IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| STATE OF TEXAS,<br>Plaintiff,<br>- against -<br>UNITED STATES OF AMERICA and ERIC H. HOLDER, JR. in his official capacity as Attorney General of the United States,<br>Defendants. | CIVIL ACTION NO. 1:11-cv-01303<br>Three-Judge panel: RMC-TBG-BAH |

**DEFENDANT INTERVENOR TEXAS LATINO REDISTRICTING TASK FORCE'S ADVISORY REGARDING PLAINTIFF'S RESPONSE TO ITS FIRST SET OF REQUESTS FOR PRODUCTION**

Pursuant to the Court's Minute Order of December 23, 2011 regarding issues of privilege, the Texas Latino Redistricting Task Force ("Task Force") respectfully submits the following summary of the current discovery dispute regarding Plaintiff State of Texas's objections to the Task Force's requests for production ("RFPs").

The Task Force attempted to conference with the State yesterday by telephone. The State responded that it was unable to confer by telephone and requested a written summary of the Task Force's concerns regarding discovery. The Task Force sent the State a written summary of its concerns yesterday but has not yet heard back from the State prior to the filing of this Advisory.

*First*, the State's responses to the Task Force's RFPs are incomplete. The State asserts that, with respect to each of the Task Force's RFPs, it has "already produced all relevant and non-privileged documents" on a FTP site generated by the State for the

*Perez v. Perry* case. However, it is not readily apparent, from the face of the documents or their titles, which documents on the FTP site prepared by the State are responsive to which RFP. Pursuant to Fed. R. Civ. P. 24(b)(2)(E)(i), documents must be produced either (1) as they are kept in the ordinary course of business or (2) organized and labeled to correspond to the categories in the request. The documents on the FTP site appear to be pulled from multiple different sources, and therefore cannot fall into the former category. Therefore, they should be labeled to correspond to the specific individual who is the subject of the request. Without a designation of which documents are responsive to which RFP, the Task Force is unable to analyze the materials on the State's FTP site in a meaningful way.

*Second*, to the extent documents were not produced on the FTP site because of an asserted privilege, the State is obligated to produce a privilege log that gives specific reasons why each document is subject to the asserted privilege. *See, e.g., United States v. Kis*, 658 F.2d 526, 539 (7th Cir. 1981) (party resisting discovery must identify facts that establish all elements of the claimed privilege); *Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir. 1985) (the burden is on the party asserting the privilege to demonstrate how each document satisfies all the elements of the privilege). While the State did generate a privilege log, the log is only for documents withheld on the basis of attorney client privilege. There are no logs related to any documents that may have been withheld on the grounds of legislative privilege or any other privilege. Furthermore, the State did not distinguish between RFPs in its log and a number of the entries in the log do not explain whether the documents are being withheld subject to the attorney client privilege or the attorney work product privilege.

*Third*, the State may not assert the attorney client privilege over a communication that was disclosed to a third party. *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (finding that the attorney-client privilege is waived through disclosure of any significant part of a confidential communication to a third person who is not a representative of either the client or the attorney). In several instances, it is unclear from a privilege log entry whether an individual receiving a communication is a third party. Thus, the State's responses are incomplete. For example, the privilege log entry for documents DEFPRIV 000014-000016 in Plaintiff's Attorney Client/Work Product Privilege Log were sent by "Clare Dyer, Manager, Mapping & Redistricting Section, Texas Legislative Council, to Senate (group), House (group), LTG Staff (group), and O0665 (?)." Without knowing the individuals who compromise "Senate (group), House (group)," etc., it is impossible for the Task Force to determine whether this communication was actually disclosed to a third party and, therefore, should have been produced.

*Fourth*, because Rep. Solomons[1] and Senator Seliger[2] both testified in their depositions, before third parties, regarding legal advice given to them by counsel

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[1] Oral and Videotaped Dep. of Burt Solomons ("Solomons Dep.") at 20:9 – 20:22, *Perez v. Perry*, 11-cv-00360, W.D Tex. Aug. 31, 2011.

Q: When you first undertook to draw the new House plan, did you study how many House districts in the old plan were Latino opportunity districts?

