IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF STATE OF TEXAS' REPLY IN SUPPORT OF SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

I. WHAT IS THE SECTION 5 STANDARD? 2

A. DOJ's "Functional Analysis" Presents Serious Constitutional Problems 4

i. Section 5 and the Fourteenth Amendment 4

ii. Section 5 and the principles of enumerated powers and federalism 9

iii. DOJ's interpretation of section 5 implicates each of these constitutional issues and therefore must be rejected 10

iv. The DOJ's Insistence That it Rather than the Courts Determines the Standards Here is Remarkable and Wrong 13

B. The Standard employed by the State comports with the text, legislative history and judicial precedent construing section 5 and is mandated by the Canon of Constitution Avoidance 15

II. TEXAS DID NOT RETROGRESS UNDER ANY MEASURE 20

A. Within the Confines of the Fourteenth Amendment, Texas Maintained or Increased the Ability of Minority Voters to Elect A Candidate of Choice 20

B. DOJ's Effort To Shift the Standard for Preclearance To Historic Election Performance Should Be Rejected, But in Any Event, None of Texas's Maps Retrogress Under that Standard 22

III. THE STATE IS ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIM FOR A DECLARATORY JUDGMENT REGARDING THE REDISTRICTING PLANS FOR THE TEXAS CONGRESSIONAL DELEGATION AND THE TEXAS HOUSE OF REPRESENTATIVES 26

A. The Dispute Regarding the Number of "Effective" or "Ability-to-Elect" Districts Raises a Purely Legal Question: When Does a Redistricting Plan Provide Voters with the "Ability to Elect" Their Preferred Candidates of Choice? 26

B. The State's Congressional Redistricting Plan Will Not Have a Retrogressive Effect 28

C. The State's House Plan Will Not Have a Retrogressive Effect 34

i. The Parties' Methodologies for Assessing Performance and Effectiveness 35

ii. The Undisputed Facts Regarding Latino-Majority Districts Show That Plan H283 Will Not Have a Retrogressive Effect on Latino Voting Strength 40

a. District 33 40
b. District 117 42
c. District 35 44
d. District 41 45

iii. **The "Additional Minority Districts" Identified by the United States Are Coalition Districts that Are Not Protected Under Section 5, and They Do Not Show Retrogression in any Event** 47

iv. Even Under the United States' Proposed Legal Standard, HD 149 Did Not Give the Alleged Minority Coalition the Ability to Elect Its Preferred Candidates of Choice 51

v. There Is No Material Question of Law or Fact Regarding African-American-Majority Districts in Plan H283 52

IV. THE STATE'S PRESUMPTION OF GOOD FAITH AND LACK OF DISCRIMINATORY INTENT HAS NOT BEEN REBUTTED BY THE DEPARTMENT'S RESPONSE 52

A. The Standard for Discriminatory Intent Is Clear, Articulable, and Well-Settled 53

B. There is no genuine issue of material with respect to no discriminatory intent in the enactment of the House Plan 55

C. The "Sequence of Events" pertaining to enactment of the House Plan provides no genuine issue of material fact with respect to actual discriminatory intent against Hispanics or African Americans 61

D. There is no genuine issue of material fact regarding lack of discriminatory intent with respect to the process by which the House Plan was enacted 62

E. There is no genuine issue of material fact regarding lack of discriminatory intent with respect to the contemporaneous statement by individual House members during the period in which the House Plan was enacted 63

F. There is no genuine issue of material fact with respect to the "impact" of the Congressional Plan 64

G. The historical background of the Congressional Plan gives rise to no genuine issue of material fact; indeed, the distinctions between it and its predecessor provide an ideal basis for summary judgment 66

H. The "sequence of events" leading to the enactment of the Congressional Plan do not give rise to any genuine issue of material fact 67

I. The "procedural and substantive facts" surrounding the enactment of the Congressional Plan do not give rise to any genuine issue of material fact 68

J. The "contemporaneous statements" leading to the enactment of the Congressional Plan do not give rise to any genuine issue of material fact 69

K. There is no genuine issue of material fact as to the lack of discriminatory intent on the part of the State of Texas 69

CERTIFICATE OF SERVICE 71

PLAINTIFF STATE OF TEXAS' REPLY IN SUPPORT OF SUMMARY JUDGMENT

The State of Texas replies in further support of its Motion for Summary Judgment of September 14, 2011 (the Motion).[1] In its response to the Motion, the Department of Justice (DOJ) objects to Texas's congressional and State House of Representatives redistricting plans. DOJ's objections indirectly claim that the congressional redistricting plan should not be precleared because the new map does not *add* an additional 1.8 racially-gerrymandered districts in which a majority of ethnic minority voters would elect a candidate who happens to be a democrat. Although section 5 merely requires that states not reduce the number of districts where minority voters have the ability to elect their candidate of choice, DOJ's objections to the congressional plan do not actually claim that Texas reduced the number of such districts. Instead, DOJ erroneously attempts to expand section 5's requirements by claiming that four new congressional seats, apportioned to Texas after the 2011 census, must be proportionally earmarked for ethnic minorities. Ironically, DOJ's objections to the redistricting plan for the Texas House of Representatives (House Plan) target only districts that were designed to protect Hispanic incumbents, turning nearly half a century of Voting Rights Act jurisprudence on its head.[2] Presumably, those districts are targeted because the Hispanic incumbents happen to be Republicans and, therefore, do not qualify as the minority voter's candidate of choice in DOJ's view. DOJ also objects to the House Plan because the plan does not maintain so-called

[1] When the State filed its Motion, it did not have the benefit of the DOJ's (or the Intervenors') objections to the State's enacted redistricting maps. Having now received both the Answers and the objecting parties' two Court-ordered supplementations, and a response to the Motion for Summary Judgment, Texas's reply is by necessity somewhat extensive. Likewise, since DOJ (and Intervenors) have elicited extensive expert and lay testimony in the days since the State filed its motion for summary judgment, Texas's reply substantially augments the summary judgment record.

[2] The Texas Legislature designed all districts with traditional redistricting principles firmly in mind, including the traditional practice of protecting incumbents.

"coalition districts," which are those districts where multiple distinct ethnic minority groups "pull, haul, and trade" to elect a democrat in the general election. *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994). Finally, DOJ claims that both the congressional and Texas House plans purportedly reflect a discriminatory purpose. But DOJ fails to provide any real evidence of a discriminatory intent and instead relies almost exclusively on its retained "expert" to support its baseless claims; an expert whose own report disavows the notion that the Legislature acted with a discriminatory purpose. DOJ's objections find no basis in the law and, in fact, impermissibly extend the Voting Rights Act (VRA) beyond its breaking point. As detailed below, DOJ's interpretations of section 5 push the VRA beyond its limited remedial purpose. Worse, DOJ actually imperils the VRA by arguing for an interpretation of section 5 that places it squarely in conflict (in more ways than one) than the U.S. Constitution.

Notably, evidently aware that the VRA does not support its objections in this case, DOJ chose not to file a cross-motion for summary judgment. And while it continually strains to identify even potentially "genuine" issues of material fact that would keep this proceeding alive, DOJ's response reveals that the dispute in this case is not factual. Indeed, this case hinges almost entirely on the proper construction of the 2006 amendments to section 5. Because determining the proper legal standard to be applied under section 5 – which is a purely legal endeavor – will determine the outcome in this case, we first explain why DOJ's proposed interpretation is legally flawed and should be rejected by this Court.

I. WHAT IS THE SECTION 5 STANDARD?

As the Supreme Court has repeatedly explained, section 5's command that covered jurisdictions engage in race-conscious redistricting is fraught with constitutional implications. First, while section 5's prohibition on retrogression requires States to engage in race-conscious

redistricting, the Supreme Court has repeatedly held that section 5 cannot be applied in a manner wherein race so dominates the process that it runs afoul of the Fourteenth Amendment. Further, a proper reading of section 5 must comport with the Constitution's principles of enumerated powers and federalism. As the Supreme Court has repeatedly instructed, courts should interpret section 5 in the manner that best alleviates and avoids the Act's constitutional infirmities.

Notwithstanding the Court's admonishments that the VRA must be narrowly interpreted to avoid constitutional problems, DOJ chooses to promote a vague and unworkable retrogression standard that actually exacerbates – rather than ameliorates – tension between the Act and the Constitution. Indeed, both DOJ's *Guidance* and its legal arguments before this Court attempt to impose a shifting multi-metric, performance-based view of retrogression that ensures candidates who happen to be Democrats – the political party that DOJ argues minorities monolithically support – are guaranteed victory on election day.[3] Notably, DOJ's "functional" approach to determining retrogression does not actually appear anywhere in the text of section 5. Because DOJ's highly subjective standard is not authorized by the Act, DOJ attempts to justify its approach by demanding that this Court defer to its interpretations. But DOJ's attempts to rewrite the retrogression standard should not be given deference for a host of reasons; not the least of

[3] DOJ's legal arguments in this case reveal that it is not merely policing retrogression, but is rather seeking to require covered jurisdictions to 'maximize' minority representation, infusing race into the redistricting process precisely where the VRA sought to remove it. The Supreme Court has previously rejected such a 'maximization' policy, because by allowing race to predominate the redistricting process, it violates the Fourthteenth Amendment. Nonetheless, DOJ attempts to revive its maximization requirement by claiming that section 5 protects districts made up of multiple ethnic groups that have little in common other than a shared preference for Democratic candidates in the general election. Although DOJ's interpretation imperils the VRA, Intervenors enthusiastically embrace the Department's position, arguing that districts where African American, Hispanic, Asian, and even white voters combine to elect a Democratic candidate should be protected. The result is an interpretation of section 5 that would protect virtually every district that happens to be held by a Democrat. But this approach turns the VRA, which was designed to remedy actual and proximate racial discrimination, into a political tool and clearly violates the Constitution.

which is that DOJ's *Guidance* does not mention the metrics it now uses. Similarly, in a breathtakingly broad and racially-selective fashion (that ignores a decade or more of equal protection jurisprudence) DOJ also erroneously claims that section 5 effectively presumes that covered states act with a discriminatory purpose by insisting that states disprove any discriminatory intent. Worse, DOJ not only attempts to impose a burden not required by the VRA, it also effectively exempts its enforcement authority from the Fourteenth Amendment's prohibitions on racially motivated action. Yet, the purported legal support for the DOJ's approach is not found in the VRA or a court decision.

All aspects of DOJ's interpretation are unavoidably and heavily in tension with more than a decade of Supreme Court decisions that clearly caution against an overly-broad and administratively awkward construction of section 5. For whatever reason, the DOJ simply ignores these warnings and advocates for an application of section 5 that presses beyond the outer limits of the Constitution and plainly conflicts with settled judicial construction of the VRA. In contrast, the standards employed by Texas in its Motion are judicially recognized, consistent with the text and legislative history of the Act, and would reduce, if not avoid, the constitutional questions the Department seems intent on exacerbating (even if doing so unnecessarily imperils the Act).

A. DOJ's "Functional Analysis" Presents Serious Constitutional Problems.

i. Section 5 and the 14th Amendment.

As early as the 1980s, the Supreme Court made clear that the 14th Amendment's equal protection guarantee required that states and their political subdivisions not, under the general label of remedial affirmative action, classify and treat citizens differently on account of race. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491 (1989) (limiting rule to states). In 1995,

the Court first recognized that the same constitutional restriction applied also to Congress. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237–39 (1995) (reversing prior precedents that had left Congress broader latitude to categorize citizens on the basis of race). Thus any law – including the VRA – that contemplates race-based classifications must serve a compelling governmental interest and be narrowly tailored to serve that interest. *Id.* Redressing a proximate race-based injury, such as remedying intentional discrimination, may serve as a compelling interest, but the race-based injury must be "identif[ied] . . . with some specificity" and a "'strong basis in evidence' to conclude that remedial action [is] necessary." *E.g.*, *Shaw v. Hunt*, 517 U.S. 899, 909, 910 (1996). A generalized, permanent requirement mandating disparate treatment on the basis of race will not suffice. "[M]inority voters are not immune from the obligation to pull, haul and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics." *DeGrandy*, 512 U.S. at 1020.

Like all others laws, the Voting Rights Act must be applied in a manner that comports with the Constitution, meaning that states cannot simply hide behind the VRA to justify violating the Constitution's equal protection requirements. *E.g.*, *Shaw v. Reno*, 509 U.S. 630, 655 (1993) ("[W]e do not read *Beer* or any of our other §5 cases to give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of non-retrogression."). Accordingly, the Supreme Court has set a high standard that states must satisfy when their district lines are based upon racial considerations and has consistently rejected districting plans that fail to meet that high standard. Despite the Court's *Adarand* and *Shaw* decisions, DOJ's redistricting guidance nonetheless demanded that states follow a race-based approach to redistricting. Indeed, the *Guidance* essentially compelled the states to maximize the number of minority opportunity

districts. Because DOJ's Guidance was flawed and contravened the Constitution, States (like Texas) that complied with the DOJ's guidance had their redistricting maps struck down by the Supreme Court. Indeed, the State's redistricting maps were rejected by the Court after the State faithfully followed the *Guidance*, which improperly required covered jurisdictions to unconstitutionally engage in racially motivated line-drawing. *See Bush v. Vera*, 517 US. 952, 983 (1996) (rejecting Texas's non-retrogression defense and finding that Texas violated Fourteenth Amendment by drawing districts on the basis of race). Indeed, the Court's mid-1990s decisions reflect the Court's clear frustration with the Department for imposing guidelines that plainly ignored the Fourteenth Amendment. *Miller v. Johnson*, 515 U.S. 900, 922 (1995) (citation omitted) (When the Justice Department's interpretation of the Act compels race-based districting, it by definition raises a serious constitutional question, and should not receive deference.). In *Miller*, the Supreme Court correctly rebuked the Department for improperly administering section 5 as if it were somehow exempt from the application of the Fourteenth Amendment:

> We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues**.** When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied.

512 U.S. at 922.

In the wake of these cases, the Court initially granted states "leeway" to effectuate their constitutional authority to redraw district lines. *E.g., Shaw*, 517 U.S. at 911. This "leeway" permitted states to consider both race and the need to comply with the VRA. However, recognizing the constitutionally perilous nature of race-based decision-making, the Court applied

strict scrutiny whenever states allowed race to "predominate" over their own race-neutral, "traditional redistricting principles." *E.g., Bush,* 517 U.S. at 958-59; *Shaw v. Hunt,* 517 U.S. at 908-11 (rejecting claimed reliance on section 5 as justification for North Carolina's creation of additional, race-based district and avoiding the constitutional question in preference to a "correct reading of section 5" that would not require the race-based district to be drawn).

