UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

TERRY PETTEWAY, et al. Plaintiffs, v. GALVESTON COUNTY, TEXAS, et al. Defendants.	§ § § § § § § § §	Civil Action No. 3:22-CV-00057 (consolidated)
UNITED STATES OF AMERICA, Plaintiffs, v. GALVESTON COUNTY, TEXAS, et al. Defendants.	§ § § § § § § § §	Civil Action No. 3:22-CV-00093
DICKINSON BAY AREA BRANCH NAACP, et al. Plaintiffs, v. GALVESTON COUNTY, TEXAS, et al. Defendants.	§ § § § § § § § §	Civil Action No. 3:22-CV-00117

DEFFENDANTS' EMERGENCY MOTION TO STAY
INJUNCTION PENDING APPEAL

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Defendants Galveston County, Texas, the Galveston County Commissioners Court, County Judge Mark Henry, and County Clerk Dwight Sullivan file this emergency motion asking that the Court stay its October 13, 2023 Order (Dkt. 251) rejecting Galveston County's adopted redistricting plan, pending the outcome of Defendants' appeal.

INTRODUCTION

On October 13, 2023, the Court entered an order providing mandatory injunctive relief to Plaintiffs and requiring Defendants to file a revised redistricting plan by October 20, 2023. Dkt. 251 at 2. The Court also set a hearing on November 1st to consider such a plan. In the alternative to submitting a new plan within seven days, the Court has ordered that Defendants must implement the illustrative plan presented by Anthony Fairfax in Plaintiffs' Exhibit 339 (attached as Appendix A). The Court provides in its Order that a new plan must be adopted "in time for the 2024 election, which means before November 11, 2023—the statutory opening date for candidate filing." Dkt. 251 at 2.

The Court's imposition of a 7-day timeline in which to adopt and file with the Court a "revised redistricting plan with sufficient supporting expert analysis establishing that it complies with § 2" of the VRA is simply not enough time. Dkt. 251 at 2 ¶ 1. Moreover, the Court's decision to put in place the Fairfax map if Defendants do not meet this deadline is, respectfully, improper. The Fairfax map, among other things, cannot be enacted without irreparable harm because its boundaries do not keep each of the Commissioners within their precincts—Commissioner Apffel's house is not within Fairfax's proposed Precinct 1,

which would prevent Apffel from running for re-election. *See* Tex. Const. Art. 16 sec. 14 (Commissioners must reside in precinct); Art. 5 sec. 18(d) (when boundaries change, Commissioners serve out the term in the precinct to which they were elected). Defendants have filed a notice of appeal with this request, and ask for an emergency stay of this order, pending the outcome of the appeal.

STANDARD OF REVIEW

Courts consider four factors when determining whether a stay should be granted during the pendency of an appeal:

1. whether the applicants have made a strong showing that they are likely to succeed on the merits;
2. whether the applicants will be irreparably injured absent a stay;
3. whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
4. where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009). The first two factors are "the most critical." *Id.* at 434. These factors are not to be applied "in a rigid or mechanical fashion." *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014) (alterations accepted). A movant "need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *U.S. v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983) (citation omitted).

ARGUMENT

I. Defendants have made a strong showing that they are likely to succeed on the merits, on appeal.

The County believes it is likely to succeed on the merits of the specific claims in

this case. In addition, the Court should have "little difficulty concluding that the legal questions presented by this case are serious, both to the litigants involved and the public at large, and that a substantial question is presented for [the Fifth Circuit] to resolve." *Campaign for S. Equal.*, 773 F.3d at 57. Defendants' arguments are more thoroughly set forth in their post-trial briefing and responses, Doc. 244 and Doc. 249, and their findings of fact and conclusions of law, Doc. 245. Defendants have preserved all of these arguments and incorporate them here by reference. Defendants summarize several critical points here.

