

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

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

MEXICAN AMERICAN	§	
LEGISLATIVE CAUCUS, TEXAS	§	
HOUSE OF REPRESENTATIVES,	§	
Plaintiffs,	§	CIVIL ACTION NO.
v.	§	SA-11-CA-361-OLG-JES-XR
	§	[Consolidated Case]
STATE OF TEXAS, et al.,	§	
Defendants.	§	

TEXAS LATINO REDISTRICTING	§	
TASK FORCE, et al.,	§	
Plaintiffs,	§	CIVIL ACTION NO.
v.	§	SA-11-CA-490-OLG-JES-XR
	§	[Consolidated Case]
RICK PERRY,	§	
Defendant.	§	

MARGARITA V. QUESADA, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
	§	SA-11-CA-592-OLG-JES-XR
RICK PERRY, et al.,	§	[Consolidated Case]
Defendants.	§	

EDDIE RODRIGUEZ, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
	§	SA-11-CA-635-OLG-JES-XR
RICK PERRY, et al.,	§	[Consolidated Case]
Defendants.	§	

JOINT SUPPLEMENTAL BRIEF FOR LULAC, NAACP, AND RODRIGUEZ PLAINTIFFS ON *ALABAMA LBC* DECISION

The LULAC plaintiffs, the NAACP plaintiffs (Texas State Conference of Branches of the NAACP, *et al.*) and the Rodriguez plaintiffs (“joint plaintiffs”) submit this supplemental brief as directed by the Court’s Order of March 25, 2015 (Doc. 1301). The Court asked the parties to address three topics in connection with the Supreme Court’s March 25, 2015, decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 4257 (2015) (“*Alabama LBC*”). Citations are to the slip opinion, available on-line at http://www.supremecourt.gov/opinions/14pdf/13-895_o7jq.pdf.

I. RACIALLY GERRYMANDERED DISTRICTS

Alabama LBC specifically addresses redistricting challenges based on claims of racial gerrymandering. Slip Op. 1 (citing *Shaw v. Hunt*, 517 U.S. 899 (1996), as example of type of claim). It did not reach vote dilution claims. *Id.* at 23 (“we do not pass on those claims”).

As these and other plaintiffs explained in the Private Plaintiffs’ Joint Advisory on the Alabama Redistricting Cases (Doc. 1288) at 3-6, the claims made by the joint plaintiffs are vote dilution claims, asserting both unconstitutional dilution through intentional acts based on race and statutory dilution under the *Gingles* formulation for Section 2 of the Voting Rights Act. The con-

stitutional claims also include a challenge to the deliberate, race-based dismantlement of a preexisting crossover district, former CD25. *See Bartlett v. Strickland*, 556 U.S. 1, 29 (2009) (plurality opinion) (deliberate elimination of preexisting crossover district raises serious Fourteenth and Fifteenth Amendment concerns).¹

The Supreme Court has long drawn a distinction between constitutional claims of vote dilution and constitutional claims of racial gerrymandering. The Supreme Court first held vote dilution in redistricting unconstitutional in *White v. Regester*, 412 U.S. 755 (1973). Later, the Court described a constitutional vote dilution claim as one asserting that the state “enacted a particular voting scheme as a purposeful device ‘to minimize or cancel out the voting potential of racial and ethnic minorities.’” *Miller v. Johnson*, 515 U.S. 900, 911 (1995), quoting *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980). The Court contrasted this vote dilution principle with a *Shaw v. Reno*-based constitutional claim of racial gerrymandering, which is an assertion that the state “used race as a basis for separating voters into districts.” *Miller*, 515 U.S. at 911.

Alabama LBC leaves these basic distinctions intact. The “predominant motive” standard used in racial gerrymandering claims is *not* the standard used to judge intentional vote dilution claims.² The question in intentional vote dilution claims is different. For intentional vote dilution, racial discrimination does not have to be the *primary* purpose; it only needs to be one purpose of

¹ Crossover CD25’s dismantlement contains elements of both intentional minority vote dilution and a racial gerrymander. The intentional vote dilution suffices to invalidate it, but the predominance of race in the way it was accomplished also would invalidate it, in light of *Alabama LBC*, as a racial gerrymander. *See* Joint Post-Trial Brief for LULAC, Quesada, and Rodriguez Plaintiffs on the 2011 Congressional Redistricting Plan (Doc. 1277) at 33-34. (*The cite to the transcript date in the foregoing document should have been to 8/15/14, not 9/15/14.*)

