No. 12-496

In The Supreme Court of the United States

STATE OF TEXAS,

Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

MOTION TO DISMISS OR AFFIRM BY INTERVENOR-APPELLEE TEXAS LATINO REDISTRICTING TASK FORCE

THOMAS A. SAENZ
NINA PERALES
Counsel of Record
KAROLINA J. LYZNIK
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
nperales@maldef.org

MARIBEL HERNÁNDEZ RIVERA
JORGE M. CASTILLO
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10024
(212) 859-8000
maribel.hernandez.rivera@friedfrank.com

December 7, 2012

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether the district court properly denied preclearance to the Texas congressional redistricting plan after concluding that the plan was enacted with a racially discriminatory purpose.

Whether the district court properly denied preclearance to the Texas State House plan after concluding that the plan created fewer Latino ability to elect districts when compared to the benchmark plan.

CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29.6, Intervenor-Appellee Texas Latino Redistricting Task Force makes the following disclosures:

1. The Texas Latino Redistricting Task Force is an unincorporated association of individuals and organizations.

2. Organizational members of the Texas Latino Redistricting Task Force include: Hispanics Organized for Political Education (HOPE), the Mexican American Bar Association of Texas, the National Organization for Mexican American Rights (NOMAR), the Southwest Voter Registration Education Project, the William C. Velasquez Institute, and the Southwest Workers' Union.

3. There is no parent or publicly held company owning 10% or more of stock in any of the above named organizations.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT..... ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES..... vi

OPINION BELOW..... 1

JURISDICTION..... 1

STATEMENT OF THE CASE..... 1

A. Factual Background 3

1. Texas's growth was primarily attributable to an increase in its Latino population..... 4

2. Congressional Plan..... 5

3. State House Plan..... 13

4. Legislative Process 15

B. Procedural Background..... 19

SUMMARY OF ARGUMENT 21

ARGUMENT..... 23

I. The Present Appeal Should Be Held Pending Disposition of *Shelby Cnty., Ala. v. Holder* 23

II. The State's Use of Race to Fracture Latino Voting Strength and the State's Reduction in the Number of Latino Ability to Elect Districts in the State House Plan Foreclosures Section 5 Preclearance 24

TABLE OF CONTENTS – Continued

Page

A. The District Court Properly Found Racially Discriminatory Purpose in the State's Congressional Plan..... 24

B. The District Court Properly Found Retrogression in the State House Plan..... 32

III. A Favorable Decision for Texas on Retrogression is Unlikely to Change the Outcome of Texas Redistricting..... 38

IV. This Case is a Poor Vehicle to Address the Constitutionality of Section 5 38

CONCLUSION..... 40

APPENDIX

Table of Contents..... i

Texas Population Growth 1990-2010 by Race (DX406, at 14) .....App. 1

Change in Texas Total Population 2000-2010 by Race .....App. 2

Plan C100: Statewide Map of Benchmark Congressional Districts (DX818, at 1).....App. 3

Plan C185: Statewide Map of Legislatively Enacted Congressional Districts (DX819, at 1).....App. 4

Plan C100: South Texas Congressional Districts Population Deviations (DX431, at 75).....App. 5

TABLE OF CONTENTS – Continued

Page

Email between E. Opiela and G. Interiano, Re: useful metric, November 19, 2010 (DX820, at 7).....App. 6

State's Proposed Congressional District 26 – Excerpt of DX819 – Plan C185.....App. 8

State's Proposed Congressional District 26 and 2005-2009 Citizen Voting Age Population (DX702).....App. 9

Plan H100: Statewide Map of Benchmark Texas House Districts (DX960, at 1).....App. 10

Plan H283: Statewide Map of Legislatively Enacted Texas House Districts (DX817, at 1)...App. 11

Benchmark and State Proposed Nueces County House Districts and Hispanic Citizen Voting Age Population (DX406, at 2-3).....App. 12

State's Proposed House District 77 and House 78 – Excerpt of DX817 – Plan H283.....App. 14

El Paso Hispanic Citizen Voting Age Population as a Percentage of Total Citizen Voting Age Population in Enacted Plan H283 (DX406, at 6).....App. 15

TABLE OF AUTHORITIES

Page

CASES

Beer v. United States, 425 U.S. 130 (1976) 33

Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982) *summarily aff'd*, 459 U.S. 1166 (1983).....31

City of Pleasant Grove v. United States, 479 U.S. 462 (1987).....31

Johnson v. De Grandy, 512 U.S. 997 (1994) 36

Georgia v. Ashcroft, 539 U.S. 461 (2003)....19, 33, 34, 35

LULAC v. Perry, 457 F. Supp. 2d 716 (E.D. Tex. 2006) 5

LULAC v. Perry, 548 U.S. 399 (2006) .....*passim*

NAACP v. New York, 413 U.S. 345 (1973) 19

Pearson v. Muntz, 639 F.3d 1185 (9th Cir. 2011).....23

Perez v. Perry, No. 11-cv-00360 (W.D. Tex. Mar. 19, 2012) 3, 29, 33

Perez v. Perry, No. 11-cv-00360, Dkt. No. 690 (W.D. Tex. Mar. 19, 2012).....15

Perez v. Perry, No. 11-cv-00360, Dkt. No. 380 (W.D. Tex. Sept. 29, 2011) 20

Perez v. Texas, 2012 WL 4094933 (W.D. Tex. Feb. 28, 2012).....3, 4, 12

Perry v. Perez, 132 S.Ct. 934 (2012) 2, 12, 20

Port Arthur v. United States, 517 F. Supp. 987 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982) 31

TABLE OF AUTHORITIES – Continued

Page

Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1997) 29

Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000) 32

Richmond v. United States, 422 U.S. 358 (1975) 36

Rogers v. Tristar Prods., Inc., 430 Fed. App'x. 899 (Fed. Cir. 2011) 23

Shaw v. Reno, 509 U.S. 630 (1993) 29

Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424 (D.D.C. 2011), *aff'd,* 679 F.3d 848 (D.C. Cir. 2012), *cert. granted in part*, 2012 WL 3018430 (U.S. Nov. 9, 2012).....30

Shelby Cnty., Ala. v. Holder, 12-96, 2012 WL 3018430 (U.S. Nov. 9, 2012).....21, 22, 23

Texas v. United States, No. 12-496 (U.S. Oct. 19, 2012) 31, 32, 38, 39

Thornburg v. Gingles, 478 U.S. 30 (1986) 36

Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).....24, 29, 30, 31, 32

STATUTES

42 U.S.C. § 1973 (1982) 19, 29

42 U.S.C. § 1973c (2006) 2, 20

42 U.S.C. § 1973c(b) (2006) 33

MOTION TO DISMISS OR AFFIRM BY INTERVENOR-APPELLEE TEXAS LATINO REDISTRICTING TASK FORCE

Intervenor-Appellee Texas Latino Redistricting Task Force, respectfully requests that this Court dismiss the appeal or, in the alternative, affirm the judgment of the United States District Court for the District of Columbia.

OPINION BELOW

The opinion of the three-judge district court (Jurisdictional Statement App. ("J.S. App.") 1-281) is reported at *Texas v. United States*, 2012 WL 3671924 (D.D.C. 2012).

