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

WENDY DAVIS, et al., §

Plaintiffs,

v. §

RICK PERRY, et al., §

Defendants.

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LEAGUE OF UNITED LATIN §
AMERICAN CITIZENS (LULAC), §
DOMINGO GARCIA, §

Plaintiffs,

v. §

RICK PERRY, et al., §

Defendants.

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EXHIBIT B
I. QUALIFICATIONS

I am a partner in the law firm of Andrews Kurth LLP, a law firm of about 400 lawyers founded in Houston in 1902. I am the attorney in charge of the firm’s appellate section, but I practice in both trial and appellate courts. I am Board Certified in Civil Trial Law, Civil Appellate Law, and Personal Injury Law by the Texas Board of Legal Specialization. I have been licensed to practice law in Texas since 1980, and have been admitted to practice before all state and federal courts in Texas and the United States Supreme Court.

I served as a state judge in Texas for 20 years, beginning in 1989 as Judge of the 234th District Court of Harris County, Texas. In my 11 years as a trial judge, I presided over 670 trials to verdict, including 454 jury verdicts. During part of that time I also served as the Administrative Judge for the 25 Harris County Civil District Courts.
In 2000, I was elected to serve as a Justice on the First Court of Appeals. Six months later, I was appointed as Chief Justice of the Fourteenth Courts of Appeals. Both of these courts possess intermediate appellate jurisdiction of civil and criminal appeals in ten counties including and surrounding Houston. During my three years on these courts, I authored 442 opinions, including 194 signed majority opinions.

In 2003, I was appointed as a Justice of the Supreme Court of Texas, where I served for six years. In addition to serving as the court of last resort in all civil matters, the Supreme Court has sole authority for licensing attorneys, is responsible for the lawyer discipline system in the state, and promulgates various professional rules including the Texas Disciplinary Rules of Professional Conduct. During my six years on the Supreme Court, I authored 122 opinions for the Court, as well as 16 concurring and 21 dissenting opinions.

With respect to recovery of attorney's fees, I have published two articles in legal journals or periodicals: *Proof of Attorney's Fees in Texas*, 24 ST. MARY’S L.J. 313 (1993), and *Proving Up Attorney’s Fees at Trial*, 28 HOUSTON LAWYER 29 (1990). I have also authored opinions on the issue, including the opinion of the Texas Supreme Court in *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006), which addresses segregation of attorney’s fees.

I have published numerous articles and editorials in legal journals and newspapers urging reforms to make litigation in Texas more efficient and less

II. SCOPE OF REVIEW

I was engaged by the Office of the Attorney General of the State of Texas to render opinions as an expert witness in this case regarding reasonable and necessary attorney’s fees claimed by certain Plaintiffs under federal law. *See* 42 U.S.C. §§ 1973(e) & 1988. I was not asked to assess or address whether the claimants were prevailing parties, but only the amount of a reasonable and necessary fee award should the Court decide they were. I have reviewed the motions requesting fees, selected pleadings in the case, the opinions and orders by this Court granting interim relief in February and March of 2012, and the Final Judgment dated September 4, 2013.

III. ANALYSIS APPLICABLE TO ALL FEE CLAIMS

Section 1973l(e) of the Voting Rights Act and Section 1988 of the Civil Rights Attorney’s Fees Award Act afford a district court discretion to award reasonable attorney’s fees to prevailing parties in redistricting and voting-rights cases. In calculating attorney’s fees, the district court first calculates the lodestar, multiplying the number of hours reasonably expended on the
litigation by a reasonable hourly rate in the local community.\(^1\) Next, the district court must consider the factors articulated in \textit{Johnson v. Georgia Highway Express, Inc.}\(^2\)

\textbf{A. Lodestar: Reasonable Rates in San Antonio, Texas}

The motions here assert hourly rates for attorneys up to $985. In my opinion, reasonable market rates for voting-rights cases in San Antonio are lower than most of those claimed, and rarely exceed $350 per hour.

