IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, et al., Plaintiffs, v. STATE OF TEXAS, et al., Defendants.	Civil Action No. 5:11-cv-360 (OLG-JES-XR) Three-Judge Court [Lead Case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), Plaintiff, v. STATE OF TEXAS, et al., Defendants.	Civil Action No. 5:11-cv-361 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
TEXAS LATINO REDISTRICTING TASK FORCE, et al., Plaintiffs, v. RICK PERRY, Defendant.	Civil Action No. 5:11-cv-490 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

MARGARITA V. QUESADA, et al., Plaintiffs, v. RICK PERRY, et al., Defendants.	Civil Action No. 5:11-cv-592 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
JOHN T. MORRIS, Plaintiff, v. STATE OF TEXAS, et al. Defendants.	Civil Action No. 5:11-cv-615 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
EDDIE RODRIGUEZ, et al., Plaintiffs, v. RICK PERRY, et al. Defendants.	Civil Action No. 5:11-cv-635 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

STATEMENT OF INTEREST OF THE UNITED STATES WITH RESPECT TO THE PROPOSED INTERIM PLANS

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I. THE UNITED STATES' INTEREST

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit.

The United States respectfully submits this brief in response to the Court's order, entered February 2, 2012 (ECF No. 598), asking the parties to submit briefs on a variety of issues to assist the Court in preparing interim redistricting plans. In this particular brief, the United States is responding to the Court's questions concerning Section 5 of the Voting Rights Act. Section 5 precludes covered jurisdictions from implementing voting changes without receiving "preclearance" for those changes. 42 U.S.C. § 1973c. The Attorney General has primary responsibility for enforcing and administering Section 5. *See id.* §§ 1973(d), 1973c(a). The United States thus has a strong interest in ensuring the statute is properly interpreted and applied.

The United States has a particular interest in the redistricting plans at issue in this case. It currently is defending the related judicial preclearance action filed by the State of Texas in the District Court for the District of Columbia. *See Texas v. United States*, No. 11-1303, 2011 WL 6440006 (D.D.C. Dec. 22, 2011). The United States has argued in that action that the State's proposed Congressional and State House plans fail to comply with Section 5. *See* United States' Post-Trial Brief, ECF No. 203, *Texas* v. *United States*, No. 1:11-cv-1303 (D.D.C. filed Feb. 6, 2012) (attached hereto as Exhibit 1) [hereinafter US Trial Br.]. The three-judge court denied the State's motion for summary judgment. *See Texas v. United States*, 2011 WL 6440006, at *1. Trial in that case has concluded, and the matter awaits decision.

II. SUMMARY OF ARGUMENT

The United States' brief is intended to assist the Court by identifying the aspects of the State's enacted plans for the State House of Representatives and U.S. Congress that the United

States believes will not have reasonable probability of gaining Section 5 preclearance in the U.S. District Court for the District of Columbia. In addition, we address whether this Court may waive preclearance requirements for voting changes that would be needed to implement the interim plans, and we contend that it may not.

Texas contends that the issues raised by the United States have not established "a reasonable probability that any aspect of the State's plans does not comply with Section 5." Texas Advisory, ECF No. 605, at 3. The United States has previously argued that the Section 5 court's ruling on the State's motion for summary judgment in the declaratory judgment action demonstrated that the Section 5 concerns were not insubstantial. ECF No. 591. In this brief, the United States avers that the evidence adduced at the recently concluded trial demonstrates that there is a reasonable probability that Texas will fail to gain preclearance on both the proposed House and Congressional redistricting plans.

The proposed State House plan (H283) is retrogressive because only 45 districts provide minority voters with the ability to elect their candidate of choice, whereas 50 districts provide minority voters with the ability to elect in the benchmark plan. The Congressional plan (C185) is retrogressive because the State has failed to prove that the proposed plan "does not increase the degree of discrimination" against minority voters. *See Texas v. United States*, 2011 WL 6440006, at *3. The Congressional plan would need to increase by one the number districts in which minority voters have the ability to elect their candidates of choice in order to avoid increasing the degree of discrimination from current levels. Because the United States reviews the plan on a statewide basis, the retrogression in these plans can be cured by creating new districts anywhere in the State. *See Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003) ("inquiry must encompass the entire statewide plan as a whole").