JURISDICTION

The judgment of the three-judge district court was entered on August 28, 2012. Texas filed a notice of appeal on August 31, 2012 (J.S. App.342-43) and its jurisdictional statement on October 19, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

STATEMENT OF THE CASE

Following release of the 2010 Census, which showed a dramatic increase in the state's Latino

population, and an increase of four seats in the Congressional delegation, the Texas Legislature enacted redistricting plans that intentionally thwarted the growing Latino electorate. App.1, 2. The redistricting plans are infected with purposeful racial discrimination in violation of the Fourteenth and Fifteenth Amendments and were properly blocked from implementation pursuant to section 5.

As a covered jurisdiction under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (2006), Texas is required to obtain preclearance before using a new apportionment. In order to obtain preclearance, the State is required to show both that the districts have not been drawn for a discriminatory purpose and that they will not have a retrogressive effect on minority voting strength. Foregoing the opportunity provided by section 5 to obtain an administrative determination of preclearance within sixty days, the State filed an action for declaratory judgment in the United States District Court for the District of Columbia ("district court").

Following the district court's denial of summary judgment to Texas, the United States District Court for the Western District of Texas, which had before it a number of lawsuits challenging both the existing districts and the Legislature's 2011 plans, drew interim plans for the State's 36 Congressional districts and 150 State House districts after making preliminary findings related to both purposeful discrimination and retrogressive effect in the State's enacted plans. *See Perry v. Perez*, 132 S. Ct. 934 (2012)

(vacating first set of interim plans and providing guidance for drawing of interim plans); *Perez v. Texas*, 2012 WL 4094933 (W.D. Tex. Feb. 28, 2012) (post-Supreme Court interim Congressional plan opinion); *Perez v. Perry*, No. 11-cv-00360, Dkt. No. 690 (W.D. Tex. Mar. 19, 2012) (post-Supreme Court interim house plan opinion).

After a trial, the district court in this case denied preclearance to the State's redistricting plans, holding that the Congressional plan was purposefully discriminatory and retrogressive and that the plan for the State House was retrogressive.

The State's appeal fails to raise any issue warranting plenary review by this Court. In addition, because the appeal presents no serious challenge to the district court's findings of purposeful discrimination, a favorable ruling for Texas on the issue of retrogression will have little practical impact on the ultimate outcome of the case and will not enable Texas to implement its enacted redistricting plans.

A. Factual Background

According to the 2010 Census, the population of Texas has increased by over four million over the past decade – an increase of about 20.6%. *See Perez v. Texas*, 2012 WL 4094933, at *3. In order to comply with the one-person, one-vote mandate, the Texas Legislature was then required to engage in a new round of redistricting to redraw the boundaries of state and Congressional voting districts. J.S. App.3.

1. Texas's growth was primarily attributable to an increase in its Latino population.

Latinos represented 65% of the total population growth in Texas. *See Perez v. Texas*, 2012 WL 4094933, at *3. In 2010, persons of Hispanic or Latino origin constituted 37.6% of the population of Texas. *See* DX391, at 994-1011. Non-Hispanic whites (Anglos) constituted 45.3% of the population. *See id.*

Latinos now comprise 25% of the citizen voting age population ("CVAP") of Texas. Over the past decade, Latino citizen voting age population increased by 701,812. By contrast, Anglo citizen voting age population increased by only 487,207.[1]

Moreover, the population growth was not uniform across the state. Some jurisdictions lost population over the decade, others remained stable, and still others experienced dramatic growth. Much of the Latino population growth in the state was concentrated in South Texas, Houston and the Dallas-Ft. Worth Metroplex. For example, the 6 majority-Latino Congressional districts located in South and West Texas increased by enough population to constitute three-fourths of an additional Congressional district within

[1] *Compare* 2000 CVAP data from U.S. Census Bureau, Census 2000, Summary File 4, Table PCT 44, *available at* factfinder2.census.gov, *with* 2010 CVAP data from Department of Justice Special Tab, *available at* http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html.

the same geographic area. App.5. In 83 of Texas's 254 counties, the substantial growth in Latino population masked the fact that the Anglo population actually *declined*.[2]

Following release of detailed census figures in February 2011, the Texas Legislature redrew its statewide redistricting plans. (The plans were embodied in separate bills. The State House plan is known colloquially as H283 (App. 11); the Congressional plan as C185 (App.4).)

2. Congressional Plan

The benchmark plan for Congressional districts (App.3) was in part the result of this Court's decision in *LULAC v. Perry*, 548 U.S. 399 (2006), that Texas's 2003 Congressional redistricting plan violated section 2 of the Voting Rights Act and was tainted by racial discrimination against Latino voters. A three-judge federal court re-drew districts in South and West Texas to remedy the section 2 violation found by this Court. *LULAC v. Perry*, 457 F. Supp. 2d 716 (E.D. Tex. 2006). In the 2011 redistricting cycle, the Legislature had to choose where to locate the state's newly acquired four Congressional seats as well as redraw

[2] For example, Latinos constituted 80% of the intercensal growth of Harris County, where the City of Houston is located. DX827, at 5. Similarly, in Dallas County, Latino growth compensated for the entire loss of Anglo population and fueled additional population growth from 2000 to 2010. *Id*.

the existing districts to bring their population back into compliance with federal law.

Despite the fact that Latinos constituted 65% of the State's overall population growth over the past decade, and was therefore the leading reason Texas gained four new Congressional seats, the State did not increase the number of Latino majority districts in its Congressional redistricting plan.[3] This was a particularly challenging task in light of the fact that most of the Latino growth occurred where there was already substantial Latino population. In addition, all of the Latino majority districts in South and West Texas were overpopulated and this required Latinos to be shifted into other districts in order to comply with one-person one-vote. For Texas, the increased demographic strength of Latinos threatened to translate into electoral victories in existing districts as well as drive the creation of new Latino-majority districts.

In response, Texas engaged in a sophisticated project of racial gerrymandering.

---

[3] *See* DX779A, at 93:7-9 (Mr. Interiano conceding that there are only seven Latino opportunity districts in the enacted plan). Even the State's expert, Dr. John Alford, testified to his surprise that the enacted Congressional map contained no new Latino majority districts, stating, "the first time I looked at the maps, that's the question that occurred to me, is where – where had that – where was that growth in the map?" DX581, at 1908:14-1909:2; 1919:15-1920:1.

First, the Legislature significantly redrew the boundaries of Congressional District ("CD") 23. (This was the district re-drawn in 2006 in response to the Court's holding in *LULAC v. Perry*). Following the boundary revision by the *LULAC* district court, CD23 had elected the Latino-preferred candidate in 2006 and 2008. In 2010, an Anglo-preferred candidate Francisco Canseco defeated the Latino-preferred incumbent with 49.3% of the vote. In 2011, Texas redistricting officials feared Mr. Canseco would be defeated in 2012 and sought to make CD23 safer for Mr. Canseco. J.S. App.165-67 at ¶39.

While he was drawing CD23 using the Texas Legislative Council's computer software, the Legislature's chief Congressional mapper Ryan Downton turned on the color shading for election results and Spanish-surnamed voter registration. J.S. App.171 at ¶46.

