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, MEXICAN AMERICAN LEGISLATIVE CAUCUS, Defendant-Intervenor, GREG GONZALES, *et al.*, Defendant-Intervenors, TEXAS LEGISLATIVE BLACK CAUCUS, Defendant-Intervenor, TEXAS LATINO REDISTRICTING TASK FORCE, Defendant-Intervenor, TEXAS STATE CONFERENCE OF NAACP BRANCHES *et al.*, Defendant-Intervenors.	Civil Action No. 1:11-cv-1303 (RMC-TBG-BAH) Three-Judge Court

UNITED STATES' POST-TRIAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Legislative History

I. INTRODUCTION

The State of Texas has failed to carry its burden to establish that the proposed redistricting plans for the Texas House of Representatives and the State's delegation to the United States Congress neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The United States requests that this Court deny Texas's request for a declaratory judgment concerning the House and Congressional plans.

The proposed State House plan (H283) is retrogressive because only 45 districts provide minority voters with the ability to elect their candidate of choice, whereas 50 districts provide minority voters with that ability in the benchmark plan. The Congressional plan (C185) is retrogressive because the State has failed to prove that the proposed plan "does not increase the degree of discrimination" against minority voters. *Texas v. United States*, No. 1:11-cv-1303, 2011 WL 6440006, at *3 (D.D.C. Dec. 22, 2011).

The proposed redistricting plans for the State House and Congress are also infected with discriminatory purpose. The use of race to achieve partisan ends transformed purported political gerrymanders into prohibited racial discrimination. The wide array of direct and circumstantial evidence – including incriminating emails and race-based precinct splits – and the clear inferences that logically flow from this collected evidence vastly outweigh the State's meager proffer of a race-neutral purpose.

II. TEXAS HAS FAILED TO PROVE THAT THE PROPOSED HOUSE AND CONGRESSIONAL PLANS DO NOT HAVE A RETROGRESSIVE EFFECT.

"The question of retrogressive effect under Section 5 looks at gains that have already

been *realized* by minority voters and protects them from future loss." *Texas v. United States*, 2011 WL 6440006, at *15. In the context of evaluating a redistricting plan, this question "requires identifying districts in which minority citizens enjoy an existing ability to elect and comparing the number of such districts in the benchmark to the number of such districts in a proposed plan to measure the proposed plan's effect on minority citizens' voting ability." *Id.* This Court identified various factors relevant to whether an ability to elect exists in a particular district. These included, among others, whether minorities vote cohesively, the presence of polarization between white and minority voters, analysis of population statistics, and an examination of other factors relevant to evaluating minority citizen voting strength, such as minority voter registration and turnout rates, election results, and minority voting behavior. *Id.* at *15-16. At trial, the United States provided substantial evidence that the redistricting plans for the House and Congress lead to retrogression in the position of racial minorities with respect to their effective exercise of their electoral franchise. *See Beer v. United States*, 425 U.S. 130, 141 (1976).

In order to avoid the conclusion that its plans are retrogressive, the State of Texas has offered a series of flawed legal arguments. First, Texas argued that a determination of the "ability to elect" under Section 5 is based solely on a district's demographic statistics. *See, e.g.*, ECF No. 41 at 4-6 (Tex. Mot. Summ. J.). This Court correctly rejected that view in denying summary judgment. *See Texas v. United States*, 2011 WL 6440006, at *13.

Next, the State developed a novel theory that retrogression should be analyzed not by looking at districts but by adding up all the racially-contested statewide elections run in ten minority districts and comparing the total number of elections minority preferred candidates won in the benchmark and proposed plans. DX 790 at 9-12 (Alford Supp. Rep.); Tr. at 48:22-50:24

(Jan. 24 a.m.). This "election summing approach" would reward the State for packing districts that already provide an ability to elect or provide for "influence districts" by giving credit for marginally improving performance in a district where minority voters cannot usually elect candidates of choice.

As a legal matter, this methodology is unsupported. The 2006 Amendments to the Voting Rights Act repudiated any approach that would aggregate minority influence within and across districts that minority voters did not actually have the ability to control. *See* 42 U.S.C. § 1973c(d) (superseding in part *Georgia v. Ashcroft*, 539 U.S. 461 (2003)). Instead, by reiterating the "ability to elect" standard, Congress clarified that the appropriate method for assessing retrogression is a comparison between the number of districts in the benchmark plan and the proposed plans in which minorities have the ability to elect their preferred candidate – precisely the approach taken by the United States' expert, Dr. Handley, in this case. *See* H.R. Rep. No. 109-478 at 68-72 (2008). As a factual matter, the State's expert, Dr. Alford, refused to draw a conclusion regarding retrogression based on the election summing methodology attributed to him. United States Proposed Findings of Fact ¶ 264 [hereinafter US PFOF].

Finally, the State says that if the Court were to use a district-by-district analysis, it should not consider elections of the districts at issue ("endogenous elections"). If one ignores endogenous elections, then the State asserts that there would be no retrogression. Six different Circuit Courts of Appeal have determined that endogenous elections are the most probative and relevant contests when assessing racially polarized voting. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1021, 1027 (8th Cir. 2006); *Old Person v. Cooney*, 230 F.3d 1113, 1125 (9th Cir. 2000); *Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1227 (11th Cir. 2000); *Sanchez v. State of Colorado*, 97 F.3d 1303, 1324-25 (10th Cir. 1996); *Rollins v. Fort Bend Ind. Sch. Dist.*, 89 F.3d

1205, 1221 (5th Cir. 1996); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1015 n.16 (2d Cir. 1995). Moreover, this argument conflicts with Dr. Alford's previous statements that endogenous elections are more probative than exogenous elections. US PFOF ¶ 264.

A. The Proposed House Plan Is Retrogressive.

There are five districts (HD 33, HD 35, HD 41, HD 117, and HD 149) that provide minority voters with the ability to elect their candidates of choice in the benchmark House plan and where that ability to elect is lost in the proposed plan. The State does not create any new ability districts in the proposed plan to offset these losses.

1. House District 33

In the proposed plan, Texas eliminates the ability of minority voters to elect candidates of choice in District 33. Benchmark House District 33 is located in Nueces County. US PFOF ¶ 10. All parties agree that Hispanic citizens currently have the ability to elect their preferred candidates of choice to the Texas House of Representatives in benchmark House District 33. *Id.* at 12. In the proposed plan, the State eliminates benchmark House District 33 from Nueces County and moves the district to Rockwall County and Collin County, near Dallas. DX 817 at 1, 5 (H283 Plan Packet).

