IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRIS COUNTY DEPARTMENT OF EDUCATION,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**CIVIL ACTION NO. H-12-2190**
	§	
HARRIS COUNTY, TEXAS; STAN STANART, HARRIS COUNTY CLERK; AND DON SUMNERS, HARRIS COUNTY TAX ASSESSOR COLLECTOR,	§	
	§	
Defendants.	§	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

I. Introduction

This case arises from the County defendants' printing and circulation of primary ballots using precinct boundary lines that Judge Gilmore previously declared violate the Fourteenth Amendment's one-person, one-vote requirement. The use of the unconstitutional boundary lines ("the 2001 Boundary Lines") both perpetuates the problem of diluted voter strength and resulted in the disenfranchisement of voters, who, under Judge Gilmore's interim order, were denied the right to vote in the relevant HCDE primary races. HCDE, concerned that seating victors of a constitutionally infirm election process will further violate voters' rights, and at the urging of county officials, initiated this action believing that only a federal judge could fashion a constitutional remedy. Notwithstanding the movants' request[1] that the Court ignore the Fourteenth Amendment violation and dismiss this action, HCDE believes the Court should

[1] As of the time of this filing, the Harris County Defendants; the Harris County Democratic Party and Lane Lewis, Chairman of the Harris County Democratic Party ("HCDP"); and the Harris County Republican Party have filed motions to dismiss. Plaintiff HCDE files this collective response to the pending motions.

fashion a remedy that gives due regard for citizens' voting rights.

The movants collectively advance the following arguments in support of their motions to dismiss:

- HCDE fails to state a claim upon which relief can be granted because no federal claim exists for failure to comply with election laws;
- HCDE lacks standing;
- HCDE failed to sue the proper parties;
- HCDE's requested relief requires preclearance under Section 5 of the Voting Rights Act including review by a three-judge panel; and
- the court should abstain, even if it finds that a federal claim exists, because an adequate remedy exists under state law.

For the reasons explained below, the movants' arguments, which entirely ignore the undisputed violation of voter rights, are factually and legally incorrect.

II. Argument

The starting point of this Court's analysis requires recognition that use of the 2001 Boundary Lines offends the Fourteenth Amendment's one-person, one-vote requirement. Indeed, as the Court noted during the emergency hearing, this is effectively the law of the case. Permitting the election of candidates by a disproportionately smaller electorate violates Judge Gilmore's order and perpetuates the Fourteenth Amendment violations that she sought to remedy when she ordered the use of interim boundaries. Indeed, Judge Gilmore has already rejected the County's argument that it be allowed to use the 2001 Boundary Lines in this election cycle, instead ordering the use of interim boundary lines.

Where, as here, apportionment has been found to violate the Fourteenth Amendment's one-person, one-vote requirement, the Supreme Court instructs that it is 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 v. Sims*, 377 U.S. 533, 585 (1964)*; see also Watson v. Comm'rs Court of Harrison Cnty.*, 616 F.2d 105, 107 (5th Cir. 1980) (per curiam) (holding that district court allowing primary elections to be held using unconstitutional apportionment plan "would subject the voters of Harrison County to four more years of government by Commissioners elected under an outdated, inequitable, unconstitutional apportionment plan"). The only exception to the general rule arises where equitable considerations justify withholding the granting of immediate relief. But where, as here, a federal court has already considered and rejected the County's equitable arguments in favor of ordering interim boundaries that the County failed to use, equitable considerations arguably no longer apply.

Indeed, the County argued in the matter pending before Judge Gilmore that the court had the equitable discretion to use unconstitutional boundary lines. *See* Defs.' Brief Concerning Use of the Existing Comm'r Precinct Boundaries on an Interim Basis 3–13. Judge Gilmore apparently rejected this argument when ordering the use of interim lines. It is doubtful that the failure to comply with her order—even if unintentional—presents a circumstance in which principles of equity excuse the continuing violation of voters' constitutional rights.[2] As Counsel for intervenor HCDP, who still represents citizen voters in the matter pending before Judge Gilmore, argued in that case, "[a]llowing Harris County to employ the old redistricting plan because election machinery is underway eviscerates the constitutional requirements." *See* Defs.' Brief Concerning Use of the Existing Comm'r Precinct Boundaries on an Interim Basis 7.

[2] The County Defendants alternately refer to the use of the 2001 Boundary Lines as "inadvertent," an "error," and "a mistake" resulting from the County Tax Assessor-Collector's failure to update the Commissioner's precinct boundaries. HCDE takes no position as to whether County officials knowingly violated Judge Gilmore's Order or merely erred in updating the boundaries as alleged.

