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

SHANNON PEREZ, et al., *Plaintiffs*, - and - EDDIE BERNICE JOHNSON, et al., - and - TEXAS STATE CONFERENCE OF NAACP BRANCHES, et al., *Plaintiff Intervenors*, v. RICK PERRY, et al., *Defendants*,	)	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs*, - and - HONORABLE HENRY CUELLAR, et al., *Plaintiff Intervenors*, v. STATE OF TEXAS, et al., *Defendants*	)	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]

TEXAS LATINO REDISTRICTING TASK FORCE, et al., *Plaintiffs*, v. RICK PERRY, et al., *Defendants*,	)	CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated case]
MARAGARITA v. QUESADA, et al., *Plaintiffs*, v. RICK PERRY, et al., *Defendants*,	)	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]
JOHN T. MORRIS, *Plaintiff*, v. STATE OF TEXAS, et al., *Defendants*,	)	CIVIL ACTION NO. SA-11-CA-615-OLG-JES-XR [Consolidated case]
EDDIE RODRIGUEZ, et al., *Plaintiff*,	)	CIVIL ACTION NO. SA-11-CA-635-OLG-JES-XR [Consolidated case]

v.)
)
STATE OF TEXAS, et al.,)
)
Defendants.)

RESPONSE OF TEXAS LATINO REDSTRICTING TASK FORCE, ET AL.
TO THE STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Texas Latino Redistricting Task Force, *et al.* ("Task Force Plaintiffs") file this response to the motion for partial summary judgment by 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" or "Texas").

I. INTRODUCTION

Texas seeks summary judgment on the Task Force Plaintiffs' claims related to:

- Intentional racial discrimination in the 2011 and 2013[1] redistricting plans;
- Violations of section 2 of the Voting Rights Act resulting from the State's application of the County Line Rule in the 2011 Texas House plan; and
- HD90 in the 2013 Texas House plan.

For the reasons set out below, Texas is not entitled to summary judgment on the Task Force Plaintiffs' claims and the Task Force Plaintiffs respectfully request that the motion be denied.

[1] The Task Force Plaintiffs do not challenge the 2013 congressional redistricting plan, C235. With respect to the 2013 Texas House plan, H358, the Task Force Plaintiffs challenge HD90 as intentionally discriminatory on the basis of race. *See* Task Force 4th Am. Compl., Dkt. 891 at 18.

II. ARGUMENT

A. Legal Standard for Summary Judgment

Summary judgment is warranted "'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.'" *Pub. Citizen, Inc. v. Louisiana Att'y Disciplinary Bd.*, 632 F.3d 212, 217 (5th Cir. 2011) (*quoting* Fed. R. Civ. P. 56(a)). A "material fact" is one that can affect the outcome of the suit under the governing substantive law. *United States v. Bloom*, 112 F.3d 200, 205 (5th Cir. 1997) (*citing United States v. Arron*, 954 F.2d 249, 251 (5th Cir. 1992)). Courts must view all evidence in the light most favorable to the party opposing the motion and draw all reasonable inferences in that party's favor. *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) ("in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'") (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986)).

Summary judgment is not warranted when the non-moving party has proffered sufficient evidence to raise a question of fact with respect to the claim on which summary judgment is sought. *Id.* at 1866-68; *see also Richardson v. Prairie Opportunity, Inc.*, 470 F. App'x 282, 286 (5th Cir. 2012) (former employee's "evidence was sufficient to create a genuine dispute on the truth" of employer's explanation for termination in discrimination suit); *Cates v. Dillard Dep't Stores, Inc.*, 624 F.3d 695, 695-96 (5th Cir. 2010) (vacating and remanding decision where fact issues precluded summary judgment).

B. The Task Force Plaintiffs' Claims Regarding Violations of the Fourteenth Amendment in the 2011 House and Congressional Plans and 2013 House Plan Are Well-established and Not Barred by Law.

There are two distinct ways of proving intentional racial discrimination in redistricting in violation of the Constitution. The first targets actions that purposefully dilute the voting strength of a particular racial group and is "analytically distinct" from the second, which flows from the *Shaw v. Reno* line of cases holding that the use of race as the predominant basis for classifying and separating voters into districts violates the Fourteenth Amendment. *Shaw v. Reno*, 509 U.S. 630, 652 (1993); *see also Miller v. Johnson*, 515 U.S. 900, 911 (1995) (explaining distinction between claims).

