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

SHANNON PEREZ, *et al.*, *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants.*	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' JOINT MOTION FOR ENTRY OF A PERMANENT INJUNCTION AND SCHEDULING ORDER FOR REMEDIAL PROCEEDINGS

The Court has not considered the merits of Plaintiffs' claims against the 2013 congressional redistricting legislation, and it has not issued an opinion on Plaintiffs' claims against the 2011 redistricting legislation for the Texas House of Representatives. Nevertheless, Plaintiffs now ask the Court to enter a permanent injunction against the congressional plan enacted in 2013 (C235) and begin remedial proceedings. Plaintiffs' Joint Motion for Entry of a Permanent Injunction and Scheduling Order for Remedial Proceedings (March 23, 2017), ECF No. 1344. Plaintiffs' motion is premature and should be denied.

1. This Court initially entered Plan C235 as an interim plan for the 2012 elections after making a preliminary determination that the districts it created did not suffer from any statutory or constitutional defects. *See* Order (March 19, 2012), ECF

No. 691. The State's 2012 congressional elections were conducted under Plan C235. In 2013, the Legislature enacted S.B. 4, formally adopting Plan C235 relying largely on this Court's preliminary legal analysis.

Plaintiffs sought a preliminary injunction against Plan C235 before the 2014 election cycle, but the Court denied the motion, finding that Plaintiffs were not likely to succeed on the merits of their claims. *See* Order at 22 (Sept. 6, 2013), ECF No. 886. The State's 2014 congressional elections were conducted under Plan C235.

Plaintiffs filed another motion for preliminary injunction against Plan C235 before the 2016 election cycle, but the Court again denied relief, finding among other things that Plaintiffs had not shown a likelihood of success on the merits of their claims. *See* Order at 5 (Nov. 6, 2015), ECF No. 1324. The Court noted specifically that trial on the merits of Plaintiffs' claims against the Legislature's 2013 plans had not been scheduled. *Id.*

Thus, Plan C235 has been approved by this Court three times under a preliminary-injunction analysis, and the State has used the plan three times to conduct congressional elections. Trial on the merits of Plaintiffs' claims against Plan C235 still has not been scheduled.

2. The motion for a permanent injunction is premature. Plaintiffs have not prevailed on the merits of their claims against the legislative act they seek to enjoin. A permanent injunction requires actual success on the merits. *Dresser-Rand Co. v. Virtual Automation, Inc.*, 361 F.3d 831, 847 (5th Cir. 2004) (citing *Amoco Prod. Co. v. Village of*

Gambell, 480 U.S. 531, 546 n.12 (1987)). This Court has not considered or decided the merits of Plaintiffs' claims against Plan C235. Plaintiffs are therefore not entitled to a permanent injunction against that plan, or any particular district within it, because they cannot establish the threshold criterion for permanent injunctive relief.

Plaintiffs are wrong to assert that this Court's opinion on Plan C185 entitles them to any remedy against Plan C235.[1] Plaintiffs do not seek injunctive relief against Plan C185, nor could they, because Plan C185 does not threaten Plaintiffs with any injury—it never took effect, and it never will because the Legislature repealed it. *Cf. Winter v. Nat'l Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (holding that a party seeking a preliminary injunction must establish "that he is likely to suffer irreparable harm in the absence of preliminary relief"). Plaintiffs' hope of triggering a statutory penalty under Section 3(c), which arises only after the dispute is resolved on the merits, does not give them a justiciable interest in the merits of the dispute. *See, e.g.*, *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000) (holding that a *qui tam* relator's interest in recovering a bounty does not provide standing, even though it gives him a "concrete private interest in the outcome," because "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing"); *id.* at 772–73 (explaining that a relator's hope

[1] The State Defendants deny that any district in Plan C185 was motivated by intentional racial discrimination or that any district had a racially discriminatory effect. The State Defendants intend to seek appellate review of the Court's opinion on the 2011 congressional plan on the merits and jurisdictional grounds at the appropriate time.

of securing a bounty does not "consist of obtaining compensation for, or preventing, the violation of a legally protected right" because "the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails").

