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

SHANNON PEREZ, et al., *Plaintiffs*, - and - EDDIE BERNICE JOHNSON, et al., - and - TEXAS STATE CONFERENCE OF NAACP BRANCHES, et al., *Plaintiff Intervenors*, v. RICK PERRY, et al., *Defendants*,	)	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs*, - and - HONORABLE HENRY CUELLAR, et al., *Plaintiff Intervenors*, 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, et al., *Defendants,*	)	CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated case]

MARAGARITA v. QUESADA, et al., *Plaintiffs,* v. RICK PERRY, et al., *Defendants,*	)	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

JOHN T. MORRIS, *Plaintiff,* v. STATE OF TEXAS, et al., *Defendants,*	)	CIVIL ACTION NO. SA-11-CA-615-OLG-JES-XR [Consolidated case]

EDDIE RODRIGUEZ, et al.,	)	CIVIL ACTION NO.
	)	SA-11-CA-635-OLG-JES-XR
	)	[Consolidated case]
Plaintiff,	)	
	)	
v.	)	
	)	
STATE OF TEXAS, et al.,	)	
	)	
Defendants.	)	

TEXAS LATINO REDISTRICTING TASK FORCE, ET AL. PLAINTIFFS' REPLY TO TEXAS'S OPPOSITION TO PLAINTIFFS' MOTIONS TO AMEND THEIR COMPLAINTS AND RESPONSE TO TEXAS'S MOTION TO DISMISS PLAINTIFFS' CLAIMS AGAINST THE 2011 PLANS AS MOOT

INTRODUCTION

The Texas Latino Redistricting Task Force Plaintiffs' (the "Task Force Plaintiffs") claims against the 2011 plans are not moot. Plaintiffs have secured an injunction against the 2011 plans and the Court has issued preliminary findings that the plans are discriminatory. *See* Dkt. 380 at 4 (order granting permanent injunction), Dkt. 690 (opinion on interim House plan), Dkt. 691 (opinion on interim congressional plan). Since the section 5 preclearance process is no longer on-going, and the 2011 plans remain law until September 24, 2013, the appropriate action at this time is for this Court to ask the parties to submit proposed final judgment on the claims related to the 2011 plans, including proposed final findings of fact and conclusions of law, and motions for relief under section 3(c) of the Voting Rights Act.

ARGUMENT

I. THE TASK FORCE PLAINTIFFS CLAIMS AGAINST THE 2011 REDISTRICTING PLANS ARE NOT MOOT

A. The Task Force Plaintiffs Maintain a Personal Stake in Declaratory and Injunctive Relief Concerning the 2011 Redistricting Plans

The Task Force Plaintiffs maintain a personal stake in the adjudication of their claims with respect to the 2011 redistricting plans. "In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (internal quotations omitted). Despite Texas's assertion to the contrary, the Task Force Plaintiffs' claims remain "live" and the Task Force Plaintiffs' interest in the outcome of the litigation has not changed merely because the Texas Legislature enacted redistricting plans that will take effect later this year.

Texas argues that the passage of the 2013 redistricting plans by the Governor in June 2013 moots any challenge to the 2011 plans, even though the 2013 maps do not go into effect until September 24, 2013. Dkt. 786 at 4-6. In making this argument, Texas ignores the state constitutional directive that would have allowed the 2013 redistricting plan bills to have gone into effect immediately. TEX. CONST. art. III, § 39 ("No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless the Legislature shall, by a vote of two-thirds of all the members elected to each House, otherwise direct . . . ."). The Texas Constitution makes clear that the 2013 redistricting plans are not in effect -- a fact Texas asks this Court to ignore when determining whether challenges to the 2011 plans are moot. The 2013 plans have not displaced the current redistricting boundaries, the 2011 redistricting plans are still law and the Task Force Plaintiffs have a concrete, legally cognizable interest in seeking final

judgment to ensure that the 2011 plans are not used for any election this year or in any future year.

Because their interest in preventing use of the 2011 plans remains live, the Task Force Plaintiffs are entitled not only to a permanent injunction of the 2011 plans but also a "declaratory judgment finding that Plans C185 and H283 illegally and unconstitutionally dilute the voting strength of Latino voters in Texas." Dkt. 59-1 (Task Force Plaintiffs' Second Amended Complaint). *See Powell v. McCormack*, 395 U.S. 486, 489, 496, 498-99 (1969) (finding that lower court erred in dismissing a case as moot because plaintiff was entitled to judgment on plaintiff's request for declaratory relief).

