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

SHANNON PEREZ, et al.,	§	
	§	
Plaintiffs	§	
	§	CIVIL ACTION NO:
	§	SA-11-CA-360-
	§	OLG-JES-XR
	§	(consolidated, lead case)
and	§	
	§	
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC)	§	
	§	
Plaintiffs	§	
	§	
v.	§	
	§	
STATE OF TEXAS; RICK PERRY, In his official capacity as Governor of the State of Texas; DAVID DEWHURST, In his official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official capacity as Speaker of the Texas House of Representatives	§	
Defendants	§	

CORRECTED PLAINTIFFS CUELLAR AND MALC'S ADVISORY AND RESPONSE TO THIS COURT'S ORDER OF MARCH 25, 2015

On March 25, 2015 this Court requested the parties submit briefs specifically identifying the districts for which they are

asserting *Shaw*/racial gerrymandering claims and to discuss how the decision in *Alabama Legislative Black Caucus v. Alabama* affects those and other pending claims. This Court also requested that the parties advise whether further factual development is necessary at this time. MALC submits this brief and advisory in response to the Court's order.

Introduction

No matter how precise your instrumentation, efficient your execution, or perfect your tactics, if you begin from the wrong premise, then you will wind up in the wrong place. The Alabama legislature made two policy choices in drawing its legislative districts: 1) adopting a more stringent than necessary population deviation requirement (± 1% v. ± 5%); and 2) an aggressive retrogression policy that treated small deviations in racial demographics as prohibited by §5. In sum, compliance with these two goals "posed particular difficulties with respect to many of [Alabama's] 35 majority-minority districts." *See Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, 575 U.S. ___, p. 2-3 (2015) (Slip Op.). The Supreme Court did not "doubt the desirability of a State's efforts generally to come close

to a one-person, one-vote ideal." *Id.* at p. 2.[1] However, the false assumption that §5 required a "roughly the same [minority] population percentage in existing minority-majority districts" was rejected by the Supreme Court. This is an assumption that Texas shared with Alabama.[2]

From these supposedly race-neutral policy choices, the district court reviewing the districting found that Alabama had not violated federal law. In specific the district court found: 1) the appellants argued that Alabama had racially gerrymandered districts "as a whole" and in 4 distinct state senate districts, 2) the Alabama Black Legislative Caucus had standing to argue for racial gerrymandering for the state as a whole, but not as to specified districts, 3) the appellants' claims failed because "race was not the predominant motivating factor" either for the state as whole or to the specified districts, and 4) Alabama's use of race to avoid minority retrogression

[1] Though, it may be important if the more stringent population deviation requirement was adopted to thwart or retrogress minority opportunity. Those facts are not discussed in this opinion, but there is no denying the more stringent requirement's effect on minority electoral opportunity.

[2] *See* Trial Tr. Vol. 4, September 9, 2011, p. 939, ln. 2-5. (Downton testimony, "Yes. I recall [Rep. Sylvester Turner] being unhappy with different parts of that. I don't remember what his **black voting age population** was, but we were concerned with a **retrogression challenge if we reduced that number**.") (emphasis added).

was narrowly tailored and a compelling state interest. The Supreme Court found these four district court holdings were wrong.

The Supreme Court found: 1) racial gerrymandering must be considered on a district by district investigation, 2) for racial gerrymander claims, legislative caucuses or other associational standing groups have standing if one of their members reside in the challenged district, 3) population deviation may not be used as one of the traditional redistricting principles to be weighed against evidence of race conscious redistricting, and 4) Alabama's false assumption concerning its restrictive retrogression standard was legally unfounded. *Id.*

All of these holdings affect claims made by the Mexican American Legislative Caucus (MALC) in this litigation. Specifically, MALC will show the following: 1) MALC has made specific racial gerrymandering claims as to specific districts in both the house and congressional districting plans enacted by the State of Texas in 2011 and 2013; 2) MALC has standing because its members reside in the districts that have been challenged; 3) the State of Texas use of "background" redistricting factors like population deviation and the "Whole County Line Rule" should not be weighed in determining

racial predominance; and 4) Texas sought to utilize false assumptions of law that severely limited the creation and preservation of minority ability to elect districts.

I. MALC has made specific racial gerrymandering claims as to specific districts

"A racial gerrymandering claim … applies to the boundaries of individual districts. It applies district by district." *Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, 575 U.S. ___, p. 6 (2015) (Slip Op.). In order to succeed on a racial gerrymandering claim, the plaintiff must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). MALC has alleged in its pleadings and brought evidence of racial gerrymandering in both the state house and congressional plans adopted by Texas in 2011 and 2013.[3]

[3] *See* MALC's Third Amended Complaint, ¶10. ("With the racial gerrymanders manifest in the 2011 and 2013 plans, which resulted in diminished and limited Latino and African American voting strength, the Defendants violated Section 2 of the Voting Rights Act and the 15th and 14th Amendments.")

A. MALC's challenged racially-gerrymandered state house districts.

In total, from testimony, evidence and pleadings, MALC has alleged that racial gerrymandering has occurred in the following state house districts enacted in the 2011 redistricting plan, H 283: HDs 26, 34, 41, 54, 77, 78, 103, 104, 105, 117, and 148.

