

No. 05-204

IN THE
Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS , *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

**On Appeal from the United States District Court
for the Eastern District of Texas**

APPELLANT LULAC's REPLY BRIEF

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ARGUMENT

Appellee, the State of Texas, responds to Appellant LULAC's challenge of the District Court's determination in this case by misstating LULAC's argument and by misstating the law and the procedural posture of the case regarding alleged procedural deficiencies in LULAC's pleadings and evidence. See State Appellee's Brief pp. 65-69.

First, contrary to the State Appellee's assertion, LULAC, does not argue that all mid-decade redistrictings lose the presumed validity accorded the last decennial census. Rather, LULAC argues that any presumed validity of census data that normally may be accorded a state, should not provide a safe-harbor for blatant political gerrymanders.

Second, LULAC has standing to raise the issues raised on remand, including the issue of one person, one vote, as an organizational plaintiff in accordance with the rules established by this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Third, LULAC raised the issues of partisan gerrymander and one person, one vote in its remand brief and in oral argument before the Three-Judge District Court without objection from the State.¹ Moreover, other parties to the litigation had plead and tried the issue in the initial trial of this action, thus the State was on notice of the allegation and cannot claim surprise. Therefore, with regard to LULAC's ability to litigate on these

¹ Although the State did object to LULAC's amended complaint it never objected to the Brief on Remand filed by LULAC, nor to LULAC's oral argument on the issues of one person, one vote or partisan gerrymanders.

issues, they were tried by consent and the District Court's failure to rule on LULAC's motion to amend its complaint is of no consequence.²

Fourth, Appellee continues to repeat the mantra that no test or standard has been suggested by the appellants sufficient to state a political gerrymander claim under the equal protection clause. In fact, clear standards have been proposed such as: 1. *A voluntary Congressional Redistricting undertaken for solely political gerrymandering purposes cannot presume the accuracy of the latest decennial United States Census in attempting to comply with the one person one vote rule; and 2. A partisan gerrymander must justify significant population variances by some legitimate state purpose other than to gain partisan advantage.*

Finally, LULAC's evidence of the population in 2003 of the State and of the districts in the State's 2003 redistricting plan are sufficient to establish the disparity of population between the districts under the procedural posture and factual circumstances of this case.

I. A redistricting plan drawn with the single-minded purpose of gaining additional partisan advantage, using three-year-old census data, that overpopulates Latino districts, violates the one person, one vote rule and is an impermissible political gerrymander.

² The State Appellee also argues that LULAC's motion to amend its complaint was untimely because it occurred post judgment. State Appellee's Brief p. 66. However, it was filed after the District Court's first judgment was vacated by the Court and the case remanded for reconsideration and before the oral argument held on remand and before the final judgment was issued. The State Appellee cites to no authority that forecloses amendment in this circumstance. In fact Rule 15 specifically allows for post judgment amendment. See: Rule 15(b) FRCP. Moreover, LULAC's motion to amend its complaint did not occur post judgment since the District Court's original judgment had been vacated. Under these circumstances, the motion to amend was in fact timely.

The State Appellee argues that Appellants' challenges to the State's 2003 plan amount to foreclosing legislative redistricting after a federal court enacts a map, even when specifically labeled as a remedial or a temporary plan. State Appellee's Brief, p. 68. The State Appellee misstates LULAC's argument.

LULAC's challenge to the State's 2003 plan as an impermissible political gerrymander and as violative of the one person, one vote rule begins with the premise that the unnecessary redistricting occurred for the sole purpose of gaining additional political advantage. See Appellant LULAC's Brief, pp. 16-17 ("...the State must bear the burden of proving that each significant variance between districts was necessary to achieve some **legitimate goal.**" "...any presumption of validity of census data that normally may be accorded a state, should not provide a safe harbor for a blatant political gerrymander."); and Appellant LULAC's Brief, pp. 21-22 ("The State's 2003 Congressional map constitutes an unconstitutional political gerrymander because the State's use of political classifications in drawing the map was unrelated to any legitimate legislative purpose.") The State Appellee's characterization of LULAC's argument as a broader obstacle to a legislature's authority to redistrict is simply wrong.