The State asserts that maintaining a third district in Nueces County would have violated the County Line Rule. DX 609 at 6 (Informal House Submission). By eliminating District 33 in the proposed plan, the State placed the County Line Rule ahead of its obligation to comply with Section 5 of the Voting Rights Act. DX 320 ¶¶ 31-32 (Arrington Rep.). Chairman Solomons stated that if there were a conflict between the County Line Rule and the Voting Rights Act, he would follow the County Line Rule. Tr. at 81:13-87:2 (Jan. 20 p.m.) (Solomons). Although the Supreme Court has never specifically addressed whether the Voting Rights Act takes precedence

over the County Line Rule, the Court noted in *Bartlett v. Strickland* that "[i]t is common ground that state election-law requirements like the Whole County Provision may be superseded by federal law – for instance, the one-person, one-vote principle of the Equal Protection Clause of the United States Constitution." 556 U.S. 1, 7 (2009) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

Once a district provides minority voters an ability to elect, it cannot be removed under Section 5 unless a replacement opportunity district is created elsewhere. [1] Although it would be permissible for the State to replace the loss of District 33 with another district in which minority voters have the ability to elect their preferred candidates elsewhere in Texas, it has not done so.

2. House District 35

In the proposed plan, Texas eliminates the ability of minority voters to elect candidates of choice in District 35. Benchmark District 35 is located in South Texas, and Hispanic citizens currently have the ability to elect their preferred candidate of choice to the Texas House of Representatives in the District. US PFOF ¶¶ 17, 20. Hispanic citizens in benchmark House District 35 elected their candidate of choice to the Texas House of Representatives in 2002, 2004, 2006, and 2008. *Id.* ¶ 20. Hispanic citizens in benchmark House District 35 elected their candidate of choice in 80% of the House of Representative races and 40% of the statewide races analyzed. *Id.* ¶ 27.

In arguing that Hispanic voters do not consistently elect their preferred candidates in benchmark House District 35, the State ignores elections for the office at issue. While

[1] Of course, "preventing retrogression under Section 5 does not require jurisdictions to violate *Shaw v. Reno* and related cases." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). And even retrogressive plans may be precleared where the jurisdiction can establish that no less retrogressive plan can be drawn due to "shifts in population or other significant changes since the last redistricting." *Id.* None of those circumstances are present here.

exogenous elections are relevant in determining whether polarization exists, the most probative evidence, the endogenous elections, proves that minority voters can elect their candidate of choice in benchmark House District 35. US PFOF ¶ 26.

The performance of Hispanic-preferred candidates in exogenous elections decreases in proposed House District 35. US PFOF ¶ 27. Dr. Handley found that the exogenous index decreases from 40% to 20%, and the degree of racially polarized voting in exogenous general elections increases in House District 35 under H283. *Id.* ¶¶ 26-27. Likewise, Dr. Alford found that minority-preferred candidates won 58% of the statewide races he analyzed in benchmark House District 35. Minority-preferred candidates only won 48% of these statewide races in proposed House District 35. *Id.* ¶ 26.

If one looks at only the 2008 and 2010 elections, then there is no decrease in performance from benchmark District 35 to proposed District 35.[2] However, both 2008 and 2010 had unique characteristics that require looking at the performance over the decade. US PFOF ¶ 92. Moreover, whether an electoral district performs or provides minority voters with the ability to elect requires an evaluation of elections across the relevant timeframe, in this case since implementation of the benchmark plan. *Cf. Thornburg v. Gingles*, 478 U.S. 30, 56 & n.25 (1986).

3. House District 41

In the proposed plan, Texas eliminates the ability of minority voters to elect candidates of choice in District 41. Benchmark District 41 is located in Hidalgo County, and the parties do not

[2] In finding no retrogression, Dr. Engstrom weighted the 2008 elections more heavily, and he did not consider the elections in the first half of the decade. As explained in Dr. Handley's expert summary, it is more appropriate to look at elections for the entire duration that the benchmark plan has been in effect.

dispute that the District provides minority voters with the ability to elect their candidates of choice. US PFOF ¶ 34. The evidence presented at trial does not prove that proposed District 41 provides minority voters with the ability to elect their candidates of choice. Hispanic CVAP decreases by 5.4%, and SSVR declines from 69.2% to 64.6%. *Id.* ¶¶ 31, 36. The performance of proposed District 41 in exogenous elections declines, but the number and size of split VTDs in the proposed plan prevents an exact measurement of the severity of that decline.

Proposed District 41 splits 17 VTDs (of 42 VTDs in the district). Thirty-one percent of the district's population resides in these split VTDs, and the partial precincts include relatively Anglo census blocks and exclude homogenous Hispanic census blocks. US PFOF ¶¶ 37, 39. Because political data is collected at the precinct level, reconstituted election analysis must assume that every census block within a precinct is politically identical. As a result, dividing precincts by a characteristic that correlates with political preference – as race does in District 41 – introduces substantial error in that analysis. In two critical elections, the Hispanic-preferred candidate appears to have received the majority of votes by razor-thin margins: 182 and 63 votes. *Id.* ¶ 42. The VTD splits could easily mask a swing of less than 100 voters, which would alter the outcome of either contest and substantially depress the exogenous election performance of proposed House District 41.[3] Because there is no dispute that the benchmark district is an ability-to-elect district, and because Texas cannot demonstrate that it remains so in the proposed plan, the changes to House District 41 diminish minority electoral ability.[4]

---

[3] This is the reason Dr. Handley cannot reach a conclusion on whether District 41 performs in the proposed plan. US PFOF ¶ 38.

[4] The United States' brief following remand from the Supreme Court in *Perez v. Perry*, No. 5:11-cv-00360, ECF No. 591 at *8 (W.D. Tex. Jan. 27, 2012), takes the same position that the United States has articulated in this case; namely, that there is a retrogression of five districts in the House because Texas

Texas relies on an unsupportable demographic bright-line standard to contend that this bizarrely-shaped district retains an ability to elect for minority voters. The United States contends that no "65 percent rule" governs retrogression analysis in the Section 5 inquiry. Under the 2006 Amendments to the Voting Rights Act, Section 5 requires a functional analysis of "the ability of . . . citizens to elect their preferred candidates of choice." 42 U.S.C. § 1973c(d); *see also* H.R. Rep. No. 109-478, at 71 ("The language in subsection (d) makes clear that it is the intent of Congress that the relevant analysis in determining whether a voting change violates subsection (b) is a comparison between the minority community's ability to elect their genuinely preferred candidate of choice before and after a voting change . . . .").

Even before the 2006 Amendments, the Department of Justice has never applied a "65 percent threshold population figure" as a rule of thumb "in redistricting matters reviewed under Section 5" and has consistently evaluated retrogression "in light of the particular factual circumstances prevailing in the affected political jurisdiction." *James v. City of Sarasota*, 611 F. Supp. 25, 32-33 (M.D. Fla. 1985). Regardless of whether raw demographic thresholds were useful before ecological regression analysis became common, there is no reason for the Court to make the assumptions about demographics, turnout, and racial bloc voting inherent in a bright-line test when the United States has presented evidence of these precise variables. *Cf. Cottier v. City of Martin*, 604 F.3d 553, 566-69 (8th Cir. 2010) (en banc) (Smith, J., dissenting) (discussing the absence of an empirical underpinning to the so-called 65 percent rule). On the other hand, a strict demographic threshold provides jurisdictions with a way to manipulate population statistics while minimizing minority electoral performance – the precise tactic used by the map-drawers

---

has not met its burden of showing that proposed House District 41 will provide minority voters an ability to elect their candidate of choice.

here. DX 304 (Opiela email).

