IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA; ERIC HOLDER in his official capacity as Attorney General of the United States, Defendants, *et al*.	Civil Action No. 1:11-cv-1303 (RMC-TBG-BAH)

PRE-TRIAL BRIEF OF DEFENDANT-INTERVENORS THE TEXAS STATE CONFERENCE OF BRANCHES OF THE NAACP, ET AL.

Defendant-Intervenors the Texas State Conference of Branches of the NAACP, et al., ("NAACP") respectfully submit the following pre-trial brief, pursuant to the Court's Minute Order of January 5, 2012. Defendant-Intervenors also adopt the points and arguments set forth in the pre-trial briefs submitted by the Texas Legislative Black Caucus ("TLBC") and the Davis Intervenors (focused on the Senate plan).

I. INTRODUCTION

In examining the State's enacted redistricting plans, it would seem that, perhaps, the Anglo population exploded and minority population decreased over the last decade. Indeed, it is difficult to interpret comparisons of the benchmark congressional plan, where minority voters were able to elect their candidate of choice in 11 out of 32 districts, to the enacted plan, where minority voters will be able to elect their candidate of choice in only 10 out of 36 districts, any other way. Likewise, an enacted State House plan in which minority voters could elect their

candidates in but 45 districts, while they had that ability in 50 districts in the benchmark plan, leads to the same conclusion—that surely Anglo population growth in the state was enormous. The State of Texas did experience explosive population growth over the last decade, so much so that it was apportioned four additional seats in Congress, but it was not due to Anglo population growth. Rather, minority population growth, Latino, African-American and Asian-American, accounted for nearly 90% of the state's population growth.

While this result may seem inexplicable given demographic changes in the state, when examined in the light of Texas's long history of discrimination, it becomes clear that Texas is repeating past mistakes, seen as recently as when it redistricted in the middle of the last decade—it intentionally sought to minimize the ability of minority voters to elect their candidates of choice and to participate in the political process. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 44 (2006) (noting the drawing of a particular district "bears the mark of intentional discrimination that could give rise to an equal protection violation"). Texas continues to exclude minority representatives in the state legislature from meaningful participation in the redistricting process, Texas continues to disregard the input of groups seeking to protect minority voting gains under Section 5, and Texas continues to develop plans that are abjectly unfair to minority voters. Sadly, the evidence will show that despite a long and recent history of litigation in which the State has consistently been shown to have acted in an unlawful, racially discriminatory way when it comes to minority voters and redistricting, Texas has continued on that very same path in this redistricting cycle.

II. RELEVANT LAW

Under Section 5 of the Voting Rights Act of 1965, a covered jurisdiction such as Texas bears the burden of proving to this Court that its congressional, State House, and State Senate

plans were enacted without discriminatory intent and will not diminish the ability of minority voters to elect the candidates of their choice. Under Section 5, if it fails to meet that burden, the Attorney General or this Court must deny preclearance to the plans.

The mechanism by which the "purpose prong" of Section 5 is applied was altered by Congress in the 2006 Reauthorization to fully restore its protections, which had been limited by the Supreme Court in *Reno v. Bossier Parish School Bd.* (*Bossier II*), 528 U.S. 310 (2000). In this Court's memorandum opinion on the denial of summary judgment, it highlighted the types of invidious intent that Congress intended to prohibit with the reauthorization of the Voting Rights Act in 2006. In particular, Congress characterized the purpose prong of Section 5 as an attempt to "prevent covered jurisdictions from enacting and enforcing voting changes made with a clear racial animus, regardless of the measurable impact of such discriminatory changes." H. R. REP. NO. 109-478, at 42. Moreover, Congress found that "[v]oting changes that 'purposefully' keep minority groups 'in their place' have no role in our electoral process and are precisely the types of changes Section 5 is intended to bar." *Id.* at 43; Memorandum Opinion at 10.

