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]

DEFENDANTS' RESPONSE TO LULAC PLAINTIFFS' MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

Two and a half years after the second trial on the State's 2011 maps concluded, the LULAC Plaintiffs[1] have moved to supplement the record with new evidence relating to their standing to challenge certain congressional districts. ECF No. 1342 ("Motion for Leave"). The new evidence—a declaration from an undisclosed LULAC representative—presents testimony about the residences of individual LULAC Plaintiffs and unnamed LULAC members. The declarant states, for example, that LULAC has "multiple members . . . who are eligible voters" in each congressional and Texas House district "involved in this litigation." ECF No. 1342-1 ¶ 5. The LULAC Plaintiffs ask this Court to admit the declaration; take judicial notice that LULAC has

[1] The "LULAC Plaintiffs" consist of LULAC and eleven individuals named in the LULAC Plaintiffs' Third Amended Complaint (ECF No. 894).

"significant membership" in CDs 23, 27, and 35; and supplement its findings of fact with "basic facts" regarding the LULAC Plaintiffs. ECF No. 1342 at 2-4.

The Motion for Leave should be denied. *First*, the LULAC Plaintiffs make no effort to justify reopening the record to offer evidence that they could have presented long ago. Nor do they mention that their repeated failure to respond to discovery requests forced Defendants to file two sanctions motions before the 2014 trial—resulting in the LULAC Plaintiffs stipulating they would not introduce new evidence like the declaration at issue here. *Second*, the LULAC Plaintiffs must prove the elements of standing; they cannot do so through their belated declaration. *Third*, allowing the LULAC Plaintiffs to reopen the record would severely prejudice Defendants.

1. In their Motion for Leave, the LULAC Plaintiffs say nothing about why they waited years to introduce new standing evidence. Instead, they acknowledge that they did not submit the proffered declaration until April 2015. *Id.* at 3. Even then, the declaration was included as a mere "suggest[ion]" in a joint brief filed by the LULAC Plaintiffs and others regarding the Supreme Court's decision in *Alabama Legislative Black Caucus v. Alabama*. ECF No. 1302 at 11. As the LULAC Plaintiffs would have it, Defendants were obligated at that point to take "steps to depose the declarant" if they chose to challenge any of his out-of-court averments. ECF No. 1342 at 3.

Not so. For one thing, this case had been pending for nearly four years when the LULAC Plaintiffs first attached the declaration to a filing. The LULAC Plaintiffs did not identify then—nor do they identify now—a change in circumstances or any other

reason they could not have offered this evidence before the 2011 or 2014 trials. Yet, in ruling on a request to reopen the record, the court must consider "the reason for the moving party's failure to introduce the evidence earlier [and] the possibility of prejudice to the non-moving party." *Chieftain Int'l (U.S.), Inc. v. Se. Offshore, Inc.*, 553 F.3d 817, 820 (5th Cir. 2008). When a party's failure to submit evidence "'is attributable solely to the negligence or carelessness'" of its attorney, it is an abuse of discretion to reopen the case and consider the evidence. *Downey v. Denton Cnty.*, 119 F.3d 381, 387 (5th Cir. 1997) (citation omitted). The LULAC Plaintiffs make no effort to overcome this hurdle here.

But even if they had tried to justify their dilatory request, the LULAC Plaintiffs would run headlong into the facts of this case. For example:

- In the August 2011 joint pretrial order, the parties stipulated to facts concerning the residences of certain plaintiffs. *See* ECF No. 277. None of the stipulations pertained to LULAC or its members.

- The LULAC Plaintiffs' initial disclosures in 2011 did not name Elia Mendoza (the new declarant), the individual plaintiffs, or any members on whose behalf LULAC was asserting claims. *See* ECF No. 975-10.

- During the 2011 trial, the LULAC Plaintiffs did not present evidence to support their standing. Defendants stipulated that the LULAC Plaintiffs would "substantially testify as to their pleadings" if they were called as witnesses. Tr. 638:8-18, Sept., 8, 2011. But unlike the new declaration, these pleadings did not allege that unnamed LULAC members were registered voters in congressional or Texas House districts across the State. *See, e.g.*, ECF No. 78.[2]

[2] The LULAC Plaintiffs' live pleading as of the 2011 trial reflected that, at most, one individual plaintiff resided in one of three congressional districts that are the focus of the Motion for Leave—CD 27, but not CD 23 or CD 35. *See* ECF No. 78 ¶¶ 30-31 (incorporating allegations from original complaint). The same is true for their pleadings as of the 2014 trial. *See* ECF No. 894 ¶ 2.

- In 2013 and 2014, the LULAC Plaintiffs repeatedly failed to respond to Defendants' discovery requests, including those seeking information about the LULAC Plaintiffs' claims against the 2011 maps. ECF No. 955. The LULAC Plaintiffs also failed to supplement their initial disclosures—except to stand on their previous vague disclosures and incorporate the Perez Plaintiffs' disclosures—notwithstanding the Court's scheduling order requiring the parties to submit updated disclosures by November 2013. *Id.*; ECF Nos. 975, 975-4. Defendants thus were forced to file a motion to compel, which this Court granted. ECF Nos. 955, 956.

