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N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EVAN MILLIGAN, *et al.*, Plaintiffs, v. WES ALLEN, *et al.*, Defendants.	Case No.: 2:21-cv-1530-AMM THREE-JUDGE COURT

MILLIGAN PLAINTIFFS' RESPONSE IN SUPPORT OF THEIR REQUEST FOR SECTION 3(C) RELIEF

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In Section 3(c) of the Voting Rights Act (VRA), Congress provided that if a court in "any proceeding" finds a violation of the Fourteenth or Fifteenth Amendment "justifying equitable relief," the court "shall retain jurisdiction for such period as it may deem appropriate" to prevent new voting laws from going into effect before being subjected to preclearance. 52 U.S.C. § 10302(c).

Congress designed Section 3(c) as a backstop "to insure against the erection of new discriminatory voting barriers by States or political subdivisions which have already been found to have discriminated." S. Rep. 89-162, 1965 U.S.C.C.A.N. 2508, 2558. That is precisely the risk here given Alabama's conduct during this redistricting cycle. This risk forms the basis of Plaintiffs' limited request to require Alabama to preclear only congressional plans and only those enacted through the 2030 census cycle or a period of roughly seven years.

Incredibly, in opposing Plaintiffs' request,[1] Alabama asks this Court to ignore the plain text and the purpose behind Section 3(c) and to impose limitations that Congress never contemplated. Alabama hyperbolically tries to analogize Plaintiffs' limited request to the all-encompassing Section 5 preclearance regime, which "suspend[ed] *all* changes to state election law — however innocuous — until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin Mun.*

[1] Plaintiffs adopt and incorporate by reference the arguments about their request for Section 3(c) relief and retention of jurisdiction from their Post-Trial Brief. ECF No. 429 ¶¶ 1156-1173.

Util. Dist. v. Holder, 557 US 193, 202 (2009). These arguments do not reflect the purpose of Section 3(c) or the actual relief requested here, and ignore Alabama's continued discriminatory acts.

First, neither the text of the VRA, nor its legislative history support Alabama's position that Section 3(c) requires Plaintiffs to prove multiple violations akin to the flagrant discrimination present in 1965. Rather, the VRA permits courts to impose Section 3(c) relief in "any proceeding." 52 U.S.C. § 10302(c). And congressionally mandated principles of statutory construction require the parties to understand the VRA's use of the term "violations," *id*., to encompass the singular, 1 U.S.C. § 1. Congress created Section 3(c) to capture "so-called 'pockets of discrimination'" outside of those States where discrimination ran rampant in 1965. H.R. Rep. No. 89-439, 1965 U.S.C.C.A.N. 2437, 2454. That is, Section 3(c)'s whole purpose is to impose more limited preclearance review *only* on those States or jurisdictions *without* the same egregious histories as Alabama in 1965. Tellingly then, only one court in sixty years has adopted Alabama's narrow interpretation of Section 3(c).

Even if Section 3(c) requires proof of an egregious history and multiple violations (and it does not), Alabama has an "extensive history of repugnant racial and voting-related discrimination is undeniable and well documented." *Allen v. Milligan*, 599 U.S. 1, 22 (2023) (citation omitted). And Alabama recently continued to commit multiple constitutional violations. *Singleton v. Allen* ("*Milligan*"), No.

2:21-CV-01291, 2025 WL 1342947, at *158-60 (N.D. Ala. May 8, 2025) (three-judge court). Numerous "judicial precedents illuminate a pervasive and protracted history of official discrimination," including "multiple cases" that "were issued in the last ten years by federal judges who remain in service today." *Id.* at *159.

Still, Alabama protests that equitable relief under Section 3(c) is not appropriate here because "[i]n Alabama today, voting discrimination is nothing like the discrimination that existed in the 1960s." Defs.' Br. 25. Yet, with respect to statewide redistricting, this Court has already expressly found that Alabama's evasive and discriminatory actions in 2023 mirrored its similar actions in the 1960s:

> We reject in the strongest possible terms the State's attempt to finish its intentional decision to dilute minority votes with a veneer of regular legislative process. On the rare occasion that federal law directs federal courts to intrude in a process ordinarily reserved for state politics, there is nothing customary or appropriate about a state legislature's deliberate decision to ignore, evade, and strategically frustrate requirements spelled out in a court order. This is not the first time the Alabama Legislature has purposefully refused to satisfy a federal court order about redistricting even after the Supreme Court affirmed that order. *See generally Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court: Rives, Thomas, and Johnson, JJ.) (per curiam). We hope it will be the last time.

Milligan, 2025 WL 1342947, at *7.

For these reasons and those offered below, Plaintiffs satisfy both the statutory and equitable requirements needed for the Court to impose a Section 3(c) remedy. In the alternative, the Court should employ its inherent authority to retain jurisdiction

over this case until 60 days after Alabama enacts a post-2030 census congressional redistricting plan to enforce its orders and hear any new challenges from Plaintiffs.

I. The Flagrant and Evasive Nature of Alabama's Fourteenth Amendment Violations Call for Relief Under Section 3(c) of the Voting Rights Act.

A. Section 3(c) Requires Findings of Discriminatory Intent in One Case, Not Multiple Cases.

Alabama contends that Section 3(c) requires proof that "a jurisdiction is committing multiple constitutional violations" to justify bail-in, Defs.' Br. 3, and that the "State has not been held liable for multiple violations," *id.* at 4. This argument fails on the law and the facts.

On the law, the plain text of Section 3(c) refers to a court ordering bail-in "in any proceeding" in which the court "finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision." 52 U.S.C. § 10302(c). This reference to a single proceeding belies Alabama's argument that Section 3(c)'s reference to "violations" means that a single constitutional violation will not suffice. Defs.' Br. 10.

As Alabama acknowledges, Defs.' Br. 11, Congress itself instructs courts to understand any reference to "violations" in the plural is inclusive of the singular: "in determining the meaning of any Act of Congress, unless the context indicates otherwise . . . . words importing the plural include the singular." 1 U.S.C. § 1. Without reference to any caselaw or statute, Alabama argues that this Court should

ignore Congress and instead assume that it is "more plausible" that Congress meant Section 3(c) to require proof of multiple violations. Defs.' Br. 11. In seeking to overcome Congress's presumption that the plural includes the singular "unless the context dictates otherwise," 1 U.S.C. § 1, however, "'[c]ontext' . . . means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts," *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993). The relevant "context" does not include a general sense that one interpretation is "more plausible." *See United States v. Paauwe*, 968 F.3d 614, 618–19 (6th Cir. 2020) ("The use of a plural noun . . . typically does not exclude the singular version of that noun, unless the provision explicitly says otherwise.").

Additionally, the strong weight of authority supports the textualist view that one or more constitutional violations in a single case suffices to bail-in a jurisdiction. Other than one case, every other court to consider the issue has held that a jurisdiction is subject to Section 3(c) bail-in based on a single violation—as construed by Alabama. *See Perez v. Abbott*, 390 F. Supp. 3d 803, 818 (W.D. Tex. 2019) (concluding that the finding that a 2011 congressional plan violated the Fourteenth Amendment was "sufficient to trigger bail-in as a potential remedy"); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 729–30 (S.D. Tex. 2017) (imposing Section 3(c) relief where city "officials intentionally discriminated against Latinos"

by enacting a dilutive voting plan); *NAACP v. Gadsden Cnty. Sch. Bd.*, 589 F. Supp. 953, 958–59 (N.D. Fla. 1984) (imposing Section 3(c) relief for a violation involving an at-large school board scheme); *McMillan v. Escambia Cnty.*, 559 F. Supp. 720, 728 (N.D. Fla. 1983) (explaining that Section 3(c) "applies to situations such as the one found here—in which a court has found in a suit a violation of the fourteenth or fifteenth amendments justifying equitable relief").[2] The only case to take a different view about the number of violations considered the issue in only two sentences and failed to contend with the Dictionary Act or any prior cases. *Jeffers v. Clinton*, 740 F. Supp. 585, 600 (E.D. Ark. 1990) (three-judge court); *cf. League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042, 1177 (N.D. Fla. 2022) (explaining that there are several "reasons to doubt" that Section 3(c) requires proof of multiple violations), *rev'd in part on other grounds sub nom. League of Women Voters of Fla., Inc. v. Fla. Sec'y of State,* 66 F.4th 905, 944 (11th Cir. 2023).

Additionally, although the U.S. Department of Justice takes a different position here, Doc. 499 at 9, it has previously agreed that Section 3(c) is "best read

[2] This includes every single one of the various cases where courts ordered Section 3(c) bail-in via a consent decree. *See, e.g.*, *Braxton v. Town of Newbern*, No. 2:23-CV-00127-KD, 2024 WL 3519193, at *3 (S.D. Ala. July 23, 2024); *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-CV-01821-MHH, 2019 WL 7500528, at *5 (N.D. Ala. Dec. 16, 2019); *Allen v. City of Evergreen*, No. CV 13-0107-CG, 2014 WL 12607819, at *1 (S.D. Ala. Jan. 13, 2014); Consent Decree at 5, *United States v. Vill. of Port Chester*, No. 06-15173, ECF No. 119 (S.D.N.Y. Dec. 22, 2009); *Blackmoon v. Charles Mix Cnty.*, No. CIV. 05-4017, 2007 WL 10085163, at *1 (D.S.D. Dec. 4, 2007); *Kirkie v. Buffalo Cnty.*, No. 03-CV-3011, 2004 WL 7397275, at *1 (D.S.D. Feb. 12, 2004); *Garza v. Cnty. of L.A.*, No. 88-5143 (C.D. Cal. Apr. 25, 1991).

to require proof of only a single constitutional violation," Statement of Interest of United States, *Perez v. State of Texas*, No. 5:11-cv-360, Doc. 827 at 4 n.2 (W.D. Tex. July 25, 2013) (attached as Ex. A). The scholar cited by Alabama in its brief agrees with this reading. *See* Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992, 2007 n.88 (2010) (explaining that an interpretation of Section 3(c) that requires multiple violations "runs counter to statutorily mandated rules of construction").

