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]
MARAGARITA V. QUESADA, et al., Plaintiffs, v. RICK PERRY, et al., Defendants.	§	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

JOHN T. MORRIS,	§	CIVIL ACTION NO.
	§	SA-11-CA-615-OLG-JES-XR
Plaintiff,	§	[Consolidated case]
	§	
v.	§	
	§	
STATE OF TEXAS, et al.,	§	
	§	
Defendants.	§	
_____	§	
	§	
EDDIE RODRIGUEZ, et al.,	§	CIVIL ACTION NO.
	§	SA-11-CA-635-OLG-JES-XR
Plaintiffs,	§	[Consolidated case]
	§	
v.	§	
	§	
RICK PERRY, et al.,	§	
	§	
Defendants.	§	

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STATEMENT OF INTEREST OF THE UNITED STATES
UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

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INTEREST OF THE UNITED STATES

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit.

This case presents important questions regarding Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, which precludes covered jurisdictions from implementing voting changes without receiving "preclearance" for those changes. The Attorney General has primary responsibility for enforcing this preclearance requirement. *See* 42 U.S.C. § 1973c(a), 1973j(d). At issue here, where the State of Texas has not received preclearance for its enacted redistricting plans that would govern the election of its U.S. Congressional delegation and State House of Representatives, is whether the State may nevertheless implement the plans on an "interim" basis as it litigates the plans' substantive compliance with Section 5. The United States has a strong interest in maintaining the settled rule that no such implementation of an unprecleared change is permissible under the Voting Rights Act.

Moreover, the United States has a particular interest in the redistricting plans at issue in this case. It currently is defending the related declaratory judgment action filed by the State of Texas in the District Court for the District of Columbia seeking judicial preclearance under Section 5 for those plans. *See Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed July 19, 2011). In the Section 5 declaratory judgment action, the United States has answered Texas's complaint by denying that the State's proposed Congressional and State House redistricting plans comply with Section 5 of the Voting Rights Act. *See* Answer at 2, Texas v. United States, No. 1:11-cv-1303 (D.D.C., filed Sept. 19, 2011); *see also* United States' Memorandum of Points and Authorities in Support of its Opposition to Plaintiff's Motion for Summary Judgment, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed Oct. 25, 2011), ECF No. 79-2 (Attachment A).

SUMMARY OF ARGUMENT

The United States submits this brief to advise this Court regarding principles for fashioning redistricting plans to govern Texas Congressional and State House elections as a remedy for the State's failure to receive Section 5 preclearance. While Texas suggests that its enacted plans substantively comply with Section 5 and eventually will receive preclearance from the D.C. district court, in addition to being incorrect, this argument is also irrelevant because this Court lacks authority to rule on the merits of the plans' compliance with Section 5 or the likelihood that Texas will prevail in its declaratory judgment action. Rather, this Court's task is simply to order a remedy for the State's failure to secure preclearance for its enacted plans, to be enforced unless and until the plans at issue obtain preclearance or the State enacts alternative plans that do so. *See Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983).[1]

This Court must reject Texas's request that it order implementation on an "interim" basis of the very legislative plans that have failed to receive preclearance. Texas's proposal contravenes the settled rule that a covered jurisdiction may not implement an unprecleared redistricting plan, as an "interim" plan or otherwise. Moreover, this is not a situation where the Court can excise the problematic parts of a plan to which an objection has been interposed, as in *Upham v. Seamon*, 456 U.S. 37 (1981). Rather, this Court must set aside the unprecleared plans and either draw up its own or accept one of the specific remedial proposals offered by the plaintiffs.

[1] As Texas observes in its filings, this task would become unnecessary if the enacted plans were to receive preclearance from the D.C. district court. The United States disagrees with Texas as to the likelihood that the plans will receive preclearance.

ARGUMENT

I. This Court May Not Order the Unprecleared Plans Into Effect

This Court should reject Texas's proposal that it order implemented on an "interim" basis the very legislative plans that have failed to receive preclearance.[2] Section 5 requires a covered jurisdiction such as Texas to obtain preclearance before implementing any new voting changes. Unless and until the State obtains such preclearance, its redistricting plans cannot be implemented, except under very exceptional circumstances, none of which are present here. Nor does this case present a situation, as in *Upham v. Seamon*, 456 U.S. 37 (1981), where the Attorney General's objection to a redistricting plan specifies a defect in only part of the plan such that it may be cured by a court and the remainder of the plan enforced.

Section 5 requires covered States to obtain judicial or administrative preclearance before enforcing a voting change. 42 U.S.C. § 1973c(a). "A voting change in a covered jurisdiction 'will not be effective as law until and unless cleared' pursuant to one of these two methods." *Clark v. Roemer*, 500 U.S. 646, 662 (1991) (quoting *Connor v. Waller*, 421 U.S. 656, 656 (1975) (*per curiam*)). "Failure to obtain either judicial or administrative preclearance 'renders the change unenforceable.'" *Id.* (quoting *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982)).

Not only is a covered jurisdiction barred from enforcing its unprecleared plan, but a federal court may not order that jurisdiction to hold elections in which unprecleared voting changes will be implemented. *See, e.g.*,*Clark*, 500 U.S. at 654 ("§ 5's prohibition against

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[2] There is nothing necessarily "interim" about the plan this Court must fashion. The plan will be in effect until Texas obtains preclearance for a legislatively enacted redistricting plan or the Court orders a different plan into effect. Accordingly, unless the already enacted plan is precleared by the district court in the District of Columbia, the plan devised here will govern Texas elections unless and until Texas passes another plan that is precleared or until the next redistricting cycle.

implementation of unprecleared changes required the District Court to enjoin the election"); *Lopez v. Monterey County*, 519 U.S. 9, 22 (1996) (holding that it was error for district court to "order elections under that system before it had been precleared"). This rule does not give way simply because a district court is put to the "unwelcome obligation" of devising an alternative redistricting plan. *See Jordan v. Winter*, 541 F. Supp. 1135, 1141 (N.D. Miss.) (three-judge panel), *vacated and remanded on other grounds*, 461 U.S. 921 (1982). Rather, the law is clear that, in such situations, courts "should not put into effect the very plans … which have failed of preclearance by the Attorney General or are awaiting a pre-clearance decision by [the District of Columbia court]." *South Carolina v. United States*, 589 F. Supp. 757, 759 (D.D.C. 1984) (three-judge panel). Were it otherwise, State officials could "evade the preclearance process by proposing the disputed plan or its suspect parts as a legally permissible 'interim' alternative." *Id.* So long as the Court is presented with other alternatives, as it is here, it would be "both inappropriate and unseemly" to "implement on a temporary basis the plan which those proceedings seek to preclear." *Jordan*, 541 F. Supp. at 1142.

While Section 5 does not by its terms cover orders by federal district courts, it does preclude a covered jurisdiction such as Texas from submitting an unprecleared plan to a court as a means of avoiding Section 5 review – including as a proposed remedy for violations of other laws, such as Section 2 of the Voting Rights Act.[3] *McDaniel v. Sanchez*, 452 U.S. 130, 137 (1982); *see also Campos v. City of Baytown*, 840 F.2d 1240, 1250 (5th Cir.), *rehearing denied*, 849 F.2d 943 (1988) (holding the district court erred by adopting an unprecleared legislative plan

[3] There is no basis for Texas's assertion that the Supreme Court "severely limited the scope of *McDaniel*" in *Lopez v. Monterey County*, 525 U.S. 266 (1999). *See* Defendants' Advisory Regarding Interim Reapportionment at 4 n.2. To the extent that *Lopez* is inconsistent with *McDaniel*, it strengthens the general rule requiring preclearance by clarifying that only "wholly court-developed plans" are exempted. *See* 525 U.S. at 287.

proposed by the City). Preclearance is required "whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people," including when the proposal is submitted to a federal court as a proposed remedy. *McDaniel*, 452 U.S. at 153; *see* 28 C.F.R. § 51.18(a) ("Changes affecting voting for which approval by a Federal court is required, or that are ordered by a Federal court, are exempt from section 5 review only where the Federal court prepared the change and the change has not been subsequently adopted or modified by the relevant governmental body.").

There is no merit to Texas's argument that, notwithstanding this general rule, this Court should order into effect all or part of the same redistricting plan that has failed to receive preclearance. Texas misreads *Upham v. Seamon*, 456 U.S. 37 (1981), a case that establishes an exception to the general rule outlined above for circumstances in which the Attorney General's objection identified only part of a plan as problematic. This case is not among those to which *Upham* applies.

In *Upham*, Texas submitted its redistricting plan to the Attorney General for preclearance. The Attorney General interposed an objection that identified two districts as raising concerns under Section 5. With regard to the remainder, the Attorney General noted that the State had satisfied its burden of demonstrating that the plan was nondiscriminatory in purpose and effect. A local district court, hearing a constitutional challenge to the redistricting plan, remedied the concerns specified in those two districts to which the Attorney General had objected. It also redrew the districts in the area of Dallas County, to which the Attorney General had not objected. *See Upham*, 456 U.S. at 38.

In a *per curiam* opinion, the Supreme Court reversed with respect to the court's modification of the Dallas County districts. It held that, in devising an interim plan, a district

court's changes to a legislatively enacted plan should be limited "by the nature and scope of the violation." *Id.* at 42. Where the Attorney General has objected to only one part of a plan and has found the remainder unobjectionable, a court should adopt a plan that permits the unobjectionable portion to go into effect. *Id.* at 43.

Upham thus applies to that limited set of cases in which a court can identify and adopt "the unoffending parts" of an unprecleared plan. *South Carolina*, 589 F. Supp. at 759 (citing *Upham*). Under such circumstances, "*Upham* requires the court to minimize violence to those legislative policies embodied in the plan by changing it only to the extent necessary to cure its cognizable flaws." *Cook v. Luckett*, 735 F.2d 912, 918 (5th Cir. 1984).

For example, in *Jordan v. Winter*, the Attorney General objected that the drawing of certain district lines diluted the black vote. 541 F. Supp. at 1143. The district court was able to "accept that decision" while drawing a map that embodied many of the legitimate political decisions made by the legislature. *Id.* Similarly, in *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991), *aff'd sub. nom. Richards v. Terrazas*, 505 U.S. 1214 (1992), the Attorney General had interposed objections to a Texas House of Representatives statewide redistricting plan only with respect to some regions. Accordingly, the court was able to "fashion a remedial plan yet remain loyal to those portions of the state in which no DOJ objections were lodged." *Id.* at 837. And in *Balderas v. State*, No. 6:01-cv-158, 2001 WL 34104833 (E.D. Tex. Nov. 28, 2001), the Attorney General had objected to the dilution of Hispanic voting strength only in certain regions of Texas. Accordingly, the court was able to fashion a remedy that "address[ed] all of [the

Attorney General's] concerns" while preserving that part of the legislative map to which no objection had been issued. *Id.*, 2001 WL 34104833 at *3.[4]

This case does not fall within the narrow exception established by *Upham* for several reasons. First, *Upham* applies only where there is an administrative objection from the Attorney General that specifies certain districts and permits a court to identify and implement "the unoffending parts." Here, by contrast, there is no administrative determination from the Attorney General at all, because the State has chosen to seek judicial preclearance exclusively through a district court proceeding. While this choice is the State's prerogative, *see* 42 U.S.C. § 1973c(a), the result is that the Attorney General has not pronounced, and could not pronounce, any parts of the plan as compliant with Section 5, as occurred in *Upham* and its progeny. Moreover, some other litigants have opposed preclearance based on claims different than those of the United States, and it ultimately will be the D.C. court that determines how much, if any, of the enacted plans comply with Section 5.

The State concedes that its choice to have the district court decide whether its plans meet the Section 5 standard makes this situation "slightly different," *see* Defendants' Advisory Regarding Interim Reapportionment at 4, but it misunderstands the significance of that difference. The State observes, correctly, that the Attorney General, rather than lodging a formal objection that has binding legal effect, has simply filed an answer "in a lawsuit that has yet to be adjudicated." *Id.* at 8. But that does not mean, as the State argues, that this Court may implement the enacted plan until such time as the D.C. court "expressly denies preclearance."

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[4] The State's reliance on *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) is misplaced. *See* Defendants' Advisory Regarding Interim Reapportionment at 7. The redistricting plan in that case received preclearance from the Attorney General before the drawing of a remedial map. *See Martinez*, 234 F. Supp. 2d at 1287.

Id. Rather, it means that the plan may not go into effect until that court expressly *grants* preclearance. *See* 42 U.S.C. § 1973c(a) (barring a covered jurisdiction from putting change into effect "unless and until the court enters such judgment"); 28 C.F.R. § 51.1(a)(1) (prohibiting "the enforcement" of covered law until a "declaratory judgment is obtained").

Second, even if the Attorney General's filings in the D.C. district court could limit the preclearance controversy in the same fashion as an administrative objection, the issues identified by the Attorney General encompass the entire plans. In particular, the United States has taken the position that both the Congressional and State House plans were drawn with discriminatory purpose. Additionally, the United States takes the position that both plans have retrogressive effects in that they diminish the ability of minority voters in the state as a whole to elect their preferred candidates of choice. *See, e.g.*, United States' Memorandum of Points and Authorities in Support of its Opposition to Plaintiff's Motion for Summary Judgment, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed Oct. 25, 2011), ECF No. 79-2. Accordingly, there is no "unoffending part[]" of either plan.

Finally, Texas asks this Court to order into effect the *entirety* of its redistricting plans, including those districts specifically identified by the Attorney General's answer as contributing to a retrogressive effect. Unsurprisingly, the State can cite to no cases under Section 5 endorsing such an approach. Instead, it relies heavily on decisions not involving Section 5's preclearance requirements, such as *Bullock v. Weiser*, 404 U.S. 1065 (1972), and *Whitcomb v. Chavis*, 396 U.S. 1055 (1970). *See* Defendants' Advisory Regarding Interim Reapportionment at 5. To the extent either of those cases is relevant here, they support the general principle that, where possible, a court should permit only the "unoffending parts" of a legislative redistricting plan to

go into effect.[5] They certainly do not support Texas's proposal to implement the entirety of its redistricting plans.

