

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

SHANNON PEREZ, *et al.*,

Plaintiffs,

v.

STATE OF TEXAS, *et al.*,

Defendants.

§
§ CIVIL ACTION NO.
§ SA-11-CA-360-OLG-JES-XR
§ [Lead case]

MEXICAN AMERICAN LEGISLATIVE
CAUCUS, TEXAS HOUSE OF
REPRESENTATIVES (MALC),

Plaintiffs,

v.

STATE OF TEXAS, *et al.*,

Defendants.

§
§ CIVIL ACTION NO.
§ SA-11-CA-361-OLG-JES-XR
§ [Consolidated case]

TEXAS LATINO REDISTRICTING TASK
FORCE, *et al.*,

Plaintiffs,

v.

RICK PERRY,

Defendant.

§
§ CIVIL ACTION NO.
§ SA-11-CA-490-OLG-JES-XR
§ [Consolidated case]

MARGARITA V. QUESADA, *et al.*,

Plaintiffs,

v.

RICK PERRY, *et al.*,

Defendants.

§ CIVIL ACTION NO.
§ SA-11-CA-592-OLG-JES-XR
§ [Consolidated case]

EDDIE RODRIGUEZ, *et al.*,

Plaintiffs,

v.

RICK PERRY, *et al.*,

Defendants.

§ CIVIL ACTION NO.
§ SA-11-CA-635-OLG-JES-XR
§ [Consolidated case]

WENDY DAVIS, *et al.*,

Plaintiffs,

v.

RICK PERRY, *et al.*,

Defendants.

§ CIVIL ACTION NO.
§ SA-11-CA-788-OLG-JES-XR
§ [Lead Case]

DEFENDANTS’ ADVISORY REGARDING INTERIM REDISTRICTING PLANS

Defendants Rick Perry, in his official capacity as Governor, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas (collectively, “Defendants”) file this Advisory regarding interim redistricting plans for the Texas House of Representatives, the Texas Senate, and Texas’s congressional seats, and in support thereof respectfully show as follows:

On January 28, 2012, the Court ordered parties who wish to preserve an April primary to submit agreed-upon interim maps by February 6, 2012. In response to that order, Defendants attempted to work with all plaintiffs in this action to develop interim maps that reflect an attempted resolution in light of the strengths and weaknesses of the various claims asserted against the maps enacted by the 82nd Texas Legislature. With respect to interim maps for the Texas House and U.S. Congress, Defendants were able to reach an agreement with Plaintiffs Texas LULAC, MALDEF, GI Forum, The Mexican American Bar Association of Texas, La Fe Policy Research and Education Center, Hispanics Organized for Political Education (HOPE), the National Organization for Mexican American Rights, Southwest Voter Registration Education Project, the William C. Velasquez Institute, Southwest Workers' Union, and other plaintiffs collectively known as the "Texas Latino Redistricting Task Force." With respect to the U.S. Congress, Defendants were also able to reach an agreement with Intervenor Congressman Henry Cuellar.

To avoid further delay of Texas's primary elections and promote full participation by Texas voters in a single, unified primary, Defendants hereby advise the Court that they will not object to the implementation of Plans H303, C226, and S167 on an interim basis for the 2012 elections. Plans H303 and C226 were developed in conjunction with the Texas Latino Redistricting Task Force and also reflect the input of other plaintiffs with whom the State has not reached agreement.

The State does not concede that any claim in the *Perez* or *Davis* litigation, or any objection in the pending preclearance litigation has merit. Nor does the State concede that any party has established a likelihood of success under Section 2 or the Constitution or a reasonable probability that any aspect of the State's plans does not comply with Section 5. The purpose of

this Advisory is to inform the Court of the State's position on agreed interim maps, to identify districts in Plans H303, C226, and S167 that depart significantly from the State's enacted plans, and to explain how each of those departures resolves legal claims raised by the plaintiffs.

While the State does not agree that alteration of any of its redistricting plans is required under any standard of review, preliminary or final, Plans H303, C226, and S167 respond to all claims that are fairly at issue in this case or the Section 5 case. These plans therefore address all districts that fall within the scope of this Court's remedial authority to depart from the State's enacted plans on an interim basis. Although these maps are far from perfect in the State's view, they are adequate for their intended purpose: to provide a reasonable resolution that allows elections to move forward without further inconvenience to Texas voters, whom all parties to this litigation ultimately strive to represent.

