Abbott, Governor of Texas v. Perez

**Case Year:**2018

**Case Ruling:**5-4

FACTS

In 2011, the Texas legislature adopted a new congressional districting plan and new districting maps for its two houses to account for population growth revealed in the 2010 census. In so doing, Texas had to comply with a complicated legal regime. The Equal Protection Clause of the Fourteenth Amendment forbids “racial gerrymandering,” that is, intentionally assigning citizens to a district on the basis of race without sufficient justification (*Shaw v. Reno* 1993)*.*

But other legal requirements suggest that state legislatures consider race in drawing districts. Like all States, Texas is subject to §2 of the Voting Rights Act of 1965 (VRA), which is violated when a state districting plan provides “less opportunity” for racial minorities “to elect representatives of their choice” (*League of United Latin American Citizens* *v. Perry* 2006). Also, in 2011 Texas was subject to §5 of the VRA, which barred it from making any districting changes unless it could prove that they did not result in harming the ability of racial minorities to elect the candidates of their choice. (After the Supreme Court decided *Shelby County* *v. Holder* in 2013, Texas was no longer covered by §5.)

To deal with these conflicting requirements, the Supreme Court has assumed that compliance with the VRA is a compelling State interest for Fourteenth Amendment purposes; and a State’s consideration of race in making a districting decision is narrowly tailored if the State has “good reasons” for believing that its decision is necessary in order to comply with the VRA.

The Texas Legislature’s 2011 plans were immediately tied up in litigation and never used. The case was assigned to a three-judge court (Texas court). Texas also submitted the plans for preclearance to the District Court for the District of Columbia (D.C. court). The Texas court drew up interim plans for the State’s rapidly approaching primaries, giving no deference to the Legislature’s plans. Texas challenged the court-ordered plans in the U.S. Supreme Court, which reversed and remanded with instructions for the Texas court to start with the Texas Legislature’s 2011 plans but to make adjustments as required by the Constitution and the VRA. The Texas court then adopted new interim plans. After the D.C. court denied preclearance of the 2011 plans, Texas used the Texas court’s interim plans for the 2012 elections.

In 2013, the Legislature repealed the 2011 plans and enacted the Texas court’s plans (with minor modifications). After *Shelby County*, D.C. court’s preclearance order was vacated. But the Texas court did not dismiss the case against the 2011 plans as moot. Instead, it allowed the plaintiffs to amend their complaint to challenge the 2013 plans and held that their challenges to the 2011 plans were live.

Texas conducted its 2014 and 2016 elections under the 2013 plans. In 2017, the Texas court found defects in several of the districts in the 2011 federal congressional and State House plans (the State Senate plan is not at issue here). It also invalidated multiple Congressional (CD) and House (HD) Districts in the 2013 plans, holding that the Legislature failed to cure the “taint” of discriminatory intent allegedly harbored by the 2011 Legislature. And the court relied on that finding to invalidate several challenged 2013 districts. The court also held that three districts—CD27, HD32, and HD34—were invalid under §2 of the VRA because they had the *effect* of depriving Latinos of the equal opportunity to elect their candidates of choice. And it found that HD90 was a racial gerrymander based on changes made by the 2013 Legislature. It gave the state attorney general three days to tell the court whether the Legislature would remedy the violations; and if the Legislature did not intend to adopt new plans, the court would hold remedial hearings.

The state asked the Supreme Court to review the Texas court’s decision.

OPINION:

***Justice Alito delivered the opinion of the Court***

The primary question is whether the Texas court erred when it required the State to show that the 2013 Legislature somehow purged the “taint” that the court attributed to the defunct and never-used plans enacted by a prior legislature in 2011.

Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State. This rule takes on special significance in districting cases.

Redistricting “is primarily the duty and responsibility of the State,” and “[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions.” *Miller* *v. Johnson* (1995). [The] “good faith of [the] state legislature must be presumed.”

The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination … The “historical background” of a legislative enactment is “one evidentiary source” relevant to the question of intent. But we have never suggested that past discrimination flips the evidentiary burden on its head …

Under these circumstances, there can be no doubt about what matters: It is the intent of the 2013 Legislature. And it was the plaintiffs’ burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent.