Texas's proposal that this Court order into effect the State's unprecleared redistricting plans is specifically foreclosed by the Voting Rights Act and settled caselaw. Because the narrow exception set out in *Upham* does not apply here, there is no basis for the Court to deviate from this settled rule.

II. Adopted Plans Must Comply with Section 2 and Section 5

The Court will need to ensure that any plans it adopts comply with both Section 2 and Section 5 of the Voting Rights Act. *See Abrams v. Johnson*, 521 U.S. 74, 90, 96 (1997); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 631 (D.S.C. 2002). The United States has attached its filings to the three-judge court in the United States District Court for the District of Columbia regarding the appropriate standard to consider when making the Section 5 inquiry. *See* United States' Statement of Genuine Issues, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed Oct. 25, 2011), ECF No. 79-1 (Attachment B); United States' Memorandum of Points and Authorities in Support of its Opposition to Plaintiff's Motion for Summary

[5] *Bullock* involved a challenge to Texas's redistricting following the 1970 census, before Texas was covered by Section 5's preclearance requirements. A district court found the redistricting plan to violate one-person, one-vote principles and ordered the State to use an alternative plan for the 1972 election. The Supreme Court stayed this order in early 1972, thus permitting the legislatively enacted plan to be used on an interim basis. The Court eventually affirmed the district court's finding as to the enacted plan's unconstitutionality, but found that the district court should have chosen an alternative plan that cured the enacted plan's constitutional deficiencies while more closely conforming to the State's political choices. *See White v. Weiser*, 412 U.S. 783, 794-97 (1973). In *Whitcomb*, the court rejected on the merits a challenge to an Indiana redistricting plan that was alleged to be dilutive. It observed in dicta that, even had the district court been correct in finding the plan unconstitutional, it should have struck down the plan only with respect to the areas where the violation was alleged and permitted the remainder of the plan to go into effect. *See* 396 U.S. at 160-61.

Judgment, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed Oct. 25, 2011), ECF No. 79-2 (Attachment A).

CONCLUSION

This Court should not implement Texas's unprecleared plan, on an interim basis or otherwise.

Date: October 28, 2011

Respectfully submitted,

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Attachment A

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, MEXICAN AMERICAN LEGISLATIVE CAUCUS, Defendant-Intervenor, GREG GONZALES, *et al.*, Defendant-Intervenors, TEXAS LEGISLATIVE BLACK CAUCUS, Defendant-Intervenor, TEXAS LATINO REDISTRICTING TASK FORCE, Defendant-Intervenor, TEXAS STATE CONFERENCE OF NAACP BRANCHES *et al.*, Defendant-Intervenors.	Civil Action No. 1:11-cv-1303 (RMC-TBG-BAH) Three-Judge Court

UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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The State of Texas has moved this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for entry of an order of summary judgment in its favor on its claims that the State's redistricting plans for the State's delegation to the United States Congress, the Texas House of Representatives, the Texas State Senate, and the Texas State Board of Education neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group and otherwise fully comply with Section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973c, and that such plans may be implemented without delay. *See generally* Benchmark and Proposed Maps (Ex. 1). As set forth below, Defendants United States and Eric H. Holder, Jr. (collectively "United States") oppose Plaintiff's Motion and submit that it should be denied. [1]

The proposed State House redistricting plan has a retrogressive effect because it provides minority voters with the ability to elect their preferred candidates of choice in 45 or 46 districts compared to the benchmark plan that provided minority voters with the ability to elect in 50 districts. The proposed Congressional redistricting plan has a retrogressive effect because, compared to the benchmark plan, it decreases the percentage of districts in the Congressional plan in which minority voters have the ability to elect and because under the proposed plan 479,704 fewer Hispanics will reside in districts in which they have an ability to elect a candidate of choice. Both plans were also adopted with a discriminatory purpose, and there are a substantial number of material facts in dispute with regard to both prongs of the Section 5

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[1] In its Answer to the Complaint (Docket No. 45), the United States admitted that Plaintiff is entitled to a declaratory judgment that the proposed redistricting plans for the State Board of Education ("SBOE") and State Senate each comply with Section 5, and averred that the Court will have to make its own determination as to whether these plans comply with Section 5 before they may be implemented. Answer ¶¶ 40, 46. A declaratory judgment in the State's favor has been entered with regard to the SBOE plan. The United States' response is directed only at the State's request for declaratory judgment with respect to the proposed plans for the Texas Congressional delegation and the State House.

standard. Therefore, summary judgment is not appropriate regarding the House plan and Congressional plan.

I. STANDARD FOR SUMMARY JUDGMENT

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In deciding whether there is a genuine issue of material fact, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Id.*

Moreover, courts have generally concluded that cases that involve questions of intent or motive are rarely appropriate for summary judgment as relevant evidence is often susceptible to different interpretations or inferences by the trier of fact. *Hunt v. Cromartie*, 526 U.S. 541, 552-553 (1999); *accord, e.g.*, *Poller v. Columbia Brad. Sys., Inc.*, 368 U.S. 464, 473 (1962); *Att'y Gen. v. Irish People Inc.*, 796 F.2d 520, 524 (D.C. Cir. 1986). In the redistricting context, assessing whether a jurisdiction was racially or politically motivated is not a simple matter, but an inherently complex task requiring the court to perform a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Hunt*, 526 U.S. at 546 (citing *Miller v. Johnson*, 515 U.S. 900, 905 (1995)); *accord Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-90

(1997) (noting that in Section 5 cases involving discriminatory purpose questions, "courts should look to our decision in *Arlington Heights* for guidance").

II. ARGUMENT

A. To Obtain Judicial Preclearance under Section 5, the State Must Demonstrate that Its Proposed Redistricting Plans Have Neither a Discriminatory Purpose nor a Retrogressive Effect

Section 5 of the Voting Rights Act requires certain covered jurisdictions to submit any voting change to the United States Attorney General or to the United States District Court for the District of Columbia for what is known as "preclearance" of the voting change before it can be implemented. 42 U.S.C. § 1973c. Texas is such a covered jurisdiction and, therefore, has submitted to this Court for preclearance its proposed redistricting plans for the State's delegation to the United States Congress and for the Texas State House of Representatives. Under Section 5, the submitting jurisdiction has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *See Georgia v. United States*, 411 U.S. 526 (1973); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.52 (2011).

B. The Section 5 Retrogression Standard Requires a Functional Analysis of Elections

A voting change has a discriminatory effect if it will lead to retrogression in the position of members of a racial or language minority group (*i.e.*, will make members of such a group worse off than they had been before the change with respect to their ability to exercise the electoral franchise effectively). *See Beer v. United States*, 425 U.S. 130, 140-42 (1976). In the context of redistricting, this means that the State must establish that its proposed plan does not diminish the ability of such minority citizens "to elect their preferred candidate of choice." 42 U.S.C. § 1973c(b).

Voting changes are "measured against the existing practice" – the benchmark – to determine whether the proposed changes will result in retrogression under Section 5. *Riley v. Kennedy*, 553 U.S. 406, 416 (2008). The benchmark against which the new plan is measured is the last legally enforceable redistricting plan in force or effect. *Id.* In this case, where the State is requesting preclearance of statewide plans, analysis of retrogression should be conducted on a statewide basis. *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003). In its 2006 reauthorization of the Voting Rights Act, Congress clarified that any voting change which has "the effect of diminishing the ability of any citizens of the United States on account of race or color, or [language minority status], to elect their preferred candidate of choice denies or abridges the right to vote" within the meaning of Section 5. 42 U.S.C. § 1973c(b); *see also id.* § 1973c(d) ("[T]he purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice."). Section 5 jurisdictions may not implement voting changes that diminish the ability of minority voters to exercise their electoral power and to elect their candidates of choice.

Contrary to the arbitrary standard presented by the State in its Motion, determining whether a minority group has the "ability to elect" a candidate of choice under Section 5 is not as simple as looking at a discrete set of population figures. "The legal standard is not total population, voting age population, voting age citizen population or registration, but the ability to elect. The Supreme Court repeatedly has declined to elevate any of these factual measures to a magic parameter." *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 79 (D.D.C. 2002) (three-judge court), *vacated on other grounds*, 539 U.S. 461 (2003) (citing *Johnson v. DeGrandy*, 512 U.S. 997, 1017 n.14 (1994)).

The State's analysis of "ability to elect" in both the State House and Congressional plans, consists only of rote application of a population formula. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment ("Tex. Mem.") at 5 ("To determine whether a district is one in which a minority group has the ability to elect its candidate of choice – *i.e.*, whether the district is a protected opportunity district – courts must look to the racial makeup of the population in the district."). The State, however, confuses "opportunity" district with "ability to elect" district, conflating Section 5 with Section 2 of the Voting Rights Act, which the Supreme Court has repeatedly advised against. "Section 2 concerns minority groups' *opportunity* to elect representatives of their choice, while the more stringent § 5 asks whether the change has the purpose or effect of denying or abridging the right to vote." *Bartlett v. Strickland*, 129 S. Ct. 1231, 1249 (2009) (citing *LULAC v. Perry*, 548 U.S. 399, 446 (2006); *Reno v. Bossier Parish Sch. Bd.* ("*Bossier I*"), 520 U.S. 471, 476-80 (1997)) (internal quotation marks and citations omitted) (emphasis added). While the Section 2 calculus must include an initial focus on a specific majority-minority population floor to determine if an "opportunity" to elect exists in a proposed "undiluted" alternative to a challenged voting practice, *Bossier I*, 520 U.S. at 480, population is just the starting point of an analysis under Section 5 to determine whether existing electoral power of a minority population has been diminished.

Moreover, the State also has no support for its arbitrary numerical standard. With regard to African-American voters, the State simply concluded that if a district has a Black voting age population greater than 40 percent, then African-American voters can elect their candidate of choice without considering whether those voters actually have elected their candidate of choice at that level. With respect to Hispanic voters, the State posits that if a district has a Hispanic citizen voting age population greater than 50 percent, then Hispanic voters can elect their

candidate of choice without considering whether those voters actually have elected their candidate of choice at that level. There is no precedent supporting the State's decision to limit the ability-to-elect analysis under Section 5 to a limited consideration of demographic data using arbitrary thresholds. Similarly, the State provided no justification for treating the two minority groups differently. The State's analysis constitutes a superficial evaluation of the ability-to-elect status of both the benchmark and proposed plans and ultimately renders its assessment of retrogression invalid.

"In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment." *See* Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act ("2011 Guidance"), 76 Fed. Reg. 7470 (Feb. 9, 2011).[2] Determining whether the ability to elect exists "requires a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id*. Besides population, this includes an examination of election history and voting patterns within the jurisdiction, voter registration and turnout information. *Id*. *See*, *e.g.*, *LULAC*, 548 U.S. at 428 (observing that "it may be possible for a citizen voting-age majority to lack real electoral opportunity").

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[2] The 2011 Guidance and the Department's Section 5 Regulations, 28 C.F.R. §§ 51.1-.67 (2011), set forth the Attorney General's analytical framework when, under the Act, he acts as the surrogate for this Court in the administrative review of Section 5 submissions. *See* 28 C.F.R. § 51.52(a). Courts have relied on these documents, particularly the Guidance, as part of their process to assure that court-drawn plans do not violate Section 5's standards. *See Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 645-646 (D.S.C. 2002). The Supreme Court has stated that it "traditionally afford[s] substantial deference to the Attorney General's interpretation of Section 5 in light of her "central role . . . in formulating and implementing" that provision. *See, e.g*., *Lopez v. Monterey Cnty.*, 525 U.S. 266, 281-282 (1999).

The Texas Legislative Council ("TLC"), a nonpartisan state agency, has advised the Texas Legislature, that "[a]n accurate measurement of minority voting strength requires a thorough district-by-district analysis of current minority population, of racial bloc voting, and of minority voter eligibility, registration, and election participation, since each of these factors affects the ability of minority group voters to elect their preferred candidates." Texas Legislative Council, *State and Federal Law Governing Redistricting in Texas* 91 (2011) (Ex. 2). Moreover, Todd Giberson, a systems analyst in the Texas Attorney General's Legal Technical Support Division, has acknowledged that his office analyzed certain primary and general election contests to assess whether a district was, in fact, an ability-to-elect district for minorities in the state. *See* Giberson Dep. at 16:5-20, 19, Oct. 18, 2011 (Ex. 3). The State has failed to include that analysis in its motion.

As demonstrated by the report of the United States' expert in this case, Dr. Lisa Handley, the proper analysis of the State House or Congressional redistricting plans leads to a conclusion that both are retrogressive – or at least raises disputed issues of fact to preclude entry of summary judgment.

C. The State's Motion for Summary Judgment Should Be Denied Because There Are Genuine Disputes of Fact as to Whether Both the House Plan and Congressional Plan Are Impermissibly Retrogressive

1. The Proposed House Plan Is Retrogressive Because It Provides Minority Voters with an Ability to Elect Candidates of their Choice in Fewer Districts than the Benchmark House Plan

The Court should deny the State's motion for summary judgment because there is a genuine dispute of material fact as to whether the proposed House plan provides minority voters with the same ability to elect candidates of their choice as the benchmark House plan. As demonstrated by the United States' expert, the benchmark plan includes 50 ability-to-elect

districts, while the proposed plan contains no more than 46. This evidence conflicts with the State's assertion, based on its population-only analysis, that the benchmark plan contains 43 ability-to-elect districts and the proposed plan contains 44. Determining whether Texas has met its burden under Section 5 to show that the House plan is not retrogressive will require resolution of these disputed facts, and the motion for summary judgment should therefore be denied

In its Statement of Material Facts, the State relies on its population-only retrogression analysis, claiming the benchmark House plan contains 30 Hispanic opportunity districts and 11 African-American opportunity districts, while its proposed House plan contains 30 Hispanic opportunity districts and 12 African-American opportunity districts. *See* Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment at 6-7. Thus, the State claims, the proposed State House plan is not retrogressive. *See* Tex. Mem. at 10-13.