Without the Task Force Plaintiffs' requested injunctive and declaratory relief, Texas can include the discriminatory elements of its 2011 plans in any future redistricting maps. *See League of United Latin Am. Citizens* [hereinafter *LULAC*] *v. Perry*, 548 U.S. 399, 415 (2006) (explaining that Texas can redistrict multiple times in one decade). For example, although Texas redistricters knew that reducing Latino ability to elect in CD 23 could violate section 2 (*see LULAC*, 548 U.S. at 427-29), the 2011 congressional redistricting plan swapped Latino majority precincts into and out of CD 23 in order to ensure that CD 23 would not elect the Latino-preferred candidate while maintaining a majority of Spanish surnamed registered voters. *See* Dkt. 482-1 at FOF Nos. 176-242; Dkt. 789-2 at Ex. Tab 4; Dkt. 790-2 at Exs. Tabs 45, 46; Dkt. 790-3 at Exs. Tabs 54, 55, 59. Redistricters made changes to HD 117 to achieve the same goal. *See* Dkt. 790-2 at Ex. Tab 49; Task Force Pls. Ex. 454 (Dep. of Rep. John Garza) at 30:6-25 (deposition admitted in the *Perez* record during the Hearing on Proposed Interim Plans, *Perez v. Perry*, No. 11-cv-360, Hr'g Tr. at 704:20-705:6 (Nov. 3, 2011)); Dkt. 834-2; Dkt. 834-3 (Jan.

17AM, pp. 159:1-11; 160:10-25 and Jan. 25PM, pp. 106:11-108:1). The Task Force Plaintiffs seek declaratory and injunctive relief to prevent redistricters from using the same dilutive mapping techniques in the future. Without a specific declaration and injunctive relief on those aspects of the 2011 redistricting plans that violate section 2 of the Voting Rights Act and/or the U.S. Constitution, Texas will not be restrained from discriminating on the basis of race in subsequent redistricting plans. *See Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998) ("The availability of even partial relief is enough to prevent mootness."). Thus the Task Force Plaintiffs' requests for injunctive and declaratory relief are not moot.

The Task Force Plaintiffs' request for declaratory relief is sufficient to qualify as a "controversy" as contemplated by the Declaratory Judgment Act. "[T]he question in each case 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." *Md. Cas. Go. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). In this case, the Task Force Plaintiffs seek declaratory relief to ensure that the discriminatory elements of the 2011 plans are never utilized, either this year or in future years.

Texas cannot rely on *Genesis Healthcare Corp. v. Smyczyk*, 133 S. Ct. 1523, 1528 (2013) to argue that enactment of the 2013 plans provides Plaintiffs with "complete relief" that renders the case moot when, without declaratory and injunctive relief, the discriminatory elements of the 2011 plans remain law. Similarly Texas's argument that Plaintiffs lack standing to challenge the 2011 plans also fails; the Task Force Plaintiffs continue to suffer injury on the basis of the 2011 plans and the Court can redress the injuries in a way that will prevent future discriminatory redistricting practices against Latino voters in Texas. *See* Dkt. 786 at 2-3; *Friends of the Earth,*

Inc. v. Laidlaw Envtl. Servs. (TOC) Inc., 528 U.S. 167, 185-86 (2000) ("It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of the suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress."). Texas's argument that Plaintiffs have lost standing in this case is misplaced. *See id.* at 189 ("The description of mootness as "standing set in a time frame" is not comprehensive.").

B. Capable of Repetition Yet Evading Review Exception

The "capable of repetition, yet evading review" doctrine is applicable where: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subject to the same action again." *Murphy v. Hunt*, 455 U.S. at 482.

Despite trial in the fall of 2011, final adjudication of the Task Force Plaintiffs' challenge to the 2011 redistricting plans was stayed pending a determination on preclearance of the same plans by the U.S. District Court for the District of Columbia. One day after the United States Supreme Court determined that Texas would no longer be subject to preclearance, Defendant Governor Perry signed the 2013 redistricting bills into law. Thus, there is no way that the Task Force Plaintiffs could have sought final resolution of their challenge to the 2011 maps prior to the passage of the 2013 redistricting bills. For this reason, the case establishes the first prong of the capable-of-repetition-yet-evading-review exception to mootness.

