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

POST-TRIAL BRIEF OF THE DEFENDANT-INTERVENOR TEXAS LATINO REDISTRICTING TASK FORCE

The Texas Latino Redistricting Task Force respectfully submits this post-trial brief pursuant to the Court's Order of January 25, 2012.

A. The State's Redistricting Plans are Retrogressive in Violation of Section 5 of the Voting Rights Act

The State has failed to carry its burden of proof with respect to retrogression under section 5. Dr. John Alford, the State's expert witness, does not offer an opinion regarding the number of Latino ability to elect districts in the benchmark plan. (Alford Dep., DX758, at 93:5-8; Trial Tr. Jan. 24 PM at 92:5-8). Dr. Alford offers no opinion regarding the number of Latino ability to elect districts in the enacted Plan H283. (Alford Dep., DX758, at 93:21-24; Trial Tr. Jan. 24 PM at 92:23-93:3). Dr. Alford testified that he was not giving the Court an answer to the question whether the enacted plan offers greater ability to elect when compared to the benchmark plan. (Trial Tr. Jan. 24 PM at 94:15-23).

Instead, Dr. Alford offered the Court an analysis of "aggregate" Latino voting strength across the benchmark and enacted plans that does not assist the Court in determining whether the State's enacted House plan diminishes Latino "ability . . . to elect their preferred candidates of choice." 42 U.S.C. 1973c (d). Dr. Alford's approach, which allows the State to offset the loss of Latino ability to elect districts with "influence" districts, is in direct conflict with the language of section 5 which was amended in 2006 to 'legislatively overrule' the U.S. Supreme Court ruling in *Georgia v. Ashcroft*. Dr. Alford's retrogression analysis has never been seen before this trial, was invented for this litigation, and contradicts the language and purpose of section 5. (Task Force Proposed Findings of Fact at ¶¶ 67-71, *Texas v. United States*, 1:11-c-v-01303, Dkt. No. 187 (DDC filed Feb. 3, 2012) [hereinafter "FOF"]).

The State's redistricting plan for Texas House of Representatives diminishes Latino ability to elect by reducing the number of ability to elect districts by two. The State removed Latino-majority HD 33 from Nueces County and relocated to Rockwall and Denton County in North Texas. The State also weakened Latino-majority HD 117 so that it is no longer an ability to elect district in the State's new plan.

The State's plan creates no new ability to elect districts to "offset" the retrogression caused by the reduction of HDs 33 and 117. At various times in this litigation the State has pointed to Latino ability to elect districts in the benchmark plan and claimed that its changes to those districts "added" Latino ability and offset retrogression. However, in none of those instances was the State correct.

For example, the State has pointed to changes in HDs 90 and 148 to support its claim of non-retrogression. HD 90 in the benchmark plan has an HCVAP of 47.9%, and

a SSVR of 47.2%. (DX0882). The State's House plan slightly increased HD 90's SSVR to 50.1%. (DX0883). HD 90 in Plan H100, the benchmark plan, is a Latino ability to elect district (DX0726 at p. 5; DX799) and continues to be one in the State's plan. (DX0726 at p. 8). Similarly, HD 148 in the benchmark plan is a Latino ability to elect district. (DX0726 at p. 7). The State's changes to the district increased its SSVR to 50% and the district remains a Latino ability to elect district in the enacted plan. (DX0726 at p. 8).

Chairman Solomons testified that during the redistricting process he considered HD 90 and HD 148 to be ability to elect districts in the benchmark House plan. (DX580 at 1600:24-1601:8). Chairman Solomons received confirmation that HD 90 and HD 148 were ability to elect districts in the benchmark plan from testimony at redistricting hearings and correspondence from Latino advocates. (DX608; DX649).

Following this Court's decision on summary judgment, the State switched strategies and claimed that any retrogression in its House plan was offset by improvements made to HD 74 which was not an ability to elect district in the benchmark. However, the State's redistricters had always considered HD 74 an ability to elect district in the benchmark, and with good reason. (DX0726 at p. 5; DX0799). HD 74 has elected a Latino representative, Pete Gallego, since 1991. (FOF on District Characteristics at ¶ 100, *Texas v. United States*, 1:11-c-v-01303, Dkt. No. 179-10 (DDC filed Feb. 3, 2012)). In the benchmark plan, HD 74 has an HCVAP of 59.7%, and a SSVR of 58.1%. (DX0882).

