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

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

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MALC'S JOINT OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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It has been 3 years last month since this case has been on file. A lot can happen in three years. Three years ago Mack Brown was coaching the Longhorns, cruel fate had not wrenched a championship away from the San Antonio Spurs, and Johnny Manziel was just a kid from Kerrville-Tivy. More acutely in this case, three years ago, there was a wholly intact Voting Rights Act. Yet, after three years, Texas' tactics have not changed.

As always, it is instructive to look at the past. In 2011, the State of Texas against all rationality and fundamental decency enacted a state house redistricting plan that actually lowered the amount of minority opportunity districts by 10% (from 50 to 45). This was done, even though, 89.1% of the population growth in this State was minority population growth. Then, as now, the State proffered motions to dismiss and motions for summary judgment. After a quick trip to Washington D.C., a permanent injunction, and two primary election resets, this Court, at the urging of the plaintiffs in this matter, created an interim map that had 51 minority opportunity districts, completely reversing the State's actions. A few months later in August of 2013, the State of Texas set Voting Rights history by losing, not one but two, preclearance

actions against the United States in the District Court of the District of Columbia in one week. One was lost by a mile; a three-judge panel found that the State of Texas had actively discriminated against minority voters in creating its state senate and congressional map. There was also strong evidence of intentional discrimination found in the creation of the state house map.

For the sport's fans at home, that is three trials, two cities, and zero wins for the State of Texas. What was the State's reaction to this? Eternal optimists that they are, the State forged on. In June of 2013, in flagrant disregard of this Court's orders, the State sought to make the temporary court-ordered maps permanent. In the words of Attorney General Greg Abbott, "The best way to avoid **further intervention** from federal judges in the Texas redistricting plans, and ensure an orderly election without further delay or uncertainty, is to enact the interim maps during the regular session."[1](emphasis added). In a Special Session, the Legislature enacted these maps with some alterations. In the course of doing so, the State believes it has mooted all claims to those maps and "insulate[d] the State's redistricting plans from further legal challenge."

That brings us to now. The State brings yet another dispositive motion in this endless litigation in the attempt to yet again silence the voice of the minority community. Old arguments have been recycled, new precedents cited, and, now, new attorneys are making arguments, but the case remains the same. It comes down to this: the State refuses, once and for all, to take responsibility for its actions. Nothing will change the facts in this case, Texas will have to explain to this panel and to the minority community of Texas why it made the choices it did in 2011 and 2013.

Three years ago the State of Texas enacted a State House redistricting plan that reduced minority districts over the strong objections of the minority community. They did this using

[1] Letter to Speaker Straus from General Abbott – March 8, 2013. (Exhibit A)

every possible redistricting trick imaginable: over-populating Latino districts; splitting precincts along racial lines; maintaining a historically inaccurate and legally suspect devotion to the whole-county line rule; colluding with third-parties to try and control venue in future legal actions surrounding redistricting; packing minority districts; "nudging" already performing minority districts to meet false legal thresholds; drawing strangely shaped districts to avoid minority populations; impermissibly separating minority communities along racial lines; drowning large and cohesive minority communities of interest in oceans of Anglo voters in order to dilute the voting strength of Latino, Asian-American, and African American voters; and, creating false minority opportunity districts by replacing high turnout Latino precincts with low turnout precincts. This was not done in the name of partisan greed.[2] The only explanation is the most obvious. All of these actions were taken for a racially discriminatory purpose or to dilute the voting strength of the minority community. Even today, that is against federal law.

**Summary Judgment Generally**

The standard for summary judgment is clear and well-known: "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to summary judgment." Fed. R. Civ. P. 56(a). The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d

[2] There is evidence that the legislative leadership in 2011 treated Latino Democrats differently than African-American Democrats, there is also evidence that minority Republicans were treated differently than their Anglo counterparts, as well. For example, Rep. Torres, one of only 5 Latino Republicans in the Texas House in 2011, was paired in a district that empirically favored Rep. Connie Scott because the new district was largely based on Rep. Scott's previous Robstown centered house district in which she had run multiple times. This was done over the strong objections of Rep. Torres. *See generally* Raul Torres Dep. 35:15 – 41:20, October 17, 2011. (Rep. Torres has been paired with Rep. Connie Scott in a district that Mr. Torres knew that he could not win. The instructions for county delegations by Chairman Solomons was to work out situations like these within your delegation. Rep. Torres brought his concern to Rep. Hunter, but his concerns were ignored.)