To avoid strict scrutiny – and a sure loss in court – states were required to first adhere to traditional, race-neutral redistricting principals, such as protecting incumbents or observing preexisting geopolitical boundaries. Thus, to the extent states considered race when drawing district lines, they could only do so when it was reasonably necessary to comply with the VRA. *E.g., Easley v. Cromartie,* 532 U.S. 234, 248 (2001); *Bush,* 517 U.S. at 1048 (Souter, J., dissenting) (listing traditional principles). Of course, if a state or political subdivision engaged in redistricting could maintain a district protected by section 5 without violating those traditional principles, but failed to do so, a reasonable inference may arise that some form of discrimination (of a type that could constitutionally require a race-based remedy) exists.

The Supreme Court has also clarified that states have no obligation to draw districts on the basis of race where an ethnic minority group would constitute *less than a majority* of the district's voters, even if the minority bloc might otherwise be able to "influence" or form a "coalition" with white voters who showed a tendency to "crossover" in support of the same candidates. *LULAC v. Perry,* 548 U.S. 399 (2006) (rejecting so-called influence districts); *Bartlett v. Strickland,* 129 S. Ct.1231, 1243-46 (2009) (rejecting cross-over form of coalition district and observing that "section 2 does not guarantee minority voters an electoral advantage"). In *Bartlett,* for example, the Court held that "nothing in section 2 grants special protection to a minority group's right to form political coalitions. 'Minority voters are not

immune from the obligation to pull, haul and trade to find common political ground.'" *Id.* at 1243 (quoting *Johnson*). The Court has arrived at these holdings after observing the impracticalities of administering coalition districts, *e.g., id.*, and stressing "the need for workable standards and sound judicial and legislative administration." *Id.* at 1244; *LULAC*, 548 U.S. at 490 n.8 (Souter, J., concurring in part) ("All aspects of our established analysis for minority-majority districts in *Gingles* and its progeny would have to be rethought in analyzing ostensible coalition districts").

With respect to the states' obligation to maintain minority districts under section 5, the Court made equally clear in *Miller* that compliance with section 5 must be squared with the Fourteenth Amendment. 515 U.S. at 927. In *Georgia v. Ashcroft,* the Court sought to alleviate the tension between section 5 and the Fourteenth Amendment by clarifying that the states were not obliged to maintain "safe" "minority-majority" districts in order to avoid liability under the VRA. 539 U.S. 461 (2003). To lessen section 5's potential conflict with the Fourteenth Amendment, the Court read section 5's retrogression standard to allow states to replace minority-majority districts with sub-majority "influence" or "coalition" districts. While a cohesive, minority voting bloc might lack the absolute power to elect its own preferred candidate in such districts, it remained able, consistent with its obligation to "pull, haul, and trade" to achieve meaningful, responsive representation. However, Congress later amended section 5 to overrule this aspect of *Ashcroft* because coalition and influence districts were deemed too nebulous and resulted in an unworkable retrogression standard.[4] Notwithstanding Congress' decision implicitly

[4] *See, e.g.*, Drew S. Days, III, "Voting Rights Act," testimony, May 17, 2006, before the U.S. Senate, Committee on the Judiciary (Federal Document Clearinghouse Congressional Testimony), 2006 WL 1332025 ("[T]he new standard established by *Georgia v. Ashcroft* has substituted an amorphous, easily manipulable standard for determining a Section 5 violation in place of the theretofore well-established and well-understood *Beer* non-

rejecting coalition districts, DOJ now asks this Court to adopt a retrogression standard that endorses coalition districts.

ii. Section 5 and the principles of enumerated powers and federalism.

Section 5 faces constitutional pressures apart from the Fourteenth Amendment concerns. Since its enactment, the Court has recognized that section 5 tests the limits of Congress' enumerated powers, even as augmented by the enforcement provisions of the Civil War amendments. *Katzenbach v. South Carolina*, 383 U.S 301 (1966). Thus, as early as *Beer v. United States*, the Court preferred a narrow reading of the states' burden to establish that its redistricting plan did not "retrogress" the position of minorities, keeping in view the section's limited purpose of simply freezing changes in voting procedures in covered areas until they were shown to be non-discriminatory. 425 U.S. 130, 140 (1976). Indeed, the entire purpose of section 5 when it was initially enacted was simply "to prevent States from 'undo[ing] or defeat[ing] the rights recently won by Negroes.'" *Id.*

Likewise, section 5 raises serious federalism and equality concerns insofar as it applied only to certain states and imposes burdens inconsistent with their sovereign status. *Katzenbach*, 383 U.S. 301 (1966). The Supreme Court has repeatedly noted the federalism costs that section 5 imposes on covered jurisdictions, describing these costs as "serious" and "substantial." *Nw. Austin Mun Util. Dist. No. 1. v. Holder*, 129 S. Ct. 2504, 2511 (2009); *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997); *Miller v. Johnson*, 515 U.S. 900, 926, (1995). Indeed, only two years ago the Supreme Court

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retrogression test."); Tyrone L. Brooks, Jr., "Impact and Effectiveness of the Voting Rights Act," testimony, Nov. 5, 2005, before the U.S. House, Committee on the Judiciary (Federal Document Clearinghouse Congressional Testimony), 2005 WL 3008836 ("I also want to echo the sentiments of my colleagues that *Georgia v. Ashcroft* provides an extremely vague and difficult standard to administer.").

issued yet another decision highlighting the delicate federalism questions that can arise even if section 5 is carefully, coherently, and predictably applied pursuant to an objective and constitutional standard. *Northwest Austin Mun. Utility Dist. No. 1. v. Holder,* 129 S. Ct. 2504 (2009). These huge federalism costs mandate a cogent, predictable, and workable retrogression standard. Finally, the Supreme Court, in *Reno v. Bossier Parish,* 528 U.S. 320 (2000) ("Bossier Parish II"), cited similar federalism concerns as supporting a narrow construction of the "discriminatory purpose" requirement, hoping to avoid the unseemly spectacle of a state being forced to appear in Washington, hat in hand, with proof that its laws are not motivated by racial animus. Yet, this is precisely what DOJ asks covered states to do. These additional constitutional concerns likewise require a narrow interpretation of section 5.

iii. DOJ's interpretation of section 5 implicates each of these constitutional issues and therefore must be rejected.

Congress's decision to overrule both *Ashcroft* and *Bossier Parish II* left DOJ with an opportunity to reconcile section 5's substantive reach with the Constitution. A retrogression standard that paid heed to the Supreme Court's repeated admonishments that section 5 cannot require states to elevate racial considerations above traditional redistricting principles would have alleviated the section's significant tension with the Fourteenth Amendment. Likewise, by establishing a clear, workable retrogression standard, DOJ could have ameliorated some of the federalism costs so frequently noted by the Supreme Court. For five years, covered jurisdictions waited for DOJ's section 5 guidance. When the Department finally issued its guidance, it issued an elusive, and ultimately subjective, retrogression standard. DOJ's *Guidance* hardly

ameliorates the noted tension between section 5 and the U.S. Constitution.[5] Indeed, it actually exacerbates them. For instance, by claiming that its functional analysis requires Texas – in order to avoid retrogression – to create additional minority opportunity districts for no other reason than the State was apportioned four additional congressional seats, DOJ elevates considerations of race above traditional, race-neutral redistricting principals. In so doing, DOJ's approach advances an interpretation of section 5 that not only conflicts with the Fourteenth Amendment's command that race-based redistricting always be tied to some specific and proximate racial discrimination, but it also contradicts the Constitution's federalist principles. Such a reading also stretches section 5 so much that it would undoubtedly exceed Congress's enumerated powers, even under the enforcement clauses of the post-civil war amendments. DOJ's conclusion that coalition districts are protected districts under section 5 is constitutionally problematic for those same reasons. Mandating the drawing or protection of coalition districts grants a special electoral advantage to minority voters that is too far divorced from the specific and proximate racial discrimination that section 5 is authorized to remedy. As a result, DOJ's approach is ripe for a challenge claiming that it unfairly discriminates against Anglo voters in violation of the Fourteenth Amendment's equal protection guarantee.

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[5] For its part, the Senate was sensitive to the need to reconcile the renewed and amendment section 5 with the Constitution. The Judiciary committee under then-Chairman Arlen Specter explained in its report:

> If a state has a large minority population concentrated in a particular area, ordinary rules of districting — following political and geographic borders and keeping districts as compact as possible — would recommend those voters be given a majority-minority district. It the State went out of its way to avoid creating such a majority-minority — one that would be created under ordinary rules — that is unconstitutional racial discrimination.

Senate Report, 109-235, *Fannie Lou Hamer, Rosa Parks, Coretta Scott King, and Cesar E. Chavez Voting Rights Act Reauthorization and Amendments of 2006* at § B.

DOJ's "functional analysis" also exacerbates the "serious" and "substantial" federalism costs that are imposed on covered jurisdictions because it fails to provide an identifiable retrogression standard that states can satisfy. The "functional analysis" that DOJ now proposes – through its expert – requires only those states covered by section 5 to aggregate, district by district, the performance of minority candidates of choice. This process is immensely burdensome because it is not automated. *See* Oct. 18, 2011 Dep. of Todd Giberson at 29:2-29:9. No software exists to perform it. *Id*. Determining electoral performance requires that States analyze endogenous and exogenous elections in a proposed district against their benchmark plans. This process requires, as a threshold matter, determining which exogenous elections the State should analyze. *Id.* at 27:8-28:18. The United States' refusal to offer any guidance on this threshold decision places states at risk of selecting the "wrong" elections, thereby jeopardizing preclearance and imposing additional burdens on the state's map-drawers.

Determining electoral performance through reconstituted election analysis also requires the States to identify the Latino or African-American candidate of choice. For a Texas House of Representatives plan, attempting to identify candidates of choice requires analysts to generate a 4,000 page report by manually pulling data for the proposed districts and analyzing this data. *Id.* at 26:11-19. Every district in each benchmark plan and every proposed plan for the State Board of Education, Texas Senate, Texas House, and Congress would require a similar analysis. *Id.* at 26:20-23; 28:19-29:1. Congress' desire to effectuate an efficient preclearance process cannot survive if states must perform the "functional analysis" that the United States proposes on each district in each plan. It therefore undermines the VRA's goal of providing an efficient preclearance process that does not interfere unnecessarily with the states' authority to conduct their elections. *See Morris v. Gressette*, 432 U.S. 491, 503 (1977) ("[T]he legislative materials

… indicate a desire to provide [administrative preclearance under Section 5 as] a speedy alternative method of compliance to covered States.)

But the constitutional problems inherent in DOJ's interpretation of section 5 do not end with its "functional" retrogression standard. The Department's proffered reading of "*any* discriminatory purpose" is also legally flawed. Its understanding of "discriminatory purpose" (as it applies to *some* races of voters in redistricting decisions) is so broad that any legislator or map-drawer hoping to avoid having preclearance denied is essentially compelled to effectively maximize minority voter's ability to elect preferred candidates, despite the fact that the Supreme Court has held that the policy of maximizing minority districts is unconstitutional. The Department's administrative rules, which were not put in place until April of this year (months after the redistricting process began in Texas), lists a number of hopelessly broad and *non-exclusive* factors that purportedly define discriminatory purpose in the context of redistricting. Reviewing just two of DOJ's factors reveals that its guidelines are simply not workable because they are inherently in tension with one another. Indeed, while the DOJ commands that minority populations may not be "fragmented" among "different districts," it simultaneously prohibits minorities from being "concentrated" in one or more districts.

iv. The DOJ's Insistence That it Rather than the Courts Determines the Standards Here is Remarkable and Wrong

In its Response, the DOJ insists that the Article III courts should defer to its interpretation of section 5. There are a host of reasons why the DOJ's approach to the standards here are not subject to deference. First, and most obviously, Article III courts do not defer to agency interpretations that implicate constitutional questions of the sort involved here. *DeBartolo Corp v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise

acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems. . . ."). The Supreme Court has made plain that rule applies here. In *Miller,* for example, the Court observed:

> Our presumptive skepticism of all racial classifications . . . prohibits us as well from accepting on its face the Justice Department's conclusion that racial districting is necessary under the Act. Where a State relies on the Department's determination that race-based districting is necessary to comply with the Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest.

515 U.S. at 922.

Second, there are hardly any "standards" to which the Court can defer.[6] Indeed, DOJ's "functional analysis" of retrogression does not set forth a standard at all and leaves its development and application of a standard to its retained expert, Lisa Handley. DOJ's *Guidance* fails to, for example, identify any of the particular metrics or combination of metrics that are said to govern retrogression. As a result, the *Guidance* provides no guidance at all because it does

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[6] To be sure, Article III courts are obliged to defer to formal agency rules and, somewhat less often, informal declarations, y agencies charged with administering ambiguous legislation. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984); *see also United States v. Mead Corp.,* 553 U.S. 218 (2001) (according informal customs letter ruling not entitled to full *Chevron* deference "respect according to its degree of persuasiveness"). But, here, DOJ's claim that its informal, late arriving *Guidance* should be accorded deference illustrates the concerns Justice Scalia highlighted in his recent concurrence in *Talk America v. Michigan Bell,* 113 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

> When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning. . . .
>
> [D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government. The seeming inappropriateness of *Auer* deference is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends.

Id. (emphasis in original).

not inform courts, litigants, or (most importantly) redistricting bodies as to how to satisfy DOJ's purported standard. For instance, the guidance fails to inform states how to discern the minority candidate of choice because the guidance does not identify which social science techniques, for doing so are deemed acceptable. Nor does the *Guidance* mention, let alone describe, the role of "endogenous" or "exogenous" reconstituted elections. Yet reconstituted election analysis is central to its experts' conclusions in this case. Moreover, when DOJ released its guidance, it specifically claimed that the guidance was "not law" at all. *See* Department of Justice Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, Notice, 76 Fed. Reg. 7470 (Feb. 9, 2011). What DOJ seeks here is abdication, not deference. Section 5 makes no reference to redistricting at all – causing at least two members of the Supreme Court to conclude that it has no such application. *Cf. Holder v. Hall*, 512 U.S. 874 (1994) (Thomas, J., dissenting; Scalia, J., joining).

Finally, DOJ's "functional analysis" approach was announced five years after Congress amended section 5 and months after Texas began its redistricting process. DOJ was well aware, as reflected in its resistance to discovery of the influences on its *Guidance*, that it would be involved in litigation with many, if not most, of the jurisdictions subject to section 5. Under the circumstances, the DOJ's late arriving declaration amounts to a litigating position. Thus, its *Guidance* is not entitled to deference. *Bowen v Georgetown Univ. Hosp.*, 488 US 204, 212-13 (1988).

