

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

SHANNON PEREZ, et al.	§
	§
<i>Plaintiffs</i>	§
	§ CIVIL ACTION NO.
v.	§ 5:11-CV-0360-OLG-JES-XR
	§ [Lead Case]
STATE OF TEXAS, et al.	§
	§
<i>Defendants</i>	§

**PLAINTIFF MEXICAN AMERICAN LEGISLATIVE CAUCUS’ MEMORANDUM  
REGARDING U.S. SUPREME COURT’S DECISION IN  
HARRIS V. ARIZONA INDEPENDENT REDISTRICTING COMMISSION**

The Plaintiff MALC submits this memorandum in response to the Court’s order allowing comment upon the Supreme Court’s opinion in *Harris v. Arizona Independent Redistricting Commission*, 578 U.S. \_\_\_ (2016) a unanimous opinion of the Court. MALC also joins in and supports the memorandum tendered by the Plaintiffs Perez et al., on this issue.

Specifically, this Court has asked the litigants for supplemental briefings as to how the recently-decided *Harris v. Arizona Indep. Redistricting Comm’n*, 578 U.S. \_\_\_ (2016), might affect the claims pertaining to any 14<sup>th</sup> Amendment causes of action that are extant in this case.<sup>1</sup> This advisory will briefly describe the holding in *Harris*, the Mexican American Legislative Caucus’ (MALC) current positions relating to the 14<sup>th</sup> Amendment and analyze how *Harris* might affect those claims.

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<sup>1</sup> See Dkt. 1329, Perez v. Perry, 5:11-CV-00260-OLG-JES-XR

**But, in short, the landmark ruling in *Harris* bolsters MALC's position on all the affected claims precisely because Texas and its leaders engaged in the exact opposite redistricting choices made by the Arizona Redistricting Commission.** At nearly every chance in which Texas could make a population deviation choice, it chose to limit minority opportunity because it could. These decisions were made with a specific intent: to limit the electoral opportunity of minority voters, and in particular Latino voters. They were made deliberately, race-consciously, and in violation of federal and state law.

**Harris**

After the 2010 census, the Arizona Independent Redistricting Commission began its work to create a map for its state legislature. The initial plan had a population deviation of 4.07%. *Harris v. Arizona Independent Redistricting Commission*, 578 U.S. \_\_\_ (2016), Slip Opinion, at 2-3. This plan was modified in order to comply with Section 5's anti-retrogression standard. Slip Opinion at 6. A new plan with more population deviation was formulated in which a few districts were de-populated in order to increase the Hispanic percentage in those districts to avoid retrogression. Slip Opinion, at 7-8.

The Commission adopted a process by which it would make redistricting decisions. The first step was to redraw all 30 of Arizona's legislative districts "in a grid-like pattern across the state." It then made adjustments to take into account the following redistricting factors: 1) to ensure population equality, 2) to maintain geographic compactness and continuity, 3) to respect communities

of interest, 4) to follow local boundaries; and 4) to use visible geographic features and undivided tracts. In addition to these neutral redistricting principles, the Commission chose to favor political competitiveness and to comply with the U.S. Constitution and the federal Voting Rights Act.

The *Harris* opinion sums up the obligation of the state under the 14th Amendment in redistricting its legislative bodies: It “requires States to ‘make an honest and good faith effort to construct [legislative] districts . . . as nearly of equal population as is practicable....’” “The Constitution, however, does not demand mathematical perfection. In determining what is ‘practicable,’ we have recognized that the Constitution permits deviation when it is justified by ‘legitimate considerations incident to the effectuation of a rational state policy.’” Slip Op. at 3.

Two criteria emerge from this formulation:

- (1) Good faith effort to create districts as nearly of equal population as is practicable.
- (2) Deviations may also be justified by “legitimate considerations” effectuating “rational state policy”.

Harris notably states, “[g]iven the inherent difficulty of measuring and comparing factors that may legitimately account for small deviations from strict mathematical equality, we believe that attacks on deviations under 10% will succeed only rarely, in unusual cases.” Texas is just such an unusual case. The population deviations are not mere mathematical blips along a uniform curve. They are hugely disproportionate. Nor is this just a partisan claim, as in *Larios*.

MALC's claim is that the State used race as a predominant factor in how it made population deviation decisions. It would be an odd irony if the State's peculiar population choices, which, in part, lead to the elimination of 5 minority opportunity districts was inoculated from legal action by an opinion that seeks to protect minority opportunity.

To begin with, it is critical to understand the role that the whole county line rule plays in understanding population deviations in the Texas plan. While MALC has maintained and will maintain as long as this litigation lasts that the whole county line rule must give way to the U.S. Constitution and federal law, the State's unbending and inflexible position on the whole county line rule has dramatic implications in light of *Harris*. Because the Texas Constitution requires that districts be apportioned to counties as near as may be, each drop-in district and the policy decisions made for that county must be considered individually. A policy that methodically over-populates minority districts in one county should not be overridden by neutral policy choices elsewhere in the map. Indeed the facts and record submitted to this Court by MALC and others shows that throughout the state map and in specific counties the State chose to over-populate minority districts in order to limit their electoral strength.

