

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

FILED
JUL 14 2006
MARSHALL, TX
U.S. DISTRICT COURT
CLERK

LEAGUE OF UNITED LATIN §
AMERICAN CITIZENS, *et al.* §
Plaintiffs, §
v. §
RICK PERRY, *et al.* §
Defendants. §

No. 2:03-CV-354
Consolidated

**STATE DEFENDANTS'
OPENING BRIEF IN THE REMEDIAL PHASE**

GREG ABBOTT
Attorney General of Texas

R. TED CRUZ
Solicitor General
Lead Attorney

KENT C. SULLIVAN
First Assistant Attorney General

DON CRUSE
BILL DAVIS

EDWARD D. BURBACH
Deputy Attorney General for
Litigation

ADAM W. ASTON
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711
512-936-1700
512-474-2697 [fax]

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Summary of the Argument 2

Argument 3

I. The Supreme Court Found Only a Narrow §2 Violation. 3

 A. The Supreme Court Held That Six Remedial Latino-Opportunity
 Districts Should Be Drawn in South and West Texas—and That
 Plan 1374C’s District 25 Was Not Required by the Voting Rights
 Act and Was Not a Latino-Opportunity District. 3

 1. To find that Plan 1374C contained only five Latino-
 opportunity districts, the Supreme Court expanded the
 “compactness” requirement under §2 to include an inquiry
 about the shared needs and interests of the minority
 community. 3

 2. Evaluating the totality of the circumstances, the Supreme
 Court concluded that there was a §2 violation centered on
 District 23. 5

 B. The Supreme Court Rejected the Argument That Seven
 Reasonably Compact Latino-Opportunity Districts Could Be
 Drawn in Texas. 5

 C. Because It Presumed That Remedial Changes to District 23
 Would Spill Over To Affect District 25, the Supreme Court
 Declined To Reach the Constitutional Claims as to Either of
 Those Districts. 6

II. The Scope of a Remedy Should Be Guided by the Scope of the §2
 Violation Itself, While Otherwise Fully Respecting the Legislative
 Policy Preferences Embodied in Plan 1374C. 7

III.	Following Those Principles Leads To a Map That Redresses the §2 Violation, Moots the Constitutional Challenges, and Affects a Limited Number of Other Districts.	11
A.	Demonstration Plan 1418C.	11
B.	The Demonstration Plan Would Remedy the §2 Violation, Would Moot the Constitutional Challenges, and Would Otherwise Fully Respect the Legislative Preferences Embedded in Plan 1374C.	14
IV.	The Timing of Any Remedy Should Minimize Disruption to the Upcoming Election.	15
	Conclusion	18
	Certificate of Service	19

TABLE OF AUTHORITIES

Cases

<i>Balderas v. Texas</i> , No. 6:01-CV-158, 2001 WL 34104836 (E.D. Tex. 2001) (three-judge court)	10, 14
<i>Chisom v. Roemer</i> , 853 F.2d 1186 (5th Cir. 1988)	16
<i>Diaz v. Silver</i> , 932 F.Supp. 462 (E.D.N.Y. 1996) (three-judge court)	16
<i>Henderson v. Perry</i> , No. 04-10649, 2006 WL 1788313 (U.S. June 30, 2006) (summary affirmance)	10
<i>Johnson v. De Grandy</i> , 512 U.S. 997 (1994)	4
<i>LULAC v. Perry</i> , 126 S.Ct. 2594 (2006)	<i>passim</i>
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	16
<i>Session v. Perry</i> , 298 F.Supp.2d 451 (E.D. Tex. 2004) (three-judge court)	3, 5, 6
<i>Soechting v. Perry</i> , No. 05-298, 2006 WL 1788314 (U.S. June 30, 2006) (summary affirmance)	10
<i>Terrazas v. Ramirez</i> , 829 S.W.2d 712 (Tex. 1991)	16
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986)	3, 4
<i>Upham v. Seamon</i> , 456 U.S. 37 (1982) (per curiam)	7
<i>Vera v. Bush</i> , 933 F.Supp. 1341 (S.D. Tex. 1996) (three-judge court)	17

Whitcomb v Chavis,
403 U.S. 124 (1971).....7

White v. Weiser,
412 U.S. 783 (1973).....7

Statutes, Rules, and Constitutional Provisions

42 U.S.C. §§15301-15545 16

42 U.S.C. §15481(a)(3)..... 16

42 U.S.C. §1973ff-1(a) 17

**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'
OPENING BRIEF IN THE REMEDIAL PHASE**

TO THE HONORABLE EASTERN DISTRICT OF TEXAS:

The scope of this remand is narrow. On direct appeal, the Supreme Court affirmed most of this Court's prior judgment upholding the congressional redistricting map passed by the Texas Legislature in 2003, and it rejected virtually all of Plaintiffs' claims attacking that map. Indeed, the Supreme Court found merit in just one claim—a vote-dilution challenge centered on old District 23 and implicating current District 25.

