UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

STATE OF TEXAS,

Plaintiff,

- against -

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

Defendants.

CIVIL ACTION NO. 1:11-cv-01303

Three-Judge panel: RMC-TBG-BAH

TRIAL BRIEF OF DEFENDANT-INTERVENOR
THE TEXAS LATINO REDISTRICING TASK FORCE

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TRIAL BRIEF OF DEFENDANT-INTERVENOR
THE TEXAS LATINO REDISTRICING TASK FORCE

Defendant-Intervenor, the Texas Latino Redistricting Task Force (hereinafter "Latino Task Force"), files this trial brief in support of its position that the State's proposed House redistricting plan would have a retrogressive effect on Latino voters' ability to elect their preferred candidates of choice and both the Texas House and Congressional redistricting plans have the purpose of diminishing the ability of Latinos to elect their preferred candidates of choice. Therefore, this Court should deny the State of Texas's request for a declaratory judgment granting preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, for both plans.

INTRODUCTION

The Latino Task Force will show during the upcoming trial that while Latinos constituted 65% of the population growth that occurred in Texas over the previous decade the proposed State House plan diminishes Latino electoral strength by decreasing the number of House districts in which Latinos have an ability to elect their candidate of choice from 33 districts to 31 districts. This clear, two-district retrogressive effect precludes the State from proving by a preponderance of the evidence that the plan may be precleared.

In addition, the Latino Task Force will present evidence that the State drew the Texas House and Congressional plans, Plans H283 and C185 respectively, with the discriminatory purpose of diluting Latino voting strength, in violation of Section 5 of the Voting Rights Act; the State's insistence that it had legitimate reasons to eliminate or limit the number of Latino ability to elect districts in its plans is unsupported by the facts and the law. As a result, Texas cannot

prove by a preponderance of the evidence that it is entitled to preclearance for either the State House or Congressional redistricting plans.

TEXAS HOUSE REDISTRICTING PLAN – H283

A. Plan H283 has a Retrogressive Effect on Latinos' Ability to Elect Their Candidates of Choice

The Latino Task Force will demonstrate that the State used demographic and election data to manipulate House district boundaries, and also eliminated a Latino ability to elect district, to disadvantage Latino voters. The Latino Task Force will further show the State's retrogression analysis, supporting its claim of no retrogression in Plan H283, was based on a flawed single-factor retrogression standard. A proper analysis shows that H283 does have a retrogressive effect on Latino voters' ability to elect their candidate of choice.

1. Legal standard

The correct legal standard for determining retrogression is a functional analysis of a variety of factors that effect Latinos' ability to elect. *See* Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act ("2011 Guidance"), 76 Fed. Reg. 7470 (Feb. 9, 2011) (explaining that the proper inquiry "requires a functional analysis of the electoral behavior within the particular jurisdiction or election district"). As this Court itself concluded, the faulty legal standard put forward by the State, which focuses solely on whether a district contains more than 50% Hispanic citizen voting age (HCVAP) population, constitutes an "insufficient" analysis and results in a lack of confidence that the State properly calculated the number of Latino ability to elect districts in the benchmark and the proposed plan. Mem. Op. at 28, Dkt. No. 115 (D.D.C. Dec. 22, 2011).

A Section 5 claim requires "identifying districts in which minority citizens enjoy an existing ability to elect and comparing the number of such districts in the benchmark to the number of such districts in a proposed plan to measure the proposed plan's effect on minority citizens' voting ability." *Id.* The evidence presented by the Latino Task Force will show that a proper analysis of ability to elect factors – including population statistics, but also the existence of polarized voting, historical discrimination, minority voter registration, and minority turnout – leads to the conclusion that the State eliminated two previously-existing Latino ability to elect districts – House District (HD) 33 and HD 117 – resulting in H283 having a retrogressive effect. *Id.* at 28-32 (identifying ability to elect factors).

2. Proof of Retrogressive Effect

In the State's House Plan, HD 33 is completely eliminated as a Latino ability to elect district. It is sliced out of Nueces County in South Texas and relocated to Rockwall County in North Texas where it becomes an Anglo-majority district with only 8.5% HCVAP. This change, standing alone, would constitute retrogression because it has the effect of diminishing the ability of Latinos to elect their preferred candidate of choice in Texas. 42 U.S.C.A. § 1973c(b) (West Supp. 2011); Def. Int. Joint Mem. in Opp'n to Summ. J. at § II.G, *Texas v. United States*, No. 1:11-cv-01303, Dkt. No. 74 (W.D. Tex. 2011). Thus, the only question is whether Texas compensated for this loss by creating a new Latino ability to elect district elsewhere in the State. The State claims to offset the elimination of HD 33 with HD 148. Texas Mot. Summ. J. at 10-13, *Texas v. U.S.*,[1] Dkt. No. 41. However, the Latino Task Force will show that HD 148 has long been a district in which Latinos have the ability to elect their candidates of choice.

