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

SHANNON PEREZ, *et al.*, Plaintiffs, and UNITED STATES of AMERICA, Plaintiff-Intervenor, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-360 (OLG-JES-XR) Three-Judge Court [Lead Case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), Plaintiff, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-361 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
TEXAS LATINO REDISTRICTING TASK FORCE, *et al.*, Plaintiffs, v. RICK PERRY, Defendant.	Civil Action No. 5:11-cv-490 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

MARGARITA V. QUESADA, *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants.	Civil Action No. 5:11-cv-592 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
JOHN T. MORRIS, Plaintiff, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-615 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
EDDIE RODRIGUEZ, *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants.	Civil Action No. 5:11-cv-635 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

UNITED STATES' POST-TRIAL REPLY BRIEF

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I. INTRODUCTION

Texas's 2011 House and Congressional plans were adopted with the purpose of diluting minority voting strength in violation of Section 2 of the Voting Rights Act, which enforces the voting guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution. Texas suggests that the State was simply trying to elect or protect Republicans. While that was undoubtedly one goal of redistricting, Texas pursued that goal by intentionally diluting the voting strength of minority voters.

Map drawers and legislators received election analyses showing the effect of redistricting plans on Hispanic voters' opportunities to elect candidates of choice, and they used those analyses to decrease those opportunities. In both the House and Congressional plans, the act of making a district appear to remain a Hispanic opportunity district, while at the same time decreasing Hispanic voters' opportunity to elect through the use of the "nudge factor," is powerful evidence that Texas not only intended the adverse effect on minority voters but also went out of its way to conceal what it was doing. Map drawers used race to draw district lines by splitting precincts in Dallas-Fort Worth (DFW) and Congressional District (CD) 23 in the 2011 Congressional Plan and in Dallas, El Paso, and Hidalgo Counties in the 2011 House Plan. The State eliminated at least four, and possibly five, minority opportunity districts in the House plan and failed to create any new minority opportunity districts in the Congressional plan, even though there had been enormous minority population growth and a consequent increase in the number of seats in the Texas Congressional delegation.

The State's post hoc rationalizations are unpersuasive. The evidence makes plain that Texas used race as a proxy for partisanship and intentionally reduced minority voters' opportunity to elect candidates of choice. Therefore, this Court should enter a declaratory judgment and set this matter for a remedial hearing to determine whether Texas's long and

continuing history of racial discrimination in voting merits further relief under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c).

II. LEGAL STANDARD

The State of Texas has propounded a legal standard under which Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and the Fourteenth and Fifteenth Amendments would, in effect, provide virtually no protection against intentional vote dilution. Texas implies that race must be *the* factor, not just *a* factor, motivating a decision maker, Tex. Br. 8-9, 12-13, 16 (ECF No. 1272), and argues that racial animus is required to prove discriminatory intent, Tex. Br. 18. These contentions conflict with binding precedent. The case law requires only that race be one motivating factor, not that it be the sole or even most significant factor, and does not require a showing of animus to establish intentional discrimination. *See, e.g.*, *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009). Texas also would have this Court ignore natural inferences drawn from aggregate evidence of the types catalogued in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), Tex. Br. 37-39, contrary to the edict of several Supreme Court cases. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997) ("*Bossier Parish I*"). This Court does not write on a blank slate; the legal standard for proving intentional vote dilution is well-settled.

A. Section 2 Prohibits Intentional Discrimination Even When Race Is Not the Exclusive or Principal Motivation.

Texas suggests that plaintiffs must prove that race was the *principal* motivating factor behind the State's adoption of the 2011 redistricting plans. *See* Tex. Br. 9, 16, 19. That contention is incorrect. Intentional vote dilution occurs where "racial discrimination [is only] one purpose, and not even a primary purpose" underlying the challenged redistricting plan. *Brown*, 561 F.3d at 433; *see also Arlington Heights*, 429 U.S. at 265-66. The presence of other

permissible purposes, such as the desire to protect incumbents of a certain political party, does not preserve the legality of a plan marked by an intent to diminish minority electoral opportunities. *See, e.g.*, *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) ("The supervisors intended to create the very discriminatory result that occurred. That intent was coupled with the intent to preserve incumbencies, but the discrimination need not be the sole goal in order to be unlawful."); *see also id.* at 778 (Kozinski, J., concurring in relevant part).

The Supreme Court's decision in *LULAC v. Perry*, 548 U.S. 399, 440 (2006), illustrates this point well. That case involved Texas's impermissible use of race to try to achieve its ultimate goal of protecting a vulnerable incumbent. In *LULAC v. Perry*, the Court struck down the 2003 modifications to Texas CD 23 as violating Section 2. *See id.* at 423-43. After the 2002 election, "it became apparent that District 23 as then drawn had an increasingly powerful Latino population that threatened to oust the incumbent Republican," *id.* at 423, and "[f]aced with this loss of voter support, the legislature acted to protect [the incumbent] by changing the lines—and hence the population mix—of the district," *id.* at 424.[1] "[T]he new plan divided Webb County and the city of Laredo," shifted nearly 100,000 Webb County residents into District 28, and "added voters in counties comprising a largely Anglo, Republican area in central Texas." *Id.* at 424; *see also id.* at 427 (noting district court finding that "Latino voting strength . . . is unquestionably weakened" and that Anglo voters would "often, if not always, prevent Latinos from electing the candidate of their choice in the district"). "In essence the State took away the Latinos' opportunity because Latinos were about to exercise it." *Id.* at 440. After concluding

[1] *See also id.* at 424-25 (describing similar purpose findings by the district court); *id.* at 428 (noting that the "rise in Latino voting power in each successive election, the near-victory of the Latino candidate of choice in 2002, and the resulting threat to the [incumbent] were the very reasons that led the State to redraw the district lines"); *id.* at 435 ("[T]he Latino population of District 23 was split apart particularly because it was becoming so cohesive.").

that Texas had violated Section 2 under the results test, the Court went further, commenting that Texas's use of race to protect a vulnerable incumbent "bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.*[2]

As in the 2003 Congressional Plan at issue in *LULAC*, Texas once again used race as a proxy for partisanship in the 2011 plans. The evidence presented at trial established that the State intentionally diluted the voting strength of minority voters in order to protect vulnerable incumbents who had been swept into office in the low turnout election of 2010 but faced a danger of defeat in 2012 if minority turnout increased, as could be expected in a presidential election. US Br. 4-5.

Texas erroneously relies on *Shaw v. Reno*, 509 U.S. 630, 652 (1993) ("*Shaw I*"), and its progeny in claiming that the State's partisan motive precludes a discriminatory purpose finding. Tex. Br. 17, 21-23.[3] As the United States has explained, the intentional vote dilution claim at issue here is "analytically distinct" from a *Shaw* claim. US Br. 71-72 (ECF No. 1279) (distinguishing intentional vote dilution and *Shaw* claims).[4] A *Shaw* claim requires proof that "race was the predominant factor motivating the legislature's decision." *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also Shaw I*, 509 U.S. at 649. By contrast, an intentional vote dilution claim is established even if race was merely one purpose, and not even a primary purpose,

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[2] The Court thus questioned the determination of the district court that "the State's action was taken primarily for political, not racial, reasons." *Id.* (citing *Session v. Perry*, 298 F. Supp. 2d 451, 508 (E.D. Tex. 2004) (three-judge court), *aff'd in part and rev'd in part sub nom. LULAC v. Perry*, 548 U.S. 399 (2006)). Notably, the district court had assessed the only primary purpose of the district boundaries—as required by the *Shaw* claim before it—and did not determine whether intentional discrimination was merely a purpose underlying the 2003 Congressional Plan. *See Session*, 298 F. Supp. 2d at 505-513.

[3] Among the *Shaw*-type cases on which Texas relies are *Bush v. Vera*, 517 U.S. 952 (1996), and *Hunt v. Cromartie*, 526 U.S. 541 (1999) ("*Cromartie I*"). *See* Tex. Br. 14, 17, 20, 22, 25, 46, 95, 97, 98, 138.

[4] The State's selective quotation of *Nevett v. Sides*, 571 F.2d 209, 218-19 (5th Cir. 1978), for the proposition that racial gerrymander and intentional vote dilution claims have the same "constitutional requisites" is misleading. Tex. Br. 16. *Nevett* simply noted that "a showing of intent is a necessary element" in both cases. 571 F.2d at 218.

underlying the challenged redistricting plan. *Brown*, 561 F.3d at 433. Here, to take just one example, even the most charitable reading of the State's division of precincts along racial lines in 2011—use of race as a proxy for partisanship—establishes that the State enacted a redistricting plan at least in part because of its effect on minority voters, who it knew were unlikely to favor Anglo-preferred candidates. *Cf. Bush v. Vera*, 517 U.S. 952, 970-71 (1996) (Opinion of O'Connor, J.) (holding that division of precincts using RedAppl, Texas's redistricting software, "suggests strongly the predominance of race").

Texas's "troubling blend of politics and race," *LULAC v. Perry*, 548 U.S. at 442, precludes the neat separation that the State wishes to impose between the elimination of Democratic-leaning districts and the elimination of minority electoral opportunity.[5] "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern," *Arlington Heights*, 429 U.S. at 265, and this case is no exception. The United States does not dispute that the Texas Legislature wanted to protect Republican incumbents. Here, ample record evidence demonstrates that in the development of the 2011 plans, State officials moved beyond benign considerations of partisanship and into invidious considerations of race, often through the use of race as a proxy for partisan preference. *See* US Br. 17-31, 41-59.

[5] The Court in *LULAC v. Perry* admonished Texas for intentionally drawing Congressional District 23 to have a nominal Hispanic voting-age majority while protecting the incumbent, who was not the Hispanic-preferred candidate. *Id.* at 440-41. The Court held that "[the State's] policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters." *Id.* at 441; *see also, e.g.*, *Brown*, 561 F.3d at 433 (holding that the defendants violated Section 2 by manipulating various aspects of the electoral process for the purpose of diluting minority voting strength); *Garza*, 918 F.2d at 769 (holding that the fragmentation of Latino communities to perpetuate incumbencies amounted to intentional discrimination in violation of Section 2); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982) (finding intentional discrimination where "requirements of incumbency are so closely intertwined with the need for racial dilution that an intent to maintain a safe, primarily white, district for [a particular incumbent] is virtually coterminous with a purpose to practice racial discrimination").

B. Discriminatory Purpose Requires Proof of More Than an Adverse Impact on Minority Citizens but Not Proof of Racial Animus.

Texas mischaracterizes the United States' arguments as relying only on the impact of the redistricting plans on minority voters, and wrongly asserts that an intentional discrimination claim requires proof of racial animus. Tex. Br. 8-9, 18. In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the Supreme Court held that the term discriminatory purpose "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 minority group." *Id.* at 279. Here, the United States has not argued that Texas enacted the redistricting plans merely with awareness of their consequences on minority voters. *See id.* at 278-79 (rejecting this standard). Rather, the United States has proven that Texas intentionally sought to harm minority voters by diminishing their opportunity to elect their preferred candidates of choice. US Br. 15 (arguing that Texas "specifically intended to minimize minority representation in the state's congressional delegation"); US Br. 36 (arguing that Texas "aim[ed] to minimize minority representation in the Texas House"). The evidence establishes that Texas used race as a proxy for partisanship to draw districts in both the 2011 House Plan and the 2011 Congressional Plan for the purpose of cracking and packing minority voters. US Br. 14-15, 28-31. Moreover, Texas tried to conceal its discriminatory plan by use of the "nudge factor"—dishonest conduct that shows consciousness of wrongdoing. US Br. 11-13.[6] Thus, this case is nothing like the legislature that enacted the veterans' preference challenged in *Feeney*, which "did not wish to harm women." 442 U.S. at 278.

[6] Other evidence relevant to the *Arlington Heights* factors—such as Texas's history of discrimination, procedural departures and contemporaneous statements—also weighs in favor of a finding of discriminatory intent, beyond simple awareness of the consequences on minority voters.

In addition, contrary to the State's unsupported assertion that a discriminatory intent claim requires "evidence of racial animus," Tex. Br. 18, proving intentional discrimination does not require proof of "animus . . . dislike, mistrust, hatred or bigotry." *Garza*, 918 F.2d at 778 (Kozinski, J., concurring in relevant part); *see also Johnson v. California*, 543 U.S. 499, 506-07 (2005) (applying strict scrutiny to "'benign' racial classifications"). Indeed, courts have repeatedly held that the adoption of electoral devices to limit minority voters' opportunity to challenge incumbents constitutes intentional discrimination. *See, e.g.*, *Barnett v. Daley*, 32 F.3d 1196, 1199 (7th Cir. 1994) ("If . . . in order to protect incumbents of whatever race [a] redistricting authority deliberately adopted devices for limiting [minority] representation . . . , they would be engaged in deliberate racial discrimination."); *Garza*, 918 F.2d at 771; *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) (upholding a finding of discriminatory intent where "racial discrimination was the necessary accompaniment of the action taken to protect incumbencies"). A Section 2 intent claim merely requires proof that the State enacted the challenged plans *because of* adverse effects on minority voters, regardless of whether racial animus, incumbency protection, or any other factor provided a motive for this specific intent.

For the same reason, Texas errs in arguing that "[i]f the Legislature treats individuals differently because of *the way they vote*, it has not treated them differently *because of race*." Tex. Br. 21 (emphasis in original). As this case illustrates, a state can do both simultaneously. Here, during the 2011 redistricting, Texas intentionally discriminated on the basis of race because it first determined whether Hispanic voters could have the opportunity to elect their candidates of choice, and then sought to diminish that opportunity in several areas in the State House and Congressional plans.[7] Texas ran analyses—for both the primary and general

[7] Racially polarized voting is highly relevant to this inquiry. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51, 55-58 (1986). Texas has conceded in this case—as the Supreme Court has found in *LULAC v. Perry*,

elections—through the Office of the Texas Attorney General (OAG) to determine whether Hispanic voters were able to elect their candidates of choice. *See, e.g.*, US PFOF ¶ 152. The OAG analyses were conducted to determine which candidates were minority voters' candidates of choice and whether they would prevail in various district configurations, not merely whether Democrats or Republicans would win. Legislators and their staff who received these results knew the difference—the analyses concerned the opportunity of minority voters to elect their candidate of choice and did not use partisan labels—and in various areas in the 2011 plans at issue here, the State sought to diminish that opportunity. *See infra* Section V.B.[8]

C. *Arlington Heights* Guides this Court's Inquiry into the Intent of the Challenged Plans.

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. In *Arlington Heights*, the Supreme Court "identifie[d], without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." *Id.* at 268. Nearly forty years of voting rights cases have applied the *Arlington Heights* framework in analyzing "whether invidious discriminatory purpose was a

548 U.S. at 427—that there is racially polarized voting throughout the State. US PFOF ¶¶ 101-104. This is not a conclusion that minority voters in Texas support Democrats; it is a conclusion that minority voters cohesively vote for the candidates of their choice and Anglo voters vote as a bloc against minority voters' candidates of choice.

[8] The Supreme Court has held that targeting minority voters for unequal treatment based on whom they might support constitutes intentional discrimination. *See Hunter v. Underwood*, 471 U.S. 222, 230 (1985) (holding that the intent of the Alabama Constitution of 1901 to "prevent blacks from becoming a swing vote and thereby powerful and useful to some group of whites" constitutes intentional discrimination); *White v. Regester*, 412 U.S. 755, 766-67 (1973) (holding that use of multi-member districts to prevent minority voters from dislodging an Anglo establishment is unconstitutional).

motivating factor" in a government body's decision to enact voting-related changes. *See, e.g.*, *Bossier Parish I*, 520 U.S. at 488.[9]

Texas attacks the United States' reliance on *Arlington Heights* by fundamentally mischaracterizing the United States' argument. Specifically, the State accuses the United States of assuming that *Arlington Heights* creates a mechanical test under which intentional discrimination is proved "by checking off the factors listed in the opinion," Tex. Br. 37. In fact, the United States made clear in its opening brief that *Arlington Heights* "identif[ied], without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." US Br. 10.

It is Texas that misunderstands *Arlington Heights*. The State tries to atomize the *Arlington Heights* evidence presented by the United States by focusing on individual pieces of evidence in isolation and then asserting that a particular piece of evidence "proves nothing by itself." Tex. Br. 38-39. The rationale of *Arlington Heights* is that intentional discrimination is difficult to uncover but may emerge when official conduct is scrutinized in its totality. *See* 429 U.S. at 266 (noting the rarity of "a clear pattern, unexplainable on grounds other than race"); *see also Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) ("[O]fficials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority.").[10] Thus, when

[9] *See also, e.g.*, *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 363 (5th Cir. 2011) ("In *Village of Arlington Heights*, the Supreme Court set forth a now-familiar test by which we are to determine whether 'there is a proof that a discriminatory purpose has been a motivating factor in [a facially neutral government decision].'" (quoting *Arlington Heights*, 429 U.S. at 265-66) (alteration in original)); *Brown*, 561 F.3d at 433; *Prejean v. Foster*, 227 F.3d 504, 509, 511 (5th Cir. 2000); *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989); *Jones v. City of Lubbock*, 727 F.2d 364, 371 n.3 (5th Cir. 1984); *Kirksey v. City of Jackson*, 663 F.2d 659, 663 & n.1 (5th Cir. Unit A Dec. 1981).

