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

SHANNON PEREZ, *et al.*,	)	
	)	CIVIL ACTION NO.
Plaintiffs,	)	SA-11-CA-360-OLG-JES-XR
	)	
v.	)	
	)	
STATE OF TEXAS, *et al.*,	)	
	)	
Defendants.	)	

The Texas NAACP Plaintiff-Intervenors' Pre-Trial Brief

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I. Introduction

Pursuant to this Court's amended scheduling order entered June 1, 2017 (ECF No. 1404), the Texas State Conference of NAACP Branches, Rev. Lawson, and Howard Jefferson (hereinafter, "the TX NAACP" or "NAACP") respectfully submit this pre-trial brief, detailing the nature of the case they intend to present the week of July 10, 2017. Six years ago, the State of Texas enacted unconstitutional and illegal redistricting maps for State House and Congress. Four years ago, after this Court had made some preliminary findings on Texas' liability, the State, in an attempt to avoid further scrutiny of its discriminatory actions but without any intent to fully remedy the discrimination deeply steeped in the maps, adopted the Court's interim Congressional plan and made only minor changes to the Court's interim State House plan, disregarding the Court's plain instructions that those interim maps did not reflect a full inquiry on the merits. Many of the districts in these maps were invalidated by the Court this year. The TX NAACP will present evidence that the discriminatory intent that motivated the 2011 plans was still present and a motivating factor when the legislature enacted the 2013 plans. The TX NAACP will furthermore present extensive evidence that numerous additional districts are required under Section 2 of the Voting Rights Act. An outline of this evidence is presented in this brief, and based on this evidence, the TX NAACP will request immediate and comprehensive relief from this Court so that the wrong visited upon Texas voters of color six years ago might finally be corrected before the 2018 elections.

II. The NAACP Demonstrative Maps

As a threshold matter, the Texas NAACP Plaintiffs have proffered two demonstrative maps: C284 for Congress and H392 for the State House. The NAACP would not advocate for the wholesale adoption of either plan, though, because these maps do not purport to correct every

unconstitutional or otherwise illegal element in Plans C235 and H358. Instead, because of the limits of time and the fact that the NAACP only has live claims in certain regions of the state, the NAACP focused its efforts on developing demonstrative districts in areas where those live claims persist.

Although both demonstrative plans create new districts in which black and Latino voters together comprise a majority of the electorate and which, based on the evidence the NAACP will proffer, are justified as coalition districts under the Voting Rights Act, these districts can also be independently understood to be districts that remedy the unconstitutional fracturing of communities of color, and that encompass compact, naturally-occurring minority communities throughout highly diverse regions of the state.

Specifically, with respect to C284, the NAACP made modifications to C235 only in the Dallas-Fort Worth ("DFW") region, to remedy the intentionally discriminatory fragmenting of communities of color and to create an additional opportunity for minority voters to elect their candidate of choice, and in Travis County, to restore into one district the fragmented minority communities in Austin. The NAACP did so because these are the regions in which the NAACP has live claims it wishes to pursue—not because it believes there are no constitutional or Voting Rights Act problems in other areas of the map. Plainly there are. But rather than develop a demonstrative map that remedies problems on which the NAACP does not have claims, the NAACP focused its efforts on proffering the best demonstrative maps relevant to its pending claims. Thus, for example, the NAACP's map does not correct the existing problems in CD 23 and CD 27, nor does it attempt to recreate a constitutional, non-racially gerrymandered version of CD 35. The NAACP believes it is possible to do all of those things, and adopts the both the Rodriguez Plaintiffs and MALC Plaintiff's maps in those regions as proof that such corrections

are possible, ensuring that all three congressional districts can be drawn as districts that elect the candidate of choice of Latino voters. The NAACP's map demonstrates that it is possible to create an additional reasonably compact coalition district in the DFW region. The NAACP's map, viewed in conjunction with the Rodriguez and MALC Plaintiffs' maps, also demonstrates that it is possible to remedy the fragmenting of Austin while still creating Latino opportunity districts in Congressional Districts 23, 27 and 35.

With respect to H392, the NAACP made modifications to the current House Plan, H358, only in the following counties: Dallas, Tarrant, Bell and Fort Bend. Again, this should in no way be read to mean that the NAACP endorses the flaws present in other counties in H358, including in Nueces, Harris and others. It is simply a reflection of the limited amount of time available to Plaintiffs' groups and the NAACP's focus on areas where its live pleading stated a claim. The NAACP's demonstrative House map started from the legislatively-enacted map, per the Supreme Court's instruction to defer to the state's judgment where possible, *Perry v. Perez*, 565 U.S. 388, 393 (2012), and creates new minority opportunities for voters of color to elect their candidates of choice in Bell, Fort Bend and Dallas Counties. In Tarrant County, the NAACP's map does not create any new minority opportunity districts, but attempts to remedy some of the flaws identified by the Court in its April 20, 2017 opinion. *See* ECF No. 1365 at 69-71. Thus, while the NAACP's maps are not appropriate for adoption without additional modifications to additional counties, they amply demonstrate that the NAACP can satisfy the first prong of *Gingles* in numerous areas across the state.

III. The NAACP's Claims Against Plan C235

a. Plan C235 As A Whole

i. *Claims and Relevant Pleading*

In its most recently amended complaint, the NAACP has a live claim that Plan C235 as a whole is intentionally discriminatory in violation of Section 2 of the Voting Rights Act and is intentionally racially discriminatory in violation of the Fourteenth Amendment to the United States Constitution. *See* 3d Am. Compl. Of Pls.-Intervenors Texas State Conference of NAACP Branches, et al., ECF No. 900, at ¶¶ 40-45, 60, 64.

ii. The Legal Standard Applicable to this Claim

Defendants' position in this litigation since the enactment of C235 in 2013 has been that the State of Texas could not possibly be guilty of intentional discrimination in enacting that plan because it simply adopted the Court's interim plan, notwithstanding this Court's emphasis on the "preliminary and temporary nature of the interim plan" in its Opinion on the interim house plan dated March 19, 2012. *Perez v. Abbott*, ECF No. 690, at 12. Indeed, the Supreme Court made clear that in developing an interim map, this Court should apply a preliminary injunction standard, making changes only "to the extent those legal challenges are shown to have a likelihood of success on the merits." 565 U.S. at 394. Furthermore, the Supreme Court noted in *University of Texas v. Camenisch* that "given the haste that is often necessary . . . a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." 451 U.S. 390, 395 (1981), Because of this less-than-complete showing at the preliminary injunction stage, "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Id*. Despite this plain law and the assertions of this Court that the interim remedy did not reflect a full ruling on the merits, Texas has persisted in claiming a safe harbor by the adoption of the Court's interim map.

As a matter of law, though, Texas' position is erroneous. The Supreme Court in *Upham v. Seamon* noted: "It is true that we have authorized District Courts to order or permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements . . . . Necessity has been the motivating factor in these situations." 456 U.S. 37, 44 (1982). The Fifth Circuit Court of Appeals and district courts in Texas have agreed that the temporary, and often urgent, nature of interim redistricting plans allows for the creation of plans that, if enacted in any other context, would not pass constitutional muster. *See Citizens for Good Gov't v. City of Quitman*, 148 F.3d 472, 475 (5th Cir. 1998) (noting the "differences between interim and permanent judicial redistricting plans" and the heightened standards required for a permanent plan); *Campos v. Houston*, 984 F.2d 446, 452 (5th Cir. 1992) ("Under appropriate circumstances, even an unconstitutional plan may be implemented on an interim basis."); *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982) ("Also in an emergency, a district court may adopt as an interim measure a redistricting plan that otherwise may not comply with the stringent requirements for a permanent court ordered plan.") (collecting cases).

Black letter law establishes the types of inquiries crucial to analyzing claims of intentional discrimination under the Equal Protection Clause or the Voting Rights Act. *See Arlington Heights v. Metro Hous. Dev. Corp*., 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."). This Court is, of course, highly familiar with the types of evidence relevant to an analysis of claims of intentional discrimination. *See, e.g., Veasey v. Abbott*, 830 F.3d 216, 234-41 (5th Cir. 2016) (in Texas voter ID case, articulating proper evidentiary analysis for intentional discrimination under totality of

circumstances standard and remanding to the Southern District of Texas), *cert. denied*, 137 S. Ct. 612 (2017).

Even under circumstances where the challenged map is not alleged to be based heavily on maps struck down as unconstitutional, precedent requires this Court, nonetheless, to look to: "(1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history, especially where there are contemporary statements by members of the decision-making body." *Overton v. Austin*, 871 F.2d 529, 540 (5th Cir. 1989) (citing *Arlington Heights*, 429 U.S. at 267-68). More recently, the Fifth Circuit further instructed that "[t]he circumstantial evidence of discriminatory intent is augmented by contemporary examples of state-sponsored discrimination in the record." *Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016). Certainly the passage of maps found to be unconstitutionally discriminatory a mere two years prior to the enactment of the maps currently under scrutiny, particularly where the more recently enacted map incorporates unconstitutional elements of the 2011 plan unchanged, constitutes a "contemporary example[] of state-sponsored discrimination in the record." *Id*. Thus, this Court's finding that the 2011 congressional plan was unconstitutional bears heavily on its analysis of whether the 2013 congressional plan was likewise in violation of the Fourteenth Amendment and Voting Rights Act.

Because the challenged congressional plan was based on the 2011 plan that violated the Constitution, the 2011 intent carries through to the 2013 enactment. Fifth Circuit law supports this proposition. In *Chen v. City of Houston*, 206 F.3d 502, 518 (5th Cir. 2000), the Court of Appeals instructed that "in the context of Voting Rights Act suits, evidence that impermissible racial intent had tainted the plan upon which the challenged plan was based has been allowed

even when enough time has elapsed for a substantial degree of familiarity and political reliance to emerge." In this case, the "substantial degree of familiarity" between the 2011 and 2013 legislature with the effects of the redistricting plans cannot be plausibly challenged. To support that contention, *Chen* relies on principles laid out by the Supreme Court in *Hunter v. Underwood*, 471 U.S. 222 (1985), where the court found that the discriminatory intent underlying a felony disenfranchisement provision persisted eighty years after its enactment, despite "judicial invalidation of the most obviously discriminatory provisions." *Chen*, 206 F.3d at 521. Although in *Chen* the Court of Appeals ultimately found that the plaintiffs had not carried their burden of proof in showing that the prior plans were enacted with discriminatory intent, it nonetheless noted that "the district court erred in categorically and totally dismissing evidence of intent garnered from prior plans." *Id.* In this case no "intervening reenactment with meaningful alterations" cleanses the 2013 enactment of its racially discriminatory intent. *Chen*, 2016 F.3d at 521.

Furthermore, the limited changes in the interim congressional map and the wholesale adoption of that plan in 2013 can easily be contrasted with a case in the Fifth Circuit where the appeals court did find that "intervening reenactment with meaningful alterations" cleansed the discriminatory guilt from a legislature. In *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 2016), a felony disenfranchisement provision initially enacted with discriminatory intent ultimately "overc[a]me its odious origin" when it was amended through "a deliberative process" and subsequently approved by a majority of voters. *Id.* at 391. The appeals court contrasted the situation in Mississippi with the situation in *Hunter*, where "'involuntary' amendments," "made through the judicial process," after a court struck parts of the provision as unconstitutional, are not of the sort that provide a cleansing effect. *Cotton*, 157 F.3d. at 391 n.8. In contrast, in

Cotton, the Mississippi legislature twice amended a constitutional provision that, when enacted in 1890, intended to discriminate against African-Americans by disenfranchising individuals who committed crimes that were "committed primarily by blacks." *Id.* at 391. The 1950 amendment removed the historically "black" crime of burglary, and the 1968 amendment broadened the scope of the provision to include rape and murder, "crimes historically excluded from the list because they were not considered 'black crimes,'" each time requiring a two-thirds vote by both houses of the legislature, and each requiring approval by the majority of voters. *Id*. Neither amendment was motivated by judicial intervention. *Id*. at 391 n.8. The Texas legislature's wholesale adoption of changes put in place by this Court to remedy constitutional defects identified under a preliminary injunction standard is easily distinguishable from the Mississippi legislature's removal of the discriminatory parts of a constitutional provision of its own volition, after careful deliberation, and upon approval of a majority of voters.

Finally, although unlikely, even if the Court finds that none of the intent of the 2011 legislature carried through to its enactment of the 2013 maps, it must nonetheless consider the legislature's motives in enacting them as permanent in 2013. The Fifth Circuit made this clear in *Prejean v. Foster*, 227 F.3d 504 (5th Cir. 2000), finding that it was inappropriate for the court below to accept an affidavit from the judge who drafted court-drawn plans as conclusive proof that the legislature did not have discriminatory intent in subsequently adopting those plans. The court stated that "[t]he fact that the legislature adopted Judge Turner's districting plan without modification might support an inference that racial decisions did not predominate, [but] [a]nother equally plausible inference is that the legislature was ready to adopt whatever proposal would satisfy its objective of creating black subdistricts." *Id*. at 511.