On appeal, Defendants will present arguments that there is no violation of the Voting Rights Act ("VRA"). As discussed in prior filings, the VRA does not provide a remedy for coalition claims, or entitlement to proportional representation. *See* Dkt. 176 at 20-22, Dkt. 244 at 33-35. While this Court understandably acknowledges prior cases in the Fifth Circuit, the Fifth Circuit can and does clarify, and if necessary overrule, itself. The Fifth Circuit should consider this fundamental issue in light of the conflicting decisions from other appellate courts. Also, Plaintiffs did not meet their *Gingles* I compactness burden (*see* Dkt 176 at 22-38, Dkt. 244 at 35-39, Dkt. 245 at 16-20 & 100-107). Plaintiffs' evidence falls shockingly short of the requisite local analysis. Dkt. 245 at ¶¶ 426-27, 454-55. Rather, Plaintiffs' experts largely address a nation-wide discussion of race and voting, rather than circumstances in Galveston County.

And while the Court discusses testimony relating to the significance of primary elections, whether primary elections are relevant in a cohesion analysis is a question for the Court, not witnesses. *LULAC v. Abbott*, 601 F. Supp. 3d 147, 165 (W.D. Tex. May 4, 2023) ("*Abbott* I"). What primary election results show on their face, particularly in a

coalition case, is critical and clear: whether different minority groups select the same candidates. *See id*. at 169 n.10 ("shared voting preferences at the primary level would be powerful evidence of a working coalition" but is not needed to prove cohesion for a single minority group). In fact, in *Abbott* I, the court agreed with Dr. Alford's view that primary elections "are relevant to analyzing divisions within political coalitions and that partisan affiliation is the main driver of voter behavior in general elections." *Id*. at 166.[1]

Plaintiffs' experts also failed to analyze data on the precinct level. Mr. Cooper, for example, relied on socioeconomic and other data that was based on municipalities, not precincts—municipalities that are cut into various sections by Plaintiffs' own proposed precincts. For example, Mr. Fairfax's proposed map has League City divided among all four precincts. Dr. Rush testified, contrary to Mr. Cooper, that populations from Texas City and League City can be included in one majority-minority precinct, even though he never analyzed whether or why such populations should be paired. Such evidence is no evidence at all. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993); *Curtis v. MS Petroleum*, 174 F.3d 661, 668 (5th Cir. 1999) (the issue of expert reliability includes whether they properly apply their methodology to the facts).

The Court placed the burden on Defendants to prove that politics, rather than race, accounted for racially polarized voting in the County under a *Gingles* analysis. While the voting evidence, including primary evidence considered inconsequential by this Court,

[1] Here, Dr. Alford analyzed 24 primary elections and found in only 2 did Black and Latino voters support the same candidate with 75% or more of their vote. DX 305 at 14-19; Dkt. 245 ¶432, 436-439. Even using Dr. Trounstine's lower standard of cohesion, Latino and Black voters support each other's candidates in only 8 out of 24 primaries. *Id.* But a one-third cohesion rate is no cohesion at all.

unmistakably shows partisanship explains voting results, the Fifth Circuit has not concluded that such a showing is Defendants' burden. Rather, Plaintiffs must establish all three *Gingles* preconditions. They did not meet their burden. Rather, polarized voting and polarization are present today—but in politics. Plaintiffs have failed to show that race that drives Galveston voters' decisions.

As discussed in Defendants' Closing Brief, the totality of the circumstances do not support a finding of vote dilution under the VRA. *See* Dkt 244 at 52-59. Nor should Plaintiffs' VRA claim prevail, as VRA effects claims are temporally limited to a very different time in this Country, a time long ago expired. *See* Dkt. 244 at 59-60.

II. Defendants will be irreparably injured absent a stay.

With respect to irreparable harm, "the inability to enforce its duly enacted plans clearly inflicts irreparable harm" on the County. *Abbott*, 138 S.Ct. at 2324 n.17 (explaining, in the context of interlocutory jurisdiction, that where state was barred from conducting elections under an enacted statute, unless the statute is unconstitutional, such an order "would seriously and irreparably harm" the state).

The Supreme Court has directed that, if a plan is "found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Here, the Court's Order references the candidate filing period as the impetus for a 7-day timeline to adopt and file a revised plan. Under *Abbott*, that timeline is too short, and the more reasonable option is to allow the enacted plan to remain in force pending the outcome of an appeal.

