

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

SHANNON PEREZ, <i>et al.</i> ,)	
)	CIVIL ACTION NO.
<i>Plaintiffs,</i>)	SA-11-CA-360-OLG-JES-XR
)	
v.)	
)	
STATE OF TEXAS, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	

**PLAINTIFFS' JOINT REPLY IN SUPPORT OF MOTION FOR ENTRY OF A PERMANENT
INJUNCTION AND SCHEDULING ORDER FOR REMEDIAL PROCEEDINGS**

Plaintiffs¹ reply to Defendants' response opposing the injunction and scheduling request. This reply is not intended to address the matters specified in the Court's Order of April 5, 2017 (Dkt. no. 1352), which Plaintiffs will subsequently address consistent with the Court's directives.

1. Defendants' Response is a thinly veiled effort to ensure that Plaintiffs have no remedy whatsoever before the 2018 congressional elections, despite this Court's explicit holding that several violations of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment persist in the current congressional redistricting plan, C235. Order, Dkt. No. 1339 at 4-5, 47, 108, 145-46, 181 (Mar. 10, 2017) ("Op."). It is axiomatic that "[a] denial of constitutionally protected rights demands judicial protection." *Reynolds v. Sims*, 377 U.S. 533, 566 (1964). None of Defendants' arguments justifies denying a permanent injunction at this time.

2. Defendants' bold attempt to elevate this Court's earlier rulings on Plaintiffs' motions for a preliminary injunction to the status of judicial "approval" of Plan C235 is illogical and contradicted by the text of the rulings. The Court's earlier preliminary injunction denials pose no obstacle to ordering relief based on the Court's final ruling on the merits of Plaintiffs' constitutional and Voting Rights Act claims. The Court's previous denial made clear it was "not a final ruling on the merits of any claims asserted by the Plaintiffs in this case or in any of the other cases consolidated with this case." Order, Dkt. no. 691 at 1 (March 19, 2012).² Now, five years later, the Court *has* issued "a final ruling on the merits" of Plaintiffs' constitutional and Voting Rights Act claims, and has specifically found that several constitutional and Voting Rights Act violations of the 2011 plan persist in the current plan. Plaintiffs have succeeded on the merits

¹ Texas NAACP Plaintiffs, African American Congresspersons, MALC, Rodriguez Plaintiffs, Quesada Plaintiffs, Texas Latino Redistricting Task Force Plaintiffs, Perez Plaintiffs, LULAC Plaintiffs, and Congressman Henry Cuellar.

² The Court did not engage in any further review on Plaintiffs' subsequent motion for preliminary injunction, merely adopting its earlier preliminary injunction analysis with caveats about the limitations of those determinations. *See* Order, Dkt. no. 886 at 22 (Sept. 6, 2013) ("The Court is keenly aware that its preliminary injunction analysis was 'expedited and curtailed' due to the circumstances at the time.").

of certain of their claims, those violations persist in Plan C235, and meaningful and timely relief, namely an end to the use of the unconstitutional plan before the 2018 elections, is required.

3. Defendants' objection to an injunction against the 2013 plan is based largely on their contention that Plaintiffs' claims against the 2011 plan are moot—a contention the Court has expressly rejected several times already. *See* Response, Dkt. No. 1349 at 3 (arguing that Plaintiffs have no “justiciable interest in the merits of the dispute”). Contrary to Defendants' protestations, the Court has already found that the 2013 plan is “heavily derived” from the 2011 plan, Op. at 2, and “Defendants were continuing to engage in exactly [the same] conduct when they adopted the interim plans in 2013,” *id.* at 4. Indeed, the 2013 interim plan “disadvantage[s] [Plaintiffs] in the same fundamental way such that Plaintiffs are *still suffering injury from the 2011 plans.*” *Id.* at 2 (emphasis added). The Court should not entertain Defendants' efforts to nullify the Court's ruling on the merits of the 2011 plan by denying Plaintiffs meaningful relief for Defendants' ongoing constitutional and statutory violations.

4. Recognizing, as they must, that at least some portions of the 2011 plan found to be in violation of the Constitution and Voting Rights Act remain intact in the 2013 plan, Defendants contend that “[e]ven if the Court's opinion on Plan C185 could provide the basis for some type of relief, it could not possibly justify an injunction against Plan C235 in its entirety.” Response, Dkt. No. 1349 at 4. But in light of the difficulties of enjoining elections in some districts and not others, courts routinely enjoin all elections until a remedial map addressing the specific violations is in place. *See, e.g., Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, Dkt. no. 171 (E.D. Va.) (upon finding one congressional district to be a racial gerrymander, three-judge district court enjoining Virginia “from conducting any elections for the office of United States Representative until a new redistricting plan is adopted”); *Harris v. McCrory*, No. 1:13-cv-949,

Dkt. no. 143 (same, after finding two North Carolina districts unconstitutional). Defendants' arguments on the scope of an appropriate remedial plan for the 2018 election cycle should be addressed during the remedial phase. In any event, contrary to Defendants' assertions, this Court's hands are not tied when it comes to ordering injunctive relief against the current plan.

