ORAL ARGUMENT – 09/10/01
01-0728
RICK PERRY ET AL. V. Del Rio ET AL.
01-0810
PERRY ET AL V. COTERA
01-0827
IN RE BENTSEN, ET AL.

TAYLOR: The Del Rio case is the earliest filed congressional state case this round of redistricting. Indeed, it is the earliest filed case nationwide to the best of our knowledge. Filed 13 days before the 77th Legislature was called into session. Filed 3 months before the census data by block level that is necessary to draw congressional districts by the legislature. Filed 5 months before the first session ended. Filed 7 months before Gov. Perry decided that the legislative branch of government would no longer be involved this round in congressional redistricting. And filed 21 months before the election that gives rise to the alleged injury in the Del Rio case.

The injury in a congressional redistricting malapportionment case is not that the districts are malapportioned. The injury is that there is an imminent election coming up based on those malapportioned districts. And there is a significant difference.

The data that we use in March during the legislative session, that data is based on a census taken 11 months before. For anyone to suggest that when a trial judge in Texas in the coming days draws a congressional plan based on that data that that data is exactly up-to-date is fooling you. That data is already 11 months behind. And because of population shifts in Texas, the data will never keep up with folks who move around Texas.

It's not that the districts are out of line with perfect equality of population. The actual concrete injury is whether or not the legislative branch is not going to get the job done, so that there's an impending election based on a district plan that's unconstitutional. And of course because of the changes in population, Texas is now entitled to 32 congress people, not 30. But that's for the 108th congress, not the 106th when Del Rio filed the claim, not the 107th while the legislature was in session, but the 108th, which begins in January 2003.

So the question for this court in terms of rightness constitutional justiciability is whether or not a law suit filed on Dec. 27 of last year in fact alleges at the time of its filing as this court has taught us in Waco v. Gibson was right and alleged concrete injury.

We submit that under no set of circumstances is a concrete injury in existence before the legislature has even had a chance.

HECHT: If it wasn't, when was it right? When were the issues right?

LAWYER: We believe there is no doubt that it was right on July 3. The reason for that is because Gov. Perry elected, and he's the only person in Texas who has this right to so elect, not to call a special session. What that meant is that no longer would the legislative branch of gov't be involved in the redistricting process.

OWEN: What if he hadn't sent that letter?

LAWYER: I still believe that a right claim would exist, because at some point you've gotten so close to the election, that there will be an imminent injury to a voter.

HANKINSON: Why wasn't there imminent injury when the legislature went out of session and had not formulated a redistricting plan?

LAWYER: On May 26, before Judge Davis in Austin when we were trying facts relative to the plea to the jurisdiction that we filed, we put into evidence a letter from Gov. Perry. That letter was encouraging both members leading the house and senate to try to continue to work together. In 1971, 1981 and 1991, we've never had a congressional plan passed in the first regular session. It's always been a special session.

HANKINSON: But in Patterson, the rightness doctrine that we apply in Texas does not require actual injury at the time of filing in order to determine whether a claim is right at the time the case is filed. We actually also have a standard that if injury is imminent. Why at that point in time when we know that we're that far down the process can we not say that injury is imminent?

LAWYER: I believe that you cannot draw a line - for example, the end of the first legislative session and expect that rule to apply for every single case that's filed in congressional redistricting decade after decade for this reason. For example, if the facts show that at 11:59 pm on sine die, one vote was lacking to be able to get a congressional plan passed, and at 12 o'clock, a press conference is held, the Gov. and the leaders say that they've been able to work together and have a strong belief that a legislative session in special session will give rise to the enactment of a plan. And in fact they meet two days later and enact a plan. Those facts I just articulated aren't made. In fact if you look in 71, 81, and 1991, that's what happened. They worked together and got it done in special session.

HANKINSON: But that's a different circumstance than the one we have here - where no progress had been made apparently.

LAWYER: I agree with that.

HANKINSON: So what is wrong with a bright line rule that would look to sine die and the availability and detailed census data as being a test for testing the rightness of a case at the time it was filed to challenge redistricting?

LAWYER: I believe that there would be no reason to have a bright line rule for justiciability from a constitutional point of view in redistricting. There is no bright line rule for any other type of threshold case. I believe the rule is already in the Planned Parenthood case to which you have mentioned, and in Gibson, because we have to take a snapshot in time of the lawsuit that was actually filed at the time that it was filed and ask ourselves the question, is harm imminent?

HANKINSON: I understand. But why wouldn't a bright line rule in this instance in determining imminent harm in fact be helpful to the jurisprudence of the state in redistricting cases?

LAWYER: Because I think it would depart unnecessarily from the constitutional justiciability rules that you've already laid out for every other type of case in Texas.

HANKINSON: Why isn't that consistent with the justiciability rules?

LAWYER: Because the consistent rule is whether or not there's a concrete injury at the time the suit is filed. If someone, for example, as in this case filed a lawsuit on May 24 in Houston, I believe that the record is clear that a legislative impasse certainly existed by May 23. Because as the legislative council website that we've cited in the brief asked the court to take notice of says: all of the deadlines, the milestones, had come and gone by that point. And so if you believe that a legislative impasse could occur sooner than the Gov's decision that the legislature will have no role anymore, then drawing the line at sine die does not take into account, as you said we must in Bland, what facts were in existence prior to the time the lawsuit was filed.

OWEN: Assuming the Governor did not send a letter and we didn't know whether the Governor intended to call a special session or not. It's now Sept., he's not called one. You said at some point that there would have to be a line drawn. Where would you draw that line and why?

LAWYER: I believe based on past history it's sometime in the month of August. If the Governor does not speak as to whether the legislature will be called back into session, then there is some point at which the judiciary must take over.

OWEN: Well how do we pick a day?

LAWYER: I don't believe it's susceptible to a specific date.

OWEN: How do the courts resolve that?

LAWYER: I think the courts have to take evidence. They have to consider the circumstances of what was transpiring at the time.

OWEN: So one lawsuit was filed Aug 15, the next is filed Aug 16. Do we call all the legislators _____ have them testify in a trial and decide what?

