Sent via email July 28, 2025

Senate Special Committee on Congressional Redistricting
Texas Senate
Sam Houston Senate Office Building, Room 445
201 E. 14th Street
Austin, TX 79701

Re: Unconstitutional Racially Discriminatory Redistricting

Dear Chair King and Committee Members:

You have been tasked by the U.S. Department of Justice and Governor Abbott with intentionally eliminating congressional districts that happen to have a multiracial majority of Black and Latino voters. It is imperative that you understand that, if you now redistrict in response to the Governor's Call, **you and the Governor will violate the Fourteenth and Fifteenth Amendments to the United States Constitution and Section 2 of the Voting Rights Act**. In so doing, you will risk Texas's legislative redistricting process being subjected to preclearance by a three-judge federal court under Section 3(c) of the Voting Rights Act. Campaign Legal Center Action is a national organization with expertise in redistricting law with the mission to advance democracy through law. We write to warn you that the current redistricting process has already ensured a constitutional violation if a new map is enacted.

Here is the problem. Congressional redistricting is only on the Governor's call for the Special Session "in light of constitutional concerns raised by the U.S. Department of Justice."[1] On July 7, 2025, the U.S. Department of Justice ("DOJ") sent a letter to Governor Abbott and Attorney General Paxton identifying the racial composition of four congressional districts (CDs 9, 18, 29, and 33) and demanding that those districts be dismantled **because of their racial makeup.** The DOJ letter contends that these districts are unconstitutional racial gerrymanders because "the record indicates that TX-09 and TX-18 sort Houston voters along strict racial lines to create two coalition seats, while creating TX 29, a majority Hispanic district."[2] Likewise, the DOJ letter characterizes CD 33 as

[1] Governor's Proclamation, July 9, 2025.
[2] Letter from Harmeet Dhillon to Gregory Abbott & Ken Paxton, "Re: Unconstitutional Race-Based Congressional Districts TX-09, TX-18, TX-29 and TX-33," July 7, 2025 ("DOJ Letter").

drawn along racial lines "in the 2021 redistricting" and that it "remains as a coalition district."[3] The letter cites the Fifth Circuit's ruling in *Petteway v. Galveston County*, No. 23-40582 (5th Cir. 2024), as the basis for its assertions.

Governor Abbott has doubled down on the DOJ's assertion, stating expressly that congressional redistricting is on the Special Session Call because "coalition districts are no longer required and so **we want to make sure that we have maps that don't impose coalition districts."**[4]

But the people who drew the 2021 congressional map—Senator Huffman, Attorney Chris Gober, and mapdrawer Adam Kincaid—testified *ad nauseum* during the pending *LULAC v. Abbott* litigation that race was not considered at all in the map's configuration. Attorney General Paxton has by letter confirmed this fact, rejecting the contention that any district in the current map is a racial gerrymander. A district is only an unconstitutional racial gerrymander "if a legislature gives race a predominant role in redistricting decisions" without a compelling reason (such as Voting Rights Act compliance) to do so.[5]

The DOJ letter gets the facts and the law badly wrong.

First, unless the State's witnesses perjured themselves in their sworn trial testimony, the 2021 congressional districts cannot possibly be unconstitutional racial gerrymanders. That should end the Legislature's consideration of congressional redistricting, because the premise of its inclusion on the Call is inaccurate. Moreover, the DOJ letter badly misstates the history of CD 33. It was originally imposed because Texas **agreed** it was an appropriate remedy for weighty allegations of intentional discrimination in how the 2011 map configured Dallas-Fort Worth congressional districts. Texas and several plaintiff groups filed a Joint Advisory with the Court (signed by then-Attorney General Abbott) saying "CD33 [i]s [n]ot a [c]oalition [d]istrict," and was not drawn as such, and that "[r]ace is not the predominant districting criterion in CD33," but rather "the district does not have a majority racial group, and neither does the Metroplex within which it is situated. The district simply reflects the population and its growth in Dallas and Tarrant Counties."[6] At final judgment, the district court agreed: "CD33 was not intentionally drawn as a minority coalition district under § 2. Rather, it was created to remedy the alleged intentional discrimination (cracking) claims by removing the fingers from the Anglo-majority districts that reached into Dallas and Fort Worth."[7]

Second, the DOJ Letter misstates the law on coalition districts. While the Fifth Circuit ruled that coalition districts cannot be the basis for a lawsuit seeking to *create new* Section 2 districts, the *Petteway* ruling did not say that coalition districts that merely

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[3] *Id.*

[4] "Abbott on THC, redistricting, and the special session," FOX 4 Dallas-Fort Worth, July 22, 2025, https://www.youtube.com/watch?v=PHsYs0NTPTY.

[5] *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 6 (2024).

[6] Joint Advisory, *Perez v. Perry*, No. 5:11-cv-00360-OLG (Feb. 16, 2012), ECF No. 660 (attached as Ex. A).

[7] *Perez v. Abbott*, 274 F. Sup. 3d 624, 653 (W.D. Tex. 2017), *rev'd and remanded on other grounds, Abbott v. Perez*, 585 U.S. 579 (2018).

happen to exist—most especially ones that resulted from a race-neutral process—can be intentionally eliminated **because of their happenstance racial composition that some Washington official researched and reported to the Legislature**. *Petteway* did not give states a free license to research the racial composition of districts that were drawn race blind at the outset and then set about to dismantle any that happen to contain a multiracial majority and replace them with Anglo-majority districts. It is hard to conceive of a more direct example of intentional racial discrimination and racial gerrymandering that what DOJ and the Governor have directed the Legislature to do.

