

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

SHANNON PEREZ, *et al.*,

*Plaintiffs,*

v.

STATE OF TEXAS, *et al.*,

*Defendants.*

CIVIL ACTION NO.

SA-11-CA-360-OLG-JES-XR

[Lead case]

**DEFENDANTS' RESPONSE TO PLAINTIFFS' POST-TRIAL BRIEFS**

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## INTRODUCTION

The Plaintiffs have tried for more than three years, and the Department of Justice has tried since August 2013,<sup>1</sup> to prove that the 2011 Texas Legislature enacted HB 150<sup>2</sup> and SB 4<sup>3</sup> for the purpose of diluting minority voting strength rather than protecting incumbents and preserving Republican political strength won in the 2010 elections. Determined to find a racially discriminatory purpose, Plaintiffs ignore the controlling influence of partisanship and incumbent protection on the 2011 redistricting process, and they insist that minority voters comprise a uniform block regardless of age, ethnicity, location, or race. Each premise of the Plaintiffs' case is either unsupported or directly contradicted by the evidence.

## ARGUMENT AND AUTHORITIES

### **I. PLAINTIFFS AND DOJ ARE NOT ENTITLED TO RELIEF ON ANY OF THEIR CLAIMS AGAINST HB 150 OR SB 4.**

The right to cast an undiluted vote belongs to each voter as an individual. *LULAC v. Perry*, 548 U.S. 399, 437 (2006) (“[T]he right to an undiluted vote does not belong to the ‘minority as a group,’ but rather to ‘its individual members.’” (quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996))); *see generally Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (citing “the basic principle that the Fifth and Fourteenth

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<sup>1</sup> *See* Order (Sept. 24, 2013), ECF No. 904 (granting United States’ Motion to Intervene (Aug. 22, 2013), ECF No. 871).

<sup>2</sup> Act of May 21, 2011, 82d Leg. R.S., ch. 1271, 2013 Gen. Laws 3435.

<sup>3</sup> Act of June 20, 2011, 82d Leg., 1st C.S., ch. 1, 2013 Gen. Laws 5091.

Amendments to the Constitution protect persons, not groups”), *quoted in Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 597 (2008) (“It is well settled that the Equal Protection Clause ‘protect[s] persons, not groups.’”). The various individual and organizational plaintiffs therefore cannot prevail on their claims by proving that HB 150 or SB 4 would have injured unidentified Black or Hispanic voters had they gone into effect.

Each Plaintiff must establish standing under Article III by proving the “triad of injury in fact, causation, and redressability.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103 (1998). To prevail on their claims of vote dilution, each Plaintiff must then prove that HB 150 and/or SB 4 diluted his or her vote (or for organizational plaintiffs, the vote of one of their members). “Only those citizens able to allege injury ‘as a direct result of having *personally* been denied equal treatment,’ . . . may bring such a challenge, and citizens who do so carry the burden of proving their standing, as well as their case on the merits.” *United States v. Hays*, 515 U.S. 737, 746 (1995) (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)).

The record contains no evidence that any Plaintiffs or any of their members have had or will have their individual right to vote diluted by HB 150 or SB 4. Whether the necessary proof of an individualized vote-dilution injury is considered as an element of Article III standing or as an element of their substantive vote-dilution

claims, Plaintiffs’ failure to offer any such proof is fatal to their claims of intentional vote-dilution under the Fourteenth Amendment and the Voting Rights Act.<sup>4</sup>

**A. Each Plaintiff Must Prove—Not Merely Allege—Individual Standing To Sue.**

The constitutional requirement of standing “requires federal courts to satisfy themselves that ‘the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.’” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)). Each plaintiff “bears the burden of showing that he has standing for each type of relief sought.” *Id.* (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

The elements of constitutional standing are well-established:

[A]t an irreducible minimum, Art. III requires the party who invokes the court’s authority to “show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,” . . . and that the injury “fairly can be traced to the challenged action” and “is likely to be redressed by a favorable decision” . . . .

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<sup>4</sup> DOJ has recently clarified that it asserts a claim for relief only under Section 2 of the Voting Rights Act. *See* United States’ Advisory Concerning *Alabama Legislative Black Caucus v. Alabama* and *Alabama Democratic Conference v. Alabama* at 2 n.1 (Dec. 2, 2014), ECF No. 1290 (“The only claim brought by the United States here is that Texas’s 2011 Congressional Plan and 2011 House Plan 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.”). DOJ claims that a finding of intentional vote dilution would justify a bail-in remedy under Section 3(c) of the Voting Rights Act, *see id.* at 4, but that would not be true for its Section 2 claim, the only claim it brings. Section 3(c) relief may not be premised upon a violation of Section 2; rather, a bail-in remedy can be considered only if “the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision.” 52 U.S.C. § 10302(c).

*Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)). The Constitution does not confer “an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments . . . ‘is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.’” *Id.* at 471 (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)).

Like Plaintiffs’ substantive claims, Article III standing must be supported by evidence. The elements of constitutional standing “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It follows that

each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. . . . At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we “presum[e] that general allegations embrace those specific facts that are necessary to support the claim.” [*Lujan v. National Wildlife Federation*, . . . 497 U.S.[ 871,] 889 [(1990)]. In response to a summary judgment motion, however, the plaintiff can no longer rest on such “mere allegations,” but must “set forth” by affidavit or other evidence “specific facts,” Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. **And at the final stage, those facts (if controverted) must be “supported adequately by the evidence adduced at trial.”** *Gladstone*, . . . 441 U.S., at 115, n. 31 . . . .

*Lujan*, 504 U.S. at 560 (emphasis added); *see also Gladstone*, 441 U.S. at 114 (“The presence of a genuine injury should be ascertainable on the basis of discrete facts presented at trial.”). Allegations in the complaint may be sufficient to survive a motion to dismiss, but when the case goes to trial, plaintiffs must prove every element of standing. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (“It is a long-settled principle that standing cannot be ‘inferred argumentatively from averments in the pleadings,’ . . . but rather ‘must affirmatively appear in the record.’” (quoting *Grace v. Am. Cent. Ins. Co.*, 109 U.S. 278, 284 (1883); *Mansfield C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884))); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 498 (5th Cir. 2007) (en banc) (“Mere assumption would not satisfy the plaintiffs’ burden to prove an element of their cause of action at this stage of the litigation, and it cannot satisfy their burden to prove standing.”).

**B. There Is No Evidence To Support A Finding That The Vote Of Any Individual Plaintiff Or Any Member Of An Organizational Plaintiff, Has Been Or Will Be Diluted By HB 150 Or SB 4.**

Plaintiffs in this case lack standing to challenge HB 150 and SB 4 because they have failed to prove that either statute has caused or will cause them injury in fact. To prove injury in fact,

The plaintiff must show that he “has sustained or is immediately in danger of sustaining some direct injury” as the result of the challenged official conduct and the injury or threat of injury must be both “real and immediate,” not “conjectural” or “hypothetical.”

*Lyons*, 461 U.S. at 101-02; *see also Hays*, 515 U.S. at 743-44 (“[E]ven if a governmental actor is discriminating on the basis of race, the resulting injury ‘accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.’” (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984) (internal quotation marks omitted))); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320 (5th Cir. 2002) (“[T]he ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.” (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972))). Likewise, for associational plaintiffs, the Supreme Court’s standing cases “have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm.” *Summers*, 555 U.S. at 498. The injury-in-fact requirement demands that each plaintiff prove “an invasion of a legally protected interest which is (a) concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Lujan*, 504 U.S. at 560 (citations omitted).<sup>5</sup>

In their proposed findings of fact and conclusions of law, Plaintiffs and DOJ do not propose a single finding that any named plaintiff, any specific member of an organizational plaintiff, or any individual voter, has suffered an actual injury as a result of HB 150 or SB 4.<sup>6</sup> Nor do any of the proposed findings of fact include a finding

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<sup>5</sup> The Court explained, “By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.” *Lujan*, 504 U.S. at 560 n.1.

<sup>6</sup> The Task Force Plaintiffs list a series of proposed findings regarding standing. *See Texas Latino Redistricting Task Force, et al. Plaintiffs’ Proposed Findings of Fact and Conclusions of Law* (“Task

that any individual is threatened with imminent injury from the operation of HB 150 or SB 4. The record contains no evidence to support such findings, in any event. The Plaintiffs therefore have not proven that they “ha[ve] sustained or [are] immediately in danger of sustaining some direct injury *as the result of the challenged official conduct*,” *Lyons*, 461 U.S. at 101-02 (emphasis added, internal quotation marks omitted), *i.e.*, that they have been injured or that they face an immediate threat of injury as the result of HB 150 and/or SB 4. As a result of this complete failure of proof on the constitutional requirement of injury in fact, DOJ and Plaintiffs lack standing to challenge either bill under any theory of liability. *See, e.g., Tangipahoa Parish Sch. Bd.*, 494 F.3d at 497-98 (noting jurisdictional defect *sua sponte*, vacating, and remanding with instructions to dismiss Establishment Clause challenge where trial record contained “no evidentiary proof that any of the Does ever attended a school board session at which a prayer like those challenged here was recited”).

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Force Proposed FOFs”) at 261-67 (Oct. 30, 2014), ECF No. 1274. These proposed findings, however, merely identify the organizational members of the Task Force, the number of members that belong to each organization, and in some cases, the areas of the State in which the members are located. *See, e.g., id.* at 267 ¶ 1702 (“There are approximately 3,500 individual members of SWU who reside in San Antonio, Austin, and Hondo, Texas.”). The proposed findings do not identify any individual member who claims to have suffered injury or to face imminent injury from either of the 2011 redistricting plans.

Without a specific allegation (and proof) of harm or threatened harm to an individual member, the proposed facts cannot support a finding of injury in fact. To draw such a conclusion would require speculation, which is not permissible. *See, e.g., Tangipahoa Parish Sch. Bd.*, 494 F.3d at 499 (“Without the requisite specifics, this court would be speculating upon the facts. This is something we cannot do, particularly in the standing context, where the facts must be proven, not merely asserted or inferred.” (citing *Lujan*, 504 U.S. at 561)).

Even if they could somehow prove standing to sue, Plaintiffs cannot prevail on their claims without proof that their own votes have been diluted or that they face an immediate threat of dilution as a result of HB 150 or SB 4. The record contains no such proof, nor could it. Both of the challenged redistricting bills were repealed before they became effective as law, and neither has been used to conduct an election.<sup>7</sup> Because neither bill has had or will have any effect on any voter, Plaintiffs cannot prove the discriminatory effect necessary to their vote-dilution claims.

## **II. PLAINTIFFS AND DOJ HAVE FAILED TO PROVE THAT THE 2011 LEGISLATURE ACTED FOR A RACIALLY DISCRIMINATORY PURPOSE WHEN IT ENACTED HB 150 OR SB 4.**

### **A. Plaintiffs And DOJ Advance A Theory Of Intentional Racial Discrimination That Conflicts With The Supreme Court's Interpretation Of The Fourteenth Amendment.**

DOJ attempts to prove its vote-dilution claim by changing the legal standard. It asserts that “[t]o prevail on its intentional vote dilution claim, the United States need only show that race was a factor in the State’s redistricting, not that it was the sole or even primary purpose.” United States’ Post-Trial Brief (“DOJ Br.”) at 73 (Oct. 30, 2014), ECF No. 1279. DOJ is wrong for at least three reasons. First, a showing of discriminatory purpose, even if made, does not establish intentional vote dilution under the Fourteenth Amendment without proof of racially discriminatory effect. *See*,

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<sup>7</sup> *See* Act of June 21, 2013, 83d Leg., 1st C.S., ch. 3, § 3, 2013 Tex. Gen. Laws 5005, 5006 (“Chapter 1 (Senate Bill No. 4), Acts of the 82nd Legislature, 1st Called Session, 2011 (Article 197j, Vernon’s Texas Civil Statutes), is repealed.”); Act of June 23, 2013, 83d Leg., 1st C.S., ch. 2, § 3, 2013 Tex. Gen. Laws 4889, 5005 (“Chapter 1271 (H.B. 150), Act, Regular Session, 2011 (Article 195a-12, Vernon’s Texas Civil Statutes), is repealed.”).

*e.g.*, *Backus v. South Carolina*, 857 F. Supp. 2d 553, 565 (D.S.C.), *aff'd*, 133 S. Ct. 156 (2012). Second, even if Plaintiffs could establish that racial discrimination was part of the purpose behind either of the challenged redistricting bills and that the enacted districts had a racially discriminatory effect (they can prove neither), no constitutional violation would occur unless racial discrimination were necessary to the bills' enactment. *See Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). In their post-trial briefs, DOJ and the Plaintiffs ignore *Mt. Healthy* entirely.

Third, consideration of race is not sufficient to establish liability under the Voting Rights Act or the Constitution. Some consideration of race is inevitable in redistricting, but it is not inherently unlawful:

redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

*Shaw v. Reno*, 509 U.S. 630, 646 (1993); *see also id.* at 680 (Souter, J., dissenting) (“[E]lectorate districting calls for decisions that nearly always require some consideration of race for legitimate reasons where there is a racially mixed population.”); *Backus*, 857 F. Supp. 2d at 565 (“For South Carolina, a covered jurisdiction under the Voting Rights Act, federal law requires that race be a consideration.”). If liability depends on the mere showing that “race was a factor” in

redistricting, then redistricting is presumptively unconstitutional unless the legislature ignores race entirely (assuming that is possible).

In its effort to discount the Legislature's undisputed partisan motivation, DOJ demonstrates that its theory of intentional racial discrimination deviates from the Supreme Court's understanding of the Fourteenth Amendment. As DOJ puts it:

Partisanship is not a legal defense to intentional race-based vote dilution, as legislators may not purposefully dismantle minority opportunity districts merely to fulfill partisan objectives. Intentional racial discrimination is intentional racial discrimination, regardless of its ultimate objective.

DOJ Br. at 68-69. If DOJ means to suggest that intentional racial discrimination can exist without the specific intent to harm members of a racial minority, DOJ has taken the racial discrimination out of intentional racial discrimination. The Supreme Court held clearly in *Feeney* that a violation of the Equal Protection Clause "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Legislators who "purposefully dismantle minority opportunity districts" have engaged in intentional racial discrimination only if they dismantle the districts *because of* the harm inflicted on minority voters. If legislators purposefully dismantle a minority opportunity district purely for partisan reasons, they may have violated the effects prong of Section 2, but they have not engaged in intentional racial discrimination under the Fourteenth Amendment.

DOJ's focus on the "ultimate objective" obscures the critical point. Whether or not harming an identifiable racial group is the *ultimate* objective, intentional racial discrimination implies that it is at least *an* objective. A Legislature cannot be guilty of intentional racial discrimination unless it deliberately sets out to harm members of an identifiable racial group, whether harming that group is the means to an end or the end itself. But proof of an impermissible objective is essential to a claim of intentional discrimination under the Fourteenth Amendment. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." (quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976))); *Feeney*, 442 U.S. at 272 (neutral law with racially discriminatory effect "is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose").

The NAACP Plaintiffs make a similar argument, asserting that "the State is not free to discriminate against voters of color by claiming that it is only discriminating against Democrats." Post Trial Brief of the NAACP and African American Congresspersons—2011 Congress and House ("NAACP/Congresspersons Br.") at 9 (Oct. 30, 2014), ECF No. 1280. Like DOJ's argument, this misses the point. If the Legislature acts only for a partisan purpose, it has not discriminated against minority voters merely because minority voters may identify with the disadvantaged political party. To prove intentional racial discrimination, plaintiffs must prove that the Legislature was actually motivated by a specific desire to impose a disadvantage on

minority voters. If the Legislature acts for a partisan purpose, and its decision is not motivated by the possible impact on minority voters, the Legislature has not acted “because of” any adverse effects on minority voters. *Cf. Feeney*, 442 U.S. at 279.

DOJ’s reliance on *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), confirms that its view of the case does not match the evidence. DOJ cites *Garza* for the proposition that discriminatory purpose does not require proof of racism or racial animus; “rather, discriminatory purpose can be established simply by proving an intent to disadvantage minority voters.” DOJ Br. at 9 (citing *Garza*, 918 F.2d at 778 & n.1 (Kozinski, J., concurring and dissenting in part)). This statement is true as far as it goes, but DOJ’s cursory formulation of the discriminatory-purpose standard omits the critical element: specific intent to disadvantage minority voters *because of their race*. That element distinguishes this case from *Garza*, which stands for the unremarkable proposition that singling out Latino voters for disparate treatment because they are Latino is intentional discrimination—a race-based decision made with the specific intent to affect members of a particular racial group. That is exactly what the county did in *Garza*; it is not what the Texas Legislature did in 2011.

In *Garza*, the plaintiffs alleged that the County of Los Angeles intentionally discriminated in drawing districts for the Los Angeles County Board of Supervisors by “deliberately diluting the strength of the Hispanic vote,” 918 F.2d at 766. The district court found that the Board had intentionally discriminated when it redistricted in 1959, 1965, and 1971, and it found that the challenged 1981 redistricting was intended

“to keep the effects of those prior discriminatory reapportionments in place, as well as to prevent Hispanics from attaining a majority in any district in the future.” *Id.* The district court also found that the Board manipulated district boundaries for the specific purpose of preventing any “well-financed Hispanic or Spanish-surname candidate” from running for election. *Id.* at 766 n.1 (Finding of Fact No. 112). In 1981, the Board passed a plan that “continued to split the Hispanic Core almost in half.” *Id.* (Finding of Fact No. 175).

The finding of intentional racial discrimination in *Garza* provides no guidance here because the facts of *Garza* bear no resemblance to the facts in this case. First, unlike the Texas redistricting process, partisanship played no role in the Los Angeles County Board of Supervisor’s redistricting effort, nor could it have—elections for county supervisors were non-partisan. *Id.* at 766. Second, the Board’s effort was defined by the deliberate targeting of Hispanic voters on the basis of race. Imposing a specific disadvantage on Hispanic citizens was both the means and the end of the Board’s action—it identified the core of Hispanic voters by race and split them in two, and it did so specifically to prevent the emergence of a viable Hispanic candidate. The only way to distinguish voters and candidates—and the only way that the Board *did* distinguish voters and candidates—was by race. Thus in *Garza*, the incumbents adopted a redistricting plan specifically because it would prevent Hispanic voters from electing a Hispanic candidate. It does not follow from *Garza* that favoring Republican

incumbents and voters regardless of race—as the Texas Legislature did in 2011—constitutes intentional racial discrimination under the Fourteenth Amendment.

Elaborating the principle underlying the *Garza* decision, Judge Kozinski's separate opinion illustrates that *specific intent* to disadvantage individuals *because of their race* is essential to a finding of intentional racial discrimination, even if “dislike, mistrust, hatred or bigotry” is not. Judge Kozinski offered the following example:

Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

*Garza*, 918 F.2d at 778 n.1 (Kozinski, J., concurring and dissenting in part). As Judge Kozinski's hypothetical demonstrates, the theory of intentional discrimination that animates *Garza* requires a racial classification made for the specific purpose of disadvantaging voters of the targeted race.

*Garza* did not involve a race-neutral decision that happened to weigh more heavily on Hispanic voters; there was nothing race-neutral about the Board's decision in *Garza*. Nor is there anything race-neutral in the racial covenant hypothesized by Judge Kozinski. In each case, the determining factor is race, and in each case, the decision is specifically intended to prevent members of a particular group—identified

only by race—from enjoying a benefit that would otherwise be available. That may not rise to the level of animus or racism, but it is the very definition of racial discrimination—a race-based decision undertaken for the specific purpose of imposing a disadvantage on members of the targeted race. *Garza* therefore fits squarely in the definition of discriminatory purpose expressed in *Feeney*—“the decisionmaker . . . selected . . . a particular course of action . . . ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” 442 U.S. at 279 (emphasis added).

The flaw in DOJ’s logic is evident in its refrain that “[p]artisanship is not a legal defense to intentional race-based vote dilution.” *E.g.*, DOJ Br. at 68. DOJ attacks a straw man—the State has not asserted partisan motivation (or incumbent protection) as a *defense* to anything; it has asserted—and the evidence confirms—that partisanship and incumbent protection were the Legislature’s true motives in 2011. DOJ’s argument implies that the State has conceded intentional race-based vote dilution but offered an ultimate partisan goal as an excuse. *See, e.g.*, DOJ Br. at 69 (“The use of intentional racial discrimination to achieve a majority for a particular political party will give rise to an equal protection violation.” (citation and internal quotation marks omitted)).

By presuming intentional race-based vote dilution, DOJ’s argument merely begs the question. If a legislature acts for the specific purpose of harming a particular racial minority, it is guilty of intentional racial discrimination under *Feeney*—intentional

racial discrimination is not permissible merely because it is a means to a non-discriminatory end. But liability under the Fourteenth Amendment still requires *proof* that the Legislature intended to disadvantage individuals because of their membership in a racial minority group. That element is absent from DOJ's legal theory and from the evidentiary record.

