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Testimony of

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On SB 6

Meeting of
The Senate Select Committee on Redistricting
Austin, Texas
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Chairwoman Huffman, Vice Chairman Hinojosa, and members of the Select Committee:

Thank you for the invitation to testify before the Senate Select Committee on Redistricting.

The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and legal institute that works to reform, revitalize, and defend our country's systems of democracy and justice. For more than two decades, the Brennan Center has built up a large body of nationally respected research and work on these issues, including in the fields of redistricting and election law. I am Senior Counsel in the Center's Democracy Program, where my work focuses on redistricting and the census.

In my comments today, I will address three topics: the state's duty to consider whether it has an obligation to create minority opportunity districts, including minority-coalition districts, the regions of the state where Plan C2101 appears to be deficient in meeting the state's obligations under the Voting Rights Act with respect to minority opportunity districts, and the partisan gerrymandering implications of Plan C2101. I am

happy, though, to address other questions the Committee may have as the Committee embarks on the important process of redrawing the state's maps.

Minority-Coalition Districts

I want to begin my remarks by addressing the subject of minority-coalition districts under Section 2 of the Voting Rights Act. This is an important subject in a state as demographically complex as Texas, and nowhere is it more important than in urban and suburban counties that, almost uniformly, have become rapidly more diverse over the course of the last few decades. The scale of the diversification of Texas, indeed, is staggering. In 1990, Fort Bend County, for example, was over 90 percent Anglo. Today, it is only 32 percent Anglo. But I hardly need to tell members this, especially members who represent rapidly diversifying urban and suburban counties. You already know this.

Yet, as the Texas Legislature proceeds to draw maps, it is not clear that this body has an adequate understanding of how to factor in Texas' demographic growth or that it has a full understanding of its obligations under voting rights laws. At the September 24, 2021 hearing on Texas Senate and State Board of Education plans, Chairwoman Huffman stated to me her belief that the United States Supreme Court's opinion in *Bartlett v. Strickland* barred the creation of minority-coalition districts under all circumstances. But, as both Nina Perales of MALDEF and I stated at that hearing, this is simply not correct. In fact, quite the opposite is true. The Supreme Court's decision in *Bartlett* takes great pains to make clear that the opinion is about crossover districts, in which Anglo voters are a majority, and not districts where two or more racial or ethnic minorities are a majority. In stressing the difference, the Court recognized that its own prior cases may have fostered confusion between crossover districts and minority-coalition districts, explaining:

> This Court has referred sometimes to crossover districts as 'coalitional' districts, in recognition of the necessary coalition between minority voters and crossover majority voters. But that term risks confusion with coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice. *We do not address that type of coalition district here*.[1]

Indeed, the Chairwoman's stated understanding of *Bartlett* at the September 24, 2021 hearing is inconsistent with public guidance issued by the Texas Legislative Council during the last round of redistricting in 2011. In that guidance, the Texas Legislative Council stated:

[1] Bartlett v. Strickland, 556 U.S. 1, 13-14 (2009) (emphasis added, citations omitted).

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> Although the *Bartlett v. Strickland* decision asserts as a bright line rule that a majority group must constitute 50 percent of the voting-age population in a proposed district to assert a claim of vote dilution under Section 2, the decision does not address the creation of a coalition district using two or more minority groups under Section 2.[2]

The Texas Legislative Council went on to explain that whether the conditions exist for creation of a minority-coalition district exist is a nuanced and fact-specific inquiry:

> The supreme court [sic] has stated that when ethnic and language minority groups are combined for the purpose of asserting compliance with Section 2, 'proof of minority political cohesion is all the more essential.' . . . Courts are likely to continue to determine the degree of political cohesion between different minority groups on a case-by-case basis.[3]

The 2011 statement by the Texas Legislative Council remains the law today in the Fifth Circuit, which includes Texas. In other words, rather than there being a blanket prohibition on minority-coalition districts in all circumstances, the Fifth Circuit has made clear that Texas must undertake a searching, region-specific inquiry.[4] As illustrated in the next section, it does not seem to have done so.