The Supreme Court has said so. In *Bartlett v. Strickland*, the Court explained that that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments."[8] The violation is even more clear with intentional destruction of coalition districts, which unlike crossover districts are actually majority-minority.

Likewise, DOJ, the Governor, and the Legislature cannot hide behind a misreading of *Petteway* to excuse this purposeful, race-based destruction of coalition districts—especially ones that were drawn blind to racial considerations. The Supreme Court has been clear that this is not permitted, holding in *Cooper v. Harris* that it will not "approve a racial gerrymander whose necessity is supported by no evidence and whose *raison d'être* is a legal mistake."[9]

By demanding a redistricting process the sole purpose of which is expressly to dismantle districts **because of their racial composition**—data about which you have been made expressly aware by DOJ and the Governor—this entire mid-decade redistricting process is now infected by invidious racial discrimination and racial predominance. You cannot unring this bell. The Call demands that you redraw districts that were drawn without regard to race expressly because of their naturally occurring racial composition. That literally "abridge[s]" "[t]he right of citizens of the United States to vote . . . on account of race" in contravention of the Fifteenth Amendment. It also creates a special rule, applied only to Black and Hispanic Texans—prohibiting their **mere existence** together as a combined majority of a district because of their race, regardless of why the district was so configured. That denies equal protection in violation of the Fourteenth Amendment.

Nothing you do now can change this. Racial discrimination is the stated purpose of this endeavor from its outset. Indeed, Governor Abbott has publicly stated that his purpose in signing such legislation would be to make sure Texas eliminated all coalition districts. The constitutional violation has already occurred. You will expose the State to serious legal jeopardy unless you abandon this unwise and unlawful mid-decade redistricting process.

Attorney General Paxton and Governor Abbott have both publicly said there is no actual constitutional problem with Texas's current map. You should not create one by continuing any further with this unlawful venture.

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[8] *See Bartlett v. Strickland*, 556 U.S. 1, 24 (2009).
[9] *Cooper v. Harris*, 581 U.S. 285, 306 (2017).

Sincerely,

/s/ Bruce V. Spiva
Bruce V. Spiva
Senior Vice President

/s/ Annabelle E. Harless
Annabelle E. Harless
Director, Redistricting Litigation

Campaign Legal Center Action
1101 14th Street NW, Suite 400
Washington, DC 20005

cc: The Honorable Greg Abbott
c/o Trevor Ezell and Robert Black
Office of the Governor
P.O. Box 12428
Austin, Texas 78711
trevor.ezell@gov.texas.gov
robert.black@gov.texas.gov

The Honorable Dustin Burrows
c/o Sarah Harrington
Office of the Speaker of the House
P.O. Box 12910
Austin, Texas 78711
sarah.harrington@speaker.texas.gov

The Honorable Dan Patrick
Office of the Lieutenant Governor
P.O. Box 12068
Austin, Texas 78711
dan.patrick@ltgov.texas.gov

The Honorable Ken Paxton
c/o Autin Kinghorn and Ryan Walters
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711
austin.kinghorn@oag.texas.gov
ryan.walters@oag.texas.gov

Via email

Exhibit A:

Joint Advisory to Court in Perez v. Perry (2012)

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

JOINT ADVISORY REGARDING INTERIM CONGRESSIONAL DISTRICTS

Plaintiff Texas Latino Redistricting Task Force, Plaintiff Mexican American Legislative Caucus, Plaintiff-Intervenor Congressman Henry Cuellar, and Defendants Rick Perry, Hope Andrade, and the State of Texas respectfully submit the following Joint Advisory Regarding Interim Congressional Districts pursuant to the Court's Order of February 15, 2012.

I. Congressional District 33

The United States Supreme Court's order in this case suggested strongly that this Court would be justified in departing from the State's enacted congressional plan in the Dallas-Fort Worth area.[1] Specifically, the Court indicated that it would be "appropriate" for this Court to deviate from the enacted plan's configuration of Tarrant County congressional districts, including CD 33, because the districts "appear[ed] to be subject to strong challenges in the §5 proceeding." *Perry v. Perez*, 132 S. Ct. 934, 944 (2012) (per curiam). The State bears the burden of proof in the Section 5 proceeding. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997); *City of Pleasant Grove v. U.S.*, 479 U.S. 462, 469 (1987). In light of the State's burden to disprove discriminatory purpose under Section 5, the Supreme Court's specific reference in *Perry* to Dallas-Fort Worth congressional districts, the Department of Justice's objection to these districts, and evidence in the record that certain features of these districts correlate to race and divide concentrated minority populations, this Court has a legal and factual basis to conclude that there is a reasonable probability these districts will fail to gain preclearance.[2]

A. CD33 Is Tailored to Address Section 5 Claims in Dallas-Fort Worth

In fashioning an interim remedy for the alleged Section 5 violations in Dallas-Fort Worth, the Court must ensure that any relief is tailored to fit the specific allegations that support the finding of a "reasonable probability." The challenges to the Dallas-Fort Worth congressional

[1] This Advisory refers to Dallas County and Tarrant County collectively as Dallas-Fort Worth because the cities of Fort Worth in Tarrant County and Dallas in Dallas County sit at opposite ends of a concentrated, continuous metropolitan area in North Texas commonly referred to as the Dallas-Fort Worth Metroplex. Because the two cities are connected by a continuous string of semi-urban and suburban cities, it is common for congressional districts to incorporate areas from Dallas and Tarrant Counties, as does the State's enacted CD24. Even cities, such as the City of Grand Prairie, may inhabit both sides of the Dallas-Tarrant county line.

