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

SHANNON PEREZ, *et al.*,

Plaintiffs,

v.

STATE OF TEXAS, *et al.*,

Defendants.

CIVIL ACTION NO.
SA-11-CA-360-OLG-JES-XR
[Lead case]

DEFENDANTS' RESPONSE TO PLAINTIFFS' JOINT MOTION FOR LEAVE TO REOPEN THE RECORD TO PROVIDE SUPPLEMENTAL EVIDENCE AND OBJECTIONS TO PLAINTIFFS' SUPPLEMENTAL EXHIBITS

Plaintiffs' claims against the 2011 redistricting plans are moot because the Texas Legislature has enacted bills that repeal those plans and establish new redistricting plans for 2014 and future elections. Although this case no longer presents an Article III case or controversy, Plaintiffs have moved for the admission of 400 exhibits that they contend are relevant to claims relating to the 2011 and 2013 redistricting plans. These exhibits consist of communications regarding the formation of the 2011 redistricting plans, expert reports from the preclearance trial in *Texas v. United States,* 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded*, No. 12-496, 2013 WL 3213539 (U.S. June 27, 2013), and demonstrative materials created by Plaintiffs for use during the preclearance trial.

Plaintiffs' request should be denied for several reasons. First, the exhibits are of no probative value to any live claim in this case. None of the exhibits should

be admitted to the record in support of claims against the 2011 maps because Texas recently repealed those maps and therefore those claims are moot. Even if the claims are not moot, many of the exhibits offered by Plaintiffs are from the preclearance trial (which involved different legal issues) and therefore offer no probative value to this case. Similarly, the exhibits should not be admitted in support of the recently urged claims against the 2013 maps. It is dubious whether exhibits regarding the creation of the 2011 maps could at all be relevant to the Legislature's passage of the 2013 maps.

Second, Plaintiffs cannot carry their burden to provide a "*bona fide*" explanation for their failure to introduce these exhibits earlier. All of the exhibits proffered by Plaintiffs have been in their possession since at least January 2012 or earlier. Worse, much of what Plaintiffs *now* argue should be included in the record could have been elicited and introduced before the record in this case even closed. For instance, Plaintiffs offer expert reports from the *preclearance* trial even though Plaintiffs were given the opportunity to retain experts and elicit expert testimony relevant to the legal issues in *this* case. They also seek to admit demonstratives used during the preclearance trial, which easily could have been produced and relied upon at trial in this case. Plaintiffs' failure to elicit that expert testimony or produce such demonstratives in *this* case does not provide a basis to reopen the record.

Finally, reopening the record at this late date would prejudice the State. Admitting additional evidence without granting the State the opportunity to cross-examine the proponent of the new evidence *in the context of the legal issues in this*

case would be severely prejudicial. And holding additional evidentiary hearings at this late date—on the eve of the 2014 election cycle—hardly makes sense given Plaintiffs' delay. This Court should therefore deny Plaintiffs' motion to reopen the record.

I. There Is No Basis For This Court To Reopen The Record To Allow The Presentation of Additional Evidence.

A motion to reopen a case to submit additional proof is within the court's discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971); *see also* FED. R. CIV. P. 59(a)(2). This discretion, however, is not limitless. "Among the factors the trial court should examine in deciding whether to allow a reopening are the importance and probative value of the evidence, the reason for the moving party's failure to introduce the evidence earlier, and the possibility of prejudice to the non-moving party." *Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 814 (5th Cir. 1996) (citations omitted). The trial court's decision "will not be disturbed in the absence of a showing that it has worked an injustice in the cause." *Id.*

