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

SHANNON PEREZ, et al., Plaintiffs and EDDIE BERNICE JOHNSON, et al., TEXAS CONFERENCE OF NAACP BRANCHES, et al., Plaintiff-Intervenors v. STATE OF TEXAS, et al., Defendants	§	CIVIL ACTION NO. 11-CA-360 OLG-JES-XR (Lead Case)
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC) Plaintiff and THE HONORABLE HENRY CUELLAR, Member of Congress, CD 28, and THE TEXAS DEMOCRATIC PARTY et al. and LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) et al., Plaintiff-Intervenors v. STATE OF TEXAS, et al., Defendants	§	CIVIL ACTION NO. 11-CA-361 OLG-JES-XR [Consolidated Case]

TEXAS LATINO REDISTRICTING TASK FORCE et al., Plaintiffs	§	
v.	§	CIVIL ACTION NO. 11-CA-490 OLG-JES-XR
RICK PERRY, in his official capacity As Governor of the State of Texas Defendants	§	[Consolidated Case]
MARGARITA QUESADA, et al., Plaintiffs	§	
v.	§	CIVIL ACTION NO. 11-CA-592 OLG-JES-XR
RICK PERRY, et al., Defendants	§	[Consolidated Case]
JOHN T. MORRIS Plaintiff	§	
v.	§	CIVIL ACTION NO. 11-CA-615 OLG-JES-XR
STATE OF TEXAS, et al., Defendants	§	[Consolidated Case]
EDDIE RODRIGUEZ, et al., Plaintiffs	§	
v.	§	CIVIL ACTION NO. 11-CA-635 OLG-JES-XR
RICK PERRY, et al., Defendants	§	[Consolidated Case]

PLAINTIFF MALC'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants have asserted entitlement to partial summary judgment with regard to various claims of the Plaintiffs including three of Plaintiff MALC's claims for relief. While the motion

for summary judgment is premature, Plaintiff MALC will nevertheless address those claims for summary judgment specific to MALC's claims.

First, the Defendants argue that Plaintiff's intentional discrimination claims must fall since Plaintiff's evidence shows partisan bias not racial or ethnic bias, as Defendants interpret Plaintiff's expert's analysis. (Defendants' Motion for Partial Summary Judgment, pp. 8-11, Doc. 210). Second, Defendants assert that none of the Plaintiffs, including MALC, can meet the first of the three so-called *Gingles* preconditions required to establish a violation of Voting Rights Act, Section 2 regarding plan C185, the newly enacted Texas Congressional plan, since in the estimation of the Defendants, no new additional majority Latino citizen voting age population districts nor any new African American citizen voting age population district, beyond those created in the challenged plan can be created. (Defendants' Motion for Partial Summary Judgment, pp. 24-27, Doc. 210). Finally, with regard to Plaintiff MALC's factual allegation that the 2010 census undercount of Latino population should be considered in the Court's analysis of the totality of circumstances, Defendants misconstrue this factual allegation of undercount of Latino population into a legal challenge to the sufficiency of the Census data. It is not such a claim. Defendants are wrong on each point of their Motion and the Motion should be denied.

Moreover, as discussed below, dispositive motions on the merits are premature as this case now stands since no effective plan is in place pursuant to Section 5 of the Voting Rights Act and this Motion for Partial Summary Judgment should, therefore, be denied.

I. MOTION FOR PARTIAL SUMMARY JUDGMENT IS PREMATURE

The State's new enactments are not effective in law, and cannot be implemented unless or until preclearance is secured. *Lopez v. Monterey County*, 519 U. S. 9, 20 (1996). Although nothing prevents this Court from taking evidence on Plaintiffs' challenges, on other grounds,

Upham v. Seamon, 456 U. S. 37, 38 (1982) it would be improper to reach a final determination on the merits of Plaintiffs' claims regarding the newly adopted plans. While nothing prohibits this Court from taking evidence and reaching a final judgment with regard to the **currently** existing malapportioned redistricting plans for the Texas House and the Congressional districts, the Defendants' Motion for Partial Summary Judgment is only directed at the Plaintiffs' claims against the newly adopted, but as yet not prelceared, redistricting plans. It is axiomatic that this Court cannot address the merits of any of the statewide plans until preclearance is obtained. *Connor v. Waller*, 421U.S. 656 (1975); *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991); and *Lopez v. Monterey County, CA*, 519 U.S. 9 (1996). This, of course, applies to dispositive motions such as a motion to dismiss or motion for summary judgment by the Defendants. *Id.* As counsel have advised this Court, the trial should proceed and evidence presented. However, this Court should stay its hand regarding final judgment on the merits of the case, until the Section 5 process has completed. Defendants' Motion for Partial Summary Judgment runs to the merits of Plaintiffs' claims and is therefore premature.