[2] Defendants do not concede that Plan C185's configuration of congressional districts in the Dallas-Fort Worth area violates the law in any way. However, as the Supreme Court recognized, the record could support an adjustment to CD33 on an interim basis, and if the Court decides to make such an adjustment, the State will not object to the Court's use of Plan C226.

districts are based on allegations of discriminatory purpose. When a district is challenged as drawn with an impermissible purpose—particularly when the effect of that alleged purpose is to fracture identifiable communities—the appropriate remedy should reverse the effect of the alleged impermissible purpose. *See, e.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (explaining that an appropriate remedy for intentional discrimination "will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future") (citing *Louisiana v. United States*, 380 U. S. 145, 154 (1965)). In redrawing a district, the Court is of course limited by its inability to make the policy decisions that inform a legislature's redistricting efforts. Thus the appropriate remedy is generally informed by the status quo ante, which provides the most recent expression of state policy.[3] *See, e.g.*, *Balderas v. Texas*, 2001 WL 35673968 (E.D. Tex. Nov. 14, 2001) (per curiam), *summarily aff'd*, 536 U.S. 919 (2002). The remedy is complicated in this case by the fact that the status quo ante is not available, strictly speaking, because of population growth and the addition of four new congressional seats in the State. But CD33, as drawn in Plan C226, provides an appropriate agreed interim remedy for the Section 5 challenge to Dallas-Fort Worth congressional districts precisely because it maintains the core of the existing congressional districts surrounding CD33, respects the boundaries of legislatively enacted districts as much as possible, and accommodates the region's fast-growing population.

The substance of the Section 5 challenge relates to the division of specific communities in Dallas and Tarrant counties and, similarly, to the separation of communities that account for the lion's share of population growth in Dallas-Fort Worth over the past decade. From 2000 to

[3] This is consistent with the Court's approach in drawing an interim Senate redistricting plan, which returned the challenged Senate district, SD10, to its benchmark configuration and adjusted the boundaries of adjacent districts only as necessary to accommodate the changes to SD10. *See Davis v. Perry*, No. 5:11-cv-788-OLG-JES-XR (Doc. 89) (implementing Plan S164 as an interim reapportionment plan for the Texas Senate).

2010, the Anglo population in Dallas and Tarrant counties decreased by 156,742. *See* Doc. 638-39. The African American population increased by 152,825 and the Latino population increased by 440,898. *Id.* Today, Anglos constitute 41% of the total population in Dallas and Tarrant Counties, African Americans constitute 19% and Latinos constitute 33%. *Id.* Plan C226 follows traditional redistricting criteria in creating CD33 as a new congressional district to accommodate the fast-growing population of the Dallas-Ft. Worth area. Opinion and Order, *Balderas v. Texas*, No. 6:01-cv-158 (Doc. 413) at *5–6 (E.D. Tex. Nov. 14, 2001).

Congressional District 33 in Plan C226 remedies the separation of communities in Dallas-Fort Worth by withdrawing the "fingers" that divide minority population, in the enacted plan, into congressional districts 6, 12, 26 and 33. Districts 6, 12, and 26 generally retract to their population bases under the benchmark congressional plan. For example, in Tarrant County, the "lightning bolt" of CD 26 that included substantial Latino population in the predominantly Anglo, Denton County-based CD 26 is withdrawn. Similarly, the extension of CD 12 into African-American neighborhoods in Tarrant County and the extension of CD 6 into predominantly Latino areas of Dallas are also withdrawn. District 33 moves eastward to fill the space created by the retraction of CDs 6, 12, and 26 to their population bases, and it encompasses the population left behind in Dallas and Tarrant counties.

The proposed CD33 reflects traditional redistricting criteria by maintaining the core of the existing districts surrounding CD33 and allowing congressional incumbents in Dallas-Ft. Worth to maintain their population bases and geographic areas of special concern. The district provides a minimally disruptive remedy because it respects the borders of surrounding congressional districts to the greatest extent possible. The northern boundary of CD 33, as it crosses the Dallas-Tarrant county line, follows the border of enacted CD 24, ensuring that CD 24

is undisturbed in Plan C226. Similarly, the boundaries of CD 32 in Dallas County remain almost exactly the same as the enacted plan. Also in Dallas County, CD 33 is shaped to create minimal changes to CD 30, an African-American majority district. Changes along the border of CD33 and CD30 that lowered both districts' compactness were made to honor Congresswoman Eddie Bernice Johnson's request to include specific areas in CD 30, including her home and office.[4] *See* Feb. 15, 2012 Hearing Tr. at 356:6–15. The southern boundary of CD 33 accommodates the boundary of the enacted CD 12, reflecting the concerns of incumbent Kay Granger to retain certain parts of the City of Fort Worth. In Tarrant County, the boundary of CD 33 extends to take in Cowboys Stadium, home to the Dallas Cowboys football team. Notwithstanding the variety of competing interests that are accommodated by the boundaries of CD33, the district's compactness scores are within the State's acceptable range of compactness and are comparable to congressional districts 2 and 35. *See* Exhibit B, Plan C226, Red 315 Report.

B. CD33 Is Not a Coalition District

Because CD 33 encompasses much of the Dallas-Fort Worth area's population growth, it is both racially and politically diverse. Electorally, no one racial group has an exclusive ability to nominate and elect its preferred candidates. Although Latinos constitute the largest number of registered voters in CD 33, the evidence in the record shows that African Americans typically turn out at higher rates than Latinos in Democratic primary elections. As a result, in the six most recent Democratic primary elections analyzed by the Texas Attorney General's office, Latino-preferred candidates in CD33 won 4 elections and African American preferred candidates won 2 elections. *See* Exhibit C, Racially Polarized Voting Analysis for CD33 at tbl. 4.

