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

SHANNON PEREZ, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]

DEFENDANTS' POST-TRIAL BRIEF

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INTRODUCTION

In the November 2010 elections, Texas voters gave the Republican Party an overwhelming political advantage in the Texas Legislature, as well as unexpected gains in the Texas congressional delegation. The voters elected 99 Republicans and 51 Democrats to the Texas House of Representatives, 19 Republicans and 12 Democrats to the Texas Senate, and 23 Republicans and 9 Democrats to Congress. The 2010 election produced a drastic shift in the Texas House of Representatives, to which 76 Republicans and 74 Democrats had been elected in 2008. Tasked with statewide redistricting as a result of the recent census, the Republican-dominated 2011 Legislature attempted to preserve Republican gains in the 2010 election by protecting incumbents in the Texas House and Congress whenever possible. The Legislature's efforts to preserve Republican strength occasionally came at the expense of Democratic electoral prospects; however, Democratic incumbents were protected at a greater rate than Republicans.

By favoring incumbents generally, and Republicans in particular, the Legislature did not intentionally discriminate against Black and Hispanic voters on the basis of race. The evidence shows that HB 150 and SB 4, the bills by which the 2011 Legislature redistricted the House and congressional districts, maintained or increased

¹ After the 2010 elections, but before the beginning of the 2011 legislative session, two House members who had been elected as Democrats changed their party affiliation to become Republicans. The 2011 legislative session began with 101 Republicans and 49 Democrats in the Texas House.

² See, e.g., http://www.lrl.state.tx.us/sessions/memberStatistics.cfm.

the electoral prospects and voting power of Republicans and maintained or diminished the electoral prospects and voting power of Democrats. That is not evidence of purposeful racial discrimination. The plaintiffs and DOJ bear the burden of proving that the Legislature acted for the purpose of diluting Black and Hispanic voting strength and that the 2011 redistricting plans had a discriminatory effect. But there is no evidence that the 2011 redistricting plans targeted minority voters, regardless of party, on account of their race. At most, Plaintiffs have proven that the plans would have disadvantaged Democrats, regardless of race, on account of their party affiliation or political preference. This is not sufficient to establish that HB 150 or SB 4 were enacted for a racially discriminatory purpose or that they affected voters on account of race.

STATEMENT OF CLAIMS

The Legislature enacted HB 150,³ a redistricting bill for the Texas House of Representatives, on May 23, 2011, and Governor Perry signed the bill into law on June 17, 2011. The Legislature enacted SB 4,⁴ which created Texas congressional districts, during a special session on June 24, 2011, and Governor Perry signed the bill into law on July 18, 2011. Before the Legislature had enacted either bill, plaintiffs began to file redistricting lawsuits.

³ Act of May 21, 2011, 82d Leg. R.S., ch. 1271, 2013 Gen. Laws 3435.

⁴ Act of June 20, 2011, 82d Leg., 1st C.S., ch. 1, 2013 Gen. Laws 5091.

Because HB 150 and SB 4 had not been precleared, Section 5 of the Voting Rights Act prevented them from becoming effective as law. In February, 2012, this Court implemented interim plans for the 2012 elections. The United States District Court for the District of Columbia denied preclearance on August 28, 2012. *See Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013). The 2013 Legislature enacted bills repealing the 2011 redistricting plans and adopting the court-drawn interim plans, making slight modifications to the House plan. The Plaintiffs amended their complaints to assert claims against the newly-enacted 2013 plans (though most continued to assert claims against the 2011 plans), and the United States Department of Justice moved to intervene to challenge the recently repealed 2011 plans. *See* United States' Motion to Intervene (Aug. 22, 2013), ECF No. 871.

In their live complaints, the parties challenge HB 150 and SB 4 under the Fourteenth Amendment and Section 2 of the Voting Rights Act.⁵ First, Plaintiffs claim that the Legislature enacted HB 150 and SB 4 for the purpose of diluting minority voting strength in violation of the Fourteenth Amendment and Section 2 of the Voting Rights Act. Second, Plaintiffs allege that HB 150 and SB 4 allocate voters on the basis of race in violation of the Fourteenth Amendment as interpreted by *Shaw*

⁵ The Perez Plaintiffs do not appear to state claims against the 2011 redistricting plans. *See* Sixth Amended Complaint of Perez Plaintiffs ¶ 23 (Feb. 25, 2014), ECF No. 960 ("This amended pleading concerns the plans for future elections to the Texas House of Representatives and the election of the Texas Congressional delegation."); *id.* at 6 (asking that the Court "[d]eclare the existing plans for election of the Texas House of Representatives and Texas Congressional seats to be in violation of the Voting Rights Act and the 14th and 15th Amendments and enjoin their use in any future elections").

v. Reno, 509 U.S. 630 (1993). Third, MALC alleges that HB 150 contains impermissible population deviations in violation of the Fourteenth Amendment's one-person, one-vote requirement. Finally, Plaintiffs allege that HB 150 and SB 4 have the effect of diluting minority voting strength in violation of Section 2 of the Voting Rights Act.

Because the Texas Legislature repealed HB 150 and SB 4, Plaintiffs' complaints against the 2011 redistricting bills are directed at statutes that no longer exist. The State Defendants will not reurge their mootness argument in the post-trial briefing, but the status of the challenged bills affects the relief available to Plaintiffs and, as a result, the claims that could warrant a decision by this Court. Even assuming that the Court has jurisdiction over the 2011 claims, Section 2 claims based on the discriminatory effect of the 2011 plans should not be decided because relief as to those claims is either impossible (for modified districts) or unnecessary (for districts subject to live claims against the 2013 plans). Under their own theory of the Court's jurisdiction, the only 2011 claims on which Plaintiffs need a judgment are intentional-discrimination claims.

When the State Defendants moved to dismiss this case as moot based on the Legislature's repeal of the 2011 redistricting bills, Plaintiffs opposed dismissal on the ground that the possibility of "bail-in" relief under Section 3(c) of the Voting Rights Act kept the case alive.⁶ The Court denied the motion to dismiss on the basis of

⁶ Plaintiffs MALC and Cuellar's Response to Defendants' Motion to Dismiss and Reply to Defendants' Response to Plaintiffs' Motion to Amend at 9 (Aug. 5, 2013), ECF No. 835 (asserting

Plaintiffs' desire to pursue 3(c) relief: "[E]ven though the 2011 plans would not be enjoined *in toto* given that they have been repealed, the ongoing controversy concerning the legality of certain portions of the plan and the presence of Plaintiffs' requests for § 3(c) relief prevent the 2011 plan claims from becoming moot." Order at 15 (June 17, 2014), ECF No. 1104. The Court thus allowed the 2011 claims to go forward because of the potential for relief under Section 3(c). In any event, HB 150 and SB 4 are necessary to Plaintiffs' case only to the extent they may provide a predicate for bail-in relief. Bail-in requires a finding "that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred," 52 U.S.C. § 10302(c). Pacause Plaintiffs' Fourteenth Amendment claims allege that the Legislature discriminated on the basis of race, the State Defendants have focused their supplementation of the 2011 case on claims of unconstitutional racial discrimination.

There is no basis for judgment on any claim based solely on the alleged discriminatory effect of the 2011 plans, even assuming those claims continue to present a live controversy. Because the challenged bills and associated districting plans

that the "nullif[ication of] Section 5 of the voting rights act has created an opportunity to bail-in Texas back into a judicial and administrative preclearance system and kept this case alive for further review"); (LULAC) Response to State's Section 3(c) Brief and State's Motion to Dismiss 2011 Challenges as Moot at 4 (Aug. 5, 2013), ECF No. 836 ("[W]hether a bail-in remedy should be ordered as a result of the state's legislative actions creating the 2011 plans is a current, disputed matter before the Court."); (NAACP) Response to State's Section 3(c) Brief and State's Motion to Dismiss 2011 Challenges as Moot at 4 (Aug. 5, 2013), ECF No. 839 ("Even if elections are never conducted under the 2011 plans, whether a bail-in remedy should be ordered as a result of the state's legislative actions creating the 2011 plans is a current, disputed matter before the Court.").

⁷ Section 3 of the Voting Rights Act was formerly codified at 42 U.S.C. § 1973a.

were repealed before they were implemented, they have not had any effect on any voter, and they will not have any effect in the future. The United States appropriately declined to request relief on this ground. *See* Closing Argument of United States, Tr. 78:10-12, July 29, 2014 ("We are not asking the Court as a result of that declaration to order the districts be redrawn at this time.").

To the extent particular districts in the 2011 plans were modified by the Court and adopted, as modified, by the Legislature in 2013, there is no reason to address Section 2 claims against them because there is no remedy to be had. The districts have already been redrawn, and Section 2 claims cannot support 3(c) relief. There is no merit to the suggestion that without a judgment, "Texas will not be restrained from discriminating on the basis of race in subsequent redistricting plans." An advisory opinion (in the form of a judgment on the legality of vacated districts under Section 2's effects prong) would not constrain, or even inform, a future legislature. Even if the Legislature could create identical districts in the future, the effect of the district lines would depend on factors like the existing population, which will vary in unpredictable ways from the population as it existed in 2011. Thus any opinion on the effect of districts that have been repealed would necessarily depend on hypothetical facts,

⁸ Texas Latino Redistricting Task Force, et al. Plaintiffs' Reply to Texas's Opposition to Plaintiffs' Motions to Amend Their Complaints and Response to Texas's Motion to Dismiss Plaintiffs' Claims Against the 2011 Plans as Moot at 6 (Aug. 5, 2013), ECF No. 838.

providing no benefit to Plaintiffs and little guidance to future lawmakers other than a generalized instruction to comply with the law.

Section 2 liability in districts that were not modified in the Court's 2012 interim plans should be considered in the context of the existing 2013 plans. *Cf.* Order at 14 (June 17, 2014), ECF No. 1104 ("With regard to those elements of the 2011 plans that remained unchanged and remained challenged in the interim plans, when the Legislature adopted the Court's interim plans it engaged in the same conduct or incorporated the identical portions of the 2011 plans alleged to be illegal into the 2013 plans."). Any consideration of relief that would require altering district boundaries is appropriate only after a full trial on Plaintiffs' live claims against the existing plans.

ARGUMENT AND AUTHORITIES

I. FOURTEENTH AMENDMENT: LEGAL STANDARDS

A. Intentional Vote Dilution

The Equal Protection Clause provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. "[I]n order for the Equal Protection Clause to be violated, 'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Rogers v. Lodge, 458 U.S. 613, 617 (1982) (quoting Washington v. Davis, 426 U.S. 229, 240 (1976)); see also Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that

impact can be traced to a discriminatory purpose." (citing Davis, 426 U.S 229; Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977))). To prove their claims of unconstitutional vote dilution, Plaintiffs must prove that (1) the Legislature enacted the challenged redistricting plans for a racially discriminatory purpose and (2) the plans had or will have a discriminatory effect. E.g., Backus v. South Carolina, 857 F. Supp. 2d 553, 567 (D.S.C.) ("Viable vote dilution claims require proof that the districting scheme has a discriminatory effect and the legislature acted with a discriminatory purpose."), aff'd, 133 S. Ct. 156 (2012); cf. Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 337 (2000) ("At the time Beer was decided, it had not been established that discriminatory purpose as well as discriminatory effect was necessary for a constitutional violation, compare White v. Regester, 412 U.S. 755, 765-766 . . . (1973), with Washington v. Davis, 426 U.S. 229, 238-245 . . . (1976)."); see also LULAC v. NE Ind. Sch. Dist., 903 F. Supp. 1071, 1093 (W.D. Tex. 1995) ("To prevail on their claim" under the Fourteenth Amendment, plaintiffs must show: (1) intentional discrimination; and (2) a resultant discriminatory effect.").

1. Discriminatory Purpose

Like other claims under the Equal Protection Clause, an intentional-vote-dilution claim requires proof of intent to injure plaintiffs *because of* their race or ethnicity. A law does not violate the Equal Protection Clause "simply because it may affect a greater proportion of one race than another," *Rogers*, 458 U.S. at 618; it must

be enacted for the specific purpose of disadvantaging individuals because of their membership in a minority group. The Supreme Court has explained that

"discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action, at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Feeney, 442 U.S. at 279 (citation and footnote omitted) (rejecting a claim of intentional gender-based discrimination under the Equal Protection Clause against a statutory hiring preference for veterans, over 98% of whom were male and only 1.8% of whom were female at the time of the complaint). To establish a Fourteenth Amendment violation, Plaintiffs must do more than prove that the Legislature took a deliberate step that caused a disparate impact (which would amount to volition), or that the Legislature was aware that its actions could have a disparate impact (which would amount to awareness of consequences). They must prove that the Legislature acted because of race and not because of some other permissible factor. In this case, Plaintiffs must prove that the Texas Legislature enacted HB 150 and SB 4 to harm minority voters because of their racial- or language-minority status, not merely to maximize the

⁰

⁹ See Daniel R. Ortiz, The Myth of Intent in Equal Protection, 41 STAN. L. REV. 1105, 1112 (1989) (explaining that the Supreme Court "refused [in Feeney] to import into equal protection the familiar doctrine that a person intends the natural and foreseeable consequences of her voluntary actions"); see also id. at 1113 (describing the Feeney standard as a "standard of specific intent," and noting that Washington v. Davis, Arlington Heights, and Feeney "require real evidence of motivation to disadvantage a protected group, and all three prevent the government from pursuing discriminatory goals but not from reaching disparate results").

Republican Party's electoral prospects in spite of its awareness that the majority of Black and Hispanic voters tend to support Democratic candidates.

2. Discriminatory Effect

To prevail on their claims of unconstitutional vote dilution, DOJ and Plaintiffs must also prove that HB 150 and SB 4 had a discriminatory effect. E.g., Backus, 857 F. Supp. 2d at 567; cf. Bossier Parish, 528 U.S. at 337. Discriminatory purpose alone cannot establish a constitutional violation. See Palmer v. Thompson, 403 U.S. 217, 224 (1971) ("[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."); United States v. O'Brien, 391 U.S. 367, 383 (1968) (citing the "familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive"). This is consistent with the text of the Constitution; a statute does not "deny to any person . . . the equal protection of the laws" if it has no effect on any person. See U.S. CONST. amend. XIV, § 1; cf. id. amend. I ("Congress shall make no law"); id. art. I, § 10, cl. 1 ("No State shall ... pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.").

In City of Mobile v. Bolden, the Supreme Court held that Fourteenth Amendment vote-dilution claims require proof of discriminatory intent, but it did not eliminate the existing requirement of a discriminatory effect. The Court merely rejected the proposition "that it is not necessary to show a discriminatory purpose in order to

prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient." *City of Mobile v. Bolden*, 446 U.S. 55, 71 (1980); *cf. id.* at 112 (Marshall, J., dissenting) (criticizing the plurality's failure "to apply the discriminatory-effect standard of *White v. Regester*"); *cf. also Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (noting that "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied by this Court in *White v. Regester*"). Though no longer sufficient to establish a constitutional violation, proof of discriminatory effect remains a necessary element of a Fourteenth Amendment vote-dilution claim. *See, e.g., Shaw,* 509 U.S. at 641 ("[T]he Court held that [multimember or at-large] schemes violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength." (citing *Rogers*, 458 U.S. at 616-17; *Regester*, 412 U.S. at 765-66)).¹⁰

The question before the Court is whether the Plaintiffs are entitled to a judgment that the Legislature's 2011 redistricting plans violated the Equal Protection

¹⁰ See also Shaw v. Hunt, 517 U.S. 899, 923 (1996) (Stevens, J., dissenting) ("[R]acially motivated legislation violates the Equal Protection Clause only when the challenged legislation 'affect[s] blacks differently from whites." (quoting Palmer, 403 U.S. at 225)); Shaw, 509 U.S. at 670-71 (White, J., dissenting) ("[W]e have put the plaintiff challenging the district lines to the burden of demonstrating that the plan was meant to, and did in fact, exclude an identifiable racial group from participation in the political process."); Rodriguez v. Harris Cnty., 964 F. Supp. 2d 686, 800 (S.D. Tex. 2013) ("To obtain relief on a constitutional vote dilution claim such as this, the plaintiffs must 'prove that the purpose and operative effect' of the challenged election scheme 'is to dilute the voting strength of [minority] citizens." (quoting Voter Info. Project, Inc. v. City of Baton Rouge, 612 F.2d 208, 212 (5th Cir.1980)); LULAC v. NE Ind. Sch. Dist., 903 F. Supp. at 1093 ("To prevail on their claim under the Fourteenth Amendment, plaintiffs must show: (1) intentional discrimination; and (2) a resultant discriminatory effect.").

Clause by intentionally diluting their vote on the basis of race. This requires proof that the 2011 plans have diluted their vote.

3. Causation

A Fourteenth Amendment violation occurs only if racial discrimination is a cause-in-fact of the Legislature's action. As the Court explained in *Arlington Heights*, proof that a decision

was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.

429 U.S. at 270 n.21 (emphasis added) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)); see also Hartman v. Moore, 547 U.S. 250, 260 (2006) ("[A]ction colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway."); Texas v. Lesage, 528 U.S. 18, 21 (1999) (per curiam) ("[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983."). Under Arlington Heights and Mt. Healthy, if a plaintiff can prove that racial discrimination was "a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the

law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 231 (1985) (holding that a statute denying the franchise to persons convicted of a "crime involving moral turpitude" violated the Equal Protection Clause where the State effectively conceded "both that discrimination against blacks was a motivating factor for the provision and that [it] would not have been adopted . . . in the absence of the racially discriminatory motivation"). "[T]he causation is understood to be butfor causation, without which the adverse action would not have been taken" *Hartman*, 547 U.S. at 260. Thus even if Plaintiffs could prove that racial discrimination played some part in the enactment of HB 150 or SB 4 (which they cannot), there would be no constitutional violation if racial discrimination was not essential to their passage. The 2011 redistricting plans violate the Constitution only if they would not have been enacted absent race-based discrimination.

B. Claims of Unconstitutional Racial Classification

Some of the Plaintiffs have argued that the Legislature violated the Fourteenth Amendment by focusing on race to an impermissible extent in drawing certain districts.¹¹ In *Shaw v. Reno*, the Supreme Court held that a plaintiff can challenge "a

¹¹ DOJ has expressly stated that it does not allege a *Shaw* violation. Closing Argument of United States, Tr. 2067:14-17, Aug. 26, 2014. Assuming that any of the Plaintiffs have articulated *Shaw* claims, liability on those claims would not support a bail-in remedy under Section 3(c). Excessive reliance on racial data does not involve "the pervasive, flagrant, widespread, and rampant discrimination" necessary to support a preclearance regime, *see Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2629 (2013) (internal quotation marks omitted), and preclearance would not prevent implementation of a plan on the basis of a *Shaw* violation, *see* Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7470 (Feb. 9, 2011) ("The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the

reapportionment statute . . . by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 509 U.S. at 649.

The plaintiff's burden is a "demanding one." *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, concurring). Strict scrutiny is not triggered by "the mere presence of race in the mix of decision making factors." *Chen v. City of Houston*, 206 F.3d 502, 514 (5th Cir. 2000). "To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices." *Id.* at 506 (citing *Miller*, 515 U.S. at 928). To prevail on a *Shaw* claim, the plaintiff must prove that race was "the 'predominant factor' motivating the legislature's districting decision." *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999).

C. Courts Must Exercise Extraordinary Caution In Determining That A Legislature Engaged In Intentional Vote Dilution Or Made Unconstitutional Racial Classifications.

Determining whether a legislature acted "because of," rather than "in spite of," race presents a particular challenge in redistricting cases because legislatures are presumably aware of race when they draw district lines, but "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to

one-person one-vote principle, on the grounds that it violates *Shaw v. Reno*, 509 U.S. 630 (1993), or on the grounds that it violates Section 2 of the Voting Rights Act.").

make." Miller, 515 U.S. at 916. The difficulty of distinguishing racial awareness from racial motivation,

together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.

Id. Because the difficulty of separating political and racial motivation increases when race overlaps with political preference,

[c]aution is especially appropriate . . . where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated.

Easley v. Cromartie, 532 U.S. 234, 242 (2001). The need for extraordinary caution when a redistricting plan is alleged to violate the Equal Protection Clause means that the burden of untangling racial and political motivation falls on Plaintiffs, and any doubt must be resolved in favor of the State.

Plaintiffs are wrong to suggest that the need for caution applies only to racial-classification claims under *Shaw* and not to intentional vote-dilution claims. The need for caution applies to all constitutional claims, particularly claims alleging an improper legislative purpose. *See, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1, 6 (1947) (explaining that the "far-reaching authority" to strike down state tax statutes based on impermissible purpose "must be exercised with the most extreme caution"); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) ("The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if

ever, to be decided in the affirmative, in a doubtful case."); *cf. id.* at 130 ("[I]f less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned."). In the context of redistricting, vote-dilution claims require the same caution owed to *Shaw* claims.

Claims of improper racial classification and intentional vote-dilution are analytically distinct, but both are based in the Fourteenth Amendment's Equal Protection Clause, and both require courts to answer the same ultimate question: did the legislature act because of race or because of some other factor? *Shaw* merely applied the general principles of determining legislative motivation, developed in cases such as *Arlington Heights*, to the context of race-based redistricting:

In the absence of a pattern as stark as those in Yick Wo or Gomillion, "impact alone is not determinative, and the Court must look to other evidence" of race-based decisionmaking. Arlington Heights, supra, at 266 (footnotes omitted).

Shaw applied these same principles to redistricting. . . . Although it was not necessary in Shaw to consider further the proof required in these more difficult cases, the logical import of our reasoning is that evidence other than a district's bizarre shape can be used to support the claim.

Miller v. Johnson, 515 U.S. 900, 914 (1995) (emphasis added); cf. Nevett v. Sides, 571 F.2d 209, 218-19 (5th Cir. 1978) ("We see no distinction that would call for different constitutional requisites in a racial gerrymander case than in a voting dilution case such as this."). The operative principle, and the need for caution before finding that a legislature acted on the basis of race, derives from Feeney:

The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a

legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. *Shaw*, supra, at 646 . . . ; see Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 . . . (1979) ("[D]iscriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects'") (footnotes and citation omitted).

Miller, 515 U.S. at 915-16. The need for caution in attributing racial motivation to legislative action is not limited to *Shaw* claims; it applies with equal, if not greater, force to claims of intentional vote dilution.

D. Partisan Motivation Does Not Equal Racial Motivation.

Giving greater priority to creating Republican-leaning districts than to creating Democratic-leaning districts is not racial discrimination. The Constitution permits legislatures to draw district boundaries for a partisan purpose, even when those lines happen to diminish the electoral prospects of the party preferred by minority voters:

If the State's goal is otherwise constitutional political gerrymandering, it is free to use . . . political data [such as] precinct general election voting patterns, . . . precinct primary voting patterns, . . . and legislators' experience . . . to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district.

Bush v. Vera, 517 U.S. 952, 968 (1996); see also id. at 1029 (Stevens, J., dissenting) ("While egregious political gerrymandering may not be particularly praiseworthy, . . . it may nonetheless provide the race-neutral explanation necessary for a State to avoid strict scrutiny"). Redistricting is an inherently partisan process; it involves the

exercise of political judgment, and it has an inevitable political impact. See, e.g., Miller, 515 U.S. at 915-16 ("The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus."); White v. Weiser, 412 U.S. 783, 795-96 (1973) ("[R]eapportionment is a complicated process. Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task."); cf. Perry v. Perez, 132 S. Ct. 934, 941 (2012) (per curiam) ("[E]xperience has shown the difficulty of defining neutral legal principles in this area, for redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment."). Absent evidence of racial animus, the pursuit of partisan political goals cannot support an inference of intentional race-based discrimination.

1. In the face of the Supreme Court's distinction between racial and partisan motives, Plaintiffs maintain that the Legislature necessarily engaged in intentional vote-dilution when it favored Republican interests and failed to create more Democratic districts. Plaintiffs attempt to bridge the gap between partisan and racial motivation with the following logic: favoring Republicans necessarily disfavored Democrats; most minority voters prefer Democratic candidates; therefore, intentionally protecting Republicans amounts to intentionally disfavoring minority voters. DOJ has argued, for instance, that the Legislature engaged in intentional-vote dilution because "the dilution was not an accident. It was a choice. They said there

wasn't the political will. What they did is that they intentionally decided not to create any of these additional districts." Closing Argument of United States, Tr. 2070:2-5, Aug. 26, 2014; cf. Closing Argument of NAACP Plaintiffs, id. at 1976:14-16 ("Just because the Voting Rights Act doesn't compel a district, doesn't absolve the state of its discriminatory refusal to draw it.").

In DOJ and Plaintiffs' estimation, choosing to create Republican districts rather than Democratic districts amounts to intentional vote dilution because the Legislature knew that if it favored Republicans, it would necessarily diminish the political strength of minority voters who favor Democrats. *See, e.g.*, Test. of Theodore Arrington, Tr. 174:8-13, July 14, 2014. Plaintiffs argue, in effect, that the Constitution forbids the State to protect any incumbent who is not the minority candidate of choice (or, to be more precise, the candidate preferred by the majority of minority voters). As the Task Force Plaintiffs put it:

It's one thing to draw a district that favors a particular incumbent or a particular political party in one place or another in Texas.

It becomes a very delicate matter when you have an incumbent who is not preferred by, for example, Latino voters. And you are now undertaking a project to engineer the district so that it will no longer elect the Latino candidate of choice.

Closing Argument of Task Force Plaintiffs, Tr. 2137:24-2138:6, Aug. 26, 2014. That argument is foreclosed by *Hunt v. Cromartie*, which held:

¹² DOJ's expert testified that any decision to favor Republicans in Texas intentionally discriminates against Latinos and African-Americans. Test. of Theodore Arrington, Tr. 174:22-175:1, July 14, 2014.

Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.

526 U.S. at 551. A redistricting plan does not violate the Equal Protection Clause merely because the legislature's political goals happen to have an impact on the party preferred by minority voters. *Cf. Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) ("The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates.").

Plaintiffs refuse to acknowledge any distinction between partisan and racial motivation. The NAACP Plaintiffs dismiss the State's reliance on *Hunt v. Cromartie* as "a disingenuous ploy that relies on a plainly incorrect reading of the 14th Amendment precedent." Closing Argument of NAACP Plaintiffs, Tr. 1978:6-7, Aug. 26, 2014. They assert that *Hunt v. Cromartie* does not provide "a free pass to discriminate against voters of color long marginalized and excluded from the political process simply because of the way they vote." *Id.* at 1978:17-19. According to DOJ, "if you aren't being classified by race but you are being classified by party, then that is a defense to a *Shaw* claim. However, that is not a defense to intentional minority vote dilution." Closing Argument of United States, Tr. 2148:16-19, Aug. 26, 2014.

Plaintiffs' efforts to avoid the plain language of *Hunt v. Cromartie* miss the point. Whether or not the Supreme Court has provided a "free pass" to do anything, it has

distinguished partisan and racial motivation. If the Legislature treats individuals differently because of the way they vote, it has not treated them differently because of race. This follows not only from Hunt v. Cromartie, but also from Feeney and Washington v. Davis. See supra Part I.C. Choosing not to draw a Democratic district is not evidence of intentional racial discrimination unless the choice was actually motivated by a desire to harm minority voters.

Plaintiffs resort to sleight-of-hand in an effort to erase the distinction between partisan and racial motivation. Responding to the suggestion that HD 41 was drawn not to discriminate against Hispanic voters but rather "to save an incumbent who had switched from Democrat to Republican," DOJ claimed there was no difference:

I think we are saying the same thing, Your Honor. The goal was to save Aaron Pena's electability by making sure to draw the district in such a way that Anglo voters would control it. We are saying the same thing.

