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

SHANNON PEREZ, ET AL.,	§	
	§	
Plaintiffs	§	
	§	
v.	§	**CIVIL ACTION NO.**
	§	**11-CA-360-OLG-JES-XR**
STATE OF TEXAS, ET AL.	§	**CONSOLIDATED ACTION**
	§	**[Lead case]**
Defendants	§	

TEXAS LATINO REDISTRICTING TASK FORCE MOTION TO AMEND COMPLAINT TO CONFORM TO COURT ORDERS AND IN LIGHT OF NEW FACTS AND RECENT SUPREME COURT DECISIONS

Plaintiffs Texas Latino Redistricting Task Force, *et al*. (Task Force Plaintiffs) move to amend their Fourth Amended Complaint in limited fashion to conform to this Court's March and April 2017 Orders on Plans C185 and H283 and in light of new facts and recent decisions of the U.S. Supreme Court.

The request to amend the Task Force Plaintiffs' complaint will not add new claims to the case overall or alter the current discovery schedule or the Task Force Plaintiffs' disclosures of expert and fact witnesses. The Task Force Plaintiffs propose to file their amended complaint (attached as Exhibit 1) for the following limited purposes:

1. In light of this Court's April 2017 Order, which continued consideration of the challenge to House districts in Nueces County, to litigate the Task Force claim in the 2014 trial that the configuration of House districts in Nueces County violates section

2 of the Voting Rights Act and intentionally discriminates against Latinos on the basis of race.[1]

2. In light of this Court's March 2017 conclusion, opposed by the Task Force, that CD35 in C185 is unconstitutional, to continue to litigate claims litigated by the Task Force in 2014 that the exclusion of Nueces County Latinos from Latino majority congressional districts in South Texas violates section 2 of the Voting Rights Act and intentionally discriminates against Latinos on the basis of race.[2]
3. In light of recent decisions of the U.S. Supreme Court clarifying the standards used to evaluate claims of intentional racial gerrymandering, to continue to litigate claims litigated by the Task Force in 2014 that CD23 and Nueces County congressional and House districts intentionally discriminate against Latinos on the basis of race.
4. In light of the additional election results for the Court's interim CD23, to continue to litigate claims litigated by the Task Force in 2014 that the design of CD23 violates section 2 of the Voting Rights Act and intentionally discriminates against Latinos on the basis of race.

The Task Force Plaintiffs seek to amend their complaint now because they did not previously have the information upon which their amendments rely, specifically this Court's April and May 2017 rulings on C185 and H283, the results of the 2014 and 2016 election cycles and the U.S. Supreme Court decisions in *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017), and *Cooper v. Harris*, No. 15-1262, 2017 WL 2216930 (U.S. May 22, 2017).

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[1] The configurations of Nueces-based HD32 and HD34 in Plan H283 remain unchanged in Plan H358. Order on Plan H283, Dkt. 1365 at 33.
[2] The configuration of Nueces-based CD27 in Plan C185 remains unchanged in Plan C235. Am. Order on Plan C185, Dkt. 1390 at 5.

With respect to the claims involving Nueces County and the South Texas configuration of House and congressional districts, the Task Force Plaintiffs and Defendants have already litigated the legality of the Nueces County configurations, the Court has made rulings on their legality, and both their legality and their impact on other districts in South Texas will be a focus of the upcoming trial on Plans C235 and H358.

With respect to the recent United States Supreme Court decisions clarifying the standards for evaluating claims of racial gerrymandering, the Task Force Plaintiffs seek to conform their complaint to present the claim that the Texas Legislature in 2013 did not conduct a "meaningful legislative inquiry" into the legality of Plans C235 and H358 prior to enacting them but simply carried forward boundaries that were originally the result of unconstitutional racial gerrymandering. *Compare Cooper v. Harris*, No. 15-1262, 2017 WL 2216930 ("*Cooper* slip op."), at *13 (May 22, 2017) (holding that a state must "carefully evaluate" whether there are legal deficiencies in its proposed maps prior to enactment), *with* Defs.' Supp. Brief Addressing *Cooper v. Harris* and *Bethune-Hill v. Virginia State Board of Elections*, Dkt. 1413 at 14 (claiming that the Legislature "simply adopted wholesale the interim congressional plan drawn by this Court in 2012," Plan C235).