### **Good Faith Effort**

The first prong of *Harris* citing *Reynolds v. Sims* requires that policy makers make a good faith effort to construct districts ... as nearly of equal population as practicable." In order to comply with this good faith effort, the

State relied solely upon the 10% safe harbor both in drop-in districts and other districts (i.e. multi-county, spill-over districts, and single county districts).

Interiano, lead cartographer for the Speaker, testified:

Q. As I understand it in drawing the House map, Plan 283, you were operating -- you were operating under the assumption that as long as you were within a 10 percent deviation you were okay; is that correct?

A. Yes.

...

Q. And there was no effort made to minimize the deviations within the counties that had whole districts wholly contained within the county?

A. I think that was up to the delegations..."

(2011 Tr. Vol. 6 at 1418.)

No effort, good faith or otherwise, was made to ensure that population deviations were of nearly equal population as practicable. For instance, in Nueces County, in which there are only two districts, there remains a huge population disparity between the Latino and Anglo districts. 6,075 people separate the two adjacent districts. HD 34 is a Latino majority district and it contains ten times more population deviation than its neighbor HD 32. (3.29% v. -.34%). This is not a mathematical game. There is a tendency to look just at the numbers and dismiss their magnitude. However, in Nueces County strict adherence to the whole county line rule and its relation to the "one person, one vote" standard resulted in the elimination of a minority opportunity district. Curiously, the State's concern for equalized, apportioned voting stops at the county limits of drop-in districts. In light of *Harris*, had Texas not over populated HD 34, the Latino voters' impact in HD 32 would have increased and

potentially both minority opportunity districts in Nueces County could have been protected.<sup>2</sup>

### **Rational State Policy**

Deviations in population may also be justified by a rational state policy. The state policy may be maintaining geographic or political boundaries, ensuring compactness, keeping whole communities of interest, or protecting minority opportunity districts. When looking at the State's policy goals in regards to population deviation, none of these neutral policy rationales were adhered to. Plan H 283 did not pay close attention to communities of interest nor compactness. It did not avoid precinct splits nor did it use population deviations to respect local boundaries. There is precious little evidence of the consideration of any of the elements or any rationale regarding population deviations. As will be discussed in detail, the State has no justification for its deviations. When you remove all possible explanations, there is only one remaining plausible reason for the choices that were made. State lawmakers chose to treat Latino Democrat incumbents in urban counties far differently than other similarly-situated representatives. They did this not to enhance minority opportunity as in *Harris*, but to minimize it.

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<sup>2</sup> Could depopulating HD 34 and adding minority population into HD 32 have saved a minority opportunity district? Taking HD 34 down to -5.00 population frees up an additional 13,000 people to place back into HD 32. With new more accurate citizenship data, it may be possible to make a district that approaches majority HCVAP status. HD 32 is currently 45.3% HCVAP.

### **MALC Population Deviation Positions**

There are two major claims that MALC makes as to the use of population deviations by the State in the creation of the 2011 legislatively-enacted map, Plan H 283: 1) the State systematically overpopulated minority opportunity districts generally in comparison to Anglo majority districts as a whole; and more importantly, 2) the State specifically overpopulated Latino majority districts in nearly every district in which it had the discretion to do so. These disparities are a matter of empirical fact both generally and specifically as to Latino urban Democrats.

Statewide “[o]f the 80 Anglo-majority districts, 34 are over-populated and 46 are under-populated. By contrast, of the 37 Latino-majority districts in Figure 6b, 22 are over-populated, and just 15 are under-populated.” Exhibit 19, “Redistricting in Texas, 2011: Racially Polarized Voting, Racially Biased Population Deviations, and Racially Gerrymandered Maps,” Dr. J. Morgan Kousser Expert report, ¶ 42; DKT 128-1, p. 72. With a more careful look, “of the 15 under-populated Latino districts, 5 are in El Paso County, where the “county line rule” requires that 5 and only 5 districts be drawn, a rule which, applied to the population total in El Paso in the 2010 census, guarantees that the districts must be underpopulated. If these 5 districts were excluded, **then more than twice as many Latino-majority districts would be over-populated as under-populated.**” (emphasis added). *Id.* In Arizona the redistricting commission, chose to underpopulate districts to protect a

legislative district that might have been a Latino opportunity district. Slip Op. at 8.

The State’s adherence to the whole county line rule does not explain away these surface findings of population deviation based on race. Point of fact, it exacerbates them. In drop-in districts, house districts constrained to one county, whose population deviation could not be affected by the whole county line rule, the population deviations between Latinos and Anglos is even more polarized. “Districts ... represented [in the seven most populous counties in Texas] by Democrats are more overpopulated under H.B. 150: 22 to 17, with an average deviation of 0.94. **And Latino Democratic districts are even more overpopulated: 13 to 6, with an average deviation of 1.17.**” (emphasis added). Id at ¶ 43. When you exclude El Paso County because it requires that all districts be de-populated, then the ratio of over-population to under-population in Latino Democratic seats in urban counties is a jaw-dropping 13 to 3 with an average deviation of 2.27.