Closing Argument of United States, Tr. 72:13-20, July 29, 2014. Similarly, the NAACP argued that "decision makers in the process were open about their intent to limit the districts that would elect candidates of choice of minority voters in Texas." Opening Statement of NAACP Plaintiffs, Tr. 75:23-76:1, July 14, 2014; *see also* Opening Statement of NAACP Plaintiffs, Tr. 33:17-20, Sept. 6, 2011 (same). But the only testimony about limiting the creation of certain districts focused on partisan makeup, not race or ethnicity:

The legislature would not pass a map that created more than one new Democratic district, unless they were required to. It wasn't an issue of whether it was a minority district or not. It was the issue of Democratic district.

Test. of Ryan Downton, Tr. 1809:15-20, Aug. 15, 2014; see also id. at 1604:7-9 ("[T]here were not votes sufficient to pass any plan that did not have three Republican districts out of four new districts."). Plaintiffs cannot manufacture a claim of racial discrimination by recasting partisan decisions in racial terms. There is a difference between partisan purpose and intentional racial discrimination. See Bush v. Vera, 517 U.S. at 968; cf. Hernandez v. New York, 500 U.S. 352, 375 (1991) (O'Connor, concurring in the judgment) ("No matter how closely tied or significantly correlated to race the explanation for [a governmental action] may be, the [action] does not implicate the Equal Protection Clause unless it is based on race."), quoted in Hunt v. Cromartie, 526 U.S. 541, 558 (1999) (Stevens, J., concurring in the judgment).

By conflating race and party, Plaintiffs' theory of intentional vote-dilution eliminates the possibility of race-neutral decisionmaking. If Plaintiffs are right, then every redistricting decision has one of two effects: (a) providing minority voters with the ability to elect, or (b) denying minority voters the ability to elect. The false choice inherent in Plaintiffs' claims was summed up by counsel for MALC: "embrace the political aspirations of Latinos" or "limit the political weight of the Latino vote." Closing Argument of MALC, Tr. 1941:21-23, Aug. 26, 2014. According to Plaintiffs, creating a Democratic district gives minority voters the opportunity to elect; refusing to do so (or creating a Republican district) denies minority voters the opportunity to

elect. Choosing not to create a Democratic district is therefore a conscious decision not to provide minority voters the opportunity to elect candidates of choice, meaning (Plaintiffs argue) that any deliberate choice not to create a Democratic district amounts to intentional racial discrimination. As DOJ put it: "[T]he decision not to draw that district was a policy choice. It was intentional. It was deliberate. It was an intent to limit or reduce minority voting strength in that area." Closing Argument of United States, Tr. 144:13-16, July 29, 2014.

This position inevitably creates a duty to maximize. It follows from DOJ's argument that when minority voters favor one political party, a legislature cannot refuse to create a district that favors that party—or create a district that favors the opposite party—without intentionally diluting minority voting strength.¹³ Failure to create an available minority opportunity district therefore amounts to intentional racial discrimination. If this is correct, the only way to avoid intentional vote-dilution is to create every possible minority opportunity district, including coalition districts. No

In general elections, racial minorities tend to prefer Democrats. If the VRA requires the construction or preservation of districts where minority-preferred candidates win, then one might plausibly say that the VRA prevents the elimination of Democratic leaning districts in any covered racially heterogeneous community. The DOJ need only ask whether the candidate minorities voted for in the general election under the benchmark plan is equally likely to win under the new plan. If not, then minorities' ability to elect their preferred candidate is diminished.

Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 223 (2007) (noting that under this interpretation, "the Voting Rights Act begins to look like it is a Democratic candidate protection program").

¹³ This argument was anticipated and its consequences discussed, in the context of Section 5, shortly after the 2006 amendment and reauthorization of the Voting Rights Act:

matter how many minority opportunity districts it creates, if a legislature makes a conscious choice not to create a single district, it has (by DOJ's logic) intentionally diluted minority voting strength. Plaintiffs' legal theory cannot accommodate any limiting principle short of maximization.

The Supreme Court has already rejected DOJ's argument that the decision not to draw an available minority opportunity district supports an inference of intentional racial discrimination. *See, e.g., Miller*, 515 U.S. at 924 ("The State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the Constitution'" (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976))). The Supreme Court has also held that states are not required to maximize minority opportunity districts:

[R]eading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast. . . . Failure to maximize cannot be the measure of § 2.

Johnson v. DeGrandy, 512 U.S. 997, 1016-17 (1994). Neither the Constitution nor Section 2 imposes a duty "to give minority voters the most potential, or the best potential, to elect a candidate." Bartlett v. Strickland, 556 U.S. 1, 15 (2009).

Plaintiffs' interpretation of the Fourteenth Amendment raises serious constitutional questions because it would make race the predominant factor in every

redistricting decision. Districts drawn on the basis of race "cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial." *Bush v. Vera*, 517 U.S. at 980. A rule that compels the legislature to act on the basis of race becomes "part of the constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race." *Id.* at 981; *cf. Miller*, 515 U.S. at 923 ("When the Justice Department's interpretation of the Act compels race-based districting, it by definition raises a serious constitutional question").

2. Failure to create Democratic coalition districts cannot support Plaintiffs' intentional-vote-dilution claims in any event because the absence of a coalition district does not dilute any group's voting strength. While nothing prevents a legislature from creating a coalition district, nothing in the Constitution or Section 2 requires it to do so. In this case, the Legislature's decision not to create coalition districts was based on the understanding that they would function as Democratic districts, as well as the good-faith belief that they were not required by Section 2.

The Legislature's belief that coalition districts were not required was based on existing Supreme Court authority, which rejected the proposition that Section 2 protects "the opportunity to join other voters—including other racial minorities, or whites, or both—to reach a majority and elect their preferred candidates." *Bartlett*, 556 U.S. at 14. The Legislature's understanding was confirmed by the Supreme Court's

decision in this case, which directly addressed—and rejected—the idea that coalition districts are legally required:

The [district] court's order suggests that it may have intentionally drawn District 33 as a "minority coalition opportunity district" in which the court expected two different minority groups to band together to form an electoral majority. . . . If the District Court did set out to create a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so. Cf. Bartlett v. Strickland, 556 U.S. 1, 13-15 . . . (2009) (plurality opinion).

Perez, 132 S. Ct. at 944. The Supreme Court's citation to Bartlett—and not to the parties' briefs or the joint appendix—reflects a legal determination, not a comment on the sufficiency of the evidence. While this statement addressed coalition districts in the court-drawn interim plan, the Supreme Court by necessary implication determined that coalition districts are not required by the Voting Rights Act.¹⁴

The Supreme Court's holding in *Perez* follows from the reasoning of *Bartlett v. Strickland*, which held that in order to demonstrate an "opportunity" to elect under Section 2 of the Voting Rights Act, a group of voters must show that it can elect its preferred candidate without assistance from other voters. In *Bartlett*, the State of North Carolina raised Section 2 as a defense, arguing that it was required to violate its

¹⁴ Accordingly, this Court is barred under the law-of-the-case doctrine from revisiting the issue of whether coalition districts are required by section 2. *See, e.g., United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) ("Under the law of the case doctrine, an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal."); *see also Alpha/Omega Ins. Servs., Inc. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 279 (5th Cir. 2001) (law-of-the-case doctrine is not limited to issues that "have been explicitly decided; [it] also applies to those issues decided by 'necessary implication'" (quoting *In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001))).

own whole-county provision to create a district in which African-American voters formed 39% of the voting-age population. The Court explained that these voters might join other groups to form a majority, but they

cannot . . . elect that candidate based on their own votes and without assistance from others. Recognizing a § 2 claim in this circumstance would grant minority voters a right to preserve their strength for the purposes of forging an advantageous political alliance.

Bartlett, 556 U.S. at 14-15 (internal quotation marks omitted). The Court refused to recognize a Section 2 claim, holding:

Nothing in § 2 grants special protection to a minority group's right to form political coalitions. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *DeGrandy*, 512 U.S., at 1020.

Id. at 15. The Supreme Court flatly rejected the notion that "opportunity" under Section 2 includes the opportunity to form a majority with other voters: "There is a difference between a racial minority group's 'own choice' and the choice made by a coalition." Id.

The distinction drawn in *Bartlett* between a group's own choice and the choice of a coalition applies whether the group in question joins "other racial minorities, or whites, or both." *Id.* at 14. This leaves no more room for a coalition of multiple minority groups than it leaves for a coalition of minority voters and "crossover" Anglo voters. The *Perez* opinion's reliance on this very passage in *Bartlett* resolves any ambiguity about the meaning of the Supreme Court's holding that there is "no basis"

to deliberately create coalition districts in which "two different minority groups [are expected] to band together to form an electoral majority." *Perez*, 132 S. Ct. at 944.

The logic of *Bartlett* applies with equal force to coalition districts. Coalition districts, no less than crossover districts, undermine "the need for workable standards" and "clear lines for courts and legislatures" embodied in the majority-minority requirement. *Id.* at 17. In *Bartlett*, the Supreme Court cautioned that a less-exacting standard

would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions. The judiciary would be directed to make predictions or adopt premises that even experienced polling analysts and political experts could not assess with certainty, particularly over the long term.

Id. The Court provided the following examples of questions that courts should not be required to ask under Section 2:

What percentage of white voters supported minority-preferred candidates in the past? How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters and will they stay the same?"

Id. Bartlett instructs that courts should not answer these questions. See id. ("A requirement to draw election districts on answers to these and like inquiries ought not to be inferred from the text or purpose of § 2.").

But these are the very questions that must be answered to create coalition districts. As with crossover districts, interpreting Section 2 to require coalition districts

"would unnecessarily infuse race into virtually every redistricting," *id.* at 21 (quoting LULAC v. Perry, 548 U.S. 399, 446 (2006)), and increase "the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision," *id.* at 21-22 (quoting Miller, 515 U.S. at 916). When the Court rejected crossover districts in Bartlett, it warned, "The statutory mandate petitioners urge us to find in § 2 raises serious constitutional questions." *Id.* at 18. Because a statutory mandate to create coalition districts raises the same constitutional questions, it cannot be inferred from Section 2, much less from the Constitution.

E. Eric Opiela's "Nudge Factor" E-mails Prove Nothing About The Legislature's Purpose In Enacting HB 150 Or SB 4.

Plaintiffs have largely staked their intentional-discrimination claims on a handful of e-mails written not by a legislator, a legislative staffer, or even a state employee, but by Eric Opiela, a lawyer who served as counsel for the Texas Republican congressional delegation. At the trial of its claims against the 2011 House redistricting plan, DOJ told the Court that "this is the rare case where key figures in the redistricting process have told us what they were going to do and how they were going to do it." Opening Statement of United States, Tr. 85:12-14, July 14, 2014. DOJ proclaimed that Opiela's e-mails are direct evidence of the Legislature's purpose in enacting HB 150 and SB 4. *See id.* at 85:9. But Opiela's e-mails prove nothing about the Legislature's purpose in creating or enacting the House or congressional redistricting plans. Opiela had nothing to do with the House plan, and there is no

evidence that his "useful metric" was actually developed or used to draw any boundary in the congressional plan.

In November 2010, Opiela sent an e-mail describing what he termed a "useful metric" for redistricting. Plaintiffs have made this e-mail the centerpiece of their case for intentional racial discrimination, even characterizing it as a "smoking gun" proving the Legislature's guilt. But there is no evidence that Opiela's "useful metric" was ever developed or used—by Opiela or anyone else—to draw districts. Opiela's e-mail and the "useful metric" that it theorizes provide no support for Plaintiffs' claims of intentional racial discrimination.

Opiela proposed calculating "a ratio for every census block in the state" showing (1) "CVAP/Total Population," (2) "Hispanic CVAP/Total Hispanic Population," (3) Spanish Surname RV/Hispanic CVAP," (4) "Spanish Surname RV/Total Hispanic Population," and (5) "Spanish Surname Turnout/Total Turnout." Ex. DOJ-75. Opiela's e-mail suggested that these ratios could be used to create a "nudge factor" to identify census blocks that would "pull [a] district's Total Hispanic Pop and Hispanic CVAPs up to majority status, but leave the Spanish Surname RV and TO the lowest." *Id.* Despite the Plaintiffs' repeated reference to Opiela's e-mail, there is no evidence that he ever acquired the necessary data and calculated the proposed ratios, or that anyone used his metric to draw districts.

The only evidence regarding the creation of Opiela's metric shows that most of the data required to put his theory into practice did not exist. See Ex. D-262. The

Texas Legislative Council ("TLC") could not provide the data necessary for blocklevel calculations of (1) CVAP/total population, (2) HCVAP/total Hispanic population, (3) SSRV/HCVAP, or (5) Spanish-surname turnout/total turnout. Ex. DOJ-86_0003. TLC simply did not have block-level CVAP data, Test. of Clare Dyer, Tr. 290:18-291:3, July 14, 2014, and RedAppl did not have Spanish-surname voterturnout data, id. at 265:18-24; Ex. DOJ-86_0003-4. The only ratio that could have been calculated was (4) SSRV/total Hispanic population, but even those data were limited to 2000 Census blocks, not the 2010 Census blocks that would be used for redistricting in 2011. Test. of Clare Dyer, Tr. 291:4-10, July 14, 2014; Ex. DOJ-86_0003. Converting the data from 2000 Census blocks to 2010 Census blocks would have been complicated and extraordinarily time-consuming. The number of Census blocks in Texas increased from approximately 675,000 in 2000 to approximately 915,000 in 2010. Test. of Clare Dyer, Tr. 291:13-16, July 14, 2014. That means that creating even one of Opiela's five ratios would require at least 675,000 separate calculations for the 2000 Census blocks alone. *Id.* at 302:21-25. There is no evidence that Opiela ever acquired the data or made the calculations necessary to develop the "nudge factor" metric.

Nor is there any evidence that Opiela's "nudge factor" was ever used to draw any of the districts in the 2011 plans. The uncontroverted evidence at trial showed that Opiela had nothing to do with the House plan. *See* Test. of Gerardo Interiano, Tr. 1493:23-1494:2, July 18, 2014; Test. of Bonnie Bruce, Tr. 1979:3-6, July 19, 2014;

Test. of Ryan Downton, Tr. 2155:2-3, July 19, 2014. The evidence also demonstrated that none of the individuals from the Speaker's office or the House Redistricting Committee who were involved in drawing the House or congressional redistricting plans ever used Opiela's "nudge factor." *See* Test. of Richard Murray, Tr. 1426:14-18, Aug. 15, 2014 (testifying that he had not seen any evidence that Opiela's methods were used in the congressional plan). The existence of an e-mail sent in 2010 by an individual who was not a member of the Legislature or part of the legislative staff proves nothing about the purpose of the 2011 redistricting plans. Whatever purpose Opiela had when he came up with his "useful metric" cannot be attributed to the State, to any member of the Legislature, or to any member of the legislative staff.

In a further effort to attribute an improper race-based motive to the Legislature, DOJ emphasizes an e-mail in which Opiela uses the word "Anglo" four times. In this e-mail, according to DOJ, "Mr. Opiela recommends two strategies to the Congressman [Lamar Smith] for how districts should be drawn. . . . [H]e outlines his strategy of going around the map in Texas to pick up Anglo voters to shore up Republican candidates." Opening Statement of United States, Tr. 86:5-11, July 14, 2014. Whatever motive this e-mail demonstrates, it cannot be imputed to the Legislature or any staff member who worked on the congressional plan. The e-mail was written to Congressman Lamar Smith (with Gerardo Interiano blind-copied) on November 20, 2010. Ex. DOJ-76. Ryan Downton, the principal drafter of the congressional plan, was not copied on the e-mail. There is no evidence that he ever

received it. There is no evidence that any member of the Legislature received it. There is no evidence that Gerardo Interiano agreed with the sentiment expressed by Opiela (whatever it was) or that he acted upon it in any way. There is simply no evidence connecting Opiela's e-mail to any plan enacted by the Legislature. Even if the e-mail can be interpreted as evidence of a racial motive on Opiela's part, there is no evidence that any member of the Legislature or legislative staff shared it.

It is no answer to argue, as Plaintiffs did when their claim started to fall apart, that the data do not matter because the "nudge factor" results appear in the enacted plans. This argument assumes that if a particular characteristic *might* have resulted from the "nudge factor," it must have resulted from the "nudge factor." By Plaintiffs' logic, since Opiela proposed the "nudge factor" as a way to help Representatives Canseco and Farenthold, any successful effort to help Canseco or Farenthold must be the work of the "nudge factor." By the same logic, since the "nudge factor" was designed to find low-turnout precincts, any district that contains low-turnout precincts must have been created with the "nudge factor." See Closing Argument of United States, Tr. 65:19-21, July 29, 2014 ("House District 117 . . . is where the how, identifying low turnout precincts, was implemented in the House plan."). This logic is obviously false. That Opiela thought up a race-based method that he apparently believed would help Republican incumbents does not imply that Republican incumbents can only be protected through race-based methods, much less Opiela's particular race-based method.

Plaintiffs cannot make up for their complete lack of evidence with vague statements about "the linkage between Mr. Opiela and the map drawers, Mr. Interiano and Mr. Downton." *Id.* at 61:5-6, July 29, 2014; *see also id.* at 62:1-2 ("all kinds of links between Mr. Interiano and Mr. Opiela"). Nor can they make up for the lack of evidence by asserting that Opiela "had these ideas, and that idea filters its way into the final product." *Id.* at 63:21-22. The claim that the enacted plans incorporate Opiela's "nudge factor" because Opiela's ideas "filter[ed] its way into the final product" through "links" between Opiela and the map drawers is pure speculation.

Opiela's e-mails, which Plaintiffs touted as direct evidence of intentional racial discrimination, prove nothing by themselves, and Plaintiffs have produced no evidence that connects them to the enacted plans. As DOJ put it, "Our claim is . . . that Mr. Opiela has influence here. He's got his computer. He's got his data." Closing Argument of United States, Tr. 2056:22-24, Aug. 26, 2014. To connect Opiela's methods and purpose to the enacted plans, Plaintiffs have to do more than show that Opiela had an idea, influence, and data; they must prove, at the very least, that his influence resulted in the implementation of his idea and the use of his data to draw the enacted plans. To prove their claim that the "nudge factor" was used to draw

¹⁵ DOJ attempted to connect Opiela to the House plan through Speaker Straus's RedAppl account, which included several entries marked "EC." *See* Ex. D-313. DOJ jumped to the conclusion that "EC" must be Eric Opiela because his middle initial is (apparently) "C." *See* Tr. 1498:20-1500:9, July 18, 2014. Despite DOJ's insinuation that these entries provided the missing link to Opiela, *see id.* at 1500:8-9 ("T'm interested to hear what you have to explain this."), "EC" turned out to be Elizabeth Coburn, an intern who worked with Gerardo Interiano on redistricting. *See* Test. of Bonnie Bruce, Tr. 1923:17-1924:8, July 19, 2014; Ex. D-370 (e-mail from Elizabeth Coburn to Gerardo Interiano).

districts, Plaintiffs must first prove that the "nudge factor" was actually used to draw districts. There is no evidence that the "nudge factor" was even calculated, much less used by any person to draw any district.

F. Plaintiffs' Allegations Regarding Split Precincts Rest On Speculation And Factual Misstatements.

Plaintiffs' intentional-discrimination case also relies on the theory that split precincts are prima facie evidence of intentional racial discrimination. DOJ alleges that both plans "purposefully split precincts on the basis of race and ethnicity to dilute minority voting strength." Complaint in Intervention ¶¶ 22, 43 (Aug. 22, 2013), ECF No. 871-1. They allege that the House and Senate redistricting committees "had a policy to minimize the splitting of voting tabulation districts." *Id.* ¶¶ 23, 44. They contend that "[a]lthough political data—*i.e.*, election returns, voter registration, and turnout—are compiled at the precinct level in Texas, that information is not available for smaller geographic areas such as census blocks. Data about the race of the inhabitants is, however, available below the precinct level." *Id.* ¶ 24. Plaintiffs' argument is wrong in every respect. Precincts can be split for a number of non-racial reasons, and political data is available at the block level.

The claim that split precincts indicate intentional racial discrimination ignores the fact that precincts may be split—and were split by mapdrawers—for various race-

¹⁶ See also Opening Statement of Task Force Plaintiffs, Tr. 69:19-24, July 14, 2014 ("[B]ecause, as the Court has heard previously, political performance data is not available below the precinct level, when you see th[is] many splits, this is an indicator that something other than political performance was driving the way these lines are moving in and out of neighborhoods.").

neutral reasons. In addition to political performance, precincts may be split to (1) follow city boundaries, (2) include financial supporters, (3) follow roads, (4) incorporate airports and government buildings, (5) include a member's home, (6) comply with the Texas Election Code, and (7) comply with the Voting Rights Act. Test. of Theodore Arrington, Tr. 177:7-178:23, July 14, 2014. The Texas Legislature had no general policy regarding split precincts. Test. of Ryan Downton, Tr. 2020:13-2021:2, July 19, 2014; Test. of Gerardo Interiano, Tr. 1592:4-7, July 18, 2014; Test. of Theodore Arrington, Tr. 179:24-3, July 14, 2014; Ex. D-128. The drafters of the Texas House redistricting plan split VTDs to accommodate the requests of Republican and Democratic members. Test. of Ryan Downton, Tr. 2023:1-6, July 19, 2014; Test. of Gerardo Interiano, Tr. 1584:14-16, July 18, 2014. To the limited extent that mapdrawers split precincts on the basis of racial data, they did so only to comply with the Voting Rights Act. Test. of Ryan Downton, Tr. 2013:6-14, 2024:6-24, 2117:14-22, 2144:23-2145:8, July 19, 2014.

The allegation that RedAppl provides only racial data, not political data, at the block level is false. Clare Dyer testified (and demonstrated) that RedAppl allows a user to display political information—specifically, the percentage of votes won by a candidate in a particular election—in a statistics bar on the RedAppl screen. When the user displays election results, any change to the district boundaries will change the election results shown. This is true even if the district is altered by splitting a precinct: the results for the blocks included in the district will be factored into the total election

performance indicator in the statistics bar. Test. of Clare Dyer, Tr. 279:3-25, July 14, 2014. As Clare Dyer testified at trial, "election data is allocated down to the block level, so that when people split VTDs, you can still get election results for the district." Test. of Clare Dyer, Tr. 265:25-266:2, July 14, 2014.

G. Plaintiffs' Arlington Heights Analysis Is Legally Flawed And Factually Unsupported.

Plaintiffs claim that the factors identified in *Arlington Heights* point to intentional discrimination in HB 150 and SB 4, but their interpretation of *Arlington Heights* is unsound, and their claims regarding departures from the normal procedural sequence are not supported by the evidence. Plaintiffs' argument is legally flawed because they wrongly assume that *Arlington Heights* identified the elements of an intentional-discrimination claim, to be proven (according to Plaintiffs) by checking off the factors listed in the opinion. Plaintiffs' argument that the Legislature's departure from the normal procedural sequence shows intentional discrimination is factually unsupported for two reasons: first, they have not identified the "normal" procedural or substantive criteria from which the Legislature allegedly departed in 2011; second, their complaints about the 2011 process do not provide evidence of racial motivation.

1. The so-called *Arlington Heights* factors are not elements of a prima facie claim of intentional discrimination.¹⁷ In *Arlington Heights*, the Supreme Court identified

¹⁷ See Closing Argument of Task Force Plaintiffs, Tr. 172:12-15, Aug. 11, 2014 ("The elements of discriminatory purpose, we know from the *Arlington Heights* case, include things like the history of the action, deviations from procedural and substantive norms, the sequence of the events and

"subjects of proper inquiry in determining whether racially discriminatory intent existed," including "[t]he specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," "[s]ubstantive departures," and "legislative or administrative history." 429 U.S. at 267-68. This nonexhaustive list does not enumerate the elements of a prima facie case; it merely identifies sources of evidence that may be relevant to the question whether a legislative body acted for a discriminatory purpose. The legal standard of intentional discrimination is established by Washington v. Davis and Feeney—whether the legislature acted because of, rather than in spite of, race.

Misinterpreting the Arlington Heights factors as elements of the claim, Plaintiffs treat the factors as boxes to be checked rather than areas to examine. This leads Plaintiffs to draw inferences of discrimination from neutral facts without a complete analysis. For example, Plaintiffs treat departures from the normal procedural sequence as though they necessarily signal racial discrimination. But Arlington Heights did not establish that procedural departures are inherently race-based or discriminatory legislatures may depart from standard procedure for any number of reasons. Merely

contemporaneous statements."); Summary of Closing Arguments at 3 (July 25, 2014), ECF No. 1183 ("[I]n Arlington Heights, the Supreme Court identified the kinds of indirect evidence that establish a prima facie case of intentional discrimination "); Closing Argument of NAACP Plaintiffs, Tr. 2088:11-16, Sept. 15, 2011 ("The Supreme Court, in Village of Arlington Heights, offered some examples of—evidence sufficient to establish a prima face case of intentional discrimination. These examples include troubling legislative history, a pattern of discriminatory events, departures from usual procedures and evidence of disparate impact."); Opening Statement of MALC, Tr. 11:19-21, Sept. 6, 2011 ("The standards for evaluating the intent portion of this case are formed by the United States Supreme Court decision in Village of Arlington Heights.").

identifying a change in procedure proves nothing by itself; it only raises the question whether the particular change in procedure actually supports an inference of racial discrimination. *Cf. Wright v. Council of Emporia*, 407 U.S. 451, 469 (1972) (timing of city's decision to create a new school district suggested it was designed to avoid a recent desegregation order because the city had found "its arrangement with the county both feasible and practical up until the time of the desegregation decree").

2. Plaintiffs have failed to identify departures from the normal procedural sequence because they have not identified the normal procedure from which the Legislature supposedly departed. See, e.g., Moore v. Detroit Sch. Reform Bd., 293 F.3d 352, 370 (6th Cir. 2002) (finding that complaints about the legislative process did not support claims of discriminatory purpose where plaintiffs did not "present any comparisons to show that the Legislature's actions and procedures with respect to the enactment of the MSRA differed in any manner, let alone in a material way, from its handling of other legislation"). In addition to their failure to provide a point of comparison, Plaintiffs' complaints about the 2011 legislative process do not show that minority citizens and legislators were subjected to different treatment, much less that they were treated differently because of race.

Plaintiffs complain that the redistricting process suggests intentional discrimination because it was unnecessarily rushed. 18 See Closing Argument of Task

¹⁸ If a rushed process were evidence of intentional racial discrimination, the VRA itself would be suspect. See Nathaniel Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 YALE L.J. 174,

Force Plaintiffs, Tr. 177:13-18, Aug. 11, 2014; Closing Argument of United States, Tr. 2063:16-25, Aug. 26, 2014. Plaintiffs provide no standard by which to measure the speed of the 2011 redistricting process. They have not identified an objective standard to determine whether the process was too rushed, and they have not proven that past redistricting cycles followed a longer timeline. DOJ, for example, introduced an exhibit setting out the timeline for 2011 congressional redistricting (Ex. DOJ-611), but they did not offer a similar timeline for previous congressional redistricting cycles. In any event, the testimony contradicts their allegation; Hanna testified that the 2011 redistricting process was not materially different from past redistricting cycles. Test. of David Hanna, Tr. 1557:9-12, Aug. 15, 2014 (testifying that 2011 special session did not seem unusually fast).

