IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA; ERIC HOLDER in his official capacity as Attorney General of the United States, Defendants, *et al*.	Civil Action No. 1:11-cv-1303 (RMC-TBG-BAH)

TRIAL BRIEF OF THE DEFENDANT-INTERVENORS TEXAS LEGISLATIVE BLACK CAUCUS AND TEXAS STATE CONFERENCE OF BRANCHES OF THE NAACP, ET AL.

The Texas Legislative Black Caucus and the Texas State Conference of Branches of the NAACP, et al., respectfully submit this trial brief pursuant to the Court's Minute Order of January 5, 2012. To avoid both duplication and the daunting task of compressing the full scope of the State's discriminatory actions into 10 pages, we focus on two discrete aspects of the State's redistricting plans: the elimination of emerging minority opportunity districts, including districts in which minorities now are a voting majority, and the imposition of disproportionate burdens on minority voters through splitting of voting precincts and disruption of minority districts, with particular focus on the illustrative treatment of House districts in Dallas County.

I. INTRODUCTION

The 2010 census provided a snapshot of a Texas population that in 10 years had grown by over 4 million persons. Nearly 90 percent of the new residents were members of racial and

language minority groups. Long dominant, Anglos have become a minority of the Texas population, and the State itself projects as that dynamic growth continues, the Anglo majority will continue to shrink in the future. The ongoing and projected future increase in the minority share of Texas population was well known when the Legislature undertook redistricting in 2011

The testimony will show a pattern to the distribution of minority population growth. Minority enclaves have expanded into neighboring areas, so that the growth creates new areas where minorities predominate. New legislative districts in which minority voters can enjoy an equal opportunity to elect candidates of their choice thus can arise organically unless the Legislature intervenes. Indeed, new districts not acknowledged by the State already have arisen with minority citizen voting age ("CVAP") majorities, including House districts 26, 106 and 144.

In 2001 the Legislature did intervene and its effort to let the declining Anglo population hold on to an artificial supermajority of legislative and congressional seats lies at the core of this action. The State dismantled districts in which minority voters have had an opportunity to elect representatives of their choice as well as districts likely to offer such an opportunity as the minority population continues to expand. In doing so the State departed time and again from its stated legislative redistricting guidelines, racially neutral redistricting criteria and governmental interests in order to minimize minority political opportunities.

II. STATEMENT OF FACTS

A. The State's Redistricting Guidelines

The Legislature adopted guidelines for redistricting. These included keeping population deviations within 10 percent, avoiding racial discrimination, avoiding the elimination of minority districts, avoiding pairing incumbents, maintaining the core of each district, drawing compact

and contiguous districts, respecting county boundaries, respecting communities of interest, and respecting municipal boundaries where possible.

B. Population shifts: Dallas County as a Case Study

Dallas County lost two of its 15 House seats due primarily to a 20 percent decline in the Anglo population, or over 133,000 persons. The minority population expanded by 28 percent (over 233,000 persons) and is now roughly two thirds of the county population. The population deficit was concentrated in 10 districts in the northern portion of the county which, collectively, were under-populated by nearly two complete seats. At the same time, a compact concentration of minority population had emerged in northeastern Dallas. Meanwhile, the population of five adjacent districts in the southern portion of the county grew apace with the rest of Texas: districts 101, 106 and 111 were within a 10 percent population deviation and needed no changes: districts 109 and 110 required only a shift of two or three precincts from the former to the latter.

Two of these districts, 101 and 106, experienced much of the county's racial transition. From 2000 to 2010, district 101 had increased from 36.0 percent to 59.7 percent minority in total population while district 106 had increased from 51.9 percent to 70 percent minority in total population. At the present time, minority citizens comprise CVAP majority in district 106.

The increase in minority population has been reflected in the election returns, with close contests in 2010 in both districts101 and 106. The Republican incumbent in district 106 switched to the Democratic Party. Districts elsewhere in Texas, including House district 26 in Fort Bend County and House district 144 in Harris County, also have gained minority CVAP majorities.

Districts 101 and 106 were compact and adhered closely to municipal boundaries. The State chose those districts for elimination. The State plan transfers much of the area of district

101 to proposed district 113, an elongated district that fragments the Cities of Balch Springs. Garland, Rowlett, and Mesquite, and that fragments the minority population of each. As to the area of district 106, the State divided the Cities of Grand Prairie and Irving and environs in an extremely contorted manner. The lines split a large number of voting precincts between districts: district 103 alone splits 30 voting precincts, all with predominantly minority populations.

The State generally creates bizarrely shaped districts in Dallas County, including proposed districts 100, 103, 104, 105, 107, and 111. The State plan packs the bulk of the minority population into districts ranging up to 91 percent minority and fragments the remainder, including the new northeastern concentration, among Anglo-controlled districts.

