

**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 PLAINTIFFS' CONDITIONAL MOTION FOR
PRELIMINARY INJUNCTION ON IMPLEMENTATION OF
2013 REDISTRICTING PLANS FOR 2016 ELECTION CYCLE**

On September 6, 2013, this Court determined that Plans H358 and C235 would be used to conduct the 2014 elections because additional delay would unnecessarily interfere with election deadlines. Order (Sept. 6, 2013), ECF No. 886, at 22. That order issued four days before the start of the filing period for the office of precinct chair and just over two months before the start of the filing period for all other offices. *Id.* at 21.

The 2016 election cycle started on September 15, 2015, when the filing period for the office of precinct chair opened. Nearly a month later, on October 14, Plaintiffs moved for a preliminary injunction against the use of Plans H358 and C235 in the 2016 elections. Conditional Motion for Preliminary Injunction on Implementation of 2013 Redistricting Plans for 2016 Election Cycle (Oct. 14, 2015), ECF No. 1319 (the "Conditional Motion"). Because Plaintiffs waited until after the start of the election

process, the threat of disrupting elections is even greater than it was in 2013. And because Plaintiffs chose to pursue their claims against the Legislature's 2011 redistricting plans despite their repeal, the Court has not yet heard evidence on their claims against the 2013 plans that they now seek to enjoin.

Texas has conducted elections under the same plans for the past two election cycles,¹ but Plaintiffs do not identify a single individual who has suffered any injury from Plan C235 or Plan H358. Even if they could provide a reason to reconfigure the State's electoral districts, and they cannot, their attempt to secure a preliminary injunction comes too late. Plaintiffs' Conditional Motion should be denied, and the 2016 elections should proceed under Plans H358 and C235 regardless of when the Court rules on their claims against the 2011 plans.

ARGUMENT

A preliminary injunction is an “extraordinary remedy” that should be granted only if the movant establishes (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public

¹ Plan H358 made minor changes to the Court's interim plan, H309, but the Court has previously recognized that the only new challenge to H358 was the Texas Latino Redistricting Task Force's claim of vote-dilution in HD 90. *See* Order (Sept. 6, 2013), ECF No. 886, at 23. The Court found, for purposes of preliminary relief, that the Task Force was not likely to succeed on the merits of that claim, *id.*, and the Task Force Plaintiffs do not join in the Conditional Motion.

interest.” *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 536–37 (5th Cir. 2013). The Court should not grant injunctive relief “unless the party seeking it has ‘clearly carried the burden of persuasion’ on all four requirements.” *PCI Transp. Inc. v. Ft. Worth & W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005) (quoting *Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192, 196 (5th Cir. 2003)). Plaintiffs have not clearly carried their burden on any requirement, and their motion should be denied.

I. PLAINTIFFS HAVE NOT SHOWN THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS AGAINST PLAN C235 OR PLAN H358.

The Court has not heard evidence on Plaintiffs’ claims against Plan C235 or Plan H358, and Plaintiffs offer no evidence in support of their Conditional Motion. The Court has already determined, under the preliminary-injunction standard, that Plaintiffs are not likely to succeed on the merits of their claims against the 2013 plans. *See* Order (Sept. 6, 2013), ECF No. 886, at 22 (Plan C235); *id.* at 23–24 (Plan H358, HD 90). Plaintiffs provide no reason to reach a different conclusion now.

Plaintiffs fail to carry their burden because their Conditional Motion contains nothing more than conclusory allegations and a reference to prior briefing on different plans. Plaintiffs’ claims against the 2013 plans were not “fully briefed” after the August 2014 trial, after the 2011 trial, or during interim plan hearings. *Cf.* Conditional Mot. 3. The parties’ earlier briefing addressed claims against the repealed 2011 plans. Incorporating that briefing by reference, *see id.* at 3 n.*, cannot demonstrate a likelihood

of success on the merits of their claims against the 2013 plans.² Because Plaintiffs give the Court no basis to evaluate their likelihood of success on the merits, they necessarily fail to carry their burden to obtain the extraordinary relief they seek.

