Rebuttal Report to Supplement Expert Report of Dr. John Alford

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Introduction

Dr. Alford mischaracterizes my analysis as one that simply relies on two indices to determine that the State House and Congressional Plans Proposed by the State of Texas offer fewer effective minority districts than the Benchmark Plans and are therefore retrogressive. [1] Although it is my expert opinion that a comparison of the number of districts that provide minority voters with the ability to elect candidates of choice in the two plans is in fact the ultimate goal of a retrogression analysis, my conclusions are based on a synthesis of a great deal of information and reflect the theories and methods that I have applied in my work over the past three decades. In addition to compiling the endogenous and exogenous indices, I also:

- Reviewed the results of the racial bloc voting analyses conducted by the Texas Attorney General (OAG) to confirm the presence of racially/ethnically polarized voting on a district-by-district basis as well as to determine who the minority-preferred candidates were in the statewide elections (again on a district-by-district basis) that I included in my indices. (See Appendix B of Handley Report.)

- Conducted an analysis of voting patterns by race/ethnicity when it was needed to confirm the identity of the minority-preferred candidates in specific endogenous elections. (See Appendix D of Handley Report.)

- Compared the recompiled election results reported by the OAG in each year to determine if the exogenous contest chosen to represent that particular year would skew the overall score in any way. (I determined that it was not.)

- Devised a weighting scheme to ensure that the results of the endogenous elections counted at least as much as the exogenous elections in determining whether a Benchmark district provided minority voters with the ability to elect candidates of their choice to the legislative office at issue.

Moreover, the endogenous and exogenous indices were not used in a simple manner – I did not just add the scores up. As I indicated in my first report, although both the

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[1] I am using the term "effective minority district" to indicate a district that provides minority voters with the ability to elect candidates of their choice to office.

endogenous and exogenous indices were considered when determining if a Benchmark district provided minorities with the ability to elect candidates of choice, when determining if a district was no longer effective in the Proposed Plan, I looked at not only the actual score on the exogenous index but the relative score (compared to the Benchmark district).

On the other hand, in his supplemental report, Dr. Alford proposes a "statewide functional analysis" for determining retrogression that I believe simplifies the analysis to the point of complete distortion.

Flaws in Dr. Alford's "Statewide Functional Analysis"

Dr. Alford's report introduces an approach to determining retrogression which he refers to as a "statewide functional analysis." This analysis is seriously flawed for a number of reasons, chief among them:

- Dr. Alford advocates disregarding whether minority voters have been successful at electing their preferred candidates to the legislative office at issue. Instead he makes his determination on whether the Proposed Plan is retrogressive solely on the basis of a set of exogenous elections.

- Dr. Alford proposes ignoring elections conducted prior to 2008 because, according to him, these elections should not be given any weight in determining if minority voters have been successful at electing their preferred candidates, even with regard presumably to the Benchmark Plan.

- Dr. Alford produces a single "statewide functional score" rather than considering each district individually. Moreover, this "functional statewide score" relies solely on exogenous index scores (preferably those only since 2008) and scores are tallied in a manner that permits the State to decrease the number of effective minority districts by rewarding the State for "improving" minority districts that are already effective.

These three points are discussed at greater length below.

Disregard for the Ability of Minority Voters to Elect Preferred Candidates to Legislative Office at Issue   Dr. Alford advocates ignoring whether minority voters have succeeded in electing their preferred candidates to legislative office in the district at issue – in fact, he argues that the Court should disregard these endogenous elections as "problematic."[2]

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[2] Alford Supplemental Report, page 6.

In my expert opinion, the most essential piece of information in determining if a Benchmark district is a district that provides minority voters with the ability to elect their candidates of choice is whether minority voters have been successful at electing their preferred candidates to the legislative office at issue in the district.[3] I would certainly not rely solely on a set of exogenous contests and ignore what Dr. Alford contends are the "special circumstances" of a particular district.[4]

An example of a "special circumstance" that Dr. Alford suggests that the Court ignore is the fact that District 74 has consistently elected Representative Gallego (a Hispanic Democrat who is clearly the choice of Hispanic voters) to the State House. Presumably Dr. Alford would have the Court treat this district as if it were not an effective minority district under the Benchmark Plan because minority-preferred candidates in statewide elections usually do not carry the district.

