

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

SHANNON PEREZ, et al.,)	
)	
<i>Plaintiffs,</i>)	CIVIL ACTION NO.
)	SA-11-CA-360-OLG-JES-XR
)	[Lead case]
)	
STATE OF TEXAS, et al.,)	
)	
<i>Defendants</i>)	
)	
)	

**TEXAS LATINO REDISTRICTING TASK FORCE, ET AL.
SUMMARY OF CLOSING ARGUMENTS:
2011 CONGRESSIONAL PLAN**

Plaintiffs Texas Latino Redistricting Task Force, *et al.*, submit the following summary of evidence regarding the 2011 Congressional Plan (C185).¹

INTRODUCTION

In spite of a U.S. Supreme Court ruling invalidating its most recent congressional redistricting plan under section 2 of the Voting Rights Act, Texas once again enacted a congressional redistricting plan that purposefully diluted Latino voting strength. The State’s 2011 redistricting plan left Latino voters with no more opportunity to elect their candidate of choice to Congress than they had in 1991, despite an increase of 6 congressional seats during the 2000 and 2010 apportionments.²

¹ The Task Force Plaintiffs neither waive nor limit themselves to the arguments contained or evidence referenced in this summary.

² See U.S. Census, “Congressional Apportionment,” U.S.Census Brief, available at <http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf>

The evidence at trial shows that Texas redistricters disregarded the recommendations of the Governor and the Republican congressional delegation to strengthen partisan advantage in the Dallas-Ft. Worth Metroplex and instead used block-level race-based redistricting to fracture Latino and African American population across districts. In South and West Texas, redistricters evaluated proposed redistricting plans behind closed doors using race-based criteria and incorporated the drafting recommendations of a former counsel to the House Speaker who recommended that they reduce the number of Latino voters from CD23 in order to defeat the Latino candidate of choice.

ARGUMENT

The Texas Latino Redistricting Task Force Plaintiffs advance claims of discrimination against Latino voters in violation of section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, et seq. as well as the 14th and 15th Amendments to the U.S. Constitution.³

Prior to the 2011 redistricting in Texas, the Latino population grew significantly – both in terms of total population and citizen voting age population. Because seats in the U.S. House of Representatives are apportioned based on total population, the growth in Latino total population was largely responsible for the allocation of four additional congressional seats to Texas. In addition, total population growth by the Latino community had a significant impact on the location of congressional districts in Texas, all of which must have a total population of 698,488 persons. For example, in Harris County, where the Anglo population decreased by 82,618, Latino total population growth supported the maintenance of districts in that area. In South and West Texas, Latino total

³ The Court dismissed the Task Force Plaintiffs' 15th Amendment claims on June 23, 2014 (Dkt. 1108).

population growth in all of the congressional districts touching the U.S. Mexico border contributed towards the placement of a new congressional district in the region. (PL399)

Citizen voting age population (CVAP) plays a role in evaluating whether a redistricting plan contains districts required by section 2 of the Voting Rights Act. From 2000 to 2010, Latino CVAP growth was 701,803 -- greater than that of all other groups in Texas. (PL1108). The growth in Latino CVAP over the preceding decade transformed CD29 into a Latino CVAP majority district and also demonstrated that additional minority opportunity districts could be created in Texas.

A. PLAN C185 DILUTES LATINO VOTING STRENGTH IN VIOLATION OF SECTION 2

The parties do not dispute whether CD35, which joins San Antonio and Austin along the I-35 corridor, is a district in which Latinos have an opportunity to elect their candidate of choice. Similarly, the parties do not dispute whether CD34, which occupies much of the geography of the former CD27, is a district in which Latinos have an opportunity to elect their candidate of choice. The evidence shows, however, that Texas “swapped” new Latino opportunity districts for pre-existing ones. The end result is that Plan C185 contains no more Latino opportunity districts when compared to the benchmark. C185 also creates fewer Latino opportunity districts than required under section 2.

