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

SHANNON PEREZ, *et al.*, *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants.*	)	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants.*	)	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]
TEXAS LATINO REDISTRICTING TASK FORCE, *et al.*, *Plaintiffs,* v. RICK PERRY, *Defendant.*	)	CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated case]

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

DEFENDANTS' ADVISORY

Pursuant to this Court's Order of February 11, 2013 (Doc. 731), Defendants Rick Perry, in his official capacity as Governor, John Steen, in his official capacity

as Secretary of State, and the State of Texas (collectively "Defendants") file this Advisory summarizing their position on the matters identified by the Court.

Before addressing the specific questions posed by the Court, Defendants advise the Court that four redistricting bills were filed in the Texas Legislature on Friday, March 8, 2013. Senate Bill 1524 and House Bill 3840 are identical bills that would adopt this Court's 2012 interim redistricting plans as permanent electoral districts for Congress, the Texas Senate, and the Texas House of Representatives.[1] House Bill 3846 would enact the districts identified as Plan H311 as permanent electoral districts for the Texas House of Representatives.[2] House Bill 3847 would enact the districts identified as Plan C236 as permanent electoral districts for Congress.[3] In the event the Legislature enacts any one of these redistricting bills, the circumstances under which they become effective will depend on the applicability of the preclearance requirement under Section 5 of the Voting Rights Act. If a new redistricting plan is enacted and Texas remains subject to the preclearance requirement, the new redistricting law cannot take effect until it is precleared. However, if Texas ceases to be subject to the preclearance requirement, then a new redistricting plan would become effective immediately after it is enacted into law.

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[1] The text of SB 1524 is available on the Texas Legislature's website at http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=83R&Bill=SB1524. The text of HB 3840 is available online at http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=83R&Bill=HB3840.

[2] The text of HB 3846 is available on the Texas Legislature's website at http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=83R&Bill=HB3846. Plan H311 is available through the "District Viewer" application on the Texas Legislative Council's website, http://www.tlc.state.tx.us/.

[3] The Text of HB 3847 is available on the Texas Legislature's website at http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=83R&Bill=HB3847. Plan C236 is available through the "District Viewer" application on the Texas Legislative Council's website, http://www.tlc.state.tx.us/.

I. If the Supreme Court Upholds Section 5, Notes Probable Jurisdiction over the State's Appeal, and Issues No Ruling During the Current Term, This Court Should Order that the 2014 Elections Be Conducted Under the Interim Plans Used in 2012.

How should this Court proceed, and how much time will it take for the Court to complete its task while still leaving sufficient time for local election officials to implement any necessary changes prior to the 2014 election cycle, if the United States Supreme Court determines that Congress did not exceed its authority when it reauthorized Section 5 of the Voting Rights Act in 2006, as asserted in the Shelby County *case, and accepts the State of Texas' appeal but issues no ruling prior to the end of the current Term?*

If the Supreme Court upholds the 2006 reauthorization of Section 5 of the Voting Rights Act in *Shelby County, Alabama v. Holder*[4] and notes probable jurisdiction over the appeal in *Texas v. United States* but does not issue a ruling during the current Term, the status of the legislatively enacted redistricting plans will remain unchanged. Section 5 of the Voting Rights Act will bar the State of Texas from implementing the plans enacted in 2011 unless and until preclearance is granted. *See* 42 U.S.C. § 1973c. Until the Supreme Court addresses the merits of the State's appeal, however, this Court cannot issue a final reapportionment order for the United States House of Representatives, the Texas Senate, or the Texas House of Representatives. As a result, the 2014 elections will have to be conducted under interim redistricting plans.

[4] 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012) (No. 12-96). As shorthand for the more complex issue presented in *Shelby County*, this Advisory refers to the potential affirmance of the court of appeals as a decision to "uphold Section 5" and to the potential reversal as a decision to "overturn Section 5." The Supreme Court granted certiorari in *Shelby County* to consider the following question: "Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution." 133 S. Ct. 594.