Focus Only on the Last Two Election Cycles   Dr. Alford also proposes ignoring any elections that occurred prior to 2008 – not because this information is not available (the TLC and OAG conducted analyses for the 2002, 2004, 2006, 2008 and 2010 elections) but because this gives "as much weight to old elections as it does to more recent ones."[5]

Furthermore, Dr. Alford suggests that the Court limit their focus to five OAG statewide (exogenous) elections that occurred in 2008 (US Senator and Justice of the Supreme Court, Place 8) and 2010 (Lieutenant Governor, Land Commissioner and Justice of the Supreme Court, Place 9). Because my comparison of the data indicates that there is very little difference in the voting patterns across the three 2010 contests (or across the two 2008 contests), selecting this set of five elections merely ensures that the 2010 election weighs more heavily in the calculation of the index score than the 2008 election.

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[3] For example, endogenous elections are the only elections examined in Bernard Grofman, Lisa Handley and David Lublin, "Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence," 79 (5) *North Carolina Law Review*, June 2001. See also Richard Engstrom, "W hen Blacks Run for Judge: Racial Divisions in the Candidate Preferences of Louisiana Voters, 73 *Judicature,* August-September 1989, an article in which Dr. Engstrom analyzes 54 judicial contests. Also see Allan Lichtman and J. Gerald Herbert, "A General Theory of Vote Dilution," 6 *La Raza Law Journal*, 1993, p. 10.

[4] Alford Supplemental Report, page 8.

[5] Alford Supplemental Report, footnote 1, page 10. See, for example, Bernard Grofman, "Criteria for Districting: A Social Science Perspective, 33 *UCLA Law Review*, October 1985, for the proposition that a series of elections should be examined.

When all ten OAG statewide elections listed by Dr. Alford are included in the index (one 2002 contest, two 2004 contests, and two 2006 contests, as well as the two 2008 and three 2010 contests),[6] the exogenous scores indicate that there are, in fact, more effective Hispanic districts in the Benchmark Plan than in the Proposed Plan:

- House Districts 33, 35 and 117 are no longer effective Hispanic districts (the index scores for these districts moved from 50 or above in the Benchmark Plan to below 50 in the Proposed Plan)

- House District 74 is the only newly effective Hispanic district (the index score moved from below 50 to 50 or above) replacing the three Hispanic districts that are no longer effective in the Proposed Plan

Dr. Alford, however, does not compare the number of effective minority districts in the Benchmark Plan to the number of effective minority districts in the Proposed Plan but instead relies on a single "statewide functional analysis" score based on only exogenous elections.

Single Exogenous Index Score for Plan   Dr. Alford takes issue with totaling the number of effective minority districts in the Benchmark Plan and comparing this to the number of effective minority districts in the Proposed Plan. Instead, he tallies up the exogenous index scores for the districts in a plan to produce a single "statewide" score for the plan.[7] He then compares the Benchmark and Proposed Plans on the basis of these single exogenous index scores to determine if the Proposed Plan score is lower. If it is not, then he concludes that the Proposed Plan is not retrogressive.

There are at least two problems with his approach: (1) his approach relies solely on the exogenous indices and, more importantly, (2) his approach allows the State to decrease the number of effective minority districts by granting it "credit" for taking already effective minority districts and making them "more effective." For example, if based on the exogenous score alone, one district increases from 80 to 100, then another district's exogenous score in the proposed plan can decrease from 60 to 40 – that is, move from usually electing the minority-preferred candidate, to electing the minority-preferred candidate less than half of the time – and not be deemed retrogressive by Dr. Alford. And this is precisely what has happened, as a review of Dr. Alford's assessment of House Districts 35 and District 74 in the Benchmark and Proposed Plans illustrate.

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[6] I do not advocate using all ten contests because this would weight some years more than others.