In its live complaint before this Court, MALC specifically averred in its Third Amended Complaint that race conscious redistricting was used to retrogress minority voting strength in the following districts and geographic areas: 1) HD 26 in Fort Bend County,[4] 2) HD 54 in Bell County,[5] 3) HDs 103, 104, and 105 in Dallas County,[6] and 4)

[4] *See* MALC's Third Amended Complaint, ¶51. ("Instead the minority population of Fort Bend County was unnecessarily fragmented to minimize its political strength in both the 2011 enactment and the 2013 enactment.")
[5] *See* MALC's Third Amended Complaint, ¶54. ("In Bell County, African American and Latino population growth exceeded over 51.64%. In the City of Killeen in Bell County, the minority community is geographically compact and politically cohesive. Both the 2011 enacted plan and the 2013 enacted plan, S.B. 3, unnecessarily fragments the minority community of Killeen to minimize its political impact on Texas House elections.")
[6] *See* MALC's Third Amended Complaint, ¶57. ("[F]ragmentation of minority population while at the same time overpopulating Latino majority districts in Dallas County led to the failure to create at least one and possibly two additional minority opportunity house districts in Dallas County in both 2011 and 2013. Plans that reduced the population variance in Latino districts and reduced the fragmentation of minority voters in Dallas County were offered as amendments in both 2011 and 2013 and were rejected.")

HD 117 in Bexar County,[7] 5) HB 77 and 78 in El Paso County.[8] In addition, MALC generally alleged that both Harris County and Nueces County in unspecified districts were racially gerrymandered to limit minority opportunity. MALC's Third Amended Complaint, ¶42-50.

B. MALC's challenged racially- gerrymandered congressional districts.

In total, MALC has alleged that the following congressional districts were infected by racial gerrymandering: CDs 23, 25, and 27, and the districts in Tarrant and Dallas Counties (primarily CDs 12 and 26).[9]

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[7] *See* MALC's Third Amended Complaint, ¶58. ("In creating a district to safely re-elect Rep. Garza the state impermissibly focused on race by targeting low-turnout Latino precincts. The HCVAP was increased to 63.8%, but the Spanish Surname Voter Registration (SSVR) actually decreased. The State clearly focused on low-turnout Latino precincts. The State's intention was made all the more clear by Rep. Garza's admission that he "wanted to get more Anglo numbers" into his district is further evidence of racial gerrymandering and evidence of racially discriminatory intent.")

[8] *See* MALC's Third Amended Complaint, ¶59.(" The 2011 enacted plan was also infected with discriminatory purpose because of the State's actions in El Paso County, Texas in the State House Plan. The border between HDs 77 and 78 had a bizarre shape with "deer antler" protrusions that split multiple precincts between these two districts. The high number of precincts splits within the deer antler protrusions strongly indicates that the State sought to divide these voters along racial lines. To date, the State has offered no explanation as to why the precincts were split. These cartographic choices are strong evidence of racially discriminatory intent.")

[9] MALC's Third Amended Complaint, ¶¶ 56-65.

II. MALC has standing.

In the Alabama case, the district court held *sua sponte* that the Alabama Democratic Conference lacked standing to bring racial gerrymander claims as to specific districts or to the state as a whole. An association has standing if any of its members would have standing in their own right to bring a racial gerrymandering claim. "Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *United States v. Hays*, 515 U.S. 737, 744-45 (1995).

This Court has already decided that MALC has standing. Dkt. 285. The Supreme Court in the Alabama case confirms this Court's approach to deciding standing issues for associations. In specific, the Supreme Court remanded to the district court in Alabama "to reconsider the Conference's standing by permitting the Conference to file its list of members." *Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, 575 U.S. ___, p. 15 (2015) (Slip Op.). MALC has already provided this information to Court in its sur-reply which described how its members had individual standing to bring the

asserted claims. Dkt. 258, Exhibit #3. These previous actions are highlighted here only to reaffirm this Court's previous holding as to MALC's standing.

III. "Background" matters such as "one person, one vote" should not be weighed in determining racial predominance.

The central holding of the Alabama redistricting case is that the "equal population goal is not one factor among others to be weighed against the use of race to determine whether race predominates". *Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, 575 U.S. ___, p. 15 (2015) (Slip Op.). "Rather it is part of the redistricting **background**, taken as a given" when determining whether racial gerrymandering has occurred in a specific district. *Id.* at 15-16. (emphasis added). Equal population "is not a factor to be treated like other nonracial factors when a court determines whether race predominates over other, 'traditional' factors in drawing district boundary lines." *Id.* at 17. Texas may not use compliance with "background" redistricting issues to disprove the predominance of race conscious redistricting.

Here, as we show infra, the record is replete with evidence that is essentially unchallenged that race played a predominant role in

the State's redistricting decisions. MALC has asserted that in state house map that both "one-person, one-vote" considerations and the Texas Constitution's requirement to keep counties as whole as possible are "background" considerations in this context. Racial gerrymandering is primarily concerned with "which voters the legislature decides to choose, and specifically whether the legislature predominately uses races as opposed" to other traditional factors. *Id.* at 17. There is no question that minority voters were used when moving district lines about. The explanations offered for that movement are now diminished as a result of the Supreme Court's guidance on racial gerrymanders detailed in the Alabama decision.

The "Whole County Line Rule" is required by the Texas Constitution. Its codification in the Texas Constitution is analogous to the requirement for population equality required by the 14th Amendment. MALC believes that § 2 requires the splitting of county lines to preserve and create minority opportunity districts, because of the supremacy of federal law over state constitutional provisions. MALC also believes that the *Alabama* decision places the State's requirement to abide by the "Whole County Line Rule," in making redistricting decisions predominated by race, to the same

consideration as the "one person, one vote" rule in the *Alabama* case, to the redistricting background. Thus disallowing it from being used to offset racial predominance questions.[10]

A. State House Districts affected by new predominance test.

As stated above the following are the districts MALC has asserted are harmed by racial gerrymandering in the 2011 state house map: HDs 26, 34, 41, 54, 77, 78, 103, 104, 105, 117, 148. Each are affected by the Supreme Court's recent decision.