On remand, the Court's task is to craft a limited remedial plan that addresses that claim and otherwise fully respects the legislative policy preferences already expressed in Plan 1374C. 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 to assist with that task.

SUMMARY OF THE ARGUMENT

On remand, the Court's task is limited to remedying the §2 violation that the Supreme Court found and otherwise fully respecting the policy choices made in the current congressional map. Five broad principles should guide the Court's remedial efforts:

- A total of six Latino-opportunity districts should be drawn in South and West Texas (not including current District 25).
- The additional Latino-opportunity district should likely be based in the general geographic region of old District 23, and the Supreme Court has strongly suggested that the remedial map should reassemble Webb County.
- As a byproduct of creating a sixth Latino-opportunity district, the Court should endeavor to make current District 25 more compact.
- The remainder of the legislatively adopted Plan 1374C should be fully respected.
- The pairing of incumbents should be avoided—especially in remedial districts drawn by a court to comply with §2.

In accordance with those principles, the individual State Defendants submit a demonstration map, Plan 1418C. That map affects only four districts, leaving 28 current districts untouched. It contains two strong Latino-opportunity districts. It is substantially more compact, and it no longer links Travis County with the border region. It also avoids pairing any incumbents and maintains the current partisan balance of the four affected districts. In short, it remedies the violation of federal law, while fully respecting the already enacted policy preferences of the Texas Legislature.

ARGUMENT

I. THE SUPREME COURT FOUND ONLY A NARROW §2 VIOLATION.

Rejecting an array of other arguments, the Supreme Court chose to reverse on only one theory—the §2 vote-dilution claim alleging that the residents of District 23 had suffered an impermissible effect on their ability to elect the candidate of their choice. *LULAC v. Perry*, 126 S.Ct. 2594, 2615, 2623 (2006). How it reached that conclusion should guide how this Court crafts an appropriately narrow remedy.

A. The Supreme Court Held That Six Remedial Latino-Opportunity Districts Should Be Drawn in South and West Texas—and That Plan 1374C’s District 25 Was Not Required by the Voting Rights Act and Was Not a Latino-Opportunity District.

Applying the standard three-prong test of *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), the Supreme Court found a §2 vote-dilution violation in South and West Texas. In so doing, it concluded that Plan 1374C contained only five Latino-opportunity districts and that the former Plan 1151C (used, in essence, as a “demonstration” map) established the possibility of drawing six such districts.

1. To find that Plan 1374C contained only five Latino-opportunity districts, the Supreme Court expanded the “compactness” requirement under §2 to include an inquiry about the shared needs and interests of the minority community.

After a full trial, this Court rejected Plaintiffs’ §2 claims regarding District 23 because, *inter alia*, it concluded that the creation of current District 25—which regression analysis had demonstrated functioned as a strong Latino-opportunity district, performing better than had old District 23—alleviated any concerns about changes in District 23. *Session v. Perry*, 298 F.Supp.2d 451, 489, 500, 503 (E.D. Tex. 2004) (three-judge court);

see also LULAC, 126 S.Ct. at 2623 (“District 25 . . . was formed to compensate for the loss of District 23 as a Latino opportunity district.”). Thus, including current District 25 in the count, Plan 1374C contained six Latino-opportunity districts.

The Supreme Court rejected that analysis. To do so, it held that that minority opportunity districts must be compact, and that any such districts that are not compact do not count under the Voting Rights Act.¹ *Id.* at 2619. And, the Supreme Court articulated a two-factor definition of compactness which it concluded current District 25 failed to meet because of (1) its “enormous geographical distance,” and (2) the “disparate needs and interest” of its Hispanic population.² *Id.* Because current District 25 was not compact, it did not count for Voting Rights Act math; and because current District 25 did not count, the Supreme Court concluded that there were only five Latino-opportunity districts in Plan 1374C.³ *Id.* (“Plan 1374C contains only five reasonably compact Latino opportunity districts. Plan 1151C, by contrast, created six such districts.”).

