IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

LA UNION DEL PUEBLO ENTERO, INC. ("LUPE"); LIONEL LOPEZ; ISABEL ARAIZA; ARLENE LIRA EASTER; ALICIA BENAVIDEZ; ANDRES ROSAS; LENA LORRAINE LOZANO SOLIS; and CARMEN RODRIGUEZ, Plaintiffs,	§	
v.	§	Civil Action No. 2:16-cv-00303
STATE OF TEXAS; GREG ABBOTT, in his official capacity as Governor of Texas; and ROLANDO PABLOS, in his official capacity as Texas Secretary of State, Defendants.	§	

DEFENDANTS' PRETRIAL BENCH BRIEF REGARDING *LULAC V. CLEMENTS*

Twenty-five years ago, the en banc Fifth Circuit rejected a Voting Rights Act challenge to Texas's method of selecting trial judges through countywide elections. *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc). In so doing, the Fifth Circuit declined the plaintiffs' invitation "to reach for social questions beyond the Voting Rights Act by recasting its meaning and purpose." *Id.* at 893–94. Instead, the court found, Section 2 of the Voting Rights Act means what it says: Plaintiffs must show that they "have suffered 'a denial or abridgement of the right . . . to vote **on account of race or color**.'" *Id.* at 854 (emphasis added) (quoting 52 U.S.C. 10301(a)). In *LULAC*, "[o]ne thread" ran throughout the plaintiffs' claims—"an insubstantiality of proof" that minority-preferred candidates "lost '**on account of race**.'" *Id.* at 877 (emphasis added).

To prove dilution on account of race, the Fifth Circuit held that plaintiffs must do more than establish that white voters tend to vote as a bloc to usually defeat minority-preferred candidates. *Id.* at 850. They must prove that any polarized voting is *legally significant*. *Id.* This standard, the Fifth Circuit made clear, requires a showing that divergent voting patterns among minorities and whites are "somehow tied to race," not other factors like partisan affiliation. *Id.* In *LULAC*, the data showed that white voters supported minority candidates at similar levels to their support for white candidates of the same party—even when the minority candidate was opposed by a white candidate. *Id.* at 861. The Fifth Circuit held that such data did not prove that polarization was occurring on account of race and did not rise to the level of legal significance.

Additionally, the Fifth Circuit concluded that Texas had a substantial interest in linking the jurisdictional and electoral bases of district courts. *Id.* at 872. This interest could be overcome only by "evidence that amounts to substantial proof of racial dilution"—a threshold that the plaintiffs did not come close to satisfying. *Id.* at 868. And the Fifth Circuit found that any evaluation of minority representation on the courts must consider the limited pool of eligible candidates. *Id.* at 865.

The Fifth Circuit's holding in *LULAC* is dispositive of this case. Plaintiffs' data shows that Hispanic candidates do not suffer any disadvantage over white candidates from the same party, so voting is not polarized on account of race or color. That evidence cannot overcome Texas's interest in linking jurisdictional and electoral bases, particularly in light of the limited pool of eligible candidates.

I. THE *LULAC* PLAINTIFFS CHALLENGED TEXAS'S CENTURY-OLD MODEL FOR ELECTING DISTRICT JUDGES THROUGH COUNTYWIDE ELECTIONS.

LULAC involved a challenge to Texas's long-established system of electing state trial judges. Under this system, the State's voters elect trial judges in countywide elections. *Id.* at 868. All voters of an entire county vote for all the trial courts of general jurisdiction in that county. *Id.* at 837, 868. Each trial court's jurisdiction spans the entire county. *Id.* As of the Fifth Circuit's 1993 en banc ruling, the challenged system had been enshrined in the Texas Constitution for nearly the entire 143-year period since trial judges were first elected in 1850. *Id.* at 868–69.