Plaintiffs' allegations of inadequate time for public review of election data and redistricting plans do not support an inference of intentional discrimination. DOJ alleges, for example, that "[u]nlike past redistricting cycles, plans and election data relevant to the 2011 [plans] were not available for a sufficient period to allow for substantive public input." Complaint in Intervention ¶¶ 37 (congressional), 53 (House) (Aug. 22, 2013), ECF No. 871-1. Plaintiffs also criticize the Legislature for

189 n.55 (2007) (noting complaints about "[a]n artificial rush to move the House version" of the Voting Rights Act (quoting S. Rep. No. 109-295, at 31 (2006))). The same goes for claims that the outcome of the redistricting process was preordained. *See id.* at 189-90 n.56 ("[T]his important legislation was—unfortunately—a bit of a foregone conclusion,' they argued, and '[f]rom the outset the default seemed to be to accept the House product without deliberation." (quoting S. Rep. No. 109-295, at 31, 34 (2006))).

"not holding hearings on plans as they were evolving," Closing Argument of Task Force Plaintiffs, Tr. 177:13-18, Aug. 11, 2014; see also Closing Argument of United States, Tr. 2063:16-2064:15, Aug. 26, 2014. There is no evidence of past redistricting cycles that have provided additional time for public input; there is no evidence showing how much time would be sufficient; and there is no evidence connecting the time provided for public input to racial considerations. Nor is there any evidence that the Legislature has ever held additional hearings after a redistricting bill (or any bill) was amended on the floor. In any event, the supposedly inadequate time for public input cannot support a claim of racial discrimination because it affected all members of the public equally. Cf., e.g., Palmer v. Thompson, 403 U.S. 217, 226 (1971) (holding that city's decision to close public pools did not violate the Equal Protection Clause because there was no discriminatory effect; the city "closed the public pools to black and white alike").

Complaints that the Legislature deviated from normal procedure by holding insufficient public hearings are similarly unsupported. DOJ alleges that "[t]he Texas House and the Senate each provided for only one hearing on the Congressional redistricting plan and provided less than 48 hours' notice before the hearings." Complaint in Intervention ¶ 38 (Aug. 22, 2013), ECF No. 871-1; id. ¶ 55 ("Two public hearings concerning the 2011 House redistricting were conducted on a Friday and on Palm Sunday, limiting public participation."). It also alleges that the timing of the 2011 House plan is suspect because "[t]he chair of the Texas House Redistricting

Committee released his statewide 2011 House plan proposal only two days before the first public hearing and required waiver of Texas's five-day posting rule, which is uncommon for a major bill such as redistricting." Complaint in Intervention ¶ 54 (Aug. 22, 2013), ECF No. 871-1. Again, Plaintiffs provide no basis for comparison and no link between the alleged defect and a discriminatory purpose. There is no evidence regarding the timing or frequency of hearings in previous redistricting cycles, no evidence (or even explanation) why the particular defects alleged by Plaintiffs in the 2011 process indicate a racially discriminatory purpose, and no explanation how or why the unspecified "normal" procedure proves a nondiscriminatory purpose or removes any discriminatory effect—there is only a generalized assertion that it wasn't normal this time.

With respect to the congressional redistricting process, Plaintiffs criticize the Legislature for holding only one special session, but they have not identified a normal process from which the Legislature departed. The only example that Plaintiffs have offered for comparison is the 2003 mid-decade redistricting, but this hardly qualifies as a normal process. In 2003, the decision to take up congressional redistricting at all led multiple parties—some of them plaintiffs in the current suit—to bring claims of unconstitutional state action. *See LULAC*, 548 U.S. at 416-17 (describing plaintiffs' claim that the Legislature's "decision . . . to effect mid-decennial redistricting, when solely motivated by partisan objectives, violates equal protection and the First Amendment because it serves no legitimate public purpose and burdens one group

because of its political opinions and affiliation"). Their constitutional claims were based on the premise that the 2003 congressional redistricting process was anything but normal:

In 2003, the newly elected 78th Legislature convened and took the unprecedented step of voluntarily considering congressional redistricting in the middle of a decade.

The process for redrawing the congressional map was extraordinary.

Brief for Appellants, Jackson v. Perry, No. 05-276, 2006 WL 62062, at *26 (Jan. 10, 2006); see also Appellant's Brief on the Merits, LULAC v. Perry, No. 05-204, 2006 WL 53996, at *6 (Jan. 10, 2006). The LULAC plaintiffs argued that "the unique circumstances of the Texas redistricting experience" gave the Supreme Court a chance to limit partisan redistricting. Appellant's Brief on the Merits, LULAC v. Perry, No. 05-204, 2006 WL 53996, at *14 (Jan. 10, 2006). The Jackson plaintiffs relied on the fact that "the 2003 plan replaced a 2001 plan that already had the right number of districts of the right size. There was no constitutional obligation to act at all." Id., 2006 WL 62062, at *26; id. at *27 ("[H]aving wholly failed to act when it had such an obligation in 2001, the State should not be allowed to redraw the map later in the decade solely to engineer what it views as a better partisan outcome.").

¹⁹ The plaintiffs in *LULAC* included the Texas Conference of NAACP Branches, LULAC, Congresswoman Sheila Jackson Lee, Congresswoman Eddie Bernice Johnson, Wilhelmina Delco, Lester Gibson, and Juanita Valdez-Cox. *See* Brief for Appellants, *Jackson v. Perry*, No. 05-276, 2006 WL 62062, at *ii (Jan. 10, 2006).

Whether or not the 2003 congressional redistricting process was normal, there is no evidence that it provided greater opportunities for participation by minority legislators or members of the public. The mere fact that the Legislature convened for multiple special sessions in 2003 is no evidence of intentional discrimination in 2011. First, the Legislature had more time in 2003 because the existing plan was not malapportioned. *See, e.g., LULAC*, 548 U.S. at 417 ("Unlike *Vieth*, where the legislature acted in the context of a required decennial redistricting, the Texas Legislature voluntarily replaced a plan that itself was designed to comply with new census data. . . . Texas had 'no constitutional obligation to act at all' in 2003"). Second, the Legislature held multiple special sessions in 2003 partly because the Democrats fled the State on two occasions to break quorum and prevent redistricting from going forward. *See LULAC*, 548 U.S. at 413; *id.* at 453-54 (Stevens, J., concurring in part and dissenting in part).

Plaintiffs allege that minority members of the Legislature were denied equal resources or opportunity to participate in the redistricting process, but there is no evidence to support a conclusion of disparate treatment. They allege, for instance, that the Legislature "didn't share Baker Botts . . . with any minority legislators. That suggests differential treatment. They didn't share the OAG analysis with the minority legislators. That suggests differential treatment." Closing Argument of United States, Tr. 70:14-18, July 29, 2014. But Chairman Burt Solomons testified that he did not share it with *any* legislators.

- Q. And just so I understand, do you recall sharing those copies of the racially polarized voting analysis with any member of the Texas legislature?
- A. I don't recall doing it.
- Q. So I just want to make sure. It wasn't just limited to minority members then?
- A. No. . . . It would have been anybody.

Test. of Burt Solomons, Tr. 1325:1-9, Aug. 14, 2014. The failure to "share" Baker Botts and OAG legal analysis does not indicate differential treatment without proof (or at least an allegation) that the same resources were generally available to Anglo legislators but not to minority legislators. Plaintiffs provided no such evidence. If the Republican leadership did hesitate to share legal advice with Democratic members, that would have been a reasonable response to repeated threats of litigation during the legislative process²⁰ and, after May 9, 2011, actual litigation.

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²⁰ See Ex. D-190, April 20, 2011 House Journal 2020 (Dutton) ("Members, one of the things—if you've been through redistricting—you have to recognize that there are going to be court challenges to whatever we do here."); Ex. D-190, April 20, 2011 House Journal 2022 (Dutton) ("I can guarantee you that the first challenge to any map that comes under this house in court is going to be on the basis of the process."); Ex. D-190, April 27, 2011 House Journal Supp. S765 (Burnam) ("And as soon as the governor signs a plan like this into law, there will be a lawsuit filed by the NAACP in Fort Worth over it."); Ex. D-190, April 27, 2011 House Journal Supp. S712 (Martinez Fischer) ("And when there seems to be a dispute over the testimony of certain witnesses that I believe have substantial implications, maybe not necessarily for the purpose of discussion at the speaker's rostrum but perhaps in various courts of law, perhaps the Department of Justice "); Ex. D-190, April 27, 2011 House Journal Supp. S720 (Martinez Fischer) ("I think you and I both recognize that this may just be one of the beginning chapters in a long, you know, redistricting litigation book that's being written."); Ex. D-190, April 27, 2011 House Journal Supp. S760 (Burnam) ("My attorneys have assured me today that we will be in court as soon as it's enacted."); Ex. D-190, April 27, 2011 House Journal Supp. S802 (Martinez Fischer) ("I say, especially to those of you who do not like to have these matters end up in court, don't like having disputes in court, litigations, this is exactly where we are going to go."); Ex. D-190, April 27, 2011 House Journal Supp. S816 (Farrar) ("How do you think that will bode in the court challenge?" (referring to the vote by 36 House members not to extend Representative Vo's time to speak, which was extended, see id. at S815)); Ex. D-281, May 17, 2011 Senate Journal Addendum A-21 (Ellis) ("And I submit to you as this goes through the process, when it gets to the Justice Department, I hope they look very closely at that.

Plaintiffs contend that the 2011 redistricting process suggests intentional discrimination because it was secretive. See Closing Argument of United States, Tr. 2062:14-24, Aug. 26, 2014. Even if this were factually accurate, it is no evidence of a departure from normal procedure because Plaintiffs have not established that the 2011 redistricting process was any more secretive than previous redistricting legislation, or any other legislation for that matter. There is no evidence, for example, that bills are typically drafted on the floor or by the entire legislature. The House redistricting process was not secretive by any measure; it was developed by dozens of members. Regardless, Plaintiffs' complaint about a so-called secret process assumes a legal obligation that does not exist. The Constitution does not "require States engaged in redistricting to compile 'a comprehensive administrative record." Bush v. Vera, 517 U.S. at 966 (quoting id. at 1026 (Stevens, J., dissenting) ("Unless the Court intends to interfere in state political processes even more than it has already expressed an intent to do, I presume that it does not intend to require States to create a comprehensive administrative record in support of their redistricting process.")).

DOJ alleges a pattern, in the development of both the House and congressional plans, "of excluding African-American and Hispanic representatives from the redistricting process while soliciting and implementing the preferences of Anglo representatives," Complaint in Intervention ¶ 60 (Aug. 22, 2013), ECF No.

And I'm going to do as much as I can to encourage them. . . . And I think if the United States Justice Department does its job, they will object to it. And I hope it ends up in court.").

871-1, and "a pattern of limiting the opportunity of African-American and Hispanic citizens to analyze and comment on the redistricting plans," *id.* ¶ 61. They allege, for instance, that "the minority members ha[d] less than 48 hours" to look at the plan, Closing Argument of United States, Tr. 2064-65, Aug. 26, 2014. But there is no evidence that the Anglo members had any more time to look at the plan, nor is there evidence that Republican or Anglo members as a group had more opportunity for input on the congressional plan or advance notice of its contents.

The only arguable examples of departures from the normal procedural sequence (if they even qualify as departures) do not indicate intentional racial discrimination. DOJ alleges, for example, that "[t]he chair of the Texas House Redistricting Committee . . . required waiver of Texas's five-day posting rule." Complaint in Intervention ¶ 54 (Aug. 22, 2013), ECF No. 871-1. But the motion to suspend the five-day posting rule was actually made by Vice-Chairman Villarreal, a Democrat, and approved by the House. *See* Test. of Marc Veasey, Tr. 29:7-25, July 14, 2014.²¹ There is no evidence that Representative Villarreal acted with a racially discriminatory purpose when he moved to suspend.

The House's calendar rule for HB 150 arguably involved a departure from standard procedure, but not one that suggests intentional racial discrimination. The initial calendar rule, drafted by Hanna, set the deadline for amendments for 5:00 p.m.

 $^{^{21} \}textit{See also} \ \text{http://www.journals.house.state.tx.us/hjrnl/82r/pdf/82RDAY55FINAL.PDF\#page=71.}$

on April 21, 2011. Test. of David Hanna, Tr. 1204:1-9, July 17, 2014; Test. of Bonnie Bruce, Tr. 1947:8-13, July 19, 2014. When the calendar rule was debated on the House floor, Representative Harold Dutton, an African-American Democrat from Houston, introduced a substitute calendar rule that extended the deadline for pre-filing amendments to Monday, April 25, 2011. Ex. D-190_00013-00014. The House unanimously adopted an amendment deadline of Monday for pre-filing amendments. The House also unanimously changed the calendar for floor debate from Tuesday, April 26 to Wednesday, April 27. Test. of David Hanna, Tr. 1205:2-5, July 17, 2014; Test. of Bonnie Bruce, Tr. 1947:14-18, July 19, 2014; Ex. D-190_00020-00021. Hanna testified that changes to the calendar rule don't happen very often, and he could not remember the House changing the calendar on the House floor. Test. of David Hanna, Tr. 1205:6-11, July 17, 2014. Hanna considered both changes to be significant, but neither supports an inference of intentional racial discrimination or—given their approval by a unanimous vote—exclusion of Democratic or minority House members.

To the extent that members of the Legislature were not able to control the redistricting process or the enacted plans, there is no evidence that they were excluded from the process because of race rather than party. If Democratic members did not have the influence they desired, that should come as no surprise—they were outnumbered two-to-one in the House. Had redistricting taken place in 2008, the process might have been different; the House was almost evenly split between

Republicans and Democrats. Perhaps Democrats would have had more leverage if they could offer a critical vote in exchange for an accepted proposal. But this is not how it worked in 2010 because the voters elected a Republican supermajority, and Democrats refused to support the final plans for fear of weakening their litigation position. *See* Test. of Burt Solomons, Tr. 1096:10-22, July 17, 2014; Test. of Gerardo Interiano, Tr. 1481:6-19, Sept. 12, 2011; Test. of Burt Solomons, Tr. 1613:21-1614:14, Sept. 13, 2011. Democratic legislators had every incentive to make the 2011 redistricting process seem abnormal, but Plaintiffs have failed to provide any evidence of what a normal process would look like. Any alleged departure from the normal procedural sequence cannot support their claims of intentional vote-dilution.

II. Intentional Vote Dilution Claims: House Bill 150 (Plan H283)

A. Bell County

MALC complains that HB 150 "unnecessarily fragments the minority community of Killeen to minimize its political impact on Texas House elections."²² The NAACP Plaintiffs do not allege intentional discrimination, but they allege that an African-American opportunity district can be drawn in Bell County.²³ Plaintiffs have

²² Plaintiff MALC's Third Amended Complaint ¶ 54 (Sept. 17, 2013), ECF No. 897.

²³ The NAACP Plaintiffs allege that the Texas Legislative Black Caucus proposed "a plan that provided 4 additional African-American opportunity districts in the Texas House of Representatives," including District 54 in Bell County. NAACP Third Amended Complaint ¶ 22 (Sept. 18, 2013), ECF No. 900. This district is actually a coalition district. See Closing Argument of NAACP Plaintiffs, Tr. 2082:1-3, Sept. 15, 2011. The Perez Plaintiffs list HD 54 as a challenged district, but they do not appear to assert claims against HB 150. See Sixth Amended Complaint of Perez Plaintiffs ¶ 23 (Feb. 25, 2014), ECF No. 960 ("This amended pleading concerns the plans for

not proven that the Legislature created or enacted House districts in Bell County for the purpose of diluting minority voting strength.

The districts in Bell County were created by Representative Jimmie Don Aycock (HD 54) and Representative Ralph Sheffield (HD 55). Representative Aycock was a member of the Redistricting Committee, and he took the lead in drawing the districts. Test. of Jimmie Don Aycock, Tr. 1729:9-11, 19-21, July 18, 2014. Representative Aycock's primary motivations in the redistricting process were to maintain communities of interests, create a legal map, and maintain as many Republican seats as possible. *Id.* at 1740:25-1741:7.

Under the benchmark plan, HD 54 included part of Bell County and all of Lampasas and Burnet. Because of population growth in Bell and Burnet County, Bell County could no longer be joined with Burnet County in a single district. As a result, Burnet County was removed from HD 54, and only Lampasas County and part of Bell County remained. *Id.* at 1727:7-20. Because Burnet County had been a strong Republican area in HD 54, Representative Aycock wanted to gain Republican strength in other areas, particularly Salado. Although Representative Sheffield did not want to lose Salado, he eventually agreed to its inclusion in HD 54. *Id.* at 1730:21-1731:4. The final configuration of HD 54 and HD 55 in Plan H283 reflects the give and take between Representative Aycock and Representative Sheffield. *Id.* at 1775:3-6.

future elections to the Texas House of Representatives and the election of the Texas Congressional delegation.").

Representative Aycock testified that Lampasas County and Killeen share common interests because Killeen is the closest major population center, and many Lampasas County residents have a connection to the military. By contrast, Lampasas County does not share the same community of interest with Temple and Belton, which are manufacturing and transportation centers in eastern Bell County. *Id.* at 1734:5-24. Representative Aycock therefore wanted to keep Lampasas County in a district with Killeen rather than Temple and Belton. *Id.* at 1732:1-1734:9.

Representative Aycock testified that he relied on his own knowledge to determine which areas would be included in HD 54 and HD 55. *Id.* at 1755:12-14. When he needed assistance in drawing the districts, he consulted with Downton, who drew boundary lines at Aycock's direction. *Id.* at 1755:1-9. As a non-lawyer, Representative Aycock relied on staff and the resources of the House Redistricting Committee to review the proposed districts and ensure legal compliance. *Id.* at 1741:8-17. At no time did Representative Aycock draw districts on the basis of race or with the intent to discriminate against minorities. *Id.* at 1775:7-12.

As drawn in Plan H283, the Bell County House districts reflect the goals identified by Representative Aycock, and they do not diminish minority voting strength. District 54 includes most of Killeen,²⁴ all of Harker Heights and Salado,

²⁴ The City of Killeen had been divided between districts in previous redistricting plans. Test. of Jimmie Don Aycock, Tr. 1773:17-25, July 18, 2014. The Legislative Black Caucus's alternative plan, H202, also split the City of Killeen between two districts. Test. of Phyllis Jones, Tr. 1715:11-1716:10, July 18, 2014.

southwestern Bell County, and all of Lampasas County. *See, e.g.*, Ex. D-341. As a result of the changes to HD 54 from the benchmark to Plan H283, Hispanic CVAP increased from 14.8% to 15.8%; Black CVAP increased from 20.5% to 22.2%; Asian CVAP increased from 2.1% to 2.6%; and Anglo CVAP decreased from 59.4% to 56.1%. *Compare* Ex. D-100_00029, *with* Ex. D-109_00039; *see also* Test. of Jimmie Don Aycock, Tr. 1728:9-16, 1731:14-25, July 18, 2014.

B. Bexar County

Plaintiffs claim that the Legislature intentionally diluted Hispanic voting strength in HD 117. DOJ alleges, for example, that Texas used a "race-based strategy" to draw HD 117, "increas[ing] its Hispanic CVAP while simultaneously removing precincts where Hispanic voters turned out to vote at a high level and replacing them with precincts whose Hispanic residents turned out at much lower rates." Complaint in Intervention ¶ 41 (Aug. 22, 2013), ECF No. 871-1. Plaintiffs have not proven that the Legislature used a "race-based method" in drawing HD 117 or that the district was created for the purpose of discriminating against Hispanic voters. Even if they could prove discriminatory purpose, Plaintiffs cannot prove that HD 117, as drawn in Plan H283, had or will have a discriminatory effect on Hispanic voters.

The evidence does not support Plaintiffs' allegations of discriminatory purpose in HD 117. Bexar County was a drop-in county in which the delegation worked collectively to reach agreement on a countywide map. Test. of Burt Solomons, Tr. 1074:2-17, July 17, 2014; Test. of Gerardo Interiano, Tr. 1517:4-7, July 18, 2014; Test.

of Trey Martinez Fischer, Tr. 112:2-12, Sept. 6, 2011. In 2011, the 10-member Bexar County delegation included 7 Democrats and 3 Republicans. Test. of Joe Farias, Tr. 338:1-5, July 15, 2014. Seven members of the Bexar County delegation had been elected from Hispanic CVAP majority districts. Ex. D-100, Plan H100, Red-109 Report (2005-2009 ACS Survey). The Bexar County redistricting process was overseen by Representative Mike Villarreal, a Hispanic Democrat who served as Vice-Chairman of the House Redistricting Committee, and Representative Ruth Jones McClendon, an African-American Democrat who was the dean of the Bexar County delegation. Test. of Gerardo Interiano, Tr. 1517:4-11, July 18, 2014; Test. of Joe Farias, Tr. 315:14-316:17, July 15, 2014; Test. of John Garza, Tr. 363:24-364:3, July 15, 2014.

At the beginning of the process, Representative Villarreal asked members to provide him with an ideal configuration of their districts. Test. of Gerardo Interiano, Tr. 1519:2-8, July 18, 2014. Representative Villarreal instructed members that their maps needed to comply with the Voting Rights Act. Test. of John Garza, Tr. 364:23-365:1, July 15, 2014. Representative Villarreal provided instructions to Bexar County members about how to draw their ideal districts, including three parameters: (i) maintain 10 districts in Bexar County; (ii) keep all districts within +/- 5% of the ideal district population; and (iii) do not eliminate "any minority-majority voting age districts." Ex. D-265; Test. of John Garza, Tr. 375:24-377:2, July 15, 2014. Representative Villarreal incorporated the members' preferences into a combined

countywide map. Test. of Gerardo Interiano, Tr. 1519:12-22, July 18, 2014. To the extent that more than one member requested a particular area, Representative Villarreal urged them to work together to resolve the conflict. Test. of John Garza, Tr. 419:7-18, July 15, 2014.

The Bexar County delegation met on numerous occasions to try to work out an agreed county-wide map. Test. of Gerardo Interiano, Tr. 1517:11-13, July 18, 2014; Test. of Trey Martinez Fischer, Tr. 114:16-24, Sept. 6, 2011. MALC's counsel, Jose Garza, was invited to attend the delegation's meetings, and the delegation was provided access to Interiano and Hanna. Test. of Trey Martinez Fischer, Tr. 72:25-73:4, Sept. 6, 2011; Ex. D-265. Interiano attended Bexar County delegation meetings and assisted members in drawing maps on RedAppl. Test. of Gerardo Interiano, Tr. 1594:1-12, July 18, 2014.

Nine of the ten members of the Bexar County delegation, including Representative Villarreal and Representative McClendon, supported the final countywide map that was submitted to the redistricting committee. Test. of Gerardo Interiano, Tr. 1594:25-1595:1, July 18, 2014; Test. of Bonnie Bruce, Tr. 1965:22-24, July 19, 2014. Only one member, Representative Joe Farias, opposed the delegation's map. Test. of Gerardo Interiano, Tr. 1595:4-6, July 18, 2014; Test. of Joe Farias, Tr. 325:18-326:2, July 15, 2014. Even though he opposed the delegation's proposal, Representative Farias admitted that all of the Bexar County districts, including HD 117, satisfied the three goals that Representative Villarreal had set out for the

delegation. Test. of Joe Farias, Tr. 340:9-12, 341:1-4, July 15, 2014; see also Test. of John Garza, Tr. 418:5-8, July 15, 2014.

During the 2011 session, HD 117 was represented by Representative John Garza, a first-term Republican who had narrowly secured election in November 2010 by 1,070 votes. Test. of John Garza, Tr. 362:9-11, July 15, 2014; Ex. D-38 at 5 (Office of Secretary of State, 2010 General Election Results, Bexar County). Based on the 2010 Census figures, HD 117 was overpopulated by 52,723 people. Test. of John Garza, Tr. 416:3-13, July 15, 2014; Ex. D-100, Plan H100, Red-100 Report at 10. At the same time, districts in central Bexar County were largely underpopulated and needed to gain population by extending beyond the City of San Antonio. Test. of John Garza, Tr. 372:3-7, July 15, 2014; Ex. D-100, Plan H100, Red-100 Report at 10 (e.g., HD 116 was underpopulated by 24,693 persons; HD 123 was underpopulated by 35,195 persons). These population variances meant that each Bexar County House district would move to some degree in the 2011 map. Test. of Joe Farias, Tr. 343:6-22, July 15, 2014.

The goals for HD 117 in the 2011 redistricting process were to provide Representative Garza with an opportunity to be reelected; create a rural, conservative district outside the City of San Antonio; and comply with the Voting Rights Act by maintaining the district's SSVR over 50%. Test. of Gerardo Interiano, Tr. 1518:9-15, 1523:2-18, July 18, 2014; Test. of John Garza, Tr. 399:4-13, July 15, 2014. The mapdrawers determined that in order to achieve these goals, HD 117 needed to

include rural areas of southern Bexar County that were previously represented by Representative Farias (HD 118) under the benchmark plan. Test. of Gerardo Interiano, Tr. 1559:1-15, 1598:2-10, July 18, 2014. HD 117's Hispanic CVAP increased from 58.8% in the benchmark plan to 63.8% in the 2011 enacted map, while HD 117's non-suspense SSVR decreased slightly from 50.8% in the benchmark to 50.1% in the 2011 enacted map. Test. of John Garza, Tr. 415:13-23, 423:5-11, July 15, 2014; Ex. D-100, Plan H100, Red-109 Report at 4; Ex. D-109, Plan H283, Red-109 Report at 4.

Representative Farias opposed the delegation's map because he wanted to retain certain areas of southern Bexar County, particularly the city of Somerset and the neighborhood of Whispering Winds. Test. of Joe Farias, Tr. 326:3-8, July 15, 2014. Representative Farias raised his concerns with Representative Garza, Speaker Straus, Representative Villarreal, Representative McClendon, and other members of the Bexar County delegation, but Representative Farias' concerns were not resolved. Test. of Joe Farias, Tr. 326:12-327:4, July 15, 2014. Representative Farias introduced an amendment on the House floor that would have returned Whispering Winds to HD 118, but the amendment was tabled by a majority vote of the House. Test. of Joe Farias, Tr. 327:5-13, July 15, 2014; Ex. D-190 (April 27, 2011 House Journal Supplement) at S730; Ex. D-190 (April 27, 2011 House Journal) at 2294-2295. Representative Farias testified that be believed partisanship, not race, motivated the

voting during the redistricting process, including the defeat of his floor amendment. Test. of Joe Farias, Tr. 353:24-354:6, July 15, 2014.

Plaintiffs contend that a single statement by Representative Garza to the effect that he wanted "more Mexicans" in his district shows that HD 117 was drawn for the purpose of diluting Hispanic voting strength. Assuming that this statement was made and accurately recounted by Representative Farias, it does not support Plaintiffs' claim.

First, the meaning of Representative Garza's alleged statement is unclear. Representative Farias testified that "towards the end of the process," he and Representative Garza were "called to the back" by Representative McClendon to discuss an amendment to their districts. Test. of Joe Farias, Tr. 335:6-11, July 15, 2014. According to Representative Farias, when he arrived at the back, Representative Garza said, "Joe, all I want is more Mexicans in my district." *Id.* at 335:14-15. Although Representative Farias was offended by his use of the term "Mexicans," he did not know what Representative Garza meant by the statement. *See id.* at 335:15-16 ("What he meant by that I don't know.").