Finally, even if Section 3(c) requires multiple findings of discriminatory intent, the record and recent Alabama history allow for such a finding here. This Court's finding that Alabama violated the Constitution was premised on Alabama's manipulation of district lines to violate the rights of tens of thousands of Black voters in Dallas County and statewide, as well as the multiple individual and organizational plaintiffs in this case. *Milligan*, 2025 WL 1342947, at *200, *204, *213. "[A]ny statute that violates the Fifteenth Amendment necessarily violates countless citizens' Fifteenth Amendment rights." Crum, *The Voting Rights Act's Secret Weapon*, 119 Yale L.J. at 2007 n.88. This is because the "right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'" *LULAC v. Perry*, 548 U.S. 399, 437 (2006) (quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996)).

Violations by localities are also relevant to the remedy here. *Cf.* Defs.' Br. 14. This is because Section 3(c) asks whether "violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred *within* the territory of such State." 52 U.S.C. § 10302(c) (emphasis added). In *Jeffers*, for example, the court correctly read this text to mean that "both State and local violations of the voting guarantees of the Fourteenth and Fifteenth Amendments must be taken into account." 740 F. Supp. at 600. Indeed, local violations committed by relatively small counties and cities were the predicate for Congress subjecting the entirety of Alabama to preclearance in 1965.[3] *See South Carolina v. Katzenbach*, 383 U.S. 301, 312 (1966); *see also Tennessee v. Lane*, 541 U.S. 509, 527 n.16 (2004) (explaining that "much of the evidence in *South Carolina v. Katzenbach*, 383 U.S. 301, 312-315 (1966) . . . involved the conduct of county and city officials, rather than the States").

Alabama admits that multiple courts have recently found local constitutional violations but attempts to downplay their significance because these cases ended in

[3] *See Katzenbach*, 383 U.S. at 314–15 ("In Dallas County, of which Selma is the seat, there were four years of litigation by the Justice Department and two findings by the federal courts of widespread voting discrimination."); S. Rep. 89-162, 1965 U.S.C.C.A.N. 2508, 2547 (referring to eight cases decided against local jurisdictions in Alabama of "discriminatory use of tests and devices"); *id.* at 2550 ("Court orders have also been evaded or disregarded in . . . Dallas, Perry, Bullock, and Macon Counties in Alabama"). The State was only joined as a party in these local cases under the strict state liability provisions of the Civil Rights Act of 1957. 52 U.S.C. § 10101(c); *see, e.g.*, *United States v. Alabama*, 362 U.S. 602, 602-03 & n.2 (1960) (explaining that Alabama was joined as a party in a case against Macon County); *United States v. Penton*, 212 F. Supp. 193, 195 (M.D. Ala. 1962) (same in Montgomery County).

consent orders.[4] Defs.' Br. 14. Alabama's position, however, ignores that "because consent decrees are entered by the court and are judicially enforceable, they function like any other court order or judgment." *Rowe v. Jones*, 483 F.3d 791, 797 (11th Cir. 2007). Moreover, these consent orders were entered only after courts found likely constitutional violations in contested preliminary injunction proceedings. *See Braxton v. Stokes*, No. 2:23-00127-KD, 2024 WL 2116057, at *1 (S.D. Ala. May 10, 2024) ("Plaintiffs are likely to succeed on the merits of their constitutional claim"); *Allen v. City of Evergreen*, No. 13-107, 2013 WL 1163886, at *1 (S.D. Ala. Mar. 20, 2013) (three-judge court) ("Plaintiffs' evidence of the presence of indicia of discrimination . . . is neither rebutted nor distinguished by the defendants.").

Nothing in Section 3(c)'s text precludes consideration of consent orders. Rather, Congress identified the entry of a consent order "resulting in any abandonment of a voting practice" as sufficient evidence of ongoing discrimination to preclude a State from bailing out of preclearance. 52 U.S.C. § 10303(a)(1)(B).

[4] The court's finding in *Stout v. Jefferson County Board of Educ*ation that the City of Gardendale intentionally discriminated in seceding from Jefferson County also implicated Black voters' rights. 882 F.3d 988, 994 (11th Cir. 2018). The secession would have changed the method for selecting the board members who governed city schools. Before the secession, the city schools were controlled by the elected county board—where Black voters had some representation. 250 F. Supp. 3d 1092, 1141 (N.D. Ala. 2017). But, after the secession, the new Gardendale board would have been appointed by the all-White city council—which was elected at-large by a majority White electorate. *Id*. at 1141; *see Robinson v. Ala. State Dept. of Educ*., 652 F. Supp. 484, 485 (M.D. Ala. 1987) (three-judge court) (recognizing that a school secession may result in voting discrimination).

Even if this Court were to require proof of state-level violations, Alabama state officials have also committed multiple recent constitutional violations. *See, e.g.*, *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-cv-01821-MHH, 2019 WL 7500528 (N.D. Ala. Dec. 16, 2019); *Ala. Legis. Black Caucus v. Alabama* ("*ALBC*"), 231 F. Supp. 3d 1026, 1348-49 (M.D. Ala. 2017); *United States v. McGregor*, 824 F. Supp. 2d 1339, 1346–47 (M.D. Ala. 2011). In *McGregor*, the Court found multiple Alabama state legislators engaged in "political manipulation motivated by racism" and that their behavior constituted "compelling evidence that political exclusion through racism remains a real and enduring problem in this State." *Id.* Alabama does not dispute this violation. *Milligan*, 2025 WL 1342947, at *158-59.

Alabama tries distinguishing *Jones v. Jefferson County Board of Education* as "focused on the legislature's discriminatory intent in 1975." Defs.' Br. 14 n.2. But this argument ignores that the Alabama Legislature maintained this discriminatory plan until as late as 2022. *Jones*, 2019 WL 7500528, at *4.

With respect to the *Shaw* violation in *ALBC*, Plaintiffs acknowledge that these claims are "analytically distinct" from a vote dilution claim. *Miller v. Johnson*, 515 U.S. 900, 911 (1995). Yet *Shaw* claims still require proof that legislatures "are motivated by a racial purpose or object," *id*. at 913. And *Shaw*-type constitutional violations can serve to demonstrate that "state officials continued in their efforts to restrict or dilute African American voting strength." *N.C. State Conf. of the NAACP*

v. McCrory, 831 F. 3d 204, 225 (4th Cir. 2016). Alabama then is simply wrong—a *Shaw*-type claim does require proof of a racial intent, which can occur even without racism. *Cf.* Defs.' Br. 16; *see also Milligan*, 2025 WL 1342947, at *196 (declining to accuse legislators of "racism"). There is no reason to ignore the finding in *ALBC*, 231 F. Supp. 3d at 1348-49, that Alabama violated the constitutional rights of thousands of Black voters across multiple districts.

Accordingly, whether Section 3(c) requires proof of one or many violations *or* multiple state or local violations, the facts here satisfy all the proposed standards.

B. The Limited Time and Scope of Plaintiffs' Bail-in Request Does Not Require Proof that Discrimination Today Is Identical to that in 1965, But Current Conditions Bear Many Similarities to that Era.

Alabama avers that Plaintiffs "have not identified flagrant voting discrimination similar to the 1960s" that would justify 3(c) bail-in. Defs.' Br. 20.

But Alabama's conduct this cycle alone shows the necessity for bail-in relief. The primary "exceptional condition[,]" *Shelby County v. Holder*, 570 U.S. 529, 535 (2013), present in 1965 which Congress saw as necessitating the preclearance regime were the covered States' engagement in the "extraordinary stratagem" of contriving new schemes for the "purpose of perpetuating voting discrimination in the face of adverse federal court decrees," *Katzenbach*, 383 U.S. at 334-35. The problem that Congress sought to address with the preclearance remedy was that, "[e]ven when favorable decisions have finally been obtained," the States "merely switched to

discriminatory devices not covered by the federal decrees." *Id*. at 314. To Congress, the paradigmatic cases justifying the need for preclearance were the grandfather clause, *Lane v. Wilson*, 307 U.S. 268 (1939), and white primary cases, in which courts repeatedly struck down different versions of the same law in the same state. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 211–13 (1996) (explaining the long history of Texas's white primary cases and that preclearance sought "to end this evasion once and for all").

This is exactly what occurred in this case. Alabama sought to "ignore, evade, and strategically frustrate" attempts to remedy racial discrimination. *Milligan*, 2025 WL 1342947, at *7. Alabama departed from the norm of complying with a court order (as affirmed by the Supreme Court) and instead deliberately schemed to enact a slightly modified map "to make the discriminatory vote dilution that [the Court] identified impossible to remedy." *Id.* at *203.

Alabama contends that for the Court to impose preclearance on the State for congressional redistricting through 2032, the Court must find "conditions similar to those that originally justified Section 5" in 1965. Defs.' Br. 3. But no other Section 3(c) cases granting relief—especially the type of time- and scope-limited relief sought here—have made such a finding. Rather, other courts have imposed preclearance after finding that a jurisdiction engaged in similar evasion or repeated wrongdoing.

For example, despite Alabama's attempt to distinguish it, Defs.' Br. 15, *Jeffers* supports bail-in here. In *Jeffers*, the court dealt with Arkansas's use of majority-vote requirements to stifle Black political power and found it impossible to "ignore the pattern formed by" the legislature repeatedly passing laws "in an attempt to close off [an] avenue of black political victory." *Id.* at 594-95. The *Jeffers* court imposed bail-in even though it did not find that the Arkansas Legislature passed the original majority-vote requirement law with discriminatory intent. Rather, the court there found that bail-in was necessary because the legislature kept amending that law to include more offices after some Black candidates began experiencing some electoral success. *Id.* at 601. So too, here. Despite this Court not finding discriminatory intent in the 2021 plan, Alabama amended its maps to stymie the election of two Black candidates in the face of multiple court orders.

Similarly, in *McMillan v. Escambia County*, the court retained jurisdiction and denied preclearance under Section 3(c) where, as here, the county attempted to bypass a prior order by proposing "remedial" plans that made "not even a pretense of affording any district" in which Black voters could elect a preferred candidate. 559 F. Supp. at 726. Likewise, in *Patino v. City of Pasadena*, the court bailed-in a city because its 2013 plan intentionally discriminated against Latino voters. 230 F. Supp. 3d at 730. There, as here, the city enacted a plan that failed to recognize a minority group's electoral strength in a manner that was intentionally designed to

skirt the VRA. *See id.* at 722–23, 727 (finding that the mayor had waited to pass a new discriminatory plan until after *Shelby County* to evade preclearance review).