HD 26 – Fort Bend

MALC presented evidence from its expert, Mr. George Korbel, that population growth in Fort Bend County was overwhelmingly minority. Trial Tr. Vol. 4, July 17, 2014, p. 1411. Population growth between Fort Bend, Wharton, and Jackson Counties was so fast that the legislature put a new district in these counties, HD 85. *Id.* at p. 1412, ln. 3-6. Yet, despite this rampant growth, 150,000 new minorities, no new minority opportunity district was created. *Id.* at

[10] MALC also has asserted that Texas has adopted more stringent than necessary "Whole County Line Rule" standard that it applied unevenly. In fact, Texas has asserted that its new interpretation of the "Whole County Line Rule" would have to be overturned by the Supreme Court of the United States. Trial Tr. Vol. 7, September 13, 2011, p. 1593, ln. 19-24. MALC has also argued that this new found devotion to the "Whole County Line Rule" is evidence of an impermissible purpose.

1412-13. Mr. Korbel further testified that HD 26 has strange gerrymandering shape, comparing it to the historic Elbridge Gerry dragon. *Id.* at 1412. Mr. Korbel testified that HD 26 was a very unusual district and that it could not have been created using traditional redistricting principles. *Id.* 1413-14. He further state that the minority population of Fort Bend was spread across 4 districts. *Id.* at 1416-17.

The State had discussions about whether or not to create a minority opportunity district in Fort Bend County, but ultimately decided not to. Trial Tr. Vol. 5, July 18, 2014, p. 1571, ln. 13-15. (Interiano testimony on state house plan). The State did not believe that it was mandated by law to create a minority opportunity district, so it failed to create one in Fort Bend. *Id.* at p. 1571, ln. 17-18. The State cited several challenges to creating its districting plan in Fort Bend and its surrounding counties. "Fort Bend County was actually one of the harder ones because you could pull in anywhere from two to four counties, and that would have an impact literally across the rest of the map on how many other districts could be fit into it." *Id.* at p. 1603, ln. 15-20. This concern implicates the "Whole County Line Rule." A second concern was the location of the 2010 incumbents.

Id. at p. 1604, ln. 17-18. Lastly, the State pointed to population deviation concerns as a challenge for the districts in Fort Bend. *Id.* at p. 1605-06.

Specifically as to HD 26, Mr. Interiano testified that Texas wanted "trying to keep a balance between 26 and 28 and the Republican strength of the district." *Id.* at p. 1607, ln. 7-8. However, Fort Bend contained several split precincts, which cannot be explained by partisan motivations.

The task before this court is to weigh the justifications for the creation of HD 26 against the substantial racial evidence before the court. The State alleges 4 different reasons for the creation of HD 26: 1) the whole county concern with strategic flexibility of pairing Fort Bend with a large number of different counties that surround it, 2) the location of one of the 2010 incumbents in HD 27, 3) population deviation concerns, and 4) the want to create two relatively equal Republican districts in voting strength. Concerns 1 and 3 are part of the redistricting background and ought not to be weighed against MALC or other plaintiff's evidence of racial gerrymandering. The problem with locating Rep. Reynolds does not impact the racial gerrymandering evidence concerning HD 26; it only explains the

strange dogleg that HD 27 takes on its southern border. Lastly, the partisan concerns are defeated by the substantial racial intent evidence presented at trial concerning precinct splits and the strange contortions of HD 26.

HD 34 – Nueces County

The Nueces County districts are uniquely affected by the "Whole County Line Rule." As cited above, the State erroneously believes that the Texas Constitution trumps federal law. This devotion to the "Whole County Line Rule" lead to the elimination of one effective minority district in Nueces County.

However, what is commonly missed in their justifications for the creation of HD 34 is that it is substantially overpopulated compared to its Nueces County neighbor, HD 32 (+3.29% v. -0.34%, or 6,075 people). As noted above by Dr. Kousser, the state packed Latinos into HD 34 making the other district an Anglo majority district. Dr. Arrington, the United States' expert, also cited several precinct splits in Nueces County that racially affect the district.

MALC Chairman, Trey Martinez Fischer, testified that he believed that a minority opportunity house district in Nueces County had been intentionally eliminated. Trial Tr. Vol. 1, September 6,

2011, p. 161, ln. 5-7. In Chairman Solomons' view, Nueces County was entitled to two districts because its population divided by the ideal population for the district was 2.02. Trial Tr. Vol. 7, September 13, 2011, p. 1429, ln. 16-21. However, MALC presented evidence that HD 34 was overpopulated compared to HD 32 while both are wholly contained within Nueces County. "In Nueces County, which is heavily Latino, the 2001 plan contained two state House districts that elected Latino Democrats in all except the Republican landslide election of 2010 (districts 32 and 33). The Committee plan packed Latinos into one of these districts, making the other a district that Latinos could no longer control." MALC Tr. Ex. 19, "Redistricting in Texas, 2011: Racially Polarized Voting, Racially Biased Population Deviations, and Racially Gerrymandered Maps", ¶ 56.

