IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA, *et al.*, Defendants, 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) Three-Judge Court

DEFENDNAT-INTERVENOR MALC'S POST TRIAL BRIEF

Introduction

Defendant Intervenors Mexican American Legislative Caucus ("MALC") respectfully submits this post trial brief. The State of Texas' has failed to meet its burden in this cause. Therefore, the State of Texas is not entitled to a declaratory judgment that the 2011 enactment of redistricting plans for the Texas House of Representatives and Texas Congressional districts are not retrogressive and that these plans were not adopted for a discriminatory purpose.

Previously, along with the other intervenor groups, MALC filed a joint memorandum addressing the legal standards that govern this Section 5 declaratory judgment action.(Docket Document 74, Oct. 25, 2011) That memorandum explained the standard Intervenors believed should be used to evaluate Texas' submission and explained why Texas' argument for a bright-line standard to evaluate the adopted plans was just wrong. With regard to whether the new redistricting plans have a prohibited discriminatory effect, Texas' ever changing standard continues to mistakenly assert that this Court should utilize a simplistic, never before used application for measuring not the election districts in which minority voters have an ability to elect candidates of choice (the key issue in assessing Section 5 "effect") but rather summation of scores of certain districts based on the success rate in "exogenous" or reconstituted elections. (Alford pre-filed testimony, Docket Document # 162-1, pp. 10-12). Section 5 case law plainly holds that no such bright-line rule exists, and that this Court must evaluate minority voters' "ability to elect" by reviewing a variety of electoral factors.

With regard to the issue of discriminatory purpose, Texas wrongly seeks to shift the burden of proof it bears on this issue (as well as on the "effect" issue) from itself to the defendants. MALC will not repeat here the analysis and authority set out in that memorandum.

When the correct Section 5 legal standards are applied to the 2011 state house and congressional redistricting plans, the facts simply do not support the State's position that the plans do not have a discriminatory effect and that the plans were not adopted with a discriminatory purpose. These facts relate both to whether these plans "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer v. United States*, 425 U.S. 125, 141 (1976), and thus have a prohibited discriminatory effect, and whether the plans have a prohibited discriminatory purpose.

Retrogression

As to retrogression, MALC agrees with and joins in the assessment made by the United States and its expert, Dr. Lisa Handley. Dr. Handley determines that the new plan for the state House reduces the number of Latino "ability to elect" districts by three and, overall, reduces the number of minority "ability to elect" districts by four or five. Dr. Handley concludes that the new congressional plan, in the context of the increase in the number of Texas congressional districts from 32 to 36, reduces the proportion of minority "ability to elect" districts from 31% to 27%, and substantially reduces the number of Latinos that reside in Latino "ability to elect" districts. Accordingly, Dr. Handley concludes that both plans are retrogressive.

In addition, the Gonzalez Intervenors have made a compelling case that with regard the State's Congressional plan CD 25 is a performing coalition district and has been dismantled without a replacement coalition or opportunity district. The racial polarization analysis performed by MALC's expert, Dr. J. Morgan Kousser is instructive on this issue. Dr. Kousser found that: "African-Americans supported Latino Democratic – but not Republican – candidates in the general election almost unanimously. Majorities of "other" ethnic groups supported Latino candidates, regardless of party, in the general election. About two-thirds of Latinos, by this

measure, also supported Democratic candidates, regardless of whether they ran against Latino Republicans or not. In general elections in Texas today, a black-Hispanic coalition in favor of Democratic candidates is a fact of life". Dx 5, Kousser Report at 59.

The State's response is to put forward a new measure for retrogression that rewards jurisdictions for packing districts to make them not opportunity districts but rather guaranteed districts while masking the elimination of opportunity districts. The State has simply failed in its burden of showing that its plans for Congress and State House of Representatives is not retrogressive.

Discriminatory Intent

As to discriminatory purpose, MALC again agrees with and join in the assessment made by the United States and its expert, Dr. Theodore Arrington. Again, however, while Dr. Kousser's analysis is complementary to Dr. Arrington's review, Dr. Kousser provides further depth, and therefore his analysis should be of assistance to the Court on this issue as well.