The relevant hourly rates here are those for voting-rights cases in San Antonio, the community in which the Court sits.\(^3\) Although other markets may have higher rates, those rates are not the starting point for the lodestar without proof that hiring a non-local attorney was a necessity.\(^4\)

The most recent survey by \textit{The Texas Lawyer} of hourly billing rates in Texas found that average hourly rates in San Antonio run from $200 to $353 per hour (\textit{see Tab A-1})\(^5\):

\begin{footnotesize}
\begin{itemize}
\item \(^1\) \textit{McClain v. Lufkin Indus., Inc.}, 649 F.3d 374, 380-81 (5th Cir. 2011).
\item \(^2\) 488 F.2d 714, 717–19 (5th Cir. 1974).
\item \(^3\) \textit{McClain}, 649 F.3d at 381.
\item \(^4\) \textit{Id.} at 382. The affidavits of Davis plaintiffs Pat Pangburn and Roy Brooks are inadequate to constitute proof that competent local counsel were not available. Both merely aver that they left picking an attorney to Sen. Wendy Davis and Rep. Marc Veasey. \textit{See} Exhibits 14, 15 to Davis Plaintiffs’ motion [Dkt. # 193-14, 193-15]. But neither Sen. Davis nor Rep. Veasey provides any explanation as to why competent Texas counsel could not be located. These plaintiffs were free to choose Washington D.C. counsel, but that does not mean that Texas taxpayers should have to pay Washington D.C. rates when there are an abundance of experienced voting-rights attorneys in this state.
\end{itemize}
\end{footnotesize}
The same survey also shows that rates are substantially higher at large firms than they are at smaller ones, with average rates at firms with fewer than 30 attorneys again falling in the $200 to $350 per hour range:6

Hourly rates charged by major law firms often reflect items like prime lease space, recruiting, marketing, charitable contributions, employee pensions, or malpractice rates that small firms may not have to match. As all of the law firms involved here except Jenner & Block (an out-of-state firm) are much smaller than 30 lawyers, their hourly rates should fall in the same $200 to $350 range.

A range of $200 to $350 is also consistent with recent awards by federal courts in Texas voting-rights cases. In 2010, a three-judge panel of this Court

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Redistricting litigation is important and often complex, but as this case shows there are many attorneys and firms eager to participate. Such cases necessarily involve politics, the public interest, and a lot of publicity in a large state like Texas. Those factors multiply the pool of lawyers who are willing to take them, even at lower rates. They also attract political parties, public interest groups, and legal aid attorneys who generally charge or accept lower rates due to the public-service nature of their work. For example, Paul Clement, one of the most heralded advocates in the country, represented the State in its appeal to the United States Supreme Court in this case at an hourly rate of $520.\footnote{See Tab A-2 to Rios Declaration [Dkt. #845-1]; see also \url{http://www.texastribune.org/texas-redistricting/redistricting/abbott-elections-should-use-legislatures-maps/} (“Abbott hired Paul Clement, a noted Supreme Court advocate, to help his office with the case (at a rate of $520 an hour, which he called ‘a steep discount’).”); \url{http://www.burntorangereport.com/diary/11585/abbott-hires-520-per-hour-lawyer-asks-supreme-court-to-block-interim-maps} (“Abbott Hires $520 per Hour Lawyer, Asks Supreme Court to Block Interim Maps”).} Just as judges or lawyers for the State accept lower salaries due to the importance of their work, the importance of this litigation is in part the very reason that hourly rates are typically low.

One of the fee claimants cites an affidavit I signed in \textit{LULAC V. City of Boerne}, Civ. Action # 96-cv-808, which quoted reasonable hourly rates of $750.
for the late Greg Coleman (noted advocate and former Solicitor General of Texas), and $360 to $550 for other attorneys at his firm, Yetter Coleman, LLP (see Tab A-2). But I was asked in that case only for an affidavit relating to fees generally charged by such firms; I was not retained as an expert and reviewed none of the files, so my opinion was not intended to address voting-rights fees specifically. As the Court awarded no fees in that case, it does not change my opinions stated above.

