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]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs,* 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 , *Defendant.*	CIVIL ACTION NO. SA-11-CV-490-OLG-JES-XR [Consolidated case]
MARAGARITA V. QUESADA, et al., *Plaintiffs*, v. RICK PERRY, *et al.,*	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

Defendants.	)	
_____	)	
	)	
JOHN T. MORRIS,	)	CIVL ACTION NO.
	)	SA-11-CA-615-OLG-JES-XR
Plaintiff,	)	[Consolidated case]
	)	
v.	)	
	)	
STATE OF TEXAS, et al.,	)	
	)	
Defendants.	)	
_____	)	
	)	
EDDIE RODRIGUEZ, et al.	)	CIVIL ACTION NO.
	)	SA-11-CA-635-OLG-JES-XR
Plaintiffs,	)	[Consolidated case]
	)	
v.	)	
	)	
RICK PERRY, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' JOINT MOTION SEEKING INJUNCTIVE RELIEF UNDER SECTION 3(C) OF THE VOTING RIGHTS ACT OR, ALTERNATIVELY, PRELIMINARY INJUNCTIVE RELIEF

Plaintiffs Texas State Conference of Branches of the NAACP, *et al.*, Congressperson Eddie Bernice Johnson, *et al.*, Margarita Quesada, *et al.*, LULAC plaintiffs, and Eddie Rodriguez, *et al.*, (hereinafter, "Joint Plaintiffs") respectfully move this Court for relief, based on Fourteenth Amendment violations in the 2011 redistricting plans, subjecting the state of Texas to a preclearance requirement, under Section 3(c), 42 U.S.C. § 1973a(c), for voting-related changes enacted by the state.[1] This is a necessary and appropriate remedy for the constitutional violations

[1] The challenges of the LULAC, African-American Congresspersons, Rodriquez, Quesada plaintiffs are limited to the congressional plans enacted by the Texas Legislature. Thus, the relief they request under this motion is limited to the congressional plans.

in the 2011 plan, and now is the proper time for this Court to award that remedy—a remedy needed to protect minority voters in the state from the pattern of discriminatory actions persistently taken by Texas. Alternatively only, the Joint Plaintiffs seek a preliminary injunction, prohibiting the state from implementing the redistricting plans enacted in 2013 and ordering a delay in the election schedule for the 2014 elections, pending further order of the Court. The first election milestone for the 2014 elections—the opening of filing for party precinct chairs—is September 10, 2013. Without injunctive relief from this Court, the implementation will commence, even though the 2013 enacted plans, under the Texas Constitution, cannot become law until September 24, 2013. Joint Plaintiffs conferred with other counsel, and Defendants oppose the motion. Counsel for MALC and Congressman Cuellar had not responded as of the time of filing. The Perez Plaintiffs and Congressman Gallego, *et al*., take no position on the motion. The Texas Latino Redistricting Task Force has taken no position on the alternative preliminary injunction motion at the time of filing.

I. LEGAL ARGUMENTS

Joint Plaintiffs adopt the interpretation of Section 3(c) set forth in their July 22, 2013 Advisory on Section 3(c), submitted in response to the request for briefing by the Court, as well as Part II of their response to the state's first-round briefing on Section 3(c). Dkt. Nos. 788, 836 (at 4-9). These filings not only outlined the significance of Section 3(c) in the instant case, but also detailed many of the findings and evidence that would warrant application here of a 3(c) remedy. They are adopted as if fully set forth herein.

Since then, the United States has filed both a Statement of Interest (Dkt. No. 827) and a Motion to Intervene (Dkt. No. 871), accompanied by a proposed Complaint in Intervention (Dkt. No. 871-1). These filings, too, provide the Court ample legal reasoning and factual detail to

justify imposition of equitable relief under Section 3(c). Joint Plaintiffs support the United States' arguments and its request to intervene and urge the Court to grant the intervention requested.

Beyond the arguments set forth in that brief, a few additional points must be added in rebuttal to the position taken by the State of Texas in its August 5 Response to Plaintiffs and the United States Department of Justice on the bail-in issue. *See* Dkt. No. 842. The State flatly mischaracterizes the United States Supreme Court's ruling in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013). The Court plainly did not "invalidate the legislatively imposed preclearance requirement." *See* Def. Br. at 1 (positing that it did). The Supreme Court explicitly invited Congress to adopt a new coverage formula. *Shelby County*, 133 S.Ct. at 2631. Such an invitation is inconsistent with the State's view that the *Shelby County* decision undermined the use, ever again, of the preclearance mechanism or federal oversight of voting changes in jurisdictions that persist with racially discriminatory behavior. In addition to inviting a new coverage formula, the Court explicitly noted that it was not ruling on, or striking down, Section 5 itself. 133 S.Ct. at 2631 ("no holding on Section 5 itself"). Rather, the current situation is precisely the sort of situation in which the State itself concedes bail-in would be appropriate: "where traditional judicial remedies have proven demonstrably inadequate." Def. Br. at 2. Despite time and time again being found to have violated the Voting Rights Act and constitutional guarantees against racial discrimination, Texas continues to use the redistricting process as a tool to disenfranchise and dilute the votes of citizens of color in the state.[2] The remedy that Joint Plaintiffs seek is ideally situated to the "current needs" present in the instant case, thereby clearly alleviating any constitutional concerns with a preclearance requirement.

