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' OPPOSED MOTION TO STAY ORDER ON PLAN C235 PENDING APPEAL OF THAT ORDER OR A FINAL JUDGMENT

Defendants the State of Texas, Greg Abbott, in his official capacity as Governor, and Rolando B. Pablos, in his official capacity as Secretary of State, respectfully move for a stay pending appeal of this Court's Order on Plan C235 (Aug. 15, 2017), ECF No. 1535, or an appeal of a final judgment. The Court's order enjoins Defendants from conducting the 2018 congressional elections using the existing Congressional Districts 27 and 35 under Plan C235. *See* Order at 105, ECF No. 1535 ("In Part VI, the Court concludes that the Plan C235 configurations of CD35 and Nueces County/CD27 violate § 2 and the Fourteenth Amendment. These statutory and constitutional violations must be remedied by either the Texas Legislature or this Court.").

The Court's order will likely be reversed on appeal because it holds that the State of Texas committed intentional racial discrimination by enacting Plan C235, which this

Court itself ordered the State to use for the 2012 elections, and which this Court refused to modify, despite plaintiffs' requests, in 2014 and 2016.

Both the balance of the equities and the public interest counsel in favor of a stay. A stay is necessary for the State to exercise its appellate rights while preserving the primary election calendar. The risk of disrupting the 2018 election cycle qualifies as an irreparable injury to Texas. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam) ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without [a federal-court] injunction suspending the [State's election law]."). There is no corresponding injury to the plaintiffs. Texas has used the court-drawn map in Plan C235 for all three congressional elections held since the Court ordered its use in 2012. Until three days ago, the Court had made clear that the map was *not* infected with racial discrimination. *See* Order at 48, 53–55 (March 19, 2012), ECF No. 691. The plaintiffs could have secured a ruling as early as 2014, when the Court originally scheduled a trial on Plan C235. But the plaintiffs insisted, over the protest of the State, on holding two other trials on maps that were never used for a single vote in a single election and that had long been repealed. The plaintiffs will not be irreparably injured by voting in the same congressional districts where they have voted since this Court first directed them to in 2012.

Defendants therefore move, under Federal Rule of Civil Procedure 62(c), to stay the Court's order and any final judgment forbidding the State to conduct the 2018 congressional elections under Plan C235. Defendants seek this stay to preserve the status quo pending appeal and allow the 2018 congressional elections to proceed under Plan C235. If the State is allowed to use Plan C235 for the 2018 elections, there will be no exigency requiring court-drawn plans before the 2018 election cycle begins and, as a result, no need to conduct a hearing on court-drawn congressional plans on September 5, 2017. Defendants request a ruling on this motion by August 23, 2017, at which point the Defendants intend to seek a stay from the United States Supreme Court, if necessary.

The Court asked whether the Governor of Texas would waive the State's rights to appeal the Court's ruling by calling a special session to redraw the maps at issue in this case. *See* Order at 105, ECF No. 1535. The Court gave the Governor three days to decide whether to convene a special legislative session to draw new maps for the 2018 elections. But the Court's relentless criticism of the 2013 Legislature's "deliberative process" makes it impossible for the State to meet the deadlines that this Court has now imposed. If the problem is that the 2013 Legislature did not spend enough time deliberating prior to adopting the 2013 court-drawn maps, then there is no way for the 2017 Legislature to satisfy an undefined sufficient-effort standard, hold protracted hearings involving interest groups, and adopt new maps that will satisfy this Court by October 1st. Even if there were time to do so, convening the Legislature prior to letting

the appeals process play out would prematurely waive the State's right to appeal a decision with which it vigorously disagrees. It is conceivable that legislative redistricting after a final decision from the Supreme Court could resolve this matter and provide stability. But immediate redistricting at this premature stage, whether it is accomplished legislatively or imposed by this Court, would be unlikely to resolve this litigation or provide stability to the 2018 election calendar; to the contrary, the most likely outcome of immediate redistricting without authoritative guidance from the Supreme Court is continued litigation, creating even greater uncertainty and confusion for Texas voters. The Governor therefore respectfully declines this Court's invitation at this time but reserves his constitutional power to convene the Legislature if the Supreme Court ultimately determines that the State's maps violate the law.