### **Population Deviations for Latino Representatives in Most Populous Counties**

**(Sorted by Deviation %)**

<b>District</b>	<b>% HVAP</b>	<b>% HCVAP</b>	<b>%SSVR</b>	<b>Population Deviation</b>	<b>Deviation Percentage %</b>	<b>County</b>	<b>Party</b>	<b>Ethnicity of Representative</b>	<b>Representative in 2011</b>
<b>103</b>	67.7	44.6	36.9	8,379	5.00%	Dallas	Democrat	Latino	Rafael Anchia
<b>51</b>	56.2	44.2	36.2	8,072	4.82%	Travis	Democrat	Latino	Eddie Rodriguez
<b>123</b>	66.5	62.7	53.9	8,037	4.79%	Bexar	Democrat	Latino	Mike Villarreal
<b>39</b>	88.5	82.3	82.2	7,746	4.62%	Hidalgo	Democrat	Latino	Armando Martinez
<b>148</b>	68.9	54.7	49.1	7,687	4.59%	Harris	Democrat	Latino	Jessica Farrar
<b>124</b>	66.0	64.1	53.8	7,186	4.29%	Bexar	Democrat	Latino	José Menéndez
<b>125</b>	69.1	63.8	58.7	6,912	4.12%	Bexar	Democrat	Latino	Joaquin Castro

40	93.3	90.3	85.8	5,856	3.49%	Hidalgo	Democrat	Latino	Veronica Gonzales
104	69.2	50.9	48.1	5,147	3.07%	Dallas	Democrat	Latino	Roberto Alonzo
36	92.2	90.3	85.1	4,368	2.61%	Hidalgo	Democrat	Latino	Sergio Muñoz, Jr.
116	59.9	58.5	50.5	3,826	2.28%	Bexar	Democrat	Latino	Trey Martinez Fischer
117	62.7	59.9	50.1	3,612	2.15%	Bexar	Republican	Latino	John V. Garza
145	69.9	58.7	50.6	3,184	1.90%	Harris	Democrat	Latino	Carol Alvarado
140	75.8	59.2	50.7	3,095	1.85%	Harris	Democrat	Latino	Armando Walle
143	73.3	58.2	52.1	-5,155	-3.08%	Harris	Democrat	Latino	Ana Hernandez
118	64.8	63.6	59.4	-5,786	-3.45%	Bexar	Democrat	Latino	Joe Farias
41	76.2	72.8	63	-7,399	-4.41%	Hidalgo	Republican	Latino	Aaron Pena
119	62.7	59.2	50.9	-7,656	-4.57%	Bexar	Democrat	Latino	Roland Gutierrez
77	78.4	72.9	66	-7,688	-4.59%	El Paso	Democrat	Latino	Marisa Márquez
76	87.3	84.3	80.7	-7,877	-4.70%	El Paso	Democrat	Latino	Naomi Gonzalez
75	91.8	89.1	81	-7,946	-4.74%	El Paso	Democrat	Latino	Chente Quintanilla

**Population Deviations of Latino Democrats in Urban Counties Excluding El Paso**  
(Sorted by Deviation %)

District	% HVAP	% HCVAP	%SSVR	Population Deviation	Deviation Percentage %	County	Party	Ethnicity of Representative	Representative in 2011
103	67.7	44.6	36.9	8,379	5.00%	Dallas	Democrat	Latino	Rafael Anchia
51	56.2	44.2	36.2	8,072	4.82%	Travis	Democrat	Latino	Eddie Rodriguez
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39	88.5	82.3	82.2	7,746	4.62%	Hidalgo	Democrat	Latino	Armando Martinez
148	68.9	54.7	49.1	7,687	4.59%	Harris	Democrat	Latino	Jessica Farrar
124	66.0	64.1	53.8	7,186	4.29%	Bexar	Democrat	Latino	José Menéndez
125	69.1	63.8	58.7	6,912	4.12%	Bexar	Democrat	Latino	Joaquin Castro
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36	92.2	90.3	85.1	4,368	2.61%	Hidalgo	Democrat	Latino	Sergio Muñoz, Jr.
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119	62.7	59.2	50.9	-7,656	-4.57%	Bexar	Democrat	Latino	Roland Gutierrez

The 13 districts in urban counties is no small number of minority opportunity districts. In H283, there were only 45 total minority opportunity districts. Of these 45 minority opportunity districts in the entire map, there were only 19 contained in drop-in counties and represented by a Latino Democratic legislator. Of these 19 districts, 13 were over-populated, fully 68%. When El Paso County districts are excluded because all districts in that county must be under-populated, then the percentage is a staggering 81%. By comparison, Anglo Republicans fared far better. Even though urban Republicans are more populated by comparison to their rural brethren, within the seven most populous counties in Texas, 19 districts are over-populated while 15 are underpopulated. See Ex. 19, ¶43.