[10] The specific categories of evidence identified in *Arlington Heights* often support intent findings "because our experience suggests that they are likely indicative of discriminatory acts." Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Geo. L.J. 279, 304-06

drawing inferences from circumstantial evidence, a court applying *Arlington Heights* must view all of the evidence collectively. In other words, the question before this Court is not whether any one piece of evidence, standing alone, would prove intentional discrimination, but rather, whether the cumulative impact of all of the evidence creates an inference of discriminatory intent. *See, e.g.*, *United States v. City of Parma*, 661 F.2d 562, 574 (6th Cir. 1981) (noting that an action by public officials that, in isolation, would not justify a finding of discriminatory intent could support such a finding when viewed in the context of other evidence); *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 20 (7th Cir. 1987) (holding that the district court erred in requiring "that each piece of circumstantial evidence 'standing alone' be sufficient to support a finding of . . . discrimination"), *other holding overruled by Coston v. Plitt Theatres, Inc.*, 800 F.2 834 (1988). The United States accordingly addressed evidence relevant under each of the "subjects of proper inquiry" identified by the Supreme Court in *Arlington Heights*, *infra* Parts III-V. Texas cannot overcome this evidence—and the inferences of discrimination it yields when taken as a whole—by characterizing any single fact as race-neutral on its face.

(1997). For example, "since people usually intend the natural consequences of their actions . . . a jurisdiction that enacts a plan having a dilutive impact is more likely to have acted with a discriminatory intent to dilute minority voting strength than a jurisdiction whose plan has no such impact." *Bossier Parish I*, 520 U.S. at 487; *see also, e.g.*, *Lane v. Wilson*, 307 U.S. 268, 275-76 (1939) (determining a limitation on voter registration to be intentionally discriminatory based on its interplay with historical discrimination); *Busbee v. Smith*, 549 F. Supp. 494, 500-02, 508, 516-18 (D.D.C. 1982), *aff'd*, 103 S. Ct. 809 (1983) (relying on contemporaneous statements to illustrative the motivations of individuals who shaped a complex legislative outcome). Texas incorrectly suggests that *Feeney* rejected the notion that "a person intends the natural and foreseeable consequences of her voluntary action." Tex. Br. 9 n.9 (quoting Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan. L. Rev. 1105, 1112-13 (1989)). In fact, the Court held in *Arlington Heights* that impact is the foremost category of circumstantial evidence of discriminatory intent and reaffirmed that decision in *Bossier Parish I*. *Arlington Heights*, 429 U.S. at 262; *see also Bossier Parish I*, 520 U.S. at 487. Thus, the totality of the evidence offered in this case only buttresses the natural inferences that *Arlington Heights* permits this Court to make.

D. Texas Cannot Demonstrate that the 2011 Plans Would Have Been Enacted If the State Had Not Engaged in Discrimination.

A line of cases beginning with *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-86 (1977), has established that a government action taken with an unconstitutional purpose need not be invalidated if the government actor proves that it would have taken the same action even in the absence of an impermissible motive. *See also, e.g.*, *Arlington Heights*, 429 U.S. at 270 n.21 (citing *Mt. Healthy*). Even if *Mount Healthy* applies to a statutory claim under Section 2, Texas bears the burden to establish that it would have enacted the very same redistricting plans had the State not engaged in intentional discrimination. Tex. Br. 12-13 (quoting *Hunter*, 471 U.S. at 231). Texas has not and cannot meet that burden.

Arlington Heights establishes that the process by which a bill is passed matters in determining its underlying intent. *See* 429 U.S. at 267. Numerous decisions by committees and staff were necessary in order to craft the precise contours of the 2011 House Plan and 2011 Congressional Plan, and there is no evidence that Texas would have enacted the same redistricting plans—including the same precinct splits—had the State completely ignored race, rather than using race as a proxy for partisanship and aiming to suppress the growing political clout of minority voters.[11] In the context of a complex redistricting bill, a partisan vote on final passage does not prove that "the *same decision* would have resulted even had the impermissible purpose not been considered." *Arlington Heights*, 429 U.S. at 270 n.21 (emphasis added).

[11] Because the State lacked partisan data at the census block level, *see infra* Section II.B, it was not possible to make the same decisions regarding the precise divisions of precincts in the absence of a racial intent. *See, e.g.*, *infra* Section IV.E (House District 41). A discriminatory purpose was also necessary to craft districts with a superficial Hispanic population majority that nonetheless eliminated Hispanic electoral opportunity, *see, e.g.*, *infra* Section V.B (Congressional District 23), and districts in which large, homogeneous minority communities were appended to larger Anglo populations likely to vote as a bloc to defeat the minority communities' preferred candidates, *see, e.g., infra* Section V.E (Dallas/Fort Worth Congressional Districts).

E. The Intent of Key Legislators and Aides Is Highly Relevant to the Purpose of Legislation.

Arlington Heights also counsels that "contemporary statements by members of the decisionmaking body" "may be highly relevant" to a determination of discriminatory intent. 429 U.S. at 268; *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 n.9 (2000) (relying on a sponsor's statement to determine legislative intent). As a result, district courts in redistricting cases have repeatedly relied on contemporaneous statements by key legislators and legislative aides when finding discriminatory intent. *See Garza v. Cnty. of Los Angeles*, 756 F. Supp. 1298, 1313-18 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990); *Busbee*, 549 F. Supp. at 500-02, 508, 516-18.

In this case, statements by Eric Opiela (an aide to Speaker Joe Straus and later U.S. Representative Lamar Smith's redistricting liaison) are important to the intent of the 2011 Congressional Plan, statements by Representative John Garza are significant to the intent of the drawing of House District (HD) 117, and statements by Representative Beverley Woolley are vital to the intent of the Harris County map in the 2011 House Plan. *See infra* Sections IV.A, IV.D, V.B. Without the intent of these key figures, the same maps never would have reached the floors of the Texas House and Texas Senate, and thus never would have been adopted by the Texas Legislature.

The State urges this Court to ignore contemporaneous statements—both spoken and recorded in email—but its arguments are unavailing. Tex. Br. 57-58. Under *United States v. O'Brien*, 391 U.S. 367 (1968), there is no bar on voiding a facially neutral statute based on the statements of legislators in the "very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose." *Id.* at 383 n.30. Other cases cited by the State merely decline to rely on the statements of legislators who

did not shape the bill in question. *See Florida v. United States*, 885 F. Supp. 2d 299, 354 (D.D.C. 2012) (three-judge court) (per curiam) (declining to rely on the statements of a legislator who "was neither a sponsor nor a primary proponent of [the law at issue], and did not play an important role in passage of the bill"); *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 424 (D.C. Cir. 1977) (declining to rely on a statement made by a member of Congress in opposition to an amendment that did not affect the provision at issue).

F. The Creation of New Minority Opportunity Districts Is Not Maximization.

Texas also suggests that the United States' argument against the State's intentional vote dilution "inevitably creates a duty to maximize," *i.e.*, to create minority opportunity districts at the expense of traditional districting principles and to violate the principles of *Shaw*, Tex. Br. 23-25. This is incorrect. A vast gulf separates the lawful voting rights remedies for intentional vote dilution that the United States seeks here and unlawful violations of *Shaw*.[12] Far from maximizing, here Texas *minimized*, actually eliminating existing minority opportunity districts and taking deliberate steps to prevent the emergence of new opportunity districts that should have resulted naturally from the State's massive minority population growth. The remedial districts drawn by this Court prove that *Shaw* did not require Texas to dilute minority voting strength or to eliminate existing opportunity districts. *See* Second Remedial House Plan (ECF No. 682-1).[13] Moreover, nothing in *Shaw* required the State to reconfigure districts such as CD

[12] The State's suggestion that a bar on intentional vote dilution "raises serious constitutional questions," Tex. Br. 24-25, is quizzical at best. Intentional discrimination plainly violates the Constitution.

[13] The facts of *Miller v. Johnson* establish the distinction between maximization and the imperative under the Voting Rights Act not to intentionally dilute the minority vote. In *Miller*, the Georgia General Assembly had taken extraordinary measures in order to create three majority-Black Congressional districts, *see* 515 U.S. at 908, and had "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations," *id.* at 916. The map of Georgia's 11th Congressional District vividly illustrates the distinction between "maximization" and the creation of geographically compact minority opportunity districts. *See id.* at 928.

23 and HD 117 to eliminate minority electoral opportunities (while maintaining nominal minority population majorities). *See Bush v. Vera*, 517 U.S. at 958 (Opinion of O'Connor, J.) (holding that strict scrutiny does not "apply to all cases of intentional creation of majority-minority districts") (citing *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *summ. aff'd*, 515 U.S. 1170 (1995)). In short, the United States does not argue for maximization, and concerns regarding maximization did not preclude the State from remedying minority vote dilution and preserving existing minority electoral opportunities.

G. Texas Is Not Entitled to a Presumption of Good Faith.

After decades of enacting discriminatory statewide redistricting plans, the State of Texas is not entitled to a presumption that the 2011 Congressional Plan and the 2011 House Plan were crafted without a discriminatory intent. Tex. Br. 14-17. The task before this Court is a sensitive one, *see Miller*, 515 U.S. at 916, but there is no basis for Texas's assertion that "any doubt must be resolved in favor of the State." Tex. Br. 15.

Under *Arlington Heights*, this Court must look to the historical background of a government action, 429 U.S. at 267, and the relevant historical background here is Texas's persistent enactment of discriminatory redistricting plans, continuing to the present day. *See* US Br. 5-7; *LULAC v. Perry*, 548 U.S. at 439-40; *see also Arlington Heights*, 429 U.S. at 265-66 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified."). Any ordinary presumption of good faith for legislative enactments is thus overcome by the State's persistent failure over several decades to afford its minority citizens equal opportunities to participate in the political process and to elect representatives of their choice. *See Harkless v. Sweeney Indep. Sch. Dist.*, 554 F.2d 1353, 1357 (5th Cir. 1977) ("Overnight changes in racial attitudes, as we have sadly noted in the last

twenty years, are rare."); *cf. Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) (holding that the "usual presumption supporting legislation" may be "balanced" by competing considerations).[14]

H. Implementation Is Not Required to Establish a Violation of Section 2.

The State of Texas argues, once again, that because this Court enjoined the 2011 House and Congressional redistricting plans before they could be used in an election, 9/29/11 Order (ECF No. 380), the plans had no discriminatory effect and thus do not violate Section 2, regardless of whether they were enacted with a discriminatory purpose. Tex. Br. 4-7; *see also* Tex. Br. 61, 76, 85, 101, 123 (individual districts). This argument is meritless, as the United States has already explained at length in its opposition to Texas's motion for summary judgment. *See* US Mem. at 3-6 (ECF No. 1071). Preliminary relief barring implementation of an intentionally discriminatory law cannot render the provision lawful and shield the State from judgment.

According to Texas's tortured logic, no party could ever bring a pre-enforcement challenge to a provision that violates Section 2 or denies equal protection of the laws because the violation would not occur unless and until the law were permitted to injure those it was intended to harm. This argument ignores the fact that Supreme Court has repeatedly found laws that had never gone into effect to violate the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *White v. Regester*, 412 U.S. 755, 759, 765-70 (1973) (holding that multimember districts

[14] In advocating a presumption of good faith, the State relies on inapposite cases involving legislative decisions that neither trigger the heightened scrutiny afforded to claims of racial discrimination nor implicate a persistent pattern of discrimination. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 6 (1947) (affording a presumption that public funds have been expended for a public purpose, in light of the "rare instances" in which the Court had found to the contrary and the serious curtailment of state legislative authority that would result from intensive judicial scrutiny of the public ends of state policy); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) (holding that a land sale could not be invalidated "on slight implication and vague conjecture" of public corruption).

in Dallas County and Bexar County that had never been implemented violated the Equal Protection Clause).

This case bears no resemblance to *Palmer v. Thompson*, 403 U.S. 217 (1971), which Texas cites for the proposition that "[d]iscriminatory purpose alone cannot establish a constitutional violation." Tex. Br. 10; *see also* Tex. Br. 12 (suggesting that plaintiffs must present proof that the challenged plans "have diluted" minority voting strength). In *Palmer*, the City of Jackson, Mississippi closed its public swimming pools in response to a judgment declaring that enforced segregation denied equal protection of the laws. 403 U.S. at 219. In rejecting an equal protection challenge to the City's refusal to reopen the pools and run them on a desegregated basis, the Court found "no state action affecting blacks differently than whites." *Id*. at 225. Under the Court's reasoning, no equal protection violation occurred because the pool closures affected all Jackson residents equally: "black and white alike." *Id.* at 226. Given the absence of differential treatment by the City, the Court found no basis for invalidating the City's action because of "the bad motives of its supporters," who may have voted to close the pools because of a desire to avoid integration of the races. *Id.* at 224-25; *see also Washington v. Davis*, 426 U.S. 229, 243 (1976) (holding of *Palmer* was that city "was extending identical treatment to both whites and Negroes").

Here, in stark contrast to *Palmer*, the 2011 Congressional Plan and the 2011 House Plan would inevitably (and by design) have had a profound discriminatory effect on minority voters had they been permitted to go into effect. *Infra* Parts IV & V. Only judicial intervention prevented this constitutional violation from harming voters. That fact does not insulate Texas from claims of intentional discrimination under Section 2 and the Equal Protection Clause.

I. *Bartlett* and *Perez* Do Not Permit Intentional Elimination of Minority Coalition Districts.

In *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Supreme Court defined a coalition district claim as an instance "in which two minority groups form a coalition to elect the candidate of the coalition's choice" but expressly stated that its decision regarding the scope of Section 2's results test "d[id] not address that type of district." *Id.* at 13 (Opinion of Kennedy, J.). What *Bartlett* did establish is that "a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts . . . would raise serious questions under both the Fourteenth and Fifteenth Amendments." 556 U.S. at 24 (Opinion of Kennedy, J.) (citing *Bossier Parish I*, 520 U.S. at 481-82).[15] Nonetheless, Texas claims that *Bartlett* "rejected the proposition that Section 2 protects 'the opportunity to join others—including other racial minorities, or whites, or both—to reach a majority and elect their preferred candidates.'" Tex. Br. 25 (quoting *Bartlett*, 556 U.S. at 14); *see also id.* at 26-27 (arguing by selective quotation that discussion limited to crossover districts applies to minority coalition districts); *id.* at 29 (arguing without additional citation that the "constitutional questions" raised by crossover districts apply with equal force to coalition districts).

The State is doubly wrong. First, *Bartlett* expressly did not reject protections for coalition districts in which groups of minority voters join together to elect their preferred candidates. *See* 556 U.S. at 13-14; *see also Growe v. Emison*, 507 U.S. 25, 41 (1993). Second, because the Court explained that the intentional elimination of crossover districts (in which a minority group and Anglos vote together) can give rise to an intentional discrimination claim, the same must be true of the elimination of coalition districts (in which different minority groups

[15] As the United States noted in its opening brief, any protection afforded to crossover districts certainly applies to coalition districts, which are more akin to single-minority majority districts than to crossover or influence districts, which depend on like-minded Anglo voters. US Br. 77-78.

vote together). *See id.* at 24; *see also LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) (recognizing that Section 2 results claims may require the creation of new minority coalition districts).

The State's latest attempt to read a bar on coalition claims into the Supreme Court's decision in *Perez v. Perry*, 132 S. Ct. 934 (2012) (per curiam), is based on a misunderstanding of that decision. The Supreme Court observed in *Perez* that this Court might have drawn a district in the Dallas area in which this Court "*expected* two different minority groups to band together to form an electoral majority." *Id.* at 944 (emphasis added). The Supreme Court then concluded that if this 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." *Id.* (citing *Bartlett*, 556 U.S. at 13-15 (plurality op.)). Thus, *Perez* addressed the absence of factual findings to support this Court's expectation of minority coalition voting. *See also* Brief for the United States as Amicus Curiae at 32-33, *Perry v. Perez*, 132 S. Ct. 934 (Dec. 28, 2011) (No. 11-713), 2011 WL 6851350, at *32-33 (describing that this Court did not lay a sufficient foundation for the use of coalition districts). The lack of express findings regarding minority cohesion bore particular import after *LULAC v. Perry*, in which the Court had accepted the finding that, under the circumstances present in that case, "African-Americans [did] not vote cohesively with Hispanics" in the Dallas area. 548 U.S. at 443 (plurality op.) (citing *Session*, 298 F. Supp. at 484.

