No. 05-439

In The
Supreme Court of the United States

GI FORUM OF TEXAS, *ET AL.*,

Appellants,

v.

RICK PERRY, *ET AL.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

REPLY BRIEF FOR APPELLANTS GI FORUM, *ET AL.*

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CONSTITUTION AND STATUTES

I. Intentional Minority Vote Dilution Is Always Motivated By A Desire To Ensure A Particular Political Outcome.

The State asks this Court to approve redistricting that intentionally dilutes minority voting strength as long as the State maintains that it was motivated by the "political" goal of preserving the incumbency of a candidate disfavored by minority voters. Such a rule would exceed any permissible constitutional limits on partisan gerrymandering and ignore both the language and purpose of the Fourteenth Amendment and Section 2 of the Voting Rights Act.

It is undisputed that in order to be re-elected in a Latino-majority district, Congressman Bonilla required Anglo bloc voting and the support of some Latino voters.[1]

In light of past Latino support for Mr. Bonilla (as high as 30% in 1996), it was not unreasonable for the State to hope that Mr. Bonilla would increase his vote share among Latinos in District 23, perhaps some day even becoming the Latino candidate of choice. However, as Latino voter registration steadily increased and Latino support for Mr. Bonilla declined, the State was faced with the erosion of Mr. Bonilla's political base.[2]

Achieving incumbency protection by diluting minority voting strength is an old practice. It exists without respect to political party and occurs in primary, general and non-partisan elections.[3] A jurisdiction will minimize or dilute minority voting strength, not necessarily because it is

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[1] GI Forum Ex. 123 (Preclearance Submission filed by State of Texas with the U.S. Department of Justice, Exhibit D at 9, n.21) ("Preclearance Submission").

[2] *See* J.S. App. at 145. The State's Expert, who advised the State's map-drawers while they were creating maps, testified that District 23 was made safer for Bonilla in response to a lack of Latino support. Jackson Pls. Ex. 140 (Gaddie deposition at 83).

[3] *See Terry v. Adams*, 345 U.S. 461, 483-84 (1953) (Clark, J., concurring) (discussing Democratic primary).

opposed to minority voting in principle, but because it wants to avoid the consequences of minority voting.[4]

GI Forum does not assert that the State bears any racial hostility towards Latinos. However, the State acted to avoid the result that would ensue from Latino voters electing their candidate of choice in District 23 – by excising them from the district.

The State argues that if it pursued an incumbency protection goal, it necessarily did not discriminate on the basis of race. The District Court agreed. J.S. App. at 170. Responding to potential political challenges, however, cannot exempt the State from the constitutional prohibition on using race as the means to an end.

A. The State Dismantled District 23 Because it Offered Latino Voters the Opportunity to Elect Their Candidate of Choice and Threatened to Unseat Congressman Henry Bonilla.

The District Court clearly erred in characterizing District 23 as not being an "effective opportunity district" because Congressman Bonilla held his seat in 2002. J.S. App. at 130, 141, 144.

The District Court ignored the fact that the parties agreed that District 23 in the *Balderas* court plan offered Latino voters the opportunity to elect their candidate of choice. *See* GI Forum Merits Br. at 7.

The District Court also twice incorrectly characterized District 23 as a "bare" Latino-majority district, although the *Balderas* court had placed within it a 57.5% Latino

[4] *See*, *e.g.*, *Garza v. County of Los Angeles Bd. of Supervisors*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991); *Ketchum v. Byrne*, 740 F.2d 1398, 1401, 1406-07 (7th Cir. 1984); *Armour v. Ohio*, 775 F. Supp. 1044, 1061 (N.D. Ohio 1991); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982). The State's argument at the close of the trial that "Henry Bonilla is winning and that's because the Latinos haven't been able to be cohesive enough to defeat him," demonstrates the State's focus on the role of Latino voters, as Latinos, in District 23. Tr., Dec. 23, 2003, 9:00 a.m., at 109 (Andy Taylor).

citizen voting age majority.[5] By contrast, the District Court never characterized the State's Districts 25 and 28 as "bare" despite the fact that they featured lower Hispanic citizen voting age populations of 55% and 56.2%, respectively.[6]

Although the District Court properly articulated the legal test for an opportunity district, J.S. App. at 158-59, it refused to consider the fact that in 2002, District 23 elected 13 of 15 Latino-preferred candidates, citing instead election results from the 1990's, before the District was created and when Latino voter registration was lower.[7]

B. The State Dismantled District 23 so Latino Voters Neither Control Nor Influence the Electoral Outcome.

The current District 23 is one in which Latinos cannot control the outcome of the election.[8] And, contrary to the State's assertion, District 23 is not an influence district. *See* State Br. at 100.

