

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

STATE OF TEXAS,

Plaintiff,

- against -

UNITED STATES OF AMERICA and ERIC H.
HOLDER, JR. in his official capacity as Attorney
General of the United States,

Defendants.

CIVIL ACTION NO. 1:11-cv-01303

Three-Judge panel: RMC-TBG-BAH

**DEFENDANT-INTERVENOR TEXAS LATINO REDISTRICTING TASK FORCE'S
NOTICE OF FILING PRE-FILED WRITTEN DIRECT TESTIMONY**

EXHIBIT 2

Supplemental Expert Report of Dr. Richard Engstrom

SUPPLEMENTAL REPORT FOR STATE OF TEXAS v.

UNITED STATES OF AMERICA

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My name is Richard L. Engstrom and I am a resident of Durham, North Carolina. I have been asked by the attorneys for the Latino Task Force Defendant Intervenor to assess the retrogressive effects of redistricting plans adopted by the State of Texas for the United States House of Representatives and the Texas House of Representatives following the 2010 Census of Population. This Supplemental Report provides this assessment.

This assessment addresses the following question: whether the changes in these plans “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise”? [*Beer v. United States*, 425 U.S. 130, 141 (1976)]. The “effective exercise” of their electoral franchise concerns “the ability of such citizens to elect their preferred candidates of choice” [Voting Rights Act, Section 2(d), amended by the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act]. The minority group of concern is Latinos. This assessment requires a comparison between the “benchmark” plans in place in 2010, and the plans adopted by the State of Texas this year to replace those plans. The benchmark plan for congressional districts contains 32 districts, while the adopted plan

contains 36. The benchmark plan and the adopted plan for the state's House districts contain the same number of districts, 150. The racially polarized voting analysis contained in my first report in this case clearly demonstrates that Latinos in the areas of Texas studied demonstrated a preference to be represented by people from within their group.

United States House of Representatives

Latinos were elected in six of the seven majority-Latino districts in the benchmark plan for the congressional districts during the last decade. These were CDs 15, 16, 20, 23¹, 27², and 28. The other majority-Latino district, CD 29 in that plan, has been represented by an Anglo representative, Gene Green, the entire decade. However, when I examined the votes cast in the geographical area of that district in the seven general elections analyzed in my racially polarized voting analysis in which Latino candidates were the Democratic nominees, and the six Democratic primaries in which Latino candidates sought that party's nomination, all of which were almost always the choice of the Latino voters in the areas examined, those candidates won a majority of the votes in the geographical area of CD 29 in all seven general elections and in five of the six Democratic primaries. Thus I conclude that the benchmark congressional plan contains seven viable³ Latino districts.

¹ Although CD23 elected a non-Latino preferred candidate in 2010, it elected the Latino-preferred candidate in 2006 and 2008.

² Although CD27 elected a non-Latino preferred candidate in 2010, it elected the Latino-preferred candidate in 2006 and 2008 as well as preceding elections back to its creation in the early 1980's.

³ Viable districts are districts that have elected Latino candidates who are Latino candidates of choice or have elected Anglo candidates and in which Latino candidates in other elections win the majority of the votes cast in the area of the district.

The Latino percentage of the voting age citizens (CVAP) in these seven districts ranged from 56.0 to 74.5, according to the United States Bureau of the Census's American Community Study for 2009. This survey reports the rolling average over the annual surveys taken from 2005 through 2009. The Texas Legislative Council (TLC) reports show, based on Spanish surname matching, that around the time of redistricting the Latino percentage of the registered voters in these districts ranged from 52.6 to 71.2.

In two of these districts, CDs 23 and 27, Latino-preferred Democratic incumbents were defeated for reelection in 2010 by non Latino-preferred Republicans, a landslide year for Republican candidates in Texas. CD 23 was the district recreated by *League of United Latin American Citizens v. Perry* [457 F. Supp. 2d. 716 (E.D. Tx 2006)] in order to create another "effective Latino opportunity district" in Texas (at 719, 721) after the Supreme Court's decision in *League of United Latin American Citizens v. Perry*, [548 U.S. 399 (2006)]. A Latino-preferred candidate was elected in the first election in that new district, defeating the incumbent non- Latino-preferred candidate, and reelected again in 2008. In 2010 however he lost the seat in the Republican landslide, receiving 44.4 percent of the overall vote despite receiving an estimated 84.7 percent of the votes cast by Latinos in that election (the 95 percent confidence interval around this estimate is 82.0 and 87.6).

