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

SHANNON PEREZ, *et al.*, *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants.*	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]

STATE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants the State of Texas, Rick Perry, in his official capacity as Governor of Texas, and Nandita Berry, in her official capacity as Texas Secretary of State (the "State Defendants") hereby move for partial summary judgment under Federal Rule of Civil Procedure 56 on the following claims:

(1) all claims alleging a violation of the Fifteenth Amendment to the United States Constitution;

(2) all claims alleging a violation of the Fourteenth Amendment to the United States Constitution with respect to the 2011[1] and 2013 House and congressional redistricting plans;

(3) all claims asserted against House District 90 in Plan H358;

(4) all claims alleging a violation of section 2 of the Voting Rights Act based on the failure to create "coalition" districts; and

(5) all claims alleging a violation of section 2 of the Voting Rights Act based on the Texas Constitution's whole-county provision.

For the reasons stated in the following memorandum of points and authorities, the State Defendants respectfully move for summary judgment on the above-listed claims.

[1] The State Defendants have also moved to dismiss all claims against the 2011 redistricting plans for lack of subject matter jurisdiction. If granted, that motion would make a ruling on the motion for summary judgment unnecessary with respect to the 2011 claims.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE STATE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A motion for summary judgment must be supported by (a) citing to specific materials that resolve an issue of fact or (b) "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

II. THE STATE DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ALL FIFTEENTH AMENDMENT CLAIMS ASSERTED AGAINST THE 2013 REDISTRICTING PLANS.

Plaintiffs allege that the House and congressional redistricting plans enacted by the Legislature in 2013 discriminate on the basis of race and national origin in violation of the Fifteenth Amendment.[2] All of these claims fail as a matter of law because the Fifteenth Amendment does not create a claim for vote dilution. *Prejean v. Foster*, 227 F.3d 504, 519 (5th Cir. 2000) ("[T]he Supreme Court has rejected application of the Fifteenth Amendment to vote dilution causes of action.") (citing *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000)). The Fifteenth Amendment prohibits the states from denying a citizen's right to

[2] *See* Fourth Amended Complaint of Plaintiffs Texas Latino Redistricting Task Force, et al. (Doc. 891) ¶ 84; Plaintiff-Intervenor Congressman Cuellar's Second Amended Complaint in Intervention (Doc. 893) ¶ 39; LULAC Intervenors Third Amended Complaint (Doc. 894) ¶ 21; Rodriguez Plaintiffs' Second Amended Complaint (Doc. 896) ¶ 25; Plaintiff MALC's Third Amended Complaint (Doc. 897) ¶ 77; Perez Plaintiffs' Sixth Amended Complaint (Doc. 959) ¶¶ 27, 28; Second Amended Complaint of Plaintiff-Intervenors Congresspersons Eddie Bernice Johnson, Sheila Jackson Lee and Alexander Green (Doc. 901) ¶ 71; Quesada Plaintiffs' Third Amended Complaint (Doc. 899) ¶¶ 79, 81, 83; Third Amended Complaint of Plaintiff-Intervenors Texas State Conference of NAACP Branches, et al. (Doc. 900) ¶¶ 62, 64; United States' Complaint in Intervention (Doc. 907) ¶¶ 70, 71.

vote. *See* U.S. Const., amend. XV; *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality) ("That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'"). There is no allegation or evidence that the State's redistricting plans will deny or abridge any citizen's right to cast a ballot, much less that they were passed for the purpose of denying any citizen's right to cast a ballot on the basis of race, color, or previous condition of servitude. Because there is no cause of action for vote dilution under the Fifteenth Amendment, the State Defendants are entitled to judgment as a matter of law on all Fifteenth Amendment claims.

III. THE STATE DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ALL FOURTEENTH AMENDMENT CLAIMS.

A. Legal Standard

The Fourteenth Amendment's Equal Protection Clause provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. "[I]n order for the Equal Protection Clause to be violated, 'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.'" *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976)). A claim of intentional racial discrimination under the Fourteenth Amendment thus comprises three distinct elements: (1) a racially discriminatory purpose; (2) a discriminatory impact on the targeted racial group; and (3) a causal connection between the discriminatory purpose and the discriminatory effect.

First, the Fourteenth Amendment requires proof of actual intent to injure persons because of their race or ethnicity. A law does not violate the Equal Protection Clause

"simply because it may affect a greater proportion of one race than another," *id.* at 618; it must be enacted for the specific purpose of disadvantaging individuals *because* of their membership in a minority group. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) "'[D]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action, at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

Second, a Fourteenth Amendment racial-discrimination claim requires proof that the challenged law achieved its intended purpose through a disparate impact on members of the targeted racial group. This is consistent with the text of the Constitution; a statute does not "deny to any person . . . the equal protection of the laws" if it has no effect on any person. *See* U.S. Const. amend. XIV; *cf. id.* amend. I ("Congress shall *make* no law . . . ." (emphasis added)). The Supreme Court has consistently held that discriminatory purpose alone is not sufficient to establish a constitutional violation. In *United States v. O'Brien*, 391 U.S. 367, 382-83 (1968), the Court rejected a claim that a criminal prohibition on the destruction of draft cards was unconstitutional because "the 'purpose' of Congress was 'to suppress freedom of speech.'" The Court relied on the "familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* at 383.[3] This principle rests on the Court's unwillingness

[3] *See also State of Arizona v. State of California*, 283 U.S. 423, 455 (1931) (collecting cases); *McCray v. United States*, 195 U.S. 27, 56 (1904) ("The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."), *cited in O'Brien*, 391 U.S. at 383.

> to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Id. at 384. The Court explained that it would not invalidate a law "which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *Id.*

Similarly, in *Palmer v. Thompson*, 403 U.S. 217 (1971), the Court rejected the argument that discriminatory purpose alone establishes an equal-protection violation. It explained that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." *Id.* at 224. As in *O'Brien*, the Court identified problems of proof and utility in striking down laws based on motive alone:

> It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

Id. at 225. Although there was some evidence that the city had closed its pools "because of ideological opposition to racial integration," *id.* at 224-25, the Court found no Equal Protection Clause violation because there was no discriminatory effect; the city "closed its pools to black and white alike." *Id.* at 226.

Third, a Fourteenth Amendment racial-discrimination claim requires causation—proof that the racially discriminatory purpose was essential to the legislature's enactment. In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285 (1977), the Supreme Court held that even if the plaintiff could prove that his constitutionally protected

conduct "played a substantial part" in the decision to terminate his employment, that decision would not "necessarily amount to a constitutional violation justifying remedial action." Instead, once the employee established that his protected conduct was a "motivating factor" in the decision, the burden shifted to the employer to prove "by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.* at 287; *cf. Texas v. Lesage*, 528 U.S. 18, 21 (1999) (per curiam) ("[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.").

The causation analysis described in *Mt. Healthy* forms part of the overall inquiry into discriminatory purpose outlined in *Arlington Heights*, which was decided on the same day. As the Court explained in *Arlington Heights,* proof that a decision

> was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind *no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose.* In such circumstances, there would be no justification for judicial interference with the challenged decision.

