

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

SHANNON PEREZ, *et al.*,

Plaintiffs,

and

UNITED STATES of AMERICA,

Plaintiff-Intervenor,

v.

STATE OF TEXAS, *et al.*,

Defendants.

Civil Action No. 5:11-cv-360
(OLG-JES-XR)
Three-Judge Court
[Lead Case]

MEXICAN AMERICAN LEGISLATIVE CAUCUS,
TEXAS HOUSE OF REPRESENTATIVES (MALC),

Plaintiff,

v.

STATE OF TEXAS, *et al.*,

Defendants.

Civil Action No. 5:11-cv-361
(OLG-JES-XR)
Three-Judge Court
[Consolidated Case]

TEXAS LATINO REDISTRICTING TASK FORCE,
et al.,

Plaintiffs,

v.

RICK PERRY,

Defendant.

Civil Action No. 5:11-cv-490
(OLG-JES-XR)
Three-Judge Court
[Consolidated Case]

MARGARITA V. QUESADA, *et al.*,

Plaintiffs,

v.

RICK PERRY, *et al.*,

Defendants.

Civil Action No. 5:11-cv-592
(OLG-JES-XR)
Three-Judge Court
[Consolidated Case]

JOHN T. MORRIS,

Plaintiff,

v.

STATE OF TEXAS, *et al.*,

Defendants.

Civil Action No. 5:11-cv-615
(OLG-JES-XR)
Three-Judge Court
[Consolidated Case]

EDDIE RODRIGUEZ, *et al.*,

Plaintiffs,

v.

RICK PERRY, *et al.*,

Defendants.

Civil Action No. 5:11-cv-635
(OLG-JES-XR)
Three-Judge Court
[Consolidated Case]

**UNITED STATES' POST-TRIAL SUMMARY REGARDING
THE 2011 TEXAS HOUSE REDISTRICTING PLAN**

Pursuant to this Court's directive, the United States submits the following summary of its case against Texas's 2011 House redistricting plan. The evidence demonstrates that the plan was adopted with the purpose of diluting minority voting strength in violation of Section 2 of the Voting Rights Act and the voting guarantees of the Fourteenth and Fifteenth Amendments. Utilizing novel tools to implement outmoded ideas, the 2011 House plan is the latest chapter in Texas's long history of racial discrimination in redistricting. Despite dramatic growth in the State's minority population over the last decade and an equally striking decline in the Anglo share of the State's population, Texas enacted a redistricting plan that actually reduced the electoral opportunity of its minority citizens.

Failure to Comply with Section 2

Compliance with Section 2 of the Voting Rights Act is a requirement of federal law, not a policy choice. The State Defendants acknowledge the explosive growth of the State's minority population between the 2000 Census and the 2010 Census. Between 2000 and 2010, the total population of Texas increased by 4,293,741 persons, and 89.2 percent of that growth was attributable to the State's minority population. The evidence shows that minority population in Texas is sufficiently geographically concentrated that the State could maintain the cores of existing minority opportunity districts and form the cores of new districts. The evidence also establishes that racially polarized voting persists in Texas elections. Likewise, the evidence demonstrates that minority voters are underrepresented in the Texas House in comparison to their share of the relevant population in the State.

The evidence shows that those individuals drawing maps and those involved in the redistricting process knew that instead of reducing the existing number of minority opportunity House districts, they could in fact have created a number of new minority opportunity House

districts, including one in El Paso County, one in the Rio Grande Valley (combining the surplus Hispanic population in Hidalgo and Cameron Counties), and one in Harris County. These additional districts would not have led to any violation of the Texas County Line Rule.

Alternative plans creating such districts also were presented to and considered by legislators.

Nonetheless, Texas failed to create any new minority opportunity districts. Texas describes this as a policy choice. The proffered justifications for the State's choice included a desire to comply with the County Line Rule and the need for approval by a Republican-dominated legislature. Legislators and their map drawers took this course of action despite the considered and consistent advice from the Texas Legislative Council ("TLC") regarding the need to comply with Section 2 of the Voting Rights Act, among other provisions. This constitutes direct evidence of discriminatory purpose.