"The second prong of the 'capable of repetition' exception requires a 'reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, at 463 (citing *Murphy v. Hunt*, 455 U.S. 478 (1982) (internal quotations omitted). Here, in addition to Texas's

status as a repeat offender in past redistricting, the 2013 redistricting plans have raised new issues of discrimination against Latino voters. *See id.* ("[T]he same controversy [is] likely to recur when a party has a reasonable expectation that it will again be subjected to the alleged illegality." (internal citation and quotations omitted.)).

C. Collateral Consequences Doctrine

Texas's assertion that the Task Force Plaintiffs' 2011 claims are moot also will not withstand the collateral consequences doctrine, which functions as another exception to mootness. Under the collateral consequences doctrine, "[e]ven if the plaintiff's primary injury has been resolved, the collateral consequences doctrine serves to prevent mootness when the violation in question may cause continuing harm and the court is capable of preventing such harm." *Dailey*, 141 F.3d at 227.

Texas spends a large portion of its motion to dismiss assuring the Court that no future elections could take place under the 2011 redistricting plans and therefore Plaintiffs' injury has been resolved. *See* Dkt. 786 at 4-5. Texas's reliance on *Terrazas v. Slagle* as support for this argument is misplaced. In that case, plaintiffs conceded that in their "challenge to the repealed house redistricting plan [ ] 'dismissal for mootness may be proper ... [b]ecause there is no current challenge to the existing plan.'" 821 F. Supp. 1162, 1166 (W.D. Tex. 1993). Here, Texas ignores the Task Force Plaintiffs' ongoing challenge to redistricting plans which are still law, and the request for both declaratory and injunctive relief. Not only are the 2011 plans (or portions of those plans) capable of being implemented or re-enacted by Texas in the absence of permanent injunctive relief, without a declaration that the State discriminated against Latino voters in the 2011 redistricting plans, Texas will be free to continue to engage in such practices in all future redistricting cycles, resulting in severe collateral consequences to Plaintiffs. *See*

Connell v. Shoemaker, 555 F.2d 483, 486 (5th Cir. 1977) (finding "the continuing practical consequences of . . . [a] determination of discrimination as sufficient to negate mootness.").

D. Texas Has Not Met Its Burden Under the Voluntary Cessation Doctrine to Establish a Valid Claim of Mootness

Texas's reliance on the voluntary cessation doctrine to assert mootness in this case is misplaced. "It is well settled that 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." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '(t)he defendant . . . free to return to his old ways.'" *U.S. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). As properly stated by Texas, not only must Texas voluntary cease any illegal conduct, the State must also "make absolutely clear that the [allegedly wrongful behavior] cannot reasonably be expected to recur." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009) (according a "lighter burden" to government actors).

Texas cannot rely on the voluntary cessation doctrine to assert that the enactment of the 2013 redistricting plans means there is "no reasonable likelihood that the State would engage in the allegedly injurious action again." *See* Dkt. 786 at 6. A voluntary action that only addresses whether the 2011 plans in their entirety will be used in a future election cannot possibly result in the cessation of all of the "injurious action" challenged in this case. As stated by the Fifth Circuit in *Sossamon*:

> [T]he voluntary cessation of a complained-of activity by a defendant ordinarily does not moot a case: If defendants could eject plaintiffs from court on the eve of judgment, then resume the complained-of activity without fear of flouting the mandate of a court, plaintiffs would face the hassle, expense, and injustice of

> constantly relitigating their claims without the possibility of obtaining lasting relief.