429 U.S. 252, 270 n.21 (1977) (emphasis added) (citing *Mt. Healthy*, 429 U.S. 274). Under *Arlington Heights* and *Mt. Healthy*, if a plaintiff can prove that racial discrimination was "a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). In *Hunter v. Underwood*, the Supreme Court held that a

statute denying the franchise to persons convicted of a "crime involving moral turpitude" violated the Equal Protection Clause where the State effectively conceded "both that discrimination against blacks was a motivating factor for the provision and that [it] would not have been adopted . . . in the absence of the racially discriminatory motivation." *Id.* at 231; *cf. Hartman v. Moore*, 547 U.S. 250, 260 (2006) ("[T]he causation is understood to be but-for causation, without which the adverse action would not have been taken . . . . [A]ction colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway."). Thus proof of discriminatory purpose does not establish a Fourteenth Amendment violation unless it was a cause in fact of the challenged legislative act.

B. The State Defendants Are Entitled To Summary Judgment On All Claims Of Intentional Discrimination Asserted Against the 2011 House And Congressional Redistricting Plans.

Some of the plaintiffs allege that the 2011 House and congressional redistricting plans were enacted for the purpose of discriminating on the basis of race in violation of the Fourteenth Amendment.[4] To establish a violation of the Fourteenth Amendment's Equal Protection Clause, a plaintiff must prove both discriminatory purpose and discriminatory effect. The undisputed facts demonstrate that the Plaintiffs in this case cannot prove that the 2011 House or congressional redistricting plans had a discriminatory effect on any voter. Because the Plaintiffs cannot prove an essential element of their Fourteenth Amendment

[4] *See* Fourth Amended Complaint of Plaintiffs Texas Latino Redistricting Task Force, et al. (Doc. 891) ¶ 82; LULAC Intervenors Third Amended Complaint (Doc. 894) ¶¶ 1, 20; Rodriguez Plaintiffs' Second Amended Complaint (Doc. 896) ¶ 24; Plaintiff MALC's Third Amended Complaint (Doc. 897) ¶ 77; Quesada Plaintiffs' Third Amended Complaint (Doc. 899) ¶¶ 79; Third Amended Complaint of Plaintiff-Intervenors Texas State Conference of NAACP Branches, et al. (Doc. 900) ¶¶ 62; United States' Complaint in Intervention (Doc. 907) ¶¶ 70 (Plan C185), 71 (Plan H283).

claims as a matter of law, the State Defendants are entitled to summary judgment on all Fourteenth Amendment claims asserted against the State's 2011 redistricting plans.

Proof of discriminatory impact is an essential element of an equal-protection claim under the Fourteenth Amendment. In *Palmer v. Thompson*, 403 U.S. 217, 224 (1971), the Court explained that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." *See also Shaw v. Hunt*, 517 U.S. 899, 923 (1996) (Stevens, J., dissenting) ("[R]acially motivated legislation violates the Equal Protection Clause only when the challenged legislation 'affect[s] blacks differently from whites.'" (quoting *Palmer*, 403 U.S. at 225)); *Shaw v. Reno*, 509 U.S. 630, 670-71 (1993) (White, J., dissenting) ("[W]e have put the plaintiff challenging the district lines to the burden of demonstrating that the plan was meant to, and did in fact, exclude an identifiable racial group from participation in the political process.").

It is an undisputed fact that the 2011 redistricting plans were never used to conduct an election. Several plaintiffs acknowledge this fact in their pleadings, alleging that the 2011 House and congressional redistricting plans never became effective as law.[5] Because the State's 2011 redistricting plans had no impact on any Texas voter, those plans could not have had a discriminatory impact on members of racial or language minority groups. It follows that the 2011 redistricting plans have not denied any person of the equal protection of the

[5] *See* Plaintiff MALC's Third Amended Complaint (Doc. 897) ¶¶ 23 ("The 2011 enactment for redistricting of the Texas House of Representatives never became effective in law."), 26 ("The 2011 enactment for redistricting of the United States House of Representatives (Congressional Districts) never became effective in law."); Rodriguez Plaintiffs' Second Amended Complaint (Doc. 896) ¶ 14 ("Plan C185 never became operative as a matter of federal law."); LULAC Intervenors Third Amended Complaint (Doc. 894) ¶ 12 ("Plan C185 never became operative as a matter of federal law.").

laws. Plaintiffs therefore cannot prove that the 2011 plans had a discriminatory impact on minority voters—an essential element of their equal-protection claim. All Fourteenth Amendment claims against the 2011 House and congressional redistricting plans therefore fail as a matter of law, and the Court should enter summary judgment for the Defendants.

C. The State Defendants Are Entitled To Summary Judgment On All Claims Of Intentional Discrimination Asserted Against The 2013 House and Congressional Redistricting Plans.

Plaintiffs claim that the Texas Legislature enacted this Court's interim House and congressional redistricting plans for the purpose of discriminating on the basis of race in violation of the Fourteenth Amendment.[6] These claims are utterly baseless. The Legislature was entitled to presume that this Court acted in good faith and without a racially discriminatory purpose when it implemented Plans C235 and H309 for the 2012 elections. There is no evidence that the Legislature or any of its members acted with a racially discriminatory purpose in adopting those plans (with modifications to the House plan) on a permanent basis. Even if there were some hint of intentional racial discrimination—and there is none—uncontroverted evidence shows that racial discrimination was neither a motivating factor nor a cause in fact of the Legislature's enactment of Plans C235 and H358.

Plaintiffs have not alleged or offered evidence that this Court acted for the purpose of discriminating on the basis of race when it adopted Plan C235 as an interim redistricting

[6] *See* Fourth Amended Complaint of Plaintiffs Texas Latino Redistricting Task Force, et al. (Doc. 891) ¶ 82 (Plan H358); LULAC Intervenors Third Amended Complaint (Doc. 894) ¶¶ 1, 20 (Plan C235); Rodriguez Plaintiffs' Second Amended Complaint (Doc. 896) ¶¶ 19, 24 (Plan C235); Plaintiff MALC's Third Amended Complaint (Doc. 897) ¶ 77 (Plan H358); Perez Plaintiffs' Sixth Amended Complaint (Doc. 959) ¶¶ 27, 28 (Plan C235), 32 (Plan H358); Second Amended Complaint of Plaintiff-Intervenors Congresspersons Eddie Bernice Johnson, Sheila Jackson Lee and Alexander Green (Doc. 901) ¶¶ 65, 67, 71 (Plan C235); Quesada Plaintiffs' Third Amended Complaint (Doc. 899) ¶ 81 (Plan C235); Third Amended Complaint of Plaintiff-Intervenors Texas State Conference of NAACP Branches, et al. (Doc. 900) ¶¶ 64 (Plans C235 and H358).

plan for the 2012 congressional elections. Nor could they. When it implemented Plan C235, the Court "t[ook] care not to incorporate into the interim plan any legal defects in the state plan." Order (Doc. 691) at 10-11 (quoting *Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (per curiam)). The Court noted that "the interim plan must address the allegations of discrimination without going beyond them. C235 adequately does so." *Id.* at 38. In some instances, the Court expressly determined that the interim plan provided a remedy for specific Fourteenth Amendment claims. *See id.* at 38-39 ("The Court need not analyze Plaintiffs' Fourteenth Amendment Claims related to DFW because they are resolved by C235."); *id.* at 41 ("C235 seeks to remedy the alleged discrimination that occurred. Insofar as C235 is not purposefully discriminatory . . ., the Court cannot remedy all asserted deficiencies in the districts under C235."). In other instances, the Court necessarily determined that retaining challenged districts would not "incorporate into the interim plan any legal defects in the state plan." *Id.* at 10-11; *cf. id.* at 49 (declining to alter CD 25); *id.* at 55 (declining to alter CD 27).

