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

SHANNON PEREZ, *et al.*,	)	
	)	CIVIL ACTION NO.
Plaintiffs,	)	SA-11-CA-360-OLG-JES-XR
	)	
v.	)	
	)	
STATE OF TEXAS, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFF INTERVENOR US CONGRESSMAN HENRY CUELLAR PRETRIAL BENCH BRIEF

CLAMS AGAINST C235:
Plaintiff Cuellar asserts claims under Sec. 2 of the Voting Rights Act insofar as CD 23 and Nueces County are concerned, Dkt 893, Second Amended Complaint

In its extensive and considered discussion of fact and expert witness testimony, this Court held that "proposed CD23 in Plan C185 violated § 2 in both "intent and in effect." (May 2, 2017 Order, Dkt# 1390 at 29) Moreover, the Court held that in C185 "approximately 200,000 Hispanic voters in Nueces County (a majority-HCVAP county) had a § 2 right that could be remedied but was not." Nueces county Latinos could and should be place in congressional districts where Latinos can elect candidates of their choice. (Dkt# 1390 at 47 n. 47) These infirmities led the Court to conclude that Latinos were "entitled to seven [Latino] .. Districts" in South/West Texas (Dkt 1339 at 11); however, C185 intentionally vitiated that entitlement.

Now the Court must consider whether or not C235, adopted in 2013, remedied those violations. The Court found that the Fourteenth Amendment violations established in C185 continue to "harm[ed]" the plaintiffs in C235 (Dkt# 1390 at 4-5).

We now have additional information to evaluate C235: the 2014 and 2016 election cycles and recent relevant Supreme Court direction in *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017), and *Cooper v. Harris*, 197 L. Ed. 2d 837, *855; 2017 U.S. LEXIS 3214.

In *Cooper* the Supreme Court makes it clear the State must "carefully evaluate" whether or not the State has carefully evaluated whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures.

We see nothing in the legislative record that fits that description, *Cooper*, 197 L. Ed. 2d 837 at 856. Indeed, the State of Texas admits that "the Legislature simply adopted [C185] wholesale as the interim congressional plan drawn by this Court in 2012, … with minor modifications that did not change the CVAP majority in any district." (Dkt.1413 at 14).

Congressional District 23 (CD 23) and Nueces County

This is astonishing! A year earlier Texas was clearly warned about the deficiencies in C185 – specifically CD 23 and Nueces County. In *Texas v.United States,* 887 F. Supp. 2d 133 (D.D.C. 2012) a three judge Court issued the findings of fact and law Nos. 56 through 60 and Nos. 78 through 85[1] concerning C185. These findings of fact and law were extensive. As far as CD 23, the Court warned that "the ability of Hispanic voters to elect their candidate of choice is lost in enacted CD 23." *Id* at 211

West Texas's CD23 has a complicated history under the VRA. In 2006, the Supreme Court held that CD23, as then constituted, violated section 2. *See LULAC v. Perry*, 548 U.S. 399, 425-42, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006). In response, the U.S. District Court for the Eastern District of Texas redrew its boundaries in 2006 to be an "opportunity district," or one in which Hispanic voters would have an opportunity to elect their preferred candidates, as required by section 2. *See* Defs.' Ex. 575, Trial Tr. 300:13-18, Sept. 7, 2011, *Perez*, No. 11-cv-360. We

[1] The case was later vacated by the Supreme Court on separate grounds and remanded but the findings were undisturbe, *Texas v. United States*, 133 S. Ct. 2885, 186 L. Ed. 2d 930, 2013 U.S. LEXIS 4927 (U.S., 2013).

now find that the Hispanic voters in CD23 turned that opportunity into a demonstrated ability to elect, but that the 2010 redistricting took that ability away. *Id* at 154

As far as Nueces County was concerned, on August 28, 2012 in *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), the three judge court held that Hispanic citizens in Nueces County were "denied their ability to elect their candidates of choice." *Id* 214 – 215.

The District of Columbia three judge court's findings certainly qualify as putting Texas on "notice" of problems with C185. Yet, Texas simply "wholesale" adopted C235 knowing that its roots came from C185.

This means that on June 26, 2013, almost a year after the three judge court warning of the deficiencies of C185 Texas adopted C235 "wholesale" with the legal deficiencies. C235 made no significant changes in C185 concerning the Latino community in CD 23 and in Nueces County makes no changes at all. Clearly, Texas did not follow the "carefully evaluate" standard set by the Supreme Court in *Cooper, Id*.

Election results comparing C235 to C185 demonstrated that the discriminatory effects of racially polarized voting in C185 have continued in C235; the projected General election results for the 2014 and 2016, comparing CD23 in both plans, demonstrate that the electoral choice of the Latino community continues to be defeated in CD 23 because of racially polarized voting. JX 100.6 100.7 and 100.8. Significantly, in C235 Clinton wins CD23 but the Hispanic congressional candidate, because of racially polarized voting, loses the district to an Anglo candidate; this indicates that many Anglo democrats will vote for an Anglo presidential candidate but not for a Hispanics congressional candidate– racially polarized voting. JX 100.9

Also, the Latino community in Nueces County under both C185 and C235 continues to vote in districts where their choice is defeated because of racially polarized voting; C235 is no different from C185 in so far as the Nueces County Latino community is concerned, see

Stipulation 1 para 7 and 8, Dkt #1442. In 2014 and 2016 the choice (Democratic Candidate) of the Latino community in Nueces County did not win in the governor or presidential election; the Nueces County Latino community is submerged in CD27, see C235 JX 100. 6.

Cooper makes it clear that "getting to the bottom of a dispute like this one poses special challenges for a trial court, which must make "'a sensitive inquiry'" into all "'circumstantial and direct evidence of intent'" to assess whether the plaintiffs have proved that race, not politics, drove a district's lines, *Cooper at 197 L. Ed. 2d 837;* see also *Hunt v. Cromartie,* 526 U. S. 541, 546, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (*Cromartie I).*

The clear warning given by the three judge court in *Texas V United States,* 887 F. Supp. 2d 133 and Texas' complete disregard of the warning, the 2014 and 2016 election results and finally the direction given by *Cooper,* this Court is well positioned to evaluate the continued discriminatory effect and impact of C 235 on CD 23 and Nueces County.

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Respectfully Submitted,

Rolando L. Rios
ROLANDO L. RIOS
115 E. Travis, Suite
1645 San Antonio,
Texas 78205 Ph:
(210) 222-2102
Fax: (210) 222-2898
E-
mail:rrios@rolandorioslaw.co
m By: Rolando L. Rios /s/
ROLANDO L. RIOS
SBN: 16935900
Attorney for Plaintiff-Intervenor
Cuellar The Law Offices of
Rolando L. Rios The Milam
Building

CERTIFICATE OF SERVICE

I certify that on this a true and correct copy of this Pretrial Brief of US Congressman Henry Cuellar has been served upon the Defendants using the electronic filing system.

Rolando L. Rios