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

SHANNON PEREZ, et al., Plaintiffs and 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	)	CIVIL ACTION NO: SA-11-CA-360-OLG-JES-XR (consolidated, lead case)

PLAINITFFS MALC AND CUELLAR'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND REPY TO DEFENDANTS'RESPONSE TO PLAINTIFFS' MOTION TO AMEND

Defendants have responded to Plaintiffs' Motion to Amend by asserting that amendment is inappropriate because this case is moot. (Dkt. 786) Within their response to Plaintiffs' motion to amend its complaint, Defendants also request that this cause be dismissed – also based on the State's assertion that the case is moot. *Id.* Defendants are wrong – this cause is not moot. Therefore, Plaintiffs MALC and Cuellar, in this pleading, respond to both the State's Motion to Dismiss and reply to Defendants' response to Plaintiffs' Motion to amend.

There are at least three scenarios possible in the current status of the case: 1) deny the motion to amend and begin consideration of MALC's intentional discrimination claim based on the 2011 enactments and determine whether Plaintiffs are entitled to Declaratory Judgment and Section 3(c) relief with regard to the 2011 plans; or 2) allow the motion to amend, set a trial schedule that allows for pre-trial motions, discovery, etc. with regard to the 2013 plans, while simultaneously allow for Plaintiff MALC and others still seeking relief in their amended complaints for declaratory judgment and 3(c) relief with regard to the 2011 plans; or finally, 3) sustain the motion to dismiss and end this course of litigation. Even if you disallow the Plaintiffs' motion to amendment, this Court may still consider the 3(c) "bail-in" evidence. This fact alone proves that the motion to dismiss for mootness is premature and has no basis in fact or law.

THIS CAUSE IS NOT MOOT AND AMENDMENT IS APPROPRIATE

The state admits in its response that in the ordinary case it is the standard practice of federal courts to allow trial amendment after a change in law like *Shelby*. Citing Justice Scalia, "instances where mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings, in which the parties may, if necessary, amend their pleadings or develop the record more fully." *See Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990); *See* Dkt. 786, p. 8,9, Defendant's response to motion to amend, *Perez v. Perry*, 5:11-cv-00360. This exactly fits the current situation. MALC has asserted in its original complaint a Section 5 enforcement action, which is now applicable only through Section 3 (c), because of the ruling in *Shelby*. Because the injury persists and because the legal framework has changed a new remedy is now

available to plaintiffs. This clearly justifies the trial amendment in relation to the change in law. There has also been the enactment of a new map, which also justifies a trial amendment. In order to overcome the common practice in federal courts to allow trial amendment after changes in law, the State asserts that the federal three-judge statute requires the filing of a new redistricting lawsuit.

The plain wording of the statute is as follows: "[a] district court of three judges shall be convened when otherwise required by Act of Congress, or when **an action is filed** challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. 2284(a) (emphasis added).There has been no action filed as to the 2013 enactments. The statute is silent as to trial amendment. In order to reach the State's interpretation, this court must add words into the statute that are not there. There is nothing in the jurisprudential history of redistricting cases or of voting rights law that requires a new complaint and a new convening of a three-judge panel against a defendant who has enacted a remedial map in pending voting rights case. More to the point there is a judicial policy reason why this is true. As cited by the State, "congress established three-judge courts, in part, to discourage forum shopping in highly political disputes." S. Rep. No. 94-204 at 2, U.S. Code Cong & Admin. News 1976, at 1989; *See also* Dkt. 786, p. 9, 10, Defendant's response to motion to amend, *Perez v. Perry*, 5:11-cv-00360. The State's illogical interpretation of the three-judge court statute encourages and rewards forum shopping by nimble jurisdictions. If the jurisdiction does not wish to explain itself in a certain forum, then all it must do is pass a new law. Litigation, especially voting rights litigation, is known for its glacial pace. A jurisdiction wishing to avoid a panel would just re-enact apportionment plan and then assert a jurisdictional motion of this type. If the State's interpretation is correct, then there would be nothing to stop

this unilateral forum-shopping by redistricting defendants. This defeats the purpose of the statute and ought not to be allowed.