Nor can Plaintiffs offer any evidence that the Court intentionally discriminated on the basis of race when it adopted Plan H309—the plan that was ultimately adopted by the Legislature, as amended, as Plan H358. In fashioning an interim House plan, the Court took "guidance from the enacted plan except in geographical areas in which the plan is legally defective," Order (Doc. 690) at 2, and it followed "the Supreme Court's direction to leave undisturbed any district that is free from legal defect," *id.* at 3 (citing *Perry*, 132 S. Ct. at 941). The Court took specific care not to incorporate any element of the legislatively enacted plan that was "allegedly tainted by discriminatory purpose." *Id.* at 4 (explaining alterations to HD

41). In doing so, the Court either acted to address specific claims of intentional discrimination, *see id.* at 5-6 (describing alterations to HD 117), or provided a remedy for claims of intentional discrimination by addressing other claims, *see id.* at 5 (explaining that changes to HD 35 "provide an appropriate remedy" for claims of intentional discrimination); *id.* at 11 (explaining that the alteration of HD 77 and HD 78 "provides an appropriate remedy for the alleged Section 2 and Fourteenth Amendment violations" in El Paso County).

In pressing their unfounded claims of intentional racial discrimination, Plaintiffs are determined to ignore the simplest and most logical explanation for the Legislature's adoption of the court-drawn redistricting plans: The Legislature justifiably believed that the Court drew legal plans that did not intentionally discriminate on the basis of race. This fact is evident in the legislative record. In the House Select Committee on Redistricting, the chair of the committee explained that he believed the court-drawn maps were legal, but he wanted the committee to address any potential legal deficiency. *See* Exhibit A-1, Transcript, Public Hearing of the Select Committee on Redistricting (May 31, 2013) at 26:3-7 ("I believe the three maps provided herein are legal and provide the voters with much needed stability going forward. If there is a legal deficiency in these maps, I want this committee to know about it and I want to correct it."). During the floor debate in the Texas House, the chair of the redistricting committee explained, "In the end, the committee found that [sic] the court-ordered interim maps to be legally sufficient to meet our legislative duties to enact maps that comply with the constitutions of the United States and Texas under the Voting Rights Act." Exhibit A-2, Texas House Journal, Supplement at S1 (June 20, 2013) (statement of Rep.

Darby). The committee chairman explained further that "it's been my position from the start that these maps are legal. And if somebody can demonstrate to me that a district has been drawn illegally, and it can be fixed and changed, then I want to consider those amendments and consider those changes." *Id.* at S5; *see also id.* at S10 ("Again, I want to make sure that we only adopt changes that are legal, that actually makes changes to an already, what I consider it to be, legal map."); *id.* at S30 ("These maps were drawn by the district court in San Antonio. So I would say on their face, they're nondiscriminatory and legal."). The Legislature had every reason to believe—as the record shows it did—that the court-drawn redistricting plans complied with the Constitution and the Voting Rights Act. At the very least, the Legislature was entitled to take the Court at its word that the interim plans were not the products of intentional racial discrimination.

Even if the Legislature's faith in the Court was misplaced—and there is absolutely no reason to believe that it was—that does not support an inference of intentional racial discrimination. Just as this Court was entitled to a presumption of good faith by the Legislature, the Legislature must be presumed to have acted in good faith when it adopted the court-drawn congressional plan and the amended court-drawn House plan. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("[T]he good faith of a state legislature must be presumed."). There is no evidence to suggest that the Legislature or any of its members adopted the court-drawn plans for the purpose of discriminating on the basis of race. Plaintiffs therefore cannot satisfy their burden to prove that racial discrimination was a substantial or motivating factor behind the Legislature's enactment of the 2013 House and congressional redistricting plans. *See Mt. Healthy*, 429 U.S. at 285.

The question posed by the Fourteenth Amendment is not whether the court-drawn interim plans or the legislatively enacted plans are perfect. The question is whether intentional racial discrimination was a substantial or motivating factor in the enactment of the 2013 plans and, if it was, whether those plans would have been enacted in the absence of a discriminatory purpose. *See id.*; *Arlington Heights*, 429 U.S. at 270 n.21. All available evidence is consistent with the legal presumption that the Legislature acted in good faith when it enacted the 2013 House and congressional redistricting plans. Plaintiffs can produce no evidence to rebut that presumption by proving that racial discrimination was substantial or motivating factor in the Legislature's adoption of redistricting plans in 2013, much less that racial discrimination was a but-for cause of their enactment. The State Defendants are entitled to summary judgment on all claims of intentional racial discrimination under the Fourteenth Amendment asserted against the 2013 House and congressional redistricting plans.

IV. THE STATE DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS DIRECTED AT HOUSE DISTRICT 90 IN PLAN H358.

A. The TLRTF Plaintiffs' Section 2 Claim Regarding House District 90

The TLRTF Plaintiffs contend that the Legislature's changes to House District 90 in 2013 violate section 2 of the Voting Rights Act "by having the effect of canceling out or minimizing their individual voting strength as minorities in Texas." Fourth Amended Complaint of Plaintiffs Texas Latino Redistricting Task Force, et al. ¶ 86 (Doc. 891). In support of their section 2 claim, the TLRTF Plaintiffs point to the reduction in Hispanic registered voters in the 2013 House plan (H358) as compared to the Court's interim House plan (H309). *Id.* ¶¶ 41, 76-78. The TLRTF Plaintiffs allege that Plan H358's changes to HD

90 reduce "the ability of Latino voters to nominate their preferred candidate in subsequent elections." *Id.* ¶ 41. Summary judgment is appropriate on the TLRTF Plaintiffs' section 2 claim because they have not proven, as they must, that the configuration of HD 90 in Plan H358 will deny or abridge the rights of Hispanic voters on account of their membership in a racial or language minority. *See* 42 U.S.C § 1973(a).

In Plan H100, HD 90 contained 47.9% Hispanic citizen voting-age population (HCVAP) and 47.2% non-suspense Spanish Surname Voter Registration (SSVR). *See* Exhibit J-21. The TLRTF Plaintiffs have acknowledged that Plan H100 provided Hispanic voters in HD 90 with the opportunity to elect their candidates of choice. *See* TLRTF Plaintiffs' Proposed Findings of Fact and Conclusions of Law ¶ 635 (Doc. 634).

When the 82nd Legislature redrew the House district lines in 2011, the Legislature increased HD 90's Hispanic voting strength in response to requests from TLRTF in testimony before the House Redistricting Committee. *See Perez v. Perry*, Trial Tr. Sept. 9, 2011 at 929:23–930:5 (Downton); *see also* Exhibit C, June 22, 2013 Letter from N. Perales to K. Seliger and D. Darby at 2. Plan H283 raised HD 90's HCVAP to 49.7% and its non-suspense SSVR to 50.1%. *See* Exhibit J-29. As with Plan H100, the TLRTF Plaintiffs have contended in this litigation that Hispanic voters had the opportunity to elect their candidates of choice in HD 90 under Plan H283. *See* TLRTF Plaintiffs' Proposed Findings of Fact and Conclusions of Law ¶ 636 (Doc. 634).

