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

SHANNON PEREZ, et al., *Plaintiffs*, - and - EDDIE BERNICE JOHNSON, et al., - and - TEXAS STATE CONFERENCE OF NAACP BRANCHES, et al., *Plaintiff Intervenors*, v. RICK PERRY, et al., *Defendants*,	)	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs*, - and - HONORABLE HENRY CUELLAR, et al., *Plaintiff Intervenors*, v. STATE OF TEXAS, et al., *Defendants*	)	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]

TEXAS LATINO REDISTRICTING TASK FORCE, et al., *Plaintiffs,* v. RICK PERRY, et al., *Defendants,*	)	CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated case]

MARAGARITA v. QUESADA, et al., *Plaintiffs,* v. RICK PERRY, et al., *Defendants,*	)	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

JOHN T. MORRIS, *Plaintiff,* v. STATE OF TEXAS, et al., *Defendants,*	)	CIVIL ACTION NO. SA-11-CA-615-OLG-JES-XR [Consolidated case]

EDDIE RODRIGUEZ, et al.,	)	CIVIL ACTION NO.
	)	SA-11-CA-635-OLG-JES-XR
	)	[Consolidated case]
Plaintiff,	)	
	)	
v.	)	
	)	
STATE OF TEXAS, et al.,	)	
	)	
Defendants.	)	

EMERGENCY MOTION FOR MODIFICATION OF INJUNCTION BY THE TEXAS LATINO REDISTRICTING TASK FORCE PLAINTIFFS AND MEMORANDUM IN SUPPORT

The Texas Latino Redistricting Task Force Plaintiffs ("Task Force Plaintiffs") move for modification of this court's injunction of the Texas Legislature's 2011 redistricting plans for Texas House and congress ("2011 plans"). On September 29, 2011, this Court enjoined the 2011 plans because they had "not been precleared pursuant to Section 5 of the Voting Rights Act." *See* Dkt. 380 at 4. In light of the U.S. Supreme Court's decision in *Shelby County, Alabama v. Holder*, "declar[ing] §4(b) unconstitutional," *Shelby Cnty., Ala. v. Holder*, No. 12-96, slip op. at 24 (U.S. June 25, 2013) (attached as Exhibit A), the Task Force Plaintiffs request that this Court modify its order enjoining the 2011 plans in order to provide the Court an opportunity to enter judgment on plaintiffs' claims under section 2 of the Voting Rights Act and the U.S. Constitution.

Argument

In order to secure a preliminary injunction, a plaintiff must establish the following four elements:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if

> the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Byrum v. Landreth, 566 F.3d 442, 445 (5th Cir. 2009).

Plaintiffs Have Demonstrated a Likelihood of Success

With respect to the first element, this Court has already found that plaintiffs have demonstrated a likelihood of success on the merits of a number claims brought against the 2011 plans under the Constitution and section 2 of the Voting Rights Act. Specifically, this Court found "a likelihood of success on the merits [of constitutional] one-person, one-vote claims with respect to HD 41." Dkt. 690 at 4. The Court found that the State's "apparently systematic overpopulation of Democrat districts and underpopulation of the one possible Republican district presents serious concerns under *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd mem. sub nom. Cox v. Larios*, 542 U.S. 947 (2004). *Id.*

Similarly, with respect to HD 144, this Court held "that the plaintiffs have demonstrated a likelihood of success on the merits of their Section 2 claim in eastern Harris County." *Id.* at 8. The Court based its conclusion on evidence "illustrating that an additional compact majority HCVAP district is possible in eastern Harris County," preliminary findings that racial block voting and cohesive voting patterns exist in Harris County, and a totality of the circumstances analysis that showed significant minority growth in Harris County coupled with Anglo decline along with a "significant amount of evidence… regarding historical racial discrimination in Texas." *Id.* at 8-9.

This Court also made findings concerning claims against particular districts using the section 5 "not insubstantial" standard set out by the Supreme Court in *Perry v. Perez*, 132 S. Ct. 934, 942 (2012). These findings, particularly with respect to claims of intentional racial

discrimination, support further findings by this Court that plaintiffs have established a likelihood of success with respect to their claims under section 2 and the Constitution.

For example, this Court found not insubstantial claims of constitutional violations with regard to Congressional Districts (CD) 9, 18, and 30, which are African American opportunity districts, finding:

> "[T]he mapdrawers took care to accommodate minor concerns of Anglo congresspersons and failed to ensure that any requests of the three African-American members were considered or accommodated. Whether the disparate treatment was purposeful or inadvertent is a not insubstantial issue to be resolved by the D.C. Court."

Dkt. 691 at 41. The U.S. District Court for the District of Columbia (DDC) subsequently made similar findings, citing the same concerns with the same districts, as well as CD 20, as evidence supporting its conclusion "that the [entire Congressional] plan was enacted with discriminatory intent." *Texas v. United States*, 887 F. Supp. 2d 133, 160-61 (D.D.C. 2012).

