

**In the United States District Court
for the Eastern District of Texas
Marshall Division**

LEAGUE OF UNITED LATIN	§	
AMERICAN CITIZENS, <i>et al.</i>	§	
<i>Plaintiffs,</i>	§	
	§	No. 2:03-CV-354
v.	§	Consolidated
	§	
RICK PERRY, <i>et al.</i>	§	
<i>Defendants.</i>	§	

**STATE DEFENDANTS’
RESPONSE BRIEF IN THE REMEDIAL PHASE**

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**STATE DEFENDANTS’
RESPONSE BRIEF IN THE REMEDIAL PHASE**

TO THE HONORABLE EASTERN DISTRICT OF TEXAS:

In this remedial phase, the Court should adhere to the principles discussed in the State Defendants’ opening brief. It should not accept the Plaintiffs’ invitation to go beyond its appropriate remedial role to instead reshape the fully legal policy preferences underpinning the vast majority of Plan 1374C. To assist the Court with its narrow remedial task, the State of Texas, Governor Rick Perry, Lieutenant Governor David Dewhurst, Texas House Speaker Tom Craddick, and Texas Secretary of State Roger Williams (collectively, the State Defendants) offer this brief in response to the various proposals before the Court.

SUMMARY OF THE ARGUMENT

The Court's task on remand is to devise a remedy for the §2 violation while at the same time fully respecting the legislative preferences of the already enacted congressional map. The remedial plan submitted by the individual State Defendants would do just that. It is directly responsive to the Supreme Court's opinion; it leaves 28 congressional districts completely untouched, and alters only District 23 and three adjoining districts. The plan likewise avoids pairing any incumbent Members of Congress and, critically, leaves the existing partisan balance of the four altered districts (two Democrats and two Republicans) undisturbed.

As the State Defendants predicted in their opening brief, several Plaintiffs have submitted maps that attempt either (1) to create seven, rather than six, Latino-opportunity districts, or (2) to alter the partisan composition of the affected districts such that they would likely elect three Democrats and one Republican. But both this Court and the Supreme Court expressly rejected the claim that seven Latino-opportunity districts must be drawn, and endeavoring to do so is thus beyond the scope of the remand. And altering the partisan composition of the affected districts is itself a partisan decision, ill suited for a judicially-drawn map. Indeed, although it may well be possible to draw the map in a way that would likely elect three Republicans and one Democrat, that deliberate result would be as altogether illegitimate as is the converse. Thus, the State Defendants' Plan, like the Bipartisan Congressional Plan, corrects the violation and otherwise consciously eschews attempting to change the partisan balance. The Court's remedial plan should do likewise.

ARGUMENT

I. MANY OF THE PROPOSALS DEPART FROM THE BASIC PRINCIPLES THAT SHOULD GUIDE THE COURT IN THIS REMEDIAL PHASE.

Nine different interested parties have suggested some thirteen different maps as models for the Court's remedy.¹ Recognizing that the Court may well choose to draw its own map rather than to adopt any party's map wholesale, the State Defendants' response brief focuses on the overarching principles that should guide the Court:

- **Drawing Six Districts in South and West Texas.** Like Plan 1418C (the demonstration map of the individual, elected State Defendants), most of the maps comply with the Supreme Court's mandate to draw six Latino-opportunity districts in South and West Texas, and all of the maps agree that a Latino-opportunity district should be centered in the region of current District 23. But some maps (such as LULAC's) seek in addition to draw a *seventh* such district—a result inconsistent with the Court's rejection of that claim. Another map (GI Forum's) endeavors to draw a seventh district with a Latino majority of *total* population but not of *citizen-voting-age* population—perhaps on the assumption that demographic shifts may make that geography an opportunity district at the time of the next Census. But federal law does not require the drawing of a *seventh* district, and doing so is not within the scope of the remand. *LULAC v. Perry*, 126 S.Ct. 2594,

¹ Some of the parties who were once Plaintiffs no longer have live claims before this Court. For example, the Supreme Court summarily affirmed the judgments against both Henderson and Soechting, *see Henderson v. Perry*, No. 04-10649, 2006 WL 1788313 (U.S. June 30, 2006) (summary affirmance); *Soechting v. Perry*, No. 05-298, 2006 WL 1788314 (U.S. June 30, 2006) (summary affirmance), and dismissed the appeal of Congresswomen Johnson and Lee, *Lee v. Perry*, No. 05-460, 2006 WL 1788315 (U.S. June 30, 2006).