For example, South and West Texas should contain seven, not six, Latino opportunity districts. A host of redistricting plans, including the interim redistricting Plan C235 demonstrates that Latinos are sufficiently numerous and compact to comprise the majority CVAP of seven districts. Dr. Richard Engstrom concluded that voting is racially polarized in Bexar County, Travis County and in South Texas. Dr. Andres

Tijerina presented “Senate Factors” evidence showing that Latinos in South and West Texas have experienced a history of discrimination in the areas of civic life, education and employment which hinders their ability to participate effectively in the political process.

The controversy in South Texas revolves around whether CD23 in Plan C185 offers Latinos the opportunity to elect their candidate of choice. On this point, the evidence is overwhelming that CD23 does not. The State’s defense, that any district with a majority of Spanish-surnamed voter registration (SSVR) is automatically a Latino opportunity district, is undermined by evidence showing that, at the time they drew CD23, Texas redistricters knew that they were reducing the likelihood that Latinos would be able to elect their candidate of choice in CD23 to one in ten elections.

The State’s only expert witness, Dr. John Alford, testified that CD23 was a Latino opportunity district in the benchmark plan but that “I think [CD 23] is probably less likely to perform than it was, and so I certainly wouldn’t and don’t [and] haven’t counted the 23rd as an effective minority district in the newly adopted plan.” (2011 Tr. 1839:3-7.)

The State’s failure to create seven congressional districts in South and West Texas that afford Latino voters the opportunity to elect their candidate of choice dilutes Latino voting strength in violation of section 2 of the Voting Rights Act.

B. PLAN C185 INTENTIONALLY DISCRIMINATES AGAINST LATINO VOTERS IN VIOLATION OF SECTION 2 AND THE 14TH AMENDMENT

The Fourteenth Amendment forbids intentional discrimination in the redistricting process. There are two distinct ways of prevailing on a claim of intentional discrimination in redistricting. The first is to prove “that the State has enacted a particular voting scheme as a purposeful device ‘to minimize or cancel out the voting potential of racial or ethnic

minorities” – a claim “analytically distinct” from claims under the *Shaw v. Reno* line of cases, which challenge the use of race as the predominant basis for classifying and separating voters into districts. *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (explaining distinction between claims); *see also Shaw v. Reno*, 509 U.S. 630, 651-52 (1993) (distinguishing claim of vote dilution in reapportionment from segregation in reapportionment).

With respect to the first category of intentional discrimination in redistricting, the U.S. Supreme Court’s decision in *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) provides guidance for this Court’s “sensitive inquiry into such circumstantial and direct evidence as may be available.” The Supreme Court’s more recent decision in *LULAC v. Perry*, 548 U.S. 399 (2006) provides additional criteria by which to determine whether Plan C185 intentionally dilutes Latino voting strength.

The evidence at trial shows that Texas redistricters crafted CD23 with the purpose of preventing Latino voters from electing their candidate of choice. Texas’s redistricters knew that the incumbent, Francisco Canseco, was not the Latino candidate of choice. They were also concerned that he might not be reelected in the upcoming 2012 general election. In response, the redistricters altered the boundaries of CD23 to help ensure the reelection of Mr. Canseco with the knowledge that the changes would prevent the election of a candidate preferred by Latino voters.

Direct Evidence

There is substantial direct evidence that mappers sought to reduce Latino voting strength in CD23. A November 2010 email between lawyers working for Texas House Speaker Joe Straus proposes a “useful metric” that would employ Latino demographic,

voter registration and turnout data to create a majority Latino CD23 with the lowest possible level of Latino voter participation. (PL617). The “nudge factor” described in the email was intended to bolster the reelection chances of Mr. Canseco in CD23. After the Census released redistricting data in 2011, the author of the “nudge factor” email worked closely with Texas mappers on the South Texas congressional districts, proposing redistricting plans throughout the process and successfully advocating for specific changes to CD23 on the final day of drafting, including the Maverick County split and inclusion of several South Texas counties in CD23.

