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]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants.*	)	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]
TEXAS LATINO REDISTRICTING TASK FORCE, et al., *Plaintiffs*, v. RICK PERRY , *Defendant.*	)	CIVIL ACTION NO. SA-11-CV-490-OLG-JES-XR [Consolidated case]
MARAGARITA V. QUESADA, et al., *Plaintiffs*, v. RICK PERRY, *et al.,*	)	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

Defendants.	)	
	)	
JOHN T. MORRIS,	)	CIVL ACTION NO.
	)	SA-11-CA-615-OLG-JES-XR
Plaintiff,	)	[Consolidated case]
	)	
v.	)	
	)	
STATE OF TEXAS, et al.,	)	
	)	
Defendants.	)	
	)	
EDDIE RODRIGUEZ, et al.	)	CIVIL ACTION NO.
	)	SA-11-CA-635-OLG-JES-XR
Plaintiffs,	)	[Consolidated case]
	)	
v.	)	
	)	
RICK PERRY, et al.,	)	
	)	
Defendants.	)	

PRIVATE PLAINTIFFS' JOINT ADVISORY ON THE ALABAMA REDISTRICTING CASES

Plaintiffs Texas State Conference of Branches of the NAACP, *et al.*, Congressperson Eddie Bernice Johnson, *et al.*, the Mexican American Legislative Caucus, Shannon Perez, *et al.*, the Texas Latino Redistricting Task Force, *et al.*, Margarita Quesada, *et al.*, LULAC plaintiffs, and Eddie Rodriguez, *et al.*, (hereinafter, "Joint Plaintiffs") respectfully submit the following advisory, as requested by this Court in Doc. No. 1284, on the potential applicability to the instant proceedings of a matter argued in the United States Supreme Court on November 12, 2014: Nos. 13-895 and 13-1138 (consolidated), *Alabama Legislative Black Caucus v. Alabama* and *Alabama Democratic Conference v. Alabama*.

It is the position of the Joint Plaintiffs that the legal issues in the Alabama cases do not substantially overlap with legal issues in the instant case and this Court should not await a decision by the Supreme Court before issuing substantive rulings in this case.

At the outset, the Joint Plaintiffs note that the issues in the Alabama cases do not overlap with Plaintiffs' and DOJ's claims of vote dilution under section 2 of the Voting Rights Act and Plaintiffs' and DOJ's claims of intentional vote dilution in violation of the Fourteenth Amendment -- a claim "analytically distinct" from a claim of racial gerrymandering under the Fourteenth Amendment. *See Miller v. Johnson*, 515 U.S. 900, 911 (1995) (explaining distinction between claims)

The legal issue in the Alabama cases is whether race predominated in the drawing of the legislative districts without being narrowly tailored to a compelling government interest. Brief for Appellants at 14, *Alabama Legislative Black Caucus v. Alabama*, No. 13-895 (August 13, 2014), and Brief for Appellants at *i*, *Alabama Democratic Conference v. Alabama*, No. 13-1138 (August 13, 2014). Alabama has asserted that the challenged districts drawn in its state legislative maps were drawn with African American supermajorities to achieve compliance with the Voting Rights Act—specifically, Section 5 of the Voting Rights Act. Brief for Appellees at 16, *Alabama Legislative Black Caucus v. Alabama* and *Alabama Democratic Conference v. Alabama*, Nos. 13-895 and 13-1138 (consolidated) (October 9, 2014). Alabama argued that Section 5 required it to maintain with precision the black voting age population in each district which enabled black voters to elect their candidate of choice. *Id.* at 70-72. Appellants in that case argued that Section 5 did not require such adherence to population percentages. Brief for Appellants at 57, *Alabama Legislative Black Caucus v. Alabama*, No. 13-895 (August 13, 2014), and Brief for Appellants at 26-27, *Alabama Democratic Conference v. Alabama*, No. 13-1138

(August 13, 2014). The Department of Justice submitted an amicus brief in that action, refuting Alabama's interpretation of Section 5 and urging the Court to remand to the lower court to perform a district-by-district analysis of whether a compelling governmental interest existed for each of the challenged districts. Brief for the United States as Amicus Curiae Supporting Neither Party at 26-27, *Alabama Legislative Black Caucus v. Alabama* and *Alabama Democratic Conference v. Alabama*, Nos. 13-895 and 13-1138 (consolidated) (August 20, 2014).

