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, Proposed Plaintiff-Intervenor, v. STATE OF TEXAS, et al., Defendants.	Civil Action No. 5:11-cv-360 (OLG-JES-XR) Three-Judge Court [Lead Case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), Plaintiff, v. STATE OF TEXAS, et al., Defendants.	Civil Action No. 5:11-cv-361 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
TEXAS LATINO REDISTRICTING TASK FORCE, et al., Plaintiffs, v. RICK PERRY, Defendant.	Civil Action No. 5:11-cv-490 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

MARGARITA V. QUESADA, et al., Plaintiffs, v. RICK PERRY, et al., Defendants.	Civil Action No. 5:11-cv-592 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
JOHN T. MORRIS, Plaintiff, v. STATE OF TEXAS, et al. Defendants.	Civil Action No. 5:11-cv-615 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
EDDIE RODRIGUEZ, et al., Plaintiffs, v. RICK PERRY, et al., Defendants.	Civil Action No. 5:11-cv-635 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

REPLY MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION TO INTERVENE

The United States meets the requirements for intervention pursuant to both Rule 24(b)(2)(A) and Rule 24(b)(1)(B). The State of Texas has identified no voting rights case in which a court has declined to permit the United States to intervene. This Court should permit the United States to intervene in the instant litigation.

I. The United States' Claims Against the 2011 Plans Are Not Moot.

Texas contends that this Court should deny the United States' motion to intervene because all claims against Texas's 2011 Congressional and House redistricting plans (collectively "the 2011 plans") are moot. Tex. Br. at 2-5 (ECF No. 877). For the reasons explained in our Statement of Interest at 8-11 (ECF No. 827), the claims in the United States' proposed complaint in intervention are not moot.

A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks and citations omitted). A case is not moot if the court can grant even a "partial remedy." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992); *see also, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 327-28 (2000) (holding that a preclearance action under Section 5 of the Voting Rights Act was not moot even though the districts at issue would not be used in any future elections).

The Fifth Circuit's decision in *United States v. McLeod*, 385 F.2d 734, 745, 752-53 (5th Cir. 1967) is instructive. In that case, the United States sought injunctive relief against Dallas County, Alabama, from threatening and coercing African Americans in the exercise of their right to vote, including preventing the county from prosecuting individuals working to register African-American voters in the City of Selma. The District Court denied the relief, and the county prosecuted those individuals. In addition to appealing the denial of the injunction, the

United States sought additional relief such as "directing the defendants to expunge all convictions [and] return all fines . . . ." *Id.* at 745. The Defendant argued that the case was moot because another court had enjoined county officials from arresting and prosecuting persons seeking to exercise the right to vote, and the county now allowed African-American voters to be registered. The *McLeod* Court rejected those arguments and found: "[c]ertainly with regard to expungement of convictions and return of fines, the case is not moot. Nor does the mere cessation of unlawful activity render a case moot." *Id.* at 752-53.

Similarly here, the case is not moot because there is an available remedy for the violations the plaintiffs have alleged. Although the State no longer seeks to implement the 2011 plans, Section 3 of the Voting Rights Act expressly authorizes this Court to grant prospective statutory relief upon a finding that "violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision." 42 U.S.C. § 1973a(c). Section 3(c) relief, like the expungement and disgorgement remedies in *Mcleod,* is available even if the intentionally discriminatory conduct justifying imposition of preclearance has ceased. *See Blackmoon v. Charles Mix Cnty.*, 505 F. Supp. 2d 585, 593 (D.S.D. 2007); *see also* Consent Decree, *Blackmoon v. Charles Mix Cnty.*, No. 05-cv-4017 (D.S.D. Dec. 4, 2007) (ECF No. 144) (Ex. 1) (authorizing Section 3(c) relief for intentional discrimination in previously existing districts).

In every redistricting cycle since 1970, courts and the Attorney General have found that one or more of Texas' statewide redistricting plans violated the voting guarantees of the Constitution or the provisions of the Voting Rights Act. *See* Statement of Interest at 18 (ECF No. 827) (listing the cases and citing the objection letters). The 2011 plans make clear that the State of Texas's pattern of intentional discrimination against minority voters has continued well

into the twenty-first century. *Id.* at 11-20 (citing among other evidence the findings in *Texas v. United States*, 887 F. Supp. 2d 133, 159-62, 177-78 (D.D.C. 2012) (three-judge court), *vacated*, 570 U.S. ___, 2013 WL 3213539 (U.S. June 27, 2013)). Section 3(c) preclearance is a prospective remedy to prevent and mitigate the harm that similar acts could cause in the future. In any case, the United States clearly has an interest in litigating whether Texas should be subject to a remedy under Section 3(c), and because the United States satisfies the criteria for intervention under Rule 24(b)(2)(A) and Rule 24(b)(1)(B) [1], the question whether claims about the 2011 plans are moot should not be determined in the context of ruling on a motion to intervene.