Even if the Court's opinion on Plan C185 could provide the basis for some type of relief, it could not possibly justify an injunction against Plan C235 in its entirety. Most of the districts challenged by Plaintiffs in Plan C185—including districts in which claims were ultimately rejected—were redrawn in Plan C235. *See* Order at 30–41 (March 19, 2012), ECF No. 691 (outlining changes to CD 6, CD 9, CD 12, CD 18, CD 23, CD 26, CD 30, and CD 33). And because the Texas Legislature enacted S.B. 4 to formally adopt Plan C235 in 2013, the policy judgments reflected in that plan are entitled to deference by the Court. *Perez v. Perry*, 132 S. Ct. 934 (2012) (per curiam).

3. Although districts 27 and 35 were maintained under Plan C235, Plaintiffs are not entitled to injunctive relief against those districts, let alone permanent injunctive relief. Only MALC and the LULAC Plaintiffs challenge CD 27,[2] and only the Rodriguez Plaintiffs purport to challenge CD 35.[3] Some plaintiffs have not challenged Plan C235

[2] *See* LULAC Intervenors Third Amended Complaint ¶ 16(c) (Sept. 15, 2013), ECF No. 894; Plaintiff MALC's Third Amended Complaint ¶ 66 (Sept. 17, 2013), ECF No. 897. The Quesada Plaintiffs and the Rodriguez Plaintiffs discuss Nueces County's placement in CD 27, but they do not have standing to challenge the district because they do not include any residents of Nueces County. *See* [Rodriguez Plaintiffs'] Second Amended Complaint ¶¶ 2, 19(c) (Sept. 17, 2013), ECF No. 896; Quesada Plaintiffs' Third Amended Complaint ¶¶ 7–16, 70 (Sept. 18, 2013), ECF No. 899.

[3] Defendants deny that the Rodriguez Plaintiffs' complaint includes a specific claim against CD 35; however, they recognize that the Court has found their arguments sufficient to challenge the district.

at all.[4] Yet Plaintiffs' joint motion makes no attempt to explain how any particular plaintiff faces such a substantial threat of irreparable injury that the need for a permanent injunction—before trial—outweighs any resulting harm and will not disserve the public interest. *See, e.g.*, *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 536–37 (5th Cir. 2013) (describing a preliminary injunction as an "extraordinary remedy" and listing the elements the party seeking relief must prove). Plaintiffs cannot clearly carry their burden of persuasion, *see, e.g.*, *PCI Transp. Inc. v. Ft. Worth & W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005), when they have not distinguished plaintiffs who allegedly face a threat of injury from plaintiffs who clearly do not.[5]

The plaintiffs who have challenged CD 27 and CD 35 are not entitled to injunctive relief based on claims of intentional racial discrimination or racial gerrymandering. To the extent this Court's opinion on Plan C185 addressed the merits of constitutional claims against the 2011 congressional districts, it does not establish that Plaintiffs have succeeded on the merits of their Fourteenth Amendment racial-discrimination claims against Plan C235. And to the extent the Court found a *Shaw* violation in CD 35, the configuration of the district does not threaten irreparable injury

[4] *See* Fourth Amended Complaint of Plaintiffs Texas Latino Redistricting Task Force, et al. (Sept. 9, 2013), ECF No. 889-1.

[5] Plaintiffs' previous motion for injunctive relief against Plan C235 suffered the same flaw, as Defendants noted in their brief in opposition, which they incorporate by reference here. *See* Defendants' Response to Plaintiffs' Conditional Motion for Preliminary Injunction on Implementation of 2013 Redistricting Plans for 2016 Election Cycle at 3–6 (Oct. 21, 2015), ECF No. 1321.

to any plaintiff's right to vote. *Compare* Plaintiffs' Joint Motion at 6 (arguing that "restrictions on the fundamental right to vote constitute irreparable injury") *with* Order at 35 n.31 (March 10, 2017), ECF No. 1339 (explaining that the harm in a racial-gerrymandering claim does not flow from vote dilution or intentional discrimination).

Plaintiffs' claims of intentional discrimination regarding the current congressional districts must take into account this Court's preliminary approval of Plan C235 in 2012 and the Texas Legislature's subsequent enactment of the plan in 2013. The Fifth Circuit has held that when a legislature amends a law, the law "as it presently exists is unconstitutional only if the amendments were adopted out of a desire to discriminate." *Cotton v. Fordice*, 157 F.3d 388, 392 (5th Cir. 1998).[6] In *Chen v. City of Houston*, the Fifth Circuit cited *Cotton* "for the important point that when a plan is reenacted—as opposed to merely remaining on the books like the provision in *Hunter*—the state of mind of the reenacting body must also be considered." *Chen v. City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000). To determine the merits of intent-based claims against Plan C235, this Court must consider the purpose of the 2013 Legislature.