The State has never offered a justification for the overpopulation of HD 34 compared to HD 32. The only justification offered for splitting precincts within Nueces County was that some of these precincts followed along a highway. Trial Tr. Vol. 1, July 14, 2014, p. 200, ln. 4-6. This *ex post facto* justification for race conscious districting has never been cited by any of the map drawers who played a role in the creation of the Nueces County map. In addition,

the Supreme Court in the Alabama case specifically cited Alabama's desire to follow "highway lines" was not mentioned in Alabama's legislative guidelines, and as such the splitting of communities along those broken lines was suspect. *Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, 575 U.S. ___, p. 18 (2015) (Slip Op.).

To be clear, the background factors, population deviation and the "Whole County line Rule", play no role in the policy choices at play in Nueces County. This court must weigh the evidence of racial gerrymandering against the State's justification of "following along a highway." There is no specific stated justification for the population deviation other than agreement between the three members of the Nueces County delegation in 2011.

HD 41 – Hidalgo County

This Court has heard extensive testimony concerning HD 41. Just as in Nueces County, if more extensively, Texas utilized population deviation and splitting precincts along racial lines in order to create another ineffective minority district. During both of the trials concerning the 2011 redistricting acts, MALC presented evidence as to attempts to use race conscious redistricting as to specific districts. MALC expert, Dr. Morgan Kousser testified as to the

strange shapes of districts, consistent with racial gerrymandering. Trial Tr. Vol. 1, September 6, 2011, p. 245-46. Dr. Kousser testified as to the racial gerrymander in HD 41, as an indicia of impermissible racial intent. Trial Tr. Vol. 1, September 6, 2011. ("[T]he areas which have a large proportion of Anglos are the darker areas here. It also shows the precincts and probably you would have to look at this really blown up, but if you look at voter -- if you look at the way that the lines are drawn they cut voter districts quite considerably. I think there are 14 VDT cuts in this particular district alone which is more than the total number of cuts in the whole state for the state senate which is 10 or 12.") The expert for the U.S., Dr. Arrington found that "there were so many cut precincts to form that district, that you no longer can tell for certain whether it is a minority district or not." Trial Tr. Vol. 1, July 14, 2014, p. 120, ln. 5-7. From the splits, "7,239 Anglos were brought into the district and 3,171 taken out." *Id.* at 143, ln. 15-16. Also from the splits, 26,000 Latinos were brought into the district, but 38,000 were removed. *Id.* at ln. 18-19. In addition, the State depopulated HD 41 in order to maximize efforts to make it become an ineffective minority opportunity district. *Id.* at ln. 23-25. The evidence of racial division of these precinct lines is substantial.

The initial version of HD 41, the Redistricting Committee's first plan - PLAN H 113, had far fewer precinct cuts that did the final version in Plan H 283. *Id.* at p. 1515-16. Plan H 113 had final sign off by Rep. Pena, the incumbent who resided in the new HD 41. After Rep. Pena signed off on the map for HD 41, Ryan Downton made several changes to HD 41 that radically altered the precinct splits in that district. *Id.* at p. 1516, ln. 2-7. Ryan Downton testified that he made these cuts at Rep. Pena's direction. Downton went on to speculate that "[Rep. Pena] took more of an interest [in redistricting] … for partisan reasons." However, the precinct splits allegedly at the behest of Pena could not have been partisan. More to the point, Rep. Pena directly contradicts Mr. Downton's understanding. Trial Tr. Vol. 6, July 19, 2014, p. 2064, ln. 8-13.

The State offered several varied policy justifications for the precinct splits (i.e. following an important road, including a childhood home of Rep. Pena, or following a ditch). As to roads, Downton explained that "there weren't a lot of members that came in with specific insistence on following roads." *Id.* at p. 2031, ln. 20-21. Following roads, therefore, was not a consistent policy followed by the cartographers. Inconsistent policies and inconsistent application

of those policies is some evidence of racialized intent. *See Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, 575 U.S. ___, p. 18 (2015) (Slip Op.) ("Transgressing their own redistricting guidelines…. The drafters split seven precincts."). There is considerable evidence that these justifications are pre-textual or, at least, *ex post facto* justifications.

The Alabama case develops a framework by which to understand the policy decisions of redistricting actors. Those things which are foundational are taken as a given and cannot be weighed against other redistricting factors. Even if this Court gave full weight to the justifications offered by Texas, the whims of legislators to tailor their district to their personal histories and geographic desires cannot outweigh the tens of thousands of Latinos who were gerrymandered out of their district.

HD 54- Bell County

Chairman Aycock, the incumbent of HD 54, described the City of Killeen as "ethnically very diverse, black, Hispanic, Asian, Native American. It is one of the most diverse communities in Texas, one of the most successfully integrated communities in Texas." Trial Tr. Vol. 5, July 18, 2014, p. 1735, ln. 16-19. MALC presented considerable

evidence that the drafters of HD 54 impermissibly used race in order to prevent the creation of a naturally occurring minority opportunity district. Mr. Korbel presented evidence that virtually the entire City of Killeen was in HD 54 in the benchmark plan. Trial Tr. Vol. 4, July 17, 2014, p. 1402, ln. 12-19. HD 54 was a multi-county district which was overpopulated by 29,000 inhabitants. *Id.* at p. 1404. Texas removed Burnet County from the district, which lowered the population below the ideal by 13,000. In order to bring HD 54 back into deviation, Texas removed 32,903 people who were two-thirds minority. Then, it added 46,937 new people to HD 54, which were 60% non-minority. *Id.* at p. 1405. In taking out the minority population and adding in the Anglo population, the drafters of HD 54 fractured the City of Killeen. Mr. Korbel testified that Killeen had been whole contained in HD 54 "for a long time". *Id.* at 1403, ln. 11.

