IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., In His Official Capacity As Attorney General Of The United States, Defendants, WENDY DAVIS, *et al.*, Defendant-Intervenors, MEXICAN-AMERICAN LEGISLATIVE CAUCUS, Defendant-Intervenors, GREG GONZALEZ, *et al.,* Defendant-Intervenors, TEXAS LEGISLATIVE BLACK CAUCUS, Defendant-Intervenor, TEXAS LATINO REDISTRICTING TASK FORCE, Defendant-Intervenor, TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Defendant-Intervenors.	)	No.1:11-CV-1303 (RMC-TBG-BAH) (three-judge court)

DEFENDANT-INTERVENORS WENDY DAVIS'AND LULAC's POST-TRIAL BRIEF

The defendant-intervenors Wendy Davis, *et al*., and LULAC respectfully submit this post-trial brief regarding the State of Texas' proposed state senate plan and the proposed congressional plan.

ARGUMENT

It is axiomatic that in a Section 5 declaratory judgment action such as this one, the State of Texas bears the burden of proving that its enacted plans "do not have the purpose and will not have the purpose or the effect of discriminating on the basis of race, color, [or membership in a language minority group]." 42 U.S.C. 1973c; *Georgia v. United States*, 411 U.S. 526, 538 (1973); and *Pleasant Grove* v. *United States,* 479 U.S. 462 (1987).[1] The Supreme Court has characterized the burden of proving the absence of discriminatory purpose and effect as a "difficult" one. *Bossier Parish School Board v. Reno*, 520 U.S. 471, 480 (1992) (quoting *Elkins* v. *United States,* 364 U.S. 208, 219 (1960) ("[A]s a practical matter it is never easy to prove a negative").

With regard to whether an enacted redistricting plan is free of a racially discriminatory purpose and should be precleared, the Court has made clear that three-judge district courts in Section 5 preclearance cases such as this one should apply the analytical framework of *Village of Arlington Heights v. Metropolitan Housing Corp*., 429 U.S. 252, 266 (1977). See *Bossier Parish v. Reno, supra*, at 488. The Court observed in *Bossier supra*, that the task of determining whether a redistricting plan (or any other voting change) is free of a racially discriminatory purpose is a "complex" one requiring a "'sensitive inquiry into such circumstantial and direct evidence as may be available.'

[1] Section 5 of the Voting Rights Act "was enacted as a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. . . . Congress therefore decided, as the Supreme Court held it could, to shift the advantage of time and inertia from the perpetrators of the evil to its victim, by freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory. *Beer* v. *United States,* 425 U.S. 130,140 (1976) (quoting H. R. Rep. No. 94-196, pp. 57-58 (1970))." *Bossier Parish School Board v. Reno*, 520 U.S. 471 (1996) (internal quotation marks omitted).

Arlington Heights, 429 U. S. [252], at 266 [1977]." *Bossier Parish School Board v. Reno, supra*, at 488. In *Bossier, supra*, the Court noted that the *Arlington Heights* framework had been applied in its prior decisions determining intent issues in section 5 preclearance declaratory judgment actions like this one: "[T]he *Arlington Heights* framework has also been used, at least in part, to evaluate purpose in our previous §5 cases. See *Pleasant Grove,* 479 U. S., at 469-470 (considering city's history in rejecting annexation of black neighborhood and its departure from normal procedures when calculating costs of annexation alternatives); see also *Busbee* v. *Smith,* 549 F. Supp. 494, 516-517 (DC 1982), summarily aff'd, 459 U.S. 1166 (1983) (referring to *Arlington Heights* test); *Port Arthur* v. *United States,* 517 F. Supp. 987, 1019, aff'd, 459 U.S. 159 (1982) (same)." *Bossier Parish School Board v. Reno, supra*, at 488.

