IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA, and ERIC H. HOLDER, JR. in his official capacity as Attorney General of the United States, Defendants, WENDY DAVIS, *et al*., Defendant-Intervenors.	)	Case No. 1:11-CV-01303 (RMC-TBG-BAH) [Three-Judge Panel]

PLAINTIFF STATE OF TEXAS' TRIAL BRIEF

Plaintiff State of Texas respectfully submits the following Trial Brief pursuant to the Court's Order of January 25, 2012.

Dated: February 6, 2012

Respectfully submitted,

/s/ Adam K. Mortara

ADAM K. MORTARA
JOHN M. HUGHES
ASHLEY C. KELLER
Bartlit Beck Herman Palenchar & Scott LLP
54 W. Hubbard Street, Suite 300
Chicago, IL 60654
Tel: (312) 494-4400
Fax: (312) 494-4440

Attorneys for Plaintiff State of Texas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

INTRODUCTION

This case arises under § 5 of the Voting Rights Act. Following the release of the 2010 census, Texas learned that its population grew by more than four million people over the course of the preceding decade. *Perry v. Perez*, 565 U.S. __, slip op. at 1 (U.S. Jan. 20, 2012). To account for that growth, Texas was required to redraw existing district boundaries for the Texas House, the Texas Senate, and the United States Congress in order to comply with the Constitution's one-person, one-vote rule. *See Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). Texas also had to create four new congressional districts apportioned to the State as a result of its increased population. Texas' enacted House Plan, Senate Plan, and Congressional Plan are at issue in this case.

Texas is a covered jurisdiction under § 5 of the Voting Rights Act. 42 U.S.C. § 1973c(a). As a consequence, § 5 prevents implementation of each of the challenged plans until Texas obtains the approval of either this Court or the Attorney General. *See Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2509 (2009). This approval – dubbed "preclearance" – requires Texas to show that its enacted redistricting plans will neither have "the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or" membership in a language minority group. 42 U.S.C. §§ 1973c(a), 1973b(f)(2).

Texas seeks a declaratory judgment that the House Plan, the Senate Plan, and the Congressional Plan comply with § 5. The United States and the Attorney General (the "United States") oppose preclearance of both the House and Congressional Plans. Seven Intervenors oppose one or more of the three plans at issue.

ARGUMENT

I. Texas' Proposed Redistricting Plans Do Not Have a Discriminatory Effect

A. Section 5 Only Prohibits Backsliding in Minority Voting Strength

Section 5 prohibits implementation of an enacted redistricting plan that will have the "effect of denying or abridging the right to vote" based on race or membership in a language minority group. 42 U.S.C. § 1973c(a). Section 5 protects "the ability of [minority] citizens to elect their preferred candidates of choice." 42 U.S.C. § 1973c(d).

The principal function of § 5 "'has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). Section 5 "prevents nothing but backsliding, and preclearance under § 5 affirms nothing but the absence of backsliding." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 335 (2000) (*Bossier Parish II*). Section 5 is not ameliorative. *Bush v. Vera*, 517 U.S. 952, 983 (1996). As this Court has found, guarding against backsliding does not safeguard emerging but not-yet-established minority voting power. Dec. 22, 2011 Mem. Op., Dkt. No. 115 at 32-33; *Beer*, 425 U.S. at 140.

Determining whether an enacted redistricting plan retrogresses requires a comparison between the existing plan and the enacted plan. *Reno v. Bossier Parish Sch. Bd*., 520 U.S. 471, 478 (1997) (*Bossier Parish I*). The retrogression analysis "must encompass the entire statewide plan as a whole." *Ashcroft*, 539 U.S. at 479. A redistricting plan that preserves minority statewide voting strength "is entitled to § 5 preclearance." *Id.* at 477 (citing *City of Lockhart v. United States*, 460 U.S. 125, 134 n.10 (1983)). A plan preserves minority voting strength so long as it assures the ability to elect an equal or greater number of minority-preferred candidates. *Abrams v. Johnson*, 521 U.S. 74, 97-98 (1997). Section 5 does not require a jurisdiction to increase the expected number of minority-preferred electoral victories to account for relative increases in minority populations. *Id.*; *see also* 42 U.S.C. § 1973(b) ("[N]othing in [the Voting Rights Act] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.")

1. Measuring Retrogression Requires a Statewide Functional Analysis of Minority Voting Strength

The general principles enjoining retrogression are well settled. But there is no legal authority dictating a specific methodology for measuring retrogression. As the entity charged with enforcing § 5, the Department of Justice has issued only high-level "assistance to jurisdictions covered by the preclearance requirements." 76 Fed. Reg. 7470 (Feb. 9, 2011) (PX 2) ("DOJ Guidelines"). To determine if a plan retrogresses, DOJ Guidelines direct covered jurisdictions to: (1) compare benchmark and enacted plans; (2) perform a "functional analysis of the electoral behavior within the particular jurisdiction or election district"; and (3) take note of "election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information" that may be important "to an assessment of the actual effect of a redistricting plan." *Id*. at 7471; *see also* 28 C.F.R. §§ 51.54(c), 51.59(a).

The DOJ Guidelines are just that. They do not answer specific legal questions concerning which elections should factor into the "functional analysis" of electoral behavior or how States should interpret election results in order to preserve statewide minority voting strength. When confronting those issues, courts should pay heed to § 5's "limited substantive goal": maintaining the ability to elect at least an equal number of minority-preferred candidates statewide. *Ashcroft*, 539 U.S. at 477. In pursuit of that aim, Texas enjoys wide latitude to select its "own method of complying with the Voting Rights Act." *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (plurality op.). Though so-called "influence districts" no longer present a viable option to avoid retrogression, 42 U.S.C. § 1973c(a), § 5 still "does not dictate that a State must pick" one method of redistricting. *Ashcroft*, 539 U.S. at 480. Instead, States retain "the flexibility to choose one theory of effective representation over the other." *Id.* at 482.

a. Section 5 authorizes States to measure retrogression by comparing exogenous election results

The parties now agree that population demographics provide an appropriate starting point for measuring minority voting strength.[1] (Handley House Report, DX326 at 2; Alford, PX175 at 4.) Once demographics produce a universe of possible ability districts, States can perform analysis of past elections in the proposed and benchmark plans.

Reconstituted election analysis is the superior method to measure retrogression. (Alford, PX175 at 4-7.) This exogenous election analysis looks to statewide electoral contests. Because candidates for statewide office are on the ballot throughout the State, reconstituted election analysis reveals how a minority-preferred candidate would have performed in a redrawn district. Courts can compare those results to the performance of the same statewide candidates in the benchmark district. (*Id.* at 5-7 & n.2.)

The same is not true for so-called "endogenous" elections. Endogenous election analysis keys off election results in the benchmark district for the particular office at issue. (Handley House Report, DX326 at 5-6; Alford, PX175 at 18 n.4.) Because newly drawn districts have no electoral history, endogenous election analysis is only possible in the benchmark plan. (Alford, PX175 at 15.) As a result, endogenous election analysis does not permit a "*comparison* of a jurisdiction's new voting plan with its existing plan." *Bossier Parish I*, 520 U.S. at 478 (emphasis added). It is no answer to compare endogenous with exogenous elections. That is analogous to comparing distance with speed or "apples to oranges." (T8A 6:19-20.)[2] With no mechanism to convert endogenous and exogenous election results into a common unit of measurement, comparing the two types of election analyses is impracticable.

