IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,

Plaintiff,

v.

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

Defendant,

WENDY DAVIS *et al.*

Defendant-Intervenors,

MEXICAN AMERICAN LEGISLATIVE CAUCUS,

Defendant-Intervenor,

GREG GONZALES *et al.*

Defendant-Intervenors,

TEXAS LEGISLATIVE BLACK CAUCUS,

Defendant-Intervenor,

TEXAS LATINO REDISTRICTING TASK FORCE,

Defendant-Intervenor,

TEXAS STATE CONFERENCE OF NAACP BRANCHES *et al.*

Defendant-Intervenors,

LEAGUE OF UNITED LATIN AMERICAN CITIZENS,

Defendant-Intervenor.

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

POST-TRIAL BRIEF OF THE GONZALES INTERVENORS AND THE LEAGUE OF LATIN AMERICAN CITIZENS

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I. INTRODUCTION

Texas's population grew by 4,293,741 in the last decade. Of those nearly 4.3 million people, approximately two-thirds are Hispanics and another 10 percent are Blacks. Due almost entirely to the increase in the state's minority population, Texas gained four additional seats in the U.S. House of Representatives, bringing the state's congressional delegation to 36. Defendants' Ex. 724 (Stephen Ansolabehere, Report on Minority and White Representation Under the Texas Congressional District Plans C185 and C100 (Oct. 21, 2011)) ("Ansolabehere Rpt.") at 7 & tbl. A.1.

Despite the growth in the state's minority population, Plan C185 ("the Congressional Redistricting Plan") *decreases* the number of congressional districts in which minorities will have the ability to elect their candidates of choice, from 11 in Plan C100 ("the Benchmark Plan") to 10 in Texas's proposed plan. This decrease in the absolute number of minority ability districts, particularly in the context of massive, concentrated minority population growth, constitutes retrogression. And the overwhelming weight of the evidence presented at trial establishes that this result was not an innocent occurrence but, rather, was the intended consequence of race-based decision-making that stripped away the voting rights of Hispanics and Blacks throughout Texas.

The Congressional Redistricting Plan dismantles three minority-ability congressional districts in the Benchmark Plan – CDs 27, 25, and 23 – without offsetting these losses elsewhere in the state. *Id.* at 29. This alone renders the Plan ineligible for preclearance under Section 5 of the Voting Rights Act of 1965 ("the VRA"), 42 U.S.C. §§ 1973-1973aa-6. . At trial, Texas fell far short of meeting its significant burden of establishing an absence of retrogression. Most glaringly, the state failed to present *any* expert testimony on the ultimate question of whether there is retrogression; its lone expert witness, Dr. Alford, admitted that his analysis is a mere "starting point" and does not provide an answer. At the same time,

Dr. Alford concedes that CDs 27, 25, and 23 were all minority-ability districts under the Benchmark Plan and that the Texas Legislature has destroyed each of them.

Equally striking is the testimony of Texas officials establishing they did not even have a standard for measuring retrogression when they created the Congressional Redistricting Plan. Of the multiple officials who testified, not one could describe with any clarity how – or even whether – the Texas Legislature identified minority-ability districts in the Benchmark Plan. Moreover, the little information these officials did provide demonstrates they either fundamentally misunderstood, or ignored, the protections the VRA affords minority-ability districts. For example, the Texas map-drawers testified uniformly that they drew the maps based on the assumption that Section 5 does not protect coalition and cross-over districts, notwithstanding that the Supreme Court has said otherwise. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1249 (2009) (plurality op.) And, showing an almost taunting disregard for the VRA and Texas's minority population, the map-drawers assumed they did not have any obligation to create new minority-ability districts, even though minority growth accounts for all four of the new congressional seats. Epitomizing this extraordinarily cynical mind-set, one of the map-drawers testified that even if Texas had 20 new congressional seats, the Texas Legislature would not have any obligation to create even one new minority-ability district.[1]

The predictable consequence of this irresponsible approach to redistricting is a proposed congressional map that is retrogressive by every objective measure. In addition to reducing the number of minority-ability districts from 11 to 10, the Congressional Redistricting Plan decreases the percentage of these districts from 34% to 28%. Trial Tr., Jan. 25, 2012 (Afternoon Session of Day 7) at 46 (Ansolabehere Direct). The effect these decreases have on Blacks and Hispanics throughout Texas is astounding: nearly 800,000 minorities lose the ability to elect the candidates of their choice. *Id.* at 47.

[1] *See* Davis Dep. at 103-04.

With minorities accounting for nearly 80% of Texas's explosive population growth, a legislature would have to work hard – and deliberately – to find a way to *decrease* by 800,000 the number of minorities able to elect their preferred candidates. The Texas Legislature did just that. The record is rife with evidence of the discriminatory purpose behind the Congressional Redistricting Plan. This evidence includes the Plan's severe disparate impact on the growing minority population compared to the shrinking white population, the rushed and closed-door process by which it was ushered through the Legislature, deliberate race-based line-drawing by the map's creators, and blatantly favorable treatment of White office-holders while the interests of minority officeholders – such as locations of homes and congressional district offices – were completely ignored.

The centerpiece of this discriminatory conduct is the brazen way in which the Texas Legislature carved up CDs 23, 25, and 27 to eliminate them as minority-ability districts. The reconfiguration of CD 23 by dividing Maverick County and replacing high turnout Hispanics with low turnout Hispanics strongly suggests a racial purpose. When Texas was forced to disclose, on the eve of trial, the now infamous – and highly cynical – email between Mr. Interiano and Mr. Opiela, any doubts about the legislature's illicit purpose were eliminated; the email reveals a cynical intent to make CD 23 appear to be minority-performing even though the map-drawers knew it would not be. Defendants' Ex. 304; Trial Tr., Jan. 17, 2012 (Afternoon Session of Day 1) at 51-57 (Interiano Cross).

