

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' OPPOSITION TO PLAINTIFFS' JOINT MOTION FOR
BIFURCATION OF REMAINING ISSUES ON 2011 REDISTRICTING
PLANS AND NEW CHALLENGE TO 2013 REDISTRICTING PLANS,
ABATEMENT OF THE TRIAL ON THE 2013 ENACTMENTS, AND
PROPOSED SCHEDULING ORDER**

The Court should deny Plaintiffs' Joint Motion for Bifurcation because it is inefficient and unwarranted under the circumstances of this case.

INTRODUCTION

On September 6th, the Court entered an order establishing a unified process to resolve all remaining claims. *See* Order at 19-20, ECF No. 886 (Sept. 6, 2013). In doing so, the Court granted the Plaintiffs' request to bring claims against the 2011 and 2013 redistricting plans in the same case. *See e.g.* MALC's Mot. Leave Am. Compl. at 4, ECF No. 779 ("The interests of justice and judicial economy will undoubtedly be served by having all allegations properly before the Court as in the

proposed amended complaint.”) In July, the Plaintiffs sought leave to amend their petitions to add claims against the 2013 plans. Earlier this month, the Plaintiffs filed their amended complaints, which challenge both the 2011 and 2013 plans.

Now, having successfully argued that the claims must be heard together, the Plaintiffs insist that they must be heard separately. The Court should deny the Plaintiffs’ motion for at least three reasons. First, bifurcation under Rule 42(b) will not accomplish any of the Plaintiffs’ stated objectives. A bifurcated trial results in a single judgment; therefore, neither an appeal regarding the 2011 plans nor a decision under Section 3(c) can occur until the Court enters judgment on all claims, including claims against the 2013 plans. Second, even if it were possible to enter a separate final judgment on the 2011 plans and secure appellate review before reaching the 2013 plans, postponing consideration of the 2013 plans would create an unnecessary and unacceptable risk of interference with the 2016 election cycle. Third, just as there is no reason to put the 2013 plans on hold, there is no reason to fast-track the repealed 2011 plans, which have never been, and will never be, used to conduct an election.

Bifurcation of the Plaintiffs’ claims cannot be justified in the interest of “convenience, to avoid prejudice, or to expedite and economize” this litigation. *See* Fed. R. Civ. P. 42(b). On the contrary, bifurcation would unnecessarily delay consideration of the 2013 plans and create a serious risk of interference with the 2016 election cycle. The Plaintiffs’ motion should be denied.

ARGUMENT

I. Plaintiffs Have Materially Altered Their Position and The Court Should Not Reward This Gamesmanship By Bifurcating Trial.

In July, August, and September, the Plaintiffs repeatedly insisted that their claims against the 2011 and 2013 must be heard together. MALC stated: “The interests of justice and judicial economy will undoubtedly be served by having *all allegations properly before the Court* as in the proposed amended complaint.... If amendment is allowed, then this action can more effectively proceed on the merits and come to a timely end without any electoral delays.” MALC’s Mot. Leave Am. Compl. at 4, ECF No. 779 (emphasis added). The NAACP, Congressional Plaintiffs, LULAC, Quesada Plaintiffs, and Rodriguez Plaintiffs argued that separation of the 2011 claims from the 2013 claims would be unfair and result in unnecessary delay:

[W]ithout amendments, new lawsuits will have to be filed, and a new trial conducted. This *will tax Plaintiffs unfairly*, and require *even further delay in a complete resolution of the case*. . . Amendment would be far from futile—it would allow this Court to make *final determinations on all the evidence with which it has been presented over the last two years*, and to *craft a remedy to fully address all of the statutory and constitutional violations that still exist in the plans*.

Joint Pls’ Mot. Leave Am. Compl. at 7-8, ECF No. 776 (emphasis added).

The Court granted Plaintiffs’ motions to amend. Order at 17, ECF No. 886 (Sept. 6, 2013). That Order set out a logical, efficient path that accommodated Plaintiffs’ request to combine claims against the 2011 and 2013 plans:

Another round of fact and expert discovery may be necessary to adequately prepare the case for a second trial. Experts will need to supplement or amend their prior opinions and present same to the Court. There may be additional fact witnesses that will need to testify in person. . . . Evidentiary challenges will need to be resolved. Oral arguments will be presented. A second trial or series of evidentiary hearings will need to be held. The Court will then begin its review of all the evidence from the first trial in this case, the second trial in this case, and any additional evidence... that may be presented by submission. After the Court's review and deliberations, it will need to prepare opinions on all remaining claims and causes of action....