¹ It has long been understood that a district must be compact in order to be *required* to be drawn should a plaintiff bring suit under §2 of the Voting Rights Act. *See Gingles*, 478 U.S. at 50; *see also Johnson v. De Grandy*, 512 U.S. 997, 1006-07 (1994) (discussing the *Gingles* preconditions). In the present case, the Supreme Court added to that rule the principle that a voluntarily state-created district that is deemed non-compact also does not count toward the State’s obligation to comply with §2 of the Voting Rights Act. *See LULAC*, 126 S.Ct. at 2619.

² As the Chief Justice observed in dissent, *see LULAC*, 126 S.Ct. at 2653-54 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part), old District 23 in Plan 1151C also combined urban Latinos with Latino populations along the Rio Grande and is substantially more geographically extended than is current District 25. Nonetheless, because no party contended that the district failed the new compactness standard (which had not yet been articulated), the Supreme Court presumed in its analysis that old District 23 would meet that test. *LULAC*, 126 S.Ct. at 2619.

³ Although this Court considered compactness, and concluded after a full trial that current District 25 was in fact compact, the Supreme Court disagreed because the standards for compactness are different for Voting Rights Act purposes than for equal-protection purposes:

2. Evaluating the totality of the circumstances, the Supreme Court concluded that there was a §2 violation centered on District 23.

Because current District 25 is non-compact, the Court concluded that minority voters in that district were “without a §2 right” to an opportunity district. *Id.* at 2616. Because old District 23 *was* compact, the Court concluded that its minority voters did have a §2 right to such a district. *Id.* That conclusion was supported, the Court explained, by the totality of the circumstances concerning District 23, including the split of Webb County—a fact the Court found particularly troubling. *Id.* at 2621-23. Indeed, the Court placed particular focus on the increasing political effectiveness and cohesiveness of the Latino vote in Webb County, and the harm it perceived from dividing that community between two congressional districts. *Id.*

B. The Supreme Court Rejected the Argument That Seven Reasonably Compact Latino-Opportunity Districts Could Be Drawn in Texas.

Some Plaintiffs advocated the drawing of seven—rather than six—Latino-opportunity districts in South and West Texas. *See Session*, 298 F.Supp.2d at 489; *LULAC*, 126 S.Ct. at 2616. This Court rejected that theory after a full trial, finding that seven reasonably compact Latino-opportunity districts could not be drawn in compliance

The [district] court’s conclusion that the relative smoothness of the district lines made the district compact, despite this combining of discrete communities of interest, is inapposite because the court analyzed the issue only for equal protection purposes. In the equal protection context, compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines. Under §2, by contrast, the injury is vote dilution, so the compactness inquiry embraces different considerations.

LULAC, 126 S.Ct. at 2618.

with §2 of the Voting Rights Act. *Session*, 298 F.Supp.2d at 491-92 & 496. The Supreme Court expressly affirmed that finding. *LULAC*, 126 S.Ct. at 2616.

C. Because It Presumed That Remedial Changes to District 23 Would Spill Over To Affect District 25, the Supreme Court Declined To Reach the Constitutional Claims as to Either of Those Districts.

The Supreme Court vacated other challenges to the district configuration in the region, presuming that those challenges would be mooted by an appropriate remedy. In particular, it vacated LULAC's claim that "the use of race and politics" in drawing District 23 violated the First Amendment and the Equal Protection Clause. *LULAC*, 126 S.Ct. at 2623. The Court explained that it presumed those claims would be mooted by a remedial plan: "The districts in south and west Texas will have to be redrawn to remedy the violation in District 23, and we have no cause to pass on the legitimacy of a district that must be changed." *Id.* (citing *Session*, 298 F.Supp.2d at 528 (Ward, J., concurring in part and dissenting in part)).

The Supreme Court expressly anticipated that a remedial map would also affect District 25 so as to moot the challenges to that district: "District 25, in particular, was formed to compensate for the loss of District 23 as a Latino opportunity district, and there is no reason to believe that District 25 will remain in its current form once District 23 is brought into compliance with §2." *LULAC*, 126 S.Ct. at 2623. For that reason, it vacated the Jackson Plaintiffs' racial-gerrymandering claim concerning that district. *Id.*

II. THE SCOPE OF A REMEDY SHOULD BE GUIDED BY THE SCOPE OF THE §2 VIOLATION ITSELF, WHILE OTHERWISE FULLY RESPECTING THE LEGISLATIVE POLICY PREFERENCES EMBODIED IN PLAN 1374C.

