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

SHANNON PEREZ, et al., *Plaintiffs*, - and - EDDIE BERNICE JOHNSON, et al., - and - TEXAS STATE CONFERENCE OF NAACP BRANCHES, et al., *Plaintiff Intervenors*, v. RICK PERRY, et al., *Defendants*,	)	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs*, - and - HONORABLE HENRY CUELLAR, et al., *Plaintiff Intervenors*, v. STATE OF TEXAS, et al., *Defendants*	)	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]

TEXAS LATINO REDISTRICTING TASK FORCE, et al., *Plaintiffs,* v. RICK PERRY, et al., *Defendants,*	)	CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated case]

MARAGARITA v. QUESADA, et al., *Plaintiffs,* v. RICK PERRY, et al., *Defendants,*	)	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

JOHN T. MORRIS, *Plaintiff,* v. STATE OF TEXAS, et al., *Defendants,*	)	CIVIL ACTION NO. SA-11-CA-615-OLG-JES-XR [Consolidated case]

EDDIE RODRIGUEZ, et al.,	)	CIVIL ACTION NO.
	)	SA-11-CA-635-OLG-JES-XR
	)	[Consolidated case]
Plaintiff,	)	
	)	
v.	)	
	)	
STATE OF TEXAS, et al.,	)	
	)	
Defendants.	)	

TEXAS LATINO REDISTRICTING TASK FORCE, ET AL. PLAINTIFFS' OPPOSED MOTION FOR RECONSIDERATION OF PORTION OF ORDER ON SUPPLMENTATION OF RECORD

The Texas Latino Redistricting Task Force, *et al*. Plaintiffs ("Task Force Plaintiffs") file this opposed motion for reconsideration of a portion of the Court's recent order on supplementation of the record. Dkt. 772 at 2 n.1 ("The Court's previous order allowed the parties to submit both documentary evidence and trial testimony, but the Court will allow only documentary evidence at this time."). Specifically, the Task Force Plaintiffs request that the Court consider entering into the record certain sworn testimony received by the District Court of the District of Columbia (DDC) in the section 5 litigation ("D.C. litigation"/"D.C. trial").

As explained below, the Task Force Plaintiffs seek reconsideration of this ruling because the sworn testimony they seek to offer is relevant to their claims of intentional discrimination in the enactment of the 2011 redistricting plans and will assist the Court in resolving those claims. Moreover, a majority of the witnesses whose testimony is offered were presented to the Court during trial in this case, and thus, the Court already has made credibility determinations for these witnesses. Furthermore, the Court has expressed a willingness to consider documentary evidence and the testimony offered by the Task Force Plaintiffs provides context and

explanations of those critical documents. For these reasons, and as more fully explained below, the Task Force Plaintiffs respectfully request that the Court reconsider its ruling regarding testimony from the D.C. litigation, and consider the attached testimony as included in Plaintiffs' Joint Motion for Leave to Reopen the Record for Supplemental Evidence. *See* Exs. A-I.[1]

ARGUMENT

I. Certain Testimony From the D.C. Litigation Is Relevant to This Court's Consideration of the Intentional Discrimination Claims in the Same Redistricting Plans and Is Admissible

a. The Testimony Offered by the Task Force Plaintiffs Is Relevant

The Task Force Plaintiffs seek to present testimony from the D.C. trial concerning House Districts (HD) 117 and 78, Congressional District (CD) 23, CD 34/27, and CD 26 because of the relevance of this evidence to the intentional discrimination and vote dilution claims of plaintiffs. According to FRE 401, "[e]vidence is relevant if . . . the fact is of consequence in determining the action." FED. R. EVID. 401(b). Moreover, the relevancy standard is "a liberal one." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 587 (1993); *see Old Chief v. United States*, 519 U.S. 172, 179 (1997) (finding that relevant evidence may not be excluded because other evidence related to it has rendered it "irrelevant;" inadmissibility must rest on other grounds).

The testimony offered here is relevant because it further supports the Task Force Plaintiffs' claims that the 2011 Texas House and congressional redistricting plans discriminated on the basis of race. The testimony provides direct evidence of racial discrimination in the drafting of challenged districts in order to dilute Latino voting strength.

