IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,

Plaintiff,

v.

UNITED STATES OF AMERICA; ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,

Defendant,

WENDY DAVIS *et al.*

Defendant-Intervenors,

MEXICAN AMERICAN LEGISLATIVE CAUCUS,

Defendant-Intervenor,

GREG GONZALEZ *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,

LEAGUE OF UNITED LATIN AMERICAN CITIZENS,

Defendant-Intervenor.

Civil Action No. 1:11-cv-01303 (RMC-TBG-BAH)

GONAZALES INTERVENORS' STATEMENT OF MATERIAL FACTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Texas's population has gown by 4,293,741 in the last decade. Decl. of John Devaney ("Devaney Decl."), Ex. 1 (Stephen Ansolabehere, Report on Minority and White Representation Under the Texas Congressional District Plans C185 and C100 (Oct. 21, 2011)) ("Ansolabehere Rpt..") at 7 & tbl. A.1.[1] Of those nearly 4.3 million people, approximately two-thirds were Hispanics. *Id.* Only about ten percent of the additional population in the state was white, and roughly ten percent was African-American. *Id.* Due almost entirely to the increase in the state's minority population, Texas will gain 4 additional seats in the U.S. House of Representatives, bringing the state's congressional delegation to 36. *Id.* at 11. If Hispanics had grown at the same rate as whites (4.1 percent), the state would have lost congressional seats rather than gained them, as the nation's population grew by 9.7 percent over the decade. *Id.*

As a result of this massive growth in the minority population, whites are no longer a majority of the state's total population. Instead, whites are now a plurality in Texas, comprising 45.3 percent of the total population, while Hispanics and African-Americans combined comprise nearly half, or 49.4 percent, of the state's population. *Id.* at 20 & tbl. A.1. The composition of Texas's eligible electorate reflects a similar trend.[2] The number of Hispanic citizens of voting age increased by 1.1 million persons over the last decade, and Hispanics' share of the eligible electorate rose from 22.3 percent in 2000 to 25.8 percent in

[1] All of the data and information used in Dr. Ansolabehere's expert report come from the U.S. Census Bureau and the Texas Legislative Council. Ansolabehere Rpt. at 5.

[2] The Census Bureau measures citizen voting age population using a separate, smaller survey called the American Community Survey ("ACS"). Ansolabehere Rpt. at 12. The annual ACS does not have sufficient precision to measure population characteristics at the level of census blocks, which are the building blocks for congressional and legislative districts. *Id.* To gain sufficient precision, the Census Bureau constructs and releases a 5-year average of the annual ACS, and the most recent such data available are the 2005-2009 ACS average. *Id.* But because the ACS data reflect only an average population between 2005 and 2009, the ACS undercounts both the state population and the citizen voting age population for 2010. *Id.* at 12-13. As set forth in Dr. Ansolabehere's report, a single calculation based on the ACS data, the enumeration data, and the percentage of each racial group that are citizens of voting age can be used to derive a more accurate estimate of citizen voting age population as of 2010. *Id.* at 13-14 & Appx.

2010. *Id.* at 15 & tbl. A.2. Whites, on the other hand, declined from 62.5 percent of eligible voters in 2000 to 55.8 percent in 2010. *Id.*

Despite the growth in the state's minority population, Plan C185, the congressional redistricting plan passed by the Texas legislature, decreases the number of congressional districts in which minorities will have the ability to elect their candidates of choice. While the benchmark plan contained 11 minority opportunity districts (CDs 9, 15, 16, 18, 20, 23, 25, 27, 28, 29, and 30), Plan C185 creates only 10 minority opportunity districts (9, 15, 16, 18, 20, 28, 29, 30, 34, and 35). *Id.* at 29. This decrease in the absolute number of minority opportunity districts constitutes retrogression.

The Texas legislature accomplished this retrogression by dismantling three minority opportunity districts and failing to offset those losses elsewhere in the state. First, the legislature destroyed the opportunity district found in benchmark CD 27 by carving out largely-Hispanic Nueces County, Pl.'s Mem. in Supp. of Summ. J., Dkt. # 41at 8, a decision that had a ripple effect throughout the state to the detriment of minority voters, Ansolabehere Rpt. at 45-48. Second, the legislature broke apart benchmark CD 25, a district the State has conceded was a crossover district in which the minority group was able to elect its candidate of choice. *See Perez v. Perry*, No. SA:11-cv-00360-OLG-JES-XR, Dkt. #457 (W.D. Tex. Oct. 21, 2011) (Defendant's Response to Plaintiffs' Post Trial Briefs), at 17 & n.9 (stating that "CD 25 in the benchmark plan is a crossover district" and defining the term as "a district in which African-Americans or Latinos make up less than 50% of voters but can usually elect their candidates of choice with reliable crossover voting by members of the Anglo majority"). Third, the legislature recrafted CD 23 to render it no longer a performing opportunity district. *See* Ansolabehere Rpt. at 36-37; Expert Report of John Alford, Dkt. # 72, Ex. 1 at 6.

During the legislative session, several alternative plans were proposed that more fairly reflected minority population growth and did not lead to retrogression. For instance, Plan C166, offered by State Representative Dawnna Dukes, created additional Hispanic opportunity districts in the Dallas-Tarrant County metroplex, Harris County, and South and Southwest Texas. *See* http://gis1.tlc.state.tx.us/ (displaying maps and reports of various plans considered by the Texas legislature). Plan C166 also kept CDs 25 and 23 in tact as minority opportunity districts, resulting in a total of 14 minority opportunity districts for the state. *Id.* The Republican leadership, however, rejected this and other alternatives.

Texas's retrogressive and inequitable redistricting plan is the result of the legislature's intent to discriminate against minority voters. Because of its long history of disenfranchising minority voters, Texas was classified as a jurisdiction covered under Section 5 of the Voting Rights Act in 1975. 40 Fed. Reg. 43746 (Sept. 23 1975). Just a few years earlier, the Supreme Court had reviewed the redistricting plan for Texas's House of Representatives and affirmed that in Texas, "the black community . . . was . . . generally not permitted to enter into the political process in a reliable and meaningful manner." *White v. Regester*, 412 U.S. 755, 767 (1973). It also affirmed that the Hispanic community "in Texas had long suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others." *Id*. at 768 (internal quotation marks and citation omitted). Because Texas continued to discriminate against racial and language minorities, the Department of Justice under Democratic and Republican presidents has refused to preclear many voting changes proposed by Texas. *See* Devaney Decl., Ex. 2. As recently as 2006, the Supreme Court found that Texas's congressional redistricting plan violated Section 2 of the Voting Rights Act. *See LULAC v. Perry*, 548 U.S. 399, 442-43 (2006).