- After LULAC's continued failure to provide complete discovery responses, Defendants filed two motions for discovery sanctions (the first of which was withdrawn shortly after filing). ECF Nos. 975, 1000.

- Before any sanctions were issued, the LULAC Plaintiffs stipulated that they would call only one witness at the 2014 trial (their expert) and limit their exhibits to documents presented in the 2011 trial or provided to Defendants around the time of the stipulation. ECF No. 1002.

None of this is mentioned in the Motion for Leave. At the same time, the LULAC Plaintiffs contend that this Court should accept their new declaration and "take judicial notice" that LULAC "has significant membership" in CDs 23, 27, and 35. ECF No. 1342 at 3. To that end, the declaration broadly asserts that LULAC's membership includes voters in each congressional and Texas House district "involved in this litigation." ECF No. 1342-1 ¶ 5. Yet, the LULAC Plaintiffs' unexplained failure to present this testimony previously—and their agreement to forego evidence on the issue in 2014—defeats any effort to reopen the record years later. *See Downey*, 119 F.3d at 387. Nor have the LULAC Plaintiffs shown that testimony regarding the extent to which unnamed LULAC members reside in specific congressional districts is appropriate for judicial notice. *See* FED. R. EVID. 201(b) ("The court may judicially

notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *Turner v. Lieutenant Driver*, 848 F.3d 678, 692 n.63 (5th Cir. 2017) (judicial notice proper for "'[s]pecific facts and propositions of generalized knowledge . . . capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy'" (citation omitted)). The Motion for Leave should be denied.

2. The Supreme Court's decision in *Alabama Legislative Black Caucus* provides the LULAC Plaintiffs no help. *See* ECF No. 1342 at 4 (noting that the requested relief is "modeled on the approach . . . approved in *Alabama Legislative Black Caucus*"). To begin, that case involved claims that the Alabama legislature engaged in racial gerrymandering, contrary to *Shaw v. Reno*, 509 U.S. 630 (1993). *See Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265-66 (2015). The LULAC Plaintiffs have not pleaded or presented any *Shaw* claims. *See, e.g.*, ECF No. 1310 at 4-5.

Nor does *Alabama Legislative Black Caucus* otherwise excuse LULAC from having to prove facts establishing standing to sue on behalf of its members. To satisfy that standard, each element of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof"; the State need not disprove standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, LULAC must show—among other things—that its members would independently meet Article III's standing requirements. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). This burden cannot be satisfied through speculation, assumption, or inference.

See Doe v. Tangipahoa Parish Sch. Bd., 494 F.3d 494, 499 (5th Cir. 2007) ("[I]n the standing context . . . facts must be proven, not merely asserted or inferred."). For that reason, LULAC cannot establish its standing merely by claiming there are "multiple members" who are voters in each district "involved in this litigation." ECF No. 1342-1 ¶ 5.[3]

Nothing in *Alabama Legislative Black Caucus* alters this well-established standard. There, the Supreme Court said only that a plaintiff should have one fair opportunity to prove standing. *See Ala. Legislative Black Caucus*, 135 S. Ct. at 1269. The LULAC Plaintiffs have been afforded more than that here, and they have chosen to present their case as they see fit. They offer no reason why they should be given another chance to litigate their claims years after the record has closed. This Court should reject that invitation.

3. What is more, Defendants would be severely prejudiced if the Motion for Leave were granted. The LULAC Plaintiffs did not previously disclose Elia Mendoza as someone with knowledge relevant to the 2011 plans. *See* ECF Nos. 975-4, 975-10. Nor did the LULAC Plaintiffs produce, in discovery, information about unnamed LULAC members. By withholding Mendoza until now, Defendants have been deprived of an opportunity to challenge the LULAC Plaintiffs' evidence. The Federal Rules set forth the appropriate remedy in a situation like this: the non-disclosing party "is not allowed to use that information or witness to supply evidence on a motion, at a hearing,

[3] LULAC must show a "distinct and palpable injury" to its members on an individualized basis. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975). This is true regardless of LULAC's attempts to minimize the declaration as merely asserting "basic facts." ECF No. 1342 at 4.

or at a trial, unless the failure was substantially justified or is harmless." FED. R. CIV. P. 37(c)(1). This approach recognizes that the failure to identify a witness causes inherent prejudice and is generally sufficient to preclude reopening the record. *See, e.g.*, *Lussier v. Runyon*, 50 F.3d 1103, 1105-06 (1st Cir. 1995) ("[O]nce the record is closed, a district court, absent waiver or consent, ordinarily may not receive additional factual information of a kind not susceptible to judicial notice unless it fully reopens the record and animates the panoply of evidentiary rules and procedural safeguards customarily available to litigants."). The LULAC Plaintiffs provide no basis to conclude otherwise here. The Motion for Leave should be rejected.

CONCLUSION

The Motion for Leave to Supplement the Record should be denied.

Date: March 22, 2017

Respectfully submitted,

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