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]

DEFENDANTS' OPPOSED MOTION TO STAY ORDER ON PLAN H358 PENDING APPEAL OF THAT ORDER OR A FINAL JUDGMENT

Defendants the State of Texas, Greg Abbott, in his official capacity as Governor, and Rolando B. Pablos, in his official capacity as Secretary of State, respectfully move for a stay pending appeal of this Court's Order on Plan H358 (Aug. 24, 2017), ECF No. 1540, or an appeal of a final judgment. The Court's order enjoins Defendants from conducting the 2018 elections using the existing districts under Plan H358 by invalidating Texas House districts in four counties and ordering the State to either immediately convene a special session of the Legislature or submit to a judicial map-drawing proceeding in less than two weeks. *See* Order at 80-82, ECF No. 1540.

As an initial matter, the Court should stay its Order on Plan H358 and the hearing scheduled for September 6, because its Order on Plan C235—upon which the Order on Plan H358 is largely based—has now been stayed. Today, Justice Alito stayed this

Court's Order on Plan C235 pending further orders from the Supreme Court. *See* Ex. 1. A stay is reasonable, given that the Court's Order on H358 expressly relies heavily on the now-stayed Order on Plan C235. *See* Order at 4, ECF No. 1540; *id.* at 81.

The Court's order will likely be reversed on appeal because it holds that the State of Texas committed intentional racial discrimination by enacting a redistricting plan that incorporated, except for a single district, the districts that this Court itself ordered the State to use for the 2012 elections.[1] The Court's order finding a *Shaw* violation in HD90 is also likely to be reversed on appeal, even if the use of race by Representative Burnam and his staff could be imputed to the Legislature as a whole, because the Legislature had a strong basis in evidence to believe that maintaining the Hispanic population in HD 90 at or near its existing level was necessary to maintain Hispanic voting strength and avoid liability under §2 of the Voting Rights Act.

Both the balance of the equities and the public interest counsel in favor of a stay. A stay is necessary for the State to exercise its appellate rights while preserving the primary election calendar. The risk of disrupting the 2018 election cycle qualifies as an irreparable injury to Texas. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006) (per curiam) ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without [a

[1] The Legislature enacted Plan H358 in 2013, which is identical to the 2012 plan created by this Court (H309) with a few, minor changes, only one of which is relevant here (HD90), because HD90 was the only changed district in which any plaintiff asserted a new claim.

federal-court] injunction suspending the [State's election law]."). There is no corresponding injury to the plaintiffs. Texas has used the court-drawn map in Plan H358 for every election held since the Court ordered its use in 2012. Until three days ago, the Court had made clear that the map was *not* infected with intentional racial discrimination or any other constitutional or VRA defect. *See* Order at 4, 5, 9, 11-12 (March 19, 2012), ECF No. 690. The plaintiffs could have secured a ruling as early as 2014, when the Court originally scheduled a trial on Plan H358. But the plaintiffs insisted, over the protest of the State, on holding two other trials on maps that were never used for a single vote in a single election and that had long been repealed. The plaintiffs will not be irreparably injured by voting in the same Texas House districts where they have voted since 2012, and any plaintiff in HD 90 will not be irreparably injured because the current configuration of the district provides the opportunity to elect the Hispanic candidate of choice.

Defendants therefore move, under Federal Rule of Civil Procedure 62(c), to stay the Court's order and any final judgment forbidding the State to conduct the 2018 Texas House elections under Plan H358. Defendants seek this stay to preserve the status quo pending appeal and allow the 2018 elections to proceed under Plan H358. If the State is allowed to use Plan H358 for the 2018 elections, there will be no exigency requiring court-drawn plans before the 2018 election cycle begins and, as a result, no need to conduct a hearing on court-drawn plans on September 6, 2017. Defendants request a

ruling on this motion by August 30, 2017, at which point Defendants intend to seek a stay from the Supreme Court of the United States, if necessary.

The Court asked whether the Governor of Texas would waive the State's rights to appeal the Court's ruling by calling a special session to redraw the maps at issue in this case. *See* Order at 81-82, ECF No. 1540. The Court gave the Governor three days to decide whether bring the Legislature into a special session to draw new maps for the 2018 elections. But the Court's relentless criticism of the 2013 Legislature's "deliberative process," *see id.* at 4 (adopting its intent analysis regarding Plan C235), makes it impossible for the State to meet the deadlines that this Court has now imposed. If the problem is that the 2013 Legislature did not spend enough time deliberating prior to adopting the 2013 court-drawn maps, then there is no way for the 2017 Legislature to satisfy an undefined sufficient-effort standard, hold protracted hearings involving interest groups, and adopt new maps that will satisfy this Court by October 1st. Even if there were time to do so, convening the Legislature before letting the appeals process play out would prematurely waive the State's right to appeal a decision with which it vigorously disagrees. It is conceivable that legislative redistricting after a final decision from the Supreme Court could resolve this matter and provide stability. But immediate redistricting at this stage, whether it is accomplished legislatively or imposed by this Court, would be unlikely to resolve this litigation or provide stability to the 2018 election calendar. To the contrary, the most likely outcome of immediate redistricting without authoritative guidance from the Supreme Court is continued litigation, creating even

