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

SHANNON PEREZ, et al., Plaintiffs, v. STATE OF TEXAS, et al., Defendants.	§ § § § § § §	 CIVIL ACTION NO. 11-CA-360-OLG-JES-XR [Lead Case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES, Plaintiffs, v. STATE OF TEXAS, et al., Defendants.	§ § § § § § § §	 CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated Case]
TEXAS LATINO REDISTRICTING TASK FORCE, et al., Plaintiffs, v. RICK PERRY, Defendant.	§ § § § § §	 CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated Case]
MARGARITA V. QUESADA, et al., Plaintiffs, v. RICK PERRY, et al., Defendants.	§ § § § § §	 CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated Case]

JOHN T. MORRIS, Plaintiff, v. STATE OF TEXAS, et al., Defendants.	§ § § § § §	CIVIL ACTION NO. SA-11-CA-615-OLG-JES-XR [Consolidated Case]
EDDIE RODRIGUEZ, et al., Plaintiffs, v. RICK PERRY, et al., Defendants.	§ § § § § §	CIVIL ACTION NO. SA-11-CA-635-OLG-JES-XR [Consolidated Case]
WENDY DAVIS, *et al.*, *Plaintiffs,* v. RICK PERRY, *et al.*, *Defendants.*	§ § § § § §	CIVIL ACTION NO. SA-11-CA-788-OLG-JES-XR [Lead Case]
LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), DOMINGO GARCIA , *Plaintiffs,* v. RICK PERRY, *et al.*, *Defendants.*	§ § § § § § §	CIVIL ACTION NO. SA-11-CA-855-OLG-JES-XR [Consolidated Case]

JOINT ADVISORY BY CERTAIN PLAINTIFFS AND PLAINTIFF-INTERVENORS ON STATUS OF LEGAL CHALLENGES

Certain Plaintiffs and Plaintiff-Intervenors—the Rodriguez plaintiffs, the Quesada plaintiffs, the Davis plaintiffs, the LULAC plaintiffs, the Texas NAACP plaintiffs, and the African-American Congressional plaintiffs—submit this joint advisory to the Court, in response to the

second paragraph of the Court's Order of January 28, 2012 (Dkt. #593) ("January 28th Order") and to the inquiry in paragraph 11 of the Court's Order of January 23rd (Dkt. # 583) about "whether the evidence in the record will need to be supplemented with updated ACS survey data."

PREAMBLE—FEBRUARY 6 DEADLINE FOR "ALL PARTY" AGREEMENT ON INTERIM MAPS

We understand that the Court indicated in its February 2nd order that, if the April 3 primary was to remain in place, "all parties" should submit an agreed interim map by today. That will not be happening. None of the parties to this submission has joined in or has any plans to join in any proposed agreement with the state, in the person of the Texas Attorney General, as to interim maps for the districting plans at issue in this dispute. Some have been contacted by the Office of the Texas Attorney General about discussing potential areas of agreement; others have not been contacted in that regard at all. In any event, no agreement has been reached, and none is foreseeable.

I. PRELIMINARY STATEMENT CONCERNING THE SCOPE OF THIS ADVISORY

A. Court directives addressed in this response

The January 28th Order directs the parties to: (a) identify the districts in the three enacted maps (Plans H283, S148, and C185) which, in light of the Supreme Court's January 20th decision in *Perry v. Perez*, are no longer subject to objection by the parties; (b) identify the districts in those maps that are being challenged and restate the specific challenges to them; and (c) as to any "statewide challenges," specifically state them.

These directives are addressed below, but in a slightly different order than listed by the Court. Item (b) is addressed in Part II. Item (c) is addressed in Part III. Finally, item (a) is addressed in Part IV.

The order also directs the parties to identify any element of any particular claim that is not in dispute. This particular directive seems best answered by the State, and, therefore, the plaintiffs and plaintiff-intervenors do not address it here, avoiding an anticipatory guess about the position the State will take.