[4] Each of these adjustments responded to a specific allegation of discriminatory purpose in this litigation. *See, e.g.*, *Perez* Trial Tr. 1305:25–1306:16; *Texas v. U.S.*, Trial Tr. T2B 79:16–80:10, 80:19–23.

Because African Americans and Latinos typically support different candidates in the Democratic Primary, District 33 is not a "minority coalition opportunity district" in which two different minority groups "band together" to form an electoral majority. *Perry v. Perez*, 132 S. Ct. at 944. Without a majority of voters of any particular race, CD33 can be expected to nominate and elect a candidate who has the cohesive support of one racial group and at least some crossover support from another group. It reflects the accepted wisdom that all voters must "pull, haul, and trade to find common political ground." *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994).

The boundaries of CD 33 very closely follow Plan C216, which was offered earlier in the litigation as a bipartisan proposal by Congressmen Cuellar and Canseco. The boundaries of CD 33 also closely follow a proposal provided to the State during the 2011 legislative session by Representative Lamar Smith on behalf of the Texas Republican delegation. *See Texas v. U.S.*, Trial Exhibit DX536. The Texas Latino Redistricting Task Force maintains that CD 33 represents carefully negotiated district boundaries that reflect the care given by the State of Texas to accommodate the concerns of congressional incumbents in Dallas-Fort Worth.

The State of Texas maintains that Plan C226 is not an expression of state policy because, unlike Plan C185, it was not enacted by the Texas Legislature. The State maintains that Plan C226 is a proposed interim remedy for as-yet-unproven allegations of discriminatory purpose, to which the state will not object at the interim stage. The State's agreement not to object to certain interim remedies in no way constitutes the creation of "state policy." *See, e.g.*, *Lawyer v. Department of Justice*, 521 U.S. 567 (1997). The State acknowledges that CD33, as drawn in Plan C226, is not inconsistent with the traditional redistricting principles that animate the enacted congressional plan.

C. CD33 Is Reasonably Compact

Proposed CD33 falls within the range of compactness of districts in the State's enacted congressional plan. As in other urban districts, the constitutional requirement to "zero out" the population in districts, as well as factors such as working around existing Voting Rights Act districts and trying to include the locations of incumbents' homes and district offices have a significant effect on district boundaries. *See* Exhibit A, Split VTDs from Unpopulated Blocks. In C185 and C226, CD2 is a majority Anglo district in Harris County and is less compact than CD33 in C226. Congressional District 18, an African-American opportunity district in the State's enacted C185, contains a similar compactness score to CD33 in Plan C226. *See Perez* Exhibit J-8; Exhibit B, Plan C226, Red 315 Report. No party has challenged the boundaries of CD18 as a racial gerrymander. The parties also note that SD12, which was used for the 1992 election cycle, is very similar to CD33 in Plan C226. *See* Doc. 656 at 44. SD12 in the 1992 redistricting plan has a shape and compactness similar to CD33 in C226 and demonstrates that such a district can—and did—exist in the past when the State's mappers relied on traditional race-neutral redistricting criteria.

In fact, examination of Plan C226's compactness scores in Tarrant and Dallas counties combined shows an overall improvement over Plan C185. With one exception, the Dallas-Tarrant based districts about which plaintiffs complained are all improved with respect to compactness. The compactness scores of CD26 improved dramatically, and the scores of CDs 12 and 6 also improved. The exception is CD30, an African American opportunity district protected by §§ 2 and 5 of the Voting Rights Act. CD30 decreased in compactness because the State accommodated requests from the incumbent. *See* Feb. 15, 2012 Transcript at 356:6–15.

Congressional Districts in Tarrant[5] and Dallas Counties[6]						
District No.	**C185 Rubber Band**	**C226 Rubber Band**	**Direction of change**	**C185 Perimeter**	**C226 Perimeter**	**Direction of change**
5	0.684	0.684	n/a[7]	0.132	0.132	n/a
6	0.725	0.764	more compact	0.204	0.215	more compact
12	0.744	0.768	more compact	0.109	0.230	more compact
24	0.749	0.750	n/a	0.213	0.211	n/a
26	0.754	0.910	more compact	0.241	0.460	more compact
30	0.814	0.760	less compact	0.253	0.180	less compact
32	0.604	0.617	more compact	0.120	0.125	more compact
33	0.600	0.430	less compact	0.143	0.045	less compact
Total	**5.674**	**5.683**	**more compact**	**1.415**	**1.598**	**more compact**
Average	**0.70925**	**0.710375**	**n/a**	**0.176875**	**0.19975**	**more compact**

D. CD33 Does Not Reflect the Impermissible Use of Race

Race is not the predominant districting criterion in CD33, and thus the district is constitutional under the *Shaw* cases. *See Bush v. Vera*, 517 U.S. 952, 959 (1996). The demographic characteristics of CD33 are consistent with the demographic trends in Tarrant and Dallas counties. That is, the district does not have a majority racial group, and neither does the

[5] CD25 has been excluded from this analysis because of the small (and unchanged) portion that it occupies in Tarrant County in each plan.
[6] Source TLC Reports RED-315 for Plans C185 and C226.
[7] Differences of less than 5/100 were recorded as n/a, meaning "no change."

Metroplex within which it is situated. The district simply reflects the population and its growth in Dallas and Tarrant counties. CD33 in C226 has an HCVAP of 39.4%, SSVR of 35.8%, a BCVAP of 24%, and an Anglo CVAP of 33.5%. *See* Doc. 656-1 at 42.