David Hanna, a lawyer with the Texas Legislative Council, authored memoranda that identified HD 74 as a Latino ability district in the benchmark plan. (DX0820;

DX0214; DX0215). Gerardo Interiano, the State's chief House mapper, identified HD 74 as a Latino district in the benchmark plan. (Trial Tr. Jan. 17 PM at 25:5-22) The State's changes to HD 74 caused it to remain a Latino ability to elect district in the enacted plan and did not "add" a new ability district that could offset the loss of HDs 33 and 117.

Dr. Richard Engstrom, expert witness for the Latino Task Force, offered uncontested evidence that the State's enacted House plan reduces the number of ability to elect districts by two and creates no new Latino ability to elect districts that could offset the loss of Latino ability in HDs 33 and 117. (DX0726).

B. The State's Redistricting Plans Have the Purpose of Discriminating Against Latino Voters, in Violation of Section 5 of the Voting Rights Act

A redistricting plan drawn with the purpose to discriminate cannot receive preclearance. (Def. Int. SJ Legal Mem. at 12-13, *Texas v. United States*, 1:11-c-v-01303, Dkt. No. 85-2 (DDC filed Oct. 28, 2011)). As demonstrated below, the State's congressional and House redistricting plans purposefully discriminate against Latino voters. The State's insistence that it had legitimate reasons to eliminate or limit the number of Latino opportunity districts in its plans is unsupported by the facts and the law.

1. Intentional Discrimination in the Texas House Plan

Despite dramatic population growth among Latinos in Texas since 2000, the State's enacted House plan carefully carves up Latino constituencies to not only limit the creation of new Latino majority districts but also to reduce the number of Latino districts in the House plan.

The State justified its elimination of CD 33 in Nueces County and its refusal to create a new district in the Rio Grande Valley on an interpretation of the Texas County Line Rule. (FOF at ¶¶ 98-118, 169-190). The State's elevation of a state redistricting

rule over the federal Voting Rights Act is inconsistent with the Supremacy Clause and also provides circumstantial evidence of discriminatory purpose under *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)).

In fact, Chairman Solomons testified he would need the U.S. Supreme Court to tell him to break the county line rule to comply with the VRA. (DX580 at 1593:15-24). Chairman Solomons made this statement despite the fact that the State's legal counsel advised redistricters at the beginning of the process that the county line rule would have to yield to federal law. (DX 381). David Hanna, counsel with the Texas Legislative Council, also authored memoranda stating that in the Nueces County state house configuration, the county-line rule "would have to yield to the federal Voting Rights Act if it can be shown retrogression could be avoided by splitting the county." (FOF at ¶ 98; DX0820; DX0214; DX0215).

It is well-established that Texas's County Line Rule (TEX. CONST. art. III, § 26) must yield to the Voting Rights Act. *See* U.S. CONST. art VI, cl. 2; *LULAC No. 4434 v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989) ("If the present [judicial election] district lines are found to violate the Voting Rights Act and/or the United States Constitution, Texas' constitutional and statutory provisions protecting district lines will be nullified under the Supremacy Clause."). In addition to the Fifth Circuit precedent in *LULAC v. Clements*, 884 F.2d at 188, federal cases consistently demonstrate that the Supremacy Clause of the United States Constitution requires state election rules to yield to the federal Voting Rights Act when they are in conflict. *See, e.g., Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) ("[T]he District Court thought it significant that the plan's drafter . . . disregarded the requirements of the Ohio Constitution where he believed that the

Voting Rights Act of 1965 required a contrary result. But [the drafter's] preference for federal over state law when he believed the two in conflict does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy Clause of the United States Constitution."); *Katzenbach v. Morgan*, 384 U.S. 641, 645-47 & nn.1-2 (1966) (holding that Section 4(e) of the Voting Rights Act prevailed over election laws of New York requiring an ability to read and write English as a condition of voting); *South Carolina v. Katzenbach*, 383 U.S. 301, 311 & n.9, 333-34, 337 (1966) (holding that the Voting Rights Act was an appropriate remedy to overcome racially biased constitutions, such as South Carolina's); *Sanchez v. Colorado*, 97 F.3d 1303, 1306-07 (10th Cir. 1996) (noting that Colorado recognizes that the Voting Rights Act prevails over the whole county rule and applying that standard); *Lopez v. Monterey Cnty.*, 871 F. Supp. 1254, 1258 (N.D. Cal. 1994) (noting that some provision of the California Constitution may have to be violated to remedy violations of the Voting Rights Act), *vacated on other grounds*, 519 U.S. 9 (1996); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1047 n.21 (D. Md. 1994) ("Plaintiffs' plan would increase the number of majority-black delegate districts by disregarding the requirement of the Maryland Constitution that delegate districts be "nested" within senatorial districts. *See* MD. CONST. art. III, § 3. Plaintiffs are correct in arguing that state statutes or constitutional provisions that result in violations of the U.S. Constitution or the Voting Rights Act are preempted by federal law. On the other hand, it is self-evident that a state plan should—indeed must—comply with state statutory and constitutional mandates if compliance with those mandates does not violate federal law." (most citations omitted))).