For example, the testimony of State Representative Joe Farias from HD 118 explains how redistricters bolstered the re-election chances of Representative Garza by limiting the Spanish Surnamed Voter Registration in HD 117 to 50%-51% and then selecting Latino majority

[1] The Task Force Plaintiffs will serve courtesy binders containing copies of Exhibits A-I on all three judges.

precincts with lower turnout rates (Somerset) for inclusion in HD 117 while removing Latino majority precincts with higher turnout rates (San Antonio's South Side) from HD117. Ex. A (Trial Tr., *Texas v. United States*, No. 1:11-cv-1303 [hereinafter Trial Tr., *Tex. v. U.S.*] Jan 24PM, pp. 15:4-17:23 (Farias)).[2]

The testimony of map-drawer Gerardo Interiano sheds additional light on the mapping of HD 117 as he explains that Somerset was put into HD 117 "[i]n order to keep the numbers the way that they were, and by that I mean the demographic and the political numbers. We could not find a way to do that without that community of Summerset [sic] . . . And the concern was that if you started removing some of those communities from Representative's Garza's district, that he would not be afforded that opportunity [to be re-elected]." Ex. B (Trial Tr., *Tex. v. U.S.*, Jan. 17AM, pp. 159:1-11; 160:10-25 (Interiano)); *see also* Ex. B (Trial Tr., *Tex. v. U.S.*, Jan. 25PM, pp. 106:11-108:1 (Interiano) (testifying that the primary goal was to ensure that members of the Bexar County delegation had the opportunity to be re-elected and recounting conversations with Rep. Garza in which Mr. Interiano instructed Rep. Garza that "we need to find a way to keep your district above 50 percent [SSVR] and maintain your other goals in the district[.]")).

This testimony regarding HD 117 relates to Ex. Tab 49 to Plaintiffs' Joint Motion for Leave to Reopen the Record for Supplemental Evidence which shows that redistricters shared among themselves a racially polarized voting analysis of HD117 showing that as the number of Latino voters in a precinct increased, the support for Rep. Garza decreased. This testimony also provides context for the testimony of State Representative John Garza regarding the changes to HD 117. *See* Task Force Pls. Ex. 454 (Dep. of Rep. John Garza) at 30:6-25 ("Q. And why did you want to go far north? A. Well, I mean, those numbers tended to be – like you had

[2] The *Texas v. United States* trial transcripts were previously filed in this case by the Quesada plaintiffs at Dkt. 597-1 through 597-16.

mentioned, they were more Anglo and more conservative.") (deposition admitted in the *Perez* record during the Hearing on Proposed Interim Plans, *Perez v. Perry*, No. 11-cv-360, Hr'g Tr. at 704:20-705:6 (Nov. 3, 2011)).

The testimony of map-drawers Gerardo Interiano and Ryan Downton on the drafting of CD 23 illustrates how the map-drawers used race to apportion Latinos into and out of those districts for the purpose of diluting Latino voting strength. For example, the testimony of Gerardo Interiano explains how he was asked to gather and analyze election and demographic data to identify Latino-majority precincts with the lowest turnout in order to create a CD 23 with a majority of Latino population that did not have sufficient Latino voting strength to oust an incumbent who was not the Latino candidate of choice. Ex. B (Trial Tr., *Tex. v. U.S.*, Jan. 17PM, pp. 52:4-54:11 (Interiano)). The testimony of Ryan Downton reveals as pretextual Defendants' claim that mappers designed CD 23 to enable the election of a candidate preferred by Latino Republicans. *Compare* Ex. C (Trial Tr., *Tex. v. U.S.*, Jan. 18AM, pp. 117:14-118:8 (Downton)) *with* Trial Ex. J-42 (Dep. of Ryan Downton) Vol. 1 at 75:15-76:4 ("Q. And what needed to happen to that district to give [Canseco] his best chance? A. Increase the number of Hispanic Republicans. Well, increase the number of Republicans period in that district, but we also needed to make sure we complied with the Voting Rights Act. So increasing the number of Hispanic Republicans would help a Hispanic Republican generally get elected."). *See also* Ex. D (Trial Tr., *Tex. v. U.S.*, Jan. 24AM, pp. 32:12-33:7 (Seliger) (testifying that although he believed that a Latino-majority district could prefer a Republican candidate, he did not want to draw Latino-majority congressional districts because he thought of them as Democratic districts). This testimony relates to Exs. Tabs 4, 45, 46, 54, 55, and 59 to Plaintiffs' Joint Motion for Leave to Reopen the Record for Supplemental Evidence which include the original email proposing the

effort to swap precincts to dilute Latino voting strength in CD 23 and continued communication among map-drawers as they worked to accomplish that goal.

Furthermore, the testimony of Maverick County Judge David Saucedo illustrates how, just as the predominantly-Latino Maverick County was increasing its voter turnout to become an important force in CD 23 elections, redistricters split the county between CD 23 and the heavily-Latino CD 28. Ex. E (Trial Tr., *Tex. v. U.S.*, Jan. 18PM, pp. 115:22-117:18 (Saucedo)).