Certainly, reasonable clients could agree to pay hourly rates higher than $200 to $350. But the question here is customary fees in the area; a defendant is required to pay a reasonable and necessary rate, not a premium rate the plaintiff may choose to pay for an attorney much in demand. Moreover, as with any other service, market rates are not governed by measures of intrinsic value; they are governed by the laws of supply and demand. As there is a large supply of attorneys willing to appear in redistricting cases at or below customary rates, it is my opinion that the customary and reasonable rates for attorneys in the San Antonio area for cases like this generally fall in the range from $200 to $350 per hour.

10 See, e.g., Fabela, 2013 WL 2655071, *4 (“[T]his court does distinguish between civil rights cases and complex commercial litigation”).

11 See Civil Action No. SA-96-CV-808-XR [Dkt. #93].

12 See Pugach v. M & T Mortg. Corp., 564 F.Supp.2d 153, 157 (E.D.N.Y. 2008) (“[C]ourts have acknowledged that a judicial determination of what is ‘reasonable’ for purposes of a fee award to be paid by the losing party to the prevailing party in a litigation is not the same as the reasonableness of a bill that a law firm might present to its own paying client.”).
B. Lodestar: Reasonable Hours Expended

1. Lack of success on appeal to U.S. Supreme Court

While I have not tried to determine generally whether the Plaintiffs here prevailed, in any case they are not entitled to recover fees for claims on which they clearly did not prevail. Both claimants seek fee awards for work performed opposing the State’s appeal of the Court’s order of November 23, 2011 implementing an interim map. The State prevailed on the appeal, the interim map championed by claimants was vacated, and the Supreme Court awarded costs against these claimants. Because neither was a prevailing party with respect to the U.S. Supreme Court appeal, fees for this work are not recoverable.

2. Fees for work before the Legislature acted

Both fee applications seek fees for periods before the Governor signed the new Texas Senate district map (on June 17, 2011). Until the new maps were adopted, any litigation about them was premature. Research, negotiations, and lobbying as part of the legislative proceedings were not part of the judicial proceedings that followed. The Plaintiffs cannot shift the cost of legislative research and activity to the State, as those are not recoverable. Accordingly, it is my opinion that fees are not recoverable for work done before the new plans were adopted and there was something to litigate about.

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13 42 U.S.C. § 1973l(e); Wilson v. Mayor & Bd. of Alderman of St. Francisville, 135 F.3d 996, 998 (5th Cir. 1998).
3. **Fees for work after this Court acted**

The Court held plaintiffs were prevailing parties based on the interim relief granted by this Court regarding the 2012 elections, and that all other claims were moot. The interim order was entered on or before March 19, 2012. Accordingly, it is my opinion that any fees incurred thereafter are not recoverable because they occurred after the only relief on which the claimants prevailed, and thus could not have contributed to it.

4. **Fees for work on other matters**

Both claimants seek fees for work performed on other cases. Such fees should be sought in the case in which the work was performed (to the extent claimants prevail there) and are not recoverable here.

5. **Duplication**

This case primarily concerns a single state-senate district. The motions seek fees for 8 attorneys from 4 different law firms plus an additional consulting firm. In the private sector, economic forces naturally limit this kind of overstaffing: clients will not pay for 8 lawyers when 1 or 2 will do. But in public-interest litigation like this, where attorneys count on court-ordered fees for part or all of their recovery, the absence of an independent client who is paying all the bills removes some of the disincentives to duplicate work.