[1] In its motion for summary judgment, Texas argued that minority voters have the ability to elect candidates of their choice in any district where a single minority group constitutes greater than 50% of the citizen voting age population. That position offers a judicially administrable rule that is impelled by the statutory text of § 5. The Court rejected Texas' argument, and that decision is now the law of the case. *See* 18B Fed. Prac. & Proc. § 4478.1 (2011). Pursuant to this Court's instructions, Texas preserves for appeal its construction of § 5's ability-to-elect language, and incorporates by reference its summary judgment briefing on this issue. (T6B 35:22-24.)

[2] Citations to the Trial Transcript in this case are notated "TXA" for morning transcripts and "TXB" for afternoon transcripts, where "X" is the day number.

Endogenous elections also mask candidate-specific anomalies that do not bear on the ability-to-elect inquiry. (Alford, PX175 at 15.) For instance, the fact that the *same* minority-preferred candidate continues to win endogenous, district-wide elections may be the product of incumbency advantage – something that may cease to exist once the contours of the new district have been drawn. (*Id.* at 17-18; Arrington, T5B 66:23-67:4.) As a matter of law, the retrogression inquiry cannot turn on whether a particular politician continues to seek reelection. Section 5 is concerned with the ability of minority *voters*, not the electoral prospects of individual incumbents. 42 U.S.C. §§ 1973c(a), (b). Because reconstituted election analysis offers the only apples-to-apples means of comparing minority voting strength across benchmark and enacted plans, it is the "best available social science tool" for testing retrogression. (Alford, PX175 at 7.) Texas has "the flexibility to choose" that tool when measuring compliance with § 5. *Ashcroft*, 539 U.S. at 482.

b. States should use a greater number of statewide elections weighted toward more recent contests

Texas' reconstituted election index relied on 10 statewide contests weighted toward more recent elections. (Alford, PX175 at 9 tbl. 2.) That approach is preferable to the United States' five-election index, which accords equal weight to contests from each of the last five cycles. (*Id* at 8.) As with any statistical sampling, increasing the number of observations improves accuracy. And weighting an index toward more recent contests provides a superior accounting of the current political landscape. (*Id.*)

c. Courts should measure the statewide ability to elect minority-preferred candidates across all districts at issue

Texas' statewide functional analysis looks at all the reconstituted electoral victories for minority candidates of choice across all districts with high minority population levels. (Alford, PX175 at 9-11, tbl. 3b.) If the total minority electoral success for the proposed plan meets or exceeds that for the benchmark, there is no retrogression. (*Id.*) The advantage of Texas'

approach is that it captures the *degree* of minority voting strength across all relevant districts. (*Id.* at 12.) A district where the minority candidate of choice prevailed in 6 of 10 statewide election contests is not the same as a district where the minority candidate of choice won all 10 statewide elections. By the same token, there is no reason to obscure the distinction between a district where the minority candidate of choice won 4 of 10 statewide contests and a district where the minority-preferred candidate was unsuccessful in all 10 statewide races.[3]

For these reasons, Texas' approach is preferable to a binary methodology. Defendants would determine retrogression by viewing each district in isolation, categorizing it as either an ability-to-elect district or not, and comparing the total number of benchmark and enacted ability districts. (*Id.* at 13.) That blunt technique ignores gradations in minority abilities to elect and gives States no credit for improving electoral performance in districts that stay above or below the ability-to-elect cutoff. (Handley, T8A 49:17-23 ("It's really nice that Texas did improve" an existing ability district but such improvement does not help Texas avoid retrogression.) The method also fails to dock any points where Texas reduces the performance of districts but does not cross the Defendants' imaginary line between ability and no-ability. (Alford, PX175 at 15-18; Texas' Closing Argument Presentation, Dkt. No. 175-1, Slide 20 (hereinafter "Texas Closing").) The relevant question is the *total* number of minority electoral successes. A binary, yes-or-no categorization of districts will offer a less reliable answer to that inquiry.

[3] During the redistricting process, Texas – relying on prior DOJ guidance (PX1) – counted the number of districts with an SSVR greater than 50% in both the enacted and benchmark plans. The enacted plan increased the number of 50%+ SSVR districts by one, and reconstituted election analysis confirmed that the plan maintained or improved minority electoral performance in all but one district. In light of those considerations, Texas determined that its plan did not retrogress. (Interiano, T1A 172:12–173:6.) Defendants harp on the fact that Texas did not fully develop the statewide functional analysis prior to litigation. That is the pot calling the kettle black, as Defendants only revealed their methodologies after Texas filed suit. In all events, Defendants' charge is a truthful irrelevancy. Retrogression turns on an objective question: did Texas' enacted plans have the "effect of denying or abridging the right to vote"? 42 U.S.C. § 1973c(a). Measuring effects turns on empirical observations, not Texas' pre-litigation thinking. It follows that the validity of the statewide functional analysis turns on its explanatory power, not when the analysis took place.

At a minimum, Texas enjoys the discretion to employ the statewide functional analysis. *Ashcroft*, 539 U.S. at 482. That method respects the text of § 5 by accounting for any circumstance where minority-preferred candidates demonstrate an ability to win actual electoral contests. 42 U.S.C. § 1973c(d); (Alford, PX175 at 11-12). Eliminating Texas' "flexibility to choose one theory of effective representation over the other," *Ashcroft*, 539 U.S. at 482, would exacerbate the "substantial federalism costs" associated with preclearance, rendering § 5 unconstitutional. *Bossier Parish II*, 528 U.S. at 336 (citation and internal quotation marks omitted); *see also Northwest Austin*, 129 S. Ct. at 2511. The Court should avoid an impermissible reading of the statute.[4] *Id.*

2. Under a Binary Approach, Districts With a Supermajority of Minority Voters Are Ability Districts as a Matter of Law

If § 5 requires States to measure retrogression through a binary approach, it is still appropriate to use exogenous elections weighted toward more recent contests. Moreover, where minority voters comprise 60% or greater of the citizen voting age population, a district affords minorities the ability to elect candidates of choice as a matter of law under this Court's summary judgment opinion. Mem. Op. at 29-30 & n.22; *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977); *Mississippi v. United States*, 490 F. Supp. 569 (D.D.C. 1979) (finding that blacks have the ability to elect when they are 65% of the total population and *60% of the total voting age population*). This Court's 60% CVAP rule is the law of the case, and no party can identify intervening law or facts to warrant reconsideration.[5] 18B Fed. Prac. & Proc. § 4478.1 (2011).

3. Section 5 Does Not Protect Coalition Districts

[4] The statewide functional analysis is also in harmony with the DOJ's Guidelines and regulations, which instruct States to conduct "a functional analysis of [] electoral behavior within the particular jurisdiction or election district." 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) (PX2); *see also* 28 C.F.R. §§ 51.54(c), 51.59(a).