As a practical matter, a 65% voting majority usually will provide minority voters with the ability to elect their candidates of choice in most districts. Here, however, the United States has presented substantial evidence that a purely demographic analysis is particularly inappropriate in District 41. The Hispanic community of Hidalgo County faces crushing socioeconomic burdens, particularly in the shantytowns known as *colonias*. US PFOF ¶ 44. There has also been a history of discrimination. US PFOF ¶ 123. Obstacles to political participation for voters in these communities uniquely impair their "'realistic opportunity to elect officials of their choice.'" *Texas v. United States*, 2011 WL 6440006, at *16 n.22 (quoting *Ketchum v. Byrne*, 740 F.2d 1398, 1410 (7th Cir. 1984)). As a result, this Court should decline the State's invitation to apply a bright-line rule here.

4. House District 117

In the proposed plan, Texas eliminates the ability of minority voters to elect candidates of choice in District 117. Proposed House District 117 does not provide Hispanic voters with the ability to elect their preferred candidate. It is undisputed that Hispanic citizens have the ability to elect their preferred candidate of choice in the benchmark plan. US PFOF ¶ 50. In crafting proposed District 117, the State used subtle yet discernible methods to maintain a Hispanic population majority, thus giving the illusion of Hispanic electoral control when no actual opportunity exists.[5]

Testimony offered by Representative Joe Farias, who represents the adjacent House

[5] Texas incorrectly states the Court does not review the elections here because of the bright-line 60% rule. To the extent the court adopted a guideline, it was 65% and not 60%. *Texas v. United States*, 2011 WL 6440006, at *16.

District 118, supports this contention. Representative Farias testified that despite fervent attempts, he was unable to keep the communities of Somerset and Whispering Winds – two majority-Hispanic, impoverished communities – in his district. US PFOF ¶¶ 160-161. In the proposed plan, Somerset and Whispering Winds were relocated to District 117, which is represented by John Garza, a non-Hispanic preferred candidate. US PFOF ¶ 155. According to Representative Farias, these communities were given to Representative Garza at the request of Speaker Straus, to help Representative Garza's reelection efforts. US PFOF ¶ 162.

Dr. Arrington concluded that by adding these low turnout Hispanic communities to District 117, the district changed politically. DX 320 ¶¶ 26-27. The expert for the United States and the expert for Texas both agree: no ability to elect exists for Hispanic citizens in District 117. According to Dr. Handley's exogenous index, proposed District 117 scores only 20 dropping from a score of 60 in the benchmark plan. US PFOF ¶ 60. Dr. Alford similarly concluded that, despite improvements in Hispanic numbers, Hispanic voters are only able to elect their candidate of choice 33% of the time, a decrease from 60% in the benchmark plan. *Id*.

5. House District 149

In the proposed plan, District 149 no longer allows minority voters the ability to elect candidates of choice because it is moved out of Harris County to Williamson County. Texas agrees that the proposed District 149 does not offer minority voters an ability to elect their candidates of choice. Texas decided to decrease the number of seats in Harris County from 25 to 24 in the proposed plan, and Texas chose to eliminate a district in which minority voters elect their candidates of choice instead of eliminating a district not protected by Section 5.

At trial, the United States and Intervenors provided substantial evidence, including expert and witness testimony, proving that benchmark District 149 has a coalition of Asian-American,

African-American, and Hispanic voters who consistency vote cohesively to elect a minority-preferred candidate. Those groups comprise 61.5% of the citizen voting age population. In her report, Dr. Handley finds that minority voters have successfully and consistently coalesced to elect the minority-preferred candidate, Representative Hubert Vo, since 2004. US PFOF ¶ 69.

The Court also received testimony from local witnesses intimately familiar with the community in southwest Harris County where benchmark District 149 is located. This testimony described the diverse minority community and its successful efforts to elect Representative Vo and other candidates in District F to the Houston City Council and trustee elections for the Alief Independent School District. DX 352 (Calvert *Perez* testimony); DX 353 (Winkler *Perez* testimony); DX 738 at 12-14 (Hochberg pre-filed direct). There is an active coalition of business leaders and homeowner associations that work across ethnic and racial lines to improve the communities located within District 149. DX 352; DX 353. The testimony discussed the diverse communities in Alief and Sharpstown areas in southwest Harris County, and the State and the City of Houston have formally recognized the independent needs of these diverse communities in Houston by creating quasi-governmental organizations whose missions are to serve the unique interests of these communities. DX 352 (Calvert pre-filed direct).

Dr. Alford challenged Dr. Handley's conclusions in his pre-filed testimony, citing the district's low performance (20%) in her analysis of exogenous elections. DX 801 at 19-21 (Alford pre-filed direct). Further, he cites his own analysis of 13 exogenous Democratic primaries to support the State's argument that minority voters in District 149 do not vote cohesively.[6] *Id.* While exogenous elections are relevant in determining whether polarization

[6] District 149 has not had an endogenous primary since 2004.

exists, the most probative evidence is endogenous elections, and they prove that minority voters in the district vote cohesively. Moreover, the elections for city council and Alief school board have a more immediate and direct impact on the community, and there is evidence the coalition elects its candidates of choice.

The State's contention that a coalition must demonstrate cohesion in statewide primary contests ignores the importance of general elections.[7] As one court noted in the context of a claim under Section 2 of the Voting Rights Act, an inflexible overreliance on primary elections is "grounded in the belief that minority voters essentially take their marbles and go home whenever the candidate whom they prefer most in the primary does not prevail." *Lewis v. Alamance Cnty.*, 99 F.3d 600, 615 (4th Cir. 1996). It is certainly reasonable for minority voters to have one preferred candidate in a primary election and a different one in a general election, but the State's view imposes a rigid understanding of political preference onto minority communities. Such a view "ignores altogether the possibility that primary election winners will become the minority's preferred candidate during the general election campaign." *Id.* This shifting of political allegiances is engagement with the "obligation to pull, haul, and trade to find common political ground" from which the Supreme Court has found minorities are not immune. *Johnson v. De Grandy*, 512 U.S.997, 1020 (1994). In short, "candidates who receive 99+% of the [minority] vote in general elections are the [minority]-preferred candidate in that election, regardless of their level of support in the primary." *Lewis*, 99 F.3d at 615. Asian-American, African-American, and Hispanic voters in benchmark District 149 need not vote cohesively in exogenous statewide primary elections so long as they vote cohesively to elect their preferred candidates in

[7] The use of general election data was thoroughly addressed by the Gonzales Intervenors in a bench memo to this Court, and the United States agrees with that analysis. *See* ECF No. 169.

endogenous general elections.