This Court has recognized minority influence districts when minority voter participation has an influence over the outcome of the election.[9] In *Georgia v. Ashcroft*, 539 U.S. 461, 487-88 (2003), the influence districts identified by the Court were ones in which African American voters did not comprise a majority in the district, but played a role in the process by providing necessary votes for the winning candidate.

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[5] J.S. App. at 127, 149.

[6] State Ex. 58.

[7] *See* J.S. App. at 127, 144; *see also* Jackson Pls. Ex. 140 (Gaddie deposition at 128-29); GI Forum Ex. 123 (Preclearance Submission Ex. D at 15).

[8] *See* J.S. App. at 191; State Ex. 56 at 9, 10.

[9] *See Voinovich v. Quilter*, 507 U.S. 146, 154 (1993); *Johnson v. DeGrandy*, 512 U.S. 997, 1021 (1994). Lower courts have followed the same approach. *See Barnett v. Chicago*, 141 F.3d 699, 703 (7th Cir. 1998); *Rural West Tennessee African-American Affairs Council v. McWherter*, 877 F. Supp. 1096, 1101 (W.D. Tenn. 1995), *aff'd*, 516 U.S. 801 (1995); *Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 991 n.13 (1st Cir. 1995).

Where, as here, Latino voters do not support Mr. Bonilla and are too few to unseat him, and Anglos vote as a bloc for Mr. Bonilla, Latino political participation has no effect on the outcome of the election and certainly does not create an obligation for Mr. Bonilla to respond to Latino interests. *See Thornburg v. Gingles*, 478 U.S. 30, 99 (1986) (O'Connor, J., concurring in the judgment).[10] In contrast to an influence district, District 23 is a textbook example of a district in which minority voter influence is minimized or cancelled out. *See Rogers v. Lodge*, 458 U.S. 613, 617 (1982).

The Court in *Gingles* explained that the race of a candidate does not determine whether he is favored by minority voters.[11] Despite the arguments by the State to the contrary, Mr. Bonilla's race simply does not bear on the question whether Latinos prefer him or are adequately represented in District 23. *See* State Br. at 101.

It is unfair to suggest that a candidate not favored by the majority of Latino voters is an appropriate representative simply because of the color of his skin.[12] Such an assumption, that all Latino politicians, because of their race, are equally responsive to Latino voters "reinforces the perception that members of the same racial group – regardless of their age,

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[10] Congressman Bonilla's subjective beliefs regarding his representation of Latinos, and the State's references to his beliefs, do not determine whether Latino voters in District 23 exercise political control or influence. This Court need not decide the issue of political influence based on the statements of incumbents when unanimous expert statistical analysis reveals that Latino voters oppose the incumbent but cannot affect the outcome of the election. This Court should not have to weigh a thank you letter to Mr. Bonilla from the GI Forum (Brief of *amicus curiae* Congressman Henry Bonilla at 10, n.10) against the GI Forum's report that Mr. Bonilla voted for Latino interests a mere 18% of the time in the Congressional session leading up to the 2002 election (National Hispanic Leadership Agenda Congressional Scorecard 107th Congress, *available at* http://www.bateylink.org/pdf/part1_scorecard02.pdf).

[11] 478 U.S. at 67-68; *see also id.* at 100 (O'Connor, J., concurring in the judgment).

[12] *See* J.A. 31-33 (discussing the State's inconsistent and racially-motivated treatment of the incumbents in Districts 23 and 29).

education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (*Shaw I*) (citations omitted).[13]

The State and Mr. Bonilla suggest that Mr. Bonilla became the candidate of choice of Latino voters for the first time in 2004, but offer no analysis to support this assertion. State Br. at 101-02. The county and district vote totals presented in their briefs show neither the level of Latino voter support for Mr. Bonilla, nor the proportion of the electorate that was comprised of Latinos in 2004. Importantly, the 2004 election results do not speak to the critical question whether the State discriminated against Latino voters when it acted to dismantle District 23 following the 2002 election.

II. The District Court Erred By Analyzing GI Forum's Intentional Vote Dilution Claim Under The *Shaw* "Predominant Motive" Test.

