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)

GONAZALES AND DAVIS INTERVENORS' TRIAL BRIEF

I. INTRODUCTION

Texas's population grew by 4,293,741 in the last decade. Of those nearly 4.3 million people, approximately two-thirds were Hispanics. Due almost entirely to the increase in the state's minority population, Texas gained 4 additional seats in the U.S. House of Representatives, bringing the state's congressional delegation to 36.

Despite the growth in the state's minority population, Plan C185, the congressional redistricting plan passed by the Texas Legislature, actually *decreases* the number of congressional districts in which minorities will have the ability to elect their candidates of choice, from 11 in the benchmark plan to 10 in Texas's proposed congressional plan. This decrease in the absolute number of minority ability districts, particularly in the context of massive, concentrated minority population growth, constitutes retrogression, plain and simple.

The Texas Legislature dismantled three minority ability districts and failed to offset those losses elsewhere.[1] The Gonzales and Davis Intervenors will focus their brief and trial evidence on Texas's intentional dismantling of the crossover district found in benchmark CD 25. Contrary to the Supreme Court's warning that a state's intentional destruction of "otherwise effective crossover districts" would "raise serious questions under both the Fourteenth and Fifteenth Amendments," *Bartlett v. Strickland*, 129 S. Ct. 1231, 1249 (2009) (plurality op.), Texas brazenly carved up the coalition of Hispanic, African-American, and Anglo voters in CD 25 to eliminate a district in which minorities had been able to elect their preferred candidates. Texas's dismantling of an effective crossover district resulted in a congressional plan in which the state's minority population would be worse off than it was before.

[1] The United States' brief will address Texas's destruction of the minority group's ability to elect its preferred candidates in CDs 27 and 23. The Gonzales and Davis Intervenors join the United States' analysis in this regard and will not provide duplicate analysis.

The Gonzales and Davis Intervenors will further prove during trial that Texas's retrogressive redistricting plan is the result of the Legislature's intent to discriminate against minority voters. The Supreme Court has identified multiple factors for inferring discriminatory intent, and Texas's congressional redistricting process and plan hit the bull's eye on each and every one. In particular, the State's failure to draw a new minority ability district in the Dallas-Tarrant Counties region of the state reflects its intentional fragmentation of minority voting strength.

In its attempt to gloss over the details on summary judgment, Texas fell far short of meeting its burden to prove Plan C185's validity under Section 5. Once all the facts come to light, Texas's failure will be even more glaring. The plan's retrogressive effect and underlying discriminatory intent require denying preclearance under Section 5.

II. ARGUMENT

A. Texas Destroyed Crossover District 25

A redistricting plan reduces minorities' "effective exercise of the electoral franchise," *Beer v. United States*, 425 U.S. 130, 141 (1976), and thus is retrogressive, when it reduces the ability of minority voters to elect their candidates of choice. 42 U.S.C. § 1973c(d). The law is clear that the "ability to elect" standard turns not on a single statistic, but on a multi-factor "functional analysis" of the electoral process, *see* Mem. Op. at 28, including whether minority groups form coalitions with other racial groups to elect their candidate of choice, *Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003) ("'[T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.'") (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)); H. Rep. No. 109-478, at 71 (2006) ("Voting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5.").

This Court has made clear that Section 5 "states no preference for how the minority group is able to elect its preferred candidate, whether by cohesive voting by a single minority group or by coalitions made up of different groups." Mem. Op. at 34. The Court has further recognized that "[i]t is simply a fact of political life that in certain districts, a single minority group may not have the ability to achieve desired electoral outcomes independently, but could elect its preferred candidate if it formed . . . a crossover district by 'attract[ing] sufficient crossover voters from white voters.'" *Id.* at 35 (quoting *Voinovich v.* Quilter, 507 U.S. 146, 154 (1993)). Under this Court's standard, a district in which the minority group is able to elect its preferred candidate with the help of another minority group or Anglo crossover votes is a minority ability district. The Gonzales and Davis Intervenors will prove the CD 25 in the benchmark plan was such a district and that Texas destroyed it in the enacted congressional plan.