With regard to assessing discriminatory intent, the Court noted in *Bossier Parish, supra*, that the 'important starting point' for assessing discriminatory intent under *Arlington Heights* is "the impact of the official action, whether it bears more heavily on one race than another. 429 U. S. at 266 (citing *Washington* v. *Davis,* 426 U.S. 229, 242 (1976))." The Court further observed that

> [i]n a §5 case, 'impact' might include a plan's retrogressive effect and …its dilutive impact. Other considerations relevant to the purpose inquiry include, among other things, 'the historical background of the [jurisdiction's] decision'; '[t]he specific sequence of events leading up to the challenged decision'; '[d]epartures from the normal procedural sequence'; and '[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body.' 429 U.S. at 266-268.

Bossier Parish School Board, supra, at 489.

Whether a redistricting plan is free of a racially discriminatory <u>effect,</u> and therefore should be precleared depends on whether the plan "would lead to a retrogression in the

position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States,* 425 U.S. 130, 141 (1976).[2] In addition to retrogression, proof that a redistricting plan would result in a dilution of minority voting strength is also a discriminatory effect that is relevant to assessing the issue of racially discriminatory purpose. *Bossier Parish School Board v. Reno, supra*, at 487.

The State of Texas takes the position that its intent in enacting the various redistricting plans at issue was a partisan one, not a racial one. As we explain below, there is overwhelming evidence that the congressional and senate plans were driven by a racially discriminatory purpose. In a case involving a state legislature, there will most always be mixed motives at work. But the fact that there may have been other motives besides racial discrimination does not warrant preclearance. As the United States correctly observed in this case in opposing the state's motion for summary judgment, "intentional discrimination encompasses actions that purposefully discriminate to achieve an otherwise permissible aim." United States' Memorandum of Points and Authorities, Document 79-2 (October 25, 2011) at p. 41. In this regard, the United States cited Judge Kozinski's opinion (concurring in part and dissenting in part) in *Garza v. Los Angeles County*, 918 F.2d 763 (1991). In that case, Judge Kozinski observed that "the single-minded pursuit of incumbency [ran] roughshod over the rights of protected minorities." *Id.* at 778. Judge Kozinski also noted

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[2] In *Beer,* the Supreme Court concluded that the city of New Orleans' redistricting plan, which created one district with a majority of voting age blacks where before there had been none, was not retrogressive and thus had no discriminatory "effect" within the meaning of Section 5. *Beer v. United States*, *supra*, 425 U. S. at 141-142.

> "[t]he careful findings of the district court graphically document the pattern--a continuing practice of splitting the Hispanic core into two or more districts to prevent the emergence of a strong Hispanic challenger who might provide meaningful competition to the incumbent supervisors. The record is littered with telltale signs that reapportionments going back at least as far as 1959 were motivated, to no small degree, by the desire to assure that no supervisorial district would include too much of the burgeoning Hispanic population.
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> Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for political challengers; incumbents greet the emergence of such power bases in their districts with all the hospitality corporate managers show hostile takeover bids. What happened here--the systematic splitting of the ethnic community into different districts--is the obvious, time-honored and most effective way of averting a potential challenge.

Garza, supra, at 778-79. The Davis Intervenors submit that this type of analysis of the intent issue is correct and should be applied here. Where, as here, Anglo incumbents took advantage of their position as decision makers in the redistricting process so as to assure themselves a secure seat at the expense of emerging minority ability to elect districts, such conduct violates the Constitution. *Garza v. Los Angles County, supra. Cf. Bush v. Vera,* 517 U.S. 952 (1996) ("political gerrymandering …accomplished in large part by the use of race as a proxy" held violative of the Equal Protection Clause of the Fourteenth Amendment). And when a state engages in intentional discrimination that violates the Constitution, it also violates the Voting Rights Act and preclearance cannot be granted. *Beer v. United States, supra.*

1. **Applying the Analytical Framework of *Arlington Heights*, the State of Texas Has Failed to Prove the Absence of Racially Discriminatory Intent.**

