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.

Civil Action No. 1:11-CV-01303 (RMC-TBG-BAH)
[Three-Judge Panel]

THE DAVIS INTERVENORS' REPLY TO PLAINTIFF'S BRIEF REGARDING THE APPLICABILITY OF THE ATTORNEY-CLIENT PRIVILEGE, WORK PRODUCT PRIVILEGE, LEGISLATIVE PRIVILEGE, AND STATUTORY PRIVILEGE

The Davis Intervenors respectfully submit this reply to the State of Texas' brief regarding the applicability of the attorney-client privilege, work product privilege, legislative privilege, and statutory privilege.

ARGUMENT

The discovery dispute between the Plaintiff State of Texas and the Davis Intervenors is much narrower than the discovery dispute between the State and the Defendant United States or other intervenors. The Davis Intervenors have narrowed their discovery request and urged the Court to require the production of all written communications for those senators and one staff member who have waived all privileges

that may have existed. Accordingly, the legal points and authorities discussed in the State's opening brief are not relevant to the issues raised by the Davis Intervenors.[1]

The State brought this lawsuit knowing full well that the intent of the Legislature would be a major issue in this case. The State's counsel early on in this litigation should have contacted members of the legislature to ask if they were willing to waive any privileges they might have. Indeed, as we pointed out in our opening memorandum, the State's counsel took precisely those steps when counsel for the Texas Latino Redistricting Task Force introduced a deposition into evidence in the San Antonio litigation that referenced numerous communications between the deponent (Mr. Ryan Downton) and members of the Legislature. In that situation, any and all claimed privileges were waived because not a single legislator invoked them.

The Davis Intervenors submit that the State should have undertaken that due diligence here as a good faith effort to respond to the parties' discovery. That is especially true in a case such as this, where the State claims it wants an expedited preclearance proceeding, but continues to take actions that slow the preclearance process down.

For the reasons set forth in our opening memorandum and in this reply memorandum, the Court should order the production of emails or any other communications sent by any of the five state senators to any other senator, or between any of the five state senators and Mr. Davis. With regard to the remaining senators (except for Intervenor Senator Wendy Davis), the State should be required to ascertain whether there are documents within the scope of the Davis Intervenors' request for

[1] The Davis Intervenors concur in and adopt by reference the legal arguments raised by the United States and the Task Force Intervenors regarding the State's inadequate responses to their discovery requests.

production and whether any individual senator wishes to invoke or waive any privileges that may exist. If such privileges are waived, documents responsive to the request for production of documents should be immediately produced.

December 30, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2011, I electronically served the foregoing Reply Memorandum on counsel for all parties by ECF filing a copy with the clerk of this court.

/s/ J. Gerald Hebert
J. GERALD HEBERT