Texas suggests that the Supreme Court resolved in *Perez* that the Voting Rights Act provides no basis for creating a minority coalition district in any circumstance because the Court cited "to *Bartlett*—and not to the parties' briefs or the joint appendix." Tex. Br. 26. However, the preceding paragraph in *Perez* laid out the factual basis for the holding with repeated citations

to the joint appendix. *See* 132 S. Ct. at 944; *see also* Tex. Br. 26 (using ellipses to omit citations to the joint appendix). It would be incongruous at best for the Supreme Court to have reached a broad legal conclusion about coalition districts, answering a question it had avoided twice, by way of a *cf.* citation in a single sentence of a per curiam decision that was joined by eight justices, with Justice Thomas concurring in the judgment. *See Perez*, 132 S. Ct. at 944. It is simply implausible, for example, that Justices Ginsburg and Breyer—who both dissented from *Bartlett*'s holding that Section 2 generally does not allow claims based on crossover districts, 556 U.S. at 44 (Ginsburg, J., dissenting); *id.* (Breyer, J., dissenting)—would have joined the *Perez* per curiam opinion had they believed that it categorically barred coalition district claims under Section 2.

In sum, Section 2 forbids jurisdictions from intentionally eliminating the opportunity of a group of minority voters to elect their candidate of choice, alone or in combination with other racial groups, by dismantling an effective multi-minority coalition district. *See Bartlett*, 556 U.S. at 24 (Opinion of Kennedy, J.) (holding that the intentional destruction of a crossover district—whose absence could not trigger a violation of the Section 2 results test—would nonetheless "raise serious questions under both the Fourteenth and Fifteenth Amendments"). Regarding HD 149, this Court need only determine that a cohesive coalition of minority voters existed and that Texas drew particular district lines at least in part because of an intent to eliminate the opportunity for those minority voters, acting in coalition, to elect their preferred candidates of choice. *See infra* Section IV.D.

III. DIRECT EVIDENCE AND LEGISLATIVE PROCEDURE

The United States and the other plaintiffs produced direct evidence that Texas acted with discriminatory intent in enacting the 2011 Congressional and House plans. US Br. 11-15. The "nudge factor" was not a mere fantasy as the State suggests. Rather, the evidence proves that

districts in both plans were drawn intentionally to have Hispanic citizen voting age population (HCVAP) that was similar to that in the existing districting plans but, in actuality, to decrease Hispanic voters' opportunity to elect their candidates of choice in those districts. As the OAG analyses provided to decision makers prior to enactment showed, the 2011 plans made it harder for Hispanic voters to elect their candidates of choice in targeted districts. The prevalence of split precincts is further evidence of purposeful racial discrimination. While the State pretends that the splitting of precincts was innocent, the evidence is clear that the State split precincts on the basis of race in an intentional effort to dilute minority voting strength.

A. Nudge Factor

Texas used the nudge factor in those select few districts (CD 23, HD 117, and HD 35) where State officials had to make it appear that Texas was complying with the Voting Rights Act, while at the same time making it more difficult for Hispanic voters to elect their candidates of choice in those same districts. Texas claims there is no evidence that the nudge factor was ever implemented by decision makers or that data for the nudge factor was even available. Tex Br. 29-35. Both claims are incorrect.

It is not surprising that no legislator confesses to using the nudge factor. Such admissions are rare in this day and age. *See, e.g.*, *Smith*, 682 F.2d at 1064. Remarkably, however, one of the two primary map drawers, Gerardo Interiano, acknowledged that "with regard to the nudge factor e-mail, there was never any doubt . . . that Mr. Opiela was trying to draw districts that would appear to be Latino opportunity districts because their demographic benchmarks were above a certain level but would elect a candidate who was not the Hispanic candidate of choice." Trial Tr. 375:19-25, Aug. 11, 2014 (Interiano). Texas tries to distance itself from Opiela's strategy, insisting that other decision makers never embraced his recommendations. The map drawers, however, used the boundaries that Opiela submitted in the 2011 Congressional Plan and

implemented his ideas about how to configure district boundaries. *See infra* V.B. (Section regarding CD 23).

Contrary to Texas's assertion, the map drawers had the data to implement the nudge factor. Clare Dyer of the Texas Legislative Council (TLC) explained that a map drawer could achieve the "nudge factor" result with data already built into RedAppl. Trial Tr. 265:18-266:21, July 14, 2014 (Dyer); *see also* Trial Tr. 396:4-397:6, August 12, 2014 (Arrington); Trial Tr. 129:6-130:11, July 14, 2014 (Arrington). Furthermore, Handley's analysis found that "the map drawers had the information necessary to ascertain that the Hispanic VTDs [voter tabulation districts] that were removed from CD 23 had consistently higher participation rates than the Hispanic VTDs that replaced them in CD 23 in Plan C185." US Ex. 687A at 7-8 (Apr. 2014 Handley Rep.). Critically, Opiela had Spanish-surname turnout data and the computing capability to be able to implement the nudge factor using separate software. US Ex. 149 (Email, Nov. 22, 2010); Trial Tr. 1490:2-1493:16, July 18, 2014 (Interiano); Trial Tr. 298:20-299:21, Aug. 11, 2014 (Interiano).

Taken together, this evidence persuasively demonstrates that Texas in fact employed the nudge factor to weaken minority voters' opportunity to elect their candidates of choice, while actively trying to conceal its race-based scheme.

B. Split Precincts

Texas split an extraordinarily large number of precincts during the 2011 redistricting: 518 precincts in the 2011 Congressional Plan and 412 precincts in the 2011 House Plan. This extensive use of split precincts shows that map drawers relied on racial data, not political data, to draw a number of districts in both Congress and the House. US Br. 14-15, 23-26, 45-48, 54-55. In defense, the State argues that it did not have a policy against splitting precincts, that precincts can be split for race-neutral reasons, that political data is available at the block level, and thus

that splitting precincts does not indicate an impermissible use of race. Tex. Br. 35-37. The evidence does not support these contentions.

One of Texas's traditional redistricting principles is to avoid splitting precincts, and the Senate adhered to this policy by splitting few precincts in the 2011 Senate Plan. Trial Tr. 249:16-24, Aug. 11, 2014 (Seliger). House Redistricting Committee Chairperson Burt Solomons instructed State representatives to not split precincts. Trial Tr. 734:8-17, July 16, 2014 (Pickett). In fact, Chairperson Solomons, opposed an amendment to a redistricting bill precisely because it split precincts. US Ex. 198 at 37-38 (House Journal, Apr. 27, 2011).

Race was the principal reason for splitting precincts. Splits were concentrated in minority communities and frequently divided precincts to exclude or include racial minority groups in specific districts in a non-random fashion. US Ex. 352 ¶¶ 92-103, 136 (Oct. 2011 Arrington Rep.). Precinct splits along the borders of several Congressional districts show a statistically significant concentration of minority voters being moved in and out of districts. US 352 ¶¶ 164-73 & tbl.21 (Oct. 2011 Arrington Rep.). Texas argues that other non-racial reasons may explain precinct splits, but as Dr. Theodore Arrington found in looking at the precincts splits in the House districts, there are two chances out of a thousand that these precinct splits occurred for a non-racial reason. Trial Tr. 139:10-140:17, July 14, 2014 (Arrington); US Ex. 352 ¶ 94 & tbl.9 (Oct. 2011 Arrington Rep.).

In CD 12 (DFW), CD 26 (DFW), HD 77 (El Paso), HD 78 (El Paso), HD 103 (Dallas), HD 104 (Dallas), and HD 105 (Dallas), map drawers admitted that they relied on racial data in deciding whether and how to split precincts. *E.g.*, Trial Tr. 2093:13-2094:7, July 19, 2014 (Downton). In CD 6 (DFW), CD 23 (West Texas), CD 33 (DFW), and HD 41 (Hidalgo), the split precincts are simply unexplainable on grounds other than race. *See infra* Sections IV.B,

IV.E, V.B, V.E; *see also* US Br. 23-26, 28-31, 45-48. The use of precinct splits is critical evidence that State officials used race as a proxy for partisanship and intentionally diluted the minority vote.

Texas incorrectly claims that it had accurate election information in RedAppl at the census block level to guide map drawers in splitting precincts. Tex. Br. 36-37. The evidence refutes that claim. RedAppl routinely displayed inaccurate election data at the block level. RedAppl assumed that the percentage of the vote received by a candidate in a particular census block within a precinct was identical to the percentage that the candidate received in the precinct as a whole. Trial Tr. 257:25-259:22, July 14, 2014 (Dyer); US Br. 15 n.6. The map drawers knew that the election data provided at the block level in RedAppl was not accurate once a precinct had been split. Trial Tr. 1628:8-1629:23, July 18, 2014 (Interiano); Trial Tr. 2094:12-23, July 19, 2014 (Downton). Although accurate election data is not available at the sub-precinct level, Texas could, and did, accurately determine racial and demographic data at the block level. Trial Tr. at 760:3-12; 763:13-764:22, Aug. 2014 (Dyer). Texas used this racial data as a proxy for partisanship and impermissibly diluted the minority vote on that basis. *Bush v. Vera*, 517 U.S. at 970-71 (Opinion of O'Connor, J.).

C. Deviations from Legislative Procedure

Texas's assertion that the United States has failed to establish that the 2011 redistricting process deviated from procedural norms rests upon a rich irony. The State claims that the United States has not defined a non-discriminatory process as a point of comparison, Tex. Br. 39-49, but Texas history offers few examples of redistricting processes that did not result in discriminatory plans. *See* LULAC *v. Perry*, 548 U.S. at 439-40.[16] Nonetheless, the United States has provided

[16] *See also Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012) (three-judge court), *vacated on other grounds*, 133 S. Ct. 2885 (2013); *Balderas v. Texas*, No. 6:01-cv-158, 2001 WL 36403750 (E.D.

significant evidence that establishes that the 2011 Congressional and House redistricting processes provided even less access to minority-preferred legislators than in prior redistricting cycles. US Br. 32-35, 59-63. These procedural departures constitute circumstantial evidence of discriminatory intent. *Arlington Heights*, 429 U.S. at 267.[17]

Mike Morrison, outside counsel to the Senate Redistricting Committee, testified in committee that the 2011 Congressional process was "quite different from what we've seen in the past" and specifically pointed to departures from the 2003 Congressional process that limited opportunities for minority-preferred legislators and minority voters to affect the process in meaningful ways. These included the failure to address Congressional redistricting in the regular session, a lack of consultation among legislators, the absence of public hearings following the release of concrete proposals, and the dearth of expert retrogression analysis. US Ex. 744 at 2-3 (Partial Hearing Tr., June 3, 2011). Similarly, Bonnie Bruce described the 2011 redistricting as a "completely different process from how we have done things," explaining that past processes involved more hearings. US Ex. 106 (Email, Mar. 16, 2011).[18] Senator Judith Zaffirini, who

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Tex. Nov. 14, 2001) (three-judge court) (per curiam); *Bush v. Vera*, 517 U.S. 952 (1996); *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991) (three-judge court), *aff'd sub nom. Richards v. Terrazas*, 505 U.S. 1214 (1992); *Upham v. Seamon*, 456 U.S. 37 (1982); *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982) (three-judge court) (per curiam); *McDaniel v. Sanchez*, 452 U.S. 130 (1981); *White v. Regester*, 412 U.S. 755 (1973); *White v. Weiser*, 412 U.S. 783 (1973); US Ex. 263 (2001 House Plan Objection); US Ex. 238 (1991 House Plan Objection); US Ex. 224 (1981 House Plan Objection); US Ex. 200 (1976 House Plan Objection: Nueces); US Ex. 201 (1976 House Plan Objection: Jefferson and Tarrant).

[17] Texas's reliance on *Moore v. Detroit School Reform Board*, 293 F.3d 352, 370 (6th Cir. 2002), is unwarranted. Tex. Br. 39. *Moore* found no proof of deviations from the State of Michigan's "handling of other legislation" and noted that plaintiffs had failed to "present any historical background that would suggest a desire to discriminate against African-Americans." *Moore*, 293 F.3d at 370. In contrast, evidence of explosive minority population growth, as well as Texas's unremitting pattern of discrimination, provides a substantial basis for this Court to infer that the procedural deviations in the 2011 process evince intent to discriminate against minority voters.

[18] David Hanna's testimony that the 2011 special session itself was not an unusually fast special session, Tex. Br. 40 (citing Trial Tr. 1557:9-12, Aug. 15, 2014 (Hanna)), does not address the fundamental issue that consideration of the 2011 Congressional plan was limited to a rapid special session in the first place.

had been on every Senate redistricting committee since being elected in 1986, asserted that the 2011 process afforded her the least input she had ever experienced. Trial Tr. 258:6-11, Aug. 11, 2014 (Seliger); *see also* Trial Tr. 897:7-23, Aug. 13, 2014 (Dukes) (describing less time to craft amendments than "[i]n previous years"). Finally, Representative Scott Hochberg also testified that it was rare for consideration of any major bill originating in the House to require waiver of the House five-day posting rule for all hearings, but the 2011 House redistricting process concluded all public hearings within four days of the release of the Chair's statewide proposal. Trial Tr. 1650:13-1652:2, July 18, 2014 (Hochberg).[19]

Each of these deviations limited the ability of minority-preferred legislators to influence the process. This is circumstantial evidence under *Arlington Heights* that legislative leadership sought to preclude minority-preferred legislators, who represented the targets of discrimination, from impeding the leadership's intended discriminatory effect. The secretive nature of the process prior to the disclosure of a statewide proposal is significant, because minority-preferred legislators had minimal opportunities to affect the bill once it had been released to the public. Moreover, the State's claim that the closed process "affected all members of the public equally," Tex. Br. 41, 46-47, is belied both by the greater involvement of Anglo-preferred legislators in that closed process and by the early disclosures of critical information to some Anglo legislators, all of whom were not minority-preferred. *See, e.g.*, Trial Tr. 1963:1-21, July 19, 2014 (Bruce)

Moreover, the Congressional redistricting process proceeded so quickly that it took only two-thirds of the time that had been allotted for the special session. Trial Tr. 464:17-24, Aug. 12, 2014 (Arrington).

[19] Committee staff established the House redistricting schedule under the direction of Chairperson Solomons, Trial Tr. 1924:17-1925:9, July 19, 2014 (Bruce), and regardless of whether Representative Villarreal made the formal motion to waive the five-day posting rule in his capacity as Vice-Chair of the House Redistricting Committee, Tex. Br. 47, House Leadership excluded Representative Villarreal from the development of that schedule. *See, e.g.*, US Ex. 108A (Email, Mar. 21, 2011); *see also* Trial Tr. 8:19-24, July 14, 2014 (Veasey) (describing how members of the redistricting committee were "kept in the dark").

(early release of House map did not include minority legislators); Trial Tr. at 1965:5-15, 1984:2-17, 1986:11-22, July 19, 2014 (Bruce) (only "individual legislators" were informed that only 24 House districts would be allotted to Harris County); Trial Tr. 1299:2-21, July 17, 2014 (Coleman) (minority legislators did not learn that 24 House districts would be allotted to Harris County until countywide draft was complete); Trial Tr. 256:20-25, Aug. 11, 2014 (Seliger) (no recollection of minority members' involvement in the development of the Congressional plan).

The State's assertion that redistricting resources were equally available to Anglo legislators and minority-preferred legislators, Tex. Br. 44-45, is belied by the simple facts that these resources were available only to legislative leadership and that legislative leadership was uniformly Anglo and not minority preferred. Thus, state-funded private legal counsel and expert Voting Rights Act guidance from the OAG were not available to minority-preferred legislators. Trial Tr. 1014:20-1016:1, 1023:14-1027:23, 1068:16-22, July 17, 2014 (Solomons). Only by withholding legitimate Voting Rights Act guidance was Chairperson Solomons able to advance superficial demographic standards for measuring retrogression and vote dilution on the House floor that legislative leadership knew were—to quote David Hanna—"phony." US Ex. 193A at 4-5 (Draft Informal Submission, Hanna comments); US Ex 635 (Draft informal Submission, Hanna comments). *Compare* Trial Tr. 1017:8-1023:6, July 17, 2014 (Solomons) (discussing Voting Rights Act election analysis received from the OAG); Trial Tr. 1640:16-1641:11, Sept. 13, 2011 (Solomons) (same), *with* US Ex. 198 at 15-18 (House Journal, Apr. 27, 2011) (asserting that population thresholds determine Voting Rights Act compliance).

Arlington Heights establishes that procedural deviations can provide circumstantial evidence that a facially neutral government action has been taken with a discriminatory intent. *See* 429 U.S. at 267. The rationale for such an inference is that decision makers may try to rush

the process to avoid scrutiny and prevent input when engaged in purposeful discrimination. Of course, plaintiffs need not prove that the procedural deviations themselves treated legislators differently based on race (though the record here does contain evidence of that sort).[20] Such a requirement would undermine the circumstantial nature of the *Arlington Heights* inquiry. The cumulative circumstantial evidence presented by the United States, along with a significant quantity of direct evidence, supports the inference that procedural deviations that limited the role of minority-preferred legislators served a broader intent to adopt redistricting plans that diminished electoral opportunities for minority voters, a goal achieved by the 2011 Congressional and House plans.