For the second time this decade, this Court is tasked with devising a remedial map for Texas's congressional districts. Such a task is understandably “unwelcome” for a court “because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance.” *LULAC*, 126 S.Ct. at 2608. A court's remedial role is therefore confined to curing the particular violation of federal law that has been found, while otherwise fully respecting the state legislature's policy preferences. *Upham v. Seamon*, 456 U.S. 37, 40-41 (1982) (per curiam) (“[Appellants] argue that . . . in the absence of any finding of a constitutional or statutory violation with respect to those districts, a court *must defer* to the legislative judgments the plans reflect, even under circumstances in which a court order is required to effect an interim legislative reapportionment plan. We agree . . .”) (emphasis added); *White v. Weiser*, 412 U.S. 783, 795 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971); *see also LULAC*, 126 S.Ct. at 2608 (explaining that “a lawful, legislatively enacted plan should be preferable to one drawn by the courts”).

Thus, the task facing this Court today is considerably different from the task that it faced in 2001. In 2001, the Court had to remedy a constitutional violation that afflicted every district in the State—lack of population equality. Texas had just been awarded two new congressional seats and the new census had revealed substantial population shifts. As a result, not a single district in the State had the constitutionally required population.

To remedy such a pervasive violation, the Court needed to make at least minimal changes to all 32 districts.

In 2006, by contrast, the Supreme Court found a §2 violation centered in just one congressional district—none of the other 31 districts was found to violate any federal statutory or constitutional law, although the viability of one other district (District 25) was called into question. To correct such a narrow violation, the Court should target its remedy to the affected region of the State while causing as little disruption as possible to the legislative policy preferences embedded in the remainder of the map.

To aid the Court in devising its remedy, the State Defendants offer five broad principles drawn from Supreme Court precedent:

- **A sixth Latino-opportunity district should be drawn in South and West Texas (not counting current District 25).** The Supreme Court found that Plan 1374C violated §2 because current District 25 was not compact, and so the plan has only five legally compact Latino-opportunity districts. The principal task before the Court is to create a sixth compact Latino-opportunity district.
- **That sixth Latino-opportunity district should likely be based in the general geographic region of old District 23, and the Supreme Court has strongly suggested that the remedial map should reassemble Webb County.** Although the Supreme Court did not *hold* that Webb County must be kept whole in any remedial map, it is difficult to avoid the strong suggestion that Webb County

should be reassembled.⁴ Indeed, its discussion of the totality of the circumstances—the touchstone of a §2 violation—was focused almost entirely on voters in Webb County, and the perceived harm from dividing them between two congressional districts. *See LULAC*, 126 S.Ct. at 2621-23.

- **In the process of creating a sixth Latino-opportunity district, the Court should also endeavor to make current District 25 more compact.** In part because of the geography of the region, it is almost unavoidable that any sizable shift of Latino population into District 23 will have consequences that will ripple into District 25. The Supreme Court expressly anticipated this likely effect, and for that reason declined to rule on the challenges to District 25. *See LULAC*, 126 S.Ct. at 2623 (“[T]here is no reason to believe that District 25 will remain in its current form once District 23 is brought into compliance with §2.”). And, although the Court did not hold that District 25 must be changed, it is difficult to ignore the Court’s serious misgivings with that district’s non-compactness.⁵

⁴ In the usual case, the type of vote-dilution violation found by the Supreme Court might be remedied in other ways. The state legislature could adopt an entirely different district configuration for the region—one that included six remedial districts—that happened to divide Webb County, so long as the result overall was not dilutive under §2. But given the particular attention given to Webb County in the Supreme Court’s opinion, any plan that significantly divided Webb County might face considerable risk.

⁵ Perhaps tellingly, Justice Souter’s dissent expressly states that he and Justice Ginsburg “join Part III of the principal opinion, *in which the Court holds that Plan 1374C’s Districts 23 and 25 violate §2 of the Voting Rights Act.*” *LULAC*, 126 S.Ct. at 2647 (Souter, J., concurring in part and dissenting in part) (emphases added). Of course, the actual majority opinion released on June 28 did not in fact strike down District 25, *LULAC*, 126 S.Ct. at 2623, but Justice Souter’s reference could be read to suggest that an earlier circulated draft may well have done just that. In any event, whether or not §2 should now be read to prohibit non-compact districts, the Court’s concern with the perceived non-compactness of District 25 is self-evident from the opinion.

