ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAY 4 2001
CLERK, U.S. DISTRICT COURT
By _____
Deputy

TRINIDAD "TRINI" GARZA and PEDRO "PETE" VACA, et al	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	Civil Action No 3-01CV0602-H
DALLAS INDEPENDENT SCHOOL DISTRICT, et al.	§	
	§	
Defendants.	§	

DEFENDANTS' RESPONSE TO APPLICATION FOR INJUNCTIVE RELIEF AND BRIEF IN SUPPORT THEREOF

Respectfully submitted,

VIAL, HAMILTON, KOCH & KNOX, L.L.P.
1717 Main Street, Suite 4400
Dallas, Texas 75201
(214) 712-4400
(214) 712-4402 FAX

and

BICKERSTAFF, HEATH, SMILEY, POLLAN, KEVER & MCDANIEL
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701
(512) 472-8021
(512) 320-5638 FAX

ATTORNEYS FOR DEFENDANTS

TABLE OF AUTHORITIES

CASES

Ballas v. Symm,
351 F.Supp. 876 (S.D.Tex. 1972) 5
aff'd 494 F.2d 1167 (5th Cir. 1974)

Bullock v. Weiser,
404 U. S. 1063 (1972) 12

Chisom v. Roemer,
853 F. 2d 1186 (5th Cir. 1988) 6, 7, 8, 10
rev'd on other grounds, 111 S.Ct. 2354 (1991)

Dillard v. Crenshaw County,
640 F. Supp. 1347 (M.D. Ala. 1986) 12

Harris County, Tex. v. CarMax Auto Superstores,
177 F.3d 306 (5th Cir. 1999) 3

Kilgarlin v. Hill,
386 U.S. 120 (1967) 12

McDaniel v. Sanchez,
101 S.Ct. 2224 (1981) 8

Reynolds v. Sims,
84 S.Ct. 1362 (1964) 8, 9, 10

Shaw v. Reno,
113 S.Ct. 2816 (1993) 5, 6

Skelton v. Yates,
119 S.W.2d 91 (Tex. 1938) 5

Terrazas vs. Slagle,
789 F.Supp. 828 (W.D. Tex. 1992) 8, 10

United States v. City of Houston,
800 F.Supp. 504 (S.D. Tex. 1992) 10

United States vs. Hays,
115 S. Ct. 2431 (1995) 8

United States v. State of Texas,
422 F. Supp. 917 (S.D. Tex. 1976) 4

Whitcomb vs. Chavis,
396 U. S. 1055 (1970) 7

White v. Carlucci,
862 F.2d 1209 (5th Cir. 1989) 3

White v. Weiser,
412 U. S. 783 (1973) 12

Winter v. Docking,
356 F. Supp. 88 (D. Kan. 1973) 12

Wise vs. Lipscomb,
98 S.Ct. 2493 (1978) 8

STATUTES

TEX. EDUC. CODE § 11.051 2

TEX. EDUC. CODE § 11.151 2

TEX. ELEC. CODE § 41.0052(a) 6

TEX. ELEC. CODE § 42.0052 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TRINIDAD "TRINI" GARZA and PEDRO "PETE" VACA,	§	
Plaintiffs,	§	
v.	§	
	§	Civil Action No 3-01CV0602-H
DALLAS INDEPENDENT SCHOOL DISTRICT, et al.	§	
Defendants.	§	

DEFENDANTS' RESPONSE TO APPLICATION FOR INJUNCTIVE RELIEF AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE BAREFOOT SANDERS, SENIOR UNITED STATES DISTRICT JUDGE:

COME NOW the Dallas Independent School District, Ken Zornes, Roxan Staff, Lois Parrott, George Williams, Se-Gwen Tyler, Hollis Brashear, José Plata, Kathleen Leos and Ron Price, (hereinafter referred to collectively as the "Trustees")[1] and make this Response to the Request for Injunctive Relief filed by Plaintiffs in their Original Complaint ("Complaint"). As good and sufficient Response to same, and in opposition thereto, Defendants would respectfully show this Court as follows:

[1] Plaintiffs have "noted" that no appearance has been made by the ersatz "Board of Education of the D.I.S.D." Indeed, no such entity is authorized or contemplated by the Texas Education Code. Chapter Eleven of the Code sets forth the appropriate organization of the state's independent school districts, and mandates that a Board of Trustees as a body corporate shall govern an independent school district, and may sue and be sued in that capacity. TEX. EDUC. CODE §§ 11.051, 11.151. Under Texas law, the Board of Trustees (who have appeared) are the equivalent of the non-existent "Board of Education of the D.I.S.D."