The State's claim with regard to the number of opportunity districts in the State House plan is plainly disputed by the report of the United States' expert. In her report, Dr. Handley finds, utilizing her "functional analysis," that there are 50 districts in the State House benchmark plan in which minority voters have the ability to elect candidates of choice, but there are only 45 or 46 districts in the proposed House redistricting plan that provide minority voters with an ability to elect. *See* Handley House Rep. at 4-13 & app. A (Ex. 4). Dr. Handley specifically found that Districts 33, 35, and 117 provided Hispanic voters an ability to elect in the House benchmark plan but do not provide Hispanic voters an ability to elect in the proposed plan. *See id.* at 9 & app. A. In addition, District 41 provided Hispanic voters with an ability to elect in the benchmark plan, and the State has not met its burden to show that District 41 provides an ability to elect in the proposed plan. *See id.* at 9-10. District 149 is a coalition district in the benchmark plan in which a combined group of minority voters elect their candidate of choice. This district

is eliminated altogether in the proposed plan and replaced with a different district in a different county with much smaller minority population. *See id.* at 13 Thus, both the ability-to-elect status of specific districts and the overall number of ability-to-elect districts in both the benchmark and proposed State House plans are disputed.

In her analysis, Dr. Handley examines the benchmark plan by looking first at the election contests for the State House. *See id.* at 3. Courts refer to the elections involving these districts in dispute as "endogenous" elections and generally consider such elections more probative for determining whether minority voters can elect their preferred candidate of choice. *See, e.g.*, *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1020-21 (8th Cir. 2006); *Goosby v. Town Bd.*, 180 F.3d 476, 497 (2d Cir. 1999) (*citing Clark v. Calhoun County*, 88 F.3d 1393, 1397 (5th Cir. 1996)); *Johnson v. Hamrick*, 196 F.3d 1216, 1222 (11th Cir. 1999). For the proposed House plan, Dr. Handley, examined the districts' likely performance using recompiled election results[3] from five contests involving Hispanic candidates that were not specific to the districts at issue. *See* Handley House Rep. at 3-4, 8.[4] Courts refer to such elections as "exogenous." Because the

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[3] Recompiled election analysis is simply the practice of aggregating votes from past elections to predict how voters in a proposed district will perform in the future. More specifically, recompilation analysis looks at the votes actually cast in a voting precinct and then recompiles a vote count for those precincts that would comprise the proposed district. Because the proposed district often times includes voting precincts that were not a part of the benchmark district, recompilation analysis can only be performed by looking at elections that span the entire jurisdiction, in this case, statewide elections. Recompilation analysis thus depends strictly on exogenous elections and does not work with endogenous elections that are specific to any particular district. The purpose of recompiled election analysis is to determine whether a minority-preferred candidate would prevail if the districts were drawn as proposed.

[4] When assessing ability to elect, courts have generally found that elections involving minority candidates are more probative than Anglo-only election contests. *Bone Shirt*, 461 F.3d at 1020–21 ("Endogenous and interracial elections are the best indicators of whether the white majority usually defeats the minority candidate."); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 553–54 (9th Cir. 1998) ("[I]n a multi seat, multi vote election, the ability of the minority to elect a non minority candidate is not as probative in a *Gingles* prong three analysis as the inability of the minority to elect a minority candidate."); *Uno v. City of Holyoke*, 72 F.3d 973, 988 n.8 (1st Cir. 1995) ("Although the VRA does not require for a successful Section 2 showing that minority-preferred candidates be members of the minority group, elections in which minority candidates run are often especially probative on the

district lines change, Dr. Handley cannot use endogenous elections to determine if the districts as revised in the proposed plan will still elect a minority candidate of choice. She evaluated an election from each of the following years: 2002, 2004, 2006, 2008, and 2010. *See id.* at 8.

a. District 33

Benchmark District 33 is located in Nueces County in the heart of Corpus Christi. Both the State and the United States agree that under the benchmark plan District 33 is an ability-to-elect district for Hispanic voters in Nueces County. Dr. Handley's election-focused analysis found that benchmark District 33 was an ability-to-elect district for Hispanic voters. *See id.* at 5. In the proposed plan, the State eliminates benchmark District 33 in Nueces County and moves the district to Rockwall County, near Dallas.[5] There is no dispute that proposed District 33 does not provide minority voters with the ability to elect their candidate of choice, *see* Tex. Mem. at 11, Handley House Rep. at 9, and Texas has not created a compensatory district for that loss, either in Nueces County or elsewhere in the State, *see* Handley House Rep. at 13-14.

b. District 35

In the proposed plan, south Texas lost another district in which Hispanics had the ability to elect a candidate. Both the State and the United States agree that, under the benchmark plan,

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issue of racial bloc voting."); *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (en banc) (holding that elections involving only white candidates are generally less probative than those involving minority candidates); *LULAC v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993) (en banc) ("This court has consistently held that elections between white candidates are generally less probative in examining the success of minority-preferred candidates, generally on grounds that such elections do not provide minority voters with the choice of a minority candidate."); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Ed.*, 4 F.3d 1103, 1128 (3d Cir. 1993) ("As a general matter, we believe that elections involving white candidates only are much less probative of racially polarized voting than elections involving both black and white candidates."); *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 304 (D. Mass. 2004) ("After having conducted an exhaustive review of the case law and the circumstances of this litigation, we conclude that the most probative elections for our purposes are likely to be multi-race endogenous elections.").

[5] The State relies on the County Line Rule, Tex. Const. art. III, § 26, a state constitutional provision dictating specific treatment of county boundaries when drawing a State House plan, as its basis for not preventing prohibited retrogression in Nueces County. Downton Dep. at 133:16-25, 134:1-2, Oct. 20, 2011. However, the County Line Rule must give way to federal law, including the Voting Rights Act.

District 35 is an ability-to-elect district for Hispanic voters. *See* Handley House Rep. at 5; Tex. Mem. at 11. The State argues that District 35 is maintained as an ability-to-elect district in the proposed plan, but the United States disagrees. *Compare* Tex. Mem. at 11, *with* Handley House Rep. at 9. Hispanic citizen voting-age population ("CVAP") decreased from 54.6 percent in the benchmark plan to 52.5 percent in the proposed plan, and Spanish surname voter registration ("SSVR") decreased from 55.4 percent to 52.7 percent. Dr. Handley's analysis shows that Hispanic voters in District 35 are able to elect their candidate of choice in the benchmark in 80 percent of state house races and in 40 percent of the statewide contests analyzed. Handley House Rep. at 5. In the proposed plan, Hispanic voters can elect their candidate of choice in only 20 percent of the contests. *Id.* at 11. According to Dr. Alford, the State's expert, election analysis of the performance of statewide candidates preferred by Hispanic voters in District 35 decreases from 58 percent in the benchmark to 48 percent in the proposed. *See* Alford Rep. at 7-8 (Ex. 6).[6] As discussed in the report of Dr. Theodore Arrington, the United States' expert concerning discriminatory intent, during the redistricting process mobilized Hispanic voters were removed from this district in order to improve Republican performance in the district and to limit the ability of Hispanics to elect candidates. *See* Arrington Rep. ¶ 17 (Ex. 7). These changes to enhance Republican performance eliminates the ability of Hispanic voters in District 35 to elect a candidate of choice.

c. District 41

[6] Regarding the Congressional plan, Dr. Alford assumed during the *Perez v. Perry* trial that the failure of the Democratic candidate in the reaggregated elections meant that Hispanics failed to elect their candidate of choice. Trial Tr., *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. 2011), at 1864:17-20 (Ex. 8). He did not analyze the State House contests at that trial.

District 41 is located in Hidalgo County in south Texas. Both the State and the United States agree that, under the benchmark plan, District 41 is an ability-to-elect district for Hispanic voters. *See* Handley House Rep. at 5; Tex. Mem. at 11. The State maintains that District 41 is an ability-to-elect district in the proposed plan, but the United States asserts that the State has not met its burden in this regard. *Compare* Tex. Mem. at 11, *with* Handley House Rep. at 9-10. Hispanic CVAP decreased from 77.5 percent in the benchmark plan to 72.1 percent in the proposed plan. Spanish surname voter registration decreased from 68.7 percent to 63 percent. As discussed in Dr. Arrington's report, proposed District 41 was crafted for an incumbent who had previously been elected in benchmark District 40, Representative Peña, and a significant number of Anglo voters were drawn into the district in the proposed plan. *See* Arrington Rep. ¶ 100 tbl. 11; V. Gonzales Decl. ¶¶ 5, 10-13 (Ex. 9); Longoria Decl. ¶¶ 11-17 (Ex. 10). Dr. Handley is unable to determine whether the proposed district provides for the ability to elect both because reliable election data is not available for the significant portion of the population that resides in precincts split between two districts and because the recompiled election analysis showed very close results. *See* Handley House Rep. at 9-10. According to Dr. Alford, the State's expert, the election analysis of the performance of statewide candidates preferred by Hispanic voters in District 41 decreases from 67 percent in the benchmark to 48 percent in the proposed. *See* Alford Rep. at 7-8.

d. District 117

District 117 is located in Bexar County near San Antonio. Both the State and the United States agree that in benchmark District 117, Hispanics have the ability to elect a candidate of choice. Under the proposed plan, the State removes portions of District 117 near San Antonio in exchange for other parts of the County. Hispanic CVAP in the district increased from 58.8

percent in the benchmark plan to 63.8 percent in the proposed plan. However, Spanish surname voter registration decreased from 50.3 percent to 50.1 percent. As discussed in Dr. Arrington's report, this exchange involved trading out mobilized Hispanic voters for other Hispanic voters. Arrington Rep. ¶ 17. Without these mobilized voters, Hispanic turnout in the proposed District 117 would be reduced compared to turnout in the benchmark District 117. Martinez Fischer Decl. ¶¶ 13, 15-16 (Ex. 11). The State's population-based approach to analyzing the ability to elect fails to account for this factor, allowing the State to maintain that, after redistricting, Hispanics still have the ability to elect a candidate of choice in District 117. Dr. Handley's election-focused analysis, however, accounts for this reduction in Hispanic turnout, concluding that, under the proposed plan, Hispanic-preferred candidates will not have the ability to elect. Handley House Rep. at 11 tbl. 4. According to Dr. Alford, election analysis of the performance of statewide candidates preferred by Hispanic voters reveals a decrease from 60 percent in District 117 in the benchmark plan to 33 percent in the proposed plan. *See* Alford Rep. at 7-8.

e. District 149 and Coalition Districts under Section 5

District 149 in the benchmark is based in southwest Harris County (including Houston), and Dr. Handley finds that the incumbent in District 149, Hubert Vo, is elected by a coalition of Hispanic, Black, and Asian voters. *See* Handley House Rep. at 3, 7; *see also* Hochberg Decl. ¶¶ 4-5 (Ex. 12). District 149 in the benchmark plan has a combined minority citizen voting age population of 61.7 percent. Handley House Rep. at 7. Since 2004, this coalition of voters in the Alief area of Houston has organized and voted cohesively to elect Rep. Vo. Winkler Decl. ¶¶ 10-11 (Ex. 13). The State eliminates the district from Harris County altogether, and District 149 in the proposed plan is moved across the state to Williamson County, where there are few minority voters. The loss of District 149 means that this coalition of minority voters in Alief will

no longer have the ability to elect a candidate of choice. In the view of the United States, District 149 is protected under the Voting Rights Act. *See* Handley House Rep. at 13.[7]

The text of Section 5, as amended by Congress just five years ago, is broad enough to protect districts such as District 149. By its terms, Section 5 protects any citizens against the adoption of voting changes that have the purpose or effect of denying or abridging their right to vote "on account of race or color." 42 U.S.C. § 1973c(a). This broad protection is not limited to those voting changes adversely affecting individuals of a single race only. For example, the adoption of a "Whites-only" primary would simultaneously deny the voting rights of both Blacks and Hispanics (and, indeed, individuals of any other race), and could be challenged by either, or both in concert.

Subsection (b) of Section 5 precludes covered jurisdictions from making changes that would "diminish[] the ability of any citizens of the United States on account of race or color, or [membership in a language minority], to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). When enacting this language, Congress apparently understood it to protect districts such as benchmark District 149. The House Report on the 2006 amendments, which the Supreme Court has regarded as authoritative, *see Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (citing the report repeatedly), explains that, under the new language, "[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, *either directly or when coalesced with other voters*, cannot be precleared under Section 5." H.R. Rep. No. 109-478, at 71 (2006) (emphasis added). Thus, Congress expected the amended

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[7] The United States' expert has identified additional districts in which citizens of one minority group may have the ability to elect candidates of their choice only when coalesced with other minority citizens. However, all of these other districts provide minority voters the same ability to elect in both the benchmark and proposed plans, so it does not matter how the districts are labeled.

Section 5 to protect coalition districts, *i.e.*, those in which minority citizens of more than one racial group are able to elect a preferred candidate of choice when they coalesce.

This explicit approval of protections for coalesced minority groups is consistent with the views expressed by Congress in earlier reauthorizations. In its 1975 reauthorization of the Voting Rights Act , Congress expanded protections for certain racial minorities who also are language minorities, including requiring Section 5 preclearance for jurisdictions (such as Texas) with a history of discriminating against them. Congress extensively studied Texas's history of discriminating against both African Americans and Hispanics and concluded that the State had "a long history of discriminating against members of both minority groups in ways similar to the myriad forms of discrimination practiced against blacks in the South." S. Rep. No. 94-295, at 25 (1975). In particular, Texas used at-large representation to "effectively deny Mexican Americans and black voters in Texas political access in terms of recruitment, nomination, election and ultimately, representation." *Id.* at 27-28.