2616 (2006). This Court should confine itself to drawing the required six Latino-opportunity districts. To attempt to draw more would impede how the Texas Legislature might later choose to exercise the discretion recognized by *Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003).

- **Ameliorating Concerns About Current District 25.** Like Plan 1418C, most of the maps endeavor to make current District 25 more compact. But a few maps (such as LULAC’s and one of Pate’s) try to preserve current District 25, despite the Supreme Court’s harsh criticism of the district and its suggestion that an effective remedy in District 23 would predictably spill over to alter current District 25’s contours. Remarkably, one map (GI Forum’s) draws an *even less compact* version of District 25, which appears aimed at aggregating different groups of Latinos into an entirely new district. The Court should avoid those paths and, while remedying the §2 violation, make current District 25 more compact.
- **Respecting Legislative Policy Preferences.** Like Plan 1418C, most of the maps implicitly recognize that one way to respect the Legislature’s policy preferences is to leave other district lines undisturbed while doing what is necessary to remedy the §2 violation. But the more ambitious aspects of those maps diverge from the narrow remedial task before the Court.
 - Some maps would needlessly redraw other districts across the State—in particular District 10 extending to Houston and District 11 spanning West Texas—to facilitate the Plaintiffs’ other goals *that are not required by federal law*. Especially if the Court is implementing a remedial map for the

November 2006 general election (which would supersede the results of primary elections already held in any affected district), it should proceed with caution in needlessly expanding the scope of its remedy.

- Other maps (such as the Jackson Plaintiffs', Travis County's, and one of Pate's) aim to undo particular political decisions made by the Legislature with which they disagree. In essence, those Plaintiffs disagree with the policy judgments that led to the three-way division of Travis County adopted by the Legislature. One of them (Travis County itself) acknowledges that such a political choice is the Legislature's prerogative, but nonetheless invites the Court to order a different result. Another set of Plaintiffs (the Jackson Plaintiffs) is more circumspect about the political nature of its attempted reassembly of Travis County, yet they go even further than the County itself suggests. Those political disagreements simply do not pertain to this remedial phase. Plaintiffs did *not* prove any violation of federal law related to the division of Travis County—after advancing partisan-gerrymandering theories, mid-decade theories, equal-population theories, and even a Voting Rights Act theory. As there is no command of federal law that overrides the Texas Legislature's entirely legal choice to divide Travis County in the manner that it chose, the Court's remedial plan should respect that decision.
- **Avoiding Needless Pairings.** Unlike Plan 1418C, most of the other maps result in the pairing of at least some incumbents. Since it is possible to avoid that result—

and also to avoid any needlessly disparate partisan impact—the Court should endeavor to avoid pairing incumbents. It should be especially wary of pairing within a §2 remedial district. Doing so would only exacerbate the uncertainty of whether such a district could be effective, and that uncertainty might be compounded in a special-election process that disregards party primaries and imposes a shortened campaign season.

Notably, the demonstration plan (1) affects a relatively small number of districts, leaving 28 of the 32 districts undisturbed, and (2) does not attempt to alter the partisan composition of the congressional delegation. The four districts in question currently elect two Democrats and two Republicans. While it is surely possible to configure the districts in such a way as to attempt to elect three Democrats or three Republicans, the State Defendants' demonstration map pursues neither course. Instead, it creates two districts that lean Democratic and two districts that lean Republican, which also mirrors the current party affiliations of the four incumbent Members of Congress. This would also comport with the approach that this Court took in *Balderas*, where it likewise eschewed attempts to alter the partisan balance and instead applied neutral judicial principles to create a limited remedial map.