I. SUMMARY OF ARGUMENT

The plaintiffs seek to enjoin the election for Dallas ISD school trustees that is required by Texas law to be held tomorrow, May 5, 2001.[2] The polls open at 7:00 a.m., only sixteen hours after the injunction hearing is scheduled to begin. In-person early voting has already ended, and thousands of persons have already cast their votes.

The Court should decline to enter the injunctive relief sought by the Plaintiffs. The Plaintiffs have not demonstrated entitlement to a preliminary injunction. The equities clearly mandate against the entry of an Order stopping an election already in progress (via early voting) and which involves a number of other local jurisdictions.

Moreover, as asserted more completely in Defendants' Motion to Dismiss, the Court lacks subject matter jurisdiction over the claims asserted by Plaintiffs' suit.

II. ARGUMENT AND AUTHORITY

A. Standard for Granting of Injunctive Relief.

Injunctive relief is "an extraordinary and drastic remedy, not be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989). A party is entitled to a preliminary injunction only upon demonstration of each of four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not issued; (3) that the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest. *E.g., Harris County, Tex. v. CarMax Auto*

---

[2] Pursuant to TEX. ELEC. CODE § 42.0052, any changes which the D.I.S.D. sought to make with regard to the date of this election must have been formalized no later than December 31, 1999.

Superstores, 177 F.3d 306, 312 (5th Cir. 1999). The decision whether to grant a preliminary injunction lies within the discretion of the district court and will not be disturbed except upon abuse of discretion. *Id.* at 312.

It should be noted that Plaintiff Garza alone must bear the burden of demonstrating these requirements for injunctive relief. Plaintiff Vaca purports to reside in Trustee District 8 (*See* Complaint at ¶ 2). This Court may take judicial notice of the fact that only one candidate filed to run in the race for District 8, the incumbent Kathleen Leos; consequently, there will be no election for Trustee District 8. Nothing which the Plaintiffs have suggested (short of postponing the election and ordering others to enter that race) would impact the outcome of the election in District 8.

While the D.I.S.D. has nine Trustee Districts, the election is only being held in two. The two newest Plaintiffs reside in Trustee Districts which are not electing Trustees in this election cycle. Only one Plaintiff, Trinidad Garza, resides in one of the Trustee Districts where an election will be held tomorrow. He is the only Plaintiff eligible to vote in tomorrow's D.I.S.D. election, and thus the only Plaintiff with an arguable injury. Thus, the Plaintiffs' collective request for injunctive relief must be analyzed in light of his claims alone.

B. As the election has commenced, the issue of an Injunction is moot.

In *United States v. State of Texas*, the United States sought a preliminary injunction to require the local tax assessor-collector to permit registration of students at Prairie View A&M prior to the general election. 422 F. Supp. 917 (S.D. Tex. 1976) (three judge court). Although the United States had been investigating registration procedures in Waller County for nine months, it waited until nineteen days before the election and one day before absentee balloting began to file the suit. The Court noted that once absentee balloting commenced, the election was considered by Texas law to have been in progress. *Id.* at 923. Given the fact that voting had already commenced and the severe

disruption to election procedures that would occur if a preliminary injunction were granted the court determined that the request for an injunction was moot. *Id.* at 925. Of course, the parallel with the instant case is inescapable, and this Court should reach the same conclusion. *See Ballas v. Symm,* 351 F.Supp 876, 880 S.D.Tex. 1972, aff'd 494 F.2d 1167 (5th Fifth Cir. 1974), citing *Skelton v. Yates* 119 SW2d. 91 (Tex. 1938).

C. Plaintiffs Cannot Demonstrate the Required Elements for Injunctive Relief.

1. No likelihood of success on the merits.[3]

Section 2 Dilution

As an Hispanic individual protected by the Voting Rights Act, Mr. Garza claims that the configuration of District 7 dilutes his vote under Section 2 of the Voting Rights Act. A resident of District 7 can make that claim only if the district is drawn to fragment the Hispanic vote so that Hispanics do not have an equal opportunity to elect the candidates of their choice. However, more than 80% of the residents of District 7 are Hispanic. It is the most heavily Hispanic district in the D.I.S.D. These is simply no serious argument that District 7 has such a small percentage of Hispanics that it is dilutive under Section 2, and there is neither a showing of harm to Mr. Garza nor likelihood of success on the merits.

