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' MOTION FOR RECONSIDERATION OF PORTION OF ORDER ON SUPPLEMENTATION OF THE RECORD

After asking this Court to reopen the record to admit 400 new exhibits, the Task Force Plaintiffs now seek to reopen the record to admit trial testimony from the preclearance proceeding in the D.C. Court—a case where the judgment has since been vacated by *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). *See Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013). The Task Force Plaintiffs do not make this request pursuant to any order of the Court. Instead, this Court established a deadline for the parties to submit documentary evidence from the preclearance trial, but it expressly declined to create a submission deadline for trial testimony. *See* Order at 2 n.1 (Doc. 772). The

Task Force Plaintiffs ask this Court to reconsider its ruling in order to introduce cherry-picked portions of testimony from the preclearance trial.[1]

This Court should deny the Task Force Plaintiffs' request to reopen the record for the following reasons. First, the testimony from the preclearance trial is of no probative value to any live claim in this case. Because the Texas Legislature has enacted bills that repeal the 2011 redistricting maps, Plaintiffs' claims against these maps are moot. But even if the claims against the 2011 maps are not moot, the proffered trial testimony is not relevant to any claim at issue in this proceeding as that testimony was elicited in a separate trial governed by a different legal standard.

Second, the Task Force Plaintiffs have failed to offer a "*bona fide*" explanation for why they failed to move for the admission of this testimony earlier. This testimony could have easily been elicited during the trial before this Court. Indeed, all but two of the witnesses testified at both trials. The Task Force Plaintiffs should not be afforded an opportunity to supplement the record with additional testimony after they failed to develop such testimony during the nine-day trial in this case.

Finally, Defendants will suffer prejudice if this Court reopens the record to consider this testimony. The cherry-picked excerpts proffered by the Task Force Plaintiffs are misleading and fail to present the full context of the testimony of the

[1] The Task Force Plaintiffs seek to offer the testimony of the following individuals who testified either live or by deposition at both the section 2 trial and the preclearance trial: Gerardo Interiano, Ryan Downtown, Senator Seliger, Representative Solomons, Representative Veasey, David Saucedo, and Alex Jiminez. Representative Farias and Senator Rodriguez only testified at the preclearance trial.

witnesses. For instance, the proffered testimony of Representative Farias fails to include his admission that he believed the changes made by the Legislature to his district were motivated by partisanship goals, not intentional race discrimination. But the prejudice suffered by Defendants cannot be cured by sustaining an optional completeness objection and allowing Defendants to submit counter-designations. Admitting testimony from a different proceeding would prejudice Defendants because they have not had an opportunity to examine any of the witnesses on the specific topics addressed in the preclearance proceeding in the context of the legal claims here. Further, this Court should not be subjected to assessing the credibility of witnesses based on a transcript from a different proceeding when the Task Force Plaintiffs could have elicited the testimony from the same witnesses during the trial in this case. Accordingly, this Court should deny the Task Force Plaintiffs' motion.

ARGUMENT

Just as the Task Force Plaintiffs have failed to demonstrate why this Court should reopen the record to consider the presentation of additional documentary evidence from the preclearance trial, the same holds true with respect to the admission of trial testimony from the preclearance trial. A trial court should only reopen the record when the proffered evidence has probative value, the moving party is able to provide a reasonable explanation for not introducing the evidence earlier, and there is no possibility of prejudice of prejudice to the non-moving party. *See Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 814 (5th Cir. 1996) (citations omitted). None of those requirements are met here.

I. The Proffered Testimony Has No Probative Value.

The trial testimony the Task Force Plaintiffs seek to introduce is not probative to the remaining claims in this case. 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). Moreover, none of the trial testimony proffered by the Task Force 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 discrimination under the Fourteenth or Fifteenth Amendment with respect to the 2011 redistricting plans. *See* Texas's Brief on Section 3(c) (Doc. 824).

Even if these jurisdictional problems did not exist, the Task Force Plaintiffs still cannot demonstrate how testimony from the preclearance trial, which involved a different legal standard, is relevant to the claims in this proceeding. The Task Force Plaintiffs contend that the trial testimony is relevant because it provides context for some of the documentary evidence they have submitted. *See* Motion for Reconsideration (Doc. 834) at 9. That argument, however, only has merit if the documentary evidence itself is relevant to the remaining claims here. Because the documentary evidence is not relevant to the remaining live issues in this case and Defendants have never had an opportunity to respond to this evidence in the context of the legal issues in this case, the trial testimony has no probative value.