Testimony in the Section 5 proceedings reflected that Rep. Lon Burnam, the incumbent in HD 90, opposed the Legislature's changes to his district in 2011 because they resulted in the predominately African-American community of Como being removed from

his district. *Texas v. United States*, Trial Tr. Jan. 17, 2012 PM at 13:12-21 (Interiano) (Doc. 597-2). This Court's interim House plan, H309, made no changes to the 2011 Legislature's configuration of HD 90. Order Regarding Plan H309 at 3 n.4 (Doc. 690); *see also* Exhibit C, June 22, 2013 Letter from N. Perales to K. Seliger and D. Darby at 2.

As of May 2013, when the 83rd Legislature began considering redistricting in its first Special Session, HD 90 contained 50.9% HCVAP and 53.2% non-suspense SSVR in Plan H309. *See* Exhibit A-3, Plan H309 Red-119 Report. During the Special Session, Rep. Burnam introduced an amendment that impacted his district and neighboring HD 99, represented by Rep. Charlie Geren. When he offered the amendment on the House floor, Rep. Burnam indicated that the purpose behind the amendment was to return the Como community to HD 90. *See* Exhibit A-2, House Journal Supp. (June 20, 2013) at S29 (statement of Rep. Burnam explaining that his amendment "has the intent of returning the neighborhood to District 90 that has always been in District 90 since the federal court created it back in 1978"). The amendment was agreed to by Rep. Geren, adopted by the House without objection from any member, and incorporated into the House plan that the Legislature adopted (Plan H358). *See* Exhibit A-4, House Journal (June 20, 2013) at 206-12.

Notwithstanding the Legislature's changes to HD 90 in 2013, Hispanics continue to represent a majority of the district's citizen voting age population and registered voters. In fact, HD 90's demographic levels changed only slightly as a result of Rep. Burnam's amendment: under Plan H358, the district contains 50.7% HCVAP (a decrease of a mere 0.2% from Plan H309) and 52.0% non-suspense SSVR (a 1.2% drop from Plan H309). *See* Exhibit A-5, Plan H358 Red-119 Report. Even so, HD 90's Hispanic voting strength

remains greater in Plan H358 than Plan H100 and Plan H283—both of which have been recognized by the TLRTF Plaintiffs as providing Hispanic voters in HD 90 with the opportunity to elect their candidates of choice. What's more, a reconstituted election analysis performed by the State's expert, Dr. John Alford, reflects that HD 90's performance index is identical in Plan H358 and Plan H309. *See* Exhibit B, Declaration of John Alford, Ph.D (Plan H309 and Plan H358 both perform 11 out of 11 for Democratic candidates in the Office of Attorney General's original 10 statewide elections and the 2012 U.S. Senate contest).

If Hispanic voters are politically cohesive, and if they turn out at the same rate as non-Hispanic voters, they will control elections in HD 90. The 2014 Democratic primary for HD 90 proves just that reality, as Rep. Burnam was unseated by the Hispanic-preferred candidate, Ramon Romero. *See* Exhibit A-6, Sergio De Leon Deposition 171:21-25 (Romero was "obviously" the candidate of choice for Hispanic voters in the 2014 Democratic primary). Thus any failure to elect Hispanic-preferred candidates in HD 90 could only result from low voter turnout or lack of cohesion among Hispanic voters in the district, neither of which provides a basis for relief under section 2. *See Salas v. Sw. Tex. Jr. Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992) ("Obviously, a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage than whites to vote.").

B. The TLRTF Plaintiffs' Fourteenth and Fifteenth Amendment Claims

The TLRTF Plaintiffs also allege that the changes to HD 90 in the 2013 House redistricting plan "discriminate against Plaintiffs on the basis of race and national origin" in violation of the Fourteenth and Fifteenth Amendments. Fourth Amended Complaint of

Plaintiffs Texas Latino Redistricting Task Force, et al. ¶¶ 82, 84 (Doc. 891). As with their section 2 claim, the TLRTF Plaintiffs' Fourteenth and Fifteenth Amendment claims should be rejected as a matter of law.

The TLRTF Plaintiffs allege no actual facts in their complaint to support their intentional discrimination claims relating to HD 90. Instead, the TLRTF Plaintiffs point only to the alleged drop in HD 90's Hispanic voting strength in Plan H358 as a basis for concluding that H358 "uses race as a predominant factor to allocate Latino voters into and out of HD 90." *Id.* ¶ 78.

Likewise, the TLRTF Plaintiffs' discovery responses provide no evidence to support their intentional discrimination claim regarding the configuration of HD 90 in Plan H358. The State served an interrogatory on the TLRTF Plaintiffs, asking them to provide the factual basis for their claim that race was used "as a predominant factor to allocate Latino voters" in Plan H358. *See* Exhibit A-7, Defendant State of Texas' Second Set of Interrogatories to Plaintiff Texas Latino Redistricting Task Force, Interrogatory No. 19. The TLRTF Plaintiffs raised objections to the interrogatory but responded with the same conclusory allegation contained in their complaint: "The Task Force alleges that race was used as a predominant factor in the drawing of House District 90." *See* Exhibit A-8, Plaintiff Texas Latino Redistricting Task Force's Responses to Defendant's Second Set of Interrogatories, Interrogatory No. 19.

The State deposed two witnesses identified in the TLRTF Plaintiffs' disclosures as having knowledge of the Hispanic community in HD 90 and the changes made to HD 90 in the 2013 redistricting process: Salvador Espino and Sergio De Leon. Neither witness could

offer any direct evidence that the Legislature was intentionally discriminatory when it adopted changes to HD 90 in 2013; rather, their testimony reflects that the TLRTF Plaintiffs' intentional discrimination claims pertaining to HD 90 are based on speculation and the alleged effects of the 2013 House plan on the district's Hispanic community. For example, Mr. Espino acknowledged that he was not a part of the Legislature's deliberations in 2013 and could not speak to the intent of any legislator:

> Q. . . . Now, you weren't a part – just to make sure I'm clear what you do and don't know. You weren't a part of the discussions that occurred at the legislature regarding the change?
>
> A. No, I was not there.
>
> Q. Okay. And as far as what any individual legislator's motivation was, you don't have an opinion one way or the other about that?
>
> A. I can't read their mind.
>
> Q. Okay. And so your judgment is based upon reviewing what the legislature did after the fact?
>
> A. My judgment is based on looking at the voting precincts and knowing their demographics and knowing their population and voting history, yes.

Exhibit A-9, Salvador Espino Deposition 63:8-21; *see also id.* at 91:2-5 ("I can't speak to the 150 state representatives down in Austin, but the plan that came out does impact negatively the Hispanic community in District 90.").

The other TLRTF witness, Sergio De Leon, explicitly rejected the argument that the Legislature discriminated on the basis of race when it made changes to HD 90 in 2013. Instead, Mr. De Leon opined that Rep. Burnam was seeking to increase his reelection chances and return the Como neighborhood to HD 90, where it had traditionally been located for many years:

> Q. And when Mr. Burnam submitted an amendment to get Como back in his district, do you think that that was an act of racial discrimination?
>
> A. An act of racial discrimination?
>
> Q. Uh-huh.
>
> A. I don't—no, I don't. I think that it had been in his district for a while, and he obviously wanted it back. It's a minority neighborhood, so I don't think you discriminate against someone for putting it back in.
>
> Q. Do you think that Lon Burnam was intentionally discriminating against Hispanic voters on the basis of their race when he got Como back?
>
> A. No.
>
> Q. Okay. And so, to close this out, you don't have any reason to believe that any other member of the legislature voted for the House plan or any amendment for the purpose of discrimination on the basis of race; is that right?
>
> A. I don't think they discriminate on the basis of race. I do know that Como typically votes for incumbents, and it was probably a two-for in Lon's opinion. One, to get a traditional district or neighborhood back in his district, and that it may afford some incumbent protection.
>
> Q. Just so I'm clear, you don't have any reason to believe that any member of the legislature intended to discriminate when they voted for the 2013 House plan; is that right?
>
> A. That's correct.