Under Section 2 of the Voting Rights Act, Texas has a legal obligation to avoid drawing district lines in a way that dilutes the votes of minority voters and prevents them from electing preferred candidates.[5] Whether liability exists under Section 2 is not a simple back-of-the-envelope calculation. Rather, the U.S. Supreme Court has said that the inquiry is "intensely local," "fact-intensive," and "functional" in nature.[6] In diverse multi-racial, multi-ethnic regions such as North Texas, among the matters that must be investigated is whether two or more minority groups in a region are politically cohesive

[2] Texas Legislative Council, *State and Federal Law Governing Redistricting in Texas*, August 2011, 64, https://redistricting.capitol.texas.gov/docs/pubs/2011_0819_State_and_Federal_Law_TxRedist.pdf.

[3] *Id.*

[4] Of the circuit courts of appeal that have considered the issue, only the Sixth Circuit has held that the Voting Rights Act does not allow a claim for a minority-coalition district. Nixon v. Kent County, 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc).

[5] Thornburg v. Gingles, 478 U.S. 30 (1986).

[6] *Id.* at 62-63, 79.

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and could together form the majority of a district.[7] It is imperative that the state not only conduct this analysis but that it do so in a transparent fashion, making its analysis available for public scrutiny before any vote on a map.

One final note about minority-coalition districts: Unlike in past rounds of redistricting, the Texas Legislative Council has not issued legal guidance on redistricting law. Neither, to my knowledge, has the Office of the Attorney General, despite the Chairwoman's statement on September 24 that OAG, at her request, is reviewing maps for compliance with voting rights laws. If OAG is advising the Chairwoman or other members of the Committee that the 2011 guidance of the Texas Legislative Council is no longer correct or applicable, it should issue formal written guidance to that effect stating the legal basis for the change in position. Members should insist, moreover, that this guidance be made public before any votes are held on proposed plans. And to the extent that OAG declines to discuss its position because of the attorney-client privilege, members should exercise their right to waive the privilege.

Regions of Concern

Plan C2101 raises a number of red flags with respect to the treatment of minority communities, particularly in Dallas and Tarrant Counties in North Texas and in Fort Bend County near Houston. These are not the only regions of concern, but I focus my comments today on these regions because the state's map choices there aggressively undermine political opportunities for fast-growing minority communities.

Dallas County & Tarrant County

At present, there are only two minority opportunity districts in Dallas and Tarrant Counties: TX-30 in Dallas County, which is a near Black majority district by citizen voting age population, and TX-33, which spans Dallas and Tarrant Counties and is a minority-coalition district with a Latino citizen voting age population of 48 percent and a Black citizen voting age population of 24 percent.

Yet, despite the fact that communities of color grew significantly in the two counties last decade while both counties lost Anglo population in absolute terms, Plan C2101 remarkably creates no new electoral opportunities for minority communities in the two counties. Instead, in several respects, it actually seems to go backwards. For example, it troublingly removes a significant part of the Latino population in western

[7] Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988) (holding that Black and Latino voters in Baytown, Texas had demonstrated political cohesiveness); LULAC v. North East Indep. School Dist., 903 F. Supp. 1071, 1081 (W.D. Tex. 1995) (finding that Black and Latino voters in school district were politically cohesive and voted as a bloc either for Black or Latino candidates).

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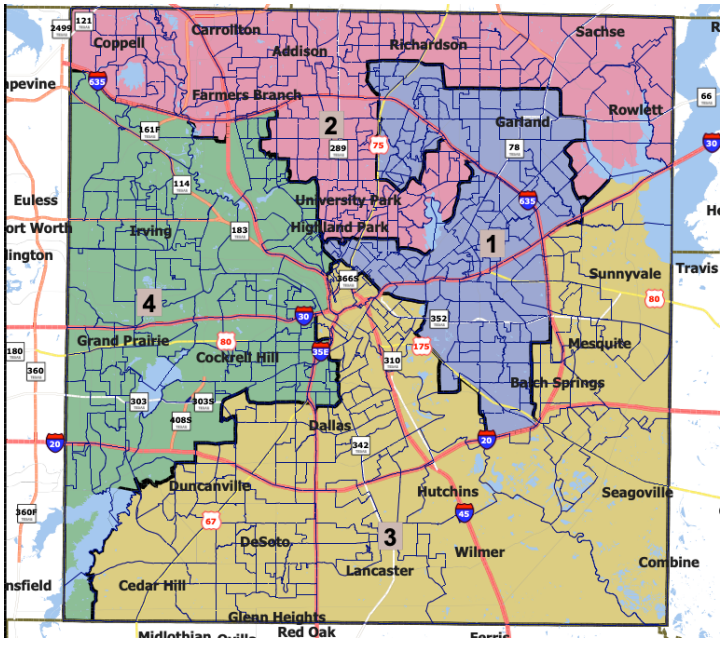
Dallas County from the current TX-33 (a minority-coalition district) and places it in TX-6 (an Anglo majority district by citizen voting age population that includes seven rural counties). As a result, TX-33 goes from having a Latino citizen voting age population of 48 percent to having one that is only 42 percent.