- **The remainder of the legislatively-enacted Plan 1374C should be fully respected.** The Supreme Court upheld the legality of almost all of Plan 1374C. Indeed, it squarely held that Plan 1374C as a whole does *not* violate any federal constitutional command regarding political fairness, rejecting all of the statewide claims brought by the various Plaintiffs, *see LULAC*, 126 S.Ct. at 2612, and summarily affirming the separate appeals brought by Henderson and Soechting.⁶ This narrow remand does not reopen those determinations, nor does it invite the parties to second-guess other aspects of Plan 1374C.
- **The pairing of incumbents should be avoided—especially in remedial districts drawn by a court to comply with §2.** When this Court drew a remedial map in 2001, it conscientiously avoided the needless pairing of incumbents. *Balderas v. Texas*, No. 6:01-CV-158, 2001 WL 34104836 (E.D. Tex. 2001) (three-judge court). The Court should adopt a similar restraint in crafting a remedial map for this narrow §2 violation, paying particular attention to whether incumbents are paired in a district designed to remedy a §2 violation. Pairing two incumbents into a remedial district involves inherently political judgments that courts are ill-suited to entertain, and should be avoided if at all possible.⁷

⁶ *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).

⁷ This principle takes on particular importance when both incumbents are minority candidates. It would be passing strange for a judicial remedial map under the Voting Rights Act to unnecessarily pair two minority incumbents in a single district, potentially prompting an electoral clash that could serve to reduce the number of minority Members of Congress elected from the covered jurisdiction.

III. FOLLOWING THOSE PRINCIPLES LEADS TO A MAP THAT REDRESSES THE §2 VIOLATION, MOOTS THE CONSTITUTIONAL CHALLENGES, AND AFFECTS A LIMITED NUMBER OF OTHER DISTRICTS.

In response to the Court's June 29, 2006, order directing the parties to submit remedial proposals, the individual officeholders named as State Defendants collectively submit Demonstration Plan 1418C.⁸

A. Demonstration Plan 1418C.

The demonstration plan alters only four districts—current District 23, current District 28, current District 25, and current District 21. A map showing the present configuration of those districts is attached as Exhibit A. Currently, only one of those districts (current District 28) was deemed by the Supreme Court to be a compact Latino-opportunity district. To comply with the Supreme Court's mandate that one more §2 remedial district be added, Plan 1418C redraws that same four-district geography to create a second §2 remedial district.

The demonstration map was drawn through a four-step process.

First, in order to directly address what seemed to be the primary concern of the Supreme Court, Plan 1418C reassembles Webb County and places it whole into current District 23. Doing so increases the Latino citizen-voting-age percentage of the district substantially, transforms the district into a Latino-opportunity district, and redresses the §2 violation found by the Court.

⁸ This plan is submitted on behalf of the individual state defendants who are elected to political office, and not on behalf of the State of Texas or the Secretary of State. It is not a submission of the covered jurisdiction and, accordingly, is not due legal deference.

Second, bringing Webb County into current District 23 in turn depletes the population of current District 28, such that it is underpopulated by roughly 100,000 people. Accordingly, as the Supreme Court anticipated, Plan 1418C then draws population from the adjoining current District 25. Paying heed to the Supreme Court's admonition to render current District 25 more compact, the result is a combined district that encompasses much of the South Texas geography of current Districts 28 and 25, but no longer reaches up to include the disparate Latino population in Travis County. Like its progenitor current District 28, the new district is also a performing Latino-opportunity district.

Third, bringing Webb County into current District 23 also overpopulates current District 23. To balance the population in the demonstration map, Plan 1418C, *inter alia*, removes the northern part of Bexar County that is included in the current District 23 and removes some of the Hill Country counties that had been added to current District 23 in 2003. Population balancing in this region has the salutary effect of avoiding pairing incumbents, because it shifts the current residence of Congressman Henry Bonilla into what becomes a new district.⁹

Fourth, after creating these two Latino-opportunity districts, and balancing population, Plan 1418C is left with two-districts-worth of population to be assigned in the region between Austin and San Antonio. Therefore, one district begins with the western portion of that area—the Hill Country counties and the portion of Bexar County removed

⁹ Moreover, to the extent that old District 23 could be faulted for linking urban Latino populations with distant Latino populations along the border, removing excess population from northern Bexar County ameliorates any such concern.

from current District 23—and moves east to join that area with the western half of Travis County. This district covers much of the population and geography removed from current District 23, currently represented by Congressman Henry Bonilla, and includes the residence of Congressman Bonilla. And the final district covers all of the remaining unassigned geography, including that portion of Travis County that was removed from current District 25. This fourth district covers much of the population and geography currently represented by Congressman Lamar Smith, and includes Congressman Smith's residence.