6. Other Existing Ability-to-Elect Districts

The State originally claimed that proposed Districts 90 and 148 were offsets for losses in the plan. However, election analyses show that performance in these two districts does not change with the increase of Hispanic population in the district. DX 326 at 5 (Handley House Rep.); DX 790 at 10-11 (Alford Supp. Rep.) .

With regard to House District 74, the State now takes the position that the district did not provide Hispanic voters with the ability to elect in the benchmark but does in the proposed plan. While the exogenous election indices in proposed District 74 do increase from the benchmark to the proposed, District 74 has consistently elected the Hispanic-preferred candidate to office. *See* US PFOF at. ¶¶ 79-80. As courts repeatedly have held, endogenous elections are the most critical in assessing a district's performance. *See* Part II, *supra.* This is particularly true in Texas, where Hispanic-preferred candidates stand virtually no chance of winning a statewide contest. As a functional matter, House District 74's Hispanic voters have been electing their preferred candidate to the Texas House of Representatives for years, establishing that this is an ability district. *See* US PFOF ¶¶ 79-80, 84. Improving the district's exogenous index score in the proposed plan does not offset the elimination of House District 33 or any other ability district.[8]

[8] For the first time, Texas suggested in its proposed findings that proposed House District 101 compensates for any retrogression resulting from the elimination of benchmark District 149 as an ability district in Plan H283. ECF No. 186 ¶ 100. During trial, District 101 was mentioned only twice: once by Representative Veasey, in the context of his complaint about the cracking minority communities in the proposed Congressional plan for the Dallas-Fort Worth area, Tr. 21:9-19 (Jan. 18 p.m.) (Veasey direct), and once by counsel for the Texas Legislative Black Caucus, in the context of his client's objection that proposed District 101 does not provide minority voters with the ability to elect preferred candidates, Tr. 140:3-7 (Jan. 24 a.m.). The pre-filed testimony of Representative Charlie Geren mentions District 101 as

B. The Proposed Congressional Plan Is Retrogressive

The 2010 Census showed that Texas's population had increased by nearly 4.3 million people since 2000. ECF No. 180 ¶ 8. Explosive growth among the State's minority population accounted for approximately 90% of that increase. *Id.* ¶¶ 8, 18. As a result of this growth, Texas was entitled to four new Congressional seats. This unprecedented increase in the size of Texas' Congressional delegation presents a question that does not often arise under Section 5: How does one measure retrogression in minority voting strength when there is an increase in the number of seats available for election?

The answer is not, as the Supreme Court has recognized, that the non-retrogression principle forbids any decrease in the percentage of seats controlled by minority voters. *See Abrams v. Johnson*, 521 U.S. 74, 97 (1997). "Under that logic, each time a State with a majority-minority district was allowed to add one new district because of population growth, it would have to be majority-minority. This the Voting Rights Act does not require." *Id.* at 97-98. But the answer also cannot be, as Texas official Doug Davis put it, that Texas could add "20 new seats," all of them controlled by Anglo voters, without violating Section 5. U.S. PFOF ¶ 187. That logic would render the concept of minority voting strength virtually meaningless, this Court has therefore recognized that "*Abrams* does not control." *Texas v. United States*, 2011 WL 6440006, at *20 (explaining that where the number of legislative seats has increased, *Abrams* "does not hold that the failure to draw new minority districts can never be retrogressive").

Instead, the appropriate inquiry here is whether the proposed plan is "more dilutive" than

---

"Democratic-leaning," but no analysis of minority electoral opportunity is mentioned. ECF No. 137-1, at 3-4 (Geren). As a review of Texas' Proposed Findings of Fact makes clear, ECF No. 186 ¶¶ 96-100, the State has not produced a scintilla of evidence that proposed House District 101 provides minority voters with an ability to elect their preferred candidates to the House.

the plan it replaces. *Reno v. Bossier Parish Sch. Bd.* (*Bossier II*), 528 U.S. 320, 335 (2000). Such a plan necessarily "increase[s] the degree of discrimination against a minority population" and is therefore not entitled to preclearance. *Texas v. United States*, 2011 WL 6440006, *3 (citing *City of Lockhart v. U.S.*, 460 U.S. 125, 134-35 (1983)); *accord Reno v. Bossier Parish Sch. Bd.* (*Bossier I*), 520 U.S. 471, 479 (1997).

One gauge of whether the degree of discrimination has increased is to assess the gap between the actual number of minority ability districts and the number of districts that would be roughly proportional to the minority share of the citizen voting age population. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 438 (2006) ("Latinos are, therefore, two districts shy of proportional representation."); *cf. De Grandy*, 512 U.S. 997, 1013-17 (1994) (noting that proportionality is an indication of equal electoral opportunity). The degree of discrimination increases if this gap widens.

This way of measuring retrogression is fully consistent with *Abrams.* In that case, African Americans were 27% of Georgia's voting age population. *See Abrams*, 421 U.S. at 103. In the benchmark 10-district plan, African-American voters had the ability to elect in one district – two districts shy of proportionality (27% x 10 = 2.7). In the proposed 11-district plan, they also had the ability to elect in one district – still a gap of two districts (27% x 11 = 2.97). There was no increase in discrimination, and there would have been no increase unless the proposed plan had contained three more districts (27% x 13 = 3.5), where the gap would grow to three seats.

This way of measuring retrogression is also consistent with the ordinary district-counting approach when the number of districts does not change. Consider the Texas House. Black and Hispanic citizens combined constitute 39.3% of the State's citizen voting age population. U.S.

PFOF ¶ 182. Proportionality would be 59 districts (39.3% x 150 = 59.0), and there are currently 50 minority ability districts – a gap of 9. Any decrease in the number of minority ability districts in the proposed plan would increase the nine-district shortfall.

In this case, the proposed Congressional plan increases the representation gap by one seat.[9] Proportionality would be 13 seats in the benchmark 32-district plan (39.3% x 32 = 12.6) and 14 seats in the proposed 36-district plan (39.3% x 36 = 14.1). The evidence at trial establishes that there are 10 minority ability districts in both the benchmark and proposed plans. U.S. PFOF ¶¶ 180-181. Consequently, the benchmark plan leaves minority voters three seats shy of proportional representation, and the proposed plan increases the gap to four.

That increase in the degree of discrimination, moreover, is not just theoretical. The proposed plan reduces by 479,704 the number of Hispanics in the State's 10 ability districts. U.S. PFOF ¶ 186. These voters, who are more than sufficient in number to anchor an additional ability district in the proposed plan, have been drawn instead into districts where their voting strength will be diluted on the basis of race because Anglos will almost always out-vote them. The proposed Congressional plan's retrogressive effect, for them, will be very real.

