IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., In His Official Capacity As Attorney General Of The United States, Defendants, WENDY DAVIS, *et al.*, Defendant-Intervenors, MEXICAN-AMERICAN LEGISLATIVE CAUCUS, Defendant-Intervenors, GREG GONZALEZ, *et al.*, Defendant-Intervenors, TEXAS LEGISLATIVE BLACK CAUCUS, Defendant-Intervenor, TEXAS LATINO REDISTRICTING TASK FORCE, Defendant-Intervenor, TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Defendant-Intervenors, League of United Latin American CITIZENS (LULAC)	)	No.1:11-CV-1303 (RMC-TBG-BAH) (three-judge court)

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF THE DAVIS INTERVENORS' MOTION FOR ATTORNEYS' FEES, COSTS, AND EXPENSES

The Davis Intervenors respectfully submit the following notice of supplemental authority in support of their Motion for Attorneys' Fees, Costs, and Expenses filed on December 17, 2013

(ECF No. 256). Plaintiff, the State of Texas, filed its "Advisory" in opposition to the motion on December 20, 2013 (ECF No. 259) and the Davis Intervenors filed their reply on December 27, 2013 (ECF No. 260).

The supplemental authority attached hereto is the unanimous order and opinion of the three-judge court in *Davis v. Perry*, No. 11-788 (W.D. Tex.), awarding attorneys' fees and costs to the Davis Plaintiffs in the case challenging the redistricting plan for the Texas Senate.[1] In that case, the Davis Plaintiffs claimed that the Senate map had not been precleared and likely would not receive preclearance under Section 5 of the Voting Rights Act ("VRA"), and that the map constituted unlawful vote dilution and discrimination in violation of Section 2 of the VRA and the Fourteenth and Fifteenth Amendments. Because *this Court* had not granted preclearance, and because the San Antonio Court concluded, upon reviewing the record in *this case*, that the Section 5 challenge was "not insubstantial," *see* Davis Intervenors' Mot. at 19-20, the San Antonio court imposed an interim map restoring Senate District 10 to its original configuration, which was the exact remedy sought by the Davis Plaintiffs in that case, *see id.* at 6. That map was used for the 2012 election, in which Senator Davis won reelection. On June 26, 2013, Texas Governor Rick Perry signed legislation adopting that map as permanent. *See id.* at 10-11. On January 8, 2014, the San Antonio Court declared the Davis Plaintiffs the prevailing parties and awarded attorneys' fees, expenses, and costs. *See Davis v. Perry*, No. 11-788 (W.D. Tex. Jan. 8, 2014) Order (ECF No. 214) (attached hereto as Ex. A).

> In declaring the Davis Plaintiffs prevailing parties, the San Antonio Court noted that
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> resolution of the prevailing party question is . . . complicated by the unique fact pattern of this case, given the impact of § 5 and the D.C. Court litigation. Although Plaintiffs did not assert claims in this Court for violations of § 5, since those claims were within the

[1] On January 9, 2014, Texas filed a notice of appeal of the District Court's order. *See Davis v. Perry*, No. 11-788 (W.D. Tex. Jan. 9, 2014) (ECF No. 215).

> exclusive jurisdiction of the D.C. Court, Plaintiffs did bring valid claims (under then-existing law) for injunctive relief against the enacted plan based on the lack of preclearance. Further, in fashioning interim relief, this Court was to ensure that the interim plan map did not violate § 5, but in doing so could only determine whether the Plaintiffs' § 5 claims in the D.C. Court were "not insubstantial."

Id. at 9. The San Antonio Court noted that the State of Texas made a choice following this Court's decision denying preclearance and the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). "[I]nstead of returning to [the San Antonio] Court to seek an order dissolving the injunction against Plan S148, [Texas] adopted the Court's interim plan and mooted Plaintiffs' remaining claims. In doing so, [Texas] ha[s] ensured that the interim relief will not be reversed, dissolved, or otherwise undone." *Id.*

The San Antonio Court thus concluded that its order imposing interim relief satisfied the requirement that "Plaintiff obtain judicially sanctioned relief," *id.* at 11, because "[i]t is undisputed that Plaintiffs obtained significant, affirmative interim relief," the "relief was judicially sanctioned, materially changed the legal relationship between the parties, and gave Plaintiffs all the relief they sought with regard to the 2012 elections," and "that relief was not and cannot now be reversed, dissolved, or otherwise undone." *Id.* at 11. Furthermore, the San Antonio Court noted that "[a]fter the Supreme Court's ruling [in *Perry v. Perez*, 132 S. Ct. 934 (2012)], ... [Texas] did not object to implementation of the proposed interim plan, agreeing that it 'respond[ed] to all claims that are fairly at issue in this case *or the Section 5 case*' and was within the Court's remedial authority." *Id.* (quoting *Davis v. Perry*, No. 11-788 (ECF No. 119 at 4)) (emphasis added) (third alteration in original). "The interim relief was therefore essentially a judicially approved settlement or consent decree." *Id.*

Texas thus conceded that the relief granted by the San Antonio Court addressed the Davis Intervenors' claims in "the Section 5 case," *id.* (*i.e.*, this case). That relief was only possible

because of the Davis Intervenors' litigation efforts in *this* case. Had the Davis Intervenors not challenged preclearance of the Senate map in this case, it would have been precleared along with the uncontested Board of Education map, *see* Davis Intervenors' Mot. at 20, and the San Antonio Court could not have issued an order imposing an interim Senate map based on the lack of preclearance. Just as the order imposing the interim Senate map satisfied the prevailing party requirements in the San Antonio case, the "unique fact pattern of this case, given the impact of § 5 and the D.C. Court litigation," *id.* at 9, requires the conclusion that the San Antonio Court's order also satisfies the requirement that the Davis Intervenors obtain "some form of judicial relief," *Turner v. Nat'l Transp. Safety Bd.*, 608 F.3d 12, 15 (D.C. Cir. 2010), to qualify them for fees for the cost of their litigation in *this case*—fees necessarily incurred in blocking preclearance in this Court and obtaining the order in the San Antonio Court, *see* Davis Intervenors' Mot. at 18-23.[2]

[2]Awarding fees in this case based on the order obtained in the San Antonio litigation will not result in duplicative recovery. The Davis Intervenors have not sought any fees in this Court that were awarded by the San Antonio Court.

Dated: January 10, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January, 2014, I served a copy of the foregoing Davis Intervenors' Notice of Supplemental Authority in Support of their Motion for Attorneys' Fees, Expenses and Costs and attached Exhibit A, on counsel who are registered to receive NEFs through the CM/ECF system. All attorneys who have not yet registered to receive NEFs have been served via first-class mail, postage prepaid.

/s/ J. Gerald Hebert
J. GERALD HEBERT