

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

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| SHANNON PEREZ, et al., |) | |
| |) | |
| Plaintiffs |) | |
| |) | CIVIL ACTION NO: |
| and |) | SA-11-CA-360-OLG-JES-XR |
| |) | (consolidated, lead case) |
| MEXICAN AMERICAN LEGISLATIVE |) | |
| CAUCUS, TEXAS HOUSE OF |) | |
| REPRESENTATIVES (MALC) |) | |
| |) | |
| Plaintiffs |) | |
| |) | |
| v. |) | |
| |) | |
| STATE OF TEXAS; RICK PERRY, |) | |
| In his official capacity as Governor of the |) | |
| State of Texas; DAVID DEWHURST, |) | |
| In his official capacity as Lieutenant |) | |
| Governor of the State of Texas; JOE |) | |
| STRAUS, in his official capacity as |) | |
| Speaker of the Texas House of |) | |
| Representatives |) | |
| Defendants |) | |

**PLAINTIFFS MALC RESPONSE TO DEFENDANTS’ MOTION TO
DISMISS**

Defendants have filed a Motion to Dismiss. The State Defendants filed this motion pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(c). At the outset Defendants contend that Plaintiff’s claims with regard to the redistricting of 2011 should be dismissed as moot. (Defendants’ Motion to Dismiss, Dkt. 995, p.1) The Defendants made virtually the same argument in opposition to Plaintiffs’ Motion to Amend its complaint in this cause and in its previous motion to dismiss 2011 claims as moot. (See, Dkt. 786). This Court rejected the

Defendants' argument and allowed the amendment and denied the Motion to Dismiss. (Dkt. 886). This Court determined that:

The fact that the Legislature has adopted the Court's interim plans in an attempt to curb this particular litigation is no assurance that it will not engage in the same conduct in the next legislative session or any session thereafter. Thus, a dispute remains over the legality of the challenged practices, there is no assurance that the conduct will not recur, and Plaintiffs maintain a personal stake in the controversy. Given these circumstances, the Court finds that there exists some cognizable danger of recurrent violation such that Plaintiffs' claims for declaratory and injunctive relief with regard to the 2011 plans are not moot.

Order, 9-16-13 (Dkt. 886, p 14)(Order Granting Motion to Amend and Denying Motion to Dismiss as Moot).

Standard of Review for Rule 12 (b)(1) and (c) Motion

Standards of review regarding Motions to Dismiss pursuant to the Federal Rule of Civil Procedure 12(b)(1), which governs challenges to a court's subject matter jurisdiction, and 12 (c), seeking judgment on the pleadings, are clearly set out in responses to this Motion by other Plaintiffs to this action. Plaintiff MALC agrees with the other Plaintiffs assessment of the standards of review and will therefore not repeat them here.

Defendants' Contentions

In their recent Motion to Dismiss, the Defendants argue that this Court should revisit its earlier determination because its prior Order is inconsistent with appropriate legal standards (Dkt. 995, p. 2) and because this Court failed to address the Fifth Circuits decision in *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004). (Dkt. 995, pp. 4-5) However, this Court's previous assessment is not inconsistent with the standards announced by the Supreme Court and the Fifth Circuit. Rather, this Court's prior ruling is consistent with those rulings and with the ruling in *McCorvey*. This Court correctly noted that the Defendant State's repeal of H283 in fact included

many of the same districts currently under challenge. (Dkt. 886, p. 13) (“Like the amended ordinance in *Associated General Contractors*, the new plans may disadvantage Plaintiffs to a lesser degree, but they disadvantage them in the same fundamental way”). *McCorvey* recognized that, an exception to the mootness rule exists where there is evidence, or a legitimate reason to believe, that the state will reenact the statute or **one that is substantially similar**. *McCorvey*, 385 F. 3d at 849. (emphasis added). Unlike the facts in this case, the Plaintiff in *McCorvey* sought to revisit a 30 year old judicial determination concerning a law that criminalized abortion. (“This exception does not apply to the instant case. Texas has not adopted any substantially similar statute, nor is there a reasonable belief that it plans to reenact the statutory provisions struck down in *Roe*”). Here, however, the new enactment maintained many of the Plan H283 features challenged by the MALC.

As the Defendants have acknowledged, an exception to the mootness rule they rely on exists when: “when there is evidence that replacement legislation has not “changed substantially” or “significantly revised” the challenged provisions of the repealed provisions, thereby **disadvantaging the plaintiffs in the same “fundamental way,”** *Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 & n.3 (1993)”. (Dkt. 995, p. 11). That was the precise evaluation and determination that this Court made in its prior ruling. (Dkt. 886, p. 13)

THIS CAUSE SHOULD NOT BE DISMISSED BECAUSE IT IS NOT MOOT

The standard for determining whether a case seeking prospective relief has been mooted by the defendant’s voluntary conduct is whether “subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the*

Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 189 (2000). The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness. *Id.*; *see also Preiser v. Newkirk*, 422 U.S. 395, 402 (1975) (in determining whether a request for declaratory judgment has become moot, the question is “whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment”).¹ Thus, although it may affect the scope of the remedy, “a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” *Id.*; *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (defendant’s declaration of intent not to revive challenged practice “does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now discontinued acts”). “Along with its power to hear the case, the court’s power to grant injunctive relief survives discontinuance of the illegal conduct.” *W.T. Grant*, 345 U.S. at 633. “But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.” *Id.* “To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.” *Id.*

Defendants fail to meet their burden of demonstrating that the conduct alleged to violate § 2 and the Constitution with regard to the 2011 plans could not reasonably be expected to recur.