1. Congressional District 23

In the proposed plan, Texas eliminates the ability of minority voters to elect candidates of choice in District 23. Congressional District 23 in the benchmark plan provides Hispanic voters with an ability to elect their preferred candidates of choice. The district's very creation in 2006 as a minority opportunity district to remedy the Section 2 violation found by the Supreme Court

[9] The United States took the position in its January brief to the court in *Perez v. Perry* that there must be 11 minority ability districts in a 36-district Congressional plan in order to avoid retrogression. *See Perez v. Perry*, ECF No. 591 at *9 (W.D. Tex. Jan. 27, 2012). That position rests on the retrogression calculations set out above and not on a new determination that benchmark Congressional District 25 provides minority voters with the ability to elect preferred candidates of choice.

in *LULAC v. Perry*, 548 U.S. at 425-42, is indicative of its status as a protected district under Section 5. Furthermore, following that decision, and as the Court had foreseen, the growing and increasingly active Hispanic community in District 23 succeeded in electing its preferred candidate to Congress, first in 2006[10] and again in 2008. US PFOF ¶ 191. Although that candidate was defeated by a Republican challenger in 2010's Republican landslide, one election does not establish the district would fail to perform in future elections or deprive the district of its ability to elect status. Indeed, those responsible for developing the plan recognized that in its current configuration, District 23 could continue to perform for Hispanic voters over the coming decade, leading them to implement a careful strategy to engineer Republican success and thwart minority electoral opportunity. US PFOF ¶¶ 229, 232.

Proposed Congressional District 23 clearly does *not* provide Hispanic voters with an ability to elect their preferred candidates. US PFOF at 198. District 23's score on Dr. Handley's exogenous effectiveness index drops from 40% to zero in the proposed plan. DX 327 at 9, 11. Dr. Alford's similar estimates show a decline from 46 to 29%, and the OAG's analysis indicates a drop from 30% to 10%. DX 801 at 11. In light of the State's intentional efforts to manipulate the district's boundaries to thwart minority electoral opportunity, this diminution in the ability of minority voters to elect their preferred candidates is hardly surprising.

---

[10] At trial, Texas proffered an argument based on the results of the 2006 Special November Elections held following the Supreme Court's decision in *LULAC*. Tr. 66:21-68:9 (Jan. 26 a.m.) (Handley). Because of time constraints, no primary election was conducted that year. Instead, all eight candidates – six Democrats, one Republican (the incumbent, Representative Bonilla), and one independent – competed in a Special Election held on the same day as Texas's General Election. PX at 186. It is unremarkable that Representative Bonilla received the plurality of votes in such a situation, but it is far more relevant that Representative Bonilla then lost the runoff election that was held five weeks later to Representative Ciro Rodriguez, who was in fact the Hispanic-preferred candidate. US PFOF ¶¶ 191-192. The results of the runoff election demonstrate that benchmark District 23, while competitive, provided Hispanic voters an ability to elect their preferred candidates.

2. Congressional District 27

Proposed Congressional District 27 does not provide minority voters with an ability to elect their candidates of choice. The parties agree that benchmark District 27 provides minority voters with an ability to elect their candidates of choice. US PFOF ¶¶ 199-205.

III. TEXAS HAS FAILED TO PROVE THAT THE PROPOSED HOUSE AND CONGRESSIONAL PLANS WERE NOT ENACTED WITH A DISCRIMINATORY PURPOSE.

Texas has failed to carry its burden of proving that its proposed House and Congressional redistricting plans do not have a discriminatory purpose. The State claims that incumbency protection and partisanship were the plans' only purposes. The law, however, does not allow the State to dismantle minority ability districts to enhance its partisan objectives simply because the minority-preferred candidates happened to lose in those districts in the last election. Texas consciously drew boundary lines to eliminate the ability of minority voters to elect their preferred candidates using a variety of techniques, including substituting low-turnout Hispanic voters for those more likely to turn out and splitting precincts to draw boundaries using racial data. Texas' manipulation of districts in the context of the evidence presented in this case constitutes purposeful discrimination prohibited under Section 5 of the Voting Rights Act.

Section 5 bars implementation of voting changes "with *any* purpose of denying or abridging the right to vote," including a discriminatory purpose that furthers an overarching partisan goal. 28 C.F.R. § 51.54(a) (emphasis added); *cf. United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009) ("[R]acial discrimination need only be one purpose, and not even a primary purpose, of an official act" to find discriminatory intent.); H.R. Rep. No. 97-226 at 30 n.101 (1982) (barring voting practices under Section 2 "if a discriminatory purpose was a motivating

factor").[11]

Intentional discrimination encompasses actions that purposefully discriminate to achieve an otherwise permissible aim. *See Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski J., concurring in part and dissenting in part) (describing as purposeful housing discrimination actions that are motivated by a desire to maintain property values). In this case, the State of Texas argues that it has met its burden of proof by evidence that its districting choices were driven by partisan objectives. But discriminatory purpose need not be the only underlying motivation for the challenged redistricting plan as long as it is one of the motives. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *cf. Garza*, 918 F2d. at 771 (affirming as intentionally discriminatory the choice to fragment Hispanic population in pursuit of a non-racial objective). The State's obvious knowing manipulation of the racial composition of the districts (as evidenced by the VTD splits) established that its aim was, at least in part, to diminish minority electoral opportunities. Thus, to the extent Texas asserts that its partisan aim was its sole motivation, it is pretextual. *See City of Pleasant Grove v. United States*, 479 U.S. 462, 470 (1987) (appellant's economic justification

---

[11] The Supreme Court's decisions in *Hunt* v. *Cromartie* (*Cromartie I*), 526 U.S. 541 (1999), and *Easley* v. *Cromartie* (*Cromartie II*), 532 U.S. 234 (2001), cited by the State, set out evidentiary requirements to establish whether race predominated for purposes of establishing a claim under *Shaw v. Reno*, 509 U.S. 630 (1993). The Supreme Court in *LULAC v. Perry*, noted the argument that *Shaw* cases describe a type of equal protection constitutional claim that is "analytically distinct" from questions of vote dilution under Section 2 (and by extension issues of retrogression) without deciding the issue. *See* 548 U.S. at 513-514. Moreover, the burden of proof in *Shaw* cases is inapposite to the context of Section 5, where Congress found that consistent patterns of discrimination should place the burden on covered jurisdictions to establish the absence of a discriminatory purpose. *See South Carolina* v. *Katzenbach*, 429 U.S. 301, 326 (1966); *see also Rogers v. Lodge*, 458 U.S. 613, 625 (1982) ("Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination . . . ."). The purpose question in Section 5 cases, under *Arlington Heights*, is not a *Shaw* inquiry of whether race was a predominant motive such that strict scrutiny is triggered under the Equal Protection Clause, but instead is a question of whether "a discriminatory purpose has been a motivating factor in the decision. *Arlington Heights*, 429 U.S. at 265-266.

for refusing to annex the area was pretextual).