However, the proposed redistricting plans for the State House and Congress are also infected with discriminatory purpose. There are particular districts in which discriminatory purpose is evident. In H283, these districts include District 41, 117, and the Harris County districts. In C185, these districts include District 23, districts in the Dallas-Fort Worth area and Districts 9, 18, and 30 in the Congress. Even if the State were to create new ability districts elsewhere in the State, those districts drawn with discriminatory intent must specifically be changed so that the interim plan will not "reflect aspects of the state plan that stand a reasonable probability of failing to gain § 5 preclearance." *Perry v. Perez*, ___ S. Ct. ___, No. 11-713, 2012 WL 162610, at *4 (U.S. Jan. 20, 2012); *cf. also Upham v. Seamon*, 456 U.S. 37, 43 (1982) (requiring that a remedial plan institute modifications "necessary to cure any constitutional or statutory defect").

III. THE UNITED STATES' SECTION 5 CHALLENGE TO H283 IS NOT INSUBSTANTIAL

There is a reasonable probability that Texas will not obtain a declaratory judgment regarding Plan H283. In particular, Districts 33, 35, 41, 117, and 149 currently provide minority voters with the ability to elect, and they will not do so in Plan H283, reducing the number of districts in which minority voters have the ability to elect their preferred candidates of choice from 50 to 45. In addition, the United States has presented a substantial discriminatory purpose claim concerning H283; this purpose is most evident in Districts 41 and 117, as well as the districts within Harris County.

A. House District 33

The United States has presented a substantial Section 5 challenge to House District 33. In the benchmark plan, House District 33 is located in Nueces County, and all parties to the

preclearance action agree that Hispanic citizens have the ability to elect candidates of their choice to the Texas House of Representatives in this district. The proposed plan moves it to Collin and Rockwall counties, and all parties agree that minorities will not be able to elect candidates of their choice there. The United States challenges that move as retrogressive in purpose and effect. *See* U.S. Trial Br. at 4-5, 29.

Texas asserted that proposed House District 74 offsets that loss. The State contends that House District 74, which has been represented by Hispanic Democrat Pete Gallego since the 1990s, was not a Hispanic ability district in the benchmark plan but is an ability district in the proposed plan. Tex. Post-Trial Brief at 13-14, ECF No. 201, *Texas v. United* States, No. 1:11-cv-1303 (D.D.C. filed Feb. 6, 2012) [hereinafter Tex. Trial Br.]. The United States presented substantial evidence at trial, however, that Hispanic citizens already have the ability to elect their preferred candidates of choice to the Texas House of Representatives in benchmark House District 74; Hispanic voters' ability to elect preferred candidates in proposed House District 74 therefore cannot offset the loss of benchmark House District 33. *See* U.S. Trial Br. at 13; United States' Proposed Findings of Fact ¶¶ 76-87, ECF No. 185, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. filed Feb. 3, 2012) (attached hereto as Exhibit 2) [hereinafter U.S. PFOF].

B. House District 35

The United States has presented a substantial Section 5 challenge to House District 35, which is south of Bexar County. U.S. Trial Br. at 5-6. The United States presented substantial evidence at trial that Hispanic citizens currently have the ability to elect their preferred candidates of choice to the Texas House of Representatives in benchmark House District 35. U.S. PFOF 18-21. Indeed, Hispanic voters elected their preferred candidate to the House in

2002, 2004, 2006, and 2008, though elections throughout the decade were very close. U.S. PFOF ¶ 20.