Adopting a Plan with Fewer Minority Opportunity Districts

Not only did the State Defendants fail to create any new minority opportunity districts in the 2011 House plan, they actually adopted a plan with significantly fewer opportunity districts. There were 50 minority opportunity districts in the 2001 Texas House of Representatives plan. The interim plans drawn by this Court demonstrate that it was possible to draw at least 52 such districts under the 2010 Census. The State Defendants admit that election analysis was an integral part of their determination regarding whether a district was in fact a minority opportunity district, and using such election analysis, the evidence shows that the number of minority opportunity districts decreased from 50 in the 2001 plan (as it existed using 2010 Census data) to only 45 or possibly 46 in the 2011 plan. Minority voters no longer had an ability to elect their preferred candidates in HD 33 (Nueces County), HD 35 (South Texas), HD 117 (Bexar County),

and HD 149 (Harris County).¹ As admitted by State Defendants, the 2011 plan eliminated completely two of these minority opportunity districts, HD 33 and HD 149. In the case of HD 35, HD 41, and HD 117, these minority opportunity districts were altered with the goal of solidifying the re-election of Anglo-preferred incumbents and ensuring that Anglo voters, not Hispanic voters, would control those districts in future elections. This purposeful dilution of minority voting strength through the dismantling of these opportunity districts violates Section 2 of the Voting Rights Act as well as the voting guarantees of the Fourteenth and Fifteenth Amendments.

The “Nudge Factor”

A collection of emails between key legislative staff, political operatives, and the map drawers indicates that those persons responsible for the 2011 House plan intended to draw some districts that would appear to be Hispanic opportunity districts, but would in reality fail to provide Hispanic voters with the opportunity to elect their candidates of choice. In their emails, these individuals discuss maintaining the Hispanic Citizen Voting Age Population (“HCVAP”) in the new district at the same level as in the benchmark district, but through using voter turnout data, swapping in lower Hispanic turnout census blocks or precincts for existing higher turnout Hispanic census blocks or precincts. Originally conceived in the Speaker’s office by staffer Eric Opiela, the effect of this so-called “useful metric” comparing the rates of Spanish Surname Voter Registration (“SSVR”) and Hispanic turnout can, for example, be seen in HD 117 and the attempt to “nudge” Republican candidates not favored by Hispanic voters to victory. The overall goal of drawing a district that would have only an appearance of Hispanic opportunity also is evident in HD 35 and HD 41.

¹ Regarding HD 41 in Hidalgo County, and as discussed below, the large number of split precincts makes it difficult to determine precisely the ability of Hispanic voters to elect in that new district.

The map drawers sought a variety of data to be able to assign population to districts at the census block level, not just the precinct level. As the emails detail, the map drawers sought and obtained the necessary population and turnout data to complete this swap. Obviously, the nudge factor was not needed in most districts – it was only needed in those few districts where the State had to maintain the appearance of complying with the Voting Rights Act, through keeping the demographic numbers equivalent, while at the same time making it more difficult for Hispanic voters to elect their candidate of choice. And Clare Dyer of the TLC explained that a map drawer could achieve the same “nudge factor” result with data already built into Texas’s Redistricting Application software, or “RedAppl,” though doing so would be tedious.

The reason the map drawers wanted a nudge factor metric is that election results are only available at the precinct level. RedAppl did not have the capability to determine political performance below the precinct level. RedAppl also had the capability to shade by HVAP at the Census block level, permitting a user to split precincts based on racial demographics. Although no one can know how individual voters voted in a particular election at the block level, Texas used race as a proxy to manipulate how a district performs.

Bexar County

Going into the 2011 redistricting process, HD 117 was a Hispanic opportunity district protected by the Voting Rights Act. In an effort to circumvent those protections, the “nudge factor” was used to maintain a Hispanic population majority in HD 117 in the 2011 plan, creating the illusion of Hispanic electoral control by swapping out high turnout Hispanic precincts for low turnout Hispanic precincts. Former Representative John Garza testified that his ideal district would extend the district north to I-10 and south to the Medina River. His ideal district would not contain any of the area inside of Loop 410. According to Representative

Garza, these areas tended to be “more Anglo and more conservative,” and election returns confirmed that he performed best in the northern part of the county and outside of Loop 410. This configuration, which would have dropped the SSVR in the district to 46.3 percent, was rejected by the leadership of the Bexar County delegation because it impermissibly diluted Hispanic voting strength. In another effort to create a district in which he would win, Representative Garza drew HD 117 into southern Bexar County to pick up the City of Somerset and the community of Whispering Winds, two areas that previously were in HD 118, which was represented by Representative Joe Farias.