greater uncertainty and confusion for Texas voters. The Governor therefore respectfully declines this Court's invitation at this time but reserves his constitutional power to convene the Legislature if the Supreme Court ultimately determines that the State's maps violate the law.

I. THIS COURT'S ORDER ENJOINS THE STATE FROM CONDUCTING ELECTIONS UNDER PLAN H358.

As it did last week with respect to the State's congressional districts, this Court's order enjoins the use of Plan H358 to conduct Texas House elections. The Court held that Plan H358 is invalid in four counties, Order at 80-81, ECF No. 1540, that the flaws it found "*must* be remedied," *id.* at 80 (emphasis added), and that if the Texas Legislature does not immediately meet to redraw the effected districts, this Court will, *id.* at 81-82. This Order forbids Texas to use H358 in the fast-approaching 2018 election cycle and orders the immediate creation of a remedy that will preclude the use of H358 in the 2018 election cycle. There is no question that the Order has the "practical effect" of an injunction. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (interpreting 28 U.S.C. § 1292(a)); *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 384 (5th Cir. 2014); *Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258, 1261–62 (D.C. Cir. 2012).

II. THE COURT'S ORDER SHOULD BE STAYED PENDING APPEAL.

The decision to enter a stay pending appeal turns on four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

(2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). A stay pending direct appeal is a well-established remedy in redistricting cases. *See, e.g.*, *Gill v. Whitford*, 137 S. Ct. 2289 (2017) (mem. op.); *Perry v. Perez*, 565 U.S. 1090 (2011) (mem. op.); *Bullock v. Weiser*, 404 U.S. 1065 (1972) (stay pending appeal in *White v. Weiser*, 412 U.S. 783, 789 (1973)); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970). All four factors favor a stay in this case.

III. DEFENDANTS WILL LIKELY SUCCEED ON THE MERITS.

A. The Court's Finding of Intentional Discrimination Is Likely to Be Reversed on Appeal.

The Court's ruling that the 2013 Legislature engaged in intentional race-based discrimination by adopting Plan H358's configuration of House districts in Bell, Dallas, Nueces, and Tarrant Counties rests on the Court's intentional-discrimination analysis in last week's Order on Plan C235, *see* Order at 4, ECF 1540, and is likely to be reversed on appeal for the reasons explained in the State's motion seeking a stay from that earlier order. *See* Motion to Stay Order on Plan C235, ECF No. 1538.

In 2012, this Court adopted Plan H309 under the Supreme Court's instruction that it "take care not to incorporate . . . any legal defects in the state plan[s]" passed in 2011. *Perry*, 565 U.S. at 393. In adopting Plan H309, the Court stated that its plan "obeys the Supreme Court's directive by adhering to the State's enacted plan except in the

discrete areas in which we have preliminarily found plausible legal defects under the standards of review the Court has announced." Opinion at 11, ECF No. 690.

The 2013 Texas Legislature repealed the 2011 House redistricting plan, which had not been precleared and was never in effect, and formally enacted Plan H358. This Court nevertheless concluded three days ago that the 2013 Legislature violated the Constitution and the Voting Rights Act because it "purposefully maintained the intentional discrimination" that this Court had found in the repealed 2011 Plan. Order at 80, ECF No. 1540. As explained in the State's motion to stay the Order on Plan C235, however, that ruling is likely to be reversed on appeal because the 2013 Legislature specifically sought to avoid any alleged prior discrimination by adopting this Court's plan and, in any event, the Legislature could not have "purposefully maintained" discrimination that the Court concluded was not present it its 2012 plan and which it did not find until 2017, four years after the State adopted the Court's plan. *See* Stay Motion at 11-16, ECF No. 1538.

B. The Court's Ruling That Plan H358 Violates VRA §2 in Nueces County Is Likely to Be Reversed on Appeal.

On appeal, the Supreme Court is likely to reverse the Court's ruling that the State violated VRA §2 in Nueces County. No party disputes that Nueces County's 2010 Census population entitled it to only two Texas House districts. Nor does any party dispute that HD 34 is a Latino opportunity district under Plan H358. Also, the current configuration is roughly proportional to the county's total HCVAP of 56%, *see* Order

at 48, and therefore creating two HCVAP majority districts, as MALC proposed, "would result in over-representation in Nueces County," *id.* The evidence does not show that Hispanic voters in Nueces County are excluded from the political process. And the evidence shows that the current configuration of Nueces County House districts does not dilute Hispanic voting strength because the population is not sufficient to create two consistently performing HCVAP-majority districts in Nueces County. 2017 Tr. 66:5–8; Order at 41-42.