II. RESPONSES TO SPECIFIC PLANS.

A. LULAC (Plan 1415C and Plan 1416C).

LULAC's remedial maps have three key flaws: (1) both maps attempt to draw seven opportunity districts rather than the required six; (2) neither map ameliorates the concerns expressed over current District 25; and (3) both maps, in order to accomplish goals not required by federal law, make needless changes to District 20.

First, LULAC openly invites the Court to draw a seventh Latino-opportunity district in addition to the six mandated by federal law. This is no accident. It reflects the earnest hope of LULAC that, if it persuades the Court to adopt that "remedy," it will have an added measure of leverage for the next redistricting cycle:

Keeping Doggett's 25th District largely intact and making changes to the disputed 23rd District could give Texas seven districts in which Latino voters are in the majority, [LULAC counsel Rolando] Rios said, up from five now.

"In 2010, we're going to be redistricting again," Rios said. "If, in this process, we start with seven Latino districts, then we start with a base of seven. And once we have that base, we can't go below that base."

Tara Copp, *First Two Redrawn Maps Emerge*, Austin Am.-Statesman, July 14, 2006, at B1, B5.

That candid statement may well reflect LULAC's goals for the next round of redistricting, but there is no serious argument that federal law requires a seven-opportunity-district configuration to be drawn now. And however admirable their objectives may be from a policy or political perspective, achieving or not achieving them

is a task for the Legislature, not a federal court drawing a remedial map. *White v. Weiser*, 412 U.S. 783, 795 (1973); *see also Upham v. Seamon*, 456 U.S. 37, 40-41 (1982).

LULAC incorrectly suggests that its seven-district map follows from the Supreme Court’s judgment, asserting that “[s]ince Latinos comprise 22% of the Texas[] Citizen voting-age population, they would be entitled to seven (7) districts.” LULAC Opening Br. 1. But the Supreme Court did *not* hold that seven districts were required.²

To the contrary, the Supreme Court *affirmed* this Court’s rejection of a seven-district claim, *LULAC*, 126 S.Ct. at 2616, and it rejected the notion that members of a minority group could be aggregated together in such a fashion to demand a §2 remedy unless suitably compact districts could be drawn, *id.* at 2619 (holding that current District 25, although it worked mathematically, was nonetheless insufficiently compact). Indeed, a key step in the Supreme Court’s reasoning was that the residents of current District 25 had *not* established a §2 right that demanded a remedy. *Id.* at 2618-19. In short, by offering a seven-district map, LULAC has offered a “remedy” for a violation that no plaintiff has proven.³ As was reiterated by the Supreme Court in this very litigation, where there is no §2 violation, there is no call for a §2 remedy. *Id.* at 2617.

² The portion of the opinion relied upon by LULAC concerns only “proportionality”—which (as one factor in the totality) examines statewide ratios of population rather than whether particular plaintiffs might have a §2 right or a §2 remedy, as required by *Gingles*. *See, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1006-07 (1994); *see also LULAC*, 126 S.Ct. at 2617. The Voting Rights Act does not contain a free-floating claim to demand “proportionality”; rather, proportionality is relevant in assessing the totality of the circumstances only after all three *Gingles* preconditions have been established.

³ This Court rejected a seven-district claim with good reason because it would spread the voting populations too thin to be politically effective. *Session v. Perry*, 298 F.Supp.2d 451, 495-96 (E.D. Tex. 2004) (three-judge court). And the Supreme Court’s disposition of the other claims in

Second, LULAC’s plan does nothing to address the compactness problem with current District 25. To the contrary, LULAC’s maps leave current District 25 largely intact—one variant (Plan 1416C) leaves it *entirely* intact—and thus perhaps vulnerable to the same constitutional criticisms that have been leveled against that district by the Jackson Plaintiffs.⁴

Third, LULAC’s plan also makes unnecessary changes to an already functioning Latino-opportunity district (District 20).⁵ It is quite possible to remedy the §2 violation without making any alterations in the lines of that district. The reasons LULAC suggests for changing District 20—its purported desire to reunite a group allegedly split by the Legislature’s line-drawing in 2003—are not mandated by federal law. The Court should not lightly disregard the Legislature’s policy preferences. And it should be cautious before expanding the number of districts being subjected to a special-election procedure this November.

