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' PRETRIAL DISCLOSURES & BENCH BRIEF

Pursuant to the Court's June 1, 2017 Order, Defendants hereby file their pretrial disclosures and bench brief. Doc. 1404 ¶¶ 1, 3; FED. R. CIV. P. 26(a)(3).

I. CLAIMS FOR WHICH DEFENDANTS ASSERT PLAINTIFFS LACK STANDING

Defendants note that each Plaintiff bears the burden to establish every element of every claim upon which that Plaintiff seeks relief from the Court. This includes standing to assert all such claims.

II. EXPECTED DEFENSES TO PLAINTIFFS' CLAIMS

Based upon the Plaintiffs' live pleadings and responses to discovery, Defendants anticipate raising the defenses set forth below during the July 2017 trial in this cause. Defendants reserve the right to raise additional defenses as necessary.

A. No credible evidence supports a claim that the Texas Legislature intentionally discriminated on the basis of race by enacting Plan C235 or Plan H358.

The Legislature adopted Plan C235 and Plan H358 because it wanted to pass fair and legal redistricting plans. In 2012, the Court adopted plans C235 and H309 after analyzing claims asserted against plans C185 and H283 under the Constitution and §2 and 5 of the Voting Rights Act, and "tak[ing] guidance" from those plans to the extent they did not "lead to violations of the Constitution or the VRA." Doc. 691 (Order Implementing C235) at 10 (quoting *Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam)); Doc. 690 (Order Implementing H309) at 3. Because plans C185 and H283 had not been precleared, the Court lacked jurisdiction to make a final determination on the merits of the plaintiffs' claims against them. For that reason, the Court's orders implementing plans C235 and H309 did not reflect a final determination on the merits of any challenge to the 2011 plans, but the Court followed the Supreme Court's instruction that it "take care not to incorporate . . . any legal defects in the state plan[s]" passed in 2011. *Id.* The Court therefore modified the States' 2011 plans "in the discrete areas in which [the Court] preliminarily found plausible legal defects," Doc. 690 at 11, and it determined that Plan C235 and Plan H309 adequately addressed the Plaintiffs' claims against the 2011 plans, including allegations of intentional discrimination. *See* Docs. 690, 691.

The Court did not intentionally discriminate on the basis of race when it implemented Plan C235, and there is no evidence that the Legislature intentionally discriminated on the basis of race when it adopted C235 exactly as drawn by the Court.

Instead, the 2013 legislative record reflects a finding that "the court-ordered interim maps [are] legally sufficient to meet our legislative duties to enact maps that comply with the constitutions of the United States and Texas under the Voting Rights Act." S.J. of Tex. Supp., 83rd Leg., 1st C.S. (June 20, 2013) at S1.

There is no evidence that the Legislature intentionally discriminated on the basis of race when it adopted amendments to Plan H309, or when it enacted the amended plan as Plan H358. Rather, as the legislative record reflects, the House Select Committee on Redistricting held hearings across the State and heard input from various individuals and groups, including several of the Plaintiffs in this case. *See* S.J. of Tex. Supp., 83rd Leg., 1st C.S. (June 20, 2013) at S1.

In considering proposed amendments to H309, Committee Chairman Darby accepted any amendment that (1) "does not create a harm or a risk to further litigation by violating the constitution's 'one person, one vote' principle" (2) "does not dilute nor dismantle a Section 2 protected district under the Voting Rights Act or violate[] the Texas Constitution regarding contiguous districts or the county line rule" (3) "addresses a concern, for example, the splitting of a community of interest" and (4) was accompanied by "an agreement amongst the members affected." *Id.* None of these requirements provides evidence of any racially discriminatory purpose. The fact that all changes to H309 were agreed to by the affected members of the House—Democrat and Republican; Anglo, Hispanic, African-American and Asian-American—confirms

the lack of evidence to support a finding of discriminatory intent in the Legislature's changes to H309 and enactment of H358.

