

Testimony of

**Michael C. Li**

Senior Counsel

Brennan Center for Justice  
At New York University School of Law

Meeting of

The Senate Select Committee on Redistricting

Austin, Texas

September 24, 2021

at 10:00 a.m.

SB 4 and SB 7

Chairwoman Huffman, Vice Chairman Hinojosa, and members of the Select Committee:

Thank you for the invitation to testify before the Senate Select Committee on Redistricting.

The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and legal institute that works to reform, revitalize, and defend our country's systems of democracy and justice. For more than two decades, the Brennan Center has built up a large body of nationally respected research and work on these issues, including in the fields of redistricting and election law. I am Senior Counsel in the Center's Democracy Program, where my work focuses on redistricting and the census.

My remarks today focus on North Texas, and, in particular, Tarrant County, because Plan S2101 raises a number red flags with respect to treatment of minority communities in the DFW Metroplex. However, the themes of my remarks are more broadly applicable to the state as a whole, particularly its urban and suburban areas, and to other maps in addition to state senate maps.

I am happy to follow up with the Committee with additional information, either on the subject of my testimony today or on other topics or to offer other help and assistance as may be beneficial in ensuring that Texas has a robust, inclusive, and transparent redistricting process.

## The Need to Consider Race in Redistricting

### Overview

This redistricting cycle, a number of states have publicly stated that they will not consider racial or ethnicity data when drawing maps. This approach is not tenable in a state as diverse and demographically complex as Texas.

Between 2010 and 2020, over 95 percent of Texas’ population growth was attributable to communities of color, including people who reported two or more races on census forms. In Dallas County and Tarrant County, the percentage was even higher, with the Anglo population of both counties decreasing in both absolute and relative terms last decade.

---

### Dallas County Demographic Change 2010-2020

	TOTAL POPULATION	ANGLO	BLACK	LATINO	ASIAN	MULTIRACIAL
2020 Population	2,613,539	724,987	564,741	1,057,835	181,314	66,754
Absolute Change 2010-2020	+245,400	-59,706	+46,009	+151,895	+63,517	+37,327
Group Share of County Population Growth 2010-2020	N/A	0%	19%	62%	26%	15%

Source: U.S. Census Bureau

---

### Tarrant County Demographic Change 2010-2020

	TOTAL POPULATION	ANGLO	BLACK	LATINO	ASIAN	MULTIRACIAL
2020 Population	2,110,640	904,884	358,645	620,907	127,783	78,920
Absolute Change 2010-2020	+301,606	-32,251	+96,123	+137,930	+44,405	+48,364
Group Share of County Population Growth 2010-2020	N/A	0%	32%	46%	15%	16%

Source: U.S. Census Bureau

---

Much of the growth of communities of color last decade in Tarrant County was centered in the current Senate District 10. All told, the non-Anglo population of SD-10 increased last decade by 134,124 people, of whom 51 percent were Latino, 25 percent

were Black, and 11 percent were Asian. By contrast, the Anglo population of SD-10 fell by 22,893 people, a decrease of nearly 6 percent. Remarkably, almost half of the Latino population growth in Tarrant County was in SD-10, as was 36 percent of Tarrant County's Black population growth and 32 percent of its Asian population growth.

As currently configured, SD-10 is only 39.5 percent Anglo by total population and 53.9 percent Anglo by citizen voting age population estimates. In fact, estimates of the Anglo citizen voting age population may be overstated. Because CVAP estimates are calculated on a five-year rolling average, they tend to trail actual population, especially in fast-growing states like Texas. It is very likely, accordingly, that SD-10 is already majority non-Anglo both by total population *and* citizen voting age population.

### *Texas' Obligations*

Given the growth of communities of color and their geographic concentration, Texas has an obligation to conduct a searching and nuanced analysis to ascertain and fully understand the extent of minority power before adopting a new plan.

Under Section 2 of the Voting Rights Act, Texas has a legal obligation to avoid drawing district lines in a way that dilutes the votes of minority voters and prevents them from electing preferred candidates.<sup>1</sup> Whether liability exists under Section 2 is not a simple back-of-the-envelope calculation. Rather, the U.S. Supreme Court has said that the inquiry is “intensely local,” “fact-intensive,” and “functional” in nature.<sup>2</sup> In diverse multi-racial, multi-ethnic regions such as North Texas, among the matters that must be investigated is whether two or more minority groups in a region are politically cohesive and could together form the majority of a district.<sup>3</sup> It is imperative that the state not only conduct this analysis but that it do so in a transparent fashion, making its analysis publicly available before any vote on a map.