Exhibit A-6, Sergio De Leon Deposition 163:18–164:22. This is consistent with Chairman Drew Darby's statement moving for adoption of the amendment, which explained that Representative Burnam had "revised his amendment and it now keeps this district a Hispanic district and brings the numbers back over 50 percent." Exhibit A-2, Texas House Journal, Supplement (June 20, 2013) at S29. The TLRTF Plaintiffs cannot explain how this statements—which, more accurately, reflects the Legislature's prudent efforts to prevent a reduction of Hispanic voting strength in HD 90—provides evidence of intentional racial discrimination on the part of any legislator.

Nor can the TLRTF Plaintiffs create a genuine issue of material fact on the question of intentional discrimination by alleging that the changes to HD 90 in the 2013 House plan would have a disparate impact on Hispanic voters. Even if the TLRTF Plaintiffs' intentional discrimination claim could survive summary judgment based on the effects of the 2013 changes to HD 90 (which it cannot), the evidence of disparate impact is not convincing, especially in light of Rep. Burnam's recent Democratic primary loss to the Hispanic-preferred candidate.

Based on the allegations in the TLRTF Plaintiffs' complaint, their discovery responses, and deposition testimony, the TLRTF Plaintiffs have provided no evidence that the Legislature's changes to HD 90 in 2013 constituted an act of intentional discrimination on the basis of race, ethnicity, or national origin. Accordingly, the Court should grant summary judgment for the Defendants on the TLRTF Plaintiffs' Fourteenth Amendment claim of racial discrimination in Plan H358.

V. SECTION 2 OF THE VOTING RIGHTS ACT

A. Section 2 Of The Voting Rights Act Does Not Require States To Create "Coalition" Districts.

The majority of the plaintiffs assert that the 2013 congressional redistricting plan (Plan C235) violates section 2 of the Voting Rights Act. All of these claims rest on a common factual underpinning: because of the growth in the Hispanic population as reflected in the 2010 Census, the State should have drawn additional districts in which a combination of Hispanic and African-American voters would constitute a majority capable of controlling the outcome of elections. These claims suffer from two common failings, making them ripe for summary judgment: (1) the Supreme Court's reasoning in *Perry* is the law of the case and

forecloses any argument that section 2 requires the creation of coalition districts; and (2) the evidence shows that the plaintiffs cannot establish the facts required to support the first *Gingles* factor—that a minority group is sufficiently large and geographically compact to constitute a majority in a single member district that might be drawn for it to control.

B. The Law Of The Case Doctrine Bars This Court From Considering Plaintiffs' Claims Regarding The Creation of Coalition Districts.

"Under the law of the case doctrine, an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) (citation omitted). The doctrine is not limited to issues that "have been explicitly decided; [it] also applies to those issues decided by 'necessary implication.'" *Alpha/Omega Ins. Servs., Inc. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 279 (5th Cir. 2001) (quoting *In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001)); *see also Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 898 n.4 (5th Cir. 1983) ("The doctrine of law of the case is not restricted to express rulings of the earlier court."). In other words, even when issues have not been expressly addressed in a prior decision, if those matters were "fully briefed to the appellate court and . . . necessary predicates to the [court's] ability to address the issue or issues specifically discussed, [those issues] are deemed to have been decided tacitly or implicitly, and their disposition is law of the case." *Felt*, 255 F.3d at 225.

The Supreme Court directly addressed whether coalition districts are required to be created under the Voting Rights Act in *Perry*. The Court held that "[i]f the District Court did set out to create a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so." *Perry*, 132 S.Ct. at 944. While this

statement addressed the creation of coalition districts in the court-drawn interim plan, the Court by necessary implication determined that coalition districts are not required to be created under the Voting Rights Act unless a single demographic group is a majority of the population. Accordingly, this Court is barred under the law of the case doctrine from revisiting the issue of whether coalition districts are required to be created under section 2.

C. Plaintiffs Cannot Demonstrate That Additional Minority Districts Can Be Drawn That Meet The *Gingles* Requirements.

At a minimum, to prove vote dilution under section 2, a plaintiff must show both that the *Gingles* preconditions are satisfied and that considering the totality of the circumstances, the challenged plans dilute minority voting strength. *See, e.g.*, *Johnson v. DeGrandy*, 512 U.S. 997 (1994) (finding all *Gingles* factors to be present but rejecting vote-dilution claims). The three *Gingles* preconditions are: (1) "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "the minority group . . . is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). A plaintiff is required to prove all three *Gingles* preconditions; failure to meet even one of the three precludes a section 2 claim. *See, e.g.*, *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) ("[W]e conclude that plaintiffs have failed to establish a genuine issue of material fact on the first part of the *Gingles* analysis. Because all three conditions must be met to establish a vote dilution claim, it is unnecessary for us to evaluate the second and third elements of the test.").

To satisfy the first *Gingles* precondition, any proposed district must contain a majority of voting-age citizens. *Campos*, 113 F.3d at 548; *see also Session v. Perry*, 298 F. Supp. 2d 451, 494 n.133 (E.D. Tex. 2004) ("This circuit, along with every other circuit to consider the question, has concluded that the relevant voting population for Hispanics is citizen voting age population."), *rev'd on other grounds*, *LULAC v. Perry*, 548 U.S. 399, 429 (2006) (commenting that using CVAP to determine Hispanic electoral opportunity "fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates"). The proposed district must also be reasonably compact. *Bush v. Vera*, 517 U.S. 952, 979 (1996) ("If because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district."). The choice between plans that create the same number of minority opportunity districts belongs to the state, not plaintiffs or the courts. *LULAC v. Perry,* 548 U.S. at 430.

Plaintiffs' own proposed demonstration plans fail to make the required showing that an additional, constitutionally permissible minority-majority district can be drawn. Instead, Plaintiffs only propose the creation of coalition districts. While it is without question that Plaintiffs and others can draw additional Democratic coalition districts in a demonstration plan, the State has no obligation to draw a district unless "the minority group [is] able to demonstrate that it is sufficiently large and geographically compact to constitute a majority." *Gingles*, 478 U.S. at 79. Compelling the states to draw electoral districts where multiple racial and ethnic groups, none of which forms a majority of voters, are joined by nothing more than a shared preference for Democratic candidates finds no support in the text of section 2. *See Perry*, 132 S.Ct. at 944 ("If the District Court did set out to create a minority coalition

district, rather than drawing a district that simply reflected population growth, it had no basis for doing so."); *Bartlett*, 129 S.Ct. at 1243 ("Nothing in § 2 grants special protection to a minority group's right to form political coalitions."); *LULAC v. Perry*, 548 U.S. at 446 ("If section 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional problems."); *Session v. Perry,* 298 F.Supp.2d 451, 483 (E.D. Tex. 2003) (three-judge court) ("A minority group lacking a majority cannot elect its candidate of choice, and denying the group a separate district cannot be a denial of any opportunity protected by the Act.").

