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' RESPONSE TO TEXAS LATINO REDISTRICTING TASK FORCE'S MOTION TO AMEND COMPLAINT

Less than a month before trial, the Task Force Plaintiffs seek to add new claims against the 2013 Texas House redistricting plan and—for the first time—assert a challenge to the 2013 congressional redistricting plan. ECF No. 1419. The Task Force Plaintiffs' Fourth Amended Complaint—their live pleading for the last four years—alleged wide-ranging claims against the 2011 redistricting plans. ECF No. 891 at 14-17, 19-20. But the Task Force Plaintiffs' challenge to the 2013 redistricting plans was limited to one portion of the Texas House plan: the Legislature's alterations to HD 90. *Id.* at 17-18. The Task Force Plaintiffs did not contest any other part of the 2013 Texas House plan or lodge any claims against the 2013 congressional plan. Now, twenty-eight days before trial in a case that has been pending for six years, the Task Force Plaintiffs request leave to amend their complaint so they can challenge the configurations of CD

23 and CD 27 in the 2013 congressional plan and the Nueces County districts in the 2013 House plan. Nothing prevented the Task Force Plaintiffs from asserting those claims long before today, and they should be held to their decision to proceed almost entirely against maps that were repealed before being used in any election.

The Task Force Plaintiffs identify three grounds to support their belated motion. First, they declare that this Court's recent orders regarding the State's 2011 redistricting plans "raised concerns for the Task Force Plaintiffs regarding remedies." ECF No. 1419 at 11. Second, they reason that the Supreme Court's decisions in *Cooper v. Harris* and *Bethune-Hill v. Virginia State Board of Elections* represent a "change in law" allowing them to expand their claims a few weeks before trial. *Id.* at 12-14. Third, the Task Force Plaintiffs maintain that 2014 and 2016 election results justify their brand-new challenge to CD 23 in the 2013 congressional plan. *Id.* at 1, 11. Yet none of those stated rationales establishes the extraordinary circumstances that would require this Court to reverse its earlier ruling that the pleading deadline will not be reopened.

I. THIS COURT'S RECENT ORDERS ON THE 2011 REDISTRICTING PLANS PROVIDE NO BASIS FOR THE PROPOSED EXPANSION OF THE TASK FORCE PLAINTIFFS' CLAIMS.

At the outset, the Task Force Plaintiffs contend that their eleventh-hour amendment would "conform to the Court's orders on Plans C185 and H283." ECF No. 1419 at 10. According to the Task Force Plaintiffs, these orders—along with the Court's May 1, 2017 Scheduling Order—indicated that "the Nueces County configurations would be analyzed again, even where they remain unchanged from the

2011 plans to the 2013 plans." *Id.* at 4 (citing ECF No. 1390 at 5; ECF No. 1365 at 36; ECF No. 1389 at 1.n.1). The Task Force Plaintiffs proclaim that these rulings "convinced" them that they needed to add claims challenging the Nueces County districts in the 2013 plans. *Id.* at 11-12. They also express a desire to "continue their claims" against CD 23 in the 2013 congressional plan. *Id.* at 17. Thus, the argument goes, good cause exists to allow the Task Force Plaintiffs to amend their complaint long after the deadline to do so has passed.[1]

This Court has already considered—and rejected—this argument. At the April 27, 2017 status conference, the Task Force Plaintiffs and others proposed amending their live pleadings to add new claims. *See, e.g.*, Apr. 27, 2017 Hr'g Tr. at 18-22 (Task Force Plaintiffs); *id.* at 36-38 (Quesada Plaintiffs). Some parties had previewed this issue before the April 27 conference as well. ECF No. 1371 at 6 n.3; ECF No. 1374 at 3 n.3. In its May 1 Scheduling Order, this Court expressly rejected the plaintiffs' proposal:

> The deadline for amendment of pleadings and joinder of parties has passed, and will not be re-opened. . . . To the extent the parties believe the 2013 plans are unconstitutional or otherwise illegal, those infirmities have existed since enactment of the plans. . . . Either the claims existed at the time of enactment or they did not, and the parties had ample opportunity to assert those claims.