The record here meets or beats that in *Jeffers*, *McMillian*, and *Patino*. This Court described "how the Legislature intended the 2023 Plan to discriminate against Black Alabamians: by perpetuating vote dilution and making it impossible to remedy," *Milligan*, 2025 WL 1342947, at *205, and "how far the Legislature was willing to travel from the norm in service of its intention not only to refuse a remedy for the likely vote dilution we found, but to prevent a remedy altogether," *id.* at *206.

In contrast, Alabama's conduct is quite different from that of other States in several recent cases where courts declined to impose preclearance. In both *Perez v. Abbott*, 390 F. Supp. 3d 803, 820 (W.D. Tex. 2019), and *Veasey v. Abbott*, 888 F.3d 792, 804 (5th Cir. 2018), "the State acted promptly to adopt the interim plans to remedy any potential violations," and there were "no findings of discriminatory intent or Fourteenth Amendment violations" concerning these interim remedial plans," *Perez*, 390 F. Supp. 3d at 820; *see also Veasey*, 888 F.3d at 804 (finding that Texas's prompt enactment of a valid Section 2 remedy precluded the use of bail-in).

Alabama also cites *League of Women Voters of Florida Inc. v. Florida Secretary of State* ("*LWV*"), 66 F.4th 905, 944 (11th Cir. 2023) and *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 241 (4th Cir. 2016), as cases showing why bail-in is inappropriate here. Defs.' Br. 3, 13, 18, 24. In *LWV*, however,

the Eleventh Circuit reversed the district court's finding of intent, 66 F.4th at 944, and in *McCrory*, 831 F.3d at 241, there was no record of defiance or attempts "to prevent a remedy altogether," as exists here. *Milligan*, 2025 WL 1342947, at *206. Rather, the North Carolina legislature at least passed a revision to the challenged law that partially ameliorated its discriminatory effects. *See McCrory*, 831 F.3d at 219.

Aside from this precedent, Alabama's proposed standard would ignore the text of Section 3(c). Unlike Section 4, Section 3(c) does not require a court to find evidence of certain conditions, like low turnout and literacy tests, as a precondition to bailing in a subset of state laws for a limited period of time. 52 U.S.C. §10303(b). Unlike Section 4, Section 3(c) was "designed to prevent a political subdivision found in violation of the constitution from performing an end run around and circumventing the court's holding by enacting a new voting plan that was no worse than the one in effect at the time the suit was instituted." *McMillan*, 559 F. Supp. at 729. That is the limited request that Plaintiffs here make as to congressional plans.

Misapprehending the purpose of Section 3(c) and its differences from Section 4, Alabama heavily relies on *Shelby County v. Holder*, 570 U.S. 529 (2013). While the Court struck down the Section 4 formula, it explicitly declined to rule out the potential of a different coverage formula. *Id.* at 557. And *Shelby County* does not touch Section 3(c) at all. This is because preclearance review under Sections 4 and 5 as compared to bail-in under Section 3(c) "have strikingly different triggers," with

the latter requiring "a violation of the Fourteenth or Fifteenth Amendment." Crum, *The Voting Rights Act's Secret Weapon*, 119 Yale L.J. at 2009. Thus, unlike the formula criticized and struck down in *Shelby County*, Section 3(c) *always* seeks "to remedy [a] problem" based on "current conditions," *Shelby Cnty.*, 570 U.S. at 557.

Still, even comparing the 2020 congressional cycle and 1965, unfortunate similarities abound. Most notably, this Court has already rightfully compared the Legislature's defiance and attempts to avoid providing equal opportunities to Black Alabamians in congressional representation to 1965. *See Milligan*, 2025 WL 1342947, at *7 (citing *Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965)). But even beyond this stark comparator, other indicia of discrimination tie these eras together.

This Court recognized that "at least some legislators actually knew . . . that without Dallas County in District 2, Black-preferred candidates would have no chance of winning in that District," yet chose to enact such a district anyway. *Id.* at *204. Dallas County and Selma were similarly a focus of Congress in 1965 when it enacted the VRA. As the House Report explained: "The litigation in Dallas County took more than 4 years to open the door to the exercise of constitutional rights conferred almost a century ago." *Katzenbach*, 383 U.S. at 315 (citing H.R. Rep. No. 439, 89th Cong., 1st Sess., 11 (1965)). And, as in 1965, when discrimination by jurisdictions throughout the Black Belt and other areas at issue in this case were a primary cause for subjecting Alabama to preclearance, *see* S. Rep. 89-162, 1965

U.S.C.C.A.N. 2508, 2547, 2550, three Alabama jurisdictions, including two in the Black Belt, have been bailed-in under 3(c) in the last 11 years because of egregious acts of discrimination, *see Braxton*, 2024 WL 3519193, at *3 (Town of Newbern, Hale County); *Jones*, 2019 WL 7500528, at *4- 5 (Jefferson County school board); *Allen*, 2014 WL 12607819, at *2 (City of Evergreen, Conecuh County).

In terms of election of Black candidates to office, only through litigation commenced decades after 1965 did a federal court draw a district that allowed for the election of the first Black congressperson in over 90 years. *Wesch v. Hunt*, 785 F. Supp. 1491, 1497–1500 (S.D. Ala. 1992) (three-judge court). Even today:

> Black candidates have enjoyed zero success in statewide elections in Alabama since 1994 (when a single Black person was elected to the Alabama Supreme Court after a previous appointment), and only three Black candidates have ever been elected to any statewide office since Reconstruction. Similarly, Black candidates have enjoyed near-zero success in legislative elections outside of opportunity districts: thirty-two of the thirty-three Black Alabamians currently serving in the 140-person Legislature were elected from majority-Black districts created to comply with federal law.

Milligan, 2025 WL 1342947, at *5. So, while Alabama does have many more Black representatives today, that success is primarily due to VRA litigation and still requires majority-Black districts in nearly all cases. *Id*. at *153.

Additionally, although the State also claims it has eliminated the literacy test and poll tax, Defs.' Br. 20, this only underscores the problem with a reliance on those terms as they existed in 1960, since new discriminatory devices and tests replace the

old and have the same effect of prolonging existing disparities. *Katzenbach*, 383 U.S. at 314. Alabama continues to enact laws that operate as a literacy test primarily for Black people. Just last year, the Alabama legislature enacted a bill that placed restrictions on the way people can receive assistance with voting by absentee ballot. The law criminalized third parties who provide that assistance in certain circumstances. Black voters were forced to sue, and a federal court enjoined provisions of the law under Section 208 of the VRA. *Ala. State Conf. of NAACP v. Marshall*, No. 2:24-CV-00420-RDP, 2024 WL 4282082, at *7 (N.D. Ala. Sept. 24, 2024), *stay pending appeal denied* No. 24-13111, 2024 WL 4481489 (11th Cir. Oct. 11, 2024). Section 208 was designed to enforce the "implicit requirement" of the VRA's nationwide ban on literacy tests that illiterate voters "may not be denied assistance at the polls." S. Rep. 97-417, 1982 U.S.C.C.A.N. 177, 241. The injunction permits voters who are blind, disabled, or who cannot read or write to continue to receive help from the person of their choice. *Marshall*, 2024 WL 4282082, at *7.

Alabama's law, although repackaged and renamed, operated as a literacy test for many Black Alabamians. "Many rural Black Belt residents struggle with illiteracy," and "[i]lliteracy primarily burdens Black Alabamians." *Milligan*, 2025 WL 1342947, at *136. Indeed, "Black Alabamians' lower educational attainment and higher rates of illiteracy are directly traceable to segregated public schools and dilapidated schools in predominantly Black areas." *Id.* at *162. "[R]acial disparities

in family poverty, internet access, and access to transportation hamper voting participation due to an inability to read ballots, learn about candidates, absentee vote, locate voting information, and travel to polls." *Id.* at *163.

This Court does not need to find that conditions present in Alabama now are identical to those in 1965 to impose the limited bail-in requested here. But even a cursory inquiry highlights many startling similarities between these periods.

C. Alabama's Record of Flagrant Discrimination in Congressional Redistricting in this Case and Earlier Confirms that Ordinary Case-by-Case Litigation has Proven Inadequate.

Alabama contends that Plaintiffs have failed to rebut Alabama's manufactured and entirely atextual "presumption that ordinary litigation is adequate to the protect the right to vote." Defs.' Br. 23. The record says otherwise.

First, to the extent Alabama seeks to invent an atextual presumption against Section 3(c) bail-in, nothing in the text of the VRA supports its position. *Cf.* Defs. Br. at 23. The use of "shall" in Section 3(c) strongly suggests the opposite—that a court *must* impose Section 3(c) preclearance once it identifies a constitutional violation. *See* 52 U.S.C. § 10302(c) ("If . . . the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State . . . , the court . . . *shall* retain jurisdiction . . . .") (emphasis added). Congress's use of the "word 'shall' usually connotes a requirement." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016).

Second, even if Plaintiffs were required to prove that ordinary litigation is inadequate to protect the right to vote, Alabama's bad-faith conduct in this case and earlier reveals that "case-by-case litigation" has proven "inadequate" to overcome "persistent discrimination." *Katzenbach*, 383 U.S. at 328. Far from the "ordinary" case, Plaintiffs succeeded in obtaining relief only after two preliminary injunction hearings, two trips to the Supreme Court, and a three-week trial. *See Milligan*, 2025 WL 1342947, at *3 (noting this case's "unusual posture" and protracted nature). The "extremely unusual nature of this case" proves that it took far more than ordinary case-by-case litigation to secure the rights of Black voters here. *Id*. at *209-10. "If it were normal, there would be other cases like this one: where a state legislature — faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district — responded with a plan that the state concedes does not provide that district." *Id*.

Tellingly, the closest cases that this Court could find involved Alabama's own defiant conduct in 1965, *see id*. at *7 (citing *Sims*, 247 F. Supp. 96), blatant discrimination related to the grandfather clause, and a case where another court ordered bail-in, *see id*. at *210 (citing *Lane v. Wilson*, 307 U.S. 268 (1939) and *McMillan*, 559 F. Supp. 720). And so, bail-in is necessary to dissuade Alabama from engaging in this type of conduct through the 2030 census.