This Court also found that claims of discrimination with respect to the congressional districts in Dallas-Fort Worth were not insubstantial because:

> "[T]he high number of split precincts in the protrusions increases the likelihood that the mapdrawers were focused on race, because partisan voting data is not available below the precinct level. Further, Texas has not offered any explanation why the precincts were split or demonstrated that political explanations are more likely than racial ones. Whether the district lines are better explained by politics or racial considerations is a not insubstantial issue that must be decided by the D.C. Court."

Dkt. 691 at 36. Although the DDC did not address the merits of this claim specifically because it had already concluded "that the Congressional Plan was motivated, at least in part, by discriminatory intent," it did recognize other potential discrimination claims in the Dallas-Fort Worth Metroplex. *Texas v. U.S.*, 887 F. Supp. 2d at 161, fn. 32. The concerns of this Court in conjunction with the discriminatory intent findings of the DDC demonstrate a likelihood of success for constitutional claims concerning districts in the Dallas-Fort Worth area.

As in the Dallas-Fort Worth area, this Court found evidence of potential intentional discrimination in the drawing of House Districts (HD) 77 and 78:

> "That line [establishing the district boundary] is indeed bizarre, even for a legislative district. District 77 has two "deer antler" protrusions that reach into HD 78 and grab predominantly Latino neighborhoods. The protrusions have the effect of concentrating Latinos into District 77, protecting a Latino Republican incumbent, Representative Margo, in District 78. Although it is difficult to tell whether those lines were drawn on partisan or racial lines, the high number of split precincts in the protrusions increases the likelihood that the map-drawers were focused on race because partisan voting data are not available below the precinct level."

Dkt. 690 at 10-11. Although the DDC did not make a discriminatory intent finding with respect to the House plan, the DDC noted evidence that "causes concern" and concluded that "the full record strongly suggests that the retrogressive effect we have found may not have been accidental." *Texas v. United States*, 887 F. Supp. 2d at 177-78. These conclusions coupled with the findings of this Court establish a likelihood of success on the merits of constitutional claims against HD 77 and 78.

Further applying the "not insubstantial" standard to section 5 claims brought against the 2011 plans, this Court was concerned with retrogression in the House plan as it pertained to HD 35:

> Because it appears that HD 35 in the enacted plan diminishes the ability of minorities to elect their candidate of choice, the claim of a Section 5 violation is not insubstantial. This Court need not make a preliminary ruling on the Section 2 and intentional discrimination claims, because restoring HD 35 to benchmark (or higher) "performance" levels and shifting the district south to the Rio Grande Valley (as plaintiffs requested) provide an appropriate remedy for those claims.

Dkt. 690 at 5. The DDC agreed with this concern, finding the evidence provided by Texas did not "meet its burden to show that the changes made to HD 35 will not have a retrogressive effect on minority voters." *Texas v. United States*, 887 F. Supp. 2d at 168. The finding of

retrogression by the DDC demonstrates a likelihood of success on plaintiffs' section 2 claims that Texas diluted the voting strength of Latinos in the House plan.

This Court also was concerned with the Legislature's changes to HD 117. The Court found:

> [In HD 117] the State may have focused on race to an impermissible degree by targeting low-turnout Latino precincts. Although the HCVAP increased from 58.8% to 63.8%, the SSVR decreased from 50.3% to 50.1%. The fact that the map drawers were able to increase the HCVAP substantially while simultaneously decreasing the proportion of registered voters with Spanish surnames indicates that they may have intentionally focused on precincts with low Latino turnout. This outcome, combined with Garza's statement in his deposition that he "wanted to get more Anglo numbers," is evidence that the decisionmakers were impermissibly focused on race in trying to make the district more Republican."

Dkt. 690 at 6. As with HD 35, the DDC concluded that the changes made by the Legislature to HD 117 were retrogressive. *Texas v. U.S.*, 887 F. Supp. 2d at 171. This retrogression finding supports the conclusion that plaintiffs have established a likelihood of success on their section 2 claim because additional Latino opportunity districts could have been drawn in the 2011 House plan and that Texas diluted the voting strength of Latinos in the House plan.

Plaintiffs Face a Substantial Threat of Irreparable Injury

Texas Attorney General Greg Abbott stated on the day of the *Shelby* decision that "Redistricting maps passed by the Legislature may also take effect without approval from the federal government." Todd J. Gillman, *Texas voter ID law "will take effect immediately," says Attorney General Greg Abbott*, DALLAS NEWS, June 25, 2013, http://trailblazersblog.dallasnews.com/2013/06/texas-voter-id-law-could-start-now-attorney-general-greg-abbott.html/.

Based on General Abbott's statements that the 2011 redistricting plans are effective because they no longer require preclearance, plaintiffs face the immediate threat that Texas will

move forward to implement its 2011 redistricting plans. Texas is moving forward to implement its previously-unprecleared voter identification law this week. *Id.* With respect to the new redistricting plans sent by the Legislature to Governor Perry last week, Governor Perry has neither signed the bills nor stated that he will sign the bills following the *Shelby* decision.