Thus, the adoption of the Court's interim plan without substantive changes does not exempt the legislature from inquiry; rather, it simply redirects the Court's inquiry to why and how the legislature adopted its interim plan without substantive changes. Rushing the enactments through with little debate and no amendment is in itself enough circumstantial evidence of discriminatory intent. As the Fourth Circuit noted in *N.C. NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016), which this Court cited in its May 2017 order, "the rushed and secretive process suggests that defendants did want to avoid scrutiny of whether their efforts in fact complied with the VRA or were intended to do so, or whether they were only creating a façade of compliance."

iii. The TX NAACP Plaintiffs' Standing

The Texas NAACP has associational standing to challenge C235 as a whole as violative of both Section 2 and the Fourteenth Amendment because it has over 10,000 members statewide, with approximately 66 local branches and 20 college chapters. NAACP Pls.' 2017 Ex. 1, Decl. of Carmen Watkins, Regional Director for Region VI of the National NAACP ¶ 4 (hereinafter, "Watkins Declaration"), ECF No. 1410-1. Specifically, counties with chapters and thus members include, but are not limited to: Harris, Tarrant, Travis, Dallas, El Paso, Ellis, Bell, Fort Bend, Bexar, McLennan, Galveston, Guadalupe, Midland, and Nueces County, among many others. *Id.* at Ex. A. The NAACP has associational standing to file suit on behalf of its members, who "would otherwise have standing to sue in their own right" as registered voters in the challenged areas. *Hancock Cty. Bd. of Superisors v. Ruhr*, 487 Fed. App'x 189, 195 (5th Cir. 2012) (quoting *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010)) (NAACP had associational standing to bring a one person, one vote claim where its members "were voters from overpopulated and under-represented districts"). By participating

in this lawsuit, the NAACP seeks to protect the right of African-American voters to participate in elections free from discrimination, a goal which is central and "germane to the organization's purpose." *Id.* at 197 ("[P]rotecting the strength of votes[] and safeguarding the fairness of elections are surely germane to the NAACP's expansive mission."). Finally, neither the claims the NAACP has asserted under the U.S. Constitution and Voting Rights Act nor the permanent injunctive relief requested requires the participation of the NAACP's individual members in this action. *See id.* at 197-98 (citing *Am. Physicians*, 627 F.3d 553) (NAACP had associational standing to bring a constitutional claim where "no factual inquiry was necessary beyond the fact that the member [wa]s a voter in" a challenged district and "the district court would not need individualized information about NAACP members" to grant injunctive relief).

Defendants and the NAACP Plaintiffs have entered into a written agreement whereby Defendants will not object to the admission of the Watkins Declaration, which is the basis for the NAACP's standing assertions. *See* NAACP Pretrial Disclosure, Ex. B, Notice of Written Agreement, ECF No. 1453-2. The Watkins Declaration is similar to the declaration proffered by Elia Mendoza, Texas State LULAC Director, in support of LULAC's standing, ECF No. 1342-1 (Mar. 20, 2017), which this Court found satisfied the standing inquiry with respect to LULAC's *Larios* challenges. House Opinion, ECF No. 1365 at 116, 120 (Apr. 20, 2017).

iv. Lay Witnesses Testifying and Summary of Expected Testimony

The NAACP will call Rep. Eric Johnson as a part of the House case about problems with the 2013 legislative process as it relates to redistricting. That same testimony will be applicable to the congressional process, and thus it is not necessary to recall him during the congressional case. For a summary of his expected testimony, see Section IV.a.iv. of this brief. While the NAACP will not be calling any other live witnesses in support of this claim, it anticipates that

legislators called by MALC and Quesada Plaintiffs will also provide evidence in support of the claims that the 2013 legislative process was infected with the same racially discriminatory intent that marked the 2011 process.

v. Expert Witnesses Testifying and Summary of Expected Testimony

Because the consideration of the totality of circumstances or Senate Factors is relevant to intentional discrimination inquiries as well as Section 2 effects inquiries, *Rogers v. Lodge*, 458 U.S. 613, 623 (1982), the NAACP will adopt and rely upon the testimony of the African-American Congresspersons' expert witness Dr. Orville Burton. On the relevant Senate Factors, Dr. Burton will testify to recent racial discrimination in voting by the State of Texas aside from this current litigation, and racial disparities in education, housing, and employment affecting voting participation that are widely known in Texas. He will also testify as to recent racial appeals in voting in Texas.

Finally, although not dispositive to the inquiry of whether the 2013 Congressional Plan as a whole was enacted with racially discriminatory intent, the NAACP's expert Dr. Edward Chervenak will testify in the House case that there is racially polarized voting in every area of the state he examined. The presence of racially polarized voting is relevant to this Court's intentional discrimination analysis. *See N.C. NAACP*, 831 F.3d at 221-22 ("In the context of a § 2, 52 U.S.C.S. § 10301(a), of the Voting Rights Act discriminatory intent analysis, one of the critical background facts of which a court must take notice is whether voting is racially polarized . . . . Racially polarized voting is not, in and of itself, evidence of racial discrimination. But it does provide an incentive for intentional discrimination in the regulation of elections."). Dr. Chervenak will not be recalled to recite the exact same testimony in the congressional case, but his House testimony is relevant.

vi. Key Exhibits

The key exhibits upon which the NAACP Plaintiffs will rely include the following 2017 exhibits: JX 100, 103 (maps); JX 25-30 (legislative documents); NAACP001-002, 014, 023, 039-41. The NAACP will also rely upon the following exhibits already admitted into evidence: 2011 Ex. 601-603, 2014 Ex. 74, 76, 638.

vii. Prior Findings Upon Which Plaintiffs Rely

Many of the Court's findings from its March 10, 2017 opinion on the 2011 congressional plan support the NAACP's contention that the 2013 plan suffers from the same constitutional flaw. This Court stated that the 2011 "mapdrawers acted with an impermissible intent to dilute minority voting strength or otherwise violated the Fourteenth Amendment." ECF No. 1339 at 4. The Court further noted "that Plaintiffs are still being harmed by the lines drawn as the direct product of these violations." *Id.* Because the legislative intent of the 2011 Legislature is highly relevant in the intent analysis of the 2013 maps, the NAACP relies on numerous findings of this Court relating to the legislative process surrounding C185, the 2011 congressional plan, in establishing that C235 as a whole is also intentionally discriminatory.

Generally, the Court found that "all of the experts agreed that there is racially polarized voting in Texas," ECF No. 1339 at 22, and that both racially polarized voting and political cohesion among African-Americans and Latinos are increasing. ECF No. 1340 at ¶¶ 682, 684. The Court emphasized that this polarization "means that partisan gerrymandering results in Anglos maintaining dominance that is not warranted by the declining Anglo population share in Texas." *Id.* ¶ 689. The Court also recognized a willingness of Anglo Republicans in Texas to subordinate the rights of minorities in Texas, noting that "any gains for VRA-protected minorities would come at the direct expense of the dominant Anglo Republican establishment."

Id. ¶ 710. Importantly, this Court stated that "the Anglo Republican establishment in the Texas Legislature had no interest in improving electoral opportunities for minority voters," and "were hostile to the creation of any minority districts." *Id.* As further evidence of general discriminatory intent, the Court also noted that the 2011 legislative session "included a number of bills that exhibited anti-minority or anti-Hispanic sentiment or had potentially discriminatory effects on minorities." *Id.* ¶ 709.

This Court found that while "[a]pproximately 89% of the 4.2 million population growth in Texas between 2000 and 2010 was attributable to minorities" and "mapdrawers and legislators were aware of the extensive of the extensive minority population growth," the congressional map failed to "reflect[] that growth in terms of the number of minority opportunity districts or minority ability to elect districts." *Id.* ¶ 666.

Specially in regard to the 2011 mapdrawers, the Court found that the principal mapdrawers, Eric Opiela and Gerardo Interiano, had email conversations discussing the "nudge factor," a principle that would allow the men to draw "districts that would appear to be Latino opportunity districts because their demographic benchmarks were above a certain level but would elect a candidate who was not the Hispanic candidate of choice." *Id.* ¶ 55. The Court noted that Opiela, Interiano, and another mapdrawer, Ryan Downton, worked closely together, and that Downton similarly understood the ability to create a façade of § 2 compliance using the "nudge factor." *Id.* ¶¶ 84, 722. The men had the means to carry out the "nudge factor," as the data was available to them from the TLC as well as RedAppl. *See id.* ¶¶ 77-79. The Court indicated that it believed the mapdrawers followed through on this concept when constructing the 2011 congressional maps, stating that "[a]lthough Downton denied intentionally manipulating turnout, the Court does not find this denial to be credible." ECF No. 1339 at 21.

Not only did the mapdrawers intentionally draw non-performing minority districts using the "nudge factor," they also achieved this aim by splitting precincts largely on the basis of race. In its findings, the Court stated conclusively that "splitting precincts is disruptive and tends to reduce voter turnout" and that "[c]oncentrating precinct splits in minority communities weighs more heavily on minority voters and drives down minority voter turnout." ECF No. 1340, at ¶ 728. The Court found that out of 8,400 precincts, *id.* ¶ 727, C185 split 518, and that the overwhelming majority of these splits occurred in minority areas. *Id.* ¶ 730.

The Court further noted that the drafters and legislative proponents of C185 intentionally misled other members of the legislature throughout the process. *See* ECF No. 1339 at 22 ("Solomons' statements on the house floor (which were likely prepared by Downton) actively misled other legislators about why changes were made."). Not only was the process deceptive, it was also secretive. "Both the House and Congressional maps were developed in private by a few key players, with minimal public input, and with minimal involvement from minority members." ECF No. 1340 at ¶ 728; *see also id.* ¶¶ 172(Q) ("Solomons did not allow HRC members to ask Downton questions during the hearing"), 182(B) (noting that no analysis was provided from the mapdrawers in writing).

The Court emphasized in its March 10, 2017 opinion on the C185 plan that "the 2013 plans are heavily derived from the 2011 plans." ECF No. 1339. After the interim congressional map, C235, was enacted, the 2011 enacted map on which it was based was denied preclearance by the D.C. District Court. ECF No. 1340 at ¶ 230. Despite this, the Court found, the Texas Legislature enacted Plan C235 as permanent without making any changes. *Id.* ¶ 232. The effect of this enactment is that "although the new plans may disadvantage Plaintiffs to a lesser degree, they disadvantage them in the same fundamental way such that Plaintiffs are still suffering injury

from the 2011 plans." ECF No. 1339 at 2. The Court specifically identified Congressional Districts 23, 27, and 35, which were inserted from C185 into the interim plan unchanged, as violations of the Voting Rights Act and Fourteenth Amendment that continued to cause harm to plaintiffs. *Id.* at 5.

b. Dallas-Fort Worth ("DFW") Challenges

i. Claims and Relevant Pleading

In its most recently amended complaint, ECF No. 900, the NAACP has a live claim that Plan C235's configuration of congressional districts in the DFW region is intentionally discriminatory in violation of Section 2 of the Voting Rights Act, and intentionally discriminatory and racially gerrymandered in violation of the Fourteenth Amendment to the United States Constitution. The NAACP also has claims that the configuration of districts in the region violates the effects test of Section 2 by diluting the voting strength of voters of color in the region and failing to create new electoral opportunities for non-white voters. Specifically, the NAACP continues to allege that CD 30 is unconstitutionally packed with voters of color, limiting those voters' influence in surrounding districts and precluding the required creation of an additional minority opportunity district in the region. *See* ECF No. 900 at ¶¶ 40-44, 60, 64.

ii. The Legal Standards Applicable to this Claim

a. Fourteenth Amendment Claims

The legal standard applicable to the NAACP's Fourteenth Amendment claims, in addition to the standard articulated in *Arlington Heights*, is that of purposeful vote dilution set forth by *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Additionally, the line of racial gerrymandering cases starting from *Shaw v. Reno*, 509 U.S. 630 (1993), and most recently resulting in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), is also applicable to the NAACP's claims.

