

## Texas Redistricting in 2011

*Davis v. Perry (Orlando L. Garcia, W.D. Tex. 5:11-cv-788)*

On September 22, 2011, six days after a three-judge redistricting bench trial on legislative and congressional districts in Texas, voters filed a federal complaint alleging dilution of minority voting strength in their districts. The court ordered the defendants to respond by October 3, and the case was consolidated with a collection of cases already underway. Seven years after the litigation began, the Supreme Court approved districting plans that reflected the political judgments of the state legislature as much as possible, modified by the district court only as necessary to cure legal defects.

*Subject:* District lines. *Topics:* Malapportionment; three-judge court; case assignment; section 2 discrimination; section 5 preclearance; intervention; attorney fees; removal; pro se party.

On September 22, 2011, eight voters in four state senate districts filed in the Western District of Texas’s San Antonio Division a federal complaint against state officials, alleging dilution of minority voting strength in their districts.<sup>1</sup> The court assigned the case to Judge Orlando L. Garcia as related to previously filed districting challenges.<sup>2</sup> On September 23, the circuit’s chief judge appointed as a three-judge court to hear the case the judges presiding over Judge Garcia’s related districting cases: Judge Garcia, District Judge Xavier Rodriguez, also in San Antonio, and Circuit Judge Jerry E. Smith, whose chambers are in Houston.<sup>3</sup>

On September 28, the three-judge court ordered defendants to respond to the complaint by October 3.<sup>4</sup>

The first of the consolidated cases was filed in San Antonio on May 9 by two voters seeking judicial intervention in the redistricting of Texas’s senate, house of representatives, and state board of education in light of the 2010 census.<sup>5</sup> The plaintiffs alleged that (1) instead of seeking districts with equal populations, Texas was aiming for disparities of no more than 10% and (2) Texas was improperly regarding prisoners as residents of their rural counties of incarceration, thereby diluting the voting strength of urban residents.<sup>6</sup> The three-judge court was appointed on May 11.<sup>7</sup> On May 31, the

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1. Complaint, *Davis v. Perry*, No. 5:11-cv-788 (W.D. Tex. Sept. 22, 2011), D.E. 1; *Davis v. Abbott*, 781 F.3d 207, 209–10 (5th Cir. 2015).

2. Docket Sheet, *Davis*, No. 5:11-cv-788 (W.D. Tex. Sept. 22, 2011); see *Abbott v. Perez*, 585 U.S. \_\_\_, \_\_\_, 138 S. Ct. 2305, 2315 (2018). See generally Ari Berman, Give Us the Ballot 267–68, 298–99 (2015).

3. Order, *Davis*, No. 5:11-cv-788 (W.D. Tex. Sept. 23, 2011), D.E. 4.

4. Order, *id.* (Sept. 28, 2011), D.E. 7.

5. Complaint, *Perez v. Texas*, No. 5:11-cv-360 (W.D. Tex. May 9, 2011), D.E. 1.

6. *Id.*

7. Order, *id.* (May 11, 2011), D.E. 4; see 28 U.S.C. § 2284(a) (2014) (“A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of

plaintiffs amended their complaint to include Texas's congressional districts.<sup>8</sup> A second amended complaint filed on June 7 challenged only districts for Texas's house of representatives and its representation in Congress.<sup>9</sup>

The second consolidated case was also filed on May 9 in San Antonio.<sup>10</sup> The Mexican American Legislative Caucus (MALC) of Texas's house of representatives challenged Texas's congressional districting, the districting for Texas's legislature and state board of education, and at-large representation in Texas's railroad commission.<sup>11</sup> In addition to malapportionment and discriminatory districting, MALC alleged that the census undercounted Latinos.<sup>12</sup> An amended complaint omitted claims respecting Texas's senate and state board of education.<sup>13</sup> The case was assigned to the same district judge and three-judge court as was the first case.<sup>14</sup> The court granted intervention by the League of United Latin American Citizens (LULAC),<sup>15</sup> the Texas Democratic Party,<sup>16</sup> and Congressman Henry Cuellar.<sup>17</sup>

A third consolidated case was filed in San Antonio on June 17: an action by the Texas Latino Redistricting Task Force and seven voters alleging malapportionment and Latino vote dilution in Texas's congressional and house of representatives districts.<sup>18</sup>

Also on June 17, Judge Garcia filed an advisory in the three cases of his previous service in Texas's house of representatives and of his associations with a few current and former members.<sup>19</sup> After a July 1 status conference, Judge Garcia consolidated the first three cases on July 6.<sup>20</sup>

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the apportionment of congressional districts or the apportionment of any statewide legislative body.”).

8. First Amended Complaint, *Perez*, No. 5:11-cv-360 (W.D. Tex. May 31, 2011), D.E. 5.

9. Second Amended Complaint, *id.* (June 7, 2011), D.E. 6; *see* Order, *id.* (June 17, 2011), D.E. 15 (permitting the second amended complaint); *see also* Third Amended Complaint, *id.* (July 19, 2011), D.E. 53.

10. Complaint, *Mexican Amer. Legislative Caucus v. Texas*, No. 5:11-cv-361 (W.D. Tex. May 9, 2011), D.E. 1 [hereinafter *Mexican Amer. Legislative Caucus* Complaint]; *see* John W. Gonzalez, *Mexican American Legislators Claim Latinos Undercounted*, *San Antonio Express-News*, May 10, 2011, at 11A.

11. *Mexican Amer. Legislative Caucus* Complaint, *supra* note 10.

12. *Id.*

13. Amended Complaint, *Mexican Amer. Legislative Caucus*, No. 5:11-cv-361 (W.D. Tex. May 31, 2011), D.E. 4; *see* Second Amended Complaint, *Perez*, No. 5:11-cv-360 (W.D. Tex. July 19, 2011), D.E. 50.