There is powerful and overwhelming evidence that the State of Texas enacted its state senate and congressional plans with a racially discriminatory intent and that each

plan will have a retrogressive, discriminatory effect on minority voters. Indeed, in the case before this Court, there is evidence that *all or nearly all* of the *Arlington Heights* factors are present: (1) The impact of the decision; (2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; (3) the sequence of events leading up to the decision; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5) contemporaneous statements and viewpoints held by the decision-makers. *Village of Arlington Heights, supra*, at 266–68. In such circumstances, the State has failed to meet its burden of proof as to both the senate and congressional plans and preclearance should be granted.

i) **The Impact Of The Decision.** As noted in the Davis Intervenors and LULAC's proposed findings of fact regarding the state senate plan, a strong coalition of African American and Hispanic voters emerged just before the 2008 elections and elected the candidate of their choice to office in 2008. That coalition reflected the growing minority population in SD 10 and recognition by black and Hispanic leaders that they could impact the 2008 state senate election.

The State unquestionably fractured the cohesive minority voting population in SD 10 when they drew the state senate plan. See Intervenors' Proposed Findings of Fact ¶s 4-8, 11-12, and 14-15. This had the effect of diminishing the voting strength of blacks and Hispanics in SD 10, a fact Dr. Alford, the state's expert, conceded. Proposed Findings of Fact ¶52. See also Proposed Findings of Fact ¶s 43 and 50. This admission is particularly important because such a weakening or dilution of minority voting strength is a strong indication of racially discriminatory purpose. As the Court observed in

Bossier Parish School Board v. Reno, supra, "a jurisdiction that enacts a plan having a dilutive impact is more likely to have acted with a discriminatory intent to dilute minority voting strength than a jurisdiction whose plan has no such impact." 520 U.S. at 587. Indeed, "t[]he fact that a plan has a dilutive impact therefore makes it 'more probable' that the jurisdiction adopting that plan acted with an intent to retrogress than 'it would be without the evidence.'" *Ibid*.

Similarly, the State's enacted congressional map (C185) in the Dallas-Tarrant counties area fractures or cracks minority neighborhoods into four different congressional districts: CD 26, CD 12, CD 33, and CD 6. See Proposed Findings of Fact ¶s 12-18 at pp. 40-43. Each of those congressional districts is bizarre in shape. These four congressional districts (26, 12, 33 and 6), each of which is dominated by Anglo Republican voters, take on these highly unusual shapes to unnaturally avoid the creation of a majority-minority district or districts in the North Texas area.

The type of minority population fragmentation that took place in dismantling SD 10 in the senate plan, as well as the cracking of minority population in North Texas under the congressional plan is almost identical to the type of fracturing of the minority population that was found violative of Section 5 in *Busbee v. Smith*, 549 F. Supp. 494 (D.C. 1982), summarily aff'd, 459 U.S. 1166 (1983). In that case, a three-judge court refused to grant preclearance to Georgia's congressional plan and stated:

> In this case, the state fragmented the large and contiguous black population that exists in the metropolitan area of Atlanta by splitting that population between two Congressional districts, thus minimizing the possibility of electing a black to Congress in the Fifth Congressional district. The impact of this of this decision is probative of racial purpose.

Busbee v. Smith, *supra* at 516-517.

In the case of SD 10 in Texas' senate plan, even though SD 12 in the benchmark map exceeded the ideal population of a senate district by more than 200,000 persons, the state's enacted map moved over 53,000 people from SD 10 into SD 12, of whom 89.5% were Hispanic or black. In addition, 104,703 Tarrant County residents formerly in SD 10 have now been stranded in SD 22, which runs south over 120 miles from Fort Worth to south of Waco. Of these persons, over 80% (84,093) are minorities (78.2% black and Hispanic and 2.1% Other). This type of fracturing or cracking of the minority population in SD 10 is similar to that described by the Court in *Busbee v. Smith, supra*, and is probative of a racially discriminatory purpose. See Proposed Findings of Fact ¶s 45-51 at pp. 31-32.