I. THIS COURT'S ORDER ENJOINS THE STATE FROM CONDUCTING ELECTIONS UNDER PLAN C235.

This Court's order enjoins the use of Plan C235 to conduct congressional elections. The Court held that the "Plan C235 configurations of CD35 and Nueces County/CD27 violate § 2 and the Fourteenth Amendment," that the violations "*must* be remedied," Order at 105, ECF No. 1535 (emphasis added), and that if the Texas Legislature does not redraw the districts, this Court will. *Id.* at 105–06. This Order alters the status quo by forbidding Texas to use C235—the map used in the previous three election cycles—in the upcoming 2018 congressional elections.

Even if there were doubt about whether the form or label of the Court's order is an injunction, there can be no doubt that its practical effect is an injunction. The Supreme Court has made clear that appellate jurisdiction over interlocutory appeals of injunctions turns on the "practical effect" and not the form of the lower court's order. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (interpreting 28 U.S.C. § 1292(a)). "Even if an order does not by its terms grant or deny a specific request for an injunction . . . the order may still be appealable if it has the 'practical effect' of doing so." *Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258, 1261–62 (D.C. Cir. 2012); *see also Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 384 (5th Cir. 2014). Accordingly, the Second Circuit has treated an order as injunctive for purposes of determining jurisdiction where "the district court not only declared the [defendant's] temporary documentation inadequate but also directed the [defendant] to create new documents that would satisfy certain specifications," thus "preclud[ing] the [defendant] from continuing to issue some of its prior documentation forms." *Etuk v. Slattery*, 936 F.2d 1433, 1440 (2d Cir. 1991). The same reasoning applies here. Because this Court has gone beyond declaring C235 unlawful and has ordered the creation of a remedy that precludes the continued use of C235, its order has the "practical effect" of an injunction, however the order is labeled.

II. THE COURT'S ORDER SHOULD BE STAYED PENDING APPEAL.

The decision to enter a stay pending appeal turns on four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

(2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). A stay pending direct appeal is a well-established remedy in redistricting cases. *See, e.g.*, *Gill v. Whitford*, 137 S. Ct. 2289 (2017) (mem. op.); *Perry v. Perez*, 565 U.S. 1090 (2011) (mem. op.); *McDaniel v. Sanchez*, 448 U.S. 1318, (1980) (Powell, J., in chambers); *Bullock v. Weiser*, 404 U.S. 1065 (1972) (stay pending appeal in *White v. Weiser*, 412 U.S. 783, 789 (1973)); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970). All four factors favor a stay in this case.

III. DEFENDANTS WILL LIKELY SUCCEED ON THE MERITS.

A. The Court's finding of intentional vote dilution is likely to be reversed on appeal.

The Court's decision that the 2013 Legislature engaged in intentional race-based discrimination when it enacted Plan C235 is likely to be reversed on appeal. In 2012, this Court adopted Plan C235 under the Supreme Court's instruction that it "take care not to incorporate . . . any legal defects in the state plan[s]" passed in 2011. *Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam). In its order adopting Plan C235, the Court stated that its "independent analysis of the plan indicates that it complies with the standards set forth in *Perry v. Perez*." Order at 2 (March 19, 2012), ECF No. 691. It concluded that Plan C235 "sufficiently resolves the 'not insubstantial' § 5 claims and that no § 2 or Fourteenth Amendment claims preclude its acceptance under a preliminary injunction standard." Order at 29 (March 19, 2012), ECF No. 691. The Court specifically stated

that "C235 is not purposefully discriminatory," *id.* at 41, and it concluded that "C235 adequately addresses Plaintiffs' § 2 claims," *id.* at 55.

The 2013 Texas Legislature repealed the 2011 congressional redistricting plan, which had not been precleared and was never in effect, and formally enacted Plan C235. This Court nevertheless concluded three days ago that the 2013 Legislature violated the Constitution and the Voting Rights Act because it failed to "cleanse the plans of continuing discriminatory intent or legal effect." Order at 37, ECF No. 1535. The Court went on to hold that "[t]he discriminatory taint was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy." Order at 39, ECF No. 1535.

The Court's finding of intentional racial discrimination in CD 27 is likely to be reversed on appeal because it applies an erroneous legal standard and because it incorporates clear errors of fact. The Court found that the 2013 Legislature intentionally discriminated against Hispanic voters in Nueces County on the basis of race because "the Legislature intentionally did not substantially address the § 2 violation" that this Court found in the 2011 plan. Order at 100–01, ECF No. 1535.