B. The Standard employed by the State comports with the text, legislative history and judicial precedent construing section 5 and is mandated by the Canon of Constitution Avoidance

Because the DOJ guidance failed to identify a workable, objecting retrogression standard for states to follow, the Texas Legislature sought to comply with Section 5 by maintaining – or in

some cases increasing – the preexisting number of minority "ability" or "opportunity" districts.[7] Each of these districts has a relevant minority ethnic population that is sufficient to ensure the minority group has the "ability" to elect the candidate of their choice. By any objective measure, in a district where a minority group constitutes 50% or more of the voting age population that minority group cannot be defeated, so long as it "pulls, hauls and trades" to achieve electoral success. When drawing Hispanic opportunity districts, the Texas Legislature considered not one, but two metrics—citizen voting age population and Spanish surname voter registration data. *Sessions v. Perry*, 298 F. Supp. 2d 451, 482 (E.D. Tex. 2004) (noting that CVAP is relevant number for Hispanic voting analysis), *rev'd on other grounds sub nom. LULAC v. Perry*, 548 U.S. 399, 441 (2006) (also relying upon CVAP, rather than VAP).

Recognizing that DOJ's guidance was decidedly nebulous and therefore impossible to definitively satisfy, the Texas Legislature took pains to compare the benchmark and proposed districts' historic and projected electoral performance. Further, consistent with the Constitution and the Legislature's desire to avoid strict scrutiny, the State refrained from subordinating race-neutral traditional redistricting principles to racial considerations. But, nonetheless, it successfully maintained or increased the number of congressional, house and senate districts in which minority voters: (1) constitute a numeric majority capable of controlling the outcome of any election *and* (2) were likely to elect their candidate of choice as demonstrated by both

[7] The Department's assertion that Texas has somehow misidentified the standard by its use of the word "opportunity" rather than "ability" in its Motion for Summary Judgment is incorrect and distracting. While section 2 to be sure refers to a minority's "opportunity" to elect a candidate of choice and section 5 refers to "ability" to elect a candidate of choice, the terms are effectively synonymous, as suggested by both parties' reliance on section 2 authorities and use of the "opportunity" in this case and elsewhere. *See* Br. of the United States in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), (referring to section 5 standard in terms of "opportunity" 20 times). *See also Bush v. Vera*, 517 U.S. 952 (1996) (discussing section 5 standard in terms of minority "opportunity to elect").

racially polarized voting analysis and reconstituted election analysis – which was calculated based upon data from ten randomly selected historic elections.

In order to determine whether the State's plans are entitled to preclearance, the Court must adopt a single, consistent and objective legal standard for identifying retrogression. The DOJ's *Guidance* to covered jurisdictions — on which the DOJ and Intervenors rely on to support their objections in this case — proposes a nebulous "functional analysis" approach that is based upon the totality of the circumstances. As a result, the DOJ's approach is highly subjective and does not establish an objective standard based upon any particular demographic metric. The DOJ's "we know it when we see it" test is not a workable standard legal standard that this Court can or should adopt. Ironically, while DOJ purports to be advancing the interests of minority voters, the DOJ's standardless approach threatens the very Act that it uses to protect minority voters by exacerbating the constitutional concerns that the Supreme Court has already expressed with regard to section 5. This Court can avoid those constitutional problems by adopting the clear, fair, and judicially administrable legal standard that DOJ refuses to implement.

This Court should adopt the State's straightforward retrogression standard, which requires simply that states maintain the same number of minority-majority districts, while also adhering to traditional redistricting principles. In so doing, this Court can ameliorate the considerable tension that exists between section 5 and the Constitution. The State's approach also conforms with the approach taken by the Supreme Court in *Beer* and later cases, in that it credits the assumption — essential to the constitutionality of any effort to draw district lines primarily on the basis of race – that there is in fact cohesive, racial bloc voting that could give rise to a race-based harm.

In *Beer*, the Supreme Court examined a plan that reconfigured the New Orleans City Council's electoral districts. 425 U.S. 130 (1976). The Court's analysis begins by establishing a standard proper for determining retrogression and definitively rejects a proportionality requirement. The Court explained that section 5 merely prohibits covered jurisdictions from moving "backwards" from the benchmark plan by reducing the number of districts where a minority voters are able to elect their candidate of choice. *Id.* at 140 & n.8. As the Court explained, "The application of this standard" is "straightforward."

> Under the apportionment of 1961 none of the five councilmanic districts had a clear Negro ***majority*** of registered voters, and no Negro has been elected to the New Orleans City Council while that apportionment system has been in effect. Under Plan II, by contrast, Negroes will constitute ***a majority of the population in two of the five districts*** and a clear majority of the registered voters in one of them. Thus, there is every reason to predict, ***upon the District Court's hypothesis of bloc voting***, that at least one and perhaps two Negroes may well be elected to the council under Plan II.

Id. at 141-42; *see also Abrams v. Johnson*, 521 U.S. 74, 97 (1997) (finding that a Georgia state house plan did not retrogress because both the benchmark and enacted plan contained 10 districts where blacks constituted a majority).

The Supreme Court's *Georgia v. Ashcroft* decision was the predicate for the 2006 amendments to the VRA. Although, there were multiple issues before the Court, the most salient issue involved the distinction between majority-minority districts and so-called coalition districts. The Court first held that that "[i]n order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice." 539 U.S. at 480 (citing *Gingles*, 478 U.S. at 48-49 (O'Connor, J., concurring in judgment). Next the Court went further and held that a State may also "choose to create a greater number of districts in which it

is likely-although perhaps not quite as likely as under the benchmark plan-that minority voters will be able to elect candidates of their choice." *Id.*

The Court observed that section 5 afforded states the discretion whether to maintain the preexisting number of "safe minority-majority districts" or some greater number of "influence" or "coalition" districts. Evidently unhappy with the notion that States could reduce the number of "safe minority districts," certain activist groups demanded that Congress overturn *Ashcroft*'s endorsement of "influence" or "coalition" districts. And Congress did so when it passed the 2006 amendments to the Voting Rights Act. *See* S. Rep. 109-259 (Jul. 26, 2006). Notwithstanding claims to the contrary, nothing in the text of the amendments suggests that Congress intended to legislatively overrule the Court's initial holding in *Ashcroft* that states could satisfy section 5 by maintaining an equal number of majority-minority districts. Further, no portion of the plain language of the 2006 amendments suggests that DOJ has the authority to impose its "functional analysis" test on every district in a statewide redistricting plan. [8] And because the 2006 amendments did not alter the Court's primary holding in *Ashcroft*, the Court's determination that states could comply with section 5 by maintaining the same number of majority-minority districts is still binding precedent today.

Allowing states to simply compare, based on current census data, the number of majority-minority districts in the benchmark plan and proposed plan would simplify the process, provide an objective standard, reduce the burden on the states, and maintain logical symmetry with section 2. As *Gingles* acknowledges and *Bartlett* later emphasized, section 2 only compels states

[8] The exercise is far from ministerial, and no program currently exists that has simply automated the process. Dr. Arrington, DOJ's expert, indicated that he had done only a small part of the work; had he run all the algorithms necessary to track the data associated with even part of the process would have taken "hundreds of hours." Arrington Depo. at 188.

to create majority-minority districts if the applicable minority group represents a numeric majority of the voting age population in the district. If it does not, the form "of the district cannot be responsible for the minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50; *Bartlett*, 129 S. Ct. at 1249 ("Not an arbitrary invention, the majority-minority rule has its foundation in principles of democratic governance. The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.").

As Texas demonstrated in its Motion for Summary Judgment, all four of its redistricting maps retain or increase the number of electoral districts in which minority voters have the "ability" to elect their candidate of choice.

II. TEXAS DID NOT RETROGRESS UNDER ANY MEASURE.

A. Within the Confines of the Fourteenth Amendment, Texas Maintained or Increased the Ability of Minority Voters to Elect A Candidate of Choice

Throughout the redistricting process, the Texas Legislature endeavored to pass lawful maps that were consistent with both the Voting Rights Act and traditional redistricting principles. To ensure compliance with section 5, the Legislature increased (in the case of Congress) or maintained (in the case of the Texas House and Senate) the number of districts where a cohesive minority population can elect their candidates of choice. The metric that the Legislature used to determine whether minorities would have an opportunity to elect their candidate of choice was citizen voting age population. *See* Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment at 4-7 (Doc. 41). Thus, the Legislature maintained or increased the number of minority districts while also adhering to traditional redistricting principles. By following the aforementioned path, the Legislature did not retrogress, complied with the VRA

and exercised the "leeway" afforded the State under the Fourteenth Amendment. *Shaw*, 517 U.S. at 911 (assuming, but not deciding that compliance with VRA constitutes a compelling governmental interest for purposes of Fourteenth Amendment).

Experts for DOJ, Intervenors, and the State all agree that Texas voters' candidate preferences appear to be entirely divorced from race. S*ee* attached reports of John R. Alford; J. Morgan Kousser; Allan J. Lichtman; Richard Engstrom, submitted in the section 2 proceeding by the State of Texas (Dr. Alford) and various Intervenors to the instant action. Put differently, experts for all sides confirm that white voters are just as likely to vote for an African American, Hispanic or white candidates. The same is true for Hispanic and African American voters. Although no ethnic or racial group votes monolithically, to the extent certain citizen groups vote cohesively, election data reveals that voters' decisions are predicated on partisan preference, not racial bias.[9] This is apparently the first such showing in a statewide redistricting case and raises serious questions about the need or continued justification for race-based remedies under the Voting Rights Act. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (limiting disparate treatment on race to circumstances necessary to remedy proximate racial harm); *LULAC v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993).

Nonetheless, DOJ and the Intervenors claim that voting is racially polarized in Texas. Those claims are not only contrary to expert testimony, they are also undermined by the fact that some pre-existing majority-minority districts in the benchmark plan choose to elect candidates

[9] According to the Intervenors' experts, 90% of African Americans favor Democrats over Republicans, regardless of the candidate's race. Further, Exit polls reveal that 60% of Hispanic voters prefer Democrats over Republicans. During t he section 2 trial, most of the Plaintiffs' experts claimed that Hispanics are less likely to support Republicans than the exit polls revealed, arguing that 75% of Hispanic voters prefer Democratic candidates. The same experts testified that 75% white voters apparently prefer Republican candidates, including Republican candidates who happen to be African American or Hispanic.

whom DOJ and the Intervenors claim are not minority voters' candidates of choice. Not coincidentally, those candidates happened to be members of one political party, rather than another party.[10] During the section 2 trial, Plaintiffs' experts testified that minority voters always prefer the Democratic candidate. See Table 1 and App. A. Although the State has repeatedly asked DOJ whether it shares the Intervenors' point of view and agrees that minority voters monolithically prefer Democratic candidates, the Department simply refuses to answer the State's questions. Nevertheless, the Department's retained expert, Lisa Handley, confirmed the Department's position when she testified on its behalf that only Democrats can qualify as a minority's candidate of choice. Moreover, DOJ's objections in this case reveal the obvious, because the Department is only objecting to districts that are represented by Hispanics who happen to be Republican. Most, if not all, of these districts retain Hispanic majorities under the State's new redistricting plan, which is why DOJ now insists that this Court apply its standardless theory of retrogression.

B. DOJ's Effort To Shift the Standard for Preclearance To Historic Election Performance Should Be Rejected, But in Any Event, None of Texas's Maps Retrogress Under that Standard

DOJ's reversion to its nebulous "functional analysis" effectively concedes the obvious: that Texas has not retrogressed because it maintained (or increased) the number of majority-minority districts. And though DOJ objects to the use of the State's concrete standard in this case, when DOJ reviews section 5 redistricting submissions in its administrative capacity, it does not initially consider anything other than whether the submitting entity maintains the pre-existing

[10] During the section 2 trial, experts hired by the Plaintiffs testified that minority voters' candidate of choice is any candidate supported by 50% or more of the minority voters. Thus, under their view, a majority of a minority population should dictate the entire community's candidate of choice even if 40% of that minority group's population prefers a different candidate of choice.

number of majority-minority districts. Indeed, DOJ's own guidelines for preclearance submissions only require covered jurisdictions to submit ethnic data and maps. 28 C.F.R. §§51.27(9); 51.28(a)(1) & (b)(1). The additional data DOJ now asks the Court to consider may be requested — at DOJ's unilateral discretion—as "supplemental" material, but is not initially required. *Id*.

Nonetheless, in this case, DOJ not only claims that retrogression should be judged under an alternate, historic election performance standard, it also argues that the most recent election results should be conveniently ignored. DOJ characterizes these historic election results as "endogenous" because that electoral data refers to elections within or for the specific district at issue. Under traditional redistricting principles, incumbent protection is a legitimate basis for states to draw districts. Yet DOJ now argues that the most recent election cycle — and the incumbent legislators most recently elected by the district's voters – should simply be ignored by this Court.

Mindful of DOJ's nebulous guidance and the possibility that the Department could change its retrogression standard, the Texas Legislature also examined each district's historical performance and enacted a map that does not retrogress under that standard. The State satisfied the historic performance standard by preserving both Democrat and Republican incumbents in these districts whenever possible. As a result, the State both maintained districts with majority-minority populations and confirmed that any *reliably* performing districts under the benchmark plan are equally likely to perform under the new plan. If a protected district was not likely to perform under the new plan, it was replaced with a new district that would perform so that there would be no net reduction in performing districts.

Every Texas House of Representatives district that is subject to challenge by the DOJ in this case is represented by an Hispanic incumbent who happens to be a Republican. Thus, DOJ is only challenging districts that are represented by minority legislators. Further, while DOJ apparently maintains that Democratic candidates are always preferred by minority voters, each of the Hispanic legislators whose districts DOJ challenges were elected to represent a district where minority voters constituted a majority of the District's population. As the Legislature endeavored to redraw these districts to equalize their population based upon the one person one vote standard, it faced the choice of simply not protecting minority incumbent officeholders who happen to be Republicans, or reconfiguring their districts on the basis of race to increase the prospects future Democratic challengers in order to appease DOJ and the Intervenors. Recognizing that protecting these minority incumbents would spark retrogression claims, the Texas Legislature carefully avoided retrogressing by eliminating Republican districts; increasing minority voters' share of the population in other districts; or simply creating new minority opportunity districts that are more likely to "perform." The Legislature confirmed their ability to perform for minority voters by reviewing reconstituted election analysis. These new minority opportunity districts include Texas House of Representatives Districts 34, 43, 74, 80 and 118.

DOJ also relies on reconstituted election analysis to lodge baseless objections to the State's Congressional redistricting plan. During the section 2 trial, Dr. Alford testified that the State's benchmark contained five majority Hispanic Congressional districts that were actually "performing." *See* Alford Report, Docket No. 72 at 2-3. That is, these Congressional districts were both electing and returning Democratic incumbents and demonstrating a recurring tendency to prefer the Democrat in reconstituted elections. Although DOJ and the Intervenors claim that voting is racially polarized and that minority populations vote monolithically, the benchmark

plan included two Congressional districts that were not performing. Put differently, although a majority of voters were Hispanic in those districts, they elected Republican candidates. Based upon exogenous reconstituted elections these congressional districts, CD 23 and CD 27, demonstrate a tendency to elect Republicans — despite the fact that minority voters constitute a majority of the citizen voting age population in the district.