Texas's history of discrimination against minority voters continued this year when the Texas legislature redrew the state's congressional districts to reduce the influence of minority voters. Texas's 2011 Legislative Session was rife with racial tension before it even addressed redistricting. Despite opposition from the Texas Legislative Black Caucus and Mexican-American Legislative Caucus, the Texas legislature passed a controversial Voter ID bill in May 2011 that would prevent minority citizens from exercising their right to vote. Devaney Decl., Ex. 3 (*Perez v. Perry*, Trial Tr. at 811-12). Even a Hispanic Republican member of the Texas House noted that the tone of the debate was hostile toward Hispanics. Devaney Decl., Ex. 4.

In the Spring of 2011, while the Texas legislature considered the Voter ID bill and other legislation, the Republican leadership began to draw congressional maps behind closed doors. Devaney Decl., Ex. 5 (First Opiela Dep. at 13-15). According to Intervenor Marc Veasey, an African-American representative in the Texas House of Representatives and a member of its redistricting committee, no minority state representatives had any input into the proposed redistricting maps before they were made public. Devaney Decl., Ex. 6 (Veasey Dep. at 25-27). Even early concerns about complying with the Voting Rights Act were jettisoned as a proposed minority-opportunity district in the Dallas-Fort Worth area, suggested by Congressman Lamar Smith in a "confidential" memo, never made it into the plan adopted by the Texas legislature. Devaney Decl., Ex. 7. Congressman Smith urged the creation of that district based on the "surging growth of Hispanic population." Devaney Decl., Ex. 8 (Second Opiela Dep. at 120). In a much publicized dispute, however, an Anglo Republican Congressman, Joe Barton, opposed the district, and his view ultimately prevailed in the Texas Legislature. *Id*. at 117-123.

The representatives of minority opportunity districts confronted their Republican colleagues about being excluded from the redistricting process, but the Republican leadership

would not budge. On the floor of the Texas Senate, where the first bill redrawing congressional districts appeared, Judith Zaffrini, a Hispanic state senator, asked Kel Seliger, an Anglo state senator and Chairman of the Senate Select Committee on Redistricting, if "any Minority members [were] involved in developing" the redistricting maps under consideration; Senator Seliger responded, "[n]ot that I recall." Devaney Decl., Ex. 9 at A-12. Similarly, Royce West, an African-American State Senator, made it clear on the Senate floor that none of the minority state senators felt they had any input in the congressional redistricting plan. *Id.* at A-3. Representative Veasey explained that, as a member of the House redistricting committee, "a lot of the map drawing and a lot of the changes that were done were done in secret . . . to keep the African-American and Latino members of the redistricting committee sort of discombobulated and not really knowing what's going on." Devaney Decl., Ex. 6 (Veasey Dep. at 23).

The Republican leadership not only excluded minority legislators from the redistricting process but they excluded the public as well. Senate Bill 4, which included the first congressional redistricting map, was made public on Tuesday May 31, 2011, the same day it was received by the Secretary of the Senate and referred to the Senate Redistricting Committee. Devaney Decl., Ex. 10. The first and only hearing open to public testimony was held on Friday, June 3, 2011—only three days after the plan was released. *Id*. On June 6, 2011—the Monday after the Friday hearing—the full Senate considered the bill. *Id.* On the Senate floor, Senator Zaffrini explained that of the witnesses who were able to attend the Senate committee's only public hearing, with the exception of one, "everybody else, every African American, every Anglo American, every Mexican American, Hispanic American, more generally speaking, every single witness testified against the plan." Devaney Decl., Ex. 9 at A-14. When Senator Zaffrini asked Senator Seliger, "[i]s that your recollection, Senator?", he responded "I believe it is." *Id*. Representative Veasey testified in his

deposition that public hearings should have been conducted throughout Texas to allow citizens of all races to comment on the plan, but this never happened. Devaney Decl., Ex. 6 (Veasey Dep. at 22-23). On the House floor, State Representative Dawnna Dukes criticized the rushed and secretive process through which the Republican leadership ushered through a map that destroyed several minority opportunity districts, including benchmark CD 25. *See* Devaney Decl., Ex. 11 at S46 ("[T]he hearing was only a shadow, a route box process, a box to be checked because they always knew they weren't going to let a plan pass that preserved the voice of Austin minorities.").

The expedited legislative process and exclusion of citizens and representatives of minority opportunity districts departed from previous redistricting practices. Representative Turner testified that he has participated in three redistricting cycles and that the legislators were provided much less time to debate and consider proposed redistricting plans in 2011 than in previous years. Devaney Decl., Ex. 3 (*Perez v. Perry*, Trial Tr. at 796-97). Senator Zaffrini also stated that in her twenty-five years of sitting on Senate Redistricting Committees, "the redistricting process during the 2011 Legislative Session was the least collaborative and most exclusive of any [she had] experienced." Devaney Decl., Ex. 12. Even counsel for the Senate Redistricting Committee testified on June 3, 2011, that they had not had the opportunity to review the congressional plan before it was submitted to the Senate and that "this process has been quite different from what we've seen in the past [because] . . . [n]obody has had the opportunity to study it the way it has been done in the past." Devaney Decl. ¶ 14 (Testimony of Michael Morrison, Hearing of Senate Select Committee on Redistricting (June 3, 2011), http://www.senate.state.tx.us/75r/senate/commit/c625/c625.htm, at 4:51:42). He explained further that this procedure differed from the one followed in 2003 when the committee's staff "went all over the state . . . spent sixteen hours in one place, twenty in another. We sat down

. . . we visited. We hired experts to do retrogression analysis." *Id.* at 4:52:27. He concluded that "if time permits, that would be the way to do it this time." *Id.* The Republican leadership chose not to do it that way in 2011.