The Court's finding is clearly erroneous because it faults the Legislature for failing to respond to a finding that had not been made in 2013 when it adopted this Court's redrawn Plan C235. The 2013 Legislature could not have deliberately failed to address a § 2 violation in CD 27 because this Court did not find a § 2 violation in CD

27 until 2017—nearly four years after the Legislature enacted Plan C235. *See* Order on Plan C185 (March 10, 2017), ECF No. 1339. The information that the Legislature had in 2013 was this Court's order adopting Plan C235 in 2012, and this Court had concluded that Plaintiffs could *not* show a likelihood of success on their claim that CD 27 was unlawful:

> Although Plaintiffs contend (and demonstrate) that Nueces County Hispanics could have been included in a South Texas district along with other voters suffering a § 2 violation, they have not established a substantial likelihood of success on their claim that the failure to so place them was a violation of § 2 or the Fourteenth Amendment. The failure to place Nueces County Hispanics in a South Texas district has not diminished Hispanic voter opportunity for § 2 purposes, since whether they are included or not, it appears that only 7 reasonably compact Latino opportunity districts can be drawn in compliance with § 2. In other words, Plaintiffs fail to demonstrate that their placement prevented them (or other Latinos) from constituting a majority in an additional district. . . .
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> Nor is the Court able to conclude that Plaintiffs have established a substantial likelihood of success on their claim that the Legislature's decision to exclude Nueces County from a § 2 district was intentionally racially discriminatory. Downton testified that there were "dual goals with 27 and 34" to create a district controlled by Cameron County and to create a district for Congressman Farenthold, who lived in Nueces County, to be elected as a Republican. The State elicited testimony that the State House and State Senate representatives from Cameron County (all three Latino Democrats) expressed a desire for a congressional district to be anchored in Cameron County, rather than, as was the case in benchmark CD 27, a district weighted on both ends by the competing ports of Brownsville and Corpus Christi. Further, Gerardo Interiano testified that Nueces County was placed in CD 27 based on a request to be put in a district going north, or at least to be the anchor of a district.
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> . . . Plaintiffs have not demonstrated a likelihood of success on their claim that a racially discriminatory purpose lay behind the decision.

Order at 53–55 (March 19, 2012), ECF No. 691.

The majority's altered finding, in 2017, of intentional vote dilution in CD 27 is clearly erroneous. The legislative record contains no evidence of intentional racial discrimination in drawing CD 27 by the 2011 Legislature. It does, however, contain extensive, uncontroverted evidence of multiple race-neutral goals that led to the configuration of CD 27, as Judge Smith previously noted in dissent. *See* Amended Order at 185, ECF No. 1390 (Smith, J., dissenting). And as the Court's latest order acknowledges, it remains true that the configuration of CD 27 does not result in vote dilution because "the failure to place Nueces County Hispanics in a South Texas district did not diminish Hispanic voter opportunity for § 2 effects purposes." Order at 101, ECF No. 1535. Without a finding of actual vote dilution, the Court's finding of intentional vote dilution is legally infirm and clearly erroneous. But in any case, the 2013 Legislature's reliance on this Court's 2012 order cannot support an inference of intentional racial discrimination.

Admittedly, the Court stated in 2012 that its analysis was preliminary—as it necessarily was, since the Court lacked jurisdiction to enter a final judgment.[1] But that analysis was the only judicial analysis available to the 2013 Legislature, and it provided a strong basis to believe that adopting CD 27 as it was configured in the Court-adopted plan did not incorporate any legal defect into the plan. The 2013 Legislature's reliance

[1] *See, e.g.*, *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam); *Terrazas v. Clements*, 537 F. Supp. 514, 525 (N.D. Tex. 1982) (per curiam).

on this Court's best effort to evaluate the plaintiffs' claims cannot support an inference that it adopted Plan C235 as part of a deliberate scheme to perpetuate racially discriminatory intent or effect. The only evidence before the Legislature in 2013 indicated that Plan C235 incorporated no such discriminatory intent or effect.

