

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

TERRY PETTEWAY, et al.	§	
Plaintiffs,	§	
v.	§	Civil Action No. 3:22-CV-00057
GALVESTON COUNTY, TEXAS, et al.	§	(consolidated)
Defendants.	§	
	§	
	§	
	§	
UNITED STATES OF AMERICA,	§	
Plaintiffs,	§	
v.	§	Civil Action No. 3:22-CV-00093
GALVESTON COUNTY, TEXAS, et al.	§	
Defendants.	§	
	§	
	§	
	§	
DICKINSON BAY AREA BRANCH	§	
NAACP, et al.	§	
Plaintiffs,	§	
v.	§	Civil Action No. 3:22-CV-00117
GALVESTON COUNTY, TEXAS, et al.	§	
Defendants.	§	
	§	

**DEFENDANTS' RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR
REMEDIAL ORDER PENDING APPEAL AND NOTICE OF REQUEST FOR
RESPONSE IN FIFTH CIRCUIT**

Defendants Galveston County, Texas, the Galveston County Commissioners Court, County Judge Mark Henry, and County Clerk Dwight Sullivan file this Response to Plaintiffs' Emergency Motion for Remedial Order and provides the Court notice that the Fifth Circuit has requested that Plaintiffs respond to the County's Stay Request.

A STAY REQUEST IS STILL PENDING IN THE COURT OF APPEALS AND THE FIFTH CIRCUIT HAS ASKED FOR A RESPONSE BY DECEMBER 4, 2023

In moving this Court for emergency relief, Plaintiffs represented to this Court that no stay requests were pending. ECF No. 266 at 1. However, the County *does have* a stay request pending at the Fifth Circuit. The County sought a stay from the Fifth Circuit as well as an administrative stay pending determination of the stay motion. *Petteway v. Galveston County*, No. 23-40582, ECF No. 13 (October 17, 2023). The Fifth Circuit recently granted an en banc hearing scheduled for May of 2024 and vacated its Order affirming this Court. *Petteway v. Galveston County*, No. 23-40582, ECF No. 136-1 (November 28, 2023). At that time, it had addressed only the temporary administrative stay, not the request for a stay pending appeal. Respectfully, while this Court was informed that no stay request is pending, that is not accurate.

The County is providing notice that following this Court's November 30, 2023 Order, the Fifth Circuit requested that Plaintiffs respond to the County's pending Motion for Stay by December 4, 2023 at 12:00 p.m. Due to this recent development, Defendants ask that the Court reset its December 4, 2023 status conference to a later time, to provide the Fifth Circuit the opportunity to consider and rule on the propriety of a stay through the appeal of this case, in light of the most recent en banc grant and appeal schedule.

THE COURT SHOULD NOT PREEMPT THE LEGISLATIVE REDISTRICTING TASK

Plaintiffs seek enforcement in a manner that will remove any opportunity for the County to act, preempting legislative activity. The Fifth Circuit recently reiterated that even if a Court believes an apportionment scheme violates federal law, the legislative body

“must usually be provided an adequate opportunity to enact revised districts before the federal court steps in to assume that authority. *In re Landry*, 83 F.4th 300, 303 (5th Cir. 2023). In such instances, “[a] court afford the legislative body . . . the first opportunity to accomplish the difficult and politically fraught task of redistricting.” *Id.* at 306-7. Plaintiffs ask this Court to preempt a legislative function, a step federal courts should be leery to take.

THE STANDARD FOR A STAY AT THE FIFTH CIRCUIT IS MET AND APPROPRIATE

Defendants have requested that the Fifth Circuit stay final judgment and additional action pending appeal. For the reasons discussed below, and because of the Fifth Circuit’s recent grant of en banc review, Defendants ask that the Court temporarily vacate its recent order and status conference to provide time for the Fifth Circuit to rule on the stay request. This will help provide certainty and prevent further confusion.

As Defendants have argued in the Fifth Circuit, the two most critical factors to consider in whether a stay should be granted during appeal are whether the applicants have made a strong showing that they are likely to succeed on the merits and whether the applicants will be irreparably injured absent a stay. *Nken v. Holder*, 556 U.S. 418, 426, 434 (2009).¹ A movant “need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.” *U.S. v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983) (citation

¹Other factors include whether the stay will substantially injure the other parties interested in the proceeding and where the public interest lies. *See Id.*

omitted).