I. Texas House of Representatives

In the Section 5 case, the United States alleged that the enacted Texas House redistricting plan would retrogress the ability of minority citizens to elect their candidates of choice in five districts: HD33, HD35, HD41, HD117, and HD149. *See* United States and Intervenors Identification of Issues (Doc. 53) at 4–6, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Sept. 23, 2011) [hereinafter Identification of Issues]. Plan H303 addresses the retrogression concern while also addressing all colorable Section 2 claims raised in the *Perez* litigation.

A. House District 35

Under the benchmark House plan, HD35 is a Latino-majority district in South Texas. The United States contends that changes to this district in the enacted plan eliminate the ability

of Latino voters to elect their candidate of choice, causing retrogression under Section 5 of the Voting Rights Act.¹ Identification of Issues at 5.

Plan H303 moves HD35 from its current location and creates a new, open seat in Cameron and Hidalgo County with 78.9% HCVAP and 74.2% SSVR. This district will provide Latino citizens with the ability to elect candidates of their choice.² The relocation of HD35 therefore addresses the United States' objection under Section 5 as well as the claim that Section 2 requires a new House seat made up of surplus population from Cameron and Hidalgo Counties.

B. House District 33

Under the benchmark House plan, HD33 is a Latino-majority district in Nueces County. Nueces County included all or part of three House districts in the benchmark plan—all of HD33 and HD34 and part of HD32. Applying the Texas Constitution's county-line rule to the 2010 Census data, the Legislature apportioned only two districts to Nueces County. The enacted plan therefore eliminated HD33 from Nueces County and relocated it to another area of the State. The United States objected to the alteration of HD33 as retrogressive under Section 5. Plaintiffs in *Perez* allege that Section 2 required the Legislature to maintain HD33 in its benchmark configuration as a Latino opportunity seat.

Plan H303 returns Nueces County to approximately its benchmark configuration, placing all or part of three House districts in the county. Two of these districts—HD30 and HD34—are expected to provide Latino voters with the ability to elect their candidates of choice.³ HD30, which includes Jim Wells County and parts of Nueces County, contains 60.5% HCVAP and

¹ Dr. Richard Engstrom, the Texas Latino Redistricting Task Force's expert, concluded that HD35 did not retrogress in Plan H283, but was in fact improved over the benchmark. *See Texas v. U.S.*, Trial Tr. 7B 13:24–14:1.

² The State's reconstituted election analysis indicates that HD35 in Plan H303 will elect the Latino candidate of choice in ten of ten elections.

³ The State's reconstituted election analysis indicates that HD30 and 34 will each elect the Latino candidate of choice in six of ten elections.

57.2% SSVR. The creation of HD30 as a second Latino-majority district in Nueces County therefore addresses the United States' objection under Section 5 and addresses the claim that Section 2 requires the State to maintain two Latino opportunity districts in Nueces County.

C. House District 41

Under the benchmark and enacted plans, HD41 is a Latino-majority district in Hidalgo County. The Legislature reconfigured the district to increase the reelection prospects of Representative Aaron Pena, a Republican who represented HD40 under the benchmark plan. (The incumbent in benchmark HD41, Representative Veronica Gonzales, would run in HD40 under the enacted plan.) The United States objected to the alteration of HD41 as retrogressive under Section 5.⁴ Identification of Issues at 5–6. Plaintiffs in *Perez* allege that HD41 violates the Equal Protection Clause's one-person, one-vote principle and reflects a prohibited discriminatory purpose.⁵

Plan H303 reconfigures HD41 to make the district more compact and to give it a more regular shape than in the enacted plan. As configured in Plan H303, HD41 has 75.7% HCVAP and 74.2% SSVR. The district is expected to provide Latino voters with the ability to elect their candidate of choice.⁶ The reconfiguration of HD41 therefore addresses the United States' Section 5 objection and addresses the claim that the boundaries of HD41 reflect a discriminatory purpose.

