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

THE UNITED STATES' OPENING TRIAL BRIEF

The United States files this pre-trial brief in support of its position that this Court should deny the State of Texas's request for a declaratory judgment granting preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, to the State's proposed redistricting plans for the Texas State House of Representatives and for the Texas delegation to the United States Congress. Both plans have a racially discriminatory purpose and would have a retrogressive effect on the ability of minority voters to elect their preferred candidates of choice.

The United States will present evidence during the upcoming trial that the proposed State House plan provides minority voters with the ability to elect their preferred candidates of choice in only 45 districts, five fewer districts than in the benchmark plan. Likewise, the evidence will demonstrate that the proposed Congressional redistricting plan abridges the right to vote by increasing minority underrepresentation. These retrogressive effects preclude the State from proving by a preponderance of the evidence that either plan may be precleared.

Furthermore, the United States will present evidence that the State House and Congressional plans have a discriminatory purpose. The record is replete with evidence that those responsible for developing the plans consciously drew boundary lines to diminish 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. Racially-charged contemporaneous statements and communication among the maps' architects also evince a concerted effort to diminish minority electoral opportunity. Significant deviations from both substantive and procedural standards further demonstrate a biased approach, including the effective exclusion of representatives of minority communities from meaningful participation in the redistricting process. Finally, the discriminatory impact of the proposed plans – alongside the decision-makers' awareness of those consequences – provides compelling evidence of

a discriminatory purpose. As a result, Texas cannot prove by a preponderance of the evidence that it is entitled to preclearance for its State House and Congressional Plans.

I. The Proposed Plans Are Retrogressive.

On December 22, 2011, this Court issued a Memorandum Opinion explaining its denial of the State's motion for summary judgment in this case. *Texas v. United States*, No. 11-1303, 2011 WL 6440006 (D.D.C. Dec. 22, 2011). The opinion analyzes the standard for determining whether a redistricting plan has a retrogressive effect under Section 5. This Court recognized that the appropriate assessment "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." *See id.* at *15. The Court identified various factors relevant to whether an ability to elect exists in a particular district. They included, among others, "whether there is cohesive voting among minorities and whether minority/White polarization is present in the jurisdiction . . . " as well as population statistics, and an examination of data –minority voter registration and turnout rates, election results, and evidence of minority voting behavior – pertaining "to actual minority citizen voting strength." *See id.* at 15-16. The evidence that the United States will present will establish under this standard that the State House plan and Congressional plan retrogress the voting strength of minority voters.

A. The State House Plan Diminishes the Number of Districts in Which Minority Voters Have the Ability to Elect their Candidate of Choice.

Applying this Court's standard, the proposed State House plan is clearly retrogressive because it provides minority voters with an ability to elect their preferred candidates in fewer districts than in the benchmark plan. Dr. Lisa Handley will explain that the benchmark plan

provides minority voters with an ability to elect their preferred candidates in 50 districts and that the proposed plan reduces that number to 45. Dr. Handley concludes that benchmark District 33 in Nueces County, District 35 in South Texas, and District 117 in Bexar County are districts in which Hispanic voters have the ability to elect their candidate of choice. *See also* Report of Dr. John Alford at 7-8 (Oct. 14, 2011) (agreeing). However, Dr. Handley will also testify that Districts 33, 35, and 117 are no longer ability districts in the proposed plans and that she is unable to make a determination about District 41. Finally, Dr. Handley will testify that District 149 provides a cohesive minority coalition of Asian, Hispanic, and Black voters with the ability to elect in the benchmark but not in the proposed plan. Rogene Calvert will testify regarding the political cohesion that has existed between the coalition's constituent minority groups, and prior testimony from the Section 2 trial will support this point as well.[1]

Overall, the benchmark State House plan contains four or five fewer districts in which minority voters have the ability to elect their candidate of choice. This clear retrogression precludes the State from satisfying its burden of proof under Section 5.