The Texas court contravened these basic principles. Instead of holding the plaintiffs to their burden of overcoming the presumption of good faith and proving discriminatory intent, it reversed the burden of proof. It imposed on the State the obligation of proving that the 2013 Legislature had experienced a true “change of heart” and had “engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.”

The Texas court’s references to the need to “cure” the earlier Legislature’s “taint” cannot be dismissed as stray comments. On the contrary, they were central to the court’s analysis. The court referred repeatedly to the 2013 Legislature’s duty to expiate its predecessor’s bad intent, and when the court summarized its analysis, it drove the point home. It stated: “The discriminatory taint [from the 2011 plans] was not removed by the Legislature’s enactment of the Court’s interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy.” …

In holding that the District Court disregarded the presumption of legislative good faith and improperly reversed the burden of proof, we do not suggest either that the intent of the 2011 Legislature is irrelevant or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court. Rather, both the intent of the 2011 Legislature and the court’s adoption of the interim plans are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the 2013 Legislature. They must be weighed together with any other direct and circumstantial evidence of that Legislature’s intent. But when all the relevant evidence in the record is taken into account, it is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination.

The only direct evidence brought to our attention suggests that the 2013 Legislature’s intent was legitimate. It wanted to bring the litigation about the State’s districting plans to an end as expeditiously as possible. The attorney general advised the Legislature that the best way to do this was to adopt the interim, court-issued plans. The sponsor of the 2013 plans voiced the same objective, and the Legislature then adopted the court-approved plans.

On its face, this explanation of the Legislature’s intent is entirely reasonable and certainly legitimate. The Legislature had reason to know that any new plans it devised were likely to be attacked by one group of plaintiffs or another … Litigating districting cases is expensive and time consuming, and until the districts to be used in the next election are firmly established, a degree of uncertainty clouds the electoral process. Wishing to minimize these effects is understandable and proper …

Once the Texas court’s intent finding is reversed, there remain only four districts that were invalidated on alternative grounds. For three of these districts, the District Court relied on the “effects” test of §2. We reverse as to each of these, but we affirm the District Court’s final holding that HD90 is a racial gerrymander.

To make out a §2 “effects” claim, a plaintiff must establish the three so-called “*Gingles*factors.” These are (1) a geographically compact minority population sufficient to constitute a majority in a single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority’s preferred candidate. If a plaintiff makes that showing, it must then go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group.

The Texas court held that CD27 violates §2 of the VRA because it has the effect of diluting the votes of Latino voters in Nueces County …

The problem with this holding is that plaintiffs could not establish a violation of §2 of the VRA without showing that there is a “possibility of creating more than the existing number of reasonably compact” opportunity districts. And as the Texas court itself found, the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino opportunity districts that exist under the current plan …

The District Court similarly erred in holding that HD32 and HD34 violate §2. These districts make up the entirety of Nueces County, which has a population that is almost exactly equal to twice the population of an ideal Texas House district. (It can fit 2.0295 ideal districts.) In 2010, Latinos made up approximately 56% of the voting age population of the county.  *Ibid.* The 2013 plan created two districts that lie wholly within the county; one, HD34, is a Latino opportunity district, but the other, HD32, is not.

Findings made by the court below show that these two districts do not violate §2 of the Voting Rights Act. Under *Gingles*, the ultimate question is whether a districting decision dilutes the votes of minority voters, and it is hard to see how this standard could be met if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice …

HD90 is a district in Tarrant County that, unlike the other districts at issue in this appeal, was not copied from the District Court’s interim plans. Instead, the 2013 Legislature substantially modified the district developed by the District Court, and the District Court held that the 2013 Legislature’s creation is an invalid racial gerrymander.

In drawing HD90, the Legislature was pulled in opposite directions by competing groups. In 2011, the Legislature, responding to pressure from MALDEF, increased the Latino population of the district in an effort to make it a Latino opportunity district. In the process of doing so, the Legislature moved the community of Como, which is predominantly African-American, out of the district. But Como residents and the member of the Texas House who represented the district, Lon Burnam, objected, and in 2013, the Legislature moved Como back into the district. That change was opposed by MALC because it decreased the Latino population below 50%. So the Legislature moved Latinos into the district to bring the Latino population back above 50%.

In light of these maneuvers, Texas does not dispute that race was the predominant factor in the design of HD90, but it argues that this was permissible because it had “*good reasons* to believe” that this was necessary to satisfy §2 of the Voting Rights Act.”