To find discriminatory intent, "direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions," may be considered. *United States v. Brown*, 328 F.3d 787 (5th Cir. 2003). A map that is drawn to intentionally diminish the influence of racial and ethnic minorities runs afoul of the Equal Protection Clause. *See Gomillion*, 364 U.S. at 341, 346. Such results can be produced by bizarrely-shaped districts that remove or add citizens solely on the basis of skin color and to limit their ability to participate in certain electoral races. *Id.* at 341. These types of intentional vote dilution claims do not require a showing that racial considerations "predominated" over all other considerations. Discriminatory intent need only be one of the causative factors. *Arlington Heights*, 429 U.S. at 265-66; *see also Hunter*, 471 U.S. at 231-31 (holding that the state's additional intention of discriminating against poor whites did not negate the intention to discriminate against blacks); *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) (holding many strategies used to protect white incumbents in high African-American populations are "necessarily racially discriminatory"); *McMillan v. Escambia County, Fla.*, 688 F.2d 960, 969 n.19 (5th Cir. 1982) (holding that incumbency protection does not justify or protect from invalidation a law that is purposefully discriminatory), *cert denied*, 464 U.S. 830 (1983). Moreover, the intentional destruction of a performing crossover district violates the Equal Protection Clause of the Fourteenth Amendment. *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009).

Racial gerrymandering jurisprudence is also applicable to the NAACP's Fourteenth Amendment claims. The State of Texas is prohibited from, absent compelling justification, "separat[ing] its citizens into different voting districts on the basis of race." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (alteration in original). The first step in proving a racial gerrymander is demonstrating that "race was the predominant factor motivating

the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Such proof can be established by showing that traditional redistricting criteria, such as compactness and respect for political subdivisions, were "subordinated" to racial criteria. *Id.* A challenger can satisfy that burden of proof with "direct evidence" of legislative motivations or "circumstantial evidence of a district's shape and demographics." *Id*. If a plaintiff satisfies her burden in demonstrating that race predominated in the construction of district lines, the burden shifts to the defendant to demonstrate that there was a compelling necessity for that use of race. *Cooper v. Harris*, 137 S. Ct. at 848. Recently, in *Cooper*, the Supreme Court found that North Carolina's attempted justification in packing African-American congressional districts up to over 50% black voting age population when those districts offered black voters the opportunity to elect the candidates of choice at a lower black voting age population was constitutionally invalid. *Id.* at 867-68. Importantly, *Cooper* confirms that just because a jurisdiction may have been using race predominantly in order to achieve a political goal, that does not negate a plaintiff's evidence that race was used predominantly:

> So, for example, if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests—perhaps thinking that a proposed district is more "sellable" as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing—their action still triggers strict scrutiny. In other words, the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.

Id. at 20 n.7 (citing *Bush v. Vera*, 517 U.S. 952, 968-70 (1996) (plurality opinion)); *Miller*, 515 U.S. at 914).

b. Section 2 Claims

With respect to the NAACP's Section 2 effects claims, success requires proof of the three *Gingles* preconditions: (1) that the minority group in question is "sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the minority group is "politically cohesive"; and (3) that the "majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). If the three *Gingles* preconditions are proven, a reviewing court must then determine whether the "totality of circumstances" indicates that minority voters have been denied equal opportunity to participate in the political process. *Johnson v. DeGrandy*, 512 U.S. 997, 1009-12 (1994).

The Fifth Circuit's interpretation of the first prong of *Gingles* requires that plaintiffs show that minority voters in a proposed district will comprise a majority of the citizen voting age population in the district. *See Perez v. Pasadena I.S.D.*, 165 F.3d 368 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000). That 50%+1 requirement under the first prong of *Gingles*, though, does not apply in a case where intentional discrimination was at play. *In Bartlett v. Strickland*, the court noted: "[n]or does this case involve allegations of intentional and wrongful conduct. We therefore need not consider whether intentional discrimination affects the *Gingles* analysis. Our holding does not apply to cases in which there is intentional discrimination against a racial minority." 556 U.S. at 20 (internal citations and quotations omitted).

As this Court recognized in both its March 10 and April 20, 2017, rulings on the 2011 challenged plans, the law of the Fifth Circuit plainly contemplates that coalition districts may be required under Section 2 of the Voting Rights Act. ECF Nos. 1339 at 78, 149-50, 1365 at 8-16. At least five cases from the Fifth Circuit have found that minority groups can be aggregated for the purpose of asserting a Section 2 claim. *See League of United Latin Am. Citizens Council No.*

4434 v. Clements, 999 F.2d 831, 864 (5th Cir. 1993) (rehearing en banc), *cert. denied*, 114 S. Ct. 878 (1994) ("[i]f blacks and Hispanics vote cohesively, they are legally a single minority group); *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) ("minority groups may be aggregated for purposes of claiming a Section 2 violation"); *Overton*, 871 F.2d at 538 (concluding that Section 2 permitted the court to order as remedy a district in which Mexican-Americans, although not a majority, could be aggregated with blacks to achieve such a result, if the two groups could be shown to be politically cohesive and that Anglos voted in bloc); *Campos v. City of Baytown*, 840 F.2d 1240, 1244-45 (5th Cir. 1988) ("a (coalition) minority group is politically cohesive if it votes together"), *reh'g denied*, *No. 4386 v. Midland ISD*, 812 F.2d 1494, 1501-02 (5th Cir.), *vacated on other grounds*, 829 F.2d 849 F.2d 943, *cert denied*, 492 U.S. 905 (1989); *League of United Latin Am. Citizens Council* 546 (5th Cir. 1987) (en banc).

Moreover, the law of this case establishes that while lay testimony on minority political cohesion is relevant, minority political cohesion cannot be established or disproven without statistical analysis of voting patterns in the area. *See* ECF No. 1365 at 60 ("While lay testimony is relevant, statistical data is essential when asserting cohesion among three different minority groups.").

Finally, several plaintiff groups argue that racially polarized voting and minority cohesion in general elections are sufficient to establish minority political cohesion in coalition districts, while Defendants seem to essentially argue that unless there is perfect cohesion among black and Latino voters in all Democratic primaries, no coalition district can be compelled. The NAACP posits that there is ample support within the Fifth Circuit for its position that proof of cohesion in general elections is sufficient to meet its burden under *Gingles*' second prong. For example, in *LULAC v. North East Independent School District*, 903 F. Supp. 1071, 1092 (W.D.

Tex. 1995), a court found that plaintiffs "have shown there is political cohesion among Black and Hispanic voters in NEISD" on the basis of statistical analysis of exogenous general elections.

Additionally, *Patino v. City of Pasadena*, No. H-14-3241, 2017 U.S. Dist. LEXIS 2529 (S.D. Tex. Jan. 6, 2017), while not a coalition district case, has helpful guidance in determining which elections are most probative for satisfying the second and third prongs of *Gingles*. The court there noted in the context of exogenous election statistics: "primaries are less probative than general elections for detecting racially polarized voting . . . because general elections present the same candidate pool to every voter, while primary elections limit voters to one party's candidates." *Id.*, at *57; *see also id.*, at *58 ("The court agrees with Dr. Engstrom, and finds, that in citywide elections other than primaries, which are less informative because voters are limited to the candidates of a single party, voting is typically racially polarized."). It would be an absurd result if courts accepted that racially polarized voting in general elections, even if absent in primary elections, was sufficient to establish a Section 2 violation, but rejected proof of minority political cohesion when present in all general elections but perhaps not apparent in every primary election.

Finally, in *LULAC Council No. 4434 v. Clements*, 999 F.2d at 881, the appeals court criticized the district court for "excluding elections in which the black-preferred candidate was Hispanic despite overwhelming evidence that Harris County black and Hispanic voters were a cohesive group within the meaning of § 2." The Court credited a defense expert, who examined mostly general elections, adopting the expert's conclusion that there was not legally significant white bloc voting against black voters because the District Court and plaintiffs' expert had not adequately factored in the high level of cohesion amongst black and Latino voters. *Id.* at 881-83.

The court made similar findings in other counties. *See, e.g., id*. at 886 ("The undisputed facts, as reflected by Taebel's exhibits, are that a majority of Hispanic voters always supported the same candidate favored by black voters in every general election. The district court found that Hispanic and black voters were cohesive in Midland, Lubbock, and Ector Counties on similar evidence. With virtually identical proof in Tarrant County, the same conclusion must follow, and we hold that it does."). Thus, within this circuit, general election data is considered sufficient and oftentimes more probative of minority cohesion in the election of minority candidates of choice.

iii. Plaintiffs' Standing

The NAACP has associational standing to challenge congressional districts in the DFW region as violative of both Section 2 of the Voting Rights Act and the Fourteenth Amendment because it has four branches in Dallas County (the Dallas, Tri-Cities, Irving and Garland branches), and approximately 725 members in Dallas County. NAACP 2017 Ex. 1, Watkins Decl., ¶ 5. Furthermore, the NAACP has three branches in Tarrant County (the Fort Worth/Tarrant, Grand Prairie, and Arlington Branches), and approximately 884 members in the county. *Id*. The NAACP has members in Congressional Districts 33 and 30. *Id*. ¶ 6. Additionally, several members of the NAACP in this region have testified before the Court or offered written proffers attesting to their membership in the NAACP. These members include: Franklin Moss, who testified on August 14, 2017, is an NAACP member residing in Tarrant County; Bob Lydia, who offered a sworn proffer on September 14, 2011 and is a NAACP member residing in Duncanville (Dallas County); and Anthony Bond, who offered a sworn proffer on September 14, 2011 and is an NAACP member residing in Irving (Dallas County). Finally, in the July 2017 trial, more NAACP members from this region are expected to testify:

Rep. Eric Johnson, NAACP member residing in Dallas County, Congressional District 30; and Rep. Toni Rose, NAACP member residing in Dallas County, Congressional District 30. In all, the Texas NAACP has standing on behalf of its members to seek to correct the constitutional deficiencies in existing congressional districts and to create new minority opportunity districts as compelled by the Voting Rights Act.

iv. Lay Witnesses Testifying and Summary of Expected Testimony

The NAACP will call Fort Worth resident and NAACP member Frank Moss to testify about communities of interest in the NAACP's proposed CD 33, and to update his testimony since he last testified in front of this Court in 2014 on totality of circumstances evidence and minority political cohesion, particularly in Fort Worth area elections.

The NAACP will call no other lay witnesses on this claim but will rely on lay witnesses called by other parties. The Texas NAACP will adopt the testimony of Rep. Toni Rose, being called by the African-American Congresspersons. It is anticipated that Rep. Rose will testify that in the years since the last trial, black and brown voters in Dallas County have been politically cohesive in supporting candidates that Anglo voters typically will not support. She with further explain that the totality of the circumstances continues to warrant the creation of new minority opportunity districts in Dallas County. Rep. Rose will also testify that the NAACP's proposed configuration of CD 24 encompasses a relatively compact minority community and reflects a district with shared interests and needs. Likewise, the NAACP anticipates adopting the testimony of Rep. Rafael Anchia, being called by MALC.

v. Expert Witnesses Testifying and Summary of Expected Testimony

In its House case, the NAACP will call Dr. Edward Chervenak to testify about the racially polarized voting studies he performed for Tarrant and Dallas Counties. In a series of

racially contested statewide elections he examined, he found that voting patterns in these elections were racially polarized in these two counties. That is, Anglos did not share candidate preferences with non-Anglo voters. Moreover, he found that black and Latino voters were highly cohesive in these elections, some of which included black candidates and some of which included Latino candidates. Because none of his testimony would differ with respect to the congressional case, the NAACP will not recall him during the congressional case and will rely upon his testimony from the House case.

The NAACP will also call Mr. Anthony Fairfax, who has previously testified in front of this Court on several occasions and has been recognized as an expert in redistricting, mapdrawing, and demographics. Tr. Transcript, Sept. 8, 2011. Mr. Fairfax will testify that the congressional districts drawn in the DFW region respect traditional redistricting criteria and encompass relatively compact minority communities by a number of different metrics. He will also testify to the current populations in these districts using the same population projections he used in his 2014 analysis. 2017 NAACP004.

The NAACP will adopt the expected testimony of experts called by the African-American Congresspersons—Drs. Richard Murray and Orville Burton—who will testify to the totality of circumstances evidence, which supports the creation of additional minority opportunity districts in the DFW Metroplex. Dr. Murray is expected to offer additional testimony of political cohesion between African-American and Latino voters.

vi. Key Exhibits

The key exhibits upon which the NAACP Plaintiffs will rely include the following 2017 exhibits: JX 100, 103 (maps); JX 25-30 (legislative documents); NAACP001-002, 004, 014, 023,

035-36, 039-41. The NAACP will also rely upon the following exhibits already admitted into evidence: 2011 Ex. 601-603, 2014 Ex. 74, 76, 638.

vii. Prior Findings Upon Which Plaintiffs Rely

In part because the NAACP claims that the changes wrought by the Court's second interim plan do not correct all the constitutional and Voting Rights Act deficiencies in the 2011 plan, many of this Court's findings with respect to plan C185 support the NAACP's contentions that plan C235 intentionally discriminates against the residents of the DFW area by failing to create additional opportunities for minority voters, and through "packing and cracking." Notably, the Court disagreed with Defendants in finding "that coalition districts may be required by §2, so long as Plaintiffs satisfy *Gingles* with regard to the coalition," ECF No. 1339 at 78, and additionally found that in many of DFW's inner-city neighborhoods, "[t]he Anglo voters have a history of polarized voting against minorities and high turnout that will overwhelm the minority voters." ECF No. 1340 ¶ 315. The Court noted that "numerous proposals . . . included a minority district in DFW," and that these were ultimately rejected because the mapdrawers considered these coalition districts to be "Democrat district[s]." *Id.* ¶ 330; *see also id.* ¶¶ 306 (Martinez Fischer proposal with two opportunities), ¶ 307 (Rep. Dukes' proposal including an additional opportunity district). The Court found that in the DFW area, "race was used as a proxy for political affiliation, and that this was done intentionally to dilute minority strength." ECF No. 1339 at 132.