Further circumstantial evidence of discriminatory purpose in the House redistricting plan is redistricters' complete failure to examine whether the districts they were creating complied with the requirements of the Voting Rights Act. Mr. Interiano testified that as the mapper he dropped in whole county plans designed by members without questioning Voting Rights Act compliance (FOF at ¶¶ 23-25, 27-30, 35).

Chairman Solomons testified variously that he never examined whether more Latino majority districts were required in the House map and instead relied on staff and on members of the House to ensure that the House map complied with the Voting Rights Act. (FOF at ¶¶ 26, 31-33). Mr. Interiano further testified that he did not analyze the House benchmark districts to aid in determining section 5 compliance. (Trail Tr. Jan. 17 PM at 26:3-28:19).

As a result of redistricters' failure to inquire into or ensure compliance with the Voting Rights Act, members drew maps that fractured Latino population to protect incumbents who were not Latino-preferred. In El Paso, the State's map includes a set of "antlers" that ensures HD 78 has less than 50% SSVR in a county that is more than 80% Latino. *See* Supplemental Opinion at 22, *Perez v. Perry*, 5;11-cv-00360, Dkt. No. 549 (W.D. Tex. filed Dec. 2, 2011) (describing "antlers"); FOF at ¶¶ 191-216).

The State's map also includes a configuration of HD 117 that now elects Latino preferred candidate in only 3 out of 7 General Elections. (DX0799). H283 withdraws HD 117 from more active South Side precincts and extends into rural areas with relatively lower Latino turnout. (FOF at ¶¶ 136-161). As a result, HD117 in the State's plan features the greatest gap between HCVAP and SSVR (13%) of any district in Texas, indicating low Latino voter engagement. (DX0799).

The incumbent, John Garza, testified that he sought to extend the boundaries of HD 117 farther north because "those numbers tended to be . . . more Anglo and more conservative." (DX0363 at 30:6-8, 30:23-25).

2. Intentional Discrimination in the Construction of CD23 in Plan C185

Plan C185 purposefully apportions Latino population into and out of Congressional District 23 to ensure that there are not enough Latinos turning out to vote in the district to elect their preferred candidate. Two significant aspects of the redistricting of CD 23 reveal that the changes were based on race. First, redistricters relied on race-based data (data showing Spanish surnamed registered voters) to decide which precincts to include and exclude in CD 23. Second, as in *LULAC v. Perry*, 548 U.S. 399 (2006), the State made the changes to CD 23 to prevent Latino voters, whom the State believed would oust the non-Latino preferred incumbent in 2012, from electing their candidate of choice. 548 U.S. at 440 ("In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation."). In a district characterized by strong racially polarized voting, the purposeful reduction of Latino turnout so that Latinos can only elect their candidate of choice in 1 out of 10 elections denies Latino voters the ability to elect their candidate of choice.

The fact that Texas intentionally created CD 23 to give the false impression of a Latino ability district, while systematically reducing the number of Latinos who voted in the district so that they could not elect the Latino-preferred candidate, further reveals an improper use of race. *See id.* at 441 ("This use of race to create the facade of a Latino district also weighs in favor of appellants' claim.").

a. Direct Evidence of Racial Purpose in Changes to CD 23

As the redistricting process began, Texas knew that the benchmark CD 23 had been created as a section 2 Latino opportunity district in 2006 by the U.S. District Court for the Eastern District of Texas following the remand of *LULAC v. Perry*, 548 U.S. 399 (2006). (DX381 at 1).