⁴ Dr. Richard Engstrom, the Texas Latino Redistricting Task Force's expert, concluded that HD41 did not retrogress in Plan H283. See *Texas v. U.S.* Trial Tr. 7B 14:4–9. The United States' expert could not determine whether Latino voters would have the ability to elect their candidate of choice in HD41 under the enacted plan. See Handley Report, *Texas v. U.S.* DX326 at 1 n.1.

⁵ The evidence indicates, consistent with the State's position, that HD41 was drawn in Plan H283 on the basis of political information—specifically, the electoral performance of precincts in Hidalgo County—rather than race. See, e.g., *Texas v. U.S.* Trial Tr. 1A 164:2–29; *id.* 7B 57:11–24, 61:14–15; see also *Texas v. U.S.* Plaintiffs' Exhibits 149 (district map with partisan shading at VTD level), 193 (RedAppl demonstration of drawing HD41).

⁶ The State's reconstituted election analysis indicates that HD41 will elect the Latino candidate of choice in seven of ten elections.

D. House District 78

House District 78 is a Latino-majority district in El Paso. In the enacted plan, HD78 has 55.2% HCVAP and 47.1% SSVR. The United States did not object to HD78 under Section 5. Plaintiffs in *Perez* claimed that Section 2 required the State to configure HD78 as a Latino-SSVR-majority district to provide Latino voters with the opportunity to elect candidates of their choice.⁷

Under Plan H303, HD78 remains a Latino-CVAP majority district, and its SSVR level increases to 50.1%. As configured in Plan H303, the district is expected to increase Latino voters' opportunity to elect their candidates of choice.⁸ The district is also drawn more compactly than it was in the enacted plan.

E. House District 144

In the benchmark plan, Anglos made up a majority of HD144's CVAP and registered voter population. The benchmark had 50.3% Latino total population. Under the enacted plan, HD144's Latino total population was reduced to 48.5%. The United States did not object to HD144 under Section 5; however, certain defendant-intervenors argued that the district retrogressed by eliminating an emerging Latino ability-to-elect district. Plaintiffs in *Perez* argued that Section 2 required the State to configure HD144 as a Latino CVAP-majority district and that the State's underpopulation of the district indicated a violation of one-person, one-vote.

There is no reasonable probability that the D.C. District Court will find retrogression in HD144. In its summary judgment opinion, that court rejected the notion that "the VRA protects

⁷ The State opposed this claim on the ground, among others, that Latino voters enjoy more than proportional representation in El Paso County House districts—Latinos constitute 75% of El Paso County's voting-age citizens, and four of the county's five House districts are represented by presumed Latino candidates of choice. *See Perez* Defendants' Exh. 51; Defendants' Post-Trial Brief (Doc. 411) at 41–42.

⁸ The State's reconstituted election analysis indicates that HD78 will elect the Latino candidate of choice in three of ten elections under Plan H303, compared to two of ten elections under Plan H283.

predictable *future* gains in minority electoral power” as “directly at odds with Section 5’s purpose to protect against *retrogressive* effect.” *Texas v. U.S.*, Memorandum Opinion (Doc. 115) at 32–33. The State maintains that the Section 2 and constitutional claims directed at HD144 are similarly without merit. Defendants recognize, however, that the Court’s interim House plan drew an additional Latino CVAP-majority district in eastern Harris County. The Court-drawn district substantially disrupted other Harris County House districts, however, raising particular concerns among members of the Legislative Black Caucus. *See, e.g.*, NAACP and Howard Jefferson Corrected Joint Advisory (Doc. 522) at 3 (objecting to the Court’s modifications to Districts 139, 141, 142, 146, and 147). Plan H303 is specifically tailored to address legal challenges to HD144 in a manner that maintains districts held by members of the Legislative Black Caucus as they were drawn by the legislature. Thus, Plan H303 responds to Section 2 concerns by configuring HD144 with 50.3% HCVAP and 48.8% SSVR while keeping the remainder of Harris County in substantially the same configuration as in the State’s enacted plan.⁹ In doing so, Plan H303 balances the concerns of other Harris County legislators who objected to Harris County as drawn by this Court.