² *Alabama LBC* does clarify the “predominant motive” standard. The “predominance” test in a racial gerrymandering claim is not based on balancing the use of race with the application of background principles such as one person, one vote. Instead, “predominance” in the use of race is measured by how it plays out in the balance along with the use of traditional, race-neutral districting principles. The test asks “whether the legislature ‘placed’ race ‘above traditional districting considerations in determining which persons were placed in appropriately apportioned districts.’” Slip Op. at 16.

the challenged action. See *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009). Even if it co-exists with another, non-racial motivation, the racially motivated action is still invalid. *Hunter v. Underwood*, 471 U.S. 222, 22 (1985).

Alabama LBC nonetheless does speak to some issues relevant to the plaintiffs' cases. These are addressed in the next part of this brief.

II. *ALABAMA LBC* OPINION'S EFFECT ON CLAIMS IN THIS CASE

A. Disapproval of mechanical reliance on numerical percentages

Alabama LBC holds that fact-based determinations about ability to elect candidates of choice of minority voters, *not* using a mechanistic "particular numerical minority percentage," are required by Section 5 of the Voting Rights Act. Slip Op. at 19-22. There is no reason to think that this rejection of a mechanistic "magic numbers" approach to minority voting rights is any less applicable to Section 2 than it is to Section 5.

1. *Alabama LBC*'s disapproval of "magic numbers" applies to Section 2

"The inquiry under § 2 . . . concerns the *opportunity 'to elect* representatives of their choice.'" *LULAC v. Perry*, 548 U.S. 399, 446 (2006) (emphasis added), quoting Section 2.³ The "ability to elect" standard in Section 5 and the "opportunity to elect" standard in Section 2 both require fact-based, practical inquiries into the actual impact of redistricting actions on minority voting power. *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986) ("flexible, fact-intensive inquiry").

³ The quoted phrase is from Section 2's subsection (b): "A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 USC § 10301(b).

Under *Alabama LBC*, it is plain that a mechanistic test based on a single numerical parameter is an illegitimate metric for a state to use to establish compliance with either Section 2 or Section 5.⁴

Similarly to Alabama in *Alabama LBC*, instead of conducting a realistic inquiry into the true question asked by Section 2, the state here drew its congressional lines using a mechanistic test for deciding whether it was complying with the Voting Rights Act. Those redrawing the lines for the Texas Legislature did not inquire whether they were creating, or dismantling, a district that would, or did, provide minority voters a reasonable opportunity to elect candidates of their choice, as required by Section 2. The state’s line-drawers used artificial numerical thresholds instead, and they used them constrictively. The record is chock full of examples of the state’s flawed approach.

2. The state’s mechanistic 50% approach to Section 2

a. Across the board

It has previously been explained how the state predetermined that it was free to scatter minority voters across Anglo-dominated districts in whatever way it wished if a proponent of a putative minority opportunity district could not demonstrate to the state mapdrawers’ satisfaction that there would be a single minority CVAP of at least 50% in a district the state deemed compact enough to satisfy it. *See* Joint Post-Trial Brief for LULAC, Quesada, and Rodriguez Plaintiffs on the 2011 Congressional Redistricting Plan (Doc. 1277) at 14-16.⁵ Relatedly, the state’s mapdraw-

⁴ The first *Gingles* factor does require meeting a specific threshold numerical test—50% citizen voting age population in a demonstration district—for a plaintiff to establish an effects-based claim under Section 2. *Valdespino v. Alamo Hts. ISD*, 168 F.3d 848, 853 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000). But establishing the basic elements to make a Section 2 effects claim is not the same thing as determining whether a given district meets the “opportunity to elect” test.

⁵ The following trial excerpt exemplifies the numerical underpinning for this policy. “Q. So your baseline was, if it isn’t . . . required by Section 2—and for ‘required,’ you understood that to mean 50-percent-plus-one-person single minority, if they are African-American or Hispanic CVAP; if it wasn’t that, then you decided you didn’t have to

ers took the unswerving position that, regardless of the facts, there was a fixed numerical threshold for whether the state would deem a given district to be one that provided minority voters an opportunity to elect their candidates of choice. The state’s “opportunity to elect” determinations were not based on any fact save one: whether a fixed 50% threshold was crossed.

