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

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

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

UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE STATE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The State Defendants have moved for summary judgment on some of the United States' claims involving the 2011 State House and Congressional plans: (1) all claims under Section 2 of the Voting Rights Act predicated on intentional racial discrimination in violation of the United States Constitution; (2) all claims alleging a violation of Section 2 of the Voting Rights Act

based on the failure to create coalition districts; and (3) all claims alleging a violation of Section 2 of the Voting Rights Act based on the whole-county provision of the Texas Constitution. As set forth below, there are genuine disputes of material fact on all of these claims, and Defendants are not entitled to judgment as a matter of law on any of them. The Court should therefore deny the State Defendants' motion as to the United States' claims.

Although the United States has not brought claims pertaining to the 2013 plans, Congress gave the Attorney General broad authority to enforce Section 2 of the Voting Rights Act and other federal laws that implement the voting guarantees of the Fourteenth and Fifteenth Amendments. *See* 42 U.S.C. § 1973j(d). The Attorney General thus has a strong interest in ensuring a proper interpretation of these voting guarantees. For that reason, the United States will also respond to the arguments of the State Defendants regarding certain claims alleging violations of the Fourteenth and Fifteenth Amendments to the United States Constitution with respect to Texas's 2013 House and Congressional redistricting plans. The United States also requests that the Court deny the State Defendants' motion as to these claims.

I. STANDARD FOR SUMMARY JUDGMENT

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In deciding whether there is a genuine issue of material fact, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Celotex Corp. v.*

Catrett, 477 U.S. 317, 322 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Id*.

The Supreme Court and the Fifth Circuit have concluded that cases involving questions of intent or motive rarely are appropriate for summary judgment, as relevant evidence often is susceptible to different interpretations or inferences by the trier of fact. *Hunt v. Cromartie*, 526 U.S. 541, 552-53 (1999); *accord, e.g., Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962); *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1265-66 (5th Cir. 1991). In the redistricting context, assessing whether a jurisdiction was racially motivated requires the court to perform a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Hunt*, 526 U.S. at 546 (citing *Miller v. Johnson*, 515 U.S. 900, 905 (1995)).

II. ARGUMENT

A. The Court should deny the State Defendants' motion for summary judgment on the United States' claims involving the 2011 Congressional and House plans.

1. The State Defendants are not entitled to summary judgment on the United States' claims of intentional discrimination.

The State Defendants argue that because the 2011 House and Congressional redistricting plans were not actually used to conduct an election, the plans could not have had a discriminatory effect on minority groups and thus have not denied any person the equal protection of the laws—regardless of whether they were enacted with a discriminatory purpose. Defs.' Br. at 3-4, 6-8 (ECF No. 996). This argument is meritless. The plans were never used for an election because courts blocked their implementation (*see* Order Enjoining the Implementation of Voting Changes (ECF No. 380); *Texas v. United States*, 887 F. Supp. 2d 133, 178 (D.D.C. 2012) (denying preclearance for the Texas 2011 Congressional and State House

plans), *vacated*, 133 S. Ct. 2885 (2013))—not because of any voluntary decision by Texas not to enact the plans.[1]

That Texas's 2011 plans were enjoined by this Court hardly means they did not violate the Equal Protection Clause. By that reasoning, no party could ever bring a pre-enforcement challenge to a law denying equal protection of the laws because (according to the State Defendants' tortured logic) there would be no constitutional violation to enjoin unless the discriminatory law was first permitted to go into effect. But the State Defendants' argument ignores the fact that Supreme Court has found laws to violate equal protection even though they had never gone into effect. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (concluding that amendment to Colorado constitution violated equal protection, even though it had been enjoined from going into effect); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (finding that state school initiative violated equal protection, even though it had been enjoined from going into effect).

This case bears no resemblance to *Palmer v. Thompson*, 403 U.S. 217 (1971), which the State Defendants cite for the proposition that government action without discriminatory effect, or that is otherwise lawful, does not violate the Equal Protection Clause simply because of the illicit motivations of individual legislators. Defs.' Br. at 7. In *Palmer*, the City of Jackson, Mississippi closed its public swimming pools. 403 U.S. at 219. In rejecting an equal protection challenge to the City's refusal to reopen the pools and run them on a desegregated basis, the Court found "no state action affecting blacks differently than whites." *Id*. at 225. Under the Court's reasoning, no equal protection violation occurred because the pool closures affected all Jackson residents

[1] As noted in the United States' response, filed today, to the State Defendants' motion to dismiss, application of the voluntary cessation rule is appropriate here. There is a reasonable possibility that the Texas Legislature would engage in the same conduct that Plaintiffs assert violate Section 2 of the Voting Rights Act and the guarantees of the Fourteenth and Fifteenth Amendments. For the same reason that the motion to dismiss is inappropriate, the motion for summary judgment should be denied.

equally—"black and white alike." *Id.* at 226. Given the absence of differential treatment by the City, the Court found no basis for invalidating the City's action because of "the bad motives of its supporters," who may have voted to close the pools because of a desire to avoid integration of the races. *Id.* at 224-25; *see also Washington v. Davis*, 426 U.S. 229, 243 (1976) (holding of *Palmer* was that city "was extending identical treatment to both whites and Negroes").