II. ARGUMENT AND AUTHORITIES

A. SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to pierce the pleadings and to assess the proof to determine whether there is genuine need for trial. *Matsushita Elec. Indus. Co. v.Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Rule 56 summary judgment is designed to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is not appropriate if there are genuine disputes of material fact. *Celotex*, 477 U.S. at 322. In the instant case, Defendants made claims of summary judgment that

ignore the record or misstate the law. As we show below, the evidence and the record in this case establish, at a minimum, a genuine dispute of material facts.

B. MALC'S FOURTEENTH AND FIFTEENTH AMENDMENT CLAIMS ARE PROPERLY BEFORE THIS COURT

Defendants assert that Plaintiff MALC's claims of intentional discrimination are not supported by any evidence and that the only evidence proffered by MALC shows partisan bias not racial bias. (Defendants' Motion for Partial Summary Judgment, pp. 8-11.) First, Defendants seem to assert that only purposeful denial of the vote is legally recognized under the Fourteenth and Fifteenth Amendments to the United States Constitution. That of course is not the case.

The Fourteenth and Fifteenth Amendments protect against purposeful vote dilution generally and minority vote dilution in particular. *Reynolds v. Sims,* 377 U.S. 533, (1964); *White v. Regester,* 412 U. S. 755 (1973); *Rogers v. Lodge,* 458 U.S. 613, 617 (1982).

The Defendants also assert that no evidence exists of intentional discrimination. Defendants simply ignore the evidence and pleadings offered by the Plaintiff.

The standard of proof required for determining intent or discriminatory purpose is the same as that used in resolving cases under the Fourteenth Amendment's Equal Protection Clause. *Rogers v. Lodge,* 458 U.S. 613, 617 (1982); *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 265 (1977).

Discriminatory purpose may be inferred from the totality of the relevant facts, including the fact that the law bears more heavily on one race than another. *Washington v. Davis*, 426 U.S. 229, 240, (1976). Factors that may be probative of a discriminatory purpose include: (1) impact of the official action; (2) historical background of the decision, "particularly if it reveals a series of official actions taken for invidious purposes"; (3) specific sequence of events leading up to

the challenged decision; (4) departures from normal procedural sequences; (5) substantive departures . . . "particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached." *Arlington Heights,* 429 U.S. at 266-67.

In *Rybicki v. State Board of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982), the court found that where the requirements of incumbency "were so closely intertwined with the need for racial dilution that an intent to maintain a safe, primarily white, district for Senator Joyce is virtually coterminous with a purpose to practice racial discrimination," is indicative of an intent to discriminate. *See Garza v. County of Los Angeles*, 918 F. 2d 763, 771-2 (9th Cir. 1990) *cert. denied* 111 S. Ct. 681 (1991).

The evidence in this case, both as alleged in the pleadings and as set out by Dr. Kousser, raises questions of fact regarding intent and establishes and supports a finding of intentional discrimination in the development of the challenged plans.

First, the Defendants acknowledge that Dr. Kousser's assessment concludes that racial motive was behind the development of the challenged plans. (Defendants' Motion for Partial Summary Judgment, page 9)("In his report, Dr. Kousser reaches the following conclusions: ….[E]vidence from maps of both State House and congressional districts, as well as patterns of racial composition of the districts, and remarks during the legislative debates makes clear an intent to discriminate against minorities during the redistricting.") In addition, the Defendants spends two pages dismissing Dr. Kousser's 134-page report,[1] ignoring 24 of his 25 tables and 12 of his 13 figures - many with multiple graphs or maps - as well as his extensive citations of comments indicating discriminatory intent drawn from the debates on the redistricting plans in

[1]The inadvertently-omitted Figure 9c adds a page and has been submitted to the Defendants.

both houses of the Texas legislature. The State's failure to confront this extensive direct and circumstantial evidence of the discriminatory intent of the legislature and the discriminatory effect of its State House and Congressional redistricting plans might be taken as an admission that it cannot refute that evidence, in as much as the Defendants have asserted that they are entitled to summary judgment because there is **no** evidence of intentional discrimination.