B. The Congressional Plan Increases the Underrepresentation of Minority Voters.

Texas's proposed Congressional plan is likewise retrogressive. Because Texas received four new Congressional seats, the retrogression analysis is more complex than when the number of districts remains constant. Defendants will establish that the proposed Congressional plan

[1] The United States continues to contend that District 41 in Hidalgo County provides an ability-to-elect in the benchmark plan, and Texas has not carried its burden to prove that the proposed district continues to do so. However, this Court has concluded that a "district with a minority voting majority of sixty-five percent (or more)," such as proposed House District 41, "essentially guarantees that . . . a cohesive minority group will be able to elect its candidate of choice." *Texas v. United States*, 2011 WL 6440006, at *16. The United States contests the continuing utility of the "sixty-five percent rule" in an age in which rich data allow for both precise analysis and sophisticated gerrymanders. Moreover, the rule has not been applied to Hispanic voters, where there has been significant problem with bilingual access under Section 203 of the Voting Rights Act. Because this issue was not addressed at summary judgment, the United States would welcome the opportunity to brief the issue.

"increase[s] the degree of discrimination against a minority voting population" and therefore is not "entitled to preclearance." *Texas v. United States*, 2011 WL 6440006, at *3. Defendants will clarify that their Congressional retrogression argument does not rest on the demonstrated decrease in the percentage of ability-to-elect districts in the proposed plan, a claim this Court has rejected. *See id.* at 20 (citing *Abrams v. Johnson*, 521 U.S. 74 (1997)). Rather, the United States argues that the appropriate inquiry here is whether the proposed plan is more dilutive than the plan it replaces. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997) (noting that an "'*increase* [in] the degree of discrimination'" constitutes retrogression (quoting *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983)).

The testimony of the United States' expert Dr. Lisa Handley will demonstrate that both the benchmark and proposed Congressional plans provide minority voters an ability to elect their preferred candidates in only ten districts.[2] In essence, the State removed two districts (23 and 27) in which Hispanics had the ability to elect under the benchmark plan and created two new districts (34 and 35) in which Hispanics would have the ability to elect in the proposed plan. However, the proposed Congressional plan would increase the degree to which minority voters are underrepresented in Texas's Congressional delegation by at least one whole seat. Whereas the benchmark plan leaves minority voters two congressional seats shy of rough proportionality with their share of the citizen voting-age population, *see Johnson v. DeGrandy*, 512 U.S. 997, 1013-17 (1994), the proposed plan would leave them at least three seats below that mark. That change is retrogressive in violation of Section 5 in a way the plan at issue in *Abrams* was not. Furthermore,

[2] The evidence will show that there are seven Hispanic ability-to-elect districts (Districts 15, 16, 20, 23, 27, 28 and 29) and three African American ability-to-elect districts (Districts 9, 18 and 30) in the benchmark plan, as well as seven Hispanic ability-to-elect districts (Districts 15, 16, 20, 28, 29, 34 and 35) and three African American ability-to-elect districts (Districts 9, 18 and 30) in the proposed plan.

and also relevant to the retrogression inquiry, Dr. Handley will testify concerning the nearly 500,000 minority voters who currently have an ability to elect their preferred candidates who would lose that ability under Texas's proposed plan.

II. The Proposed Plans Were Adopted with a Discriminatory Purpose.

The evidence presented at trial will show that, in drawing both the State House and Congressional plans, Texas intentionally used racial means to achieve a preferred partisan outcome. Such tactics are not novel in the annals of Texas redistricting. For example, in *Bush v. Vera*, the Supreme Court held that the use of racial proxies for political persuasion violates the Equal Protection Clause of the Fourteenth Amendment. *See* 517 U.S. 952, 968 (1996) (plurality op.). In *LULAC v. Perry*, Justice Kennedy wrote that a strikingly similar attempt to maintain the façade of minority control while diminishing minority voters' ability to elect their candidate of choice "bears the mark of intentional discrimination that could give rise to an equal protection violation." 548 U.S. 399, 440 (2006).[3] Congress passed Section 5 to prevent such unconstitutional laws from going into effect. The United States will present this and other evidence under the framework set out in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977), and applied by this Court in its December 22 memorandum opinion, *see Texas v. United States*, 2011 WL 6440006, at *5-6, *21-22, which will foreclose Texas from proving the absence of a discriminatory purpose.