A. The Supplemental Exhibits Have No Probative Value.

Plaintiffs' motion to reopen the evidence should be denied because the evidence they seek to admit has no probative value. "Trial courts as a rule act within their discretion in refusing to reopen a case where the proffered 'new' evidence is insufficiently probative to offset the procedural disruption caused by reopening." *Rivera-Flores v. Puerto Rico Tele. Co.*, 64 F.3d 742, 746 (1st Cir. 1995). Because the 2011 redistricting plans have since been repealed by the passage of the 2013 redistricting plans, this Court lacks jurisdiction to make any additional

findings or enter a final judgment with respect to the 2011 plans. *See* Texas's Opposition To Plaintiffs' Motions To Amend Their Complaints and Motion To Dismiss Plaintiffs' Claims Against the 2011 Plans As Moot (Doc. 786). There is thus no need for the Court to admit additional evidence related to claims it lacks subject matter jurisdiction to consider. Moreover, none of the evidence proffered by Plaintiffs can be used to support relief provided under section 3(c) of the Voting Rights Act. Because this Court lacks jurisdiction to make a finding of intentional violation of the Fourteenth or Fifteenth Amendment with respect to the 2011 redistricting plans, bail-in based on findings relating to the 2011 maps would not comport with the language of section 3(c). *See* Texas's Brief on Section 3(c) (Doc. 824). Accordingly, Plaintiffs have not—and cannot—demonstrate the probative value this evidence has to any claims related to the 2011 plans.

Even if this Court had jurisdiction over any claims related to the 2011 redistricting plans, it should not reopen the record to admit Plaintiffs' evidence, which primarily consists of email communications, expert reports, newspaper articles, and demonstrative aids that were introduced in the preclearance trial. For instance, Plaintiffs fail to explain how expert reports from the preclearance trial are relevant to the section 2 and Constitutional challenges in this case. All of the expert reports are from experts whose opinions were never disclosed in this case pursuant to the Federal Rules of Civil Procedure or the Court's scheduling orders. But even if these experts had been properly disclosed, this Court should exclude the reports as they all involve an analysis of the 2011 plans under section 5—a legal standard that is distinct from the one required under section 2 and the

Constitution. In the preclearance proceeding, the State had the burden of proof to demonstrate that the 2011 plans would not lead to retrogression in the position of racial minorities and would not have a discriminatory purpose. *See Beer v. United States*, 425 U.S. 130, 141 (1976); *Reno v. Bossier Parish School Board* (*Bossier II*), 528 U.S. 320, 325 (2000). None of the expert reports purport to offer an analysis of the redistricting plans under section 2 or the Constitution, and as a result, they lack any probative value to any remaining challenges to the 2011 plans.

Likewise, Plaintiffs cannot establish how the demonstrative aids they created for the preclearance trial in the D.C. Court are relevant to the remaining claims in this proceeding. Plaintiffs seek to admit dozens of maps shaded to show political affiliation or demographics, all relating to the 2011 redistricting plans or demonstration plans considered by the 2011 Legislature.[1] Because all of the claims to the 2011 plans are moot, these demonstrative aids have no probative value. Nor can Plaintiffs suggest that the information in these exhibits is not cumulative of other evidence. This Court has sufficient variations of the same maps and data in the existing record, and the inclusion of additional maps—none of which have been properly authenticated—would be cumulative.[2] *See Kelly v. Commercial Union Ins. Co.*, 709 F.2d 973, 980 (5th Cir. 1983) (it is within the trial court's discretion to deny a motion to reopen where proffered evidence is cumulative); *Joseph v. Terminix Int'l*

[1] *See, e.g.,* Plaintiffs' Supplemental Exhibit List (Doc. 790-1) at Tabs 15, 85-121, 295-298, 301-307, 327-328, 363-365.

[2] This same objection also applies to exhibits reflecting reports and screenshots from the RedAppl software program, racially polarized voting analyses for districts in the 2011 redistricting plans, and charts summarizing data contained in other exhibits. *See, e.g.,* Plaintiffs' Supplemental Exhibit List (Doc. 790-1) at Tabs 9-10,12, 14, 16-17, 62-66, 71, 265, 339-341. The data in these exhibits are duplicative of other reports and analyses in the Court's record.

Co., 17 F.3d 1282, 1285 (10th Cir. 1994) (holding that the trial court did not abuse its discretion in excluding evidence where the "new" evidence would have been cumulative).

Finally, Plaintiffs also seek to offer numerous exhibits containing objection letters that the Department of Justice issued to the State of Texas and other local jurisdictions, some of which date back to the 1970s.[3] These exhibits lack probative value to show the intent of the Legislature when it passed the 2011 redistricting plans or the effect of those plans. *See Prejean v. Foster*, 83 Fed. App'x 5, 8-9 (5th Cir. 2003) (finding that the trial court did not abuse its discretion in excluding legislative history and preclearance materials from a series of redistricting acts passed by the Louisiana Legislature in the years before and after the passage of the challenged legislation).