The Court's conclusion that the alleged "discriminatory taint was not removed" reflects legal error—beyond the clearly erroneous finding of intentional discrimination by the 2011 Legislature—because it improperly shifts the burden of proof.[2] To prevail on their intentional-discrimination claims, the plaintiffs bore the burden to prove that the 2013 Legislature enacted Plan C235 for the specific purpose of denying or abridging voting rights on account of race and that the enacted plan had the intended effect. Redistricting plans "violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength." *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (citing *Rogers v. Lodge*, 458 U.S. 613, 616–17 (1982); *White v. Regester*, 412 U.S. 755, 765–66 (1973)); *Lewis v. Ascension Parish Sch. Bd.*, 806 F.3d 344, 358–59 (5th Cir. 2015); *Backus v. South Carolina*, 857 F. Supp. 2d 553, 567 (D.S.C.) ("Viable vote dilution claims require proof that the districting scheme has a discriminatory effect and the legislature acted with a discriminatory purpose."), *aff'd*,

[2] It also assumes, clearly contrary to the facts, that this Court's interim congressional plan included a "discriminatory taint." It did not, and even if it did, the Legislature had no reason to think so. This Court's order adopting the plan expressly stated that "C235 is not purposefully discriminatory." Order at 41, ECF No. 691.

568 U.S. 801 (2012). Unless and until the plaintiffs proved that the 2013 Legislature engaged in intentional racial discrimination—and they did not—the Defendants had no burden to prove anything. *Cf. Arlington Heights v. Metro. Hous. Dev. Corp.*. 429 U.S. 252, 270 n.21 (1977) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). Even if the burden had shifted, the Legislature's well-documented reliance on this Court's 2012 order is sufficient to prove that any alleged discriminatory purpose was not necessary to the 2013 Legislature's enactment of Plan C235.

The suggestion that the Legislature had a duty to engage in some unspecified "deliberative process" likewise depends on improperly shifting the burden away from the plaintiffs. No such duty exists in any case: the Constitution does not "require States engaged in redistricting to compile a comprehensive administrative record." *Bush v. Vera*, 517 U.S. 952, 966 (1996). And even if there were such an obligation, the 2013 Legislature here complied because it *did* engage in a deliberative process. It repealed the 2011 plans before they took legal effect, and it followed established legislative procedures to enact a different plan that this Court had ordered into effect—a plan which not only made extensive substantive changes, but which also resulted from a protracted deliberative process involving multiple groups of plaintiffs, weeks of district-court proceedings, and a decision by the United States Supreme Court. If that process did not give the Legislature enough time to deliberate, it is not clear how a special session of the 2017 Legislature could be sufficiently deliberative.

The Court's conclusion that the 2013 Legislature "in fact intended any such [discriminatory] taint to be maintained but be safe from remedy," Order at 39, ECF No. 1535, is clearly erroneous and legally infirm. There is no evidence to support a finding that any member of the 2013 Legislature, let alone the body as a whole, actually intended to maintain any "taint" or preserve it from a remedy. The Court's conclusion that the Legislature's "strategy" of adopting the Court-drawn congressional plan "is discriminatory at its heart and should not insulate either plan from review" misstates the Legislature's purpose, the Defendants' position in this case, and the effect of enacting Plan C235. The Court's opinion accuses Defendants of "arguing that the 2013 plans could have no impermissible intent such that, whatever possible or likely discriminatory or unconstitutional effects remained in those plans, Plaintiffs would have no remedy, and Defendants would maintain the benefit of such discrimination or unconstitutional effects." Order at 37, ECF No. 1535. This drastically misstates the Defendants' position. Defendants have certainly argued that adoption of the Court-drawn plans does not demonstrate racially discriminatory *purpose*. But Defendants have never argued—nor could they—that adoption of Plan C235 would deprive Plaintiffs of a remedy on claims of discriminatory *effects*. Defendants have always recognized, as they must, that claims of discriminatory *effect* against Plan C235 may proceed—unlike Plan C185, Plan C235 has taken legal effect, so this Court has jurisdiction to entertain legal claims against it. Defendants have merely denied that the plan has any such

discriminatory effect. At no point have Defendants argued that Plan C235 is insulated from review.