As indicated in guidance offered by the Department of Justice for applying Section 5 to redistricting plans, and as set forth in this Court's memorandum opinion on denial of summary judgment, the analysis used to determine whether laws are enacted with a discriminatory purpose are violative of the Equal Protection Clause of the 14th Amendment is instructive in analyzing whether redistricting plans were enacted with a discriminatory purpose violative of Section 5 of the Voting Rights Act. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977). But even under that exacting constitutional analysis, claims of intentional discrimination do not require a showing that racial considerations "predominated" over all other

considerations—discriminatory intent need only be one of the causative factors. *Id.* at 265-66. *See also, Hunter v. Underwood*, 471 U.S. 222, 231-32 (1985) (holding that the state's additional intention of discriminating against poor whites did not negate the intention to discriminate against blacks); *McMillian v. Escambia County, Fla.*, 688 F.2d 960, 969 n. 19 (5th Cir. 1982) (holding that incumbency protection does not justify or protect from invalidation a law that is purposefully discriminatory), *cert. denied*, 464 U.S. 830 (1983); *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) (holding many strategies used to protect white imcumbents in high African-American populations are "necessarily racially discriminatory."). Moreover, the *Arlington Heights* approach endorsed by Congress and this Court clearly acknowledges that a challenged law may be so clearly discriminatory in effect that there is no other explanation than the law was adopted with a discriminatory purpose. 429 U.S. at 266.

Additionally, with the 2006 Reauthorization, Congress made clear that Section 5 was intended to prohibit retrogression in districts in which minority voters are able to elect candidates of choice either "directly or coalesced with other voters." H.R. REP. NO. 109-478, at 46. The state's refusal to accept this clear instruction from Congress implicates a significant number of districts across each plan. Moreover, this Court noted "[t]he question of retrogressive effect under Section 5 looks at gains that have already been realized by minority voters and protects them from future loss." Memorandum Opinion at 27. This court also recognized that a retrogression inquiry must consider "population shifts between or among redrawn districts that diminish or enhance the ability of a significant, organized group of minority voters to elect their candidate of choice." *Id.* at 32. Thus, the narrow way in which Texas parses Section 5 in order to minimize the ability of minorities to participate in the political process is not consistent with an accurate interpretation of the statute.

III. FACTS TO BE OFFERED IN TRIAL

A. Discriminatory Intent

The NAACP Defendant-Intervenors, along with the Department of Justice and other Defendant-Intervenors, will offer a host of evidence in support of claims of discriminatory intent and retrogressive effect. The process by which the state developed its congressional, state house, and state redistricting plans is prime evidence of the discriminatory intent that infected each plan. In past redistricting cycles, the State conducted statewide public hearings to receive input from citizens of Texas regarding well-publicized proposed plans. This was not the case this cycle.

This Court will hear from members of the Texas Legislative Black Caucus, both through live and written testimony, about the bizarre manner in which the state conducted this redistricting process, and the great lengths to which the leadership in the state legislature went to exclude minority members of the legislature from meaningful participation in the process. Representative Sylvester Turner will testify through proffer that in all of his years in the state legislature, he has never witnessed a redistricting process conducted at such a break-neck speed, with no public hearings after maps have been publicized, and with such little incorporation of minority members input. He will offer testimony that he has never before seen a situation in which maps were voted on after only being publicized a short time earlier. Representative Dawnna Dukes will testify that the development of the final maps was conducted in secrecy, despite overtures made by members of the Legislative Black Caucus to the legislature's leadership. Both will testify that any changes made in response to Caucus members' recommendations were minor, while the substantive suggestions were ignored. In fact, every substantive plan or district design offered by the Caucus or the NAACP or other group interested in protecting hard-won gains for minority voting rights was rejected by State.

This Court will hear from a number of witnesses about how the enacted redistricting plans—the actual results—leave no doubt as to the invidious discriminatory intent with which they were crafted. Dr. Richard Murray will testify about the end result of the congressional redistricting plan, in which minority voters will be able to elect fewer candidates of their choice despite being responsible for almost all of the state's population growth and the apportionment of four additional seats. Dr. Murray will also testify that the inconsistency between where population growth has been over the last decade and where the state decided to remove State House Districts can be explained no other way than by invidious intent. For example, the legislature determined the Harris County delegation would lose a representative in the 2011 State House redistricting plan. However, rather than remove a district from the Anglo-predominant east side of the county, where the population decreased, the state removed a minority coalition district from the west side of the county, where population growth was explosive. This was a common pattern across the state, and all of this is irrefutable evidence of an intent to discriminate against minority voters.

