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]

PLAINTIFFS' *JOINT* OPPOSITION TO DEFENDANTS' MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

Plaintiffs[1] submit this response in opposition to the Defendants' motion to certify.[2] The Court should deny Defendants' motion to certify the question of subject-matter jurisdiction/mootness for interlocutory appeal to the Fifth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b). Because certification under § 1292(b) is not available in cases pending before three-judge district courts, the Fifth Circuit would have no jurisdiction to accept certification in this case. Section 1292(b), by its plain text, limits certification for interlocutory appeal to cases where there is a "Court of Appeals which would have jurisdiction of an appeal of such action." 28 U.S.C. § 1292(b).

[1] Plaintiffs herein are the Texas NAACP Plaintiffs, African-American Congresspersons, MALC, Rodriguez Plaintiffs, Quesada Plaintiffs, Texas Latino Redistricting Task Force Plaintiffs, Perez Plaintiffs, LULAC Plaintiffs, and Congressman Henry Cuellar.

[2] The Texas Democratic Party and its Chairman Gilberto Hinojosa join this Response and oppose the State's effort to trigger an interlocutory appeal. However, strictly in the alternative, TDP/Hinojosa request that, in the event an interlocutory appeal is granted, they be granted interlocutory appeal of their partisan gerrymandering claims.

The Fifth Circuit has no jurisdiction over an appeal of this action; rather, the United States Supreme Court has direct review over this action. *See* 28 U.S.C. § 1253 (providing for direct review to Supreme Court); 28 U.S.C. §§ 1291, 1292 (precluding the Courts of Appeals from exercising jurisdiction where "direct review may be had in the Supreme Court"). Defendants erroneously rely on a case interpreting § 1292(b) that predates the statute's amendment and clarification, underscoring that the interlocutory appeal sought by Defendants is not authorized by the statute. But even if § 1292(b) did permit certification in this case, interlocutory appeal is inappropriate here because it would not materially advance the ultimate resolution of this litigation; any relief yet to be imposed could address, and will undoubtedly impact, Plaintiffs' pending claims regarding the 2013 map, which Defendants do not contend are moot. Moreover, the presence of a dissenting opinion is insufficient to satisfy § 1292(b)'s standard. Certification would serve no purpose but delay—jeopardizing the availability of a remedy prior to the 2018 elections—and would waste the parties' and the Court's resources. Defendants' motion should be denied.

I. The Fifth Circuit Has No Jurisdiction over Interlocutory Appeals Pursuant to 28 U.S.C. § 1292(b) in Cases Pending Before Three-Judge District Courts.

Certification under 28 U.S.C. § 1292(b) is not available in cases pending before three-judge district courts, where direct review may be had in the Supreme Court. Thus the Fifth Circuit would have no jurisdiction to entertain an interlocutory appeal in this case. Section 1292(b) provides that

> [w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. *The Court of Appeals which would have jurisdiction of an appeal of such action* may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order . . . .

28 U.S.C. § 1292(b) (emphasis added). Here, there is no Court of Appeals "which would have

jurisdiction of an appeal of [this] action" because this case is pending before a three-judge district court with direct review to the Supreme Court. *See* 28 U.S.C. § 1253 ("Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."); 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where direct review may be had in the Supreme Court."); 28 U.S.C. § 2284 ("A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts . . . ."). Certification under § 1292(b), by the plain text of the statute, is not available in cases pending before three-judge district courts where the Supreme Court has appellate jurisdiction, and the Fifth Circuit would therefore have no jurisdiction to entertain the interlocutory appeal that Defendants request.[3]

A contrary conclusion would disrupt the balance Congress struck in determining the circumstances in which appellate jurisdiction rests with the Supreme Court versus the Courts of Appeals, and the circumstances in which the Supreme Court may or may not decline review. Congress determined that the Supreme Court should have direct review from redistricting cases decided by three-judge district courts. *See* 28 U.S.C. §§ 1253, 2284. Congress did not create an off-ramp to the Court of Appeals for issues over which there might be disagreement. The reading of § 1292(b) that Defendants propose would vitiate the Supreme Court's responsibility to decide those issues, and would convert any eventual Supreme Court review from mandatory to discretionary. *Compare* 28 U.S.C. § 1254 *with id.* § 2284; *see Hicks v. Miranda*, 422 U.S. 332,

[3] Nor, under the plain text of § 1292(b), is certification to the Supreme Court available.