F. House District 149

In the benchmark plan, HD149 is located in Southwest Harris County. Harris County had 25 House districts in the benchmark plan. Applying the county-line rule to the 2010 Census population, the Legislature apportioned 24 House seats to Harris County. In the enacted plan, HD149 is moved out of Harris County, and HD 149 is combined with HD137. The United States objected to the removal of HD149 as retrogressive under Section 5. Identification of Issues at 6. Plaintiffs in *Perez* alleged that the removal of HD149 violated Section 2.

⁹ The State’s reconstituted election analysis indicates that HD144 will elect the Latino candidate of choice in five of ten elections

Plan H303 essentially reinstates benchmark HD149, renumbering it as HD136. As in the benchmark plan, no single racial group forms a majority of voting-age citizens or registered voters in HD136, which has 33.8% Black CVAP, 27.2% Anglo CVAP, 19.5% Hispanic CVAP, and 18.3% Asian CVAP. By reconfiguring HD136, Plan H303 addresses the United States' Section 5 objection and addresses all claims regarding the district that were asserted in *Perez*.

In light of the Supreme Court's decision, HD149 is the only Texas House district challenged by the NAACP, the Texas Legislative Black Caucus, and other plaintiffs representing the interests of African-American voters that this Court has the authority to alter. All of these plaintiffs' other challenges to the Texas House map call for the creation of new coalition districts. The Supreme Court has prohibited this Court from creating such districts. While the State does not concede that the law requires HD136 to be drawn, it included the district in H303 in an effort to reach a resolution with the African-American plaintiffs who have made claims regarding benchmark HD149.

G. House District 117

Under the benchmark plan, HD117 is a Latino-majority district. As compared to the benchmark, the State's enacted plan increased HCVAP in HD117 from 58.5% to 63.8% and reduced SSVR slightly, from 50.8% to 50.1%. *Texas v. U.S.* Plaintiff's Ex. 13, 14. The United States objected to the alteration of HD117 as retrogressive under Section 5. Identification of Issues at 6. Plan H303 makes no change to HD117 because it is not retrogressive as a matter of law under the standard announced by the court in *Texas v. United States*.

In its summary judgment opinion in *Texas v. U.S.*, the D.C. District Court held that "[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.” *Texas v. U.S.*, 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.” *See id.* at 29–30 n.22 (citing *Mississippi v. United States*, 490 F. Supp. 569 (D.D.C. 1979); *Ketchum v. Byrne*, 740 F.2d 1398, 1410–15 (7th Cir. 1984)). The court explained that “*Ketchum* reached its figure by reasoning from a simple voting majority and augmenting it by five percent to account for low voter registration among minority voters, five percent for low voter turnout, and five percent for youthful population,” and that the court “would not have added five percent for the youthful portion of the minority population.” *Id.* at 30 n.22 (citing *Ketchum*, 740 F.2d at 1415). Thus the court’s 65% “voting majority” refers to 65% total population or 60% VAP. It follows from the court’s opinion that a district with 60% HCVAP is, by definition, an ability-to-elect district under Section 5. *Cf. Texas v. U.S.* Trial Tr. 6B 85:16–22, 88:2–9. Under the D.C. court’s standard, HD117’s 63.8% HCVAP makes it an ability-to-elect district as a matter of law. Thus, there is no reasonable probability that HD117 will be found to retrogress under Section 5.

Furthermore, there is no evidence that HD117 was drawn for the purpose of discriminating against Latino voters. The Bexar County House districts in Plan H283 were drawn by the Bexar County delegation under the direction of Representative Mike Villarreal, the Democratic Vice Chair of the House Redistricting Committee, and Ruth Jones McClendon, the Democratic leader of the Bexar County delegation. *Texas v. U.S.* Trial Tr. 6B 6:19–25. Nine of the ten members from Bexar County supported the final Bexar County map. *Id.* 6B 13:18–24. Only Representative Joe Farias, a Democrat representing HD118, opposed the plan because the communities of Somerset and Whispering Winds were removed from his district and included in District 117. T1A 159:24–161:3; T6B 8:21–9:2. He testified, however, that those communities

were placed in HD117 by Vice Chairman Villarreal. *Id.* 6B 23:18–25:4. There is no colorable Section 2 or constitutional claim with respect to HD117, and as a result, plan H303 leaves the districts as enacted by the Legislature.