These deviations were sought consciously and deliberately in statewide effort to soak up as much minority population into as few districts as possible. These deviations are partisan, but they are also racial. “Partisanship explains some of it. Democrats are disadvantaged by the way that they drew lines, but that's not all. Latinos are even more disadvantaged. There are even more Latino districts that are overpopulated that could not be explained simply by partisanship and they can't be explained by the county line rule.” Tr. Trans. P. 236-237 (Dr. Kousser explaining his population deviation analysis and its racial implications).

There are other possible explanations for population deviations using neutral redistricting principles. These might include county line splits, precinct

splits, and compactness of the districts. However, Plan H 283 had a larger deviation, more precinct splits, and was less compact than other plans rejected by the Legislature. See Ex. 19, Table 20, p. 82-83. The State proffers only two explanations for its deviations. First, compliance with the county line rule requires some measure of population deviance. This obviously does not affect the wide-spread, and racially-targeted population deviations among the drop-in counties. The second rationale was that the drafting of drop-in counties was orchestrated by the county delegations themselves. (“Q. And there was no effort made to minimize the deviations within the counties that had whole districts wholly contained within the county? A. I think that was up to the delegations in doing that. The members asked and we told them they were free to do so, but depending on who submitted the map it was ultimately their decision.”) Tr. Trans. Vol. 6, p. 1474, ln. 2-9. (Interiano cross-examination).

The direction and discretion given to these delegations that led to the creation of the drop-in districts was deficient. Interiano, lead staffer on House Redistricting for the Speaker and lead drafter for the State House plan, testified:

Q. As I understand it in drawing the House map, Plan 283, you were operating -- you were operating under the assumption that as long as you were within a 10 percent deviation you were okay; is that correct?

A. Yes. (2011 Tr. Vol. 6 at 1473)

There was no direction given regarding race, nor was direction given concerning how the *Larios* case might impact the delegation’s partisan choices. These

delegations were left to their own devices with little direction in an attempt to avoid responsibility for the final product. More to the point, even if the counties were given wide latitude to craft their own plan, minority representatives were shut out of the decision making process.

Harris County minority legislators directly experienced being shut out of the legislative process. The Harris County Delegation began working on their maps under the assumption that the County would be apportioned 25 districts. Chairman Solomons made a policy decision to reduce that number to 24 seats. Tr. II Trans., p. 1012-13. There were objections lodged by the minority members of the Harris County Delegation.

“Q. The black caucus did meet and discuss redistricting. Is that correct? A. We did as a caucus. Q. Okay. And so you're familiar with obviously with whether or not other caucus members had concerns as well as to how their districts looked and what Mr. Interiano produced. A. Yes, sir, I was.”

...

“Q. Okay. And probably how many of the caucus members out of Harris County had concerns who were African-Americans?”

A. It seemed like to me like all of the African-Americans from Harris County had problems with their district.

Q. And were there a number of the Hispanic legislators as well out of Harris County who indicated they had problems?

A. They did.

Q. Okay. And did many of them have problems that were never fixed or cured?

A. Yes, sir.”

Tr. II, Trans., p. 1238-9. (Representative Thompson describing minority objections to the Harris County plan). The State also refrained from providing resources to these members, including a racially polarized voting analysis that was used to determine whether or not a district was a minority opportunity district.

“Q. Okay. And so are you surprised that there allegedly was such an opportunity available?”

A. I was surprised when I learned about the resources that were available to me that was there that I was not able to access.”

Tr. II Trans, p. 1236. (Representative Thompson describing the lack of access to resources).

In the end, the Harris County minorities were given the guidance that they could make any changes that they wanted to their districts as long as they did not affect Republican districts without the incumbent’s consent.

By leaving it up to the delegations with little or no guidance to its members regarding population deviations, the State created an environment that was destructive to minority opportunity. When there was agreement among the members of the delegation, as in Travis County, no attention was paid to population disparities as long as they were within the safe harbor. This inattention created larger disparities among the minority members. In Bexar County, where there was some agreement as to the plan, the lack of guidance also lead to higher deviations for minority members. Most problematic, in counties in which there was no agreement as in Harris County, minority representatives were not given the resources that were shared with other

leaders of the legislature. And when they voiced their concerns, they were given an impossible direction to cure the substantial defects in their county plan.

The problems associated with population deviations were widely known and criticized by minority representatives on the House Floor. During the debate on H.B. 150 which became plan H 283, Representative Walle asked the Chairman of the Redistricting Committee, “Why do we choose to over-populate nearly every minority majority district in Harris County?” Ex. 19, p. 66, 67.

In sum, the lack of direction, oversight, and resources, all led to the situation this Court now faces. A plan that obviously and systematically treats urban Latino Democrats differently and more harshly than other members of the legislature.

During its second bite at the apple in *Perez’s* second trial, the State proffered the testimony of Dr. John Alford who tried to de-bunk the empirical claims above. The critical element in all of Dr. Alford’s rationalization of the State’s bizarre and discriminatory population deviations is that Dr. Alford’s testimony and report did not analyze population deviations within specific counties, which is exactly where the vote dilution occurs.

“ Q. Your analysis doesn't analyze whether there are systematic population deviations within any one county, do they?

