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

DEFENDANT-INTERVENOR TEXAS LATINO REDISTRICTING TASK FORCE'S RESPONSE TO THE COURT'S ORDER OF MARCH 6, 2012

Defendant-Intervenor Texas Latino Redistricting Task Force respectfully submits the following Response to the Court's Order of March 6, 2012.

INTRODUCTION

In a hearing held on February 14 and 15, 2012 before the Texas district court, one plaintiff group argued that creating the new Latino-opportunity district in South-Central Texas would be unconstitutional.[1] Counsel for the Rodriguez Plaintiffs, who also represents the Gonzales Defendant Intervenors in this case,[2] further argued that the new Latino-opportunity

[1] *See* Tr. Feb. 14-15 Hearing, *Perez v. Perry*, 5:11-cv-360, at 284:18-20 ("And *Shaw v. Reno* and racial gerrymandering principles raise a substantial -- substantial shadow over District 35.").
[2] *See id.* at 264:19-24 ("The Gonzalez intervenors is the group that is most closely aligned with the people I represent here. It doesn't include Travis County and the city of Austin, but we are substantially the same. We have exactly the same interests. In fact, I am the attorney -- although I wasn't up there for -- I am the attorney for the Gonzalez intervenors in D.C.").

district in South-Central Texas would violate section 5 of the Voting Rights Act by including Latinos who currently reside in benchmark Congressional District (CD) 25.

The Texas Latino Redistricting Task Force consistently has maintained that the creation of a new Latino-opportunity district in South-Central Texas is appropriate and will not adversely affect the incumbency interests of other members of Congress, including Congressman Lloyd Doggett (D-Austin), who represents the Anglo-majority CD 25. Nevertheless, the Rodriguez Plaintiffs (and their aligned party the Gonzales Defendant Intervenors) challenge the new Latino-opportunity district in South-Central Texas, arguing that its creation is barred by the current CD 25.

The Texas Latino Redistricting Task Force, in an Advisory to this Court, stated that a new Latino-majority CD 35 may encompass portions of Travis County legally because the benchmark CD 25 in Central Texas is an Anglo majority district in which Anglo voters dominate the Democratic Primary. Thus, neither Latinos, who constitute 25% of the district's CVAP, nor African Americans, who constitute 9% of the district's CVAP, have the ability to nominate and elect their respective preferred candidates to office.[3]

Following the *Perez* court's adoption of an interim congressional redistricting plan that contains seven Latino opportunity districts in South Texas, including a Latino-opportunity CD 35 in South-Central Texas, the Gonzales Defendant Intervenors filed a notice with this Court that described the Texas district court's interim congressional plan as "perpetuat[ing] many of the Section 5 violations identified by [some] Intervenors" and urged this Court to issue a "ruling . . . which will result in a more comprehensive remedy."[4] To the extent that the Gonzales Defendant

[3] Dkt. 210 at 3.
[4] Dkt. 211 at 1.

Intervenors urge this Court to rule that the interim CD 35 is foreclosed by a requirement to maintain the boundaries of the benchmark CD 25, the Texas Latino Redistricting Task Force disagrees.

Below, the Texas Latino Redistricting Task Force summarizes the evidence regarding benchmark CD 25 and minority electoral opportunity.

I.
APPLICABLE LEGAL STANDARD FOR EVALUATING CD 25

The State's enacted congressional redistricting plan can violate section 5 in either of two ways: first, by reducing, statewide, the number of districts in which minority voters have the ability to elect their candidates of choice; and second by purposefully discriminating against minority voters.

With respect to both the retrogression and purpose standards, Congress amended section 5 in 2006 to address the U.S. Supreme Court's ruling in *Georgia v. Ashcroft*, 539 US 461 (2003) (holding that a redistricting plan could be precleared under section 5 even if it reduced minority voters' ability to elect their preferred representatives, as long as it preserved electoral "influence" that was "not limited to winning elections"). Congress's 2006 amendments to section 5 made clear that the purpose of the statute is to prevent voting practices that diminish "the ability of [minority] citizens *to elect* their preferred candidates of choice." 42 U.S.C. 1973c (emphasis added).

The House Committee on the Judiciary explained in its report that "the Supreme Court, in the case of *Georgia v. Ashcroft* . . . weaken[ed] Section 5's protection of minority groups from voting changes that diminish their ability to elect their preferred candidates of choice." H.R. Rep. No. 109-478, at 68 (2006) (Ex. 1, filed herewith). The Committee continued:

> Moreover, the Committee is concerned by testimony indicating that "[m]inority influence is nothing more than a guise for diluting minority voting strength." Accordingly, leaving the *Georgia* standard in place would encourage States to spread minority voters under the guise of "influence" and would effectively shut minority voters out of the political process. In essence, the Committee heard that Section 5, if left uncorrected, would now allow "States to turn black and other minority voters into second class voters who can influence elections of white candidates, but who cannot elect their preferred candidates, including candidates of their own race." This is *clearly not* the outcome that Congress intended the Voting Rights Act and Section 5 to have on minority voters.