The Court further found that much of the minority population in Dallas and Tarrant counties had been cracked "through bizarrely shaped fingers" that "put[] them into "Anglo-dominated" areas and that "strand[ed] urban Hispanic and African-American voters." ECF No. 1340 at ¶ 315. The Court found that this was achieved by drafting a possible minority coalition

district, and then fragmenting it "primarily among CD6, CD12, CD26, and CD33." ECF No. 1339 at 133. In its discussion of cracking, the Court relied upon Franklin Moss' testimony, which emphasized that African-American and Hispanic voters had coalesced to elect several candidates in the past, and that C185 had splintered these working coalitions to their detriment. *See* ECF No. 1340 at ¶¶ 324-25. Further discriminatory intent to crack was demonstrated through the splitting of numerous precincts in DFW on the basis of race, with no other legitimate justification, *See id.* ¶ 313, despite warnings that this could create legal problems for the state. *See id.* ¶ 299 (noting that Hanna had advised the mapdrawers against "a persistent pattern of dividing minority neighborhoods").

The Court found that vote dilution took place through packing, as well. Numerous legislators alleged that CD 30 had been packed during the legislative process, which the mapdrawers and proponents of C185 vehemently denied. *See id.* ¶¶ 187(B) ("Seliger also responded to questioning about whether CD30 . . . was packed, and he denied that it was), 293 ("Veasey complained that all the African-Americans were put into one district in Dallas County . . . unnecessarily . . . . Solomons responded with his opinion that the map was an improvement for minority representation"). Despite these denials, the Court ultimately found that "CD30 demonstrates a classical racial gerrymandering technique of packing minority voters into CD30 to waste their votes, while moving Anglos into neighboring districts to increase their Republican performance." ECF No. 1339 at 131-32. To support this conclusion, the Court found that "no additional African-American population would have been needed to be added to CD30 to comply with the VRA." *Id.* at 128. However, significant changes were made nonetheless, "without any input from Congresswoman Johnson or respect for the integrity of the district other than its racial composition." *Id.*; *see also* ECF No. 1340 at ¶ 245 ("From the benchmark, BVAP

increased from 42.5% to 46.5% and HVAP increased from 34.7% to 35.6%."). Additionally, the Court found that 31 precincts in Dallas County were split by CD 30, *id.* ¶ 314, and further found that the mapdrawers' justifications for these splits were not credible. *See* ECF No. 1339 at 131 (rejecting Defendants' justifications as "generalities and speculation").

In finding "that Plaintiffs ha[d] satisfied their burden of showing that intentional vote dilution was a motivating factor in the drawing of district lines . . . and that map drawers intentionally diluted minority voting strength in order to gain partisan advantage," *id.* at 125, the Court looked to factors such as proportionality of representation, Texas' historical background of discrimination, and the sequence of events leading up to the map's passage. The Court noted that "[m]inorities are not represented in proportion to their numbers in the DFW area," ECF No. 1340 at ¶ 333, and that "proportionality is always a relevant consideration in a §2 vote dilution analysis, and lack of proportionality is probative evidence of vote dilution." ECF No. 1339 at 138. Further, the Court cited both historical and recent instances of voting discrimination in Texas as probative to discriminatory intent and noted that the actions of past legislatures were "similar to the actions Plaintiffs complain were taken in 2011," *id.* at 140-42, and specifically cited to the testimony of Mr. Moss on recent instances of voter intimidation at predominantly minority precincts. ECF No. 1340 at ¶ 327. Finally, in finding the districts in the DFW region "invalid because they violate § 2 and the Fourteenth Amendment," ECF No. 1339 at 146, the Court found the "sequence of events leading up to the decision" to be probative. *Id.* at 142. The Court found that "the map essentially passed in sixteen days," and that "[t]he initial proposal was drawn largely in secret," without the input of minority members. *Id.* at 143. The Court importantly noted that "[i]n this case, the rushed and secretive process suggests that Defendants

did want to avoid scrutiny of whether their efforts in fact complied with the VRA or were intended to do so, or whether they were only creating a façade of compliance." *Id.* at 144.

c. Travis County Challenges

i. Claims and Relevant Pleading

In its most recently amended complaint, ECF No. 900, the NAACP has a live claim that Plan C235's configuration of congressional districts in the Austin region is intentionally discriminatory in violation of Section 2 of the Voting Rights Act and intentionally discriminatory and racially gerrymandered in violation of the Fourteenth Amendment to the United States Constitution. Specifically, the NAACP continues to allege that voters of color in Austin were fractured and split from each other on the basis of race, limiting those voters' influence in districts in the region. *See* ECF No. 900 at ¶¶ 40, 45, 60, 64.

ii. The Legal Standards Applicable to this Claim

The same legal standards applicable to the NAACP's Fourteenth Amendment challenges to Plan C235 as a whole and to the DFW region are applicable to its Fourteenth Amendment challenges to the configuration of congressional districts in Travis County. *See* Section III.a.ii, III.b.ii, *supra*.

iii. Plaintiffs' Standing

The Texas NAACP has associational standing to challenge congressional districts in Travis County as violative of the Fourteenth Amendment because it has at least three branches in Travis County (the Austin Branch, the Austin Youth Chapter, and the Elgin Branch). NAACP 2017 Ex. 1, Watkins Decl., at Ex. A. Additionally, several members of the NAACP in this region have either been deposed by the State or have offered written proffers to this Court attesting to their membership in the NAACP. These members include: Jeff Travillion, who

offered a sworn proffer on September 14, 2011 and was deposed in 2014, an NAACP member residing in Travis County; and Wilhelmina Delco, who offered a sworn proffer on September 14, 2011 and was deposed in 2014, an NAACP member residing in Austin (Travis County). In all, the NAACP has standing on behalf of its members to seek to correct the constitutional deficiencies in existing congressional districts in Travis County.

iv. Lay and Expert Witnesses Testifying and Summary of Expected Testimony

The NAACP does not intend to call any new witnesses on this claim, which has been resolved by the Court's ruling on the 2011 configuration of congressional districts and the failure in the 2013 enactment to make any changes to the unconstitutional fragmentation of voters in Austin. All that is left is for the Court to devise a proper remedy to the existing constitutional harm in the 2013 plan.

v. Key Exhibits

Likewise, the NAACP does not intend to use any additional exhibits in this phase of the litigation on this claim. It will rely on the Court's prior findings.

vi. Prior Findings Upon Which Plaintiffs Rely

Though the Court invalidated CD 35 based on the fact that it was an unconstitutional *Shaw*-type racial gerrymander, the creation of CD 35 (which exists unchanged in C235, *see* ECF No. 1340 ¶ 423 ("The legislatively drawn CD35 remains in place in the interim plan"), ECF No. 1339 at 35 ("The court did not find Plaintiffs likely to prevail on this claim . . . . The court now finds that its preliminary finding – made without the benefit of a full examination of the evidence – was in error"), inevitably and intentionally fractured communities of color in the areas surrounding it, as well. For this reason, many of the Court's findings relating to the Austin area

and CD 35 under plan C185 support the NAACP's claim that minority communities in this region were cracked in order to intentionally dilute their voting strength.

In creating unconstitutional CD 35, Downton splintered the surrounding minority communities in Travis County. *See id.* at 38 (noting that Downton admittedly "split the African-American community in East Austin because he had to include some of that population in CD35 'to create a conduit to pick up the rest of the Hispanic population in the northwest part of 35'"), ECF No. 1340 at ¶ 413 ("In Plan C185, the dense African-American population of east Austin is divided between CD25 and CD35 . . . . The African-American population of eastern Travis County is divided among four districts (CD10, CD17, CD25, and CD35)."). The Court specifically called the African-American population in eastern Travis County "fractured." *Id.* Dr. Murray testified, and this Court cited, that because of this "fracturing," "the African-American community in Travis County is pretty effectively neutered by C185." *Id.* ¶ 414. This fracturing, or cracking, occurred despite the presentation of several alternatives, which would have achieved the Legislature's goal of adding a new HCVAP-majority district without dividing Travis County so significantly. *See id.* ¶¶ 406 (Reps. Turner and Davis' proposal creating a new Hispanic district, but splitting Travis County into only two districts), 407 (Rep. Martinez Fischer's proposal splitting Travis County into only two districts), ¶ 408 (Martinez Fischer's proposal creating a new Hispanic district from Bexar and Bastrop Counties without cutting into Travis County), 410 (Dukes' statewide substitute maintaining "the minority coalition of Hispanic and African American voters in east Travis County . . . so their voice and vote can be effective").

The creation of CD 35, touted as beneficial to Hispanic Texans, actually diluted the voting strength of Hispanics as well as African-Americans. Citing Dr. Ansolabahere, the Court noted that "[a]lthough Hispanics placed into CD35 will have the opportunity to elect, roughly

201,881 Travis County Hispanics are placed into districts lacking such opportunity. The net effect of Plan C185 compared to Plan C100 is to reduce the number of Travis County Hispanics residing in districts where they can elect their preferred candidates by 63,000." *Id.* ¶ 415. Notably, this court stated that the creation of CD 35 was "used as an excuse for the destruction of CD25." *Id.* ¶ 430. CD 25 was a crossover district in which "Hispanics and African Americans, and Anglos act as a coalition, [and] are able to elect the candidate of choice from all races." *Id.* ¶ 410 (quoting Rep. Dukes' testimony); *see also id.* ¶¶ 392 (noting that Rodriguez considered the plan to be a "direct assault on a successful coalition of minority voters and Anglo voters in Travis County"), ¶ 400 (noting that Sen. Watson believed that "the map ignored [Travis County's] effective coalition").

The Court found that CD 35 was drawn "for the purpose of eliminating the existing district in which minorities and Anglos together elected a Democratic candidate." ECF No. 1339 at 45. While this might, at first glance, seem to be a partisan rather than racial motivation, this Court has found that "race was used as a proxy for political affiliation" during the mapdrawing process, *id.* at 132, and also that "Downton was aware that in Texas there is a different party preference associated with race." ECF No. 1340 at ¶ 679. Similarly, the Court found that CD 35 was drawn to avoid meaningfully addressing areas with real § 2 needs, as this would upset the intended partisan balance. *See* ECF No. 1339 at 48 (discussing the unmet needs of CD 27/Nueces County). The Court noted that using this tactic, the mapdrawers "were able to create the façade of complying with § 2 while actually minimizing the number of districts in which minorities could elect their candidates of choice despite the massive minority population growth that had occurred throughout the state." *Id.* at 45. Thus, the creation CD 35 not only amounted

to a racial gerrymander, but also had the intended effect of diluting minority voting strength in all surrounding areas, which has carried through to the plans currently in place.