14. Order, *Mexican Amer. Legislative Caucus*, No. 5:11-cv-361 (W.D. Tex. May 10, 2011), D.E. 2; Docket Sheet, *id.* (May 9, 2011).

15. Order, *id.* (July 6, 2011), D.E. 26.

16. Order, *Perez*, No. 5:11-cv-360 (W.D. Tex. July 13, 2011), D.E. 31.

17. Order, *id.* (July 15, 2011), D.E. 42.

18. Complaint, *Tex. Latino Redistricting Task Force v. Perry*, No. 5:11-cv-490 (W.D. Tex. June 17, 2011), D.E. 1; *see* Second Amended Complaint, *id.* (July 25, 2011), D.E. 68; Amended Complaint, *id.* (June 30, 2011), D.E. 16; Order, *id.* (June 22, 2011), D.E. 6 (appointing a three-judge court to hear the case).

19. Advisory, *Perez*, No. 5:11-cv-360 (W.D. Tex. June 17, 2011), D.E. 14.

20. Order, *id.* (July 6, 2011), D.E. 23.

On July 25, the three-judge court granted<sup>21</sup> motions to intervene in the consolidated actions by the Texas Legislative Black Caucus,<sup>22</sup> three African-American members of Congress,<sup>23</sup> and the Texas NAACP with three members and voters.<sup>24</sup>

A joint filing by the parties on June 29 identified four additional pending cases filed in Texas federal courts and seven in Texas state courts.<sup>25</sup>

An action filed in the Eastern District on February 10 by three voters alleged the improper strengthening of Hispanic votes by inclusion in census data undocumented immigrants who disproportionately reside among Hispanic citizens.<sup>26</sup> On March 28, Judge Richard A. Schell granted MALC's motion to intervene as a defendant.<sup>27</sup> At a June 23 status conference, Judge Schell discussed the plaintiffs' June 22 request for a three-judge court<sup>28</sup> and agreed to request one.<sup>29</sup> On July 8, Judge Schell transferred the case to the earlier appointed three-judge court in the Western District.<sup>30</sup> The Texas Latino Redistricting Task Force was permitted to intervene as a defendant on July 25.<sup>31</sup> On July 26, however, the court granted the plaintiffs a voluntary dismissal.<sup>32</sup>

On May 13, Texas removed to federal court in the Southern District of Texas an action filed by MALC in Hidalgo County's state court.<sup>33</sup> On March 28, 2013, Judge Randy Crane granted the state's motion to transfer the case to the Western District.<sup>34</sup> Judge Garcia remanded the case to state court, because the only federal issue was the accuracy of census methods, but MALC

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21. Order, *id.* (July 25, 2011), D.E. 67.

22. Intervention Motion, *id.* (July 19, 2011), D.E. 60.

23. Intervention Motion, *id.* (July 19, 2011), D.E. 61.

24. Intervention Motion, *id.* (July 22, 2011), D.E. 64.

25. Agreed Report, *id.* (June 29, 2011), D.E. 19.

26. Complaint, *Teuber v. Texas*, No. 4:11-cv-59 (E.D. Tex. Feb. 2, 2011), D.E. 1; *see* Second Amended Complaint, *id.* (June 22, 2011), D.E. 42; First Amended Complaint, *id.* (May 27, 2011), D.E. 33.

27. Order, *id.* (Mar. 29, 2011), D.E. 13; *see* Intervention Motion, *id.* (Feb. 22, 2011), D.E. 3.

28. Request, *id.* (June 22, 2011), D.E. 43; *see* Request, *id.* (June 27, 2011), D.E. 46 (corrected filing).

29. Transcript at 13–34, *id.* (June 23, 2011, filed Sept. 1, 2011), D.E. 53; *see* Order, *id.* (July 6, 2011), D.E. 50 (appointing a three-judge court consisting of Judges Schell, Smith, and Garcia).

30. Order, *id.* (July 8, 2011), D.E. 52; *see* Docket Sheet, *Teuber v. Texas*, No. 5:11-cv-572 (W.D. Tex. July 11, 2011).

31. Order, *Teuber*, No. 5:11-cv-572 (W.D. Tex. July 25, 2011), D.E. 65.

32. Order, *id.* (July 26, 2011), D.E. 68.

33. Notice of Removal, *Mexican Amer. Legislative Caucus v. Texas*, No. 7:11-cv-144 (S.D. Tex. May 13, 2011), D.E. 1.

34. Order, *id.* (Mar. 28, 2013), D.E. 21; *see* Docket Sheet, *Mexican Amer. Legislative Caucus v. Texas*, No. 5:13-cv-261 (W.D. Tex. Apr. 1, 2013).

could not obtain relief from the state defendants respecting census procedures.<sup>35</sup>

On May 30, 2011, the day that Texas's legislature adjourned a legislative session without drawing district lines for the state's increased representation in Congress, the City of Austin, Travis County, which includes Austin, and nine voters filed a federal action in the Western District's Austin Division seeking judicial oversight of congressional redistricting.<sup>36</sup> An amended complaint filed on July 18 challenged the congressional districts drawn in the legislature's special session.<sup>37</sup> On July 6, the circuit's chief judge appointed Judge Lee Yeakel, to whom the case was originally assigned, and Judges Smith and Garcia as a three-judge court to hear the case.<sup>38</sup> On July 27, Judges Smith and Garcia transferred the case to their three-judge court with Judge Rodriguez.<sup>39</sup> Judge Yeakel dissented from the transfer.<sup>40</sup> Judge Yeakel opined that the federal courts should follow the rule created by Texas's supreme court and regard the first case filed after the legislature adjourns following a new census as the first ripe case.<sup>41</sup> Judge Yeakel also dissented from the consolidation of his congressional redistricting case with the districting cases respecting the state's representative bodies.<sup>42</sup>

