IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA, and ERIC H. HOLDER, JR. in his official capacity as Attorney General of the United States, Defendants, WENDY DAVIS, *et al.*, Defendant–Intervenors.	Case No. 1:11–CV–01303 (RMC–TBG–BAH) [Three–Judge Panel]

PLAINTIFF THE STATE OF TEXAS' PROPOSED FINDINGS OF FACT

Plaintiff the State of Texas respectfully proposes the following Findings of Fact pursuant to the Court's Order of January 10, 2012.

Dated: February 3, 2012

Respectfully submitted,

/s/ *Adam K. Mortara*

ADAM K. MORTARA
JOHN M. HUGHES
ASHLEY C. KELLER
Bartlit Beck Herman Palenchar & Scott LLP
54 W. Hubbard Street, Suite 300
Chicago, IL 60654
Tel: (312) 494–4400
Fax: (312) 494–4440

Attorneys for Plaintiff State of Texas

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I. General Findings

A. Voting Patterns in Texas

1. Race and partisan preference correlate strongly in Texas. T5A[1] 21:1–8, 61:4–11; T5B 83:4–24.

2. Voting patterns in Texas general elections are determined by party preference rather than the race of candidates. Alford Direct Testimony, PX175 at 27.

3. Latino voting patterns—specifically, Latino voters' general preference for Democratic candidates—do not vary when a Latino Republican runs against an Anglo Democrat. T5A 24:15–25:4; DX5 at tbl. 2. Anglo voting patterns—specifically, Anglo voters' general preference for Republican candidates—do not vary when a Latino or African-American Republican runs against an Anglo Democrat. *See, e.g.* PX26; Engstrom Expert Report, DX725 at tbls. 3–8. African-American and Latino voters in Texas generally do not prefer the same candidates in primary elections. *See* T5A 22:21–23:4; T5B 55:20–56:2; T7A 22:9–15; Alford Direct Testimony, PX175 at 20–21; Engstrom Expert Report, DX725 at 26.

4. The term "coalition district" is commonly used to describe a district in which multiple minority groups combine to form a majority of voters. T5B 45:19–24. Because African-American and Latino voters in Texas generally favor Democratic candidates, so-called "coalition districts" will almost certainly be Democratic-leaning districts. T3B 83:2–25; PX27.

5. In a so-called "coalition" district, any group that does not control the outcome of the relevant primary does not elect its candidate of choice in the general election, only its second-choice candidate. *See* Alford Direct Testimony, PX175 at 20–21; T5B 45:25–47:12.

[1] Citations to the Trial Transcript in this case are notated "TXA" for morning transcripts and "TXB" for afternoon transcripts, where "X" is the day number. Citations to the *Perez* Trial Transcript are notated "PTT."

6. Because African–American and Latino voters in Texas generally favor Democratic candidates, it is very difficult to disaggregate an intention to affect Democrats from an intention to affect minority voters. T5B 81:23–82:1.

B. Retrogression Analysis

7. All parties agree that Section 5 of the Voting Rights Act prohibits backsliding from a preexisting baseline or "benchmark" districting plan. Doc. 79–2 at 4; Doc. 92 at 18. No clear standard exists to measure the difference in minority voting strength between the benchmark and enacted plans. The Department of Justice has offered limited "assistance to jurisdictions covered by the preclearance requirements of Section 5." 76 Fed. Reg. 7470 (Feb. 9, 2011), PX2.

8. The DOJ's *Guidance* directs covered jurisdictions to: (1) compare the benchmark plan to the enacted plan using updated census figures; (2) perform a "functional analysis of the electoral behavior within the particular jurisdiction or election district," without relying on "predetermined or fixed demographic percentages"; and (3) take note of "election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information" that may be important "to an assessment of the actual effect of a redistricting plan." *Id*. at 7472; *see also* 28 C.F.R. §§ 51.54(c), 51.59(a). These factors do not offer precise criteria by which states can avoid retrogression and ensure preclearance of redistricting plans. T1A 186:3–187:8.

9. Both Texas and the United States acknowledge that courts measure retrogression on a statewide basis. Doc. 79–2 at 10; Doc. 41 at 4.

10. Population and demographic data provide an appropriate starting point for identifying districts that may offer minorities the ability to elect candidates of their choice. Alford Direct Testimony, PX175 at 2–4; Handley House Report, DX326 at 2. Once demographics produce a universe of potential ability districts, statistical analysis of past election performance allows for a comparison

between minority voting strength in the proposed and benchmark plans. Alford Direct Testimony, PX175 at 3–4; DX326 at 2.

11. Analysis of endogenous elections—previous elections in benchmark districts, or elections on all fours with the election in dispute—is only possible for districts in the benchmark plan. T7A 31:6–23; Alford Direct Testimony, PX175 at 15; Handley House Report, DX326 at 8.

12. Because no elections have been held in proposed electoral districts, exogenous election analysis—analysis based on previous statewide elections—is necessary to perform a functional analysis of an enacted but yet–to–be–implemented redistricting plan. T7B 11:11–23, 13:9–21; Alford Direct Testimony, PX175 at 15–18.

1. Department of Justice: Binary Retrogression Analysis

13. The United States and all Intervenors use a binary standard to determine whether districts offer minority voters the ability to elect candidates of their choice. Handley House Report, DX326 at 2–3; Declaration of Dr. Arrington, DX320 at 1; Lichtman Expert Report, DX372 at 4, 7; Rebuttal Report of Richard Engstrom, DX747 at 2.

14. The United States' retrogression analysis uses a weighted average of endogenous and exogenous elections for benchmark districts and exogenous elections for proposed districts to determine whether or not districts qualify as ability–to–elect districts. T8A 5:17–6:10; DX326 at 3.

15. The United States tallies the number of districts where minorities have the ability to elect their candidates of choice in the benchmark. The United States then compares that sum to the number of ability districts in the enacted plan. If the former number is greater than the latter, the United States finds impermissible retrogression. T8A 5:11–16.

16. The United States' expert, Dr. Lisa Handley, determines that a district in the benchmark has the ability to elect if the Hispanic candidate of choice wins more than half the time. T8A 12:23–13:4.

17. Dr. Handley considered demographics as an initial threshold to identify potential ability-to-elect districts, removing all districts with a combined minority population below 50%. T8A 71:16–72:17; DX326 at 3.

18. The United States' endogenous election index affects the determination of ability to elect only with respect to HD35 and HD74. All other districts identified as providing the ability to elect in the benchmark also show an exogenous index score above 50. T8A 22:15–24, 23:8–17.

19. The United States' exogenous index for HD35 shows a decrease from 40, or 2 out of 5 elections, to 20, or 1 out of 5 elections. T8A 23:14–18.

20. The two elections in the United States' exogenous index where the Hispanic candidate of choice won in benchmark HD35 are the 2002 gubernatorial election between Perry and Sanchez and the 2004 Court of Criminal Appeals election between Keasler and Molina. T8A 26:9–28:4.

21. Mr. Keasler's victory in the 2004 Court of Criminal Appeals race (as reconstituted in the United States' index for benchmark HD35) was decided by a margin of only 425 votes. T8A 27:22–29:1. The United States' exogenous election analysis of HD35 would show the same score in both the benchmark and enacted HD35 if 220 people changed their vote to Mr. Molina in 2004 Court of Criminal Appeals election. T8A 28:23–29:7.

2. Texas Statewide Functional Analysis

22. Texas eschews a binary, district–counting approach in favor of what it calls a "statewide functional analysis." The statewide functional analysis analyzes all the exogenous electoral victories for minority–preferred candidates across all districts under consideration. Alford Direct Testimony, PX175 at 9. If the total voting power of minority voters in the exogenous elections reconstituted for the proposed plan meets or exceeds the sum for the benchmark, there is no retrogression. *Id.*

23. It is not possible to compare endogenous elections in a benchmark plan to endogenous elections in an enacted plan. Texas therefore uses exogenous reconstituted analysis to measure minority voting strength. Alford Direct Testimony, PX175 at 15–18.

24. Using only exogenous elections controls for the effect of incumbency in specific benchmark districts. *Id.* at 17–18.

25. Dr. Alford performed a reconstituted election analysis using a ten-election index created by the Texas Attorney General during the legislative session (the "OAG 10"), Dr. Handley's five-election index, and the five most recent elections in the OAG 10. T7A 15:17–21; Alford Direct Testimony, PX175 at 10–11, tbl. 3b.

26. Texas weights the OAG 10 toward more recent contests. Recent elections best reflect current conditions that may impact minority voter success, including factors like population shifts. Alford Direct Testimony, PX175 at 8.

27. As a factual matter, a district in which the minority–preferred candidate prevails in five of ten statewide elections does not indicate the same level of minority voting strength as a district in which the minority candidate of choice wins all ten statewide elections. T8A 49:17–23.

28. Using a greater number of elections and weighting the exogenous election analysis toward more recent elections provides more accuracy than a five–election analysis and more accurately reflects minority voting strength heading into the next election cycle. Alford Direct Testimony, PX175 at 8; T7A 15:13–21.

29. The statewide functional analysis permits a more thoughtful analysis of minority voting strength in "the entire statewide plan as a whole," *Ashcroft*, 539 U.S. at 479, because it considers the *degree* of change in minority voting strength in all relevant districts. Alford Direct Testimony, PX175 at 12.

C. The Texas Legislature's Efforts to Comply with the Voting Rights Act

30. In 2001, the Department of Justice objected to the LRB–drawn redistricting plan for the Texas House of Representatives on the ground that "the number of districts in which the level of Spanish surnamed registration (SSRV) is more than 50 percent decreases by two as compared to the benchmark plan." PX1 at 3. In the same letter, the Department of Justice grounded its refusal to preclear the State's plan on "an analysis of election returns and other factors." *Id.*

31. In February 2011, the Department of Justice published a notice entitled *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470 (Feb. 9, 2011). In the *Guidance*, the DOJ instructed that the ability to elect candidates of choice "either exists or it does not in any particular circumstance." It cautioned, however, that retrogression cannot be measured by demographic data alone; rather, the inquiry "requires a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.* at 7471.

32. Thus the available DOJ guidance stated that election analysis was relevant to judging retrogression but did not provide instructions on how to perform election analysis. T1A 137:11–22.

33. Gerardo Interiano testified that if the State had received specific instructions from the Department of Justice regarding election analysis under Section 5 of the VRA, he would have followed those instructions. T1A 137:11–22; 187:1–8.

34. Mr. Interiano testified that the Legislature's goal was to meet or surpass every possible benchmark that might apply in order to avoid objection to preclearance by the DOJ. T1A 137:23–138:16.

35. In an effort to ensure compliance with the Voting Rights Act, the Legislature performed both a demographic analysis and an electoral analysis on proposed redistricting plans. T1A 137:23–138:16.

36. The Legislature's demographic analysis relied on several measures, including Spanish Surname Voter Registration (SSVR), Hispanic citizen voting age population (HCVAP), and Black voting age population (BVAP). T1A 138:23–139:9.

37. The Legislature did not rely exclusively on fixed demographic percentages when evaluating proposed plans for retrogression. T1A 186:15–16. The State did, however, expressly consider demographic data for the purpose of complying with Sections 2 and 5 of the Voting Rights Act. T1A 138:17–22.

