

U.S. DISTRICT COURT
MARSHALL DIVISION
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CLERK OF COURT
MARSHALL, TEXAS

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

LEAGUE OF UNITED LATIN
AMERICAN CITIZENS, ET AL.

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vs

CIVIL ACTION NO 2:03-CV-354

RICK PERRY, GOVERNOR OF TEXAS
ET AL.

Consolidated

PLAINTIFF LULAC's PROPOSED REMEDY

Introduction:

The Supreme Court, having affirmed in part, reversed in part and vacated in part, has remanded this case for further hearings to remedy the violation that Plan 1374C inflicted on the Latino community. The Court found that Congressional District (CD) 23, as configured in Plan 1374C, violated § 2 of the Voting Rights Act, 2006 U S LEXIS 5178, at 73 *Slip Opinion*, page 41

In considering the totality of circumstances, the Court found that LULAC's Complaint in this case was a statewide claim and that Plan 1374C created only five (5) reasonably compact Latino Districts (*Slip Opinion*, page 29) Since Latinos comprise 22% of the Texas' Citizen voting-age population, they would be entitled to seven (7) districts: "Latinos are, therefore, two districts shy of proportional representation" *Slip Opinion*, page 32. Therefore, considering the totality of circumstances, in so far as the issue of proportionality is concerned, is determined in favor of the Plaintiffs, *Slip Opinion*, page 36.

Remedy:

Once a reapportionment plan has been found to violate federal law, District Courts have been directed to order new elections under a plan that has corrected the violation. In *Reynolds v Sims*, 377 U.S. 533 (1964), more to the point, the Court stated:

“...once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.” *Id.* at 585. see also *Quilter v Voinovich*, 794 F. Supp. 756 (1992), 575

In situations where a court has found for plaintiffs on the merits, and has adopted a new plan that fully remedies the violation, the new plan should be implemented and no stay pending appeal by the defendants should be granted. The United States Supreme Court generally has refused to grant the stays of remedies pending appeal in voting rights cases. In the leading cases of *Thornburg v Gingles* and *White v Regester*, 412 U.S. 755 (1973), the District Courts ordered elections under remedial plans even though the defendants were taking appeals. *Gingles v Edmisten*, 590 F. Supp. 704, 736 (E.D.N.C. 1984) (three judge court); *Graves v Barnes*, 343 F. Supp. 704, 736 (E.D. Tex. 1972) (three-judge court). In both cases, the defendants sought orders from the Supreme Court staying the relief pending appeal, and in both the Supreme Court denied the motions to stay the injunctions. *Edmisten v Gingles*, 465 U.S. 1075 (1984); *Graves v Barnes*, 405 U.S. 1201 (1972) (Powell, J., in chambers). See also, *Jordan v Winter*, 604 F. Supp. 807 (N.D. Miss.) (three-judge court), *stay denied*, 466 U.S. 920 (1984)

Requirements of Court Ordered Plan:

The requirements for Court-ordered remedial plans are:

- population equality;
- compliance with §§ 2 and 5 of the Voting Rights Act;
- tailoring the districts as closely as possible to the scope of the violation; and
- Effectuating "the legislative choices" in the previous districting plans.

Vera v. Bush, 933 F. Supp. 1341 at 1347 (S D Tex. 1996) ; *See, e.g., Wise*, 437 U.S. at 540, 98 S. Ct. at 2497; *Upham*, 456 U.S. at 44, 102 S. Ct. at 1522.

Further, a District Court fashioning a reapportionment plan or in choosing among plans, should not pre-empt the legislative task or 'intrude upon state policy any more than necessary.'" *Upham v Seamon*, 456 U.S. 37, at 41; *White v. Weiser*, 412 U.S., at 794-795 (citations omitted) *Weiser* itself presents a good example of when such an intrusion is not necessary. The Court held there that the District Court erred when, in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state-proposed plan. The only limits on judicial deference to state apportionment policy, the Court held, were the substantive constitutional and statutory standards to which such state plans are subject. *Id.*, at 797. In fact, a District Court errs when, in fashioning a remedy, it rejects state policy choices more than necessary to meet the specific constitutional or statutory violations at issue. *Upham*, 456 U.S. at 41. (Here only CD 23 was found to violate any statutory or constitutional protection.)