LAWYER: I believe if two cases were filed that close together, then there would have to be determination made on pleas to the jurisdiction if one was even filed as to whether or not the first filed case was right. In this case, the first filed case in Austin was filed last year, not this year. And I might mention, and it's in the record, when another lawsuit was filed one day later, Dec. 28 in Federal court in the Eastern district called Mayfield, I filed a motion to dismiss and that 3-judge panel consisting of Judge King, Judge Folsom, and Judge Hanna unanimously said that it was not constitutionally nor was it prudentially right.

That decision was on April 26 in Mayfield. Also in Lee, which was filed in March, a federal case decided the same day. And on May 8, a third federal decision consisting of King, Ferguson and Smith...

HANKINSON: But we've got Cotera out there on May 31. Again, we're trying to get a broad principles of justiciability and rightness _____. What guidelines can you give us?

LAWYER: The guideline is to determine the facts and whether they are right at the time the original petition is filed. This court need not go any further than what it's already articulated in Planned Parenthood and in the Gibson case. Subject matter jurisdiction is a threshold question. It cannot be waived. In the Del Rio case at the time that lawsuit was filed, it was mere speculation, absolute surmise that the legislature wouldn't get the job done. Our opponents believe that the judiciary rather than the legislative branch of government should get the first crack on congressional redistricting. They filed suit before the legislature even had its chance. The federal court disagreed with that.

HECHT: Was the federal court wrong in Mayfield II?

LAWYER: If you look at the Mayfield II decision of Higginbotham, I think it's perfectly consistent with our position. Because in Mayfield II, it was clear that Judge Higginbotham believed they had subject matter article 3 constitutional jurisdiction. It's also clear they believed they had prudential jurisdiction.

HECHT: But Mayfield II was filed before the end of the session.

LAWYER: That's right.

HECHT: By a census data. So that would argue that your Art case is the first filed right case.

LAWYER: That's exactly correct. If you combine the Judge King opinion with Judge Higginbotham opinion, King tells you Dec. is too early, March is too early. And if you look at the Higginbotham decision it tells you April is ok, and May is okay. If you apply those federal decisions together to the state's situation, you are correct that the ART case would be the first filed right case, because there was a legislative impasse by the 23rd, and the case was filed on the 24th.

HECHT: He also rejects the arguments though that cases cannot ripen. That's contrary to your position.

LAWYER: On prudential jurisprudence there is a significant difference between constitutional rightness and prudential rightness. This court has made that imminently clear in several of its decisions saying: now wait a minute, subject matter jurisdiction is something we have to decide at the get go - a snapshot in time. But even if you have subject matter jurisdiction perhaps there are reasons for judicial economy, for not impetuously jumping in and interfering with the legislature, that we're going to wait. And that's called prudential rightness. And both on the state level and the federal level, we have those differences.

JEFFERSON: Have you established conclusively a legislative impact on the 24? Is that conclusive or is there a fact question?

LAWYER: We believe it was a conclusive determination.

JEFFERSON: There is no way as a matter of law that the legislature could have at that point in time adopted _____?

LAWYER: That is our position, and I believe that our opponents will concede that point. In fact, our opponents are on the record saying by May 8, which I think is too early. Because by May 10, there was still time for the house to pass a HB. By May 18, there was still time for the senate to send a bill to the house.

HECHT: They could suspend the rules.

LAWYER: Absolutely, and that would be a factual determination.

HECHT: Even on the last day.

LAWYER: That's true.

PHILLIPS: This court had an opinion that came out May 19, and the legislature had no problem reversing it by statute _____.

LAWYER: You're exactly right that the legislature can suspend its rules. But the question is whether or not at the time the lawsuit was filed on Dec. 27, the case was right.

PHILLIPS: Well we were asking about May 24.

LAWYER: On May 24, it was clear from the evidence below that the legislature was at an impasse during the first session. Now I argued below and continue to argue today that we think the better rule is when the legislative branch of government is no longer going to be involved, and

the Governor is the one who makes that call. And he made that call on July 3.

HECHT: The problem with that is it gives him a lot of power over which case is going to be first filed, and which case is going to be dominant.

LAWYER: He's the only individual under our Texas constitution that the voters have empowered to decide if the legislature is going to get the job done or not when it fails to do so in the first session. That's his decision.

JEFFERSON: What's the last day he can make that decision?

LAWYER: There is no last day. He could decide that tomorrow.

JEFFERSON: Or he could decide it till the end of Sept or even Oct 1?

LAWYER: Yes. At anytime.

JEFFERSON: And that's the deadline the federal court has set for the state to work out the redistricting.

LAWYER: That is correct.

PHILLIPS: He could still a special session today.

LAWYER: He could.

PHILLIPS: What would that do to your position?

LAWYER: I believe that the Rivas case would nevertheless be ripe, because he has actually said that he won't. So changing his mind doesn't then cause that case to be unripe. We have an election that is coming up and a very real Oct. 1 deadline. And so it wouldn't be moot either.

O'NEILL: But it sounds like you want to draw bright lines on that end, but then when you go back to the Del Rio case, you don't want to draw a bright line there. You want to talk about probabilities at this end, but on Del Rio what's wrong with saying that the Texas Legislative Council revised population figures didn't indicate that the case was ripe at that point in time. Why do you have to wait till the formal census data?

LAWYER: Two answers. We are arguing a bright line. The bright line is the date that the lawsuit was filed. To answer your question though, there was no way to actually get a remedy. The lawsuit was asking for a 32 district plan. We didn't have the data nor do we legally have the right to put into place the 32 district plan back in December.

O'NEILL: But doesn't brightness involve injury, and aren't we talking about injury to the one voter representation?

LAWYER: Absolutely. And the concrete injury is not the existence of a malapportioned district. It's the existence of a looming election with not enough time and the election is going to occur under that unconstitutional district.

O'NEILL: And do you have authority for the proposition that that's the injury we look to in making this determination?

LAWYER: I believe Terrasas(?) v. Ramirez would bear that out, that the injury that we're looking for is whether or not there has been a plan that's passed that's illegal, as in Terrassas(?), which the allegation was, or there's no plan and there is not enough time to get a plan in place before the impending election.

HANKINSON: I'm a little bit confused. In response to an earlier question I asked, you indicated that a bright line ruling in redistricting cases would not be appropriate. Yet I think I just heard you say that you are advocating a bright line rule. So I'm a little bit confused. Can you straighten that out for me please?