38. Gerardo Interiano explained that the Legislature attempted to avoid retrogression by maintaining or increasing SSVR and HCVAP levels in existing Latino-majority districts. T1A 138:25–139:2.

39. To the extent he used racial data to evaluate proposed districts, Mr. Interiano relied almost exclusively on SSVR data because of concerns about citizenship levels among Latinos. T7B 65:5–15.

40. Mr. Interiano never used Hispanic voting age population shading in the State's mapping program, called RedAppl, because David Hanna advised him it was an unreliable indicator of performance and because the DOJ had identified SSVR as a measure of retrogression in 2001. T7B 65:16–66:3.

41. While the redistricting plans were being negotiated and drafted, Mr. Interiano received legal advice from David Hanna, an attorney employed by the Texas Legislative Council. Mr. Interiano also consulted lawyers from Baker Botts, LLP, which had been hired by the Speaker's office to represent the Texas House of Representatives. Finally, Mr. Interiano consulted with the Office of the Attorney General. T1A 134:25–135:11.

42. In his analysis of proposed redistricting plans, David Hanna put great emphasis on the fifty percent Spanish surname voter registration criterion based on the DOJ's 2001 objection letter. T1A

137:23–138:16. Mr. Hanna was unable to provide a final opinion regarding whether the Texas House map complied with Section 5 because he believed that the guidance provided by the Department of Justice was too vague. T1A 136:9–18; Hanna Deposition at 27:1–11. He did not perform an election analysis because he did not want to jeopardize the non–partisan status of TLC and informed Mr. Interiano that he needed to go to the Attorney General's office for election analysis. T1A 172:12–173:6.

43. David Hanna continued to perform demographic analysis of plans for Mr. Interiano. T1A 173:7–19. The evidence included three memoranda from Mr. Hanna to Mr. Interiano regarding draft House redistricting plans. On April 6, 2011, Mr. Hanna wrote a memorandum to Mr. Interiano regarding the most recent proposed House plan. PX3. On April 12, 2011, Mr. Hanna wrote a memorandum about Plan H110. PX4. And on April 20, Mr. Hanna wrote a memorandum to Mr. Interiano about Plan H153. PX5.

44. The Texas Attorney General's Office provided Mr. Interiano with election analysis of proposed redistricting plans or proposed districts in an attempt to comply with the 2011 DOJ Guidance and the 2001 DOJ letter. T1A 136:19–137:10; 187:9–16. The State's electoral analysis involved two steps: a racially polarized voting analysis (RPVA) and a reconstituted election analysis (REA). The State's RPVA used a multiple regression analysis to identify the preferred candidates of African–American and Latino voters in various general and primary elections. PX24, PX25, PX26, PX27, PX28, PX29.

45. To perform its reconstituted election analysis, the State took precinct–by–precinct results from prior elections and reaggregated those results for all precincts in a proposed district. Alford Direct Testimony, PX175 at 5–6.

46. Both the RPVA and REA were performed by the Office of the Attorney General's Litigation and Technical Support Division (LTS). T1A 172:6–11.

47. The REA was based on ten elections: the 2002 race for Governor (Perry (R) vs. Sanchez (D)); the 2004 races for the Texas Court of Criminal Appeals (Keasler (R) vs. Molina (D)) and the Texas Railroad Commission (Carillo (R) v. Scarborough (D)); the 2006 races for Lieutenant Governor (Alvarado (D) v. Dewhurst (R)) and the Texas Court of Criminal Appeals (Keller (R) v. Molina (D)); the 2008 races for United States Senate (Cornyn (R) v. Noriega (D)) and Texas Supreme Court (Johnson (R) v. Yanez (D)); and the 2010 races for Lieutenant Governor (Chavez–Thompson (D) v. Dewhurst (R)), Land Commissioner (Patterson (R) v. Uribe (D)), and Texas Supreme Court (Bailey (D) v. Guzman (R)). Alford Direct Testimony, PX175 at 8 n.2, 9 tbl. 2.

48. The set of elections used to conduct the RPVA and REA analysis was selected by Todd Giberson, a geographer in the LTS Division. Mr. Giberson selected these elections before any redistricting plan had been introduced in the Legislature. *See* Giberson Deposition at 16:5–18:5.

49. When the House Redistricting Committee had a final draft of the House map, they submitted it to the Texas Attorney General's office to have an election analysis performed. T1A 172:6–11.

50. The Office of the Attorney General provided Mr. Interiano with summaries of electoral analysis as well as full reports, although the full reports were several thousand pages long. T1A 174:22–175:12.

51. David Hanna provided Mr. Interiano with a comparison of the number of SSVR > 50% districts in the benchmark to the proposed House plan, showing an increase of 1. PX6. The election analysis OAG provided shows that in each of these districts the functional performance is increased or essentially unchanged except for one district, HD117. PX26; PX27. Therefore, Mr. Interiano knew that at worst the proposed plan had the same number of ability to elect districts as the benchmark plan. T1A 181:7–20; PX6.

II. Texas House of Representatives (Plan H283)

A. Retrogression

52. The United States alleges that the enacted House redistricting plan, Plan H283, contains only 45 districts in which minority voters have the ability to elect candidates of their choice compared with 50 ability districts in the benchmark, Plan H100. United States Statement of Issues (Doc. 79.1) at 3.

53. The United States does not contend that H283 retrogresses the ability of African-American voters to elect their candidates of choice. Alford Direct Testimony, PX175 at 3 n.1. There are only 10 Hispanic districts and one combined minority district that register changes in the level of minority voter success using reconstituted election analysis. *Id.* at 9–10, 19. These are the districts that are truly in dispute. *Id.*

54. The United States contends that changes to House Districts 33, 35, 41, 117, and 149 decreased minority voters' ability to elect candidates of their choice and are therefore retrogressive in effect. United States and Intervenors Identification of Issues (Doc. 53) at 4–6.

55. Plan H100 contained 30 districts in which Latinos formed a majority of voting–age citizens. PX13. Plan H283 creates 30 districts in which Latinos form a majority of voting–age citizens. PX14.

56. There are no methods for making adjustments to the Latino population counts in the United States Census and American Community Survey that are more accurate than the data contained in the United States Census and American Community Survey. PTT 1667:10–1668:10, 1682:1–4.

1. House District 33 (Nueces County)

57. In the benchmark plan, H100, Nueces County contained two Texas House districts and part of a third district. PX13. Nueces County elected three Republicans to the House in 2010. PX19 at 1773–74, 1776.

58. Dividing Nueces County's population by the 2010 ideal district population size yields approximately 2.03 districts. Applying the county–line rule, Gerardo Interiano and David Hanna

determined that only two House seats would be apportioned to Nueces County. T1A 146:21–147:10; PX8.

59. Under the benchmark plan, Nueces County contained two Latino–majority districts. PX13. Because Nueces County's total SSVR is just under 50%, Mr. Hanna and Mr. Interiano determined that it was not possible to create two districts wholly within Nueces County in which Latino voters could elect the candidate of their choice. T1A 147:11–23.

60. In the enacted plan, District 32 has 37.3% SSVR and 44.2% HCVAP. PX14. In the enacted plan, District 34 has 60.8% SSVR and 64.6% HCVAP. PX14. Under the benchmark plan, District 32, District 33, and District 34 did not consistently elect Latino voters' candidate of choice. According to DOJ's election analysis, Districts 33 and 34 in the benchmark plan score 60 on the exogenous index. DX326 at 5, tbl. 1.

61. The State's reconstituted election analysis shows that District 33 performed in 6 out of 10 elections. Alford Direct Testimony, PX175 at 11, tbl. 3b. In the enacted plan, the Legislature strengthened the Latino voters' influence in one of Nueces County's two remaining districts. Accordingly to DOJ's election analysis, District 34 scores 80 on the exogenous index. DX326 at 11, tbl. 4. The State's reconstituted election analysis indicates that District 34 in the enacted plan will consistently elect the Latino community's candidate of choice 9 out of 10 times. Alford Direct Testimony, PX175 at 11, tbl. 3b.

2. Texas House District 35 (South Texas)

62. Texas House District 35 is a competitive but Republican–leaning Hispanic–majority district in South Texas. T1B 119:18–120:12. Representative Jose Aliseda, a Latino Republican, has been the incumbent in District 35 since being elected in 2010. T1B 108:1.

63. The State's reconstituted election analysis shows that District 35 performed in 5 out of 10 elections in the benchmark plan and performs in 4 out of 10 elections in the enacted plan. Direct

Testimony, PX175 at 11, tbl. 3b. DOJ's election data shows that District 35 scores 80 on the endogenous index and 40 on the exogenous index in the benchmark plan and scores 20 on the exogenous index in the acted plan. DX326 at 11, tbl. 4.

64. The fact that the district does not consistently elect candidates presumed to be the choice of Latino voters is not caused by Latinos' lack of ability to elect but rather by the fact that Latinos do not vote monolithically for the same candidates in rural South Texas. T1B 119:18–121:4.

65. Based on the five most recent reconstituted elections, HD35 maintains the same ability to elect in the enacted plan as it provided in the benchmark plan. Alford Direct Testimony, PX175 at 11, tbl. 3b.

66. Dr. Engstrom, the Texas Latino Task Force's expert, concluded that HD35 did not retrogress in Plan H283, but was in fact improved over the benchmark. T7B 13:24–14:1.

67. The configuration of HD35 in the enacted plan does not have a retrogressive effect because the district's character remains the same—if it was an ability–to–elect district under the benchmark plan, it remains so under the enacted plan. Alford Direct Testimony, PX175 at 15–16.

3. Texas House District 41 (Hidalgo County)

68. Texas House District 41 is located in Hidalgo County in South Texas. PX14.

69. As drawn in the enacted plan, HD41 contains 72.1% HCVAP and 63% SSVR. PX14.

70. Based on the demographic ability–to–elect threshold adopted in the Court's summary judgment opinion, HD41 provides Latino voters with the ability to elect regardless of electoral analysis. *See* Memorandum Opinion (Doc. 115) at 29 n.22.

71. Dr. Richard Engstrom concluded that HD41 did not retrogress in Plan H283. T7B 14:4–9.

72. As configured in Plan H283, HD41 provides Latino voters with the ability to elect candidates of their choice. T7B 14:4–9; Alford Direct Testimony, PX175 at 11, tbl. 3b.

4. House District 117 (Bexar County)

73. The Bexar County delegation redrew its own districts under the leadership of Democrats Mike Villarreal, the Vice–Chairman of the House Redistricting Committee, and Ruth Jones McClendon, the leader of the delegation. T1A 155:13–21.

74. Speaker Straus instructed the members to draw their own districts first, and he would take the remainder as his district. *Id.* 156:3–8. Representative Villarreal worked with members to coordinate the individual districts, and he assembled them into a county–wide map. T1A 155:11–157:24. Representatives Villarreal and McClendon ultimately signed off on the Bexar County map. *Id.* at 157:14, 17–24.

75. Representative John Garza, a freshman Republican representative of District 117, asked to have certain Republican–leaning areas included in his district, but his request was denied by Representative Villarreal because District 117's Spanish–surname voter registration had to be maintained above 50%. T1A 159:4–21. Representative Joe Farias, a Democrat representing District 118, was ultimately unhappy with his district because he did not retain the community of Somerset in his district. Instead, Somerset was included in District 117. T1A 159:24–161:3.