The United States also presented substantial evidence at trial that Hispanic citizens will not have the ability to elect their preferred candidates of choice in proposed House District 35. *Id.* ¶¶ 22-28. Compared to benchmark House District 35, the proposed district decreases Hispanic population and voter registration percentages. *Id.* ¶ 25. The proposed district increases the degree of racially polarized voting. *Id.* ¶ 26. And it decreases the performance of Hispanic-preferred candidates in general elections. *Id.* ¶ 27. In light of those changes, expert witness Dr. Lisa R. Handley concluded that Hispanic voters will not be able to elect their chosen candidates to the House from the reconfigured district. U.S. Trial Br. at 6.

C. House District 41

The United States has presented a substantial challenge to House District 41 under both the purpose and effect prongs of Section 5. *See* U.S. Trial Br. at 6-9, 23 & n.12. Benchmark District 41 is located in Hidalgo County, and the parties agree that the District provides minority voters with the ability to elect their candidates of choice. U.S. PFOF ¶ 34. The evidence presented at trial does not prove that proposed District 41 provides minority voters with the ability to elect their candidates of choice.

The performance of proposed District 41 in exogenous elections declines, but the number and size of split VTDs in the proposed plan prevents an exact measurement of the severity of that decline. Thirty-one percent of the District's population resides in these split VTDs, and the partial precincts include relatively Anglo census blocks and exclude homogenous Hispanic census blocks. *Id.* ¶¶ 37, 39. Because political data are collected at the precinct level, reconstituted election analysis must assume that every census block within a precinct is

politically identical. As a result, dividing precincts by a characteristic that correlates with political preference – as race does in District 41 – introduces substantial error in that analysis.[1] Because there is no dispute that the benchmark district is an ability-to-elect district, and because Texas cannot demonstrate that it remains so in the proposed plan, the challenge to House District 41 under the effect prong of Section 5 is not insubstantial.[2]

More importantly, Texas has used race as a proxy for partisanship in District 41 and has drawn the District with the purpose of eliminating minority voters' ability to elect their candidate of choice, violating the purpose prong of Section 5. With no partisan data available below the precinct level, the statistically significant racial skew to the 17 split precincts along the boundaries of proposed District 41 are "unexplainable on grounds other than race." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The inference that naturally arises from this persistent pattern is that the map-drawers added Anglo voters to this district so that Hispanic voters would not be able to elect their candidate of choice. U.S. PFOF ¶¶ 148-149.

The State has failed to rebut the inference of arises from the persistent bias of precinct splits across the proposed plans. The United States presented the testimony of Jaime Longoria, assistant county administrator of Hidalgo County, who explained that several Hispanic

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[1] This is the reason that Dr. Handley could not reach a conclusion on whether District 41 performs in the proposed plan. *Id.* ¶ 38.

[2] The United States has urged the District of Columbia Court not to apply a presumption that a 65% voting majority provides minority voters provides the ability to elect their candidates of choice. *See* U.S. Trial Br. at 8-9. The United States presented substantial evidence in District 41 that the Hispanic community of Hidalgo County faces crushing socioeconomic burdens, particularly in the shantytowns known as *colonias*. U.S. PFOF ¶ 44. There has also been a history of discrimination. *Id.* ¶ 123. Obstacles to political participation for voters in these communities uniquely impair their "'realistic opportunity to elect officials of their choice.'" *Texas v. United* States, 2011 WL 6440006, at *16 n.22 (quoting *Ketchum v. Byrne*, 740 F.2d 1398, 1410 (7th Cir. 1984)).

neighborhoods were eliminated from the district via the exclusion of partial precincts. *Id.* ¶ 149; *see also id.* ¶¶ 150-154 (setting out timeline and limited information concerning precinct splits). This district of plan H283 stands a reasonable probability of failing to gain preclearance.

D. House District 117

The United States has also presented a substantial challenge to House District 117 under both the purpose and effect prongs of Section 5. *See* U.S. Trial Br. at 9-10, 20-22. Texas has eliminated the ability of minority voters to elect candidates of choice in District 117 without creating a new ability district elsewhere in the State, violating the effects prong of Section 5. It is undisputed that Hispanic citizens have the ability to elect their preferred candidate of choice in the benchmark plan. U.S. PFOF ¶ 50. Expert testimony provided by both Texas and the United States indicated that the proposed district will not provide Hispanic citizens with the ability to elect preferred candidates. *Id.* ¶ 60.