Here, in stark contrast to the situation in *Palmer*, the 2011 plans, enacted with discriminatory purpose, would inevitably (and by design) have had a profound discriminatory effect on minority voters had they been permitted to go into effect. Indeed, in the D.C. District Court, for example, the United States presented substantial evidence that despite dramatic minority population growth in the last decade, the 2011 Congressional plan for Texas did not create any additional Congressional districts in which minority voters would have the opportunity to elect candidates of choice. The effect, according to the D.C. District Court, was that the 2011 Congressional plan would have been more dilutive of minority voting strength than the plan it was to replace. *See Texas*, 887 F. Supp. 2d at 156-59. The D.C. District Court also found that "substantial surgery" had been performed on each of the black ability districts in Texas, removing "economic engines" and Congressional district offices and that "[n]o such surgery was performed on the districts of Anglo incumbents." *Id.* at 159-60. Moreover, in its findings of fact, *id.* at 216-22, the D.C. District Court noted what the map drawers had done by dividing minority communities by race and submerging minority population from Tarrant County into the Anglo population in Denton County, *see id*. at 221 ("The boundary between enacted CD 26 and enacted CD 12 in Tarrant County—the eastern boundary of the 'lightning bolt'—divides minority communities according to race. . . . The 'lightning bolt' running through Tarrant County in the Congressional Plan contains 38 splits of voter tabulation districts ('VTD').

The purpose behind the split VTDs was to move Hispanic populations into enacted CD 26 and split the non-Hispanic population out of the district. Mr. Downton testified that he drew the map to keep the Hispanic population together, even though he also testified that these Hispanic populations may not want to be submerged into Denton County." (citations omitted)).

With regard to the State House plan, the United States established that the 2011 House plan "will have the effect of abridging minority voting rights in four ability districts—Districts 33, 35, 117, and 149—and that Texas did not create any new ability districts to offset those losses." *Id.* at 166. As a result, the D.C. District Court concluded that the State had failed to establish the absence of discriminatory effect in the State House plan. *See id.* at 138, 159-65. Because the D.C. District Court determined that the State had failed to establish that its 2011 House plan would not have had a retrogressive effect, it did not analyze whether Texas had established that the plan did not intentionally discriminate against minority voters, but the Court nonetheless noted that the United States and Defendant-Intervenors had presented "record evidence that cause[d] concern," and noted that the "full record strongly suggests that the retrogressive effect we have found may not have been accidental." *Id.* at 177-78 (citing "incredible testimony of the lead House mapdrawer [that] reinforces evidence suggesting [intentional efforts by the State to dilute minority voting power]").

This evidence amply demonstrates that the 2011 Congressional and State House plans, both of which were enacted with discriminatory purpose, would have had a significant discriminatory effect on minority voters had they been used in elections. Only judicial intervention prevented this constitutional violation from harming voters. Thus, this Court should deny summary judgment with respect to the United States' claims of intentional discrimination involving the 2011 plans.

2. Coalition districts are protected under Section 2 of the Voting Rights Act.

The State Defendants argue that the failure to create coalition districts can never violate Section 2 of the Voting Rights Act. That contention is refuted by Fifth Circuit precedent, which is binding on this Court.[2] The State Defendants' claim that the Supreme Court invalidated these holdings regarding the viability of coalition claims, in a single sentence of a per curiam opinion in *Perry v. Perez*, 132 S. Ct. 934 (2012) (per curiam), is without merit. *Perry* merely concluded that this Court had not provided adequate justification for drawing an interim district in Dallas-Fort Worth, *id.*; one sentence in *Perry* did not re-write Section 2 jurisprudence on coalition claims. For these and the reasons that follow, the State Defendants are not entitled to summary judgment on the coalition claims.

a. Fifth Circuit case law allows coalition claims under Section 2 of the Voting Rights Act.

The Fifth Circuit has held that, under certain circumstances, Section 2 requires the drawing of "coalition districts" in which two or more racial-minority groups together form a numerical majority. *See LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988). In *LULAC*, the Fifth Circuit made clear that "if blacks and Hispanics vote cohesively, they are legally a single minority group, and elections with a candidate from this single minority group are elections with a viable minority candidate." 999 F.2d at 86. The Fifth Circuit further stated in *Campos* that "nothing in the law . . . prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics." 840 F.2d at 1244. *Campos* affirmed the findings that the coalition

[2] "[T]he judgments of the Court of Appeals for the Fifth Circuit are binding on the three-judge district court." *Ala. NAACP State Conf. of Branches v. Wallace*, 269 F.Supp. 346, 350 (M.D. Ala. 1967); *see also Finch v. Miss. State Med. Ass'n*, 585 F.2d 765, 773 (5th Cir. 1978) (recognizing that "a district court within [a] Circuit . . . was bound to follow the law of the circuit").

minority group in that case was sufficiently large and geographically compact to be a majority in a single-member district, that Blacks and Hispanics were politically cohesive, and that bloc voting by the Anglo majority usually prevented them from electing their preferred candidates. *See id.* at 1244-49. As the Fifth Circuit recognized, once cohesion has been established, such a claim is analytically indistinct from a dilution claim brought by a single minority group and is actionable under Section 2. *Id.* at 1244; *cf. Large v. Fremont Cnty.*, 709 F. Supp. 2d 1176, 1195-1202 (D. Wyo. 2010), *remedy aff'd*, 670 F.3d 1133 (10th Cir. 2012) (finding Native American voters to be cohesive notwithstanding division into two tribes).[3]

b. Section 2 of the Voting Rights Act protects all districts, including existing coalition districts, from intentional discrimination.

The Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), guarantees that voters in any type of district are protected from intentional discrimination. Because Section 2 enforces the constitutional bar on intentional discrimination in voting, *see, e.g.*, *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009), Section 2 forbids jurisdictions from intentionally eliminating the opportunity of a group of minority voters to elect their candidate of choice, alone or in combination with other racial groups, by dismantling an effective multi-minority coalition district. No party truly disputes this proposition. *See* Tex. Interim Plans Br. at 18 (ECF No. 631)

[3] The Eleventh Circuit also has upheld the validity of coalition claims. *See Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990). The Second and Ninth Circuits have identified coalition claims without specifically addressing the validity of the underlying theory. *See Pope v. Cnty. of Albany*, 687 F.3d 565, 572 & n.5 (2d Cir. 2012) (expressly declining to address the issue because of failure to establish majority bloc voting); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275-76 (2d Cir. 1994), *vacated on other grounds*, 512 U.S. 1283 (1994) (affirming Section 2 violation against Black and Hispanic voters); *Badillo v. City of Stockton*, 956 F.2d 884, 890-91 (9th Cir. 1992) (affirming dismissal based on failure to establish Black/Hispanic cohesion). However, the Sixth Circuit has held that coalition claims are not permissible. *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc).

(recognizing "the Constitution's protection of voters in any district from intentional racial discrimination").

The logic of the Supreme Court's decision in *Bartlett* supports the conclusion that intentionally eliminating minority opportunity by dismantling coalition districts violates the Constitution. In *Bartlett*, the Supreme Court stated 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." 556 U.S. at 24 (citing *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-82 (1997)). If, as *Bartlett* suggests, the Reconstruction Amendments bar intentionally discriminatory elimination of crossover districts—districts in which minority voters have the opportunity to "elect the candidate of [their] choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate," *id.* at 13—then those Amendments must also bar intentionally discriminatory elimination of coalition districts "in which two minority groups form a coalition to elect the candidate of the coalition's choice," *id.* *See also id.* at 13-14 (placing coalitions districts on a spectrum closer to single-minority majority districts than either crossover districts or influence districts).

c. The Supreme Court decisions regarding the results portion of Section 2 of the Voting Rights Act may require the creation of new minority coalition opportunity districts.

A redistricting plan can violate the Section 2 results standard when it avoids creating a district that would provide minority voters with an opportunity to elect their candidates of choice. *See Bartlett*, 556 U.S. at 11; *Growe v. Emison*, 507 U.S. 25, 40-41 (1993). As the Supreme Court has explained, "it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district." *Bartlett*, 556 U.S. at 19.

The Supreme Court has expressly withheld judgment regarding whether coalitions of multiple minority groups can satisfy the first *Gingles* precondition[4] and in general be covered by the Section 2 results test. *See id.* at 13-14; *Growe*, 507 U.S. at 41. However, a claim on behalf of a coalition of minority groups is fully consistent with *Bartlett*'s analysis of the text of Section 2. In that case, the Court held that a State would not violate Section 2 by failing to create a district in which a majority of the population was Anglo, but many members of the Anglo population regularly crossed over to form a successful political coalition with the substantial black minority. The Court reasoned that declining to draw such a district generally does not deprive minority citizens of the opportunity to "elect representatives of their choice" because they had no such opportunity to begin with, no matter how cohesive the minority group may be. *Bartlett*, 556 U.S. at 14-15. Rather, the Court held that both before and after the redistricting, minority citizens in a majority Anglo district must form a coalition with part of the majority to achieve political success, and so they "have the same opportunity to elect their candidate as any other political group with the same relative voting strength." *Id.* at 20.

Unlike a coalition of Anglo and non-Anglo citizens in a majority-Anglo jurisdiction, a coalition comprised of non-Anglo citizens in such a jurisdiction can, and sometimes does, experience common subordination of its members' voting power on account of their non-Anglo

[4] In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court established a framework for proving a vote dilution claim under Section 2 of the Voting Rights Act. Part of any such claim involves establishing that the minority community "is sufficiently large and geographically compact to constitute a majority in a single-member district . . . ." *Id.* at 50-51. When a plaintiff challenges the failure to draw a sufficient number of majority minority districts, *see Growe v. Emison*, 507 U.S. 25, 39-41 (1993), "the first *Gingles* precondition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice[,]" *Johnson v. DeGrandy*, 512 U.S. 997, 1008 (1994). In *Bartlett v. Strickland*, 556 U.S. 1, 12 (2009), the Supreme Court clarified that the minority group must constitute more than 50 percent of the population in a reasonably compact illustrative district to satisfy the first *Gingles* precondition. In a Statement of Interest to this Court, the United States previously explained how the text of Section 2 and its legislative history support the creation of coalition districts and how coalition districts are consistent with the *Gingles* framework. *See* U.S. Statement of Interest at 18-27 (ECF No. 504).

racial status. The Supreme Court has recognized that Texas historically has directed discrimination in voting towards both Latinos and Blacks, often employing the same discriminatory devices to disenfranchise both groups. *See LULAC v. Perry*, 548 U.S. 399, 439-40 (2006) (majority op.) (citations omitted). For example, the adoption of a "Whites-only" primary would simultaneously deny the voting rights of both Blacks and Hispanics. Consequently, under some circumstances, members of multiple minority groups could constitute "members of a class of citizens," 42 U.S.C. § 1973(b), protected by Section 2 of the Act.

d. *Perry v. Perez* did not address the legal viability of coalition claims.