76. District 117 has 50.8% SSVR and 58.8% HCVAP in the benchmark plan. PX13. In the enacted plan, District 117 has 50.1% SSVR and 63.8% HCVAP. PX14.

77. The State's reconstituted election analysis shows that District 117 only performed in 5 out of 10 elections in the benchmark plan and performs in 2 out of 10 elections in the enacted plan. The most recent elections show that HD117 performed in 2 out of 5 elections in both the benchmark and adopted plans. Alford Direct Testimony, PX175 at 11, tbl. 3b.

78. Dr. Alford did not perform a turnout analysis of HD117 or any other district. He did not rely on any turnout analysis done by the Office of the Attorney General because he considered the turnout models to be highly unreliable. T7A 86:10–88:9, 89:6–21.

79. District 117 contains 63.8% Hispanic CVAP. The Court's summary judgment opinion held that a minority group that constitutes a supermajority will likely have the ability to elect its candidates of choice notwithstanding variations in turnout, registration, and other factors. Memorandum Opinion (Doc. 115) 29. The Court relied on precedent establishing a 65% total population threshold, or a 60% voting age population threshold, for an "effective majority" under Section 2. *See id.* at 29–30 n.22. Applying a stricter 60% CVAP threshold, HD117 qualifies as an ability to elect district based on demographics alone. T6B 85:16–22, 88:2–9.

80. District 117 also contains 4.6% Black CVAP, resulting in a combined Black and Hispanic CVAP of 68.4%. PX14. Applying the same standard the United States does for determining the existence of a coalition district, the minority voting majority in HD117 makes it an ability–to–elect district even under a 65% VAP threshold. *See* Memorandum Opinion (Doc. 115) 29–30 n.22.

5. House District 149 (Harris County)

81. Harris County contained 25 House districts under the benchmark plan. T1A 150:16–17. Dividing Harris County's 2010 census population, 4,092,459, by the ideal House district population size, 167,637, yields approximately 24.41 State House districts. Applying the county–line rule, Gerardo Interiano and David Hanna determined that only 24 House seats would be apportioned to Harris County. T1A 148:1–10.

82. Chairman Solomons determined, based on the advice of counsel to the House Redistricting Committee and the Texas Legislative Council, that Representatives Scott Hochberg and Hubert Vo could be paired in Harris County because their districts did not qualify for protection under the Voting Rights Act. It was further determined that if a court determined that the Voting Rights Act protected coalition districts, District 137, held by Mr. Hochberg, was more likely to qualify as a coalition district. T1A 152:24–153:8. This determination was based on a memorandum from David Hanna to Gerardo Interiano indicating that it would be a novel concept to extend Voting Rights Act protection to a

district made up of four different groups. T1A 152:24–153:20. For this reason, the Houston delegation was informed that the district in which Hochberg and Vo would be paired should more closely resemble the existing District 137. T1A 153:9–12.

83. Representative Hubert Vo first ran in HD149 in 2004. He was unopposed in the Democratic primary. In the general election, he defeated the incumbent, Republican Talmadge Heflin, by 33 votes (out of 41,357 cast). PX19. Representative Vo has never had a primary opponent in HD149. *Id.*

84. District 149 in the benchmark plan did not perform well for Democrats. Alford Direct Testimony, PX175 at 19. The district only elected one Democrat out of five in an index of statewide elections selected by the DOJ's expert, Dr. Lisa Handley. DX326 at 7, tbl. 3.

85. Minority voters in HD149 do not usually vote cohesively in Democratic primary elections. Alford Direct Testimony, PX175 at 19, Appendix C tbl. C1. Black voters opposed Hispanic–preferred candidates in 5 out of 8 Democratic primaries where a Hispanic candidate was on the ballot. *Id.*

86. Dr. Engstrom did not analyze HD149 specifically to estimate the behavior of Asian voters because he believed that the analysis would be unreliable. T7B 21:24–22:13. Dr. Engstrom could not determine whether Hubert Vo was the Latino candidate of choice in HD149. T7B 23:9–12.

87. There is no basis in the record to determine whether the benchmark configuration of HD149 gave minority voters the ability to elect candidates of their choice.

6. Texas House District 74 (Southwest Texas)

88. Under the United States' exogenous election index, HD74 scores 20 in the benchmark and 100 in the enacted House plan. T8A 51:25–52:3, 57:5–22. The benchmark district did not typically support Hispanic candidates of choice. Alford Direct Testimony, PX175 at 17.

89. Representative Pete Gallego has represented HD74 since 1990. T8A 52:20–53:8.

90. The United States' expert did not perform RPVA for HD74 to determine the actual percentage of the Hispanic vote Representative Gallego received in past elections. T8A 55:16–56:1.

91. Representative Gallego enjoys a fourteen percentage point advantage over statewide Hispanic candidates of choice in HD74 due in part to his longtime incumbency. T8A 53:9–55:10. Representative Gallego's 18–year incumbency in HD74 might increase Anglo Republican crossover support. T8A 56:11–14.

92. Dr. Handley's methodology fails to take into account the incumbency advantage in districts like HD74. Alford Direct Testimony, PX175 at 18; T8A 55:23–56:1.

93. Dr. Handley's conclusion that HD74 has perfect ability to elect in the benchmark plan is based solely on Representative Gallego's success in endogenous elections. Alford Direct Testimony, PX175 at 17–18.

94. The only reason that HD74 could qualify as an ability–to–elect district in the benchmark House plan (if it does) is the presence of the popular long–term incumbent, Representative Pete Gallego. T8A 56:15–57:4. Representative Gallego is not running for reelection in HD74 in 2012. T8A 52:9–16; PX10; Alford Direct Testimony, PX175 at 18. There is no way to create an index value for the adopted plan that mathematically incorporates an incumbent's decision to seek or forgo reelection. *Id.* For that reason, reliance on endogenous elections to determine performance is problematic. *Id.* at 17.

95. The enhancement of exogenous electoral performance in HD74 under Plan H283 marks a substantial improvement in Latino voting strength over the benchmark plan by increasing to a near certainty the likelihood that Latino voters will have the ability to elect their candidates of choice in HD74. Using the OAG's 10–election index, HD74 elected 4 out of 10 minority–preferred candidates in the benchmark. The enacted plan increases minority performance to 10 out of 10 elections. Alford Direct Testimony, PX175 at 11, tbl. 3b.

7. House District 101 (Tarrant County)

96. In the enacted plan, HD101 is an open seat in Tarrant County. *See* PX14.

97. Under the benchmark plan, HD101 was located in Dallas County and had 61.3% Anglo CVAP, 18.4% Black CVAP, 16% Hispanic CVAP, and 3% Asian CVAP. *See* PX13.

98. In the enacted plan, HD101 has 42.9% Anglo CVAP, 28% Black CVAP, 19.7% Hispanic CVAP, and 7.8% Asian CVAP. *See* PX14.

99. The Texas Legislative Council's reconstituted election analysis indicates that Democrats will consistently prevail over Republicans in HD101 as drawn in Plan H283. *See* PX20 1472–73, 1977–78 (reconstituted general election results for enacted HD101 in 2008 and 2010).

100. The creation of HD101 as an open, Democratic–leaning, majority–minority citizen voting age population district in Tarrant County makes up for any diminution in minority voting strength that resulted from changes to HD149. *Cf.* PX19 1028–29, 1464–67, 2016–20 (reconstituted general election results for benchmark HD149 in 2006, 2008, and 2010).

101. Based on the full results of the reconstituted election analysis for the Texas House presented by Dr. Alford, there is no retrogression in the adopted plan. Alford Direct Testimony, PX175 at 9.

B. Discriminatory Purpose

1. Race–Neutral Redistricting Objectives

102. The Texas House of Representatives has 150 seats. In the 82nd Texas Legislature, the Texas House contained 101 Republicans and 49 Democrats. T1A 63:12–19; *id.* 133:2–4.

103. From the outset of his appointment as Chairman of the House Redistricting Committee, Representative Burt Solomons stated that the redistricting process would be "member driven," with every incumbent legislator afforded an opportunity to be reelected. T1A 133:18–134:10; T2A 45:25–46:12; PX7; PX71.

104. The opportunity to be reelected resulted in only pairing incumbents of the same party, where population shifts required that pairing be made. This resulted in the pairing of 12 Republicans (including four in Dallas County alone) and two Democrats. T2A 51:21–52:15.

105. The House redistricting plan protects incumbents, Republican and Democrat, with limited exceptions. Overall, it is an incumbent protection plan. T5A 122:12–124:13.

106. Of the fourteen incumbents paired in Plan H283, only two are Democrats. T1A 134:11–20.

107. Minority representatives protected their own districts and participated in drawing the maps for their own counties. The influence of Democratic representatives was limited only insofar as they did not have the ability to eliminate Republican incumbents or ensure an increase in the size of the Democratic delegation in the Texas House. T5A 122:12–124:13.

108. Democratic members of the Texas House had as much influence on the redistricting bills as would be expected—perhaps more—of a 49-member delegation in a 150-member body.

109. To the extent the district boundaries were not determined by traditional redistricting principles, Plan H283 was adopted with partisan, not racial, motives. T6B 29:7–10.

110. Speaker Joe Straus is regarded as trustworthy by Democratic members of the House. He does not harbor racial animus against any ethnic group. T6B 21:16–22. There is no evidence to suggest that Chairman Burt Solomons harbors racial animus against any group. Coleman Deposition at 15:12–14. Nor is there evidence to suggest that any member of the Texas House of Representatives harbors racial animus against any group. *Cf.* T6B at 21:23–22:16.

2. Sequence of Events

111. The Texas Legislature meets every odd–numbered year for a 140 calendar–day session. T1A 60:21–62:6. Members of the Legislature are paid approximately $600 per month. *Id.* Because of the Legislature's constitutional restrictions and the press of a busy calendar, if redistricting bills were not passed by the House Redistricting Committee and introduced on the House floor by April 2012, it is unlikely that they could have been enacted during the regular session. *Id.* at 65:8–66:3.

112. The 2011 legislative session also included the two–year state budget, fifteen agency sunset laws, public school finance legislation, and five "items" which were declared emergencies pursuant to

the Governor's constitutional authority to do so. T1A 74:6–25. The process was understandably hurried because of the volume of work, the short prescribed time, and the operating rules of the Legislature. T4B 69:12–72:4.

113. Pursuant to the Texas Constitution, if the Texas House and Texas Senate redistricting plans were not enacted during the regular session, they would have been delegated to the five–person Legislative Redistricting Board (LRB), consisting of the Lieutenant Governor, the Speaker of the House, the Attorney General of Texas, the Comptroller of Public Accounts, and the General Land Office Commissioner. T1A 62:15–22; TEXAS CONST. art. III, § 28.

114. As Intervenor–Defendant Senator Davis testified, neither Republicans nor Democrats wanted redistricting handed off to the LRB, so there was an incentive to enact the state plans prior to the end of the session. T4A 55:18–56:12.

115. The House Redistricting Committee was chaired by Representative Burt Solomons. Chairman Solomons testified that he relied on his staff throughout the process to provide legal opinions on redistricting and proposed maps. T4B 67:17–23.

116. The Texas Legislature drew H283 to achieve the following goals: (1) ensure that the process of drawing the House redistricting process was driven by House members; (2) comply with federal law; (3) comply with state law; (4) maintain compactness and contiguity; (5) keep each county in a single district except where division of population was necessary to comply with one–person, one–vote or to apportion surplus population; (6) preserve communities of interest; (7) avoid pairing incumbents where possible; and (8) where pairing was necessary, give incumbents a chance at reelection by pairing Democrats only with other Democrats and Republicans only with other Republicans. PTT 1499:15–1500:3.