538 (1986). Summary judgment is designed to isolate and dispose of factually-unsupported claims and defenses.[3]

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (emphasis added). Summary judgment is not warranted when the non-moving party has offered sufficient evidence to raise a question of fact with respect to the claim on which summary judgment is sought. *See, e.g., Colony Ins. Co. v. Peachtree Const., Ltd.* 647 F.3d 248, 254 (5th Cir. 2011) (vacating and remanding decision where fact issues precluded summary judgment); *Cates v. Dillard Dept. Stores, Inc., 624 F.3d 695* (5th Cir. 2010) (same). In addition, the Court should resolve factual disputes in favor of the non-movant where facts specifically averred by that party contradict facts specifically averred by the movant.[4]

Summary judgment may be appropriate when deciding issues of law. However, as here, questions of law and fact are often difficult to untwine.[5] These mixed factual situations, as with MALC's 14th & 15th amendment claims, as well as, our Section 2 evidence, may be inappropriate

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[3] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986)("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported "claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.")

[4] *Lujan* @ 888

[5] *See Pullman-Standard v. Swint*, 456 U.S. 273, 288, 102 S. Ct. 1781, 1790, 72 L. Ed. 2d 66 (1982) ("**The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law**.… Treating issues of intent as factual matters for the trier of fact is commonplace... [T]he principal question was whether the defendants had intentionally maintained a racially segregated school system at a specified time in the past. **We recognized that issue as essentially factual**...) (emphasis mine).

for summary judgment.[6] Generally, these factual disputes in mixed questions as to material factual issues should generally preclude summary judgment

Summary judgment is particularly inappropriate where allegations of intentional discrimination have been made, *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999), and in "extraordinarily fact-oriented issues" implicated in cases under Section 2 of the Voting Rights Act. *Velasquez v. City of Abilene*, 725 F.2d 1017, 1020 (5th Cir. 1984); *see also Fairley v. City of Hattiesburg*, 584 F.3d 660, 670 (5th Cir. 2009) ("[T]he need for a developed district court record is especially acute in VRA cases."). Because the instant litigation involves both claims of intentional discrimination and fact-intensive claims under the Voting Rights Act, summary judgment is not an appropriate method of resolution of the claims.

## 15th Amendment

Texas makes the false assertion that MALC's 15th Amendment claims stem solely from our vote dilution evidence. This is incorrect. MALC's 15th Amendment claim is based not on vote dilution, but rather intentional discrimination. Vote dilution is evidence of this racial discrimination. The Fifteenth Amendment to the United States Constitution guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. Amend. XV. While it is true that the Supreme Court has "never held that vote dilution violates the Fifteenth Amendment," *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n. 3 (2000), the Fifteenth Amendment also prohibits intentionally discriminatory legislative actions.

[6] *See e.g. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S. Ct. 3177, 3189, 111 L. Ed. 2d 695 (1990)(Plaintiff's standing to sue turned on activities of the plaintiff that were in dispute.); *Durham v. Business Management Assocs.*, 847 F.2d 1505, 1509-10 (11th circuit)(Whether or not the statute of limitations had expired depended upon the dispute between when plaintiff had received notice.)

*Mobile v. Bolden*, 446 U.S. 55, 62 (1980). In fact, in a case involving the deliberate screening out of a group of minority voters from the electorate, the Supreme Court specifically held: "When a legislature . . . singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1961) (emphasis added).

More to the point, recent precedents are unclear as to whether vote dilution is foreclosed from consideration as a 15th Amendment violation. *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elec.*, Case No. 1:11-cv-05065 (N.D. Ill. Nov. 1, 2011), Dkt. 98 at 13. The court in that case stated:

> [t]he language of § 2 of the Voting Rights Act, which forbids intentional vote dilution, "track[s], in part, the text of the Fifteenth Amendment." *Bartlett*, 129 S. Ct. at 1240; see, e.g., *Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (stating that the similarity in language of two statutes is "a strong indication that the two statutes should be interpreted par passu."). The Supreme Court hasn't decided whether the Fifteenth Amendment applies to vote dilution claims. *Voinovich*, 507 U.S. at 159. The language the *Board of Elections cites in Bossier Parish Sch. Bd.*, 528 U.S. at 334 n.3, doesn't resolve the issue; it simply keeps the issue undecided. As one court of appeals said, "We simply cannot conclude that the [Supreme] Court's silence and reservation on these issues clearly forecloses Plaintiffs' Fifteenth Amendment claim." *Page v. Bartels*, 248 F.3d 175, 193, n.12 (3d Cir. 2001).