Order at 19-20, ECF No. 886.

The Plaintiffs changed position almost immediately, rejecting the Court's solution for the orderly resolution of this case and arguing that the Court should instead hold a hasty trial on the repealed 2011 maps and delay action on the now-live 2013 maps until after appellate review of the 2011 decision. Pls' Mot. Bifurcation at 2 (Sept. 17, 2013) ("An expedited resolution of the issues regarding the 2011 plans will allow for appellate review in a timely fashion so that any further litigation will benefit from the Supreme Court's guidance.") Plaintiffs apparently want to retry their claims against the 2011 plans, get appellate feedback, seek Section 3(c) relief, get appellate feedback (perhaps simultaneously with an appeal of the 2011 ruling), then challenge the 2013 plans, and get appellate feedback. *Id.* This is simply not efficient.

Defendants reject Plaintiffs' claims that the 2011 plans have any relevance to the 2013 plans. Plaintiffs initially filed suit to prevent implementation of the 2011 legislative plans. *See* Defs' Mot. Dismiss at 3, ECF No. 769-1 (June 29, 2013). The

Legislature has enacted and the Governor has signed bills repealing the 2011 plans and establishing new plans for elections going forward. *Id.* The Court recently authorized use of these 2013 plans in the upcoming election cycle specifically because election deadlines have already passed and a complete review is could not occur prior to the 2014 elections. Order at 22¹, 23², ECF No. 886. Hurried litigation of the 2011 claims while ignoring the 2013 plans is not an efficient course of action. See discussion *infra* Section II.

Efficiency aside, bifurcation cannot and will not give Plaintiffs the timely appellate review they seek. Separate trials under Rule 42 result in a single final judgment *after all issues are tried*, not separate final judgments for each trial. *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 304 n.19 (5th Cir. 1993) (quoting *Swofford v. B. & W., Inc.*, 336 F.2d 406, 415 (5th Cir.1964), *cert. denied*, 379 U.S. 962 (1965)). Any order on the 2011 plans is by definition not a final judgment and cannot be appealed. See *Gaffney v. Riverboat Services of Indiana, Inc.*, 451 F.3d 424, 442 n.18 (7th Cir. 2006) (quoting 4 Moore’s Federal Practice § 21.03 (2005)); *Reid v. General Motors Corp.* 240 F.R.D. 260, 236 (E.D. Tex. 2007) (citing *United*

¹ “The Court is keenly aware that its preliminary injunction analysis was ‘expedited and curtailed’ due to the circumstances at the time. But the Court is facing similar circumstances at this juncture and conducting yet another preliminary review of the same maps under current time restraints would cause unnecessary delay. The Court will review all of the evidence and reach a final decision on the merits of all claims under the Voting Rights Act and the U.S. Constitution, but it is impossible to reach that decision prior to the various deadlines for the 2014 elections.” (internal citation omitted).

² “As with the Congressional plan, the Court’s preliminary injunction analysis was necessarily expedited and curtailed due to circumstances at that time, but current time restraints make the present situation no better. Again, the Court will review all of the evidence and reach a final decision on the merits of all claims under the Voting Rights Act and the U.S. Constitution, but that decision will not be reached prior to the 2014 elections.”

States v. O'Neil, 709 F.2d 361, 368 &n.6 (5th Cir. 1983); *Belmont Place Assoc. v. Blyth, Eastman, Dillon & Co.*, 565 F.2d 1322, 13323 (5th Cir. 1978)). Appeal must wait for final resolution of all claims presented. The Plaintiffs' proposed path does not achieve their primary stated purpose.