H. Coalition Districts

By addressing the districts discussed in sections A through F above, Plan H303 represents the broadest possible application of the Court’s remedial power to draw an interim reapportionment plan. All of the remaining districts challenged in *Perez* and *Texas v. U.S.* but not addressed by Plan H303 are coalition districts. It is not possible to draw additional House districts in which a single minority group constitutes a majority of voting-age citizens.

The Supreme Court’s opinion in *Perry v. Perez* instructs that a court may not consciously set out to create “coalition” districts in an interim redistricting plan. *See Perry v. Perez*, 565 U.S. ____ (2012) (per curiam), slip op. at 10 (citing *Bartlett v. Strickland*, 556 U. S. 1, 13–15 (2009)). Various plaintiffs have urged the Court to do just that in Fort Bend County, Bell County, and Dallas County, where proposed districts HD26, HD54, and HD107, for example, join various minority groups in a deliberate effort to reach a combined minority-CVAP majority.¹⁰ The Supreme Court has removed any doubt that such districts are not authorized in an interim plan, much less required by the Voting Rights Act. *See Perry*, slip op. at 10.

I. Population Deviations in Urban Counties

In *Perry v. Perez*, the Supreme Court removed all doubt that *de minimis* population deviations in a legislatively enacted plan cannot be disturbed in a court-drawn interim plan unless those deviations are found to be unlawful. *Perry v. Perez*, Slip op. at 8. The Supreme Court also explained that the stricter standard of population deviation that applies to court-drawn

¹⁰ *See, e.g.*, Plan H302, Red106; Identification of Issues at 21–22.

maps does not require a court to equalize population deviations that comply with the standards that govern legislatively drawn plans. *See id.* at 8–9 n.2.

There is no legal justification for equalizing the *de minimis* population deviations in the State’s enacted plan because the plaintiffs’ one-person, one-vote claims are completely baseless. Plan H283 is presumptively consistent with the Equal Protection Clause’s one-person, one-vote principle because it keeps all districts within a 10% range of ideal population. *See, e.g., Brown v. Thomson*, 462 U.S. 835, 842–43 (1983); *Perez* Trial Tr. 994:15–18. This case is nothing like *Larios v. Cox* because Plaintiffs’ own experts acknowledged that the Legislature did not systematically target Democratic incumbents. *See Perez* Trial Tr. 403:2–18 (Martin), 273:21 (Kousser); *cf. Larios v. Cox*, 300 F. Supp. 2d 1320, 1326–27 (N.D. Ga. 2004) (Democratic-majority Georgia Legislature paired 50% of Republican incumbents in the House and 42% in the Senate). Expert opinions purporting to find discriminatory intent in an alleged pattern of overpopulating minority districts failed to consider race-neutral explanations for population deviations such as the distribution of surplus population in counties such as Bexar and Harris. *Compare Texas v. U.S.* Defendants’ Exh. 320 Illustration 2 (purporting to find disproportionate overpopulation of minority districts), *with id.* Plaintiffs’ Exh. 159 (showing that surplus county population fully accounts for thirteen overpopulated minority districts). In fact, the United States’ expert, Dr. Arrington, admitted on cross-examination in the Section 5 case that there is no systematic overpopulation of minority districts in the House plan when 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.”).

II. Texas Congressional Districts

The United States' expert, Dr. Lisa Handley, found that the legislatively enacted congressional plan contained the same number of ability-to-elect districts as the benchmark plan. She concluded that the plan retrogressed, however, because it failed to maintain the same proportion of Latino ability-to-elect districts following the expansion of the Texas delegation to 36 seats. Despite the State's disagreement with this conclusion, Plan C226 addresses the United States' retrogression concerns as well as all Section 2 and constitutional claims fairly at issue in the *Perez* litigation.