While Republicans rejected any requests from the representatives of minority opportunity districts, they granted even whimsical requests of Anglo legislators. In Plan C185, for example, the district offices of all three African-American Members of Congress would no longer be in their districts, but the Republican leadership never fixed these districts to include the district offices. Exs. 13-15 (*Perez v. Perry*, Trial Tr. at 1279; 1335; 1515-1516). The leadership's redrawing of the district held by Congressman Charlie Gonzalez, Chair of the Congressional Hispanic Caucus, not only excluded Congressman Gonzalez's district office but also removed key economic and cultural landmarks that had long been located in the district, including the Alamo and the Convention Center named after Congressman Gonzalez's father. Devaney Decl., Ex. 16 ¶¶ 3-9, 11. By contrast, the Republican leadership ensured that Anglo Congresswoman Kay Granger, whose office originally had been drawn out of her district, had her office drawn back in before adoption of the final plan. Devaney Decl., Ex. 5 (First Opiela Dep. at 63); Ex. 17. Similarly, Anglo Congressman Kenny Marchant requested on May 31, 2011, that his district lines be drawn to cross a street to include his "grandbabies'" school. Devaney Decl., Ex. 18. Anglo Congressman Lamar Smith also requested on June 8, 2011, that his district lines be drawn to include a precinct with the San Antonio Country Club. Devaney Decl., Ex. 19. The Republican leadership granted both Congressman Marchant and Congressman Smith's requests. Devaney Decl., Ex. 20.

The Republican legislators and staff members responsible for drawing the congressional map also paid little heed to the Voting Rights Act. Their starting premise was that Section 5 does not apply to any of the 4 new districts. A key staff member explained

that "[e]ven if you have 20 new seats," the legislature could make all of them Anglo districts without violating Section 5. Devaney Decl., Ex. 21 (Davis Dep. at 103-104). In fact, Eric Opiela, counsel to the Republican congressional delegation and one of the original developers of the new congressional map, testified that racial bloc voting and electoral performance, factors integral to the Voting Rights Act, are nothing more than "hocus-pocus." Devaney Decl., Ex. 9 (Second Opiela Dep. at 171-72); *see also id.* ("Q: (BY MR. NOTZON) This is the hocus-pocus that's been accepted by the Supreme Court of the United States. A: They might—if they did, then they did. Yeah. I think they did in 2005. I'm sorry, Bob. I just don't buy it."). Still, when considering Congressional District 23, Mr. Opiela wrote to Congressman Lamar Smith, "I don't think we mess with [Congressional District 23]" because it was "barely performing . . . add R[epublican]s (which will be Anglos) and you put a neon sign on it telling the court to redraw it." Devaney Decl., Ex. 22. But despite Mr. Opiela's concerns, the Republican legislators and staff did redraw Congressional District 23 and did so in a way that makes it look like a Hispanic-opportunity district but prevents it from electing Hispanic preferred candidates. Devaney Decl., Ex. 23 (*Perez v. Perry*, Trial Tr. at 950). According to Ryan Downton, Mr. Opiela and he had conversations about giving the Republican incumbent for Congressional District 23 the "best chance to be reelected, while maintaining or increasing the Hispanic percentages, total population Hispanic voting age, Hispanic citizen voting age, and Spanish surname voter registration." *Id.* (*Perez v. Perry*, Trial Tr. at 952). In other words, they manipulated the statistics for Congressional District 23 so that, on paper, it would look like a Hispanic-opportunity district but, in practice, would not perform as one. When questioned directly by the judges during trial, the State's expert John Alford conceded that Congressional District 23 as drawn by the legislature is not an effective minority district. Devaney Decl., Ex. 24 (*Perez v. Perry*, Trial

Tr. at 1839). He added: "[I]f I was advising the legislature on drawing the 23rd, I would not have done what was done to the 23rd." *Id.* (*Perez v. Perry*, Trial Tr. at 1838).[3]

When he reviewed the Republican congressional redistricting plan eleven days before the final plan was adopted, Dub Maines, the district director for Congressman Barton, grew concerned with the proposed plan and felt the need to ask his Republican colleagues "is there any reason why every effort should not be made to make the map more likely to pre-clear, especially if it doesn't hurt the political aims in any way?" Devaney Decl., Ex. 25. Even Republican staff members were concerned that their proposed plans limited the ability of minority groups to elect their candidates of choice more than was necessary to achieve Republican political goals.

Only twenty days after the Republican leadership released the congressional map to the public and the representatives of minority-opportunity districts, the Texas legislature adopted the congressional plan known as Plan C185. Devaney Decl., Ex 10. The Republican leadership had excluded representatives of minority-opportunity districts and members of the public from the redistricting process and ignored their requested changes while granting those of Anglo representatives. These discriminatory practices are all evidence of the discriminatory intent that motivated the Texas legislature to adopt Plan C185.

RESPECTFULLY SUBMITTED: October 25, 2011

/s/ John M. Devaney

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Marc Erik Elias
Kevin J. Hamilton

[3] The Declaration of Dr. Theodore S. Arrington, to be filed by Defendant United States, also supports this analysis when it concludes that the process to enact Plan C185 "was closed to minority representatives of choice. Nothing that would increase minority election districts or enhance those that might be weak, like benchmark District 23, was changed after the chairmen introduced the plan. And the process was closed before that submission." *See* Declaration of Theodore S. Arrington, Ph.D at 65 (October 19, 2011) (to be filed by Defendant United States in this matter).

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GONZALES INTERVENORS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiff State of Texas is seeking summary judgment preclearance of the State's congressional redistricting plan known as Plan C185.[1] But the State's claim that Plan C185 is entitled to preclearance as a matter of law is belied by its cramped analysis of the Section 5 standard, the opinion of its own expert, and a wealth of evidence from the legislative session, all of which demonstrate that Plan C185 has a retrogressive effect on minority voters and was driven by a discriminatory purpose. The plan has a retrogressive effect because it decreases both the absolute number of minority opportunity districts and minorities' share of the state's districts relative to the benchmark plan. Additionally, the record is rife with evidence of the discriminatory purpose behind Plan C185; the plan's disparate impact on the growing minority population compared to the shrinking white population, the rushed and closed-door process by which it was ushered through the legislature, and the multiple statements from legislators remarking on the plan's unfair treatment of minority voters are more than sufficient to create a genuine issue of material fact. As such, the State has fallen far short of meeting the heavy burden it bears to prove its congressional plan passes Section 5 muster as a matter of law.[2]

II. ARGUMENT

A. Summary Judgment Standard

A motion for summary judgment may only be granted when "the pleadings depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v.*

[1] The Gonzales Intervenors limit their opposition to the State's congressional redistricting plan and take no position with respect to preclearance of the Texas House or Texas Senate plan.

[2] Defendant-Intervenor League of United Latin American Citizens and Veasey Intervenors join in Gonzales Intervenors' Statement of Material Facts and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment.