Texas offers two pieces of evidence to support its claim. The first—that one of the plaintiffs, MALC, demanded as much—is insufficient. A group that wants a State to create a district with a particular design may come to have an overly expansive understanding of what §2 demands. So one group’s demands alone cannot be enough.

The other item of evidence consists of the results of the Democratic primaries in 2012 and 2014. In 2012, Representative Burnham, who was not the Latino candidate of choice, narrowly defeated a Latino challenger by 159 votes. And in 2014, the present representative, Ramon Romero, Jr., beat Burnam by 110 votes. These election returns may be suggestive, but standing alone, they were not enough to give the State good reason to conclude that it had to alter the district’s lines solely on the basis of race. And putting these two evidentiary items together helps, but it is simply too thin a reed to support the drastic decision to draw lines in this way.

We have previously rejected proffers of evidence that were at least as strong as Texas’s here …

By contrast, where we have accepted a State’s “good reasons” for using race in drawing district lines, the State made a strong showing of a pre-enactment analysis with justifiable conclusions. In *Bethune-Hill*[*v. Virginia State Board Elections* 2017], the State established that the primary mapdrawer “discussed the district with incumbents from other majority-minority districts[,] . . . considered turnout rates, the results of the recent contested primary and general elections,” and the district’s large prison population. The State established that it had performed a “functional analysis,” and acted to achieve an “informed bipartisan consensus.”

Perhaps Texas could have made a stronger showing, but it is the State’s burden to prove narrow tailoring, and it did not do so on the record before us. We hold that HD90 is an impermissible racial gerrymander. On remand, the District Court will have to consider what if any remedy is appropriate at this time.

Except with respect to one Texas House district, we hold that the court below erred in effectively enjoining the use of the districting maps adopted by the Legislature in 2013 …

It is so ordered.

***Justice Thomas, with whom Justice Gorsuch joins, concurring***

I adhere to my view that §2 of the Voting Rights Act of 1965 does not apply to redistricting. Thus, §2 cannot provide a basis for invalidating any district, and it cannot provide a justification for the racial gerrymander in House District 90. Because the Court correctly applies our precedents and reaches the same conclusion, I join its opinion in full.

***Justice Sotomayor, with whom Justice Ginsburg, Justice Breyer, and Justice Kagan join, dissenting***

The Court today goes out of its way to permit the State of Texas to use maps that the three-judge District Court unanimously found were adopted for the purpose of preserving the racial discrimination that tainted its previous maps. In reaching its desired result, the majority commits … fundamental errors along the way.

[On the merits] the majority elides the standard of review that guides our resolution of the factual disputes in these appeals—indeed, mentioning it only in passing—and selectively parses through the facts. As a result of these errors, Texas is guaranteed continued use of much of its discriminatory maps.

This disregard of both precedent and fact comes at serious costs to our democracy. It means that, after years of litigation and undeniable proof of intentional discrimination, minority voters in Texas—despite constituting a majority of the population within the State—will continue to be underrepresented in the political process. Those voters must return to the polls in 2018 and 2020 with the knowledge that their ability to exercise meaningfully their right to vote has been burdened by the manipulation of district lines specifically designed to target their communities and minimize their political will. The fundamental right to vote is too precious to be disregarded in this manner. I dissent …

[The] Court … asserts that the District Court legally erred when it purportedly shifted the burden of proof and “required the State to show that the 2013 Legislature somehow purged the ‘taint’ that the court attributed to the defunct and never-used plans enacted by a prior legislature in 2011.” But that holding ignores the substantial amount of evidence of Texas’ discriminatory intent, and indulges Texas’ warped reading of the legal analysis and factual record below.

The majority believes that, in analyzing the 2013 maps, the District Court erroneously “attributed [the] same [discriminatory] intent [harbored by the 2011 Legislature] to the 2013 Legislature” and required the 2013 Legislature to purge that taint. The District Court did no such thing. It engaged in a painstaking analysis of discriminatory intent under *Arlington Heights* *v. Metropolitan Housing Development Corp* (1977), which is critical to understanding why the District Court did not improperly presume that the Legislature acted with discriminatory intent.