Belatedly, the State Appellee contends that partisanship was not the sole purpose of the 2003 redistricting. See State Appellee's Brief, pp. 30-34. Yet, the record before the Three-Judge District Court led to its determination in its initial January 6, 2004 memorandum opinion, that partisan gain was the sole motivation behind the plan. *See, e.g. Session v. Perry*, 298 F. Supp. 2d 451, 471, 473 (E.D. Tex. 2004)(vacated, *Henderson v. Perry*, 160 L.Ed.2d 252 (2004). These findings were not revoked by the Three-Judge District

Court in its subsequent determination, since no evidentiary hearing was held on remand. *See* J.S. 3a (“The history of this case and of the efforts of the State legislature to draw lines for its thirty-two congressional districts is set out in our previous opinion, and we will not repeat it here.”). Furthermore, the reasons offered by the State to justify its redistricting efforts do not amount, in fact, to reasons for embarking on the redistricting journey the State pursued in 2003, but rather, are only desperate attempts to shield it from liability.

First, the State argues that it was simply complying with its “duty” to redistrict. State Appellee’s Brief, p. 30. Yet, its authority for this motivational purpose simply concludes that no legal authority existed to force the State to redistrict. State Appellee’s Brief, p. 31. That is simply a misstatement of what the Texas Attorney General said when asked by the Chairman of the House Redistricting Committee whether the State had a duty to redistrict in 2003 to supplant the Balderas Plan.³ The second justification offered by the State was because the court drawn plan “produced antimajoritarian electoral results.” State Appellee’s Brief, p. 32. This is simply a complaint that the voters in several heavily Republican Districts voted for Democratic candidates. This complaint also simply ignores the State’s own expert witness who conceded on cross-examination that his opinion was that the Balderas Court plan actually favored Republican Candidates.⁴ What the state argues here is

³ “ We conclude that the Texas Legislature has the authority to adopt a congressional redistricting plan for the electoral period 2003 through 2010, but it cannot be compelled to do so.” April 23,2003 Opinion Letter Opinion No. GA-0063 from Texas Attorney General Gregg Abbott to Representative Joe Crabb, the Chairman of the Texas House Redistricting Committee <http://www.oag.state.tx.us/opinions/GA/GA0063.pdf>

⁴ / Q. Is it your opinion that the Balderas map is biased in favor of the Democrats?
A. No.

telling. The concept “antimajoritarian electoral results” is simply that the majority of the voters did not vote for the “correct” candidates. Changing a redistricting plan because you do not agree with the results is a slippery slope. In our system, it is the voters who choose elected officials and not the elected officials who choose voters. Ignoring the fact that the 2001 court drawn plan it was seeking to replace was drawn by the Three-Judge Court to give Republicans advantage in 22 of the 32 district, nevertheless, this “purpose” is simply another way of saying that the State was motivated by the goal of gaining additional partisan advantage for Republicans.

Finally, the State argues that it was motivated by a number of nonpartisan goals such as avoiding the splitting of Arlington, keeping Parker and Wise counties in Congresswoman Granger’s districts and trying to “maintain the city limit lines for Ft. Worth and Arlington.” State Appellee’s Brief, pp. 33-34. It is difficult imagine how the State can argue with a straight face that maintaining the city limits of Fort Worth and Arlington required the demographic carnage presented by the redistricting at issue. Protecting the integrity of Arlington cannot license the relocation of half of the voters in Texas or drastically altering Congressional Districts hundreds of miles away from the city limits of Arlington. A plan involving only three Congressional Districts could have easily been drawn to correct the perceived

Q. Is it your opinion that the Balderas map favors the Republicans?

A. Maybe slightly.

Gaddie Dep. At p. 9

slight to the City of Arlington.^{5/} Had the State dealt directly with this matter, this case would have never been filed.

In any event, these are not motivations for calling three special sessions in a row for the sole purpose of redistricting an already legal map, spending inordinate amounts of public money in that effort, seeking assistance from the Department of Homeland Security in finding recalcitrant legislators needed to complete the task, or in visiting the issue of redistricting in the first place, but rather are examples of the detail redistricting can involve. The existence of an impermissible political gerrymander and a violation of the one person, one vote rule begin with the inescapable fact that the State replaced a fair and legal redistricting plan for purely partisan reasons.