Finally, Part V contains a response to the Court's January 23rd inquiry about updated ACS survey data.

B. Effect of interlocking nature of districts and population on this advisory

The nature of creating legislative and congressional districts is such that a decision about where the line will be drawn in one part of the state can be based on where the line-drawer intends to line to be drawn in another part of the state. Or, the line drawn in one part can necessarily have an effect in a nearby district or even one relatively distant because of one person, one vote requirements. Also, because intentional discrimination can affect decisions across the state, every district in a map can be affected in some fashion when such discrimination is remedied.

Against this backdrop, the Court should understand that, in the discussion in Parts II-IV, below, the parties are trying to hone in on the districts likely to be most affected by their challenges and by the remedies sought as a result of them.

II. CHALLENGED DISTRICTS AND CHALLENGES SPECIFIC TO THEM

A. State House

The challenges in the House focus on the reduction in minority voting strength in the following specific districts: 26, 33, 35, 41, 54, 117, 144, and 149; and on the failure of the Legislature to draw districts that recognized naturally occurring minority districts that reflect the population growth, including in northeastern Dallas County, Bell County, and eastern Harris

County. These naturally occurring districts are consistent with the interim districts 54, 107 and 144 drawn by this Court. The challenges are based on discriminatory results of the State's plan that violate section 2 of the Voting Rights Act and the Legislature's racially discriminatory motivation that guided formation of the H283 districts.

We note that each of these areas is at issue in before the District of Columbia Court, as are districts 101 and 106, as to which there is substantial evidence of racially discriminatory purpose and effect as to the elimination of emerging minority districts.

B. State Senate

The challenge to the Senate Plan, (S156) focuses on the State's destruction of SD 10. In the benchmark plan, SD 10 was a district in which black and Hispanic voters elected their preferred candidate to office. The State chose to dismantle that ability to elect district in the 2011 redistricting plan by fracturing large minority populations in Tarrant County into other adjoining senate districts that would be dominated by Anglo voters. The state's actions were both intentionally discriminatory and will have a discriminatory effect. Minority voters in SD 10, who are politically cohesive, will have their voting strength diminished by the fragmentation of minority neighborhoods under the state's pan. The evidence in the DC case establishes that the senate map drawers (Mr. Doug Davis and Senator Kel Seliger) knew that they were fracturing minority neighborhoods by removing them from SD 10, but did so anyway. The State's expert witness, Dr. John Alford, admitted in the DC preclearance trial that minority voters in SD 10 were cohesive in the 2008 election and that they elected their candidate of choice in that election, State Senator Wendy Davis. He also admitted that by removing many of the minority neighborhoods from SD 10 and placing them into other Anglo voter dominated districts, minority voting strength would be diminished under the state's proposed senate map.

Nothing in the Supreme Court's recent decision in *Perry v. Perez* changes the number of districts that are under challenge in the senate plan. The focus of the Davis and LULAC plaintiffs' challenge remains the destruction of SD 10, which has been converted from an effective ability to elect district to one in which minority voters will no longer have an equal opportunity to participate effectively in the political process or to elect their candidate of choice.

C. Congress

With regard to specific districts in the State's congressional plan, we describe those challenges as follows:

1. CD 23

CD 23 is challenged under Section 2 of the Voting Rights Act ("Section 2") and the Equal Protection Clause of the United States Constitution. The Section 2 challenge is based on both intentional discrimination and the effect of that redrawn district on minority voting opportunities.

The State engaged in a deliberate effort to redraw CD 23 so that it would no longer function as a district in which Hispanic voters have a reasonable opportunity to elect candidates of their choice. And the State's effort had the effect of accomplishing its intended objective.