A. HCDE's Allegation that The County Defendants Have Violated Voter Rights Guaranteed by the United States Constitution States a Claim Upon Which Relief Can Be Granted.

From the outset, it appears that the movants fail to appreciate the allegations set forth in HCDE's amended complaint. As noted above, HCDE, at the invitation of County representatives, filed this lawsuit for the purpose of having a federal court consider the County's admitted use of the unconstitutional 2001 Boundaries. Judge Gilmore has already determined that use of such boundaries violates the Fourteenth Amendment's one-person, one-vote requirement. Only a federal judge can remedy the constitutional harm perpetuated by the County's use of the unconstitutional boundaries. County officials recognized as much when they requested that HCDE file this lawsuit. To now embrace the contention that dismissal is required because "no federal claim exists" ignores the federal claims asserted in HCDE's amended complaint and would require the Court to ignore the undisputed fact that voters' constitutional rights were denied by the County's misuse of the 2001 Boundaries. As argued above, it is HCDE's position that the rights of the voters, as afforded to them by the United States Constitution, cannot be ignored, and that a federal court should fashion an appropriate remedy to address the constitutional violation.

B. HCDE Has Article III and *Jus Tertii* Standing to Seek a Remedy That Protects the Integrity of its Governance and Addresses the Violation of Voters' Constitutional Rights.

In order to have standing under Article III, HCDE is required to demonstrate that (1) it has suffered an "injury in fact" that is "concrete and particularized," as well as "actual or imminent" rather than "conjectural or hypothetical"; (2) the injury is "fairly traceable" to the challenged conduct; and (3) it is likely, rather than "merely speculative," that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61

(1992) (internal quotation marks omitted). HCDE easily meets the three requirements set forth by *Lujan.*

HCDP argues that the case should be dismissed because HCDE lacks standing to "control the selection of party nominees." *See* Defs.' Mot. to Dismiss 2. HCDP fails to appreciate that HCDE has never sought to control the selection of party nominees. Instead, it seeks a court order addressing the County's constitutional violation in order to ensure that the constitutionally infirm election process does not compromise its governance. The seating of candidates whose right to hold office is in doubt poses significant governance problems for HCDE. A court order addressing the County's constitutional violation and approving the election process for HCDE's election will remedy HCDE's particularized injury-in-fact. Accordingly, HCDE has met its burden of establishing Article III standing.

Although the County Defendants ignore the injury to HCDE's governance, they do acknowledge that voters may have been injured by their misuse of the unconstitutional boundaries. *See* Defs.' Mot. to Dismiss 3. Implicit in the movants' standing arguments is that, because no voters have filed suit, no other party has standing to complain about the constitutional violation in this case. But the movants' argument ignores the fact that Judge Gilmore already sided with voters when she determined that using the 2001 Boundaries would violate voters' constitutional rights. Why should voters be compelled to once again initiate litigation to vindicate rights already vindicated? There is no dispute that the County used the wrong lines, that the use of such lines disenfranchised voters in at least one precinct, and that this disenfranchisement perpetuates a constitutional violation that Judge Gilmore sought to remedy. As this Court noted during the prehearing conference, Judge Gilmore's ruling is akin to the "law of the case"; accordingly voter participation to vindicate rights already determined is not

required for this Court to retain jurisdiction to fashion a remedy to address the constitutional violation at hand. *Cf. Lujan*, 504 U.S. at 560–61 (providing that the determination of whether Article III standing exists must comport with the "manner and degree of evidence required at the successive stages of the litigation").

Separate from HCDE's standing to seek a judicial remedy for the imminent harm to its governance is its *jus tertii* standing to seek protection of voters' rights. *See Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (allowing, without commenting on third-party standing, the claim of candidate George W. Bush to assert the equal protection rights of Florida voters); *Craig v. Boren*, 429 U.S. 190, 191–97 (1976) (allowing vendor standing to challenge on equal protection grounds an Oklahoma law that prohibited the sale of beer to males under age 21, but to females only under age 18); *Barrows v. Jackson*, 346 U.S. 249, 254–60 (1953) (allowing standing for a white woman selling land to challenge a racially restrictive covenant); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (allowing a doctor standing to raise the constitutional rights of married persons seeking birth control). Where, as here, HCDE can demonstrate Article III standing, it should be allowed to seek a remedy that cures the threat to its governance and vindicates the already proven violation of voters' rights.