DOJ and Plaintiffs dismiss the significance of partisanship, asserting that it qualifies as a race-neutral factor only “[f]or purposes of *Shaw* claims.” DOJ Br. at 73. Not so. That *Shaw* claims are analytically distinct from intentional-vote-dilution claims does not mean that the Fourteenth Amendment's distinction between racially discriminatory purpose and partisan purpose vanishes outside the narrow confines of *Shaw*. Partisan motivation is race-neutral for all purposes, and evidence that the Legislature acted with a partisan purpose confirms that it did not act with a racial purpose. This does not mean that a partisan purpose cannot coexist with a racially discriminatory purpose, nor does it mean that an actor may not act with a racially discriminatory purpose in the service of some ultimate race-neutral goal (including, but not limited to, partisan goals).

The point—which DOJ remains determined to obscure—is that partisan purpose and racially discriminatory purpose are separate concepts. The Constitution permits legislatures to draw district boundaries for a partisan purpose, even when those lines happen to diminish the electoral prospects of the party preferred by minority voters:

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

*Bush v. Vera*, 517 U.S. 952, 968 (1996); *see also id.* at 1029 (Stevens, J., dissenting) (“While egregious political gerrymandering may not be particularly praiseworthy, . . . it may nonetheless provide the race-neutral explanation necessary for a State to avoid strict scrutiny . . .”). Whether partisan motivation has the *effect* of diluting a group's voting strength is a different question, but discriminatory effect without discriminatory purpose does not amount to intentional racial discrimination under the Fourteenth Amendment.

DOJ and Plaintiffs' theory of liability cannot accommodate the idea that a legislature might act for a race-neutral purpose yet still cause a racially disparate result. On the one hand, DOJ maintains that “[a] deliberate decision not to create an opportunity district required by Section 2 or a conscious decision to eliminate such a district constitutes intentional vote dilution.” DOJ Br. at 8. On the other hand, DOJ's expert testified that any decision to favor a Republican in Texas intentionally discriminates against Latinos and African-Americans. Test. of Theodore Arrington, Tr. 174:22-175:1, July 14, 2014. In essence, DOJ denies that a legislature can ever select a particular course of action “in spite of” rather than “because of” its adverse effect on a particular racial minority group. *Cf. Feeney*, 442 U.S. at 279. A theory that

denies the central premise of *Feeney* is not a valid theory of intentional discrimination under the Fourteenth Amendment.

The Joint Plaintiffs attempt to fashion a doctrinal shortcut from jury-selection cases, asserting that “once adverse impact is established, . . . a *prima facie* case of discriminatory purpose has been made out, and ‘the burden then shifts to the State to rebut the case.’” ” Joint Post-Trial Brief for LULAC, Quesada, and Rodriguez Plaintiffs on the 2011 Congressional Redistricting Plan (“Joint Plaintiffs’ Br.”) at 68 (Oct. 30, 2014), ECF No. 1277 (quoting *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977)). But *Castaneda* involved a claim of racial discrimination in the selection of grand juries. This is one of “certain limited contexts” in which the Supreme Court “has accepted statistics as proof of intent to discriminate.” *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987). The Court recognized the unique nature of jury-selection cases in *Arlington Heights*, explaining, “Because of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion*.” 429 U.S. at 266 n.13 (citing *Turner v. Fouche*, 396 U.S. 346, 359 (1970); *Sims v. Georgia*, 389 U.S. 404, 407 (1967) (per curiam)). The burden-shifting framework described in *Castaneda* presumes intent based on impact alone, but it does not apply here. There is a burden-shifting framework that applies to this case—as explained in *Arlington Heights* and *Mt. Healthy*, it requires the plaintiff to prove discriminatory intent and effect—but it goes unmentioned in the Joint Plaintiffs’ brief.

**B. To Make Race The Predominant Feature Of Their Case, DOJ and Plaintiffs Ignore The Evidence.**

To support their claims, DOJ and Plaintiffs must ignore the impact of partisanship on the 2011 redistricting bills and on voting behavior in the State. To read DOJ's description of the 2010 elections, one might think that Texas elections are non-partisan. Not once does DOJ use the terms "Democrat" or "Republican." Instead, DOJ explains that "reduced voter turnout among Hispanic and African-American voters, as often occurs in a midterm election, . . . enabled Anglo-preferred candidates of choice to prevail over Hispanic-preferred candidates of choice in two Hispanic opportunity districts in Congress . . . and in four Hispanic opportunity districts in the State House." DOJ Br. at 4. In CD 23, Representative Canseco "defeated the Hispanic-preferred candidate." *Id.* In CD 27, "Solomon Ortiz, the Hispanic-preferred candidate," *id.*, lost to "Representative Blake Farenthold, an Anglo-preferred candidate," *id.* at 5. In House districts 33, 34, 35, and 117, "Hispanic-preferred candidates" were defeated by "candidate[s] preferred by Anglo voters." *Id.*

Allegations that the Legislature set out to favor Anglo voters reflect nothing more than the Plaintiffs' single-minded focus on race. The Joint Plaintiffs, for example, accuse the Legislature of "[f]ollowing a racial double-standard," by "drawing Anglo-dominant districts when they are permitted, but refusing to draw minority-dominant districts unless they are required." Joint Plaintiffs' Br. at 62. DOJ even coins a new phrase: "Anglo opportunity districts." DOJ Br. at 31. The terms "Anglo

opportunity district” and “Anglo-dominant districts” are littered throughout DOJ’s and Plaintiffs’ briefs, but they appear nowhere in the legislative record, and there is no evidence that any such concepts factored into redistricting in 2011. Rebranding all Republican districts as “Anglo-dominant districts” and all Democratic districts as “minority-dominant districts” is a transparent effort to twist the Legislature’s admitted (and proven) partisan motives into evidence of race-based discrimination.

DOJ’s charge that the State “implement[ed] outmoded ideas in the face of massive growth in the minority population,” DOJ Br. at 1, is unclear; it does not say what “outmoded ideas” the State implemented. The charge is also ironic, since DOJ’s own theory of the case is founded on the outmoded idea that minority voters form a single indistinguishable group, regardless of race, ethnicity, community, socioeconomic status, or political preference. In Dallas-Fort Worth, for example, DOJ asserts that the State “packed minority citizens into CD 30 . . . and cracked the remaining minority community between CDs 6, 12, 26, and 33.” *Id.* at 2. The premise of this argument is that every “minority” individual in Dallas and Tarrant County is part of a single “minority community” based solely on their membership in one of many racial minority groups. That every single Asian-American, Black, and Hispanic individual in the Dallas-Fort Worth region belongs to a single “community” defined only by the “minority” status of its members cannot be assumed, even if it could be believed.

But DOJ's and Plaintiffs' theory of the case depends on distorting the facts beyond recognition. DOJ alleges, for example, that in 2010, "candidates who were not the candidates of choice of minority voters prevailed in a number of Congressional and House minority opportunity districts." DOJ Br. at 1. Since Republicans swept the 2010 elections, that term presumably refers to Republicans. Assuming, for the sake of argument, that the terms "candidates who were not the candidates of choice of minority voters" and "Republicans" merely reflect different perspectives on the same facts, only one is consistent with common sense and the evidence in this case. Attempting to protect Republican incumbents because they are Republicans is not race-based discrimination (unless actually motivated by a racially discriminatory purpose), even if they were elected in minority opportunity districts.

The evidence confirms that partisanship and incumbent protection—not a desire to harm minority voters or favor Anglos—drove the 2011 redistricting process. More importantly, it establishes that even if Plaintiffs could prove that racial discrimination were part of the purpose behind the 2011 redistricting bills (which they cannot), it was not a cause-in-fact of the Legislature's action. The Joint Plaintiffs themselves acknowledge that partisanship dictated the character of congressional districts: "The key instruction from Solomons was that three out of the four new congressional districts apportioned to Texas had to be Republican districts." Joint Plaintiffs' Br. at 14; *id.* at 15 (referring to Solomons's "up-front directive on the 3-1

split”).<sup>8</sup> The only testimony about limiting the creation of certain districts focused on partisan makeup, not race or ethnicity:

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

Test. of Ryan Downton, Tr. 1809:15-20, Aug. 15, 2014; *see also id.* at 1604:7-9 (“[I]here were not votes sufficient to pass any plan that did not have three Republican districts out of four new districts.”). Even if the Plaintiffs could shift the burden to the State by proving discriminatory purpose and discriminatory effect, this evidence would carry the State’s burden of proving that partisanship and incumbent protection were sufficient—and racially discriminatory purpose was not necessary—to enact HB 150 and SB 4. *See Mt. Healthy*, 429 U.S. at 286-87.

**C. DOJ’s Purported “Direct Evidence” Of Intentional Discrimination Proves Nothing About The Legislature’s Purpose.**

DOJ claims that “emails among key redistricting figures” provide direct evidence of intentional discrimination. DOJ Br. at 11. But the “key redistricting figure” turns out to be Eric Opiela, and the claim turns out to be a reprise of the “nudge factor” theory. DOJ’s attempt to connect Opiela’s “nudge factor” to the 2011 plans is based entirely on innuendo and unfounded assertions. DOJ states, for

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<sup>8</sup> To the extent Chairman Solomons’s purpose is relevant to the purpose of the 2011 redistricting plans, MALC’s chairman testified that he did not believe Chairman Solomons acted for the purpose of discriminating against minority voters in the redistricting process. *See* Test. of Trey Martinez Fischer, Tr. 118:16-20, Sept. 6, 2011 (responding to a question about the purpose of the 2011 House plan).

instance, that “Opiela suggested that Interiano focus on Hispanic turnout when crafting districts,” *id.* at 12, but there is no evidence that Interiano did so; the only evidence is that he did not. *See, e.g.*, Test. of Gerardo Interiano, Tr. 1600:21-1601:8, July 18, 2014. DOJ claims that “map drawers used race as a proxy for partisanship, and they assumed that excluding politically active Hispanic voters was equivalent to excluding politically active Democratic voters.” DOJ Br. at 12. DOJ cites no evidence to support this claim, and there is no such evidence in the record. Determined to make the evidence fit its theory, DOJ states:

When the map drawers combined the race-based turnout data, which Interiano and Opiela requested and received from the TLC, with racial population figures, they were able to create a block-level estimate of the number of Hispanic and non-Hispanic voters who turned out in a given election from a single census block.

DOJ Br. at 13 (citing Plaintiff-Intervenor United States’ Proposed Findings of Fact and Conclusions of Law (“DOJ Proposed FOFs”) ¶ 111 (Oct. 30, 2014), ECF No. 1278, in turn citing Test. of Clare Dyer, Tr. 760:21-762:15, Aug. 13, 2014; Ex. DOJ-729). This statement begs several questions, none of which are supported by the evidence. The cited finding of fact states only that “Opiela also made his own request to the TLC, and obtained block-level data for the 2010 election.” DOJ Proposed FOF ¶ 111. Even if this proposed finding of fact were true, it would not support DOJ’s assertions that Opiela or Interiano received “race-based turnout data” from TLC, that “map drawers combined . . . race-based turnout data . . . racial population figures,” or that “map drawers” “were able to create a block-level estimate” of Hispanic or non-

Hispanic turnout. DOJ Br. at 13. What DOJ means (unless it has deliberately misrepresented the evidence) is that someone could have taken these steps, but that is no evidence that anyone did. After three years and multiple opportunities for discovery, DOJ can offer nothing more than a string of question-begging assertions to connect Eric Opiela's "nudge factor" e-mail to the Legislature's redistricting plans. There is still no evidence that Eric Opiela developed the "useful metric" he proposed in November 2010, no evidence that any person used his metric to draw districts in 2011, and no evidence that any person who worked on the 2011 plans considered turnout data or used any other race-based method to achieve partisan goals.

DOJ also points to "racially focused statements by key players in the redistricting" as direct evidence of intentional discrimination. DOJ Br. at 11. According to DOJ, e-mails "show that decisionmakers thought and spoke in terms of race." *Id.* at 13. When the "key players" are unveiled, however, they turn out to be Eric Opiela and Representative John Garza (whom DOJ does not name, instead identifying him only as "the non-Hispanic-preferred candidate elected to HD 117 in 2010"), *id.* at 14.

With respect to Opiela, DOJ cites an e-mail in which he supposedly described a "plan to protect the newly elected incumbents in CD 23 and CD 27 by adding 'Anglo voters' to those districts and then, in the case of CD 23 adding enough low-turnout Hispanic areas of Bexar County to ensure its majority-minority population status." *Id.* at 13-14. DOJ stresses that Opiela "refers to 'Anglo voters' as the solution to his

political problem not just once, but four times in a single paragraph.” *Id.* at 14.<sup>9</sup> The evidence cited by DOJ does not support any of these statements. Regarding Opiela’s references to “pick[ing] up Anglo voters,” the first three deal with the need to avoid packing in Congressman Cuellar’s district (CD 28) and a potential Cameron County-based district; they have nothing to do with finding Anglo voters to add to CD 23 or CD 27. *See* Ex. DOJ-76, *cited in* DOJ Proposed FOF ¶ 117.

The only mention by Opiela of adding Anglo voters to CD 23 concerns moving the district into Midland, an option he deemed “unacceptable” under Section 2. *See id.* at 2. To the extent Opiela’s single mention of Anglo voters with respect to CD 23 can be interpreted to indicate *his* belief that Anglo voters were necessary to reelect Canseco, Opiela’s e-mail is no evidence that anyone in the Legislature shared this belief, much less that they acted on it in drawing CD 23. And it provides no support whatsoever for DOJ’s allegation of a “plan” to add low-turnout Hispanic voters to CD 23. Opiela’s e-mail does not mention turnout at all, *see id.*, and the election analysis cited by DOJ lists only raw turnout figures that provide no data on Hispanic voters. *See* Ex. DOJ-761, *cited in* DOJ Proposed FOF ¶ 117. A single statement about Anglo voters in CD 23, made by Opiela to Congressman Lamar Smith in 2010, proves nothing about the Legislature’s creation of CD 23 in Plan C185.

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<sup>9</sup> DOJ cites DOJ Proposed FOF ¶ 118, which addresses split precincts, *see* DOJ Br. at 14, but presumably meant to cite ¶ 117, which contains allegations of “[r]acially [f]ocused [s]tatements.”

As for “the non-Hispanic-preferred candidate elected to HD 117 in 2010,” DOJ Br. at 14, DOJ alleges that he “testified that he wanted to add ‘more Anglo’ voters to his district to secure his reelection chances,” *id.* (citing DOJ Proposed FOF ¶ 362). But the cited proposed finding states, “The Anglo voters in northern Bexar County turn out at a higher rate than the Hispanic voters in southern Bexar County.” DOJ Proposed FOF ¶ 362 (citing Test. of John Garza, Tr. 429:11-430:3, July 15, 2014; Ex. TLRTF-954 (Bexar County election returns by precinct)). The evidence cited by DOJ does not support the claim about Representative Garza’s testimony or the proposed finding of fact. In the relevant portion of his trial testimony, counsel for the Task Force asked Representative Garza if precincts in northern Bexar County had higher voter turnout than precincts in southern Bexar County “[i]n total, not with respect to Anglos or Hispanics or anything like that.” *See* Test. of John Garza, Tr. 429:11-24, July 15, 2014. Representative Garza responded that this was “natural because they were more populated than the rural areas. Yes, voter turnout generally would be higher,” but he could not speak to “percentages of registered voters and who actually voted.” *Id.* at 429:25-430:3. The Task Force exhibit cited by DOJ shows precincts in Bexar County listed by number with the total number of registered voters, the total number of ballots cast, and the percentage of registered voters turning out in the 2010 general election, *see* Ex. TLRTF-954 at 1-13; precincts listed by number with the number of ballots cast for John Garza and David Leibowitz, *id.* at 14-15; and precincts listed by number with the number of votes cast for Joe Farias in an

uncontested election, *id.* at 15. The list of precincts and ballots cast provides no information on the race or ethnicity of voters, nor does it indicate where the listed precincts are located. The cited evidence does not support DOJ's claim (in its brief) that John Garza "testified that he wanted to add 'more Anglos' to his district," DOJ Br. at 14, nor does it support DOJ's statement (in its proposed findings of fact) that "Anglo voters in northern Bexar County turn out at a higher rate than the Hispanic voters in southern Bexar County," DOJ Proposed FOF ¶ 362.

DOJ concludes that these e-mails and statements provide direct evidence of intentional racial discrimination because they "reveal the extent to which the key redistricting participants conceived of partisan politics in distinctly racial terms." DOJ Br. at 14. First, it is a stretch to characterize Eric Opiela and John Garza as "the key redistricting participants." Second, it is outrageous for DOJ to argue that these two individuals' (alleged) "conce[ption] of partisan politics in distinctly racial terms," DOJ Br. at 14, constitutes direct evidence of intentional racial discrimination given DOJ's unrelenting focus on race to the exclusion of relevant partisan information. In the sentence *immediately preceding* its verdict on "conceiv[ing] of partisan politics in distinctly racial terms," DOJ describes a Republican State Representative not as a Republican (or by his name) but as "the non-Hispanic-preferred candidate elected to HD 117 in 2010," *id.*

DOJ also continues to insist that precinct splits provide direct evidence of intentional racial discrimination. DOJ Br. at 11. DOJ initially argued that split

precincts indicated discriminatory intent because (according to DOJ) racial data were the only data available below the precinct level. In its complaint, for example, DOJ asserted:

Although political data—i.e., election returns, voter registration, and turnout—are compiled at the precinct level in Texas, that information is not available for smaller geographic areas such as census blocks. Data about the race of the inhabitants is, however, available below the precinct level.

Complaint in Intervention ¶ 24 (Aug. 22, 2013), ECF No. 871-1. That allegation is, of course, completely false. *See* Defendants’ Post-Trial Brief (“Defendants’ Br.”) at 35-37 (Oct. 30, 2014), ECF No. 1272. But that does not stop DOJ from asserting that “[e]lection data is available only by precinct, and it is not available at the census block level.” DOJ Br. at 15.

In the face of evidence disproving this contention, DOJ moves the goalposts, now asserting that the State could not have relied on block-level political data because RedAppl’s allocation of the data “is not accurate, and Texas redistricting officials knew that.” DOJ Br. at 15 (citing DOJ Proposed FOF ¶ 123). The charge that the State could not have relied on block-level political data because it did not exist has morphed into a charge that the State could not have relied on block-level political data because it was not accurate. First, DOJ does not identify the “redistricting officials” who supposedly knew that block-level data were not accurate. (It cites only trial testimony from Dr. Arrington and Clare Dyer, *see* DOJ Proposed FOF ¶ 123.) Second, that the data were not precisely accurate does not imply that they could not

have been used. Political data are not racial data, even if the political data are inaccurate. The supposed flaws in the block-level political data provide no evidence that the Legislature used race as a proxy for partisanship, as DOJ alleges. *See* DOJ Br. at 14, 15.

**III. PLAINTIFFS HAVE NOT PROVEN THAT THE LEGISLATURE VIOLATED THE FOURTEENTH AMENDMENT WHEN IT ENACTED HB 150.**

**A. Plaintiffs Have Not Proven That The Legislature Intentionally Diluted Black Or Hispanic Voting Strength in HB 150.**

**1. Bexar County**

In their post-trial briefs, the Task Force Plaintiffs and DOJ press their argument that HD 117 was drawn with discriminatory intent. For example, the Task Force Plaintiffs allege that Gerardo Interiano’s “technique of swapping geographic territory into and out of HD 117 while monitoring election performance and SSVR” and Representative John Garza’s purported “racial statements” provide “direct evidence” of intentional discrimination. Post-Trial Brief of Plaintiffs Texas Latino Redistricting Task Force, et al. (“Task Force Br.”) at 46-47 (Oct. 30, 2014), ECF No. 1282. DOJ alleges that in HD 117, “state officials applied a ‘nudge factor’ that focused on replacing high-turnout Hispanic voters with low-turnout Hispanic voters.” DOJ Br. at 2. DOJ’s failure to identify these “state officials” who supposedly used a “nudge factor” is not surprising; there is no evidence that any state official or state employee used a “nudge factor” or any other method to swap some Hispanic voters for other Hispanic voters on the basis of their propensity to turn out.

However, the evidence establishes that the mapdrawers utilized SSVR in light of DOJ guidance, Test. of Gerardo Interiano, Tr. 35:11-14, Aug. 11, 2014, and the consideration of election performance data was consistent with the Legislature's overall goal of providing incumbents from both political parties with a fair opportunity to be reelected, Test. of Gerardo Interiano, Tr. 1426:23-1427:14, Sept. 12, 2011. With respect to Representative John Garza's alleged statement about wanting "more Mexicans" in his district, the Plaintiffs have offered nothing to indicate what the statement meant (assuming it was even made as Representative Farias testified), *see* Test. of Joe Farias, Tr. 335:15-16, July 15, 2014, or any basis for the Court to conclude that such a statement demonstrates the purpose of Bexar County members who approved the delegation map, the Legislature that adopted H283, or anyone who helped draft HD 117.