Indeed, ten years ago, a three-judge court ordered a new congressional redistricting plan in August of 1996 for elections to be held in November, 1996. In that case, the court ordered a plan into effect that affected 13 congressional districts and

ordered open elections for November 1996 with run offs, if necessary, for December, 1996, *Vera*, at 1352 (court order on 1996 special elections)

In this case, the Supreme Court found:

Congressional District 23:

- 1) The redrawing of lines in District 23 under Plan 1374C caused the Latino share of the citizen voting-age population to drop from 57.5% to 46%. The District Court recognized that "Latino voting strength in Congressional District 23 is, unquestionably, weakened under Plan 1374C." 2006 U S LEXIS 5178, at 54 (*Slip Opinion*, page 17 and 20)
- 2) The Latinos' diminishing electoral support for Congressman Bonilla indicates their belief he was "unresponsive to the particularized needs of the members of the minority group" *Ibid* (same). In essence the State, against the background of a long history of discrimination, took away the Latinos' opportunity to elect a candidate of their choice because Latinos were about to exercise it 2006 U S LEXIS 5178, at 54 (*Slip Opinion*, page 34)
- 3.) The old District 23 did possess electoral opportunity protected by § 2 and that by 2002 the Latino candidate of choice in District 23 won the majority of the district's votes in 13 out of 15 elections for statewide office holders, 2006 U S LEXIS 5178, at 54 (*Slip Opinion*, page 21)
- 4) Since the redistricting prevented the immediate success of the emergent Latino majority in District 23, there was a denial of opportunity in the real sense of that term 2006 U S LEXIS 5178, at 56 (*Slip Opinion*, page 22)

Congressional District 25:

- 5) Did not find that District 25 violated the voting rights of Latinos.
- 6) Did not confront appellants' claim of an equal protection violation in the drawing of District 25. The districts in south and west Texas will have to be redrawn to remedy the violation in District 23, and we have no cause to pass on the legitimacy of a district that must be changed. See *Session, supra*, at 528 (Ward, J, concurring in part and dissenting in part). District 25, in particular, was formed to compensate for the loss of District 23 as a Latino opportunity district, and the District Court found that District 25 was an "effective" Latino opportunity district. § 2, *Slip Opinion*, page 26
- 7) Found that District 25 was not a reasonably compact district to be included as a minority district for "proportionality" purposes and that, therefore, Plan 1374C contains only five reasonably compact Latino opportunity districts, *Slip Opinion*, page 29
- 8) To be sure, § 2 does not forbid the creation of a non-compact majority-minority district. *Bush v Vera*, 517 U.S., at 999 (KENNEDY, J, concurring). The non-compact district cannot, however, remedy a violation elsewhere in the State. See *Shaw II, supra*, at 916 (unless "the district contains a 'geographically compact' population" of the racial group, "where that district sits, 'there neither has been a wrong nor can be a remedy'" (quoting *Grove*, 507 U.S., at 41)) Simply put, the State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right. *Slip Opinion*, page 24.

LULAC Proposed Remedies: Plan A and Plan B¹

For the convenience of the Court we attach a copy of the two plans to this brief. In each map we have had C 1374 overlaid (dark black line) to show the minimal nature of the changes proposed. Exhibits A and B are maps and data tables of Plans A and B. The entire redistricting plan package has been attached to the Court's copies. We also attach a RED-M201 report which contains a particularly helpful statistical description of the two plans. Exhibit C. The RED-M201 includes the standard racial and ethnic information (Population, Voting Age Population, Citizen Population and Citizen Voting Age Population) from the 2000 Census. In addition it contains:

1. Spanish Surnamed Voter Registration information over a 6 year span (1998 through 2004) which demonstrates the current racial make up of the proposed plans and the rate of ethnic change. There is no way to exactly identify the "Anglo", "Black", and "Other" registered voter information.^{2/}
2. Political information with indices derived for the same 6 year span. The Democratic index is identified as the weighted average of statewide candidates

¹ These Plans are available at the Texas Legislative Council's web site on redistricting at <http://www.tlc.state.tx.us/>, LULAC Proposed Remedy **Plan A**: Public File identification C 1415; LULAC Proposed Remedy **Plan B**: Public File identification C 1416. The labeling of the respective plans as A and B is not intended to indicate any preference by LULAC; both plans are being proposed with equal preference.