Second, whatever Representative Garza meant, there is no evidence that any members other than Representatives Farias and McClendon were aware of his statement, that any member shared his view, or that his motivation affected the configuration of the Bexar County districts. The Supreme Court has expressly rejected the notion that courts may strike down a facially neutral statute

on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

O'Brien, 391 U.S. at 384. "The purpose of a single legislator is normally too slim a reed upon which to rest a determination regarding the legislature as a whole." Florida v. United States, 885 F. Supp. 2d 299, 354 (D.D.C. 2012) (per curiam); id. at 354-55 (holding that single legislator's statement, during floor debate, "that it should be harder to vote—as it is 'in Africa" was "not enough to suggest that his purpose, whatever it was, represented the purpose of the Florida legislature as a whole"); see also Castaneda-Gonzalez v. Immigration & Naturalization Serv., 564 F.2d 417, 424 (D.C. Cir. 1977) ("Statements by individual legislators should generally be given little weight when searching for the intent of the entire legislative body."). An isolated statement by Representative Garza does not establish the purpose of the Bexar County delegation when it submitted the countywide plan, the purpose of the Legislature that enacted HB 150, or the purpose of legislative staff who worked on HD 117. The evidence suggests just the opposite. Representative Farias testified that nothing in the final plan was inconsistent with the goals that Representative Villarreal set for the delegation. Test. of Joe Farias, Tr. 341:1-4, July 15, 2014.

Third, including Somerset and Whispering Winds in HD 117 was consistent with race-neutral redistricting principles, including the partisan purpose of adding Republican areas to Representative Garza's district, following natural boundaries, and

equalizing population. The testimony established that both areas were likely to support Republican candidates. Representative Farias testified that his three Republican opponents were from Southern Bexar County and that he had lost to his opponents in Somerset and Whispering Winds precincts. Test. of Joe Farias, Tr. 336:15-337:3, July 15, 2014. Both areas also lie south of the Medina River which, together with the San Antonio River, forms a natural boundary between HD 117 and HD 118 in southeastern Bexar County under Plan H283. See Ex. D-284; Ex. DOJ-290; see also Test. of Joe Farias, Tr. 319-20, July 15, 2014 (identifying precincts in which Somerset and Whispering Winds are located). Representative Farias also acknowledged that including Somerset and Whispering Winds in HD 117 was consistent with the need to shed excess population from the district since both areas were sparsely populated. Test. of Joe Farias, Tr. at 353:14-23, July 15, 2014.

Finally, Representative Garza's statement provides no support for Plaintiffs' theory that HD 117 was drawn deliberately to capture low-turnout Hispanic voters. There is no evidence that voter turnout analysis played any part in the creation of HD 117. The State's mapdrawers did not utilize voter turnout data or otherwise seek out precincts with low Hispanic voter turnout. Test. of Gerardo Interiano, Tr. 1600:16-1601:8, 1601:19-24, July 18, 2014. Representative Farias admitted that neither Representative Garza nor Representative Villarreal ever mentioned voter turnout with respect to HD 117 in any public comments or private conversations. Test. of Joe Farias, Tr. 344:3-11, 345:11-17, July 15, 2014.

Representative Garza and his staff worked with Interiano during the redistricting process to generate proposed maps for HD 117. Test. of Gerardo Interiano, Tr. 1517:14-20, 1521:2-1522:23, 1523:14-18, 1596:2-11, July 18, 2014. In these interactions, Representative Garza never indicated that he wanted his district to have less Hispanic population or lower-performing Hispanic precincts, Test. of Gerardo Interiano, Tr. 1518:20-22, July 18, 2014. Interiano never utilized racial shading while working with Representative Garza's staff, nor did he receive any information from Representative Garza's staff about the racial composition of areas being added to or removed from HD 117. Test. of Gerardo Interiano, Tr. 1599:11-16, July 18, 2014; Test. of Gerardo Interiano, Tr. 54:19-55:8, Aug. 11, 2014. Representative Garza asked to have certain Republican-leaning areas included in his district, but his request was denied by Representative Villarreal because it would have reduced SSVR in HD 117. Test. of Gerardo Interiano, Tr. 1521:5-1522:23, July 18, 2014. Given his position as a junior member and the delegation's guidelines, Representative Garza did not have much influence on how HD 117 was constructed in the eventual map, and the configuration was not entirely what Representative Garza had sought for his district, cf. Florida v. U.S., 885 F. Supp. 2d at 354 (noting that legislator who made potentially discriminatory statements "was neither a sponsor nor a primary proponent of HB 1355, and did not play an important role in passage of the bill"); but Representative Garza ultimately agreed to the map that had been approved by all but one member of the delegation. Test. of Gerardo Interiano, Tr. 1521:51522:23, 1596:19-1597:4, July 18, 2014; Test. of John Garza, Tr. 420:1-15, 422:7-13, July 15, 2014.

Even if Plaintiffs could prove that the creation of HD 117 was motivated by a racially discriminatory purpose, their Fourteenth Amendment vote-dilution claim would fail because they cannot prove that the district had a discriminatory impact on any voter. The Court modified HD 117 in Plan H309, which was used to conduct elections in 2012. *See* Opinion at 6 (March 19, 2012), ECF No. 690. The 2013 Texas Legislature adopted the Court's configuration of HD 117. *See* Act of June 23, 2013, 83d Leg., 1st C.S., ch. 2, 2013 Tex. Gen. Laws 4889. Because HD 117, as configured in Plan H283, has not had and will not have any effect on any voter, Plaintiffs cannot establish intentional vote dilution under the Fourteenth Amendment.

C. Dallas County

Dallas County lost two seats after the 2010 Census, which required the pairing of four Republican members. The Dallas County House districts were drawn to absorb the loss of the two districts and to maintain all existing minority opportunity districts. Test. of Theodore Arrington, Tr. 183:22-184:4, July 14, 2014; Test. of Ryan Downton, Tr. 2014:25-2015:15, July 19, 2014. The Dallas County delegation could not agree on a countywide map. Test. of Ryan Downton, Tr. 2014:25-2015:15, July 19, 2014; *see* Joint Ex. J-61, Gerardo Interiano Dep. 127:17-129:10, Aug. 2, 2011; Test. of Ryan Downton, Tr. 924:1-3, Sept. 9, 2011. Dallas County was a difficult area to draw because four Republican members had to be paired. Given that all of the

Democratic-leaning districts within Dallas were protected by the Voting Rights Act, none of those members could be paired. Test. of Ryan Downton, Tr. 2015:7-12, July 19, 2014.

Downton drew the district lines in Dallas County. *See* Joint Ex. J-62, Ryan Downton Dep. 72:24-73:5, Aug. 31, 2011; Test. of Ryan Downton, Tr. 924:1-929:8, Sept. 9, 2011; Test. of Ryan Downton, Tr. 1989:5-10, July 19, 2014. Chairman Dan Branch asked Downton to help create a plan for Dallas County that would be agreeable to as many members as possible. Test. of Ryan Downton, Tr. 1989:5-10, 2015:16-2016:1, July 19, 2014. Chairman Branch provided Downton input in drawing his district and asked Downton to draw the other districts in Dallas County and meet with Republican and Democratic members to receive input. Test. of Ryan Downton, Tr. 2016:2-8, July 19, 2014.

Downton worked on drawing the districts in Dallas County before the release of the first public map in early to mid-April. Test. of Ryan Downton, Tr. 2016:14-16, July 19, 2014. Downton drew the boundaries of HD 103 and HD 104 first because of concerns about maintaining their SSVR levels. Test. of Ryan Downton, Tr. 2069:11-21, July 19, 2014. He met with Democratic Representatives Rafael Anchia (HD 103) and Eric Johnson (HD 100), and Republican Representatives Linda Harper-Brown and Cindy Burkett to create the configurations of their districts. Test. of Ryan Downton, Tr. 2016:23-2017:7, July 19, 2014. Downton worked with Representative Anchia to create a district he was satisfied with that maintained his SSVR at its

benchmark level. Test. of Ryan Downton, Tr. 2017:18-22, July 19, 2014. Representatives Anchia and Roberto Alonzo (HD 104) agreed to trade some precincts in the downtown Dallas area, which was the eastern and southeastern portion of HD 103. Test. of Ryan Downton, Tr. 2017:23-2018:1, July 19, 2014. Ultimately, the Dallas County plan paired four Republicans—Rodney Anderson and Linda Harper-Brown in HD 105, and Cindy Burkett and Joe Driver in HD 113. Ex. D-109.

David Hanna provided a retrogression analysis to Downton of the house districts in Dallas County. Hanna's first memo regarding the Dallas County districts in Plan H110 indicated that the decline in SSVR in HD 103 should be remedied and that consideration should be given to keeping HD 104 over the 50% threshold if possible. Test. of Ryan Downton, Tr. 2143:10-2144:2, July 19, 2014; Ex. D-122. Maintaining HD 104's SSVR above 50% presented a challenge due to the lack of concentrated Hispanic population necessary to maintain the SSVR level in HD 103. Test. of Ryan Downton, Tr. 2017:11-2018:1, July 19, 2014. The enacted plan maintained SSVR in both HD 103 and 104 in response to the concerns raised by Hanna. *Id.* at 2144:3-9. In order to keep HD 104 above 50% SSVR and maintain the benchmark SSVR level in HD 103, Downton testified that he considered racial data at the block level in order to comply with the Voting Rights Act and avoid retrogression. Id. at 2080:4-13, 2080:22-2081:4, 2144:23-2145:3. Although Representative Anchia offered an alternative plan during the legislative session, his proposed plan was not acceptable

because HD 104 did not contain enough population to maintain an SSVR majority or allow for a pairing of Representatives Harper-Brown and Anderson. *Id.* at 2076:9-18.

To pair Representatives Anderson and Harper-Brown, Downton was directed by one of the chairmen to extend HD 105 south to pick up Representative Anderson's house. *Id.* at 2018:2-9; Ex. DOJ-299A. Representative Harper-Brown's house is located in precinct 4626 in the northern portion of HD 105, and Representative Anderson's house is located in precinct 4528 in the southern portion of HD 105. Test. of Ryan Downton, Tr. 2018:15-22, July 19, 2014; Ex. D-319. In pairing Representatives Harper-Brown and Anderson in HD 105, Downton split precincts in order to capture Representative Anderson's residence and avoid overpopulating HD 105 and underpopulating HD 104. Precinct 4504 was split because of the large population in the precinct that did not need to be moved into HD 105 as Downton attempted to draw a line down HD 105 to Representative Anderson's house, and create a pathway up to precincts 4510, 4514, and 4516. Test. of Ryan Downton, Tr. 2021:3-22, July 19, 2014. If precinct 4504 had not been split, this would have left HD 104 underpopulated by 35,000. *Id.* at 2022:9-13. In order to create a pathway to Representative Anderson's house, Downton split precinct 4508. Id. at 2022:14-19. Additionally, Downton split precincts 4515 and 4517 to comply with the Voting Rights Act to maintain SSVR levels above 50% in HD 104. Id. at 2023:15-2024:9; Ex. D-109_00045.

Allegations that the Legislature packed or cracked Hispanic voters in Dallas County are unfounded. To support a claim of packing or cracking, a plaintiff must demonstrate that it would be possible to create an additional district if the alleged packing or cracking had not occurred. *See, e.g., DeGrandy*, 512 U.S. at 1008 ("When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice."). Downton testified that it was not possible to create additional SSVR-majority districts in Dallas County, Test. of Ryan Downton, Tr. 2053:25-2054:8, July 19, 2014, and that creating a third district with a significant (but sub-majority) SSVR population would require dismantling HD 104, the only SSVR-majority district in the county, *id.* at 2054:5-2055:2. Plaintiffs have provided no contrary evidence.

None of the Plaintiffs' lay witnesses had any personal knowledge of the legislative process or the purpose of any district boundary in Dallas County. *See* Test. of Juanita Wallace, Tr. 579:19-580:3, July 15, 2014; Test. of John Lopez, Tr. 610:22-611:8, 614:19-23, 615:6-11, July 15, 2014; Test. of Michael McPhail, Tr. 1128:13-1129:6, July 17, 2014; Test. of Raul Magdaleno, Tr. 1140:12-14, July 17, 2014. Representative Anchia did not raise any concerns about the 2011 House plan with Downton, and he testified that he has no reason to believe that Downton intentionally discriminated against Latinos or African-Americans in the 2011

redistricting process. See Rafael Anchia Dep. 170:22-24, 176:5-8, April 9, 2014 (ECF No. 1092-2).

D. El Paso County

Plaintiffs' claims against the El Paso County House districts focus on split precincts and the shape of the border between Districts 77 and 78. The Task Force contends that the Legislature deliberately "pack[ed] Latinos into surrounding districts to undermine their political power in HD 78." Plaintiff Texas Latino Redistricting Task Force, et al. Proposed Findings of Fact and Conclusions of Law ¶ 459 (Feb. 10, 2012), ECF No. 634. LULAC pointed to the shape of HD 78—"like a deer, antlers and everything"—as an example of "what has been done again by the people in power to dilute the Latino community." Opening Statement of LULAC, Tr. 29:22, 30:1-2, Sept. 6, 2011. Whatever HD 78 might have resembled, it was not part of a plan to dilute the Hispanic vote in El Paso County. The evidence shows that the shape of HD 78 originated with Democratic Representative Marisa Marquez, that it was part of an agreed-upon countywide plan submitted by the El Paso delegation, and that minor changes were made by the House Redistricting Committee to increase the district's SSVR percentage to avoid retrogression. There is no evidence that HD 78 was drawn for the purpose of diluting Hispanic voting strength.

At the start of the 2011 redistricting, El Paso County was apportioned 5 House districts. Test. of Joe Pickett, Tr. 729:5-7, July 16, 2014. Because it maintained 5 districts, El Paso County was a drop-in county in the 2011 House plan. Test. of Jose

Rodriguez, Tr. 731:17-20, 783:10-14, July 16, 2014; Test. of Joe Pickett, Tr. 783:10-14, July 16, 2014.

Under the benchmark plan, District 75 was overpopulated by 51,771; District 76 was underpopulated by 34,992; District 77 was underpopulated by 35,070; District 78 was overpopulated by 1,148; and District 79 was underpopulated by 20,465. Ex. D-100_00017-18; Ex. D-47. Data available at the time of redistricting in 2011 showed that El Paso County's estimated Hispanic citizen voting age population was 74.74%. Ex. D-218_00001; Test. of Jose Rodriguez, Tr. 715:25-716:14, July 16, 2014. The five-member El Paso delegation consisted of one Republican and four Democrats, three of whom are Hispanic. Test. of Joe Pickett, Tr. 729:21-730:19, 780:15-21, July 16, 2014. Representative Joe Pickett felt that equalizing population was more challenging than dealing with the physical features of El Paso County. *Id.* at 737:8-11.

Representative Joe Pickett was on the Redistricting Committee in 2011 and served as the unofficial leader of the El Paso delegation, responsible for organizing the effort to draw the El Paso County districts. *Id.* at 725:18-22; 731:25-732:4. Pickett has represented a majority-Hispanic district for 20 years and testified he is the Hispanic candidate of choice in his district. *Id.* at 781:19-782:6. During the 2011 session, Representative Joe Pickett and the El Paso delegation met to discuss redistricting in El Paso. *Id.* at 783:10-14. Representative Pickett asked all of the members of the El Paso delegation to participate and provide their input and proposed maps. *Id.* at 732:19-24.

All five members of the county delegation had input into the map that was proposed to the House Redistricting Committee. *Id.* at 732:19-733:1. Representative Quintanilla, through his staff, also had significant involvement in drawing the El Paso districts. *Id.* at 756:13-21, 783:21-784:1. Representatives Naomi Gonzales and Dee Margo, the only Republican in the delegation, had comparatively little input in drawing the El Paso districts. *Id.* at 756:22-757:2, 784:2-4, 784:8-10; Test. of Dee Margo, Tr. 827:13-19, July 16, 2014. Representative Marquez had the most involvement in the process of drawing the El Paso districts. Test. of Dee Margo, Tr. 820:13-22, July 16, 2014.

Representative Marquez was concerned whether any of her political opponents would be in her district, HD 77, or whether they would be in Representative Dee Margo's district, HD 78. These political opponents included Representative Joe Moody, former El Paso mayor John Cook, and Representative Chente Quintanilla's chief of staff, Robert Grijalva. *Id.* at 820:23-821:15; Test. of Joe Pickett, Tr. 788:12-789:8, July 16, 2014. Representative Marquez mentioned to Representative Joe Pickett several times that she wanted to exclude certain individuals that might run against her in the future. Test. of Joe Pickett, Tr. 758:25-759:3, July 16, 2014. Both John Cook and Joe Moody would have lived in HD 78 under Plan H283. Test. of Joe Moody, Tr. 879:3-7, 8-20, July 16, 2014. In addition to excluding her political rivals from her district, Representative Marquez wanted to make sure that she had a strong

Democratic district that would allow her to be reelected. Test. of Dee Margo, Tr. 822:6-11, July 16, 2014.

Representative Pickett sent three proposed plans for the configuration of the El Paso delegation to Chairman Solomons's RedAppl account. Test. of Bonnie Bruce, Tr. 1950:4-7, July 19, 2014; Test. of Joe Pickett, Tr. 752:19-21, July 16, 2014; Ex. D-271; Ex. D-304. The first proposal was sent on March 15, 2011. Test. of Bonnie Bruce, Tr. 1949:16-1950:3, July 19, 2014; Ex. D-271; Ex. D-304. Representative Pickett later withdrew this proposal because certain members of the delegation did not approve it. Test. of Joe Pickett, Tr. 785:2-786:11, 790:8-14, July 16, 2014; Test. of Bonnie Bruce, Tr. 1950:10-1951:2, July 19, 2014.

Representative Marquez requested changes to the El Paso districts. Representative Joe Pickett initially informed her that it was too late to make changes because the El Paso delegation had agreed upon a map. Test. of Joe Pickett, Tr. 785:8-17, July 16, 2014. Representative Marquez persisted with a request to change some of the boundaries between her district and Representative Dee Margo's district. Representative Joe Pickett instructed Representative Marquez to work it out with Representative Dee Margo but not to change the other three El Paso County districts because everyone had agreed on their boundaries. *Id.* at 785:18-786:7.

Representative Marquez approached Representative Margo several times and asked for changes between their districts. Test. of Dee Margo, Tr. 809:12-15, 822:1-5, July 16, 2014. Representative Marquez and Representative Margo discussed making

changes to HD 77 and HD 78 in the West and in the Northeast. Marisa Marquez Dep. 59:25-60:10, Feb. 4, 2014 (ECF No. 1092-3).

The El Paso delegation met again in an effort to come to a consensus, and following this meeting Representative Pickett sent two different versions to Chairman Solomons's RedAppl account. Test. of Joe Pickett, Tr. 762:19-764:12, July 16, 2014. One was a proposed plan Representative Pickett received from Representative Marquez, which is identified in Representative Pickett's RedAppl account as "PICK H120." *Id.* at 760:12-21; Ex. D-272; Ex. D-297. These plans were downloaded to Chairman Solomons's account on March 21, 2011 and became "SOLO H109" and "SOLO H110." Ex. D-271; Ex. D-302; Ex. TLRTF-504.

The plan identified as "SOLO H109" (which is Plan PICK H118 in Representative Pickett's RedAppl plan list) was the first version sent from Representative Pickett for El Paso County, and "SOLO H110" (which is Plan PICK H120 in Representative Pickett's RedAppl plan list) was the second version of the county plan. Ex. D-271; Ex. TLRTF-500; Ex. TLRTF-503; Ex. TLRTF-504; Ex. TLRTF-505. Bonnie Bruce, the primary user of the Solomons RedAppl account, forwarded both plans to Downton, counsel for the House Redistricting Committee, on or about that same day. Test. of Ryan Downton, Tr. 1992:1-24, 2009:7-2010:11, July 19, 2014; Test. of Bonnie Bruce, Tr. 1972:6-22, July 19, 2014. Districts 77 and 78 are different in Plan SOLO H109 and Plan SOLO H110. Districts 75, 76, and 79 are

identical in Plan SOLO H109 and Plan SOLO H110. Ex. D-279_00127, 279_00137; Ex. TLRTF-504_006; Ex. TLRTF-505_005.

Although Bruce sent both plans to Downton, he only downloaded the second version of the El Paso plan on March 23, 2011 because that was the version he was told to use. Test. of Ryan Downton, Tr. 2009:7-2010:11, 2012:9-22, July 19, 2014. Representative Pickett had informed Bruce and Downton that the delegation agreed to use the second version of the El Paso plan, which included the "antler" configuration initially proposed by Representative Marquez. Test. of Bonnie Bruce, Tr. 1953:19-1954:11, July 19, 2014; Test. of Ryan Downton, Tr. 1989:23-1990:1, 2010:2-11, 2104:9-12, July 19, 2014. Plan SOLO H110 became "HRC1 H169" in the House Redistricting Committee account. Ex. D-270; Ex. D-244; Ex. TLRTF-506; Ex. TLRTF-505.

As Downton prepared the full statewide plan, he included the configuration for El Paso County districts that existed in "PICK H120." Ex. D-209; Test. of Ryan Downton, Tr. 1994:5-1996:16, July 19, 2014; Ex. D-271; Ex. D-302; Ex. D-347; Ex. D-209. The House Redistricting Committee presented this version of HD 78, based on a draft plan entitled "HRC1 H215", to Representative Margo on April 5, 2011. Ex. D-209; Test. of Ryan Downton, Tr. 1995:17-1996:24, July 19, 2014. Plan HRC1 H215 was a full state map that Downton was putting together. Test. of Ryan Downton, Tr. 1997:19-1998:2, July 19, 2014. This version of District 78 had a total SSVR of 45.8%. The configuration of the El Paso County districts in Plan HRC1 H215 is identical to

the configuration of the El Paso County districts in Plan PICK H120. Ex. D-279_00002; Ex. D-279_00089; Ex. D-209; Ex. D-349. Representative Dee Margo signed a copy of Plan HRC1 H215. Test. of Dee Margo, Tr. 823:11-824:2, July 16, 2014; Ex. D-209.

Representative Joe Pickett was aware that the districts had to comply with the Voting Rights Act, and he made sure that an analysis was performed to ensure that they did. Test. of Joe Pickett, Tr. 798:10-19, July 16, 2014. On April 6, 2011, Downton sent a draft statewide plan to Hanna and asked him to run a retrogression analysis. Test. of Ryan Downton, Tr. 1999:13-2000:17, July 19, 2014; Ex. D-325. On or around April 7, 2011, Hanna identified a possible retrogression risk in El Paso and recommended increasing the SSVR in District 78. Test. of Ryan Downton, Tr. 2000:18-2001:18, July 19, 2014; Test. of David Hanna, Tr. 1191:6-1192:3, July 17, 2014; Ex. D-122. Hanna used the total SSVR, rather than the non-suspense SSVR, when he analyzed districts in his memos. Test. of David Hanna, Tr. 1212:9-1213:3, July 17, 2014.

After receiving Hanna's comments, Downton informed Representative Joe Pickett that changes were needed to raise the SSVR level of HD 78. Test. of Ryan Downton, Tr. 2001:19-24; 2122:12-18, July 19, 2014. Based on Hanna's comments, Downton made changes to the boundary line between District 78 and District 77—which included splitting precincts—to increase the SSVR percentage in HD 78 as suggested by Hanna. *Id.* at 2011:18-2012:3; 2013:6-11. Hanna testified that he did not

advise against splitting precincts. Test. of David Hanna, Tr. 1158:19-20, July 17, 2014. Instead, Hanna testified at trial that the easiest way to raise the SSVR in HD 78 would be to split a few precincts. *Id.* at 1159:2-8, July 17, 2014. Although the TLRTF attempted to show at trial that the SSVR in HD 78 could be improved in a way other than splitting precincts, the demonstration was done using 2012 precinct data which was not available to the mapdrawers during the 2011 legislative session. Test. of Ryan Downton, Tr. 2110:10-2111:11, July 19, 2014.

By splitting precincts along the border between HD 77 and HD 78, Ryan Downton was able to increase the Total SSVR from 45.8% to 46.8% in District 78.²⁵ *Id.* at 2006:15-21, 2117:14-22; Ex. D-367. In the final 2011 House plan, the "snout" of the "anteater" on the eastern portion of HD 78 is shaped in part due to precinct boundaries. Test. of Dee Margo, Tr. 826:5-10, July 16, 2014; Ex. D-321.

Downton testified that he considered racial data at the block level while splitting these precincts in order to comply with the Voting Rights Act and avoid retrogression. Test. of Ryan Downton, Tr. 2013:6-14, July 19, 2014. In addition to raising the Total SSVR in District 78, Downton's changes did not worsen the population deviation in El Paso. He kept the El Paso districts' population deviation percentages identical to the population deviations in the plan proposed by

²⁵ In light of the undisputed evidence that Downton split precincts to *increase* HD 78's SSVR, which was already below 50% (in the benchmark plan and the then-existing draft plan), MALC's statement that precinct splits in HD 78 "render[ed] it a non SSVR majority district" is contrary to the evidence. *See* Plaintiff MALC's Post Segment One Closing Argument Summary at 8 (July 25, 2014), ECF No. 1185.

Representative Marquez (Plan PICK H120). Ex. D-279_000077; Ex. D-109_00141. Another effect of these changes to HD 78 was to remove precinct 23, which included Representative Margo's district office, many of his financial supporters, and his mother-in-law's residence. Test. of Dee Margo, Tr. 824:3-16, July 16, 2014; Ex. D-320; Ex. D-321. Representative Dee Margo did not agree with removing precinct 23 from HD 78. *See Id.* at 833:1-15.

The changes made to raise the Total SSVR of HD 78 are reflected in "HRC1 H258" in Downton's RedAppl account. Test. of Ryan Downton, Tr. 2011:14-2012:3, July 19, 2014; Ex. D-270; Ex. D-366. After making the changes to the El Paso map, Downton met with Representative Joe Pickett to review the changes. Representative Pickett gave his final agreement to the map that Downton presented. Test. of Ryan Downton, Tr. 2122:12-2123:2, 2123:21-23, July 19, 2014. The changes to the configuration of Districts 77 and 78 appeared in Plan H110, a pre-public plan, created on April 12, 2011. *Id.* at 2004:5-2005:3; Ex. D-317²⁶; Ex. D-368.

On or about April 12, 2011, Hanna performed a second retrogression analysis of the El Paso districts. Test. of David Hanna, Tr. 1192:4-7, July 17, 2014; Ex. D-327. Based on the modifications to District 78, Hanna withdrew his retrogression concerns and no longer identified this district as a possible retrogression risk. Test. of David Hanna, Tr. 1192:8-19, July 17, 2014; Ex. D-327. As a result, the House Redistricting

²⁶ The United States has raised a hearsay objection to this exhibit to the extent it is used to prove the truth of the matter asserted.

Committee included this version for the El Paso districts in Plan H113, Chairman Solomons' first public plan. Ex. D-112_00001; Ex. D-112_00030. The configuration for the El Paso districts never changed after Downton made the adjustments to District 78 to comply with the Voting Rights Act. Ex. D-123; Ex. D-109_00011; Ex. D-109_00045; Test. of Ryan Downton, Tr. 2006:22-2007:22, July 19, 2014.

In both the House benchmark plan and the 2011 House plan, all five of the House districts in El Paso County had over 50% HCVAP. Test. of Jose Rodriguez, Tr. 709:8-12; 714:7-11, July 16, 2014. In both the House benchmark plan and the 2011 House plan, four of the five House districts in El Paso County had a Spanish surname voter registration above 50%. *Id.* at 709:13-710:1; 714:12-15, July 16, 2014.