1. No Additional Minority Opportunity Congressional Districts Can Be Created.

Plaintiffs' section 2 challenges to the 2013 Congressional Plan are focused on the creation of additional minority opportunity districts in Dallas and Tarrant Counties.[7] Although Plan C235 creates CD 33, which is a coalition district (as the Supreme Court has defined that term) with 41.4% HCVAP and 24.6% African-American CVAP population, *see* Exhibit A-10, Plan C235, Red-116 Report, Plaintiffs continue to insist that there is sufficient minority population to create another minority opportunity district. But none of the districts Plaintiffs propose are required under section 2. This is because Plaintiffs have put forth numerous demonstration plans which create nothing more than a new coalition district in Dallas and Tarrant Counties. These districts do not satisfy the first *Gingles* precondition by

[7] All Plaintiffs except for the Task Force Plaintiffs and the United States assert a claim under section 2 against the 2013 congressional plan and contend that an additional minority opportunity district in Dallas and Tarrant Counties should have been created. *See* Second Amended Complaint of African-American Congresspersons ¶¶ 22-24 (Doc. 901); LULAC Plaintiffs' Third Amended Complaint ¶ 16 (Doc. 894); MALC's Third Amended Complaint ¶ 73 (Doc. 897); NAACP Third Amended Complaint ¶ 41 (Doc. 900); Quesada Plaintiffs' Third Amended Complaint ¶ 60 (Doc. 899); Rodriguez Plaintiffs Third Amended Complaint ¶ 19 (Doc. 896); Perez Plaintiffs Sixth Amended Complaint ¶ 27 (Doc. 958).

creating a district that contains either a Hispanic CVAP majority or an African-American CVAP majority. *See* Table 1.

Table 1: Demographics of Proposed Congressional Districts in Selected Demonstration Plans

Plan	District	ACVAP	BCVAP	HCVAP
C238 (Rep. Anchia Plan)	3	37.2%	14.4%	44.9%
	33	38.6%	37.4%	17.9%
C251 (Rep. Y. Davis Plan)	3	38.7%	16.8%	40.4%
	33	41.3%	29.3%	28.3%
C248 (Sen. West Plan)	3	37.2%	14.4%	44.9%
	33	38.6%	37.4%	17.9%
C236 (Rep. Y. Davis Plan)	3	18.7%	16.8%	40.3%
	33	41.3%	23.3%	29.3%
C241 (Rep. Johnson Plan)	3	44.6%	14.0%	37.0%
	33	40.8%	29.8%	23.2%

See Exhibits A-11, A-12, A-13, A-14, A-15. Further, none of these proposed districts are reasonably compact. For instance, several versions of CD 3 proposed in the demonstration

plans are not reasonably compact when compared to the districts in Plan C235. *See, e.g.*, Exhibit A-10, Plan C235 Red-315 Report; Exhibit A-12, Plan C238 Red-315 Report; Exhibit A-14, Plan C248 Red-315 Report.

Like the Plaintiffs, the Legislature has tried but failed to draw a legal and effective Hispanic CVAP-majority district in Dallas and Tarrant Counties. While the area has experienced Hispanic growth over the last decade, the number of Hispanic voting-age citizens is too low, and the population is too spread out. *See* Exhibit A-16, Texas Legislative Council, Special Tabulation: Estimated HCVAP, 2008-2012 5-Year American Community Survey; Joint Trial Exhibit J-62, Deposition of Ryan Downton at 127:8-128:6; Joint Trial Exhibit J-58, Deposition of Doug Davis, at 59:10-15; *Perez v. Perry*, Trial Tr. at 906:14-17. Plaintiffs have not proven that the Legislature could have drawn additional geographically compact congressional districts with a Hispanic or African-American citizen voting-age majority. As a result, they cannot establish an injury as a matter of law, and the Court cannot provide a remedy.

2. No Additional Minority Opportunity Texas House District Can Be Created.

Plaintiffs cannot establish a section 2 violation in Plan H358 as a matter of law because there is no evidence that additional compact Texas House districts can be created in which Hispanic or African-American voters form a majority. Numerous plans attempt to draw new coalition districts in Bell County, Fort Bend County, and elsewhere, yet these districts do not meet the first *Gingles* precondition. For instance, the NAACP Plaintiffs, Perez Plaintiffs, LULAC Plaintiffs, and MALC propose plans that change the configuration of the districts in Fort Bend County from the manner in which they are drawn in Plan

H358.[8] As shown in the table below, none of the proposed Fort Bend County districts proffered by Plaintiffs are districts where a single minority group would form the majority of the citizen voting-age population. *See* Table 2.

Table 2: Demographics of Proposed Fort Bend County Districts in Selected Demonstration Plans

Plan	District	ACVAP	BCVAP	HCVAP
H334 (Rep. Martinez-Fischer Plan)	26	37.6%	17.0%	13.7%
	27	30.4%	45.5%	15.7%
	85	53.9%	13.1%	29.2%
H314 (Rep. Y. Davis Plan)	26	51.8%	10.5%	14.7%
	27	15.6%	46.4%	26.8%
	85	49.4%	14.7%	28.2%
H366 (Perez Plaintiffs Demonstration Plan)	26	50.6%	10.4%	12.3%
	27	25.4%	48.1%	16.1%
	85	34.1%	23.9%	30.4%

See Exhibits A-17, A-18, A-19.

[8] *See* Plaintiff MALC's Third Amended Complaint ¶¶ 51-53 (Doc. 897); Perez Plaintiffs' Sixth Amended Complaint ¶ 28 (Doc. 958); NAACP Plaintiffs' Third Amended Complaint ¶ 22 (Doc. 900).

Similarly, Plaintiffs attempt to create additional minority opportunity districts in Bell County.[9] But all of the proposed districts are coalition districts, and therefore not required by section 2. *See* Table 3.

Table 3: Demographics of Proposed Bell County Districts in Selected Demonstration Plans

Plan	District	ACVAP	BCVAP	HCVAP
H329 (Rep. Martinez-Fischer Plan)	54	43.0%	29.4%	19.1%
	55	73.2%	10.0%	13.9%
H333 (Rep. Martinez-Fischer Plan)	54	43.0%	29.4%	19.1%
	55	73.2%	10.0%	13.9%
H364 (Perez Plaintiffs)	54	42.6%	29.8%	19.2%
	55	73.1%	10.0%	13.9%
H365 (Perez Plaintiffs)	54	42.4%	30.0%	19.2%
	55	72.7%	10.1%	14.0%

See Exhibits A-20, A-21, A-22, A-23. Because Plaintiffs have not offered (and cannot offer) any evidence suggesting that the Legislature or this Court could draw additional House or congressional districts with a Hispanic or African-American voting majority, they cannot

[9] *See* Plaintiff MALC's Third Amended Complaint ¶¶ 54-56 (Doc. 897); Perez Plaintiffs' Sixth Amended Complaint ¶ 28 (Doc. 959); NAACP Plaintiffs' Third Amended Complaint ¶ 22 (Doc. 900).

establish an injury as a matter of law, and the Court cannot provide a remedy. Summary judgment is therefore appropriate on all section 2 challenges to Plans C235 and H358 based on the failure to create coalition districts.