C. HCDE Properly Sued the Parties Responsible for the Constitutional Violation.

The movants mistakenly contend that HCDE sued the wrong parties, arguing that the primary election belongs to the political parties who merely contract with the County to "provide election equipment and count the votes." *See* Cnty. Defs.' Mot. to Dismiss 1. The movants' argument is both factually and legally misguided.

The County—not the political parties—set the boundary lines.[3] In fact, the election services contracts attached to HCDP's motion to dismiss provide that Harris County Election Officer Stan Stanart, acting as the "Contracting Officer," is responsible for, among other things, "preparing and submitting all required submissions to the U.S. Department of Justice under the federal Voting Rights Act of 1965 required of the County" for the primary and any runoff elections.

If the movants' arguments had any merit, presumably the County, which is the lone party defendant in the matter pending before Judge Gilmore, would have argued in that case that it was not required to use the court-ordered interim boundaries in the primary elections. Not surprisingly, it has never made this argument. While the political parties may have an interest in how this Court (or Judge Gilmore) fashions a remedy to address the County's use of unconstitutional boundaries, it remains the County's responsibility to ensure that legally correct boundary lines are used when conducting both the primary and general elections. Indeed, the County cannot reasonably argue that this Court is unable to fashion a remedy that directs the County Defendants to cure the constitutional violation caused by their use of the unconstitutional 2001 Boundaries.

The movants rely almost exclusively on *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008) to argue that the political parties have the authority to choose which candidate will represent them in the general election. The movants' reliance on *Torres* is misplaced because *Torres* did not involve an acknowledged violation of the Fourteenth

[3] This fact is additionally corroborated by the affidavit of Mr. Thomas Moon, the Senior Manager for Voter Registration for Harris County, which was filed in the case pending before Judge Gilmore. Mr. Moon affirms that he is the County Employee responsible for overseeing the redrawing of voter precincts to conform to redistricting maps and that his office submits the redrawn maps to the County Commissioner's Court for approval. *See* Aff. of Thomas Moon ¶¶ 2, 9, Nov. 11, 2011, ECF No. 37.

Amendment's one-person, one-vote requirement; rather, it was limited to examination of the First Amendment rights of a candidate participating in a political party's delegate convention.

In *Torres*, a candidate sought a declaration that New York's delegate convention system violated the rights of challengers running against candidates favored by party leadership and requested an injunction mandating a primary election. *Id.* at 202. Under New York law, party nominees are selected by a convention of elected delegates. *Id.* at 200–201. Convention nominees are automatically placed upon the general election ballot along with independent candidates that timely submit conforming nominating petitions. *Id.* at 201. Respondent Torres complained that the state's convention system burdened challengers seeking to run against candidates favored by party leaders and deprived voters of their right to choose their party's candidate. *Id.* at 202. Significantly, New York law does not compel elected delegates to vote for any particular candidate. *Id.* at 205. Accordingly, the Supreme Court recognized that Respondent Torres' real complaint was that a candidate that was not favored by party leaders did not have a realistic chance to secure their parties nomination. *Id.* at 204–205. The Court rejected the claim, concluding that New York's convention system did not violate the First Amendment.

Different than the delegate convention system at issue in *Torres*, in which elected delegates were free to vote at the convention for the nominee of their choice, leaders of political parties in Texas do not have the discretion to choose which candidates will represent their party in a general election. *See Briscoe v. Boyle*, 286 S.W. 275 (Tex. Civ. App. 1926). In Texas, where "the Legislature has taken possession and control of the machinery of the political parties of the state," the state's political parties can only select candidates in the manner dictated by Texas law:

> In fine, the Legislature has in minute detail laid out the process by which political parties shall operate the statute-made machinery for making party nominations,

> and has so hedged this machinery with statutory regulations and restrictions, as to deprive the parties and their managers of all discretion in manipulating that machinery.

Id. at 276.

As a matter of state law, the selection of party candidates for the general election rests exclusively with voters (*see* Tex. Elec. Code § 172.001) and nothing in *Torres* permits the political party movants to "manipulate the machinery" of Texas election law to permit them to ignore the harm caused by an acknowledged violation of voters' rights in this case.