As such, the Court's previous ruling on the Fifteenth Amendment vote dilution claim should be reconsidered and changed.

Even if this court decides, as a matter of law, that vote dilution claims do not implicate 15th Amendment actions, there is still ample evidence that the State of Texas intentionally discriminated against minority voters thereby "abridging" their right to vote.[7] Most importantly,

[7] This evidence will be described in greater depth in answering the 14th Amendment Claim.

there is actually evidence in this case that the State may have engaged in a scheme to deny certain Latino citizens their right to vote because of their race.

There is evidence that members of the Speaker's redistricting team colluded with attorney Michael Hull[8] to file a federal lawsuit that sought to treat Latino voters differently than citizens of other demographics.[9] The lawsuit asserted that the presence of undocumented immigrants in state house, state senate, and congressional districts had the effect of increasing the "Hispanic vote."[10] This assertion was made even though undocumented immigrants are of various races and demography and live throughout Texas, not just in Hispanic districts. The fact that complaint was consumed with only Hispanic voters and their relative voting strength in comparison to other voters is a telltale sign that the plaintiffs in *Teuber* and their confederates in the State were seeking an outcome that "single[d] out a readily isolated segment of a racial minority for special discriminatory treatment," which would have "violate[d] the Fifteenth Amendment."[11]

**Fourteenth Amendment**

As other parties have or will point out, there is not one shred of evidence proffered by the state to dispute the evidence presented by litigants as to the State's discriminatory purpose. Their request for summary judgment comes down to two arguments: 1) the maps that intentionally discriminated against minorities were never enforced ("no harm, no foul"), and 2) the maps that currently exist were created by this Court and could not possibly be discriminatory.

[8] *See* Interiano Deposition, Vol. 2 pp. 59-72 (Mr. Interiano describes his discussions with Mr. Hull and the filing of the Speaker's redistricting team's role in filing the *Teuber* law suit.)
[9] *See Teuber, et al. v. Texas*, No. 5:11-cv-572-OLG-JES-XR (W.D. Tex., filed Feb. 10, 2011)
[10] *See Teuber Plaintiffs Original Complaint* at ¶ 22. ("Further, the inclusion of **undocumented immigrants in the U.S. Census might have the purpose and effect of strengthening the Hispanic vote**, and if so this practice could violate the equal protection and due process guarantees of the Fourteenth Amendment and Fifteenth Amendment to the United States Constitution, Section 2 of the Voting Rights Act, and Article I, Sections 3, 3a, 19, and 29 of the Texas Constitution.")
[11] *Gomillion* at 346.

Like a child caught with its hand in a cookie jar, the State asks this Court to forget the mountains of evidence from the first two trials and focus instead on the fact that the bad acts were never enshrined in law. Let's put aside for a moment the fact that Plaintiffs like MALC had to spend hundreds of thousands of dollars, expend years of work, and fight tooth and nail to prevent the implementation of these plans. Never mind that when the plaintiffs sought interim fees based on the defeat of the enacted plan and the improvement of the court-ordered temporary plan, the State said no party had prevailed. Now, the State is claiming the plaintiffs' victory as inoculating them from a remedy that they richly deserve.[12]

If this is true, then it would lead to the following paradox. Any jurisdiction that had been enjoined by a temporary or permanent injunction from implementing an election change because of strong evidence of intentional discrimination would necessarily be inoculated from violations of the 14th Amendment as a matter of law. This would be especially true for the worst kinds of actors. So, the stronger the case initially (i.e. the more likely that a permanent injunction could be ordered), the less likely it would be to be remedied. The corollary is also true. Bad cases with poor facts that do not rise to the level of injunction would be the ones ripe for ultimate intentional discrimination remedies like bail-in under Section 3(c). This is the State's Orwellian vision for Texas' voting rights future. Good cases won't ultimately protect voters from a uniquely bad actor and bad cases are the only situations ripe for remedy under the voting rights act's bail-in provision. Up is down. Left is Right. We've always been at war with Eastasia.