As a result, the redistricting of Nueces County and CD23 in Plans C235 and H358 contains many of the same features that the Task Force Plaintiffs showed, and the Court found, created racial gerrymanders. The 2014 and 2016 election results in CD23 further demonstrate how the racial gerrymander in that district continues to discriminate against Latino voters despite the Court's interim changes.

Accordingly, the Task Force Plaintiffs move the Court for leave to amend under Federal Rule of Civil Procedure 15, which strongly encourages amending pleadings to accurately reflect

a party's claims. Because the Task Force Plaintiffs' limited proposed amendment relates to issues that have been tried by the parties' consent, that have been affected by a change in law, and that justice requires be reflected in their operative complaint, the Court should grant the Task Force Plaintiffs' motion.

ARGUMENT

I. THE PARTIES HAVE TRIED BY CONSENT THE LEGALITY OF THE NUECES COUNTY CONFIGURATIONS, WHICH REMAIN UNCHANGED IN H358 AND C235, AND THE COURT SHOULD THEREFORE GRANT TASK FORCE PLAINTIFFS' LEAVE TO AMEND UNDER RULE 15(B)(2).

The Court's March 10 and April 20 Orders and the Court's May 1 Scheduling Order stated that the Nueces County configurations would be analyzed again, even where they remain unchanged from the 2011 plans to the 2013 plans. *E.g.*, Am. Order on Plan C185, Dkt. 1390 at 5 ("The configurations of CD35 and CD27 remain unchanged in Plan C235, and whether the harms found regarding CD23 continue in Plan C235 remains to be decided."); Order on Plan H283, Dkt. 1365 at 36 ("[W]ith regard to Nueces County, Plaintiffs have failed to demonstrate a violation of § 2's results test at this time. However, they may continue to pursue this claim with regard to Plan H358 in the 2013 plan trial because the Nueces County configuration remains unchanged from Plan H283."); Scheduling Order, Dkt. 1389 at 1 n.1.

Based on the evidence presented thus far in the case, the Court has recognized the importance of the Nueces County configurations to any remedy that the Court orders for the South Texas region. With respect to Plan C185, the Court observed that the Nueces-based configuration affected other districts in South Texas. Am. Order on Plan C185, at 10–11, 46, 47, 54, 56–58, and 164; *see id.* 56–57 ("[T]he decision to remove Nueces County from its existing configuration led to other questionable race-based decisions, such as CD34 stretching from Cameron County all the way to Gonzales County and CD15 stretching from Hidalgo County to

Guadalupe County in an effort to 'pick up Anglo voters.'"). With respect to Plan H283, the Court observed that the Nueces-based configuration could affect other districts in South Texas and deferred decision on this issue until Plaintiffs show whether it is possible for Nueces County to contain entirely two majority-HCVAP Latino opportunity districts. Order on Plan H283, Dkt. 1365 at 34–36, 40; *see id.* 32 n.22 ("Nueces County presents a strong case for requiring the State to follow § 2 over the County Line Rule . . . ."). If the Court were to deny the Task Force Plaintiffs leave to amend to incorporate their claims in Nueces County, the Task Force Plaintiffs would lose the ability to obtain a remedy in Nueces County and South Texas that addresses their claims in Nueces County.

Federal Rule of Civil Procedure 15(b) in part provides: "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue." Fed. R. Civ. Pro. 15(b)(2). Rule 15(b) "unequivocally states that issues tried by express or implied consent shall be treated as if raised by the pleadings," *Metropolitan Life Ins. Co. v. Fugate*, 313 F.2d 788, 795 (5th Cir. 1963), "effect[ing] the desirable policy of bringing 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).

To determine whether parties have tried an issue by implied consent, courts in the Fifth Circuit consider "whether the parties recognized that the issue entered the case at trial, whether the evidence supporting the issue was introduced at trial without objection, and whether a finding of trial by consent would prejudice the opposing party." *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (citing *United States v. Shanbaum*, 10 F.3d 305, 312–13 (5th Cir. 1994)). Courts

look for evidence of express consent in the record of a case, whether in pleadings or other briefing. *See, e.g.*, *Deere & Co. v. Johnson*, 271 F.3d 613, 622 (5th Cir. 2001); *iMatter Utah v. Njord*, 774 F.3d 1258, 1264 n.4 (10th Cir. 2014) ("Regardless of whether iMatter Utah properly pleaded a facial challenge in its complaint, both parties have addressed the facial validity of [Utah's parade permit] regulations in their briefing and arguments before the district court and on appeal. We therefore treat this issue as though it was raised in the pleadings.").