LAWYER: The bright line rule I'm speaking of is the rule that should apply to all cases, not just redistricting cases. And that is at the time the lawsuit is filed was it justiciable? That's what this court has taught us in Gibson, and that's what the rule should be here. I'm not suggesting that redistricting cases should be given some arbitrary bright line rule like sine die, because the facts and circumstances every decade will depend necessarily on whether or not there's a legislative impasse. This time there was on May 23. Next time there may not be.

PHILLIPS: Have any Texas courts taught us that bright line rule before this?

LAWYER: I believe the Planned Parenthood case specifically talks about at the time the lawsuit is filed. And so by virtue of those words, I believe we understand from a constitutional power situation, you must make the determination at the beginning. And this court has been clear...

HANKINSON: Aren't you taking those words out of context in terms of the way that case was decided? That case was actually decided based on the totality of the record that was presented to the TC, which meant that testimony that was offered after the filing of the lawsuit was relevant to the determination of rightness.

LAWYER: The dissent specifically Judge Hecht when you were talking about the fact that we've got to be careful when the courts sua sponte is deciding whether there's jurisdiction. We need to give every inference to the plaintiffs and their pleading and take evidence.

HANKINSON: I just don't read Patterson to stand for the propositions since there were no

question about timing in terms of determining the brightness in the case. There's no question the dominant jurisdiction at issue. And I'm a little bit confused by your reading Patterson so restrictively in light of the totality of the Patterson opinion and the way it was decided.

LAWYER: The way I read Patterson is that the difference between the majority and the dissenting opinion was whether or not the plaintiff had an adequate chance to show jurisdiction. In our case they've amended twice.

HANKINSON: Patterson was not a dissent. It was a concurring opinion related to standing as opposed to rightness.

PHILLIPS: You concede this is not the federal rule?

LAWYER: Well we believe that the federal and the state rule are conterminous as far as federal, constitutional and prudential rightness is concerned. The differences between the two federal court opinions is that the second opinion is talking about prudential rightness, the first opinion is talking about art. 3 rightness. This court has said that the separation of powers principle stops and prohibits the issuance of advisory opinions. Somebody in the executive branch, like the AG, may be able to give an advisory opinion, but not a court of law. And so for those reasons, the first filed case - the Del Rio case - was not ripe and should be dismissed.

The fact is as it was talking about standing my point simply is that the words it chose to decide whether you have the power or not is at the time the lawsuit is filed. Because if you do not, you must stop and dismiss the case at that moment. And for those reasons, we ask that the petitions be ruled upon in our favor, and that we go to trial immediately in Houston, Texas as soon as possible.

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TERRELL: I would like to direct my argument to the questions that I hear from the court. Number 1, we have a difference of opinion with the AG with respect to the date when the suit was right - when any suit could be right. And we do argue for a bright line rule. And the bright line rule is very simple. It is not until the legislature under its own rules has had an opportunity to act. The legislature had that opportunity only after Del Rio, and that opportunity ended unless it did something which it had never done before in redistricting, to change its rules. Its rules required that the house act by May 10 on any bill that originated there; and by May 18 on any bill sent to it by the senate. That has never changed in redistricting. That is a time when under Patterson and Waco, the injury became likely. And the question is whether it's likely, and not that injury had occurred, and whether there is to be any conjecture about future events.

HANKINSON: They why isn't Cotera the first filed right case?

LAWYER: Because Cotera was filed after sine die, but long after the power of the

legislature under its own rules terminated on May 18 - thirteen days after. In fact, ours was filed 6 days after that power terminated.

HANKINSON: We've been hearing from Mr. Taylor in responses to some earlier questions that certainly the legislature could have suspended the rules. And so we didn't know that injury was likely at that point in time. What's your response to that?

LAWYER: The legislature could have suspended its rules. The governor could have called a special session. There are many could have's. But none of them rose to a likelihood _____ not to defeat the fact that under the rules existing, published for everyone to see, that there was a likelihood of injury.

HECHT: But what if there had been discussions on May 8 that they were close and they would make a decision but they would have to suspend the rules. Would that affect the rightness decision?

LAWYER: Discussions I don't think would. Because you would have to look in fact to see if the rules had changed before the rules themselves decided that they had not acted. Now there's always speculation at the end of every session, and there's always speculation about calling a special session. But I really think this court is on a slippery slope. And I do agree with the bright line if you start supposing about what the legislature might do after its own rules expire and what the governor might do.

PHILLIPS: Well why isn't it a slippery slope to say that courts in the State of Texas can be entertaining this issue while the legislature is still in session?

LAWYER: I don't think so because the fact is under their own rules, the time has elapsed for them to act. Now it's not to say that they couldn't change those rules possibly, but it would take a heroic effort to do that. And in fact, that is more of an effort than one man, the governor, deciding to call a special session. It is more unlikely than the governor calling a special session because of the politics involved as a practical matter.

O'NEILL: But if we're talking about probabilities what's wrong with drawing the bright line when sine die day comes up? What's wrong with that?

LAWYER: Because I don't think that it deals with the kind of organic inquiry that this court engaged in in other decisions on justiciability.

O'NEILL: But doesn't it keep this out of the speculation as to what might or could happen?

LAWYER: I think that going with the legislature's own rules keeps you out of speculation. I think that you are speculating that there won't be a special session if you go with sine

die possibly. There is less speculation in fact on the question of whether the legislature is going to undertake an heroic vote which has never occurred in redistricting. And so I don't think it can change its rules.

O'NEILL: You're still into a squaring match. You're still into prognostication which you wouldn't be to sine die and therefore why not take that course?

LAWYER: Respectfully you're not into a swearing match because all you have to do is look at the legislature's rules. There are in place. You don't have to take anybody's word for the rule.

O'NEILL: Let's say there were a bill on the table and that there was a tremendous likelihood that they would suspend the rules. Couldn't you have testimony to that effect, that there's an amendment to suspend the rules and go ahead and pass the plan beyond the dates?

LAWYER: I suppose that we can imagine many things. That would be one thing that we could imagine.

O'NEILL: What if that were the case? Wouldn't you have people prognosticating about what was going to happen?

LAWYER: I think not. You can have people prognosticate, but I think the court would still have jurisdiction on May 10, if in fact that had not occurred by the time that the May 10 and May 18 dates had gone by, which they have here.

