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]

Texas's Reply In Support Of Texas's Motion To Dismiss Plaintiffs' Claims Against The 2011 Plans As Moot

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The 2011 plans have been repealed. The Plaintiffs' fixation on the effective date is neither here nor there. The plans passed by the 2011 Legislature have not and will not ever be used for elections in Texas.

The voluntary-cessation doctrine incorporates a presumption that government officials act in good faith. *See* Texas's Mot to Dismiss, *Perry v. Perez*, No. 5:11-cv-360, at 2–8 (W.D. Tex. July 19, 2013) (Doc. 786) (hereinafter "Tex. Mot."); *see also Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009) ("[G]overnment actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith" whenever they promise that "the challenged conduct will not recur once the suit is dismissed as moot."). Although courts usually are wary when a defendant vows that he will not "return to his old ways," *see United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953), federal courts assume the best, not the worst, when the defendant is a government entity. And when the government entity accompanies that promise with repeal of the challenged statute, federal courts need not assume anything, because

mootness is assured. *See, e.g.*, *Kremens v. Bartley*, 431 U.S. 119, 132 (1977); *Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999).

Plaintiffs ask this Court to assume the worst, but they have offered no evidence whatsoever to rebut the presumption of good faith. *Cf. City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). In any event, Texas does not even need a presumption of good faith because the Court need not take our word for it: State and federal law forbid Texas to implement the 2011 plans.

I. TEXAS HAS SATISFIED THE VOLUNTARY-CESSATION DOCTRINE.

The plaintiffs argue that "Texas has not met its burden under the voluntary cessation doctrine," *see, e.g.*, Task Force Plaintiffs' Response, *Perry v. Perez*, No. 5:11-cv-360, at 9 (W.D. Tex. Aug. 5, 2013) (Doc. 838) (hereinafter "Task Force Resp."), but it is impossible to imagine what more Texas could do. The Legislature has repealed the offending plans. *See* S.B. 4, 83d Leg., 1st C.S. (June 23, 2013) (enacting Plan C235); S.B. 3, 83d Leg., 1st C.S. (June 23, 2013) (enacting Plan H358). The Governor signed the repeal into law. *See* Letter from Gregory S. Davidson, Executive Clerk to the Governor, to John Steen, Secretary of State (June 26, 2013). And although the replacement plans will not automatically take effect until September 24, 2013, *see* TEX. CONST. art. III, § 39, the Attorney General of Texas has announced that the United States and Texas Constitutions forbid the State to use the 2011 plans in any special election before the effective date. *See* Tex. Mot. at 786 (citing TEX. CONST. art. III, § 13, and TEX. CONST art. XVI, § 27). If that were not enough, the Secretary of State has filed a declaration stating the obvious: The Secretary will not conduct a special election in violation of federal and state law. *See* Tex. Mot. at Ex. A (Declaration of Keith Ingram); *cf. Sossamon*, 560 F.3d at 325 ("Director Quarterman's affidavit is sufficient."). The plaintiffs have no answer to these sure

signs that the 2011 plans are dead and buried, except to cite DOJ preclearance objections from the 1970s.[1] *See, e.g.*, Task Force Resp. at 9.

Instead of addressing Texas's arguments, the plaintiffs ask the Court to engage in unjustifiable speculation. For instance, the plaintiffs warn that the Texas Legislature might re-adopt elements of the 2011 plans in the 2021 session (or possibly sooner). *See* Task Force Resp at 5 ("[W]ithout . . . Plaintiffs' requested injunctive relief, Texas can include the discriminatory elements of the 2011 plans in any future redistricting map."). But for two reasons, the plaintiffs cannot avoid mootness by speculating on the actions of legislators yet to be elected. First, the plaintiffs cannot rebut the presumption of good faith with idle speculation, but instead must point to hard evidence. *See Sossamon*, 560 F.3d at 325. That is why the Fifth Circuit held that Mr. Sossamon's imagined scenarios were "too speculative to avoid mooting the case" and insisted upon "*evidence* that the voluntary cessation is a sham for continuing possibly unlawful conduct." *Id.* (emphasis added). Plaintiffs have no evidence, so they are left observing that the occasion to redraw legislative districts will reoccur in the future. That is surely true, but there is nothing nefarious about the Legislature's return to the subject of redistricting, a task that the "one person, one vote" principle of *Reynolds v. Sims*, 377 U.S. 533 (1964), requires them periodically to undertake. *See LULAC v. Perry*, 548 U.S. 399, 416 (2006) ("[T]he Constitution vests redistricting responsibilities foremost in the legislatures of the States . . . .").