[5] JUDGE HOWELL's observation at closing argument that the Court established a 65% CVAP bright line (T9A 9:24-25) is at odds with the authorities the Court relied on in its footnote, but this makes no difference to the outcome of the analysis because the two districts at issue (HD 41 and HD 117) remain "ability to elect" districts as a matter of law under either standard. *See infra* at 11-12.

In *Bartlett*, the Supreme Court held that § 2 does not protect coalitions of minority and majority voters. 129 S. Ct. at 1243. Since this Court's summary judgment order, the Supreme Court has clarified the law. Following *Perez*, a district court also has no remedial authority under § 2 ***or § 5*** to draw districts composed of either minority-majority or minority-minority coalitions. *Perez*, slip op. at 10. In light of *Perez*, this Court should reconsider its decision concerning coalition districts.

There is no remedy to create coalition districts because multi-racial coalitions lie beyond the reach of § 5. While the Supreme Court previously held that States could use influence and coalition districts to prevent retrogression, that view was predicated on the assumption that "the ability of racial groups to elect candidates of their choice is only one factor under § 5." *LULAC v. Perry*, 548 U.S. 399, 446 (2006) (citing *Ashcroft*, 539 U.S. at 480). Abrogating *Ashcroft*, Congress has since clarified that the purpose of § 5 "is to protect the ability of [minority] citizens to elect their preferred candidates of choice." 42 U.S.C. § 1973c(d). That language tracks the text of § 2, which affords minority citizens the "opportunity . . . to elect representatives of their choice." 42 U.S.C. § 1973.

Though § 2 is concerned with "opportunity" and § 5 focuses upon "ability," that textual distinction is not material to the legal status of coalition districts. Whether the focus is "opportunity" or "ability" to elect, the sole textual question is *who* enjoys that opportunity or ability. If members of two or more minority groups cannot band together to create an *opportunity* to elect, *Perez*, slip op. at 10, there is no textual basis for concluding that § 5 protects a minority coalition's *ability* to elect. In fact, this Court has held that "ability," vis-a-vis "opportunity," connotes a *higher* level of minority voting strength. Mem. Op. at 12 n.7. It follows that § 5 is even less amenable to a textual construction that protects minority coalitions. Because the statutory text of § 5 is plain, resorting to "the controversial realm of legislative history" is forbidden. *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004).

Yet even if § 5 does extend to coalition districts, the minority coalition must vote cohesively. Contested primary elections between members of the putative coalition offer the most probative evidence of cohesion. *LULAC*, 548 U.S. at 444 (Even assuming protected coalitions exist, in "the absence of any contested Democratic primary . . . no obvious benchmark exists for deciding whether [minority voters] could elect their candidate of choice."); *Session v. Perry*, 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004), *aff'd in relevant part*, *LULAC*, 548 U.S. 399; *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y. 2004) (per curiam), *aff'd* 543 U.S. 997 (2004). Without cohesive voting in the primary, the candidate of choice of at least one cohort in the supposed minority coalition will *not* win the primary and hence the general election.

That minority voters cohere in the general election is beside the point. The minority group whose candidate lost the primary will, at best, be coalescing behind its *second-choice* candidate. Section 5 does not protect a coalition where some members have the ability to elect *the* candidate of their choice while other members settle for the next best thing. As the Supreme Court stated in *LULAC*:

> The opportunity [for African-Americans] "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. Accordingly, the ability to aid in Frost's election does not make the old District 24 an African–American opportunity district for purposes of § 2. If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.

548 U.S. at 445-56. The logic of *LULAC* applies with equal force to § 5. A minority group that has the ability to nominate, then elect, its first-choice candidate is in a different position than minorities who cannot get their preferred candidate through the primary. It follows that the two groups do not enjoy the same ability to elect. The text of § 5 cannot accommodate an

interpretation that creates two ability-to-elect tiers among voters who purport to share the same statutory rights.

B. The Texas House Plan Does Not Retrogress

Texas' House Plan H283 increases minority voting strength. Accordingly, the Plan is not retrogressive. The parties' disagreement centers on (1) 10 majority HVAP districts that experienced changes in performance[6] and (2) a putative coalition district. (Alford, PX175 at 9, 19.)

1. Applying the Statewide Functional Analysis, Texas Improves Hispanic Voters' Ability to Elect

Because § 5 does not protect coalition districts, HD149 is irrelevant to the retrogression inquiry. *Perez*, slip op. at 10. Applying a functional analysis to districts subject to § 5's protection, the enacted plan is not retrogressive. (Alford, PX175 at 11, tbl. 3b.) As illustrated in the following table, the enacted plan improves minority voters' ability to elect in districts 34, 43, 74, 80, 118, and 137. Those gains are only partially offset by performance changes in districts 33, 35, 41, and 117. On balance, Hispanic candidates of choice win four additional statewide contests in the enacted plan over the benchmark.

	Dr. Handley's 5 Elections		OAG's 10 Elections		5 most Recent Elections in OAG's 10	
District	**Benchmark**	**Adopted**	**Benchmark**	**Adopted**	**Benchmark**	**Adopted**
33	3	0	6	0	2	0
34	3	4	6	9	2	4
35	2	1	5	4	1	1
41	4	3	7	5	4	2
43	5	5	9	10	4	5
74	1	5	4	10	2	5
80	5	5	9	10	4	5
117	3	1	5	2	2	2
118	5	5	7	10	2	5
137	3	5	8	10	5	5
Total Wins	**34**	**34**	**66**	**70**	**28**	**34**
Difference Between Adopted and Benchmark:		**0**		**+4**		**+6**

[6] No defendant alleges that any of the maps retrogress African-American voting strength.

(Alford, PX175 at 11, tbl. 3b.) In fact, after accounting for DOJ's admitted error in HD118, the sum of minority-preferred wins under the United States' five-election index shows a one-election improvement in the enacted plan. (*See* Texas Closing Slide 17.) The evidence confirms that the enacted plan augments Hispanic statewide voting strength. That is the opposite of retrogression. *Bossier Parish II*, 528 U.S. at 335.

2. Texas' House Plan Is Not Retrogressive Under a Binary Analysis

Texas prevails even under a binary approach. The United States contends that districts 33, 35, 117, 149, and perhaps 41, shift from ability to inability in the enacted plan with no corresponding offsets. The evidence is to the contrary.

a. Proposed HD41 and HD117 are ability-to-elect districts as a matter of law under this Court's bright line

As a matter of law, HD41 and HD117 are ability-to-elect districts. HD41 has a HCVAP of 72.1%, well above this Court's 60% bright-line cutoff. (Alford, PX175 at 10, tbl. 3a.)

HD117 has an HCVAP of 63.8%, which also satisfies this Court's bright-line demographic threshold. (*Id.*) Even if this Court concludes that a 65% minority-supermajority is necessary to "guarantee[] that . . .a cohesive minority group will be able to elect its candidate of choice," HD117 still qualifies as performing under the Defendants' view of coalition districts. Mem. Op., Dkt. 115, at 29. HD117's Black and Hispanic CVAP together account for 68.4% of the district. (PX14.) Thus, HD117 meets any reasonable construction of the Court's bright-line standard.