IV. THE 2011 HOUSE PLAN

Texas tries to justify the reduction of minority opportunity districts from 50 to either 45 or 46, *see* US PFOF ¶¶ 34-45, 297-299, by explaining that it sought either to protect Republican incumbents or to follow traditional redistricting principles. Texas does not dispute that minority voters no longer had an opportunity to elect their preferred candidates in HD 33 (Nueces County), HD 35 (South Texas), HD 117 (Bexar County), HD 149 (Harris County), and possibly HD 41 (Hidalgo County) in the 2011 House Plan. US PFOF ¶ 298. Texas also does not dispute that it prevented the emergence of new minority opportunity districts in Dallas County, El Paso County, Harris County and the Rio Grande Valley (spillover from Hidalgo and Cameron counties). US PFOF ¶¶ 513-543, 494-512, 293-301. In each situation where a minority opportunity district was eliminated, the evidence demonstrates that Texas intended the adverse

[20] The exclusion of minority legislators from the Harris County redistricting process exhibited both discriminatory purpose and retaliation against the African-American legislator who stood most prominently against it. Trial Tr. 1303:22-1304:10, 1304:15-1306:4, 1313:10-15, July 17, 2014 (Coleman); US Ex. 442 (Woolley Plan List).

effect on minority voters. In each case where Texas declined to create a minority opportunity district, non-racial reasons neither explain nor justify Texas's decision.

A. Bexar County

HD 117 was drawn to eliminate Hispanic electoral opportunity. Texas does not dispute that Hispanic electoral opportunity decreased in HD 117 in the 2011 Plan. Tex. Br. 52-60; *see also* US Ex. 350 at 11 (Oct. 2011 Alford Rep). That decrease in performance was deliberate. The evidence establishes that Representative Garza was not the Hispanic-preferred candidate when he was elected to represent HD 117 in 2010. US Ex. 351 at 35 (2011 Handley House Rep.); US Ex. 112 (Email, March 25, 2011) (VTD Analysis, HD 117). In creating the 2011 district, Representative Garza worked with map drawer Interiano to create the façade of Hispanic opportunity in a district that was designed to protect him from a Hispanic constituency that did not support him. Trial Tr. 1523:2-9, July 18, 2014 (Interiano); US Ex. 481 (Garza Shapefiles). The methods used to protect Representative Garza, which included removing politically mobilized, high-Hispanic-turnout precincts and replacing them with non-mobilized, low-Hispanic-turnout precincts, establish that the district was drawn to intentionally dilute Hispanic voting strength. US Br. 41-43. Texas's claims to the contrary are based on unsupported characterizations of the evidence.

In arguing that the drawing of HD 117 could not be intentionally dilutive, the State claims that because Bexar County was a "drop in" county, every district in the county map was necessarily supported by all of the members in the county delegation. Tex. Br. 56-57. The evidence does not establish that all of the delegation members supported the proposed county map as a whole. Members of the Bexar County delegation were instructed to create their ideal districts. Trial Tr. 329:6-10, July 15, 2014 (Farias). Delegation members then signed off on their own districts; there is no evidence to suggest members approved of the configuration of

other delegation members' districts. In fact, the evidence suggests just the opposite because every minority-preferred legislator in Bexar County (a majority of the delegation) voted in favor of Representative Joe Farias's failed amendment to change the map as a whole by returning the community of Whispering Winds back to HD 118. Trial Tr. 351:11-21, July 15, 2014 (Farias).

However, even if the Bexar County delegation supported the final map, it would not change the fact that HD 117 was drawn to diminish Hispanic voting strength, because Representative Garza and his staff, together with Interiano, intentionally drew a district that would deny Hispanic voters an opportunity to elect their preferred candidate. And Texas's argument that every district in Bexar County met the standards established by a Hispanic Democrat rests on the premise that Representative Mike Villarreal developed those standards. Tex. Br. 54-55. That is incorrect. The 50 percent concentration of Spanish-surnamed voters deemed necessary to establish Hispanic electoral opportunity, *see* US Br. 73-76, was developed by legislative leadership, not Representative Villarreal. US Ex. 198 15-18 (House Journal, Apr. 27, 2011); Trial Tr. 1521:2-25, July 18, 2014 (Interiano)

The State also defends the elimination of minority electoral opportunity in HD 117 as the result of a race-neutral attempt to design a rural district outside the City of San Antonio. Tex. Br. 58. But this argument depends on several distortions and misstatements of the evidence. Representative Garza never intended to draw a rural district. When he drew his ideal district, it ran north to I-10, taking in suburban, non-rural areas in northern Bexar County, and south to the Medina River, excluding the rural portions of southern Bexar County. Trial Tr. 363:24-364:3, 367:5-25, 379:6-19; July 15, 2014 (Garza); *see also* TLRTF Ex. 523 (Garza Map, H100). It was not until after Representative Garza learned that his ideal district lowered Hispanic Spanish surnamed registered voters ("SSVR") to an impressible level that he drew HD 117 into southern

Bexar County, taking in more rural areas. *Compare* TLRTF Ex. 523 (Garza Map, H100) *with* TLRTF Ex. 528 (Garza Map, H104) *and* US Ex. 294D (Bexar Cnty Map, Plan H283).

Moreover, HD 117 in the 2011 plan is not "a rural, conservative district outside the City of San Antonio." Tex. Br. 55. HD 117 takes in significant non-rural areas in the northern part of the district, including several heavily developed suburban areas and portions of the City of San Antonio where Loop 1604 meets I-10 West. Trial Tr. 1549:20-1551:6, 1550:22-1551:6, July 18, 2014 (Interiano). And there is no evidence to suggest that these areas are, as the State puts it, "conservative." Tex. Br. 59. Although Texas cites Representative Farias for the idea that the City of Somerset and the community of Whispering Winds are conservative, he said no such thing. Rather, he testified that these communities were majority Hispanic with very low voter turnout and that a legislator would need to work hard to get their votes. Trial Tr. 322:23-324:2, 336:14-337:7, July 15, 2014 (Farias).

Likewise, Texas's claim that HD 117 in the 2011 plan follows natural boundaries is also plainly false. Tex. Br. 58-59. The 2011 district cuts cities and highways, *see* US Ex. 291B (Bexar Cnty. Map); US Ex. 294B (Bexar Cnty. Map), and contrary to the State's claims, does not follow the Medina or San Antonio Rivers. *See id*.

Texas argues that the United States places too much weight on Representative Garza's statements that he needed his district to be "more Anglo" and wanted "more Mexicans" in his district to secure his reelection chances. Tex. Br. 67-68. These statements establish that Representative Garza conceived of the redistricting process in distinctly racial terms. US Br. 13-14. When combined with the fact that Representative Garza worked with Interiano to increase the district's HVAP and HCVAP while simultaneously decreasing the proportion of SSVR and Hispanic electoral opportunity, the statements confirm that Representative Garza

intentionally and impermissibly focused on race when drawing the district. Trial Tr. 119:14-19, 124:10-127:14, July 14, 2014 (Arrington); US Ex. 356 ¶¶ 17-18, 37-39 (Feb. 2014 Arrington Rep.); *see also* 3/9/12 Opinion at 6 (ECF No. 690).

The State is plainly wrong to assert that "there is no evidence that voter turnout analysis played any part in the creation of HD 117." Tex. Br. 59. Representative Garza testified that he and his staff conducted a district-wide analysis of voter turnout during the redistricting process and that, as a general matter, turnout of Anglos and Hispanics was discussed. Trial Tr. 373:12-19, July 15, 2014 (Garza). From that analysis, Representative Garza was able to determine that turnout among Hispanics in southern Bexar County was low, *id.* at 373:20-374-13, and that turnout among Anglos in northern Bexar County was high, *id.* at 429:11-430:3. Representative Garza knew that he was supported by the Anglo voters in the north and not the Hispanic voters in the south. *Id.* at 363:4-13, 377:11-22. Representative Garza also knew that he was not supported by the politically-active Hispanic voters in the South San Antonio Independent School District (ISD). *Id.* at 377:23-378:1. Armed with this knowledge, Representative Garza worked with Interiano to create a district that ran farther into northern Bexar County to pick up supportive Anglo population and into southern Bexar County to pick up low-turnout Hispanic population, while excising the high-turnout Hispanic voters in South San Antonio ISD. *See* US Ex. 294D; *compare* US Ex. 292A (Bexar Cnty. Pct. Map) *with* TLRTF Ex. 1361 (Bexar Cnty. Election Returns by Pct.).

Texas's attempts to minimize Representative Garza's role in drafting his district are unpersuasive. The State takes the incredible position that Representative Garza was a "junior member" of the delegation who "did not have much influence on how HD 117 was constructed." Tex. Br. 60. Not only was Representative Garza able to draft his ideal district, he and his staff

were able to work directly with Interiano to create at least five drafts of HD 117. US Ex. 482 (Garza Plan Log). When Representative Farias, a more senior member of the Bexar delegation, sought to have communities with which he had long-standing ties returned to his district, Representative Garza was able to block that request. Although Representative Farias reached out to Speaker Straus, Chairperson Solomons, and Interiano to express his desire to retain Somerset and Whispering Winds, Representative Garza's interests prevailed. Trial Tr. 326:12-327:4, July 15, 2014 (Farias).

The only evidence to suggest that Representative Garza did not have absolute control over the creation of his district was the guidance he received from Representative Villarreal to maintain at least 50 percent SSVR in HD 117 after Representative Garza initially reduced SSVR to 46.3 percent. US Br. 41. However, after receiving that guidance, Representative Garza demanded that the SSVR in his district not exceed 50.1 percent, the barest majority, which the 2011 Plan reflects. US Br. 42-43. Representative Garza's monopoly on the development of his district, which included the ability to veto any changes throughout the process, bears no resemblance to the example offered by the State of a lone legislator in *Florida v. United States* who made inappropriate statements on the House floor but had absolutely no involvement in drafting the challenged laws. 885 F. Supp. 2d at 354; Tex. Br. 58, 60. Conversely, Representative Farias's exhaustive, yet futile attempts to negotiate the return of the City of Somerset and the community of Whispering Winds to HD 118 supports the conclusion that minority-preferred legislators had little to no influence in the redistricting process, especially if their interests ran counter to those of Anglo-preferred legislators. US Br. 43-44.

In sum, overwhelming evidence illustrates that HD 117 was drawn to intentionally diminish Hispanic voting strength. Despite Texas's unsubstantiated attempts, this purposeful dilution cannot be explained by race-neutral redistricting principles.

B. Dallas County

The use of race to configure HD 105 in the 2011 House Plan prevented another minority opportunity district from being created in Dallas County. US Br. 51-55. Texas admits that the map drawers used race in configuring HD 103, HD 104, and HD 105. Tex Br. 63. They used race as a proxy for partisanship when they split 22 precincts in HD 105 in the 2011 House Plan to prevent the emergence of a new minority opportunity district in western Dallas County. US Br. 51-55; PFOF ¶ 536. In particular, they packed minority voters into HD 104 when analysis already showed that minority voters in that district could elect their candidates of choice. All three of the State's justifications for splitting these 22 precincts—(1) increasing SSVR in HD 104 above 50 percent, (2) keeping SSVR in HD 103 at the same level, and (3) pairing two Republican incumbents in HD 105—are unsupported by the evidence.

Texas did not need to increase SSVR in HD 104 to more than 50 percent, and therefore, Texas did not need to split precincts on the basis of race. Texas relies on an April 7, 2011, memorandum authored by David Hanna to justify the use of race to split precincts in HD 105. US Ex 343 (First Hanna Memo, version A). While noting the part of the memo that mentions a need to increase SSVR in HD 104 (because no new Hispanic opportunity districts were created), Texas fails to point this Court to the part of the memo that says this draft plan (H109) would allow Hispanic voters the opportunity to elect their candidates of choice. *Id*. Therefore, there would be no need to use race to split any precincts on the border between HD 104 and HD 105 in

an attempt to add Hispanic population and increase the SSVR in HD 104 in Plan H109.[21] Adding more Hispanic voters in HD 104 was simply packing.

Texas also cites the need to increase the SSVR in HD 103 in the 2011 Plan as a justification for splitting precincts on the basis of race in the northern portion of HD 105. *See* Tex Br. 63; US Ex. 299A (Map showing splits in HD 105). It was not necessary to split precincts by race in order to do this. Representative Rafael Anchia, who represents HD 103, submitted his ideal district to map drawer Ryan Downton in H257. Trial Tr. 2075:4-2076:8, July 19, 2014 (Downton); US Ex. 427 (HRC1H257 shapefile). The configuration included neither the incursion into Irving, nor any precincts split on the basis of race. *Compare* US Ex. 427 (HRC1H257 Shapefile) with US Ex. 299A (Dallas Cnty. Map, Plan H283). It would have been possible to use H257, Anchia's proposed map, to provide Hispanic voters the ability to elect their candidates of choice, without splitting precincts. *See* US Ex. 427. The configuration of HD 103 also would have allowed HD 104 to have sufficient minority voters without packing additional Hispanic voters into the district.

Texas claims that the desire to pair Representative Linda Harper-Brown (who represented HD 105 in 2011) and Representative Rodney Anderson (who represented HD 106, a district that was no longer in Dallas County in the 2011 Plan) also explains the split precincts in the southern portion of HD 105. Tex Br. 64. First, there was no need to split precincts to accomplish this pairing. Representative Jim Jackson submitted a map to Downton that successfully paired Representatives Harper-Brown and Anderson without splitting precincts. Trial Tr. 2077:13-2079:11, July 19, 2014 (Downton); US. Ex. 512 (Jackson Proposed HD 115, HD 105 Map). Second, there is no race-neutral reason why the precincts needed to be split in such a manner,

[21] The SSVR in HD 103 or HD 104 did not change in subsequent drafts of the plan.

taking in the Anglo population and excluding the Hispanic population from HD 105. US Ex. 299A (Dallas Cnty. Map, Plan H283).

The only explanation left for why precincts were split is that State officials, using race as a proxy for party, sought to prevent the emergence of a new minority opportunity district in the area of HD 105. When Hispanic voters appeared to have a chance to elect their candidate of choice in 2012—given the success of minority-preferred candidates in 2006 and 2008 in HD 106 and their near success in HD 105 in 2008—the Legislature took that opportunity away. *Cf. LULAC v. Perry*, 548 U.S. at 440 (noting that although Hispanic voters had not elected a candidate of choice yet, they were about to do so).

The State also incorrectly asserts that in order to raise a claim regarding cracking or packing, the United States has to show that an additional majority SSVR district could be created in Dallas County. Texas cites *Johnson v. DeGrandy*, 512 U.S. 997, 1008 (1994), for the proposition that to maintain a vote dilution claim, the first *Gingles* precondition requires the ability to create an additional minority opportunity district. Tex Br. 75. *DeGrandy* does not address intentional vote dilution, however, and the first *Gingles* precondition does not apply to intentional vote dilution claims. US Br. 79-80. Furthermore, when a plaintiff alleges a results claim for vote dilution statewide—as has been alleged here—the plaintiff needs to show only that an additional minority opportunity district can be created in the State, not necessarily in the county. *See infra* Sections IV.C, D, H. The United States has demonstrated that this requirement can be met. US Br. 16-19, 37-41. At any rate, the United States also has shown that it is possible to create an additional majority-minority district in Dallas County. US Ex. 513 (Dallas Cnty. Demonstration Map); *see also* US PFOF at 526-529.

Moreover, the most relevant Supreme Court precedent is not *DeGrandy* but *LULAC v. Perry*. In *LULAC*, the Court held that taking away political opportunity just as a minority group is about to exercise it—the situation present in Dallas County—"bears the mark of intentional discrimination that could give rise to an equal protection violation." 548 U.S. at 440. Regardless of the potential to craft a single-minority majority district, a jurisdiction may not deliberately split minority communities to create a situation in which minority voters have less opportunity than other citizens to participate in the political process and to elect legislators of their choice. *See Garza*, 917 F.2d at 771; US Br. 79-80.

C. El Paso County

As in Dallas County, Texas prevented the emergence of another minority opportunity district in HD 78 in El Paso County. Hispanic voters had elected their candidate of choice in 2008 in HD 78. US Ex. 370 at 71-72 (RED-225, Plan H100). The 2011 House Plan moved several predominantly Anglo precincts from HD 77 into HD 78 and moved several Hispanic precincts from HD 78 into HD 77.[22] The changes decreased SSVR in HD 78 from 47.1 percent to 46.8 percent. US Ex. 395 at 16 (Plan Packet H100); US Ex. 396 at 16 (Plan Packet H283).