Under *Arlington Heights*, “in determining whether racially discriminatory intent existed,” this Court considers “circumstantial and direct evidence” of: (1) the discriminatory “impact of the official action,” (2) the “historical background,” (3) the “specific sequence of events leading up to the challenged decision,” (4) departures from procedures or substance, and (5) the “legislative or administrative history,” including any “contemporary statements” of the lawmakers …

The District Court followed the guidance in *Arlington* *Heights* virtually to a tee, and its factual findings are more than “plausible” in light of the record. To start, there is no question as to the discriminatory impact of the 2013 plans, as the “specific portions of the 2011 plans that [the District Court] found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans, their harmful effects ‘continu[ing] to this day.’” Texas, moreover, has a long “history of discrimination” against minority voters.  “In the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost.”

There is also ample evidence that the 2013 Legislature knew of the discrimination that tainted its 2011 maps. “The 2013 plans were enacted by a substantially similar Legislature with the same leadership only two years after the original enactment.” The Legislature was also well aware that “the D.C. court concluded that [its 2011] maps were tainted by evidence of discriminatory purpose,” and despite the District Court having warned of the potential that the Voting Rights Act may require further changes to the maps, “the Legislature continued its steadfast refusal to consider [that] possibility.”

Turning to deliberative process … the District Court concluded that Texas was just “not truly interested in fixing any remaining discrimination in the [maps].” Despite knowing of the discrimination in its 2011 maps, “the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.”

The absence of a true deliberative process was coupled with a troubling sequence of events leading to the enactment of the 2013 maps. Specifically, “the Legislature pushed the redistricting bills through quickly in a special session,” despite months earlier having been urged by the Texas attorney general to take on redistricting during the regular session. By pushing the bills through a special session, the Legislature did not have to comply with “a two-thirds rule in the Senate or a calendar rule in the House,” and it avoided the “full public notice and hearing” that would have allowed “‘meaningful input’ from all Texans, including the minority community.”

There was [also] substantial evidence that the 2013 Legislature instead adopted the interim plans as part of a “strategy [that] involved adopting the interim maps, however flawed,” to insulate (and thus continue to benefit from) the discriminatory taint of its 2011 maps. Texas hoped that, by adopting the 2012 interim maps, the challengers “would have no remedy, and [the Legislature] would maintain the benefit of such discrimination or unconstitutional effects.” That strategy originated with the Texas attorney general, who was responsible for defending the State in the redistricting challenges.  He advised the Legislature that adopting the interim plans was the “best way to avoid further intervention from federal judges” and to “*insulate* [Texas’] redistricting plans from further legal challenge.” …

In the end, having presided over years of litigation and seeing firsthand all of the evidence, the District Court thought it clear that Texas’ “strategy involved adopting the interim maps, however flawed” so that the challengers “would have no remedy, and [Texas] would maintain the benefit of such discrimination and unconstitutional effects.” It is hard to imagine what a more thorough consideration of the *Arlington Heights* factors in these cases would have looked like. Review of the District Court’s thorough inquiry leads to the inescapable conclusion that it did not err—let alone clearly err—in concluding that the “Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans.” …

The majority resists the weight of all this evidence of invidious intent not only by disregarding most of it and ignoring the clear-error posture, but also by endorsing Texas’ distorted characterizations of the intent analysis in the orders below. Specifically, the majority accepts Texas’ argument that the District Court “reversed the burden of proof” and “imposed on the State the obligation of proving that the 2013 Legislature had experienced a true ‘change of heart’ and had ‘engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.’” The District Court did no such thing, and only a selective reading of the orders below could support Texas’ position …

The Equal Protection Clause of the [Fourteenth Amendment](https://www.law.cornell.edu/supct-cgi/get-const?amendmentxiv) and §2 of the Voting Rights Act secure for all voters in our country, regardless of race, the right to equal participation in our political processes. Those guarantees mean little, however, if courts do not remain vigilant in curbing States’ efforts to undermine the ability of minority voters to meaningfully exercise that right. For although we have made progress, “voting discrimination still exists; no one doubts that.” *Shelby County*.

The Court today does great damage to that right of equal opportunity. [It allows] Texas to use electoral maps that, in design and effect, burden the rights of minority voters to exercise that most precious right that is “preservative of all rights.” Because our duty is to safeguard that fundamental right, I dissent.