In CD 25, over the strong objections of minority officials, including Representative Dawnna Dukes, the map-drawers destroyed the coalition of Hispanic, African-American, and White voters to do away with a district in which minorities had been able to elect their preferred candidates. At the same time, at the request of White Congressman Harvey Hiderbran, the Legislature kept whole a White, rural district immediately to the west of CD 25. And, in CD 27, the legislature eviscerated a minority-performing district by moving

more than 200,000 Hispanics in Nueces County into a district to the north where they lose the ability to elect candidates of their choice. As Dr. Ansolabehere explains in his testimony, that decision had profound ripple effects throughout much of the state, including preventing the creation of another minority-ability district in South Texas.

In sum, the Supreme Court has identified multiple factors for inferring discriminatory intent, and Texas's Congressional Redistricting Plan hits the bull's eye on each and every one. The plan's retrogressive effect and underlying discriminatory intent require denying preclearance under Section 5.

II. ARGUMENT

A. The Congressional Redistricting Plan Has a Retrogressive Effect

The Court's Memorandum Opinion issued December 22, 2011 explains that the purpose of Section 5 is "'to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their *effective exercise of the electoral franchise*.'" Mem. Op. at 7 (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976). As the Court recognized, determining whether a new voting plan diminishes ability to elect and has retrogressive effect requires comparing the voting plan in place and the proposed plan. "[A]ny change in the new plan that has the effect of diminishing citizens' ability to elect a candidate of their choice on account of race, color, or membership in a language minority group 'denies or abridges the right to vote' within the meaning of Section 5." Mem. Op. at 9 (quoting 42 U.S.C. § 1973c(b); H. Rep. No. 109-478, at 56).

The Congressional Redistricting Plan reduces the number of districts in which minority groups have an opportunity to elect their preferred candidates from 11 to 10. As Dr. Ansolabehere's analysis makes clear, the Benchmark plan contained eight Hispanic opportunity districts: CDs 15, 16, 20, 23, 25, 27, 28, and 29. Ansolabehere Rpt. at 29. The Congressional Redistricting Plan, however, creates only seven such districts: CDs 15, 16, 20,

28, 29, 34, and 35. *Id.* The Plan maintains districts 9, 18, and 30 as African-American opportunity districts.

1. The Texas Legislature Dismantled Congressional Districts 23 and 27 and Eliminated Them as Minority-Ability Districts

This decrease in the absolute number of minority opportunity districts is striking under any retrogression analysis, but it is all the more remarkable here given the dramatic growth of Texas's Hispanic population over the past decade. The Hispanic population grew from 6.7 million to 9.5 million, a 42 percent increase, between 2000 and 2010. *Id.* at 11. The Black population experienced more modest gains, increasing by 526,000, or 23 percent. *Id.* at 1011. The White population, meanwhile, experienced the smallest growth of all three major racial groups, increasing only 457,000, or 4.1 percent, over the entire decade. *Id.* at 10. The same trends exist among the State's eligible voters, as the "Hispanic population was the fastest growing segment not only of all persons in the state but of the eligible electorate over the past decade." *Id.* at 14. But despite these gains in minority population, the Congressional Redistricting Plan decreases the number of Hispanic opportunity districts by one and increases the number of white districts by five. *Id*. at 32.

The State does not contest that it eliminated Benchmark CD 27 as a Hispanic ability district. Under the Benchmark Plan, CD 27 ran from Nueces County down to Cameron County and was 63.8 percent Hispanic. *Id.* at 33. Hispanics in this district had a reasonable opportunity to elect their candidates of choice. *Id.* at 34. The Congressional Redistricting Plan C185 carves out Nueces County, which is majority-Hispanic, resulting in a new CD 27 that is just 41.1 percent Hispanic. *Id.* Under the State's plan, CD 27 is now a white-majority district in which racially polarized voting will result in defeat of the minority-preferred candidate. *Id*. at 33-34. As described below, the State's decision to move more than 200,000 Hispanics in Nueces County out of Benchmark CD 27 had significant ripple effects

throughout Texas and goes a long way toward explaining the widespread dilution of minority voting rights that the Congressional Redistricting Plan causes.

The Plan also eliminates a Hispanic opportunity district in CD 23. Under the Benchmark Plan, CD 23 was a district in which the minority-preferred candidate had a reasonable opportunity of winning and won the district more often than not. Ansolabehere Rpt. at 36, 37. Minority-preferred candidates received between 48.7 percent and 51.4 percent of the district's vote. *Id.* The Congressional Redistricting Plan, however, lowers the electoral performance of minority-preferred candidates in CD 23 to the point that it is no longer a Hispanic opportunity district. *Id.* at 37. The electoral performance of minority-preferred candidates in new CD 23 now lies in the range between 45.0 percent and 47.9 percent. *Id.* Notably, this range falls "below the lowest performance of any of the minority opportunity seats" under the benchmark plan and is now "clearly at the level of districts that all agree are not minority opportunity districts." *Id.* at 37.