B. GI Forum (Plan 1418C).

The same problems surface, albeit more subtly, in GI Forum’s map. It suffers from three parallel flaws: (1) the GI Forum map goes out of its way to draw a seventh very heavily Latino district not required as a remedial district; (2) while it makes changes

this case provides yet another reason to reject a seven-district map—to spread the population that thin would likely require the aggregation of widely dispersed Latino populations with disparate interests so as to not be sufficiently “coherent” to warrant a §2 remedy. *LULAC*, 126 S.Ct. at 2619.

⁴ The “minimalist” plan submitted by Pate (Plan 1407C) also leaves District 25 untouched and thus fails to address the Supreme Court’s concern with its noncompactness.

⁵ The “minimalist” remedial plan submitted by Pate (Plan 1407C) shares this defect, also making needless changes to District 20.

in District 25, those changes actually make the district *less* compact rather than more compact; and (3) to facilitate those changes, GI Forum’s map asks the Court to disregard the Legislature’s policy preference for how to draw District 11 in West Texas. None of those features of the GI Forum map is a fitting “remedy” for the §2 violation centered in old District 23.

First, while acknowledging that the Supreme Court’s holding does not compel the drawing of a seventh Latino-opportunity district, *see* GI Forum Opening Br. 3-4, GI Forum nonetheless asks the Court to draw a district that almost—but not quite—reaches that mark, *see* GI Forum Opening Br. 6. This new district would have a majority Hispanic *total* population but below a majority of *voting-age* population. *See* GI Forum Remedial Exh. 1, at 8. It is hard to see how drawing contorted lines to achieve such a result could be a valid “remedy” for a §2 violation centered in another region of the State. *See LULAC*, 126 S.Ct. at 2617.

Second, the new District 25 that GI Forum proposes—far from curing its compactness problems—instead makes them worse. In terms of quantitative compactness, GI Forum’s proposal is far worse than the lines of current District 25 challenged by the Jackson Plaintiffs.⁶ GI Forum’s proposed district has a smallest-circle

⁶ The plans submitted by Owens may raise compactness questions. Both plans would create long, flat districts running parallel to the border. One of the districts (which Owens labels District 28) would begin at El Paso and run along the border to McAllen in Starr County, adding three additional counties of length to what had been (by geographic necessity) one of the longest congressional districts in the United States. The other district (which Owens labels District 23) would run from far West Texas to reach Starr County. While it may be theoretically possible to draw suitably “compact” districts that have a similar configuration, the Court should hesitate to do so in this remedial phase given the Supreme Court’s expressed concern about the much shorter District 25.

score of 12.3—well above current District 25’s score of 8.5, and almost double the next-highest score in Plan 1374C. GI Forum Remedial Exh. 1, at 26; Def. Tr. Exh. 38 (Plan 1374C compactness scores). And GI Forum’s district has a perimeter-to-area score of 17.3—also well above current District 25’s score of 9.6 and more than 50% higher than the next-highest mark in Plan 1374C. GI Forum Remedial Exh. 1, at 26; Def. Tr. Exh. 38.

In terms of qualitative compactness, GI Forum’s proposed districts raise far more questions than they answer. GI Forum suggests that the populations at the two ends of its long district share some similarities, citing as evidence a newspaper article about apartment prices, aggregate ZIP-code statistics about average home price, and a source to convert “cost of living” between the two areas. *See* GI Forum Opening Br. 6. Setting aside the methodological problems with some of this information, as well as the questionable relevance of these particular metrics for determining shared voting interests, this narrow remand is not the time for GI Forum to plead and attempt to prove up a brand new §2 claim about a different region of the State. Nor would GI Forum’s proposed district establish either a §2 right or a §2 remedy, in part because the district is drawn so that Latinos do not achieve even a bare majority of the citizen-voting-age population, let alone the heightened number that may be required to establish that a Latino-opportunity district would be effective. *See LULAC*, 126 S.Ct. at 2624 & 2626 (affirming this Court’s rejection of a §2 claim based on old District 24); *see also Session*, 298 F.Supp.2d at 494-96 (noting that a bare majority was insufficient, in part because of lower turnout among Latino voters).