The State has asserted that an election analysis is unnecessary in District 117 because more than 60% of the citizen voting age population of the proposed District is Hispanic. Tex. Advisory, ECF No. 605, at 9-10. However Texas has misinterpreted the District of Columbia Court's finding concerning the so-called 65 Percent Rule. The Court's opinion denying the State's motion for summary judgment observed, "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." *Texas v. United States*, 2011 WL 6440006, at *16 (emphasis added). The Court rule described a voting majority, which suggested that the relevant measure was citizen voting age population. Moreover, the court did not list differentials in age distribution as a factor that the required supermajority would take into account. Nevertheless,

Texas has attempted to cut the voting majority to 60% by assuming that the D.C. Court had adopted the precise observations made by cases that the Court cited in support of the 65 Percent Rule. *See* Tex. Advisory, ECF No. 605 at 10 (citing *Texas v. United* States, 2011 WL 6440006 at *16 n.22). During closing arguments, the Court corrected this misinterpretation of its prior opinion.

> MR. MORTARA: But split VTDs does not [a]ffect the calculation of demographic benchmarks like HCVAP. What you see here is that 14 House District 41 in the adopted plan has an HCVAP of 72.1 15 percent well in excess of the bright line 60 percent benchmark the Court adopted in footnote 22 of its summary judgment opinion. Under this Court's bright line, House District 41 is an ability to elect district in the proposed plan as a matter of law. Therefore, there is no retrogression with respect to this district. The same is true of House District --
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> JUDGE HOWELL: We didn't adopt a 60 percent bright line rule. We said 65 percent in the text of the opinion.
>
> MR. MORTARA: I'm going to show you on the screen the opinion.
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> JUDGE COLLYER: Are you debating with Judge Howell of what we said in our opinion? Mr. Mortara, please do not do that.
>
> MR. MORTARA: Your Honor, the footnote 22 of the opinion establishes in the text a 60 percent voting age population number. It starts with 65 percent population and in the footnote gets down to 60 percent voting age. As Your Honor knows, there are substantial citizenship issues with the Hispanic population in Texas and therefore, a 60 percent Hispanic voting age population is not a good benchmark.
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> JUDGE HOWELL: Mr. Mortara, you can stick with your 60 percent interpretation of the opinion, and you can continue with that throughout your briefing in the case. And we can rest on that.

Tr. at 9:12-10:17 (Jan. 31 a.m.) (attached hereto as Exhibit 3). The Court again reached out to clarify the applicable metric during the United States' closing argument:

> MR. MELLETT: Let me address, it was brought up a couple of times regarding the 65 percent rule. The, Your Honors, we respectfully disagree that there should be a bright line rule. And part of that –
>
> JUDGE HOWELL: Do you agree that it's 65 percent in our opinion?
>
> MR. MELLETT: No, Your Honor.
>
> JUDGE HOWELL: Do you agree that at least that we said 65 percent?
>
> MR. MELLETT: Yes, we do agree that you said it's 65 percent.
>
> JUDGE HOWELL: Thank you for that.

Id. at 85:18-86:4. Judge Howell made one additional mention of the relevant portion of the Court's final opinion to clarify its meaning:

> JUDGE HOWELL: Can I just make sure that everybody understands what we said because we were very careful about this line in our opinion. And we thought we were clear, a District with minority voting majority, we didn't say voting age, we said voting minority so people in prisons who don't vote don't constitute part of a voting majority.

Id. at 87:12-18. Because the 63.8% HCVAP concentration in proposed House District 117 falls below the D.C. Court's 65% CVAP threshold for a de jure performing district, retrogression concerns in this District are not insubstantial.

