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' OPPOSITION TO THE UNITED STATES' MOTION TO INTERVENE

Defendants Rick Perry, in his official capacity as Governor, John Steen, in his official capacity as Secretary of State, and the State of Texas (collectively "Defendants") file this Opposition to the United States' Motion to Intervene.

INTRODUCTION

The Voting Rights Act and constitutional challenges to the 2011 redistricting legislation were litigated before this Court for over two years. Since these cases were filed this Court has held a two-week trial (nearly two years ago), conducted multiple evidentiary hearings, and has considered thousands of pages of evidence to assess the myriad districting challenges lodged by the multiple plaintiffs to this action. The individual plaintiffs and plaintiff groups represent varied interests including the minority voters across the State of Texas.

In June of 2013, the Texas Legislature enacted bills that repeal the 2011 plans and establish new redistricting maps governing future elections. The Governor has signed those bills into law. As a result, the vacated 2011 plans can never be used to conduct any election.

Despite the long history of this case and the current procedural posture, the Department of Justice ("DOJ") now seeks permission to intervene pursuant to Rule 24(b)(2)(A) and Rule 24(b)(1)(B),asserting claims based entirely on the now-defunct 2011 plans. Motion to Intervene at 5-6 (Doc. 871). For the reasons stated below, this Court should deny DOJ's request for intervention because its claims are moot and because DOJ has failed to satisfy the requirements for intervention set forth in Federal Rule of Civil Procedure 24.

ARGUMENT

The Motion to Intervene should be denied because this Court cannot provide any relief on claims against the 2011 plans. Claims against the 2011 plans are moot because the 2011 plans are repealed, and the Court therefore lacks subject matter jurisdiction as to claims against the 2011 plans. The Motion to Intervene should also be denied because its motion is untimely, and will cause delay and prejudice. *See* Fed. R. Civ. P. 24(b); *see also Kneeland v. National Collegiate Athletic Assoc.*, 806 F.2d 1285, 1289 (5th Cir. 1987). In the present litigation, DOJ comes too late, for it has been aware of this redistricting litigation for years, and intervention will cause delay and prejudice to Defendants. Accordingly, the Motion to Intervene should be denied.

A. The Department of Justice Does Not Meet the Requirements of Rule 24 Because Claims Against the 2011 Plans Are Moot.

Rule 24(b)(1)(B) allows permissive intervention when there is a claim or defense that shares with the main action a common question of law or fact. Rule 24(b)(2)(A) states that "On *timely* motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on a statute or executive order administered by the officer or agency." In the present case, DOJ cannot meet either requirement because claims against the 2011 plans are moot. *See generally* Texas's Opposition to Plaintiffs' Motions to Amend Their Complaints and Motion to Dismiss Plaintiffs' Claims Against the 2011 Plans as Moot (Doc. 786).

DOJ only seeks to sue Texas on claims against the 2011 plans—not the 2013 plans. Motion to Intervene, Ex. 1 at 14. (Doc. 87-1). As a result of the Legislature's enactment of new redistricting plans and its repeal of the redistricting plans enacted in 2011, any claims asserted against the 2011 redistricting plans no longer present a live case or controversy. *See generally* Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 769.1); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)) ("A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.").

All claims against the 2011 plans, whether brought by DOJ or plaintiffs, are moot. Because the 2011 plans are repealed, and DOJ only asserts claims arising from the 2011 plans, DOJ does not have a claim that meets the requirements of Rule 24(b) and the Motion to Intervene must be denied.

B. The Court Cannot Provide Section 3(c) Relief on Claims Against the 2011 Plans.

DOJ seeks an order declaring that the 2011 Congressional and House plans for Texas were adopted in violation of the Voting Rights Act, the Fourteenth Amendment and the Fifteenth Amendment, and requests Section 3(c) relief. *See* Motion to Intervene, Ex. 1 at 14-15 (Doc. 87-1). But this Court lacks jurisdiction to make the necessary finding of such violations with respect to the 2011 redistricting plans because all claims against those plans are now moot.

Like any plaintiff in federal court, a plaintiff seeking relief under section 3(c) must, at an absolute minimum, present a claim that satisfies Article III's case-or-controversy requirement. *See, e.g., Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 869–70 (2011). The power of federal courts "to pass upon the constitutionality" of a state or federal statute "arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference." *Golden v. Zwickler*, 394 U.S. 103, 110 (1969) (quoting *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89–90 (1947)); *cf. Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury

suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.").