In hopes of protecting the incumbent in District 23, Congressman Francisco Canseco, the Legislature made his district both more Hispanic *and* more Republican — which are not incongruous in a state where Hispanic support for Democrats is now as low as 60%. *See* Alford Report at 4 tbl. 1. Thus, while Congressional District 23 provides minority voters a greater "opportunity" or "ability" to control the outcome of an election if cohesive bloc voting truly exists, CD 23's performance in ten reconstituted elections shows that the District moves from favoring the Democrat in only 3 of 10 races to only 1 of 10. In other words, CD 23 was not a "performing" district under the benchmark plan and thus need not be one today — even if Hispanics continue to constitute a majority of the District's voting age population.

The Legislature used one of the State's four new congressional seats to created Congressional District 34, which is based in Brownsville, at the request of multiple Democratic legislators. The congressional district to the north, CD 27, is based out of the incumbent Congressman's largely Republican base in Nueces County. Historical election data reveals that Former CD 27 was largely a toss-up under the benchmark plan because its voters favored Democratic candidates in exactly half of the exogenous elections conducted since 2006. In the new Brownsville-based CD 34, which was drawn to encompass a large portion of former CD 27's territory, voters would have favored a Democrat in 10 out of 10 races. Finally, the Legislature drew a wholly new majority Hispanic district, Congressional District 35, between

San Antonio and Austin. Prior election analysis suggests that the new district would have performed in 10 out 10 past races.

Thus, under the State's benchmark plan, there were seven Congressional districts where Hispanic voters constituted a majority of the population. Of those, five districts actually performed within DOJ's meaning of the term — i.e., the district elected Democrats. The benchmark plan also had three performing African American districts that were likely to elect African American voters' candidate of choice. Under its new redistricting plan, the State has eight Congressional districts where Hispanics constitute a majority of the population — eight actual Hispanic opportunity districts, seven of which are likely to elect Hispanic voters' candidate of choice — and the three performing African American Congressional districts. No matter which metric or which definition of "ability to elect" the Court applies, Texas has increased that metric — by either one or two Congressional districts. By not only maintaining, but increasing, the number of minority Congressional districts, the State has met and exceeded the standard for preclearance under Section 5. *Georgia v. Ashcroft*, 539 U.S. 461 (2003) ("a plan that merely preserves 'current minority voting strength' is entitled to §5 preclearance") (citing *City of Lockhart v. United States*, 460 U.S. 125 (1983)); *Bush v. Vera*, 517 U.S. 952 (1996).

III. THE STATE IS ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIM FOR A DECLARATORY JUDGMENT REGARDING THE REDISTRICTING PLANS FOR THE TEXAS CONGRESSIONAL DELEGATION AND THE TEXAS HOUSE OF REPRESENTATIVES.

A. The Dispute Regarding the Number of "Effective" or "Ability-to-Elect" Districts Raises a Purely Legal Question: When Does a Redistricting Plan Provide Voters with the "Ability to Elect" Their Preferred Candidates of Choice?

No genuine issue of material fact exists regarding retrogression in the State's redistricting plans for the Texas congressional delegation or the Texas House of Representatives. Because, the relevant facts are not in dispute. Both parties base their arguments about the plans' alleged retrogressive effect—or lack thereof—entirely on objective demographic data and an analysis of electoral outcomes. Both parties conduct their analysis using the same demographic and electoral information, which was provided by the Office of the Attorney General, the Texas Legislative Council, and the United States Census Bureau. *See, e.g.*, Handley House Report at 4 n.6 (stating that the United States expert "relied extensively on the State's reports," prepared by the Texas Legislative Council and the Office of the Attorney General, in conducting her analysis of the Texas House plan). Alford Dep. At 76:15-25.

The ultimate question is a legal one: whether these undisputed facts establish that the redistricting plans will not "have the effect of denying or abridging the right to vote on account of race, ethnicity, or membership in a language minority group." 42 U.S.C. § 1973c(a). Specifically, the parties disagree about the proper standard for retrogression, which hinges upon the meaning of the "ability-to-elect" language in section 5 of the Voting Rights Act. *See* U.S. Statement of Genuine Issues ¶ 1. Consistent with the Supreme Court's prior decisions construing Section 5, the State defines "ability-to-elect" districts based upon a workable objective standard: demographic data indicating a cohesive racial or ethnic group has the ability to elect candidates of their choice—whether or not that candidate receives support from other voters in the district. In the case of Hispanic voters, for example, a district satisfies the State's standard if voting age Hispanic citizens constitute 50 percent or more of the district's citizen voting age population. The DOJ adopts a more complicated outcome-based definition that requires analysis of endogenous and exogenous elections—but provides no identifiable basis to

determine, without preclearance review and expert analysis, whether a state's plan has a retrogressive effect. Although the DOJ's approach is practically unworkable and legally flawed, the undisputed facts reveal that all of the State's maps satisfy the Department's metric, will not have a retrogressive effect, and are entitled to preclearance.

Although the DOJ promotes its "functional approach" as an antidote to bright-line tests that may not account for actual voting strength, the Department's own analysis reveals that its application of the "functional approach," is in fact based on strict enforcement of numerical benchmarks. The DOJ's classification of HD 35 and HD 74 illustrates that the "functional approach." For example, while the DOJ classifies HD 74 in the benchmark plan as a Latino ability-to-elect district, it scored only 20 on the DOJ's expert's apparently proprietary Exogenous Minority Effectiveness Index. *See* Handley House Report at 5.[11] However, the DOJ does not extend the same treatment to HD 35 in the State's proposed plan—despite the fact that the district also received a score of 20—and the Department therefore refuses to classify HD 35 as an ability-to-elect district, *see* Handley House Report at 11.[12]

B. The State's Congressional Redistricting Plan Will Not Have a Retrogressive Effect.

Plan C185 does not reduce the number of Latino or African-American ability-to-elect congressional districts under either party's metric standard. Depending on the standard applied, the State's congressional redistricting plan either maintains or increases the number of districts in

[11] The State's analysis of 48 elections showed that Latino-preferred candidates prevailed in 50% of contests in HD 74. *See* Alford Report at 14, Table 2.

[12] Like HD 74 in the benchmark plan, HD 35 elected Latino-preferred candidates in 48% of the contests analyzed by the State. *See* Alford Report at 14, Table 2. Had HD 35 been able to meet the 50% threshold, it would appear to qualify as an ability-to-elect district under the United States' interpretation of section 5.

which Latino and African-American voters have the ability to elect their preferred candidates of choice. Under the State's legal standard, the benchmark plan contains 7 Latino and 1 African-American ability-to-elect districts, and Plan C185 contains 8 Latino and 2 African-American ability-to-elect districts. *See* Motion for Summary Judgment (Doc. 41) at 10. According to the DOJ, both the benchmark plan and Plan C185 contain 7 Latino and 3 African-American ability-to-elect districts. *See* Congressional Report of Dr. Lisa Handley at 8–9.

By any objective measure, the State increased or maintained the number of Congressional districts where Latino and African-American voters have a sufficient portion of the population to elect their candidate of choice. As a result, the State did not retrogress. The DOJ attempts to challenge the State's Congressional map by claiming that maintaining minority districts is insufficient—but the Department's arguments fail as a matter of law. The DOJ complains that, under their "functional" approach to measuring ability to elect, Plan C185 retrogresses by reducing the proportion of Latino opportunity seats from 7 out of 32 to 7 out of 36. Response at 22-24. While the DOJ's approach is legally flawed, there is no dispute about the facts—and as a result, the DOJ's argument does not raise any genuine issue of material fact. *See* FED. R. CIV. P. 56(a). Rather, the DOJ merely invites the Court to adopt the United States' "functional" standard as a matter of law and extend Section 5 to prohibit "proportional" retrogression. The Supreme Court has already rejected attempts to read a proportionality requirement into Section 5—so this Court must reject the DOJ's flawed functional standard. A redistricting plan that preserves the existing number of districts in which a minority racial or ethnic group has the ability to elect the candidate of its choice satisfies section 5's retrogression standard as a matter of law—because it does not have the effect of denying or abridging the right to vote on account of race or color.

Indeed, a proportionality standard for apportioning new congressional seats conflicts with Supreme Court precedent. *See Abrams v. Johnson*, 521 U.S. 74, 97-98 (1997). Worse, the proportionality standard merely exacerbates the Act's constitutional infirmities by implicating significant constitutional questions. *See Bush v. Vera*, 517 U.S. 952, 989 (Kennedy, J., concurring) (reserving the question of "whether race is predominant whenever a State … foreordains that one race be the majority in a certain number of districts …. [W]e would no doubt apply strict scrutiny if a State decreed that certain districts had to be [white], and our analysis should be no different [for minorities]."); *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997); *Davis v. Bandemer*, 478 U.S. 109, 132 (1986). Further, imposing a proportionality standard threatens to merge Section 2's vote dilution standard with the Section 5 preclearance standards. *But see Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 483 (1997).

The Supreme Court's *Abrams v. Johnson* decision directly conflicts with the DOJ's reading of Section 5. 521 U.S. at 97-98. In *Abrams*, Georgia received one additional congressional seat due to population reapportionment after the decennial Census. *Id.* at 104 (Breyer, J., dissenting). Under Georgia's benchmark Congressional plan, one of the State's ten districts was majority African-American. *Id.* at 97. *Abrams* had one district out of 11 that was majority Black. *Id.* After Georgia received an additional Congressional seat and reapportioned its districts, the State maintained that African-American district—but did not add an additional minority seat. In *Abrams*, the Appellants argued that because African-American voters' proportion of Congressional seats was reduced from 10% to 9%, that reduction constituted retrogression under Section 5. *Id.* The Supreme Court rejected this proportional approach.[13] *Id.*

[13] *Abrams* also discredits the functional approach that the DOJ proffers in the case. Because the Court simply examined whether the number of "majority black" districts was reduced. *Abrams v. Johnson*, 521 U.S. at 97-98.

In so doing, it found that "[a]ppellants have not shown that black voters **in any particular district** suffered a retrogression in their voting strength under the court plan measured against the 1982 plan." *Id.* (emphasis added).

The *Abrams* Court correctly identified the principal defect in reading Section 5 to impose a proportionality requirement when states apportion new congressional seats. *See id*. Unless the apportioning state sets aside seats for minority candidates, a proportionality standard will inevitably lead to retrogression. *See id.* In cases where states only receive one new district, avoiding proportional retrogression would require states to make the new district a minority opportunity district. *See id.* The Court rejected this argument, explaining that "[u]nder that logic, each time a State with a majority-minority district was 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.* at 97–98

Although the DOJ attempts to distinguish *Abrams v. Johnson* from this case by arguing that *Abrams* involved just one additional Congressional district—while Texas received four additional districts— the Department's argument lacks legal merit. First, the language in *Abrams* makes plain that Section 5 looks to whether "voters in any particular district suffered . . . retrogression." *Id.* This approach examines the *losses* suffered by voters in particular districts, not whether the new plan retains the same proportion of Latino opportunity districts. Nothing in *Abrams* suggests that the Court's focus on the loss of particular districts somehow imposes a

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Under this standard, Congressional District 23 qualifies as an opportunity district and the proportions that the United States cites are maintained.

proportionality standard when the State receives more than one additional Congressional seat. [14] Further, interpreting Section 5 to require that states categorically create race-based districts—in the absence of evidence that minorities suffered a race-based injury—unnecessarily exposes Section 5 to constitutional infirmity because such a requirement runs afoul of the 14th Amendment.

Controlling precedent other than *Abrams* likewise measures retrogression based upon the *number* of districts, rather than the *proportion* of districts. In *Beer v. United States*, 425 U.S. 130, 136 (1976), the city of New Orleans enacted a redistricting plan that created two majority African American council districts where none had existed before. Because African-Americans constituted 35 percent of New Orleans' population, but only received 29 percent—two out of seven—of the city council seats, the appellants argued that the city's redistricting plan interfered with African-Americans' voting rights in violation of Section 5. The Supreme Court rejected the appellants' claim, concluding: "It was therefore error for the District Court to conclude that Plan II 'will . . . have the effect of denying or abridging the right to vote on account of race or color' within the meaning of §5 of the Voting Rights Act." *Id.* at 142; *see also Ketchum v. Byrne*, 740 F.2d 1398, 1402 n.2 (7th Cir. 1984).

Looking to the number of districts, rather than the proportion of districts, also avoids unnecessarily exposing the Act to potential constitutional infirmities. Nothing in the Fourteenth

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[14] The foregoing analysis assumes that the United States' proposed proportionality standard would measure the number of opportunity seats (under the United States' "functional" standard) against the size of the Texas congressional delegation. Because the congressional delegation is not a legislative body, logic dictates that the more appropriate measure for proportionality would be the number of Texas opportunity seats against the total size of the legislative body. Under this standard, the proportions are the same under the benchmark and new congressional plans: seven out of 435. The foregoing analysis also assumes that the "standard practice, or procedure with respect to voting" that caused the alleged disproportion, namely the allocation of four additional seats to Texas under the United States Constitution, is a state action subject to Section 5 review. 42 U.S.C. 1973c(b) (2006). This assumption is faulty, as the State cannot unilaterally increase the size of its congressional delegation.

Amendment grants any group a right to proportional representation. *See Bandemer*, 478 U.S. at 132. The fact that the DOJ calculates proportionality by measuring opportunity districts against the total size of the delegation—rather than proportion of total population versus proportion of seats—does not change the character of their standard. It is still a proportional standard. Indeed, the DOJ simply attempts to obscure its proportionality argument by adding a layer of abstraction and using districts as a proxy for Latino population. If Section 5 imposes a proportionality standard that the Fourteenth Amendment does not command, then Section 5 would not be "proportional and congruent" to the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 533. Thus, interpreting Section 5 to impose "proportionality" standard for retrogression would therefore raise constitutional problems with the VRA. *See City of Boerne*, 521 U.S. at 533.

Section 2 and Section 5 offer minority voters different protections, and the Supreme Court has rejected attempts to collapse the two distinct standards. *See Bossier Parish*, 520 U.S. at 480. Section 2 measures vote dilution against a reasonable alternative plan. *See id.* Section 5, conversely, measures vote dilution against the benchmark plan. *See id.* The "proportionality" retrogression standard that the DOJ proposes simply replaces the benchmark plan with a hypothetical, DOJ-imposed plan that has the additional congressional seats allocated according to benchmark proportions. The Supreme Court has rejected similar approaches because they dispense with the benchmark comparison and exacerbate Section 5's the already significant federalism implications. *See id.*

Section 5 does not require Texas to disprove discriminatory effect and intent based on comparisons to hypothetical plans. Texas must already defend itself against hypothetical alternatives in Section 2 proceedings. Further, the DOJ has cited no legal authority or policy rationale that would justify reading Section 5 to impose the proportionality standard—much less

a proportionality standard based upon purely hypothetical comparisons. Indeed, numerous legal authorities, federalism concerns, and the cannon of constitutional avoidance require that the DOJ's proposed "proportionality" standard for retrogression be rejected by the Court.