Additionally, the Task Force and DOJ claim that HD 117 was intentionally drawn to exclude high-turnout Hispanic areas and add low-turnout Hispanic areas. Task Force Br. at 47; DOJ Br. at 41-43. Yet the evidence reflects that the State's mapdrawers did not utilize voter turnout data or seek out low-turnout areas in drafting HD 117. Test. of Gerardo Interiano, Tr. 1600:16-1601:8, 1601:19-24, July 18, 2014. The evidence also demonstrates that Somerset and Whispering Winds—two areas that anchor the Plaintiffs' turnout claims—were added to HD 117 for race-neutral reasons like protecting an incumbent Republican by adding Republican areas to his district, following natural boundaries, and equalizing population. *E.g.*, Test. of

Joe Farias, Tr. 336:15-337:3, 353:14-23, July 15, 2014; Ex. D-284; Ex. DOJ-290. The decision to include Somerset and Whispering Winds in HD 117 rather than HD 118 was ultimately made by Speaker Joe Straus. *See* Task Force Br. at 45; Test. of Gerardo Interiano, Tr. 1558:21-25, 1597:11-1598:1, July 18, 2014. There is no allegation or evidence that Speaker Straus made this decision for a racially discriminatory reason (or based on turnout figures). Similarly, the Legislature had at least two race-neutral reasons not to include precincts from the South San Antonio ISD in HD 117. First, Representative Garza lost several precincts in the area by wide margins in 2010. *See* Task Force Br. at 40. Second, precincts in South San Antonio ISD were heavily populated, and Representative Garza needed to shed population to meet one-person-one-vote requirements. *See* Test. of John Garza, Tr. 416:3-13, July 15, 2014; Test. of Joe Farias, Tr. 353:14-23, July 15, 2014; Ex. D-100\_00012.

Likewise, there is no support for the Task Force Plaintiffs' argument that the drafting of HD 117 failed to follow "expressed criteria," or that the evidence somehow contradicts Interiano's testimony, merely because HD 117 includes some non-rural communities and areas within the City of San Antonio in Plan H283. Task Force Br. at 63-64. The evidence establishes that the mapdrawers' goals for HD 117—which included creating a rural, conservative district outside the City of San Antonio and complying with the Voting Rights Act, Test. of Gerardo Interiano, Tr. 1518:9-15, 1523:2-18, July 18, 2014; Test. of John Garza, Tr. 399:4-13, July 15, 2014—were not the type of all-or-nothing proposition that the Task Force Plaintiffs suggest.

Just the opposite is true: the mapdrawers recognized that constructing HD 117 required a balancing of various goals, not all of which could be achieved to a tee. Test. of Gerardo Interiano, Tr. 1559:1-15, 1598:2-10, July 18, 2014. Indeed, Representative Garza was not entirely satisfied with how his district was drawn, but he agreed to a map that received near-unanimous approval from the Bexar County delegation. *Id.* at 1596:19-25; Test. of John Garza, Tr. 422:7-13, July 15, 2014.

The evidence also refutes the Task Force Plaintiffs' contention that HD 117 was drawn "behind closed doors," with Representative Mike Villarreal excluded from the process. Task Force Br. at 65. The record establishes that the Bexar County delegation met numerous times as a group to negotiate a countywide map; members sent their ideal districts to Representative Villarreal; HD 117 was revised during the process to address concerns raised by Representative Villarreal; proposed maps for HD 117 were prepared by Interiano along with Representative Garza and his staff, in coordination with Representative Villarreal; and the version of HD 117 incorporated into the delegation map was accepted by Representative Villarreal. *E.g.*, Test. of Gerardo Interiano, Tr. 1517:11-20, 1519:2-22, 1521:2-1522:23, 1595:4-6, 1596:2-1597:4, July 18, 2014.

The possibility that other configurations of HD 117 could have maintained 50% SSVR but increased the performance of Democratic candidates, *see* Task Force Br. at 45, proves that political performance was the predominant factor in the adopted configuration of the district. Gerardo Interiano testified, for instance, that while it

might have been possible to maintain an SSVR majority by removing Somerset and including precincts from San Antonio, he did not believe it was possible to do so while still maintaining political performance. Test. of Gerardo Interiano, Tr. 1559:7-15, July 18, 2014.

DOJ's contention that Representative Farias was subjected to "disparate treatment" during the redistricting process is similarly unfounded. DOJ Br. at 43-44. The evidence reflects that Representative Farias—the lone dissenter from the Bexar County delegation's map—objected to certain areas being assigned to HD 117. Test. of Joe Farias, Tr. 326:3-8, July 15, 2014. Representative Farias raised his concerns with the Bexar County delegation, and then with the full House (through a floor amendment); none of his efforts proved successful. *Id.* at 326:12-327:13, 333:10-12. The fact that Representative Farias did not get precisely what he wanted in his district—just like other Bexar County members, *see* Test. of Gerardo Interiano, Tr. 1596:19-25, July 18, 2014; Test. of Trey Martinez Fischer, Tr. 112:2-12, Sept. 6, 2011—reflects the give-and-take process by which the delegation worked out a Bexar County map. It is not evidence of intentional discrimination.

## **2. Cameron County, Hidalgo County, and HD 35**

The Task Force argues that the Legislature's failure to create a new district joining Cameron and Hidalgo's surplus populations is evidence of intentional discrimination because "redistricters created new Anglo-majority State House districts to accommodate population growth in Denton and Montgomery Counties." Task

Force Br. at 26. First, the Legislature's apportionment of new districts to Denton County and Montgomery County was not a choice. *Compare* Ex. D-212 (House districts per county under 2000 Census), *with* Ex. D-213 (House districts per county under 2010 Census). Second, the decision not to create a district joining surplus population from Cameron and Hidalgo Counties cannot support a claim of intentional vote dilution because it did not dilute Hispanic voting strength. As the Task Force recognizes in its brief, every district in Cameron and Hidalgo County under Plan H283—including HD 41—would have been a Latino opportunity district. *See* Task Force Br. at 6 n.4 (listing House districts 31, 36, 37, 38, 39, 40, 41, and 43 as Latino opportunity districts in H283). Failure to adopt an alternative configuration of districts does not prove intentional vote dilution if every resident of Cameron and Hidalgo County would have resided in a Latino opportunity district under the adopted configuration.

DOJ contends that the configuration of HD 35 in Plan H283 reduced the ability of Hispanic voters to elect their candidate of choice. But there is no evidence in the record that Texas intentionally sought to eliminate Hispanic opportunity in HD 35. Nor did DOJ even attempt to offer any live testimony related to the performance of HD 35 at trial. Instead, DOJ points to the expert report of Dr. Handley from the Section 5 case as proof that Plan H283 eliminated the opportunity of Hispanic voters to elect their preferred candidate. But even if this report were admissible—which the State denies—this evidence indicates that HD 35's status remained unchanged from

Plan H100 to Plan H283. The report submitted by Dr. Handley confirms that minority-preferred candidates win less than half the time under either plan: one of five elections in Plan H283 and two of five elections in Plan H100. *See* Ex. DOJ-351. One of the benchmark elections was a 2004 race for Court of Criminal Appeals where the minority-preferred candidate pulled out a 0.5% margin of victory. Putting that razor-thin election to one side, DOJ would show identical exogenous performance in both the benchmark and enacted plans. HD 35 therefore would have given Hispanic voters the same opportunity to elect in Plan H283 that it provided in Plan H100.

In a last-ditch effort to paint HD 35 as the product of intentional racial discrimination, DOJ brings back the “EC” notation from Speaker Straus’s RedAppl log. *See* Ex. D-313. The “EC” notation was originally presented as the missing link between Eric Opiela and the 2011 House plan. That theory was proven to be completely baseless—“EC” was not Eric Opiela, she was Elizabeth Coburn. *See* Test. of Bonnie Bruce, Tr. 1923:17-1924:8, July 19, 2014; Ex. D-370 (e-mail from Elizabeth Coburn to Gerardo Interiano). Determined to wring some evidence of intentional discrimination out of “EC,” DOJ repurposes the exhibit, now alleging that “HD 35 was assigned as a ‘special project’ to an employee of the Office of Speaker Straus, suggesting that the effects of changes made to the district were intended by House leadership.” DOJ Br. at 84. The point of this is not entirely clear, but the suggestion that assigning a “special project” to an intern demonstrates an intent to discriminate is pure speculation.

### 3. Dallas County

DOJ contends that the State relied on race to prevent the emergence of a minority opportunity district in Dallas County, focusing on the existence of split precincts and the configurations of HD 103, HD 104, and HD 105. *See* DOJ Br. at 2, 51, 54. But the evidence shows that the Dallas County districts were drawn to balance the goals of pairing four Republicans, otherwise protecting incumbents, and avoiding retrogression in HD 103 and HD 104. *See* Defendants' Br. at 61-64. There is no evidence that the State impermissibly relied on race in drawing the districts in Dallas County or that it intentionally discriminated against any group of minority voters.

Dallas County lost two seats after the 2010 Census, which required the Legislature to pair four Republican members while preserving all existing minority opportunity districts. Test. of Ryan Downton, Tr. 2014:25-2015:15, July 19, 2014. Downton explained that he split precincts along the border of HD 104 and HD 105 in the enacted plan in order to capture Representative Anderson's residence and to maintain population levels in the districts. *Id.* at 2020:2-2020:12, 2021:3-2021:22, 2022:9-2022:19. He explained that splitting precincts was necessary to maintain the SSVR level of HD 104 to avoid retrogression. *Id.* at 2023:15-2024:9; Ex. D-109\_00045.

Ignoring this evidence, DOJ relies on changes to the minority voting-age population in HD 104, 105, and 106 to claim that state officials forestalled the natural emergence of a new minority opportunity district. But voting-age population is not an

appropriate measure to determine whether Section 2 required the Legislature to create an additional Hispanic-opportunity district in Dallas County. Downton provided un rebutted testimony at trial that it was not possible to create an additional Hispanic-opportunity district without retrogressing HD 103 and HD 104 given the level of Hispanic citizen-voting-age population in Dallas County. *See* Defendants' Br. at 65.

Nor does the electoral performance of HD 105 and HD 106 support DOJ's theory that the State prevented the emergence of a new opportunity district. DOJ argues that minority voters in HD 106 had elected their candidates of choice in 2006 and 2008 under the benchmark map. DOJ Proposed FOF ¶ 522. But if the minority candidate of choice won only two of five elections, the district would not qualify as an opportunity district under the test applied by DOJ's expert. *See* Ex. DOJ-351 at n. 10 (2011 Handley House Rep.). HD 105 has never been an opportunity district. *See id.* at 3-8.

That Downton did not accept a proposal by Representative Anchia does not indicate racial discrimination or race-based decision-making. *See* DOJ Br. at 53. Downton considered all proposals submitted to him by Hispanic incumbents in Dallas County, but he was unable to accept Representative Anchia's proposal because HD 104 did not contain enough population to maintain an SSVR majority, and it did not allow for the pairing of Representatives Anderson and Harper-Brown. *See* Defendants' Br. at 63-64. Although Downton could not accept his proposed district, he continued to work with Representative Anchia to create a district that he was

satisfied with while maintaining benchmark levels of SSVR in HD 103 and HD 104. Test. of Ryan Downton, Tr. 2017:18-2017:22, July 19, 2014.

DOJ asserts that alternative plans would have created an additional minority-opportunity district in Dallas County, *see* DOJ Br. at 53-54, but none of these alternative plans created an additional HCVAP-majority district. Instead, these plans merely created coalition districts. Test. of Trey Martinez Fischer, Tr. 86:8-22, Sept. 6, 2011 (discussing the creation of coalition districts in HD 102 and 107 under H205); Ex. D-107 (H201, Red 116, ACS 2008-2012); Ex. D-324 (H202, Red 116, ACS 2005-2009); Ex. D-108 (H205, Red 116, ACS 2008-2012); Ex. D-110 (H288, Red 116, ACS 2008-2012).

#### **4. El Paso County**

The Task Force and DOJ assert a claim of intentional vote dilution in El Paso County, suggesting that the failure to create a new minority opportunity district violated Section 2. Plaintiffs' vote dilution claim centers exclusively on the configuration of HD 78. In Plan H283, HD 78 is comprised of 55.2% HCVAP and 47.2% SSVR. Ex. D-109\_00045. The district's demographic levels in Plan H283 were virtually identical to those in Plan H100. *See* Ex. D-100\_00035 (HD 78 in Plan H100 comprised of 56.2% HCVAP and 47.5% SSVR). Similarly, the electoral performance in HD 78 remained unchanged from the benchmark to the enacted plan. *See* Ex. D-2, Racially Polarized Voting Analysis for Plan H100 at 1853-56 (indicating that the Hispanic candidate of choice in HD 78 won 2 of 10 elections); Racially

Polarized Voting Analysis for Plan H283 at 2085-87 (indicating that the Hispanic candidate of choice in HD 78 won 2 of 10 elections). El Paso County contained five House seats in the benchmark plan, four of which were held by Democrats. HD 78 was held by a Republican during the 2011 legislative session and had been, with the exception of one election, for at least the preceding fifteen years. *See* Test. of Ed Martin, Tr. 406:3–407:1, Sept. 7, 2011.

Plaintiffs contend that the State intentionally diluted the vote of Hispanics in by failing to create a fifth (*i.e.*, five out of five) Hispanic opportunity districts in El Paso County. Plaintiffs, however, offered no evidence that the configuration of HD 78 deprives any Hispanic voter in El Paso County of an “equal opportunity” to participate in the political process or to elect candidates of their choice. Nor did Plaintiffs offer any evidence that would suggest the State was required to create such a district in a region of the state that has 75% Hispanic voting age population. *See* Ex. D-51. Hispanic voters are more than proportionally represented in El Paso County’s delegation given that in four out of the five districts, Hispanic voters elected their candidate of choice.<sup>10</sup> *See* Ex. D-2 (Racially Polarized Voting Analysis for Plan H100

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<sup>10</sup> Although DOJ contends that proportionality should only be measured on a statewide basis, this analysis should not apply when measuring proportionality on the House plan. Because the Texas Constitution’s county-line rule requires that House seats be apportioned by county, it makes sense to treat counties as discrete units of apportionment, particularly counties entitled to multiple districts. The Legislature does not face the same constraint in drawing Congressional districts, which are fewer in number and greater in population. Given that the State is constrained by the county-line rule to treat El Paso County as a separate unit for purposes of apportioning House seats, it is logical for the inquiry into proportionality to incorporate a congruent framework. In El Paso County, the Legislature could draw only five districts. Under Plan H283, Spanish-surnamed registered voters

and Plan H283). The only possible basis for Plaintiffs' claim is that the Legislature failed to maximize Hispanic representation. Section 2 "is not concerned with maximizing minority voting strength." *See Bartlett v. Strickland*, 556 U.S. 1, 23 (2009). The Legislature's decision to maintain existing Hispanic population levels in the district, presumably offering some protection to the incumbent, does not support a finding of vote dilution. *See Shaw v. Hunt*, 517 U.S. at 913 ("We have recognized that a State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan so discriminates on the basis of race or color so as to violate the Constitution." (internal quotation marks omitted)).

Although the Task Force alleges a "distinct claim[] of intentional discrimination [that] challenges the use of race as a basis for separating voters" in HD 78, they do not clearly assert a *Shaw* claim. Task Force Br. at 23. They argue that the State relied on race to draw HD 78, but do not state that race predominated in the creation of the district. Regardless of how the Task Force classifies their Fourteenth Amendment claim as to HD 78, there is no evidence that the State engaged in an impermissible race-based classification or that race predominated in the creation of this district.

The Task Force suggests that Representative Pickett and the El Paso delegation favored a map that included the so-called "chef's hat" version of HD 77, implying

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would form a majority in four of the five districts, and Hispanic voting-age citizens would form a majority in all five.

that the decision to adopt the so-called “antler” version of the district was made by the Redistricting Committee. This version of events omits a material fact: Downton used Representative Marquez’s “antler” version of the map because Representative Pickett instructed him to do so. *See* Test. of Bonnie Bruce, Tr. 1953:19-1954:11, July 19, 2014; Test. of Ryan Downton, Tr. 1989:23-1990:1, 2010:2-11, 2104:9-12, July 19, 2014.

Further, neither the Task Force nor DOJ can rely on the existence of split precincts along the border of HD 78 and HD 77 as evidence of intentional race discrimination. Downton explained that he split precincts along the border between HD 78 and HD 77 in order to comply with Section 5 of the VRA and avoid retrogression in HD 78. Test. of Ryan Downton, Tr. 2006:15-21, 2011:18-2012:3, 2013:6-14, 2117:14-22, July 19, 2014. While Downton did consider racial data at the block level to increase the SSVR in HD 78, his consideration of race was done for the permissible purpose of complying with the Voting Rights Act. *See, e.g., United Jewish Orgs. v. Carey*, 430 U.S. 144, 159-62 (1977) (upholding New York’s use of racial criteria in drawing district lines so as to comply with § 5 of the Voting Rights Act).

Likewise, there is no evidence that race predominated in the drawing of HD 78 that would support a *Shaw* claim alleged by the Task Force. A plaintiff raising a *Shaw* claim bears the significant burden of proving that racial considerations were “the ‘predominant factor’ motivating the legislature’s districting decision,” *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999), not simply “a motivation for the drawing of a

majority-minority district.” *Vera*, 517 U.S. at 959. The plaintiff’s burden is a “demanding one.” *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O’Connor, J., concurring). Indeed, “[t]o invoke strict scrutiny, a plaintiff must show that the State has relied on race in *substantial* disregard of customary and traditional districting practices.” *Chen v. City of Houston*, 206 F.3d 502, 506 (5th Cir. 2000) (*citing Miller*, 515 U.S. at 928). “[T]he Supreme Court does not believe that the mere presence of race in the mix of decision making factors, and even the desire to craft majority-minority districts, . . . alone automatically trigger[s] strict scrutiny.” *Id.* at 514. A plaintiff’s heavy burden of establishing the predominance of race can be met either through direct evidence of the legislature’s purpose or through circumstantial evidence, including, among other things, a district’s demographics or shape. *See Shaw v. Hunt*, 517 U.S. at 905; *Miller*, 515 U.S. at 916.

The Task Force Plaintiffs have not met the heavy burden of proving that the Legislature drew HD 78 predominately on the basis of race. The shape of HD 77 was determined almost entirely by Representative Marquez because her proposal was adopted by the El Paso delegation with only slight modifications. Test. of Joe Pickett, Tr. 772:10-773:21, July 16, 2014. To the extent Downton used racial data to increase the SSVR in HD 78, he did so only on the margins of the district, affecting a small portion of its boundary. Test. of Ryan Downton, Tr. 2006:15-21, 2013:6-14, 2117:14-22, July 19, 2014; Ex. D-367. The Task Force even concedes in their brief that race was not the sole factor Downton considered in drawing HD 78, acknowledging that

he “had the election data on and he selected blocks based on Hispanic shading while keeping an eye on the fluctuations in the plan statistics on political results.” Task Force Br. at 38.

The Task Force focuses on the fact that Downton could have increased the SSVR in HD 78 by splitting precincts in a different manner or splitting fewer precincts. *See* Task Force Br. at 46-47. But this evidence is not relevant to their purported *Shaw* claim because the key question is whether the State elevated race over all other redistricting principles. That Downton might have increased HD 78’s SSVR by moving whole precincts does not prove that splitting precincts was improper or that it unnecessarily elevated racial considerations. Other than suggesting that Downton could have drawn the lines differently in order to achieve the same goal, the Task Force offers no evidence demonstrating how the State disregarded other traditional redistricting principles. The consideration of race in a limited area to ensure compliance with Section 5 does not demonstrate that race predominated.

## **5. Harris County**

DOJ contends that the State “purposefully diluted the minority vote” in Harris County by deviating from “past practice” involving the county line rule, “refus[ing] to accept TLC advice regarding minority coalition districts,” and overpopulating minority districts. DOJ Br. at 55. Each contention borders on frivolous. *See* Defendants’ Br. at 79-85, 140-44.

First, the Legislature's decision to apportion 24 House districts to Harris County was consistent with its own past practice. In 2001, when Harris County was entitled to 24.46 ideally populated districts, the House voted to apportion 24 seats. *See* Test. of Garnet Coleman, Tr. 1328:1-3, July 17, 2014; Ex. D-127\_00002. The apportionment of 24 seats to Harris County in 2011 followed TLC's advice. *See* Test. of David Hanna, Tr. 1202:10-23, July 17, 2014; Test. of Burt Solomons, Tr. 1567:7-1568:19, Sept. 13, 2011. Second, the Legislature did not refuse to accept TLC advice regarding coalition districts in Harris County. David Hanna advised that HD 137 was not a performing Hispanic opportunity district and that it would require a "novel retrogression theory" for HD 149 to be protected under the Voting Rights Act. *See* Ex. D-122; Defendants' Br. at 84. Third, the Legislature did not systematically overpopulate minority districts in Harris County. Three-quarters of *all* Harris County districts are overpopulated because the county's surplus population had to be spread among the 24 apportioned districts, which was done with no disparate impact on minority-majority districts. *See* Ex. D-109\_00036-37, 109\_00041-42 (10 of 13 Anglo-CVAP-majority districts overpopulated in Harris County under Plan H283; 8 of 11 Anglo-CVAP-minority districts overpopulated).

