IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,

Plaintiff,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE
UNITED STATES, *et. al.*

Defendants.

Case No. 1:12-cv-00128-RMC-DST-RLW

DEFENDANT-INTERVENORS' MOTION FOR CLARIFICATION OF THE TRIAL SCHEDULE

Defendant-Intervenors [1] respectfully move this Court for clarification of the trial schedule, and, specifically to adjourn the trial date of July 9, 2012, to such date as will allow the parties to complete necessary discovery and adequately prepare for trial. Postponing the trial date is necessary in this case because of the delays in completing discovery that were caused by Plaintiff, the State of Texas, and is compounded by the nature of the discovery necessary to bring this matter to trial.

Intervenors stress at the outset that the Court has taken every step reasonably possible to accommodate Texas's request for the extraordinary expedition of this case to trial, and Intervenors were prepared to meet this ambitious schedule. It is now abundantly clear, however, that Texas cannot meet the demands of the schedule it demanded. Texas has failed to provide

[1] This motion is submitted on behalf of all Defendant-Intervenors, specifically, the Texas State Conference of NAACP Branches and the Mexican American Legislative Caucus of the Texas House of Representatives; the Texas League of Young Voters Education Fund, Imani Clark, Kiessence Culbreath, Demariano Hill, Felicia Johnson, Dominique Monday and Brianna Williams; Eric Kennie, Anna Burns, Michael Montez, Penny Pope, Marc Veasy, Jane Hamilton, David De La Fuente, Lorraine Birabil, Daniel Clayton and Sergio Deleon; the Texas Legislative Black Caucus, League of Women Voters of Texas, Justice Seekers, Peter Johnson, Peter Johnson, Ronald Wright, Donald Wright, Southwest Workers Union, La Union Del Pueblo Entero; Victoria Rodriguez, Nicole Rodriguez, Southwest Voter Registration Education Project, Mi Familia Vota Education Fund.

the parties with crucial information on a timely basis that it knew would be subject to discovery in this matter, and has voluntarily interposed unsupported objections and assertions of waivable privilege to discovery that have led and will continue to lead to prolonged delays. Intervenors recognize Texas's legitimate interest in a speedy determination of its Amended Complaint, but also equally legitimate are the interests of Intervenors, minority voters in Texas, and the hundreds of thousands of individuals in the State who lack the documents needed to comply with the new photo ID requirement for in-person voting in Texas.[2] When, as here, a requested rush to judgment imperils the rights of parties to take appropriate discovery, thereby creating the risk that this case may be adjudicated on less than a full record, prudence dictates that reasonable extensions be granted. For all of these reasons more fully discussed below, discovery should be extended and the trial date adjourned accordingly.

I. The Court and Defendants Have Attempted To Accommodate Texas's Desire For Expedited Consideration Despite Texas's Failure To Act With Requisite Speed.

From the outset, Texas has asked for speed from others, but conducted itself as if time were not of the essence. This pattern dates from the day Senate Bill 14 ("SB 14") was signed into law by the Governor on May 27, 2011. (Dckt. 1, par. 6) Aware that the law required Section 5 preclearance, and, ostensibly concerned about it being effective in time for the 2012 November general election, Texas waited a full two months before submitting the law to the Attorney General for administrative preclearance,[3] and a full eight months before filing this lawsuit, on January 24, 2012. Remarkably, after filing the Complaint, Texas then failed to serve the Attorney General – hardly a difficult task – for over two weeks. (Dckt. 10)

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[2] *See* Attorney General's March 12, 2012 letter of Section 5 objection, at 3 (Dckt. 25-7) (State's September 2011 data indicated that 603,892 registered voters do not have a driver's license or state ID card; State's January 2012 data indicated that the number is 795,955).

[3] *See* Attorney General's September 23, 2012 letter, at 1 (Dckt. 1-4) (States' submission received on July 25, 2011).

Nevertheless, this Court has accommodated Texas's request for a decision no later than August 15 by setting a stringent discovery schedule that would end all discovery within a period of approximately 90 days, and scheduling a trial for the second week of July. Defendants and Intervenors have worked around the clock to try to make this schedule work. By its intentional and unintentional acts, Texas has made the schedule unworkable.

II. Texas Did Not Prepare Its Case For Accelerated Discovery And Has Not Produced Documents With Sufficient Speed So As To Allow The Parties To Prepare For A July 9 Trial.