Catrett, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). All justifiable inferences must be drawn in the nonmoving party's favor, and the Court should accept the nonmoving party's evidence as true. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

B. Plan C185 Has a Retrogressive Effect

The brief entitled Certain Defendant-Intervenors' Memorandum in Opposition to Texas' Summary Judgment Motion, Addressing the Section 5 Legal Standard ("Joint Standards Brief") sets forth the legal standard for retrogressive effect. The Gonzales Intervenors have joined in that brief and adopt and incorporate that standard here. In short, a redistricting plan reduces minorities' "effective exercise of the electoral franchise," *Beer v. United States*, 425 U.S. 130, 141 (1976), and thus is retrogressive, when it reduces the ability of minority voters to elect their candidates of choice. 42 U.S.C. § 1973c(d).

The Joint Standards Brief does not directly address the case of crossover districts in defining a minority group's ability to elect its candidate of choice. The law, however is clear: the "ability to elect" standard turns not on a single statistic, Jt. Stds. Br. at 6, but on a multi-factor "functional analysis" of the electoral process, Dep't of Justice Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011), including whether minority groups form coalitions with other racial groups to elect their candidate of choice. *See* Jt. Stds. Br. at 6; *Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003) ("'[T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.'") (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)); H. Rep. No. 109-478, at 71 (2006) ("Voting 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."). Under this standard, a

district in which the minority group is able to elect its preferred candidate with the help of another minority group or white crossover votes is a minority opportunity district. Also under this standard, a district in which the minority group has a numerical majority is not necessarily a minority opportunity district if that group does not have a reasonable opportunity to elect its candidate of choice. *See* Jt. Stds. Br. at 7-9.

Compared with the benchmark plan, Plan C185 reduces the number of seats in which Hispanics have an ability to elect their candidates of choice. While minority groups had the ability to elect their candidates of choice in 11 congressional districts under the benchmark plan, Plan C185 creates only 10 such districts. Specifically, Plan C185 dismantles benchmark CDs 27, 25, and 23, all of which are no longer minority opportunity districts, and fails to offset these losses elsewhere in the state. This alone renders Plan C185 ineligible for preclearance under Section 5.

But Plan C185 would fail preclearance review even if the number of minority opportunity districts remained the same. Where Texas has gained 4 congressional districts due almost entirely to growth in the minority population yet fails to create any additional minority opportunity districts, the State's plan unlawfully diminishes minorities' "effective exercise of the electoral franchise," *Beer*, 425 U.S. at 141 (1976).

1. Plan C185 Decreases the Total Number of Congressional Districts in which Minority Groups Have the Ability to Elect Their Candidates of Choice

Plan C185 reduces the number of districts in which minority groups have an opportunity to elect their preferred candidates from 11 to 10. As Dr. Ansolabehere's analysis makes clear, the benchmark plan contained 8 Hispanic opportunity districts: CDs 15, 16, 20, 23, 25, 27, 28, and 29. Ansolabehere Rpt. at 29. Plan C185, however, creates only 7 such districts: CDs 15, 16, 20, 28, 29, 34, and 35. *Id.* Plan C185 maintains districts 9, 18, and 30 as African-American opportunity districts.

This decrease in the absolute number of minority opportunity districts is striking under any retrogression analysis, but it is all the more remarkable here given the dramatic growth of Texas's Hispanic population over the past decade. The Hispanic population grew from 6.7 million to 9.5 million, a 42 percent increase, between 2000 and 2010. Ansolabehere Rpt. at 11. The African-American population experienced more modest gains, increasing by 526,000, or 23 percent. *Id.* The white population, meanwhile, experienced the smallest growth of all three major racial groups, increasing only 457,000, or 4.1 percent, over the entire decade. *Id.* at 10-11. The same trends exist among the State's eligible voters, as the "Hispanic population was the fastest growing segment not only of all persons in the state but of the eligible electorate over the past decade." *Id.* at 14; *see also id.* at tbl. A.2. But despite these gains in minority population, Plan C185 decreases the number of Hispanic opportunity districts by one and increases the number of white districts by five. *Id*. at 32.

Plan C185 accomplishes this retrogression by dismantling three Hispanic opportunity districts: CDs 27, 25, and 23.

The State freely admits that it eliminated benchmark CD 27 as a Hispanic opportunity district. Pl.'s Mem. in Supp. of Summ. J., Dkt. #41 at 8. Under the benchmark plan, CD 27 ran from Nueces County down to Cameron County and was 63.8 percent Hispanic. *Id.*; *see also* Ansolabehere Rpt. at tbl. B.3. Hispanics in this benchmark district had a reasonable opportunity to elect their candidates of choice. Ansolabehere Rpt. at 34. Plan C185 carves out Nueces County, which is majority-Hispanic, resulting in a new CD 27 that is just 41.1 percent Hispanic. *Id.* tbl. B.3. Under the State's plan, CD 27 is now a white-majority district in which racially polarized voting will result in defeat of the minority-preferred candidate. *Id*. at 33-34.

Plan C185 also eliminated a minority opportunity district in the Travis County area. Although benchmark CD 25 had a majority-white population, Ansolabehere Rpt. tbl. B.3, the

minority group had the ability to elect its preferred candidates due to high levels of white crossover voting. *Id*. at 34. Hispanics and African-Americans in CD 25 voted cohesively, while whites in Travis County "split their votes approximately in half, with half choosing the minority-preferred candidates and half choosing their opponents." *Id*. at 34-35.[3] As a result, the minority-preferred congressional candidate in general elections "won handily" in 2006, 2008, and 2010, and the minority-preferred congressional candidate won by 60% in 2008. *Id*. at 35.

Plan C185 "completely restructures the district, taking out large numbers of minorities and putting in large numbers of whites from communities to the north. The voting behavior of the whites in these counties differs substantially from the voting behavior of Whites in Austin, the seat of Travis County." *Id.* at 35. CD 25 under Plan C185 contains a white population that cohesively votes against the minority-preferred candidate. *Id.* As a result, the new CD 25 "is no longer a district in which minority-preferred Congressional candidates will prevail." *Id.* In fact, the State has already conceded before the Western District of Texas that it chose to eliminate the minority opportunity district in CD 25. *See Perez v. Perry*, No. SA:11-cv-00360-OLG-JES-XR, Dkt. # 457 (W.D. Tex. Oct. 21, 2011) (Defendant's Response to Plaintiffs' Post Trial Briefs), at 18.