Plaintiffs make a specific allegation against only one district—they allege that CD 23 in Plan C235 results in the denial or abridgment of the right to vote on account of race or color, or because of membership in a language-minority group, in violation of Section 2 of the Voting Rights Act. *See* Conditional Mot. 3. The Court has already rejected that argument. After the Court implemented Plan C235 on an interim basis for the 2012 elections, it explained that CD 23 was an opportunity district under Section 2 because “C235 restores CD 23 to benchmark performance, and Plaintiffs argued that CD 23 in the benchmark was an opportunity district.” Order (March 19, 2012), ECF No. 691, at 32.

Despite the Court’s prior ruling, Plaintiffs assert that “CD23 in the interim-2013 enacted plan deprived Latino voters of their right to elect their candidate of choice,” Conditional Mot. 3. But they offer nothing to support that allegation. Plaintiffs’ omission is telling. The State held elections in CD 23, as configured in Plan C235, in 2012 and 2014. Yet Plaintiffs’ motion does not allege that any particular plaintiff cast a

² Briefing on Plaintiffs’ claims against the 2011 plans is not relevant, but because Plaintiffs rely exclusively on prior briefing to support their Conditional Motion, Defendants incorporate their own prior briefs by reference. *See* Defendants’ Response to Plaintiffs’ Post-Trial Briefs (Dec. 4, 2014), ECF No. 1295; Defendants’ Findings of Fact and Conclusions of Law (Oct. 30, 2014), ECF No. 1276; Defendants’ Post-Trial Brief (Oct. 30, 2014), ECF No. 1272; Defendants’ Response to Plaintiffs’ Post-Trial Briefs (Oct. 21, 2011), ECF No. 457; Defendants’ Post-Trial Brief (Oct. 7, 2011), ECF No. 411.

ballot in either election, that any plaintiff's right to vote was denied or abridged on account of race or because of membership in a language-minority group, or that any plaintiff was unable to elect his or her candidate of choice. *Cf.* 52 U.S.C. § 10301.

The facts disprove Plaintiffs' allegation in any event. According to the most current available data, CD 23 contains 61.6% Hispanic CVAP, and in the 2014 election, 56.6% of registered voters (57.8% non-suspense) had Spanish surnames. *See* Exhibit 1, Plan C235, Red-119 Report (2009–2013 ACS Survey). In 2012, Pete Gallego was elected to Congress from CD 23 as a Democrat. In 2014, Will Hurd was elected to Congress from CD 23 as a Republican. To the extent Hispanic voters in CD 23 preferred the Democratic candidate, they seized the opportunity to elect a representative of their choice in 2012. To the extent Hispanic voters in CD 23 preferred the Republican candidate, they seized the opportunity to elect a representative of their choice in 2014. District 23 remains a competitive district, but Plaintiffs offer nothing to support their allegation that it deprives Hispanic voters of the opportunity to elect representatives of their choice.

II. PLAINTIFFS HAVE NOT SHOWN A SUBSTANTIAL THREAT OF IRREPARABLE HARM IF AN INJUNCTION DOES NOT ISSUE.

Plaintiffs fail to identify any specific threat of irreparable harm to support their request for a preliminary injunction. Instead, Plaintiffs offer the conclusory allegation that allowing elections to proceed under the same districts used in 2012 and 2014 will violate their “fundamental rights.” Conditional Mot. 4. It is not plausible to allege that

every plaintiff faces an imminent threat to his or her fundamental rights. Plaintiffs do not face the same threat of injury because they reside in a variety of districts, some of which have not been challenged as configured in the 2013 plans and many of which unquestionably provide an opportunity to elect under Section 2. *See, e.g.*, Second Amended Complaint (Sept. 17, 2013), ECF No. 896, at 4, 5 (Rodriguez Plaintiffs' complaint, identifying plaintiffs who reside in CD 15, CD 16, and CD 34). Because they have made no effort to distinguish plaintiffs who assert a threat of injury from those who don't—let alone to specify the nature of any particular plaintiff's threatened injury—Plaintiffs have failed to carry their burden to show a substantial threat of irreparable harm.

