets from *Gingles*, a case that did not consider this question. It is true, but beside the point, that Section 2 does not protect coalitions "defined solely by a common political party affiliation." *See* Defendants' Post-Trial Brief at 19. The coalitions at issue here are defined by common discrimination on account of race or color, not simple party affiliation. The State-drawn boundaries, when combined with racially polarized voting patterns, deprive minority voters of the opportunity to elect candidates of their choice. And it is even more irrelevant, and hardly surprising, that *Gingles*, in assessing a claim brought by a single minority group, spoke of "the minority group." *Id.* The Supreme Court later explicitly reserved this question in *Growe v. Emison*, 507 U.S. 25, 41 (1993), making all the more inexplicable Texas's suggestion that *Gingles* already had decided it implicitly.

The legislative history of Section 2 is silent with respect to coalition claims. But the Congress that last amended the relevant text in 1982 was well aware that black and Hispanic citizens face common obstacles to the full exercise of their voting rights in Texas and elsewhere, including with respect to redistricting. In its 1975 reauthorization of the Voting Rights Act – a bill that expanded protections for certain racial minorities who also are language minorities,

including by requiring Section 5 preclearance for jurisdictions (such as Texas) with a history of discriminating against them – Congress extensively studied Texas's history of discriminating against both blacks and Hispanics. It concluded that the State had "a long history of discriminating against members of both minority groups in ways similar to the myriad forms of discrimination practiced against blacks in the South." S. Rep. No. 94-295, 94th Cong., 1st Sess. 25 (1975). In particular, Texas used at-large representation to "effectively deny Mexican Americans and black voters in Texas political access in terms of recruitment, nomination, election and ultimately, representation." *Id.* at 27-28.

As a result of that expansion of Section 5's coverage in 1975, by the time Congress amended the Voting Rights Act in 1982, the Attorney General's exercise of this Section 5 authority provided ample evidence of discriminatory practices in certain jurisdictions – including Texas – that affected Hispanics and blacks alike. For example, in 1975, the Attorney General refused to preclear under Section 5 a Texas bill that would have required all registered voters to re-register or be purged from the voting rolls. He found that this change would have a discriminatory effect "[w]ith regard to cognizable minority groups in Texas, namely, blacks and Mexican-Americans." See H. Rep. No. 97-227, 97th Cong., 1st Sess. 15-16 (1981). In 1981, the Attorney General refused to pre-clear the closing of polling places near both black and Hispanic communities. See S. Rep. No. 97-417, 97th Cong., 2d Sess. 11 (1982). And during consideration of the 1982 amendments, the Attorney General objected to a New York City redistricting plan on the basis of its effects on black and Hispanic voters. *See id*.

Accordingly, not only is the broad language of Section 2 fully consistent with a challenge brought on behalf of black and Hispanic voters facing common discrimination, but there is no reason to think that Congress had any intention of precluding such a challenge. To the contrary,

the legislative history suggests that Congress recognized that, in certain jurisdictions and at certain times, two or more minority groups would face common deprivation of voting rights susceptible to a common remedy such as the one sought here.

B. Minority Coalition Opportunity Districts Are Consistent With The Gingles *Framework And Other Supreme Court Precedent.*

Recognizing this claim is consistent with the *Gingles* analytical framework that the Supreme Court applied and refined in *Bartlett*, where it rejected the possibility of a Section 2 claim brought by racial minorities who, while constituting a minority of a district's population, claimed to control the district politically because of reliable cross-over voting by members of the Anglo majority. That sort of claim, the Court reasoned, in addition to being inconsistent with Section 2's text, was inconsistent with the basic premises that underlie a *Gingles* claim. The claim at issue here, on the other hand, is fully consistent with the *Gingles* premises, and so it easily can be analyzed under the *Gingles* framework. Accordingly, nothing in *Bartlett* – or in the litany of other cases cited by Texas that address situations in which minority racial groups do *not* constitute the majority in a district – undermines the Fifth Circuit's holding in *Campos*, which remains binding on this Court.

The two essential premises of a *Gingles* claim are that racial bloc voting occurs in the jurisdiction and that members of a racial minority group have enough political power, in the absence of the challenged voting practice, to elect a representative of their choice. Only when these two premises are satisfied can it be said that the majority racial group dilutes the voting strength of minority voters "by submerging them in a white majority, thus impairing their ability to elect representatives of their choice." *Gingles*, 478 U.S. at 46. Two of three traditional preconditions for a successful *Gingles* claim derive from the premise of racially polarized voting – the requirements that the minority group be "politically cohesive" and that the majority group

"votes sufficiently as a bloc"– while the third is that the minority group could comprise more than 50 percent of the relevant population in a properly drawn district. *Id.* at 49-51.

In *Bartlett*, the Supreme Court observed the tension between these *Gingles* elements and a claim based on reliable Anglo cross-over voting. It expressed skepticism that plaintiffs could in one breath show the required racially polarized voting and in the next establish the existence of sufficiently reliable cross-over voting as to form a cognizable coalition. See *Bartlett*, 129 S. Ct. at 1244. And such a district does not permit non-Anglo voters, who make up a minority of its population, sufficient political power to elect representatives without assistance. *Id*. at 1243-1244. In short, allowing such crossover claims "would require us to revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence." *Id.* at 1244.