As a result of that expansion of Section 5's coverage in 1975, by the time Congress amended the Voting Rights Act in 1982, the Attorney General's exercise of this Section 5 authority provided ample evidence of discriminatory practices in certain jurisdictions – including Texas – that affected Hispanics and African Americans alike. For example, in 1975, the Attorney General refused to pre-clear under Section 5 a Texas bill that would have required all registered voters to re-register or be purged from the voting rolls. He found that this change would have a discriminatory effect "[w]ith regard to cognizable minority groups in Texas, namely, blacks and Mexican-Americans." H. R. Rep. No. 97-227, at 15-16 (1981). In 1981, the Attorney General refused to pre-clear the closing of polling places near both African-American and Hispanic communities. S. Rep. No. 97-417, at 11 (1982). During consideration of the 1982

amendments, the Attorney General objected to a New York City redistricting plan on the basis of its effects on African-American and Hispanic voters. *See id*.

The only reported Section 5 decision of which we are aware involving coalition districts under Section 5, which predated the 2006 amendments, did not doubt that true coalition districts could be protected, though it found no such coalition was at issue in that case. In *Texas v. United States*, 802 F. Supp. 481 (D.D.C. 1992) (three-judge court), the State of Texas sought judicial preclearance for the redistricting plan it adopted following the 1990 Census. The court concluded that the plan did not have a retrogressive effect, because the number of districts in which "minorities can elect candidates of their own choosing" increased by one, with the creation of an additional "Hispanic district." *Id.* at 486. It credited the conclusion of the State's expert, who found, based on "major differences . . . in the pattern of Black and Hispanic support," that "mixed minority" districts "would not actually work and could not be considered minority districts." *Id.* By implication, a cohesive "mixed minority" or coalition district would have counted in terms of determining the number of districts in which minority voters had the ability to elect their preferred candidates.

Although there is little case law regarding coalition districts under Section 5, a number of courts have addressed the issue of coalition districts under Section 2 of the Voting Rights Act of 1964, 42 U.S.C. § 1973. The Supreme Court has "[a]ssum[ed] (without deciding) that it was permissible for the district court to combine distinct ethnic and language minority groups for purposes of assessing compliance with Section 2 . . . ." *Growe v. Emison*, 507 U.S. 25, 41 (1993).

With one exception, lower courts addressing the issue have either held expressly or assumed that the analysis of Section 2 claims set out by the Supreme Court in *Thornburg v.*

Gingles, 478 U.S. 30 (1986), applies to Section 2 claims on behalf of a coalition of minority voters. For example, the Fifth Circuit expressly addressed this issue in *Campos v. City of Baytown* and held that "nothing in the law . . . prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics." 840 F.2d 1240, 1244 (5th Cir. 1988). The appellate court affirmed the trial court's findings that the coalition minority group was sufficiently compact to be a majority in a single-member district, that Blacks and Hispanics were politically cohesive, and that bloc voting by the White majority usually prevented them from electing their preferred candidates. The court specifically rejected the City's argument that "plaintiffs must show that Blacks are cohesive, that Hispanics are cohesive and that Blacks and Hispanics are together cohesive," finding that "that burden is too great, if not impossible, in certain situations." *Id.* at 1245. Instead, noting "the proper standard is the same as in *Gingles*," the court opined: "The key is the minority group as a whole." *Id.*

Similarly, in *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524 (11th Cir. 1990), the Eleventh Circuit followed the Fifth Circuit and held that "[t]wo minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner." The court affirmed the district court's dismissal of plaintiff's Section 2 claim, but only because the "class failed to demonstrate that blacks and Hispanics in Hardee County have ever voted together." *Id.* at 527. Likewise, the Second Circuit upheld the district court's application of the *Gingles* framework to a vote dilution claim brought by a coalition of Black and Hispanic voters in *Bridgeport Coal. v. City of Bridgeport*, 26 F.3d 271, 275-76 (2d Cir.), *vacated and remanded on other grounds*, 512 U.S. 1283 (1994). The court quoted favorably the district court's findings that "[c]ombining minority groups to form [majority-minority] districts is a valid means of complying with Section 2 if the combination is

shown to be politically cohesive," and that "White bloc voting in Bridgeport will dilute minority voting except in districts in which clear [minority-majorities] are established, by a single group or a combination African-American and Latino voters." *See id.* at 275. In sum, the Second Circuit found "more than sufficient evidence to support a conclusion that the Coalition satisfied its burden imposed by *Gingles*." *Id. But see Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc) (holding that the plain language of Section 2 does not support a vote dilution claim by a coalition of minority groups).

In our view, the text and legislative history of Section 5 of the Voting Rights Act, including the 2006 amendments, stand as the clearest expression of Congressional intent on this issue. Congress plainly contemplated the protection of districts where minority voters are electorally cohesive under Section 5. Even without benefit of such a clear statement of congressional intent, most circuits have reached a similar view with respect to Section 2. As such, the proposed plan's disassembly of District 149, in which minority voters had the ability to elect in the benchmark, is retrogressive.

2. The Proposed Congressional Plan Is Retrogressive

The proposed Congressional redistricting plan has a retrogressive effect. The proposed plan decreases the percentage of districts in which minority voters have the ability to elect, and many Hispanic voters who currently reside in districts in which they can elect a candidate of choice in the benchmark would no longer have that ability to elect in the proposed plan.

The State's flawed analysis that considered only demographics of districts in assessing ability to elect leads to the conclusion that the benchmark plan contains seven Hispanic opportunity districts (Districts 15, 16, 20, 23, 27, 28 and 29) and one African-American opportunity district (District 30), and that the proposed plan contains seven Hispanic opportunity

districts (Districts 15, 16, 20, 23, 28, 29, and 34) and two African-American opportunity districts (Districts 18 and 30). Material Facts in Support of Plaintiff's Motion for Summary Judgment at 4-5. The State concludes in its Motion that statewide, the proposed plan increases the number of minority opportunity districts. *See* Tex. Mem. at 6-7, 9.[8]

The State's conclusion as to "opportunity districts" in the benchmark and proposed Congressional plan is plainly disputed by the report of the United States' expert, Dr. Handley, who concludes that the proposed Congressional plan does not increase the number of minority opportunity districts when compared to the benchmark, but rather maintains the same number of such districts in the context of an expanded delegation. *See* Handley Cong. Rep. at 8-9 (Ex. 14). Dr. Handley's report demonstrates that there are seven Hispanic ability-to-elect districts (Districts 15, 16, 20, 23, 27, 28 and 29) and three African American ability-to-elect districts (Districts 9, 18 and 30) in the benchmark plan and seven Hispanic ability-to-elect districts (Districts 15, 16, 20, 28, 29, 34 and 35) and three African American ability-to-elect districts (Districts 9, 18 and 30) in the proposed plan. Handley Cong. Rep. at 5-9. In essence, Dr. Handley concludes that the State did not simply maintain the same ten ability-to-elect districts, but rather that it removed two districts (23 and 27) in which Hispanics had the ability to elect under the benchmark plan and created two new districts (34 and 35) in which Hispanics have the ability to elect in the proposed plan, leaving Hispanic voters with a smaller shaer of the now larger congressional delegation. There are thus disputed issues of fact as to whether the State's

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[8] Dr. Handley's reports clears up the confusion created by the State's filings in this case. In its Complaint, the State does not characterize any of its districts as "opportunity" or "ability-to-elect" districts, but rather describes them according to population characteristics. *See* Compl. ¶¶ 36-37 & attachment 1, at 3-5. In its Motion, the State characterizes certain districts as "opportunity" districts but does not always adhere to its own population criteria. Thus, the State now characterizes proposed District 35 as an opportunity district where it does not meet the Complaint's population criteria of 60 percent Hispanic voting-age population ("HVAP"). *See* Tex. Mem. at 8; *see also* Handley Cong. Rep. at 8.

proposed Congressional plan increases the number of ability-to-elect districts when compared to the benchmark.

a. District 23

Under the existing plan, Congressional District 23 is located in southwest Texas and encompasses 17 whole counties and parts of three other counties. Both the State and the United States agree that, under the benchmark plan, District 23 is an ability-to-elect district for Hispanic voters. *See* Tex. Mem. at 8-9; Handley Cong. Rep. at 5-6. The State maintains that District 23 is an ability-to-elect district in the proposed plan, but the United States disagrees. *Compare* Tex. Mem. at 8-9, *with* Handley Cong. Rep. at 7-8. Hispanic CVAP in the district increased from 58.4% in the benchmark plan to 58.5% in the proposed plan. Spanish surname voter registration increased from 52% in the benchmark plan to 54% in the proposed plan. However, the exogenous election performance decreases from 40% in the benchmark plan to zero in the proposed plan. Handley Cong. Rep. at 11. In his trial testimony in *Perez v. Perry*, Dr. Alford stated that District 23 did not allow Hispanic voters to elect their candidate of choice. Trial Tr., *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. 2011), at 1878:5-6 [hereinafter "*Perez* Tr."] (Ex. 8) ("[Dr. Alford]. I – I don't count 23 as one of the seven performing districts when I evaluate [the proposed Congressional plan].") In particular, Dr. Alford said that he would "not recommend changing the 23rd in the way in which it was changed." *Id.* at 1879:21-22.

b. District 27

Under the existing plan, Congressional District 27 is located in south Texas, bordering on both Mexico and the Gulf of Mexico. It includes all of Kenedy, Kleberg, Nueces, and Willacy counties, and parts of Cameron and San Patricio counties. Both the State and the United States agree that, under the benchmark plan, District 27 is an ability-to-elect district for Hispanic

voters. *See* Tex. Mem. at 8; Handley Cong. Rep. at 5-6. Under the proposed plan, District 27 will be substantially reconfigured and moved north removing Kenedy, Kleberg, Willacy, and Cameron counties population. The proposed district adds the whole counties of Aransas, Calhoun, Jackson, Lavaca, Matagorda, Refugio, Victoria, and Wharton counties, and parts of Bastrop, Caldwell, and Gonzales counties. All of Nueces County and a slightly larger portion of San Patricio County remain in proposed District 27. Both the State and the United States agree that Hispanic citizens will not be able to elect candidates of their choice in proposed District 27. *See* Tex. Mem. at 8; Handley Cong. Rep. at 5-6.

c. Retrogression Standard in the Congressional Plan

A simple numerical comparison of the ability-to-elect districts in the benchmark and proposed Congressional plans does not provide a complete view of the existence of retrogression as it does in the State House plan, insofar as the total number of districts in the State House remain the same following redistricting, while the total number of the districts in Texas' congressional delegation increases from 32 in the benchmark to 36 in the proposed. Rather, the existence of retrogression in the proposed Congressional plan should be determined through a more detailed look at the actual effect that the proposed voting change has on minority electoral power in Texas. This is because, after all, the State has asked this Court for "a determination that the [plan] is no more dilutive than what it replaces," *Reno v. Bossier Parish Sch. Bd.* ("*Bossier II*"), 528 U.S. 320, 335 (2000), which is comparing proposed minority electoral strength to the benchmark.

The State's request for a judgment of Section 5 preclearance of the proposed Congressional plan is made in the context of an almost unprecedented increase in the number of seats in its Congressional delegation – four – resulting from a State population increase fueled

mostly by the increase in the State's Hispanic population.[9] According to the 2010 Census, from 2000 to 2010, the total population of Texas increased by 4,293,741 persons to 25,145,561, and the total Hispanic population of the state increased by 2,791,255 persons to 9,460,921. Thus, the growth in the State's Hispanic population accounted for 65 percent of the State's total population increase during that decade, and Hispanics now constitute 37.6 percent of Texas's total population. Handley Cong. Rep. at 1 n.1. Under such circumstances, as is demonstrated below, the electoral power of the State's Hispanic population has been clearly diminished, amounting to prohibited retrogression.

Under the benchmark Congressional plan, minority voters currently have the ability to elect their preferred candidates of choice in ten of the thirty-two Congressional districts in Texas. They thus possess electoral power in 31.3 percent of the State's Congressional districts. The proposed Congressional plan reduces that power to ten out of thirty-six districts – 27.7 percent of the State's Congressional Districts. Applying this same focus only to the State's Hispanic voters, under the benchmark Congressional plan, Hispanic voters currently have the ability to elect their preferred candidates of choice in seven of the 32 Congressional districts in Texas. They thus possess electoral power in 21.9 percent of the State's Congressional districts, already far below their proportion of the state population. The proposed Congressional plan reduces that power further by establishing only seven ability-to-elect districts out of 36 total – 19.4 percent of the

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[9] An increase of four in the number of Congressional seats, as just occurred in Texas, is unprecedented in states fully covered under Section 5. Both California and Florida experienced similar increases since 1970, but Section 5 coverage for both states is not statewide, only in a small number of counties. California went from 45 to 52 (+7) between 1980 and 1990, and Florida from 15 to 19 (+4) between 1970 and 1980, and from 19 to 23 (+4) between 1980 and 1990. Texas has seen smaller increases in the past, specifically, between 1970 and 1980 from 24 to 27 (+3) and between 1980 and 1990 from 27 to 30 (+3). *See* U.S. Dep't of the Interior, *National Atlas: Congressional Apportionment* (Feb. 28, 2011), *at* http://nationalatlas.gov/articles/boundaries/a_conApport.html.

State's Congressional Districts. Handley Cong. Rep. at 10-11 tbl. 7. While Section 5 may not require that minority groups be accorded electoral power proportional to their representation in the population, it prohibits actual diminution of minority existing electoral power. The circumstances in this case are exceptional, yet the State proposes not to maintain the share of minority ability-to-elect districts in the Congressional delegation, and has chosen to take away from a substantial number of Hispanics their ability to elect candidates of choice. As a result, Hispanics in Texas will have a diminished ability to elect members of Texas' Congressional delegation.