The State Defendants assert that the Supreme Court's decision in *Perry* forecloses the argument that Section 2 ever requires the drawing of coalition districts. *See* Defs.' Br. at 20-21. That contention is meritless. *Perry*, when considered in the context of this litigation's procedural history, shows that that the Supreme Court did not decide whether Section 2 can require coalition districts. Therefore, the Fifth Circuit's decisions in *LULAC v. Clements* and *Campos*, discussed above, remain binding precedent on this issue.

On November 26, 2011, this Court adopted Plan C220 as the interim plan to be used in 2012 to elect members of the Texas delegation to the United States House of Representatives. Order (ECF No. 544); *see also id.* at 1-2 (noting that the map was "not a ruling on the merits of any claims"). In its Order, this Court explained that "[b]ecause much of the growth that occurred in the Dallas-Fort Worth metroplex was attributable to minorities, the new district 33 was drawn as a minority coalition opportunity district." *Id.* at 13. This Court described a variety of population figures related to African American and Hispanic growth in the region, as well as the advocacy of Congressperson Lamar Smith for the creation of such a district, but it did not make

any factual findings related to the cohesion of African American and Hispanic voters in the Dallas-Fort Worth metroplex. *Id.* at 13-14 & nn.27-28.

On direct appeal, the Supreme Court vacated and remanded the November 26 Order. *See Perry*, 132 S. Ct. at 934. The Supreme Court observed that this Court might intentionally have drawn a district in the Dallas area in which this Court "*expected* two different minority groups to band together to form an electoral majority." *Id.* at 944 (emphasis added). The Supreme Court then concluded that if this 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." *Id.* (citing *Bartlett*, 556 U.S. at 13-15 (plurality op.)).[5] Thus, *Perry* addressed the absence of factual findings to support this Court's expectation of minority coalition voting. *See also* Brief for the United States as Amicus Curiae at 32-33, *Perry v. Perez*, 132 S. Ct. 934 (Dec. 28, 2011) (No. 11-713), 2011 WL 6851350 (describing that this Court did not lay a sufficient foundation for the use of coalition districts). The lack of express findings regarding minority cohesion bore particular import after *LULAC v. Perry*, in which the Supreme Court had accepted the finding that, under the circumstances present in that case, "African-Americans [did] not vote cohesively with Hispanics" in the Dallas area. 548 U.S. at 443 (plurality op.) (citing *Session v. Perry*, 298 F. Supp. 451, 484 (E.D. Tex. 2004) (three-judge court) (per curiam)). In the absence of such factual findings of cohesion, it would be just as likely that the interim district that this Court originally drew would elect the preferred candidate of a coalition of Anglo voters and a single minority group, a class that the Supreme Court has held is generally outside the protection of Section 2. *See Bartlett*, 556 U.S. at 13-15.

[5] As noted above, the Supreme Court in *Perry* would have needed to distinguish the language in *Bartlett*, not cite to it, if it intended to eliminate the possibility that a Plaintiff could bring a coalition claim under Section 2.

This understanding of *Perry* is far more logical than a categorical bar on minority coalition claims that the State Defendants seek to glean from a single sentence in the Court's opinion. *See* Defs.' Br. at 20-21. *Bartlett*—the only case cited in this portion of *Perry*—expressly declined to reach the very conclusion that the State Defendants assert. 556 U.S. at 13-14. Moreover, it would be incongruous at best for the Supreme Court to have reached this broad legal conclusion, answering a question it had avoided twice, in a single sentence of a per curiam decision that was joined by eight justices, with Justice Thomas concurring in the judgment. It is simply implausible, for example, that Justices Ginsburg and Breyer—who both dissented from *Bartlett*'s holding that Section 2 generally does not allow claims based on crossover districts, *id.* at 44 (Ginsburg, J., dissenting); *id.* (Breyer, J., dissenting)—would have joined the *Perry* per curiam opinion had they believed that it categorically barred coalition-district claims under Section 2. Therefore, contrary to the State Defendants' argument, the law of the case doctrine does not bar this Court from considering claims related to minority coalitions.

e. There are disputed facts that prevent summary judgment against the United States' coalition claim.[6]

Substantial circumstantial evidence also establishes that Texas engaged in intentional discrimination when it eliminated House District 149. It is clear that the State Defendants' actions resulted in the elimination of a coalition district. This Court has already heard testimony from Rogene Calvert and Sarah Winkler regarding coalition voting in District 149 prior to the 2011 redistricting, in which African American, Hispanic, and Asian voters coalesced to elect Representative Vo and other minority candidates of choice. *See* Testimony of Rogene Calvert at

[6] In this motion, Defendants have not addressed the factual basis for the United States' claim that the 2011 House plan reflects intentional discrimination against minority voters participating in a coalition in District 149.

417:11-423:21, *Perez v. Perry* (No. 11-360) (Ex. A); Testimony of Sarah Winkler at 424:7-429:25, *Perez v. Perry* (No. 11-360) (Ex. B); *see also* Op. at 10 (ECF No. 690) (describing the diverse coalition) [hereinafter 3/19/12 Op.]. At the Section 5 preclearance trial in Washington, D.C., Representative Scott Hochberg presented unrebutted testimony that the Asian, Hispanic, and African American voters who made up the majority of the citizen-voting age population in District 149 worked in coalition to unseat long-time Anglo incumbent Talmadge Heflin and to elect Representative Hubert Vo, the first Vietnamese-American to serve in the Texas Legislature. *See* Testimony of Scott Hochberg at 12:11-14:11, *Texas v. United States* (No. 11-1303) (Ex. C); *see also Texas*, 887 F. Supp. 2d at 172-75, 244-46 (finding an existing minority coalition in District 149).