The State achieved this result through a very subtle but significant manipulation that is reflected in the email between Mr. Opiela and Mr. Interiano. Their goal, which they achieved, was to make CD 23 appear falsely to be a minority-ability district. The change in CD 23 is driven by turnout of the areas kept, added, and removed, and to some extent by the racial composition as well. The area kept by the redistricting plan has the highest percent White (34 percent) of the three types of areas (same, out, and in), the highest turnout (42 percent), and the lowest support for minority-preferred candidates (46 to 49 percent). The area removed has the lowest percent White and the highest combined percent Hispanic and Black; it has somewhat lower turnout (39 percent), and the highest support for minority preferred candidates (58 to 60 percent). The areas added to the districts have the highest percent Hispanic (67 percent) but very low percent Black; it has the lowest turnout rate (33 percent), and somewhat lower support for minority preferred candidates than the areas taken out (51 to

56 percent). The combination of very low turnout and lower support for minority-preferred candidates in the areas added compared with the areas subtracted, due in part to the lower percent Black, reduced the electoral performance of minority preferred candidates in CD 23 by 3 to 4 percent and rendered the district no longer a minority opportunity seat. *Id.* at 42.

Although Dr. Alford has conceded that CD 23 is no longer a minority-ability district, Texas continues to weakly contend otherwise. But its argument is limited to the racial composition of the district and does not apply the full "ability to elect" legal standard that this Court has adopted. Dr. Alford described it best when he testified: "So I don't think that the 23rd is any more likely to perform than it was. I think it is probably less likely to perform than it was, and so I certainly wouldn't count and don't – in all of this discussion, I haven't counted the 23rd as an effective minority district in the newly adopted plan, but it does remain a majority district." *Perry v. Perez* Trial Tr. at 1839.

It is also significant that on the Bexar County end of the district (where CD35 and its swap-mate, CD23, literally come together), the Legislature divided longstanding communities of interest in south San Antonio in order to buttress its design of CD 35. The Congressional Redistricting Plan C185 cracks a traditional voting community on the South Side of San Antonio by dividing it three ways and moving the vast majority of its population into new CD35 and a newly configured CD20. Former Congressman Ciro Rodriguez also testified about Plan C185's fracturing of the South Side community in San Antonio, explaining that the Harlandale school district was cut into three pieces, part of it due to CD35's southern extension into that part of the community. *Perry v. Perez* Trial Tr. at 784. Historically, this high performing Hispanic voting area in the Harlandale district had been kept unified. *Id*. at 784-85. He further testified to the importance of keeping that community of interest intact. *Id*. at 786.

2. The Texas Legislature Dismantled Congressional District 25, Which Was Also a Minority-Ability District Under the Benchmark Plan

This Court has made clear that Section 5 "states no preference for how the minority group is able to elect its preferred candidate, whether by cohesive voting by a single minority group or by coalitions made up of different groups." Mem. Op. at 34. The Court has further recognized that "[i]t is simply a fact of political life that in certain districts, a single minority group may not have the ability to achieve desired electoral outcomes independently, but could elect its preferred candidate if it formed . . . a crossover district by 'attract[ing] sufficient crossover voters from white voters.'" *Id.* at 35 (quoting *Voinovich v.* Quilter, 507 U.S. 146, 154 (1993)). Under the Court's standard, a district in which the minority group is able to elect its preferred candidate with the help of another minority group or Anglo crossover votes is a minority-ability district.

In holding that crossover districts "must be recognized as ability districts in a Section 5 analysis of a benchmark plan," this Court emphasized that "there must be discrete data, by way of election returns, to confirm the existence of a voting coalition's electoral power." Mem. Op. at 36; *see also id.* at 35 n.29. The Gonzales Intervenors have provided extensive, unrefuted evidence of election returns and other information establishing that Benchmark CD 25 was an effective crossover district in which Hispanics and Blacks were able to elect the candidates of their choice because of voting cohesion between minorities and because a significant portion of Whites – but short of a majority of them – consistently voted for the minority-preferred candidate.[2] Accordingly, Texas's expert, Dr. Alford, admitted unequivocally during the trial that CD was a district in which minorities had the ability to elect the candidates of their choice. Alford Dep. (Jan. 22, 2012) at 180. The evidence

[2] The Gonzales Intervenors first submitted Dr. Ansolabehere's retrogression analysis as Exhibit 1 to the Devaney Declaration in support of their Opposition to Plaintiff's Motion for Summary Judgment. *See* Dkt. #77-2 ("Devaney Decl."), Ex. 1 ("Ansolabehere Rpt."). By agreement of the parties, the Gonzales Intervenors intend to file Dr. Ansolabehere's supplemental report, focusing exclusively on minority and Anglo voting patterns in Travis County and CD 25, on Monday, January 16.

supporting this conclusion is uncontested and compels a finding that CD 25 was a minority-ability district in the Benchmark Plan. Further, the evidence summarized below responds directly to the Court's questions posed during closing argument to counsel for the United States and the Gonzales Intervenors relating to CD 25. Specifically, the evidence establishes that Blacks and Hispanics are able to elect the candidates of their choice in CD 25 because of racial cohesion between those two groups, coupled with a sufficient amount – but not a majority – of White cross-over votes. The district is thus one in which minority voters determine the outcome and override the majority of White voters.

a. General Election Results Establish That CD 25 Was A Minority-Ability Crossover District

Minority-preferred candidates in CD 25 and in Travis County win virtually all general elections. Congressman Lloyd Doggett won the congressional elections in CD 25 in 2006, 2008, and 2010 with overwhelming support from Blacks and Hispanics. Similarly, in eight of the nine Travis County elections analyzed by Professor Engstrom, the minority-preferred candidates won, with more than 70% of Blacks and Hispanics supporting the same candidates. Further, in 35 general elections in Travis County between 2002 and 2010 that the Gonzales Intervenors analyzed, the minority candidates prevailed with the support of Black and Hispanic voters. And, as the minority-preferred candidate for President in 2008, President Obama won 60% of the vote in the area defined by CD 25 under Plan C100. Defendants' Ex. 724 (Ansolabehere Rpt.) at 35; Defendants' Ex. 724 (Ansolabehere Rebuttal Rpt. to Supp. Rpt. of Alford) at 20-24. The Gonzales Intervenors also provided many other examples over the last two decades of the tri-ethnic voting coalition in Travis County and Austin coming together to elect minority-preferred candidates, who themselves are minorities, to school districts, city offices, and Texas Senate races in White-dominated districts. *See* Defendants' Ex. 671; Tr. of Sept. 10, at 1189-91 (Test. of D. Butts).

