IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,

Plaintiff,

v.

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

Defendant,

WENDY DAVIS *et al.*

Defendant-Intervenors,

MEXICAN AMERICAN LEGISLATIVE CAUCUS,

Defendant-Intervenor,

GREG GONZALES *et al.*

Defendant-Intervenors,

TEXAS LEGISLATIVE BLACK CAUCUS,

Defendant-Intervenor,

TEXAS LATINO REDISTRICTING TASK FORCE,

Defendant-Intervenor,

TEXAS STATE CONFERENCE OF NAACP BRANCHES *et al.*

Defendant-Intervenors,

LEAGUE OF UNITED LATIN AMERICAN CITIZENS,

Defendant-Intervenor.

Civil Action No. 1:11-cv-01303 (RMC-TBG-BAH)

REPLY MEMORANDUM OF CERTAIN DEFENDANT-INTERVENORS IN SUPPORT OF MOTION FOR JUDICIAL NOTICE OF RESULTS FROM THE 2012 TEXAS DEMOCRATIC CONGRESSIONAL PRIMARY

I. Introduction

The Texas Latino Redistricting Task Force ("Task Force") is the only party that has opposed Defendant-Intervenors' Motion for Judicial Notice. While the Task Force has filed a lengthy opposition, it notably does not contest that the facts listed in Defendant-Intervenors' motion meet the requirements of Fed. R. Evid. 201. It does not contest that these are "adjudicative fact[s]" that are "not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably questioned." Fed. R. Evid. 201(a), (b). Nor does the Task Force object to the timing of the motion for judicial notice, implicitly recognizing, as it must, that "[t]he court may take judicial notice at any stage of the proceeding," Fed. R. Evid. 201(d).

Instead, the singular focus of the Task Force's objection is that such facts "are not relevant to an analysis of benchmark CD 25" because there is not a perfect overlap between the geography and electorate of Benchmark CD 25 and Interim CD 35. Task Force's Resp. to Mot. for Judicial Notice of the Results from the 2012 Texas Democratic Congressional Primary, Dkt. #225 ("Task Force Br.") at 2. But in so doing, the Task Force misunderstands and misstates the relevance standard. Because the 2012 Democratic Congressional Primary results are relevant to the issues before the Court and otherwise meet the criteria for judicial notice, the Court should grant the motion.

II. Argument

A. The Facts for which Judicial Notice Is Sought Are Relevant.

According to the Task Force, unless adjudicative facts are on their own outcome-determinative, they cannot be relevant for purposes of judicial notice. *See* Task Force Br. at 5 ("[T]here is simply no way that results from a single election in interim CD 35 can demonstrate that a pre-existing district in a different geography was a minority ability-to-elect district."); *id.* at 8 (suggesting that the facts do not provide "conclusive proof" that "interim CD 35 (and also benchmark CD 25) elected the Latino-preferred candidate"). But

that simply is not the standard. Evidence is considered relevant if "it has *any* tendency to make a fact more or less probable than it would be without the evidence." Fed. R. Evid. 401(a) (emphasis added). In particular, facts can be relevant for purposes of judicial notice without being dispositive of an issue. *See, e.g.*, *Hernandez-Mendoza v. Gonzales*, 537 F.3d 976, 979 n.3 (9th Cir. 2007) ("We grant Hernandez-Mendoza's motion for judicial notice of the state court order vacating his conviction . . . although it is not dispositive to our resolution of his case."); *Transmission Agency of N. Cal. v. Sierra Pac. Power*, 295 F.3d 918, 924 n.3 (9th Cir. 2002) ("Although that [administrative law judge] decision is still subject to further administrative and judicial review, and therefore not finally dispositive of any issue in the case, the existence of the ongoing litigation within FERC is an adjudicative fact relevant to this case. Further, the existence of the opinion is not in dispute, nor are its contents. Therefore, we take judicial notice of [the decision].") (citing Fed. R. Evid. 201); c*f. Landy v. FDIC*, 486 F.2d 139, 171 (3d Cir. 1973) (Kalodner, J., concurring in part and dissenting in part) ("The doctrine of judicial notice, at the appellate level, may permit recognition of the filing of an action subsequent to entry of a challenged district court order, but it does not operate to make such filing a critical or dispositive factor in determining whether the district court's order was in error.").

