UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, et al.	§	
	§	
Plaintiffs	§	
	§	CIVIL ACTION NO.
v.	§	5:11-CV-0360-OLG-JES-XR
	§	[Lead Case]
STATE OF TEXAS, et al.	§	
	§	
Defendants	§	

PEREZ PLAINTIFFS' TRIAL BRIEF

The Perez Plaintiffs hereby submit their Trial Brief as follows:

Introduction

One consistent element of Texas redistricting is duplicity. It may take different forms from year to year but it is always present.

For example, in the 1964 case of *Kilgarlin v. Martin*, 252 F. Supp. 404 (1966), the court "was assured by the defendant that the State's policy limits the size of any multi-member district to fifteen Representatives" and that "any county that attained a million or more residents in the future would be subdivided for Representative districts." See *Graves v. Barnes*, 343 F. Supp. 704, 716-717 (1972). The future rolled around 6 years later when Dallas County hit 1,000,000 in the 1970 census and the "state's policy" evaporated.

In the 1980's, then Governor Clements announced that the creation of a black congressional seat in Dallas was of paramount concern, although his true concern was probably defeat of Congressman Mattox. It required a special session to achieve and that issue became the focal point of *Upham v. Seamon*, 456 U.S. 37 (1982). This year the State effectively foreclosed the creation of minority districts by imposing unrealistic threshholds for doing so, and fragmented minority concentrations throughout the plan. That same year in the 1981 redistricting

of the Texas House, innumerable county line cuts resulted in the *Clements v. Valles* litigation, 620 S.W. 2d 112 (Texas 1981). The Texas Attorney General advised the Texas Supreme Court that these cuts were necessary in order to comply with the Voting Rights Act. The court in *Valles* accepted the view that compliance with the Act was paramount but concluded the plan had failed to allocate two whole seats to Nueces as was required. *Valles,* 620 S.W. 2d 115.

In this year's round, the Chair of the House Committee testified that it would require the U.S. Supreme Court to tell him that the county line rule should give way to the Voting Rights Act. (2011 Tr. Vol. 7 at 1593.) Yet the plan produced by the Committee, and adopted, made unnecessary county cuts in the Valley. Thus, combining Cameron and Hidalgo counties would have produced 7 ideally populated districts and required a single cut between Cameron and Hidalgo. The plan, however opted for additional cuts joining portions of Hidalgo to District 31 cutting the county line of Hidalgo and Zapata and joining portion of Cameron in District 43 cutting the lines of Cameron and Willacy Counties.

Minimally, this suggests that explanations offered by the State for its redistricting actions must be viewed with a bit of skepticism.

In this brief, we will examine the Texas House plan from two perspectives, first, the fragmentation or dilution of minority voting strength as a 14th Amendment issue and second, the impact of the *Larios* decision upon the House plan.

We fully recognize the presence of most serious Section 2 issues, but in interest of space, we adopt the brief and arguments of the MALC Plaintiffs.

The Korbel testimony and exhibits demonstrate the requisite *Gingles* factors and the necessity for a Section 2 remedy for as expressed by the 5th Circuit in *Clark v. Calhoun County*, 21 F.3d 92 (5th Cir. 1994):

> [I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three Gingles factors but still have failed to establish a violation of Section(s) 2 under the totality of circumstances. In such cases, the district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of Section(s) 2 of the Voting Rights Act.

The Fragmentation Issue

The discussion should begin with the recognition that the State has acknowledged the pervasive presence of racially polarized voting throughout the electorate, disputing its existence in only Nueces and Kleberg counties. (2014 Congressional Tr. Vol. 7 at 2168-2169.) What are the ramifications of the existence of such polarization? It means, of course, that when the State picks up a minority concentration and reassigns them to a majority Anglo district, it has knowingly and intentionally diluted the voting strength of that minority community. The State appears to argue that such actions do not give rise to any legal challenge, and that unless the minority community can meet all the *Gingles* tests, they have no complaint. (2014 Congressional Tr. Vol. 7 at 2127-2128.) This argument incorrectly suggests that the 14th Amendment somehow became subsumed into the *Gingles* analysis under Section 2. This argument consigns *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) to the ashcan of history. Unconstitutional vote dilution can arise in a single member district scheme as well as in an at large system. *Robinson v. Anderson County*, 505 F. 2d 674 (5th Cir. Tex. 1974).

This State argument that Plaintiffs fail unless they satisfy all of the *Gingles* factors was explicitly rejected by the 9th Circuit in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), cert. den., in a case of strikingly similar facts. The court, in rejecting the defendants' argument, noted:

> "To impose the requirement the County urges would prevent any redress for districting which was deliberately designed to prevent minorities from electing

> representatives in future elections governed by that districting. This appears to us to be a result wholly contrary to Congress' intent in enacting Section 2 of the Voting Rights Act and contrary to the equal protection principles embodied in the *fourteenth amendment*."