117. The redistricting plan for the Texas House of Representatives was drafted primarily by Gerardo Interiano, an attorney on Speaker Joe Straus's staff. Ryan Downton, an attorney who served as general counsel to the House Redistricting Committee, also drafted parts of the Texas House plan. T1A 133:5–10.

118. In addition to the Voting Rights Act and the United States Constitution, the creation of the Texas House redistricting plan was guided by Article III § 26 of the Texas Constitution, which provides that House seats must be apportioned to counties based on the number of population in each as determined by the most recent United States Census. The Texas Constitution's limitation on dividing a county into multiple House districts is generally known as the county–line rule. To prepare for the redistricting process, Mr. Interiano attended a March 1, 2011 presentation on the county–line rule given to the House Redistricting Committee by David Hanna of the Texas Legislative Council. T4A 142:11–17; PX9.

119. Plan H283 contains one violation of the county–line rule in Henderson County, which was necessary to equalize population and thereby assure equal population under the United States Constitution. T1A 146:10–20. To the extent that other districts in Plan H283 cross county lines, they do so to accommodate the surplus population in various counties consistent with the Texas Constitution. PTT 1423:8–1426:3; TEX. CONST. art. III,, § 26.

120. Mr. Interiano was instructed to create a redistricting plan based on proposals from members of the Texas House. T1A 131:21–132:14. To that end, Mr. Interiano began working with House members before the release of block–level Census data. He estimated that he spoke to all but about ten House members during the redistricting process. T1A 132:15–133:1.

121. Prior to the release of a proposed State House map, state map drawers repeatedly met with representatives from minority groups such as the Mexican American Legal Defense and Education Fund ("MALDEF") and the Mexican American Legislative Caucus ("MALC"). T1B 16:18–18:2.

122. On March 1, March 15, and March 24, 2011, the House Committee on Redistricting held public hearings to solicit input from the public regarding the apportionment of the members of the Texas House of Representatives. PX36; PX37; PX38; PX39.

123. The House Redistricting Committee held two public hearings on the proposed House map. In order to provide members of the public ample opportunity to review and comment on the proposed House plan, one hearing was held during the week and one was held during the weekend. Solomons ¶ 17, PX148.

124. Pursuant to legislative rules every public plan, accompanying reports, and any amendments were accessible for viewing on the internet by legislative members and the public through "DistrictViewer," the Texas Legislative Council's web–based interactive application, which displays all public maps and reports on the internet. *See* PX71, April 13, 2011 Press Release; Tex. Leg. Council, Guide to 2011 Redistricting 16 (2010), *available at* http://www.tlc.state.tx.us/redist/pdf/Guide_to_2011_Redistricting.pdf.

125. On April 13, 2011, Representative Burt Solomons, Chairman of the House Committee on Redistricting, introduced House Bill 150, and released for public consideration an initial plan (H113) to apportion members of the Texas House of Representatives. PX71, April 13, 2011 Press Release.

126. Following the release of H113, the House Redistricting Committee held public hearings on April 15, 17 and 19, 2011. PX36 at 19–21; PX37 at 20–26.

127. At the first hearing, held on April 15, 2011, Chairman Solomons introduced a committee substitute plan (H134). PX38, April 15, 2011 House Redistricting Committee Hearing at 3:21–6:5.

128. A representative of MALDEF, Luis Figueroa, testified at the Redistricting Committee hearing held on April 15, 2011 and presented an alternative map, Plan H115. PX38, April 15, 2011 House Redistricting Committee Hearing at 10:6–13:10. Committee members questioned the viability of MALDEF's alternative map in light of its repeated violations of the county–line rule. *Id*. at 13:3–15:4.

129. At the April 15, 2011 hearing, Representative Veronica Gonzalez and other members of the public provided testimony regarding the proposed House map (H134). *Id*. at 129:7–18.

130. At the April 17, 2011 hearing, representatives of Texas LULAC, Linda Chavez, and the Mexican American Bar Association, Celeste Villareal, and other members of the public provided testimony regarding the proposed House map (H134). PX39, April 17, 2011 House Redistricting Committee Hearing Witness List.

131. The Legislature increased SSVR in HD90 and HD148 at the request of MALDEF and Representative Mike Villarreal, the Vice–Chairman of the House Redistricting Committee. T1B 10:7–18. Rep. Burnam stated on the floor of the Texas House that the SSVR in HD90 was increased by removing the African–American community. PX43 at S164–68. The changes to HD90 prompted a primary challenge from an Hispanic candidate. This is the first time Representative Burnam has been challenged in a Democratic primary since 1996. T2B 64:2–10, 64:24–65:6; PX101.

132. The floor debate on the House Plan was stopped for approximately three hours to address concerns of several African–American members in Harris County. During this time, the House Redistricting Committee and members of the Harris County delegation worked to make changes to the map to address the concerns of these members. All members of the Harris County delegation voted in support of the amendment that altered the House map. Solomons ¶ 21, PX148.

3. Open and Fair Procedures

133. The process for creating a House plan was a "member–driven" process. Chairman Solomons encouraged members of various county delegations where the counties contained a whole number of districts to work together as a dilatation to come up with agreed to maps. Solomons ¶ 9, PX148.

134. Democrat and minority House members actively participated in the redistricting process. The Vice–Chairman of the Redistricting Committee, Representative Mike Villarreal, a Latino Democrat, drafted the Bexar County map with the help of his delegation. Representative Joe Pickett, a member of the Redistricting Committee and an Anglo Democrat, took the lead in drafting the El Paso County map. Representative Eddie Rodriguez, a Latino Democrat, took the lead in drawing the Travis County map. Solomons ¶ 10, PX148.

135. The Texas Legislative Council is a statutorily–created, nonpartisan agency that provides legal, administrative and technical support to the Texas Legislature. (Tex. Gov. Code § 323.001 et seq.). Its services were available to every legislator, regardless of party affiliation or seniority. T4B 113:11–14.

136. Every legislator had unlimited access to the RedAppl mapping software through terminals installed in their chambers; in addition, public access terminals were maintained at the offices of the TLC, and legislators could also permit access to any aides or outside consultants. T1A 68:14–25; 70:11–19; T3A 42:25–43:9.

137. Most importantly, the evidence proved beyond question that all members of the House had an equal and fair opportunity to participate in the redistricting process. The United States' expert, Dr. Ted Arrington, confirmed that Republicans and Democrats alike participated in the process and protected incumbents: "In other words, this was an incumbent protection plan. It was also . . . representative driven, no question about it." T5A 123:6–8; *see generally id.* at 122:12–124:13.

138. The principal flaw in the process, according to Dr. Arrington, was the inability of Democratic representatives to increase the Democratic political strength of Latino–majority districts that elected

Republicans in 2010. *See id.* at 123:1–5 ("And you will notice that there is no allegation by me that districts that are currently represented by Hispanic Democrats were made non–effective. The districts that were changed so that they would be non–effective were districts that are held by Republicans who ran in 2010.").

139. Several Democratic legislators indicated that there was no House map for which they would have voted because voting for a map would potentially weaken future litigation positions. PTT 1480:9–19, 1481:11–13; *id.* 1613:21–1614:14.

Bexar County

140. The Bexar County delegation redrew its own districts under the leadership of Democrats Mike Villarreal, the Vice–Chairman of the House Redistricting Committee, and Ruth Jones McClendon, the leader of the delegation. T6B 6:19–25.

141. Representative Villarreal worked with members to coordinate the individual districts, and he assembled them into a county–wide map. T1A 155:11–157:24.

142. Representative John Garza, a freshman Republican representative of District 117, asked to have certain Republican–leaning areas included in his district, but his request was denied by Representative Villarreal because District 117's Spanish–surname voter registration had to be maintained above 50%. T1A 159:4–21.

143. Vice Chairman Villarreal initially proposed putting Somerset and Whispering Winds in Representative Garza's district. T6B 24:11–14. Representative Farias disagreed with Vice–Chairman Villareal on the removal of Somerset and Whispering Winds from his district. T6B 23:18–25:4.

144. Representative Joe Farias, a Democrat representing District 118, was ultimately unhappy with his district because he did not retain the communities of Somerset and Whispering Winds in his district. Instead, Somerset was included in District 117. T1A 159:24–161:3; T6B 8:21–9:2.

145. Representative Farias had an opportunity to offer an amendment on the House floor to move Whispering Winds and Somerset back into his district. T6B 25:6–9. The amendment offered by Representative Farias included precinct splits for the sole purpose of elevating racial statistics above 50.1% for District 117. Representative Farias did not offer his amendment with any discriminatory purpose, even though the amendment contained numerous precinct splits. T6B 18:16–20, 25:22–26:2

146. Vice Chairman Villareal insisted on Representative Garza's district being greater than 50% HCVAP. T6B 27:13–28:24; Garza Dep. 19:9–22, 26:24–27:14, 32:24–32:9.

147. Nine of the ten members of the Bexar County delegation, including Representatives Villarreal and McClendon, supported the final Bexar County map. T6B 13:18–24.

El Paso County

148. The El Paso County delegation is comprised of four Democrats and one Republican. All of the members of the El Paso County delegation agreed to the county–wide proposal. Margo Direct Testimony (Doc. 137-3) at 2–3.

149. After the El Paso County delegation agreed to the county–wide proposal, Representative Marquez asked Representative Margo if he would agree to revise the proposal to move into her district an area that would have been his. Representative Margo and the other members of the delegation revised to the originally agreed–to proposal to accommodate Representative Marquez. *Id.* at 3.

Harris County

150. Based on the advice of David Hanna, Chairman Solomons made the decision that Harris County would only be allocated 24 seats, rather than 25 seats. Solomons ¶ 12, PX148.

151. The House Redistricting Committee relied on demographic data and regression analyses conducted by the Office of the Attorney General to determine whether a seat was protected and performing under the Voting Rights Act. Solomons Direct Testimony, PX148 ¶¶ 14–15.

Hidalgo County

152. The drafting of HD41 was based primarily on political shading. T7B 61:14–15.

153. In drawing District 41, Mr. Interiano activated political shading in RedAppl to identify Republican voters and draw a district in which Representative Peña would have as good a chance at reelection as possible. T1A 164:2–29

154. Mr. Interiano was asked to use the 2010 Texas gubernatorial election, the 2008 presidential elections, and the 2010 Attorney General election to produce political shading when drawing HD41. T7B 57:11–24.

155. Gerardo Interiano also relied on Representatives Ryan Guillen, a Democrat, and Aaron Peña, a Republican, who made specific requests to include parts of Hidalgo County in HD41. T1A 162:19–22; T7B 61:23–62:15.

156. Mr. Interiano testified that other representatives from Hidalgo County submitted proposals to him but were not as involved in the redistricting process. Given the demographics and political leanings of the area, Mr. Interiano did not believe that it was possible to draw a district that was not heavily Latino and Democratic. T1A 163:2–164:1.

157. Mr. Interiano acknowledged, however, that District 41 in Plan H283 would not be a Republican district, and Representative Peña would not be elected unless he had the support of the Latino community and received crossover votes from Democrats. T1A 164:2–19.