While redistricting CD23, redistricters relied on an index of racially contested elections (the OAG10) to evaluate the ability of Latino voters to elect their preferred candidate in various draft plans. This index did not measure partisan performance but instead focused on re-aggregating past election results from races in which a Latino candidate ran head to head against a non-Latino candidate. Redistricters checked the performance of Latino-preferred candidates in the OAG10 index as they created draft redistricting plans and strove to ensure that the Latino-preferred candidate success rate in CD23 would be 1/10. For example, a May 28, 2011 email from House Redistricting Committee counsel Ryan Downton to Gerardo Interiano, counsel to the House Speaker, and Doug Davis, Senate Redistricting Committee counsel, provides an update on his progress in drafting CD23. In response to the question from Mr. Interiano “Have you been able to make any of the changes that we all discussed,” Mr. Downton writes: “Have it over 59% HCVAP, but still at 1/10.” (PL659). Mr. Downton further testified that almost all the drafts that he worked on for CD23 had a 1/10 performance for Latino preferred candidates.

Ryan Downton, the lead mapper on the congressional plan, testified that although he knew he could increase the Latino voting strength in CD23 by swapping territory with CD28, a heavily Latino district adjacent to CD23, he chose not to because it would have endangered the ability of Mr. Canseco to be reelected. Tr. 1693:23-1694:21 (8/15/14).

Racial considerations played a central role in the creation of CD23 in two respects. First, redistricters explicitly sought to craft a district that would be over 50% HCVAP and SSVR. Second, redistricters used race, specifically in the form of the OAG10, to ensure that their CD23 would not be likely to elect the Latino candidate of choice. Mr. Downton testified that when he was drawing CD 23, he turned on the REDAPPL shading for election results and SSVR. (2011 Tr. 954:4-8) This meant that he could see the effects on election results and SSVR of every change he made the instant he made the change. He made these changes precinct-by-precinct, with the dual goals of strengthening the district for Mr. Canseco and increasing the SSVR. Mr. Downton acknowledged that it was possible that in the precincts he swapped into CD23 Anglo voters turned out at higher rates than Latino voters. Mr. Downton further acknowledged that voting in the Latino majority precincts he swapped into CD23 could have been more racially polarized.

Discriminatory Effect

Plan C185 reveals that redistricters accomplished their goal of creating a CD23 with a majority of SSVR and reduced Latino voter turnout. Dr. Henry Flores testified that CD23 in Plan C185 features a Latino voter turnout rate of -2% and a non-Latino voter turnout rate of +2% when compared to CD23 in C100.⁴ In the context of racially

⁴ Although each general election features its own specific dynamics, Dr. Flores's analysis detected changes in the turnout rates of Latinos and non-Latinos within the same election, thus demonstrating that the boundary changes in CD23, not election dynamics, drove the turnout changes between CD23 in C100 and

polarized voting, these percentage changes widen the turnout gap between Latinos and non-Latinos and “nudge” CD23 down to a one-in-ten success rate for Latino-preferred candidates in the OAG10 index.

Dr. Flores specifically identified the following changes to CD23 as reducing Latino turnout and widening the turnout gap between Latinos and non-Latinos: the split of Maverick County and exclusion from CD23 of an area with relatively higher Latino turnout and a small participation gap between Latinos and non-Latinos; inclusion of all or part of Frio, LaSalle, and Atascosa counties, an area with a large participation gap between Latinos and non-Latinos; inclusion of all or part of seven counties north and east of the Pecos River with a large participation gap between Latinos and non-Latinos; precinct swaps with CD16 in El Paso County that resulted in removing precincts from CD23 with a relatively higher Latino turnout rate; removal of more than 85,000 Latino voters with a relatively higher turnout rate from CD23 in Bexar County.