In such case, the Court should order that elections to the U.S. House be conducted under Plan C235, that elections to the Texas Senate be conducted under Plan S172, and that elections to the Texas House be conducted under Plan H309. For the reasons stated in Defendants' Advisory on Issues Relating to Interim Redistricting Plans (Doc. 728), this Court's interim redistricting plans for the 2012 elections account for every purported legal defect identified by the district court in *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), and this Court has made a preliminary determination that the interim maps fix any likely violations of the U.S. Constitution or Section 2 of the Voting Rights Act. *See* Interim Congressional Order (Doc. 681); Interim House Order (Doc. 682); Interim Senate Order, *Davis, et al. v. Perry, et al.*, No. 5:11-cv-788-OLG-JES-XR (Doc. 141 Feb. 28, 2012). If the Court orders elections to proceed under the 2012 interim plans, no further proceedings will be necessary to determine the boundaries of electoral districts for the 2014 elections.

Should the Court determine that further proceedings are necessary before it enters interim redistricting plans for the 2014 elections, Defendants propose that the Court rule on any outstanding motions by July 1, 2013; that the parties submit any requested briefing by July 8, 2013, with any responsive briefing to follow on July 15, 2013; that the Court hold a hearing on July 22, 2013, continuing until July 25, 2013, if necessary; that any post-hearing briefs be filed by August 2, 2013; and that the Court issue interim redistricting orders on or before August 30, 2013.

II. If the Supreme Court Upholds Section 5 and Dismisses the State's Appeal, the Court Must Give the Legislature an Opportunity to Enact New Redistricting Plans and, if the Legislature Does Not Act, Enter Reapportionment Orders Consistent with the Guidelines Established in *Upham v. Seamon* and *Perry v. Perez*.

> *How should this Court proceed, and how much time will it take for the Court to complete its task while still leaving sufficient time for local election officials to implement any necessary changes prior to the 2014 election cycle, if the United States Supreme Court determines that Congress did not exceed its authority when it reauthorized Section 5 of the Voting Rights Act in 2006, as asserted in the* Shelby County *case, and dismisses the State of Texas' appeal?*

If the Supreme Court upholds Section 5 and dismisses the State's appeal in *Texas v. United States*, the denial of preclearance regarding the legislatively enacted redistricting plans for the U.S. House, the Texas Senate, and the Texas House will become final. The enacted plans will then be in the same posture as the congressional redistricting plan at issue in *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam). The manner in which the Court proceeds will depend on the Legislature's response. If the Legislature initiates the process necessary to enact new redistricting plans, the Court must defer for a reasonable time to allow the Legislature to act. If the Legislature does not act within a reasonable time, this Court must enter reapportionment plans to remedy the malapportionment of electoral districts under the 2001 benchmark plans, deferring to the 2011 legislatively enacted plans whenever possible. If the Legislature acts by passing new redistricting plans and they are enacted into law, this case will become moot. If the Legislature passes new redistricting plans but preclearance is delayed, the Court may be required to implement interim plans based on the newly enacted plans.

When a legislatively enacted redistricting plan is invalidated, courts must give the legislature the opportunity to create a remedial plan. *See, e.g.*, *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) ("[E]ven after a federal court has found a districting plan unconstitutional, 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.'" (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978))). The same policies that obligate the courts to defer to legislative reapportionment in the first instance "apply with equal force to violations of the Voting Rights Act." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1124 (5th Cir. 1991). Thus the Legislature should have "the first opportunity to devise remedies for violations of the Voting Rights Act." *Id.* (remanding with instructions to give the city 120 days to develop a new plan and submit it for preclearance); *see also Harper v. City of Chicago Heights*, 223 F.3d 593, 599 (7th Cir. 2000) ("When a Section 2 violation has been found, the district court must, wherever practicable, afford the jurisdiction an opportunity to remedy the violation first, . . . with deference afforded the jurisdiction's plan if it provides a full, legally acceptable remedy.") (alteration in original, internal quotation marks omitted). Accordingly, this Court should not take any steps to implement a permanent remedial plan unless and until the Texas Legislature fails to act in response to the denial of preclearance. If the Legislature indicates that it will take up redistricting, this Court should set a deadline that gives the Legislature notice of the time frame within which it must enact new redistricting plans and submit them for preclearance.