Blacks and Hispanics have been able to elect the candidates of their choice in these elections because of the significant size of the minority population, the amount of turn-out among minority voters, the cohesion between Black and Hispanic voters, and cross-over support from significant numbers of White voters. Defendants' Ex. 724 (Ansolabehere Rpt.) at 20-23. The amount of White cross-over voting is sufficiently high that the Black and Hispanic population of Benchmark CD 25 can elect their preferred candidates to Congress, even though minorities are not a majority of the population in the district and even though a majority of Whites vote, on average, for candidates not preferred by minorities. Defendants' Ex. 724 (Ansolabehere Rebuttal Rpt. to Supp. Rpt. of Alford) at 24-25. The power of the Black and Hispanic coalition is starkly shown by the fact that minorities have been able to elect the candidates of their choice with less than a majority of Whites – 47% on average and sometimes as little as 38% –supporting the minority-preferred candidates. *Id.* at 20-23.

Although they are not a majority of the White voters in CD 25 and Travis County, the Whites who cross over to support minority-preferred candidates are essential to the success of the tri-ethnic coalition. Replacing those White voters with White population typical of the rest of the state, as the Legislature did in the Congressional Redistricting Plan, would transform the district into one in which Blacks and Hispanics would no longer be able to elect their preferred candidates. This is because the amount of White cross-over voting in Benchmark CD 25 as a whole – and in the Travis County portion of it in particular – is higher than anywhere else in Texas. *Id*. at 28-29. Thus, as this Court stated in describing the Gonzales Intervenors' contention that CD 25 is a minority-ability district, "CD 25 will lose large numbers of minority voters in the proposed plan, and these voters will be replaced by an influx of White voters whose voting behavior differs substantially from the Whites who voted with minorities in the benchmark." Mem. Op. at 19.

Further proof of the voting patterns described above is found in ecological regressions for candidates with Spanish Surnames in Travis County, which show very high levels of cohesion among Hispanic and Black voters and divisions among Whites. In contrast to the average 47% White support for these candidates, ecological regressions show that, as described, more than 70% of Blacks and Hispanics support the same candidates. Defendants' Ex. 724 (Ansolabehere Rebuttal Rpt. to Supp. Rpt. of Alford) at 28-29. Focusing specifically on congressional elections in CD 25, it becomes very apparent how these voting patterns permit minorities to elect the candidates of their choice. Congressman Doggett won the 2010 election in Benchmark CD 25 with overwhelming support from Black and Hispanic voters, but with only 38% support among White voters. Thus, he would have been defeated in the 2010 general election but for the minority voters of Travis County. *Id.* at 24-25. At the same time, however, the 38% White cross-over vote enabled Blacks and Hispanics to elect Congressman Doggett, their preferred candidate. *Id.*

b. Primary Election Results Also Confirm That CD 25 Was A Minority-Ability Crossover District

Texas's expert is forced by the overwhelming evidence summarized above to concede that Benchmark CD 25 was a minority-ability district in the general elections. But Texas attempts to side-step the obvious legal effect of this unavoidable concession – a finding of retrogression – by arguing that only primary elections are relevant for determining whether minorities have the ability to elect candidates of their choice. As the Gonzales Intervenors demonstrated in their "Bench Brief Regarding Use of General Election Data in Coalition and Crossover Districts," filed January 23, 2012 (Document No. 169), results from general elections are highly relevant to identifying minority-ability districts, and Texas is manifestly incorrect in claiming otherwise. The Bench Brief, which the Gonzales Intervenors incorporate by reference, demonstrates that the VRA explicitly addresses equal opportunity for minority voting blocs in both primary *and* general elections, and that a wealth of federal

case law supports the use of data from general elections to determine the presence of cohesive minority voting blocs.

Moreover, even if Texas were correct in claiming that only primaries are relevant, the unrefuted evidence establishes that Blacks and Hispanics are also able to consistently elect their preferred candidates in Democratic primaries in CD 25 and Travis County. Black and Hispanic preferred candidates succeed as often, or more often, than White-preferred candidates in those primaries. Defendants' Ex. 724 (Ansolabehere Rebuttal Rpt. to Supp. Rpt. of Alford) at 23-24.

No racial group dominates the primary process in Travis County. Power is shared equally and in such a way that the racial groups succeed in nominating their preferred candidates 75 percent of the time. Of 43 primaries in Travis County analyzed by Dr. Ansolabehere, Whites backed the winner in 31 primaries; Hispanics backed the winner in 32 primaries; and Blacks backed the winner in 31 primaries. These results demonstrate that minority-preferred candidates have the ability to win the Democratic primaries in Travis County, and that the primaries do not block or prevent minority-preferred candidates from moving on to the general elections. *Id.*

The ability of Blacks and Hispanics to elect candidates of their choice in Democratic primaries is also demonstrated by the Democratic Congressional primary elections for Benchmark CD 25 in Travis County. In those elections, Congressman Doggett was also the preferred candidate of Hispanic and Black voters, as well as White voters. Since Congressman Doggett eventually won with a majority of the Hispanic and Black vote in the general election, it is clear that the primary election process facilitated, rather than interfered with, the ultimate election of the candidate preferred by Hispanic and Black voters. *Id.*

This evidence and the other evidence summarized above distinguishes Benchmark CD 25 from the alleged influence district that was addressed in *LULAC v. Perry*, 548 U.S.

