

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]

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.

GREG ABBOTT,

Defendant.

Civil Action No. 5:11-cv-490
(OLG-JES-XR)
Three-Judge Court
[Consolidated Case]

MARGARITA V. QUESADA, *et al.*,

Plaintiffs,

v.

GREG ABBOTT, *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.

GREG ABBOTT, *et al.*,

Defendants.

Civil Action No. 5:11-cv-635
(OLG-JES-XR)
Three-Judge Court
[Consolidated Case]

**UNITED STATES' RESPONSE TO DEFENDANTS' NOTICE OF
THE FIFTH CIRCUIT'S DECISION IN DAVIS V. ABBOTT**

Once again, Defendants have attempted to revive their assertion that Plaintiffs' claims against Texas's 2011 Congressional and House redistricting plans are moot. This Court has correctly rejected Defendants' mootness arguments on multiple occasions, and it should do so again. *See Perez v. Texas*, 970 F. Supp. 2d 593, 601-03 (W.D. Tex. 2013) (three-judge court) (ECF No. 886); Order at 2 (ECF No. 904); Order at 5-15 (ECF No. 1104). Defendants' latest mootness argument comes in the form of a "Notice of the Fifth Circuit's Decision in *Davis v. Abbott*," which they have appended to an unrelated advisory requested by this Court. *See* Defs.' Advisory at 1, 23-25 (ECF No. 1310). But this Court has already expressly distinguished this case from the *Davis* litigation and concluded that "in contrast [to *Davis*], the claims in this case are not moot." Order at 4 n.1 (ECF No. 951). The Fifth Circuit's decision, 781 F.3d 207 (5th Cir. 2015), provides no basis to disturb this Court's conclusion that litigation against the 2011 Congressional and House plans continues to present a live controversy.

In *Davis*, the Fifth Circuit addressed an appeal from the order of a three-judge district court¹ granting attorneys' fees following litigation over Texas's 2011 Senate redistricting plan (S148). The district court had granted interim relief to the plaintiffs, enjoining the 2011 Senate plan and ordering an interim plan for the 2012 elections, after which the State legislatively enacted the interim plan as the 2013 Senate plan (S172). *See Davis*, 781 F.3d at 211-12. Although the parties continued to litigate over fees, they agreed that the plaintiffs' remaining claims against the 2011 Senate plan were moot. *See id.* at 212. Thus, in its order awarding the plaintiffs fees, the district court also ordered the remaining claims dismissed as moot, albeit without the substantial factual or legal analysis that would have been necessary had any party contested the mootness claim. *See id.* at 213; *see also* Final Judgment, *Davis v. Perry*, No. 5:11-

¹ As this Court is aware, the members of this Court also comprised the three-judge court in *Davis*. *See* Order Constituting Three-Judge Court, *Davis v. Perry*, No. 5:11-cv-788 (W.D. Tex. Sept. 23, 2011) (ECF No. 4).

cv-788 (W.D. Tex. Sept. 4, 2013) (ECF No. 190); *cf. Perez*, 970 F. Supp. 2d at 601-03; Order at 5-15 (ECF No. 1104). In turn, the Fifth Circuit did not address the validity of the district court's mootness order, which neither party contested on appeal. *See Davis*, 781 F.3d at 209, 213 n.5, 220; *see also* Appellee Br. at 30 n.6, *Davis v. Perry*, No. 14-50042 (5th Cir. June 9, 2014) (Ex. 1). Rather, *Davis* recited that the underlying litigation had become moot following enactment of the 2013 Senate plan. *See* 781 F.3d at 209, 213 n.5, 215 & n.9, 218-20. This recitation of the procedural history of the case does not constitute "new, binding authority on mootness from the Fifth Circuit." Defs.' Advisory at 24.

Defendants seize on background statements in *Davis* while ignoring the legal and factual context of that case. Following the parties' agreement that the remaining claims against the 2011 Senate plan were moot, the district court ordered the claims dismissed "because (1) Plan S148 has been repealed, (2) Plaintiffs agree that Plan S172 does not violate the Voting Rights Act or the Constitution, and (3) Plaintiffs do not seek any further relief with regard to Plan S148." *Davis*, 781 F.3d at 212-13. Of these three circumstances, only the first is present with regard to the 2011 Congressional and House plans at issue here. As in *Davis*, the 2011 Congressional and House plans have been repealed. In sharp contrast to *Davis*, however, several Plaintiffs have asserted that the 2013 Congressional and House plans are unlawful as well, in part because they incorporate some of the same features that Plaintiffs are challenging in the 2011 plans. *See, e.g.,* MALC 3d Am. Compl. ¶ 2 (ECF No. 897). Also unlike *Davis*, the United States and other Plaintiffs continue to seek relief based on the 2011 Congressional and House plans, namely under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c). *See, e.g.,* U.S. Compl. at 15 (ECF No. 907); *cf. Compl., Davis v. Perry*, No. 5:11-cv-788 (W.D. Tex. Sept. 22, 2011) (ECF No. 1) (not requesting Section 3(c) relief); *LULAC v. Perry*, No. 5:11-cv-855 (W.D. Tex. Oct.