Despite months of lead time, Texas has not been prepared to meet the very accelerated schedule for which it petitioned this Court. Having been the plaintiff in a number of Section 5 actions, when Texas insisted that the Court set an expedited schedule, it was well aware of the classes of documents and data it would be asked to produce in this case, and Texas could reasonably have been expected to have made an immediate production of a substantial portion of such basic discovery without awaiting formal requests (or, at the least, to have been prepared to make such a production immediately once those requests were made). For example, Texas cannot credibly claim to have been surprised that Defendant and Intervenors have sought transcripts of the legislative process, as well as documents and databases from such agencies and officers as its Secretary of State, Department of Public Safety, and legislators. The relevant basic information from these agencies and officials should have been requested, reviewed, and ready for production by Texas at or before the formal opening of discovery.

That is decidedly not what happened here. After DOJ's and Intervenors' Requests for Production of Documents were served (on March 21 and March 23, respectively), Texas unilaterally decided to make responsive documents available "on a rolling basis." It took over a week for Texas to produce the basic legislative history of SB 14, and almost three weeks to

produce transcripts of the legislative hearings relating to SB 14 (and only after being directed to do so by this Court). Texas finally "rolled" out what it apparently asserts is a large portion of its production a month after the requests were made. Given Texas's delays, Intervenors have not had an opportunity to review this production fully or to ascertain its level of completeness, but it is already clear that Texas's "rolling" production is not over. For example, no production has yet been made of transcripts or other documents relating to the 2005, 2007, and 2009 photo ID legislative proposals—all of which this Court has deemed relevant. *See* 4/10/2012 Tr. of Proceedings at 50:1 – 15 (Ex. A, attached hereto)

Even without Texas's continuing assertions of multiple privileges (discussed below), its continuing delay in producing documents in and of itself has rendered it impossible for depositions to occur in accordance with the initial Court-ordered date of April 9. Assuming that Texas completes its document production within the next week, which seems highly unlikely given its pattern of delays in this litigation, the earliest that meaningful depositions could reasonably occur would be mid-May. As demonstrated below, however, other actions taken by Texas seriously jeopardize the prospect of depositions occurring even by that date. Indeed, as of today, aside from the Rule 30(b)(6) deposition on limited topics related to the contents of Texas's state databases, not a single deposition has even been scheduled.

III. Texas Has Failed To Produce Essential Computer Data.

The crucial determination of discriminatory effect in this case rests on the extent to which minority voters currently have the types of photo ID that SB 14 requires in order for registered voters to cast a ballot at the polls on Election Day or cast a ballot utilizing Texas's system of in-person early voting.[4] Among the most important information that the State possesses in this

[4] Under SB 14, the following are required in order to register to vote: "(1) a driver's license, election identification certificate, or personal identification card issued to the person by the Department of Public Safety that has not

regard are its Voter Registration ("VR"), Driver's License System ("DLS"), and License To Carry ("LTC") databases. Intervenors and their experts need the data in the relevant fields of these databases in order to: (a) conduct statistical analyses to determine rates of ID ownership, by race, to address whether Texas can meet its burden of showing a lack of retrogressive effect; and (b) determine the time necessary to undertake these analyses and prepare the requisite expert reports. But Texas still has not provided Intervenors with the relevant data in these databases.

Early in this litigation, the Court directed the parties to arrange for the speedy production of the relevant databases. *See* 3/27/2012 Order (Dckt. 43). One of the first points of agreement among the parties was that Texas would provide descriptions of all the fields in these three key databases, so that Defendant and Intervenors could determine which fields contain relevant data. Detailed information as to the DLS and LTC fields was not supplied by Texas until April 2, and included an e-mail from the State informing the parties that similar detail was not provided as to the Voter Registration database because that database contained only "name, residence address, mailing address, date of birth, driver's license number, last-four digits of SSN, and indication of whether the person wishes to be an election worker." (4/2/2012 D'Andrea Email, Ex. B, attached hereto). Indeed, at the April 10 conference, the State expressly represented to the Court that those were the only fields in the VR database. *See* 4/10/2012 Tr. of Proceedings at 33:15 – 34:19 (Ex. C, attached hereto).