Even if it did not, the basic electoral contours of HD117 are unchanged. In both the benchmark and enacted plans, the district has trended Republican. The minority-preferred candidate won only 2 of the last 5 exogenous elections in both the benchmark and enacted plans. (Alford, PX175 at 11, tbl. 3b.) Incorporating more dated contests, the minority-preferred

candidate prevailed in less than a majority of statewide elections. (*Id.*) If HD117 is not an ability district in the enacted plan, it was not an ability district in the benchmark either.

b. HD35's status is unchanged

HD35 does not change from the benchmark to the proposed plan. In the benchmark, Hispanic-preferred candidates won only 5 of 10 exogenous elections. (Alford, PX175 at 11, tbl. 3b.) Reflecting the Republican trend of the district, four of those five victories are dated: the minority-preferred candidate prevails in only one of the last five statewide contests in both the benchmark and enacted plans. (*Id.*) Using a seven-election index, the Latino Task Force's expert opined that Texas actually improved the minority voting strength of HD35. (Engstrom, T7B 13:24-14:1.) The United States' five-election index also confirms that minority-preferred candidates win less than half the time: one of five elections in the enacted plan and two of five elections in the benchmark. (*Id.*) One of those benchmark elections was a 2004 race for Court of Criminal Appeals where the minority-preferred candidate eked out a 0.5% margin of victory. (Texas Closing Slide 7.) Putting that razor-thin election to one side, the United States would show identical exogenous performance in both the benchmark and enacted plans. From every vantage point, HD35 provides minority voters the same ability to elect in the enacted plan as it provided in the benchmark.

The United States' contrary conclusion rests on its erroneous use of endogenous election analysis. (Alford, PX175 at 14-15.) Yet as noted *supra*, this Court can only measure retrogression by comparing exogenous election results. *See Bossier Parish I*, 520 U.S. at 478. On that metric, there is no disagreement: Texas did not retrogress HD35.

c. HD149 is not an ability-to-elect district

Even assuming § 5 protects coalitions, for two reasons HD149 is still not an ability-to-elect district. First, the putative quad-ethnic coalition of Blacks, Hispanics, Anglos, and Asians do not vote cohesively in Democratic primaries. (Alford, PX175 at 19, Appendix C, tbl. C1.)

Absent cohesion, the coalition does not possess a collective ability to elect candidates of choice. *LULAC*, 548 U.S. at 445-56. Second, HD149 was a Republican district in the benchmark, electing the minority candidate of choice in only one of the United States' five exogenous elections. (Handley House Report, DX326 at 7.) Under a binary analysis, a 20% minority-preferred district is a 100% non-performing district. Any changes to HD149 did not retrogress.

d. Texas compensated for the loss of HD33 through HD74

If a binary analysis is deployed, Texas agrees that HD33 was an ability district in the benchmark but not the enacted plan. Texas compensated for the loss of HD33 by converting HD74 into a performing district. Using both the United States and Texas' exogenous indices, HD74 did not perform in the benchmark plan. (Alford, PX175 at 11, tbl. 3b.) In the enacted plan, the minority candidate of choice prevailed in all 10 of the exogenous elections. Flipping HD74 to a highly performing ability district compensates for the loss of HD33.

The United States again attempts to mis-categorize HD74 as an ability district in the benchmark by relying on the district's endogenous performance. HD74 highlights the methodological flaw in this approach. The district's endogenous score is attributable to the 22-year incumbency of Democratic Representative Pete Gallego. (T8A 52:20-53:8.) Without the well-known benefits of incumbency, (Arrington, T5B 66:23-67:4), HD74's exogenous performance shows that the district would elect a Republican. Relying on the happenstance of incumbency to measure minority electoral ability shifts the focus of retrogression analysis from voters to politicians, which is error. Minority voters' ability to elect cannot turn on whether a particular incumbent seeks reelection. That logic applies with added force to HD74, since Rep. Gallego is relinquishing his House seat to run for Congress. (PX10.) Controlling for Rep.

Gallego's incumbency, Texas converted HD74 from a non-performing benchmark district to an ability district in the enacted plan.[7]

Even under a binary methodology, Texas did not reduce the number of binary-counted ability-to-elect districts. There is no retrogression. *Bossier Parish I*, 520 U.S. at 478.

C. The Texas Senate Plan Does Not Retrogress

A statewide functional analysis confirms that Texas' Senate Plan does not retrogress. Under that analysis, minority-preferred candidates win four additional statewide contests in the enacted plan over the benchmark. (Alford, PX175 at 28-29, tbls. 5a & 5b.) There is no backsliding to redress, and the United States concurs.

The same conclusion holds under a binary approach. Various Intervenors allege that Texas deprived minority voters of the ability to elect a candidate of choice in Senate District 10. (Jan. 13, 2012 Joint Trial Br. at 8-9, Dkt. No. 141.) But as the United States recognized at closing argument, the evidence does not support a finding of retrogression. (T9A at 83:7-15.)

SD10 is located in Tarrant County and includes large portions of the Fort Worth metropolitan area. (PX15, S100 Benchmark.) In the benchmark, the district had Anglo, Hispanic, and Black CVAPs of 62.7%, 15.1%, and 18.3% respectively. (T4A at 52:10-53:4.) All the evidence confirms that minority voters in SD10 do not vote cohesively in Democratic primaries. (Alford, PX175 at 30, Appendix C, Table C3.)

SD10 is a Republican district that almost never elects minority candidates of choice. (PX21.) Senator Davis, the incumbent Democrat, is the sole exception. Senator Davis' 2008 Republican opponent was an incumbent Senator facing an ethics scandal in the months preceding the election. (PX108, Fort Worth Star Telegram.) Senator Davis believes her opponent's

[7] If Defendants are correct that minority coalitions are protected by § 5, Texas also turned HD101 into an ability-to-elect district. In the benchmark plan, HD101 was a majority Anglo district in Dallas County. (PX13.) In the enacted plan, HD101 is an open-seat in Tarrant County with a combined Black, Hispanic, and Asian CVAP of 55.5%. (PX14.) Enacted HD101 has a strong Democratic tilt, ensuring the election of minority-preferred candidates. (PX20.) Counting coalition districts, HD101 provides an additional offset to HD33.

scandal helped her politically. (T4A at 69:16-25.) Facing a weak opponent in a strong Democratic election cycle, Senator Davis managed to win her 2008 election by approximately 7,100 votes out of over 288,000 cast. (*Id.* at 63:3-11.) The Libertarian candidate received more votes than Senator Davis' margin of victory. (*Id.* at 63:13-18.) Every other Republican statewide candidate prevailed in SD10 during the 2008 election cycle. (*Id.* at 63:19-65:2.) Republicans also prevailed in the district in prior and subsequent elections. (PX21.)

The evidence confirms that SD10 is a reliable Republican district that – with one exception – *never* offers minorities the ability to elect candidates of their choice. The single counterexample raised by Intervenors does not transform SD10 into an ability district. Under a binary analysis, the ability to elect requires more than a single, razor-thin victory over a scandal-plagued opponent in a strong Democratic election cycle. Because SD10 was not performing in the benchmark, Texas' decision to make the district even more Republican had no effect on the number of ability districts. The Senate Plan is not retrogressive.

Finally, Defendant-Intervenors' presence in this suit is not authorized under § 5 for the reasons given in Texas' oppositions to their intervention motions, incorporated herein by reference. (Texas Oppositions, Dkt. Nos. 8, 22.) This Court's putative reliance on any contention that the United States does not itself adopt to refuse preclearance is error because it is error to have permitted intervention.