By failing to create a Latino opportunity district or an additional minority-coalition district in North Texas, Plan C2101 perpetuates the underrepresentation of Latinos in the region. At nearly 1.7 million, the Latino population of Dallas and Tarrant Counties is now greater than the Latino population of states like Colorado and New Mexico. In Dallas County last decade, Latinos accounted for 62 percent of the county's population growth, while in Tarrant County, Latinos were nearly half of growth. Given this dynamic growth, it would not be difficult to create a Latino opportunity district or an additional minority-coalition district in the region. In fact, it would be relatively straightforward.

One way to create an additional minority opportunity district in North Texas would be to build off of Dallas County Commissioner District 4. As pictured on the following page, Commissioner District 4 is a compact district on the western side of Dallas County. With a population that is almost 61 percent Black + Latino, Commissioner District 4 is a performing minority-coalition district that has been represented on the county commissioner court by a Latina for more than a decade. Moreover, the population of Commissioner District 4 is roughly 653,000 according to the 2020 census, not far from the target population of a congressional district (766,987).



Creation of a new minority opportunity district in western Dallas County would allow the Tarrant County portions of the current TX-33 to form the basis of a new minority opportunity district based completely or substantially in Tarrant County.

Fort Bend County

Fort Bend County, west of Houston, is one of the most diverse suburban counties in America, with communities of color driving growth last decade.

In the benchmark plan (Plan C2100), TX-22 is anchored in Fort Bend County, where more than two-thirds of the district's population lives. Likewise, nearly 80 percent of the population of Fort Bend County lives in TX-22. In recent years, TX-22, like Fort Bend County in general, has increasingly emerged as a political battleground as diverse coalitions of non-Anglo voters increasingly compete for power. It is, in many ways, a poster child for the diverse, multiracial coalitional district of the future.

Like many districts in fast-growing suburban Texas, TX-22 is significantly over the target population for districts, needing to shed 205,232 people to achieve population equality. Although the population excess in TX-22 is almost exactly equal to the Brazoria County portions of the district, Plan C2101 opts for more aggressive surgery, heavily falling on racial and ethnic lines.

Under the redrawn configuration of TX-22, large blocks of heavily minority portions of the district are removed by extending TX-7 from Harris County into Fort Bend County, while other blocks of minority voters are added to TX-9. As a result of the changes, the citizen voting age population of TX-22 goes from 46 percent Anglo to nearly 55 percent Anglo. Meanwhile, the Asian citizen voting age population of the district goes from 16 percent to 10 percent and the Black citizen voting age population from 16 percent to 11 percent.

This transformation of an emerging coalition district into a district where minorities will have no ability to elect raises significant red flags not only with respect to potential violations of the Voting Rights Act but also intentional discrimination. As the Supreme Court cautioned in *LULAC v. Perry*, the "undermin[ing of] the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive" can "bear[] the mark of intentional discrimination that could give rise to an equal protection violation."[8] In this regard, it is not enough for the state to say that it drew maps on a "color blind" basis if members and others are well aware of demographic changes occurring in the region.

[8] LULAC v. Perry, 548 U.S. 399, 439-40 (2006) (discussing Texas' dismantling the 23rd Congressional District in 2003 in response to increased Latino political effectiveness).

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Partisan Gerrymandering Considerations

Finally, I want to address the partisan gerrymandering implications of Plan C2101.

In 2019, the Supreme Court held in *Rucho v. Common Cause* that partisan gerrymandering claims brought under the U.S. Constitution are non-justiciable political questions.[9] This, however, may not be the end of the story for congressional redistricting. Indeed, Chief Justice John Roberts expressly noted in his *Rucho* opinion that "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause."[10] Congress is currently considering such legislation in the form of the Freedom to Vote Act (S. 2747), which among other things, would ban partisan gerrymandering by statute.[11]

In this regard, it is significant that Plan C2101 would fail the rebuttable presumption in Section 5003(c)(3) the Freedom to Vote Act. That presumption uses data from the last two presidential and U.S. Senate elections to make an assessment of the partisan bias of a plan. If a plan produces statistically significant bias in any two of the four elections, the presumption is triggered. Plan C2101 results in statistically high bias in four out of four specified test elections. This is much higher than the bias under the state's benchmark plan (Plan C2100), which would not trigger the presumption.