The Task Force Plaintiffs also cannot demonstrate how the proffered testimony is not cumulative of other testimony already in the record. This Court conducted a nine-day trial in 2011 and heard testimony from dozens of witnesses. The inclusion of additional testimony from many of the *same* witnesses who testified before this Court is cumulative and unnecessary. *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). Particularly when, the Task Force Plaintiffs have not even attempted to explain why such testimony could not have been elicited during the trial in this case or why other witnesses were never called to testify.

II. The Task Force Plaintiffs Fail To Offer Any Explanation For Not Moving For The Admission Of This Testimony Earlier.

The Task Force Plaintiffs have provided no explanation for failing to move for the admission of this testimony into the record earlier. Although this Court provided a schedule for the parties to move for the admission of additional documentary evidence into the record, the invitation from the Court to offer any additional evidence and the Task Force Plaintiffs' adherence to this deadline does not satisfy their burden to provide a "*bona fide*" explanation. *See Rivera-Flores v. Puerto Rico Tele. Co.*, 64 F.3d 742, 746 (1st Cir. 1995); *see also 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).

The preclearance trial occurred in January 2012, and the Task Force Plaintiffs never once moved for the admission of this testimony over the course of the last eighteen months. Instead, the Task Force Plaintiffs chose to stand idly by for over a year while this case progressed to its current procedural posture, never once suggesting that the Court should take additional evidence or testimony into the record from the preclearance proceeding. The Task Force Plaintiffs' failure to elicit testimony from certain witnesses during the section 2 trial is not a valid reason for reopening the record to admit testimony from another proceeding. Because the Task Force Plaintiffs have failed to offer a *bona fide* explanation for not moving for the admission of this evidence earlier, this Court should deny their motion.

III. Defendants Would Suffer Prejudice If The Record Is Reopened To Admit The Proffered Testimony.

Admitting the evidence at this stage of the proceedings would work an injustice on Defendants and would be severely disruptive to current proceedings. If this Court reopens the record to receive testimony from the preclearance trial, there is no question that the floodgates will open as other plaintiffs will move to submit their own designations from the preclearance trial, which lasted approximately two weeks and contains testimony from dozens of witnesses (many of whom testified before this Court). The Task Force Plaintiffs suggest that Defendants will suffer no

prejudice because this testimony was developed in the D.C. Court during the preclearance trial and Defendants were present. *See* Motion for Reconsideration (Doc. 834) at 9. But Defendants have never had an opportunity to develop testimony from these witnesses regarding the legal issues present in this case. As a result, admitting trial testimony from another proceeding—even one in which Defendants were a party—would still be unjust.

Additionally, the selected excerpts from the trial testimony proffered by the Task Force Plaintiffs are incomplete and misleading. The proffered testimony of Representative Farias is a perfect example of how the admission of only certain portions of the trial record would harm Defendants. This is because the portion of Representative Farias's testimony offered by the Task Force Plaintiffs intentionally leaves out the most important part—where he states directly and unequivocally that changes to the Bexar County map were motivated by partisanship goals, not racial discrimination. This Court, however, cannot simply remedy this prejudice by providing Defendants with the opportunity to submit counter-designations. Defendants will be severely prejudiced because they will not have an opportunity to examine Representative Farias or any other witness in the context of the legal issues in this case. To mitigate any prejudice to Defendants, this Court would have to conduct further evidentiary proceedings in order for Defendants to examine the witnesses. Given the procedural disruption that would ensue with further evidentiary proceedings, this Court should deny the Task Force Plaintiffs' motion. *See U.S. v. Thetford*, 676 F.2d 170, 182 (5th Cir. 1982) (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).

Likewise, the Task Force Plaintiffs suggest that there would be minimal prejudice because this Court has already made credibility determinations for many of the witnesses whose D.C. trial testimony is offered here. *See* Motion for Reconsideration (Doc. 834) at 10. But that does not make it easier for this Court to admit the testimony or erase the prejudice Defendants would suffer. Instead, it only highlights that the Task Force Plaintiffs had every opportunity in this Court to develop the record and elicit the necessary testimony from Gerardo Interiano, Ryan Downtown, Senator Seliger, Representative Solomons, Representative Veasey, David Saucedo, and Alex Jiminez—all of whom testified live or by deposition in both the section 2 trial and the preclearance trial. The Task Force Plaintiffs' failure to obtain their desired record in this case does not entitle them to reopen the record two years later.

CONCLUSION

The Court should deny the Task Force Plaintiffs' motion for reconsideration.