B. Plaintiffs' racial gerrymandering claims fail because they cannot meet their burden to prove that race was the predominant factor in the 2013 legislature's decision to enact Plan C235, Plan H358, or any district therein.

To mount a *Shaw*-type racial gerrymandering claim, "[t]he plaintiff's evidentiary burden is 'to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motiving the legislature's decision to place a significant number of voters within or without a particular district.'" Doc. 1339 (Order on Plan C185) at 30 (citing *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015)).

The 2013 Legislature could not have drawn the boundaries of districts in Plan C235 predominantly on the basis of race because it did not draw district boundaries at all; it adopted the district boundaries implemented by this Court. Because it did not move any population between districts, the 2013 Legislature did not make a decision to place any voters within or without a particular district. Except for the few districts from Plan H309 that were modified, the same is true of Plan H358. To the extent the Legislature redrew any district boundaries in Plan H358, it did so based on amendments agreed to by the affected members of the House, and subject to the criteria laid out by Chairman Darby; it did not do so on the basis of the race of the affected population.

C. Plaintiffs cannot meet their burden to prove vote dilution in violation of §2 of the Voting Rights Act.

To prove vote dilution under §2, a plaintiff must show both that the *Gingles* preconditions are satisfied and that, under the totality of the circumstances, the challenged plans dilute minority voting strength. *See, e.g.*, *Johnson v. DeGrandy*, 512 U.S. 997 (1994) (finding all *Gingles* factors to be present but rejecting vote-dilution claims). The three *Gingles* preconditions are: (1) "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district" (2) "the minority group . . . is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

1. Plaintiffs' vote-dilution claims fail to the extent they rely on "coalition" districts.

Section 2 of the Voting Rights Act does not compel states to create "coalition" districts. To satisfy the first *Gingles* precondition, plaintiffs must demonstrate that the minority population whose vote is allegedly diluted "is sufficiently large and geographically compact to constitute a majority" of voting-age citizens in a proposed district. *Gingles*, 478 U.S. at 79 (emphasis added); *see also LULAC v. Perry*, 548 U.S. 399, 429 (2006) (commenting that using CVAP to determine Hispanic electoral opportunity "fits the language of §2 because only eligible voters affect a group's opportunity to elect candidates"). Here, with the exception of a single district in Plan H391, Plaintiffs

attempt to meet the first *Gingles* prerequisite with coalition districts in which no minority group comprises at least 50% of the citizen voting-age population. Aside from that one proposed House district, Plaintiffs combine Black, Hispanic, and (in some cases) Asian CVAP to reach the 50% threshold. These allegations cannot support a vote-dilution claim under §2 because the absence of a coalition district does not dilute any group's voting strength.

The notion that §2 can require states to create coalition districts finds no support in the statutory text or Supreme Court precedent. In *Bartlett v. Strickland*, the Supreme Court rejected a claim that §2 protects "the opportunity to join other voters—including other racial minorities, or whites, or both—to reach a majority and elect their preferred candidates." 556 U.S. 1, 14 (2009) (plurality op.). In this case, the Supreme Court expressly rejected the proposition that coalition districts are legally required:

> The [district] court's order suggests that it may have intentionally drawn District 33 as a "minority coalition opportunity district" in which the court expected two different minority groups to band together to form an electoral majority. . . . If the District Court did set out to create a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so.

Perry v. Perez, 565 U.S. at 398-99 (citing *Bartlett v. Strickland*, 556 U.S. at 13-15). These decisions recognize "a difference between a racial minority group's 'own choice' and the choice made by a coalition." *Bartlett*, 556 U.S. at 15. But only the group's "own choice" is legally significant: "Nothing in §2 grants special protection to a minority group's right to form political coalitions." *Bartlett*, 556 U.S. at 15; *cf. LULAC v. Perry*,

548 U.S. at 446 ("If [§]2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional problems."). The Supreme Court has established that the "opportunity" to elect protected by §2 does not include the opportunity to form a majority with other voters.