Finally, Plan C185 also eliminates a Hispanic opportunity district in CD 23. Under the benchmark plan, CD 23 was a district in which the minority-preferred candidate had a reasonable opportunity of winning and won the district more often than not. Ansolabehere Rpt. at 36 & tbl. C.1. Minority-preferred candidates received between 48.7 percent and 51.4

[3] Although the Joint Standards Brief generally states that "[i]n Texas, racially polarized voting is a well recognized fact of political life," Jt. Stds. Br. at 9, Dr. Ansolabehere's expert report filed in *Perez v. Perry*, No. SA:11-cv-00360, Dkt. # 123, establishes that Travis County is the lone exception to racial bloc voting in Texas: "Travis County breaks the pattern observed elsewhere in the state. . . . In Homogeneous White Precincts in Travis County, the electorate divides 50-50 between Republicans and Democrats. . . . The implied degree of racial polarization is noticeably lower in Travis than it is elsewhere in the state, and Whites do not appear to vote as a cohesive bloc in opposition to minorities in this county." *See* Devaney Decl., Ex. 26 (*Perez v. Perry*, Ansolabehere Rpt. at 33-34).

percent of the district's vote. *Id.* tbl. C.1. Plan C185, however, lowers the electoral performance of minority-preferred candidates in CD 23 to the point that it is no longer a Hispanic opportunity district. *Id.* at 36; *see also* Dr. Lisa Handley, "A Section 5 Voting Rights Analysis of the Proposed Texas Congressional Plan" at 8 (Oct. 19, 2011) (to be filed by Defendant United States in this matter). The electoral performance of minority-preferred candidates in new CD 23 now lies in the range between 45.0 percent and 47.9 percent. *Id.* at 37. Notably, this range falls "below the lowest performance of any of the minority opportunity seats" under the benchmark plan and is now "clearly at the level of districts that all agree are not minority opportunity districts." *Id.* at 37. For instance, all parties agree that benchmark CD 32 is not a minority opportunity district. *See* Pl.'s Mem. in Supp. of Summ. J., Dkt. #41 at 6. In that district, minority preferred candidates won 46.6 percent for President in 2008 and 45.2 percent for Governor in 2010. Ansolabehere Rpt. at 37 & tbl. C.1. The performance of the minority-preferred candidates for Governor in 2010, at just 45.0 percent, is lower in new CD 23 than it is in benchmark CD 32. *Id.* at 37.

The State achieved this result through a very subtle but significant manipulation. Although the Hispanic percentage of the total population in this district remained the same between the benchmark plan and Plan C185, the State removed the portion of the Hispanic population that had the highest support for minority-preferred candidates and replaced it with a low-turnout Hispanic population. *Id.* at 41-42. The State also removed a large portion of the African-American population and added areas with very few African Americans. *Id.* "The combination of very low turnout and lower support for minority-preferred candidates in the areas added compared with the areas subtracted, due in part to the lower percent Black, reduced the electoral performance of minority preferred candidates in CD 23 by 3 to 4 percent and rendered the district no longer a minority opportunity seat." *Id.* at 42.

The State maintains that CD 23 remains a Hispanic opportunity district. Pl.'s Mem. in Supp. of Summ. J., Dkt. #41 at 7. But the State limits its analysis to the racial composition of the district rather than applying the full "ability to elect" legal standard. *See* Jt. Stds. Br. at 7-9. In fact, the State's undue reliance on numerical majorities is undercut by its own argument and by the testimony of its own expert.

The State itself recognizes that a bright-line population statistic cannot serve as the sole criterion for assessing a minority group's "ability to elect," as it contends that African-American opportunity districts require less than a majority-African-American population. Pl.'s Mem. in Supp. of Summ. J., Dkt. #41 at 9-19 (noting that CDs 9, 18, and 30 are over 30 percent but less than 50 percent African-American). Its suggestion that racial composition is the sole determining factor with respect to Hispanic opportunity districts is, therefore, inconsistent.

The State's own expert has further testified that CD 23 under Plan C185 is not a Hispanic opportunity district. *See* Expert Report of John Alford, Dkt. # 72, Ex. 1 at 6 ("[W]hile District 23 remains a majority Hispanic district in both adult citizen population and registered voters, the performance of the district drops from just below a half to just below a third."); Devaney Decl., Ex. 24 (*Perez v. Perry*, Trial Tr. at 1839) (John Alford: "So I don't think that the 23rd is any more likely to perform than it was. I think it is probably less likely to perform than it was, and so I certainly wouldn't count and don't—in all of this discussion, I haven't counted the 23rd as an effective minority district in the newly adopted plan, but it does remain a majority district."); *see also id.* at 1838 ("[I]f I was advising the legislature on drawing the 23rd, I would not have done what was done to the 23rd."). Thus the State's assertion that CD 23 is a minority opportunity district under Plan C185 was directly refuted by its own expert in open court.

In sum, contrary to the State's contention that Plan C185 increases the number of minority opportunity district from 10 to 11, Pl.'s Statement of Material Facts, Dkt. #41 at 4-6, Plan C185, in fact, decreases the number of minority opportunity districts from 11 to 10. The State's faulty math is due to its narrow focus on majority-Hispanic districts rather than Hispanic opportunity districts, an approach that differs from its own analysis of African-American opportunity districts and from the analysis of its own expert. Benchmark CD 25, though not a majority-Hispanic district, was clearly a district in which Hispanics had the ability to elect their preferred candidates. New CD 23, although it is a majority-Hispanic district, does not provide Hispanics a reasonable opportunity to elect their candidates of choice. The State's strategic shuffling of populations in and out of district boundaries has resulted in a net loss for Texas minorities.

2. Plan C185 Decreases the Percentage of Congressional Districts in which Minority Groups Could Elect Their Candidates of Choice

Even assuming Texas had maintained the same number of minority opportunity districts—which it has not—Plan C185 still would be retrogressive because it diminishes minority voting strength relative to the State as a whole. The State has the burden to show not only that Plan C185 would not decrease the absolute number of minority opportunity districts but also that it would not decrease the percentage of minority opportunity districts in the State. *See* Jt. Stds. Br. at 11; *Beer*, 425 U.S. at 141 (holding Section 5 is meant to prevent "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"). Congress enacted Section 5 "to prevent States from undoing or defeating the rights recently won" by minority groups. *Id*. at 140 (internal quotation marks omitted). And, in 2006, Congress reaffirmed that "[t]he comparative analysis under Section 5 is intended to be specifically focused on whether the electoral power of the minority community is more, less, or just as able to elect a preferred candidate of choice after a voting change as before." H.R. Rep. No. 109-478, at 70 (2006).

Certainly, where the absolute number of minority-preferred representatives remains the same but the total number of representatives in the congressional delegation grows, the "effective exercise of the electoral franchise" is diminished. This consideration is particularly important where, as here, the state gained multiple seats as a direct result of substantial growth in its minority population. Where the number of minority voters grows but the number of minority opportunity districts remains the same, more minority voters are left without an opportunity to elect candidates of their choice, and the plan is retrogressive.