To the extent Plaintiffs' motion can be construed as offering these exhibits to support their claims against the 2013 redistricting plans, this Court should deny Plaintiffs' motion. Plaintiffs' challenges to the 2013 plans are still in the initial stages. Plaintiffs' opposed motions seeking leave to add claims against the 2013 plans are still pending, the deadline to file a responsive pleading to the amended claims has not yet passed, this Court has not yet entered a scheduling order, and the parties have not yet engaged in discovery. It would be inappropriate to allow Plaintiffs to prematurely "supplement" a record that does not yet exist as to those claims. Moreover, this evidence is neither relevant to passage of the 2013 plans nor does it purport to show the motivations or intentions of the Legislature when it

[3] *See, e.g.,* Plaintiffs' Supplemental Exhibit List (Doc. 790-1) at Tabs 190-250.

drew certain districts during the 2013 legislative session. Plaintiffs insist that because the 2011 plans were used as the baseline for the Court's interim plans and the Legislature adopted some aspects of interim plans in the 2013 plans, email communications regarding efforts to draw the 2011 plans are relevant to their claims of intentional discrimination under the Constitution. *See, e.g.,* Plaintiffs' Supplemental Exhibit List (Doc. 790-1). But documents relating to prior redistricting acts passed by the Legislature before the passage of the 2013 plans should be properly excluded as irrelevant. *See Prejean*, 83 Fed. App'x at 8-9. Accordingly, Plaintiffs have failed to establish that the exhibits have any probative evidentiary value and are not cumulative.

B. Plaintiffs Offer No Justification For Their Failure To Introduce This Evidence Earlier.

This Court should further deny Plaintiffs' request to reopen the record because they offer no credible explanation for why this evidence was not introduced earlier. A court must consider whether "the moving party's explanation for failing to introduce the evidence earlier is *bona fide*." *Rivera-Flores*, 64 F.3d at 746. A change in legal standards on appeal may justify reopening to the extent that an issue "emerged after the original record was made." *Patterson v. American Tobacco Co.*, 586 F.2d 300, 304 (4th Cir. 1978). Inadvertence, however, is not a compelling explanation for failing to offer available evidence in the first instance. *See Love v. Scribner*, 691 F. Supp. 2d 1215, 1235 (S.D. Cal. 2010).

Plaintiffs contend that they proceeded without delay in seeking to supplement the record because they filed their motion by the deadline in the Court's

May 29, 2013 order. *See* Plaintiffs' Opposed Joint Motion for Leave to Reopen the Record (Doc. 789) at 6. But this alone is not a sufficient explanation to justify reopening the record in this case. Although the Court's order provided Plaintiffs with a deadline to supplement the record, the issuance of an order and Plaintiffs' adherence to the deadline does not excuse them from providing a reasonable explanation for failing to introduce the evidence in a timely manner. *See U.S. v. Crawford*, 533 F.3d 133, 138-39 (2d Cir. 2008) (holding that the district court abused its discretion in reopening the record where the government did not offer an explanation for failing to do so during its case-in-chief); *U.S. v. Nunez*, 432 F.3d 573, 579-80 (4th Cir. 2005) (holding that where the government moved to reopen the evidence "[u]pon prompting by the district court," the district court abused its discretion by admitting the evidence absent a "reasonable explanation" from the government for its failure to introduce that evidence at trial). "Where counsel fails to account adequately for the failure to elicit the evidence . . . there is substantial justification for refusing to reopen the record." *Blissett v. Lefevre*, 924 F.2d 434, 439 (2d Cir. 1991). Because Plaintiffs offer no reasonable explanation for not moving for the admission of this evidence sooner, this Court should deny their motion.