In *Bush v. Vera*, where the Supreme Court struck down certain Texas congressional districts as unconstitutional racial gerrymanders, the Court performed a fact-based analysis that included examining the racial and nonracial reasons proffered for the districts. With respect to CD30, the Supreme Court found it significant that CD30 elevated race over other traditional concerns such as partisanship. 517 U.S. at 969–97. Nonetheless, the Supreme Court recognized a number of legitimate factors that could have led to the drawing of a noncompact CD30. For example, the Supreme Court acknowledged that Congresswoman Johnson's first proposal was compact but that "five other congressmen would have been thrown into districts other than the ones they currently represent." *Bush v. Vera*, 517 U.S. at 967 (quoting lower court decision). Thus, the Supreme Court recognized that "incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional redistricting principles, such as compactness, in the drawing of bizarre district lines." *Id*.

* * *

The U.S. Supreme Court in *Perry v. Perez* noted that it is "appropriate" for this Court to disregard aspects of the State's enacted CD 33 that "appear to be subject to strong challenges in the §5 proceeding." 132 S.Ct at 944. In light of the Supreme Court's conclusion that there exists a strong purpose-based challenge to the State's enacted congressional plan in the Dallas-Ft. Worth area, the Court is justified, at the interim stage, in addressing the alleged fracturing of the minority population in that area.[8] Because CD 33, as drawn in Plan C226, reflects neutral

[8] As noted above, the State does not concede that there is any merit to this challenge, nor does it concede that any alteration of the Dallas-Fort Worth area congressional districts would be justified upon final judgment.

redistricting criteria and is tailored to address the specific harm alleged under Section 5, it is appropriate for the Court to incorporate that district in an interim congressional plan for the 2012 elections.

II. Congressional District 35

Plan C226 creates CD 35, which is a new Latino opportunity district in Central Texas, and is identical to the CD 35 proposed in Plan C185. Because Texas enacted CD 35 as part of Plan C185, unless there is a likelihood of success on the merits of a Section 2 or constitutional claim against it, this Court has no authority to modify it. *Perry v. Perez*, 132 S. Ct. at 942. This Court must therefore evaluate any challenge to CD 35 under the likelihood-of-success standard because it has not been challenged by any party under Section 5. Nor could it be, since the Department of Justice Guidelines expressly excludes *Shaw v. Reno* claims from the scope of the Section 5 discriminatory purpose inquiry. U.S. Department of Justice, *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*: Notice, 76 Fed. Reg. 7470 (Feb. 9, 2011). As a result, unless Plaintiffs can meet their burden of showing why CD 35 cannot be part of the interim plan, this Court is properly constrained to include the district in any interim plan it adopts.

A. CD35 Does Not Reflect the Impermissible Use of Race

The Rodriguez Plaintiffs, the Quesada Plaintiffs, and LULAC have challenged the inclusion of CD 35 in Plan C226 as a violation of the Fourteenth Amendment because it is allegedly drawn on the basis of race.[9] Plaintiffs, however, have failed to demonstrate a

[9] No Plaintiff in this case has raised a Section 2 claim against CD 35. There is no allegation that CD 35 was drawn with the purpose of denying or abridging the rights of Latino or African-American citizens to vote on account of race or language minority status. The only claim that has been asserted against CD35 arises under the Fourteenth Amendment.

likelihood of success on the merits of their claim that race predominated over other considerations in the drawing of CD 35.

It is well-established that legislatures are afforded the benefit of a presumption of good faith when they conduct redistricting. *See Chen*, 206 F.3d at 505 ("The [Supreme] Court has clearly indicated that th[e] presumption [of good faith] may impact the assessment of the propriety of summary judgment in a suit challenging districts as racial gerrymanders."); *see also Miller*, 515 U.S. at 916 ("The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.").

In *Shaw v. Reno*, the Supreme Court held that a plaintiff can challenge "a reapportionment statute . . . by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 509 U.S. 630, 649 (1993). A plaintiff raising a *Shaw* claim bears the significant burden of proving that racial considerations were "the 'predominant factor' motivating the legislature's districting decision," *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (citations omitted), not simply *a* "motivation for the drawing of a majority-minority district." *Vera*, 517 U.S. at 959. The plaintiff's burden is a "demanding one." *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, concurring). Indeed, "[t]o invoke strict scrutiny, a plaintiff must show that the State has relied on race in *substantial* disregard of customary and traditional districting practices. *Chen v. City of Houston*, 206 F.3d 502, 506 (5th Cir. 2000) (*citing Miller*, 515 U.S. at 928). "[T]he Supreme Court does

not believe that the mere presence of race in the mix of decision making factors, and even the desire to craft majority-minority districts, . . . alone automatically trigger[s] strict scrutiny." *Id.* at 514 (citations omitted). A plaintiff's heavy burden of establishing the predominance of race can be met either through direct evidence of the legislature's purpose or through circumstantial evidence, including, among other things, a district's demographics or shape. *See Shaw v. Hunt*, 517 U.S. 899, 905 (1996); *Miller*, 515 U.S. at 916.

If a plaintiff meets its heavy burden of proving racial "predominance," the challenged district is subject to "strict scrutiny," which means that the district must be "narrowly tailored to further a compelling state interest." *Vera*, 517 U.S. at 976; *see id.* at 977 ("A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles . . . may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'").