Nor does the evidence support DOJ's claim that the Harris County House redistricting process "reinforces the role of race." DOJ Br. at 58. DOJ argues that a notation in Representative Wayne Smith's RedAppl log provides direct evidence of intentional discrimination; but on the other hand, DOJ argues that Representative

Smith was working on a bipartisan Harris County map before Representative Beverly Woolley took over the process. *Id.* at 58-59. DOJ cannot have it both ways. As Defendants have argued previously, Representative Smith and Representative Senfronia Thompson worked together on a Harris County map early in the 2011 redistricting process, but it provided for 25 members and was not accepted as the delegation map; there is no evidence that any of Representative Smith's proposals were incorporated into Plan H283; and the Harris County map adopted by the Redistricting Committee was subsequently altered through floor amendments offered by Representative Garnet Coleman, Representative Thompson, and Representative Alma Allen. Defendants' Br. at 81-84. DOJ also asks the Court to conclude that Representative Woolley offered a floor amendment "to punish Representative Coleman for challenging her authority" based on a comment in her RedAppl log stating only, "[t]he new final amendment changes . . . LOL." DOJ Br. at 58-59. But neither DOJ nor any plaintiff provided evidence regarding the purpose behind Representative Woolley's amendment, and DOJ offers no basis for the Court to adopt such a speculative finding.<sup>11</sup>

DOJ's claim that David Hanna "warned House leadership that a functioning minority coalition district such as HD 149 was protected by the Voting Rights Act

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<sup>11</sup> DOJ relies, in part, on the Section 5 deposition testimony of Representative Smith, Representative Woolley, and Jeffrey Archer. *See* DOJ Br. at 57-59 (relying on DOJ Proposed FOFs ¶¶ 552, 553, 580). Defendants maintain their objection to the admissibility of these deposition excerpts. *See* Joint Advisory Regarding Designated Deposition Testimony at 2-3 (Sept. 29, 2014), ECF No. 1255.

and could not be eliminated,” DOJ Br. at 57 (citing DOJ Proposed FOF ¶¶ 321<sup>12</sup>, 580<sup>13</sup>), ignores the evidence. DOJ insinuates that the Redistricting Committee sought a second opinion to counter TLC’s advice that HD 137 and HD 149 were protected, *see* DOJ Proposed FOF ¶ 580, but there is no evidence that TLC gave such advice or that it was received by the Redistricting Committee. David Hanna’s e-mail of February 17, 2011—sent to Denise Davis, not the Redistricting Committee—said nothing about HD 149. *See* Ex. DOJ-102 (stating, with respect to Harris County, “Should do 24 but this will mean the loss of another R seat since all D seats are minority. (Hochberg has Hispanic seat).”<sup>14</sup>). There is no connection between Hanna’s

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<sup>12</sup> This proposed finding states:

Throughout the redistricting process, the TLC advised Chairman Solomons and his staff to use a functional election analysis under Section 5 of the Voting Rights Act, to preserve coalition districts (particularly HD 149), to draw an additional Hispanic district in Dallas County, and to compensate for the elimination of a Hispanic opportunity district from Nueces County.

DOJ Proposed FOF ¶ 321 (citing “US Ex. 102 (Email Feb. 18, 2011); US Ex. 357 (TLC guidance); US Ex. 343 at 5 (First Hanna Memo, version A)”).

<sup>13</sup> This proposed finding states:

The TLC advised House leadership that HDs 137 and 149 were protected under the Voting Rights Act regardless of whether they afforded an electoral opportunity to a single minority group or minority voters in coalition, but rather than follow that advice, the Redistricting Committee sought alternative legal advice from its litigation team.

DOJ Proposed FOF ¶ 580 (citing “US Ex. 102 (Email, Feb. 18, 2011); US Ex. 357 at 96-97 (TLC Guidance); Archer Dep. 53:14-56:1, Oct. 12, 2011 (ECF No. 1182-3); US Ex. 113 at 3 (Email, Mar. 21, 2011).”

<sup>14</sup> Hanna changed his opinion about HD 137 after reviewing the data. *See* Ex. DOJ-343-0005 (“When examining the overall current Hispanic population percentage (63.8) or even the HVAP (59.8) one might assume that District 137 is a Hispanic district. However because of the high

e-mail and Bonnie Bruce's e-mail to Chairman Solomons on April 3, 2011, which suggested seeking advice from the litigation team regarding "Nueces County," "Vo/Hochberg pairing," and "Harris County (24 v. 25)." Ex. DOJ-113-0003. The cited passage from Jeff Archer's deposition does not address Harris County House districts or coalition districts at all. *See* Archer Dep. 53:14-56:1, Oct. 12, 2011 (ECF No. 1182-3). Just before the passage cited by DOJ, however, Archer explained that TLC did not produce the final draft of its redistricting guidance until August 2011, and no draft of Chapter 4 ("Federal Preclearance: Section 5 of the Voting Rights Act," *see* Ex. DOJ-357-0085) was ever circulated before the final publication. *See* Archer Dep. 53:1-13, Oct. 12, 2011 (ECF No. 1182-3). To the extent David Hanna provided specific advice regarding HD 149, he indicated that it would not qualify for protection under Section 5. *See* Ex. DOJ-343-0005 ("If it can be determined that the district was a true minority coalition district, there could be a retrogression issue in its elimination but this would be a novel retrogression theory to apply where no single racial or ethnic group has more than a quarter of the VAP of the district."). DOJ's claim that David Hanna "warned House leadership" that "HD 149 was protected by the Voting Rights Act" has no basis in the evidence.

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number of non-citizens in the district, the SSVR is in the low 20's and as such this is not likely a performing Hispanic district.").

## 6. Hidalgo County: HD 41

DOJ contends that the Legislature intentionally discriminated on the basis of race by eliminating the opportunity of Hispanic voters to elect their candidate of choice in HD 41. But there is no evidence that the Legislature acted for the purpose of diluting Hispanic voting strength in Hidalgo County or that Plan H283 would have eliminated Hispanic electoral opportunity in HD 41.

There is no evidence that Plan H283 would have had a discriminatory effect on Hispanic voters in HD 41. The district's HCVAP remained virtually the same, with 77.5% in Plan H100 and 72.1% in Plan H283. Ex. D100-00034; Ex. D109-00039. Given the high HCVAP in this district, there is little doubt that Hispanic voters would have had the opportunity to elect their candidate of choice if they voted cohesively. DOJ offered no testimony at trial relating to the alleged vote dilution in HD 41. Instead, DOJ relies on Dr. Handley's report from the Section 5 proceeding, but Dr. Handley was unable to conclude that Plan H283 would have deprived Hispanic voters of the opportunity to elect their candidate of choice in HD 41. *See* Ex. DOJ-351.<sup>15</sup>

DOJ has also failed to prove its allegation that the Legislature created HD 41 with a racially discriminatory purpose. DOJ rests on the mere assertion that, notwithstanding the evidence, "the simplest explanation for the remarkable racial pattern in split precincts along the boundary of HD 41: The precincts were divided

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<sup>15</sup> Defendants maintain a hearsay objection to Ex. DOJ-351, which is the expert report offered by Dr. Handley in the Section 5 proceeding in the D.C. District Court.

along racial lines using racial data.” DOJ Brief at 47. This is pure speculation. The undisputed evidence at trial established that HD 41 was drawn solely for a partisan purpose—to maximize the reelection prospects of Representative Aaron Pena. *See* Test. of Gerardo Interiano, Tr. 41:8-15, Aug. 11, 2014. When Representative Pena testified, at DOJ’s insistence, he confirmed that race was never a consideration during the drawing of District 41, as the area is overwhelmingly Hispanic. Test. of Aaron Pena, Tr. 124:3-15, Aug. 11, 2014.

With no evidence that the mapdrawers relied on racial data to draw HD 41, DOJ relies entirely on its conviction that the 17 precincts that were split along its boundaries must have been split on the basis of race. But the State provided a race-neutral explanation for these precinct splits. Interiano explained how he relied on partisan shading, using the 2010 Texas Attorney General race, to draw the initial configuration of HD 41. Test. of Gerardo Interiano, Tr. 1504:13-15, 1579:12-1580:2, 1580:6-15, 1580:19-22, 1581:10-15, 1581:21-1582:7, July 18, 2014; *id.* at 38:8-12, Aug. 11, 2014. He explained that he split four precincts to include Representative Pena’s home and exclude Representative Gonzalez’s home. Test. of Gerardo Interiano, Tr. 1507-1508, July 18, 2014; Test. of Aaron Pena, Tr. 146:19-147:7, Aug. 11, 2014; Test. of Gerardo Interiano, Tr. 1507:17-22, July 18, 2014; Test. of Theodore Arrington, Tr. 192:6-20, July 14, 2014; Ex. D-295. Representative Pena testified that many of the other precincts were split to include voters he thought he could persuade to vote for him; others were split to include areas that were more affluent, which he assumed

would lean Republican. Test. of Aaron Pena, Tr. 110:12-111:8, Aug. 11, 2014. Representative Guillen also used a database of voting histories from the Democratic Party to identify individuals who would be likely to vote for Representative Pena. *Id.* at 111:9-17. The State's mapdrawers also demonstrated that precincts were split in order to allow the district boundaries to follow roads or city boundaries—all race-neutral explanations that DOJ failed to rebut. Test. of Gerardo Interiano, Tr. 44:22-45:16, Aug. 11, 2014; Test. of Aaron Pena, Tr. 148:1-15, 149:4-25, 150:8-13, Aug. 11, 2014; Test. of Jaime Longoria, Tr. 531:2-5, July 15, 2014; Ex. D-295; Ex. D-670; Test. of Gerardo Interiano, Tr. 1506:22-1507:9, July 18, 2014; Test. of Aaron Pena, Tr. 100:2-101:6, 152:23-153:2, 153:4-14, Aug. 11, 2014. The mere existence of split precincts in HD 41 does not establish an impermissible racial purpose or impermissible race-based methods. The testimony and exhibits confirm that precincts may be split—and were split in HD 41—for various race-neutral reasons. There is no evidence to support a finding that precincts were actually split on the basis of race.

Against this evidence, DOJ offers the testimony of Jaime Longoria, who admitted that he had no personal knowledge of the mapdrawing process. Longoria conceded that the State added wealthy neighborhoods to HD 41 while excluding lower-income areas, Test. of Jaime Longoria, Tr. 535:25-536:3, July 15, 2014, corroborating Representative Pena's testimony that he looked for wealthier areas because he believed affluent voters were more likely to vote for him as a Republican. Test. of Aaron Pena, Tr. 139:14-22, Aug. 11, 2014. Representative Pena was familiar

with Hidalgo County; he instructed both Interiano and Downton to include certain areas in HD 41 because he believed could convince individuals who lived there to vote for him even though he had switched parties. Test. of Aaron Pena, Tr. 139:6-13, Aug. 11, 2014. Representative Pena did not act with a racially discriminatory purpose. Test. of Aaron Pena, Tr. 111:17-20, 127:16-21, 137:7-12, Aug. 11, 2014.

DOJ also points to a made-for-litigation, racially shaded map of HD 41, attempting to show that precincts were split to include Anglos. *See* Ex. DOJ-422; *see also* Ex. DOJ-516 (chart showing populations moved out of HD 41). DOJ's map proves nothing more than the uncontested fact that in Texas, race and politics are difficult to disaggregate. Since Anglo voters are generally more likely to vote for Republicans, any effort to make HD 41 a more Republican-leaning district could be expected to increase the percentage of Anglo voters. That incidental racial effect is consistent with the use of political data and personal knowledge to configure the district. It does not prove that finding Anglo voters was the ultimate goal or that it was the method used to increase the district's Republican profile. *See Vera*, 517 U.S. at 968.

The ultimate question in HD 41 is whether a race-neutral or race-based explanation is more plausible. *Id.* The mapdrawers provided undisputed testimony that they relied on political data and the personal knowledge of two Hispanic lawmakers to make HD 41 more Republican. *See* Test. of Gerardo Interiano, Tr. 1579:12-1580:2, July 18, 2014; Test. of Gerardo Interiano, Tr. 39:23-40:6, Aug. 11,

2014; Test. of Ryan Downton, Tr. 2027:3-16, July 19, 2014. The configuration of HD 41 in Plan H283 would have accomplished the Legislature's partisan objective. Test. of Aaron Pena, Tr. 110:7-11, 110:12-111:8, Tr. 111:9-17, Aug. 11, 2014. DOJ insists that the State's true purpose was to discriminate against Latinos, but it has no direct evidence, and its indirect evidence is *fully consistent* with Texas' asserted motive. Intentional racial discrimination is not the most plausible explanation for HD41. The record cannot support a finding of intentional vote dilution.

## 7. Nueces County

No party disputes that Nueces County's 2010 Census population entitled it to two—and only two—state house districts. Nevertheless, multiple plaintiffs allege that the Legislature's adherence to the county line rule in Nueces County demonstrates intentional discrimination. Under the 2010 Census, Nueces County is entitled to 2.029 districts. Test. of Abel Herrero, Tr. 657:8-658:7, July 15, 2014; Ex. D-214 at 1. Accordingly, the Texas Constitution required that only two districts be apportioned to Nueces County. *Clements v. Valles*, 620 S.W.2d 112, 114 (Tex. 1981); Ex. D-128 at D128\_00152-00153; Test. of David Hanna, Tr. 1185:16-22, July 17, 2014.

David Hanna initially advised that Nueces County was entitled to two and only two districts. Test. of David Hanna, Tr. 1185:16-22, July 17, 2014. Because the entire county had slightly less than 50% SSVR, it was impossible to create two districts with an SSVR majority. *Id.* Both Hanna and Jeff Archer analyzed the county and concluded that it was not possible to draw two districts entirely within Nueces County that

performed for Hispanic candidates of choice. *Id.* at 1190:21-1191:2; *see also* Test. of Ryan Downton, Tr. 2037:23-2038:5, July 19, 2014; Test. of Theodore Arrington, Tr. 199:14-17, July 14, 2014; Test. of Gerardo Interiano, Tr. 1449:19-23, 1452:10-14, 1498:14-18, Sept. 12, 2011. Hanna raised the question whether Section 5 of the Voting Rights Act required the Legislature to divide Nueces County into more than two districts in order to preserve the two existing Hispanic opportunity districts and avoid retrogression, *id.* at 1191:3-5, although the Legislature could also avoid retrogression by creating another Hispanic opportunity district elsewhere in the state. *Id.* at 1190:10-15. Hanna was also concerned that failing to comply with the county line rule created a legal risk that the plans would be invalidated in state court. Test. of David Hanna, Tr. 1201:15-22, July 17, 2014.

Ultimately, the Legislature decided to ensure that Nueces County maintained at least one strong Hispanic opportunity district. Test. of Gerardo Interiano, Tr. 1498:6-23, Sept. 12, 2011. In doing so, they did exactly what Hanna advised in his February 17, 2011, e-mail to Denise Davis. *See* Ex. D-192 (“Corpus—Two seats only; three R’s. And worse one of the seats will probably have to be more Hispanic than the other and probably elect a D. Not sure on this but preclearance likely an issue here.”). As a result of the 2011 redistricting, the Nueces County delegation went from three Republicans to one Republican and one Democrat in 2012. Test. of Abel Herrero, Tr. 660:10-12, 661:11-15, July 15, 2014.

**B. The Legislature’s Adherence to the Texas Constitution Is Not Evidence Of Intentional Race-Based Discrimination.**

**1. The Texas Constitution’s County-Line Rule Is A Traditional Race-Neutral Redistricting Principle.**

The United States Supreme Court has repeatedly recognized that maintaining the integrity of county boundaries is a valid traditional districting principle. *See LULAC v. Perry*, 548 U.S. 399, 463 n.5 (2006) (observing that “traditional redistricting criteria” includes “compactness” and “preserving county lines”); *Vera*, 517 U.S. at 963 (observing “[t]raditional districting criteria” to include “maintain[ing] the integrity of county lines. . .”); *Mahan v. Howell*, 410 U.S. 315, 322 (1973) (“[A] State may legitimately desire to construct districts along political subdivision lines . . . .” (quoting *Reynolds v. Sims*, 377 U.S. 533, 580-81 (1964))). Traditional redistricting principles cannot be subordinated to race without triggering strict scrutiny and likely leading to invalidation under the Fourteenth Amendment.<sup>16</sup>

MALC nevertheless suggests that *Bartlett* stands for the proposition that “state election law requirements, such as the whole county provision, must give way when in conflict with federal voting rights law.” MALC Br. at 3. But the arguments advanced by MALC and other Plaintiffs imply that a “conflict” arises whenever it is possible to create an additional majority-minority district by breaking the county-line rule. This

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<sup>16</sup> *See, e.g., Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) (“Only rarely are statutes sustained in the face of strict scrutiny. As one commentator observed, strict-scrutiny review is ‘strict’ in theory but usually ‘fatal’ in fact.” (quoting Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972))).

suggests that Plaintiffs' arguments have less to do with the application of the county-line rule than its existence.<sup>17</sup> In any event, *Bartlett* does not support Plaintiffs' attempt to undermine the county-line rule. In fact, the Supreme Court has repeatedly and clearly held that traditional redistricting principles *cannot* be subordinated to race without running afoul of the Fourteenth Amendment and thereby subjecting a state's reapportionment plan to strict scrutiny, and it has rejected the claim that abandonment of a state's county-line rule is justified merely to create a potential race-based district. The State's decision to adhere to its race-neutral traditional redistricting principle rather than subordinate it to race and risk violating the federal constitution is neither unconstitutional nor indicative of a racially discriminatory purpose.

The Texas Constitution requires that seats in the Texas House of Representatives be apportioned "by county" and that "the district lines shall follow county boundaries." *Smith v. Craddick*, 471 S.W. 2d 375, 377 (Tex. 1971). The relevant section provides:

The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to

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<sup>17</sup> Within hours of being named chairman of the redistricting committee, Chairman Solomons was informed by a representative of MALDEF that the State would be sued over the county line rule regardless of what plan was passed. Test. of Bonnie Bruce, Tr. 1928:14-25, July 19, 2014.

make up the ratio of representation, such counties shall be contiguous to each other; and *when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.*

TEX. CONST. art. III, § 26 (emphasis added). This provision, known as the “county-line” or “whole-county” rule, has been in effect since 1876. *See Craddick*, 471 S.W. 2d at 376; Ex. D-128\_00143 (ILC “State and Federal Law Governing Redistricting In Texas”).

Between the enactment of the county line rule in 1876 and 1966, Texas had never drawn a Texas House district across a county line. *Craddick*, 471 S.W. 2d at 376; *see also* Ex. D-128 \_00147. Beginning in 1964, the State’s interest in preserving county integrity had to yield to the Fourteenth Amendment where it resulted in districts that deviated impermissibly from the ideal population. The Texas Supreme Court has consistently interpreted the county-line rule to permit the creation of districts that cross a county line if necessary to comply with the Fourteenth Amendment’s one-person-one-vote mandate. *See Craddick*, 471 S.W. 2d at 378; *Valles*, 620 S.W.2d at 114 (reaffirming *Craddick*’s holding that “wholesale cutting of county lines [violates] section 26” unless evidence demonstrates “that the cutting of county lines was *necessary* to satisfy the requirements of equal representation”). The Court has been clear, however, that if there is no evidence to establish that “the wholesale cutting of county lines . . . was either required or justified to comply with the one-[person], one-

vote decisions,” the cutting of county lines violates the Texas Constitution. *Id.* at 378.<sup>18</sup>

The only federal provision analyzed in *Craddick* and *Valles* is the federal one-person, one-vote requirement. *See Craddick*, 471 S.W. 2d at 377; *Valles*, 620 S.W.2d at 114. Although *Valles* contains a one-sentence passing reference to the Voting Rights Act, the reasoning of the opinion does not address the intersection of the Voting Rights Act and Article III, Section 26. *Valles*, 620 S.W.2d at 115. Accordingly, *Craddick* and *Valles* stand for the proposition that Article III, Section 26 must yield to federal equal-population requirements, but nothing more.

## **2. The Enacted State House Plan Adheres To Texas’s Race-Neutral Redistricting Principle of Keeping Counties Whole.**

The county line rule addresses three apportionment scenarios: (1) a single county entitled to exactly one representative; (2) a county entitled to less than one representative; and (3) a county entitled to more than one representative. TEX. CONST. art. III, § 26; Ex. D-128\_00148-00155; Ex. D-124 at 5.

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<sup>18</sup> In the 1971 redistricting cycle, some Texas legislators assumed that federal equal-population requirements had effectively done away with the county-line rule, and adopted a House plan that divided 33 counties between multi-county districts in violation of the rule. *Craddick*, 471 S.W. 2d at 378. The Texas Supreme Court held that Section 26 must be enforced to the extent possible without violating federal equal protection standards, meaning that districts must not cross county lines unless necessary to ensure equal population. *Id.*

After the 1981 redistricting cycle, the Texas Supreme Court again held that the Legislature’s House plan violated the county-line rule. *Valles*, 620 S.W.2d at 114. Of the 34 counties divided by the Legislature, 24 had surplus population, but 10 had less than enough population to form a single district. *Id.* The State argued that every split was necessary to comply with one-person-one-vote and Section 5 of the Voting Rights Act. The court rejected the State’s argument because other proposed plans showed that it was possible to comply with federal law while dividing fewer counties. *Id.*

In the first apportionment scenario, a county entitled to almost exactly one district must be apportioned one district within its boundaries. TEX. CONST. art. III, § 26 (“[W]henver a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District.”) The Texas Supreme Court has twice interpreted this provision to mean that a county whose population is slightly over or slightly under the population of an ideal district must constitute a single district by itself. See *Valles*, 620 S.W.2d at 114-115; *Craddick*, 471 S.W.2d at 378; see also Ex. D-128\_00148. The Texas Legislative Council advised that the legislature may create a single house district of any whole county whose population falls within an overall population deviation range of 10 percent likely complies with federal one-person, one-vote standards. Ex. D-128\_00148.