A. I think I was told how many. I don't remember what that number was. By through Geraldo and Ryan, they're the ones who basically say, "Here's what you've got -- here's what's out there." For me, it's 150 -- I have 150 seats, and how many are Voting Rights Act protected districts, for example, in a particular area. Not necessarily throughout the state of Texas. But how many in a player Dallas County, Harris County, Bexar County, whatever. I knew that there were certain numbers of those districts, because I was told that was a protected district."

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Solomons Dep. at 156:18 – 157:17.

Q. Did you have no concerns about the voting rights implications of doing that [moving Nueces County out of its historical connection to the Valley]?

A. Of course I did.

regarding compliance with the Voting Rights Act in the redistricting process, any documents withheld by the State pursuant to attorney client privilege on this issue must be disclosed. *Id.* Thus, the State's objections to the Task Force's RFPs concerning Rep. Solomons and Senator Seliger on the basis of attorney client privilege are without merit.

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Q. What were they? What were the concerns?

A. I wanted -- I wanted to feel assured from the people who knew a lot more about it, that they thought that that would work and that it was legal.

Q. And who -- did people provide you that assurance?

A. Staff. Staff said they thought it would work.

Q. Which staff?

A. My staff.

Q. This would be Mr. Downton and Mr. Interiano, again?

A. Well, Ryan is part of my staff, and Mr. Interiano is the Speaker's staff.

Q. So was it both of them?

MR. COHEN: That's actually a privileged question. You can answer.

THE WITNESS: I was relying on staff to tell me where they had concerns, that I should have concerns about, and if I needed to do something in connection with that. That was moving along fairly quickly in the special session with a large degree of staffs, working with staffs, and the Senate taking a lead.

[2] Oral and Videdtaped Dep. of Kel Seliger at 28:12 – 30:5, *Perez v. Perry*, 11-cv-00360, W.D. Tex. Sept. 1, 2011.

A. Was -- was that what I think specifically as we reached that conclusion? I can't tell you that. Keep in mind what -- I painted in the broad strokes. And when Doug and I would sit and talk and I'd say, "What can we do in this area to comply with the law? Can we do anything with Mr. Farenthold's district?" Then somebody would give me the model. And the first question was, "Is it legal and what do the numbers look like?" In the end I'm not sure that 27 is the one that we drew or this came from the House.

Q. Okay. As you were -- when you had worked on your draft before you started melding it with the House draft, did you make any explorations about whether your draft was compliant with the Voting Rights Act?

A. Yeah, because my instructions were the same, "Let's see what we can do." And whatever we did, whatever we thought would be in a map, we need to analyze it. There were a couple of areas -- you recall the horseshoe district?

Q. Yes, I do.

A. In order to do that and have it comply, it was sort of a weird look, and it was largely my fault. Was it legal? Did it do something that we wanted to do? Okay, let's draw it. Well, that's one of the reasons that we defaulted to the House map, because they came to a better conclusion.

Q. Was that the district people nicknamed the"jumbo shrimp"?

A. That was also the jumbo shrimp.

Q. Once you began to meld the Senate draft with the House draft, did you make any inquiry at that point whether the product that was emerging complied with the Voting Rights Act?

A. Absolutely. We asked the House people to check it and check it again. And that would be my question of Doug or counsel, "Is this legal in whole or are the parts legal?" And my approach was pretty simple and I think pretty reliable. And early on I told counsel Professors Morrison and Gwen, that if they told something -- if they told me something was not legal, it was coming out of the map. And if they told me something was legal, then we'd go from there. And so we had those discussions a lot.

For all the foregoing reasons, the Task Force asserts that the State's discovery response was incomplete and must be supplemented.

Dated: December 28, 2011

Respectfully Submitted,

/s/Nina Perales

Nina Perales (D.C. Bar No. TX0040)
Marisa Bono
Rebecca Couto
Karolina Lyznik
Mexican American Legal Defense
& Educational Fund
110 Broadway, Suite 300
San Antonio, TX 78205
Telephone No.: (210) 224-5476
Facsimile No.: (210) 224-5382
E-mail address: nperales@maldef.org

Karen M. Soares (D.C. Bar No. 503295)
Jorge M. Castillo
Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW
Washington, DC 20006

*Attorneys for Defendant-Intervenor,*
*Texas Latino Redistricting Task Force*