A. Intentional Vote Dilution Claims Require a Different Analysis than *Shaw*-type Cases.

A facially neutral districting statute may be constitutionally invalid if it fences out a racial group from the political process, *see Gomillion v. Lightfoot*, 364 U.S. 339 (1960), or it is intended to minimize or unfairly cancel out a racial group's voting strength. *See Rogers*, 458 U.S. at 613; *City of Mobile v. Bolden,* 446 U.S. 55, 66 (1980); *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 165 (1977) (UJO); *White v. Regester*, 412 U.S. 755, 765-67 (1973). Lower courts from almost every circuit have followed this Court's precedent and recognized that purposeful dilution of the voting power of a particular racial group violates the Fourteenth and Fifteenth Amendments as well as the Voting Rights Act.[14]

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[13] For further discussion, *see* GI Forum Merits Br. at 34-35.

[14] *See*, *e.g.*, *Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, 796 F. Supp. 681, 687-88 (E.D.N.Y. 1992); *Page v. Bartels*, 284 F.3d 175 (3rd Cir. 2001); *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Comm'n*, 536 F. Supp. 578, 584-85 (E.D. Pa. 1982);

(Continued on following page)

The District Court certainly understood that, in addition to its racial gerrymandering allegations, GI Forum had brought an intentional vote dilution claim. *See* J.S. App. at 145. Thus, the District Court was required to evaluate GI Forum's intentional vote dilution claim in a manner entirely different from that of its *Shaw*-type racial gerrymandering claims. *See Shaw I,* 509 U.S. at 649-50; *see also Miller v. Johnson*, 515 U.S. 900, 911 (1995). Notwithstanding that comprehension, the District Court improperly used the legal analysis applicable to *Shaw*-type cases, concluding that GI Forum was required to show that race was the "Legislature's predominate consideration." J.S. App. at 90, 164, 178-79.

B. The Correct Standard to Determine Whether the State Acted With a Discriminatory Purpose When it Removed Latinos From District 23 Is That Articulated in *Arlington Heights*.

Had the District Court properly analyzed GI Forum's intentional vote dilution claim, it would have applied the factors articulated in *Arlington Heights* and found that the motivating factor of race rendered the State's District 23 unconstitutional. *See Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977); *see also Hunt v. Cromartie*, 526 U.S. 541, 546 n.2 (1999) (*Cromartie I*).

First, the State's manipulation of District 23 "bears more heavily" on Latino voters than Anglo voters. *See Arlington Heights*, 429 U.S. at 266; J.S. App. at 144-45.

Second, the "historical background" and the "specific sequence of events leading up to the challenged decision" illustrate that, at least with regard to District 23, the

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Washington v. Finlay, 664 F.2d 913, 919 (4th Cir. 1981); *Neal v. Coleburn*, 689 F. Supp. 1426, 1432-33, 1435-36 (E.D. Va. 1988); *Robinson v. Commissioners Court*, 505 F.2d 674, 678 (5th Cir. 1974); *Kirksey v. Board of Supervisors of Hinds Co.*, 554 F.2d 139, 142-43 (5th Cir. 1977); *Armour,* 775 F. Supp. at 1047-48; *Ketchum,* 740 F.2d at 1406; *Rybicki,* 574 F. Supp. at 1113; *Leadership Roundtable v. City of Little Rock*, 499 F. Supp. 579, 583-84 (E.D. Ark. 1980); *Garza,* 918 F.2d at 766; *Brown v. Bd. of School Comm'rs*, 706 F.2d 1103, 1106-07 (11th Cir. 1983).

State reacted to the voting particularities of the Latino population, not to a change in the manner Democrats or Republicans were voting. *Id.* at 267. *See* J.S. App. at 128, 145. Less than six months after Mr. Bonilla almost lost his seat, the State undertook a new redistricting, in large part to protect his incumbency from the threat posed by a growing Latino electorate that was no longer willing to give him a portion of its support.

Third, in enacting Plan 1374C, the State in many ways departed significantly from its "normal procedural sequence." *Id.* at 267. The 2003 redistricting required one regular and three special sessions of the Legislature and was characterized by two failures to achieve a legislative quorum when opposing legislators fled the State, as well as the abandonment of the time-honored "two-thirds rule" in the Texas Senate. *See* J.S. App. at 64-65.

Finally, the legislative history behind the dismantling of District 23 supports the conclusion that the State acted with the intent to dilute the voting strength of Latinos in that district. *See Arlington Heights*, 429 U.S at 268. Plan 1374C was enacted, not without fanfare, but rather with repeated warnings that splitting Webb County in half would violate the Voting Rights Act because it would dilute Latino voting strength.[15]

III. Even Assuming That Texas Offered A Permissible "Political" Motive, An Asserted Political Motive, Without More, Cannot Justify The Dismantling Of A Latino Opportunity District.