Racial Gerrymandering

Mr. Garza also raises a *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816 (1993) racial gerrymandering claim. (*See* Complaint at ¶75). Logically, this is the direct opposite of his Section 2 claim. A *Shaw* claim asserts that the governmental body over-emphasized race in drawing districts.

---

[3] In addition to the arguments herein, Plaintiffs do not have a likelihood of success on the merits because as fully discussed in Defendants' Motion to Dismiss, Plaintiffs lack standing to pursue their claims before this Court.

By contrast, a section 2 dilution claim asserts that the government under-emphasized race by failing to draw districts that comply with the Voting Rights Act. This may be the only case in voting rights jurisprudence to raise *Shaw* and Section 2 arguments with regard to the same district.

Further, Mr. Garza may be estopped from claiming that District 7 is the result of an intentional racial gerrymander. When the district was drawn in 1991, Mr. Garza was a member of the D.I.S.D. Board of Trustees representing District 7. As a Trustee, he himself voted to adopt the District 7 boundaries.

Purposeful Discrimination

The Plaintiffs' final claim, that the school district engaged in purposeful discrimination by declining to cancel the election, fails as a matter of law. Even if we assume *arguendo* that all of the Plaintiffs' assertions were true, and that the census reveals serious statutory and constitutional defects in the current districting scheme, the DISD had no discretion to reschedule the election. It may conduct an election only as permitted by law. There was a window in which it could change the May election date, but that legal authority expired on December 31, 1999, more than sixteen months before the release of the census. *See* TEX. ELEC. CODE § 41.0052(a).

Further there is no legitimate assertion that the D.I.S.D. is any way delaying redistricting. It began the process even before the census data were released on March 14, 2001, and has been actively involved in preparing to adopt new plans. There is simply no established factual basis for the "purposeful discrimination" claim.

Postponing the election is inappropriate.

More generally speaking, as discussed *infra*, the Fifth Circuit has made clear that federal courts should not generally enjoin state elections allegedly conducted in violation of the Voting Rights Act. *Chisom v. Roemer*, 853 F. 2d 1186 (5th Cir. 1988), *reh'g en banc den.* Sept. 14, 1988, *rev'd*

on other grounds, 111 S.Ct. 2354. In *Chisom,* the District Court concluded that an election plan had defects in the electoral system which resulted in the denial of African-American citizens' right to vote, and thereafter entered an Order enjoining the election. Upon expedited appeal, the Circuit vacated the District Court's Order, noting that "the possibility that other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against the claim of irreparable harm." *Id.* at 1189 (citations omitted). Only when the threatened harm would impair the Court's ability to grant an effective remedy in the future was there present a need for preliminary relief. Plaintiffs have made no such showing.

a. <u>The D.I.S.D. must first be afforded the opportunity to attempt redistricting.</u>

The Court in *Chisom* went on to note that even **after** an adjudication on the merits that a legislative apportionment is unconstitutional[4], the Court should nonetheless defer to the State process for the purpose of giving that entity an opportunity to redress any determined Constitutional harm. The Fifth Circuit was guided by the action of the United States Supreme Court in *Whitcomb vs. Chavis,* 396 U. S. 1055 (1970), in which the Court stayed a District Court's Order enjoining an election even after a three judge court found Indiana's multi-member districts to be unconstitutional. The Fifth Circuit found "significant" the Supreme Court's action in *Chavis,* where it actually permitted the conduct of an election under a scheme which had been previously found constitutionally infirm. *Chisom,* 853 F.2d at 1190. The Court further noted that even assuming that violations were found, the State institution must be afforded an opportunity to repair defects which the Court finds.

After a trial on the merits, and a declaration that an existing election scheme is unlawful, it is "appropriate, whenever practicable to afford reasonable opportunity for the legislature to meet

[4] Which obviously has not taken place here.

constitutional [or federal statutory] requirements by adopting a substitute measure..." *Wise vs. Lipscomb*, 437 U.S. 535, 98 S.Ct. 2493 (1978). The Fifth Circuit has acknowledged the instruction of the United States Supreme Court that "redistricting and reapportionment is a legislative task which the Court should make every effort not to preempt," and further has clearly and unequivocally stated that "judicially it becomes appropriate only when a legislature fails to reapportion according to Federal Constitution requisites in a timely fashion after having had an adequate opportunity to do so". *See Chisom*, 853 F.2d at 1192 (quoting *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.1, 101 S.Ct. 2224, 2236 (1981)).