Id. at 70 (internal cites to Oversight Hearing on the Voting Rights Act: The Judicial Evolution of the Retrogression Standard, Subcommittee on the Constitution, Committee on the Judiciary, 109th Cong. 1 (November 9, 2005) omitted).

Today, the Supreme Court recognizes that the minority voter candidate of choice can be eliminated in a political primary, leaving minority voters only a choice between candidates they did not originally prefer. *See League of U. Latin Am. Citizens v. Perry*, 548 U.S. 399, 445 (2006) (concluding that CD 24 with an Anglo majority and 24% African American voting age population was not an African-American opportunity district because African-Americans could not elect their candidate of choice in the Democratic Primary). The Court explained in *LULAC*:

> The District Court found, however, that African–Americans could not elect their candidate of choice in the primary [in benchmark CD 24] . . . . The opportunity "to elect representatives of their choice," 42 U.S.C. § 1973(b), requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. There is no doubt African–Americans preferred Martin Frost to the Republicans who opposed him. The fact that African–Americans preferred Frost to some others does not, however, make him their candidate of choice.

Id. at 444-46; *see also id.* at 446-47.

Historically, minority voting strength was diluted through practices aimed at the primary, as well as the general election. In the early 1900's, Texas Progressives used restrictive laws and

practices, such as the "White Man's Primary" to exclude Mexican American voting in the Democratic Primary elections, which in a one-party state pre-empted the general election. In establishing the White Man's Primary Association (WMPA) in 1904, the Texas Democratic Executive Committee required an oath, declaring "I am a white person and a Democrat."[5] In South Texas, the Dimmit County WMPA was so effective that the *Carrizo Springs Javelin* in June 12, 1914 said it "absolutely eliminates the Mexican vote as a factor in nominating county candidates, though we graciously grant the Mexican the privilege of voting for them afterwards."[6] The U.S. Supreme Court, striking down the Texas White Man's Primary Associations, stated "[i]t seems to us hard to imagine a more direct and obvious infringement of the Fourteenth [Amendment]." *Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927).

There is no doubt that the scope of the protections afforded by the federal Voting Rights Act includes the right to cast an undiluted vote in primary elections. Where, as here, the primary election is an integral part of the election machinery, Congress can act to "to protect rights of federal suffrage secured by the Constitution in primary as in general elections." *Smith v. Allwright*, 321 U.S. 649, 659-660 (1944), citing *United States v. Classic*, 313 U.S. 299, 323 (1941).

Thus, the Court may find retrogression in the State's enacted congressional redistricting plan if the changes to CD 25 took away Latino or African American voters' ability to elect their preferred candidates and the State did not offset this retrogression elsewhere in the State, or if the changes to CD 25 purposefully thwarted the ability of Latino or African American voters to elect their preferred candidate. Under either prong of section 5, the analysis turns on ability to elect.

[5] DX828, Report of Dr. Andres Tijerina, at 12.
[6] *Id*.

II.
CD 25 IS AN ANGLO MAJORITY DISTRICT

In the benchmark plan, C100, CD 25 is an Anglo majority district. Anglos constitute 63% of the district's CVAP, Latinos constitute 25% of the CVAP and African Americans constitute 9% of the CVAP.[7]

There is no dispute among the parties that benchmark CD 25 is an Anglo-majority district. The Gonzales Intervenor's expert witness, Dr. Ansolabehere, reported the respective citizen voting age populations in CD 25.[8] Dr. Ansolabehere further identified benchmark CD 25 as a "WM" (White Majority) district in Table 7 of his August 8, 2011 expert report.[9] State Representative Dawnna Dukes, testifying on behalf of the Gonzales Intervenors, stated that the combined minority population of CD 25 constitutes a minority of CD 25's voting age population.[10]

III.
CD 25 IS CHARACTERIZED BY RACIALLY POLARIZED VOTING

A. Voting in Democratic Primary Elections is Racially Polarized in CD 25

Congressman Lloyd Doggett has not been opposed in a Democratic Primary election since the creation of CD 25 in 2006.[11] Thus, there is no "endogenous" data available to evaluate

[7] *See* DX880, Texas Legislative Council, RED-106 Report for Plan C100.
[8] *See* DX724, Table B-3, Ansolabehere Report [Dkt. 155-2, p. 55], p. 60 (D.D.C. filed Oct. 21, 2011 & Jan. 17, 2011).
[9] Ex. E-15, Ansolabehere Report, *Perez v. Perry*, No. 5:11-cv-360 [Dkt. 229-1], at 61 (W.D. Tex. filed Aug. 23, 2011); s*ee also* Ex. J-44, Deposition of Dr. Stephen Ansolabehere, *Perez v. Perry*, No. 5:11-cv-360, at 109:11-200 (W.D. Tex. Aug. 22, 2011) ("[CD] 25 is White Majority under both [total population and voting age population].").
[10] Tr. Jan. 19 PM, 124:25-125:18.
[11] DX965, Deposition of Eduardo Rodriguez, *Perez v. Perry*, 5:11-cv-360, at p. 48:10-13 (W.D. Tex. Aug. 29, 2011).

whether Democratic Primary elections for congress in CD 25 are racially polarized. For this reason, one must turn to exogenous (statewide) elections.