A. The State May Not Rely on Racial Stereotypes in Redistricting.

The District Court did not address GI Forum's claim that the State relied on a constitutionally-prohibited assumption: that Latinos reliably support Democratic candidates and thus must be removed from District 23 in

[15] Tr., Dec. 16, 2003, 8:30 a.m., at 112-13 (J. Morgan Kousser).

order to guarantee that it continues to elect a Republican incumbent. *See* GI Forum Post-Trial Br. at 5.

This Court has made clear that a State may not assign voters to districts on the assumption that their race and political party are aligned. *See Bush v. Vera*, 517 U.S. 952, 968 (1996) ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.").

B. The State Did Not Demonstrate a Nexus Between Race and Partisanship in District 23.

Although courts approach cautiously the analysis whether a state articulating a legitimate political motive is in fact relying on impermissible racial stereotype, states may not simply assert, without more, that minority voters are Democrats in order to satisfy the constitutional inquiry. *See Easley v. Cromartie*, 532 U.S. 234, 266-67 (2001) (*Cromartie II*) (Thomas, J., dissenting) ("It is not a defense that the legislature merely may have drawn the district based on the stereotype that blacks are reliable Democratic voters.").

Evidence that a State relied on race as a proxy for partisanship includes statements to that effect by a State in the Section 5 preclearance process, *Vera*, 517 U.S. at 969, testimony by State officials that confounds race and partisanship, *see id.* at 969-70, and redistricting conducted below the level of political precincts. *See id.* at 970-71.[16]

IV. The District Court Erred By Accepting The State's Asserted Partisan Justification Without Evidentiary Support.

The Latino voters in District 23 who comprised part of Mr. Bonilla's base are not, by definition, Democrats. They are more accurately characterized as Republicans, Independents or ticket-splitters, to the extent that they may support Democratic candidates in non-congressional elections. These Latino voters supported Mr. Bonilla in

[16] *See also Cromartie II*, 532 U.S. at 243-56 (adding additional criteria, including a state's rejection of reasonable alternative district configurations).

larger numbers in the early 1990's but chose to vote for his opponent at greater rates after 1996.[17]

The steady withdrawal of Latino support drove Mr. Bonilla's vote share downward – from 64% in 1998, to 61% in 2000,[18] to only 51% in 2002. At the same time, the number of voters living in the district, and the partisan index of the district, remained relatively unchanged.[19]

A. The State's Witnesses Did Not Testify That Webb County Latinos Were Removed From District 23 Because Latinos Were Democrats.

The State did not prove that Latinos reliably voted Democratic in District 23 congressional elections, especially in Webb County.

The State's witnesses never testified that they examined the voting behavior of Webb County before splitting it and removing over 100,000 Latinos from District 23. The chief redistricter in the Texas House of Representatives, Representative Phil King, testified that Webb County was split to balance out population after redistricters added voters from the Hill Country.[20]

The State's expert, Dr. Keith Gaddie, who served as an advisor to the Legislature during the redistricting process, testified that although he was concerned enough to ask for the data to do a *Cromartie* analysis of the relationship between majority-minority district boundaries and partisan voting patterns, the State never asked him to do the analysis.[21] Ultimately, the State produced a *Cromartie*

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[17] GI Forum Ex. 107, 130 (Flores expert report).

[18] State Ex. 20.

[19] The Republican performance of District 23 was enhanced by the *Balderas* District Court when compared to District 23 in the previous (1990's) plan. GI Forum Ex. 3, 4. In fact, the precincts comprising District 23 demonstrated a 56.4% Republican index in statewide elections in 2004, according to the Texas Legislative Council. *See id*.

[20] Tr., Dec. 18, 2003, 1:00 p.m. at 145-46 (Phil King).

[21] Jackson Pls. Ex. 140 (Gaddie deposition at 27, 29, 113).

analysis at trial for Districts 9 and 25 in its plan, but not District 23.[22]

Significantly, the redistricting plan passed in the Texas House never split Webb County. The redistricting plan initially passed in the Senate split Webb County without adding the Hill Country to District 23.[23] When he testified, Mr. Bob Davis, the Senate redistricter, gave no reason at all to split Webb County. Mr. Davis testified that the splitting of Webb County made available enough Latino population to create District 25, but he claimed to have been uninvolved in the redistricting that split Webb County.[24]

B. The State Characterized Latinos as Voting Republican Significantly and Substantially in District 23 Congressional Elections.