The exceptional circumstances in this case readily distinguish it from *Abrams v. Johnson*, 521 U.S. 74 (1997). In *Abrams*, several Georgia voters challenged the congressional redistricting plan adopted by the district court as being inconsistent with Sections 2 and 5 of the Voting Right Act, claiming, among other things, that it included only one majority-Black district and did not adequately represent the interests of Georgia's Black population. In the benchmark plan, one out of 10 districts was majority Black, while the district court's plan kept one majority Black district even though the total number of districts had increased to 11. The court rejected the claim that Blacks did not have "the same electoral opportunities" under the district court's plan since it reduced their relative influence from one of 10 districts (10 percent) to one of 11 districts (9 percent). *Id.* at 97-98. The court specified that the VRA does not mandate that "each time a State with a majority-minority district" is allowed to "add one new district because of population growth, it would have to be majority-minority. This the Voting Rights Act does not require." *Id. Abrams* does not address circumstances, present here, where the increase in the number of districts is much greater than one – in this case, four – and where the population growth is predominately led by Hispanic voters. Under the proposed plan, Hispanic voters will

lose ground in their existing ability to elect candidates of choice with the proposed plan even though the number of majority Hispanic districts remains the same, seven.

In addition to the above, the State's own actions with regard to District 23, which may give rise to a finding of discriminatory purpose (see below), cannot be ignored in determining the existence of the retrogressive effect of the State's action in the proposed Congressional plan. The State considers benchmark District 23 to be a Hispanic opportunity district under Section 5. Despite that view, however, the State took action resulting in the weakening of the election performance of the proposed District 23, and removal of its ability-to-elect status, to ensure that a Hispanic candidate of choice could not be elected. Ruiz Mendelsohn Decl. ¶¶ 5-9 (Ex. 15); Rodriguez Decl. ¶¶ 4-6 (Ex. 16). The State employee who participated in drawing the State's Congressional plan has testified that proposed District 23 was constructed in such a way as to increase slightly the Hispanic population metrics, while at the same time increasing the partisan Republican performance of the District for the incumbent, who is indisputably not the Hispanic-preferred candidate of choice. Downton Dep. at 43:22-25, 44:1-25, 45:1-16, Oct. 20, 2011 (Ex. 5).

The effect of this line drawing is to decrease Hispanic turnout dramatically in proposed District 23. The racially polarized voting analysis provided by the State shows that it increased the number of Hispanics voting for the Republican candidates only slightly. The chart below shows that the real effect was to significantly decrease the number of Hispanics voting for the Hispanic preferred candidate.

	Benchmark Estimated Hispanic Votes for Anglo Candidate	Proposed Estimated Hispanic Votes for Anglo Candidate	Benchmark Estimated Hispanic Votes for Hispanic Candidate	Propose Estimated Hispanic Votes for Hispanic Candidate
2002	7,614	8,572	59,861	48,455

2004	13,421	13,923	74,156	57,621
2006	8,614	9,254	42,891	31,970
2008	6,805	9,445	83,907	67,650
2010	755	3,812	45,291	33,503

See State of Texas's Racially Polarized Voting Analysis for Congressional District 23 (Ex. 17); *see also* United States' Identifications of Elections Considered (Docket # 58). The above-cited actions of the State – seeking to change an admitted "opportunity" district so as to increase the electability of a Hispanic-non-preferred candidate of choice – not only speak to the State's retrogressive intent, but to the retrogressive effect of the State's seemingly successful intended actions. In this case, Texas was not the "incompetent retrogressor." See *Bossier II*, 528 U.S. at 332.

Finally, under the benchmark plan, there are ten districts in which minorities have the ability to elect candidates of their choice, and according to the 2010 Census, there is a total Hispanic population of 4,974,087 persons in these benchmark districts. Handley Cong. Rep. at 2 tbl. 1. Under the proposed plan, there are ten districts in which minorities have the ability to elect candidates of their choice, and according to the 2010 Census, there is a total Hispanic population of 4,494,383 persons in these proposed districts. Handley Cong. Rep. at 9 tbl. 6. Thus, the State's proposed Congressional plan, while maintaining the same number of minority ability-to-elect districts as in the benchmark plan, reduces by 479,704 the number of Hispanics in the State's ten minority ability-to-elect Congressional districts. *Id.* The State has chosen to do this despite the substantial growth in the State's Hispanic population over the past decade, responsible for most of the total population growth in the State between 2000 and 2010 and the resulting four seat increase in the State's Congressional delegation. While Section 5 does not

compel the State to increase Hispanic voting power, under the circumstances of this case, Section 5 does not give the State license to decrease already existing Hispanic voting power as it has.

d. Unavoidable Retrogression

Nor was the State unable to avoid the retrogression from the benchmark to the proposed plan in District 23.[10] In fact, the State could have maintained benchmark District 23 as an ability-to-elect district with only minor changes to its proposed plan which do not impact the rest of the proposed districts. *See* Handley Cong. Rep. at 9-10. In doing so, the State would have at the least maintained the overall share of Hispanic voting strength contained in the benchmark plan.

D. There Is Direct and Circumstantial Evidence of Discriminatory Purpose in the Enactment of Both the Proposed House and Proposed Congressional Plans.

The United States and State disagree on the critical material fact of whether the House and Congressional redistricting plans were adopted, at least in part, with a prohibited discriminatory purpose in violation of Section 5. As outlined below, and discussed in greater detail in Dr. Arrington's declaration, there is direct and circumstantial evidence that the development and passage of these redistricting plans were tarnished by the prohibited purpose of diminishing the ability of citizens of the United States, on account of race, color, or membership in a language minority group, to elect their preferred candidates. As discussed in Part I, *supra*,

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[10] Whether the State could have avoided retrogression in the formulation of its redistricting plan is a factor in the overall retrogression analysis. *See* 2011 Guidance, 76 Fed. Reg. at 7472 ("In considering whether less-retrogressive alternative plans are available, the Department of Justice looks to plans that were actually considered or drawn by the submitting jurisdiction, as well as alternative pans presented or made known to the submitting jurisdiction by interested citizens or others. In addition, the Department may develop illustrative alternative plans for use in its analysis, taking into consideration the jurisdiction's redistricting principles. If it is determined that a reasonable alternative plan exists that is non-retrogressive or less retrogressive than the submitted plan, the Attorney General will interpose an objection.")

the Supreme Court has held that question of intent or motive are rarely appropriate for summary judgment. *See, e.g.*, *Hunt*, 526 U.S. at 552-53.

1. The Section 5 Purpose Standard Includes Direct and Circumstantial Evidence of Discriminatory Intent.

To meet its preclearance burden under Section 5, in addition to demonstrating the absence of discriminatory effect, the State has the burden of demonstrating that the voting changes at issue do not have the purpose of denying or abridging the right to vote on account of race or color, or membership in a language minority group. 42 U.S.C. § 1973c(a). Congress has defined "purpose" under Section 5 as including "any discriminatory purpose." *Id.* § 1973c(c).

In its Memorandum, the State argues that "any discriminatory purpose" refers "only to intentional discrimination that itself violates the Fourteenth or Fifteenth Amendment." Tex. Mem. at 17. In arguing the absence of such purpose in the State's passage of both the Congressional and State House plans, the State points only to allegedly undisputed evidence, contained mostly in conclusory declarations of State legislative officials and legislative journals, that the State was motivated by "ordinary districting principles and, therefore, not by any invidious unconstitutional purpose." *Id.* at 24; *see also id.* at 25, 27-28 (same). The State also submits form declarations stating that that during the redistricting process for both the Congressional and State House plans, no changes were proposed by any Texas legislator, legislative staff member or anyone else, with "the purpose of harming any voter or group of voters on account of their race, ethnicity or national origin" and that the State legislative

leadership would not have permitted any such proposal to be brought to the legislative floor for debate or consideration. Tex. Mem. at 26, 29.[11]

The State's argument with regard to discriminatory purpose appears to be that as long as there is no "smoking gun" evidence of specific racial intent, there can be no violation of the purpose prong of Section 5. However, what is noticeably absent from the State's discussion of discriminatory purpose under Section 5 is any discussion of what the Supreme Court itself has set down as guidance for assessing discriminatory purpose in the context of redistricting. As the Court stated in *Bossier I*, "assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a 'sensitive inquiry into such circumstantial and direct evidence as may be available.'" 520 U.S. at 488 (citing *Arlington Heights*, 429 U.S. at 266). "There, we set forth a framework for analyzing 'whether invidious discriminatory purpose was a motivating factor' in a government body's decisionmaking." *Id*. (citing *Arlington Heights*, 429 U.S. at 266).

Under the *Arlington Heights* rubric, the "important starting point" for assessing whether the State can establish that the proposed plan was adopted free of a discriminatory purpose is "the impact of the official action whether it bears more heavily on one race than another. *Id*. (citing *Arlington Heights*, 429 U.S. at 266). "In a § 5 case, 'impact' might include a plan's retrogressive effect and…its dilutive impact." *Id*. Other factors besides impact relevant to a purpose inquiry under *Arlington Heights* include: the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; the sequence

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11 These form declarations were prepared by the Texas Attorney General's Office without prior consultation with the declarants concerning their content. *See* Solomons Dep. at 194:14-195:24, Oct. 14, 2011 (Ex. 18). Moreover, multiple declarants admitted that they lacked personal knowledge of whether other legislators, legislative staff, or consultants relied on race in drawing districts incorporated in the final plan. *See, e.g.*, Downton Dep. at 51:14-52:3, Oct. 20, 2011; Interiano Dep. at 175:15-176:18, Oct. 20, 2011; Solomons Dep. at 199:15-20, Oct. 14, 2011.

of events leading up to the decision; whether the challenged decision departs, either procedurally or substantively, from the normal practice; and contemporaneous statements and viewpoints held by the decision-makers. *Id.* at 266-68; *see also* 2011 Guidance, 76 Fed. Reg. at 7471; Arrington Rep. ¶ 9.[12]

The State also contends that such intentional discrimination must be "actually motivated by racial or ethnic animus," Tex. Mem. at 19, with no support in the statutory text or jurisprudence. In *Bossier Parish II*, the Supreme Court held that the "purpose prong" of Section 5 barred voting changes that are intended to retrogress the voting strength of present or future minority voters. *See* 528 U.S. at 337-341. The 2006 Amendments to the Voting Rights Act expanded the purpose prong to address the broader field of discriminatory aims, *see* 42 U.S.C. § 1973c(c), but did not eliminate the prohibition on voting changes enacted with an intent to retrogress. In addition, intentional discrimination encompasses actions that purposefully discriminate to achieve an otherwise permissible aim. *See Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski J., concurring in part and dissenting in part) (describing purposeful housing discrimination motivated by a desire to maintain property values). Such changes fall within the bar on changes with "any purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group." 28 C.F.R. § 51.54(a); *see also* 2011 Guidance, 76 Fed. Reg. at 7471 ("The Department will also evaluate whether there are instances where the invidious element may be missing, but the underlying motivation is nonetheless intentionally discriminatory.").

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[12] The TLC specifically notes in its guidance to state legislators that Congress and the Department of Justice set out the *Arlington Heights* framework as the means by which to assess intent. *See State and Federal Law Governing Redistricting in Texas*, *supra*, at 87-89 (citing H.R. Rep. No. 109-478, at 66-68 (2006); 28 C.F.R. §§ 51.54-.59); *see also* Arrington Rep. ¶ 9.

Utilizing the *Arlington Heights* analysis in this case, as is amply demonstrated both by the reports of the United States' experts, Dr. Handley and Dr. Arrington, as well as by the declarations and other exhibits appended to this Response, and applying the broad scope of the purpose prong set out in the 2006 Amendments to the Voting Rights Act, there is substantial factual dispute concerning whether the proposed Congressional and State House plans were enacted with a discriminatory purpose.

2. There Are Genuine Disputes of Material Facts Regarding Whether the Proposed House Plan Was Adopted with Discriminatory Intent.

The Court should deny the State's request for summary judgment regarding the purpose of the proposed State House plan because substantial evidence creates a genuine dispute of material facts concerning the possible presence of a discriminatory purpose. Dr. Handley and Dr. Arrington's reports establish a discriminatory impact in four or five districts. These retrogressions occurred using techniques that suggest a discriminatory purpose, including setting boundaries at a level of detail where race is the only available data and substituting low-turnout Hispanic voters for higher ones while maintaining a minority population majority. Deviations from procedural and substantive standards, as well as racially-charged contemporaneous statements, also provide significant evidence of a discriminatory purpose. The State has presented little evidence concerning the intent of the proposed plan, but the legislative staff who crafted the map and legislators closely involved in the process have provided conflicting testimony. Assessing the credibility of these witnesses and resolving other disputed factual issues cannot be performed until trial.

a. Impact of the Decision

As is indicated in the report of Dr. Handley, the proposed House plan has a retrogressive impact on the minority population in the State of Texas, as the proposed plan contains at least four, and perhaps five, fewer minority ability-to-elect districts than exist in the benchmark plan. *See* Handley House Rep. at 1, 8-10, 13. This significant impact is highly relevant to the discriminatory purpose analysis. Moreover, there is other evidence of the impact of the proposed plan on the State's minority population. As pointed out by Dr. Arrington, the State ignored the substantial increase in the minority population, especially in the Dallas-Fort Worth area, in proposing a plan that actually reduced minority electoral power. *See* Arrington Rep. ¶¶ 52-60. Although the proposed House plan does not include the visually striking evidence of cracking, in the manner of the proposed Congressional plan, *see infra*, the proposed House plan uses visually subtle but no less direct methods to effectuate a retrogression in Hispanic representation in Dallas-Fort Worth and Harris County. Specifically, these counties exhibit wide variation in district populations to protect incumbents from districts drawn prior to ten years of explosive minority population growth. *See id.* ¶¶ 104-107. Moreover, in Harris County, the two incumbents who are paired in District 137 are the candidates of choice of the Hispanic community in Hispanic-controlled districts, either alone or as part of a cohesive coalition. *See id.* ¶¶ 38, 41. Traditional districting criteria did not prevent the State from creating additional ability-to-elect districts. *See id.* ¶¶ 61-76.