The parties tried by consent in 2011 and 2014 the legality of the Nueces County configurations that are part of Plans C185 and C235 and Plans H283 and H358. First, the parties recognized that the lawfulness of these configurations was at issue during the 2011 and 2014 trials as well as prior to the trials. In their currently operative complaint, the Task Force Plaintiffs challenge each of these configurations under § 2 of the Voting Rights Act and the Fourteenth Amendment. *See* Task Force Pls.' Fourth Am. Complaint, Dkt. 891.

With respect to the Nueces County congressional configuration, the Task Force Plaintiffs alleged that Plan C185 "removes Nueces County, and its more than 200,000 voting-age Latinos, from the South Texas configuration of congressional districts and strands them in a district stretching northward in order to prevent Nueces County Latinos from electing their candidate of choice." Task Force Pls.' Fourth Am. Complaint ¶ 43, Dkt. 891 at 12.

With respect to the Nueces County configuration in Plan H283, the Task Force Plaintiffs alleged that Plan H283 "dilutes Latino voting strength statewide by 'packing' Latino voters in El Paso, Cameron, Hidalgo, *and Nueces counties*." *Id.* ¶ 37, Dkt. 891 at 10 (emphasis added). Moreover, the Task Force Plaintiffs consistently argued that these configurations are unlawful. *E.g.*, 6/9/2014 Task Force Pls.' Resp. to Defs.' Mot. to Dismiss, Dkt. 1076 at 4 ("[T]he State's 2013 redistricting plans contain features that the Task Force Plaintiffs continue to challenge,

including the elimination of the second Latino-majority state house district in Nueces County and the removal of Nueces County from the configuration of Latino majority districts in South and West Texas."); *id.* at 12–13; 7/14/2014 Tr. 70–72; 8/11/2014 Tr. 171–72. Defendants addressed these arguments directly, arguing in turn that the challenged Nueces County configurations were not only lawful but also inevitable. 7/14/2014 Tr. 102–03; 8/11/2014 Tr. 211–12.

At trial in 2014, the Task Force Plaintiffs provided evidence without objection on a host of issues underlying their § 2 and Fourteenth Amendment claims against the Nueces County configurations. This evidence includes but is not limited to: evidence of the compactness of Latino opportunity districts that could and should have been drawn in Nueces County and South Texas, *e.g.*, 8/11/2014 Tr. 229–30; *see also* Order on Plan C185, Dkt. 1390 at 47; evidence of racially polarized voting in Nueces County and in the South Texas region affected by changes to Nueces-based district boundaries, *e.g.*, 8/12/2014 Tr. 477–84; *see also* Order on Plan C185, Dkt. 1390 at 49–51 (citing Dr. Engstrom's reports); and evidence of the intentional and improper use of incorrect racial targets in redistricting, *e.g.*, 8/11/2014 Tr. 64–65. Defendants did not object to the introduction of this and other similar evidence, and Defendants introduced their own evidence on these very issues.

Following trial in 2014, the Task Force Plaintiffs summarized their evidence on the Nueces County configurations in their Proposed Findings of Fact and Conclusions of Law (Dkt. 1274), including evidence on demographic change, racially polarized voting, Senate Factors, the ability to create two HCVAP majority House districts in Nueces County, the elimination of HD33 as a Latino opportunity district in Nueces County and subsequent packing of Latino voters into one House district, House mappers' refusal to acknowledge controlling law, the ability to

place Nueces County in a Latino opportunity congressional district, and the intentional removal of Nueces County from the South Texas configuration of congressional districts. *See* Dkt. 1274 at 4–5, 7, 14, 20–21, 36, 43, 71–73, 104–05, 111–17, 123, 137–38, 145–47, 157–58, 170–71, 198–201, 229, 236, 247, 259–60, 320–21, 409–11, and 420–21.