Reaggregated election results produced by the Texas Legislative Council show that in racially-contested Democratic primaries since 2002, Latino candidates for statewide office garnered a majority of votes in CD 25 in only three out of nine elections.[12]

An analysis of racially polarized voting by the State of Texas showed that within the boundaries of benchmark CD 25, in reaggregated statewide Democratic primaries since 2006, Anglo voters supported a Latino candidate running head to head against a non-Latino only half the time.[13]

The Gonzales Defendant Intervenors presented no analysis of Democratic Primary elections within benchmark CD 25.[14] Instead, the Gonzales Defendant Intervenors limited their analysis to Travis County. However, the boundaries of benchmark CD 25 include a portion of Travis County as well as all of Hays, Bastrop, Caldwell, Gonzales, Fayette, Lavaca and Colorado counties. In benchmark CD 25, only 53% of Anglos and 65% of Hispanics live in Travis County.[15] Because so much of CD 25 lies outside of Travis County, an analysis of racially polarized voting in CD 25 is incomplete without including the all the precincts in the district.

There is no question that a Latino-preferred candidate must survive the relevant primary election in order to be elected to office. State Representative Eddie Rodriguez agreed that in order for Latinos in a congressional district to be able to elect their candidate of choice, African-

[12] Ex. 2 (demonstrative distilled from DX665 at p. 5) (filed herewith).
[13] PX24 at 582-83 (showing that Anglo voters in CD 25 in C100 supported Rick Noriega and Hector Uribe in the Democratic Primary but not Linda Yanez or Linda Chavez Thompson).
[14] *See* DX724, at p. 126 [Dkt. 155-3 at 45] (Attachment 6 to Ansolabehere Rep. of Jan. 16, 2012) (limiting analysis to precincts in Travis County, as opposed to the precincts in CD 25).
[15] PX11, at p. 7 (RED-100 for C100, District Population Analysis with County Subtotals).

Americans and Anglos would have to provide the majority of their support to the Latino-preferred candidate in the primary.[16] He further agreed that a Latino-preferred candidate can be eliminated when there is racially-polarized voting inside the Democratic Primary.[17]

B. Latinos, African Americans and Anglos do not Share Candidate Preferences in Democratic Primary Elections in Travis County

The Gonzales Defendant Intervenors focus their arguments regarding voting behavior in CD 25 on one geographic portion of the district – Travis County. As explained above, this analysis is incomplete because CD 25 is comprised of seven whole counties plus a portion of Travis County. Nevertheless, even when looking at Travis County in isolation, statistical analyses of Democratic Primary elections reveals that voting in Travis County is polarized along racial lines between Latinos, African Americans and Anglos.[18]

Dr. Richard Engstrom, expert witness for the Texas Latino Redistricting Task Force, examined the results in Travis County of six racially-contested statewide Democratic Primary elections from 2006 to 2010.[19] He concluded that in six elections: "In the multivariate analyses, none of the Latino candidates in the Democratic primaries was favored by the African American voters. . . . The [Anglo] voters provided a majority of their votes to two of the Latino candidates[.]"[20]

The fact that Anglo voters shared the same candidate preference as Latinos in only two of six primary elections, and African Americans never shared the same candidate preference as

[16] DX965, at 62:7-14.
[17] *Id*. at 57:22-58:3.
[18] Dr. Kousser, expert witness for MALC, did not conduct an analysis of primary elections in Travis County. Kousser Dep., *Perez v. Perry*, No. 5:11-cv-360, at pp. 88:21-89:2 (W.D. Tex. Aug. 16, 2011).
[19] DX725, at 23-26 [Dkt. 156-4].
[20] *Id*.

Latinos in primary elections, demonstrates that Latinos, African Americans and Anglos prefer different candidates in Travis County.