Representative Marquez does not remember any of her colleagues being concerned about the "antlers" in HD 77. Marisa Marquez Dep. 65:13-66:6, Feb. 4, 2014 (ECF No. 1092-3). She did not believe Hispanics were moved from other districts into HD 77 in order to concentrate Hispanics into HD 77. *Id.* at 37:25-38:4, 42:16-21. Representative Marquez is unaware of any resident of HD 78 who claimed they were denied representation because they lived in Representative Margo's district. *Id.* at 68:25-69:6. Two of the witnesses who testified about El Paso, Senator Rodriguez and Representative Moody, had no involvement in the creation of the House districts, and Moody was not a member of the Legislature. Test. of Jose Rodriguez, Tr. 697:19-21, 707:19-22, July 16, 2014; Test. of Joe Moody, Tr. 838:4-10, 882:3-16, July 16, 2014.

At no time did any member of the El Paso delegation express a desire to discriminate against Latinos, African-Americans, or any other minority. Test. of Joe Pickett, Tr. 798:20-25, July 16, 2014; Test. of Dee Margo, Tr. 827:20-22, July 16, 2014. Representatives Pickett and Margo testified that they would not have tolerated it if a member of the El Paso delegation discriminated against Latinos, African-Americans, or any other minority. Test. of Joe Pickett, Tr. 799:1-2, July 16, 2014; Test. of Dee Margo, Tr. 827:23-24, July 16, 2014. The plaintiffs have not provided any evidence reflecting any intent to discriminate against minority voters in El Paso on the part of any member of the county delegation or any member of the Legislature.

Even if Plaintiffs could prove that the El Paso County House districts in Plan H283 were drawn with a racially discriminatory purpose, their Fourteenth Amendment vote-dilution claim would fail because they cannot prove that the districts had a discriminatory effect. The Court modified the El Paso County districts in Plan H309. *See* Opinion at 10-11 (March 19, 2012), ECF No. 690. The 2013 Legislature adopted the Court's configuration of El Paso County. *See* Act of June 23, 2013, 83d Leg., 1st C.S., ch. 2, 2013 Tex. Gen. Laws 4889. Because the challenged El Paso County districts, as configured in Plan H283, have not had and will not have any effect on any voter, Plaintiffs cannot establish intentional vote dilution under the Fourteenth Amendment.

E. Fort Bend County

MALC alleges that the Legislature intentionally discriminated on the basis of race in drawing Fort Bend County House districts because the minority population "was unnecessarily fragmented to minimize its political strength." MALC Third Amended Complaint ¶ 51; see also id. ¶ 77.27 According to MALC, an amendment offered in 2013 created an additional district, "anchored in Fort Bend County, with a minority citizen voting age population of over 50%." Id. ¶ 52. Plaintiffs have produced no evidence that House districts in Fort Bend County were drawn for the purpose, or that they have the effect, of diluting any group's voting strength.

Under the benchmark House plan, Fort Bend County was represented by two Republicans, Charlie Howard (HD 26) and John Zerwas (HD 28), and one Democrat, Ron Reynolds (HD 27). Consistent with Chairman Solomons's instruction, the members of the Fort Bend delegation worked together to determine a proposed plan. Each member consented to the configuration by signing a map of his proposed district. Ex. D-229 at 51, 98, 120. Representative Senfronia Thompson, who gave limited testimony about Fort Bend County, was not aware that the members of the county delegation had drawn and approved their districts. Test. of Senfronia Thompson, Tr. 1283:12-23, July 17, 2014.

²⁷ The NAACP Plaintiffs allege that a Texas Legislative Black Caucus plan created HD 26 as an additional African-American opportunity district in Fort Bend County. NAACP Third Amended Complaint ¶ 22. In Plan H202, however, HD 26 had a Black voting-age population of only 14.1%. Joint Ex. J-25, Plan H202, Red-100 Report.

Fort Bend was one of the more challenging counties for the mapdrawers because the districts could impact anywhere from two to four counties, which would then have an impact across the remainder of the statewide map. Test. of Gerardo Interiano, Tr. 1603:15-18, July 18, 2014. The boundaries of HD 26 were defined, in part, by precinct boundaries and natural features.²⁸ *Id.* at 1606:25-1607:18. Multiple other factors also impacted how the Fort Bend districts could be configured.

The location of the incumbents' homes also presented a challenge. *Id.* at 1604:9-15. Representative Reynolds lived in a densely Republican area, and he wanted the community he lived in to stay together. The map drawers did not want to place Representative Reynolds in the new District 85 because that would have hindered his reelection chances. *Id.* at 1605:10-1606:24. Balancing the Republican strength of Districts 26 and 28 in Fort Bend County was an additional challenge, as Representative Howard and Representative Zerwas wanted to keep their districts equally Republican. *Id.* at 1606:25-1607:11, 1607:19-1608:8.

Another challenge in drawing the districts for Fort Bend County was ensuring that the Fort Bend County districts had similar populations. *Id.* at 1605:21-1606:10. The population in rural counties surrounding Fort Bend County affected how the Fort Bend County districts could be drawn. *Id.* at 1606:5-10.

²⁸ George Korbel's analysis of Fort Bend County under Plan H283 did not provide information about factors such as rivers, city boundaries, roads, or political data that might account for district boundaries. Test. of George Korbel, Tr. 1455:14-21, July 17, 2014.

Plaintiffs have not proven that the Fort Bend County districts diluted any group's voting strength. The evidence shows that it is not possible to create an additional House district in Fort Bend County in which Asian-American, Black, or Hispanic citizens form a majority of the citizen voting-age population. *See, e.g.*, Test. of George Korbel, Tr. 1455:8-13, July 17, 2014 (acknowledging that Plan H361 does not create any additional districts in which a single group comprises the majority of CVAP). Even if Section 2 could require coalition districts, there is no evidence of cohesion among Asian-American, Black, and Hispanic voters in Fort Bend County. *See* Test. of John Alford, Tr. 1866:10-1867:18, July 19, 2014; Test. of Robert Brischetto, Tr. 978:11-979:2, July 16, 2014 (no multivariate analysis of primary elections in Fort Bend County).

F. Harris County

DOJ alleges that the Legislature applied the Texas Constitution's whole-county provision "inconsistently from past practice in Harris County, providing legislators an excuse to eliminate House District 149, a district in which minority voters had the ability to elect their candidate of choice." Complaint in Intervention ¶ 58 (Aug. 22, 2013), ECF No. 871-1. This allegation is wrong on every count. The Legislature applied the whole-county provision consistently with past practice; HD 149 was not a protected opportunity (or ability) district; and the Legislature eliminated HD 149 by pairing two Democratic incumbents whose districts it believed (correctly) were not protected by the Voting Rights Act.

In the benchmark plan, Harris County had 25 House districts, represented by 13 Republicans and 12 Democrats. Ex. D-100_00027. Based on the 2010 Census, Harris County was entitled to 24.41 House districts. Test. of Gerardo Interiano, Tr. 1419:22-1420:6, Sept. 12, 2011; Test. of Ryan Downton, Tr. 930:11-19, Sept. 9, 2011; Test. of Scott Hochberg, Tr. 1666:11-14, July 18, 2014; Ex. D-221_00001. In 2001, when Harris County was entitled to 24.46 House districts, the House adopted a redistricting plan that apportioned 24 districts to Harris County. Test. of Garnet Coleman, Tr. 1328:1-3, July 17, 2014; Ex. D-127_00002. The 24-member plan adopted by the House in 2001 was supported by Harris County Democrats, including Representative Garnet Coleman, Representative Jessica Farrar, Representative Scott Hochberg, Representative Senfronia Thompson, and Representative Sylvester Turner. Ex. D-127_00002. In 2001, the Legislative Redistricting Board apportioned 25 House districts to Harris County. Test. of Garnet Coleman, Tr. 1326:23-1327:1, July 17, 2014.

After the 2010 census figures were released in February 2011, Hanna provided a risk assessment regarding the number of House districts in Harris County. Test. of David Hanna, Tr. 1201:25-1202:23, July 17, 2014; Ex. D-135. Hanna advised that Harris County should get 24 districts because the "as nearly as may be" language of the Texas Constitution's county line rule "means something, and one number only," and "putting the wrong number in Harris County is a catastrophic error if you guess

wrong" because it would require Harris County and most of the rural areas of the State to be redrawn. Test. of David Hanna, Tr. 1202:14-23, July 17, 2014; Ex. D-135.

Applying the county line rule, and consistent with the advice of TLC, Chairman Solomons determined that Harris County would have 24 districts in the 2011 House map. Test. of Burt Solomons, Tr. 1012:24-1013:2, July 17, 2014; Test. of Burt Solomons, Tr. 1567:7-1568:19, Sept. 13, 2011; Test. of Ryan Downton, Tr. 930:14-931:7, Sept. 9, 2011. After making this decision, Chairman Solomons notified Harris County delegation members of his decision. Test. of Bonnie Bruce, Tr. 1986:11-14, July 19, 2014. Plaintiffs have not proven that the decision to draw 24 districts in Harris County diluted Black or Hispanic voting strength because they have not established that a 25-district plan would have allowed for an additional BCVAP, HCVAP, or SSVR majority district.²⁹

In the beginning of the 2011 redistricting process, Representative Wayne Smith and Representative Senfronia Thompson were working together on a 25-member map for Harris County. Test. of Senfronia Thompson, Tr. 1241:10-1242:3, 1266:3-5, July 17, 2014; Test. of Gerardo Interiano, Tr. 1611:4-7, July 18, 2014. The 25-member map on which Representative Smith and Representative Thompson were working was not adopted as the Harris County map, Test. of Senfronia Thompson, Tr. 1268:14-17,

²⁹ See, e.g., Joint Ex. J-23, Plan H115, Red-100 Report, Red-109 Report (2005-2009 ACS Survey); Joint Ex. J-26, Plan H205, Red-100 Report, Red-109 Report (2005-2009 ACS Survey); Joint Ex. J-27, Plan H214, Red-100 Report, Red-109 Report (2005-2009 ACS Survey); Joint Ex. J-37, Plan H292, Red-100 Report, Red-109 Report (2005-2009 ACS Survey).

July 17, 2014; Test. of Hubert Vo, Tr. 1375:19-23, July 17, 2014, and the delegation was unable to reach agreement on a countywide map, Test. of Senfronia Thompson, Tr. 1242:4-7, July 17, 2014; Test. of Ryan Downton, Tr. 931:16-932:4, Sept. 9, 2011. Plaintiffs provided no evidence that any of Representative Smith's proposed configurations for Harris County were incorporated into the version adopted by the Legislature in Plan H283.

The Harris County map that was dropped into the statewide map submitted to the House Redistricting Committee was a 24-member plan provided by Representative Beverly Woolley, which had the agreement of the Harris County Republican delegation. Test. of Gerardo Interiano, Tr. 1609:7-14, July 18, 2014. Downton reviewed the Harris County Republican delegation's proposed map and made changes to ensure compliance with the Voting Rights Act. These changes were incorporated into the initial statewide House plan released by Chairman Solomons, Plan H113. Test. of Ryan Downton, Tr. 931:16-932:13, Sept. 9, 2011.

Following the release of Plan H113, Luis Figueroa of MALDEF testified at the House Redistricting Committee hearing on April 15, 2011 that the Hispanic population needed to be increased in HD 148. *See* Ex. D-595 (April 15, 2011 House Redistricting Committee Hearing Transcript) at 32:1-12, 34:9-13; Jessica Farrar Dep. 46:14-47:4, 47:13-48:16, March 4, 2014 (ECF No. 1092-2). Based on requests of MALDEF and Representative Villarreal, the mapdrawers increased HD 148's SSVR

and HCVAP in the proposed House plan.³⁰ Test. of Ryan Downton, Tr. 932:14-933:1, Sept. 9, 2011; Test. of Ryan Downton, Tr. 2049:11-21, 2141:12-23, July 19, 2014; Test. of Gerardo Interiano, Tr. 1431:7-20, Sept. 12, 2011. The increase in HD 148's SSVR was also consistent with recommendations made by Hanna, who had analyzed HD 148 and suggested that the district's SSVR be increased to avoid possible retrogression issues. Test. of David Hanna, Tr. 1198:3-14, 1198:22-1199:5, July 17, 2014; *compare* Ex. D-327 (Hanna's April 12, 2011 retrogression memo), *with* Ex. D-123 (Hanna's April 20, 2011 retrogression memo).

When the statewide House plan was considered on the House floor, the floor debate was stopped for approximately three hours to address concerns of several African-American members in Harris County. During this time, the House Redistricting Committee, Speaker Straus's staff, and Democratic and Republican members of the Harris County delegation worked collectively to make changes to the map to address the concerns of these members. Test. of Gerardo Interiano, Tr. 1608:20-1609:6, July 18, 2014; Test. of Gerardo Interiano, Tr. 1430:17-1431:6, Sept. 12, 2011; Test. of Ryan Downton, Tr. 933:10-934:10, 935:19-937:18, Sept. 9, 2011. The House adopted several floor amendments altering the configuration of the Harris County map, including changes proposed by Representative Garnet Coleman,

³⁰ Compare Ex. D-100_00036 (42.1% HCVAP, 40.0% non-suspense SSVR, and 39.4% total SSVR in HD 148 under Plan H100), with Ex. D-112_00032 (42.4% HCVAP, 39.4% non-suspense SSVR, and 38.6% total SSVR in HD 148 under Plan H113), and Ex. D-109_00046 (51.4% HCVAP, 50.0% non-suspense SSVR, and 49.1% total SSVR in HD 148 under Plan H283).

Representative Senfronia Thompson, and Representative Alma Allen. Test. of Gerardo Interiano, Tr. 1608:22-1609:6, 1610:9-13, July 18, 2014; Test. of Garnet Coleman, Tr. 1336:2-6, July 17, 2014; Test. of Gerardo Interiano, Tr. 1475:16-1476:10, Sept. 12, 2011.

Because the Legislature reduced the number of districts apportioned to Harris County, the Legislature paired two Democratic incumbents, Representative Scott Hochberg (District 137) and Representative Hubert Vo (District 149). Ex. D-190_00652-00654. In the benchmark House plan, no one minority group represented a majority of the citizen voting age population in either district.³¹ Hanna advised that the pairing did not create any retrogression problems because HD 137 was not a performing Hispanic opportunity district, and it would require a "novel retrogression theory" to extend Voting Rights Act protection to HD 149 because no single racial or ethnic group comprised more than a quarter of the district's voting age population. Ex. D-122; Test. of David Hanna, Tr. 1193:4-1194:18, July 17, 2014. Hanna confirmed at trial that he did not believe HD 149 was a protected district under the benchmark plan. Test. of David Hanna, Tr. 1158:8-9, July 17, 2014. Based on the advice of TLC, the mapdrawers determined that HD 149 was not a protected district and that it was permissible to pair Representatives Hochberg and Vo. Test. of Ryan

³¹ Ex. D-100_00032 (35.5% Anglo CVAP, 26.4% BCVAP, 25.6% HCVAP, and 11.6% Asian CVAP in HD 137; 37.6% Anglo CVAP, 26.1% BCVAP, 19.0% HCVAP, and 16.2% Asian CVAP in HD 149).

Downton, Tr. 2051:15-21, 2142:22-2143:7, July 19, 2014; Test. of Gerardo Interiano, Tr. 1482:13-21, Sept. 12, 2011. Representative Vo testified that he did not believe that the enacted House plan intentionally fragmented the Asian-American community. *See* Test. of Hubert Vo, Tr. 1381:17-21, 1381:25-1382:8, July 17, 2014; *see also* Rogene Calvert Dep. 89:2-18, May 30, 2014 (ECF No. 1092-2).

Even if Plaintiffs could prove that the Harris County House districts in Plan H283 were drawn with a racially discriminatory purpose, their Fourteenth Amendment vote-dilution claim would fail because they cannot prove that the districts had a discriminatory impact on any voter. The Court modified Harris County in Plan H309. *See* Opinion at 8-10 (March 19, 2012), ECF No. 690. The 2013 Texas Legislature adopted the Court's configuration of Harris County. *See* Act of June 23, 2013, 83d Leg., 1st C.S., ch. 2, 2013 Tex. Gen. Laws 4889. Because the Harris County districts, as configured in Plan H283, have not had and will not have any effect on any voter, Plaintiffs cannot establish intentional vote dilution under the Fourteenth Amendment.

G. Hidalgo County

Plaintiffs allege that the Legislature drew House District 41 by "purposefully split[ting] precincts on the basis of race and ethnicity to dilute minority voting strength" and "minimize the number of Hispanic voters." Complaint in Intervention ¶¶ 43, 52 (Aug. 22, 2013), ECF No. 871-1. The evidence disproves Plaintiffs' allegations. The Legislature did not draw HD 41 to include Anglo population, exclude

Hispanic population, or dilute Hispanic voting strength. The district was drawn at the direction of Representatives Aaron Pena and Ryan Guillen to provide Representative Pena with the best chance to be reelected as a Republican. Test. of Aaron Pena, Tr. 89:18-91:9, Aug. 11, 2014; Test. of Gerardo Interiano, Tr. 41:8-15, Aug. 11, 2014. District 41 was not drawn on the basis of race; it was drawn on the basis of political data and Representative Pena and Representative Guillen's personal knowledge of the area. The resulting district was not designed to dilute Hispanic voting strength, and it would not have done so had it been implemented.

Plaintiffs have failed to prove discriminatory purpose in the creation or enactment of HD 41. The overriding purpose of HD 41, as drawn in Plan H283, was to maximize the reelection prospects of Representative Aaron Pena. Representative Pena was elected in HD 40, which became HD 41 in Plan H283. Test. of Aaron Pena, Tr. 88:8-13, Aug. 11, 2014. In December 2010, after being elected as a Democrat, Representative Pena changed parties. *Id.* at 121:22-122:11 (explaining change of party). During a meeting early in the 2011 session, Representative Pena explained to his colleagues that the party in control maximizes its opportunities during redistricting. He explained that his objective was to see a competitive district so that alternative views could be expressed. *Id.* at 123:6-18.

When Representative Pena first met with the mapdrawers, he articulated the following goals: he wanted his colleagues not to be paired; he wanted his colleagues to have safe districts, which was easy because they live in a very Democratic area; and he

wanted a district centered in the McAllen-Edinburg area to be maximized for the Republican vote. *Id.* at 127:1-19.

Interiano drew the initial boundaries of HD 41 at the direction of Representative Pena and Representative Guillen. Test. of Gerardo Interiano, Tr. 1501:1-4, 1503:18-25, July 18, 2014; *id.* at 38:4-7, Aug. 11, 2014. Representatives Pena and Guillen told Interiano to create a Republican district that would give Representative Pena the best chance at being reelected. Test. of Gerardo Interiano, Tr. 41:8-15, Aug. 11, 2014; Test. of Aaron Pena, Tr. 104:2-8, Aug. 11, 2014. The initial version of HD 41 was drawn as HD 40 and appears in Plan H113. Test. of Gerardo Interiano, Tr. 38:20-25, Aug. 11, 2014; Ex. D-334.

Interiano's first step was to pull up the election data from the 2010 Abbott election at the precinct level. Test. of Gerardo Interiano, Tr. 1504:13-15, 1579:12-1580:2, July 18, 2014; *id.* at 38:8-12, Aug. 11, 2014. Interiano sometimes used Perry 2010 and McCain 2008 election results to find high and low benchmark political performance. Test. of Gerardo Interiano, Tr. 1580:19-22, July 18, 2014. Next, he pulled up population statistics to make sure the district had the appropriate number of people, roughly between 160,000 and 175,000. *Id.* at 1580:6-15. Political shading for

the 2010 Abbott race and total population were the only data used to create the district for Representative Pena.³² *Id.* at 1580:23-1581:2.

The next step was to select all of the most Republican precincts and add them to the district. Test. of Gerardo Interiano, Tr. 1581:10-15, 1581:21-1582:7, July 18, 2014. Representatives Pena and Guillen were present while Interiano was selecting precincts to include in HD 41. Interiano did not look at racial data when he was drawing HD 41. Test. of Gerardo Interiano, Tr. 38:17-19, Aug. 11, 2014; *id.* at 40:19-24 (block-level racial shading not used to draw HD 41). While working with Interiano to draw the district, neither Pena nor Guillen shared racial demographic information with Interiano. Test. of Gerardo Interiano, Tr. 1592:17-25, July 18, 2014.

Representative Guillen and Downton made further changes to the boundaries of HD 41. Representatives Pena and Guillen discussed the changes made to the map. Representative Guillen was looking for what Representative Pena described as "persuadables"—conservative or independent-minded people who are not Republicans but might vote for either party. Test. of Aaron Pena, Tr. 110:12-111:8, Aug. 11, 2014. Representative Guillen used a database of voting histories from the Democratic Party to identify these persuadables. *Id.* at 111:9-17. Representative Pena felt like he could persuade voters in the area around his home to vote for him because

³² Dr. Arrington admitted that the boundaries of HD 41 were consistent with areas of greater support for General Abbott, Test. of Theodore Arrington, Tr. 191:20-192:5, July 14, 2014, and he conceded that he has no knowledge of the area, *id.* at 192:7-196:4.

they knew him growing up, they know that he means well, and they can trust him. *Id.* at 139:6-13. Outside his neighborhood, Representatives Pena and Guillen assumed that people who pay heavy property taxes are more likely to be conservative. *Id.* at 139:14-22. They discussed voting patterns, but never race. *Id.* at 111:18-20. At no time did Representative Pena or Representative Guillen attempt to split or remove Latinos, nor did they ever discriminate on the basis of race.³³ *Id.* at 137:7-12.

VTDs were split in HD 41 for race-neutral reasons. Interiano testified that precincts were split to include Pena's home, to exclude Representative Veronica Gonzalez's home and provide a link to the adjacent district, to remove a Democratic precinct and maintain a link to the adjacent district, and to follow a road. Test. of Gerardo Interiano, Tr. 1507-1508, July 18, 2014. Downton was not involved in the initial creation of HD 41, but he worked with Representative Pena to make additional changes to the district after the initial proposal was created. Downton testified that every precinct he split was based on Representative Pena's request. Test. of Ryan Downton, Tr. 2027:3-2030:25, 2067:11-2068:14, July 19, 2014. Precincts 0107 and 0014 were split to bring in Representative Pena's home. Test. of Aaron Pena, Tr. 146:19-147:7, Aug. 11, 2014; Test. of Gerardo Interiano, Tr. 1507:17-22, July 18, 2014; Test. of Theodore Arrington, Tr. 192:6-20, July 14, 2014; Ex. D-295. Precinct

³³ A shaded map of HD 41 in Plan H283 shows several areas of concentrated Anglo population that were not included in HD 41. D-296; Test. of Theodore Arrington, 186:25-189:10, July 14, 2014. Based on the 2005-2009 ACS survey, HD 41 maintained 65% SSVR under Plan H283. Test. of Theodore Arrington, Tr. 185:16-19, July 14, 2014; Ex. D-109.

oncolo was split to exclude Representative Gonzalez's home, and Precinct 0214 was split to maintain contiguity with the neighboring district. Test. of Aaron Pena, Tr. 147:12-25, Aug. 11, 2014; Test. of Gerardo Interiano, Tr. 1507:10-16, July 18, 2014; Ex. D-295. Precincts 0006, 0008, 0025, 0035, 0047, 0048, 0063, and 0095 were split to follow roads. Test. of Gerardo Interiano, Tr. 44:22-45:16, Aug. 11, 2014; Test. of Aaron Pena, Tr. 148:1-15, 149:4-25, 150:8-13, Aug. 11, 2014; Test. of Jaime Longoria, Tr. 531:2-5, July 15, 2014; Ex. D-295; Ex. D-670. Precincts 0028 and 0103 were split to remove Democratic areas from the district; Precinct 0088 was split to follow the City of Alton's boundary. Test. of Gerardo Interiano, Tr. 1506:22-1507:9, July 18, 2014; Test. of Aaron Pena, Tr. 100:2-101:6, 152:23-153:2, 153:4-14, Aug. 11, 2014; Ex. D-295; Ex. D-670. Precinct 0105 was split at the direction of Representatives Pena and Guillen. Test. of Aaron Pena, Tr. 145:3-22, Aug. 11, 2014; Ex. D-375; Ex. D-295.

The Plaintiffs' witnesses provided no evidence that anyone divided precincts in HD 41 on the basis of race. The United States' witness Jaime Longoria admitted that precincts might be split for any number of reasons, Test. of Jaime Longoria, Tr. 531:9-13, July 15, 2014, and he acknowledged that many of the precinct splits in HD 41 followed roads, *id.* at 530:23-531:8, 531:14-19 (Precincts 63, 47, 48, and 95); 538:9-17 (Precincts 6 and 25). Moreover, Mr. Longoria had no personal knowledge about the creation of HD 41 or the reason behind any part of its boundary. *Id.* at 535:25-536:3. He did not speak to any legislator or legislative staffer who was involved in

drawing the district, *id.* at 526:22-527:4, and he had no personal knowledge why any precinct in HD 41 was split, *id.* at 528:17-20, 529:1-5, 529:22-25, 530:5-8, 533:11-14, 538:18-22.

Even if Plaintiffs had proven that the creation of HD 41 was motivated by a racially discriminatory purpose, their Fourteenth Amendment vote-dilution claim would fail because they cannot prove that the district had a discriminatory impact on any voter. The Court modified HD 41 in Plan H309, which was used to conduct elections in 2012. *See* Opinion at 3-4 (March 19, 2012), ECF No. 690. The 2013 Texas Legislature adopted the Court's configuration of HD 41. *See* Act of June 23, 2013, 83d Leg., 1st C.S., ch. 2, 2013 Tex. Gen. Laws 4889. Because HD 41, as configured in Plan H283, has not had and will not have any effect on any voter, Plaintiffs cannot establish intentional vote dilution under the Fourteenth Amendment.

H. Lubbock County

The House districts in Lubbock County and the surrounding area are consistent with race-neutral principles, and there is no evidence that the Legislature intended to dilute Hispanic voting strength.³⁴ The Plaintiffs' only witness for Lubbock County testified that he had no personal knowledge of voting related discrimination in Lubbock County, Test. of Lorenzo Sedeno, Tr. 490:14-17, July 15, 2014, exclusion of Hispanic candidates from running for office, *id.* at 490:18-22, or discrimination against

³⁴ Plaintiffs do not appear to have alleged that the 2011 Legislature intentionally discriminated on the basis of race in drawing the House districts in Lubbock County.

Hispanics in education, employment, or health, *id.* at 490:23-491:2. He believed that Plan H283 was drawn with an eye towards partisanship and maximizing the party's ability to stay in power, as well as an intent to protect incumbents. *Id.* at 491:3-14.

Lubbock County in plan H283 does not contain any county line splits. Ex. D-109_00018; Ex. D-109_00002 (Statewide Map of H283). In contrast, MALC Plan H329 splits Lubbock County into three separate districts, containing two county line splits. Test. of Lorenzo Sedeno, Tr. 493:2-15, July 15, 2014; Ex. MALC-100.

MALC Plan H329 was not made public during the 2011 legislative session; it was made public on June 19, 2013. Test. of Lorenzo Sedeno, Tr. 495:23-496:6, July 15, 2014; Ex. MALC-100. According to data available to the Legislature in 2011, Plan H329's HD 88 had HCVAP of 47.2% and SSVR of 46.3%. Test. of Lorenzo Sedeno, Tr. 496:20-497:2, July 15, 2014; Ex. D-322. MALC presented no evidence about the SSVR in Plan H329's proposed HD88 or whether the district would perform. Using 2008-2012 ACS data, Lubbock County is only 26.39% HCVAP. Ex. D-181_00005.