^{2/} The Spanish Surnamed registration data is derived by the Texas Secretary of State using a computer match between the list of Spanish Surnames prepared by the US Bureau of the Census and the names on the Texas Registration rolls organized by voting precinct. It is not a precise measurement because some Hispanic persons do not have Spanish Surnames and some non-Hispanic persons have Spanish surnames. Most commonly this occurs as a result of intermarriage. Our experience and studies demonstrate that these two subsets tend to offset each other. Spanish Surnamed registration has been derived and used by the State to support Judicial and administrative activities relating to the Federal Voting Rights Act since the late 1970s. The measure of change available over time gives a helpful measure of not only current racial and political realities but also is an indication of inter-census change. Although the state does produce estimates and projection of population change, these are only available by City (place) and County. There is no parallel information available for precincts or census geography (Tract, Block Group, Block etc.)

Because Democratic candidates have fared poorly statewide this performance average can be misleading. The report also includes the results of the 1998 (Sharpe vs Perry) and 2002 (Sharpe vs Dewhurst) races for Lt. Governor. It is usually used as an indication of how a well funded and well known Democrat would do against a well funded and well known Republican. As with change in registration, these two indices show change over the six year period. However, that change has to be interpreted in conjunction with the differential turn-out rates in presidential years compared with non-presidential years

3. Two commonly used measures of compactness (Perimeter to Area and Smallest Circle) While useful, these measures are largely determined and a real effort at compactness is constrained by the efforts to create a remedy which has a minimal effect on the other districts in the overall plan which were not invalidated by the Supreme Court

Under the Legislative Plan (1374 C), Webb County is split almost in half between Districts 28 and 23. The essential difference in the two plans offered by LULAC is that in Plan A (1415 C) Webb County is made whole and placed in the Congressional District 28

In Plan B (1416 C), Webb County is again made whole but placed in District 23 where it was in this Court's Remedy Plan adopted in 2001 (1151 C) as well as in all of the Congressional Plans used during the 1990s.

In both plans, population shifts in other counties (largely in Bexar County) were required to accommodate the movement of Webb County. In each proposed LULAC plan, the traditional East Side African American Community in San Antonio is maintained together and not divided as in 1374 C.^{3/} Each of the LULAC plans are

^{3/} We believe that the split of the traditional East Side African American community in Bexar County was not intentional but likely the inadvertent result of an attempt to arrive at population equality among the districts

designed to fit with the remainder of 1374C and results in no changes in any other district.

Some Observations on the two plans

LULAC Proposed Plan A (C 1415): This proposed plan is drawn in such a way that only five (5) Congressional Districts in 1374 C are changed. All others remain identical.

District 20 is modified slightly so that it is at 54.2% Spanish Surnamed registration and 55.5% Spanish Surnamed Voting Age population. The African American Citizen Voting Age population is 7.6%. The traditional African American Community in San Antonio sometimes referred to as the Eastside has been reunited in District 23.

District 23 Under C 1374, District 23 contained half of Webb County. Under this proposal, District 23 is redrawn to exclude Webb County. There is an adjustment (primarily in Bexar County) so that even though Webb County has been removed, District 23. The Hispanic Citizen Voting Age Population (HCVAP) in this plan is 57.6% Spanish Surnamed and 6% African American. This is slightly higher than the level in District 23 in Plan 1151 C. The Spanish Surnamed Voter Registration (SSVR) is at 54.2% which is identical to the level of District 23 in this Court's 1151C.

District 21 has been changed to include parts of that part of Travis contained in the Legislative plan together with Kerr, Kendall and Real Counties which were in District 21 under the Court Plan (1151 C). There have been very minimal changes in Hays and Comal Counties from Plan 1374 C). These changes were necessary because of the movement in Webb County.

District 28 has been changed. Under 1374 District 28 contained half of Webb County. In this proposal, Webb County is entirely removed from District 28 with adjustments in Bexar County and in Starr County.