In the drafting of CD 27, map-drawer Ryan Downton admits that the map-drawers could have kept Latino-majority Nueces County in the south Texas configuration of Latino-majority congressional districts, but instead joined Nueces with Anglo-majority counties to the north to help re-elect Rep. Farenthold, removing Nueces County Latino voters from an area in which they had the opportunity to elect their preferred candidate. Ex. C (Trial Tr., *Tex. v. U.S.*, Jan. 18AM, pp. 119:10-123:1 (Downton)).

The testimony of Texas legislators and area residents demonstrates that map-drawers also used race to apportion Latino and other minority populations into and out of CD 26 for the purpose of diluting minority voting strength in the Dallas Ft-Worth metroplex. *See* Ex. F (Trial Tr., *Tex. v. U.S.*, Jan. 18PM, pp. 105:7-107:11 (Jimenez) (demonstrating as pretext the claim that partisanship motivated the "lightning bolt" of CD 26)); Ex G (Trial Tr., *Tex. v. U.S.*, Jan. 18PM, pp. 18:13-23:2 (Veasey)) (explaining that the "lightning bolt" of CD 26 separated Latinos from African Americans and pulled Tarrant County's Latino-majority neighborhoods into a congressional district anchored in Anglo-majority Denton County)); Ex. H (Trial Tr., *Tex. v. U.S.*, Jan. 20PM, pp. 105:2-106:20; 107:12-108:2 (Solomons) (testifying that he had no explanation for why CD 26 cut 38 precincts in Tarrant County)). This testimony explains the maps that are Exs. Tabs 15, 19, and 20 to Plaintiffs' Joint Motion for Leave to Reopen the

Record for Supplemental Evidence and provides additional context in which to understand the exhibits.

With respect to the State House, the testimony of map-drawer Gerardo Interiano provides circumstantial evidence of intent with respect to inconsistency in the way the 2011 plan dealt with the County Line Rule. Mr. Interiano admits that he could have created seven Latino opportunity districts in the area of Cameron and Hidalgo counties, but chose not to because the creation of the seventh district would cause an illegal "cut" of a county line elsewhere in the map as opposed to a legal "spill." Ex. B (Trial Tr., *Tex. v. U.S.*, Jan. 17PM, pp. 41:23-42:22 (Interiano) (testifying that if map-drawers had drawn seven districts in south Texas "any way you could have drawn those seven districts, it would have been Hispanic majority districts")).

Finally, the testimony of the 2011 Chairman of the House Redistricting Committee, Representative Burt Solomons and other Texas legislators illuminate the extent to which the 2011 maps ignore traditional redistricting considerations (providing circumstantial evidence of racial intent). *See* Ex. I (Trial Tr., *Tex. v. U.S.*, Jan. 18PM, pp. 128:1-129:11; 130:3-140:18 (Rodriguez) (testifying that the "antlers" of HD 77 do not follow mountain geography or precinct boundaries and that the antlers concentrate Latino population in HD 77 and reduce Latino population in HD 78). *Compare* Ex. H (Trial Tr., *Tex. v. U.S.*, Jan. 20PM, pp. 97:1-101:19 (Solomons) (testifying that although he was committee chair, he left it to his staffers to draw the maps and ensure Voting Rights Act compliance)) *with* Trial Tr. at 1442:2-6, *Perez v. Perry*, No. 11-cv-360 (W.D. Tex. 2011) (Interiano) ("Q. And if members from a county could not come to an agreement the Chairman and the Speaker in consultation with a member from the county would make the final decision on how the lines would be drawn, correct? A. Yes, ma'am.").

Thus, the proffered testimony from the D.C. litigation is both relevant and probative of the issues remaining before this Court.

b. The Testimony Offered by the Task Force Plaintiffs Is not Prejudicial

"A court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403. As the Fifth Circuit has held, the scope of Rule 403 "is narrow;" none of the Rule 403 factors weigh against admitting the testimony offered by the Task Force Plaintiffs in this case. *United States v. Fields*, 483 F.3d 313, 354 (5th Cir. 2007).

Defendants are familiar with all of the testimony offered here because it was accepted by the court in the D.C. litigation and Defendants had the opportunity to prepare and present a defense to the testimony at that time. This is not a situation in which Defendants are confronting, for the first time, evidence offered by Plaintiffs and thus the Court need not consider that factor in the analysis of prejudice. *See Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 814 (5th Cir. 1996) ("While there is always the possibility of some prejudice in that additional evidence is being introduced against the non-moving party, our concern is with undue prejudice."). As a result, Defendants are not unfairly prejudiced.

Rather than confuse the issues or waste time, the testimony offered here relates to evidence already before the Court and clarifies the facts. The Court has agreed to consider certain documentary evidence from the D.C. litigation. *See* Dkt. 772 at 2. The testimony offered here puts that documentary evidence, for example emails between map-drawers and legislative staff, into context, clarifies the meaning of certain terms used in the emails, and provides further explanation of the redistricters' thought process. *See, e.g.*, Ex. B (Trial Tr., *Tex. v. U.S.*, Jan.