Dr. John Alford, expert witness for the State of Texas, examined Democratic Primary elections in Travis County and concluded that on average Anglo voters do not share the same candidate preferences as Latino voters. Dr. Alford explained that in Democratic Primary elections: "[t]he average Anglo support for Hispanic candidates in Travis County, at 45%, is slightly above the [statewide] average of 43%, but it's below the 49% support in Bexar County. Black support for Hispanic candidates, at 30%, is the lowest in any of the counties in the analysis and is well below the average of 40%."[21]

The experts in the case agree that the best estimates of racially polarized voting are obtained by using the Ecological Inference method and ensuring that the measure of the Hispanic electorate is based on Hispanic registered voters or citizen voting age population.[22] In fact, the State's expert, Dr. John Alford, stated that "[o]f the various combinations of methods summarized in Table 2, Engstrom's analysis uses the best combination of modern statistical techniques and quality data."[23]

The Travis County primary election analysis conducted by Gonzales Defendant Intervenors' expert, Dr. Steven Ansolabehere, used neither the most modern statistical techniques nor appropriate data.[24] Furthermore, Dr. Ansolabehere did not identify the elections analyzed or the time period of his analysis.[25]

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[21] Ex. E-17, Alford Report, *Perez v. Perry*, No. 5:11-cv-360 [Dkt. 223-2 at 19-20], at 18-19 (W.D. Tex. filed Aug. 22, 2011).
[22] *Id.* at 10-11.
[23] *Id*. at 10.
[24] *See* Ex. E-15, Ansolabehere Report, *Perez v. Perry*, No. 5:11-cv-360 [Dkt. 123-1 pp. 30-31], at 29-30 (W.D. Tex. filed Aug. 8, 2011); *id.* at 10 (relying on VAP instead of CVAP: "We will

Nevertheless, Dr. Ansolabehere concluded that out of the 43 unidentified primary elections he examined in Travis County, Latinos, African Americans and Anglos voted together for the same candidate in only 14 elections. State Representative Eddie Rodriguez, the lead plaintiff among the Rodriguez plaintiffs, conceded that Travis County Anglo voters did not always support Latino-preferred candidates in the Democratic Primary.[26]

IV.
ANGLO VOTERS DETERMINE THE OUTCOME OF PRIMARY ELECTIONS IN CD 25

The electorate in benchmark CD 25 is heavily Anglo, including in Democratic Primary elections. As a result, when Anglo voters vote cohesively, their preferred candidate wins the Democratic nomination. In the rare instance (once in the past decade) in which Anglo voters split their support among candidates, a minority-preferred candidate can win the nomination with out the support of a majority of Anglo voters.

For example, in the 2002 Democratic Primary and subsequent Democratic Primary runoff, none of the three Latino candidates running in racially contested elections won a majority of votes in the benchmark CD 25: Victor Morales (primary runoff for U.S. Senate), Ray Madrigal (primary election for Land Commissioner), and Ernesto De Leon (primary election for Agriculture Commissioner).[27]

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discuss the implications of adjustment of citizens of voting age separately and set aside the question of turnout entirely. Our primary focus is on total voters and voting age population."); DX724, at p. 122 [Dkt. 155-3 at 41] (Attachment 4 to Ansolabehere Rep. of Jan 16, 2012) (limiting analysis to VAP instead of CVAP and limiting analysis to Ecological Regression instead of Ecological Inference).

[25] *See* DX724, at p. 126, *supra*, note 14.

[26] DX965 at 47:4-8.

[27] DX437.

In 2006, Maria Luisa Alvarado ran in the Democratic Primary runoff election for Lt. Governor. Her Anglo opponent, Mr. Grant, won the majority of votes cast in CD 25 in that primary election.[28] Dr. Engstrom's analysis of candidate preferences in Travis County demonstrates that Anglo voters preferred Ben Grant and Latino voters preferred Ms. Alvarado.[29] In this election, Anglo voters nominated their candidate of choice.

In 2008, Baltasar Cruz ran in the Democratic Primary election for Texas Supreme Court Place 7. His Anglo opponent, Mr. Houston, won the majority of votes cast in CD 25 in that primary election.[30] Dr. Engstrom's analysis of candidate preferences in Travis County demonstrates that Anglo voters preferred Mr. Houston and Latino voters preferred Mr. Cruz.[31] In this election, Anglo voters nominated their candidate of choice.

In 2008, Linda Yanez ran in the Democratic Primary election for Texas Supreme Court Place 8. Ms. Yanez won the majority of votes cast in CD 25 for that primary election.[32] The State's racially polarized voting analysis shows that Anglo voters in CD 25 split their support across Democratic Primary candidates and that Ms. Yanez was the preferred candidate of Latino voters in CD 25.[33] In this election, because Anglo voters in CD 25 were not cohesive and split their votes across Democratic Primary candidates, Anglo voters did not nominate their candidate of choice.

[28] DX439.
[29] DX725, Table 8.
[30] DX440.
[31] DX725, Table 8.
[32] DX440.
[33] PX24, at 581-84 (State's Racially Polarized Voting Analysis, T 4, for CD 25 in Plan C100).

In 2008, Richard Noriega ran in the Democratic Primary election for Governor. Mr. Noriega won the majority of votes cast in CD 25 for that primary election.[34] The State's racially polarized voting analysis shows that Mr. Noriega was the preferred candidate of Anglo voters in CD 25 and that Latino voters also preferred Mr. Noriega. [35] In this election, Anglo voters nominated their candidate of choice.