In holding that crossover districts "must be recognized as ability districts in a Section 5 analysis of a benchmark plan," this Court emphasized that "there must be discrete data, by way of election returns, to confirm the existence of a voting coalition's electoral power." Mem. Op. at 36; *see also id.* at 35 n.29. Through the written reports and expert testimony of Dr. Stephen Ansolabehere, the Gonzales Intervenors will provide the evidence required to demonstrate that benchmark CD 25 is an effective crossover district in which Hispanics, African-Americans, and a significant portion of Anglos consistently vote for the minority-preferred candidate.[2] Dr. Ansolabehere will provide detailed ecological regression and election performance analyses demonstrating that minorities in benchmark CD 25 routinely elect their candidates of choice due to the fact that Anglo voters in that area vote at

[2] The Gonzales Intervenors first submitted Dr. Ansolabehere's retrogression analysis as Exhibit 1 to the Devaney Declaration in support of their Opposition to Plaintiff's Motion for Summary Judgment. *See* Dkt. #77-2 ("Devaney Decl."), Ex. 1 ("Ansolabehere Rpt."). By agreement of the parties, the Gonzales Intervenors intend to file Dr. Ansolabehere's supplemental report, focusing exclusively on minority and Anglo voting patterns in Travis County and CD 25, on Monday, January 16.

sufficiently high rates for those candidates. Dr. Ansolabehere will further establish that the racial and political balance unique to benchmark CD 25 means that no one group dominates the primary process, as power is shared equally among Hispanics, African Americans, and Anglos alike. Finally, he will demonstrate that Texas's dismantling of CD 25 is a dramatic racial reconfiguration, drastically reducing the number of Travis County minorities who are able to elect their preferred candidates and eliminating altogether what was a performing minority ability district.

The Gonzales Intervenors will also provide live testimony from State Representative Dawnna Dukes. Representative Dukes will testify that during the legislative session, several alternative plans were proposed that more fairly reflected minority population growth and did not lead to retrogression. For instance, Plan C166, offered by Representative Dukes, created additional Hispanic opportunity districts in the Dallas-Tarrant County metroplex, Harris County, and South and Southwest Texas, all the while keeping CD 25 in tact as a minority opportunity district, resulting in a total of 14 minority opportunity districts for the state. Although Representative Dukes criticized on the House floor the rushed and secretive process through which the Republican leadership ushered through a map that destroyed several minority opportunity districts, including benchmark CD 25, *see* Devaney Decl., Ex. 11 at S46, the legislative leadership ignored her views and rejected Plan C166 and other alternatives in favor of a retrogressive congressional map.

In addition, the Gonzales Intervenors will provide the pre-filed testimony of Travis County Attorney David Escamilla. Mr. Escamilla will describe the tri-ethnic coalition that has worked closely together within benchmark CD 25, resulting in the election of many minority and minority-preferred candidates. Mr. Escamilla will further testify that Plan C185 tears apart this coalition, drowning out the votes and voices of many Travis County minorities among Anglo-dominated districts. His testimony will be supported by evidence

from the Section 2 trial held before the U.S. District Court for the Western District of Texas. In that proceeding, political consultant, David Butts, and Travis County Commissioner, Sam Biscoe, shed light on how the tri-ethnic coalition in Travis County operates to elect minority-preferred candidates, and explained how the path to success for candidates in that area is a "coalition strategy" bringing together Hispanics, African-American, and Anglos.[3]

Texas has expressly conceded that CD 25 is a crossover district and that it intentionally chose to eliminate the district. *See, e.g.*, *Perez v. Perry*, No. SA:11-cv-00360-OLG-JES-XR, Dkt. #457 (W.D. Tex. Oct. 21, 2011) (Defendant's Response to Plaintiffs' Post Trial Briefs), at 18 & n.9 (stating that "CD 25 in the benchmark plan is a crossover district" and defining the term as "a district in which African-Americans or Latinos make up less than 50% of voters but can usually elect their candidates of choice with reliable crossover voting by members of the Anglo majority"); *Perry v. Perez*, Emergency Application for Stay of Interlocutory Order (U.S. Nov. 30, 2011) at 24 & n.14 (arguing that "the VRA does not require the State or permit a court to maintain a crossover district such as District 25, absent a demonstration of intentional racial discrimination."); *Perry v. Perez*, Nos. 11-713, 11-714, 11-715, Brief for Appellants (U.S. Dec. 21, 2011) at 23-24 (criticizing the Texas district court for "deliberately 'preserv[ing] [D]istrict 25 as a crossover district' in order to 'maintain[] the status quo and comply[] with Section 5.'") (quoting *Perez v. Perry*, No. SA:11-cv-00360-OLG-JES-XR, Dkt. #544 (W.D. Tex. Nov. 26, 2011) at 11 n.24). In fact, providing "no opposition" to the Gonzales Intervenors' evidence of Anglo and minority cohesion in the district, Mem. Op. at 18, Texas has instead relied on an overly expansive reading of the Supreme Court's holding with respect to Section 2 to maintain that Section 5 provides no protection of crossover districts whatsoever. *See* Pl.'s Reply in Support of Summ. J., Dkt. #92 at 7. But as this Court has made clear, "freedom from an obligation to

[3] The trial testimony of both witnesses will be designated as evidence in the present case.

create a crossover district under Section 2 does not equate to freedom to *ignore* the reality of an existing crossover district in which minority citizens are able to elect their chosen candidates under Section 5." Mem. Op. at 36. Therefore, Texas's only viable defense of its decision to eliminate the CD 25 crossover district has been foreclosed by the law of the case.

