

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

SHANNON PEREZ, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	11-CA-360-OLG-JES-XR
STATE OF TEXAS, et al.,	§	[Lead Case]
Defendants.	§	

MEXICAN AMERICAN	§	
LEGISLATIVE CAUCUS, TEXAS	§	
HOUSE OF REPRESENTATIVES,	§	
Plaintiffs,	§	CIVIL ACTION NO.
v.	§	SA-11-CA-361-OLG-JES-XR
	§	[Consolidated Case]
STATE OF TEXAS, et al.,	§	
Defendants.	§	

TEXAS LATINO REDISTRICTING	§	
TASK FORCE, et al.,	§	
Plaintiffs,	§	CIVIL ACTION NO.
v.	§	SA-11-CA-490-OLG-JES-XR
	§	[Consolidated Case]
RICK PERRY,	§	
Defendant.	§	

MARGARITA V. QUESADA, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
	§	SA-11-CA-592-OLG-JES-XR
RICK PERRY, et al.,	§	[Consolidated Case]
Defendants.	§	

EDDIE RODRIGUEZ, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
	§	SA-11-CA-635-OLG-JES-XR
RICK PERRY, et al.,	§	[Consolidated Case]
Defendants.	§	

JOINT ADVISORY ON CHALLENGES TO PLAN C235

The Perez Plaintiffs, the LULAC Plaintiffs, and the Rodriguez Plaintiffs (“Joint Plaintiffs”) submit this joint advisory pursuant to the Court’s instruction to identify the claims they are pursuing with regard to the 2013 congressional plan, Plan C235. Order of April 5, 2017 (Dkt. No. 1352). Part I briefly identifies the legal violations that the Court found in the 2011 congressional plan. Part II summarizes the Joint Plaintiffs’ challenges to the districts as drawn in the 2013 congressional map. If the Joint Plaintiffs obtain relief based on the joint request for a permanent injunction (Dkt. No. 1344), the challenges to Plan C235 identified here will either narrow or be eliminated.

I. LEGAL VIOLATIONS FOUND IN PLAN C185

The Court’s Order of March 10, 2017 (Dkt. No. 1339) considered the legal challenges to Plan C185. It found the following legal violations in the specified Plan C185 districts and regions:

CD23

- Section 2 of the Voting Rights Act, under the effects test of *Thornburg v. Gingles* (Dkt. No. 1339 at 29);
- Section 2 of the Voting Rights Act, under the intentional vote dilution prong (Dkt. No. 1339 at 29);

- Fourteenth Amendment's Equal Protection Clause, as a racial gerrymander under the *Shaw v. Reno* line of cases (Dkt. No. 1339 at 32).

CD35

- Fourteenth Amendment's Equal Protection Clause, as a racial gerrymander under the *Shaw v. Reno* line of cases (Dkt. No. 1339 at 35).

CD27

- Section 2 of the Voting Rights Act, under the effects test of *Thornburg v. Gingles* (Dkt. No. 1339 at 57);
- Section 2 of the Voting Rights Act, under the intentional vote dilution prong (Dkt. No. 1339 at 57-58).

South/West Texas area¹

- Section 2 of the Voting Rights Act, under the effects test of *Thornburg v. Gingles* (Dkt. No. 1339 at 6, 11, 58-59);
- Section 2 of the Voting Rights Act, under the intentional vote dilution prong (Dkt. No. 1339 at 6, 11, 58-59).

Dallas-Fort Worth region

- CD26, under Fourteenth Amendment's Equal Protection Clause, as a racial gerrymander under the *Shaw v. Reno* line of cases (Dkt. No. 1339 at 108);
- Regional (especially implicating CDs 5, 6, 12, 24, 26, 30, 32, & 33), as intentional vote dilution under the Fourteenth Amendment's Equal Protection Clause (Dkt. No. 1339 at 146);
- Regional (especially implicating CDs 5, 6, 12, 24, 26, 30, 32, & 33), under Section 2 of the Voting Rights Act's intent prong (Dkt. No. 1339 at 146).

¹ The area of Texas covered by this description is roughly bounded by a line running from Nueces County to Cameron County, along the Rio Grande River boundary with Mexico to El Paso, back to Bexar County (and reaching counties immediately north of it stopping at the southern Travis County line), then back over to Nueces County. The Section 2 violations found in this area are largely inseparable from the legal violations summarized above in sub-parts A-C above.

II. LEGAL VIOLATIONS ALLEGED IN PLAN C235

The Joint Plaintiffs intend to pursue the following claims with regard to Plan C235.

CD23

- Section 2 of the Voting Rights Act, under the effects test of *Thornburg v. Gingles*.

Plan C235's CD23 is not identical to Plan C185's CD23. The modifications, however, are still insufficient to resolve the district's shortcomings under the effects test of Section 2, nor do they appear to fully remediate the Court's findings of Fourteenth Amendment violations.

CD35

- Fourteenth Amendment's Equal Protection Clause, as a racial gerrymander under the *Shaw v. Reno* line of cases;
- Fourteenth Amendment's Equal Protection Clause, as the intentional destruction of a preexisting crossover district using racial tools, under the plurality opinion in *Bartlett v. Strickland*, 556 U.S. 1 (2009);
- Fifteenth Amendment, as an abridgement of the right to vote on account of race.

