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. 11-CA-360-OLG-JES-XR [Lead Case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES, 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-CA-490-OLG-JES-XR [Consolidated Case]
MARGARITA V. QUESADA, et al., Plaintiffs, v. RICK PERRY, et al., Defendants.	§ § § § § §	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated Case]

EDDIE RODRIGUEZ, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
	§	SA-11-CA-635-OLG-JES-XR
RICK PERRY, et al.,	§	[Consolidated Case]
Defendants.	§	

REPLY TO STATE'S OPPOSITION TO PLAINTIFFS' MOTIONS FOR LEAVE TO AMEND

The LULAC Plaintiffs, the Texas State Conference of NAACP Branches, *et al*., the Rodriguez Plaintiffs, the African-American Congresspersons, and the Quesada Plaintiffs reply to Texas's Opposition to Plaintiffs' Motions to Amend Their Complaints (Doc. 786) ("State Opp."). Plaintiffs filed a joint motion for leave to amend their complaints (Doc. 776), with their proposed amended complaints appended.[1]

I. FULL RESPONSE TO STATE'S MOOTNESS AND STAY ARGUMENTS DEFERRED UNTIL AUGUST 2ND DEADLINE.

The State included in its Opposition filing a Motion to Dismiss Plaintiffs' Claims Against the 2011 Plans As Moot, with an alternative request that the Court at least withhold further action as to the 2011 Plans until after they become legally effective on September 24, 2013. *See* State Opp. at 2-7 (mootness motion); 7-8 (alternative stay request). Under Local Rule CV-7(e)(2), Plaintiffs' response to that motion is not due to be filed until August 2, 2013.[2] This reply will touch on the State's mootness argument, but a fuller response will be filed by the later deadline.

[1] *See* Docs. 776-2 (NAACP), 776-3 (African-American Congresspersons), 776-4 (Quesada), 776-5 (LULAC), and 776-6 (Rodriguez).

[2] Or August 5th, if an agreed extension motion is granted.

II. THERE IS NO BASIS TO THE STATE'S JURISDICTIONAL CONCERN.

Insofar as the challenges to the new plans enacted in 2013 are concerned, the State's opposition to the Court's allowing the filing of the plaintiffs' amended complaints is extremely narrow and hyper-technical. The State concedes, as it must, that application of the ordinary rules requires allowing the amended complaints to be filed. State Opp. at 8-9 (citing Supreme Court and other authority that support concession that Plaintiffs have "good cause to amend their complaints to challenge the new plans instead of the old").

But the State *suggests*—it is not really an argument, and the State concedes there is no authority to support the proposition—that there "may" be a jurisdictional problem with amending the complaints to add challenges to the 2013 plans. State Opp. at 9-11. The concern seems to be that the requirement of the three-judge court statute, 28 U.S.C. § 2284(a)—that a district court of three judges "be convened" when an action is filed challenging statewide redistricting plans—means that a challenge to a newly-enacted redistricting statute dictates that the process of convening the three-judge court has to start completely anew in a differently docketed case. The State's jurisdictional concern has no basis in the language of Section 2284(a) or in the jurisprudence governing three-judge courts.

A. Since the challenges to the 2011 plans are not moot, the jurisdictional issue does not even arise.

The first flaw in the State's position is that it presupposes that the challenges to the 2011 plans are moot. As indicated at the beginning of this reply, Plaintiffs later will be filing a fuller response to this mootness argument. For now, Plaintiffs highlight the points made in this regard in the Statement of Interest filed yesterday by the United States (Doc. 827) ("U.S. Statement"). Plaintiffs' existing complaints request relief sufficient to encompass a bail-in remedy under Section 3(c) of the Voting Rights Act. U.S. Statement at 8-10. This means that the challenges to the

2011 plans remain live challenges even as the Court's ruling on the request to file amended complaints is pending. The current 2011 challenges are not moot. In addition, the 2011 plans remain in place as state law until September 24th. As long as the plans are state law, the challenges to them remain live challenges, independent of the Section 3(c) issue. Since the case in its current status—before action on the amended complaints—remains a live controversy, there is no need to "convene" a newly-constituted three-judge court, even under the State's perplexing theory about what it means to "convene" a three-judge court. In short, if the State's position on mootness as to claims concerning the 2011 plans is wrong (and it is), then its jurisdictional concern under Section 2284 evaporates.