B. CD35 Reflects a Variety of Race-Neutral Considerations

CD 35 joins communities from Travis and Bexar Counties and results in a district that contains 58.3% Latino voting age population, 51.9% Latino citizen voting age population, and 45.0% Spanish surname voter registration. Exhibit B, Plan C226, Red 106 Report. The reconstituted election analysis shows that CD 35 elects the Latino preferred candidate in 10 out of 10 racially contested exogenous general elections. Exhibit D, Plan C226, District 35, Reconstituted Election Analysis at tbl. 4. CD 35 also has a Black citizen voting age population of 11.1%. Exhibit B, Plan C226, Red 106 Report. This is higher than the 9% Black citizen voting age population in benchmark CD 25. *Perez* Exhibit J-1, Plan C100, Red 106 Report. The difference between CD 25 and CD 35 is a change in the relative Anglo and Latino populations. In Plan C100, CD 25 is 54.9% Anglo voting age population and 33.8% Latino voting age

population; in Plan C226, CD 35 is 29.4% Anglo voting age population and 58.3% Latino voting age population. *Perez* Exhibit J-1, Plan C100, Red 202 Report; Exhibit B, Plan C226, Red 202 Report.[10]

As was stated on the record during public redistricting committee hearings and the floor debate, the concept of this district was originally presented to the Legislature by the Texas Latino Redistricting Task Force in Public Plan C122. *Perez* Exhibit D-22 at A-2; *Perez* Exhibit J-62, Deposition of Ryan Downton at 114:17–24. In determining where the four new congressional districts should be drawn, the Legislature took into consideration where the population growth had been throughout the state. Mr. Downton testified that there was significant population growth in Central Texas that would support the creation of a new congressional district. *Perez* Trial Tr. at 915:17–22; *see also Perez* Exhibit D-43; *Perez* Exhibit J-58, Deposition of Doug Davis, 17:4-14 (explaining that the Legislature drew the new congressional districts based on population growth). In fact, the growth in the Latino community was so significant within Central Texas that the Legislature concluded the Latino population was sufficiently large and geographically compact such that it could create a Latino opportunity district that met the 50% citizen voting age population threshold. *See* Exhibit E, *Perez* Exhibit D-44; Exhibit F, *Perez* Exhibit D-43.

Testimony at trial confirmed that CD 35 comports with the traditional redistricting principle of maintaining communities of interest. Lay witnesses discussed the communities of

[10] The Latino Task Force plaintiffs take the position that the Latino citizen voting age population in Texas is sufficiently large and geographically compact to comprise seven Latino opportunity districts in South and West Texas: 15, 16, 20, 23, 28, 34, and 35. (Ex. J-11.) CD 35 in Plan C226 has an HCVAP of 51.9 and meets the majority threshold set out in Bartlett and section 2 cases in the Fifth Circuit. *See Bartlett v. Strickland*, 556 U.S. 1, 12 (2009); *Valdespino v. Alamo Heights Indep. Sch. Dist*., 168 F.3d 848 (5th Cir. 1999). The Latino Task Force plaintiffs take the position that in light of the evidence they introduced of racially polarized voting and the presence of Senate Factors, CD 35 meets all three criteria set out in *Gingles*, 478 U.S. at 50-51, and can be considered a required § 2 district. The creation of CD 35 addresses the requirement under § 2 that a seventh Latino opportunity district be created in this region. Defendants stand by their prior arguments regarding the absence of evidence to support the *Gingles* factors throughout the State.

interest in southeast Austin and San Antonio and how the residents of south San Antonio have more in common with the residents of southeast Austin than with the residents of geographically closer Alamo Heights. *Perez* Trial Tr. at 556:10-557:6, 557:17-558:19, 559:1-17. Further, Mr. Downton's testimony showed that it is not unusual for areas in San Antonio and Austin to be combined in a congressional district. *Id*. at 944:11-22. San Antonio and Williamson County, which is north of Austin, were combined in Congressional District 21 for the 1996 special and general elections, the 1998 general election, the 2000 general election, the court-ordered map that was used for the 2002 election, and the legislatively drawn map used for the 2004 elections and the 2006 primaries. Perez Latino Task Force Exhibits 305–306. In the benchmark congressional plan, CD 21 unites portions of San Antonio and the City of Alamo Heights with the City of Austin and even the Texas Capitol building.

The record shows that in creating CD 35, the State accommodated the requests of various Democratic state legislators with respect to the boundary between CD 35 and CD 20 and also respected Guadalupe County's request to be kept whole in the redistricting plan. *See Perez* Trial Tr. at 918:23-919:22, 985:21–986:9. Additionally, Mr. Downton testified that certain areas in Travis and Bexar Counties were included within District 35 in order to keep Latino communities of interest together. *See* Perez Exhibit J-62, Deposition of Ryan Downton at 114-25-116:7, 118:13-119:4, 121:22-25.

This evidence further reveals that rather than drawing CD 35 solely on the basis of race, the requirements of the VRA were considered in creating this new district. *See Robertson v. Bartels*, 148 F. Supp. 2d 443, 458 (D.N.J. 2001) (finding that strict scrutiny did not apply because the districting plan "was drawn utilizing traditional redistricting principles while seeking to comply with the Voting Rights Act by giving minority candidates the opportunity to be

elected to political office"). Mr. Downton testified that when drafting the new congressional plan he looked at possibilities for expanding minority representation. *Perez* Trial Tr. at 917:24-919:13. Nevertheless, even if Mr. Downton considered the racial composition of District 35, it is clear the Legislature considered many factors other than race. As the Court recognized in *Shaw*, mere consciousness of race in redistricting is an insufficient basis on which to trigger strict scrutiny where it is considered along with traditional redistricting principles. *See Shaw*, 517 U.S. at 905.

The Texas Latino Redistricting Task Force maintains that CD 35 is a required district under section 2 of the Voting Rights Act and that it satisfies all of the requirements under *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See* Doc. 416.