If this is an accurate vision of the future of voting rights enforcement, it would functionally nullify the Voting Rights Act. Because, the artful voting rights practitioner would

[12] Lee Rosten, a Jewish humorist, once wrote in his book, "The Joys of Yiddish", that "chutzpah" was "that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan." Rosten might have made a good voting rights attorney.

hold back on injunction await the impact of the discriminatory practice and proceed accordingly to bail-in. So, the effect would be more people harmed by offending jurisdictions, not fewer. That seems at odds with the purpose of the Act.

More to the point, the State's actions have harmed minority voters. Discrimination doesn't just harm voters solely through implementation. A state seeking and enacting a fundamentally unjust and racist law does immeasurable damage to the society that allows it whether or not it is ever truly implemented. Inchoate crimes are still crimes. Intentional discrimination enshrined in law is harmful to the Republic regardless of their implementation. MALC would appreciate the opportunity to prove that.

Even if this Court were inclined to believe that an unimplemented law[13] does no harm and, therefore does not foul, there **is** specific evidence of harm. Minority voters participated in districts that continue to diminish their ability to effectively participate in the electoral process. West Texas Latino voters continue to have no option but to cast their votes in districts in which no opportunity exists for meaningful participation. Yet, growth over the decade in West Texas has been primarily Latino. Latino voters resided in geographically compact areas of West Texas large enough to comprise a majority if not divided into separate districts. Texas House districts in Bell County, Tarrant County, Dallas County, McClellan County and Fort Bend County fragment minority so that their vote is diminished when compared to Anglo voters. Nueces County Latino voters had their vote diminished, even though Latino population growth exceeded Anglo population growth. All of these districts were developed in the 2011 plans and carried forward in recent elections. That is direct harm regardless of implementation.

[13] The redistricting plans were in fact, to a large degree enforced and used in elections. The 2013 plans are heavily derived from the 2011 plans, given the deferential standard required by the application of *Perry v. Perez*

Summary Judgment is also inappropriate for intentional discrimination claims. The Texas legislature is the prime actor here, and a "legislature's motivation is itself a factual question." *Hunt v. Cromartie*, 526 U.S. at 546; see also *Prejean*, 227 F.3d at 509 ("Legislative motivation or intent is a pardigmatic fact question").

In this context, resolution of claims of intentional discrimination is not appropriate at the summary judgment stage given the fact-sensitive nature of the Court's inquiry, and the disputes over inferences that may or should be drawn from those facts. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266; see also *Cromartie*, 526 U.S. at 546 ("The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor . . . ."). In *Cromartie*, the Supreme Court reversed the trial court's award of summary judgment in an intentional discrimination case, explaining that it was error to have resolved "the disputed fact of motivation" at that stage, 526 U.S. at 552, and remanded the case for trial. In the same fashion, and for basically the same reasons, this Court should deny Defendants' summary judgment motion on intentional discrimination claims and proceed to trial on the merits.

Joint Plaintiffs have proffered more than sufficient evidence, disputed though it may be by the State (although not with an identification of the dispute in its motion), to warrant a rejection of the State's motion for partial summary judgment on this ground. A summary brief of this evidence is here:

| Intentional Discrimination | Source |
|---|---|
| Systematic overpopulation of Latino House districts where possible | MALC Exhibit 19 – Expert Report by Dr. Morgan Kousser. |
| Splitting precincts along racial lines | Precinct Splits in Hidalgo, Dallas, Ft. Bend |