Alternative plans, including H202, eliminated instead two under-populated (-24.49% and -15.97% respectively) districts, 114 and 115; maintained districts 101 and 106 substantially intact; respected municipal boundaries; united the northeastern minority concentration; provided for compact districts; and more closely adhered to the State's redistricting guidelines than the State's own plan.

C. The Impact of Excessive Voting Precinct Splits in the State's Plans

The State's proposed House Senate and congressional redistricting plans divide over 900 precincts between two or more districts. Texas had seen the impact of precincts splits in the post-1990 redistricting. As detailed in *Vera v. Richards*, 861 F. Supp. 1304, 1325 SD TX 1994, the effect of contorted district lines and "splitting dozens of VTD's…was an electoral nightmare." The court noted that "voters were confused and frustrated. They did not know… the candidates running for office. The boundaries had become so complex that the county clerk's

office sent the wrong ballots to certain precincts and erroneously counted those votes within the wrong District... as a result of the complex new district lines."[1]

Prior to any election, the precinct splits in the three plans have to be reconciled with each other and with precinct splits by the various counties' redistricting plans. Counties must reassign voters, identify and obtain new polling sites, and print and distribute new voter registration cards. The concomitant changes in precinct lines and polling places by the individual counties are subject to section 5 review. These tasks involve significant financial costs for the counties.

With new lines, new districts and new candidates, and because voter registration cards list only the precinct number and not the polling place location, the splitting of precincts imposes burdens on individual voters. The precinct splits occur primarily in predominantly minority districts and primarily affect minority voters. Minority citizens labor under numerous disadvantages in navigating such changes. Many minority voters in Texas continue to bear the effects of past discrimination including the effects of segregated schools. Many lack reading and/or English language skills, internet skills and other resources for obtaining election information. Accordingly, minority voters depend on district-focused organizations to obtain basic information necessary to vote and participate in the political process effectively.

The contorted lines of districts 103-105 create a daunting organizational challenge. Less dramatically, three adjacent heavily black districts (109, 110 and 111) that, aside from the transfer of 10,000 or so persons from district 109 to adjacent district 110, needed no changes to comply with one-person, one-vote requirements or other of the State's own criteria. The State's

[1] The courts have recognized the need for extensive time and publicity in order to avoid the deleterious effects of major changes in voting practices and procedures. *Common Cause v. Billups*, 406 F. Supp.2d 1326, 1365 (N.D. Ga. 2007), *Common Cause of Georgia* v. *Billups*, 504 F. Supp. 2d 1333, 1380 (ND Ga. 2007), *aff'd* 554 F.3d 1340, 1347 (11 Cir. 2009); *Purcell v. Gonzales*, 549 U.S. 1 (2006).

plan would transfer 117,890 persons, the large majority of whom were black, into or out of these three districts – over 100,000 more people than is necessary under the State's guidelines.

Alternative plans rejected the State, including H202, S153 and C155 split far fewer voting precincts and avoided disruption and fragmentation of vulnerable minority communities.

The State has identified no new measures to inform minority voters of their new polling place and assignments in light of these changes.

III. DISCUSSION

A. The State's Discriminatory Elimination of Emerging Minority Districts

The Supreme Court made clear in *City of Pleasant Grove v. United States*, 479 U.S. 462, 471-472 (1987) that " Section 5 looks not only to the present effects of changes, but to their future effects as well. Likewise, an impermissible purpose under § 5 may relate to anticipated as well as present circumstances." The Court recognized the very real prospect of a city or state "effectively diluting the black vote in advance. This is just as impermissible a purpose as the dilution of present black voting strength."

The Texas Legislative Black Caucus has identified a number of House districts – 26, 54, 101, 106, and 144 – that rapidly have been emerging as effective minority opportunity districts, but that the State plan eliminates completely or substantially strengthens the threatened Anglo majority. At least three such districts, already have passed that threshold: minorities now comprise a majority of voting age citizens in districts 26, 106 and 144 and minorities currently enjoy an opportunity to elect candidates of their choice.