I. McLennan County

Plaintiffs have asserted (but not pleaded³⁵) that the Legislature intentionally discriminated against minority voters in McLennan County. The NAACP, for

³⁵ The Perez Plaintiffs' live pleading includes a claim against HD 56 in McLennan County, but the claim is directed only at SB 3, the House redistricting plan enacted in 2013. *See* Sixth Amended Complaint of Perez Plaintiffs ¶ 28 (Feb. 25, 2014), ECF No. 960 ("The current enactment perpetuates that discrimination and is littered with intentional diminution of minority strength and fragmentation of minority communities in violation of the 14th and 15th Amendments together with violations of 14th amendment one person-one vote commands in the Districts we detail below. . . . McLennan County District 56").

instance, has alleged that "minority voters, black and Latino, are cut out of districts in a manner to ensure that they are always on the losing side of elections [in] McLennan County." Opening Statement of NAACP Plaintiffs, Tr. 76:8-11, July 14, 2014; *see also* Opening Statement of Perez Plaintiffs, *id.* at 81:1-5 (stating that "a portion of that minority community that has been part of that district was chopped off and reduced that effectiveness as a minority district, which had elected the candidate of choice for decades in McLennan County"). Plaintiffs have not presented evidence to support this allegation, and they have not proven that the House districts in McLennan County were drawn for the purpose of diluting any group's voting strength.

Commissioner Lester Gibson, who testified about McLennan County, was not familiar with the 2011 House plan. *See* Test. of Lester Gibson, Tr. 1846:17-1847:1, July 18, 2014. Commissioner Gibson had not looked at any figures showing whether there was vote dilution in McLennan County. *Id.* at 1839:14-18. He could not identify an election where the minority candidate of choice in McLennan County lost an election, due to the white vote, since segregation ended. *Id.* at 1842:2-13. Commissioner Gibson was not aware of any legislator's purpose in voting for or against the 2011 House plan. *Id.* at 1847:9-12.

J. Midland County and Ector County

There is no evidence that the House districts in Midland County and Ector County were drawn for the purpose of diluting Hispanic voting strength.³⁶ The districts are consistent with the county line rule and with the configuration of districts in the benchmark plan. Plaintiffs' demonstration districts, on the other hand, violate the county line rule, and their boundaries indicate that they were drawn primarily on the basis of race. A jurisdiction must have a "strong basis in evidence" to conclude that a race-based district is necessary to avoid vote dilution in violation of Section 2. See, e.g., Abrams v. Johnson, 521 U.S. 74, 91 (1997); Shaw, 509 U.S. at 656. The Legislature had no strong basis in evidence to believe that a race-based district was necessary to avoid a violation of the Voting Rights Act.

K. Nueces County

No party disputes that Nueces County's 2010 Census population entitled it to two—and only two—Texas House districts. Plaintiffs contend, nevertheless, that the Legislature's failure to ignore the county-line rule in Nueces County amounts to intentional racial discrimination because breaking the county line would have allowed the State to remove Anglo population, which would have made it possible to create two SSVR-majority districts in Nueces County. *See, e.g.*, Complaint in Intervention ¶ 57 (Aug. 22, 2013), ECF No. 871-1 (alleging that the Legislature intentionally

³⁶ Plaintiffs do not appear to have alleged that the 2011 Legislature intentionally discriminated on the basis of race in drawing the House districts in Midland and Ector County.

discriminated by rejecting "calls for deviation from the County Line Rule in order to comply with the Voting Rights Act in Nueces County"). The argument that Section 2 of the Voting Rights Act required the Legislature to deviate from a traditional, race-neutral redistricting principle reflects a misunderstanding of *Gingles* and the Supremacy Clause. The suggestion that its adherence to race-neutral redistricting principles violated the Constitution is baseless.

Based on its 2000 Census population, Nueces County was entitled to 2.26 House seats; thus, in the benchmark plan, Nueces County contained two whole districts and a portion of a third, which joined surplus population with San Patricio, Aransas, and Calhoun County. Based on its 2010 Census population, Nueces County was entitled to 2.029 House seats. Test. of Abel Herrero, Tr. 657:8-658:7, July 15, 2014; Ex. D-100; Ex. D-212; Ex. D-214. Accordingly, the Texas Constitution required that only two districts be apportioned to Nueces County. Test. of David Hanna, Tr. 1185:16-22, July 17, 2014. Failure to comply with the Texas Constitution's whole-county rule would have exposed the entire plan to a challenge in state court. *Id.* at 1201:15-22.

Given that Nueces County's population was a near-exact multiple of the ideal district population, a decision to discard the county-line rule might have prompted a constitutional claim, as well. A legislature's decision to employ race-neutral criteria such as maintaining county lines normally rebuts an inference that lines were drawn on the basis of race. *See Bush v. Vera*, 517 U.S. at 978 (noting that states "may avoid

strict scrutiny altogether by respecting their own traditional districting principles"). Subordination of traditional principles to racial considerations, however, may violate the Constitution. *Id.* ("The constitutional problem arises only from the subordination of those principles to race.").

Because Nueces County's level of Spanish-surnamed registered voters was just under 50%, it was not possible to create two SSVR-majority districts without removing a portion of the county's population and violating the whole-county rule. See Test. of David Hanna, Tr. 1186:6-12, July 17, 2014; Test. of Ryan Downton, Tr. 2037:23-2038:5, July 19, 2014; Test. of Theodore Arrington, Tr. 199:14-17, July 14, 2014; Test. of Gerardo Interiano, Tr. 1449:19-23, 1452:10-14, 1498:14-18, Sept. 12, 2011. Plaintiffs contend that the Legislature's failure to include part of a third district in Nueces violates the Voting Rights Act; however, Downton testified that Nueces County raised concerns under the VRA regardless of whether it had 2 or 3 districts. Test. of Ryan Downton, Tr. 2095:25-2096:14, July 19, 2014. Ultimately, the Legislature elected to ensure that one of the two Nueces County House districts would be a strong Hispanic opportunity district. Test. of Gerardo Interiano, Tr. 1498:6-23, Sept. 12, 2011. In doing so, they did exactly what Hanna advised in his February 17, 2011, e-mail to Denise Davis. See Ex. D-192 ("Corpus—Two seats only; three R's. And worse one of the seats will probably have to be more Hispanic than the other and probably elect a D. Not sure on this but preclearance likely an issue here."). As a result of the 2011 redistricting, the Nueces County delegation went from three

Republicans to one Republican and one Democrat in 2012. Test. of Abel Herrero, Tr. 660:10-12, 661:11-15, July 15, 2014.

Plaintiffs' argument that the Legislature improperly elevated the county-line rule over the requirements of the Voting Rights Act begs the question whether the Voting Rights Act required the Legislature to violate the county-line rule. Plaintiffs' argument that it did misconstrues preemption doctrine and the first *Gingles* factor.

In order to prove that the VRA preempts the Texas Constitution, Plaintiffs must establish a specific conflict between the two. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (explaining that state laws are preempted if it is impossible to comply with state and federal law or if the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). If Section 2 does not require the State to create a particular district, there is no conflict and no preemption. A state "must have a 'strong basis in evidence' for finding that the threshold conditions for § 2 liability are present" to justify the subordination of traditional districting principles to racial considerations. *Bush v. Vera*, 517 U.S. at 978.

Plaintiffs do not present a clear conflict between the county-line rule and Section 2 in Nueces County because, among other reasons, they cannot satisfy the first *Gingles* factor without excluding part of the county's population. To satisfy *Gingles*, plaintiffs must establish "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population

to elect candidates of its choice." *DeGrandy*, 512 U.S. at 1008. But "the § 2 compactness inquiry should take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries." *Abrams*, 521 U.S. at 1008 (quoting *Bush v. Vera*, 517 U.S. at 977).

If an additional district cannot be drawn without altering the population base, the first Gingles factor is not satisfied. Cf. Fairley v. City of Hattiesburg, 584 F.3d 660, 671 (5th Cir. 2009) (affirming rejection of Section 2 claim where "the only plan the plaintiffs developed in the district court [involved] exclusion of dormitory students, including an unknown number of City residents, from the City's population for redistricting decisions"). Every plan Plaintiffs offered to show the possibility of creating a second SSVR-majority district in Nueces County did so by removing predominantly Anglo population and placing it in districts based in other counties. See, e.g., Ex. D-108 (Plan H205). If "reach[ing] out to grab small and apparently isolated minority communities" makes a district non-compact for Section 2 purposes, see Bush v. Vera, 517 U.S. at 979, ignoring natural boundaries to cut out part of the population base should also raise doubts about the sufficiency and compactness of the population claiming a Section 2 injury. Plaintiffs' inability to create two SSVR-majority districts in Nueces County without removing a chunk of the population suggests that the county's Hispanic population is not sufficiently large to form a majority in two Texas House districts.

L. Tarrant County

Representative Charlie Geren took the lead in drawing the Tarrant County House map. Test. of Gerardo Interiano, Tr. 1561:20-23, July 18, 2014; Test. of Ryan Downton, Tr. 2097:9-11, July 19, 2014. Downton also worked on the Tarrant County map. Test. of Ryan Downton, Tr. 1989:5-9, July 19, 2014.

All members of the Tarrant County delegation came to a consensus and agreed on a map for Tarrant County. Test. of Marc Veasey, Tr. 13:13-16, 14:2-8, July 14, 2014; Test. of Ryan Downton, Tr. 2098:3-7, July 19, 2014. In the proposal from the Tarrant County delegation, the SSVR for HD 90 was lower than the SSVR for HD 90 under the benchmark plan. Test. of Ryan Downton, Tr. 2098:19-2099:16, July 19, 2014. The proposed map from the Tarrant County delegation was included in the statewide substitute that was released on April 13, 2011. *Id.* at 2099:3-16.

The changes made to the Tarrant County delegation's map were made at the request of MALDEF. Ex. D-190_632; Test. of Marc Veasey, Tr. 32:4-9, 33:1-3, July 14, 2014; Test. of Ryan Downton, Tr. 929:23-930:5, Sept. 9, 2011. On April 15, 2011, Luis Figueroa testified at a public hearing on behalf of MALDEF. At that hearing, Mr. Figueroa indicated that MALDEF was concerned about the SSVR of HD 90. Test. of Marc Veasey, Tr. 30:8-31:6, July 14, 2014; Test. of Ryan Downton, Tr. 929:23-930:5, Sept. 9, 2011; Ex. D-116_00099; Ex. D-595 at 32. Hanna also indicated that there was potentially retrogression in HD 90 in the map proposed by the Tarrant County delegation. Ex. D-327; Test. of Ryan Downton, Tr. 2145:17-2146:6, July 19, 2014.

Interiano asked Representative Geren to modify the Tarrant County delegation's proposed map to raise the SSVR of House District 90 to over 50%. Test. of Gerardo Interiano, Tr. 1562:7-10, July 18, 2014. The Tarrant County delegation's proposed map for Tarrant County was subsequently modified by Downton in order to raise the total SSVR of HD 90 to over 50%. Test. of Ryan Downton, Tr. 2100:21-24, July 19, 2014.

After HD 90 was modified to raise the total SSVR to over 50%, Representatives Burnam and Veasey no longer supported the Tarrant County map. *Id.* at 2101:12-15; Test. of Ryan Downton, Tr. 930:6-10, Sept. 9, 2011. However, after HD 90 was modified, Hanna no longer had concerns about retrogression in HD 90. Test. of Ryan Downton, Tr. 2146:7-20, July 19, 2014; Ex. D-123.

M. Cameron County and Hidalgo County.

The Task Force Plaintiffs claim that the Legislature intentionally diluted Hispanic voting strength in Cameron County and Hidalgo County when it declined to create a House district by joining the two counties' surplus populations:

In Cameron and Hidalgo Counties, dramatic population growth provided an obvious opportunity to create an additional Latino opportunity district. The State's plan for the House of Representatives fails to create that additional district that so organically grew there; instead, overpopulating existing districts and pushing excess population to the north into other already existing Latino opportunity districts.

Opening Statement of Task Force Plaintiffs, Tr. 20:6-12, Sept. 6, 2011. Plaintiffs have not proven that the Legislature engaged in intentional vote dilution. They have not

proven that the Legislature acted with a discriminatory purpose because there is no evidence that the decision not to create a Cameron-Hidalgo district was based on the race of its potential inhabitants. They have not proven that the decision resulted in vote dilution because, under Plan H283, every resident of each county would have resided in a Hispanic opportunity district.

Even if Plaintiffs could prove that the Legislature acted with a discriminatory purpose when it configured HD 35 in Plan H283 and declined to create a new district joining surplus population from Hidalgo County and Cameron County, their Fourteenth Amendment vote-dilution claims would fail because they cannot prove that HD 35 or the absence of a Cameron-Hidalgo district had a discriminatory impact on any voter.

First, Plaintiffs cannot show a discriminatory effect from HD 35 because the Court modified the district in Plan H309, shifting it south to create a new district joining Cameron County and Hidalgo County, as the plaintiffs requested. *See* Opinion at 5 (March 19, 2012), ECF No. 690. The 2013 Texas Legislature adopted the Court's configuration of HD 35. *See* Act of June 23, 2013, 83d Leg., 1st C.S., ch. 2, 2013 Tex. Gen. Laws 4889. Because HD 35, as configured in Plan H283, has not had and will not have any effect on any voter, Plaintiffs cannot establish intentional vote dilution under the Fourteenth Amendment.

Second, even if the Court had not created the Cameron-Hidalgo district requested by Plaintiffs, the Legislature's failure to create the district did not have a

discriminatory effect on voters in Cameron County or Hidalgo County. In Plan H283, Cameron County included HD 37, HD 38, and part of HD 43; Hidalgo County included HD 36, HD 39, HD 40, HD 41, and part of HD 31. See Ex. D-109_00030 (Red-100 Report). Those districts would have been Hispanic opportunity districts as drawn in Plan H283. See, e.g., Texas Latino Redistricting Task Force, et al., Proposed Findings of Fact and Conclusions of Law ¶ 295 (Feb. 10, 2012), ECF No. 634 (identifying districts 31, 36, 37, 38, 39, 40, 41, and 43 as Latino opportunity districts in Plan H283). Even without a new district joining populations from Cameron County and Hidalgo County every resident of each county would have resided in a Hispanic opportunity district under Plan H283. It follows that the failure to draw an additional Hispanic opportunity district would not have denied or abridged any Hispanic voter's opportunity to elect his or her preferred candidate. Cf. 52 U.S.C. § 10301(b)³⁷ (providing that a violation of Section 2 is established if "the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").

³⁷ This provision of the Voting Rights Act was formerly codified at 42 U.S.C. § 1973(b).

III. INTENTIONAL VOTE DILUTION CLAIMS: SENATE BILL 4 (PLAN C185)

A. Economic Engines, District Offices, and Member Homes

The alleged removal of "economic engines," homes, and district offices from districts represented by African-American members of Congress has been a major component of Plaintiffs' intentional-discrimination claims against SB 4. According to the plaintiffs, including the Department of Justice, the targeted removal of economic engines and offices from African-American districts is strong evidence of intentional racial discrimination. For example, DOJ alleges: "The 2011 Congressional plan for Texas removed already-established Congressional district offices from several majority-minority Congressional districts but not from majority-Anglo districts." DOJ Complaint in Intervention ¶ 34 (Aug. 22, 2013), ECF No. 871-1.38 These claims do not stand up to scrutiny. The removal of economic engines and district offices was not confined to African-American members of Congress, and the removal of one member's home from her district resulted from a programming error, not racial discrimination.

The evidence suggests, at the very least, that the plaintiffs made their claims of intentional discrimination in the removal of economic engines from African-American congressional districts without reasonable investigation. The evidence showed, for

³⁸ See also DOJ Complaint in Intervention ¶ 33 (Aug. 22, 2013), ECF No. 871-1 ("The 2011 Congressional plan for Texas removed key economic engines and cultural facilities, such as medical and convention centers, sports arenas, and universities, from several majority-minority Congressional districts but not from majority-Anglo districts.").

example, that Anglo members of Congress lost several economic engines in Plan C185, some of which were moved to districts represented by African-American members. See, e.g., Test. of Eddie Bernice Johnson, Tr. 715:16-716:11, Aug. 12, 2014; Ex. D-447 (AT&T Stadium and Rangers Ballpark); Test. of Eddie Bernice Johnson, Tr. 717:2-718:5, Aug. 12, 2014; Ex. D-448.2; Ex. D-448.3 (Texas Instruments corporate headquarters); Test. of Eddie Bernice Johnson, Tr. 718:6-17, Aug. 12, 2014, Ex. D-500.2, Ex. D-500.3 (ExxonMobil corporate headquarters); Test. of Eddie Bernice Johnson, Tr. 718:18-719:2, Aug. 12, 2014, Ex. D-499.2, Ex. D-499.3 (University of Dallas); Test. of Richard Murray, Tr. 1453:17-1455:12, Aug. 15, 2014, Ex. D-481 (Hobby Airport); Test. of Richard Murray, Tr. 1455:13-1459:16, Aug. 15, 2014, Ex. D-475, Ex. D-477 (Rice University and MD Anderson Cancer Center); see also Ex. D-469 (Baylor College of Medicine); Ex. D-470 (Memorial-Hermann Texas Medical Center).

African-American members also retained certain economic engines that were located in their districts in Plan C100. *See* Test. of Eddie Bernice Johnson, Tr. 713:10-12, Aug. 12, 2014 (Parkland Hospital); *id.* at 713:13-15, Ex. D-445 (University of Texas Southwestern Medical Center); Test. of Eddie Bernice Johnson, Tr. 713:16-714:1, Aug. 12, 2014, Ex. D-446 (Margaret Hunt Hill Bridge); Test. of Richard Murray, Tr. 1453:3-6, Aug. 15, 2014, Ex. D-474 (Texas Southern University and the University of Houston); Test. of Richard Murray, Tr. 1444:15-1446:1, Aug. 15, 2014, Ex. D-470 (Medical Center area). Moreover, some economic engines allegedly

removed from African-American members' districts were actually moved to other minority-opportunity districts. *See, e.g.*, Ex. D-501.2, 501.3 (Houston Baptist University); Ex. D-470 (Reliant Park and Astrodome); Test. of Richard Murray, Tr. 1447:8-1448:16, Aug. 15, 2014, Ex. D-473 (downtown Houston area); *see also* Test. of Richard Murray, Tr. 1448:17-1453:2, Aug. 15, 2014, Ex. D-474 (Third Ward-MacGregor area).

Even if Plaintiffs had supported their factual allegations, the movement of economic engines would not be proof of a discriminatory purpose because the RedAppl mapping software used by the mapdrawers does not identify the location of economic engines in member's districts. Test. of Clare Dyer, Tr. 782:12-783:8, Aug. 13, 2014. Unless a member of Congress alerted the mapdrawers that he or she wanted a particular location in their district, the mapdrawers would not have known what the member wanted. Test. of Ryan Downton, Tr. 1675:9-24, Aug. 15, 2014. In some instances, members of Congress requested that points of interest be added to their districts, but the mapdrawers did not actively seek to remove such locations from any members' districts. *Id.* at 1676:14-22.

Congresswoman Eddie Bernice Johnson's home was inadvertently excluded from CD 30 based on a mapping error by the Texas Legislative Council. In January 2011, Clare Dyer of TLC notified the Texas congressional delegation that TLC intended to input the census block location of each member's residence in RedAppl. Ex. D-503. Ms. Dyer provided each member with a map that shaded the census block

for the address that TLC had identified as their residence and instructed the member to notify TLC if the residence or census block location in the map was incorrect. Ex. D-503; see also Test. of Clare Dyer, Tr. 770:8-10, 773:20-774:4, Aug. 13, 2014. The map that Ms. Dyer sent to Congresswoman Johnson's office contained the correct address for Congresswoman Johnson's residence, but the residence was placed in the wrong census block in the map because TLC used 2009 Census blocks, rather than 2010 Census blocks, to generate the map. Test. of Eddie Bernice Johnson, Tr. 723:12-724:15, Aug. 12, 2014; Test. of Clare Dyer, Tr. 778:23-779:21, 780:6-781:4, Aug. 13, 2014; Ex. D-504. Congresswoman Johnson did not respond to Ms. Dyer's memorandum, and TLC entered into RedAppl the census block identified in the map provided to Congresswoman Johnson. Test. of Clare Dyer, Tr. 767:3-5, 781:17-23, Aug. 13, 2014. The census block identified in RedAppl as containing Congresswoman Johnson's residence is located in CD 30 in Plan C185. Id. at 781:24-782:1, Aug. 13, 2014; Test. of Eddie Bernice Johnson, Tr. 725:12-726:21, Aug. 12, 2014; Test. of Richard Murray, Tr. 1461:25-1462:7, Aug. 15, 2014. Because RedAppl does not provide the physical address of a member's residence, a RedAppl user would not have known that the census block for Congresswoman Johnson's home was incorrect; they would have thought they were including Congresswoman Johnson's home in her district. Test. of Clare Dyer, Tr. 781:10-782:10, Aug. 13, 2014.

The Plaintiffs attempt to avoid this undisputed fact by arguing that the Legislature could and should have done more to ensure that Congresswoman

Johnson's home was not drawn out of her district. They contend, for example, that Congresswoman Johnson identified the precincts in which her home and district offices were located during the legislative process. *See* Closing Argument of Congresspersons, Tr. 2018:5-16, Aug. 26, 2014. They provide no evidence, however, that this message was ever delivered to any member of the Texas Legislature or any member of the legislative staff. The exhibit on which they rely contains a series of e-mails and a PDF attachment that were sent to Congressman Lamar Smith and Opiela. Ex. NAACP/Congresspersons-75. They have provided no evidence that these e-mails, the attached document, or the information therein were ever forwarded by Congressman Smith or Opiela to the Legislature.

Plaintiffs' allegations about the removal of congressional offices were unqualified: every African-American congressperson lost their district office; not a single Anglo congressperson did. Dr. Richard Murray, for example, testified without qualification that all African-American congresspersons, and only the African-American congresspersons, lost their district offices, making out a prima facie case of intentional discrimination. Test. of Richard Murray, Tr. 1462:8-19, 1467:10-17, 1476:6-9, Aug. 15, 2014; *see also* Plaintiffs' Joint Brief on Interim Maps at 52 (Feb. 10, 2012), ECF No. 623 ("[T]he only members of Congress to have their district offices drawn out [of] the district were minority members of Congress.").

These allegations are false. The Defendants demonstrated through the crossexamination of Dr. Murray that Republican Congressmen John Culberson, Lamar Smith, Kevin Brady, Michael McCaul, and Joe Barton all lost district offices in Plan C185 (McCaul and Barton lost two each).³⁹ The evidence reflected that at least ten other members lost one or more district offices from their respective districts in Plan C185. Ex. D-716 (identifying Congressmen Ted Poe (CD 2), Ron Paul (CD 14), Ruben Hinojosa (CD 15), Bill Flores (CD 17), Charles Gonzalez (CD 20), Francisco Canseco (CD 23), Lloyd Doggett (CD 25), Blake Farenthold (CD 27), Henry Cuellar (CD 28), and Gene Green (CD 29) as losing one or more district offices in C185).

Downton testified that he did not intentionally remove congressional district offices from any members' districts. Test. of Ryan Downton, Tr. 1676:9-13, Aug. 15, 2014. RedAppl did not identify district offices, so the mapdrawers would not have known that a district office had been placed in a different district unless they were alerted to that fact. *Id.* at 1675:25-1676:8; Test. of Ryan Downton, Tr. 1020:23-1021:2, Sept. 9, 2011; Test. of Burt Solomons, Tr. 1581:4-22, Sept. 13, 2011; *see also* Test. of Clare Dyer, Tr. 772:24-773:11, Aug. 13, 2014. To the extent the mapdrawers received, and could accommodate, a member's request to have a district office included in his or her district, that change was incorporated into the map. *E.g.*, Test. of Ryan Downton, Tr. 1629:25-1630:5, Aug. 15, 2014.

³⁹ Test. of Richard Murray, Tr. 1467:18-1468:19, Aug. 15, 2014 (discussing Ex. D-491.1-.2 (Culberson)); *id.* at 1474:7-1476:5 (discussing Ex. D-493.1-.4 (Barton)); *id.* at 1471:16-1474:6 (discussing Ex. D-492.1-.4 (McCaul)); *id.* at 1470:3-1471:15 (discussing Ex. D-490.1-.2 (Brady)); *id.* at 1468:20-1469:22 (discussing Ex. D-489.1-.2).

Following the public release of the initial congressional plan, neither Congresswoman Eddie Bernice Johnson nor Congresswoman Sheila Jackson Lee notified the mapdrawers that their district offices had been removed from their districts. Test. of Ryan Downton, Tr. 1019:15-18, 1020:11-19, Sept. 9, 2011; Test. of Eddie Bernice Johnson, Tr. 705:15-25, Aug. 12, 2014; Test. of Burt Solomons, Tr. 1376:25-1377:5, Aug. 14, 2014. The evidence shows that they had every opportunity to do so. Downton recalled communicating with Congressman Al Green or Congressman Gene Green regarding the removal of a district office; the request was considered but could not be accommodated because it would have required significant changes to the map given the office's location. Test. of Ryan Downton, Trial Tr. 1019:12-1020:8, Sept. 9, 2011. On June 2, 2011, Congresswoman Lee issued a statement opposing the proposed congressional plan, C125. The statement expressed disappointment at the proposal's alleged failure to reflect minority population growth and the division of historic neighborhoods in CD 18. See Ex. DOJ-608. Although her office had obviously reviewed the proposal, the statement said nothing about district offices.

The Plaintiffs' claims of intentional racial discrimination based on the treatment of economic engines, offices, and homes are, like Dr. Murray's prima facie case, completely baseless. The confidence with which the plaintiffs, their witnesses, and their experts have repeated these false allegations—including in sworn testimony—

should cast serious doubt on every allegation of intentional discrimination by the 2011 Legislature.

B. Population Growth

The magnitude of minority population growth, particularly Hispanic population growth, has been a central theme of Plaintiffs' case. Given the Hispanic population growth of nearly 2.8 million, Ex. TLRTF-629-001 (roughly 65% of all statewide growth) and the State's gain of four congressional seats, Plaintiffs suggest that it should be easy to create additional Hispanic-opportunity congressional districts. They claim that the 2011 congressional plan's failure to reflect the population growth that entitled the State to four new congressional seats can only be explained as a concerted effort to dilute minority voting strength.

Plaintiffs' claim has superficial appeal—with four new districts and Hispanic population growth of 2.8 million, it is difficult to understand how the Legislature could *not* create multiple new Hispanic-opportunity districts—but linking total population growth to newly apportioned congressional districts is misleading. Congressional districts are apportioned to the State, not to new population, and total population growth is not a reliable indicator of the ability to create additional Hispanic opportunity districts. Plaintiffs' own demonstration plans prove that it is not possible to draw more reasonably compact HCVAP-majority congressional districts than the State created in Plan C185.