Unlike in Dallas County, however, Texas does not dispute that another Hispanic opportunity district could have been created in El Paso County. HD 78 could have been drawn as a minority opportunity district, and in fact, several alternative plans presented to the Legislature did just that. Trial Tr. 461:23-462:8, Sept. 7, 2011 (Flores); Trial Tr. 1174:21-1175:1, July 17, 2014 (Hanna); *see also* TLRTF Ex. 340 (Map, Plan H292). There were no legal obstacles to creating another minority opportunity district in El Paso; the Legislature simply

[22] Trial Tr. 694:1-11, 696:11-697:18, 698:9-16, July 15, 2014 (Rodriguez); Trial Tr. 2117:14-2118:25, July 19, 2014 (Downton); TLRTF Ex. 328 (El Paso Map with HCVAP shading, Plan H283); TLRTF Ex. 1012 (West Antler Map with HVAP shading, Plan H283); TLRTF Ex. 1014 (East Antler Map with HVAP shading, Plan H283).

decided not to do so. Trial Tr. 2042:24-2043:4, July 19, 2014 (Downton). The refusal to create this minority opportunity district is evidence of intentional vote dilution.

Texas also admits to using race to split precincts in El Paso County. Tex. Br. 72-73. A draft map, H109, had reduced SSVR in El Paso County from 47.1 percent to 45.8 percent. US Ex. 343 at 3 (First Hanna Memo, version A). Texas claims it split precincts using race to increase the SSVR to 46.8 percent. The Texas Latino Redistricting Task Force has cast serious doubt on this claim, and in any event, it was not necessary to split any precincts or use race to achieve this result. The problem could have been resolved by swapping whole precincts from an adjoining district.[23]

D. Harris County

The 2011 House Plan intentionally diluted minority voting strength in Harris County by removing HD 149, a minority opportunity district in which a cohesive coalition of Hispanic, African-American, and Asian-American voters had successfully elected the first Vietnamese American to serve in the Texas Legislature. Trial Tr. 1341:1-4, 1342:10-1343:23, 1346:10-18, July 17, 2014 (Vo); Trial Tr. 354:1-355:19, Sept. 7, 2011 (Martin); Trial Tr. 890:23-891:18, Sept. 8, 2011 (Murray). Texas does not dispute that the 2011 House Plan deliberately fragmented HD 149 and paired the incumbent, Representative Hubert Vo, with Representative Scott Hochberg in HD 137.[24] Rather, the State claims that it had free rein to crack this cohesive

[23] US Ex. 343 at 3 (First Hanna Memo, version A); *see also* Trial Tr. 794:2-12, July 16, 2014 (Pickett); Trial Tr. 1056:2-1057:9, July 17, 2014 (Solomons); Trial Tr. 2110:6-2113:21, July 19, 2014 (Downton) (demonstrating that it was possible to restore SSVR without splitting additional precincts).

[24] Because HD 137 remained largely unchanged in terms of demographics and minority electoral opportunity before and after the 2011 redistricting, the status of that district under the Voting Rights Act is unchanged in turn. *See* US Ex. 351 at 5, 11 (2011 Handley House Rep.) (minority opportunity before and after redistricting); US Ex. 395 at 12 (Plan Packet, H100) (13.7% Anglo VAP); US Ex. 396 at 12 (Plan Packet, H283) (10.9% Anglo VAP). Thus, the potential Voting Rights Act implications of eliminating minority electoral opportunity in HD 137, Tex. Br. 84, are irrelevant to the State's decision to eliminate House District 149.

minority coalition because, according to the State, the Voting Rights Act does not require the creation of minority coalition districts. Tex. Br. 79, 84-85.

Regardless of whether the Voting Rights Act can require the creation of minority coalition districts—which it can[25]—Section 2 and the U.S. Constitution forbid the intentional elimination of an existing minority coalition district. *See Bartlett*, 556 U.S. at 24 (Opinion of Kennedy, J.) (observing that the intentional destruction of an effective coalition district raises "serious questions under both the Fourteenth and Fifteenth Amendments"); *see also id.* at 26-44 (Souter, J., dissenting for four justices) (arguing that crossover districts should receive the same treatment as minority-majority districts). Moreover, faulty legal advice received by legislative leadership, Tex. Br. 84-85, provides no defense to a claim of intentional vote dilution. Where, as here, State officials enact a redistricting plan with the intent to diminish the voting strength of minority voters, it is irrelevant whether they also specifically intended to violate the Voting Rights Act. *See, e.g.*, *Miller*, 515 U.S. at 911.[26]

Circumstantial evidence establishes that Texas cracked HD 149 at least in part to eliminate the opportunity for a minority coalition to elect its preferred candidate and with the specific intent to privilege the reelection of an Anglo Democrat over an Asian-American

[25] It is well-established in the Fifth Circuit that, given proof of electoral cohesion, Section 2 of the Voting Rights Act may require the creation of minority coalition districts. *See LULAC v. Clements*, 999 F.2d at 864; *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988). "[T]he judgments of the Court of Appeals for the Fifth Circuit are binding on the three-judge district court." *Ala. NAACP State Conf. of Branches v. Wallace*, 269 F. Supp. 346, 350 (M.D. Ala. 1967) (three-judge court); *see also Finch v. Miss. State Med. Ass'n*, 585 F.2d 765, 773 (5th Cir. 1978) (recognizing that a three-judge "district court within [a] Circuit . . . was bound to follow the law of the circuit").

[26] Even David Hanna recognized that "there could be a retrogression issue" in the elimination of House District 149 from Harris County. Tex. Ex. 122 at 6 (First Hanna Memo). His suggestion that it "would be a novel retrogression theory" to assert that the elimination of District 149 violated the Voting Rights Act, *id.*, ignored binding Fifth Circuit precedent recognizing the validity of minority coalition claims. *See LULAC v. Clements*, 999 F.2d at 864; *Campos v. City of Baytown*, 840 F.2d at 1244. Nothing in either case suggests that, in spite of sufficient proof of cohesion, a coalition of Hispanic, Black, and Asian-American voters should be treated differently from a coalition of only Hispanic and Black voters.

Democrat. Moreover, the decision to allocate only 24 districts to Harris County constitutes a substantive deviation from past application of the Texas County Line Rule, to the detriment of minority voters. *See Arlington Heights*, 429 U.S. at 267 (establishing that such substantive deviations may be circumstantial evidence of discriminatory intent). There is no dispute that the House plan that became law in 2001 included 25 districts in Harris County, and that plan was not challenged in court. Any rationale for the decision to include only 24 districts in Harris County should have applied equally to Harris County in 2001 because the county's percentage of the overall population in the State was virtually the same in 2001 and in 2011 (24.46 ideal districts vs. 24.41 ideal districts). Trial Tr. 1326:23-1327:1, July 17, 2014 (Coleman); Tex. Ex. 199 (2000 Census ideal district sizes); Tex. Ex. 200 (2010 Census ideal district sizes); *see also Clement v. Valles*, 620 S.W.2d 112 (Tex. 1981) (interpreting the Texas County Line Rule without establishing a standard for the number of districts in a multi-district county); *Smith v. Craddick*, 471 S.W.2d 375 (Tex. 1971) (same). More critically, the decision to reduce the number of districts in Harris County did not require the elimination of HD 149. Tex. Br. 84. The State could have eliminated a district that did not provide minority voters with an opportunity to elect their preferred candidate to the Texas House. Instead, Texas removed HD 149 from Harris County and fragmented the Asian-American community of southwest Harris County. Trial Tr. 1381:8-16, 1381:25-1382:5, July 17, 2014 (Vo).[27]

Texas's assertions regarding the Harris County redistricting process ignore critical details that constitute circumstantial evidence of a discriminatory intent. Tex. Br. 81-83. For example,

[27] The State's assertion that Representative Vo "testified that he did not believe that the enacted House plan intentionally fragmented the Asian-American community" is inaccurate and unsupported. Tex. Br. 85. Representative Vo merely testified that he had no knowledge of the intention of the person who drew the map and "scattered" the Asian American community. Trial Tr. 1381:17-21, July 17, 2014 (Vo). Moreover, the State has provided no rebuttal to the testimony that numerous Anglo representatives assured Representative Hochberg that he would be re-elected from the new District 137. Trial Tr. 1659:25-1660:22, 1674:14-1675:14, July 18, 2014 (Hochberg).

the State claims that "Chairman Solomons notified Harris County delegation members of his decision" to allot 24 districts to Harris County. Tex. Br. 81. However, the evidence at trial established that Chairperson Solomons notified only particular members of the Harris County delegation of this decision; minority members and the single minority-preferred Anglo member of the delegation did not learn that Harris County would include only 24 districts until after a 24-district map was complete. *See* Trial Tr. at 1965:5-15, 1984:2-17, 1986:11-22, July 19, 2014 (Bruce); *see also* Trial Tr. 1299:2-21, July 17, 2014 (Coleman); Trial Tr. 1351:11-17, July 17, 2014 (Vo). Similarly, Texas notes that the Harris County "delegation was unable to reach agreement" under the cooperative redistricting process initiated by Representative Wayne Smith and Representative Senfronia Thompson. Tex. Br. 81-82. This breakdown was inevitable, however, when the consensus process aimed to draw 25 districts, Trial Tr. at 1266:3-5, July 17, 2014 (Thompson), and Anglo-preferred members alone knew during the process that Chairperson Solomons had allotted only 24 districts to Harris County. Finally, while the State points out that the House floor debate paused "in order to address concerns of several African-American members in Harris County," Tex. Br. 83, there is no dispute that minority members were barred from making any change to Anglo-controlled districts, *i.e.*, changes that might have cured intentional vote dilution. Trial Tr. 1314:13-1316:3, July 17, 2014 (Coleman); Trial Tr. 933:10-22 (Sept. 9, 2011) (Downton).

In sum, the fragmentation of an existing minority coalition district HD 149 diluted the minority vote in Harris County. Significant circumstantial evidence establishes that Texas intentionally cracked the multiethnic community in HD 149 in order to eliminate minority voters' opportunity to elect their preferred candidate of choice and configured HD 137 to favor

the re-election of an Anglo incumbent over the only Vietnamese-American ever elected to the Texas Legislature.

E. Hidalgo County: House District 41

As the United States established in its opening brief, those who drew HD 41 in Hidalgo County aimed to eliminate the opportunity for Hispanic voters to elect their preferred candidate of choice—both by dividing precincts on the basis of race and under-populating the district. US Br. 45-48. While the ultimate motive for this vote dilution was to provide Representative Aaron Peña with the best chance to be reelected as a Republican after having been elected as a Democrat, Tex. Br. 86, Texas's conduct constitutes intentional race discrimination all the same. Although the State offers alternative explanations for the bizarre shape of HD 41, the splitting of 17 precincts, and the careful exclusion of homogeneous Hispanic neighborhoods, Tex. Br. 85-91, these explanations do not stand up to careful scrutiny.

The parties do not dispute the basic timeline of the construction of HD 41. In the first stage, Interiano drew HD 41 using political data from the 2010 Attorney General's race, and he split only four precincts. Tex. Br. 87-88; Tex. Ex. 334 (Split VTDs H113). Representative Peña then signed off on this district. Tex. Ex. 229 at 91 (signed map); Trial Tr. 1509:2-1510:24, July 18, 2014 (Interiano); Trial Tr. 93:3-23, Aug. 11, 2014 (Peña). In the second stage, Downton made numerous changes to HD 41 that resulted in a total of 17 precinct splits. Tex. Br. 89; Trial Tr. 2027:3-2031:14, July 19, 2014 (Downton); Tex. Ex. 295 (Split VTDs H283).

Texas cannot logically use Interiano's testimony or any involvement of Representative Ryan Guillen in the first stage of the construction of HD 41 to explain precinct splits that occurred in the second stage. Moreover, to the extent that Downton relied on racial concentrations as a proxy for political preferences, those actions cannot be "dismiss[ed] as mere fine tuning." *Bush v. Vera*, 517 U.S. at 971 n.* (Opinion of O'Connor, J.) (internal quotation

marks and citation omitted). Rather, the evidence establishes that intent to diminish minority electoral opportunity infected both stages of the process.

There is no question that Interiano's principal purpose in the first stage was political, Tex. Br. 87-88, but the State cannot plausibly claim that this was Interiano's sole purpose. Interiano was aware of the demographic makeup of the Rio Grande Valley, the persistence of racial bloc voting patterns throughout Texas, and the existence of Hispanic electoral opportunity in every Hidalgo County district prior to the 2011 redistricting. *See Miller*, 515 U.S. at 916 ("Redistricting legislatures will . . . almost always be aware of racial demographics."). Moreover, the Hanna memos notified Interiano that he had reduced SSVR in Representative Peña's district—then still labeled HD 40—by 23.6 percentage points below the SSVR level in the district that had elected Representative Peña as a Democrat. US Ex. 339 at 2 (Hanna Memo, Plan H110). The extreme population deviations in Hidalgo County, US Br. 46-47, and the complete exclusion of all other Hidalgo County incumbents from the redistricting process—most notably the incumbent who represented nearly all voters included in HD 41—reinforce that Interiano drew HD 41 with an intent to eliminate existing electoral opportunities enjoyed by the Hispanic community of Hidalgo County, even if that intentional vote dilution was in turn driven by the fact that the Hispanic community had consistently chosen to elect an entirely Democratic delegation to the Texas House. *See* US Ex. 374 at 2-3 (RED-202, Plan H283); US Ex. 396 at 1 (Plan Packet, H283); Trial Tr. 1501:1-8, July 19, 2014 (Interiano); US Ex. 198 at 90-95, 99 (House Journal, Apr. 27, 2011); *see also Garza*, 918 F.2d at 778 & n.1 (Kozinski, J., concurring in relevant part).

In the second stage of the construction of HD 41, the State claims that "Representative Guillen and Downton made further changes to the boundary of HD 41." Tex. Br. 88. The

essential problem with this theory is that Downton testified that he worked only with Representative Peña, Trial Tr. 2027:3-2028:11, July 19, 2014 (Downton), and Representative Peña testified that he did not directly ask Downton to include or exclude portions of split precincts from his district. Trial Tr. 95:4-9, 98:10-15, 106:5-15, 107:4-108:17, 113:8-18, Aug. 11, 2014 (Peña). In over 275 pages of testimony in this case, Downton mentioned Representative Guillen only to note that the Representative had voiced support for the 2011 House Plan. Trial Tr. 940:4-12, Sept. 9, 2011 (Downton); *see also* Trial Tr. 903:1-1023:15, Sept. 9, 2011 (Downton); Trial Tr. 1988:17-2156:12, July 19, 2014 (Downton). The State cannot both rely on Downton's testimony and maintain its assertion that Representative Guillen provided data to guide the second-stage precinct splits.[28]

Representative Peña's testimony at trial flagrantly contradicted his sworn deposition, and this Court therefore should reject the trial testimony as not credible. Because Representative Peña's late-breaking testimony was the sole support for the State's assertion about Representative Guillen's supposed role, the Court should in turn reject the theory that Representative Guillen was the mastermind behind the second-stage precinct splits. At trial, Representative Peña testified that he had been in the same room with Downton when Downton was actually changing lines in his district. Trial Tr. 91:24-92:9, Aug. 11, 2014 (Peña). But he also admitted that, during his deposition, he had stated that he never saw Downton actually

[28] The State did not name Representative Guillen in its disclosures or call him as a witness at trial. *See* Defs. Notice of 2d Am. Disclosures (ECF No. 979); Defs. 2d Am. Disclosures (Ex. 1). However, in a sworn declaration, Representative Guillen stated that other than negotiating regarding a single precinct that would be split between his district and District 41, he did not "recall any conversations in which [he] gave specific advice or instructions concerning which portions of particular precincts to include in Representative Peña's district." US Ex. 68 at 4-5 (Guillen Decl.). Defendants have objected to this declaration under Federal Rule of Evidence 802. However, given Defendants' access to Representative Guillen, their reliance on his purported out-of-court statements, and their failure to list Representative Guillen in their disclosures—as well as the United States' disclosure of the sworn declaration before trial—the admission of the declaration will serve the interests of justice and should be permitted under the residual exception to the hearsay rule, Federal Rule of Evidence 807.

drawing the confines of his district. *Id*. at 92:11-20. At trial, Representative Peña claimed that he was aware that parts of particular precincts would have favored him for reelection. *Id*. at 95:4-96:2, 98:16-19. During his deposition, he testified that he had no reason to believe that any particular part of those same precincts would have been more politically favorable to him. *Id.* at 96:7-19, 98:20-99:12. At trial, Representative Peña claimed that Representative Guillen had used a database of voting histories and another database of property tax records to identify favorable portions of split precincts. *Id.* at 111:9-17, 139:14-22. But he also admitted that, during his deposition, he had testified that he didn't know how it would be possible to identify conservative voters within a single precinct. *Id.* at 164:22-165:14. And of course, because the Interiano draft of HD 41 did not contain racially-divided precinct splits, this intensive search for "persuadable" voters using individual voter histories and property tax records would have had to occur in the second stage, *after* Representative Peña had already signed off on his district. The State's suggestion that Representative Peña would have requested this complex analysis after signing off on his district simply is not plausible. Without Representative Peña's claims, there is no evidence that Representative Guillen guided the racially-divided precinct splits in the second stage of the development of HD 41.