A. Congressional District 23

The State's enacted congressional plan increased CD23's HCVAP majority from 58.4% to 58.5% and its SSVR majority from 52.6% to 54.8%. The United States nevertheless objected to the changes to CD23 as retrogressive under Section 5. Identification of Issues at 8–9. Plaintiffs in *Perez* alleged that the legislatively enacted CD23 denied Latino voters the opportunity to elect their candidates of choice.

The underlying dispute about CD23 in both *Perez* and *Texas v. U.S.* has been whether the district qualified as an “opportunity” or “ability-to-elect” district under the benchmark plan. The State has consistently maintained that the status of CD23 is unchanged—if it was an opportunity or ability-to-elect district in the benchmark, it remains so in the enacted plan. The State recognizes, however, that the district is fairly at issue. To address the specific concerns of Plaintiffs in this case and the United States without making unwarranted changes to the district,

Plan C226 returns CD23 as close as possible to its benchmark configuration, thus restoring any opportunity or ability to elect that may have been lost in the enacted plan.¹¹

B. Congressional District 33

Plaintiffs in *Perez* and the defendants in *Texas v. U.S.* challenged the configuration of congressional districts in Tarrant County on various grounds. Although the State maintains that these districts are the product of purely political—and therefore perfectly legal—motivations, it acknowledges that these districts are fairly at issue and that the Supreme Court specifically recognized concerns with the enacted plan’s CD33.

Plan C226 addresses these concerns by creating more compact districts in the Tarrant County area. Specifically, this was achieved by drawing CD33 as a compact “crossover district” in the Dallas-Fort Worth area with 39.4% HCVAP and 35.8% SSVR. This district should provide all minority voters in the district the opportunity to combine with other like-minded voters to elect the representative of their choice.

C. Congressional District 27

In the benchmark plan, CD27 is a 63.8% HCVAP and 61.1% SSVR majority district that includes Nueces, Kleberg, Kenedy, and Willacy County, most of Cameron County, and the southwest portion of San Patricio County. The district is currently represented by Republican Blake Farenthold. The enacted plan changes CD27 substantially, retaining its base in Nueces County but adding new counties to the north and west to create a district with 41.1% HCVAP and 36.7% SSVR. The United States objected to the alteration of CD27 as retrogressive under

¹¹ The State’s reconstituted election analysis indicates that the Latino candidate of choice will win three of ten elections in CD23 under Plan C226—the same number as in the benchmark plan and an increase over both the legislatively enacted plan (one of ten) and Plan C220 (two of ten).

Section 5. Plaintiffs in *Perez* allege that the changes to CD27 violate the rights of Nueces County's Latino voters under Section 2.

Plan C226 does not alter CD27 as drawn in the enacted plan because any retrogression caused by the Legislature's changes is more than offset by CD34, an open district with 71.7% HCVAP and 71.9% SSVR that occupies much of former CD27's territory and materially increases Latino voting strength. *See, e.g.*, Direct Testimony of John Alford, *Texas v. U.S.* Plaintiff's Exh. 175 at 23–24. With respect to Section 2, there is no evidence that the changes to CD27 will exclude Nueces County's Latino voters from the political process, and Nueces County's competitive political landscape (which resulted in the election of three Republicans to the Texas House in 2010) challenges the assumption that making CD27 more Republican will injure Nueces County voters in any way.

D. Congressional District 25

In the benchmark plan, CD25 was a 63.1% Anglo CVAP-majority district with 25.3% Hispanic CVAP and 9% Black CVAP. The United States raised no objection to the configuration of CD25 in the enacted plan. In *Perez* and *Texas v. United States*, private plaintiffs and intervenors allege that the changes to CD25 constitute unlawful racial discrimination in violation of the Fourteenth Amendment. There is no serious claim that CD25—which was, if anything, a crossover district—is protected under Section 2 of the Voting Rights Act.

