UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*,	)	
	)	CIVIL ACTION NO.
Plaintiffs,	)	SA-11-CA-360-OLG-JES-XR
	)	
v.	)	
	)	
STATE OF TEXAS, *et al.*,	)	
	)	
Defendants.	)	

THE AFRICAN-AMERICAN CONGRESSPERSONS
PLAINTIFF-INTERVENORS' PRETRIAL BRIEF

Introduction

The African-American Congresspersons adopt the argument of the Texas NAACP in regards to demonstrative map C284 for the United States Congress and in regards to the intentional discrimination and Section 2 issues in the Dallas Fort Worth Area and as to discrimination in the Congressional Map as a whole in C235.

Congresswoman Eddie Bernice Johnson represents Congressional District 30 in Dallas County, Congresswoman Sheila Jackson-Lee represents Congressional District 18 in Harris County, and Congressman Alexander Green represents Congressional District 9 in Fort Bend and Harris Counties. Congresswoman Johnson resides in CD30 in Dallas County, Congresswoman Jackson-Lee resides in CD18 in Harris County, and Congressman Green resides in CD9 in Harris County.

A review of the Red 202 and Red 100 reports reveals that the Black and Hispanic Voting Age Population for CD30 was 76.7 percent of C100 (the map in effect in 2010) and it was reduced to 75.9 percent in C235. In regards to CD30, that number was 76.2 percent in C100 and it was reduced to 75.3 percent in C235. As to CD9, the Black and Hispanic Voting Age Population in C100 was 74.3 and the number in C235 is 72.7. The African-American Congresspersons do not seek changes to Congressional Districts 9 or 18 (as configured in C235) in this litigation but do believe that CD30 is still the result of intentional discrimination though the configuration of the district in CD235 is superior to the configuration in C185. However, the African-American Congresspersons do believe that it is possible to draw a new Latino opportunity district or coalition district that may lean Latino in the Harris and Fort Bend Area without modifying or changing the current composition or configuration of CDs 9 and 18 in C235. In addition, they do seek the unpacking of CD30 and a correction in the Dallas and Tarrant County Area of the vote dilution, intentional discrimination and underrepresentation of African-Americans and Latinos. Further, they seek a map as a whole that is more reflective of the State's relevant population instead of a map that places a premium on white votes and a marked discount on minority votes.

The Latest Pleading

In its most recently amended complaint, Second Amended Complaint of the Plaintiff-Intervenors' African-American Congressional Intervenors (ECF No. 901), the African-American Congresspersons have live claims against C235 as a hole in that it is intentionally discriminatory in violation of both Section 2 of the Voting Rights Act and the Fourteenth Amendment to the United States Constitution. The Complaint contends that the Congressional Plan denies fair representation in the United States Congress to African-American and Latino voters through vote dilution and other forms of intentional discrimination. It alleges that Anglo voters have been

largely placed in Congressional Districts where they can determine the outcome where the opposite is true for African-American and Latino voters. As a compliment to this the Complaint also complains about the failure to draw naturally occurring districts because of a racially discriminatory motivation, especially in the Dallas and Tarrant County area. Further, the complaint also complains about how CD30 was drawn in a manner to prevent minorities from obtaining a third ability to elect seat other than CD30 and CD33. As CD30 was almost a perfect size in C100 it was unnecessary to perform major surgery particularly since it was not for the purpose of creating another ability to elect district. Areas such as Oak Lawn, Turtle Creek, Uptown, City place, Knox-Henderson, Lower Greenville and Junius Heights were taken out for a discriminatory reason.

It is important to note that the Complaint avers that Latinos and African-Americans vote as a group and are politically cohesive in general and particularly in CD9, CD18 and CD30. As the State has stipulated whites are racially polarized against African-Americans. The State contends that actions at issue in this case were taken because of the political preference of African-Americans and Latinos and not because of their race or ethnicity.

A relevant and related issue is the State's new contention where it attempts to force witnesses to say that if they say the current map discriminates that they are saying that this 3 Judge Panel discriminates. This is a dishonest argument. As we noted in our pleadings, the Court ordered interim House and Congressional Plans in effect on February 28, 2012 based on preliminary determinations regarding the merits of the Section 2 and constitutional claims presented in the case and the Court expressly advised that its "preliminary conclusions" may be revised upon full analysis. ECF No. 681.