In its Amended Order on the congressional challenge, the Court concluded that "The Task Force Plaintiffs . . . assert § 2 claims on behalf of Nueces County Hispanic voters [and] Plaintiffs have demonstrated that the Nueces County Hispanics have established a § 2 violation insofar as they have shown that their § 2 rights could have been accommodated but were not." Am. Order on Plan C185, Dkt. 1390 at 57 n.58. There can be no doubt that the parties tried their claims regarding the Nueces County boundaries and there is no dispute that those boundaries did not change in the Court's interim plans or H358 and C235.

In addition, the Task Force Plaintiffs were the only plaintiffs to plead a claim of racial gerrymandering against the configuration of CD23. *See* Am. Order on Plan C185, Dkt. 1390 at 29 ("The Task Force Plaintiffs also mount a *Shaw*-type racial gerrymandering claim against CD23."). That claim, tried in 2011 and 2014, included the Task Force Plaintiffs' evidence of specific changes made to CD23 to "swap" Latinos with higher participation rates for Latinos with lower participation rates in order to reduce Latino voting strength in the district. *See, e.g.*, 8/12/2014 Tr. 518–20.

Following trial, the Court found that "CD23 in Plan C185 was not intended to be and is in fact not a Latino opportunity district despite its majority-HCVAP status" and relied on the Task Force Plaintiffs' evidence to conclude that "[Ryan] Downton used race to increase the SSVR and HCVAP of CD23 to create the facade of a Latino opportunity district, while he intentionally

manipulated Hispanic voter cohesion and turnout to reduce the performance of the district for Hispanic candidates of choice." Am. Order on Plan C185, Dkt. 1390 at 12, 22.

Although the Court adjusted some of the boundaries of CD23 in its 2012 interim plan, most of the district's boundaries remained unchanged and were incorporated into C235, including the inclusion of parts of Frio and LaSalle Counties with predominantly Latino population but low Latino participation rates, the inclusion of predominantly Anglo counties north of the Pecos River, and exclusion of Latinos with higher participation rates on San Antonio's South Side from CD23. Because the Task Force Plaintiffs already tried their claims of vote dilution and intentional discrimination related to CD23 in C185, they seek to amend their complaint in order to respond to the Court's recent statement that "whether Plaintiffs are continuing to be harmed by violations found with regard to CD23 remains undecided[.]" Am. Order on Plan C185, Dkt. 1390 at 1 n.*. The Task Force Plaintiffs seek to provide more recent evidence of racially polarized voting and election results in the district, as well as to argue their claims under the guidance provided by the U.S. Supreme Court in *Bethune-Hill* and *Cooper*.

A finding of trial by consent on the Task Force Plaintiffs' claims on CD23 and Nueces County will not prejudice Defendants. The parties have already finished conducting discovery on these district configurations present in both the 2011 and 2013 plans and the Task Force Plaintiffs' recent expert reports only update their previous conclusions regarding racially polarized voting and CD23's election performance. Moreover, as the configurations remain largely unchanged in the 2013 plans, Defendants would not be required to defend those configurations on any new grounds. Rather, it is the Task Force Plaintiffs who will be prejudiced by denial of leave to amend. Accordingly, granting the Task Force Plaintiffs leave to amend will ensure that no party is prejudiced.

In sum, the parties have long been apprised of § 2 and Fourteenth Amendment claims against CD23 and the Nueces County configurations present in Plans C185, C235, H283, and H358, the Task Force Plaintiffs have introduced evidence without objection on these claims, and Defendants will not be prejudiced by a finding of trial by consent. Therefore, the parties have tried by consent the Task Force's § 2 and Fourteenth Amendment claims based on the unchanged CD23 and Nueces County configurations, and the Court should grant the Task Force leave to amend its complaint to conform to the Court's orders.

II. THE COURT SHOULD GRANT THE TASK FORCE PLAINTIFFS LEAVE TO AMEND, BECAUSE GOOD CAUSE EXISTS TO EXCEPT THE TASK FORCE PLAINTIFFS FROM THE COURT'S SCHEDULING ORDER, AND IT IS IN THE INTERESTS OF JUSTICE THAT THE TASK FORCE PLAINTIFFS' COMPLAINT ACCURATELY REFLECT THEIR CLAIMS AGAINST THE UNCHANGED NUECES COUNTY CONFIGURATIONS AND THE GERRYMANDER FEATURES OF CD23.