[2] After the *Shelby County* decision, the State also announced plans to implement the Voter ID requirement that had been denied preclearance under Section 5 by a three-judge panel in the D.C. District Court. The Department of Justice has filed a lawsuit challenging that requirement under Section 2 and the Fourteenth Amendment, and is also seeking Section 3(c) relief in case.

The State's argument also disregards the fundamental difference between a congressional requirement and a congressional authorization. Preclearance under the coverage formula struck down in *Shelby County* was effectively a federal command by the legislative branch of government. But preclearance under Section 3(c) would be a judicial determination. There is no command by the federal legislative branch. Rather, through Section 3(c), the federal legislative branch added a specific tool to the federal courts' well-entrenched, historically recognized equitable powers. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971) (discussing broad equitable powers of federal courts to remedy past instances of racial discrimination). Under Section 3(c), the federal courts act in a specific factual context, in a current case, to determine whether equitable discretion should be exercised to require preclearance. *Shelby County* does nothing to call into question preclearance when it is imposed in these circumstances. In fact, its invitation to Congress to devise a new coverage formula indicates just the opposite, suggesting that requiring preclearance based on current conditions and more context-specific facts would be justified.

Finally, contrary to the State's position, the 2011 redistricting plans are not moot. This Court has already denied the State's motion to dismiss the claims against the 2011 plans as moot. Dkt. No. 771 (July 1, 2013). The reasons such claims are not moot are provided in the Section 3(c) response, Dkt. No. 836 (at 2-4), The challenges brought by Joint Plaintiffs and others against the 2011 redistricting plans are ripe for ruling, and as a part of that ruling, this court should order bail-in under Section 3(c) as a part of the justified, tailored equitable relief due to Joint Plaintiffs in light of the State's discriminatory and illegal actions.

II. ADDITIONAL RELEVANT EVIDENCE OF INTENTIONAL DISCRIMINATION IN THE 2011 REDISTRICTING PLANS

Many of the acts of intentional discrimination in the 2011 plans are highlighted in the 3(c) Advisory filed by Joint Plaintiffs, Dkt. No. 788 (at 13-21).[3] In its proffered complaint in intervention, the United States also highlights these and other intentional acts as justification for judicial imposition of Section 3(c) relief. Dkt. No. 871-1, at 5-13 (including allegations concerning race-based splitting of precincts and needless fragmentation of minority voting communities). The following are additional examples of why a bail-in is an appropriate remedy for the race-based constitutional violations in the 2011 redistricting plans:

- The 2011 congressional plan engaged in a grossly disproportionate fragmentation of minority voters, as highlighted in the expert testimony of Dr. Ansolabehere. Whereas 88% of all Anglos (7.5 million) in the state ended up in Anglo majority districts, only 44% of Latinos ended up in majority Latino districts, with only a small number (625,000) of African-Americans ending up in plurality African-American districts contrasted with 1.3 million African-Americans ending up in majority Anglo districts. Tr. of Sept. 10, 2011, at 1124-1126, 1136. This is an unconstitutional racial classification modeled after the principle of division along racial lines addressed in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). *See also Robinson v Commissioners Court, Anderson County*, 505 F.2d 674, 678 (5th 1975) (stating test to be whether there has been "unconstitutional manipulation of electoral district boundaries so as to minimize or dilute the voting strength of a minority class or interest").

- The isolation of more 200,000 Latinos in Nueces County in an Anglo-dominated district to protect an Anglo incumbent who is not the candidate of choice of Latino voters. This isolation was at odds with the historic redistricting practice of orienting Nueces-based congressional districts toward the South Texas region where Latino voters predominate and virtually eliminated the possibility of creating an additional Latino opportunity district in the South-West-Central Texas region.

- The purposeful elimination of a minority crossover district anchored in Travis County, using race, including extensive race-based precinct splitting, as the tool to dislodge Latino and African-American voters from one another and from Anglo voters who historically crossed over to voter for those minorities'

[3] These include the state's treatment of the minority voting community in the Dallas-Fort Worth area, the intentionally disparate and discriminatory treatment of districts represented by African-American congressional incumbents in crafting their districts, the exclusion of minority members of the Texas Legislature from a role in crafting the plans, the race-based manipulation of Latino voting precincts in the drawing of CD 23, and many other examples included in that Advisory, adopted fully herein.

preferred candidates, all in contravention of the constitutional warning laid down in *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality opinion). These actions were detailed in the testimony of David Butts, who explained that African-American voters in Travis County were divided into primarily three congressional districts, none based in the county and all Anglo-dominated districts where the African-American votes would be submerged and ineffective. Tr. of Sept. 10, 2011, at 1195.