As a result of triggering the rebuttable presumption, Texas would be barred from using Plan C2101 until it rebutted the presumption in litigation. Texas, of course, does not have to draw its congressional map to comply with pending federal legislation. The fact that its proposed plan so definitively triggers the presumption should be a red flag. This is all the more so given substantial evidence that Texas' failure to create additional electoral opportunities for communities of color is a key driver of that bias.

That adverse treatment of minority communities is creating partisan bias is not something new. Rather, it is simply a reflection that at times both parties have found it useful to cynically dilute the electoral effectiveness of communities of color. Last decade, for example, the original congressional redistricting plan adopted by the Texas Legislature (Plan C185) but never used because of a failure to obtain preclearance contained among the highest levels of partisan bias in the country that decade, mainly because the plan failed to create any new minority opportunities. By contrast, a study by the Brennan Center found that the court-drawn interim plan (Plan C235), which, among

[9] Rucho v. Common Cause, 139 S.Ct. 2484 (2019).

[10] *Id.* at 2508.

[11] Freedom to Vote Act, S. 2747, 117th Cong. (2021), § 5003(c)(1), https://www.congress.gov/bill/117th-congress/senate-bill/2747/text.

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other things, partially remedied cracking of minority communities in the Dallas-Fort Worth region, significantly reduced levels of partisan bias.[12] Plans proposed by the Texas Latino Redistricting Task Force (Plan C213) and other Black and Latino plaintiffs (Plan C286) did even better, reducing partisan bias to nominal levels and creating new minority opportunities.[13]

Plan C2101, like earlier plans drawn by both parties, creates political advantages on the backs of people of color. Texas is now more diverse than ever. It's time to stop preventing communities of color from having a seat at the table.

Conclusion

Discrimination in redistricting unfortunately is nothing new. For more than five decades, Texas has struggled to draw maps that treat its communities of color fairly. This was the case when Democrats were in control of map drawing, and, unfortunately, it has remained the case in the two decades since Republicans have been in control of the process. But after a decade in which communities of color provided over 95 percent of the state's population growth, it is more important than ever to work to get it right.

In this endeavor, naked partisanship is no virtuous defense. Prior to the 1990s, southern white Democrats were able to maintain a lock on power in the region in part because they strategically discriminated against communities of color, dividing them up to help prop up white Democrats. As Ben Ginsberg, former general counsel to the Republican National Committee explained, "We began looking at the data, and we saw that white Southern Democrats had dominated the redistricting process literally since the Civil War, and that had created underrepresentation for two groups – Republicans and minority voters."[14] The creation of majority-minority and minority-coalition districts after *Thornburg v. Gingles* created greater equity both for minority voters and for Republicans.[15]

But with Republicans now in control of the redistricting process in much of the South, including Texas, some of the same tricks are being deployed against Democrats. By failing to create new minority opportunities and by ruthlessly dividing non-white communities – whether that is being done on a "race blind" basis or not – states like

[12] Michael Li and Laura Royden, *Minority Representation: No Conflict with Fair Maps*, Brennan Center for Justice, 2017, https://www.brennancenter.org/sites/default/files/2019-09/Minority-Representation-Analysis_0.pdf.

[13] *Id.*

[14] Michael Kelly, *Segregation Anxiety*, New Yorker, Nov. 20, 1995, 46, 48, http://www.newyorker.com/magazine/1995/11/20/segregation-anxiety.

[15] Li and Royden, *supra*.

Texas are creating some of the same sorts of disparities for minority voters and Democrats as existed previously for minority voters and Republicans. And the remedy is largely the same: stop discriminating against people of color.

Unfortunately, Plan C2101 contains worrying indications that communities of color will once again see their political power targeted by map drawers for both racially discriminatory and partisan reasons. It is not too late. I urge this body to pause and look more closely at the maps, both because it will help the state avoid protracted litigation and legal liability and because it is what the people of Texas, and particularly its growing minority communities, deserve.

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