I. The County is likely to succeed on the merits, on appeal.

The County is likely to succeed on the merits of the specific claims in this case. At this time, the Court should have “little difficulty concluding that the legal questions presented by this case are serious, both to the litigants involved and the public at large, and that a substantial question is presented for [the Fifth Circuit] to resolve.” *Campaign for S. Equal.*, 773 F.3d at 57. The County maintained during this case that a minority coalition cannot support a claim for violation of the Voting Rights Act (“VRA”) as neither the statute, nor interpretations, contemplate minority coalitions who gather due to political ideology. *See* Dkt. 176 at 20-22, Dkt. 244 at 33-35. This Court is bound by Fifth Circuit case law permitting two distinct minority groups to jointly pursue a VRA claim; however, in granting en banc review and vacating its order affirming this Court, the Fifth Circuit provides a significant signal that that minority coalitions are not permissible under the VRA. Respectfully, the County requests that the Court withhold further action on Plaintiffs’ requested relief or enjoining the County’s use of its adopted map until the Fifth Circuit has had the opportunity to consider Defendants’ stay motion.

II. County Defendants will be irreparably injured absent a stay.

With respect to irreparable harm, “the inability to enforce its duly enacted plans clearly inflicts irreparable harm” on the County. *Abbott*, 138 S.Ct. at 2324 n.17 (explaining, in the context of interlocutory jurisdiction, that where state was barred from conducting elections under an enacted statute, unless the statute is unconstitutional, such an order “would seriously and irreparably harm” the state).

The Supreme Court has directed that, if a plan is “found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time.” *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Here, the Court is mindful of the candidate filing period closing December 11, 2023. Under *Abbott*, the more reasonable option is to allow the enacted plan to remain in force pending the outcome of an appeal.

As Judge Costa wrote in *Thomas v. Bryant*, the defendants in that case (Mississippi state officials) “can establish irreparable harm” where there was a trial court order “preventing enforcement of a state law, including the drawing of legislative lines, and where there was a “meaningful possibility (but not certainty) that a full appeal cannot be decided in time to provide Defendants relief before” the election at issue. 919 F.3d 298, 303 (5th Cir. 2019) (citing *Abbott*, 138 S.Ct. at 2324 n.17). The court acknowledged the plaintiffs faced “the same risk that the appellate ruling would prove futile” if the Fifth Circuit granted a stay. *Id.*

Understanding these parameters, the court explained that its decision teetered on whether the defendants in *Thomas* have a strong likelihood of success. As discussed above, Defendants have established a strong likelihood of success on the merits.

III. The remaining elements of substantial injury and public interest both support a stay of the Order pending appeal.

In considering harm to other parties, the “maintenance of the status quo is important.” *Louisiana by & through Landry v. Biden*, No. 22-30087, 2022 WL 866282, at *3 (5th Cir. Mar. 16, 2022). A stay would preserve that status quo to permit the Fifth Circuit to address the critical legal question of whether the VRA protects minority coalitions. In

these circumstances, the alleged harm of an election under the existing plan should not outweigh the numerous harms of an injunction.

As the County discusses above, there is a likelihood of success on the merits. There is no substantial injury to Plaintiffs; they cannot, as two distinct minority groups, coalesce to establish a VRA violation. The public interest similarly supports the enforcement of properly enacted laws—including redistricting plans adopted by governmental bodies within the State of Texas. The County has operated under the enacted plan, (i.e. Map 2), for almost two years. Implementing a new map will undoubtedly create confusion needlessly in the community.

Again, Plaintiffs ask the Court to preempt legislative authority and create a remedial redistricting schedule that is unworkable, in contravention of appellate authority. A court that invalidates redistricting legislation must “afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure.” *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). Denial and/or postponement of Plaintiffs’ request is appropriate.

CONCLUSION AND PRAYER

The County asks that the Court deny, or at least postpone, any emergency relief sought by Plaintiffs, to allow the Fifth Circuit time to consider Defendants’ request for stay pending the outcome of an appeal of this matter.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served to all counsel of record via the ECF e-filing system on December 1, 2023.

/s/ Joseph Russo, Jr.