In 2010, Hector Uribe ran in the Democratic Primary election for Land Commissioner. Mr. Uribe won the majority of votes in CD 25 in that primary election.[36] The State's racially polarized voting analysis shows that Mr. Uribe was the preferred candidate of Anglo voters in CD 25 and that Latino voters also preferred Mr. Uribe. [37] In this election, Anglo voters nominated their candidate of choice.

Also in 2010, Linda Chavez-Thompson ran in the Democratic Primary election for Lt. Governor. Mr. Earle, her Anglo opponent, won the majority of votes cast in CD 25 in that primary election.[38] The State's racially polarized voting analysis shows that Ronnie Earle was the preferred candidate of Anglo voters in CD 25 and that Latino voters preferred Ms. Chavez-Thompson. [39] In this election, Anglo voters nominated their candidate of choice.

As demonstrated above, Anglo voters in benchmark CD 25 generally nominate their preferred candidate in the Democratic Primary. When Latino voters preferred a candidate who was different from the Anglo preferred candidate, Latino voters were only successful in nominating their preferred candidate one time. An examination of all nine racially-contested

[34] DX440.
[35] PX24, pp. 581-84.
[36] DX441.
[37] PX24, pp. 581-84.
[38] DX441.
[39] PX24, pp. 581-84.

Democratic Primary elections from 2002-2010 reveals that the Latino candidate has won only 3 of 9 elections within the boundaries of benchmark CD 25.[40]

The State's racially polarized voting analysis also provides the only estimates available in this case of the voter turnout in Democratic Primary elections by Latinos, African Americans and Anglos in benchmark CD 25. The State's analysis shows that in CD 25, Anglo voter turnout in Democratic Primary elections far outweighs Latino or African American voter turnout.[41] The State's analysis estimates that Anglos comprised: 73% of turnout in the 2002 Democratic Primary race for Governor, 76% of turnout in the 2006 Democratic Primary for Lt. Governor; 78% of the 2008 Democratic Primary race for U.S. Senator; and 80% of turnout in the 2010 Democratic Primary race for Lt. Governor.[42]

The Gonzales Defendant Intervenors miss the point by suggesting that the current incumbent of CD 25, Mr. Lloyd Doggett, could or would be the Latino-preferred candidate if he had ever had a contested primary in CD 25. First, Mr. Doggett has never been opposed in a Democratic Primary since the benchmark CD 25 was created in 2006 so it is impossible to know which voters would have preferred him.[43] Second, and more importantly, whether Mr. Doggett would

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[40] Ex. 2 (attached); DX0437, DX0439, DX0440, DX0441.

[41] PX24, pp. 579-80 (State's Racially Polarized Voting Analysis, T 3, for CD 25 in Plan C100).

[42] *Id.* The Task Force relies in part on the State's Racially Polarized Voting Analysis, PX24, pp. 577 - 600.) The Task Force cautions that this is not the same document criticized by Dr. Alford at trial on January 24. (Tr. Jan. 24 PM, at 85-89.) In his testimony, Dr. Alford criticized a different table of estimates by the State regarding a State House district. Because the Task Force relies on a different table, and estimates based on a much larger set of data (congressional district instead of a State House district), Dr. Alford's statements are distinguishable.

[43] In 2004, Mr. Doggett ran in a racially contested primary election in a very different configuration of CD 25 that stretched 300 miles from Travis County to the Texas-Mexico border. *See LULAC v. Perry*, 548 U.S. at 424. The outcome of that primary election does not inform the analysis of benchmark CD 25 because the two districts were not comparable in geography or electorate. Prior to 2004, when he ran in a Travis County-based congressional district, Mr. Doggett was not opposed by any minority candidates.

ever have been able to win Latino voter support is different from the question whether CD 25 is a Latino ability to elect district. As explained above, section 5 protects minority ability to elect, not the ability to 'chime in' on a candidate already selected by Anglo voters. The current configuration of CD 25 contains a majority of Anglo voters whose turnout in the Democratic Primary strongly outnumbers that of Latinos and African Americans. The disparate participation rates and polarization between Latinos, African Americans and Anglos in Democratic Primary elections in CD 25 necessarily lead to the conclusion that CD 25 is not a minority ability to elect district.[44]

V.
EVEN IF CD 25 WERE A MINORITY ABILITY TO ELECT DISTRICT, RETROGRESSIVE CHANGES TO CD 25 CAN BE OFFSET ELSEWHERE IN THE STATE'S REDISTRICTING PLAN

Dr. Ansolabehere, testifying for the Gonzales Defendant Intervenors, stated in his report that CD 35 in the State's enacted plan:

> takes an area out of Travis County that is 76 percent Black or Hispanic (and 65 percent Hispanic) in order to create a majority Hispanic district. It takes those minority voters out of a district in which they already have the ability to elect (and