To the extent Plaintiffs argue that their request is reasonable because the evidence was unavailable to them during the trial in this case, this explanation is also insufficient to justify reopening the record. Defendants concede that some of the exhibits Plaintiffs proffer—namely, the email communications involving the mapdrawers—were not produced until the preclearance trial in the D.C. Court. But regardless of when these documents were produced, Plaintiffs had access to this

information since at least January 2012 and had access to this information during the evidentiary hearings held by this Court relating to the interim plans. Plaintiffs never once attempted to supplement the record. Instead, Plaintiffs waited over a year before moving for the admission of 400 new exhibits, none of which are relevant to the remaining claims in this case. The same is true with respect to the expert reports Plaintiffs seek to admit. During the section 2 trial, Plaintiffs had ample opportunity to proffer expert reports and testimony that were relevant to those claims. Plaintiffs should not be provided the opportunity to supplement the record with additional expert reports in a different proceeding from the same experts who testified almost two years ago. As a result, Plaintiffs' motion cannot be considered timely.

C. Admitting Plaintiffs' Supplemental Exhibits Would Result In Prejudice To Defendants.

Finally, admitting the evidence at this stage in the proceedings would work an injustice on Defendants. It is clear that "[r]eopening proof on the motion of one party long after trial has been completed can put the opposite party at a distinct disadvantage." *Ramsey v. United Mine Workers*, 481 F.2d 742, 753 (6th Cir. 1973). Reopening the record "should not imbue the [new] evidence with distorted importance, prejudice the opposing party's case, or preclude an adversary from having an adequate opportunity to meet the additional evidence offered." *U.S. v. Thetford*, 676 F.2d 170, 182 (5th Cir. 1982) (citations omitted). In particular, the non-moving party is prejudiced if it lacks the opportunity to cross-examine the proponent of the new evidence. *See, e.g., Greater Dallas Home Care Alliance v.*

United States, No. 398-CV-9768, 1998 WL 355464, at *1 (N.D. Tex. June 22, 1998) (refusing to reopen the record because it would require another hearing to give the non-movant the opportunity to cross-examine the author of a document); *cf. In re Harker*, 357 F.3d 846, 849 (8th Cir. 2004) (noting, in upholding a reopening of the record, that the non-movant was given an opportunity to cross-examine the proponent witness).

Allowing Plaintiffs to submit 400 additional exhibits to an already voluminous evidentiary record in this case would be prejudicial to Defendants and disruptive to current proceedings. Nearly all of the exhibits Plaintiffs offer are fraught with evidentiary problems as they contain inadmissible hearsay, have not been properly authenticated, and lack a proper foundation. The only way to potentially cure these evidentiary problems would be for this Court to conduct additional evidentiary hearings.

Plaintiffs' suggestion that there would be no prejudice to the State because it is "already familiar" with the evidence and had an opportunity to respond to the evidence in the D.C. Court misses the point. *See* Plaintiffs' Opposed Joint Motion for Leave to Reopen the Record (Doc. 789) at 6. The State would still suffer prejudice in this case because it has never had the opportunity to respond to this additional evidence in the context of the legal claims at issue before this Court. For instance, it is without question that Defendants would suffer prejudice if this Court were to admit the expert reports from the preclearance trial. Defendants have not had an opportunity to depose or cross-examine these experts for purposes of the section 2 or Constitutional claims Plaintiffs have asserted against the 2011 and

2013 plans. To mitigate any prejudice to Defendants, they should be entitled to an opportunity to cross-examine the experts and call witnesses in opposition. Given the procedural disruption that would ensue with further evidentiary proceedings, this Court should deny Plaintiffs' request to reopen the record. *See Thetford*, 676 F.2d at 182 (in the context of a motion to reopen, the proffered evidence should not prejudice the opposing party's case or preclude an adversary from having an adequate opportunity to meet the additional evidence offered).

II. If This Court Concludes That The Record Should Be Reopened, The Evidence Plaintiffs Seek To Introduce Is Inadmissible.

If this Court concludes that Plaintiffs have demonstrated that the record in this case should be reopened, the exclusion of Plaintiffs' supplemental exhibits is warranted because they are inadmissible. Defendants' objections to Plaintiffs' exhibits are stated in the attached Exhibit 1.

CONCLUSION

The Court should deny Plaintiffs' motion to reopen the record or, in the alternative, sustain all of Defendants' objections to Plaintiffs' exhibits.

Dated: August 5, 2013

Respectfully submitted.

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