- “If a district was over 50-percent HCVAP, then it was a Hispanic majority district and, therefore, there would be an opportunity for the Hispanic population to elect the candidate of its choice.” Tr. 9/9/11 at 920, lines 6-9 (R. Downton).
- “I believe that any district where the Hispanic citizen voting age population exceeds 50 percent, it is, by definition, a Hispanic opportunity district.” *Id.* at 966, lines 10-12 (R. Downton).
- “I was always looking at 50 percent threshold for either black or Hispanic.” *Id.* at 1012, lines 11-12 (R. Downton).
- “If Hispanic citizens of voting age make up more than 50 percent of the district, they have the opportunity to elect their candidates of choice, if they all vote homogeneously.” Tr. 8/15/14 at 1635, line 24-1636, line 1 (R. Downton).
- “[M]y belief was that if it was a district that was over 50 percent Hispanic CVAP, it can elect a minority. . . . [I]f you have more than 50 percent of the citizen voting age population in a district, you can elect your candidate of choice if they all vote.” *Id.* at 1766, lines 5-10 (R. Downton).

b. Specific districts and areas

This locked-in numerical target was used in specific areas across the state.

DFW area

- “Q. . . . [D]id you ever do any analysis of the actual performance numbers within any of those districts [in the Dallas-Fort Worth region] to see whether or not minority candidates of choice actually got elected in ten out of ten, nine out of ten, eight out of ten? A. No. Q. Not a single district? A. Not that I recall.” Tr. 8/15/14 at 1798, lines 2-9 (R. Downton).

draw it, correct? A. Uh-huh. Q. You weren’t required to draw it? A. Right. Q. And you weren’t going to draw it because it was just a Democratic district, correct? A. I think so, yes.” Tr. 8/11/14 at 288, lines 6-16 (K. Seliger).

- “Q. So you’re not testifying that 50 percent voting age population is necessary for an effective performing voting rights district for African-Americans? A. I don’t know the answer to that.” Tr. 9/9/11 at 1012, lines 22-25 (R. Downton).

South Texas

- “[I]t is my position there are seven Latino opportunity districts in south and central Texas, because the HCVAP is over 50 percent in each district.” Tr. 9/9/11 at 950, lines 10-13 (R. Downton).

CD35

- “District 35, we felt that it was essential to keep it over 50 percent[.]” *Id.* at 919, lines 11-12 (R. Downton).
- “We felt that CD-35 needed to stay above 50 percent CVAP or SSVR.” Tr. 8/11/14 at 362, lines 5-6 (G. Interiano).
- “We felt that district [CD35] needed to remain above 50 percent.” *Id.* at 363, lines 2-3 (G. Interiano).
- “When we were creating District 35, we were creating a Section 2 majority Hispanic CVAP district, so it had to be over 50 percent.” Tr. 8/15/14 at 1642, lines 20-22 (R. Downton).
- “And you can’t take it [Hispanic population] from District 35 because District 35 is barely over 50 percent H-CVAP.” *Id.* at 1665, lines 23-25 (R. Downton).
- “At some point in trying to get District 35 over the 50 percent threshold, I also turned on racial shading for Travis County to find the concentrated Hispanic populations to draw them in to get over the 50 percent benchmark. . . . I thought it was necessary to comply with Section 2, yes.” *Id.* at 1674, line 25-1675, line 8 (R. Downton).
- “Q. Why did you want to go up to the northwest part of 35 to join Hispanic population to south San Antonio? A. Because we were trying to create a Hispanic opportunity district that was over 50 percent HCVAP.” *Id.* at 1779, lines 7-10 (R. Downton).

CD23

- “I believe District 23 was still above 50 percent at that point, and that was the baseline we used.” Tr. 9/9/11 at 920, lines 4-6 (R. Downton).

- “Q. And in your opinion, if Congressional District 23 had a majority Hispanic population, did you consider it to be a minority opportunity district? A. Yes.” *Id.* at 1635, lines 19-22 (R. Downton).

c. Non-50% numerical “baseline” objectives

The state also used numerical targets rather than election opportunity measures outside the context of its self-proclaimed 50% test for what constitutes a minority opportunity district.

- “We tried to make sure we were maintaining levels of HCVAP in the Hispanic districts and black voting age population in the black districts.” Tr. 9/9/11 at 914, lines 2-4 (R. Downton).
- “[W]e were able to keep the HCVAP [for CD23] at the level it had been under the baseline map.” *Id.* at 921, lines 11-12 (R. Downton).
- “Q. And you’re talking about raising [CD]20 back up to at least the benchmark because it had dropped in a previous proposal, is that correct? A. Yes, ma’am.” Tr. 8/14/14 at 1360, lines 1-4 (B. Solomons).
- “You can’t take it [Hispanic population] from District 20 because we were just trying to raise District 20 back closer to the baseline. And you can’t take it from District 35 because District 35 is barely over 50 percent H-CVAP.” Tr. 8/15/14 at 1665, lines 21-25 (R. Downton).