A pro se federal complaint filed on June 15 in the Southern District's Houston Division challenged new congressional district lines as drawn with improper political gerrymandering.<sup>43</sup> On July 20, Judge Lee H. Rosenthal transferred the case to the Western District.<sup>44</sup>

On June 17, Governor Rick Perry signed into law legislative redistricting of Texas's house of representatives, and on July 18 he signed into law legislative redistricting of Texas's representatives to Congress.<sup>45</sup> Pursuant to section

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35. Opinion, *Mexican Amer. Legislative Caucus*, No. 5:13-cv-261 (W.D. Tex. Dec. 18, 2013), D.E. 28.

36. Complaint, *Rodriguez v. Perry*, No. 1:11-cv-451 (W.D. Tex. May 30, 2011), D.E. 1.

37. Amended Complaint, *id.* (July 18, 2011), D.E. 23.

38. Order, *id.* (July 6, 2011), D.E. 20.

39. Order, *id.* (July 27, 2011), D.E. 29; see Docket Sheet, *Rodriguez v. Perry*, No. 5:11-cv-635 (W.D. Tex. May 30, 2011).

40. Transfer Dissent, *Rodriguez*, No. 1:11-cv-451 (W.D. Tex. July 27, 2011), D.E. 30, 2011 WL 3209075.

41. *Id.* at 3–4; see *Perry v. Del Rio*, 66 S.W.3d 239 (Tex. 2001).

42. Transfer Dissent, *supra* note 40, at 5–6.

43. Complaint, *Morris v. Texas*, No. 4:11-cv-2244 (S.D. Tex. June 15, 2011), D.E. 1; see Amended Complaint, *id.* (June 27, 2011), D.E. 7.

The three-judge court in the Western District denied a July 8, 2014, motion to amend the complaint. Docket Sheet, *id.* (May 9, 2011) [hereinafter *Perez* Docket Sheet]; see Motion to Amend Complaint, *Perez v. Texas*, No. 5:11-cv-360 (W.D. Tex. July 8, 2014), D.E. 1128.

44. Order, *Morris*, No. 4:11-cv-2244 (S.D. Tex. July 20, 2011), D.E. 24; see Order, *Morris v. Texas*, No. 5:11-cv-615 (W.D. Tex. July 26, 2011), D.E. 26 (appointing a three-judge court).

45. *Perez v. Perry*, 835 F. Supp. 2d 209, 211 (W.D. Tex. 2011); Pretrial Opinion, *Perez*, No. 5:11-cv-360 (W.D. Tex. Sept. 2, 2011), D.E. 285, 2011 WL 9160142; see *Texas v. United States*, 831 F. Supp. 2d 244, 246 (D.D.C. 2011).

5 of the Voting Rights Act,<sup>46</sup> Texas sought preclearance of this redistricting, as well as redistricting for Texas's senate and its state board of education, by filing a civil action in the U.S. District Court for the District of the District of Columbia on July 19.<sup>47</sup>

A fourth federal case originally filed in San Antonio was filed by six voters on July 15 claiming that Texas's new congressional districts were "drawn to insure that population gains in minority communities from 2000 to 2010 did not afford minority voters increased electoral opportunity."<sup>48</sup> This case joined the consolidation on July 21.<sup>49</sup>

On October 17, LULAC filed an action challenging Texas's senate districts,<sup>50</sup> and this action joined the consolidation two days later.<sup>51</sup>

In pretrial rulings on September 2, the three-judge court dismissed (1) political gerrymandering claims because their proponents had not specified a "reliable legal standard" for resolving them and (2) claims respecting the counting of prisoners as without a legal basis.<sup>52</sup> The court conducted a bench trial from Tuesday, September 6, through Friday, September 16, including the intervening Saturday.<sup>53</sup> On September 30, the court adopted a schedule for the creation of court-drawn interim districts should preclearance of the legislature's districts not be resolved; as amended, the order specified that hearings would begin on October 31.<sup>54</sup>

Judge Rosemary M. Collyer drew the preclearance action in the District of Columbia and requested appointment of a three-judge court to hear the

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46. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (2015) (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

47. Complaint, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. July 19, 2011), D.E. 1; *Abbott v. Perez*, 585 U.S. \_\_\_, \_\_\_, 138 S. Ct. 2305, 2315 (2018); *Texas v. United States*, 798 F.3d 1108, 1111 (D.C. Cir. 2015); *Davis v. Abbott*, 781 F.3d 207, 209 (5th Cir. 2015); *Texas v. United States*, 247 F. Supp. 3d 44, 47 (D.D.C. 2017); *Texas v. United States*, 49 F. Supp. 3d 27, 31–32 (D.D.C. 2014); *Texas v. United States*, 887 F. Supp. 2d 133, 138 (D.D.C. 2012); *Perez v. Abbott*, 274 F. Supp. 3d 624, 632 & n.7 (W.D. Tex. 2017); *Perez v. Texas*, 970 F. Supp. 2d 593, 596 (W.D. Tex. 2013); *Texas v. United States*, 831 F. Supp. 2d at 246–47; *Perry v. Perez*, 565 U.S. 388, 391 (2012); *Perez*, 835 F. Supp. 2d at 211.

48. Complaint at 2, *Quesada v. Perry*, No. 5:11-cv-592 (W.D. Tex. July 15, 2011), D.E. 1; see Amended Complaint, *Perez*, No. 5:11-cv-360 (W.D. Tex. Aug. 2, 2011), D.E. 105; see also Nolan Hicks, *Democrats File New Suit*, San Antonio Express-News, July 16, 2011, at 1B.