Similarly, the tremendous growth of minority population in the Dallas-Tarrant counties region, coupled with the overall loss of Anglo population in the two county area, forced the State of Texas to create bizarrely-shaped racially gerrymandered congressional districts dominated by Anglos in order to prevent the creation of a naturally occurring majority-minority district or districts in that area. Under the state's plan, there is only one minority ability to elect district in North Texas (CD 30—which is packed with excessive minority population beyond what is needed to maintain an ability to elect district and thus wastes minority votes). As a result of the State's failure to create one or two new minority ability to elect districts in the Dallas-Tarrant counties region, approximately one and half million blacks and Hispanics in that area are cracked and stranded in districts controlled by Anglo voters. Such discriminatory effects are strong indicia of racial purpose, as the Supreme Court observed in *Arlington Heights, supra*, 429 U. S., at 266, because the impact of an official action is often probative of why the action

was taken in the first place since people usually intend the natural consequences of their actions. *Bossier Parish School Board v. Reno, supra,* at 487.

ii) The Historical Background Of The Decision To Enact Senate and Congressional Maps in Texas in 2011 Provides A Context Full of Racial Discrimination in the Voting and Redistricting Areas.

Texas has a long history of official discrimination aimed at the right to vote. From the white primary declared unconstitutional in *Smith v. Allright*, 321 U.S. 649 (1944) to the Supreme Court's 2006 decision in *LULAC v. Perry, supra*, the State has engaged in massive resistance with respect to providing equal opportunities for all its citizens to register, to vote, and to participate effectively in the political process. Indeed, Texas is subject to the special provisions of the Voting Rights Act like Section 5 because of its long history of discrimination aimed at black and language minority voters (*e.g.*, Hispanics).

As part of the 1975 amendments to the Voting Rights Act, Congress extended the Act's strong protections to cover language minorities. As the Supreme Court observed in *Briscoe v. Bell*, 432 U.S. 404, (1977), a case in which Texas challenged the application of the Voting Rights Act to it: "Congress concluded after extensive hearings that there was 'overwhelming evidence' showing 'the ingenuity and prevalence of discriminatory practices that have been used to dilute the voting strength and otherwise affect the rights of language minorities." *Briscoe v. Bell, supra*, 432 U.S. at 405-406(footnote omitted). The Court further observed in *Briscoe, supra*, that Congress, in amending the Voting Rights Act in 1975 was particularly concerned "over the plight of Mexican-American citizens in Texas, a State that had not been covered by the 1965 Act." *Id*., at 406.

In the last four decades of redistricting, the State of Texas has been dragged into federal court every cycle, and each time has been found to have violated the constitutional rights of voters or violated their rights under the Voting Rights Act. See, *e.g.*, *White v. Regester*, 412 U.S. 755 (1973); *White v. Weiser*, 412 U.S. 783 (1973); *Upham v. Seamon,* 456 U.S. 37 (1982); *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D.Tex. 1991), *aff'd sub nom. Richards v. Terrazas*, 505 U.S. 1214, 112 S. Ct. (1992) (mem.), and *Slagle v. Terrazas*, 506 U.S. 801, 113 S. Ct. (1992) (mem.); *Vera v. Bush*, 517 U.S. 952 (1996); and *LULAC v. Perry*, 548 U.S. 399 (2006).

The State's recurring violations of the Constitution and the Voting Rights Act, particularly in the areas of voting rights and redistricting, provide strong circumstantial evidence that its post-2010 redistricting plans for Congress and senate are once again infected with purposeful discrimination.

iii) The Sequence of Events That Led Up To The Enactment of the Senate Plan Reveals a Pattern of Discriminatory Conduct.

The series of events that led up to enactment of the plan show that minority legislators or those representing majority-minority districts were kept in the dark about redistricting and the possible reconfiguration of their own districts, while Anglo legislators had total access to legislative leaders. See Proposed Findings of Fact ¶s 28-32 at pp. 20-22; ¶36 at pp. 24-25; and ¶7 at pp. 37-38. The details of the evidence set forth in the proposed findings of fact show that Anglo leaders in the senate, for example, knew about the growing minority population in the Dallas-Tarrant region and systematically set out to fracture that population into Anglo-controlled districts. See Proposed Findings of Fact at ¶s 42 and 51, pp. 28 and 33. Anglo senators were taken off the senate floor, one

by one, so they could have input into how their districts would be redrawn, while minority legislators were shut out of the process. *Id*. at ¶s 29 and 33, pp. 20 and 22.