Relevant Law

An analysis of intentional discrimination under the Equal Protection Clause of the Fourteenth Amendment should begin with a review of *Arlington Heights v. Metro Hous. Dev. Corp*., 429 U.S. 252, 266 (1977) and its progeny. There the Court noted that the issue is not to determine that the discriminatory purpose was the sole reason but whether it was a "motivating factor" and one should make such a determination after a sensitive inquiry into such circumstantial and direct evidence as may be available. The Department of Justice on its website includes a discussion of the proof of discrimination under the Voting Rights Act and it provides as follows:

> The Senate Committee on the Judiciary issued a report to accompany the 1982 legislation. In that report, it suggested several factors for courts to consider when determining if, within the totality of the circumstances in a jurisdiction, the operation of the electoral device being challenged results in a violation of Section 2. These factors include:
>
> 1. the history of official voting-related discrimination in the state or political subdivision;
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
> 3. the extent to which the state of political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
> 4. the exclusion of members of the minority group from candidate slating processes;
> 5. the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
> 6. the use of overt or subtle racial appeals in political campaigns; and
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29.

The Judiciary Committee also noted that the court could consider additional factors, such as whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members or where the policy underlying the state or political subdivision's use of the challenged standard, practice, or procedure is tenuous. However, the Judiciary Committee

report describes this list of factors as neither exclusive nor comprehensive. Moreover, a plaintiff need not prove any particular number or a majority of these factors in order to succeed in a vote dilution claim.

Since the invalidation of Section 4(b) of the Voting Rights Act (VRA), litigation under the Constitution and Section 2 of the Voting Rights Act have taken on added importance to African-Americans and Latinos. See *Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

It is essential that all Americans be given an equal and meaningful opportunity to participate in the political process. Currently, Texas has less than 45 percent whites in the State but they control by discriminatory redistricting methods 24 of 36 Congressional seats and have been in control the last two elections of one of the other 12 in a less well used method of discrimination against minority voters. We should adhere to the suggestions of former Supreme Court Justice Thurgood Marshall who said in a dissenting opinion in *City of Mobile v. Bolden*, 446 U.S. 55, 103-104 (198):

> The American ideal of political equality, conceived in the earliest days of our colonial existence and fostered by the egalitarian language of the Declaration of Independence, could not forever tolerate the limitation of the right to vote to white propertied males."

In the same sense, we cannot simply permit racial gerrymandering to plant second or third class status on racial and ethnic minorities. This cannot be forever tolerated. As the United States Supreme Court has held, the Right to Vote is the most preservative of all of our rights. *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). Further, the Supreme Court has held that when there is a strong correlation between minorities and a political party, as there is now with the Democratic Party, it is permissible to place a majority of reliable voters from that party in a majority district for that party even if those are minority voters. *Easley v. Cromartie*, 532 U.S. 234 (2001). Years ago in Texas the Court invalidated multi-member districts that were then employed by the

Democratic Party to prevent minorities from being elected to public office. *White v. Regester,* 412 U.S. 755, 765-70 (1973). Things have not changed greatly in that African-Americans and Latinos have a less valued vote than whites in that whites dominate at least 2 of every 3 races in Texas Congressional districts even though they are less than 45 percent of the Citizen Voting Age population. Add Congressional District 23 to this discussion and we can see the influence that is being provided to them in C235. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the United States Supreme Court held that when maps are drawn to intentionally diminish the influence of racial and ethnic minorities this runs afoul of the Constitution. In this case, the State failed to draw new opportunity districts for specific minority groups or coalition districts as well as naturally occurring districts where minority group members may have a say in the outcome. The State cannot hide behind the fact that minorities vote Democratic nowadays because of good reason. To hold that because minorities vote Democratic gives the State a license to limit their franchise or political participation is to deny them the right of political association or expression that is given to whites. The United States Supreme Court held that "[a] court considering a challenge to a state election law must weigh the character and magnitude of the essential injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against 'the precise interests put forward by the State as justifications for the burden imposed by the rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebreeze*, 460 U.S. 780, 789. There is no need for this action by the State of Texas. It was done simply because the people in power had the authority to do it. In drawing up fair districts the majority would probably still fare well, better than their percentage of the population but no where near the extreme dominance provided them by the current map. As in *Celebreeze*, the action in this case implicates the Fourteenth Amendment through the application of the First

