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

IN THE

# Supreme Court of the United States

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

APPELLANTS,

V.

SHANNON PEREZ, ET AL.,

APPELLEES.

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

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## JOINT APPELLEES' BRIEF AS TO INTERIM CONGRESSIONAL PLAN

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## QUESTIONS PRESENTED

1. Whether this Court should order interim adoption of the Texas Legislature's 2011 congressional redistricting plan where that plan continues Texas's long history of discriminating against racial minorities in voting, flouts the Voting Rights Act and Constitution, and intentionally cracks minority communities, reducing minority influence even as Texas's minority population has grown dramatically.

2. Whether the district court erred in following this Court's precedent and Section 5 of the Voting Rights Act by refusing to adopt Texas's congressional plan as an interim plan where the Attorney General and many intervenors have challenged the entire plan as violating Section 5, the plan has not received Section 5 approval, and the district court—as required by precedent—has yet to rule on other serious challenges to Texas's plan.

3. Whether this Court should adopt Texas's novel rule requiring adoption of an unprecleared plan except where changes are necessary to "address likely legal errors" even though this conflicts with statutory text and decades of this Court's precedent and the standard would not lead to a significantly different interim plan because Texas's plan is riddled with "likely legal errors."

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

Appellants are Rick Perry, in his official capacity as Governor of Texas, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas.

Appellees are Shannon Perez, Harold Dutton, Jr., Gregory Tamez, Sergio Salinas, Carmen Rodriguez, Rudolfo Ortiz, Nancy Hall, Dorothy Debose, Mexican American Legislative Caucus of the Texas House of Representatives, Texas Latino Redistricting Task Force, Armando Cortez, Socorro Ramos, Gregorio Benito Palomino, Florinda Chavez, Cynthia Valadez, Cesar Eduardo Yevenes, Sergio Coronado, Gilberto Torres, Renato De Los Santos, Joey Cardenas, Alex Jimenez, Emelda Menendez, Tomacita Olivares, Jose Olivares, Alejandro Ortiz, Rebecca Ortiz, National League of United Latin American Citizens, Gabriel Y. Rosales, Belen Robles, Ray Velarde, Johnny Villastrigo, Bertha Urteaga, Baldomero Garza, Marcelo Tafolla, Raul Villastrigo, Asenet T. Armadillo, Elvira Rios, Patricia Mancha, Texas Democratic Party, Boyd Richie, Congressman Henry Cuellar, Margarita V. Quesada, Rome Munoz, Marc Veasey, Jane Hamilton, Lyman King, John Jenkins, Kathleen Maria Shaw, Debbie Allen, Jamaal R. Smith, Sandra Puente, Texas NAACP, Howard Jefferson, Rev. Bill Lawson, Juanita Wallace, Congresswoman Eddie Bernice Johnson, Congresswoman Sheila Jackson Lee, Congressman Al Green, Eddie Rodriguez, Milton Gerard

Washington, Bruce Elfant, Balakumar Pandian, Alex Serna, Sandra Serna, Betty F. Lopez, David Gonzalez, Beatrice Saloma, Lionor Sorola-Pohlman, Eliza Alvarado, Juanita Valdez-Cox, Josephine Martinez, Nina Jo Baker, City of Austin, and Travis County.

Pursuant to Rule 29.6, no publicly held corporation owns more than 10 percent of any corporate appellee, and no corporate appellee has a parent corporation.

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The Order and Supplemental Order of the three-judge district court are not yet published in a federal reporter. The orders are available to the Court in the Joint Appendix at 89-121 and 132-55.

## JURISDICTIONAL STATEMENT

A three-judge district court in the Western District of Texas, convened under 28 U.S.C. § 2284, entered an order adopting an interim reapportionment plan for use in Texas's 2012 elections for members of the U.S. House of Representatives. The State defendants appealed this order and were denied a stay in the district court. They then sought and received a stay from this Court. This Court has jurisdiction under 28 U.S.C. § 1253 to consider the State's challenge to the interim map.

This brief addresses only Case Number 11-715, regarding the Interim Congressional Plan.

## I. STATEMENT OF CASE

Entering the 2011 reapportionment process, Texas had every reason to respect minority voting rights. Had it not been for growth in Texas's minority population, the State actually would have lost congressional seats. Supplemental Appendix ("SA") 9.[1] Instead, because the State's Hispanic population

[1] Appellees submit this Supplemental Appendix because Texas failed to include in the Joint Appendix record material designated by Appellees.

exploded and its African-American population grew rapidly, the State gained four seats in Congress. SA 9.

Texas also had every reason to understand its obligations under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Texas has been a covered jurisdiction since 1975, its inclusion prompted by its "long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process." *LULAC v. Perry*, 548 U.S. 399, 439 (2006) (internal quotation marks and citation omitted); *see also White v. Regester*, 412 U.S. 755, 767-68 (1973). Since its inclusion, the Department of Justice—under Democratic and Republican presidents alike—"has frequently interposed objections against the State and its subdivisions," *LULAC*, 548 U.S. at 440 (internal quotation marks and citation omitted), and Texas has lost more Section 5 enforcement suits than any other state. *See* 1 Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 250 tbl.4 (Mar. 8, 2006).

Despite Texas's experience and changing demography, the Legislature approached congressional redistricting in 2011 as it has so often in the past—with little concern for minority voting rights, federal law, or this Court's decisions. Rather than learning from its history, Texas chose to repeat it.

## A. The Texas Legislature's Congressional Redistricting Process

The Texas Legislature received from the Census Bureau the data required for redistricting in February 2011. Although the Legislature knew that it had to have a redistricting plan passed and precleared by November 14, it moved at a snail's pace. The Legislature did not conduct a single committee hearing on congressional redistricting during its five-month regular session. The first congressional redistricting bill was not filed until May 31, 2011, after adjournment of the regular session. And after the Legislature finally passed a congressional redistricting bill nearly a month later, the Governor waited almost another month before signing it on July 18.

This slow pace was not due to any effort to listen to the concerns of minority voters or elected officials. Indeed, although Hispanics and African Americans together now comprise a larger share of Texas's population than Anglos, SA 18, 48, not a single Hispanic or African-American legislator was allowed to participate in crafting Texas's new congressional districts. Texas Senate Journal for the Eighty-Second Legislature, First Called Session (June 6, 2011) ("Senate Journal") at A-12, *available at* http://www.journals.senate.state.tx.us/sjrnl/821/pdf/82S106-06-FA.pdf; JA 709-12. As one African-American representative in the Texas House of Representatives explained, "a lot of the map drawing and a lot of the changes that were done were done in secret . . . to keep the African-American and Latino members of the redistricting committee sort of discombobulated and not really knowing what's going

on." JA 708. It is not inevitable, of course, that an entirely Anglo group of legislators will ignore the rights of minority voters, but it turned out to be what happened here.

The Anglo leadership not only excluded minority legislators from the redistricting process, but they excluded the public as well. The first and only hearing open to public testimony was held just three days after the congressional plan was released, and on June 6, 2011—the Monday after the Friday hearing—the full Senate considered the bill. Of the witnesses who were able to attend the Senate committee's one public hearing, only one supported the plan; "everybody else, every African American, every Anglo American, every Mexican American, Hispanic American, more generally speaking, every single witness testified against the plan." Senate Journal at A-14.; *see also* Texas House Journal for the Eighty-Second Legislature, First Called Session (June 14, 2011) at S46, *available at* http://www.journals.house.state.tx.us/hjrnl/821/pdf/82C1DAY08SUPPLEMENTFINAL.pdf (State Representative Dawnna Dukes: "[T]he hearing was only a shadow . . . , a box to be checked because they always knew they weren't going to let a plan pass that preserved the voice of Austin minorities.").

This delayed and abbreviated legislative process that excluded minority representatives and citizens was even worse than some of the State's previous redistricting processes. Several elected officials noted that while the 2011 redistricting process was cloaked in secrecy and backroom dealing, previous cycles had provided greater opportunity for open debate and collaboration. *See, e.g.*, Transcript of Bench Trial at

796–97, *Perez v. Perry*, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Sept. 8, 2011) (testimony of State Rep. Sylvester Turner); JA 518 (Senator Zaffrini stating that in her twenty-five years of sitting on Senate Redistricting Committees, "the redistricting process during the 2011 Legislative Session was the least collaborative and most exclusive of any [she had] experienced"). Even independent counsel for the Senate Redistricting Committee testified that "this process has been quite different from what we've seen in the past [because] . . . [n]obody has had the opportunity to study it the way it has been done in the past." Testimony of Michael Morrison, Hearing of Senate Select Committee on Redistricting (June 3, 2011), *available at* http://www.senate.state.tx.us/75r/senate/commit/c625/c625.htm, at 4:51:42. He explained that this procedure differed from the one followed in 2003, when the committee's staff "went all over the state . . . spent sixteen hours in one place, twenty in another. We sat down . . . we visited. We hired experts to do retrogression analysis . . . . [T]hat would be the way to do it this time." *Id.* at 4:52:27. The Texas Legislature, however, chose not to do it that way in 2011.

The 2011 cycle instead was marked by the Legislature's deliberate disregard for minority voting rights. Eric Opiela, counsel to the Republican congressional delegation and one of the original developers of the new congressional map, aptly summed up the Legislature's approach, testifying that key principles under the Voting Rights Act, such as racial bloc voting and electoral performance, are nothing more than "hocus-pocus" that he refused to consider in developing the congressional plan. *Texas v.*

*United States*, 1:11-cv-01303-RMC-TBG-BAH (D.D.C. Oct. 25, 2011), Dkt. No. 77 at 9.

Unsurprisingly, a plan crafted with little respect for minority voting rights repeatedly violated those rights. For example, just as the Texas Legislature did in the plan this Court rejected in *LULAC*, 548 U.S. 399, the Legislature again gerrymandered Congressional District 23 to leave it a nominal Latino opportunity district while ensuring that it would almost never elect the Latino preferred candidate. *See* SA 40-41 (explaining how Texas strategically removed the politically active portion of the Hispanic population and a large portion of the African-American population, replacing them with low-turnout Hispanics to reduce electoral performance of minority-preferred candidates); JA 959. The State's own expert could not stomach this maneuver, testifying: "I would not have done what was done to the 23rd." JA 678. Given this Court's clear ruling in *LULAC*, "my first advice to the legislature would be just . . . with a slight memory of history, do as little as possible to the 23rd as you can," because "enough is enough, right?" JA 680. Even Mr. Opiela, who views basic principles of the Voting Rights Act as "hocus-pocus," advised Congressman Lamar Smith: "I don't think we mess with [District 23]" because it was "barely performing"; "add R[epublican]s (which will be Anglos) and you put a neon sign on it telling the court to redraw it." JA 981. Nonetheless, the Texas Legislature did "mess with" District 23, converting it into a district in which Latinos are almost certainly unable to elect their preferred candidates.

Similarly, despite this Court's clear statement that if "a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments," *Bartlett v. Strickland*, 129 S. Ct. 1231, 1249 (2009) (plurality op.), the Texas Legislature did exactly that, breaking apart Congressional District 25, a district the State concedes was a crossover district in which minority voters were able to elect their candidate of choice. *See* Defs.' Resp. to Pls.' Post-trial Brs. ("Defs.' Post-Trial Resp. Br.") at 18 & n.9, *Perez v. Perry*, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Sept. 8, 2011), Dkt. No. 457. As a result of the Legislature's race-conscious shuffling of voters in and out of the district, SA 33-34, District 25 under the enacted plan "is no longer a district in which minority-preferred Congressional candidates will prevail," SA 33-34.

The Legislature's dismissive attitude toward the concerns of minority voters was further reflected in its treatment of minority legislators. In the enacted plan, for example, the Texas Legislature redrew the districts of all three African-American members of the State's congressional delegation so that none of their district offices remained in their districts. JA 769, 929-30, 932-33. Similarly, the Legislature redrew the district held by Congressman Charlie Gonzalez, Chair of the Congressional Hispanic Caucus, not only to exclude his district office but also to remove key landmarks, including the Alamo and the Convention Center named after Congressman Gonzalez's father. JA 948-49. By contrast, when Anglo Congresswoman Kay Granger's campaign office was originally drawn out of her

district, the Legislature made sure to correct the problem before adopting the final plan. JA 700-01, 963. Similarly, when Anglo Congressman Kenny Marchant requested that his district lines be changed to include his grandchildren's school, and when Anglo Congressman Lamar Smith asked that his district be drawn to include the San Antonio Country Club, the Legislature granted both requests. JA 964-65, 979.

Reviewing the congressional redistricting plan 11 days before it was adopted, Dub Maines, district director for Republican Congressman Joe Barton, grew concerned and asked his Republican colleagues: "[I]s there any reason why every effort should not be made to make the map more likely to pre-clear, especially if it doesn't hurt the political aims in any way?" JA 982-83. Even Republican staff members were concerned that their proposed plans limited the ability of minority groups to elect their candidates of choice more than was necessary to achieve their political goals. But those warnings went unheeded, as the Texas Legislature pushed through a plan that even its advisors knew was legally flawed.

### B. Legal Challenges to the Congressional Map

Unsurprisingly, given the Legislature's utter disregard for minority voting rights, numerous voters, elected officials, and citizen groups filed suit challenging the Legislature's redistricting plan. Those suits—raising claims of unconstitutional racial gerrymandering, intentional discrimination, and violations of Section 2 of the Voting Rights Act—were rapidly consolidated before a three-judge panel in the Western District of Texas. *Perez v. Perry*, No. 5:11-

cv-360-OLG-JES-XR (W.D. Tex. 2011). Over the course of a two-week bench trial beginning on September 6, 2011, in San Antonio, that Court moved expeditiously to hear the evidence necessary to evaluate these claims.

The Texas district court heard abundant evidence that Texas violated Section 2 of the Voting Rights Act by going out of its way to fracture minority voters among Anglo-dominated districts instead of following traditional redistricting principles that would have led—because of explosive minority population growth—to additional minority opportunity districts. Although Texas gained four congressional seats, although Hispanic and African-American population growth created all those additional seats, and although Hispanics and African Americans together now outnumber Anglos in Texas, the congressional redistricting plan the Legislature enacted actually *reduced* the number of districts in which minority voters would be able to elect their candidate of choice. While the benchmark plan contained 11 minority opportunity districts (of 32 total), the Legislature's plan cut that number to 10 (of 36). SA 28.

Several areas of the state experienced such substantial minority population growth that any neutral line-drawing process would have yielded additional majority-minority seats. For instance, in the Dallas-Fort Worth area, spread across Dallas and Tarrant Counties, the Hispanic population jumped by 440,898, the African-American population grew by 152,825, and the white population fell by 156,742. U.S. Census Bureau, http://factfinder.census.gov; *see also* SA 25. Plaintiffs presented multiple maps

demonstrating how following neutral redistricting criteria could generate additional majority-minority districts respecting these population changes. *See, e.g.*, Plan C166 Report, District 35; Plan C202 Report, Districts 34 & 35, *available at* http://gis1.tlc.state.tx.us/. Texas, however, not only failed to draw an additional majority-minority district in this region, it went out of its way to "crack" the expanded minority population among seven oddly-shaped districts (Districts 5, 6, 12, 24, 26, 32, 33). None of these districts provides minorities an opportunity to elect their candidate of choice; in fact, although the Anglo population in this area decreased, Texas added another Anglo-majority district.

Similarly, in Harris County the population grew from 3.4 million in 2000 to 4.1 million in 2010. SA 24. All of that growth came from minorities, as the Anglo population actually declined by 70,000. SA 24. Plaintiffs proposed several plans drawing a majority-minority district in this area, *see, e.g.*, Plan C166 Report, District 36, *available at* http://gis1.tlc.state.tx.us/, but Texas chose to cancel out the County's minority population growth by redrawing District 2 to wrap around Houston and wind through Eastern Texas, *see* Plan C185, submerging the minority population in an Anglo-dominated district even though the minority group was "sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (stating preconditions for Section 2 claim).

Additionally, the district court record is replete with evidence that the congressional plan was driven

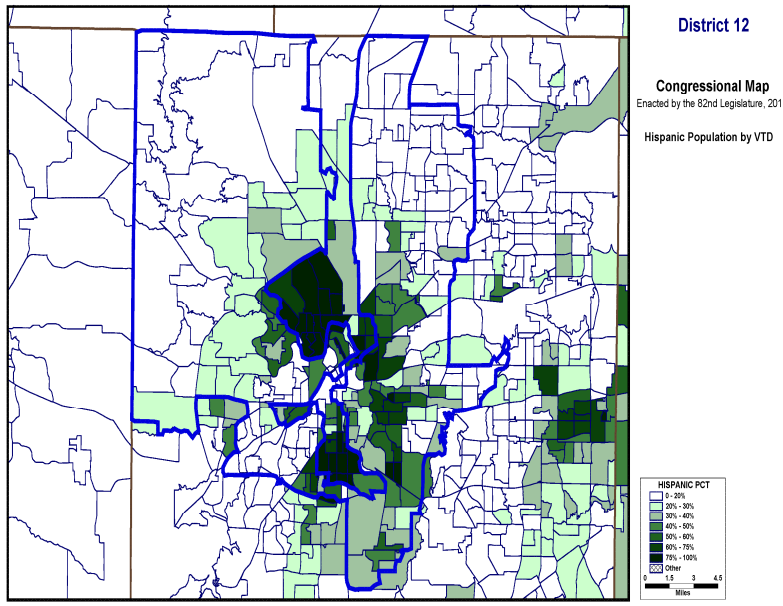
by a racially discriminatory intent to suppress minority voting rights and keep minorities "in their place," H. Rep. No. 109-478, at 43 (2006), despite their massive population growth throughout the decade. Texas managed to thwart progress for minority voters by, among other things, dismantling several districts that had elected minorities' candidate of choice. For example, as noted above, despite this Court's recent confirmation that intentionally drawing district lines to "destroy otherwise effective crossover districts" raises serious constitutional questions, *Bartlett*, 129 S. Ct. at 1249 (plurality op.), the Texas Legislature did exactly that, breaking apart an acknowledged crossover district in Congressional District 25. *See* Defs.' Post-Trial Resp. Br. 18 & n.9. Similarly, as noted above and as this Court rejected in *LULAC*, 548 U.S. 399, the Legislature again gerrymandered Congressional District 23 to leave it a nominal Latino opportunity district while ensuring that it would almost never elect the Latino preferred candidate. *See* SA 40-41.

Finally, the district court heard evidence of the extent to which race had been "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), resulting in an unconstitutional racial gerrymander. As but one example, expert witness Dr. Morgan Kousser described the jagged "lightning bolt" that extends from District 26 and into District 12, carefully excising a substantial Hispanic population in Tarrant County from the African-American communities immediately surrounding the area. Transcript of Bench Trial, *Perez v. Perry*, No. 5:11-cv-00360-OLG-JES-XR at 256-57 (W.D. Tex. Sept. 6,

2011) (testimony of Dr. Morgan Kousser). As demonstrated in the shaded maps below, the lightning bolt reaches south in a narrow path to heavily Hispanic neighborhoods in Forth Worth's historic North Side, where it immediately widens to encompass virtually every heavily Hispanic neighborhood north of downtown Fort Worth. It then narrows dramatically, skirting African-American neighborhoods but picking up a narrow band of Hispanic precincts. The lightning bolt then widens to pick up the largest concentration of Hispanic voters south of downtown Fort Worth.

**Texas Congressional District 12**

as passed by the 2011 Texas Legislature (Plan C185)




By carefully attaching Hispanic voters to Anglo-dominated District 26 and African-American voters to Anglo-dominated District 12, Texas effectively destroyed any ability of minority voters to unite with other Hispanics or African Americans, as individual ethnic groups or as a coalition, to elect their candidate of choice. As a result, neither district is one in which minorities will have an opportunity to elect their candidates of choice.

In sum, the evidence at trial demonstrated that the Texas Legislature's congressional district map, like its congressional redistricting process, was largely governed by unlawful racial considerations, as Texas legislators knew precisely how best to, and, in fact did, pick off, split up, and drown out minority voters to ensure that minority population gains would not translate into minority electoral gains.

