IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

WENDY DAVIS, MARK VEASEY, *et al.*, *Plaintiffs,*	§
v.	§ CIVIL ACTION NO. § SA-11-CA-788-OLG-JES-XR § [Lead Case]
RICK PERRY, *et al.*, *Defendants.*	§
LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), *et al.*, *Plaintiffs,*	§
v.	§ CIVIL ACTION NO. § SA-11-CA-855-OLG-JES-XR § [Consolidated Case]
RICK PERRY, *et al.*, *Defendants.*	§

DAVIS-VEASEY AND LULAC PLAINTIFFS' JOINT ADVISORY TO THE COURT

On September 7, 2012, this Court issued an order seeking the parties' written advisories on how the Court should proceed after the November 2012 elections. (Dkt. # 719).[1] Thereafter, on November 14, 2012, this Court supplemented its earlier orders and directed the parties to "include in their filing a statement of whether this court should place this case in an administrative stay pending a decision from the Supreme Court on the § 5 issue" in *Shelby County, Alabama v. Holder*. (Dkt. #723). The Davis-Veasey and LULAC Plaintiffs respectfully submit this advisory addressing each of the questions outlined by the Court.

[1] The parties were initially instructed to file their written advisories on or before December 1, 2012, but that deadline was later extended to Monday, December 3, 2012. (Dkt. #721).

1. Whether the State's appeal of the D.C. Court's ruling affects the Court's ability to exercise its remedial authority and proceed on the merits of the remaining challenges to the enacted plans.

As we explain in detail below, the State's appeal of the D.C. Court's ruling has no impact on this Court proceeding to order a final remedy with respect to some, but not all, of the claims in this case.

This lawsuit was brought challenging both the benchmark plan (S100) and the plan (S148) enacted by the State of Texas in 2011. Plaintiffs claimed that the benchmark plan (S100) was malapportioned in violation of the one-person, one-vote requirement of the Fourteenth Amendment to the United States Constitution. With regard to the enacted plan (S148), plaintiffs claimed that the enacted plan did not meet the requirements of Section 5 of the Voting Rights, and that the absence of timely preclearance of the senate plan required this Court to impose an interim remedy for the 2012 elections. Plaintiffs also alleged that Plan S148 was enacted with a racially discriminatory purpose and effect, would have a dilutive impact on minority voters, and thus violated Section 2 of the Voting Rights Act, as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. See Plaintiffs' Complaint (Dkt. #1).

The Plaintiffs herein have prevailed on their claims that the benchmark plan was malapportioned in violation of the one-person, one-vote requirement. Thus, this Court should enter final judgment in Plaintiffs' favor on that claim.

Plaintiffs also claimed that the State's enacted senate plan (S148) would not gain Section 5 preclearance in time for the 2012 elections and asked this Court to impose a plan "to remedy the existing constitutional violation of Plaintiffs' rights and to protect

their rights to cast an undiluted vote for the state senate." *Id*., at ¶ 23 and Count III of Plaintiffs' Complaint. Plaintiffs have thus prevailed on that claim as well as they obtained a remedial plan that this Court ordered into effect (Plan S172). Thus, this Court should also enter a judgment on that claim, and such a ruling is not affected by the State's appeal of the D.C. ruling or any decision in the *Shelby County* case.

In addition, the Davis-Veasey and LULAC plaintiffs also alleged in this case that Plan S148 was enacted with a racially discriminatory purpose and will have a racially discriminatory impact in violation of Section 2 of the Voting Rights Act, as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. Trial has been held in this Court on those claims and Plaintiffs have presented this Court with evidence in support of that claim.