5. Remarkably, Defendants contend that Plaintiffs--and the public--face no irreparable injury based on this Court's finding that Texas violated Plaintiffs' fundamental right to vote, acted with racially discriminatory intent, and engaged in unjustified race-based redistricting when it drew the 2011 plan and carried over many of the same constitutional and statutory violations in 2013. It is well established that the right to vote is one of the most fundamental rights in our democracy and is thus afforded special protections. *See Reynolds*, 377 U.S. at 554-55, 563; *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). As such, any impediment or abridgment of the right to vote is an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Plaintiffs and all other Texas voters in the affected areas will suffer irreparable injury if they are forced to participate in yet another round of congressional elections under unconstitutional districts. *See, e.g., Larios v. Cox*, 305 F. Supp. 2d 1335, 1344 (N.D. Ga. 2004) ("If the court . . . allow[s] the 2004 elections also to proceed pursuant to unconstitutional plans, the plaintiffs and many other citizens in Georgia will have been denied their constitutional rights in two of the five elections to be conducted under the 2000 census figures. . . . Accordingly, . . . plaintiffs will be injured if a stay is granted because they will be subject to one more election cycle under unconstitutional plans.").

Defendants' suggestion, moreover, that this Court found no irreparable harm from the identified *Shaw* violations, Response, Dkt. no. 1349 at 6, contradicts both the Court's opinion and common sense. The Court specifically found that residents of racially gerrymandered

districts suffer “harm flow[ing] from being ‘personally subjected to [a] racial classification.’” Op. at 35 n.31 (quoting *ALBC v. Alabama*, 135 S. Ct. 1257, 1265 (2015)). Indeed, after finding two North Carolina districts to be unconstitutional racial gerrymanders, a three-judge district court recently denied the state’s motion for a stay of the remedy pending appeal, recognizing that “[t]o force the plaintiffs to vote again under the unconstitutional plan . . . constitutes irreparable harm to them, and to the other voters” in the unconstitutional districts. *Harris v. McCrory*, No. 1:13-cv-949, ECF No. 148 (M.D.N.C. Feb. 9, 2015) (Order Denying Emergency Motion to Stay). The court further held that “the public interest aligns with the plaintiffs’ interests,” as “[t]he public has an interest in having congressional representatives elected in accordance with the Constitution.” *Id.* at 4.³ Courts have consistently acted to ensure that voters already constitutionally harmed by illegal redistricting plans do not further suffer irreparable harm. *See, e.g., Vera v. Bush*, 933 F. Supp. 1341, 1352-53 (S.D. Tex. 1996) (ordering a remedial plan on August 6, 1996, for November 1996 elections); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (denying motion to stay a May 22, 1996, deadline for the Legislature to enact a remedial plan for the November 1996 congressional election). “Once a State’s apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.” *Reynolds*, 377 U.S. at 585.

6. Defendants suggest that the Legislature’s state of mind in enacting Plan C235 must be examined before any effect can be given to this Court’s finding that the State of Texas engaged in intentional discrimination when drawing certain districts in the 2011 plan. This is an incorrect

³ *See also Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560-61 (E.D. Va. 2016) (same); *Johnson v. Miller*, 929 F. Supp. 1529, 1560-61 (S.D. Ga. 1996) (“The public has a strong interest in having elections conducted according to constitutionally drawn districts, instead of pursuant to racially gerrymandered lines that violate the constitutional rights of all citizens within those districts.”).

reading of the precedents they cite. In *Chen v. City of Houston*, the court observed that “intervening reenactment with meaningful alterations may render the current law valid.” *Chen v. City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000). Here, in contrast, the unconstitutional features of the prior plan were not corrected in the reenactment. As this Court determined, “the fact that a challenged law is amended does not alone moot the underlying claim unless the law has been sufficiently altered so as to present a substantially different controversy.” Op. at 2; *see also id.* at 5 (“Plaintiffs should not have to jump through additional hoops to prove that the 2011 mapdrawers’ intent carried forward to the 2013 Legislature when Plaintiffs’ fundamental claims are that the 2011 mapdrawers acted with discriminatory intent, Plaintiffs are still being harmed by the districts drawn with that intent, and Plaintiffs have potential relief available under § 3(c) for that harm.”). There is no precedent for the proposition that simply re-enacting the same originally discriminatory districts in a new plan removes the taint of racial discrimination.

7. Finally, any consideration of whether there is time to have another trial on the merits of Plaintiffs’ claims specifically as they relate to the 2013 congressional redistricting process and to implement a remedy before the 2018 election cycle must take into account Texas’ election schedule. The filing period for the upcoming congressional primary elections begins November 11, 30 days before the filing deadline of December 11. Tex. Elec. Code § 172.023. Election precinct lines must be changed before that date to correspond with congressional district boundaries. Eight months (April to November) leaves sufficient time to remedy the violations already found. But delaying all relief until the Court schedules and holds another trial and issues another merits determination would raise a serious risk that Plaintiffs will be forced to vote in yet another election under unconstitutional districts.

Plaintiffs respectfully move the Court, in advance of the 2018 election cycle, to permanently enjoin Plan C235, unless and until the portions of that plan that perpetuate districts this Court determined on March 10, 2017, to be in violation of the Voting Rights Act or the Fourteenth Amendment are remedied.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Plaintiffs conferred with counsel for Defendants State of Texas, et. al., on April 6, 2017 regarding the fact that Plaintiffs' reply brief might be a few lines over the five-page limit and Counsel for Defendants indicated that they do not oppose Plaintiffs filing a reply brief that is more than five but under six pages in length as measured by the text only.

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I hereby certify that a true and correct copy of the foregoing was sent via the Court's electronic notification system or email to the following on April 6, 2017:

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