Nos. 11-713, 11-714 and 11-715

In The Supreme Court of The United States

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *ET AL.*,

Appellants,

v.

SHANNON PEREZ, *ET AL.*,

Appellees.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *ET AL.*,

Appellants,

v.

WENDY DAVIS, *ET AL.*,

Appellees.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *ET AL.*,

Appellants,

v.

SHANNON PEREZ, *ET AL.,*

Appellees.

On Appeal from the United States District Court for the Western District of Texas

REPLY BRIEF FOR APPELLEES TEXAS LATINO REDISTRICTING TASK FORCE, TEXAS MEXICAN AMERICAN LEGISLATIVE CAUCUS AND SHANNON PEREZ, *ET AL.*

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INTRODUCTION

The Voting Rights Act could not be clearer: "No court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment" preclearing a voting change. 42 U.S.C. § 1973l(b). Just as clearly, the Act squarely provides that "unless and until" the D.D.C. "enters" a declaratory judgment — or this Court reverses its refusal to do so, *see, e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461 (2003) — Texas cannot "administer" its new districting map. 42 U.S.C. § 1973c(a).

In *Texas v. United States*, the three-judge court statutorily assigned the exclusive authority to pass on Texas's preclearance request squarely refused to issue that judgment without further proceedings. After noting that "Texas has not disputed many of the . . . specific allegations of discriminatory intent" that the defendants in that proceeding had presented, Addendum at 56A, the three-judge court in the D.D.C. unanimously concluded that it needed to conduct "further review of the claims of discriminatory purpose directed to all three Plans." *Id.*

The preclearance panel's holding that Texas has so far "failed to demonstrate that the Plans do

not have the purpose of 'denying or abridging the right to vote on account of race or color, or [membership in a language minority group]," Addendum at 52A, should be the end of this appeal. The State itself acknowledged in its opening brief that it would be entitled to the relief it seeks "only after" it "demonstrates a likelihood of success on the merits." Br. for Appellants at 28, *Perry v. Perez*, Nos. 11-713, 11-714, and 11-715 (Dec. 21, 2011) [hereinafter "Appellants' Br."]. The preclearance panel — the only court with subject-matter jurisdiction over the question whether the State's plans should be precleared — has decided that the State has not made such a demonstration. That decision is not now before this Court. Indeed, the United States — the required defendant in that proceeding — is not even a party to this case.

Texas has not appealed from the preclearance panel's holding that "genuine issues of material fact regarding whether the [State's] Plans were enacted with discriminatory intent" preclude preclearance on the current record. Addendum at 54A. Nor, indeed, can it. *See Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 40-41 (1995) (explaining that denials of motions for summary judgment are not ordinarily appealable). Instead, Texas seeks an end-run around the entire preclearance process by asking this Court to "impose Texas' legislatively enacted plan as the interim plan while preclearance is pending." Appellants' Br. at 54-55.

That unprecedented request — Texas points to not a single example of a court ever having so

acted — flouts the plain text and purpose of section 5. Indeed, as appellees explained in our opening brief, an unbroken line of this Court's precedents establishes that Texas cannot circumvent section 5 by getting a federal court to adopt its plan in the guise of a "judicial plan." *See* Br. for Appellees Texas Latino Redistricting Task Force, *et al.* at 44-45, *Perry v. Perez*, Nos. 11-713, 11-714, and 11-715 (Dec. 21, 2011) [hereinafter "Appellees' Opening Br."]. That is true regardless of whether the plan is adopted for one election cycle or for all five before the next census.

ARGUMENT

Just as the local three-judge district court in this case properly rejected Texas's attempt to rewrite the Voting Rights Act, so too should this Court.

As appellees explained in our opening brief, the three-judge court in the Western District of Texas was required to enjoin Texas's use of unprecleared redistricting plans and was required to draw interim maps. *See* Appellees' Opening Br. at 36-43. In drawing those interim maps, while the three-judge court was required to defer to *precleared* state policy judgments — those, for example, reflected by the benchmark plans — it was foreclosed from deferring to unprecleared state policy judgments. It is telling that the State challenges only a handful of the districts drawn by the three-judge court. It is even more telling that those districts are the ones the three-judge court drew to avoid retrogression, to comply with one-

person, one vote, and to provide minority voters with their federally protected equal opportunity to participate and elect candidates of their choice.

I. Any Delays Texas Has Experienced In Obtaining Preclearance Are The State's Own Fault And Are Due To Its Adoption Of Plans That Dilute Latino Voting Strength

Much of the State's opening brief is devoted to its claim that it is somehow entitled to interim preclearance by this Court because the process is taking too long. *See* Appellants' Br. at 2, 29, 46-48. That claim is entirely meritless. To the contrary, the State has been unable to obtain preclearance because it has dragged its feet in seeking approval of discriminatory plans.

1. States that want swift preclearance determinations can get them. The vast majority of states choose the administrative route, with its strictly limited time period. *See* Appellees' Opening Br. at 19. That route gives states certainty that they will obtain a determination within sixty (or at most, 120) days of submission. *See* 28 C.F.R. § 51.37. This time around, Alabama, Alaska, California, Georgia, Louisiana, North Carolina, South Carolina, South Dakota, and Virginia have already chosen this route. *See* Br. of the United States as *Amicus Curiae* Supporting Affirmance in Part and Vacatur in Part at 1a-3a, *Perry v. Perez*, Nos. 11-713, 11-714, and 11-715 (Dec. 28, 2011) [hereinafter "Amicus Br. of the United States"]. Alabama, Alaska, Georgia,

Louisiana, North Carolina, South Carolina, and Virginia have all received preclearance and can implement their plans. *See id.*[1] Their experience shows both that it is possible for states to draw plans that comply with section 5's substantive requirements and that the administrative preclearance process is working efficiently. If Texas had really wanted a quick determination about the purpose and effect of its 2011 plans, it could have obtained one.

But a swift section 5 determination is a two-edged sword. For covered jurisdictions that have avoided retrogression and purposeful discrimination, administrative preclearance has only an upside: within a few months of submission, the jurisdiction receives a green light to use its new maps. But for covered jurisdictions that have retrogressed, or purposefully discriminated against minority voters, administrative preclearance is deeply unattractive: once the Attorney General has interposed an objection, the new plan is clearly unusable, unless and until the jurisdiction obtains a declaratory judgment from the D.D.C. 42 U.S.C. § 1973c(a). And because the administrative objection must be interposed swiftly, it will almost certainly prevent using the new plans in even a single election cycle. Texas, by contrast, would turn preclearance on its head: under its version of section 5, by filing a declaratory judgment action seeking preclearance, a

[1] A list of states that have submitted their redistricting plans for administrative preclearance is available on the website of the U.S. Department of Justice at http://www.justice.gov/crt/about/vot/sec_5/statewides.php.

covered jurisdiction would almost automatically guarantee its ability to use unprecleared plans in the first election cycle after redistricting, since a judicial preclearance action will predictably not be completed in time.

2. Texas was on notice from 2006, when section 5 was renewed, that if it wanted to use its new lines for the 2012 election, it would need to draw the maps quickly in order to obtain preclearance by December 2011 when its election cycle — one of the earliest in the Nation — would get underway. And yet the State dawdled, not adopting a state house redistricting plan until June 17, 2011, and not even adopting a congressional plan during its regular session.[2] The State then waited until two months after the House plan and one month after the Congressional plan had been adopted even to begin the preclearance process, and it chose the judicial route. Its counsel were not neophytes: they surely must have been aware that judicial preclearance would take several months, with little prospect of a resolution in time for the normal election calendar to work.

Moreover, even within the judicial preclearance process, the State dragged its feet. As appellees explained in our opening brief, the State declined the United States' offer of an early trial date, persisted in seeking summary judgment rather than a dispositive trial, and offered a novel and unpersuasive legal standard for determining

[2] *See* Joint Pretrial Order at 23, 25, *Perez v. Perry*, No. 5:11-cv-00360, Dkt. No. 277 (W.D. Tex. Aug. 31, 2011).

whether the State's new districts gave minority voters an equal opportunity to elect representatives of their choice. *See* Appellees' Opening Br. at 20-21; *see also* J.A. 550. One plausible inference to draw is that Texas was hoping for precisely the situation that now exists: no definitive determination in time for the first post-redistricting election, so that it can offer its novel theory that mere submission of a change should allow the change to go into effect.

The State's complaints about other actors' conduct are meritless. Neither the litigants opposing the State's redistricting plans nor the two three-judge courts created the situation faced by Texas today.

First, with respect to the State's claim that the interventions by affected voters in *Texas v. United States* caused the preclearance case to be "bogged down," the contrary is true. Appellants' Br. at 2. The intervenors adhered rigorously to the schedule urged by the United States. Moreover, the intervenors assisted the preclearance panel in its consideration of the issues before it by providing evidence from the *Perez* record that went to questions of discriminatory purpose and effect.

Second, contrary to the State's argument that the Texas panel should have refrained from holding the trial on the section 2 and constitutional challenges in *Perez*, that court acted entirely appropriately. *See* Appellants' Br. at 15. The Western District was aware that it could not issue a ruling on the plans prior to preclearance but it knew

that if preclearance were obtained, it would then need to rule quickly on whether the plans satisfied section 2 and the Fourteenth Amendment. By receiving the evidence necessary to resolve those claims, the local three-judge court positioned itself to provide an expeditious resolution of the remaining issues.

3. The record in this case and in *Texas v. United States* strongly suggests that Texas chose to seek judicial preclearance rather than administrative preclearance, because of, and not despite, the potential delay. Texas's sole hope of implementing its plans was to avoid a preclearance determination, since such a determination was quite likely to result in the plans being denied preclearance. Had the State submitted its plans for administrative preclearance and received an objection from the Attorney General, it would not even have the figleaf behind which to erect its argument that "interim preclearance" — a misnomer if ever there were one — should be granted.

Nowhere in the State's opening brief does the State grapple with two of the most salient facts about Texas and redistricting: First, Texas has a long and sorry history of diluting Latino voting strength from *White v. Regester*, 412 U.S. 755 (1973), through the present. Since its coverage under section 5, the State of Texas has been blocked eleven times from enacting discriminatory statewide laws. In every round of redistricting since its coverage, Texas has been required to redraw its districts. In 1976, the Attorney General objected to a

discriminatory State House plan; in 1982, the Attorney General objected to discriminatory House, Senate and Congressional redistricting plans; and in 1991, the Attorney General objected to a discriminatory House redistricting plan.[3] And this Court held, in *LULAC v. Perry*, 548 U.S. 399, 440 (2006), that the Texas congressional redistricting plan bore "the mark of intentional discrimination that could give rise to an equal protection violation."

Second, the share of the State's population that is Latino is burgeoning, and yet the State drew congressional and house districts that failed utterly to take this into account — indeed, that reacted to this fact by deliberately minimizing Latino voting strength. As appellees explained in our opening brief, in response to the legitimate political aspirations of "increasingly politically active and cohesive" Latino communities, *LULAC v. Perry*, 548 U.S. at 439, the State purposefully drew district boundaries in a manner that would dilute Latino voting strength. *See* Appellees' Opening Br. at 9-19 .

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[3] See Letter from John R. Dunne, Assistant Attorney General – Civil Rights Division – Dept. of Justice, to Honorable John Hannah, Jr., Secretary of State of Texas (Nov. 12, 1991); Letter from Wa. Bradford Reynolds, Assistant Attorney General – Civil Rights Division – Dept. of Justice, to Honorable David Dean, Secretary of State of Texas (Jan. 29, 1982 and Jan. 25, 1982); Letter from J. Stanley Pottinger, Assistant Attorney General – Civil Rights Division – Dept. of Justice, to Honorable Mark White, Secretary of State of Texas (Jan. 26, 1976 and Jan. 23, 1976), *available at* http://www.lawyerscommittee.org /projects/section_5/.

Concern about the strong population growth among Latinos in Texas and how to respond to it permeated the 2011 legislative session. Legislators were candid about the threat they perceived from increased Latino population, particularly with respect to redistricting. For example, between 2000 and 2010, the Latino population in Harris County increased by 551,789 and the Anglo population decreased by 82,438. *See* Expert Report of Richard Murray at 27, Trial Ex. E-4, *Perez v. Perry*,[4] Trial Tr. 166:15-22. An Anglo Texas Representative from Harris County explained the lines she had drawn — in which proportionally more minority districts are overpopulated above the ideal district size for Harris County when compared to Anglo districts — by telling minority representatives that "you all are protected by the Voting Rights Act and we are not," and explaining that "We don't want to lose these people due to population growth in the county, or we won't have any districts left." Decl. of Garnet F. Coleman at 2-3, *Texas v. United States*, No. 1:11-cv-01303, Dkt. No. 79-26 (D.D.C. Oct. 25, 2011).

Texas Senator Kel Seliger, who chairs the Texas Senate Select Redistricting Committee, testified in *Perez* that although he believed Latinos are willing to vote for Republican candidates, "Republicans haven't done a very good job of reaching out to Latino voters [and] [w]e keep coming up with proposals to declare English the official language of Texas to no good end." Tr. of Dep. of Kel Seliger at 34:20-35:16, Trial Ex. J-59, *Perez v. Perry*,

[4] All citations to *Perez v. Perry* refer to *Perez v. Perry*, No. 5:11-cv-00360 (W.D. Tex. 2011).

Trial Tr. 1746:18-1747:2 [hereinafter "Seliger Dep."]. Senator Seliger shared his view that creating Latino-opportunity districts seemed to be in some tension with the goal of creating Republican-leaning districts. *Id.* at 35:12-16 ("Q. Do you think it's possible that you could have a majority-Latino district that did prefer a Republican candidate in the general? A. Sure, philosophically I think you could. Has it been done? That, I don't know."). Moreover, despite the fact that Latino Republicans pushed their party to be more inclusive during the 2011 legislative session and that analyses of Latino voting behavior suggest that "[t]here is much more movement across party lines, in terms of how Latinos are distributed," (Trial Test. of Dr. John Alford at 1873:12-19, *Perez v. Perry*, Sept. 14, 2011), when faced with strong Latino population growth and the opportunity to reach out to the burgeoning Latino electorate, the State chose instead to fragment Latino voters so that they would experience no increase in the opportunity to elect Latino-preferred candidates in the new House and Congressional redistricting plans.

Appellees are confident that the Washington D.C. panel will ultimately deny preclearance to the State's plans precisely because Texas intentionally discriminated against Latino voters in drawing its State House and Congressional districts and that, if the State appeals, this Court will affirm the denial of preclearance. We are also confident that, even with respect to areas where the Washington D.C. panel finds neither a discriminatory purpose nor a retrogressive effect, the three-judge court in the

Western District of Texas will find violations of section 2 in the refusal to draw new districts that properly reflect growing Latino populations and that, if the State appeals, this Court will, as it did in *LULAC v. Perry*, 548 U.S. 399 (2006), find violations of section 2. But neither of those decisions, neither of which has yet been rendered, is now before this Court.

II. The Interim Plans Adopted By The Three-Judge Court Comply With All The Relevant Legal Principles

1. Contrary to the State's argument, the three-judge court in this case was forbidden from simply implementing the State's unprecleared plan as an interim measure. *See* Appellants' Br. at 54-55.

As appellees explained in our opening brief, if the Texas panel had done what the State asks — defer wholesale to the State's plan in adopting an interim plan — then the court's plan *itself* would have required preclearance. *See* Appellees' Opening Br. at 44-45 (citing *Lopez v. Monterey Cnty.*, 519 U.S. 9, 22 (1996) and *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981)); *see also* 28 C.F.R. § 51.18(a).

The State's argument that such deference is authorized by regulation, misconstrues the applicable language. *See* Appellants' Br. at 6, 55. To be sure, 28 C.F.R. § 51.18(d) provides that "[a] Federal court's authorization of the emergency interim use without preclearance of a voting change does not exempt from section 5 review any use of

that practice not explicitly authorized by the court." But that provision does *not* say that federal courts are permitted to authorize such use; indeed, this Court has unanimously held in *Clark v. Roemer*, 500 U.S. 646, 652-55 (1991), that when plaintiffs timely seek to enjoin use of an unprecleared election practice — as appellees undeniably did here, filing suit within days of the State's adoption of the challenged plans — it is error for courts to permit their use to go forward. Moreover, as appellees have already explained, any emergency here was entirely of Texas's own making, *see supra* pp. 4-8, and thus provides no basis for circumventing section 5's clear command that no practice can be used "unless and until" it receives preclearance. 42 U.S.C. § 1973c(a).

Finally, the State's attempt to distinguish between "interim" and "permanent" use of a plan is disingenuous at best. *See* Appellants' Br. at 52 ("Allowing an election to go forward on an interim basis while preclearance is pending is not the same as *granting* preclearance."). Many state legislative offices — including, for example, seats in the Texas Senate — involve staggered four-year terms. "Interim" use of a practice that is ultimately denied preclearance can thus result in the use of impermissible electoral practices for nearly half a decade. As this Court long ago recognized, section 5 was intended to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). The State's proposed rule would reverse that burden.