The district court recognized, however, that under this Court's precedent, it could not rule on any of these challenges until Texas first obtained Section 5 preclearance of its plan. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 283 (2003) (Kennedy, J., concurring) ("Where state reapportionment enactments have not been precleared in accordance with § 5, the district court 'err[s] in deciding the constitutional challenges' to these acts.") (quoting *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam)); *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978). The Texas district court therefore is waiting upon Texas to complete the preclearance process before ruling on the merits of these claims. *See* JA 215-16 ("[T]he law precludes the Court from issuing a final decision on the merits until there has been a determination on preclearance.").

### C. Texas's As-Yet Unsuccessful Preclearance Process

Texas, meanwhile, rather than taking "the more expeditious method" of administrative preclearance through the Department of Justice, *McCain v. Lybrand*, 465 U.S. 236, 247 (1984), instead chose to pursue the slower route of judicial preclearance. After filing a declaratory judgment action in D.C. district court, the State then chose to forgo setting a quick trial date and insisted on pursuing summary judgment as the sole avenue for resolution of the Section 5 issues. The D.C. district court specifically suggested to Texas that it reconsider its decision to rely on summary judgment, stating to Texas's counsel: "[W]ould [you] rather say, 'Okay, let's just go to trial and get this done[']  instead of try summary

judgment[?]" JA 923. But Texas rejected this option, even though numerous parties, including the Attorney General, alleged that the Texas Legislature had engaged in intentional discrimination in enacting its congressional redistricting plan, and this Court has made clear that a "legislature's motivation is itself a factual question." *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999); *see also id.* at 546-47 ("The task of assessing a jurisdiction's motivation . . . is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'") (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

The Attorney General and Intervenors filed briefs opposing the State's motion for summary judgment. The Attorney General argued that the entire congressional plan is retrogressive based on a statewide measure of voting opportunity. In addition, he identified two districts—Congressional Districts 23 and 27—as violating Section 5's prohibition against retrogressive effect, which would require redrawing most of the congressional map in South and West Texas. The Attorney General also argued that the plan had been enacted with a racially discriminatory purpose, undermining the legislative policy choices that drove the State's drawing of congressional district lines. Intervenors, meanwhile, not only buttressed the Attorney General's claims but also argued and offered evidence of additional Section 5 violations, including with respect to District 25 and the reduction in the absolute number of minority opportunity districts statewide.

After "extensive briefing" and "lengthy oral argument," JA 550, the D.C. district court unanimously denied the State's summary judgment motion, JA 550-51. The court determined that the State "used an improper standard or methodology to determine which districts afford minority voters the ability to elect their preferred candidates of choice and that there [we]re material issues of fact in dispute that prevent[ed]" the court from entering summary judgment for Texas. JA 550-51. Because Texas had declined to schedule a trial and no final ruling on preclearance could be issued before Texas's filing deadlines, the court noted that "[t]he District Court for the Western District of Texas must designate a substitute interim plan for the 2012 election cycle." JA 550. The D.C. district court has scheduled a Section 5 preclearance trial for the second half of January, 2012, beginning on January 17.

### D. The District Court's Interim Congressional Map

Anticipating the possibility that Texas might fail to obtain preclearance and aiming to keep Texas's statutory election schedule on track, the Texas district court had allowed the parties to submit proposals for interim plans, comment on or object to the proposals, and make their case at interim plan hearings conducted between October 31 and November 4, 2011. Texas asked the district court simply to adopt its unprecleared plan, claiming that it was "appropriate for interim designation." JA 291. Numerous intervenors explained why this was inappropriate under this Court's precedent and

highlighted the many pending challenges to the Texas Legislature's plan.

After concluding the interim plan hearings, the Texas district court spent the next two and a half weeks crafting interim plans. On November 23, in light of the D.C. district court's ruling and the impending opening of candidate qualifying for Texas elections, the court published its proposed congressional plan and invited comments and objections. JA 205-06. This ruling was unanimous; no judge voiced any objection. On November 26, the court, with Judge Smith now dissenting in favor of a different plan (but not the Legislature's plan), adopted Plan C220 as the interim plan. JA 132-55. Two days later, congressional elections opened with candidate qualifying. As anticipated in the court's prior orders, on December 2 the court issued a supplemental order further explaining the governing case law and its approach to the interim plan. JA 89-121.

On December 9, this Court stayed the Texas district court's interim congressional plan and noted probable jurisdiction. This forced the district court to alter the State's statutory election schedule, moving the primaries back a month, to April 3, 2012. JA 80-88. This new schedule is premised on interim congressional and legislative maps being in place by February 1, 2012. JA 80.

## II. SUMMARY OF ARGUMENT

Texas's 2011 congressional redistricting process confirms that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to

share and participate in our democratic processes and traditions." *Bartlett*, 129 S. Ct. at 1249 (plurality op.). Though Hispanics and African-Americans together now comprise a larger share of Texas's population than Anglos, neither group played any role in shaping the congressional districts that will elect Texas's members of the U.S. House of Representatives over the next decade. This was not an "equal opportunity to share and participate in our democratic processes." *Id.* Given the State's demographic changes, Texas eventually will reach a point where map drawers will be practically unable to deny minority voters an equal opportunity to elect their candidates of choice. But the Texas Legislature endeavored to postpone that date by intentionally dismantling coalition districts and minority opportunity districts, packing millions of additional minority voters into fewer minority opportunity districts than existed before, and cracking naturally occurring minority populations to prevent them from obtaining political power. Yet again, "the State took away the [minorities'] opportunity because [minorities] were about to exercise it. This bears the mark of intentional discrimination." *LULAC*, 548 U.S. at 440. Thus, the Texas Legislature's 2011 congressional redistricting plan was simply another step in Texas's "long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process." *Id.* at 439 (internal quotation marks and citation omitted).

Nonetheless, Texas asks this Court to order implementation of its plan, effectively bypassing not only Section 5 of the Voting Rights Act, but also

Section 2 and the Constitution. In Texas's view, the only right at stake here is the right of state sovereignty, and that trumps all.

Texas forgets, however, that our Constitution values other rights even more highly, including the rights of individuals to vote and to have their votes count equally, regardless of the color of their skin. We fought a war to win these rights, and they are enshrined in the Fourteenth and Fifteenth Amendments, each of which gives Congress the "power to enforce" its protections "by appropriate legislation," even over objections by states. *City of Boerne v. Flores*, 521 U.S. 507, 518 ("[M]easures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures place[] on the States."); *see also City of Rome v. United States*, 446 U.S. 156, 179 ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.").

"The first century of congressional enforcement of the[se] Amendment[s], however, can only be regarded as a failure," and "Congress responded with the Voting Rights Act." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2508, 2509 (2009). Under Section 5 of the Act, of course, a covered jurisdiction such as Texas "must obtain either judicial or administrative preclearance before implementing a voting change. No new voting

practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance." *Lopez v. Monterey Cnty.*, 519 U.S. 9, 20 (1996).

While Section 5 imposes burdens on states, the question whether those burdens are justified is neither raised nor necessary to a decision here, and it must be left for another day. The question here is how a district court should proceed when faced with an impending election and a state-enacted plan that has not received Section 5 approval. This Court's decisions give a clear answer: such a plan may not be adopted by a court. *See, e.g.*, *id.* at 22. This Court's decisions also direct that a court facing this situation may not conduct its own analysis of whether the plan complies with Section 5 or other legal requirements. *See, e.g.*, *Branch*, 538 U.S. at 283 (Kennedy, J., concurring) ("Where state reapportionment enactments have not been precleared in accordance with § 5, the district court 'err[s] in deciding the constitutional challenges' to these acts.") (quoting *Connor*, 421 U.S. at 656). Rather, the court's role in such a case is to adopt an interim plan to govern elections until a state-enacted plan obtains preclearance. *See, e.g.*, *Lopez*, 519 U.S. at 23 ("The three-judge district court may determine only whether § 5 covers a contested change, whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate.").

In adopting an interim plan, the court should defer to the State's policy choices reflected in any benchmark plan that has obtained preclearance and to any aspects of the new redistricting plan that the Attorney General or D.C. district court find

compliant with Section 5. But the court may not defer to state policy choices that have not been approved by those authorized to grant preclearance. *See, e.g.*, *id.* at 22 (because the "system under which the District Court ordered the County to conduct elections undoubtedly 'reflect[ed] the policy choices' of the County," it was "error for the District Court to order elections under that system before it had been precleared") (quoting *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981)). At the very least, before preclearance is granted, courts should not defer to state policy choices that are the subject of specific challenges under Section 5, Section 2, or the Constitution.

What a court must do in this situation is exactly what the district court did here. With election deadlines looming and Texas having failed to obtain preclearance—in part because its plan is illegal and cannot be precleared and in part because Texas delayed in enacting a plan, pursued the slower route of judicial preclearance, and chose to pursue only summary judgment—the court had no choice but to adopt an interim plan. In doing so, the district court hewed as closely as it could to the benchmark plan, which had obtained preclearance. It even respected the Legislature's enacted but unprecleared plan to the extent it could without risking a violation of federal law.

Texas would have this Court reverse the district court for doing exactly what this Court has required lower courts to do throughout Section 5's history. The Court should decline. If the Court orders adoption of Texas's redistricting plan, it will not only be eviscerating Section 5, but also ordering imposition

of a racially discriminatory map that violates Section 2 and the Constitution. Even if the Court remanded and directed the district court to defer to those portions of Texas's plan not subject to pending challenges, the result would be little (if any) different from what the district court already did; the result would merely be delayed adoption of the same interim map. The Court should, therefore, affirm, both because the district court followed this Court's past instructions and also because if the district court had broken this Court's rules and evaluated the legality of Texas's plan, it unquestionably would have found the plan lacking.

## III. ARGUMENT

Texas claims the district court erred by declining to adopt its proposed map because the court found no legal error in the map. This argument ignores the facts and the law. In truth, the district court found an insurmountable legal flaw in Texas's proposed plan: it had not received Section 5 approval. Once the district court made that finding, it was precluded by this Court's decisions from assessing any other deficiencies in the map and was required to adopt an interim plan. *See, e.g.*, *Branch*, 538 U.S. at 283 (Kennedy, J., concurring); *Lopez*, 519 U.S. at 23; *McDaniel*, 452 U.S. at 153. Texas suggests otherwise by citing *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam), and by casting aspersions on Section 5. These arguments do not hold water. The district court proceeded exactly as it should have in light of Texas's failure to obtain preclearance, carefully drawing an interim map that respected the most recent plan to obtain preclearance and even respecting the Legislature's proposed plan to the

extent it could without violating federal law. In asking this Court to nonetheless reverse the district court's ruling, Texas effectively asks this Court to overrule its own longstanding approach to Section 5 and to reward Texas for its delay in seeking preclearance. The Court should refuse.

### A. The District Court Followed This Court's Rules in Evaluating Texas's Plan

Texas's argument effectively asks this Court to write Section 5 out of the U.S. Code. It is beyond dispute that "Section 5 requires States to obtain either judicial or administrative preclearance before implementing a voting change. A voting change in a covered jurisdiction 'will not be effective as la[w] until and unless cleared' pursuant to one of these two methods." *Clark v. Roemer*, 500 U.S. 646, 652 (1991) (quoting *Connor*, 421 U.S. at 656). "Failure to obtain either judicial or administrative preclearance" not only prevents a change from taking effect, it "'renders the change unenforceable.'" *Id.* (quoting *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982)). Indeed, "[i]f voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." *Id.* at 652-53 (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969)). These are far from novel concepts—they are the first principles of Section 5, repeatedly, recently, and unanimously reaffirmed by this Court. *See, e.g.*, *Lopez*, 519 U.S. at 20 ("A jurisdiction subject to § 5's requirements must obtain either judicial or administrative preclearance before implementing a voting change. No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance.").

In a series of cases, this Court has made clear that just as a covered jurisdiction may not enforce a voting change without preclearance, neither may a district court considering a challenge to such a change allow it to take effect. First, in *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977), Warren County asked a three-judge district court in Mississippi to conduct its own analysis of an unprecleared change the County wanted to implement. The court found that the proposed change violated no legal requirements and ordered it into effect. *Id.* at 644. This Court unanimously reversed, holding that where a voting change has not been precleared, the district court cannot pass on its compliance with Section 5 or any other legal requirements; instead, "the inquiry of a local district court . . . is 'limited to the determination whether a (voting) requirement is covered by § 5, but has not been subjected to the required federal scrutiny.'" *Id.* at 645-46 (quoting *Perkins v. Matthews*, 400 U.S. 379, 383 (1971)); *see also McDaniel*, 452 U.S. at 150 n.31 ("Our decision in [*Warren County*] illustrates that a District Court's conclusion that a reapportionment plan proposed by a covered jurisdiction complies with constitutional requirements is not a substitute for § 5 review."). Therefore, "it was error for the District Court to determine the constitutional validity of the county's plan and to order that it be implemented, rather than limiting its inquiry . . . to the question whether the county had complied with § 5." *Id.*

Second, in *McDaniel*, 452 U.S. 130, the question was whether a county's redistricting plan, enacted at the direction of a federal court, had to receive Section

5 preclearance before it could take effect. This Court held that "whenever a covered jurisdiction submits a proposal [to a court] reflecting the policy choices of the elected representatives of the people . . . the preclearance requirement of the Voting Rights Act is applicable," so it was "error for the District Court to act on the county's proposed plan before it had been submitted to the Attorney General or the United States District Court for the District of Columbia for preclearance." *Id.* at 153.

Finally and most recently, in *Lopez*, 519 U.S. 9, Monterey County had failed to obtain preclearance for several changes to its system for electing judges. The district court decided to adopt on an interim basis Monterey County's unprecleared system, accepting the County's argument "that there is a difference between a district court's failing to enjoin an unprecleared election scheme . . . and its ordering, pursuant to its equitable remedial authority, an election under an unprecleared plan." *Id.* at 22. This Court unanimously reversed, holding that "where a court adopts a proposal 'reflecting the policy choices . . . of the people [in a covered jurisdiction] . . . the preclearance requirement of the Voting Rights Act is applicable.'" *Id.* (quoting *McDaniel*, 452 U.S. at 153) (alterations in original). Because the "system under which the District Court ordered the County to conduct elections undoubtedly 'reflect[ed] the policy choices' of the County," it was "error for the District Court to order elections under that system before it had been precleared by either the Attorney General or the United States District Court for the District of Columbia." *Id.*

These cases control the outcome here. Texas asked the district court to adopt its proposed redistricting plan despite its failure to obtain preclearance. JA 291. But ordering its use as an interim measure would sidestep the preclearance requirement, and it would plainly be "error for the District Court to order elections under that system before it had been precleared." *Lopez*, 519 U.S. at 22. Despite this clear law, Texas offers several reasons why this Court should deviate from its past precedent and order adoption of its map. Each argument fails.

### 1. *Upham* Requires No Different Result

The centerpiece of Texas's argument is that *Upham*, 456 U.S. 37, requires courts adopting interim redistricting plans to defer to legislatively enacted maps even if they have not received preclearance. *Upham* says no such thing.

In *Upham*, Texas submitted its congressional redistricting plan to the Attorney General for preclearance, and he issued a finding "that the State 'has satisfied its burden of demonstrating that the submitted plan is nondiscriminatory in purpose and effect' with respect to" 25 of the plan's 27 districts. *Id.* at 38. He nonetheless denied preclearance because of "object[ions] to the lines drawn for two contiguous districts in south Texas, Districts 15 and 27." *Id.*; *see also Abrams v. Johnson*, 521 U.S. 74, 85 (1997) (noting that in *Upham* "[t]he Attorney General had objected under § 5 . . . to a specific part of the plan," but "had approved the other 25 districts"). A Texas district court then adopted an interim map that not only redrew Districts 15 and

27, but also redrew four districts in Dallas County, districts where the Attorney General had affirmatively found no Section 5 violation. *Upham*, 456 U.S. at 39-40. Texas appealed to this Court *not* as to districts 15 and 27, but rather as to the Dallas County districts. *Id.* at 38 ("The court devised its own districts for Dallas County, and it is that part of the District Court's judgment that is on appeal here."). Thus, *Upham* involved a court deviating from portions of a state-enacted plan where the Attorney General—who has authority to evaluate plans under Section 5—had affirmatively found those portions of the plan compliant. *Upham* thus stands only for the proposition that courts should defer to those portions of a legislatively-enacted map that an authorized decision maker (the Attorney General or D.C. district court) has found compliant with Section 5, or that face no objection under Section 5, not that courts must defer to unprecleared plans generally, a rule that would render Section 5 meaningless. *Id.* at 40-41 ("*[I]n the absence of any objection to the Dallas County districts by the Attorney General*, and in the absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgments the plans reflect.") (emphasis added).

*Upham* thus provides no support for Texas's position here. Unlike in *Upham*, where the Attorney General had found 25 of Texas's 27 congressional districts compliant with Section 5, here no body authorized to grant preclearance has found any part of Texas's plan consistent with Section 5. Rather, in the face of objections from the Attorney General and many intervenors to Texas's entire congressional redistricting plan, the D.C. district court has not

found any districts compliant. Indeed, the only Section 5 finding made so far is that "the State of Texas used an improper standard or methodology to determine" whether its plan has retrogressive effects. JA 550.

In short, while *Upham* requires district courts to defer to those portions of a legislatively enacted plan found compliant with Section 5 or facing no Section 5 objection, here Texas's entire plan is challenged under Section 5 and the only Section 5 findings go against Texas, so adopting the Texas Legislature's plan was not appropriate and certainly not required. Indeed, given the numerous valid challenges to Texas's plan that the Texas district court has properly refrained from analyzing to date, requiring deference to the Legislature's plan here would lead to the absurd result of authorizing violations of federal law. But "*Upham* called on courts to correct—not follow—constitutional defects in districting plans." *Abrams*, 521 U.S. at 85.

### 2. Precedent Forbade the District Court from Conducting Its Own Analysis

Texas chides the district court for refusing to adopt the State's plan without conducting a full analysis of it under Section 5, Section 2, and the Constitution. But this Court's decisions and the plain text of Section 5 dictated the district court's approach.

The Texas district court lacks jurisdiction to decide whether Texas violated Section 5, for Congress gave "exclusive authority to pass on the discriminatory effect or purpose of an election change

to the Attorney General and to the District Court for the District of Columbia." *Lopez*, 519 U.S. at 23. "This congressional choice in favor of specialized review necessarily constrains the role of the three-judge district court," which "lacks authority to consider the discriminatory purpose or nature of the changes." *Id. See also Warren County*, 429 U.S. at 645 ("What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General the determination whether a covered change does or does not have the purpose or effect of denying or abridging the right to vote on account of race or color.") (internal quotation marks and citation omitted). As the Texas district court observed: "[T]he Court is prevented from making Section 5 determinations not only because it lacks jurisdiction to do so, but also because as a practical reality, the three judge panel has not heard evidence regarding Section 5; nor could it hear that evidence and make those determinations without wasting an enormous amount of judicial resources and potentially reaching a result that would later be inconsistent with a D.C. Court ruling." JA 91. Indeed, had the Texas district court made a finding of likely retrogression and used that as a basis to justify interim relief, Texas surely would have objected, citing these very cases.

As for Texas's suggestion that the district court erred by declining to rule on other challenges to Texas's plan—such as those brought under Section 2 and the Constitution—this Court has made clear that it is error for a district court to consider such challenges before a plan is precleared. "[U]ntil clearance has been obtained," courts should not

"address the constitutionality of the new measure." *Wise*, 437 U.S. at 542; *see also Connor*, 421 U.S. at 656 (holding that district court erred in considering racial discrimination claims as to Mississippi laws because "[t]hose Acts are not now and will not be effective as laws until and unless cleared pursuant to § 5"). As Justice Kennedy explained in *Branch*, the alternative rule proposed by Texas would have many harmful effects, including "forc[ing] the federal courts to undertake unnecessary review of complex constitutional issues in advance of [a preclearance] determination," thereby "frustrating the mechanism established by the Voting Rights Act." 538 U.S. at 284 (Kennedy, J., concurring). For that and other reasons, "[w]here state reapportionment enactments have not been precleared in accordance with § 5, the district court 'err[s] in deciding the constitutional challenges' to these acts." *Id.* at 283 (quoting *Connor*, 421 U.S. at 656); *see also Lopez*, 519 U.S. at 23 ("The three-judge district court may determine only whether § 5 covers a contested change, whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate.").