Districts are drawn on the basis of total population, but the relevant measure of potential voting strength is citizen voting-age population. Test. of John Alford, Tr. 1822:11-13, Aug. 16, 2014. Hispanic CVAP increased by approximately 700,000 over the past decade, Ex. TLRTF-631-001. This represents roughly 25% of the total Hispanic population growth of 2.8 million and approximately 44% of the total CVAP growth of 1,596,550, see id. Plaintiffs cannot seriously argue that districts drawn to reflect this population growth—districts with a Hispanic population majority, only 25% of which is eligible to vote—would increase Hispanic voting strength. More than likely, they would cite these districts as evidence of vote dilution, if not intentional racial discrimination. See, e.g., LULAC, 548 U.S. at 441 (finding that "evidence suggesting that the State intentionally drew District 23 to have a nominal Latino voting-age majority (without a citizen voting-age majority)" indicated the "use of race to create the facade of a Latino district"); cf. Closing Argument of United States, Tr. 58:13-20, July 29, 2014 ("[R]edrawing certain Latino opportunity districts so that they would maintain the majority-minority status but would elect the candidate of choice preferred by Anglo voters. . . . I call these informally 'appearance districts.' Drawing appearance districts is a dilutive intent."). Realistic assessment of the potential to create Hispanic opportunity districts must start with Hispanic citizen voting-age population.

The possibility of converting HCVAP growth into additional opportunity districts depends on the distribution and geographic concentration of the Hispanic

citizen-voting-age population. Test. of John Alford, Tr. 1819:1-1820:5, Aug. 16, 2014. The evidence shows that based on 2010 estimates, Hispanic citizen-voting-age population is overwhelmingly concentrated in the South and Southwest regions of the State, just as it was under the 2000 Census. *See id.* at 1823:18-1829:10; Ex. D-230, Ex. D-231. The increase in HCVAP was distributed across all 32 benchmark congressional districts, from a low of approximately 14,000 to a high of approximately 90,000, Ex. D-439; Test. of John Alford, Tr. 1832:6-14, Aug. 16, 2014, but the growth was concentrated in districts that already had an HCVAP majority. Of the 11 benchmark districts with an estimated HCVAP gain of more than 40,000, 7 were existing Hispanic opportunity districts. Ex. D-439; Test. of John Alford, Tr. 1832:15-1833:2, Aug. 16, 2014.

In areas of the State that did not already have high concentrations of Hispanic CVAP, growth in Hispanic CVAP made up less than half of the total CVAP growth. Dr. Ansolabehere found that the six benchmark Hispanic opportunity districts in Southwest Texas experienced a similar average increase in total CVAP (approximately 77,000) as the remaining 26 benchmark districts (approximately 74,000); however, in the six Southwest Texas districts, the average increase in Hispanic CVAP was over 67,000, compared to just over 31,000 in the remaining 26 districts. Ex. TLRTF-913; Test. of John Alford, Tr. 1834:11-1836:15, Aug. 16, 2014. Of the 32 benchmark districts, only CD 29 (already considered a Hispanic opportunity district) became an

HCVAP-majority district over the decade, increasing from approximately 47% to 59% HCVAP. Ex. D-439; Test. of John Alford, Tr. 1832:21-24, Aug. 16, 2014.

The demonstration plans offered by Plaintiffs in this litigation illustrate the difficulty of translating the past decade's population growth into additional HCVAPmajority congressional districts. After three years of effort, none of the plaintiffs have offered a congressional redistricting plan with more than eight geographically compact HCVAP-majority districts—the same number created in the State's 2011 plan, C185. Plaintiffs have argued that Plans C188 and C262 created 9 HCVAP-majority districts, but at least one of the districts in each plan is not reasonably compact. In Plan C262, CD 28 goes from Webb County to northern Travis County. Ex. LULAC-11 (Plan C262 map). In Plan C188, CD 28 goes from Webb County to northern Travis County, and CD 10 goes from Hidalgo County to northern Travis County. Joint Ex. J-10 (Plan C188). In its order implementing Plan C235, this Court appropriately rejected Plan C188 (and a similar plan, C211) on the ground that the ninth Hispanic opportunity district "fail[ed] to satisfy Gingles in terms of compactness." Order at 51 (March 19, 2012), ECF No. 691 ("The Supreme Court has ruled that a nearly identical (and arguably more compact) district in the same location was 'noncompact for § 2 purposes.' LULAC, 548 U.S. at 435.").

The Plaintiffs' failure to draw additional compact HCVAP-majority districts confirms Dr. Alford's conclusion: despite the substantial growth in the State's Hispanic population between 2000 and 2010, it is not possible to draw more

geographically compact HCVAP-majority districts than the Legislature created in Plan C185. The Legislature's failure to accomplish in 2011 what none of the plaintiffs have been able to accomplish after more than three years of litigation is not evidence of intentional racial discrimination.

C. Congressional District 23

The Legislature had two goals in CD 23: to maintain or improve the benchmark level of HCVAP and SSVR to comply with the Voting Rights Act, and to provide Republican incumbent Francisco "Quico" Canseco with the best chance of reelection. Test. of Ryan Downton, Tr. 1634:19-1635:2, Aug. 15, 2014. The Legislature accomplished the former goal by increasing CD 23's HCVAP from 58.4% under Plan C100 to 58.5% under Plan C185 and increasing non-suspense Spanish Surname Voting Registration (SSVR) from 52.6% to 54.8%. Compare Ex. D-400.6, (Plan C100, Red-109 Report, 2005-2009 ACS Survey), with Ex. D-401.6 (Plan C185, Red-109 Report, 2005-2009 ACS Survey). With respect to the latter goal, election analysis provided to the State's mapdrawers in 2011 indicated that CD 23 did not consistently perform for Democratic candidates (preferred by the majority of Hispanic voters in CD 23) under either Plan C100 or C185—the Hispanic-preferred candidate prevailed in 3 out of 10 elections in the OAG 10 under Plan C100, compared to 1 out of 10 under Plan C185. Test. of Ryan Downton, Tr. 1637:9-1638:8, Aug. 15, 2014.

Although the Legislature increased the performance of Republican candidates in statewide exogenous elections under Plan C185, Test. of John Alford, Tr. 1858:24-1859:3, Aug. 16, 2014; Ex. D-430, the only available evidence regarding the possible outcome of an endogenous election suggests that Pete Gallego, the Democratic challenger, would have prevailed against Congressman Canseco if the 2012 election had been conducted under Plan C185. Test. of John Alford, Tr. 1855:8-13, Aug. 16, 2014; Ex. D-428. Thus CD 23 leaned slightly more Republican than it had in the benchmark plan, consistent with the Legislature's stated goals, but it likely would have remained a highly competitive district in which Democratic congressional candidates outperformed Democratic candidates for statewide office. Test. of John Alford, Tr. 1851:14-1852:11, Aug. 16, 2014. In any event, under Plan C185, CD 23 provided the opportunity for cohesive Hispanic voters to elect their candidate of choice. Test. of John Alford, Tr. 1849:16-20, 1859:22-25, Aug. 16, 2014.

The configuration of CD 23 went through numerous changes during the 2011 redistricting process. *Compare, e.g.*, Ex. D-548.1 (statewide map for Plan C125), *with* Ex. D-559.1 (statewide map for Plan C149), *and* Ex. D-401.1 (statewide map for Plan C185). In the initial congressional plan released by Chairmen Burt Solomons and Kel Seliger (Plan C125), the El Paso boundary lines featured a protrusion from CD 23 into CD 16, consistent with a proposed map from the Texas Republican congressional delegation. Test. of Ryan Downton, Tr. 1640:24-1641:2, Aug. 15, 2014. In Plan C125, Maverick County was wholly contained within CD 28. *Id.* at 1641:5-8.

Moreover, CD 20's HCVAP and SSVR levels in Plan C125 were well below the benchmark figures because the creation of CD 35, a new HCVAP-majority district that extended from Bexar to Travis County, caused a ripple effect in which population was moved from CD 20 to CD 35 and from CD 23 and CD 28 into CD 20. *Id.* at 1642:20-1643:7; Joint Ex. J-62, Ryan Downton Dep. 33:21-35:13, 86:3-87:2, 89:2-22, Aug. 12, 2011.

Following the release of Plan C125, Representative Jose Menendez testified at a House Redistricting Committee hearing and requested that the configuration of CD 20 change to include more of downtown San Antonio. Test. of Ryan Downton, Tr. 1643:14-18, Aug. 15, 2014; Ex. D-601 (June 2, 2011 House Redistricting Committee Hearing Transcript) at 23-34. Accommodating Representative Menendez's request required the mapdrawers to make changes to CD 20, CD 23, and CD 35; in doing so, they attempted to balance the goals of keeping CD 35's HCVAP over 50% and maintaining CD 20 and CD 23 at or near benchmark demographic levels. Test. of Ryan Downton, Tr. 1643:14-22, 1664:24-1666:3, Aug. 15, 2014; Test. of Ryan Downton, Tr. 918:11-17, 918:23-921:12, 985:1-15, Sept. 9, 2011.

The congressional redistricting plan adopted by the House Redistricting Committee, Plan C149, made changes to Bexar County which included increasing CD 20's HCVAP to 60%. Test. of Ryan Downton, Tr. 1647:8-23, Aug. 15, 2014; Ex. D-559.7 (Plan C149, Red-119 Report, 2005-2009 ACS Survey). Plan C149 retained a configuration of El Paso County similar to Plan C125, with a protrusion from CD 23

into CD 16. Test. of Ryan Downton, Tr. 1647:24-1648:6, Aug. 15, 2014; Ex. D-559.1 (statewide map for Plan C149). Maverick County remained entirely contained within CD 28 under Plan C149. Ex. D-559.1.

Following the adoption of Plan C149, the mapdrawers continued drafting proposed maps that impacted CD 23 and neighboring districts. Test. of Ryan Downton, Tr. 1649:22-1650:10, Aug. 15, 2014. In order to ensure that CD 23 remained at benchmark population levels, the district needed to draw population from Hispanic areas. Test. of Ryan Downton, Tr. 917:24-921:12, Sept. 9, 2011. Because population could not be shifted from El Paso County or Bexar County without adversely impacting other districts, the mapdrawers determined that CD 23 needed to include a portion of either Webb County or Maverick County to maintain compliance with the Voting Rights Act. Test. of Ryan Downton, Tr. 1664:24-1666:18, Aug. 15, 2014; Test. of Ryan Downton, Tr. 921:7-18, Sept. 9, 2011. In light of LULAC v. Perry, however, the mapdrawers did not consider splitting Webb County to be an option. Test. of Ryan Downton, Tr. 1666:5-10, Aug. 15, 2014. Although Maverick County could have been placed wholly within CD 23, such a change was not legally required and would have negatively affected CD 23's Republican performance. Id. at 1666:11-18. The mapdrawers thus made the political decision to add to CD 23 only the portion of Maverick County needed for Voting Rights Act compliance. Id. at 1666:16-18.

On June 13, one day before the House floor debate on the congressional redistricting plan, Opiela sent Downton and Interiano a proposed map—uploaded to Speaker Straus' RedAppl account as STRJ C116—that made changes to El Paso and Bexar Counties and split Maverick and Atascosa Counties. Id. at 1656:11-1659:15, Aug. 15, 2014; Test. of Gerardo Interiano, Tr. 313:22-314:4, Aug. 11, 2014; Ex. D-541.1 (statewide map for STRJ C116). At this point in the drafting process, Downton felt that he had received enough suggestions from Opiela, and he was more concerned with finalizing a plan that could be adopted in the House than he was with satisfying Opiela and his clients. Test. of Ryan Downton, Trial Tr. 1690:11-23, Aug. 15, 2014. Downton ultimately drafted a floor amendment that borrowed the concept of splitting Maverick and Atascosa Counties from STRJ C116, but he revised their configuration, and the floor amendment did not incorporate the bulk of Opiela's proposals. Id. at 1660:18-25, 1726:15-1727:1; Ex. D-674 (overlay maps comparing STRJ C116 and Plan C170 in Atascosa, Bexar, El Paso, and Maverick Counties). The boundary between CD 23 and CD 28 was drawn by Ryan Downton, not Opiela.

Chairman Solomons subsequently offered the floor amendment as Plan C170, which created a smoother boundary line between CD 16 and CD 23 in El Paso County, changed the configuration of district boundaries in Bexar County, and split Maverick, Atascosa, and La Salle Counties between CD 23 and CD 28. Test. of Ryan Downton, Tr. 1662:20-1663:14, Aug. 15, 2014; Ex. D-567.1 (statewide map for Plan C170). Plan C170's changes to El Paso County were consistent with the changes that

had originally been suggested by Representative Pickett on behalf of Congressman Silvestre Reyes. Test. of Ryan Downton, Tr. 1643:23-1644:3, 1644:9-15, Aug. 15, 2014; Test. of Ryan Downton, Tr. 920:14-15, 921:1-6, Sept. 9, 2011; Joint Ex. J-62, Ryan Downton Dep. 37:20-38:23, 99:12-100:21, Aug. 12, 2011. Plan C170 was adopted by a majority of the House, including Representative Eric Johnson, Representative Pickett, and Representative Mike Villarreal. Ex. D-603.3 (June 14, 2011, House Journal) at 393-394. Representative Villarreal, the Vice-Chairman of the House Redistricting Committee and a member of the Bexar County delegation, described Plan C170 as an improvement to CD 23 and thanked Chairman Solomons for offering it. Test. of Burt Solomons, Tr. 1339:14-25, 1353:20-25, Aug. 14, 2014; Ex. D-603.1 (June 14, 2011 House Journal Supplement) at S2. Following the adoption of Plan C170, the configuration of CD 23 remained unchanged in Plan C185, except for minor technical corrections. Test. of Ryan Downton, Tr. 1692:15-1693:2, Aug. 15, 2014.

The adoption of Plan C170 demonstrates the divergence of the Legislature's goals from the goals of Opiela and the Republican Congressional delegation. CD 23's HCVAP and SSVR levels were higher under Plan C170 (58.5% HCVAP, 54.8% non-suspense SSVR) than Opiela's proposal in STRJ C116 (56.8% HCVAP, 53.6% non-suspense SSVR), Ex. D-677, but its Republican performance was lower, *see* Ex. D-692 (52.5% McCain 2008 under STRJ C116; 51.6% under Plan C170); Test. of Ryan Downton, Tr. 1669:6-10, 24-25, Aug. 15, 2014. Opiela was dissatisfied with Chairman

Solomons' floor amendment and was upset that the mapdrawers had not adopted his proposals—a sentiment that he emphasized to Interiano and Congressman Lamar Smith. Test. of Ryan Downton, Tr. 1653:13-21, 1666:19-22, Aug. 15, 2014; Test. of Gerardo Interiano, Tr. 368:8-10, 374:13-17, Aug. 11, 2014; *see also, e.g.*, Ex. D-631 ("okay . . . this has to stop"); Ex. D-632 ("Why do this to me?").

This was only one of many instances in which the Legislature declined to accept Opiela's ideas for the congressional plan. Other ideas that the Legislature declined to incorporate were a proposal to add the City of Odessa to CD 23, Test. of Ryan Downton, Tr. 1646:24-1647:7, Aug. 15, 2014; a jagged boundary between CD 23 and CD 16 in El Paso County, id. at 1649:2-5, 18-21; Test. of Gerardo Interiano, Tr. 358:23-359:3, Aug. 11, 2014; and a proposal to take CD 20 outside of Bexar County, Test. of Ryan Downton, Tr. 1656:18-1657:4, Aug. 15, 2014; Test. of Gerardo Interiano, Tr. 363:6-21, Aug. 11, 2014. The Legislature also disagreed with the Republican congressional delegation about CD 35. Opiela and the congressional delegation believed it was more important to maintain benchmark demographic levels in CD 20 than to ensure an HCVAP majority in CD 35; the Legislature believed it was more important to create CD 35 as an HCVAP-majority district. Test. of Gerardo Interiano, Tr. 362:3-363:5, 371:18-23, Aug. 11, 2014; Test. of Ryan Downton, Tr. 1646:8-22, 1691:19-22, Aug. 15, 2014; Test. of Ryan Downton, Tr. 918:6-17, 918:23-919:13, Sept. 9, 2011.

There is no evidence that the so-called "nudge factor" theorized by Opiela in a 2010 e-mail was ever developed by Opiela, provided to the State's mapdrawers, or used to draw CD 23 (or any other district). Not only were the data required to calculate the "nudge factor" unavailable, see, e.g., Ex. D-262, the State's mapdrawers did not receive any communications from Opiela purporting to implement the "nudge factor" approach. Test. of Ryan Downton, Tr. 1671:23-1672:3, Aug. 15, 2014; Test. of Gerardo Interiano, Tr. 375:5-8, Aug. 11, 2014; see also Test. of Richard Murray, Tr. 1426:14-18, Aug. 15, 2014. Opiela never indicated that he had sought to include lowturnout Hispanics in CD 23 in any of his proposed congressional maps. Test. of Gerardo Interiano, Tr. 375:9-13, Aug. 11, 2014. The mapdrawers themselves did not rely on turnout data in drafting CD 23 or any other district. Test. of Ryan Downton, Tr. 956:11-957:7, 1005:17-24, Sept. 9, 2011. Spanish-surname turnout data was not even available to mapdrawers using RedAppl in 2011, Test. of Clare Dyer, Tr. 784:19-785:10, Aug. 13, 2014; see also Test. of Lisa Handley, Tr. 622:20-623:21, Aug. 12, 2014.

The evidence does not support the allegation that the Legislature set out to replace areas of high Hispanic voter turnout with areas of low Hispanic voter turnout in CD 23. Dr. Flores's opinion that the mapdrawers deliberately manipulated turnout is unfounded. His turnout analysis was based exclusively on data from the 2010 general election—an election that the mapdrawers did not consider, Test. of Henry Flores, Tr. 548:7-13, Aug. 12, 2014; Ex. D-661 (Texas Secretary of State, Turnout and Voter Registration Figures, 1970-Current). He did not consider the 2008 presidential

election, which the mapdrawers used to measure partisan performance when drawing the congressional plan. Test. of Henry Flores, Tr. 549:17-20, Aug. 12, 2014; Test. of Ryan Downton, Tr. 1611:4-12, 1668:18-23, Aug. 15, 2014. Not even the 2010 data support Dr. Flores's conclusion. Using Dr. Flores's data and turnout measure (Spanish surname turnout/SSVR), Dr. Alford determined that the difference in turnout between the Bexar County precincts moved in and out of CD 23 in Plan C185 was a mere 0.4%. Test. of John Alford, Tr. 1861:15-22, 1862:18-23, Aug. 16, 2014; Ex. D-431. Dr. Flores acknowledged that Latino turnout in CD 23 actually increased in Bexar County under Plan C185 compared to the benchmark plan. Test. of Henry Flores, Tr. 555:13-17, Aug. 12, 2014. Similarly, Dr. Handley's analysis demonstrates that any reduction in voter participation in CD 23 would have been less significant in heavily Hispanic precincts (defined by Dr. Handley as precincts with greater than 65% Hispanic voting-age population) than in all precincts combined. Test. of Lisa Handley, Tr. 634:2-637:21, Aug. 12, 2014; Ex. D-676.

Dr. Flores made no effort to determine whether partisanship explained the changes to CD 23; he did not consider the role of political considerations at all. Test. of Henry Flores, Tr. 541:16-20, 542:1-4, 550:5-7, Aug. 12, 2014. Had he done so, he would have found, as Dr. Arrington recognized, that the precincts moved into CD 23 under Plan C185 had higher levels of Republican performance than precincts that were moved out, thus satisfying the State's goal of improving Congressman Canseco's reelection chances. Test. of Theodore Arrington, Tr. 451:1-8, Aug. 12, 2014.

The evidence also proves that whatever Opiela expected to achieve with the so-called "nudge factor" did not occur in CD 23 (or any other district) in Plan C185. In his "useful metric" e-mail from November 2010, Opiela describes "a 'nudge factor' by which one can analyze which census blocks . . . help pull the district's Total Hispanic Pop and Hispanic CVAPs up to majority status, but leave the Spanish Surname RV and TO the lowest." Ex. DOJ-75. But rather than increasing Hispanic population and CVAP while minimizing SSVR and Hispanic turnout—the mechanism imagined by Opiela—Plan C185 narrowed the spread between CD 23's non-suspense SSVR and HCVAP levels from 5.8% under Plan C100 to 3.7% under Plan C185. See Ex. D-677. Even if Opiela had succeeded in creating his "useful metric," the evidence shows that the Legislature did not use it to create CD 23.

Even if Plaintiffs could prove that the creation of CD 23 was motivated by a racially discriminatory purpose, their Fourteenth Amendment vote-dilution claim would fail because they cannot prove that the district had a discriminatory impact on any voter. The Court modified CD 23 in Plan C235, which was used to conduct elections in 2012. *See* Order at 30-32 (March 19, 2012), ECF No. 691. The 2013 Texas Legislature adopted the Court's configuration of CD 23. *See* Act of June 21, 2013, 83d Leg., 1st C.S., ch. 3, 2013 Tex. Gen. Laws 5005. Because CD 23, as configured in Plan C185, has not had and will not have any effect on any voter, Plaintiffs cannot establish intentional vote dilution under the Fourteenth Amendment.

D. Congressional District 25

Under Plan C100, CD25 was an Anglo-CVAP-majority district based in Travis County. Test. of Stephen Ansolabehere, Tr. 968:8-14, Aug. 13, 2014. The Legislature pursued two goals in the Travis County area: creating a new Hispanic opportunity district to reflect concentrated population growth in Central Texas, Test. of Ryan Downton, Tr. 1597:20-1598:5, 1779:7-10, Aug. 15, 2014; and reducing the reelection prospects of CD 25's Democratic incumbent, Congressman Doggett, *id.* at 1785:4-14. The reconfiguration of congressional districts in Travis County did not have the purpose or effect of diluting minority voting strength.

By creating CD 35 as a new Hispanic CVAP-majority district linking Travis and Bexar Counties, the Legislature provided Hispanic voters in Travis County with the opportunity to elect their candidate of choice. To the extent this reduced the ability of certain Travis County voters to elect a Democratic member of Congress, that harm fell on Anglo and minority voters alike.

District 35 was based on a proposal by the Mexican American Legal Defense and Education Fund in Plan C122. Joint Ex. J-62, Ryan Downton Dep., 114:17-24, Aug. 12, 2011; Test. of Ryan Downton, Tr. 915:16-921:18, Sept. 9, 2011. Population growth in central Texas justified the creation of a new congressional district in C185, such as CD 35. See Test. of Ryan Downton, Tr. 915:16-921:18, Sept. 9, 2011.

In Travis County, Latinos vote cohesively at a rate below 70% in primary elections. Engstrom Rebuttal Rep. tbl. 8 (Joint Expert Ex. E-7). In Travis County, the

average Anglo support for Latino candidates is at 45%, which is slightly above the statewide average of 43%, but below the 49% support in Bexar County. *Id.* tbls. 1-8. In Travis County, African-American support for Latino candidates is at 30%, which is the lowest in any of the counties and is well below the statewide average of 40%. *Id.*

Southeast Austin and Southside and Westside of San Antonio are major urban areas sharing common interests, which weighs in favor of combining these communities of interest in one congressional district as CD35 in plan C185 does. Test. of Joe Bernal, Tr. 557:7- 559:3, Sept. 7, 2011. It is not unusual for Austin and San Antonio to be combined in the same congressional district. Test. of Ryan Downton, Tr. 943:7-944:16, Sept. 9, 2011. San Antonio and Williamson County were combined in Congressional District 21 for the 1996 special and general elections, the 1998 general election, the 2000 general election, the court-ordered map that was used for the 2002 election, and the legislatively drawn map used for the 2004 elections and the 2006 primaries. Exs. TLRTF-305-306. Certain areas in Travis and Bexar Counties were included within District 35 in order to keep Latino communities of interest together. Joint Ex. J-62, Ryan Downton Dep. 114-25-116:7, 118:13-119:4, 121:22-25, Aug. 12, 2011.

The Legislature considered many factors other than race in drawing CD 35. Test. of Ryan Downton, Tr. 915:16-921:18, Sept. 9, 2011. Governor Perry's office wanted the Redistricting Committee to create Republican districts in Travis County, and specifically indicated that Lloyd Doggett should be in a Republican district. Test.

of Ryan Downton, Tr. 1785:4-11, Aug. 15, 2014. Downton primarily used partisan shading when drawing Travis County. Travis County borders several Republican districts. Travis County has a large Anglo Democrat population. Downton attempted to divide Travis County's Anglo democrats among the Republican districts for the partisan purposes of electing Republicans from those districts. *Id.* at 1674:11-21. Downton was attempting to create a Section 2 district under the Voting Rights Act when he drew CD35. Accordingly, he considered racial data in Travis County to reach the 50% HCVAP threshold, which he thought was necessary to comply with Section 2. Test. of Ryan Downton, Tr. 1674:25-8, Aug. 15, 2014.

Plaintiffs' primary complaints with CD35 have nothing to do with race. Representative Eddie Rodriguez does not like that San Antonio and Bexar County would anchor the new district CD35. Test. of Eddie Rodriguez, Tr. 828:10-17, Aug. 13, 2014. He is concerned that, under C185, Travis County Voters will not have the same voting strength to elect somebody from Travis County. *Id.* at 851:3-7. Representative Rodriguez does not feel that he has suffered any injury as a resident of CD35 so long as CD35 continues to elect Lloyd Doggett or someone from Travis County. That would change if CD35 elected someone from San Antonio. *Id.* at 851:8-852:8. Representative Dukes's first and foremost issue with plan C185 is that Travis County is the only urban county that does not have a congressional seat anchored within the county. Test. of Dawnna Dukes, Tr. 881:3-10, Aug. 13, 2014.

E. Congressional District 27

The Legislature's goals with respect to CD 27 were to create a Republicanleaning congressional district anchored in Nueces County and to create a separate congressional district anchored in Cameron County. Test. of Ryan Downton, Tr. 1632:21-1633:4, Aug. 15, 2014; Test. of Ryan Downton, Tr. 1021:21-1022:14, Sept. 9, 2011. Downton was responsible for drawing CD 27 in Plan C185. Test. of Ryan Downton, Tr. 1632:18-20, Aug. 15, 2014. The concept for anchoring Nueces County with counties to the north came from the Republican congressional delegation's proposed map, comments made at the 2010 interim hearings, and conversations Downton had with legislators from Nueces County and Cameron County. Id. at 1594:11-18, 1634:5-11, 1762:15-22. Downton learned about comments made at interim hearings by speaking with Chairman Todd Hunter, who advised Downton and the Redistricting Committee on the configuration of Nueces County, Test. of Todd Hunter, Tr. 1118:11-25, Aug. 14, 2014; Test. of Ryan Downton, Tr. 1785:18-21, Aug. 15, 2014, and from reviewing the reports from the interim hearings. Test. of Ryan Downton, Tr. 1633:9-18, 1725:16-20, 1761:18-1762:2, Aug. 15, 2014.