Nueces County

158. Based on the advice of David Hanna, Chairman Solomons believed it would be a violation of the Texas Constitution to assign three seats to Nueces County unless the Voting Rights Act required it. It was not possible to draw two Latino protected districts in Nueces County, and as a result, Chairman Solomons decided that the better approach would be to draw one protected district. Solomons Direct Testimony, PX148 ¶ 13.

Tarrant County

159. Every member of the Tarrant County delegation supported the map proposed to the House Redistricting Committee and signed a copy of it to indicate their support. Geren Direct Testimony (Doc. 137–1) at 3.

160. On April 19, 2011, Chairman Solomons offered an amendment to the Tarrant County map that changed two districts: District 99 (Geren–R) and District 90 (Burnam–D). The effect of the amendment was to increase the number of Latino voters in District 90 by moving a predominately Latino part of Representative Geren's district into Representative Burnam's district. This amendment was offered in response to a recommendation by MALDEF at a Redistricting Committee hearing on April 15, 2011. Representative Burnam did not support this amendment. Geren Direct Testimony (Doc. 137–1) at 3–4.

161. Dr. Kousser opined that the Legislature's effort to increase the SSVR of HD90 above 50% was evidence of racially discriminatory intent. T5A 31:19–33:15. Dr. Kousser was not aware, however, and did not consider in rendering his opinion the fact that the amendment to HD90 that increased SSVR over 50% was proposed by MALDEF. T5A 34:3–19. In fact, the evidence showed that a version of HD90 similar to the district in the enacted plan was submitted to the Committee by MALDEF in Plan H115. PX151.

4. Alleged Overpopulation of Minority Districts

162. Dr. Morgan Kousser and Dr. Ted Arrington opined that population deviations among House districts provided evidence of discriminatory purpose because they demonstrated a pattern of systematically overpopulating minority districts. T5B 57:4–23.

163. Dr. Kousser's opinion was based on a comparison of the total population of districts in urban counties with multiple wholly contained districts. T5A 12:20–15:19. Dr. Kousser focused on urban counties to control for the effect of the Texas Constitution's county–line rule, which would not require population variation among districts in a single county. Dr. Kousser identified six underpopulated

Latino districts and thirteen overpopulated Latino districts in seven urban counties. DX5 at 64–69 & figs. 6, 11.

164. The pattern of population deviations in the Texas House map does not support Dr. Kousser or Dr. Arrington's opinion as to discriminatory purpose. Both experts failed to apply consistent standards in their analysis. Each was quick to dismiss the underpopulation of Latino districts in El Paso County as the result of the county–wide population deficit (El Paso was entitled to 4.78 House districts). Neither accounted, however, for the fact that many overpopulated Latino districts were located in counties with excess population. Bexar County, for instance, had enough population for 10.23 ideally populated districts—not enough to warrant an additional seat, but enough to require the average district size to exceed the statewide ideal population. The same was true of Harris County—the largest in the state—which had enough population for 24.41 ideally sized districts. *See* PX8.

165. When the natural overpopulation of Bexar and Harris County is accounted for, the balance of population deviations shifts dramatically. In fact, Dr. Arrington admitted on cross–examination that there is no systematic overpopulation of minority districts in the House plan if the County Line Rule is taken into account. T5B 61:8–11 ("Q: There's no systematic overpopulation of minority districts when the County Line Rule is taken into account, is there? A. That's correct.").

166. The evidence does not support Dr. Kousser and Dr. Arrington's conclusion that systematic overpopulation of Latino districts in the Texas House map demonstrates discriminatory purpose. The opinions offered by Dr. Kousser and Dr. Arrington on this subject are unfounded, and their testimony is not credible. There is no discernible pattern of underpopulating or overpopulating House districts in Plan H283.

167. The Court finds as a matter of fact that there is no evidence that the Texas Legislature intentionally or systematically overpopulated Latino– or African–American–majority districts, much less that it did so with a discriminatory purpose.

5. Split Voter Tabulation Districts

168. The Texas Legislature had no general policy regarding split precincts. T7B 64:2–7.

169. Members often requested precinct splits to benefit their constituents by providing clearer boundaries between districts. T7B 64:2–7 (Interiano). The drafters of the Texas House redistricting plan split VTDs to accommodate the requests of Republican and Democratic members. T2A 96:16–22 (Downton).

170. Representatives Garnet Coleman and Joe Farias, both Democrats, testified that splitting VTDs was common in redistricting. T3B 64:15–22; T6B 18:7–15, 25:22–26:8, 28:21–29:3. Dr. Arrington testified that split VTDs in the House map were part of the basis of his opinion on discriminatory purpose. T5B 23:3–6.

171. Dr. Kousser opined that the shape and split VTDs in HD41 demonstrated discriminatory intent because the drafter of the map clearly acted intentionally to include Anglo population. T5A 42:5–14; 52:10–20. Dr. Kousser conceded that he did not know what information the drafter considered, that his report did not include a map showing racial distribution of population in HD41 as shown on RedAppl, and that he had not looked at a politically shaded map of Hidalgo County. T5A 51:18-29, 62:24–63:3; PX149 (RedAppl maps showing racial and political shading of VTDs in HD41). Dr. Kousser also admitted that a racially shaded map of HD41 did not provide any basis to conclude that the lines were drawn based on race. T5A 75:7–12.

172. Dr. Arrington acknowledged that VTDs could be split for a number of reasons other than purposeful division of racial groups. The race–neutral reasons for splitting VTDs included (a) roads, (b) city boundaries, (c) universities, and (d) donors. T5B 27:14–29:1; PX105. Dr. Arrington also

acknowledged that VTDs could be split on the basis of race for purposes of compliance with the Voting Rights Act. T5B 30:17–31:14.

173. Dr. Arrington acknowledged that VTDs split for a non–racial purpose would still show up as racial VTD splits in the "z–score" analysis in his expert report. T5B 29:2–20. Dr. Arrington admitted that he did not control for race–neutral reasons for split VTDs in the Texas redistricting maps. T5B 29:21–30:16. Moreover, Dr. Arrington's analysis of VTD splits could not distinguish between permissible and impermissible uses of race.

174. The Legislature split a precinct in the City of Humble to accommodate a compromise between Representatives Huberty and Thompson over who would represent Humble. T7B 68:24–69:21.

175. Several precincts were divided in HD145 and HD148 in order to capture specific areas to maintain both districts above 50% SSVR. T7B 66:8–68:9.

176. Dr. Arrington conceded that Mr. Longoria, Rep. Peña, and Rep. Guillen had lived in Hidalgo County all their lives and would be able to identify areas based on comparative wealth rather than racial makeup. T5B 34:24–35:14.

177. In evaluating split VTDs, Dr. Arrington did not consider Texas Election Code's requirement that precincts must be redrawn if they contain less than 100 or more than 5,000 people. T5B 37:21–38:18; Tex. Elec. Code § 43.032; PX152. Dr. Arrington acknowledged that precincts with substantial population growth would have to be redrawn regardless of redistricting. *Id.* at 38:19–39:6.

178. Although he acknowledged that the intervenors' proposed maps could have a statistically significant "z–score," Dr. Arrington admitted that he did not calculate a "z–score" for any of the intervenors' proposed maps. He maintained that even if an intervenor's map showed a statistically significant "z–score," it would be distinguishable from the State's proposed map because the State's map was enacted with a discriminatory purpose while the intervenors' maps were not. T5B 37:1–9.

179. Dr. Arrington based his conclusion that the State's map was enacted with a discriminatory purpose on his finding that the State's map was retrogressive. T5B 37:1–9.

180. The Court concludes that Dr. Arrington's opinion about discriminatory purpose, to the extent it is based on split VTDs, is not supported by the record or by a reliable analysis. The Court therefore finds, as a matter of fact, that Dr. Arrington's testimony and opinion on the subject are not credible.

181. Mr. Interiano split precincts when drawing HD41 in order to make the district as Republican as possible and to prevent a pairing of Representatives Peña and Veronica Gonzales. T1A 165:24–167:2; T7B 60:19–21. In some parts of the district, precincts were split so that the district boundary would follow a road or make the lines straighter. T1A 168:6–17.

182. Mr. Interiano testified that he did not rely on racial information when he split precincts in HD41. He did not believe that information was available, and in any event, he was not instructed by Representatives Guillen or Peña to draw any lines based on race. T1A 168:22–169:2.

183. Racially shaded maps presented by the DOJ and intervenors do not show a strong correlation between Anglo population and the boundaries of HD41. DX784; *cf.* PX149. More importantly, there is no evidence that the drafters of HD41 actually used racial shading at any time during the creation of the district.

184. Jaime Longoria, a resident of Hidalgo County, identified numerous race–neutral reasons for VTD splits in HD41. For example, he identified several areas that were included in HD41 in split precincts as exclusive or higher–income. He also identified areas that were excluded in split precincts as undesirable for race–neutral reasons, for example, the presence of a sewer plant. T3B 15:6–12, 19:8–20, 20:19–21:1, 21:12–22:2, 22:25–23:9, 29:3–19; *see also* Doc. 175.1 at 55.

185. Politically shaded maps presented by the State of Texas show that the boundaries of HD41 correspond with areas of highest Republican voting strength in Hidalgo County. PX149 at 4.

III. Texas Congressional Plan (Plan C185)

A. General Findings

186. Ryan Downton was the principal drafter of the congressional redistricting plan. T2A 45:23–46:12; T7B 71:13–16. Congressional districts must be drawn within one person of the ideal district size. Congressional districts therefore must be "zeroed out" by the map drafter. T2A 89:9–22; T7B 71:21–72:2.

187. Gerardo Interiano periodically helped Mr. Downton with the congressional map to zero out population deviations. T7B 71:17–72:2. Zeroing out usually occurs in urban areas because precincts and blocks are larger in rural areas, making it harder to find single digit blocs to reach the required population deviation. T7B 73:16–74:7.

B. Retrogression

188. Under the benchmark plan, congressional districts 9, 18, and 30 provide African–American voters with the ability to elect candidates of their choice. Under the enacted plan, congressional districts 9, 18, and 30 continue to provide African–American voters with the ability to elect candidates of their choice. Handley Congressional Report, DX327 at 5–6.

189. Under the benchmark plan, Latinos make up the majority of citizen voting age population and registered voters in seven congressional districts: 15, 16, 20, 23, 27, 28, and 29.

190. Two of these districts—23 and 27—are presently represented by Republicans Francisco "Quico" Canseco and Blake Farenthold, respectively. The rest are represented by Democrats. PX17.

191. Latinos make up the majority of citizen voting age population in eight districts under the enacted plan: 15, 16, 20, 23, 28, 29, 34, and 35. Latinos make up the majority of registered voters in all of these districts except CD35, which has 43.8% Spanish–surnamed voter registration. PX12.

192. The United States and Intervenors allege that Districts 23, 25, and 27 are potentially retrogressive. T6A 136:24–137:1, 137:23–138:3.

193. Reconstituted election analysis of the Congressional map shows that under any index, the ability to elect statewide remains the same or increases compared to the benchmark, whether CD25 is counted or not. Alford Direct Testimony, PX175 at 22–23; T7A 43:22–44:19.