D. The Texas Congressional Plan Does Not Retrogress

Applying a statewide functional analysis, the Congressional Plan substantially improves Hispanic voting strength. Using demographics as a starting point to capture potential ability districts, minority-preferred candidates win 13 additional statewide contests in the enacted plan over the benchmark. (Alford, PX175 at 22-23, tbls. 4a & 4b.) That marked improvement defeats any claim of retrogression.

The same conclusion follows under a binary approach. The United States claims that *both* the benchmark and enacted plans contain three African-American and seven Hispanic ability districts. Even accepting those figures as correct, maintaining the same number of ability-to-elect districts is not retrogressive. That is so irrespective of minority population growth. *Abrams v. Johnson*, 521 U.S. 74, 97-98 (1997); Mem. Op., Dkt. No. 115, at 39. But in all events, the United States' accounting of ability districts is inaccurate.

The United States counts CD23 as an ability district in the benchmark but not the enacted plan. This is despite the fact that minority voters elected their candidate of choice less than half the time under both the five- and ten-election exogenous indices. (Alford, PX175 at 23, tbl. 4b.) Once again, the United States converts CD23 from a non-performing to an ability district based on erroneous endogenous analysis. That methodological sleight of hand is all the more inappropriate for CD23 because it relies on a meager three cherry-picked elections. (Handley, T8A 61:16-24.) The minority-preferred candidate prevailed in only two of those three contests, including a court-ordered special election runoff that did not occur on general election day. (Texas Closing Slide 26.) Of the three elections that did occur on general election day, the Republican earned the most votes in two. (*Id.*) Even if it were appropriate to use endogenous election analysis (and it is not), CD23 remains a non-performing district in the benchmark plan. Correcting for the United States' improper categorization, the enacted plan adds a Hispanic ability district.

The Gonzales Intervenors claim that CD25 qualifies as an ability-to-elect district in the benchmark. Neither Texas nor the United States takes that position. "The demographics for the district show why." (Alford, PX175 at 26.) Benchmark CD25 has an Anglo CVAP of over 60%, a Hispanic CVAP of 25%, and a Black CVAP under 10%. (*Id.*) Though CD25 is a reliable Democratic district, it is not one where Anglos vote as a bloc to defeat minority-preferred candidates. (*Id.*) Nor do minorities in CD25 vote cohesively in Democratic primaries.

(*Id.*, Appendix C, tbl. C2.) Unless all Democratic districts are *ipso facto* ability districts, CD25 was not performing in the benchmark.

Every conceivable binary approach confirms that Texas did not reduce the number of ability districts in the Congressional Plan. It follows that the Congressional Plan did not have the effect of denying or abridging the voting rights of minorities. *Bossier Parish II,* 528 U.S. at 335.

II. Texas' Proposed Redistricting Plans Were Not Enacted With a Discriminatory Purpose

A. Burden of Proof

Section 5 prevents implementation of a redistricting plan that has the "purpose . . . of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." 42 U.S.C. § 1973c(a). In *Bossier Parish II,* the Supreme Court held that § 5 proscribed only a retrogressive purpose. 528 U.S. at 329. That holding rested in part on the "extraordinary burden-shifting procedures of § 5." *Id.* at 335. Reading the purpose provision to cover "discriminatory but nonretrogressive vote-dilutive purposes" would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality." *Id.* at 336 (quoting *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999)).

Despite those constitutional concerns, in 2006 Congress amended § 5 to cover "any discriminatory purpose." 42 U.S.C. § 1973c(c). In so doing, Congress made § 5 coterminous with the Fourteenth Amendment's Equal Protection Clause, *LaRoque v. Holder*, No. 10-0561, 2011 WL 6413850, at *26 (D.D.C. Dec. 22, 2011), exacerbating "the substantial federalism costs" associated with preclearance, *Bossier Parish II*, 528 U.S. at 336. The Supreme Court has already expressed "serious misgivings about the constitutionality" of § 5 in general, *Northwest Austin*, 129 S. Ct. at 2511, and the new purpose provision in particular, *Bossier Parish II*, 528 U.S. at 336. Forcing Texas to bear the burden of disproving discriminatory purpose would

exceed Congress' enforcement authority under the Fifteenth Amendment and violate the Tenth Amendment. To avoid an unconstitutional construction of § 5, Defendants must bear the burden of proving that Texas acted with discriminatory purpose. *Northwest Austin*, 129 S. Ct. at 2513.

B. Discriminatory Purpose Requires State Action Because of, Not In Spite of, Race or Ethnicity

1. Disparate Impact Is Insufficient to Establish Discriminatory Purpose

Because the 2006 reenactment aligned § 5 with the Equal Protection Clause, the Supreme Court's Fourteenth Amendment jurisprudence announces the standard for unearthing "any discriminatory purpose." *See Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality op.). Discriminatory purpose "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (citations and internal quotation marks omitted).

To determine whether a redistricting plan was enacted because of – not in spite of – race, courts may consider "the impact of the official action[;] … the historical background of the jurisdiction's decision; the specific sequence of events leading up to the challenged decision; departures from the normal procedural sequence; and the legislative or administrative history, especially . . . any contemporary statements by members of the decisionmaking body." *Bossier Parish I*, 520 U.S. at 489 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)) (brackets and internal quotation marks omitted).

Courts should not fixate on the *Arlington Heights* factors. They are mere tools to investigate the underlying question of discrimination. *Id.* Where a race-neutral motive for State action is more plausible than a race-based explanation, a court should not find discriminatory purpose. *Vera*, 517 U.S. at 967. That is true even if State action has a disparate impact on racial

minorities. Standing alone or given undue weight, disparate impact is not sufficient to support a claim of discriminatory purpose. *Bossier Parish I*, 520 U.S. at 487-88; *Shaw v. Hunt*, 517 U.S. 899, 914 n.6 (1996); *Miller*, 515 U.S. at 922.

To the contrary, States will "almost always be aware of racial demographics" in the redistricting context. *Miller*, 515 U.S. at 916. Where race and politics tightly correlate, a State is bound to know that political decisions will have a foreseeable effect on minority voters. But "[i]f the State's goal is otherwise constitutional political gerrymandering, it is free to use … precinct general election voting patterns, precinct primary voting patterns, and legislators' experience to achieve that goal." *Vera*, 517 U.S. at 968 (internal citations omitted). That is so "regardless of [the State's] awareness of its racial implications." *Id.*; *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.")

A political gerrymander is not akin to "a racial gerrymander, no matter how conscious redistricters were of the correlation between race and party affiliation. If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify." *Vera*, 517 U.S. at 968 (citation omitted); *Shaw*, 517 U.S. at 905 (same). Any disparate impact resulting from political redistricting decisions is incidental. That is, the State action is "in spite of" not "because of" the known, "adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279.