C. The State's House Plan Will Not Have a Retrogressive Effect.

Putting aside for the moment whether the states and their political subdivisions are obliged to recognize and maintain districts based on the tendency of multiple races of voters to support candidates of the same political party in the general election, the identification of the majority-minority districts in the Texas House should be clear. In its Motion for Summary Judgment, Texas identified 30 such districts under the benchmark and enacted plans. One additional district, HD 90 increased its proportion of Hispanic population as well; it now contains 50.1% Spanish surname registered voters and 49.7% Hispanic Citizen Voting Age population.

The Department of Justice contends that all but one of the 30 Hispanic majority districts – HD78 – identified in the Motion were effective under the benchmark. Identification of Issues, Doc. 53 at 5; Lisa Handley Rep. at 4. The DOJ contends that of the majority Hispanic *effective* districts in the benchmark, only districts 33, 35, 41 and 117 cease to be effective under the new plan, though all but CD 33 remain literal majority Hispanic districts under any conceivable understanding. Meanwhile, the state also increased the Hispanic population of districts 90 and 148,[15] which DOJ and its expert concede to be effective under the new plan. Thus, from the perspective of majority-minority "effective" districts, the parties are two districts apart with four

[15] To be sure, HD 90 reflects an HCVAP estimate of 49.7% according to the U.S. Census Department's American Community Survey, which contains a 2.5% margin of error. It also contains 50.1% SSVR. Under the benchmark, those figures were 47.9% and 47.2%, respectfully.

in dispute. In addition, the Department of Justice refuses to give the State credit for a significant improvement in performance in District 74, which moves from 24 of 48 (50%) to 46 of 48 (96%) in the analysis of all elections and from 4 of 10 to 10 of 10 in the State's analysis of selected races. *See* Alford Report at 8, 17.

The dispute as to three of the districts – 33, 35, and 117 – is whether they were in fact "effective" under the benchmark plan and/or whether they will continue to be under the enacted plan. The dispute as to 33 adds the question of whether its loss was unavoidable as a matter of law. Lastly, DOJ's expert is unable to offer an opinion as to District 41, though it continues to be as effective in the new plan under any reasonable understanding of the word "ability" to elect.

i. The Parties' Methodologies for Assessing Performance and Effectiveness

The Court will recall the efforts to identify the method and basis for the DOJ's objections in advance of this briefing. DOJ indicated that it had looked at the states' data and "all of the elections," although it would not identify what role the elections had played in its analysis in advance of the preparation of its expert's report. Eventually, in its "Identification of Elections Considered" (Doc. 58), the United States listed, among other things, the Texas Legislative Council's "Red 225" reports. Those reports identify the vote total, within each district, for every statewide race since 2002. Thus, if one were interested in knowing only whether the democrat or republican running for statewide office would have prevailed and how often in, for example, a particular state house or senate district, then one could total up the victories and express them as a percentage. Of course, because Red 225 reports say nothing about *who in the district supported which candidate* one is left to assume, as is most often the case, that the democrat is the minority preferred candidate in each of the districts. Likewise, another

shortcoming of this analysis is that it is not limited to contests involving ethnically diverse contests and thus ultimately expresses only whether all of the voters in a particular district are supporting candidates of a particular political party.

The State's expert, John Alford, effectively reverse engineered the DOJ's approach, by looking at "all of elections" in the "Red 225" report and finding that in each district DOJ objected to the percentage of support among all voters for any democrat moved from at or above 50% to any number below 50%. No district improving from any number above 50% in the benchmark was claimed to be ineffective previously. Thus, for example, DOJ urged that old HD 74 was "effective" under the old plan and gave the state no credit for its improvement where, under the benchmark, democrats prevailed in exactly 50% of the races run in Red 225 to 96% under the enacted plan. Meanwhile, districts 35 and 41 are said not to perform at 48% under the new plan. Alford Report, Docket No. 72 at 8.

All involved in this case agree that the rate of support among all voters in a district for any democrat, regardless of race, is an inferior mode of analysis. *E.g.*, Exhibit 9, Deposition of John Alford at 217:21-218:5; Response at 9-10 n.4 (Doc. 79.2) Rather, an analysis of contests involving a choice between minority and Anglo candidates is preferred, as it reflects voter behavior where race is a variable. Exhibit 9, Deposition of John Alford at 217:21-218:5; Response at 9-10 n.4 (Doc. 79.2). Anticipating the reliance or some combination of performance-based metrics, the State performed a "functional analysis" in hopes of avoiding any later retrogression argument. In particular, the state enlisted the services of the Texas Attorney General's Litigation and Technical Support (LTS) division – a group made up entirely of mathematicians and engineers. That group, working independently of any legislator or lawyers

and before the Legislature's consideration of any plans, selected its own a set of ten statewide general elections involving ethnically diverse candidates between 2002 and 2010. Dep. of Todd Giberson at 27:8-28:18. The LTS group ran what is known as a racially-polarized voting analysis, employing a social science technique known as "ecological regression"[16] to identify the minority- and majority-preferred candidates in each of those ten races in every district in each of the four existing benchmark plans. This process is quite involved and results in a report that is several thousands of pages long. These reports must then be hand reviewed to determine, with respect to each district, how many times out of ten races the minority-preferred candidate prevailed. Later, as plans approached passage, LTS would run the same analysis in the new district configurations to determine the rate at which a minority-preferred candidate would prevail under the proposed plan. Again, this process is quite involved and takes considerable time and labor even when performed by trained professionals, as DOJ's own experts and lawyers can attest. Exhibit 9, Deposition of John Alford at 51:16-51:21, 82:22-83:2. Still, using this analysis allowed the state to assure itself, on at least one reasonable, neutral understanding of "functional analysis," that its new districts were not materially moving backward in terms of their likely performance.

DOJ's expert employed a combination of three methods to arrive at the conclusion that DOJ had objected to the correct four districts. First, like the state she focused on majority-minority population, although she looked only at the benchmark ethnic population figures and

[16] There is debate among the experts as to whether the "ecological regression" technique for indentifying race-based voting patterns is the best technique available. The State's expert, John Alford and the Latino Taskforce Expert Richard Engstrom, prefer ecological inference because it precludes the possibility of so-called out-of-bounds results (estimates of less than zero 0% or more 100% support) and its reduced reliance on "linear assumptions."

focused on Hispanic voting age population, rather than Hispanic Citizen Voting Age. Thus, she counts any district in which 51% of white voters support candidate X and 51% of Hispanic voters support candidate Y as racially polarized, Handley Dep. at 12, and counts any district in which the Hispanic preferred candidate prevails as effective regardless of the Hispanic Citizen Voting Age population figures in the district. *E.g.*, Handley Rep. at 5 (listing District 137 as performing with 59.8% HVAP and 25.6% HCVAP); *Cf. LULAC v. Perry*, 548 U.S. 399, 441 (2006) (criticizing Texas for claiming Hispanic opportunity with *voting age* Hispanic majority but not accounting for Hispanic citizenship differential).

Next Dr. Handley employed an "endogenous" effectiveness index that tracked how often the democrat preferred by 50% or more of Hispanic voters had prevailed in past elections involving the District itself. To determine future performance, she then shifted to exogenous races, looking to five reconstituted statewide contests involving only Hispanic democrats. Dr. Handley ignores past exogenous evidence of a District's weakness as well as the failure of the District to elect a minority-preferred candidate coming into the redistricting process. Thus, according to Dr. Handley, a state would be obliged to abandon the traditional, race-neutral principle of protecting the incumbency of minority republican officeholders if, in a majority of past elections Hispanic democrats had prevailed. Instead, the state would be obliged to reconfigure the district on the basis of race in order to assure the incumbent's likely defeat in the next election. This would raise obvious Fourteenth Amendment problems.

Interestingly, Dr. Handley was also hired by the State of Alaska to assist in that state's efforts to redraw its house boundaries in 2011. *See* Exhibit 8, Dr. Lisa Handley, *A Voting Rights Analysis of the Proposed Alaska State Legislative Plans* at 6, 7, 10, 21 (expert report prepared for

the Alaska Redistricting Board to evaluate adopted state legislative plans' compliance with section 5). In her Alaska report, she details the racially-polarized voting in the state and the recurring victories of former state representative Woodie Salmon in House District 6. Mr. Salmon defeated every white republican opponent he faced in 2004, 2006 and 2008. He was defeated by a white Republican in 2010, however. When describing the Alaska's benchmark plan, Dr. Handley observes that "[t]here are four majority Alaska Native state house districts . . . under the current plan: Districts 6, 38, 39 and 40. Three of these districts (Districts 38, 39, and 40) have consistently elected Alaska native-preferred candidates to office. " *Id.* at 21. Later, she counts up the "effective" districts: "The Benchmark Plan therefore consists of four 'effective' districts – that is, districts that consistently elect minority-preferred candidates even when the voting is polarized (Districts 37, 38, 39, and 40) – and one district that might best be characterized as an 'equal opportunity' district (District 6) because, although it has a substantial minority population and has elected minority candidates in the past, it does not always elect the minority-preferred candidate." *Id.; see also id.* at 28.

In her analysis of Texas's redistricting plans, by contrast, Dr. Handley's analysis incorporates a rigid benchmark within the so-called functional analysis, as she imposes a strict 50% threshold to separate districts that provide Latino voters with the ability to elect from those that do not. This failure to consider levels of performance and degrees of change eliminates much of the functionality from the "functional" analysis. As detailed below, Texas had a number of "equal opportunity" districts coming into the 2010 cycle. Despite Dr. Handley's new-found fondness for ignoring incumbency and the results of the 2010 election, they are just as plainly "equal opportunity" districts coming out.

ii. The Undisputed Facts Regarding Latino-Majority Districts Show That Plan H283 Will Not Have a Retrogressive Effect on Latino Voting Strength.

a. District 33

This Court should grant summary judgment because Defendants have failed to establish that a genuine issue of material fact exists with respect to whether the enacted plan for the Texas House retrogresses District 33. The facts regarding the demographic makeup of District 33 in the benchmark and the enacted plans are not in dispute. In the benchmark plan, Nueces County was apportioned two seats wholly within the county and a portion of a third district. District 33 had 55.3% SSVR and 60.4% HCVAP, and District 34 had 53.8% SSVR and 58.2% HCVAP. State's MSJ, Exhibit 9. According to the 2010 census, Nueces County grew at a substantially slower rate than the state as a whole, and the county's population no longer entitled it to more than two districts. Nueces County now has two districts, Districts 34 and 32, both of which are wholly contained within its boundaries. District 32 has 37.3% SSVR and 44.2% HCVAP, and District 34 has 60.8% SSVR and 64.6% HCVAP. State's MSJ, Exhibit 12.

Although Nueces County went from having two HCVAP majority districts in the benchmark plan to just one HCVAP majority district in the enacted plan, the elimination of District 33 does not constitute retrogression under section 5. The loss of a district in Nueces County was unavoidable due to the loss of population in Nueces County over the last decade and the need to comply with the county-line rule as set forth in the Texas Constitution. Under Article III, § 26 of the Texas Constitution, electoral districts for the Texas House must "be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed." TEX.

CONST. art. III, § 26. The Texas county-line rule plainly qualifies as a race-neutral, traditional districting principle. *E.g.*, *LULAC v. Perry*, 548 U.S. at 463 n.5 (2006) (observing that "traditional redistricting criteria" include "compactness" and "preserving county lines"); *Bush*, 517 U.S. at 963 (observing that "[t]raditional districting criteria" include "maintain[ing] the integrity of county lines"). The Supreme Court has established beyond question that traditional redistricting principles cannot be subordinated to race without running afoul of the Fourteenth Amendment. *E.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) (explaining that "an impermissible racial motive" exists if "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations") (quoting *Miller*, 515 U.S. at 916); *Bush*, 517 U.S. at 978 ("The constitutional problem arises only from the subordination of [traditional districting] principles to race.").

Here, dividing Nueces County's total population, 340,223, by the ideal district population size of 167,637, yields only 2.02 districts. The Legislature's apportionment of two districts to Nueces County is thus mandated by the Texas Constitution and inevitably results in the loss of a Latino majority district. The State cannot be required (and is not permitted) to subordinate its traditional redistricting principles, such as compliance with the Texas Constitution, to avoid a section 5 violation that is unavoidable due to demographic changes within the district. Nor should it be required to replace this district elsewhere in the state because doing so would require it to create a race-based district outside of Nueces County as a purported remedy for the alleged (but nonexistent) race-based injury in Nueces County.

Even if this Court determines that the loss of a district in Nueces County is not the result of unavoidable retrogression, the State is entitled to summary judgment under the functional approach advocated by Defendants. Under the benchmark plan, none of the Districts in Nueces

County, including District 33, consistently elected Latino voters' candidate of choice. All three State house incumbents under the benchmark plan are republicans, Using the same data as the State, Handley's analysis confirms that both Districts 33 and 34 in the benchmark plan score 60 on the exogenous index. *See* DOJ Response Exhibit 4, at 5, Table 1. The State's reconstituted election analysis also confirms that District 33 only performed in 6 out of 10 elections. Alford Report, Doc. No. 72 at 25-29. Under the enacted plan, the Legislature strengthened the Latino voters' influence in one of Nueces County's two remaining districts. There is no dispute between the parties that new District 34 will now consistently elect the Latino community's candidate of choice 9 out of 10 times under the State's analysis and scores 80 on Handley's exogenous index. *See* DOJ Response Exhibit 4, at 11, Table 4, Appendix A; Alford Report Docket No. 72 at 25-29. Thus even under Defendants' proposed standard, the State improved Latino voters' strength within Nueces County by creating one district in which Latinos clearly have the ability to elect the candidate of their choice where no such district existed before. Accordingly, Defendants have not established the existence of a genuine issue of material fact as to whether the elimination of District 33 in Nueces County is retrogressive.

b. District 117

Defendants have failed to demonstrate a genuine issue of material fact exists regarding retrogression in District 117. Both the State and Defendants agree that under their respective standards, District 117 provides Latino voters the ability to elect the candidate of their choice under the benchmark plan, *see* DOJ Response Exhibit 4, Handley Report at 17, Appendix A, but the parties reach different legal conclusions about Latino voters' ability to elect under the enacted plan. This legal dispute does not preclude summary judgment, however, because the evidence proves that the district does not retrogress under either party's standard.

District 117 is located in Bexar County, and under the benchmark plan has 50.8% SSVR and 58.8% HCVAP. State's MSJ, Exhibit 9. In the enacted plan, District 117 has 50.1% SSVR and 63.8% HCVAP. State's MSJ, Exhibit 12. Thus, under the State's population percentage approach, District 117 provides Latino voters with the ability to elect candidates of choice in both the benchmark and the enacted plan.