JEFFERSON: What would happen in that event if the legislature then decided to suspend the rules and take on redistricting, and you have the court cases pending because it was filed after May 18? What would they court do? Would they abate, suspend itself or what?

LAWYER: Well first, that's the same question that could come up if you adopted a sine die rule, and then the governor call a special session. So that's the problem with bright line rules. But under that circumstance, which has never, ever happened in redistricting, then I think that the court could well lose jurisdiction under an organic test. That's the problem with just saying sine die is ever and evermore the rule. You have to look at the particular circumstances.

JEFFERSON: So you're saying the opposite then. The court could acquire jurisdiction on May 19, and then lose it because the legislature undertakes to...

LAWYER: It's possible that that could happen. I can't say that that wouldn't happen. And that's why I think that you need to be careful with bright line rules. But if you go to a bright line rule, you need to respect the bright line rule as it is stated by the legislature, who after all are supposed to in the hierarchy be the one to deal with redistricting.

There's one other point that I want to deal with and it deals with your question Chief Justice. The federal courts have the same rule as Texas has announced in the Waco and the Patterson cases. It looks to what the situation was at the time the suit was filed. Moore practice says that. All of the cases that the other side cites...

HECHT: Well it doesn't cite any authority for that _____.

LAWYER: And all of the cases that the other side cite are not in a dominant jurisdiction context. They are in a judicial convenience context.

HECHT: It is strange that Moore does have that little paragraph and no case is cited.

LAWYER: In any case, I do believe that to follow state court principles is what you're here about. Justiciability is a procedurals quintessential state court issue. And I would ask you to consider a bright line rule. The rules of the legislature itself, that's an organic set of rules that can change. You don't have to just go with sine die which ignores special sessions. But in fact goes with what the legislature itself is doing. And they are the ones charged with this responsibility.

HECHT: How long do you estimate the trial on the merits will take?

LAWYER: The Austin court did not set a schedule. The Houston court did. The Houston court set an outside time of 2 weeks. In fact, she has allotted hours among the parties that would take less than 2 weeks. So I would say that it would take less than 2 weeks for us to have a decision. All of which is important because of the Oct. 1 federal deadline set by the 3-judge court in Tyler.

HECHT: Is it your view that that deadline too has some flexibility in it, that if the state courts were on the verge of getting a plan final on appeal, that the federal courts would be obliged even if they went forward to take a look at that plan?

LAWYER: I believe so. Because 1), we would not start trial in Tyler until Oct. 15, so you could tack on 15 days. But that aside, there is the US SC decision in _____ v. _____. And in that case, the SC was pretty strong in saying that federal courts should stay their hand until such time as within a reasonable time the state, and that includes the state courts, have had time to act So if a state trial court were in trial and had a deadline that was reasonably within October, I think the federal courts should not act.

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RELATORS/RESPONDENTS

SMITH: The rule being advocated today by the Governor and Secretary of State with respect to rightness is, in my opinion and I think this is supported by the case law, is an utterly new rule, a rule with no basis either in the case law of this state or in the federal case law. And it is a rule that is being advocated primarily because it serves their purpose of allowing them as defendants to

pick and choose when and where they are going to be sued on congressional redistricting.

That rule, as I say, is completely unsupported in the case law. There is not a single case cited in any of the briefs filed in this court...

HANKINSON: How do you characterize that rule?

LAWYER: The rule as I understand it would be that if an original petition is filed at a time when the case is unright, nothing that can thereafter happen can ever bring that case into the jurisdiction of the TC.

O'NEILL: Do you agree with the distinction they have drawn between constitutional right and prudential rightness?

LAWYER: There is such a distinction, but there is no case in the federal system that has ever relied on that distinction for these purposes.

O'NEILL: Well let's say you've acknowledged that distinction and you think it has some merit. And for prudential reasons, why would we do a relation back doctrine for rightness to allow Del Rio to become right for dominant jurisdiction purposes? Wouldn't that allow then pre-empted suits now to be filed for the next census10 years later?

LAWYER: Assuming that Del Rio was not right in Dec., and I think that's an open question, although I don't think the court needs to reach it, the right way to deal with it was to have a plea to the jurisdiction set for a hearing immediately. What happened instead here was the plea to the jurisdiction was filed in Jan., but it wasn't set until May.

O'NEILL: It seems to me those are two distinct inquiries that the court has to make. Whether for dominant jurisdiction purposes and prudential reasons, even though a case may ripen for constitutional rightness, that for prudential reasons we should not allow the type of forum shopping that relation back would permit.

LAWYER: It may well be that if you hold that the case was not fully right for all purposes until May 8, that it should not relate back for dominant jurisdiction purposes. But there is no reason to say that the Del Rio amended petition filed on May 8, which was at a time when it was fully right, there was a complete legislative impasse and everybody knew there was not even a serious proposal being floated in the legislature for a congressional map, that petition is the second petition filed in any court in the State of Texas, and there's no reason why that one should not be treated...

O'NEILL: You're talking about the amended petition?

LAWYER: Yes.

O'NEILL: Again, that's relating back. That's arguing for a relation back. And my question to you is, isn't that a bad precedent for prudential reasons because it allows forum shopping.

LAWYER: I don't think I'm arguing for a relation back, because I'm saying the date ought to be May 8. It should not be Dec. 27. And that the amended petition - it should not make a different whether you file it with the old docket number, or a new docket number. You file the petition which relates jurisdictional facts, which are valid and make the case right as of that date. A rule that says because you chose...

O'NEILL: So then you agree with their argument that you look at the likelihood of the legislature acting?

LAWYER: Oh yes. It's a clear question of likelihood of the failure of the legislature to do its constitutional duty.

HECHT: But that's just imponderable whether they will really do it or not.

LAWYER: It is a difficult question. And if the court is of the view that a bright line rule should be adopted, it seems to me very clear that the only serious candidate for a new bright line rule would be the sine die rule, which is supported here both by Speaker Laney and by it looks like Lt. Gov. Ratliff in his most recent filing. A rule which gives a certain amount of respect to the whole legislative process and says we'll let you finish it, get to May 28, go home, and then the case would be right.

HECHT: The problem with that rule is suppose they say on sine die, we got 95% of the way there, as they have in the past, but we can't finish it until a special session. The Governor says don't leave Austin, it starts on Monday.