Third, GI Forum's map needlessly affects two neighboring districts. In order to achieve its goal of drawing a nearly-majority-Latino District 25, GI Forum redraws District 20, leading to the same difficulties as LULAC's proposal. In addition, GI Forum would also unnecessarily redraw District 11 in West Texas. Because remedying the §2 violation in old District 23 does not require such a change, the Court can avoid needlessly upsetting the policy preferences embedded in current District 11.

C. Travis County (Plan 1413C and Plan 1414C).

Travis County proposes to alter six congressional districts in an effort to, in its words, ensure that the County now "solidly anchor[s]" a congressional district, Travis County Opening Br. 1, while at the same time actively rebuilding what the County alleges was an "effective tri-ethnic coalition" of voters, Travis County Opening Br. 2. While those may be legitimate aims for a legislature to pursue, neither result is mandated by federal statutory or constitutional law, and thus neither is an appropriate goal for the Court to pursue in remedying a §2 violation elsewhere in the State.

First, Travis County expressly admits that the Legislature violated no federal mandate in how it chose to divide Travis County among three congressional districts. "The legislature chose to place the City in three congressional districts in Plan 1374C, and the City does not seek a remedy that would undermine that legislative choice. Maintaining a presence of multiple congressional districts in the City would be both possible and acceptable." Travis County Opening Br. 5. Yet, despite that disclaimer, Travis County proposes to make dramatic shifts in how that division was accomplished, even redrawing current District 10 in the northern part of Travis County and other nearby

counties. Making those changes would require the Court to needlessly reject the Legislature’s entirely legal policy preferences expressed in its division of Travis County.

Indeed, the extra-legal nature of Travis County’s argument is made clear by its use of normative terms such as “anchoring” and “hosting” a district to describe its goals for rearranging district lines—terms that are not attached to any mandate of federal law. While Travis County may wish, for its own reasons, to second-guess the Legislature’s choices in drawing these districts, it is inappropriate to do so in the context of this remedial proceeding. *Upham*, 456 U.S. at 43 (“[I]n the absence of a finding that the Dallas County reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature.”). If Travis County disagrees with the relative emphasis placed on “anchoring” versus “hosting” congressional districts, it must persuade the Legislature that meets within its borders.

Second, Travis County holds up its plan as furthering what it calls an “effective tri-ethnic coalition” that, the County boasts, has an even greater combined percentage of minority voters than did the court-drawn Plan 1151C (which the Legislature subsequently rejected). Travis County Opening Br. 12-13. The County implores the Court to go out of its way to draw this new district because it is “the only truly equitable result.” Travis County Opening Br. 13. But, however genuinely Travis County may feel about creating such a new district, it did not prove at trial—and did not argue on appeal—that such a result was required by §2 of the Voting Rights Act. Because such an Austin-centered coalition district is not required to remedy the §2 violation actually found by the Supreme

Court in old District 23, it would be inappropriate to allow the County's aspiration for it to trump the policies expressed by the Legislature. *E.g., Upham*, 456 U.S. at 40-41 & 43.

D. The Jackson Plaintiffs (Plan 1406C).

The Jackson Plaintiffs' proposal suffers from at least four flaws: (1) it improperly would elevate supposedly "neutral" principles over the Legislature's expressed policy preferences; (2) like the Travis County proposals, it attempts to redraw the Austin area to accomplish an end not mandated by federal law; (3) it wrongly attempts to create a *politically* "competitive" district to accomplish an end not mandated by federal law; and (4) it would have disparate effects on incumbents that can easily be avoided.