Alabama also asks this Court to ignore evidence that earlier advocacy and proceedings proved inadequate to secure the relief that Plaintiffs obtain here. Defs.' Br. 21-22. Alabama posits—without evidence—that the Justice Department's 1992 objection under Section 5 to Alabama's failure to draw a second majority Black district was "not binding" on Alabama. *Id*. This is wrong. A Section 5 objection was an "administrative finding of discrimination," *Regents of the University of California v. Bakke*, 438 U.S. 265, 305 (1978), which had the *binding* effect of forbidding Alabama from enforcing its enacted 1992 plan, 52 U.S.C. § 10304(a).

Moreover, Alabama, Defs.' Br. 21, asks this Court to disregard its findings that "long-term history of redistricting" in the trial "record undeniably reflects a series of official actions taken for invidious purposes." *Milligan*, 2025 WL 1342947, at *197. But the undisputed record includes evidence that from 1970 through today, Alabama rejected Black people's repeated calls to draw two majority-Black districts, despite the feasibly of creating two reasonably configured districts. *Id*. at *58–59; *cf. Jeffers*, 740 F. Supp. at 594-95 (finding that a state's 16-year "pattern" of passing majority-vote laws was a "deliberate attempt to reduce black political opportunity").

Alabama also avers that "State Defendants have no intentions to pass additional congressional district maps or participate in mid-cycle redistricting before the 2030 census data is released." Defs.' Br. 9. And it contends that "Plaintiffs have now stated that adequate relief to a dilutive plan can be provided without resort to

preclearance." *Id.* at 12. Alabama cites a status report in which Plaintiffs agreed that "an injunction barring the Secretary of State from administering Alabama's congressional elections according to the 2023 Plan and ordering him to administer congressional elections according to the [Special Master] Plan . . . is a full remedy to the Section 2 violation." *Id.* (citing ECF No. 497 ¶ 3). But Plaintiffs have not (and do not) concede that a court order maintaining the current map through 2030 is sufficient to remedy the *Fourteenth Amendment* violation, and Plaintiffs' bail-in request includes the 2030 congressional redistricting cycle as well—which their status report did not address.

As to the 2030 cycle, Defendants argue that the record does not "warrant a presumption that the state legislature will act with discriminatory intent in the 2030s," Defs. Br. at 14 n.2, and contend that presuming that "different legislature" may enact a discriminatory plan "more than five years from now offends the presumption of good faith," *id.* at 24. But Alabama's argument would mean that no court could impose bail-in that extends beyond the current legislature, imposing a limit found nowhere in the statute. And if one cannot presume how future Alabama legislatures may act, it undermines the import of Alabama's representation that it does not intend to redistrict before 2030. The new Legislature and Secretary who will take office next year would not be bound by that representation or promise from past officials.

In any case, if the findings in this case (together with those in other cases) are insufficient to call into question Alabama's atextual presumption-of-good-faith rule when it comes to congressional redistricting, it is unclear what would do so.

II. Alternatively, This Court Should Exercise Its Inherent Equitable Power to Retain Jurisdiction Over Challenges to Alabama's Post-2030 Redistricting Plans.

Based on its findings that Alabama repeatedly violated the VRA, the Constitution, this Court's prior order, and rulings of the U.S. Supreme Court in the 2020 cycle, Plaintiffs request that this Court exercise its inherent equitable power to retain jurisdiction over challenges to Alabama's congressional maps through the next census cycle. Alabama charges that this is "virtually the same relief [as] under Section 3(c)," Defs.' Br. 26, and implies that the Court retaining jurisdiction would be unjust or improper, *id.* at 30. Plaintiffs' request, however, would not require Alabama to preclear its plan with a court or the Justice Department. It would instead ensure that a court with sufficient familiarity with its troubling course of conduct this cycle would have the first opportunity to hear any challenge.

When Defendants systematically refuse to obey court orders, district courts have broad equitable authority to remedy persistent legal violations. *See United States v. Virginia*, 518 U.S. 515, 547 (1996) (requiring the district court to retain jurisdiction to order further relief where a state "chose not to eliminate, but to leave untouched," an unconstitutional policy); *Louisiana v. United States*, 380 U.S. 145,

154–55 (1965) (affirming an order that barred a state from adopting any new voting tests absent judicial review where the state had sought to replace one discriminatory device with a similar one); *cf. also North Carolina v. Covington*, 585 U.S. 969, 976 (2018) (affirming an order where the court retained jurisdiction to remedy a state's adoption of "new districts [that] were mere continuations" of an unconstitutional plan). District courts have an inherent equitable power to modify injunctions to adapt to changed circumstances.

Defendants argue, however, that Plaintiffs' request is a departure from the ordinary, and that the Court lacks an equitable basis for retention. Defs.' Br. 25–29. Their brief argues that Plaintiffs ask for "*this* Court [to] adjudicate a speculative, *future* dispute that may (or may not) occur in the next decade over a state law that has not even been drafted." *Id.* at 27. Plaintiffs' request, however, is not for the Court to retain jurisdiction because there could possibly be challenges to hypothetical future redistricting plans. Rather, Plaintiffs seek to assure compliance with the court orders and constitutional rights that Alabama willfully disregarded.

Defendants also try to distinguish Plaintiffs' request from cases where courts retain jurisdiction for years by arguing that Plaintiffs are not asking for relief that is remedial in nature or asking the court to supervise structural reforms. Defs.' Br. 26–27. But the retention of jurisdiction to hear challenges into the next cycle is precisely what is needed to achieve durable relief. Indeed, Alabama itself concedes that the

Court should retain jurisdiction to enforce the order for essentially the same period. *Cf*. ECF No. 497 ¶ 2.

Jeffers demonstrates this principle in the context of redistricting cases. As Defendants note, the *Jeffers* court retained jurisdiction over claims brought against census maps enacted post-judgement. 740 F. Supp. at 602. *Jeffers* noted the court's authority to retain jurisdiction to entertain challenges to the changed circumstances of a new redistricting plan were "appropriate under the facts of [the] case"—of relevance there, defendants' pattern of enacting state laws that systematically reduced Black citizens' political opportunity. *Id*. at 595. Similarly, as discussed *supra*, the facts here dictate an appropriate equitable remedy.

Jeffers is not unique. Courts have long retained jurisdiction over court-ordered plans through the next census cycle and heard later challenges to new plans.[5] The panel in *Sims* retained jurisdiction over its 1965 order until after the 1970 census.

[5] *See, e.g.*, *Blacks United For Lasting Leadership, Inc. v. City of Shreveport*, 571 F.2d 248, 251 (5th Cir. 1978) (noting that the district court retained jurisdiction over its court-ordered plan and heard a later challenge after a new census); *Simon v. Landry*, 419 F.2d 1329 (5th Cir. 1969); *Smith v. Clark*, 189 F. Supp. 2d 548, 559 (S.D. Miss. 2002), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003) (retaining jurisdiction over a court-ordered map until the 2010 census); *Smith v Hoseman*, 852 F. Supp. 2d 757, 763 (S.D. Miss. 2011) (same until the 2020 census); *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 935 (W.D. Mo.) (until 1990), *aff'd sub nom. Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *LeBlanc v. Rapides Par. Police Jury*, 315 F. Supp. 783, 788 (W.D. La. 1969); *Fain v. Caddo Par. Police Jury*, 312 F. Supp. 54, 58 (W.D. La. 1969); *Skolnick v. Ill. State Electoral Bd*., 307 F. Supp. 691, 698 (N.D. Ill. 1969); *Wells v. Rockefeller*, 273 F. Supp. 984, 992 (S.D.N.Y.), *aff'd* 389 U.S. 421 (1967); *Connor v. Johnson*, 265 F. Supp. 492, 499 (S.D. Miss. 1967); *see also Connor v. Winter*, 519 F. Supp. 1337, 1342 (S.D. Miss. 1981) (summarizing this case's extensive history where the court heard challenges to multiple post-1970 state plans).

Sims v. Amos, 336 F. Supp. 924, 931 (M.D. Ala. 1972) (three-judge court); *see also Clark v. Putnam Cnty.*, 293 F.3d 1261, 1264-65 (11th Cir. 2002) (noting that the district court retained jurisdiction to hear subsequent challenges after a new census); *Dillard v. City of Greensboro*, 74 F. 3d 230, 231 (11th Cir. 1996) (similar).

Defendants also cite *Boe v. Marshall*, 767 F. Supp. 3d 1226, 1257 (M.D. Ala. 2025), to characterize Plaintiffs' request for relief as analogous to judge-shopping through manipulating case assignments. Defs.' Br. 29. This argument strains credulity. Asking the Court to ensure adherence to its own prior orders and address new claims arising out of the same pattern of conduct has no factual nexus to the conduct of individual attorneys sanctioned in *Boe.* Even when a case is closed, the district court maintains the authority to supervise its injunction. "[A] court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances intro an instrument of wrong." *League of United Latin American Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 436 (5th Cir. 2011) (citing *United States v. Swift & Co.*, 286 U.S. 106, 114–15 (1932)). Courts regularly use that authority in the redistricting context.[6]

[6] *See, e.g.*, *Whitest v. Crisp Cnty. Sch. Dist.*, 601 F. Supp. 3d 1338, 1349 (M.D. Ga. 2022), *aff'd*, No. 22-11826, 2023 WL 8627498 (11th Cir. Dec. 13, 2023); *Adamson v. Clayton Cnty. Elections & Registration Bd.*, 876 F. Supp. 2d 1347, 1359 (N.D. Ga. 2012); *Wright v. City of Albany*, 306 F. Supp. 2d 1228, 1240 (M.D. Ga. 2003); *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 219 F. Supp. 3d 949, 962 (E.D. Mo. 2016).

Because a challenge to the 2030 cycle would involve the "same principal defendant, the same cause of action, and similar factual allegations," the panel could appropriately decide to hear the case even. *In re BellSouth Corp.*, 334 F. 3d 941, 950 (11th Cir. 2003) (addressing allegations of "judge shopping"); *see Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 1685122, at *2 (S.D. Tex. Apr. 6, 2020) (denying a motion to randomly assign a case to a new judge where a subsequent proceeding related to an earlier one); *see also* S.D. Ala. Civil L.R. 13(c).

The Court's retention of jurisdiction is far different from preclearance. Unlike preclearance, Plaintiffs would bear the burden of proving to this panel that any post-2030 map violated Section 2 or the Constitution. Absent a preliminary injunction, Alabama would be free to implement its map. Moreover, Plaintiffs are only asking the Court to retain jurisdiction over the parties, claims, and issues related to this case. If Plaintiffs here lost standing, or a new separate case was filed, or the post-2030 map did not involve the regions at issue here, then the panel could not hear the case.