Moreover, since each separate plans is also a separate enactment, Plaintiffs challenging multiple state-wide redistricting plans, e.g. Senate, Congressional and State House enactments, would, under Defendants' interpretation of the three judge court statute, require not just three separate lawsuits, but three separate panels.

Finally, late trial amendments have been allowed before in redistricting cases to allow plaintiffs to reassert their section 2 claims against a new plan adopted by Texas. In its argumentation on mootness, Texas cites *Terrazas v. Slagle*. *See* Dkt. 786, p. 4, Defendant's response to motion to amend. *Terrazas* has a complicated procedural history that largely mirrors our current set of facts. In *Terrazas* just as in our case, there was a redistricting map adopted in a special session, which was being challenged by a set of plaintiffs. Then as now, the plaintiffs sought leave to amend their pleadings to incorporate the new enactments, which the district court granted. The only action that was subsequently nullified was the action against the House plan, which the plaintiffs chose not to amend their petitions to incorporate new challenges against the newly enacted map. *See Terrazas v. Slagle*, 821 F. Supp. 1162, 1166 (W.D. Tex. 1993)(per curiam)("After the elections, this Court requested motions for summary judgment from the parties. The state had already filed on August 28, 1992, a motion to dismiss for mootness, or, alternatively, for partial summary judgment on the plaintiffs' senate action, which attacked the repealed S.B.31. On December 7, 1992**, the plaintiffs requested leave to file an amended complaint that challenged S.B.1, which this court subsequently granted on January 19, 1993.**")(emphasis added).

It is clear that amendment is both necessary and proper in this instance. These maps were created in large measure through this court. This court should review them for compliance with Section 2 and the U.S. & Texas Constitutions. Judicial economy, federal case law, the history of practice in Texas redistricting cases, and federal statute allow MALC to seek a trial amendment.

THIS CAUSE SHOULD NOT BE DISMISSED BECAUSE IT IS 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.

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 has been completed it is now 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. A claim similar to this was summarily dismissed by this Court just a few weeks ago.

Generally, a claim "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023

(2013)(internal quotation marks and citations omitted). A case is not moot if the court can grant even a "partial remedy." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992). In order to prove up the mootness of MALC's claims, the State argues that the new maps nullify any current claim based on those enactments. However, their reliance on *Terrazas* is distinguishable. First, and this goes without saying, this is a historic case like no other. There has never been a bail-in motion against a jurisdiction formerly covered by Section 5. Without much hyperbole, it is sufficient to say that this court and this case may be the touchstone by which future litigants seek the so called "pocket trigger". Secondly, it is long-settled law that a Section 3 action may follow remedial action. *See Blackmoon v. Charles Mix County*, 505 F. Supp. 2d 585, 593 (D.S.D. 2007)(the court held that if plaintiffs prevailed on their race discrimination claim, they may be entitled remedy under Section 3, and that possibility of further relief defeated any claim to 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. 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 remedial plans. But, they were assuredly not.

Those enactments caused an injury that persists today. That injury is the intentional discrimination by the State to actively dilute the voting strength of minorities throughout Texas.

It began easy enough. For example, early in the redistricting process, the Speaker's Chief of Staff Denise Davis, his legal counsel Lisa Kaufman, and his redistricting counsel Gerardo Interiano met with a third party, Michael Hull, to discuss a legal strategy that would actively seek

to hold Hispanic congressional, state senate, and state house districts to a different apportionment standard, because of the presence of undocumented immigrants in those districts. See Attachment # 5 (Interiano Deposition). The *Teuber* complaint that resulted from these meetings, makes clear that it is concerned with the exclusion of the noncitizen and undocumented population, despite the U.S. Constitutional mandate to contrary, because, "the inclusion of undocumented immigrants in the U.S. Census might have the purpose and effect of strengthening the Hispanic vote…" Dkt. 1, Plaintiff's original complaint, *Teuber v. Texas*, 4:11-cv-00059.