But Texas' obligations do not end with creating Section 2 districts under the Voting Rights Act. Like all states, Texas has a constitutional obligation to avoid intentional discrimination against racial and ethnic minorities. The Supreme Court has made clear that liability for intentional discrimination can exist even where no liability exists under Section 2 of the Voting Rights Act, explaining that “if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious concerns under both the Fourteenth and Fifteenth Amendments.”<sup>4</sup> Likewise, the Supreme Court has held that the “undermin[ing

---

<sup>1</sup> Thornburg v. Gingles, 478 U.S. 30 (1986).

<sup>2</sup> *Id.* at 62-63, 79.

<sup>3</sup> Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988).

<sup>4</sup> Bartlett v. Strickland, 556 U.S. 1, 24 (2009) (Kennedy, J.) (plurality opinion).

of] the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive” can “bear[] the mark of intentional discrimination that could give rise to an equal protection violation.”<sup>5</sup>

In gauging whether there is discriminatory intent, a state’s awareness that a state’s action bears “more heavily on one race than another” is a key factor that courts will consider.<sup>6</sup> As the Supreme Court has explained, “Adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence . . . is one factor among many others which may be considered by a court” in evaluating whether a state’s motive is discriminatory.<sup>7</sup> Drawing maps without racial or ethnicity data will not insulate a state from liability if a state becomes aware of the disparate impact or if a state ignores its obligation to carefully consider whether it is diluting minority voting power.

### *Red Flags*

The proposed state senate map under consideration by the Select Committee (Plan S2101) raises a number of flags regarding the treatment of communities of color, particularly with regard to changes made to the benchmark configuration of SD-10. These changes suggest that Texas has not yet done the careful analysis required by both the Voting Rights Act and the Constitution.

To start, Plan S2101 makes wholesale changes to SD-10 despite the fact that there is no legal reason to do so. Although SD-10 became much more demographically diverse last decade, the overall population of the district reported by the census (945,496) is not far from the target population for Texas Senate districts (940,178). In fact, the exceedingly small population deviation of just 5,318 people (or 0.57 percent) is well within the ten percent top-to-bottom deviation generally permitted under case law for legislative districts.<sup>8</sup> In other words, if Texas wanted, it could leave SD-10 exactly as it is or make at most nominal changes. Instead, Plan S2101 removes over a third of the population from the district and, in the process, significantly fractures minority communities.

Altogether, Plan S2101 would remove 317,966 people in Tarrant County from SD-10 and replace them with 328,149 people from Johnson County and Parker County.

---

<sup>5</sup> League of United Latin American Citizens v. Perry, 548 U.S. 399, 439-40 (2006) (discussing Texas’ dismantling the 23rd Congressional District in 2003 in response to increased Latino political effectiveness).

<sup>6</sup> U.S. v. Brown, 561 F.3d 420, 433 (5th Cir. 2009).

<sup>7</sup> Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65 (1979).

<sup>8</sup> Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (population deviations within a 10 percent top-to-bottom threshold are presumptively constitutional).

Of the people added to the district from Johnson County and Parker County, 72 percent are Anglo. By contrast, 55 percent of the Tarrant County people removed from the district are non-Anglo. Overall, Plan S2101 would remove 34 percent of the current SD-10's Latino population, 23 percent of its Black population, and 46 percent of its Asian population.

Minority neighborhoods that Plan S2101 would move from SD-10 to SD-9 include the North Side of Fort Worth, which is heavily Latino, and the Central Meadowbrook neighborhood, which is two-thirds Latino and Black. These neighborhoods are kept together with other heavily Latino and Black neighborhoods in a variety of other plans, including the benchmark congressional plan (Plan C2100) and both the benchmark State Board of Education plan (Plan E2100) and the state's proposed State Board of Education plan (Plan E2103).

It is noteworthy in this regard that the changes to SD-10 proposed by Plan S2101 in many ways mirror attempted changes to the district last decade that were found to be intentionally discriminatory by a three-judge panel in an action brought by Texas to obtain preclearance to use the plan. In denying preclearance, the panel held that "there is little question that dismantling SD 10 had a disparate impact on racial minority groups in the district . . . by submerging their votes within neighboring and predominately Anglo districts."<sup>9</sup> Even some of the same neighborhoods are involved. In the decade since, SD-10 has only gotten more non-Anglo. This should be a major red flag for this body as it proceeds.