B. Calculated adverse consequences of state’s mechanistic measures

1. DFW area and CD30

The consequences of the state’s paint-by-the-numbers approach to parceling out its version of minority voting rights inevitably, and calculatedly so, fell harshly on minority voting power. In the Dallas-Fort Worth area, minority voting communities were chopped up and scattered into Anglo-dominated districts across the region. CD30, the existing African-American opportunity district, was over-packed with minority voters, helping to prevent those unnecessarily packed into CD30 the opportunity to coalesce with other minority voters in the region to gain an undi-

luted measure of electoral strength. The state's approach here increased Anglo voting power in the region at the cost of lessening minority voting power.

2. Travis County, former CD25, and CD35

In Central Texas, the mechanistic approach was used as a license to disregard the minority voting opportunity already in existence in crossover CD25 and, instead, to carve those minority voters (along with the critical mass of Anglo voters who crossed over to align with their voting preferences) into five pieces. Despite the Supreme Court's 2009 warning in *Bartlett* about protecting crossover districts from targeted dismantlement, the state treated the fact that minority voters were able to elect their candidate of choice in former CD25 as an impediment to its goal of protecting Anglo voting power across the state and as inconsequential since CD25 did not satisfy the state's rigid 50% formula.

In addition, in place of what the facts showed to be a performing minority opportunity crossover district, the state substituted its lone new Latino opportunity district (CD35) rather than locating such a district in a way that didn't supplant an already existing minority opportunity district. The state used its rigid numerical test for both parts of its Travis County effort. It predetermined that, regardless of what the actual performance of the district showed about minority voting power, former CD25 could be dismantled because it did not satisfy the state's numerical formula. And it used the 50% threshold test to justify CD35 and the role it played in displacing former CD25.

3. Nueces County and CD27

This by-the-numbers treatment of Travis County dovetailed with the state's formulaic predetermination that there would be only one new minority opportunity district in the entire state.

This was used to excuse what the state did in Nueces County. There, the state purposely, and with full awareness of the consequences, cast adrift over 200,000 Latinos in Nueces County into a new CD27, so that they were effectively deprived of *any* meaningful voting power in congressional elections. The justification was that the one new Latino opportunity district the state had determined to create was already in place elsewhere, through CD35.

4. CD23

Finally, the mechanistic approach took full flower with the state's micro-manipulation of CD23. The state assiduously worked to outwardly cloak CD23 with numbers designed to give a false appearance of minority voting opportunity. At the same time, behind the numbers, the state had worked through the nudge-factor to reach a real-world situation that was quite the opposite of what it wanted the numbers to portray on the surface. The state used artificial numerical targets to paint one picture, to be shown to those monitoring protection of minority voting rights as required by Section 2. It used its own, nuanced political calculations to achieve a quite different picture, to be shown to those it actually wanted to please, demonstrating that, behind the numbers, Anglo voters would dominate the district and elect their candidate of choice instead of the candidate of choice of Latino voters.

The treatment of CD23 throws into relief the fact that the state redistricters were actually well aware that artificial numerical thresholds were not the way to test whether minority voting opportunities were actually being undermined or not. They knew that more nuanced, fact-based measures of performance were the true test of the voting opportunities in a given district. The test of performance that they ignored for voting rights purposes, is what they really acted on. This is what the nudge factor was all about.

III. FURTHER FACTUAL DEVELOPMENT

The joint plaintiffs are of the view that, but for a single technical matter noted in the next paragraph, there is no need at this time for further factual development of the record in this case in light of *Alabama LBC*. Further evidence now on the substantive issues would nearly certainly be repetitive and of little or no use to the Court in making its decision and could jeopardize timely relief.

The technical addition suggested for the record is by the LULAC plaintiffs, to provide basic facts about the location of its individual plaintiffs and LULAC's Texas membership. This addition should not require any additional testimony. Instead, it can be handled through the proffer of a declaration. A declaration by the Texas LULAC State Director that suffices for this purpose is attached to this brief as Exhibit A, which, if there are no objections, can simply be made part of the record.

Respectfully submitted,

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