A. The State House Plan Intentionally Minimizes Minority Voters' Ability to Elect their Candidates of Choice.

[3] *See also 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) (explaining that animus is not needed to establish discriminatory intent).

The United States' defense begins with direct evidence of discriminatory intent. Dr. Theodore Arrington will testify that the State House plan splits precincts in Hidalgo County to exclude Hispanic voters from District 41, and Jaime Longoria will provide local knowledge about those areas. The deposition testimony of Representative Aaron Peña, Gerardo Interiano, and Ryan Downton will show that race was used as a political proxy. E-mails sent by state officials will show that those drawing the maps targeted individual census blocks that would increase or maintain a district's Hispanic population while minimizing Hispanic political participation, and testimony of Representative Joe Farias and Dr. Arrington, along with the deposition testimony of Representative John Garza, will show the application of this strategy in District 117. Finally, Abel Herrero will testify that the bizarrely interlocked districts in Nueces County exclude current and former Hispanic representatives of both parties from District 32 and pack Hispanic voters into District 34.

Dr. Arrington will also testify concerning voter confusion likely to result from the splitting of precincts, which occurs disproportionately in minority communities, and the pairing of minority-preferred incumbents in Harris County. Both Dr. Arrington and Dr. Kousser discuss the use of large deviations in district population to disadvantage minority voters.

The United States will also present evidence of the historical background of the State House plan, beginning with the documentary record of Texas's uniform failure to receive preclearance for State House plans since its coverage under Section 5 and the history of federal judicial intervention to end intentional racial discrimination against Hispanic and Black voters in Texas. The Section 2 record also includes a history of racial and ethnic discrimination in Texas, as well as the history of racially polarized voting.

Witness testimony concerning the sequence of events will also provide circumstantial evidence of the State of Texas's discriminatory intent. The deposition and prior trial testimony of

Speaker Joe Straus, Redistricting Committee Chairman Burt Solomons, Gerardo Interiano, Ryan Downton, Jeff Archer, David Hanna, and Stacy Napier, along with e-mails among them, will set out the House leadership's knowledge of what the Voting Rights Act required, their choice not to follow the advice of an apolitical state agency, their knowledge that a plan to protect incumbents would harm Hispanic voters, and their failure to provide resources to minority legislators. The testimony of Representatives Garnet Coleman, Mark Veasey, and Scott Hochberg will establish how contentious aspects of the redistricting were subject to secretive processes. Finally, the deposition testimony of Ryan Downton will establish that Chairman Solomons' statewide proposal was retrogressive under any standard.

The United States will present several departures from ordinary procedural rules during passage of the House plan. Representatives Coleman and Hochberg will testify that the legislative process included a truncated hearing schedule with committee hearings held on a Friday and Sunday and on short notice, possible only after a waiver of Texas's five-day posting rule. In addition, the testimony of Representatives Coleman and Hochberg, along with the deposition transcript of Representatives Aaron Peña, Wayne Smith, and Beverly Woolley, will describe the abandonment of procedures set out by Chairman Solomons under which county delegations were to develop maps based on the consent of all members.

Dr. Arrington will also testify concerning numerous substantive departures from state and federal policies, including a state policy against splitting precincts, federal limitations on population deviations between districts, and the U.S. constitutional requirement that federal law preempt state law. The deposition testimony of Jeff Archer, Ryan Downton, Mark Hanna, Representative Todd Hunter, and Chairman Solomons, along with documentary evidence, will support Dr. Arrington's conclusions.

Finally, the United States will present the contemporaneous statements of lawmakers to demonstrate the racially charged nature of the 2011 redistricting. Representative Farias will testify concerning bias against poor Hispanics in Bexar County, and Representatives Coleman and Hochberg will testify concerning statements made against minority-supported legislators – including the preferred candidate of an Asian-led multi-minority coalition – in Harris County.

B. The Congressional Plan Intentionally Limits the Creation of Districts in which Minority Voters Will Have the Ability to Elect their Candidates of Choice.