344 (1975) (explaining that the Court has "no discretion to refuse adjudication of [a] case [on direct review] on its merits as would have been true had the case been brought [to it] under [its] certiorari jurisdiction."). Defendants' interpretation would disrupt operation of the direct appeal statute, invite forum shopping, and contravene Congress's clear intent.[4]

Congress determined that redistricting cases were of sufficient importance that direct review to the Supreme Court was appropriate despite the need to "keep within narrow confines" the Supreme Court's appellate docket. *Goldstein v. Cox*, 396 U.S. 471, 478 (1970). Indeed, in 1976, Congress substantially reduced the circumstances under which direct review to the Supreme Court may be had, yet Congress maintained direct review for redistricting cases. *See* Pub. L. 94-381, 90 Stat. 1119 (1976). If redistricting cases in general are of such importance that direct review is appropriate, it would make scant sense for redistricting cases involving controlling issues of law over which there are substantial grounds for disagreement to be diverted away from the Supreme Court to the Courts of Appeals. If anything, review by the Supreme Court is all the more important for such issues.

Defendants do not grapple with the text of § 1292(b) in their motion, but rather rely upon a 1974 case to contend that certification to the Fifth Circuit is appropriate. *See* Mot. at 3-4. In that case, *Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974) (*per curiam*), the Fifth Circuit entertained an interlocutory appeal pursuant to § 1292(b) in a case pending before a three-judge district court. The *Beare* court noted that because the order at issue was not final and did not grant or deny

[4] Defendants' position is all the more puzzling in light of their opposition to Plaintiffs' motion for injunctive relief. If Defendants wish to appeal the March 10 ruling, they can do so (to the proper Court) once this Court issues an injunction effectuating its March 10 ruling. Together, Defendants' opposition and present motion for certification appear designed not to achieve a full and final resolution of the issues but to forestall the relief to which Plaintiffs are entitled as a result of the Court's March 10 ruling.

injunctive relief, it was "one of the relatively rare situations in which the Court of Appeals is required to review the decision of a three-judge District Court." *Id.* at 244.

But *Beare* was decided under a prior version of § 1292(b) that was silent as to whether the Court of Appeals must have ultimate appellate jurisdiction over the action to entertain an interlocutory appeal. The version of the statute at issue in *Beare*, which was enacted in 1958, provided that if the district judge made the requisite findings, "[t]he Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . ." Pub. L. No. 85-919, 72 Stat. 1770. Congress amended § 1292(b) in 1984 to include the limitation that such review is only available in "[t]he Court of Appeals *which would have jurisdiction of an appeal of such action*." Trademark Clarification Act of 1984, Pub L. No. 98-620, 98 Stat. 3335 (codified as amended at 28 U.S.C. § 1292(b)) (emphasis added). Congress's amendment abrogated *Beare* and forecloses Defendants' motion.[5]

II. An Immediate Appeal Will Not Materially Advance the Ultimate Termination of this Litigation.

Even if appeal under § 1292(b) were statutorily authorized, an immediate appeal would not materially advance the ultimate termination of this litigation, and is therefore unwarranted. Interlocutory appeals under § 1292(b) "represent a rarely used exception to the strong judicial policy disfavoring piecemeal appeals." *Coates v. Brazoria Cty.*, 919 F. Supp. 2d 863, 866 (S.D. Tex. 2013) (citation and quotation marks omitted); *see also United States v. Nixon*, 418 U.S. 683,

[5] Where a three-judge district court decides certain ancillary issues, such as entitlement to attorneys' fees, the Court of Appeals has jurisdiction over an appeal. *See Watkins v. Fordice*, 7 F.3d 453, 455 n.2 (5th Cir. 1993). Consideration by a three-judge court of such ancillary matters is not mandatory, *see* 28 U.S.C. § 2284(b)(3), whereas the Order over which the Defendants seek interlocutory review was required to be decided by a three-judge court, *see id.* § 2284(a). The Court of Appeals would thus have no jurisdiction over an appeal of the March 10, 2017 Order, and thus by its terms § 1292(b) is unavailable to Defendants here.

690 (1974) ("The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals."). To be appropriate, an interlocutory appeal must, among other things, "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). To determine whether that requirement is satisfied, the court should consider "whether an immediate appeal would (1) eliminate the need for trial, (2) eliminate complex issues so as to simplify the trial, or (3) eliminate issues to make discovery easier and less costly." *Coates*, 919 F. Supp. 2d at 867 (citation and quotation marks omitted).