Rather than no evidence of racial intent, the record shows an extensive examination of the plans, evidence and record of the adoption of the challenged plans, voting patterns of Texas voters and other evidence that supports Dr. Kousser's assessment. Dr. Kousser provided evidence that:

> 1. Using various statistical methodologies, voting in recent statewide and selected state House and Congressional elections was markedly racially polarized: Latinos voted overwhelmingly for Latino candidates in Democratic primaries; majorities of all others voted for non-Latino candidates. In general elections, African-Americans joined Latino voters in overwhelmingly supporting Latino Democratic candidates, even when Republicans nominated candidates who had Spanish surnames. Kousser Report, pp. 9-54, Figures 1-4; Tables 1-16.
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> 2. The Texas Legislative Council and other publications about redistricting made clear that since the 2004 case of *Larios v. Cox*, brought by Georgia Republicans to overturn a Democratic redistricting, population disparities among state legislative districts had to be justified by a rational state policy, and that a pattern of overpopulating districts on the basis of race or party was legally questionable. The TLC also set out the generally understood principle that in redistricting, equal population and adherence to the Voting Rights Act take precedence over all other goals. In particular, it reminded legislators in papers and presentations that according to decisions of the Texas Supreme Court, the "county line rule" should be waived when it conflicted with equal population requirements. And indeed, the legislature split county lines 17 times in H283, the plan for the State House that was finally adopted. Kousser Report, pp. 54-57, 59.
>
> 3. Nonetheless, across the State, H283 overpopulated a higher proportion of districts containing a majority of Latinos than it did

districts containing a majority of Anglos. Kousser Report, pp.64-69, Figures 5 and 6.

4. As in *Larios*, there was considerable evidence in Texas in 2011 of bias against minorities and Anglo Democrats in the legislative process. Minority legislators were not proportionately represented on redistricting committees, they were not consulted about redistricting by the legislative leadership, and their plans were uniformly rejected. Their criticisms of the majority's plans were unceremoniously rejected, when they were deemed worthy of any attention whatsoever. Analysis of the debates on the redistricting plans and of maps of particular districts show that the legislature applied strikingly inconsistent principles when drawing districts, protecting incumbent and other districts that are extremely unlikely to elect the candidates of choice of minority voters, but splitting or packing districts where the candidates of choice of minority voters could be elected. Tables of statistics about these plans on the State House and Congressional levels substantiate the comments on the legislative floor. Maps make the racially discriminatory – not just partisan -- intentions of the legislature graphically apparent. Kousser Report pp. 70-134.

5. Texas is a state with two substantial, underrepresented minorities who sometimes live in close proximity to each other and who regularly vote together in general elections. To consider their proportions separately, as the State's motion does on p. 3 ("additional geographically compact districts in which Latino *or* African-American voters would form a majority . . . additional congressional districts consisting of a majority of Latino *or* African-American voters."[2]) distorts the realities of state politics and society and would deprive minorities of an equal opportunity to elect candidates of their choice. Election returns from State House districts in 2008 and 2010 show that over 80 percent of the districts in which African-Americans and Latinos <u>together</u> composed the majority of voting age persons (not just citizens) elected Latino, African-American, or Anglo Democratic candidates, even in an election that was a landslide for the Republicans.[3] Kousser Report, pp. 73-77, Tables 18-20.

6. Plans proposed by minority legislators or offered during this litigation are equally or more compact, have no more "county cuts," and split fewer precincts than the plans finally adopted. The

[2]Italics added.

[3]As noted above, the first part of the Kousser report showed that such candidates are the overwhelming candidates of choice of Latinos and African-Americans.