A. GOOD CAUSE EXISTS UNDER RULE 16(B) TO EXCEPT THE TASK FORCE PLAINTIFFS FROM THE COURT'S SCHEDULING ORDER TO AMEND THEIR COMPLAINT TO CONFORM TO THE COURT'S ORDERS ON PLANS C185 AND H283.

Federal Rule of Civil Procedure 16(b) permits amendment of pleadings after a scheduling order's deadline to amend has expired. *See Marathan Fin. Ins., Inc. v. Ford Motor Co.*, 591 F.3d 458, 470 (5th Cir. 2009). Under Rule 16(b), a scheduling order may be modified "'for good cause and with the judge's consent.'" *Id.* (quoting Fed. R. Civ. Proc. 16(b)(4)). Good cause "requires a party 'to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension.'" *Id.* (quoting *S&W Enters., LLC v. Southtrust Bank of Ala.*, 315 F.3d 533, 535 (5th Cir. 2003)). "Four factors are relevant to good cause: '(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice.'" *Id.* (quoting *Sw. Bell Tel. Co. v. City of El Paso*, 346 F.3d

541, 546 (5th Cir. 2003)). When the moving party shows good cause, the court will apply the liberal standard of Rule 15(a). *S&W Enters., LLC v. Southtrust Bank of Ala.*, 315 F.3d 533, 536 (5th Cir. 2003).

Good causes exists to create an exception for the Task Force Plaintiffs under the Court's May 1 Scheduling Order to allow the Task Force Plaintiffs to amend. The need to amend arose recently for three reasons: 1) the Court's March and April Orders on Plans C185 and H283 raised concerns for the Task Force Plaintiffs regarding remedies; 2) the United States Supreme Court's decisions in *Bethune-Hill v. Virginia State Board of Elections* and *Cooper v. Harris* constituted a change in law;[3] and 3) recent election results support continuing claims of vote dilution and intentional discrimination in CD23.

First, because the Nueces County configurations remain unchanged from the 2011 plans to the 2013 plans, the Task Force Plaintiffs believed that a remedy fashioned by the Court to address any legal violations arising from configurations in the 2013 plans would need to address any legal violations arising from the configurations in the 2011 plans as well. Accordingly, the Task Force Plaintiffs did not think that it was necessary to include separate claims against the identical Nueces County configurations in the 2013 plans. However, as discussed above, the Court's March 10 and April 20 Orders and its May 1 Scheduling Order stated that the unchanged Nueces County configurations would be analyzed again and convinced the Task Force Plaintiffs

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[3] Courts in the Fifth Circuit regularly consider intervening change in law as a reason to grant leave to amend. *E.g.*, *Garcia v. Lion Mex. Consol., L.P.*, No. 5:15-CV-1116-DAE, 2016 WL 6157436, at *2 (W.D. Tex. Oct. 21, 2016) (citing *Matter of Southmark Corp.*, 88 F.3d 311, 314–15 (5th Cir. 1996)); *Kelly v. Porter, Inc.*, Nos. 08–4310, 08–4311, 2010 WL 520485, at *2 (E.D. La. Feb. 11, 2010); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, No. Civ. A. H013624, 2005 WL 3504860, at *19 (S.D. Tex. Dec. 22, 2005) ("Under Federal Rule of Civil Procedure 15, this Court has the discretion to allow amendment of a pleading . . . when an intervening court decision changes the law . . . .").

of the need to amend their complaint to reflect claims against the configurations. *See* Am. Order on Plan C185, Dkt. 1390 at 5; Order on Plan H283, Dkt. 1365 at 36.