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| | Counties in the State House Map (See Attached exhibit) |
| Maintaining a historically inaccurate and legally suspect devotion to the whole-county line rule; | Archer Deposition 122:10-143:13 (Mr.Archer describes the numerous historical deviations in previous redistricting maps concerning the Whole County Line Rule). |
| Colluding with third-parties to try and control venue in future legal actions surrounding redistricting. | Interiano Deposition, Vol. 2 pp. 59-72 |
| Packing minority districts | MALC Exhibit 19 – Expert Report by Dr. Morgan Kousser. |
| "Nudging" already performing minority districts to meet false legal thresholds | MALC Exhibit 19 – Expert Report by Dr. Morgan Kousser |
| Treating African American members of the Legislature differently than Latino members | |
| Impermissibly separating minority communities along racial lines | Email from Ryan Downton to Gerardo Interiano 5/28/2011 LP000195 (Describing Downton's intent to "keep the Black population together in [CD] 12" in order to keep it separate from the Latino population in Fort Worth) |
| Coupling Latino and African communities to larger Anglo populations | For example, Nueces Counties Latino voters in CD 27 in both the 2011 & 2013 maps. |
| Creating false minority opportunity districts by replacing high turnout Latino precincts with low turnout precincts | Email from Eric Opiela to Gerardo Interiano 11/19/2010 DEFPRIV000221 |

The State's argument as to the maps enacted in 2013 centers on the Legislature's adoption of the court-ordered map. Intentional discrimination is not washed away by reenactment. Murder cannot be absolved by resurrection. To begin with the court-ordered map was not a final determination of any claims. It was a temporary map issued by this court so that Texas could have an orderly election schedule. In order to defeat the assertions of plaintiffs, the State suggests that legislators wanted to adopt these maps in order to end this matter. If that were true, then doing nothing would bring faster finality. The State knew or should have known that

enacting a new legislative statute would bring future litigation, because after *Shelby* and the vacated rulings in DDC, this court would then have the authority to issue its Section 2 remedies. In other words, we would be done by now.

No. The State's real motivation was the need to avoid further intervention by federal judges. See Attachment. Why would they want to avoid intervention? Because, Texas feared that this panel might find intentional racial discrimination in Texas' enactments and seek a fuller remedy including solutions to racial gerrymanders and provide Section 3(c) relief. In order to enact this plan, the State deviated substantially from normal procedure:

- Governor's call was limited to just enacting the court-adopted interim map (a move that the Legislature later recanted. The uncertainty made it difficult to prepare for the special session);
- No Calendar rule was adopted for the consideration of the redistricting bills, which meant little notice for amendments and worse preparation;
- The Attorney General's representative did not appear before the committee despite being requested to appear by members of the committee. Yet, a representative from the Attorney General was present at a Republican Caucus meeting during the debate in which amendments were discussed;
- No resources or counsel was provided to the House Committee on Redistricting even though the Senate Redistricting Committee had those resources;
- HB 3, word for word the same bill as SB 3, was defeated in committee, yet SB 3 was passed. This has almost never occurred and has never occurred with redistricting;
- The rationale for accepting amendments changed without notice. At first, Chairman Darby said no amendments. Then, he said only legally necessary amendments. Finally, he said amendments that have been agreed to will be accepted. Little notice was given for these changes in direction.
- Even though Chairman Darby said that he would accept agreed to amendments, he declined to accept an amendment that was agreed to by two Latino lawmakers in El Paso County.
- In Committee, an agreed to amendment by Rep. Vo was defeated despite his assertion that he and Rep. Murphy had reached a deal involving only their two districts. Rep. Huberty called Murphy and asserted that the deal did not exist. Later the Vo amendment was accepted.

In sum, these deviations from normal procedure coupled with the stated intent to avoid further intervention from federal judges, all the while making no effort at all to address Plaintiffs' and minority voters concerns with other areas of the maps, illustrates an intent to avoid a bail-in remedy. This is exactly the kind of recursive policymaking that Section 5 sought to prevent. It is exactly the mindset that MALC intends to probe, and is evidence of intentional racial discrimination.

## Section 2 Districts

At the outset, it is important to note that the State has failed to attack the demographic numerosity, geographic compactness, or presence of racially polarized voting in any proffered Section 2 district. The State has not attacked the totality of circumstances evidence offered by MALC and other plaintiffs during the first trial. If the state had evidence to contradict these points, it would be presented in this motion. The absence of this contra-evidence is proof positive the State's sole defense against MALC's Section 2 districts is their perverse interpretation of voting rights law. To date, there are only two arguments made by the State as to these districts: 1) coalition districts are not required districts, and 2) the whole county line rule is sacrosanct over federal law. MALC disagrees.