The inherent equitable power of courts allows for supervision over remedial relief when appropriate under the facts of the case. This Court is well within its mandate to retain jurisdiction to prevent violations of its own orders, the VRA, and Fourteenth Amendment arising from Alabama's disregard for such orders and laws.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court order Alabama to submit all future congressional redistricting plans for preclearance under Section 3(c) until 60 days after Alabama's enactment of a plan after the 2030 census. Alternatively, Plaintiffs ask the Court to retain jurisdiction for the same time period.

Respectfully submitted this 25th day of June 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2025, I filed the above document on this Court's CM/ECF system, which caused the document to be served on all counsel of record.

/s/ Deuel Ross
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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. 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]

STATEMENT OF INTEREST OF THE UNITED STATES WITH RESPECT TO SECTION 3(C) OF THE VOTING RIGHTS ACT

Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c), is a vital remedial provision through which federal courts can protect the rights of minority voters by imposing a preclearance requirement on jurisdictions where intentional racial discrimination in voting has occurred. Because the State of Texas is no longer subject to the preclearance provisions of Section 5 of the Voting Rights Act through the formula in Section 4(b), Section 3(c) relief is available against the State. This Court must now determine whether intentional discrimination motivated the State's 2011 Congressional and State House redistricting plans in order to adjudicate Plaintiffs' requests for such relief. As discussed below, Section 3(c) relief is warranted in this case because existing evidence establishes intentional voting discrimination and other proceedings provide overwhelming evidence of constitutional violations in and by the State.

I. THE UNITED STATES' INTEREST

The United States respectfully submits this Statement of Interest under 28 U.S.C. § 517 to address Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c), and the possible impact of that provision on this case. *See* Order (ECF No. 772); *see also* 28 U.S.C. § 517 (authorizing the Attorney General to attend to the interests of the United States in any pending suit). In light of the United States' enforcement responsibilities with regard to racial discrimination in voting and the Attorney General's obligation to review proposed voting changes in jurisdictions that are covered under Section 3(c), *see* 42 U.S.C. § 1973a(c), the United States has a strong interest in ensuring that this provision of the Voting Rights Act is interpreted and applied appropriately.

The United States has a particular interest in the application of Section 3(c) in this case. In defending the judicial preclearance action filed by the State of Texas under Section 5 of the Voting Rights Act, *see Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012) (three-judge court), *vacated*, 570 U.S. ___, 2013 WL 3213539 (U.S. June 27, 2013), the United States took

the position that the State failed to establish that its 2011 Congressional and State House redistricting plans were not adopted with a discriminatory purpose, *see* U.S. Post-Trial Br., *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Feb. 6, 2012) (ECF No. 203), and the United States avers that the evidence presented in that case proves that those redistricting plans are intentionally discriminatory regardless of which party bears the burden of proof. Those same plans are the subject of Plaintiffs' challenge in this case under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the intentional discrimination underlying those plans is the core of Plaintiffs' requests for Section 3(c) relief. *See, e.g.*, NAACP Proposed 2d Am. Compl. (ECF No. 776-2).

II. SECTION 3(C) OF THE VOTING RIGHTS ACT

Section 3(c) of the Voting Rights Act provides:

> If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth and fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until [preclearance is granted by the court or the Attorney General declines to interpose an objection].

42 U.S.C. § 1973a(c); *see also* H.R. Rep. 89-439 at 13 (1965) ("Section 3 of the bill makes additional remedies available to deal with denials or abridgments of the right to vote in so-called 'pockets of discrimination'—areas outside the States and subdivisions to which the prohibitions of section 4 are in effect."). Thus, under Section 3(c), a court can "bail in" a jurisdiction,

subjecting it to a preclearance regime akin to that under Section 5. *See* 28 C.F.R. § 51.8. Since the adoption of the Voting Rights Act in 1965, courts in at least 18 different cases have ordered relief under Section 3(c), requiring jurisdictions not covered through Section 4's formula to obtain preclearance of some or all proposed voting changes. These cases have led to the coverage of two states—Arkansas, *see Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990) (three-judge court), and New Mexico, *see Sanchez v. Anaya*, No. 82-0067 (D.N.M. Dec. 17, 1984)—as well as twelve counties, two cities, and two school districts.[1] Once covered, these jurisdictions, like the jurisdictions covered by Sections 4(b) and 5, typically have sought administrative preclearance for voting changes from the Attorney General, rather than seeking judicial preclearance from the federal district court.

To trigger Section 3(c) coverage, the Attorney General or an aggrieved person must establish that a violation of the voting guarantees of the Fourteenth or Fifteenth Amendments has occurred within the jurisdiction. *See* 42 U.S.C. § 1973a(c). As a practical matter, this requires a finding of intentional voting discrimination. *See Jeffers*, 740 F. Supp. at 591-92; *Brown v. Bd. of Sch. Comm'rs*, 542 F. Supp. 1078, 1101-03 (S.D. Ala. 1982); *see also Rogers v. Lodge*, 458 U.S.

[1] *See Blackmoon v. Charles Mix Cnty.*, No. 05-CV-4017 (D.S.D. Dec. 4, 2007); *Kirkie v. Buffalo Cnty.*, No. 03-CV-3011 (D.S.D. Feb. 10, 2004); *United States v. Bernalillo Cnty.*, No. 93-156-BB/LCS (D.N.M. Apr. 22, 1998); *United States v. Alameda Cnty.*, No. C95-1266 (N.D. Cal. Jan. 22, 1996); *United States v. Cibola Cnty.*, No. 93-1134 (D.N.M. Apr. 21, 1994); *United States v. Socorro Cnty.*, No. 93-1244 (D.N.M. Apr. 11, 1994); *Garza v. Cnty. of Los Angeles*, No. 88-5143 (C.D. Cal. Apr. 25, 1991); *United States v. Sandoval Cnty.*, No. 88-1457 (D.N.M. May 17, 1990); *United States v. McKinley Cnty.*, 86-0029-C (D.N.M. Jan. 13, 1986); *Woodring v. Clarke*, No. 80-4569 (S.D. Ill. Oct. 31, 1983) (Alexander County); *McMillan v. Escambia Cnty.*, No. 77-0432 (N.D. Fla. Dec. 3, 1979); *United States v. Thurston Cnty.*, No. 78-0-380 (D. Neb. May 9, 1979); *United States v. Vill. of Port Chester*, No. 06-15173 (S.D.N.Y. Dec. 22, 2006); *Brown v. Bd. of Comm'rs*, No. CIV-1-87-388 (E.D. Tenn. Jan. 18, 1990) (City of Chattanooga); *Cuthair v. Moteczuma-Cortez Sch. Dist. No. RE-1*, No. 89-C-964 (D. Col. Apr. 8, 1990); *NAACP v. Gadsden Cnty. Sch. Bd.*, 589 F. Supp. 953 (N.D. Fla. Mar. 6, 1984).

613, 617-20 (1982).[2] A court must also find that the constitutional violation justifies equitable relief.

Once a court makes such a finding, Section 3(c) authorizes a district court to require preclearance of all voting changes. *See* 42 U.S.C. § 1973a(c) (applying to any "voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting"); *cf. Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969) ("The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.").[3] Imposing a preclearance requirement for all voting changes is warranted when there is a demonstrated history of intentional discrimination and the potential for backsliding through creative changes in voting procedures. *Cf. South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (describing preclearance as "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims."); H.R. Rep. 94-196, at 57-58 (1975) (describing preclearance as a remedy "to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as

[2] Although Section 3(c) uses the plural term "violations of the fourteenth or fifteenth amendment justifying equitable relief . . . within the territory of such State or political subdivision" to describe the trigger, 42 U.S.C. § 1973a(c), the provision is best read to require proof of only a single constitutional violation. *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise, . . . words importing the plural include the singular."); *see also McMillan v. Escambia Cnty.*, 559 F. Supp. 720, 728 (N.D. Fla. 1983) ("Section 1973a(c) applies to situations such as the one found here—in which a court has found in a suit *a violation* of the fourteenth or fifteenth amendments justifying equitable relief." (emphasis added)); cases cited *supra* note 1 (applying coverage after a single constitutional violation). *But see Jeffers*, 740 F. Supp. at 600 ("[I]t would be strange if a single infringement could subject a State to such strong medicine."). The Court need not reach this issue in this case, both because of the multiple constitutional violations at issue in this litigation and the State of Texas's history of intentional discrimination against minority voters.

[3] In some cases, courts have exercised discretion to limit relief to a particular subset of voting changes. *See, e.g., Jeffers*, 740 F. Supp. at 601-02 (requiring preclearance for any voting changes related to the imposition of a majority-vote requirement in general elections, and retaining jurisdiction to review challenged redistricting plans for the State House and State Senate); *United States v. Vill. of Port Chester*, No. 06-15173 (S.D.N.Y. Dec. 15, 2006).

the old ones had been struck down"). The duration of the preclearance remedy is subject to the court's discretion. *See* 42 U.S.C. § 1973a(c) (providing that the court "shall retain jurisdiction for such period as it may deem appropriate").

Notably, a request for relief under Section 3(c) need not be the primary focus of a complaint. *See Jeffers*, 740 F. Supp. at 591-92 (holding that constitutional violations with respect to voting practices that were not "the principal focus of the complaint" satisfied Section 3(c)). Texas's argument to the contrary lacks a firm grounding in the statutory text. *See* Tex. Br. 17-18 (ECF No. 824). As the three-judge court properly held in *Jeffers*, the phrase "violations of the fourteenth or fifteenth amendment justifying equitable relief" in Section 3(c) is not limited to the conduct that was the focus of the plaintiff's complaint. 740 F. Supp. at 592. No such limitation appears anywhere in the text of Section 3(c). *See* 42 U.S.C. § 1973a(c); *Jeffers*, 740 F. Supp. at 592 (noting that reading the statute in such a "crabbed" manner would be "inconsistent with its broad remedial purpose").