The State attempts to justify this reversal of the statutory language by turning section 5 into an entirely procedural hurdle. Refusal to defer to a covered jurisdiction's unprecleared election laws, the State argues, is justified only when a covered jurisdiction fails even to submit the changes for preclearance — where jurisdictions are, to use the State's term, "recalcitrant"— and not when a jurisdiction is seeking preclearance. Appellants' Br. at 49. The State's argument completely ignores the fact that section 5 is not simply a procedural requirement: it imposes substantive standards. A jurisdiction that adopts a retrogressive plan or that intentionally discriminates against minority voters — an allegation that the preclearance panel found colorable with respect to Texas's plans — is not less "recalcitrant" than a jurisdiction that adopts a fair electoral practice but fails to obtain preclearance. *See* Addendum at 54A. If anything, minority voters are more injured by what Texas has done.

2. As appellees explained in our opening brief, the three-judge court in this case was required to craft an interim plan for conducting the 2012 State House and Congressional elections. *See* Appellees' Opening Br. at 25-26. Moving beyond the State's categorical objection to the three-judge court's having adopted any plan other than the unprecleared 2011 legislative plan, a stark fact emerges: the State's main objections to the judicial maps involve their preservation of existing Latino-opportunity districts and their creation of new districts that fairly recognize intercensal Latino population growth.

Although the State says the three-judge court "proceeded to draw maps governed by its own sense of appropriate public policy," that is simply not the case. Appellants' Br. at 3. To be sure, the three-judge court did not carefully craft its lines to pursue political advantage, as the legislative plan did, but that refusal was entirely appropriate. Nor did the three-judge court surgically move voters in and out of districts to protect incumbents, but that too is beyond a court's role.

To the extent appropriate, the three-judge court *did* defer to state policy. Many of its districts track the lines of districts in the State's plans nearly exactly. The court also deferred a great deal to precleared State policy by relying on the benchmark as the starting point for its plans. The State ignores those decisions entirely.

a. With respect to the State House map, the court's districts are based largely on the benchmark and the State's map. Where the benchmark districts were malapportioned and had to be brought into compliance with one person one vote, the district court looked to the State's House plan and followed it in many instances. *See* J.A. 170-73. For example, more than half of the districts in the court's plan share at least 70 percent of their population with districts in the State's plan. *See* Addendum at 64A-67A.

Many of the remaining districts are based on the benchmark. For example, the three-judge court chose to maintain, in their benchmark locations, two districts that the State's plan relocated to completely

different areas of the state. The district court's interim House plan retained HD 33 in Nueces County, and retained HD 149 in Harris County, where these districts are presently located. The State's plan would have cut HD 33 and HD 149 out of their current locations in the House map and relocated them to Rockwall and Williamson counties respectively. The district court was unanimous in finding that HD 33 and HD 149, both majority-minority districts, should remain in their current locations. Judge Smith wrote that the elimination of HD 33 in Nueces County raised "possible concerns under section 5" and the elimination of HD 149 in Harris County "raises possible section 5 concerns and potentially reeks of racial gerrymandering." J.A. 193.

The State eliminated HD 33 under the guise of adhering to the County Line Rule. However, the precleared benchmark House plan had itself allocated Nueces County among two districts and a partial district that "broke" the county line.

The State's objection to three districts in the court's House plan that it claims improperly unite residents of diverse racial backgrounds similarly ignores the court's deference to the benchmark plan — itself a precleared expression of state policy. *See* Appellants' Br. at 19. Those districts are already majority-minority districts in the benchmark House plan. The district court simply maintained those districts in their current geographic location and maintained their majority-minority demographic composition.

For example, the benchmark HD 149 in Harris County is 77% minority. *See* H100 Map and Voting Rights Data, Trial Ex. J-21, *Perez v. Perez*, Trial Tr. 166:6-14. The State has never claimed that any district in the benchmark plan, which was drawn by the Texas Legislative Redistricting Board in 2001, is a racial gerrymander. Nevertheless, when the district court chose to maintain HD 149 in the same geographic area as the benchmark, with a resulting 75% minority population, the State claims that the district is "race-based" without "legal or factual justification." Appellants' Brief at 19.

The State even accuses the district court of creating racial gerrymanders when the State's versions of the same districts contain majority-minority populations. For example, the State created HD 26 in Fort Bend County with a combined minority population of 56%. *See* H283 Map and Voting Rights Data, Trial Ex. J-29, *Perez v. Perry*, Trial Tr. 166:6-14. The State does not appear to consider its majority-minority district to be a racial gerrymander. By contrast, the State claims that the court impermissibly relied on race when it created its interim HD 26, which is located in the same area of Fort Bend County, splits fewer cities, is more compact, and also contains a majority-minority population.[5]

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[5] *See* Texas Legislative Council, Plan H302_RED100_Population_County, Plan H302_RED135_Cities_CDPs, Plan H302_RED315_Compactness, Nov. 22, 28, 2011, *available at* ftp://ftpgis1.tlc.state.tx.us/planH302/reports/PDF/; *see also* Appellants' Br. at 19.

Similarly, the State's HD 54 in Lampasas and Bell counties is a majority-minority district, but the State does not describe its version of this district as a racial gerrymander. *See* H283 Map and Voting Rights Data, Trial Ex. J-29, *Perez v. Perry*, Trial Tr. 166:6-14. Only when the court located this district in the same geographic area, and made the district more compact by pulling it in one county, does the State now claim that the majority-minority population in the district is unconstitutional. *See* Appellants' Br. at 19.

Finally, the State complains that the district court reduced the extreme population variations between urban districts in Dallas, Harris, and Tarrant counties that the State created for admittedly political reasons. *Id.* at 19-20. However, the district court is not empowered to use the 10% population variation to achieve political ends such as to protect incumbents or to discriminate on the basis of race. In his dissenting opinion, Judge Smith found that "the Legislature created substantial population disparities in Dallas and Harris Counties in a manner that may raise concerns of racial or partisan gerrymandering in violation of *Larios v. Cox*." J.A. 194.

In this case, appellees have raised colorable claims that State's population deviations within the counties were the product of intentional dilution of burgeoning Latino voting strength. Certainly, the district court cannot incorporate population variations that discriminate against certain classes

of voters to pursue political or racially discriminatory ends.

The district court's interim House map is based on neutral principles. For example, the district court's interim House plan splits fewer cities and Census Designated Places than the State's House plan.[6]

Of the more than 1,200 cities in Texas, the State identifies only two that it claims are unfairly split by the district court's House map: The Woodlands[7] and Frisco. It argues that "[n]either of these changes serves any apparent remedial purpose." Appellants' Br. at 18-19. However, the State's House plan split those same two jurisdictions. *See* H283 Map and Voting Rights Data, Trial Ex. J-29, *Perez v. Perry*, Trial Tr. 166:6-14. Despite the fact that the district court's House plan and the State's House plan divide these same two areas, the State claims that the district court's House plan "disregards countless carefully considered policy choices reflected in the legislatively enacted plan." Appellants' Br. at 18. In fact, the State's House plan splits more than 200 Texas cities

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[6] *Compare* Texas Legislative Council, Plan H302_RED135_ Cities_CDPs, Nov. 28, 2011, *available at* ftp://ftpgis1. tlc.state.tx.us/planH302/reports/PDF/ *with* H283 Map and Voting Rights Data, Trial Ex. J-29, *Perez v. Perry*, Trial Tr. 166:6-14.

[7] "The Woodlands" is not a city; it is a special use district associated with an upper-income master-planned housing development. *See* "The Woodlands," available at http://www.thewoodlands.com.

and census designated places – more than the number split by the district court in its House plan.[8]

Had the district court deferred any more to the State's unprecleared plan, not only would it have abdicated its responsibility to craft an independent interim plan that could be put into place without itself first obtaining preclearance, but it would have violated the Voting Rights Act. Recall, as appellees explained in our opening brief, that the State's House plan decreases the number of Latino-opportunity districts. *See* Appellees' Opening Br. at 10 (explaining that the Legislature's redistricting plan reduced the number of Latino-opportunity districts by two). It eliminates Latino-opportunity district HD 33 in Nueces County and reconfigures HD 117 in Bexar County so that it no longer offers Latinos the opportunity to elect their preferred candidate. *See id.* at 11 ("The State pulled the boundaries of HD 117 out of precincts in Southwest San Antonio and extended the district into rural areas of the county.") This was done at the request of the incumbent, who is not Latino-preferred. *See* Supp. J.A. Exhibit 1 (testifying that he advocated extending the boundaries of his district, "as far north" as possible in order to gain voters that "were more Anglo and more conservative"). The State's House plan also intentionally discriminates against Latino voters by failing to create a Latino-

[8] *See* Texas Legislative Council, Plan H302_RED135_ Cities_CDPs, Nov. 28, 2011, *available at* ftp://ftpgis1. tlc.state.tx.us/planH302/reports/PDF/; *see also* H283 Map and Voting Rights Data, Trial Ex. J-29, *Perez v. Perry*, Trial Tr. 166:6-14.

opportunity district in the Rio Grande Valley, where the population increased by the size of a House district, and in El Paso, where the district court found the State had created a district in a bizarre shape to protect an incumbent who was not Latino-preferred from his burgeoning Latino electorate. *See id.* at 10-12 (explaining that in the Rio Grande Valley counties of Cameron and Hidalgo, "Latinos constitute more than 88% of the population of both counties" and "[g]iven that over 99% of the population growth over the decade was Latino, such a district would inevitably have been majority-Latino." (citing Expert Report of Dr. Susan Gonzalez Baker at Tables 3 & 4, Trial Ex. E-9, *Perez v. Perry*, Trial Tr. 166:15-22.)).

b. The three-judge court's interim Congressional map also complies with the relevant districting principles.

The State's charge that the interim judicial plan "alters the boundaries of *every single one* of the 36 congressional districts" in the State's unprecleared plan is misleading. Appellants' Br. at 22. Many of the geographic differences between the interim plan and the State's plan are slight and contain few people. *See* J.A. at 147-148 & n.30 (noting that 9 of the interim plan's districts share 93% to 99% of the population in the State's corresponding districts).

Where the interim and State's districts are not identical, there are good reasons supporting the differences. The interim plan is slightly different

from the State's plan because the district court used whole precincts as building blocks in order to minimize the disruption caused by forcing counties to redraw their precincts before an imminent election. *See* J.A. at 138 n.12 and 150 n.33 ("The Court notes that all population shifts were done in terms of VTD's. A "VTD" is a voter tabulation district and is the functional equivalent of a voting precinct. . . . The Court's map splits only 3 VTD's."). By contrast, the State's Congressional plan contains 520 split VTD's. *See* Comparison of All Submitted Interim Congressional Maps, MALC Pl. Ex. 37, *Perez v. Perry*, (W.D. Tex. admitted Oct. 31, 2011).

Further differences between the plans reflect the district court's compliance with the Voting Rights Act. *See* J.A. at 139-44, 146 (describing reliance on the benchmark plan to maintain African American opportunity districts 9, 18 and 30 and Latino-opportunity districts 15, 16, 20, 23, 27, 28 , and 29). The district court added the four new congressional districts in the same geographic areas as the State's plan and then adjusted the remaining districts around the new districts while maintaining their historic locations. Given the district court's reliance on State policy (as expressed either in the benchmark or the State's new plan) and neutral redistricting criteria, the need to avoid violations of the Voting Rights Act, and the strict requirement of equal population in congressional redistricting, it is predictable that the plans would look slightly different. *See* J.A. at 139, 141-42, 147.

Demonstrating the consistency between the State's plans and the district court's plans, the State can identify only 7 districts out of 186 in the Congressional and House plans that it claims are improper.

The few material differences between the interim judicial plan and the State's unprecleared maps are directly attributable to the court's desire to avoid retrogression and to follow neutral districting principles rather than squeezing every last bit of political advantage for one side.

c. On close inspection, the State's objections to the interim judicial plan for congressional districts are similarly meritless.

First, many of the objections are overstated. As explained above, the State's charge that the judicial plan "alters the boundaries of *every single one* of the 36 congressional districts," Appellants' Br. at 22, ignores the fact that most of those alterations still maintain the constituencies of the districts while also complying with neutral districting principles and the Voting Rights Act. The overwhelming majority of the judicially crafted districts overlap the unprecleared districts in every relevant respect.

Second, the judicial plan closely follows the benchmark, which, as appellees explained in our opening brief, provides the appropriate source of state policy to which courts should defer. *See* Appellees' Opening Br. at 28. For example, the State complains that the district court did not adopt the

State's wholesale reconfiguration of CD 20, a majority-Latino district located in the center of San Antonio, Texas. *See* Appellants' Br. at 23. However, the district court's interim CD 20 shares 77% of its population with the benchmark CD 20.[9] The district court was reasonable to take this least-change and neutral approach to CD 20, as opposed to the State's more extreme and unnecessary changes to CD 20. *See* C185 Map and Voting Rights Data, Trial Ex. J-8, *Perez v. Perry*, Trial Tr. 166:6-14.

Similarly, the State claims that the district court's decision to maintain Nueces County in a Gulf Coast congressional district is incorrect because it "frustrates the desire expressed by the public and legislators from both political parties that Nueces County and Cameron County serve as anchor counties in separate congressional districts." Appellants' Br. at 23. On the contrary, besides the incumbent, who feared he would not be reelected if CD 27 remained majority-Latino, few people advocated for Nueces County to be cut away from other majority-Latino counties along the Gulf Coast in South Texas.[10]

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[9] *See* Texas Legislative Council, RED-340 Report Comparing Plan C220 and Plan C100, Nov. 23, 2011, *available at* ftp://ftpgis1.tlc.state.tx.us/planc220/reports/PDF/.

[10] *See* Trial Test. of Ryan Downton at 1022:10–18, *Perez v. Perry*, Sept. 9, 2011; Trial Test. of Gerardo Interiano at 1461:25–1462:7, *Perez v. Perry,* Sept. 12, 2011; Tr. of Dep. of Gerardo Interiano at 113:20-22, Trial Ex. J-61, *Perez v. Perry*, Trial Tr. 1746:18-1747:2; Seliger Dep. at 90:10–21.

Third, many of the features to which the State objects are actually present in its districts as well. For example, the district court's four new congressional districts are located in the same areas as the proposed new districts in the State's unprecleared plans. *See* Addendum at 59A-62A. One new district is in Dallas-Fort Worth, one is on the Gulf Coast, stretching from Bastrop County to Wharton County, one is based in South San Antonio and runs along the I-35 corridor, and one is in East Texas, running from Chambers County to Jasper. *See id.* The State never explains why the court's decisions, which mirror its own, somehow constitute "highly controversial policy judgments[.]" Appellants' Br. at 3.

Similarly, the State complains that the interim judicial plan divides the City of Arlington into three congressional districts without admitting that the State's plan does the same.[11]

Where the interim judicial plan deviates from the benchmark plan or the policies embodied in the State's unprecleared plan, it does so for entirely justifiable reasons. Of particular salience, the three-judge court, in stark contrast to the State, drew a plan that more fairly reflects Latino population and voting strength.

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[11] *See id.*; *compare* Texas Legislative Council, PlanC220_RED135_Cities_CDPs, *available at* ftp://ftpgis1.tlc.state.tx.us/planC220/reports/PDF/ *with* C185 Map and Voting Rights Data, Trial Ex. J-8, *Perez v. Perry*, Trial Tr. 166:6-14.

For example, the State complains that the district court deliberately created CD 33 as a majority-minority district. *See* Appellants' Br. at 24. However, the court heard testimony that the State's congressional districts intentionally split minority voters in this geographic area, known as the Dallas-Ft. Worth Metroplex. *See* M.J.A. at 12-18; 47-51. The State had located one of its four new districts in the Metroplex but the State's CD33 was not compact, perpetuated the fracturing of minority voters and sprawled into 3 counties. The district court's version of this district was more compact and located in one county. *See* Addendum at 59A.

The State's congressional plan does not add any Latino-opportunity districts for the second consecutive redistricting cycle. Texas has not added a Latino-opportunity congressional district since 1991. Since the 1990 census, the Latino population in Texas increased by 5.1 million; the Anglo population increased by 1.1 million. Nevertheless, Texas crafted a congressional plan that carves away majority-Latino counties from majority-Latino districts and uses race to change districts to ensure that Latinos cannot elect their candidate of choice.

Each of the six majority-Latino congressional districts in South Texas was overpopulated according to the 2010 Census. The total excess population from the majority-Latino districts in South Texas, which are located adjacent to each other, constituted three-quarters of an additional congressional district. *See* Addendum at 58A. In addition, the 2010 Census revealed significant

additional population in the I-35 corridor counties to the north of the majority-Latino districts. *See* J.A. at 142.