Second, the Supreme Court's decisions in *Bethune-Hill* and *Cooper* constituted a change in law pertaining to the analysis of *Shaw* claims under the Fourteenth Amendment. In *Bethune-Hill* and *Cooper*, the Supreme Court clarified that a racial gerrymander can occur when a state fails to conduct a careful legislative inquiry into the possible legal deficiencies of any district contained in a redistricting plan prior to enactment. *Cooper* slip op., at 13 ("[A] legislature undertaking a redistricting must assess whether the new districts it contemplates (not the old ones it sheds) conform to the VRA's requirements."); *id.* at 13 ("To have a strong basis in evidence to conclude that § 2 demands . . . race-based steps, the State must carefully evaluate whether a plaintiff could establish the Gingles preconditions—including effective white bloc-voting—in a new district created without those measures."); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) ("[T]he basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district. Racial gerrymandering claims proceed 'district-by-district.'" (quoting *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015))). Importantly, the Court held in *Bethune-Hill* that, although "[t]he ultimate object of the inquiry . . . is the legislature's predominant motive for the design of the district as a whole," a court "may consider evidence regarding certain portions of a district's lines" and "must consider all of the lines of the district at issue." *Bethune-Hill*, 137 S. Ct. at 800. This instruction not only reiterates the predominance inquiry for analyzing a *Shaw*

claim but also builds on and expands current standards for evaluating Shaw claims by directing the inquiry into district lines and portions of those lines.[4]

The recent decisions shed new light on the Task Force Plaintiffs' *Shaw* claim against CD23. In analyzing CD23 in C185, the Court ruled in favor of the Task Force Plaintiffs' claim that the district constituted a racial gerrymander. Am. Order on Plan C185, Dkt. 1390 at 29–32. The interim plan that the Court issued in 2012, emphasizing that it was "not a final ruling on the merits of any claims asserted by the Plaintiffs," addressed some discriminatory features of CD23, like the split in Maverick County. 3/19/2012 Order, Dkt. 691 at 1. However, the interim plan did not address some features of CD23 that the Task Force Plaintiffs have since then consistently argued and shown were and are discriminatory. These include: the addition of parts of Frio and LaSalle Counties with predominantly Latino population but low Latino participation rates; the addition of counties north of the Pecos River with predominantly Anglo population and high Anglo participation rates (such as Loving, Winkler, Ward, Crane, Upton, Reagan, Schleicher, and part of Sutton); and the removal of the South Side of San Antonio, which has higher Latino participation rates. *See, e.g.*, Fact Findings on Plan C185, Dkt. 1340 at 512–21; 10/31/2014 Task Force Pls.' Post-Trial Brief, Dkt. 1282 at 67–70, 91–95, 108–09.

When enacting a new congressional redistricting plan in 2013, the Texas Legislature did not conduct the careful, district-specific inquiry required under *Bethune-Hill* and *Cooper* prior to enacting the plan but "simply adopted [the interim plan] wholesale." Defs.' Supp. Brief Addressing *Cooper v. Harris* and *Bethune-Hill v. Virginia State Board of Elections*, Dkt. 1413 at 14. As a result, the discriminatory features mentioned above remained in the plan and persist to

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[4] For further discussion of how the *Bethune-Hill* and *Cooper* decisions have altered analysis of *Shaw* claims and required states to carefully evaluate district lines for discrimination, see Task Force Pls.' Advisory Regarding *Cooper v. Harris* and *Bethune-Hill v. Virginia State Bd. of Elections*, Dkt. 1416.

this day. Because the legality of these features is enmeshed in the resolution of this case, the Task Force Plaintiffs' *Shaw* claim against CD23 similarly persists through the 2013 plans. Am. Order on Plan C185, Dkt. 1390 at 5 ("[W]hether the harms found regarding CD23 continue in Plan C235 remains to be decided.").

Additionally, the four relevant factors also support a finding of good cause. First, the delay in the Task Force Plaintiffs seeking leave to amend was due to the unavailability of the information upon which the Task Force Plaintiffs rely, as well as Court's Scheduling Order indicating that the deadline to amend had already passed. Second, as discussed above, the proposed amendment is important, because it will ensure that any remedies ordered with respect to the 2011 Nueces County and South Texas configurations will be consistent with those necessary to address legal deficiencies in the 2013 plans. Third, also discussed above, granting leave to amend will not prejudice the parties, as the claims underlying the Task Force Plaintiffs' limited proposed amendment are already, and have for a long time been, part of this litigation. Fourth, because no party will be prejudiced by the proposed amendment, there will be no need for a continuance or any other delay in the litigation of this case.

Because good cause exists to create an exception to the Court's Scheduling Order, the Court may consider the Task Force Plaintiffs' request under the liberal standard of Rule 15.