[1] Any reference to *Texas v. U.S.* refers to *Texas v. United States*, No. 1:11-cv-01303 (W.D. Tex. 2011).

The Latino Task Force will present testimony from Gerardo Interiano (counsel to the Texas House Speaker) showing that he did not examine the election performance of benchmark HD 148 before he started mapping to determine if it was already a Latino ability to elect district. Ex. 47 at 74:21-75:6, *Texas v. U.S.*, Dkt. No. 85-6. Nevertheless, the State claims that HD 148 is a "new" Latino majority district in Plan H283 that can guarantee Voting Rights Act compliance by offsetting the loss of HD 33. In fact, the State knew that increasing the HCVAP of HD 148 to above 50% would not change the performance of the district. Ex. 65 at 1-2, *Texas v. U.S.*, Dkt. No. 85-14. Because HD 148 exists as a Latino ability to elect district in the benchmark, it cannot offset the loss of HD 33 in Plan H 283.

In addition to the loss of HD 33, the State altered the boundaries of HD 117 so that it is no longer a Latino ability to elect district. The evidence will show how the State swapped precincts in and out of HD 117 in order to reduce the election performance of Latino-preferred candidates. The result of exchanging precincts on the southwest side of San Antonio for precincts on the far northside and in rural Bexar County is that Latino-preferred candidates are less likely to win elections in HD 117. Ex. 45 at 10, *Texas v. U.S.*, Dkt. No. 83-45; Ex. 7, *Texas v. U.S.*, Dkt. No. 83-7. The State's flawed analysis of ability to elect districts, which would allow it to claim this weakened district as an ability to elect district merely because it has greater than 50% HCVAP, defies reality and rewards the State for reducing Latinos ability to elect in a district in order to preserve the incumbency of a candidate who is not the choice of Latino voters. The State's creation of HD 117 as a district in which Latinos do not have the ability to elect their preferred candidate is retrogressive; Plan H 283 has not offset this change with the addition of a Latino ability to elect district elsewhere in Texas. Ex. 44 at 8-9, *Texas v. U.S.*, Dkt. No. 83-44.

Thus, because the State's House Plan eliminates two Latino ability to elect districts and does not offset the retrogressive effect elsewhere in the plan, H283 is retrogressive.

B. Plan H283 was Drafted with a Racially Discriminatory Purpose

In the face of shifting demographics, and the increase in the number of Latino citizens of voting age in Texas from 2000 to 2010, the State's refusal to create additional Latino ability to elect districts, as well as its subtraction from the current number of Latino ability to elect districts in the House Plan, is circumstantial evidence of an intent to limit Latino electoral strength in the new redistricting plans. In addition to having a retrogressive effect, the Latino Task Force will show that H283 was drafted with a racially discriminatory purpose.

1. Legal standard

The Latino Task Force will demonstrate how an analysis of intentional discrimination pursuant to the factors set-out by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and adopted by this Court, leads to the conclusion that the State drafted H283 with a discriminatory purpose. Mem. Op. at 11-12, Dkt. No. 115 (D.D.C. Dec. 22, 2011) (finding that *Arlington Heights* provides the proper analysis for determining discriminatory purpose). In addition to direct evidence of racially discriminatory purpose, the factors laid out by the Supreme Court in *Arlington Heights* include: "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; "[t]he specific sequence of events leading up [to] the challenged decision"; "[d]epartures from the normal procedural sequence"; "substantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and "[t]he legislative or administrative history," which can be "highly

relevant . . . where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. at 267-68.

2. Proof of Discriminatory Purpose

Ultimately, the Latino Task Force will show through evidence and testimony that all of the *Arlington Heights* factors were present in the creation of H283 and, therefore, the State cannot prove by a preponderance of the evidence that its House redistricting plan was drafted without a racially discriminatory purpose. Looking at the historical background to Texas redistricting, the evidence will show that Texas has enacted and then been forced to remedy discriminatory redistricting plans in every decade since its coverage by section 5 in the 1970's. The evidence will also show that the 2011 Texas Legislative Session was rife with racial tension. Ex. 59 at 1, 6, *Texas v. U.S.*, Dkt. No. 83-78. The Texas Legislature departed from normal substantive considerations in a number of important respects, including failing to make the necessary inquiry into whether maps conformed with the Voting Rights Act and elevating state redistricting rules over federal civil rights mandates despite knowing that federal law governed.[2] Additional evidence will show numerous departures from the normal procedural sequence, including that, at the outset of the Session, the Texas House of Representatives voted down a rules adoption stating that all legislatively approved maps would comply with the Voting Rights Act. Ex. 34 at 2-4, *Texas v. U.S.*, Dkt. No. 83-34.

