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-Intervenor,

GREG GONZALES *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.

Civil Action No. 1:11-cv-1303
(RMC-TBG-BAH)
Three-Judge Court

Wendy Davis-Marc Veasey Intervenors' Statement of Legal Position On How the Destruction of Senate District 10 Violates Section 5 of the Voting Rights Act

The Davis-Veasey Intervenors oppose preclearance of the State Senate plan because it was enacted with a racially discriminatory purpose and because it will have a retrogressive, discriminatory effect. **The focus of the Davis-Intervenors' case regarding the proposed senate map will be on the State of Texas's destruction of Senate District 10, a district in which minority voters (African Americans and Latinos) and some Anglos elected their candidate of choice to the state senate in 2008, only to have that opportunity taken away by the state's proposed state senate plan.**

Retrogressive Effect. A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' ''effective exercise of the electoral franchise'' when compared to the benchmark plan. *Beer* v. *United States* at 141. In 2006, Congress clarified that this standard means the jurisdiction must establish that its proposed redistricting plan will not have the effect of ''diminishing the ability of any citizens of the United States'' because of race, color, or membership in a language minority group defined in the Act, ''to elect their preferred candidate of choice.'' 42 U.S.C. 1973c(b) & (d). In analyzing redistricting plans under the Voting Rights Act, the Department of Justice follows the congressional directive of ensuring that the ability of such citizens to elect their preferred candidates of choice is protected. That ability to elect either exists or it does not in any particular circumstance.

In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Department of Justice (DOJ) "does not rely on any predetermined or fixed demographic percentages at any point in the assessment." Department Of Justice Guidance Concerning Redistricting Under Section 5 of the Voting

Rights Act. 76 Federal Register 7470, 7471 (February 9, 2011). In the Department's view, rather than just relying on the racial composition of a district, the Department performs "a functional analysis of the electoral behavior" within the district. *Id.*

In DOJ's words, "census data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact on the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change." That is critical in assessing the retrogressive effect of what the State of Texas did to SD 10.

Comparison of the racial/ethnic population of SD 10 in the benchmark and proposed plans is an important starting point of any Voting Rights Act analysis, but additional demographic and election data are also helpful in determining if the district has been transformed from being an effective district for minorities under the benchmark plan to an ineffective district under the proposed plan. As DOJ explains, "census population data may not reflect significant differences in group voting behavior. Therefore, election history and voting patterns within the [district], voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan." DOJ Redistricting Guidance at 7472 (emphasis added).

In assessing whether the changes to SD 10 violate Section 5 of the Voting Rights Act, certain factors are relevant to the analysis according to DOJ: "These factors include whether minority voting strength is reduced by the proposed redistricting; whether minority concentrations are fragmented among different districts; whether minorities are

over-concentrated in one or more districts; whether alternative plans satisfying the jurisdiction's legitimate governmental interests exist, and whether they were considered; whether the proposed plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and, whether the plan is inconsistent with the jurisdiction's stated redistricting standards." DOJ Redistricting Guidance at 7471-472 ; *see also* 28 C.F.R. § 51.59.

Judged by these factors, what the State did to the voters in SD 10 violates the retrogressive effect prong of Section 5 because its net effect would be to reduce minority voters' ''effective exercise of the electoral franchise'' when compared to the benchmark plan. *Beer* v. *United States* at 141. First, no one seriously can contest that in the reconfiguration of Senate District 10, "minority voting strength is reduced by the proposed redistricting." Second, as the maps show, "minority concentrations are fragmented among different districts[.]" Indeed, the minority community in SD 10 has been split four ways as seen in the attached map. Third, "alternative plans satisfying the [State's] interests exist" and were offered in the Texas Senate during the legislative process. The State did not seriously consider these alternatives. Fourth, the State's plan "ignores other relevant factors such as compactness" by creating bizarrely shaped districts. Fifth, by splitting up communities of interest, the state has drawn a map "that inexplicably disregards available natural or artificial boundaries" and one that fails to protect communities of interest that Senate Leaders said throughout the process was an important consideration.

Intent. In addition to having a retrogressive effect, the enactment of the proposed State Senate Plan was motivated by a racially discriminatory intent. The Davis-Veasey Intervenors intend to rely on the factors set forth in *Village of Arlington Heights v. Metropolitan Housing Corporation* in demonstrating that the State cannot meet its burden of proof under Section 5 to prove the absence of a racially discriminatory purpose with regard to the proposed State senate Plan. *See* 28 C.F.R. §51.57(e); *see also* DOJ Redistricting Guidance at 7471. The redrawing of Senate District 10 was a cynical and intentional cleaving of an effective concentration of minority voter neighborhoods into disparate pieces that now will have no political impact on any of the districts they are placed within.

State legislative leaders knew Senate District 10 was majority-minority in population at the time of the 2011 redistricting, they acknowledged that Senator Davis was the minority voters' candidate of choice in 2008 when minority voters elected her, they were warned that dismantling Senate District 10 would harm minority voting rights in violation of the Voting Rights Act, and they were informed that the process by which the State Senate map was drawn denied any meaningful opportunity for the public or state senators who represented majority-minority districts to participate in the redistricting process, which was one of the least transparent redistricting processes in modern times. Despite knowing that District 10 was an effective district, state legislative leaders intentionally eliminated Senate District 10 as a minority opportunity district through a closed process that shut out input from minority communities and their elected representatives.

Respectfully submitted,

/s/ J. Gerald Hebert
J. GERALD HEBERT
D.C. Bar #447676
Attorney at Law
191 Somerville Street, #405
Alexandria, VA 22304
Telephone: 703-628-4673
hebert@voterlaw.com

PAUL M. SMITH
MICHAEL DESANCTIS
JESSICA RING AMUNSON
CAROLINE LOPEZ
Jenner & Block LLP
1099 New York Ave., N.W.
Washington, D.C. 20001
Tel: (202) 639-6000
Fax: (202) 639-6066

Attorneys for Davis Defendant-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2011, I electronically filed the foregoing with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ J. Gerald Hebert
J. GERALD HEBERT