In addition, the State split precincts, drawing district boundaries at a level of detail at which political data is not available and lines can only be guided by racial data, to eliminate minority election districts and to disadvantage minority voters. *See id.* ¶¶ 77-83, 103-104. Proposed District 41 is a particularly striking example of this practice, as its boundaries split 14

precincts and include 69.5% of the Anglo VAP of the split precincts but only 40.2% of the Hispanic VAP of the split precincts. *See* Arrington Rep. at 30. The State's employees indicated that they followed guidance from a state legislator concerning which portions of split precincts would be politically favorable, *see* Interiano Dep. at 174:4-24, Oct. 20, 2011 (Ex. 19); Downton Dep. at 128:1-18, Oct. 20, 2011, but that same legislator denied instructing state employees to split precincts in order to include anything more than his home and the high school he had attended and to exclude the home of another legislator, *see* Peña Dep. at 97:16-102:15, 157:5-173:4., Oct. 19, 2011 (Ex. 20). The legislator denied any local knowledge of whether certain portions of split precincts were more likely than others to favor him politically. *See, e.g.*, Peña Dep.at 163:17-25, 168:17-169:5, 172:19-173:4, Oct. 19, 2011. Because political data is not available at the census block level, the only remaining possibility is that the State drew the lines on the basis of race, as the outcome strongly suggests.

In addition to the general evidence above, District 117 provides an example in the proposed House plan of the same strategy applied to District 23 in the proposed Congressional plan, whose effect is discussed above. Again the State removed high turnout Hispanic voters and replaced them with Hispanic voters known to turn out at a lower rate. *See* Arrington Rep. ¶¶ 17, 26-27, 144; Farias Decl. ¶¶ 11-16 (Ex. 21); Martinez Fischer Decl. ¶¶ 6-9, 15-18; Garza Dep. at 40:8-12, 42:15-18, Oct. 19, 2011 (Ex. 22); Ruiz Mendelsohn ¶¶ 5-9; Rodriguez Decl. ¶¶ 4-6. And again the State maintained the superficial appearance of a Hispanic ability-to-elect district by maintaining Hispanic population levels. *See* Martinez Fischer Decl. ¶¶ 15-16; Garza Dep. at 58:16-24, Oct. 19, 2011; *see also LULAC*, 548 U.S. at 441 (criticizing the maintenance of nominal population majorities "to create the façade of a Latino district").

b. Sequence of Events

As was also the case with regard to the Congressional plan, the House redistricting process was a secretive process not effectively open to minority representatives of choice. *See* Arrington Rep. ¶¶ 108-129; V. Gonzales Decl. ¶¶ 5-10, 19-24. The concerns of these representatives were not taken into account by those who were in charge of the Texas redistricting process. Most changes to minority ability-to-elect districts made during deliberations on the House plan on the House floor were trivial, and most such districts were not changed at all. As Dr. Arrington states, "From the perspective of minority ability to elect representatives of their choice, the entire process after introduction of the Chairman's plan meant nothing." Arrington Rep. ¶ 121. Minority legislators' efforts to amend the plan were tabled and later withdrawn. In contrast, majority legislators' amendments were generally accepted. Amendments by minority legislators to increase the number of ability-to-elect districts were quickly tabled. *See* HB 150 – Debate, Texas House Journal ("Floor Debate"), S97-256 (Apr. 27, 2011) (Ex. 23).

c. Procedural and Substantive Departures

As indicated above, the secretive House redistricting process afforded minority representatives limited access to effective participation. V. Gonzales Decl. ¶¶ 5-10, 19-24. This limited the ability of those who would advocate for the creation of additional minority ability-to-elect districts to influence the process. Arrington Rep. at ¶¶ 3, 127-129. Examples include an extremely truncated hearing schedule after the Chairman of the Redistricting Committee released his proposed plan, composed of two hearings on a Friday and a Sunday, and suspension of the "five-day posting rule" for proposed legislation, *see, e.g.*, Gonzales Dec. ¶¶ 19-24, despite the admission that the State depended on the committee process to determine statewide VRA

compliance. *See* Downton Dep. at 133:19-135:7, Oct. 20, 2011 (acknowledging that the Chairman's plan was retrogressive, even under the State's population-based metrics).

As a matter of substance, the State claimed to have relied on a "member-driven" consensus process to protect incumbents of all parties and – when that process failed – to assemble a plan that met the approval of the House leadership. *See Perez* Tr. 1427 (Interiano); at Downton Dep. at 77:7-13, Oct. 20, 2011. As Dr. Arrington's report indicates, however, the line drawers, operating away from public view, broke from a consensus or partisan motivation and drew lines on a purely racial basis when partisan data was unavailable. *See* Arrington Rep. ¶ 83 ("[T]hese changes were not random, but had a statistically significant racial pattern.").

The proposed House plan also deviates from a substantive policy against splitting precinct lines. Not only did House leadership argue against splitting precincts as a general policy, *see id.* ¶ 77, but splitting precincts on the basis of race at the block level in some instances create districts that – according to the best available election data – perform worse than districts drawn on the basis of whole precincts, *see id.* ¶¶ 17-20.[13] Nevertheless, the proposed House plan splits 412 precincts, *id.* ¶ 77. Moreover splitting precincts results in the need to create more or different precincts and can result in additional expense, disruption, and confusion of elections officials and voters, and reduction in voter participation. *See id.* ¶ 84-96; *see also* V. Gonzales Decl. ¶ 15; Longoria Decl. ¶ 14.

Finally, the House plan deviates from traditional redistricting principles. As Dr. Arrington indicates, this was certainly the case given the State's inconsistent application of Texas's constitutional County Line Rule in both Nueces and Harris counties. Arrington Rep.

[13] Because election returns are aggregated at the precinct level and cannot be disaggregated, if a cluster of Anglo voters are split out of a predominantly Hispanic and Democratic precinct, those white voters will appear to be Democrats in an election analysis of a proposed district, regardless of their actual political affiliation. *See id.* ¶ 80.

¶¶ 30-51. Moreover, the districts deviate substantially from the equal population principle in a manner that cannot be justified by reasonable state policies, particularly within large, urban counties. *See id.* ¶¶ 104-107. In one particularly flagrant instance, the district with the highest Anglo population in predominantly Hispanic Hidalgo County – District 41 – is underpopulated by 7,399 persons and borders on a district that is overpopulated by 5,856 persons. V. Gonzales Decl. ¶ 17.

d. Contemporaneous Statements

Statements made by those engaged in the State House redistricting process provide further indicia of discriminatory intent. Most tellingly, Representative Beverly Woolley, who led the redistricting process in Harris County that had excluded participation by any minority members of the Harris County delegation, told a group of minority representatives, "[Y]ou all are protected by the Voting Rights Act and we are not. We don't want to lose these people due to population growth in the county, or we won't have any districts left." Coleman Decl. ¶¶ 9-14 (Ex. 24) (approximating quote). Moreover, Representative John Garza of District 117 first requested that his district extend into a predominantly Anglo area of Bexar County, and when he was rebuffed he requested inclusion of particular territory in his district that would maintain only the superficial appearance of Hispanic electoral control, specifically telling Representative Joe Farias of District 118 that he needed "more Mexicans in [his] district" while rejecting those in areas where Hispanics are politically organized. Farias Decl. ¶¶ 11-16; *see also* Martinez Fischer Decl. ¶¶ 6-9. Finally, members of the House Redistricting Committee and other Anglo members of the Harris County delegation repeatedly suggested to Representative Scott Hochberg, a senior Anglo Democrat, that the district in which he had been drawn with Representative Hubert Vo, a junior Asian Democrat and one of only two Asian Americans in the

Texas House, would favor Hochberg being reelected. *See* Hochberg Decl. ¶¶ 2-3. This decision made little sense from a partisan perspective and can only be explained by intent to break the multiethnic coalition that had supported Representative Vo. *See id.*

Using the *Arlington Heights* framework as set forth above, there are clearly disputed material facts at issue with regard to the existence of discriminatory purpose in the formulation of the State's Congressional and House plans. The State has clearly not met its burden of demonstrating the absence of such discriminatory intent.

3. There Are Genuine Disputes of Material Facts Regarding Whether the Proposed Congressional Plan Was Adopted with Discriminatory Intent.

The Court should deny the State's request for summary judgment regarding the purpose of the proposed congressional plan because substantial evidence creates a genuine dispute of material facts concerning the possible presence of a discriminatory purpose. In proposed District 23, retrogression occurred using techniques that suggest a discriminatory purpose, including setting boundaries at a level of detail where race is the only available data and substituting low-turnout Hispanic voters for higher ones while maintaining a minority population majority. Proposed districts in the Dallas-Fort Worth area were purposely manipulated to decrease current and future minority voting strength. Deviations from procedural and substantive standards, as well as contemporaneous statements, also provide significant evidence of a discriminatory purpose.

a. Impact of the Decision

As indicated above, the State's proposed plan for the Texas Congressional delegation retrogresses from the benchmark plan, with a substantial adverse impact on the ability of the State's minority population to elect their candidates of choice. But the evidence suggests other

impacts as well. The State chose not to propose any new additional minority ability-to-elect districts and removed hundreds of thousands of minority voters from districts in which they could elect candidates of choice, in the face of a substantial increase in State population driven in very large part by large increase in the Hispanic population, an increase that led to the allocation of four new Congressional seats. This suggests both possible dilution as well as possible retrogression of minority voting strength in Texas. Indeed, as the Court is aware, there is pending vote dilution litigation under Section 2 of the Voting Rights Act in Texas, in which the parties have just completed final briefing. As the Supreme Court noted in *Bossier I*, "evidence of a plan's dilutive impact may be relevant to the Section 5 purpose inquiry." 520 U.S. at 487. In that regard, the Court noted:

> As we observed in *Arlington Heights*, the impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions. Thus, a jurisdiction that enacts a plan having a dilutive impact is more likely to have acted with a discriminatory intent to dilute minority voting strength than a jurisdiction whose plan has no such impact. A jurisdiction that acts with an intent to dilute minority voting strength is more likely to act with an intent to worsen the position of minority voters – *i.e.*, an intent to retrogress – than a jurisdiction acting with no intent to dilute. The fact that a plan has a dilutive impact therefore makes it "more probable" that the jurisdiction adopting that plan acted with an intent to retrogress than "it would be without the evidence." To be sure, the link between dilutive impact and intent to retrogress is far from direct, but "the basic standard of relevance . . . is a liberal one," and one we think is met here.

Id. (internal citations omitted).

Besides the above, there is additional evidence of the impact of the proposed Congressional plan that can advise a determination of prohibited intent. Specifically with regard to proposed District 23 and some districts in the Dallas-Fort Worth area (Dallas and Tarrant

Counties), the minority population was purposely manipulated to decrease current and future minority voting strength. In the proposed plan, the State split Maverick County between two districts – District 23 and District 28 – and made other changes in the San Antonio area that removed high turnout Hispanic voters from District 23 and replaced them with Hispanic communities that turn out to vote at a lower rate, as well as with Anglo voters. *See* Arrington Rep. ¶¶ 141-145; Cantu Decl. ¶¶ 6-12 (Ex. 25); Hernandez Decl. ¶¶ 6-9 (Ex. 26); Ruiz Mendelsohn Decl. ¶¶ 5-9; and Rodriguez Decl. ¶¶ 4-6. In so doing, the State has created a proposed district that modestly increases the Hispanic population, but will actually be less likely to provide Hispanic voters with the ability to elect their candidate of choice, in order to protect the Republican incumbent. *See* Arrington Rep. ¶¶ 141-145. This was part of an intentional strategy "to limit the creation of minority election districts as much as possible while presenting the appearance of non-retrogression based on unreliable, misleading bright line tests based on [voting-age population ("VAP")] or CVAP." *Id.* ¶ 194.

In Harris County, the State cracked the large Hispanic population, which is substantial enough to form the core of an additional minority district, and submerged it in six Anglo-dominated districts. *See* Arrington Rep. ¶¶ 146-147. In addition, in the Dallas-Fort Worth area, the State has pulled strangely-shaped minority population areas out of certain districts in order to submerge them in larger Anglo populations and to reduce minority voting strength. *See id.* ¶¶ 148-151; Rosas Decl. ¶ 13-18 (Ex. 27); Veasey Decl. ¶¶ 9-11 (Ex. 28). The data utilized in making some of these changes were race-based, as opposed to partisan. *See* Arrington Rep. ¶¶ 164-173. While race and political affiliation may often coincide, race cannot be used as a proxy for political persuasion in the redistricting process. *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality op.).

b. Historical Background of the Decision

The action of the State in devising the proposed Congressional plan must be viewed in the context of redistricting litigation involving the State's benchmark Congressional plan resolved only five years ago. That benchmark plan was finally completed by a federal court in 2006 following the Supreme Court's decision in *LULAC*, in which the Court found that previous State action with regard to Congressional District 23 violated Section 2 of the Voting Rights Act and required a redrawing of that District. *See* 548 U.S. at 442-43.

As indicated above, the State has created a proposed District 23 that appears to be a better Hispanic district if one looks only at population but is actually a lower performing district when one looks at election data, in order to protect the Republican incumbent. This action on the part of the State is strikingly similar to the redrawing of District 23 a decade earlier, which drew the following strong rebuke from Justice Kennedy:

> […T]he Latinos' diminishing electoral support for Bonilla indicates their belief he was "unresponsive to the particularized needs of the members of the minority group." In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation. Even if we accept the District Court's finding that the State's action was taken primarily for political, not racial, reasons, the redrawing of the district lines was damaging to the Latinos in District 23. The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo.
>
> [T]he reason for taking Latinos out of District 23, according to the District Court, was to protect Congressman Bonilla from a constituency that was increasingly voting against him. The Court has noted that incumbency protection can be a legitimate factor in districting, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents. If the justification for incumbency protection is to

> keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. By purposely redrawing lines around those who opposed Bonilla, the state legislature took the latter course. This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters. The policy becomes even more suspect when considered in light of evidence suggesting that the State intentionally drew District 23 to have a nominal Latino voting-age majority (without a citizen voting-age majority) for political reasons. This use of race to create the facade of a Latino district also weighs in favor of appellants' claim.