The configuration of CD 27 in Plan C185 is consistent with requests by members of the public and South Texas legislators that Nueces County and Cameron County be placed in different congressional districts. At the 2010 interim hearing in Corpus Christi, numerous citizens testified that due to competing economic interests, and the connection between Nueces County and communities to the north of Corpus

Christi, they would prefer to have Nueces County and Cameron County in separate congressional districts. Test. of Todd Hunter, Tr. 1073:7-1075:19, Aug. 14, 2014; D-574. Among the citizens advocating the separation of Nueces and Cameron Counties was former Democratic State Representative and MALC Chairman Hugo Burlanga, who testified that the ports of Brownsville and Corpus Christi should be represented by different congressmen. Test. of Todd Hunter, Tr. 1075:20-1076:8, Aug. 14, 2014; Ex. D-574 at 25. Senator Eddie Lucio, Jr., and Representative Rene Oliveira supported the separation of Nueces and Cameron Counties as a means of securing an additional congressional seat based in the Rio Grande Valley. Test. of Ryan Downton, Tr. 1022:17-18, Sept. 9, 2011; Test. of Todd Hunter, Tr. 1076:17-1077:4, Aug. 14, 2014; Test. of Theodore Arrington, Tr. 444:23-445:6, Aug. 12, 2014; Ex. D-607; see Rene Oliveira Dep. 63:6-10, 63:24-25, March 26, 2014 (ECF No. 1092-3). Representative Hunter communicated his opinion to the Redistricting Committee that Nueces County should be in a congressional district going north. Test. of Todd Hunter, Tr. 1118:11-25, Aug. 14, 2014. Downton received directives from Representative Hunter on how to draw Nueces County. Test. of Todd Hunter, Tr. 1118:11-25, Aug. 14, 2014; Test. of Ryan Downton, Tr. 1785:18-21, Aug. 15, 2014. Nueces County has been joined with counties to the north of Nueces County in past configurations. Test. of Todd Hunter, Tr. 1078:14-16, Aug. 14, 2014. Because of the population of Nueces County in Plan C185, the county will have a say in who is

elected to CD 27. Test. of Todd Hunter, Tr. 1077:14-1078:10, Aug. 14, 2014; see also Ex. D-401.2.

Under Plan C185, the Legislature created CD 34 as a reliable Latino-majority district anchored in Cameron County. *See* Joint Ex. J-62, Ryan Downton Dep. 61:18-23, Aug. 31, 2011. Professor Alford testified that CD 34 is a much more Democratic-leaning district than former CD 27 in the benchmark plan, and to the extent CD 34 is a replacement for CD 27, it is a more effective district. Test. of John Alford, Tr. 1829:9-10, 1829:15-21, 1831:7-9, Sept. 14, 2011.

The plaintiffs presented no evidence that the Legislature created CD 27 for the purpose of discriminating against Hispanic voters in Nueces County. Representative Dawnna Dukes testified that she was aware that citizens from Nueces County and Cameron County wanted the two counties to have their own congressional districts. Test. of Dawnna Dukes, Tr. 917:2-11, Aug. 13, 2014. The Task Force Plaintiffs' expert, Dr. Henry Flores, did not have an opinion on whether race was the predominant factor guiding map drawers in the configuration of CD 27. Test. of Henry Flores, Tr. 543:8-16, Aug. 12, 2014. The United States' expert testimony on the subject amounted to uninformed speculation. Dr. Arrington did not review the transcript from the interim hearing held in Corpus Christi; he did not consider the public testimony in favor of putting Nueces County and Cameron County in separate congressional districts, Test. of Theodore Arrington, Tr. 465:3-7, Aug. 12, 2014; he did not know that Nueces County and Cameron County have separate media markets,

id. at 466:18-24; see also D-574 at 24; he was not aware that Nueces County and Cameron County were home to competing ports, Test. of Theodore Arrington, Tr. 466:14-17, Aug. 12, 2014; and he was not aware that representatives from South Texas had requested that Cameron County anchor its own congressional district, id. at 466:18-467:3.

F. Dallas/Fort Worth

Plaintiffs allege that the congressional districts in Dallas and Tarrant County intentionally diluted minority voting strength and that the Legislature intentionally divided minority voters on the basis of race. See, e.g., Complaint in Intervention ¶ 27 (Aug. 22, 2013), ECF No. 871-1. The evidence shows that the Legislature relied on political data to place Democratic areas in Republican districts and maintain a pro-Republican partisan balance. To the extent race was a factor in the creation of CD 12 and CD 26, it was considered only to correct the inadvertent fracturing of minority communities. In any case, race did not predominate in the creation of CD 12 or CD 26; the Dallas/Fort Worth congressional districts were not drawn for the purpose of diluting minority voting strength; and they have not had a discriminatory effect.

Population growth indicated that a new congressional district would be located in the Dallas/Fort Worth region. Test. of Ryan Downton, Tr. 1597:20-1598:9, Aug. 15, 2014. The primary questions were whether it was possible to create a Hispanic citizen-voting-age-majority district in Tarrant and/or Dallas County and, if not, whether the creation of a Democratic-leaning district was legally required or politically

feasible. Because Chairman Burt Solomons did not believe that he had the votes to pass a plan that created two new Democratic districts, he did not want to propose such a plan unless it would be required by the Voting Rights Act. Test. of Gerardo Interiano, Tr. 380:15-382:8, Aug. 11, 2014. In terms of population growth, Dallas County itself had not grown, but the surrounding counties had. Test. of Ryan Downton, Tr. 1597:20-1598:5, Aug. 15, 2014. The Legislature attempted to draw a congressional district in the Dallas/Fort Worth region in which Latino voters could elect the candidate of their choice, but could not get the HCVAP levels over 50% and create a district that was reasonably compact. Joint Ex. J-62, Ryan Downton Dep. 67:15-69:10, 126:12-128:6, August 12, 2011; Test. of Ryan Downton, Tr. 1598:10-21, Aug. 15, 2014.

Downton reviewed several proposals for a Hispanic opportunity congressional district in the Dallas/Fort Worth region, but none had an HCVAP majority. Test. of Ryan Downton, Tr. 1598:10-19, 1605:4-12, Aug. 15, 2014. The proposed plans included a MALDEF plan, *id.* at 1592:12-1593:6; the Republican congressional delegation plan, *id.* at 1594:11-22; two plans from the Governor's office, *id.* at 1602:7-1603:17, 1604:16-1605:3; and a plan from Congressman Joe Barton (which was potentially subject to legal challenge on other grounds), *id.* at 1605:20-1606:1. The Republican congressional delegation's plan proposed two new Republican districts and two new Democratic districts. Test. of Ryan Downton, Trial Tr. 1797:10-23, Aug. 15, 2014; *see also* Ex. D-573.1. Downton and Chairman Solomons consulted with

lawyers from TLC, who advised that a proposed district would not be a required draw if it did not reach 50% HCVAP. Test. of Ryan Downton, Tr. 1797:10-23, Aug. 15, 2014. The congressional delegation's proposed Dallas/Fort Worth Democratic-leaning district (CD 33) contained only 34% SSVR, which meant that it was not required by the Voting Rights Act. Test. of Gerardo Interiano, Tr. 350:25-351:25, Aug. 11, 2014.

Downton modified the proposed Dallas/Fort Worth districts to see if he could get them above 50% HCVAP, but he could not. Test. of Ryan Downton, Tr. 1598:10-21, Aug. 15, 2014. The 50% HCVAP threshold was important because if such a district could have been drawn, it likely would have been required under the Voting Rights Act, while a district without an HCVAP majority would not. Id. at 1598:22-1599:2. The Legislature viewed the creation of coalition districts as Democratic districts and they did not have a goal of creating additional Democratic congressional districts unless it was required to do so. Test. of Kel Seliger, Tr. 277:7-17, Aug. 11, 2014. Expert testimony has established that it is not possible to draw an HCVAPmajority district within Tarrant County or Dallas County. Test. of George Korbel, Tr. 1236:21-1238:17, Aug. 14, 2014. Hanna testified that the demonstration plan MALDEF submitted to create an additional majority Hispanic district in Dallas/Fort Worth had a lot of arms and tentacles so he attempted to draw a district himself that would be more compact and realized that it could not be done. Test. of David Hanna, Tr. 1576:19-1577:3, Aug. 15, 2014. Downton determined that such a district could not be drawn with population from both counties. At that point, it was effectively determined that three of the new congressional districts would be Republican and one would be Democratic. Test. of Ryan Downton, Tr. 1600:4-10, Aug. 15, 2014. Although Dr. Theodore Arrington criticized the Legislature for failing to create additional minority opportunity districts in the Dallas/Fort Worth region, he did not dispute that from 2000 to 2010, HCVAP numbers only rose from 22.4% to 22.6% statewide, and conceded that he did not conduct a statewide analysis in every county to see how much the HCVAP increased during this time period. Test. of Theodore Arrington, Tr. 451:19-25, 453:2-21, Aug. 12, 2014.

Partisan performance then became the dominant factor in the Dallas/Fort Worth congressional districts. Downton created a new district in North Texas to reflect significant population growth in the region, particularly outside Dallas and Tarrant County. With the new district, he had to balance the percentage of Republicans in each district to be more balanced across all the districts. Test. of Ryan Downton, Tr. 1606:7-22, Aug. 15, 2014. Downton tried to keep Districts 24, 26, 12, 33, 35, and 6 balanced between 55% and 60% McCain (in the 2008 presidential election). *Id.* at 1626:15-22. He explained that if the McCain results varied between districts, Congressmen complained because they felt like someone else was getting a stronger district. *Id.* at 1612:17-1613:1.

Downton initially drew CD 26, including its southern extension into Tarrant County, to balance the strong Republican nature of Denton County and to prevent

the other Tarrant County districts from being too Democratic. *Id.* at 1607:24-1608:9. After Plan C125 was released, Representative Charlie Geren advised Downton that Kay Granger (his Congressperson) wanted North Richland Hills in her district. Downton moved the southern extension of CD 26 west to accommodate this request. *Id.* at 1613:24-1614:11. He drew the boundaries of CD 12 along the city lines of Haltom City, Richland Hills, West Lake, and Keller. *Id.* at 1614:22-1615:2. Congresswoman Granger also requested the Trinity River Vision project, but only part of it was included in her district under Downton's plan HRC1 C130. *Id.* at 1615:7-15. Downton also added an airport into CD 12 at Congresswoman Granger's request. *Id.* at 1622:23-1623:16. At this point in the process, Downton was using McCain shading and total population data, *id.* at 1611:2-1612:6, 1616:12-17; he did not use racial shading, *id.* at 1617:10-14.

Between May 25 and May 28, Interiano informed Downton that he had split up the African-American population in Fort Worth and asked him to fix it because they were trying to keep communities of interest together. *Id.* at 1618:6-23. Hanna had advised the mapdrawers that it would be better to keep Hispanic communities together and to keep black communities together, but he did not advise whether or not black and Hispanic communities should be kept combined in a single district. Test. of David Hanna, Tr. 1546:14-1547:4, Aug. 15, 2014. Downton checked to see whether African-American and Hispanic communities had been divided in Tarrant County using RedAppl's racial shading feature—the only means available since

Downton was not familiar with Fort Worth. Test. of Ryan Downton, Tr. 1618:24-1620:1, Aug. 15, 2014. When Downton considered racial shading, he did so at the VTD or precinct level. *See id.* at 1619:14-17. In Plan C125, areas of more concentrated black population were joined in CD 12, *id.* at 1621:20-1622:4, and Hispanic communities were joined in CD 26, *id.* at 1622:5-9.

In the next version of the congressional plan, C149, Downton captured more of the Trinity River Vision project in CD 12. He also learned through a blog that he had split Hispanic communities in Fort Worth; in response, he used racial shading at the VTD level to identify and reunite them. *Id.* at 1623:22-1624:16; see also Ex. D-715. Plan C149 also put the Como area into CD 26 because Representative Marc Veasey had requested that it be included in a Hispanic opportunity district in the Texas House plan. The Geren amendment, Plan C169, see Ex. D-566, moved Como from CD 26 and joined it with the Fort Worth African-American community in CD 12, which Downton understood to be at Representative Veasey's request. Test. of Ryan Downton, Tr. 1625:1-12, 1629:7-2, Aug. 15, 2014. Mr. Downton testified that any precinct splits made in the Dallas/Fort Worth region in the Congressional plan were done to comply with one-person, one-vote, ensure that the entire Trinity River Vision project was included in Congresswoman Granger's district, and to include district offices in the appropriate districts based on specific member requests. *Id.* at 1631:5-24, 1715:2-15, 1718:5-24, 1719:4-13, 1720:4-1721:1, 1723:8-25.

Even if Plaintiffs could prove that the creation of the Dallas/Fort Worth area congressional districts in Plan C185 was motivated by a racially discriminatory purpose, their Fourteenth Amendment vote-dilution claim would fail because they cannot prove that the districts had a discriminatory impact on any voter. The Court modified the districts substantially in Plan C235, which was used to conduct elections in 2012. See Order at 33-39 (March 19, 2012), ECF No. 691. The 2013 Texas Legislature adopted Plan C235. See Act of June 21, 2013, 83d Leg., 1st C.S., ch. 3, 2013 Tex. Gen. Laws 5005. Because the Dallas/Fort Worth congressional districts, as configured in Plan C185, have not had and will not have any effect on any voter, Plaintiffs cannot establish intentional vote dilution under the Fourteenth Amendment.

IV. FOURTEENTH AMENDMENT: ONE PERSON, ONE VOTE

A. Legal Standard

In a state legislative districting plan, a total deviation of less than 10% from strictly equal population is considered to be de minimis and consistent with the Constitution. See, e.g., Brown v. Thomson, 462 U.S. 835, 842-43 (1983) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations."); see also Fairley, 584 F.3d at 675 (confirming that a total population deviation of less than 10% "is considered minor and does not suffice, alone, to make out a prima facie case of discrimination"); Rodriguez v. Pataki, 308 F. Supp. 2d 346, 363-64 (S.D.N.Y.), aff'd, 543 U.S. 997 (2004) ("Thus, a redistricting plan with a maximum deviation below ten

percent is *prima facie* constitutional and there is no burden on the State to justify that deviation.") (quoting *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1031 (D. Md. 1994)). "[F]or deviations below 10%, the state is entitled to a presumption that the apportionment plan was the result of an 'honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)). Plan H283 is entitled to a presumption of good faith and compliance with the Equal Protection Clause because the total deviation does not exceed ten percent. Plaintiffs' claim that Plan H283 is not entitled to a presumption of constitutionality misinterprets the law.

Plaintiffs would deprive Plan H283 of the presumption of good faith on the authority of Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga.), aff'd, 542 U.S. 947 (2004). Based on Larios, they contend that the Legislature's reliance on a 10% threshold demonstrates a lack of good faith. Plaintiffs misinterpret Larios, and they read too much into the Supreme Court's summary affirmance. Larios itself recognizes that legislative plans with a total deviation under 10% "are presumptively constitutional, and the burden lies on the plaintiffs to rebut that presumption." 300 F. Supp. 2d at 1341. In Larios, the district court merely found that the plaintiffs successfully carried their burden.

There is no authority for the proposition that reliance on a 10% threshold is improper. In *Rodriguez v. Pataki*, 308 F. Supp. 2d at 366, the district court rejected the

argument that the state's intentional adherence to the ten percent rule, which was undisputed in the record, demonstrated a lack of "honest and good faith effort" to achieve population equality. The court held that "an express objective of staying within a ten-percent deviation while pursuing other legitimate goals provides no support to the plaintiffs' claim of invidious or arbitrary discrimination or of bad faith." *Id.* at 367; *see also Marylanders for Fair Representation*, 849 F. Supp. at 1034 (holding that the goal of staying within a ten percent deviation "demonstrates nothing more than the objective of crafting a plan with constitutional population equality"). The Supreme Court affirmed *Rodriguez v. Pataki* after it affirmed *Larios. See* 543 U.S. 997 (2004).

The Supreme Court's summary affirmance of the district court's judgment in Larios did not revise the doctrine of one-person, one-vote:

When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.

Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring), quoted in Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam) (explaining that "[t]he District Court erred in believing that our affirmance in [Tucker v.] Salera[, 424 U.S. 959 (1976),] adopted the reasoning as well as the judgment of the three-judge court in that case"); see also Bush v. Vera, 517 U.S. at 996 (Kennedy, J., concurring) ("We do not endorse the reasoning of the district court when we order summary affirmance.").

Because the ten percent threshold is intended to provide leeway for the exercise of state policy in drawing state legislative districts, plaintiffs bear a heavy burden to overcome the presumption of constitutionality that attaches to a plan with minimal deviation. Specifically, a plaintiff must prove:

that the deviation in the plan results *solely* from the promotion of an unconstitutional or irrational state policy. . . . In addition, the plaintiff must prove that the minor population deviation is not caused by the promotion of legitimate state policies.

Rodriguez, 308 F. Supp. 2d at 365 (quoting Marylanders for Fair Representation, 849 F. Supp. at 1032). The district court in Rodriguez v. Pataki explained that this heavy burden is necessary to preserve the ten percent threshold and protect the legislature's prerogative to draw electoral districts:

If the burden on the plaintiffs in minor-deviation cases were anything less than this substantial showing, then the plaintiffs would be able to challenge any minimally deviant redistricting scheme based upon scant evidence of ill will by district planners, thereby creating costly trials and frustrating the purpose of *Brown*'s "ten percent rule."

Id. at 365. The Plaintiffs have utterly failed to carry this heavy burden. They have identified no policy or pattern of overpopulating certain districts to favor members of one party or residents of certain regions. They have identified no improper purpose underlying the creation of any House districts. Accordingly, they have failed to shift the burden to the State to justify the deviations from equal population in Plan H283.

B. Plaintiffs Have Not Shown Systematic Overpopulation Of Hispanic Or African-American Opportunity Districts In Plan H283.

Whether evaluated for purpose or effect, Plan H283 bears no resemblance to the plans struck down in Larios. In 2001, the Democrat-controlled Georgia legislature redrew Georgia House and Senate districts to further two "expressly enumerated objectives: the protection of rural Georgia and inner-city Atlanta against a relative decline in their populations . . . and the protection of Democratic incumbents." Larios, 300 F. Supp. 2d at 1325. A three-judge district court found unequivocal evidence that the legislature "systematically and intentionally create[d] population deviations among districts in order to favor one geographic region of a state over another." *Id.* at 1347. The Georgia Legislature also used the redistricting plan to systematically eliminate Republicans. The Georgia House plan paired 50% of Republican incumbents; the Senate plan paired 42%. See id. at 1326-27. The result was a House plan in which 90 of the 180 seats deviated from the ideal population by more than 4%, to the uniform disadvantage of Republican districts, and half of Republican incumbents were paired while Democrats were generally protected. The problem in Larios was not that the Georgia Legislature relied on a 10% safe harbor; it was the Legislature's use of the deviation to systematically target the Republican Party and favor specific regions of the State. 40 Cf. LULAC, 548 U.S. at 463 n.5 (Stevens, J., concurring in part and

⁴⁰ To carry their burden and rebut the presumption of constitutionality, however, the plaintiffs must do more than show that the State could have drawn a plan with a lower deviation. *See, e.g.*, *Gaffney v.*

dissenting in part) (explaining that the Georgia state legislative districts at issue in Larios were "driven by the impermissible factors of regional favoritism and the discriminatory protection of Democratic incumbents" (emphasis added)). The record shows no such pattern of regional or partisan favoritism through deviations from equal population in Plan H283.

Unlike the Georgia Legislature, the Texas Legislature expressed neutral goals that did not favor any particular region or target any political party. In the House redistricting plan, the Legislature acted "to make sure that it was a member-driven process and that we paired the least number of members, while abiding with both state and federal law"; to maintain compactness and contiguity; to keep counties whole; and to preserve communities of interest. Test. of Gerardo Interiano, Tr. at 1499:15-1500:3, Sept. 12, 2011. The Legislature had no specific policy regarding deviation from ideal district population. *See* Test. of Ed Martin, Tr. 412:2-16, Sept. 7, 2011 (testimony from Perez expert that he did not identify a unifying purpose behind the deviations in Plan H283 and was not aware of any intent to overpopulate Hispanic- and African-American-majority districts).

The record shows no pattern of systematically overpopulating Democratic districts, nor does it indicate systematic overpopulation of either African-American or Hispanic opportunity districts. Dr. Alford testified that the average deviation from the

Cummings, 412 U.S. 735, 740-41 (1973) (holding that a total deviation of 7.83% did not state a prima facie claim, even if a smaller deviation were possible).

statewide ideal district population in Plan H283 was +232 persons in minority-CVAPmajority districts, -124 persons in Anglo-CVAP-majority districts, -242 persons in majority-SSVR districts, and +63 persons in SSVR-minority districts. Test. of John Alford, Tr. 1870:8-1123, July 19, 2014. The greatest average deviation in this group amounts to less than two tenths of a percent of the ideal district population. Id. at 1871:16-24. Dr. Alford also adjusted his analysis to account for drop-in counties, where the total county population, divided by the whole number of apportioned districts, might produce an average district population higher or lower than the statewide ideal. See id. at 1872:1-1873:17. Based on the adjusted ideal district population, the average deviation was -170 in minority-CVAP-majority districts, +91 in Anglo CVAP-majority districts, +80 in SSVR-majority districts, and -21 in SSVRminority districts. Id. at 1873:18-1874:22. Finally, Dr. Alford considered districts in drop-in counties as a separate set to test the allegation that a pattern of overpopulation appeared in drop-in counties. See id. at 1875:1-11. Based on the adjusted countywide ideal population, the average deviation was -149 in minority-CVAP-majority districts, +141 in Anglo-CVAP-majority districts, -626 in SSVRmajority districts, and +209 in SSVR-minority districts. *Id.* at 1876:11-25.

Dr. Alford considered the distribution of deviation from the ideal district population in various sets of districts to test the allegation that there was a pattern of overpopulating minority-majority districts and underpopulating Anglo-majority districts in Plan H283. Based on his analysis of the distribution of deviation from the

statewide ideal population, Dr. Alford testified that there was no discernible pattern of overpopulating minority-CVAP-majority districts, see id. at 1880:13-17; Ex. D-172, or SSVR-majority House districts relative to the statewide ideal, see id. at 1881:25-1882:13; Ex. D-173, and no discernible pattern of underpopulating Anglo-CVAPmajority districts relative to the statewide ideal, see id. at 1883:10-14; Ex. D-174. Based on a similar analysis of the distribution of deviation in drop-in districts, Dr. Alford testified that there was no discernible pattern of overpopulating minority-CVAPmajority districts in drop-in counties relative to the countywide ideal population, see id. at 1884:20-24; Ex. D-175, and no discernible pattern of overpopulating SSVRmajority districts in drop-in counties relative to the countywide ideal population, see id. at 1885:22-1886:1; Ex. D-176. Plan H283 does not demonstrate any pattern of deviation, much less one that disadvantages Democrats, minority voters, or a particular region of the State. See, e.g., Test. of Theodore Arrington, Tr. 182:10-13, July 14, 2014 (conceding that there is no systematic overpopulation of minority districts in Plan H283 when one takes the county line rule into account).

Nor does Plan H283 indicate an effort to reduce the size of the minority party's delegation. In 2000, Georgia Democrats set out to increase their share of power by redistricting a significant percentage of the Republican delegation out of existence. The plans considered in *Larios* paired 50% of Republican incumbents in the Georgia House and 42% of Republican incumbents in the Georgia Senate. The Georgia Legislature's failure to protect Republican incumbents provided clear evidence of an

improper design. *See Larios*, 300 F. Supp. 2d at 1347 ("[T]he policy of protecting incumbents was not applied in a consistent and neutral way. . . . On the contrary, it was applied in a blatantly partisan and discriminatory manner, taking pains to protect only Democratic incumbents."). Regardless of what happened at the polls, the redistricting plans for the Georgia House and Senate guaranteed wholesale defeat for the minority party.

Texas Republicans did not use the redistricting process to increase their share of the Texas House delegation. They had already gained seats by winning elections in 2010. Plan H283 would merely have preserved victories provided by voters in the preexisting (and legal) districts, and it would have done so without systematically eliminating Democratic incumbents or reducing the size of the Democratic delegation. See Test. of J. Morgan Kousser, Tr. 273:21, Sept. 6, 2011 (testimony by MALC's expert that Plan H283 does not show the same pattern of incumbent pairing as the plans at issue in Larios); Test. of Ed Martin, Tr. 403:2-18, Sept. 7, 2011 (testimony by Perez expert that he was not aware of any intent to systematically pair Democratic incumbents); Joint Ex. E-16, Expert Report of Michael McDonald, Appendix at 10-13 (identifying 51 districts in Plan H283 as Democratic-majority districts based on the Democratic share of statewide elections from 2002-2010). Of the fourteen incumbents that would have been paired under Plan H283, only two were Democrats. See Ex. D-13 at S-99. The absence of discriminatory incumbent pairings in Plan H283 is sufficient to distinguish this case from Larios.

C. Population Deviations In Plan H283 Do Not Dilute Minority Voting Strength.

Unlike the Georgia plans in *Larios*, 300 F. Supp. 2d at 1347, Plan H283 does not dilute the votes of citizens in certain areas of the State. In Rodriguez v. Pataki, 308 F. Supp. 2d 346, the district court considered a claim, similar to the claim in *Larios*, that the New York Legislature unconstitutionally deviated from one-person one-vote by overpopulating "downstate" districts. The CVAP figures showed that districts in New York City were underpopulated, in terms of eligible voters, by 12% and that upstate districts were overpopulated by 15.4%. The court recognized that total population is the generally accepted apportionment base, but it found the CVAP data useful to judge the dilutive effect of the redistricting plan. Based on the proportion of eligible citizens and actual voters, the court found that "[t]he practical effect of the Senate Plan . . . is to dilute the votes of 'upstate' residents, not those who reside 'downstate." Id. at 369. The legislature had not used CVAP figures and did not favor one apportionment base over the other; the CVAP figures merely showed "that under the circumstances of this case, including the fact that the plan is prima facie constitutional, we do not need to ignore the reality that the overpopulation of New York City districts has not, in fact, diluted the voting strength of 'downstate' voters." *Id.* at 370.

As in Rodriguez v. Pataki, the record shows that voting strength in Plan H283 would have been uniformly stronger in Democratic districts, despite their alleged

systematic overpopulation, because the average number of eligible voters in Democratic districts is lower than the number in Republican districts. The statewide average VAP under Plan H283 was 121,716. *See* Joint Ex. J-29, Plan H283, Red 100 Report. The average VAP in House districts at or above 50% HCVAP was 116,376. *See* Joint Ex. J-29, Plan H283, Red 106 Report. The statewide average district CVAP was 99,273. *See id.* Only 14 Democratic districts in Plan H283 would have had a citizen voting age population above the statewide average. *See id.*; *see also* Joint Ex. J-29, Plan H283, Red 350 Report.

The Hidalgo County districts in Plan H283 show an even starker pattern: all of the districts would have had a citizen-voting-age population below the statewide average, and the districts represented by Democratic incumbents would have had lower citizen-voting-age population than HD 41, drawn for Representative Pena. The variation in total district population between HD 41 and the remaining Hidalgo County districts would not have injured Democratic incumbents or diluted voting strength in Democratic districts because there is no similar variation in voting-age or citizen-voting-age population. Under Plan H283, the five Hidalgo County House districts would have had the following voting-age populations: 104,939 (HD 31); 111,643 (HD 36); 114,761 (HD 39); 112,156 (HD 40); and 111,689 (HD 41). See Joint Ex. J-29, Plan H283, Red 100 Report. The same districts would have had the following citizen-voting-age populations: 56,380 (HD 31); 67,940 (HD 36); 74,275 (HD 39); 69,900 (HD 40); and 79,770 (HD 41). See Joint Ex. J-29, Plan H283, Red

106 Report. Thus HD 41 would have had the highest CVAP of all five Hidalgo County House districts, and its VAP would have ranked third out of five.

Whatever the disparity in total population among the five Hidalgo County House districts, it would not have diminished the voting strength of voters outside HD 41. If there is any potential disparity in voting strength, the evidence suggests that votes in HD 41 would have carried less weight than votes in the surrounding districts. Even if *Larios* could support a county-specific one-person-one-vote claim, *Rodriguez v. Pataki*—a case that was summarily affirmed by the Supreme Court after *Larios*—shows that Plaintiffs have failed to identify an injury resulting from population deviations in Hidalgo County.

CONCLUSION

The Court should enter judgment for Defendants on all claims.

Date: October 30, 2014 Respectfully submitted.

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