This meant that he could see the effects on election results and on Latino voter registration of every change he made the instant he made it. He moved precincts into and out of CD23 for the purpose of strengthening the district for an incumbent who is not the Latino candidate of choice. J.S. App.173-74 at ¶50. In particular, Downton "swapped out" precincts where Latino registered voters were more likely to turn out to vote and "swapped in" precincts with lower Latino turnout. Although benchmark CD23 was overpopulated by approximately 149,000 and needed to release population to meet the new population ideal, Texas redistricters shifted 380,677 people out of

the district and shifted 231,514 new people into the district. J.S. App.172-73 at ¶¶47, 49; DX436.

Texas redistricters used race to select Latino voters with the lowest voter turnout for inclusion in CD23. An email exchange between lawyers for the Texas House Speaker who were working on the redistricting plans stated that the goal of changes to CD23 was to "help pull the district's Total Hispanic Pop[ulation] and Hispanic CVAPs up to majority status, but leave the Spanish Surname [Registered Voter] and [turnout numbers] the lowest," which would be "especially valuable in shoring up [incumbent] Canseco." App.7.

In altering CD23, Mr. Downton testified that he moved majority Anglo counties north of the Pecos River into CD23, and split the heavily Latino, politically mobilized Maverick County so that half of it would be located outside of CD23. J.S. App.172-73 at ¶48; DX577, at 964:13-19, 965:24-966:2. He did this even though he and Senate Chairman Seliger admitted that "the excess population in CD23 could have been addressed by simply moving CD23 down toward the border with Mexico," and Chairman Seliger admitted that if this were done, "Hispanic voters would 'determine[ ] the outcome' of the election in CD23." J.S. App.172-73 at ¶48. Mr. Downton admitted to removing the highly – and increasingly – mobilized Maverick County voters, who are over 95% Latino, because they would not vote for the incumbent he sought to protect. J.S. App.176-77 at ¶55.

While redistricters were swapping Latino voters in and out of CD23, they were keeping a careful eye on both Latino population and how the district performed on an index of ten racially-contested elections prepared for the redistricters by the Texas Attorney General. The goal was to design a CD23 that contained a majority of Hispanic citizen voting age population but would have the ability to elect the Latino-preferred candidate in only one of ten elections. For example, a May 28, 2011 email by Ryan Downton notes that his draft map of CD23 was "over 59% HCVAP, but still at 1/10 [exogenous election performance]." DX903. Redistricters achieved their goal in the enacted CD23. J.S. App.178-80 at ¶59.

Indeed, the State's own expert, Dr. John Alford, testified that "I think [CD23] is probably less likely to perform than it was, and so I certainly wouldn't and don't [and] haven't counted the 23rd as an effective minority district in the newly adopted plan." J.S. App.163 at ¶33. He further stated, "I don't count 23 as one of the seven performing districts when I evaluate C-185." DX581, at 1878:18-1879:6.[4]

---

[4] Alluding to this Court's decision in *LULAC v. Perry*, he also testified: "If I [were] advising the legislature on drawing the 23rd, I would not have done what was done to the 23rd." DX581, at 1838:11-15. He further testified:

> [M]y first advice to the legislature would be just – you know, in simple – with a slight memory of history, do as little as possible to the 23rd as you can. It really has been a difficult – it was a difficult district for the Court to draw. It was a difficult district for the

(Continued on following page)

Dr. Alford further testified, with respect to the Legislature's changes to CD23 and the 2003 redistricting of CD23 that was invalidated by this Court's decision in *LULAC v. Perry*, that "[t]here are some obvious parallels between what happened previously and what happened this time" and "we feel like we are all having déjà vu[.]." DX581, at 1875:2-9; 1929:13-21.

In comparing the changes made to CD23 in *LULAC v. Perry* and the State's 2011 redistricting of CD23, Dr. Alford noted that:

- changes were made to CD23 to shore up the reelection prospects of Representative Bonilla in 2003 and in Plan C185 the changes were made to shore up the reelection chances of Representative Canseco (DX581, at 116:22-117:7);
- in *LULAC*, the benchmark CD23 was a Latino majority district whose incumbent was not the candidate of choice and most observers agreed that, as here, CD23 was about to elect the Latino candidate of choice (DX581, at 107:17-108:11);

> legislature to draw. But, basically, enough is enough, right? Don't make this hard on yourself . . . Don't mess with the 23rd. That would be my first rule for drawing the districts.

DX581, at 1840:12-22.

- in 2003, CD23 split Webb County and the City of Laredo, and Dr. Alford knew that some people were upset that CD23 in Plan C185 splits the border city of Eagle Pass and Maverick County (DX581, at 117:8-118:2).

While they were drawing the Congressional plan, Texas redistricters knew that their changes to CD23 could violate the Voting Rights Act. In early April 2011, mapdrawer Doug Davis responded to an email from Lee Padilla, a regional political director for the National Republican Congressional Committee, noting that a draft map of CD23 "looks nice politically," but still raises "concern[s] about the Voting Rights Act." J.S. App.44 (citing DX978).

The district court found "an abundance of evidence that Texas, in fact, [used] various techniques to maintain the semblance of Hispanic voting power in the district while decreasing its effectiveness." J.S. App.44.

Thus, although the enacted CD23 contains a slightly higher Latino voter registration than its predecessor, it was racially engineered to have lower Latino turnout and would produce dramatically lower election returns for Latino-preferred candidates. *See* J.S. App.44-45 ("Texas's protestations that the district has remained functionally identical are weakened first by the mapdrawers' admissions that they tried to reduce the effectiveness of the Hispanic vote and then, more powerfully, by evidence that they did."); *see also Texas v. United States*, No. 11-cv-01303, Trial

Tr. 01/18/2012 at 53:23-54:1 (Interiano testimony that the enacted CD23 has lower Latino voter turnout than the benchmark CD23).

In the Dallas-Ft. Worth Metroplex, Texas redistricters excised Latino voters from the City of Fort Worth Congressional district and joined them with a heavily Anglo electorate to the north in Denton County. App.9; *see* J.S. App.203-06 at ¶¶114, 116. This "lightning bolt" extension of the enacted CD26 into Ft. Worth also used race methodically to separate Latino voters from African American voters in the area, splitting 38 precincts in the process. App.8; J.S. App.205-06 at ¶¶115, 116; 206-07 at ¶117.

Mr. Downton explained in an email to fellow redistricters Gerardo Interiano and Doug Davis: "[c]hanges made to keep the Black population together in District 12." DX903. Based on this evidence, the District Court in the Western District of Texas, which was tasked with drawing interim plans for use while the enacted plans were being litigated, determined that it could not legally incorporate the enacted CD26 into its interim plans. *See Perez v. Texas*, 2012 WL 4094933, at *15 (W.D. Tex. Feb. 28, 2012).

This Court found in *Perry v. Perez* that the state's redistricting in the Dallas-Ft. Worth Metroplex "appear[s] to be subject to strong challenges in the §5 proceeding" and that departing from the State's enacted plan in the interim plan "seems appropriate." 132 S. Ct. 934, 944 (2012). Similarly, the district court here found that, "[t]he purpose behind the split VTDs

was to move Hispanic populations into enacted CD26 and split the non-Hispanic population out of the district." J.S. App.206-07 at ¶117.