Section 3(c) does not require that other equitable relief actually has been granted regarding the constitutional violations underpinning a bail-in, since the statutory text specifies only that there must be constitutional violations "justifying," but not necessarily resulting in, equitable relief. 42 U.S.C. § 1973c(a); *see also Jeffers*, 740 F. Supp. at 595 & n.7, 600.[4] Indeed, to the extent that Section 3(c) requires a court to find that equitable relief is justified, the

[4] Nothing in the statute's text supports Texas's argument that Section 3(c) relief can be imposed only after a final judgment of intentional discrimination. *See* Tex. Br. 9-12. So long as "the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred," the court can impose relief under Section 3(c). 42 U.S.C. § 1973a(c). There is no statutory basis to exclude findings of intentional discrimination made in support of a preliminary injunction under Rule 65(a) or partial final judgment under Rule 54(b). While Section 3(a) references both "interlocutory orders" and "final judgments," 42 U.S.C. § 1973a(a), Section 3(c) does not refer to one at the expense of the other, as Texas infers. *See* Tex. Br. 10-11. Section 3(c) refers to neither. *See* 42 U.S.C. § 1973a(c).

preclearance remedy in Section 3(c) can be that relief. Moreover, a court must take into account "both State and local violations of the voting guarantees of the Fourteenth and Fifteenth Amendments," *Jeffers*, 740 F. Supp. at 600, because the text of Section 3(c) requires only that violations have occurred "within the territory" of the jurisdiction. 42 U.S.C. § 1973a(c).

Texas's assertion that *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), renders Section 3(c) constitutionally suspect, Tex. Br. at 3, 9, 18-20, ignores the central logic of the decision. *Shelby County* held only that the coverage formula in Section 4(b) of the Voting Rights Act, as reauthorized by the Voting Rights Act Reauthorization and Amendments Act of 2006, is unconstitutional and "can no longer be used as a basis for subjecting jurisdictions to preclearance" under Section 5 of the Act. 133 S. Ct. at 2631. The Court concluded that the coverage formula no longer "makes sense in light of current conditions," *id.* at 2629, but the Court indicated specifically that it was issuing "no holding on [Section] 5 itself, only on the coverage formula," *id.* at 2631, and did not address Section 3(c). The trigger for Section 3(c) relief is far different than the coverage formula in Section 4(b). The trigger is geographically focused and dependent on a judicial finding of a recent constitutional violation.

III. SECTION 3(C) APPLIED TO THIS LITIGATION

For this Court to impose relief under Section 3(c), two basic conditions must be met. First, the request for relief must be made in a "proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision." 42 U.S.C. § 1973a(c). In this case, plaintiffs filed an action under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, to enforce the guarantees of the Fourteenth and Fifteenth Amendments against racial discrimination in voting in the State of Texas, among other claims. Second, a court must conclude that "violations

of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision." 42 U.S.C. § 1973a(c). Although this Court has not yet made such findings regarding the State's 2011 redistricting plans, the evidence presented to this Court—as well as the substance of the decision in *Texas v. United States* and other instances of discrimination in voting in Texas—demonstrates that such constitutional violations have occurred within the State.[5]

For the reasons set out below, this Court has jurisdiction to hear plaintiffs' request for relief under Section 3(c). While Plaintiffs can effectively present the evidence already admitted before this Court, the Attorney General is uniquely positioned to describe the evidence presented in *Texas v. United States* and other instances of intentional discrimination in Texas. The Attorney General avers that the Court should impose Section 3(c) coverage on the State of Texas as to all voting changes for a ten-year period following the entry of a coverage order, and should consider extending the bail-in period beyond 10 years in the event of further discriminatory acts. This preclearance requirement would apply to any voting qualification or voting-related standard, practice, or procedure that the State enacts or seeks to administer that differs "from that

[5] Texas's contention that a court can order bail-in only after providing some other relief to the plaintiff, *see* Tex. Br. 3, 6-7, once again contradicts the text of the statute, which expressly authorizes a court to require preclearance of voting changes regardless of whether the court grants any additional relief. Congress could have authorized a federal court to order bail-in "in addition to granting other relief"; instead, Congress authorized a federal court to order bail-in "in addition to such relief as it *may* grant." 42 U.S.C. 1973a(c) (emphasis added). We note that this Court has already entered equitable relief in response to Plaintiffs' claims in this case, in ordering implementation of interim redistricting plans, premised in part on this Court's findings that in several districts there were "not insubstantial" claims of racially discriminatory purpose. *See* Order (ECF No. 690); Order (ECF No. 691).

in force or effect at the time th[is] proceeding was commenced." 42 U.S.C. § 1973a(c). The instant litigation commenced on May 9, 2011.

A. This Court Maintains Jurisdiction to Consider Additional Relief for Claims Against Texas's 2011 Redistricting Plans.

Plaintiffs in this litigation have principally requested that this Court "[d]eclare the existing plans for election of the Texas House of Representatives and Texas Congressional seats to be in violation of the Voting Rights Act and unconstitutional and enjoin their use in any future elections." *E.g.*, Perez 3d Am. Compl., Request for Relief ¶ B (ECF No. 53).[6] Since 1975, and until the Supreme Court's decision in *Shelby County*, Texas had been covered under Section 4(b) of the Voting Rights Act and was therefore subject to the preclearance requirements of Section 5. The question of relief under Section 3(c) therefore never arose, as coverage subjecting Texas to the preclearance requirements set forth in Section 5 existed already.[7] However, now that the Supreme Court has struck down the Section 4(b) coverage formula and thereby relieved Texas from the requirement to comply with Section 5, *see Shelby County*, 133 S. Ct. at 2631, the question of additional relief under Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c), predictably has arisen.

Texas argues primarily that this Court lacks jurisdiction to impose Section 3(c) relief as a remedy for intentional discrimination underlying the State's 2011 redistricting plans because those plans have now been repealed and can no longer serve as the basis for the findings of violations of the Fourteenth or Fifteenth Amendment. *See* Tex. Br. at 4. It is axiomatic that a

[6] This Court has not yet granted the Perez Plaintiffs' request for leave to file a Fourth Amended Complaint.

[7] This explains the relatively few cases in which relief under Section 3(c) has been imposed to date, as Section 4(b) subjected those jurisdictions with the most egregious histories of racial discrimination to a preclearance requirement.

case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks and citations omitted). A case is not moot if the court can grant even a "partial remedy." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992); *see also, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 327-28 (2000) (holding that a preclearance action under Section 5 of the Voting Rights Act was not moot even though the districts at issue would not be used in any future elections); *United States v. McLeod*, 385 F.2d 734, 752-53 (5th Cir. 1967) (holding that the "mere cessation of unlawful activity" concerning minority voting rights does not "render a case moot" when additional remedies are available).[8]

This case is not moot because the availability of the Section 3(c) remedy allows this Court to grant relief to the Plaintiffs if they prevail on their claims. In this case, Plaintiffs have pled constitutional violations regarding the 2011 State House and Congressional plans.[9] The prayers for relief in Plaintiffs' complaints are broad enough to encompass requests for relief under Section 3(c), through either requests for compliance with preclearance requirements or requests for further just and proper relief. *See, e.g.*, MALC 2d Am. Compl., Prayer ¶¶ A, G (ECF No. 50); LULAC Am. Compl., Prayer ¶ C (ECF No. 78). Moreover, in light of *Shelby*

[8] *See also Harris v. City of Houston*, 151 F.3d 186, 188, 191 n.6 (5th Cir. 1998) (noting that a plaintiff "could have preserved his suit by requesting" additional relief, "as opposed to resting completely on the request for injunctive relief" against an event that had by that point occurred); *FTC v. Gibson Prods. of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978) (holding that substantial compliance with subpoenas did not moot enforcement action because further relief would be available in the event that subpoenas were invalid).

[9] Texas's argument that the plaintiff who initiated the litigation must still be "aggrieved" by the practice that initially prompted the lawsuit, *see* Tex. Br. at 4, 6, is inconsistent with the language of Section 3(c). The provision merely requires that the relevant proceeding have been "*instituted* by the Attorney General or an aggrieved person." 42 U.S.C. § 1973c(a) (emphasis added); *see also Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011) (holding that "aggrieved" denotes an individual within the zone of interest sought to be protected by the provision and making no reference to temporal limitations).

County, Plaintiffs now have sought to amend their complaints to clarify their requests for Section 3(c) relief. *See, e.g.*, NAACP Mot. for Leave to Amend (ECF No. 776); NAACP Proposed 2d Am. Compl. ¶ 61, Prayer ¶ C (ECF No. 776-2); MALC Mot. for Leave to Amend (ECF No. 779); MALC Proposed 3d Am. Compl., Prayer ¶ C (ECF No. 779-1). These requests for Section 3(c) relief are sufficient to preserve this Court's jurisdiction.

In *Blackmoon v. Charles Mix County*, 505 F. Supp. 2d 585 (D.S.D. 2007), the court addressed closely analogous circumstances regarding Section 3 of the Voting Rights Act. After modifying the jurisdiction's redistricting plan to remedy a successful malapportionment claim, the court nonetheless denied a defendant jurisdiction's motion to dismiss as moot plaintiffs' claims that the prior redistricting plan was racially discriminatory. *See id.* at 593. The court concluded that if plaintiffs prevailed on their race discrimination claim, they might be entitled to relief under Section 3 of the Voting Rights Act, and the possibility of further relief precluded mootness. *See id.*[10]

A similar result is warranted here. Had Texas not been covered under Section 4(b)'s formula, this Court likely would have already adjudicated Plaintiffs' claims of intentional discrimination and addressed the issue of Section 3(c) coverage. Should this Court impose Section 3(c) relief, the redistricting plans enacted by Texas in 2013 will be subject to review under Section 3(c)'s preclearance process. *See* 42 U.S.C. § 1973a(c) (requiring preclearance for

[10] *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam), is not to the contrary. In that case, the Court addressed only the district court's finding that the county's at-large election system violated the Fourteenth Amendment. It vacated and remanded the case for consideration of whether the method of election violated the newly amended Section 2 of the Voting Rights Act, and it noted that a finding of liability under Section 2 "would moot the constitutional issues presented by the case." *Id.* But the Court expressly refused to reach the issue of remedy. *See id.* at 51 n.4 (noting that the Court was not reaching the issue of remedy); *id.* at 52 n.6 (same). Thus the Court's statement that a finding of liability would moot the constitutional issues refers to issues of liability, not remedy.

any voting practice "different from that in force or effect at the time the proceeding was commenced"). Texas should not be permitted to avoid Section 3(c) review of future voting changes only because Section 4(b) once required that it be subject to Section 5. While there was once no need for this Court to consider Section 3(c), the issue is now plainly ripe, and these facts are precisely what Section 3(c) was intended to address. Intentional discrimination has occurred within a jurisdiction now not subject to Section 5, and preclearance review will prevent that jurisdiction from enforcing new rules to perpetuate voting discrimination. *Cf. South Carolina*, 383 U.S. at 335.