17, 2011) (ECF No. 1) (not requesting Section 3(c) relief in consolidated challenge to the 2011 Senate plan). These critical differences both distinguish *Davis* and preclude a mootness finding here.

This Court has determined on multiple occasions that the claims against the 2011 Congressional and House plans are not moot, based on both the voluntary cessation doctrine and the availability of further effectual relief. *See Perez*, 970 F. Supp. 2d at 601-03; Order at 5-15 (ECF No. 1104); *see also* Order at 2 (ECF No. 904) (“We have already concluded that the 2011 plan claims are not moot and that the parties can pursue relief under § 3(c) with regard to the 2011 plan claims.”); Order at 4 n.1 (ECF No. 951) (“[T]he claims in this case are not moot.”). The Fifth Circuit’s decision in *Davis* did not address the binding precedent underlying those decisions, let alone offer new guidance for this Court. Rather, the stark differences between *Davis* and this case reinforce this Court’s determinations. Plaintiffs’ request for Section 3(c) relief based on intentional vote dilution in the 2011 plans, now substantiated by weeks of trial testimony and documentary evidence of purposeful discrimination, “prevent the 2011 plan claims from becoming moot.” Order at 15 (ECF No. 1104). Moreover, Plaintiffs’ claims against the 2013 Congressional and House plans, along with Defendants’ failure to concede the illegality of their conduct while repealing the 2011 plans, support this Court’s finding that “there is no indication or assurance that, in the next redistricting cycle, the Texas Legislature will not engage in the same alleged conduct that Plaintiffs assert violated their rights.” *Perez*, 970 F. Supp. 2d at 602; *see also* Order at 14-15 (ECF No. 1104). Nothing in *Davis* should disturb these well-reasoned conclusions.

For the foregoing reasons, the United States respectfully requests that this Court decline to dismiss Plaintiffs' claims regarding Texas's 2011 Congressional and House redistricting plans as moot.

Date: May 12, 2015

RICHARD L. DURBIN, JR.
Acting United States Attorney
Western District of Texas

Respectfully submitted,

VANITA GUPTA
Principal Deputy Assistant Attorney General
Civil Rights Division

/s/ Daniel J. Freeman

T. CHRISTIAN HERREN, JR.
TIMOTHY F. MELLETT
JAYE ALLISON SITTON
DANIEL J. FREEMAN
MICHELLE A. MCLEOD
ERIN VELANDY
PATRICK M. HOLKINS
Attorneys
Voting Section, Civil Rights Division
U.S. Department of Justice
Room 7123 NWB
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 305-4355

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2015, I served a true and correct copy of the foregoing via the Court's ECF system on the following counsel of record:

David R. Richards
Richards Rodriguez & Skeith, LLP
davidr@rrsfirm.com

Richard E. Grey III
Gray & Becker, P.C.
rick.gray@graybecker.com

*Counsel for Perez Plaintiffs
and Plaintiff-Intervenors Pete Gallego and
Filemon Vela Jr.*

Luis Roberto Vera, Jr.
Law Offices of Luis Roberto Vera, Jr. &
Associates
lrvlaw@sbcglobal.net
George Joseph Korbel
Texas Rio Grande Legal Aid, Inc.
gkorbel@trla.org

*Counsel for Plaintiff League of United Latin
American Citizens*

John T. Morris
johnmorris1939@hotmail.com

Pro Se Plaintiff

Nina Perales
Marisa Bono
Nicolas Espiritu
Mexican American Legal Defense
and Education Fund
nperales@maldef.org
mbono@maldef.org
nespiritu@maldef.org

Mark Anthony Sanchez
Robert W. Wilson
Gale, Wilson & Sanchez, PLLC
masanchez@gws-law.com
rwwilson@gws-law.com

*Counsel for Plaintiff Latino Redistricting
Task Force*

Jose Garza
Law Office of Jose Garza
garzpalm@aol.com

Mark W. Kiehne
Ricardo G. Cedillo
Davis, Cedillo & Mendoza
mkiehne@lawdcm.com
rcedillo@lawdcm.com

Joaquin G. Avila
Seattle University School of Law
avilaj@seattleu.edu

Cynthia B. Jones
Jones Legal Group, LLC
jones.cynthiab@gmail.com

*Counsel for Plaintiff Mexican American
Legislative Caucus*

Karen M. Kennard
City of Austin Law Department
karen.kennard@ci.austin.tx.us

Max Renea Hicks
Law Office of Max Renea Hicks
rhicks@renea-hicks.com

Manuel Escobar, Jr.
Manuel G. Escobar Law Office
escobarm1@aol.com

Marc Erik Elias
Abha Khanna
Perkins Coie LLP
akhanna@perkinscoie.com
melias@perkinscoie.com