399, 443-447 (2006), which the United States referred to in its closing argument last week in discussing CD 25. In that case, appellants alleged that the reconfiguration of Texas CD 24 violated § 2 of the VRA because it diluted Black voting strength in a district that, according to appellants, Blacks had "effectively control[led]." *Id.* at 443. But Blacks were only 25.7% of the CVAP in the district and, importantly, "[did] not vote cohesively with Hispanics." *Id.* Moreover, Whites were 50% of the CVAP, and the Court found that the district had been specifically drawn for a White candidate who had no opposition in the primaries. *Id.* at 443-44. Further, analysis of three statewide elections by appellants' own expert showed that the Black-preferred candidate in old CD 24 would have won only once. *Id.* at 445. Based on this evidence, the Supreme Court held only that the trial court did not commit "clear error" in finding that the district was controlled by "Anglo Democrats" and was not one in which Blacks had the ability to elect the candidates of their choice. *Id.* at 444. In so holding, the Court also was careful to emphasize that § 2 – that provision at issue in that case – does not require creating coalition districts, while such districts have a higher level of protection under § 5. *Id.* at 446-47.

The distinctions between this case and *LULAC v. Perry* are obvious. First, in contrast to the racially polarized voting in *LULAC*, Blacks and Hispanics vote cohesively in CD 25, which creates a far stronger ability for minorities to elect their preferred candidates than Blacks had in *LULAC*. Second, while Black-preferred candidates won only 33% of the elections in old CD 24 that were analyzed, Blacks and Hispanics consistently elect their preferred candidates in primaries and general elections in CD 25 and Travis County. In other words, CD 25, unlike old CD 24, is a district in which election results indisputably show that minorities are able to control outcomes. Nowhere is this clearer than the 2010 election in which Blacks and Hispanics were able to elect Congressman Doggett with only 38% White crossover vote. Third, while the White incumbent (Congressman Frost) in *LULAC* had never

had a primary opponent, much less minority primary opponents, 548 U.S. at 444, the incumbent in the crossover CD 25 (at least, the Travis County portion of it) did have a primary opponent in the 2004 version of the map, and he defeated his Hispanic opponent in the primary, winning the Hispanic vote overwhelmingly. Fourth, as the Court recognized in *LULAC*, a finding that a district is not protected under § 2 does not establish an absence of protection under § 5. *See also Bartlett v. Strickland*, 129 S. Ct. 1231 at 1249. Here, this Court has properly recognized that § 5 "states no preference for how the minority group is able to elect its preferred candidate," and the evidence is clear that Blacks and Hispanics are able to elect their preferred candidates through racially cohesive voting and White crossover support. CD 25 is therefore protected under § 5, and *LULAC* has no bearing on that necessary conclusion.

c. The Texas Legislature Dismantled CD 25

The Congressional Redistricting Plan "completely restructures the district, taking out large numbers of minorities and putting in large numbers of whites from communities to the north. As described, the voting behavior of the whites in these counties differs substantially from the voting behavior of Whites in Austin, the seat of Travis County." Under the Congressional Redistricting Plan, CD 25 contains a White population that cohesively votes against the minority-preferred candidate. As a result, the new CD 25 is no longer a district in which minority-preferred Congressional candidates will prevail.

Dr. Ansolabehere's testimony explains how Texas strategically moved certain populations in and out of CD 25 based on voter turnout for minority-preferred candidates:

> The small area kept in CD 25 votes 60 percent for the minority preferred candidates. Plan C185 removed a large number of voters (roughly 225,000) who voted 60 percent for the minority preferred candidates. The Plan, then added back into the district an almost equally large number of voters (about 200,000) who voted roughly 40 percent for the minority preferred candidates. As a result of these shifts, CD 25 moves from minority opportunity to not.

Defendants' Ex. 724 (Ansolabehere Rpt.) at 39. In other words, the Texas Legislature's removal of minorities from CD 25 renders it a non-performing district, regardless of White crossover votes.

Dr. Ansolabehere further explains how the Congressional Redistricting Plan divides Travis County across five congressional districts, none of which comprises a majority of Travis County residents, even though the county has sufficient population to encompass one entire congressional district and much of a second. Defendants' Ex. 724 (Ansolabehere Supp. Rpt.) at 25. In short, Plan C185 unravels a benchmark district in which minority voters, though not a majority, were in the driver's seat to elect their candidates of choice. This result constitutes retrogression.

B. The Congressional Redistricting Plan Violates Section 5 Because It Is the Result of a Discriminatory Purpose

A voting change, such as a redistricting plan, violates Section 5 and cannot be precleared if it is motivated by "any discriminatory purpose" to diminish "the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 42. U.S.C. § 1973c(b)-(c). A state's failure to create additional minority opportunity districts can be relevant to whether a state is intentionally keeping minority voters "in their place" by perpetuating unconstitutional conditions or making them worse. H. Rep. No. 109-478, at 68; *see also* S. Rep. No. 109-295, at 16 (2006). *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), establishes the factors that a court should use to determine whether a voting change has a discriminatory purpose. *See also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997) (holding that when conducting an inquiry into the purpose prong of Section 5, "courts should look to our decision in *Arlington Heights* for guidance"). These factors are: (1) whether the plan has a disproportionate impact on members of a certain race, (2) the historical background of the plan, (3) the specific sequence of events leading to the plan, (4) departures from normal

procedures in passing the plan, (5) legislative history of the plan including statements by decision-makers. Here, the evidence establishes overwhelmingly that these factors are met and that Texas cannot meet its burden of demonstrating it acted without unlawful discriminatory purpose when it adopted the Congressional Redistricting Plan.