In addition, the Plaintiffs seek bifurcation in an attempt to gain an early ruling on whether Section 3(c) will apply to Texas in the future. Pls' Mot. Bifurcation at 3 ("The appropriate standard on which to judge the 2013 enactments can only be known after the 3(c) demands of the parties are resolved.") Once again, the Plaintiffs' chosen path does not achieve their desired outcome. Any bifurcated ruling on the 2011 plans would not result in a final judgment. A final judgment would not come until all claims have been heard and resolved by the Court. Only a final judgment can be the basis for Section 3(c) relief. *See* Defs' Br. Section 3(c) at 9-12, ECF No. 824 (July 22, 2013). Nothing requires the Court to decide whether Section 3(c) applies before addressing the Plaintiffs' claims against the 2013 legislative plans, and as shown below, Plaintiffs' request for such a lengthy delay will unnecessarily hinder the Court's ability to give due consideration to the 2013 maps.

The Plaintiffs' recently amended pleadings do not support bifurcation under Rule 42(b). The Plaintiffs have failed to carry their burden of showing that separate trials are necessary or more efficient than a single trial resolving all issues before the Court.

II. The Court Should Adopt an Orderly Litigation Schedule that Enables the Court to Complete Its Review of All Matters In Time For the 2016 Elections.

Rule 42(b) authorizes separate trials of one or more separate issues or claims “[f]or convenience, to avoid prejudice, or to expedite and economize.” Fed. R. Civ. P. 42(b). “The burden is on the party seeking separate trials to prove that separation is *necessary*.” *Crompton Greaves, Ltd. v. Shippers Stevedoring Co.*, 776 F. Supp. 2d 375, 402 (S.D. Tex. 2011) (emphasis added) (quoting *Houston McLane Co. v. Connecticut Gen.*, 2006 WL 3050812 *2 (S.D. Tex. Oct. 24, 2006).

The Plaintiffs have failed to demonstrate that bifurcation is necessary or that bifurcation will accomplish any of Rule 42’s requirements. Rather, the Plaintiffs’ plan is inconvenient, inefficient, and should not be followed.

This Court has stated repeatedly that the rush associated with the 2011-2012 litigation was unfortunate and precluded full consideration of the 2011 maps. *E.g.* Order at 3³, 22⁴, 23⁵, ECF No. 886 (Sept. 6, 2013); Order at 2⁶, 28-29⁷, ECF No. 691

³ “Under severe time constraints, this Court undertook the task of crafting a second set of interim plans, applying the legal standards imposed by the Supreme Court.”

⁴ “The Court is keenly aware that its preliminary injunction analysis was ‘expedited and curtailed’ due to the circumstances at the time.” (citation omitted).

⁵ “As with the Congressional plan, the Court’s preliminary injunction analysis was necessarily expedited and curtailed due to circumstances at that time, but current time restraints make the present situation no better.”

⁶ “Further, both the trial of these complex issues and the Court’s analysis have been necessarily expedited and curtailed, rendering such a standard even more difficult to apply. The Court has attempted to apply the standards set forth in *Perry v. Perez*, but emphasizes that it has been able to make only preliminary conclusions that may be revised upon full analysis.”

⁷ “Although, as noted, several parties have urged the Court to wait for a decision on preclearance from the D.C. Court, the Court heard testimony from the parties that in order to proceed with a May 29 primary, a map needed to be in place by March 3. Thus, the Court concluded that it could not

(Mar. 19, 2012); Order at 12⁸, ECF No. 690 (Mar. 19, 2012). The Court avoided duplicating those problems for the 2014 elections by ordering that the 2014 elections will proceed under the 2013 maps. Order at 21-24, ECF No. 886.

But the Plaintiffs have failed to grasp this simple fact. The Plaintiffs' Motion for Bifurcation, which provides for the hearing on the 2011 maps and Section 3(c) to occur just two months from now, puts the parties and the Court in the same position they were in back in 2011-12, hastily litigating complicated legal issues that should instead be heard on a routine litigation schedule.⁹ Following Plaintiffs' proposal—which seeks to delay consideration of the 2013 maps for more than a year—will also make it virtually impossible for the Court to meaningfully and carefully review the 2013 maps prior to the 2016 elections.

First, the Plaintiffs' proposed schedule precludes careful review of the 2011 maps and newly-sought relief under Section 3(c). The State's Response to the Motion for Bifurcation is due on September 24, 2013. The Plaintiffs' proposed schedule has deadlines starting ten days later, with the first of several hearings set a mere three weeks from now. Pls' Mot. Bifurcation at 2. Plaintiffs further propose

wait for a decision from the D.C. Court without further delaying the primary and causing substantial hardship to the Republican and Democratic parties, which have scheduled their conventions for June.”