The Supreme Court has confirmed that, with respect to voting changes related to population growth, the Section 5 retrogression analysis takes into account whether a change in a minority group's percentage of the total population would be reflected in their ability to elect candidates of their choice. In *City of Richmond v. United States*, 422 U.S. 358, 371 (1975), the city annexed surrounding communities that decreased the African-American population from 52 percent to 42 percent of the city's total population. The city then changed its system for electing the city's nine-person council from an at-large to a nine-ward system. Under this proposal, African Americans could elect fewer overall council members, but they could elect council-members in proportion to their new percentage of the total population. The Supreme Court held that this plan did not violate Section 5 because, as a result of the minority group's changed percentage of the total population, "the ward system fairly reflect[ed] the strength of the Negro community as it exists after the annexation," and African-Americans therefore "[would] not be underrepresented on the council." *Id.* at 371. While *City of Richmond* does not require proportional representation, it does hold that voting changes related to changes in population size and composition must "fairly reflect" the minority group's size relative to the total population. The Supreme Court reaffirmed this holding in *City of Rome v. United States*, 446 U.S. 156, 187 (1980), where it held that a covered jurisdiction seeking preclearance of a voting change has the burden to show that the

change "fairly reflects" changes in the minority population's strength. Any voting change that would decrease the proportion of minority-opportunity districts after an increase in the proportion of the minority population does not square with *City of Richmond* or *City of Rome* and, as such, cannot be precleared.

Abrams v. Johnson, 521 U.S. 74 (1997), does not hold otherwise. *See* Jt. Stds. Br. at 11 n.36. The *Abrams* Court held in a single paragraph that a covered jurisdiction cannot be required to draw a new majority-minority district when the state has gained only one additional district because of population growth. *Id.* at 97-98. Notably, none of the parties in *Abrams* provided any evidence of the extent to which minority population growth drove the addition of the state's congressional seat. By contrast, where a state is allotted multiple new seats, the failure to apportion them fairly is retrogressive, particularly when the new seats were apportioned because of substantial, concentrated growth in minority communities, as is the case in Texas.

The Justice Department has a long history, both before and after *Abrams*, of objecting in situations where the proportion of seats controlled by a minority group decreases despite the absolute number of majority-minority districts remaining constant. *See, e.g.*, Devaney Decl., Ex. 27 (explaining that addition of a new at-large member to a county commission where African-American voters had only been able to elect their preferred candidates from two single-member majority-minority districts would be retrogressive because it would result in African-American voters having a "smaller share of representation under the expanded commission than is available to them under the current system"); Devaney Decl., Ex. 28 (objecting to redistricting plan that maintained same number of majority-African-American wards even though city's African-American population had increased; "The plan does maintain four black districts, but implicit in that criterion is an intent to limit black political strength in the city to no more than four districts, even though Ward 4 had become majority

black and demographic trends indicate that its strength will continue to increase in the future."); Devaney Decl., Ex. 29 (finding county's proposal to add two single-member commissioner districts "unnecessarily reduced the level of black voting strength" because the benchmark plan enabled African-American voters "to elect a candidate of choice in one of the three single-member districts in the county" whereas the proposed plan only enabled African-American voters to "elect a candidate of choice in one out of every five single-member districts"); Devaney Decl., Ex. 30 (objecting to addition of two appointed members to an otherwise elected Board of Trustees from seven single-member districts where appointed members were not the "candidate of choice of minority voters" because "the act expands the board's membership by more than a quarter without a concomitant expansion of the electoral franchise"). Thus, the Justice Department has consistently held that maintaining the current number of majority-minority districts while increasing the total number of elected positions is retrogressive where the minority population has either held steady or increased relative to the Anglo population.

Here, under the benchmark plan, minority voters could elect their candidates of choice in 11 out of 32 (34.4 percent) of Texas's congressional districts. Texas gained 4 additional seats after the 2010 apportionment, due almost entirely to the growth in the minority population; *See* Ansolabehere Rpt. tbl. A.1. In fact, if Hispanics had grown at the same rate as whites (4.1 percent since 2010), the State would have *lost* seats in Congress rather than gained them, as the nation's population grew by 9.7 percent over the decade. *Id.* at 11. Yet, under Plan C185, the minority population sees no gain in the number of opportunity districts; instead, that number drops from 11 out of 32 (34.4 percent) to 10 out of 36 (27.7 percent).

Even if one assumes that the State maintained 11 minority opportunity districts—which it did not—doing so in the face of rapid population growth and the addition of 4 seats

constitutes unlawful retrogression, as 11 out of 36 (30.5 percent) is less than 11 out of 32 (34.4 percent).[4] The percentage of white districts, by contrast, has grown significantly. Under the benchmark plan, whites controlled 21 out of 32 (65.6 percent) of the state's congressional seats. Even assuming Plan C185 maintains 11 minority opportunity districts, whites' representation in the congressional delegation has grown under Plan C185 to 25 out of 36 (69.4 percent), even though the white population shrank relative to the total population, *see* Ansolabehere Rpt. tbl. A.1 (showing that whites' share of the total population dropped from 52.4 percent in 2000 to 45.3 percent in 2010).

In sum, Texas's substantial gains were driven by its minority population, but under Plan C185, those gains are realized by the white plurality at the expense of minority groups.

C. Plan C185 Violates Section 5 Because It Is the Result of a Discriminatory Purpose

The Joint Standards Brief submitted by multiple Intervenors sets forth the standard for discriminatory intent under Section 5. Jt. Stds. Br. at 12-15. The Gonzales Intervenors adopt and incorporate that standard here. In short, a voting change, such as a redistricting plan, violates Section 5 and cannot be precleared if it is motivated by "any discriminatory purpose" to diminish "the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 42. U.S.C. § 1973c(b)-(c). A state's failure to create additional minority opportunity districts can be relevant to whether a state is intentionally keeping minority voters "in their place" by perpetuating unconstitutional conditions or making them worse. H. Rep. No. 109-478, at 68; *see also* S. Rep. No. 109-295, at 16 (2006). *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), establishes the factors that a court should use to determine whether a

[4] The State's expert indicated during his testimony in *Perez v Perry* that both the benchmark plan and Plan C183 contain 10 minority opportunity districts. *See* Devaney Decl., Ex. 24 (*Perez v. Perry*, Trial Tr. at 1833, 1835). Even assuming these facts to be true, the retrogression analysis does not change, as 10 out of 36 (27.8 percent) is less than 10 out of 32 (31.3 percent).

voting change has a discriminatory purpose. *See also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997) (holding that when conducting an inquiry into the purpose prong of Section 5, "courts should look to our decision in *Arlington Heights* for guidance"). These factors are: (1) whether the plan has a disproportionate impact on members of a certain race, (2) the historical background of the plan, (3) the specific sequence of events leading to the plan, (4) departures from normal procedures in passing the plan, (5) legislative history of the plan including statements by decision-makers. Here, the evidence shows that in light of these factors, there is a genuine dispute of material fact as to whether Texas had an unlawful discriminatory purpose when it adopted Plan C185.