Representative Farias made fervent attempts to keep Somerset and Whispering Winds -- two majority-Hispanic, impoverished communities -- in HD 118. Both Representatives Farias and Garza agree that the two communities have low rates of Hispanic turnout, despite their relatively high Hispanic population. After Representative Garza made a request to add “more Mexicans” to his district, Representative Farias offered to trade Somerset and Whispering Winds for the South San Antonio Independent School District (“ISD”), a majority-Hispanic community located inside Loop 410 and previously in HD 117. Representative Farias described the South San Antonio ISD area as one with a mobilized electorate and high turnout, and Representative Garza refused to take the area into his district. Mr. Interiano confirmed that Representative Garza wanted to create a rural district, and Hispanic voter turnout in the rural areas of southern Bexar County is low, according to Representatives Farias and Garza.

Representative Farias also offered an amendment to Plan H283. That amendment would have left Somerset in HD 117 and would have returned Whispering Winds to HD 118. Because of the State’s directive that Hispanic opportunity districts had to maintain at least 50 percent SSVR and because Representative Garza demanded that the SSVR in HD 117 not exceed 50.1

percent, Representative Farias had only one tenth of one percent of SSVR population to work with when drafting his amendment. Representative Farias was able to draft an amendment that would have returned Whispering Winds to HD 118 and kept the SSVR in HD 117 at the 50.1 percent level. However, Representative Garza refused to support this amendment.

Testimony of the United States's expert Dr. Theodore Arrington confirmed that adding these low turnout Hispanic communities to HD 117 and removing higher turnout Hispanic communities changed the district's performance and made it such that minority voters no longer had the ability to elect their preferred candidate in the district. The lack of Hispanic opportunity in HD 117 was not accidental, but rather by design. As Mr. Interiano confirmed for this Court, HD 117 could have been drawn to meet all the specifications required by the State and Representative Garza's 50.1 percent SSVR request without including the low turnout, majority Hispanic communities of Somerset and Whispering Winds.

Dallas County

Despite advice from the TLC that a new minority opportunity district should be drawn if possible, the enacted configuration effectively prevented the creation of a new minority opportunity district. As Dr. Arrington observed, the shapes of districts in western Dallas County are bizarre. A narrow land bridge in HD 105 maintains the district's Anglo population by splitting precincts to move Anglo voters into the district and to remove Hispanic voters. The boundary of HD 105 splits 22 precincts and numerous communities of interest. It includes narrow slivers of population that exclude Hispanic population on either side. Longtime community residents Michael McPhail and John Lopez testified that the population split out of HD 105 in the communities of Irving and Grand Prairie, respectively, is disproportionately

Hispanic and low income, while the population remaining within HD 105 is disproportionately Anglo and relatively high income.

Mr. Downton admits that he was splitting precincts to pull Hispanic voters out of HD 105, but he says that it was done only to comply with the Voting Rights Act by maintaining SSVR levels in HD 103 and having an SSVR of 50.1 percent in HD 104. Mr. Downton also admits, however, that in determining SSVR, RedAppl uses precinct level data, not block level data. Mr. Downton knew that RedAppl would treat the 22 split precincts in HD 105 as homogenous precincts, including the Anglo population in the SSVR calculation even though it has been split out of the precinct. Thus, Mr. Downton knew that HD 103 and 104 had higher SSVR shares than indicated by RedAppl. Nor did Mr. Downton testify that HD 103 or 104 required additional Hispanic voters in order to maintain the existing electoral opportunity.

Moreover, the minority opportunity districts on the western side of Dallas are disproportionately high in population, further diluting minority voting strength. In fact, the deviation in HD 105 is at the maximum possible acceptable deviation of plus 5 percent over the ideal size population. Mr. Downton admits that keeping the districts overpopulated in the 2011 redistricting plan was “a policy choice,” and it was not necessary to comply with the Voting Rights Act. As Us Exhibit 513 illustrates, it is possible to create a new minority opportunity district in Dallas. At the time of enactment, there were numerous alternative plans that created a third opportunity district.