C. CD35 is Reasonably Compact.

Despite the adherence to these traditional districting principles, Plaintiffs point to the non-compact shape of CD 35 to support their claim that CD 35 was drawn predominantly on the basis of race in disregard of traditional districting principles. While the contours of CD 35 are not perfect, for purposes of a *Shaw* claim, its shape is relevant only for any light it may shed on the claim that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913. Plaintiffs, however, offer no evidence that Texas' purpose in drawing CD 35 was improperly dominated by race. Instead, the evidence demonstrated that Texas drew CD 35 based on the population growth in Central Texas and the large amount of Latino citizens who resided in that area.

Nor can Plaintiffs demonstrate that the compactness measures for CD 35 serve as circumstantial evidence of racial predominance. CD 35 has the following compactness scores:

(1) perimeter to area score of 0.054 and (2) area to rubber band score of 3.64. *See* Exhibit B, Plan C226, Red 315 Report. CD 35 is not the least compact district in Plan C226 and is only slightly less compact than other districts in Plan C226. As a result, there is no evidence that CD 35's shape indicates the predomination of race over traditional redistricting principles.

Finally, it is worth noting that CD35, like CD 33 does not have the bizarre shape of any of the districts invalidated by the Supreme Court in *Bush v. Vera*. *E.g.*, 517 at 972 ("According to the leading statistical study of relative district compactness and regularity, [the Harris County districts] are two of the three least regular districts in the *country*." (emphasis added)). The compactness scores for CD 35 exceed the scores for Anglo-majority CD 2 and are more than twice as compact as the scores for the districts invalidated in *Bush v. Vera*. *Compare* Exhibit B, Plan C226, Red 315 Report, *with* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 565 tbl. 3 (1993).

D. Split Precincts Do Not Indicate Improper Race-Based Decisionmaking.

Although parties challenging CD35 point to the splitting of precincts as evidence that race predominated in its creation, they have offered no evidence to suggest how this practice proves the predomination of in any decision made by the Legislature. *See Perez* Trial Tr. at 675:7–677:14, 1197:22–1198:21. Instead, the evidence shows that precincts were split in CD35 in order to equalize population between the congressional districts. Indeed, every time the mapdrawers zeroed out population due to modifications made to district configurations during the legislative process, this resulted in more precincts being split. *See Texas v. U.S*, Trial Tr. T2A at 89:2-22, 92:3-93:15. Virtually every split precinct in the southern portion of Bexar County in CD 35 is due to the need to equalize population. Furthermore, precincts were split

along the border between CD 35 and Districts 20 and 23 in order to comply with the Voting Rights Act by maintaining appropriate Hispanic population levels in those areas. *See Perez* Trial Tr. at 917:24–921:18. Other splits in precincts were necessary to keep neighboring CD 23 at or above the benchmark levels and to ensure that CD 35 had at least 50% HCVAP for purposes of the Voting Rights Act. *See Texas v. U.S.*, Trial Tr. T2A at 95:16-96:3. Precincts were also split in order to make the boundaries smoother and more compact along the I-35 corridor in CD 35. *See Perez* Trial Tr. at 917:24-921:18.

In *Bush v. Vera*, the testimonial and written record showed that the State's motive in creating less compact districts was to maximize African American voting strength and draw a 50% district no matter what it took. *See* 517 U.S. at 969. Here, because of the explosive population growth in the Latino community, it was easy to draw a Latino-majority district along the I-35 corridor from San Antonio to Austin. *Perez* Latino Task Force Exhibit 399; *Perez* Exhibit J-11; *Perez* Exhibit J-9. CD 35 also contains non-racial VTD splits, in contrast to the findings in *Bush v. Vera*.

CD 35 also respects city boundaries where possible. Both San Antonio and the City of Austin are larger than one congressional district and must be split in congressional redistricting. The decision where to divide those cities to create CD35 was made on the basis of politics, not race. For example, the State has explained that its division of the City of Austin was based on both partisan politics and a particular political decision regarding incumbent Democratic Congressman Lloyd Doggett. The portions of San Antonio shifted into CD 35 in Plan C185 (and Plan C226) are related to policy objectives such as including downtown San Antonio in CD 35, and the resulting district boundaries do not divide residents on the basis of race.

* * *

Because the parties challenging CD35 have not come close to carrying their burden of proving that race predominated over other considerations in CD35, there is no basis to conclude that a Fourteenth Amendment challenge to that district under *Shaw* is likely to succeed. *See Chen*, 206 F.3d at 521. Rather, the evidence reflects that CD 35 comports with race-neutral traditional districting principles. In addition to complying with equal population requirement for congressional districts, Texas took into account joining communities of interest, drawing a new district where significant population growth had occurred in the state, and compliance with the Voting Rights Act. Texas was well within its right to create a district in which Latino voters would have an opportunity to elect a candidate of their choice. This Court should therefore include CD 35 as proposed in C226 in the interim plan.

CONCLUSION

For the reasons stated above, the undersigned parties respectfully submit that any interim congressional plan must include CD35 as enacted by the Texas Legislature and included in Plan C226. The undersigned further submit that CD33, as drawn in Plan C226, is an appropriate and minimally disruptive remedy for the alleged Section 5 violation in the configuration of congressional districts in Dallas/Fort Worth.