In crafting proposed District 117, the State purposefully eliminated electoral opportunity while applying a subtle yet discernible methods to maintain a Hispanic population majority. Because this intentional retrogression violates the purpose prong of Section 5, any interim plan must redraw this specific district, rather than merely replacing it with a performing district elsewhere in the State to satisfy retrogression concerns. The precipitous drop in Hispanic turnout between benchmark District 117 and proposed District 117 is a principal example of the strategy

developed by Eric Opiela and Gerardo Interiano when they were both on the staff of House Speaker Joe Straus. According to Opiela,

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

DX 304. Interiano acted upon Opiela's request and received at least some of the data from the Texas Legislative Council (TLC). DX 294; DX 197. Interiano was responsible for drawing the maps in Bexar County, and proposed District 117 was drawn as a "50+1" District with precisely 50.1% SSVR. U.S. PFOF ¶¶ 158-159.[3] The result of this strategy is clear: despite marginal changes in SSVR between benchmark District 117 and proposed District 117, projected Hispanic turnout falls between 40% and 50%. US PFOF ¶ 163. Dr. Arrington concluded that by focusing on poor, low turnout Hispanic communities, the map-drawers dramatically and deliberately diminished the Hispanic community's ability to elect preferred candidates. DX 320 ¶¶ 26-27. This district of plan H283 stands a reasonable probability of failing to gain preclearance.

E. House District 149

The United States has presented a substantial Section 5 challenge to House District 149. U.S. Trial Br. at 10-13, 29-30. In the benchmark plan, House District 149 is located in southwestern Harris County and has been represented since 2005 by the only Vietnamese

[3] When the representative of District 118 sought to recover two impoverished communities that had been excised from his District, he was told that no change to District 117 would be permitted if it raised SSVR above 50.1%. U.S. PFOF ¶¶ 158, 160-161.

American ever to serve in the Texas Legislature, Representative Hubert Vo. U.S. PFOF ¶ 63. The proposed plan moves the district to Williamson County, where all parties agree minorities will not be able to elect candidates of their choice. *Id.* ¶ 75. The United States challenges that move as retrogressive in effect and discriminatory in purpose.

At trial, the United States presented substantial evidence that a coalition of Asian-American, African-American, and Hispanic citizens currently have the ability to elect preferred candidates of choice to the Texas House of Representatives in benchmark House District 149. These minority groups comprise 61.5% of the district's citizen voting age population and voted cohesively to elect their preferred candidate, Representative Vo, in 2004, 2006, 2008, and 2010. *Id.* ¶ 69. The United States presented evidence that this coalition has elected other candidates for local offices, and this coalition includes many facets of life including economic coalitions. *Id.* An existing coalition district in which minority voters elect their candidate of choice is protected under Section 5. *See Texas v. United States*, 2011 WL 6440006, at *18-19.

The United States also presented substantial evidence that the change to House District 149 is tainted with racially discriminatory intent. The proposed plan draws Representative Vo into House District 137, which is represented by a longtime Democratic incumbent, Representative Scott Hochberg. U.S. PFOF ¶ 167. It contains only a fraction of Representative Vo's current constituency. *Id.* ¶ 169. Anglo legislators told Representative Hochberg that he would be "comfortable" in proposed House District 137, suggesting that the district had been drawn to favor him over Representative Vo. *Id.* Partisan motives would have led to the opposite result – favoring Representative Vo over Representative Hochberg – because the latter is a more senior, more powerful, and more influential legislator. *Id.* ¶ 170. The only apparent explanation here for targeting a junior member over a senior member is race. *Id.* ¶ 171.

The State's evidence does not establish that this challenge is insubstantial. The State did not dispute that Representative Vo was, in fact, the minority-preferred candidate in the four elections he won. Instead, the State presented evidence that Democratic candidates for statewide offices rarely win in District 149.[4] The State also offered evidence that there is no coalition in House District 149 because minority voters do not vote cohesively in Democratic primaries for statewide offices, but Texas did not address the coalition for local offices. The United States has argued that Section 5 protection does not depend on cohesion in statewide primary elections. U.S. Trial Br. at 12-13; *see also* Gonzales Intervenors' Bench Brief, ECF No. 169, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. filed Jan. 23, 2012). The State offered no evidence to rebut the United States' intent claim on this district. This aspect of plan H283 stands a reasonable probability of failing to gain preclearance.