A particular element of the state's concerted effort to destroy CD 23 as an opportunity district for Hispanic voters is the enacted plan's cracking of the south side of San Antonio Hispanic voting community into three congressional districts. This division—centered on the Harlandale school district area—was part and parcel of the state's plan for diluting the power of Hispanic voters in the current CD 23. The state's determination to remove high-performing Hispanic precincts from CD 23 resulted in packing some of those precincts into CD 20, and moving others into the new CD 35, dividing them from the historic local community of interest

and uniting them, instead, with disparate communities in Austin, stretching to north of the downtown and university area.

2. CD 27

CD 27 is challenged under Section 2 and the Equal Protection Clause on both intent and, as to Section 2, effect grounds insofar as it affects the voting opportunities of Hispanic voters. The State's removal of the sizeable Hispanic voting population in Nueces County from its historic orientation toward a South Texas configuration, redirecting that population into an Anglo-dominated district running north then west from Nueces County, was an intentional effort to lessen Hispanic voting opportunities across the expanse of South and West Texas, and it had that effect. Also, it even had deleterious effects on such voting opportunities in the Harris County configuration of districts.

3. CD 35

CD 35 is challenged on both Section 2 and Equal Protection grounds. Under Section 2, it constitutes an impermissible effort to trade-off the Section 2 rights of those in one part of the state (CD 23) for those in another part of the state (the Interstate 35 corridor from San Antonio to Austin), in violation of the determination in *LULAC v. Perry* that such swaps are impermissible under Section 2 where the rights of those in the eliminated district are not matched by those in the new district.

CD 35 also is inconsistent with the equal protection requirements in cases such as *Shaw v. Reno* and, more recently, *Bartlett v. Strickland*. The district, in its northern extension into Travis County, is part of the state effort to purposely destroy an existing crossover district (current CD 25), without legal necessity. *See* Part II.C.4, below. It is not necessary to create an additional Hispanic opportunity district in Central Texas through the destruction of an existing crossover

district in the area. Adding a small slice of minority voters in Travis County, who already live and vote in a crossover district, by a narrow band to a larger group of minority voters in Bexar County, who already live and vote in opportunity districts, nets out here no gain at all for minority voters. In the course of the larger scheme in performing this purposeful sleight-of-hand, nearly all of the African-American voters and a half or so of the Hispanic voters in Travis County and current CD25 are place in areas where Anglo voters who vote in ways hostile to minority interests will dominate.

4. CDs 10, 17, 21, 25

These districts, together, are challenged under the Equal Protection Clause. First, they constitute the deliberate destruction of an existing crossover district (current CD 25), in violation of the constitutional principle explained in *Bartlett*. Second, they also violate this constitutional provision because of their deliberate fragmentation of minority voting communities, particularly Black voting communities, in Travis County. In the case of CDs 10, 17, 21, and 25, the state rendered minority voting opportunities virtually meaningless by placing the fragmented minority voting groups in predominantly Anglo districts not even anchored in the voters' home county.

5. CDs 6, 12, 24, 32, 33

These districts, taken together, are challenged under both Section 2 and the Equal Protection Clause. They are all in the Dallas-Fort Worth Metroplex. There is considerable evidence that the failure to create one or two effective minority ability to elect districts in this region of the State was intentionally discriminatory.

According to the 2010 census, over 2.1 million Latinos and African Americans resided in Dallas and Tarrant Counties—enough population for more than three majority-minority congressional districts. Under the current benchmark map, there is only one minority ability to

elect district, CD 30 (represented by Congresswoman Eddie Bernice Johnson). Under the State's proposed congressional plan (S185), there remains only one minority ability to elect district (CD 30).

Since 2000, the Latino population in Dallas and Tarrant Counties has grown by 83.7%, the African American population by 34.1%, and population of other minorities by 12.0%. In contrast, the Anglo population in Dallas and Tarrant Counties has *declined* by 29.8% since 2000. African-Americans and Hispanics now comprise a majority of the population of these two counties: 52.6%. In the last decade, the Anglo population in Dallas and Tarrant Counties *decreased* by 156,742 while the African-American and Hispanic population increased by almost 600,000. *Id*.