If the Legislature passes new redistricting plans and they are enacted into law, this case will be moot. *See, e.g.*, *Puerto Rican Legal Defense & Educ. Fund v. Gantt*, 796 F. Supp. 698, 700 (E.D.N.Y. 1992) (holding that complaint challenging preexisting 34-district congressional plan became moot when new 31-district plan was enacted and signed into law); *see also Tangipahoa Citizens for Better Gov't v. Parish of Tangipahoa*, No. 03-2710, 2004 WL 1638106 (E.D. La. July 19, 2004) (granting motion to dismiss Section 2 claims as moot where the challenged redistricting plan failed to gain preclearance and subsequent plan had been precleared). If the Legislature enacts new plans but preclearance is delayed, this Court will again be required to fashion interim maps for the 2014 elections. The newly enacted plans will serve as the starting point for any court-drawn interim plans. *See Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (per curiam) (instructing that "the state plan serves as a starting point for the district court").

If the Legislature does not enact new redistricting plans, this Court must fashion remedial redistricting plans under the guidelines established by the Supreme Court in *Upham v. Seamon*, 456 U.S. at 40–43, deferring to the legislatively enacted plans and limiting any modifications to the State's plans "to those necessary to cure any constitutional or statutory defect." *Id.* at 43; *see also Perry v. Perez*, 132 S. Ct. at 941 ("'[F]aced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting

Rights Act.'" (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997))). Defendants propose that any proceedings necessary to create remedial plans be conducted according to the schedule proposed above, *see supra* Part I, unless the Legislature demonstrates its intent to pass new redistricting plans in response to the denial of preclearance.

III. If the Supreme Court Upholds Section 5 and Affirms *Texas v. United States*, the Court Must Give the Legislature an Opportunity to Enact New Redistricting Plans and, if the Legislature Does Not Act, Enter Reapportionment Orders Consistent with the Guidelines Established in *Upham v. Seamon* and *Perry v. Perez*.

> *How should this Court proceed, and how much time will it take for the Court to complete its task while still leaving sufficient time for local election officials to implement any necessary changes prior to the 2014 election cycle, if the United States Supreme Court determines that Congress did not exceed its authority when it reauthorized Section 5 of the Voting Rights Act in 2006, as asserted in the* Shelby County *case, accepts the State of Texas' appeal, and affirms the D.C. decision on preclearance?*

If the Supreme Court upholds Section 5 and affirms the district court's denial of preclearance in *Texas v. United States*, the denial of preclearance with respect to the legislatively enacted redistricting plans for the U.S. House, the Texas Senate, and the Texas House will become final. The enacted plans will then be in the same posture as the congressional redistricting plan at issue in *Upham v. Seamon*. In such case, this Court should give the Legislature a reasonable opportunity to enact new redistricting plans if it initiates the legislative process for enacting new redistricting plans. If the Legislature enacts substitute plans, this case will be moot. If the Legislature enacts substitute redistricting plans but does not secure preclearance in time for the 2014 elections, this Court must enter interim

reapportionment plans based on the newly enacted plans. If the Legislature does not act within a reasonable time, the Court should issue a remedial plan for the 2014 elections under the guidelines established by the Supreme Court in *Upham*.

IV. If the Supreme Court Upholds Section 5 and Reverses *Texas v. United States*, the Court Must Account for the Specific Grounds for Reversal in Fashioning any Interim Plan.

> *How should this Court proceed, and how much time will it take for the Court to complete its task while still leaving sufficient time for local election officials to implement any necessary changes prior to the 2014 election cycle, if the United States Supreme Court determines that Congress did not exceed its authority when it reauthorized Section 5 of the Voting Rights Act in 2006, as asserted in the* Shelby County *case, accepts the State of Texas' appeal, and reverses the D.C. decision on preclearance in whole or in part?*

If the Supreme Court upholds Section 5 and reverses the district court's decision in *Texas v. United States* in whole or in part, this Court must determine how the Supreme Court's ruling affects the legal enforceability of the legislatively enacted redistricting plans and the contents of any interim redistricting plan this Court might have to implement. The impact of any reversal by the Supreme Court will depend in large part on whether its decision effectively preclears one or more of the State's redistricting plans.