Latinos in CD 23 were able to elect their preferred candidate in 2006 and 2008. (DX725 at 26). The fact that Latinos were able to elect their preferred candidate in two of the most recent three elections demonstrates that CD23 is a Latino opportunity district in the benchmark. *See Magnolia Bar Ass'n, Inc. v. Lee*, 994 F.2d 1143, 1149 (5th Cir. 1993) ("[E]lections involving the particular office at issue will be more relevant than elections involving other offices.").[1]

Texas redistricters knew that Mr. Canseco, elected in 2010, was not the Latino-preferred candidate and risked electoral loss in 2012 in a Latino ability to elect district. (FOF at ¶¶ 287, 290). Chairman Seliger testified he wanted to make CD 23 safer for Mr. Canseco and that he believed that Mr. Canseco might lose in 2012 if the district was not reconfigured in some way. (FOF at ¶¶ 264, 285).

Mr. Interiano received an email in November of 2010 from his colleague in the House Speaker's Office, Eric Opiela, that stated "certain data would be useful in identifying a nudge factor by which one can analyze which census blocks, when added to a particular district, especially 50 plus 1 majority -minority districts, help pull the districts total Hispanic pop[ulation] and the Hispanic CVAP up to majority status, but leave the

[1] Dr. Engstrom testified in *Perez* that CD 23 is a Latino opportunity district, despite the result of the 2010 congressional election. (DX575 at 20:24-21:23). The State agrees that a Latino opportunity district does not have to elect the Latino preferred candidate in every election. (FOF at ¶ 3).

Spanish surnamed registered voters and turnout the lowest. This is especially valuable in shoring up Canseco and Farenthold." (FOF at ¶ 293). Mr. Interiano and Mr. Downton, the chief architect of the congressional map, communicated extensively with Mr. Opiela and Mr. Downton incorporated Mr. Opiela's suggestions into the congressional map. (FOF at ¶¶ 301-308).

Ryan Downton testified that while creating CD 23, he swapped precincts into and out of the district based on Spanish surnamed voter registration and political performance even though he was aware that he might be selecting precincts for inclusion into CD 23 in which Latino turnout was lower than other precincts. (FOF 309-335). Despite the fact that the population of CD 23 was approximately 149,000 over the ideal district size (FOF at ¶ 373), Mr. Downton moved a much larger number of 380,677 people out of the benchmark CD 23. Then he moved 231,514 new people into CD 23. (DX1015).

Throughout the process, Mr. Downton reported on his progress to ensure that CD 23 would only elect the candidate of choice in one out of ten elections. (FOF at ¶ 291 ("Have it over 59% HCVAP, but still at 1/10.")).

Mr. Downton and Mr. Interiano relied on statistical analyses performed by the Texas Attorney General's office to evaluate draft districts (FOF at ¶¶ 13, 14, 16, 17, 272, 291, 320, 350; DX579 at 76.1:19-22; DX779A at 88:15-19, 89:18-22, 92:2-16). The AG analysis estimated that, when compared to the benchmark, the State's new CD 23 disproportionately reduced the average number of Latino voters in a General Election by 3,151. The Attorney General's estimates show that in the 2002 election for Governor, the State's new CD 23 reduced the number of Latino voters by 10,269 and increased the

number of Anglo voters by 1,059 when compared to the benchmark. (FOF at ¶¶ 390-391).

Mr. Interiano testified that he understood the November 2010 email to mean that Mr. Opiela was searching for a method by which to draw a district that featured lower turnout of Spanish surname voters, while leaving the Hispanic citizen voting age population higher. (Trial Tr. Jan. 17 PM at 53:16-22). Mr. Interiano further testified that the result was achieved in the State's CD 23. (Trial Tr. Jan. 17 PM at 53:23-54:11).

At trial in *Perez*, the State's expert Dr. Alford, testified: "I think [CD 23] is probably less likely to perform than it was, and so I certainly wouldn't and don't [and] haven't counted the 23rd as an effective minority district in the newly adopted plan." (DX581 at 110:3-7). He further stated, "I don't count 23 as one of the seven performing districts when I evaluate C-185." (*Id.* at 115:5-6). Mr. Downton testified he knew that CD 23 in the State's plan elects the Latino preferred candidate in one out of ten racially contested general elections. (FOF at ¶ 271).

The factors identified by the Supreme Court in *LULAC v. Perry* as indicating intentional discrimination are present in the revisions to CD23 in Plan C185.