Courts have long recognized that public decision-making bodies, like the State of Texas, can have more than one motive when enacting a statute. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.").

The Court in *Arlington Heights* continued:

> In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Id. at 265-66.

Thus, plaintiffs can prove that a law is unconstitutional even where the challenged law resulted from considerations of race as well as other motivations. *See id.* at 270-71

n.21 (in order to defeat constitutional claim, defendant must show that "the same decision would have resulted even had the impermissible purpose not been considered").

1. <u>Texas Misapprehends the Fourteenth Amendment Test for Intentional Discrimination</u>.

The State's argument that Plaintiffs have no claim under the Fourteenth Amendment is wrong in two respects. First, Texas incorrectly asserts that in order to prevail on an equal protection claim Plaintiffs must prove that the challenged law has a disproportionate negative effect on one racial group. Second, Texas incorrectly asserts that a challenged law must go into effect before a court may find it unconstitutional.

2. <u>Disparate Racial Impact Is Not a Necessary Element of an Equal Protection Claim</u>.

Texas cannot support its novel contention that only laws with a disparate racial impact can violate the Fourteenth Amendment. State Defendants' Mot. for Partial Summ. J. (hereinafter "State MSJ"), Dkt. 996 at 4 ("[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.") (emphasis added).

Texas misreads *United States v. O'Brien*, 391 U.S. 367 (1968), in which the Supreme Court upheld, in a First Amendment challenge, a federal law prohibiting knowing destruction of draft cards. The Supreme Court in *O'Brien* said nothing about requiring disparate impact on the basis race in order to establish a Fourteenth Amendment violation. In that case, the Court declined to find that the challenged statute was enacted for the purpose of limiting free speech based on the Court's observation that there was insufficient evidence in the record to establish discriminatory motive by Congress and the Court's conclusion that "the destruction of Selective Service certificates

is in no respect inevitably or necessarily expressive [speech]." *United States v. O'Brien*, 391 U.S. at 385.

The only other case cited by Texas similarly does not support the State's unusual claim. In *Palmer v. Thompson*, the Supreme Court declined to find an equal protection violation where Jackson, Mississippi closed all of its swimming pools, concluding that the closure of the pools treated all races equally and did not separate the races. *See* 403 U.S. 217, 220-21 (1971) (explaining that because "closing the pools to all [did not deny] equal protection to Negroes, [the Supreme Court] must agree with the courts below and affirm"). Because the Supreme Court in *Palmer* found that the closing of pools did not treat Jackson residents differently from each other on the basis of race, it never reached the question whether (and certainly never required the plaintiffs to show) different treatment was more adverse to one group or another.

Since *O'Brien* and *Palmer*, both decided before 1972, the Supreme Court has made clear that governmental racial classifications, even when "benign" and without adverse impact on a particular racial group, are subject to strict scrutiny under the Fourteenth Amendment. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Johnson v. California*, 543 U.S. 499, 505 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995); *Shaw*, 509 U.S. at 650.

Today, there can be no dispute that governmental "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Shaw*, 509 U.S. at 651 (*citing Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("It is axiomatic that

racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.").

Even if Texas were right, and Plaintiffs were required to show that the challenged redistricting plans would have a discriminatory effect on Latino voters, Plaintiffs presented ample evidence at trial and developed additional facts in this latest round of discovery that create an issue of fact as to whether the challenged redistricting plans have a negative effect on Latino ability to elect their candidate of choice.

For example, with respect to the 2011 Texas House plan, this Court found preliminarily that: "it appears that HD 35 in the enacted plan diminishes the ability of minorities to elect their candidate of choice," Dkt. 690 at 5; "the State may have focused on race to an impermissible degree by targeting low-turnout Latino precincts [in HD117]," *id.* at 6; "the high number of split precincts in the protrusions [between HD77 and HD78] increases the likelihood that the map-drawers were focused on race," *id.* at 10-11; and "the Court preliminarily concludes that the creation of a new Latino district in eastern Harris County is justified by the totality of the circumstances," *id.* at 8-9.