A section 5 court must look at the current population and respond "to the realities of a situation as they exist *at the time of decision*." *City of Rome v. United States*, 472 F.Supp. 221, 247 (D.D.C.1979), *aff'd.*, 446 U.S. 156, 186-187 (1980) (emphasis added). The City of Rome

had annexed a number of areas over time and thereby enlarged the pool of persons eligible to vote in its at-large elections. The Court determined to "look at the annexations as of the date of the most recent information, information which reflects an effect on black voting strength considerably more pronounced than was the case when the annexations were initially implemented. This approach comports with the terms of section 5, … which requires, in the future tense, that the plaintiff jurisdiction demonstrate that its voting changes "Will not " have a discriminatory effect." *Id.* at 246.[2]

Contrary to the State's evidence, minority citizens in districts 26, 106 and district 144 today form a majority of all voting age citizens. Each of these districts offers a present opportunity for minority voters, acting in the coalitions that so characterize Texas elections, to elect representatives of their choice. The elimination of minority CVAP majorities in districts 26, 106 and 144 constitute part of the retrogression in the State's House plan, as well as to the evidence of a racially discriminatory purpose that permeates each of the three plans.

B. The Discriminatory Impact of Excessive Voting Precinct Splits

The State split over 900 voting precincts in its three plans knowing that the splits would create voter confusion and frustration, and the State disproportionately imposed those burdens most heavily on minority voters least able to bear them. That lesson, taught by bitter experience, had been underlined by both the United States District Court and the Supreme Court. Despite all, the State split precincts at will, especially in minority communities.

[2] Similarly, in *Hale County, Alabama v. United States*, 496 F. Supp. 1206 (DDC 1980), this Court reviewed a majority black county's change from district to at-large elections adopted in 1965, as the Voting Rights Act was being passed. The county had only a handful of black registered voters in 1965, too few to exert significant electoral influence under any election system. By the time of section 5 review, however, the black registration had increased. This Court properly looked at black voting strength as of the time of its decision and found the change to have a racially discriminatory effect.

The State plans exacerbate these co burdens by contorted, community-disrupting boundaries. Redistricting plans can discriminate apart from the viability of individual districts where district lines are "so contorted as to be likely to confuse voters and candidates, and to exacerbate the financial and other disadvantages of many black candidates."[3], or where, in light of the "effect of splitting a large number of voting precincts…and the concomitant assignment of large numbers of voters… we are unable to conclude that [the plan] can be implemented without serious danger of discriminating against black voters." [4]

Any redistricting plan will involve some disruption, and some voters will have burdens to bear. The Supreme Court, *in Burdick v. Takushi*, 504 U.S. 428, 434 (1992), held that in judging the burdens on voters imposed by a particular government action, courts should weigh "the character and magnitude of the asserted injury… against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." (Internal quotation marks omitted). See also *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Crawford v. Marion County Board of Elections*, 128 S. Ct.1610 (2008).

Here, the burdens imposed by the State are unnecessary, they are imposed unequally, and they would have a racial effect: A disproportionate number of black, Hispanic and Asian voters would face unnecessary burdens, and many would lose their votes. Those burdens also are avoidable: alternative plans would have split a much smaller, manageable number of precincts. And they will have a retrogressive effect on minority voter participation as a direct result of the State's plans.

[3] See, e.g., March 12, 1982 letter from Wm. Bradford Reynolds to Gerald L. Baliles, http://www.lawyerscommittee.org/admin/section_5/objections/files/1982_03_12_VA_82-2748.PDF

[4] See, e.g., May 6 letter from Wm, Bradford Reynolds to Charles A. Graddick, http://www.lawyerscommittee.org/admin/section_5/objections/files/1982_05_06_AL_82-1363.PDF

The State has identified no governmental interest in the imposition of these burdens; indeed, all neutral interests militate against the changes. The splits undermine the legitimate public interest in reducing costs to government, undermine the interest in administrative efficiency, undermine the interest in the integrity of elections as citizens lose their votes or cast their ballots in the wrong district and in the wrong contests, and undermine the interest in voter confidence by confusion and disorganization in a core government function.

Not only has Plaintiff identified no legitimate governmental interest that even supports, much less justifies these burdens, these burdens are the product of its departures from its stated redistricting criteria of maintaining the core of each existing district and drawing compact districts, as in House district 103 and many other districts.

IV. CONCLUSION

In its December 22, 2011 Memorandum Opinion, this three-judge Court correctly observed that "[b]y enacting Section 5, Congress aimed to guarantee that minorities' new gains in political participation would not be undone." Memorandum Opinion at 7. These examples of the State's intentional undoing of present and future minority gains are just the tip of the iceberg in terms of the evidence of the invidious racial purpose and retrogressive effect of the proposed House, Senate and congressional redistricting plans. In these and in many other ways across the State of Texas each of the proposed redistricting plans was rife with the indicia of intentional discrimination set forth in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-268 (1977). Accordingly, this court should deny the State's request of a section 5 declaratory judgment

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2012, I electronically filed the foregoing Trial Brief of the Texas Legislative Black Caucus and the Texas State Conference of Branches of the NAACP, et al., 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.

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