A. They do not.

Q. So, for example, you haven't analyzed whether there are deviations -- systematic deviations within Hidalgo County?

A. That's correct. I have not.

Q. Okay. You have not analyzed whether there may be systematic population deviations in Harris County, have you?

A. I have not.

Q. And you haven't analyzed whether there are systematic population deviations in Dallas County, have you?

A. I have not.

Q. And you haven't analyzed whether there may be systematic population deviations in Nueces County, have you?

A. No, I have not.

Q. And you haven't analyzed whether there may be, what I'll call idiosyncratic population deviations within a part of one county or within a part of a plan that may indicate that the districts were drawn with a racially discriminatory intent, have you?

A. I have not.”

Tr. II, Trans., p. 1900. (Dr. Alford cross-examination on population deviation).

When all other explanations fail to explain away these deviations, the only real answer remains obvious. Using population deviation was one of the tools used by the State to deliberately erode minority opportunity. The macro facts are well known to everyone. Texas grew by 4.2 million new Texans. Of that growth, 65% was Latino. Ex. 20, ¶2. (2,791,255 Latinos compared to 4,293,741 of overall growth). The State using many tools, including population deviation, was able to actually reduce the number of minority opportunity districts from 50 to 45. One of the most potent of these tools was the use of population deviation in order to soak up as many Latinos in individual districts as possible. It was not done in every district, but it was done to such a degree that it limited minority opportunity in Bexar, Dallas, Harris, Nueces, and

Hidalgo County. The tools used were not just over-population, but also strategic and race-conscious under population, as in HD 41 in Hidalgo County.

No matter the choice, the result was the same, less opportunity for minority voters to elect leaders of their choice.

### **Hidalgo County**

Ironically, in a sea of over-population, the most obvious case of population deviation chicanery is in Hidalgo County. HD 41 in Plan H 283 is one of the least populated districts in the State. Every single one of its neighboring districts contained wholly within Hidalgo County is over-populated by an average of 5,990 people, meaning that HD 41 has 13,389 fewer people than its neighboring districts on average. In the benchmark plan, HD 40, which would later be re-numbered to HD 41, was over-populated by 47,775 people or 28.50%. In order to maximize the influence of Anglo's in this district, HD 41 was depopulated to -4.41%. Texas removed 55,174 former residents of HD 40 and split 20 precincts along racial lines in order to increase the percentage of Anglo Voting Age Percentage in HD 40 in Plan H 100 from 5.1% to 19.7% in HD 41 in Plan H 283. There are 60,553 Anglos in Hidalgo County. See Red 100 Report, Plan H 283. HD 41, as result of the depopulation and race-conscious precinct splits, contains 25,984 Anglos or nearly 43% of all Anglos in Hidalgo County.

**House Districts and their deviations wholly contained within Hidalgo  
County**

District	% HVAP	% HCVAP	%SSVR	Population Deviation	Deviation Percentage %	County	Party	Race of Representative	Representative in 2011
36	92.2	90.3	85.1	4,368	2.61%	Hidalgo	Democrat	Latino	Sergio Muñoz, Jr.
39	88.5	82.3	82.2	7,746	4.62%	Hidalgo	Democrat	Latino	Armando Martinez
40	93.3	90.3	85.8	5,856	3.49%	Hidalgo	Democrat	Latino	Veronica Gonzales
41	76.2	72.8	63	-7,399	-4.41%	Hidalgo	Republican	Latino	Aaron Pena

**Bexar County**

HD 117 is less obvious but equally destructive misuse of population. To begin with, HD 117 was a former minority opportunity district, which has elected a candidate of minority choice since 2004. In 2010, Republican John Garza was elected to represent HD 117. Racially-polarized voting analysis performed by MALC expert, Dr. Kousser, proved that Rep. Garza was not the choice of the minority community in HD 117. Using a range of racially-polarized voting models, Dr. Kousser estimated that Rep. Garza only received, at best, 12.5% of the Latino vote in HD 117 in the 2010 election. MALC Ex. 19, Tables 12, 13, 14. In the benchmark plan, H 100, HD 117 was substantially over-populated by 52,723 people. In Plan H 283, HD 117 was brought down to 2.15% deviation. HD 117 is adjacent to 4 other house districts in Plan H 283, HDs 122, 125, 124, and 118.

HD 122 is an Anglo majority district that experienced the largest population growth among Bexar County House districts. HD 124 and 125 are

both Latino opportunity districts. In Plan H 100, HD 124 was over-populated and HD 125 was under-populated. In Plan H 283, both were over-populated by 7,186 and 6,912 respectively. HD 118 is a Latino opportunity district then-represented by Representative Joe Farias that was under-populated in Plan H 100 and also in Plan H 283. The State faced a difficult dilemma with HD 117. How could it ensure the election of Rep. Garza and still have HD 117 resemble demographically a minority opportunity district? The State deployed a two-pronged approach to this problem: 1) keep the population of HD 117 as low as practically possible, and 2) ensure that low-turnout Latino precincts were included in HD 117 in order to create a faux minority opportunity district.