The second reason why this speculation cannot avoid mootness is that the plaintiffs' legal scenario makes no sense. Even if the plaintiffs had evidence predicting Legislative trickery in 2021, their request for an injunction would be entirely premature. Courts do not enjoin future

[1] LULAC argues that the *Terrazas* court "refused to stay its hand" while rejecting "this very argument." *See* LULAC Plaintiffs, *Perry v. Perez*, No. 5:11-cv-360, at 3 (W.D. Tex. July 19, 2013) (Doc. 836) (citing *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. Dec. 24, 1991)). But the *Terrazas* discussion has nothing to do with mootness. Instead the *Terrazas* court chose to follow existing state law, which called for elections on March 10, 1992, rather than be "held hostage" by the Texas Legislature's delay in enacting legislation to move the date of the primary elections.

laws, thereby threatening future legislators with contempt for enacting the same. The way to stop a hypothetical, future legislature from "includ[ing] the discriminatory elements of [the] 2011 plans," *see* Task Force Resp at 5, is a future lawsuit seeking a preliminary and a final injunction against that future plan, not an injunction from this Court directed at future legislators who might now be thirteen-years old. *See* TEX. CONST. art. III, § 7 (minimum age for member of the House is twenty-one years); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 n.2 (1992) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending.").

II. REPEAL OF A STATUTE IS PROPERLY ANALYZED UNDER THE VOLUNTARY-CESSATION DOCTRINE, NOT THE DOCTRINAL EXCEPTIONS FOR "COLLATERAL CONSEQUENCES" OR INJURIES "CAPABLE OF REPETITION YET EVADING REVIEW."

After the plaintiffs' discuss voluntary cessation, they invoke the remaining two exceptions to mootness. *See, e.g.*, Task Force Resp, at 7-8 (capable of repetition yet evading review); *id.* at 8-9 (collateral consequences). The plaintiffs fail to cite a single case applying either of these exceptions to a change in the legal framework. That is because it is well established that changes in the law should be analyzed under the voluntary-cessation doctrine. *See, e.g, Kremens v. Bartley*, 431 U.S. 119, 132 (1977); *Massachusetts v. Oakes*, 491 U.S. 576, 582 (1989); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472 (1990). The plaintiffs only introduce confusion by invoking every remaining exception in the book.

Plaintiffs turn first to the exception for injuries "capable of repetition yet evading review," which applies to injuries too fleeting for the ordinary pace of justice. In the most famous example, the Supreme Court held that a woman's challenge to a Texas abortion statute was not moot, even though she no longer was pregnant, because pregnancy by its nature progresses faster than the court system. *Roe v. Wade*, 410 U.S. 113, 125 (1973). Another

common application of this exception is election cases, where independent candidates are unconstitutionally barred from the ballot, and Election Day comes and goes before the federal courts can act. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *see also* John Morris Plaintiffs' Response, *Perry v. Perez*, No. 5:11-cv-360, at 6 (W.D. Tex. Aug. 5, 2013) (Doc. 841) (citing *Storer*).

This doctrinal exception to mootness has no application in our case. As the plaintiffs acknowledge, the exception applies only where there is a reasonable expectation or demonstrated probability that "the *same controversy* will recur." Task Force Resp at 7 (quoting *FEC v. Wis. Right to Life, Inc.*, 546 U.S. 410, 463 (2007)). Jane Roe demonstrated that she might face an unwanted pregnancy again. The Libertarian candidate demonstrated that he might run for office again. Plaintiffs must likewise demonstrate that Texas might adopt the 2011 plans again. As it turns out, that is the same demonstration that the doctrine of voluntary cessation demands, so the Court should take that well-worn path instead. Moreover, even if the Legislature were to re-adopt the 2011 plans, the plaintiffs' injury would not be fleeting. Indeed, the plaintiffs would have at least two years (before the next legislative session) to secure a final judgment against the new plans.

Next the plaintiffs invoke the doctrine of "collateral consequences," which recognizes that a case is not moot so long as some residual injury remains. In the classic application of this doctrine, federal courts have allowed a former inmate to challenge his conviction even after his release from prison. *See, e.g.*, *Sibron v. New York*, 392 U.S. 40 (1968). The former inmate's claim is not moot so long as he faces collateral consequences associated with being an ex-con, such that a judgment overturning his conviction would bring a measure of redemption. *Id.*

Once again it is difficult to see how the "collateral consequences" doctrine advances the present discussion. The core of the plaintiffs' "collateral consequences" argument is that their

claims against the 2011 plans are not moot because the 2011 plans are "capable of being implemented or re-enacted by Texas in the absence of permanent injunctive relief." *See* Task Force Resp at 8. As we previously explained, the 2011 plans themselves are not capable of being *implemented* without violating the United States and Texas Constitutions. And, as we have also explained, the plaintiffs must do more than simply assert that the plans are *capable* of being *re-enacted*, they must offer evidence rebutting the presumption of good faith—evidence suggesting that the Legislature will re-enact the 2011 plans once this Court dismisses the plaintiffs' claims as moot. That is an extraordinary charge to hurl at the Texas Legislature, and after extensive briefing, the plaintiffs have no evidence to back it up.

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Respectfully submitted.

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