B. Since the amended complaints would be in the same action, the statute's terms show that there is no jurisdictional issue raised.

The second flaw is that the language of Section 2284 does not support the State's position anyway. Section 2284(a) requires that a three-judge court "be convened" when "an action" is filed challenging the constitutionality of statewide redistricting. The amended complaints would be filed in *this* action—which, as it exists this moment and as it will exist upon the filing of the amended complaints, is "an action" challenging statewide redistricting. Nothing in the statutory language says that a three-judge court must be separately convened each time a new statute is enacted affecting statewide redistricting. By its terms, all it requires is that the panel be "convened" in an action where statewide redistricting is being challenged. That describes this situation precisely. An amended complaint filed as allowed under Rule 15 of the Federal Rules of Civil Procedure is filed in the same action as was the complaint which it amends; it does not commence a brand new action.

C. The three-judge court requirements of § 2284(a) are not jurisdictional.

The third flaw is that the State's position presupposes that the Section 2284(a) duty is jurisdictional. While older Supreme Court precedents held that the three-judge court statute in force then was jurisdictional, the statute was amended in 1976. Two appeals courts, in decisions cited by the state, have held that the post-1976 statute remains a jurisdictional one. State Opp. at 1.[3] But the Supreme Court has not addressed this question. And one of the leading commentaries on federal court practice has questioned whether the post-1976 statute is jurisdictional. 17 Wright, Miller, Cooper, *FEDERAL PRACTICE AND PROCEDURE* § 4235, at 205-07. This commentary goes on to say that the Supreme Court "should hold that the three-judge provision is *not* jurisdictional." *Id*. at 208 (emphasis added). There are indications more recent than the appeals court authority the state cites that the Supreme Court would do just that. In *Brown v. Plata*, 131 S.Ct. 1910 (2011), the Court considered the requirements of a statute, 18 U.S.C. § 3626(a)(3)(A), that incorporates Section 2284, in connection with the question of whether a three-judge court had been properly convened. The Court's answer was that it had been properly convened, but the answer was not couched in jurisdictional terms at all. Instead, the Court said that the lower court had "acted reasonably." 131 S.Ct. at 1930-32. This suggests that the state's Section 2284 concern is not tied to jurisdiction—and since its only complaint was based on the technical question of jurisdiction, there is no non-jurisdictional objection to the requested amendments.

D. If formalism remains a concern, the original presiding judge can ask the Chief Judge of the Fifth Circuit to convene the same members as the "new" three-judge court.

Finally, in the unlikely event this Court has a residual concern about the jurisdictional issue, there is a ready-made solution that does not require resorting to the State's form-over-substance

[3] *See Kalson v. Paterson*, 542 F.3d 281 (2d Cir. 2008); *Armour v. Ohio*, 925 F.2d 987 (6th Cir. 1991) (en banc). An unpublished opinion, *LULAC of Texas v. Texas*, 318 Fed.Appx. 261 (5th Cir. 2009), adopted the *Kalson* position on jurisdiction. *Id*. at 264. The decision has no precedential weight though. *See* Fifth Cir. Loc. Rule 47.5.4.

solution of filing new lawsuits. It would totally unnecessary, but the presiding judge originally assigned this case when it was filed can request the Chief Judge of the Fifth Circuit to convene a "new" three-judge court to hear the claims as to the 2013 redistricting plans, with a suggestion that the newly-convened court be composed of the same members as compose this Court. *Cf. Epstein v. Lordi*, 261 F.Supp. 921, 929 (D.N.J. 1966) (case mooted as to three-judge issues reverts to the single judge before whom the case was originally brought).

III. The State's argument against allowing the bail-in claim rests solely on its incorrect argument that the challenges to the 2011 plans are moot.

The State's only argument against allowing the Section 3(c) claims in the amended complaints is that the 2011 plan challenges are moot. State Opp. at 11. As discussed earlier in this reply, *see* Part II.A, and as will be further addressed in response to the State's motion to dismiss as moot, the 2011 plan challenges are not moot. Hence, to that extent, the State's argument is wrong. The State has no argument against the Section 3(c) claims insofar as they are directed at the 2013 enactments.