II. LULAC has standing to raise the issues of one person, one vote.

The State Appellee argues that LULAC lacks the appropriate standing to raise the one person, one vote issue because it is not a person residing in an alleged over-populated district. State Appellee's Brief, pp. 65-66n.84. Yet, the appropriate question determining standing for an organizational plaintiff such as LULAC is whether: 1) its members would otherwise have standing to sue in their own right; 2) the interests it seeks to protect are germane to the

⁵ / This concern for the territorial integrity of Arlington and Fort Worth as a justification for redistricting is questionable at best. For example, if the Court looks at the *Balderas* Plan, the City Arlington (population 339,369) is split between Districts 6 and 24. If the legislature had wanted to preserve the city limits of Arlington which is considerably smaller than a Congressional District, the entire City could have been placed entirely in District 24 by simply adjusting the line it shares with District 6. See Plan 01151C at <http://gis1.tlc.state.tx.us/>. The city of Fort Worth (population 534,694) is also smaller than a single Congressional District. As such it also could have been located entirely in a single Congressional District. However, **both** the *Balderas* plan and the one at issue divide Fort Worth among 4 Congressional Districts. Compare Plan 01151C (*Balderas* plan) with Plan 01374 C (Legislative plan at issue) <http://gis1.tlc.state.tx.us/>

organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of the individual member in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The State Appellee does not allege that LULAC's pleadings fail to establish each of these elements, because they do, but rather that no individual voter was included by LULAC as a plaintiff in this action. The State Appellee relies on the wrong legal authority for its position and its protest should be discounted.

III. **LULAC appropriately raised the issue of one person, one vote.**

The State Appellee also objects to LULAC's challenge to the 2003 plan as violative of the one person, one vote rule because LULAC did not raise the issue prior to the initial judgment in the case and because the Three-Judge Court failed to rule on LULAC's motion to amend its complaint. (The amended complaint sought to include a claim of impermissible partisan gerrymandering and a one person, one vote claim).⁶

First, the initial judgment in this case was vacated by this Court and the case remanded for further proceedings. Thus, no judgment was in place when LULAC filed its Brief on Remand in which it raised the issues of one person, one vote and partisan gerrymandering and its amended complaint and

⁶ The State Appellee also references LULAC's notice of appeal to support its argument that LULAC should not be allowed to raise claims regarding one person, one vote. The State suggests that since LULAC's notice of appeal does not specifically reference "equal population" as an appeal issue, it should now be foreclosed from arguing such a claim. State Appellee's Brief, p. 66n.84. Rule 3 FRAP sets out the requirements for a notice of appeal. Rule 3 makes no mention of a need to set out the issues to be raised on appeal, but even if it did, Appellant LULAC in fact identified the Three-Judge Court's denial of its claims under the "Equal Protection Clause" as a reason for its appeal. The equal population rules for redistricting are in fact "equal protection" claims.

thus it raised the issue pre-judgment, not post judgment. Although the Three-Judge Court took all pending motions under advisement, to be determined at some point after the scheduled hearing for oral argument in the case, the Three-Judge Court never ruled on LULAC's motions. *See*: January 21, 2006 Transcript of Arguments, pp. 4, 6-7. Thus, no basis for denial of the motion, if it was in fact denied, was ever articulated by the Three-Judge Court. The outright refusal to allow an amendment without articulating any justification is an abuse of discretion. *Foman v. Davis* 371 U.S. 178, 182 (1966)⁷

Second, LULAC filed its motion to amend its complaint and its proposed amended complaint on January 14, 2005, after initial briefs on remand had been filed and thus after LULAC had already filed its remand brief in which it raised its one person, one vote and partisan gerrymandering claims regarding the 2003 map. The State did not object to LULAC's remand brief or move to strike that pleading. In addition at the hearing on oral argument LULAC presented argument, without objection from the State, on the issues. *See*: January 21, 2005 Transcript of Arguments, pp.60-73, 155-158.

⁷ The grounds for the amendment were clearly articulated by LULAC's motion and will not be repeated here, although it is clear that a key element for amendment cannot be disputed. That is the State Appellee cannot show or argue prejudice by the amendment since the issue was already present in the case as a result of claims put forth by the Travis County plaintiffs as well as the Jackson plaintiffs.

Even without the amendment, LULAC presented briefing and argument on the issues, without objection, prior to judgment. Therefore, by implied consent LULAC participated on the trial of these issues and is not precluded from presenting its arguments on the issues of one person, one vote and partisan gerrymandering to this Court.

IV. LULAC's evidence on the Texas population in 2003 is sufficient to establish the disparity of population between the districts in the 2003 plan under the procedural circumstances of this case.