The evidence will demonstrate that the State's proposed Congressional plan was drawn with a discriminatory purpose to limit the creation of districts in which minority voters would have the ability to elect their preferred candidates of choice. As noted above, despite the fact that a huge increase in the Hispanic population drove the State's population growth, Texas chose not to create any new additional minority ability-to-elect districts and to remove hundreds of thousands of minority voters from districts in which they could elect a candidate of choice under the existing plan. As part of this concerted effort, a number of cohesive minority communities were split intentionally. In other cases, minorities were packed into existing ability-to-elect districts to avoid creating any new such districts. Contemporary documentary evidence shows that the plan's developers purposefully sought to fashion districts with a superficial appearance of minority electoral opportunity, which in reality diminished the influence of minority voters. The high number of split precincts in the districts at issue further illustrates the extent to which lines were drawn on the basis of race to the detriment of minority voters.

Specifically with regard to Congressional District 23, there is evidence of a focused intent to retrogress the ability of minority voters to elect, one that bears a striking resemblance to the State's action during the previous redistricting cycle with regard to former Congressional District 23, a

course of action found by the Supreme Court in *LULAC v. Perry* to evince intentional discrimination and to necessitate a redrawing of the district to comply with Section 2 of the Voting Rights Act. *See* 548 U.S. at 440-43. In this round of redistricting, the State again made District 23 less viable for Hispanic voters, creating a false impression of Hispanic influence and non-retrogression through reliance on unreliable and misleading bright line tests. As part of the State's misguided strategy, line drawers purposefully removed high turnout Hispanic voters from District 23 and replaced them with Hispanics demonstrated to turn out to vote at a lower rate, as well as with Anglo voters. Dr. Arrington will address the mechanisms by which the State eliminated Districts 23 and 27 as ability-to-elect districts, in large part through the removal or splitting of effective and well-organized minority communities. Maverick County Judge David Saucedo also will discuss the detrimental consequences of the State's decision to split Maverick County.

In addition, there is striking evidence the State chose to pack minority voters into already existing ability districts, again to avoid creating any new such districts. The phenomenon is particularly acute in Congressional District 30, which is located in Dallas County. Nearby Congressional Districts 6, 12, 26, and 33 reveal more splitting of minority cohesive communities, again in an apparent effort to undermine their electoral influence. As Representative Mark Veasey, Dr. Arrington, and other experts will testify, throughout the Dallas-Fort Worth metroplex, and in some other areas as well, the State has pulled strangely-shaped areas with concentrations of minority population out of certain districts in order to submerge them in larger Anglo populations, thereby diluting minority voting strength. Notably, while Hispanics and Blacks account for more than 55 percent of the population in the Dallas-Fort Worth area, only one of the region's eight Congressional districts (the packed District 30) enables minority voters to elect a candidate of choice. State Representative Mark Veasey will recount how the efforts of minority legislators to

create another majority-minority district in the area were defeated, despite the existence of several viable alternative plans that included another reasonably compact minority ability district.

Further, as Dr. Arrington, Representatives Marc Veasey, Joe Farias, Dawnna Dukes, and other legislators from the Section 2 trial will attest, the Congressional redistricting process was a secretive one, with little or no opportunity for minority representatives to participate in any meaningful way. Even after the original proposed plan – developed behind closed doors – was introduced, efforts by minority representatives to amend the plan failed, with a majority of legislators in the State House and Senate rejecting any amendments to the Redistricting Committees' plan that might have increased the number of minority ability districts. Those most directly affected will also testify that the process was far less open than in the past.

Finally, new evidence proves unequivocally that state officials, operating away from public view, drew lines using block-level data based primarily on race to substitute for a lack of partisan data below the precinct level. Specifically, e-mail correspondence between United States Congressional representatives and their staff, State officials involved in devising the State's plans, and legislative leaders primarily responsible for redistricting provide evidence of the exclusionary process described above, in which data based on race and ethnicity was used to deny or abridge the right to vote through the drawing of Congressional district lines.

III. CONCLUSION

For the reasons set out above, the evidence to be presented by the United States at trial will prevent Texas from establishing by a preponderance of the evidence that its State House and Congressional plans have neither a discriminatory purpose nor a discriminatory effect. Therefore, the State of Texas is not entitled to a declaratory judgment granting preclearance to implement those plans.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2012, I served a true and correct copy of the foregoing via the Court's ECF system on the following counsel of record:

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