Plaintiffs here also were Defendant-Intervenors in the D.C. action and presented evidence of racially discriminatory intent and effect to that three-judge court as well. That evidence included evidence that the 2011 redistricting process was characterized by highly irregular and racially exclusionary legislative tactics, including the casting aside of the traditional 2/3 rule in the senate, which prevented all of the senators representing majority-minority districts from effectively participating in the redistricting process. That and other evidence of racially discriminatory procedures used by the State to enact a senate plan in 2011 led the D. C. Court to conclude that the State of Texas acted with a discriminatory purpose in redrawing Senate District 10 by deliberately and systematically fracturing minority communities in Senate District 10, particularly in light of the State's lengthy history of suppression of minority voting rights. Plan S148 has been denied the requisite preclearance and the decision of the D.C. Court is a final judgment. The State

has not sought a stay of that decision pending its appeal to the Supreme Court. Thus, because Plan S148 has not been precleared, it is "not effective as law[.]". *Connor v. Waller*, 421 U.S. 656 (1971) (*per curiam*).

This Court's interim plan (S172) remedies certain of the claims in this case. The interim plan remedies the malapportionment of the benchmark plan (S100), and remedies the proven violation of Section 5. That interim map returned Senate District 10 to the exact way it was drawn in the benchmark plan (S100).[2] Under the benchmark plan, which was precleared back in 2001, minority voters elected their candidate of choice in 2008. The State of Texas deliberately destroyed that district in the 2011 round of redistricting, intentionally and systematically fracturing minority communities during a highly irregular and racially exclusionary legislative process. There is no contention that the benchmark plan (S100) was enacted with a racially discriminatory intent. Indeed, that plan unites many (but not all) of the politically cohesive minority communities in Tarrant County.

This Court's interim remedial plan (S172)) restored SD 10 to its pre-2011 configuration and, in the 2012 elections, minority voters coalesced once again and re-elected Senator Davis as their candidate of choice in Senate District 10. *See* Elections: November 6, 2012 General and Special Election Results – State Senator – District 10, TARRANT COUNTY, http://tcweb.tarrantcounty.com/evote/lib/evote/2012/Nov6/results/contest_21.pdf (last

[2] This was possible because benchmark Senate District 10 was well within the acceptable population deviation for state legislative districts.

visited November 26, 2012).[3] Thus, the plan imposed by this Court earlier this year can serve as a remedial state senate plan for the State of Texas. And the legality of the remedial plan ordered into effect by this Court will be completely unaffected by either the State's pending appeal of the D.C. case or the outcome in the *Shelby County, Alabama* case. Accordingly, the Davis-Veasey and LULAC Plaintiffs believe this Court should adopt the interim plan as the Court's final remedial plan at this time.[4]

If Texas is unsuccessful in its pending appeal and the Court in the *Shelby County* case leaves Section 5 intact, Plan S148 remains null and void as a matter of law. In that case, this Court would not have to adjudicate whether Plan S148 meets the requirements of Section 2 and whether that plan was enacted with a racially discriminatory purpose in violation of the United States Constitution.

If this Court were to proceed to enter a final judgment as described above, and if Texas is successful in its appeal of the D.C. Court ruling, or if the Supreme Court strikes down Section 5 in the *Shelby County* case, Texas might then attempt to impose Plan S148 to replace the final remedial plan ordered into effect by this Court. This Court would then proceed to decide the remaining claims: whether Plan S148 complies with Section 2 of the Voting Rights Act and whether the plan is free of purposeful discrimination under the United States Constitution.

Accordingly, this Court may decide to stay its hand on the Section 2 and constitutional (intentional discrimination) claims in this case pending a decision in Texas'

[3] It is worth noting that minority voters played such a decisive role in the 2012 elections in SD 10 that Senator Davis' winning margin in the November 2012 general election came from 11 key minority voting precincts.