In *Chisom*, the Fifth Circuit recognized a "mandate" that responsible local authorities must be first be given an opportunity to correct any Constitutional or statutory defect before the Court itself attempts to draft a remedial plan. The District Court's failure to permit same in *Chisom* was found to be a fatal error, and as noted, the District Court's Order ignoring this mandate was vacated.

This mandate was followed in *Terrazas vs. Slagle*, where the district court declined to enter a stay <u>even after</u> preparing its own redistricting plan, because the stay would result in postponing primary elections which had been previously scheduled. 789 F.Supp. 828, 844 (W.D. Tex. 1992) (three judge panel).

Plaintiffs cannot demonstrate that they are likely to prevail on the merits of this case and as a result, they are not entitled to injunctive relief.

2. <u>No irreparable harm.</u>

Most significantly, Plaintiffs do not have a legally protected right to an immediate reapportionment of their districts. The equal protection clause requires only that a legislative body adopt some reasonable plan for periodic revision of their apportionment schemes. *Reynolds v. Sims*, 84 S.Ct. 1362 (1964). In *Reynolds*, the United States Supreme Court made clear that decennial

apportionment (as mandated by the laws of the State of Texas) is a rational approach to readjustment of legislative representation in order to take into account population shifts and growth.

Plaintiffs herein would apparently have this Court ignore *Reynolds*. Instead, they seek an immediate reapportionment less than ten years after one Plaintiff himself voted to approve the current plan, and less than a year before the state mandated reapportionment would accomplish the desired goal. The fact that population shifts may occur in frequencies which could be addressed other than in decennial reapportionments is of no consequence. As the Court noted in *Reynolds,* "limitations and the frequency of reapportionment are justified by the need for stability and continuity in the organization in the legislative system although undoubtedly, reapportioning no more frequently than every ten years leads to some imbalance in the population of districts towards the end of the decennial period. As acknowledged by Plaintiffs in paragraph 30 of the Complaint, the D.I.S.D. has adopted a plan in which its nine Trustee Districts are reapportioned after each decennial census, and new elections will take place in less than a year.

As discussed above Plaintiff Garza resides in a District that is predominantly Hispanic, and therefore cannot reasonably claim harm due to Section 2 or fifteenth Amendment vote dilution.

As the Plaintiffs have not suffered irreparable harm, they are not entitled to injunctive relief.

3. Enjoining the election would grossly prejudice the District.

The equities strongly support the denial of the relief sought by the Plaintiffs. The District and its candidates have already planned extensively for both the current redistricting and the impending (and state mandated) election. Nine candidates are expending all their resources to win the contested Trustee positions.

4. Enjoining the election would disserve the public.

Postponing an election is an especially extraordinary request even in the context of injunctions as extraordinary relief. The courts have uniformly held that postponing or canceling an election is a step not to be taken except under the most compelling circumstances, which are not present here. "In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitous changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Reynolds v. Sims* 84 S.Ct. 1362, 1393 (1964). Even then, overturning an election is itself an extraordinary remedy seldom ordered. *See Chisom*, 853 F.2d at 1190; *Terrazas v. Slagle*, 789 F.Supp. at 844.

The better course of action is to let the election proceed and if, upon later examination it is determined that the plan was unlawful, to consider at that juncture whether to overturn the election and order a new one. *United States v. City of Houston*, 800 F.Supp. 504, 506 (S.D. Tex. 1992) three judge court).

The Dallas County Community College, the Dallas City Council and a host of other governmental entities have scheduled elections commencing **a mere sixteen hours** after this hearing. There are several hotly contested Dallas City Council races and other ballot initiatives which will take voters to the polls.[5] The issuance of an injunction as prayed for by the Plaintiff would violate the fourth required element for injunctive relief in that it would be a disservice to the public interest. As

---

[5] According to *The Dallas Morning News*, thirty three cities and school districts in Dallas County will settle contests tomorrow.

the Court well knows, early voting commenced more than two weeks ago and has already concluded. Voting by mail, a three month process, has already been, and as a practical matter, is substantially completed. For this Court to cancel this election at this point would invalidate the votes already cast by an estimated thirteen thousand citizens[6] based on no more than Plaintiffs' speculation that the lines (which one Plaintiff participated in drawing and for which he voted affirmatively) are somehow unconstitutional.