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14 The number of attorneys included in each fee claim are: Davis (7) and LULAC (1). AngleStrategies, which claims fees of nearly $40,000, is an outside consulting firm that was retained by J. Gerald Hebert.
In calculating the number of hours reasonably expended, the Court “must eliminate excessive or duplicative time.” It is natural that advocacy groups and officeholders want their own attorneys in a redistricting case, but the number of people interested and affected by redistricting in Texas is limited (if at all) only by the entire population. Even if several attorneys agree to work cooperatively on a redistricting case, that does not make it reasonable and necessary for the defendant to pay for all of them when all of the claims made by the independent parties they represent are the same. The Voting Rights Act does not require that a governmental entity pay for multiple attorneys to file similar motions or appear at hearings when less would do. The fees claimed should be reduced accordingly.

C. Analysis of remaining Johnson factors

There is a strong presumption that the lodestar method yields a reasonable fee. But before making any fee award, courts also consider the following factors from Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).

1. time and labor required. My opinions on this factor are set out in part III(B) above and in the individual analyses of each claim in part IV below.

2. novelty and difficulty of the questions. While the redistricting process for the entire state was complex, this case was limited to challenging a single

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15 LULAC No. 4552 v. Roscoe Indep. Sch. Dist., 119 F.3d 1228, 1231 (5th Cir. 1997).

district in north Texas. And as all those demographics and voting patterns were thoroughly researched and analyzed in the legislative proceedings, that should have simplified them for the judicial proceedings.

3. skill requisite to perform the legal service properly. The skill needed by a single attorney or firm to handle every aspect of this case was substantial. But the skill needed by additional attorneys to adopt pleadings, motions, or claims made by others was minimal.

4. preclusion of other employment. Merely spending hours on this case rather than some other is not “preclusion of other employment,” as that would merely duplicate the time-and-labor-expended factor.\(^\text{17}\)

5. customary fee. My opinions on this factor are set out in part III(A) above.

6. fixed or contingent fee. A contingent fee may be higher than a fixed fee because of the risk of non-recovery. But reasonable fee awards are common if a party prevails in redistricting or voting-rights cases. And for the reasons stated in part III(A) above, many attorneys appear to be willing to bring suits like this despite the risk and the lower hourly rates because of the political and public-interest implications involved in the result.

7. time limitations imposed by the client or circumstances. Like most redistricting cases, this one had to be handled on an expedited basis. New

\(^{17}\) See Shipes v. Trinity Indus., 987 F.2d 311, 321-22 (5th Cir. 1993) (“If, for example, [plaintiff]’s attorney worked on nothing but this case, then this potential loss of income in refusing other employment is compensated for in the number of hours she billed in the instant case.”).
districts drawn by the Texas Legislature are generally effective for the next election, which is rarely more than a few months away. In my opinion, the fees here should be no higher than in other redistricting cases, as the exigencies are usually the same.

8. results obtained. My opinions on this factor are set out in part III(B) above, and in the individual analyses of each claim in part IV below.

9. experience, reputation, and ability of the attorneys. Some of the attorneys included here are very experienced and well-known counsel involved in redistricting and voting-rights cases, both in Texas and beyond. Yet as indicated by the rate charged by Paul Clement, 18 it does not appear that exceptional experience, reputation, and ability translate into anything like the fees that would be expected in other types of cases.

10. undesirability of the case. Given the politics, publicity, and profile of redistricting cases, redistricting cases do not appear to be undesirable to anybody except, perhaps the defendants.

11. nature of the professional relationship. A few of the attorneys and law firms in this case serve regularly as counsel for politicians, interest groups, or community groups like those they represent here. Accordingly, they are in some respects similar to the “captive” law firms often used by insurers, which bill at reduced rates in return for a steady flow of business. 19 These

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18 See part III(A), supra.

long-term relationships would probably not exist if these attorneys did not charge rates equal to or lower than other firms of comparable ability.

12. *awards in similar cases*. My opinions on this factor are set out in part III(A) & (B) above.

IV. ANALYSIS OF INDIVIDUAL FEE CLAIMS

A. Davis

The Davis plaintiffs seek fees and expenses of $616,813.45. For a number of reasons that claim should be reduced.