- The discriminatory actions with respect to the Latino incumbent in CD 20, eliminating important markers, including San Antonio's downtown, from the district at the same time that the neighboring Anglo incumbent in CD 21 was receiving favorable treatment with respect to inclusion of a country club. The D.C. court found this of a kind with the treatment of African-American incumbents in the Dallas and Houston areas in terms of intentional racial discrimination.

Many of these intentionally racially discriminatory actions remain in place in the 2013-enacted plans. Specifically, the discriminatory actions in Travis and Nueces Counties remain untouched, as does the discriminatory treatment that redrew CD 20. The grossly disproportionate fragmentation of minority populations across the state remains largely in place, despite the addition of new CD 33. Thus, on the basis of all of the evidence before it on the intentional discrimination motivating the 2011 Congressional and State House redistricting plans, and the long history of intentional racial discrimination in voting demonstrated by Texas and its sub-jurisdictions,[4] this Court should rule on the challenges against the 2011 plan and provide 3(c) relief. As part of that relief, of course, this Court should preliminarily enjoin the implementation of any new redistricting plans, including the ones enacted in the summer of 2013, pending preclearance from this Court.

III. PRELIMINARY INJUNCTION INDEPENDENT OF SECTION 3(C)

The Court should issue a preliminary injunction barring implementation of the 2014 plans even if it decides not to trigger Section 3(c)'s preclearance provisions. To secure a preliminary injunction, Plaintiffs must establish four elements:

[4] Also detailed in the 3(c) Advisory filed by Joint Plaintiffs, Dkt. No. 788.

> (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). As discussed above, *supra* Section II, and in briefing on the motion to amend the complaints, Dkt. No. 776, Joint Plaintiffs have demonstrated that the 2013-enacted plans do not remedy all of the instances of intentional discrimination and vote dilution in the 2011 plans. The congressional plan, C235, even though different in some respects from the 2011 enacted plan, still incorporates and retains clear instances of purposeful, race-based line-drawing.[5] Thus Joint Plaintiffs are likely to succeed on the merits of their claims.

Second, Joint Plaintiffs will suffer irreparable harm if the State begins implementing the 2013 redistricting plans. The first election deadline, for the 2014 elections, is rapidly approaching. While candidate filing for legislative and congressional seats opens on Saturday, November 9, 2013, and closes at 6 p.m. on Monday, December 9, 2013, Tex. Elec. Code § 172.023, there are earlier election milestones. The earliest election deadline affected by adjustments to district lines for legislative and congressional seats is the opening of filing for precinct chair positions, which is September 10, 2013. Tex. Elec. Code § 172.023(b), 2nd sentence. Absent injunctive relief from this Court, which would delay the opening of filing for party precinct chairs, implementation of the 2013-enacted plans will begin, and Joint Plaintiffs will suffer the irreparable harm of yet again being subjected to Texas' discriminatory redistricting plans.

[5] For example, the instances delineated at the end of Part II, above, are race-based constitutional violations warranting pre-implementation relief with respect to the 2014 plan. *See also,* Joint Motion to Amend Complaints, and attached Proposed Complaints, Dkt. No. 776. The factual evidence cited there is fully adopted herein.

Finally, Defendants will suffer no harm if this Court grants the requested injunctive relief. The first election deadline, while significant, can be pushed back or extended without necessarily affecting the rest of the election schedule. This Court could then schedule a hearing before the next significant election deadline (November 9), and such a delay would give this Court the time it needs to review the pending motions to amend complaints, the amended complaints, and other briefing critical to establishing a trial or evidentiary hearing schedule regarding challenges to the 2013 plans. The public would be best served by the issuance of injunction so that voters do not start to rely on a plan likely to be struck down in the near future. As such, Joint Plaintiffs have satisfied the necessary elements for injunctive relief, and should this Court decide not to rule on the challenges to the 2011 plan, it should order the State to refrain from implementing the 2013 plans until further order from this Court.

IV. CONCLUSION

Failure to apply the bail-in provision to Texas would leave thousands of voters of color in Texas in an untenable position—being subjected to the unrestrained and intentionally discriminatory actions of the state. This Court can and should rule on the claims against the 2011 redistricting plans. No remedy to the constitutional violations contained in those plans can be equitable without the protections offered by Section 3(c). Alternatively, in the event that the Court does not impose a Section 3(c) remedy, the Court should enjoin implementation of the 2014 plans enacted by the Texas Legislature this summer until further order of the Court.

Dated: September 4, 2013.

Respectfully Submitted,

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