49. Order, *Quesada*, No. 5:11-cv-592 (W.D. Tex. July 21, 2011), D.E. 8; see Order, *id.* (July 20, 2011), D.E. 6 (appointing a three-judge court).

50. Complaint, *LULAC v. Perry*, No. 5:11-cv-855 (W.D. Tex. Oct. 17, 2011), D.E. 1.

51. Order, *id.* (Oct. 19, 2011), D.E. 4.

52. Pretrial Opinion, *supra* note 45, at 19–22, 24–25.

53. Amended Interim Districting Scheduling Order, *Perez*, No. 5:11-cv-360 (W.D. Tex. Oct. 4, 2011), D.E. 391, 2011 WL 10843392; *Perez* Docket Sheet, *supra* note 43.

54. Amended Interim Districting Scheduling Order, *supra* note 53; see Order, *Perez*, No. 5:11-cv-360 (W.D. Tex. Sept. 30, 2011), D.E. 385 (order before amendment); *Perez* Docket Sheet, *supra* note 43 (noting hearings on October 31 and November 3).

case, as required by section 5(a) of the Voting Rights Act.<sup>55</sup> The circuit's chief judge appointed Circuit Judge Thomas B. Griffith and District Judge Beryl A. Howell to join Judge Collyer.<sup>56</sup> The court granted seven motions to intervene.<sup>57</sup> The court denied without prejudice intervention by the Texas Democratic Party, which did not take a position on the controversy but sought to protect its interests should a remedy affect election dates; the court determined that such a concern was premature.<sup>58</sup>

Judge Collyer quickly determined that no party objected to the board of education districts, so the court granted Texas preclearance for them.<sup>59</sup> So that the three-judge court in Texas would know whether it should proceed with the crafting of interim districts, the three-judge court in the District of Columbia issued a brief order on November 8, after briefing and oral argument on November 2, announcing its conclusion

that the State of Texas used an improper standard or methodology to determine which districts afford minority voters the ability to elect their preferred candidates of choice and that there are material issues of fact in dispute that prevent this Court from entering declaratory judgment that the three redistricting plans meet the requirements of Section 5 of the Voting Rights Act.<sup>60</sup>

A complete published opinion followed on December 22.<sup>61</sup>

“With the invaluable technical assistance of the staff at Texas Legislative Council,”<sup>62</sup> the district judges on the Texas three-judge court announced on November 23 an interim districting plan for Texas's house of representatives<sup>63</sup> and senate.<sup>64</sup> Three days later, the court announced a districting plan

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55. Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. July 21, 2011), D.E. 4; Transcript at 6–7, *id.* (Sept. 21, 2011, filed Oct. 13, 2011), D.E. 71 [hereinafter Sept. 21, 2011, D.D.C. Transcript]; see 52 U.S.C. § 10304(a) (2015).

56. Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. July 27, 2011), D.E. 7.

57. Order, *id.* (Sept. 29, 2011), D.E. 55; Order, *id.* (Sept. 8, 2011), D.E. 32; Order, *id.* (Aug. 16, 2011), D.E. 11; *Texas v. United States*, 798 F.3d 1108, 1111 (D.C. Cir. 2015); *Texas v. United States*, 49 F. Supp. 3d 27, 32 & n.2 (D.D.C. 2014); *Texas v. United States*, 887 F. Supp. 2d 133, 138 n.2 (D.D.C. 2012).

58. Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Oct. 7, 2011), D.E. 65.

59. Docket Sheet, *id.* (July 19, 2011) (noting a minute order on September 22, 2011); Sept. 21, 2011, D.D.C. Transcript, *supra* note 55, at 8–15; *Texas v. United States*, 887 F. Supp. 2d at 138 n.1; see *Texas v. United States*, 831 F. Supp. 2d 244, 247 & n.3 (D.D.C. 2011).

60. Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Nov. 8, 2011), D.E. 106, 2011 WL 5402888; see *Perry v. Perez*, 565 U.S. 388, 391 (2012); *Texas v. United States*, 887 F. Supp. 2d at 139; *Perez v. Abbott*, 274 F. Supp. 3d 624, 633–34 (W.D. Tex. 2017); *Perez v. Perry*, 835 F. Supp. 2d 209, 211 (W.D. Tex. 2011); see also Nolan Hicks, “Improper Standard or Methodology” Found, San Antonio Express-News, Nov. 9, 2011, at 1B; *Trial on Redistricting Maps Is Ordered*, Nov. 9, 2011, at A21.

61. *Texas v. United States*, 831 F. Supp. 2d 244; see *Texas v. United States*, 247 F. Supp. 3d 44, 47 (D.D.C. 2017); *Texas v. United States*, 887 F. Supp. 2d at 139.

62. *Perez*, 835 F. Supp. 2d at 212.

63. *Id. passim*; Opinion ex. A, *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. Nov. 23, 2011), D.E. 528; see Supplemental Opinion, *Perez*, No. 5:11-cv-360 (W.D. Tex. Dec. 2, 2011), D.E. 549.

for Texas's representation in Congress.<sup>65</sup> The circuit judge, dissenting from the two house plans, would have given greater deference to enacted district lines.<sup>66</sup> On December 8, the Supreme Court stayed the district court's ruling and set the matter for argument on January 9, 2012.<sup>67</sup>

On January 20, the Supreme Court vacated the district court's maps because they did not sufficiently incorporate Texas's political and policy judgments that were reflected in Texas's challenged maps.<sup>68</sup> The court should have deviated from the challenged maps only to correct probable constitutional or voting rights violations.<sup>69</sup> Although the court should have taken into account probable section 5 violations as well as probable violations of the claims before it, "The court should presume neither that a State's effort to preclear its plan will succeed nor that it will fail."<sup>70</sup> The Texas three-judge court adopted new plans on February 28.<sup>71</sup> The Supreme Court declined to stay these plans.<sup>72</sup>

On August 28, the District of Columbia court "conclude[d] that Texas has failed to show that any of the redistricting plans merits preclearance."<sup>73</sup>

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64. Order, *Davis v. Perry*, No. 5:11-cv-788 (W.D. Tex. Nov. 23, 2011), D.E. 89, 2011 WL 6207134.