In arguing otherwise, Texas again misunderstands *Upham*. There, this Court said that "in the absence of any objection to the Dallas County districts by the Attorney General, and in the absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgments the plans reflect." *Upham*, 456 U.S. at 40-41 (emphasis added). Texas ignores the crucial first clause of this passage and focuses only on the remainder, pulling this quote out of context to suggest that a court must defer unless it

finds a constitutional or statutory violation. But in *Upham* "[t]he Attorney General had objected under § 5" only "to a specific part of the plan" and "had approved the other 25 districts." *Abrams*, 521 U.S. at 85. As the numerous other cases cited above make clear, it was only because the Attorney General "had approved the other 25 districts" that a court could even consider other challenges to those districts. *Id*; *see also Branch*, 538 U.S. at 283 (Kennedy, J., concurring); *Lopez*, 519 U.S. at 23; *Wise*, 437 U.S. at 542; *Connor*, 421 U.S. at 656. Here, with no Section 5 approval granted as to any part of Texas's plan, and with objections pending as to the entire plan, the normal rule applied: "The three-judge district court [could] determine only whether § 5 cover[ed] [the] contested change, whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, [was] appropriate." *Lopez*, 519 U.S. at 23.

### 3. Preclearance, Not Submission, Is Key

Texas claims that this Court's clear precedent—that courts should not defer to unprecleared plans—applies only where a state fails to seek preclearance at all. Texas invents this distinction out of thin air, and it is refuted by Section 5's text, this Court's decisions, and simple logic.

Section 5 provides that whenever a covered jurisdiction "shall enact or seek to administer any" change in voting practices, the jurisdiction "may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such . . . [change] neither has the purpose nor will have the effect of denying or

abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a). "[U]nless and until the court *enters such judgment* no person shall be denied the right to vote for failure to comply with such" change. *Id.* (emphasis added). Thus, the plain language of Section 5 makes clear that only a ruling by the court, not the mere filing of a declaratory judgment action, allows a change to take effect.

The import of this language becomes even clearer when it is compared to the language governing administrative preclearance, which grants states more leeway. Administrative preclearance was not part of the original Voting Rights Act, but was added "after concerns arose that the declaratory judgment route would unduly delay implementation of nondiscriminatory legislation." *McCain*, 465 U.S. at 246. If a covered jurisdiction submits a change for administrative preclearance, it takes effect if "the Attorney General has not interposed an objection within sixty days after such submission, or . . . has affirmatively indicated that such objection will not be made." 42 U.S.C. § 1973c(a). Thus, unlike in the D.C. district court, in the administrative process, "silence constitutes consent." *McCain*, 465 U.S. at 247. Congress could have applied a similar rule to judicial preclearance, but it did not.

Accepting Texas's view would not only ignore this statutory distinction by turning silence into consent in the D.C. district court, but it would turn even rejection into consent by overriding the D.C. district court's finding that "Texas used an improper standard or methodology to determine" whether its plan has retrogressive effects. JA 550. Texas's mere application for preclearance would require deference,

even if denied. Unsurprisingly, this Court has never indicated that such an approach comports with Section 5; instead, the Court has repeatedly emphasized that "Congress required each jurisdiction subject to § 5, as a condition to implementation of a voting change subject to the Act, to identify, submit, *and receive approval* for all such changes." *Clark*, 500 U.S. at 658 (emphasis added).

Indeed, numerous decisions of this Court make clear that mere submission of a plan does not require a reviewing court to defer to it. For example, in *Warren County*, the County had submitted its proposals to the Attorney General before submitting them to the district court. 429 U.S. at 644. When the district court adopted one of the submitted but unprecleared plans after concluding that it violated no federal law, this Court unanimously reversed, holding: "No new voting practice or procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object to a proposal submitted to him." *Id.* at 645 (emphasis added). Similarly, in *Lopez* the State had filed a declaratory judgment action seeking preclearance of its election system in the D.C. district court but later voluntarily dismissed the action. 519 U.S. at 16. This Court nonetheless held that it was "error for the District Court to order elections under that system before it had been precleared by either the Attorney General or the United States District Court for the District of Columbia." *Id.* at 22 (emphasis added).

Moreover, Texas's proposed rule—that states receive an "A for effort" and automatic deference through mere submission of a plan—lacks any logical

basis and would create backwards incentives for states. It makes no sense for submission of a plan to trigger deference when the whole point of submission is to allow a decision on preclearance. This Court has been crystal clear that "[i]f a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change." *Id.* at 20. No decision of any court, and no principle of logic, suggests that this rule changes as soon as a jurisdiction submits a proposed change. Were that the rule, jurisdictions would have perverse incentives to drag their feet in obtaining preclearance; so long as a submission is merely pending, it deserves deference, but an actual preclearance decision might end that deference. In such circumstances, a jurisdiction would be better off constantly changing and resubmitting its voting rules than it would be actually trying to see any through to preclearance, but the whole purpose of Section 5 was to prevent such gamesmanship. *See, e.g.*, *McDaniel*, 452 U.S. at 151 (refusing to allow changes adopted by covered jurisdictions in response to court orders to take effect without preclearance because "if covered jurisdictions could avoid the normal preclearance procedure by awaiting litigation challenging a refusal to redistrict after a census is completed, the statute might have the unintended effect of actually encouraging delay").

#### 4. For Purposes of This Case, Section 5 Should Be Enforced as Written

Much of Texas's attack on the district court's ruling amounts to nothing more than an attack on the wisdom of Section 5 itself. For example, Texas repeatedly suggests that its failure to obtain

preclearance cannot alone justify refusal to implement its proposed redistricting plan. But this ignores Section 5. "If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes" without any further showing. *Clark*, 500 U.S. at 652-53 (citing *Allen*, 393 U.S. at 572). Indeed, "[f]ailure to obtain either judicial or administrative preclearance" not only prevents a change from taking effect, it "'renders the change unenforceable.'" *Id.* at 652 (quoting *Hathorn*, 457 U.S. at 269).

While Texas is free to cast aspersions on Section 5, its attacks on the wisdom of the statute are legally irrelevant here and should be ignored, for Texas has never challenged the constitutionality of Section 5 in this litigation and should not be heard to do so now. *See, e.g.*, *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) (confirming the general rule that this Court will not review "'questions not pressed or passed upon below'") (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)).

Whatever Texas may think of Section 5, it is the law and should be given the respect due to one of the landmark pieces of legislation of our time. "'The Congress is a coequal branch of government whose Members take the same oath [Justices] do to uphold the Constitution of the United States.'" *Nw. Austin*, 129 S. Ct. at 2513 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)). Moreover, "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." *Id.* "Congress amassed a sizable record in support of its decision to extend the

preclearance requirements," *id.*, and the adequacy of that record is neither argued nor necessary to a decision here.

Accordingly, this Court should evaluate the district court's decision based on Section 5's text and this Court's decisions interpreting it. Applying that standard, it is clear that the approach Texas urges would have required the district court to flatly ignore existing law. It is understandable for Texas to demand as much, for that is the only way it can achieve adoption of a discriminatory and unconstitutional map, but it is no basis for reversal.

### B. The District Court's Interim Map Is an Appropriate Response to an Enacted Map that Is Illegal and Not Precleared

There is no question—not even from Texas—that the three-judge panel had to adopt an interim map for the 2012 election. There was no alternative because the benchmark map violated the one-person, one-vote standard, the legislatively enacted map was subject to countless legal challenges and had yet to receive Section 5 approval, and important election deadlines were rapidly approaching. Texas argues, however, that the district court erred in adopting the map it did. The State's argument fails under existing precedent and even under its own proposed standard.

In the district court, the only "interim map" Texas proposed was the map the Legislature passed. *See* JA 291 (State urging that its unprecleared map is "appropriate for interim designation"). Texas did not seek deference, it sought complete acquiescence. But as explained above, adopting that map wholesale

was not an option. No part of the map had received Section 5 approval, the entire map was subject to numerous legal challenges, the district court lacked jurisdiction to consider the Section 5 challenges, and the district court was not allowed to consider other challenges under this Court's precedent.

Here, Texas seems to recognize that its position in the district court was untenable. Abandoning its trial court absolutism, Texas now argues that the district court should have fashioned a congressional map that "narrowly address[ed] likely legal errors while respecting the lines actually drawn by the legislature wherever possible." Emergency Appl. for Stay of Interlocutory Order Directing Implementation of Interim Texas Congressional Redistricting Plan Pending Appeal to the United States Supreme Court at 5, *Perry v. Perez*, No. 11A536 (Nov. 30, 2011) ("Congressional Stay Application"). That approach, however, also conflicts with this Court's precedent, and, ironically, the result would look no more like Texas's proposed map than does the interim map. Rather, the central difference between the district court's interim map and the court-enacted map Texas desires would be a profoundly disruptive delay.

### 1. The District Court Took the Proper Approach Under This Court's Precedent

Texas claims that the district court's approach to crafting the interim plan was "fundamentally unmoored" from "any properly constrained judicial inquiry" or "any discernible legal standard." Reply in Support of Emergency Application for Stay of

Interlocutory Order Directing Implementation of Interim Congressional Redistricting Plan at 6, *Perry v. Perez*, No. 11A536 (Dec. 5, 2011) ("Congressional Stay Reply"). Neither the court's process nor the map that resulted from that process bears any resemblance to this description.

As the district court explained, "[i]n drawing this Congressional map, all proposed maps, including the State's enacted map, were considered." JA 137. "The Court sought to create a plan that maintain[ed] the status quo pending resolution of the preclearance litigation to the extent possible, complie[d] with the United States Constitution and the Voting Rights Act, and embrace[d] neutral principles such as compactness, contiguity, respecting county and municipal boundaries, and preserving whole VTDs [(voting tabulation districts)]." JA 137-38. Throughout, the court "also sought to balance these considerations with the goals of state political policy," as reflected in the enacted plan, to the extent it could without risking a violation of federal law. JA at 138. Deviations from the State's proposed map were driven by two basic needs firmly rooted in precedent: (1) to adopt a map that did not itself violate federal law; and (2) to adopt a map that could be implemented quickly. JA 137-38.

This was precisely how the district court was supposed to proceed. The court could not adopt Texas's proposed plan or use it as the benchmark because it had not received Section 5 approval. *See, e.g.*, *Lopez*, 519 U.S. at 22 ("[W]here a court adopts a proposal 'reflecting the policy choices . . . of the people [in a covered jurisdiction] . . . the preclearance requirement of the Voting Rights Act is applicable.'")

(quoting *McDaniel*, 452 U.S. at 153) (alterations in original); *Abrams*, 521 U.S. at 96 (holding that a plan denied preclearance "could not operate as a benchmark"); *Clark*, 500 U.S. at 652 ("Failure to obtain either judicial or administrative preclearance 'renders the change unenforceable.'") (quoting *Hathorn*, 457 U.S. at 269). Instead, the district court started from the benchmark plan and began by making the changes necessary to comply with one-person, one-vote requirements. JA 139. In making these changes, the district court recognized that it could not itself violate Section 5 by causing "retrogression in [minority] voting strength," so it maintained districts in the benchmark plan that allowed minority voters to elect their candidates of choice. JA 138-39 (quoting *Abrams*, 521 U.S. at 96 ("[I]n fashioning the plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases.")). This effort, required by law, JA 139, explains much of the difference between the interim map and Texas's proposed map. *See, e.g.*, JA 140 (describing the "difference between the Court's plan and the enacted plan" as primarily "attributable to maintaining district 29 as in the benchmark to avoid retrogression and maintain the status quo").

In addition to complying with Section 5, the district court had to minimize split VTDs in the interim map to ensure that it could be "implemented under severe time constraints." JA 90. "After hearing evidence at trial and in the interim plan hearing, it became clear that cutting VTDs would create enormous administrative and financial difficulties for local governments preparing for an election at the eleventh hour." JA 102; *see also Vera v. Bush*, 933 F.

Supp. 1341, 1347 (S.D. Tex. 1996) (discussing the "troubling" hurdles imposed by split VTDs). Avoiding split VTDs led to many variations from Texas's proposed plan (which split over 400 VTDs), but it was "practical realities" inherent to the District Court's task—not some insidious motive, as Texas seems to imply, Congressional Stay Reply 6—that required the District Court to minimize split VTDs. JA 90.

Though the district court could not adopt Texas's proposed map for the reasons already stated, it "gave as much consideration to the State's enacted map as possible." JA 90. Indeed, "after maintaining current minority districts and adding in the new districts, [the district court] inserted a number of districts with minimal change from the enacted plan where possible." JA 147. As a result, in the interim plan:

> district 1 has a 97.2% population overlap with district 1 in the enacted plan. District 3 has a 97.8% population overlap with the enacted plan. District 4 has a 96.5% population overlap with the enacted plan. District 5 has a 94% population overlap with the enacted plan. District 8 has a 92.7% population overlap with the enacted plan. District 11 has a 96.7% population overlap with the enacted plan. District 13 has a 98.6% population overlap with the enacted plan. District 14 has a 97.2% overlap with the enacted plan. District 19 has a

> 99.2% population overlap with the enacted plan.

JA 147-48 n.30. These substantial areas of overlap refute Texas's repeated claims that the district court "disregard[ed]" the enacted map. *See, e.g.*, Congressional Stay Application 4, 12, 13, 19, 21, 23. On the contrary, the court "deferred" to Texas's map where it could without risking a violation of Section 5.

Under different circumstances, this Court's precedent may have required greater deference to Texas's map. For example, if the D.C. district court had found specific parts of the map compliant with Section 5, the Texas district court would have had to defer to those portions under *Upham*, unless it found some other legal violation. 456 U.S. at 38-40. *Upham* also suggests that even if the D.C. court had not approved parts of the plan, any portion of the plan to which no party objected in the Section 5 proceeding should also receive deference, unless it suffered from some other legal flaw. *Id.* at 40-41 ("[I]n the absence of any objection to the Dallas County districts by the Attorney General, and in the absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgments the plans reflect.").

Neither of these conditions was met as to Texas's congressional redistricting plan. The D.C. district court has not found any parts of the congressional redistricting plan compliant; indeed, its only finding to date is that "the State of Texas used an improper standard or methodology to determine" whether its plan has retrogressive effects.

JA 550. Moreover, contrary to Texas's suggestion, *see* Congressional Stay Application 3, 11, every part of Texas's congressional redistricting plan has been challenged in the Section 5 proceeding. *See, e.g.*, JA 94 (confirming that the Attorney General's challenges were not "limited to any particular district or districts" (internal quotation marks omitted)); *see also* JA 95 ("The intervenors also assert that while certain districts exhibit characteristics that are indicative of discriminatory purpose, they are challenging the plans in their entirety."). There was thus no basis for greater deference here.

Comparing the interim congressional map to the interim state Senate map confirms that the district court understood these distinctions. In the Section 5 proceedings as to Texas's state Senate redistricting plan, only one district was challenged as violating Section 5. JA 407. As to that map, the district court "maintain[ed] the status quo from the benchmark plan" with regard to the single challenged Senate district "but otherwise [used] the enacted map as much as possible." JA 408. The difference in the district court's approaches to the two plans illustrates the court's understanding of Section 5 and this Court's precedents and its efforts to defer to Texas's policy choices wherever these authorities allowed it to do so. It also confirms that in adopting an interim congressional map, the district court carefully complied with the law. It is Texas's proposed approach, not the district court's decision, that ignores precedent and the text of Section 5.

### 2. Even Under Texas's Proposed Standard, the District Court's Interim Map Is Proper

Texas broadly criticizes the district court's approach, claiming the court erred by making "no findings as to the likelihood of any constitutional or statutory violation." Congressional Stay Application 14. As noted above, however, controlling Supreme Court precedent *prevented* the court from making such findings in the absence of preclearance. This was not the only hurdle. As a practical matter, what Texas demands would have led to profoundly disruptive delay. JA 90, 99. With respect to the numerous Section 5 concerns that have prevented preclearance of the enacted map, the District Court, "has not heard evidence" on them. JA 91. With respect to the multitude of other statutory and constitutional challenges—both district-by-district and statewide—the District Court did all it could prior to preclearance, *see* JA 100 (describing weeks of trial and hearings), but requiring rulings as to the "close to fifty separate challenges to three different electoral maps" would necessarily have led to further delay, JA 100.

In any event, there is little reason to think that the analysis demanded by Texas would produce a map that looks anything more like the enacted map than does the interim map. Texas now argues that the district court's map should have "narrowly address[ed] likely legal errors while respecting the lines drawn by the legislature wherever possible." Congressional Stay Application 5. But the district court "inserted a number of districts with minimal change from the enacted plan where possible." JA

147. Many of the district court's other deviations from the enacted map were necessary to allow the interim plan to be implemented quickly, and would have been required even if the court had otherwise adopted Texas's proposed map. JA 103 ("[E]ven if the Court was required to give *Upham* deference to the interim maps, the Court would still have needed to make the changes to the uncontested districts to correct cuts in the VTDs that would have impeded implementation of the plan under intense time constraints."); *see also* JA 90 ("[T]he Court's obligation to ensure that the interim map . . . is capable of being implemented under severe time constraints . . . prevents the Court from adopting even the unchallenged districts from the enacted plan wholesale.").

More importantly, reviewing Texas's district-by-district challenges to the interim map demonstrates that the vast majority of the interim plan's deviations from the enacted plan would have been required if the district court had analyzed the "likely legal errors" in Texas's proposed map. Congressional Stay Application 5.

One of Texas's most prominent challenges concerns District 23, a Hispanic opportunity district that required this Court's protection in *LULAC*, 548 U.S. 399. Congressional Stay Application 21-22. Despite this history and Texas's continued legal violations as to District 23, Texas is now adamant that the district court should have adopted wholesale the District 23 contained in the enacted map. Yet Texas's failures with respect to this district—prominent among them, its failure to meet its Section 5 burden—were glaring; even the State's own

expert conceded during the Texas trial that, despite the State's assertions to the contrary, the Legislature had failed to draw District 23 as a minority opportunity district. JA 678. Unsurprisingly, District 23 was the subject of multiple challenges before the D.C. district court, both with respect to its retrogressive effect and its discriminatory purpose. *See, e.g.*, JA 577, 582-85, 588-90; *see also* JA 603 ("This stark resemblance of the State's action concerning the proposed Congressional plan to that action found by the Court in *LULAC* as evidencing intentional discrimination during the previous redistricting cycle, suggests strongly that such action 'bears the mark' of intentional discrimination."). District 23 likewise was the subject of numerous statutory and constitutional challenges in the two-week trial in Texas. *See, e.g.*, Post-Trial Br. of Pls. Tex. Latino Redistricting Task Force et al. ("TLRTF Post-Trial Br.") at 5, 35-43, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Oct. 8, 2011), Dkt. No. 416; Post-Trial Br. (Corrected) of Rodriguez Pls. ("Rodriguez Post-Trial Br.") at 3, 26, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Oct. 11, 2011), Dkt. No. 424. Given these myriad challenges and the clear illegality of the district, it would have been clear error—even under Texas's proposed standard—for the district court to use the challenged, unprecleared, discriminatory, and otherwise illegal District 23 advanced by Texas.

A similar analysis governs District 27, a second target of Texas's attack. Congressional Stay Application 22-23. District 27 was a minority opportunity district in the benchmark plan. The enacted plan tore it apart, moving several hundred thousand Hispanics into an Anglo-majority district

and eliminating the district as a minority opportunity district. Not surprisingly, this transparent act of retrogression features prominently in the United States' legal challenge to the State's enacted plan. *See, e.g.*, JA 578. Texas's destruction of District 27 plays a similarly central role in the Section 2 and constitutional challenges before the district court. *See, e.g.*, TLRTF Post-Trial Br. at 5, 42-43; Rodriguez Post-Trial Br. at 3-4. As was the case with District 23, even under Texas's proposed standard it would have been clear error for the district court to adopt the version of District 27 advanced by Texas.