Texas's interpretation of when Section 3(c) relief would become moot would render the provision a nullity, effectively permitting a defendant to avoid bail-in by abandoning a challenged practice at any time up to the moment of final judgment. *See* Tex. Br. 4-5, 13-14. The jurisdiction could then adopt a slightly modified discriminatory practice, necessitating the filing of a new complaint. This cycle of discrimination would create the type of gamesmanship the preclearance requirements embodied in both Section 5 and Section 3(c) were designed to end.

B. Violations of the Fourteenth and Fifteenth Amendments Justifying Equitable Relief Have Occurred in the State of Texas.

The evidence before this Court establishes that Texas enacted its 2011 Congressional and State House redistricting plans with the intent to discriminate against minority voters, in violation of Section 2 of the Voting Rights Act and the voting guarantees of the Fourteenth and Fifteenth Amendments to the U.S. Constitution. This Court may consider testimony and evidence offered during its prior hearings; depositions and other documentary evidence previously offered in *Texas v. United States*, No. 1:13-cv-1303 (D.D.C), *see* Order at 2 (ECF No.

772); and sworn trial testimony given in *Texas v. United States*. *Cf.* Fed. R. Civ. P. 32(a)(4)(E), (a)(8).[11] As noted below, aside from the 2011 statewide redistricting plans, there is also substantial evidence of recent discrimination in violation of Sections 2 and 5 of the Voting Rights Act and the voting guarantees of the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

Although this Court should consider Plaintiffs' claims against the 2011 Congressional and State House plans, it need not issue an opinion that addresses all challenged aspects of those plans, since the 2013 plans eliminate the need to redraw either map. Rather, once this Court finds any constitutional violation justifying equitable relief, the requirement for imposing relief under Section 3(c) has been met, and further analysis of the 2011 plans is unnecessary.

1. The 2011 Congressional Plan

In *Texas v. United States*, a three-judge court of the U.S. District Court for the District of Columbia unanimously concluded that Texas had not met its burden of showing no discriminatory purpose when it enacted the 2011 Congressional redistricting map, Plan C185. *See* 887 F. Supp. 2d at 159-62. As the D.C. court noted, the United States and defendant-intervenors in that litigation "provided more evidence of discriminatory intent than [the Court had] space, or need, to address." *Id.* at 161 n.31. The evidence in that case—as well as that presented to this Court—provides a sufficient basis for this Court to conclude that Texas had a discriminatory purpose when it enacted the 2011 Congressional redistricting plan.

In the U.S. District Court for the District of Columbia, the United States presented several categories of circumstantial evidence under the framework set out in *Village of Arlington*

[11] To the extent this Court concludes that any such testimony is inadmissible, the Court should permit the presentation of additional testimony concerning the adoption of the 2011 Plans.

Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-68 (1977). *See Texas v. United States*, 887 F. Supp. 2d at 159. First, the evidence established that "substantial surgery" had been performed on each of the black ability to elect districts in Texas, removing "economic engines" and Congressional district offices in a manner that "could not have happened by accident," and that "[n]o such surgery was performed on the districts of Anglo incumbents." *Id.* at 159-60; *see also id.* at 160 (rejecting Texas's proffered explanation: "coincidence"). The parties then established Texas's "history of failures to comply with the [Voting Rights Act]," the exclusion of minority members of Congress and state legislators from effective participation in the redistricting process, and procedural and substantive departures from the normal decision-making process. *Id.* at 160-61. The D.C. court deemed this evidence sufficient to preclude the State from establishing the absence of discriminatory intent and noted that the court's silence concerning potential discriminatory intent in District 23 and the Dallas-Fort Worth Metroplex reflected only the lack of need to address those additional areas. *See id*. at 161 & n.31.

In fact, the United States presented substantial additional evidence of discriminatory intent in District 23 and the Metroplex. The contours of District 23 reflect a concerted effort to minimize Hispanic voter registration and turnout levels while preserving Hispanic population majorities—a purely superficial victory for Hispanic voters. *See* DX 304, Notice of Filing Def. Ex. List (ECF No. 615); *see also* DX 294, Notice of Filing Def. Ex. List (ECF No. 615) (request by the map-drawer for necessary information). Precincts are deliberately split along the border of Congressional District 23 without political data, in a manner that establishes a statistically significant racial bias. *See* DX 320 at 56 tbl. 21, Notice of Filing Def. Ex. List (ECF No. 615). District 23 divided Maverick County and the City of Eagle Pass just after the Hispanic community there had become more politically active, *see* Trial Tr. at 112:24-113:1, 116:17-

117:19, *Texas v. United States*, No. 1:12-cv-1303 (D.D.C. Jan. 18 p.m.) (Ex. 1), and even the State's expert admitted before this Court that he would "not recommend changing the 23rd in the way in which it was changed." Trial Tr. at 1839:1-24, 1879:21-22.

The 2011 Congressional redistricting plan split the African-American and Hispanic communities of the Dallas-Fort Worth Metroplex into four separate Anglo-controlled Congressional districts: Districts 6, 12, 26, and 33. DX 320 ¶¶ 148-152 & tbls. 16-17, Notice of Filing Def. Ex. List (ECF No. 615). The lightning-bolt shape of District 26 illustrates a particularly egregious configuration, capturing much of the Hispanic population of Tarrant County—from both whole and partial precincts—and appending that population to primarily Anglo Denton County. *See* DX 630, Notice of Filing Def. Ex. List (ECF No. 615); DX 887 at 74-82, 185-88, Notice of Filing Def. Ex. List (ECF No. 615). To prevent the emergence of a new district in the Metroplex in which minority voters would have the ability to elect representatives of their choice, the State increased the combined black and Hispanic voting-age population of District 30—the sole minority ability district in the region—from an already concentrated 81.1% to a remarkable 85.9%. *See* DX 858 at 2, Notice of Filing Def. Ex. List (ECF No. 615) (2011 plan data); DX 859 at 2, Notice of Filing Def. Ex. List (ECF No. 615) (benchmark plan data). Therefore, Congressional districts in the Dallas-Fort Worth area provide additional evidence of discriminatory intent underlying Plan C185—more of the evidence of intentional discrimination that the D.C. court had neither "space, [n]or time, to address." 887 F. Supp. 2d at 161 n.31.

2. The 2011 State House Plan

Because the D.C. court determined that the State of Texas had failed to establish that its 2011 redistricting plan for the Texas House of Representatives would not have had a

retrogressive effect, the court did not analyze whether Texas had established that the plan did not intentionally discriminate against minority voters. *See Texas v. United States*, 887 F. Supp. 2d at 177-78. Nonetheless, the United States and defendant-intervenors presented sufficient evidence to prove that the 2011 House redistricting map—Plan H283—was enacted with discriminatory intent in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the U.S. Constitution. *See id.* at 177 (cataloging substantial "record evidence" concerning the State's purpose).

The United States first established the basic fact that Texas had failed to create any new House districts in which minority voters would have the ability to elect their preferred candidates of choice, despite dramatic growth in the State's Hispanic population in the decade preceding redistricting. *See id.* at 177-78. The United States next showed that in House District 117, map-drawers had used a "deliberate, race-conscious method to manipulate not simply the Democratic vote but, more specifically, the *Hispanic* vote," namely by "switching high-turnout for low-turnout Hispanic voters, hoping to keep the [Spanish Surname Voter Registration] level just high enough to pass muster under the [Voting Rights Act] while changing the district into one that performed for Anglo voters." *Id.* at 178; *see also id.* at 238-40 (findings of fact). Moreover, the United States established that the lead House map-drawer offered "incredible testimony" that "reinforces evidence suggesting mapdrawers cracked [precincts] along racial lines to dilute minority voting power" and "suggests that Texas had something to hide in the way it used racial data to draw district lines." *Id.* at 178; *see also id.* at 232-34, 240-41 (findings of fact). *See generally id.* at 229-35 (findings of fact concerning House redistricting process).

The United States and other parties presented substantial additional unrebutted evidence of discriminatory intent that the D.C. court ultimately had no need to address. *See* U.S. Br. at 3-

12 (ECF No. 630). The most damning evidence relates to House District 41, where Texas used race as a proxy for partisanship and drew the district with the intent to minimize minority voting strength in an effort to eliminate minority voters' ability to elect their candidates of choice. The State of Texas's redistricting reports specifically showed that in the absence of partisan data, map-drawers split Hidalgo County precincts 25, 47, 48, 88, 95, and 103 along stark racial lines, to exclude from House District 41 certain neighborhoods containing far greater concentrations of Hispanic voters. *See* DX 886 at 71, 75-77, Notice of Filing Def. Ex. List (ECF No. 615); *see also* DX 787, Notice of Filing Def. Ex. List (ECF No. 615) (RedAppl screen captures). Representative Aaron Peña—the Anglo-preferred incumbent on whose behalf map-drawers crafted District 41—admitted in his deposition that he lacked sufficient local knowledge to provide political information at the sub-precinct level and denied asking that the precincts be split. *See* Joint Deposition Designations at 1058-71, *Texas v. United States*, No. 1:12-cv-1303 (Peña Dep. at 154:2-173:24, Oct. 19, 2011) (Ex. 2).

The configurations in Plan H283 for Nueces and Harris Counties provide additional evidence of intent driven by racial discrimination, rather than partisanship. In Nueces County, the State deliberately eliminated House District 33—a district in which minority voters had the ability to elect representatives of their choice that was then represented by a Hispanic Republican—and protected the Anglo incumbent in District 32 by crafting a hook-shaped extension to pack Hispanic voters and potential Hispanic challengers (Republican and Democrat) into District 34. *See* DX 510 at 2, Notice of Filing Def. Ex. List (ECF No. 615); DX 737 at 13-15, Notice of Filing Def. Ex. List (ECF No. 615) (Pre-Filed Direct Testimony of Abel Herrero); Trial Tr. at 110:20-112:8, *Texas v. United States*, No. 1:12-cv-1303 (D.D.C. Jan. 17 a.m.) (Ex. 3).