No such problems are posed by a claim that Section 2 requires the creation of a majority-minority district composed of two minority groups. To the contrary, such a claim conceptually is identical to a classic *Gingles* claim on behalf of a single racial group. The group seeking representation can itself be divided into two or more sub-groups, but the same often is true for groups that are thought of as a single race. *See, e.g., Large v. Fremont Cnty.*, 709 F. Supp. 2d 1176, 1195-1202 (D. Wyo. 2010) (finding Native American population sufficiently cohesive notwithstanding that it was divided into two tribes), *appeal pending from different order*, No. 10-8071 (10th Cir.). So long as the two racial sub-groups are cohesive enough to satisfy *Gingles*, there is no reason why they should not be able to bring a claim as a unified group.

Because this claim is conceptually no different than any other under *Gingles*, recognizing it does not pose any of the other practical problems that, the Supreme Court noted in *Bartlett*, would bedevil the courts if minority groups that did not have majority control over a district could bring Section 2 claims. *Bartlett* observed that extending Section 2 protection to districts in

which minorities were not the majority would leave courts and legislatures alike without "workable standards" and "clear lines," 129 S. Ct. at 1244. It is inherently "speculative," and beyond the competence of the courts to assess, whether a particular district will give rise to a functioning and enduring political coalition between a minority group and parts of the majority. *Id.* at 1245. By contrast, whether a proposed district is majority-minority is "an objective, numerical test" that can be applied in straightforward fashion. *Id.* The experience of the Fifth Circuit and other courts that recognize the possibility of claims brought by minority coalitions indicates that courts need not speculate about unknowable political outcomes to determine which such claims have merit.

Nor does this case expand the universe of viable *Gingles* claims so far as to "result in a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision,'" thereby raising constitutional concerns. *Bartlett*, 129 S. Ct. at 1247 (*quoting Miller v. Johnson*, 515 U.S. 900, 916 (1995)). Most courts to consider the question have decided or assumed that two minority groups can collectively be entitled to a single majority-minority district under Section 2, but few such claims have been brought, and most have been – correctly – denied based on their facts. *See, e.g., Concerned Citizens of Hardee County v. Hardee County Bd. of Commissioners*, 906 F.2d 524, 527 (11th Cir. 1990) (finding "little evidence that blacks and Hispanics in Hardee County worked together and formed political coalitions"); *Badillo v. City of Stockton*, 956 F.2d 884, 891 (9th Cir. 1992) (plaintiffs "failed to prove that blacks and Hispanics were politically cohesive, either when combined or when considered separately"). As described below, we believe Section 2 requires the drawing of a district recognizing more than one minority group only under particular circumstances.

C. The Groups In Such a Coalition Must Demonstrate The Same Cohesion Required For Any Gingles *Claim, Not Perfect Cohesion.*

A coalition of two minority groups must satisfy the same *Gingles* preconditions as a single group. The plaintiffs must establish the existence of "a distinctive minority vote" as well as "majority bloc voting" that is directed against the coalition as a whole, not simply against each of the two sub-groups independently. *See Growe*, 507 U.S. at 41. In short, they must establish that they in some meaningful sense constitute a voting bloc.

Plaintiffs asserting this type of claim do not, however, need to make out the implausible showing that they never compete with each other politically, as Texas suggests. In particular, the fact that blacks and Hispanics often compete in primaries before unifying in general elections does not, without more, defeat their claim. *See* Defendants' Post-Trial Brief at 25. Every *single-race* group presumably has intramural skirmishes in districts where the primary winner is likely to prevail in the general election. If such primary battles were inconsistent with the necessary cohesion, no Section 2 claim could ever succeed. To be sure, if blacks or Hispanics often allied with Anglos in contested primaries at each other's expense, that would be evidence that the coalition lacks the necessary cohesion. *See, e.g.*, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 379 n.39 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004). But Texas points to no such evidence here.

Plaintiffs asking for the creation of a minority coalition district must also satisfy the usual requirement that their illustrative district be reasonably compact. In our view, a coalition district in the area of Dallas and Tarrant counties – a variant of which is in several of the plans proposed in this case – can be drawn that satisfies that requirement.[8]

[8] The first proposed plan to include a minority coalition district in the Dallas-Fort Worth Metroplex area came from the Texas Republican Congressional delegation, sent from the office of Representative Lamar Smith to Texas legislative staff. *See* Lamar Smith Proposal, Doc. 117-2

CONCLUSION

This Court should find that Texas's failure to make District 23 an effective Hispanic opportunity district violates Section 2 of the Voting Rights Act. It also should reject Texas's argument that Section 2 can never require the creation of a minority coalition opportunity district.

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Respectfully submitted,

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at 21. Other examples of proposed plans with at least one new geographically compact minority coalition district in this region are Plans C106, C110, and C163.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing was sent via the Court's electronic notification system and/or email to the following counsel of record on November 7, 2011 to:

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