[44] The Gonzales Defendant Intervenors have pursued a dual (and contradictory) strategy of asserting simultaneously that CD 25 is required by the Voting Rights Act to be maintained and, at the same time, that CD 25 is not characterized by racially polarized voting. Dr. Ansolabehere, expert witness for the Gonzales Defendant Intervenors, testified that his analysis led him to conclude that there is no racially polarized voting in Travis County. *See Perez v. Perry* Ex. J-44, *supra* note 9, at 31:21-33:10. Section 5 of the Voting Rights Act protects minority voters from voting practices that deny or abridge the right to vote "on account of race or color[.]" 42 U.S.C. 1973c. The purpose of the Act is to prohibit election practices that, often when combined with voting along racial lines, operate to diminish minority voting strength. If there is no racially polarized voting in Travis County (an assertion with which the Task Force disagrees), the Voting Rights Act cannot provide a remedy to protect minority voters from discrimination 'on account of race or color' by requiring that voters in this area be maintained together in a congressional district. *See also* Plaintiff MALC's Post-Hearing Brief, *Perez v. Perry*, No. 5:11-cv-360 [Dkt. 665], at 9-10 (filed Feb. 20, 2012).

> nominate) and doing so renders that district (CD 25) no longer a district in which minorities have the ability to elect their preferred candidates.[45]

Dr. Ansolabehere concluded that the majority of African Americans who live in CD 25 would be included in the new CD 35. Similarly, Dr. Ansolabehere concluded that 68% of Latinos who live in CD 25 would be included in the new CD 35.[46]

When comparing benchmark CD 25 to the new CD 35, African American CVAP increases from 9% to 11%.[47] Hispanic CVAP increases from 25% to 52%. The Gonzales Defendant Intervenors have never suggested that African Americans and Latinos placed in CD 35 would lack the opportunity to nominate and elect their candidate of choice.

Thus, according to the Gonzales Defendant Intervenors, most Travis County minority voters who live in CD 25 are shifted into a new majority-minority CD 35 where African American and Latino CVAP exceeds 60% and they will have the ability to elect their preferred candidate.

In essence, the Gonzales Defendant Intervenors argue that African Americans and Latinos in CD 25 are required by the Voting Rights Act to be contained in a Travis County-based congressional district, as opposed to any other congressional district in which they would have the ability to nominate and elect their preferred candidate.

CONCLUSION

The claim that CD 25 is a minority ability to elect district even when Anglos control the outcome in primary and general elections, turns the Voting Rights Act on its head. Under this logic, any majority-minority district can be dismantled, its Latino and Black voters scattered into districts where they constitute less than 30% of the voters, and, as long as a Democratic

[45] DX724, at 110 [Dkt. 155-3 at 29] (Ansolabehere Rebuttal at 28).
[46] *Id.* at 111 [Dkt. 155-3 at 30] (Ansoloabehere Rebuttal at 29).
[47] PX11, at p. 9 (RED-106 report for C100); PX12 at 10.

candidate wins the General Election, the Voting Rights Act will be satisfied. That is simply not the case.

The main concern of the Rodriguez/Gonzales parties is that Democratic precincts in Travis County be gathered together so that they can elect a candidate to Congress. State Representative Eddie Rodriguez testified that as a Latino he would consider that he had an equal opportunity to participate and elect his candidate of choice if a candidate that he supported from Travis County were nominated and elected to Congress.[48] Mr. Rodriguez ultimately testified that he agreed to serve as a plaintiff in the litigation at the request of Congressman Lloyd Doggett.[49]

Partisan political objectives, as well as the desire to protect incumbents, are common features of redistricting litigation. However, the Voting Rights Act does not exist to protect political parties or office-holders. The Court need not accept the invitation to hold that any district, regardless of its demographic composition or level of polarized voting, is protected by section 5 simply because minority voters agree with the outcome of the General Election because such a holding would stretch section 5 beyond any reasonable interpretation. At stake here, for the Task Force and Latino voters in Texas, is the creation of a new opportunity congressional district. The Task Force urges the Court to apply section 5 to protect minority voters' ability to elect and not to invalidate a newly created district in which minority voters have the opportunity to elect their candidate of choice.

Dated: March 13, 2012

Respectfully submitted,

/s/ Nina Perales
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[48] DX965 at 64:6-65:4.
[49] DX965 at 67:6-22.

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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 March 13, 2012.

/s/ Nina Perales
Nina Perales (D.C. Bar No. TX0040)

Exhibit 1

109TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPORT 109–478

FANNIE LOU HAMER, ROSA PARKS, AND CORETTA SCOTT KING VOTING RIGHTS ACT REAUTHORIZATION AND AMENDMENTS ACT OF 2006

MAY 22, 2006.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 9]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 9) to amend the Voting Rights Act of 1965, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

THE AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

didates of choice. Voting 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. To allow otherwise would be contrary to the protections afforded by the 14th and 15th amendment and the VRA.