3. State House Plan

The Legislature's plan for the State House: reduced the number of Latino ability districts; drew oddly shaped districts in areas with concentrated Latino populations that impaired Latino voters' ability to elect the candidates of their choice; and refused to draw Latino majority districts in areas with significant increases in the Latino population. *Compare* App.10, *with* App.11.

The district court concluded that H283, the enacted plan, reduced minority ability to elect and that "Texas did not create any new ability districts to offset those losses." J.S. App.69.

Reduction in the number of Latino Ability districts

Texas eliminated House District ("HD") 33 in Nueces County, a Latino majority county in South Texas where Latino population growth was substantial. App.12-13. In the benchmark plan, HD33 is located inside the City of Corpus Christi and contains 55% Latino voter registration. The Legislature's plan relocates HD33 to Rockwall and Collin counties in North Texas where the district contains 8.5% Latino

voter registration and is not a Latino ability district. J.S. App.70.

Disadvantageous boundaries in areas with substantial Latino populations

In addition to reducing the number of Latino ability districts, the Legislature also drew districts in areas with substantial Latino populations in ways that minimized Latino voters' opportunity to elect their preferred candidates.

In El Paso County, which is 80% Latino, the State re-drew HD78 into a bizarre shape that maximized the number of Anglo voters in the district. App.14, 15; DX827 at 5. As a result, although the remaining House districts in El Paso County have an average of 74% Latino registered voters, HD78 in the Legislature's plan contains 47% Latino registered voters. *See* DX817, at 16. The Legislature's reconfiguration of HD78 splits 15 voting precincts, and does not follow traditional features such as the mountain range that dominates the area's geography. DX406, at 1, 5. The U.S. District Court for the Western District of Texas concluded that the "deer antler" protrusions of the district and "the high number of split precincts in the protrusions increases the likelihood that the map-drawers were focused on race because partisan voting data are not available below the precinct level" and found that the plaintiffs in that case had presented a viable claim of purposeful discrimination.

Perez v. Perry, No. 11-cv-00360, Dkt. No. 690 at 10-11 (W.D. Tex. Mar. 19, 2012).

In Bexar County, where Latinos are in the majority and the Latino population over the last decade increased by 250,000, Texas withdrew HD117 from more active Latino precincts and extended the district into rural areas with relatively lower Latino turnout in order to protect the incumbent who was not Latino-preferred. J.S. App.81-82; 255 at ¶241; DX827, at 15.

The incumbent of HD117 testified 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." DX363 at 30:1-31:7. In addition, Redistricter Gerardo Interiano testified "that a 'ground rule[ ]' for drawing HD117 was to keep the SSVR level just above 50%." J.S. App.81.

The district court found that redistricters achieved their dual goals "by placing in the new district areas with high Hispanic populations but lower voter turnout, while excluding from the district high-Hispanic, high-turnout areas." J.S. App.80-81, 82.

4. Legislative Process

The Texas Legislature conducted its 2011 redistricting against a backdrop of racial tension as a heated debate over immigration bills in the 2011 legislative session sparked hostile rhetoric aimed at

Spanish-speakers and Latinos in general. DX831, at 6; DX580, at 103:1-104:19; DX430, at 5 (Republican State Representative Aaron Peña stating, "The tone of the debate is basically saying: 'We don't want you. This is a war over our culture. These people bring diseases into our country.'").

Departures from the Normal Procedural Sequence

The district court found that the legislative redistricting process "severely circumscribed the opportunity for meaningful public scrutiny and comment, including by minority citizens and their elected officials." J.S. App.154-55 at ¶21. The first Congressional map proposed by redistricting officials was the subject of only one public hearing in the Texas House and in the Senate. J.S. App.148-49 at ¶13. In addition, Latino and African American members of the Senate Redistricting Committee voiced concerns that they were being excluded from the Congressional redistricting process. J.S. App.149 at ¶14.

Although the Senate Redistricting Committee retained experts to assess the legality of any proposed redistricting plans, Chairman Seliger admitted that these experts had "not seen the Congressional Plan until it was released in committee and that these outside experts had not evaluated the plan for compliance with the VRA." J.S. App.152 at ¶18. That same day the full Senate voted to adopt the proposed

Congressional Plan through Senate Bill 4 ("SB 4"). *Id.* The House Redistricting Committee met to discuss SB 4 a mere 3 days after its passage in the Senate and "passed it out of Committee without taking any public comments." J.S. App.153 at ¶19.

The redistricting plan for the State House was adopted in a similarly rushed manner. The district court again found that "[t]he rushed schedule severely hampered the ability of citizens to attend the two hearings on the bill and of legislators to prepare objections or proposed amendments." J.S. App.239 at ¶204.

The Legislature's rushed enactment of the redistricting bills stands in stark contrast to the behind-the-scenes process in which legislative staff painstakingly crafted redistricting plans that limited, and even subtracted from, minority political strength. *See* J.S. App.43, 44; J.S. App.81; J.S. App.96-97.

Departures from Normal Substantive Considerations

At the outset of the process, Texas redistricters did not request that the Attorney General help them identify which districts in the existing ("benchmark") plans were minority ability to elect districts so that they could determine whether the proposed new plans were retrogressive. J.S. App.16 n.9. The chairmen of the House and Senate Redistricting Committees

similarly "made little independent effort to ensure that minority districts were protected" in the new redistricting plans. J.S. App.161-62 at ¶30.

Chairmen Solomons and Seliger also departed from the custom of accommodating Congressional representatives of the same political party when they rejected the proposal of Congressman Lamar Smith, on behalf of a majority of the Texas Republican Congressional delegation, to create a majority minority Congressional district in the Dallas-Fort Worth area. J.S. App.200-01 at ¶108. Congressman Lamar Smith distributed the draft Congressional map to Republican leaders of the Texas Legislature, as well as the Lieutenant Governor and Governor. *Id.*; DX394, at 1-16. Congressman Smith's map stated that it created "one new Voting Rights Act district in the Dallas-Ft. Worth area," and "reflects the population growth in Texas over the last decade." DX394, at 11. House Redistricting Committee Chairman Solomons denied the existence of such a proposed map; when State Representative Marc Veasey, who was also a member of the House Redistricting Committee, inquired whether the Republican delegation's proposed map included a majority minority Congressional district, Chairman Solomons told him "there was no such map." J.S. App.201 at ¶109.

B. Procedural Background

This case was heard by a court consisting of Circuit Judge Thomas B. Griffith and District Judges Rosemary M. Collyer and Beryl A. Howell.

Intervenor-Appellee Texas Latino Redistricting Task Force (Latino Task Force) is a coalition of statewide Latino organizations that formed prior to the 2011 legislative session to protect Latino electoral opportunity in the redistricting process and secure fair redistricting plans for Texas. On September 8, 2011, the Latino Task Force intervened to oppose preclearance of the State's enacted Congressional and State House plans. *Texas v. United States*, No. 11-cv-01303, Dkt. No. 32 (D.D.C. Sept. 8, 2011).[5]

The Latino Task Force, along with individual Latino voters of Texas, also filed suit in the United States District Court for the Western District of Texas in June 2011 alleging that the State House and Congressional plans violated section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1982), and the Fourteenth Amendment, and sought to have the plans enjoined under section 5 of the Voting Rights Act, 42

[5] To the extent that Texas argues that the Latino Task Force should not have been permitted to intervene in this action, the argument is unfounded. *See Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003) ("Private parties may intervene in § 5 actions assuming they meet the requirements of Rule 24, and the District Court did not abuse its discretion in granting the motion to intervene in this case.") (citing *NAACP v. New York*, 413 U.S. 345, 367 (1973)).