IV. The NAACP's Claims Against Plan H358

a. Plan H358 As a Whole

i. Claims and Relevant Pleading

In its most recently amended complaint, the NAACP has a live claim that Plan H358 as a whole is intentionally discriminatory in violation of Section 2 of the Voting Rights Act and is intentionally racially discriminatory in violation of the Fourteenth Amendment to the United States Constitution. *See* 3d Am. Compl. of Pls.-Intervenors Texas State Conference of NAACP Branches, et al., ECF No. 900, at ¶¶ 22, 46, 4852, 56, 60, 64.

ii. The Legal Standard Applicable to this Claim

The same legal standards applicable to the NAACP challenge to Plan C235 as a whole are applicable in its challenge to Plan H358 as a whole. *See* Section III.a.ii *supra*.

iii. Plaintiffs' Standing

As with the congressional challenges, the Texas NAACP has associational standing to challenge H358 as a whole as violative of both Section 2 and the Fourteenth Amendment because it has over 10,000 members statewide, with approximately 66 local branches and 20 college chapters. NAACP 2017 Ex. 1, Watkins Decl., at ¶ 4. Specifically, counties with chapters and thus members include, but are not limited to: Harris, Tarrant, Travis, Dallas, El Paso, Ellis, Bell, Fort Bend, Bexar, McLennan, Galveston, Guadalupe, Midland, and Nueces County, among many others. NAACP 2017 Ex. 1, Watkins Decl., Ex. A. The NAACP has associational standing on behalf of members in these counties. And again, the veracity and

admissibility of the Watkins Declaration upon which the NAACP's standing is based is unchallenged by the State.

iv. Lay Witnesses Testifying and Summary of Expected Testimony

The NAACP's witness Rep. Eric Johnson will testify about the process for enacting H358 in 2013. Rep. Johnson will testify that the same tense and racially charged legislative environment present in 2011 carried over into the 2013 session and special session on redistricting. His testimony will reflect that the 2013 redistricting session included no process to get input from legislators of color, no discussion by leadership of needing to improve upon the Court's preliminary injunction corrections to the 2011 House map, no attempts to make such corrections, and that amendments to the Court's interim House map were superficial in nature and did not substantively alter the discriminatory effect of the 2011 House plan. He will also testify that the 2013 legislative process on redistricting was substantially less involved and engaged than other processes for equally important bills.

v. Expert Witnesses Testifying and Summary of Expected Testimony

Just as with the NAACP's challenge to C235 as a whole, because the consideration of the totality of circumstances or Senate Factors is relevant to intentional discrimination inquiries as well Section 2 effects inquiries, the NAACP will adopt and rely upon the testimony of the African-American Congresspersons' expert witness Dr. Orville Burton. Again, he will testify to recent racial discrimination in voting by the state of Texas, racial disparities in education, housing, and employment affecting voting participation, and recent racial appeals in voting in Texas. Additionally, just as with the challenge to the congressional plan as a whole, the NAACP will rely upon Dr. Chervenak's findings that there is racially polarized voting across the state.

vi. Key Exhibits

The key exhibits upon which the NAACP Plaintiffs will rely include the following 2017 exhibits: JX 106-108 (maps); JX 25-30 (legislative documents); NAACP001-002, 004, 014, 023, 034. The NAACP will also rely upon the following exhibits already admitted into evidence: 2011 Ex. 601-603, 2014 Ex. 74, 76, 638.

vii. Prior Findings Upon Which Plaintiffs Rely

As with the congressional plan, this Court's findings with respect to the 2011 Plan, H283, are highly relevant in the challenge to H358 because so many of the illegal or unconstitutional elements persist in Plan H358. In its opinion explaining the second remedial map, the Court noted that it left 122 districts entirely unchanged based on its preliminary findings. ECF No. 690 at 3. Thus, the NAACP relies on many of this Court's findings supporting that "the overall configuration of Plan H283 is the product of intentional vote dilution," because so much of that overall and unconstitutional configuration remains untouched in H358. ECF No. 1365 at 83.

In discussing H283 as a whole, much of which is unchanged in H358, this Court found that "evidence of the mapdrawing process supports the conclusion that mapdrawers were motivated in part by an intent to dilute minority voting strength," and that "[d]iscussions among mapdrawers demonstrated a hostility to creating any new minority districts, as those were seen to be a loss of Republican seats, despite the massive minority population growth statewide." *Id.* According to the Court, "the mapdrawers utilized a variation of Opiela's nudge factor and manipulated Hispanic turnout in drawing districts." ECF No. 1364 at ¶ 61. As in the process for drafting the congressional maps, the Court found that protecting Republican incumbents was prioritized over the creation of minority opportunity, which "required the reduction of Hispanic voters' ability to elect their preferred candidates of choice in future elections." *Id.* ¶ 15. To achieve this aim, Downton used block-level racial shading throughout the map to split precincts

on the basis of race and increase SSVR, *id.* ¶ 35, and Interiano utilized "Hispanic turnout data to draw districts . . . aware that the effectiveness of a minority district depended in large part on voter turnout." *Id.* ¶ 62; *see also id.* ¶ 74 ("The House plan splits 412 precincts, and some precincts are split more than once. In the House map, precincts are split most often in the minority districts."). Although Interiano and Downton both denied utilizing the nudge factor, block-level racial shading, and Hispanic turnout data to draw the districts, the Court found their testimony to be incredible. *See id.* ¶¶ 35, 61, 62; *see also id.* ¶ 63 ("Interiano testified that he did not know how to do racial shading at the block level . . . . This testimony is not credible."). Further, the Court also found that the race-neutral reasoning behind Solomons' rejection of amendments that provided more minority opportunity were pure pretext. *See id.* ¶ 77 ("Solomons opposed Faria's proposed amendment to Bexar County in the House map in part because it increased the number of split precincts. Given the number of split precincts in the plan, this basis for opposition was pretextual.").

The Court also made several findings that indicated the mapdrawers were willfully ignorant of the law and there was a lack of accountability or responsibility for ensuring that the maps they drafted actually complied with the law. *Id.* ¶¶ 12-14 (highlighting that Solomons and Interiano made no independent inquiries about what was required by § 2 and expected staff to identify legal violations for them). The Court noted that "Solomons assumed that VRA compliance was being looked at by the drop-in county delegations because there were members in protected minority districts in the counties," and that "Interiano testified that delegation maps were dropped into the map 'and that was it'" and "he 'was not in a position to be providing instructions to members.'" *Id.* ¶ 10. As a result, the Court noted that many of the "legal standards" utilized by the mapdrawers were flatly incorrect. *See* ECF No. 1365 at 17 ("although

the TLC had advised that the County Line Rule would also have to yield to the VRA and Texas had itself taken this position in prior redistricting litigation, redistricting leadership flatly rejected that position"); *see also id.* at 8 ("The Court agrees with Plaintiffs that § 2 can require the creation of minority coalition districts"). "Further," the Court found, "although various mapdrawers drew different portions of the map, they did so with authority from the Legislature, and thus their motives, knowledge, and intent must be imputed to the Legislature when it enacted the plan." *Id.* at 85.

Procedural elements of the process also lent themselves to the Court's finding that "invidious discriminatory purpose underlies Plan H283," and many of those same procedural flaws continued through the 2013 enactment. *Id.* at 84. The procedure for drafting the maps, according to Solomons, would be "member driven." ECF No. 1364 at ¶ 34. However, "members had input primarily on their own districts or counties, and there were numerous instances where the member-driven process was not followed and where member input was not sought or was ignored." *Id.* Further, the fact that member input was not taken into account in the initial drafting process was not discovered until the maps' release on April 13, as "[b]efore the first public plan H113 was released on April 13, the overall plan was largely drawn in secret. No one saw a statewide plan until the first committee plan was released." *Id.* ¶ 41. The secrecy of the process was bolstered by Solomons' unwillingness to "allow Interiano and Downton to be legal resources for members of the HRC or the house." *Id.* ¶ 16. The Court noted that the mapdrawers and legislative proponents had incentive to rush the process, and that "there was a lot of pressure to pass the map during regular session," as they "wanted to avoid going to the LRB." *Id.* ¶ 37. In fact, the Court explicitly stated that "[o]nce the first public plan was released on April 13, the process moved very quickly, and all changes were completed on April 28, when

the House concluded third reading." *Id.* ¶ 39. Both witnesses and legislators complained about the short notice for public hearing and the truncated time allowed for feedback on the proposed map, *Id.* ¶¶ 42-43, 45; *see also id.* ¶ 47. Despite the time constraints, minority members and groups nonetheless expressed "that plan H283 would have a negative impact on the minority community because it did not account for the minority growth," *id.* ¶ 79, and "presented options that would have expanded the number of minority opportunity districts." *Id.* ¶ 45; *see also id.* ¶¶46, 50, 51. However, honoring these changes did not comport with the legislative proponents' goal of utilizing race to prioritize incumbency protection and partisanship over all else, and thus they were routinely defeated in committee and then later on the floor." *Id.* ¶ 45.

Finally, the Court found that racially polarized voting existed throughout Texas. ECF No. 1365 at 84. The Court also noted in its general congressional findings, incorporated by reference in the findings in the House case, that historical discrimination against minorities in Texas has had a lasting negative impact on participation in the political process, income, and education level, ECF No. 1340 at ¶¶ 735-38, and that there has been increased cohesion between minorities in Texas in general elections. *Id.* ¶ 681, 706. These findings are just as applicable to challenges to H358 as they were to challenges to H283.

b. Harris County Challenges

i. Claims and Relevant Pleading

In its most recently amended complaint, ECF No. 900, the NAACP has a live claim that House District 149 is protected under Section 2 of the Voting Rights Act and the Fourteenth Amendment. As urged by the NAACP, this Court corrected the illegal dismantling of HD 149 in Harris County in its interim map, on the basis that it was protected by Section 5 of the Voting Rights Act. *See* Op. on H309, ECF No. 690 at 10 (Mar. 19, 2012) ("Because Vo is likely the minority candidate of choice of one or more minorities in benchmark HD 149, the district could

be considered either a "coalition district" or a "crossover" district. *See Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). The D.C. Court has indicated that Section 5 protects such districts from retrogression, *Texas v. United States*, 2011 WL 6440006, at *18-19, so the Section 5 case with respect to HD 149 and its effect on statewide retrogression is not insubstantial.").

In 2013, just prior to the Supreme Court's ruling removing the protections of Section 5 from voters of color in Texas, the legislature adopted the interim map's configuration of House districts in Harris County without modification. However, it is unclear whether all the intentional discrimination established by the NAACP and other parties has been adequately remedied, and other Plaintiffs have urged modifications in Harris County to create new minority opportunity house districts. JX-107 (MALC/Perez demonstrative map). This Court of course has not yet ruled on whether bail-in under Section 3(c) of the Voting Rights Act is appropriate. Should the MALC and Perez Plaintiffs succeed in their efforts, or should the Court deem further modifications necessary to the county district configuration in order to remedy the discriminatory intent present since 2011, the NAACP Plaintiffs wish to, in an abundance of caution, put into the record a limited amount of additional evidence justifying the continued protection of House District 149 as a Section 2 coalition district. The same law of coalition districts described in section III.b.ii.b of this brief would also be applicable here.

ii. Plaintiffs' Standing

The Texas NAACP has associational standing to defend State House districts in Harris County as protected by Section 2 of the Voting Rights Act and the Fourteenth Amendment because it has a Houston branch and several college chapters, with approximately 1,232 members in the county. NAACP 2017 Ex. 1, Watkins Decl., ¶ 5. Additionally, several members of the NAACP in this region have testified before the Court or offered written proffers attesting

to their membership in the NAACP. These members include: Plaintiff Howard Jefferson, who testified on September 12, 2011, and is a member of the NAACP residing in Houston; Plaintiff Reverend William Lawson, who testified on September 9, 2011, and is a member of the NAACP residing in Houston; and Carolyn Scantlebury, who proffered a sworn statement to this Court on September 14, 2011, and is a member of the NAACP residing in Houston.

iii. Lay Witnesses Testifying and Summary of Expected Testimony

The NAACP does not intend to call any new lay witnesses in regard to its evidence and claims on House District 149 and will rely on testimony already in the record and findings made by this Court.

iv. Expert Witnesses Testifying and Summary of Expected Testimony

The very limited amount of additional evidence that the NAACP intends to proffer in support of House District 149 will be presented by the NAACP's expert witness Dr. Edward Chervenak. Dr. Chervenak performed two sets of racially polarized voting analyses in Harris County. He performed an ecological inference analysis of five racially-contested statewide elections in 2014 and 2016 to examine voting patterns countywide in Harris County. That analysis had three independent variables: Anglo voters, African-American Voters, and Latino voters. He will testify that voting was racially polarized and that black and Latino voters were highly cohesive. He also examined those exogenous elections within the boundaries of House District 149 but using four independent variables: adding Asian-American voters as a separate category since they constitute a plurality of the population in that district. He found the same pattern held true with respect to racially polarized voting, and that Asian-American voters were cohesive with black and Latino voters. Finally, he examined and will testify about an endogenous HD 149 primary. When presented between the choice between an Asian-American

candidate and an African-American candidate, a majority of black, Latino and Asian-American voters all supported the Asian-American candidate. Thus, Dr. Chervenak concluded that this is a district where voters of color are cohesive.

v. Key Exhibits

The key exhibits upon which the NAACP Plaintiffs will rely include the following 2017 exhibits: JX 106-108 (maps); JX 25-30 (legislative documents); NAACP001-002, 004, 014, 023. The NAACP will also rely upon the following exhibits already admitted into evidence: 2011 Ex. 601-603, 2014 Ex. 74, 638.

vi. Prior Findings Upon Which Plaintiffs Rely

Despite having found the NAACP's claims on HD 149 moot, this Court nonetheless found "that that there is persuasive evidence of intentional vote dilution in Harris County" in plan H283. ECF No. 1365 at 56. As an initial matter, this Court noted that "the existence of racially polarized voting, the lingering effects of past discrimination, and the totality of the circumstances" each led to its finding that the Harris County configuration is the result of intentional vote dilution in violation of § 2 and the Fourteenth Amendment. *Id.* at 57. In addition to these factors, the Court highlighted that the race-based and exclusionary processes utilized in Harris County were of the sort that the Court noted in its statewide discussion, finding that "Harris County is yet another example of where the member-driven process was at odds with § 2 compliance." *Id.* at 56. The same willful ignorance led the redistricting leadership to believe "that county delegations would consider VRA compliance because the delegations contained minority members, yet in Harris County the minority members were essentially shut out of the map-drawing process." *Id.* The lack of minority member input in conjunction with the aim to use race to protect incumbents and partisan success allowed the redistricting

leadership to "feign[] VRA compliance" while simultaneously using it "to undermine minority voting strength instead of truly complying with the act." ECF No. 1365 at 56.