Dated: August 9, 2013

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Defense Litigation

J. REED CLAY, JR.
Special Assistant and Senior Counsel to the Attorney General

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN
Chief, Special Litigation Division
Texas Bar No. 00798537

ANGELA COLMENERO
Assistant Attorney General

MATTHEW H. FREDERICK
Assistant Solicitor General

P.O. Box 12548, Capitol Station
Austin, TX 78711-2548
(512) 463-0150
(512) 936-0545 (fax)

ATTORNEYS FOR THE STATE OF TEXAS, RICK PERRY, AND JOHN STEEN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing was sent on August 9, 2013, via the Court's electronic notification system and/or email to the following counsel of record:

DAVID RICHARDS
Richards, Rodriguez & Skeith LLP
816 Congress Avenue, Suite 1200
Austin, TX 78701
512-476-0005
davidr@rrsfirm.com

RICHARD E. GRAY, III
Gray & Becker, P.C.
900 West Avenue, Suite 300
Austin, TX 78701
512-482-0061/512-482-0924 (facsimile)
Rick.gray@graybecker.com

ATTORNEYS FOR PLAINTIFFS PEREZ, DUTTON, TAMEZ, HALL, ORTIZ, SALINAS, DEBOSE, and RODRIGUEZ

JOSE GARZA
Law Office of Jose Garza
7414 Robin Rest Dr.
San Antonio, Texas 78209
210-392-2856
garzpalm@aol.com

MARK W. KIEHNE
mkiehne@lawdcm.com
RICARDO G. CEDILLO
rcedillo@lawdcm.com
Davis, Cedillo & Mendoza
McCombs Plaza
755 Mulberry Ave., Ste. 500
San Antonio, TX 78212
210-822-6666/210-822-1151 (facsimile)

ATTORNEYS FOR MEXICAN AMERICAN LEGISLATIVE CAUCUS

GERALD H. GOLDSTEIN
ggandh@aol.com
DONALD H. FLANARY, III
donflanary@hotmail.com
Goldstein, Goldstein and Hilley
310 S. St. Mary's Street
San Antonio, TX 78205-4605
210-226-1463/210-226-8367 (facsimile)

PAUL M. SMITH, MICHAEL B. DESANCTIS, JESSICA RING AMUNSON
Jenner & Block LLP
1099 New York Ave., NW
Washington, D.C. 20001
202-639-6000

J. GERALD HEBERT
191 Somervelle Street, # 405
Alexandria, VA 22304
703-628-4673
hebert@voterlaw.com

JESSE GAINES
P.O. Box 50093
Fort Worth, TX 76105
817-714-9988
gainesjesse@ymail.com

ATTORNEYS FOR PLAINTIFFS QUESADA, MUNOZ, VEASEY, HAMILTON, KING and JENKINS

LUIS ROBERTO VERA, JR.
Law Offices of Luis Roberto Vera, Jr. & Associates
1325 Riverview Towers
San Antonio, Texas 78205-2260

NINA PERALES
nperales@maldef.org
MARISA BONO
mbono@maldef.org
Mexican American Legal Defense
and Education Fund
110 Broadway, Suite 300
San Antonio, TX 78205
210-224-5476/210-224-5382 (facsimile)
MARK ANTHONY SANCHEZ
masanchez@gws-law.com
ROBERT W. WILSON
rwwilson@gws-law.com
Gale, Wilson & Sanchez, PLLC
115 East Travis Street, Ste. 1900
San Antonio, TX 78205
210-222-8899/210-222-9526 (facsimile)

ATTORNEYS FOR TEXAS LATINO REDISTRICTING TASK FORCE, CARDENAS, JIMENEZ, MENENDEZ, TOMACITA AND JOSE OLIVARES, ALEJANDRO AND REBECCA ORTIZ

JOHN T. MORRIS
5703 Caldicote St.
Humble, TX 77346
281-852-6388

JOHN T. MORRIS, PRO SE

MAX RENEA HICKS
Law Office of Max Renea Hicks
101 West Sixth Street Suite 504
Austin, TX 78701
512-480-8231/512/480-9105 (facsimile)

ATTORNEY FOR PLAINTIFFS CITY OF AUSTIN, TRAVIS COUNTY, ALEX SERNA, BEATRICE SALOMA, BETTY F. LOPEZ, CONSTABLE BRUCE ELFANT, DAVID GONZALEZ, EDDIE RODRIGUEZ, MILTON GERARD WASHINGTON, and SANDRA SERNA

210-225-3300
irvlaw@sbcglobal.net
GEORGE JOSEPH KORBEL
Texas Rio Grande Legal Aid, Inc.
1111 North Main
San Antonio, TX 78213
210-212-3600
korbellaw@hotmail.com