Amendment. Whites are given benefits as a result of their political affiliation but minorities are denied them. In other words, harm is coming to them as a result of their political affiliation or association or expression. The State says that it took such matters into consideration. This means that the State clearly understood what it was doing when it decided to deny representation to African-Americans and Latinos. This must be additional evidence of intentional discrimination. As I stated to this Court before, if you have a law protecting fruit and you put it in a bag to protect it, it is not a justification for destroying that fruit for one to say I knowingly destroyed the fruit because I just do not like paper bags. It just does not work. To do so would cause minorities to have to support odious candidates for example or odious policies simply to get protection when at the same time the discriminatory party they are supporting is discriminating against them. This makes for some kind of Hobson's choice I would argue. In *Cooper v. Harris,* 137 S. Ct. 1455, 1473 (U.S. 2017), the Supreme Court noted that "racial identification is highly correlated with political affiliation." Both of our Experts, Dr. Vernon Burton and Dr. Richard Murray, have made it plain that this was by design and not happenstance. The Court noted in *Coope*r that evidence in regards to the desire to draw a district for a certain purpose actually debunked the claim of the State that it was about politics: "That evidence, the District Court plausibly found, itself satisfied the plaintiffs' burden of debunking North Carolina's 'it was really politics' defense; there was no need for an alternative map to do the same job." *Cooper*, *supra*. According to *Thornburg v. Gingles*, 478 U.S. 30, 48 n. 11 (1986), the State is prohibited from engaging in vote dilution by dispersing minority group members into districts where they become ineffective voters, as the State has done in this case to ensure that minorities could only be likely to elect 11 of 36 State representatives even though they comprise a majority of the State's population (each of the 11 is not necessarily an ability to elect district). It is important to note that in looking at 2010 Census

figures, 33.3 percent of the population in the Dallas/Fort Worth Metroplex are Latino compared to 38.7 percent in Harris and Fort Bend Counties. There is a Latino opportunity district in the Harris and Fort Bend area but there is none in the metroplex. Moreover, to make matters worse, the growth in the Metroplex was about enough for a new Congressional District (because of whites who moved away and minorities who grew greatly). Currently there are at least 9 Congressional Districts that touch the Metroplex, Congressional Districts 5, 6, 12, 24, 25, 26, 30, 32 and 33. Only 2 of these are minority opportunity districts and the other 7 are all districts where Anglos comprise the dominant voting majority. Anglos make up 41.2 percent of those in Dallas and Tarrant Counties but dominate 77 percent of the districts that represent it in Congress.

C185 was the map originally drawn by the Texas Legislature for Texas' Congressional elections after the 2010 Census. This Court has found that map to be discriminatory and prior to the Shelby County decision a 3 Judge Panel also heard whether the case violated Section 5. That Court, in a case handed down *Texas v. United States*, 887 F.Supp.2d 133 (D.D.C., 2012) *vacated* 133 S. Ct. 2885, 186 L. Ed. 2d 930, 2013 U.S. LEXIS 4927 (U.S., 2013), held that the rights of African-Americans and Latinos were violated under Section 5 by the State's adoption of C185 (which is largely included in C235). Instead of considering these changes, which it had the authority to do, the State chose not to adopt the many problems identified first by the DC panel and many later by this Court even though they were aware of their concerns. Section 5 is no longer required, but State Legislatures are perfectly able to consider compliance with it as a criteria in its redistricting plans even now. See *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015). It is further important to note that a separate 3 Judge panel heard whether Texas Voter Identification Law violated Section 5 around that same time and determined that it too was discriminatory. *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), vacated and remanded, 133

S. Ct. 2886, 186 L. Ed. 2d 930 (2013). This case was handed down on or about August 30, 2012. When the Legislature met in 2013 to adopt C235 it chose not to correct any problems with that voting law either that had been found to be illegal by yet another bi-partisan group of Judges. After the DC decision was vacated due to the Shelby County decision, the matter was considered first by a district court in Corpus Christi and then by a panel of the 5th Circuit Court of Appeals and then by the 5th Circuit sitting en banc. See *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016)(en banc), cert. denied) after a United States District Court held the same in 2014. *Veasey v. Perry*, 71 F.Supp. 3d 627, 633 (S.D. Tex. 2014). The law was found to be discriminatory by all the courts, though the 5th Circuit preliminarily determined that there should be a further analysis of the intentional discrimination claim. When the 5th Circuit analyzed the voter identification evidence to determine if there might have been intentional discrimination, it reviewed a number of Arlington Heights factors including (1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and legislative history, especially contemporary statements by members of the decision-making body. See *Veasey v. Abbott* at p. 231. In this case, we have essentially the same historical background to the decision, but we know that the Legislature was aware of the deficiencies in the map but did nothing to address them. Further, it is important to note that the Section 5 decision preceded the adoption of the plans in 2013, and Shelby County was handed down a week or so after the plans were adopted. At the time the decision was made on how to handle the changes to the 2011 map, the Section 5 opinion was live and viable.