III. PLAINTIFFS HAVE NOT IDENTIFIED ANY THREATENED INJURY THAT OUTWEIGHS THE HARM THAT WILL RESULT FROM AN INJUNCTION.

Because a “preliminary injunction is an extraordinary remedy never awarded as of right,” the Court is required to “balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Whereas Plaintiffs have identified no threat of irreparable harm if the injunction is denied, Defendants will unquestionably suffer irreparable harm if the 2013 plans are enjoined, and the public interest will be disserved. “When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.” *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) (quoting *Planned Parenthood of Greater Tex.*

Surgical Health Servs. v. Abbott, 734 F.3d 406, 419 (5th Cir. 2013)). Any change to the existing districts will impose additional burdens on election officials, and the confusion that will follow changes to district and precinct boundaries creates a risk of harm to at least some of the millions of voters who are not plaintiffs in this lawsuit. Since Plaintiffs offer nothing to weigh against the inevitable harm to Defendants and the public, that should be enough to deny their motion.

The Fifth Circuit has instructed that courts should not change election procedures once “the election machinery is already in motion.” *Veasey*, 769 F.3d at 896. The election machinery is already in motion for 2016. County voter registrars have redrawn local voting precincts, a process that takes approximately six to seven weeks. Exhibit 2, Declaration of Keith Ingram ¶ 2. The application period for the office of precinct chair opened on September 15, 2015, and if any changes to precincts are made, the filing period will have to start again. *Id.* ¶ 5. The filing period for an application for a place on the general primary election ballot opens on November 14, 2015, and closes on December 14, 2015. *Id.* ¶¶ 3-4. Finally, the mass mailout of voter registration certificates is scheduled to begin on or after November 15, 2015, based on the district lines in the 2013 plans. *Id.* ¶ 6. To complete the mass mailout on or after November 15, 2015, district lines had to be finalized approximately two months earlier, in mid-September 2015. *Id.* Any change to the current district lines in the 2013 plans at this point in the election cycle will therefore impose severe burdens on election officials and

create a risk of confusion for individual voters who have voted under Plans C235 and H358 for the past two election cycles.

Plaintiffs have pointed to nothing specific about the 2013 plans that imposes a significant burden on them, particularly when compared to the important interests served by adhering to well-defined election deadlines. Even if Plaintiffs could show a likelihood of success on the merits or a threat of irreparable injury, which they cannot, Plaintiffs cannot demonstrate that the equities weigh in favor of issuing injunctive relief.

CONCLUSION

The Court should deny the conditional motion for a preliminary injunction, and the 2016 election should proceed under Plans C235 and H358.

Date: October 21, 2015

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant
Attorney General

JAMES E. DAVIS
Deputy Attorney General
for Litigation

/s/ Angela V. Colmenero
ANGELA V. COLMENERO
Chief, General Litigation Division

MATTHEW H. FREDERICK
Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-6407
Fax: (512) 474-2697

COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing was sent on October 21, 2015, via the Court's CM/ECF system and/or email to the following counsel of record:

DAVID RICHARDS
Richards, Rodriguez & Skeith LLP
816 Congress Avenue, Suite 1200
Austin, TX 78701
512-476-0005
davidr@rrsfirm.com

RICHARD E. GRAY, III
Gray & Becker, P.C.
900 West Avenue, Suite 300
Austin, TX 78701
512-482-0061/512-482-0924 (facsimile)
Rick.gray@graybecker.com
**ATTORNEYS FOR PLAINTIFFS
PEREZ, DUTTON, TAMEZ, HALL,
ORTIZ, SALINAS, DEBOSE, and
RODRIGUEZ**

JOSE GARZA
Law Office of Jose Garza
7414 Robin Rest Dr.
San Antonio, Texas 78209
210-392-2856
garzpalm@aol.com

MARK W. KIEHNE
RICARDO G. CEDILLO
Davis, Cedillo & Mendoza
McCombs Plaza
755 Mulberry Ave., Ste. 500
San Antonio, TX 78212
210-822-6666/210-822-1151 (facsimile)
mkiehne@lawdcm.com
rcedillo@lawdcm.com