This Court will hear how numerous plans were presented to the state legislature that would have both protected minority voting gains and expanded in nothing more than a fair manner the opportunities for minority voters—the source of Texas' population growth—to elect the candidates of their choice. Plans submitted by numerous plaintiff groups in the Section 2 lawsuit demonstrated that it was possible to create two additional minority opportunity districts in the Dallas-Fort Worth Metroplex, even though the State implausibly argued that it was impossible to create even one new opportunity district in the region. While the State did place one of the new congressional districts in this area, it is an Anglo majority district. This is astonishing, given that the Anglo population in the Dallas-Fort Worth Metroplex decreased over

the last decade. And by looking at the shape of that district, Congressional District 33 in the state's enacted plan, it is clear that the district had to be racially gerrymandered in order to exclude the large minority communities that have developed in the region.

Additionally, the African-American Members of Congress from Texas will all testify as to the "surgical precision" with which significant historical elements and political and economic resources were removed from their districts. Each one of these Congresspersons had their district office removed from their district, while apparently no Anglo Congressperson suffered such a loss. The district office is a key political resource for minority voters in that district, enabling them to have a recognized avenue of communication with their representative. Congresswoman Eddie Bernice Johnson even had her home drawn out of her district. Moreover, the African-American Congresspersons had important economic generators, including hospitals, business centers, and entertainment resources, carefully carved from their districts. The ability to elect candidates of choice matters so that those candidates can be responsive to the needs of that minority community and bring particularized economic resources to the district. The loss of these economic generators deprives minority voters of an equal opportunity to participate in the political process. The Voting Rights Act was passed to prohibit the intentional and invidious disadvantaging of minority voters in this way.

Finally, the Congresspersons will testify that despite the fact that each of these districts needed only minor changes to bring it into compliance with the equal population mandate of the Equal Protection Clause of the 14th Amendment, major changes were made to the districts. The legislature added to these minority districts large areas where expansion and home development for wealthy Anglos is being planned. These unnecessary additions could not have been

accidental, and will undermine the ability of African-American and other minority voters to continue electing the candidates of their choice over the next decade.

These end results indicative of discriminatory intent are also seen in the State House plan enacted by the State. The enacted plan is rife with examples of the intentional dismantling of coalition House districts. For example, in districts like House District 26, the demographic trend was obvious—minority growth over the decade was so enormous that incumbents not preferred by minority voters would have a difficult time being re-elected. But protecting Anglo incumbents cannot be an excuse to intentionally fragment cohesive minority voting blocks. Additionally, State House plans submitted by the Texas Legislative Black Caucus demonstrated that the application of neutral redistricting principles facilitated the creation of numerous new minority opportunity districts, again reflective of the demographic change in the state. And, again, in a masterpiece of racial gerrymandering, the state carved apart one minority group from another in order to prevent those groups from voting together to elect a candidate of their choice. On the basis of all the evidence available, it is difficult to find a reasonable explanation for the choices made in the plans enacted by the state other than a conscious effort to minimize the political voice of minority voters in the state.

B. Retrogressive Effect

The congressional, State House and State Senate redistricting plans enacted by the State of Texas will make it more difficult for minority voters to continue being able to elect their candidates of choice, and this retrogressive effect is widespread. Though evidence of retrogressive effect in a number of other districts will be discussed at trial, this opening brief will examine one particular crossover district and one particular coalition district as illustrative of the State's refusal to respect the right of minority voters to be able to elect their candidate of choice.