D. Section 2 Of The Voting Rights Act Does Not Require The State To Violate The Texas Constitution's Whole-County Rule.

MALC and the United States claim that section 2 of the Voting Rights Act required the Legislature to depart from the Texas Constitution's whole-county rule in order to create Hispanic-majority districts based in Nueces County, Midland and Ector County, and Lubbock County. *See* Plaintiff MALC's Third Amended Complaint ¶¶ 38-45 (Doc. 897); United States' Complaint in Intervention ¶¶ 56-57 (Doc. 907).[10] They argue that the whole-county rule had to yield because dividing these counties would have allowed the Legislature to create House districts with a Hispanic citizen voting-age majority. The premise appears to be that federal law requires the State to abandon the whole-county rule whenever a county line interferes with the creation of a potential minority-majority district. That premise is mistaken. Reliance on traditional, race-neutral redistricting principles is consistent with the Constitution and the Voting Rights Act, and the Legislature's adherence to the Texas Constitution's race-neutral whole-county rule did not violate federal law.

Article III, § 26 of the Texas Constitution requires that electoral districts for the Texas House of Representatives comprise whole counties whenever possible. The Texas Supreme Court has interpreted this provision to require that "apportionment be by county" and that "the district lines shall follow county boundaries." *Smith v. Craddick*, 471 S.W.2d

[10] The United States also claims that the whole-county rule "was applied inconsistently from past practice in Harris County, providing legislators an excuse to eliminate House District 149." United States' Complaint in Intervention ¶ 58 (Doc. 907).

375, 378 (Tex. 1971). Where a county's population is too great to form a single district but not great enough to form multiple districts wholly within the county, the "surplus" must be assigned to a single contiguous district. Tex. Const. art. III, § 26 ("[F]or any surplus of population it may be joined in a Representative District with any other contiguous county or counties."). Thus the whole-county rule permits counties to be divided between two districts, but only when necessary to comply with the Equal Protection Clause's one-person, one-vote mandate. *See Smith*, 471 S.W.3d at 378; *cf. Clements v. Valles*, 620 S.W.2d 112, 114 (Tex. 1981) ("[The] state constitution requires that a county constitute a separate district if the population of the county is slightly under or over the ideal population but within constitutional limits of variation.").

The Texas whole-county rule plainly qualifies as a traditional districting principle. *E.g., Perry*, 548 U.S. at 463 n.5 (observing that "traditional redistricting criteria" include "compactness" and "preserving county lines"); *Bush*, 517 U.S. at 963 (observing that "[t]raditional districting criteria" include "maintain[ing] the integrity of county lines"). The Supreme Court has construed section 2 and the Equal Protection Clause to incorporate traditional redistricting principles such as maintaining political subdivisions and county lines. *See, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 92 (1997); *Bush v. Vera*, 517 U.S. at 963; *Brown v. Thompson*. 462 U.S. 835, 843-44 (1983); *Mahan v. Howell*, 410 U.S. 315, 329–30 (1973). In *Bartlett v. Strickland*, the Supreme Court rejected the State of North Carolina's claim that section 2 required it to ignore county lines in order to create a crossover district. *See* 129 S.Ct. at 1243. The Court recognized only that traditional redistricting principles, like the

county-line rule, may be superseded by "the one-person, one vote principle of the Equal Protection Clause of the United States Constitution." *Id.* at 1239.

The Supreme Court has also established that traditional redistricting principles cannot be subordinated to race without running afoul of the Fourteenth Amendment. *E.g., Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) (explaining that "an impermissible racial motive" exists if "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations" (quoting *Miller*, 515 U.S. at 916)); *Bush*, 517 U.S. at 978 ("The constitutional problem arises only from the subordination of [traditional districting] principles to race."). In *Abrams*, the Court found that the district court acted within its discretion in deciding it could not draw two majority-African-American districts without allowing racial considerations to predominate over traditional redistricting principles, such as preserving county lines. *See Abrams*, 521 U.S. at 85–95. If anything, a legislature's decision to employ race-neutral criteria such as maintaining county lines should rebut an inference of discriminatory purpose. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 637 (1993).

Far from endorsing the Plaintiffs' argument that race-neutral redistricting principles must automatically yield to the goal of creating minority-majority districts, the Supreme Court has confirmed that traditional redistricting principles are permissible redistricting tools that presumptively comply with federal law. The State's decision to comply with both the Texas Constitution and the U.S. Constitution by adhering to its race-neutral constitutional rules governing the creation of House districts cannot support a claim under section 2 of the Voting Rights Act or the Fourteenth Amendment as a matter of law. *See Bush*, 517 U.S. at 978 ("[States] may avoid strict scrutiny altogether by respecting their own traditional

districting principles. . . . The constitutional problem arises only from the subordination of those principles to race.").

Neither the Constitution nor section 2 compels the Texas Legislature to abandon the whole-county rule for the sole purpose of creating majority-minority districts. To the extent Plaintiffs assert claims based on the State's adherence to the Texas Constitution's whole-county rule, those claims must fail as a matter of law. The State Defendants are therefore entitled to summary judgment.

CONCLUSION

For the reasons stated above, the State Defendants respectfully urge the Court to grant summary judgment on (1) all claims alleging a violation of the Fifteenth Amendment to the United States Constitution; (2) all claims alleging a violation of the Fourteenth Amendment to the United States Constitution with respect to the 2011 and 2013 House and congressional redistricting plans; (3) all claims asserted against House District 90 in Plan H358; (4) all claims alleging a violation of section 2 of the Voting Rights Act based on the failure to create "coalition" districts; and (5) all claims alleging a violation of section 2 of the Voting Rights Act based on the Texas Constitution's whole-county provision.

Dated: May 14, 2014

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General
for Defense Litigation

J. REED CLAY, JR.
Special Assistant and Senior Counsel
to the Attorney General

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN
Chief, Special Litigation Division
Texas State Bar No. 00798537

ATTORNEYS FOR THE STATE OF TEXAS, RICK PERRY, AND NANDITA BERRY

CERTIFICATE OF CONFERENCE

I hereby certify that on May 13, 2014, I conferred with counsel for all parties in this case regarding the State Defendants' Motion for Summary Judgment. Counsel for all parties indicated that they are opposed to this motion.

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing was sent on May 14, 2014, via the Court's electronic notification system and/or email to the following counsel of record:

DAVID RICHARDS
Richards, Rodriguez & Skeith LLP
816 Congress Avenue, Suite 1200
Austin, TX 78701
512-476-0005
davidr@rrsfirm.com

RICHARD E. GRAY, III
Gray & Becker, P.C.
900 West Avenue, Suite 300
Austin, TX 78701
512-482-0061/512-482-0924 (facsimile)
Rick.gray@graybecker.com
ATTORNEYS FOR PLAINTIFFS PEREZ, DUTTON, TAMEZ, HALL, ORTIZ, SALINAS, DEBOSE, and RODRIGUEZ

JOSE GARZA
Law Office of Jose Garza
7414 Robin Rest Dr.
San Antonio, Texas 78209
210-392-2856
garzpalm@aol.com

MARK W. KIEHNE
RICARDO G. CEDILLO
Davis, Cedillo & Mendoza
McCombs Plaza
755 Mulberry Ave., Ste. 500
San Antonio, TX 78212
210-822-6666/210-822-1151 (facsimile)
mkiehne@lawdcm.com
rcedillo@lawdcm.com

GERALD H. GOLDSTEIN
DONALD H. FLANARY, III
Goldstein, Goldstein and Hilley
310 S. St. Mary's Street
San Antonio, TX 78205-4605
210-226-1463/210-226-8367 (facsimile)
ggandh@aol.com
donflanary@hotmail.com