First, the Davis attorneys claim hourly rates from $340 to $985 per hour. As indicated in part III(A) above, those are not the customary rates for redistricting or voting-rights cases in Bexar County. Even assuming every hour all seven attorneys billed was reasonable and necessary, reasonable rates would reduce the Davis plaintiffs’ claim by $253,196.25.20

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<td></td>
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<td><strong>$253,196.25</strong></td>
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It appears that Ms. Amunson was a seventh-year associate at the time the litigation began in 2011. Ms. Lopez was a third-year associate at this time. Mr. Ubriani was a first-year when he
Second, various consultants, paralegals, and legal assistants employed by the Davis plaintiffs claim excessive hourly rates, ranging as high as $310. According to the above referenced *Texas Lawyer* billing survey, the average rate for a “Senior Legal Assistant” in San Antonio is $150 per hour.\(^{21}\) Even assuming that all of the non-attorney staff qualify for this title, and that all of the work they performed was reasonable, imposing a top hourly rate of $150 would reduce the Davis plaintiffs’ claim by $14,056.25.\(^{22}\) Further, the evidence does not establish that these non-attorney staffers qualify as senior legal assistants. For example, it appears that the entity claiming the most fees, AngleStrategies, is a political consulting firm.\(^{23}\) The Court should consider whether Texas taxpayers should be required to pay nearly $40,000 to a partisan political consultant in a redistricting case.

Third, the Davis plaintiffs claim fees of $16,250 for time expended before the Legislature acted. They also seek $100,976.25 in fees and $9,498.64

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</table>


\(^{22}\) See [http://www.anglestrategies.com/whoweare.html](http://www.anglestrategies.com/whoweare.html)

started work on the case in 2012, and Mr. Garber was a third-year when he performed worked on the fee application in 2013.
in costs for periods after this Court’s March 19, 2012 orders. For the reasons stated in part III(B)(2) and (3) above, these are unrecoverable.

Fourth, the Davis plaintiffs claim $135,430.38 for time relating to the appeal to the United States Supreme Court in this case. They did not prevail in that appeal.

Fifth, the Davis plaintiffs’ attorneys claim fees for work performed on other redistricting cases. In particular, the Jenner & Block attorneys claim extensive fees for work performed well in advance of the filing of this lawsuit that was clearly not for this case. For example, the Davis plaintiffs request fees for work in early August 2011—more than a month before the original complaint was filed in this case—for work performed by Jenner attorneys on matters such as reviewing a draft motion to postpone trial, coordinating the filing of an expert report, reviewing discovery, and researching and drafting “supplemental briefing re staying case.”24 None of this had anything to do with this case. All told, it appears that the Davis plaintiffs seek $55,241.25 for work performed on other cases, none of which is recoverable here.

Sixth, the Jenner attorneys used block-billing that makes it impossible to tell how much time they spent on a listed task. Further, many of the entries are vague and incomplete. For example, an entry for Caroline Lopez recites “Reviewed orders; phone call with G. Hebert in W.D. Tex. litigation.”25 Given

24 Declaration of Paul Smith [Dkt. # 193-10], Ex. B at 12-13. By comparison, Jenner & Block’s bills specifically note that some entries were for the “Senate Map Litigation.” Id. at 17.
25 Id. at 16.
that the Jenner attorneys performed work on more than one redistricting case in the Western District, this description is inadequate for the Court to tell which case she was working on, what she did, or whether the work she performed was related to claims the Davis plaintiffs actually asserted and on which they prevailed. For this reason, the Court should consider that the Davis plaintiffs appear to be seeking fees for work performed in other cases in an even higher amount than discussed in the preceding paragraph.

Finally, though the Davis plaintiffs did not bill for travel time, they do seek costs associated with J. Gerald Hebert’s and AngleStrategies’s travel from Washington D.C. to San Antonio in the amount of $7,312.27. As there has been no showing that hiring Washington D.C. lawyers and support staff was a necessity, those fees and costs should not be included for the reasons stated in part III(A) above.