Having consistently represented that a significant portion of Latino voters favor the Republican candidate in District 23 congressional elections, the State may not now argue the opposite and claim that it removed Latinos from the district because they were Democrats.

In its application for preclearance, the State repeatedly characterized as "significant" and "substantial" the Republican votes cast by Latinos in District 23 congressional elections.[25] The State also asserted that Latinos and Anglos do not vote differently in congressional elections in District 23 and that "Congressman Bonilla receives up to 40% of the Hispanic vote in District 23."[26]

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[22] State Ex. 34-37.

[23] Plan 1362C was passed by the Senate on September 24, 2003. *See also* Senate plans 1359C and 1354C. All plans are available at http://gis1.tlc.state.tx.us/.

[24] Tr., Dec. 18, 2003, 8:30 a.m., at 84 (Bob Davis); Tr., Dec. 18, 2003, 1:00 p.m., at 39 (Bob Davis).

[25] GI Forum Ex. 123 (Preclearance Submission Ex. D at 10, 11).

[26] *Id.* at 10 (quoting Dr. Keith Gaddie testifying in 2001 that he had heard the 40% number "from somewhere").

In an attempt to explain the changes to District 23 as having no negative effect on Latino voters, the State ultimately declared to the United States Justice Department that District 23 was one of a number of districts in which the congressional incumbents "can be legitimately described as candidates of the minority communities' choice" and as one of "eight functioning minority districts from Plan 1151C . . . " GI Forum Ex. 123 (Preclearance Submission Ex. D at 9, 15).[27]

At trial, the Senate's chief redistricter, Mr. Bob Davis, testified that he believed Mr. Bonilla, as a Republican candidate, received more support from Latino voters than other Republican candidates.[28] Representative Phil King testified that he believed that Congressman Bonilla was the Latino candidate of choice in District 23 "because they keep electing him."[29]

In its Brief to this Court, the State continues to assert that "Throughout his career, Congressman Henry Bonilla has attracted substantial support from the Hispanic community." State Br. at 101. *See also id.* (twice more characterizing the support of Latino voters in District 23 for Mr. Bonilla as "significant").

Thus, the State firmly describes Latinos as Republicans for the purpose of adding legitimacy to its bolstering of Congressman Bonilla's incumbency. At the same time, the State relies on the contention that Latinos are Democrats to justify removing more than 100,000 Latinos from District 23.

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[27] GI Forum offers these statements to demonstrate the State's belief that race and partisanship are not closely correlated in District 23, not for the purpose of suggesting that Mr. Bonilla is the Latino candidate of choice or has ever received 40% of Latino votes in his election.

[28] Tr., Dec. 18, 2003, 1:00 p.m., at 48-49 and 54 (Bob Davis); Tr., Dec. 18, 2003, 8:30 a.m., at 114 (Bob Davis).

[29] Tr., Dec. 18, 2003, 1:00 p.m., at 168, 179 (Phil King).

C. The District Court's Conclusion that "Politics Not Race" Motivated the Dismantling of District 23 Is Undermined by its Fact Findings.

The District Court's findings regarding the State's motive in protecting Mr. Bonilla's incumbency specifically focused on the race, not political affiliation, of Latino voters:

> The record presents undisputed evidence that the Legislature desired to increase the number of Republican votes cast in Congressional District 23 to shore up Bonilla's base and assist in his reelection. The evidence showed that Bonilla had lost a larger amount of Hispanic support in each successive election. In 2002, Bonilla attracted only 8% of the Latino vote.

J.S. App. at 128. *See also id.* at 145.

In addition, the District Court's recognition that Latinos had supported Mr. Bonilla at higher levels in the past served to undermine its conclusion that the State removed "reliably Democratic voters"[30] from District 23.

Beyond noting that in one election cycle (2002) Latinos in Webb County voted Democratic in non-congressional elections, the District Court did not explore, and made no specific findings of fact, regarding the extent to which Latinos could be removed from District 23 because they were reliable Democratic voters.[31]

Although it concluded that the State removed Latinos from District 23 only because they were Democrats, the District Court never found that Mr. Bonilla's incumbency was threatened because District 23 had become "more Democratic." Nor could it have, because the *Balderas* court

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[30] J.S. App. at 144.