ECF No. 1389 at 1-2 & n.1; *see also id.* at 2 n.1 ("The Court did not defer consideration

[1] *See Marathon Fin. Ins., Inc. v. Ford Motor Co.*, 591 F.3d 458, 470 (5th Cir. 2009) (amendments of pleadings after a scheduling order's deadline has passed are governed by Federal Rule of Civil Procedure 16(b)(4), which provides that an order can be modified after it is entered "only for good cause and with the judge's consent").

of 2011 claims.").

The Task Force Plaintiffs' request to add new 2013 claims beyond the existing pleading deadline essentially functions as a motion for reconsideration. *See* Fed. R. Civ. P. 54(b). At the same time, the Task Force Plaintiffs make no effort to establish there are "extraordinary circumstances" that would compel the Court to reverse its earlier ruling barring further amendments. *See In re Goff*, 579 F. App'x 240, 245 (5th Cir. 2014). On that basis alone, the Motion should be denied.[2]

The Task Force Plaintiffs also fail to demonstrate—as they must, under Federal Rule 16(b)(4)—that there is good cause to modify the existing scheduling order at this late stage. *See Marathon*, 591 F.3d at 470-71 (district court properly denied leave to amend complaint six weeks before trial when movant "had ample opportunity" to address the issue "well before the eve of trial"). The Task Force Plaintiffs offer no legitimate explanation for waiting four years to assert claims that would have existed (if at all) when they filed their Fourth Amended Complaint in September 2013. *See id.* at 470. And Defendants would be prejudiced by any expansion of the Task Force Plaintiffs' 2013 claims, which have been focused until now on one discrete part of the Texas House plan. *See id.* (good-cause analysis under Rule 16(b) includes consideration of whether non-movant could suffer prejudice as a result of amendment). Besides, even

[2] *See United States v. Renda*, 709 F.3d 472, 478-79, 487 (5th Cir. 2013) (district court did not abuse its discretion in denying request to reconsider and revisit prior interlocutory order).

if it were appropriate to modify the scheduling order now, the Task Force Plaintiffs still would have to show that an amended complaint is permissible under Rule 15(a). *See S&W Enters., L.L.C. v. SouthTrust Bank of Ala.*, 315 F.3d 533, 536 (5th Cir. 2003). The Task Force Plaintiffs' delay in seeking to amend their complaint, and the resulting prejudice to Defendants from any such amendment, are reasons enough to reject the last-minute request.[3]

The Court's decision to preclude additional pleading amendments is not merely consistent with the discretion provided under Rules 15 and 16: it follows by necessity from the facts of this case. The parties and the Court have recognized that the remaining trial proceedings must be conducted on an expedited basis due to the 2018 election cycle. *See, e.g.*, ECF No. 1388 at 1-2; ECF No. 1389 at 1 (noting the Court's expectation that "counsel and the parties [will] work diligently to meet the [scheduling] deadlines"). Indeed, the Task Force Plaintiffs "continue to urge the Court to proceed with haste" in light of the impending 2018 election. ECF No. 1419 at 17. Allowing the Task Force Plaintiffs—or any party—to amend their pleadings years after filing their operative

[3] *See United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 386 (5th Cir. 2003) (leave to amend complaint should not be granted when there is "undue delay" or "undue prejudice to the opposing party by virtue of allowance of the amendment" (citation and internal quotation marks omitted)); *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 566 (5th Cir. 2003) (recognizing that courts are afforded "extensive discretion" under Rule 15(a) in considering whether to permit an amended complaint after the time for amendments has passed) (citation and internal quotation marks omitted).

complaints would only sow confusion about the scope of each party's claims and disrupt the existing, finely tuned schedule.[4]