65. Order, *Perez*, No. 5:11-cv-360 (W.D. Tex. Nov. 26, 2011), D.E. 544 [hereinafter W.D. Tex. Nov. 26, 2011, Order].

66. *Perez*, 835 F. Supp. 2d at 218–27 (Judge Smith, dissenting); W.D. Tex. Nov. 26, 2011, Order, *supra* note 65, at 17–21 (same).

67. *Perry v. Perez*, 565 U.S. 1090 (2011); *Perry v. Davis*, 565 U.S. 1090 (2011); *Perry v. Perez*, 565 U.S. 1090 (2011); *Perry v. Perez*, 565 U.S. 388, 392 (2012); *Perez v. Texas*, 970 F. Supp. 2d 593, 597 (W.D. Tex. 2013).

68. *Perez*, 565 U.S. 388; *Abbott v. Perez*, 585 U.S. \_\_\_, \_\_\_, 138 S. Ct. 2305, 2316 (2018); *Evenwel v. Abbott*, 578 U.S. \_\_\_, \_\_\_, 136 S. Ct. 1120, 1125 (2016); *Texas v. United States*, 49 F. Supp. 3d 27, 33 (D.D.C. 2014); see Daniel P. Tokaji, *Election Law in a Nutshell* 99–101 (2013); Todd J. Gillman & Gromer Jeffers, Jr., *Justices Reject Court's Remaps*, Dallas Morning News, Jan. 21, 2012, at A1; Adam Liptak, *Justices Reject Election Maps by U.S. Court*, N.Y. Times, Jan. 21, 2012, at A1.

69. *Perez*, 565 U.S. at 393–97.

70. *Id.* at 395.

71. *Perez v. Texas*, 891 F. Supp. 2d 808 (W.D. Tex. 2012); Order, *Davis v. Perry*, No. 5:11-cv-788 (W.D. Tex. Feb. 28, 2012), D.E. 141 (Texas's senate); Order, *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. Feb. 28, 2012), D.E. 682 (Texas's house of representatives); Order, *id.* (Feb. 28, 2012), D.E. 681 (U.S. House of Representatives); *Perez*, 970 F. Supp. 2d at 597; *Texas v. United States*, 887 F. Supp. 2d 133, 139 (D.D.C. 2012); see *Perez v. Perry*, 26 F. Supp. 3d 612, 614 (W.D. Tex. 2014); see also *Court Issues Election Maps*, Dallas Morning News, Feb. 29, 2012, at 1; Manny Fernandez, *Federal Judges Approve Final Texas Redistricting Maps*, N.Y. Times, Feb. 29, 2012, at A17; Nolan Hicks, *New Maps for Voting Are Released*, San Antonio Express-News, Feb. 29, 2012, at 1A.

72. *LULAC v. Perry*, 567 U.S. 966 (2012).

73. *Texas v. United States*, 887 F. Supp. 2d at 138; see *id.* at 178 ("We conclude that Texas has not met its burden to show that the U.S. Congressional and State House Plans will not have a retrogressive effect, and that the U.S. Congressional and State Senate Plans were not enacted with discriminatory purpose."); *Perez*, 585 U.S. at \_\_\_, 138 S. Ct. at 2316; *Texas v. United States*, 798 F.3d 1108, 1112 (D.C. Cir. 2015); *Texas v. United States*, 49 F. Supp. 3d at 33; *Davis v. Abbott*, 781 F.3d 207, 211 (5th Cir. 2015); see also *Perez*, 26 F. Supp. 3d at 614; *Perez*, 970 F. Supp. 2d at 597; Robert Barnes, *Federal Court Throws Out Texas Redistricting*

In a case arising out of Alabama, the Supreme Court declined on June 25, 2013, to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance.<sup>74</sup> The Court vacated the denial of preclearance to Texas and remanded the case for further consideration in light of the change in section 5 law.<sup>75</sup> On December 3, the district court dismissed the preclearance action as moot.<sup>76</sup>

Later, the three-judge court determined that remaining matters, such as fee awards, could be addressed by Judge Collyer alone.<sup>77</sup> Judge Collyer awarded intervenors who sought fees a total of \$1,096,770.01 in attorney fees and costs on June 18, 2014.<sup>78</sup>

This matter presents a case study in how not to respond to a motion for attorney fees and costs. . . . [R]ather than engage the fee applicants, Plaintiff Texas basically ignores the arguments supporting an award of fees and costs. In a three-page filing entitled “Advisory,” Texas trumpets the Supreme Court’s decision, expresses indignation at having to respond at all, and presumes that the motion for attorney fees is so frivolous that Texas need not provide further briefing in opposition unless requested. Such an opposition is insufficient in this jurisdiction. Circuit precedent and the Local Rules of this Court provide that the failure to respond to an opposing party’s arguments results in waiver as to the unaddressed contentions, and the Court finds that Texas’s “Advisory” presents no opposition on the applicable law. Accordingly, the Court will award the requested fees and costs.<sup>79</sup>

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*Plan, Citing Bias*, Wash. Post, Aug. 29, 2012, at A5; Manny Fernandez, *Federal Court Finds Texas Voting Maps Discriminatory*, N.Y. Times, Aug. 29, 2013, at A13; Gary Martin & Gary Scharrer, *Legislature’s Redistricting Rule Illegal*, San Antonio Express-News, Aug. 29, 2012, at 1.