In sum, Plan C185 decreases the number of minority ability districts from 11 to 10. The State's faulty math is due to its narrow focus on numerical majorities and its failure to recognize that a minority group's ability to elect its preferred candidates requires a functional analysis of multiple factors. Benchmark CD 25 is clearly a district in which minorities have the ability to elect their preferred candidates. The State's strategic destruction of the district results in a net loss in districts for Texas minorities.

B. Texas's Congressional Plan Was Enacted with a Discriminatory Purpose

A redistricting plan violates Section 5 if it is motivated by "any discriminatory purpose" to diminish "the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 42. U.S.C. § 1973c(b)-(c). *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), establishes the factors that a court should use to determine whether a voting change has a discriminatory purpose: (1) whether the plan has a disproportionate impact on members of a certain race, (2) the historical background of the plan, (3) the specific sequence of events leading to the plan, (4) departures from normal procedures in passing the plan, and (5) legislative history of the plan including statements by decision-makers. Here, all available evidence—both on the current record and to be introduced at trial—points in just one direction: Texas adopted Plan C185 with unlawful discriminatory purpose.

Texas's history of disenfranchising minority voters reveals a persistent and troubling pattern. Texas has been a covered jurisdiction since 1975, its inclusion prompted by its "long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the

electoral process." *LULAC v. Perry*, 548 U.S. 399, 439 (2006) (internal quotation marks and citation omitted). Since its inclusion, the Department of Justice—under Democratic and Republican presidents alike—"has frequently interposed objections against the State and its subdivisions," *LULAC*, 548 U.S. at 440 (internal quotation marks and citation omitted), and Texas has lost more Section 5 enforcement suits than any other state. *See* 1 Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 250 tbl.4 (Mar. 8, 2006).

The sequence of events leading to enactment of Plan C185 was shrouded in secrecy, as the Legislature's abbreviated process purposefully excluded minority voters and representatives. Although Hispanics and African Americans together now comprise a larger share of Texas's population than Anglos, Ansolabehere Rpt. at 20, not a single Hispanic or African-American legislator was allowed to participate in crafting Texas's new congressional districts. *See* Devaney Decl., Ex. 6, Ex. 9 at A-3 & A-12. As one African-American representative in the Texas House of Representatives explained, "a lot of the map drawing and a lot of the changes that were done were done in secret . . . to keep the African-American and Latino members of the redistricting committee sort of discombobulated and not really knowing what's going on." Devaney Decl., Ex. 6.

The Anglo leadership not only excluded minority legislators from the redistricting process, but they excluded the public as well. The first and only hearing open to public testimony was held just three days after the congressional plan was released, and on June 6, 2011—the Monday after the Friday hearing—the full Senate considered the bill. Devaney Decl., Ex. 10. Of the witnesses who were able to attend the Senate committee's one public hearing, only one supported the plan; "everybody else, every African American, every Anglo American, every Mexican American, Hispanic American, more generally speaking, every single witness testified against the plan." Devaney Decl., Ex. 9 at A-14.; *see also* Devaney

Decl., Ex. 11 at S46 (State Representative Dawnna Dukes: "[T]he hearing was only a shadow . . . , a box to be checked because they always knew they weren't going to let a plan pass that preserved the voice of Austin minorities.").

Several elected officials noted that the 2011 redistricting process was cloaked in secrecy and backroom dealing, in contrast to previous cycles that had provided greater opportunity for open debate.[4] Even independent counsel for the Senate Redistricting Committee testified that "this process has been quite different from what we've seen in the past [because] . . . [n]obody has had the opportunity to study it the way it has been done in the past."[5]

The 2011 cycle was marked by the Legislature's deliberate disregard for minority voting rights. Eric Opiela, counsel to the Republican congressional delegation and one of the architects of the new congressional map, aptly summed up the Legislature's approach, testifying that key principles under the Voting Rights Act, such as racial bloc voting and electoral performance, are nothing more than "hocus-pocus" that he refused to consider in developing the congressional plan. Dkt. # 77 at 9.