In the second apportionment scenario, a county entitled to less than one representative must be joined with a contiguous whole county or counties to reach the proper population level. TEX. CONST. art. III, § 26 (“[W]hen two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other.”). “In other words, such counties may not be split between districts but must be placed in their entirety in districts that consist of a cluster of whole counties.” Ex. D-128\_00149. Most counties in Texas fall in this apportionment scenario—under both the 2000 and 2010 censuses, 231 of the 254 counties fell five percent or more below the ideal district population. *Id.* (2000); Ex. D-214 (2010).

In the third apportionment scenario, counties entitled to more than one representative must be apportioned that number of representatives. TEX. CONST. art. III, § 26 (“[W]hen any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county.”). TLC advised the legislature: “If the county does not have surplus population, it must be assigned a whole number of representatives, and no part of the county may be part of a district that extends outside the county.” Ex. D-128\_00152.

When a county has surplus population, meaning a county is entitled to one or more whole representatives and a fraction of an additional representative, the county may be joined with one or more adjacent counties in another district. *Id.* (“[F]or any surplus of population it may be joined in a Representative District with any other contiguous county or counties.”)<sup>19</sup> There are three potential ways to treat surplus population: (1) distribute it among the whole districts apportioned to the county, increasing the population of each slightly above the ideal population; (2) apportion an additional district to the county, reducing the population of each district below the ideal population; or (3) treat the leftover population as “surplus” by placing it in a

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<sup>19</sup> The language found in Article III, Section 26 calls for creation of “floterial districts,” which are banned under federal law and are not relevant to this case. The Texas Supreme Court has since ruled that, instead of creating floterial districts, it is permissible to combine the surplus population with one or more contiguous counties to reach the appropriate population. *Craddick*, 471 S.W. 2d at 378.

district with one or more adjacent counties. *Id.* According to TLC, the Texas Supreme Court appears to have “established a general rule that the legislature must treat a county as having no surplus population if it can be divided into a whole number of districts with population deviations permissible under federal law.” *Id.* at D128\_00152-00153 (discussing *Valles*, 620 S.W.2d at 115).

Compliance with the second apportionment scenario, a county entitled to less than one representative, has not proven difficult to achieve while simultaneously complying with federal one-person, one-vote standards. For example, the 1971 legislature split one such county; none were split in 1981; the 1991 legislature contained two splits for this reason; and the 2001 Legislative Redistricting Board plan and the federal court’s modifications split only one county on this ground. Ex. D-128\_00150.

At trial, the evidence established that the only county-line cut in the State’s enacted house map occurs in Henderson County. Test. of Gerardo Interiano, Tr. 1424: 8-10, Sept. 12, 2011. The justification for the cut was to comply with the one-person, one-vote federal requirement. Test. of Gerardo Interiano, Tr. 1423:11-22, 1424:15-21, Sept. 12, 2011. Henderson County has population of 78,532 and is entitled to only 46.9% of a single district.<sup>20</sup> Ex. D-214 at 1. Ideally, all of Henderson County would have been combined with another whole county or counties, but none

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<sup>20</sup> Under the 2010 census, Texas’s ideal house district size was 167,637. Ex. D-214 at 1; Ex. D-124 at 4.

of the surrounding counties have population that would have allowed this and compliance with federal one-person, one-vote requirements. Henderson County was instead divided between House District 10 in adjacent Ellis County<sup>21</sup> and House District 4 in Kaufman County.<sup>22</sup> Ex. D-109 at 2. David Hanna identified the Ellis County area as a potential area where a county split would be necessary to comply with one-person, one-vote. Ex. D-124 at 11-12.

In addition, although other counties are split among different districts in the enacted house map, these splits are required by and consistent with Article III, Section 26. *See Craddick*, 471 S.W. 2d at 378 (it is “permissible to join a portion of that county (in which the surplus population reside and which is not included in another district within that county) with contiguous area of another county to form a district” to comply with the one-person, one-vote mandate). Even Dr. Arrington, the Department of Justice’s expert, acknowledged this in his testimony. Test. of Theodore Arrington, Tr. 180:10-15, July 14, 2014. Such splits naturally occur as a result of apportioning “surplus population” which cannot be distributed among the existing county districts on account of the deviation limitations imposed by the

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<sup>21</sup> Ellis County’s population is 149,610, and it is entitled to 89% of a district. Ex. D-214 at 1. House District 10 consists of all of Ellis County, plus 13,453 people from Henderson County for a total district population of 163,063. Ex. D-109\_00028. House District 10 is 2.73% underpopulated. *Id.*

<sup>22</sup> Kaufman County’s population is 103,350, and it is entitled to 62% of a district. Ex. D-214 at 1. House District 4 consists of all of Kaufman County, plus the remaining 65,079 from Henderson County for a total district population of 168,429. Ex. D-109 at D109\_00028. House District 4 is .47% overpopulated.

Fourteenth Amendment.<sup>23</sup> In such cases, Article III instructs that the surplus population must be apportioned wholly within a single representative *district*. Test. of Gerardo Interiano, Tr. 1424:23-25; 1425-1426:1-3, Sept. 12, 2011.

**3. Supreme Court Precedent Clearly Establishes That Traditional Redistricting Principles Cannot Be Subordinated To Race Without Violating The Fourteenth Amendment.**

The Supreme Court has consistently recognized that even in the face of the Voting Rights Act, states maintain discretion to determine how to reapportion their own districts. *See Bartlett*, 129 S. Ct. at 1248 (explaining that “[section] 2 allows States to choose their own method of complying with the Voting Rights Act”); *Bush v. Vera*, 517 U.S. 952, 978 (1996) (“[W]e adhere to our longstanding recognition of the importance in our federal system of each State’s sovereign interest in implementing its redistricting plan.”).

In *Bush v. Vera*, the Texas Legislature unambiguously announced its intent to draw three additional majority-minority congressional districts. *See Vera*, 517 U.S. at 978. When the reapportionment plan was challenged on Fourteenth Amendment grounds, Texas asserted in its defense that the creation of these districts was justified by compelling government interests in complying with section 2. *Id.* at 977. Before applying the strict scrutiny test to the State’s defense, however, the Court first

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<sup>23</sup> For example, Fort Bend County has 585,375 population and is entitled to 3.49 districts. Ex. D-214 at 1. Fort Bend County contains all of three districts, HD 26, HD 27, and HD 28. Ex. D-109 at 2. Fort Bend’s surplus population of 104,827 is combined with the entirety of Wharton and Jackson counties to form HD 85. *Id.* HD85 has total population of 160,044 and is 4.45% underpopulated. Ex. D-109 at D109\_00034.

reaffirmed its prior holdings recognizing the states' sovereign interest in implementing their redistricting plans:

the States retain a flexibility that federal courts enforcing § 2 lack, both in insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability. And nothing that we say today should be read as limiting a State's discretion to apply traditional districting principles in majority-minority, as in other, districts. The constitutional problem arises only from the subordination of those principles to race.

*Id.* at 978 (internal quotations and citations omitted). The Supreme Court has never directed states to eschew neutral, traditional redistricting principles in order to create race-based districts. Rather, it has construed Section 2 to require such districts only where they can be drawn without subordination of race-neutral principles, thus avoiding the constitutional difficulty that a contrary reading would create. While it is entirely within a State's province to create a race-based district when it determines creation of such district is necessary to further a compelling government interest, the State's decision not to engage in presumptively unconstitutional racial classifications requires that it not subordinate those rules. The State's decision in this case to avoid strict scrutiny altogether by adhering to its race-neutral redistricting principles can only be a product of its desire to follow the Fourteenth Amendment's prohibition against racial classification.

Plaintiffs argue, nonetheless, that Texas's decision to adhere to its whole-county line rule should be characterized as an attempt to avoid compliance with

Section 2 of the Voting Rights Act because the enacted plan failed to “improve” or maximize Latino voting strength statewide. *See* Closing Argument of MALC, Tr. 1986:25-1989:4, Sept. 15, 2011. This argument must fail because Section 2 “is not concerned with maximizing minority voting strength.” *Bartlett*, 556 U.S. at 23 (citing *Johnson v. DeGrandy*, 512 U.S. 997, 1022 (1994)); *see also Shaw v. Hunt*, 517 U.S. at 913 (“We have recognized that a State’s policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan so discriminates on the basis of race or color as to violate the Constitution.”) (internal quotation marks omitted).

**4. The Legislature’s Application Of The County-Line Rule In Plan H283 Did Not Conflict With The Voting Rights Act Because It Did Not Prevent The Creation Of Any District Required By Section 2.**

**a. Hidalgo County and Cameron County.**

DOJ alleges, without citing any specific testimony, that failing to join the surplus populations from Cameron and Hidalgo Counties into a single district caused additional county line splits elsewhere in Plan H283. *See* DOJ Br. at 39. DOJ misinterprets the *Valles* case, attempting to equate the scenario in *Valles* to the scenario in South Texas. In *Valles*, the Texas Supreme Court criticized the legislature for splitting a single county’s surplus population among two districts instead of one. *Valles*, 620 S.W.2d at 114 (“In addition, three counties, Nueces, Denton and Brazoria, which are entitled to one or more representatives, are cut so that their surplus

populations are joined to two, rather, than one adjoining district.”). DOJ attempts to treat “the Valley” as a single county: “In fact, by refusing to combine the surplus population from the Valley into a single district, the 2011 Plan increased the number of county line breaks, a substantive departure from the Texas County Line Rule.” DOJ Br. at 39. This is incorrect: the legislature’s decision to combine Cameron’s surplus into one district and Hidalgo’s surplus into a different district is consistent with the county line rule and the *Valles* case’s admonition to combine surplus population with adjacent whole counties to form a single district. This decision did not increase the number of county line breaks.

Gerardo Interiano testified that he attempted to combine the surpluses from Cameron and Hidalgo counties into a single district, but he found that doing so required a county line split elsewhere in the map. Test. of Gerardo Interiano, Tr. 1540:1-7, July 18, 2014. Interiano also testified that he was advised by counsel that the Legislature could not justify breaking the county line rule under that circumstance. *Id.* at 1540:8-15.

The legislature’s decisions in South Texas were also guided by the race-neutral principle of incumbent protection. In 2011, Republican Representative Aliseda was the incumbent in HD35 in South Texas. Ex. D-109 at 149 (Red 350 Incumbents Report). In addition to the county line rule, the legislature was attempting to maintain HD 35 as a republican district for Aliseda. By the time the Court drew its plan,

Aliseda had announced his retirement, and it was no longer necessary to protect him as an incumbent. This removed a key constraint faced by the legislature in 2011.

**b. West Texas**

MALC focuses its county line arguments on West Texas, claiming that Lubbock County and Midland and Ector Counties should have been split to form additional Hispanic opportunity districts. Lubbock County is entitled to 1.66 districts under the 2010 census. Ex. D-214 at 1. Plan H283 apportioned one full district, HD 84, and combined the surplus population with several whole adjacent counties in compliance with the Texas Constitution. Ex. D-109 at 2. In 2013, MALC proposed Plan H329, which split Lubbock County into three districts. Ex. MALC-100. HD 84 is wholly contained in Lubbock County, but part of Lubbock is joined with adjacent counties in HD 83, and part of Lubbock is joined with adjacent counties in HD 88. Test. of Lorenzo Seden, Tr. 492:24-493:15, July 15, 2014. Using 2005-2009 ACS data, which was available to the Legislature in 2011, HD 88 in Plan H329 had only 47.2% HCVAP and 46.3% SSVR. *Id.* at 496:14-497:2; Ex. D-322. Based on the district's irregular shape, it is evident that MALC has subordinated the county-line rule solely to create a race-based district. As a result, MALC has failed to prove that Plan H283 violates Section 2 in Lubbock County, much less that Plan H329's subordination of traditional redistricting principles to race could survive strict scrutiny under the Fourteenth Amendment.

Ector County and Midland County are each entitled to 0.82 districts, meaning they must be combined with adjacent whole counties to reach the appropriate population level. Plan H283 combined all of Ector and three other whole adjacent counties to form HD 81, and combined all of Midland with four other whole adjacent counties to form HD82. Ex. D-109 at 2. MALC proposed two plans in an attempt to establish a Section 2 district that would trump the county line rule: Plans H329 and H360. In addition to the infirmities addressed above, Plan H329 combines portions of Ector and Midland counties into HD 82 and combines the remainder of Ector and Midland counties with several other counties to form HD 81. Ex. MALC-94. Plan H360 was unveiled on June 19, 2013, and thus could not have been considered by the legislature. Ex. MALC-91. Plan H360 combines portions of Midland and Ector counties with other whole counties to form HD 82, and combines the remainder of Midland and Ector counties with other whole counties to form HD 81. Because the proposed districts in Midland and Ector counties are drawn solely in pursuit of a race-based goal, and because they subordinate traditional redistricting principles, they are neither required by Section 2 nor consistent with the Fourteenth Amendment.

**C. *Arlington Heights* Factors**

The Plaintiffs have attempted to establish a departure from the normal procedural sequence by amassing a volume of complaints about the legislative process, but they have failed to establish the normal process from which the Legislature supposedly departed, and their complaints do not indicate disparate

treatment of minority citizens or legislators. Alleged departures from the normal procedural sequence are relevant to the question of discriminatory purpose only if (1) there is a foundational showing of the normal process from which the legislature supposedly deviated is identified, and (2) the departure from the normal procedural sequence, taken in context, bears some indicia of intentional racial discrimination. Without specific evidence showing what part of the process changed, and in what way, it is not possible to determine whether the change supports an inference of discriminatory purpose.

The Task Force argues that events unrelated to redistricting during the 2011 session provide circumstantial evidence of intentional discrimination in the enactment of Plan H283. First, they rely on statements by Senator Chris Harris during a Senate Transportation and Homeland Security Committee hearing on June 13, 2011, during the 2011 special session. When a bilingual witness testified in Spanish, through an interpreter, Senator Harris told the witness that his refusal to testify in English was “insulting.” *See* Task Force Br. at 30. Senator Harris’s statement provides no evidence of the Legislature’s intent when it enacted Plan H283. The statement was made after Plan H283 was enacted (during a Senate hearing on a bill that had nothing to do with redistricting), and there is no evidence that Senator Harris played any part in the development of Plan H283.

Second, the Task Force suggests that statements about immigration legislation made on the steps of the Capitol by a member of the public provide evidence that the

Legislature intended to dilute Hispanic voting strength through Plan H283. *See* Task Force Br. at 30. They attribute the statements to the Legislature because the speaker was “legislatively sponsored” by Representative Leo Berman, *id.*; Task Force Proposed FOF ¶ 433, whom they note made statements to the effect that individuals who cannot read English should not be able to drive in Texas, Task Force Proposed FOF ¶ 434. That Representative Berman sponsored an individual to speak on the Capitol steps does not imply that her statements reflect the views of the Legislature. In any event, to the extent Representative Berman provides the link between the speaker’s statements and Plan H283, there is no connection; Representative Berman did not vote for HB 150. Ex. D-190\_873-74.

Complaints about the interim hearings do not support claims of intentional racial discrimination because there is no evidence that the 2010 Legislature scheduled or conducted the hearings with a discriminatory purpose, and any deficiencies in the hearings had the same effect on all members of the public. The NAACP Plaintiffs complain that the 2010 interim hearings “impacted the ability of minority communities to give meaningful input” because they took place before the release of census data or proposed redistricting plans. NAACP/Congresspersons Br. at 19. The lack of census data or proposed plans would have had the same impact on *every* community’s ability to provide input, not just minority communities. Likewise, holding hearings “during the work week, in the middle of the day” would have the same effect on all voters, not just “voters of color,” as the NAACP Plaintiffs suggest.

*See id.* Complaints about the lack of public transportation do not hold up. Congressman Marc Veasey complained that the 2010 Legislature intentionally discriminated on the basis of race by conducting an interim hearing at the George Allen Courthouse in downtown Dallas because he had to pay for parking. Test. of Marc Veasey, Tr. 11:3-13, July 14, 2014. He conceded, however, that the courthouse is about two blocks from Dallas Union Station, which has bus and light rail service, including light rail service from downtown Fort Worth. *Id.* at 22:20-23:12.

Congressman Marc Veasey complained that he was excluded from the process because Chairman Solomons made changes to his district without consulting him, and he did not know why the changes were made. *See* Test. of Marc Veasey, Tr. 15:3-20, July 14, 2014. He conceded, however, that the change to his district was based on a request from MALDEF, as Chairman Solomons explained on the House floor. *See id.* at 30:5-33:6; Ex. D-190\_632. Notwithstanding this admission by its own witness, DOJ continues to present the Legislature's acceptance of MALDEF's suggestion as an instance of exclusion of minority lawmakers. According to DOJ, "Even in Tarrant County, where the county delegation reached a consensus, House leadership redrew the boundaries of the county's sole African-American opportunity district to divide minority communities." DOJ Br. at 59. This tendentious slant on the evidence proves that the alleged procedural departures on which DOJ and Plaintiffs rely are not reliable indicators of intentional racial discrimination. In their hands, any decision by the Legislature can qualify as evidence of exclusion, disparate treatment, or a

departure from normal procedures (since the normal procedure has never been identified).

The Task Force makes a similar effort to paint the Legislature's good-faith efforts as evidence of intentional discrimination. Shortly after it complains that the House leadership failed to review proposed plans for compliance with the Voting Rights Act, *see* Task Force Br. at 60-61, the Task Force accuses "Redistricters" of drawing maps "behind closed doors" because the Redistricting Committee made changes to the El Paso delegation's proposal, *see id.* at 65. But these changes prove that House leadership *did* review proposed plans for compliance with the Voting Rights Act. Ryan Downton amended the El Paso delegation's plan after David Hanna raised a concern about retrogression in HD 78. *See* Test. of Ryan Downton, Tr. 2011:18-2012:3, 2013:6-12, July 19, 2014. Downton made minor changes along the border between HD 77 and HD 78 to increase HD 78's SSVR percentage and avoid retrogression. The only reason Downton modified the El Paso districts was to avoid a VRA violation. Proving the heads-I-win-tails-you-lose nature of Plaintiffs' case, the Task Force portrays the Redistricting Committee's effort to avoid a VRA violation as an instance of drawing plans "behind closed doors."

**IV. PLAINTIFFS HAVE NOT PROVEN THAT THE LEGISLATURE VIOLATED THE FOURTEENTH AMENDMENT WHEN IT ENACTED SB 4.**

**A. Plaintiffs' Allegation That The Legislature Failed To Reflect Population Growth In Plan C185 Has No Legal Or Factual Basis.**

Plaintiffs continue to argue that the State could and should have created more Hispanic opportunity districts than it did in Plan C185. This dispute comes down to two questions: (1) the definition of “opportunity”—specifically, whether CD 23 would have been a Hispanic opportunity district under Plan C185; and (2) the possibility of drawing a Hispanic opportunity district in the Dallas-Fort Worth region.

To illustrate the 2011 Legislature’s supposed failure to create the required number of Hispanic opportunity districts, the Task Force Plaintiffs allege that Plan C235, the Court’s interim redistricting plan (and the 2013 Legislature’s enacted plan), “contains eight districts in which Latinos constitute the majority of the citizen voting age population—one more than the State’s enacted C185.” Task Force Br. at 9-10 (citing Task Force FoF ¶ 999, in turn citing ECF No. 691; Ex. TLRTF-1076). The Task Force is mistaken. Plan C185 would have created 8 districts with an HCVAP majority, the same number created by Plan C235. *See* Ex. D-401.3 (Plan C185); Ex. TLRTF-1046\_8-9 (Plan C235); Order at 51-52 (March 19, 2012), ECF No. 691. The alleged difference between Plan C185 and C235 is the characterization of CD 23—the State considers it to be a Hispanic opportunity district; the Plaintiffs do not. The State does not disagree that it is possible to create 7 Hispanic opportunity districts in South

and West Texas, but in the State's view, that is exactly what Plan C185 would have done.

The narrowness of the dispute over the number of Hispanic opportunity districts in Plan C185 undermines the Plaintiffs' broader argument that the State failed to account for the increase in Hispanic population growth. The question is not whether population growth allowed the State to create additional HCVAP-majority districts but, rather, how many of the 8 HCVAP-majority districts created in Plan C185 qualify as Hispanic opportunity districts. This demonstrates that the State did not shut out large pockets of eligible Hispanic voters; it merely apportioned the existing population of Hispanic voters differently than Plaintiffs would have preferred.

The difference between the State's enacted plan and the plan that Plaintiffs allege should have been drawn is therefore a question of degree, and a small one at that. This is significant to the question of intentional racial discrimination because the evidence proves that the State pursued the same goal as Plaintiffs—recognizing Hispanic population growth by creating an additional congressional district in which Hispanic voters formed a majority. That the State did not pursue this goal in the same manner as Plaintiffs does not demonstrate intentional racial discrimination. The evidence shows that the State created a different CD 23 than the Plaintiffs preferred because of partisan political considerations, specifically, the desire to make CD 23 a

Hispanic CVAP-majority district that leaned Republican in order to protect a newly elected incumbent.