Hidalgo County

In the 2001 plan, HD 41 in Hidalgo County was a functioning minority opportunity district protected by the Voting Rights Act. In the 2011 plan, it was altered with the goal of shoring up a vulnerable incumbent and ensuring that Anglo voters, not Hispanic voters, would

control this district in future elections. In Hidalgo County, split precincts in the 2011 House plan follow a clear racial pattern, and there can be no credible argument that this was done in order to comply with the Voting Rights Act. A disproportionate share of Anglo voters is split into HD 41, while a disproportionate share of the Hispanic voting-age population is split into other districts. Jaime Longoria, a longtime public servant in Hidalgo County, explained that the 2011 House Plan divides precincts to place country clubs, gated communities, and other disproportionately Anglo neighborhoods in HD 41 and to exclude densely populated Hispanic neighborhoods and colonias. HD 41 divides cities and breaks working relationships between more affluent communities and those in need of development. It is both grossly under-populated in comparison to the other districts in Hidalgo County and is the most Anglo district in an overwhelmingly Hispanic county.

Mr. Interiano drew the version of HD 41 that was included in Chairperson Burt Solomons' initial statewide proposal (Plan H113), relying on political data and the assistance of incumbent Representatives Aaron Peña (then HD 40) and Ryan Guillen of HD 31. This draft plan split four precincts for reasons explained by Mr. Interiano to be: the inclusion of Representative Peña, the exclusion of the incumbent of a neighboring district, and the exclusion of a Democratic-leaning precinct. On April 5, 2011, Representative Peña signed off on this map, which indicated he would vote for the final plan as long as this version of HD 41 was included. This map contained none of the racially divided precinct splits described by Mr. Longoria.

Notwithstanding the prior approval of Representative Peña, Mr. Downton subsequently made significant changes to HD 41 during the Committee's consideration and divided thirteen additional precincts. Several of these splits placed disproportionately Anglo neighborhoods in HD 41 and excluded homogenous Hispanic neighborhoods; in six cases, the difference in

Hispanic voting-age population share between the included and excluded portion was ten percent or greater. Although Mr. Downton admitted to dividing precincts using racial shading at the census block level elsewhere in the 2011 House plan, he claimed to have divided precincts in HD 41 solely at the direction of Representative Peña and principally to follow roads. This is implausible for several reasons. First, Representative Peña testified in his deposition that the only direction he provided Mr. Downton was to include in HD 41 his childhood home in Precinct 107, and otherwise, Representative Peña merely ratified the precinct splits he was shown. Second, splits introduced by Mr. Downton in Precincts 48, 95, 103, and 105 moved the district boundary away from major roads. Third, on the western edge of Precincts 7 and 8 and the southern edge of Precinct 66, Mr. Downton left the boundary of HD 41 separated from major roads. Finally, the racial pattern in precinct splits not explained by Mr. Interiano or in Mr. Peña's deposition simply is too consistent to support an alternative explanation.

Nueces County

Prior to the 2011 redistricting, Nueces County included two House districts in which Hispanic voters had the opportunity to elect their preferred candidates, HD 33 and 34, as well as a portion of a third district in which Anglo voters were a majority (HD 32). Nueces County did not grow as quickly as the rest of the state, and applying the County Line rule alone would have required the drawing of only two districts. The TLC advised, however, that the Supremacy Clause could require that the County Line Rule yield to the Voting Rights Act, as often happens with respect to one-person, one-vote requirements. Nonetheless, Chairperson Burt Solomons announced on the House floor that any deviation from the County Line Rule in order to comply with the Voting Rights Act must be ordered by the courts, and Nueces County was drawn to

include only two districts, HD 32 and HD 34. Hispanic voters lost the ability to elect a candidate of choice by the elimination of HD 33.