LAWYER: You could have a bright line rule with an escape clause which says if the governor and the legislative leaders are looking like they are about to keep going, then that's not really sine die. But in a situation like this one where the impasse was just as clear on May 8 as it was on May 24, as it was on May 28, the governor then says I'm not even going to call you back into session until you show me that the two parties can get together and come up with a map. There was never any real hope of happening. In that situation it would seem like sine die would be a good bright line rule if you want to go with a new rule.

HECHT: Is there any jurisprudential justification for spending this much energy litigating the forum, the selection of the forum?

LAWYER: In a redistricting case it is relatively an unusual animal, and this kind of thing does happen.

PHILLIPS: We're of the opinion, but maybe we're not well informed, that in most states

there is some administrative rule that takes care of cases of statewide importance. Is this kind of litigation common around the nation?

LAWYER: It is somewhat common. There are many states though where the rule is that you bring a case of this kind in the state capitol, which solves the problem. I don't think the court has to necessarily adopt a venue rule like that. But in terms of trying to minimize the problem, a bright line that says while the regular session is in session we will respect the legislature but absent special circumstances we will assume that the litigation process begins if the legislature has failed its duty on the date of its adjournment...

PHILLIPS: There is this body of jurisprudence out there from the states that don't have that kind of rule. Have any principles developed that we could look to?

LAWYER: I don't know of any cases which specifically addressed the question of how you apply the usual rightness, likelihood of imminent injury test in the redistricting context. But it is very clear that there have been a number of cases that have been filed during legislative sessions, including Terrasas(?) 10 years ago.

PHILLIPS: But Terrasas(?) was an attack on the method the legislature was using. It's entirely different.

LAWYER: That's true. But it is not unusual for cases to be filed at a time comparable to the May 8 filing, which is to say everybody knows the legislature is about to end and the process is about to fail, and there's no particular magic to that date. That's the way the usual rightness rule works. It has the downside of being relatively vague. On the other hand, it is the way the rule has worked in every other context.

PHILLIPS: If Associated Republicans of Texas had filed a suit on May 7 in Harris county, would that have trumped?

LAWYER: It certainly would have been right. I don't think that May 8 was the day - that week was the week when bills had to be out of committee to have any realistic prospect of going through either in the house or the senate. And so by that time it was completely clear to anybody who was observing the process. But I wouldn't say that the 8th and the 7th is some magic line. I do think these things have a certain amount of gray area if you're talking about a likelihood of imminent injury test. If they had done that, I think that they would probably be in a dominant jurisdiction position.

HANKINSON: What is the rule of dominant jurisdiction that should be applied? First filed, or first right case filed?

LAWYER: The general rule of dominant jurisdiction is even if your initial petition is defective and doesn't state a valid claim, if you later on fix it, there is a relation back. That's what

Cleveland v. _____ says.

O'NEILL: But that's a defect in pleadings.

LAWYER: Yes.

O'NEILL: Which is quite different from rightness.

LAWYER: It makes sense to say you can't acquire dominant jurisdiction if you don't have jurisdiction. I don't have a problem with that. In this instance then, it really doesn't make a difference if the court thinks there was valid jurisdiction of the May 8th petition.

HANKINSON: Then your point is is that you agree that the dominant jurisdiction rule should be the first right case filed?

LAWYER: I do agree with that. I think that that is not a problem. And I think then the only real argument that the defendants have here is that somehow you should ignore a petition that was filed on May 8 because it was filed in the existing litigation rather than as a new case. And there is no such law.

RODRIGUEZ: Just to be clear. Are you conceding that the Dec. 27 filing of the year 2000, that when that was filed the case was not right?

LAWYER: I do not concede that. I don't think it needs to be decided. But because of the nature of the right at stake, which is a two-fold right under the US SC's case law, it's a right not just to vote equally but to be represented equally, to live in a district which has the same number of inhabitants as the other people's districts. But I think the injury is right the minute that it becomes clear what the census figures are going to show, that if you're living in an over-populated district, you are then less well represented than people in smaller districts.

JEFFERSON: So you don't think you ever have to await the legislative process on redistricting?

LAWYER: I think you're entitled once the census numbers come out to get a declaratory judgment that there's an injury occurring that is a violation of the 1 person/1 vote doctrine.

JEFFERSON: So the legislative process has no bearing on that?

LAWYER: It doesn't prevent you from getting that limited relief. I think the courts could not properly at that point order into place a new map until the legislative process has ended.

JEFFERSON: Well if they couldn't order one, then why is there jurisdiction?

LAWYER: There is jurisdiction to declare that the violation is occurring and that the state has an obligation to fix it. But I think then the proper thing for the court to do is to allow the legislature its regular session to fix it, and then go forward if it doesn't do so.

BAKER: But that goes back to the argument that Justice O'Neill expressed, that you could file tomorrow for 2010 and just wait.

LAWYER: The SC has said the census numbers are presumptively conclusively presumed valid for 10 years. And so until the next census numbers come out 10 years from now, if the districts are equal under this census, there is no way to challenge them until the next census comes out.

O'NEILL: So that filing the day before the census figures come out would not be right?

LAWYER: It was probably not right for 12 hours. It was right the next morning.

O'NEILL: So you agree on the 27th it wasn't right?

LAWYER: If the numbers were not out for 24 hours after that, I don't think that makes a difference because I think cases can ripen, but if there were such a rule that they can't then it was not right the day it was filed.

BAKER: I was interested in your opening statement that the rule that rightness is determined at the time of filing suit is unsupported by any authority. And so I would like for you to tell me what you think about what we said in Gibson.

LAWYER: Gibson was a case where there was only one petition filed, and there was no argument about any subsequent developments making the case right. When the case got to this court, the issue of rightness was raised for the first time on appeal, and the court said that we will undertake a review of the record to see if there's any evidence in the record. All of the evidence in the record was before the original petition because the petition had been dismissed. There was no factual development in the TC. And the court said that we will look at developments before the single petition that was in existence. It based that decision on the Texas Association of Business decision. And if you go back and look at that, which is cited about a dozen times in the Gibson case, what that decision says, Justice Cornyn's opinion says, it is reasonable to expect plaintiffs when jurisdiction is challenged in the TC to include in their petition the jurisdictional facts that established jurisdiction. And the reason that that is reasonable is because plaintiffs in the TC have the opportunity to amend their petition to add any jurisdictional facts they need once the jurisdictional issue is raised. So that opinion is fully consistent with the proposition that an amended petition can establish jurisdiction even if there wasn't jurisdiction on the basis of the original petition.