**B. Congressional District 23**

DOJ alleges that in CD 23, “state officials applied a ‘nudge factor’ that focused on replacing high-turnout Hispanic voters with low-turnout Hispanic voters.” DOJ Br. at 2. DOJ’s failure to identify the “state officials” who supposedly used a “nudge factor” is remarkable, but not surprising; there is no evidence that any state official or state employee used a Eric Opiela’s “nudge factor” or any other method to swap certain Hispanic voters for other Hispanic voters on the basis of their propensity to turn out.

The Task Force cites Dr. Flores’s testimony for the claim that changes to CD 23 “were calculated to create a CD 23 that had more Latino registered voters but would have a lower Latino turnout rate.” Task Force Br. at 70 (citing Task Force Proposed FOF 1412, in turn citing Test. of Henry Flores, Tr. 524:9-20, Aug. 12, 2014). Dr. Flores’s testimony is nothing more than speculation. He is not qualified to render an opinion on the purpose behind legislative acts, and his opinion was not based on consideration of all relevant evidence. Dr. Flores admitted that he had no evidence that any member of the Legislature intended to discriminate against Latino voters in the passage of Plan C185. Test. of Henry Flores, Tr. 535:14-17, Aug. 12, 2014. He was not aware of Ryan Downton’s testimony regarding the goals in drawing CD 23. *Id.* at 544:17-545:3. He did not consider the role that partisan goals might have

played in CD 23. *Id.* at 550:5-7. He did not consider the effect on Republican voting strength that resulted from moving precincts in and out of CD 23. *Id.* at 551:14-15; 552:15-18. And he testified that without a specific analysis, he could not say whether or not decreased turnout was an incidental effect of purely partisan goals. *Id.* at 551:18-552:14. In forming his opinion about the intent behind the drawing of CD 23, he did not consider Ryan Downton’s testimony that he tried to find Latino-majority precincts that supported John McCain in the 2008 presidential election. *Id.* at 552:19-553:6. Dr. Flores relied solely on 2010 turnout numbers, but he did not consider turnout rates in 2008. *Id.* at 548:7-549:6. Nevertheless, he conceded that according to his analysis, the turnout of Latino voters in Bexar County actually increased in CD 23 under Plan C185 compared to Plan C100. *Id.* at 555:13-17.

The Task Force’s discussion of CD 23 incorporates a number of subtle factual misstatements, which suggest that they have either deliberately glossed over critical fact issues or missed their significance entirely. For example, they cite Dr. Flores’s testimony that Opiela’s “‘nudge factor email’ expresses a clear intent, in order to protect the incumbent of CD 23, to pull CD 23’s Hispanic population or CVAP up to majority status to create a congressional district that looks like a Hispanic majority district but yet leaves the Spanish surname RV and turnout the lowest—exactly what CD 23 looks like in C185.” Task Force Br. at 95. To claim that this is “exactly what CD 23 looks like in C185” is a material misrepresentation of the evidence. Opiela envisioned minimizing SSVR levels, but that is exactly what the Legislature did not do

in CD 23—Plan C185 increased CD 23’s SSVR by more than two percentage points over the benchmark plan. *Compare* Ex. D-400.6 (Plan C100, 52.6% Non-Suspense SSVR, 2010 General Election), *with* Ex. D-401.6 (Plan C185, 54.8% Non-Suspense SSVR, 2010 General Election). This evidence that CD 23 did not produce the outcome contemplated by the “nudge factor” is all the more critical now that the claim has begun to shift from the proposed “nudge factor” itself to the possibility of achieving so-called “nudge factor results.” *See, e.g.*, DOJ Br. at 13 n.5; *cf.* Defendants’ Br. at 33-35; Closing Argument of United States, Tr. 2053:16-18, Aug. 26, 2014.

Like the Task Force, DOJ draws a false analogy between the 2011 plan and the 2003 plan: “Just like in *LULAC v. Perry*, state officials in 2011 once again eliminated minority voters’ opportunity to elect their candidate of choice in CD 23. DOJ Br. at 19. The version of CD 23 that the Legislature enacted in 2011 is not “just like” the version enacted in 2003; the two are nothing alike. In 2003, the Legislature took away Hispanic voters’ control of CD 23 by removing Hispanic voters and eliminating the preexisting Hispanic voting majority. It reduced the Hispanic CVAP from a 57.5% majority to a 44% minority. *See* Chart: Evolution of Congressional District 23, *infra*. The 2003 district featured “the additional political nuance that Bonilla would be reelected in a district that had a majority of Latino voting age population—although clearly not a majority of citizen voting age population and certainly not an effective voting majority.” *Session v. Perry*, 298 F. Supp. 2d 451, 497 (E.D. Tex. 2004), *rev’d in part sub nom. LULAC v. Perry*, 548 U.S. 399 (2006). As configured in 2003, CD 23

created the appearance (by at least one measure) of a Hispanic majority, but it took away any chance of a Hispanic voting majority. Whether or not it specifically targeted Latino voters because of their race, there is no question that the Legislature reconfigured CD 23 by removing Latino voters.

<b>EVOLUTION OF CONGRESSIONAL DISTRICT 23</b>				
Plan	HCVAP	SSVR	BCVAP	ACVAP
<b>Plan 1151C (2001)</b> <sup>24</sup> (court-drawn upon failure of 77th Legislature to enact a plan)	57.5%	55.3%	N/A	N/A
<b>Plan 1374C (2003)</b> (struck down in <i>LULAC v. Perry</i> )	46%	44%	N/A	N/A
<b>Plan C100 (2006)</b> <sup>25</sup> (court-drawn on remand from <i>LULAC v. Perry</i> )	58.4%	52.6% <sup>26</sup>	3.4%	35.9%
<b>Plan C185 (2011)</b> <sup>27</sup> (enacted by 82nd Legislature)	58.5%	54.8% <sup>28</sup>	2.3%	37.3%

In 2011, the Legislature attempted to configure CD 23 in a way that would be favorable to the Republican incumbent, but the similarities with 2003 end there. Rather than remove Hispanic voters, as the Legislature did in 2003, the 2011 Legislature increased the percentage of eligible Hispanic voters and registered Spanish-surnamed voters in CD 23. Unlike the 2003 map, which took away Latino

<sup>24</sup> Population data for Plans 1151C and 1374C taken from *Session v. Perry*, 298 F. Supp. 2d at 496.

<sup>25</sup> Ex. D-400.3 (Red-106 Report, 2005-2009 ACS Survey); *cf.* Ex. D-400.5 (Red-116 Report, 2008-2012 ACS Survey) (59.6% HCVAP, 3.5% BCVP, 34.3% ACVAP).

<sup>26</sup> Ex. D-400.6 (Red-109 Report, 2005-2009 ACS Survey) (52.6% Non-Suspense SSVR, 2010 General Election); *cf.* Ex. D-400.7 (Red-119 Report, 2008-2012 ACS Survey) (53.4% Non-Suspense SSVR, 2012 General Election).

<sup>27</sup> Ex. D-401.3\_1 (Red-106 Report, 2005-2009 ACS Survey); *cf.* Ex. D-401.5\_1 (Red-106 Report, 2008-2012 ACS Survey) (59.8% HCVAP, 2.6% BCVP, 35.7% ACVAP).

<sup>28</sup> Ex. D-401.6 (Red-109 Report, 2005-2009 ACS Survey) (54.8% Non-Suspense SSVR, 2010 General Election); *cf.* Ex. D-401.8 (Red-119 Report, 2008-2012 ACS Survey) (55.3% Non-Suspense SSVR, 2012 General Election).

voters' "opportunity" to elect their candidate of choice by making them a minority, Plan C185 preserves and in fact improves Latino voters' opportunity, if they vote cohesively, to control the outcome in CD 23 regardless of how the Anglo minority votes.

DOJ misrepresents David Hanna's testimony regarding alternative configurations of CD 23. According to DOJ, the SSVR level of CD 23 "could have been increased without dividing Maverick County, and by incorporating less of Ata[s]cosa, La Salle, or Dimmit[] Counties," and "Hanna admitted that doing so would have alleviated his concerns about the low level of Hispanic performance in CD 23." DOJ Br. 24 (citing DOJ Proposed FOF ¶ 169 (in turn citing Trial Tr. 1521:15-25, Aug. 15, 2014)). In the cited testimony, however, Hanna does not mention Maverick, Atascosa, LaSalle, or Dimmit, nor does he mention increasing SSVR in CD 23. He merely testified that it "[p]robably" would have been possible to configure CD 23 in a way that would have resolved his concerns about VRA compliance, Tr. 1521:15-20, Aug. 15, 2014, and that he thought it would have been possible to increase "Latino performance" (DOJ's terminology) in CD 23; however, he noted that the consequences of increasing "Latino performance" in CD 23 were uncertain, *see id.* at 1521:21-25.

DOJ also misrepresents a statement by Chairman Solomons regarding Plan C170, his West Texas amendment. According to DOJ, Solomons "misled fellow members" when he stated that the amendment "made changes necessary to maintain

the ability of Hispanic voters to elect their candidates of choice in CD 23.” DOJ Br. 26. DOJ claims this statement was false because “Plan C170 in fact decreased the performance of Hispanic-preferred candidates in statewide elections in CD 23,” and “Solomons and his staff had received OAG election analyses prior to his introduction of Plan C170.” *Id.* (citing DOJ Proposed FOF ¶ 287 (in turn citing Ex. DOJ-761; Tr. 1285:20-1289:25, Aug. 14, 2014)). The cited testimony does not support DOJ’s statement. Solomons testified that he did not know if he was aware that the amendment would (allegedly) reduce “Latino performance” in CD 23, Tr. 1288:25-1289:5, Aug. 14, 2014, and although he “would think” that his staff was aware of OAG’s analysis, he did not testify that they were, *see id.* at 1289:6-16.

Aside from its misrepresentation of the record, DOJ’s claim assumes that Solomons could not have honestly believed that a change increased Hispanic electoral opportunity if it did not increase Democratic performance. But if opportunity means the potential to form an electoral majority—as Ryan Downton believed—then it is possible to increase Hispanic opportunity without increasing the performance of Democratic candidates. (DOJ refers to them only in racial terms, but the record shows that the candidates identified by DOJ as “Hispanic-preferred” are all Democrats. *Compare* Ex. DOJ-761 (listing Chavez-Thompson (2010), Yanez (2008), and Molina (2006)), *with* Ex. DOJ-601\_10-11 (OAG RPVA, listing party affiliation)). DOJ effectively argues that Solomons deliberately misled members of the House because he did not accept DOJ’s definition of electoral opportunity. Disagreement

with DOJ's interpretation of Section 2 is not evidence of dishonesty or racially discriminatory purpose.

DOJ alleges that “[o]fficials intentionally removed highly mobilized Hispanic voters from the district and replaced them with low-turnout Hispanic voters.” DOJ Br. at 22 (citing DOJ Proposed FOF ¶¶ 147-49). But what “officials” are they talking about? The cited portion of their proposed findings of fact does not reveal the answer; it consists almost entirely of testimony by Plaintiffs’ experts, all of whom speculate that the nudge factor was employed based only on Opiela’s original suggestion. *See* DOJ Proposed FOF ¶¶ 147-49 (citing testimony and reports from Dr. Arrington, Dr. Handley, and Dr. Flores). In any event, the uncontroverted evidence establishes that the individuals who constructed CD 23 did not rely on turnout data. *See* Test. of Ryan Downton, Tr. 956:11-957:7, 1005:23-24, Sept. 9, 2011. This does not stop DOJ from indulging in rank speculation that “Downton was betting that the actual turnout in the fractured Hispanic community would not be as high in future CD 23 elections.” DOJ Br. at 25 (citing nothing). To the extent this charge is based on the division of the Harlandale community, it does not prove intentional discrimination. The Joint Plaintiffs admit that Downton did not intentionally divide Harlandale. *See* Joint Plaintiffs’ Br. at 44 (“The mapdrawer performing the South San Antonio surgery did not even know about such thing as the Harlandale school district.” (citing Test. of Ryan Downton, Tr. 1752, Aug. 15, 2014)).

Although DOJ's allegations regarding the nudge factor have barely progressed beyond the pleading stage, DOJ's post-trial brief makes a critical admission. According to DOJ, "Downton's actions reveal that he adopted Opiela's 'concept' of making the district appear Hispanic but driving down the ability of Hispanic voters to elect their candidates of choice. He just did it in a different way than Opiela suggested." DOJ Br. at 24-25. This is a direct admission that *Downton did not use Opiela's "nudge factor."* DOJ also concedes that "Downton rejected Opiela's boundary changes" contained in Map STRJC 116. DOJ Br. at 25 n.16.

DOJ asserts that "Texas officials wanted to make CD 23 safer for an incumbent who was not preferred by Hispanic voters." DOJ Br. at 26. In fact, the Legislature wanted to make CD 23 safer for Representative Francisco Canseco, a Republican. DOJ claims that this was intentional racial discrimination. DOJ is wrong. Congressman Canseco communicated his goals for CD 23 to Congressman Lamar Smith: reduce the population to comply with one-person-one-vote; maintain the district's character as a minority opportunity district; and make sure that it would be competitive within the requirements of the Voting Rights Act. Test. of Francisco Canseco, Tr. 572:8-15, Aug. 12, 2014. He believed that he could be reelected in CD 23 as a Republican if the district were maintained as a Hispanic-majority district. *Id.* at 572:16-21. The Redistricting Committee had the same goals and the same belief about Congressman Canseco's reelection prospects. They did not include the goal of

diluting Hispanic voting strength or the belief that Hispanic voters would not vote for Congressman Canseco.

**C. Travis County, Congressional District 25, and Congressional District 35.**

**1. The Legislature’s Decision Not to Preserve CD 25 Is Not A Violation of Section 2 or the Fourteenth Amendment.**

The Rodriguez Plaintiffs, the Quesada Plaintiffs, and LULAC have challenged the inclusion of CD 35 and the elimination of CD 25 in Plan C185 as a violation of the Fourteenth Amendment and Section 2 of the Voting Rights Act. To the extent the Joint Plaintiffs allege that the Legislature’s decision to eliminate CD 25 in the enacted plan was a violation of Section 2, this Court has already held otherwise. CD 25 is a crossover district, and *Bartlett* is clear that “§ 2 does not mandate preserving crossover districts.” Order at 42 (March 19, 2012), ECF No. 691 (citing *Bartlett*, 556 U.S. at 23).

Likewise, the Legislature’s decision not to retain the configuration of benchmark CD 25 does not amount to a violation of the Fourteenth Amendment. Relying on dictum in *Bartlett*, the Joint Plaintiffs contend that Plan C185 is unconstitutional because the Legislature dismantled a preexisting crossover district. Joint Plaintiffs’ Br. at 24-25. But *Bartlett* did not create a bright-line rule forbidding states from dismantling crossover districts. Rather, *Bartlett* recognizes the Constitution’s protection of all *voters*—including voters in a crossover district (or any

district)—from intentional racial discrimination, not any sort of constitutional protection of crossover districts themselves:

And if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments. *See Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 481-482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997); Brief for United States as *Amicus Curiae* 13–14. There is no evidence of discriminatory intent in this case, however.

*Bartlett*, 556 U.S. at 24. The cited portion of *Bossier Parish* discusses constitutional vote dilution claims, which require plaintiffs “to establish that the State or political subdivision acted with a discriminatory purpose.” *Bossier Parish*, 520 U.S. at 481. Similarly, the cited amicus brief addresses a potential exception to Section 2’s majority-minority requirement in cases “where intentional racial discrimination is shown.” *See* Brief for the United States as Amicus Curiae Supporting Affirmance at 14, *Bartlett v. Strickland*, 556 U.S. 1 (2009) (No. 07-689), 2008 WL 3861362. *Bartlett* does not recognize heightened constitutional protection for crossover districts, nor does it suggest that the loss of an effective crossover district is a legally cognizable injury. The Court merely recognized that although crossover districts are not protected by Section 2, the voters who live in crossover districts are protected by the Fourteenth and Fifteenth Amendments from intentional discrimination on the basis of race.<sup>29</sup>

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<sup>29</sup> The Joint Plaintiffs devote several pages in their brief to an attempt to prove that cohesion exists in Travis County. *See* Joint Plaintiffs’ Br. at 26-35. Whether or not the members of the tri-

**2. The Joint Plaintiffs have not offered any evidence that the Legislature chose to dismantle CD 25 with the intent to harm minority voters.**

In altering the boundaries of CD 25, the Legislature did not act “to ensure that Anglos could maintain, and even enhance, their superior political power in congressional elections.” Joint Plaintiffs’ Br. at 22. The Legislature’s decision to change CD 25 had nothing to do with the Black and Hispanic voters who made up less than half of the district’s citizen-voting-age population; it had everything to do with the incumbent, an Anglo Democrat. The Legislature reconfigured CD 25 to ensure that Democrats in Travis County, including Anglo Democrats, did not maintain their ability to elect a member of Congress. Indeed, the evidence offered at

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ethnic coalition vote cohesively is not relevant to whether the Legislature set out to intentionally harm minority voters in CD 25, which is what the Joint Plaintiffs must demonstrate in order to prevail on their Fourteenth Amendment claim.

Even if this evidence were relevant, there is no evidence to suggest that African-Americans and Hispanic voters are cohesive when they have a choice of Democrats in primary contests in Travis County. First, Plaintiffs are wrong to suggest that this Court should only consider general elections to judge cohesion among various demographic groups. Contested primary elections between members of the putative coalition offer the most probative evidence of cohesion. *LULAC v. Perry*, 548 U.S. at 444 (“Even assuming protected coalitions exist, in “the absence of any contested Democratic primary . . . no obvious benchmark exists for deciding whether [minority voters] could elect their candidate of choice.”); *Session*, 298 F. Supp. 2d at 478, *aff’d in relevant part*, *LULAC*, 548 U.S. 399; *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y. 2004) (per curiam), *aff’d* 543 U.S. 997 (2004); *see also Lewis v. Alamance County, N.C.*, 99 F.3d 600, 616 (4th Cir. 1996) (“Not to separately consider primary and general elections risks masking regular defeat in one of these phases with repeated successes in the other, and thereby misperceiving a process that is palpably in violation of the Voting Rights Act, as not violative of the Act at all”). Second, if this Court focuses solely on voting behavior in Travis County (which the State contends is not relevant given that CD 25 covered more geography than one county), there is no evidence of cohesion in contested Democratic primary elections between minority and non-minority candidates. *See* Joint Ex. E-7, Engstrom Rebuttal Report, tpls. 1–8; Test. of Eddie Rodriguez, Tr. 824:17-8:25-25, Aug. 13, 2014; Test. of Stephen Ansolabehere, Tr. 977:16-980:13.

trial demonstrated that the Legislature redrew CD 25 solely for the partisan purpose of unseating the incumbent, Democratic Congressman Lloyd Doggett. A motivation to dismantle a Democratic district with the goal of removing a Democratic incumbent does not violate the Constitution or the Voting Rights Acts. This claim has been raised and rejected before by the Supreme Court, and this Court should do the same here. *See LULAC v. Perry*, 548 U.S. at 445–46 (rejecting a claim challenging amendments to CD 24, held at the time by Democratic Congressman Martin Frost). The Joint Plaintiffs edge closer to the truth when they allege that Downton “was indifferent to what his handiwork did to Austin.” Joint Plaintiffs’ Br. at 23. To the extent their claims rest on Downton’s motivation, this statement amounts to a concession—indifference is not intentional racial discrimination.

In the Court’s interim plan order, it recognized the essentially partisan nature of the changes to CD 25, finding that “[a]s a factual matter, however, the Court cannot conclude at this time that the dismantling of CD 25 was motivated by a discriminatory purpose as opposed to partisan politics.” Order at 48 (March 19, 2012), ECF No. 691. The Joint Plaintiffs have introduced no additional evidence that would require this Court to reach a different conclusion. The Joint Plaintiffs instead rely on a statistical analysis purporting to show that race is a better indicator than party for the division of some portions of Travis County in benchmark CD 25. Joint Plaintiffs’ Br. at 33-34 (citing Ex. ROD-912). But even Ansolabehere admits his analysis is incomplete given his failure to consider the extensive record supporting the Legislature’s decision to

create a new Section 2 district using the geography that comprised former CD 25. *See* Test. of Stephen Ansolabehere, Tr. 986:18-987:12, 987:17-989:10. In creating CD 35 in Plan C185, the Legislature had to take race into account in order to create a district where Hispanics would be a majority of the citizen voting population. Ryan Downton testified that he specifically included more Hispanic-leaning precincts into new CD 35 in order to create a HCVAP-majority district. Test. of Ryan Downton, Tr. 917:24-919:13, Sept. 9, 2011; Test. of Ryan Downton, Tr. 1643:12-18, 1674:11-1675:8. Ansolabehere's analysis proves nothing regarding the Legislature's intent. Accordingly, there is no evidence of intentional discrimination to support a Fourteenth Amendment claim in CD 25. Indeed, there is not even evidence of disparate impact. The dismantling of CD 25 will have just as much impact on Anglo Democratic voters as it will on African-American Democratic voters.