Texas likewise contends that its plans were motivated by a desire to protect incumbent officeholders. While incumbency protection can be a legitimate factor in redistricting, if "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." *LULAC v. Perry*, 548 U.S. at 441. And as the Supreme Court admonished Texas following the last redistricting cycle, "incumbency protection" in that context "cannot justify the [adverse] effect on Latino voters." *Id.*; *see also Garza*, 918 F.2d at 771 (finding purposeful discrimination where racial intent "was coupled with an intent to preserve incumbencies"); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982) (finding intentional discrimination "where requirements of incumbency are so closely intertwined with the need for racial dilution that an intent to maintain a safe, primarily white, district for [a particular incumbent] is virtually coterminous with a purpose to practice racial discrimination").

The United States examines below the direct evidence of discriminatory purpose and then looks at the circumstantial evidence of discriminatory purpose under the *Arlington Heights* factors. *See Arlington Heights*, 429 U.S. at 265-66. Applying the *Arlington Heights* standard to the facts of this case, the State of Texas has failed to meet its burden to prove that its proposed House and Congressional plans lack "the purpose . . . of denying or abridging the right to vote on account of race" or language minority status. 42 U.S.C. § 1973c.

A. Direct Evidence that the Proposed Congress and House Plans Were Enacted with a Discriminatory Purpose

"Direct evidence is something close to an explicit admission . . . that a particular decision was motivated by discrimination; this type of evidence is rare, but it 'uniquely reveals' the . . .

intent to discriminate." *Diaz v. Kraft Foods Global, Inc.*, 653 F.3d 582, 587 (7th Cir. 2011) (quoting *Rudin v. Lincoln Land Cty. Coll.*, 420 F.3d 712, 720 (7th Cir. 2005)). Emails among key redistricting figures provide just such evidence.

Perhaps the most critical email is the exchange between Eric Opiela and Gerardo Interiano when they were both on staff for Speaker Straus, in which Opiela suggests that Interiano focus on Hispanic turnout to maintain the superficial appearance of minority control with population demographics while minimizing actual minority electoral strength. DX 304. According to Opiela,

> It also would be good to calculate Spanish Surname Turnout/Total Turnout ratio for the 2006-2010 General Elections for all VTDs (I already have the data for this for 2006-2008 in a spreadsheet, just need to gather it for every VTD for 2010). . . . These metrics would be useful in identifying a "nudge factor" by which one can analyze which Census blocks, when added to a particular district (especially 50+1 minority majority districts) help pull the district's total Hispanic Pop and Hispanic CVAPs up to majority status, but leave the Spanish Surname RV and TO the lowest. This is especially valuable in shoring up Canseco and Farenthold.

DX 304. Interiano acted upon Opiela's request and received at least some of the data from the Texas Legislative Council (TLC). DX 294; DX 197.

The proposed plans demonstrate, moreover, that the map-drawers were successful in achieving Opiela's stated goal. In proposed Congressional District 23, for example, the map-drawers swapped out high-performing Hispanic precincts in Maverick County and on the south side of San Antonio and swapped in precincts elsewhere with higher SSVR but lower Hispanic turnout. The result is a district in which SSVR increases slightly but Hispanic turnout and performance go down. In proposed House District 117, the map-drawers substituted high-turnout Hispanic precincts in south San Antonio for poor, low-turnout Hispanic precincts in the

City of Somerset and the impoverished community of Whispering Winds. The result is a district that very deliberately maintains a 50.1% SSVR but decreases Hispanic turnout and performance. These results are not merely a coincidence but the intended effect of the deliberate effort to target Hispanic turnout described in Opiela's email.

B. Partisanship as a Pretext for Racial Discrimination

The assertion that the map-drawers drew Congressional and House districts solely to improve the chances of Republican incumbents to win reelection is a pretext for a discriminatory purpose. With no partisan data available below the precinct level, the statistically significant racial skew to the 518 split precincts in the proposed Congressional plan and the 412 split precincts in the proposed House plan are "unexplainable on grounds other than race." *Arlington Heights*, 429 U.S. at 266. For that reason, split precincts are the most probative circumstantial evidence of a discriminatory purpose. The proposed Congressional and House plans split precincts in a manner that divides racial groups and weakens minority voting strength with alarming consistency, and a political justification does not explain this racially discriminatory pattern. This pattern is clearest in proposed Congressional Districts 6, 23, and 26, as well as proposed House District 41.

In Congressional District 6, there are 39 VTD splits in the "finger" that reaches up from majority Anglo Ellis and Navarro Counties to remove large concentrations of African-American and Hispanic population from Dallas and Tarrant Counties. DX 875 at 2. These splits disproportionately affect majority minority precincts – 28 of the 39 split VTDs are majority minority. DX 877 at 36-38, 41-42. These splits also divide minority communities of interest in Arlington, Cedar Hill, and Duncanville into three separate Congressional districts.

Likewise, there are 39 VTD splits in proposed Congressional District 23; 18 are in Bexar

County alone. US PFOF ¶¶ 231-235. Plan C185 splits the south side of San Antonio, including the community of Harlandale, among three Congressional districts. Historically, Harlandale has been home to a highly effective and politically active Hispanic community that wields considerable influence within a single Congressional district. In Harlandale, precincts 1044, 1045, 1046, and 1048 are split. *Id*. As noted above, political data cannot guide precinct splits; only racial demographics and population totals are available at the block level. The only plausible explanation for this concentration of VTD splits is an objective to diminish minority electoral ability.

In Congressional District 26, the district's boundaries divide 49 precincts, and 38 of these splits are located in the "lightning bolt" in Tarrant County. US PFOF ¶¶ 250-251. The boundary between Congressional District 26 and District 12 at the eastern boundary of the "lightning bolt" divides African-American communities from Hispanic communities according to race. *Id*. The boundary line divides a homogenous Democratic area and could not have been guided by political data. *Id.*

Race is also used to split VTDs in proposed House District 41, a politically marginal district whose boundaries divide 17 precincts. Although Texas has provided explanations for a few of these splits, the State has failed to rebut the inference of arises from the persistent bias of precinct splits across the proposed plans. US PFOF ¶¶ 150-154.[12]

In dozens of Congressional and House districts across the state, there is a consistent

[12] Representative Aaron Peña lacks the necessary knowledge to guide these precinct splits, *see* Joint Designations at 1058-71 (Peña Dep. at 154:2-173:24, Oct. 19, 2011), and the State's suggestion that Representative Guillen could provide local knowledge based on having "lived in Hidalgo County all [his] life" is at best misleading. Tex. Proposed Findings, ECF No. 186 ¶ 176. Representative Guillen lives in Rio Grande City, in Starr County. *See, e.g.*, *State Representative . Ryan Guillen*, Texas Trib., *at* http://www.texastribune.org/directory/ryan-guillen.

pattern of dividing precincts according to race, DX 320 tbl. 11 & tbl. 20, and the State has offered only minimal evidence and hypothetical rationales. Texas has failed to prove that any factor other than race can explain the persistent bias of precinct splits across the proposed plans.