During the 2011 legislative session, Republican Congressman Lamar Smith took the lead on congressional redistricting for the Republicans in the Texas congressional delegation. Legal counsel for the Republican members of the congressional delegation, Eric Opiela, engaged in numerous email correspondence with legislative staff in the Texas Legislature regarding the configuration of the congressional districts. What that correspondence showed was that around early April 2011, Congressman Smith distributed a draft congressional plan to Republican leaders of the Texas Legislature, as well as the Lieutenant Governor and Governor.[1] That map created a new majority-minority district in the Dallas-Fort Worth region. *Ibid*. As Congressman Smith put it, the map created "one new Voting Rights Act district in the Dallas-Fort Worth area" and "reflects the population growth in Texas over the last decade." *Ibid*. Minority group members of the Texas Legislature, including a member of the House Redistricting Committee,

[1] Because this exhibit is voluminous, we have provided the Bates stamp page number for the convenience of the Court.

repeatedly asked Anglo legislative leaders in the Texas House, such as Redistricting Committee Chairman Solomons, to see the plan but were told, falsely, that the map didn't exist. Similarly, Senator Rodney Ellis testified that he "was left out of the process and most of the members who represented minority districts, all of us were left out of the process." Sen. Rodney Ellis Trial Testimony at 95 (1/20/2012am session).

Furthermore, the Texas Legislature did not conduct a single hearing on congressional redistricting in the 2011 regular legislative session. Instead, redistricting was taken up in a special session in June 2011. Senators on the redistricting committee, like Senator Zaffirini (Hispanic) and Senator West (African-American), complained that the process was too rushed and they complained that neither they nor the public had adequate time to study it or meaningfully participate. African American State Senator Royce West, for example, said he was not shown the proposed congressional map until the day of the redistricting committee hearing. Similarly, Hispanic State Senator Judith Zaffirini told Chairman Seliger: "I've been on every redistricting committee since my election in 1986 and I must say that I have never had less input into the drawing of any map until this session."

The congressional redistricting process was so rushed, in fact, that even the State's outside counsel, Baylor law professor Mike Morrison, acknowledged that the redistricting process in 2011 was far more truncated than previous cycles, telling Senator West: "this process has been quite different from what we've seen in the past. We didn't get to Congressional; we didn't see a plan until the regular session ended. Nobody has had the opportunity to study it the way it has been done in the past or the way you do it ideally." Professor Morrison also contrasted the 2011 cycle with the 2003 redistricting cycle when the Texas Legislature conducted numerous field hearings to obtain public input. Morrison said: "We went all over the

state as you said earlier today. We spent 16 hours in one place, 20 in another. We sat down in your office, we visited. We hired experts to do retrogression analysis and if time permits that would be the way to do it this time." Unfortunately for Texas voters, particularly minority voters, there were no public field hearings held across the State on congressional redistricting plans in 2011.

Once the congressional map reached the senate floor, Senator Seliger was again forced to admit that not only did the outside team of lawyers he hired not see the congressional plan until it was released in committee, he also was forced to acknowledge that they had failed to be given a chance to evaluate it for compliance with the Voting Rights Act. Senator Seliger also admitted, under questioning by Senator Zaffirini, that no Hispanic or black member of the Senate was involved in the development of the congressional plan. Senator Seliger also conceded he never asked any senators to participate in drawing the plan, which was drafted he said, by the senate redistricting committee director Doug Davis. This was the same Doug Davis who testified that he worked on the 2003 congressional redistricting plan that had been struck down in *LULAC v. Perry* as violating the Voting Rights Act.

The State's enacted congressional map (C185) in the Dallas-Tarrant counties area fractures or cracks minority neighborhoods into four different congressional districts: CD 26, CD 12, CD 33, and CD 6. Each of those congressional districts will be dominated by Anglo Republican voters and are bizarre in shape because they have been configured to avoid the creation of a majority-minority district or districts in the North Texas area.