C. The Court's Ruling That HD 90 in Tarrant County Was Racially Gerrymandered Is Likely to Be Reversed on Appeal.

The Court's conclusion that the 2013 revision to HD90 in H358 was a racial gerrymander will likely be reversed on appeal because it is inconsistent with the record and established law. The 2013 amendment by the sitting Democratic representative, Lon Burnam, brought Como back into the district, based on well-documented requests by its residents. *See* Order at 67-68, ECF No. 1540. But doing so without other changes would have lowered the HCVAP and SSVR while drawing opposition from MALC, which opposed allowing HD90's HCVAP to drop below 50%. Tr.638-39, 641. Burnam's staff member who drew the amendment testified that he did not communicate with legislators (other than Burnam) at any point during his drafting of proposed amendments to HD 90. *Id.* at 695:3–10. Even if Burnam's staff member relied predominantly on race in drafting the amendment to HD90, that reliance cannot be imputed to the Legislature as a whole. Even if it could be, the Legislature had a strong

basis to believe that consideration of race was necessary to avoid a violation of the Voting Rights Act. That belief was well-founded. The Task Force Plaintiffs alleged intentional vote dilution in HD90, but the Court rejected that claim. Under the Court's analysis, however, the price of that victory was a loss on the Task Force Plaintiffs' *Shaw* claim. The Court's order is likely to be reversed on appeal because it leaves the State in the very lose-lose situation that the strong-basis-in-evidence standard is meant to avoid.

IV. DENIAL OF A STAY PENDING APPEAL WILL CAUSE IRREPARABLE INJURY TO THE STATE.

The Court's order imposes at least two irreparable injuries on the State. First, enjoining the State from conducting elections under its duly enacted House districts is a sufficient injury to warrant a stay. *See Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). Second, the State is irreparably injured if its election calendar is undone by a federal court injunction without time to appeal. In *Purcell*, for example, a two-judge motion panel for the Ninth Circuit enjoined Arizona's voter-identification procedures. 549 U.S. at 3-4. The Supreme Court held that, *even if* the state law was ultimately held unlawful, federal courts should not halt a State's election procedures without allowing adequate time for full appellate review. *Id.* at 5-6. Absent a stay, that will happen here.

V. A STAY PENDING APPEAL WILL NOT HARM THE PLAINTIFFS.

The plaintiffs have voted under Plan H358 or the materially indistinguishable Plan H309 for three consecutive House elections. It cannot be that this Court's reversal

of its previous decision to allow this map to be used for three election cycles gives rise to an irreparable injury that can be used against the State.

VI. A STAY PENDING APPEAL SERVES THE PUBLIC INTEREST.

A stay pending appeal serves the public interest. Plan H358 reflects the statutory policy of the Legislature, which "is in itself a declaration of the public interest." *Virginian Ry. Co. v. Sys. Fed'n No.* 40, 300 U.S. 515, 552 (1937). A stay will also prevent disruption of the 2018 House elections, allowing them to be conducted under the same districts that have been used in every Texas House election held in this decade. And as explained at the opening of this brief, the threat of disruption of the 2018 election calendar is wholly attributable to delays in the resolution of this case that resulted from the plaintiffs' demand for a trial on redistricting plans that never took legal effect and were never used to conduct a single election. The public interest counsels heavily against saddling the voters of Texas with the consequences of the plaintiffs' insistence on avoidable delays.

CONCLUSION

Defendants respectfully request that the Court stay its Order on Plan H358, and any final judgment forbidding the State to conduct elections under Plan H358, pending appeal of that Order or pending appeal of a final judgment preventing the State from using the existing districts under Plan H358.

Date: August 28, 2017

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that on August 28, 2017, I conferred with counsel for all plaintiffs and plaintiff-intervenors about the foregoing motion. Counsel for the Texas Latino Redistricting Task Force Plaintiffs, the MALC Plaintiffs, the NAACP Plaintiffs, the Perez Plaintiffs, the Congresspersons, and the LULAC Plaintiffs advised that they oppose the motion. Counsel for the United States did not advise that they oppose or do not oppose the motion.

/s/ Patrick K. Sweeten
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I hereby certify that a true and correct copy of this filing was sent on August 28, 2017, via the Court's electronic notification system and/or email to the following:

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