Section 172.001 of the Texas Election Code provides that "a political party's nominees in the general election for offices of state and county government and the United States Congress ***must be nominated by primary election,*** held as provided by this code, if the party's nominee for governor in the most recent gubernatorial general election received 20 percent or more of the total number of votes received by all candidates for governor in the election." Tex. Elec. Code § 172.001 (West Supp. 2011) (emphasis added). The only circumstances in which a political party is authorized by the Texas Election Code to select a candidate for that party for the general election ballot is in a situation described in Sections 145.035 and 145.036 of the Texas Election Code. Section 145.036 provides that a political party's executive committee may nominate a candidate for a place on the general election ballot only as "a replacement . . . to fill [a] vacancy in the nomination." *Id*. § 145.036. Given that no candidate has been validly selected, there can be no "replacement" candidate. Additionally, Section 145.036 applies only when a candidate's name is to be omitted from the ballot under Section 145.035. Section 145.035 provides for removal of a candidate's name from the general election ballot only if the candidate "withdraws, dies, or is declared ineligible on or before the 74th day before the election." *Id.* § 145.035. Because none of these circumstances are present here, and Texas law does not otherwise afford

political parties the discretion to select a nominee for the general election, the movants' request that this Court ignore the violation of voters' rights and allow the political parties to violate state election law as they suggest should be rejected.[4]

D. Neither Preclearance Nor Consideration by a Three-Judge Panel Are Required to Remedy the County's Constitutional Violation.

The movants additionally argue that preclearance and consideration by a three-judge panel are required. It is well established, however that preclearance and review by a three-judge panel are not required when a federal court prepares and adopts a voting change to remedy a constitutional violation. *See Connor v. Johnson*, 402 U.S. 690 (1971) (per curiam); *McDaniel v Sanchez*, 452 U.S. 130 (1981) (providing that preclearance is not required when, because of exigent circumstances, a federal court fashions a plan); *cf. E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636, 638 n.6 (1976) (providing that Section 5's preclearance procedures do not apply when a reapportionment scheme is submitted and adopted pursuant to court order). Where, as here, court relief is required to remedy an undisputed violation of voter rights, preclearance is not required.

E. The Court Should Decline the Movants' Request that it Abstain–Even if it Finds that a Federal Claim Exists–Because an Election Contest can Provide an Adequate State Law Remedy.

The upshot of the movants' arguments is that this Court should enable them to ignore the interests of voters whose constitutional rights were unquestionably infringed by allowing the political parties to choose party candidates for the general election. As explained above, this

[4] The County Defendants separately argue that HCDE has not plead a claim against Harris County, contending that it has not named a responsible county policymaker. Yet, this argument ignores that Judge Gilmore has already determined that use of the 2001 Boundary lines is unconstitutional and it is undisputed that the named County officials used the unconstitutional boundaries. While HCDE does not know the specifics of how County officials determined to use the unconstitutional boundaries, it has alleged sufficient facts to maintain its action against the County Defendants.

argument ignores the fact that Texas law does not provide political parties with the discretion to bypass primary election results. The movants' contention that their proposed violation of state law can be rectified in a subsequent election contest filed in state court also provides no consolation to disenfranchised voters, or to HCDE, which seeks to avoid this very threat to its governance.

HCDP, conceding that this Court "would undoubtedly have jurisdiction" to remedy the illegal use of the 2001 Boundaries had they been used in a general election, draws a distinction between the use of unconstitutional boundaries in primary versus general elections. This distinction finds no support in law and is at odds with the United States Supreme Court's decision in *Smith v. Allwright*, 321 U.S. 649 (1944). In *Smith*, a case in which the Supreme Court reversed an order denying relief to a Texas voter who was denied the right to vote in a primary election, the court expressly rejected such distinction recognizing that the primary election was inherently related to the general election:

> It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in the general election, is a right secured by the Constitution.

Id. at 661; *see also United States v. Classic*, 313 US 299 (1941) (providing that Article I, Section 4 of the Constitution authorized Congress to regulate primary as well as general elections "where the primary is by law made an integral part of the election machinery").

Where, as here, the County's fails to comply with a court-ordered remedy to an ongoing violation of the Fourteenth Amendment's one-person, one-vote requirement, federal law mandates that the court exercise jurisdiction to remedy the continuing violation and vindicate voter rights. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Accordingly, this Court should decline the movants' request that it dismiss this action in favor of their self-prescribed remedy,

particularly where their request proposes to choose party candidates in violation of state law requiring selection of party candidates in accordance with a lawful primary election.

III. Prayer

For the foregoing reasons, HCDE requests that all movants motions to dismiss be denied in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2012, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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