17PM, pp. 52:4-54:11 (Interiano testifying on Opiela email)). For just this reason, the testimony offered here is not cumulative of this Court's record; it is supplemental and relevant to the issues of intentional discrimination and vote dilution pending before this Court. Moreover, particularly since this Court will consider bail-in motions under section 3(c) of the Voting Rights Act, the Court would benefit from having before it all relevant evidence of intentional racial discrimination with respect to Texas's redistricting.

Finally, by moving for supplementation of this Court's record with testimony offered in the D.C. trial at this time, the Task Force Plaintiffs are keeping within the schedule set by the Court for consideration of supplemental documentary evidence. *See* Dkt. 772 at 2. The Task Force Plaintiffs' motion is made expeditiously and without delay. In sum, none of the Rule 403 factors weigh against the consideration and admission of the testimony from the D.C. trial offered here. *See* Fed. R. Evid. 403 (listing the factors for consideration in determining whether to exclude otherwise relevant evidence as: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence).

II. The Court Has Already Heard Testimony From and Made Credibility Determinations About the Majority of the Witnesses Whose Testimony Is Offered

An additional factor weighing in favor of reconsidering supplementation of this Court's record with testimony from the D.C. trial is that nearly all of the witnesses whose D.C. trial testimony is offered here testified before this Court at trial in *Perez*. *See* Trial Tr. at 1417:25-1500:25, 1746:22, *Perez v. Perry*, No. 11-cv-360 (W.D. Tex. 2011) (Interiano); Trial Tr. at 903:1-992:5, 1746:22, *Perez v. Perry*, No. 11-cv-360 (W.D. Tex. 2011) (Downton); Trial Tr. at 1551:19-1641:20, 1746, *Perez v. Perry*, No. 11-cv-360 (W.D. Tex. 2011) (Solomons); Trial Tr. at 560:14-577:22, *Perez v. Perry*, No. 11-cv-360 (W.D. Tex. 2011) (Jimenez); Trial Tr. at 761:1-

775:20, *Perez v. Perry*, No. 11-cv-360 (W.D. Tex. 2011) (Saucedo). Therefore, this Court has already made credibility determinations with respect to these witnesses.

This Court has already admitted deposition testimony of two witnesses whose D.C. trial testimony is offered here: Senator Kel Seliger and Rep. Marc Veasey. *See* Trial Tr. at 1746:22, *Perez v. Perry*, No. 11-cv-360 (W.D. Tex. 2011) (Seliger); Trial Tr. at 1746:13, *Perez v. Perry*, No. 11-cv-360 (W.D. Tex. 2011) (Veasey). These witnesses, as well as Senator Jose Rodriguez and Rep. Joe Farias whose testimony was elicited in the D.C. trial only, are also elected officials in Texas who have sworn "to faithfully execute the duties of the office[s]" to which they were elected and further swore to give truthful testimony in this case.

Because the Court is familiar with the previous testimony of most of the witnesses whose testimony is offered here, and has every reason to trust the reliability of Senator Rodriguez and Representative Farias, both of whom have served many years in public office, the fact that the Court has not heard live the particular testimony offered now does not weigh against the introduction of this testimony into this Court's record.

CONCLUSION

For the foregoing reasons, the Task Force Plaintiffs respectfully request that the Court reconsider its decision to exclude testimony made part of the record in the D.C. litigation and include the attached testimony as part of Plaintiffs' Joint Motion for Leave to Reopen the Record for Supplemental Evidence. *See* Exs. A-I. The Task Force Plaintiffs also request that the Court exercise its discretion to admit the testimony from the D.C. trial into this Court's record for use in future determinations consistent with this Court's findings.

Dated: August 2, 2013

Respectfully submitted,

/s/ Nina Perales

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CERTIFICATE OF CONFERENCE

I hereby certify that, on August 2, 2013, counsel for the Task Force Plaintiffs communicated with the other parties in this matter. Counsel for Defendants State of Texas and Rick Perry oppose this motion. Counsel for MALC Plaintiffs, Perez Plaintiffs, Rodriguez Plaintiffs, Quesada Plaintiffs, and LULAC Plaintiffs do not oppose this motion. At the time of filing, counsel for the Texas Democratic Party Plaintiffs, the Congresspersons Plaintiffs, and the NAACP Plaintiffs had not responded.

/s/ Nina Perales
Nina Perales

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has electronically submitted a true and correct copy of the above and foregoing via the Court's electronic filing system on the 2nd day of August, 2013. The undersigned counsel hereby certifies that she caused a true and correct copy of the above and foregoing to be mailed to the persons listed below by the close of the next business day.

/s/ Karolina J. Lyznik
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