The State's expert, Dr. Alford, testified in *Perez*, with respect to the changes in CD23 from Plan C100 to Plan C185, that "[t]here are some obvious parallels between what happened previously and what happened this time." (DX581 at 114:2-9). Dr. Alford also stated, when discussing the changes to CD23 "we feel like we are all having déjà vu[.]" (DX581 at 119:18-21.) Specifically, Dr. Alford noted that:

- changes were made to CD23 to shore up the reelection prospects of Representative Bonilla in 2003 and in Plan C185 the changes were made

to shore up the reelection chances of Representative Canseco (DX581 at 116:22-117:7);

- in *LULAC*, the benchmark CD23 was a Latino majority district whose incumbent was not the candidate of choice and most observers agreed that CD23 was about to elect the Latino candidate of choice (DX581 at 107:17-108:11).
- in 2003, CD 23 split Webb County and the City of Laredo, and he knew that some people were upset that CD23 in Plan C185 splits the border city of Eagle Pass and Maverick County (DX581 at 117:8-118:2); and

Mr. Downton testified that he moved majority Anglo counties north of the Pecos River into CD 23, and split the heavily Latino, politically mobilized Maverick County and the City of Eagle Pass. (FOF at ¶¶ 337-349). He 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. (FOF at ¶ 342).

Ultimately, with respect to CD 23 in this round of redistricting, Dr. Alford testified that "If I [were] advising the legislature on drawing the 23rd, I would not have done what was done to the 23rd." (DX581 at 109:9-21). He further testified:

> [M]y first advice to the legislature would be just -- you know, in simple -- with a slight memory of history, do as little as possible to the 23rd as you can. It really has been a difficult -- it was a difficult district for the Court to draw. It was a difficult district for the legislature to draw. But, basically, enough is enough, right? Don't make this hard on yourself. . . Don't mess with the 23rd. That would be my first rule for drawing the districts.

(DX581 at 111:8-22). He also stated: "I would have advised [] rather than creating a replacement district for the 23rd, I would have advised making the 23rd itself a better

performing district in terms of election numbers, or -- basically that, or leaving the 23rd alone." (DX581 at 111:23-112:5).

In *LULAC v. Perry*, it "[bore] the mark of intentional discrimination" when the Legislature reduced the HCVAP of CD23 to below 50% to ensure incumbent Rep. Bonilla's re-election. 548 U.S. at 440. Here, Mr. Downton's actions are even more deliberate. Using sophisticated technology, he removed precincts based on their election performance and SSVR, thus virtually ensuring that he moved in precincts where the Anglo vote overwhelmed the Latino vote and moved out precincts where the Latino voters were more active. In the resulting CD23, Latino voter turnout rates are lower and Latino voters are no longer able to elect their preferred candidates.

This is simply a more sophisticated way to dilute the Latino vote.

The leaders of the redistricting process in the Texas House and the Senate, Chairmen Solomons and Seliger, testified that they believed the types of changes made to CD 23 would raise issues under the Voting Rights Act. Chairman Seliger testified that if he had understood that Mr. Canseco was not the Latino preferred candidate, and he was taking steps to make CD 23 district safer for Mr. Canseco, that would have created a concern in his mind regarding compliance with the Voting Rights Act. (FOF at ¶ 363). Chairman Solomons testified that if a new congressional plan were to reduce the number of wins by the minority candidate of choice from 3 in the base plan down to one that would necessitate a change to the plan. (FOF at ¶ 392). Nevertheless, the map both Chairmen oversaw resulted in the very changes they opined would be discriminatory. The claims of ignorance by Chairman Solomons, for whom Mr. Downton worked, are not credible. Chairman Solomons sat in front of the computer with Mr. Downton while he

was mapping the congressional plan. (FOF at ¶ 319). Chairman Solomons also received emails that contained detailed analyses of estimated changes in the votes cast in districts and made decisions based on that information. (FOF at ¶ 292).

Similarly, the State's claim that it was trying to protect the incumbency of an Hispanic Republican is not credible when redistricters testified they never took steps to ensure that Mr. Canseco would be successful in the Republican primary election after the changes made to CD 23 (FOF at ¶¶ 351-355, 380, 416, 418-422).

3. Intentional Discrimination in the Construction of CD27 in Plan C185

The State also discriminated against Latinos in the creation of CD 27. CD27 is a Latino opportunity district in the benchmark. For over 30 years, since the creation of CD27, Nueces County, a majority-Latino county, was included as the northern anchor of this district. (DX778A at 65:11-19; DX575 at 18:5-13).