“One of the extraordinary features about House District 117 in the enacted map is that the gap between citizen voting age population among Hispanics and voter registration is 13 percentage points, which is beyond any gap that we see in any other State House district.” Tr. II, Trans. P.68. (Dr. Arrington testifying about HD 117). This change was deliberately orchestrated to change it from a minority opportunity district to an ineffective district. This is precisely the opposite choice made by the Arizona redistricting commission. HD 117 was specifically tailored to “remove[] from the district areas right next to San Antonio there, the more heavily urban districts, and they've inserted in its place more rural districts on both the -- both the north and south end. So that's how they retailored 117 for the new district.” Tr. II, Trans, p. 125. (Dr. Arrington on HD 117's specific tailoring). There is evidence that this was not an accident. The so-called nudge factor email details the process by which the

cartographers for the State looked to find optimal Hispanic precincts that would function to make a district appear to be a minority district in terms of population but not performance.

Rep. Garza and his staff were keenly interested in keeping the Spanish Surname Voter Registration as low as possible while still maintaining the artificial threshold of 50.1%. Several attempts were made by Rep. Farias to work with Rep. Garza in order to return Somerset back into Rep. Farias district. Tr. II, Trans. p. 330. Each of these attempts were rejected because the SSVR was too high for Rep. Garza.

Q. Can you tell us about the topics of these conversations, what he -- were there any stipulations that [Rep. Garza] had for your amendment?

A. The toughest one he had was that he would not move from 50.1 percent, one tenth of 1 percent over the 50. If it was more than that, he would have us redraw the lines. So we were redrawing lines trying to reach that number. But it's so difficult to reach one tenth of one percent, that every map we took to him he rejected or his staff or him together collectively, they rejected any idea we had or plan on redrawing that line....

Q. Okay. So 50.1 percent is SSVR. And do you know if there is a minimum SSVR that Representative Garza knew of before--.

A. From what I understood, the instruction we had, his district had to be 50 percent or more.

Q. Okay. And he wanted no more than what percentage?

A. 50.1 percent.”

Tr. II, Trans. p. 328-9.

The role that population deviation played is critical here. HD 117 could not take any more precincts from HD 122, even though it was substantially over-populated because that would reduce his SSVR below 50.1%.<sup>3</sup> Tr. II, Trans. p. 371. (“Q. When you shared your desires for your district [to gain more Anglos in the north], your requests were met with some chagrin; is that correct? A. Initially, yes.”) (cross examination of Rep. Garza). Rep. Garza and his staff also flatly rejected plans that would have taken excess population from HD 124 or 125, because they were within Loop 410. Tr. II, Trans., p. 386. (“Q. Now, after you received or saw some drafts from Representative Villarreal, you continued to work on a plan that was acceptable to you; is that correct? A. The only question -- this map had lots of objections from many of the delegates, so it didn't -- wasn't discussed in much depth, because of the uproar over several of the districts. I don't remember who in particular, so it wasn't discussed much, and this was thrown out pretty quickly, from what I remember. Q. And the Mike Villarreal map that you saw for 117, that took you inside Loop 410, didn't it? A. I didn't look at this map, again, that closely, because no one liked it, from what I remember.”)

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<sup>3</sup> It is important to note that Rep. Garza would have liked to have taken more territory from HD 122. “And you were asked: And why did you want to go farther north? You testified: Well, I mean those numbers tended to be, like you had mentioned, they were more Anglo and more conservative.” Tr. II, Trans. p. 368.

As discussed above, Rep. Garza also rejected many maps offered by Rep. Farias, because it would have increased his SSVR by a small percentage. Here, the strangeness of HD 117's population deviation is a symptom of the tight-wire balancing act by the State. It could not add more Anglo precincts because that would lower the SSVR below the benchmark number and would likely be an obvious regression for a marginal district. Rep. Garza could not and would not accept any population from HD 124 nor 125. And, every attempt by Rep. Farias to regain the City of Somerset was blocked again because of the threat of adding any SSVR population that might take HD 117 above 50.1%.

In *Harris*, the Supreme Court validated the choice by the Arizona Independent Redistricting Commission to use population deviation to protect a marginal minority opportunity district. The State's actions as to HD 117 are the mirror-image of that policy. Rather than use population deviation by taking excess minority precincts in HD 124 or 125 to protect HD 117, they sought to add as many Anglos and low-turnout Latinos as possible in order to subvert the electoral will of a majority of minority voters in HD 117.

### **Dallas County**

Dallas County is a clear case of over-population of Latino districts in order to stifle the creation of a naturally-occurring minority opportunity district. There are two Latino opportunity districts in Dallas County, HD 103 and HD 104. In the benchmark plan, HD 103 was the least populated district