Here, even the Task Force must admit that Benchmark CD 25 and Interim CD 35 have three counties in common and a 40.6% population overlap. Task Force Br. at 4. Therefore, its argument that the primary election results are entirely irrelevant plainly fails. Defendant-Intervenors agree with the Task Force that this election data is not the *sole* determinant of the extent to which Benchmark CD 25 was a minority ability district; indeed, Defendant-Intervenors provided ample evidence regarding this question during the course of trial. The most recent primary election provides just one more data point. Moreover, to the extent the Court would like a more "sophisticated" analysis of the election results, *id.* at 5, Defendant-Intervenors are more than willing to provide an expert affidavit providing that

analysis, *see* Mem. in Support of Mot. for Judicial Notice, Dkt. #224-1 at 6 n.11. But it would defy logic to rule that a primary election held in a congressional district identical to the district at issue in this litigation is entirely irrelevant to the case.

In fact, it is the Task Force, not movants here, that has continually argued that primary election results are directly relevant to whether a benchmark district can be considered a minority ability district. *See* Response of Texas Latino Redistricting Task Force to Gonzales Intervenors' Brief Regarding Congressional District 25, Dkt. #223 ("Task Force CD 25 Br.") at 9-10 ("This point is particularly true in a reliably Democratic district such as benchmark CD 25 where Congressman Lloyd Doggett has run unopposed in every Democratic primary. When Latino voters have no choice in the primary election, one cannot rely on General Election results to conclude that, under the Voting Rights Act, the district offers Latino voters the opportunity to elect their candidate of choice."). Now that the results of the 2012 Democratic Primary are not what the Task Force either predicted or desired, it contends that these results have no relevance whatsoever. The Task Force cannot have it both ways.

There is no question, therefore, that the results of the 2012 Democratic Primary in CD 35 are relevant to whether Benchmark CD 25 was a district in which minorities were able to nominate candidates of choice in primary elections and, more broadly, whether the Texas Legislature's proposed map complies with Section 5 of the Voting Rights Act.

B. The Task Force's Attempt to Explain Away These Judicially-Noticeable Facts Is Unavailing

In its attempt to sweep the election results under the rug, the Task Force employs several methods, none of which undermines the fact that the primary election data is appropriate for judicial notice. First, the Task Force suggests that Interim CD 35 is not, in fact, a minority ability district because, "although it does contain a majority Hispanic CVAP," it "does not contain a majority of Latino registered voters." Task Force Br. at 5.

This, however, runs counter to the Task Force's previous suggestion to the contrary. *See, e.g.*, Task Force CD 25 Br., Dkt. #223 at 2 n.3 ("[A]fter counsel for the Gonzales Intervenors argued to the *Perez* court that CD 35*, a new Latino opportunity district*, was precluded by the requirement to maintain the current boundaries of CD 25, the Task Force was forced to defend against this assertion by pointing out that CD 25 is an Anglo-majority district in which Latino voters lack the ability to elect their candidate of choice.") (emphasis added).

Second, the Task Force contends that Defendant-Intervenors' emphasis on the Travis County portion of Interim CD 35 constitutes "cherry-pick[ing]," as it "provides no evidence relevant to the performance of benchmark CD 25 as a whole." Task Force Br. at 6; *see also id.* ("The question posed by section 5 is whether minority voters had the ability to elect their preferred candidates in the entirety of benchmark CD 25, not in a limited portion of Travis County that was located in benchmark CD 25[.]"). As noted above, Defendant-Intervenors provided ample evidence regarding electoral performance in the entirety of Benchmark CD 25 during and after trial, and the most recent primary election merely supplements rather than supplants those data. In any event, the Task Force cannot disclaim the fact that Travis County population constituted 60% of Benchmark CD 25 and 21% of Interim CD 35. Nor can it refute that the tri-ethnic coalition between Hispanic, Black, and Anglo voters is overwhelmingly centered in Travis County. The Western District of Texas has made clear that the Travis County portion of Benchmark CD 25 is relevant to any analysis of CD 35; indeed, the Task Force has expressly relied upon this fact in defending the composition of CD 35. *See* Task Force CD 25 Br., Dkt. #223 at 14 ("In its recent opinion, issued in support of its order on the 2012 interim congressional plan, the *Perez* court noted that in the State's Plan C185, 'the northern portion of CD 35 includes the bulk of the Hispanic minority population in Austin/Travis County that was formerly in CD 25. It is undisputed that CD 35 is a Latino majority district.' The *Perez* court recognized that the inclusion of most of CD 25's Latino population from Travis County in the new Latino-majority CD 35 is a

consideration in the retrogression analysis. . . . .") (quoting Order—Plan C235, Dkt. #691 at 41-42, *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. Mar. 19, 2012)); *see also id.* at 15. Where the Task Force has itself relied upon the overlap between the Travis County portions of Benchmark CD 25 and Interim CD 35, it cannot be heard to argue that primary results from this area are irrelevant.

