UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, - against - UNITED STATES OF AMERICA and ERIC H. HOLDER, JR. in his official capacity as Attorney General of the United States, Defendants.	CIVIL ACTION NO. 1:11-cv-01303 Three-Judge panel: RMC-TBG-BAH

Defendant-Intervenor Texas Latino Redistricting Task Force's Summary of Expert Reports of Dr. Richard Engstrom

Pursuant to this Court's order of January 10, 2012, the Texas Latino Redistricting Task Force respectfully submits this summary of the reports of its expert, Dr. Richard Engstrom.[1]

Qualifications

My name is Richard L. Engstrom and I am a resident of Durham, North Carolina. I am a former Research Professor of Political Science and Endowed Professor of Africana Studies at the University of New Orleans. I was employed as a consultant at the Center for Civil Rights at the School of Law, University of North Carolina, Chapel Hill, from 2006 through 2007. I am presently a Visiting Research Fellow at the Center for the Study of Race, Ethnicity, and Gender in the Social Sciences at Duke University. I have served two terms as the Chairperson of the Representation and Electoral Systems Section of the American Political Science Association,

[1] Dr. Engstrom's Expert Report in this case, Corrected Rebuttal Report from *Perez v. Perry*, Supplemental Report in this case, and Rebuttal Report in this case have been filed as exhibits DX725, DX725, DX726, and DX747, respectively.

from 1993-1995 and 1995-1997, and served as a member of the Executive Council for that section from 1993 to 2007.

I have done extensive research into the relationship between election systems and the ability of minority voters to participate fully in the political process and to elect representatives of their choice. The results of my research on this topic have been published in the *American Political Science Review, Journal of Politics, Western Political Quarterly, Legislative Studies Quarterly, Social Science Quarterly, Journal of Law and Politics, Electoral Studies, Representation, Saint Louis University Public Law Review*, and other journals and books. Three articles authored or co-authored by me were cited with approval in Thornburg v. Gingles, 478 U.S. 30, at 46 n.11, 49 n.15, 53 n.20, 55, and 71 (1986), the Supreme Court decision interpreting amended section 2 of the Voting Rights Act. I am the co-author, with Mark A. Rush, of *Fair and Effective Representation? Debating Electoral Reform and Minority Rights* (Lanham, MD: Rowman and Littlefield Publishers, Inc. 2001).

I have also testified as an expert witness in numerous cases in federal and state courts across the United States. Since 2005 I have testified at trial and/or been deposed in the following cases: *Pender County v. Bartlett* (General Court of Justice, Superior Court Division, County of Wake, NC 2005), *Arise for Social Justice v. City of Springfield and Springfield Election Commission* (D.C. Mass. 2006, 2007), *Gonzalez v. State of Arizona* (D.C. Ariz. 2008), *United States of America and Cesar Ruiz v. Village of Port Chester* (S.D. NY 2008), *United States of America v. Euclid City School District Board of Education and Cuyahoga County Board of Elections* (N.D. Ohio 2009), *Benavidez v. City of Irving, Texas* (N.D. Tex. 2009), *Benavides v. Irving Independent School District, Texas* (N.D. TX 2009), and *Perez v. Perry* (W.D. TX 2011).

Retrogression Under Section 5

This assessment addresses the following question: whether the changes in these plans "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). The "effective exercise" of their electoral franchise concerns "the ability of such citizens to elect their preferred candidates of choice" Voting Rights Act, Section 2(d), amended by the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act. The minority group of concern is Latinos. This assessment requires a comparison between the "benchmark" plans in place in 2010, and the plans adopted by the State of Texas this year to replace those plans. The benchmark plan for congressional districts contains 32 districts, while the adopted plan contains 36. The benchmark plan and the adopted plan for the state's House districts contain the same number of districts, 150. The racially polarized voting analysis contained in my first report in this case clearly demonstrates that Latinos in the areas of Texas studied demonstrated a preference to be represented by people from within their group and that non-Latinos do not share the same candidate preferences as Latinos in the general or primary election.