Using the functional approach advocated by Defendants, District 117 preserves Latino voters' ability to elect candidates of choice to the extent it existed under the benchmark plan. Although District 117 provided Latino voters with the ability to elect, the district did not perform consistently for Democratic candidates under the benchmark plan. The State's reconstituted election analysis shows that District 117 only performed in 5 out of 10 elections in the benchmark plan and performs in 2 out of 10 elections in the enacted plan. *See* Alford Report, Docket No. 72 at Table 2. Handley's analysis is consistent with these findings, showing that District 117 scores 60 on the both the endogenous and exogenous indices in the benchmark plan. *See* DOJ Response Exhibit 4, Handley Report at 5, Table 1. Under her analysis, District 117 scores 20 on the exogenous index in the enacted plan. *See* DOJ Response Exhibit 4, Handley Report at 11, Table 4.

Even though the election results for the district do not show that the Latino candidate of choice is consistently elected in racially contested elections, this is not evidence of retrogression. Instead, it is undisputed that Latinos have the ability to elect the candidate of their choice based on the fact they are the majority of the population in District 117. The fact that the district does not consistently elect candidates presumed to be the choice of Latinos is not caused by Latinos' lack of ability but, rather, by the fact that Latinos do not vote monolithically for the same candidates in this competitive district. *See* Exhibit 14, Deposition of John Garza at 65:9-25,

42:9-14 (stating that he is Latino candidate of choice in his district and describing his district as being comprised of rural, conservative Latinos). Although Defendants make much of the fact that the election performance in racially contested elections slightly decreased in this district, a decrease alone does not resolve the legal question of whether the district provides Latino voters with the ability to elect. The change in the predicted rate of victory for Democratic candidates is not material because the district's Democratic performance was not strong to begin with. This was, and it remains, a competitive district. Because the State has not decreased the SSVR or HCVAP strength in District 117 such that Latinos could not elect their candidate, there is no evidence of retrogression.

c. District 35

Both parties agree that under their own standard, District 35 provided Latino voters with the ability to elect their candidates of choice in the benchmark plan. In the benchmark plan, District 35 has 55.3% SSVR and 54.6% HCVAP. State's MSJ, Exhibit 9. In the enacted plan, District 35 has 53.4% SSVR and 52.5% HCVAP. State's MSJ, Exhibit 12. District 35 remains a majority-Latino district in both plans and therefore provides Latinos with the numerical strength, if they vote cohesively, to elect the candidate of their choice. As a result, District 35 qualifies as an ability-to-elect district under the enacted plan.

Using the functional approach advocated by Defendants, District 35 preserves Latino voters' ability to elect candidates of choice to the extent it existed under the benchmark plan. Although District 35 provided Latino voters with the ability to elect, the district did not perform consistently for Democratic candidates under the benchmark plan. Based on the State's reconstituted election analysis, District 35 only performed in 5 out of 10 elections in the benchmark plan and performs in 4 out of 10 elections in the enacted plan. *See* Alford Report,

Docket No. 72 at Table 2. Handley's analysis shows that District 35 scores 80 on the endogenous index and 40 on the exogenous index in the benchmark plan and scores 20 on the exogenous index in the enacted plan. *See* DOJ Response Exhibit 4, Handley Report at 11, Table 4.

Even though the election results for the district do not show that the Latino candidate of choice is consistently elected in racially contested elections, this is not evidence of retrogression. Instead, it is undisputed that Latinos have the ability to elect the candidate of their choice based on the fact they are the majority of the voting-eligible population and registered voters in District 35. The fact that the district does not consistently elect candidates presumed to be the choice of Latinos is not caused by Latinos' lack of ability but, rather, by the fact that Latinos do not vote monolithically for the same candidates in this competitive district. *See* Exhibit 10, Deposition of Jose Aliseda at 56:3-57:12, 60:21-61:11 (explaining that his district is conservative, Latinos do not vote cohesively, and that the Latino community has the ability to elect the candidate of their choice in his district). The slight decrease in predicted electoral performance alone does not prove that Latino voters lack the ability to elect. Because the State has not decreased the SSVR or HCVAP strength in District 35 such that Latinos could not elect their preferred candidates if they vote cohesively, there is no evidence of retrogression.

d. District 41

Likewise, Defendants have failed to demonstrate the existence of a fact issue as to whether the enacted plan retrogresses District 41. District 41 is located in Hidalgo County in South Texas and is currently represented by Representative Aaron Peña, a Latino Republican. Under the State's population percentage approach, it is clear that District 41 offers Latinos the ability to elect the candidate of their choice in both the benchmark and enacted plans. District 41

is most analogous to former District 40 in the benchmark plan and had 69.2% SSVR and 77.5% HCVAP. State's MSJ, Exhibit 9. Under the State's population percentage approach, District 41 continues to be an effective Latino district with 64.6% SSVR and 72.1% HCVAP. State's MSJ, Exhibit 12. Defendants acknowledge that this district continues to be an effective district in both the benchmark and enacted plans. *See* DOJ Response Exhibit 4, Handley Report, Appendix A.

Although DOJ claims it cannot make a determination as to whether District 41 offers Latino voters the ability to elect their preferred candidate, the election data demonstrate that the district continues to be effective even under its proposed election-focused approach. Under the benchmark plan, District 40 performed in 7 out of 10 elections using the State's reconstituted election data. *See* Alford Report., Docket No. 72 at Table 2. Relying on this same data, Handley finds that District 41 scores 100 on the endogenous and 80 on the exogenous indices. *See* DOJ Response Exhibit 4, Handley Report at 5, Table 1. Under the enacted plan, District 41 elects the Latino candidate of choice in 5 out of 10 elections using the State's reconstituted election data. *See* Alford Report, Docket No. 72, Table 2. Similarly, under Handley's analysis, District 41 scores 60 on the exogenous index. *See* DOJ Response Exhibit 4, Handley Report at 11, Table 5. The slight drop in election performance is not significant enough to render this district retrogressive in light of the numeric strength of Latinos. Furthermore, District 41 has elected Representative Peña since 2002. Even though he switched parties after the 2010 election, Defendants have not established that Representative Peña will somehow not continue to be the Latino candidate of choice in District 41. As a result, the State has met it burden to demonstrate that District 41 is not retrogressive.

iii. The "Additional Minority Districts" Identified by the United States Are Coalition Districts that Are Not Protected Under Section 5, and They Do Not Show Retrogression in any Event.

Although the United States identifies four "additional minority (black and/or Hispanic) districts" under the benchmark plan: HD 27, 46, 120, and 149. But only HD 149 is alleged to have a retrogressive effect. Although DOJ alleges that HD 46 and 120 are protected districts under the benchmark plan, DOJ also admits that they are maintained as performing districts in the proposed plan. Those districts therefore do not present a retrogression issue.[17] Similarly, both parties classify HD 27 as an African-American ability-to-elect district under the enacted plan.[18] Under DOJ's functional analysis HD 27 is maintained as a performing district under the enacted plan, while HD 27 represents an additional ability-to-elect district under the State's analysis. Thus, regardless of the standard use HD 27 does not present a retrogression issue.

House District 149 is the only "additional minority district" that raises a legal issue because it is not an ability-to-elect district under either standard in the enacted plan, and the parties dispute whether it qualified as such under the benchmark plan. The United States classifies HD149 as an "ability to elect" district for minorities generally because, although it does not contain a majority of voters from any protected minority group, Anglo voters are in the minority. But the State's decision not to maintain the HD 149 as it existed in the benchmark

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[17] *Compare* U.S. Statement of Genuine Issues ¶ 11, 13 (United States' classification of HD 46 and 120 as "additional minority (black and/or Hispanic) districts" under the benchmark and enacted plans), *with id.* ¶¶ 10, 12 (State's list of Latino and African-American ability-to-elect districts, which does not include HD 46 or 120 under the benchmark or enacted plans).

[18] *Compare* U.S. Statement of Genuine Issues ¶¶ 11, 13 (United States' classification of HD 27 as an "additional minority (black and/or Hispanic)" district under the benchmark plan and a Black ability-to-elect district under the enacted plan), *with id.* ¶¶ 10, 12 (Texas's classification of HD 27 as an African-American ability-to-elect district under the enacted plan but not under the benchmark plan).

plan does not have a retrogressive effect because it is, at most, a coalition district and therefore not an "ability to elect" district for purposes of section 5. Further, the undisputed facts show that HD 149 did not offer voters the ability to elect presumptive minority candidates of choice even under the United States' proposed legal standard.

The text of the VRA does not support an interpretation that would compel states to maintain minority-supported coalitions defined solely by a common political party affiliation. Section 5 protects voters against changes in voting procedure that result in a disadvantage "on account of race or color." 42 U.S.C. § 1973c. The Supreme Court has rejected the notion that section 2 of the VRA protects minority citizens' right to form political alliances. *See Bartlett,* 129 S. Ct. at 1243 (2009) ("Nothing in section 2 grants special protection to a minority group's right to form political coalitions."); *cf. Baird v. Consol. City of Indianapolis,* 976 F.2d 357, 361 (7th Cir. 1992) ("[The VRA] is a balm for racial minorities, not political ones—even though the two often coincide."). Other decisions of the Supreme Court similarly recognize that only in a majority-minority district can the minority group "elect a representative of its own choice" because only then can it "dictate outcomes independently." *Growe v. Emison,* 507 U.S. 25, 40 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993). Courts of appeals have adopted a similar logic in "uniformly" rejecting claims that the Voting Rights Act compels the creation of so-called influence districts. *See Hall v. Virginia*, 276 F. Supp. 2d 528, 535 (E.D. Va. 2003), *aff'd*, 385 F.3d 421, 427-30 (4th Cir. 2004). The Supreme Court later followed suit when it declared "influence" districts beyond the purview of the Voting Rights Act. *See LULAC v. Perry*, 548 U.S. 399, 486 (2006) (Kennedy, J.). Congress has likewise rejected the notion that section 5 requires states to preserve districts in which a protected group constitutes less than a majority. A redistricting plan that fails to maintain a district in which voters of multiple races or

ethnicities are united by a shared partisan preference does not deprive anyone of the right to vote "on account of race or color."

In *LULAC v. Perry*, the Court addressed the so-called "influence" district, holding "that African-Americans had influence in the district . . . does not suffice to state a section 2 claim. The opportunity to elect representatives of their choice . . . requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. . . . If section 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional problems." 548 U.S. 399, 446 (2006). In *Bartlett v. Strickland*, the Court refused to interpret section 2 to protect so-called "crossover" districts, wherein an ethnic minority is said to coalesce with a portion of the majority (assumed to comprise Anglo voters) to elect its candidate of choice. In addition to constitutional concerns, the Court focused on the importance of a minority group's ability to elect candidates without forming political alliances:

> African American [voters] in District 18 have the opportunity to join other voters—***including other racial minorities***, or whites, or both—to reach a majority and elect their preferred candidate. They cannot, however, elect that candidate based on their own votes and without assistance from others. Recognizing a § 2 claim in this circumstance would grant minority voters "a right to preserve their strength for the purposes of forging an advantageous political alliance." ***Nothing in § 2 grants special protection to a minority group's right to form political coalitions***.

Bartlett, 129 S. Ct. 1231 at 1243 (emphasis added, citation omitted). If the potential to elect preferred candidates by joining members of other groups does not establish a minority group's "opportunity to elect" under section 2, it is difficult to imagine how the potential to form a coalition could establish the "ability to elect" protected by section 5.

Congress's 2006 amendments to the VRA confirm that section 5's "ability to elect" standard contemplates only those districts in which a minority group forms a majority. In *Georgia v. Ashcroft*, the Supreme Court held that states could avoid retrogression by substituting coalition or influence districts for safe majority-minority districts, even though minorities in such districts might not be able to elect a candidate of choice. 539 U.S. 461 (2003). Congress added the "ability to elect" language to section 5 to overrule this holding. Notably, Congress did not disturb the Court's holding that states could avoid retrogression by maintaining the same number of majority-minority districts. Thus the result of *Ashcroft* and the addition of the "ability to elect" standard is that section 5 must be interpreted to protect only districts in which a minority group constitutes the majority of voters and therefore has the ability to elect candidates without attracting support from other groups.

A broader reading of section 5 raises obvious constitutional concerns because it would require courts and legislatures to become fixated on race in drawing virtually every district. *See Georgia v. Ashcroft*, 539 U.S. 461, 490–91 (2003) ("[T]he Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life."). Indeed, if the states must draw districts with minority percentages between 15% and 40% to avoid liability, then race will be the "predominant factor" in virtually every redistricting decision. *See Miller*, 515 U.S. at 916. The VRA was intended "to hasten the waning of racism in American politics," *De Grandy*, 512 U.S. at 1020, not to ensure that "race predominates in the redistricting process." *Miller*, 515 U.S. at 916.

In addition to the legal bar to the recognition of such sub-majority districts, there is no evidence that black and Hispanic voters vote cohesively in the Democratic primary so as it make

the Democratic nominee both parties' candidate of choice. See *Growe v. Emison*, 507 U.S. 25, 41 (1993) (demanding heightened proof of cohesion as part of any claim based on claim of "agglomerated political bloc"). In fact, the proof is just the opposite. Black and Hispanic voters do not support the same candidates and often vote in opposition to each other in the primary, as multiple experts have testified in this and related proceedings. *E.g.*, Alford Rep. at 9; Engstrom Dep. at 59:15–22, 63:2–64:12 (disagreeing with DOJ that House District 137 performs for Hispanic voters because their preferred candidate failed to prevail in the democratic primary). Indeed, it is has been well known for some time in Texas "[t]hat there is no cohesion between Black and Latino voters in the primary contests is beyond serious dispute." *Session v. Perry*, 298 F. Supp. 451, 484 (E.D. Tex. 2004), *aff'd in relevant part and rev'd in part sub nom., LULAC v. Perry*, 548 U.S. 399 (2006). This is true for all of the districts identified by Intervenors,[19] which universally rely on cross-over Anglo voters and/or a coalition of minority voters to perform and show no evidence of cohesion.

iv. Even Under the United States' Proposed Legal Standard, HD 149 Did Not Give the Alleged Minority Coalition the Ability to Elect Its Preferred Candidates of Choice.

Even if HD 149 were a potential ability-to-elect district despite the lack of any majority racial or ethnic group, it fails to qualify as such even under the United States' proposed functional approach. The State's reconstituted election data shows that District 149 is not a district that performs well for Democrats, with only 9 out of 48 election wins over the last decade and in racially contested elections. *See* Docket No. 72, Alford Report, Table 2. Defendants'

[19] Intervenors complain that fact issues exist as to the ability of Latinos, African-Americans and other minorities to elect their candidates of choice in Texas House Districts 26, 51, 90, 101, 103, 106, 144, an d 148. They also raise objections as to Congressional District 25.

expert agrees that District 149 (as it was drawn in the benchmark) does not consistently elect the minority preferred candidate of choice (whichever of the three minority groups that could be) in the benchmark plan as it only scores 20 on the exogenous index and 80 on the endogenous index. *See* DOJ Resp. Exhibit 4, Handley Report at 7, Table 3. Defendants' analysis, which is based on the same elections used by the State, demonstrates that District 149 has elected Representative Vo based on the fact that he has been the incumbent since 2005. However, District 149 does not consistently perform as an effective minority district in other racially contested elections. As a result, Defendants have failed to establish a genuine issue of fact or law regarding retrogression in District 149.

v. There Is No Material Question of Law or Fact Regarding African-American-Majority Districts in Plan H283.