Third, the Task Force further tries to undermine the significance of these objective election results by suggesting that the motion "request[s] judicial notice of the irrelevant fact that '[s]ome of the Travis County precincts [in interim CD 35] that voted overwhelmingly for Congressman Doggett have Hispanic populations exceeding 70%." Task Force Br. at 6. Although the facts speak for themselves, perhaps a different phrasing would make their relevance more clear to the Task Force: in fact, *all* of the Travis County precincts—including those with high Hispanic populations—voted overwhelmingly for Congressman Doggett. The Task Force's suggestion that the motion for judicial notice "present[s] a series of illogical leaps," *id.* at 7, merely reveals the Task Force's own willful misunderstanding of a simple, judicially-noticeable fact: those parts of Benchmark CD 25 that are now included in Interim CD 35, including those with high minority populations, voted overwhelmingly for Congressman Doggett against two Latina opponents in the primary election held under the interim map. Despite the Task Force's attempt to confuse the issue and pretend that "[n]one of this makes any sense," *id.* at 7, it is no more complicated than that.

Additionally, in its attempt to stamp out the election results as relevant to the analysis, the Task Force notes that "Rep. Doggett garnered a higher percentage of votes in the counties of Interim CD 35 with lower percentages of Latino registered voters." Task Force Br. at 8. But not only does this have no bearing on the relevance of the adjudicative facts, but even here the worst the Task Force can say about Congressman Doggett's performance in the area is that where Hispanic registered voters constitute a majority, a majority of the voters

supported Doggett. *See id.* ("In Bexar County, where the SSVR is 52.6%, Rep. Doggett's support dropped to 53.75% of the vote.").

Finally, the Task Force devotes several pages to explaining the "special circumstances" of the 2012 primary in Interim CD 35. *See id.* at 9-11. Once again, this argument is hardly a basis for deeming the primary results altogether irrelevant to the analysis. Rather, it merely reflects the Task Force's attempt to re-open the argument so as to minimize the persuasive effect of the evidence and has absolutely no bearing on the question before the Court: whether it should take judicial notice of the undisputed primary election data. Moreover, the "special circumstances" articulated by the Task Force are hardly compelling. The Task Force contends that Congressman Doggett's home is in Travis County and that "he performed much better in Travis County [where he received 93% of the vote] than in Bexar County." *Id.* at 9 n.6. While this may be true, it does not undo the fact that Doggett still received 54% of the vote in Bexar County (not to mention 75% in Caldwell, 88% in Comal, 70% in Guadalupe, and 89% in Hays). It also notes that the appearance of two Latina candidates on the ballot "has the tendency to cause the Latino vote to splinter." *Id.* at 11. It fails to acknowledge, however, that in the CD 35 primary, votes for the two Hispanic candidates *together* totaled less than 27% of the total votes cast. *See* Office of the Secretary of State, 2012 Democratic Party Primary Election, Election Night Returns (June 6, 2012), http://enr.sos.state.tx.us/enr/results/may29_161_state.htm. Even if all of those votes had gone to one Latina candidate, Congressman Doggett still would have won by an overwhelming majority.

In sum, the Task Force's brief is not a credible opposition to judicial notice of the primary election results of Interim CD 35. It is instead a thinly-veiled attempt to explain away this obviously relevant evidence and, as part of the effort, contradicting without acknowledgement its own previous positions in this litigation. As such, it provides no basis for the Court to turn a blind eye to the data.

III. Conclusion

For all of the foregoing reasons, as well as the reasons set forth in the Memorandum of Certain Defendant-Intervenors in Support of the Motion for Judicial Notice from the 2012 Texas Democratic Congressional Primary, Defendant-Intervenors respectfully request that the Court grant the motion and take judicial notice of the facts listed therein.

RESPECTFULLY SUBMITTED: July 25, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2012, I electronically filed the foregoing Memorandum of Certain Defendant-Intervenors in Support of Motion for Judicial Notice of the Results from the 2012 Texas Democratic Congressional Primary with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

DATED: July 25, 2012

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