In drawing the lines of HD 54, Chairman Aycock was motivated by "maintain[ing] communities of interest." *Id.* at p. 1741, ln. 3. Chairman Aycock also recognized the City of Killeen as a community of interest. *Id.* at p. 1746, ln. 23-24. In addition, Chairman Aycock also acknowledged that it was a viable option to keep Killeen intact. *Id.* ln. 20-21. He also acknowledged that removing portions of Killeen

from HD 54 meant removing minorities. *Id.* at p. 1744, ln. 18-21. ("Killeen is heavily minority in all areas, so wherever you take them out of Killeen, there is pretty good likelihood that there will be substantial minorities.")

Texas' justification for splitting Killeen was a geographic argument. Chairman Aycock believed that pairing Lampasas and Killeen was preferable than pairing it with Temple or Belton. *Id.* at p. 1741, ln. 21-25. Per the Alabama case, this justification must be weighed against the evidence of racial gerrymandering without considering background issues as part of the decision calculus. The stated basis for the creation of HDs 54 and 54 as they were, was to keep communities of interest whole. Yet, Chairman Aycock acknowledged that Killeen was certainly a community of interest. Inconsistent applications of race neutral redistricting principles is also evidence of racial intent. *See Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, 575 U.S. ___, p. 18 (2015) (Slip Op.) ("Transgressing their own redistricting guidelines.... The drafters split seven precincts.... All of this is to say that, with respect to District 26 and likely others as well, had the District Court treated equal population goals as background factors, it might have

concluded that race was the predominant boundary-drawing consideration"). Here, the background factors are unconsidered. The only thing that lay before this Court is Chairman Aycock's justification of trying to keep communities of interest whole by dissecting the minority population of Killeen.

HD 77 & 78- El Paso County

This Court has heard a great deal of evidence concerning HD 77 & 78 and the racially driven decisions made by map drawers here. It is listed here again to reiterate that MALC believes that HD 77 and 78's boundary can only be explained by race conscious redistricting. Ryan Downton testified that these changes were not done for a political purpose. Trial Tr. Vol. 6, July 19, 2014, p. 2103, ln. 5-6. Indeed they were committed for a racial purpose. Id. at p. 2102, ln. 19-23. These changes were not made for any state house background factor. They were created consciously and racially.

HD 103, 104, and 105 – Dallas County

In Dallas County, Texas again used population deviation and precinct splits to limit Latino opportunity. There is direct evidence from the State of the use of race conscious redistricting to meet artificial demographic benchmarks. In Dallas County, Downton

testified that "once we determined we couldn't get 103 and 104 both above 50 percent, we wanted to keep 104 above 50 and keep 103 as close to where it started as possible. That was also difficult, because 103 was the most underpopulated district in the state when we started. It needed 50,000 more people. And so we worked with Representative Anchia to come up with a configuration that he was satisfied with and that kept his SSVR where it was, and we were able to do that." Trial Tr. Vol. 4, September 9, 2011, p. 926, ln. 10-18. This was a race conscious decision:

"Q. And were you aware that what you were extracting from 105 at the time you were drawing the incursion or the fingers—whatever you want to call them--in, you were extracting heavy Hispanic population out of what otherwise would be in the center of 105?

[Downton]: Yeah, we were concerned with 103, that -- we wanted to try to maintain its SSVR level and it needed 50,000 additional people." Trial Tr. Vol. 4, September 9, 2011, p. 999, ln. 5-11.

Here, the state uses population deviation as justification for drawing the racial finger into HD 105 from HD 103. In addition,

Downton also uses the artificial benchmark of SSVR to justify cracking precincts along racial lines.

There is more evidence that HD was also created with racial intent. In HD 105, Dr. Arrington testified that the precinct cuts moved "22,000 Anglos in and only 5,000 out" and "22,000 Hispanics in, 15,000 out." Trial Tr. Vol. 1, July 14, 2014, p. 151, ln. 16-18. More than just splitting precincts, population deviation was again used as cudgel to dilute minority voting strength. Both HD 103 and 104, the only two Latino districts in Dallas County, have been overpopulated relative to other districts in Dallas County.

The justification offered by the State for these policy choices are directly indicted by the *Alabama* case. Using artificial demographic benchmarks to address non-existing retrogression cannot justify racial gerrymanders. In addition, the need to bring HD 103 from being the least populated district in the state to becoming one of the most cannot be weighed against the use of race conscious districting, because population deviation is a background factor that is taken as a given.[11] Finally, Texas testifies that it split precincts between HD

[11] It is important to note that the desire to take HD 103 from 50,000 people down to 8,379 up is itself a curious choice. If a drafter was struggling to make

104 and 105 only to create a pairing of two Republican incumbents. This policy choice cannot explain the precinct splits along the border of HD 103 and 105 (i.e. the Irving finger). It also must be weighed against the use of race to accomplish this goal. Giving full weight and credibility to the State in seeking to join Reps. Harper Brown and Anderson in a pairing, splitting precincts along racial lines is not narrowly tailored enough to achieve a compelling state interest in this case. The partisan goal to only pair incumbents of the same party in districts that could be won in the primary must be balanced against the means chosen to accomplish that goal. Here, MALC believes Texas has failed that test.