Redistricters knew Rep. Farenthold is not the Latino candidate of choice. (FOF at ¶ 432). In drawing the congressional map, Defendants sought to protect Rep. Farenthold's incumbency and radically re-drew CD 27 to exclude Nueces County and its Latino voters. Nueces County, which formerly contained the majority of registered voters in CD27, now comprises the southern portion of a majority Anglo district and contains a minority of registered voters in the district. (FOF at ¶¶ 425-448). In the State's plan, Nueces County Latino voters can no longer determine the outcome of the election in their congressional district.

The 206,293 Latino residents of Nueces County historically accustomed to the opportunity 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 re-election of an incumbent who is not the Latino candidate of choice. (DX575 at 28.7:24-28.8:7; DX827 at 13).

Texas created CD 34 to the south of the new CD 27; CD 34 is a Latino-opportunity district which has most of former CD 27's population. (DX577 at 59:14-19; DX778A at 31:24-32:3, 66:13-15). Mr. Downton, who drew the map, testified that CD 34 was a "swap" for CD 27 for purposes of § 5, as did Chairman Seliger. (FOF at ¶¶ 470-471). Dr. Alford similarly testified that CD 34 is a swap for CD 27, which is no longer a Latino opportunity district. (DX581 at 108.1:18 – 108.2:12).

The removal of Nueces County from the configuration of Latino opportunity districts in South and West Texas not only purposefully deprives the thousands of Latino voters in Nueces County the opportunity to elect their preferred candidate -- the change further makes impossible the creation of seven Latino opportunity districts in South and West Texas. (DX575 at 19:10-20).

4. Refusal to Create 7 Latino Opportunity Districts in South Texas

In the benchmark congressional plan the Latino ability to elect districts in South and West Texas were all overpopulated. (DX 431 at p. 75).

Mr. Downton testified that it was possible to draw a total of seven Latino opportunity congressional districts in South and West Texas and that the decision not to draw seven was a "political decision." (DX579 at 63:2-10).

Mr. Downton testified that during the legislative process he examined proposed congressional plans that created seven Latino majority districts in South and West Texas that elected Latino preferred candidates in more than half of the reaggregated exogenous elections. (FOF at ¶ 272). Mr. Downton also testified that that the adoption the South and

West Texas configuration of the State's plan as opposed to a configuration such as that in C190 (which includes Nueces County in the South Texas configuration) was "a political choice." (FOF at ¶ 465).

Representative Solomons voted against an amendment offered by Representative Alonzo that would have created seven Latino opportunity districts in South Texas, all of which would have elected the candidate of choice despite the fact that the amendment was supported by House members he trusted to take the lead on drafting maps for their respective county delegations. (FOF at ¶¶ 61-62).

Similarly, Representative Solomons voted against and never offered to try and incorporate Representative Alonzo's proposed amendment to create seven south Texas Latino districts in the State's enacted map. (FOF at ¶¶ 61-62).

5. Racial Purpose in Dallas-Ft. Worth

The State's enacted congressional plan further separates Latinos on the basis of race in the Dallas-Ft. Worth area. The "lightning bolt" in CD 26 excises Latino voters from the City of Fort Worth and joins them with a heavily Anglo electorate to the north in Denton County. (FOF at ¶¶ 221-245).

The "lightning bolt" in CD 26 also separates Latino voters from African American voters in Tarrant County. (DX0702). On May 28, 2011, Ryan Downton wrote an email to Gerardo Interiano and Doug Davis regarding his progress on congressional redistricting. Mr. Downton reported "Changes made to keep the Black population together in District 12." (DX903).

6. There is Ample Circumstantial Evidence of Circumstantial Evidence of Racial Purpose

As previously described, the State's adopted House and Congressional redistricting plans fail to create any additional Latino opportunity districts, despite the strong growth of the Latino population in Texas. In the face of shifting demographics, and the increase in the number of Latino registered voters 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 opportunity districts in the House plan, is circumstantial evidence of an intent to limit Latino electoral strength in the new redistricting plans.

a. The Historical Background of the Challenged Decision

Since 1982, the State of Texas, or one of its political subdivisions, has been subject to over 200 voting rights challenges. (DX831 at 5). Against this backdrop, Texas commenced another round of statewide redistricting in February 2011.

The 2011 Texas Legislative Session was rife with racial tension. (DX831 at 6). Larry Gonzales, a Latino Republican member of the Texas House, testified that the legislative debate in the 2011 Session, particularly with respect to immigration, may have upset some Latinos who have conservative values but who might have taken the debate personally. (DX580 at 103:1-104:19).