1. Disproportionate Impact

a. The Statewide Disparate Impact of the Congressional Redistricting Plan

Disproportionate impact is "an important starting point" in an analysis of potential discriminatory purpose. *Village of Arlington Heights*, 429 U.S. at 266. Although other evidence is often necessary, discriminatory intent may be inferred from disproportionate impact alone only when that pattern is "stark." *Id.* Thus, in cases where there is a significant disproportionate impact that cannot plausibly be explained on neutral grounds, courts draw a strong – and sometimes dispositive – inference of discriminatory intent. *Rybicki v. State Board of Elections of Illinois*, 574 F. Supp. 1082, 1108-09 (N.D. Ill. 1982) (disproportionate impact of a redistricting plan was stark enough to support "a strong inference of a purpose to dilute" the black vote); *City of Port Arthur v. United States*, 517 F. Supp. 987, 1022 (D.D.C.1981) (annexation plan that significantly diminished black voting strength suggested "invidious motive"); *Hale County v. United States*, 496 F. Supp. 1206, 1218 (D.D.C.1980) (concluding that "an inference of discriminatory purpose may be drawn from the discriminatory effects of the change" at issue, and observing that "*[s]uch an inference is particularly reasonable and persuasive in cases under section 5, a provision based on Congressional findings of 'pervasive purposeful voting discrimination' in those areas covered by the Act*") (emphasis added). Here, the disproportionate impact of the Congressional Redistricting Plan is pervasive and severe, requiring a strong, if not dispositive, inference of discriminatory purpose.

The evidence described above demonstrates that, even by Texas's own standard of measuring electoral opportunity by racial composition alone, the Congressional Redistricting Plan creates a disproportionate number of majority-White districts compared to Whites' share of the state population. Whites are no longer the majority racial group in Texas; rather, they are a plurality, comprising 45.3 percent of the total population. Defendants' Ex. 724 (Ansolabehere Supp. Rpt.) at 20. Hispanics and African Americans combined, meanwhile, account for almost half of the population, or 49.4 percent. *Id.* Yet Whites are an outright majority of the population in 20 of the State's 36 congressional districts under the Congressional Redistricting Plan, and a plurality of all persons in 3 more. *Id.* "In other words, although Hispanics and Blacks combined outnumber Whites, Whites are the majority or plurality of the total population in 64 percent of Texas's Congressional Districts." *Id.* An analysis of the citizen voting age population only amplifies the problem. According to Dr. Ansolabehere's calculations, Anglos' share of the eligible electorate dropped from 62.5 percent to 55.8 percent since 2000. *Id.* at 21. Yet the number of districts in which Whites are a majority of the citizen voting age population *increased* from 22 to 25, an increase that keeps the share of districts in which Whites are a majority of the voters at 69 percent. *Id.* at 21 & tbl. B.1. In short, "Plan C185 does not reflect the growing presence of Hispanics in the eligible electorate[,] . . . [n]or does it reflect the shrinking presence of White Non-Hispanics among eligible voters." *Id.* at 21.

Dr. Ansolabehere's account of Texas's disparate treatment of Blacks as compared to Whites is particularly striking. These two groups each gained approximately 500,000 persons, with similar increases in the number of eligible voters. *Id.* at 22 & tbls. A.1 & A.2. Because each group's growth accounts for less than a single congressional district, one would expect that the group with more geographically concentrated growth would be more likely to gain seats. Black population growth was concentrated in three counties: Dallas, Harris, and

Tarrant Counties. *Id.* at 22. White population growth, by contrast, was distributed across the state; in fact, the Anglo population actually declined in Harris and Dallas Counties. *Id.* In spite of these factors, the Congressional Redistricting Plan added three majority-White districts, including one in Dallas County, and no additional majority-Black districts. *Id.* at 22, 27.

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

At the same time that it increases representation for the decreasing Anglo segment of the population, the Congressional Redistricting Plan also fragments the growing minority population in districts where their votes will be drowned out by Anglo voters. Of Texas's 9.1 million voting-age Anglos, 8 million live in majority-Anglo districts. *Id.* at 24. "In other words, 88 percent of White adults live in districts where most people are of the same racial group as they are, and just 12 percent live in districts where they are the minority." *Id.* By contrast, Blacks and Hispanics are disproportionately in districts where they are the minorities. Only 40 percent of minorities live in districts where a minority group comprises the majority or plurality, while over half of minorities live in majority-Anglo districts. *Id.* at 25. "The difference is a stark one – just 1.1 million White voters are stranded compared with 4.2 million Black and Hispanic voters." *Id.*

Nor is this disparity a simple function of plurality rule. In Harris County, the largest county in the state, all of the 700,000 in population gain came from minorities, while the county's Anglo population actually declined by 70,000. *Id.* at 26. The county's population is now 41 percent Hispanic, 33 percent Anglo, and 19 percent African-American. *Id.* Still, the Congressional Redistricting Plan distributes the county's Hispanic population across districts such that only 31 percent of Hispanics are in majority- or plurality-Hispanic districts. By comparison, over 80 percent of Whites in Harris County are in majority-White districts. The same holds true for Dallas County, the second largest in the state. While the White population fell by 200,000 over the last decade, Hispanics in Dallas County grew by 250,000 persons, accounting for 38 percent of the county's population. (Whites are now 33 percent of Dallas County and Blacks comprise 23 percent of the county population.) *Id.* at 27. "Curiously enough, Whites, who already controlled most of the seats [in Dallas County], gained another, even though they lost 200,000 persons." *Id.* As a result, "[o]ver 90 percent of White Non-Hispanics in Dallas County live in Congressional Districts in which Whites are the majority. Compare that with 58 percent of Blacks and 0 percent of Hispanics. None of the nearly 1 million Hispanics in Dallas County are in majority Hispanic districts." *Id.* at 28.