District 33 is a third prominent target of Texas's attack, enjoying an entire section in Texas's brief, which refers to the district derisively as a "'coalition district' in North Texas that joins African-American, Latino, and Asian populations in an effort to form a multi-ethnic minority-controlled district." Congressional Stay Application 17. Texas insists that the District Court should have adopted the legislatively enacted District 33, but under Texas's proposed standard the district court could not possibly have adopted that district because, as alleged by both the Attorney General and intervenors and as confirmed by the record before both the Texas and the D.C. courts, the enacted plan's District 33 reflected the State's failure to draw majority-minority districts required by Section 2, was the product of intentional discrimination, and contributed to the enacted map's statewide retrogressive effect. *See, e.g.*, JA 598 ("Proposed districts in the Dallas-Fort Worth area were purposely manipulated to decrease current and future minority voting strength."); *see also* Plan

C166 Report, District 35; Plan C202 Report, Districts 34 & 35, *available at* http://gis1.tlc.state.tx.us/ (Plaintiffs proposing multiple majority-minority districts in the Dallas-Fort Worth area based on minority population growth). Texas's current allegation—that the district court, in creating interim District 33, somehow was motivated by illegal race-based considerations—is particularly ironic in light of this background. Congressional Stay Application 18-19. The allegation is also untrue. There is a simple, straightforward, and expressly articulated reason why interim District 33 includes such a high percentage of minorities: the population growth in that area was overwhelmingly comprised of minorities. JA 146-47. Indeed, Texas's protracted and convoluted efforts to avoid drawing District 33 as a minority opportunity district, reflected in its decision instead to fracture minority populations among Anglo-dominated districts, illustrate the discriminatory purpose motivating the enacted plan. *See, e.g.*, JA 600-01 ("[I]n the Dallas-Fort Worth area, the State has pulled strangely-shaped minority population areas out of certain districts in order to submerge them in larger Anglo populations and to reduce minority voting strength . . . . The data utilized in making some of these changes were race-based, as opposed to partisan."). In short, the district court could not have adopted the enacted District 33 even under Texas's proposed approach. Instead, it would have been required to do precisely what it did here: in the absence of a benchmark district, to draw its own based on neutral redistricting principles.

Yet another target of Texas's attack is District 25. As with enacted District 33, the District 25 drawn by the Legislature is both a product of

intentional discrimination and a contributor to the enacted map's statewide retrogressive effect. Rodriguez Post-Trial Br. at 16-25; Rodriguez Pls.' Post-Trial Resp. Br. at 8-11, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Oct. 21, 2011), Dkt. No. 458; Gonzales Intervenors' Statement of Material Facts in Opp'n to Pl.'s Mot. for Summ. J. at 3-5, No. 1:11-cv-01303-RMC-TBH-BAH (D.D.C. Oct. 25, 2011), Dkt. No. 77. That District 25 in the benchmark plan is a "crossover" district does not, as Texas suggests, render it utterly defenseless against race-based tampering. On the contrary, this Court recently recognized that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Bartlett*, 129 S. Ct. at 1249. That is exactly what Texas did as to District 25, a district the State concedes was previously a crossover district in which minority voters were able to elect their candidate of choice. Defs.' Post-Trial Resp. Br. 18 & n.9. Thus, yet again, had the district court followed Texas's proposed approach, deferring to Texas's proposed District 25 would not have been an option.

Texas lodged its final attack against District 35. Congressional Stay Application 23. On one level, the attack is somewhat surprising, insofar as interim District 35 was drawn "consistent with the Legislature's choice to create a new Latino opportunity district and with its general choice of location in the enacted plan." JA 142. To that end, the court drew District 35 as a new minority opportunity district anchored in Bexar County and extending northeast along the I-35 corridor and

reflecting the massive population growth in the area. JA 142–43. To the extent that interim District 35 differs from the enacted District 35, the differences largely can be explained by the court's treatment of District 25. The drawing of this adjacent district required corresponding adjustments to District 35, and the District Court made these adjustments pursuant to neutral redistricting principles, including incorporating state political policy as reflected in the enacted map to the extent it could. *See* JA 141-43.

In short, the District Court made decisions "consistent with the Legislature's choice" and "gave as much consideration to the State's enacted map as possible." JA 90, 142. It refrained only from "rubberstamping" challenged districts, JA 90, districts that would have been rejected even under Texas's proposed approach. The result is a map that looks as much like the enacted map as any map adopted under Texas's proposed standard could have.

### 3. Texas's Description of the Record is Misguided at Best

In an effort to bolster its case—or perhaps as an explanation for how it reached its problematic conclusions—Texas has described the lower court proceedings in a manner that is, at best, misguided, and in all events inconsistent with the actual record. Three errors warrant particular mention.

First, it is simply incorrect to suggest that the Attorney General—much less the other litigants in the preclearance proceedings—challenged only two of the 36 districts contained in the enacted plan. *See*

Congressional Stay Application at 3, 11. Both the Attorney General and the other litigants challenged the map statewide. As the District Court explained:

> The United States has stated that the evidentiary basis for its claim of discriminatory intent "is not limited to any particular district or districts but rather extends to the kinds of direct and circumstantial evidence that the Supreme Court identified as probative of discriminatory purpose in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).". . . The intervenors also assert that while certain districts exhibit characteristics that are indicative of discriminatory purpose, they are challenging the plans in their entirety.

JA 94-95 (citation omitted). Properly characterized, the nature of these challenges makes even clearer the flaws in Texas's arguments, particularly its claim that the District Court's decision is somehow in tension with the partially precleared plan in *Upham*.

Texas similarly mischaracterizes the proceedings in this case when it claims that the "one lodestar" guiding the district court "was a belief, based on a misreading of this Court's precedents that it could not give any weight to the duly enacted legislative map, lest it give effect to an unprecleared legislative map." *See* Congressional Stay Application 2. As even a cursory review of the court's interim

map and Congressional Order confirms, this characterization of the district court opinion is not only wrong with respect to "this Court's precedents," it is also wrong with respect to its characterization of the record. Contrary to Texas's suggestion, the court most certainly *did* take into account "state political policy," as reflected in the enacted map, to the extent it could. It is similarly misguided to suggest that no other "lodestar" guided the court's decisions; the court's careful and thorough description of its process is utterly irreconcilable with such a contention. The concession of the dissenting judge, whom Texas quotes throughout its briefing, is telling: even he agreed that the interim congressional plan was "an honest and diligent effort to achieve what an interim plan should do," JA 151. Indeed, he had joined with the majority in proposing the very same plan before abruptly changing his mind. JA 161.

Finally, Texas accuses the court of "believ[ing] itself free (indeed, compelled) to chart its own course and redraw the entire map based on its own assessment of 'state political policy.'" Congressional Stay Application 7 (quoting JA 138). But this reference to "state political policy" merely signifies the district court's efforts to incorporate the enacted map where legally permissible. It was through this approach that the district court was able to strike the difficult and proper balance between the competing mandates before it.

In sum, the District Court approached its redistricting task in a systematic, principled, and legally sound manner. It began with the benchmark map, as was required by this Court's precedent and Section 5; it made required adjustments in a narrow

and appropriate manner; and it incorporated "state political policy," as reflected in the enacted map, to the extent it could without violating federal law. Although Texas is now demanding a novel standard—that the court fashion a congressional map that "narrowly address[es] likely legal errors while respecting the lines actually drawn by the legislature wherever possible," Congressional Stay App 5—that approach is not legally permissible. Moreover, even if it were, it would not produce a map that looks anything more like the enacted map than does the interim map. Its primary effect instead would be a profoundly disruptive delay.

## IV. CONCLUSION

Race was a central consideration in Texas's 2011 congressional redistricting process, as legislators strategically shuffled minority voters and flouted minority voting rights. This focus on race was the only way that Anglo elected officials currently in power could ensure that, despite massive minority population growth, minority voters gained no political power. The Legislature's approach was also a reminder that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett*, 129 S. Ct. at 1249 (plurality op.).

It is now up to this Court to determine whether, in Texas, "citizens of all races [will] have equal opportunity to share and participate in our democratic processes." *Id.* In the name of state sovereignty, Texas asks this Court to order adoption of a racially discriminatory map that lacks

preclearance under Section 5 and violates Section 2, Section 5, and the Constitution. This approach not only ignores decades of this Court's precedent, it also forgets that the Civil War Amendments mean that state sovereignty no longer includes the power to trample on minority voting rights.

Applying this Court's precedent, the district court here did precisely what it was supposed to do. All agree that the court had no choice but to adopt an interim plan. In doing so, the district court hewed as closely as it could to the benchmark plan, which had obtained preclearance, and it respected the Legislature's enacted but unprecleared plan to the extent it could without risking a violation of federal law.

Even if the district court had ignored precedent and used Texas's proposed approach—adopting a congressional map that "narrowly address[es] likely legal errors while respecting the lines actually drawn by the legislature wherever possible," Congressional Stay App 5—the result would have been no closer to Texas's proposed plan than is the plan the district court already adopted. The reason is that Texas's enacted plan is so shot through with "likely legal errors" that little of it could be adopted.

In short, neither existing precedent nor Texas's proposed deviation from it can justify the result Texas seeks. Texas nonetheless demands that this Court place its imprimatur on the State's 2011 congressional reapportionment plan, a plan that continued Texas's "long, well-documented history of discrimination." *LULAC*, 548 U.S. at 439. The Court should decline.

Respectfully submitted,

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# SUPPLEMENTAL APPENDIX

## REPORT ON MINORITY AND WHITE REPRESENTATION UNDER THE TEXAS CONGRESSIONAL DISTRICT PLANS C185 AND C100

Stephen Ansolabehere, Professor of Government, Department of Government, Harvard University, Cambridge, Massachusetts, October 21, 2011

### I. Statement of Inquiry

I have been asked to examine representation of Whites, Hispanics, and Blacks in the Congressional District plans adopted and considered by the Texas State Legislature following the 2010 Census and 2011 apportionment. I have also been asked to examine demographics, voting patterns, and district boundaries in specific counties and their surrounding areas, especially Bexar County, Dallas County, Harris County, Nueces County, Tarrant County, Travis County, and the area encompassed in South and Southwest Texas.

The primary purpose of this analysis is to assess whether the Congressional District map adopted by the Texas State Legislature reduced the opportunities of minority voters to elect their candidates of choice. I am asked to compare specific districts within Plan C100 and Plan C185 to determine if any districts that were minority opportunity districts under Plan C100 are no longer so under Plan C185, and I have been asked to

determine whether Hispanics and Blacks have on net lost representation in the state. Finally, I have been asked to determine whether Plan C185 provides minority voters reasonable opportunities to elect candidates of their choice to the U. S. House of Representatives and whether Plan C185 is in line with general principles of democratic representation, such as majority rule.

## II. Background and Qualifications

I am a professor of Government in the Department of Government at Harvard University in Cambridge, MA. Formerly, I was an Assistant Professor at the University of California, Los Angeles, and I was Professor of Political Science at the Massachusetts Institute of Technology, where I held the Elting R. Morison Chair and served as Associate Head of the Department of Political Science. At UCLA and MIT, I taught PhD level courses on applied Statistics in the Social Sciences. I directed the Caltech/MIT Voting Technology Project from its inception in 2000 through 2004, am the Principal Investigator of the Cooperative Congressional Election Study, a survey research consortium of over 250 faculty and student researchers at more than 50 universities, and serve on the Board of Overseers of the American National Election Study. I am a consultant to CBS News' Election Night Decision Desk. I am a member of the American Academy of Arts and Sciences (inducted in 2007).

My areas of expertise include American electoral politics and public opinion, as well as statistical methods in social sciences. I am author of

numerous scholarly works on voting behavior and elections, with particular focus on the application of statistical methods. This scholarship includes articles in such academic journals as the Journal of the Royal Statistical Society, the American Political Science Review, the American Economic Review, the American Journal of Political Science, Legislative Studies Quarterly, the Quarterly Journal of Political Science, Electoral Studies, and Political Analysis. I have published articles on issues of election law in the Harvard Law Review, Texas Law Review, Columbia Law Review, New York University Annual Survey of Law, and the Election Law Journal, for which I am a member of the editorial board. I have coauthored three scholarly books on electoral politics in the United States, The End of Inequality: Baker v. Carr and the Transformation of American Politics, Going Negative: How Political Advertising Shrinks and Polarizes the Electorate, and The Media Game: American Politics in the Media Age. I am coauthor with Ted Lowi, Ben Ginsberg, and Ken Shepsle of American Government: Power and Purpose, a college textbook on American government. My curriculum vita with publications list is attached to this report.

I have worked as a consultant to the Brennan Center in the case *McConnell v. FEC*, 540 US 93 (2003). I have testified before the U. S. Senate Committee on Rules, the U. S. Senate Committee on Commerce, the U. S. House Committee on Science, Space, and Technology, the U. S. House Committee on House Administration, and the Congressional Black Caucus. I filed an amicus brief with Professors Nathaniel Persily and Charles Stewart on behalf of neither party to the U. S. Supreme Court in the case of *Northwest Austin Municipal Utility District*

*Number One v. Holder*, 557 US (2009). I am consultant for the Rodriguez plaintiffs in *Perez v. Perry*, currently before the District Court in San Antonio, Texas, and I am consultant for the Guy plaintiffs in *Guy v. Miller* in Nevada state court. I am compensated at the rate of $400 per hour.

III. Sources of Information

All of the data and information used in this report come from the U. S. Census Bureau and the Texas Legislative Council. The Texas Legislative Council provides geographic information, demographic information, and election results at the level of the Voting Tabulation District (VTD), and it produces reports that aggregate that information to the level of the Congressional District for each plan. The information available that was used in this report includes maps, reports, and spreadsheets. We obtained data from their main website http://www.tlc.state.tx.us/redist/ redist.html and ftp site ftp://ftpgis1.tlc.state.tx.us/DistrictViewer/ congress/. The Texas Legislative Council is the primary source of the information used in this report.

The Texas Legislative Council produced an analysis of Citizens of Voting Age Population in each district in Plan C185 on June 15, 2011 and for Plan C100 on August 2, 2011. In addition, I contacted the American Community Survey from the U. S. Bureau of the Census and obtained information provided on the website of the U. S. Bureau of the Census (www.census.gov). The data consist of the 2010 Census enumeration for Texas and the average of the American Community Survey for the years 2005-2009.

The Texas Legislative Council also provides information on Spanish Surname Voter Registration (SSVR). I do not use these data in my assessment, as I am unsure of their quality. We can measure potential errors in SSVR using VTDs where the Census 2010 Enumeration indicates No Hispanics of Voting Age and where Census 2010 indicates that all people are Hispanics of Voting Age. There are 74 Precincts in which Census 2010 counted no Hispanic persons of Voting Age. Three percent of all registered people in these areas are identified as having Spanish Surnames. These must be False Positives - people identified as Hispanics who clearly cannot be according to Census 2010. There are six precincts where the only persons who could be registered are Hispanics. Forty-four (44) percent of all registered persons in these precincts have Spanish Surnames, but according to Census all must be Hispanic. These are False Negatives, and in these all-Hispanic precincts the errors occur at a very high rate. Consequently, I only use the Census data in measuring racial composition of the electorate.

## IV. Analysis

The State of Texas experienced profound demographic changes between the 2000 and 2010 Census. The State added 4.3 million people from 2000 to 2010; two thirds of them were Hispanics. Only about 10 percent of the additional persons in the state were White, and roughly 10 percent were Black. In 2000, the State was majority White; it is now plurality White. And Hispanics are the plurality and Whites the minority in the five most populous counties, which contain half of the population of the State of Texas.

The State's new Congressional District map does not reflect those changes. In fact, Hispanics are worse off than under the prior plan (C100). That conclusion is borne out in the following factual findings.

First, compared with the existing Congressional District plan (C100), the new district plan (C185) reduces the number of seats in which Hispanics have an opportunity to elect their candidates of choice. Under Plan C100, eleven (11) Congressional Districts are configured in such a way that Hispanics and Blacks have an opportunity to elect their candidates of choice. These were CDs 9, 15, 16, 18, 20, 23, 25, 27, 28, 29, and 30. Under Plan C185, ten (10) Congressional Districts are configured in such a way that Hispanics and Blacks have an opportunity to elect their candidates of choice. These are CDs 9, 15, 16, 18, 20, 28, 29, 30, 34 and 35. See Section C.1, pages 30-34.

Second, Plan C185 sufficiently altered three existing Hispanic opportunity districts so that minorities can no longer elect their preferred candidates in those districts. Districts 23 and 27 were majority Hispanic and Hispanic performing districts under C100. District 27 was transformed into a majority White district. District 23 was reconfigured so that it is no longer an effective district of Hispanic preferred candidates. District 25 was a cross-over district in which Whites split their votes evenly, and Hispanics and Blacks were pivotal in choosing the winner. It was dismantled entirely to construct a new Hispanic majority district (CD 35). The net effect of these changes was a loss of 1 Hispanic opportunity district statewide. See sections C.3 and C.4, pages 34-43.

Third, the dramatic changes in Whites' and Hispanics' shares of the population are not reflected in the composition of districts. Even though Whites' share of the population declined from 52 percent to 45 percent, they remain the majority in 70 percent of Congressional Districts in the State. Even though Hispanics' share of the population grew from 32 to 38 percent, they remain the majority in just 22 percent of Congressional Districts in Texas. See B.1.

Fourth, Hispanics account for most of the growth in the Citizen Voting Age Population in the state, the eligible electorate. From 2000 to 2010, the number of Hispanic citizens of voting age increased by 1.1 million persons. The number of White citizens of voting age increased by only 470,000. But, the new district Plan created a net of three additional districts in which Whites are a majority of the eligible electorate and only one additional district in which Hispanics are a majority of the eligible electorate. See B.1 and B.2, pages 19-24.

Fifth, Plan C185 creates minority rule in the five most populous counties in the state. The five most populous counties in the state (Harris, Dallas, Tarrant, Bexar, and Travis) contain over 11 million people, almost half the state. In 2000, whites were the plurality of the people in these five counties combined. Today, Hispanics are the plurality, and Whites are the minority. Plan C185 configures the districts in these counties in such a way that Whites increase the number of districts in these areas in which they are a majority. In the 19 districts that have a plurality or majority of persons in one of these counties, 12 are majority White districts. In Dallas and Harris Counties, Hispanics are the plurality of the population but a majority in only 1 of 12 districts.

Whites retain their majorities in these districts even though they became a minority of the population between 2000 and 2010. Plan C185 violates the most basic notion of majority rule. See Sections B.2 and B.3.2, esp. pages 24-33.

Sixth, the effect of these lines is to treat White and Minority voters differently. Eighty-eight percent of Whites end up in majority White districts. Only 40 percent of Hispanics and Blacks end up in Hispanic Majority or Black Plurality districts, respectively. This is not a natural consequence of plurality rule. Even in the Harris and Dallas counties, where Whites are the minority of the population, 90 percent of Whites end up in majority White districts. In Dallas, there are no Hispanic districts, so the plurality Hispanic population effectively has no opportunity to elect their candidates of choice, and the plurality group is completely diluted electorally. See section B.3, pages 24-29.

## A. Population Size, Trends, and Characteristics

### A.1. Statewide Total Population Trends

Today, no single racial or ethnic group is a majority in Texas. According to figures from the U. S. Census Bureau, 45 percent of persons in the state identify as White Non-Hispanics, 38 percent identify as Hispanics, and 12 percent identify as Black. [2]

[2]Black may be either Hispanic or Non-Hispanic. Approximately 2 percent of Black persons in Texas (approximately 60,000 persons) identify as Hispanic and Black. This is a very small amount of overlap between the groups, so we use just the figure for Black overall. Source:

That is a marked change from 2000, when whites comprised 52 percent of the state's population, Hispanics were 32 percent, and Blacks 11 percent. The Census' counts of population overall and for each racial or ethnic group in the State are shown in Table A.1.