A map showing how these four districts appear in Plan 1418C is attached as Exhibit B.¹⁰ For convenience, the districts have (with one exception) been renumbered to correspond to the congressional incumbent residing in each. Congressman Henry Cuellar would, under Plan 1418C, reside in the new District 28; Congressman Henry Bonilla would reside in the new District 23; and Congressman Lamar Smith would reside in the new District 21. The one exception is Congressman Lloyd Doggett, who under both the current plan and Plan 1418C physically resides in District 10 according to the RedAppl database. The new District 25, however, does include a large majority of the geography Congressman Doggett now represents in current District 25.

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

¹⁰ For the Court's convenience, the Texas Legislative Council's version of this map is also included as Exhibit C, and a copy of the Texas Legislative Council's statistical package for the map is included as Exhibit D.

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.

B. The Demonstration Plan Would Remedy the §2 Violation, Would Moot the Constitutional Challenges, and Would Otherwise Fully Respect the Legislative Preferences Embedded in Plan 1374C.

Plan 1418C works as a remedial map because it adds one additional Latino-opportunity district, creating the statewide total of six districts required to remedy the §2 violation. In Plan 1418C, both new District 28 and new District 25 contain sufficient majorities of Latino citizen-voting-age population to be politically effective, as the regression analyses confirm. *See* Giberson Aff. ¶3 (Exhibit E). Indeed, the performance of new District 28 is superior by those measures to the old District 23 configuration that was included in the court-drawn Plan 1151C. *See* Giberson Aff. ¶3 (Exhibit E). Moreover, the two new districts are substantially more compact than is current District 25. *See* Giberson Aff. ¶4 (Exhibit E).

The new districts are more compact both quantitatively and qualitatively. For example, quantitatively, the critically important current District 25—which the Supreme Court found to be non-compact under the Voting Rights Act and which the Jackson

Plaintiffs argued is constitutionally non-compact—currently has a smallest-circle score of 8.5 and a perimeter-to-area score of 9.6. In contrast, new District 25 in the demonstration map has a markedly smaller smallest-circle score of 4.1 and a perimeter-to-area score of 6.5. *See* Giberson Aff. ¶4 (Exhibit E). In addition, the new districts are more compact in the qualitative sense because none links the portions of Travis County that the Supreme Court found could not meaningfully be aggregated with the border region for purposes of drawing a §2 remedial district. *Cf. LULAC*, 126 S.Ct. at 2618-19 (“[T]he District Court’s findings regarding the different characteristics, needs, and interests of the Latino community near the Mexican border and the one in and around Austin are well supported and uncontested.”).

Plan 1418C would also moot the pending constitutional challenges to current District 23 and current District 25. The challenge to current District 23 is focused on the manner in which Webb County is divided in Plan 1374C—a question that would be mooted by Plan 1418C’s consolidation of Webb County into one district. And the challenge to current District 25 is based on the way in which population is joined between Travis County and the border region—a question that likewise would be mooted by Plan 1418C’s removal of Travis County from any district connected to the border.

IV. THE TIMING OF ANY REMEDY SHOULD MINIMIZE DISRUPTION TO THE UPCOMING ELECTION.

The State stands ready to expeditiously implement whatever changes are ordered by the Court as part of a remedial map. Because preparations for the November 2006 elections are already well underway, and because of the complexity of making changes to

district lines in the middle of the process, the State respectfully requests that—assuming the map is to take effect for the 2006 elections¹¹—any remedial map be ordered by approximately August 7, 2006. That date would allow a brief candidate-qualification period (to be ordered by the Court) and allow the ballot to be certified on September 6, 2006—which would logistically enable a smooth and orderly election. *See* Letter from the Office of the Texas Secretary of State (Exhibit F).