As Judge Costa wrote in *Thomas v. Bryant*, the defendants in that case (Mississippi

state officials) "can establish irreparable harm" where there was a trial court order "preventing enforcement of a state law, including the drawing of legislative lines, and where there was a "meaningful possibility (but not certainty) that a full appeal cannot be decided in time to provide Defendants relief before" the election at issue. 919 F.3d 298, 303 (5th Cir. 2019) (citing *Abbott*, 138 S.Ct. at 2324 n.17). The court acknowledged the plaintiffs faced "the same risk that the appellate ruling would prove futile" if the Fifth Circuit granted a stay. *Id*.

Understanding these parameters, the court explained that its decision teetered on whether the defendants in *Thomas* have a strong likelihood of success. As discussed above, Defendants have established a strong likelihood of success on the merits.

III. The remaining elements of substantial injury and public interest both support a stay of the Order pending appeal.

In considering harm to other parties, the "maintenance of the status quo is important." *Louisiana by & through Landry v. Biden*, No. 22-30087, 2022 WL 866282, at *3 (5th Cir. Mar. 16, 2022). A stay would preserve that status quo to permit the Fifth Circuit to address the difficult legal questions such as whether coalition districts are permissible, whether temporal limits on Section 2 are appropriate, the appropriate weight of primary elections in coalition actions. In these circumstances, the alleged harm of an election under the existing plan should not outweigh the numerous harms of an injunction.

As Defendants discuss above, there is a likelihood of success on the merits. Therefore, there is no substantial injury to Plaintiffs because there has been no established violation of the VRA, and no dilutive plan enacted by the County. The public interest

similarly supports the enforcement of properly enacted laws—including redistricting plans adopted by governmental bodies within the State of Texas.

Again, the Court's order provides a remedial redistricting schedule that is unworkable; consequently it is unlikely to withstand appellate scrutiny. A court that invalidates redistricting legislation must "afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). Requiring the County to review and enact redistricting legislation, complete with expert analysis, within seven days of its order will not provide the County necessary time to consider critical County legislation. Therefore, a stay is appropriate, pending appeal.

CONCLUSION AND PRAYER

Defendants ask that the Court enter an order staying its October 13, 2023 Order imposing mandatory injunctive relief pending the outcome of an appeal of this matter.

If the Court is inclined to deny the County any form of relief requested, the County respectfully requests the Court issue a ruling on this request by October 16, 2023, which would enable timely consideration of that denial in an emergency stay motion on appeal.

Respectfully Submitted,

PUBLIC INTEREST LEGAL FOUNDATION

Joseph M. Nixon
Federal Bar No. 1319
Tex. Bar No. 15244800
J. Christian Adams*
South Carolina Bar No. 7136
Virginia Bar No. 42543
Maureen Riordan*
New York Bar No. 2058840
107 S. West St., Ste. 700
Alexandria, VA 22314
jnixon@publicinterestlegal.org
jadams@publicinterestlegal.org
mriordan@publicinterestlegal.org
713-550-7535 (phone)
888-815-5641 (facsimile)

**admitted pro hac vice*

GREER, HERZ & ADAMS, L.L.P.

By: /s/ *Joseph Russo*
Joseph Russo (Lead Counsel)
Fed. ID No. 22559
State Bar No. 24002879
jrusso@greerherz.com
Jordan Raschke
Fed. ID No.3712672
State Bar No. 24108764
jraschke@greerherz.com
1 Moody Plaza, 18th Floor
Galveston, TX 77550-7947
(409) 797-3200 (Telephone)
(866) 422-4406 (Facsimile)

Angie Olalde
Fed. ID No. 690133
State Bar No. 24049015
2525 S. Shore Blvd. Ste. 203
League City, Texas 77573
aolalde@greerherz.com
(409) 797-3262 (Telephone)
(866) 422-4406 (Facsimile)

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served to all counsel of record via the ECF e-filing system on October 14, 2023.

/s/ Angie Olalde