In CD 27, also referred to as a "Latino opportunity district" by the district court (at 720), the long-term Latino-preferred incumbent in the district was also defeated for reelection. Despite receiving an estimated 86.6 percent of the votes cast by Latinos

(confidence interval = 85.3 to 88.1), he received 47.5 percent of the overall vote and lost.⁴ The loss of these two districts by the Latino candidates favored by Latino voters in a banner year for Republicans does not, in my opinion, remove them from being considered viable Latino districts. However, when examining the votes cast in the geographical area of that district in the seven general elections analyzed in my racially polarized voting analysis in which Latino candidates were the Democratic nominees, and the six Democratic primaries in which Latino candidates sought that party's nomination, all of which were almost always the choice of the Latino voters in the areas examined, those candidates won a majority of the districts in the benchmark plan.

The adopted plan, like the benchmark plan, also provides seven roughly comparable opportunities for Latinos to elect their preferred candidates of choice in the adopted congressional plan. These are districts 15, 16, 20, 28, 29, 34, and 35. They are all majority districts in CVAP, ranging from 51.9 percent to 72.7 percent. The Latino voter registration, with one exception, ranges from 53.0 percent to 71.9 percent. The exception is CD 35 in that plan, in which Latino registration drops to 45.0 percent. However, when examining the votes cast in the geographical area of that district in the elections analyzed in my racially polarized voting analysis, the Latino candidates won a majority of the votes in all 13 elections.

Two districts in which Latino candidates had been elected in the benchmark plan do not have comparable substitutes in the adopted plan. The previous CD 27 has been abolished as a majority-Latino district, and CD 23, while still a majority-Latino in CVAP

⁴ The estimates reported in this paragraph are based on the same methodology employed to obtain those reported in my racially polarized voting study discussed above, King's ecological inference

(58.5 percent) and registration (54.8 percent) has been reconfigured in a way that the Latino-preferred candidates in the statewide elections lost six of the seven general elections within it.

I conclude that the adopted plan has seven districts reasonably similar in opportunity to the seven in the benchmark plan that have provided Latino voters with demonstrated opportunities to elect their preferred candidates of choice, including candidates from within their own group if that remains their preference. However, there is more to the retrogression issue than the absolute number of districts providing such opportunities. As noted above, the overall number of districts is not the same in the two plans. The benchmark provided seven out of 32, whereas the adopted plan contains seven out of 36. In overall terms, therefore, the relative percentage of opportunities has been reduced from 21.9 percent to 19.4 percent. In light of this, I cannot conclude that the adopted plan does not entail a retrogression in the position of Texas Latinos with respect to “their effective exercise of the electoral franchise”. I conclude that it does.

Texas House of Representatives

Latino Democratic candidates were elected in the last three elections in 23 of the 25 majority-Latino districts in the benchmark plan for the state House districts, the elections held in 2006, 2008, and 2010. These were HDs 31, 36, 37, 38, 39, 40, 41, 42, 43, 74, 75, 76, 77, 104, 116, 118, 119, 123, 124, 125, 140, 143, and 145. Anglo Democrats were elected in the other two, districts 79 and 80. However, when I examined the votes cast in the geographical area of these districts in the seven general elections and

procedure.

six primary elections analyzed in my racially polarized voting analysis, the Latino candidates received a majority of the votes cast in all 13 of those elections in HD 70 and 12 of the 13 in HD 80. The Latino percentage of the voting age citizens (CVAP) in these 25 districts ranged from 59.7 to 93.6 while the Latino percentage of the registered voters in these districts ranged from 55.2 to 90.9. Thus I conclude that these 25 districts were viable Latino districts in the benchmark plan for the Texas House.

There are four additional majority-Latino districts in both CVAP and voter registration in the benchmark plan. In three of these districts Latinos won the 2006 and 2008 House elections, but lost as incumbents in 2010. These were HDs 33, 34, and 35, in which Latinos constituted 60.4, 58.2, and 54.6 percent of the CVAP respectively, and 55.3, 53.8, and 55.3 percent of the voter registration. Despite their losses, these incumbent candidates were competitive in 2010, winning 47.5, 46.0, and 47.2 percent of the votes, respectively, in 2010.⁵

The fourth majority-Latino district is HD 117, a district that an Anglo Democrat won in 2006 and 2008. This is a district in which the Latino candidates in the exogenous elections I analyzed in my racially polarized voting study received over a majority of the vote in a four of the seven general elections, and in all six of the Democratic primaries. The incumbent was also competitive in the 2010 landslide, winning 48.1 percent of the