B. JUSTICE REQUIRES THAT THE TASK FORCE PLAINTIFFS' COMPLAINT ACCURATELY REFLECTS THEIR CLAIMS AGAINST THE UNCHANGED NUECES COUNTY CONFIGURATIONS ACROSS THE 2011 AND 2013 PLANS AND AGAINST THE UNCHANGED FEATURES OF CD23 THAT THE STATE WAS REQUIRED TO CAREFULLY EVALUATE, AND THE COURT SHOULD THEREFORE GRANT TASK FORCE PLAINTIFFS LEAVE TO AMEND UNDER RULE 15(A)(2).

Federal Rule of Civil Procedure 15(a)(2) provides: "[A] party may amend its pleading . . . with the opposing party's written consent or the court's leave," and "[t]he court

should freely give leave when justice so requires." Fed. R. Civ. Pro. 15(a)(2). "'[T]he language of this rule evinces a bias in favor of granting leave to amend,' and '[a] district court must possess a substantial reason to deny a request.'" *SGIC Strategic Global Investment Capital, Inc. v. Burger King Europe GmbH*, 839 F.3d 422, 428 (5th Cir. 2016) (quoting *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (internal citations and quotation marks omitted)). "The liberal amendment policy underlying Rule 15(a) affords the court broad discretion in granting leave to amend and, consequently, a motion for leave to amend should not be denied unless there is 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed[,] undue prejudice to the opposing party by virtue of allowance of the amendment, [or futility of amendment].'" *United States ex rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 386 (5th Cir. 2003) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).[5]

The Task Force Plaintiffs seek leave to amend their complaint in a limited manner that comports with one of the purposes of Rule 15, that pleadings accurately reflect the claims between the parties and any intervening changes in law. As discussed above, the Court's Orders on Plans C185 and H283 convinced the Task Force Plaintiffs of the need to amend, with particular attention to consistency in remedies. Also as discussed above, the change in law regarding *Shaw* claims that was inaugurated by *Bethune-Hill* and *Cooper* instructs that the Task Force Plaintiffs' Fourteenth Amendment claim against CD23 persists, in light of the Texas

[5] A district court's denial of leave to amend is reviewed for abuse of discretion. *SGIC Strategic Global Investment Capital, Inc.*, 839 F.3d at 428 (quoting *Engstrom v. First Nat'l Bank*, 47 F.3d 1459, 1464 (5th Cir. 1995)). "[G]iven the policy of liberality behind Rule 15(a), it is apparent that when a motion to amend is not even considered, much less not granted, an abuse of discretion has occurred." *Id.* (internal citations and quotation marks omitted).

Legislature's failure to "carefully evaluate" that district prior to enacting Plan C235. *See Cooper* slip op., at 13.

Moreover, no reasons weigh against granting the Task Force Plaintiffs leave to amend in the limited manner that it proposes. Rule 15 "does not impose a time limit for permissive amendment," and a party seeking leave to amend may overcome a suggestion of "procedurally fatal" delay by showing that such delay "was due to oversight, inadvertence, or excusable neglect." *Smith*, 393 F.3d at 595 (citations and internal quotation marks omitted).[6] Here, the Task Force Plaintiffs seek leave to amend prior to trial on the issues that they seek to reflect in their complaint. This is not an instance of procedurally fatal delay; the Court has ample time to consider the Task Force Plaintiffs' narrow request, and the Task Force Plaintiffs have ample time to conform their complaint to the Court's Orders on Plans C185 and H283.

Nor are the Task Force Plaintiffs seeking leave to amend in bad faith or for dilatory motive. Bad faith encompasses those instances where a party excludes known claims in an attempt to gain a tactical advantage, dilatory motives those instances where a party engages in tactical maneuvers solely to delay the litigation. *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 599 (5th Cir. 1981) ("[W]here the movant first presents a theory difficult to establish but favorable and, only after that fails, a less favorable theory, denial of leave to amend on the grounds of bad faith may be appropriate. . . . [W]here the failure to include in the complaint a known theory of the case arises not from an attempt to gain tactical advantages but from a reasonable belief that the theory is unnecessary to the case, denial of leave to amend is

[6] Indeed, the Fifth Circuit has held that leave to amend may be granted after trial and even after dismissal of a case altogether. *E.g.*, *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) ("Amendment can be appropriate as late as trial or even after trial . . . ."); *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69 (5th Cir. 1961); *Daniel Lumber Co. v. Empresas Hondurenas, S.A.*, 215 F.2d 465 (5th Cir. 1954).