IV. THE UNITED STATES' SECTION 5 CHALLENGE TO C185 IS NOT INSUBSTANTIAL

The United States has challenged plan C185 under both prongs of Section 5. The United States claims that the plan is retrogressive because it increases minority underrepresentation by one district. U.S. Trial Br. at 14-16. The United States also claims that the plan reflects purposeful discrimination against minority voters; this purpose is most evident in Congressional District 23, in the Dallas-Fort Worth Metroplex, and in Congressional Districts 9, 18, and 30. U.S. Trial Br. at 18-30.

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[4] In its post-trial proposed findings of fact, Texas suggested for the first time that proposed House District 101 compensates for any retrogression resulting from the elimination of benchmark District 149 as an ability district in Plan H283. ECF No. 186 ¶ 100. As a review of Texas' proposed findings of fact makes clear, the State has not produced a scintilla of evidence that proposed House District 101 provides minority voters with an ability to elect their preferred candidates to the House. *Id.* ¶¶ 96-100.

Texas acknowledges in its advisory that Congressional District 23 and the Dallas-Fort Worth Metroplex are "fairly at issue." Tex. Advisory, ECF No. 605 at 13-14. As we explain below, moreover, all of the United States' challenges are not insubstantial. These aspects of plan C185 therefore stand a reasonable probability of failing to gain preclearance.

A. Congressional District 23

Congressional District 23 in the benchmark plan provides Hispanic voters with an ability to elect their preferred candidates of choice. The district's very creation in 2006 as a minority opportunity district to remedy the Section 2 violation found by the Supreme Court in *LULAC v. Perry*, 548 U.S. 399, 425-42 (2006), is indicative of its status as a protected district under Section 5. Furthermore, following that decision, and as the Court had foreseen, the growing and increasingly active Hispanic community in District 23 succeeded in electing its preferred candidate to Congress, first in 2006 and again in 2008. *See* U.S. PFOF ¶ 191.

The United States has stated that in Congressional District 23, there is direct evidence of discriminatory purpose to keep the Hispanic concentration the same but decrease the ability of Hispanic voters to elect their candidates of choice by swapping out high turnout Hispanic voters and replace them with low turnout Hispanic voters. *Id.* ¶¶ 197, 229-230; U.S. Trial Br. at 20-22. The map drawers were successful in their efforts; proposed Congressional District 23 clearly does not provide Hispanic voters with an ability to elect their preferred candidates. U.S. PFOF ¶¶ 198, 236-237. The United States has also identified evidence regarding splitting precincts based on race in Congressional District 23, which also supports a conclusion that the District was shaped by a discriminatory purpose. *Id.* ¶¶ 231-235; U.S. Trial Br. at 22-24.

B. Dallas-Fort Worth Area

Instead of allowing a minority-controlled Congressional district to emerge naturally within the compact minority communities in the Dallas-Fort Worth Metroplex, the map-drawers intentionally divvied up urban, low-income, minority population among four Anglo-controlled Congressional districts with bizarre shapes – CD6, CD12, CD26, and CD33. Cracking of the minority population and submersion in Anglo, rural districts is further evidence of discriminatory purpose. USPFOF ¶¶ 239-256; U.S. Trial Br. at 24-25; *see also Busbee v. Smith*, 546 F. Supp. 494, 517 (D.D.C 1982) (finding that splitting Black voters in Atlanta among two districts was probative of racial purpose); *see also* 28 C.F.R. § 51.59(a)(3)-(4) (packing and cracking minority populations is probative of discriminatory purpose). Moreover, the boundaries of Congressional District 26 split 49 precincts, and 38 of these splits are located in a "lightning bolt" in Tarrant County. U.S. PFOF ¶ 250. The boundary between Congressional District 26 and District 12 at the eastern boundary of the "lightning bolt" divides minority communities according to race. *Id.* The boundary line divides a homogenous Democratic area and could not have been guided by political data. *Id.* ¶ 251. Based on this evidence, there is a reasonable probability that these aspects of the Congressional Plan will not gain Section 5 preclearance.