1. Congressional District 23

194. The Texas Legislature increased HCVAP and SSVR in CD23 over benchmark levels. *See* PX11; PX12.

195. The State's reconstituted election analysis showed that the Latino candidate of choice was elected in three of the OAG 10 elections in benchmark CD23 and one of ten elections in the enacted district. Alford Direct Testimony, PX175 at 23 tbl. 4; PX65.

196. The United States' expert concluded that CD23 retrogressed because Democrat Ciro Rodriguez won 2 out of 3 endogenous elections in the benchmark district, and the enacted district scored 40 on Dr. Handley's exogenous index. T8A 60:25–61:8, 63:13–18.

197. If the endogenous score for CD23 had been 1 out of 3, Dr. Handley would not have considered it to be an ability–to–elect district in the benchmark. T8A 16:16–24.

198. Dr. Handley relied on the December 12, 2006 special runoff election held in CD23 between Congressman Ciro Rodriguez and then–incumbent Congressman Henry Bonilla to score a victory for the Hispanic candidate of choice in her endogenous index of CD23, based on Rodriguez securing 54.28% of the vote. T8A 64:7–17.

199. A special runoff was held in CD23 in 2006 because no candidate received a majority of the overall vote in the first runoff following the court redraw on CD23.T8A 64:18–24.

200. The initial runoff in CD23 occurred the same day as every other general election. The incumbent Congressman Henry Bonilla received far more votes than any other candidate in the initial runoff, where 124,000 voters cast their ballots, as opposed to the special runoff where only 70,000 ballots were cast. T8A 66:21–67:2.

201. General election days are more indicative of future elections in CD23 and therefore present better indicators of voting strength for endogenous analysis purposes. T8A 67:3–8.

202. Representative Bonilla was more successful in the initial runoff because there was no primary held in 2006, per court order. T8A 67:13–22.

203. Periodicals from 2006 suggest that Representative Bonilla lost the special runoff election due to significant election contributions from the Democratic National Committee and the personal appearance and campaign efforts of President Bill Clinton. T8A 67:19–68:1.

204. The 2006 special runoff election in CD23 is not a reliable indicator of ability to elect because the election took place under unusual circumstances. T8A 68:1–9.

2. Congressional District 25

205. Congressional District 25 in the benchmark plan is a majority–Anglo district represented by Democrat Lloyd Doggett. PX11; PX17. African–American and Hispanic voters do not vote cohesively in Travis County primary elections. T7B 49:15–24; Engstrom Expert Report, DX725 at 26; Alford Direct Testimony, PX175 at 26, Appendix C tbl. C2.

206. Congressman Doggett has not had a primary opponent in any election conducted under the benchmark plan. PX17.

207. That Congressional District 25 consistently elects a Democrat does not make it an ability to elect district under Section 5 of the Voting Rights Act. Alford Direct Testimony, PX175 at 26–28.

208. There is no evidence that CD25 provides any particular minority group with the ability to elect candidates of its choice. Alford Direct Testimony, PX175 at 26.

209. The evidence demonstrates that minority voters in CD25 do not have the ability to elect candidates of their choice without the support of Anglo voters. Alford Direct Testimony, PX175 at 26.

210. Congressional District 25 is not an ability–to–elect district in the benchmark plan. *Id.*

211. The alteration of CD25 in the enacted plan does not diminish the ability of minority voters to elect candidates of their choice. *Id.*

212. Travis County is a majority–Anglo county, and CD25 is a majority–Anglo district. *See* PX11. In the benchmark plan, the district is 63.1% Anglo, 25.3% Hispanic; and 9% Black CVAP.

213. Representative Dawnna Dukes, the current representative of Texas House District 46, testified that CD25 provides minority voters with the ability to elect candidates of their choice because a tri–ethnic coalition of African–American, Anglo, and Hispanic voters elects Democratic candidates. T3B 85:1–23.

214. Representative Dukes testified that the so–called tri–ethnic coalition consists of Democratic organizations and African–American, Anglo, and Hispanic community leaders who join together to support minority and female candidates for office. *Id.*

215. The tri–ethnic coalition only endorses Democratic candidates, *id.* 103:19–24, and it frequently works to ensure that its chosen candidate is the only candidate running in a given election. *Id.* 105:15–21; PX138–147.

216. The tri–ethnic coalition's success depends on Anglo support for Democratic candidates. *Id.* 86:1–10.

217. Anglos in CD25 do not vote as a bloc to defeat minority candidates of choice. Alford Direct Testimony, PX175 at 26. The evidence also confirms that Blacks and Hispanics in CD25 do not vote cohesively in Democratic primaries. *Id.* at 27, Appendix C tbl. C2.

218. Benchmark CD25 did not provide Latino or African–American voters with the ability to elect candidates of their choice. The modification of CD25 in the enacted plan is therefore not retrogressive.

3. Congressional District 27

219. Congressman Blake Farenthold, a Republican, has been the incumbent in District 27 since being elected in 2010. T6A 16:10–15; PX11.

220. In the benchmark plan, District 27 has 59.4% SSVR and 63.8% HCVAP. PX11.

221. In the enacted plan, District 27 has 36.8%% SSVR and 41.1% HCVAP. PX12.

222. District 27 in the benchmark plan consisted of Nueces, Kleberg, Kenedy, and Willacy County, most of Cameron County, and the southwest portion of San Patricio County. PX11.

223. The State's reconstituted election analysis shows that District 27 performed in 6 out of 10 elections in the benchmark plan and performs in 0 out of 10 elections in the enacted plan. PX175 at 23.

224. Benchmark CD27 was reconfigured in the enacted plan into CD34, which retains all of Cameron, Kleberg, Kenedy, and Willacy County from benchmark CD27. PX12.

225. Plan C185 creates CD34 as an open district anchored in Cameron County. PX12; PX175 at 24. District 34 has 71.1% SSVR and 71.7% HCVAP. PX12.

226. District 34 in the enacted plan shows perfect exogenous election results in both the State's reconstituted election analysis and the DOJ's exogenous index. *Id.*

227. The reconfiguration and enhancement of benchmark CD27 into the enacted CD34 marks a substantial improvement in Latino voters' ability to elect their candidate of choice over the benchmark. PX175 at 23–24. Any diminution in Latino voters' ability to elect caused by the reconfiguration of CD27 is more than offset by CD34.

C. Discriminatory Purpose

1. Congressional District 23

228. Congressional District 23 was drawn with two goals: (1) maintain or increase benchmark levels of SSVR and HCVAP; and (2) provide the incumbent, Republican Francisco "Quico" Canseco with a chance to be reelected. T2A 78:13–16, 80:18–81:3.

229. Ryan Downton relied on SSVR data when configuring the boundaries of CD23 in order to maintain the benchmark population levels. T2A 78:13–16. Mr. Downton relied on SSVR data for

Voting Rights Act purposes (Section 2 and/or Section 5) in drafting CD23, CD20, and CD35. T2A 77:24–84:20, 104:10–15.

230. In order to ensure that CD23 remained at benchmark population levels after some of its population was moved to CD20, it drew population from Hispanic areas. T2A 77:24–79:14.

231. At the time he was drafting CD23, Mr. Downton assumed that varying levels of Republican performance in otherwise identical Latino–majority precincts indicated varying levels of Latino Republicans. T2A 158:5–18. Given the choice of two otherwise identical Latino–majority precincts, Mr. Downton would select the precinct with higher Republican political performance. T2A 109:7–16. Mr. Downton believed he was selection Latino–majority precincts with higher numbers of Latino Republican voters. T2A 158:12–18.

232. There is no evidence that the drafters of the congressional map consciously excluded high–turnout Latino precincts or consciously included low–turnout Latino precincts when drawing CD23. Mr. Downton did not consider turnout data when drafting the congressional redistricting plan. T2A 88:16–19, 151:20–24.

233. In a November 2010 e–mail, from Eric Opiela to Gerardo Interiano, Mr. Opiela asked for data that would allow him to discover a "nudge factor," which he believed would identify high–registration but low–performing Hispanic precincts. DX304.

234. Even if the Legislature could have targeted high–registration but low–turnout Latino areas, there is no evidence that any of the map drafters did so. The evidence indicates, to the contrary, that the ratios probative of Latino turnout in CD23 went in the opposite direction of that suggested by Mr. Opiela's "nudge factor." The ratio of SSRV to HCVAP increased from 87% in the benchmark to 91.1% in the enacted plan. PX11; PX12. The ratio of SSRV to total Hispanic population increased slightly from 41.49% in the benchmark to 42% in the enacted plan. PX11; PX12.

235. Under Plan C185, CD23 maintains or increases HCVAP and SSVR levels over the benchmark plan. *Compare* PX11 (58.4% HCVAP, 52% SSVR) *with* PX12 (58.5% HCVAP, 54.1% SSVR). The ratio of SSVR to HCVAP in the benchmark and enacted plans demonstrates that the changes to CD23 increased the proportion of eligible Latino voters who are actually registered to vote.

2. Congressional District 25

236. The United States did not object to CD25 on the basis of discriminatory purpose.

237. There is no evidence that the Texas Legislature drew CD25 with a racially discriminatory purpose.

3. Congressional District 26

238. In the benchmark and enacted congressional plans, CD26 is a Denton County–based district that extends in a narrow strip into Tarrant County. PX11; PX12.

239. The Legislature extended the southern portion of CD26 in response to concerns that the original, shorter, extension separated two Hispanic communities in the city of Fort Worth. T2A 68:8–69:9.

240. The southern extension was narrowed in response to Congressman Kay Granger's request to keep a development project in CD12. T2A 69:2–9.

241. The extension was modified further to accommodate Democratic State Representative Marc Veasey's request that an African–American community in Fort Worth be moved from CD26 to CD12. T2A 69:14–17.

242. The State of Texas has established that CD26 was drawn for permissible political purposes. The record does not contain evidence of racially discriminatory purpose to rebut that evidence.

4. Congressional District 27

243. The House and Senate changed the configuration of District 27 so that the incumbent, Representative Blake Farenthold, would have a good opportunity to be reelected. T2A 70:19–71:19; Seliger ¶ 18, PX163.

244. Senator Eddie Lucio, Jr. and Representatives Eddie Lucio, III and Rene Oliveira, all Democrats from Cameron County, asked that Cameron County form the anchor of a congressional district (CD34) independent from Nueces County. T1A 88:14–89:6; T2A 70:19–72:3; PX170.

245. The State of Texas has established that CD27 was drawn for permissible political purposes. The record does not contain evidence of racially discriminatory purpose to rebut that evidence.

5. Open and Fair Procedures

246. The House of Representatives and the Senate each worked on their own versions of a Congressional map during the regular session. Because the Senate liked some of the concepts in the House plan, Chairman Seliger and Chairman Solomons decided that the House would be the primary architects of the Congressional plan and that the Senate would carry the bill. Declaration of Kel Seliger ¶ 13.

247. Senator Seliger and Doug Davis looked to see whether it was possible to create additional Latino opportunity districts in Harris County and Dallas County. They determined that they could not draw an additional district in either region that satisfied the requirements of Section 2 of the Voting Rights Act. Seliger ¶¶ 14–15, PX163.

248. There is no evidence that the Legislature conducted statewide hearings on proposed redistricting plans during the legislative session in 2001. T3B 114:24–115:1.

249. During the 2001 redistricting process the legislature failed to pass any maps for the House and Senate, which resulted in the LRB being activated. T3B 60:24–61:5. The Texas House was controlled by Democrats in 2001, led by Democratic Speaker Pete Laney. T3B 61:6–12.