If the Supreme Court reverses in whole as to any specific redistricting plan, that plan will become effective. This Court may then proceed to a final adjudication of the plaintiffs' claims under the Constitution and Section 2 of the Voting Rights Act. If the Supreme Court reverses in part but remands for further proceedings in the district court, this Court should hold a hearing to determine whether the Supreme Court's ruling requires any changes to this Court's interim redistricting

plans before the 2014 elections. To justify a departure from the legislatively enacted plan, the Court would have to determine that the plaintiffs have shown a likelihood of success on the merits under the Constitution or Section 2. *Perry v. Perez*, 132 S. Ct. at 942. Defendants propose that any hearing required to adjudicate claims under the Constitution or Section 2 or to determine the effect of a partial reversal be conducted according to the schedule outlined above. *See supra* Part I.

V. If the Supreme Court Overturns Section 5 and Vacates the District Court in *Texas v. United States*, the Court May Reach the Merits of Plaintiffs' Claims Under the Constitution and Section 2.

> *How should this Court proceed, and how much time will it take for the Court to complete its task while still leaving sufficient time for local election officials to implement any necessary changes prior to the 2014 election cycle, if the United States Supreme Court determines that Congress exceeded its authority when it reauthorized Section 5 of the Voting Rights Act in 2006, as asserted in the* Shelby County *case, accepts the State of Texas' appeal, and vacates the decision on preclearance?*

If the Supreme Court overturns Section 5 and vacates the district court's order in *Texas v. United States*, the State's redistricting plans will be in effect immediately, and the plaintiffs' claims under the Constitution and Section 2 of the Voting Rights Act challenging those plans will become ripe for final adjudication by this Court. The Court would no longer have the authority to remedy any Section 5 violations, even those previously identified by the D.C. Court. Should the Court determine that further proceedings are necessary to decide these claims on the merits, Defendants propose that the Court proceed according to the schedule described above. *See supra* Part I.

VI. If the Supreme Court Notes Probable Jurisdiction in *Texas v. United States* But Does Not Issue an Opinion Before the End of the Current Term, This Court Must Issue Interim Maps for the 2014 Elections Using the Legislatively Enacted Plans as a Baseline.

> *If the Supreme Court Accepts the State of Texas' appeal but does not issue an opinion before the end of the current Term: (a) Would this Court be required to issue interim maps for the 2014 elections? (b) If so, which apportionment plan would the Court use as a baseline when drawing an appropriate interim map?*

If the Supreme Court notes probable jurisdiction in *Texas v. United States* but does not issue an opinion before the end of the current Term, the State will have no permanent electoral districts for the 2014 elections to the U.S. House, the Texas Senate, or the Texas House. Assuming that Section 5 continues to apply to Texas, interim maps will be necessary to conduct the 2014 elections unless the Texas Legislature enacts new redistricting plans and those plans are precleared.

Interim redistricting plans for the 2014 elections must be based on the plans enacted by the Texas Legislature. As the Supreme Court explained in *Perry v. Perez*, 132 S. Ct. at 941, "the state plan serves as a starting point for the district court" in drawing an interim plan. Thus any interim redistricting plan must incorporate the policy choices reflected in the legislatively enacted plans to the extent those choices do not conflict with the Constitution or the Voting Rights Act. *Id.* (holding that when "'faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997))).

For the reasons stated in Defendants' Advisory on Issues Relating to Interim Redistricting Plans (Doc. 728), this Court's interim redistricting plans for the 2012 elections account for every purported legal defect identified by the district court in *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012). Assuming that the Legislature does not pass new redistricting plans, which would serve as the basis for any interim plan, this Court should order the 2014 elections to proceed under the 2012 interim plans. In this case, no further proceedings will be necessary to determine the boundaries of electoral districts for the 2014 elections. If the Court determines that further proceedings are necessary, Defendants propose the schedule outlined above. *See supra* Part I.

VII. If the Supreme Court Does Not Reverse or Vacate the District Court's Decision in *Texas v. United States*, All Section 2 and Constitutional Challenges to the Legislatively Enacted Redistricting Plans Remain Unripe for Adjudication.