[7] The single score does not actually reflect the entire state, but rather a subset of the state – only districts with substantial minority populations are included in the score.

District 35 in the Benchmark Plan is 56.4% Hispanic in voting age population (HVAP), 54.6% in Hispanic citizen voting age population (HCVAP) and 55.4% in Spanish surname voter registration (SSVR). Until 2010, this district was represented by a Hispanic Democrat. The Proposed Plan decreases the Hispanic percentages in this district to 54.9% HVAP, 52.5% HCVAP, and 52.7% SSVR. In addition, the Exogenous Effectiveness Index for this district falls from 40 in the Benchmark to 20 in the Proposed Plan.

It appears that Dr. Alford believes that because this district scored a 40 on the Exogenous Index in the Benchmark Plan, it should not be considered an effective minority district since the State would be required to draw a district that increases the Exogenous Index to 60 in order for it to retain its status as an effective minority district. In fact this anomaly simply did not occur – in no instance did I find that the Proposed Plan maintained or increased the Exogenous Index score of a Benchmark district only to hold that the district ceased to be effective.[8] With respect specifically to House District 35, the Exogenous Index declined along with the minority concentration of the district.

Adopting an approach that "accounts for relative changes in the electoral success of minority voters" and relies on a single exogenous index score statewide, would permit the State to redraw House District 35 so that it was no longer an effective minority district by simply offsetting this change with an increase in the exogenous score of already effective District 74.[9] In fact, because the exogenous index score increased from 20 to 100 (+80) between the Benchmark and Proposed Plans in District 74, the State could do the same thing it did in House District 35 (-20) to three additional districts and the plan would still not be retrogressive according to Dr. Alford.

Moreover, because the Proposed Plan offers two new minority districts with exogenous index scores totaling +200, the Proposed Plan could balance this by making **five** districts no longer effective minority districts by decreasing their

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[8] Because I viewed each district as a discrete case – unlike Dr. Alford's statewide single figure approach – had this anomaly occurred I would have noted and discussed it in my report. In every instance that I determined a district would not longer provide minority voters with the ability to elect candidates of their choice to office, the exogenous index decreased. As I noted in my earlier report, the exogenous index is designed to provide a relative measure of effectiveness when comparing the Benchmark to Proposed districts – and in the case of District 35, the exogenous score was lower in the Proposed Plan than in the Benchmark Plan.

[9] As noted earlier in the text of this report, Dr. Alford argues that, despite the fact that District 74 has consistently elected the minority-preferred Hispanic Democrat to the State House, this district should not be deemed an effective minority district because it scores only 20 on the Exogenous Index.

exogenous scores from 80 to 40 or from 60 to 20. The Proposed Plan could even balance these two new minority districts with **ten** districts that were no longer effective by moving them from 60 to 40 on the exogenous index. Presumably this is precisely what Congress sought to avoid – balancing "ability to elect" districts with some greater number of districts unlikely to elect minority-preferred candidates – when it amended Section 5 of the Voting Rights Act in 2006. This is also the reason the US Department of Justice guidance indicate that the "ability to elect either exists or it does not in any particular circumstance."[10]

The "Bright Line Test" and House District 117

The "65% rule" adopted by some courts in the 1970s and 1980s was designed to produce an equivalent number of minority and white voters at the polls on election day. The percentage was arrived at by conjecture: in the absence of any district-specific information about racial voting patterns, it was hypothesized that a district that was 65% minority in population would compensate for the higher proportion of minorities below the voting age and for the lower levels of minority registration and turnout.[11]

Analytical techniques have been developed in the past few decades, including techniques I have devised and written about,[12] that allow redistricters and the courts to determine (rather than speculate) what percentage minority is needed to provide minority voters with the ability to elect candidates of choice on a district-specific basis. For example, estimates of district-specific participation rates and voting patterns by race can be used to calculate this percentage. Recompiled election results also provide this information because the results account not only for the relative participation rates of whites and minorities, but the degree of minority cohesion and white crossover voting found in any given proposed election.