LULAC, 548 U.S. at 440-41. This stark resemblance of the State's action concerning the proposed Congressional plan to that action found by the Court in *LULAC* as evidencing intentional discrimination during the previous redistricting cycle, suggests strongly that such action "bears the mark" of intentional discrimination.

c. Sequence of Events

As set forth in Dr. Arrington's and other declarations, the Congressional redistricting process was a secretive process with little or no opportunity for minority representatives of choice to participate. V. Gonzales Decl. ¶¶ 7-10, 19-24. Even after the original proposed Congressional plan, developed in secret, was introduced, minority efforts to amend the plan were to no avail. Farias Decl. ¶ 17; Martinez Fischer Decl. ¶ 12; V. Gonzales and Martinez Fischer Dep. 58:8-20, July 28, 2011 (Ex. 29). The majorities in the House and Senate rejected any amendments to the Redistricting Committees' plan that would have increased the number of minority ability-to-elect districts, and there is no evidence that rejection of the proposed amendments, and the overall limitation of minority ability-to-elect districts in the proposed plan,

was necessary in order to comply with traditional redistricting principles. *See* Arrington Rep. ¶¶ 174-193; V. Gonzales Decl. ¶¶ 25-26.

d. Procedural and Substantive Departures

Again, the Congressional redistricting process afforded little access to minority representatives. According to those directly affected by this secretiveness, the process was far less open than it had been in the past, evidencing an extreme intent to limit or eliminate minority participation in this redistricting cycle and, in turn, to limit minority ability-to-elect districts. *See Perez* Tr. at 92:1-23 (Martinez Fischer); V. Gonzales Decl. ¶¶ 7-10, 19-24; Veasey Decl. ¶¶ 5-8; Veasey Dep. at 23:6-17, 26:14-22, Aug. 29, 2011 (Ex. 30). Moreover, notwithstanding the State's claim of purely partisan reasoning behind the process and the substantive changes made to benchmark districts, the state's line drawers, operating away from public view, drew the lines with racial block-level data to substitute for the lack of partisan data available below the precinct level. "The racial nature of these actions is statistically convincing." Arrington Rep. ¶ 195.

e. Contemporaneous Statements

While the existence of contemporaneous statements of direct racial intent related to current redistricting efforts may be rare, the email exchanges between United States Congressional representatives and staff, and State officials involved in devising the State's plans, provide riveting circumstantial evidence bearing witness to the process discussed above, where data as to race and ethnicity rather than partisan data drove the line drawing for the proposed Congressional plan, and where the State sought to exclude minority representatives from the redistricting process. These "real time" discussions as set out at length in Dr. Arrington's report provide substantial evidence of the discriminatory intent of the framers of the State's proposed Congressional plan. *See id.* ¶¶ 181-192.

III. CONCLUSION

As set forth above, there are numerous disputed issues of material fact with regard to the retrogressive effect and discriminatory purpose of the State's redistricting plans for its delegation to the United States Congress and the State House of Representatives, and the State is not entitled to judgment as a matter of law. The State's motion for summary judgment should be denied.

Date: October 25, 2011

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Attachment B

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.	Civil Action No. 1:11-cv-1303 (RMC-TBG-BAH) Three-Judge Court

UNITED STATES' STATEMENT OF GENUINE ISSUES

Pursuant to Local Rule 7(h), the United States submits the following statement of genuine disputed material facts in response to Plaintiff's Motion for Summary Judgment. Because the Court has granted declaratory judgment concerning the State Board of Education plan, *see* Sept. 22 Minute Order No. 1, and because the United States has admitted that Plaintiff is entitled to a declaratory judgment that the Senate plan complies with Section 5 of the Voting Rights Act, *see* U.S. Answer ¶ 46, this statement addresses only the proposed Congressional and House redistricting plans.

Prohibited Effect under Section 5

1. There is a genuine issue concerning the proper methodology to determine "the ability of [protected] citizens to elect their preferred candidates of choice." 42 U.S.C. § 1973c(d).
2. The State of Texas indicates that it has conducted its determination of retrogression under Section 5 through the use of population statistics alone. *See* Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment ("Tex. 7(h) Statement") 4-8.

3. For Hispanic communities, Texas uses a fifty percent citizen voting-age population cutoff; for Black communities, the State uses a forty percent voting-age population cutoff. *See* Tex. 7(h) Statement at 7-8. The State does not assess whether a coalition of minority voters has the ability to elect its candidate of choice in any district.
4. Population cutoffs do not provide a valid indicator of minority electoral opportunity or the existence of ability to elect. *See* Handley Cong. Rep. at 2-3; Handley House Rep. at 2-3.
5. While the demographic composition of an electoral district is a valid starting point for an analysis of ability to elect, such an approach alone, without analysis to determine if such population cutoffs provide a valid indication of a minority community's ability to elect its candidate of choice, fails to take into account the actual electoral performance of the districts. *See* Handley Cong. Rep. at 2-3; Handley House Rep. at 2-3. Analysis of election performance – conducted over time with a view toward voter turnout, racial polarization, and other relevant factors – provides the proper measure of ability to elect. *See* Handley Cong. Rep. at 2-3; Handley House Rep. at 2-3.
6. In contrast to the State's Statement of Material Facts, the State's expert, Dr. John Alford, appears to agree that the proper analysis under the Section 5 retrogression standard is "a more 'functional' analysis of the performance of the districts in terms of electing candidates of choice." Alford Rep. at 4.
7. The election-focused analysis conducted by the United States' effect expert, Dr. Lisa Handley, proceeds beyond population figures to focus on endogenous elections – elections for the offices elected from the district at issue – and exogenous elections – elections for offices other than the one elected from the district – to create an

"effectiveness index" that estimates the ability of minority communities to elect their candidates of choice in particular districts. This analysis includes a review of data created by the State, including a district-by-district racial bloc voting analysis. Handley Cong. Rep. at 3-4; Handley House Rep. at 3-4.

Texas House of Representatives

8. An election-oriented functional analysis of the proposed State House plan leads to the conclusion that the plan is retrogressive under Section 5. There are 50 minority districts in the benchmark plan that offer minority voters an ability to elect. *See* Handley House Rep. at 1. The United States contends that there are only 45 minority districts in the proposed plan that offer minority voters an ability to elect. *See* Handley House Rep. at 1.

9. The United States contends that Districts 33, 35, and 117 provide Hispanic voters an ability to elect in the benchmark plan but not in the proposed plan. District 149 provides minority voters an ability to elect in the benchmark plan, and it does not provide minority voters with an ability to elect in the proposed plan. District 41 provides minority voters an opportunity to elect a candidate of choice in the benchmark. The State has failed to meet its burden of proof of showing that District 41 provides an ability to elect in the proposed plan because of the data issues surrounding the precinct splits. See Handley Rep. at 9-10.

10. The State has asserted that there are forty-one districts in the benchmark State House plan that offer minorities the ability to elect candidates of choice: thirty that provide that ability to Hispanic voters – Districts 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 74, 75, 76, 77, 78, 79, 80, 104, 116, 117, 118, 119, 123, 124, 125, 140, 143, 145 – and eleven that provides that ability to Black voters – Districts 22, 95, 100, 109, 110, 111, 131, 139,

141, 142, and 146. Tex. 7(h) Statement at 6-7; *see also* Tex. Mem. at 10-13 (naming individual districts).

11. Utilizing the election-focused approach to determine the ability-to-elect status of the benchmark districts, the United States contends that there are fifty districts in the benchmark plan that offer minorities the ability to elect candidates of choice: thirty-four that provide that ability to Hispanic voters – Districts 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, 119, 123, 124, 125, 137, 140, 143, 145 and 148 – twelve that provide that ability to Black voters, Districts 22, 95, 100, 109, 110, 111, 131, 139, 141, 142, 146 and 147 – and four additional minority (black and/or Hispanic) districts – Districts 27, 46, 120, and 149. Handley House Rep. at 4-8 & app. A.

12. The State has also asserted that there are forty-two districts in the proposed State House plan that offer minorities the ability to elect candidates of choice: thirty that provide that ability to Hispanic voters – Districts 31, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 74, 75, 76, 77, 78, 79, 80, 104, 116, 117, 118, 119, 123, 124, 125, 140, 143, 145, and 148 – and twelve that provide that ability to Black voters – Districts 22, 27, 95, 100, 109, 110, 111, 131, 139, 141, 142, and 146. Tex. 7(h) Statement at 7-8; *see also* Tex. Mem. at 6-9 (naming individual districts).

13. Again utilizing the election-focused approach to determine the ability-to-elect status of the proposed districts, the United States contends that there are forty-five or forty-six districts in the proposed State House plan that offer minorities the ability to elect candidates of choice – thirty or thirty-one that provide that ability to Hispanic voters, Districts 31, 34, 36, 37, 38, 39, 40, 42, 43, 51, 74, 75, 76, 77, 79, 80, 90, 103, 104, 116,

118, 119, 123, 124, 125, 137, 140, 143, 145, and 148 and possibly District 41 – thirteen that provide that ability to Black voters – Districts 22, 27, 95, 100, 109, 110, 111, 131, 139, 141, 142, 146, and 147 – and two additional minority districts – Districts 46 and 120. Handley House Rep. at 8-13 & app. A.

14. Dr. Alford has also acknowledged declines in the effectiveness of Districts 35, 41, and 117, and he notes that benchmark District 33 has been eliminated from its location in the benchmark plan. *See* Alford Rep. at 7-8.

15. Therefore, there are genuine disputes whether proposed Districts 35, 41, and 117 provide Hispanic voters with the ability to elect their candidates of choice in the proposed plan and whether District 149 provides minority voters with the ability to elect their candidate of choice.

United States Congress

16. An election-oriented functional analysis of the proposed Congressional plan leads to the conclusion that the plan is retrogressive under Section 5. There are 10 minority districts out of 32 districts in the benchmark plan that offer minority voters an ability to elect. *See* Handley Cong. Rep. at 1. There are 10 minority districts out of 36 districts in the proposed plan that offer minority voters an ability to elect. *See* Handley Cong. Rep. at 1.

17. The proposed Congressional plan also removes hundreds of thousands of minority voters from districts that provide them with the ability to elect candidates of choice. Under the proposed plan, 479,704 fewer Hispanics would reside in such districts. *Id.* at 9.

18. Because the proposed plan includes the four new Texas Congressional seats, the plan substantially decreases the percentage of minority ability-to-elect districts when

compared to the benchmark plan. That percentage falls from 31.3% to 27.7% for minority districts and from 21.9% to 19.4% for Hispanic districts. *Id.* at 11.

19. The State has asserted that there are eight districts in the benchmark Congressional plan that offer minorities the ability to elect candidates of choice: seven that provide that ability to Hispanic voters – Districts 15, 16, 20, 23, 27, 28, and 29 – and one that provides that ability to Black voters – District 30. Tex. 7(h) Statement at 4-5; *see also* Tex. Mem. at 6-7, 9 (naming individual districts).

20. Utilizing the election-focused approach to determine the ability-to-elect status of the benchmark districts, the United States contends that there are ten districts in the benchmark plan that offer minorities the ability to elect candidates of choice: seven that provide that ability to Hispanic voters – Districts 15, 16, 20, 23, 27, 28, and 29 – and three that provide that ability to Black voters – Districts 9, 18, and 30. Handley Cong. Rep. at 5-6.

21. The State has also asserted that there are ten districts in the proposed Congressional plan that offer minorities the ability to elect candidates of choice: eight that provide that ability to Hispanic voters – Districts 15, 16, 20, 23, 28, 29, 34, and 35 – and two that provide that ability to Black voters – Districts 18 and 30. Tex. 7(h) Statement at 5-6; *see also* Tex. Mem. at 6-9 (naming individual districts).

22. Again utilizing an election-focused approach to determine the ability-to-elect status of the proposed districts, the United States contends that there are ten districts in the proposed plan that offer minorities the ability to elect candidates of choice: seven that provide that ability to Hispanic voters – Districts 15, 16, 20, 28, 29, 34, and 35 – and three that provide the ability to Black voters – Districts 9, 18, and 30. Handley Cong. Rep. at 6-9.

23. Dr. Alford has also acknowledged that proposed District 23 does not provide Hispanic voters with the ability to elect their candidate of choice. *See* Trial Tr., *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. 2011), at 1878:5-6 [hereinafter "*Perez* Tr."] ("[Dr. Alford]. I – I don't count 23 as one of the seven performing districts when I evaluate [the proposed Congressional plan].").

24. Therefore there are genuine disputes whether proposed Districts 23 provides Hispanic voters with the ability to elect their candidates of choice and whether District 9 provides Black voters with the ability to elect their candidate of choice and therefore, whether the State has added one new Hispanic ability-to-elect district and one new Black ability-to-elect district, comparing the benchmark to the proposed Congressional plan. *See* Tex. 7(h) Statement at 5-6.

25. Retrogression in the proposed Congressional plan was not unavoidable. Dr. Handley was able to draw an illustrative Congressional plan, based on the proposed plan, that modified only the area around District 23 and would provide minority voters with the ability to elect their candidate of choice in that District without reducing the ability to elect in surrounding districts. *See* Handley Cong. Rep. at 9-10.

Discriminatory Intent

26. Texas's statement of undisputed facts is devoid of evidence or assertions in support of its claim that the proposed State House and Congressional plans lack a discriminatory purpose, in apparent non-compliance with Local Rule 7. *See* Tex. 7(h) Statement. The burden of proof is on the State to establish the absence of a discriminatory purpose. *See Georgia* v. *United States*, 411 U.S. 526, 538 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966).

27. The only materials provided by the State purporting to support its claim of a lack of discriminatory purpose are a set of brief declarations of State officials attesting to a lack of discriminatory intent in the redistricting process. *See* Solomons Decl. (Tex. Ex. 25); Seliger Decl. (Tex. Ex. 26); Downton Decl. (Tex. Ex. 27); Interiano Decl. (Tex. Ex. 28); Davis Decl. (Tex. Ex. 29).

28. These form declarations were prepared by the Texas Attorney General's Office without prior consultation with the declarants concerning their content. *See* Solomons Dep. at 194:14-195:24. Moreover, multiple declarants admitted that they lacked personal knowledge of whether other legislators, legislative staff, or consultants relied on race in drawing districts incorporated in the final plan. *See, e.g.*, Downton Dep. at 51:14-52:3; Interiano Dep. at 175:15-176:18; Solomons Dep. at 199:15-20

29. There is ample circumstantial evidence of a discriminatory purpose with regard to both the State House and Congressional plans to establish a clear and genuine dispute of material facts.