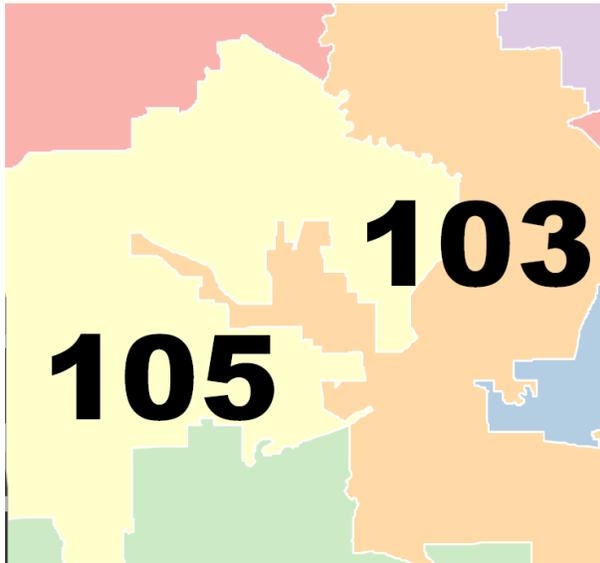
in the state, missing the ideal population by 50,291 people or -30%. Neighboring HD 104, was also down population by substantial percentage, - 21.32%. Yet, there was rampant Hispanic and minority growth in other surrounding districts in Dallas County. Specifically, "Dallas County lost population relative to the state. The lost population is in fact, Anglo population. It did not lose Hispanic population, and it did not lose black population. It lost Anglo population. But because of that loss, Dallas County in the new plan is only entitled to 14 districts instead of 16." Tr.II, Trans. p. 145. (Testimony of Dr. Arrington). In order to mitigate the loss of Anglo voter strength in Dallas County, the State made the strange policy choice to increase the population in these Latino opportunity districts from being among smallest districts in the benchmark plan to becoming some of the largest in Plan H 283. HD 103, in Plan H 283, is 5% over populated adding 58,670 people back into the district. HD 104 is 3.07% over populated adding 40,884 in total population. Tr. II, Trans. p. 149. ("Q. Okay. The -- so, Dr. Arrington, specifically in terms of the population deviations as they're used here in 103, 104 and 105, compared to the other Dallas districts, is there an indication of how population deviation is used? A. Yeah. They're close to the extremes of plus and minus five.")(Dr. Arrington testimony on population deviations in Dallas County).

The State relied upon the safe harbor 10% and made no effort to reduce deviations within county populations. Tr. Trans. p. 1474. ("Q. So from the overall map drawer's point of view there was no effort to -- for example, the Dallas deviation is 8.88 percent, I believe. A. Uh-huh. Q. Houston is over nine

percent, I believe. The statewide map itself is right at 9.92 percent I believe. There was no effort to get those deviations any lower. As long as you were below 10 percent everybody thought they were okay? A. Yes, sir, that's correct.”) (Interiano cross examination).

This is not just a numbers game. These choices had a dramatic effect on minority opportunity in the deeply-contested HD 105. Much has been made concerning the radical and racially-motivated precinct splits in HD 105. However, use of population deviation also plays an important role in its non-performance as a naturally-occurring minority opportunity district. It is true that HD 105 is heavily over-populated compared to other Anglo majority districts in Dallas County. The critical element is that the systematic over-population of HD 103 and HD 104 sponges up Latinos from HD 105 and prevents the creation of a burgeoning Latino opportunity district.

Because of apportionment, Dallas County had to lose two state house districts. The State chose to eliminate HD 106, which was largely subsumed into HD 105. HD 106 had previously elected a Democrat and contained the high growth Latino areas in Irving. In Plan H 100, HD 106 had 44.3% in Hispanic Voting Age Population and 22.9% SSVR. When this district was eliminated and combined with parts of the previous HD 105, the high growth Hispanic areas of Irving were extracted and placed into HD 103.



The arm from HD 103 that juts into HD 105 (shown above) contains substantial Latino population in the City of Irving. They are also the loci of many split precincts that extracted population from HD 105 into HD 103. (“Q. All right. Now I would like to ask you some questions about the precincts that have been split between District 105 and neighboring District 103. A. Uh-huh. Q. So I want to direct your attention to west Irving, to the area along Irving Boulevard that includes portions of Precincts 4610 and 4618. Can you indicate where that area is in the report? A. Right in -- excuse me. Right here. Q. Thank you. And can you tell the Court about the racial demographics of the population that has been split out of Precincts 4610 and 4618? A. These are very Hispanic neighborhoods.”) Tr.II, Trans. p. 1115. (McPhail testimony).

The horrible truth of this inexplicable arm splitting the City of Irving along racial lines is that it was completely unnecessary. The State chose to overpopulate HD 103 substantially above the statewide average and the Dallas

County average. There is no stated policy rationale for this choice. They did this for the most obvious reason possible. They did it in order to hoard as many Latino voters in Latino districts as possible and prevent Latinos in Irving from having influence at the ballot box.

### **Harris County**

Just as in Dallas County, Harris County experienced substantial minority population growth. Initially, slated to have 25 delegation members, Chairman Solomons made the decision to reduce the number to 24. The stated reason for this was a dogmatic insistence that the whole county line rule required it. Chairman Solomons sought to pair two Democrats whom he believed did not represent minority opportunity districts. In addition to this anti-minority policy decision, Chairman Solomons and the drafters of H283 chose to over populate nearly every Latino opportunity district in Harris County. The stark reality of the population deviations becomes apparent when you divide the county in half. While Harris County experienced growth that was comparable to the rest of the State, the population growth was very uneven throughout the County. Specifically, the western portion of Harris County grew very quickly, while its eastern edge actually experienced negative growth.