Plan C235's CD35 is identical to Plan C185's CD35. As such, it remains an unconstitutional gerrymander for the reasons determined by the Court in its March 10 ruling on the 2011 map.

The Joint Plaintiffs also continue to assert their challenge to CD35 under the Fourteenth Amendment, based in part on the *Bartlett* plurality's warning of the constitutional infirmities that come with the purposeful destruction of an existing, viable crossover district. The Court reserved this issue, and the dismantling of benchmark CD25, in its March 10 ruling. Dkt. No. 1339 at 41 n.38.

In addition, the Joint Plaintiffs assert a Fifteenth Amendment claim with regard to CD35. The *Bartlett* plurality recognized constitutional problems with intentional destruction of a preexisting crossover district not only under the Fourteenth Amendment's Equal Protection Clause, but also under the Fifteenth Amendment. *See* 556 U.S. at 24 ("And 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.”) (emphasis added). Early in this case, the Court granted partial summary judgment in favor of the state defendants on the parties’ Fifteenth Amendment claims. *See* Order of Aug. 31, 2011 (Dkt. No. 275), at 17. But the scope of the Court’s ruling was limited, based only on the conclusion that “the law does not recognize a claim under the Fifteenth Amendment *for vote dilution.*” *Id.* (emphasis added). The Joint Plaintiffs’ claims under the *Shaw* line of cases and *Bartlett* are not vote dilution claims and, thus, are still maintainable under the Fifteenth Amendment consistent with the Court’s 2011 ruling granting partial summary judgment.²

CD27

- Section 2 of the Voting Rights Act, under the effects test of *Thornburg v. Gingles*;
- Section 2 of the Voting Rights Act, under the intentional vote dilution prong;
- Fifteenth Amendment, as an abridgement of the right to vote on account of race.

Plan C235’s CD27 is identical to Plan C185’s CD27. As such, it remains a Section 2 violation under the effects and intent prongs for the reasons determined by the Court in its March 10 ruling on the 2011 map.

South/West Texas

- Section 2 of the Voting Rights Act, under the effects test of *Thornburg v. Gingles*;
- Section 2 of the Voting Rights Act, under the intentional vote dilution prong;

² Protectively, the Joint Plaintiffs also assert Fifteenth Amendment claims arising from intentional vote dilution concerning any of the districts in which they assert a Fifteenth Amendment challenge. The Supreme Court has been equivocal on whether such claims are viable under the Fifteenth Amendment. In *Voinovich v. Quilter*, the Court said it had “not decided whether the Fifteenth Amendment applies to vote-dilution claims.” 507 U.S. 146, 159 (1993). Ten years later, the Court questioned *Voinovich*’s observation. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000). In the Fifth Circuit case relied upon by this Court in its previous Fifteenth Amendment ruling, *Prejean v. Foster*, 227 F.3d 504 (5th Cir. 2000), the court held that the Fifteenth Amendment does not reach vote dilution claims. But the next year, the Third Circuit noted that the question remained open. *Page v. Bartels*, 248 F.3d 175, 193 n.12 (3d Cir. 2001). The Supreme Court still has not resolved the question, and it is for that reason that the Joint Plaintiffs make such claims in this case to at least preserve the issue for appeal.

- Fifteenth Amendment, as an abridgement of the right to vote on account of race.

As already explained, the Section 2 violations found in this area are largely inseparable from the legal violations in related areas of Plan C235. These are summarized above in the sub-parts of Part II related to CDs 27 and 35.

Dallas-Fort Worth region

- Regional (especially implicating CDs 3, 5, 6, 12, 24, 26, 30, 32, & 33), under Section 2 of the Voting Rights Act's effects test of *Thornburg v. Gingles*;
- Regional (especially implicating CDs 3, 5, 6, 12, 24, 26, 30, 32, & 33), under Section 2 of the Voting Rights Act's intentional vote dilution prong;
- Regional (especially implicating CDs 3, 5, 6, 12, 24, 26, 30, 32, & 33), as intentional vote dilution under the Fourteenth Amendment's Equal Protection Clause;
- Fifteenth Amendment, as an abridgement of the right to vote on account of race.

Plan C235's Dallas-Fort Worth region is not identical to that of Plan C185, but legal violations identified by the Court in its March 10 ruling on the 2011 map persist. A specific example is that the intentional packing of minority voters in CD30 and widespread cracking of minority populations to dilute minority voting strength across the region continues under Plan C235.

The Joint Plaintiffs' Section 2 effects claim is based on the failure of Plan C235 to create at least one coalition district of Latino and African-American voters in the Dallas-Fort Worth region in addition to CD30, an African-American opportunity district, and CD33, a minority opportunity district that has performed for African-American voters in each of the three elections since it came into existence.³

³ The plausibility of possible claims in the Harris County area is being evaluated but not yet completed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2017, I filed a copy of the foregoing for service on counsel of record in this proceeding through the Court's CM/ECF system.

 /s/ Renea Hicks
Max Renea Hicks