First, the Jackson Plaintiffs ask the Court to use what they label "neutral" principles to override the admittedly legal choices made by the Legislature in drawing its map. Jackson Pls. Opening Br. 6 & 13-16. In essence, the Jackson Plaintiffs would elevate a grab-bag of purportedly "neutral" principles into the equivalent of federal statutes that could trump state policy preferences. These are of course the same "neutral" principles that formed the basis of the Jackson Plaintiffs' now-rejected partisan gerrymandering claim, now repackaged as a §2 remedy. But precisely because those supposedly "neutral" principles do not have the force of federal statutory or constitutional law, they simply cannot trump the policy judgments embodied in Plan 1374C.⁷

As a general matter, a federal court should employ "neutral" principles only to the extent that it is forced to disregard the Legislature's policy preferences. They are not a

⁷ The Jackson Plaintiffs at least implicitly recognize the great difference between a federal mandate (such as the Voting Rights Act) and a mere "traditional" principle. *See* Jackson Pls. Opening Br. 12 & 13 (grouping these into different headings).

mechanism to set aside or second-guess the aspects of the Legislature’s plan that do not offend federal mandates. Thus, in 2001, when this Court was forced to draw the entire 32-district map without a recent legislative plan in place, use of such “neutral” principles was entirely appropriate. *Balderas v. Texas*, No. 6:01-CV-158, slip op. at 4-5 (E.D. Tex. 2001) (three-judge court). The situation today is very different. Here, there is a valid legislative plan in place, save this Court’s task of remedying a single §2 violation concerning District 23. And, beyond that narrow task, the Court must fully respect the legislative preferences embodied in the existing map.

The Jackson Plaintiffs ask the Court to err when they urge it to second-guess any aspect of the Legislature’s map by invoking some brooding omnipresence of supposedly “neutral” principles. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 306-07 (2004) (Kennedy, J., concurring in the judgment) (noting “the lack of comprehensive and neutral principles for drawing electoral boundaries” and that “no substantive definition of fairness in districting seems to command general assent”).

Second, insofar as it affects the Austin area, the Jackson Plaintiffs offer a proposal that suffers from the same flaws as the Travis County proposal. But, worse, the Jackson Plaintiffs do not even acknowledge that they are dramatically deviating from the Legislature’s design. To the extent that the Jackson Plaintiffs’ proposal departs from the mandates of federal law, it should not be used as a basis to override *what even Travis County recognizes as* the Legislature’s legitimate policy choice.⁸ *Cf.* Travis County

⁸ The same attempt is made in the “expansionist” map submitted by Pate (Plan 1408C) and in both maps submitted by Owens (Plan 1402C and Plan 1403C). Pate and Owens would each

Opening Br. 5 (“The legislature chose to place the City in three congressional districts, and . . . [m]aintaining a presence of multiple congressional districts in the City would be both possible and acceptable.”).

The Jackson Plaintiffs pin their hopes on principles that are not mandated by federal law—such as “Respect for Municipalities.” *See* Jackson Pls. Opening Br. 14-15 (touting that “Austin is once again in two districts, rather than three”). But the Supreme Court long ago rejected the notion that Members of Congress represented cities rather than people. *Wesberry v. Sanders*, 367 U.S. 1, 14-16 (1961). The Legislature’s choice to divide Travis County into more congressional districts was entirely legal and should not be second-guessed on the ground of such an amorphous and flexible “principle”—one that, depending on how it is applied, could have results far from “neutral.”

Third, the Jackson Plaintiffs proclaim that in their proposal “District 23 becomes more competitive” in *political* terms. *See* Jackson Pls. Opening Br. 13; *see also* Jackson Pls. Opening Br. 9 (characterizing it as “competitive” and “hardly a ‘safe’ district”). But, as the Supreme Court squarely held, there is no federal mandate to redraw *any* part of Plan 1374C to secure a more “competitive” *political* result. *LULAC*, 126 S.Ct. at 2612. Because the goal of a more politically “competitive” District 23 is not required by federal

remove current District 21 from any part of Travis County, in derogation of the policy preferences of the Legislature acknowledged by the County itself. As Pate explains in the “Epilogue” of his brief, “if Austin is not a community of interest, then that term has no rational meaning.” Pate Opening Br. 10. But this remedial phase is not an opportunity to elevate the Plaintiffs’ view of the relative merits of “anchoring” versus “hosting” congressional districts (to use Travis County’s terminology) over the preferences expressed by the Legislature.

statutory or constitutional law, it is not an appropriate metric for choosing one remedial map over another.