Undiscussed heretofore additionally is the fact that the canceling of the election at this late date would have an unconscionably chilling effect. It is impossible at this point to get new ballots out to all affected election precincts. An announcement that this election (after the Dallas City Council, certainly the most high profile) was canceled would certainly cause undue confusion among voting citizens, any number of whom would likely believe that all elections were canceled (including the aforementioned dozens of other local elections not impacted by this Court's decision).[7] The impact upon the democratic process in general would be nothing short of a disaster.

Case law weighs heavily against Plaintiffs' Application.

Plaintiffs' assertions that the interruption of the D.I.S.D.'s election process is justified under these circumstances is without sound applicable authority and ignores the clear rulings by the Supreme Court in favor of maintaining the integrity of the election process.

As noted, the reluctance to enjoin elections exists even when the challenged election practice has been found to be unconstitutional. In 1967, the United States Supreme Court specifically

---

[6] Again, according to *The Dallas Morning News,* this will represent a full ten percent of the individuals exercising their right to vote.

[7] This is the linchpin of the affirmative defense of laches previously pled by the Defendants. The Plaintiffs chose to sit on their rights which they could have exercised many months ago (indeed at the time when the District starting working on the redistricting process. That the Plaintiffs chose to wait this long, forcing the Court to delay any action is unconscionable .

affirmed a lower court's decision to permit an election to proceed even though the electoral districts in use had been found to be unconstitutionally infirm. *Kilgarlin v. Hill*, 386 U.S. 120 (1967). In 1972, a district court declared Texas' congressional districts to be unconstitutional and ordered implementation of a new plan shortly before the filing deadline. The Supreme Court, however stayed the district court order and permitted the election to be conducted under the redistricting plan that had been declared to be invalid. *White v. Weiser*, 412 U. S. 783 (1973); *Bullock v. Weiser*, 404 U. S. 1063 (1972). *See also Dillard v. Crenshaw County*; 640 F. Supp. 1347 (M.D. Ala. 1986); *Winter v. Docking*, 356 F. Supp. 88 (D. Kan. 1973). When the Supreme Court affirmatively stays orders to implement new election plans and specifically upholds decisions not to enjoin elections under constitutionally infirm systems, it is difficult to agree with the Plaintiffs' urging of this Court to grant preliminary relief.

The federal courts have viewed requests to enjoin elections with extreme disfavor. There is clearly no reason to depart from the general rule of refusing to halt the currently ongoing election.

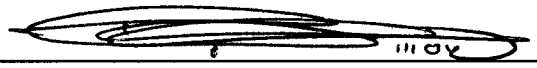
III. CONCLUSION

Plaintiffs cannot demonstrate entitlement to injunctive relief. Plaintiffs cannot show the requisite likelihood of success upon the merits. They cannot show that they will be irreparably harmed by this Court's permitting the May 5th election to continue. The law of this Circuit is clear: even when a judicial determination is made that an election as planned may violate the Constitution or the Voting Rights Act, the courts must give the offending institution an opportunity to repair the damage before involving itself in the political process. In addition, the equities clearly mandate against the entry of an Order stopping an election already in progress and which involves a number of other local jurisdictions.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants pray that Plaintiffs' Application for Injunctive Relief be denied.

Respectfully submitted,



Eric V. Moyé
State Bar No. 14611300
Dawn Kahle Doherty
State Bar No. 00793625

VIAL, HAMILTON, KOCH & KNOX, L.L.P.
1717 Main Street, Suite 4400
Dallas, Texas 75201
(214) 712-4400
(214) 712-4402 FAX

Myra A. McDaniel
State Bar No. 135203300
Sydney W. Falk, Jr.
State Bar No. 06795400
C. Robert Heath
State Bar No. 09347500
David Méndez
State Bar No. 13932575
BICKERSTAFF, HEATH, SMILEY, POLLAN, KEVER & MC DANIEL
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701
(512) 472-8021
(512) 320-5638 FAX

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been served upon all parties in accordance with the relevant Rules of Civil Procedure by hand delivering a copy of same to all counsel of record upon the date of filing.

Eric V. Moyé