The undisputed facts show that Plan H283 does not retrogress African-American voting strength as a matter of law. Under the United States' proposed legal standard, Plan H283 increases the number of African-American ability-to-elect districts from twelve to thirteen. *See* U.S. Statement of Genuine Issues ¶¶ 11, 13. Similarly, under the State's proposed legal standard, the number of African-American ability-to-elect districts increases from eleven to twelve. *See id.* ¶¶ 10, 12. Thus under either party's definition of "ability to elect," African-American voters' ability to elect increases in Plan H283.

IV. THE STATE'S PRESUMPTION OF GOOD FAITH AND LACK OF DISCRIMINATORY INTENT HAS NOT BEEN REBUTTED BY THE DEPARTMENT'S RESPONSE.

DOJ's purported "analysis" of the State's Motion for Summary Judgment and its legal pleadings objecting to the State's redistricting plan reflect the Department's willingness to ignore the law in order to justify a decidedly outcome-oriented approach—an approach that undeniably

eschews constitutionally protected notions of federalism in favor of legally baseless political activism. Further, DOJ's pleadings reveal that in its zeal to oppose the maps enacted by the Texas Legislature, the Department not only ignored the law, but also simply disregarded the evidentiary facts. Indeed, DOJ contends that the State omitted "any discussion of what the Supreme Court itself has set down as guidance for assessing discriminatory purpose in the context of redistricting," *Opp. Mem.* at 28—a claim that selectively ignores no less than eight pages from the State's Memorandum in Support (16-24), which cites two dozen Supreme Court cases.

A. The Standard for Discriminatory Intent Is Clear, Articulable, and Well-Settled

Notwithstanding DOJ's claims to the contrary, the standard for discriminatory purpose, is well-settled. Indeed, federal agencies are not simply empowered to divine "discriminatory purpose" in a misguided effort to justify and advance their desired policy prerogatives. As the Supreme Court has recognized:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (citations, notes omitted).[20] The Court's "because of" nexus reflects a requirement, a factual burden that the DOJ's purported evidence simply does not satisfy—because there is no actual evidence that the Texas Legislature acted with a discriminatory purpose when it enacted the State's redistricting plans. Indeed, for

[20] Although *Feeney* is not a voting rights case, its equal protection analysis is relevant here, in part, because the Court, cited *Village of Arlington Heights v. Metropolitan Houston Dev. Corp.*,429 U.S. 252 (1977), *Washington v. Davis*,426 U.S. 229 (1976), and *United Jewish Organizations v. Carey*, 430 U.S. 144 (1976), the latter of which is a Section 5 decision.

the Legislature to have acted with a discriminatory purpose, the 181-member bicameral body would have specifically desired to enact a map that discriminates against African Americans and Hispanics ***because of*** their color or language—and if such a nefarious plot actually existed, the DOJ would have far more interesting evidence than the circumstantial innuendo it invokes to support its baseless claims.[21] But as *Georgia v. Ashcroft, Shaw v. Reno*, and other large-body legislative cases demonstrate, when genuine discriminatory purpose exists, there is ample evidence of it. Recognizing the total absence of any real evidence of a discriminatory purpose in the record, the DOJ hides behind veiled allusions and rhetorically charged insinuation.

Because it simply lacked any actual, probative evidence of discriminatory purpose, the DOJ outsourced its "discriminatory purpose" analysis to Dr. Theodore Arrington, a retired political scientist, who professed to be an expert on the history of political systems, and statistical analysis of elections and voting patterns. Dr. Arrington, although frequently published over his several decades of work, candidly acknowledged in his deposition that *he* has never authored a scholarly article on voters' intent. Indeed, he testified that he is unaware of *any* political scientist ever having ever done so. Depo. Tr. at 11 ("Q: Who are the recognized experts in your field on intent? A: So far as I know, there are none."), 13 (no political science literature on intent of the legislature). Further, Dr. Arrington claims to have no more voter animus expertise than the average lay person. Consequently, his expert report correctly concedes

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[21] Tellingly *no* Court has found an actual discriminatory purpose in an act of the Texas Legislature since *1973*, when the State's politics and demographics – and, frankly, the South's civil rights record – were of an entirely different makeup. *White v. Regester.* 412 U.S. 755 (1973) (finding that black voters in Dallas County and Hispanic voters in Bexar County were excluded from the voting process through use of multi-member districts). The Department of Justice does not enjoy as unsullied a record, having been found to have knowingly and intentionally discriminated against voters in its application of the Voting Rights Act numerous times in the past 20 years. *E.g., Shaw v. Reno,* 509 U.S. 630 (1993); *Northwest Austin Municipal Utility District v. Holder,* 129 S. Ct. 2504, 2511 (2009);, *Miller v. Johnson,* 515 U.S. 900 (1995). Many of those cases, unfortunately, involved instances in which states tried to follow DOJ dictates, only to find themselves unfairly tarred as violators of the Fourteenth Amendment. *E.g., Bush v. Vera,* 517 U.S. 952 (1996).

that he adduced no evidence that voters base their electoral decisions upon racial consideration—or otherwise discriminate against candidates based upon their race or ethnicity. *Report*, ¶¶ 140, 198 ("I neither claim nor deny that this intent is motivated by racial or ethnic animus."). Instead, Dr. Arrington's expert report on the *Village of Arlington Heights* is less an expert report than it is a discussion of the relevant factors for evaluating discrimination.

B. There is no genuine issue of material fact with respect to discriminatory intent in the enactment of the House Plan

Dr. Arrington's first focuses on the alleged disparate impact of the Texas House plan: "the proposed [Texas House] plan contains at least four, and perhaps, five fewer minority ability-to-elect districts than exist in the benchmark plan." *Opp. Mem.* at 31. As the State explained in great detail, *supra,* Dr. Arrington's claim is objectively incorrect.

Next, Dr. Arrington contends that "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." *Opp. Mem.* at 31. This claim is also not supported by the record. Indeed, the State presented uncontroverted evidence that the percentage of noncitizen voting age minorities in the Dallas-Fort Worth area (the "Metroplex") is markedly higher than other parts of the state. Arrington Depo. at 232. Because these minorities are non citizens, they cannot vote and therefore cannot contribute to a cohesive minority voting bloc. Moreover, while the Legislature contemplated creating an additional Latino opportunity district in the Metroplex, it was impossible to do so without violating constitutional principles in *Shaw*—principles that the DOJ has conveniently chosen to ignore.[22]

[22] Like many of the issues raised by Dr. Arrington, whether a new opportunity district should be created in the Metroplex is a question more properly addressed under the vote dilution standards of section 2. If the State was *required* to draw such districts based on all the evidence (rather than, as here, Dr. Arrington's and Dr. Handley's

Next, the Department concedes that it found no evidence of "cracking" (the splitting of minority groups).Instead, DOJ points to what it terms the "visually subtle" technique of underpopulating some districts while overpopulating other districts in the Metroplex and Harris County. Although Dr. Arrington conceded that the "whole county rule" would have some effect on this variance, he argues that "[a] more rational approach would be to under-populate minority districts." Arrington Decl., ¶ 107. To support his contention, Dr. Arrington claims both that the U.S. Census Bureau sometimes undercounts minorities—and that the minority community's growth rate outpaces the Anglo population. *Id. That* approach is fraught with constitutional concerns, as a legal matter, intentionally underpopulating minority districts is constitutionally suspect at best. Further, it would have raised the specter of "*cracking*—which the DOJ has conceded is *not* present in this case. Furthermore, even the DOJ's *Guidance* concedes it is never improper to use the most recent "Public Law 94-171 Census data." Accordingly, the States's reliance on that data cannot be the basis for a retrogression claim against the State.

Next, Dr. Arrington alleges that (1) in Harris County, two incumbents were paired into a single district, and that both are "the candidates of choice in Hispanic-controlled districts, either alone or as part of a cohesive coalition." Pairing these incumbents was necessary in Harris County under the Texas Constitution's County Line Rule. Harris County, which was assigned 25 districts in 2000 (based on an erroneous, but unchallenged application of the County Line Rule) was only entitled to 24 districts in 2010. Dr. Arrington effectively conceded this point in his deposition, when he acknowledged the Texas Constitution's County Line Rule was properly followed. *E.g., Depo.* at 95. Thus, for the DOJ's argument to have merit, the State would have

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recitations of the plaintiffs' assertions in then the three-judge court trying the Section 2 case in San Antonio is far-better suited to address the question than this one, whose role is markedly more limited.

had to subvert a long-standing, race neutral redistricting principle–which predates the 1876 Constitution. However, the Voting Rights Act jurisprudence does not pre-empt state law when, as here, the Act and traditional redistricting principles can be harmonized.[23] Significantly applying a different set of rules to Harris County *solely on the basis of race* would have amounted to an overt *Shaw*-type violation of the Fourteenth Amendment. *Shaw v. Reno*, 509 U.S. at 644.

The DOJ's objections to these two Harris County Democrats—both of whom represent "unprotected" non-majority-minority districts—conveniently overlooks the ***six*** pairs of Republicans whose districts were combined in other parts of the state. *Cf. Cox v. Larios* , 542 U.S. 947 (2004) (use of pairing as a partisan political device is material when majority party uses it to eliminate the *other party's* seats, not its own); *Bartlett v Strickland*, 129 S. Ct. at 1243-46 (multi-ethnic districts are not "protected" ones under the Act). Had Texas intended to use pairing as a tool to suppress or abridge minority voting strength, it could have paired both incumbent Democrats with *Republicans* in Republican-leaning districts that would have eliminated *both* Democrats' likely reelection. Here, two districts in which an Asian Democrat and an Anglo Democrat rely upon several ethnic groups to "pull, haul and trade" in order to get their candidate of choice elected, are being combined into a very strong, and very reliable Democratic seat.

The next allegedly improper act cited by the DOJ is the splitting of precincts in HD 41, where the incumbent, Representative Aaron Peña is not only Hispanic—but also happens to be a Republican. The DOJ points to an apparent discrepancy between of Rep. Peña's recollections

[23] Several witnesses explained the harmonization of federal law, including one-person/one vote principles, with the County Line Rule**.** *E.g.* Downton Depo. at 81 (discussing "acceptable deviation").

and the recollections of legislative staff who drew the State's redistricting map. For summary judgment purposes, the Court can take as true the assumption that "political data is not available at the census block level, [and] that the only remaining possibility is that the State drew the lines on the basis of race." *Opp. Mem.* at 32. The State is undoubtedly aware that Hidalgo County is heavily Hispanic. Consequently, the mapdrawers would have been able to identify Hispanic areas of the HD 41. Further, even if mapdrawers were cognizant of the motion that, in certain areas of the state, Hispanics are loyal democrats, those facts alone cannot form the basis of a discrimination claim. *Hunt v. Cromartie*, 526 U.S. 541, 551 (1994) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.").

But the DOJ's objections to HD 41 fail because the Legislature maintained an absolute ***supermajority*** Hispanic Citizen Voting Age Population in District 41 (over ***70%***)—and did so while harmonizing its legitimate goal of attempting to protect an incumbent *Hispanic* elected official. By definition, if the Hispanic voters in HD 41 vote even remotely like the DOJ expects them to "perform,"—voting cohesively, monolithically, and exclusively for Democratic candidates—the Hispanic community will undoubtedly have the voting strength to elect its candidate of choice . Of course, Rep. Peña has himself been Hispanic voters' candidate of choice for the last decade. Yet now, because Rep. Peña happens to be a Republican, the DOJ claims he is no longer the Hispanic community's candidate of choice.

Next, the DOJ expresses similar objections to House District 117 and Congressional District 23.[24] Congressional District 23 was drawn by a three-judge panel in 2006 with the express purpose of electing an Hispanic voters' candidate of choice. But the district failed to behave as predicted and sent Hispanic Republican Francisco "Quico" Canseco to Congress in 2010. "Again," writes DOJ "the State removed high turnout Hispanic voters and replaced them with Hispanic voters known to turn out at a lower rate. . . . And again the State maintained the superficial appearance of a Hispanic ability-to-elect district by maintaining Hispanic population levels." *Opp. Mem.* at 32. The Court may, once more, take these facts as true, for they have little bearing on genuine discriminatory intent.

As noted *supra*, the State does not claim that CD 23 was a genuinely performing district in the benchmark. Indeed, Hispanic voters undoubtedly had the ability to elect their candidate of their choice—though Intervenor LRTF witness Richard Engstrom said, this was an "opportunity that wasn't seized." *Rebuttal Rep. (*W.D. Texas) at 27. Indeed, in the three "endogenous" elections for CD 23, the first, a special run-off went to a Democrat in a very narrow, plurality decision. The second went to the same congressman as an incumbent during the heavily Democratic year of 2008. Most recently, Congressman Canseco was elected by voters of CD 23 during an election cycle that favored Republicans. In the "old," pre-2006 CD 23, Hispanic Republican Congressman Henry Bonilla had held the seat for fourteen years. (a fact of which this Court may take judicial notice). And in the 10 elections the State used for its analysis during the redistricting process, the purported Hispanic candidate of choice won only three times in ten under the "old" district—which is not markedly better than the one in ten ratio

[24] Although a more thorough discussion of DOJ's discriminatory purpose allegations against the congressional plan are considered later, CD 23 is discussed here.

under the new map—well below the "better than half" standard that *Dr. Arrington* seems to advocate. Depo. at 229.

More fundamentally, the DOJ's suggestion that "the State maintained the superficial appearance [of] . . . Hispanic population levels" is misleading—because it incorrectly suggests the Legislature left a bare majority in place. In fact, the Legislature actually ***increased*** both the Hispanic Citizen Voting Age Population (by .1 from a strong majority 54.4 to 54.5) and the SSVR % (from 52.6 to 54.8). Tellingly, the DOJ's expert, Dr. Handley, insisted that the CD 23 should have been *packed* with Hispanics in a fashion that would have constituted improper racial redistricting (HCVAP from 54.4 to ***67.5%***). Further, even if CD 23 had been improperly packed as Dr. Handley suggested, her proprietary "Exogenous Index" at only 80. While the Department appears to pay little heed to the traditional redistricting principle of protecting incumbents, the Response Memorandum points to no evidence that discriminatory intent affected the Legislature's decision to protect an incumbent Republican Hispanic congressman in a district that has been represented ***by*** a Hispanic Republican for 16 of the last 20 years.