The evidence shows, contrary to the Court's conclusion, that the 2013 Legislature had every reason to believe that Plan C235 removed any supposed "taint" by addressing every substantial legal claim asserted against the plan it replaced. MALDEF provided written testimony to the House Select Committee and the Senate Select Committee, which explained exactly how Plan C235 fixed every element of Plan C185 that led the D.C. court to deny preclearance. *See* JX-28 at 11-13; JX-29 at 13-15. MALDEF informed the committee that the interim plan addressed the D.C. court's concern about intentional discrimination in CD 23 by restoring the district to benchmark performance levels. JX-28 at 12; Order at 32–33, ECF No. 691; *Texas v. United States*, 887 F. Supp. 2d 133, 156–57 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013) (mem. op.). In Dallas-Fort Worth, the interim plan remedied claims of intentional discrimination by curing "the fracturing of minority voters in DFW." JX-28 at 12; Order at 36–38, ECF No. 691; 887 F. Supp. 2d at 219. Plan C235 addressed claims of intentional discrimination in districts represented by African-American and Latino incumbents by ensuring that incumbents' homes and district offices were located in their districts. JX-28 at 12; Order at 41, ECF No. 691; 887 F. Supp. 2d at 160–62. Finally, MALDEF explained to the committee that the interim plan addressed retrogression by restoring CD 23's performance and creating CD 33, as a result of which "[t]he court's interim plan contains 12 minority ability to elect districts." JX-28 at 12. In

light of this evidence in the legislative record, it was clear error for the Court to find that the 2013 Legislature never "looked to see whether any discriminatory taint remained in the plans," Order at 34, ECF No. 1535.

B. The Court's Ruling on Racial Gerrymandering Is Likely to be Reversed on Appeal.

The Court's ruling that CD 35 was a racial gerrymander is likely to be reversed on appeal because it is legally infirm and based on clear factual errors. To prevail on a racial-gerrymandering claim under *Shaw*, the plaintiff must prove that race was "the 'predominant factor' motivating the legislature's districting decision," *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999)—that is, that "race for its own sake" was "the overriding reason" for the decision to adopt a particular district. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). Here, there is no evidence that the 2013 Legislature relied predominantly on race in deciding to enact CD 35, and even if it had relied on race when it enacted the Court-adopted plan, it had a strong basis in evidence to believe that CD 35, as configured in Plan C235, was necessary to comply with VRA § 2.

The Court faulted the State for "improperly focus[ing] on the re-enactment of a plan containing CD 35, rather than the decision as to which voters to place within and without the district at the time that decision was made (in 2011)." Order at 103, ECF No. 1535. Even if it were relevant to the question presented here, the majority's finding of a *Shaw* violation by the 2011 Legislature was clearly erroneous as noted by Judge Smith's previous dissent, *see* Amended Order at 180 (May 2, 2017), ECF No. 1390

(Smith, J., dissenting)—and its opinion was advisory, *id.* at 169. Whether or not its particular reliance on race was "actually necessary," the 2011 Legislature had "good reasons to believe," *Bethune-Hill*, 137 S. Ct. at 801, that it had to create CD 35 as a Latino-opportunity district to comply with VRA § 2 (a difficult standard to apply given the unsettled nature of the law, *see* Order at 36 n.42, ECF No. 1535), and as a Latino-ability district to comply with VRA § 5 (where the ability-to-elect standard did not depend on whether any subset of voters actually had a § 2 right). It could not have done so without relying on racial data.

But the question for claims against the 2013 Legislature's enactment of Plan C235 is whether the 2013 Legislature—not the 2011 Legislature—made a race-based decision in adopting CD 35. There is no evidence that race was the predominant factor or that race for its own sake was the overriding reason for the 2013 Legislature's decision to enact CD 35 as configured in Plan C235.

The Court clearly erred when it found "no evidence" that when the 2013 Legislature enacted CD 35, it "considered any evidence to provide a strong basis in evidence that did not previously exist in 2011." The Legislature considered at least three pieces of evidence that did not exist in 2011, which provided a strong basis to believe that the configuration of CD 35 was consistent with the Constitution and the Voting Rights Act. First, the Legislature considered this Court's 2012 determination, under a preliminary-injunction analysis, that the plaintiffs were not likely to succeed on their claim that CD 35 was subject to strict scrutiny or that it would fail strict scrutiny if it

applied. Order at 48, ECF No. 691. Second, this Court had determined that Plan C235 addressed the claim that § 2 required "7 Latino opportunity districts in South/Central/West Texas." *Id.* at 32. And third, the D.C. district court had recognized that CD 35 was a Hispanic ability-to-elect district for purposes of VRA § 5. 887 F. Supp. 2d at 153. The 2013 Legislature thus had the benefit of new evidence indicating that VRA § 2 required 7 Latino-opportunity districts in the region, that CD 35 was one of those districts, and that CD 35 was not an unconstitutional racial gerrymander.