Prior to the drawing of new district plans, one might have expected increases in the number and share of Texas' Congressional districts that contain majorities or pluralities of Hispanics, and declines in the share of districts that have majorities or pluralities of Whites. The total population of the State of Texas increased by 4.3 million people from 2000 to 2010. White non-Hispanics, the largest racial or ethnic group, grew by only 457,000 people from 2000 to 2010. This is the smallest growth of all three major groups and it is far less than the 698,488 persons required for an additional district. The number of Blacks, the smallest of the three major racial or ethnic groups, increased 526,000, a 23 percent rate of growth since 2000. The number of Hispanics in the state grew from 6.7 million people to 9.5 million people, a 42 percent increase in this group's population and an increase that accounts for the large majority of the state's growth. Indeed, if Hispanics had grown at the same rate as White Non-Hispanics (4.1 percent growth over the entire decade) the state would have lost seats in the Congress, rather than gained them, because the nation's population grew by 9.7 percent over the decade.

## A.2. Citizenship and the Eligible Electorate

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U. S. Bureau of the Census, http://quickfacts.census.gov/qfd/states/48000. html.

These population figures are tempered somewhat by the lower citizenship rates of Hispanics compared with Whites. It is sometimes argued that the Hispanic share of the eligible electorate is sufficiently low that it is impossible to increase the number of districts where minorities have a reasonable opportunity to elect their candidates of choice. But even by that metric, Hispanics' presence in the electorate grew substantially more than Whites. Hispanic citizens of voting age, the best gauge of the eligible electorate, increased by 1.1 million persons from 2000 to 2010. This increase represents approximately half of the total increase in eligible voters in the state. White citizens of voting age, on the other hand, increased only 470,000 persons over the same time span, and Black citizens of voting age increased by nearly as much. The additional White citizens of voting age are less than one-fifth of the total increase in the eligible electorate statewide from 2000 to 2010. Hispanics increased their share of the Citizen Voting Age Population, and Whites' share of the eligible electorate shrank between 2000 and 2010. The problem is that Whites gain three additional seats, Blacks none, and Hispanics only one.

### A.2.1 Measurement of CVAP

Before assessing the Hispanic, Black, and White shares of the eligible electorate, an aside about measurement is in order. Prior Court decisions use the Citizen Voting Age Population (CVAP) to gauge the number of eligible voters overall and in each group. The Census Bureau measures Citizen Voting Age Population using a separate survey from the Census Enumeration of total persons and voting age

persons. Between 2000 and 2010 the Census Bureau changed its methodology for conducting this survey. In 2000 and early redistricting cycles, the Bureau conducted a large survey, called the Long Form, at the same time as the decennial enumeration to measure citizenship, education, income, and other population characteristics. In 2005, the Bureau switched to a smaller annual survey of 3 million persons, called the American Community Survey (or ACS). The annual ACS does not have sufficient precision to measure population characteristics at the level of Census Blocks, which are the building blocks for Congressional and legislative districts. To gain sufficient precision, the Bureau constructs and releases a 5-year average of the annual ACS, and the most recent such data available are the 2005-2009 ACS average.

There is a problem using the 2005-2009 ACS. The population estimates generated by that study systematically fall short of the population counts from the Census Enumeration. The 2010 Census Enumeration count of the population of the State of Texas is 25.1 million persons. The 2005-2009 ACS estimate of the population of the State of Texas is 23.8 million persons, 1.3 million persons too few. The ACS understates the Voting Age Population by 1.1 million persons. And most alarmingly, the discrepancy between the ACS population estimates and the Census Enumeration counts varies by population groups. Nearly all of the error in the population and voting age population is in the Hispanic population figures.

A.2.2 Projected 2010 CVAP

The Appendix to this report discusses in greater length the reasons why the 2005-2009 ACS average under estimates the 2010 population, and how to correct the problem. Simply put, the time frames of the studies differ. The mid-point of the 2005-2009 ACS is 2007, and the degree of understatement is exactly what one would expect from a simply linear trend in the population from 2000 to 2010. The 5-year ACS average looks like the population circa 2007, not 2010. There is a simple correction for this problem, discussed in the Appendix. The simple idea is to estimate the percent of each population group (White, Hispanic, Black) that are Citizens of Voting Age using the ACS, and then multiply that times the number of persons in each group according to the Census Enumeration. That adjustment predicts accurately the voting age populations for each group for 2010. Here I apply that correction to the CVAP to make the best projection of the CVAP in 2010. Without doing that the CVAP data are not consistent with the Enumeration of total persons.

One may then calculate the population for each group's CVAP as their total population in the enumeration times the appropriate percentage of a group that are citizens of voting age. According to the ACS figures, 77.0 percent of Whites are citizens of voting age, 68.9 percent of Blacks are citizens of voting age, and 42.9 percent of Hispanics are citizens of voting age. Those percentages appear constant from 2005 to 2009. That calculation implies a total CVAP for the state of 15,725,999, which is 829,604 more persons that the 2005-2009 ACS reports. See Table A.2.

The calculations reveal that the 2005-2009 ACS slightly over estimates the White 2010 (projected) CVAP, and substantially underestimates the Black and Hispanic CVAP. Rescaling the 2005-2009 ACS to be in line with the population counts from the Enumeration implies that there are 8,774,942 White citizens of voting age; 1,997,202 Black citizens of voting age; and 4,063,891 Hispanic citizens of voting age. The figure for whites is almost 18,000 persons less than the ACS estimate of 8,793,200. The figure for Blacks is 132,000 (or about 8%) above the ACS estimate of 1,864,530. And, the figure for Hispanics is 390,000 (10%) above the ACS estimate of 3,674,800.

The American Community Survey estimates matter to the assessment of the racial composition of districts and the electoral performance of districts because Citizen Voting Age Population is a critical component in such analyses. It is also essential to understand that the Hispanic population was the fastest growing segment not only of all persons in the state but of the eligible electorate over the past decade.

## A.3. Hispanic Growth

The Census Enumeration and the ACS show the growing importance of Hispanics in the total population and the eligible electorate in Texas. The number of Hispanic adult citizens—those eligible to vote—increased by 1.1 million persons over the past decade. In the 2000 Census, there were 2,973,000 Hispanic adult citizens in the State; by 2010, I project, there were 4,063,000. By comparison, the

number of White Non-Hispanic adult citizens increased by just 470,000. In other words, from 2000 to 2010, the number of additional Hispanics who are eligible to vote is the equivalent of over one and a half Congressional districts, while the number of additional Whites who are eligible to vote equaled slightly over one half of one Congressional District. These figures are shown in Table A.2.

Hispanics' share of the eligible electorate rose, while White Non-Hispanics' share decreased substantially. White Non-Hispanics declined from 62.5 percent in 2000 to 55.8 percent in 2010. Hispanics, on the other hand, rose from 22.3 percent of the Citizen Voting Age Population in 2000 to 25.8 percent of the Citizen Voting Age Population in 2010. That trend will continue.

The Citizen Voting Age Population is driven by citizenship rates and by age distributions. There is a significant discrepancy between Whites and Hispanics in the percent of those populations who are Citizens of Voting Age: 77 percent of Whites in Texas are adult citizens; 43 percent of Hispanics are. Half of that discrepancy arises from the very large fraction of Texas' Hispanic citizens who are not yet of age to vote. Seventy-eight percent of White Citizens are of Voting Age in Texas. Only 57 percent of Hispanic Citizens are adults. In other words, there are 2.8 million Hispanic citizens under 18 years of age in Texas, and over the coming decade half of those people will become adults. That fact alone will increase the share of the eligible electorate who are Hispanic in the State of Texas over the course of the coming decade. The districts proposed in Plan C185 will be in place from 2012 to 2020, and they will dramatically affect the ability of the rising Hispanic

voters to elect their candidates of choice.

## B. Representation of Racial Groups Under Plans C100 and C185

Multiple metrics and criteria are used to determine whether there has been retrogression. The two metrics examined here are (1) the racial composition of districts and (2) the electoral performance of districts. Statistics on racial composition of districts are used to ascertain the number of districts in which minorities comprise a majority of the population or of the eligible electorate. This may be interesting in its own right, but it is usually introduced as evidence of the latter metric. Electoral performance statistics, including past vote, turnout, and racial composition of eligible voters, are used to assess whether and where Hispanics and Blacks have opportunities to elect their candidates of choice. I examine racial composition of districts here, and turn to electoral performance in the next section.

I reach three overarching conclusions about the racial composition of districts.

First, all of the White majority districts under Plan C100 remain White majority districts under Plan C185, but Plan C185 dismantles one of the existing eight Hispanic districts, Congressional District 27. Plan C185 moves almost 300,000 Hispanics in Nueces and San Patricio Counties from old CD 27, which was majority Hispanic, into new CD 27, which is majority White. This sizable Hispanic population no longer has a meaningful opportunity to elect their candidates of choice. As discussed in Section D, this change has far reaching

effects on districts from El Paso to Houston.

Second, the substantial gains in population by Hispanics and Blacks have not translated into increases in the share of seats in which minorities are a majority or plurality. The number of Hispanics increased by 2.8 million persons from 2000 to 2010 - the equivalent to four entire Congressional Districts. The number of Blacks increased by approximately 500,000 persons. The number of White Non-Hispanics increased by about 500,000 persons, slightly more than one half of one Congressional District. Plan C185 creates a net of one additional majority Hispanic district; it creates no additional Black majority or plurality districts; it creates three additional majority White districts.

Third, in the largest urban areas in the State of Texas, district lines are drawn so that the White minority dominates the majority of districts. In the most populous counties, Whites were the plurality of the population in 2000. Today, Whites are the minority and Hispanics are the plurality. Despite this shift, the minority White population retains its status as the majority of most of the districts; indeed, two additional White majority districts are created in these areas. Hispanics and Blacks, however, gain no seats in the most populous counties even though they account for nearly all of the population growth. In Dallas and Harris, the problem is particularly acute. There Whites declined in absolute numbers, but gained seats. Hispanics are the pluralities in these counties, but Hispanics are majorities in no Dallas districts and just one Harris district, while the minority White population has the majority in 8 of the 12 Dallas and Harris Districts.

B.1. Classification of Majority Minority and White Districts in Plans C100 and C185

The Texas Legislative Council provides Census data that can be mapped into each plan and used to calculate the racial and ethnic group composition of the districts. For each district in Plans C100 and C185, 1 determined which racial or ethnic group had a majority and a plurality of the Total Population or of the Voting Age Population. A plurality means that the group has the largest share of the relevant population of all racial or ethnic groups.

Table B.1 presents counts of the number of districts under the existing plan (C100) and the new plan (C185) that are Majority or Plurality White Non-Hispanic, Hispanic, or Black. The Census enumeration offers two ways to count population of districts, total number of persons and voting age persons. Total population is relevant because districts represent persons, and the Voting Age Population provides the best available gauge of the eligible electorate using the Enumeration. Additionally, the table presents the classification of districts based on the Citizen Voting Age Population using the 2005-2009 ACS average.[3]

It is also possible to classify districts based on registration and turnout. The redistricting process itself can affect turnout and registration, as recent research on the mobilizing effect of Majority-Minority districts suggests.[4] As discussed in the section on

[3] Using the projection of the 2005-2009 ACS to 2010 does not change the classification of any of the districts as majority White, Hispanic or Black CVAP or plurality Black CVAP.

[4] M. Barretto, Gary Segura, and N. Woods, "The Mobilizing Effect of Majority Minority Districts on Latino

Sources of Information in this report, I have concerns about data quality in the SSVR reports. Hence, I focus on the classification of districts according to Census figures on racial composition of total, voting age, and citizen voting age populations.

B.2. Number of Majority Minority and Majority White Districts

Plan C185 creates disproportionate numbers of districts in which Whites comprise the majority. White Non-Hispanics are a plurality of the population (45.3 percent), and Hispanics and Blacks combined account for almost half of the state's population (49.4 percent). Yet, White Non-Hispanics are an outright majority of the population of 20 of Texas' 36 Congressional Districts under Plan C185, and a plurality of all persons in three more. Hispanics are a majority of total population in 8 districts and a plurality in three others, while Blacks are a plurality of all persons in 2 districts. In other words, although Hispanics and Blacks combined out number Whites, Whites are the majority or plurality of the total population in 64 percent of Texas' Congressional Districts.

The opportunity for whites to elect a majority of the Congressional delegation is magnified further upon considering the voting age population. White Non-Hispanics comprise 49.6 percent of persons over 18 years old in the State of Texas, and they are a majority or plurality of the VAP in 69.4 percent of U.

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Turnout," American Political Science Review 98 (2004) 65-75.

S. House seats under Plan C185. By comparison, Hispanics are 33.6 percent of the voting age population, but they are a majority of the VAP in only 22.2 percent of seats. Blacks comprise 12.0 percent of the voting age population. They have majorities of the VAP in no seats and are pluralities of the voting age population in 8.3 percent of seats. Blacks and Hispanics, then, are 45.8 percent of the Voting Age Population, but majorities or pluralities in just 30.5 percent of the seats.

Using the eligible electorate as the standard changes the classification of several districts. Three Congressional Districts in which Whites are a plurality of the population are, in fact, districts where they are the majority of the eligible electorate. Three districts also appear to be Hispanic districts using total population, but they are not majority Hispanic in terms of VAP or CVAP. Two are in fact White majority districts (6 and 27) and one is Black Plurality (9).

Plan C185 also does not reflect the growing presence of Hispanics in the eligible electorate measured using CVAP. Nor does it reflect the shrinking presence of White Non-Hispanics among eligible voters. In 2000, Hispanics were 22.3 percent of the Citizen Voting Age Population, and under plan C100, Hispanics are a majority of adult citizens in 21.9 percent of districts. By 2010, Hispanics had increased to 25.8 percent of the CVAP, but plan C185 keeps their share of seats constant at 22.2 percent.

The number of districts in which White Non-Hispanics comprise the majority of the eligible electorate increased, even though White Non-Hispanics decreased as a share of the eligible

electorate. In 2000, White Non-Hispanics were 62.5 percent of adult citizens in the State of Texas. The 2005-2009 ACS put their share of the CVAP at 59.0 percent, and the projection of the ACS to 2010 suggests that White Non-Hispanics are 55.8 percent of the eligible electorate — a 7 percentage point drop since 2000. Even still that group gained three districts in which it comprises a majority of the eligible electorate. The number of districts in which White Non-Hispanics are a majority of the CVAP increased from 22 to 25, and that increase kept the share of districts in which they are a majority at 69 percent.

Comparison of Blacks with White Non-Hispanics is similarly revealing. Blacks and White Non-Hispanics gained approximately 500,000 persons each. Blacks comprise 3 million people in the state and roughly 2.5 million people of Voting Age Population. Each group also saw similar increases in the number of eligible voters. Since each group accounts for less than one district, it makes sense that the group with more geographically concentrated growth would stand a better chance of gaining seats. Black population growth is concentrated in 3 counties: 60 percent of the Black population growth occurred in Dallas, Harris, and Tarrant Counties. White population growth was distributed across the state, and their populations declined in Harris and Dallas Counties. In spite of these factors, Plan C185 added 3 additional White districts and no additional Black districts. Plans C100 and C185 both had 1 majority Black CVAP district (CD 30) and 2 plurality Black CVAP districts (CDs 9 and 18). Plan C100 had 22 majority White CVAP districts, and Plan C185 has 25 majority

White CVAP districts. It is somewhat surprising that Whites gain three seats and Hispanics 1 seat even though their population growth was much smaller than Hispanics, and it is surprising that Blacks gain no seats while Whites gain 3 seats because Blacks gained at least as much population and their population growth was much more highly concentrated geographically.

The five most populous counties account for 11 million people, almost half of the population of the state of Texas. Hispanics are the plurality of the population of these 5 counties combined. Of the 19 Congressional Districts that contain a majority or plurality of these counties' populations, just 4 have majority or plurality Hispanic populations. Twelve of these districts are majority White Non-Hispanic. Three are majority or plurality Black. Even though Whites comprise the second largest racial or ethnic group in the five largest counties, they have majorities or pluralities in three times as many seats as the largest group, Hispanics.

The Census Bureau projects that by 2020 Hispanics will be a plurality of all persons in Texas. The trends in citizenship suggest further that White Non-Hispanics will not be a majority of the eligible electorate by the end of the coming decade. Yet the districts set in place in Plan C185 create solid majorities of White Non-Hispanics in two out of every three Congressional Districts. This will make it exceedingly difficult for Hispanic voters to increase their ability to elect candidates to Congress over the coming decade, a decade in which that group will see its numbers in the electorate continue to grow overall and relative to White Non-Hispanics.

## B.3. Stranded Voters

### B.3.1 Statewide

Texas' new Congressional Districts treat minority and White voters quite differently. The most dramatic evidence is the incidence of minority voters in White districts and the incidence of White voters in minority districts. Table B.2 shows the numbers of Whites, Hispanics, and Blacks of voting age in districts where a majority or plurality of the eligible electorate are White, Hispanic, or Black. The striking fact born out in the table is that White Non-Hispanics are overwhelmingly represented by Congressional Districts in which the majority are White Non-Hispanics, while a minority of the Hispanic and Black population lives in districts that are Majority Hispanic or Majority Black.

First, consider the situation of Whites. Of the 9.1 million White non-Hispanics of voting age in Texas, 8 million live in White Majority districts and 1.1 million live in districts in which minorities are the majority or plurality of the eligible electorate. In other words, 88 percent of White adults live in districts where most people are of the same racial group as they are, and just 12 percent live in districts where they are the minority.

Blacks and Hispanics, on the other hand, are disproportionately in districts where they are the minorities. Of the 6.1 million Hispanics of voting age, 2.7 million live in districts in which Hispanics are the majority and 3.4 million live in districts where they are not the majority. Of the 2.3 million Blacks of voting age, 623,195 reside in districts that are Plurality or Majority Black, while 1.6 million live in

districts where they are the minority. Blacks and Hispanics of voting age are nearly as numerous as Whites - 8.4 million versus 9.1 million. However, only 40 percent of Blacks and Hispanics live in districts where each of these groups is the majority or plurality, and 51 percent live in districts where Whites are the majority.

The stranding of minority voters becomes a problem precisely because Whites tend to vote cohesively and as a bloc opposed to Hispanic and Black voters.[5] Almost 90 percent of Whites in the State of Texas end up in districts where they are the majority and, therefore, where the large majority of Whites have the opportunity to elect candidates of their choosing. A majority of Black and Hispanic voters, however, end up in districts where Whites are the majority and, thus, where they likely will not be able to elect their candidates of choice. Plan C185 clearly treats Blacks and Hispanics differently from Whites. The difference is a stark one - just 1.1 million White voters are stranded compared with 4.2 million Black and Hispanic voters.

B.3.2. Harris and Dallas Counties

One might think that Whites enjoy an

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[5] See the ecological regression results in Table 4 in Stephen Ansolabehere, "Report on Minority and White Representation and Voting Patterns Under Congressional District Plan C185," in the case of Perez v. Perry, No. 5:1 l-CV-00360-OLGJES-XR (N.D. TEX.), Docket Number 123, Exhibit 1. The exception, as discussed below, is Travis County.

advantage in the creation of seats in the State simply as a function of plurality rule, with Whites being the plurality group. However, whites are also the majority in the two largest counties in the State -- Harris and Dallas Counties, where Hispanics are the plurality and Whites are the minority.

Harris County, home to Houston, TX, is the largest county in the state. Its population grew 20 percent, rising from 3.4 million persons in 2000 to 4.1 million persons in 2010. All of that population growth came from minorities. Harris' Hispanic population grew from 1.1 million to 1.7 million, an increase of 550,000 persons. Harris' Black population grew from 645,000 to 807,000, an increase of 160,000 persons, while the County's White Non-Hispanic population declined by 70,000 persons.

Whites were the plurality group in 2000. Forty-two percent of all persons in Harris County identified themselves as White Non-Hispanics in 2000; 33 percent, as Hispanic, and 19 percent as Black. Today, Hispanics are the plurality group. The county's population is 41 percent Hispanic, 33 percent White Non-Hispanic, and 19 percent Black.

Harris County has sufficient population for 6 Congressional Districts. Under Plan C185, Harris County's population was spread across 7 CDs, six of which drew a majority or plurality of their populations from Harris County. These were districts 2, 7, 9, 10, 18, 29, and 36.