[31] The State argues in its Brief that the 2002 election results overstated the strength of Democratic candidates and are an aberration. *See* State Br. at 102. If that were the case, the District Court's reliance on this one election to assess the likelihood of Latinos voting Democratic is even more problematic. Although GI Forum does not agree with the State that the 2002 election was an aberration, GI Forum maintains that it was inappropriate for the District Court to base its entire conclusion regarding the political tendencies of Webb County Latinos on one year's non-congressional election results.

plan made District 23 slightly more Republican when compared to the 1990's plan, according to the Texas Legislative Council.[32] The District Court only found that Latinos created the incumbency crisis for Mr. Bonilla by withdrawing their previous support. Having formed a necessary part of Mr. Bonilla's political base, these Latino voters are not properly characterized as reliable Democrats to justify their removal from District 23.

D. The District Court Improperly Accepted the State's Conflation of Race and Partisanship.

In *Bush v. Vera*, this Court found that statements that conflated race and partisanship revealed an unconstitutional reliance on race to achieve a political end. *Vera*, 517 U.S. at 970. The State's frequent interchangeable use of race and partisan affiliation when discussing its changes to District 23 demonstrates this same unconstitutional use of race as a proxy for partisanship.[33]

Instead of scrutinizing the State's discussion of District 23 under the *Shaw* and *Miller* line of cases, the District Court carried forward the interchangeable use of race and partisanship in its opinion.[34]

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[32] *See* GI Forum Ex. 3.

[33] *See* Tr., Dec. 18, 2003, 8:30 a.m., at 115 (Bob Davis) ("Once District 23 was taken down, *its Hispanic numbers were reduced, its Republican numbers were increased*, all the advice that we had was that you had to look at the plan as a whole." and "if you were going to reduce District 23 and *enhance its Republican status and reduce the Hispanic voting age population and Spanish surname registered voters . . .* "); Tr., Dec. 18, 2003, 1:00 p.m. at 151 (testimony of Phil King) ("The – the concern was that District 23, *because we had put more Republicans in there, might not be a – considered a Hispanic District*. And so the advice was that we should create an additional District.") (emphasis added).

[34] *See* J.S. App. at 128, 143-44.

V. The District Court Erred In Not Analyzing GI Forum's Claim That The State Improperly Used Race When It Constructed District 23 As A "Nominal" Latino District That Could Not Elect The Latino-Preferred Candidate.

"Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks . . . and schools . . . so did [this Court] recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race." *Miller*, 515 U.S. at 911. GI Forum argued that the State improperly relied on race when it constructed District 23 as a "nominal" Latino-majority district. GI Forum Post-Trial Br. at 6. The District Court did not address GI Forum's contention.

The evidence shows that the State meticulously tailored District 23 to ensure a 50.9% Latino voting age majority so that Congressman Bonilla would be perceived as the Latino candidate of choice in a Latino district. At the same time, the State reduced the Latino population so that Latinos could not elect their candidate of choice. *See id.* at 10-12.

Notably, the boundary of District 23 splits seven precincts as it passes through the middle of Webb County and the City of Laredo. Redistricting at the level at which only race data is available, the State carefully placed enough Latinos in District 23 to be able to call it a Latino-majority district.[35] As Representative Phil King testified, "Well, we tried the keep it above 50 percent Hispanic VAP, and we tried to make it a District that [had] some more Republicans in it so that Henry Bonilla could have an easier time with re-election because we didn't want to lose him."[36]

Racial considerations trumped the State's incumbency protection goal as the State rejected at least two more traditional options for ensuring that Congressman Bonilla could be re-elected. First, the State could have avoided splitting a political jurisdiction and community of interest

[35] Tr., Dec. 16, 2003, 1:00 p.m., at 5-6 (Jose Homero Ramirez).

[36] Tr., Dec. 18, 2003, 1:00 p.m., at 164 (Phil King).

by removing Webb County in its entirety from District 23. District 23 would have been left with its traditional West Texas configuration and a minority of Latino voters and Mr. Bonilla would have been safely re-elected by the Anglo voters who have always supported him.[37]

Alternatively, the State could have placed Mr. Bonilla's Bexar County home and surrounding voting base into the adjacent District 11, which was an open seat just to the north of District 23. Placing Mr. Bonilla into District 11, which was designed as a Republican district without an incumbent, would have ensured Mr. Bonilla's re-election and left District 23 as a Latino opportunity district. No longer forced to create District 25 in an attempt to offset the loss of District 23, the State could have used District 25 to create another Republican district elsewhere in the State and would have ended up with a more compact set of districts in South and West Texas and the same number of Republican districts as in its Plan 1374C.[38]

VI. GI Forum's *Gingles* Demonstrative Districts Were "Compact" Because They Met The Compactness Standards Of The Challenged Districts.