The Court noted that "[i]n Harris County, the minority population (including Hispanic, African-American, and Asian) grew between 2000 and 2010, while the Anglo population declined," ECF No. 1364 at ¶ 411, and also found that "Anglos make up only 33% of Harris County population." *Id.* ¶ 485. However, the plan that was initially drafted "primarily by the Anglo Republican members of the delegation (and their mapdrawer) without any input from minorities or Democrats," *id.* ¶ 506, "eliminated a minority coalition district, HD149, and does not create any new districts where minority voters can elect candidates of their choice." *Id.* ¶ 477. Under the Plan, the 33% Anglo population "would control 54% (13 of 24) of the House Districts in Plan H283." *Id.* ¶ 485. The Court emphasized that the considerations of minority members were still not taken into account once the map hit the floor for debate. *See id.* ¶¶ 469 (noting that changes "were not the result of any compromise with Democrat members"), 475 ("African-American legislators were not very successful in getting changes made to their districts in a way they wanted.").

The Court found, in sum:

> Plan H283 eliminated HD149 and did not create any new minority ability districts despite the fact that all the growth in Harris County was due to minorities. Mapdrawers increased the SSVR of HD148, a district that was already strongly performing for Latinos, above 50% in order to offset the loss of an SSVR-majority district in Nueces County, and claimed it was a new Latino opportunity district. Mapdrawers did not look at and were not concerned with whether this increase improved Latino electoral ability in HD148; they increased the Hispanic population solely to bring the district above 50% SSVR.

Id. ¶ 508. With respect to HD 149, specifically, the court found that testimony supported the contention that African-American, Asian, and Latino voters coalesced in this district to elect numerous candidates of their choice. *Id.* ¶¶ 426-427; *see also id.* ¶¶ 410 ("Calvert testified at

trial that, although they are too small in total numbers to control elections, the Asian community has been able to form coalitions with other minorities in the area such that the Asian population can elect candidates of their choice."), 425 (noting that HD 149 in the benchmark was an effective minority coalition district and had "strong influence from Asian Americans," and "was a multi-ethnic coalition"). Despite the fact that "[r]epresentatives from the Asian community in southwest Harris County testified repeatedly that they wanted to be kept together in a district," the Asian community was nonetheless "split among several dis districts in Plan H283." *Id.* ¶ 510; *see also id.* ¶ 446 (noting that "the concentrated Asian area . . . in 149 is split," and that "[a] substantial Asian-American community was removed from HD137 and placed in a predominantly African-American district.").

Not only did the Court find that the Republican-driven plan fractured the Asian community in Harris County in such a way that it "would not be able to elect its candidate of choice," *id.* ¶ 448, it also found that "mapdrawers then artificially inflated the SSVR and HCVAP of existing Latino ability district HD148 to claim VRA compliance." ECF No. 1365 at 56. According to the Court, Downton made changes to the initial plan in order to "match benchmark numbers for the minority district, and he used race to do so." ECF No. 1364 at ¶ 506. This was done despite the fact that "mapdrawers and Hanna were aware that HD148 was a performing Hispanic district" without being majority HCVAP or SSVR. *Id.* ¶ 422. The Court further noted that despite this increase, "election returns do not indicate that increasing the SSVR actually made HD148 more effective for Latinos," *id.* ¶ 445, and that Downton admitted this fact. ECF No. 1365 at 57 ("Downton agreed that raising the SSVR of HD148 to 50% did not enhance the ability of minority voters to elect their candidate of choice"). In an attempt to simultaneously create a façade of compliance with the VRA and protect Republican districts, the

drafters of H283 intentionally discriminated against the minorities of Harris County by unjustifiably packing some opportunity districts and fragmenting others, with the overall effect of making voters of color less capable of electing their candidates of choice in the county as a whole. This discriminatory intent is relevant in recognizing HD 149 as a protected Section 2 district.

c. Fort Bend County Claims

i. Claims and Relevant Pleadings

In its most recently amended complaint, ECF No. 900, the NAACP has a live claim that Plan H358's configuration of House districts in Fort Bend County is intentionally discriminatory in violation of Section 2 of the Voting Rights Act and the Fourteenth Amendment to the United States Constitution, and violates the effects test of Section 2 by diluting the voting strength of voters of color in the region and failing to create new electoral opportunities for non-white voters. *See* ECF No. 900 at ¶¶ 22, 46, 48-52, 56, 60, 64.

ii. The Legal Standards Applicable to this Claim

The same legal standards applicable to the NAACP claim that naturally occurring coalition districts are warranted in the DFW region are also applicable in its claim that a naturally occurring coalition district is warranted in Fort Bend County. *See* Section III.b.ii.b, *supra*.

iii. Plaintiffs' Standing

The Texas NAACP has associational standing to argue that State House districts in Fort Bend County are intentionally discriminatory and that the Voting Rights Act compels the drawing of an additional minority district because the NAACP has a Missouri City and Vicinity Branch with approximately 147 members in Fort Bend County. NAACP 2017 Ex. 1, Watkins Decl., ¶ 5. The NAACP has members living in both House District 26 and House District 27.

Id. ¶ 6. Additionally, Grady Prestage, a lay witness who will testify in the July 2017 trial, is an NAACP member living in the county. Thus, the NAACP has standing to urge for voting rights remedies in Fort Bend County.

iv. Lay Witnesses Testifying and Summary of Expected Testimony

Plaintiffs will call to the stand Fort Bend County Commissioner Grady Prestage. Commissioner Prestage, an NAACP member, will testify about his familiarity with the areas encompassed by NAACP proposed House District 26 based on his decades living in the county and serving on the county commission. He will testify that compared to the current version of HD 26, the NAACP's version creates a compact district encompassing an easily identifiable community of interest—a Sugar Land district—and that the district lines encompass a very compact minority community. He will testify to political cohesion between black, Latino and Asian-American voters, including his mentorship and support of several Asian-American elected officials in the region. He will offer examples of situations where those groups have united politically to elect their candidates of choice.

v. Expert Witnesses Testifying and Summary of Expected Testimony

NAACP expert Dr. Chervenak will testify to the racially polarized voting studies he performed for Fort Bend County. Again using ecological inference, the gold standard for performance of such analyses, Dr. Chervenak concluded and will testify that voting in the county is racially polarized, with African-American, Latino and Asian-American voters sharing the same candidate preference, and Anglo voters not supporting the candidates preferred by voters of color. Specifically, in the five exogenous racially-contested elections examined by Dr. Chervenak, that pattern held true regardless of whether the minority-preferred candidate was black or Latino. Dr. Chervenak will then testify about his examination of endogenous elections

in HD 26. There were no contested primaries in recent years, so he examined racially-contested general election races. Regardless of whether the minority candidate was Asian-American or African-American, black, Latino and Asian-American voters were cohesive in their support of the candidate of color, and Anglo voters were strongly opposed to the minority candidate. Thus, Dr. Chervenak will conclude that this district is one where minority voters are highly cohesive.

Likewise, the NAACP will also call its expert witness Anthony Fairfax to testify about his analyses of the current version of HD 26 and the NAACP's proposed version of HD 26. Mr. Fairfax will testify that the NAACP's proposed configuration of HD 26 is more compact than the current version of HD 26 by every mathematical measure he used. The current version of the district splits eleven places—cities, towns, and census designated places—while the NAACP's version splits only seven, indicating that the NAACP's plan appropriately respects political subdivisions, much more so than the current plan. He also will testify that the NAACP's House District 26 is a Sugar Land-based district (94.5% of the city in the district), with the only exclusions being portions in Harris County and a few very long, skinny appendages of city-annexed areas. Had the district encompassed those portions, it would have resulted in a very non-compact district. Mr. Fairfax will also testify that the NAACP's district contains all of Greatwood, New Territory, and almost all (97.6%) of Four Corners, bedroom communities adjacent to Sugar Land. Thus, Mr. Fairfax will testify that this district encompasses a very easily identifiable and reasonably compact minority community.

vi. Key Exhibits

The key exhibits upon which the NAACP Plaintiffs will rely include the following 2017 exhibits: JX 106, 108 (maps); JX 25-30 (legislative documents); NAACP001-002, 004, 014, 023,

032-34. The NAACP will also rely upon the following exhibits already admitted into evidence: 2011 Ex. 601-603, 2014 Ex. 74, 638.

vii. Prior Findings Upon Which Plaintiffs Rely

Although this Court found that Plaintiffs did not, in 2011, provide sufficient evidence to demonstrate intentional vote dilution in Fort Bend, or that their proposed multi-ethnic coalition district HD 26 was required under plan H283, several of their findings nonetheless lend support to the NAACP claims in Fort Bend under plan H358. The Court noted that the population growth in the Fort Bend region "was 80% minority," that "Asian, Hispanic, and African-American growth all exceeded Anglo growth," and that "there was sufficient total minority population growth in Fort Bend County to populate a new district." ECF No. 1364 at ¶ 527; *see also id.* ¶ 537 ("Fort Bend County had enough growth for a new district to be added there. The mapdrawers did not put a new minority district in Fort Bend County, despite substantial minority population growth there"). Indeed, the Court cited the testimony of Ed Martin, who noted that while "Fort Bend County is only 38% Anglo in terms of voting age population . . . in Plan H283, Anglo voters would control 71% of the 3.5 districts in Fort Bend County." *Id.* ¶ 525.

Further, this Court found that "Fort Bend County has a substantial Asian-American population." *Id.* ¶ 515. Though the Court found lay testimony concerning cohesion and racially polarized voting alone to be insufficient to support the creation of proposed HD 26," the Court noted that "lay testimony is relevant," ECF No. 1365 at 60, and the lay testimony presented indicated that both racially polarized voting and cohesion are present in Fort Bend. *See* ECF No. 1364 at ¶¶ 532 ("Rep. Senfronia Thomson . . . is familiar with Fort Bend county politically and personally. She has observed cooperation between African Americans, Latinos, and Asians . . . and she thinks there should be an Asian coalition district there. She testified that African

Americans and Latinos vote with Asians in that area."), 533 ("Brischetto found a high degree of racially polarized voting in Fort Bend County," "racial bloc voting in general elections," and "that Anglo bloc voting was sufficient to usually defeat the Latino-preferred candidate. Brischetto found that African Americans, Asians, and Latinos were very cohesive in . . . the general elections."). Additionally, multiple amendments were proposed that would have created an Asian-American, Latino, and African-American coalition district, with Asian-Americans the greatest population percentage of the coalition. *See id.* ¶¶ 520 (Rep. Walle amendment), 521 (Rep. Turner proposed plan).