In addition, the concentration of split precincts in minority communities will have a disparate impact on minority voters. Not only will local governments be forced to expend scarce resources to establish new polling places; minority voters will need to find new locations at which they can cast a ballot. DX 320 ¶¶ 84-94. Voter confusion will result, and minority turnout will suffer.

C. *Arlington Heights* factors

1. Discriminatory Impact

Under the *Arlington Heights* framework, the "important starting point" for an assessment of the circumstantial evidence is the discriminatory impact of the proposed plans. 429 U.S. at 266. This is because people usually intend the natural consequences of their actions. *Id.* In a Section 5 case, moreover, "'impact' might include a plan's retrogressive effect and . . . its dilutive impact." *Bossier I*, 520 U.S. at 488. Here, both plans weigh more heavily on minority communities in several different ways.

As set out above, both plans have a retrogressive impact on minority voting strength. *See* Section II.A & II.B, *supra*. This retrogressive impact is particularly probative of discriminatory intent when assessed alongside the explosive growth of minority population in the State during the last decade. *See Texas v. United States*, 2011 WL 6440006, at *21. Retrogression was no accident, and it cannot be explained by traditional race-neutral districting principles. DX 320 ¶¶ 61-76.

The proposed Congressional plan also has a dilutive impact on minority voting strength,

which this Court has long considered probative of discriminatory purpose. *See Busbee v. Smith*, 546 F. Supp. 494, 517 (D.D.C 1982) (three-judge court) (finding that splitting Black voters in Atlanta among two districts was probative of racial purpose); *see also* 28 C.F.R. § 51.59(a)(3)-(4) (the Attorney General considers packing and cracking minority populations to be probative of discriminatory purpose). The evidence presented at trial demonstrates that the Congressional plan packs a large concentration of Dallas County's minority population into Congressional District 30. This concentration of African-American and Hispanic population is not necessary for minorities to elect their candidate of choice in District 30. Perez Tr. at 1484:6-1486:2 (Interiano); US PFOF ¶ 256.

Furthermore, instead of allowing a minority-controlled Congressional district to occur naturally within the compact minority communities in the Dallas-Fort Worth Metroplex, the map-drawers intentionally divvied up urban, low-income, minority population among four Anglo-controlled Congressional districts – CD 6, CD 12, CD 26, and CD 33. The State's proposed Congressional District 6 removes much of the growing minority population bordering Tarrant and Dallas Counties, just east of the City of Arlington, and submerges that population into majority Anglo Ellis and Navarro Counties. US PFOF ¶ 247. The State's proposed Congressional District 12 combines a majority of Tarrant County's northern Anglo, rural population with southeast Fort Worth which is made up of several inner-city, low-income communities that are predominantly minority. *Id.* at 248. Proposed Congressional District 26, which is anchored in rural, majority Anglo Denton County, snakes down and removes two significant minority communities of interest in Tarrant County – Near North Side and South Fort Worth. *Id.* at 249. Proposed Congressional District 33, one of the State's newly apportioned Congressional districts, encompasses all of Parker County and parts of Wise County. That

district fractures minority communities of interest in the City of Arlington, one of the fastest growing minority populations in Tarrant County, and subordinates its minority voting strength to that of the majority-Anglo electorate in Parker and Wise counties. *Id.* at 253. As a result of this configuration, minorities in the Dallas-Fort Worth Metroplex do not constitute a significant portion of the population in proposed Congressional Districts 6, 12, 26, or 33.

One further example of discriminatory effect is the Congressional plan's treatment of minority members of Congress. The evidence presented at trial established that the map-drawers had removed key economic features, or "guts," as the Court put it, from the districts currently represented by Representatives Eddie Bernice Johnson, Sheila Jackson Lee, and Alexander Green, all of whom are African-American and represent districts controlled by minority voters. ECF No. 181 ¶¶ 190-194, 198-200, 230. The map-drawers had drawn those members' district offices out of their districts and had even drawn Representative Johnson's district to exclude her home. *Id.* This occurred despite those members' repeated efforts to address and remedy these issues. There was no hint of comparable treatment of Anglo members of Congress and, in fact, there is evidence that the map-drawers accommodated those members' requests to have certain schools, country clubs, and other special projects drawn into their districts. ECF No. 181 ¶¶ 212-213. When asked to explain this disparate treatment, Interiano notably did not chalk it up to politics. Rather, he testified implausibly that it was all merely a "coincidence." Tr. at 95:3-95:19 (Jan. 25 p.m.) (Interiano). This unexplained "coincidence" that affected only minority representatives is further evidence of purposeful discrimination.

2. **Historical Background of the Decision**

Texas' history of official racial discrimination against its African-American and Hispanic citizens is longstanding and well-documented. DX 347 at 2-9 (Murray Rep.). Historically, state

officials have established poll taxes, organized White-only primaries, and instituted other forms of discrimination that have directly affected the rights of minorities to register, vote, and otherwise participate in the political process. *White v. Regester*, 412 U.S. 755, 765 (1973); DX 347 at 2-9; Perez Tr. at 583:1-585:17 (Tijerina). Texas has continued this pattern of discrimination with its redistricting efforts, and the Attorney General or a federal district court has objected to the discriminatory effects of every House redistricting plan enacted by the State since it became covered by Section 5 of the Voting Rights Act in 1975. US PFOF ¶ 128. As recently as 2006, the Supreme Court invalidated portions of the State's Congressional redistricting plan because it violated the Voting Rights Act. *LULAC v. Perry*, 548 U.S. at 477. The State's repeated attempts to prevent minority citizens from participating effectively in the political process have lingering and enduring effects that remain evident today and account for the disparate turnout rates of Anglo and minority voters. DX 347 at 2-9; *cf. Rogers v. Lodge*, 458 U.S. 613, 625 (1982) (stating that evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where discriminatory practices were commonly utilized, were not abandoned until federal intervention, and were replaced by practices which, though neutral on their face, serve to maintain the status quo).

3. Sequence of Events

The sequence of events that led to the passage of the proposed House redistricting plan travelled along two tracks. The open track provided limited opportunities for public engagement including 2010 public hearings, allowing individual members to sign off on their own districts, an amendment process, and a floor debate. Even these processes were limited by the failure to conduct the 2010 hearings in accessible locations or to produce a summary report for use in

developing maps, waiver of notice requirements before key hearings, and the uniform rejection of substantive amendments that would have meaningfully improved minority voters' ability to elect their candidates of choice. US PFOF ¶¶ 94-104, 216-217. Moreover, in Harris County the consensus process was transformed into an ambush that provided little opportunity for minority-preferred legislators to shape their districts and eliminated the district represented by the only Vietnamese American ever to serve in the Texas Legislature. US PFOF ¶¶ 172-179.