The redistricting field hearings conducted by Texas prior to the 2011 legislative session were held at places and times inconvenient to minority and working class populations. Proposed Findings of Fact at ¶s 22-25 at pp. 16-19. The 2010 field hearings also differed from past redistricting cycles, testified one minority member of the Senate Redistricting Committee and were "a sham," with low attendance, low participation, the lack of invited testimony, and the lack of prepared materials for members of the Senate Redistricting Committee. See Proposed Findings of Fact ¶25 at 18.

Once the legislative session started in January 2011, not a single field hearing on redistricting was held in the State, even though such hearings had been held in 2003 when the State last undertook congressional redistricting. Proposed Findings of Fact at ¶s 9-10 at pp. 38-39. The only hearing that was held in the Senate on the senate plan was conducted less than 24 hours after the redistricting plan was publicly released, giving minority voters (and the general public) no meaningful opportunity to participate in the redistricting process. Proposed Findings of Fact at ¶37 at pp. 25-26.

Perhaps the most inflammatory evidence of racially discriminatory purpose was revealed in an email sent just prior to the one and only committee hearing on the senate plan. At that time, a scheme was hatched by Anglos running the senate redistricting process to prepare the committee report, with final maps and statistical reports on the plan, even before the Senate Redistricting Committee hearing was even held. The idea of "pre-doing" the committee report was rejected, not because it would deny legislators an effective opportunity to try and amend the proposed plan in committee, or because it

would deny the public the right to seek changes in the plan, or even because it was the wrong thing to do. Rather the plot to pre-do the committee report was rejected because it would leave a "paper trail" that the Redistricting Committee hearing was a sham, and that such a paper trail and a sham hearing would damage chances of Voting Rights Act preclearance. See Proposed Findings of Fact ¶s34-35 at pp. 23-24.

In sum, the evidence showed that state senators representing majority-minority districts were shut out of the process and many of them, veterans of redistricting, found that the process leading up to the enactment of the redistricting plan was the worst, most exclusionary, and discriminatory ever. Proposed Findings of Fact ¶8 at pp. 38-39. Under *Arlington Heights*, *supra*, such a sequence of events preceding the enactment of the plans strongly suggests that both the senate and Congressional plans were enacted with racially discriminatory intent.

iv) Texas' Process For Enacting The Senate And Congressional Plans Departed, Both Procedurally And Substantively, From The Normal Practice and Is Suggestive of A Racially Discriminatory Intent

The 2011 redistricting process differed from past cycles in several important respects. First, minority legislators were shut out of the process this time like never before. See Proposed Finding of Fact ¶8 at p.38. Second, unlike 2003 when the Legislature conducted field hearings across the state before enacting a new congressional plan (and, of course, well after census data and new plans had been drawn), not a single redistricting field hearing was held in 2011. See Proposed Findings of Fact ¶9 at pp. 38-39. And the 2010 pre-census field hearings were considered "perfunctory". *Id*., at ¶25, pp. 18-19.

There were other irregularities in the 2011 legislative process regarding redistricting. For example, once the Senate had approved the proposed senate plan, it was sent over to the House for quick action. Under normal procedures, when a bill is sent over from the Senate, it is referred to a committee and a public hearing (or hearings) is held to allow the public to voice their views. See Proposed Finding of Fact ¶40 at p. 27. But not a single hearing on the senate redistricting bill was held in the House where the public was allowed to testify and have any input. *Ibid*. Furthermore, the House ordinarily holds its committee hearings in committee rooms, which publicly broadcast the hearings over the web and on cable TV. Here again, there was a departure from the norm, as the House Redistricting Committee hearing was held in a room without anybroadcast capability. *Id*.