In the 2011 plan, HD 32 was drawn deliberately to minimize the opportunity of Hispanic voters to elect their preferred candidates. District 34 was packed with Hispanic voters; it included a higher share of SSVR than either of the two minority opportunity districts in the 2001 map. The 2011 map also included low-turnout minority communities in HD 32, minimizing the number of active minority voters while reducing the appearance of having maximized the district's Anglo vote. Moreover, an irregular extension of HD 34 grabbed the homes of the Hispanic Republican incumbent from what had been HD 33 and the Hispanic Democrat who had preceded him, thereby ensuring that HD 32 included no Hispanic individuals with state legislative experience. The Hispanic Republicans of Texas, a political organization that works to promote Hispanic Republicans, opposed the 2011 district lines in Nueces County.

El Paso County

The configuration of districts in El Paso County in the 2011 plan provides a stark example of the legislature's blatant disregard of Section 2 of the Voting Rights Act. Despite the legal advice of the TLC regarding the need to comply with Section 2 and the existence of a compact alternative district that would have provided minority voters with an opportunity to elect their candidate of choice, the legislature adopted a contorted configuration for Districts 77 and 78 designed to ensure the election of an Anglo-preferred incumbent at the expense of minority voters. This gerrymander was accomplished by Mr. Downton, who admitted that it was possible to create an additional minority opportunity district in the county but claimed that he neglected to do so based on a "policy choice." To the extent that any changes were required to the El Paso County configuration to ensure compliance with Section 2 and maintain the requisite

SSVR, they could have involved the simple swapping of precincts between adjacent districts recommended by TLC counsel David Hanna, rather than the precinct splitting and gerrymandering that occurred in the final map.

Harris County

Another minority opportunity district could have been created in Harris County. Mr. Hanna explained that he was able to draw such a district at the time. There was a policy choice though not to create such a district because it would have been difficult to get such a map approved with Republicans losing another seat. Although Mr. Hanna advised that reducing the number of districts in Harris County from 25 to 24 would cause the Republicans to lose a seat in the county, that is not what happened. Instead, another minority opportunity district was eliminated.

Initially, Chairperson Solomons announced on the floor of the House that Harris County would be allotted 25 districts and directed the county delegation to cooperate in determining district boundaries. Late in the process, however, it was announced that Harris County would have only 24 districts. Representative Beverly Woolley announced that she had drawn a 24-district plan and that her plan would be placed in the Chair's statewide proposal. When Representative Garnet Coleman complained to Representative Woolley that her drawing of a 24-district map behind closed doors contravened the instructions from House leadership to have an incumbent driven process, she responded by stating: "[Y]ou all's districts are protected. Ours aren't." Following their confrontation, Representative Woolley filed an amendment -- to her own map -- that would have gutted Representative Coleman's district, removing to adjacent districts its most prominent features as well as his district office.

In the 24-district plan for Harris County adopted by the legislature, HD 137 paired Representatives Scott Hochberg and Hubert Vo, two incumbents elected from majority-minority districts. The new combined district maintained the number of Representative Hochberg's district (137), included a greater share of his former district, and divided the Asian American communities in both former Districts 137 and 149 (Representative Vo's district). In combination with contemporaneous statements from Anglo Republicans that Representative Hochberg likely would be comfortable in the new district, the evidence supports the conclusion that HD 137 was drawn to favor an Anglo incumbent with significant seniority, Representative Hochberg, over the first Vietnamese American ever to serve in the Texas Legislature. This configuration does not serve a partisan purpose and was inconsistent with the partisan tactics used in 2001, which had targeted the more senior Democrat.

Moreover, the evidence establishes that Representative Vo's district was one in which a coalition of minority voters came together to elect their preferred candidates. As explained in our response to the State Defendants' Summary Judgment Motion, the elimination of an existing minority voting opportunity, whether or not it is a coalition, by dismantling such a district is intentional discrimination, in violation of the United States Constitution.