The County's Hispanic population is distributed across districts in such a way that only 31 percent of Hispanics are in districts that are majority or plurality Hispanic. This is striking because Hispanics are the single largest racial or

ethnic group in the county. By comparison, over 80 percent of White Non-Hispanics in Harris County are in districts that are Majority White. Two-thirds of the Black population of Harris is in the two Black Plurality districts. The district lines in Harris County magnify White representation and shrink Hispanic representation.

Dallas County bears out similar patterns to Harris County. Dallas is the second largest county in the state with 2.4 million persons. In 2000, Whites were 44 percent of the Dallas County population; Hispanics were 30 percent; and Blacks were 12 percent. Between 2000 and 2010, the White population of Dallas County fell 200,000 persons, dropping from 983,317 to 784,693. The Hispanic population jumped 250,000 persons, rising from 662,729 to 905,940. And the Black population climbed from 462,609 to 548.141. By 2010, Hispanics accounted for 38 percent of people in Dallas County, Whites are 33 percent, and Blacks are 23 percent.

Plan C185 added a fifth Congressional District to Dallas County, even though the county's population grew at about the national average. Under Plan C100, CDs 24, 30, and 32 had a majority of their populations in Dallas County, and district 5 had a plurality of its population in the County. Under Plan C185, Dallas residents are the majority of the population in districts 6, 30, and 32, and they are the plurality of the population in districts 5 and 24.

Curiously enough, Whites, who already controlled most of the seats, gained another, even though they lost 200,000 persons. Under Plan C100, Whites held the majority in three of the four Dallas

Districts (numbers 5, 24, and 32). The reshuffling of district lines in Dallas added another White district in the area, number 6. Under Plan C185, Whites - the minority group in the county - are now the majority in four of five Dallas Districts (numbers 5, 6, 24, and 32). Blacks are a majority in CD 30. And Hispanics are the majority in no districts in Dallas County, even though they are the plurality group.

Over 90 percent of White Non-Hispanics in Dallas County live in Congressional Districts in which Whites are the majority. Compare that with 58 percent of Blacks and 0 percent of Hispanics. None of the nearly 1 million Hispanics in Dallas County are in majority Hispanic districts.

The situation in Dallas and Harris Counties runs counter to majority rule and casts doubt on the notion that the statewide patterns are a simple consequence of plurality rule. First, one might argue that the single largest group in an area will naturally have disproportionately more representation than the smaller groups. If that line of argument characterizes the districting in Texas, then the Hispanics ought to be the majority of the population in most of the Harris and Dallas districts. Dallas and Harris are the largest counties in the state, with over 6 million people combined. There are 2.5 million Hispanics in these two counties combined, and Hispanics are the single largest group in these counties, with roughly 40 percent of the combined populations. Two and a half million persons are the equivalent of the entire population of three and a half Congressional Districts. However, only 1 of the 12 Harris or Dallas Districts is a majority or plurality of Hispanic.

Second, a minority of the population ought not to have a majority of the seats—that violates majority rule.[6] White Non-Hispanics are one-third of the populations of these counties, and the second largest ethnic group. They comprise the majority or plurality of 8 of the 12 districts in these two counties. Because there is racial bloc voting in Dallas and Harris counties, the configuration of districts in these counties makes it exceedingly difficult for the large majority of Hispanics in these counties to elect the candidates of their choice.[7]

## C. Electoral Performance

The Department of Justice and prior legal decisions instruct us to look not only at the racial composition of districts, but at electoral performance. In this section, I examine the composition of the eligible electorate, turnout, and past vote to establish where Hispanics and Blacks had opportunities to elect their candidates of choice under Plan C100 and under Plan C185. Comparison of electoral performance under Plans C100 and C185 shows clear evidence of retrogression statewide. It also reveals three districts of where Plan C185 eliminated minority opportunity districts: these were CD 23, CD 25, and CD 27 under Plan C100.

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[6] See for example, Robert Dahl, A Preface to Democratic Theory. New Haven, CT: Yale University Press, 1956, esp. pages 124-51.

[7] See Table 4 in Stephen Ansolabehere, op cit.

C.1. Overall

Plan C185 reduces the number of districts in which Hispanics have an opportunity to elect their preferred candidates. Under Plan C100 there were 3 Black opportunity districts and 8 Hispanic opportunity districts. These were 9, 15, 16, 18, 20, 23, 25, 27, 28, 29, and 30. Under Plan C185 there are 3 Black opportunity districts and 7 Hispanic opportunity districts. These are 9, 15, 16, 18, 20, 28, 29, 30, 34, and 35.

Four comments are in order about the observed retrogression.

First, this degree of retrogression is particularly striking because it is in absolute numbers, not percentages. The number of districts where Hispanics or Blacks have a reasonable opportunity to elect candidates of their choosing declines from 11 to 10. That decline comes in the face of substantial growth in Hispanic and Black populations that resulted in the State of Texas being allotted 4 additional U. S. House seats. And it comes in the face of substantial growth in the number Hispanics and Blacks eligible to vote, growth in Hispanics' share of the eligible electorate, and declines in the White share of the eligible electorate from 2000 to 2010.

Second, racial composition is not determinative of opportunities to elect candidates. Not all of the districts in the above classification are majority Hispanic or majority Black. Under Plan C100, two of the three Black opportunity districts were plurality Black (numbers 9 and 18), and one of the 8 Hispanic opportunity districts (number 25) was plurality White, but where Hispanics were a large

and pivotal share of the electorate.

Third, with the exception of benchmark CD 25, all parties are in agreement about this classification of districts under Plan C100. CD 25 is what justice Kennedy termed a cross-over district in his opinion in Bartlett v. Strickland. As I will show below, CD 25 under Plan C100 regularly elected the minority preferred candidates to the U. S. House of Representatives. CD 25 was substantially reconfigured so that it will no longer function as a cross-over district. The district was dismantled in part to create a majority Hispanic district, CD 35, but that represents no net gain in districts where minority votes could elect their preferred candidates, and it did not offset losses of minority opportunity districts elsewhere.

Fourth, even setting aside CD 25, Hispanics and Blacks lost ground in the districting process. Texas gained 4 additional seats because of minority population growth but saw no gain in the number of minority opportunity districts, and the percent of districts in which such opportunities exist declined significantly. That pattern is most striking in Harris and Dallas Counties, the two most populous areas, where Whites actually declined in number and in share of the eligible electorate and they are now a minority of the population. Even still in these two counties, Whites—already the majority of most of these counties' districts—gained two additional seats.

C.2. Minority Opportunity Districts

The method for determining which districts are Hispanic or Black opportunity districts proceeds in

three steps. First, I conduct ecological regressions and homogeneous precinct analysis for all statewide (state and federal) elections in 2008 and 2010 to determine which candidate in each is the minority-preferred candidate. I also calculated the average vote of minority-preferred statewide (state and federal) candidates, as an additional measure of electoral performance. Second, I calculate the percent of the vote in each district for the minority-preferred candidate. Third, I determine, based on vote shares and based on recent U. S. House election results in the districts, in which Congressional districts minorities have at least a 50 percent chance of electing their candidates of choice.

Table C.1 summarizes the statistical analysis of the electoral performance of the 32 districts under Plan C100 and the 36 districts under Plan C185. The rows correspond to the district numbers, and the districts on the whole line up, with a few exceptions where districts were substantially restructured, as in 25 and 27. Even in these cases, the numbers denote analogous districts. The same elections are analyzed under each set of districts. The first column under each Plan is the average of the 2008 and 2010 statewide and federal elections, the second column is the 2008 Presidential Vote, and the third column is the 2010 Governor vote.

The number of White (or non-minority) districts increases under Plan C185 by 5. Under Plan C100, there were 21 districts where minority-preferred candidates do not have a significant chance of winning. These were Districts 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 17, 19, 21, 22, 24, 26, 31, and 32. The parties in this suit agree that these districts were not minority opportunity districts. The electoral

performance of minority-preferred candidates in these districts ranges from 22.9 percent in district 13 (2008 Presidential vote) to 46.6 percent in district 32 (2008 Presidential Vote). Under Plan C185, there are 26 districts where minority-preferred candidates do not have a significant chance of winning. These are Districts 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 17, 19, 21, 22, 23, 24, 25, 26, 27, 31, 32, 33, and 36. The parties in this suit agree that these districts were not minority opportunity districts.

The number of Hispanic or Black opportunity districts decreases under Plan C185. Under Plan C100 the minority opportunity districts were 9, 15, 16, 18, 20, 23, 25, 27, 28, 29, and 30. The electoral vote for the minority-preferred candidate in statewide and federal elections in these districts ranges from a low of 48.7 percent in District 23 (2010 Governor) to a high of 82 percent in District 30 (2008 Presidential Vote and 2010 Governor Vote). Under Plan C185 the minority opportunity districts are 9, 15, 16, 18, 20, 28, 29, 30, 34, and 35. Districts 34 and 35 are new Hispanic majority districts, and, in these, minority-preferred candidates won 57 to 64 percent of the vote.

Minorities had the opportunity to elect candidates of their choice in the general elections in Districts 23, 25, and 27 under Plan C100. None of these are minority opportunity districts under Plan C185.

C.3. Minority Districts Lost

Districts 25 and 27 clearly switch from minority opportunity districts to White districts.

Plan C185 simply dismantled an Hispanic district and made it into a White district, both in racial composition and electoral performance. CD 27 ran from Nueces County down to Cameron County, at the southern tip of Texas. It was a majority Hispanic District under Plan C100, and it became a majority White CVAP district under Plan C185, as indicated in Table B.3. Ecological regressions reveal that the degree of Hispanic cohesion and of white cohesion are high, and whites vote as a bloc opposed to Hispanic preferred candidates in the new CD 27. The ecological regression of Vote for the Minority Preferred Candidate on White Percent of the Voting Age Population has an intercept of .728 and a slope of -.681.[8] This implies that 73 percent of Hispanics and Blacks voted for the minority preferred candidates in statewide elections in the areas encompassed in the new District 27, but only 5 percent of Whites in that area did. Racial polarization, then, is 68 percentage points.

The racialized voting in this area translates directly into election outcomes. CD 27 was 64 percent Hispanic CVAP; it is now 51 percent White CVAP. In the CD 27 defined by Plan C100, Obama won 54 percent of the vote. The minority-preferred Congressional candidate in the general election won

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[8] The dependent variable in this ecological regression is the Average Percent of Vote won by Minority Preferred candidates in Statewide elections in 2010. The regression has an R-square of .762, a Root MSE of .08505, and 314 observations (VTDs). The Standard Error on the intercept of .728 is .013 and the Standard Error on the slope of -.681 is .022.

handily in 2006 and 2008, but not in 2010. In the CD 27 defined by Plan C185, Obama won 41 percent of the vote. This is no longer a district in which minority preferred candidates have a good shot of winning the congressional seat.

Plan C185 also eliminated a minority opportunity in the Travis County area. District 25 presents a somewhat different case than District 27. Under Plan C100, District 25 drew most of its population from Travis County, and it covers seven less populous counties to the south and southeast of Travis. Under Plan C185, the district is reoriented; it takes a smaller population from Travis County and extends to the north all the way to Tarrant County.

As it was configured District 25 under Plan C100 was a minority opportunity district because of high levels of White cross-over voting. Whites were the majority of the electorate under Plan C100, but Hispanics were the decisive voting group in the elections. Ecological regressions and homogeneous precinct analyses show that Hispanics and Blacks in Travis County voted cohesively. Also, Whites in Travis County split their votes approximately in half, with half choosing the minority-preferred candidates and half choosing their opponents.[9] The voting behavior of Whites in Austin is fairly unusual within the state. All other major counties show White cohesion. Keeping the Austin vote together in CD 25

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[9] See Table 4 in Stephen Ansolabehere, "Report on Minority and White Representation and Voting Patterns Under Congressional District Plan C185," in the case of Perez v. Perry, No. 5:11-CV-00360-OLGJES-XR (N.D. TEX.), Docket Number 123, Exhibit 1.

created unique opportunities for minorities to elect their preferred candidates with the support of White voters. The minority-preferred Congressional candidate in the general elections won handily in 2006, 2008, and 2010. Obama, the minority preferred candidate for President in 2008, won 60 percent of the vote in the area defined by CD 25 under Plan C100.

Plan C185 completely restructures the district, taking out large numbers of minorities and putting in large numbers of whites from counties to the north. The voting behavior of the whites in these counties differs substantially from the voting behavior of Whites in Austin, the seat of Travis County. Unlike the White population encompassed in CD 25 under Plan C100, the White vote in the new CD 25 shows high levels of racial cohesion and polarization. Ecological regression analysis of the relationship race and vote among the Voting Tabulation Districts in the new CD 25 yields an estimate of White cohesion of .85 --- 85 percent of Whites in this new district vote for the same candidate. And that candidate is not the minority-preferred candidate. The electoral performance of the new CD 25 clearly favors the White preferred candidates in this areA. In CD 25 defined by Plan C185, Obama won 43 percent of the vote, and this is no longer a district in which minority-preferred Congressional candidates will prevail.

Finally, consider District 23. The federal courts created this district in 2006 to be a minority-performing district. This is the most recently created district in the Texas Congressional map. Immediately before that redistricting minority preferred candidates did not succeed in their

attempts to win District 23. In 2004, Bonilla, who was not preferred by a majority of Hispanics and Blacks, defeated Sullivan 69 to 30. Immediately after the 2006 redistricting of CD 23, Hispanic preferred candidates prevailed. Rodriguez, the minority-preferred candidate, beat Bonilla 54 to 46 in the 2006 Congressional elections, and Rodriguez, again minority-preferred, beat Larson 56 to 42 in the 2008 Congressional elections.

CD 23 under Plan C100 was a minority opportunity district, but it was not a sure thing. In 2010, Rodriguez was yet again the minority-preferred candidate, but he lost to Canseco, 49 percent to 44 percent. As it was configured under Plan C100, the minority-preferred candidates in statewide and federal offices won half the votes. Obama, the minority-preferred candidate in this District, won 51 percent here; Perry, who was opposed by a majority of minorities in the District, won 51 percent here. CD 23, then, was a highly competitive district, but one where minorities had a reasonable opportunity of winning, and they won the district more often than not.

Rather than shore up the minority vote in CD 23, the State weakened this district when it passed the new Congressional district map. Plan C185 lowers the electoral performance of minority-preferred candidates in the District to the point that it is likely no longer a minority opportunity seat. As displayed in Table C.1, the vote for minority preferred candidates under Plan C185 drops 3 to 4 percentage points from the electoral performance under the baseline Plan C100. That may sound like a small change, but in a competitive district such as this one, it made a huge difference. The electoral

performance of CD 23 now lies in the range 45.0 percent (2010 Governor Vote) to 47.9 percent (2008 Presidential Vote), which is below the lowest performance of any of the minority opportunity seats under Plan C100. The electoral performance of CD 23 is now clearly at the level of districts that all agree are not minority opportunity districts, such as CD 32. All parties agree that benchmark CD 32 is not a minority opportunity district, and in that district minority-preferred candidates won 46.6 percent for President 2008 and 45.2 percent for Governor in 2010. The performance of minority-preferred candidates for Governor in 2010 is lower in new CD 23 than it is in benchmark CD 32.

The courts created CD 23 just 5 years ago to be a minority opportunity district. If there were questions about CD 23 under Plan C100, they were resolved under Plan C185.

## C.4. Elements of Change

The changes in the electoral performance of CD 23, 25, and 27, as well as other districts, came about by moving areas in and out of districts. In some districts, such as 25 and 27, the changes in the areas covered are dramatic. In other districts, such as 23, they are more subtle.

### C.4.1. Components of Change

There are three components of change: size of the electorate, racial composition of population, and electoral performance of each areA. Table C.2 shows the Voting Age Population and Turnout of areas kept in each district (Same), removed from each district

(Out), and added to each district (In). VAP and Turnout are two measures of size of the electorate, and the ratio of Turnout to VAP reveals the rate at which people participate in an area. Table C.3 presents the racial composition of areas kept the same, moved out, and brought in each district. Table C.4 shows the electoral performance of each of the areas. Performance times size is the magnitude of change in the electoral performance of minority preferred candidates. Moving a small number of minority voters in and a small number of majority voters out may not be as consequential as moving large blocs of these voters in and out of districts.

The redistricting cycle produced considerable churning. Most districts in the state show substantial shifts in VAP and Turnout. District 31 is the only district that lost precincts, and added no precincts. Districts 1 and 16 experienced only small changes. All other districts experienced changes in population of at least 50,000 persons, and most saw changes of at least 100,000 persons. This was even true for districts that did not have populations far in excess of the required number under the 2010 apportionment.

C.4.2. Reconfigured Districts

The most dramatically changed district is 25. It kept only 126,000, lost 489,000, and added 392,000 voting age persons. See Table C.2. Only 28 percent of the voters (2008 Turnout) were in the old district. Looking at Table C.4 it becomes obvious what the redistricting process did. The small area kept in CD 25 votes 60 percent for the minority preferred candidates. Plan C185 removed a large number of

voters (roughly 225,000) who voted 60 percent for the minority preferred candidates. The Plan, then, added back into the district an almost equally large number of voters (about 200,000) who voted roughly 40 percent for the minority preferred candidates. As a result of these shifts, CD 25 moves from minority opportunity to not.

District 27 shows a variation on the same theme. As with CD 25, Plan C185 removed a large number of eligible voters who voted for the minority preferred candidates, and replaced them with an equally large number of eligible voters who voted against minority preferred candidates.

There is an additional component to the change in CD 27. The area removed had a much lower rate of turnout than the area added. In the area taken out, only 28 percent of the VAP voted in 2008. In the area added in, 48 percent of the VAP voted in 2008. The difference reflects, in part, lower citizenship rates in the area taken out. This shift means that the area added in ends up being a much larger component of the vote and of electoral performance in the district than the area taken out, even though they are about the same number of persons. Here is an example where the districting process uses the turnout to shape the political performance of the district.

District 6, in the Dallas-Fort Worth area and counties to the south, shows the opposite pattern. In this district, a large, relatively high turnout area was moved out of the district, and a somewhat smaller, relatively low turnout area was moved into the district. The area moved in was majority Hispanic; the area moved out was majority White. The area

kept the same in this district, although less populous than the area moved in, has very high turnout and votes overwhelmingly against minority preferred candidates. In short, Plan C185 appends a low turnout minority area to a high turnout, but smaller White area to form District 6. The resulting district votes somewhat more favorably to minority preferred candidates than it did before, but that came off of a low base, and the district remains one where minority preferred candidates are highly unlikely to win. This is an example of a change in district lines that results in stranding of minority voters.

District 26, also in the Dallas-Fort Worth area, reveals a somewhat different pattern. Here there is a straight-up swap of a White area in the Fort Worth area (moved out) for an Hispanic area (moved in). The White area moved out of the district voted approximately 50-50 for the minority preferred candidates and had relatively high turnout; 50 percent of the VAP voted in 2008. The Hispanic area that is added to the district has extremely low turnout, less than 30 percent of the VAP votes, but it votes overwhelmingly for the minority preferred areas. One might have created a cross-over district in this area along the lines of the old district 25. Instead, the White urban area that splits its vote is added to a White suburban area in CD 12, and the Hispanic area in east and central Fort Worth is added to the more rural Denton County to the North. Like District 6, this is an example of the stranding of minority voters. Also, Districts 6 and 26 are examples of decisions under Plan C185 to divide the Dallas-Fort Worth area in ways that ultimately preclude the creation of a minority district in these counties.

CDs 6, 25, 26, and 27 exhibit some of the patterns of large shifts in population exhibited in Plan C185. Turnout, race, and electoral performance all factored into the changes in the electoral performance in some districts, such as 25 and 27. In other cases, such as 6 and 26, these very large changes in population were used to keep the districts performing about the way they had been, and they split off significant Hispanic vote from their immediate communities, in these examples, central Fort Worth and central Dallas.

District 23 represents some of the most subtle changes in district demography. As mentioned earlier, Plan C185 shaves 3 to 4 percentage points off the electoral performance of minority preferred candidates in this district, converting the district from a competitive seat where minority-preferred more often than not won to a district where minorities likely will not elect their preferred candidates.