These are just a few of the examples across the state "of violations of majority rule, where the minority Whites are the majority of Congressional Districts, and missed opportunities, where Hispanics account for most of the growth in population and eligible voters, but did not receive any increase in representation." *Id.* at 49. As a result of this systematic stranding of minority voters, the vast majority of minorities are unable to elect candidates of their choice. In this way, the Congressional Redistricting Plan enhances voting opportunities for Anglos and suppresses minority voting opportunities.

Most striking is the sheer number of Texas minorities who will lose out under Texas's enacted congressional plan.

> Plan C185 substantially reduces the number of Blacks and Hispanics in districts where they have the ability to elect their preferred candidates. Under Plan C100, there were 6,443,817 Blacks and Hispanics in congressional districts where they had the ability to elect their preferred candidates. Under Plan C185, that number was reduced to 5,662,409. Using the standard approach to retrogression, Plan C185 reduced the number of Blacks and Hispanics in minority districts by 781,408. This is more than the growth in the total number of White Non-Hispanics from 2000 to 2010.

Defendants' Ex. 724 (Ansolabehere Supp. Rpt.) at 31.

In a decade in which the minority population made record gains, Texas's enacted congressional plan would yield record losses for minority representation. This extraordinary disproportionate impact could not have happened without race-conscious decision-making.

b. The Specific Disproportionate Impact and Ripple Effects Resulting From the Texas Legislature's Discriminatory Treatment of Hispanics in Nueces County

The disproportionate impact of the Texas Legislature's decision to remove more the 200,000 Hispanics from Nueces had enormous ripple effects throughout the state and strongly suggests discriminatory purpose.

While Texas has suggested that its decision to dismantle benchmark CD 27 was no harm, no foul, since it replaced that district with a new majority-Hispanic district in CD 34, *see* Pl.'s Mem. in Supp. of Summ. J., Dkt. #41 at 8, and that "it would not have been possible" to draw a seventh majority-Hispanic district in Southwest Texas, *id.* at 7, both of these propositions to be false. Benchmark CD 27 was anchored by Nueces County, a majority-Hispanic area. Defendants' Ex. 724 (Ansolabehere Rpt.) at 44. The district had an excess of approximately 40,000 people for an ideal congressional district. *Id.* As Dr. Ansolabehere described, "[t]he path of least resistance would have been to take some of the population from this county to help construct a seventh [majority-Hispanic] district somewhere in the Rio Grande Valley." *Id.* at 44. In fact, several alternative plans, including Plan C166 offered by State Representative Dawnna Dukes, did just that. *Id*. Instead, Texas chose to remove Nueces County from the Southwest Texas districts altogether and put it into

a new district extending north along the Gulf Coast. *Id.* at 44. "The [206,000] Hispanics in Nueces previously were in a district where Hispanics could elect their candidates of choice; now they are not." *Id.* at 45.

Texas's decision to excise Nueces County from benchmark CD 27 had a ripple effect throughout the State, to the detriment of minority voters. First, it precluded the creation of a seventh majority-Hispanic district in Southwest Texas. *Id.* at 44. The districts in largely-Hispanic Southwest Texas exceeded the total population for 6 districts by 506,708, and "a simple adjustment to the envelope of these districts could have easily added the needed 191,780 persons so as to have sufficient population in the area for a seventh district[.]" *Id.* at 43. But moving Nueces County into a majority-Anglo district in the Southeast removed 340,000 persons – the majority of whom are Hispanic – from the Southwest Texas area, leaving insufficient population for a seventh majority-Hispanic district. "In essence, then, moving Nueces County into a White district guaranteed that there would not be a seventh Hispanic District in Southwest Texas, even though there was sufficient population to support such a district." *Id.* at 46.

Second, removing Nueces County from Benchmark CD 27 necessitated the elimination of the crossover district in CD 25. *Id.* After sewing together new CD 34 out of the scraps of Benchmark CD 27, the only way to create an additional majority-Hispanic district was to fashion new CD 35 by connecting two clusters of Hispanic population by a 50-mile-long strip along Interstate 35. *Id.* at 47. This required taking a quarter of the Hispanic population out of CD 25, destroying what was once a minority-ability district. *Id.* "Again, an attempt to correct the error of moving Nueces County led to loss of yet another opportunity district." *Id.*

Third, moving Nueces County out of the Southwest Texas districts pulled all of the districts along the Gulf Coast to the southwest, including the Harris County districts, leaving

no flexibility for the creation of an additional Hispanic seat in Harris County. *Id.* at 47. To compensate for the population loss from Nueces, the large Hispanic population in Harris County was pulled into – and stranded within – new White CD 36. Several alternative plans, including Plan C166, managed to create a new minority ability district in Harris County by leaving Nueces County alone. *Id.* The Congressional Redistricting Plan, by contrast, creates a new majority-White district to the east of Harris County. *Id.*

Thus, the decision to remove Nueces County out of Benchmark CD 27 had far-reaching effects on what could be accomplished elsewhere in the state. In dismantling CD 27, the State eliminated a majority-minority district *and* a crossover district and replaced those with a single majority-minority district. This move also prevented the creation of a seventh majority-Hispanic district in Southwest Texas and constrained the ability to draw a new Hispanic district in Harris County. Contrary to the State's suggestion that it had "limited options when it altered CD27's lines," Dkt. #41 at 8, the State deliberately rejected the path of least resistance and instead chose the path that resulted in maximum gains for Whites and minimal gains for Hispanics. This could not have happened without race-conscious decision-making.