250. Alexander Green, Eddie Bernice Johnson, and Sheila Jackson Lee, Texas' three African–American members of Congress, complained that under Plan C185, their district offices are not included in their congressional districts. T5B 13:13–14:11.

251. The RedAppl program does not identify the offices of congressmen. The only candidate–specific information in RedAppl is a star indicating candidate residence. T7B 57:25–58:22.

252. At the beginning of the redistricting process, the Texas Legislative Council sent a letter to every elected member of Congress, the Texas House, the Texas Senate, and the State Board of Education asking them to confirm their home address. The designation of member residences in the RedAppl program is based on information provided by the elected officials. T7B 57:25–58:14.

253. Congresswoman Johnson complained that her house was not included in her congressional district. T2B 79:16–80:10, 80:19–23. RedAppl indicates, however, that her house is within CD30 in the enacted plan. PX12.

254. Congressman Gene Green and Congresswoman Sheila Jackson Lee were the only two Democratic congressional members to request a personal meeting with Chairman Solomons. During the meetings, neither congressperson provided him with any details requesting specific changes to their districts. Declaration of Burt Solomons ¶ 8.

255. Throughout the legislative session, Chairman Seliger had meetings with members of Congress to discuss their preferences for their districts. Declaration of Kel Seliger ¶ 12, PX163.

256. Senator Seliger met with Congresswoman Shelia Jackson Lee in his office and later spoke with her on the phone shortly before the map was up for a vote. Senator Seliger was unable to accommodate a specific request she made for her district because it was days before the floor vote. Senator Seliger confirmed that even though Congresswoman Lee's request was not accommodated, the proposed plan did not reduce her chance of getting reelected. *Id.*

257. There is no evidence that Congresswoman Lee alerted any member of the Texas Legislature that her district office had been excluded from her district.

258. There is no evidence that Congresswoman Johnson made any specific requests to the Texas Legislature regarding the 30th Congressional District. Nor is there any evidence that Congresswoman Johnson alerted any member of the Texas Legislature that her district office had been excluded from her district.

259. There is no evidence that Congressman Alexander Green made any specific requests to the Texas Legislature regarding the 9th Congressional District. Nor is there any evidence that Congressman Green alerted any member of the Texas Legislature that his district office had been excluded from his district.

260. Certain Republican members of Congress made specific requests to the Texas Legislature regarding their districts. DX396 at 69; DX398 at 61; DX401 at 19–20. There is no evidence that the Legislature or any staff member affirmatively reached out to Republican members of Congress to consult with them about proposed changes to their districts.

261. The Legislature also responded to specific requests from Democratic members of the Texas House and Senate. PX170.

262. There is no evidence that the Legislature intentionally removed any member of Congress's district office from his or her district. T7B 94:16–95:19. The evidence indicates, to the contrary, that the Legislature accommodated the requests of minority legislators when specific requests—including requests to move a district office—were brought to the map–drawers' attention. T1B 22:20–23:13; T7B 95:5–17.

263. There is no evidence that the Legislature's failure to include any congressman's district office in a redrawn congressional district was done for the purpose or will have the effect of denying or abridging any person's right to vote or ability to elect his candidate of choice.

6. Contemporary Statements

264. An individual named Eric Opiela sent various e–mails to Gerardo Interiano regarding congressional redistricting. PX163; PX164; DX287.

265. Mr. Opiela was employed during the 82nd legislative session as counsel for the Texas Republican congressional delegation. Opiela Dep. (10/17/2011) at 104:2–25. There is no evidence that Mr. Opiela was employed by the Texas Legislature or any member during any session of the 82nd Texas Legislature.

266. Dr. Arrington, the United States' expert on discriminatory purpose, testified that the Opiela "nudge factor" e–mail was a key finding of his research. T5A 115:12–116:19; DX287. Dr. Arrington did not know whether Mr. Opiela received the information he wanted from Mr. Interiano or anyone else. T5A 116:13–19.

267. No evidence indicates that Mr. Opiela succeeded in his efforts to develop the "nudge factor" formula.

268. The Legislature did not utilize Mr. Opiela's "nudge factor" analysis. Nor could they have. It is not possible for someone using the RedAppl system to create the "nudge factor" statistic hypothesized by Mr. Opiela. Deposition of Clare Dyer 62:24–63:10.

269. Mr. Opiela did not succeed in exerting the influence he sought to exert on the congressional redistricting plan. T5B 85:8–87:17, 90:25–91:15; PX164; PX163. Mr. Opiela had no actual control over the redistricting process, as evidenced by his frustration at the congressional plan. T5B 85:8–87:17. Whatever his goals were, Mr. Opiela did not get what he wanted in the congressional plan. T7B 96:23–97:24; T5B 87:10–17, 90:25–91:15; PX164; PX163.

270. Shading in RedAppl is selected by choosing one of two categories: population or election data. T7B 70:8–18.

271. Spanish Surnamed Voter Registration is based on data from the Secretary of State and is displayed as an election statistic in RedAppl. *Id.*

272. Election statistics can only be shaded in RedAppl at the county or VTD level but not at the block level. T7B 70:13–14.

273. Because SSVR is a function of the election analysis in RedAppl, SSVR shading is available only at the county and VTD level. T7B 58:16–20, 65:8–15.

274. Shading for SSVR is not available at the block level in RedAppl. Claire Dyer Deposition at 60:13–61:20.

275. Precincts show the same SSVR shading across blocks when SSVR shading is displayed in RedAppl. T7B 71:7–9.

276. Mr. Interiano was not aware that RedAppl allowed a user to show racial shading at the block level because he relied on SSVR. T7B 70:14–18.

IV. Texas Senate (Plan S148)

A. Retrogression

277. The Davis Intervenors, the Texas State Conference of NAACP Branches, LULAC, and the Texas Legislative Black Caucus allege that the enacted Senate Plan (S148) is retrogressive. Their retrogression argument hinges on whether Texas transformed Senate District 10 (SD10) from an ability–to–elect district in the benchmark plan (S100) into a non–performing minority district in S148. Joint Trial Br. (Doc. 141) 8–9. The evidence does not support a finding of retrogression.

278. SD10 is located in Tarrant County and includes large portions of the Fort Worth metropolitan area. PX15. The district has a majority Anglo VAP of 52.7%, a Hispanic VAP of 24.8%, and a Black VAP of 24.8%. T4A 51:2–16.

279. Viewing only citizen demographic figures, SD10 has a 62.7% Anglo CVAP, a Hispanic CVAP of 15.1% and a Black CVAP of 18.3%. *Id.* 52:10–53:4.

280. Senate District 10 is currently represented by Democrat Wendy Davis, who was elected in 2008 to a four–year term.

281. The Texas Democratic Party decided to devote its resources primarily to the Davis campaign for Senate District 10 rather than investing in other statewide races. T4A 26:5–15.

282. There is substantial evidence that Blacks and Hispanic voters do not vote cohesively in Democratic primary elections in the benchmark SD10. *See* Alford Direct Testimony, PX175 at 30, Appendix C tbl. C3; PX135. In 7 of 8 contested primaries with a Hispanic candidate on the ballot, Hispanic and Black voters had different candidates of choice. Alford Direct Testimony, PX175 at 30.

283. Senator Davis was unopposed in the 2008 primary election. T4A 58:16–17; PX135.

284. When Davis ran for the Senate, SD10 was represented by Republican Kim Brimer. T4A 16:6–16. Senator Brimer filed a lawsuit to exclude Davis from the ballot. The Democratic Party participated in that lawsuit as an interested party. Senator Brimer's lawsuit was unsuccessful. T4A 20:2–18.

285. SD10 traditionally supports Republican candidates. Alford Direct Testimony, PX175 at 30; PX21. Senator Davis is the sole exception. Senator Davis won her 2008 election by approximately 7,100 votes out of over 288,000 cast. T4A 63:3–11; PX31 at 14.

286. The Libertarian candidate received more votes than Senator Davis' margin of victory. T4A 63:13–16; PX31 at 14.

287. Senator Davis did not win a majority of votes cast in the 2008 election for Senate *Dis*trict 10. T4A 62:16–63:7.

288. Senator Davis' 2008 Republican incumbent faced an ethics scandal in the months preceding the election. T4A 68:20–69:21; PX108. Senator Davis believes her opponent's scandal aided her politically. T4A 69:16–25.

289. The Lone Star Project, a partisan blog formerly affiliated with the Democratic Trust, reported that Senator Brimer was surprisingly weak going into the 2008 campaign. T4A 66:21–67:21, 68:13–18; PX106.

290. Every other Republican statewide candidate prevailed in SD10 during the 2008 election cycle. T4A 63:19–65:2. Republican statewide candidates also prevailed in prior and subsequent elections. PX21.

291. 2008 SD10 election showed 25.8% Anglo crossover support for Sen. Davis. T7A 33:7–9 (Alford).

292. 25.8% cross–over voting by Anglos in SD10 is not extreme polarization. T7A 33:12–16 (Alford).

293. The decisive factor in Sen. Davis' 2008 election was not the degree in change in minority support but a much higher level of Anglo crossover voting. T7A 35:14–19 (Alford).

294. SD10 is a 63% Anglo majority district where the change in Hispanic voting will not make a significant difference. T7A 35:20–23 (Alford). A 63% Anglo majority could not have afforded a minority group the ability to elect the candidate of its choice. *Id.*

295. Sen. Davis was elected on the basis of Anglo crossover voting. T7A 36:24–36:1 (Alford).

296. Endogenous elections are useful to determine cohesion and polarization in a Section 2 *Gingles* analysis, but they are not useful for a Section 5 comparison where no endogenous results are available for any enacted plan. Exogenous elections are used for comparisons. T7A 37:8–19 (Alford); Alford Direct Testimony, PX175 at 18 n.4.

297. Exogenous elections in SD10 from every election during the last decade show that a Republican candidate defeats any Democratic candidate. T7A 38:15–16 (Alford). Indeed, Senator Davis's 2008 election was the only instance in which minority voters successfully elected the candidate of their choice in SD10. *Id.*

298. SD10 was drawn as a Republican district that had the potential to develop into a minority ability–elect district, but despite Sen. Davis election in 2008 the amount of progress towards becoming an ability to elect district is much less than expected. T7A 39:23–40:8 (Alford).

299. Senator Davis never proposed an amendment that would have maintained the benchmark configuration of SD10. T4A 84:16–18. Rather, both of Senator Davis's amendments proposed districts drawn for the specific purpose of including more Latino and African–American population in SD10. *Id.* 85:21–25.

300. Reconstituted Election analysis of the Senate map shows that under all three indices, minority voters' ability to elect remains the same or increases when compared to the benchmark, whether SD10 is counted or not. T7A 44:17–19 (Alford). Because the Senate map did not alter minority voters' ability to elect the candidates of their choice, the enacted map did not retrogress. *Id.*

B. Discriminatory Purpose

301. The Senate Select Committee on Redistricting began holding public hearings across the State in the fall of 2010. Declaration of Kel Seliger ¶ 6, PX163. Lieutenant Governor Dewhurst asked Senator Seliger and Doug Davis to hold off on moving the Senate redistricting legislation forward until the Legislature passed a budget. *Id.* at ¶ 7.