> legislature could not have chosen H283 or C185 because they were more aesthetically pleasing or because they caused voters less confusion or registrars, less administrative inconvenience. And compared to the alternative plans, H283 and C185 offer markedly fewer districts where combined minorities can elect candidates of their choice. Kousser Report, pp. 80-83, Tables19-23.

This record and this evidence is the type of evidence that has been recognized as probative on the issue of intent in a minority vote dilution and redistricting case. *White v. Regester*, 412 U. S. 755 (1973); *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265 (1977); *Garza v. County of Los Angeles*, 918 F. 2d 763, 771-2 (9th Cir. 1990) *cert. denied* 111 S. Ct. 681 (1991). Taken together with the evidence of continued effects of discrimination presented by Plaintiffs' experts Chapa and Gonzales-Baker and with the evidence of the history of discrimination presented by Plaintiffs' expert Tijerina, Dr. Kousser's evidence not only raises a genuine issue of material fact, but establishes the existence of intentional discrimination in the development of the challenged plans. Defendants' Motion for Partial Summary Judgment with regard to Plaintiff MALC's Fourteenth and Fifteenth Amendment challenges should be denied.

C. MALC'S GINGLES I EVIDENCE IS SUFFICIENT

The Supreme Court first construed the amended version of *§ 2* of the Voting Rights Act, 42 U.S.C. § 1973, in *Thornburg v. Gingles*, 478 U.S. 30, (1986). In *Gingles*, the plaintiffs were African-American residents of North Carolina who alleged that multimember districts diluted minority voting strength by submerging black voters into the white majority, denying them an opportunity to elect a candidate of their choice. The Court identified three "necessary preconditions" for a claim that the use of multimember districts constituted actionable vote dilution under *§ 2*: (1) The minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be

"politically cohesive," and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51,

The Court later held that the three *Gingles* requirements apply equally in § 2 cases involving single-member districts, such as a claim alleging vote dilution because a geographically compact minority group has been split between two or more single-member districts. *Growe v. Emison,* 507 U.S. 25, 40-41, (1993). The first of the *Gingles* preconditions is commonly referred to as *Gingles I.*

With regard to *Gingles I*, the Court recently established that only by presenting a majority-minority district could minority plaintiffs satisfy the first *Gingles* precondition. *Bartlett v. Strickland,* 129 S. Ct. 1231, 1244 (2009). ("We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration"). The Court defined majority-minority district as those that contain at least a majority of minority **voting age population**. *Strickland,* 129 S. Ct. at 1242 ("In majority-minority districts, a minority group composes a numerical, working majority of the **voting age population**. Under present doctrine, § 2 can require creation of these districts.")(emphasis added). In the Fifth Circuit "a working majority of the voting age population" has been determined to mean a district in which the minority group is at least 50% of the citizen voting age population of a single member district. *Valdespino v. Alamo Heights I.S.D.*, 168 F.3d 848 (5th Cir. 1999) cert. denied, 528 U.S. 1114 (2000).

Defendants argue that they are entitled to summary judgment collectively on Plaintiffs' Section 2 claims regarding the challenged Texas congressional plan, Plan C 185, because they assert none of the Plaintiffs can establish that it is possible to draw an "additional compact

districts with a majority of Latino or African-American voters." Defendants' Motion for Partial Summary Judgment, p. 26, Doc. 210. Defendants misstate the record in this case.

Plaintiff MALC has indeed identified numerous plans that produce additional *Gingle I* districts beyond those produced in the State's new congressional plan, Plan C185. For instance, Plan C188 identified in MALC's designation of exhibits and in Dr. Kousser's Report has 9 majority Latino citizen voting age population districts. Plan C185 only has 8. Moreover, Dr. Kousser testifies that Latinos and African Americans are politically cohesive in the general election, and that majority Black and Hispanic voting age population districts are the most predictably reliable districts for minority voters to successfully elect candidates of their choice. Kousser Report pp 26-52, 73-77. When compared to the number of majority Black and Hispanic citizen voting age population districts, every plan submitted by MALC has more such districts than does plan C185. Kousser Report p. 111, Table 22 (13 or 14 such districts compared to 11). Finally, Dr. Kousser has testified that the alternative plans offered by MALC and others are no less compact than plan C185. Kousser Report p. 112-3, Table 23.