Historical Background of the Decision

Despite a recent U.S. Supreme Court ruling invalidating Texas CD23 under section 2 of the Voting Rights Act, and a strikingly similar set of facts leading up to the 2011 redistricting, Texas redistricters chose once again to take away Latino electoral opportunity in CD23 because they feared Latinos would oust the incumbent. *See LULAC v. Perry*, 548 U.S. 399, 440 (2006) (“In essence the State took away the Latinos’ opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation.”)

CD23 in C185. Whether or not turnout in the 2010 General Election was low, the point is that Latino turnout was *lower* in CD23 in C185 when compared to CD23 in C100.

The State's expert, Dr. Alford, testified, with respect to the changes in CD23 from Plan C100 to Plan C185, that "[t]here are some obvious parallels between what happened previously and what happened this time." (2011 Tr. 1875:2-9.) Dr. Alford also stated, when discussing the changes to CD23 "we feel like we are all having déjà vu[.]" (2011 Tr. 1929:18-21.) Specifically, Dr. Alford noted that:

- changes were made to CD23 to shore up the reelection prospects of Representative Bonilla in 2003 and in Plan C185 the changes were made to shore up the reelection chances of Representative Canseco;
- in 2003 changes were made to CD23 to add overwhelmingly Anglo Hill Country counties;
- in 2003, CD 23 split Webb County and the City of Laredo, and he knew that some people were upset that CD23 in Plan C185 splits the city of Eagle Pass and Maverick County; and
- in *LULAC*, the benchmark CD23 was a Latino majority district whose incumbent was not the candidate of choice and most observers agreed that CD23 was about to elect the Latino candidate of choice.

Ultimately, with respect to CD 23 in the 2011 round of redistricting, Dr. Alford testified: "If I [were] advising the legislature on drawing the 23rd, I would not have done what was done to the 23rd." (2011 Tr. 1838 9:21.) He further testified:

[M]y first advice to the legislature would be just -- you know, in simple -- with a slight memory of history, do as little as possible to the 23rd as you can. It really has been a difficult -- it was a difficult district for the Court to draw. It was a difficult district for the legislature to draw. But, basically, enough is enough, right? Don't make this hard on yourself. . . Don't mess with the 23rd. That would be my first rule for drawing the districts.

(Tr. 1840:8-22.) He also stated: “I would have advised [] rather than creating a replacement district for the 23rd, I would have advised making the 23rd itself a better performing district in terms of election numbers, or -- basically that, or leaving the 23rd alone.” (Tr. 1840:23-1841:5.)

The historical background for CD23’s redistricting demonstrates that in 2011 Texas acted to preserve Mr. Canseco’s incumbency despite its awareness that taking away Latino voters’ opportunity to elect their preferred candidate could violate the Voting Rights Act and the U.S. Constitution.

Substantive Departures

Texas redistricters departed from normal substantive considerations in redistricting when they rejected proposals by the Republican congressional delegation and the Office of the Governor to create a combined majority-minority district in the Dallas-Ft. Worth area. Although the proposals by the Republican delegation and the Governor shared the stated partisan goals of Texas redistricters, the redistricters instead crafted districts in Dallas-Ft. Worth that spread out the minority population in order to maintain Anglo majorities (albeit shrinking) in all districts other than CD30.

Texas redistricters also departed from normal substantive considerations in South Texas by failing to evaluate whether their changes to CD23 would undermine the ability of Mr. Canseco to be re-nominated in the Republican primary. Mr. Canseco testified that he ran unsuccessfully for the Republican nomination in CD23 in 2004 and 2008 and later prevailed in the 2010 Republican primary by about 750 votes. Mr. Canseco further testified that he was concerned as CD23 was evolving in the 2011 legislative session that the district was losing precincts on the South Side of San Antonio that had supported him

in his Republican primaries and that if CD23 gained heavily Republican areas he might not be re-nominated. Nevertheless, and despite Mr. Canseco's position that redistricters need to be sensitive, when drawing a Latino majority district, to the areas that will support a Latino Republican in the primary, Texas redistricters removed areas that were supportive of Mr. Canseco in his past primaries and added areas to CD23 where, in the 2012 election, Mr. Canseco failed to garner a majority of the vote. (PL1158)