Finally, Texas's history of racial discrimination in conjunction with this Court's findings specifically as to Fort Bend under H283 will support the NAACP's claims under Plan H358 that Fort Bend was drafted in an intentionally discriminatory manner. Though the fact that all delegates, including a Democrat, approved the Fort Bend map under H283, this Court cited testimony in its congressional opinion "noting that both Republicans and Democrats have discriminated against minorities because they are unsure of how they will vote and therefore try to control it." ECF No. 1339 at 141. This Court additionally highlighted the lasting impact of discrimination in Fort Bend in noting that "[i]n Fort Bend County, 31.7% of Hispanics have less than a high school education, compared to 11.3% for the entire County population," and the per-capita income for Hispanics was $18,086, compared to $43,208 for non-Hispanic Anglos. ECF No. 1364 at ¶ 535. The NAACP relies on this additional evidence to support its live claims.

d. Dallas County Claims

i. Claims and Relevant Pleadings

In its most recently amended complaint, ECF No. 900, the NAACP has a live claim that Plan H358's configuration of state House districts in the DFW region is intentionally discriminatory in violation of Section 2 of the Voting Rights Act, intentionally discriminatory

and racially gerrymandered in violation of the Fourteenth Amendment to the United States Constitution, and violates the effects test of Section 2 by diluting the voting strength of voters of color in the region and failing to create new electoral opportunities for non-white voters. By packing more voters of color into House districts than is necessary to elect their candidates of choice, the State has manipulated the county's district configurations to avoid having to draw the naturally occurring districts that would reflect the minority population in the county, and has failed to draw the new minority opportunity districts that are compelled by Section 2 of the Voting Rights Act. *See* ECF No. 900, at ¶¶ 22, 46, 48-52, 56-60, 64.

ii. The Legal Standards Applicable to the Claims

The same legal standards applicable to the NAACP claim that naturally occurring coalition congressional districts are warranted in the DFW area are also applicable in its claim that naturally occurring coalition House districts are warranted in Dallas County. *See* Section II.b.ii.b, *supra*.

iii. Plaintiffs' Standing

The Texas NAACP has associational standing to challenge congressional districts in the DFW region as violative of both Section 2 of the Voting Rights Act and the Fourteenth Amendment because it has four branches in Dallas County (the Dallas, Tri-Cities, Irving and Garland branches), and approximately 725 members in Dallas County. NAACP 2017 Ex. 1, Watkins Decl., ¶ 5. At a bare minimum, the NAACP has members in House Districts 100, 109, 110, and 11. *Id*. ¶ 6. Additionally, several members of the NAACP in this region have testified before the Court or offered written proffers attesting to their membership in the NAACP. These members include: Bob Lydia, who offered a sworn proffer on September 14, 2011 and is an NAACP member residing in Duncanville (Dallas County); and Anthony Bond, who offered a

sworn proffer on September 14, 2011 and is an NAACP member residing in Irving (Dallas County). Finally, in the July 2017 trial, more NAACP members from this region are expected to testify: Rep. Eric Johnson, NAACP member residing in Dallas County, House District 100; and Rep. Toni Rose, NAACP member residing in Dallas County, House District 110. In all, the Texas NAACP has standing on behalf of its members to seek to correct the constitutional deficiencies in existing House districts and to create new minority opportunity districts as compelled by the Voting Rights Act.

iv. Lay Witnesses Testifying and Summary of Expected Testimony

Rep. Eric Johnson will testify to communities of interest encompassed in the NAACP's proposed House Districts. Specifically, based on his lifetime spent in Dallas County, he will describe the compact Latino populations captured in the three Latino districts that the NAACP proposes for the western part of the county. He will describe how proposed House District 107 encompasses a relatively compact minority community and how voters of color in that area share history and many current interests and needs. He will explain how House District 102, a Garland-based district that encompasses much of the geography of current House District 107, also represents a community of interest and encapsulates a relatively compact minority community.

The NAACP will adopt the testimony of Rep. Toni Rose, being called by the African-American Congresspersons and presented as part of the congressional case. It is anticipated that Rep. Rose will testify that in the years since the last trial, black and brown voters in Dallas County have been politically cohesive in supporting candidates that Anglo voters typically will not support. She will further explain that the totality of the circumstances continues to warrant the creation of new minority opportunity districts in Dallas County. These same factors that

warrant the creation of a new congressional district based in Dallas County likewise support the creation of new House districts in the county.

v. Expert Witnesses Testifying and Summary of Expected Testimony

The NAACP will call Dr. Edward Chervenak to testify about the racially polarized voting studies he performed for Dallas County. As with all his other analyses, he identified and analyzed several recent statewide racially contested elections. He found that voting was racially polarized, with a majority of Anglo voters preferring a candidate different from the candidate preferred by voters of color. He will testify that black and Latino voters in Dallas County are highly cohesive in the elections he examined.

The NAACP will again call Mr. Anthony Fairfax, who will testify that the House districts drawn in the DFW region respect traditional redistricting criteria and encompass relatively compact minority communities by a number of different metrics. He will also testify to the current populations in these districts using the same population projects he used in his 2014 analysis. He notes that the districts in Dallas County proposed by the NAACP split no precincts, and are more compact in at least two of the three mathematical measures utilized than the equivalent districts in the current plan. He also noted that the NAACP plan split fewer places (towns, cities and census-designated places) and fewer neighborhoods than did the existing plan, and so the NAACP districts demonstrate respect for political subdivisions.

The NAACP will adopt the expected testimony of experts called by the African-American Congresspersons—Drs. Richard Murray and Orville Burton—who will testify to the totality of circumstances evidence, which supports the creation of additional minority opportunity districts in the DFW Metroplex. Dr. Murray is expected to offer additional testimony of political cohesion between African-American and Latino voters.

vi. Key Exhibits

The key exhibits upon which the NAACP Plaintiffs will rely include the following 2017 exhibits: JX 106, 108 (maps); JX 25-30 (legislative documents); NAACP001-002, 004, 014, 023, 037-38. The NAACP will also rely upon the following exhibits already admitted into evidence: 2011 Ex. 601-603, 2014 Ex. 74, 638.

vii. Prior Findings Upon Which Plaintiffs Rely

This Court's findings with respect to Dallas County under Plan H283 support the NAACP's intentional vote dilution claims under Plan H358. Importantly, the Court found that "Engstrom's analyses reveal[ed] that Latinos in Dallas County are very cohesive in their candidate preferences for Latino candidates, and that preference is shared by African Americans but not other voters." ECF No. 1364 at ¶ 606. There was additional lay testimony that further supported the contention that African-Americans and Latinos vote cohesively. *See id.* ¶¶ 608 ("Rep. Anchia has seen examples of Latinos and African-Americans being cohesive in Dallas"), 609 ("Juanita Wallace offered lay testimony that Black and Latino voters work together to elect candidates."), 610 ("Raul Magdaleno. . . testified to the coalition in Dallas between Latinos and African Americans.").

As in the state-wide findings, the Court found that "redistricting leadership [was] hostile to the creation of a new Latino district in Dallas County because they felt it would be a Democrat district and result in the further loss of a Republican seat there beyond the two already required by the lack of growth in Dallas County overall," and as a consequence "they eliminated districts that were on track to perform for minority voters." ECF No. 1365 at 67. While "Dallas County lost population relative to the state as a whole," ECF No. 1364 at ¶548, with the loss of 198,000 Anglos, "[t]he minority population of Dallas County grew by almost 350,000 and accounted for

100% of the growth in Dallas County. In 2010, Dallas County was 33.1% Anglo, 38.3% Latino, and 22.3% African American." *Id.* ¶ 549. Because the Dallas County delegation "could not agree on a map due to the loss of two districts," "Downton drew the map, working with some but not all members of the Dallas County delegation." *Id.* ¶ 28. Consistent with Downton's practice in Harris County (and statewide), the Court found that he and the redistricting leadership used "block level racial shading when drawing all six minority districts in Dallas County – HD 100, 103, 104, 109, 110, 111." *Id.* ¶ 558. The Court found that Downton employed this tactic in order to impermissibly use race as a means to combine HD105 and 106 into a Republican partisan gerrymander, ECF No. 1365 at 68, and in doing so "eliminate[d] HD106, the district that had actually become majority-minority CVAP . . . and had elected the minority-preferred candidate in two of five elections." *Id.* at 67.

Though the Court found that Plaintiffs did not sufficiently show the elimination of HD106 was done to harm minorities rather than protect Republicans, the Court did find "that Plaintiffs ha[d] proven an improper use of race in western Dallas County to dilute Latino voting strength," and that "[t]he configuration of HD103, HD104, and HD105 is [i]ndisputably based in large part on race." ECF No. 1365 at 66. To achieve this aim, the Court found that "Downton deliberately split precincts by race to put Hispanic voters into HD103 and HD104 but not in HD105." ECF No. 1364 at ¶ 563. As in Harris, the Court found that "Downton relied on the 50% SSVR threshold in bad faith to waste Latino votes in HD104 because there is no indication that HD104 needed to be at 50% SSVR to continue performing." ECF No. 1365 at 68. The Court additionally found that "although HD103 was maintained at benchmark SSVR, there is no indication that mapdrawers thought this was actually necessary for VRA compliance," *id.*, and further, that Downton himself "did not believe that raising the SSVR of HD103 was necessary"

but rather that he "saw it as an opportunity to make HD105 more Anglo and safer for the Republican." *Id.* at 68-69. Though Downton alleged that he needed to use race to maintain the SSVR of HD 103 and HD 104, "the Court [found] that this was yet another example of mapdrawers using superficial compliance with the VRA to dilute minority voting strength rather than enhancing it." *Id.* at 68.

The Court noted that "Dallas County was not a 'member-driven' process," and that "[Yvonne] Davis was not shown her district before the first plan was publicly released." ECF No 1364 at ¶ 554. Further, while the HRC heard testimony from legislators and constituents that the way in which the districts were drawn in Dallas County split up African-American communities and diluted their vote, *see id.* ¶¶ 569 (Rep. Caraway and Rep. Johnson testimony), 570 (testimony of Sandra Crenshaw, Precinct 3549 Chair), this input was not taken into account in the final plan. The mapdrawers did not explore "whether any additional minority districts could be drawn or maintained to recognize the population growth" in Dallas County. ECF No. 1365 at 67.

The NAACP additionally relies on this Court's findings concerning past instances of discrimination and their lasting effects. The Court noted that "[l]ay witnesses testified to instances of "official discrimination against Hispanics and African Americans in Dallas County." ECF No. 1364 at ¶ 611; *see also id.* ¶¶ 612 ("Magdaleno testified that he has not gotten favorable help from elected officials in Dallas when seeking help for the Latino and African-American communities in Dallas), 613 ("Rep. Anchia has heard complaints from constituents (fewer than 10) in Dallas County about Spanish-language materials not being available at polling locations."). This Court additionally noted that "54.8% of Hispanics in Dallas County lack a high school education (compared to 25.1% of the total population of Dallas County)," and "the

per capita income for Hispanics was $12,727, compared to $43,103 for non-Hispanic Anglos." *Id.* ¶ 614.

e. Tarrant County Claims

i. Claims and Relevant Pleading

In its most recently amended complaint, ECF No. 900, the NAACP has a live claim that House District 101 is protected under Section 2 of the Voting Rights Act and the Fourteenth Amendment. *See* ECF No. 900, at ¶¶ 22, 46, 48-52, 56, 60, 64. While the State has not yet attempted to dismantle House District 101, the consistent position it has taken throughout the course of this litigation is that it is under no obligation to protect or preserve a coalition district. *See* Congress Op., ECF No. 1339, at 59. However, this Court has already identified constitutional flaws in the House map in Tarrant County, particularly as relates to HD 90, that will necessitate a redrawing of the Tarrant County House map. Because this Court has not yet ruled on whether bail-in under Section 3(c) of the Voting Rights Act is appropriate, that remedial process could happen without the protections of Section 5. Thus, the Texas NAACP Plaintiffs wish to, in an abundance of caution, put into the record a limited amount of additional evidence justifying the protection of House District 101 as a Section 2 coalition district. The same law of coalition districts described in section III.b.ii.b of this brief would also be applicable here.

ii. Plaintiffs' Standing

The Texas NAACP has associational standing to defend state House districts in Tarrant County as protected by Section 2 of the Voting Rights Act and the Fourteenth Amendment because it has three local branches in Tarrant County (the Fort Worth/Tarrant, Grand Prairie, and Arlington Branches), with approximately 884 members in the county. NAACP 2017 Ex. 1, Watkins Decl., at ¶ 5. The NAACP has members in House Districts 95 and 101. *Id.* ¶ 6. Additionally, a member of the NAACP in this county has testified before the Court attesting to

his membership in the NAACP: Franklin Moss, a resident of Fort Worth, testified on August 14, 2014, and is slated to testify in the congressional case in 2017, as well.

i. Lay Witnesses Testifying and Summary of Expected Testimony

The NAACP does not intend to call any new lay witnesses in its House case in regard to claims on House District 101, but will rely on testimony of minority political cohesion offered in the congressional case by House District 101 Rep. Chris Turner (the Quesada Plaintiffs' witness) and NAACP member Franklin Moss.

ii. Expert Witnesses Testifying and Summary of Expected Testimony

The very limited amount of additional evidence that the NAACP intends to proffer in support of House District 101 will be presented by the NAACP's expert witness Dr. Chervenak. Dr. Chervenak performed an ecological inference analysis of five racially-contested statewide elections in 2014 and 2016 to examine voting patterns countywide in Tarrant County. He will testify that voting was racially polarized and that black and Latino voters were highly cohesive. Finally, he examined and will testify about an endogenous HD 101 primary he examined. When presented with the choice between Anglo candidates and an African-American candidate, a majority of black and Latino voters did not support the black candidate, and were cohesive in that regard. Thus, Dr. Chervenak concluded that this is a district where voters of color are cohesive.

iii. Key Exhibits

The key exhibits upon which the NAACP Plaintiffs will rely include the following 2017 exhibits: JX 106, 108 (maps); JX 25-30 (legislative documents); NAACP001-002, 004, 014, 023. The NAACP will also rely upon the following exhibits already admitted into evidence: 2011 Ex. 601-603, 2014 Ex. 74, 638.

iv. Prior Findings Upon Which Plaintiffs Rely

The findings of this Court with respect to the intentional vote dilution that took place in Tarrant County under Plan H283 supports the NAACP's claims that HD 101 must be recognized by this Court as a protected Section 2 district or it might be subject to the same discriminatory treatment persisting in the H358 Tarrant County design. With respect to Tarrant County generally, this Court found that "Latino voters in Tarrant County have been very cohesive in their candidate preferences for Latino candidates, and that preference is shared by African-Americans in the general elections studied, but not by other voters." ECF No. 1364 at ¶ 644 (citing to Dr. Engstrom's report); *see also id.* ¶ 649 (noting that "Terrysa Guerra, a campaign staffer and consultant who worked for Chris Turner in Tarrant County in 2008 and 2010, testified about 'black/brown coalitions' in Tarrant County"). The Court also noted that "minority population growth accounted for almost 89% of Tarrant County's population growth. The Hispanic population increased by 197,687; African-American population increased by 79,809; and Asian population increased by 31,321." *Id.* ¶ 623.