Racially Polarized Voting Analysis[2]

My analysis of the racially polarized voting for *Perez v. Perry* concerned the extent to which the candidate preferences of Latinos and other voters in areas of Texas of particular relevance to the Texas Latino Redistricting Task Force's claims have differed in the most recent elections for statewide offices in Texas in which the voters have been presented with a choice

[2] Please see the full text of Dr. Engstrom's Oct 21, 2011 Expert Report in this case, filed as exhibit DX725, for the complete analysis, including data and methods.

between or among Latino and non-Latino candidates. The elections analyzed are the latest Democratic Party and Republican Party primaries and general elections for a variety of statewide offices, which were held in 2006, 2008 and 2010. The areas at issue include the counties of Bexar, Dallas, El Paso, Harris, Nueces, Tarrant, and Travis, and a 52-county area in South Texas.

Group difference in voting preferences are common across the seven counties examined in this analysis and in the South Texas area. Latino voters have been very cohesive in their preferences for Latino candidates, across different offices and across all three election cycles, in general elections and in Democratic primaries. They do exercise discretion however in choosing which Latino candidates to support. Not every Latino candidate on the ballot can expect to be their preferred candidate, in general or primary elections.

These candidates preferred by Latino voters have been supported in general elections by African American voters as well. However, this African American support is not typically present in primaries. Indeed, African Americans have a distinct tendency to vote for candidates competing with the candidates preferred by Latinos in primary elections. The "other" voters in my analysis (predominantly Anglo) usually cast a majority of their votes for the opponents of Latino-preferred candidates in primary elections as well, and consistently do so in general elections.

CDs 23 and 27 and HDs 33 and 78

I also examined whether voting in the 2010 general election to fill congressional seats in Texas Districts 23 and 27, and Texas House of Representative elections to fill the seats in Districts 33 and 78, had been racially polarized. These are districts in which incumbents in Latino opportunity districts were defeated for reelection. The analyses of these elections rely on the same EI methodology and turnout data used in the analyses of the 2010 elections above. Only

the bivariate version of EI is employed for this purpose as the African American voting age population in these districts is low- 4.0 percent in CD 23, 2.6 percent in CD 27, 4.6 percent in HD 33, and 4.7 percent in HD 78.

Racially polarized voting was present in all four of these elections. In CD 23 the incumbent Ciro D. Rodriguez received an estimated 84.7 percent of the votes cast by Latinos and just 18.1 percent of those cast by non-Latinos. In CD 27 the incumbent Solomon P. Ortiz received an estimated 86.6 percent of the votes cast by Latinos and only 15.9 percent of those cast by non-Latinos. In the HD 33 election Latino support for incumbent Solomon Ortiz, Jr. is estimated to be 92.3 percent, while that from the non-Latino voters is estimated as only 11.0. In HD 78 these respective figures were 79.6 and 28.4.

Given that turnout data are available that identify voters in this election that have Spanish surnames and those that do not, I have been asked to calculate the percentage of those turning out that was Latino, based on these data. These percentages are 40.77 in the CD 23 election, 46.72 percent in that for CD 27, 45.08 in the HD 33 election, and 34.88 in that for HD 78.

The percentages of the overall votes received by the incumbents are 44.44 in CD 23, 47.11 in CD 27, 47.49 in HD 33, and 47.59 in HD 78.

Viable[3] Latino Districts in C100 and C185 and HD100 and H283

The third issue I have been asked to address is the number of districts that provided Latino voters with a reasonable opportunity to elect representatives of their choice, including from within their own group if that is their preference, in the previous plan, C100, and the

[3] Viable districts are districts that have elected Latino candidates who are Latino candidates of choice or have elected Anglo candidates and in which Latino candidates in other elections win the majority of the votes case in the area of the district.

number of such districts provided in the State's congressional plan, C185. The presence of such districts is addressed again with state House of Representative districts.