Despite the need to release population from the benchmark majority-Latino districts in South Texas, and the ease with which the State could have created a seventh majority-Latino district, the Legislature enacted a congressional redistricting plan that fractured majority-Latino communities in South Texas in order to maintain the status quo of six Latino districts in the region.

For example, in the benchmark Congressional plan, CD 23 is a Latino-opportunity district. In 2006, following the remand of *LULAC v. Perry* and the *LULAC* district court's redrawing of CD 23, Latino voters elected their candidate of choice to Congress. In 2008, Latino voters again elected their candidate of choice. *See* Engstrom Corr. Rebuttal Report at 27, Trial Ex. E-7, *Perez v. Perry*, Trial Tr. 166:15-22 [hereinafter "Engstrom Corr. Rebuttal Report"]. In 2010, an Anglo-preferred candidate defeated the Latino-preferred incumbent.

Also since 2006, voting has remained strongly racially polarized in CD 23. *See LULAC v. Perry*, 548 U.S. 399, 427 (2006) (finding that racially polarized voting in CD 23 was "especially severe."). In South and West Texas, where CD 23 is located, from 2006 to 2010 Latino support for their preferred candidates in racially-contested elections ranged from 89% to 81%. By contrast, Anglo support for Latino preferred candidates ranged from 13% to 19%. Engstrom Corr. Rebuttal Report at 7. As a result,

Latino voters in CD 23 continue to struggle to elect their candidate of choice in a context of high racial polarization and relatively lower Latino turnout rates. *Id*. at 25-26. From 2006 to 2010, Latino-preferred candidates won 2 out of three congressional elections inside CD 23 and Latino-preferred candidates won 3 of 7 racially contested exogenous general elections.[12]

The 2010 Census showed that the benchmark CD 23 was overpopulated by 149,163 people. *See* Trial Test. of Dr. Henry Flores at Trial Tr. 450:2-11,, *Perez v. Perry*, Sept. 7, 2011; Chart, Pl. Ex. 236 *Perez v. Per*ry, Trial Tr. 2019: 2-6. In its 2011 redistricting plan, the State radically revised CD 23, removing 380,677 people (more than twice the amount needed to achieve equal population) and moving in 231,514 people who had not previously resided in CD 23.[13]

The State made deliberate changes to ensure the re-election of the incumbent in CD 23, despite the fact that it knew the incumbent was not the

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[12] See Charts at 5, Pl. Ex. 200, *Perez v. Per*ry, Trial Tr. 2019: 2-6; Election Analysis – 2002 at 1, Pl. Ex. 237, *Perez v. Per*ry, Trial Tr. 2019: 2-6; Election Analysis – 2004 at 1,3, Pl. Ex. 238, *Perez v. Per*ry, Trial Tr. 2019: 2-6; Election Analysis – 2006 at 1, Pl. Ex. 239, *Perez v. Per*ry, Trial Tr. 2019: 2-6; Election Analysis – 2008 at 1, Pl. Ex. 240, *Perez v. Per*ry, Trial Tr. 2019: 2-6; Election Analysis – 2010 at 1, Pl. Ex. 241, *Perez v. Per*ry, Trial Tr. 2019: 2-6.

[13] *See* Office of the Texas Attorney General, Plan Comparison Reports for C100 and C185, Trial Ex. D-2, *Perez v. Perry*, Trial Tr. 1747:3-12.

candidate of choice of Latinos. *See* Trial Test. of Ryan Downton, *Perez v. Per*ry, Tr. 966:3-5; Dep. Tr. of Ryan Downton at 90:9-11, Trial Ex. J-62-I, *Perez v. Per*ry, Trial Tr.1746:18-1747:2; Engstrom Corr. Rebuttal Report at 25.[14]

Texas redistricters were aware that the benchmark CD 23 was a Latino-opportunity district and that undermining Latino electoral opportunity in CD 23 would potentially violate section 2 of the Voting Rights Act, 42 U.S.C. 1973. *See* Seliger Dep. at 30:6-15.

Nevertheless, as appellees explained in our opening brief, the State reconfigured CD 23 so that it would elect the Latino-preferred candidate in only one of ten elections. *See* Appellees' Opening Br. at 16 (citing J.A. 666 and Supp. J.A. Exhibit 2).

All experts in this case agreed that Latinos no longer have the ability to elect their candidates of choice in the State's CD 23. *See* Trial Test. of Dr. Henry Flores at Trial Tr. 454:8-455:1, *Perez v. Perry*, Sept. 7, 2011; Trial Test. of Dr. Richard Engstrom at Trial Tr. 515:24-516:4, *Perez v. Perry*, Sept. 7, 2011; Trial Test. of Allan Lichtman at Trial Tr. 1235:15-1236:2, *Perez v. Perry*, Sept. 10, 2011; Trial Test. of Dr. John Alford at Trial Tr. 1872:14-24, 1877:25-1878:7, *Perez v. Perry*, Sept. 14, 2011.

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[14] *See also* Amicus Br. of Congressman Canseco at 4 ("Under the State's Plan, the Texas Legislature made changes to District 23 to protect the incumbent, Congressman Canseco[.])"

The State's "political decision" was to ensure, through sophisticated fragmentation of the rapidly-growing Latino population, that the State's Latino voters would be unable to elect even one more Latino-preferred candidate to Congress. The district court's refusal to adopt the same tactics in its interim Congressional plan, and to maintain CD 23's configuration as a Latino-opportunity district, is a reasonable rejection of purposeful vote dilution. The district court explained its creation of CD 23 as generally "maintaining the status quo" by (1) keeping HCVAP above 50%; (ii) not decreasing SSVR; and (iii) maintaining the current ability of Latinos to elect their candidate of choice.[15] J.A. 143.

The same analysis holds with respect to Congressional District 27. In the benchmark, Nueces County voters constituted the majority of registered voters in CD 27. From 2000 to 2010, the county's Latino population grew by 31,342 and its Anglo population decreased by 6,308.[16] In the

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[15] Contrary to the assertion of Judge Smith in his dissent (J.A. 153), the evidence in the case regarding Latino-opportunity to elect was based on statistical election analysis performed by the State of Texas and appellees that identified Latino candidates of choice in racially contested elections regardless of political party. There is no evidence in the case suggesting that the district court relied on partisan political performance as a proxy for Latino-opportunity to elect. *See* Engstrom Corr. Rebuttal Report at 26-27; Attorney General Reaggregaed Elections Summary, Pl. Ex. 293, *Perez v. Perry*, Trial Tr. 2019:2-6.

[16] *Compare* Race, Hispanic or Latino, Age, and Housing Occupancy; 2010, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml1?pid

State's congressional plan, Nueces County is no longer the anchor of CD 27. The State separated Nueces County, and its Latino voters, from similar South Texas counties to protect the incumbent Blake Farenthold who was not Latino-preferred and who had won the seat in 2010 with 775 votes. *See* Seliger Dep. at 90:10–14 (explaining the goal of "helping Congressman Farenthold get reelected with a base out of Nueces County.").

As described by Senator Kel Seliger, chairman of the Texas Senate Redistricting Committee:

> We cut the district off at Nueces County. And this was -- early on when I met with the Republicans in the Congressional delegation, they said, "Would you mind looking if there is a way to give Mr. Farenthold a good chance to hold that district," in what had been clearly an opportunity district in my view.

Seliger Dep. at 25:24-26:4.

Here, too, the three-judge court's decision to preserve the benchmark district represents nothing more than its compliance with the longstanding principle that judicially crafted plans should avoid

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=DEC10_PL_QTPL&prodType=table *with* GCT-PL. Race and Hispanic or Latino: 2000, *available at* http://factfinder.census.gov/servlet/GCTTable?_bm=n&_lang=en&mt_name=DEC_2000_PL_U_GCTPL_ST2&format=ST-box_head_nbr=GCT-PL&ds_name=DEC_2000_PL_U&geo_id=04000US48.

retrogression. *See* Appellees' Opening Br. at 48-49. The district court explained its configuration of CD 27 as "restor[ing] district 27 to its benchmark configuration as a South Texas district, extending south from Nueces County with Cameron County as its anchor at the border." J.A. at 141.

As appellees explained in our opening brief, there is nothing objectionable — or even demanding of special explanation — in the court's creation of several additional Latino-opportunity districts (one Congressional district and two House districts). *See* Appellees' Opening Br. at 49-50. The fact that a significant majority of the State's intercensal growth is attributable to increases in its Latino population make such districts the natural byproduct of any redistricting plan that doesn't *deliberately* try to avoid creating them. *See id.* at 50-51.

Furthermore, the district court's observations regarding the dramatic Latino growth from 2000 to 2010 is not the same as mapping for proportionality. If the district court had sought to create a proportional number of districts for Latinos, it would have created many more than it did. Instead, the interim plans demonstrate that the district court sought to avoid retrogression and follow neutral districting criteria; it did not seek to create a proportional number of districts.

Thus, contrary to the suggestion of the United States, it is unnecessary to remand the case for further explanation on this point. *See* Amicus Br. of United States at 10, 30-33. In its creation of CD 33,

for example, the district court employed neutral districting principles in a geographic area (Tarrant County) where the Latino population increased by 197,687, African American population increased by 79,809, and Anglo population increased by 41,882 over the past decade. Creating an additional, compact congressional district in this area of the state, with two large and growing minority populations, would predictably yield a district that is 28% Anglo, 40% Latino and 27% African American.[17]

Finally, the State never addresses the serious legal and constitutional problems with its plans identified by Judge Smith in his dissent. Judge Smith elaborated on the reasons why the three-judge court could not adopt the State's plans wholesale, both in light of the fact that the plans had not received preclearance and in light of flaws he found in the State House plan ranging from a district that "potentially reeks of racial gerrymandering," J.A. 193, to other districts that "may raise concerns of racial or partisan gerrymandering in violation of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004)," J.A. 194, to other districts that created an "extreme gerrymander and palpable population disparities with neighboring districts," J.A. 192, and still another district whose elimination

[17] In a multi-ethnic state such as Texas, where the population is 45% Anglo, 38% Hispanic and 12% African American, the notion that districts should be majority Anglo by default, and that all majority-minority districts are constitutionally suspect unless justified under the Voting Rights Act, is illogical and borders on the offensive.

by the State raises "a possible section 5 retrogression claim." J.A. 193.

In sum, at this point, six experienced judges from different backgrounds and with different perspectives have all concluded after spending months on the cases before them that the State's plans had serious flaws. Unless and until the State receives preclearance, or appeals from a D.D.C. decision denying it, this Court should not intervene.

CONCLUSION

For the reasons stated here and in appellees' opening brief, the orders of the United States District Court for the Western District of Texas should be affirmed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**********	)	
STATE OF TEXAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 11-1303
	)	(TBG-RMC-BAH)
	)	
UNITED STATES OF AMERICA, and ERIC H. HOLDER, in his official capacity as Attorney General of the United States	)	
	)	
Defendants, and	)	
	)	
Wendy Davis, et. al., Intervenor-Defendants.	)	
	)	
**********		

MEMORANDUM OPINION

Before: GRIFFITH, Circuit Judge, COLLYER &HOWELL, District Judges.

COLLYER, District Judge:

In the summer of 2011, the Texas legislature redrew the boundaries for voting districts in the State to account for the report of the 2010 Census that its population had grown in the last decade by

more than four million people, about two-thirds of whom are Hispanic. As required by Section 5 of the Voting Rights Act, Texas has asked this Court for a declaratory judgment that its redistricting plans have neither the purpose nor the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The United States contends that the proposed congressional and State House districts adversely affect the voting rights of Hispanics. Various Intervenors assert the same claim as the United States, but some of them target the plans for the State Senate as well.

On November 8, 2011, this Court denied summary judgment to Texas because: 1) Texas used an improper standard and/or methodology to determine which districts afford minority voters the ability to elect their candidates of choice; and 2) material facts remain in dispute regarding whether the plans in fact comply with Section 5 of the Voting Rights Act. Order [Dkt # 106]. This Opinion provides our analysis.

I. FACTS

A. Procedural Background

On July 19, 2011, Texas filed the instant complaint for declaratory judgment that redistricting plans[1] it adopted to govern elections for the U.S. House of Representatives ("Congressional Plan"), the

[1] Redistricting is a process by which national, state, and local voting districts are redrawn, normally after each national census because of population changes over the intervening decade.

State House of Representatives ("State House Plan"), the State Senate ("State Senate Plan") (collectively the "Plans"), and the State Board of Education complied with Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The United States and several of the Intervenors[2] (collectively with the United States, the "Defendants") filed answers challenging the Congressional Plan, the State House Plan, and the State Senate Plan. No one challenges the redistricting plans for the State Board of Education.[3]

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[2] This Court has granted seven parties status as Defendant-Intervenors. Each Intervenor contests various aspects of one to three of the plans in their capacity as individual voters, state elected representatives, or civil rights advocacy groups. The Davis Intervenors are Texas State Senators and representatives from districts in the Fort Worth area. The Mexican American Legislative Caucus is a caucus group in the Texas House of Representatives. The Gonzales Intervenors are a group of Hispanic and Black voters residing in Texas. The Texas Legislative Black Caucus is composed of seventeen members of the Texas House of Representatives. The Texas Latino Redistricting Task Force is a group of Hispanic organizations focusing on redistricting and voter registration. The Texas State Conference of NAACP Branches and the League of United Latin American Citizens are civil rights and advocacy groups concerned with minority voting rights in Texas.

[3] The Texas State Board of Education ("BOE") is composed of fifteen single-member districts. Texas claimed that the benchmark plan for the BOE contained three Hispanic "opportunity" districts, with a Hispanic Citizen Voting Age Population ("HCVAP") of greater than fifty percent, and two Black "opportunity" districts, with a Black Voting Age Population ("BVAP") of greater than thirty percent. In the proposed BOE plan, Texas states that there are also three Hispanic "opportunity" districts that have an HCVAP of greater than fifty percent, and two Black "opportunity" districts with BVAPs of greater than thirty percent. This Court provided the parties another opportunity to object to preclearance of the

Texas moved for summary judgment on September 14, 2011. The parties engaged in swift discovery, filed briefs and exhibits, and presented oral argument to this Court on November 2, 2011.

A three-judge court in the Western District of Texas is currently hearing constitutional challenges and challenges under Section 2 of the Voting Rights Act to these same redistricting Plans. Mindful of the fact that our refusal to grant preclearance would require that court to draw interim plans because of election-related deadlines in Texas, this Court issued an order denying summary judgment on all three Plans on November 8, 2011. *See* Dkt. # 106; *see also* Perez v. Texas, No. 5:11-360, Am. Order [Dkt. # 391] (W. D. Tex. Oct. 4, 2011) (consolidated action); Davis v. Perry, No. 5:11-788, Am. Order [Dkt. # 15] (W. D. Tex. Oct. 4, 2011). The Court now issues its Memorandum Opinion explaining its reasoning.

B. Statutory Background

The Voting Rights Act of 1965 ("VRA"), Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 et seq.), was enacted to counteract attempts by states and local jurisdictions to evade the Reconstruction Amendments' prohibitions on racial discrimination in voting.[4] Litigation and court

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proposed BOE plan during a teleconference held on September 21, 2011. After no party voiced opposition, this Court entered declaratory judgment in favor of Texas on that plan on September 22, 2011. See Minute Entry Order (Sept. 22, 2011). Consequently, the BOE plan is not in contention here.

[4] The VRA was extended in 1975 to cover members of language minority groups, such as Hispanics. Through reference to 42

orders had been slow and often ineffective in curbing the egregious abuses that jurisdictions had used to impede minority voters in the exercise of their constitutionally protected rights. *South Carolina v. Katzenbach,* 383 U.S. 301, 313-14 (1966). The VRA contains a set of "sterner and more elaborate measures" that Congress found necessary to fight the "insidious and pervasive evil which had been perpetrated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Id.* at 309.

The VRA contains a complex remedial scheme "aimed at areas where voting discrimination has been most flagrant." *Id.* at 315. These targeted, temporary remedial measures apply to a state or local political body that is a "covered" jurisdiction as defined by Section 4(b) of the VRA, *i.e.*, one that has been found, according to a statutory formula, to have engaged in voting discrimination. *See* 42 U.S.C. § 1973b(b); *Riley v. Kennedy*, 553 U.S. 406, 413 (2008). Section 5 is one of those temporary remedial measures. It was enacted as "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130,

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U.S.C. § 1973b(f)(2) in both subsections (a) and (b), Section 5 extends its protection to language minority groups:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

42 U.S.C. § 1976b(f)(2).

140 (1976) (quoting H.R. REP. No. 94-196, at 57-58 (1970)).