2. Covered Jurisdictions May Act On The Basis of Race to Comply With The Voting Rights Act

Section 5 requires covered jurisdictions to walk a fine line. Like the Equal Protection Clause, § 5 purports to ban any decision undertaken on the basis of race. But covered jurisdictions *must* draw certain districts based on race to comply with § 5's prohibition on

retrogression and § 2's assurance of electoral opportunity. To avoid a Hobbson's choice, the Supreme Court has assumed that compliance with § 5 is a compelling state interest that can warrant narrowly tailored, intentional discrimination. *Miller*, 515 U.S. at 921; *Shaw*, 517 U.S. at 908. But to obey both the Fourteenth Amendment and the Voting Rights Act, a State must have a "strong basis in evidence" for concluding that the use of race is "reasonably necessary to comply" with the statute. *Vera*, 517 U.S. at 977-78 (discussing § 2), 983 (discussing § 5) (citation and internal quotation marks omitted). Reasonable necessity does not impose an "impossibly stringent" requirement, but instead affords States "a limited degree of leeway" to meet the requirements of the Act. *Id.* at 977. A State need not design a perfect fit between race-based means and statutory ends. *Id.*

Absent a strong evidentiary basis for believing that the use of race is necessary, a State may not purposefully use race to increase the number of minority opportunity or ability-to-elect districts. *Id.* at 983; *Perez*, slip op. at 10. Where unnecessary to comply with the statute, race-based decision making offends both the Equal Protection Clause and § 5's purpose provision.

C. Texas' House Plan Was Not Enacted with a Discriminatory Purpose

The direct evidence confirms that Texas enacted the House Plan with partisan, not racial, purposes. The Chairman of the House Redistricting Committee set out to pass a "member driven" map that was legal and afforded every incumbent legislator an opportunity to win reelection. (T2A 45:25-46:12; T4B 35:12-20.) The race-neutral aim was clear: protecting incumbents whenever practicable. (T1B 35:15-20; T5A 123:6-8.)

The two staff members with primary responsibility for drawing House districts proceeded with Chairman Solomon's directives in mind. They worked with members to create a map that complied with both the Voting Rights Act and Texas law while giving the vast majority of incumbents an opportunity to win another term. (Interiano, T1A 138:17-22, 139:24-1; Downton, T2A 88:20-89:1.) The mapdrawers never drew district boundaries based on race except where

necessary to comply with the Voting Rights Act. (*Id.*) And Chairman Solomons never had any reason to believe the proposed plan was crafted with a discriminatory purpose. (T4B 35:12-20.)

Texas' political objectives may have had a disparate impact on minorities. With 101 Republican members alongside 49 Democrats, (T1A 63:12-19), the race-neutral interest in protecting incumbents was bound to have an effect on Democratic – and hence minority – voters. That did not convert Texas' House Plan into an impermissible "racial gerrymander." *Vera*, 517 U.S. at 968. Ignoring the law, Defendants contend that disparate impact is itself sufficient to establish discriminatory purpose. (*E.g.*, Arrington, T5B 82:17-83:3.) They point to various examples of adverse effects as proof of Texas' impermissible intent. But Texas' race-neutral, political objectives better explain each of Defendants' illustrations. Wherever the House Plan resulted in disparate impact, Texas' decision makers acted in spite of, not because of, race. *Feeney*, 442 U.S. at 279.

1. The Overpopulation of Minority Districts Was Not Motivated by Discriminatory Purpose

Defendants contend that Texas acted with racially discriminatory intent by overpopulating minority districts. (Kousser, T5A 34:4-18; Arrington T5B 57:4-23.) Not so. Texas intended to comply with its race-neutral County Line Rule, not to impact minority voters. (*E.g.*, Hanna Presentation, PX9; Interiano, T1A 148:1-10.) The County Line Rule is a State constitutional provision that prevents House districts from splitting county lines. (*Id.*) Because mapdrawers cannot draw fractional districts, faithful application of the County Line Rule required Texas to create a less-than-ideal number of House seats in Harris and Bexar counties. That assured minority districts in Harris and Bexar would be overpopulated.

Texas did not proceed with the *intent* to overpopulate minority (or Anglo) districts. In fact, Texas' consistent, race-neutral application of the County Line Rule resulted in the *underpopulation* of minority districts in El Paso County. Controlling for the County Line Rule,

the House Plan does not systematically overpopulate minority districts. (Texas Closing Slide 44.) On this point, the United States' expert only agreed after cross-examination, despite his false accusation of discriminatory intent on direct. (Arrington, T5B 61:8-11.) Texas' intent to comply with its Constitution is not tantamount to a racially discriminatory purpose. In fact, it is the opposite: the Legislature intended to comply with the race-neutral County Line Rule. If the County Line Rule had a disparate impact on minorities, that impact was incidental and thus lawful. *Feeney*, 442 U.S. at 279.

2. Split Precincts Do Not Show Discriminatory Purpose

Defendants next point to precinct splits as proof of Texas' discriminatory purpose. Because precinct splits had a disparate impact on minorities, Defendants allege an impermissible state of mind. The law and the facts show otherwise.

There is nothing inherently impermissible about splitting precincts, and Texas law "expressly allows" the procedure. *Perez*, slip op. at 9 (citing Tex. Elec. Code Ann. § 42.032). Minority-sponsored alternatives to the House Plan split many precincts, (DX320 at tbl. 19), and minority representatives proposed amendments that split precincts as well. (T3B 64:15-22; T6B 18:7-15, 25:22-26:8, 28:21-29:3.) The mapdrawers testified that they split precincts only for permissible reasons, among them: member requests for particular geographies, maintaining communities of interest, complying with the one-person-one-vote rule, and avoiding retrogression under § 5. All of these justifications could have a disparate impact on minority voters, but the United States' analysis made no effort to control for Texas' lawful intentions. (Arrington, T5B 29:21-23, 37:1-9.) Under Defendants' mistaken view, disparate impact alone suffices to establish Texas' discriminatory purpose, obviating the need for further analysis. (*Id.* 37:1-9.) That is not the law. *Cromartie*, 526 U.S. at 551 ("[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.") Under binding

Supreme Court precedent, there is no evidence demonstrating that Texas' decision to "freely split[] precincts" was undertaken with a discriminatory purpose. *Perez*, slip op. at 9.

3. HD41 Was Not Drawn With A Discriminatory Purpose

Mr. Interiano drew HD41 with partisan motives to protect the election prospects of Aaron Peña, a Latino Republican incumbent. (T1A 165:24-167:2.) To achieve that permissible goal, Mr. Interiano relied on Rep. Peña (R) and Rep. Guillen's (D) familiarity with the area to include favorable and exclude unfavorable neighborhoods. Mr. Interiano also relied on political – not racial – data. (*Id.* 168:22-169:2.) Texas' method and purpose were lawful. To achieve an admitted political gerrymander, Mr. Interiano was free to use "general election voting patterns" while relying upon Reps. Peña and Guillen's "experience." *Vera*, 517 U.S. at 968.

Despite his sworn testimony, the United States claims that Mr. Interiano constructed HD41 with discriminatory purpose. As supposed proof, the United States relies on the testimony of a disgruntled voter, who by-and-large claims that Texas added wealthy neighborhoods to HD41 while excluding lower-income areas. (Longoria, T3B 15:6-12, 19:8-20, 20:19-21.) The United States also points to a made-for-litigation, racially shaded map of HD41, showing an increase in the district's Anglo population. (DX 784.)