As the 9th Circuit found, the trial court noted:

> "the Supervisors appear to have acted primarily on the political instinct of self-preservation," the court also found that they chose fragmentation of the Hispanic voting population as the avenue by which to achieve this self-preservation. Finding No. 181.

The Court in affirming a 14th Amendment violation held:

> Applying the standard to this case of intentional discrimination, we agree with the district court that the supervisors' intentional splitting of the Hispanic core resulted in a situation in which Hispanics had less opportunity than did other county residents to participate in the political process and to elect legislators of their choice. We conclude, therefore, that this intentional discrimination violated both the Voting Rights Act and the *Equal Protection Clause*.

The treatment of McLennan County is but one example of the fragmentation we perceive. The single member legislative district in that county was the product of the second *Graves v. Barnes* litigation, 378 F. Supp. 640 (1974), which had found discrimination in the Waco political processes. The court in that case placed the bulk of the McLennan County minority population into a single district (District 57 in the Benchmark Plan). This minority community remained intact in that district for almost 40 years, electing the minority candidate of choice. (Korbel testimony, 2014 House Tr. Vol. 4 at 1442-1443.) HB 283 removed 23,000 people from District 57, 70 percent of whom were minority and imported 20,000 persons "who were more than 80 percent Anglo," *Id.* at 1444, thereby cracking the minority voting strength.

The Bell County scenario is much the same. The City of Killeen is essentially Fort Hood and was historically contained in HD 54 and only some 200 Killeen citizens were not in the District. (2014 House Tr. Vol. 4 at 1403.) The City of Killeen is heavily minority, and there has emerged an effective minority political coalition around municipal policies. A minority

candidate recently ran a reasonably strong campaign against the incumbent member of the Texas House. HB 283 addressed that concern by cynically splitting the Killeen minority community.

The legislature took some 32,000 Killeen residents out of the District, of which almost 70 percent were minority, and replaced them with 20,000 persons who are more than 80 percent Anglo. (*Id* at 1404.) Although the State would blithely describe this as mere partisanship, it is clearly an intentional fragmentation of the minority community resulting in dilution of minority voting strength.

Similar patterns can be seen in the urban areas of Dallas, Harris and Tarrant. Attached hereto as Exhibit 1 are the maps of Dallas and Tarrant, where for example, the odd configurations of Districts 93 and 105 are only explained by racial line drawing. As Korbel explains, HD 105 had "experienced a drop in Anglo Voting Age population to less than 40%." In order to remedy this, "precinct splits took a long finger of heavily Hispanic blocks (now precincts 4653, 4654 and 4659) to be packed into HD 103," and a "lightning bolt went into former HD 106 to add concentrations of Anglo voters." (Perez Ex. 133 at 12.) In east Dallas County, District 102 had a combined Black and Hispanic population of 49.6% VAP at the end of the decade and an Anglo VAP of 43%. HB 283 reversed those numbers, creating an Anglo VAP of 51.8 %. (Perez Ex. 12.) Similarly, in Tarrant, the Fish Hook District 93 "plucks several heavily minority precincts from the mid cities area and ties them" to heavily Anglo northern portions of the county. (*Id* at 13.) Both Korbel and Representative Burnam agree that this configuration foreclosed the creation of a minority opportunity district. (Perez Ex. 139.)

The *Larios* Issue

The Supreme Court decision in *Larios*, *Cox v. Larios*, 542 U.S. 947 (2004), was a new element in redistricting this decade. Indeed David Hanna cautioned the Legislature regarding its

limitations upon the so-called 10% safe harbor. (Perez Ex. 132.) Hanna advised the Legislature that they should insure "that deviations … do not consistently advantage or disadvantage one or more…racial or ethnic or political parties," and "that all deviations are justified by a legitimate consistently applied policy." (Perez Ex. 132.) Hanna's cautionary advice was totally ignored and indeed we have never heard any explanation for deviations that permeate the whole county urban districts. The deviation issue is consequential to minority voters. As Dr. Kousser testified: "The population disparities are clearly correlated with partisanship and ethnicity. Latinos are disproportionately disadvantaged." (2011 Tr. Vol. 1 at 249.)