Plaintiffs' vote-dilution claims against Plan C235 fail because they do not show that additional geographically compact minority-majority districts can be drawn. None of the proposed congressional plans creates more HCVAP- or BCVAP-majority districts than Plan C235. As a result, the Plaintiffs' vote-dilution claims against Plan C235 cannot meet the first *Gingles* prerequisite.

The majority of Plaintiffs' vote-dilution claims against Plan H358 fail for the same reason: they do not demonstrate that Black or Hispanic voters can form a majority in additional Texas House districts. Only one of the demonstration districts offered by Plaintiffs—HD32 in Plan H391—contains more than 50% HCVAP. But that district fails the first *Gingles* prerequisite because it is not reasonably compact. To create an additional HCVAP-majority district, Plan H391 must draw two House districts that cross the Nueces County line. This indicates that Plaintiffs cannot create an additional HCVAP-majority district in Nueces County; they must combine part of Nueces County with Kleberg County.

But because crossing the county line is not necessary to equalize district population, Plan H391 conflicts with the whole-county rule contained in Article III, §26 of the Texas Constitution. The fact that Plaintiffs cannot create two HCVAP-

majority districts in Nueces County, even after removing part of the County's population, demonstrates that the lack of an additional Hispanic opportunity district in Nueces County is the result of insufficient population, not the State's configuration of electoral districts. Under these circumstances, disregarding a traditional redistricting principle such as the whole-county rule cannot be subordinated to race without creating serious constitutional concerns. *See, e.g., Hunt v. Cromartie*, 526 U.S. 541, 547 (1999); *LULAC v. Perry*, 548 U.S. at 463 n.5; *see also Bartlett*, 556 U.S. at 14; *Abrams v. Johnson*, 521 U.S. 74, 85–95 (1997).

2. Plaintiffs' proposed "coalition" districts fail the second and third *Gingles* prerequisites because Plaintiffs cannot prove political cohesion among the relevant minority populations or racial bloc voting by an Anglo majority.

Even if Plaintiffs could satisfy the first *Gingles* prerequisite through coalition districts, they would fail the second *Gingles* prerequisite because they cannot show that the relevant minority groups are politically cohesive. It is not sufficient to show that voters share the same partisan preference in general elections. To show political cohesion among Black, Hispanic, or Asian voters, Plaintiffs would have to show that voters in each group prefer the same candidates in primary elections. To the extent there is any evidence of primary-election voting, it shows that Black and Hispanic voters are not cohesive; rather, they consistently prefer opposing candidates. Thus, even if separate minority groups could theoretically be treated as one, Plaintiffs cannot demonstrate cohesion among minority voters in any proposed coalition district.

Plaintiffs cannot satisfy the third *Gingles* prerequisite because the evidence does not show legally significant racially polarized voting. To prevail on a vote-dilution claim, plaintiffs must show legally significant racial bloc voting or racially polarized voting—meaning that voting patterns are caused by racial considerations rather than non-racial factors such as partisan preferences. *LULAC v. Clements*, 999 F.2d 831, 849-59 (5th Cir. 1993) (*en banc*). Here, the evidence does not show legally significant racially polarized voting, either across the State as a whole or in any specific area of the State. As Plaintiffs' experts acknowledge, to the extent there are any racially polarized voting patterns in Texas as a whole, they are explained entirely by partisan affiliation. Indeed, analyses offered in this case show that Anglo voters across the State generally favor Republican candidates in general elections regardless of the race or ethnicity of the candidates on the ballot. Collectively, the evidence fails to demonstrate legally significant racially polarized voting.

3. Plaintiffs cannot establish based on the totality of circumstances that minority voters do not have an equal opportunity to participate in the political process.

Even if they could establish the three *Gingles* prerequisites, Plaintiffs could not prove vote-dilution under §2 because neither Plan C235 nor Plan H358 results in a denial or abridgment of the right of any citizen to vote on account of race, color, or membership in a language minority group. The evidence does not establish that, based on the totality of circumstances, the political processes leading to nomination or election in the State are not equally open to participation by members of any class of

citizens, nor does the evidence establish that the members of any class of citizens have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.