The Supreme Court noted probable jurisdiction to entertain only three questions: (1) whether Alabama's legislative redistricting plans unconstitutionally classify black voters by race by intentionally packing them in districts designed to maintain supermajority percentages produced when 2010 census data are applied to the 2001 majority-black districts; (2) whether, as the dissenting Judge concluded [in the Alabama Democratic Conference case], this effort amounted to an unconstitutional racial quota and racial gerrymandering that is subject to strict scrutiny and that was not justified by the putative interest of complying with the nonretrogression mandate of Section 5 of the Voting Rights Act; and (3) whether the plaintiffs in the Alabama cases have standing to bring such a constitutional claim. All of these questions relate to the racial gerrymandering claims.

The claims of racial gerrymandering in the instant case are not similar to the claims in the Alabama cases. First, for example, Texas does not argue that its assignment of Latino and African-American populations to the challenged congressional districts in the Dallas Ft. Worth area was for the purpose of complying with the Voting Rights Act. State Trial Brief at 133 ("Partisan performance then became the dominant factor in the Dallas/Fort Worth congressional districts.") Defendants in this action have alleged partisan justifications almost across the board. State Trial Brief at 1. That is in direct contrast to the Alabama Defendants, who relied on Voting

Rights Act justifications. Brief for Appellees at 69 *Alabama Legislative Black Caucus v. Alabama* and *Alabama Democratic Conference v. Alabama*, Nos. 13-895 and 13-1138 (consolidated) (October 9, 2014).

Second, the issues in the Alabama cases, whether supermajority districts constitute racial gerrymanders and whether compliance with the Voting Rights Act is a compelling state justification for creating supermajority districts, are markedly different from the issues here. In this case, Plaintiffs allege that Texas made predominant and unjustified use of race when it created districts that it intended not to elect the minority candidate of choice. To the extent that Texas offers the defense that the challenged districts were drawn to comply with section 5 of the Voting Rights Act, that defense is limited to the practice of splitting voting precincts, State Trial Brief at 36, and creating districts, for example with SSVR and/or election performance for Latino-preferred candidates below the benchmark. State Trial Brief at 55, 66 and 114 (addressing HD78, HD117 and CD23 respectively). Even if the Supreme Court concludes in the Alabama cases that compliance with section 5 is a compelling state interest, *see, e.g. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 475 n.12 (Stevens, J., concurring in part and dissenting in part) (2006); *id*. at 485 n.2 (Souter, J., concurring in part and dissenting in part); *id*. at 518 (Scalia, J., concurring in the judgment in part and dissenting in part), the issues of narrow tailoring are completely different between the Alabama cases and the instant case. Texas' response to other claims of racial gerrymandering (see, *e.g*., Quesada Plaintiffs' August 2011 Amended Complaint at ¶¶ 61-62) are simply, again, a defense of partisan gerrymandering. Therefore, the Supreme Court's opinion in the Alabama cases is unlikely to provide any additional guidance to this Court in resolving the Plaintiffs' claims here. Moreover, because the courts below in the Alabama cases did not perform a district-by-district analysis, *Ala. Legislative*

Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1298 (M.D. Ala. 2013), it is possible that the Supreme Court could remand for a district-by-district analysis. If that were to be the case, this Court certainly would learn nothing new from that decision.

A second and independent reason for not waiting for a decision in the Alabama cases is that a delay in ruling by this Court could very well impact the 2016 elections. Two election cycles have already passed in Texas without resolution of these important constitutional and Voting Rights Act claims. Given Texas' primary schedule, new or interim plans will need to be in place before the end of 2015 in order to avoid adjusting any primary deadlines.[1] It is entirely possible that the Supreme Court might not rule on the Alabama cases until as late as June 2015. This would not leave sufficient time for completion of the appellate process in this case before new plans must be in place. There is no justification for risking confusion and uncertainty in the 2016 elections when the Plaintiffs' claims are now ripe for adjudication. In as important a constitutional area as redistricting and voting rights, there will often be some case in the Supreme Court pipeline that could provide additional insights about pending litigation. But that is not a sufficient reason to delay decisions and, where appropriate, remedies in connection with those whose rights are directly at issue in the instant litigation.

For the foregoing reasons, Joint Plaintiffs urge this Court to not wait on the Supreme Court's decision in the Alabama cases before issuing substantive rulings on the claims pending before this Court and moving into the remedy stage in time for the 2016 elections.

Dated: December 2, 2014.

[1] If the Court finds, based on the additional evidence it heard this year, that the violations in the 2011 plans were not remedied by the interim plans, then this Court should order Texas to remedy those violations, or order a remedy itself if there is insufficient time for the Legislature to enact a remedy itself. Additionally, if this Court is to have time to rule on the 2013 challenges in time for a remedy for the 2016 elections, again, a delay pending the outcome of the Alabama cases will not facilitate such resolution.

Respectfully Submitted,

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