CD 26. CD 26 under the State's plan, for example, has been referred to at trial as the "lightening bolt district." It is dominated by Denton County Anglo voters and then protrudes

with a jagged extension in a southerly direction carving out minority voters from Tarrant County, particularly Latino population in the historic Northside/Stockyards area of Tarrant County.

CD 12. Dubbed the 'broken heart district' because its configuration resempbles a heart split in two, CD 12 in the state's proposed plan attaches the large Anglo population in northwest Fort Worth and western Tarrant County to a large part of SE Fort Worth, which is made up of heavily African-American neighborhoods. This oddly-shaped district would submerge the voting strength of African American voters in Fort Worth because the district will be dominated by Anglo voters residing in the more affluent areas of Tarrant County. Rep. Veasey Trial Testimony at 20 (1/18/2012pm session).

CD 33. CD 33 is comprised of heavily Anglo, suburban Parker and Wise counties (just northwest and west of Tarrant County) and then juts, fist-like, into Tarrant County from the west and extends deep into Tarrant County, grabbing fast-growing minority population areas to the south and east of CD 12. The district then extends into the City of Arlington and into the Grand Prairie area that straddles the Dallas-Tarrant counties border, and picks up the minority growth areas in southeast Tarrant County, Arlington—southeast Arlington-Grand Prairie. The district, like CD 26 and 12, has been drawn along racial lines to absorb the neighborhoods in these fast growing minority areas and submerge them into heavily Anglo-dominated District 33.

CD 6. CD 6 contains the heavily Anglo counties of Ellis and Navarro and reaches into both Dallas County and Tarrant County to pick up and absorb heavily Hispanic neighborhoods in Dallas County and areas of Tarrant County with rapidly growing Hispanic and black population areas. What is also telling about the configuration of this proposed congressional district is that

it splits black neighborhoods from Hispanic neighborhoods in a House district that just a month earlier, in drawing House districts, the leadership had insisted on keeping together.

6. CD 30

This district is challenged on the grounds that it was intentionally packed with minority voters and because its configuration was driven by a racially discriminatory intent. And that district, CD 30, is packed with minority population far in excess of what is needed to create an ability to elect district, and the result is that the state has deliberately created a heavily packed district that wastes many minority votes and diminishes the possibility of placing minority voters into an additional ability to elect district or districts in the North Texas region of the State.

More than 85% of the voting age population is minority. Yet, substantial numbers of nearby minority voters were placed in districts anchored in Anglo-dominated districts in suburban areas of the Metroplex. This is an effective racial gerrymander.

CD 30 is currently represented by African American Congressoman Eddie Bernice Johnson. The State's proposed congressional plan removed the home and district office of Congresswoman Johnson from her congressional district. Congresswoman Johnson tried several times to get her house back in her district but she was unsuccessful. African-American Members of Congress Al Green (CD 9) and Sheila Jackson Lee (CD 18) also had their district offices taken out of their districts, as did Hispanic Congressman Charlie Gonzalez CD 20). Each of these minority Members of Congress had important economic generators inexplicably removed from their districts as well, much to the detriment of the ability of the voters in those districts to fully participate in the political process.

There are only three African-American congresspersons from Texas while there are more than 20 Anglo Congresspersons. That these three African-American congresspersons were singled out for such treatment of their districts, homes, and district offices while the Anglo congresspersons went essentially untouched bespeaks a clear invidious intent at work in the legislative design.

Meanwhile, Anglo Members of Congress were accommodated completely, with one Member asking for a condo full of Republicans to be put in his district, along with an exclusive San Antonio country club (Rep. Lamar Smith), another wanting his "grandbabies" private school in his district (Rep. Kenny Marchant), and still another asking that her campaign office be moved back into her district (Rep. Kay Granger). In each instance, the Anglo Congresspersons' requests were immediately granted. That African American Members of Congress could be subject to such blatantly disparate treatment is strong evidence that the congressional plan is infected with racially discriminatory intent.

