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

SHANNON PEREZ, ET AL., *Plaintiffs* VS. STATE OF TEXAS, ET AL., *Defendants.*	§	Civil Action No. 11-CV-360-OLG-JES-XR [Lead Case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, (MALC) *Plaintiff*, VS. STATE OF TEXAS, ET AL., *Defendants*.	§	Civil Action No. 11-CV-361 OLG-JES-XR [Consolidated Case]
TEXAS LATINO REDISTRICTING TASK FORCE, ET AL., *Plaintiffs*, VS. RICK PERRY, *Defendant*.	§	Civil Action No. 11-CV-361-OLG-JES-XR [Consolidated Case]
MARGARITA V. QUESADA, ET AL., *Plaintiffs*, VS. RICK PERRY, ET AL., *Defendants*.	§	Civil Action No. 11-CV-592-OLG-JES-XR [Consolidated Case]

JOHN T. MORRIS, *Plaintiff,* VS. STATE OF TEXAS, ET AL., *Defendants.*	§	Civil Action No. 11-CV-615-OLG-JES-XR [Consolidated Case]
EDDIE RODRIQUEZ, ET. AL., *Plaintiffs,* VS. RICKY PERRY, ET. AL. *Defendants.*	§	Civil Action No. 11-CV-635-OLG-JES-XR [Consolidated Case]

TEXAS DEMOCRATIC PARTY AND GILBERTO HINOJOSA'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS (Dkt. 995)

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW Texas Democratic Party and Gilberto Hinojosa, in his capacity as Chair of the Texas Democratic Party (hereinafter collectively referred to as "TDP"), in the above entitled and numbered cause, and files this Response to Defendants' Motion to Dismiss (Dkt. 995) and would show this Honorable Court as follows:

INTRODUCTION

A majority of the Supreme Court has already rejected Texas's argument that partisan gerrymandering claims are not justiciable. As even Texas concedes, the plurality in *Vieth v. Jubelier* could not get five votes for the very proposition that Texas raises once again in this proceeding. 541 U.S. 267 (2004). Justice Kennedy's concurrence expressly left the courthouse doors open to partisan gerrymandering claims like those advanced by TDP here, explaining,

"That no standard has emerged in this case should not be taken to prove that none will emerge in the future." *Id.* at 311 (Kennedy, J., concurring in judgment). And four other Justices believed that a workable standard already existed, although they disagreed as to the contours of that standard. These opinions in *Vieth* foreclose Texas's attempt to dismiss the partisan gerrymandering claims on the basis of justiciability.

In any case, the constellation of facts here results in an extreme partisan gerrymander that is evident on its face. The combination of the process by which the Republican leadership came up with the plan; the statistics developed by Dr. Michael P. McDonald; the fracturing of minority communities in compact metropolitan areas like Austin and Fort Worth; the resulting utterly bizarre shape of the districts drawn in contravention of traditional districting principles; and the failure to recognize the source of the population growth that resulted in additional congressional seats all support the finding of an extreme partisan gerrymander here. Nor was the Republican leadership attempting to remedy a previous Democratic gerrymander. TDP submits that the Supreme Court's concern over an applicable standard for partisan gerrymandering cases is not at issue in this case because the state's witnesses admit the motivation for the plan was to target Democrats as a class and therefore undermine the power of their vote. Indeed, Texas' main, if not sole, response to the claims made by other Plaintiffs of intentional racial discrimination is to argue that it was not racial discrimination at work but merely partisan discrimination. Citizens should not have their votes diluted solely on the basis of their political beliefs. And that is precisely what this Court will hear during the trial of this case.

LEGAL STANDARD

Texas has moved pursuant to Rule 12(b)(1) and 12(c) to dismiss TDP's partisan gerrymandering claims. Although it is true that the TDP bears the burden of proof in responding

to the motion, that burden is easily satisfied here. The court may not dismiss for lack of subject matter-jurisdiction "unless it appears certain that the plaintiff[s] cannot prove any set of facts in support of [their] claim which would entitle [them] to relief." *Hobbs v. Hawkins*, 968 F.2d 471, 475 (5th Cir. 1992) (alterations in original) (internal quotation marks omitted). Moreover, the court must take as true all of the allegations of the complaint and the facts set out by the plaintiff in considering this motion. *See Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 553 (5th Cir. 2010). These facts plainly demonstrate that the TDP has established a justiciable partisan gerrymandering claim.