inappropriate." (citations omitted)). In contrast, the Task Force Plaintiffs seek to include the same claims against the Nueces County configurations in the 2013 plans as they had alleged against those configurations in the 2011 plans and to continue their claims against CD23. As mentioned above, their motivation to do so is to preserve their ability to obtain remedies with respect to the 2013 plans that are consistent with the remedies they sought against the 2011 plans. Furthermore, the Task Force Plaintiffs have no dilatory motive; indeed, they have participated actively in the litigation and have urged and continue to urge the Court to proceed with haste so that the State of Texas can implement any remedial maps ordered by the Court in time for the 2018 election.

Nor is this an instance of repeated failure to cure deficiencies by previous amendments, for example where the party seeking amendment has failed to allege a cognizable claim in one pleading after another. *E.g.*, *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 367–68 (5th Cir. 2014). The Task Force Plaintiffs have amended their complaint only once since the enactment of the 2013 plans and those plans' inclusion in this case. *See* Task Force Pls.' Fourth Am. Complaint, Dkt. 891. Moreover, the Court has decided that the Task Force Plaintiffs' claims against the Nueces County and CD23 configurations in the 2011 plans are cognizable, and there is no reason to think that the same claims against identical and near-identical configurations in the 2013 plans would not also be cognizable. *See* 6/17/2014 Order, Dkt. 1104 at 10–15; 9/6/2013 Order, Dkt. 886 at 8–15.

Nor will granting the Task Force Plaintiffs leave to amend cause Defendants undue prejudice. A party is unduly prejudiced where amendment will subject it to additional, unanticipated discovery and argument. *See Smith v. EMC Corp.*, 393 F.3d 590, 596 (5th Cir. 2004) ("A defendant is prejudiced if an added claim would require the defendant 'to reopen

discovery and prepare a defense for a claim different from the [one] . . . that was before the court.'"). The parties have already conducted discovery pertinent to the Task Force Plaintiffs' claims, and as mentioned above, the parties have already argued and presented evidence on the lawfulness of the configurations at issue during trial. The Task Force Plaintiffs' supplemental expert reports, already disclosed to the parties, only update previous analysis to include elections held under C235 and H358. On the other hand, as discussed above, denying leave to amend would prejudice the Task Force Plaintiffs.

Nor is this an instance in which amendment would be futile. Futility occurs where an amendment sought would have no legal effect, and granting leave to amend is therefore wasteful or unnecessary. *E.g.*, *Simmons v. Sabine River Auth. Louisiana*, 732 F.3d 469, 478 (5th Cir. 2013) ("'[I]f a complaint as amended is subject to dismissal, leave to amend need not be given.'" (citation omitted)). Amendment here will save judicial resources, sparing the Court and the parties from confusion during trial over what claims arising initially from the 2011 plans lie against the 2013 plans too. Amendment will also reduce confusion later over whether certain possible remedies adequately address the identical and near-identical configurations in Nueces County and CD23.

In sum, the Federal Rules of Civil Procedure evince a policy of liberal amendment of complaint, in particular for parties to conform their pleadings to the claims that they are actually litigating or have litigated, and no reasons weigh against the Task Force Plaintiffs amending their operative complaint in a limited manner to conform to the Court's recent Orders on Plans C185 and H283. Therefore the Court should grant leave to amend.

CONCLUSION

In light of the foregoing, the Court should grant the Task Force Plaintiffs leave to amend their Fourth Amended Complaint to conform to the Court's March 10, 2017 and April 20, 2017 Orders.

DATED: June 12, 2017

Respectfully submitted,

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Certificate of Conference

I hereby certify that counsel for Task Force Plaintiffs sought the position of counsel for Defendants State of Texas, et al., on this motion via e-mail on the 11th and 12th days of June, 2017. Counsel for Defendants did not respond prior to the filing of this motion.

/s/ Nina Perales
Nina Perales

Certificate of Service

I hereby certify that on this 12th day of June, 2017, I served a copy of the foregoing document on all counsel registered to receive NEFs through this Court's CM/ECF system. All attorneys who are not registered to receive NEFs have been served via email.

/s/ Nina Perales
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