U.S.C. § 1973c (2006), because they had not received preclearance. The Latino Task Force case was consolidated along with four other lawsuits (and the claims of five sets of intervenors) before a three-judge court in the United States District Court for the Western District of Texas ("the *Perez* court"). The lead case was captioned *Perez v. Texas*, Civil Action No. 11-CA-360-OLG-JESXR (2011). The *Perez* court conducted a trial from September 6 to September 16, 2011.

In light of the undisputed fact that the 2011 plans had not been precleared, on September 29, 2011, the *Perez* court issued an order enjoining implementation of the enacted State House and Congressional redistricting plans. *Perez v. Perry*, No. 11-cv-00360, Dkt. No. 380 at 4 (W.D. Tex. Sept. 29, 2011). On November 23, 2011 and November 26, 2011, respectively, the *Perez* court ordered into effect the State House and Congressional interim redistricting plans for the 2012 election cycle. Texas appealed to this Court, arguing the interim plans did not defer sufficiently to the enacted plans.

On January 20, 2012 this Court vacated the interim plans and provided additional guidance to the *Perez* court in creating its interim remedy. *Perry v. Perez*, 132 S. Ct. 934 (2012). On February 28, 2012, the *Perez* court ordered into effect a new set of interim redistricting plans that were used for the 2012 primary and general elections.

Pursuant to this Court's guidance, the interim plans departed from the State's enacted plans where

the *Perez* court found that plaintiffs had made "not insubstantial" claims of purposeful discrimination or retrogression under section 5 and where plaintiffs had demonstrated a likelihood of success on either section 2 or constitutional claims.

In this case, the district court entered judgment in favor of Texas on its State Board of Education redistricting plan on September 22, 2011. *Texas v. United States*, No. 11-cv-01303, Minute Order (D.D.C. Sept. 22, 2011). With respect to its remaining requests for preclearance, instead of seeking a trial at the earliest possible date, the State filed a motion for summary judgment.

On November 8, 2011, the three-judge court in the D.D.C. unanimously denied the State's motion for summary judgment and noted serious concerns with the State's enacted plans. *Texas v. United States*, No. 11-cv-01303, Dkt. No. 106 (D.D.C. Nov. 8, 2011). The case was tried from January 17 to 26, 2012, with closing arguments held on January 31, 2012. On August 28, 2012 the district court denied preclearance to the State's enacted Congressional, Senate and State House plans.

SUMMARY OF ARGUMENT

First, this case should be held pending disposition of *Shelby Cnty., Ala. v. Holder,* 12-96, 2012 WL 3018430, at *1 (U.S. Nov. 9, 2012). The decision in *Shelby*, regarding whether Congress' decision in 2006

to reauthorize section 5 of the Voting Rights Act exceeded its authority, will significantly affect this case, which was brought pursuant to section 5. It is also possible that the decision in *Shelby* will require further proceedings in the district court before this case is ripe for review.

Second, the district court properly concluded that the enacted Congressional plan was purposefully discriminatory and the State House plan was retrogressive. The district court correctly interpreted section 5 and employed the well-established analysis set out by this Court.

Third, because Texas's arguments focus almost entirely on the district court's retrogression analysis, a favorable decision for Texas on these issues is unlikely to change the outcome of the case in light of the district court's extensive findings related to purposeful discrimination.

Fourth, this case is a poor vehicle to address the constitutionality of section 5. The constitutional claim was not properly pleaded or litigated below. Furthermore, Texas's claims that section 5 was applied to it in an unconstitutional manner are unsupported by the record.

ARGUMENT

I. The Present Appeal Should Be Held Pending Disposition of *Shelby Cnty., Ala. v. Holder*.

On November 9, 2012, this Court granted the petition for a writ of certiorari in *Shelby Cnty., Ala. v. Holder,* 12-96, 2012 WL 3018430, at *1. The Court will decide the question "whether Congress' decision in 2006 to reauthorize section 5 of the Voting Rights Act under the pre-existing coverage formula of section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution."

Because the question presented in *Shelby* directly addresses the constitutionality of section 5, a decision in *Shelby* will significantly affect the continued course of this case. Until the Court decides whether Congress acted within its authority when reauthorizing section 5, it is not clear whether this case is appropriate for review or should be reconsidered by the district court pursuant to guidance that will be provided in *Shelby*. *See generally Rogers v. Tristar Prods., Inc.*, 430 Fed. App'x. 899 (Fed. Cir. 2011) (staying proceedings pending decisions in the same court on related cases); *Pearson v. Muntz*, 639 F.3d 1185, 1190 (9th Cir. 2011) (staying proceedings pending a decision in another case before the same court on an issue germane to the instant case).

II. The State's Use of Race to Fracture Latino Voting Strength and the State's Reduction in the Number of Latino Ability to Elect Districts in the State House Plan Forecloses Section 5 Preclearance.

Texas's appeal claims a number of errors, almost all in the district court's retrogression analysis, in an attempt to portray this case as worthy of review. However, the district court made numerous findings related to discriminatory purpose, and Texas makes no meritorious argument that the findings should be overturned by this Court. The purposeful discrimination in both the Congressional and State House plans dooms the possibility of their preclearance. Additionally, the district court's findings with respect to the elimination of a Latino ability to elect district in the Texas House plan, with no offset, precludes preclearance of the House plan under section 5's retrogression standard. Thus, regardless of Texas's dispute with other portions of the district court's decision, the enacted redistricting plans cannot be precleared and the issue of Texas redistricting properly should return to the U.S. District Court in the Western District of Texas.

A. The District Court Properly Found Racially Discriminatory Purpose in the State's Congressional Plan

The district court applied this Court's decision in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), to find "sufficient evidence

to conclude that the Congressional Plan was motivated, at least in part, by discriminatory intent" and could not be precleared. J.S. App.57. The district court reached this conclusion on discriminatory purpose as "an alternative, unanimous basis [upon which] to deny preclearance for the Congressional Plan."[6] J.S. App.51.

The district court made extensive fact findings in support of its conclusion that Texas had performed "substantial surgery," involving unnecessary and damaging changes, on Latino and African American majority districts while making no such changes to Anglo majority districts. J.S. App.52-53; *see* J.S. App.193-93 at ¶¶88-89 (CD9 – Congressman Al

[6] In the retrogression portion of its opinion, the district court concluded that the Congressional plan was retrogressive. *See* J.S. App.37-38. Two members of the panel concluded that by holding steady the number of Latino ability to elect districts in the enacted plan, in light of the 4-seat increase in the State's Congressional delegation, Texas had reduced the ability of Latino voters to elect their preferred candidates (7 of 32 districts is 22% and 7 of 36 districts is 19%). The district court concluded that maintenance of the benchmark level of Latino ability to elect would require one additional Latino ability to elect district (8 of 36 districts is 22%). *See* J.S. App.45-51. A different combination of two members of the panel concluded that the plan was retrogressive because it eliminated a crossover district that elected the minority-preferred candidate of choice. *See* J.S. App.45 n.22. Texas challenges these rulings without acknowledging that repairing the purposeful discrimination in CD23, so that it remains a Latino ability to elect district, also repairs the one-district retrogression found by the district court. Thus, whether or not Texas is correct in its critique of the district court's retrogression analysis, the outcome is the same.