That evidence does not show discriminatory purpose. Including wealthier areas (or excluding a sewage plant) in a district is compatible with a desire to locate affluent, more Republican voters. (Texas Closing Slide 55.) Like the United States' witness, those instructing Mr. Interiano could look at a map and finger country clubs and high-income, gated communities without resort to racial demographics.

As for the United States' racially shaded map, it is probative only of an uncontested fact: in Texas, race and politics are difficult to disaggregate. (Arrington, T5B 81:23-82:1.) Making HD41 more Anglo and less Hispanic was preordained once Texas decided to draw a more

Republican district. That predictable disparate impact does not convert Texas' political gerrymander into a racial one. *Vera*, 517 U.S. at 968.

The ultimate question concerning HD41 is whether a race-neutral or race-based explanation is more plausible. *Id.* Texas' Latino mapdrawer testified under oath that he worked with political data and two Latino lawmakers (from different parties) to make HD41 more Republican. All agree that enacted HD41 somewhat achieves Texas' stated, partisan objective. Without any direct evidence to draw upon, the United States contends that Texas' true purpose was to discriminate against Latinos. To prove its point, it offers indirect evidence that is *fully consistent* with Texas' asserted motive. Discriminatory purpose is not the most plausible explanation for the makeup of HD41. Texas acted with a permissible, partisan objective. Any disparate impact on Hispanics was incidental.

4. The Redistricting Process Was Fair

In a final attempt to unearth discriminatory purpose, Defendants allege that Texas shut minority members out of the redistricting process. The facts belie that assertion. Minority-preferred Democrats played an active role in drawing their own districts or those of their delegations. For instance, Latino Democrat Mike Villareal was the Vice-Chairman of the redistricting committee. He took the lead in drawing the Bexar County districts, and his plan won the support of 9 of the County's 10 representatives, including 6 minority-preferred incumbents. (Texas FOF, Dkt. No. 186, ¶ 147 (hereinafter "FOF").) Democrats also took the lead in drawing maps in El Paso and Travis Counties. (FOF ¶ 134.) All members from El Paso – four Democrats and a lone Republican – agreed with their district configurations. (FOF ¶ 148.)

The mapdrawers met on a regular basis with members of both political parties and organizations representing minority interests. (T1B 16:18-18:2; FOF ¶¶ 128, 131.) Texas often accommodated the concerns of minority-preferred members, (*e.g.* FOF ¶¶ 132, 149). At the end

of the process, all members – Republicans and Democrats alike – had a fair opportunity to participate. (FOF ¶ 137.)

To be sure, minority-preferred candidates did not direct the redistricting process. That comes as no surprise. Republicans controlled more than two-thirds of the Texas House. A race-neutral, member-driven process aimed at protecting incumbents assured that minority-preferred Democrats could not attain every item on their redistricting wish list. Simply put, Republicans did not need any Democratic votes to enact a final plan. In light of that base political reality, the fact that almost every Democrat is satisfied with his or her own district is notable. Whatever the political motives, Texas' redistricting process does not establish a discriminatory purpose.

D. Texas' Senate Plan Was Not Enacted with a Discriminatory Purpose

As with the House Plan, the direct evidence shows that Texas enacted the Senate Plan with partisan objectives. The Texas Senate was composed of 19 Republicans and 12 Democrats. To maintain their partisan advantage, the Senate leadership set a goal of protecting Republican voting strength. (T4A 71:12-72:4.) In furtherance of that objective, the enacted plan altered SD10 to make it more Republican. That permissible purpose did not violate § 5.

Undeterred by the law, the Intervenors complain of the Senate mapdrawer's admitted awareness that improving SD10's Republican performance involved moving Democratic, minority voters. (Davis Intervenors' Closing, Dkt. No. 172, Slides 8-9.) Yet no matter how often Defendants pretend otherwise, mere awareness "of racial demographics" does not establish discriminatory purpose. *Miller*, 515 U.S. at 916. In Texas, minority voters are predominantly Democratic. Redistricting with the intent to shore up Republican voting strength will lead to both a predictable and a lawful disparate impact on minority communities. *Id.*

Intervenors also point to the redistricting process as evidence of discriminatory intent. That argument falls flat. The Chairman of the Redistricting Committee and the principal mapdrawer met with almost every Senator to discuss district preferences. (PX163 ¶ 7.) The

process was open and fair, and minority-preferred members provided input that was reflected in the enacted plan. (FOF ¶ 305.) The Senate Plan passed by a vote of 29 to 2, with all 19 Republicans and 10 of 12 Democrats voting in favor. (FOF ¶ 311.)

Texas' Senate Plan achieved its objective: improving Republican election performance. Because § 5 is not a bar on partisan politics, Texas enacted the Senate Plan with a lawful motive.

E. Texas' Congressional Plan Was Not Enacted with a Discriminatory Purpose

The direct evidence again confirms that Texas adopted the Congressional Plan with the lawful aim of protecting incumbents. (*E.g.*, T2A 70:19-71:19.) To refute Texas' stated intentions, Defendants rely on four principal arguments: (1) the lack of proportional representation; (2) the configuration of CD23; (3) the configuration of CD26; and (4) the supposed disparate treatment of Black members of the congressional delegation. None of those arguments is persuasive.

1. Section 5 Does Not Require Proportional Representation

Acknowledging that the State maintained the same number of ability districts, *but see supra*, I.D., Defendants nevertheless contend that Texas' failure to create *additional* performing districts is evidence of discriminatory purpose. Just the opposite is true. Texas can only draw districts on the basis of race to meet the requirements of the Voting Rights Act. *Vera*, 517 U.S. at 978. Once Texas avoided retrogression, it lacked a "strong basis in evidence" to conclude that the use of race was "reasonably necessary" to satisfy either § 5 or § 2. *Id.* at 977-78.

The additional districts Defendants proposed confirm Texas' position. Defendants variously suggest that Texas should have created either new minority coalitions or a sprawling monstrosity of a district where race was plainly the predominate factor in the configuration. (*See* PX167.) Texas is not required to draw new coalition districts, *Perez*, slip op. at 10, so those proposed seats do not qualify as "reasonably necessary" to comply with § 2. And creating an "uncouth" district based almost exclusively on race would have flouted the Equal Protection

Clause. *Gomillion v. Lightfoot*, 364 U.S. 339, 340-41 (1960). Far from establishing discriminatory purpose, Texas' refusal to create additional performing districts *confirms* that the State was mindful of its statutory and constitutional responsibilities.

2. Texas Did Not Draw CD23 with Discriminatory Purpose

Texas drew CD23 with the legitimate goal of protecting a Latino Republican incumbent. (Downton, T2A 78:13-16, 80:18-81:3.) Though the principal mapdrawer, Ryan Downton, did use race to maintain the benchmark SSVR levels, (*id.* at 78:13-16), that use of race was "reasonably necessary" to comply with the Voting Rights Act. *Vera*, 517 U.S. at 977-78. Only six years ago, the Supreme Court invalidated Texas' enacted version of CD23 because it had insufficient levels of HCVAP and SSVR. *LULAC*, 548 U.S. at 427. Section 5 permitted Texas to act on the Supreme Court's concerns by using race in order to maintain CD23's benchmark demographics. *Vera*, 517 U.S. at 978. To preserve CD23's demographic characteristics while protecting the Republican incumbent, Downton used political statistics to add Hispanic precincts that he believed contained a higher number of Latino Republicans. (T2A 158:12-18.) That partisan aim was lawful.