Section 3(c) relief cannot be ordered in response to a claim that is moot or that never matured into an Article III case or controversy because a court without jurisdiction cannot make the necessary finding of intentional discrimination in violation of the Fourteenth or Fifteenth Amendment. Because this Court lacks jurisdiction over DOJ's proposed claims, and cannot provide the requested relief, the Motion to Intervene must be denied.

C. DOJ's Motion to Intervene Is Untimely.

Under Rule 24(b)(1) a court may permit anyone to intervene on *timely* motion. Similarly, under Rule 24(b)(2) a court may permit a federal agency to intervene on *timely* motion. In the present litigation, the Motion to Intervene should be denied under both Rule 24(b)(1) and Rule 24(b)(2) because the Motion to Intervene is untimely.

The timeliness of a motion to intervene is determined by analyzing the following four factors:

> "(1) the length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely."

Sierra Club v. Espy, 18 F.3d 1202, 1205 (5th Cir. 1994).

DOJ rests its claim to intervention largely on the first factor, contending that it has just acquired an interest in this litigation since the Supreme Court's decision in *Shelby County*. Motion to Intervene at 5 (Doc. 871). Although *Shelby County* was recently decided, DOJ has been aware of and at times has even participated in this litigation since at least October 28, 2011. *See* October 28, 2011 Statement of Interest of the United States under Section 5 of the Voting Rights Act of 1965 (Doc. 475).[1] The claims DOJ now asserts could have been brought and tried with the similar claims brought by the other plaintiffs in this case. DOJ made a decision not to participate in the original trial of this matter. Neither the existence of Section 5, nor the decision in *Shelby County*, prevented the DOJ from bringing these claims in this suit over two years ago. Additionally, the trial in this case occurred in September 2011, and the last evidentiary hearing before this Court occurred in February 2012. Given that it has been almost two years since the trial in this case, any request for intervention at this stage of the litigation is untimely on its face. *See LULAC v. Clements*, 999 F.2d 881, 884 n.11 (5th Cir. 1993) (holding that motion for intervention under Rule 24 was untimely where certain district judges sought to intervene as defendants after trial).[2]

DOJ provides a singular explanation for why it would be prejudiced if it is not allowed to intervene, stating that:

---

[1] DOJ filed additional statements of interest with this Court. *See* Doc. 504, Doc. 515, Doc. 591, and Doc. 592.

[2] DOJ cites to *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994) for authority that the decision in *Shelby County* is an "unusual circumstance" permitting intervention, but *Sierra Club* does not indicate that decisions by the Supreme Court are considered unusual circumstances. *See* Motion to Intervene at 6 (Doc. 871).

> [T]he United States will be prejudiced if it is not granted full party status, as the United States would seek to present evidence in any evidentiary hearing conducted pursuant to a request for Section 3(c) relief. Because of the Attorney General's lead role in the D.C litigation, the participation of the United States will assist the Court in deciding the factual issues in this case.

Motion to Intervene at 6 (Doc. 871). In effect, DOJ admits that its interest hinges upon an effort to "present evidence in any evidentiary hearing conducted pursuant to Section 3(c)". However as set forth above, Section 3(c) relief cannot be ordered in response to a claim that is moot or that never matured into an Article III case or controversy.

Despite its allegations of alleged prejudice, in the event the Court even allows additional consideration of a now moot districting plan under Section 3(c), no such prejudice to DOJ would occur as no less than six different plaintiffs in this case have requested Section 3(c) bail-in relief that DOJ now requests. *Id.* at 3; *see also Kneeland*, 806 F.2d at 1289 ("In acting on a request for permissive intervention the district court may consider, among other factors, whether the intervenors' interests are adequately represented by other parties."). Many of the plaintiffs seeking additional 3(c) relief in this action participated in the Section 5 proceedings in Washington D.C. Any relevant evidence from the D.C. trial (if allowed by this Court) will undoubtedly be presented by these plaintiffs in the litigation, who surely are aware of the evidence presented in a case they actively litigated. [3] Indeed numerous plaintiffs have already petitioned to reopen the record to admit additional

[3] Attorneys Nina Perales, Chad Dunn, Jose Garza, and J. Gerald Hebert were involved in the D.C. trial and are involved in the present litigation.

exhibits from the D.C. trial *See* Opposed Joint Motion of Plaintiffs for Leave to Reopen the Record to Provide Supplemental Evidence (Doc. 793).