The plaintiffs filed suit under Section 2 of the Voting Rights Act, challenging the election of district judges in nine counties. *Id.* at 837 & n.1.[1] The plaintiffs argued that countywide elections impermissibly diluted the voting power of Hispanics and African-Americans. *Id.* at 838. The district court found a Section 2 violation in all of the challenged counties and divided the nine counties into electoral subdistricts. *Id.* The case wound its way through multiple appeals, including an initial en banc Fifth Circuit decision that the Voting Rights Act did not apply to judicial elections (a ruling later reversed by the Supreme Court). *See id.* at 838–39 (summarizing procedural history). On remand from the Supreme Court, a Fifth Circuit panel affirmed the district court's vote-dilution findings as to eight of the nine counties. *Id.* at 839. The Fifth Circuit then decided to hear the case en banc a second time. *Id.*

[1] The plaintiffs also alleged that the State's system of electing trial judges violated the Fourteenth and Fifteenth Amendments to the U.S. Constitution, but the district court rejected these arguments. *LULAC*, 999 F.2d at 837–38. The plaintiffs did not appeal this ruling. *Id.* at 838 n.3.

II. THE *LULAC* COURT HELD THAT A VOTE-DILUTION CLAIM REQUIRES PROOF THAT DIFFERENCES IN VOTING PATTERNS AMONG MINORITY AND WHITE VOTERS ARE ATTRIBUTABLE TO RACE.

The *LULAC* en banc majority began its Section 2 analysis by noting that challenges to multimember schemes "are governed by the framework established in *Thornburg v. Gingles*, 478 U.S. 30 (1986)." *See LULAC*, 999 F.2d at 849. As the Fifth Circuit recognized, this framework requires plaintiffs to make a threshold showing that: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Id.* (citing, *inter alia*, *Gingles*, 478 U.S. at 50–51). If the plaintiffs establish these preconditions, they must prove that, based on the "totality of circumstances," they lack "the same opportunities to participate in the political process and elect representatives of their choice enjoyed by other voters." *Id.*; *see* 52 U.S.C. 10301(b). In this latter inquiry, courts are guided by factors identified in a 1982 Senate report to the Voting Rights Act. *LULAC*, 999 F.2d at 849 (citing S. Rep. No. 417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177).

The crucial issue in *LULAC* was "*Gingles*' white bloc voting inquiry" and the related Senate Report factor regarding "the extent to which voting . . . is racially polarized." *Id.* at 850 (citation omitted) (omission in original). The en banc court found that the Supreme Court had already resolved this issue: "As the Court in *Gingles* held, the question is not whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *Id.* (quoting *Gingles*, 478 U.S. at 55). Yet

under the district court's reading of Section 2, the *LULAC* plaintiffs were only required to "demonstrate that whites and blacks generally support different candidates to establish legally significant white bloc voting." *Id.* The Fifth Circuit rejected this approach:

> Unless the tendency among minorities and whites to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race . . . plaintiffs' attempt to establish legally significant white bloc voting, and thus their dilution claim under § 2, must fail. **When the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens in the contested counties . . . the district court's judgment must be reversed**.

Id. (emphasis added). The Fifth Circuit emphasized the limits of Section 2's reach:

> The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters "on account of race or color." . . . . In holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat.

Id. The district court's test "ignored controlling authorities," including *Whitcomb v. Chavis*, 403 U.S. 124 (1971), which "established a clean divide between actionable vote dilution and 'political defeat at the polls,'" and *Gingles*, where "a majority of the Justices rejected the very test employed by the district court as a standard crafted to shield political minorities from the vicissitudes of 'interest-group politics rather than a rule hedging against racial discrimination.'" *LULAC*, 999 F.2d at 850–51 (citations omitted). These cases "unmistakably prescribe[d] the very inquiry into the causes underlying the lack of support for minority-preferred candidates among white voters

with which the district court dispensed." *Id.* at 854, 855–58.[2]

Applying this standard to the record before it, the Fifth Circuit reversed the district court's vote-dilution findings. *Id.* at 877. In each challenged county, there was insufficient proof "that the minority-preferred candidate lost 'on account of race.'" *Id.*; *see id.* at 877–93 (analyzing record evidence relating to each county). For example:

- In Dallas County, "[r]oughly 61-77% of white voters consistently supported Republicans, even when black Republicans ran against white Democrats," and "black Democrats also won as large a percentage of the white vote as white Democratic candidates." *Id.* at 878–79. This was not vote dilution: "The point is that a black Democratic voter and a white Democratic voter stand in the same position. Both are unable to elect the Democratic judicial candidate they prefer." *Id.* at 879.[3]

- In Harris County, "[t]he black-preferred candidate . . . , regardless of race, was always the Democratic candidate" and "[t]he Republican candidate always won the white vote, generally taking between 55% and 65%, whether the Republican candidate was black, Hispanic, or Anglo." *Id.* at 882–83.