Conclusion

The Court should grant the Plaintiffs' joint motion for leave to amend their complaints. The State has provided no plausible reason not to do so. It has admitted that there is good cause for amending. Its suggestion about a § 2284(a) jurisdictional concern is insupportable.

Respectfully submitted,

/s/ Luis R. Vera, Jr.

LUIS ROBERTO VERA, JR.
LULAC National General Counsel
Law Offices of Luis Roberto Vera, Jr.
& Associates
1325 Riverview Towers 111 Soledad
San Antonio, TX78205
(210) 225-3300
lrvlaw@sbcglobal.net

Counsel for LULAC Plaintiffs

/s/ Allison J. Riggs
Allison J. Riggs (*pro hac vice*)
Anita S. Earls
Southern Coalition for Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
(919)-323-3380 (phone)
(919)-323-3942 (fax)
allison@southerncoalition.org

Robert S. Notzon (D.C. Bar No. TX0020)
Law Office of Robert S. Notzon
State Bar No. 00797934
1502 West Avenue
Austin, Texas 78701
(512)-474-7563 (phone)
(512)-852-4788 (fax)
Robert@NotzonLaw.com

Gary L. Bledsoe
Law Office of Gary L. Bledsoe and Associates
State Bar No. 02476500
316 West 12th Street, Suite 307
Austin, Texas 78701
Telephone: 512-322-9992
Fax: 512-322-0840
Garybledsoe@sbcglobal.net

Victor Goode
Assistant General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
Telephone: 410-580-5120
Fax: 410-358-9359
vgoode@naacpnet.org

FOR INTERVENORS TEXAS STATE CONFERENCE OF NAACP BRANCHES, ET AL.

GERALD H. GOLDSTEIN
Goldstein, Goldstein and Hilley

310 S. St. Mary's Street
29th FloorTower Life Bldg.
San Antonio, Texas78205
Phone: (210) 852-2858
Fax: (210) 226-8367

/s/ J. Gerald Hebert
J. GERALD HEBERT
D.C. Bar #447676
Attorney at Law
191 Somerville Street, #405
Alexandria, VA22304
Telephone: 703-628-4673
Email: hebert@voterlaw.com

PAUL M. SMITH
D.C. Bar #358870
MICHAEL B. DESANCTIS
D.C. Bar #460961
JESSICA RING AMUNSON
D.C. Bar #497223
CAROLINE D. LOPEZ
D.C. Bar #989850
Jenner & Block LLP
1099 New York Ave., N.W.
Washington, D.C.20001
Tel: (202) 639-6000
Fax: (202) 639-6066

JESSE GAINES
TX Bar No. 07570800
PO Box 50093
Ft Worth, TX76105
(817) 714-9988

ATTORNEYS FOR QUESADA PLAINTIFFS

____*/s/ Renea Hicks*______________________
Renea Hicks
Attorney at Law
State Bar No. 09580400
Law Office of Max Renea Hicks
101 West 6th Street
Austin, Texas 78701

(512) 480-8231 - Telephone
(512) 480-9105 - Facsimile
rhicks@renea-hicks.com

ATTORNEYS FOR PLAINTIFFS EDDIE RODRIGUEZ, ET AL., TRAVIS COUNTY, AND CITY OF AUSTIN

PERKINS COIE LLP

Marc Erik Elias
Admitted Pro Hac Vice
700 Thirteenth Street N.W., Suite 600
Washington, DC 20005-3960
(202) 434-1609
(202) 654-9126 FAX
MElias@perkinscoie.com

Abha Khanna
Admitted Pro Hac Vice
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8312
(206) 359-9312 FAX
AKhanna@perkinscoie.com

ATTORNEYS FOR PLAINTIFFS EDDIE RODRIGUEZ, ET AL.

ATTORNEYS FOR PLAINTIFFS EDDIE RODRIGUEZ, *ET AL.*

David Escamilla
Travis County Attorney
State Bar No. 06662300
P.O. Box 1748
Austin, Texas 78767
(512) 854-9416
fax (512) 854-4808

Attorney for Plaintiff Travis County

Karen Kennard
City Attorney
State Bar No. 11280700
P.O. Box 1088

Austin, Texas 78767-1088
(512) 974-2268
fax (512) 974-6490

Attorney for Plaintiff City of Austin

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 2013, 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/ Luis Roberto Vera__________________
Luis Roberto Vera, Jr.