With respect to the 2011 congressional plan, this Court found preliminarily that Plaintiffs had presented a "not insubstantial" claim of retrogressive effects in CD23. Dkt. 691 at 31. This Court further found preliminarily that Plaintiffs had presented "'not insubstantial' § 5 claims of cracking and packing" in Dallas-Ft. Worth. *Id.* at 38.

This Court's preliminary findings in support of the interim redistricting plans (and the evidence on HD90 in H358 discussed in this brief at section II(E) *infra*) more than satisfy any requirement that the Task Force Plaintiffs create a fact issue with respect to the adverse effects of the challenged redistricting plans on Latino voters.

3. Discriminatory Redistricting Plans May Be Challenged Before They Go into Effect.

Texas further errs in asserting that a law cannot be found to violate the Fourteenth Amendment if it has not yet gone into effect. *See* State MSJ, Dkt. 996 at 8-9 ("It is an undisputed fact that the 2011 redistricting plans were never used to conduct an election. . . . It follows that the 2011 redistricting plans have not denied any person of the equal protection of the laws."). If Texas's assertion were true, there could never be a pre-enforcement challenge to any statute under the Equal Protection Clause.

Texas cites no case to support its contention that a redistricting plan must be used in an election before it can be challenged. In fact, federal courts routinely hear Fourteenth Amendment challenges to redistricting plans that have not yet been used in an election. *See, e.g.*, *Balderas v. Texas*, 536 U.S. 919 (2002) (Fourteenth Amendment challenge to 2001 Texas redistricting plan); *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (subsequent history omitted) (Fourteenth Amendment challenge to 2003 Texas redistricting plan); *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992) (Fourteenth Amendment challenge to North Carolina redistricting plan); *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd sub nom. Shaw v. Reno*, 509 U.S. 630 (1993) (Fourteenth Amendment challenge to North Carolina redistricting plan); *Terrazas v. Slagle*, 789 F. Supp. 828, 834 (W.D. Tex. 1991), *aff'd*, 506 U.S. 801 (1992) (Fourteenth Amendment challenge to 1991 Texas redistricting plan).

C. Task Force Plaintiffs Have Alleged Sufficient Evidence of Intentional Discrimination to Bring a Claim Under the Fifteenth Amendment of the U.S. Constitution.

The Fifteenth Amendment, ratified in 1870 after a bloody Civil War, promised unequivocally that "[t]he right of citizens of the United States to vote" no longer would

be "denied or abridged . . . by any State on account of race, color, or previous condition of servitude. *Shaw*, 509 U.S. at 639 (*quoting* U.S. Const. amend. XV, § 1). Although created with the goal of ensuring the franchise of African Americans, "[t]he Amendment grants protection to all persons, not just members of a particular race. *Rice v. Cayetano*, 528 U.S. 495, 512 (2000).

The Task Force Plaintiffs challenge the 2011 and 2013 redistricting plans under the Fifteenth Amendment because the plans: (1) create districts that purposefully dilute Latino voting strength and (2) assign Latinos, on the basis of race, into and out of districts. *See* Task Force 4th Am. Compl., Dkt. 891 at ¶¶ 41-43, 53, 56, 66-67, 78-79, 83-84.

The U.S. Supreme Court "has not decided whether the Fifteenth Amendment applies to vote-dilution claims . . . ." *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993). The State's reliance on dicta in a footnote in *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 369 (2000) (*Bossier II*), to assert otherwise is misplaced. In *Bossier II*, the Supreme Court observed that "we have never held that vote dilution violates the Fifteenth Amendment" and cited the language in *Voinovich* explaining that the Court had not decided the question. *Id.* at n.3. The State cannot rely on any suggestion to the contrary in *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. *See Bossier II*, 120 S.Ct. at 875, n.3 (2000)."). The Fifth Circuit's dicta relies on *Bossier II,* a case involving preclearance under section 5 of the Voting Rights Act (not a vote dilution challenge) and in which the Supreme Court merely noted that it has not decided whether intentional vote dilution violates the Fifteenth Amendment.