III. LAY WITNESSES EXPECTED TO TESTIFY & SUMMARY OF EXPECTED TESTIMONY

Jacey Jetton

Mr. Jetton is a resident of Fort Bend County who has been involved with multiple political organizations in Fort Bend County and the greater Houston area. Mr. Jetton will testify regarding communities of interest in Fort Bend County and how different communities prioritize various issues. Mr. Jetton will testify that minority groups do not vote cohesively in Fort Bend County.

Orlando Sanchez

Mr. Sanchez is a long-time resident of Harris County and is the current Harris County Treasurer. Mr. Sanchez has both campaigned for and been elected to State and local offices since the early 1990's. Based on decades of observing voting trends as a candidate and community resident, Mr. Sanchez will testify that minority groups do not vote cohesively in Harris County.

Elizabeth Alvarez Bingham

Ms. Alvarez Bingham lives in Dallas County and has been involved in community outreach for multiple political campaigns and organizations in Dallas and Tarrant counties over the past four election cycles. Ms. Alvarez Bingham will testify about

communities of interest in Dallas and Tarrant counties. Ms. Alvarez Bingham will testify that minority groups, particularly African American voters and Hispanic voters, do not vote cohesively in Dallas and Tarrant counties.

Representative Scott Cosper

Representative Cosper is the newly elected representative of Texas State House District 54 and is the former mayor of Killeen. Representative Cosper will testify regarding the current configuration of the Texas State House districts in Bell and Lampasas counties and how the current configuration reflects the communities of interest in that region. Representative Cosper will testify that the proposed demonstration plans offered by Plaintiffs for this trial do not reflect the communities of interest in Bell and Lampasas counties. Representative Cosper will testify that minority groups do not vote cohesively in Bell County. Representative Cosper will assert legislative privilege as to his subjective intent, mental impressions, investigative efforts, thought processes, and communications with other legislators regarding any particular legislative act related to his service in the 2017 Legislature. *See* Doc. 1138. Representative Cosper was not a member of the Texas Legislature during the 2011 or 2013 sessions.

Representative Todd Hunter

Representative Hunter represents Texas State House District 32. Representative Hunter will testify regarding voting trends in Nueces County and interests unique to Nueces County. Representative Hunter will testify about the configuration of the Texas

State House and congressional districts in Nueces County, and that the general purpose of the Texas Legislature in 2013 was to pass fair and legal maps as adopted by the Court in 2012. Representative Hunter will assert legislative privilege as to his subjective intent, thought processes, mental impressions, investigative efforts, and communications with other legislators regarding any particular legislative act. *See* Doc. 1138.

Representative Drew Darby

Representative Darby represents Texas State House District 72. Representative Darby was the Chairman of the Texas House of Representatives Select Committee on Redistricting in 2013. Representative Darby will testify that the general purpose of the Texas Legislature in 2013 was to pass fair and legal maps as adopted by the Court in 2012. Representative Darby will assert legislative privilege as to his subjective intent, thought processes, mental impressions, investigative efforts, and communications with other legislators regarding any particular legislative act. *See* Doc. 1138.

Representative Rafael Anchia

Representative Anchia represents Texas State House District 103. Representative Anchia was a member of the Texas Legislature in 2013 and is expected to testify about the process that the Legislature went through to adopt the maps in 2013, Plaintiff MALC's demonstration maps and other matters at issue in this litigation.

Conor Kenny

Mr. Kenny was Representative Lon Burnam's chief of staff during the 2013 session of the Texas Legislature. Mr. Kenny will testify about the changes to Texas

House District 90 from the Court-drawn interim plan to the plan that was adopted in 2013 by the Texas Legislature. The substance of Mr. Kenny's testimony is reflected in the clips of his 2014 deposition attached to this filing.