In crafting its remedy, the Court should also be cognizant of several additional legal constraints on the State's ability to effectively implement a new map. First, the Help America Vote Act of 2002 (HAVA), 42 U.S.C. §§15301-15545, requires in part that States provide machines accessible to voters with disabilities at each polling place. 42 U.S.C. §15481(a)(3). Each of these special machines must be programmed by a third-party vendor. *See* Letter from the Office of the Texas Secretary of State (Exhibit F). Changes to district lines that require the creation of new polling places could affect compliance with the federal statutory directives in HAVA.

¹¹ The Supreme Court has called it “the unusual case” in which a court would permit an election to proceed under a plan that has been held to be illegal. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). There are, however, circumstances “where an impending election is imminent and a State’s election machinery is already in progress, [in which] equitable considerations might justify a Court in withholding the granting of immediately effective relief in a legislative apportionment case.” *Id.*; accord *Chisom v. Roemer*, 853 F.2d 1186, 1189-90 (5th Cir. 1988). A number of courts have permitted elections to proceed under districting plans that had already been adjudicated to violate federal law. *See, e.g., Diaz v. Silver*, 932 F.Supp. 462, 468-69 (E.D.N.Y. 1996) (three-judge court); *see also Terrazas v Ramirez*, 829 S.W.2d 712, 720-21 (Tex. 1991) (collecting cases in which both federal and state courts permitted impending elections to proceed under unconstitutional plans). Likewise, this Court may well conclude that the present case is that “unusual case,” *Reynolds*, 377 U.S. at 585, and so the effect of any remedial plan should be stayed until after the 2006 elections.

Second, another federal statute—the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)—dictates the amount of time that Americans overseas, including members of the military, must be given to cast their ballots. 42 U.S.C. §1973ff-1(a). Each state overseas ballot is tailored to the voter’s polling place—containing the full slate of candidates available in his or her city, county, state house district, state senate district (where such a race is being held in 2006), congressional district, and other offices. Those tailored ballots are generated by the same coding process that prepares the voting machines for use in each polling place. *See* Letter from the Office of the Texas Secretary of State (Exhibit F). An overly expedited schedule, whether for a general election or a special runoff, may impede compliance with UOCAVA.

At a minimum, in order to accomplish the logistical steps necessary for an orderly election, any judicial order to implement a remedial plan in November 2006 should issue as soon as reasonably possible, optimally on or before August 7, 2006. And, preferably, any such order would reflect whether it is meant to override the demands of other federal statutes (HAVA and UOCAVA), if a conflict between the court’s order and those federal directives becomes unavoidable.¹²

¹² When the court ordered a remedy in 1996, it was addressing a federal constitutional violation, *Vera v. Bush*, 933 F.Supp. 1341, 1342-43 (S.D. Tex. 1996) (three-judge court), so there would have been little question whether its remedy would trump conflicting demands in federal statutes.

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,

BY: 

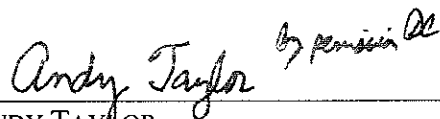
R. TED CRUZ*
Solicitor General
Lead Attorney
State Bar No. 24001953

GREG ABBOTT
Attorney General of Texas
KENT C. SULLIVAN
First Assistant Attorney General
EDWARD D. BURBACH
Deputy Attorney General for Litigation

DON CRUSE
BILL DAVIS
ADAM W. ASTON
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711
512/936-1700
512/474-2697 [fax]
ATTORNEYS FOR THE STATE DEFENDANTS

* Motion pending to substitute as lead counsel.

 *by permission of*
ANDY TAYLOR
Prior Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of this submission to be provided to all counsel of record in this case as reflected in the Court's electronic docket by the means of overnight mail sent on July 13, 2006, and that I will also send a courtesy copy of the brief to counsel via electronic mail on July 14, 2006.



DON CRUSE

APPENDIX TABLE OF CONTENTS

Selected Districts from Plan 01374C, U.S. Congressional Districts, 109th Congress	Tab A
Selected Districts from Plan 01418C, State Defendants' Demonstration Plan	Tab B
Texas Legislative Council Maps of Selected Districts from Plan 01418C	Tab C
Texas Legislative Council Statistical Package for Plan 01418C	Tab D
Todd Giberson Affidavit and Other Materials	Tab E
Letter from the Office of the Texas Secretary of State	Tab F