ARGUMENT AND AUTHORITIES

I. VOTING IN TEXAS ELECTIONS IS RACIALLY POLARIZED

Dr. Kousser is a Professor of History and Social Science at the California Institute of Technology. He has conducted analyses of racial voting patterns, using well-established social science analytic techniques, throughout his professional career, and also has testified in numerous Voting Rights Act cases regarding racially polarized voting. (Dx 5 Kousser Report and cv).

In this case, Dr. Kousser reviewed a number of statewide and district-specific Texas elections, using methodologies consistent with those approved by the United States Supreme Court. In his declaration, he explains the mechanics of the methodologies and their underlying logic. (Dx 5 Kousser Report at 15-32). From his analysis, Dr. Kousser concludes that:

> First, voting in recent Texas elections has been ethnically polarized. Latinos and non-Latinos vote differently. Second, that pattern is not simply a function of partisanship. Ethnic polarization is often even more stark within Democratic primaries when Latino candidates run against non-Latino candidates than it is in general elections. Third, Latino voters in Texas overwhelmingly favor Democratic nominees, even when Republican nominees have Spanish surnames. Indeed, some non-Latino Democratic nominees have received more than 85 percent of Latino votes in general elections when running against Spanish-surnamed Republicans. Fourth, and less substantively, these results hold across three methods of estimation (ER, weighted ER, and EI) and two levels of aggregation (all the precincts in the state or in individual congressional and State House races, and all 150 State House districts). The patterns inhere in the data, not in the methods or the ways voters were grouped into districts.

(DX 5, Kousser Report, at 32-33).

Similar results are reached by other Intervenors' experts (see, *e.g.*, the Declaration of Dr. Richard Engstrom, submitted by Intervenor Texas Latino Redistricting Task Force). Dr. Handley, the United States' expert, also concludes that voting in Texas elections is racially

polarized, in an analysis of voting within the specific districts she examined. The State's expert, Dr. Alford, did not conduct an independent racially polarized voting analysis for this case.[1]

II. DISCRIMINATORY PURPOSE

Texas rests its claim that the state House and congressional redistricting plans are free of discriminatory purpose on self-serving testimony of members of the Texas Legislature and their staff. Its expert, Dr. Alford, did not conduct any analysis of the purpose issue. The testimony of the Legislators and the redistricting staff is contradictory and not credible. For instance, the Chairman of the redistricting committee not only testified that he did not assess the number of opportunity districts that needed to be considered in evaluating plans for compliance with the Voting Rights Act, he in fact left the entire matter up to his staff:

> Q. And is it your testimony that representatives didn't need to know the number of ability-to-elect districts
> **A. I didn't say that.**
> **Q.** And they didn't know the number -- the method that you were using to determine the number of ability-to-elect districts?
> **A. No. I relied on staff of what I needed -- in large part, I relied on staff as to what I would need to tell to keep the members informed. If I didn't say it, I didn't say it."**

(*Texas v. U.S.* Solomons' Trial Transcript, Day 4, Afternoon Session, p. 64)(emphasis added)

> " Witness: **I was reliant -- I don't want to be too repetitious, but I was very reliant on staff on the technical aspects of the Voting Rights Act** and how that would work and what they were doing, and they knew that I wanted a fair and legal map, and I wanted one that would hold up. And so I was convinced that they had the ability to know what we needed to do and what we didn't need to do."

(id at p. 67)(emphasis added)

[1] In the Texas case that is pending regarding the state House and congressional plans, Dr. Alford testified that the measure of whether elections in Texas are racially polarized, requires a 90/10 differential in voting patterns between minority and white voters. *Perez v. Texas*, 11-cv-360, (W.D. Tex. 2011)(Alford deposition, p. 53-55). Such an extreme level of polarization is inconsistent with the levels of polarization deemed significant by the United States Supreme Court and is not supported by any scholarly authority. (Kousser Declaration, at 11-14) .