### Coalition Districts

Contrary to Defendants' assertion, the Supreme Court did not answer the question of whether coalition districts might be compelled under the Voting Rights Act in *Perry v. Perez*, 132 S. Ct. 934 (2013). Rather, the Court established new guidelines for the implementation of court-drawn interim plans where the enacted plans could not be used. The Court directed that district courts engaged in such activities must make findings akin to preliminary injunction

findings—that plaintiffs must demonstrate a likelihood of success on the merits. Id. at 941-42. This Court had purposely avoided making such findings, believing that it was constrained from making such findings until the Section 5 proceedings had been completed. Order, Dkt. 528, at 4 (Nov. 23, 2011).

In its decision, the Supreme Court was not commenting on the legal theories underpinning the claims, but rather the articulated basis for districts changed in the interim plan, noting that "[s]ome specific aspects of the District Court's plans seem to pay adequate attention to the State's policies, others do not, and the propriety of still others is unclear." 132 S. Ct. at 943. The Supreme Court's fault with the first interim plans was that "the court did not say that those allegations were plausible, much less likely to succeed." Id. at 944. "Without such a determination, the District Court had no basis for drawing a district that does not resemble any legislatively enacted plan." Id. Thus, with regard to the CD 33 coalition district, when the Supreme Court said that the District Court "had no basis" for purposely drawing that district as a coalition district, it was not making any judgment about whether the district had been in fact purposefully so drawn as a coalition district or was the normal result of following redistricting principles. *Id.* It certainly was not making any judgment that coalition districts could never be justified. *Id.*

Even if this Court were inclined to give weight to the State's law of the case argument, trial would afford the parties an opportunity to present additiona and new evidence, new actors, and new maps. Ironically, the State's actions adopting new maps gives rise to a new opportunity to revisit the minority cohesion arguments of the plaintiffs.

There are short-hand arguments that the State expresses with absolute certainty that have no basis in law. It is untrue that coalition districts are completely foreclosed from consideration

under Section 2. Despite the State's confidence, their cited precedents show the cracks in the armor.

| Precedent | Differentiation |
|---|---|
| "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." See *Perry*, 132 S.Ct. at 944 | Answered above. |
| "Nothing in § 2 grants special protection to a minority group's right to form political coalitions." *Bartlett*, 129 S.Ct. at 1243 | *Bartlett* was focused on cross-over districts in which there was no minority-majority districts. |
| "If section 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional problems." *LULAC v. Perry*, 548 U.S. at 446 | LULAC was focused on influence districts in which a minority combines with Anglo cross-over:<br><br>"As the Court has done several times before, we assume for purposes of this litigation that it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population…. Anglos made up 49.8% of the CVAP. African Americans were only 20 %. … In short, that Anglo Democrats control this district is," according to the District Court, "the most rational conclusion." *Id.*, at 484. |
| "A minority group lacking a majority cannot elect its candidate of choice, and denying the group a separate district cannot be a denial of any opportunity protected by the Act." *Session v. Perry*, 298 F.Supp.2d 451, 483 (E.D. Tex. 2003) | Again this precedent is focused on old CD 24, which was an Anglo Democrat controlled district. It was 49.8 % Anglo CVAP. |

In short, the State cannot point to one precedent in which a minority-majority district with evidence of minority cohesion was denied creation under Section 2. The reason why this is true is that it is a truly unique factual situation. Most States are not blessed with Texas' cultural

diversity. There are very few states that can create meaningful and performing majority-minority districts. Texas can. MALC can also prove that these voters vote together in Bell & Ft. Bend Counties.[14]