- In Tarrant County, "black candidates won as great a share of white votes as white candidates, if we control for party affiliation," and black Republicans won the same share of elections as white Republicans among races with black or Hispanic candidates. *Id.* at 887.

- In Bexar County, "[a]ny proof of dilution [was] meager at best," where "Anglo voters gave a majority of their votes to Republicans, and Hispanic voters gave a majority of their votes to Democrats, even when Hispanic Republican candidates faced Anglo Democratic opponents." *Id.* at 889.

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[2] *Accord LULAC*, 999 F.2d at 854 ("[Section 2] is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats.").

[3] *See also LULAC*, 999 F.2d at 879 ("We repeat. The race of the candidate did not affect the pattern. White voters' support for black Republican candidates was equal to or greater than their support for white Republicans. Likewise, black and white Democratic candidates received equal percentages of the white vote. Given these facts, we cannot see how minority-preferred judicial candidates were defeated 'on account of race or color.' Rather, the minority-preferred candidates were consistently defeated because they ran as members of the weaker of two partisan organizations. We are not persuaded that this is racial bloc voting as required by *Gingles*.").

- In Lubbock County, voting patterns in general elections "resulted from party loyalty," not the race of the candidates. *Id.* at 892. And in one of the two Democratic primary races on which the plaintiffs relied, the minority-preferred candidate received a majority of the votes cast; so the primaries did not show that "the minority-preferred candidate was consistently defeated within the meaning of *Gingles*." *Id.* at 892–93.

Thus, there was no basis for the district court's finding of a Section 2 violation—even if the district court had applied the correct standard. *Id.* at 877.

III. THE *LULAC* COURT RECOGNIZED A SUBSTANTIAL STATE INTEREST IN LINKING THE JURISDICTIONAL AND ELECTORAL BASES OF JUDGES.

The en banc *LULAC* opinion also addressed Texas's interest in linking district judges' jurisdictional and electoral bases. At the outset, the court recognized that this interest was "relevant to a determination of liability" and that its weight was a question of law, not a factual question to be "described on a county-by-county basis." *Id.* at 870–71. The linkage interest must be "balanced against localized evidence of racial vote dilution" in the totality-of-the-circumstances inquiry. *Id.* at 868. Under this balancing standard, "plaintiffs cannot overcome a substantial state interest by proving insubstantial dilution." *Id.* at 876. Instead, the court held, "proof of dilution, considering the totality of the circumstances, must be substantial in order to overcome the state's interest in linkage . . . . As a matter of law, Texas' interest cannot be overridden by evidence that sums to a marginal case." *Id.*

In *LULAC*, the balance tipped decidedly in the State's favor. On the one hand, the evidence of vote dilution was minimal, at best. *See id.* at 877; *supra* Part II. On the other hand, the State's linkage interest was "substantial" and "integral to the judicial office." *LULAC*, 999 F.2d at 872. Linkage "ha[d] been in place throughout the

143 year history of judicial elections in Texas." *Id.* at 869. It "advance[d] the state's substantial interest in judicial effectiveness," while "balanc[ing] accountability and judicial independence." *Id.* at 868.[4] And the weight of this interest was "virtually assigned" by the Supreme Court's decision in *Gregory v. Ashcroft*, which recognized "the authority of the people of the States to determine the qualifications of their most important government officials." 501 U.S. 452, 463 (1991); *LULAC*, 999 F.2d at 871–72. Reflecting on the State's linkage interest, the Fifth Circuit concluded:

> The decision to make jurisdiction and electoral bases coterminous is more than a decision about how to elect state judges. It is a decision of what *constitutes* a state court judge. Such a decision is as much a decision about the structure of the judicial office as the office's explicit qualifications such as bar membership or the age of judges. The collective voice of generations by their unswerving adherence to the principle of linkage through times of extraordinary growth and change speaks to us with power. Tradition, of course, does not make right of wrong, but we must be cautious when asked to embrace a new revelation that right has so long been wrong. There is no evidence that linkage was created and consistently maintained to stifle minority votes.

LULAC, 999 F.2d at 872.