HD 117

Again, MALC and other plaintiffs presented evidence of racial intent to minimize minority voting strength in HD 117. Without rehashing the evidence, the plaintiffs' evidence sought to prove that the drafters of HD 117 sought to switch out high turnout Latino precincts with low turnout precincts. As a result, HD 117 had the biggest disparity between its Hispanic Citizen Voting Age Population

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a benchmark he or she obviously believed was required by law, that task becomes more difficult the more population is added.

and its SSVR. In this case, Rep. Garza wanted to send his district north because, "those numbers tended to be … more Anglo and more conservative." Trial Tr. Vol. 2, July 15, 2014, p. 368-69. There was evidence presented that Rep. Garza was seeking foreign nationals in his district to increase his Hispanic population but to lower the voter turnout.

In defense of this evidence, Texas asserted that HD 117 had to shed a large amount of population and Rep. Garza was seeking to make the district more rural and to have more of the BexarMet water utility as part of the district. As stated above, the shedding of population cannot be weighed against the evidence that racial concerns predominated the creation of HD 117, as they are background redistricting matters. The real question is how that population was shed.

As to Bexar Met, Rep. Garza could not identify which areas of District 117 included people who were in BexarMet. *Id.* at p. 405, ln. 15-18. In fact, Rep. Garza could not identify any redistricting goals he had with taking more or less of BexarMet's territory. *Id.* at p. 408-09. Uncovering the truth about racially-motivated policy decisions often comes down to difficult credibility calls. Here, the case is

simple. There is direct evidence of racial intent. There is evidence of impact.

HD 148 – Harris County

Chairman Burt Solomons testified that HD 148 had its Latino population "bumped up" so that it would have a majority Spanish surname voter registration. Trial Tr. Vol. 7, September 13, 2011, p. 1600, ln. 1-6. This change to HD 148 was not done to increase the number of Latino opportunity districts but rather to increase the Latino demography of that district. Trial Tr. Vol. 7, September 13, 2011, p. 1600-01.

Through the *Alabama* lens, this policy decision is suspect. Using racial gerrymandering to meet a legally false demographic benchmark is directly indicted by the Supreme Court. *Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, 575 U.S. ___, p. 17 (2015) (Slip Op.). ("There is considerable evidence that this goal [to maintain existing racial percentages in already performing minority opportunity districts] had a direct and significant impact on the drawing of at least some of District 26's boundaries.") Here, Chairman Solomons stated justification for drawing HD 148 is

unfounded in law. The race conscious choice, therefore cannot be justified.

B. Congressional Districts affected by the new predominance test.

Just as with the state house, Congressional districts are affected by the Alabama decision. Specifically, MALC alleges that in C185, CD 23, CD 25 and CD 27 were affected.

CD 23

MALC has complained that CD 23 was cynically manipulated to decrease the ability of Latino's ability to elect while increasing the Hispanic Citizen Voting Age population of the district. MALC's Third Amended Complaint, ¶64. CD 23 was created with the intent to create an artificial minority opportunity district. Eric Opiela, a Republican redistricting lawyer who had been employed by the Speaker, had devised a plan to limit Latino electoral opportunity by trying to mathematically determine Latino precincts with the lowest turnout possible. There is considerable evidence that his ideas took hold in Plan C185, Texas' adopted congressional plan. Ryan Downton channeling Mr. Opiela described his work as, "have [CD 23] over 59% HCVAP, but still at 1/10. There has to be some level of HCVAP where it doesn't make a difference what the election results are. It is more

Hispanic than the other two San Antonio based districts." This email proves that Downton used race in order to create a district that was majority Latino, but would never or, at least, rarely elect the candidate of choice of the minority community.

CD 23 had to lose 149,163 people because it was substantially overpopulated. Trial Tr. Vol. 2, August 12, 2014, p. 505, ln. 16. Texas removed 230,000 people from CD 23 that had previously resided in the district. *Id.* at p. 506, lin. 14-15. The turnout rate of the Latino voters who moved into CD 23 is 11%. Trial Tr. Vol. 2, August 12, 2014, p. 508, ln. 8. The turnout rate of the Latino voters who were moved out of CD 23 was 14.9%. *Id.* at ln. 11.

The State attempts to deflect blame for its actions by offering partisanship as the motive. But, the State sought to create a numerical Latino majority district that could not be won by Latino voters. However, the Voting Rights Act "does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." *Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, 575 U.S. ___, p. 19 (2015) (Slip Op.) The admitted goals used to draw CD 23 implicate a racial gerrymander.

CD 25

MALC has alleged that CD 25 was an effective crossover district in the 2011 plan. *See* MALC's Third Amended Complaint, ¶68. Further, MALC has argued that the division of CD 25 is a racial gerrymander and a retrogression of minority voting strength. There are other claims by MALC and other plaintiffs concerning vote dilution.

There is substantial evidence that the map drawers used race based decision-making to dissect Travis County's minority population. Dr. Ansolabehere analyzed the district cuts of both Travis County and the benchmark CD 25 crossover district and concluded that these division more closely resembled racial lines than other lines. Rod. Exh. 912 at 7. Dr. Ansolabehere performed a statistical analysis to determine the correlations between racial composition of VTDs and inclusion of that VTD into a given district in the county. He performed the same analysis based on partisan vote. "The racial indicators are statistically significantly correlated with inclusion of VTDS in specific CDs." Rod. Exh. 912 at 39. Dr. Ansolabehere determined that "race is a stronger predictor than party of vote for which VTDs are put in which CDs." Id.