To assess the opportunities provided in the post-2010 redistricting plans, in which elections have not been held, I examine the votes cast in statewide elections analyzed above within the geographical area of the congressional or state House districts in each of the plans in which Latinos constitute a majority of the voting age population. The elections utilized for this purpose are the seven elections analyzed above in which Latino candidates ran as Democratic nominees in general elections, and the six Democratic primaries in which Latinos sought that party's nomination. The above analyses reveal that these Latino candidates in those elections were almost always the choice of Latino voters in the areas analyzed. I consider Latinos to have a reasonable opportunity in a district when their preferred candidates win a majority of the votes cast in these elections in the districts more often than not, in both the general elections and Democratic primaries.

United States House of Representatives - Conclusions

I conclude that the benchmark plan contains seven viable Latino districts. These were CDs 15, 16, 20, 23[4], 27[5], 28, and 29. The Latino percentage of the voting age citizens (CVAP) in these seven districts ranged from 56.0 to 74.5, according to the United States Bureau of the Census's American Community Study for 2009. This survey reports the rolling average over the annual surveys taken from 2005 through 2009. The Texas Legislative Council (TLC) reports show, based on Spanish surname matching, that around the time of redistricting the Latino percentage of the registered voters in these districts ranged from 52.6 to 71.2.

[4] Although CD 23 elected a non-Latino preferred candidate in 2010, it elected the Latino-preferred candidate in 2006 and 2008.

[5] Although CD 27 elected a non-Latino preferred candidate in 2010, it elected the Latino-preferred candidate in 2006 and 2008 as well as preceding elections back to its creation in the early 1980s.

In two of these districts, CDs 23 and 27, Latino-preferred Democratic incumbents were defeated for reelection in 2010 by non Latino-preferred Republicans, a landslide year for Republican candidates in Texas. CD 23 was the district recreated by *League of United Latin American Citizens v. Perry*, 457 F. Supp. 2d 716 (E.D. Texas 2006) in order to create another "effective Latino opportunity district" in Texas (at 719, 721) after the Supreme Court's decision in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006). A Latino-preferred candidate was elected in the first election in that new district, defeating the incumbent non Latino-preferred candidate, and reelected again in 2008. In 2010 however he lost the seat in the Republican landslide, receiving 44.4 percent of the overall vote despite receiving an estimated 84.7 percent of the votes cast by Latinos in that election.

In CD 27, also referred to as a "Latino opportunity district" by the district court (at 720), the long-term Latino-preferred incumbent in the district was also defeated for reelection. Despite receiving an estimated 86.6 percent of the votes cast by Latinos, he received 47.5 percent of the overall vote and lost.[6] The loss of these two districts by the Latino candidates favored by Latino voters in a banner year for Republicans does not, in my opinion, remove them from being considered Latino districts. However, when examining the votes cast in the geographical area of that district in the seven general elections analyzed in my racially polarized voting analysis in which Latino candidates were the Democratic nominees, and the six Democratic primaries in which Latino candidates sought that party's nomination, all of which were almost always the choice of the Latino voters in the areas examined, the candidates in those elections won a majority of the districts in the benchmark plan.

[6] The estimates reported in this paragraph are based on the same methodology employed to obtain those reports in my racially polarized voting study discussed above, King's ecological inference procedure.

The adopted plan, like the benchmark plan, also provides seven roughly comparable opportunities for Latinos to elect their preferred candidates of choice. These are districts 15, 16, 20, 28, 29, 34, and 35. They are all majority districts in CVAP, ranging from 51.9 percent to 72.7 percent. The Latino voter registration, with one exception, ranges from 53.0 percent to 71.9 percent. The exception is CD 35 in that plan, in which Latino registration drops to 45.0 percent. However, when examining the votes cast in the geographical area of that district in the elections analyzed in my racially polarized voting analysis, the Latino candidates won a majority of the votes in all 13 elections.