560 F.3d at 324.

Nowhere is this problem more apparent than in Texas redistricting where, in each decennial redistricting since the 1970's, one or more of its redistricting plans have been blocked as racially discriminatory. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); Dep't of Justice Objection Letter from Ralph Boyd to Geoffrey Connor, No. 2001-2430 (Nov. 16, 2001) *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_111601.pdf; *Terrazas v. Slagle*, 789 F.Supp. 828 (W.D. Tex. 1991), ; Dep't of Justice Objection Letter, No. 92-0070 (Mar. 9, 1992) *available at* http://www.justice.gov/crt/about/vot/sec_5/tx_obj2.php; Dep't of Justice Objection Letter, No. 91-3395 (Nov. 12, 1991) *available at* http://www.justice.gov/crt/about/vot/sec_5/tx_obj2.php; *Upham v. Seamon*, 456 U.S. 37 (1982); Dep't of Justice Objection Letter, No. 81-0298 (Jan. 25, 1982) *available at* http://www.justice.gov/crt/about/vot/sec_5/tx_obj2.php; Dep't of Justice Objection Letter, No. 81-0306 (Jan. 25, 1982) *available at* http://www.justice.gov/crt/about/vot/sec_5/tx_obj2.php; *White v. Weiser*, 412 U.S. 783 (1973); *Smith v. Craddick*, 471 S.W.2d 375 (Tex. 1971).

In fact, the 2013 redistricting plans themselves deviate from this Court's interim redistricting plans specifically to discriminate against Latino voters. *See* Dkt. 780-1 (Task Force Plaintiffs challenging changes made to House District 90 in the 2013 House map). When a defendant replaces one illegal law with another, "[t]here is no mere risk that [Defendant] will repeat its allegedly wrongful conduct; it has already done so." *Ne. Fla. Chapter Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993); *see also Hornbeck Offshore Servs. L.L.C. v. Salazar*, 2010 WL 3523040, at *6 (E.D. La. 2010) (denying a motion to dismiss on the grounds of mootness where the court found the case was "not a case like

Sossamon, where the government yielded to the challenge and ended the challenged policy. In this case, the defendants have issued a new moratorium, a moratorium that

is substantially the same as the first one, ...”). Thus, even though the newly passed 2013 redistricting plans “disadvantage [Latinos] to a lesser degree” than the 2011 plans, the purpose and effect of the 2013 redistricting plans “disadvantages [Latinos] in the same fundamental way.” *City of Jacksonville*, 508 U.S. at 662.

II. THE 28 U.S.C. § 2284 JURISDICTIONAL ISSUE RAISED BY TEXAS DOES NOT BAR ENTRY OF FINAL JUDGMENT ON THE 2011 CLAIMS

Texas concedes that Plaintiffs may amend their complaints to add new claims when there has been a change in the law. *See* Dkt. 786 at 8. As established in the Task Force Plaintiffs’ motion to supplement their pleadings, none of the discretionary factors that courts typically consider weigh against allowing the Task Force Plaintiffs to supplement their complaint with challenges to the 2013 House plan. *See* Dkt. 780 at 5-6; *see also Human Genome Scis., Inc. v. Kappos*, 738 F. Supp. 2d 120, 122-23 (D.D.C. 2010) (“[S]upplemental pleadings are used, e.g., . . . to put forward new claims or defenses based on events that took place after the original complaint or answer was filed; . . . .”) (citing *United States v. Hicks*, 283 F.3d 380, 386 (internal citations and quotations omitted)). Because the 2013 redistricting plans were based largely on interim plans created by this Court in the litigation of the 2011 redistricting plans, this case presents the ideal circumstances for appropriate supplementation of the original pleadings. *See Friends of the Earth*, 528 U.S. at 191-92 (“To abandon the case at an advanced stage may prove more wasteful than frugal.”).

Moreover, Texas itself asserts that despite the jurisdictional requirements of 28 U.S.C. § 2284, the interests of judicial economy weigh heavily in favor of preserving the present three-judge panel for the challenge to the 2013 plans. Hr’g Tr. at 45:9-11, *Perez v. Perry*, No. 11-cv-

360 (W.D. Tex. July 1, 2013) (counsel for Texas stating: "Now I don't disagree that it would be good for purposes of judicial economy if this panel could handle [the challenge to the 2013 plans].").

CONCLUSION

For the foregoing reasons, the Task Force Plaintiffs respectfully request that this Court deny Texas's motion to dismiss and grant the Task Force Plaintiffs leave to supplement their pleadings to include a challenge to the 2013 House plan.

Dated: August 5, 2013

Respectfully submitted,

/s/ Nina Perales

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has electronically submitted a true and correct copy of the above and foregoing via the Court's electronic filing system on the 5th day of August, 2013. The undersigned counsel hereby certifies that she caused a true and correct copy of the above and foregoing to be mailed and/or facsimile to the persons listed below by the close of the next business day.

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