Further undermining the State's argument are the observations by the Supreme Court that an intentional vote dilution under the Fifteenth Amendment is analyzed in the same manner as a claim under the Fourteenth Amendment. *See Rogers v. Lodge*, 458 U.S. 613, 621 (1982) (affirming that "a determination of discriminatory intent is 'a requisite to a finding of unconstitutional vote dilution' under the Fourteenth and Fifteenth Amendments"). The Fourth, Fifth, and Eleventh Circuit Courts of Appeal agree with this analysis under the Fifteenth Amendment. *See Lodge v. Buxton*, 639 F.2d 1358, 1372 (5th Cir. 1981), *aff'd sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982) ("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."); *see also United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1555 (11th Cir. 1984) ("[T]he 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."); *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir. 1981) ("Claims of racially discriminatory vote dilution exist under both the fifteenth amendment and the Equal Protection Clause of the fourteenth amendment.").

Furthermore, Task Force Plaintiffs' claims under the Fifteenth Amendment are not limited to intentional vote dilution. Task Force Plaintiffs also challenge, as violative of the Fifteenth Amendment, the State's purposeful assignment of Latino voters into and out of districts on the basis of race in: HD90 in H358; HD117 in H283; CD23 in C185; and the Dallas-Ft. Worth Metroplex in C185. *See* Task Force 4th Am. Compl., Dkt. 891 at ¶¶ 37, 41-42, 53, 56, 67, 78.

The assignment of Latino voters, on the basis of their race, into and out of specific congressional and House districts "may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw*, 509 U.S. at 657 (ultimately resolving claim under the Fourteenth Amendment); *see also Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) ("When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.").

D. <u>The Task Force Plaintiffs Have Advanced Viable Claims of a Section 2 Violation Involving the Texas Whole County Provision.</u>

It is well-established that Texas's County Line Rule (Tex. Const. art. III, § 26) must yield to the Voting Rights Act. *See* U.S. Const. art VI, cl. 2; *LULAC Council No. 4434 v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989) ("If the present [judicial election] district lines are found to violate the Voting Rights Act and/or the United States Constitution, Texas' constitutional and statutory provisions protecting district lines will be nullified under the Supremacy Clause."). In addition to the Fifth Circuit precedent in *LULAC Council No. 4434*, federal cases consistently demonstrate that the Supremacy Clause of the United States Constitution requires state election rules to yield to the federal Voting Rights Act when they are in conflict. *See, e.g.*, *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) ("[T]he District Court thought it significant that the plan's drafter . . . disregarded the requirements of the Ohio Constitution where he believed that the Voting Rights Act of 1965 required a contrary result. But [the drafter's] preference for federal over state law when he believed the two in conflict does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy Clause of the

United States Constitution."); *Katzenbach v. Morgan*, 384 U.S. 641, 643-47 & nn.1-2 (1966) (holding that Section 4(e) of the Voting Rights Act prevailed over election laws of New York requiring an ability to read and write English as a condition of voting); *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 & n.9, 333-34, 337 (1966) (holding that the Voting Rights Act was an appropriate remedy to overcome racially biased constitutions, such as South Carolina's); *Sanchez v. Colorado*, 97 F.3d 1303, 1306-07 (10th Cir. 1996) (noting that Colorado recognizes that the Voting Rights Act prevails over the whole county rule and applying that standard); *Lopez v. Monterey Cnty.*, 871 F. Supp. 1254, 1258 (N.D. Cal. 1994) (noting that some provision of the California Constitution may have to be violated to remedy violations of the Voting Rights Act), *vacated on other grounds*, 519 U.S. 9 (1996); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1047 n.21 (D. Md. 1994) ("Plaintiffs' plan would increase the number of majority-black delegate districts by disregarding the requirement of the Maryland Constitution that delegate districts be 'nested' within senatorial districts. *See* Md. Const. art. III, § 3. Plaintiffs are correct in arguing that state statutes or constitutional provisions that result in violations of the U.S. Constitution or the Voting Rights Act are preempted by federal law. . . . On the other hand, it is self-evident that a state plan should—indeed must—comply with state statutory and constitutional mandates if compliance with those mandates does not violate federal law.").