4. Besides denying Defendants their most basic right to due process, Plaintiffs' attempt to secure permanent relief without trial on the merits disregards this

[6] The court distinguished *Hunter v. Underwood*, 471 U.S. 222 (1985), on the ground that the challenged constitutional provision in that case had been amended only involuntarily through judicial invalidation, whereas the Mississippi Legislature voluntarily "superseded the previous provision and removed the discriminatory taint associated with the original version." *Id.* at 391 & n.8.

Court's existing scheduling order. Before conducting supplemental proceedings on claims against the 2011 redistricting plans, the Court ordered that the liability phase of this proceeding would be divided into four segments: (1) Texas House 2011; (2) Congressional 2011; (3) Texas House 2013; and (4) Congressional 2013. Order at 1–2 (May 29, 2014), ECF No. 1018. The Court has conducted a trial on only the first and second segments. Plaintiffs offer no reason to skip the third and fourth segments of the liability phase.

Injunctive relief is unnecessary because there is still time to hold a trial on the 2013 congressional redistricting legislation before the 2018 election cycle begins. The parties' pretrial estimates indicate that the Court could conduct a trial on the 2013 congressional redistricting plan in two to three days and a trial on both the congressional and Texas House plans in four to five days.[7] Rather than rush to a remedy before trial,

[7] The parties estimated 8 to 15 hours of trial time for claims against the 2013 congressional redistricting legislation and 12 to 12.5 hours of trial time for claims against the 2013 Texas House redistricting legislation. *See* Rodriguez Plaintiffs' Advisory on Estimated Trial Time at 2 (June 3, 2014), ECF No. 1038 (estimating 3 hours for presentation of claims against the 2013 congressional plan); Perez Plaintiffs' Advisory Regarding Estimate on Trial Time at 1 (June 3, 2014), ECF No. 1040 (anticipating no testimony on congressional plans and no additional testimony on the 2013 House plan); United States' Advisory to the Court Regarding Trial Time at 2 (June 3, 2014), ECF No. 1042 (anticipating 4 hours of direct testimony regarding the 2011 congressional plan, 7 hours of direct testimony regarding the 2011 House plan, and no testimony regarding the 2013 plans); Defendants' Advisory on Estimated Trial Time at 2 (June 3, 2014), ECF No. 1043 (requesting 6 hours per side for claims against the 2013 Texas House plan and 4 hours per side for claims against the 2013 congressional plan); Texas Latino Redistricting Task Force Plaintiffs' Advisory to the Court Regarding Estimated Trial Time at 3 (June 3, 2014), ECF No. 1044 (anticipating 13 hours of trial time to present their case on phases 1 through 3 and no trial time for phase 4); NAACP, African-American Congresspersons, LULAC, and Quesada Plaintiffs' Advisory on Estimated Trial Time at 2 (June 3, 2014), ECF No. 1045 (anticipating up to 1.5 hours of trial time for the NAACP Plaintiffs on the 2013 Texas House plan, up to 4 hours of trial time for the NAACP and African-American Congresspersons on the 2013 congressional plan, and 3 hours for the Quesada and LULAC Plaintiffs on the 2013 congressional plan); Plaintiff MALC's

Defendants respectfully suggest that the Court follow the existing scheduling order and, to the extent the outstanding claims cannot be resolved without trial,[8] conduct a trial on the merits of the 2013 redistricting legislation before the 2018 election cycle begins.

CONCLUSION

The Court should deny Plaintiffs' motion for a permanent injunction.

Date: March 30, 2017

Respectfully submitted.

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Response and Advisory to this Court's Order Regarding Trial Time and Presentation at 1–2 (June 3, 2014), ECF No. 1046 (anticipating 1 hour or less of direct testimony on claims against the 2013 Texas House Plan and 1 hour or less of direct testimony on claims against the 2013 congressional plan).

[8] The Court previously granted Defendants' motion for summary judgment in part, but the remaining arguments remain under consideration. *See* Order at 4 (June 23, 2014), ECF No. 1108.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing was sent on March 30, 2017, via the Court's CM/ECF system and/or email to the following counsel of record:

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