Section 5 requires covered jurisdictions to obtain preclearance for any changes to voting qualifications, requirements, standards, practices, or procedures either administratively from the Attorney General or from the District Court for the District of Columbia. Section 5 places the burden of proof on the covered jurisdiction to show that the planned change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." 42 U.S.C. § 1973c(a). Subsection 1973c(b) of the statute further provides that:

> Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or [membership in a language minority group], to elect their preferred candidates of choice denies or abridges the right to vote . . . .

Id. § 1973c(b). The goal of subsection 1973c(b) "is to protect the ability of such citizens to elect their preferred candidates of choice." *Id.* § 1973c(d). In addition, the statute further explains that "[t]he term 'purpose'. . . shall include any discriminatory purpose." *Id.* § 1973c(c). No change to a voting practice or procedure, including an electoral redistricting plan, *see Miller v. Johnson*, 515 U.S. 900, 905-06 (1995), may be implemented until

preclearance is granted. *Reno v. Bossier Parish School Bd.* (*Bossier I*), 520 U.S. 471, 477-78 (1997).

Section 5 originally was intended to be in effect for only five years, but Congress has re-authorized it four times, most recently in 2006 for twenty-five years.[5] *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2510 (2009). During the 2006 reauthorization, Congress amended the statute to clarify what it meant by "effect" and "purpose" under Section 5, *Shelby Cnty. v. Holder*, No. 10-cv-651, 2011 WL 4375001, at *10-11 (D.D.C. Sept. 21, 2011), and added language to emphasize that a Section 5 inquiry must focus on whether a proposed change will "diminish[]" the ability of minority voters "to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b), (d); H.R. REP. NO. 109-478, at 46 (2006) ("Thus, in amending Section 5 to add a new subsection (b), the Committee makes clear that in making preclearance determinations under Section 5, the comparative 'ability [of the minority community] to elect preferred candidates of choice' is the relevant factor to be evaluated . . . ." (alterations in original)).[6] Speaking broadly, Congress proscribed "any" change that would have such an "effect" because such a change "denies or abridges the right

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[5] On July 27, 2006, President George W. Bush signed into law the Fannie Lou Hamer, Rosa Parks, & Coretta Scott King Voting Rights Reauthorization & Amendments Act of 2006 ("2006 Amendments"), Pub. L. No. 109-246, 120 Stat. 577 (2006). This legislation was passed by a vote of 390-33 by the U.S. House of Representatives, and 98-0 by the Senate.

[6] The House Committee on the Judiciary reported H.R. 9, the Fannie Lou Hamer, Rosa Parks, & Coretta Scott King Voting Rights Reauthorization & Amendments Act of 2006, out of Committee by a vote of 33-1. There was no dissenting minority opinion to the Committee Report.

to vote." 42 U.S.C. § 1973c(b). Thus, a covered jurisdiction will not meet the requirements of Section 5 when a proposed change to a voting procedure or plan would have a retrogressive effect on the "ability" of minority voters to elect candidates of their choice. *Id.*

The 2006 Amendments also proscribe "any" change that "has the purpose of" diminishing the ability of minority voters to elect candidates of their choice. Congress sought to ensure that "purpose" was no longer limited to a "retrogressive purpose," as the Supreme Court had held in *Reno v. Bossier* (*Bossier II*), 528 U.S. 320 (2000), *see* 42 U.S.C. § 1973c(b)-(c); H.R. REP. NO. 109-478, at 46, but covered more broadly "any discriminatory purpose." 42 U.S.C. § 1973c(c) (emphasis added).

Defendants challenge both the effect of and the purpose behind Texas' redistricting Plans. In particular, this lawsuit focuses on the Plans' effect on Hispanic and Black voters in Texas and whether these Plans were enacted with a discriminatory purpose aimed at such voters. For the purposes of the VRA, Hispanic citizens are treated as members of a language minority group. *See* 42 U.S.C. § 1973l(c)(3) ("'[L]anguage minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.").

1. "Effects" Analysis

The Section 5 evaluation of whether a new procedure has "the effect of denying or abridging the right to vote" is not a question of constitutional law but of statutory construction, and is dependent on congressional intent. *Beer*, 425 U.S. at 139-40. By

enacting Section 5, Congress aimed to guarantee that minorities' new gains in political participation would not be undone. *Id.* at 140-41. Thus, the Supreme Court has found that the "purpose of [Section] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141 (emphasis added); *see* 42 U.S.C. § 1973c(d) ("The purpose of [§ 1973(b)] is to protect the ability of such [minority] citizens to elect their preferred candidates of choice.").

Determining whether a new voting plan diminishes the ability to elect and thus has a retrogressive effect on minority voting rights necessarily requires a comparison between the voting plan in place and the proposed plan. *Bossier I*, 520 U.S. at 478. A covered jurisdiction's existing plan serves as the "benchmark" against which the "'effect' of voting changes is measured." *Id.* The Supreme Court has instructed that Section 5 is not ameliorative and the focus of its retrogression analysis is on "freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory." *Beer*, 425 U.S. at 140 (quoting H.R. REP. NO. 94-196, at 57-58) (internal quotation marks omitted). If a plan does not increase the degree of discrimination against a minority voting population, it is entitled to preclearance. *City of Lockhart v. United States*, 460 U.S. 125, 134-35 (1987). For example, plans that preserve or actually increase minority voting strength should be precleared unless they have a discriminatory purpose. *See Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003) (quoting *Lockhart*, 460 U.S. at 134 n.10; *Bush*

v. Vera, 517 U.S. 952, 983 (1996)); *Beer*, 425 U.S. at 141 (holding that an "ameliorative new legislative apportionment cannot violate [Section] 5 unless . . . [it] so discriminates on the basis of race or color as to violate the Constitution").

Beer described Section 5 as requiring covered jurisdictions to protect minority groups' "effective exercise of the electoral franchise," which meant the "ability of minority groups to participate in the political process and to elect their candidate of choice." 425 U.S. at 141 (emphasis added). Although the Supreme Court used this phrase in subsequent decisions, it was not until *Georgia v. Ashcroft* that the Court provided further explanation of its reasoning. *Georgia v. Ashcroft* placed greater emphasis on minority participation in electoral politics, holding that a "court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice" but should look to the "totality of the circumstances" regarding voter participation, including "the extent of the minority group's opportunity to participate in the political process." 539 U.S. at 479-80 (emphasis added). Using this analysis, the Court stated that Section 5 accommodates choices by covered jurisdictions among systems of representation when redistricting, *i.e.*, a jurisdiction may create "safe" majority-minority districts that may "virtually guarantee the election of a minority group's preferred candidate"; it may create districts where a coalition of voters "will help to achieve the electoral aspirations of the minority group"; or it may add "influence districts," where minorities play a "substantial, if not decisive, role in the electoral process." *Id.* at 480-83. The Supreme Court concluded that the lower court's

retrogression analysis had focused too much on decreases in the Black population in majority-minority districts and had not properly credited increases in coalition and influence districts under Georgia's proposed redistricting plan, which could offset potential losses in majority-minority districts. *Id.* at 486-87.

Congress disagreed with this analysis and amended Section 5 in response to *Georgia v. Ashcroft* during the VRA's 2006 reauthorization. *See* H.R. REP. NO. 109-478, at 45; S. REP. NO. 109-295, at 18 (2006); *see also LaRoque v. Holder*, 650 F.3d 777, 794 (D.C. Cir. 2011); *Shelby Cnty.*, 2011 WL 4375001, at *11. The 2006 Amendments clarified that Congress intended a Section 5 inquiry to focus on whether a proposed voting change will diminish the "ability [of minority citizens] to elect preferred candidates of choice." H.R. REP. NO. 109-478, at 46 (emphasis added). Thus, Congress specified that any change that has the effect of diminishing citizens' ability to elect a candidate of their choice on account of race, color, or membership in a language minority group "denies or abridges the right to vote" within the meaning of Section 5. 42 U.S.C. § 1973c(b); H.R. REP. NO. 109-478, at 46.

By these Amendments, Congress sought to make clear that it was not enough that a redistricting plan gave minority voters "influence"; a plan cannot diminish their ability to elect candidates. The House Report opined that leaving the *Georgia v. Ashcroft* standard in place would encourage states to disperse minority voters into different voting districts under an "influence" label and that gains made by minority voters in districts where they were represented by

the candidate of their choice would be jeopardized. H.R. REP. NO. 109-478, at 45.

2. "Purpose" Analysis

Section 5 also prohibits covered jurisdictions from implementing a plan that is enacted with the "purpose" of "denying or abridging the right to vote on account of race, color, or [membership in a language minority]." 42 U.S.C. § 1973c. In *Bossier II*, the Supreme Court held that a plan animated by a discriminatory purpose could nonetheless merit preclearance if its purpose was something other than to diminish a minority group's ability to elect their preferred candidates. The government conceded that the plan proffered by the covered jurisdiction did not have a retrogressive effect on the voting ability of the minority population. 528 U.S. at 324. The government argued that the Court should nonetheless deny preclearance because facts demonstrated that the plan was enacted with discriminatory intent. *Id.* at 328. In a 5-4 decision, the Supreme Court concluded that "the 'purpose' prong of § 5 covers only retrogressive dilution." *Id.* In other words, Section 5 only prohibited plans that were enacted with the purpose to reduce minorities' ability to elect — whether or not retrogression actually occurred. Section 5 did not, however, "prohibit preclearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose." *Id.* at 341.

In the 2006 Amendments, Congress clarified that the "purpose" requirement of Section 5 prohibits not only voting plans enacted with a retrogressive purpose, but also plans devised with "any

discriminatory purpose." 42 U.S.C. § 1973c(c). The House Report characterized *Bossier II* as a severe limitation on the reach of the "purpose" prong, through which "Congress [had] sought to prevent covered jurisdictions from enacting and enforcing voting changes made with a clear racial animus, regardless of the measurable impact of such discriminatory changes." H.R. REP. NO. 109-478, at 42. According to the House Report, Congress intended to restore the pre-Bossier II discriminatory purpose standard:

> Voting changes that "purposefully" keep minority groups "in their place" have no role in our electoral process and are precisely the types of changes Section 5 is intended to bar. To allow otherwise would be contrary to the protections afforded by the 14th and 15th [A]mendment[s] and the VRA. Thus, by clarifying that any voting change motivated by any discriminatory purpose is prohibited under Section 5, the Committee seeks to ensure that the "purpose" prong remains a vital element to ensuring that Section 5 remains effective.

Id. at 43. To that end, Congress endorsed the framework in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), to determine "whether voting changes submitted for preclearance were motivated by a discriminatory purpose." *Id.* Prior to *Bossier II*, courts had relied upon the factors set forth in

Arlington Heights to assess whether a covered jurisdiction's proposed change to its voting procedures was based upon a discriminatory purpose. *See Arizona v. Reno*, 887 F. Supp. 318, 322 (D.D.C. 1995); *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983). Indeed, *Bossier I* instructed lower courts conducting a Section 5 analysis to "look to . . . *Arlington Heights* for guidance," where the Court had "set forth a framework for analyzing 'whether invidious discriminatory purpose was a motivating factor' in a government body's decisionmaking." 520 U.S. at 488 (quoting *Arlington Heights*, 429 U.S. at 266). The legislative history to the 2006 Amendments and reauthorization of the VRA demonstrate congressional agreement with that approach.

Arlington Heights was not a Voting Rights Act case. It involved the refusal of the Village of Arlington Heights, Illinois, to re-zone a tract of land for low-income housing, which was challenged as a violation of the Equal Protection Clause of the Fourteenth Amendment. In reaching its decision in favor of the Village, the Supreme Court identified multiple factors to assess whether the Village's purpose was discriminatory. 429 U.S. at 267-68. The Court cautioned that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266; *see also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (describing such an inquiry as "an inherently complex endeavor").

"[A]n important starting point," the Court directed, is to consider whether the challenged action "bears more heavily on one race than another."

Arlington Heights, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)) (internal quotation marks omitted). In "easy" cases, "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Id.* (citations omitted). That said, absent a pattern of discrimination which is "stark," an action's "impact alone is not determinative, and the Court must look to other evidence." *Id.* (footnote omitted). Courts should consider "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; "[t]he specific sequence of events leading up [to] the challenged decision [which] also may shed some light on the decisionmaker's purposes"; and "[t]he legislative or administrative history," which can be "highly relevant . . . where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 267-68.

C. Parties' Arguments Regarding the Legal Standard to Measure Retrogressive Effect

Texas and the Defendants contest the standard for measuring whether a proposed redistricting plan would have a retrogressive effect on minority voters' ability to elect their candidates of choice. Texas relies on voting population demographics alone. In both its benchmark and proposed plans, Texas counted as ability districts, which it calls "opportunity

districts,"[7] those districts in which Blacks make up forty percent of the voting-age population and Hispanics make up fifty percent of the citizen voting-age population. Texas omitted consideration of all other factors. The United States, joined by all Intervenors, argues for a multi-factored "functional" analysis, which starts with an examination of voting-age population but also analyzes additional factors. *See* Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470 (Feb. 9, 2011).

Texas contends that the 2006 Amendments to Section 5 provide that covered jurisdictions need only maintain those districts where minority voters can control the election and posits that majority-minority districts are best suited to accomplish this goal. Texas relied on voting-age population statistics to ensure that its proposed redistricting Plans were not retrogressive. Texas explains that each of its Plans maintains at least the same number of districts as in

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[7] Texas' use of "opportunity district" connotes a measure of uncertainty that is not supported by the language of the VRA. "Opportunity" denotes conditions that are "favorable" to such an outcome. See WEBSTER'S INTERNATIONAL NEW DICTIONARY 1583 (3d ed. 2002) (defining "opportunity" as "a combination of circumstances, time, and place suitable or favorable for a particular activity or action" (emphasis added)). The statutory standard is whether minorities have an "ability to elect" a preferred candidate. An "ability" denotes the "the physical, mental, or legal power to perform," *Id.* at 3, a concept that requires a greater degree of certainty that an event can occur. Thus, in line with the language of Section 5, this Court references "ability districts" as districts that afford minority voters the electoral power protected under Section 5. This term is used both for districts that have afforded minority voters the ability to elect their preferred candidate in the past and those that predictively will do so in the future.

the benchmark plans in which a specified minority constitutes a percentage of eligible voters sufficient to determine the outcome of elections. Texas sets this percentage at more than fifty percent of the citizen voting-age population for Hispanics ("HCVAP") and forty percent of the voting-age population for Blacks ("BVAP") in the State. Texas "defines 'ability to elect' districts based upon . . . demographic data indicating [that] a [single] cohesive racial or ethnic group has the ability to elect candidates of their choice — whether or not the candidate receives support from other voters in the district." Pl.'s Reply [Dkt. # 92] at 27. Thus, Texas' arguments that its Plans have no retrogressive effect are solely based upon data measuring minority voting-age population.

Defendants challenge this logic and its results. All Defendants ask this Court to conclude, consistent with the guidance issued by the DOJ in 2011 ("2011 DOJ Guidance"), that there is no single measure that determines minorities' ability to elect:

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment." *See* [2011 DOJ Guidance]. Determining whether the ability to elect exists "requires a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.* Besides population, this includes an examination of election history and

> voting patterns within the jurisdiction, voter registration and turnout information.[8]

U.S. Mem. [Dkt. # 79] at 6; *see* Intervenors' Joint Mem. [Dkt # 74] at 7.

Although the United States relies on the multi-factored 2011 DOJ Guidance, the test it offered to measure retrogression, while more comprehensive than Texas' approach, still relied upon a limited set of data. Using data compiled by the State, the United States' expert, Dr. Lisa Handley, performed a functional election analysis in which she assessed data on statewide elections and elections within specific voting districts in order to identify which districts afford minority voters the ability to elect. She then recompiled data on certain statewide elections based upon the proposed new boundaries of voting districts and determined how often minority-preferred candidates would succeed in the redrawn districts. The United States used this data to assert that minority groups' ability to elect would be lost in

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[8] The 2011 DOJ Guidance indicates that the DOJ also assesses:

> whether minority concentrations are fragmented among different districts; whether minorities are overconcentrated in one or more districts; whether alternative plans satisfying the jurisdiction's legitimate governmental interests exist, and whether they were considered; whether the proposed plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and, whether the plan is inconsistent with the jurisdiction's stated redistricting standards.

76 Fed. Reg. 7470-01, at 7472.

certain proposed congressional and State House districts.

The Intervenors also take issue with Texas' view that all districts where Hispanic voters constitute a majority of the citizen voting-age population or Black voters constitute forty percent of the voting-age population are ipso facto "ability to elect" districts. They advocate for a multi-factored approach that accounts for:

- the size of a district's minority population considering citizenship rates;
- voting-age population and voter registration;
- the extent of racially polarized voting;
- the presence of electoral coalitions involving minority voters;
- the role of incumbency in past elections;
- factors that affect turnout rates by race; and
- recent electoral trends.

Intevenors' Joint Mem. at 6-7.