The Latino Task Force will also demonstrate how the State's discriminatory purpose manifested itself in individual State House Districts. The Rio Grande Valley's population is growing and the "excess" population in Cameron and Hidalgo counties essentially created a new House district in that location; that is, the redistricters could have "spilled" the excess population

[2] Latino Task Force Statement of Material Facts at ¶¶ 453-537, *Texas v. U.S.*, Dkt. No. 78-1.

of each of the two counties toward the other county to make a new House district which would, because of the majority Latino population in the area, have been a Latino ability to elect district. Ex. 32, *Texas v. U.S.*, Dkt. No. 83-32. Instead, and purportedly to comply with the County Line Rule, the excess population in each county was spilled northward, resulting in no creation of an additional Latino ability to elect district. *Id*. The Latino Task Force will provide evidence that the Chair of the House Redistricting Committee declared that he would follow the County Line Rule rather than the Voting Rights Act until the U.S. Supreme Court ordered him to do otherwise. Ex. 47 at 89:15-20, *Texas v. U.S.*, Dkt. No. 85-6. Elevating a state's election law over the federal Voting Rights Act in order to claim that the state was barred from creating an additional Latino ability to elect district is a strong indicator of racial intent.

Similarly, although in the benchmark plan Nueces County hosts a portion of one Anglo majority district and two wholly-contained Latino majority districts, the State eliminated one of the two Latino ability to elect districts in H 283. Ex. 49 at 150:11-18, *Texas v. U.S.*, Dkt. No. 85-7. It did this despite the fact that it was possible to preserve both Latino majority districts in Nueces County. Ex. 33, *Texas v. U.S.*, Dkt. No. 83-33.

The evidence will further show that in El Paso County the boundaries of HD 78 in H283 do not follow the edges of the nearby mountain, a natural geographic feature, or existing precinct boundaries. Ex. 30, *Texas v. U.S.*, Dkt. No. 83-30. The boundaries of HD 78 do closely follow the racial composition of the Census block groups in El Paso County (a level of geography at which racial, but not political, data are available). Ex. 31, *Texas v. U.S.*, Dkt. No. 83-31. The State rejected the more natural configuration of House districts in El Paso County, in which all are Latino ability to elect districts and follow neighborhood boundaries, and instead chose to gerrymander the districts to ensure that HD 78 cannot elect the Latino-preferred candidate.

In Bexar County, the changes to HD 117 also demonstrate discriminatory intent. Representative Garza testified that he wanted HD 117, which he represents, to extend farther north so that he could gain more Anglo population on the assumption that they would vote for him. Ex. 48 at 30:6-31:3, 58:9-15, *Texas v. U.S.*, Dkt. No. 83-67. The Latino Task Force will present evidence showing that, in changing HD 117, the State added areas containing Latino adult citizens who were much less likely to register to vote than the Latino adult citizens in the benchmark HD 117. This is consistent with the findings of Dr. Flores that the State's changes to HD 117 reduced the number of registered Latinos who turn out to vote in elections. Ex. 45 at 10, *Texas v. U.S.*, Dkt. No. 83-45.

The evidence is clear that H283 has a retrogressive effect and that the State drafted the plan with a discriminatory purpose. Thus, the State House Plan should not be precleared.

CONGRESSIONAL REDISTRICTING PLAN – C185

A. Plan C185 was Drafted with a Racially Discriminatory Purpose

Equally illuminating is the evidence demonstrating that the State extended its discriminatory purpose into the drafting of its Congressional plan. Applying the same standard for discriminatory purpose as outlined above, *see infra* B.1., the Latino Task Force will demonstrate how the State intentionally apportioned Latino population into and out of Congressional District (CD) 23 to ensure a Latino-majority district that cannot elect the Latino-preferred candidate and how the State discriminated against Latino voters in its reconfiguration of CD 27.

1. Intentional Discrimination in the Construction of CD 23 in Plan C185

The State reconfigured CD 23 to deprive Latinos of the ability to elect their preferred candidate. The Latino Task Force will present evidence that, when he was drawing CD 23, Mr.