30. "In a § 5 case, 'impact' might include a plan's retrogressive effect and . . . its dilutive impact." *Bossier Parish I*, 520 U.S. at 488. Other relevant factors under *Arlington Heights* include: the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; the sequence of events leading up to the decision; whether the challenged decision departs, either procedurally or substantively, from the normal practice; and contemporaneous statements and viewpoints held by the decision-makers. *See id.* at 266-68; *see also* Guidance Concerning Redistricting under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011); Arrington Rep. ¶ 9.

31. The Texas Legislative Council specifically notes in its guidance to state legislators that Congress and the Department of Justice set out the *Arlington Heights* framework as the means by which to assess intent. *See* Texas Legislative Council, *State and Federal Law Governing Redistricting in Texas* 87-89 (2011) (citing H.R. Rep. No. 109-478, at 66-68 (2006); 28 C.F.R. §§ 51.54-.59); Arrington Rep. ¶ 9.

32. Evidence concerning the intent of redistricting plans may be synthesized by an expert in political science. *See, e.g.*, *Garza v. County of Los Angeles*, 918 F.2d 763, 767 n.1 (1990); *Session v. Perry*, 298 F. Supp. 2d 451, 508 n.201 (E.D. Tex.), *vacated sub nom. Henderson v. Perry*, 543 U.S. 941 (2004). The United States has employed Dr. Theodore Arrington as its expert concerning discriminatory purpose. *See* Arrington Rep. ¶¶ 2-4.

Texas House of Representatives

33. The United States contends that a purpose of the proposed State House redistricting plan is to eliminate minority communities' ability to elect their candidate of choice in districts won by candidates not preferred by the minority voters in the watershed 2010 election. *See* Arrington Rep. ¶¶ 16-29, 130-132, 140. In addition, the plan is intended to prevent the emergence of new ability-to-elect districts in Dallas and Harris Counties. *See id.* ¶¶ 52-60, 139.

34. The State has claimed that the purposes of the State House redistricting were to restore population equality between districts, to follow other legal constrains including the Voting Rights Act, and to minimize the pairing of incumbents. *See* Tex. Mem. at 28-29.

35. Therefore a genuine dispute of material fact exists concerning the purpose of the proposed State House plan.

36. The proposed House redistricting plan eliminates four or five minority ability-to-elect districts from the benchmark plan, *see* Handley House Rep. at 13, and does not create additional minority ability-to-elect districts despite tremendous minority population growth over the last decade, *see* Arrington Rep. ¶¶ 52-60. Traditional districting criteria did not prevent the State from creating additional ability-to-elect districts. *See id.* ¶¶ 61-76.

37. The proposed House redistricting plan also splits precincts in a manner that strongly evinces race-based intent, rather than a partisan purpose. Because political data is not available below the precinct level, boundaries that divide precincts can only be guided by racial data. *See id.* ¶¶ 77-83, 103-104. The statistical relationship between splitting precincts and the racial character of the district is significant at the .0009 level, meaning that there is less than 9 chances out of 10,000 that a relationship this strong would occur by chance. *See* Arrington Rep. at 27.

38. The boundaries of proposed District 41 split fourteen precincts and include 69.5% of the Anglo VAP of the split precincts but only 40.2% of the Hispanic VAP of the split precincts. *See* Arrington Rep. at 30 tbl. 11. The line drawers claimed that they relied on a legislator's local political knowledge when drawing the district. *See Perez* Tr. 1001:23-1002:5 (Downton); Interiano Dep. at 185:18-190:1. However the incumbent in that District denied guiding more than the small splits that included his home and excluded the legislator currently representing the District and admitted a lack of local political knowledge concerning the split precincts. *See* Peña Dep. at 97:16-102:15, 157:5-173:4.

39. The background of the State House redistricting is the landmark 2010 election, in which candidates who were not the choice of the minority community carried districts that

provided minority communities with the ability to elect, as a result of low Hispanic turnout. This presented an opportunity to advance incumbent protection as a rationale for retrogressive intent. Even so, the House redistricting process incorporated race in a manner that did not advance its political aims or promote Voting Rights Act compliance. *See* Arrington Rep. ¶¶ 16-29.

40. The State House redistricting process left minority representatives unable to provide meaningful input. The only two Redistricting Committee hearings on the Chairman's proposed map occurred within four days of the release of the map, on a Friday and a Sunday. *See id.* ¶¶ 108-109. The Committee and House as a whole approved few amendments, and fewer still benefitted minority voters. Final passage occurred only two weeks after release of the Chairman's proposal. *See id.* ¶¶ 111-129.

41. The redistricting process deviated from ordinary Texas House procedures, including suspension of the "five-day posting rule" for proposed legislation, the holding of a hearing on a Sunday, and holding a hearing in a room that was not wired for sound or video recording. *See* V. Gonzales Decl. ¶¶ 19-24.

42. The proposed State House plan departs from a substantive preference against splitting precincts, *see, e.g.*, April 27 House Tr. at S133-34, to split a total 412 precincts, *see* Arrington Rep. ¶ 77. Splitting precincts makes it more difficult for voters to exercise the franchise and disproportionately burdens minorities. *See id.* ¶¶ 84-96.

43. The proposed State House plan also departs from the substantive standard that Texas's County Line Rule, Tex. Const. art. III, § 26, must give way to federal law. *See* Arrington Rep. ¶ 30 (quoting *State and Federal Law Governing Redistricting in Texas*, *supra*, at 142). Although the proposed House plan deviates from the state rule in deference to the

one person, one vote standard, *see* Downton Dep. 86:22-87:17, the chairman of the House Redistricting Committee stated on the floor of the House that he would not consider whether the Voting Rights Act required a deviation from the state rule unless ordered to do so by the Supreme Court. *See* April 27 House Floor Tr. at S214-15. The County Line Rule was used to justify the elimination of two ability-to-elect districts. *See* Arrington Rep. ¶¶ 30-51.

44. Deviations in district population also cumulatively bias the proposed House plan against minority voters by overpopulating ability-to-elect districts, despite higher rates of minority population growth and known undercounts in minority communities. *See* Arrington Rep. ¶¶ 104-107.

45. Even under the Voting Rights Act standard applied by those who drew the proposed House plan (a voter registration requirement different from the population metrics now applied by the State), the Chairman of the House Redistricting Committee's initial proposal deviated from the core substantive requirement of non-retrogression under the Voting Rights Act. *See* Downton Dep. at 133:19-135:7; *see also id.* at 94:21-96:12 (noting that changes now advanced as correcting retrogression in the initial proposal were not made because of retrogression concerns).

46. Contemporaneous statements by lawmakers who controlled the redistricting process also provide glaring evidence of discriminatory intent. Representative Beverly Woolley, who led the redistricting process in Harris County, told a group of minority representatives, "[Y]ou all are protected by the Voting Rights Act and we are not. We don't want to lose these people due to population growth in the county, or we won't have any districts left."

Coleman Decl. ¶¶ 9-14 (approximating quote and explaining that he understood "these people" to mean Anglo Republicans).

47. The plan prepared by Representative Woolley eliminates the district currently represented by Hubert Vo, the candidate of choice of a cohesive minority coalition and one of only two Asian Americans in the Texas House. *See* Hochberg Decl. ¶¶ 4-5. Members of the House Redistricting Committee and other Anglo members of the Harris County delegation repeatedly told Representative Scott Hochberg, the senior Anglo Democrat who had been paired with Representative Vo, "you're coming back" and "you're gonna win this." *See id.* ¶ 7. The decision to protect Hochberg made little sense from a partisan perspective and can only be explained as intent to break a multiethnic coalition and preference for an Anglo legislator, regardless of party. *See id.* ¶¶ 8-11.

48. Representative John Garza of District 117, in Bexar County, rejected inclusion of Hispanics in politically organized portions of the City of San Antonio and told Representative Joe Farias of neighboring District 118 that he needed "more Mexicans in [his] district." Farias Decl. ¶ 14; *see also* Martinez Fischer Decl. ¶¶ 6-11 (noting that Garza first asked for additional Anglo communities but was rebuffed). The elimination of high turnout Hispanic communities and addition of low turnout Hispanic communities resulted in elimination of Hispanic voters' ability to elect their candidate of choice, the same result seen in proposed Congressional District 23, discussed at length below. *See* Arrington Rep. ¶¶ 26-27.

49. As a general matter, email discussion between State redistricting officials and a member of Congress demonstrate how an awareness of race infected the redistricting process apart from any partisan motivation. *See id.* ¶ 135.

United States Congress

50. The United States contends that discriminatory intent permeated the Congressional redistricting process, based on a broad array of circumstantial evidence. *See* Arrington Rep. ¶¶ 194-198.

51. The State argues that the Congressional plan was motivated only by compliance with one-person, one vote; the Voting Rights Act; and "traditional redistricting principles." Tex. Mem. at 25.

52. Therefore a genuine dispute of material fact exists concerning the purpose of the proposed Congressional plan.

53. Race and ethnicity were common themes during discussions between the Republican leadership and others, including a United States Congressman and staff. State leaders viewed race as a proxy for party, leading to redistricting decisions and movements of population based solely on the basis of race. *See* Arrington Rep. ¶¶ 181-193.

54. Certain population adjustments obtained by splitting precincts and removing individual census blocks could only have been made based on race. Statistical tests demonstrate to an extreme level of significance that race played a role in these population moves. *See* Arrington Rep. ¶¶ 164-173.

55. The elimination of District 23 as a minority ability-to-elect district has a disproportionate negative impact on minority voters. The splitting of well-organized Hispanic communities in Maverick and Bexar Counties and substitution with areas that are equally Hispanic, but not politically organized, made it possible to decrease the ability of Hispanic voters to elect a candidate of their choice while still maintaining the illusion of a district with sufficient Hispanic voting age population to control elections. *See* Arrington

Decl. ¶ 144; *see also* Hernandez Decl. ¶¶ 8, 12; Ruiz Mendelsohn Decl. ¶¶ 6-7. The Hispanic community in Maverick County is a long-standing community of interest that has consistently voted as a bloc for a common political interest. *See* Cantu Decl. ¶¶ 10-11; Hernandez Decl. ¶¶ 8-10. The proposed Congressional plan packs half of Maverick County into District 28, where Hispanics could already elect candidates of choice in the benchmark plan, with full knowledge that Maverick County was becoming the electoral tipping point in Congressional elections in benchmark District 23. Without the politically mobilized base in Maverick County, a Hispanic candidate is not electable in proposed District 23. *See* Arrington Rep. ¶ 114; *see also* Hernandez Decl. ¶¶ 7, 12.

56. The reconfiguration of District 27 strands the sizeable Hispanic community in Nueces County in a heavily Anglo district, thus creating a similar disproportionately negative effect on minority voters. District 27 previously combined Nueces County with demographically and economically similar Hispanic communities to the south to form an ability-to-elect district. *See* Truan Decl. ¶ 10. In the proposed plan, the County is separated from those southern areas and submerged in the northern Anglo population, bringing together majority Anglo, older, rural, higher income populations of the Northern counties, with the majority Hispanic, younger, more urban, and lower income population of Nueces County. *See* Truan Decl. ¶ 11; J. Gonzalez Decl. ¶¶ 18-20. This negates the long-developed political power of that County. *See* Arrington Rep. ¶ 142; Truan Decl. ¶ 13; J. Gonzalez Decl. ¶ 23.

57. In Harris County, the State cracked a substantial Hispanic population – enough for an additional ability-to-elect district – and placed it in six Anglo-dominated districts. *See* Arrington Rep. ¶¶ 146-147.

58. The proposed Congressional Plan applies the same technique in Dallas County, where Anglo-dominated districts from outside the County "swoop in" and crack the Hispanic population, a population that is again substantial enough to form an ability-to-elect district. *See id.* ¶¶ 148-149.

59. The proposed Congressional plan fractures the minority population in Tarrant County, which has a minority population of over 750,000 but does not include a single district in which minority voters have the ability to elect their candidate of choice. *See id.* ¶¶ 151 & tbl.17. The southern boundary District 26 extends through the center of proposed District 12, drawing in the Hispanic population concentrated in the City of Fort Worth. As a result, Hispanic voters who reside in the heart of the City of Fort Worth are drawn in with the majority-Anglo population of Denton County. The remainder of the Hispanic population of the Fort Worth area, which resides in the southern and southwestern portions of Tarrant County, is drawn into proposed Districts 6 and 33, where it is joined to majority-Anglo Parker County and Ellis County. The shape of these four districts suggests that the minority population was purposely fragmented and submerged into overwhelmingly Anglo suburban and exurban areas in Denton, Ellis, and Parker Counties. *See id.* ¶¶ 150-152 & map 7; *see also* Veasey Decl. ¶¶ 9-10.

60. During the redistricting process, a number of alternatives were presented that did not split these minority communities and would have both preserved minority ability-to-elect districts and created new ability-to-elect districts. *See* Arrington Rep. ¶¶ 153-163. Even Congressman Lamar Smith, an Anglo Republican, proposed the creation of a majority Hispanic district in the Dallas-Fort Worth area that would have had a combined Black and Hispanic voting-age population of 78% and likely would have provided the Hispanic

community with the ability to elect its candidate of choice. *See* Lamar Smith Proposal, *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. 2011), Doc. 117-2, at 21; *see also* Arrington Rep. ¶¶ 181-183.

61. The State redistricting process was also closed to effective minority participation. Time constraints imposed by those in charge of the process made effective minority organized opposition and meaningful minority participation difficult if not impossible, and minority attempts to amend the original proposal met with consistent rejection. *See* Arrington Rep. ¶¶ 174-180. Email discussions between State officials involved in redistricting and Congressional members and staff demonstrate the closed nature of the process. *See id.* ¶¶ 181-193.

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