Green); J.S. App.193-95 at ¶¶90, 92 (CD18 – Congresswoman Sheila Jackson Lee); J.S. App.195-96 at ¶¶94, 96-97 (CD30 – Congresswoman Eddie Bernice Johnson); J.S. App.54; *see* J.S. App.197-98 at ¶¶99-100. Removing critical economic generators from majority minority districts, including hospitals, universities, sports arenas, as well as removing long-standing district offices, Texas burdened the predominantly minority race constituents of these districts and offered no race-neutral explanation, other than "coincidence," for its racially disparate treatment. J.S. App.52-54; J.S. App.192-98 at ¶¶88-90, 92, 94, 96-97, 99-100.

In addition to the facts above, the district court made extensive fact findings related to purposeful discrimination in the changes to Latino majority CD23, which had been created after this Court's decision in *LULAC v. Perry*, as a remedial Latino opportunity district. J.S. App.167-80 at ¶¶40-60. The district court concluded "that the Hispanic voters in CD23 turned [the] opportunity [provided by the Court in *LULAC v. Perry*] into a demonstrated ability to elect, but that the 2010 redistricting took that ability away." J.S. App.39.

The district court explained that CD23 was "engineered to decrease minority voting power" and "selectively drawn to include areas with high minority populations but low voter turnout, while excluding high minority, high turnout areas." J.S. App.8 n.5. The district court noted "an abundance of evidence" that redistricters used race to reduce the Latino voter

registration and turnout in CD23, assigned hundreds of thousands of individuals into and out of CD23 in order to reduce the overall turnout by Latino voters and split a predominantly Latino border county because it would not support the Anglo-preferred incumbent. J.S. App.44; *see* J.S. App.168-77 at ¶¶43-55. The district court concluded:

> The mapdrawers consciously replaced many of the district's active Hispanic voters with low-turnout Hispanic voters in an effort to strengthen the voting power of CD23's Anglo citizens. In other words, they sought to reduce Hispanic voters' ability to elect without making it look like anything in CD23 had changed.

J.S. App.43.

With respect to the State House plan, although the district court found it unnecessary to reach the question of discriminatory purpose after finding retrogression, the district court made additional findings of fact to support its concern that the House plan was also drafted with a discriminatory purpose. J.S. App.95-97.

The district court observed that the "process for drawing the House Plan showed little attention to, training on, or concern for the VRA," and that "despite the dramatic population growth in the State's Hispanic population that was concentrated primarily in three geographic areas, Texas failed to create any new minority ability districts among 150 relatively small House districts." J.S. App.95.

The district court's concerns were "exacerbated by the evidence we received about the process that led to enacted HD117." J.S. App.96. The district court noted that "the mapdrawers modified HD117 so that it would elect the Anglo-preferred candidate yet would look like a Hispanic ability district on paper . . . [The] testimony is concerning because it shows a deliberate, race-conscious method to manipulate not simply the Democratic vote but, more specifically, the *Hispanic* vote. *Id.*

The district court explained that "[t]he record shows that the mapdrawers purposely drew HD117 to keep the number of active Hispanic voters low so that the district would only appear to maintain its Hispanic voting strength, *and that they succeeded*." J.S. App.81 (emphasis added).

The district court further cited the testimony of the chief redistricter for the State House plan that suggested mapdrawers "cracked VTDs along racial lines to dilute minority voting power." J.S. App.96. The district court concluded that this evidence "may support a finding of discriminatory purpose in enacting the State House Plan" and that "the full record strongly suggests that the retrogressive effect we have found may not have been accidental." J.S. App.97.

The U.S. District Court for the Western District of Texas made similar findings, noting that in HD117 "the State may have focused on race to an impermissible degree by targeting low-turnout Latino precincts."

Perez v. Perry, No. 11-cv-00360, Dkt. No. 690 at 6 (W.D. Tex. Mar. 19, 2012). The Western District court explained:

> The fact that the map drawers were able to increase the HCVAP substantially while simultaneously decreasing the proportion of registered voters with Spanish surnames indicates that they may have intentionally focused on precincts with low Latino turnout. This outcome, combined with Garza's statement in his deposition that he "wanted to get more Anglo numbers," is evidence that the decisionmakers were impermissibly focused on race in trying to make the district more Republican.

Id. As a result of this conclusion, in its interim plan, the Western District court reconfigured HD117 to return it to benchmark levels. *Id*.

Congress is authorized by the Fourteenth and Fifteenth Amendments to prohibit voting changes that have "the purpose . . . of denying or abridging the rights to vote on account of race or color. . . ." 42 U.S.C. § 1973c. This Court has further provided that the inquiry into whether voting-related practices are purposefully discriminatory is based on *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997) (in examining whether redistricting plan contains purposeful discrimination, "courts should look to our decision in *Arlington Heights* for guidance."); *Shaw v. Reno,* 509 U.S. 630,

644 (1993) (citing *Arlington Heights* standard in context of Equal Protection Clause challenge to redistricting).

Congress amended section 5 in 2006 to make clear that discriminatory intent prohibited by the Act included "any discriminatory purpose" and not just intent to retrogress. Congress intended section 5 to "prevent not only purposefully retrogressive discriminatory voting changes, but also those '[v]oting changes that 'purposefully' keep minority groups 'in their place.'" *See Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 437 (D.D.C. 2011), *aff'd,* 679 F.3d 848 (D.C. Cir. 2012), *cert. granted in part*, 12-96, 2012 WL 3018430 (U.S. Nov. 9, 2012) (citing H.R. Rep. No. 109-478, at 68 (2006)).

In this case, the district court followed *Arlington Heights* to conclude that the enacted Congressional plan was purposefully discriminatory. *See* J.S. App.52 ("Our analysis follows the Supreme Court's decision in *Arlington Heights*[.]"). Referring to *Arlington Heights*, the district court explained "Texas can carry its burden by showing that these factors – the longstanding yardstick for determining discriminatory intent – do not, taken together, show discriminatory purpose." J.S. App.36.

The district court's fact-intensive inquiry under *Arlington Heights* included findings related to discriminatory impact that "alone could well qualify as a 'clear pattern, unexplainable on grounds other than race,'" (citing *Arlington Heights*, 429 U.S. at 266) as well as the sequence of events leading up to the

adoption of the Congressional redistricting plan, "procedural and substantive departures from the normal decisionmaking process" and Texas's long history of discrimination in redistricting stretching back four decades. J.S. App.55-57.