As a result of the State's fractured configuration of South and West Texas districts, there are now 111,270 fewer Latinos living in South and West Texas opportunity districts than there were under the six districts in the *Balderas* plan.[39]

The District Court found that GI Forum had established racially polarized voting and a "political, social, and economic legacy of past discrimination," but rejected GI Forum's alternative districts. J.S. App. at 136.

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[37] According to the State's expert, Webb County is not so populous as to require its division in a congressional redistricting plan and it was not necessary to split Webb County to preserve the incumbency of Congressman Bonilla. Jackson Pls. Ex. 140 (Gaddie deposition at 134); Tr., Dec. 18, 2003, 1:00 p.m., at 17, 57-58 (Bob Davis).

[38] Tr., Dec. 18, 2003, 1:00 p.m., at 56-57 (Bob Davis).

[39] *Compare* GI Forum Ex. 3 *with* GI Forum Ex. 48.

To the extent that the District Court concluded that GI Forum failed to satisfy the first *Gingles* precondition because its proposed districts were not non-compact but "more unusually shaped than in either Plan 1151C or Plan 1374C" it clearly erred. *Id.* at 134. The State does not dispute that GI Forum's demonstrative districts met the compactness standards established by the State plan. The District Court accepted the testimony of the State's expert that the compactness of districts in the State's plan "are solidly within the realm of acceptability patterned by the courts."[40] Having determined that the State's districts were compact, the District Court could not reject the GI Forum's more compact demonstrative districts.[41]

VII. GI Forum's Proposed Districts Offered The Opportunity To Elect Latino-Preferred Candidates.

The District Court clearly erred in concluding that GI Forum had not proposed seven districts in which Latino voters had the opportunity to elect their candidate of choice.

The District Court credited and relied upon GI Forum's expert's analysis showing that the State's Latino citizen voting age majority districts offered Latinos the opportunity to elect because Latinos were successful in all or almost all elections. *See* J.S. App. at 142, 145, 151, 154-55, 158-59, 190, 200. In doing so, the District Court accepted both the methodology and results of that analysis, performed by nationally-recognized political scientist, Dr. Richard Engstrom.[42]

However, after analyzing and approving the State's districts under a functional approach, the District Court

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[40] State Ex. 55 at 2.

[41] GI Forum's proposed district with the highest "perimeter to area" score is District 28 (with a score of 10). This compares favorably to the *Balderas* court-ordered District 25 (with a score of 11.8) and the State's District 15 (with a score of 11.6). GI Forum's proposed district with the highest "smallest circle" score is District 28 (with score of 6). This compares favorably to the State's District 15 (with a score of 6.5) and the State's District 25 (with a score of 8.5). GI Forum Ex. 3, 48, 49.

[42] *See* GI Forum Ex. 86 (Engstrom expert report).

reversed course and declared that the GI Forum proposed districts would not offer the opportunity to elect the Latino-preferred candidate despite the fact that Dr. Engstrom's analysis showed that GI Forum's proposed districts offered the same or better opportunity as the State's districts.[43] Having relied upon GI Forum's expert to declare that the State's District 28 elected 8 out of 8 Latino-preferred candidates in recompiled elections, the District Court clearly erred by ignoring the same analysis that found that GI Forum's District 28 elected 8 out of 8 Latino-preferred candidates in those same recompiled elections.[44]

Although the State claims that the District Court's findings are supported by "witnesses familiar with the areas covered" and "testimony of elected officials from the districts at issue," none of those witnesses testified with respect to the GI Forum demonstrative plan.[45]

The State never presented any analysis of the GI Forum districts. The District Court only had before it the credited analysis of Dr. Engstrom that GI Forum District 28 "performed" for Latino voters 100% of the time. GI Forum Ex. 86 (Engstrom expert report).

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[43] After rejecting the testimony of one expert witness who claimed that the State's District 27 would be ineffective for Latino voters, the District Court cited this same discredited testimony to support its conclusion that the GI Forum's proposed District 28 would be ineffective. Because Dr. Polinard never testified about the GI Forum plan, there is no way of knowing what he might have said about the proposed District 28. J.S. App. at 49-50.

[44] Compare partial table at J.S. App. at 152 n.151, which cites to GI Forum Ex. 129, 130 and 131 with full table provided to the District Court at GI Forum Post-Trial Brief at 15.