1. Disproportionate Impact

Plan C185 has a disproportionate impact on Texas's Hispanic and African-American residents.

Even by Texas's own standard of measuring electoral opportunity by racial composition alone, Plan C185 creates a disproportionate number of majority-white districts compared to whites' share of the state population. Whites are no longer the majority racial group in Texas; rather, they are a plurality, comprising 45.3 percent of the total population. Ansolabehere Rpt. at 20. Hispanics and African-Americans combined, meanwhile, account for almost half of the population, or 49.4 percent. *Id.* Yet whites are an outright majority of the population in 20 of the State's 36 congressional districts under Plan C185, and a plurality of all persons in 3 more. *Id.* "In other words, although Hispanics and Blacks combined outnumber Whites, Whites are the majority or plurality of the total population in 64 percent of Texas's Congressional Districts." *Id.* An analysis of the citizen voting age population only amplifies the problem. According to Dr. Ansolabehere, whites' share of the eligible electorate dropped from 62.5 percent to 55.8 percent since 2000. *Id.* at 21. Yet the number of districts in which whites are a majority of the citizen voting age population increased from

22 to 25, an increase that keeps the share of districts in which whites are a majority of the voters at 69 percent. *Id.* at 21 & tbl. B.1.

Plan C185's disparate treatment of African Americans and whites is particularly striking. These two groups saw similar population gains in the last decade, each gaining approximately 500,000 persons with similar increases in the number of eligible voters. Ansolabehere Rpt. at 22 & tbls. A.1 & A.2. Because each group's growth accounts for less than a single congressional district, one would expect that the group with more geographically concentrated growth would be more likely to gain seats. African American population growth was concentrated in three counties: Dallas, Harris, and Tarrant Counties. *Id.* at 22. White population growth, by contrast, was distributed across the state; in fact, the white population declined in Harris and Dallas Counties. *Id.* In spite of these factors, Plan C185 added three majority-white districts, including one in Dallas County, and no additional majority-African-American districts. *Id.* at 22, 27.

A closer look at Texas's largest counties further illuminates the extent to which Plan C185 increases representation for a decreasing segment of the population. The five most populous counties account for 11 million people, almost half of the State's population. *Id.* at 23. Hispanics are a plurality of the population of these five counties combined. Yet of the 19 districts that contain a majority or plurality of these counties' populations, just four have majority or plurality Hispanic populations, while 12 of these districts are majority-white. "Even though Whites comprise the second largest racial or ethnic group in the five largest counties, they have majorities or pluralities in three times as many seats as the largest group, Hispanics." *Id.*; *see also id.* at 28.

At the same time that it increases representation for the decreasing white segment of the population, Plan C185 also strands the growing minority population in districts where their votes will be drowned out by white voters. Of Texas's 9.1 million voting-age whites, 8

million live in majority-white districts. *Id.* at 24. "In other words, 88 percent of White adults live in districts where most people are of the same racial group as they are, and just 12 percent live in districts where they are the minority." *Id.* By contrast, blacks and Hispanics are disproportionately in districts where they are the minorities. Only 40 percent of minorities live in districts where a minority group comprises the majority or plurality, while over half of minorities live in majority-white districts. *Id.* Nor is this disparity a simple function of plurality rule. In Harris County, the largest county in the state, all of the 1.1 million in population gain came from minorities, while the county's white population actually declined by 70,000. *Id.* at 25-26. The county's population is now 41 percent Hispanic, 33 percent white, and 19 percent black. *Id.* at 26. Still, Plan C185 distributes the county's Hispanic population across districts such that only 31 percent of Hispanics are in majority- or plurality-Hispanic districts. By comparison, over 80 percent of whites in Harris County are in majority-white districts. As a result of this systematic stranding of minority voters, the vast majority of minorities are unable to elect candidates of their choice. Almost 90 percent of whites, meanwhile, are drawn into districts where their preferred candidates will win. *See id.* at 25 ("The difference is a stark one—just 1.1 million White voters are stranded compared with 4.2 million Black and Hispanic voters."). In this way, Plan C185 enhances voting opportunities for whites and suppresses minority voting opportunities.

Finally, the State's decision to excise Nueces County from its majority-minority district had a ripple effect throughout the State, to the detriment of minority voters. The State suggests that its decision to dismantle benchmark CD 27 was no harm, no foul, since it replaced that district with a new majority-Hispanic district in CD 34. Pl.'s Mem. in Supp. of Summ. J., Dkt. #41 at 8. It further contends that "it would not have been possible" to draw a seventh majority-Hispanic district in Southwest Texas. *Id.* at 7. Both of these propositions are false. Benchmark CD 27 was anchored by Nueces County, a majority-Hispanic area.

Ansolabehere Rpt. at 44. The district had an excess of approximately 40,000 people for an ideal congressional district. *Id.*; *see also* Pl.'s Mem. in Supp. of Summ. J., Dkt. #41 at 8. "The path of least resistance would have been to take some of the population from this county to help construct a seventh [majority-Hispanic] district somewhere in the Rio Grande Valley." Ansolabehere Rpt. at 44. In fact, several alternative plans, including Plan C166 offered by State Representative Dawnna Dukes, did just that. *Id.*; *see also* Plan C166 map and reports, *available at* http://gis1.tlc.state.tx.us/. Instead, the State chose to remove Nueces County from the Southwest Texas districts altogether and put it into a new district extending north along the Gulf Coast. Ansolabehere Rpt. at 44.