The State's witness, Interiano, who was "lead staffer in charge of the House redistricting plan" (2011 Tr. Vol. 6 at 1418), testified:

> Q. As I understand it in drawing the House map, Plan 283, you were operating -- you were operating under the assumption that as long as you were within a 10 percent deviation you were okay; is that correct?
> A. Yes.
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> ************
>
> Q. And there was no effort made to minimize the deviations within the counties that had whole districts wholly contained within the county?
> A. I think that was up to the delegations in doing that. The members asked and we told them they were free to do so, but depending on who submitted the map it was ultimately their decision.
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> ************
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> Q. Houston is over nine percent, I believe. The statewide map itself is right at 9.92 percent I believe. There was no effort to get those deviations any lower. As long as you were below 10 percent everybody thought they were okay?
> A. Yes, sir, that's correct.
> Q. Now, the -- did I understand you correctly to say that in Harris County the map was drawn by the Republican delegation?
> A. That's correct.

(2011 Tr. Vol. 6 at 1473-74.)

The State's witness Ryan Downton, who was General Counsel to the House Committee on Redistricting, confirmed Interiano's testimony regarding the approach to population equality. (2011 Tr. Vol. 4 at 994.) Jeff Archer, of the Legislative Council, testified on deposition that for the whole counties, such as Dallas and Harris, there was no compelling justification for deviation within those counties and those districts could have been drawn close to zero deviation. (Archer Depo. at 56-7, Perez Ex.123)

Downton testified to another noteworthy feature of House redistricting:

> Q. Okay. Now, two, am I correct in understanding that you and the other map drawers for the Texas House were drawing under the instructions of Chairman Solomons?
> A. That's correct.
> Q. ...as I recall you were saying that you and the other map drawers were under directions where a goal of yours was to provide for the reelection for as many Republican members of the Texas House as possible. Is that correct?
> A. Yes.
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> ************
>
> Q. Okay. So, in fact, you were drawing maps with the goal to reelect as many members -- Republican members to the Texas House as possible?
> A. Yes. I may have misheard. I thought your initial question, goal to elect as many Republicans.
> Q. I said reelect.
> A. Then yes, that is correct.

(2011 Tr. Vol. 4 at 995-97.)

Certainly, these instructions explain the many anomalies that emerge from the House bill.

To date, the State has simply failed to come to terms with the *Larios* issue. The State's initial attack on *Larios* is to write it off as a summary affirmance that "has no impact on the underlying one-person, one-vote doctrine." (State's Brief, Clerk's Doc. 411 p. 65.) Of course,

this was not the reading placed on *Larios* by Judge Higginbotham writing for the three-judge court in *Henderson v. Perry*, 399 F. Supp. 2d 756, 759 (E.D. Tex. 2005):

> The Court has only recently demanded exactitude in the population of districts drawn by the Georgia legislature for partisan gain… It did so in *Larios* by denying it the 10% toleration of deviation in the drawing of lines for state legislative seats. 399 F. Supp.2d at fn. 78.

Nor can the *Larios* decision be ignored as simply a summary affirmance. See *Thonen v. Jenkins*, 517 F.2d 3, 7 (4th Cir. 1975):

> Although we agree with the courts in *Skehan* and *Jordon* that the Supreme Court's summary affirmance of a three-judge court decision is not as strong precedent as a full Supreme Court opinion … we also agree with the Second Circuit that "the privilege of disregarding even summary Supreme Court holdings rests with the court alone." *Doe v. Hodgson*, 500 F.2d 1206…"

While the whole county rule may explain deviation in the State's rural districts, no such justification is available in the large urban counties. Indeed, no state witness has ever offered any explanation, much less a credible one, for the deviations as we have noted above. Jeff Archer of the Legislative Council acknowledged that there was no apparent justification for these deviations. The State's 4 large urban counties Harris, Dallas, Tarrant and Bexar comprise 40% of the Texas House of Representatives. A sampling of the deviations is instructive. In Harris County, District 147 is overpopulated by 4.91% and District 142 is underpopulated by 4.83%, a top to bottom deviation 9.74%. In Dallas County, District 103 is overpopulated by 5% and District 102 is underpopulated by 3.88%. In Bexar County, the range is from 4.57% under to 4.79% over, deviation of 9.36% and Tarrant County with a total deviation of 6.73%.

The State has acknowledged that all of the House maps had "the partisan goal" of protecting Republican incumbents. Nowhere is it more evident than the urban counties where declining Anglo population placed Anglo Republicans incumbents in peril.

If Judge Higginbotham correctly read the *Larios* decision in his opinion in *Henderson v Perry* (supra), the redistricting scheme for these urban counties must fall:

> The Court has only recently demanded exactitude in the population of districts drawn by the Georgia legislature for partisan gain… It did so in *Larios* by denying it the 10% toleration of deviation in the drawing of lines for state legislative seats. *Henderson v. Perry*, 399 F. Supp.2d at fn. 78.

CONCLUSION

We urge the invalidation of the HB 283 for all of the reasons asserted by the Plaintiff groups.

Respectfully submitted,
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