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

SHANNON PEREZ, *et al.*,

Plaintiffs,

and

UNITED STATES of AMERICA,

Plaintiff-Intervenor,

v.

STATE OF TEXAS, *et al.*,

Defendants.

Civil Action No. 5:11-cv-360 (OLG-JES-XR)
Three-Judge Court
[Lead Case]

UNITED STATES' ADVISORY & RESPONSE TO TEXAS' MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

In this case, the United States has asserted claims only against the 2011 Congressional and 2011 House plans. *See* Compl. ¶¶ 69–71 (ECF No. 907). The United States has never asserted any claim against, nor sought to invalidate any district in, either the 2013 Congressional plan or the 2013 House plan. *See id.* The Private Plaintiffs have brought claims against both 2011 plans and both 2013 plans.

The Court previously ordered "that the liability and remedial phases of trial will be bifurcated" and that "the liability phase will be divided into four segments" to address each of the challenged plans. Order at 1–2 (ECF No. 1018). Only after "all four segments of trial on liability issues have been completed" and "the Court has reached a decision on liability," the case would proceed to "the remedial phase of trial." *Id.* at 3.

In the current posture, the United States agrees that "the remedial phase of trial" should not proceed until after the Court has "reached a decision on liability" with respect to each of the four challenged plans. *Id.* at 2–3. Accordingly, the Court should not entertain "evidence and legal argument on proposed remedial plans and proposals for prospective Section 3(c) relief" until it has conducted trial and issued a liability decision regarding the 2013 Congressional Plan and the 2013 House Plan. *Id.* at 3.

Adhering to the Court's previously-ordered trial plan is necessary and appropriate here. Because the parties have not yet had "[t]he opportunity to be heard" regarding the 2013 plans, *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 n.4 (1996), and because "the nature of the violation determines the scope of the remedy," *Milliken v. Bradley*, 418 U.S. 717, 749 (1974), the Court cannot fully address the question of remedies now. In fact, the Court cannot enter full and final relief until it has received a complete evidentiary record and made findings regarding "the nature of the violation," if any, on the remaining claims. *Milliken*, 418 U.S. at 749. Thus, judicial economy militates strongly in favor of completing the liability phase and assembling a complete record before inviting the parties "to present evidence and legal argument" on proposed remedies. Order at 3.

The alternative course—proceeding with a partial remedial phase tied to the 2011 plans now and revisiting remedy after trial and decision on the 2013 plans—would create piecemeal litigation and waste the resources of the parties and the Court. In the first place, any order "granting or denying" an injunction at this juncture likely would prompt an immediate direct appeal to the Supreme Court. 28 U.S.C. § 1253. Such an appeal from a partial remedy would fracture the case into two halves, with one half pending before the Supreme Court and the other half remaining in this Court. The half remaining in this Court would either be stayed or proceed

along a parallel track with the half pending in the Supreme Court. In either scenario, the parties and the courts would be required to expend duplicative resources litigating this dispute in two separate fora and could face undue delay in the ultimate resolution of this suit.

Moreover, proceeding with a partial remedy now not only would divide the case along parallel tracks but also would multiply and complicate the remedial proceedings. Indeed, the Court still would be required to revisit the question of remedy later if it finds constitutional or statutory violations in the 2013 plans—and might wish to revise "the scope of the remedy" in light of the new evidence even if it does not find any such violations. *Milliken*, 418 U.S. at 749. And, of course, any later order "granting or denying" an injunction would prompt a *second* direct appeal to the Supreme Court. 28 U.S.C. § 1253.

For these reasons, the United States agrees that the Court should adhere to its previously-ordered plan and complete the liability phase with respect to the 2013 plans before it proceeds to the remedial phase. Accordingly, if the Court maintains that plan, the United States believes that there is no basis for an interlocutory appeal at this juncture.

Date: April 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2017, I served a true and correct copy of the foregoing via the Court's ECF system on all counsel of record.

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