Without an order enjoining the 2011 plans for reasons other than lack of section 5 preclearance, Plaintiffs will suffer irreparable harm as Texas implements redistricting plans that dilute Latino voting strength and purposefully discriminate against Latino voters. *See Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2010) ("In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages."). As described above, this Court has found that Plaintiffs have demonstrated a substantial likelihood of success on a number of claims under section 2 and the Constitution. *See* Dkt. 690, 691. Should Texas implement the 2011 plans, Plaintiffs face not merely speculative, but likely harm that they would be forced to cast their ballots in a discriminatory election scheme. *See Janvey*, 647 F.3d at 601; *see also Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. . . . [T]he Constitution demands, no less.").

Moreover, the threatened deprivation of a fundamental right by itself constitutes irreparable harm. *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) ("[A]lleged constitutional infringement will often alone constitute irreparable harm."). Voting is a fundamental right since it is preservative of all other rights in our democracy and that right "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Sims*, 377 U.S. at 555,

561.

The Balance of Harms tip in Favor of Plaintiffs

Unlike the irreparable harm to be suffered by Plaintiffs if they cannot secure a modification of the Court's injunction, any harm to Texas is purely speculative in nature and thus not sufficient to outweigh the harm to Plaintiffs. *See generally Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985) ("Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant."). The only harm Texas *could* face if the Court modifies its injunction is postponement of its election deadlines while the Court makes a final decision on the merits of the 2011 plans. However, there is still ample time for the Court to finalize its review of the 2011 plans before any such deadlines arrive.[1]

Modification of the Injunction Would Serve the Public Interest

Finally, as the Supreme Court has held, "judicial relief [is] appropriate . . . when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Sims*, 377 U.S. at 586. Here, the only redistricting plans enacted by the Texas Legislature are the 2011 plans. Judicial relief, including the modified injunction requested here, is appropriate in this instance. The public interest is served when citizens are able to participate fully and effectively in an electoral process free of constitutional and other federal legal concerns.

Conclusion

For the foregoing reasons, the Task Force Plaintiffs respectfully request that the Court modify its injunction to include a finding that the injunction is necessary because Plaintiffs have

[1] This Court considered similar claims of harm by Texas when considering Plaintiffs' initial motion for a temporary restraining order on the implementation of the 2011 plans in September of 2011. *See* Dkt. 380 at 4-5. Even at that time, when election administration deadlines were closer, the Court did not find the harm to Texas sufficient to outweigh the harm to Plaintiffs in the exercise of their fundamental right to vote. *See id.*

demonstrated a likelihood of success on their claims under section 2 of the Voting Rights Act and the Constitution.

Dated: June 26, 2013

Respectfully submitted,

/s/ Nina Perales

Nina Perales
Karolina J. Lyznik
MALDEF
110 Broadway Street, #300
San Antonio, TX 78205
(210) 224-5476
Fax: (210) 224-5382

Robert W. Wilson
Mark Anthony Sanchez
Gale, Wilson & Sanchez, PLLC
115 East Travis, 19th Floor
San Antonio, TX 78205
(210) 222-8899
Fax: (210) 222-9526

COUNSEL FOR PLAINTIFFS TEXAS LATINO REDISTRICTING TASK FORCE, RUDOLFO ORTIZ, ARMANDO CORTEZ, SOCORRO RAMOS, GREGORIO BENITO PALOMINO, FLORINDA CHAVEZ, CYNTHIA VALADEZ, CESAR EDUARDO YEVENES, SERGIO CORONADO, GILBERTO TORRES, RENATO DE LOS SANTOS, JOEY CARDENAS, ALEX JIMENEZ, EMELDA MENENDEZ, TOMACITA OLIVARES, JOSE OLIVARES, ALEJANDRO ORTIZ, AND REBECCA ORTIZ

CERTIFICATE OF CONFERENCE

On June 25, 2013, the undersigned counsel for the Task Force Plaintiffs contacted counsel of record for the parties regarding the above-referenced Motion, who responded as follows: counsel for Quesada Plaintiffs, Rodriguez Plaintiffs, LULAC Plaintiffs, TLBC Plaintiffs, Perez Plaintiffs, MALC Plaintiffs, Texas NAACP Plaintiffs and Congressman Cuellar Plaintiffs do not oppose this motion. At the time of filing, Counsel for Defendants' State of Texas and Rick Perry have not responded.

/s/ Nina Perales
Nina Perales

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has electronically submitted a true and correct copy of the above and foregoing via the Court's electronic filing system on the 26th day of June, 2013. The undersigned counsel hereby certifies that she caused a true and correct copy of the above and foregoing to be mailed to the persons listed below by the close of the next business day.

/s/ Karolina J. Lyznik
Karolina J. Lyznik

David Escamilla
Travis County Asst. Attorney
P.O. Box 1748
Austin, TX 78767