Unsurprisingly, a plan crafted with little respect for minority voting rights will have a discriminatory effect on minority voters. For example, just as it did in 2003, *see LULAC*, 548 U.S. 399, the Texas Legislature again gerrymandered CD 23 to retrogress the ability of Latino voters to elect their preferred candidates. *See* Ansolabehere Rpt. at 41-42 (explaining how Texas strategically replaced the politically active portion of the Hispanic population and a large portion of the African-American population with low-turnout Hispanics to reduce electoral performance of minority-preferred candidates). The State's own expert could not

[4] *See, e.g.*, Devaney Decl., Ex. 3 at 796-97; Devaney Decl., Ex. 12 (Senator Zaffrini stating that in her twenty-five years of sitting on Senate Redistricting Committees, "the redistricting process during the 2011 Legislative Session was the least collaborative and most exclusive of any [she had] experienced").

[5] Devaney Decl. ¶ 14 (Testimony of Michael Morrison, Hearing of Senate Select Committee on Redistricting (June 3, 2011), http://www.senate.state.tx.us/75r/senate/commit/c625/c625.htm, at 4:51:42).

stomach this maneuver, testifying: "I would not have done what was done to the 23rd." Devaney Decl., Ex. 24. Even Mr. Opiela, who views basic principles of the Voting Rights Act as "hocus-pocus," advised Congressman Lamar Smith: "I don't think we mess with [CD 23]" because it was "barely performing"; "add R[epublican]s (which will be Anglos) and you put a neon sign on it telling the court to redraw it." Devaney Decl., Ex. 22. Nonetheless, the Texas Legislature did "mess with" CD 23, converting it into a district in which Latinos are unable to elect their preferred candidates. Similarly, as discussed above, Texas intentionally broke apart CD 25, a district the State concedes was a crossover district in which minority voters were able to elect their candidate of choice.

Texas also intentionally fragmented minority voting strength to avoid the creation of minority ability to elect districts in the Dallas-Tarrant counties region of the state. Despite massive minority population growth in this region, under Plan C185 minority voters in this area will be stranded in Anglo-dominated districts in which they have no ability to elect candidates of their choice. District 26 under the enacted plan, for example, has a long lightening bolt extension from Denton into Tarrant County that slices out of District 12 areas of substantial minority population. As expert witness Alan Lichtman will testify, this bizarre configuration can have no other plausible purpose other than to prevent the formation of a Tarrant-based majority-minority district that would provide minorities with an ability to elect preferred candidates to Congress.

The Legislature's dismissive attitude towards minority voters was further reflected in its treatment of minority legislators. For example, Texas redrew the districts of all three African-American members of the State's congressional delegation so that none of their district offices remained in their districts. Devaney Decl., Exs. 13-15. Similarly, the Legislature redrew the district held by Congressman Charlie Gonzalez, Chair of the Congressional Hispanic Caucus, not only to exclude his district office but also to remove key

landmarks, including the Alamo and the Convention Center named after Congressman Gonzalez's father. Devaney Decl., Ex. 16 ¶¶ 3-9, 11. By contrast, when Anglo Congresswoman Kay Granger's campaign office was originally drawn out of her district, the Legislature made sure to correct the problem before adopting the final plan. Devaney Decl., Exs. 5 & 17. Similarly, when Anglo Congressman Kenny Marchant requested that his district lines be changed to include his grandchildren's school, and when Anglo Congressman Lamar Smith asked that his district be drawn to include the San Antonio Country Club, the Legislature granted both requests. Devaney Decl., Exs. 18-20.

Reviewing the congressional redistricting plan 11 days before it was adopted, Dub Maines, district director for Republican Congressman Joe Barton, expressed concern about the plan to his Republican colleagues: "[I]s there any reason why every effort should not be made to make the map more likely to pre-clear, especially if it doesn't hurt the political aims in any way?" Devaney Decl., Ex. 25. Even Republican staff members were concerned that the State's plan limited the ability of minority voters to elect their preferred candidates more than was necessary to achieve their political goals. But those warnings went unheeded, as the Texas Legislature pushed through a plan that even its advisors knew was legally flawed.

III. CONCLUSION

The Gonzales and Davis Intervenors will present evidence establishing that: (1) Benchmark CD 25 is a district in which minorities have the ability to elect their preferred candidates; (2) the Texas Legislature destroyed benchmark CD 25 and decreased the number of minority ability to elect districts from 11 to 10; and (3) the Texas Legislature acted with discriminatory purpose in adopting its congressional plan, including the failure to drawn any new minority ability to elect districts in the Dallas Fort Worth region of North Texas.

RESPECTFULLY SUBMITTED: January 13, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2012, I electronically filed the foregoing Opposition to Motion for Summary Judgment 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: January 13, 2012

Respectfully submitted,

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