Texas House of Representatives – Conclusions

There are 33 viable Latino districts in the benchmark plan. They are: HDs 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 51, 74, 75, 76, 77, 79, 80, 90, 103, 104, 116, 117, 118, 199, 123, 124, 125, 140, 143, 145 and 148.

The new districts in the redistricting plan for the Texas House adopted by the state retain the opportunities for Latinos to elect candidates of their choice in 31 of the 33 districts.

The most egregious instance of retrogression in the new plan is the dismantling of HD 33. This is a majority-Latino district in which Latinos constitute 60.4 percent of the CVAP and 55.3 percent of the voter registration, and in which the Latino-preferred candidate won the 2006 and 2008 elections. He also received 47.5 percent of the votes in 2010 despite the Republican landslide. HD 33 is not a district located in another part of the state, in which Latinos constitute only 8.5 percent of the CVAP and 6.5 percent of the voter registration. A district replacing HD 33, in which Latinos would have a comparable, or better, opportunity to effectively exercise their franchise, is not contained in the new plan.

HD 117 is another district in which the opportunity Latinos have to elect a representative of their choice is impaired by the new plan. The 2010 election for this seat was very competitive. The choice of Latino voters in this election was the incumbent, who received an estimated 85.6 percent of their votes.[7] He lost the election however, receiving an overall vote of 48.1 percent. While the Latino percentage of the CVAP in this district is increased from 58.8 percent to 63.8, the Latino percentage of the registered voters has been reduced from 50.8 percent to 50.1. In addition, whereas the Latino candidates in the exogenous elections I studied had received a majority of the votes in this district in four of the seven general elections, they did so in three in the newly adopted HD 117. Further, in the latest exogenous elections, the two general elections in 2010, the votes received by the Latino candidates is reduced by 3.0 and 3.3 percentage points, a significant drop in a district just lost by the Latino candidate of choice by a margin of 3.8 percentage points.

My examination of the differences in the districts in the benchmark plan for the U.S. House of Representatives seats in Texas and the state's replacement for that plan, and the differences in the benchmark plan for seats in the Texas House of Representatives and the state's replacement plan, requires me to conclude that both of the new plans have a retrogressive effect.

Rebuttal to Dr. John Alford's January 17, 2012 Supplemental Report

In his report Dr. Alford adopts what he calls a "statewide functional analysis" in place of the conventional approach (which he calls "district counting") to assessing retrogression in new redistricting plans.

There are serious problems with this new approach suggested by Dr. Alford. One is that in analyzing the ability of Hispanic voters to elect their preferred candidates of choice in the

[7] See text at note 5, supra.

districts in a benchmark plan, Dr. Alford's approach totally ignores the outcomes of the actual legislative elections that have been held in those districts. These "endogenous" elections are generally considered the most probative indicator, but not the only indicator, of such an ability to elect. I am not aware of any analysis, prior to this one by Dr. Alford, by any expert that completely ignores the results of endogenous elections in a benchmark plan in a retrogression analysis, prior to this one by Dr. Alford.

Dr. Alford however argues that only the results of elections to statewide offices within the geographical area of a district, such as elections for Governor and United States Senator, be used for this purpose. The results of these reaggregations of votes in these "exogenous" elections during the time the districts have been in place are substituted by Dr. Alford for the results of the actual legislative elections.

Another problem is present in Dr. Alford's approach to assessing the ability of Hispanics to elect their preferred candidates of choice in a state's newly adopted districts. This analysis is also based on reaggregations of the votes in the same exogenous elections, but this time in the geographical areas of the newly adopted districts. This is a standard procedure for assessing how many of these districts provide minority voters with the ability to elect their preferred candidates in these adopted districts. But Dr. Alford pushes this further; he does not use the results of these reaggregations to predict how many districts will provide the ability to elect, but rather how many state legislative elections Hispanic preferred candidates will win while these districts are in place.