Then when we get to the Waco, Gibson case, there was only one petition and I think what the court was doing was saying we will look at the facts that existed by the time you file your one petition. If you're talking about things after that, we're going to send it back without

prejudice and say you can file a new case with a new petition and rely on new facts. But there is nothing in the case that dealt with the question of developments after the petition was filed. And nothing in the case that dealt with the significance of an amended petition because there was no amended petition.

BAKER: The question is, if you can amended what facts can you put in your amendment? Should they relate only to the fact that existed at the time the suit was filed, or before, or do you have the opportunity to put in new facts so you say in your view we're now right but for purposes of jurisdiction don't you decide when its filed? Don't we have some cases that say that even in Texas?

LAWYER: The cases are entirely on the other side. Going back to 1889 in the Dalton v. Rainey case, this court said (this was a case which was brought to collect a debt that hadn't come due yet and when it got up to this court they argued that the case should never have been within the jurisdiction of the court because it was filed prematurely) and this court held in 1889 there was an amended petition that was filed after the debt became due and therefore there was no problem with the case having gone to judgment and no basis to overturn the judgment.

O'NEILL: But none of this answers the jurisprudential reasons for dominant jurisdiction determining that you can't ripen over time for purposes of determining dominant jurisdiction.

LAWYER: But I don't think there's any prudential or policy reason why a subsequent petition which alleges valid jurisdictional facts and could just as easily have been filed with a new docket number instead of an old document number should be ignored for purposes of dominant jurisdiction. It doesn't accomplish anything.

O'NEILL: Except for the very purposes that we have questioned about here, and that is, what would preclude then someone from filing today with a 10-year later census?

LAWYER: There are two things. It would be dismissed because the plea to the jurisdiction would be heard and it would be dismissed. So it would accomplish nothing in that way. And second, under the rule that I've espoused here in response to Justice Hankinson's question, the filing today wouldn't do any good because the rule is the first right petition that I would advocate, not the first petition. So there is no policy problem with a rule that says an amended petition can count.

O'NEILL: It sounds like you're abandoning then the problem that it wasn't right at the beginning but it relates back. Your relying now on a whole new proposition of when was it likely that the legislature wouldn't come up with a plan.

LAWYER: I think you can look at the amended petition independent of whatever happened in the case beforehand. And if it was right, there is no earthly reason why that petition should not have the same respect as an original new petition in a different case.

O'NEILL: So the answer to my question is yes?

LAWYER: I think so. But I don't know that it's a new argument. I think it's the argument I've intended to make...

O'NEILL: Well I didn't mean you. But you did make the argument, at least I read it in the briefs, that somehow the Del Rio case could have ripened for dominant jurisdiction purposes by a subsequent filing. And I hear you now saying that's not the case, that the rightness increase can depend on what the legislature was doing at the time.

LAWYER: That is how it ripens. Assuming it wasn't ripe in December, it ripens between Dec and May by virtue of the fact that it was unlikely to...

HANKINSON: But you're not claiming that it relates back so that - it became the first filed right case as of Dec. 27. You're claiming it was the first filed right case as of May 8?

LAWYER: Assuming it wasn't ripe in Dec. independently, that's right. I'm not asking the court to say we can file an unripe case and get the benefit of that date. I don't think that makes any sense.

HANKINSON: You're saying that we should just pretend like Dec 27 never happened and treat the amended petition as if it were an original petition and that you claim that May 8 was the first filed right case, Del Rio's amended petition. Is that what your argument is?

LAWYER: Yes. And I think there is no case in this state and no case in the federal system that has ever said that such an amended petition or complaint doesn't count for purposes of rightness or somehow should be treated as a nullity.

PHILLIPS: But as to the date of this what you and opposing counsel share in common is you both say that you look at when the legislative process is not going to approve it. You said that a sine die rule would be a good bright line rule, but any of these other states that have the kind of problems we do ever used a sine die test?

LAWYER: I'm not going to be able to cite a case that says that. I think that this might be a new idea of a state's supreme court coming in and say we're going to establish our own specific rule for that purpose. But I do think that if you're going to be doing that, and there's a lot to be said for that, clearly that is the only good candidate for such a rule. A rule that says a governor's letter sometime later on that he doesn't have a current intention of calling a special session can't it seems to me be a very good alternative bright line rule for a couple of different reasons. If you look at that letter, first of all it says it currently doesn't seem to me like it would do any good to call a session, and so I am not a call a session at this time. So the letter itself is somewhat tentative. It also has no legal consequence. I think as Mr. Taylor conceded, he could have changed his mind 5 minutes later. It's not like it's an official act that somehow he has ceded his authority back to the legislature.

OWEN: What if he calls a special session tomorrow morning?

LAWYER: Then I would think that whichever court has dominant jurisdiction ought to stay its hand and see what happens. And if there's a new redistricting plan passed, then they would have to have an amended petitions challenging that if somebody wanted to do it.

PHILLIPS: It is the sec. of state - let's suppose there's a court judgment on a legislative enactment and at the same time we're running up against an Oct. 1 date.

LAWYER: I would think that if the sec. of state - that's an issue of state constitutional law and I'm not sure I'm in a position to answer that.

HECHT: Do you agree with Mr. Terrell that if the state courts are close, the federal courts either ought to defer or at least give respect to the progress that the state system has made?

LAWYER: I don't have a problem with that. I think the federal panel headed by Judge Higginbotham is likely to be reasonable on that subject.

HECHT: Concerning relief, we have indicated rather pointedly that appellate courts ought to be reluctant to interfere with competing trial courts that have same subject matter pending. Why should we do so in this case?

LAWYER: I think we face a very unusual situation with the federal deadline coming up on a matter of intense public importance. And that I think is why we thought it was appropriate for us to proceed here from Harris county by way of direct mandamus, which ordinarily wouldn't have been procedurally appropriate.

I think that in the public interest and the interest of the state in making sure that there is a single plan that is drawn by a state court prior to Oct. 1, it would only be the sensible thing for this court to clarify matters as soon as possible and let this process go forward.