ARGUMENT

I. A MAJORITY OF THE SUPREME COURT HAS CONFIRMED THAT PARTISAN GERRYMANDER CLAIMS ARE JUSTICIABLE

At the outset, Texas confuses the question of whether TDP's partisan gerrymandering claims are *justiciable* and whether TDP ultimately will prevail on the merits. The result in *Vieth* makes clear that the partisan gerrymandering claims remain justiciable. In emphasizing that the plurality would have held that the issue is nonjusticiable, Texas discounts the fact that the Supreme Court has never so held even though the question has been clearly presented. Justice Kennedy expressly "reject[ed] the plurality's conclusions as to nonjusticiability," *Vieth*, 541 U.S. at 311 (Kennedy, J., concurring in judgment), and left the courthouse doors open so that workable standards could "emerge," *id.* at 317. And four other Justices believed that manageable standards existed but could not agree on precisely what test to use. Thus, these opinions have established that partisan gerrymandering claims remain justiciable.

Texas makes up out of whole cloth the idea that the opinions in *Vieth* somehow required that plaintiffs asserting a partisan gerrymandering claim must set forth a specific partisan

gerrymandering standard to get to trial. Nothing in Justice Kennedy's opinion in *Vieth* forecloses the development of the contours of a standard based on the particular facts before the court. Indeed, that a trial would be needed to develop the facts logically follows from the principles suggested in Justice Kennedy's opinion. For challenges under the Fourteenth Amendment, Justice Kennedy explains that "a subsidiary standard could show how an otherwise permissible classification, as applied, burdens representational rights, [and] we could conclude that appellants' evidence states a provable claim under the Fourteenth Amendment standard." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in judgment). This language links the development of a standard to the presentation and evaluation of evidence, which is best accomplished at trial. So too Justice Kennedy linked a First Amendment challenge to a partisan gerrymander to the development of a factual record: "If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest." *Id.* at 315. Although Justice Kennedy did note that this First Amendment analysis first would require the availability of a manageable standard, *id.*, notably he did not require that the standard must be developed before trial. For these reasons, Texas's motion to dismiss on justiciability grounds is unfounded.

Each of these inquiries is best developed at trial with the full facts before this Court. Hearing this claim will not cause any undue burden on opposing counsel or this Court. TDP has indicated that they will call one expert witness on the partisan gerrymandering issue only by deposition. TDP will also present evidence of partisan intent culled from the witnesses called by other parties and by deposition excerpts and produced documents. This presentation is a narrow one and will ensure protection for one of the "most serious claims" in the long tradition that "'the

right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'" *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in judgment) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938)). Therefore, Texas's Motion to Dismiss should be denied.

II. THE CONSTELLATION OF FACTS HERE DEMONSTRATES A PARTISAN GERRYMANDER

Even if this Court were to require the presentation of a standard before trial – which it should not – TDP has presented a constellation of facts, which must be taken as true, and which demonstrate an extreme partisan gerrymander. In *Vieth*, Justice Kennedy explained that plaintiffs must show either that "an otherwise permissible classification, as applied, burdens representational rights" under the Fourteenth Amendment or that "an apportionment has the purpose and effect of burdening a group of voters' representational rights" under the First Amendment. 541 U.S. at 314. In the First Amendment Context, Justice Kennedy explained that voters should be protected from being "burden[ed] or penalize[ed] because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Id.* at 314. None of the factors described below is either necessary or dispositive standing alone. But together they show the Republican leadership's invidious intent in applying partisan classifications in a way unrelated to any legitimate legislative objective. This partisan gerrymander imposed a burden on Democratic voters because of their past representational choices, and it did so by favoring voters for Republican candidates while disfavoring voters for Democratic candidates so as to dictate electoral outcomes in an affront to basic democratic values. *See, e.g., Cook v. Gralike*, 531 U.S. 510, 523 (2001) (holding that state legislatures may not use their power under the Elections Clause to "dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional

restraints"); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995) (same). Indeed, those who drew the congressional plan for the Texas (including incumbent Republican Members of the Congressional Delegation) made clear that their goal was to create 26 districts that would be under the clear control of Republican voters. The Defendants saw two types of districts in their plan: Voting Rights Act districts and Republican districts. To achieve their goal of 26 Republican controlled congressional seats, Defendants intentionally limited the number of districts in which minority voters would have effective opportunity to elect their preferred candidate to ten districts. In so doing, and because minority voters in Texas largely vote for Democratic candidates, the State intentionally disfavored the candidates of choice of minority voters.

The Republican leadership's exclusion of Democratic representatives from the legislative process of redistricting, as well as the general public, is another indication of the extreme partisan gerrymander that likely also was linked to race. The Republican leadership did not extend opportunities for meaningful and effective participation in the planning to those state legislators elected by Democratic voters or to the general public. During the regular legislative session, only one hearing on congressional redistricting was convened in the House Committee and only one hearing was convened in the Senate Committee. No opportunity for meaningful opportunity comment on a congressional plan was available at either. Indeed, in the House Redistricting Committee hearing, no public testimony was even allowed. Legislators who represent Democratic voters were not given an opportunity to review or discuss the plan with the Republican leadership until *after* the leadership had already agreed to a map. Indeed, on May 28, 2011, the Tribune reported that Governor Perry would only call legislators back for a special session "when they get to an agreed bill." Democratic members of the House and Senate, and on