The district court's analysis is consistent with this Court's section 5 cases. *See City of Pleasant Grove v. United States,* 479 U.S. 462, 469-70 (1987) (considering city's history in rejecting annexation of black neighborhood and its departure from normal procedures when calculating costs of annexation alternatives); *see also Busbee v. Smith,* 549 F. Supp. 494, 516-17 (D.D.C. 1982), *summarily aff'd*, 459 U.S. 1166 (1983) (referring to *Arlington Heights* test and considering departures from normal substantive considerations); *Port Arthur v. United States,* 517 F. Supp. 987, 1019 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982) (referring to *Arlington Heights* test).

Although Texas claims that the district court employed a "new permissive standard" for finding discriminatory purpose in a redistricting plan, the district court conducted its purposeful discrimination analysis firmly within the framework established by *Arlington Heights*. The crux of Texas's position appears to be the assertion that circumstantial evidence cannot serve as the basis for a finding of purposeful discrimination. *See* Appellant's Jurisdictional Statement, *Texas v. United States*, No. 12-496, at 29 (U.S. Oct. 19, 2012) [hereinafter "J.S."] ("Such indirect evidence is plainly insufficient to support a finding of a discriminatory purpose."); *see also* J.S. at 3

(referring to a "hodgepodge of circumstantial evidence"). This argument is meritless. *See Arlington Heights*, 429 U.S. at 266.

Similarly, the extensive findings of fact in support of the district court's conclusion that the enacted Congressional plan is purposefully discriminatory overcomes any suggestion by Texas that the district court erred by improperly shifting the burden to Texas to prove non-discrimination. *Compare* J.S. at 30, *with* J.S. App.43-45; 51-57; 167-80 at ¶¶40-60; 192-209 at ¶¶86-120.

Finally, the analysis employed by the district court does not raise constitutional problems that the Court sought to avoid in *Reno v. Bossier Parish Sch. Bd.,* 528 U.S. 320 (2000) (*Bossier Parish II*). Section 5, consistent with the Fourteenth and Fifteenth Amendments, prohibits purposefully discriminatory acts aimed at denying or abridging the right to vote. Texas fails to explain how, under the amended section 5, the inquiry into purposeful racial discrimination against voters (even one that extends beyond intent to retrogress) "exacerbate[s]" federalism costs "to the extent of raising concerns about [Section] 5's constitutionality." J.S. at 7.

B. The District Court Properly Found Retrogression in the State House Plan

The district court concluded that the State House plan was retrogressive because it "will have the effect of abridging minority voting rights in four ability

districts – HDs33, 35, 117, and 149 – [and] Texas did not create any new ability districts to offset those losses." J.S. App.69.

In reaching its conclusion, the district court applied the standard set out in *Beer v. United States*, that the plans must not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. 130, 141 (1976). The district court followed the well-established test for "effective exercise" which includes evaluating minority voters' ability to elect their preferred candidate. *See Georgia v. Ashcroft*, 539 U.S. 461, 479-80 (2003). The understanding of "ability to elect" is further informed by Congress' amendment to section 5 in 2006 to make clear that "ability to elect" means minority voters' "ability . . . to elect their preferred candidates of choice." *See* 42 U.S.C. § 1973c(b) (2006).

Texas does not dispute that its enacted State House redistricting plan eliminated Latino-majority HD33 in Nueces County. Texas also concedes that under an ability to elect standard, HD33 was an ability district in the benchmark plan and not an ability district in the enacted plan. J.S. App.69-70.[7] The loss of HD33 alone constitutes retrogression that

[7] The U.S. District Court for the Western District of Texas similarly concluded that the elimination of Latino-majority HD33 in Nueces County constituted "the elimination of one of the Hispanic ability districts." *Perez v. Perry*, No. 11-cv-00360, Dkt. No. 690 at 7 (W.D. Tex. Mar. 19, 2012).

would bar preclearance unless the loss of Latino ability to elect was offset elsewhere in the plan. *See Georgia v. Ashcroft*, 539 U.S. at 479 ("[W]hile the diminution of a minority group's effective exercise of the electoral franchise in one or two districts may be sufficient to show a violation of § 5, it is only sufficient if the covered jurisdiction cannot show that the gains in the plan as a whole offset the loss in a particular district.").

The district court properly rejected the claims by Texas that it had offset the loss of HD33 by increasing the Latino population in pre-existing Latino ability to elect districts. *See* J.S. App.91-95. Texas asserted that by increasing Latino population in HDs 74, 90 and 148, it offset the loss of HD33. *See* J.S. App.91. But Texas could not show that any of those districts were not already ability to elect districts. In fact, all three had consistently elected Latino-preferred candidates to the State House. For example, HD74 in the benchmark plan contained a 58% Spanish surnamed Voter Registration (SSVR) and had elected the Latino-preferred candidate, Pete Gallego, for over 20 years. Placing even more Latinos in HD74 did not transform it into an ability district that could offset the loss of HD33. *See* J.S. App.94-95.

The lack of success by Texas in proving non-retrogression in its State House plan was largely caused by Texas itself, when it advocated for contradictory (and erroneous) legal standards during the course of the case.

Texas's first strategy was to argue that the district court must rely on a bright-line demographic test to measure retrogression. However, Texas's argument was undercut by its own expert who testified that one Congressional district that did not meet the State's bright-line threshold was an ability to elect district and that another Congressional district that did meet the bright-line test was worse than a toss-up for Latino voters. *See, e.g.*, J.S. App.110-11 n.9; DX581, at 1827, 1839.

Texas's insistence on a bright-line test for retrogression was further discredited by the evidence that it had sought to eliminate Latino ability to elect in CD23 and HD117 by selecting Latino voters for inclusion and exclusion from the districts based on their voter registration and turnout, while at the same time using race to make sure the districts would remain over 50% Hispanic citizen voting age population. J.S. App.43-45, 81-82; J.S. App.172-73 at ¶¶47-49, 253-55 at ¶¶237, 239-41.

The district court properly rejected Texas's bright-line test for retrogression because the retrogression inquiry includes "all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan. . . . 'No single statistic provides courts with a shortcut to determine whether' a voting change retrogresses from the benchmark." *Georgia v. Ashcroft*, 539 U.S. 461, 479-80 (2003)

(quoting *Johnson v. De Grandy,* 512 U.S. 997, 1020-21 (1994)) (citing *De Grandy*, 512 U.S. at 1011-12, 1020-21; *Richmond v. United States,* 422 U.S. 358, 371-72 (1975); *Thornburg v. Gingles*, 478 U.S. 30, 97-100 (1986) (O'Connor, J., concurring in judgment)).

Realizing that its bright-line test was supported by neither precedent nor its own expert, Texas changed its strategy at trial to assert that the district court *should* base its retrogression analysis on an examination of election results in districts, *but* any amount of electoral influence, even slight, should be considered adequate to offset the loss of ability to elect districts. *See* J.S. App.18-24. The district court found that this argument "is not only foreclosed by the 2006 amendments [to section 5], but it lies outside accepted academic norms among redistricting experts." J.S. App.22. The district court further found that Texas's election-based retrogression test undermined the purposes of the Act because it would allow Texas to offset the loss of a Latino ability to elect district by fracturing Latino population across districts in which Latinos are unable to elect their candidates of choice. J.S. App.21-22.