All Defendants contend that Section 5 protections are not limited to districts where a single minority group has the ability to elect its candidate of choice, but extend to districts where one group of minority voters joins together with voters of a different racial or language background to elect the minority voters' candidate of choice. The United States points to language in the House Report accompanying the 2006 Amendments explaining that Section 5 protects minorities' ability to elect candidates of choice either "directly or coalesced with other voters." U.S. Mem. at 14 (quoting H.R. REP. NO. 109-478, at 46). Defendants urge this Court to conclude that the proposed Plans are retrogressive because they do not account for the loss of coalition districts, while Texas

contends that such districts are not protected under the VRA.

Defendants also argue that where, as in Texas, a proposed plan contains an increased number of voting districts, the percentage of minority ability districts in the proposed plan should be measured against the percentage of minority ability districts in the benchmark plan. Defendants ask this Court to find that the Congressional Plan is retrogressive because it increases the number of electoral districts (in significant part because of the increase in the Hispanic population in Texas), but allegedly does not increase the number of ability districts for Hispanic voters.

Finally, the Intervenors, most specifically the Texas Legislative Black Caucus ("TLBC"), the League of United Latin American Citizens ("LULAC"), and the Texas State Conference of NAACP Branches, assert that Section 5 not only protects against the diminishment of an existing ability to elect, but also the diminishment of an emerging ability to elect. These Intervenors contend that Section 5's retrogression standard must include an assessment of whether redistricting forestalls emerging minority electoral opportunities in benchmark districts. They argue that, because a retrogression analysis under Section 5 in some measure looks to the future effect of changes in voting practices, it must protect against the reduction of predictable future gains in minority voting strength.

D. Parties' Arguments Regarding the Contested Plans

Applying their own respective retrogression analyses, the parties dispute the alleged retrogressive effect that Texas' proposed restricting Plans will have on minority voters' ability to elect their candidates of choice. The parties' comparison of the benchmark plans, *i.e.*, the most recent electoral plans in effect for the U.S. House of Representatives, Texas State Senate, and Texas House of Representatives,[9] with Texas' proposed redistricting Plans leads them to dispute which districts should be counted as minority ability districts in both the benchmark and proposed Plans.[10]

1. The Congressional Plan

In its analysis of the benchmark congressional districts, Texas identified, out of a total of thirty-two districts, seven Hispanic ability districts, each of which allegedly has an HCVAP of more than fifty percent.[11] Texas concedes that under the proposed

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[9] Texas identified the following benchmark plans. For the U.S. House of Representatives, the State identified plan C100, which was implemented in 2006 by the U.S. District Court for the Eastern District of Texas in *LULAC v. Perry*, 457 F. Supp. 2d. 716 (E.D. Tex. 2006). For the Texas House of Representatives, it identified plan H100, which was implemented in 2001 by the same district court in *Balderas v. Texas*, No. 01-158, Final Judgment [Dkt # 458] (E.D. Tex. Nov. 28, 2001). For the Texas State Senate, it identified plan S100, which was implemented in 2001 after it received preclearance from the DOJ.

[10] For example, Texas identified eight minority ability districts in the benchmark congressional plan while the United States identified ten. Likewise, Texas identified forty-three minority ability districts in the benchmark plan for the Texas House while the United States identified fifty.

[11] Texas identified Congressional Districts 15, 16, 20, 23, 27, 28, and 29 as Hispanic ability districts in the benchmark.

Congressional Plan, Congressional District ("CD") 27 would no longer be an ability district for Hispanics. Texas counters that this loss is more than offset by two new Hispanic ability districts: approximately 71.7 percent of the citizen voting age population of CD 34 will be Hispanic; 51.9 percent of CD 35 will be as well. As a result, Texas asserts that its proposed Congressional Plan will add one Hispanic ability district, increasing the number of Hispanic ability districts from seven to eight. The proposed Congressional Plan will thus, according to Texas, ameliorate rather than retrogress Hispanic voting power in the State.

Texas also asserts that Black voting power in the State will be enhanced under the Congressional Plan. Currently, only CD 18 has a BVAP of more than forty percent. With the new plan, CD 30 will also.[12]

The United States agrees that the proposed Congressional Plan does not retrogress Black voting power, and appears to credit Texas with three (not just two) Black ability congressional districts in the Congressional Plan. According to the United States, CDs 9, 18, and 30 are, and will remain, Black ability districts in both the benchmark and the proposed plan. The United States argues, however, that Hispanic voting power will retrogress under the proposed Congressional Plan because: 1) Texas' Congressional Plan does not create any new Hispanic ability districts, despite a significant increase in the Hispanic population and four new congressional

[12] Without explaining its relevance, Texas also points out that CD 9, which has a more than thirty percent but less than forty percent BVAP, will maintain that percentage under the proposed plan.

districts in the State; and 2) CD 23, which Texas counts as a Hispanic ability district under the benchmark, would not be an ability district in the proposed plan.

Both the United States and Texas agree that the proposed Congressional Plan would include at least seven Hispanic ability districts (CDs 15, 16, 20, 28, 29, 34, and 35) and that CD 27, which was a Hispanic ability district under the benchmark, would lose this status. The parties dispute the status of CD 23 under the proposed plan. Although both agree that CD 23 is a Hispanic ability district under the benchmark, they disagree as to its status under the proposed plan. Texas asserts that CD 23 will continue to be a Hispanic ability district in the proposed plan because it will have an HCVAP of 58.5 percent. The United States argues that CD 23's new boundaries, which will allegedly include Hispanics with lower voter turnout, will actually decrease Hispanic voter participation and diminish their ability to elect. However, the United States agrees that the alleged addition of CDs 34 and 35 as Hispanic ability districts in the proposed Congressional Plan would provide Texas with seven total Hispanic ability districts under the proposed plan.

The Gonzales Intervenors argue that CD 25 should be counted in the benchmark as a minority ability district and that the proposed Congressional Plan has a retrogressive effect on this district. They argue, with no opposition from Texas, that Hispanic, Black, and fifty percent of White voters in CD 25 have voted cohesively in support of minority preferred candidates. But CD 25 will lose large numbers of minority voters in the proposed plan, and

these voters will be replaced by an influx of White voters whose voting behavior differs substantially from the Whites who voted with minorities in the benchmark.

Finally, the United States and several Intervenors assert that the proposed Congressional Plan is retrogressive because it fails to recognize adequately the significance of the Hispanic contribution to Texas' population growth in the last decade. According to the 2010 Census, the population of the State has grown by over four million people since 2000, of which approximately two-thirds are Hispanics. This population surge has resulted in a gain of four seats in the U.S. House of Representatives, increasing the number of Texas delegates from thirty-two to thirty-six, an increase unprecedented for a state fully covered by Section 5. U.S. Mem. at 22 n.9. Despite the historic increase in the number of congressional seats, these Defendants argue that Texas drafted a redistricting plan that creates no new Hispanic ability districts. They argue that this is sufficient evidence that the proposed Congressional Plan is retrogressive, because maintaining at seven the number of Hispanic ability districts in the face of this surge in Hispanic population would reduce the proportion of Hispanic ability districts in Texas' congressional delegation.[13] Texas responds that a redistricting plan that preserves the pre-existing number of minority ability

[13] The United States and the Latino Redistricting Task Force Intervenors calculate that Hispanic voters have the ability to elect preferred candidates in 21.9 percent of the benchmark districts but only in 19.4 percent of the districts in the Congressional Plan.

districts will always satisfy Section 5's retrogression standard.

2. The Texas House of Representatives Plan

In the benchmark plan for the Texas House of Representatives, Texas identifies thirty districts out of a total of 150 that have an HCVAP of more than fifty percent, which, by Texas' measure, afford Hispanic citizens the ability to elect their candidates of choice.[14] According to Texas, the proposed State House Plan will also have thirty districts that have an HCVAP of more than fifty percent, allegedly maintaining the same number of Hispanic ability districts as in the benchmark. Texas concedes that State House District ("HD") 33, which is currently a Hispanic ability district under the benchmark plan, will no longer be such a district in the proposed State House Plan. Texas claims, however, that "new" HD 148 will offset that loss. With regard to the Black minority population, Texas identifies eleven districts in the benchmark plan that have a BVAP of more than forty percent, and twelve districts with the same BVAP of more than forty percent in the proposed State House Plan. The proposed plan adds HD 27 as a new Black ability district. Based on these population statistics, Texas contends that its proposed State House Plan will not have a retrogressive effect on the ability of Hispanic or Black voters to elect their candidates of choice to the Texas House of Representatives.

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[14] The thirty Hispanic ability districts that Texas identifies in the House benchmark plan are districts 31, 33-43, 74-80, 104, 116, 117-119, 123-125, 140, 143, and 145.

The United States and several Intervenors, however, disagree. Notably, the United States does not believe the proposed State House Plan would retrogress Black voting power.[15] However, according to the United States and several Intervenors, the State House Plan would retrogress Hispanic voting power. Based on its retrogression analysis, the United States identifies thirty-four Hispanic ability districts under the benchmark plan, of which three or four will allegedly be lost in the proposed State House Plan.[16]

Additionally, Dr. Handley opines that of four "coalition districts" in the benchmark, where minorities have been able to elect their candidates of choice by uniting with other minority groups, two — HD 149 and HD 27 — will be lost. In HD 149, a coalition of Hispanic, Black, and Asian voters has repeatedly elected its candidate of choice since 2004, but that ability would be lost under the proposed State House Plan. Although Dr. Handley also identified HD 27 as a coalition district in the benchmark, she noted that it would change to a

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[15] The United States identifies twelve Black ability districts under the benchmark plan, 22, 95, 100, 109-111, 131, 139, 141, 142, 146, and 147. It identifies HD 27 as a new Black ability district in the proposed State House Plan, which brings its count of such districts to thirteen under the proposed plan.

[16] The United States asserts that Hispanic voters would lose the ability to elect their candidate of choice in HDs 33, 35, and 117 due to the reconfiguration of the Hispanic population in each district and racially polarized voting. Additionally, the government states that Hispanic voters may also lose their ability to elect in HD 41. The government's expert was "unable to make a determination" regarding this district. U.S. Mem., Ex. 4 [Dkt. # 79-6] at 1 n.1 (Handley House Report). Texas argues that HDs 35, 41, and 117 will remain majority-minority, although there will be a decrease in HCVAP in HDs 35 and 41.

Black ability district under the proposed plan. Due to alleged fracturing in these districts, the United States anticipates a loss of four to five minority ability districts, *i.e.*, HDs 33, 35, 41, 117, and 149, in the State House Plan.

As noted, most Intervenors agree with the United States. In addition, Intervenors TLBC, LULAC, and the Texas State Conference of NAACP Branches argue that, under the State House Plan, minority voting power would be diminished in HDs 26, 101, 106, and 144, each of which was on the verge of becoming a minority ability district under the benchmark.

3. The Texas State Senate Plan

Out of a total of thirty-one State Senate districts, Texas identifies seven Hispanic ability districts under the benchmark plan in which there is an HCVAP of greater than fifty percent,[17] and claims the same number based on the same districts in the proposed State Senate Plan. Additionally, Texas identifies two Black ability districts with a BVAP of more than forty percent under the benchmark plan, each of which remains such in the proposed State Senate Plan.[18] The United States has similarly concluded that the proposed State Senate Plan is not retrogressive.

However, the Davis Intervenors allege that the State Senate Plan is retrogressive because it

[17] The Hispanic ability districts that Texas identifies in the State Senate benchmark plan are districts 6, 19-21, 26, 27, and 29.

[18] The Black ability districts that Texas identifies in the State Senate benchmark plan are districts 13 and 23.

fractures Black and Hispanic communities that have formed a working coalition to elect their candidate of choice in Senate District ("SD") 10.[19] This is not a district deemed by Texas or the United States to be a minority ability district in the benchmark plan. However, the Intervenors claim both that it was an ability district in the benchmark and that, due to alleged fracturing of SD 10's minority communities in the proposed State Senate Plan, minority voters in this district will no longer be able to elect their candidate of choice. Texas "refutes any argument that [SD] 10 was 'dismantled'" and further states that SD 10 "in both the benchmark plan and [the proposed plan] is a crossover district, and not even a particularly strong one. Such districts are not protected under the VRA." Texas Reply to Senate [Dkt. # 90] at 5.

Another group of Intervenors — TLBC, LULAC, and the Texas State Conference of NAACP Branches — argues that the proposed State Senate Plan will retrogress minority voters' ability to elect in SD 15. These Intervenors allege that the combined Black and Hispanic percentage of total population in proposed SD 15 decreases from 72.3 percent to 66.7 percent and that such a decrease will be electorally significant. Texas argues in response that "[SD] 15 was not a protected district under the benchmark

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[19] The Davis Intervenors provide a statement from County Commissioner Roy Brooks that Black and Hispanic leaders "deliberately and aggressively recruited Wendy Davis to run in 2008 . . . . To elect our candidate of choice, Blacks and Hispanics had to come together and vote together, which we did." Davis Statement of Facts [Dkt. # 76-2] at ¶ 4. The Davis Intervenors allege that Senator Davis was elected with ninety-nine percent of the Hispanic and Black vote and that she only received thirty percent of the White vote. *Id.* at ¶ 6.

because it was not a majority-minority district."[20] Texas Reply to Senate at 4. According to Texas, "In both the benchmark and [the proposed plan], [SD] 15 is a coalition district" and "such districts are not protected." *Id.*

II. STANDARD FOR SUMMARY JUDGMENT

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); accord *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Talavera v. Shah*, 638 F.3d 303, 308 (D.C. Cir. 2011). Moreover, summary judgment is properly granted against a party who "after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255; *Talavera*, 638 F.3d at 308. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Anderson*, 477 U.S. at 252. In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d

[20] The HCVAP of benchmark SD 15 is twenty-four percent and the BVAP is 26.2 percent, thus, this district is not a majority-minority district for either group individually.

671, 675 (D.C. Cir. 1999). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Id.* If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

III. ANALYSIS

A. Summary Judgment is Inappropriate Because Texas Used an Incorrect Standard to Measure Retrogression

Texas urges this Court to rely solely on voter demographic data to identify majority-minority districts and to count only such districts as minority ability districts. This Court cannot oblige. We find that a simple voting-age population analysis cannot accurately measure minorities' ability to elect and, therefore, that Texas misjudged which districts offer its minority citizens the ability to elect their preferred candidates in both its benchmark and proposed Plans. Since Texas used the wrong standard, there are material facts in dispute about which districts are minority ability districts in the benchmark and proposed Plans. On this record, we cannot determine whether the Plans will have a retrogressive effect on Texas' minority citizens' ability to elect.

Beginning with *Beer*, the Supreme Court has addressed the relationship between majority-minority districts and a minority group's ability to elect, but has never suggested that the inquiry required by Section 5 can be satisfied by examining only the number of majority-minority districts. In

fact, the Court has acknowledged that the inquiry is a complex undertaking. *See Georgia v. Ashcroft*, 539 U.S. at 480 ("The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine."); *see also Holder v. Hall*, 512 U.S. 874, 883-84 (1994) (plurality opinion) ("[T]here may be difficulty in determining whether a proposed change would cause retrogression . . . ."). Defendants correctly argue that population demographics provide only a valid starting point, and demonstrating that Hispanics or another minority group constitute a citizen voting-age majority in a district may well not suffice, on its own, to demonstrate that they have the ability to elect. *See*, *e.g.*, *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 428 (2006) (observing that "it may be possible for a citizen voting-age majority to lack real electoral opportunity"). Texas has been able to provide no authority to support its reliance on a single-factor test, and we decline to depart from the clear guidance of the Supreme Court's Section 5 precedent that assessing retrogression is a multifaceted, fact-specific inquiry.

In rejecting Texas' standard, this Court starts with the 2006 Amendments to Section 5. The fundamental question is whether any change proposed by Texas "will have the effect of diminishing the ability" of minorities "to elect" their preferred candidates. 42 U.S.C. § 1973c(b). Should there be any doubt, Congress emphasized that the "purpose" of § 1973c(b) is "to protect the ability" of minority citizens "to elect their preferred candidates." *Id.* § 1973c(d). Clearly, "ability to elect" is the statutory watchword.

In making its Amendments, Congress sought to restore the "ability to elect" standard promulgated by the Supreme Court in *Beer*. H.R. REP. NO. 109-478, at 45-46 ("[A] change should be denied preclearance under Section 5 if it diminishes the ability of minority groups to elect their candidates of choice. Such was the standard of analysis articulated by the Supreme Court in *Beer v. United States* . . . ."); *see Beer*, 425 U.S. at 141 (stating that the Section 5 standard "can only be fully satisfied by determining . . . whether the ability of minority groups to participate in the political process and to elect their choices to office is . . . affected"). The House of Representatives identified significant benefits to minority communities under the *Beer* standard. H.R. REP. NO. 109-478, at 45-46. In addition, the House Report specifically commented that "[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5." *Id.* at 46 (emphasis added).