Despite the high Court not directly speaking on the issue, a number of lower courts, including at least five cases from the 5th Circuit Court of Appeals, have found that minority groups can be aggregated for the purpose of asserting a Section 2 claim. See *League of United Latin Am. Citizens Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (rehearing en banc), cert. denied 114 S. Ct. 878 (1994) ("[i]f blacks and Hispanics vote cohesively, they are legally a single minority group"); *Overton v. City of Austin*, 871 F.2d 529, 538 (5th Cir. 1989) (concluding that Section 2 permitted the court to order as remedy a district in which Mexican-Americans, although not a majority, could be aggregated with blacks to achieve such a result, if the two groups could be shown to be politically cohesive and that Anglos voted in bloc); *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) ("minority groups may be aggregated for purposes of claiming a Section 2 violation"); *Campos v. City of Baytown*, 840 F.2d 1240, 1244-45 (5th Cir. 1988) ("a (coalition) minority group is politically cohesive if it votes together") reh'g denied, 849 F.2d 943, cert denied, 492 U.S. 905 (1989); *League of United Latin Am. Citizens Council No. 4386 v. Midland ISD*, 812 F.2d 1494, 1501-02 (5th Cir. 1987), vacated on other grounds, 829 F.2d 546 (5th Cir. 1987) (en banc). Other circuits considering the issue have agreed, see, e.g., *Badillo v. City of Stockton*, 956 F.2d 884, 891 (9th Cir. 1992); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906 F.2d 524 (11th Cir. 1990); *Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739, 746 (D.C. Mass. 1985), aff'd, 784 F.2d

[14] See Expert Report by Dr. Robert Brischetto

409 (1st Cir. 1986). To date, the only circuit to take a contrary position is the 6th Circuit in *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc).

Specifically, in Brewer v. Ham, 876 F.2d 448 (5th Cir. 1989), the Fifth Circuit reaffirmed its holding in *Campos v. City of Baytown*, 840 F.2d at 1244-45, that minority groups may be aggregated for purposes of asserting a Section 2 violation and establishing the first prong of Gingles. *Brewer*, 876 F.2d at 453. The Fifth Circuit affirmed this position on coalition districts. in *LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (rehearing en banc), the Fifth Circuit noted: "we have treated the issue as a question of fact, allowing aggregation of different minority groups where the evidence suggests that they are politically cohesive, and we need not revisit this question here." *Id*. at 864 (internal citations omitted). The law in the Fifth Circuit remains that if plaintiffs can prove all the *Gingles* factors and make a case for a remedy under the totality of the circumstances, different racial minority groups can be aggregated to satisfy the first prong of *Gingles*.

Finally, even if this Court believes that Section 2 does not require the consideration of minority-majority districts, this does not preclude their consideration as solutions to a racial gerrymander.[15]

**The Whole County Line Rule**

The State Asserts that the Whole County Line Rule prevents the creation of MALC's proposed Section 2 districts in PLAN H 321 & PLAN H 329. Further, the State alleges that MALC is asking the State to abandon the whole county line rule and to impermissibly draw districts based on racial considerations. These allegations are baseless. MALC has not asked the

[15] This Court outlined the procedure by which it determined that CD 33 in the interim map was not a coalition district but a solution to a racial gerrymander. MALC believes that HD 54 and HD 26 fit into this category, as well.

State to abandon the whole county line rule. MALC has shown how five county cuts can create three new Latin majority districts in Lubbock, Midland & Ector, and Nueces & Kleberg Counties. More importantly, there is not one iota of evidence proffered by the State to show that MALC has created racial gerrymanders in disregard to the 14th Amendment's dictate. There is no indicia of racial intent in these districts. There are few, if any precinct splits. There are not strange shapes that seek to avoid Anglo population. Indeed, our geographic compactness scores for these districts rival the State's.

The districts are all Latino majority in CVAP, which is the Fifth Circuit's preferred metric to measure whether a minority community is sufficiently large so to qualify under *GinglesI*. In addition, there are no claims as to the geographic non-compactness of these districts. If MALC proves that through evidence the totality of the circumstances and racially polarized voting, then the districts should lead this Court to address the deficiencies in the map.

| District/ Plan | HCVAP |
|---|---|
| HD 32/PLAN H 329 | 59.5 %, *See* State's Motion for Summary Judgment Exhibit A-20 |
| HD 81/ PLAN H 329 | 55.3 %, *See* State's Motion for Summary Judgment Exhibit A-20 |
| HD 88/ PLAN H 329 | 50.9 %, *See* State's Motion for Summary Judgment Exhibit A-20 |

The Whole County Line Rule should not prevent the creation of these districts for five main reasons: 1) the Whole County Line Rule has been deviated from in the past in order to comply with federal law and protect minority voters, 2) the Whole County Line Rule should yield to federal law because of the Supremacy Clause, 3) the State's new found devotion to the Whole County Line Rule is evidence of racially discriminatory intent, 4) the Whole County Line

Rule conflicts with other portions of the Texas Constitution, and 5) Counties are arbitrary units of geography.