African-Americans and Latinos have nowhere to go within our structure but to the Government for help. The United States Supreme Court has just handed down a case out of North Carolina, *Cooper v. Harris*, 137 S. Ct. 1455 (U.S. 2017), and this case has noted the problem with

distinguishing between race and party in the South today. Sadly, the GOP which was the champion of African-Americans for many years in this country, has now become known as the white man's party. See Ian Haney-Lopez, How the GOP Became the "White Man's Party", SALON (Dec. 22, 2013, 5:00 PM), http://www.salon.com/2013/12/22/ how_the_gop_became_the_white _mans_party/[https;//perma.cc/J4ZJ-FYYT]. Black voters are now Democrats. Richard Wormser, Jim Crow Stories: Democratic Party, PBS, http://www.pbs.org/wnet/jimcrow/stories _org_democratic.html [https://perma.cc/92D2-J8JJ].

Expert Witnesses have acknowledged that African-Americans prevail in seats that are drawn with 35 percent or greater and sometimes even less. The State's Expert Dr. John Alford has acknowledged as much. The African-American Congressional Intervenors take the position that CDs 9, 18 and 30 are all protected opportunity seats or are clearly seats that Section 2 requires to be drawn and preserved as the districts at issue in *Cooper v. Harris*, 137 S. Ct. 1455 (U.S. 2017). In *Cooper* the Court noted that the State is required to draw performing districts that are less than 50 percent minority under Section 2 and further that the State should not seek to increase the numbers of African-Americans or minorities up to 50 percent when a district is already performing.

When we look at *Cooper* and *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015) we can see where the Supreme Court seems to be paying heightened attention to Southern State Legislatures and their handling or placing of minority voters in redistricting. In *Cooper* they said you can't increase the number of minorities in a performing district simply to achieve 50 percent and in *Alabama Legislative Black Caucus v. Alabama*, they held that you can't unnecessarily put additional voters into an African-American district to prevent a decline in population. Importantly, additional minority areas were placed in CD30 for no legitimate reason.

Lay Witnesses for African-American Congressional Intervenors

State Representative Toni Rose will be the only lay witness tendered by the African-American Congressional Intervenors in light of the time constraints of the case and the findings and decision as to this date of the court in regards to the related 2011 Map. Representative Rose will discuss what relevant matters occurred during the 2013 Legislative Session (her first), totality of circumstances evidence in Dallas County (and related matters regarding actions of the State Legislature) and the continued need of minorities for protection of their voting rights, relevant communities of interest in Dallas County and how they are handled more appropriately under the NAACP maps such as C-284, the continuing political cohesion between African-Americans and Latinos in Dallas County. Congresspersons will also adopt the testimony of NAACP witness, **State Representative Eric Johnson**.

Expert Witnesses for the African-American Congressional Intervenors

Dr. Richard Murray. Dr. Richard Murray supplementary report focuses on developments since 2013 that will support modification of C235. He will testify about evidence that illustrates continued racial polarization in Texas and in various geographical areas thereof, the use of voting practices and procedures to enhance the opportunity for discrimination, overt or subtle racial appeals and the election of minority candidates. Dr. Murray will detail the population growth in Texas from 2010 to 2015 that further shows the need for more Latino and minority representation and how these numbers make it even more likely that minorities are deserving of additional protection or representation, discusses how the Donald Trump election with a focus on Texas fits under a Senate Factor analysis and how it has caused a strengthening of the coalition between not only African-Americans and Latinos but with Asians as well. He will do this in reference to the State and specific areas such as the Metroplex. Dr. Murray has offered an opinion that the

Legislature intends to run out the clock so it will have an advantage of a discriminatory map for the complete time period covered by this decade. He will talk about possible remedies as well and the *Cooper v. Harris* decision of the United States Supreme Court and how parts of it apply in Texas regarding distinguishing race and party. He will talk about other relevant matters regarding discrimination in the adoption of the bills in question.