[45] State Br. at 94. All of the testimony cited in the State's Brief was offered in criticism of the State's districts, not those proposed by GI Forum. J.S. App. at 155-57. The fact-intensive inquiry mandated by *Gingles* is not met when a district court makes conclusions about Latino political effectiveness in one redistricting plan based on testimony about districts in a different plan.

VIII. The State's Suggestion That This Court Should Adopt A New Standard For Measuring Proportionality Should Be Rejected.

The State relies on this Court's decision in *DeGrandy* in support of its argument that proportionality should be measured on a "regional" basis, where the region is defined by reference to plaintiffs' demonstrative districts. State Br. at 96-97. In *DeGrandy*, however, this Court limited its proportionality argument to a specific geographic area (Dade County),[46] only because the parties had "*agreed* in the District Court on the appropriate geographical scope for analyzing the alleged § 2 violation and devising its remedy." *DeGrandy,* 512 U.S. at 1022 (emphasis added).

GI Forum, however, has consistently maintained that Latino votes were diluted *statewide* through Plan 1374C and thus a statewide analysis is the appropriate, and only, measure of proportionality in this case.[47]

The State's attempt to limit the measure of proportionality to the geographic area comprised only of proposed remedial districts not only lacks legal support, it makes little sense. If the relevant "region" for evaluating proportionality is defined by the boundaries of the plaintiffs' demonstrative districts, it would result in the rejection of most, if not all, Section 2 claims. If, for example, there exists an area of a state that currently lacks any minority district, and a Section 2 plaintiff illustrates that a minority district could be drawn there, the state could always prevail by simply pointing out that the plaintiff seeks to control 100% of the representatives in that *one-district* "region," where a minority group does not constitute 100%

[46] It is important to note that in *DeGrandy* the more discreet geographical measure, Dade County, was discernable, well-defined by preexisting county lines, and acceptable to the parties. None of these scenarios presents itself here.

[47] *See*, *e.g.*, GI Forum First Am. Compl. at 1, 5, and 7; GI Forum Post-Trial Br. at 9 and 23; Tr., Dec. 23, 2003, 9:00 a.m., at 49-50 (Nina Perales); *see also* First Amen. Compl. paragraphs 21-23 (discussion of *Gingles* factors in statewide context).

of the "region's" population. If the plaintiff then turns to a different area of the state, where there already is one minority district, and the plaintiff draws a demonstrative plan with two minority districts in that general area, the state could again successfully argue that the plaintiff has no right to control 100% of the representatives in that *two-district* "region," where the minority population does not constitute 100% of that region's population, and so forth.

Moreover, the whole idea of a "regional proportionality" analysis breaks down when *Gingles* districts are located in disparate areas of a state. For instance, if the African American community could meet the first *Gingles* prerequisite in a district in Houston, and then sought a second district in Dallas, a "regional proportionality" analysis would be unmanageable, given the distance between these two metropolitan areas.

GI Forum has described its remedial districts as located generally in South and West Texas but the boundaries of these seven proposed congressional districts do not themselves create an objectively-defined geographic region. The State's attempt to limit proportionality to a "region" defined by proposed remedial districts improperly ties the question of *remedy* (which is always limited in a Section 2 case to a particular area of the jurisdiction) into the question of *liability* (which looks at vote dilution overall in the jurisdiction). Under the State's reasoning, the "region" for proportionality purposes becomes a moving target, as its boundaries change with each proposal offered in satisfaction of the first *Gingles* precondition.[48]

To confine the proportionality inquiry to a "regional analysis," as the State here requests this Court do, is not only nonsensical, but would certainly defeat the purpose of Section 2 of the Voting Rights Act.

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[48] For example, in 2001, the *Balderas* Court referred to "South and West Texas" as a region comprised of six congressional districts. *Balderas v. Texas*, No. 6:01-CV-158, slip op., at 26-28 (E.D. Tex. Nov. 14, 2001), *aff'd mem.*, 536 U.S. 919 (2002). Two years later, the *Session* court treated "South and West Texas" as a larger seven-district region.

The District Court has already found that "six districts in which Latinos hold a majority of citizen voting age population, out of the thirty-two districts that comprise Texas, do not equate to arithmetic proportionality between the number of Latino majority-minority districts and the Latinos' percentage of the citizen voting age population in the State." J.S. App. at 139-40. In this case, proportionality for Latinos should be measured statewide and is met with 8 districts. Contrary to the State's assertion in its Brief, the District Court never counted either District 29 or District 23 in its proportionality analysis. *See* J.S. App. at 139; GI Forum Merits Br. at 149.

Respectfully submitted,

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