This inescapable truth is backed up by the process by which CD 25 was created. Ryan Downton has asserted that the deconstruction of Travis County was done for partisan reasons. Trial Tr. Vol. 5, August 15, 2014, p. 1674. However, what Mr. Downton actually did was to divide Travis County residents on the basis of race. He acknowledged that "Anglo Democrats needed to be divided" among the districts. Id.

This Court must weigh this evidence against the pre-textual justification that these changes were made for partisan reasons.

CD 27

As to CD 27, the state purposefully manipulated 206,293 Hispanics, who had previously been able to elect the candidate of their choice from the district. This Latino population was stranded in a majority Anglo district effectively nullifying their electoral voice. MALC's Third Amended Complaint, ¶66. The State admits that CD 27 is no longer a performing minority opportunity district. In order to avoid retrogression, the State asserted that it replaced CD 27 with CD 34, which does not contain the 206,293 Hispanics from Nueces County. Yet, "[a] racial gerrymandering claim … applies to the boundaries of individual districts. It applies district by district."

Alabama Legislative Black Caucus, et al. v. Alabama, et al., 575 U.S. ___, p. 6 (2015) (Slip Op.). The elimination altogether of CD 27 as an effective minority opportunity district simply cannot be justified by the creation of a new district. In fact, CD 34 can co-exist with CD 27, since the new district came to be as a result of the increase in the size of the delegation as a whole, form population growth primarily in the minority community. (MALC Exhibits 17,18; *Perez* Interim Map Exhibits 6,7)

The *Alabama* case gives this Court a new perspective through which to view the elimination of CD 27 as a minority opportunity district.

This is especially true, since maintaining CD 27 as a minority opportunity district can occur without threatening the effectiveness of CD 34

IV. Texas sought to utilize false assumptions of law that severely limited the creation and preservation of minority ability to elect districts.

The Alabama legislature believed that it had to meet existing racial demographic totals in each existing minority opportunity

district. In other words, Alabama believed that even minute decreases in black voting age population would subject the voting change to a § 5 challenge. Just as this court has found, the Supreme Court rejects this false notion. "Section 5 … does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." *Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, 575 U.S. ___, p. 19 (2015) (Slip Op.)

Texas also believed these false assumptions when it suited its purpose. Specifically, when the enacted plan was in danger of having fewer than required minority opportunity districts in the state house map, then the Redistricting Committee artificially increased the SSVR totals for two existing operational minority opportunity districts, HDs 148 and 90. In addition, the need to meet an artificial SSVR threshold in HD 77 to avoid nominal racial retrogression created the strangely shaped antlers that have formed the basis for much court inquiry. In HD 103, Mr. Downton testified that in order to avoid retrogression HD 103's SSVR had to be kept at its existing level. This has also affected the congressional maps. Downton testified in his emails that he believed at some level of demographic

strength electoral performance did not matter. Later, he testified that he determined for § 5 purposes that there was no retrogression between 1/10 district and a 3/10 district, both were non opportunity districts in his opinion, which was ratified by decision-makers like Chairman Solomons. What is particularly troubling is all of these false assertions of the law never produced increased electoral outcomes for candidate of minority preference. Indeed, these assumptions came out on the wrong side for Latinos in Texas.

Alabama is an object lesson for legislatures not to fool themselves in redistricting. The Alabama legislature made two policy choices, both of which were harmful to minority electoral opportunity on their own. But, in concert, these choices lead to the creation of districts with the taint of racially impermissible purpose. The Supreme Court is appropriately admonishing Alabama's rejection of textual reality and the district court's ratification of this skewed perspective.

In terms of skewed perspectives as to redistricting, Texas leads the Nation. Not only did Texas deploy the false opportunity district approach in dealing with retrogression. Texas has adopted other more novel practices and beliefs concerning redistricting. As MALC

has argued throughout the litigation, Texas has utilized a more stringent than necessary "Whole County Line Rule" doctrine that borders on zealotry. Its lawyers at Texas Legislative Council, previous practice in other statewide redistricting plans, and a commonsense understanding of the role of federal law in relation to state sovereignty all point to the fact the "Whole County Line Rule" must give way when found in violation of federal law. Yet, Chairman Solomons would have to be told by no less than the Supreme Court of the United States that his interpretation was incorrect.

These are not distinct isolated choices. They work together to defeat minority electoral opportunity. In Bell County, the State believes the best way to preserve communities of interest is by dividing the largest community of interest in the county. In Fort Bend, the State believes that the best way to balance Republican voting strength between HD 26 and 27 is by splitting precincts even though no meaningful political data exists at the block level. All of these are aimed at one final truth. Texas impermissibly and intentional racially discriminated against minority voters.

V. Impact on other claims

MALC also asserts that Section 2 districts were possible in other areas of the State: Midland/Ector, Lubbock and Nueces counties. Each of these areas can produce compact Latino opportunity district with greater than 50% citizen voting age population with minimal cuts to county boundaries. *See* Plaintiff MALC exhibits 91-96, 100-102, and 107-109.

The State's objection to the creation of these districts is compliance with the "Whole County Line Rule."