To be sure, in discussing the State's "distrust of judicial subdistricts," the Fifth Circuit distinguished between trial and appellate judges. *Id.* at 873 (noting that appellate judges "make decisions in groups" and "[w]hen collegial bodies are involved, all citizens continue to elect at least one person involved in making a particular decision"). But the court did not say—nor would it have had a basis to say—that the State's linkage interest is limited to district judges. The court's analysis instead

[4] *See also Houston Lawyers' Ass'n v. Att'y Gen. of Tex.*, 501 U.S. 419, 426 (1991) (recognizing Texas's interest in maintaining link between district judge's jurisdictional and electoral bases).

suggests this linkage interest is similarly weighty for appellate judges:

- The court recounted Texas's long history of linkage, observing that "[t]radition speaks to us about its defining role—imparting its deep running sense that this is what judging is about." *Id.* at 872.

- The court explained that linkage ensures "judges remain accountable *to the range of people within their jurisdiction*." *Id.* at 869 (emphasis added).

- The court remarked that a broad electoral base "diminishes the semblance of bias and favoritism towards the parochial interests of a narrow constituency." *Id.*

- Given the interests accepted in *Gregory*, the court found that "the people of Texas have at least a substantial interest in defining the structure and qualifications *of their judiciary*." *Id.* at 872 (emphasis added).

The Fifth Circuit concluded that Texas's linkage interest outweighed the plaintiffs' evidence of vote dilution—even if the district court's findings were correct. *Id.* at 877.

IV. UNDER *LULAC*, A FUNCTIONAL ANALYSIS OF THE STATE'S JUDICIAL MODEL MUST TAKE INTO ACCOUNT THE LIMITED POOL OF ELIGIBLE CANDIDATES.

LULAC's analysis of the proportion of minority judges also bears on the instant case. The en banc court noted that "[t]he absence of minority office holders is typically an important consideration in dilution cases." *Id.* at 865. Indeed, the "cornerstone of the plaintiffs' proof" in *LULAC* was the "small number of minority judges" serving in the challenged counties. *Id.* The plaintiffs' contentions were unconvincing.

The court explained that the totality-of-the-circumstances inquiry—which includes consideration of the number of minority office-holders—must be conducted "with a 'functional view of the political process.'" *Id.* (quoting *Gingles*, 478 U.S. at 45). Applying this approach to plaintiffs' challenge, the Fifth Circuit found that "[a] functional analysis of the electoral system must recognize the impact of limited pools

of eligible candidates on the number of minority judges that has resulted." *Id.* Thus, it was the percentage of *eligible lawyers* who were minorities—not the percentage of *voters* who were minorities—that the Fifth Circuit focused on in its analysis. *Id.* at 865–66. The evidence showed that in five of the challenged counties, the percentage of minority district judges exceeded the percentage of minority lawyers eligible to serve as district judges; in the other four counties, there were no minority judges and a "very small" number of eligible candidates. *Id.* So the "absence of eligible candidates [went] a long way in explaining the absence of minority judges." *Id.* at 866.

The court also rejected plaintiffs' attempts to sidestep this issue:

> Plaintiffs cannot emphasize the scarcity of successful minority candidates to support the inference of dilution and simultaneously urge that the number of minorities eligible to run is not relevant. Plaintiffs argue that this factor may not be considered because the limited number of minority lawyers was caused by state discrimination in education. We are not persuaded this argument merits exclusion of the evidence.

Id. As such, the Fifth Circuit gave weight to the evidence reflecting a limited number of eligible minority candidates in the challenged counties. *Id.* at 865–66, 877–93.

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In rejecting plaintiffs' challenge to Texas's system of electing district judges, the en banc *LULAC* majority emphasized that the Voting Rights Act "responds to practices that impact *voting*; it is not a panacea addressing social deficiencies." *Id.* at 866. For that reason, the Court's task was a limited one: "To those who push judicial entry onto this larger field we must answer that our task is more narrowly drawn—to decide if *voting* rights have been denied. We lack the authority, even if we had the wisdom, to do more." *Id.* at 893.

The same remains true today. Plaintiffs' data shows that Hispanic votes in Texas's statewide judicial elections are not being diluted on account of race or color. Voting in general elections may be polarized, but it is polarized on account of political party. Such scant evidence of dilution is not sufficient to overcome the "collective voice of generations" and "their unswerving adherence to the principle of linkage through times of extraordinary growth and change."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2018, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system and served on all attorney(s) and/or parties of record, via the CM/ECF service and/or via electronic mail.

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