

**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' ADVISORY REGARDING HD90

The 2013 Legislature altered the boundary of HD90 to add the Como community, which had been removed from the district in 2011, and made additional changes to address “an objection . . . that the district’s Latino population was too low.” *Abbott v. Perez*, 138 S. Ct. 2305, 2329 (2018). This Court held that the use of race to address that objection constituted a racial gerrymander under *Shaw v. Reno*, 509 U.S. 630 (1993), but it rejected the claim that the Legislature engaged in intentional vote dilution by including Como in HD90. *See* Order on Plan H358 at 80 (Aug. 24, 2017), ECF No. 1540. The Supreme Court affirmed, holding that the Legislature’s consideration of race in HD90 was not narrowly tailored to a compelling governmental interest and rejecting the claim that the Legislature’s amendments to HD90 reflected intentional discrimination against minority voters. *Abbott v. Perez*, 138 S. Ct. at 2329 n.24 (“The Legislature adopted changes to HD90 at the behest of *minority groups*, not out of a desire

to discriminate. . . . That is, [Chairman] Darby was *too* solicitous of changes with respect to HD90.”).

On remand from the Supreme Court, this Court determined that the constitutional defect in HD90 requires a remedy. But the Court rejected proposed Plan H407—which would have returned HD90 to its configuration under Plan H283 and removed Como from the district—because it correctly found that “the proposed remedy exceeds the scope of the violation found by the Court.” Order at 2 (Aug. 30, 2018), ECF No. 1600. The Court instructed that any remedy “must respect the legislative choices made in 2013, except to remedy the constitutional violations.” *Id.*

The Court abstained from imposing a remedy at that time to provide the Legislature with the first opportunity to redraw HD90. *Id.* But it ordered that “if no action is taken to introduce a redistricting bill within the first 45 days of the 2019 regular session, or if it otherwise is made apparent that no redistricting legislation will be considered during the session, the Court will proceed with a remedial phase.” *Id.* Accordingly, the Court instructed the parties to prepare to submit remedial proposals “no later than the 46th day of the 2019 regular session.” *Id.* at 3.

It is now apparent that the Legislature will not provide a remedy because no bill has been introduced to address the violation in HD90, as explained below. The 45th day of the 2019 regular session fell on February 21. As of that date, HB 1282 was the only bill filed that related to the composition of districts for the Texas House of Representatives. But HB 1282 does not appear to be an attempt to provide a remedy in

HD90. The bill would enact Plan H307, which redraws *every* House district in Tarrant County and makes substantial changes throughout the State, altering district boundaries in Bell County, Dallas County, El Paso County, Harris County, Nueces County, and Webb County. *See* Exhibit 1 (Red-340 Report, Plan Overlap Population Analysis). Because HB 1282 far exceeds the scope of the violation found by this Court, it does not provide an appropriately tailored remedy for HD90, and it does not justify postponing the remedial phase.

It is therefore appropriate for this Court to provide a remedy by ordering that boundaries in HD 90 drawn solely on the basis of race in 2013 be redrawn but otherwise leaving HD90 unchanged. Although Defendants do not suggest that it is the only possible remedy, they submit that an existing proposal—Plan H328—provides a complete remedy in HD90 without going beyond the scope of the violation found by this Court.¹ Plan H328 was the original proposal offered in 2013 to return Como to HD90. The proposal was based on two instructions: “keep the amendment simple by involving only two (or maybe three) members, and bring Como back into HD90.” Order on Plan H358 at 68 (footnote omitted).

The changes reflected in Plan H328 would accomplish the Legislature’s goal of returning Como to HD90, and they would eliminate the changes that led this Court to find racial gerrymandering. As this Court explained in its order on Plan H358, the

¹ The most recent Red-119 report for Plan H328 is attached as Exhibit 2.

finding of racial gerrymandering was based entirely on changes to HD90 made by Representative Burnam and his chief of staff after they had already created Plan H328. Specifically, the Court found that “the changes to HD90 between Plan H328 and Plan H342 to ensure that its SSVR was above 50% were dictated solely by race.” Order on Plan H358 at 73; *see also id.* at 78 (“The Court’s finding that the Legislature violated *Shaw* rests on changes made to HD90 after Como was moved back into HD90”). And the Court has already determined that the decision to return Como to HD90 was neither “a race-based decision,” Order on Plan H358 at 72, nor “a purposefully discriminatory device meant to minimize, cancel out, or dilute the Latino vote,” *id.* at 80.

Defendants have advised the MALC and Task Force Plaintiffs that they intend to propose Plan H328 as a potential remedy for the violation in HD90. To this date, although Defendants have proposed H328 and invited feedback and suggestions from Plaintiffs, Plaintiffs have not responded with an alternative proposal. However, counsel for MALC has advised that Plaintiffs are now considering an alternative proposal for HD90. Defendants therefore request that the Court set March 1, 2019, as the date by which Plaintiffs must submit any alternative proposal so that the parties can attempt to resolve any differences prior to a remedial hearing. Defendants further request that the Court set a remedial hearing no more than 30 days after March 1, 2019. This will avoid unnecessary delay and allow the Court to provide a remedy in HD90 well in advance of any upcoming election deadlines.

CONCLUSION

Since no narrowly tailored remedy addressing the violation found by this Court in HD90 has been filed in the first 45 days of the legislative session, a judicial remedy as contemplated by the Court's order of August 30, 2018, is appropriate. An order that the boundaries of HD90 be redrawn as reflected in Plan H328 would provide a complete remedy for the constitutional violation found by this Court while respecting the Legislature's choices made in 2013. Defendants understand, however, that Plaintiffs may propose an alternative remedy tailored to the violation in HD90. Defendants therefore request that the Court set a schedule as set forth above to facilitate a swift resolution to this litigation.

Date: February 22, 2019

Respectfully submitted.

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