⁵ An analysis of the votes cast in the 2010 election in HD 33 reveals that the Latino incumbent received an estimated 92.3 percent of the Latino vote in this election. The 95 percent confidence interval for this estimated, derived through the Ecological Inference methodology (EI), is 88.5 percent to 95.4 percent. See my Corrected Rebuttal Report in *Perez v. Perry*, W.D. Tx September 12, 2011, at 25. An analysis of the votes cast in the 2010 election in HD 35, also based on EI, reveals that the incumbent received 77.9 percent of the Latino vote. See Lisa Handley's report in this case, A Section 5 Voting Rights Analysis of the Proposed Texas State House Plan, October 19, 2011, at 34.

votes 2010 while receiving 85.6 percent of the votes cast by Latinos.⁶ These four districts I also conclude were viable districts in the benchmark plan.

There are also three districts in the benchmark plan that were not majority-Latino districts in either CVAP or voter registration but in which Latino Democratic candidates won the three most recent elections. These were HDs 51, 103, and 148. While Latinos constitute 45.8 percent of the CVAP in HD 51, and 40.9 percent of the registered voters, the Latino representative in that district received from 75.9 and 89.5 percent of the overall votes in these elections. Likewise, while Latinos constitute 46.5 percent of the CVAP in HD 103, and 39.3 percent of the registered voters, the Latino representative in that district received 83.4 percent of the overall vote in 2006 and 88.3 percent in 2008, and was unopposed in 2010. And in HD 148, in which Latinos constitute 42.1 of the CVAP and 40.0 percent of the registered voters, the representative in that district received from 58.7 percent to 84.3 percent of the votes in the three elections.

Another district in the benchmark plan, HD 90, is 47.9 percent Latino in CVAP and 47.2 percent in voter registration. The representative that won this district in the last three elections is an Anglo Democrat, who received from 65.3 percent to 86.4 of the overall vote in them. An analysis of the 2010 election in this district reveals that the incumbent received an estimated 85.2 percent of the Latino vote in this election.⁷ This is a district in which the Latino candidates in the endogenous elections I analyzed won all seven elections with votes ranging from 61.8 percent to 69.8 percent, and five of the six

⁶ Handley Report, at 35.

⁷ Handley Report, at 33 .

Democratic primaries. These four districts I therefore conclude are also viable Latino districts in the benchmark plan. This brings the total number of such districts in the benchmark plan to 33.

The new districts in the redistricting plan for the Texas House adopted by the state retain the opportunities for Latinos to elect candidates of their choice in 31 of the 33 districts. The most egregious instance of retrogression in the new plan is the dismantling of HD 33. This is a majority-Latino district in which Latinos constitute 60.4 percent of the CVAP and 55.3 percent of the voter registration, and in which a Latino Democrat won the 2006 and 2008 elections. He also received 47.5 percent of the votes in 2010 despite the Republican landslide. HD 33 is now a district located in another part of the state, in which Latinos constitute only 8.5 percent of the CVAP and 6.5 percent of the voter registration. A district replacing HD 33, in which Latinos would have a comparable, or better, opportunity to effectively exercise their franchise, is not contained in the new plan.

HD 117 is another district in which the opportunity Latinos have to elect a representative of their choice is impaired by the new plan. The 2010 election for this seat was very competitive. The choice of Latino voters in this election was the incumbent, who received an estimated 85.6 percent of their votes.⁸ He lost the election however, receiving an overall vote of 48.1 percent. While the Latino percentage of the CVAP in this district is increased from 58.8 percent to 63.8, the Latino percentage of the registered voters has been reduced from 50.8 percent to 50.1. In addition, whereas the Latino

⁸ See text at note 5, supra.

candidates in the exogenous elections I studied had received a majority of the votes in this district in four of the seven general elections, they did so in three in the newly adopted HD 117. Further, in the latest exogenous elections, the two general elections in 2010, the votes received by the Latino candidates is reduced by 3.0 and 3.3 percentage points, a significant drop in a district just lost by the Latino candidate of choice by a margin of 3.8 percentage points.

Conclusion

My examination of the differences in the districts in the benchmark plan for U.S. House of Representatives seats in Texas and the state's replacement for that plan, and the differences in the benchmark plan for seats in the Texas House of Representatives and the state's replacement plan, requires me to conclude that both of the new plans have a retrogressive effect.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge. Executed on October 23, 2011 in Durham,

NC.



Richard L. Engstrom