HECHT: Well maybe it would be better to litigate it in two courts, get two CA's looking at it, and maybe we would know more the other way.

LAWYER: But you have the scenario. Say the two TC's on the 25th or 26th of Sep. each pick a different map. And appeals are filed. Nothing is done to change that situation and the Oct. 1 deadline comes. I think that the federal court in that situation in view of the fact that there are federal rights at stake and impending deadlines, are very likely to say well we're just going to throw the state's stuff out and start over. We'll draw the map. And that wouldn't be a particularly good outcome for the federalism concerns that animate Rogue(?) v. Emerson, the SC case that led to this kind of two-stage process.

So I think if the state wants to get the most bang for its buck in terms of its

opportunity to get the maps drawn in state court, it ought to have a single court doing it rather than two. But there might be an alternative way which is to say to have the two judges hearing the evidence and then a process of resolution at the end. Indeed I suppose they could sit together and we could see what happens then. Those are all possibilities, but it seems to me that commonly the most sensible is to have one trial. We're going to have to do a lot of traveling back and forth between Austin and Houston if they both go to trial the same day.

BAKER: What evidence did you have in the abatement hearing in Harris county about that - traveling, etc between Houston and Austin if the cases go to trial at the same time?

LAWYER: I don't know if there was any formal evidence put in. We certainly - I think both judges are aware that we're up against a very tight deadline and that the trials have to go forward immediately. And Judge Bland has given us about 51 hours of trial time to share among all the multiple parties that are in that court. So I don't think there is any reasonable dispute that it would be somewhat of a hardship to try to have both trials going on at the same time. Although, I guess they could go in reverse order. We do have a lot of lawyers on both sides of the case.

BAKER: I just remember from the old days that docket announcements when a lawyer came in and say well judge, I can't go to trial here because I'm going to trial Monday morning in Judge Baker's court. And the answer we used to give: well I notice you're with Baker & Botts, or so and so and there's lots of lawyers there; why don't you just send one of them over there. And you answered my question - there are plenty of excellent lawyers that know what's going on here. Why can't you try two cases in two courts at the same time with the similar parties and the same issue?

LAWYER: I don't think there would be any way that would be impossible. I think it is possible. We would have to coordinate the witnesses much more than the lawyers and we would have to basically say...

BAKER: But that's not impossible either is it?

LAWYER: Not a bit.

PHILLIPS: As far as the two judges sitting together, I read an Illinois case once where state and federal judges sat together and then rendered separate judgments. Is this a common practice?

LAWYER: It's not a common practice, but that happened in the mid '60s, and it happened again about 1 week ago in Oregon, where the federal 3-judge panel was sitting waiting kind of like the one in Tyler called up the state judge and said, let's all get together and see if we can resolve this together. I think they had a 4-judge panel in Oregon approaching the issue as well. This _____ v. Emerson(?) thing is something we're all experimenting with because it was only decided in 1992, essentially after the litigation round last time. And how this will play out - it may well be that the dynamics of the process will push in that direction of greater state/federal cooperation. Because

otherwise you have this oddity where you have a state trial and then you go straight to federal court and it's not clear where the state appellate process comes out of that as well.

HECHT: Will the witnesses in both trials be essentially the same?

LAWYER: I believe they will.

HECHT: How long do you anticipate the case will take to try?

LAWYER: We do have this 51 hour allocation in Judge Bland's court. Judge Davis has been less specific. But I think we're talking about a trial that will last somewhere between 6 to 8 to 9 trial days in that range. The judges seem to be in a posture of keeping pretty tight reign on us. Even though there are probably 10 - 12 expert witnesses. The time is very, very carefully allocated at least in Houston.

HECHT: Is there any reason why either case should not proceed immediately to trial as soon as we rule?

LAWYER: No. Just enough time for us to know where to get to and get our exhibits and our witnesses lined up. I think everybody is anticipating the possibility of a quick ruling, and I know both judges are anticipating the need to go to trial as soon as there is an indication of where that should occur or in both places.

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REBUTTAL

TAYOR: There's an important public policy consideration with respect to rightness, and that's the concept of filing prematurely place holder lawsuits.

HANKINSON: Let's talk for a minute about dominant jurisdiction. Do you agree with your opponent's statement that the rule should be the first filed right case?

LAWYER: Yes.

RODRIGUEZ: Why isn't the May 8th amended petition the first filed right case?

LAWYER: Because that petition amends a lawsuit that was originally filed on Dec. 27. The TC's obligation under this court's jurisprudence was to dismiss immediately. It could not go forward.

HANKINSON: But if the TC didn't dismiss and the case remained pending, why would an amended petition be treated any differently than the filing of an original petition?

LAWYER: The amended petition to the extent that it alleged facts prior to the existence of the original petition would be something that an appellate court and the TC could take into consideration. Here, the amended petition on May 8, alleged only facts that occurred after the original filing.

HANKINSON: But it is an amended petition alleging then as they existed on May 8. If that had been filed under a new cause number, would that then be the first filed right case?

LAWYER: If a new lawsuit had been filed on May 8, it would have been the first filed case, but not right case. Because as I argued earlier, it wasn't until the 23rd of May that a legislative impasse occurred.

HANKINSON: But I'm still very confused about why we are going to treat an amended petition, which supercedes under Texas law the original petition, any differently than the filing of an original petition. And we can argue about whether it was right on May 8, but I don't know of any Texas law that requires us to treat an amended petition any differently than an original petition.

LAWYER: The amended petition on May 8 would relate back to the Dec. 27 filing. That lawsuit had no jurisdiction.

HANKINSON: But why?

LAWYER: Because this court has told the other courts that they must dismiss and take no further action.

HANKINSON: But it was not dismissed. But if it had been dismissed, then that would be a different matter. It was not dismissed, so the case remained pending whether or not the TC had jurisdiction during that 6-month interim period of time. So why when the May 8th amended petition was filed that that did not then attach jurisdiction as of May 8, not any earlier date but as of May 8?

LAWYER: It doesn't because it did not allege a concrete injury as of May 8.

HANKINSON: That's the rightness question. And I understand that. But I'm just talking about the procedural aspect, because I understand you to say that because rightness is at issue we should treat an amended petition in a case that has not been dismissed even if it should have been differently _____ file an original petition with a new cause number. I'm having a hard time understanding that distinction procedurally.