Indeed, the Jackson Plaintiffs' argument demonstrates only that their map has a profound partisan effect. By choosing one district to arbitrarily make more *politically* "competitive," the Jackson Plaintiffs would consciously change the balance. In Plan 1374C, the four affected districts were divided 2-2 between the political parties. In the Jackson Plaintiffs' proposal, by contrast, the four districts are redrawn to be 3-1 in favor of one party. (Even if the "competitive" label were true, that would make it a 2-1-1 map in favor of one party.) The Court can easily avoid having such a partisan impact, as other maps demonstrate. *See* State Defs. Opening Br. 13-14 (discussing the politically neutral effect of Plan 1418C).

Fourth, the Jackson Plaintiffs' proposal has disparate effects on the various incumbents. It would force the Court to choose between pairing two incumbent Hispanic Members of Congress in new District 23 or pairing two members of the same political party in new District 21.⁹ The Jackson Plaintiffs hesitate to select either of those options, instead forcing that unsavory choice onto the Court: "If the Court wished to remove Congressman Bonilla's residence from District 23," where he would be paired with Congressman Cuellar, "in order to enhance Hispanic electoral opportunities there, that would require minimal line changes in Bexar County, affecting only a handful of precincts in Districts 21 and 23," which would pair Congressman Bonilla with

⁹ The map submitted by the Texas Coalition of Black Democrats (Plan 1421C) would create the same dilemma.

Congressman Smith from his same party. Jackson Pls. Opening Br. 17. Meanwhile, it would absolutely insulate one incumbent (Congressman Doggett) from any risk of being paired.¹⁰ That sort of political carving is easily avoided with a map that ensures that there is no needless new pairing of incumbents.

E. “Bipartisan Congressional Plan” (Plan 1425C).

A plan was also submitted by various Members of Congress. This plan differed somewhat from the other plans in that it proposed a split of Webb County, albeit a more nuanced split than the down-the-highway approach taken by the Texas Legislature in 2003. The proponents of this plan say that it is favored by both incumbent Members of Congress who currently represent Webb County, as well as some local political leaders

¹⁰ Press accounts suggest that Congressman Doggett may have recently moved from current District 10 into current District 25. At the time the Court considered Plan 1374C, Congressman Doggett was in current District 10. *See, e.g.*, Alford Report at 29 (“Congressman Doggett remains in the 10th District [in Plan 1374C]”) [Jackson Tr. Exh. 44]; Lichtman Report at 73 (Table 32) [Jackson Tr. Exh. 1]. Nonetheless, he ran for and was elected to represent current District 25. The State Defendants’ proposed map, Plan 1418C, was drawn like every other map—using the RedAppl database, which includes the home residences of all the incumbent Members of Congress. And the RedAppl database (which is regularly updated) lists Congressman Doggett’s home address as still within District 10. Indeed, in an abundance of caution, while drafting the State Defendants’ opening brief, staff of the Office of the Attorney General telephoned the Legislative Council to verify Congressman Doggett’s home address. And Legislative Council staff expressly confirmed that, according to the official records of the Legislative Council, Congressman Doggett’s home residence was still within District 10.

Regardless of whether Congressman Doggett may have at some point purchased an additional home or whether he might own multiple homes in multiple districts, he is not paired in the RedAppl database, and Plan 1418C results in the identical partisan divide as currently exists, including a strongly Democratic District 25 that encompasses over 97% of Congressman Doggett’s prior geography. And, assuming press accounts of Congressman Doggett’s new address are accurate, he has traded being nominally paired with Congressman McCaul for being nominally paired with Congressman Smith. Those nominal pairings do not affect his ability to run as an incumbent in his current District, any more than they did in 2004.

“who believe that continued representation by two congressmen . . . is better than having a county whole in a single congressional district.” Congressmen’s Opening Br. 2.