302. During the time period between when the census numbers were released and the Legislature passed a budget, Senator Seliger and Doug Davis met with almost every Senator to discuss their preferences for their districts. *Id.*

303. Senator Seliger and Doug Davis relied on the Office of the Attorney General, Professors Guinn and Morrison, and Bob Heath to provide counsel and advice regarding the proposed Senate and congressional plan and determine if the demographics, performance, or any other attribute of a proposed district would raise concerns under the Voting Rights Acts. *Id.* at ¶ 4.

304. Senator Kel Seliger, the Chairman of the Senate Select Committee on Redistricting, maintained an open door policy, by which any of his 30 colleagues in the Senate could meet with him at any time. T2A 12:5–8.

305. Sen. Seliger and his committee counsel, Doug Davis, received substantial bipartisan input from the other senators and their staffs, including input from members who represented majority minority districts. That input result is reflected in numerous instances in the enacted plan T2A 13:11–15:24.

306. After completion of the map but before its release to the public, Senator Seliger met in person with 29 senators to show them the proposed district that had been drawn based on their input (and with one by telephone). T2A 7:16–21.

307. Senator Shapiro, an Anglo Republican, was not pleased with the new configuration of her district in the proposed Senate plan. The enacted Senate District 8 was essentially the opposite of what she requested during the process. Shapiro Direct Testimony (Doc. 137-4) ¶ 3.

308. The plan was released to the public 48 hours prior to the hearing on it, although Texas rules only require one day's notice prior to the hearing. Senate Rule 11.10, Public Notice of Committee Meetings (adopted by 82nd Legislature).

309. Senator Davis spoke at the committee hearing, as well as during floor debate, after the plan was passed by the committee. T2A 13:5–8; PX45. Because Senator Davis was not a committee member, she was not authorized to propose amendments to the map while it was before the committee. Instead,

Senator Judith Zaffirini, who was a member of the committee, sponsored amendments on Senator Davis's behalf. T4A 87:17–22.

310. The committee substitute amendments proposed by Senator Zaffirini on behalf of Senator Davis were "drawn specifically and purposely [sic] to include more Hispanic and black voters than the district that [Senator Davis] represent[s] now." T4A 87:17–22.

311. The Senate passed the Senate redistricting plan on a roll call vote of 29–2. It received broad, bipartisan support in both committee and Senate floor votes. Ten Democratic senators (all of whom self–identify as representing majority minority districts) voted for the plan; two (Sens. Davis and Ellis) did not. T4A 11:2–16. The map could have passed with as few as two Democratic votes, T4A 11:2–16; PX45 at A–23, thus, concerns about the process having been lost to the Legislative Redistricting Board cannot have been the basis for the supermajority of Democratic votes in favor of the map.

312. Senator Davis is one of the most junior members of the Texas Senate. T4A 75:4–6.

313. In March 2011, during the legislative session, Senator Kel Seliger and Doug Davis held a meeting with Senator Davis, in which they brought a map of her existing district and asked her what changes she would like to make. T4A 35:4–11, 38:9–12; T2B 171:16–172:1.

314. Senator Davis first saw the draft of her new district on May 10, 2011. T4A 42:3–4. Members of the public attended a hearing on the proposed Senate redistricting plan on May 12, 2011 and gave testimony regarding SD10. T4A 77:7–25; PX124.

315. Senator Zaffirini offered two amendments on behalf of Senator Davis in a committee hearing on May 12, 2011. Senator Davis laid out the (proposed) maps in the amendments, which were designated Plans S120 and S121. T4A 44:24–45:6. Both plans increased the Latino and African–American population in SD10. *Id.* at 45:10–11. Neither plan offered as an amendment preserved the benchmark configuration of SD10. *Id.* at 79:12–14. One of the proposed amendments was "a

demonstration map to demonstrate that a Section 2 map could have been drawn an opportunity district from the urban core of Fort Worth into the urban core of Dallas that would have satisfied the Section 2 requirements." *Id.* at 45:13–17.

316. The Senate redistricting bill required the support of two thirds of the Senate, or 21 senators, to reach the Senate floor. T4A 72:14–73:8. To get the Senate redistricting bill to the floor required the support of all 19 Republican senators and at least 2 Democratic senators. T4A 73:9–74:2.

317. The members of the Senate had an incentive to pass a redistricting plan because they did not want the Legislative Redistricting Board to redraw the Senate districts. T4A 55:8–56:12. Once the redistricting bill got to the floor, it only needed a bare majority to pass. T4A 76:1–5. Thus the Senate redistricting bill, once it reached the floor, did not require any Democratic votes to pass, and Democratic senators did not have to vote for the bill in order to avoid the LRB. T2A 11:9–16.

318. Senator Ellis proposed that Democratic Senators "call the lawyers and ask in previous battles in court or at the Justice Department on redistricting did this matter." T4A 104:12–20. After he sent a letter to the Justice Department stating concerns with the Senate map, Senator Ellis spoke on the telephone to representatives of the Justice Department. *Id*. at 112:11–17. Senator Ellis testified that "we were told by the lawyers that the Justice Department and the court would understand, as long as we made a record, why we voted against it." *Id.* at 103:5–7.

319. The alleged concerns about the enacted plan were not great enough to persuade any senators, except for Senators Ellis and Davis, to vote against the plan. T4A 56:13–14, 103:2.

320. The goal of the Senate redistricting leadership was protection of Republican voting strength, T1B 144:8–21. Sen. Davis conceded that redistricting is deeply partisan, and an exercise in which "[e]verybody is trying to protect their district." T4A 71:12–72:4.

321. The Senate map-drawer and counsel understood the interplay between Sections 2 and 5 and the Voting Rights Act. T1B 142:1–4.

322. Although the intent of the Texas Senate was partisan, in the end, the map passed the Senate on a strongly bipartisan vote. *Id.*; T4A at 11:2–16; PX45 at A–23.

323. The evidence shows that the Texas Senate redistricting plan was enacted for permissible race-neutral purposes. The record does not contain evidence of racially discriminatory purpose to rebut that showing. The Court therefore concludes that the Texas Senate redistricting plan was not enacted with a racially discriminatory purpose.

Dated: February 3, 2012

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID J. SCHENCK
Deputy Attorney General for Legal Counsel

DAVID C. MATTAX
Deputy Attorney General for Defense Litigation

J. REED CLAY, JR.
Special Assistant and Senior Counsel
to the Attorney General

BRUCE D. COHEN
Special Assistant to the Attorney General

/s/ *Adam K. Mortara*
ADAM K. MORTARA
JOHN M. HUGHES
ASHLEY C. KELLER
Bartlit Beck Herman Palenchar & Scott LLP
54 West Hubbard Street, Suite 300
Chicago, Illinois 60654
(312) 494–4400 / (312) 494–4440 (fax)

ANGELA V. COLMENERO
MATTHEW H. FREDERICK
Assistant Attorneys General
Office of the Attorney General
P.O. Box 12548, Capitol Station
209 W. 14th Street
Austin, Texas 78701
(512) 936–1342 / (512) 936–0545 (fax)

Attorneys for Plaintiff the State of Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via the Court's electronic notification system to the following parties on February 3, 2012:

Daniel J. Freeman
Bryan L. Sells
Janie Allison Sitton
Michelle Andrea McLeod
Olimpia E. Michel
Thornton Russell Nobile
U.S. DEPARTMENT OF JUSTICE
Voting Section, Civil Rights Division
950 Pennsylvania Avenue, NW
NWB Room 7203
Washington, DC 20530
(202) 305-4355
Email: daniel.freeman@usdoj.gov
Email: bryan.sells@usdoj.gov
Email: jaye.sitton@usdoj.gov
Email: michelle.mcleod@usdoj.gov
Email: t.russell.nobile@usdoj.gov

J. Gerald Hebert
191 Somerville Street, #405
Alexandria, VA 22304
(703) 628-4673 Fax: (202) 736-2222
Email: jghebert@comcast.net;
Email: Hebert@Voterlaw.Com

Paul M. Smith
Michael B. DeSanctis
Jessica Ring Amunson
Caroline D. Lopez
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Washington, D.C. 20001
Email: Psmith@Jenner.Com
Email: Mdesanctis@Jenner.Com
Email: Clopez@Jenner.com
Email: Jamunson@Jenner.Com

Nina Perales
Karolina J. Lyznik
Marisa Bono
Rebecca McNeill Couto
MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, INC.
110 Broadway Suite 300
San Antonio, TX 78205
(210) 224-5476 Fax: 210-224-5382
Email: nperales@maldef.org
Email: klyznik@maldef.org
Email: mbono@maldef.org
Email: rcouto@maldef.org

Robert Stephen Notzon
1507 Nueces Street
Austin, TX 78701-1501
(512) 474-7563 Fax: (512) 474-9489
Email: robert@notzonlaw.com

Ray Velarde
1216 Montana Avenue
El Paso, TX 79902
(915) 532-6003
Email: velardelaw2005@yahoo.com

Chad W. Dunn
BRAZIL & DUNN
4201 FM 1960 West Suite 530
Houston, TX 77068
(281) 580-6310
Email: chad@brazilanddunn.com

Joaquin Avila
LAW OFFICE OF JOAQUIN G. AVILA
P.O. Box 33687
Seattle, WA 98133
(206) 724-3731
Email: jgavotingrights@gmail.com

Mark A. Posner
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
1401 New York Avenue, NW Suite 400
Washington, DC 20005
(202) 307-1388
Email: mposner@lawyerscommittee.org

John M. Devaney
Marc Erik Elias
Kevin J. Hamilton
PERKINS COIE
700 13th Street, NW Suite 600
Washington, DC 20005-3960
(202) 628-6600 Fax: (202) 654-9124
Email: jdevaney@perkinscoie.com
Email: melias@perkinscoie.com
Email: khamilton@perkinscoie.com

Renea Hicks
LAW OFFICES OF MAX RENEA HICKS
101 West Sixth Street
Suite 504
Austin, TX 78701
(512) 480-8231
Fax: (512) 480-9105
Email: rhicks@renea-hicks.com

John Kent Tanner
3743 Military Road, NW
Washington, DC 20015
(202) 503-7696
Email: john.k.tanner@gmail.com

Jorge Martin Castillo
Karen M. Soares
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
One New York Plaza
22nd Floor
New York, NY 10004
(212) 859-8439
Email: jorge.castillo@friedfrank.com
Email: karen.soares@friedfrank.com

Jose Garza
LAW OFFICE OF JOSE GARZA
7414 Robin Rest Drive
San Antonio, TX 98209
(210) 392-2856
Email: garzpalm@aol.com

Allison Jean Riggs
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 West Highway 54
Suite 101
Durham, NC 27707
(919) 323-3380 x 117
Fax: (919) 323-3942
Email: allison@southerncoalition.org

Gary L. Bledsoe
LAW OFFICE OF GARY L. BLEDSOE AND ASSOCIATE
316 West 12th Street
Suite 307
Austin, TX 78701
(512) 322-9992
Fax: (512) 322-0840
Email: garybledsoe@sbcglobal.net

Luis Roberto Vera , Jr.
LAW OFFICES OF LUIS ROBERTOVERA, JR. & ASSOCIATES
Riverview Towers Building
111 Soledad
Suite 1325
San Antonio, TX 78205-22660
(210) 225-3300
Email: Irvlaw@sbcglobal.net

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ADAM K. MORTARA
Attorney for Plaintiff State of Texas