[4] The fact that this Court's interim plan for the state senate may serve as a final remedial plan stands in sharp contrast to the interim plans for the State House and the Congressional Districts, which is the subject of a separate advisory being filed today.

appeal of the redistricting ruling by the D.C. Court or until a decision by the Supreme Court in the *Shelby County, Alabama* case. Even if the Court does so, however, there is no reason for this Court not to enter a partial judgment in Plaintiffs' favor now on the one-person, one-vote and Section 5 claims. As noted above, see page 3, *supra*, those claims have been fully proven and relief has been afforded to the Plaintiffs pursuant to those claims. Neither a decision in the *Shelby County* case nor a decision in Texas' appeal of the D.C. Court ruling will have any effect on those claims.

2. The timing of ruling on the remaining pending motions.

This Court should proceed to issue a judgment with respect to the malapportionment claim and the claim that the State failed to obtain Section 5 preclearance of its 2011 plan in time for the 2012 elections. Because Plaintiffs are prevailing parties on those claims, Plaintiffs intend to file promptly upon issuance of a judgment a motion for attorneys' fees, expenses and costs respecting those claims. The Court would then rule on the motion in due course.

3. Whether any of the legal challenges asserted in these proceedings have become moot as the result of the D.C. Court's ruling on Section 5 challenges.

The Section 2 claims and claims of unconstitutional racial discrimination respecting the enacted Senate plan (S148) are moot in view of the D.C. Court's ruling.

4. A proposed litigation plan and schedule for reaching the merits of the remaining Section 2 and constitutional challenges.

If this Court issues a judgment in Plaintiffs' favor on the malapportionment claim and Section 5 claims as described in section 1, above, and either dismisses the remaining Section 2 and constitutional claims as moot or holds them in abeyance pending the

Supreme Court's ruling in the Texas appeal of the D.C. Court ruling or in the *Shelby County* case, Plaintiffs would promptly file a motion for attorneys' fees, expenses, and costs with respect to those claims pursuant to the Federal Rules of Civil Procedure and the Local Rules of this Court.

5. Anticipated length of time it will take to reach the merits of the remaining challenges and prepare remedial plans.

See Plaintiffs' response to Number 4, above.

6. Any 2014 election deadlines coming up in 2013 that the Court should be aware of in terms of issuing remedial plans in advance of the 2014 election cycle.

By issuing a ruling at this time that the interim remedial plan used in 2012 will become the final remedial plan for the Texas state senate, this Court would avoid any issues with respect to the timing of a remedial plan in advance of the 2014 election cycle. Such a ruling would give the State and the public notice of the state senate plan to be used in future elections and eliminate any uncertainty for voters and local election officials with respect to which plan will be used in future elections.

7. Whether the parties anticipate the Texas legislature will take up the issue of redistricting during its next regular session.

The Plaintiffs are unaware whether the State of Texas will attempt to take up the issue of senate redistricting during the 2013 regular session. In light of the State's lengthy history of suppression of minority voting rights, the State should be on notice that Plaintiffs herein will challenge any effort to enact a plan that fractures or fragments the politically cohesive minority communities that comprise SD 10. Furthermore, as noted above, the 2011 redistricting process was characterized by highly irregular and racially

exclusionary legislative tactics, including the casting aside of the regular 2/3 rule in the senate in order to prevent the senators representing majority-minority districts from effectively participating in the redistricting process. If the Texas senate in 2013 once again casts aside the 2/3 rule and/or enacts a senate redistricting plan that harms minority voters in 2010, they will find themselves back in Court for yet another protracted legal battle.

There is also legal authority suggesting that if the State of Texas attempts to dismantle SD 10 in 2013 and impose new districts in the Dallas Fort Worth region, or otherwise attempts to replace the interim plan (S172) with a new senate plan, then all 31 Texas senators must stand for re-election in 2014. See *Armbrister v. Morales*, 943 S.W. 2d 202 (1997).

8. If the Texas Legislature does take up redistricting, how will that affect the Court's future course of action herein?

See Plaintiffs' response to Number 7, above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of this motion upon each attorney of record and filed this document electronically in the ECF files of this Court on this the 3rd day of December, 2012.

/s/ J. Gerald Hebert
J. GERALD HEBERT