That kind of bipartisan consensus about the beneficial effects of a particular split of Webb County, when combined with proof that the two resulting districts would both be Latino-opportunity districts, would be a powerful reason to consider preserving some split of Webb County. And preserving some split of Webb County also offers the Court an alternative approach to preventing a pairing of incumbents in a Latino-opportunity district. Congressmen’s Opening Br. 5. Although the Supreme Court certainly suggested that Webb County should be kept whole, it did not hold that it must be. And if there were any map that would represent a viable way to maintain a split Webb County, it would be this map—which embodies a bipartisan compromise, in concert with local leaders, seeking to protect the interests of Hispanic voters and Webb County in particular and to alter the status quo as little as possible.

Indeed, the Bipartisan Congressional Plan has much to recommend it. It remedies the §2 violation, raising Hispanic citizen-voting-age-population in District 23 to 57.4%. *See* Congressmen’s Opening Br. 5. And it places the remainder of the Webb County Hispanic population in another performing Hispanic-opportunity district, District 28, so that none are “stranded” in a non-performing district. Moreover, the plan renders District 25 substantially more compact and, critically, does not attempt to alter the present partisan balance within the affected districts. Accordingly, the individual State Defendants who submitted Plan 1418C as a demonstration plan have no quarrel with the Bipartisan Congressional Plan and would readily accept it as a remedy.

III. LIKELY OBJECTIONS TO THE INDIVIDUAL STATE DEFENDANTS' PLAN 1418C.

From press accounts of the prior week, Plaintiffs' principal objections to Plan 1418C are likely to be twofold: 1) that it does not create a seventh Latino-opportunity district, and 2) that it removes from District 25 Congressman Doggett's "base" in Travis County, leaving that largely Democratic county to be likely represented by three Republican Congressman. Neither objection is persuasive.

With respect to the first complaint, both this Court and the Supreme Court were clear that creating a seventh Latino-opportunity district is not required by the Voting Rights Act, *see* Part II.A, *supra*, and so endeavoring to do so is beyond the scope of this limited remand.

With respect to the second complaint, removing Travis County from District 25 is the largely unavoidable consequence of the Plaintiffs' challenges to the non-compactness of that district. If the Court endeavors (1) to keep Webb whole, (2) to render District 25 more compact, (3) to avoid altering the partisan composition of the affected districts, and (4) to keep Congressman Doggett "anchored" in Travis County, something must give. Given the limitations of populations and geography, the State Defendants are unaware of any map that accomplishes all four. It is possible to accomplish (1), (2), and (4)—as Travis County and the Jackson Plaintiffs do—by deliberately altering the lines to make it likely to elect an additional Democrat to Congress. It is possible to accomplish (2), (3), and (4)—as the Bipartisan Congressional Plan does—if one is willing to leave Webb County divided. Or, it is possible to accomplish (1), (2), and (3)—as the individual State

Defendants' Plan 1418C does—but not without removing Travis County from the border District 25.

And, between these four possible objectives, (4) has the least basis in federal law or this Court's mandate on remand. Even without the Travis County portion, Congressman Doggett is left with an open, strongly Democratic District 25 that encompasses a majority of the population and virtually all of the geographic territory of his current district. Indeed, the only electoral threat to Congressman Doggett that has been suggested in press criticism is not from a Republican challenger, but rather from a potential Hispanic Democratic challenger—surely not a prospect that the Voting Rights Act was intended to prohibit.

Thus, either Plan 1418C or the Bipartisan Congressional Plan provides the best approach to remedying the §2 violation while respecting the demonstrated preferences of the Legislature and staying within the limited judicial role for adopting a remedial plan.

CONCLUSION

The State Defendants respectfully request that the Court adopt a remedial plan that appropriately respects the policy preferences embodied in Plan 1374C and that it order implementation of that plan on a schedule consistent with the smooth administration of the upcoming election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I will cause a copy of this brief to be sent to all counsel of record in this case as reflected in the Court's electronic docket by the means of electronic mail on July 21, 2006 and that a paper copy is being sent by UPS overnight mail to those counsel of record for whom we do not have an electronic-mail address for delivery on July 21, 2006.

DON CRUSE