Even Latino Republican legislators were not immune from stereotypes and negative racial comments during the Legislative Session. During the 2011 Special Legislative Session, a legislatively-sponsored speaker on the Capitol steps stated: "If you really want to know why in Texas we don't get immigration legislation passed, it's because we have 37, 36 Hispanic legislators in the Texas Legislature. All of the states

that have passed legislation have a handful. . . ." (DX575 at 441:7, 13, 17; DX509 at 1:25-1:45).

The 2011 Legislative Session was also characterized by elected officials criticizing Latinos and Spanish-speakers without respect to immigration status. On June 13, 2011, in a Senate Transportation and Homeland Security Committee hearing, a Spanish-speaking witness attempted to give testimony through an interpreter. State Senator Chris Harris stated: "Did I understand him correctly that he has been here since 1998? . . . Why aren't you speaking in English, then? . . . You've been here for 23 years!" Senator Harris continued: "It's insulting to us. It is very insulting. And if he knows English, he needs to be speaking in English." (DX575 at 437:2-438:22, 441:7, 13, 17; DX509 at 0:17-1:24).

b. Departures from the Normal Procedural Sequence

The adoption of the House and congressional redistricting plans was characterized by numerous departures from the normal procedural sequence. At the outset of the Session, on January 24, 2011, the Texas House of Representatives voted down a rules adoption stating that all legislatively approved maps would comply with the Voting Rights Act. (DX381 at 2-4).

The Texas Legislature's redistricting process was abnormally rushed and did not proceed in a typical manner. (DX575 at 25:7-9, 25:20-24). Redistricting committees held some hearings with no maps. (*Id.* at 25:20-25). They also held some hearings with no Census data available. (*Id.*). Subsequent hearings did not provide sufficient notice or time for the minority community to analyze or present testimony on the State-produced maps during the Legislative session. (DX773 at 68:13-69:19; DX575 at 25:20-26:9; Task

Force Statement of Material Facts Still in Dispute at ¶¶ 453-537, *Texas v. United States*, 1:11-c-v-01303, Dkt. No. 78-1 (DDC filed Oct. 25, 2011)).

c. Departures from Normal Substantive Considerations

In addition to the departures from normal substantive considerations described above, 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, the Legislature departed from the normal substantive consideration of accommodating congressional representatives of the same political party. U.S. Representative Lamar Smith, the spokesperson for the Texas Republican congressional delegation, provided and advocated for an additional Latino opportunity district in the Dallas Ft. Worth area. (FOF at ¶¶ 253-257). However, Texas redistricters refused to accommodate the Republican delegation's request.

7. Partisanship as Pretext

The State claims that whatever negative impact the plans have on Latinos can be justified by partisanship. The State's actions are unlawful even if the State can point to other, purportedly non-racial purposes. *See LULAC v. Perry*, 548 U.S. 399, 441 (2006); *Garza v. County of L.A.*, 756 F. Supp. 1298, 1349 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990) ("racial discrimination is not just another competing consideration.") (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)).

First, the State's use of race as a proxy for partisanship is unconstitutional. The record in this case demonstrates that Latinos can vote for Republicans and Democrats. Nevertheless redistricters used racial and partisan terms interchangeably; Chairman Seliger he assumed that a Latino majority district would be a Democratic district. (Trial Tr. Jan. 24 AM at 31:15-22; 32:12-33:7).

Second, to the extent that redistricters relied on race-based districting to protect incumbency, as in the changes to CD 23 and 27 and HDs 78 and 117, that is improper. The Supreme Court held in *LULAC v. Perry*, with respect to incumbency protection:

> If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. By purposely redrawing lines around those who opposed Bonilla, the state legislature took the latter course. This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters. See *Gingles, supra*, at 45 (citing Senate Report factor of whether "the policy underlying" the State's action "is tenuous"). The policy becomes even more suspect when considered in light of evidence suggesting that the State intentionally drew District 23 to have a nominal Latino voting-age majority (without a citizen voting-age majority) for political reasons. *Session, supra*, at 497. This use of race to create the facade of a Latino district also weighs in favor of appellants' claim.

548 U.S. at 441.

Although the State relies on *Hunt v. Cromartie*, 526 U.S. 541 (1999) and its later case *Easley v. Cromartie* 532 U.S. 234 (2001), those cases are very different from the case here. Furthermore, Texas cannot show that the challenged districts in its plans are the result of "political or traditional, districting motivations" as opposed to motives that were "predominantly racial." *Easley*, 532 U.S. at 249.