The Texas Legislature was advised by the Legislative Council that the County Line Rule must yield to the requirements of the Voting Rights Act. The Texas Legislative Council presentation by Senior Legislative Counsel David Hanna on the County Line Rule for House Districts from March 1, 2011 states, "Basic Rule: A county may be cut in

drawing a house district only when required to comply with: the one-person, one-vote requirement of the Fourteenth Amendment to the United States Constitution; or the Voting Rights Act." Pl. Ex. 226, Dkt. 320-2 at 51.

Minority members of the Texas Legislature knew that the Legislative Council had produced a redistricting primer for members of the Legislature and it placed a higher value on compliance with the Voting Rights Act when compared to the preservation of the whole county. *See* Ex. 1, San Antonio Trial Tr., 76:16-78:3, Sept. 6, 2011 AM. In spite of this direction from legal counsel, the Legislature justified the failure to create any additional Latino opportunity districts in the enacted a House map on the need to follow the County Line Rule, even at the expense of the Voting Rights Act.

The chief author of the Texas House plan, Chairman Burt Solomons, chose to follow the state County Line Rule over the federal mandate to avoid vote dilution in redistricting. *See, e.g.*, Ex. 2, Solomons Dep., Vol. I, 47:14-47:18, Aug. 31, 2011 ("Until a court—preferably the US Supreme Court—said that the Voting Rights Act trumped and was supreme over the Texas Constitution with the county line rule. We had that discussion, and I told you that is what it was going to take before I think to change that.").

E. <u>The Task Force Plaintiffs Have Created a Fact Issue as to Whether the Configuration of HD90 in Plan H358 Dilutes Latino Voting Strength and Uses Race as a Predominant Factor to Allocate Latino Voters into and out of HD90.</u>

The Task Force Plaintiffs seek a declaration that "the alterations made to House District (HD) 90 in the 2013 Texas House of Representatives redistricting plan (Plan H358) violate their civil rights by unlawfully diluting the voting strength of Latinos [and] discriminate against them on the basis of race and national origin." Dkt. 891 at 2-3. The

Task Force Plaintiffs further assert that "[t]he configuration of HD 90 in Plan H358 dilutes Latino voting strength and uses race as a predominant factor to allocate Latino voters into and out of HD 90." *Id.* at 11.

Contrary to the suggestion of Texas, the Task Force Plaintiffs are not required to show, and do not claim, that H358 eliminated the ability of Latino voters to elect their candidate of choice in HD90. Dkt. 996 at 13. Instead, the Task Force Plaintiffs allege that HD90 was changed purposefully to "reduce the ability of Latino voters to nominate their preferred candidate in subsequent elections" and that Latinos and others were assigned into and out of HD90 on the basis of their race. *Id.* at 11.

The Task Force Plaintiffs have developed substantial circumstantial evidence of intent to reduce Latino voters' ability to elect their preferred candidate. *See Arlington Heights*, 429 U.S. at 266. HD90 is the only Latino opportunity House district in Tarrant County. In 2011, the Texas Legislature made changes to HD90 to bring nearby Latino voters into the district and increase the SSVR of HD90. The Legislature's decision to increase the Latino voting strength of HD90 was maintained by this Court in its interim redistricting plan for the 2012 elections.

The sequence of events leading up to the alteration of HD90 in H358 shows that Latino voters were increasingly exercising political strength in the district and the incumbent faced the possibility of losing his seat. In the 2012 Democratic Primary election, the Anglo incumbent of HD90, Representative Lon Burnam, was challenged by a Latino candidate. Mr. Burnam prevailed in the Democratic Primary election by 159 votes and went on to win the General Election in November 2012.

Mr. Burnam testified that he knew he was not the Latino-preferred candidate in the 2012 Primary. *See* Ex. 3, Burnam Dep., 125:12-126:4, May 19, 2014. The Task Force Plaintiffs' expert Dr. Richard Engstrom further found that Mr. Burnam was not the Latino candidate of choice in the 2012 Primary. *See* Ex. 4, Engstrom Dep., 59:20-61:1, May 1, 2014. When the Texas Legislature took up redistricting in 2013, Mr. Burnam worked to develop an amendment to the House plan that would bring a substantial number of non-Latino voters back into HD90. *See* Ex. 3, Burnam Dep., 72:8-73:7, May 19, 2014.