Thus, "being able" or "having the power" to elect — in the past (the benchmark) and the future (a proposed redistricting plan) — is what matters under Section 5. This Court concludes that a review of redistricting plans under Section 5 must be concerned with the functioning of the electorate, *i.e.*, whether minority voters will be "effective [in their] exercise of the electoral franchise." *Beer*, 425 U.S. at 141.

Texas perceives "ability" and "opportunity" as interchangeable, but they represent different concepts that serve different purposes. In its motion, Texas identifies minority "opportunity districts" as significant under Section 5. An "opportunity" to elect

is meaningful under Section 2 of the VRA, but not necessarily under Section 5.

Section 2 is violated upon a showing that minorities "have less opportunity than other members of the electorate to . . . elect representatives of their choice." 42 U.S.C. § 1973(b). Section 2 "was designed as a means of eradicating voting practices that minimize or cancel out the voting strength and political effectiveness of minority groups"; thus, it "bars all States and their political subdivisions from maintaining" any voting practice that, inter alia, dilutes the votes of minority citizens. *Bossier I*, 520 U.S. at 479 (internal quotation marks and citation omitted). A plaintiff claiming vote dilution under Section 2 must satisfy the three "*Gingles* factors:" 1) the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; 2) the group is politically cohesive; and 3) there is sufficient bloc voting by the White majority to defeat the minority preferred candidate. *Id.* at 479-80 (citing *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)). Under the first *Gingles* factor, a plaintiff must show that a sufficient minority population is present to have the potential or opportunity to elect its preferred representative in a single member district. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1243 (2009) (plurality opinion) (citing *Gingles*, 478 U.S. at 50 n.17). That is, Section 2 concerns itself with the possibility of a minority group's present, but unrealized, opportunity to elect. *See Bossier I*, 520 U.S. at 480 ("Because the very concept of vote dilution implies – and, indeed, necessitates – the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable

alternative voting practice to serve as the benchmark 'undiluted' voting practice."). Without such a showing, there can be neither wrong nor remedy. *Bartlett*, 129 S. Ct. at 1243 (citing *Growe v. Emison*, 507 U.S. 25, 41 (1993)).

Under Section 2, demographic data is necessarily geared towards identifying minority voters' "opportunity" to elect. Thus, because Texas equates "opportunity" and "ability" districts, it relies on data analysis pertinent to Section 2 to sustain its analysis of retrogressive effect under Section 5. However, population demographics alone will not fully reveal whether minority citizens' ability to elect is or will be present in a voting district. Demographics alone cannot identify all districts where the effective exercise of the electoral franchise by minority citizens is present or may be diminished under a proposed plan within the meaning of Section 5.[21] *See*, *e.g.*, *LULAC*, 548 U.S. at 428.

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. A Section 5 claim requires a determination of how and where minority citizens' ability to elect is currently present in a covered jurisdiction and how it will manifest itself in a proposed plan. This 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

[21] Section 2 challenges are most often concerned with vote dilution claims. This Court uses case law from Section 2 in this Section 5 analysis only as it speaks to circumstances that adversely impact minority citizens' ability to elect.

citizens' voting ability. *See Bossier I*, 520 U.S. at 478 ("Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan."). Determining where and how the ability to elect is present is a careful inquiry. This Court finds that the simple voting-age population statistics used by Texas are insufficient, and we cannot be confident that Texas has properly identified existing ability districts in its benchmark or future ability districts under the proposed Plans. Therefore, this Court can neither count the former nor compare them to the latter. There are no easy shortcuts in this inquiry. In particular, language minority status or race does not constitute a simple proxy for partisan preference in gauging the ability to elect. *See*, *e.g.*, *Bush v. Vera*, 517 U.S. at 968 ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotyping requiring strict scrutiny is in operation.").

B. The Correct Legal Standard Governing Retrogression Analysis

1. Ability-to-Elect Factors

If population statistics alone are insufficient to determine the existence and location of ability districts, what factors are relevant to an inquiry into retrogressive effect under Section 5? Below we outline the types of factors that are relevant for this analysis. Our list of factors is not exhaustive. It merely highlights the kinds of factors missing from the standard Texas used to seek preclearance.

At the outset, a court addressing a proposed voting plan under Section 5 must determine whether

there is cohesive voting among minorities and whether minority/White polarization is present in the jurisdiction submitting the plan. *See*, *e.g.*, *Georgia v. Ashcroft*, 539 U.S. at 485 ("[I]t is of course true that evidence of racial polarization is one of many factors relevant in assessing whether a minority group is able to elect a candidate of choice . . . ."). Polarized voting occurs when minority and White communities cast ballots along racial or language minority lines, voting in blocs. *See* H.R. REP. NO. 109-478, at 20. Polarized voting between minorities and Whites often renders minority voters powerless to elect their candidate of choice because White voters will not cross over to elect a minority-preferred candidate. *Id.* Furthermore, polarized voting often signals that minority communities in fact prefer different candidates than the majority and helps to identify districts in which minority voters are effective in electing their candidates of choice.

Next, this Court agrees with all parties that population statistics are significant and an important starting point for a retrogression analysis. Drawing a district with a "safe" minority population can essentially guarantee electoral success for minority voters, regardless of challenges posed by racially polarized voting. *See Georgia v. Ashcroft*, 539 U.S. at 480-81 (noting that "majority-minority districts may virtually guarantee the election of a minority group's preferred candidates in those districts"). Even when voting is polarized, a minority group that constitutes a supermajority in a district will likely have the ability to elect its chosen candidate. A district with a minority voting majority of sixty-five percent (or more) essentially guarantees

that, despite changes in voter turnout, registration, and other factors that affect participation at the polls, a cohesive minority group will be able to elect its candidate of choice.[22] Where such a circumstance is present, there would be no need to make further inquiries into minority voters' ability to elect. However, when there is no supermajority in a

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[22] The Supreme Court found a figure of sixty-five percent of total population to be reasonable to achieve a majority of eligible minority voters in a district. *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977). In a similar vein, the three-judge court in *Mississippi v. United States*, 490 F. Supp. 569 (D.D.C. 1979), assessing a Section 5 challenge, found that:

> Low black voter registration and voter turn-out combined with racial bloc voting make it necessary for an electoral district in Mississippi to contain a substantial majority of black eligible voters in order to provide black voters with an opportunity to elect a candidate of their choice. It has been generally conceded that, barring exceptional circumstances such as two white candidates splitting the vote, a district should contain a black population of at least 65 percent or a black VAP [voting age population] of at least 60 percent to provide black voters with an opportunity to elect a candidate of their choice.

490 F. Supp. at 575. Likewise, the Seventh Circuit used a minority population figure of sixty-five percent in a Section 2 case to identify when minorities are an "effective majority," i.e., whether they have a "realistic opportunity to elect officials of their choice" in a district. *Ketchum v. Byrne*, 740 F.2d 1398, 1410-15 (7th Cir. 1984). *Ketchum* reached its figure by reasoning from a simple voting majority and augmenting it by five percent to account for low voter registration among minority voters, five percent for low voter turnout, and five percent for youthful population. *Id.* at 1415. If *Ketchum* had started with voting-age population, it would not have added five percent for the youthful portion of the minority population. *Id.*

district, a Section 5 analysis must go beyond mere population data to include factors such as minority voter registration, minority voter turnout, election history, and minority/majority voting behaviors.[23]

Determining that minorities have an ability to elect based solely on their numbers in the voting population of a district cannot account for the most fundamental concern of Section 5: the effect past discrimination has on current electoral power. 42 U.S.C. § 1973b(b); *see Riley*, 553 U.S. at 412 (noting that a jurisdiction is covered under Section 5 if among other things, "on one of three specified coverage dates . . . it maintained a literacy requirement or other 'test or device' as a prerequisite to voting"). As the Intervenors note, historical discrimination against Hispanics in Texas has, in some areas of the State, continued to depress their educational and economic conditions such that the mere attainment of citizen voting-age status might have no real effect on their ability to elect representatives of choice. *See* Latino Redistricting Task Force's Statement of Material Facts in Dispute

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[23] Texas asks this Court to set the percentage for a "safe" district at forty percent BVAP and fifty percent HCVAP. This Court has already noted that, standing alone, these percentages are insufficient to establish the existence of an ability district. Texas' expert seems to agree. Dr. John Alford reports that Hispanic voters will have an ability to elect in a district in which the number of registered Hispanic voters exceeds fifty percent. U.S. Mem., Ex. 6 [Dkt. # 79-8] at 4 (Report of Dr. John Alford). In contrast, Texas relied on (citizen) voting-age population statistics alone. Texas' reliance on a forty percent BVAP and not a BVAP greater than fifty percent suggests that Texas also recognizes the importance of factors beyond majority status in determining which districts will provide minority voters the ability to elect.

[Dkt. # 78-1] at ¶ 257 ("Lower levels of education, income, and earnings have the lingering effect of lowering Latino [electoral] participation rates, including registering and voting."). The Supreme Court has also noted that "the political, social, and economic legacy of past discrimination for Latinos in Texas may well hinder their ability to participate effectively in the political process." *LULAC*, 548 U.S. at 440 (internal quotation marks and citations omitted). Such a background requires a more complicated retrogression analysis than Texas wants this Court to approve, but it is part and parcel of discerning whether minority voters will be effective in their exercise of the electoral franchise. Because the statutory watchword is "ability to elect," data that pertains to actual minority citizen voting strength must be analyzed for each relevant district.

In particular, minority voter registration and minority voter turnout can be important indicators of whether historical barriers to minorities' ability to elect have been eradicated.[24] For example, the Senate Committee on the Judiciary found during the 2006 reauthorization of the VRA that Latino voters nationwide turned out and voted at rates significantly lower than White voters. In addition, the Committee found that in Texas, while 41.5 percent of Latinos were registered to vote, only approximately 29.3 percent turned out in the 2004 election. *See* S. REP. NO. 109-295, at 11. Such findings underscore why Texas' reliance on a bare

[24] Texas provided some such data in its motion and reply brief, but made no arguments regarding its significance for a retrogression inquiry. It continued to rely on population statistics to argue that its Plans do not have a retrogressive effect.

majority-minority district cannot be used to determine an ability district under Section 5. Given its history, Texas cannot overlook education and employment levels affecting minority electoral participation and remnants of historic discrimination that may continue to affect voting in some areas of the State. Minority voter registration and turnout, together with other evidence of election results and minority voting behavior, will supplement any court's analysis of population trends when counting ability districts in the benchmark and proposed plans.

Other factors are also relevant in the determination of whether past gains in minority citizens' ability to elect will be diminished by "any" change in voting practices. Although the Supreme Court has never outlined all factors relevant to this inquiry, it has emphasized that retrogression analysis "is often complex in practice to determine." *Georgia v. Ashcroft*, 539 U.S. at 480. We conclude that the type of factors relevant to this complex inquiry may include the number of registered minority voters in redrawn districts; population shifts between or among redrawn districts that diminish or enhance the ability of a significant, organized group of minority voters to elect their candidate of choice; an assessment of voter turnout in a proposed district; to the extent discernible, consideration of future election patterns with respect to a minority preferred candidate; and new ability districts that would offset any lost ability district.[25]

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[25] Nonetheless, it may be that retrogression in a proposed plan is unavoidable. Population losses or shifts can decrease minority voter participation. States and other political jurisdictions legitimately consider geographic (e.g., mountains,

Although Intervenors urge this Court to find retrogression when redistricting dismantles a voting district in which a minority group was on the cusp of achieving majority status, this Court will not consider this as a factor in our retrogression analysis. The argument that the VRA protects predictable future gains in minority electoral power is directly at odds with Section 5's purpose to protect against retrogressive effect. *See Beer*, 425 U.S. at 140 (Section 5 was enacted "to shift the advantage of time and inertia from the perpetrators of the evil to its victim, by freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory." (internal quotation marks and citations omitted)). Redistricting can have no retrogressive effect on an ability to elect that has not yet been realized. *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), cited by TLBC, LULAC, and the Texas State Conference of NAACP Branches, does not change this assessment. As discussed

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water courses) and political (e.g., county lines, city lines) boundaries in drawing election districts. In some circumstances, a non-retrogressive redistricting plan may not be possible given other legitimate constraints on electoral maps. This Court agrees with the comment in the 2011 DOJ Guidance:

> There may be circumstances in which the jurisdiction asserts that, because of shifts in population or other significant changes since the last redistricting (e.g., residential segregation and demographic distribution of the population within the jurisdiction, the physical geography of the jurisdiction, the jurisdiction's historical redistricting practices, political boundaries, such as cities or counties, and/or state redistricting requirements), retrogression is unavoidable.

76 Fed. Reg. 7470-01, at 7472.

further below, *Pleasant Grove* was a discriminatory purpose case. 479 U.S. at 471-72. The decision did not address whether it would be retrogressive to suppress emerging voting strength in a redistricting effort. In line with *Beer* and the language of Section 5, this Court finds that evidence of preventing an emerging ability to elect from crystallizing will not support the contention that a plan has an impermissible retrogressive effect under Section 5.

Finally, Texas argues that the United States' analysis of retrogression, reflected in the 2011 DOJ Guidance, is elusive and expensive. We disagree. Although our analysis is not identical to the 2011 DOJ Guidance, it shares many factors. The 2011 Guidance is consistent with the guidance DOJ has been issuing to assess retrogressive effect for the past two decades.[26] Covered jurisdictions, including

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[26] The relevant DOJ guidance memoranda are those issued in 2001 and 1987. In those policy statements, the DOJ (in different administrations and under different Attorneys General) listed factors exceedingly similar, if not identical, to the ones that the DOJ currently asserts are relevant to a Section 5 retrogression analysis. Compare Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S. § 1973c, 66 Fed. Reg. 5412-01, at 5413 (Jan. 18, 2001) with 76 Fed. Reg. 7470-01, at 7471. In the 2001 Guidance Memorandum, the DOJ stated that it would begin its retrogression analysis by compiling all relevant census data; such data was "the important starting point" for administrative evaluation of benchmark and proposed plans. See 66 Fed. Reg. 5412-01, at 5413 (indicating that DOJ would review "additional demographic and election data" to assess the "actual effect" of proposed changes on minority populations and explicitly mentioning, as it did in 2011, that it believed that "election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important" to a VRA retrogression analysis). A Notice issued by the DOJ in1987 was very similar.

Texas, have been able to preclear voting plans under its various iterations.[27] Thus, despite Texas' arguments to the contrary, this Court is hard-pressed to find that a multi-factored test — dependent on population analyses and other factors — is too new, too expensive, or too complex for covered jurisdictions to follow.

2. Coalition Districts

In counting ability districts, Texas ignored those in which coalitions of minority voters and coalitions of minority and White voters formed to support the minority-preferred candidate. But Section 5 requires such consideration in determining whether minorities have the ability to elect preferred candidates. The statute states no preference for how the minority group is able to elect its preferred candidate, whether by cohesive voting by a single minority group or by coalitions made up of different

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See Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486-01 (Jan. 6, 1987). DOJ noted in 1987 that many covered jurisdictions, much like Texas before this Court, had urged it to adopt a retrogression standard that could be "applied to submitted changes in a fairly mechanical way," but the DOJ declined to adopt such an approach because it would be unrealistic to shorten "[a] Section 5 determination [that] is . . . based on the appraisal of a complex set of facts that do not readily fit a precise formula for resolving the preclearance issues." *Id.* at 486.

[27] See Pl.'s Mem.[Dkt. # 41] at 3 ("[I]n 2003 the [Texas] Legislature decided to take up redistricting again and enacted a congressional redistricting plan. That plan was precleared by the Department of Justice . . . .").

groups.[28] Indeed, the Supreme Court has recognized the value of voting coalitions formed by minority voters:

> [T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice . . . . [M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground.

Georgia v. Ashcroft, 539 U.S. at 481 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)) (internal quotation marks omitted). It is simply a fact of political life that in certain districts, a single minority group may not have the ability to achieve desired electoral outcomes independently, but could elect its preferred candidate if it formed either a crossover district by "attract[ing] sufficient crossover votes from white voters," *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993), or a coalition district by partnering with another minority group.[29]

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[28] The House Report on the 2006 Amendments clearly recognized that coalition districts can work to form an ability district, see H.R. REP. NO. 109-478, at 46, and, while the Senate emphasized majority-minority districts, it did not distinguish or discard minority coalition districts. See S. REP. NO. 109-295, at 17.