The decision to wrench Nueces County out of CD 27 had ripple effects on the construction of districts throughout southern and central Texas. First, it precluded the creation of a seventh majority-Hispanic district in Southwest Texas. *Id.* Moving Nueces County into a majority-white district in the Southeast removed 340,000 persons—206,000 of whom are Hispanic—from the Southwest Texas area, leaving insufficient population for a seventh majority-Hispanic district. "In essence, then, moving Nueces County into a White district guaranteed that there would not be a seventh Hispanic District in Southwest Texas, even though there was sufficient population to support such a district." *Id.* at 46. Second, removing Nueces County from CD 27 necessitated the elimination of the crossover district in CD 25. *Id.* After sewing together new CD 34 out of the scraps of benchmark CD 27, the only way to create an additional majority-Hispanic district was to fashion new CD 35 by connecting two clusters of Hispanic population by a 50-mile-long strip along Interstate 35. *Id.* This required taking a quarter of the Hispanic population out of CD 25, destroying what was once a crossover district. *Id.* "Again, an attempt to correct the error of moving Nueces County led to loss of yet another opportunity district." *Id.*; *see also Bartlett v. Strickland*, 129 S.Ct. 1231, 1249 (2009) ("[I]f there were a showing that a State intentionally drew

district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments."). Third, moving Nueces County out of the Southwest Texas districts pulled all of the districts along the Gulf Coast to the southwest, including the Harris County districts, leaving no flexibility for the creation of an additional Hispanic seat in Harris County. Ansolabehere Rpt. at 47. Several alternative plans, including Plan C166, managed to create a new minority opportunity district in Harris County by leaving Nueces County alone. *Id.*; *see also* Plan C166 map and reports, *available at* http://gis1.tlc.state.tx.us/. Plan C185, by contrast, creates a new majority-white district to the east of Harris County. Ansolabehere Rpt. at 47.

The decision to remove Nueces County out of benchmark CD 27, then, had far-reaching effects on what could be accomplished elsewhere in the State. Texas's suggestion that it simply swapped one majority-minority district for another is misleading. In fact, in dismantling CD 27, the State eliminated a majority-minority district *and* a crossover district and replaced those with a single majority-minority district. This move also prevented the creation of a seventh majority-Hispanic district in Southwest Texas and constrained the ability to draw anew Hispanic district in Harris County. Contrary to the State's suggestion that it had "limited options when it altered CD27's lines," Pl.'s Mem. in Supp. of Summ. J., Dkt. #41 at 8, the State rejected the path of least resistance and instead chose the path that resulted in the maximum gains for whites and minimal gains for Hispanics.

In sum, Plan C185 squelches opportunities for minority advancement by manipulating district lines while maximizing white voting power throughout the state. Plan C185's disproportionate impact on minority voters reflects an intent to keep minorities "in their place," H. Rep. 109-478, at 68, despite their massive gains throughout the last decade. As a result, Plan C185 maintains a majority of the power in a racial group that is no longer a majority.

2. Historical Background

Texas has a long history of discriminating against its African-American and Hispanic residents. In 1973, the Supreme Court affirmed findings to this effect, *see White*, 412 U.S. 767-68, and in 2006, the Court again found that Texas violated the Voting Rights Act in its drawing of the district lines for Congressional District 23, s*ee LULAC*, 548 U.S. at 442-43. The Department of Justice under Republican and Democratic presidents has also rejected many Texas voting changes as retrogressive in violation of the Voting Rights Act. *See* Devaney Decl., Ex. 2.

3. Sequence of Events

Here, the sequence of events leading up to the adoption of Plan C185 shows that it is the product of a discriminatory purpose. The congressional redistricting map was drafted largely in secret by Anglo Republican congressmen and the Anglo Republican leadership in the state legislature. Devaney Decl., Ex. 7 (Veasey Dep. at 26-27); Ex. 9 at A-12. They excluded representatives of minority-opportunity districts from the redistricting process and provided them the proposed congressional plan only days before the only public hearing on the plan. Devaney Decl., Ex. 7 (Veasey Dep. at 33-34); Ex. 10. Because the Republican leadership of the State House and Senate redistricting committees called for only one public hearing, the public had almost no input into the plans. In their only opportunity to comment, members of the public testified almost unanimously in opposition to the plan. Devaney Decl., Exs. 9 at A-14. Despite this public criticism, the Republican controlled redistricting committees held no more public hearings, either in Austin or elsewhere in the state. Devaney Decl. ¶ 14 (Mike Morrison Video Testimony). The Anglo Republican leadership also rejected requests by representatives of minority opportunity districts to revise the plan. They ignored concerns of racial fairness raised by minority legislators. *See, e.g.*, Devaney Decl., Ex. 11 at S45-S46. Calls by African-American members of Congress to include their district offices in their districts went unheeded, but similar requests by Anglo members of Congress

were fulfilled. Devaney Decl., Exs. 13-15 (*Perez v.* Perry, Trial Tr. at 1279; 1335; 1515-1516); Ex. 5 (First Opiela Dep. at 63); Exs. 17-20 (E-mails from Members of Congress). In fact, while the leadership freely indulged requests from Anglo members of Congress to include a certain school or country club in their districts, Devaney Decl., Exs. 17-20, it wrenched long-held economic and cultural institutions from the district held by the Chair of the Congressional Hispanic Caucus, Devaney Decl., Ex. 16 ¶¶ 3-9. The expedited, exclusive, and inequitable process leading up to the adoption of Plan C185 is evidence of the plan's discriminatory purpose.

4. Departure from Normal Procedures

As members of the Texas legislature and their staff have testified, these practices departed from those followed in previous redistricting cycles. Even the nonpartisan counsel for the Senate redistricting committee testified that redistricting procedure resulting in Plan C185 was significantly different from the procedure followed in the past. Devaney Decl. ¶ 14 (Mike Morrison Video Testimony).

5. Legislative History

The contemporaneous statements of the legislators and staff members responsible for Plan C185 also show that they were motivated by a discriminatory purpose. Republican staff members discussed how to make a congressional district look like a Hispanic-opportunity district but not perform like one. Devaney Decl., Ex. 23 (*Perez v. Perry*, Trial Tr. at 950-52). They also expressed their own concerns that the redistricting maps went too far and likely diminished the rights of minority groups without achieving any additional Republican advantage. Devaney Decl., Ex. 25 (Maines E-mail).

III. CONCLUSION

For all of the foregoing reasons, and pursuant to the standards set forth in this brief and in the Joint Standards Brief submitted by multiple Intervenors, the Gonzales Intervenors

request that the Court deny Plaintiff's Motion for Summary Judgment with respect to preclearance of Plan C185 and expeditiously proceed to trial to resolve the matter.

RESPECTFULLY SUBMITTED: October 25, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2011, I electronically filed the foregoing Opposition to Motion for Summary Judgment with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

DATED: October 25, 2011

Respectfully submitted,

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