> *If the D.C. decision to deny preclearance is left undisturbed and the State's enacted plans are legally unenforceable: (a) Would all of the Section 2 and constitutional challenges in this case become moot? (b) If the issues in this case become moot, what jurisdiction and authority does this Court retain, and for how long?*

If the Supreme Court affirms the district court's decision in *Texas v. United States* or declines to exercise jurisdiction over the State's appeal, it will eliminate the prospect of the challenged redistricting plans taking legal effect until this Court remedies those districts found to be in violation of Section 5. If there is no chance that the legislatively enacted plans will be implemented, challenges to those plans under the Constitution or Section 2 of the Voting Rights Act remain unripe, and the Court lacks subject matter jurisdiction to adjudicate them. *See, e.g.*,

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does."). This Court, however, would retain jurisdiction to enter permanent remedial maps to address the districts found to violate Section 5 and enter reapportionment plans, deferring to the 2011 legislatively enacted plans whenever possible.

VIII. If the District Court's Decision in *Texas v. United States* is Reversed in Whole or In Part, the Case May Be Remanded, in Which Case this Court Must Order Interim Plans for any Redistricting Plan that Has Not Been Precleared.

If the D.C. decision is reversed in whole or in part, is there any possibility of remand to the D.C. Court? What would happen then?

If the Supreme Court reverses *Texas v. United States* in whole or in part, it is possible—though unwarranted—that the Supreme Court will remand for further proceedings in the district court. The United States has proposed just such a remand for the Senate redistricting plan. *See* United States' Mot. to Affirm in Part at 26, *Texas v. United States*, No. 12-496 (U.S. Dec. 7, 2012) (arguing that the evidence identified by the court "was insufficient to support a finding of intentional discrimination" but urging remand "because the record may contain additional evidence that would support such a conclusion"). According to the United States, the district court's factual finding regarding discriminatory purpose in the Senate plan was clearly erroneous. *See id.* at 28 ("[T]he district court's conclusion as to discriminatory purpose amounts to clear error based on the explanation provided by the district court."). Defendants believe that it would be improper and unwarranted to remand the case only to give the intervenors a second chance to defeat

preclearance of the Senate plan; nevertheless, Defendants recognize that a remand is possible.

The nature of any further proceedings in the D.C. district court—and any related proceedings in this Court—will depend on the specific basis for reversal and the scope of the remand. To the extent the Supreme Court remands for further proceedings regarding a particular redistricting plan, the legal status of that plan will remain unchanged. Assuming that no State-created substitute plan becomes effective before the 2014 elections, this Court must implement an interim plan consistent with the Supreme Court's opinion reversing the district court and with the principles outlined in *Perry v. Perez*.

IX. Challenges to the Enacted Plans Under the Constitution and Section 2 Will Become Ripe Only if the Supreme Court Reverses or Vacates the District Court in *Texas v. United States* or the Plans Otherwise Become Legally Effective.

> *Under which scenarios would this Court move forward with a decision on the Section 2 and constitutional issues raised in this case? Would the record available for the Court's consideration be limited to the evidence already presented in this case? Would the parties supplement the current record? Would the Court's consideration of the issues in this case be based, in part, on the factual evidence in the D.C. record, which has already been tendered to this Court? Would this Court be bound by any findings or conclusions of the D.C. court? Would the parties need to supplement or amend their proposed findings of fact and conclusions of law?*

The plaintiffs' challenges to the enacted plans under the Constitution and Section 2 will become ripe if the Supreme Court holds that Section 5's coverage formula is not valid or reverses or vacates the district court's order in *Texas v. United States*. Only then would this Court proceed to final adjudication of claims against the enacted plans under the Constitution and Section 2. If the Supreme

Court ultimately upholds the district court's ruling in *Texas v. United States* with respect to any legislatively enacted plan, challenges to that plan remain unripe. This Court, however, would retain jurisdiction to enter permanent remedial maps to address the districts found to violate Section 5 and enter reapportionment plans, deferring to the 2011 legislatively enacted plans whenever possible.

To the extent Texas remains subject to Section 5 and the district court's opinion in *Texas v. United States* is not reversed or vacated on appeal, its legal conclusions under Section 5 will bind this Court, at least as a practical matter, because this Court lacks statutory authority to consider the merits of a Section 5 claim. *See, e.g.*, *Perry v. Perez*, 132 S. Ct. at 942 (noting that "§ 5 allows only [the District Court for the District of Columbia] to determine whether the state plan complies with § 5" and "other district courts may not address the merits of § 5 challenges") (citing *Perkins v. Matthews*, 400 U.S. 379, 385 (1971))).