Representative Hochberg also testified at the preclearance trial about the dismantling of the coalition district in District 149. *See* Testimony of Scott Hochberg at 20:9-21:18 (Ex. C).[7] The State Defendants have not established the absence of a genuine dispute regarding the United States' claim that the Harris County House redistricting was motivated by discriminatory intent.

3. The State Defendants are not entitled to summary judgment regarding Texas's inconsistent application of the county line rule.

The Court should deny the State Defendants' request for summary judgment regarding the United States' claims that Texas intentionally discriminated against minority voters through its inconsistent application of the State's county line rule during the 2011 House redistricting process. In seeking summary judgment as to these claims, the State Defendants assert that the county line rule must *never* yield to the Voting Rights Act. This argument is incorrect as a matter of law. *See* Supremacy Clause, U.S. Const. art. VI, cl. 2. The State Defendants' argument also misses the point of the United States' Complaint (ECF No. 907) as to this issue.

[7] Rep. Hochberg also observed that the elimination of District 149 deviated from past application of the Texas county line rule, Tex. Const. art. III, § 26, which is discussed below.

In Paragraphs 53-58, under the heading "Procedural Departures from Texas's Usual Redistricting Practices," the United States alleges that the procedural departures from the usual process are evidence of discriminatory intent. Although deviations from the county line rule occurred in prior years, the United States established in the D.C. District Court and will establish here that the inconsistent application of this rule in 2011 discriminated against minority voters. In addition to the State Defendants' errors of law, therefore, there are also genuine issues of material fact in dispute. Summary judgment is thus inappropriate.

a. The Texas county line rule must yield to the Voting Rights Act when there is a conflict.

State law requirements like Texas's county line rule are superseded by federal law, including the Voting Rights Act, when there is a conflict. *See* Supremacy Clause, U.S. Const. art. VI, cl. 2. In creating its interim House plan, this Court considered the application of the county line rule in Nueces County. *See* 3/19/12 Op. at 8. The Court stated that absent a Section 5 retrogression violation, it would not cut the county line in violation of the Texas Constitution to create a second Hispanic district in the county. *Id*. The Court noted, however, that it would be appropriate to make such a cut if necessary to avoid a violation of Section 2 of the Voting Rights Act:

> This is not to say that Section 2 of the VRA could never require a county line cut. This Court can envision a situation in which the refusal to cut a county line could, even in the absence of discriminatory purpose, result in vote dilution.

Id.

Contrary to this Court's Opinion, the State Defendants contend that "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." Defs.' Br. at 29 (citing *Smith v. Craddick*, 471 S.W.2d 375, 378 (Tex. 1971)). The State Defendants' reliance on the Texas

Supreme Court's decision in *Smith* is unpersuasive. First, the *Smith* court noted that the requirements of the county line rule "are inferior to the necessity of complying with the Equal Protection Clause[,]" without addressing other statutes, 471 S.W.2d at 378, but only because the Equal Protection Clause was the only federal law at issue; Texas was not subject to Section 5 of the Voting Rights Act at the time of that decision and compliance with the Voting Rights Act was not the justification for violating the county line rule. Second, the Supremacy Clause affords equal preemptive power to the United States constitution and to federal statutes. *See, e.g.*, *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819)).[8]

The State Defendants likewise argue, incorrectly, that the U.S. Supreme Court's decision in *Bartlett* stands for the proposition that only the one-person, one-vote principle of the Equal Protection Clause may supersede the whole-county rule. Defs.' Br. at 29-30. In fact, the decision stands for precisely the opposite proposition:

> It is common ground that state election-law requirements like [North Carolina's] Whole County Provision may be superseded by federal law—*for instance*, the one-person, one-vote principle of the Equal Protection Clause of the United States Constitution. Here the question is whether § 2 of the Voting Rights Act requires district lines to be drawn that otherwise would violate the Whole County Provision. That, in turn, depends on how the statute is interpreted.

Bartlett, 556 U.S. at 7 (emphasis added; internal citation omitted). This passage illustrates that the one-person, one-vote principle is just one example of a federal law—not the only federal law

[8] Texas incorrectly argues that *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981) supports the State Defendants' position that only a violation of the one-person, one-vote rule in the federal Equal Protection Clause would supersede the Texas county line rule. In the *Valles* case, the State claimed that the failure to create two representative districts inside Nueces County was justified in order to satisfy the Voting Rights Act. The *Valles* court disagreed and noted that two alternative plans created a second district wholly within Nueces County while still preserving Hispanic voting strength under the Voting Rights Act. Therefore, the State's violation of the county line rule was not justified in that instance in order to comply with the Voting Rights Act. *Id*. at 115. Thus, the *Valles* decision does not speak to a situation where violating the county line rule *is* necessary to comply with the Voting Rights Act.

—that can trump a county line rule. In *Bartlett*, the Court found that North Carolina could not rely on Section 2 to justify deviating from its whole-county provision because the evidence in that case showed that the failure to create the district in question would not have violated Section 2. *Id*. at 13.[9] If the Voting Rights Act could never supersede a state's county line rule, the *Bartlett* Court would not have needed to address whether the evidence in the case satisfied the substantive requirements of Section 2. Similarly, the Supreme Court has provided guidance to district courts drawing interim plans that they are to follow a state's legislative policies and traditional redistricting principles, but only "to the extent those policies do not lead to violations of the [U.S.] Constitution or the Voting Rights Act." *Perry*, 132 S. Ct. at 941; *accord Abrams v. Johnson*, 521 U.S. 74, 79 (1997); *Upham* v. *Seamon*, 456 U.S. 37, 43 (1982) (per curiam).