On or about October, 2010, Mr. Hull and the three lawyers for the Speaker began to meet to discuss the merits of the case, the best venue, and the proper course of action. See Attachement # 5 (Interiano Deposition Testimony)("Q. Were there discussions with Mr. Hall that Mr. Hall should pursue litigation so that there might be a more favorable venue or forum for what would end up being the conservative argument with the Republican argument on redistricting? Mr. Mattox: Objection to form. A. [by Mr. Interiano] I believe that there was."). Just after the complaint was filed, in February of 2011, Mr. Hull furnished Mr. Interiano a copy of the complaint. See attachment #1 (Interiano email). This was not service; it was evidence of the conspiracy. Throughout the redistricting process, Mr. Hull and his associate Scott Sims worked directly with Mr. Interiano to help create the maps that would eventually become the enacted maps for the state house. See attachment # 2 (Hull email). Richard Trabulsi, an associate of Mr. Hull, offered his services to help ward off counter redistricting proposals. See Attachement # 3.

More importantly, however, from the very beginning, Mr. Hull, aided by the Speaker's staff, actively sought a litigation strategy that would treat many Texas Latinos as unworthy of fair representation. See Attachement # 5,("Q: Part of the lawsuit that Mr. Hall filed was the

notion that undocumented immigrants or folks who were in this country who were not citizens should not be counted in redistricting. Is that -- is that your understanding. A. [by Mr. Interiano]: To the best of my knowledge, yes.") These actions were strengthened by Mr. Hull working directly with the Speaker's redistricting team to help create the house map at issue in this lawsuit. *Id.* This is how the State's redistricting process began - with conspiracy and a legal theory that sought to diminish the impact of the Latino population in the redistricting process.

This illicit motivation permeated the process and manifest itself in the fragmentation or packing of minority voters. Throughout the creation of both the house and congressional map, the State used every tool at its disposal to impermissibly dilute minority voting strength. As has been discussed in trial, the State used population deviation where possible to minimize the growing voting strength of the Latino population. In addition, the State also split precincts along racial lines in order to maximize Anglo control of legislative and congressional districts. For instance, HD 105 split many precincts and extracted thousands of minorities in the attempt to preserve control of the district for the Anglo population in Irving and Grand Prairie. In Bell County, the City of Killeen was split in a way to disfranchise its growing African American population. Perhaps most illustrative of the state's abridging the voting rights of minorities on account of race is the Tarrant County congressional map. As has been talked about at length, Tarrant County's African American population was meticulously extracted from Tarrant County to be joined together in CD 12 and then swallowed by neighboring Anglo Counties. The same is true for Tarrant Counties Latinos. They were painstakingly gathered together and taken north to be swallowed by the Anglo population in Denton County. This was no accident. In the words of Ryan Downton, principal mapmaker of the congressional map and legal counsel to the House

Committee on Redistricting during the 82nd Legislative Session, "Changes made to keep the Black population together in District 12." Attachment #4 (Downton email).

There is more evidence, most already before this Court and some in the new evidence submitted by the Plaintiffs in the Latino Task Force's submission to this court, which MALC hopes to call attention to and to discuss regarding the intentional discrimination present in the adoption of the maps in 2011. In fact, one federal court has already said, "[t]he parties have provided more evidence of discriminatory intent than we have space, or need, to address here." Dkt. 230, p. 42 @ FN 32, *Texas v. U.S.*, 1:11-cv-01303.

MALC submits the preceding exposition only to assert that even though these maps have been replaced by remedial maps that are responsive to some of the concerns of the plaintiffs[1], there still persists an injury that must be remedied.

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 back into a judicial and administrative preclearance system and kept this case alive for further review. It is this law change that justifies both the rejection of the state's reasserted motion to dismiss for mootness and the granting of leave to amend the plaintiff's complaint.

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Respectfully submitted,

/s/ Jose Garza

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[1] This remedial action is substantial evidence that MALC is a prevailing party in its attempt to seek an interim attorney's fee award.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 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/ Jose Garza_____
JOSE GARZA