Simply put, DOJ will not be prejudiced if its Motion to Intervene is denied because numerous parties seek Section 3(c) relief, and numerous parties are aware of the same evidence. Because the Motion to Intervene is untimely, and because DOJ will suffer no prejudice if its motion is denied, the Court should not allow DOJ to intervene.

D. Intervention by DOJ Will Cause Delay and Prejudice.

The Motion to Intervene should be denied because intervention of DOJ will delay the resolution of this case and prejudice the parties. Fed. R. Civ. P. 24(b)(3) ("In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.").

Although DOJ says that it "does not seek to relitigate the trial that has already been conducted", its proposed Complaint indicates otherwise. For example, the proposed Complaint includes claims for violations of the Fifteenth Amendment, yet all Fifteenth Amendment claims in this case have been adjudicated. Motion to Intervene, Exhibit 1 at 14 (Doc 871-1);*see also* Order at 18 (Doc. 275) ("It is therefore ORDERED that Defendants' Motion for Partial Summary Judgment and supporting memorandum of law (Dkt. # 210) is GRANTED in part on the Fifteenth Amendment claims") (emphasis in original). Additionally while on one hand DOJ utilizes the invalidation of Section 5 in the *Shelby County* decision as the basis for late intervention, the factual allegations set forth in its proposed complaint are

wholly tethered to the same Section 5 proceedings *Shelby County* has rendered invalid.

This Court has rightfully been sensitive to delay in resolving the litigation, given the effect of such delay on election deadlines. *See* March 19, 2012 Order at 28-29 (Doc. 691) ("Thus, the Court concluded that it could not wait for a decision from the D.C. Court without further delaying the primary and causing substantial hardship to the Republican and Democratic parties. . . The Task Force Plaintiffs note that C226 does not necessarily address or resolve all of their claims, but they agree that it is an acceptable compromise to permit the primary elections to occur without further delay."). Intervention by DOJ raises the very real threat of prejudice to the parties in the form of additional delay. New claims from a new party will unnecessarily complicate the litigation and require the parties to divert time and resources away from expeditiously resolving the litigation in order to preserve election deadlines. Accordingly, this Court should deny the Motion to Intervene.

CONCLUSION

DOJ's Motion to Intervene should be denied because it is untimely, it will cause undue delay and prejudice, and this Court cannot provide relief based on moot claims against the 2011 plans.

Dated: August 29, 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 State 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 29, 2013, via the Court's electronic notification system, email and/or U.S. mail 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
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
755 Mulberry Ave., Ste. 500
San Antonio, TX 78212
210-822-6666/210-822-1151 (facsimile)

JOAQUIN G. AVILA
P.O. Box 33687
Seattle, WA 98133
206-724-3731/206-398-4261 (facsimile)
jgavotingrights@gmail.com
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

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

LUIS ROBERTO VERA, JR.
Law Offices of Luis Roberto Vera, Jr. & Associates
1325 Riverview Towers
San Antonio, Texas 78205-2260
210-225-3300
lrvlaw@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

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

KAREN M. KENNARD
City of Austin Law Department
PO Box 1088
Austin, TX 78767-1-88
(512) 974-2268/512-974-2894 (facsimile)
karen.kennard@ci.austin.tx.us
ATTORNEY FOR PLAINTIFF CITY OF AUSTIN

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

JOCELYN SAMUELS
T. CHRISTIAN HERREN, JR.
TIMOTHY F. MELLETT
BRYAN SELLS
JAYE ALLISON SITTON
DANIEL J. FREEMAN
MICHELLE A. MCLEOD
U.S. Department of Justice
Civil Rights Division, Voting Rights
Room 7254 NWB
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
daniel.freeman@usdoj.gov
ATTORNEYS FOR
UNITED STATES
DEPARTMENT OF JUSTICE

Via E-Mail:

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

Via U.S. Mail

Enrique T. Dela Garza
304 Esperance Dr.
Laredo, TX 78041

Jose A. Botello
3712 McClelland Ave., Ste. 8
Laredo, TX 78040

/s/ Patrick K. Sweeten
Patrick K. Sweeten