The analysis turns largely on the facts of each case. *Id.* at 241 ("The issue in this case is evidentiary."). Here, instead of showing (as did the State in *Cromartie*) that precincts were selected for inclusion in a district based on election returns, the State has demonstrated the opposite.

For example, the State does not dispute that the "lightning bolt" of CD 26 in Tarrant County follows race (carving out majority Hispanic citizen voting age population Census

block groups and separating them from African American majority Census block groups) and does not follow percent of ballots cast for Democratic candidates. *See* DX702 (map showing race shading); PX133 (map showing political shading) and DX903 (Downton email: "Changes made to keep the Black population together in District 12.").

Similarly, redistricters focused on race in CD 23 when they changed CD 23. Mr. Downton testified that opposed to simply looking at election returns, he chose precincts for inclusion and exclusion from CD 23 based on race, i.e. the percent of Latino registered voters in the precinct. (FOF 331) Mr. Downton's use of race was not for the purpose of creating a district in which Latinos could elect their preferred candidate -- quite the opposite. Mr. Downton systematically and knowingly selected precincts in order to siphon Latino voters out of the district, reducing the number of Latinos who would cast ballots in CD 23 elections in order to protect an incumbent who was not the Latino preferred candidate. (FOF at ¶¶ 336-346).

The record is replete with evidence that Latinos vote for Republican and Democratic candidates. (FOF at ¶¶ 477-499). As explained by the State's expert Dr. Alford, "I think that is something we -- we can clearly infer about Latino voting behavior from all of this analysis. There is much more movement across party lines, in terms of how Latinos are distributed[.]" (FOF at ¶ 498).

Despite the conviction of many in the Texas Republican Party, including Latino Republican officeholders, that Latinos can and do vote for Republican candidates, and in the face of Census data showing continued strong growth in the Texas Latino population, the State chose a strategy of minimizing Latino voting strength instead of creating redistricting plans that fairly reflected Latino growth. This unconstitutional (not to

mention self-defeating) strategy included: rejecting outright the suggestion of Representative Lamar Smith, spokesperson for Texas Republican delegation, to create a Latino opportunity district in the DFW area; drawing district boundaries in DFW that can only be explained on the basis of race; and dramatically revising the configuration of South Texas congressional districts to fracture away Latino population growth into Anglo-majority districts and minimize the number of Latino opportunity districts in that region.

LULAC v. Perry made clear that redistricters may not pursue political ends by purposefully reducing the ability to elect of Latino voters:

> Even if we accept the District Court's finding that the State's action was taken primarily for political, not racial, reasons, the redrawing of the district lines was damaging to the Latinos in District 23. The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo. . . Even assuming Plan 1374C provides something close to proportional representation for Latinos, its troubling blend of politics and race—and the resulting vote dilution of a group that was beginning to achieve §2's goal of overcoming prior electoral discrimination—cannot be sustained.

548 U.S. at 440, 442 (internal citation omitted) The decision in *LULAC* rejected the district court's reliance on *Cromartie* to excuse the State's discrimination against Latino voters. *See Session v. Perry*, 298 F.Supp.2d 451, 509 n.206 (E.D.Tex. 2004) *rev'd LULAC v. Perry*, 548 U.S. 399 (2006) (citing *Cromartie* to support its conclusion that the "State has articulated a legitimate political explanation for its districting decision.").

CONCLUSION

For the foregoing reasons, the Latino Task Force Intervenors respectfully request that the Court deny the State's request for preclearance of its state House and congressional redistricting plans.

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Respectfully submitted,

/s/ Nina Perales
Nina Perales (D.C. Bar No. TX0040)
Rebecca Couto (*pro hac vice*)
Marisa Bono (*pro hac vice*)
Karolina Lyznik (*pro hac vice*)
Mexican American Legal Defense
& Educational Fund
110 Broadway, Suite 300
San Antonio, TX 78205
Telephone No.: (210) 224-5476
Facsimile No.: (210) 224-5382
E-mail address: nperales@maldef.org

Karen M. Soares (D.C. Bar No. 503295)
Jorge M. Castillo (*pro hac vice*)
Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW
Washington, DC 20006

Attorneys for Defendant-Intervenor,
Texas Latino Redistricting Task Force

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 February 6, 2012.

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