Far more important, however, were private proceedings among the architects of the House plan. Because no major changes improving minority voters' ability to elect their candidates of choice occurred after the release of Chairman Solomons' first statewide map, US PFOF ¶ 101, this process is what truly mattered, and legislators chosen by minority voters had no ability to influence it. Emails among key figures reveal a consistent pattern: TLC attorney David Hanna warned of Voting Rights Act issues, and the Chairman and staff failed to address those concerns. US PFOF ¶¶ 106-111. The State chose instead to rely on a retrogression standard that Hanna described as "phony." US PFOF at ¶¶ 112-113.

The process under which the proposed Congressional plan was enacted was even more hasty and secretive. At the close of the regular legislative session, the House and Senate Committees had not released a public proposal for Congressional redistricting. The Committees released a joint proposal only after the start of a special session and provided only 72 hours notice before the sole public hearing on the proposal in each committee; in fact, the Senate committee worked from a substitute proposal released the night before its sole public hearing. Minority members raised concerns regarding their total exclusion from the drafting process and their inability to influence the plan via amendments, and they were not alone in their criticism. US PFOF ¶¶ 215-224. The Senate Committee's counsel described the redistricting process as

"quite different from what we've seen in the past" based on the failure to release a proposal during the regular session, the limited time for review of the proposal, and failure to provide counsel with the necessary election data to evaluate Voting Rights Act compliance. US PFOF ¶ 225.

4. Procedural and Substantive Deviations

The proposed House and Congressional plans also illustrate several deviations from procedural and substantive standards. For example, Chairman Solomons released his statewide proposal only two days before the first public hearing, which required waiver of Texas's five-day posting rule. In addition, two public hearings concerning House redistricting were conducted on a Friday and on Palm Sunday, limiting public participation. As noted above, the Congressional redistricting deviated from past procedures under which plans and relevant election data were available for a sufficient period to allow for substantive public input. US PFOF at ¶¶ 97-100, 225.

In terms of substance, minority ability districts were systematically overpopulated within individual urban counties, particularly Harris, Hidalgo, and Nueces. US PFOF ¶¶ 114, 120, 124 In addition, Chairman Solomons rejected an amendment sponsored by a minority-preferred Hispanic legislator on the ground that it split VTDs, even though the plan as a whole split 412 VTDs. US PFOF ¶ 116. Deviations from the Texas County Line Rule were permitted in order to comply with federal law in Henderson County, but calls for deviation in order to comply with the Voting Rights Act in Nueces County were soundly rejected. US PFOF ¶¶ 131-132. Finally, the Texas County Line rule was applied inconsistently from past practice in Harris County, which gave legislators an excuse to eliminate House district 149, a district in which minority voters had the ability to elect their candidate of choice. US PFOF ¶¶ 131-133.

5. Contemporaneous Statements

The public contemporaneous statements of legislators provide the final evidence of the discriminatory purpose underlying the redistricting process. Representative Beverly Woolley of Harris County told minority members of the Harris County delegation: "You all are protected by the Voting Rights Act and we are not" as the justification for changes she made to the Harris County map. Tr. at 68:18-22 (Jan. 19 p.m.) (Coleman). Representative Scott Hochberg was told that he would be "comfortable" in his district after he was paired with Representative Hubert Vo, a Vietnamese American, in a district from which Asian-American voters had been excised. DX 738 at 21. Representative John Garza repeatedly told Representative Joe Farias that he would allow no more than 50.1% SSVR in his district. Tr. at 18:7-20 (Jan. 24 p.m.) (Farias). Finally, House Speaker Joe Straus told then-Representative Abel Herrero that he would be paired with another Hispanic representative before Census data was released. ECF No. 161-3 at 11:21-12:5 (Herrero). Although both legislators lost their 2010 elections, proposed House District 34 follows tortured borders to ensure Speaker Straus's prediction came true. *Id.* at 13:16-19.

IV. CONCLUSION

As set forth above, the State of Texas has failed to carry its burden to prove that the proposed redistricting plans for the Texas House of Representatives and the State's delegation to the United States Congress neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. *See* 42 U.S.C. § 1973c. Therefore the Court should deny the State's request for a declaratory judgment permitting the implementation of these redistricting plans.

Date: February 6, 2011

Respectfully submitted,

RONALD C. MACHEN, JR.
United States Attorney
District of Columbia

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

/s/ Timothy F. Mellett
T. CHRISTIAN HERREN, JR.
TIMOTHY F. MELLETT
BRYAN SELLS
JAYE ALLISON SITTON
OLIMPIA E. MICHEL
T. RUSSELL NOBILE
DANIEL J. FREEMAN
MICHELLE A. MCLEOD
Attorneys
Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 353-0099
Facsimile: (202) 307-3961

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2011, I served a true and correct copy of the foregoing via the Court's ECF system on the following counsel of record:

David John Schenck
Matthew Hamilton Frederick
Office of the Attorney General
david.schenck@oag.state.tx.us
matthew.frederick@oag.state.tx.us

Adam K. Mortara
John M. Hughes
Ashley C. Keller
Bartlit Beck Herman Palenchar & Scott LLP
john.hughes@bartlit-beck.com
Ashley.keller@bartlit-beck.com

Counsel for Plaintiff

Marc A. Posner
Lawyers' Committee for Civil Rights
mposner@lawyerscommittee.org

Jose Garza
Law Office of Jose Garza
garzpalm@aol.com

Joaquin Avila
avilaj@seattleu.edu

Counsel for Mexican American Legislative Caucus

John Kent Tanner
john.k.tanner@gmail.com

Counsel for Texas Legislative Black Caucus

Joseph Gerald Hebert
jghebert@comcast.net

Counsel for Davis Intervenors

Robert Stephen Notzon
robert@notzonlaw.com

Gary L. Bledsoe
Law Office of Gary L. Bledsoe & Associates
garybledsoe@sbcglobal.net

Allison Jean Riggs
Southern Coalition for Social Justice
allison@southerncoalition.org

Counsel for Texas State Conference of NAACP Braches

John M. Devaney
Marc Erik Elias
Perkins Coie LLP
jdevaney@perkinscoie.com
melias@perkinscoie.com

Kevin J. Hamilton
Perkins Coie
khamilton@perkinscoie.com

Renea Hicks
Law Offices of Max Renea Hicks
rhicks@renea-hicks.com

Counsel for Gonzalez Intervenors

Nina Perales
Marisa Bono
Rebecca McNeill Couto
Karolina J. Lzynik
Mexican American Legal Defense & Educational Fund
nperales@maldef.org
mbono@maldef.org
rcouto@maldef.org
klyznik@maldef.org

Karen M. Soares
Jorge Martin Castillo
Fried, Frank, Harris, Shriver & Jacobson LLP
karen.soares@friedfrank.com
jorge.castillo@friedfrank.com

Counsel for Texas Latino Redistricting Task Force

Ray Velarde
velardelaw2005@yahoo.com

Counsel for League of United Latin American Citizens

/s/ Daniel J. Freeman
DANIEL J. FREEMAN
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 353-0099
Facsimile: (202) 307-3961