As describe above, the central holding of the Alabama redistricting case is that the "equal population goal is not one factor among others to be weighed against the use of race to determine whether race predominates". *Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, 575 U.S. ___, p. 15 (2015) (Slip Op.). "Rather it is part of the redistricting **background**, taken as a given" when determining whether racial gerrymandering has occurred in a specific district. *Id.* at 15-16. (emphasis added). Equal population "is not a factor to be treated like other nonracial factors when a court determines whether race predominates over other, 'traditional' factors in drawing district boundary lines." *Id.* at 17. As discussed above, the Texas "Whole County Line Rule", fits into the mold of rules

and regulations cast as "background" factors to be taken as a given but not used to evaluate decisions otherwise grounded in racial decisions. *Id.* Texas, thus, may not use compliance with "background" redistricting issues such as the "Whole County Line Rule" to disprove the predominance of race conscious redistricting.

Moreover, the "Whole County Line Rule" was unevenly and inconsistently applied. There have been dozens of deviations from the whole county line rule in every state house map since 1973, up to and including Plan H 283. (MALC Exhibit 157, 169). The Texas Legislature was advised by its counsel that the Whole County Rule must yield to the requirements of the Voting Rights Act. The Texas Legislative Council's PowerPoint by Senior Legislative Council David Hanna on the County Line Rule for House Districts presented on March 1, 2011 states, "Basic Rule: A county may be cut in drawing a house district only when required to comply with: the one-person, one-vote requirement of the 14th Amendment to the United States Constitution; or the Voting Rights Act." (DX381, p. 51; *see also* MALC Exhibit 48, page 9.) The Texas Legislative Council (TLC) advised in its publication that the "that the provisions of Section 26 [the Whole County Rule] must be enforced as written to the extent possible

without violating federal redistricting standards." In fact, the TLC advised that: "because of conflicts with the federal law governing redistricting, Section 26, Article III, Texas Constitution, cannot be given full effect as written." (MALC Exhibit 167, p. 10, 17). Despite this advice, Texas developed a new conception of the whole county line rule that deviated from its previous practice. The legislative redistricting decision-makers adopted a policy that the "Whole County Line Rule" trumped federal law. (Tr. Vol. 6, p. 1447. (Interiano Testimony)). In fact, Chairman Burt Solomons was unequivocal that in a conflict with the Voting Rights Act obligations the Texas constitutional requirement would control. (Tr. Vol. 7, pp. 1592-95).

This deviation from normal procedure and new found overzealousness specifically prevented the creation of a new Hispanic opportunity district in Hidalgo and Cameron Counties. Initially, Mr. Interiano interpreted the "Whole County Line Rule" as wholly preventing the creation of the Hidalgo and Cameron district. (Tr., Vol. 5, p. 1540, lines 13-24. ("I believe that splitting -- that having both of those counties be split was a violation, in and of itself.")).

At trial, Gerardo Interiano eventually acknowledged combining population from Hidalgo County with population from Cameron County would not in and of itself breach the whole county provision but in his opinion would cause a county break to the north of Hidalgo and Cameron. (Tr. Vol. 5, p. 1542, lines 3-6).

Yet, in the Court's interim map, H 309, the Court created the Hidalgo/Cameron Section 2 district without causing a County Line to be cut North of Hidalgo or Cameron County. (R, Dkt. 682, (Plan H 309)). Based on its pretextual interpretation of the whole county line rule, the State failed to create *Gingles* I districts in Lubbock, Midland/Odessa, Nueces County, and Hidalgo/Cameron. (Tr. Vol. 5, p. 1542, lines 3-6 (Cameron/Hidalgo); MALC Exhibits 71-76 (Record Votes on MALC Amendments, which contained Midland/Odessa, Nueces County, and Cameron/Hidalgo amendments, during the 83rd Legislative Session); (plans rejected because county line was broken to create minority opportunity districts. Tr.-1, pp. 1593-1595)).

Mr. Hanna also testified that if Section 2 required the creation of an additional minority opportunity district in the area of Nueces County, the whole county line rule could not stand in the way

because of the Supremacy Clause of the United States Constitution. In fact, if the "Whole County Line Rule" conflicted with federal law, Mr. Hanna believed that the whole county line rule must yield to federal law. (Tr. Vol. 4, p. 1208-09. (Hanna Testimony) *See also* Tr.-1, p. 76 (Martinez Fischer testimony that that was the instruction from Legislative Council.)).

Inconsistent policies and inconsistent application of those policies is evidence of racialized intent. *See Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, 575 U.S. ___, p. 18 (2015) (Slip Op.)("Transgressing their own redistricting guidelines…. The drafters split seven precincts.").

The choice to divide, rather than combine minority populations in Lubbock, Midland/Ector, and Nueces counties to avoid drawing new Latino opportunity districts, thus becomes predominantly a racial one.

Thus, the *Alabama* decision lends further support to MALC's Section 2 claim with regard to new Latino opportunity districts in Midland/Ector, Lubbock and Nueces Counties.

VI. CONCLUSION

When choices made both big and small always tend to hurt one side over the other, it is reasonable to assume that the result was intended.

The evidence before this Court after two trials and over a month of testimony and hundreds of exhibits fully supports Plaintiff MALC's assertions of a racial gerrymander in the plans H283 and C185, as well as MALC's claims of Section 2 violations.

The determination of the United States Supreme Court in *Alabama*, supports MALC's claims, both as to racial gerrymanders in H283 and C185 and as to its Section 2 claims.

Finally, as to the Court's final question, MALC does not believe that the record will require further development, but all depends on the scope of this Court's decision on the review of Plans H283 and C185.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the April 20, 2015, I electronically filed the foregoing using the CM/ECF system which will send notification of such filing to all counsel of record who have registered with this Court's ECF system, and via first class mail to those counsel who have not registered with ECF.

/s/ Jose Garza
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