the two legislative redistricting committees, never saw the plan until it was made public on Tuesday, May 31, 2011. The failure of state officials to provide a meaningful opportunity to participate effectively in the redistricting process was a procedural and substantive departure from past practices in Texas. In past redistricting cycles, State of Texas legislative redistricting committees went around the State with proposed redistricting plans and permitted members of the public, as well as elected representatives of Democratic communities, to have input into the redistricting process. This departure from ordinary procedural practices to foreclose all but the Republican leadership from meaningful input into the process is an indication of an extreme partisan gerrymander. Indeed, Democrats in the Texas Legislature were effectively excluded from the process.

The defects in the 2011 plan were preserved except for those changes ordered by this Court. The 2013 plans retain much of the defects of the 2001 plan and therefore much of the damage inflicted upon voters who were targeted simply because they supported Democratic Nominees in the past, has been preserved in the 2013 plans.

TDP' expert, Dr. McDonald, developed statistics based on aggregate statewide election returns within proposed and alternative districts, which "clearly illustrates the burdens that partisan gerrymanders place upon voters and political parties." McDonald Report at 1, Dkt. # 961. Based on his analysis as outlined in his report and detailed in the accompanying Appendix, Dr. McDonald found that the 2013 plans represent extreme partisan gerrymanders. Dr. McDonald's conclusion is supported by the map drawers' own testimony that the contours of the lines were developed mainly on the basis that the leadership wanted to draw Republican districts.

The extreme partisan gerrymander is also evident in the Republican leadership's intentional maintenance of redistricting plans that fracture compact minority population

concentrations in metropolitan areas in Texas, with large concentrations of Democratic voters, such as Austin and Forth Worth, and the resulting bizarre shapes of the districts in those areas in contravention of traditional districting principles. This pattern is especially telling because it ignored the fact that growth in the African-American and Hispanic communities, which have historically voted for the Democratic Party, drove approximately 90 % of the State's growth between 2000 and 2010, which resulted in the addition of four congressional seats. *Cf.* Dr. Allan Lichtman Report at 1, Dkt. # 968 (concluding that African-American and Hispanic voters vote cohesively in favor of Democratic party candidates). Defendants splintered existing political subdivisions in violation of traditional redistricting principles. *See Shaw v. Reno*, 509 U.S. 630, 647 (1993).

Nor was the Republican leadership motivated by the arguably legitimate political goal of attempting to remedy a previous Democratic gerrymander. In *LULAC*, the Supreme Court noted that the Republican leadership had acted to counteract the "continuing influence of a court-drawn map that 'perpetuated much of the [1991] gerrymander.'" 548 U.S. at 412 (alterations original); *see also id.* at 419 (Kennedy, J.). Here, the benchmark map no longer bore the mark of what was claimed to be previous Democratic gerrymanders, because the benchmark map already over-represented Republicans relative to their vote share. Instead, the Republican leadership acted to further deepen that disparity. These actions are contrary to Justice Kennedy's recognition that "although there is no constitutional requirement of proportional representation . . . a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority." *Id.* Republican candidates for statewide office between 2000 and 2010 receive around 57% of the statewide vote, on average. State of Texas officials knew these numbers before they drew the

map and yet drew the 2011 congressional map in a way designed to bring about a result in which Republicans will control 72% of the congressional districts (26 of 26). Such a result grossly distorts Republicans' share of the representation.

Although none of these factors is either necessary or dispositive, they are certainly enough to survive a motion to dismiss as they demonstrate an egregious partisan gerrymander. The broadest standard is the "'well developed and familiar standard,' that these legislative classifications 'reflec[t] *no* policy, but simply arbitrary and capricious action.'" *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring). Based on the particular context of the Texas's Plan, the legislative classifications based on partisan affiliation – as filtered through the even more impermissible proxy of racial classification – has no legitimate policy. Like the early obscenity cases, courts will know a partisan gerrymander that is so extreme that it is arbitrary and capricious when they see one. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). And that is precisely what this Court will see here. What happened in Texas in 2011, and continued in 2013, was not simply legislative leaders going about their business of redrawing congressional boundaries in accordance with traditional redistricting principles.

The unusual closed procedure used by the Republican leadership, coupled with the statistical showing of the unnecessary burden on Democratic voters, the fracturing and packing of minority communities that have voted for the Democratic Party in contradiction of traditional districting principles, and the lack of any need to remedy a previous Democratic gerrymander, show that the Republican leadership had no legitimate policy for applying these partisan classifications.

CONCLUSION

For the reasons set forth below, the Defendants' Motion to Dismiss the partisan gerrymandering claim should be denied.

Dated this 9th day of June, 2014.

Respectfully submitted,

By: */s/ Chad W. Dunn*

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