LAWYER: Whether you accept that distinction or not, the outcome is the same. Whether it was filed separately or amended it should be dismissed.

HANKINSON: Is there a distinction or not?

LAWYER: I believe that there is. Because I don't believe that you can have a policy when you had no article 3 jurisdiction in federal court, or art. 1 jurisdiction here to continually amend lawsuits that aren't ripe in the first place...

JEFFERSON: Well if it were a brand new lawsuit there would be citation issues right? A period to answer the lawsuit.

LAWYER: Yes.

JEFFERSON: That's at least one distinction.

LAWYER: Yes. Also my opponents talk about an escape clause. I think the concept of sine die is something that the Texas legislature could embrace if it wanted to, or a mandatory venue provision in a particular county, they could do that if they wanted to. But not this court.

PHILLIPS: Counsel, we can't do that. And both of you all seem to agree that the federal rule would be to look at practical impossibility after they get through with all their parties and pack up and go home. Your argument seems to be based on the rules of the legislature itself and when that is impossible under a structure without some deadlines being suspended by an extraordinary vote of both houses. And your opposing counsel seems to be based on utter lack of activity that makes based on predictions in the past impossible. Is there a record in the TC's of these various arguments? In other words, you're both asking for a factual determination. Do we have a record of testimony from legislators or what do we have?

LAWYER: All we have in both cases are exhibits that have been introduced, and then also the legislative web site that was printed and put before the courts giving them notice of the deadlines. The reason why we argued sine die was our _____ official because it ignores whether or not there's been a legislative impasse prior to that time. In _____ v. Lamb, 543 F.Sup.68 - it's a 3 judge panel decision out of the Colorado federal court, which we cited in our brief. They look at legislative impasse and they said a case filed during the session in light of the evidence presented at the TC was one to give a right claim.

PHILLIPS: But you admit that under Judge Hecht's scenario and under your rules, if they were taking votes on amended these deadlines to bring up a new bill, we could easily end up in a situation that would be fact based and we have to review that determination. And if we had several courts going and they made several different factual determinations and we don't have constitutional authority to review those, we could be in a mess couldn't we?

LAWYER: It could be very difficult. All I can add is that under the Bland case, this court said that in certain circumstances the TC must hold an evidentiary hearing to determine its jurisdiction when it's ruling on a plea to the jurisdiction. We had hearings in both courts in these cases and to review that...

O'NEILL: But I think CJ's point is that would impact our jurisdiction to review the TC's determinations. So do you actually want this to be a factual inquiry? So we can't look at it.

LAWYER: I understand. But the best I can say to that is that the Waco case, the Planned Parenthood case, the other cases all stand for an important proposition. We're not going to allow the policy of frivolous, premature filing because that's not healthy, it's not good, and it's not subject matter jurisdiction. And that's what happened in this case on Dec. 27.

OWEN: How is that ever resolved? Let's suppose you have 3 trial courts, in 3 different CA jurisdictions, each of them takes testimony from legislators and picks a different impasse date. It's taken up on appeal. Each of the CA's affirm 3 different impasse dates. Now what do you do?

LAWYER: I think as in this case, you would of course have the ability to decide which case was justiciable, which case had the constitutional...

OWEN: But there are factual findings in each case supported by the evidence. There is evidence. So what do we do?

LAWYER: Yes. To answer your question, you have jurisdiction to review whether the CA correctly or incorrectly determined whether the TC had jurisdiction...

O'NEILL: But that would entail the factual sufficiency review, which we don't have jurisdiction to do.

LAWYER: I'm about to answer that part. And on the question of the facts before those courts, Judge Bland in Houston made a factual determination that her cases predominated over the other cases. And under this court's jurisprudence when there are two competing cases and one TC says I've got dominant jurisdiction, then that court has dominant jurisdiction.

O'NEILL: But Judge Davis made the same determination here, and his would have dominant jurisdiction under that scenario as well.

LAWYER: There wasn't a plea in abatement on dominant jurisdiction in Travis county that is on appeal here.

O'NEILL: But both courts decided that they had jurisdiction. So that throws us into the same quandary.

LAWYER: But the Austin court didn't decide that it had dominant jurisdiction. Only the Harris county court did. The Austin court decided that it had jurisdiction in Cotera and Del Rio, because I filed pleas to the jurisdiction on behalf of the Governor and the secretary. But in Houston, the trial judge found that those cases did not have jurisdiction, at least the first one Del Rio, and so her case was the first filed right case and had dominant jurisdiction based on a plea in abatement, that

she overruled.

PHILLIPS: And the states willing to live or die by the first determination by any of its 600 trial judges with this type of jurisdiction and they have dominant jurisdiction?

LAWYER: The state is willing to abide by which of these cases was the first right dominant case. And we believe that that's ART.

HECHT: One policy in _____ v. Black is that it doesn't hurt anything and maybe it will help something for the competing cases to go along as much as they can. Does that counsel against granting relief to relators here?

LAWYER: Yes. Legally there is not the type of conflict this court has previously embraced, like one court enjoining another court, etc. We have for example, 17 expert witnesses in this case, but only one witness can be on the stand at the same time. So we can try this case in Austin and we can try this case in Houston.

HECHT: You agree that the witnesses will be essentially the same in both cases; however many cases?

LAWYER: Yes.

PHILLIPS: Would this court have any authority to order one judge to go to the other judge's jurisdiction?

LAWYER: No. The reason why not is there are appellate decisions which say that a Travis county judge cannot sit outside of Travis county. So there's no way to try both cases simultaneously. We have to pick Houston or we have to pick Austin. So if both are going to go forward, we're just going to need to try to cooperate. And I might add, that those trial judges have cooperated extensively. In fact when I used the word in one of the hearings before Judge Davis that there was some interference of trial settings, he corrected me. He said there's no interference here. We're cooperating fully. And so I believe that those courts will cooperate and that we could try the case in both places at the same time.

Having said that, we believe that it would be in the taxpayers' interest to try this case in one place, one time, and that's Houston, Texas.

HECHT: Gov. Ratliff has made that argument in his filings and the Governor and the secretary agrees with that?

LAWYER: Yes.