Moreover, under normal legislative procedures or tradition involving redistricting legislation, the House does not try to amend the Senate's redistricting plan and the Senate does not try to amend the House's redistricting plan. That normal process or tradition also was not followed here. See Proposed Finding of Fact ¶41 at p. 28. Minority members of the House unsuccessfully attempted to amend the senate plan by reuniting the minority neighborhoods that had been splintered off from SD 10. *Ibid*.

There were also substantive departures from the norm. For example, the State claimed that respecting 'communities of interest' was an important redistricting criteria. Yet with regard to SD 10 in the senate map and the congressional districts in the Dallas-Tarrant region of North Texas, minority communities of interest were knowingly 'sliced and diced'. With regard to the senate plan in particular, the map drawer admitted that respecting communities of interest was a criterion that the Texas State Senate attempted

to follow, he could not provide a working definition of what constituted a community of interest and he admitted dividing such communities from each other.

The "[d]epartures from the normal procedural sequence" further suggest "that improper purposes are playing a role." *Arlington Heights, supra*, at 267. The State obviously thought field hearings were important or they wouldn't have conducted them. Indeed, the evidence showed they conducted them purportedly to obtain public input. See Proposed Findings of Fact ¶22, at p. 16. Yet, the State deviated from its 2003 procedure of conducting field hearings after census data were released and proposed plans were drawn. By holding field hearings in 2010 in places and times inconvenient to minority voters but favorable to Anglo voters, the State acted in contradiction to its purported goal of obtaining meaningful public input. That is particularly true where, as here, state officials claim that compliance with the Voting Rights Act was the paramount concern.

Furthermore, the substantive departures, such as disregarding the criterion of communities of interest and the carving up of minority communities in both the Senate and Congressional plan in the Dallas-Tarrant region of North Texas, are also highly relevant to the issue of racially discriminatory purpose. Protecting communities of interest, or keeping them together was considered important enough for the State of Texas that it adopted that criterion as part of its redistricting process. As the Court stated in *Arlington Heights, supra*, at 267-68, when such "factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached, then such substantive departures are indications of a racially discriminatory intent."

v) The Legislative History Behind The Senate And Congressional Plans, Including Contemporary Statements By Members Of The Decisionmaking Body, Exhibit Racially Discriminatory Intent.

In determining racially discriminatory intent, the legislative history and contemporary statements by members of the decisionmaking body can be "highly relevant." *Village of Arlington Heights, supra*, at 268. In the case before this Court, the record is replete with evidence from these sources that provide strong indicia of discriminatory purpose.

Minority senators on the Senate Redistricting Committee, for example, protested the lack of adequate notice and the opportunity for meaningful participation in the process during the legislative sessions. See Proposed Findings of Fact ¶33, pp. 22-23. All twelve Senators representing majority-minority districts inserted a strong statement into the senate journal protesting the racially discriminatory and exclusionary process. *Id*., ¶36, at p. 24. Other citizens and legislators also made contemporary statements protesting the racially discriminatory process, including all of the minority members of the Senate Redistricting Committee. See Proposed Findings of Fact, ¶36 at 24-25. In addition, ahough Senator Wendy Davis made repeated requests to see how the senate district she represented had been redrawn by the Anglo leadership, she was told no such map existed; yet one Anglo Senator told her he had seen her district and it had been "shredded." *Id.*, at ¶33, p. 22. Furthermore, during a legislative hearing on the congressional map, not only did minority members of the redistricting committee protest they had not seen the proposed map and had been shut of the process of developing it, these members even got the Senate Redistricting Committee's outside counsel to admit that he hadn't seen the state's proposed congressional map either. *Id*., ¶s9-10 at p.38-39.

The head of the Senate Redistricting Committee (Sen. Seliger) also admitted during the legislative debate that not a single minority person had been involved in developing the congressional plan. *Id*., ¶10 at p. 39.

All of this legislative history, as well as the statements and events cited above and in the proposed findings of fact, took place contemporaneously with the State's enactment of the state senate plan and the congressional map. They are, as noted above, "highly relevant" to, and strongly suggestive of, the presence of a racially discriminatory intent.