The remaining claims that the State makes concerning the second-stage precinct splits are equally implausible. *First*, the State relies on Interiano's testimony concerning the precincts he split to include Representative Peña in HD 41, to exclude Representative Veronica Gonzales from HD 41, and to exclude a Democratic-leaning precinct from HD 41. Tex. Br. 89. Each of these splits, however, was made during the first stage of the construction of HD 41; thus, they cannot explain the second-stage precinct splits. Tex. Ex. 334 (Split VTDs H113); Trial Tr. 1506:6-1508:4, 1583:1-1584:16, July 18, 2014 (Interiano); US Ex. 516 (HD 41 Split Summary).

Second, Texas has identified individual census blocks with Anglo population concentrations outside of the boundary of HD 41 and asks this Court to infer that a map drawer motivated by race would have included those blocks. Tex. Br. 89 n.33. But the mere presence of Anglo population concentrations—without noting the total population of these census blocks and the surrounding, majority-Hispanic blocks—does not establish that adding these Anglos to HD 41 would have further increased the Anglo proportion of the population in HD 41. Moreover, ever since the Supreme Court held in *Shaw I* that bizarrely shaped districts in which race trumps traditional districting principles can (in some instances) give rise to constitutional claims of race discrimination, 509 U.S. at 647, any sophisticated map drawer motivated by race would know to exercise greater subtlety than extending appendages to grab every last Anglo voter. *Third*, the State asserts that the racially divided precincts were split to follow roads. In offering this race-neutral explanation, Texas relies only on the testimony of Interiano, who did not split the precincts at issue, and Representative Peña, whose trial testimony was not credible. *See* Tex. Br. 90. Moreover, the roads claim is implausible given the degree of political importance of this district following Representative Peña's change in party and the delivery of a House supermajority (with substantial implications under the rules of the Texas House), the failure to divide other precincts in order to align the boundary of HD 41 with roads, and the division of other precincts to move the boundary away from roads. *See* Trial Tr. 32:10-33:21, Aug. 11, 2014 (Interiano); US Ex. 313 (HD 41 Pct. Map, NE); US Ex. 314 (HD 41 Pct. Map, NW).

The United States offered the testimony of Jaime Longoria and Arrington in order to explain precisely what the boundary of HD 41 did to the communities of Hidalgo County: the boundary excluded homogeneous Hispanic communities—even below the precinct level—in a manner that maximized Anglo population and minimized Hispanic electoral opportunity. Trial

Tr. 506:9-507:4, 513:2-524:4, July 15, 2014 (Longoria); Trial Tr. 120:1-10, July 14, 2014 (Arrington); *cf. Bush v. Vera*, 517 U.S. at 968 (Opinion of O'Connor, J.) (striking down districts whose boundaries had been unlawfully shaped predominantly by racial considerations, notwithstanding the State's assumptions of stereotypical political preferences). In the absence of plausible alternative explanations provided by Texas's map drawers or Representative Peña, the testimony provided by Longoria and Arrington amply establishes that Texas divided precincts by race and intentionally diluted Hispanic voting strength in Hidalgo County. *See Feeney*, 442 U.S. at 275 ("If the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral."); *see also Arlington Heights*, 429 U.S. at 266.

F. Nueces County

Texas attempts to defend the deliberate elimination of a Hispanic opportunity district from Nueces County by effectively claiming that Section 2 of the Voting Rights Act may never preempt state law. The State bases this argument on three premises. *First*, Texas claims that the Texas County Line Rule, Tex. Const. art. III, § 26, is a traditional districting requirement that strictly forbids any division of county lines not mandated by one-person, one-vote requirements. *Second*, Texas asserts that intentional vote dilution does not occur if it is impossible to draw an additional district that meets the *Gingles* compactness requirement. *Third*, Texas argues that any district that deviates in any way from a traditional districting requirement does not meet the *Gingles* compactness requirement. Tex. Br. 97-98. All three premises are incorrect.

The strict reading of the Texas County Line Rule that the State urges is not the sacrosanct traditional redistricting principle that Texas would have this Court believe. It is well-established that the Rule consistently yields to federal requirements. For example, the Texas Supreme Court held in *Smith v. Craddick* that the requirements of the County Line Rule "are inferior to the

necessity of complying with the Equal Protection Clause." 471 S.W.2d at 378. Texas has offered no rationale for why one-person, one-vote requirements under the Equal Protection Clause should receive different treatment from the Equal Protection Clause prohibition on intentional vote dilution.

More critically, Texas departed from the County Line Rule when doing so served its vote dilution purposes. In the Rio Grande Valley, the State refused to combine the surplus population of Hidalgo County and Cameron County and actually *increased* the number of county line breaks in order to prevent the creation of a new minority opportunity district. *See* US Br. 39; *cf. Clements v. Valles*, 620 S.W.2d at 114 (finding a violation of the County Line Rule where counties had been "cut so that their surplus populations [were] joined to two, rather than one adjoining district"). *See generally Arlington Heights*, 429 U.S. at 267 (suggesting that deviations from substantive standards may be circumstantial evidence of discriminatory intent).[29]

Texas's second premise is also contradicted by the case law. The first *Gingles* precondition does not apply to claims that a redistricting plan was drawn with a discriminatory intent. *Shaw v. Hunt*, 517 U.S. 899, 914-18 (1996); *Garza*, 918 F.2d at 769-71; *see also* US Br. 79-80; *supra* Section IV.B.

Finally, unwavering application of all traditional redistricting principles is not required in order to meet the *Gingles* compactness requirement, and so the State's third premise fails as well. Failure to abide by "traditional districting principles" has been defined as synonymous with the creation of "bizarrely-shaped districts" forbidden by *Shaw*, not with a failure to maintain every

[29] Declining to apply the State's strict interpretation of the Texas County Line Rule is distinguishable from *Fairley v. City of Hattiesburg*, 584 F.3d 660 (5th Cir. 2009) (Smith, J.), in which plaintiffs sought "to redistrict based on fictional population data, namely the pretense that a number of City residents were not there." *Id.* at 672. The plan proposed by the *Fairley* plaintiffs plainly violated one-person, one-vote requirements. *See id.* at 672 & n.15 (citing, *inter alia*, *Reynolds v. Sims*, 377 U.S. 533, 576 (1964)).

municipal boundary. *See Clark v. Calhoun Cnty.*, 21 F.3d 92, 95 (5th Cir. 1994); *see also Houston v. Lafayette Cnty.*, 56 F.3d 606, 611 (5th Cir. 1995) (holding that compactness is not a "narrow" standard and "does not require some aesthetic ideal" to be met (internal citation and quotation marks omitted)); *Rodriguez v. Harris Cnty.*, 964 F. Supp. 2d 686, 744 (S.D. Tex. 2013) (noting that a requirement to "comport[] with traditional redistricting principles" does not establish "the *degree* to which . . . maps must comply with these principles" (emphasis added) (citing *Sensley v. Albritton*, 385 F.3d 591 (5th Cir. 2004)). It is permissible to create or maintain minority electoral opportunities, even at the expense of strict compliance with other traditional districting principles, without running afoul of *Shaw*. *See Bush v. Vera*, 517 U.S. at 958 (Opinion of O'Connor, J.) (distinguishing the creation of minority electoral opportunities from the race-based districting at issue in *Shaw*). A districting plan that generally respects county boundaries but includes a single additional division of a county boundary in order to reduce vote dilution is different from a plan that ignores traditional districting principles entirely. *Cf. Miller*, 515 U.S. at 908 (noting that a redistricting plan containing a district in which racial consideration predominated "split 26 counties, 23 more than the existing congressional districts").

At issue here is a single additional county line division necessary to preserve a minority opportunity district, a split that was also present in the previously existing districts. Texas essentially claims that a geographically compact district drawn by the State in 2001—HD 32, which included a portion of Nueces County and the entirety of four other counties—would cease to be compact a decade later simply because the Voting Rights Act replaced the one-person, one-vote doctrine as the rationale to cross a county line. Tex. Br. 98 (arguing that the compactness requirement "is not satisfied" if any Nueces County district includes population outside the county). Thus, the issue is not geographic compactness *per se* but inconsistent treatment of

federal laws and adherence to state law over the Voting Rights Act. A rigid requirement that districts comply with traditional districting principles before drawing a minority opportunity district would permit jurisdictions to select "an array of redistricting principles such that it would be difficult [to draw a minority opportunity district] and yet still comply with each of the defendant's redistricting principles." *Rodriguez v. Harris Cnty.*, 964 F. Supp. 2d at 745. Moreover, the Supreme Court has held that at-large elections and multi-member districts, which were once traditional districting principles in a variety of jurisdictions, have been used to achieve intentional vote dilution. *See Rogers v. Lodge*, 458 U.S. 613 (1982); *White v. Regester*, 412 U.S. at 766-67. Therefore, the inconsistent treatment of federal law—namely, the one-person, one-vote principle and the Voting Rights Act—suggests that Texas specifically opposed compliance with the Act. This hostility towards protections for minority voting rights in turn serves as circumstantial evidence of specific intent to diminish the electoral opportunities of minority voters. *See Arlington Heights*, 429 U.S. at 267 (noting that departures from substantive principles may serve as circumstantial evidence of intentional discrimination).

Texas also does not attempt to defend the specific boundary between districts within Nueces County, which provides strong circumstantial evidence that Texas eliminated a Hispanic opportunity district from Nueces County because of the detrimental effect its elimination would have on Hispanic voters. The State merely asserts that the Texas Legislature intended for one of the two Nueces County House Districts to be "a strong Hispanic opportunity district." Tex. Br. 96. Even that claim is unsupported; the testimony on which Texas relies states only that the Legislature sought "to create one district with a higher Hispanic citizen voting age population than the other." Trial Tr. 1498:6-23, Sept. 12, 2011 (Interiano). The State has offered no explanation for packing HD 34 in the 2011 House Plan with a greater HVAP and SSVR share

than either HD 33 or HD 34 in the 2001 House Plan, for drawing the irregular boundary between the two Nueces County districts, or for overpopulating HD 34 in comparison to HD 32, notwithstanding Hispanic population growth rates that exceeded Anglo rates. The only remaining explanation is that the districts within Nueces County were drawn to ensure that District 32 would not afford Hispanic voters with an opportunity to elect their preferred candidates of choice, even after a further decade of disproportionate population growth. US Br. 50-51.

G. Tarrant County

Texas's account of the redistricting process in Tarrant County in 2011 ignores key procedural deviations. Tex. Br. 99. Because Tarrant County was one of eight drop-in counties in the 2011 House Plan, Trial Tr. 1876:2-8, July 19, 2014 (Alford), the delegation members worked together to come to a consensus agreement as instructed by Chairperson Solomons. Trial Tr. 1069:18-1070:1, 1073:13-1074:1, July 17, 2014 (Solomons). After members of the delegation reached a consensus, however, changes were made to HD 95, a Black opportunity district, which divided communities of interest and excluded key African-American communities. Trial Tr. 14:9-16:1, July 14, 2014 (Veasey). The State claims that this change was made to comply with a request by MALDEF, Tex. Br. 99, but even if that is true, it does not justify failing to inform U.S. Representative Marc Veasey, the incumbent of HD 95 at that time and also a member of the House Redistricting Committee, to explain the change, and to afford an opportunity for Representative Veasey to offer input concerning his own district. Trial Tr. 14:9-16:1, July 14, 2014 (Veasey). Notwithstanding the supposed openness of Chairperson Solomons's "member-driven process," Representative Veasey was kept in the dark about changes to his district, and he was powerless to make suggestions after the secretive changes were made. As a result, Representative Veasey, along with every other minority-preferred

legislator, was denied the ability to effectively participate in the redistricting process, *see* US Br. 59-62, which provides circumstantial evidence of discriminatory intent. *See Arlington Heights*, 429 U.S. at 267.

H. The Rio Grande Valley

The State of Texas's deliberate decision not to recognize significant Hispanic growth in the Rio Grande Valley through the creation of an additional Hispanic opportunity district constitutes intentional vote dilution. US Br. 38-39. The State contends, however, that because all Hispanic voters in the Hidalgo-Cameron area reside in Hispanic opportunity districts, there was no denial or abridgment of any Hispanic voter's ability to vote. Texas is incorrect on both the facts and the law. Factually, there is a serious question whether Hispanic voters had the opportunity to elect their candidates of choice in HD 41 in Hidalgo County in the 2011 House Plan. US Br. 45-46. Legally, the claim is for intentional vote dilution statewide and not for intentional vote dilution only in that specific area of the Rio Grande Valley. The Supreme Court rejected a similar argument by Texas in *LULAC v. Perry*, 548 U.S. at 437-38. Texas had argued that the Supreme Court needed to examine Southwest Texas—not the State as a whole—when assessing whether there was a Section 2 violation. The State argued that because Hispanic voters were represented in proportion to their population in Southwest Texas, there was no Section 2 violation. The Court found, however, that an allegation of statewide vote dilution calls for a corresponding statewide examination. *Id*.

I. Texas Used Population Deviation as a Tool to Minimize Minority Electoral Opportunity.

Texas has fundamentally misconstrued the United States' arguments concerning overpopulation of particular districts in the 2011 House Plan. Distinguishing this case from *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004), Texas argues that

the United States has failed to show a pattern of "systematic overpopulation" of Hispanic or African-American opportunity districts in the 2011 House Plan. Tex. Br. 140-44. But the United States has never advanced a constitutional one-person one-vote claim under *Larios* asserting statewide manipulation of district sizes in the 2011 House Plan. Rather, the United States has established that the State selectively manipulated districts sizes in particular counties—Dallas, Harris, Nueces, and Hidalgo—in order to minimize minority voting opportunities in violation of Section 2 of the Voting Rights Act. *See supra* Sections IV.B, IV.D-F. Although statewide averages obscure these patterns, targeted deviations are readily apparent at the county level.

In Hidalgo County, for instance, HD 41 was underpopulated by 4.41 percent of an ideal-sized district, while neighboring districts with greater Hispanic population concentrations were overpopulated by up to 4.62 percent of the ideal-sized district. U.S. Ex 374 at 2-3 (RED-202, Plan H283); *see also* US Ex. 396 at 1 (Plan Packet, H283). This striking disparity evinces a conscious effort to consolidate Anglo voters in HD 41 while minimizing the number of Hispanic voters added to this Anglo core, an effort buttressed by splitting precincts on the boundary of the district along racial lines. US Ex. 516 (HD 41 Split Summary); Trial Tr. 143:4-25, July 14, 2014 (Arrington); Trial Tr. 22:9-24:22, Aug. 11, 2014 (Interiano). Similarly, in Nueces County, map drawers used deviations to pack Hispanic voters into HD 34, drawing the district with a population 3.29 percent larger than the ideal district size. US Ex. 396 at 5 (Plan Packet, H283). HD 32, by contrast, was underpopulated by 0.34 percent, protecting Anglo control over that district. US Ex. 396 at 5 (Plan Packet, H283); Trial Tr. 626:1-633:22, July 15, 2014 (Herrero).

Texas also manipulated district population sizes to safeguard Anglo-controlled districts, as illustrated by the example of Dallas County. In the 2011 House Plan, House Districts 103,

104, and 105 all approached the maximum permitted overpopulation, with HD 103 deviating precisely 5.0 percent above the population of an ideal-sized district. Trial Tr. 149:20-25, July 14, 2014 (Arrington); US Ex. 396 at 10 (Plan Packet, H283). Like HD 34 in Nueces County, House Districts 103 and 104 were packed with Hispanic voters, many of whom were removed from HD 105. Trial Tr. 147:2-148:22, 155:1-22, July 14, 2014 (Arrington); Trial Tr. 599:12-19, July 15, 2014 (Lopez); US Ex. 299D (Dallas Cnty., Map for Plan H283). Because HD 105 could not shed population into equally overpopulated HD 103 and HD 104, the only potential areas to remove from HD 105 were Anglo communities along the district's northern border with HD 115. Texas declined to remove these communities, and doing so would have made HD 105 less safe for an Anglo-preferred incumbent. US Ex. 299A (Dallas Cnty., Plan H283). Instead, the State thwarted the natural emergence of a Hispanic opportunity district by increasing the dwindling Anglo population concentration in HD 105. Trial Tr. 148:23-151:22, July 14, 2014 (Arrington); US Ex. 352 ¶¶ 52-60 & tbls.5-6 (Oct. 2011 Arrington Rep.). *Compare* US Ex. 395 at 10 (Plan Packet, H100), *with* US Ex. 396 at 10 (Plan Packet, H283).