74. *Shelby County v. Holder*, 570 U.S. 529 (2013); see *Perez*, 585 U.S. at \_\_\_\_, 138 S. Ct. at 2317; *Texas v. United States*, 798 F.3d at 1112, 1118 (“the Supreme Court did not invalidate Section 5; it only invalidated the formula used to determine which jurisdictions would be required to seek preclearance”); *Texas v. United States*, 247 F. Supp. 3d 44, 46–47 (D.D.C. 2017); *Texas v. United States*, 49 F. Supp. 3d at 33; *Perez v. Abbott*, 274 F. Supp. 3d 624, 634 & n.11 (W.D. Tex. 2017); see also Robert Barnes, *Court Blocks Key Part of Voting Rights Act*, Wash. Post, June 26, 2013, at A1; Adam Liptak, *Justices Void Oversight of States, Issue at Heart of Voting Rights Act*, N.Y. Times, June 26, 2013, at A1.

75. *Texas v. United States*, 570 U.S. \_\_\_\_, 133 S. Ct. 2885 (2013); *Texas v. United States*, 798 F.3d at 1112; *Texas v. United States*, 49 F. Supp. 3d at 33; *Perez*, 274 F. Supp. 3d at 634; *Perez*, 26 F. Supp. 3d at 615; *Perez*, 970 F. Supp. 2d at 598.

76. Opinion, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Dec. 3, 2013), D.E. 255 [hereinafter D.D.C. Mootness Opinion]; *Perez*, 585 U.S. at \_\_\_\_, 138 S. Ct. at 2317; *Texas v. United States*, 798 F.3d at 1112; *Texas v. United States*, 49 F. Supp. 3d at 34; *Perez*, 274 F. Supp. 3d at 634.

77. Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Jan. 22, 2014), D.E. 263; *Texas v. United States*, 247 F. Supp. 3d at 47; *Texas v. United States*, 49 F. Supp. 3d at 34–35; see *Texas v. United States*, 798 F.3d at 1113; D.D.C. Mootness Opinion, *supra* note 76, at 4.

78. *Texas v. United States*, 49 F. Supp. 3d at 44; *Texas v. United States*, 798 F.3d at 1113; *Texas v. United States*, 247 F. Supp. 3d at 46–48.

79. *Texas v. United States*, 49 F. Supp. 3d at 31; see Advisory, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Dec. 20, 2013), D.E. 259.



The court of appeals affirmed the fee award on August 18, 2015.<sup>80</sup> On March 30, 2017, Judge Collyer awarded the intervenors \$226,894.67 in attorney fees for the appeal.<sup>81</sup>

On June 26, 2013, Texas's governor signed into law new districting plans for Texas's senate, house of representatives, and representation in Congress.<sup>82</sup> The senate plan was not challenged.<sup>83</sup> Texas's legislature adopted the court's plan for Congress and made slight modifications to the court's plan for Texas's house.<sup>84</sup>

The Justice Department advised the three-judge court in Texas on July 25 that if it found intentional voting discrimination in the cases before it, it was empowered under section 3(c) of the Voting Rights Act to retain jurisdiction over Texas's voting laws and subject them to preclearance requirements similar to those provided for in section 5.<sup>85</sup> Over Judge Smith's dissent, Judges Garcia and Rodriguez granted the Department's motion to intervene.<sup>86</sup>

The court decided on September 6 to allow Texas to proceed with 2013 districts while the court further considered the merits of the plaintiffs' claims.<sup>87</sup> In September, plaintiffs and intervenors filed 11 amended complaints.<sup>88</sup> On June 17, 2014, the court unanimously determined that political

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80. *Texas v. United States*, 798 F.3d 1108, cert. denied, 577 U.S. \_\_\_, 136 S. Ct. 981 (2016); see *id.* at 1116 ("To say that Texas 'prevailed' in this suit because a different litigant in a different suit won on different grounds that Texas specifically told the district court it would not raise is, to say the least, an unnatural use of the word 'prevailing.'"); *Texas v. United States*, 247 F. Supp. 3d at 46–48; see also Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Apr. 26, 2016), D.E. 279 (allocating the fee award among six law firms).

81. *Texas v. United States*, 247 F. Supp. 3d 44; Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Apr. 4, 2017), D.E. 290.

82. *Perez v. Perry*, 26 F. Supp. 3d 612, 615; *Texas v. United States*, 798 F.3d at 1112; *Texas v. United States*, 49 F. Supp. 3d at 33; Advisory, *Perez v. Texas*, No. 5:11-cv-360 (W.D. Tex. June 27, 2013), D.E. 763; see *Evenwel v. Abbott*, 578 U.S. \_\_\_, \_\_\_, 136 S. Ct. 1120, 1125 (2016).

83. *Perez v. Texas*, 970 F. Supp. 2d 593, 596 n.1 (W.D. Tex. 2013); see *Abbott v. Perez*, 585 U.S. \_\_\_, \_\_\_, 138 S. Ct. 2305, 2316 (2018).

84. *Perez*, 585 U.S. at \_\_\_, 138 S. Ct. at 2317; *Perez*, 970 F. Supp. 2d at 598, 606–07.