Texas is quite blunt in the fact that it purposefully deconstructed Congressional District 25. That district, centered in Travis County, was a thriving minority crossover district. In a purported attempt to oust an Anglo Democrat, Lloyd Doggett, the State of Texas fragmented a historical African-American community in Austin. This Court will hear testimony, both live and through offers of proof, that Lloyd Doggett was, in fact, the candidate of choice of a coalition of minority voters in the Austin area. This Court will hear that Congressman Doggett was responsive to the needs of the minority community and that African-American and Latino voters continued, time and time again, to vote for him. The NAACP Report Cards, rating the performance of members of Congress on issues of importance to African-American voters supports this contention. Defendant-Intervenors will offer live testimony and written proffers that will describe the very historic and very politically active African-American community in East Austin that was vital in ensuring the election of Congressman Doggett, and his predecessor, and that this community is now splintered into multiple congressional districts. Where a minority community, though technically not a majority in the district, is voting cohesively and is able to elect their candidate of choice, the ability of those voters to work politically with Anglo voters cannot be justification to crack that cohesive community and purposefully silence any political voice they had in the region.

As another example, the State's removal of House District 149 will starkly diminish the ability of minority voters in Harris County to elect their candidate of choice. Evidence presented to this Court will show that Hubert Vo, the first and only Vietnamese-American elected to serve in the Texas State House of Representatives, was the candidate of choice of minority voters in his district. Regardless of the reconstituted election results for statewide, exogenous elections, the evidence will show that, in the endogenous election that mattered, Mr. Vo had broad support

from Asian-American, African-American and Latino voters in his district. In that part of Harris County, minority coalitions exist to elect a number of candidates on a local level, and the minority communities in question share a large number of common interests and challenges. Proffer testimony will document the political cohesiveness of different minority groups in these local races. In the district in question, House District 149, a coalition of voters minority voters had made the type of gain that Section 5 was intended to protect—the demonstrated ability to elect a candidate of their choice.

Texas is an enormously diverse state, and particularly in the urban regions, many different racial and ethnic minority groups live in very integrated patterns. If the Voting Rights Act does not protect the ability of these minority groups to act in a politically cohesive way, then states like Texas will use that decision to splinter racial groups and ensure that because they do not live in discrete, single-race pockets, they will never be able to elect, or continue electing, their candidates of choice.

IV. CONCLUSION

The issues raised in this pre-trial brief are but a glimpse into the overwhelming evidence that will be offered to this Court on issues of retrogressive effect and discriminatory intent in the State's enacted House, Senate and congressional redistricting plans. Texas has in the past and again in this last redistricting cycle flaunts its efforts to keep minority voters "in their place," a violation of the discriminatory purpose prong of Section 5. Given that and the deleterious effect of the redistricting plan on minority voters, this court should deny the State's request for preclearance under Section 5 of the Voting Rights Act.

Dated: January 13, 2012

Respectfully Submitted,

/s/ Allison J. Riggs
Allison J. Riggs

N.C. Bar No. 40028
(Admitted Pro Hac Vice)
Anita S. Earls
N.C. Bar No. 15597
Southern Coalition for Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
(919)-323-3380
(919)-323-3942 (fax)
allison@southerncoalition.org

/s/ Robert S. Notzon_____
Robert S. Notzon
D.C. Bar No. TX0020
Law Office of Robert S. Notzon
1507 Nueces Street
Austin, Texas 78701
(512)-474-7563
(512)-474-9489 (f)
Robert@NotzonLaw.com

Gary Bledsoe
TX Bar No. 02476500
(Admitted Pro Hac Vice)
Law Office of Gary L. Bledsoe and Associates
316 West 12th Street, Suite 307
Austin, Texas 78701
(512)-322-9992
(512)-322-0840
garybledsoe@sbcglobal.net

Victor Goode
Assistant General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
Telephone: 410-580-5120
Fax: 410-358-9359
vgoode@naacpnet.org

Attorneys for NAACP Defendant-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2011, I electronically filed the foregoing Pre-Trial Brief of Defendant-Intervenors Texas State Conference of Branches of the NAACP, et al., 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.

/s/ Allison J. Riggs