Downton, the author of the Congressional plan, turned on the shading for election results and Spanish surname voter registration (SSVR).[3] The evidence will show that Mr. Downton made changes precinct-by-precinct, with the dual goals of strengthening the district for the incumbent, who was not the candidate of choice of Latinos, and increasing the SSVR.[4] As a result, the precincts that he drew into the map had a slightly higher SSVR, but lower election results for Latino-preferred candidates. Ex. 47 at 28.3-28.4, *Texas v. U.S.*, Dkt. No. 85-6; *see also* Ex. 4, *Texas v. U.S.*, Dkt. No. 83-4. Mr. Downton admitted to removing the highly—and increasingly—mobilized Maverick County voters, who are over 95% Latino, because they would not vote for the incumbent he sought to protect. Ex. 53 at 87:21-23, *Texas v. U.S.*, Dkt. No. 85-9; Ex. 23 at 1, *Texas v. U.S.*, Dkt. No. 83-23.

The evidence will show that even according to the State's own internal analysis, in achieving the correct population for CD23, the State's plan disproportionately reduced the Latino electorate. Ex. 17, *Texas v. U.S.*, Dkt. No. 79-19. This is consistent with the intent expressed in communications between legislative representatives and one of the map-drawers.[5] After purposefully changing CD 23 to ensure that Latino preferred candidates would be far less likely to be elected, the State takes the position that if the HCVAP of a district is greater than 50%, then by definition Latinos have the ability to elect the candidates of their choice. Ex. 49 at 150:16-22, *Texas v. U.S.*, Dkt. No. 85-7. Thus, the State takes the position that CD 23 in C185 is a Latino ability to elect district even though the State systematically and cynically altered the district so that it would no longer elect the Latino preferred candidate. *Id.* at 94:11-19. The

[3] Ex. 47 at 52:4-8, *Texas v. U.S.*, Dkt. No. 85-6; Ex. 53 at 41:15-17, 56:15-57:8, *Texas v. U.S.*, Dkt. No. 85-9.
[4] Ex. 47 at 75:23-76:3, *Texas v. U.S.*, Dkt. No. 85-6; Ex. 49 at 102:5-11, *Texas v. U.S.*, Dkt. No. 85-7.
[5] E-mail Chain between Eric Opiela, Gerardo Interiano, and Lisa Kaufman (Nov. 17, 2010, 10:19PM CST; Nov. 19, 2010, 06:17AM CST; Nov. 19, 2010, 6:39AM CST) (DEFPRIV000221).

State's position was rejected by its own expert witness. Ex. 47 at 115:5-6, *Texas v. U.S.*, Dkt. No. 85-6.

2. Intentional Discrimination in the Construction of CD 27 in Plan C185

The State also discriminated against Latinos in the reconfiguration of CD 27. For over 30 years, since the creation of CD 27, Nueces County, a majority-Latino county, was included as the northern anchor of this district. Ex. 53 at 65:11-19, *Texas v. U.S.*, Dkt. No. 85-9; Ex. 47 at 18:5-13, *Texas v. U.S.*, Dkt. No. 85-6. The evidence will show that in drawing the Congressional map, the State sought to protect Rep. Farenthold's incumbency and radically re-drew CD 27 so that it is centered outside of South Texas. Nueces County, which formerly contained the majority of registered voters in CD 27, now comprises the southern portion of a majority Anglo district and contains a minority of registered voters in the district. Ex. 57 at 59:23-60:2, *Texas v. U.S.*, Dkt. No. 83-76; Ex. 54 at 51:6-11, *Texas v. U.S.*, Dkt. No. 83-73. The 206,293 Latino residents of Nueces County historically accustomed to the ability to elect the Latino candidate of choice are now stranded in a district to the north with an Anglo majority so that the State can assure the reelection of an incumbent who is not the Latino candidate of choice. Ex. 47 at 28.7:24-28.8:7, *Texas v. U.S.*, Dkt. No. 85-6; Ex. 40 at 13, *Texas v. U.S.*, Dkt. No. 83-40. The removal of Nueces County from the configuration of Latino ability to elect districts in South and West Texas purposefully deprives the thousands of Latino voters in Nueces County the ability to elect their preferred candidate and furthermore prevents the creation of seven Latino ability to elect districts in South Texas.

CONCLUSION

For the foregoing reasons, the Latino Task Force will demonstrate at trial that Texas cannot carry its burden of proof and that the Court should deny preclearance of the State of Texas's House and Congressional redistricting plans.

Dated: January 13, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she filed the foregoing document and all attachments using the Court's electronic case filing system on January 13, 2012.

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