At minimum, Plaintiff's evidence establishes a genuine issue of material fact and Defendants' Motion for Summary Judgment with regard to MALC's Section 2 of the Voting Rights Act claim against Plan C 185 should be denied.

D. MALC'S UNDERCOUNT CLAIMS ARE RELEVANT TO CLAIMS PRESENTED

The Defendants challenge Plaintiff's Section 2 claim regarding the undercount of the Latino population as if it were a stand-alone claim. However, evidence of the undercount of Latino population is only one of a numerous **factual** allegations used to support Plaintiff's Section 2 vote dilution claim in the Court's analysis of the totality of circumstances and relates

only with regard to the Texas House redistricting plan. Specifically Plaintiff's has alleged, in its First Claim for Relief as follows:

> Plaintiff's cause of action arises under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. The State Defendants are in violation of the Voting Rights Act because the State Defendants: have failed provide sufficient Latino and minority opportunity districts in H. B. 150 and S. B. 4 in the face of racial bloc voting; employed redistricting gerrymandering techniques such as packing and cracking of minority communities to limit and avoid drawing Latino and minority opportunity districts in H. B. 150 and S. B. 4; used redistricting criteria, such as the "whole county" rule in an inconsistent and unjustifiable pretext to limit and avoid drawing Latino and minority opportunity districts in H. B 150;, failed to consider the effect of the undercount of Latinos as contained in the 2010 Census and proceeded with the 2011 redistricting, using the 2010 Census without modification or accommodation for the undercount of Latinos with regard to H. B. 150. The failure of the Defendants to draw additional Latino and minority opportunity districts in H. B. 150 and S. B. 4; the Defendants use of racial gerrymandering techniques such as cracking and packing Latino and minority population to limit the number of Latino and minority opportunity districts drawn in H. B. 150 and S. B. 4; the Defendants' use of redistricting criteria unevenly and as a pretext to limit the number of Latino opportunity districts in H. B. 150; and use of the 2010 Census without accommodation for the undercount of Latino population **all work together to result in a violation of the rights of Plaintiff as secured by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.**

Plaintiff, MALC's Second Amended Complaint, pp. 14-15. (emphasis added) There is no separate cause of action alleged by Plaintiff regarding the census undercount. Nor is Plaintiff MALC attempting to supplant the census. The legal arguments regarding claims seeking to replace the census are simply not applicable here. Defendants have misconstrued Plaintiff's claims and have requested relief that assumes a cause of action that does not exist.

III. CONCLUSION

On the record of this case the Defendants are not entitled to Summary Judgment on any of the issues presented in their motion. Plaintiff MALC has presented evidence establishing a

genuine issue of material fact with regard to its claim that the challenged plans were adopted with the intent to discriminate against and disadvantage Latino voters, and that the Congressional plan adopted by the State of Texas violates Section 2 of the Voting Rights Act. Finally, the State has mischaracterized MALC's assertions with regard to the undercount of the Latino population as a factor to be considered in the over-all case. In any regard, since neither Plan C185 nor Plan H283 has not yet received approval pursuant to Section 5 and neither is currently effective in law, a determination on the merits of Plaintiff's claims is premature. Defendants' Motion for Summary Judgment should be denied.

DATED: August 23, 2011

Respectfully submitted,

/s/ Jose Garza

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CAUSE NO. 5:11-CV-361-OLG-JES-XR

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent by the Court's electronic notification system August 23, 2011, to counsel of record registered with the court to receive same and to those not so registered the foregoing document has been sent by email as agreed by the parties for each of the cases referenced above, .

/s/ Jose Garza
Jose Garza

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

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ORDER

ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Came on for consideration the Defendants' Motion for Partial Summary Judgment in the above entitled and numbered cause. Having considered the motion, the pleadings and other

documents on file, and the arguments of counsel, the Court concludes that the motion should in all respects be Denied.

It is therefore ordered, adjudged and decreed that Defendants' Motion for Partial Summary Judgment on the Pleadings is DENIED.

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UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT JUDGE

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JUSTICE, U. S. COURT OF APPEALS,
FOR THE 5th CIRCUIT