⁸ “We emphasize the preliminary and temporary nature of the interim plan, ordered in adherence to the standards set forth by the Supreme Court in this very case, as we undertake our ‘unwelcome obligation’ mindful of the exigent circumstances created by the need for timely 2012 primaries and general elections in Texas.” (footnote omitted).

⁹ The proposed schedule does not reflect input from the Defendants or the United States, whose motion to intervene was granted today. Any schedule to resolve the outstanding claims should reflect the input of all parties and the Court. This case should not proceed on an expedited schedule proposed unilaterally by the Plaintiffs.

an evidentiary hearing in just over nine weeks that Plaintiffs assert should allow the Court to (1) resolve all claims against the 2011 plans and (2) make a determination regarding the extraordinary relief provided for by Section 3(c). *Id.* This is an impractical, if not impossible, schedule. No provision is made for disclosure of the proposed witnesses who will be presented at the October 18 and December 1 hearings, nor does the proposed schedule address discovery related to those witnesses. These witnesses will need to be deposed, especially in light of the different burden of proof and substantive requirements that exist in this case as compared to the Section 5 action in which much of the testimony arose. Moreover, no discovery has occurred in any court with respect to the extraordinary and newly-sought relief of bail-in, yet the Plaintiffs somehow believe that it could be concluded in just a couple of months. The current state of discovery in this litigation precludes the ability to conduct a thorough and meaningful hearing on all 2011 map issues and Section 3(c) on December 1. The Court should not adopt a schedule that will result in the same hasty resolution of claims regarding the 2011 maps that occurred two years ago.

Second, the lengthy delay contemplated in Plaintiffs' plan would needlessly force hasty consideration of the 2013 maps due to the quickly approaching 2016 elections. Plaintiffs ignore that the 2013 maps are the live maps. The 2011 maps are not in effect and have never been used for an election. There is no need to rush litigation over the 2011 maps. The Plaintiffs' schedule creates a false sense of urgency regarding the 2011 maps while simultaneously creating unnecessary

urgency in the future for the resolution of claims regarding the 2013 maps. This haste was unavoidable in 2011, but is completely avoidable now.

The Plaintiffs' challenges to the 2013 maps should be addressed now, in an orderly manner that allows the Court to give due consideration to those plans. Such thoughtful and deliberate litigation can be conducted in time to prevent problems with the 2016 election cycle if the parties begin that litigation process now.

Nevertheless, the Plaintiffs seek to delay any consideration of the live 2013 maps until after this Court completes its analysis of the now-defunct 2011 maps and all appeals from that decision are concluded. This Court has already recognized that there is substantial work to be completed, including discovery, updated expert reports and testimony, evidentiary challenges, evidentiary hearings, and a second trial, along with potential appellate review. Order at 19-20, ECF No. 886. Rushing through this process on the 2011 maps (intentionally delaying any action on the live 2013 maps) accomplishes nothing, while threatening to saddle Texas voters in 2016 with the same difficulties that plagued the 2011 election cycle.

The Court's order of September 6, 2013, recognized the need to conduct this litigation in a timely (not hurried) and organized (not disorderly) fashion: "the Court must balance the need to protect voting rights that may be affected by the redistricting maps with the need to avoid the adverse effect on voting rights that comes with delay and confusion during election time. This litigation will continue for as long as it takes to reach a legally correct decision on very important issues,

but elections must go on.” Order at 20, ECF No. 886. Plaintiffs’ plan ignores the Court’s wishes and would yield hasty litigation over both the 2011 map (now) and 2013 map (in the future). The Court should instead adopt a plan that (1) permits meaningful and efficient review of all claims in one proceeding and (2) concludes in time for the State to conduct orderly elections in 2016.

CONCLUSION AND PRAYER

The Court should deny Plaintiffs’ Joint Motion for Bifurcation.

Dated: September 24, 2013

Respectfully submitted,

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I hereby certify that a true and correct copy of this filing was sent on September 24, 2013, via the Court's electronic notification system and/or email to the following counsel of record:

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