The Whole County Line Rule has given way to federal law since 1973. In each map since *White v. Regester*, counties have been split to comply with the "one person, one vote" standard. Counties have also been split, just to make the map's puzzle work.[16] Often the use of surplus populations in counties was split between counties. There are several cases of counties that are split who are insufficiently large to constitute multiple districts. In the past forty years, every map has contained deviations from the whole county line rule.

The Whole County Line Rule must yield to federal law in factually specific situations. In the words of Jeffrey Archer, interim executive director for the Texas Legislative Council:

> "So in the case of a -- a minority population that votes as a block and is consistently outvoted by polarized voting, by surrounding voters that happened to be on a county line, in the absence of crossover voters in adjacent counties, or some other factor, there could be a scenario -- the ideal scenario would be to isolate a population right on a county line. With it, you have a minority district. There's no way to draw districts that give those voters or similar voters opportunity to elect candidates of their choice for that minority district, and that retaining that split would -- in the same way the multi-member districts did, there's the other example, that -- Jingles is the perfect example, federal law supreme. I don't know that the law -- the state law at the time required multi-member districts in -- was it North Carolina, or if it just allowed them. But the practice of multi-member districts had to yield to federal law, when you had the insular minority population, the three factors in Jingles; the size, the polarized voting and the political cohesiveness of those minority voters. **So in that scenario by itself, I would advise a person to take a long look at that and determine whether that was a Section 2 violation. It could well be a Section 2 violation.**" Archer Deposition, pp. 150 -151.

[16] Archer Deposition 122:10-143:13 (Mr.Archer describes the numerous historical deviations in previous redistricting maps concerning the Whole County Line Rule).

Texas only points to *Bartlett* as a decision in which the whole county line rule was maintained. That case is inapplicable here, because the jurisdiction in *Bartlett* split a county to preserve an African American districts in which minorities were not a majority of the district. *Bartlett* certainly makes no long term pronouncements about the sanctity of whole county provisions. More to the point, as was shown at trial, both Jeff Archer and David Hanna believe that the Whole County Line Rule should yield to Section 2 in certain factual scenarios. Since there are fact scenarios in which Section 2 might trump the whole county line rule, this renders this summary judgment motion a nullity on this score.

More to the point, Texas' new found love for its Constitutional provisions is further evidence of racial discrimination. As described by Jeff Archer in his deposition, there are so many deviations from the whole county line rule that they are difficult to count. The State's evangelism on this issue at a time of rampant minority growth is suspect. Far from being race-neutral, reinterpretation of previously used standard that is inapposite of the advice given to you by legal counsel is intent evidence. None of the staffers in charge of the redistricting process looked to previous maps to determine Texas' historical lassitude in relation to the Whole County Line Rule. These recent converts to the cult of the County Line deployed this standard to explain away all manner of legislative sins from denial of minority opportunity to strange population deviations.

Most importantly, the Whole County Line Rule conflicts with other provisions of the Texas Constitution, namely Amendment 3A, Texas' Equal Rights Amendment. Amendment 3A provides more expansive protections than the 14th Amendment of the United States Constitution. This is especially true as to voter dilution. The conflict between these two provisions must be

rectified on the side of the most recently issued law change. Therefore, at least to voter dilution claims, the Whole County Line Rule must yield to Amendment 3A of the Texas Constitution.

Lastly, Counties are arbitrary geographic units that were created, at least partially, to dilute the voting strength of Latinos in Texas. Far from having a race neutral background, counties were carved with racialized intent in mind. It is tragically ironic that the State now deploys it to defeat the voting strength of the minority community. These are all issues of fact that cut against the importance and necessity of the Whole County Line Rule.

More to the point, these are all reasons why this summary judgment motion should be denied.

## Conclusion

For all of the foregoing reasons, MALC respectfully request that this Court deny Defendants' motion for partial summary judgment.

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Respectfully submitted,

/s/ Jose Garza

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**ATTORNEYS FOR MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REP. (MALC)**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 9h day of June, 2014, I electronically filed the foregoing using the CM/ECF system which will send notification of such filing to all counsel of record who have registered with this Court's ECF system, and via first class mail to those counsel who have not registered with ECF.

_____/s/ Jose Garza_____
JOSE GARZA