85. Statement of Interest, *Perez*, No. 5:11-cv-360 (W.D. Tex. July 25, 2013), D.E. 827; see Voting Rights Act of 1965, Pub. L. No. 89-110, § 3(c), 79 Stat. 437, 437, as amended, 52 U.S.C. § 10302 (2015); see also *Perez*, 585 U.S. at \_\_\_, 138 S. Ct. at 2322; Marcia Coyle & Todd Ruger, *DOJ Messes with Texas Over VRA*, Nat'l L.J., July 29, 2013, at 11; Richard L. Hasen, *Holder's Texas-Size Gambit: Will It Save the Voting Rights Act?*, Nat'l L.J., Aug. 5, 2013, at 39; Sari Horwitz, *State Voting Laws to Be Challenged*, Wash. Post, July 26, 2013, at A1; Gromer Jeffers, Jr., *U.S. Challenges Texas on Election Laws*, Dallas Morning News, July 26, 2013, at A1; Adam Liptak & Charlie Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, N.Y. Times July 26, 2013, at A1; Gary Martin, *U.S. Hits Texas on Voting Rights*, San Antonio Express-News, July 26, 2013, at 1.

86. Opinion, *Perez*, No. 5:11-cv-360 (W.D. Tex. Sept. 24, 2013), D.E. 904; see Intervention Complaint, *id.* (Sept. 25, 2013).

87. *Perez*, 970 F. Supp. 2d at 596, 606–09; see *Perez*, 585 U.S. at \_\_\_, 138 S. Ct. at 2313, 2317–18.

88. Amended Cross-Claim, *Perez*, No. 5:11-cv-360 (W.D. Tex. Sept. 18, 2013), D.E. 902; Second Amended Complaint, *id.* (Sept. 18, 2013), D.E. 901; Third Amended Complaint, *id.*

gerrymandering claims were non-justiciable, but challenges to the 2011 plans were not moot.<sup>89</sup> “[T]he State has steadfastly maintained the legality of *all* of the challenged conduct and has not announced any policy change that would preclude the Legislature from engaging in the same alleged wrongful conduct.”<sup>90</sup>

On January 8, 2014, the court awarded plaintiffs who challenged the senate districts \$360,659.68 in attorney fees and expenses.<sup>91</sup> An additional \$2,718.75 was awarded on January 15.<sup>92</sup> The court of appeals determined, however, on March 17, 2015, that the senate-district plaintiffs did not qualify as prevailing parties.<sup>93</sup> On November 6, 2015, the three-judge court declined to enjoin the 2013 districts for 2016 elections.<sup>94</sup>

A new malapportionment challenge to Texas’s senate districts was filed in Austin on April 21, 2014,<sup>95</sup> and assigned to a three-judge court consisting of Judge Yeakel, Circuit Judge Catharina Haynes, and Eastern District Judge Michael H. Schneider.<sup>96</sup> On November 5, the court held that the Equal Protection Clause did not require states to apportion their legislative districts equally by both total population and voter population; equal total populations are enough.<sup>97</sup> On April 4, 2016, the Supreme Court agreed.<sup>98</sup>

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(Sept. 18, 2013), D.E. 900; Third Amended Complaint, *id.* (Sept. 18, 2013), D.E. 899; Fifth Amended Complaint, *id.* (Sept. 18, 2013), D.E. 898; Third Amended Complaint, *id.* (Sept. 17, 2013), D.E. 897; Second Amended Complaint, *id.* (Sept. 17, 2013), D.E. 896; Third Amended Complaint, *id.* (Sept. 15, 2013), D.E. 894; Second Amended Complaint, *id.* (Sept. 12, 2013), D.E. 893; First Amended Complaint, *id.* (Sept. 11, 2013), D.E. 892; Fourth Amended Complaint, *id.* (Sept. 9, 2013), D.E. 891.

89. *Perez v. Perry*, 26 F. Supp. 3d 612 (W.D. Tex. 2014).

90. *Id.* at 621.

The court held on June 23, 2014, that according to Fifth Circuit law “vote dilution claims are not cognizable under the Fifteenth Amendment.” Order, *Perez*, No. 5:11-cv-360 (W.D. Tex. June 23, 2014), D.E. 1108.

91. *Davis v. Perry*, 991 F. Supp. 2d 809 (W.D. Tex. 2014), *rev’d*, *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015).

The court determined that it was premature to resolve other fee motions. Opinion, *Perez*, No. 5:11-cv-360 (W.D. Tex. Jan. 8, 2014), D.E. 951, 2014 WL 69888.

92. Supplemental Order, *Davis v. Perry*, No. 5:11-cv-788 (W.D. Tex. Jan. 15, 2014), D.E. 217, 2014 WL 172119; *Davis*, 781 F.3d at 213.

93. *Davis*, 781 F.3d 207, *cert. denied*, 577 U.S. \_\_\_, 136 S. Ct. 534 (2015).

94. Opinion, *Perez*, No. 5:11-cv-360 (W.D. Tex. Nov. 6, 2015), D.E. 951, 2015 WL 6829596; *see Abbott v. Perez*, 585 U.S. \_\_\_, \_\_\_, 138 S. Ct. 2305, 2313, 2317–18 (2018).

95. Complaint, *Evenwel v. Perry*, No. 1:14-cv-335 (W.D. Tex. Apr. 21, 2014), D.E. 1; *see Evenwel v. Abbott*, 578 U.S. \_\_\_, \_\_\_, 136 S. Ct. 1120, 1125 (2016).

96. Order, *Evenwel*, No. 1:14-cv-335 (W.D. Tex. Apr. 28, 2014), D.E. 9.

97. Opinion, *id.* (Nov. 5, 2014), D.E. 35, 2014 WL 5780507.

98. *Evenwel*, 578 U.S. \_\_\_, 136 S. Ct. 1120 (2016); *id.* at \_\_\_, 136 S. Ct. at 1127–28 (“As history, precedent and practice demonstrate, it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts.”); *see Robert Barnes, High Court Halts Effort to Redefine Voting Rights*, Wash. Post, Apr. 5, 2016, at A1; Adam Liptak, *Justices Reject Challenge on “One Person One Vote,”* N.Y. Times, Apr. 5, 2016, at A1; *see also David Montgomery & Michael Wines, District Fight May Persist in Texas After Ruling*, N.Y. Times, Apr. 5, 2016, at A14.