B. LULAC

LULAC seeks fees and expenses of $99,815. Its lead counsel, Luis Roberto Vera, Jr., claims an hourly rate of $400 per hour. As indicated in part III(A) above, that is above the customary rates for redistricting and voting-rights cases in Bexar County. Again, assuming every hour billed was reasonable and necessary, a top hourly rate of $350 would reduce this claim by $9,667.50.

See supra note 4.
Although LULAC contends that it played an active role in this case, LULAC’s filings and Mr. Vera’s billing records make clear that the Davis plaintiffs carried the laboring oar in this litigation. In several instances, LULAC’s pleadings recited the Davis pleadings verbatim. The most apparent example of this is in the original complaints—the paragraphs of LULAC’s complaint differ from the paragraphs of the Davis complaint only when plugging in LULAC-specific information in place of Davis-specific information, such as party names. The majority of LULAC’s subsequent filings were jointly filed with the Davis plaintiffs; and when LULAC filed an individual pleading (such as its fee application), LULAC made sure to expressly incorporate everything already asserted by the Davis plaintiffs.

LULAC’s pattern of taking the lead from the Davis plaintiffs is likewise observable in Mr. Vera’s billing records. Out of the 193.35 hours submitted by Mr. Vera for reimbursement, 74.15 of those were spent “conferring” or “working with” Mr. Hebert and the Davis plaintiffs in some capacity. Over one-third of Mr. Vera’s claimed hours came from just conferring about the case with Davis representatives. To some degree, these billings reflect mere duplication of effort stemming from having more attorneys involved than necessary. The amount of fees sought should be reduced accordingly.

In addition, LULAC’s claim includes $2,200 for fees related to the parallel Perez litigation and also seeks $500 for fees related to the appeal in
this case to the United States Supreme Court. Those sums are unrecoverable for the reasons stated in part III(B)(2) above.

The LULAC claim also includes $1,900 for fees incurred before the Legislature adopted any maps for the 2012 elections, and $10,840 for fees incurred after this Court adopted the interim maps that governed the 2012 elections. For the reasons stated in part III(B)(2) & (3) above, those amounts are unrecoverable.

Finally, in addition to seeking changes to Senate District 10, LULAC also asserted challenges to districts in central Texas. Those claims were unsuccessful, and LULAC’s fee request should be reduced accordingly.

CONCLUSION

The fee claims here seek over $700,000 in reimbursement for 8 attorneys working at 4 different firms for a case primarily concerning a single state-senate district. Under the law, the prevailing parties are entitled only to:

- fees, costs, and expenses in litigation, as opposed to the legislative arena; limiting the claims to amounts incurred after the Legislature adopted the first maps in June 2011 requires reductions of $18,150;

- fees, costs, and expenses that led to the interim orders on which they partially prevailed; limiting the claims to amounts incurred before this Court issued the March 19, 2012 interim order requires reductions of $121,314.89;

- fees, costs, and expenses related to the claims on which they partially prevailed; eliminating such amounts related to the Supreme Court appeal requires reductions of $135,930.38; eliminating such amounts related to work performed on other cases requires reductions of $55,241.25;
Costs incurred by out-of-state counsel whose hiring was a necessity; absent such a showing, eliminating items related to out-of-state counsel requires reductions of $7,312.27;

hourly rates customary in the district where the Court sits; after applying the above reductions to hours billed for excluded periods and work, adjusting rates for the remaining hours billed requires further monetary reductions of $125,991.25.

The figures above are best estimates of the reductions that should be applied without double-counting any. For example, when a party charged above-market hourly rates for work done before the Legislature acted in June 2011, the fees should be eliminated if they relate to lobbying, and in the alternative reduced to local customary rates.

Dated: October 4, 2013

Scott A. Brister