None of these factors is satisfied here. Discovery on the 2011 maps is over, the trial has been conducted, and the Court has issued its opinion with respect to the Congressional map and State House maps. The remaining proceedings before this Court are (1) resolution of Plaintiffs' claims against the 2013 Congressional and State House maps, which Defendants acknowledge still exist and need to be resolved, Mot. at 8, and (2) creation of a remedy for any legal and constitutional violations in the existing redistricting plans before the 2018 elections. Thus, there are substantial elements of this case that must and will proceed regardless of this requested appeal, even if it were allowed. Neither the parties nor the Court stand to gain anything from an immediate appeal of the Court's opinion as to the 2011 Congressional map. Moreover, given that some infirmities in the 2011 plans were carried over intact into the 2013 plans and, as Plaintiffs contend, other infirmities were left unremedied, any relief the Court imposes might remedy the 2013 claims as well. Defendants do not contend that those claims are moot.[6] An immediate appeal would not materially advance the litigation.

[6] For this reason, the Defendants' mootness argument is also not a "controlling question of law"—at least not with respect to the overall litigation—because immediate resolution of it "would have

It would, however, cause unnecessary delay and multiply these proceedings, requiring the Court of Appeals to wade into a dispute over whether it has jurisdiction to entertain interlocutory appeals under § 1292(b) from three-judge district courts. Shifting this dispute to another court would achieve no efficiency in this litigation; instead, it would drain the resources of the parties and the courts. Rather than simplify any appellate proceedings, as Defendants contend, *see* Mot. at 7, an appeal to the Fifth Circuit would add an *additional* layer of appellate review, because the losing party there could then petition the Supreme Court for certiorari—review that would involve both the Court of Appeals' jurisdiction to entertain an interlocutory appeal and the question of mootness.[7] Additionally, an interlocutory appeal would bifurcate the 2011 Congressional case from the 2011 State House case. Judicial economy is advanced by avoiding piecemeal appeals in this case, and instead maintaining the appellate structure Congress intended for this case—direct review to the Supreme Court.

III. The Presence of a Dissenting Opinion Is Insufficient "Disagreement" to Warrant Piecemeal Appeal Under § 1292(b).

A disagreement between the majority and the dissent is insufficient to warrant a piecemeal appeal under § 1292(b). "The threshold for establishing a 'substantial ground for difference of

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little or no effect on subsequent proceedings," *Ryan v. Flowserve Corp.*, 444 F. Supp. 2d 718, 723 (N.D. Tex. 2006) (internal quotation marks omitted), other than to multiply them.

[7] Furthermore, the Supreme Court has held that the Courts of Appeals, when properly exercising interlocutory review, "may address any issue fairly included within [a] certified order because it is the *order* that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996) (internal quotation marks omitted). Consequently, interlocutory review by the Fifth Circuit here could reopen this Court's March 10, 2017 Order and result in duplicative proceedings by the Fifth Circuit and the Supreme Court not only on jurisdictional questions but also on the merits.

opinion' is higher than mere disagreement or even the existence of some contrary authority." *Coates*, 919 F. Supp. 2d at 868.

> Courts traditionally will find a substantial ground for difference of opinion "if a trial court rules in a manner which appears contrary to the rulings of all Courts of Appeals which have reached the issue, if the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented."

Id. at 868-69 (quoting 4 Am. Jur. 2d *Appellate Review* § 123 (2012)). These factors are not present here. Instead, there is merely a dissenting opinion. If that were enough to satisfy § 1292(b)'s requirement, there would be piecemeal appeals to different appellate courts in any number of three-judge district court decisions. As evidenced by Defendants' inability to cite a single example since 1974, that cannot be what Congress intended and it would permit the exception for interlocutory review to swallow the rule.

CONCLUSION

Defendants' motion should be denied. Section 1292(b) does not permit immediate appeal in cases before three-judge district courts, and therefore the Fifth Circuit would have no jurisdiction to entertain such an appeal. Moreover, the statute's requirements are not satisfied here: an interlocutory appeal would needlessly multiply the proceedings and delay this litigation's ultimate resolution.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2017, I served a copy of the foregoing Plaintiffs' Opposition to Defendants' Motion to Certify Order for Interlocutory Appeal on counsel who are registered to receive NEFs through the CM/ECF system. All attorneys who have not yet registered to receive NEFs have been served via first-class mail, postage prepaid.

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