There is no reasonable basis to impute the 2011 Legislature's allegedly improper reliance on race to the 2013 Legislature. Nor can the 2013 Legislature be faulted, much less found to have violated the Constitution, for failing to alter a court-approved plan based on "the possibility that such infirmities remained," Order at 103–104, ECF No. 1535, when this Court's 2012 order found that the plaintiffs were not likely to succeed on their *Shaw* claim against CD 35, *see* Order at 48, ECF No. 691. The Court's 2017 finding of a *Shaw* violation in CD 35 is therefore likely to be reversed on appeal.

IV. DENIAL OF A STAY PENDING APPEAL WILL CAUSE IRREPARABLE INJURY TO THE STATE.

The Court's order imposes at least two irreparable injuries on the State. First, enjoining the State from conducting elections under its duly enacted congressional districts is a sufficient injury to warrant a stay. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). Second, the State is irreparably injured

if its election calendar is undone by a federal court injunction without time to appeal. In *Purcell*, for example, a two-judge motion panel for the Ninth Circuit enjoined Arizona's voter-identification procedures. 549 U.S. at 3–4. The Supreme Court held that, *even if* the state law was ultimately held unlawful, federal courts still cannot halt a State's election procedures without allowing adequate time for full appellate review by the State. *Id.* at 5–6.

V. A STAY PENDING APPEAL WILL NOT HARM THE PLAINTIFFS.

The plaintiffs have voted under Plan C235 for three consecutive congressional elections. It cannot be that this Court's reversal of its previous decision to allow this map to be used for three election cycles gives rise to an irreparable injury that can be used against the State.

A stay pending appeal also will not harm the plaintiffs because CD 27 and CD 35 do not dilute Hispanic voting strength. This Court's recent order reaffirms that "failure to place Nueces County Hispanics in a South Texas district did not diminish Hispanic voter opportunity for § 2 effects purposes. Since whether they were included or not, no additional compact Latino opportunity district could be drawn." Order at 101, ECF No. 1535. And no plaintiff denies that CD 35 provides Latino voters with the opportunity to elect their candidate of choice.

VI. A STAY PENDING APPEAL SERVES THE PUBLIC INTEREST.

A stay pending appeal serves the public interest. Plan C235 reflects the statutory policy of the Legislature, which "is in itself a declaration of the public interest." *Virginian*

Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937). A stay will also prevent disruption of the 2018 congressional elections, allowing them to be conducted under the same districts that have been used in every Texas congressional election held in this decade. And as explained at the opening of this brief, the threat of disruption of the 2018 election calendar is wholly attributable to delays in the resolution of this case that resulted from the plaintiffs' demand for a trial on redistricting plans that never took legal effect and were never used to conduct a single election. The public interest counsels heavily against saddling the voters of Texas with the consequences of the plaintiffs' insistence on avoidable delays.

CONCLUSION

The Defendants respectfully request that the Court stay its Order on Plan C235, and any final judgment forbidding the State to conduct elections under Plan C235, pending appeal of that Order or pending appeal of a final judgment preventing the State from using the existing Congressional Districts 27 and 35 under Plan C235.

Date: August 18, 2017

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that on August 17, 2017, I conferred with counsel for all plaintiffs and plaintiff-intervenors about the foregoing motion. Counsel for the Texas Latino Redistricting Task Force Plaintiffs, the MALC Plaintiffs, the Quesada Plaintiffs, the NAACP Plaintiffs, the Perez Plaintiffs, the Congresspersons, Congressman Cuellar, the Rodriguez Plaintiffs, and the LULAC Plaintiffs advised that they oppose the motion. Counsel for the United States did not advise that they oppose or do not oppose the motion.

/s/ Patrick K. Sweeten
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing was sent on August 18, 2017, via the Court's electronic notification system and/or email to the following counsel of record:

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