ATTORNEYS FOR INTERVENOR-PLAINTIFF LEAGUE OF UNITED LATIN AMERICAN CITIZENS

ROLANDO L. RIOS
Law Offices of Rolando L. Rios
115 E Travis Street, Suite 1645
San Antonio, TX 78205
210-222-2102
rrios@rolandorioslaw.com

ATTORNEY FOR INTERVENOR-PLAINTIFF HENRY CUELLAR

GARY L. BLEDSOE
Law Office of Gary L. Bledsoe
316 W. 12th Street, Ste. 307
Austin, TX 78701
512-322-9992/512-322-0840 (facsimile)
garybledsoe@sbcglobal.net

ATTORNEY FOR INTERVENOR-PLAINTIFFS TEXAS STATE CONFERENCE OF NAACP BRANCHES, TEXAS LEGISLATIVE BLACK CAUCUS, EDDIE BERNICE JOHNSON, SHEILA JACKSON-LEE, ALEXANDER GREEN, HOWARD JEFFERSON, BILL LAWSON, and JUANITA WALLACE

VICTOR L. GOODE
Asst. Gen. Counsel, NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-5120
410-580-5120/410-358-9359 (facsimile)

STEPHEN E. MCCONNICO
smcconnico@scottdoug.com
SAM JOHNSON
sjohnson@scottdoug.com
S. ABRAHAM KUCZAJ, III
akuczaj@scottdoug.com
Scott, Douglass & McConnico
One American Center
600 Congress Ave., 15th Floor
Austin, TX 78701
512-495-6300/512-474-0731 (facsimile)

ATTORNEYS FOR PLAINTIFFS CITY OF AUSTIN, TRAVIS COUNTY, ALEX SERNA, BALAKUMAR PANDIAN, BEATRICE SALOMA, BETTY F. LOPEZ, CONSTABLE BRUCE ELFANT, DAVID GONZALEZ, EDDIE RODRIGUEZ, ELIZA ALVARADO, JOSEY MARTINEZ, JUANITA VALDEZ-COX, LIONOR SOROLA-POHLMAN, MILTON GERARD WASHINGTON, NINA JO BAKER, and SANDRA SERNA

CHAD W. DUNN
chad@brazilanddunn.com
K. SCOTT BRAZIL
scott@brazilanddunn.com
Brazil & Dunn
4201 FM 1960 West, Suite 530
Houston, TX 77068
281-580-6310/281-580-6362 (facsimile)

ATTORNEYS FOR INTERVENOR-DEFENDANTS TEXAS DEMOCRATIC PARTY and BOYD RICHIE

Via Email
JOAQUIN G. AVILA
P.O. Box 33687
Seattle, WA 98133
206-724-3731/206-398-4261 (facsimile)
vgoode@naacpnet.org

ATTORNEY FOR TEXAS STATE CONFERENCE OF NAACP BRANCHES

ROBERT NOTZON
Law Office of Robert S. Notzon
1507 Nueces Street
Austin, TX 78701
512-474-7563/512-474-9489 (facsimile)
robert@notzonlaw.com
ALLISON JEAN RIGGS
ANITA SUE EARLS
Southern Coalition for Social Justice
1415 West Highway 54, Ste. 101
Durham, NC 27707
919-323-3380/919-323-3942 (facsimile)
anita@southerncoalition.org

ATTORNEYS FOR TEXAS STATE CONFERENCE OF NAACP BRANCHES, EARLS, LAWSON, WALLACE, and JEFFERSON

DONNA GARCIA DAVIDSON
PO Box 12131
Austin, TX 78711
512-775-7625/877-200-6001 (facsimile)
donna@dgdlawfirm.com
FRANK M. REILLY
Potts & Reilly, L.L.P.
P.O. Box 4037
Horseshoe Bay, TX 78657
512-469-7474/512-469-7480 (facsimile)
reilly@pottsreilly.com
ATTORNEYS FOR DEFENDANT STEVE MUNISTERI

jgavotingrights@gmail.com

ATTORNEYS FOR MEXICAN AMERICAN LEGISLATIVE CAUCUS

KAREN M. KENNARD
2803 Clearview Drive
Austin, TX 78703
(512) 974-2177/512-974-2894 (facsimile)
karen.kennard@ci.austin.tx.us

ATTORNEY FOR PLAINTIFF CITY OF AUSTIN

DAVID ESCAMILLA
Travis County Asst. Attorney
P.O. Box 1748
Austin, TX 78767
(512) 854-9416
david.escamilla@co.travis.tx.us

ATTORNEY FOR PLAINTIFF TRAVIS COUNTY

/s/ Patrick K. Sweeten
Patrick K. Sweeten