2. Texas' State Senate and Congressional Plans Are Retrogressive With Respect to the Ability of Minority Voters to Effectively Exercise the Electoral Franchise

As noted above, the State of Texas dismantled SD 10 by fracturing the minority population. As a result, minority voters in SD 10 will no longer have the ability to elect their candidate of choice, as they did in the 2008 elections.

In denying the State's motion for summary judgment in this case, this Court correctly observed that "[s]ince coalition and crossover districts provide minority groups the ability to elect a preferred candidate, they must be recognized as ability districts in a Section 5 analysis of a benchmark plan. Coalition and crossover districts that continue unchanged into a proposed plan must be counted as well. Our recognition that crossover and coalition districts are ability districts in a benchmark plan is rooted in the fact that there must be discrete data, by way of election returns, to confirm the existence of a voting coalition's electoral power." Memorandum Opinion at 36. The evidence developed in this case, including the endogenous election results from 2008, show that the minority voter coalition in SD 10 elected their preferred candidate to office. The

State's expert witness admitted that blacks and Hispanics were cohesive in their voting patterns and elected their candidate of choice in SD10 in 2008. See Findings of Fact ¶11 at p. 9. That ability to elect in SD 10 was removed by the state's senate plan and has not been replaced. Dr. Alford also conceded this when he acknowledged that the state's plan diminished minority voters' ability to elect a candidate of choice in SD 10. *Id.*, at 34. Thus, there is retrogression with regard to the State's senate plan.

With regard to the State's congressional plan, there is also clear retrogression. For example, the State weakened the ability of Hispanic voters to elect the candidate of their choice in CD 23, dismantled CD 27, and eliminated one racial crossover or racial coalition district (CD 25) by fragmenting the cohesive minority voters in Travis County. The State also failed to draw new districts that took into account the dramatic Hispanic and African American growth over the last decade. As noted in the proposed findings of fact, minority population combined accounted for 89 percent of the Texas total population growth since 2000; Anglos accounted for only 11 percent of the population growth.

Texas has gone from 11 districts out of 32 (which includes CD 25) districts under the benchmark map where minority voters have elected the candidate of their choice to just 10 of 36 under the enacted plan. Decreasing the number of districts in which minority voters can elected their preferred candidate is retrogressive. Moreover, even if the number of ability to elect districts remained the same (11 of 32 to 11 of 36), the new plan would still be retrogressive because the level of representation statewide would be reduced. Because the State of Texas is requesting preclearance of statewide plans,

analysis of retrogression should be conducted on a statewide basis. *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003).

Finally, we would note that the State has made much of the fact that the united states does not oppose preclearance of the senate plan. But the Voting Rights Act gives primary responsibility for enforcing Section 5 to this Court, not the United States Attorney General. See *City of Port Arthur, Texas v. United States*, 459 U.S. 159, 165 note 5 (1982). In *Port Arthur, supra*, the United States and the City agreed upon a new method of election following a denial of preclearance. The three-judge court, however, conditioned acceptance of the new plan on elimination of a majority vote requirement for certain positions. On appeal, the City contended that the DC court was required to accept the plan because the Attorney General had agreed to it. The Supreme Court disagreed, saying that the United States was acting in its capacity as a litigant and that the neither the Attorney General, nor the city, nor both, could dictate to this Court the acceptability of the plan. *Ibid*. Thus, it is of no legal consequence that the United States in this case does not oppose preclearance (although counsel for the United states did concede during closing arguments that the United States might reach a different conclusion today in light of the intent evidence offered by the Defendant Intervenors).

CONCLUSION

For the reasons set forth above, the State of Texas has failed to meet its burden of proof that its state senate plan (S156) and its congressional plan (C185) are free of a racially discriminatory purpose and effect. Accordingly, the State's request for a declaratory judgment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February 2012, I filed and served the foregoing Post-Trial Brief by filing the same in this Court's ECF system, which caused copies of this document to be sent to counsel of record in this litigation.

/s/ J. Gerald Hebert
J. GERALD HEBERT