Over Judge Smith’s dissent, Judges Rodriguez and Garcia determined on March 10, 2017, that the 2011 plan for Texas’s congressional districts was discriminatory in violation of section 2 of the Voting Rights Act.<sup>99</sup> The court noted that “the 2013 plans are heavily derived from the 2011 plans, and Plaintiffs contend that many of the alleged violations of the [Voting Rights Act] and the Constitution initially enacted in 2011 persist in the 2013 plans, though some perhaps to a lesser degree.”<sup>100</sup> The court also noted that the section 3(c) question remained an open one.<sup>101</sup> The court reached a similar decision on Texas’s house of representatives on April 20.<sup>102</sup>

In an August 15, 2017, order, the district court concluded “that the racially discriminatory intent and effects that it previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged.”<sup>103</sup> Justice Alito stayed this order on August 28 pending further Supreme Court consideration.<sup>104</sup> By a vote of five to four, the full Supreme Court extended the stay pending appeal.<sup>105</sup>

The Supreme Court decided on June 25, 2018, that “[t]he 2013 Legislature was not obligated to show that it had ‘cured’ the unlawful intent that the court attributed to the 2011 Legislature.”<sup>106</sup> The Court approved the bounda-

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99. *Perez v. Abbott*, 253 F. Supp. 3d 864, 879 (W.D. Tex. 2017) (amended opinion); see Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10301 (2015); see also *Perez*, 585 U.S. at \_\_\_, 138 S. Ct. at 2317; Robert Barnes, *Gerrymandering by Tex. Lawmakers Aimed to Hurt Minorities, Judges Say*, Wash. Post, Mar. 12, 2017, at A4; Manny Fernandez, *Texas Congressional Maps re Struck Down for Bias*, N.Y. Times, Mar. 12, 2017, at 21.

100. *Perez*, 253 F. Supp. 3d at 874.

101. *Id.* at 874–75.

102. *Perez*, 585 U.S. at \_\_\_, 138 S. Ct. at 2317.

103. *Perez v. Abbott*, 274 F. Supp. 3d 624, 652 (W.D. Tex. 2017) (reviewing congressional districts), *appeal pending*, 583 U.S. \_\_\_, 138 S. Ct. 735 (2018); see *Perez v. Abbott*, 267 F. Supp. 750 (W.D. Tex. 2017) (finding intentional discrimination in a review of state house of representatives districts); see also *Perez*, 585 U.S. at \_\_\_, 138 S. Ct. at 2317–18; James Barragán, *Texas Map Ordered Redone*, Dallas Morning News, Aug. 16, 2017, at A1; Sara Randazzo, *Court Says to Redraw Two Texas Districts*, Wall St. J., Aug. 16, 2017, at A2; James Barragan, *Court Orders Texas Remap*, Dallas Morning News, Aug. 25, 2017, at A1.

104. *Abbott v. Perez*, 582 U.S. \_\_\_, 138 S. Ct. 1 (2017); see Allie Morris, *Redistricting Order Suspended*, San Antonio Express News, Sept. 1, 2017, at A2.

105. *Abbott v. Perez*, 582 U.S. \_\_\_, 138 S. Ct. 49 (2017) (staying order on congressional districts pending appeal); see *Abbott v. Perez*, 582 U.S. \_\_\_, 138 S. Ct. 49 (2017) (staying order on state house of representatives districts pending appeal); *Abbott v. Perez*, 582 U.S. \_\_\_, 138 S. Ct. 1 (2017) (preliminary stay by Justice Alito); see also Robert Barnes, *Gerrymandering, Sales Tax in Supreme Court’s Sights*, Wash. Post, Jan. 13, 2018, at A8; Robert Barnes, *Justices: Electoral Districts in Texas Needn’t Shift Yet*, Wash. Post, Sept. 13, 2017, at A4; Adam Liptak, *Court Halts Redistricting in Texas as It Weighs Case*, N.Y. Times, Sept. 13, 2017, at A17.

The Supreme Court dismissed for want of jurisdiction precautionary appeals by some plaintiffs. *Morris v. Texas*, 583 U.S. \_\_\_, 138 S. Ct. 747 (2018); *Tex. Democratic Party v. Abbott*, 583 U.S. \_\_\_, 138 S. Ct. 739 (2018).

106. *Perez*, 585 U.S. at \_\_\_, 138 S. Ct. at 2313; see Robert Barnes, *Supreme Court Favors Texas in Redistricting Case*, Wash. Post, June 26, 2018, at A4; Jess Bravin & Brent Kendall,

ries of all congressional and legislative districts, with the exception of one house district, which had been substantially modified from the district court’s plan, and which the Supreme Court found to be “an impermissible racial gerrymander.”<sup>107</sup>

The district court decided on July 3 that however the racial gerrymander is remedied, “all the maps for the 2018 elections will remain the same as for 2016.”<sup>108</sup>

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*High Court Upholds Texas District Maps*, Wall St. J., June 26, 2018, at A2; Adam Liptak, *Texas Voting Map, Called Illegal, Is Upheld Because of an Error by a Lower Court*, N.Y. Times, June 26, 2018, at A20.

107. *Perez*, 585 U.S. at \_\_\_\_, 138 S. Ct. at 2330, 2334–35.

108. Order, *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. July 3, 2018), D.E. 1586.