Faced with these realities, the Task Force Plaintiffs pursue a different tack. They aver that "the legality of the Nueces County configurations" and CD 23 was tried by the consent of the parties in 2011 and 2014. ECF No. 1419 at 4-10. So, the Task Force Plaintiffs argue, they should be allowed to amend their complaint because Rule 15(b) provides that an issue "'tried by the parties' express or implied consent . . . must be treated in all respects as if raised in the pleadings.'" *Id.* at 5 (quoting Fed. R. Civ. P. 15(b)(2)). Yet, as the Task Force Plaintiffs acknowledge, this approach is intended to "bring[ ] pleadings in line with issues that *actually were developed at trial*." *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1352 (5th Cir. 1985) (emphasis added); ECF No. 1419 at 5. Here, the earlier trial proceedings pertained only to the 2011 plans; the 2013 redistricting plans have not yet been tried. The Task Force Plaintiffs cannot legitimately contend that Defendants have consented to the parties raising any unpleaded challenges to the 2013 maps. *Smith v. EMC Corp.*, 393 F.3d 590, 596-97 (5th Cir. 2004) (rejecting application of Rule 15(b) where parties disputed whether unpleaded claim entered the case at trial). The Court should deny the Motion.

[4] Defendants' timing concerns are not just theoretical. Even without any amendments to their existing complaints, the plaintiffs have collectively designated eleven expert witnesses and disclosed twenty-one fact witnesses for the trial on the 2013 plans. Several of the fact witnesses were not identified in the parties' previous disclosures and thus likely will be deposed before trial, as will the expert witnesses.

II. NEITHER *COOPER* NOR *BETHUNE-HILL* SUPPORTS THE TASK FORCE PLAINTIFFS' EFFORTS TO AMEND THEIR CLAIMS ON THE EVE OF TRIAL.

The Task Force Plaintiffs also assert that the Supreme Court's rulings in *Cooper v. Harris* and *Bethune-Hill v. Virginia State Board of Elections* effected a change in the law that justifies their proposed amended complaint. ECF No. 1419 at 12-14; *see Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017). Defendants have already explained why *Cooper* and *Bethune-Hill* have little impact on this case. *See* ECF No. 1413. Suffice it to say for purposes of the instant Motion that neither decision breaks significant new legal ground; instead, both cases reaffirm established redistricting principles. *Id.* at 1-13. In each case, the Supreme Court applied longstanding precedent involving the racial-predominance standard and the narrow tailoring analysis in racial gerrymandering challenges. *See Cooper*, 137 S. Ct. at 1469-74; *Bethune-Hill*, 137 S. Ct. at 797-802. Neither case represents an intervening legal change that would justify an amendment to the Task Force Plaintiffs' complaint. *See Schiller*, 342 F.3d at 568 n.3 (district court appropriately rejected request to amend complaint because intervening appellate ruling "merely confirmed" existing legal principles and did not generally alter established legal standards).

Yet even if *Cooper* or *Bethune-Hill* somehow altered the legal framework governing certain racial gerrymandering challenges (which they do not), the Task Force Plaintiffs' reliance on them as a basis for amending their complaint still fails. Critically, *Cooper* and *Bethune-Hill* are distinct from the instant case in several important respects. Those

distinctions include, for example, that the 2013 Texas Legislature did not rely predominantly on race or engage in the sort of race-based decisionmaking condemned in *Cooper* and *Bethune-Hill*. *See* ECF No. 1413 at 13-20. As such, neither of these rulings changed the controlling law on any relevant questions before this Court now.[5] And nothing in the two Supreme Court opinions creates new claims that the Task Force Plaintiffs were somehow prevented from asserting prior to the pleading deadline.

III. THE 2014 AND 2016 ELECTION RESULTS OFFER NO GROUND FOR THE TASK FORCE PLAINTIFFS TO ASSERT A BRAND-NEW CHALLENGE TO CD 23 UNDER THE 2013 PLAN.