**3. CD 35 was never intended to be a “swap” for purposes of Section 2.**

The LULAC, Quesada, and Rodriguez Plaintiffs argue that the creation of CD 35 violated “the ‘no swap’ Section 2 principle laid down in . . . LULAC v. Perry” because “it was used to try to swap out the Section 2 rights of Latinos in former CD23.” Joint Plaintiffs’ Br. at 7. This argument assumes that the Legislature intended to eliminate the opportunity to elect in CD 23 and that it intended CD 35 to offset the elimination for purposes of Section 2. Both assumptions are wrong. The Legislature did not intend to eliminate—and it did not eliminate—preexisting Latino

electoral opportunity in CD 23, nor did it conceive of CD 35 as a “swap.” (Dr. Alford’s description of CD 35 as a replacement or “offset” for CD 23 proves nothing. He did not draw the plan, and he did not purport to testify about the Legislature’s purpose.)

**D. Congressional District 27**

DOJ and the Plaintiffs allege that CD 27 was intentionally drawn to dilute Hispanic voting power in Nueces County. *See* DOJ Br. at 26-28; Joint Plaintiffs’ Br. at 46-51; Task Force Br. at 89-91. They are only able to reach this conclusion by ignoring evidence explaining the Legislature’s partisan goal of protecting the Republican incumbent in benchmark CD 27 as well as creating a map that allowed for Nueces County and Cameron County to each have their own anchored congressional district. *E.g.*, Test. of Ryan Downton, Tr. 1021:21-1022:14, Sept. 9, 2011; Test. of Ryan Downton, Tr. 1632:21-1633:4, Aug. 15, 2014. The Plaintiffs have not proven, as they must, that CD 27 was drawn with the intent to discriminate on the basis of race.

The evidence reflects that the configuration of CD 27 in Plan C185 was consistent with requests from South Texas legislators and members of the public. *See* Defendants’ Br. at 127-130. In an effort to counter this evidence, DOJ and the Plaintiffs argue that the State’s mapdrawers ignored testimony regarding “the importance of continuing to allow Hispanic voters in Nueces County the opportunity to elect candidates of choice,” DOJ Br. at 28, and the need to “recognize the growth

of the Latino population,” Joint Plaintiffs’ Br. at 50. But DOJ and the Plaintiffs point only to vague testimony reflecting consideration of general redistricting principles; they have not shown that the mapdrawers ignored any specific requests regarding the drawing of congressional lines in Nueces County. *See, e.g.*, DOJ Br. at 28 (citing witness who testified about wanting to “make sure that we are together with those things that have the same thing in common with us”); Joint Plaintiffs’ Br. at 50 (citing witnesses who asked members to “take a look at the minority representation” and add “at least four more Representatives here in this area” in light of minority population growth); Ex. D-574 at 48:2-6, 52:3-8, 98:1-4.

There is no merit to the Plaintiffs’ suggestion that the mapdrawers’ testimony on the purposes behind CD 27 has changed during this litigation such that the stated explanation for CD 27’s configuration is “pretextual.” Joint Plaintiffs’ Br. at 49. In his 2011 testimony, Mr. Interiano stated that CD 27 was drafted in part based on public requests provided at the interim Corpus Christi hearing. Test. of Gerardo Interiano, Tr. 1461:25-1462:7, Sept. 12, 2011. Downton similarly testified in 2011 that Rio Grande Valley legislators sought a congressional district anchored in Cameron County. Test. of Ryan Downton, Tr. 1021:22-1022:18, Sept. 9, 2011; *see also* Order at 54 (March 19, 2012), ECF No. 691 (citing testimony of Interiano and Downton regarding the dual purposes behind the drafting of CD 27).

Nor have the Plaintiffs satisfied their burden of proving that CD 27 was drawn for the purpose of discriminating against Hispanic voters by pointing to a November

2010 e-mail from Eric Opiela to Congressman Smith (with a blind copy to Gerardo Interiano) referencing CD 27. Joint Plaintiffs' Br. at 16, 46-47 (citing Ex. DOJ-76). The email in question was written well before the legislative session, and prior to the release of census information, by an individual who was neither a legislator nor a state mapdrawer. The Plaintiffs offered no evidence about the meaning of the e-mail or, more importantly, any proof that the e-mail reflects the purpose of the State's mapdrawers or the Legislature. There is no evidence that Ryan Downton, the mapdrawer responsible for drafting the congressional plan, even saw the e-mail. Accordingly, there is no direct or circumstantial evidence to support Plaintiffs' claim of intentional discrimination in CD 27.

#### **E. Dallas/Fort Worth**

The evidence shows that political performance predominated in the creation of Dallas/Fort Worth congressional districts, and racial data was considered in a small area for the limited purpose of correcting the inadvertent separation of Hispanic and African-American communities. Race did not predominate in the creation of any congressional district in the region. The Joint Plaintiffs' assertion that the Legislature pursued an "over-arching goal of enhancing Anglo voting power," Joint Plaintiffs' Br. at 11, is an attempt to avoid the evidence by recasting it in purely racial terms. The decision not to create a coalition district resulted from overriding partisan concerns, and the districts were drawn almost exclusively with political data. *See* Defendants' Br. at 130-36. Only four points merit a further response.

First, Plaintiffs and DOJ continue to suggest that the number of precinct splits provides evidence of racially discriminatory purpose. *See, e.g.*, DOJ Br. at 28-30. The number of split precincts has no independent significance because the strict population-equality requirement for congressional districts requires mapdrawers to “zero out” every district—that is, reduce the deviation to zero—which requires splitting multiple precincts in order to find blocks that add up precisely to the ideal population. Ryan Downton testified that he zeroed out congressional districts after every revision, which necessarily increased the number of split precincts. *See, e.g.*, Test. of Ryan Downton, Tr. 1632:6-8, Aug. 15, 2014 (“[E]very iteration of the map you saw would have required zeroing out again. Every time you zero out, you are going to split multiple precincts.”); *id.* at 1718:13-14 (“[Y]ou have got to get to zero population, so you have got to find blocks to get you there.”); *id.* at 1718:18-24 (“Every time—the way I would zero out is I would go around the borders of the districts and look for blocks of the size I needed to keep going until I got to zero. But then every time I changed the map, I would do it again. So all of the—all of the areas that I worked on more regularly, and there were a lot of changes, particularly Bexar County and Tarrant County, there are going to be a lot of splits.”).

Second, the Joint Plaintiffs assert, without foundation, that Ryan Downton used “racial shading at both the block and precinct level” in Tarrant County. Joint Plaintiffs’ Br. at 65 (citing Tr. 1710). Downton’s testimony in the cited portion of the transcript discusses racial shading, but it does not mention block-level shading. *See*

Test. of Ryan Downton, Tr. 1710:1-25, Aug. 15, 2014. In testimony not mentioned by the Joint Plaintiffs, however, Downton testified specifically that when he relied on racial shading in Tarrant County, he relied only on shading at the VTD or precinct level. *See id.* at 1619:14-17 (“Q. And when you—just so the record is clear, when you are looking at this racial shading, what level are you looking at it at? A. At the VTD level.”).

Third, DOJ’s claim that the 2011 congressional plan packed Dallas County minority voters into CD 30 rests on an incomplete concept of packing. DOJ argues that packing occurs when “substantial minority population is added to [an] already performing district.” DOJ Br. at 30. DOJ leaves out a critical element: packing occurs only if the addition of voters to an existing district prevents the creation of an additional district. *See, e.g., Bartlett*, 556 U.S. at 15 (explaining that unless “the minority has the potential to elect a representative of its own choice in some single-member district . . . there neither has been a wrong nor can be a remedy” (citation omitted)); *see also id.* (“There is a difference between a racial minority group’s ‘own choice’ and the choice made by a coalition.”). Because DOJ alleges only that the concentration of minority voters in CD 30 was excessive, they have not articulated a packing claim, much less proven that the configuration of CD 30 resulted from intentional racial discrimination.

Finally, DOJ accuses the Legislature of drawing CD 33 so that it “wends eastward splitting 10 precincts and fracturing minority communities of interest in the

City of Arlington, which has one of the fastest growing minority populations in Tarrant County, and subordinates their voting strength to that of the majority-Anglo electorate in Parker and Wise counties.” DOJ Br. at 30; *cf.* DOJ Proposed FOF ¶ 234 (including identical language, citing Exs. DOJ-699\_4 and DOJ-711\_8). This claim is nonsensical. First, the charge of “fracturing” is untrue: as drawn in Plan C185, CD 33 includes the entire City of Arlington. *See* Ex. D-401.9\_33 (showing 100% of Arlington in CD 33). It follows that the district boundaries did not “fracture” any community in Arlington. In fact, Plan C185 made Arlington the anchor of CD 33. *See id.* (showing that Arlington would have contained 365,335 of the district’s total population of 698,488); *cf.* Ex. D-401.2\_6 (showing that Tarrant County contained 558,265 persons, compared to Parker County’s 116,927 and Wise County’s 23,296). Second, the number of split precincts proves nothing: DOJ does not explain why the splits are significant, and the cited exhibit lists split precincts only in CD 12 (*see* Ex. DOJ-699\_4-5).

In any event, the voting strength of minority communities of interest in Arlington would not have been “subordinate[d] . . . to that of the majority-Anglo electorates in Parker and Wise counties.” DOJ presents a distorted picture of CD 33, asserting that “Anglos make up 87.2 percent of the VAP in Parker County and 82.9 percent of the VAP in Wise County.” DOJ Br. at 30 (citing DOJ Proposed FOF ¶ 234 (in turn citing Ex. DOJ-711\_8)). But DOJ omits any mention of the portion of CD 33 in Tarrant County, which would have been only 46.2% Anglo. *See* Ex. DOJ-

711\_8. More importantly, CD 33's Black, Hispanic, and "Other" population in Tarrant County would have totaled 300,359; the district's combined Anglo population from Parker and Wise counties would have been only 118,035. *See id.* The evidence directly contradicts DOJ's claim of "subordination."

**F. Plaintiffs' Complaints About Lost Economic Engines, Offices, and Member Homes Are Baseless.**

In spite of the evidence, DOJ, the NAACP Plaintiffs, and the Congresspersons continue to assert that the three African-American members of Congress were targeted in the 2011 plan through the removal of "economic engines," district offices, and one member's home. Their determination to pursue this discredited theory leads them to ignore or misrepresent the evidence. This dubious legal argument has no basis in fact.

The record does not support the claim that African-American members of Congress were subjected to disparate treatment during the 2011 congressional redistricting process, much less that they were discriminated against on the basis of race. The NAACP Plaintiffs make the sweeping claim that the Legislature ignored requests by African-American members of Congress but honored a "myriad of trivial Anglo requests." NAACP/Congresspersons Br. at 26; *see also* DOJ Br. at 31-32. They point to Congressman Marchant's request for his grandchildren's school, Congressman Lamar Smith's request for a San Antonio Country club, and Congresswoman Granger's request for downtown Fort Worth.

NAACP/Congresspersons Br. at 26. Each request was either made directly or forwarded to legislative staff. *See* Exs. TLRTF-270, 276, 282, 284, 292, 311\_214.

The allegation that mapdrawers deliberately ignored African-American members' concerns "despite those members' repeated efforts to address and remedy these issues" is simply not true. There is no evidence that Congresswoman Johnson or Congresswoman Jackson Lee made specific requests to the Legislature or legislative staff. *See* DOJ Br. at 31; NAACP Plaintiffs/Congresspersons' Br. at 26. The only evidence of any communication by Congresswoman Johnson regarding CD 30 is a series of e-mails between Eric Opiela, Congressman Lamar Smith, Martin Weiser, and Rod Givens in March 2011, before Plan C125 was released. *See* Ex. NAACP-75. There is no evidence that this message was delivered to any state legislator or legislative staff member. That Eric Opiela and Congressman Smith failed to pass on a request to the State's mapdrawers, *see* DOJ Br. at 31; NAACP/Congresspersons Br. at 23-26, is not evidence of intentional race-based discrimination by the Legislature or legislative staff. Congresswoman Jackson Lee issued a statement about Plan C125 after its public release, but it did not raise any specific concerns about her district. The statement refers to unspecified "historic neighborhoods" and "major communities of interest," but it does not mention her district office or economic engines. *See* Ex. DOJ-639. Ryan Downton testified that the mapdrawers received a request from Congressman Al Green or Congressman Gene Green to have a district office moved into one of their districts. This request could not be accommodated, but it was not

ignored; Downton considered the request and determined that further changes could not be accommodated without making substantial revisions to the map, which were not feasible at that point in the process. Test. of Ryan Downton, Trial Tr. 1019:12-1020:8, Sept. 9, 2011.

DOJ's assertion that "[t]here was no comparable treatment of Anglo members of Congress," DOJ Br. at 32, is not true. The evidence reflects that the movement of economic engines and district offices affected all members regardless of race or party affiliation. *See* Defendants' Br. at 103-104, 107-108 (listing examples of economic engines and district offices removed from Anglo members' districts, including locations moved to African-American members' districts). The evidence reflects that at least 10 Anglo members—nearly half of all Anglo members in the Texas congressional delegation—lost one or more district offices in Plan C185. Ex. D-716. Even if this could be characterized as a "small handful of Anglo members of Congress," NAACP/Congresspersons' Br. at 25,<sup>30</sup> it disproves the claim that only African-American members of Congress lost their district offices.

Likewise, there is no support for DOJ's and the Plaintiffs' claims that Congresswoman Johnson's home was removed from her district because of intentional discrimination. Instead, the evidence proves beyond question that

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<sup>30</sup> *Cf.* NAACP/Congresspersons Br. at 29 (asserting that "[a]ll three African-American Congresspersons los[t] their district offices" compared to "only 1 of 23 or 24 Anglo Congresspersons").

Congresswoman Johnson's home was inadvertently placed outside her district due a mapping error. *See* Defendants' Br. at 105-106. TLC mistakenly identified the wrong census block for Congresswoman Johnson's residence and entered that erroneous location into RedAppl; this error was not apparent to RedAppl users and the State's mapdrawers would have thought they were including Congresswoman Johnson's home in her district when drafting the congressional map. Test. of Clare Dyer, Tr. 781:10-782:10, Aug. 13, 2014.<sup>31</sup>

The NAACP Plaintiffs' allegation that Chairman Solomons's "story changed throughout the course of the litigation," NAACP/Congresspersons Br. at 28, is contradicted by the evidence. They claim that in 2011, Chairman Solomons "testified that Congresswoman Sheila Jackson Lee did, when they met in person, tell him about the parts of her district she liked or was satisfied with." NAACP/Congresspersons Br. at 28. In the cited portion of his testimony, however, Solomons said no such thing; he testified that they "had some brief conversation about redistricting, not anything specific, not anything specific to her district," and, in response to the question whether "she did like the current configuration of her district," he responded, "I

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<sup>31</sup> DOJ and the Plaintiffs rely, in part, on deposition testimony of Congressman Green and Congresswoman Jackson Lee. *See* DOJ Br. at 31-32 (relying on DOJ Proposed FOFs ¶¶ 256, 258-259, 261-262); NAACP/Congresspersons Br. at 25-26. These depositions were not admitted as joint exhibits or included in the deposition testimony offered for admission in the parties' Joint Advisory Regarding Designated Deposition Testimony (Sept. 29, 2014), ECF No. 1255, and counsel for the NAACP Plaintiffs and the Congresspersons opposed the admission of certain excerpted deposition testimony of these individuals, Tr. 2164:22-2167:17, Aug. 26, 2014. Defendants object to the use of any deposition excerpts that were not previously admitted as joint exhibits or included in the parties' Joint Advisory.

guess so. I mean, I don't recall specific—the specific conversation, but I think she generally was happy with what she had, basically.” 2011 Tr. 1627:17-1628:2. In 2014, he testified similarly: “She never talked to me about her district,” and “She never mentioned her district as such about what she liked or wanted or what he was concerned about.” Test. of Burt Solomons, Tr. 1372:15-19, Aug. 14, 2014. This testimony is not inconsistent.

**V. PLAINTIFFS ARE NOT ENTITLED TO RELIEF UNDER SECTION 2 OF THE VOTING RIGHTS ACT.**

**A. The Voting Rights Act Does Not Require States To Create Or Preserve Coalition Or Crossover Districts.**

To the extent Plaintiffs' claims rest on the potential to create coalition districts, they are foreclosed by the Supreme Court's decision in this case. *See Perry v. Perez*, 132 S. Ct. 934, 944 (2012) (per curiam) (“If the District Court did set out to create a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so. *Cf. Bartlett v. Strickland*, 556 U.S. 1, 13-15 . . . (2009) (plurality opinion).”). According to DOJ, “*Perez* establishes only that Section 2 requires a specified factual basis, principally findings of minority cohesion” to support a claim of vote-dilution for failure to create a coalition district. DOJ Br. at 78-79. This interpretation of the Supreme Court's holding is implausible.

In *Perez*, the Supreme Court identified two potential reasons for creating CD 33 under Plan C220—reflecting population growth or intentionally creating a coalition district—and instructed that the latter was improper. 132 S. Ct. at 944. In so holding,

the Court did not refer to the district court record; it cited *Bartlett v. Strickland*. In *Bartlett*, the Supreme Court flatly rejected the notion that “opportunity” under Section 2 includes the opportunity to form a majority with other voters. *See* 556 U.S. at 13-15. The Supreme Court’s reference to this very passage in *Bartlett* resolves any ambiguity about the basis of its holding that this Court had “no basis” to deliberately create coalition districts in which “two different minority groups [were expected] to band together to form an electoral majority.” 132 S. Ct. at 944.

DOJ cannot escape the plain language of the Supreme Court’s holding by referring to “the context of this litigation’s procedural history.” DOJ Br. at 78. If the Supreme Court intended to say that the record was not sufficient to support the creation of coalition districts in this case, it would have said so. Instead, it said that this Court had no basis to create coalition districts. The Supreme Court’s citation to *Bartlett*—and not to the record or the joint appendix—confirms that this was a legal determination, not a comment on the sufficiency of the evidence. The only logical conclusion that can be drawn from what the Court actually said is that there is no legal basis for this Court to require the State of Texas to create coalition districts.

The NAACP Plaintiffs argue that at least five Fifth Circuit cases permit the aggregation of minority groups to prove a Section 2 claim, *see* NAACP/Congresspersons Br. at 16 (citing *LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc); *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989); *Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir.

1988); *LULAC v. Midland ISD*, 812 F.2d 1494 (5th Cir. 1987)), but Fifth Circuit cases cannot salvage their claims in the face of contrary Supreme Court authority. The most recent decision cited by the NAACP Plaintiffs predates *Bartlett* by more than fifteen years. The Fifth Circuit's decisions therefore do not account for the Supreme Court's rejection of any right to form political coalitions, and they cannot survive the Supreme Court's contrary rulings in *Bartlett* and *Perry*.

Even if Section 2 did require the State to create coalition districts in certain circumstances, the record shows that those circumstances have not been proven. The evidence shows a consistent lack of cohesion between Black and Hispanic voters in Democratic primary elections. As the Task Force acknowledges, "In the Democratic primary elections, Latino preferences were not consistently shared by the rest of the primary voters." Task Force Br. 16.

**B. The State Defendants Have Not Conceded, and Plaintiffs Have Not Proven, Legally Significant Racially Polarized Voting.**

Plaintiffs and DOJ maintain that the State has conceded the existence of legally significant racially polarized voting, thereby admitting that *Gingles* 2 and 3 are established throughout the State. *See* DOJ Br. at 65; Task Force Br. at 12. Plaintiffs are wrong. The State conceded nothing more than what the expert testimony shows: in general elections, a majority of the State's Anglo voters tend to vote for Republicans, and a majority of Black and Hispanic voters tend to vote for Democrats. Tr. 2168:22-2169:19, Aug. 26, 2014. This does not amount to a concession that legally significant

racially polarized voting exists.<sup>32</sup> To prove legally significant racially polarized voting, Plaintiffs must prove that voting patterns are driven by racial considerations, not just partisan politics. The causation requirement is clear from the text of section 2:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote *on account of* race or color  
.....

52 U.S.C. § 10301(a) (emphasis added).<sup>33</sup> To prove a vote-dilution claim under section 2 of the Voting Rights Act, Plaintiffs must show that voting preferences are caused by racial considerations. *See, e.g., LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc). Plaintiffs have failed to make this showing.

The Senate Report to the 1982 VRA amendments shows that Congress intended to codify the vote-dilution standard announced in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973). *See* S. Rep. No. 97-417 at 2, *reprinted in* 1982 U.S.C.C.A.N. 177, 179 (1982) (“The amendment also adds a new

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<sup>32</sup> In many areas of the State that are contested in this case, statistical differences in general-election voting patterns would not prove racially polarized voting under *Gingles* for the additional reason that there is no “white majority.”