It took a Rule 30(b)(6) deposition for Defendant and Intervenors to learn that this was not so. Specifically, on April 17, the State's designated representative testified that the VR Database

expired or that expired no earlier than 60 days before the date of presentation; (2) a United States military identification card that contains the person's photograph that has not expired or that expired no earlier than 60 days before the date of presentation; (3) United States citizenship certificate issued to the person that contains the person's photograph; (4) a United States passport issued to the person that has not expired or that expired no earlier than 60 days before the date of presentation; or (5) a license to carry a concealed handgun issued to the person by the Department of Public Safety that has not expired or that expired no earlier than 60 days before the date of presentation" SB 14 § 14.

is comprised of "more than a hundred fields" (Gloria Martinez, Tr. at 24: 21-23, Ex. D, attached hereto), including such fields as whether registered voters had cast a ballot in particular elections and their mode of voting, including whether they voted by absentee ballot.[5] (*Id.*, 19: 6-9, 20:8 - 22:4). Without a full list of the fields, Intervenors have had no way of ascertaining the universe of data contained in this essential database, and therefore have been stymied in commencing their statistical analyses. The parties are over a month into discovery, and for all intents and purposes, this critical database still has not been produced.

The 30(b)(6) deposition also revealed that Texas has failed to produce data contained in potentially highly relevant fields in the other key databases. As to the DLS database, Texas has not produced data identifying whether persons listed in that database are citizens, and whether these individuals have a driver's license or ID card that is currently valid — information that is necessary to determine the extent to which Texas citizens do or do not have the photo ID mandated by SB 14. As to the LTC database, Texas has not produced data in fields relating to which persons maintain current and valid licenses to carry handguns, and whether such persons are identified as Hispanic.[6]

Moreover, to the extent that Texas has produced limited portions of its databases, its productions have been riddled with problems that have delayed the Intervenors. Three times, for example, Texas has failed to provide Intervenors with necessary passwords to access the data at the same time that the data were produced, leading to days of delay in accessing the data. Most

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[5] Since the photo ID requirement enacted in SB 14 does not apply to absentee voting, it is important to review data relating to past use of absentee voting by Texas's registered voters, and such data were requested in Intervenors' document requests.

[6]The witnesses produced in response to the 30(b)(6) witnesses could not testify fully and responsively on key issues, raising the real probability that further 30(b)(6) depositions will have to be taken, further delaying discovery. *See, e.g.*, testimony of C. Johnson-Lawson, explaining repeatedly that she could not identify the fields in the License To Carry database where information resides as to current or expired licenses. Johnson-Lawson Tr., at 43: 18 – 45:12. (Ex. E, attached hereto)

astonishingly, after vigorously fighting the production of data containing full Social Security numbers, Texas mistakenly produced to Intervenors data from the VR database that contained full Social Security numbers. Intervenors immediately notified the State and, at the State's request, Intervenors ceased all review of the VR data that had been provided, with the State sending a representative from Texas to collect the VR data disks personally. Although Texas promptly replaced the disks, valuable time was lost yet again. And, most recently, Intervenors learned that they are unable to confirm whether they can access all entries in the DLS database data provided without additional (record layout) information from the State, which should have been provided at the outset.[7]

On Friday, April 20, after reviewing the expedited transcript of the Rule 30(b)(6) deposition, Intervenors sent a letter to Texas asking it to produce a list of the VR database fields that day, immediately (within one business day) produce data in additional fields from the DLS and LTC databases identified in the letter, and provide other technical information so as to avoid the problems with accessing the data that have occurred heretofore. (4/20/2012 Letter from E. Rosenberg to M. Frederick, Ex. F, attached hereto). The State responded by e-mail later that day, advising Intervenors that it would get back to Intervenors "by early next week." (4/20/2012 E-mail from P. Sweeten to E. Rosenberg, Ex. G, attached hereto). To date, Intervenors have not received any additional VR database field information, data, or other technical information from the State.

IV. Texas Has Chosen To Interpose Privilege Objections At The Expense Of The Schedule.

Texas has the right to assert privilege objections, and it has done so repeatedly and broadly since this litigation has started. What it does not have a right to do, however, is to insist

[7] Delays are inherent in litigation. When, however, one party has successfully obtained a schedule as expedited as this one, fairness dictates that even limited delays gain importance when viewed cumulatively.

on an extremely expedited schedule when its repeated assertions of privilege have resulted in weeks, if not months, of delay in discovery. Had Texas been serious about allowing full discovery in this case consistent with its desire for an expedited schedule, it could have – and should have – acted differently.

For example, rather than filing a Motion for Protective Order making a broad claim of legislative privilege – unconnected to any particular legislator's assertion of privilege – it could have indicated at the outset which legislators intended to assert the privilege. This would have saved the month that has been consumed on Texas's Motion.