Texas readily acknowledges that the 2011 House Plan includes population deviations, but the State argues that these deviations did not facilitate vote dilution because most minority opportunity districts had a lower citizen voting-age population than other districts. Tex. Br. 145-46. In effect, Texas claims that existing minority opportunity districts had to be packed. However, the sole case on which Texas relies, *Rodriguez v. Pataki*, 308 F. Supp. 2d at 369-70, does not support the claim. The court there merely noted in dicta, after finding "that the plaintiffs failed to show that the deviation was not caused by the promotion of court-approved state policies," that the overpopulation of districts might not create an imbalance of the number of voters per district if citizenship rates differ across districts. *Id*. Texas's argument also

incorrectly suggests that the Hispanic voters that Texas packed into districts in Hidalgo and Nueces Counties were mostly non-citizens; in fact, the non-citizen Hispanic population in those districts was relatively minimal in the 2011 House Plan. *Compare, e.g.*, US Ex 396 at 5 (Plan Packet, H283) (HD 34 HVAP of 67.7%), *with* US Ex. 381 at 1-2 (RED-106, Plan H283) (HD 34 HCVAP of 64.6%).

V. THE 2011 CONGRESSIONAL PLAN

Despite the massive growth in minority population that allowed for Texas to be apportioned four new Congressional seats after the 2010 Census, Texas created no additional minority opportunity districts in its 2011 Congressional Plan.

Texas attempts to justify the elimination of a minority opportunity district in CD 23 with the explanation that the State was protecting a Republican incumbent. Tex. Br. at 114. The fact that map drawers swapped out high-turnout Hispanic precincts for low-turnout Hispanic precincts while attempting to maintain the appearance of Hispanic opportunity in CD 23 demonstrates that Texas intended an adverse effect on minority voters in CD 23. Similarly, the splitting of Hispanic communities and precincts in heavily Hispanic neighborhoods in CD 23 on the final day of map drawing demonstrates the intent to have an adverse effect on Hispanic voters.

Texas also argues that its failure to create a minority opportunity district in DFW is justified by its desire to avoid creating another Democratic district. However, Texas's cracking and packing of the minority population in DFW, and its use of race as a proxy for partisanship, establish that the State intended an adverse effect on minority voters.

A. Population Growth

Texas suggests that the Plaintiffs' alternative proposals are "misleading" and fail to account for the distribution and geographic concentration of Texas's Hispanic citizen-voting-age

population. Tex. Br. at 110-11. Beyond the ten minority opportunity districts in the 2011 Congressional Plan, as numerous alternative plans have shown, Texas could have created at least two more Congressional districts in which minority citizens would have had an opportunity to elect candidates of their choice. Trial Tr. 406:11-407:5, Aug. 12, 2014 (Arrington); US Ex. 602 (Article, Apr. 7, 2011); US Ex. 605 (Article, May 26, 2011); US Ex. 613 (NAACP Plan).

First, Texas could have maintained CD 23 as a Hispanic opportunity district by drawing the district's lines without reducing the number of participating Hispanic voters. US Ex. 686 at 9-10 & app.E (2011 Handley Cong. Rep.). Various alternative plans, as well as this Court's interim plan, did precisely that. Trial 307:18-308:6, Aug. 11, 2014 (Interiano); Trial Tr. 64:24-65:20, Oct. 31, 2011 (Golando); US Ex. 756 (Map, Plan C220); 11/26/11 Order (ECF No. 544).

Second, Texas could have drawn an additional minority opportunity district in the DFW Metroplex. Downton, the primary map drawer for the 2011 Congressional Plan, was aware of a proposal that would have provided minority voters in Tarrant and Dallas counties with an additional opportunity to elect their candidate of choice. US Ex. 653 (L. Smith Proposal); Trial Tr. 974:22-975:1, Sept. 9, 2011 (Downton). Indeed, many of Downton's early drafts included a second minority opportunity district in DFW, as did this Court's interim plan. US Ex. 674 (HRC Shapefiles, Part I); US Ex. 675 (HRC Shapefiles, Part II); US Ex. 756 (Map, Plan C220); 11/26/11 Order (ECF No. 544).

B. Congressional District 23

Texas tacitly admits to knowingly diluting minority voting strength when it states that the Legislature wanted "to provide Republican incumbent Francisco 'Quico' Canseco with the best chance of reelection," Tex. Br 114, while knowing that Representative Canseco was not the Hispanic preferred candidate of choice. Trial Tr. 308:18-309:17, Aug 11, 2014 (Interiano); Trial Tr. 966:3-5, Sept. 9, 2011(Downton). The map drawers received the OAG analysis for each of

their draft maps, and they used the analysis to determine whether Hispanic candidates of choice would prevail for CD 23 for a particular draft plan. Trial Tr. 5:13-8:25, 302:4-304:24, 307:18-308:6, 310:21-311:7, Aug. 11, 2014 (Interiano). This was compared to whether Hispanic candidates of choice prevailed in the same 10 elections in CD 23 in the 2006 Plan. *Id.* As they drew the maps, the map drawers knew they were decreasing the opportunity for Hispanic voters to elect their candidates of choice in CD 23. *Id.* Indeed, the State admits that Hispanic voters' opportunity to elect in CD 23 decreased in the 2011 Plan. Tex Br. 114.

The evidence is clear that the map drawers used the election analyses to draw lines based on race, impermissibly diluting the minority vote to serve their partisan goals. They plainly understood that the OAG analyses concerned Hispanic performance, not Democratic or Republican performance, as the following exchange between counsel for the United States and Interiano illustrates:

> Q. And I just want to be clear, if I can, that when you were receiving these and understanding them from the Office of the Attorney General, you were understanding these as Hispanic performance and not necessarily Democratic performance, correct?
>
> A. That is correct, yes, sir.
>
> Q. Okay. And so the three out of ten was Hispanic performance, for example, in District 23?
>
> A. The Hispanic candidate of choice.
>
> Q. And is that often referred to as Hispanic performance in that district?
>
> A. Yes, sir.

Trial Tr. 304:13-24, Aug. 11, 2014 (Interiano). Similarly, other staff and the TLC expressed concern about the decreased performance for Hispanic voters—not whether Democrats were being elected. Trial Tr. 644:17-645:23, 660:14-662:20, Aug. 12, 2014 (Archer); US Ex. 609

(Archer RBVA); Trial Tr. 1512:2-1519:7, Aug. 15, 2014 (Hanna). Those concerns went unheeded. *See* US Ex. 761 (CD 23 Election Analyses).

Texas claims that Dr. John Alford concluded that CD 23 provided an opportunity for Hispanic voters to elect their candidates of choice. Tex Br. 115. Three years earlier, however, he reached the opposite conclusion before this Court: "I don't count 23 as one of the seven performing districts when I evaluate C-185." Trial Tr. 1878:5-6, Sept. 14, 2011 (Alford).

The State erroneously asserts that Alford conducted an endogenous election analysis in CD 23 of the 2012 Congressional election for the 2011 Plan. Tex Br. 115. He did not. Trial Tr. 1850:1-3, Aug. 16, 2014 (Alford) ("the plan has never been used, so we have no example of that in the plan itself"). Alford added up results in Congressional elections for CD 16, CD 20, CD 21, CD 23, and CD 28 and attributed Republican votes to Representative Canseco, Democratic votes to Representative Gallego, and other votes to the other category—a type of reconstituted election analysis that no other expert finds valid. US Br. 21.

In addition to the problems with Alford's faulty reconstituted analysis, the 39 split precincts in CD 23 in the 2011 Plan do not allow for an accurate analysis of the election results in a very close election contest. Alford's report indicates that the Canseco/Gallego contest would have been very close (a 2,517 vote margin). As Dr. Lisa Handley explained, there is no accurate way to determine the performance of a split precinct in a recompiled election analysis. US Ex. 351 at 9-10 (2011 Handley House Rep.). The 39 split precincts do not permit the votes in those precincts to be allocated correctly. US Ex. 704 at 159-168 (RED-110, Plan C185) (showing VAP of more than 71,000 in the 39 split precincts in CD 23). Even if this method of reconstituting an election were valid—and it is not—there is no way to determine if the results are accurate in a reconstituted election when the results are this close.

Splitting Maverick County occurred at the very end of the map-drawing process, and this too evinces that Texas drew CD 23 because of its adverse effects on Hispanic voters. *See* US Ex. 196 at 307 (Email, June 13, 2011). In justifying the decision to split Maverick County, the map drawers explained that it was the only option because Webb County could not be split due to the Supreme Court's decision in *LULAC v. Perry*. Tex Br. 117. The map drawers in the 2011 Congressional Plan, however, followed the exact same blueprint in dividing Maverick County that the Supreme Court found objectionable in *LULAC v. Perry*. The Supreme Court found that the 2003 redistricting plan at issue in *LULAC v. Perry* divided the cohesive Hispanic community in Webb County—whose total population is 94 percent Hispanic—in half. 548 U.S. at 439. Likewise, during the 2011 redistricting, map drawers divided the cohesive Hispanic community in Maverick County—whose total population is 95.7 percent Hispanic—in half. US Ex. 704 at 164; US Ex. 690 at 6. In *LULAC v. Perry*, the Supreme Court found the politically active community in Webb County had been responsible for the incumbent's near defeat in 2002. 548 U.S. at 439. Similarly, the politically active community in Maverick County likely would have led to the political defeat of the incumbent in 2012. *See* Tex Br. 117 (explaining that keeping Maverick County whole would have negatively affected Representative Canseco's reelection chances). The Supreme Court found in *LULAC v. Perry*, that the "State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo." 548 U.S. at 440. Likewise, during the 2011 redistricting, the map drawers did the exact same thing in Maverick County by splitting the City of Eagle Pass. US Br. 23-26.

The State argues that the Legislature voted to approve splitting the communities of interest in Maverick County and Eagle Pass, and Representatives Mike Villareal, Joe Pickett, and

Eric Johnson supported that amendment. Tex. Br. 119. However, their support was based on Chairperson Solomons's misrepresentation on the House floor. Tex. Ex. 603.1 at S1-S2 (House Journal, June 14, 2011). Chairperson Solomons stated that changes in his amendment—including the splitting of Maverick County and Eagle Pass—were necessary in order "to maintain the performing nature of this Hispanic majority district in South Texas." Tex. Ex. 603.1 at S2 (House Journal, June 14, 2011). This statement was false. The Solomons Amendment (Plan C170) decreased the performance of Hispanic-preferred candidates in CD 23. *See* Trial Tr. 1285:20-1289:16, Aug. 14, 2014 (Solomons); *see also* US Ex. 761 (CD 23 Election Analyses). Moreover, Chairperson Solomons knew that Hispanic voters did not have the same opportunity to elect candidates of choice in CD 23 in his amendment as compared to the 2006 Plan. Trial Tr. 1285:20-1289:25, Aug. 14, 2014 (Solomons); *see also* Tex. Ex. 603.2 at 367 (House Journal, June 14, 2011).

It is incredible that Texas argues that Opiela never sought to implement the nudge factor in CD 23, when the text of his email specifically mentions "shoring up Canseco," who represented CD 23. US Ex. 75 (Email, Nov. 19, 2010). It is clear that Opiela submitted draft maps that made CD 23 appear to be a Hispanic opportunity district but in reality, failed to provide Hispanic voters the opportunity to elect their candidate of choice. Opiela sent an "optimized" map to Interiano on the morning of June 13, 2011, which is in evidence as Map STRJC 116. US Ex. 739 (Map(s), STRJC116); US Ex. 664 (Straus (Part I) Plan List). That map decreased turnout and Hispanic performance in the OAG analysis to such a level that no Hispanic-preferred candidates reached 50 percent in any of the reconstituted election contests. US Ex. 761 (CD 23 Election Analyses); US Ex. 754 (Email, June 13, 2011).

Likewise, it is clear that the final map included specific precinct splits and boundary lines drawn by Opiela. US PFOF ¶¶ 172-174. A comparison of maps shows that STRJ C116 and the 2011 Congressional Plan are identical in many areas. Trial Tr. 318:21-320:18, Aug. 11, 2014 (Interiano). Indeed, Downton admits that the 2011 Congressional Plan contained Opiela's "concepts." Trial Tr. 1726:2-14, Aug. 15, 2014 (Downton).

Texas trumpets Alford's findings that there is no difference in Hispanic turnout in CD 23 between the 2006 and 2011 plans, but Handley's and Dr. Henry Flores's analyses of Hispanic turnout in CD 23 are more credible than Alford's. Alford looked only at Bexar County. Alford testified that the turnout for the 10,469 Hispanic voters from Bexar County added to the district and the 86,433 Hispanic voters from Bexar County removed from the district was the same. Trial Tr. 1873:4-1875:24, Aug. 16, 2014 (Alford). However, Alford did not conduct turnout analysis on the 76,000 Hispanic voters added to CD 23 from areas outside of Bexar County, and he admitted that "I just can't tell you what the overall effect is for the entire district." *Id*. at 1875:11-12. Handley and Flores both found that precincts with higher Hispanic participation rates were removed from CD 23 while precincts with lower Hispanic participation rates were added. US Br. 22. "That is true whether the comparison is for participation rates in 2008 or 2010." US Ex. 687A at 7 (Apr. 2014 Handley Rep.).

Texas also makes much of Arrington's testimony that the precincts moved into CD 23 must have had a higher performance for Republican candidates than the precincts removed from CD 23. Tex. Br. 122. While that is undoubtedly true in CD 23,[30] that is not relevant for the intent inquiry. The map drawers, legislative leaders and staff, and TLC counsel all received the

[30] The evidence in the record is clear that Arrington did not undertake an analysis of the Republican performance of each precinct added to or subtracted from CD 23. He examined only Hispanic voter turnout at the precinct level. Trial Tr. 400:24-403:7, Aug. 12, 2014 (Arrington). He looked at the reconstituted election results for CD 23 as a whole. *Id*. at 403:8-405:11.

OAG analyses, which told them whether Hispanic voters were able to elect their candidates of choice in the reconstituted elections. Trial Tr. 5:13-8:25, 302:4-14, 310:21-311:7, Aug. 11, 2014 (Interiano). The analyses showed that Hispanic voters' opportunity to elect decreased under the 2011 Plan in CD 23. As explained above, they understood this analysis was not an analysis of Democratic versus Republican performance, but rather an analysis of Hispanic voters' ability to elect their preferred candidates in those 10 elections. Moreover, in splitting 39 precincts in the district, the map drawers did not have the political data in RedAppl to evaluate partisan performance. US Br. 14-15, 23-26.

Although Texas claims in general that there may be legitimate reasons for split precincts, Texas did not attempt to justify the 37 precinct splits in CD 23 made on the last day of map drawing. Texas split communities of interest in Harlandale, the Southside of San Antonio, Maverick County, Eagle Pass, and elsewhere. *Id*. The Supreme Court has noted that the significant costs associated with splitting precincts and district lines include a severe disruption in political activity as well as significant administrative problems. *See Bush v. Vera*, 517 U.S. at 974 (Opinion of O'Connor, J.). The use of split precincts is more evidence that Texas intended the adverse impact on Hispanic voters in CD 23 in the 2011 Congressional Plan.

C. Congressional District 27

Texas admits that it eliminated a minority opportunity district in CD 27 and left Hispanic voters in Nueces County without the opportunity to elect a candidate of their choice but justifies doing so by pointing to the 2010 field hearings. In particular, Texas claims that the field hearings support the "concept for anchoring Nueces County with counties to the north." Tex. Br. 127. They do not. Eleven people who testified at the hearings stated that they wanted to have a district anchored in Corpus Christi, and most of them requested a "Coastal Bend" district. *See* US. Ex. 460 at 25-137 (Oct. 20, 2010 Corpus Christi Field Hearing) (Testimony of Burlanga,

Luna-Saldana, Edwards, Bookout, Seamen Farenthold, Long, Yeamans, Youeld, Brandon, and Grando). No one attending the hearings requested that Nueces County be grouped with Bastrop, Caldwell, Gonzales, and Lavaca counties, which are not part of the Coastal Bend area. *Id.*; *see also* Trial Tr. 1097:9-13, Aug. 14, 2014 (Hunter).

Almost as many people at the 2010 field hearing stressed the importance of maintaining a Hispanic opportunity district in Nueces County as those who wanted a "Coastal Bend" district. *See* US. Ex. 460 at 47-98 (Oct. 20, 2010 Corpus Christi Field Hearing) (Testimony of Luna-Saldana, Sosa, Farenthold, Vera, Hernandez, and Meza-Harrison). U.S. Representative Blake Farenthold mentioned that both a "Coastal Bend" district and maintaining a Hispanic opportunity district might be achieved. *Id.* at 90-93

Texas also justified including counties north of Nueces County in a Congressional district on the grounds that previous districts had done so. However, such a configuration was found to violate the Voting Rights Act. *See Seamon v. Upham*, 536 F. Supp. 931, 961 (E.D. Tex.), *vacated on other grounds*, 456 U.S. 37 (1982). Similarly, the northern configuration used in the 2011 Plan would leave Hispanic voters in Nueces County without the opportunity to elect candidates of choice.