His staff on the other hand testified that the legal staff of the Texas Legislative Council (TLC) and in particular Mr. Hanna was directing the legal analysis of the plans and that if he raised concerns they were addressed. (*Texas v. U.S.* Interiano Trial Transcript, Day 1, AM Session, pp. 134-135). Yet, Mr. Hanna testified that he raised legal concerns about whether the plans were complying with the Voting Rights Act and his concerns remained to the end. (Deposition of David Hanna, 1/ 12/2012, p. 17,18, 42, 46, 47, 91,92, 98-101)

As noted, the United States expert, Dr. Arrington, concludes that both plans were motivated, in part, by a discriminatory purpose, employing the long recognized framework for analyzing discriminatory purpose first set forth by the Supreme Court in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977). Dr. Kousser, who has particular expertise regarding racially-motivated election laws (see Dx 5, Kousser Report and curriculum vitae), also conducted an analysis utilizing the *Arlington Heights* factors. Dr. Kousser's analysis is compelling, and he concludes unequivocally that a host of factors demonstrate that both the state House and congressional plans were motivated by an intention to minimize minority voting opportunity. (Kousser Declaration, at. 62-109, and attached declaration exhibits). In these circumstances, the State has not met its burden.

A. Texas State House Plan

With regard to the state House plan, Dr. Kousser's testimony may be summarized as follows:

First, Dr. Kousser examined whether the Texas Legislature utilized population disparities in the total population assigned to each new House district so as to disadvantage Latino voters. (DX 5, Kousser Report, at 63-75). Dr. Kousser concludes that: Latino majority districts are more likely to be overpopulated than Anglo majority districts; that, prior to redistricting, the

Legislature was apprised by its own legal counsel that population variances that treat minority voters systematically worse than white voters may constitute evidence of discriminatory intent; that the State's 2011 plan contained more districts at the extreme ends of the population deviation limits than the previous redistricting plan; and that the State used population variances to gain racial and partisan advantage self- consciously.[2] (DX 5, Kousser Report, at 63-75)

Second, Dr. Kousser concludes that the legislative process that led to the adoption of the new House plan consistently ignored minority suggestions and alternatives. (DX 5, Kousser Report, at 76).

Third, Dr. Kousser determines that neutral redistricting principles (beyond those examined by the United States' expert) do not explain the decisions made by the Legislature that retrogress and otherwise disadvantage Latino voters. (DX 5, Kousser Report, at 77-82).

Fourth, Dr. Kousser finds that the State inconsistently applied its redistricting policies such as the "whole county line" rule[3]. (DX 5, Kousser Report, at 83-89).

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[2] During debate on the second reading of the bill, Rep.Armando Walle asked Redistricting Committee Chair Burt Solomons: "Why do we choose to over populate nearly every minority majority district in Harris County?" (DX 5, Kousser Report, at 73)

[3] Dr. Kousser notes that: "It is worth quoting the Solomons/Martinez Fischer conversation at some length to spotlight the inconsistencies and lack of a rational, articulated policy to explain why some county lines were cut and why districts were drawn to curtail, instead of to preserve the opportunities for minorities to elect candidates of their choice:

> SOLOMONS: So why didn't we create two Latino majority seats in Nueces County? The overall population in Nueces has an SSVR [Spanish-surname voting registration] of 49 percent; as a result it is impossible to draw two Latino majority seats within Nueces.
> We decided to draw only one strongly Latino district to allow the Latino community in Nueces to elect a representative of their choice . . .
> MARTINEZ FISCHER: . . .it appears to me that district [*sic* county] had two performing minority opportunity districts, and they seemed to be working quite fine. . . . [I]f I'm not mistaken your map makes about 17 cuts. And I guess what I'm saying is that why couldn't one of those . . .cuts could have been in the Coastal Bend that would have resulted in there being not just one minority opportunity district [in Nueces County] but two?
> SOLOMONS: I don't know. My response is we didn't unnecessarily cut any county line where it didn't absolutely need to be done. Not just to do it to create new districts but because it absolutely had to be done in the context of what was being accomplished in that area.

Finally, Dr. Kousser examines the districting configurations reflected in the new House plan, and concludes that the State made use of traditional gerrymandering techniques to manipulate minority voters to their disadvantage. (DX 5, Kousser Report, at 90-93; Figures 7-9).

The evidence of intent is comprehensive and compelling. Defendants have not met their burden and are not entitled to summary judgment with regard to the Texas House redistricting plan.