The change in district 23 is driven by turnout of the areas kept, added, and removed, and to some extent by the racial composition as well. The area kept by the redistricting plan has the highest percent White (34 percent) of the three types of areas (same, out, and in), the highest turnout (42 percent), and the lowest support for minority-preferred candidates (46 to 49 percent). The area removed has the lowest percent White and the highest combined percent Hispanic and Black; it has somewhat lower turnout (39 percent), and the highest support for minority preferred candidates (58 to 60 percent). The areas added to the districts have the highest percent Hispanic (67 percent) but very low percent Black; it has the lowest turnout rate (33 percent), and

somewhat lower support for minority preferred candidates than the areas taken out (51. to 56 percent). The combination of very low turnout and lower support for minority-preferred candidates in the areas added compared with the areas subtracted, due in part to the lower percent Black, reduced the electoral performance of minority preferred candidates in CD 23 by 3 to 4 percent and rendered the district no longer a minority opportunity seat.

## D. Regional Concerns

So far, I have considered individual districts and counties in isolation, but some of the specific decisions made about the inclusion of a county in one district or another have consequences far beyond that county or that district. Minority representation in the State of Texas is determined by decisions about district boundaries in three areas of the State. The first area is South and Southwest Texas. This is a large triangle that extends from the farthest western point in El Paso due east to Bexar County and San Antonio and then due South to the southern tip of Texas in Cameron County. The second area is Harris County and the City of Houston and neighboring Counties, especially Fort Bend and Galveston. The third area is Dallas-Fort Worth, which is contained in Dallas and Tarrant Counties. Even these areas can affect one another. As we will see below the decision to move Nueces County out of the South and Southwest triangle districts had far reaching effects on Harris County's districts.

### D.1. The Southwest Texas Triangle

The Southwest Texas Triangle is the area enveloped by the triangle with vertices at El Paso,

San Antonio, and Cameron County. Under Plan C100 there were six districts in this area: 15, 16, 20, 23, 27, and 28. All were majority Hispanic districts and all were Hispanic opportunity districts. The 2010 Census revealed that these districts combined population was 4,697,636. This exceeded the total population for 6 districts by 506,708.

A simple adjustment to the envelope of these districts could have easily added the needed 191,780 persons so as to have sufficient population in the area for a seventh district in the triangle. Indeed, if one includes all of Bexar County, not just the part that is encompassed in CDs 20, 23, and 28, there would have been more than enough population for 7 congressional districts. Also one could have easily gained the additional population by adding in nearby counties such as Crane and Ector in Southwest Texas or Gonzales, Lavaca, and Victoria in South Central Texas.

The State argued in its filing in this case that since there was not sufficient population in the 6 Hispanic Districts in Southwest Texas that a 7th district need not be formed from their numbers. But, the path of least resistance would be to add the 191,780 persons from neighboring areas. The alterations in the existing districts reveal that would not have been difficult to do. For example Plan C185 expands District 23 northward across the Pecos River, and the new areas added to CD 23 alone accounted for an additional 224,964. Instead, the State Legislature chose to weaken CD 23. It did this by adding large numbers of voters to the district from outside the area previously enveloped by the Southwest Texas districts, and it removed key Hispanic communities from the old CD 23, such as

the southern half of Maverick County and high turnout Hispanic areas in Bexar County. All told, 375,155 people were taken out of this district. And these changes, as we have seen, markedly weakened the electoral performance of minority-preferred candidates in this district and rendered this district no longer a minority opportunity district.

More dramatic still was the dismantling of CD 27 on the Southern vertex of the triangle. Nueces County, with 340,222 persons, was one of two population centers in the old CD 27, with Cameron County being the other. The district had an excess of 43,505 people for an ideal Congressional District according to the 2010 Census. The path of least resistance would have been to take some of the population from this county to help construct a seventh district somewhere in the Rio Grande Valley. Many of the alternative plans, such as PlanC202, did just that.

Plan C185, instead, removes Nueces County from the triangle districts altogether. This county, which anchored a majority Hispanic district, is put into a district that extends north and northwest, along the Gulf Coast. The new CD 27 is now a majority White district. The 240,000 Hispanics in Nueces previously were in a district where Hispanics could elect their candidates of choice; now they are not.

To adjust for the dismantling of a Hispanic seat in CD 27, Plan C185 creates a new Hispanic district from the remnants of CD27. New CD 34 snakes from Cameron County, past Bexar County, to Caldwell County. District 34 is an Hispanic majority seat and one where minority-preferred candidates

will likely succeed. This may seem like a straight up exchange of a newly formed Hispanic seat (34) for a refurbished White seat (27). It is not.

D.2. Ripple Effects of Nueces County

The decision to wrench Nueces County out of its old district 27 had ripple effects on the construction of districts throughout southern and central Texas. It affected the configuration of districts throughout the Rio Grande Valley and the triangle and precluded the creation of a seventh district there. It affected the crafting of districts in the San Antonio and Austin area, including the construction of 35 and the destruction of 25. And it constrained the ability to craft a new Hispanic district in the Houston area, as many alternative plans were able to achieve (such as Plans C166 and C202).

The most immediate and direct effect of this decision was on the creation of a seventh Hispanic district in Southwest Texas. The populations of CDs 15, 16, 20, 23, 27, and 28 as configured under Plan C100 plus the additional 200,000 persons brought in by expanding the boundaries of 23 under Plan C185 contained more than enough population to create 7 Hispanic majority districts in this area. Moving Nueces County into a white district in the Southeast removed 340,000 persons - 206,000 whom are Hispanic - from the envelope of the Southwest Texas districts. This was too great a deficit to overcome with marginal changes in the area above CD 23. In essence, then, moving Nueces County into a White district guaranteed that there would not be a seventh Hispanic district in Southwest Texas, even though

there was sufficient population to support such a district.

A second effect of this decision was to constrain the set of possible Hispanic districts in Bexar County in particular. Given the population growth around San Antonio, this was the likely location of the seventh Hispanic district in the area. Plan C202, for example, places a new Hispanic district, numbered 33, immediately to the south of Bexar County. Plan C166 squeezes another Hispanic district in, running south and west of Bexar. Other plans provide other examples. Most put a district in this area. Plan C185 cuts into the area where most other plans would have put a seventh Hispanic district in the Valley in order to have enough population for new CD 34. It is the Hispanic district sewn together from the scraps of old district 27.

The State then proceeded to create an Hispanic district by taking Hispanic population in northern Bexar County and connecting it with Hispanic population in southern Travis County. These two clusters are connected by a strip along Interstate 35 that is three miles wide and 50 miles long. Fittingly, this is CD 35.

The creation of CD 35 took a large Hispanic population of 161,254 out of CD 25. CD 25 was a cross-over district anchored in Austin. Plan C185 took one-fourth of its population to make a majority Hispanic district, and rendered the district no longer functioning as a minority opportunity district. Again, an attempt to correct the error of moving Nueces County led to loss of yet another opportunity district.

The out waves of the ripple effect reach all the way to Harris County. If one overlays the Plan C100

and Plan C185 maps, there is an evident shift in the location of all of the districts in the Harris area to the Southwest. The reason for this is that moving Nueces into the new District 27 pulled all of the districts along the Gulf to the Southwest. Nueces County alone is half of the population of a Congressional District. Adding that population to counties to the north and northeast meant that the CD in that area (old District 14, now numbered 27) had to shift its geographic location. Next comes District 22, which is pulled out of Galveston County to the east and into Fort Bend County the West. And all of the Harris County districts are pulled further in this direction.

The shift in these districts left no flexibility for the creation of an additional Hispanic seat in Harris County. Other maps, such as 166 and 202, place a new minority opportunity district there. In stead, Plan C185 creates a new White Majority District (number 36) to the East of Harris County and it pulls CD Number 2 out of this area and entirely into Harris. In doing so, CD 2 adds a sizable minority population from Houston to White suburban communities to reconfigure this Majority White district.

The decision to take Nueces County out of 27, then, had far reaching affects on what could be accomplished elsewhere. It prevented the creation of a seventh Hispanic district in Southwest Texas. It led to the dismantling of CD 25, and it greatly constrained the ability to make a new Hispanic district in Harris County.

D.3. Dallas-Fort Worth

I have discussed the effects of districting in

Dallas earlier. The districts in Plan C185 extend arms into the county that grab urban minority populations and attach them to rural and suburban areas and counties. This is especially true for CDs 5, 6, 12, and 33. The effect of such encroachments is to break up the Hispanic and Black populations that run through the middle of these Counties horizontally, much as Mississippi's district boundaries used to divide the Black Belt Counties. Several plans offer a minority opportunity district that follows the contours of the Hispanic and Black population in Dallas and Tarrant Counties, rather than fracturing those populations and appending those segments to rural and suburban White districts.

Travis County presents a further variation on the extent of minority under representation under Plan C185. Although Travis has enough population to be a majority of 2 districts, the county is sufficiently divided that it is a majority of no districts. Travis residents are a plurality in one district, CD 25. In many ways, the division of Travis resembles Tarrant County. Most of the population of both of these counties is pulled off to other counties to accommodate districts that are based elsewhere. The one district that does remain in the county somewhat (CD 25) is White Majority, and the county is a bare majority White, but the story of Travis, like that of Tarrant, emerges upon considering the other districts that carve up the county.

Dallas County saw rapid growth in its Hispanic population and decline in its White population. Tarrant County saw its Hispanic population growth faster than its White population. Rather than create an additional Hispanic district in

these Counties, Plan C185 created additional White Majority districts.

Across the state are ample examples of violations of majority rule, where the minority Whites are the majority of Congressional Districts, and missed opportunities, where Hispanics accounted for most of the growth in population and eligible voters, but did not receive any increase in representation. Most troubling, though, is the actual retrogression in the number of Congressional Districts in which minorities have an opportunity to elect their preferred candidates. This group accounts for 2.8 million additional people in the state - the equivalent of 4 entire districts. Yet, they witnessed the dismantling of three long-standing minority opportunity seats and ended up with fewer seats overall where Hispanics and Blacks can elect their preferred candidates.

Table A.1. Population Growth in Texas

| Population Count | Census 2000 | Census 2010 | Growth |
|---|---|---|---|
| Total | 20,851,820 | 25,145,561 | 4,293,741 |
| Hispanic | 6,669,666 | 9,454,731 | 2,785,065 |
| White Non-Hispanic | 10,933,313 | 11,390,939 | 457,626 |
| Black | 2,404,566 | 2,967,176 | 562,610 |

Source: U.S. Bureau of Census.

Table A.2. White, Hispanic and Black CVAP as a Percent of Total CVAP

| | 2000 Long Form | | 2005-2009 ACS | | 2010 Enumeration x ACS CVAP % | |
|---|---|---|---|---|---|---|
| | Number | %CVAP | Number | %CVAP | Number | %CVAP |
| White | 8,305,993 | 62.5% | 8,793,200 | 59.0% | 8,774,942 | 55.8% |
| Hispanic | 2,972,988 | 22.3% | 3,674,800 | 24.6% | 4,063,891 | 25.8% |
| Black | 1,606,131 | 12.1% | 1,864,530 | 12.5% | 1,997,202 | 12.7% |
| Other | 412,295 | 3.1% | 412,295 | 3.9% | 896,382 | 5.7% |
| Total | 13,299,845 | 100.0% | 14,896,395 | 100.0% | 15,725,999 | 100.0% |

Table B.1. Number of Majority and Plurality White, Hispanic and Black Congressional Districts, as a Percent of Total Population, Voting Age Population, and Citizen Voting Age Population, under New Districts (Plan C185) and under Current Districts (Plan C1001

| | | Plan C185 | | Plan C100 | |
|---|---|---|---|---|---|
| | | Majority N (%) | Plurality N (%) | Majority N (%) | Plurality N (%) |
| White | Total Pop | 20 (56%) | 3 (8%) | 18 (56%) | 4 (13%) |
| | VAP | 23 (64%) | 2 (6%) | 20 (63%) | 2 (6%) |
| | CVAP | 25 (69%) | 0 | 22 (69%) | 0 |
| Hispanic | Total Pop | 8 (22%) | 3 (8%) | 7 (22%) | 2 (6%) |
| | VAP | 8 (22%) | 0 | 7 (22%) | 2 (6%) |
| | CVAP | 8 (22%) | 0 | 7 (22%) | 0 |
| Black | Total Pop | 0 | 2 (6%) | 0 | 1 (3%) |
| | VAP | 0 | 3 (8%) | 0 | 1 (3%) |
| | CVAP | 1 (3%) | 2 (6%) | 1 (3%) | 2 (6%) |

Source: Computed by Author from Texas Legislative Council Reports R202 for Plans C185 and C100, and CVAP reports issued by the Texas Legislative Council using the average of the 2005-2009 American Community Surveys.

Table B.2. Numbers of Whites, Hispanics, and Blacks of Voting Age in Majority White, Majority

Hispanic, and Plurality Black Districts Under Plans C185*

| | Majority White Districts | Majority Hispanic Districts | Plurality Black Districts |
|---|---|---|---|
| White Non-Hispanic | 7,959,894 | 853,812 | 260,978 |
| Hispanic | 2,872,874 | 2,752,804 | 517,466 |
| Black | 1,402,019 | 217,499 | 623,195 |
| Number of Districts | 25 | 8 | 3 |

Source: Calculated by author from data provided by Texas Legislative Council. *Note: Majority or Plurality Status Determined as a Percent of CVAP.

Table B.3. White, Hispanic, and Black Share of CVAP in Congressional Districts under Plan C100 and Plan C185.

| | Plan 000 | | | Plan C185 | | |
|---|---|---|---|---|---|---|
| CD Number | White Percent | Hispanic Percent | Black Percent | White Percent | Hispanic Percent | Black Percent |
| 1 | 75.1 | 5.1 | 18.3 | 74.8 | 5.2 | 18.5 |
| 2 | 64.5 | 11.1 | 21.5 | 66.0 | 16.7 | 11.9 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 3 | 68.7 | 10.8 | 11.1 | 76.4 | 7.9 | 7.6 |
| 4 | 81.5 | 5.5 | 10.5 | 81.8 | 4.9 | 11.2 |
| 5 | 74.3 | 9.5 | 13.6 | 72.9 | 10.7 | 14.2 |
| 6 | 68.1 | 11.7 | 16.0 | 57.7 | 25.3 | 13.5 |
| 7 | 69.6 | 13.9 | 9.2 | 68.3 | 14.5 | 10.1 |
| 8 | 82.5 | 6.6 | 8.9 | 79.4 | 8.8 | 9.5 |
| 9 | 21.9 | 19.1 | 48.4 | 22.6 | 18.3 | 47.6 |
| 10 | 68.3 | 15.6 | 11.1 | 72.6 | 13.5 | 10.3 |
| 11 | 68.7 | 25.4 | 4.2 | 71.2 | 23.1 | 4.0 |
| 12 | 74.5 | 15.5 | 6.7 | 68.2 | 12.7 | 15.6 |
| 13 | 76.6 | 14.4 | 6.4 | 77.2 | 14.3 | 5.8 |
| 14 | 66.8 | 20.5 | 9.9 | 63.0 | 13.0 | 21.2 |
| 15 | 24.5 | 71.9 | 2.5 | 25.4 | 71.0 | 2.4 |
| 16 | 20.0 | 74.5 | 3.4 | 21.5 | 72.7 | 3.7 |
| 17 | 76.8 | 11.1 | 9.9 | 69.8 | 13.6 | 13.4 |
| 18 | 27.4 | 22.3 | 46.7 | 29.4 | 17.4 | 48.9 |
| 19 | 67.9 | 24.8 | 5.6 | 66.7 | 25.4 | 6.1 |
| 20 | 26.2 | 63.8 | 7.7 | 29.2 | 62.9 | 5.4 |
| 21 | 68.9 | 21.3 | 6.3 | 74.4 | 19.7 | 3.0 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 22 | 58.4 | 17.8 | 13.8 | 61.3 | 16.2 | 11.2 |
| 23 | 35.9 | 58.4 | 3.5 | 37.3 | 58.5 | 2.4 |
| 24 | 65.0 | 15.1 | 13.1 | 72.0 | 12.2 | 9.1 |
| 25 | 63.1 | 25.3 | 9.1 | 78.2 | 10.3 | 8.3 |
| 26 | 72.4 | 9.9 | 14.3 | 74.1 | 14.7 | 7.5 |
| 27 | 32.1 | 63.8 | 2.8 | 51.4 | 41.1 | 5.8 |
| 28 | 28.7 | 68.3 | 1.9 | 26.2 | 65.9 | 6.4 |
| 29 | 28.3 | 56.0 | 13.5 | 24.6 | 56.3 | 16.3 |
| 30 | 27.7 | 19.8 | 50.1 | 24.1 | 20.6 | 53.5 |
| 31 | 68.9 | 14.3 | 13.0 | 69.2 | 15.0 | 11.7 |
| 32 | 66.2 | 20.7 | 8.8 | 70.1 | 11.8 | 11.5 |
| 33 | | | | 69.4 | 11.6 | 14.4 |
| 34 | | | | 25.2 | 71.7 | 2.3 |
| 35 | | | | 34.5 | 51.9 | 11.3 |
| 36 | | | | 75.4 | 12.9 | 9.7 |

Source: Reports Red 106 for Plan C100 and Plan C185 provided by Texas Legislative Council.