2. Historical Background

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

3. Sequence of Events

Here, the sequence of events leading up to the adoption of the Congressional Redistricting Plan shows that it is the product of a discriminatory purpose. As established by the testimony of Representative Dawnna Dukes, Congresswomen Sheila Jackson Lee, and others, the congressional redistricting map was drafted largely in secret by White Republican congressmen and the White Republican leadership in the state legislature. *See, e.g.*, Veasey Dep. at 26-27. On the floor of the Texas Senate, where the first bill redrawing congressional districts appeared, Judith Zaffrini, a Hispanic state senator, asked Kel Seliger, a White state senator and Chairman of the Senate Select Committee on Redistricting, if "any Minority members [were] involved in developing" the redistricting maps under consideration; Senator Seliger responded, "[n]ot that I recall." Defendants' Ex. 46 (Texas Senate Journal, Eighty-Second Legislature, June 6, 2011, at A-12). They excluded representatives of minority-opportunity districts from the redistricting process and provided them the proposed congressional plan only days before the only public hearing on the plan. Veasey Dep. at 33-34.

The Republican leadership not only excluded minority legislators from the redistricting process but they excluded the public as well. Senate Bill 4, which included the first congressional redistricting map, was made public on Tuesday May 31, 2011, the same day it was received by the Secretary of the Senate and referred to the Senate Redistricting Committee. Defendants' Ex. 672. The first and only hearing open to public testimony was held on Friday, June 3, 2011 – only three days after the plan was released. *Id.* On June 6, 2011 – the Monday after the Friday hearing – the full Senate considered the bill. *Id.*

On the House floor, State Representative Dawnna Dukes criticized the rushed and secretive process through which the Republican leadership ushered through a map that destroyed several minority opportunity districts, including Benchmark CD 25. Trial Tr., Jan. 19, 2012 (Afternoon Session of Day 3) at 95-96 (Dukes Direct); Defendants' Ex. 673. She explained that "the hearing was only a shadow, a route box process, a box to be checked

because they always knew they weren't going to let a plan pass that preserved the voice of Austin minorities." *Id.* Indeed, during the legislative session, several alternative plans were proposed that more fairly reflected minority population growth and did not lead to retrogression. As described, for instance, the plan offered by Representative Dukes created additional Hispanic-ability districts in the Dallas-Tarrant County metroplex, Harris County, and South and Southwest Texas. Trial Tr., Jan. 19, 2012 (Afternoon Session of Day 3) at 93-100 (Dukes Direct); Defendants' Ex. 688. Her plan also kept CDs 25 and 23 in tact as minority-ability districts, resulting in a total of 14 minority-ability districts for the state. *Id.* The Republican leadership, however, rejected this and other alternatives without any meaningful debate. *Id.*

In addition, while Republicans rejected any requests from the representatives of minority ability districts, they granted even whimsical requests of Anglo legislators. In the Congressional Redistricting Plan, for example, the district offices of all three Black Members of Congress would no longer be in their districts, but the Republican leadership never fixed these districts to include the district offices. Defendants' Exs. 574-83 (*Perez v. Perry*, Trial Tr. at 1279; 1335; 1515-1516). In a similar vein, the Republican leadership's redrawing of the district held by Congressman Charlie Gonzalez, Chair of the Congressional Hispanic Caucus, not only excluded Congressman Gonzalez's district office but also removed key economic and cultural landmarks that had long been located in the district, including the Alamo and the Convention Center named after Congressman Gonzalez's father.[3]

By contrast, the Republican leadership ensured that White Congresswoman Kay Granger, whose office originally had been drawn out of her district, had her office drawn back in before adoption of the final plan. Opiela Dep. at 63. And the Republicans also accommodated White Congressman Kenny Marchant's request on May 31, 2011, that his

[3] *See* Document No. 77, Devaney Decl., Ex. 16 ¶¶ 3-9, 11.

district lines be drawn to cross a street to include his "grandbabies'" school.[4] Perhaps most galling of all, White Congressman Lamar Smith requested on June 8, 2011, that his district lines be drawn to include a precinct with the San Antonio Country Club. The Republican leadership granted that request, at the same time that it was removing Black and Hispanic representatives from their congressional districts.[5]

4. Departure from Normal Procedures

As members of the Texas legislature and their staff have testified, these practices departed from those followed in previous redistricting cycles. Even the nonpartisan counsel for the Senate redistricting committee testified that redistricting procedure resulting in the Congressional Redistricting was significantly different from the procedure followed in the past.[6]

5. Legislative History

The contemporaneous statements of the legislators and staff members responsible for the Congressional Redistricting Plan also show that they were motivated by a discriminatory purpose. As described, Republican staff members discussed how to make a congressional district look like a Hispanic-opportunity district but not perform like one. And they also expressed their own concerns that the redistricting maps went too far and likely diminished the rights of minority groups without achieving any additional Republican advantage.[7]

III. CONCLUSION

For these reasons, the Court should deny Texas's request for preclearance and find that the Congressional Redistricting Plan violates Section 5 of the Voting Rights Act. Further, the Court should find that the Plan is retrogressive and was enacted with discriminatory intent.

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[4] *See* Document No. 77, Devaney Decl., Ex. 18.
[5] *See* Document No. 77, Devaney Decl., Exs. 19, 20.
[6] Devaney Decl. ¶ 14 (Mike Morrison Video Testimony).
[7] Devaney Decl., Ex. 25 (Maines E-mail).

RESPECTFULLY SUBMITTED: February 6, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2012, I electronically filed the foregoing Post-Trial Brief with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

DATED: February 6, 2012

Respectfully submitted,

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