Plan C226 makes no change to CD25 as enacted by the Texas Legislature because there is no legal basis on which to do so. This district is, at best, a crossover district as defined by the Supreme Court in *Bartlett v. Strickland*, 556 U. S. 1 (2009). Representative Dawnna Dukes testified, for example, that the so-called “tri-ethnic coalition” in Travis County depends on Anglo support for Democratic candidates to succeed. The United States has properly taken the position

that CD25 does not provide minority voters with the ability to elect candidates of their choice within the meaning of the Voting Rights Act. *See* Identification of Issues at 9 (stating that with the exception of CD23 and CD27, the enacted congressional plan will not change the ability of minority citizens to elect their preferred candidates of choice).¹² Furthermore, even if the reconfiguration of CD25 could be construed as retrogressing minority voters' ability to elect under Section 5, Plan C226's creation of a new crossover district in CD33, and its creation of new Latino opportunity district CD35 in Central Texas, more than offset any such loss.

The allegations of intentional racial discrimination in CD25 are utterly baseless. There is no evidence whatsoever that the Legislature altered CD25 to harm any voter on the basis of race or language minority status. The Legislature redrew CD25 to make reelection much more difficult for a particular incumbent congressman who, in the months leading up to the 2011 legislative session, championed federal legislation that had the effect of temporarily depriving the State of more than \$800 million in education funding. Political motivations for a districting decision are entirely permissible. *See, e.g., Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (“[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact.”). Any adjustments to the enacted CD25 or any other part of the Austin area in the congressional map would be wholly outside this Court's interim map-drawing authority.

¹² Even if CD25 were otherwise eligible for protection under the Voting Rights Act, the lack of cohesion among Latino and African-American voters would undermine any potential claim of crossover or coalition status. *See Perez* Trial Tr. at 265:15–18 (Kousser statement that Latinos and African Americans are not cohesive in the Democratic primary elections); *id.* at 506:3–508:5 (Engstrom statement that African-Americans are the “least likely group to support Latinos in a Democratic primary”); *see also Texas v. U.S.*, Alford Direct Testimony, Plaintiffs' Exh. 175 at 27, Appx. C tbl. C2. Likewise the lack of Anglo bloc voting to defeat minority candidates of choice. *Texas v. U.S.*, Alford Direct Testimony, Plaintiff's Exh. 175 at 26.

E. Requests of Individual Members of Congress

Congresswoman Eddie Bernice Johnson, Congresswoman Sheila Jackson-Lee, and Congressman Alexander Green have alleged that the State's enacted congressional plan demonstrates intentional racial discrimination based in part on the Legislature's failure to include their existing district offices in their districts in the enacted plan. Congresswoman Johnson also contends that her house was not included in CD30. Congresswoman Lee contends that the Legislature further discriminated on the basis of race by removing downtown Houston from CD18 and placing it in CD29, a Latino-majority district represented by Democrat Gene Green.

While these members' complaints are understandable, their accusation of racial discrimination is unfounded. The failure to include these members' district offices was inadvertent. RedAppl, the State's mapping software, does not identify district offices, *Texas v. U.S.* Trial Tr. 5B 13:13-14:11, and the Legislature was not advised of the oversight during the legislative session. *Id.* 7B 57:25-58:22; Plaintiff's Exh. 12. The removal of Congresswoman Johnson's house from CD30 was also inadvertent. The State relied on RedAppl, which identifies member residences based on information provided by each member's staff, but which was apparently mistaken in this instance. The removal of downtown Houston from CD18 was not intended to have any effect on African-American voters (downtown Houston being a relatively low-population area) or on Congresswoman Lee. Nevertheless, in an effort to reach an agreed resolution, all of these concerns are addressed in Plan C226.

III. Texas Senate

The United States judicially admitted that the Senate plan complies with Section 5 of the Voting Rights Act. *See Texas v. U.S.*, Answer (Doc. 45) ¶ 46 ("Defendants admit that Plaintiff is entitled to a declaratory judgment that the proposed Senate plan complies with Section 5 of the

Voting Rights Act.”). A group of intervenors led by Senator Wendy Davis alleged that the alteration of SD10—Senator Davis’s district—had a retrogressive effect and demonstrated a racially discriminatory purpose. *See Texas v. U.S.*, Davis-Veasey Intervenors’ Statement of Legal Position (Doc. 52).¹³ Senator Davis filed a lawsuit in this Court alleging that the Senate plan caused vote dilution and reflected discriminatory purpose in violation of Section 2 and the Fourteenth Amendment. Senator Davis’s claims are directed at SD10.