Texas redistricters also departed from normal substantive considerations in CD23 by relying on the OAG10 index to ensure a 1/10 success rate for Latino preferred candidates in their draft plans but refusing to consider whether decreasing CD23 to a 1/10 success rate for Latino preferred candidates undermined its status as a Latino opportunity district under section 2.

Texas redistricters further departed from normal substantive considerations in CD23 by ignoring concerns expressed by Jeff Archer, Interim Assistant Executive Director at the Texas Legislative Council that CD23 might not offer Latino voters the opportunity to elect their candidate of choice in compliance with section 2 of the Voting Rights Act. Similar concerns were expressed by Doug Davis, counsel to the Senate Redistricting Committee, but redistricters did not change their configuration of CD23 to improve Latino voting strength in the district.

In general, Texas redistricters followed the normal substantive consideration of placing new congressional districts in areas of greatest growth. However, redistricters departed from this consideration when it came to creating a new district in South Texas that would absorb the substantial population growth in that region and be Latino-majority. In that situation, redistricters created a new Latino-majority CD35 linking San

Antonio to Austin but then removed Latino opportunity to elect in CD23, ensuring no net gain in Latino electoral opportunity in South Texas.

The State's Defenses are Unavailing

Texas claims that there can be no discrimination in its configuration of CD23 because, with a majority of HCVAP and SSVR, CD23 offers Latino voters the opportunity to elect their candidate of choice. Under this view, any differences in voter registration or turnout rates between Latino and non-Latino voters, and the historical bases for those differences is pushed aside. In essence, Texas is arguing a demographic "safe harbor" for its changes to CD23.

The State's argument is fruitless here because the evidence demonstrates: Texas set out to create a district that would elect the Latino candidate of choice in only one of ten elections; Texas relied on data from racially-contested elections to evaluate Latino opportunity to elect in its draft districts; and Texas acted to preserve the incumbency of a candidate it knew was not preferred by Latino voters. Thus, Texas never sought to create a Latino-majority district using only demographic data. The State's changes to CD23 were always designed to reach a level of election performance that would ensure the reelection of a candidate not preferred by Latino voters.

The State also contends, contrary to the view of its expert witness, that CD23 may not have been a Latino opportunity district in the benchmark plan because it elected the Latino-preferred candidate in only three of ten elections in the OAG10 index. In fact, in light of all 14 racially-contested statewide elections held between major party candidates during the time period covered by the OAG10 (2002-2010), the Latino-preferred

candidate won 7 in CD23, a success rate of 50%. The Latino-preferred candidate also won two of three endogenous elections in benchmark CD23.

Furthermore, if the State's goal was to re-elect Mr. Canseco in a general election, redistricters could have created CD23 with an eye to partisan performance and without looking at racial data. Instead, redistricters strove to increase the HCVAP and SSVR of CD23 while at the same time ensuring that Latino-preferred candidates would have little success in the district.

The evidence demonstrates that Latinos were not the "collateral damage" in an effort to preserve Mr. Canseco's incumbency. Instead, Latinos were at the heart of the endeavor, swapped into and out of CD23 based on whether or not their presence in the district made it more or less likely they would elect the Latino candidate of choice in the OAG10 index. Redistricters used Latinos as building blocks for a district that would be majority Latino but not offer Latinos as realistic opportunity to elect their preferred candidate.