GERALD H. GOLDSTEIN
DONALD H. FLANARY, III
Goldstein, Goldstein and Hilley
310 S. St. Mary's Street
San Antonio, TX 78205-4605
210-226-1463/210-226-8367 (facsimile)
ggandh@aol.com
donflanary@hotmail.com

PAUL M. SMITH, MICHAEL B.
DESANCTIS, JESSICA RING
AMUNSON
Jenner & Block LLP
1099 New York Ave., NW
Washington, D.C. 20001
202-639-6000

J. GERALD HEBERT
191 Somerville Street, # 405
Alexandria, VA 22304
703-628-4673
hebert@voterlaw.com

JESSE GAINES
P.O. Box 50093
Fort Worth, TX 76105
817-714-9988
gainesjesse@ymail.com
**ATTORNEYS FOR PLAINTIFFS
QUESADA, MUNOZ, VEASEY,
HAMILTON, KING and JENKINS**

JOAQUIN G. AVILA
P.O. Box 33687
Seattle, WA 98133
206-724-3731/206-398-4261 (facsimile)
jgavotingrights@gmail.com
**ATTORNEYS FOR MEXICAN
AMERICAN LEGISLATIVE CAUCUS**

NINA PERALES
MARISA BONO
Mexican American Legal Defense
and Education Fund
110 Broadway, Suite 300
San Antonio, TX 78205
210-224-5476/210-224-5382 (facsimile)
nperales@maldef.org
mbono@maldef.org

MARK ANTHONY SANCHEZ
ROBERT W. WILSON
Gale, Wilson & Sanchez, PLLC
115 East Travis Street, Ste. 1900
San Antonio, TX 78205
210-222-8899/210-222-9526 (facsimile)
masanchez@gws-law.com
rwwilson@gws-law.com
**ATTORNEYS FOR TEXAS LATINO
REDISTRICTING TASK FORCE,
CARDENAS, JIMENEZ,
MENENDEZ, TOMACITA AND
JOSE OLIVARES, ALEJANDRO AND
REBECCA ORTIZ**

JOHN T. MORRIS
5703 Caldicote St.
Humble, TX 77346
281-852-6388
johnmorris1939@hotmail.com
JOHN T. MORRIS, PRO SE

LUIS ROBERTO VERA, JR.
Law Offices of Luis Roberto Vera, Jr.
1325 Riverview Towers
San Antonio, Texas 78205-2260
210-225-3300
lrvlaw@sbcglobal.net

GEORGE JOSEPH KORBEL
Texas Rio Grande Legal Aid, Inc.
1111 North Main
San Antonio, TX 78213
210-212-3600
korbellaw@hotmail.com
**ATTORNEYS FOR
INTERVENOR-PLAINTIFF
LEAGUE OF UNITED LATIN
AMERICAN CITIZENS**

ROLANDO L. RIOS
Law Offices of Rolando L. Rios
115 E Travis Street, Suite 1645
San Antonio, TX 78205
210-222-2102
rrios@rolandorioslaw.com
**ATTORNEY FOR INTERVENOR-
PLAINTIFF HENRY CUELLAR**

VICTOR L. GOODE
Asst. Gen. Counsel, NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-5120
410-580-5120/410-358-9359 (facsimile)
vgoode@naacpnet.org
**ATTORNEY FOR TEXAS STATE
CONFERENCE OF NAACP
BRANCHES**

MAX RENEH HICKS

Law Office of Max Reneh Hicks
101 West Sixth Street Suite 504
Austin, TX 78701
512-480-8231/512/480-9105 (facsimile)

**ATTORNEY FOR PLAINTIFFS
CITY OF AUSTIN, TRAVIS
COUNTY, ALEX SERNA,
BEATRICE SALOMA, BETTY F.
LOPEZ, CONSTABLE BRUCE
ELFANT, DAVID GONZALEZ,
EDDIE RODRIGUEZ, MILTON
GERARD WASHINGTON, and
SANDRA SERNA**