Mr. Burnam's amendment, which was incorporated into H358, changes the court-drawn interim plan by swapping precincts and portions of precincts between HD90 and HD99. *See* Ex. 5, Texas Legislative Council RED216 Report Excerpts for Plan H309 and Plan H358. The population removed from HD90 is 44% Latino with a Spanish Surnamed Voter Registration (SSVR) of 20.6%. *Id.* The population added to HD90 is 33.8% Latino with an SSVR of only 8.5%. *Id.* The changes to HD90 result in a decrease in the SSVR of HD90 from 51.1% to 50.1 %. *Id.*

The evidence shows that the adoption of the Burnam amendment to HD90 departed from normal procedure. The amendment changing HD90 was never heard in committee before being incorporated into the enacted 2013 Plan—Plan H358. *See* Ex. 3 at 238:22-239:13; Ex. 6, Texas House Journal Supplement—3rd Day (June 20, 2013) at S29. In fact, the amendment to HD90 was introduced for the first time on the House floor during the debate on the redistricting bill and there was no opportunity for public examination or comment before the amendment came up for a vote. *Id.*

The evidence shows that H358 departs from normal substantive considerations as well. Despite the fact that HD90 was already a Latino opportunity district, Mr. Burnam's amendment reduced the SSVR in the district. *Compare* Ex. 7, Excerpt of Plan H309 RED202, *with* Ex. 8, Exceprt of Plan H358 RED-202. Plan H358's boundaries for HD90 also split ten precincts. *See* Ex. 9, Excerpt of RED-380 Split Precinct Report for Plan H358.

Plans C185 and H283 and the alterations made to HD90 in H358 operate to dilute the voting strength of Latinos in the State of Texas. Although HD90 remained a district that leaned Democratic in General Elections, the performance of Latino candidates in exogenous Democratic Primaries was reduced in H358. *See* Ex. 10, District Election Analysis RED-225 Report Excerpts, 2002-2012.

The facts offered by Texas in support of its motion are not dispositive of the Task Force Plaintiffs' claims regarding HD90. In some cases they are not even relevant. For example, whether or not Texas's expert found that HD90 remained a district that leaned Democratic in the General Election is not relevant to the question whether Latino voting strength was purposefully reduced in the Democratic Primary in order to preserve the incumbent Mr. Burnam. Dkt. 996 at 15. Similarly, whether or not Texas was able, through an excruciating racial gerrymander, to create a district with 50.1% SSVR does not answer the question whether the changes reduced Latino voting strength when compared to the court-drawn plan H309. *Id.* at 14. Finally, whether or not Mr. Burnam asserted a need to add a predominantly non-Latino precinct to HD90 for reasons of continuity does not overcome the evidence that his amendment was also intended to weaken Latino voting strength in the district. *Id.*

Finally, in its motion, Texas ignores the Task Force Plaintiffs' claim that H358 uses race as a predominant factor to allocate Latino voters into and out of HD90. Dkt. 996 at 12-15. Representative Burnam testified that he and his map-drawer, Chief of Staff Conor Kenny, split precincts and drew at the block level in order to separate Latino from Anglo voting age population. *See* Ex. 3, Burnam Dep. at 114-121. Mr. Burnam further testified that he did not examine how his changes to HD90 would affect Latino voters' ability to elect their preferred candidate because "My objective was to get Como back into the district and to -- to maintain the number of 50." *See* Ex. 3, Burnam Dep. at 122:12-17. This evidence creates an issue of fact regarding whether "'race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines,' [and] 'the legislature subordinated traditional race-neutral districting principles . . . to racial considerations[.]'" *Bush v. Vera*, 517 U.S. 952, 958 (1996) (*quoting Miller*, 515 U.S. at 913, 916) (redistricting found unconstitutional in "mixed motive suit," where, despite legislators' stated concern with preserving minority-majority districts, minority voters were moved into and out of districts predominantly because of their race).

III. CONCLUSION

For the reasons stated above, Texas is not entitled to summary judgment on the Task Force Plaintiffs' claims and the Task Force Plaintiffs respectfully request that the motion be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has electronically submitted a true and correct copy of the above and foregoing via the Court's electronic filing system on the 9th day of June, 2014. The undersigned counsel hereby certifies that she caused a true and correct copy of the above and foregoing to be e-mailed and/or facsimile to the persons listed below by the close of the next business day.

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