PAUL M. SMITH, MICHAEL B. DESANCTIS, JESSICA RING AMUNSON
Jenner & Block LLP
1099 New York Ave., NW
Washington, D.C. 20001
202-639-6000

J. GERALD HEBERT
191 Somervelle Street, # 405
Alexandria, VA 22304
703-628-4673
hebert@voterlaw.com

JESSE GAINES
P.O. Box 50093
Fort Worth, TX 76105
817-714-9988
gainesjesse@ymail.com
ATTORNEYS FOR PLAINTIFFS QUESADA, MUNOZ, VEASEY, HAMILTON, KING and JENKINS

JOAQUIN G. AVILA
P.O. Box 33687
Seattle, WA 98133
206-724-3731/206-398-4261 (facsimile)
jgavotingrights@gmail.com
ATTORNEYS FOR MEXICAN AMERICAN LEGISLATIVE CAUCUS

NINA PERALES
MARISA BONO
Mexican American Legal Defense and Education Fund
110 Broadway, Suite 300
San Antonio, TX 78205
210-224-5476/210-224-5382 (facsimile)
nperales@maldef.org
mbono@maldef.org

MARK ANTHONY SANCHEZ
ROBERT W. WILSON
Gale, Wilson & Sanchez, PLLC
115 East Travis Street, Ste. 1900
San Antonio, TX 78205
210-222-8899/210-222-9526 (facsimile)
masanchez@gws-law.com
rwwilson@gws-law.com
ATTORNEYS FOR TEXAS LATINO REDISTRICTING TASK FORCE, CARDENAS, JIMENEZ, MENENDEZ, TOMACITA AND JOSE OLIVARES, ALEJANDRO AND REBECCA ORTIZ

JOHN T. MORRIS
5703 Caldicote St.
Humble, TX 77346
281-852-6388
johnmorris1939@hotmail.com
JOHN T. MORRIS, PRO SE

LUIS ROBERTO VERA, JR.
Law Offices of Luis Roberto Vera, Jr.
1325 Riverview Towers
San Antonio, Texas 78205-2260
210-225-3300
lrvlaw@sbcglobal.net

GEORGE JOSEPH KORBEL
Texas Rio Grande Legal Aid, Inc.
1111 North Main
San Antonio, TX 78213
210-212-3600
korbellaw@hotmail.com
ATTORNEYS FOR INTERVENOR-PLAINTIFF LEAGUE OF UNITED LATIN AMERICAN CITIZENS

ROLANDO L. RIOS
Law Offices of Rolando L. Rios
115 E Travis Street, Suite 1645
San Antonio, TX 78205
210-222-2102
rrios@rolandorioslaw.com
ATTORNEY FOR INTERVENOR-PLAINTIFF HENRY CUELLAR

GARY L. BLEDSOE
Law Office of Gary L. Bledsoe
316 W. 12th Street, Ste. 307
Austin, TX 78701
512-322-9992/512-322-0840 (facsimile)
garybledsoe@sbcglobal.net
ATTORNEY FOR INTERVENOR-PLAINTIFFS TEXAS STATE CONFERENCE OF NAACP BRANCHES, TEXAS LEGISLATIVE BLACK CAUCUS, EDDIE BERNICE JOHNSON, SHEILA JACKSON-LEE, ALEXANDER GREEN, HOWARD JEFFERSON, BILL LAWSON, and JUANITA WALLACE

MAX RENEA HICKS
Law Office of Max Renea Hicks
101 West Sixth Street Suite 504
Austin, TX 78701
512-480-8231/512/480-9105 (facsimile)
ATTORNEY FOR PLAINTIFFS CITY OF AUSTIN, TRAVIS COUNTY, ALEX SERNA, BEATRICE SALOMA, BETTY F. LOPEZ, CONSTABLE BRUCE ELFANT, DAVID GONZALEZ, EDDIE RODRIGUEZ, MILTON GERARD WASHINGTON, and SANDRA SERNA

STEPHEN E. MCCONNICO
SAM JOHNSON
S. ABRAHAM KUCZAJ, III
Scott, Douglass & McConnico
One American Center
600 Congress Ave., 15th Floor
Austin, TX 78701
512-495-6300/512-474-0731 (facsimile)
smcconnico@scottdoug.com
sjohnson@scottdoug.com
akuczaj@scottdoug.com
ATTORNEYS FOR PLAINTIFFS CITY OF AUSTIN, TRAVIS COUNTY, ALEX SERNA, BALAKUMAR PANDIAN, BEATRICE SALOMA, BETTY F. LOPEZ, CONSTABLE BRUCE ELFANT, DAVID GONZALEZ, EDDIE RODRIGUEZ, ELIZA ALVARADO, JOSEY MARTINEZ, JUANITA VALDEZ-COX, LIONOR SOROLA-POHLMAN, MILTON GERARD WASHINGTON, NINA JO BAKER, and SANDRA SERNA

KAREN M. KENNARD
2803 Clearview Drive
Austin, TX 78703
(512) 974-2177/512-974-2894 (facsimile)
karen.kennard@ci.austin.tx.us
ATTORNEY FOR PLAINTIFF CITY OF AUSTIN

VICTOR L. GOODE
Asst. Gen. Counsel, NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-5120
410-580-5120/410-358-9359 (facsimile)
vgoode@naacpnet.org
ATTORNEY FOR TEXAS STATE CONFERENCE OF NAACP BRANCHES

ROBERT NOTZON
1507 Nueces Street
Austin, TX 78701
512-474-7563/512-474-9489 (facsimile)
robert@notzonlaw.com

ALLISON JEAN RIGGS
ANITA SUE EARLS
Southern Coalition for Social Justice
1415 West Highway 54, Ste. 101
Durham, NC 27707
919-323-3380/919-323-3942 (facsimile)
anita@southerncoalition.org
ATTORNEYS FOR TEXAS STATE CONFERENCE OF NAACP BRANCHES, EARLS, LAWSON, WALLACE, and JEFFERSON

DONNA GARCIA DAVIDSON
PO Box 12131
Austin, TX 78711
512-775-7625/877-200-6001 (facsimile)
donna@dgdlawfirm.com
ATTY FOR DEFENDANT STEVE MUNISTERI

DAVID ESCAMILLA
Travis County Asst. Attorney
P.O. Box 1748
Austin, TX 78767
(512) 854-9416
david.escamilla@co.travis.tx.us
ATTORNEY FOR PLAINTIFF TRAVIS COUNTY

ROBERT L. PITMAN, JOCELYN SAMUELS, T. CHRISTIAN HERREN, JR., TIMOTHY F. MELLETT, BRYAN SELLS, JAYE ALLISON SITTON
DANIEL J. FREEMAN
MICHELLE A. MCLEOD
U.S. Department of Justice
Civil Rights Division, Voting Rights
Room 7254 NWB
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 305-4355; (202) 305-4143
ATTORNEYS FOR THE UNITED STATES

CHAD W. DUNN
K. SCOTT BRAZIL
Brazil & Dunn
4201 FM 1960 West, Suite 530
Houston, TX 77068
281-580-6310/281-580-6362 (facsimile)
chad@brazilanddunn.com
scott@brazilanddunn.com
ATTORNEYS FOR INTERVENOR-DEFS TEXAS DEMOCRATIC PARTY and BOYD RICHIE

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN