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Nos. 11-713, 11-714, 11-715

IN THE
Supreme Court of the United States

RICK PERRY, GOV. OF TEXAS, *et al.*,
Appellants,

v.

SHANNON PEREZ, *et al.*
Appellees.

**On Appeal From The
United States District Court
For the Western District of Texas**

**BRIEF AMICUS CURIAE FOR THE
ORGANIZATION OF CHINESE AMERICANS
GREATER HOUSTON CHAPTER
IN SUPPORT OF APPELLEES**

BENJAMIN C. HSING
SAUL P. MORGENSTERN*
NOAH PETERS
GRACE YANG

KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
(212) 836-7210
SMorgenstern@
kayescholer.com

**Counsel of Record*

*Counsel for Organization of Chinese Americans
Greater Houston Chapter as Amicus Curiae*

MARGARET FUNG
KENNETH KIMERLING
GLENN D. MAGPANTAY
JERRY VATTAMALA
Asian American Legal
Defense and Education
Fund
99 Hudson St, 12th Fl.
New York, NY 10013

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Appellants,

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Appellees.

RICK PERRY, GOV. OF TEXAS, *et al.*,
Appellants,

v.

WENDY DAVIS, *et al.*
Appellees.

QUESTION PRESENTED

Did the district court abuse its discretion under the Voting Rights Act when it redrew 36 electoral districts?



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INTEREST OF THE AMICUS CURIAE¹

Amicus is the Organization of Chinese Americans Greater Houston Chapter (“OCA”), a social justice advocacy organization dedicated to securing the rights of Asian Pacific Americans in the United States. Amicus represents neither party in this action, and offers the following views on this matter.

SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act requires that any redistricting plan for the Texas House of Representatives not permit retrogression with respect to the large and growing Asian American populations in Districts 149 and 26, both in Greater Houston. As part of a coalition with African American and Hispanic voters, Asian Americans in District 149 have succeeded in electing the first and only legislator of Vietnamese descent in the State of Texas, Hubert Vo, who is one of only two Asian American legislators in the State of Texas. The growing Asian American population in District 26, the largest of any State House district in Texas,

¹ The parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk of this Court. This brief was not written in whole or in part by counsel for a party. Amicus and their counsel were not compensated in any way.

stands poised to elect the preferred candidate of its choice within this decade.

Because the Texas Legislature's redistricting plan, PlanH283, abridges the Asian American community's right to vote in the State of Texas by purposefully diluting the large Asian American populations in these districts, Section 5 of the Voting Rights Act forbids its implementation, even on an interim basis. Evidence indicates that the Legislature intentionally diluted the Asian American populations in these districts in order to reduce minority voting power, as shown by contemporaneous comments made by legislative members during the redistricting process. This evidence is especially troubling in light of Texas's history of discrimination against racial and language minorities in the political process, discrimination that led to it becoming a covered jurisdiction under Section 5 in the first place.

Thus, the three-judge panel below acted appropriately in ordering the adoption of Court Interim House Plan H302, which preserves Districts 149 and 26 in their present configurations, pending resolution of the Section 5 preclearance issues in *Texas v. United States et al.*, C.A. No. 11-1303 (D.D.C.). Amicus respectfully requests that this Court allow Court Interim House

Plan H302 to remain in force until the Texas Legislature produces a redistricting plan that complies with Section 5 of the Voting Rights Act.

ARGUMENT

I. PLANH283 HAS A RETROGRESSIVE EFFECT ON ASIAN AMERICAN VOTING RIGHTS UNDER SECTION 5 OF THE VOTING RIGHTS ACT

A. Asian Americans Are a Protected Class Under the Voting Rights Act

The sorry history of broad and deep discrimination against the Asian community in the United States is well known. Until 1943, federal policy barred immigrants of Asian descent from becoming United States citizens. See *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting) (alluding to “the Chinese race” as “a race so different from our own that we do not permit those belonging to it to become citizens of the United States.”). Legally identified as “aliens ineligible to citizenship,” *Ozawa v. United States*, 260 U.S. 178 (1922), Asian immigrants were prohibited from voting, see, e.g., Cal. Const. art. II, § 1 (1879) (“no native of China . . . shall ever exercise the privileges of an elector in this State”); owning land, *Oyama v. California*, 332 U.S. 633, 662 (1948) (Murphy, J., concurring) (noting that

California's Alien Land Law "was designed to effectuate a purely racial discrimination, to prohibit a Japanese alien from owning or using agricultural land solely because he is a Japanese alien."); see also Tex. Civ. Stat. art. 167-75 (1947); and offering testimony against whites, *People v. Brady*, 40 Cal. 198 (1872) (upholding law providing that "Chinese shall not be witnesses in an action or proceeding wherein a white person is a party" against Fourteenth Amendment challenge). Whether a cause of their inferior legal status or as a consequence of it, Asian immigrants were subject to pervasive violence and discrimination. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of Japanese-Americans during World War II); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding segregation of Asian schoolchildren). Federal policy reflected widespread racist notions in severely restricting Asian immigration into the United States from the Chinese Exclusion Act of 1882 until the Immigration Act of 1965.

Recognizing that "[d]iscrimination against Asian Americans is a well known and sordid part of our history," S. Rep. No. 94-295, 94th Cong., 1st Sess. 28 n. 21 (1975), Congress in 1975 extended the Voting Rights Act to cover "language minorities," including "persons who are . . . Asian

American.” 42 U.S.C. §§ 1973b(f), 1973l(c)(3); see also S. Rep. No. 94-295 at 28-30 (noting that “language minority citizens have been the target of discrimination in almost every facet of life.”). Of particular significance here, Congress singled out the State of Texas as having a particularly egregious record of discriminating against language minorities in the political process. See S. Rep. No. 94-295 at 25-28. As a result of the 1975 amendments, Texas became a “covered jurisdiction” subject under Section 5 of the Voting Rights Act. 28 C.F.R. pt. 51 app.

Nonetheless, discriminatory attitudes towards Texas’s Asian American voters persist to the present day. For example, during a 2009 Texas House of Representatives hearing, legislator Betty Brown suggested that Asian American voters should adopt names that are “easier for Americans to deal with” in order to avoid difficulties imposed on them by voter identification laws. R.G. Ratcliffe, *Texas Lawmaker Suggests Asians Adopt Easier Names*, Houston Chronicle, Apr. 8, 2009.

Another example comes from Hubert Vo’s 2004 victory over Anglo incumbent Talmadge Heflin in Texas House District 149. After two recounts sustained Vo’s narrow victory, Heflin requested that the Texas House of Representatives

investigate the legality of the votes cast in the election. The implication was that Vietnamese American supporters of Vo voted in the wrong district or were not United States citizens. Vo's campaign voiced concern that such an investigation could intimidate Asian Americans from political participation. See Thao L. Ha, *The Vietnamese Texans*, in *Asian Texas* 284-285 (Irwin A. Tang ed. 2007).

Asian Americans throughout the nation lent their monetary support to help Vo retain his seat. Asian American political advocacy groups organized a rally at the Texas Capitol upon Vo's swearing-in on January 11, 2005. In addition to Asian Americans, the crowd included many African American, Hispanic, and Caucasian supporters of Vo. On January 27, 2005, the Texas House of Representatives investigative committee announced that it had found no evidence of voter fraud, and Vo's election was upheld. *Id.*

In light of its special concern for the voting rights of racial and language minorities, Section 5 of the Voting Rights Act demands that this Court give particular scrutiny to the effect of the Texas Legislature's proposed map on Asian American voting strength. It would be particularly unfortunate to permit the State of Texas to undo

Hubert Vo's dramatic and historic victory for Asian Americans at the ballot box by means of a change in its election laws. Indeed, Section 5 was designed to prevent precisely this result.

B. Voting Coalitions are Protected Under Section 5 of the Voting Rights Act

Section 5 of the Voting Rights Act prohibits redistricting plans that result in a “retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” 76 Fed. Reg. 7470 (Feb. 9, 2011) (quoting *Beer v. United States*, 425 U.S. 125, 141 (1976)). Further, Section 5 prohibits changes that would “diminish[] the ability of any citizens of the United States on account of race or color, or [membership in a language minority], to elect their preferred candidate of choice.” 42 U.S.C. § 1973c(b). The House Report on the 2006 Amendments to the Voting Rights Act, which this Court has regarded as authoritative, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (citing H.R. Rep. 109-478 repeatedly), states that “[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, *either directly or when coalesced with other voters*, cannot be precleared under Section 5.” H.R. Rep. No. 109-478, at 71 (2006) (emphasis added). Thus, it is

clear that Congress intended to provide protection under Section 5 to coalition districts, *i.e.*, districts where different minority groups are able to coalesce and elect a preferred candidate of choice.

The State of Texas argues that only districts where a single minority group makes up more than 50% of the population are protected from retrogression under the Voting Rights Act. See, *e.g.*, Defs.' Mot. to Stay Implementation of Interim House Redistricting Plan Pending Appeal 7-8, Nov. 23, 2011, Dkt. No. 529. But Texas confuses Section 2 of the Voting Rights Act with Section 5. While a Section 2 claim requires that a minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district," *Bartlett v. Strickland*, 129 S. Ct. 1231, 1242 (2009) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986)), Section 5 contains no such requirement. See, *e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461, 477-478 (2003) ("Georgia argues that a plan should be precleared under § 5 if the plan would satisfy § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. We have, however, 'consistently understood' § 2 to 'combat different evils and, accordingly, to impose very different duties upon the States.'") (quoting *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 477 (1997) (*Bossier Parish I*)).

Section 5 of the Voting Rights Act prohibits election law changes that diminish the ability of Asian Americans to elect their preferred candidate of choice, either alone or as a part of a voting coalition with other minority groups. Thus, for any redistricting plan to obtain preclearance from the Department of Justice (“DOJ”) or the United States District Court for the District of Columbia, the plan must not retrogressively affect the Asian American community’s ability to elect its preferred candidate of choice.

C. PlanH283 Dismantles Districts with High Concentrations of Asian Americans

1. District 149

The Asian American population in Texas grew 71.5% between 2000 and 2010. See <http://www.texastribune.org/library/data/census-2010/>. Texas has the third largest Asian American community in the country, after New York and California. See *U.S. Census Bureau Releases TX Population Estimates*, Texas Tribune (June 16, 2010), available at <http://www.texastribune.org/texas-counties-and-demographics/census/us-census-bureau-releases-tx-population-estimates/>. See also Test. of Rogene Calvert, Trial Tr. 418:21-24 (Sep. 7, 2011)

(hereinafter “Calvert Test.”). Yet, there are only two Asian American legislators in Texas, both State Representatives.

In Harris County, the county in which State House District 149 (hereinafter “District 149”) is located, the population increased 20.3% between 2000 and 2010, but the Asian American population grew 44% within the same time period. See <http://www.usatoday.com/news/nation/census/profile/TX>; Matthew Bloch, Shan Carter and Alan McLean, *Mapping the 2010 U.S. Census*, New York Times (2011), available at <http://projects.nytimes.com/census/2010/map>.

District 149 covers the Alief/Sharpstown area of Greater Houston. It has a combined minority citizen voting age population of 61.7%. See United States and Defendant-Intervenors Identification of Issues 6, *Texas v. United States et al.*, C.A. No. 11-1303 (D.D.C.), Sept. 29, 2011, Dkt. No. 53. Currently, Asian Americans comprise 18.3% of the district’s total population. See Census 2010 Redistricting Data [P.L. 94-171] Summary File. Beginning in 2004, the Asian American community has voted as a bloc with Hispanic and African American voters in District 149 to elect Hubert Vo as the first Vietnamese American state representative in Texas history. See Test. of Ed

Martin, Trial Tr. 350:15-23 (Sept. 7, 2011) (hereinafter "Martin Test."); Calvert Test. 420:2-421:13; Test. of Sarah Winkler, Trial Tr. 425:18-426:10 (Sept. 7, 2011) (hereinafter "Winkler Test.>").

With PlanH283, the Texas Legislature eliminated Mr. Vo's State House seat and redistributed the coalition of minority voters in the Alief/Sharpstown area to the surrounding three districts, Districts 133, 136 and 137. See Martin Test. at 350:25-352:25. District 149 would be relocated to Williamson County, on the other side of the State, where there are few minority voters. See http://gis1.tlc.state.tx.us/download/House/PLA_NH283.pdf.

As a practical matter, the atomization of the minority voters over three districts is a significant step backward for their ability to form coalitions to elect any minority candidate of their choice, and virtually guarantees the loss of a representative preferred by the minority communities that constitute District 149. See Martin Test. at 350:25-352:13; Calvert Test. at 421:14-423-14; Winkler Test. at 426:11-428-3.

2. District 26

State House District 26 (hereinafter "District 26") is located immediately south of District 149 in

the Sugar Land area in Fort Bend County. District 26 has the largest percentage of Asian Americans of any legislative district in Texas. See United States and Defendant-Intervenors Identification of Issues 22, *Texas v. United States et al.*, C.A. No. 11-1303. The Asian American population in District 26 grew from 22.6% to 33.6% between 2000 and 2010. See *id.* Further, the minority population in District 26 increased from 44% to 60.6 % between 2000 and 2010. See *id.* PlanH283 decreases the minority population in District 26 to 54.7% and the Asian American population to 27.5%. See *id.* The decrease in the size of the Asian American population significantly weakens the Asian American community's ability to elect its preferred candidate of choice. The decrease in the minority population of District 26 imposes further limitations on the Asian American franchise by reducing the opportunities to form coalitions to elect minority representatives of any kind.

II. PLANH283 WAS DRAFTED WITH DISCRIMINATORY INTENT

A. *Arlington Heights* Sets Forth the Applicable Framework in Evaluating Purpose Under Section 5

Under Section 5 of the Voting Rights Act, courts must conduct an "inquiry into such

circumstantial and direct evidence as may be available” to assess the purpose with which a covered jurisdiction is acting in changing its voting laws. See *Bossier Parish I*, 520 U.S. 471, 488 (citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). “The ‘important starting point’ for assessing discriminatory intent under *Arlington Heights* is ‘the impact of the official action whether it ‘bears more heavily on one race than another.’... ‘[I]mpact’ might include a plan’s retrogressive effect and... its dilutive impact.” *Id.* at 489 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Other relevant factors include the historical background of the decision; the sequence of events leading up to the decision; whether the challenged decision departs from normal practice; and contemporaneous statements and viewpoints of the legislators that drafted the proposed plan. See *Arlington Heights*, 429 U.S. at 266-68.

1. **Circumstantial Evidence Indicates That PlanH283 Was Drafted with Discriminatory Intent**
 - a. **PlanH283 Has a Retrogressive Impact on Asian American Electoral Power**

PlanH283 has a retrogressive effect on Asian American voters' electoral power. The net population growth in Harris County is solely attributable to its minority population; yet PlanH283 decreases minority representation while protecting every Harris County district with an Anglo representative. See Decl. of Theodore S. Arrington ¶ 41, *Texas v. United States et al.*, C.A. No. 11-1303 (D.D.C.), Oct. 25, 2011, Dkt. No. 79-9 (hereinafter "Arrington Decl."). See also Martin Test. at 349:15-350:7. PlanH283 atomizes the substantial minority population of District 149 and distributes it among Districts 133, 136 and 137, diluting Asian American and minority voting strength as a whole. Districts 133 and 136 continue to be heavily Anglo under PlanH283.

Nor does the added minority population significantly change the demographics of District 137. District 137 is heavily minority, with 59.8% of

its population being of Hispanic voting age and less than a third being of Anglo voting age under the benchmark plan. District 137's Representative is Scott Hochberg, and under PlanH283, he and Hubert Vo will be the two incumbents in a merged minority opportunity district. As a result, one will be eliminated as a representative. Both Representative Hochberg and Vo are the candidates of choice of the Asian American community in minority-heavy Harris County. See Winkler Test. at 426:11-17. The inevitable loss of one of the minority communities' candidates of choice and the potential loss of an Asian American legislator in District 149 has a retrogressive and dilutive effect on the Asian American population's ability to elect its preferred candidates of choice. See Arrington Decl. ¶¶ 41-43.

With regard to District 26, the District Court below concluded that PlanH283 "substantially reconfigured HD26 in a way that made it irregularly shaped" and "that this reconfiguration may have been an attempt by the State to intentionally dismantle an emerging minority district." See Order Regarding Interim Texas House of Representatives Plan [*Perez Order*] at 11, Nov. 23, 2011, Dkt. No. 528. With its large and growing Asian American population, District 26 presents a clear opportunity for Asian Americans in

Fort Bend County to elect their preferred candidate of choice in the next decade. See Arrington Decl. ¶ 63. The fact that Asians Americans have not yet elected their candidate of choice in District 26 does not lessen the protection that Section 5 of the Voting Rights Act affords. Evidence, including the district's abnormal shape under PlanH283, indicates that the Legislature intentionally reduced the large and growing Asian American population in District 26 in order to diminish its political power and protect the district's Anglo incumbent, Charles Howard.

Proposed PlanH283 disproportionately affects Asian American voters. Of the 50 benchmark minority districts, 24% of them (12 districts) are in Harris County. See *id.* at ¶50. Of the 12 minority election districts in Harris County, there is only one district where Asian American voters have the ability to elect a preferred candidate of choice, District 149, and this district is eliminated under PlanH283. Moreover, PlanH283 significantly reduces the Asian American population in District 26, the district with the largest percentage of Asian Americans in the state. At the same time, PlanH283 does nothing to offset the decrease in Asian American representation in Texas. This is further evidence that PlanH283 was

intended to diminish the Asian American community's voting power.

**b. The Texas Legislature
Departed From Normal
Redistricting Practices in
Crafting PlanH283**

The proposed elimination of District 149 in PlanH283 is demonstrative of an inconsistent application of redistricting standards. In 2000, Harris County was entitled to 24.46 districts, and in 2010 it was entitled to 24.41. The State is permitted to round up or round down in such large counties. Texas rounded up to 25 districts for the benchmark plan, but then rounded down for PlanH283. See Arrington Decl. ¶ 40. Texas has offered no rationale for the inconsistent treatment of the "left-over" portion of the district total. See *id.* at ¶ 49.

Moreover, avoiding the pairing of incumbents is a stated goal of the redistricting process. See *id.* Pairing of incumbents is undesirable because it allows the map drawers, instead of the voters, to determine the winner of the contest. See *id.* at ¶¶ 43-44. Without any explanation, however, PlanH283 pairs incumbents Vo and Hochberg. See *id.* at ¶ 49.

Finally, it is telling that minority representatives from Harris County were excluded from the process that resulted in PlanH283. Their attempts to participate in the process were rebuffed by Anglo representatives. See *id.* at ¶ 51. These procedural and substantive departures in the State's redistricting process are evidence of intentional discrimination under the *Arlington Heights* decision.

2. Contemporaneous Statements Also Indicate That PlanH283 Was Motivated by a Discriminatory Purpose

Statements of individuals involved in the State House redistricting process further evidence discriminatory intent. Representative Beverly Woolley led the redistricting process. She excluded the minority representatives from the Harris County redistricting process, and in doing so, said to a group of minority representatives “[Y]ou all are protected by the Voting Rights Act and we are not. We don’t want to lose these people due to population growth in the county, or we won’t have any districts left.” Coleman Decl. ¶¶ 9-14, *Texas v. United States et al.*, C.A. No. 11-1303 (D.D.C.), Oct. 25, 2011, Dkt. No. 79-26 (approximating quote).

Moreover, the Anglo representatives of Harris County and the House Redistricting Committee suggested to Scott Hochberg, a senior Anglo Democrat representing benchmark district 137, that they intended to give Mr. Hochberg an advantage in being reelected by combining his district with District 149, represented by Hubert Vo, a junior Asian American Democrat and one of only two Asian American House representatives in Texas. See Hochberg Declaration ¶¶ 7-8, *Texas v. United States et al.*, C.A. No. 11-1303 (D.D.C.), Oct. 25, 2011, Dkt. No. 79-14. This intimation by the Republican-controlled House Redistricting Committee to a senior Democratic House Representative assuring him that his seat is not likely in jeopardy is illogical from a partisan perspective. The only logical explanation of the decision to pair Rep. Hochberg and Rep. Vo is to eviscerate the multiracial coalition that elected Rep. Vo, which, in turn, evidences an intention to retrogress Asian American voting strength.

III. COURT INTERIM HOUSE PLAN H302 SHOULD BE ADOPTED

The District Court ordered Interim Plan H302 because the Plan proposed by the Texas Legislature was not precleared by the United States District Court for the District of Columbia,

and a plan was needed for the 2012 election cycle by the end of November 2011. See *Perez Order* at 3-4. The District Court's primary goal was "to preserve the status quo as much as possible" because to do otherwise would "require the Court to rule on the merits of the State's enacted plan, which it is not permitted to do at this juncture." *Id.* at 4 and n.7.

H302 retains benchmark District 149, which the Texas Legislative House Plan would eliminate from Harris County. H302 maintains the Asian American population's ability to elect a preferred candidate of choice via a minority coalition; preserves Hubert Vo's seat, one of the two held by Asian Americans, in the State House; and maintains minority electoral power in Harris County.

Although the dissenting judge below – Judge Smith – would have proposed a different plan, he also recognized that the elimination of District 149 in PlanH283 "raises possible section 5 concerns and potentially reeks of racial gerrymandering." See *Perez Order* at 21 (Smith, J., dissenting). Judge Smith's proposed plan would also keep District 149 in Harris County.

District 26 has the largest percentage of Asian Americans of any House of Representatives

district in Texas. The District Court's interim plan – H302 – preserves the status quo and maintains the electoral influence of the Asian voters pending a final determination on the merits. By contrast, PlanH283 would reconfigure the district into an irregular shape to dismantle an emerging minority coalition, thus decreasing the electoral power of the Asian American population.

If Districts 149 and 26 are not preserved, the Asian American community will suffer a major setback in achieving fair representation in the State of Texas, and the repercussions will reverberate throughout the country. It will provide an unfortunate signal to the rest of the States that marginalizing Asian American voters is an acceptable practice, particularly in districts where sizable Asian American populations stand poised to elect candidates of their choosing.

CONCLUSION

Amicus respectfully requests the preservation of benchmark Districts 149 and 26 by permitting the Court Ordered Interim Plan, H302, to continue in effect until new State House of Representatives districts are precleared under Section 5 of the Voting Rights Act.

Respectfully submitted,

BENJAMIN C. HSING
SAUL P. MORGENSTERN*
NOAH PETERS
GRACE YANG
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022

**Counsel of Record*

MARGARET FUNG
KENNETH KIMERLING
GLENN D. MAGPANTAY
JERRY VATTAMALA
Asian American Legal
Defense and Education
Fund
99 Hudson St, 12th Fl.
New York, NY 10013

*Counsel for Organization of Chinese Americans
Greater Houston Chapter as Amicus Curiae*

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