Despite this population growth, when turning specifically to HD 90, the Court found that Downton's initial draft of HD 90 decreased total SSVR from 45% to 40%. *Id.* ¶ 625. Because of retrogression concerns, and because "they believed they could 'offset' the loss of HD33, Downton and redistricting leadership decided to raise the SSVR of HD90 above benchmark levels to 50.1% (non-suspense)." ECF No. 1365 at 70. Just as they noted with respect to Harris and Dallas Counties, the Court noted that there was "no indication that HD90's SSVR needed to be increased to that level to remain a performing ability-to-elect district." *Id.* The Court also found that these changes were made based on race, and without regard to the district's actual performance for minority voters. ECF No. 1364 at ¶ 653. The Court found that the mapdrawers

also used the 50% SSVR pretext to "shore up HD93 as an Anglo district. Between Plan H113 and Plan H283, approximately 1,460 Black + Hispanic total population and 830 B + HVAP were removed from HD93 and approximately 435 Anglo total population and 413 Anglo VAP were moved into HD93, increasing the Anglo CVAP from 65.7% to 66.5%." ECF No. 1365 at 71. As found by the Court, Defendants' practice of "ignor[ing] DOJ guidance that ability to elect was not measured simply by a demographic criterion" "was merely superficial compliance with the VRA, invoked in bad faith to actually undermine Latino voting strength." *Id.*

This process of "superficial compliance" required changes to Reps. Veasey and Burnam's districts; however, the Court noted that neither representative was consulted "and they later opposed the changes." ECF No. 1364 at ¶ 629. Veasey, who was on HRC, "felt that the process was secret and there was no transparency." *Id.* ¶ 630. The Court noted that several legislators, including Reps. Burnam and Veasey, introduced amendments that would more adequately address the growth of Tarrant County's minority population, but these amendments were tabled. *Id.* ¶¶ 633-635. As in the statewide plan, this secretive and exclusive process is evidence of discriminatory intent. To lend further support to a finding of discrimination, this Court also made findings to the lingering effects of past discrimination, noting that "[i]n Tarrant County, 47% of Hispanics lack a high school education. The per capita income for Hispanics was $14,489, compared to $35,179 for non-Hispanic Anglos." *Id.* ¶ 650. These findings on discriminatory methods, procedures, and history as to Plan H283 explain why the NAACP feels it necessary to defend HD 101.

f. Bell County Claims

i. Claims and Relevant Pleading

In its most recently amended complaint, ECF No. 900, the NAACP has a live claim that Plan H358's configuration of House District 54 in Bell County is intentionally racially

discriminatory in violation of Section 2 of the Voting Rights Act and the Fourteenth Amendment to the United States Constitution, and violates the effects test of Section 2 by diluting the voting strength of voters of color in the region and failing to create an additional electoral opportunity for non-white voters. *See* ECF No. 900, at ¶¶ 22, 46, 48-52, 56, 60, 64.

ii. The Legal Standards Applicable to the Claim

The same legal standards applicable to the NAACP claim that naturally occurring coalition districts are warranted in the DFW region are also applicable in its claim that a naturally occurring coalition district is warranted in Bell County. *See* Section III.b.ii.b, *supra*.

iii. Plaintiff's Standing

The Texas NAACP has associational standing to argue that state House districts in Bell County are intentionally discriminatory and that the Voting Rights Act compels the drawing of an additional minority district because it has two local branches in Bell County (the Killeen and Temple Branches), with approximately 320 NAACP members countywide. NAACP 2017 Ex. 1, Watkins Decl., ¶ 5. The NAACP has members living in both House District 54 and House District 55. *Id*. ¶ 6. Additionally, Phyllis Jones, a lay witness who testified in the July 2014 trial and will testify in the July 2017 trial, is an NAACP member living in the county. Thus, the NAACP has standing to urge for voting rights remedies in Bell County.

iv. Lay Witnesses Testifying and Summary of Expected Testimony

The NAACP intends to call to the stand Phyllis Jones, who testified in the 2014 trial and to whose testimony the Court referred several times in its April 20, 2017 opinion on the 2011 State House claims. Tr. Transcript July 18, 2014. Ms. Jones will update her testimony on minority political cohesion, offering examples since 2014 of instances where African-American and Latino voters have worked together on issue campaigns and to elect candidates both groups

preferred. She has also reviewed the NAACP's demonstrative House District 54 configuration. She will testify that this district remedies the intentionally discriminatory fracturing of minority communities in the area that occurred in 2011. Based on her 20 years of experience organizing in the larger Bell County region, Ms. Jones will testify that the NAACP's district both reflects a community of interest and captures a reasonably compact minority community. She will explain that the district, which runs along the State Road 190 corridor, shares many common interests and characteristics. She will explain that the portions of Harker Heights that are not in the district are ones that have significant socioeconomic differences from the rest of the district. She will testify that the parts of Belton included in the district share many commonalities with the City of Killeen.

v. Expert Witnesses Testifying and Summary of Expected Testimony

The NAACP will call Dr. Chervenak to testify about the racially polarized voting analyses he performed in elections in Bell County. Having examined a series of exogenous racially contested statewide elections to see what the racial voting patterns were in Bell County in those elections, Dr. Chervenak found that voting is racially polarized, with black and Latino voters sharing the same candidate preference, and Anglo voters sharing the opposite candidate preference. He also looked at one recent racially-contested endogenous election, the 2012 race for House District 54, where an African-American candidate challenged a white candidate. Anglo bloc voting was so high that it enabled the defeat of the candidate of choice of minority voters, and black and Latino voters were highly cohesive in their support of that black candidate.

The NAACP will also have Mr. Fairfax testify to his analysis of the current and NAACP proposed versions of House District 54. Mr. Fairfax will describe the demographics of the NAACP's district, which is a black and Latino coalition district, as opposed to the current

district. Mr. Fairfax will testify that the mathematical compactness scores for the NAACP's proposed district were within the range of the other minority districts, current and proposed, measured in his report and thus are reasonably compact by mathematical measures. When measuring the number of split "places"—cities, towns and census designated places—Mr. Fairfax will testify that the current version of HD 54 splits four and the NAACP plan splits four, so they are equally respectful of political subdivisions. Mr. Fairfax will testify that the NAACP's district is a Killeen-centered one, with 97.7% of the population of Killeen, and because the city is not large enough to support an entire House district, the district also encompasses part of neighboring towns, including Belton, the county seat. A small portion of Belton is in current HD 54, but the NAACP's district includes a more sizable portion of it. Mr. Fairfax will testify that because Killeen and Belton are part of the same metropolitan statistical area, as determined by the Census Bureau, they are appropriately similar communities for inclusion within a district.

vi. Key Exhibits

The key exhibits upon which the NAACP Plaintiffs will rely include the following 2017 exhibits: JX 106-108 (maps); JX 25-30 (legislative documents); NAACP001-002, 004, 014, 023, 034. The NAACP will also rely upon the following exhibits already admitted into evidence: 2011 Ex. 601-603, 2014 Ex. 74, 638.

vii. Prior Findings Upon Which Plaintiffs Rely

The NAACP will rely on this Court's findings as to the egregious intentional discrimination in the Bell County region under Plan H283, as the House district configuration in H283 is unchanged in H358. The Court found that "evidence of past races demonstrate that racially polarized voting exists in the Bell County area," and that "Blacks, Asians, and Latinos

vote very cohesively." ECF No. 1364 at ¶689. Further, the Court credited the testimony of Phyllis Jones, who stated that minority voters frequently voted together in Killeen and Fort Hood. *Id.* ¶ 691. Additionally, the Court found that as with the majority of Texas, "[m]inority population growth accounted for more than 70% of the growth in Bell and Lampasas counties between 2000 and 2010." *Id.* ¶ 670.

The Court found that despite the growing minority population in the region, "Anglo Republican incumbent Aycock," who took on the primary role of drafting the Bell County area districts, "divided the growing minority City of Killeen to protect his incumbency." *Id.* ¶ 697. The Court found that "Aycock was not the minority candidate of choice and often voted against NAACP positions." ECF No. 1365 at 76; *see also* ECF No. 1364 at ¶ 693 (noting that Jones testified that Aycock "does not adequately represent voters of color in Killeen"). The Court noted that Plaintiffs proposed minority coalition districts could be justified under § 2 based on the evidence of cohesion in the general elections, ECF No. 1364 at ¶ 697, and further noted that Aycock stated that "a coalition district 'would have probably got me unelected because I couldn't put that many Republicans together in one place,'" and that "he 'sort of looked at' whether he could configure HD54 in such a way that it would create a coalition district and came to the conclusion that it could not be done. He did not look at election returns in deciding not to draw a collation district." *Id.* ¶ 673. While "the Legislature's intentional failure to create the [coalition] district [HD 54] was not, standing alone, intentional vote dilution," the Court noted that "the evidence does indicate that mapdrawers (specifically Aycock) intentionally racially gerrymandered the districts to dilute the minority vote by moving minority population out of HD54 and moving Anglo population in, thus cracking and diluting the minority vote to ensure Anglo control over both districts." ECF No. 1365 at 76.

The Court found that "Aycock's objections to minority-proposed plans were pretextual," and that his testimony providing justification for the way in which Killeen was split was not credible. *Id.* at 77; *see also* ECF No. 1364 at ¶¶ 680 (opposing an alternative plan because it utilized a land bridge even though H283 also uses a land bridge), 683 ("Aycock's assertion that it was more important to keep Lampasas County together with the City of Killeen as a community of interest than it was to keep the City of Killeen together as a community of interest is not credible."). Rather than this purported justification, the Court instead found that "the decision to split Killeen and the minority community within it was to ensure that HD54 and HD55 remained Anglo-majority, and would re-elect Republican incumbents," ECF No. 1365 at 77, the result of which was that "[m]inorities in Bell County do not have an opportunity to elect their candidate of choice in Plan H283." ECF No. 1364 at ¶ 682.

In addition to finding that the construction of the Bell County region diluted minority voting strength, the Court also found that that the population deviations in the region were "in contravention of the one person, one vote principle," and that the "mapdrawers intentionally used race in a way that would overwhelm the remaining Latino voters of HD54 with the new influx of Anglo voters while also stranding a large portion of Killeen's minority voters in the already heavily Anglo HD55," thus "exacerbate[ing] the existing population deviations, which could have easily been remedied." ECF No. 1365 at 149.

The Court bolstered its findings of intentional racial discrimination with findings of past instances of discrimination in voting, as well as findings demonstrating the lasting impact of historical racism. The Court again cited the testimony of Phyllis Jones, in which she stated that she had "witnessed voters of color being treated differently than Anglo voters in Bell County," ECF No. 1364 at ¶¶ 692-93, specifically "that minority voters are sometimes faced with lack of

translators or more rigorous questioning about ID." ECF No. 1365 at 77 n.57. As evidence of the effects of systematic historic discrimination, the Court noted that "[i]n Bell and Lampasas Counties, 13% of Hispanic and 12.1% of African-American households received SNAP or food stamps, compared to only 5% for Anglos," ECF No. 1364 at ¶ 695, and that "[i]n Bell and Lampasas Counties, 15% of Hispanics over the age of 25 are functionally illiterate, compared to 2.4% of Anglos," with 25.5% of Hispanics over the age of 23 having not completed high school, "compared to 8.8% for Anglos." *Id.* ¶ 696. The NAACP will rely on these findings in demonstrating that the same discriminatory intent is present in Plan H358.

V. Conclusion

Based on the evidence described in this trial brief, and additional evidence elicited during trial, the TX NAACP will respectfully request that this Court enter judgment in its favor, order the creation of the remedial districts necessary to address the TX NAACP's claim, and otherwise provide the full remedy allowed under the law.

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Respectfully submitted,

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