Thus, by clarifying that any voting change motivated by any discriminatory purpose is prohibited under Section 5, the Committee seeks to ensure that the "purpose" prong remains a vital element to ensuring that Section 5 remains effective. In amending the purpose prong to bar "any discriminatory purpose," the Committee is aware of concerns by some that such a prohibition is "standardless" and unadministerable.[180] However, the Committee finds these concern to be unfounded. H.R. 9 is intended to restore the "discriminatory purpose" standard that was in place and administered until 2000. Moreover, the Committee concludes that the factors set out in *Village of Arlington Heights et al. v. Metropolitan Housing Development Corporation et. al.* provide an adequate framework for determining whether voting changes submitted for preclearance were motivated by a discriminatory purpose, including determining whether a disproportionate impact exists; examining the historical background of the challenged decision; looking at the specific antecedent events; determining whether such change departs from the normal procedures; and examining contemporary statements of the decision-maker, if any.[181] In weighing each of these factors, the Committee believes that a proper and fair determination may be made as to whether a voting change was motivated by a discriminatory intent.

Retrogressive Effect—The Ability to Elect

In 2003, the Supreme Court, in the case of *Georgia v. Ashcroft,* construed Section 5 to narrow its reach, significantly restricting the scope of the "effect" prong and weakening Section 5's protection of minority groups from voting changes that diminish their ability to elect their preferred candidates of choice.

In a 5–4 decision, the *Georgia* Court held that "any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability to elect candidates of choice, the extent of the minority groups' opportunity to participate in the political process, and the feasibility of creating a non-retrogressive plan."[182] In particular, the majority found that "In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice. While this factor is an important one in the Section 5 retrogression inquiry, it cannot be dispositive."[183] Indeed, the Court

[180] *Id.*

[181] *See* 429 U.S. 252 (1976).

[182] *See Georgia v. Ashcroft,* 539 U.S. 461, 479 (2003).

[183] *Id.* at 480 (emphasis added). This vague and open-ended "totality of the circumstances" test opened the door to allow all manner of raw political considerations to trump the minority's true and genuine choice of candidates. As one commentator has pointed out, "the majority [in *Georgia v. Ashcroft*] went further than the principle required to resolve Georgia itself and embraced a more expansive, still ill-defined conception of other modes of 'political influence' that might be attributed to minority voters. These more nebulous modes of influence might also substitute, the Court held, for safe minority-controlled election districts. The dissent was right to raise questions, both in principle and in practice, about whether this further flexibility in the VRA is appropriate." Richard H. Pildes, "The Constitutionalization of Democratic Politics," 118 Harv. L. Rev. 28, 95 (2004). The dissent in *Georgia v. Ashcroft* case correctly pointed out that a "totality

deemed other factors, such as whether minority voters could influence an elected representative (to the extent that a representative would be willing to take the minority interest into account) relevant to the retrogression analysis. The Court further held that—the State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable." [184] Under its "new" analysis, the Supreme Court would allow the minority community's own choice of preferred candidates to be trumped by political deals struck by State legislators purporting to give "influence" to the minority community while removing that community's ability to elect candidates.

Permitting these trade-offs is inconsistent with the original and current purpose of Section 5. The majority opinion in *Georgia* turns Section 5 on its head. The provision was and continues to be an extraordinary remedy to address a long and continued history of discrimination in certain States and jurisdictions. Its purpose is to require the scrutinizing of changes to voting procedures made by jurisdictions to ensure that minority voters are not discriminated against and that gains made by minority voters over the course of decades are not eroded. The preclearance provisions in Section 5 were and are intended to put the burden of proof on covered jurisdictions to demonstrate they are not enacting voting changes that diminish the ability of minorities to elect their preferred candidates of choice.[185] Directly contrary to that proposition, *Georgia v. Ashcroft* appears to hold that courts should defer to the political decisions of States rather than the genuine choice of minority voters regarding who is or is not their candidate of choice.

Over the last 30 years, Section 5's "effect" prong has served to protect the minority communities' ability to elect candidates of choice in covered jurisdictions. In particular, the Committee heard testimony describing the "judicial development of the retrogression standard" [186] and the importance of the standard in protecting minority voters and their ability to elect candidates of their choice. Since the Supreme Court's decision in *Beer v. United States,*[187] it was accepted that if "the ability of minority group's ability to elect candidates of choice to office is diminished, Section 5 requires the denial of preclearance." [188]

Indeed, the benefits to the minority community under the *Beer* standard were significant over the last several decades. The Committee heard testimony describing the positive impact that minority-preferred representatives have had on minority communities by fully "representing their interests." [189] In particular, the Committee heard testimony confirming that minority-preferred elected officials

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of the circumstances" under Section 5 is hopelessly unadministrable by the Department of Justice because such a concept does not retain "the anchoring reference to electing a candidate of choice." *Georgia v. Ashcroft,* 539 U.S. 461, 493 (Souter, J., dissenting).

[184] *Id.* at 483.