Following the district court's denial of preclearance, Texas has once again reverted to the argument that retrogression analysis should be based only on a bright-line demographic rule.

Texas cannot now claim surprise that the district court looked at past election results in its retrogression analysis because Texas did the same in its redistricting

process. Contrary to the bright-line demographic test advocated by Texas in this appeal (*see* J.S. at 23-27), Texas redistricters evaluated districts based on election results in past elections. *See, e.g., Texas v. United States*, No. 11-cv-01303, Trial Tr. 01/18/2012 at 26:3-17; 47:17-48:7 (Interiano testimony that redistricters looked at exogenous election data prepared for them by the Texas Attorney General in order to evaluate their draft Congressional and State House plans).

Texas redistricters relied on past election results because, in combination with demographics, they help explain whether an existing or proposed district offers minority voters the ability to elect their candidate of choice. *See, e.g.,* DX903 (email between Texas redistricters notes that a draft map of CD23 was "over 59% HCVAP, but still at 1/10 [exogenous election performance].").

Although Texas now claims that the district court erred by looking at past elections in districts in the benchmark plan to determine minority ability to elect, Texas's expert testified at trial that if one wants to answer the question whether there is the possibility of electing a candidate to a particular office, then endogenous elections (held for the office at issue) are the best demonstration in that district of what is possible. *Texas v. United States*, No. 11-cv-01303, Trial Tr. 1/24/12 at 101:24-102:11.

III. A Favorable Decision For Texas on Retrogression is Unlikely to Change the Outcome of Texas Redistricting.

Texas's appeal focuses almost entirely on a critique of the district court's retrogression analysis. *See* J.S. at 12-27. However, a favorable decision for Texas by this Court on retrogression will not disturb the district court's conclusion that the Congressional plan is purposefully discriminatory. J.S. App.51 ("[W]e reach this issue as an alternative, unanimous basis to deny preclearance for the Congressional plan."). Furthermore, the district court's findings of fact related to purposeful discrimination in the State House plan will likely lead to a denial of preclearance on those grounds if the district court has the opportunity to reach that issue on remand.

IV. This Case is a Poor Vehicle to Address the Constitutionality of Section 5.

Texas filed this case as a section 5 preclearance action; it did not include in its complaint a claim that section 5 is unconstitutional. *See Texas v. United States*, No. 11-cv-01303, Dkt. 1 at 8-10 (D.D.C. July 19, 2011) (seeking declaratory judgment that the enacted statewide redistricting plans "fully comply with Section 5 of the Voting Rights Act" and "may be implemented immediately."). Texas did not raise a constitutional claim at summary judgment or in its post-trial briefing. *See Texas v. United States*, No. 11-cv-01303, Dkt. 41 and 201. The constitutional claim advanced by Texas for the first time in this appeal

has not been developed in or ever considered by the district court. J.S. App.23-24 n.11.

In addition, Texas does not succeed in portraying its disagreement with the district court ruling as an "as-applied" constitutional challenge. The district court followed well-established rules to evaluate discriminatory purpose and retrogression in the Congressional and State House plans before deciding the plans could not be precleared under section 5.

Awareness of the impact of redistricting changes on minority voters' ability to elect is not, as Texas argues, maximizing the need for states to take race into account. *See* J.S. at 4, 31-33. In reality, redistricters carefully juggle a host of priorities as they draft plans using sophisticated computer programs and they monitor, in real time, changes in demography and predicted election outcomes as they assign population into and out of districts. As applied by the district court, section 5 merely ensures that, as state officials pursue their redistricting goals, they are conscious of race to the extent that they avoid stripping minority voters of the gains they have won thus far.

In this appeal, Texas dresses up its arguments in the sheep's clothing of "race neutrality." Chafing at the requirement to avoid racial discrimination, Texas casts section 5 as a law that forces unnecessary racial considerations on a process that otherwise would never involve race. The reality is otherwise, as

demonstrated by the long, unfortunate history of racial discrimination in Texas redistricting.

The argument by Texas that section 5 imposes substantial federalism costs is also unmoored in fact. In the 2011 redistricting cycle, no covered state that submitted a statewide redistricting plan to the Attorney General for preclearance received an objection.[8] Only three local jurisdictions received objections to their redistricting plans by the Attorney General, out of a total of 1,139 redistricting submissions.[9] In section 5 litigation, the Attorney General has opposed preclearance of only the Texas Congressional and House plans.[10]

CONCLUSION

Section 5 is a limited provision that blocks only discriminatory election changes. In the 2011 redistricting cycle, every covered state other than Texas was able to comply with section 5's prohibition on racial discrimination. The discrimination against Latino voters that infects Texas's Congressional and

[8] *See* http://www.justice.gov/crt/about/vot/sec_5/statewides.php.

[9] Professor Justin Levitt, Loyola Law School, Los Angeles, Testimony Before the United States Commission on Civil Rights – Redistricting and the 2010 Census: Enforcing Section 5 of the VRA (Fed. 3, 2012) at 7-8, *available at* http://redistricting.lls.edu/files/USCCR%20testimony.pdf.

[10] *Id*.

State House plans demonstrate why section 5 remains a tailored remedy for racial discrimination and render this case unworthy of further review. The appeal should be dismissed or, in the alternative, the judgment of the district court should be affirmed.

Respectfully submitted,

THOMAS A. SAENZ
NINA PERALES
Counsel of Record
KAROLINA J. LYZNIK
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
nperales@maldef.org

MARIBEL HERNÁNDEZ RIVERA
JORGE M. CASTILLO
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10024
(212) 859-8000
maribel.hernandez.rivera@friedfrank.com

Attorneys for Intervenor-Appellee
Texas Latino Redistricting Task Force

TABLE OF APPENDICES

Page

Texas Population Growth 1990-2010 by Race (DX406, at 14) ..... App. 1

Change in Texas Total Population 2000-2010 by Race ..... App. 2

Plan C100: Statewide Map of Benchmark Congressional Districts (DX818, at 1) ..... App. 3

Plan C185: Statewide Map of Legislatively Enacted Congressional Districts (DX819, at 1) .... App. 4

Plan C100: South Texas Congressional Districts Population Deviations (DX431, at 75)..... App. 5

Email between E. Opiela and G. Interiano, Re: useful metric, November 19, 2010 (DX820, at 7) ..... App. 6

State's Proposed Congressional District 26 – Excerpt of DX819 – Plan C185 ..... App. 8

State's Proposed Congressional District 26 and 2005-2009 Citizen Voting Age Population (DX702)..... App. 9

Plan H100: Statewide Map of Benchmark Texas House Districts (DX960, at 1)..... App. 10

Plan H283: Statewide Map of Legislatively Enacted Texas House Districts (DX817, at 1)..... App. 11

Benchmark and State Proposed Nueces County House Districts and Hispanic Citizen Voting Age Population (DX406, at 2-3)..... App. 12

State's Proposed House District 77 and House 78 – Excerpt of DX817 – Plan H283..... App. 14

TABLE OF APPENDICES – Continued

Page

El Paso Hispanic Citizen Voting Age Population as a Percentage of Total Citizen Voting Age Population in Enacted Plan H283 (DX406, at 6) ..... App. 15