The State Appellee also argues that all the Appellants claiming a one person, one vote violation have failed in their burden because no legally sufficient replacement data for the decennial census data was offered or accepted by the Three-Judge Court. State Appellee's Brief, pp. 58-59, 66-67. The State Appellee misrepresents the Appellant LULAC's argument and therefore, applies the wrong standard. Moreover, the State Appellee ignores the procedural posture of the case in evaluating whether LULAC's exhibits and data are sufficient to establish the violation alleged here. Initially, it should be noted that there was no evidentiary hearing held on remand in this case. The parties were allocated ninety minutes per side for argument. *See*: January 21, 2005 Transcript of Arguments, pp.4-5. After noting that various

motions were pending and that the court was not inclined to rule on any of them until after the hearing, Judge Higginbotham went on to say: “But we want to tell you at the outset that we understand the scope of the mandate is an argument.” *Id.* p. 5. At that point LULAC moved to admit its four exhibits, the State objected and the court reserved ruling. *Id.* pp. 5-7. The State Appellee argued that no need existed to develop the record regarding the issue of one person, one vote any further than had been developed at the initial trial. *Id.* at pp. 123, 140-42. No additional evidence was taken at the January 21, 2005.

Some of the parties, including LULAC, did however attach affidavits and other exhibits to their Briefs on Remand. For instance, the Jackson Appellants submitted the affidavit of an expert, Dr. John Alford, who testified concerning the results of the 2004 elections among other things.(docket # 200) The Appellant G. I. Forum submitted a summary of population estimates developed by the State’s demographer showing Latino population growth in Texas counties.(docket #s 208 and 209) The LULAC affidavit was provided by Dr. Bill Spears, a demographer from the University of Texas at San Antonio. J.S. 55a-56a. Dr. Spears described the growth of population in Texas generally, and in the individual Congressional districts in the 2003 map. *Id.* Dr. Spears testified that his estimates of population for each of the districts were derived from population estimates developed for Texas counties by

Texas State Data Center by the State's demographer, Dr. Steve Murdock. *Id.* Finally, Dr. Spears testified that he was attaching a summary table of the 2003 and 2004 population estimates of each of the Texas Congressional districts in the 2003 plan, which he opined provided a more accurate reflection of the population of these districts than that provided by the 2000 Census and showed a disparity of population exceeding 88,000 persons between the largest and smallest districts. *Id.* The State did not attempt to depose Dr. Spears, nor did it provide any controverting testimony. LULAC has never argued that this evidence is sufficient to support an attack on the presumptive validity of the 2000 Census. Rather, LULAC has consistently argued that in light of the State's single-minded purpose to achieve partisan political advantage, the Census should not be afforded any presumptive validity in the evaluation of the 2003 plan. In this circumstance, and in light of the fact that no evidentiary hearing was held on remand, LULAC believes that its evidence is sufficient to show that the districts in the 2003 map are not of equal population, and therefore violative of one person, one vote and that such imbalance in population between districts forms the basis for an impermissible political gerrymander.

The State Appellee's argument that data and estimates submitted by LULAC are insufficient to replace or stand-in for the decennial census, simply

misses the point. Generally, the decennial census data is presumed accurate, and only figures that have a high degree of accuracy and are clear, cogent and convincing override the prior decennial census numbers. This presumption should not apply here, however, since no legitimate state goal exists for the redistricting. *See Larios v. Cox*, 159 L.Ed.2d 831, 833-34 (2004). LULAC' expert employed the methodologies used by the Census Bureau and the State's demographer to update its 2000 numbers. The methodologies employed by the Census Bureau and by Dr. Murdock, exceed the accuracy of the numbers approved by the Fifth Circuit in *Valdespino v. Alamo Heights Independent School District* 168 F. 3d 848, 854 (5th Cir. 1999) to overcome this presumption of accuracy. Nevertheless, assuming the new census numbers, together with the estimates used by LULAC's experts in exhibits to LULAC's Brief on Remand, to show the current population of the Texas Congressional districts, fall short of clear, cogent and convincing, since the only reason for the 2003 redistricting was partisan gain, the estimates submitted by LULAC for each of the districts, suffice to establish the one person, one vote violation. *See Garza v. County of Los Angeles*, 918 F. 2d 763, 772-73 (9th Circuit, 1990) *cert. denied*, 498 U.S. 1028 (1991)(“the [Supreme]Court noted with approval the possibility of using predictive data in addition to census data in designing decennial reapportionment plans.”).

CONCLUSION

The Court should reverse the judgment in this cause, declare Plan 1374C an unconstitutional partisan gerrymander, that violates the one person, one vote rule and dilutes the voting strength of minority voters of Texas and order elections in the 2006 election cycle pursuant to the valid 2001 redistricting plan.

Respectfully Submitted,

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