This Court is not bound, however, by any factual determinations made in the preclearance case. Assuming for the sake of argument that the D.C. court's factual determinations would otherwise meet the requirements of collateral estoppel, factual determinations by the Section 5 court cannot have any preclusive effect because the State bore the burden of proof under Section 5, whereas the plaintiffs bear the burden of proof under the Constitution and Section 2. *See, e.g.*, *McHan v. C.I.R.*, 558 F.3d 326, 331 (4th Cir. 2009) (holding that the doctrine of collateral estoppel does not apply "when the party against whom the doctrine is invoked had the burden in the first proceeding, but the party seeking to invoke the doctrine has

the burden in the second proceeding"); CHARLES ALAN WRIGHT, ET AL., 18 FEDERAL PRACTICE AND PROCEDURE § 4422 (2d ed. 2002) ("Failure of one party to carry the burden of persuasion on an issue should not establish the issue in favor of an adversary who otherwise would have the burden of persuasion on that issue in later litigation."); *cf. Grogan v. Garner*, 498 U.S. 279, 284–85 (1991) (noting that a judgment of fraud based on a preponderance-of-evidence standard could have collateral estoppel effect on the question of nondischargeability if the subsequent claim also required proof by a preponderance of the evidence, but not if it required clear and convincing evidence (citing RESTATEMENT (SECOND) OF JUDGMENTS §§ 27, 28(4))); *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938) ("The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata."); *cf. also City of Port Arthur v. United States*, 517 F. Supp. 987, 1004 n.119 (D.D.C. 1981) (refusing, in a Section 5 preclearance lawsuit, to give collateral estoppel effect to factual findings made in a previous constitutional challenge because, among other reasons, "the burden of proof [in the previous case] was precisely the reverse of that which exists in the instant case").

Assuming the plaintiffs' Constitutional and Section 2 claims ripen at some point, Defendants believe that the existing record is sufficient to allow the Court to reach the merits of any claim asserted. Defendants do not believe that supplementation of the record is necessary or appropriate, nor do Defendants believe that consideration of the factual record from the D.C. court is necessary to resolve the claims asserted in this case. Defendants believe that supplementation

or amendment of the parties' proposed findings of fact or conclusions of law is unnecessary; however, given the current status of the preclearance process, it is possible that supplemental or amended proposed findings of fact and conclusions of law may be appropriate at some point.

X. Defendants Await Plaintiffs' Identification of Congressional and Texas House Districts Still Subject to Challenge.

> *In the event the Court does need to proceed with determining the Section 2 and constitutional issues at some juncture, the Court must have a clear understanding of the specific districts in each enacted plan that are alleged to be the result of statutory or constitutional violations. Therefore, the parties' advisories must include a LIST of the specific districts still being challenged in this case, with such list naming the district by number and the specific challenge being asserted.*

Defendants understand that the *Davis* plaintiffs' challenge is limited to the configuration of Senate District 10 in Plan S148, which they allege constitutes vote dilution and intentional discrimination in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the U.S. Constitution. *See, e.g.*, Complaint ¶ 41, *Davis, et al. v. Perry, et al.*, No. 5:11-cv-788-OLG-JES-XR (Doc. 1, Sept. 22, 2011). Defendants are unable to identify with certainty the specific districts in Plan H283 and Plan C185 that remain subject to challenge. Defendants therefore await plaintiffs' briefing to discover which congressional and Texas House districts are still challenged and on what grounds.

XI. Defendants Anticipate that the Limited Issues in the Senate Case Will Allow for an Expedient Resolution.

Do the parties to the Senate case anticipate that their case may be resolved more expediently given the limited issues therein?

Because the plaintiffs in *Davis v. Perry* limit their challenge to Senate District 10, Defendants expect that a final resolution will require less time and effort by the Court and the parties.

Dated: March 22, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing was sent on March 22, 2013, via the Court's electronic notification system and/or email to the following counsel of record:

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