District 25 is modified slightly in Starr County and Travis County but retains a Citizen Voting Age Population of 51.8% Spanish Surnamed and 9.9% African American. 52.6% of the registered voters are Spanish Surnamed.

No incumbent Congressmen are paired under this plan. The top to bottom deviation is less than one half of one percent (0.42%) based on the 2000 Census.

LULAC Proposed Plan B: (C 1416) This plan is drawn in such a way that only four (4) of the Congressional Districts in Plan 1374 C are changed. All others remain identical.

District 28 under Plan 1374 C had included half of Webb County. Under this proposal all of Webb County has been placed in District 23. Population adjustments to offset the changes in 23 come primarily in Bexar County. As drawn, District 28 is 52.4% Spanish Surnamed Citizen Voting Age Population and 8.2% African American.

District 23 Under 1374 C, District 23 included approximately half of Webb County. In this plan all of Webb County is placed in District 23. Webb County was entirely in District 23 under this Court's C 1151. The Spanish Surnamed Registration level and Voting Age Citizenship are at 54.2% and 57.8%. It is at exactly the same level Spanish Surnamed Registration and 0.2% higher in Citizen Voting Age population as in this Court's Plan 1151 C.

District 20 is modified slightly so that it is at 54.2% Spanish Surnamed registration and 54.8% Spanish Surnamed Voting Age population. The African American Citizen Voting Age population is 7.65.

District 21 has been changed to include parts of that part of Travis contained in

the Legislative plan together with Kerr, Kendall and Real Counties which were in District 21 under the Court Plan (1151 C). There have been very minimal changes in Hays and Comal Counties from Plan 1374 C).

District 25 is not changed at all.

This plan has the downside of pairing two current incumbents. These are Congressman Bonilla (elected in District 23) and Congressman Cuellar (elected in District 28). Congressman Cuellar lives in Webb County.

The top to bottom population deviation in this plan is less than 1% (0.98%) based on the 2000 Census.

Each of the plans were developed based on the frequent direction from the Supreme Court that remedies should make minimum changes in unaffected districts and to the extent possible retain the legislative intent involved in the invalidated districts.

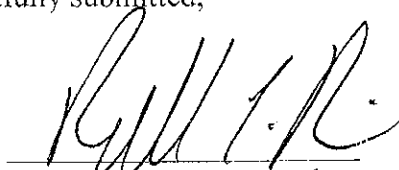
Both LULAC plans also follow the state policy of preferring minimal change changes to effectuate remedy. In Plan A there is no pairing of incumbents, which is another state policy. Each has minimal population deviation based on the 2000 Census. According to the information from the Texas Legislative Council, both plans split no existing voting precincts. In 1997 this Court drew a plan that had a slight (approximately 1% top to bottom deviation—largest to smallest district). The use of the Census late in the decade has diminishing value and to reduce the deviation much more than 1% would require splitting of voting precincts. This would further complicate the introduction of the remedy.

The Supreme Court found that the drop in citizen voting-age population to from 57.5% to 46% in the 23rd Congressional District denied Latinos and opportunity to elect candidates of their choice

LULAC's proposed remedy plans present this court with a plan in which the Latino community in the 23rd Congressional District is increased so that citizen voting age population is about 57% in both plans and about 54% of the registered voters in the District are Latino. Clearly CD 23 in both plans is a Latino opportunity district

DATED: July 14, 2006

respectfully submitted,

By: 
Rolando L. Rios - Attorney in charge
SBN 169359000 / FBN: 14370

Rolando L. Rios
George Korbel
The Law Office of Rolando L. Rios
115 E Travis, Suite 1645
San Antonio, Texas 78205
Ph (210) 222-2102
Fax (210) 222-2898

Jose Garza
SBN: 07731950 / FBN: 1959
Judith A. Sanders-Castro
SBN: 17595255
The Law Office of Jose Garza
7414 Robin Rest Dr
San Antonio, Texas 78209
Ph (210) 392-2856

Luis Roberto Vera, Jr.
SBN: 20546740 / FBN: 16294
LULAC General Counsel
105 S. St. Mary's Street
San Antonio, Texas 78205

Ph (210) 225-3300
Fax (210) 225-2060

Attorneys for Plaintiff, LULAC-Statewide