Dr. Vernon Burton will update his testimony on the Senate Factors. He has an updated history of discrimination in Texas regarding African-American and Latino voters, racial disparities in Socioeconomic areas of life (particularly education, employment, housing, transportation and health, racial appeals up to 2014, the Voter Identification Law and the significance of the use of alleged voter fraud as a justification for the Voter Identification Law and other relevant matters regarding discrimination in the adoption of the bills. He will discuss various matters relating to Legislative actions in Texas.

The African-American Congresspersons will adopt the expected testimony of experts called by the NAACP--**Anthony Fairfax** and **Edward Chervenak**. Mr. Fairfax will testify about various matters including racially polarized voting and cohesive voting. Mr. Chervenak will testify about traditional redistricting principles, map drawing, redistricting and demographical matters, various descriptors regarding C-284 and the admonitions of this Court and other issues.

Key Exhibits

The African-American Congressional Intervenors will offer some of the following exhibits we think are noteworthy at this juncture:

i. We will utilize parts of the Legislative Record to show that the Legislature was aware of various problems with the C235 prior to its adoption.

ii. NAACP Legislative Report Cards to Show important areas of concern for African-Americans before the United States Congress from 2014 to the present. This will show how Texas Congressional Delegation voted on these important matters.

iii. Demonstrative Exhibits to Show the Trump Effect in Texas.

iv. Demonstrative Exhibits to Show connection between current discrimination and historical discrimination.

Expert Reports

Federal Rule of Civil Procedure 26(a)(2)(B)(ii) requires that facts or data considered by the witness forming the opinion be referenced. By using the terms facts or data it seems pretty obvious that it was intended that hearsay would be permissible. Federal Rules of Evidence Rule 703 provides that an expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. This provides a wide latitude of information for an expert to consider. Experts may base their opinions on otherwise-inadmissible information, such as hearsay, so long as the information is the sort reasonably relied upon in the experts' field. *Factory Mutual Insurance v. Alon USA L.P.*, 705 F.3d 518, 523-24 (5th Cir. 2013). In *Factory Mutual*, the 5th Circuit even permitted an opinion based on information from lay witnesses, and this was information that was actually presented to a jury. Under Rule 703, "the facts or data . . . upon which an expert bases an opinion or inference . . . the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." *U.S. v. Grace*, 504 F.3d 745, 759 (9th Cir. 2007). The courts recognize that frequently when testifying, "[m]any experts in trials, in one degree or another, rely on information supplied by others who are not present to testify.", *Nardi v. Pepe*, 662 F.3d 108, 112 (1st Circuit 2011). It is permissible for an expert to testify about

another expert's data. *McWilliams v. State,* 367 S.W.3d 817 (Tex. App.—Houston [14th], 2012). When testifying on his or her report, it is contemplated that the expert will supplement, elaborate upon and explain the report. *Muldrow v. Re-Direct, Inc.,* 493 F.3d 160, 167 (D.C.Cir. 2007).

Evidence of Intentional Discrimination

The African-American Congressional Intervenors would like to alert this panel to some of the types of matters they will contend evidence intentional discrimination. One matter is the failure to consider implementing the changes suggested by the DC Court in the Section 5 case. It is also our opinion that the maps themselves show clear discrimination against African-Americans and Latinos. C185 is a major part of C235, and it was adopted by the same legislature that adopted SB14, the State's discriminatory voter identification law. Further, the State admits knowing that minority vote predominately Democratic, and since party has become a defining racial characteristic in the South this knowing action is also evidence of intentional discrimination.

Parts of Opinion Relies Upon

The African-American Congressional Intervenors will rely greatly on the findings in the Court's decision in regards to the 2011 maps. It will particularly weigh heavily on the Court's discussion or holdings in regards to the finding of intentional discrimination, and as it relates to the Metroplex, it will rely heavily on the Court's discussion of CD30 and its illegal creation resulting from packing, cracking, and a host of other illegal actions. The decision in regards to the ability to use mid-decade data, minority political cohesion and the implications for drawing districts under Section 2 as well as other discussion in the opinion of other supporting information such as that regarding the City of Austin and the splitting of its minority population or the creation of Congressional District 26.

DATED: July 3, 2017. Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was sent via the Court's electronic notification system or email to the following on July 3, 2017:

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