STEPHEN E. MCCONNICO
SAM JOHNSON

S. ABRAHAM KUCZAJ, III
Scott, Douglass & McConnico
One American Center
600 Congress Ave., 15th Floor
Austin, TX 78701
512-495-6300/512-474-0731 (facsimile)

smconnico@scottdoug.com
sjohnson@scottdoug.com
akuczaj@scottdoug.com
**ATTORNEYS FOR PLAINTIFFS
CITY OF AUSTIN, TRAVIS
COUNTY, ALEX SERNA,
BALAKUMAR PANDIAN,
BEATRICE SALOMA, BETTY F.
LOPEZ, CONSTABLE BRUCE
ELFANT, DAVID GONZALEZ,
EDDIE RODRIGUEZ, ELIZA
ALVARADO, JOSEY MARTINEZ,
JUANITA VALDEZ-COX, LIONOR
SOROLA-POHLMAN, MILTON
GERARD WASHINGTON, NINA JO
BAKER, and SANDRA SERNA**

GARY L. BLEDSOE

Law Office of Gary L. Bledsoe
316 W. 12th Street, Ste. 307
Austin, TX 78701

512-322-9992/512-322-0840 (facsimile)
garybledsoe@sbcglobal.net
**ATTORNEY FOR INTERVENOR-
PLAINTIFFS TEXAS STATE
CONFERENCE OF NAACP
BRANCHES, TEXAS
LEGISLATIVE BLACK CAUCUS,
EDDIE BERNICE JOHNSON,
SHEILA JACKSON-LEE,
ALEXANDER GREEN, HOWARD
JEFFERSON, BILL LAWSON, and
JUANITA WALLACE**

ROBERT NOTZON

1507 Nueces Street
Austin, TX 78701
512-474-7563/512-474-9489 (facsimile)
robert@notzonlaw.com

ALLISON JEAN RIGGS

ANITA SUE EARLS
Southern Coalition for Social Justice
1415 West Highway 54, Ste. 101
Durham, NC 27707
919-323-3380/919-323-3942 (facsimile)
anita@southerncoalition.org
**ATTORNEYS FOR TEXAS STATE
CONFERENCE OF NAACP
BRANCHES, EARLS, LAWSON,
WALLACE, and JEFFERSON**

KAREN M. KENNARD
2803 Clearview Drive
Austin, TX 78703
(512) 974-2177/512-974-2894 (facsimile)
karen.kennard@ci.austin.tx.us
**ATTORNEY FOR PLAINTIFF
CITY OF AUSTIN**

DAVID ESCAMILLA
Travis County Asst. Attorney
P.O. Box 1748
Austin, TX 78767
(512) 854-9416
david.escamilla@co.travis.tx.us
**ATTORNEY FOR PLAINTIFF
TRAVIS COUNTY**

RICHARD L. DURBIN, JR., JOCELYN
SAMUELS, T. CHRISTIAN HERREN,
JR., TIMOTHY F. MELLETT, JAYE
ALLISON SITTON, DANIEL J.
FREEMAN
U.S. Department of Justice
Civil Rights Division, Voting Rights
Room 7254 NWB
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 305-4355; (202) 305-4143
**ATTORNEYS FOR THE
UNITED STATES**

DONNA GARCIA DAVIDSON
PO Box 12131
Austin, TX 78711
512-775-7625/877-200-6001 (facsimile)
donna@dgdlawfirm.com
**ATTY FOR DEFENDANT STEVE
MUNISTERI**

CHAD W. DUNN
K. SCOTT BRAZIL
Brazil & Dunn
4201 FM 1960 West, Suite 530
Houston, TX 77068
281-580-6310/281-580-6362 (facsimile)
chad@brazilanddunn.com
scott@brazilanddunn.com
**ATTORNEYS FOR
INTERVENOR-DEFS TEXAS
DEMOCRATIC PARTY and BOYD
RICHIE**

/s/ Angela V. Colmenero
Angela V. Colmenero
Counsel for Defendants