¹ Because of the different standards for initial standing and subsequent mootness, a defendant’s voluntary action after suit is filed may not necessarily moot a claim, even though the plaintiff would have lacked initial standing had she filed her complaint after the defendant’s voluntary action took place. *Id.* at 191.

Although the 2011 plans have been repealed, the Supreme Court has held that repeal of a challenged law does not render a case moot if there is a reasonable possibility that the government would reenact the law if the proceedings were dismissed. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982).

Similarly, the fact that a challenged law is amended does not alone moot the underlying claim unless the law has been sufficiently altered so as to present a substantially different controversy. *Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993).

The 2013 plans are heavily derived from the 2011 plans, given the deferential standard required by the application of *Perry v. Perez*. MALC contends that many of the alleged violations of the Voting Rights Act and the Constitution in the 2011 plans persist in the 2013 plans. MALC contends that the interim plans did not go far enough in curing the alleged Section 2 and the intentional racial discrimination, and argue that the Legislature ignored these concerns when adopting the interim plans in 2013. Like the amended ordinance in *Associated General Contractors*, the new plans may disadvantage Plaintiffs to a lesser degree, but they disadvantage them in the same fundamental way. Thus, Plaintiff is still suffering injury from the 2011 plans, even if they are repealed. Moreover, there is no indication or assurance that, in the next redistricting cycle, the Texas Legislature will not engage in the same alleged conduct that Plaintiff asserts violated their rights, such as dismantling coalitions, manipulating voter turnout among Hispanics, or engaging in other conduct that Plaintiffs allege violated their rights in connection with the 2011 plans. While Texas may have voluntarily ceased or diminished the allegedly illegal conduct, it has not conceded the illegality of the conduct and has steadfastly maintained that its actions did not violate Plaintiffs' rights. The fact that the Legislature has

adopted the Court's interim plans in an attempt to curb this particular litigation is no assurance that it will not engage in the same conduct in the next legislative session or any session thereafter. In fact, Texas has a recent history of taking a court-ordered plan and redrawing the lines, mid-decade, once the oversight of the courts is removed. Thus, a dispute remains over the legality of the challenged practices, there is no assurance that the conduct will not recur, and Plaintiffs maintain a personal stake in the controversy. Given these circumstances, there exists some cognizable danger of recurrent violation such that Plaintiffs' claims for declaratory and injunctive relief with regard to the 2011 plans are not moot.

Defendant's Motion to Dismiss should also be denied because there is still work for this Court to perform. Plaintiff MALC requested not just injunctive relief, but also sought declaratory judgment and sought compliance with the Section 5 of the Voting Rights Act with regard to any subsequent redistricting plans. Since the coverage formula for Section 5 coverage has been rejected by the Supreme Court, a Section 3(c) remedy has become ripe, because of a change in law. This remedy would not have been necessary for the plaintiffs before this recent change, since coverage and Section 5 review would have been automatic. In addition, many of the Plaintiff's claims remain unchanged in the new enactment.

Since a Section 3 (c) remedy requires a determination of intentional discrimination and since Plaintiff MALC has alleged that the 2011 enactments are tainted with discriminatory purpose, and since trial on this issue will soon be completed, it will be appropriate to determine whether this Court should grant Plaintiff's request for declaratory judgment and Section 3 (c) relief. This Court has seen much of the evidence necessary to make a finding of intentional discrimination that would allow a "bail-in" of Texas into a pre-clearance regime and to enter

judgment for Plaintiff on this issue. In order to defeat the possibility of this finding, the State has reasserted its motion to dismiss for mootness.

In short, a claim is not moot if there has been an injury and a remedy exists for that harm. The injury is the stain of discriminatory intent that still lingers from the 2011 enactment and the continuation of many of the same features objected to in the original enactment. The state may wish that the 2011 redistricting enactments never occurred. In truth, many minority plaintiffs certainly wish that those maps had never been enacted. The state may even argue that the harms created by the enactment of Plans H283 and C185 have been sanitized by the state's adoption of most of this Court's interim plans. But, they were assuredly not.

Those enactments caused an injury that persists today. That injury is dilution of minority voting strength and the intentional discrimination by the State.

Just as intervening events may moot claims because of changes in law or fact; intervening events may ripen remedies. It is not without a little hint of irony that the longtime goal of Texas to nullify Section 5 of the voting rights act has created an opportunity to bail-in Texas into a judicial and administrative preclearance system and kept this case alive for further review. It is this law change that justifies the rejection of the state's reasserted motion to dismiss for mootness.

DATED: June 9, 2014

Respectfully submitted,

/s/ Jose Garza

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**ATTORNEYS FOR MEXICAN
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TEXAS HOUSE OF REP. (MALC)**

CERTIFICATE OF SERVICE

I hereby certify that on the 9^h day of June, 2014, I electronically filed the foregoing using the CM/ECF system which will send notification of such filing to all counsel of record who have registered with this Court's ECF system, and via first class mail to those counsel who have not registered with ECF.

_____/s/ Jose Garza_____
JOSE GARZA