The State Defendants also argue generally that "racial considerations" cannot predominate over traditional redistricting principles. *See* Defs.' Br. at 30-31. However, considering whether a proposed plan is consistent with the Voting Rights Act is not an impermissible racial consideration. The Court in *Abrams*, on which the State Defendants rely, did not hold that racial considerations are wholly improper, but instead specified that if the predominant motive in creating districts is race, the redistricting plan must, under the strict scrutiny standard, be narrowly tailored to serve a compelling governmental interest. 521 U.S. at

[9] Indeed, in an earlier case, both the Chief Justice and the North Carolina Supreme Court recognized that North Carolina's whole county provision must yield to the Voting Rights Act in appropriate circumstances. *See Bartlett v. Stephenson*, 535 U.S. 1301 (2002) (Rehnquist, C.J., Circuit Justice). In deciding a stay application, the Chief Justice noted that "[t]he Supreme Court of North Carolina recognized, however, that requirements of federal law will preclude the new plan from giving full effect to the 'whole county provision.'" *Id*. at 1302. He further noted that the North Carolina Supreme Court, like four other state supreme courts had, "harmonized" the state constitutional provision with federal law, ordering that the new plan "must preserve county lines to the maximum extent possible, except to the extent counties must be divided to comply with Section 5 of the Voting Rights Act[,] . . . to comply with Section 2 of the Voting Rights Act, and to comply with the U.S. Constitution, including the federal one-person one-vote requirements." *Id.* (internal quotations omitted) (quoting *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002) (noting similar reconciliations between federal law and county boundary requirements in four other states)).

91. Assuming without deciding that Section 2 compliance is a compelling governmental interest, the *Abrams* Court based its holding on the fact that there was no strong evidence that vote dilution, in violation of Section 2, would result from plan at issue. *Id*. at 91-92. Unlike the plan in *Abrams*, there is substantial evidence (and, at a minimum, a material issue of fact) that Texas violated Section 2 by intentionally applying its county rule inconsistently to eliminate minority opportunity districts in the 2011 House plan.

b. Inconsistent application of the county line rule creates a factual dispute that must be evaluated by the Court at trial.

The United States alleges that the inconsistent application of the county line rule is a procedural departure that provides evidence of intent. Guidelines from the Texas Legislative Council ("TLC") state that the county line rule should yield to one-person, one-vote concerns under the Constitution or adherence to the Voting Rights Act. *See* Texas Legislative Council, *State and Federal Law Governing Redistricting in Texas* 137-38, 141-42 (Aug. 2011), http://www.tlc.state.tx.us/pubspol/State&Federal_Law_TxRedist.pdf (Ex. D). The TLC also provided this information in training sessions to legislators prior to the redistricting process.

Despite this guidance, Representative Burt Solomons, Chair of the House Redistricting Committee, stated that if there were a conflict between the county line rule and the Voting Rights Act, he would follow the county line rule, Testimony of Burt Solomons at 81:13-87:2, *Texas v. United States* (No. 11-1303) (Ex. E), absent a specific mandate from the Supreme Court, *see* House Floor Tr. at S214-15 (Tex. Apr. 27, 2011) (statement of Rep. Solomons) (Ex. F). Indeed, deviations from the county line rule in the 2011 House plan in Texas were permitted in Henderson County in order to comply with the federal one-person, one-vote requirement, Testimony of Burt Solomons at 85-86 (Ex. E), but calls for a deviation from the county line rule to comply with the Voting Rights Act in Nueces County—to protect a district in which minority

voters previously had the ability to elect their candidates of choice—were rejected, House Floor Tr. at S99-100 (Tex. Apr. 27, 2011) (statement of Rep. Solomons) (Ex. F), even after the TLC warned legislators about possible retrogression issues, Email from David Hanna to Denise Davis (Feb. 17, 2011) (Ex. G); Possible Retrogression Issues for Black and Hispanic Dists. in Proposed House Plan (Ex. H).

Further, during the 2011 House redistricting process, the application of the county line rule was inconsistent from past practice in Harris County, *see* Testimony of Gerardo Interiano at 150:4-19, *Texas v. United States* (No. 11-1303) (Ex. I), providing legislators an excuse to eliminate District 149, a district in which minority voters had the ability to elect their candidate of choice. Harris County contained 25 House districts in the redistricting plan adopted based on the 2000 Census, and not all of the districts were contained entirely within Harris County. Testimony of Gerardo Interiano at 150:11-19 (Ex. I); Dist. Pop. Analysis with Cnty. Subtotals: House Dists. – Plan H100 at 10-11 (Ex. J). In drawing the 2011 plan, however, Texas reduced the number of House districts in Harris County, even though the relative size of the County's population in comparison to the population of an ideal Texas House district remained virtually unchanged according to the 2010 Census.[10] Harris County contained only 24 districts in the 2011 plan because the legislature used the county line rule to justify the elimination of any districts that would not be wholly contained within Harris County. *See* Testimony of Gerardo Interiano at 148:1-10 (Ex. I); Dist. Pop. Analysis with Cnty. Subtotals: House Dists. – Plan H283 at 10-11 (Ex. K).