B. **Texas Congressional Districts**

Dr. Kousser also examined the congressional redistricting plan for evidence of intentional discrimination. (DX 5, Kousser Report, at 96-110). As with his analysis of the Texas House plan, Dr. Kousser reviewed evidence consistent with the framework of *Village of Arlington Heights* and determined that the State's congressional plan was adopted with a discriminatory intent. (DX 5, Kousser Report, at 109-110) ("Like the state House plan, the congressional plan not only had a retrogressive effect by more than one index, but it also bears plentiful signs of having been adopted with a racially discriminatory intent".)

In his evaluation, Dr. Kousser examined the legislative process used to adopt the plan. Dr. Kousser found that the secretive nature of the process disadvantaged minority legislators and

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> MARTINEZ FISCHER: So when you took a district in South Texas and you took a member's district out of Webb County and put it in Hidalgo County, what was the justification for that?
> SOLOMONS: I'm reminded that we only cut in one area and everything else was spill overs. Spill overs are not cuts in county lines. Spill overs are not.
> MARTINEZ FISCHER: Well, I think they break a county line.
> SOLOMONS: Well, they don't cut them intentionally to go—they're because of the population numbers. It's not because you're going around to do that.
> MARTINEZ FISCHER: Right. So why didn't the district that currently spilled over into Webb continue to go into Webb and instead made the decision to veer into Hidalgo?
> SOLOMONS: I don't know. The committee—this is the map the committee proposed based on what we were advised and how we have to abide by the law, and that's what we did. . . .
> MARTINEZ FISCHER: . . .it's curious to me that we can spill over into Hidalgo County and justify it, but we can't spill over outside Nueces County and justify it by maintaining two minority opportunity districts that are currently there today."

minority voters. (DX 5, Kousser Report, at 96-97) (no minority member of the legislature, and specifically no Latino member, was involved in drawing the plan).

Dr. Kousser further examined the plan to see if traditional gerrymandering techniques such as packing, cracking, and tacking were employed to disadvantage minority voters. (DX 5, Kousser Report, at 97-101, Tables 22-23) ("The packing of minorities, along with the "cracking" of other minority areas and the extension of districts based in suburban and rural counties into central cities or other heavily minority regions, made it possible to deny minorities the opportunity to elect or influence the election of other candidates of choice.") Dr. Kousser also examined how the specific district lines were employed to disadvantage minority voters. For instance, Dr. Kousser reviewed the maps for congressional districts 12 and 26 in Tarrant and Denton Counties in North Texas where he was able to overlay map lines on demographic data showing Latino population concentrations. (DX 5, Kousser Report, at 102). The irregular lines used between those districts were clearly aimed at carving out Latino voters from Tarrant County and tacking them into an Anglo majority district in Denton County, diminishing Latino opportunities in Tarrant County. *Id.*

As with his evaluation of the Texas House plan, Dr. Kousser examined potential justifications such as compactness or a potential desire to improve minority opportunities. (DX 5, Kousser Report, at 105-108). Dr. Kousser's evaluation, however, revealed that the State's congressional plan could not be explained by any objective traditional redistricting standard since alternative plans – which provided for substantially greater minority electoral opportunities – accomplished these goals while the State's plan does not.

Dr. Kousser determined that the evidence of racial intent in the development and adoption of the State's congressional redistricting plan is "plentiful." (DX 5, Kousser Report, at

109-110) ("The maps demonstrate intentional racial gerrymandering at least as clearly as anything in *Shaw v. Reno* or *Miller v. Johnson* or *Bush v. Vera*, although this time, racial minorities were the victims, rather than the beneficiaries of that line-drawing.").

CONCLUSION

Defendant-Intervenor MALC respectfully urges this Court to deny Texas' request for Declaratory Judgment and enter judgment for Defendant and Defendant Intervenors and Dismiss this action and award reasonable attorneys fees to prevailing Defendant Intervenors.

Dated February 6, 2012

Respectfully submitted,

FOR INTERVENOR MEXICAN AMERICAN LEGILATIVE CAUCUS (MALC)

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2012, I electronically served the foregoing via ECF on all other parties in this litigation.

/s/ Jose Garza -