Rejecting Downton's sworn testimony, Defendants allege that Texas' true motive was to move high-registration but low-turnout Hispanics into CD23. To support that conjured theory, Defendants rely on an email from Eric Opiela, which appears to search for a method to pinpoint registered, low-turnout Hispanics. (DX304.) For three reasons, Defendants' argument is easy to dispatch. First, there is no evidence that Opiela played a role in drawing CD23. *Arlington Heights* permits courts to evaluate claims of discriminatory purpose by consulting "contemporary statements by **members of the *decisionmaking* body**," 429 U.S. at 268 (emphasis added), not officious intermeddlers with no actual authority to act. Downton – an actual decisionmaker – testified under oath that he did not use turnout statistics to draw CD23. Section 5's purpose provision is not concerned with third-party motives.

Second, and corroborating Downton's account, there is no evidence that the actual mapdrawers could or did target low-turnout Hispanics. To the contrary, the undisputed testimony reveals that it is impossible for a RedAppl user to create the "nudge factor" Mr. Opiela hypothesized. (Dep. of Clare Dyer 62:24-63:10.) Finally – and further reinforcing Texas' points – the evidence shows that Hispanics in enacted CD23 are *more* likely to turnout on election day. (*See* ratios of SSVR to HCVAP, PX11; PX12.) That no doubt explains why Mr. Opiela expressed frustration that the enacted Congressional Plan did not achieve his objectives. (PX163; PX164.)

Section 5 does not hold Texas accountable for receiving and ignoring third-party advice. Whatever the motives of outside interests, Texas did not draw CD23 with an impermissible purpose.

3. Texas Did Not Draw CD26 with Discriminatory Purpose

Defendants claim that the southern protrusion in CD26 – which they pejoratively describe as a "lightening bolt" – is evidence of Texas' discriminatory purpose. That position ignores both the history and political makeup of the area. In the benchmark and enacted plans, CD26 contains a southern protrusion extending down from Denton into Tarrant County. (PX11; PX12.) Yet the Supreme Court did not disturb the benchmark configuration of the district in *LULAC*. 548 U.S. at 399. Texas narrowed the protrusion in the enacted plan to accommodate requests from Republican Congressman Kay Granger and Democratic State Representative Marc Veasey. (T2A 69:2-17.) The protrusion that remains contains a high concentration of Democratic voters. That is by design. Texas drew the benchmark protrusion with a political purpose. The enacted plan follows suit.

True to form, Defendants' produce a racially shaded map that no mapdrawer actually used. This "evidence" shows that the enacted protrusion contains a high concentration of minority voters. (DX630.) According to Defendants, this proves Texas' discriminatory purpose.

But political shading – which the mapdrawers did consult – confirms that the protrusion is composed of a large concentration of Democratic voters. (PX133.) Texas' political motive may have had a disparate impact. There is no plausible evidence of impermissible purpose.

4. Texas Did Not Purposefully Snub Minority-Preferred Members of Congress

In a final effort to show unlawful intent, Defendants claim that Texas acted with discriminatory purpose because enacted districts did not retain the district offices of three African-American members of Congress. (T5B 13:13-14:11.) Defendants say that contrasts with the accommodations Texas made for Republican members. Defendants distort the record. Texas did accommodate specific requests from Republican members. (*E.g.*, DX396 at 69.) That is only proof that it is always he who asks who receives. Texas did not make a concerted effort to solicit the redistricting preferences of Congressmen from either party. The State instead attempted to accommodate unsolicited requests from a bipartisan group of lawmakers. (T1B 22:20-23:13.)

Without hearing from the members, the mapdrawers did not know where district offices were located. (T7B 57:25-58:22.) And there is no evidence that any African-American member asked Texas to keep a watchful eye out for his or her district-office. (FOF ¶ 259.) At worst, the evidence shows that Texas was guilty of blithe indifference to the wants of certain Congressmen. That state of mind does not violate the Voting Rights Act.

CONCLUSION

The Court should issue a declaratory judgment preclearing the House Plan, the Senate Plan, and the Congressional Plan.

Dated: February 6, 2012

Respectfully Submitted,

FOR THE PLAINTIFF:

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil Litigation

DAVID C. MATTAX
Director of Defense Litigation
Acting Deputy Attorney General for Civil Litigation

DAVID J. SCHENCK
Deputy Attorney General for Legal Counsel

J. REED CLAY, JR.
Special Assistant and Senior Counsel
to the Attorney General

BRUCE D. COHEN
Special Assistant to the Attorney General

Office of the Attorney General
P.O. Box 12548, Capitol Station
209 W. 14th Street
Austin, Texas 78701
(512) 936-1342 / (512) 936-0545 (fax)

Attorneys for the State of Texas

/s/ Adam K. Mortara
ADAM K. MORTARA
JOHN M. HUGHES
ASHLEY C. KELLER
Bartlit Beck Herman Palenchar & Scott LLP
54 W. Hubbard Street, Suite 300
Chicago, IL 60654
(312) 494-4400 / (312) 494-4440 (fax)

Attorneys for the State of Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent the Court's electronic notification system to the following parties on February 6, 2012:

Daniel J. Freeman
U.S. DEPARTMENT OF JUSTICE
Voting Section, Civil Rights Division
950 Pennsylvania Avenue, NW
NWB Room 7203
Washington, DC 20530
(202) 305-4355
Email: daniel.freeman@usdoj.gov

J. Gerald Hebert
191 Somerville Street, #405
Alexandria, VA 22304
(703) 628-4673 Fax: (202) 736-2222
Email: jghebert@comcast.net

Paul M. Smith
Michael B. DeSanctis
Jessica Ring Amunson
Caroline D. Lopez
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Washington, D.C. 20001

Mark A. Posner
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
1401 New York Avenue, NW Suite 400
Washington, DC 20005
(202) 307-1388
Email: mposner@lawyerscommittee.org

John M. Devaney
Marc Erik Elias
PERKINS COIE
700 13th Street, NW Suite 600
Washington, DC 20005-3960
(202) 628-6600 Fax: (202) 654-9124
Email: jdevaney@perkinscoie.com
Email: melias@perkinscoie.com

Nina Perales
MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, INC.
110 Broadway Suite 300
San Antonio, TX 78205
(210) 224-5476 Fax: 210-224-5382
Email: nperales@maldef.org

Robert Stephen Notzon
1507 Nueces Street
Austin, TX 78701-1501
(512) 474-7563 Fax: (512) 474-9489
Email: robert@notzonlaw.com

Ray Velarde
1216 Montana Avenue
El Paso, TX 79902
(915) 532-6003
Email: velardelaw2005@yahoo.com

Chad W. Dunn
BRAZIL & DUNN
4201 FM 1960 West Suite 530
Houston, TX 77068
(281) 580-6310
Email: chad@brazilanddunn.com

/s/ Adam K. Mortara
ADAM K. MORTARA
Attorney for Plaintiff State of Texas