There is no merit whatsoever to the claim that benchmark SD10 provided minority voters with the opportunity or ability to elect their candidate of choice. In the benchmark Senate plan, SD10 had 62.7% Anglo CVAP majority with 18.3% Black CVAP and 15.1% Latino CVAP. At most, SD10 was a potential crossover district, and thus not protected by the Voting Rights Act. But even the district’s crossover potential was very rarely realized. Senator Davis’s 2008 election is the only exception to benchmark SD10’s consistent record of electing Republican candidates.¹⁴ Because benchmark SD10 afforded minority voters no ability to elect their candidates of choice, there can be no retrogression when the district is altered. The DOJ recognized as much.

Despite maintaining that all of Davis’s claims lack merit, the State recognizes that the Court had some concerns about the district, which motivated it to return SD10 to its benchmark configuration in its interim plan. Pursuant to the Court’s instruction, the State and the Davis Plaintiffs have discussed an agreement, but the two sides have not been able to agree to a

¹³ The Texas State Conference of NAACP Branches, LULAC, and the Texas Legislative Black Caucus joined the Davis Intervenors in their opposition to SD10. *See* Identification of Issues at 20. These additional intervenors also challenged SD15 under Section 5; however, this claim was not pursued in the Section 5 trial.

¹⁴ *See* Alford Direct Testimony, *Texas v. U.S.* Plaintiff’s Exh. 175 at 30. Senator Davis’s election was marked by a weak Republican opponent facing an ethics scandal, *Texas v. U.S.* Trial Tr. 4A 68:20–69:25; *Texas v. U.S.* Plaintiffs’ Exh. 106, 108; increased Anglo crossover voting, *Texas v. U.S.* Trial Tr. 7A 35:14–19; and a focused effort targeting SD10 by the Texas Democratic Party, which recruited Davis to run for the seat, *id.* 4A 26:5–15. Even in these circumstances, Senator Davis did not win a majority of votes and, in fact, won by fewer votes than were cast for the Libertarian candidate. *Id.* 4A 62:16–63:16; *Texas v. U.S.* Plaintiffs’ Exh. 31 at 14.

resolution. Despite the Supreme Court's instructions, Davis has essentially demanded that SD10 be redrawn as a performing coalition district. But Davis has not, and cannot, propose a configuration of SD10 that provides a single minority group the opportunity to elect its candidate of choice. She therefore has no chance of prevailing on her claim that a "performing" Section 2 district must be drawn to replace the legislatively enacted SD10.

Although Davis's demand for a performing Section 2 district has no legal basis whatsoever, Plan S167—to which the State will not object—addresses Davis's Fourteenth Amendment and discriminatory purpose claims by configuring SD10 in a more compact fashion wholly within Tarrant County. Under Plan S167, SD10 has 54.2% Anglo VAP, 15.5% Black VAP, 26.6% Hispanic VAP, 15.6% Hispanic CVAP, and 12.9% SSVR. Although the State maintains that the legislatively enacted plan was not the product of racially discriminatory intent, the proposed Senate plan addresses concerns about dividing minority communities in Tarrant County by placing all communities identified by the plaintiffs into a single compact district.

Under Plan S167, SD10 is expected to remain a Republican-leaning district as it was in the benchmark, the legislatively enacted plan, and this Court's interim plan. Even assuming Senator Davis's Fourteenth Amendment and discriminatory purpose claims have merit—and they do not—that does not entitle her to a district in which she will essentially be guaranteed reelection, which is what she is demanding. At most, she is entitled to have SD10 adjusted by this court in a way that addresses the only colorable legal claims she has. That is exactly what Plan S167 does. The further adjustments to SD10 sought by Senator Davis—which are designed to create a coalition district or to improve Senator Davis's electoral prospects—are beyond this Court's authority.

CONCLUSION

The State does not concede that any of the claims asserted against the enacted redistricting plans have legal merit. Nevertheless, Texas voters are better served, in the short term, by a reasonable resolution that allows elections to go forward while doing minimal violence to the legislative intent embodied in the State's enacted redistricting plans. Plans H303, C226, and S167 provide such a resolution. For that reason, the State will not object to their implementation on an interim basis for the 2012 elections.

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