Furthermore, Texas could have – and should have – produced a privilege log on day one of this litigation identifying all the types of privilege that are claimed (including the specific legislators claiming any such privileges), and then asked the Court to resolve the specific privilege issues immediately. Instead, Texas has produced "rolling" privilege logs accompanying its "rolling" production, which will in turn require "rolling" briefing on successive privilege claims. Briefing on the applicability and scope of those privileges is now scheduled to run into May, making a July trial impossible.

Indeed, shortly after the Court issued its April 20 decision denying Texas's Motion for a Protective Order, Texas made clear that its claim of legislative privilege goes beyond that claimed in that motion. In its April 20 decision, the Court stated that "because Texas has sought only protection from 'discovery of communications between members of the state legislature, communications between state legislators and their staff, and communications between state legislators and their constituents,' [citation omitted] Texas will presumably produce responsive documents from any legislators or staff members that fall outside the scope of the aforementioned communications." Order, at 3. Notwithstanding this statement by the Court, Texas provided a privilege log later that day in which it notified the parties that it is withholding – on the basis of

legislative privilege – documents reflecting communications between the Secretary of State and Texas legislators. *See* Office of the Secretary of State Privilege Log (Ex. H, attached hereto). Texas has not explained why its original motion did not encompass this aspect of its legislative privilege claim, and apparently would now have the parties and the Court engage in yet another round of briefing and decision-making regarding legislative privilege. Obviously, any such briefing would occasion a further delay in the discovery schedule.

V. Texas Has Chosen To Force Defendants To Subpoena Individual Legislators At The Expense Of The Schedule.

Pursuant to this Court's order, Texas has now advised Defendant and Intervenors that some of the legislators whom the United States and Intervenors wish to depose would appear for depositions without a subpoena (subject, nevertheless, to the possible assertion of legislative privilege). However, the list omitted other legislators identified by the United States and Intervenors, as well as legislative staff that were identified for deposition.[8] Thus, it appears that many potential deponents will not voluntarily appear for depositions in this case because they allegedly are "independent State officers," and claim they only would appear pursuant to subpoenas issued by a court in Texas. This points to yet more rounds of briefing before this Court (as to the "independent State officer" issue), and perhaps courts in Texas as well (if legislative privilege is litigated there as well).

Texas cannot have it both ways. Either discovery can take place expeditiously with the cooperation of Texas's legislators – who passed the legislation at issue and whose purposes are

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[8] Omitted legislators and staff include Representative Leo Berman, Representative Joe Straus, Representative Dwayne Bohac, Karina Davis, and Deniece Davis. Their omission implies that these persons will not voluntarily agree to be deposed. *Compare* 3/19/2012 Maranzano letter (Ex. I, attached hereto) *and* 4/18/2012 Rosenberg Email (Ex. J, attached hereto) *with* 4/20/2012 Tx. Not. at 4 (Dckt. 83).

unequivocally deemed relevant by the governing statute – or it cannot. And if it cannot, discovery must be extended and the trial must be postponed.

VI. Intervenors Will Be Prejudiced If Discovery Is Not Extended.

More than four weeks have passed since this Court ordered the expedited discovery requested by Texas. Yet, to date, Texas has failed to provide to Intervenors the most basic of information – field listings and clearly relevant data from the VR, DLS, and LTC databases, which would allow Intervenors and their experts to fully begin their analyses. Texas has improperly withheld numerous documents from production under the rubric of a legislative privilege assertion whose relevance and scope still must be determined. Texas has otherwise produced documents at such a slow pace that what Texas itself asserts is the bulk of its production did not occur until three days ago. No depositions have been taken, except for a 30(b)(6) deposition. For all intents and purposes, the parties are still at the starting gate of discovery.

Even were Texas to immediately cure the deficiencies that have occurred to date, and it was possible for depositions to begin in earnest in mid-May, the parties are at least five weeks behind schedule. The original schedule put enormous pressure on the United States and Intervenors to complete meaningful discovery. Shortening it by a third renders it impossible for Intervenors to review and analyze the thousands of relevant documents, undertake the necessary depositions, and perform the expert analyses needed to be performed prior to trial.

CONCLUSION

For the reasons set forth above, the Defendant-Intervenors respectfully request that this Court grant the motion to clarify the schedule, and issue an order extending discovery and adjourning the July 9 trial date.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 23rd, 2012, the foregoing Motion was filed with the Clerk of the Court using the CM/ECF system which will electronically serve all counsel of record.

/s/ Ezra D. Rosenberg

Ezra D. Rosenberg