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Respectfully Submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

/s/ David C. Mattax
DAVID C. MATTAX
Deputy Attorney General for Defense Litigation
Acting Deputy Attorney General for Civil Litigation
State Bar No. 13201600

DAVID SCHENCK
Deputy Attorney General for Legal Counsel

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

ANGELA COLMENERO
Assistant Attorney General
Texas Bar No. 24048399

MATTHEW H. FREDERICK
Special Counsel to the Attorney General
Texas Bar No. 24040931

P.O. Box 12548, Capitol Station
Austin, TX 78711-2548
(512) 936-1342
(512) 936-0545 (fax)

ATTORNEYS FOR THE STATE OF TEXAS, HOPE ANDRADE AND RICK PERRY

Mexican American Legal
Defense and Educational Fund

/s/ Nina Perales
Nina Perales
Rebecca M. Couto
Marisa Bono
Karolina J. Lyznik

MALDEF
110 Broadway Street, #300
San Antonio, TX 78205
(210) 224-5476
Fax: (210) 224-5382

Robert W. Wilson
Mark Anthony Sanchez
Gale, Wilson & Sanchez, PLLC
115 East Travis, 19th Floor
San Antonio, TX 78205
(210) 222-8899
Fax: (210) 222-9526

COUNSEL FOR PLAINTIFFS TEXAS LATINO REDISTRICTING TASK FORCE, RUDOLFO ORTIZ, ARMANDO CORTEZ, SOCORRO RAMOS, GREGORIO BENITO PALOMINO, FLORINDA CHAVEZ, CYNTHIA VALADEZ, CESAR EDUARDO YEVENES, SERGIO CORONADO, GILBERTO TORRES, RENATO DE LOS SANTOS, JOEY CARDENAS, ALEX JIMENEZ, EMELDA MENENDEZ, TOMACITA OLIVARES, JOSE OLIVARES, ALEJANDRO ORTIZ, AND REBECCA ORTIZ

/s/ Rolando Rios
Rolando Rios
115 E. Travis, Suite 1645
San Antonio, Texas 78205
Phone: (210) 222-2102
Fax: (210) 222-2898

COUNSEL FOR PLAINTIFF-INTERVENOR CONGRESSMAN HENRY CUELLAR

/s/ Jose Garza

JOSE GARZA
Texas Bar No. 07731950
Law Office of Jose Garza
7414 Robin Rest Dr.
San Antonio, Texas 78209
(210) 392-2856
garzpalm@aol.com

JOAQUIN G. AVILA
LAW OFFICE
P.O. Box 33687
Seattle, Washington 98133
Texas State Bar # 01456150
(206) 724-3731
(206) 398-4261 (fax)
jgavotingrights@gmail.com

Ricardo G. Cedillo
State Bar No. 04043600
Mark W. Kiehne
State Bar No. 24032627
DAVIS, CEDILLO & MENDOZA, INC.
McCombs Plaza, Suite 500
755 E. Mulberry Avenue
San Antonio, Texas 78212
Tel.: (210) 822-6666
Fax: (210) 822-1151
rcedillo@lawdcm.com
mkiehne@lawdcm.com

ATTORNEYS FOR MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REP. (MALC)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing was sent via the Court's electronic notification system and/or email to the following counsel of record on February 16, 2012, to:

Via CM/ECF

DAVID RICHARDS
Texas Bar No. 1684600
Richards, Rodriguez & Skeith LLP
816 Congress Avenue, Suite 1200
Austin, TX 78701
512-476-0005
davidr@rrsfirm.com

RICHARD E. GRAY, III
State Bar No. 08328300
Gray & Becker, P.C.
900 West Avenue, Suite 300
Austin, TX 78701
512-482-0061/512-482-0924 (facsimile)
Rick.gray@graybecker.com
ATTORNEYS FOR PLAINTIFFS PEREZ, DUTTON, TAMEZ, HALL, ORTIZ, SALINAS, DEBOSE, and RODRIGUEZ

JOSE GARZA
Texas Bar No. 07731950
Law Office of Jose Garza
7414 Robin Rest Dr.
San Antonio, Texas 78209
210-392-2856
garzpalm@aol.com

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

GERALD H. GOLDSTEIN
ggandh@aol.com
DONALD H. FLANARY, III
State Bar No. 24045877
donflanary@hotmail.com
Goldstein, Goldstein and Hilley
310 S. St. Mary's Street
San Antonio, TX 78205-4605
210-226-1463/210-226-8367 (facsimile)

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

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

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

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

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

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

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

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

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

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

GARY L. BLEDSOE
State Bar No.: 02476500
Law office of Gary L. Bledsoe
316 W. 12th Street, Ste. 307
Austin, TX 78701
512-322-9992/512-322-0840 (facsimile)
garybledsoe@sbcglobal.net
ATTORNEY FOR INTERVENOR-PLAINTIFFS TEXAS STATE CONFERENCE OF NAACP BRANCHES, TEXAS LEGISLATIVE BLACK CAUCUS, EDDIE BERNICE JOHNSON, SHEILA JACKSON-LEE, ALEXANDER GREEN, HOWARD JEFFERSON, BILL LAWSON, and JUANITA WALLACE

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

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

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

ROBERT NOTZON
State Bar No. 00797934
Law Office of Robert S. Notzon
1507 Nueces Street
Austin, TX 78701
512-474-7563/512-474-9489 (facsimile)
robert@notzonlaw.com

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

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

FRANK M. REILLY
Potts & Reilly, L.L.P.
P.O. Box 4037
Horseshoe Bay, TX 78657
512-469-7474/512-469-7480 (facsimile)
reilly@pottsreilly.com
ATTORNEYS FOR DEFENDANT STEVE MUNISTERI

Via Email

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

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

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

/s/ David C. Mattax
DAVID C. MATTAX
Deputy Attorney General for Defense Litigation
Acting Deputy Attorney General for Civil Litigation