The ideal population size in Harris County, with 24 districts, is 170,519. Because Harris County was slated to lose a seat, ideally every district should be over populated to soak up the excess population from the eliminated district. A

possible rational policy choice would have located the eliminated district from the vastly under-populated east end of the county. Instead, the district that was eliminated was HD 149, which had actually increased in population. Instead, the State chose to preserve all four Anglo controlled districts in the depopulated eastern edge of Harris County. HDs 144, 127, 128 and 129 were saved by manipulating population deviations within Harris County to preserve these districts. Within counties, population deviation is a whack-a-mole game. When policy makers make the choice to depopulate with one hand, they must over populate on the other. On the west end of the county, where a minority opportunity district was eliminated, six minority districts were heavily packed and severely overpopulated: HD 131 at 175,227; HD 146 at 174,485; HD 147 at 175,873; HD 139 at 175,733; HD 148 175,324 and HD 137 at 173,598. By contrast, the Anglo controlled HDs 126, 136 and 150 are under populated. This is the irrationality of the State's choice. Anglo districts that had gained population in the benchmark plan were kept under the county average, while minority districts in the same area were substantially over populated in order to prevent any increase in minority opportunity. The truth of this is in both the Court's first and second interim plans. When neutral redistricting guidelines are used and packing and overpopulation are ameliorated, then HD 144 naturally becomes a minority opportunity district because of the powerful growth of the Latino community in Pasadena.

**Population Deviation in Western Harris County Sorted by Deviation**

%

<b>District</b>	<b>Population Deviation</b>	<b>Deviation Percentage %</b>	<b>Party</b>	<b>Race of Representative</b>	<b>Representative</b>	<b>Area of Harris County</b>
<b>139</b>	8,096	4.83%	Democrat	African American	Sylvester Turner	West
<b>130</b>	7,895	4.71%	Republican	Anglo	Allen Fletcher	West
<b>148</b>	7,687	4.59%	Democrat	Latino	Jessica Farrar	West
<b>131</b>	7,590	4.53%	Republican	Anglo	Alma Allen	West
<b>146</b>	6,848	4.09%	Democrat	African American	Borris Miles	West
<b>134</b>	6,784	4.05%	Republican	Anglo	Sarah Davis	West
<b>137</b>	5,961	3.56%	Democrat	Anglo	Scott Hochberg/Vo	West
<b>138</b>	5,422	3.23%	Republican	Anglo	Dwayne Bohac	West
<b>133</b>	5,404	3.22%	Republican	Anglo	Jim Murphy	West
<b>132</b>	5,336	3.18%	Republican	Anglo	William 'Bill' Callegari	West
<b>135</b>	4,785	2.85%	Republican	Anglo	Gary Elkins	West
<b>140</b>	3,095	1.85%	Democrat	Latino	Armando Walle	West
<b>126</b>	1,619	0.97%	Republican	Anglo	Patricia Harless	West
<b>136</b>	-1,094	-0.65%	Republican	Anglo	Beverly Woolley	West
<b>150</b>	1,098	0.65%	Republican	Anglo	Debbie Riddle	West

The average over population among minority districts in the western edge of Harris County is 6,337. For Anglo districts, the average is 4,484, which is 29%

smaller than minority districts. There has been no stated policy rationale for this choice. Tr. Trans. p. 1474. (“Q. Houston is over nine percent, I believe. The statewide map itself is right at 9.92 percent I believe. There was no effort to get those deviations any lower. As long as you were below 10 percent everybody thought they were okay? A. Yes, sir, that's correct.”) (Interiano cross-examination).

There was no apparent rational for these choices, save and except the need to treat minorities differently and Latinos far differently than other state representatives.

### **Nueces County**

This is fairly straightforward. Nueces County has two districts. One is a Latino opportunity district and the other is an Anglo district. HD 32, the Anglo majority district, is slightly underpopulated. HD 34, the Latino opportunity district, is over-populated. There is no stated policy rational for this choice. Taken singularly this may be dismissed, but when the same pattern emerges county by county, then the intent to treat minority voters differently becomes clear. Moreover, the benchmark plan had two Latino opportunity district in Nueces County, and Plan H 283 has only one, and it is overpopulated.

It is an undisputed empirical fact that minority districts generally and Latino districts specifically were systematically over-populated compared to similarly situated Anglo-controlled districts.

## CONCLUSION

On this record, and based on a review of the standards announced in *Harris*, Plan H 283 clearly, improperly, and intentionally used population deviations to further illegal political limits on Latino voters and violates the 14<sup>th</sup> Amendment in the geographic areas and specific districts described above.

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Respectfully submitted,

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(MALC)**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10<sup>th</sup> day of May, 2016, I electronically filed the foregoing using the CM/ECF system which will send notification of such filing to all counsel of record who have registered with this Court's ECF system, and via first class mail to those counsel who have not registered with ECF.

\_\_\_\_\_/s/ Jose Garza\_\_\_\_\_  
JOSE GARZA