S. Abraham Kuczaj, III
Stephen E. McConnico
Sam Johnson
Scott Douglass & McConnico, LLP
akuczaj@scottdoug.com
smcconnico@scottdoug.com
sjohnson@scottdoug.com

David Escamilla
Travis County Ass't Attorney
david.escamilla@co.travis.tx.us

Counsel for Rodriguez Plaintiffs

Gerald Harris Goldstein
Donald H. Flanary, III
Goldstein, Goldstein and Hilley
ggandh@aol.com
donflanary@hotmail.com

Paul M. Smith
Michael B. DeSanctis
Jessica Ring Amunson
Jenner & Block LLP
psmith@jenner.Com
mdsanctis@jenner.Com
jamunson@jenner.Com

J. Gerald Hebert
Law Office of Joseph Gerald Hebert
hebert@voterlaw.com

Jesse Gaines
Law Office of Jesse Gaines
gainesjesse@ymail.com

Counsel for Quesada Plaintiff-Intervenors

Rolando L. Rios
Law Offices of Rolando L. Rios
rrios@rolandorioslaw.com

Counsel for Plaintiff-Intervenor Henry Cuellar

Gary L. Bledsoe
Law Office of Gary L. Bledsoe
garybledsoe@sbcglobal.net

Victor L. Goode
NAACP
vgoode@naacpnet.org

Robert Notzon
Law Office of Robert Notzon
robert@notzonlaw.com

Anita Sue Earls
Allison Jean Riggs
Southern Coalition for Social Justice
allison@southerncoalition.org
anita@southerncoalition.org

*Counsel for Plaintiff-Intervenor Texas State
Conference of NAACP Branches*

Chad W. Dunn
K. Scott Brazil
Brazil & Dunn
chad@brazilanddunn.com
scott@brazilanddunn.com

*Counsel for Plaintiff-Intervenor Texas
Democratic Party*

John K. Tanner
John Tanner Law Office
3743 Military Rd. NW
Washington, DC 20015

*Counsel for Plaintiff-Intervenor Texas
Legislative Black Caucus*

Hector De Leon
Benjamin S. De Leon
De Leon & Washburn, P.C.
hdeleon@dwlawtx.com
bdeleon@dwlawtx.com

Eric Christopher Opiela
Eric Opiela PLLC
eopiela@ericopiela.com

Christopher K. Gober
Michael Hilgers
Gober Hilgers PLLC
cgober@goberhilgers.com
mhilgers@goberhilgers.com

James Edwin Trainor, III
Beirne, Maynard & Parsons, LLP
ttrainor@bmpllp.com

Joseph M. Nixon
Beirne Maynard & Parsons LLP
jnixon@bmpllp.com

*Counsel for Plaintiff-Intervenors Joe Barton
et al.*

Scott Keller
Matthew Frederick
Angela V. Colmenero
Ana M. Jordan
Jennifer Settle Jackson
Adam Bitter
William T. Deane
Summer R. Lee
Michael B. Neill
Office of the Texas Attorney General
scott.keller@texasattorneygeneral.gov
matthew.frederick@
texasattorneygeneral.gov
angela.colmenero@
texasattorneygeneral.gov
ana.jordan@oag.state.tx.us
jennifer.jackson@texasattorneygeneral.gov
adam.bitter@texasattorneygeneral.gov
bill.deane@texasattorneygeneral.gov
summer.lee@texasattorneygeneral.gov
michael.neill@texasattorneygeneral.gov

*Counsel for Defendants State of Texas and
Greg Abbott and Defendant-Intervenors
David Dewhurst, Joe Strauss, and John
Steen*

Donna Garcia Davidson
Donna G. Daviddson Law Firm
donna@dgdlawfirm.com

Frank M. Reilly
Potts & Reilly, LLP
reilly@pottsreilly.com

*Counsel for Defendant-Intervenors Steve
Munisteri*

Kent M. Adams
Lewis, Brisbois, Bisgaard, & Smith LLP
kadams@lbbslaw.com

*Counsel to Defendant-Intervenor Sarah M.
Davis*

Clarkson F. Brown
Bexar County District Attorney's Office,
101 W Nueva, Suite 5049
San Antonio, TX 78205
(210) 335-2150
clarkb@bexar.org

Counsel for Amicus Curiae Bexar County

Ned Bennet Sandlin
Texas Municipal League
bennett@tml.org

*Counsel for Amicus Curiae Texas Municipal
League*

Manuel A. Pelaez-Prada
Pelaez Prada, PLLC
mpp@lonestaradr.com

*Counsel for Amicus Curiae San Antonio
Hispanic Chamber of Commerce*

/s/ Daniel J. Freeman
DANIEL J. FREEMAN
Attorney, Voting Section
Civil Rights Division
U.S. Department of Justice
Room 7123 NWB
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
daniel.freeman@usdoj.gov