[29] Dicta in *Bartlett v. Strickland*, a Section 2 case, differentiated between minority citizens' "own choice" and the choice made by a coalition. 129 S. Ct. at 1244; *see also Voinovich*, 507 U.S. at 154 (comparing crossover districts to "influence" districts). This Court clarifies that coalition districts for Section 5 purposes are

Texas contends that the 2006 Amendments that overruled *Georgia v. Ashcroft* also rejected the idea that coalition politics should be taken into account under Section 5. This argument has no support in the text of the Amendments themselves and misreads the legislative history. Congress only took issue with *Georgia v. Ashcroft* to the extent that it held that states could trade "influence" districts for prior "ability" districts without issue under Section 5. *See* H.R. REP. NO. 109-478, at 44 ("[T]he Supreme Court would allow the minority community's own choice of preferred candidates to be trumped by political deals struck by State legislators purporting to give 'influence' to the minority community. . . . Permitting these trade-offs is inconsistent with the original and current purpose of Section 5."). Congress never found that coalition districts could not provide minority citizens with the ability to elect.[30]

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those in which the candidate voted into office by the coalition is the minority-preferred candidate, whether that candidate is a member of the minority or not. Identification of the minority preferred candidate is a factual question.

[30] In the Senate Report to the 2006 Amendments, Senator Jon Kyl wrote separately "to explain why [he] believe[s] that Congress cannot require that state or local governments create or retain influence or coalition districts." S. REP. NO. 109-295, at 22 (Additional views of Senator Kyl). Senator Kyl's individual views regarding the scope of protection afforded to minorities under Section 5 do not change this Court's analysis, or call into question the legislative intent regarding the 2006 Amendments. First, the Senate Report carries little weight as a piece of legislative history or evidence of legislative intent. As noted by Senator Patrick Leahy and others, the Senate Report was filed a week after the Act had been passed by both houses of Congress. The Senate Report was not considered by Congress prior to a vote on the legislation, and Congress did not adopt or

Texas also cites *Bartlett v. Strickland* to argue that the Supreme Court has rejected the notion that a Section 5 analysis can take political coalitions into account, but *Bartlett* is not a Section 5 case and does not deal with coalition districts. *See* 129 S. Ct. at 1242-43 (stating that the Court did not address "coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice"). Like Section 2 cases before it, a plurality of the Court in *Bartlett* held that a compact minority group needs to have the potential ("opportunity") to constitute a majority in a district for there to be a Section 2 violation. *Id.* at 1244 ("Only once, in dicta, has this Court framed the first *Gingles* requirement as anything other than a majority-minority rule."). Thus, the *Bartlett* Court held that Section 2 does not require states to create potential crossover districts to ensure equal electoral opportunity for minority voters because nothing in Section 2 grants special protection to minority citizens' "right[] to form political coalitions." *Id.* at 1243. Yet, freedom from an obligation to create a crossover district under Section 2 does not equate to freedom to ignore the reality of an existing crossover

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affirm its findings. Indeed, "post- passage legislative history is a contradiction in terms. Any after-the-fact attempts to re-characterize the legislation's language and effects [cannot] be credited." S. REP. NO. 109-225, at 55 (Additional views of Senators Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin). Second, as explained below, the statutory text and the Supreme Court's jurisprudence regarding Section 5 make clear that crossover and minority coalition districts provide minority citizens the ability to elect their candidates of choice.

district in which minority citizens are able to elect their chosen candidates under Section 5.

Since coalition and crossover districts provide minority groups the ability to elect a preferred candidate, they must be recognized as ability districts in a Section 5 analysis of a benchmark plan. Coalition and crossover districts that continue unchanged into a proposed plan must be counted as well. Our recognition that crossover and coalition districts are ability districts in a benchmark plan is rooted in the fact that there must be discrete data, by way of election returns, to confirm the existence of a voting coalition's electoral power. For example, evidence that a coalition had historical success in electing its candidates of choice would demonstrate that the minority voters in that district had, and would continue to have, an ability to elect their preferred candidates. Proving the existence of a coalition district will require more exacting evidence than would be needed to prove the existence of a majority-minority district as demonstrating past election performance is vital to showing the existence of an actual coalition district.

By contrast, a state creating a "new" crossover or coalition district simply anticipates, or hopes, that the minority population in the new district will align politically and coalesce with other groups of voters to elect its candidates of choice. It would be extremely difficult to confirm that minority voters would indeed have the ability to elect in the newly formed district.[31] Since potential new crossover-coalition

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[31] Indeed, a state's attempt to create future crossover districts may lead to the creation of "influence" districts that *Georgia v. Ashcroft* approved and Congress rejected in the 2006 Amendments. In *Georgia v. Ashcroft*, the Court approved

districts are "subject to [this] high degree of speculation and prediction," *Bartlett*, 129 S. Ct. at 1245, they can rarely be deemed ability districts in a proposed plan.

3. Retrogression in Proportional Versus Absolute Terms

The Defendants argue that retrogression should be assessed on a plan-wide basis, contending that a relative overall decrease in minority citizens' share of electoral districts is retrogressive. According to this argument, Texas' failure to draw one or more additional Hispanic ability districts in the Congressional Plan is retrogressive in the face of the

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Georgia's creation of new influence and coalition districts in proposed redistricting plans to offset the loss of majority-minority districts in the benchmark. 539 U.S. at 487. Specifically, the Supreme Court stated that Georgia had probably met its burden of demonstrating non-retrogression because its strategy of increasing Black voting strength by "'unpacking' minority voters in some districts to create more influence and coalitional districts [was] apparent." *Id.* As part of the 2006 reauthorization of the VRA, Congress rejected Georgia's proposition that creation of influence and coalition districts may be used to offset other losses of a minority population's voting power, specifically amending Section 5 to "make[] clear that . . . the comparative 'ability [of the minority community] to elect preferred candidates of choice' is the relevant factor to be evaluated when determining whether a voting change has a retrogressive effect." H.R. REP. NO. 109-478, at 46. The House Report to the 2006 Amendments explained the "concern[] . . . that '[m]inority influence is nothing more than a guise for diluting minority voting strength'" and that "leaving the Georgia standard in place would encourage States to spread minority voters under the guise of 'influence' and would effectively shut minority voters out of the political process." *Id.* at 45.

Hispanic population growth in Texas that is in large measure responsible for the State's four new congressional seats. In support, they cite *Georgia v. Ashcroft*: "[I]n examining whether [a] new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole." 539 U.S. at 479. But that language does not support the Defendants' argument. It was speaking to a state's ability under Section 5 to offset the loss of an ability district in one area of a state by the gain of a new ability district elsewhere. *Id.*

Texas relies on *Abrams v. Johnson*, 521 U.S. 74 (1997), which rejected the idea that the addition of electoral districts necessarily requires the addition of minority ability districts. In *Abrams*, Georgia gained a single new congressional district because of a population increase. This new district was not a minority ability district. The plaintiffs argued that the new plan was retrogressive because by failing to draw the new district as an ability district, the percentage of majority Black districts in the State decreased from ten percent to nine percent. 521 U.S. at 97. The Supreme Court rejected the argument, stating that if it found retrogression on such facts, "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.

The United States distinguishes *Abrams*, relying on the substantial growth in Texas' Hispanic population, Texas' four new congressional seats (an unprecedented number for States fully covered by

Section 5),[32] and the new provisions of the 2006 Amendments. It urges this Court to limit *Abrams* to its facts, arguing that although a state need not add a new ability district for each new district, under the facts of this case it was retrogressive for Texas not to add any new ability districts.

This Court concludes that *Abrams* does not control. Although *Abrams* is clear that the VRA does not require there to be a new minority ability district for every new congressional seat, it does not hold that a state's failure to draw new minority districts can never be retrogressive. Nevertheless, this Court concludes that Texas' failure to draw new Hispanic ability districts to match the growth of its Hispanic population was not retrogressive. Section 5 is limited to preventing "[s]tates from undoing or defeating the rights recently won" by minorities, *Beer*, 425 U.S. at 140 (quoting H.R. REP. NO. 91-397, at 8) (internal quotation marks omitted); it does not require states to add additional protections, *Id.* (quoting H.R. REP. NO. 94-196, at 57-58) (internal quotation marks omitted), or to create new minority districts in proportion to increases in the minority group's population. *Id.* at 137 n.8 ("This Court has, of course, rejected the proposition that members of a minority group have a federal right to be represented in legislative bodies in proportion to their number in the general population."). Here, where Texas'

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[32] Notably, after the 1990 Census, Texas gained three additional congressional seats in response to which it created two new majority Black districts and a majority Hispanic district "with a view to complying with the Voting Rights Act." See *Bush v. Vera*, 517 U.S. at 957. All three districts, however, were found to be the product of an unconstitutional racial gerrymander. *Id.* at 979-86.

percentage gain in congressional seats (12.5%) is similar to Georgia's percentage gain in Abrams (10%), we see no need to require of Texas what the Supreme Court did not require of Georgia.

Although Texas' alleged failure to account for the significant increase of the Hispanic population in the State does not establish retrogression, it is relevant to the Court's evaluation of whether the Congressional Plan was enacted with discriminatory purpose. A redistricting plan that does not increase a minority group's voting power, despite a significant growth in that minority group's population, may provide significant circumstantial evidence that the plan was enacted with the purpose of denying or abridging that community's right to vote.[33] Cf. City of *Pleasant Grove*, 479 U.S. at 471 ("Section 5 looks not only to the present effects of changes, but to their future effects as well . . . . Likewise, an impermissible purpose under § 5 may relate to anticipated as well as present circumstances.").[34] The

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[33] Based upon its identification of minority ability districts, the United States contends that nearly half a million Hispanics would lose their ability to elect in the proposed Congressional Plan.

[34] In *City of Pleasant Grove*, an "all-white enclave in an otherwise racially mixed area of Alabama," sought preclearance for the annexation of two parcels of land, one vacant and another containing a few white residents. 479 U.S. at 465. The three-judge district court declined to grant preclearance, concluding that the jurisdiction had failed to demonstrate that the annexations did not have the purpose of abridging the minority population's right to vote. The Supreme Court affirmed the three-judge court, concluding that there was sufficient evidence to support the allegation that the city was annexing non-Black areas but refusing to annex Black areas. Despite the fact that there were "no black voters in Pleasant

Defendants are therefore incorrect as to the form, but not necessarily as to the substance of their argument. A state's failure to account for a minority group's population growth that results in additional electoral seats, while not conclusive of an unlawful retrogressive effect under Section 5, may be nonetheless highly relevant and probative to the purpose inquiry.

C. Discriminatory Purpose

Summary judgment is also not appropriate because Texas has failed to demonstrate that the Plans do not have the purpose of "denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." Texas argues that its legislators had no animus towards any racial or language minority group but acted from purely partisan motives in drawing its

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Grove" and the annexations therefore could not have an effect on Black voting in the city, the Court explained:

> [A]n impermissible purpose under § 5 may relate to anticipated as well as present circumstances . . . . Common sense teaches that appellant cannot indefinitely stave off the influx of black residents and voters . . . . One means of thwarting this process is to provide for the growth of a monolithic white voting block, thereby effectively diluting the black vote in advance. This is just as impermissible a purpose as the dilution of present black voting strength. To hold otherwise would make appellant's extraordinary success in resisting integration thus far a shield for further resistance. Nothing could be further from the purposes of the Voting Rights Act.

Id. at 471-72 (citations omitted).

redistricting Plans. Texas further argues that significant federalism concerns would be raised if a federal court were to examine the actions of its State legislature.[35] The United States responds that a discriminatory purpose that violates Section 5 does not always require an intent to target a minority group but can include a plan enacted in a discriminatory manner, even if designed to achieve a permissible aim.[36] The Intervenors present some

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[35] Texas does not challenge the constitutionality of Section 5, see Complaint [Dkt. # 1], but relies on the Constitution as a shield. Texas argues that the 2006 Amendments only forbid states from making those changes that would themselves violate the Fourteenth Amendment's guarantee of equal protection and the Fifteenth Amendment's guarantee that the right to vote shall not be "denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend XIV, § 2; *Id.* amend. XV, § 1. A simple comparison of Section 5 and these Reconstruction-era Amendments shows that they do not track and Texas' contention cannot be accepted wholesale. The Fifteenth Amendment does not protect language-minority voters and the Fourteenth Amendment does not apply to a language minority qua language minority. *See Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) ("Language, by itself, does not identify members of a suspect class."); but see *Olagues v. Russoniello*, 797 F.2d 1511, 1521 (9th Cir. 1986) (distinguishing *Soberal-Perez v. Heckler* and stating that a non-English speaking classification is facially neutral but is, for all practical purposes, a classification based on race and national origin and therefore suspect), vacated as moot, 484 U.S. 806 (1987). Thus, while both Amendments are relevant to the legitimacy of a redistricting plan as to other minorities, they are not determinative and provide only guidance as to language minorities, such as Hispanics.

[36] The United States cites Judge Kozinski's opinion concurring in part and dissenting in part in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), for this proposition:

evidence supporting their claims of discriminatory purpose, but also suggest that further discovery is needed. At oral argument, Texas contended that, even if taken as true, the evidence presented by the United States and Intervenors is insufficient to prove discriminatory intent.

We conclude that there are genuine issues of material fact regarding whether the Plans were enacted with discriminatory intent. As discussed earlier, the 2006 Amendments make illegal any changes to voting qualifications, requirements, standards, practices, or procedures that are adopted or pursued in order to deny or abridge the right to vote "on account of" a particular characteristic protected by the statute. 42 U.S.C. § 1973c(a)-(c). As the Supreme Court reminds us in *Arlington Heights*, "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266; *see also Cromartie*, 526 U.S. at 546 ("The task of

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> Assume you are an anglo [sic] homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

918 F.2d at 778 n.1.

assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor . . . ."). Such an intensely fact-driven inquiry is typically difficult to resolve at the summary judgment stage.

The United States asserts that there is ample circumstantial evidence of discriminatory purpose with regard to the State House and Congressional Plans that raises a genuine dispute of material facts. Likewise, the Intervenors challenge the Plans overall, their general impact on Hispanic voters,[37] the rushed sequence of events that preceded their adoption, procedural and substantive departures from past practice, and treatment of specific districts and communities within each Plan.

Texas only countered arguments from the United States and those Intervenors that challenge the State Senate Plan. In its brief and at oral argument, Texas offered three responses to Defendants' claims of discriminatory purpose: 1) the State's obligation to its own Constitution, which specifically bans unnecessarily dividing counties to form voting districts, *see* TEX. CONST. art. III, § 26; 2) political logic: Hispanics are Democrats, Democrats are the party out of power in the State, and, therefore, it is politics not illegal animus that accounts for any alleged circumstantial evidence of discriminatory

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[37] For example, there are allegedly no new Hispanic ability districts in the Congressional Plan, despite Hispanics' substantial population growth in Texas. The Gonzales Intervenors allege, however, that although Whites now constitute 45.3 percent of the State's population, Whites are a majority of the voting-age population in twenty-five out of thirty-six congressional districts, an increase from twenty-two in the benchmark.

purpose[38]; and 3) affidavit testimony by Texas legislators and their staff that no discriminatory purpose was espoused by any member of the Texas Legislature, any staff, or anyone else when offering redistricting proposals. Yet Texas has not disputed many of the Intervenors' specific allegations of discriminatory intent. This Court concludes that the United States and Intervenors have provided sufficient evidence to preclude summary judgment and to require further review of the claims of discriminatory purpose directed to all three Plans.

IV. CONCLUSION

Section 5 requires a multi-factored, functional approach to gauge whether a redistricting plan will have the effect of denying or abridging minority citizens' ability to elect representatives of their choice. It does not lend itself to formalistic inquiry and complexity is inherent in the statute. The ability to elect can rarely be measured by a simple statistical yardstick, as is the essence of Texas' approach. Defendants also challenge all three Plans as discriminatory in purpose, but genuine disputes of material fact preclude summary judgment on this record. For these reasons, the motion for summary judgment filed by the State of Texas was denied.