Although there is no evidence that the reconfiguration of CD23 was a purely partisan effort, any such claim would fail. The testimony and evidence at trial demonstrates that Latinos are flexible in their support for candidates and will vote for Republican or Democratic candidates depending on their message and outreach in the Latino community. In light of this record, treating Latino voters as a proxy for Democratic voters would lack the nexus between partisanship and race needed to avoid a constitutional violation. *See, e.g. Easley v. Cromartie*, 532 U.S. 234, 245 (2001) (finding no violation where "African-Americans [] register and vote Democratic between 95% and 97% of the time.").

C. PLAN C185 INTENTIONALLY DISCRIMINATES AGAINST LATINO VOTERS IN VIOLATION OF THE 14TH AMENDMENT (SHAW V. RENO)

Texas used race as the predominant factor in drawing districts in the Dallas Ft. Worth area. In Dallas County, Mr. Downton drew at the block level, splitting voting precincts (VTDs) to assign Latinos into the Anglo-majority congressional district 6. In Tarrant County, the “lightning bolt” of CD 26 excises Latino voters from the City of Fort Worth and joins them with a heavily Anglo electorate to the north in Denton County. The “lightning bolt” also divides Latinos from African Americans, assigning Latinos to CD26 and African Americans to CD12.

Mr. Downton testified that he had no personal knowledge of the community characteristics of the residents who live inside the “lightning bolt” of CD26. 2014 Tr. 1710:9-13. Although he was aware that Latinos in Ft. Worth constitute the majority of Texas House District 90, he did not overlay the boundaries of HD90 while drawing the “lightning bolt” of CD 26. 2014 Tr. at 1712:4-8. Mr. Downton relied exclusively on racial shading to assign voters to CD26 and CD12 in the area of the “lightning bolt.” 2014 Tr. 1710:14-20.

Mr. Downton testified that in Tarrant County, precincts split by the CD26 “lightning bolt” placed more Latino population than African American population in CD26. 2014 Tr. 1714:20-1719:3. Mr. Downton also testified that in Dallas County, precincts split by CD6 placed more Latino population than non-Latino population in CD6. 2014 Tr. 1719:20-1724:16.

Mr. Downton conceded that he was not drawing Latinos into CD26 in Tarrant County and into CD 6 in Dallas County to create remedial Latino opportunity districts. 2014 Tr. 1720:4-1721:1. There is also no partisan justification for separating Latinos from African

Americans and assigning them to different congressional districts if, as Texas claims, these two groups of minority voters support the same political party.

By redistricting at the block level and relying on racial shading to assign voters to districts, Texas engaged in unconstitutional race-based redistricting. *See Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) (“When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’”).

DATED: August 21, 2014

Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND

/s/ Nina Perales

Nina Perales
Texas Bar No. 24005046
Ernest I. Herrera
New Mexico Bar No. 144619
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
FAX (210) 224-5382

Denise Hulett
National Senior Counsel
MALDEF
1512 14TH St.
Sacramento, CA 95814
(916) 642-6352

COUNSEL FOR PLAINTIFFS TEXAS
LATINO REDISTRICTING TASK
FORCE, RUDOLFO ORTIZ, ARMANDO
CORTEZ, SOCORRO RAMOS,
GREGORIO BENITO PALOMINO,

FLORINDA CHAVEZ, CYNTHIA
VALADEZ, CESAR EDUARDO
YEVENES, SERGIO CORONADO,
GILBERTO TORRES, RENATO DE LOS
SANTOS, JOEY CARDENAS, ALEX
JIMENEZ, EMELDA MENENDEZ,
TOMACITA OLIVARES, JOSE
OLIVARES, ALEJANDRO ORTIZ, AND
REBECCA ORTIZ

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has electronically submitted a true and correct copy of the above and foregoing via the Court's electronic filing system on the 21st day of August, 2014. The undersigned counsel hereby certifies that she caused a true and correct copy of the above and foregoing to be e-mailed and/or facsimile to the persons listed below by the close of the next business day.

/s/ Nina Perales
Nina Perales

David Escamilla
Travis County Asst. Attorney
P.O. Box 1748
Austin, TX 78767
Fax: (512) 854-4808