7. CDs 2, 7, 8, 14, 22, 27

These districts, primarily in the areas in and around Harris County, are challenged under both Section 2 and the Equal Protection Clause. As a result of the state's actions in wresting the Hispanic population in Nueces County from its historic orientation toward South Texas, *see* Part II.C.2, above, there was a ripple effect rotating northward and then eastward into the greater Houston area that resulted in fragmentation of minority voting communities, primarily Hispanic, and prevented the creation of an additional Hispanic or possibly coalition minority opportunity district in the area. The ripple effect of remedying the state's Section 2 and constitutional violations in this major urban area could also potentially affect CDs 9, 18, and 29.

8. CDs 15, 16, 20, 23, 27, 28, 34, 35

The cumulative effect of the state's dissection of the Hispanic voting communities in the wide swath of South, West, and even Central Texas covered by these districts was deliberately designed to lessen Hispanic voting opportunities in the area and it had that effect, a violation of both Section 2 and the Equal Protection Clause. At least one additional Hispanic opportunity district could have been created in this area, without the destruction of an existing crossover district (current CD 25). The effects of remedying the state's violation will necessarily ripple across all these districts, to one degree or another.

III. DISTRICTS NO LONGER OBJECTED TO IN LIGHT OF *PERRY V. PEREZ*

A. State House

None.

B. State Senate

None.

C. Congress

In light of the discussion in Part I.B, above, there actually are no districts in Plan C185 that are not subject to a challenge of some sort. However, Part II, above, identifies the principal locus of the statutory and constitutional challenges being made.

Still, there are certain districts that are only tangentially involved in the challenges lodged in this case. The effects on them of remedying the challenges would be minor, at best, population adjustments for equal population purposes. These districts are CDs 1, 4, 11, 19, and 22. But for the discussion in Part IV, below, CD 36 also would fall into this category. Finally, while the ripple effect of remedy might be somewhat greater on them, CDs 3, 5, and 32 also are not targeted in any challenge.

IV. STATEWIDE CHALLENGES

CDs 33 and 36 are two of the four new districts added to the Texas congressional delegation as a result of the reapportionment following the 2000 Census. Given the disproportionately large role that Hispanic and Black population growth played in the gaining of all four of these new seats, and the disproportionately large fragmentation and isolation of minority voters across the state into Anglo-dominated districts, these two districts are an aspect of the result of the intentional discrimination against minority voters infecting the whole of Plan C185. Their creation and location, therefore, are challenged under the Equal Protection Clause.

Relatedly, because the State's proposed congressional plan fails to recognize and respect the explosive minority population growth over the course of the last decade, the plaintiffs and intervenors challenge all of the new congressional districts (CDs 33 through 36) in the State's proposed plan. Those new districts and where they have been located in the state's proposed plan are a product of the state having enacted a redistricting plan that is racially discriminatory in purpose and effect.

V. CVAP AND UPDATED ACS SURVEY DATA

In paragraph 11 of the Jan. 23rd order, the Court asks "whether the evidence in the record will need to be supplemented with updated ACS survey data[.]" The answer is "yes." At a minimum, Dr. Ansolabehere will need to supplement his previous report and testimony on the ACS survey data to add a short report that includes Attachments 1 and 2 to his Jan. 16th rebuttal report in the DC case (which will be submitted to this Court as part of the record designation from the DC case), as well as a short explanation of the implications of the updated survey data. The Census Bureau's special tabulations necessary to project the updated ACS survey data to the block level in Texas have not yet occurred and appear to be about two months from completion. This data would be highly probative of the Section 2 issues because of its update (still lagging,

however) of the survey data and CVAP used during the September trial. If this Court intends to draw interim maps before that data is available, then it still could be used (and the record supplemented) for any final Section 2 determinations the court might be called upon to make with respect to C185, if it ever clears the preclearance hurdle.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2012, I electronically filed the foregoing using the CM/ECF system which will send notification of such filing to all counsel of record.

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