In Harris County, the State deviated from established procedures by excluding every minority legislator in the delegation from the redistricting process for the express purpose of protecting incumbents from minority population growth—resulting in the elimination of a district represented by the Texas House's sole Vietnamese member rather than the district of a senior Anglo Democrat. *See* Trial Tr. at 53:19-55:18, 68:10-22, *Texas v. United States*, No. 1:12-cv-1303 (D.D.C. Jan. 19 p.m.) (Ex. 4); DX 738 at 12-14, 19-22, Notice of Filing Def. Ex. List (ECF No. 615) (Pre-Filed Direct Testimony of Scott Hochberg).

In sum, the evidence convincingly establishes that the State of Texas enacted its 2011 House redistricting plan with discriminatory intent.[12]

3. Other Violations of the Fourteenth and Fifteenth Amendments

As noted above, for purposes of Section 3(c), the relevant evidence of discrimination is not limited to the precise practices that were challenged in the lawsuit. *See Jeffers*, 740 F. Supp. at 591-92 (holding that constitutional violations with respect to voting practices that were not "the principal focus of the complaint" satisfied Section 3(c)). In this case, Texas's pervasive history of voting discrimination against its African-American and Hispanic citizens is long-standing and well-documented. As recently as 2006, the Supreme Court held that the State's Congressional redistricting plan "undermined the progress of a racial group that has been subject to significant voting-related discrimination." *LULAC v. Perry*, 548 U.S. 399, 438 (2006). The Court concluded that the State's division of a cohesive Hispanic community just as it "was

[12] Although the United States did not oppose preclearance of Texas's 2011 State Senate plan, intervenors did oppose preclearance, and the District Court denied preclearance of that plan after concluding that Texas had not met its burden of showing no discriminatory purpose when it enacted the 2011 Senate redistricting map. *See Texas v. United States*, 887 F. Supp. 2d at 162, 166.

becoming more politically active" bore "the mark of intentional discrimination that could give rise to an equal protection violation." *Id.* at 438-39.

In every redistricting cycle since 1970, courts have similarly found that one or more of Texas's statewide redistricting plans violated the voting guarantees of the Constitution or provisions of the Voting Rights Act.[13] Likewise, since Texas became a covered jurisdiction under Section 5 pursuant to the 1975 amendments to the Voting Rights Act, the Attorney General has interposed an objection to at least one of the State's redistricting plans in each decennial redistricting cycle.[14]

Overall, the Attorney General has frequently interposed objections to a broad spectrum of voting changes proposed by the State and its political subdivisions.[15] Since 1976, the Department has issued 207 Section 5 objections to proposed electoral changes in Texas (188 related to changes enforced by Texas political subdivisions, 19 by the State itself). On numerous occasions, the Attorney General determined that the State or its political subdivisions were unable to demonstrate that proposed voting changes were adopted without a discriminatory purpose. *See generally* 42 U.S.C. § 1973c(a)-(c). Examples in the last three years alone include:

- A 2012 objection to a Galveston County redistricting plan for Commissioners Court. The Attorney General concluded that the county had not met its burden with regard to discriminatory purpose, citing (1) a failure to adopt set redistricting criteria, (2) the

[13] *See, e.g.*, *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012) (three-judge court), *vacated on other grounds*, 570 U.S. ___, 2013 WL 3213539 (U.S. June 27, 2013); *LULAC v. Perry*, 548 U.S. 399 (2006); *Balderas v. State of Texas*, No. 6:01CV158, 2001 WL 36403750 (E.D. Tex. Nov. 14, 2001) (three-judge court) (per curiam); *Bush v. Vera*, 517 U.S. 952 (1996); *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991) (three-judge court), *aff'd sub nom.*, *Richards v. Terrazas*, 505 U.S. 1214 (1992); *Upham v. Seamon*, 456 U.S. 37 (1982); *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982) (three-judge court) (per curiam); *McDaniel v. Sanchez*, 452 U.S. 130 (1981); *White v. Regester*, 412 U.S. 755 (1973); *White v. Weiser*, 412 U.S. 783 (1973).

[14] *See* DX 277-86, Notice of Filing Def. Ex. List (ECF No. 615) (DOJ Objection Letters).

[15] U.S. Dep't of Justice, *Section 5 Objections Texas*, *at* http://www.justice.gov/crt/about/vot/sec_5/tx_obj2.php (last visited July 17, 2013) (listing Section 5 objections in Texas).

deliberate exclusion from the redistricting process of the sole minority-preferred Commissioner, and (3) the discriminatory impact of the voting change on minority groups.[16]

- A 2012 objection to a Nueces County redistricting plan for Commissioners Court. The Attorney General concluded that the county had not met its burden with regard to discriminatory purpose after it intentionally moved Anglo voters into a district in which Hispanic voters previously had the ability to elect their preferred candidates of choice and moved Hispanic voters out of that district, over the vocal opposition of Hispanic citizens.[17]

- A 2010 objection to Runnels County's Spanish-language election procedures. The Attorney General concluded that the county had not met its burden with regard to discriminatory purpose after the county proposed replacing bilingual poll officials in each precinct with a single bilingual assistor available by phone, admitted rapid growth in the county's Hispanic population, and failed to provide a credible explanation for the proposed change.[18]

- A 2010 objection to Gonzales County's Spanish-language election procedures. The Attorney General concluded that the county had not met its burden with regard to discriminatory purpose after the county proposed replacing bilingual poll workers in ten of the county's eighteen voting precincts with "best efforts" to place bilingual workers in seven of fifteen precincts, noting county officials' "openly expressed hostility toward complying with the language minority provisions of the Voting Rights Act."[19]

Moreover, as the Supreme Court has recognized, a jurisdiction's historical practices can provide relevant circumstantial evidence from which a court can infer that more recent conduct was motivated by discriminatory purpose. *See Rogers*, 458 U.S. at 625 (holding that evidence of past discrimination is relevant to drawing an inference of purposeful discrimination); *City of Rome v. United States*, 446 U.S. 156, 177 (1980) ("[E]lectoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful

[16] Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to an attorney for Galveston County, Texas (Mar. 5, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_030512.php.

[17] Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to attorneys for Nueces County, Texas (Feb. 7, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/ l_020712.php.

[18] Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to the Runnels County Clerk (June 28, 2010), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_062810.php.

[19] Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to an attorney for Gonzales County, Texas (Mar. 10, 2010), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/ l_031210.php.

discrimination."). Therefore, Texas's present-day discrimination must be considered in the context of its robust history of voting discrimination against racial minorities, which dates back to Reconstruction. *See generally White v. Regester*, 412 U.S. 755, 766-69 (1973) (recounting "the history of official racial discrimination in Texas"); *Vera v. Richards*, 861 F. Supp. 1304, 1317 (S.D. Tex. 1994) (three-judge court) (noting that "Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process"), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996). As the Supreme Court has recognized, Texas's pervasive history of discrimination has included efforts to prevent African-American and Hispanic voters from participating equally in the electoral process, with State officials promptly enacting new discriminatory measures shortly after established laws were struck down. *LULAC*, 548 U.S. at 439-40 (quoting *Vera*, 861 F.Supp. at 1317). These discriminatory election practices have included State constitutional amendments and codified laws that levied poll taxes, established all-white primaries, created restrictive voter-registration time periods, diluted minority voting strength through the use of racial gerrymandering, and even barred the election of minority officeholders. *See LULAC*, 548 U.S. at 439-40.[20]

[20] *See also, e.g.*, *Beare v. Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971) (three-judge court) (striking down newly instituted annual voter-registration system), *aff'd sub nom. Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974); *United States v. Texas*, 252 F. Supp. 234 (W.D. Tex. 1966) (barring use of a poll tax as a voting requirement), *aff'd*, 384 U.S. 155 (1966); *Terry v. Adams*, 345 U.S. 461 (1953) (striking down all-white "Jaybird primary"); *Smith v. Allwright*, 321 U.S. 649 (1944) (striking down white primary); *Grovey v. Townsend*, 295 U.S. 45 (1935) (permitting exclusion of African Americans from Democratic primary based on purported lack of state action); *Nixon v. Condon*, 286 U.S. 73 (1932) (striking down State-authorized white primary); *Nixon v. Herdon*, 273 U.S. 536 (1927) (striking down State-mandated white primary). *See generally* Robert Brischetto et al., *Texas, in Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*, at 233-70 (Chandler Davidson & Bernard Grofman eds., 1994).

D. This Court Should Impose Section 3(c) Preclearance.

Upon finding that the 2011 Congressional or State House redistricting plan was intentionally discriminatory, this Court should grant relief pursuant to Section 3(c) of the Voting Rights Act. As set forth above, the prerequisites to Section 3(c) relief have been met, and Texas's pattern of intentional discrimination in voting warrants the imposition of a preclearance requirement under Section 3(c). As in *Jeffers*, the violations in this case are "persistent and repeated," otherwise likely to recur, and of the type "likely [to] be prevented, in the future, by preclearance." 740 F. Supp. at 601.

This Court should issue an order requiring Section 3(c) preclearance review of all voting changes that the State of Texas enacts or seeks to administer during the ten-year period following the issuance of such order. This coverage period is no longer or shorter than necessary here to ensure that preclearance will be applied to decennial redistricting and the accompanying reconfiguration of precincts. During that period, no "voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced," *i.e.*, May 9, 2011, that the State of Texas enacts or seeks to administer could be implemented unless and until this Court concludes that the proposed change does not have the purpose or effect of denying or abridging the right to vote based on race, color, or language minority status, or such change has been submitted for review by the Attorney General and the Attorney General fails to interpose an objection within sixty days of the submission. 42 U.S.C. § 1973a(c). If at any point during the ten-year period following such order this Court finds that the State has not met its statutory burden under Section 3 or the Attorney General objects to a proposed change (and such objection is not overturned by a decision of this Court), this Court should consider extending the bail-in period beyond the

original 10 years. *Cf.* 42 U.S.C. § 1973b(a)(5) (requiring termination of a bailout from Section 4(b) coverage in the event of discriminatory acts within a ten-year period); *id.* § 1973b(a)(1)(D) (barring bailout in the event of a denial of judicial preclearance or imposition of a Section 5 objection not overturned by a court).

IV. CONCLUSION

For the reasons set out above, this Court maintains jurisdiction to consider requests for relief under Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c), and should grant such relief in this case.

Date: July 25, 2013

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