II. The United States' Motion to Intervene Is Timely.

Texas's assertion that the United States delayed intervention long after it knew of this case, *see* Tex. Br. at 6, ignores the analytical distinction between awareness of litigation and awareness of a particularized interest in the litigation. *See, e.g.*, *LULAC v. City of Boerne*, 659 F.3d 421, 433-34 (5th Cir. 2011) (explaining that timeliness depends on, *inter alia*, the timing of the applicant's awareness of its interest in the litigation and judging timeliness from the date that parties moved to modify a consent decree). Moreover, this argument disregards the history of this litigation. Only after the Supreme Court held in *Shelby County v. Holder*, 113 S. Ct. 2612, 2615 (2013), that it is unconstitutional to use the coverage formula in Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), "as a basis for subjecting jurisdictions to preclearance" under

[1] The United States has moved in the alternative to intervene pursuant to Federal Rule of Civil Procedure 24(b)(1)(B). However, because Texas does not contest that the United States is a federal governmental agency that administers the statute at issue in this litigation, Rule 24(b)(2)(A) provides a clear procedural path to intervention. Nevertheless, the United States maintains that intervention is also appropriate pursuant to Rule 24(b)(1)(B). *See* Mot. to Intervene at 7-8 (ECF No. 871).

Section 5 did the United States' interest in the application of Section 3(c) arise.[2] Moving for intervention within ten weeks of such a significant change in voting law is timely.[3]

Texas's claim that it will be prejudiced by the participation of the United States as a full party is similarly at odds with established case law and a fair reading of the pleadings. Prejudice to existing parties "must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervenor to participate in the litigation." *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994). In any event, the United States has assured the Court and the parties that it does not seek to relitigate the issues addressed in the 2011 trial. *See* Mot. to Intervene at 6. Granting the instant motion also would not insert a new Fifteenth Amendment claim into this litigation. *See* Tex. Br. at 8-9. Rather, the United States has alleged in its proposed complaint in intervention that the 2011 plans are intentionally discriminatory and violate Section 2 of the Voting Rights Act due to their violation of the voting guarantees of the Fourteenth and Fifteenth Amendments. *See* U.S. Compl. ¶ 1 (ECF No. 871-1).[4] And the fact that the United States presented similar evidence in Section 5 proceedings to disprove the State's

[2] Texas claims that the decision in *Shelby County* does not constitute an unusual circumstance preceding the United States' motion to intervene. *See* Tex. Br. at 6 n.2. There can be little doubt that declaring a portion of the Voting Rights Act unconstitutional—one that had been used almost daily since 1965—qualifies as an extraordinary or unusual circumstance.

[3] The State's specific contention that intervention after trial is "untimely on its face," Tex. Br. at 6, is belied by both the orders of this Court and consistent case law. Since trial—and as recently as late June 2013—this Court has permitted several parties to intervene. *See* Text Order (Jan. 24, 2012); Text Order (Jan. 25, 2012); Order (ECF No. 766). Moreover, numerous decisions have permitted intervention at late stages of litigation. *See, e.g.*, *LULAC v. City of Boerne*, 659 F.3d at 434 (permitting intervention after entry of a consent decree); *Ross v. Marshall*, 426 F.3d 745, 754 (5th Cir. 2005) (holding that there are "no absolute measures of timeliness" and noting that even post-judgment intervention may be permissible in some cases (internal quotation marks and footnotes omitted)). *LULAC v. Clements*, 999 F.2d 881 (5th Cir. 1993) (en banc), on which the State relies, does not establish a broad rule against post-trial intervention. The en banc court merely affirmed a denial of post-trial intervention as "well within the district court's discretion" in that particular case. *Id.* at 844 n.11.

[4] *See generally Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (noting that "the Voting Rights Act protects the public interest in the 'due observance of all constitutional guarantees' and the individual's right to vote").

claim that the 2011 plans lacked discriminatory intent, *see* Tex. Br. at 8-9, in no way reduces the relevance of that evidence to this case.

Texas also ignores the special status of requests by the United States to intervene in litigation invoking federal statutes, *see* Fed. R. Civ. P. 24(b)(2); *see also, e.g.*, *Nuesse v. Camp*, 385 F.2d 694, 706 (D.C. Cir. 1967), and the Attorney General's unique "statutory obligations to enforce the public interest in compliance with . . . voting rights legislation," *Posada v. Lamb Cnty.*, 716 F.2d 1066, 1075 (5th Cir. 1983). As this Court has explained, ". . . the United States has an interest in enforcing federal law that is independent of any claims of private citizens. In the [voting rights] context, the Supreme Court has characterized this as 'the highest public interest in the due observance of all constitutional guarantees.'" *United States v. E. Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 58 (5th Cir. 1979) (quoting *United States v. Raines*, 362 U.S. 17, 27 (1960)).

III. Conclusion

For the reasons set out in the United States' motion to intervene (ECF No. 871) and in this reply memorandum, the United States respectfully requests that this Court grant permissive intervention pursuant to Rule 24(b)(2)(A) or Rule 24(b)(1)(B).

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