Table C.1. Electoral Performance of Districts: Vote Share of Minority Preferred Candidates for Statewide and Federal Office, 2008 and 2010

| | Plan. C100 | Plan C185 |
|---|---|---|

| CD Number | Average '08, '10 | 2008 Pres. | 2010 Gov. | Average '08,'10 | 2008 Pres. | 2010 Gov. |
|---|---|---|---|---|---|---|
| 1 | 32.0 | 30.7 | 32.5 | 31.6 | 30.6 | 32.2 |
| 2 | 38.6 | 39.9 | 39.2 | 33.2 | 36.1 | 37.0 |
| 3 | 37.4 | 42.1 | 39.2 | 32.9 | 37.8 | 34.6 |
| 4 | 32.8 | 30.4 | 33.3 | 33.6 | 29.6 | 33.9 |
| 5 | 36.2 | 36.3 | 38.1 | 37.8 | 37.6 | 39.4 |
| 6 | 38.4 | 39.9 | 40.0 | 41.9 | 42.9 | 43.2 |
| 7 | 37.6 | 41.2 | 43.6 | 35.2 | 39.5 | 42.2 |
| 8 | 27.7 | 25.7 | 28.1 | 25.9 | 26.5 | 28.0 |
| 9 | 75.6 | 77.3 | 78.4 | 75.4 | 77.0 | 77.7 |
| 10 | 41.2 | 44.6 | 42.5 | 40.5 | 42.9 | 42.1 |
| 11 | 24.9 | 23.9 | 25.0 | 24.6 | 23.4 | 24.7 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 12 | 35.2 | 36.6 | 36.2 | 41.9 | 44.4 | 42.8 |
| 13 | 25.3 | 22.9 | 26.2 | 24.6 | 22.4 | 25.6 |
| 14 | 34.4 | 33.3 | 35.5 | 43.4 | 42.2 | 42.6 |
| 15 | 60.0 | 60.1 | 58.0 | 56.7 | 58.0 | 55.1 |
| 16 | 63.5 | 66.2 | 62.3 | 62.4 | 65.1 | 61.3 |
| 17 | 34.7 | 32.3 | 35.9 | 41.5 | 41.3 | 42.4 |
| 18 | 75.8 | 77.6 | 77.6 | 77.8 | 80.1 | 80.6 |
| 19 | 27.6 | 27.6 | 28.3 | 28.5 | 28.2 | 29.2 |
| 20 | 64.0 | 64.1 | 64.4 | 58.8 | 59.7 | 58.6 |
| 21 | 36.6 | 41.0 | 37.9 | 39.1 | 43.1 | 40.4 |
| 22 | 39.7 | 41.4 | 42.1 | 35.3 | 38.0 | 38.0 |
| 23 | 49.8 | 51.4 | 48.7 | 46.7 | 47.9 | 45.0 |
| 24 | 40.2 | 44. | 41. | 36.0 | 41.0 | 37.4 |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | 7 | 7 | | | |
| 25 | 57.5 | 59.9 | 57.3 | 41.8 | 43.0 | 42.8 |
| 26 | 38.0 | 41.6 | 38.9 | 35.1 | 39.1 | 35.8 |
| 27 | 53.5 | 53.6 | 50.3 | 42.2 | 40.6 | 41.1 |
| 28 | 56.4 | 56.2 | 55.0 | 60.8 | 60.5 | 60.3 |
| 29 | 65.6 | 62.0 | 67.1 | 68.6 | 65.1 | 70.3 |
| 30 | 80.0 | 82.0 | 82.0 | 80.0 | 82.1 | 82.0 |
| 31 | 38.2 | 41.9 | 38.5 | 38.5 | 43.2 | 38.5 |
| 32 | 41.7 | 46.6 | 45.2 | 39.9 | 44.5 | 43.2 |
| 33 | | | | 39.7 | 42.0 | 40.8 |
| 34 | | | | 60.2 | 60.7 | 57.0 |
| 35 | | | | 62.7 | 64.2 | 62.3 |
| 36 | | | | 34.2 | 29.8 | 33.5 |

Table C.2. VAP and Turnout in Parts of Districts that Remained, Were Removed, and Newly Incorporated Parts of Districts

| | Voting Age Population | | | 2008 Turnout | | |
|---|---|---|---|---|---|---|
| CD Number | Same | Out | In | Same | Out | In |
| 1 | 511,664 | 30,351 | 14,014 | 253,705 | 15,587 | 7,584 |
| 2 | 261,555 | 313,363 | 248,613 | 132,675 | 134,212 | 104.047 |
| 3 | 403,871 | 201,701 | 94,378 | 217,918 | 80,806 | 51,179 |
| 4 | 490,551 | 128.172 | 30,351 | 243,675 | 68,042 | 15,587 |
| 5 | 440,542 | 96,619 | 67,364 | 203,978 | 47,103 | 17,722 |
| 6 | 200,974 | 381,494 | 281,338 | 103,022 | 185,846 | 88,635 |
| 7 | 418,129 | 181,818 | 98,682 | 209,456 | 87,849 | 37,886 |
| 8 | 413,765 | 208,390 | 100,594 | 190,193 | 103,765 | 44,224 |
| 9 | 416,827 | 108,289 | 77,306 | 141.088 | 37,630 | 30,728 |
| 10 | 400,843 | 306,629 | 117,266 | 199,784 | 142,561 | 68,679 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 11 | 415,915 | 113,993 | 107,312 | 188,596 | 58,290 | 54,684 |
| 12 | 297,943 | 305,588 | 207,860 | 137,939 | 136,045 | 103,528 |
| 13 | 454,171 | 48,957 | 62,941 | 217,400 | 21,375 | 29,541 |
| 14 | 276,111 | 293,549 | 250,755 | 130,447 | 139,358 | 118,671 |
| 15 | 293,528 | 244,096 | 172,268 | 86,876 | 85,267 | 58,534 |
| 16 | 486,361 | 46,266 | 9,352 | 168,098 | 12,199 | 2,115 |
| 17 | 350,055 | 228,128 | 178,202 | 148,318 | 109,814 | 84,449 |
| 18 | 340,684 | 182,545 | 176,924 | 135,048 | 60,349 | 74,661 |
| 19 | 471,579 | 48,624 | 50,398 | 217,808 | 22,531 | 21,255 |
| 20 | 347,971 | 168,328 | 164.747 | 132,024 | 50,774 | 69,885 |
| 21. | 353,349 | 300,804 | 208,744 | 205,038 | 163,824 | 115,861 |
| 22 | 391,943 | 264,756 | 102,768 | 201.448 | 113,980 | 47,221 |
| 23 | 334, | 267, | 159, | 142,4 | 103.3 | 52,1 |

| | | | | | | |
|---|---|---|---|---|---|---|
| | 318 | 851 | 744 | 09 | 00 | 29 |
| 24 | 375,225 | 205,125 | 154,018 | 194,994 | 86,428 | 67,560 |
| 25 | 126,507 | 489,434 | 392,869 | 78,045 | 221.205 | 194,894 |
| 26 | 385,140 | 268,028 | 107,779 | 201,471 | 134,204 | 29,089 |
| 27 | 279,138 | 245,548 | 236,807 | 116,813 | 70,223 | 113,343 |
| 28 | 336,287 | 237,016 | 125,699 | 101,885 | 84,328 | 54,740 |
| 29 | 386.108 | 70,324 | 93,029 | 89,437 | 19,094 | 25,443 |
| 30 | 396,959 | 110,450 | 94,842 | 170,439 | 40,021 | 41,505 |
| 31 | 500,711 | 148,891 | 0 | 243,169 | 59,168 | 0 |
| 32 | 185,129 | 290,757 | 343,429 | 116,270 | 93,714 | 154,875 |
| 33 | | | 510,694 | | | 255,594 |
| 34 | | | 483,742 | | | 151,669 |
| 35 | | | 499, | | | 177, |

| | | |
|---|---|---|
| | 962 | 057 |
| 36 | 511,<br>093 | 224,<br>318 |

Table C.3. Hispanic and White Percentof VAP in Parts of Districts that Remained, Were Removed, and Newly Incorporated Parts of Districts

| | Hispanic % off VAP | | | White % of VAP | | |
|---|---|---|---|---|---|---|
| CD Number | Same | Out | In | Same | Out | In |
| 1 | 12.5 | 4.1 | 4.8 | 67.8 | 82.3 | 86.8 |
| 2 | 20.3 | 18.9 | 35.6 | 59.3 | .51.5 | 45.7 |
| 3 | 12.9 | 32.5 | 12.5 | 63.7 | 39.4 | 42.0 |
| 4 | 10.1 | 13.1 | 4.1 | 76.8 | 70.6 | 82.3 |
| 5 | 17.0 | 21.6 | 47.1 | 67.7 | 56.6 | 27.1 |
| 6 | 17.8 | 20.3 | 55.0 | 69.1 | 54.0 | 26.8 |
| 7 | 22.9 | 21.6 | 36.2 | 56.2 | 56.7 | 41.2 |
| 8 | 167 | 5.7 | 17.0 | 73.3 | 82.8 | 64.1 |
| 9 | 38.0 | 42.3 | 23.0 | 12.0 | 14.8 | 19.1 |
| 10 | 24,2 | 26.6 | 16.6 | 59.8 | 52.5 | 69.9 |
| 11 | 33.2 | 25.4 | 11.5 | 60.6 | 70.5 | 85.4 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 12 | 19.7 | 29.3 | 22.6 | 68.3 | 60.8 | 47.9 |
| 13 | 19.6 | 20.4 | 25.1 | 71.2 | 72.2 | 71.0 |
| 14 | 22.5 | 28.5 | 14.9 | 63.1 | 58.9 | 51.3 |
| 15 | 84.1 | 72.3 | 65.9 | 13.2 | 24.6 | 29.7 |
| 16 | 77.5 | 96.6 | 92.6 | 17.1 | 2.3 | 6.5 |
| 17 | 19.6 | 14.1 | 20.0 | 63.8 | 79.3 | 59.2 |
| 18 | 32.2 | 51.7 | 31.3 | 015.0 | 27.4 | 35.4 |
| 19 | 29.6 | 26.1 | 28.2 | 62.0 | 70.8 | 63.3 |
| 20 | 70.2 | 63.5 | 55.9 | 21.3 | 22.7 | 33.8 |
| 21. | 22.9 | 27.3 | 26.6 | 69.7 | 56.0 | 64.8 |
| 22 | 20.8 | 28.6 | 22.3 | 48.7 | 47.5 | 59.9 |
| 23 | 62.2 | 63.4 | 66.6 | 33.6 | 27.2 | 28.3 |
| 24 | 18.3 | 32.9 | 25.5 | 59.7 | 36.0 | 52.0 |
| 25 | 18.9 | 37.7 | 13.9 | 66.0 | 52.0 | 75.6 |
| 26 | 15.9 | 21.2 | 56.0 | 70.3 | 52.9 | 31.8 |
| 27 | 54.8 | 85.6 | 33.9 | 38.9 | 12.5 | 56.9 |
| 28 | 85.0 | 62.4 | 44.5 | 13.6 | 32.7 | 34.7 |
| 29 | 47.8 | 58.9 | 59.0 | 13.0 | 30.6 | 17.3 |
| 30 | 33.5 | 39.3 | 45.8 | 14.3 | 45.7 | 27.2 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 31 | 19.5 | 15.9 | -- | 63.6 | 65.1 | -- |
| 32 | 13.2 | 51.7 | 24.8 | 73.1 | 31.6 | 50,9 |
| 33 | | | 19.7 | | | 59.9 |
| 34 | | | 79.1 | | | 18.4 |
| 35 | | | 57.6 | | | 29.6 |
| 36 | | | 21,9 | | | 66.8 |

Table C.4. Share of 2008 Vote for Minority Preferred Candidates for Statewide and Federal Office, in Parts of Districts that Remained, Were Removed, and Newly Incorporated Parts of Districts

| | Averae 2008 Vote Share | | | 2008 Presidential Vote Share | | |
|---|---|---|---|---|---|---|
| CD Number | Same | Out | In | Same | Out | In |
| 1 | 34.4 | 35.0 | 27.0 | 30.8 | 28.5 | 23.6 |
| 2 | 33.8 | 50.7 | 40.0 | 33.3 | 46.4 | 39.7 |
| 3 | 36.8 | 50.0 | 31.2 | 39.0 | 50.1 | 32.5 |
| 4 | 34.7 | 32.2 | 35.0 | 29.7 | 33.1 | 28.5 |
| 5 | 38.5 | 41.8 | 66.1 | 35.2 | 41.1 | 65.5 |
| 6 | 33.3 | 45.9 | 58.0 | 31.1 | 44.7 | 56.6 |
| 7 | 38.0 | 46.4 | 42.1 | 39.0 | 46.7 | 42.3 |
| 8 | 26.5 | 34.8 | 35.3 | 25.5 | 26.0 | 30.5 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 9 | 77.6 | 79.2 | 77.5 | 76.9 | 79.1 | 77.4 |
| 10 | 42.8 | 47.0 | 45.8 | 42.5 | 47.6 | 44.1 |
| 11 | 26.9 | 27.6 | 26.4 | 23.7 | 24.7 | 22.1 |
| 12 | 36.8 | 37.7 | 53.9 | 37.2 | 36.0 | 54.0 |
| 13 | 25.2 | 34.2 | 26.2 | 22.4 | 22.4 | 22.6 |
| 14 | 39.6 | 34.6 | 54.4 | 35.5 | 31.3 | 49.6 |
| 15 | 68.7 | 60.9 | 51.4 | 64.2 | 55.9 | 48.7 |
| 16 | 67.0 | 84.9 | 76.2 | 65.0 | 82.9 | 74.6 |
| 17 | 40.4 | 32.0 | 50.9 | 36.8 | 26.0 | 49.1 |
| 18 | 85.7 | 61.6 | 69.9 | 85.6 | 59.8 | 70.1 |
| 19 | 29.9 | 25.7 | | 34.3 | 28.3 | 20.9 |
| 20 | 66.1 | 70.7 | 55.0 | 62.8 | 67.4 | 53.7 |
| 21. | 33.0 | 49.0 | 58.7 | 34.0 | 49.8 | 59.1 |
| 22 | 40.9 | 47.5 | 30.0 | 40.0 | 43.9 | 29.3 |
| 23 | 49.4 | 59.9 | 56.2 | 46.5 | 58.0 | 51.5 |
| 24 | 37.5 | 58.1 | 45.1 | 39.0 | 57.4 | 46.5 |
| 25 | 58.9 | 62.1 | 38.3 | 60.0 | 59.8 | 36.2 |
| 26 | 34.4 | 49.13 | 60.0 | 36.2 | 49.6 | 59.1 |
| 27 | 51.0 | 70.5 | 40.3 | 46.0 | 66.3 | 35.0 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 28 | 70.1 | 50.7 | 57.0 | 635 | 47.3 | 54.7 |
| 29 | 713 | 54.7 | 703 | 64.9 | 48.6 | 66.0 |
| 30 | 86.5 | 61.5 | 66.1 | 86.3 | 63.6 | 65.2 |
| 31 | 42.1 | 39.6 | -- | 43.2 | 36.6 | -- |
| 32 | 36.2 | 54.9 | 47.2 | 39.8 | 55.0 | 48.0 |
| 33 | | | 42.7 | | | 42.0 |
| 34 | | | 65.3 | | | 60.7 |
| 35 | | | 66.1 | | | 64.2 |
| 36 | | | 36.3 | | | 29.8 |

## APPENDIX

## THE AMERICAN COMMUNITY SURVEY AND THE CITIZEN VOTING AGE POPULATION

Stephen Ansolabehere

In 2000, the Census gauged the Citizen Voting Age Population in the United States using the long-form of the Census. The long-form was a random sample survey administered at the same time as the Census Enumeration. The survey was sufficiently large to provide estimates of citizenship and other population characteristics at the Census block level, the lowest level of aggregation of Census datA. Because it is a random sample survey rather than an enumeration there is always a margin of error or sampling error associated with the citizenship data.

In 2005, the Census Bureau began the American Community Survey (ACS), which is a

random sample survey of 3 million Americans each year, with the aim of replacing the Census Long Form with the ACS. Census made this switch so as to measure changes in population characteristics over time, because many federal programs are tied to income and other indicators and the information from the Long-Form becomes quickly out of date. The annual ACS sample is sufficient to provide information such as citizenship down to the level of areas of 65,000 persons or more with a reasonable degree of precision (a small margin of error). To gain sufficient precision at the block level, Census constructs a 5-year average of the ACS.

The most current release of such data is the average of the surveys from 2005 to 2009. The Census Bureau has scheduled the release of the 5-year average of the 2006 to 2010 ACS in December, 2011.

1. Discrepancies between ACS and the Enumeration

The population figures produced using the ACS are systematically lower than the population counts from the Census Enumeration, which is the official source for population counts. The 2010 Census Enumeration records 25.1 million persons in the state of Texas in 2010. The 2005-2009 ACS estimate is 23.8 million persons. ACS underestimates the total population by 1.3 million persons. The 2005-2009 ACS estimates a Texas Voting Age Population of 17,185,930 persons. The actual enumeration figure is 18,279,737, which is 1.1 million persons larger than the ACS projection.

The discrepancy between the 2010 Enumeration and the 2005-2009 ACS estimates

varies across racial groups. Most of the difference arises among Hispanics. The ACS and Census Enumeration provide counts of total population and voting age population of White Non-Hispanics, Blacks, and Hispanics. The 2005¬2009 ACS estimates of the White Non-Hispanic population exceeds the Census enumeration count by 30,000 persons. The ACS under estimates Blacks by 200,000 persons. And the ACS under estimates Hispanics by 900,000 persons. Hence, Hispanics and Blacks account for 1.1 million persons of the 1.3 million persons in Texas under estimated by the ACS. The remaining 200,000 person discrepancy between the ACS and Enumeration consist of persons of another race, such as American Indians or Asian, or who identify as more than one race. Exact figures are provided in Table A.2.

Similar discrepancies arise with the Voting Age Population using the ACS. The 2005-2009 ACS under estimates the White Voting Age Population by 136,000 persons, which is 1.5% below the actual number. The ACS under estimates the Black Voting Age Population by 150,000, which is 7.8% below the actual number. And, the ACS under estimates Hispanic Voting Age Population by 590,000 persons, which is 10.6% below the actual number.

The differences between the ACS and Enumeration far exceed what might arise from sampling error. ACS reports a margin of error for each of its estimates. All of the observed differences between the survey and enumeration exceed the reported margins of error. In other words, these discrepancies are highly unlikely to have arrived by chance or as a result of sampling variation and reflect systematic bias. The difference appears to be

due to the Census' new approach to measuring CVAP. The Census 2000 Long Form in 2000 estimated Texas' population within 30,000 of the Census Enumeration.

2. A Simple Explanation

The difference appears to be due to population trends and the different time frames of the Enumeration and of the 5-year average of the ACS 2005-2009 study. The Enumeration was conducted in April 2010. The ACS figures reported by Census for analysis of Citizen Voting Age Population are constructed by averaging five years of data, from 2005 to 2009. The mid-point year is 2007. According to the 2000 and 2010 enumerations, the total population growth over the entire decade in the state of Texas was 4,293,473, or 429,374 per year. Over the 3-year period from 2007 to 2010, then, one would expect the population of Texas to grow 1,288,123 (3 times 429,374). Thus, from simple trends in the population one would expect a discrepancy between the Enumeration and the ACS of approximately 1.3 million persons, which is almost exactly the observed difference between the total counts from the two sources. Finally, the projection of Texas' population from the one-year 2010 ACS is 25.2 million, which differs only slightly from the Enumeration's count of 25.1 million.

Voting Age Population exhibits similar trending. According the Census enumerations, the VAP in Texas was 14,977,890 in 2000 and 18,279,736 in 2010, a growth of 3,301,846 total or 330,185 per year. The difference between the 2000 VAP and the 2005-2009 ACS estimate of the VAP is 2,208,040, or a growth rate of 315,434. The annual growth in VAP

is quite similar using either the 2005-2009 ACS or the 2010 Enumeration to estimate the change since the 2000 Enumeration.

These findings suggest caution in using the ACS CVAP estimates for the State of Texas in 2010. The 2005-2009 ACS are not calibrated to match the 2010 Enumeration, and the 2005-2009 ACS understates the overall population and the populations within specific subgroups by the amount implied by a linear trend from 2007 to 2010.

3. A Possible Adjustment

One may use the ACS and the Enumeration to estimate the CVAP for the State and specific groups. The Enumeration provides counts of all persons with in a given ethnic or racial group. The ACS provides estimates of the percent of persons in each group who are Citizens of Voting Age. That percent is very stable year to year from 2005 to 2010 for the major ethnic and racial groups in Texas and for the State's overall population. One way to adjust the ACS to be consistent with the Enumeration, then, is to multiply the percent of each group who are adult citizens (from the ACS) times the Census enumeration of 2010 for each group to estimate the CVAP of each group in 2010.

According to the ACS figures, 77.0 percent of Whites are citizens of voting age, 68.9 percent of Blacks are citizens of voting age, and 42.9 percent of Hispanics are citizens of voting age. These percentages are stable year to year from 2005 to 2009. One may then calculate the population for each group's CVAP as their total population in the enumeration times the appropriate percentage. That calculation implies a total CVAP for the state of

15,725,999, which is 829,604 more persons than the ACS reports in their estimates.

The calculations reveal that the ACS slightly over estimates the White CVAP, and substantially underestimates of the Black and Hispanic CVAP. Rescaling the ACS to be in line with the population counts from the Enumeration implies that there are 8,774,942 White citizens of voting age; 1,997,202 Black citizens of voting age; and 4,063,891 Hispanic citizens of voting age. The figure for whites is almost 18,000 persons less than the ACS estimate of 8,793,200. The figure for Blacks is 133,000 (or about 8%) above the ACS estimate of 1,864,530. And, the figure for Hispanics is 390,000 (10%) above the ACS estimate of 3,674,800.

In the past, courts have relied on the citizen voting age population from the Census Long-Form to determine whether the majority in a district are Hispanic Citizens of Voting Age. Considering the discrepancies between the ACS and the enumeration, care needs to be taken in applying the 2005-2009 ACS Citizenship estimates to redistricting questions. Uncritical use of the 2005-2009 ACS counts will not produce an accounting of the electorate that is consistent with the Enumeration. In fact, ACS would provide a count too low by 1.3 million people.

This does not mean that the ACS Citizenship data are not useful. Rather, they need to be treated in a way that is consistent with the official population counts from the Enumeration. One can use the Enumeration and the ACS 2005 to 2009 together to project the likely CVAP for different racial groups. The Census Bureau is scheduled to release the 2006-2010 ACS average in December,

2011, and these data are to be calibrated to the 2010 Enumeration. Until such data are available, though the best we can rely on are projections using ACS and the Enumeration.

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