<sup>33</sup> Congress added the “results in” language in 1982 for the express purpose of overruling *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which held that section 2 required proof of intentional discrimination. As originally enacted, section 2 provided:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Voting Rights Act of 1965, Pub. L. 89-110, Title 1, § 2, 79 Stat. 437, *quoted in Chisom v. Roemer*, 501 U.S. 380, 391 (1991).

subsection to section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester*.”); *see also id.* at 21 (referring to *White v. Regester* and *Whitcomb v. Chavis*); *id.* at 193-94 (Additional Views of Senator Robert Dole) (recognizing codification of *White v. Regester* and *Whitcomb v. Chavis*). In both *White* and *Whitcomb*, the Supreme Court held that plaintiffs could prove vote dilution by proving that a challenged voting practice had a discriminatory effect, but only where the discriminatory result was caused by racially motivated voting. In *Whitcomb*, the Supreme Court explained that proof of causation is necessary to distinguish vote dilution from mere “political defeat at the polls,” *Whitcomb*, 403 U.S. at 153. Thus under the results test employed by *Whitcomb v. Chavis* and *White v. Regester*, plaintiffs are required to prove that the alleged harm to minority voters was caused by racially motivated voting by the white majority.

Congress understood that its decision to adopt the liability standard set forth in *Whitcomb* and *White* meant that the “results in” standard incorporated an element of causation tied to race. The Senate Report defines “racial bloc voting” as voting on the basis of race:

[T]here still are some communities in our Nation where *racial politics do dominate the electoral process*. In the context of *such racial bloc voting* and other factors, a particular election method can deny minority voters equal opportunity to participate meaningfully in elections.

S. Rep. 97-417 at 33, *reprinted in* 1982 U.S.C.C.A.N. 177, 211 (1982) (emphasis added).

Thus “racial bloc voting” exists where “racial politics . . . dominate the electoral

process,” *id.*, or “race is the predominant determinant of political preference,” *id.* at 33. The Senate Report confirms that Plaintiffs must prove that racially motivated voting caused their alleged injuries, and absent such proof of causation, Plaintiffs cannot establish liability under the results test:

The results test makes no assumptions one way or the other about the role of racial political considerations in a particular community. If plaintiffs assert that they are denied fair access to the political process, in part, because of the racial bloc voting context within which the challenged election system works, they would have to prove it.

*Id.* at 34, *reprinted in* 1982 U.S.C.C.A.N. at 177, 212. Without proof of race-based bloc voting, “it would be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process under the results test.” *Id.* at 33, *reprinted in* 1982 U.S.C.C.A.N. 177, 211, *cited in* *Clements*, 999 F.2d at 855. And the Judiciary Committee expressly denied the charge that the proposed amendments would permit courts to assume or grant a presumption “that race is the predominant determinant of political preference.” *Id.* at 33 (quoting Subcommittee Report, 41–44). In short, the VRA does not presume that voting patterns are caused by racial considerations, but it requires the plaintiff to prove that they are.

The Supreme Court’s decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), did not alter the definition of racial bloc voting. Justice Brennan’s plurality decision concluded that plaintiffs need not show that race dictated voters’ decisions; rather, plaintiffs could satisfy their burden by proving that white voters preferred different candidates than black voters, even if those voting patterns reflected divergent political

views rather than racial discrimination. *See id.* at 74 (Brennan, J.) (“[T]he legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. . . . [I]n order to prove a prima facie case of racial bloc voting, plaintiffs need not prove causation or intent.”). This interpretation of Section 2 attracted only four votes.

A majority of the Supreme Court expressly rejected Justice Brennan’s conclusion that the race of the voters is dispositive and “the race of the candidate . . . is irrelevant.” *Id.* at 68. Justice White pointed out that such a reading of the statute was inconsistent with congressional intent. He characterized the plurality’s position as “interest-group politics rather than a rule hedging against racial discrimination.” *Id.* at 83 (White, J., concurring). Justice O’Connor, joined by Justices Burger, Powell, and Rehnquist, agreed with Justice White that the plurality’s refusal to consider the race of candidates—or the reasons why voters rejected minority candidates—was inconsistent with Congress’s intent when it amended section 2 to incorporate *Whitcomb*’s “results” test. *See id.* at 101 (O’Connor, J., concurring in the judgment) (“I agree with Justice White that Justice Brennan’s conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with *Whitcomb* and is not necessary to the disposition of this case.”). Justice O’Connor’s concurring opinion went further, stressing that the Court could not determine whether minority voters would be excluded from the political process if it did not know why voters rejected

minority candidates. She explained that the basis for the voters' decision "would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interest into account." *Id.* at 100. Thus the majority in *Gingles* rejected an interpretation of Section 2 that would allow courts to find racial bloc voting based solely on statistical evidence that different groups tend to vote for different candidates regardless of the reason for the voting patterns.

Proof of causation is central to the results test under section 2 and essential to maintaining the statute's constitutionality. *LULAC v. Clements*, 999 F.2d 831, 852 (5th Cir. 1993) (en banc), continues a consistent line of authority concluding that vote dilution claims under section 2 require proof of causation. Other courts have similarly concluded that plaintiffs claiming vote dilution must identify race-based voting patterns to satisfy section 2's causation requirement. *See, e.g., Nipper v. Smith*, 39 F.3d 1494, 1523–24 (11th Cir. 1994) (en banc) ("Unless the tendency among minorities and white voters to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race, voting rights plaintiffs simply cannot make out a case of vote dilution."); *Vecinos de Barrio Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995) (holding that "plaintiffs cannot prevail on a VRA § 2 claim if there is significantly probative evidence that whites voted as a bloc for reasons wholly unrelated to racial animus"); *see also United States v. Charleston County*, 365 F.3d 341, 347–48 (4th Cir. 2004) (holding that the cause of racially polarized voting is relevant to the totality-of-circumstances inquiry); *cf. Muntaqim v. Coombe*, 366 F.3d 102, 126 (2d

Cir. 2004) (applying the clear statement rule to conclude that section 2, even as construed to require some connection to racial discrimination, could not apply to New York's felon disenfranchisement law without exceeding Congress's enforcement power and "disturb[ing] the balance of power between the States and the Federal Government"), *vacated for lack of subject matter jurisdiction on reh'g en banc*, 449 F.3d 371 (2d Cir. 2006) (per curiam) (dismissing appeal and vacating prior opinions after finding that plaintiff lacked standing).

The expert analysis in this case confirms that race is a relevant factor in racially polarized voting analysis. Dr. Engstrom, for example, testified that racially contested elections provide the most probative evidence of racially polarized voting. Test. of Richard Engstrom, Tr. 517:23-518:6, Sept. 7, 2011. Dr. Handley also limited her analysis to contests involving minority candidates. *See* DOJ Br. at 20. This approach is consistent with the Fifth Circuit's conclusion that "elections between white candidates are generally less probative in examining the success of minority-preferred candidates, generally on grounds that such elections do not provide minority voters with the choice of a minority candidate." *Clements*, 999 F.2d at 864, *cited in* DOJ Br. at 20 n.13; *see also Magnolia Bar Ass'n, Inc. v. Lee*, 994 F.2d 1143, 1149 (5th Cir. 1993), *cited in* Task Force Br. at 14. If the race of candidates were irrelevant to the question of racially polarized voting, there would be no reason for Plaintiffs' experts and the Fifth Circuit to consider it. This makes sense in light of the Senate Report's conception of racially polarized voting as a circumstance in which "racial politics . . . dominate the electoral

process,” S. Rep. No. 97-417 at 33, *reprinted in* 1982 U.S.C.C.A.N. 177, 211 (1982), and “race is the predominant determinant of political preference,” *id.*

It follows that if voting patterns are *not* driven by race, then divergence between Anglo and minority voting preferences does not provide circumstantial evidence of racial discrimination. The record consistently demonstrates that party predominates over race in Texas general elections. *See, e.g.*, Test. of John Alford, Tr. 1790:22–25, Sept. 14, 2011 (“[W]here there’s a choice between partisanship and race or ethnicity, there simply isn’t any discernible impact left for ethnicity in general election voting.”). The *Clements* court focused on similar evidence when it concluded that party was more predictive of voting decisions than race: “white voters in most counties, both Republican and Democratic, without fail supported the minority candidates slated by their parties at levels equal to or greater than those enjoyed by white candidates, even where the minority candidate was opposed by a white candidate.” *Clements*, 999 F.2d at 861.

Evidence of racially polarized voting is generally stronger in primary elections, but it does not show that Anglo bloc voting typically prevents minority voters from nominating their candidates of choice. Dr. Engstrom testified that non-Latino voters generally do not prefer the same candidates as Latino voters in Democratic primary elections. Task Force Br. at 16; Joint Ex. E-7 at 25. In particular, Dr. Engstrom and Dr. Alford agreed that Democratic primary elections feature polarized voting between Black and Hispanic voters. *See* Task Force Br. at 17; *see generally* Joint Ex. E-7.

The same pattern has not been established in Republican primary elections, however. Dr. Engstrom testified that racially polarized voting was not evident in the 2012 Republican primary election for U.S. Senator. Test. of Richard Engstrom, Tr. 481:22-482:3, Aug. 12, 2014. Similarly, in the 2012 Republican primary for the Texas Supreme Court, Dr. Engstrom testified that he found polarized voting in some counties but not in others; however, overall, he did not detect a pattern of “stark racially polarized voting.” *Id.* at 481:15-21.

Incorporating a causation requirement into racially polarized voting analysis guards against potential constitutional infirmities in Section 2’s results test because it ensures that the statute does not compel a race-based remedy in the absence of a race-based harm. Race-based governmental decision-making is presumptively unconstitutional. *See, e.g., Bartlett*, 556 U.S. at 927 (“We must be most cautious before interpreting a statute to require courts to make inquiries based on racial classifications and race-based predictions. The statutory mandate petitioners urge us to find in § 2 raises serious constitutional questions.”); *cf. Miller*, 515 U.S. at 927 (“[T]he Justice Department’s implicit command that States engage in presumptively unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress’ authority under . . . the Fifteenth Amendment . . . into tension with the Fourteenth Amendment.”) (citation omitted). Interpreting Section 2 to require race-based districting only when necessary to remedy race-based voting also ensures that the statute is a proper exercise of Congress’s power to enforce the Fourteenth and

Fifteenth Amendment by “appropriate” legislation. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (holding that the Religious Freedom Restoration Act exceeded Congress’s Fourteenth Amendment enforcement power because its substantive reach was “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior”).

Treating party as a proxy for race produces anomalous results unless party affiliation perfectly tracks racial divisions. When it does not—as in this case—the problem identified by the *Clements* court still exists: if the mere defeat of Democratic candidates proves vote dilution, the Court has two problematic remedial options: (a) provide a remedy to African-American and Latino Democrats but not Anglo Democrats or (b) provide a remedy to Democrats regardless of race. *Cf. Clements*, 999 F.2d at 861 (“If we are to hold that these losses at the polls, without more, give rise to a racial vote dilution claim warranting special relief for minority voters, a principle by which we might justify withholding similar relief from white Democrats is not readily apparent.”). The parties who allege injuries in this case, as in *Clements*, are identifiable predominantly by party, not race or ethnicity. A disadvantage allegedly caused by a redistricting scheme is not cognizable as vote dilution under section 2 of the Voting Rights Act if the injury is “shared equally among all members of the Democratic Party.” *Id.* at 852. Because that is the case here, Plaintiffs have not proven legally significant racially polarized voting, and they cannot prove vote dilution.

**C. Plaintiffs Have Provided No Evidence That Minority Citizens' Current Socioeconomic Status or Political Participation Levels Result From Past Discrimination Or State Action.**

Plaintiffs have introduced no evidence that the present-day socioeconomic status or political participation rates of minority voters result from past discrimination. Plaintiffs have anticipated their failure to carry their burden of proof on this point by asserting that it does not exist. *See, e.g.* Task Force Br. at 19-20; DOJ Br. at 66. They are mistaken. Plaintiffs seeking a remedy for racial discrimination must prove that the remedy is necessary in light of current conditions. *See Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013). To secure relief based on the lingering effects of past discrimination, Plaintiffs therefore must prove the connection between past discrimination and current conditions. They have not done so in this case.

Plaintiffs and DOJ cannot escape their burden by pretending that it does not exist. DOJ, for instance, asserts that “disproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation . . . [Therefore,] plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.” DOJ Br. at 66 (quoting S. Rep. No. 97-417 at 29 n.114). DOJ omits the following caveat from the Senate Report: “Where these conditions are shown, and where the level of Black participation in politics is depressed . . . .” S. Rep.

No. 97-417 at 29 n.114, *reprinted in* 1982 U.S.C.C.A.N. 177, 206.<sup>34</sup> At most, this comment purports to relieve plaintiffs of their burden to prove a causal connection between depressed socioeconomic status and lower levels of political participation (a dubious proposition after *Shelby County*). But it does not purport to relieve plaintiffs of their burden to prove a causal connection between past discrimination and current socioeconomic status. Even taken at face value, the Senate Report therefore does not permit plaintiffs to assume that current levels of political participation result from past discrimination; at the very least, they must prove the initial causal link between past discrimination and depressed socioeconomic status. They have failed to carry their burden.

The Task Force asserts that “Latinos bear the present effects of [past] discrimination in the form of lower rates of political participation,” citing Dr. Tijerina’s 2011 report and a number of proposed findings of fact. Task Force Br. at

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<sup>34</sup> The footnote reads, in full:

The courts have recognized that disproportionate educational employment, income level and living conditions arising from past discrimination tend to depress minority political participation, *e.g.*, *White*, 412 U.S. at 768; *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145. Where these conditions are shown, and where the level of Black participation in politics is depressed, Plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

S. Rep. No. 97-417 at 29 n.114, *reprinted in* 1982 U.S.C.C.A.N. 177, 206.

21.<sup>35</sup> But the proposed findings, the sources cited in the findings, and the Tijerina report provide no support for the proposition that current rates of political participation among Latinos result from past discrimination.<sup>36</sup> Dr. Tijerina's report

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<sup>35</sup> In support, the Task Force cites Dr. Tijerina's 2011 report, Joint Ex. E-10 at 32, and paragraphs 178, 191, 196-200, 204, 208, 246, 247, 258-69, 339-47, 358-64, and 414 from its proposed findings of fact.

<sup>36</sup> See Task Force Proposed FOF ¶ 178 ("Discrimination against and segregation of Latinos has existed in Texas since the 1840s."), ¶ 191 (effect of poll tax on Latino access to voting; 1933 study of Austin elections showed Latino turnout of less than 3%), ¶ 196 (citing Tijerina's discussion of Progressive-era political bosses and politicians such as Archie Parr, Jim Wells, Ed C. Lasater, D.W. Glasscock, and John Nance ("Cactus Jack") Garner, Joint Ex. E-10 at 11, for the proposition that "[g]errymandering done by political bosses to control the Latino vote proved to be an effective and accepted practice by Anglo-American policy makers at all levels of Texas government"), ¶ 197 (political bosses gerrymandering by "nearly doubling the number of South Texas counties"), ¶ 198 (1918 state law eliminating interpreters at the polls), ¶ 199 (White Man's Primary), ¶ 200 (threats of prison and executions by Texas Rangers to prevent Latinos from voting between 1900 and 1930), ¶ 204 (exclusion of Latino candidates from slates by the Good Government League in post-World War II San Antonio), ¶ 208 (segregated schools, poll tax, voting and job discrimination from the 1920s through the 1960s), ¶ 246 (citing testimony about an unspecified exhibit during the 2011 trial and page 1 of Dr. Tijerina's report for the proposition that "[t]he effects of segregation have lingered even after blatant signs limiting African-American and Hispanic access to public services were taken down"), ¶ 248 (citing page 32 of Dr. Tijerina's report for the proposition that "[t]he lower rate of voter registration, voting, and running for elective office of Texas Latinos is directly related to the past discrimination of Latinos in Texas"), ¶ 258 (passage of joint resolution in 1841 suspending printing laws in Spanish), ¶ 259 (passage of law in 1856 restricting the use of Spanish in Texas courts), ¶ 260 (1925 law mandating use of English language in public education), ¶ 261 ("By the turn of the 20th century, many Latinos attended segregated schools."), ¶ 262 (continued segregation of Latino students into the 1960s and 1970s), ¶ 263 (disparity in number of Latino and Anglo schools in San Antonio in 1934), ¶ 264 (disparate funding of Latino and Anglo schools in San Antonio in 1934), ¶ 265 (insufficient resources in urban Latino schools and corporal punishment for speaking Spanish in the 1920s and 1930s), ¶ 266 (officially endorsed neglect of Latino student enrollment in the 1920s), ¶ 267 (severe underenrollment of Latino children in 1920 despite mandatory-attendance law in effect since the 1880s), ¶ 268 ("In the 1920s, Lyndon B. Johnson taught Latino students at a segregated school in Cotulla, Texas, where Latinos typically attended school for only half a day and only to the sixth grade."), ¶ 269 (asserting that lingering effects of discrimination "are evident in the data" based on Tijerina's testimony that "Mexican-Americans have the lowest educational statistics in the state of Texas, and that is the lowest in the nation" (citing 2011 Tr. 586:2-4)), ¶ 339 (officially sanctioned vigilante groups drove Latino landowners out of Austin in the 1850s; city council took their land; Latinos later required to live in the city dump), ¶ 340 (Latinos in Austin lived on prime real estate after city dump moved), ¶ 341 (city used federal funding to create nation's first housing project in order to move Latinos and African-Americans off of valuable real estate in Austin), ¶ 342 (City of Austin advertised housing project despite the fact

offers a conclusion without explanation or authority. On page 1 of his report, he states that Latinos in Texas

have a legacy of exploitation and abuse by Anglo-Americans who have used government, financial, and technological advantages to appropriate Mexican American lands, labor, and resources, and that Mexican Americans in Texas today bear the effects of this discrimination which hinders their ability to participate effectively in the democratic process.

Joint Ex. E-10 at 1. Perhaps because this is a summary of his report, he cites no sources. In the body of his report, Tijerina presents a history of discrimination against Latinos, beginning with the founding of the Republic of Texas in 1836, *id.* at 2, and ending with the persistence of at-large electoral systems in the 1980s, *id.* at 32. He then concludes abruptly, without citing any data or authorities:

As a result of the historical discrimination against Mexican Americans in Texas, they still bear the effects of this discrimination which hinders their ability to participate effectively in the political process. It is clear that the lower rates of voter registration, voting, and running for elective office are directly related to this discrimination.

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that it was “effectively a government-created ‘barrio’”), ¶ 343 (Latinos across the State forced to live outside city limits in areas that eventually became barrios), ¶ 344 (use of restrictive covenants reported to have continuing effects in Corpus Christi and San Antonio in 1977), ¶ 345 (violent, officially sanctioned eviction and murder of Latino landholders in the mid-to-late 1800s), ¶ 346 (1852 Texas Land Relinquishment Law required pre-1835 land grants to be surveyed and filed by 1853, but Latinos not allowed to testify in support of land claims without good-character testimony from two Anglo men), ¶ 347 (labor restrictions required Latinos, including individuals who had been significant landowners, to secure county passes to seek work in other counties), ¶ 358 (deliberate minimization of education to keep Latinos out of skilled or white-collar jobs in the early 20th century), ¶ 359 (early-20th-century labor controls and restriction of free movement by Latino workers), ¶ 360 (systematic arrest of Latino workers and parole as “convict labor” in Willacy County in the 1920s), ¶ 361 (use of de jure and de facto labor controls, rationalized by the U.S. Department of Justice, to create labor surpluses and depress wages), ¶ 362 (migrant cotton workers paid 50 to 75 cents per hour in the 1940s), ¶ 363 (substandard housing for migrant farm workers in the 1940s), ¶ 364 (lack of access to health care, sick leave for migrant farm workers in the 1940s), ¶ 414 (“The absence of Latinos from all levels of appointed positions before 1970 is a major indicator of their exclusion from the democratic process in Texas.”).

Joint Ex. E-10 at 1. This conclusion finds no support in the body of Dr. Tijerina's report, which confines itself to events that occurred approximately 25 to 175 years before the 2011 Legislature enacted HB 150 and SB 4, and which makes no effort to connect those events to present-day conditions.

If anything, the evidence casts doubt on the notion that past discrimination explains current levels of political participation. The Task Force notes, for example, that Latino registration trails both African-American and Anglo registration by 19.4% and 19.3%, respectively. Task Force Proposed FOF ¶ 253. Unless Plaintiffs can explain how past discrimination affects Latino voters differently than it affects Black voters, whose registration rate is essentially identical to Anglo voters, there is no basis to assume a causal relationship between past discrimination against Latinos and current levels of political participation.

Plaintiffs have failed to present any evidence to demonstrate how, and to what extent, if any, past discrimination is the cause of current socioeconomic conditions. The Task Force asserts that Latinos experience lower educational achievement and earnings than Anglos, Task Force Br. at 21, but they do not say how this relates to past discrimination. Although the Task Force Plaintiffs cite Dr. Chapa's report, Dr. Chapa conducts no analysis of the relationship between past discrimination and current educational and socioeconomic status. In his 2011 report, he merely presents data showing disparities between Hispanics and non-Hispanics (and, with respect to median and per capita income, between Hispanics and Anglos), refers to "an

extensive historical literature that documents the history of Hispanics in Texas,” and concludes, with no further analysis or explanation, that “this discrimination still has a strong present day impact on the education, income, and earning of Hispanic Texans.” Joint Ex. E-1 at 4-5 & tbls. 2-6, *cited in* Task Force Br. at 21.

**CONCLUSION**

The Court should enter judgment for Defendants on all claims.

Date: December 4, 2014

Respectfully submitted.

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