Other Evidence of Discriminatory Purpose

Applying the same factors set forth by the Supreme Court for determining discriminatory purpose in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the United States' expert Dr. Arrington concluded that Texas had engaged in intentional discrimination by enacting the 2011 House Plan. The email correspondence reviewed by Dr. Arrington and presented at trial establishes that the legislators and their map drawers acted in direct contravention of official advice from lawyers working for the TLC regarding the

need to comply at that time with Section 5, as well as Section 2, of the Voting Rights Act. The TLC's advice included general guidelines published at the start of the redistricting process (regarding, for example, the fact that Texas's County Line Rule must yield to the Voting Rights Act), as well as specific retrogression concerns regarding particular proposals for various regions (including the plans for Dallas, El Paso, Harris, Hidalgo, and Nueces Counties, as well as South Texas). Testimony by longtime TLC staffer David Hanna confirmed that he consistently reminded legislators, members of their staff, and map drawers about the need to comply with the Voting Rights Act. Mr. Hanna communicated his views during seminars, in a published redistricting manual, and in ongoing written analysis concerning the application of the Voting Rights Act to plans being considered. Mr. Hanna repeatedly counseled that a district's status as a minority opportunity district related to how it performed in terms of providing minority voters with an ability to elect their preferred candidates, not a perfunctory determination based on some arbitrary demographic threshold.

In addition to the inculpatory emails, Dr. Arrington's conclusion regarding intentional discrimination is supported by the large number of precinct splits (a total of 412) in the 2011 House plan, as well as the fact that precincts in minority opportunity districts were split more often than in other districts. These splits occurred despite legislators testifying that Redistricting Committee Chairperson Burt Solomons opposed splitting precincts, "put[ing] the fear of God" into them to discourage them from doing so. Dr. Arrington also demonstrated that Texas's map drawers utilized differential population deviations to undermine minority voting strength.

Lack of Participation by Minority-Preferred Legislators

The 2011 House redistricting process limited minority legislators' ability to affect the final map. As a former state House member and member of the Redistricting Committee in

2011, Congressperson Marc Veasey testified that much of the process was secretive and that he and other minority legislators were kept in the dark. No minority legislators were among those “key” members that the Redistricting Committee gave an early opportunity to review a proposal for their district. In fact, Congressman Veasey testified that his state House district was changed without his knowledge or approval after the Tarrant County delegation submitted the drop-in plan for the county. Furthermore, legislators did not have a chance to review a statewide map until after Chairperson Solomons released his proposal to the public. And once the Chair released his statewide proposal, the only public hearings were held two days and four days after the proposal’s release which fell on a Friday and on Palm Sunday. Scheduling the hearings so soon after the release of the public proposal provided insufficient time for minority-preferred legislators and their constituents to propose changes to the Committee. Overall, from the time of the release of the first statewide proposal, the process lasted only two weeks. Even more significant, the enacted plan failed to incorporate most of the alternative proposals offered by minority groups or minority-preferred legislators.

The 2010 field hearings did not provide a meaningful opportunity to influence the 2011 House Plan. Those hearings, conducted before Census data or proposed maps were available, and the 2009-2010 House Redistricting Committee’s interim report provided no substantive recommendations to the 2011-2012 Committee. Further, they were often held during the workday and in locations that were not easily accessible by public transportation, making it difficult for everyone, but particularly the minority community, to participate. In fact, the Committee rejected specific offers from minority legislators to suggest more accessible locations for the hearings.

Finally, despite preparing and to some extent relying on racially polarized voting analyses, the Committee never used that information to compile a list of minority opportunity districts protected under the Voting Rights Act. Indeed, the Committee never even announced the standard it was using to identify such districts. Nor did it share any of the racially polarized voting analyses with minority legislators, who remained unaware of the existence of the reports throughout the process.

Conclusion

The foregoing outlines the substantial direct and circumstantial evidence that Texas's 2011 House plan was enacted with a racially discriminatory purpose. The evidence shows that the state reduced minority voting opportunities in the 2011 House plan, when it easily could have instead expanded such opportunities. This reduction in minority voting opportunities and overall dilution of minority voting strength took place in the face of substantial growth in the minority population around the state over the prior decade, in the presence of geographically compact areas of minority population that could maintain the cores of existing districts and form the cores of new districts, and in the continued persistence of racially polarized voting in the state. The evidence shows that this was done intentionally. The United States asks this Court to find that the State Defendants engaged in intentional racial discrimination in violation of Section 2 of the Voting Rights Act and the voting guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution in adopting the 2011 House plan.

Date: July 25, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2014, I served a true and correct copy of the foregoing via the Court's ECF system on the following counsel of record:

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