If for example 80 percent of these exogenous elections were "won" by a Hispanic preferred candidate in the area of an adopted district, other experts will find that this is good evidence of an ability to elect in that district. In contrast, Dr. Alford would project that Hispanic

preferred candidates will win four out of five of the endogenous elections (assuming two-year terms) within that district while it is in place. Likewise, if Hispanic preferred candidates "won" only 20 percent of the exogenous elections in an adopted district, other experts would infer that this is inadequate evidence to conclude a district is an ability to elect district. Dr. Alford would predict, however, that Hispanic preferred candidates will be elected in one of the five state legislative elections. The first inference in each case, concerning the district being an ability to elect district or not, is credible; Dr. Alford's inference, projecting how many of the state legislative elections will result in Hispanic preferred candidates winning, is not. Dr. Alford simply pushes the empirics further than justifiable.

This type of direct extrapolation from exogenous election results to endogenous election results is certainly not justified in the Texas context. When the exogenous index score for a district is 100, not surprisingly the endogenous index score is also 100. The only exogenous score of zero for a district is likewise zero on the endogenous score. But when the exogenous index score for a district is less than 100 but greater than zero, the endogenous index score is higher 75 percent of the time. It is never lower.[8]

The inability to extrapolate successfully from exogenous scores to endogenous scores, as Dr. Alford tries to do in his assessment of the Adopted Plan, is not surprising. There are important contextual differences between them. The endogenous elections are to seats in the state legislature, in which the candidates live within the district, and whose campaigns focus on the voters in the district. The exogenous elections are all for statewide offices that are not likely to involve candidates who reside in the district, and who are attempting to appeal to a much

[8] Please see Table 1 on page 5 of Dr. Engstrom's Rebuttal Report in this case, DX747, for a comparison of the scores on the respective indexes when the exogenous index is below 100.

wider range of voters. This is not to suggest that exogenous elections cannot be informative, or that they are without any probative value whatsoever. It is to suggest, however, that they not be the exclusive basis for making the assessments of benchmark districts when relevant endogenous elections are available for that purpose, and that they are not a good basis for predicting the specific number of elections in many new districts that will result in Hispanic preferred candidates winning.

Another problematic part of Dr. Alford's report, although it does not concern his statewide functional analysis, is a statement in which he asserts that the court in this case, in its Memorandum Opinion of December 22, 1011, articulated a "bright-line rule" that a district that is "equal to or greater than 60%" (at 5) Hispanic in citizen voting age population (CVAP) is per se an ability to elect district. He then claims that HD 117 is therefore an ability to elect district in the state's adopted plan because the Hispanic CVAP in it is 63.8 percent. He claims that this 60 percent CVAP standard is articulated by the court in footnote 22 of its opinion. This footnote does not so state. Indeed, the footnote appears at the end of the following sentence:

> A district with a minority voting majority of sixty-five percent (or more) essentially guarantees that, despite changes in voter turnout, registration, and other factors that affect participation at the polls, a cohesive minority group will be able to elect its candidate of choice.
>
> (Op. at 30, emphasis added).

The following sentence in the opinion does state that if this threshold is met, there is "no need to make further inquiries" about the Hispanic ability to elect in that district. Id. I agree with Dr. Alford that the court must be referring to CVAP when it said "a majority voting minority" in the statement above, but the bright-line test articulated by the court is 65 percent,

not 60 percent, as Dr. Alford claims. HD 117 in the adopted plan therefore does not automatically qualify as an ability to elect district based on this bright-line test, as Dr. Alford claims.

Nothing in Dr. Alford's Supplemental Report causes me to change my opinion about the retrogressive nature of the redistricting plan for the Texas House of representatives adopted by the State of Texas in 2011. In my opinion, it is retrogressive.

Dated: February 6, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she filed the foregoing document and all attachments using the Court's electronic case filing system on February 6, 2012.

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