Congressman Will Hurd (conditionally)

In light of the MALC and Perez Plaintiffs' untimely designation of Dr. Henry Flores as a testifying expert witness on Congressional District 23, Defendants conditionally designate United States Congressman Will Hurd to provide testimony in response. Congressman Hurd will testify regarding the demographics of CD23, communities of interest in CD23, his campaign and outreach efforts, and voting trends in CD23. Defendants will make Congressman Hurd available for a deposition at a mutually agreeable time and place before he testifies at trial.

IV. EXPERT WITNESSES EXPECTED TO TESTIFY & SUMMARY OF EXPECTED TESTIMONY

Dr. John Alford

Dr. Alford will testify that Plaintiffs, in their various demonstration plans offered in this case, fail to create any new compact BCVAP- or HCVAP-majority districts. That failure—despite numerous plaintiffs, experts, and intervenors spending more than six years on this case—proves that the geographic distribution of minority population constrains the Black or Hispanic opportunity districts that it is possible to draw. It also demonstrates that it is not possible to create any additional reasonably compact BCVAP- or HCVAP-majority districts than exist in Plans C235 and H358.

Dr. Alford will testify about the lack of reliable evidence presented by Plaintiffs to prove that different minority groups share candidates of choice. The most reliable analysis of candidate preference between different minority groups comes from Dr. Richard Engstrom, who concludes that African American and Latino voters do not share candidates of choice in the Democratic primaries. Dr. Alford confirms that conclusion with an updated analysis of the Democratic primaries in CD33 and HD90, which show that African American and Latino voters are not politically cohesive.

Dr. Alford will testify that CD23 has historically been a competitive district, and it remains so under its current configuration. Democrat Pete Gallego won the first election using the current map, defeating the incumbent Republican. Republican Will Hurd won narrow victories in 2014 and again in 2016, even though Democrat Hillary Clinton won the top of the ticket in 2016. The percentage of HCVAP is now 62.1%, and the non-Anglo CVAP percentage is now 67.8%. Hispanic turnout in the district is also increasing, and is outpacing the growth of non-Hispanic votes cast. The failure of the Democratic candidate to win CD23 not is attributable to declining support among Anglo voters, but rather, appears to result from declining support for the Democratic candidate from African American and Hispanic voters.

Dr. Alford will also identify problems with the Texas State House and congressional demonstration plans proposed by Plaintiffs for this trial.

V. EXHIBITS DEFENDANTS EXPECT TO USE

Defendants' exhibit list is appended to this filing as Exhibit A. Additionally, the parties have conferred and agreed to two joint exhibit lists. The first, Exhibit B, is the joint exhibit list regarding various demonstration plans proposed by Plaintiffs for this trial (as well as the 2013 enacted plans) and the accompanying reports from the Texas Legislative Council. The second, Exhibit C, is the joint exhibit list that includes materials pertaining to the consideration of the Texas State House and congressional maps during the 2013 session of the Texas Legislature.

VI. DEPOSITION DESIGNATIONS

Defendants' deposition designations are attached to this filing as Exhibit D. Defendants previously designated most of these designations on June 13, 2014, under a previously operative scheduling order. *See* Doc. 1092-1 (Line Designations appended to Doc. 1092, Notice of State Defendants' Deposition Designations). Defendants have added the deposition designations from the 2017 round of discovery and reduced the prior designations primarily to focus on the issues relevant to the Texas State House and congressional maps passed by the Texas Legislature in 2013.

Defendants may designate portions of the depositions of Elizabeth Alvarez Bingham, Orlando Sanchez, Conor Kenny in lieu of calling those witnesses live in order to streamline the presentation of Defendants' case. Defendants have received the rough draft of the transcript from the Alvarez Bingham deposition and have attached the portions that they intend to designate. Defendants have not received the transcript from

the Sanchez deposition yet. As both of those depositions were completed less than a week ago, Defendants do not have the final transcript for either deposition. Defendants will provide the Court and all parties with their designations shortly after receiving the transcripts.

VII. STIPULATIONS

The parties have reached two sets of factual stipulations, both of which have been filed with the Court. *See* Docs. 1442, 1445.

Date: July 3, 2017

Respectfully submitted.

/s/ Patrick K. Sweeten

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