Although it may well be that 60% HCVAP is almost always sufficient to provide Hispanic voters with the ability to elect candidates of their choice in Texas, in the case of State House District 117 as configured in the Proposed Plan, this percentage is

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[10] Guidance Concerning Redistricting under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011).

[11] See, for example, Kimball Brace, Bernard Grofman, Lisa Handley and Richard Niemi, "Minority Voting Equality: The 65 Percent Rule in Theory and Practice," 10 (1) *Law and Policy*, January 1988.

[12] See, for example, Bernard Grofman, Lisa Handley and David Lublin, "Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence," 79 (5) *North Carolina Law Review*, June 2001; also Brace, Grofman, Handley, 1988.

simply not high enough. This is demonstrated by an examination of the recompiled election results: the minority-preferred candidate carried this district in only one of the five elections I included in my exogenous index (and only two of the ten contests in the OAG list of elections). [13]   Thus, even though the Hispanic population increased to 63.8% HCVAP, the exogenous index fell from 60 to 20. I conclude on this basis that District 117 in the Proposed Plan will not provide minority voters with the ability to elect candidates of choice to office because of actual participation rates and voting patterns in the proposed district.

The Proposed Congressional Plan

Dr. Alford contends that the Proposed Plan is not retrogressive because it offers the same number of effective minority districts as the Benchmark Plan.[14] This proposition ignores the relative decline in minority voting strength – the increase in the total number of seats, with no increase in the number of seats in which minority voters will be able to elect their preferred candidates, means that white voting strength will increase and minority voting strength will therefore decrease.

Following Dr. Alford's reasoning, even if the minority population of the State of Texas increased to 50% and even if the congressional delegation increased in size to 50, there would be no retrogression in minority voting strength so long as minority voters maintained the ability to elect their preferred candidates in ten congressional districts – even though they were denied this ability in 40 congressional districts. Minority voter strength is a relative term – it depends not only on the number of districts that minorities are able to elect their preferred candidates, but the number of districts that they cannot.

Another way of looking at this issue is to consider the degree of minority under-representation in the Benchmark and Proposed Plans. Minority voters would be further from proportional representation under the Proposed Plan than under in the Benchmark Plan – and whites would be even more over-represented. Although there is no guarantee of proportional representation embedded in the Voting Rights Act, a decrease in the degree of proportionality by one district constitutes a decrease in the voting strength of minority voters.

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[13] This could be the result of one or both of the following factors: the participation rate of the minorities now included in the proposed district is lower than that of the minorities in the old district (in fact, the SSVR does decrease slightly), or voting is more racially/ethnically polarized in the newly configured district than in the old district.
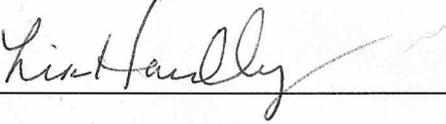
[14] In this instance, Dr. Alford appears to accept a comparison of the number of effective minority districts in the Benchmark and Proposed Plans as the standard for determining retrogression. He indicates that he performed a statewide functional analysis to "confirm" the reliability of these results. Alford Supplemental Report, page 15.

The minority population makes up 37% percent of the citizen voting age population in the State of Texas, according the American Community Survey 2005-2009. Minority voters have the ability to elect minority-preferred candidates in 10 districts out of a total of 32 districts in the Benchmark Plan. This is a disparity of two seats from proportionality – that is, if there were 12 effective minority districts (37% of 32 seats is 11.8), then minority voting strength, as measured by the number of districts minority voters have the ability to elect candidates of choice, would essentially be proportional to the citizen voting age population that is minority.

In the Proposed Plan, however, 13 effective minority districts (37% of 36 seats is 13.3) would be required to achieve proportional representation since there was an increase of four seats in the new plan. There are only 10 effective minority districts, however, in the Proposed Plan. This means that minority voters would be under-represented by three seats in the Proposed Plan compared to two seats in the Benchmark Plan (and white voters would be over-represented by three seats in the Proposed Plan).   An increase in the degree of minority under-representation constitutes a retrogression of minority voting strength.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this _____ 16 _____ day of ___ January ___ 2012.

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Lisa Handley, PhD.