Date: December 22, 2011

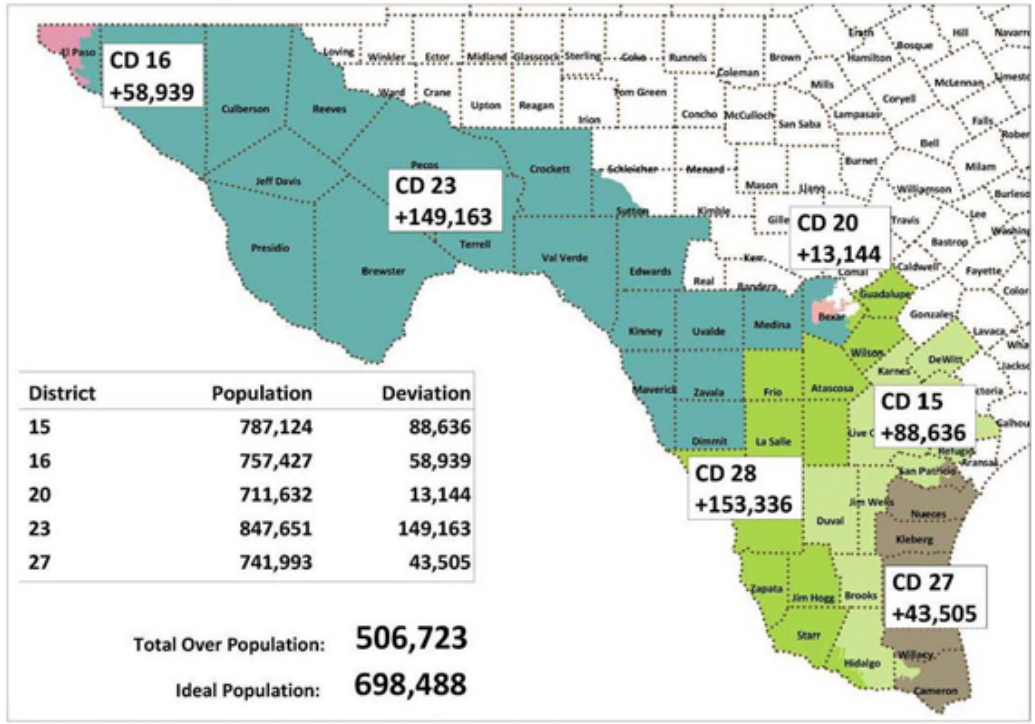
/s/
THOMAS B. GRIFFITH
United States Circuit Judge

[38] But see *Bush v. Vera*, 517 U.S. at 968 ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotyping requiring strict scrutiny is in operation.").

/s/
ROSEMARY M. COLLYER
United States District Judge

/s/
BERYL A. HOWELL
United States District Judge

C100 South Texas Congressional Districts: Population Deviations



District	Population	Deviation
15	787,124	88,636
16	757,427	58,939
20	711,632	13,144
23	847,651	149,163
27	741,993	43,505

Total Over Population: **506,723**

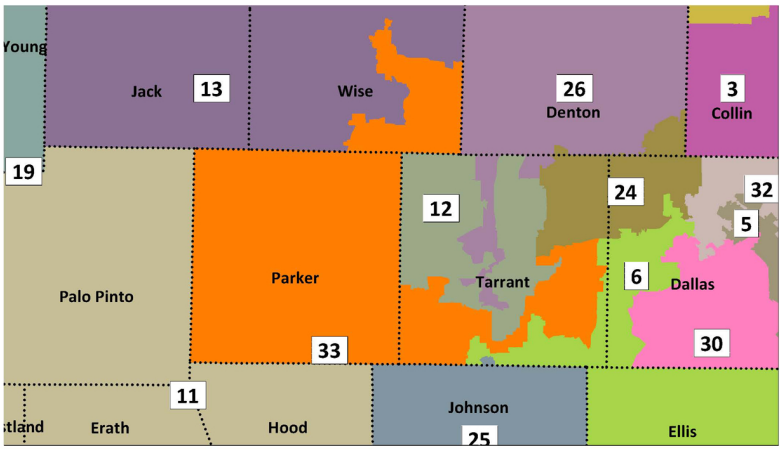
Ideal Population: **698,488**

Data Source: Texas Legislative Council 2011. C100 Block Equivalency File (ftp://ftpgis1.tlc.state.tx.us/DistrictViewer/Congress/).

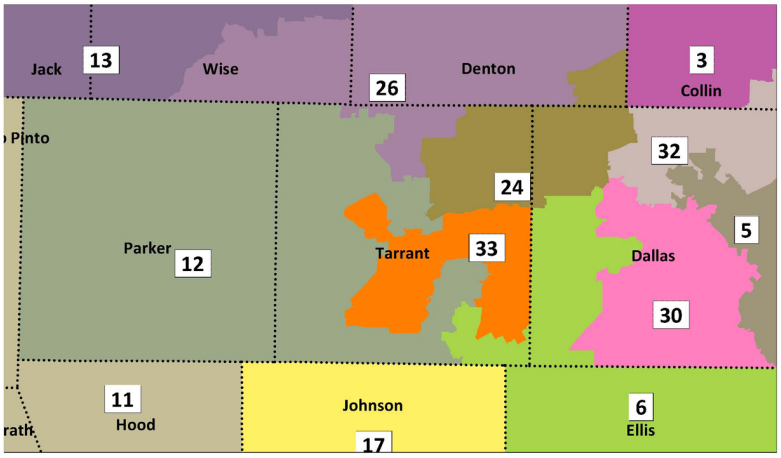
PL 399

Congressional District 33

Plan C185: 82nd Legislature Enacted Congressional Plan



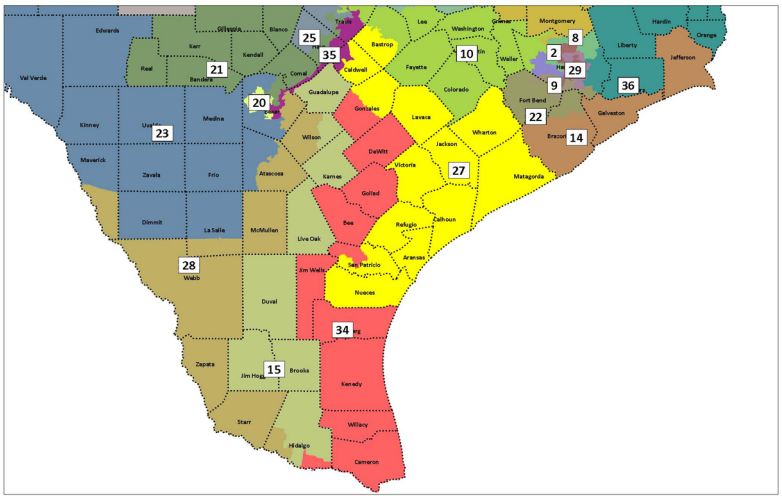
Plan C220: Court-Ordered Interim Congressional Plan



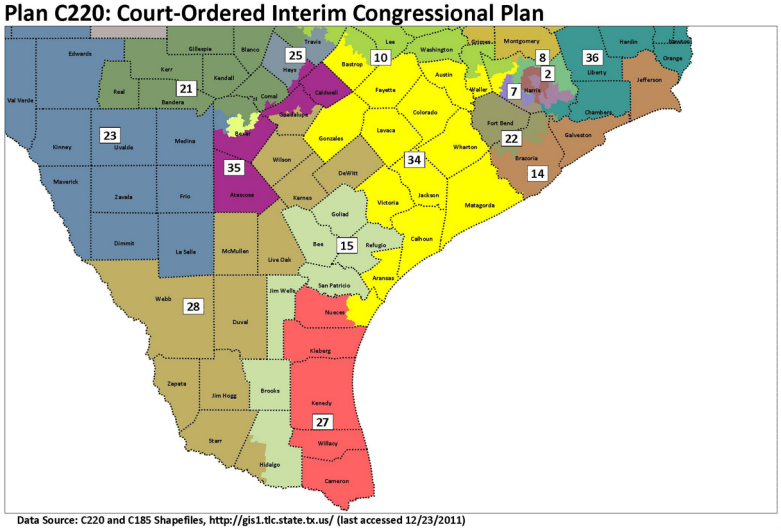
Data Source: C220 and C185 Shapefiles, http://gis1.tlc.state.tx.us/ (last accessed 12/23/2011)

Congressional District 34

Plan C185: 82nd Legislature Enacted Congressional Plan



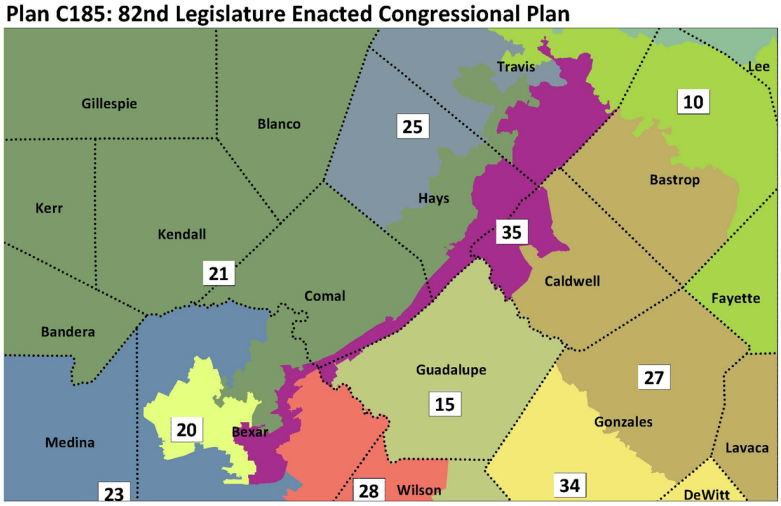
Plan C220: Court-Ordered Interim Congressional Plan



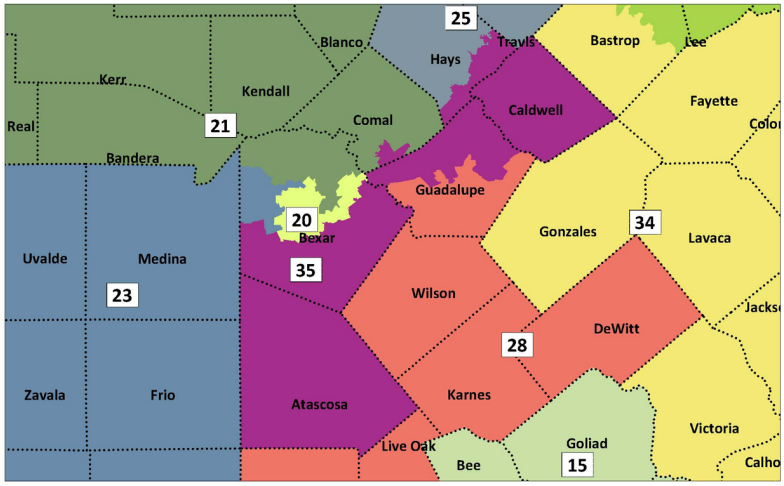
Data Source: C220 and C185 Shapefiles, http://gis1.tlc.state.tx.us/ (last accessed 12/23/2011)

Congressional District 35

Plan C185: 82nd Legislature Enacted Congressional Plan



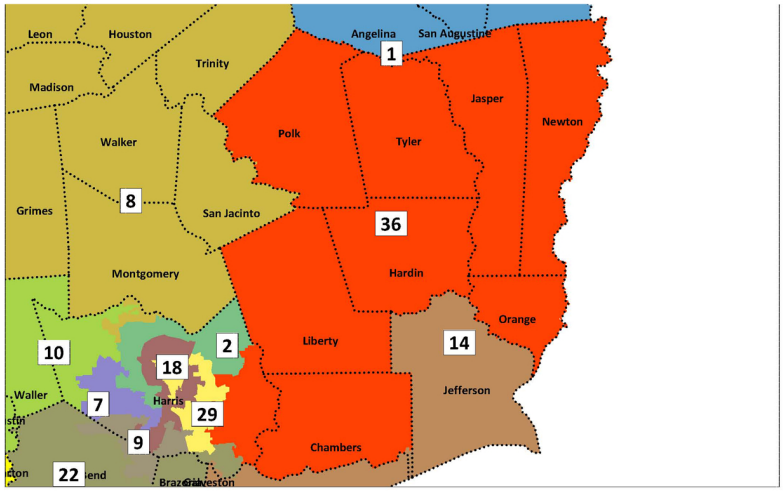
Plan C220: Court-Ordered Interim Congressional Plan



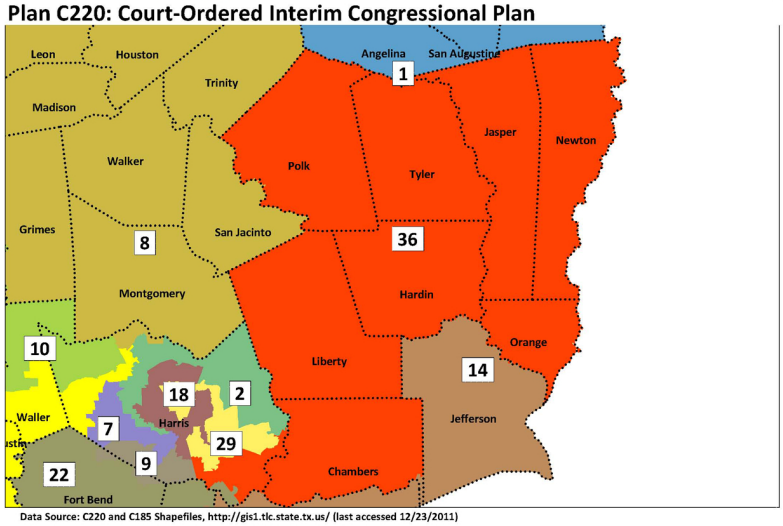
Data Source: C220 and C185 Shapefiles, http://gis1.tlc.state.tx.us/ (last accessed 12/23/2011)

Congressional District 36

Plan C185: 82nd Legislature Enacted Congressional Plan



Plan C220: Court-Ordered Interim Congressional Plan



Data Source: C220 and C185 Shapefiles, http://gis1.tlc.state.tx.us/ (last accessed 12/23/2011)

Interim Congressional Plan Overlap with State's Congressional Plan (Districts with 70% and Higher Overlap)	
District	C185 Core Preservation
1	97.20%
2	73.00%
3	97.80%
4	96.50%
5	94.00%
6	78.20%
7	83.50%
8	92.70%
9	80.90%
11	96.70%
13	98.60%
14	97.20%
16	89.10%
19	99.20%
22	84.90%
24	85.30%
26	80.20%
28	70.60%
29	83.40%
30	80.60%
31	74.10%
32	85.50%
36	76.70%

*Data Source:
Texas Legislative Council, Red-340 report, *available at* ftp://ftpgis1.tlc.state.tx.us/PlanC220/Reports/PDF/ (last accessed 12/23/11)

Interim House Plan Overlap with State's House Plan (Districts with 70% and Higher Overlap)	
District	H283 Core Preservation
1	100.00%
2	100.00%
4	100.00%
5	99.00%
6	98.90%
7	100.00%
8	100.00%
9	100.00%
10	98.10%
11	100.00%
13	75.10%
14	100.00%
15	87.30%
16	74.80%
17	89.60%
18	100.00%
19	100.00%
20	94.90%
21	88.90%
22	86.00%
23	100.00%
24	99.80%
25	99.20%
27	93.90%
29	99.60%
37	88.90%
38	84.70%
39	73.40%

*Data Source: Texas Legislative Council, Red-340 report, *available at* ftp://ftpgis1.tlc.state.tx.us/PlanH302/Reports/PDF/ (last accessed 12/23/11)

Interim House Plan Overlap with State's House Plan (Districts with 70% and Higher Overlap), cont.	
District	H283 Core Preservation
42	96.60%
44	100.00%
45	100.00%
46	88.30%
47	95.60%
48	91.70%
49	91.30%
50	85.80%
51	100.00%
52	96.30%
53	100.00%
54	72.80%
55	71.10%
56	90.90%
12	100.00%
58	100.00%
59	100.00%
60	70.90%
62	100.00%
63	95.40%
64	94.60%
65	100.00%
66	97.20%
67	92.20%
69	78.30%
70	81.80%
71	87.50%
72	94.40%

*Data Source: Texas Legislative Council, Red-340 report, *available at* ftp://ftpgis1.tlc.state.tx.us/PlanH302/Reports/PDF/ (last accessed 12/23/11)

Interim House Plan Overlap with State's House Plan (Districts with 70% and Higher Overlap), cont.	
District	H283 Core Preservation
73	100.00%
74	100.00%
75	99.80%
76	96.50%
79	96.60%
81	100.00%
82	100.00%
83	87.90%
84	99.90%
86	100.00%
87	100.00%
89	90.20%
90	81.60%
91	72.80%
92	92.40%
94	75.30%
95	81.90%
96	78.80%
97	79.40%
98	96.40%
99	76.40%
102	71.50%
103	72.00%
104	71.00%
105	72.10%
108	85.40%
109	76.60%
111	85.40%

*Data Source: Texas Legislative Council, Red-340 report, *available at* ftp://ftpgis1.tlc.state.tx.us/Plan H302/Reports/PDF/ (last accessed 12/23/11)

Interim House Plan Overlap with State's House Plan (Districts with 70% and Higher Overlap), cont.	
District	H283 Core Preservation
115	79.90%
116	98.50%
117	80.00%
118	73.00%
119	79.50%
120	93.60%
121	95.30%
122	97.40%
123	96.70%
124	95.00%
125	99.40%
127	83.70%
128	74.50%
129	84.90%
131	74.00%
132	82.50%
134	74.10%
138	75.60%
139	72.70%
140	74.50%
150	79.70%

*Data Source: Texas Legislative Council, Red-340 report, *available at* ftp://ftpgis1.tlc.state.tx.us/PlanH302/Reports/PDF/ (last accessed 12/23/11)