This reduction forced the pairing of incumbents in an area with a rapidly growing minority population, despite Chairperson Solomons's stated intent to minimize such pairings.

[10] According to the 2010 Census, Harris County had 24.41 times the population of an ideal Texas House district. The County had 24.46 times the population of an ideal House district based on the 2000 Census.

House Floor Tr. at S99-100 (Tex. Apr. 27, 2011) (statement of Rep. Solomons) (Ex. F). Moreover, the paired incumbents were from Districts 137 and 149, which the TLC advised were protected under the Voting Rights Act, Email from David Hanna to Denise Davis (Feb. 17, 2011) (Ex. G); *see* TLC, *State and Federal Law Governing Redistricting in Texas* 137-38, 141-42 (Aug. 2011), *http://www.tlc.state.tx.us/pubspol/State&Federal_Law_TxRedist.pdf* (Ex. D); Jeffrey Archer Dep. at 53:14-56:1, Oct. 12, 2011 (Ex. L), and as between those two, the district eliminated was represented by Vietnamese-American Representative Vo, not Anglo Representative Hochberg.

Determining whether Texas selectively used the county line rule to eliminate districts in Harris and Nueces Counties in which minority voters were able to elect their candidates of choice, in violation of Section 2, will require the resolution of disputed facts. The State Defendants' motion for summary judgment as to this issue therefore should be denied.

B. The State Defendants have made other meritless arguments in seeking summary judgment on the private Plaintiffs' claims involving the 2013 plans

Congress gave the Attorney General broad authority to enforce the federal laws that implement the voting guarantees in the Fourteenth and Fifteenth Amendments. *See* 42 U.S.C. § 1973j(d). The Attorney General thus has a strong interest in making sure that federal laws concerning voting rights are properly interpreted and vigorously and uniformly enforced. As a result, the United States addresses certain 2013 claims regarding the Fourteenth and Fifteenth Amendments even though the claims fall outside of the scope of the United States' Complaint in Intervention (ECF No. 907).

1. The Fifteenth Amendment prohibits intentional vote dilution.

The State Defendants argue that the Fifteenth Amendment does not create a claim for vote dilution and thus that they are entitled to summary judgment on all Fifteenth Amendment

claims brought by all plaintiffs against the 2013 redistricting plans. The State Defendants' argument is incorrect.

At the outset, we note that the Court need not decide the scope of the Fifteenth Amendment because all of the plaintiffs who raise constitutional challenges to intentional vote dilution base their claims on both the Fourteenth and Fifteenth Amendments. And it is undisputed that the Fourteenth Amendment prohibits intentional vote dilution. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 617 (1982).

But if the Court decides to address the Fifteenth Amendment issue, it should reject the State Defendants' argument. The Fifth Circuit has squarely held that vote dilution claims are cognizable under the Fifteenth Amendment. *See Lodge v. Buxton*, 639 F.2d 1358, 1372 (5th Cir. Unit B 1981) ("A plaintiff bringing a voting dilution case attacking an electoral system that is racially neutral on its face, may challenge such system on the grounds that it violates either the Fourteenth or Fifteenth Amendment."), *aff'd*, 458 U.S. 613 (1982); *accord id.* at 1375; *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 552 n.8 (5th Cir. 1980) ("it is clear that a majority of the [Supreme Court] believes that a fifteenth amendment claim can be made out against vote-diluting at-large districting if discriminatory purpose is proved"); *Voter Information Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 211 (5th Cir. 1980) (holding that plaintiffs' vote dilution claim stated a cause of action under both the Fourteenth and Fifteenth Amendments; explaining that "[t]o hold that a system designed to dilute the voting strength of black citizens and prevent the election of blacks as Judges is immune from attack would be to ignore both the language and purpose of the Fourteenth and Fifteenth Amendments."); *accord United States v. Marengo Cnty. Com'n*, 731 F.2d 1546, 1555 (11th Cir. 1984) (relying on Fifth Circuit precedent to conclude that "the Fifteenth Amendment, as well as the Fourteenth, protects

not only against denial of the right to vote but against dilution of that right as well"); *Perkins v. City of West Helena*, 675 F.2d 201, 205-06 (8th Cir. 1982) (citing Fifth Circuit precedent in concluding that "Plaintiffs' claim of racially discriminatory vote dilution is also cognizable under the Fifteenth Amendment"), *aff'd*, 459 U.S. 801 (1982).

While the Supreme Court has not ruled explicitly on the question (*Voinovich v. Quilter*, 507 U.S. 146, 159 (1993)), the Court's decisions suggest that it would recognize the viability of vote dilution claims under the Fifteenth Amendment. For example, the Supreme Court strongly suggested in *Bartlett* that the Fifteenth Amendment prohibits at least some forms of intentional vote dilution. 556 U.S. at 24 (explaining 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"). And although the four-justice plurality in *Mobile v. Bolden*, 446 U.S. 55, 65-66 (1980), opined that the Fifteenth Amendment did not prohibit vote dilution, the Fifth Circuit has emphasized that the other "five Justices [in *Bolden*] explicitly stated that, with the proper proof, the Fifteenth Amendment would support a voting dilution claim," *Lodge*, 639 F.2d at 1369 n.25.