C. Districts 9, 18, and 30

There is a reasonable probability that Texas will not gain preclearance regarding Districts 9, 18 and 30 because of discriminatory purpose in drawing these districts in Plan C185. Substantial evidence was presented at trial that the map drawers had removed economic engines from Districts 9, 18, and 30 (*e.g.*, hospitals, manufacturing hubs, and the Superdome). They had similarly drawn the Congress members' district offices out of each of their districts and had drawn Representative Johnson's home from her district. U.S. Trial Br. at 26; *see also* NAACP Proposed Findings of Fact ¶¶ 190-194, 198-200, 230, ECF No. 181, *Texas v. United States*, No.

1:11-cv-360 (D.D.C. filed Feb. 3, 2012); NAACP Post-Trial Brief at 4-12, ECF No. 198. *Texas v. United States*, No. 1:11-cv-360 (D.D.C. filed Feb. 6, 2012). There was no hint of comparable treatment of Anglo members of Congress. NAACP Proposed Findings of Fact ¶¶ 212-213. When asked to explain this disparate treatment, map-drawer Gerardo Interiano testified implausibly that it was all merely a "coincidence." Tr. at 95:3-95:19 (Jan. 25 p.m.) (attached hereto as Exhibit 4).

D. Minority Growth

The United States discusses its retrogression challenge at length in its post-trial brief, *see* U.S. Trial Br. 14-16, and we incorporate that discussion here. We explain that, under the standard set forth in the memorandum opinion denying the State's motion for summary judgment, Plan C185 is retrogressive because it "increase[s] the degree of discrimination against a minority population." *Texas v. United States*, 2011 WL 6440006, at *3 (citing *City of Lockhart v. United States*, 460 U.S. 125, 134-35 (1983)); *accord Reno v. Bossier Parish Sch. Bd.* (*Bossier I*), 520 U.S. 471, 479 (1997) .

This challenge is not insubstantial. The three-judge court in the District of Columbia denied the State's motion for summary judgment on that issue and specifically rejected the State's reliance on *Abrams v. Johnson*, 521 U.S. 74, 97 (1997). *See Texas v. United States*, 2011 WL 6440006, at *20 (explaining that where the number of legislative seats has increased, *Abrams* "does not hold that the failure to draw new minority districts can never be retrogressive"). As a result, any interim plan must account for the United States' challenge. To do so, the 36-district interim plan must increase the number of minority ability districts by one

district. If this Court finds that there are 10 minority ability districts in the benchmark plan, the interim plan must have 11.[5] The new district may be anywhere in the State.[6]

V. THIS COURT MAY NOT WAIVE PRECLEARANCE REQUIREMENTS

The Court has also requested an advisory regarding whether it may waive the preclearance requirements for "the voting changes that would need to be submitted to the Department of Justice by the counties after new interims plans are issued in this case." ECF No. 598. The United States contends that this Court does not have the authority to waive the preclearance requirements, where there is no emergency that would justify such a decision. In addition, administrative preclearance is available on an expedited basis, which would allow jurisdictions to obtain preclearance in a timely manner.

Section 5 requires covered States to obtain judicial or administrative preclearance before enforcing a voting change. 42 U.S.C. § 1973c(a). "A voting change in a covered jurisdiction 'will not be effective as law until and unless cleared' pursuant to one of these two methods." *Clark v. Roemer*, 500 U.S. 646, 662 (1991) (quoting *Connor* v. *Waller*, 421 U.S. 656, 656 (1975) (per curiam)). "Failure to obtain either judicial or administrative preclearance 'renders the change unenforceable.'" *Id.* (quoting *Hathorn* v. *Lovorn*, 457 U.S. 255, 269 (1982)).

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[5] The United States does not count Congressional District 25 among the 10 minority ability districts in the benchmark plan.

[6] The 2010 Census showed that Texas's population had increased by nearly 4.3 million people since 2000. U.S. Request for Judicial Notice ¶ 8, ECF No. 180, *United States v. Texas*, 1:11-cv-360 (D.D.C. filed Feb. 3, 2012) (attached hereto as Exhibit 5). Explosive growth among the State's minority population accounted for approximately 90% of that increase. *Id.* ¶¶ 8, 18. As a result of this growth, Texas was entitled to four new Congressional seats, but minority voters did not receive the ability to elect a candidate of choice in one of the new districts. Failure to create any new seats in which minority voters would have the ability to elect their preferred candidates of choice, as a reflection of the State's explosive minority growth, is also substantial evidence of a discriminatory purpose. *See* U.S. Trial Br. at 24.

Not only is a covered jurisdiction barred from enforcing its unprecleared plan, but a federal court may not order that jurisdiction to hold elections in which unprecleared voting changes will be implemented. *See, e.g.*, *Clark*, 500 U.S. at 654 ("§ 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the election"); *Lopez* v. *Monterey County*, 519 U.S. 9, 22 (1996) (holding that it was error for district court to "order elections under that system before it had been precleared"). In both *Clark* and *Lopez*, the Court declined to decide whether there could ever be a circumstance in which a court may "allow an election for an unprecleared seat to go forward" but observed that "extreme circumstances might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed." *Clark*, 500 U.S. at 654; *Lopez*, 519 U.S. at 21 (quoting *Clark*, 500 U.S. at 654). In neither of those cases did the court find such an exigency, and no greater emergency exists here.

The Attorney General's regulations regarding Section 5 make it clear that "changes affecting voting for which approval by a Federal court is required, or that are ordered by a Federal court, are exempt from section 5 review only where the Federal court prepared the change and the change has not been subsequently adopted or modified by the relevant governmental body." 28 C.F.R. § 51.18(a). Voting changes such as polling place and precinct changes would be determined by the counties and not the court, and therefore, would require preclearance. *See id.* § 51.18(b).[7]

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[7] The district court in *Johnson v. Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996), did not permit a covered jurisdiction to forgo preclearance. In that case, the court, having found one Florida congressional district unconstitutional, directed the Florida Legislature to revise the district boundaries by a date certain. The court explained that it would review the plan for compliance with Section 5 and – if satisfied – order the plan into effect without preclearance. *See id.* at 1494. The court never did so, however. After the Legislature enacted a new plan, the Attorney General precleared it, and then the district court found the

The Section 5 Procedures also note that emergency interim use does not insulate a jurisdiction from obtaining preclearance for a practice on a permanent basis: "In emergencies. 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." 28 C.F. R. § 51.18(d). The United States is unaware of any situation in which § 51.18(d) has been invoked by a court to authorize a jurisdiction not to obtain preclearance.

The United States also contends that there is no emergency situation that would justify the use of the regulation. First, any emergency situation would be created by the court itself. The court has already moved the primary, and it is within the court's authority to set a primary date that would allow for enough time so that the preclearance process can be followed. Second, even if the court adhered to an April primary date, there is still enough time for jurisdictions to submit their voting changes for preclearance. Jurisdictions would be able to request expedited review of their Section 5 submission, and jurisdictions often can receive a response in significantly less than 60 days. *See* 28 C.F.R. § 51.34.

VI. CONCLUSION

In order to address the United States' substantial retrogression claims, an interim House plan must maintain 50 districts in which minority voters have the ability to elect their candidates of choice, and an interim Congressional plan must include 11 such districts. *See Beer v. United States*, 425 U.S. 130, 141 (1976). The specific districts infected with a discriminatory purpose must be drawn in the interim map.

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constitutional violation remedied. *See Johnson v. Mortham*, No. TCA 94-40025, 1996 WL 297280, at *1 (N.D. Fla. May 31, 1996).

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