[185] *See* H.R. Rep. No. 94–196 (1975) and *Beer v. United States*, 425 U.S. 130 (1976).

[186] *See Oversight Hearing on the Voting Rights Act: The Judicial Evolution of the Retrogression Standard, Subcommittee on the Constitution, Committee on the Judiciary,* 109th Cong. 1 (November 9, 2005).

[187] 425 U.S. 130 (1976).

[188] *See Oversight Hearing on the Voting Rights Act: The Judicial Evolution of the Retrogression Standard, Subcommittee on the Constitution, Committee on the Judiciary,* 109th Cong. 1 (November 9, 2005).

[189] *Id.*

fight for issues that are of importance to minority communities,[190] and received evidence that "[o]fficials elected because of the equal voting opportunities afforded minority citizens were more attuned to the needs of the minority communities." [191] These "tangible benefits were the direct result of the success of the Voting Rights Act." [192] The Committee finds these results to be the types of successes that Congress sought to achieve through Section 5. These outcomes are achieved most often when a geographically compact minority group is able to control the outcome of an election, such that minority-preferred candidates are elected to office—on terms similar to other communities.

The Committee believes that the gains made by minority communities in districts represented by elected officials of the minority communities' choice would be jeopardized if the retrogression standard, as altered by the Supreme Court in *Georgia,* remains uncorrected by Congress. Indeed, the Committee was persuaded by testimony revealing that the current interpretation "permits a jurisdiction to choose among different theories of representation, introduces a substantial uncertainty for minority communities into a statute that was specifically intended to block persistent and shifting efforts to limit the effectiveness of minority political participation." [193] Moreover, the Committee is concerned by testimony indicating that "[m]inority influence is nothing more than a guise for diluting minority voting strength." [194] Accordingly, leaving the *Georgia* standard in place would encourage States to spread minority voters under the guise of "influence" and would effectively shut minority voters out of the political process. In essence, the Committee heard that Section 5, if left uncorrected, would now allow "States to turn black and other minority voters into second class voters who can influence elections of white candidates, but who cannot elect their preferred candidates, including candidates of their own race." [195] This is *clearly not* the outcome that Congress intended the Voting Rights Act and Section 5 to have on minority voters.

Testimony presented to the Committee further suggested that, if left unaddressed, the *Georgia* standard threatens "the Nation's commitment to representative democracy. . . ." [196] The Committee agrees. Section 5 was intended to prevent covered jurisdictions from making decisions that shut minority voters out of the political process. The Committee is convinced that Congress should not allow covered jurisdictions the discretion to make decisions on behalf of minority voters on the record it has before it. To leave the present retrogression standard enunciated in *Georgia* uncorrected would effectively diminish the significance of Section 5's remedy and would make Federal scrutiny a wasteful formality.

Thus, in amending Section 5 to add a new subsection (b), the Committee makes clear that in making preclearance determina-

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[190] *See* Frederickson and Vagins, Promises to Keep: The Impact of the Voting Rights Act in 2006, March 2006, at 25.
[191] *Id.*
[192] *Id.*
[193] *See Oversight Hearing on the Voting Rights Act: The Judicial Evolution of the Retrogression Standard, Subcommittee on the Constitution, Committee on the Judiciary,* 109th Cong. 1 (November 9, 2005).
[194] *Id.*
[195] *Id.*
[196] *Id.*

Exhibit 2

Congressional District 25 C100		
		C100 - 25
	HVAP	33.8
	HCVAP	25.3
	SSVR	20.4
Election	**Candidate**	
2010 General	Doggett	52.82
2008 General	Doggett	65.82
2006 Special	Doggett	67.25
Endogenous Win-Loss		3-0
2010 General	Chavez-T	46.34
2010 General	Uribe	48.24
2008 General	Noriega	55.39
2008 General	Yanez	57.78
2008 General	Molina	56.29
2006 General	Alvarado	52.4
2006 General	Molina	58.72
2004 General	Molina	56.62
2002 General	Sanchez	48.9
2002 General	Yanez	54.06
2002 General	Molina	50.82
2002 General	Mirabal	57.39
General Win-Loss		9-3
2010 D Primary	Chavez-T	27.64
2010 D Primary	Uribe	55.6
2008 D Primary	Noriega	57.86
2008 D Primary	Cruz	45.08
2008 D Primary	Yanez	53.92
2006 DP Runoff	Alvarado	46.95
2002 DP Runoff	Morales	32.03
2002 D Primary	Madrigal	34.36
2002 D Primary	DeLeon	42.27
D Primary		3-6
2010 R Primary	Carillo	39.36
2004 RP Runoff	Carillo	58.44
2002 R Primary	Rodriguez	37.87
R Primary		1-2

Source: DX0655 at p. 5, DX0884, DX0437, DX0439, DX0440, and DX0441 (Texas Legislative Council Reports RED-109 and RED-206 reports for C100)