Nor can the Task Force Plaintiffs rely on recent election results as a basis for bringing claims against the 2013 congressional plan for the first time. The Task Force Plaintiffs maintain that 2014 and 2016 election results "further demonstrate how the racial gerrymander in [CD 23] continues to discriminate against Latino voters despite the Court's interim changes." ECF No. 1419 at 3. The Motion says nothing more about the supposed import of these new election results. Instead, as the Task Force Plaintiffs would have it, the mere existence of intervening elections since they filed their live pleading four years ago provides them a hook to bring new legal challenges. Not so.

[5] *See United States ex rel. SNAPP, Inc. v. Ford Motor Co.*, 618 F.3d 505, 513-14 (6th Cir. 2010) (district court did not abuse discretion in denying request to file second amended complaint because "no holding of [an intervening appellate decision] affected the circuit's law on the questions at issue before the district court").

Defendants acknowledge, of course, that elections have been conducted under the redistricting plans that are the subject of next month's trial. But, without more, that does not afford the Task Force Plaintiffs an opportunity to assert claims against a redistricting plan that they have chosen not to challenge in the four years since its enactment. Nor can the Task Force Plaintiffs credibly claim they were unable to contest the 2013 congressional plan without recent election results. Indeed, when the Task Force Plaintiffs brought claims against a portion of the 2013 House plan in their Fourth Amended Complaint, no elections had been conducted under the plan. But nothing stopped the Task Force Plaintiffs from challenging HD 90 at that point. *See* ECF No. 891 ¶¶ 78-79 (alleging that the 2013 House plan "uses race as a predominant factor to allocate Latino voters into and out of HD 90" and that the changes to HD 90 "operate to dilute the voting strength of Latinos"). The Motion is not well-taken.

* * * *

Against all of this, the Task Force Plaintiffs argue that their proposed amendment "will not add new claims to the case overall," "alter the current discovery schedule," or cause Defendants any undue prejudice. ECF No. 1419 at 1, 17-18. That is not true. Other plaintiffs lodging challenges against the Nueces County districts in the 2013 House plan or against CD 23 and CD 27 in the 2013 congressional plan says nothing about whether—and to what extent—the *Task Force Plaintiffs* have asserted any claims on these issues. It says nothing about the arguments that the *Task Force Plaintiffs* would make in an effort to prevail on those claims. And it says nothing about the

evidence—testimony, documents, or otherwise—on which the *Task Force Plaintiffs* would rely to support their newfound claims at the upcoming trial. The Task Force Plaintiffs' 2013 claims have been limited to one district in the House plan, and Defendants have mounted their defense against the Task Force Plaintiffs' claims on that basis since September 2013. The Task Force Plaintiffs should not be permitted to change course on the eve of trial.

CONCLUSION

The Task Force Plaintiffs surely would prefer that they had brought claims, in the first instance, against the State's 2013 redistricting plans beyond their challenge to House District 90. But nothing in the Federal Rules allows them to turn back time—at this late hour, no less—and assert claims that they should have lodged four years ago when they were given the opportunity to do so. This Court has already ruled as such, and the Task Force Plaintiffs have not shown the extraordinary circumstances necessary for the Court to overturn itself now. The Task Force Plaintiffs must be held to their litigation decisions. The Motion to Amend Complaint should be denied.

Date: June 16, 2017

Respectfully submitted.

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

SHANNON PEREZ, *et al.*,

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[Lead case]

ORDER DENYING TEXAS LATINO REDISTRICTING TASK FORCE'S MOTION TO AMEND COMPLAINT

Before the Court is the Texas Latino Redistricting Task Force's Motion to Amend Complaint (ECF No. 1419). After due consideration, the Court is of the opinion that the Motion lacks merit and should be DENIED.

IT IS THEREFORE ORDERED that the Texas Latino Redistricting Task Force's Motion to Amend Complaint is hereby DENIED.

SIGNED this _____ day of _____, 2017.

_____
United States Circuit Judge

_____
United States District Judge

_____
United States District Judge