The result of the surgical redrawing of SD-10 is a significant cracking of communities of color. While nearly half of Tarrant County's Latino population is in the benchmark SD-10, only 32 percent would be under Plan S2101. The percentage of the county's Black population in SD-10 would similarly fall from 57 percent to 43 percent, while the share of Tarrant County Asians in the district would go from 42 percent to just 22 percent. Similar changes take place when the district is viewed from the standpoint of citizen voting age population.

### **A Note on Partisan Gerrymandering**

The redistricting process in Texas is a partisan one, and there could be a temptation for lawmakers to try to use politics to justify line drawing choices, particularly in light of the Supreme Court's decision in *Rucho v. Common Cause* holding that partisan

---

<sup>9</sup> Texas v. U.S., 887 F.Supp.2d 133, 163 (D.D.C. 2012), vacated and remanded, Texas v. U.S., 133 S.Ct. 2885 (2013).

gerrymandering claims are non-justiciable political questions under the U.S. Constitution.<sup>10</sup>

However, Texas is among the most demographically diverse states in the country, and voting patterns in Texas are more politically polarized along racial and ethnic lines than in many states. This means that targeting voters because of partisanship will inevitably have a significant racial and ethnic valence. Although the Supreme Court has held that federal courts may not step in to police partisan gerrymandering, the use of race or ethnicity as a proxy for partisanship remains constitutionally suspect under the Supreme Court's racial gerrymandering line of cases and could subject the state to liability for racial, rather than partisan, gerrymandering.

Notably, unlike claims rooted in racial animus, the Supreme Court's racial gerrymandering jurisprudence does not require proof of discriminatory intent. Rather, the legal inquiry is whether race predominated in the drawing of district boundaries. The Supreme Court has made clear that a state's motive is irrelevant to this inquiry. Rather, strict scrutiny review is triggered whenever:

[L]egislators have 'place[d] a significant number of voters within or without' a district predominately because of their race, regardless of their ultimate objective in taking that step . . . In other words, the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.<sup>11</sup>

This limitation is significant. Historically, in Texas, the engineering of partisan advantage for either Democrats or Republicans has relied heavily on underrepresenting communities of color in order to shore up electoral opportunities for white candidates of whatever party is in charge at the time. Indeed, given the high level of racially polarized voting in the state, it is difficult to successfully gerrymander in Texas without at least some targeting of racial and ethnic minorities.

The 2011 congressional map passed by the Texas Legislature, for example, had some of the highest rates of partisan bias of any congressional map this decade. However, the partisan bias was largely a product of the failure to preserve a Latino ability to elect district in West Texas and the failure to create additional electoral opportunities for Latinos in North Texas.<sup>12</sup> When a court subsequently modified the map to address the

---

<sup>10</sup> *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019).

<sup>11</sup> *Cooper v. Harris*, 137 S.Ct. 1455, 1473-4 n.7 (2017) (emphasis added).

<sup>12</sup> Laura Royden, Michael Li, and Yuri Rudensky, *Extreme Gerrymandering and the 2018 Midterm*, Brennan Center for Justice, 2018, [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Extreme\\_Gerrymandering\\_Midterm\\_2018.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Extreme_Gerrymandering_Midterm_2018.pdf).

treatment of minority communities, the map’s bias fell significantly.<sup>13</sup> Maps proposed by Latino groups that were not adopted would have reduced the bias even further.<sup>14</sup>

## **Conclusion**

Texas has struggled for more than five decades to draw maps that treat its communities of color fairly. This was the case when Democrats were in control of map drawing, and, unfortunately, it has remained the case in the two decades since Republicans have been in control of the process. But after a decade in which communities of color powered the state’s growth to an unprecedented extent, it is more important than ever to work to get it right.

At the nation’s founding, John Adams wrote that legislative bodies should be an “exact portrait, a miniature” of the people as a whole. The idea was simple. Decisions should be made by legislative bodies that resemble the people being represented. Unfortunately, redistricting is too often used by map drawers to do the exact opposite – to exclude rather than include.

Plan S2101 contains worrying hints that communities of color will once again see their political power undermined. I urge this body to pause and look more closely at the maps, both because it will help the state avoid protracted litigation and legal liability and because it is what Texans deserve.

---

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*