Texas House District 117, which the DOJ claims was altered in a manner similar to Congressional District 23, *Opp. Mem.* at 32, involves yet another Hispanic legislator, Rep. John Garza, who happens to be a Republican. Although Rep. Garza is Hispanic, DOJ somehow argues that the Legislature acted with racial animus when it attempted to ensure the representative is reelected. Again, the question is primarily one of retrogression, but the statistics which once more show an 8.5% increase from a strong 58.8% Hispanic Citizen Voting Age Population to 63.8%. Nonetheless the Department's Memorandum suggests—that the Legislature created a slim, rather than a strong majority of Hispanic voters. If Hispanic voters are as cohesive as DOJ claims, they cannot be prevented from electing their candidate of choice.

And if *turn-out* is the problem, that is surely beyond the province of legitimate state action absent any indication that the State has taken any action to suppress voter registration or participation. *Cf. United Jewish Organizations v. Carey*, 430 U. S. 144, 165 (1977) (rejecting a Hasidic group's challenge to a redistricting plan and noting "Nevertheless, there was no fencing out the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength.") (citation omitted).

C. The "Sequence of Events" pertaining to enactment of the House Plan provides no genuine issue of material fact with respect to actual discriminatory intent against Hispanics or African Americans

The DOJ also argues that the House redistricting process excluded minority members and was therefore not "effectively open to minority representatives of choice." *Opp. Mem.* at 33. Even if every fact the Department asserts about the legislative process, were true, the DOJ's evidence only reveals partisanship—which is not prohibited by the Act. Indeed, the DOJ produces no evidence that actions were taken by the legislature "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279. The difference is marked, and underscores the basic inapplicability of 1970s racial precedents to twenty-first century Texas politics. The Republican majority in both houses actively sought to protect Hispanic (and African American) members of their party, and, at the same time, let stand or strengthen the likelihood of success of every majority-minority seat (or replacement seat created when districts were altered) as discussed *supra*. This is a far cry from 1970s-era exclusion of minority elected officials and organizations from the process. The fact that most floor motions offered by "minority legislators" were voted down or tabled is beside the point. Indeed, the fact that "Amendments by minority legislators to increase the number of ability-to-elect districts were quickly tabled," merely describes the ordinary legislative process—not

invidious discriminatory intent. *Opp. Mem.* at 33. Dr. Arrington admitted that he did not look into whether Hispanic and African American Republicans were an integral part of the process, or voted for the redistricting plan. The evidence (from the same House Journal cited by the Department) is clear. These minority elected officials were undeniably integrally involved in the process-and voted for the plan. *See House Journal Excerpts. Exhibit to Motion in Supp. of Motion for Sum. Judg.* Put simply, political animus may have – indeed, certainly -- infused the legislative session, but racial discrimination did not. *Hunt v. Cromartie*, 526 U.S. at 551.

D. There is no genuine issue of material fact regarding lack of discriminatory intent with respect to the process by which the House Plan was enacted

The Department's next *Arlington Heights* factor – supposed departures from routine process – once more illustrates how little genuine evidence it is able to adduce in response to the Motion for Summary Judgment. Taking all of its evidence as true, the Department has shown that a busy legislature which considered over 7,000 bills in its extremely limited 140-day session (during the first 60 days of which, only emergency bills may be acted upon), moved quickly to enact the House Plan, after attempting – and, in large part, succeeding – at getting input from all legislators (of both parties), with respect to their proposed districts. Assuming Dr. Arrington's conclusion is correct and the map-drawers "broke from a consensus or partisan motivation and drew lines on a purely racial basis when partisan data was unavailable," *Opp. Mem.* at 34, this suggests, at worst, that they recognized the importance of race in a Voting Rights Act-saturated process and in a state where the Department's allegations of bloc voting characteristics suggest that would have been a natural course of action. Indeed, in the heavily-Hispanic counties where the allegation appears to be leveled (Hidalgo, Bexar, Nueces), it would have been difficult for the map-drawers *not* to have assumed that most census blocks were Hispanic, and that such voters

leaned democratic. Moreover, it is difficult to imagine what unique advantage would have inured from doing so.

The Department's strangest argument concerns the County Line Rule, whose application is a question of law, not fact. Here, the contention is that the State "inconsistent[ly] appli[ed] it in Nueces and Harris counties, when, in fact, it applied the Rule in a rigorous, race (and partisan-) neutral way across the State. According to DOJ, the State should have apportioned Harris County a 25th district, and Nueces a third one, when their populations –according to the same standard applied to the other 252 counties – did not call for them. The "inconsistency," of course, in light of the provision itself and the two leading cases construing the Rule, would have come from treating those two counties differently *solely on account of race*. Tex. Const. art. III, § 26; *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981); *Smith v. Craddick*, 471 S.W.2d 375 (Tex. 1971). Dr. Arrington simply misunderstands the law when he suggests that the constitutional Rule is perhaps "merely a strong suggestion, when following the rule conflicts with compliance with § 5 and other Federal requirements." Report at ¶ 36. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("[S]trict scrutiny applies when race is the 'predominant' consideration in drawing the district lines such that 'the legislature subordinates traditional race-neutral districting principles to racial considerations.'") (citation and internal abridgments omitted).

E. There is no genuine issue of material fact regarding lack of discriminatory intent with respect to the contemporaneous statement by individual House members during the period in which the House Plan was enacted.

The Department pulls out all stops with its final objection to the House Plan contention, insisting that comments supposedly attributed to certain House members are "further indicia of discriminatory intent." *Opp. Mem.* at 35. It does so with a series of declarations that so plainly flout Fed. R. Evid. 802, the Court would be well within its authority to reject them outright.

They are, in each instance, quite literally, "statement[s], other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," Fed. R. Evid. 801(c)(3), none of which were made available to the State at a time in which it could have inquired into the *bona fides* of the allegations – and after several, repeated, requests that the Department make available its purely *factual* bases for its allegations.

The notion that the United States would argue that a genuine issue of material fact exists on the basis of a series of hearsay affidavits regarding the comments of various legislators requires little further comment, except to note that such declarations do not give rise to any *genuine* issue of material fact.

Even if the Court were to credit these affidavits as both admissible and true, they indicate nothing more than that certain legislators were aware that the Voting Rights Act governed the legislative process and that race was the integral aspect of that Act. In any event, there were clearly Republican legislators participating in the 2011 redistricting process. To the extent these stray comments are the sole evidence the DOJ demands this Court consider as evidence of "because of" rather than "in spite of" racial animus in the redistricting process, it is clear that there is no genuine issue of material fact as to discriminatory intent in the enactment of the House Plan.

F. There is no genuine issue of material fact with respect to the "impact" of the Congressional Plan

The Department's Congressional Plan discussion reflects one of the central themes of Dr. Arrington's report, in that it reflects that a section 2 case has been brought and is pending in the United States District Court for the Southern District of San Antonio. No dilutive effect has been independently identified by Dr. Arrington; rather, he relies on evidence introduced by

plaintiffs in the section 2 proceeding. The evidence, though, consists of demonstrative plans that neither he nor DOJ subjected to the requisite *Gingles* or *Shaw* analysis. Arrington Depo. at 112-13, 116-17; DOJ *Guidance* (*Shaw* analysis not a part of its preclearance process). Under *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) (*Bossier I)* this evidence ***cannot*** be dispositive, 520 U.S at 477. *Bossier I* reiterated that the focus of a section 5 case is not a hypothetical "better" plan, especially one untested by the compactness, community of interest and bloc voting tests currently *pending* in San Antonio; rather, it is the benchmark plan which is squarely before this Court, and upon which the record is clear and complete.

The Department then reiterates its contention that Congressional District 23, which has been a Republican district for 16 of the last 20 years, and which has wholly failed to perform consistently even though redrawn by a federal court five years ago, was somehow manipulated for the purpose of discriminating on the basis of race, when in actuality the purpose was to protect republican incumbent Francisco Canseco. That district is discussed *supra* in response to its discussion by the DOJ, and its strong Hispanic majority need not be re-argued here.

Odder, however, is the Department's reliance upon the *Bush v. Vera* holding that "race may not be used as a proxy for political persuasion" in its discussion of the districts drawn in the Harris County and the Dallas-Fort Worth area. *Opp. Mem.* at 38; *Bush v. Vera*, 517 U.S. at 968. In *Bush,* of course, the State of Texas was taken to task for trying to adhere to the DOJ's guidance when creating reliably "safe" districts for African Americans in precisely the same place: Dallas County. Here, the opposite is true. Racial data were used as ***racial data*** to ensure that the majority-minority districts were not unlawfully packed; while the DOJ freely asserts that "there is substantial enough population to form the core of an additional majority district," it does so without benefit of the *Shaw* and *Gingles* analyses that the State ***did*** perform and proved

that no ability-to-perform district could lawfully be drawn. Doug Davis Depo. 82-84; Interiano Depo (W.D. Tex) I, 135. Once more, even taking the Department's assertions as true for the purposes of this Motion, it has only indicated that a genuine section 2 dispute exists in San Antonio, not a section 5 dispute here.

G. The historical background of the Congressional Plan gives rise to no genuine issue of material fact; indeed, the distinctions between it and its predecessor provide an ideal basis for summary judgment

The Department notes that *LULAC v. Perry*, 548 U.S. 399 (2006), concerned CD 23, and the matter at bar concerns District 23, remarking that it sees a "stark resemblance" between the old District 23 that was redrawn in *LULAC*, and the enacted District 23. In fact, the differences are marked, and illustrative of the fact that Texas shouldered its duties under the Voting Rights Act, even in the extremely partisan environment in which it found itself during the recent legislative session.

There were two problems with District 23 as drawn by the Texas Legislature in 2003. First, the Legislature, as the DOJ quotes but fails to analyze, "intentionally drew [it] to have a nominal Latino voting-age majority (without a citizen voting-age majority) for political reasons." What had been a Hispanic Citizen Voting Age Population of 57% was "dropped to 46%, though the Latino share of the total voting-age population remained just over 50%." *Id.* at 423-24. But even *that* would have been acceptable, had a reasonably compact replacement district been created that included the hundred thousand or so Hispanic voters that had been taken out of the district. Instead, the Legislature created the "bacon-strip," *id.* at 498, a 300-mile district that purported to find a community of interest existing between rural Rio Grande Valley Hispanics, and inner-city urban Hispanics in the Austin area.

In the instant case, the benchmark citizen voting age population is maintained (it actually increases slightly from 58.4 to 58.5%, and the SSVR% is increased from 52.6% to 54.8%. Moreover, the Legislature recognized what the data were telling it; a longtime conservative part of the state would not elected a Democrat even when it was drawn by a three-judge court for that express purpose. Another fundamental difference exists between the plan at issue in LULAC and this case. The recently enacted plan also presents an additional Latino opportunity district, encompassing a much more cohesive grouping of Hispanic voters in the Austin – San Antonio region (District 35). The voting analysis upon which DOJ jointly relies suggests that the District will almost certainly elect the Hispanic candidate of choice.

H. The "sequence of events" leading to the enactment of the Congressional Plan do not give rise to any genuine issue of material fact

The Department's argument with respect to the enactment of the Plan is easily stated and easily addressed; indeed, simply quoting its assertion nearly settles the issue.

> The majorities in the House and Senate rejected any amendments to the Redistricting Committees' plans 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.

Opp. Mem. at 40-41. This argument is essentially one of maximization. That is, DOJ demands an inference of discriminatory intent because the State did not create *more* districts than it was required to. The Supreme Court rejected a less artfully worded maximization policy in *Miller v. Johnson*, 515 U.S. at 924 ("adhering to other districting principles instead of creating as many majority-minority districts as possible does not support inference [of unconstitutional discrimination]"). In enacting the 2006 amendments to the VRA, the Senate was more direct: "The [section 5] language 'any discriminatory purpose' does not permit a finding of

discriminatory purpose that is based, in whole or part, on a failure to adopt the optimal or maximum number of majority-minority the legislature's failure to adopt a plan that created additional minority opportunity districts does not permit an inference of discriminatory intent.

Moreover, the Department's "facts," taken as true for summary judgment purposes, do not show that minority candidates were not given a chance to participate; rather, they simply demonstrate that they were out-voted, on political grounds. And indeed many of the rejected plans created more minority districts than were required, many of which would not have performed as minority districts, suffered from *Shaw* concerns, or simply replaced likely republican victories with democratic ones. That is not a section 5 issue; it is a political one.

I. The "procedural and substantive facts" surrounding the enactment of the Congressional Plan do not give rise to any genuine issue of material fact

Taken as true, the Department's factual showing regarding the development and enactment of the Congressional Plan does not give rise to a genuine issue of material fact precluding summary judgment. Indeed, the Department has once more conflated race with partisanship. To the extent the minority representatives perceived themselves as having been afforded little access to the process, it was not on the basis of their race, but their party. To the extent that Hispanic Republican members of both the Congressional delegation and the Texas Legislature had more input than their democratic colleagues, racial animus did not undergird the putative "discrimination," political affiliation did. And the DOJ's principal evidence of that discrimination is telling: "a process . . . far less open than it had been in the past." *Opp. Mem.* at 41. Yet, in the preceding paragraph, the same legislators supposedly closed out from the process, consistently found their amendments voted down. In fact, they were a part of the process, but it was a political one that rewarded a party enjoying a two-to-one majority in the

preceding cycle. Conclusory statements regarding a process that was allegedly more closed than in the past do not give rise to an inference of discriminatory intent, and does not bar summary judgment.

J. The "contemporaneous statements" leading to the enactment of the Congressional Plan do not give rise to any genuine issue of material fact.

The Department's excited discussion of supposedly "riveting circumstantial evidence" involving various e-mails between Congressional staff members and State staff members is illustrative of how little genuine factual support it has for its opposition to the Motion. With respect to each of the messages, Dr. Arrington, the Department's designated "motive and intent" expert,[25] agreed that there was nothing unethical, inappropriate or particularly unusual about them. Arrington Depo. 213-17. The emails show nothing improper, and demonstrate only the uncontested fact that individuals involved in the congressional redistricting process (including various representatives whose districts were at issue), recognized that racial demographics were going to be an important part of the redistricting process, as they have been since the VRA was enacted. DOJ's suggestion that this evidence would preclude summary judgment is risible.

K. There is no genuine issue of material fact as to the lack of discriminatory intent on the part of the State of Texas.

Having made a *prima facie* case for enactment of legislation of the sort that is recognized as a core function of a state's responsibilities, the State of Texas is entitled to a presumption of good faith in its legislative processes. *Miller*, 515 U.S. at 915. Here, there is no substantive evidence that would give rise to a genuine issue of material fact precluding summary judgment.

[25] A title he freely eschewed and a field different from the statistical and historical election analysis to which he devoted his professional career.

For this reason, the State is entitled to summary judgment as to the issue of lack of discriminatory purpose attending its 2011 legislative redistricting plans.

For the reasons stated herein and in the State's underlying Memorandum, the State of Texas respectfully prays that the Court grant summary judgment and preclear its redistricting plans.

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