If Texas merely wanted to protect Representative Farenthold as it has claimed, Trial Tr. 228:8-229:22, Aug. 11, 2014 (Seliger), the State could have done so by carving out the small portion of Nueces County that contained his home and moving that portion into a northern Congressional district. The State did not need to dilute the voting strength of Nueces County's Hispanic population. Texas's choice to do so is additional evidence of discriminatory intent.

D. Economic Engines, District Offices, and a Member's Home

Contrary to Texas's assertion, the United States does not contend that all minority-preferred legislators lost every economic engine or office that was in their districts or that all

Anglo-preferred legislators retained every economic engine or office that was in their districts in the 2011 Congressional Plan. Tex. Br. 103. On balance, however, the map drawers' removal of economic engines, district offices, and a member's home from districts in the 2011 Congressional Plan had a disproportionately negative effect on Texas's African-American U.S. Representatives. This is more than mere coincidence.

The evidence establishes that the treatment of Anglo-preferred U.S. Representatives and minority-preferred U.S. Representatives was unequal in the Congressional redistricting process. US Br. 31-32. When the African-American representatives attempted to remedy the removal of economic engines, district offices, and a home from districts in the 2011 Congressional Plan, those changes were not made. *Id.* Conversely, map drawers accommodated Anglo-preferred representatives' requests to include portions of a development project, a country club, and their grandchildren's schools within their districts. *Id.* These differing outcomes confirm that Anglo-preferred representatives had direct access to key State officials while minority-preferred representatives did not. Indeed, Texas's post-trial brief fails to note any evidence establishing that an Anglo-preferred representative made a request regarding his or her district that was not honored.

Texas instead lists eight economic engines that it claims were removed from the districts of Anglo-preferred representatives. Tex Br. 103-104. Five of the eight economic engines are located in the DFW Metroplex, and U.S. Representative Eddie Bernice Johnson testified that the loss of economic engines in these districts was due to an agreement or trade. Trial Tr. 715:3-9, 716:3-8, 716:15-21, Aug. 12, 2014 (Johnson). Moreover, the State fails to explain that because of substantial population growth in the DFW area, an additional Congressional district was added to the region (in parts of Tarrant, Parker and Wise counties). The addition of the new

Congressional district resulted in a natural shift of certain economic engines to other Congressional districts in the area. *Compare* Tex. Ex. 400.1 at 11, 24 *and* Tex. Ex. 401.1 at 11, 29 *with* Tex. Exs. 447,448, 449, 469, 470, 475, 481, and 500; *see also* Trial Tr. 685:23-686-5, Aug. 12, 2014 (Johnson) (testifying that her district was almost at an ideal population size for the 2011 redistricting and required few changes). No such factors explain the removal of economic engines from districts represented by minority-preferred legislators.

The scope of the disparate treatment is also telling. The three African-American representatives collectively lost more than 15 economic engines. Trial Tr. 691:21-692:20, Aug. 12, 2014 (Johnson); Trial Tr. 1389:10-1391:9, 1408:2-14 1411:8-22, Aug. 14, 2014 (Murray); Trial Tr. 1335:2-1336:21, Sept. 12, 2011 (Green); Trial Tr. 1511:7-1513:5, Sept. 12, 2011 (Jackson-Lee); Alexander Green Dep. 19:16-21:14, Sept. 2, 2011. By comparison, the 26 Anglo-preferred representatives in the 2011 Congressional Plan collectively lost only eight economic engines. Tex. Br. 104. Texas lists 10 Anglo-preferred legislators that *may have* lost one of their district offices. Tex. Br. 108 (citing Tex. Ex. 716) (stating that the following list contains the name of Congressional members whose district office(s) *may have been* removed from their district in the 2011 Plan). But here too, the State fails to account for the changes in district configurations due to either overpopulation, underpopulation, or the addition of a new Congressional district to the region. *Compare* Tex. Ex. 716 at 12-14 *with* US Ex. 710 at 3-8 (establishing that Congressional Districts 9, 18, and 30 had deviations of 5.05%, 3.22%, and 1.14% respectively while Congressional districts represented by Anglo-preferred representatives who may have lost their district offices had deviations ranging from 9% to 40%). Texas also fails to demonstrate whether these Anglo-preferred representatives lost their main district office or a regional district office. *See* Tex. Br. 108; *see also* Tex Ex. 716 at 6-7 (noting the addresses

of the African-American representatives' main district offices that were no longer in their districts under the 2011 Plan).

The State also seeks to sidestep evidence establishing that the African-American representatives reached out to legislative leadership with concerns about their districts. Tex. Br. 105, 107. The evidence before this Court demonstrates that in late 2010, Interiano arranged a meeting in Washington, D.C. that included three members of the House Redistricting Committee, a representative from Speaker Straus's office, and a representative from the Texas Attorney General's office. Trial Tr. 682:24-683:18, Aug. 12, 2014 (Johnson). At that meeting, Representative Lamar Smith and Opiela were designated as the individuals who would coordinate the Congressional delegation's participation in the 2011 redistricting process. Trial Tr. 684:3-7, Aug. 12, 2014 (Johnson). Representative Johnson testified that Representative Smith and Opiela were the State's designees for the House Redistricting Committee. *Id*. Texas cannot now plausibly claim that Representative Smith and Opiela were inappropriate channels through which to communicate with legislative officials regarding redistricting. Tex. Br. 106-107. Similarly, U.S. Representative Alexander Green and U.S. Representative Sheila Jackson Lee communicated directly with legislative leadership regarding concerns for their districts. Trial Tr. 255:6-256:8, 271:14-272:6, Aug. 11, 2014 (Seliger); NAACP Ex. 608 (June 2, 2011, Statement of Representative Jackson Lee). The State's claim that these representatives did not properly communicate their concerns is simply inaccurate. Tex. Br. 109.

Finally, Texas argues that the removal of Representative Johnson's home from her district was inadvertent, and implies that "Congresswoman Johnson did not respond to Ms. Dyer's memorandum" which could have prevented Representative Johnson's home from being removed from her district. Tex. Br. 106. This is untrue. The United States established at trial

that Dyer sent that memorandum to the representative's public fax number, and Dyer did not know whether that fax transmission was successful or whether it was ever received by Representative Johnson's staff. Trial Tr. 766:2-767:5, Aug. 13, 2014 (Dyer). Moreover, the State fails to mention that because the TLC incorrectly used 2009 Census block data, even if Representative Johnson had received the memorandum, her address would have appeared correct, and she would have had no reason to reach out to Dyer or her staff. US PFOF ¶ 247; Tex Ex. 503 at 1-2, 102-104 (Dyer Memo) (stating that the TLC has "enclosed a map indicating the census block we have identified as the location of your residence and a form on which you can indicate if our information is *incorrect . . . if the information on the map is correct, it is not necessary to send a response.*") (emphasis added).

While the TLC inadvertently could have used the incorrect census data when geo-coding Representative Johnson's home, the State's failure to correct this mistake was intentional. After learning that her home had been drawn out of CD 30, Representative Johnson contacted Representative Smith and Opiela several times by telephone and by email and alerted them to the removal of her home from the district. Trial Tr. 686:12-687:4, Aug. 12, 2014 (Johnson). Representative Johnson also worked with the Congressional delegation to submit a map to the Texas legislature that returned her home to her district, but the legislatively enacted plan did not reflect those changes. Trial Tr. 1277:10-1279:2, Sept. 12, 2011 (Johnson). While Downton claimed that he was not told that Representative Johnson's home was removed from CD 30, this testimony is implausible. Trial Tr. 1020:15-19, Sept. 9, 2011 (Downton). The evidence establishes that Opeila, the State-designated redistricting contact for the Congressional delegation, had regular email contact with both Interiano and Downton. Trial Tr. 951:7-17, Sept. 9, 2011 (Downton); Trial Tr. 1455:4-13, Sept. 12, 2011 (Interiano). Opiela regularly passed

along the requests of Anglo-preferred members of Congress to Downton and that Downton personally received requests from Anglo-preferred representatives. TLRTF Ex. 311 at 214 (Email, May 31, 2011) (Marchant request for grandchildren's school); TLRTF Ex. 276 (Email, June 8, 2011) (Granger's request for campaign office); TLRTF Ex. 270 (Email, June 8, 2011) (Smith request for country club); Trial Tr. 909:11-21, 915:3-15, Sept. 9, 2011 (Downton) (Granger request for North Richland and for Trinity River Project); TLRTF Exs. 282, 284, 292 (Emails, June 8, 2011) (Downton trying to appease Marchant). The fact that the African-American representatives were unable to communicate their concerns for their districts illustrates that Anglo-preferred members of Congress had direct access to legislative leaders and the map drawers while the African-American members of Congress were kept in the dark. This unequal treatment highlights the purposeful discrimination that infected the 2011 Congressional redistricting process.

E. Dallas/Fort Worth Metroplex

The arguments raised by Texas to explain the dilutive configuration of Congressional districts in DFW are contrary to established law. The State argues that if a 50 percent HCVAP Congressional district could not be drawn in DFW, then no majority-minority district needed to be created because coalition districts are not required by the Voting Rights Act. Tex. Br. 131-32. Additionally, Texas argues that, because a 50 percent HVCAP majority district could not be drawn in DFW and because coalition districts are not required by the Voting Rights Act, the map drawers were free to crack and pack DFWs minority population for partisan gain. *Id.* at 143-46. The State is wrong.

Due to significant population growth in DFW, which was wholly attributable to the minority population, the legislature was strongly encouraged to create a second minority opportunity district in DFW. US Br. 22. Downton testified that he received redistricting plans

from the Governor's office, the Republican Congressional delegation, the Texas Latino Redistricting Task Force, and State legislators, all of which created a new minority opportunity district in DFW. Trial Tr. 1794:21-1797:23, Aug. 15, 2014 (Downton). Representative Smith explained that "the [Republican] delegation proposal adds a new DFW VRA district . . . to minimize the possibility of a successful Section 2 claim since there are over a million voting age Hispanics in DFW and they do not have either an effective coalition or Hispanic majority district." TLRTF Ex. 1114 at 203-204 (Email, May 14, 2011). Still, Downton never did an analysis of the performance of any of the DFW Congressional district configurations or looked at these districts' performance under the OAG analyses to determine whether African Americans and Hispanics worked together to elect their preferred candidates. Trial Tr. 1797:25-1798:9, Aug. 15, 2014 (Downton). Instead, Chairperson Solomons and Downton rejected each of these DFW configurations because they did not have an HCVAP majority, and they erroneously concluded that minority coalition districts were not required under Section 2. *Id.* 1794:21-1797:23.

As outlined more fully above, *supra* Section II.I, Texas incorrectly argues that it was not required to draw a minority coalition district in DFW. *See also* US Br. 76-80. That argument directly conflicts with binding Fifth Circuit precedent. *See LULAC v. Clements*, 999 F.2d at 864 ("If blacks and Hispanics vote cohesively, they are legally a single minority group, and elections with a candidate from this single minority group are elections with a viable minority candidate."); *Campos*, 840 F.2d at 1244 ("There is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics."). Texas's refusal to even consider the creation of a minority coalition district in DFW—despite binding case law potentially requiring it—is additional evidence of intentional discrimination.

Concluding that African-American and Hispanic voters in DFW could not be drawn into a minority opportunity district where either group alone constituted a CVAP majority, the State proceeded to intentionally minimize those voters' electoral strength by packing additional voters into an existing minority opportunity district, CD 30, and cracking the remaining minority population across four other Congressional districts. US Br. 28-31. These cracking and packing techniques routinely have been proscribed by courts. *Williams v. City of Dallas*, 734 F.Supp. 1317, 1409 (N.D.Tex. 1990); *Terrazas v. Clements*, 537 F.Supp. 514, 542-45 (N.D. Tex. 1982). Such tactics are prohibited even when minority voters do not currently reside in a district in which they are able to elect their candidate of choice. US Br. 79-80; *see also Garza*, 918 F.2d at 769 (rejecting the county's argument that regardless of any intentional or unintentional dilution of minority voting strength there was no violation of the Voting Rights Act, because at the time the district lines were drawn, no single-member district with a majority of minority voters could be drawn); *cf. LULAC v. Perry*, 548 US at 440 ("In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation."). Texas's actions here are similar to those found unlawful in *Garza* and *LULAC v. Perry*. The State diminished Hispanic and Black electoral voting strength so that those voters would not have the opportunity to elect their preferred candidates in another Congressional district in DFW.

The State's asserted race-neutral reasons for the configuration of DFW's Congressional districts—partisan performance, unifying minority communities of interest, and accommodating the requests of Anglo-preferred members—are unsupported. Tex. Br. 133-135. As explained fully above in Sections II.A, partisanship is not a defense to intentional vote dilution, *see, e.g.*, *Brown*, 561 F.3d at 433, and the use of race to achieve partisan ends is prohibited racial

discrimination under Section 2. *LULAC v. Perry*, 548 U.S at 442 (holding that Texas's "troubling blend of politics and race—and the resulting vote dilution of a [minority] group that was beginning to achieve § 2's goal of overcoming prior electoral discrimination—[could not] be sustained"). Consequently, the State's argument that it was free to pack and crack Black and Hispanic population because neither group could constitute a majority in a second DFW Congressional district is not supported.

The State's claim that it intended to unite minority communities of interest in DFW is disingenuous. Tex. Br. 135. Downton testified that he read a blog entry and learned that he had split Hispanic communities of interest in Tarrant County. Trial Tr. 1710:9-1711:3, Aug. 15, 2014 (Downton); *but see id.* at1784:3-9 (establishing that there is no such entry regarding DFW neighborhoods during the time period Downton said he read one). Supposedly based on that blog entry, Downton said he used racial data in RedAppl to draw district boundaries to "unite" Hispanic communities in the "lightning bolt" of CD 26. *Id*. at 1627:19:-1628:23. Downton testified that he was unfamiliar with the Hispanic communities in Fort Worth, and he could provide no basis for uniting these communities other than the fact that they were Hispanic. *Id*. at 1710:9-13. He did not reach out to any DFW legislators to assist him in making these changes even though two minority-preferred legislators from the DFW area (Representative Roberto Alonzo and Representative Veasey) served on the House Redistricting Committee. *Id.* Moreover, trial testimony established that heavily Hispanic areas are located just outside of the "lightning bolt" that Downtown created. *Id*. at 1789:9:-1790:18. Downton provided no explanation for why that Hispanic population was not grouped with the other Hispanic communities that he drew into the "lightning bolt." *Id.*

Downton did not provide plausible testimony as to why he separated the African-American community from the Hispanic community in the "lightning bolt," stating only that he thought he did so based on a request from Representative Veasey. Trial Tr. 1713:15-1714:8, Aug. 15, 2014 (Downton). Yet Downton contradicted himself later by testifying that Representative Veasey never spoke to him about any plan and that the only comments Representative Veasey made were when he spoke on the record at public hearings. *See id*. at 1805:16-21; *see also* Tex. Ex. 545 (Veasey Fair Plan uniting Hispanic and African-American communities in DFW and creating an additional minority opportunity district in the region). [31]

Texas claims that the contours of the "lightning bolt" can be further explained by U.S. Representative Kay Granger's request to maintain the Trinity River Vision project in CD 12. Tex. Br. 135; *see also* Trial Tr. 1615:7-10, Aug. 15, 2014 (Downton). This is untrue. Trinity River Vision is a revitalization project of the Trinity River that spans 88 miles, and the river's boundaries are not materially similar to the contours of the CD 26 "lightning bolt." *Compare* US 722 (Tarrant Cnty. CD 26 Map) *with* US Ex. 755 (Trinity River Vision Tarrant Cnty. overlay Map); *see also* Trinity River Vision Master Plan, *available at* http://www.trinityrivervision.org (last visited Nov. 17, 2014).

Texas has provided no sufficient legal justification or race-neutral principle to explain the intentional diminution of minority electoral opportunities in DFW. Therefore, this Court should find that the configuration of Congressional districts in DFW was motivated by a racially discriminatory purpose.

[31] Downton's claim that he wanted to unite Hispanic communities of interest in CD 26 and Black communities of interest in CD 12 is undermined by the fact he failed to keep communities of interest together in many other parts of the state despite being urged to do so by legislators, advocacy groups, and citizens. US Br. 23-26, 28-31, 43-44, 45-48, 54-55, 56-57, 59-60.

VI. CONCLUSION

For the reasons set out in the United States' post-trial brief (ECF No. 1279) and in this reply brief, the United States respectfully requests that this Court enter an order declaring that the 2011 Congressional and House plans were adopted with the purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and the voting guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution. The United States further requests that this Court set a schedule for further proceedings regarding relief under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c).

Date: December 4, 2014

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