To be sure, Supreme Court and Fifth Circuit decisions prior to *Bartlett* contained dicta questioning whether the Fifteenth Amendment covers vote dilution claims. In the course of engaging in statutory interpretation of Section 5 of the Voting Rights Act, the Supreme Court observed in dicta that "we have never held that vote dilution violates the Fifteenth Amendment" and that *Bolden* "not only does not suggest that the Fifteenth Amendment covers vote dilution, it suggests the opposite." *Bossier*, 528 U.S. at 335 n.3. Likewise, in dicta, in the course of authorizing a Fifteenth Amendment claim to proceed, the Fifth Circuit observed that "the Supreme Court has rejected application of the Fifteenth Amendment to vote dilution causes of

action." *Prejean v. Foster*, 227 F.3d 504, 519 (5th Cir. 2000). The Fifth Circuit in *Prejean* cited only *Bossier* and *Bolden* for this point, without addressing the prior Fifth Circuit case law.

Such dicta do not, of course, overrule binding Circuit precedent. Unless and until the Supreme Court or the Fifth Circuit sitting en banc overturns *Lodge*, *Uvalde*, and *Voter Information Project*, they remain binding on this Court and compel the conclusion that the Fifteenth Amendment prohibits intentional vote dilution.

2. Legislative adoption of an interim plan drawn by a court does not preclude a finding that its enactment was intentionally discriminatory.

The State Defendants are not entitled to summary judgment on claims of intentional discrimination against the 2013 legislatively enacted House and Congressional plans simply because those plans are identical to or substantially similar to this Court's 2012 court-ordered interim plans.[11] *See* Defs.' Br. at 8-12. While there can be no question that this Court had no independent discriminatory intent in drawing its interim plans for the State House and Congressional districts, the same cannot be said about the Texas legislature when it enacted the 2011 plans—plans that this court was required to use as a starting point for its 2012 interim plans. *See Perry*, 132 S. Ct. at 938. During the preclearance litigation in the D.C. District Court, Plaintiffs and the United States uncovered evidence to support a finding of intentional discrimination in the 2011 plans. That evidence was never presented to this Court, and as a result, a factual inquiry into whether the 2013 plan cured the vestiges of the legislature's preexisting discriminatory intent is appropriate. *See supra* at 6-7.

[11] The Congressional plan adopted by the legislature in 2013 (Plan C235) is identical to the interim plan imposed by this Court in 2012. The 2013 House plan (Plan H358) differs slightly from this Court's 2012 interim plan (Plan H309).

The State Defendants' argument ignores this Court's reasoning when it implemented the court-ordered plans. In imposing plans for use during the 2012 election, this Court emphasized the "preliminary and temporary nature" of the interim plans. *See* 3/19/12 Op. at 12 (explaining the interim House plan). This Court noted that its maps were "not a final ruling on the merits of any claims asserted by the Plaintiffs in this case . . . ." Order at 1 (ECF No. 691) (explaining the interim Congressional plan) [hereinafter 3/19/12 Order]; *see also* Op. at 12 (noting that nothing in the interim House plan "represent[ed] a final judgment on the merits as to any claim or defense in this case"). Rather, the interim maps were the result of "preliminary determinations regarding the merits of the § 2 and constitutional claims presented in the case, and application of the 'not insubstantial' standard for the § 5 claims, as required by the Supreme Court decision in *Perry v. Perez*, 565 U.S. __, 132 S. Ct. 934 (2012) (per curiam)." 3/19/12 Order at 1; *see also* 3/19/12 Op. at 2-3. Plaintiffs' claims against the 2011 and 2013 Congressional and House plans, including those of intentional discrimination, have not been adjudicated fully by this, or indeed any, court. That the plans enacted by the legislature in 2013 are substantially similar or even identical to the interim plans adopted by this court does not entitle the State Defendants to summary judgment on plaintiffs' claims of intentional discrimination.

The case of *Texas v. United States*, 785 F. Supp. 201 (D.D.C. 1992) (three-judge court), a Section 5 declaratory judgment action before the United States District Court for the District of Columbia, is instructive. In that case, Texas argued that it was entitled to summary judgment because the redistricting plan enacted by its legislature and submitted for preclearance review under Section 5 was substantively identical to a redistricting plan already precleared by the Attorney General following the adoption of a settlement plan in related litigation. As part of the requisite analysis under Section 5, the court conducted an inquiry to determine "whether a

racially discriminatory purpose was among the factors that motivated the State in devising [the plan,]" *id.* at 205-06, an inquiry equivalent to the one this Court must now conduct when adjudicating Plaintiffs' claims under the Constitution and Section 2 of the Voting Rights Act that the 2013 Congressional and House plans were enacted with a discriminatory purpose. The *Texas* court there correctly noted that "[t]he purposes motivating the [court-ordered] settlement plan are different from those motivating [the legislative bill]" enacting that same plan, as well as the fact that the two plans were adopted "in different contexts". *Id.* Recognizing that "any determination of whether [the bill] has a discriminatory purpose would require us to conduct some kind of hearing," the court held that "[i]n any event, it is not an issue that can be resolved on summary judgment." *Id.* Likewise, this Court will need to perform a comparable factual inquiry here to assess whether the 2013 plans were enacted with a discriminatory purpose, and the State Defendants thus are not entitled to summary judgment.

III. CONCLUSION

As set forth above, there are numerous disputed issues of material fact with regard to the United States' challenges to the 2011 plans, and the State therefore is not entitled to judgment as a matter of law. Accordingly, this Court should deny the State Defendants' motion for partial summary judgment regarding the United States' claims.

Date: June 9, 2014

Respectfully submitted,

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