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

PLAINTIFF'S SUPPLEMENTAL BRIEF ON PRIVILEGE

Pursuant to the Court's Memorandum Opinion on Privilege Claims ("Privilege Order") (Doc. 128), Plaintiff State of Texas respectfully files this Supplemental Brief on Privilege. Texas understands its obligations under the Privilege Order and is working diligently to fulfill them. Among these obligations is that Texas supply further support for any claims of privilege relating to communications between and among Office of the Attorney General ("OAG") personnel. *See* Privilege Order at 20 ("[T]he Court invites Texas to support its argument [regarding OAG communications], if it chooses to do so, with more specificity ….). Texas respectfully submits that an *in camera* review of 62 pages containing OAG internal communications would best inform the Court's judgment on the applicability of the work product privilege.

There are two groups of communications at issue. The first type are internal OAG communications between attorneys Daniel Hodge (First Assistant Attorney General), David Schenck (Deputy Attorney General for Legal Counsel), Stacey Napier (Senior Counsel to the Attorney General), and Matthew Frederick (Special Counsel to the Attorney General), and OAG personnel, David Falk, Todd Giberson, and Joshua Zahn of Legal Technical Support (a group of analysts and statisticians that support OAG). Daniel Hodge, David Schenck, Stacey Napier, and Matthew Frederick have participated in redistricting litigation since February 2011. David Falk, Todd Giberson, and Joshua Zahn prepare racially polarized voting analysis and summaries at the direction of OAG attorneys. The communications at issue involve emails summarizing and analyzing racially polarized voting reports prepared at the direction of OAG attorneys. Copies of the underlying racially polarized voting reports from which the summaries derive are attached to these communications. The substance of the emails often discuss conclusions drawn from the summaries. But these internal communications and work product were never sent to the map drawers Interiano, Downton, and Davis.

Pursuant to the Privilege Order, and without waiving its work product privilege, Texas proposes that it produce the racially polarized voting reports that are attachments to the internal communications (and were sent to the map drawers), but not the emails between OAG attorneys and OAG personnel.

The second type of communication consists of emails that OAG attorney Stacey Napier sent to map drawers and their counsel. These emails forward the LTS summaries. They come second in chronological sequence because Ms. Napier could not forward the racially polarized voting report summaries until she solicited and received them from internal OAG personnel. As stated above, Ms. Napier did not forward internal OAG discussions to map-drawers.

The work product privilege should protect internal OAG discussions unless disclosed to an adversary. *See United States v. Deloitte LLP*, 610 F.3d 129, 140 (D.C. Cir. 2010). These discussions reflect the "mental impressions, conclusions, opinions, or legal theories" of OAG attorneys. *Id.* at 135. Indeed, OAG attorneys drafted or solicited them. The discussions therefore qualify as "opinion work product" that is "virtually undiscoverable." *Id.*

Texas and OAG personnel reasonably anticipated litigation and Texas respectfully requests the Court to reconsider its ruling on this issue. Texas anticipated litigation because Texas has faced redistricting litigation in **every** redistricting cycle since *Baker v. Carr*, 369 U.S. 186 (1962). Texas did not need to wait until a lawsuit had commenced to receive work product protection. *See In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994) ("Some cases [interpreting the work product privilege] have attributed significance to whether a document was obtained before or after litigation was commenced, but this cannot be sound. Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced.") (quoting 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2024, at 197-98 (1970)).

In addition, Texas faced actual litigation in February 2011. The *Teuber* lawsuit, filed on February 11, 2011, challenged the Legislature's 2011 redistricting process on the ground that the use of unadjusted census data for redistricting "might have the purpose and effect of strengthening the Hispanic vote" in violation of the Fourteenth Amendment and Section 2 of the Voting Rights Act. *See* Plaintiffs' Original Complaint and Request for Injunctive and Declaratory Relief, and Designation of a Three-Judge Court (Doc. 1) ¶ 22, *Teuber, et al. v. Texas, et al.*, No. 4:11-cv-00059 (E.D. Tex. Feb. 10, 2011). On February 22, 2011, the Mexican American Legislative Caucus (MALC) moved to intervene in the *Teuber* case, alleging that "any

modification of the redistricting data for consideration of citizenship or voter eligibility . . . would result in a dilution of Latino voting strength." Motion to Intervene (Doc. 3) at 4, *Teuber, et al. v. Texas, et al.*, No. 4:11-cv-00059 (E.D. Tex. Feb. 22, 2011). MALC cautioned that "[t]he Voting Rights Act specifically prohibits discrimination against Latinos in voting," *id.* at 7, and alleged that "the Texas Attorney General has consistently defended Texas redistricting enactments that were found to discriminate against minority voters including Latinos." *Id.* at 8.

Texas prepared the racially polarized voting analysis summaries and discussions because of threatened or pending litigation. The proper test for determining when a party anticipates litigation assesses "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained **because of the prospect** of litigation." *See Deloitte*, 610 F.3d at 137 (internal citations and quotation marks omitted). Racially polarized voting analyses speak to discrete doctrinal questions raised under Sections 2 and 5 of the Voting Rights Act. Performing these analyses serves no legitimate legislative function other than to equip legislators with information on litigation and liability under these sections. If Section 2 and Section 5 litigation was not preordained, OAG personnel would never have prepared these summaries and discussions.

Applying the foregoing standards to the types of emails submitted here, both should be protected. The internal OAG emails were prepared in anticipation of litigation and never shared outside the OAG's office. The discussions contemplate litigation and discuss racially polarized voting analyses, which are discrete to litigation under the Voting Rights Act. An *in camera* review of these 62 pages will provide the Court with a showing of what Texas believes should remain protected and what Texas will produce.[1]

[1] Texas is producing the communications with map drawers today.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court undertake an *in camera* review of certain OAG communications and conclude that the discussions contained therein qualify for the work product privilege.

Dated: January 5, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via the Court's electronic notification system to the following parties on January 5, 2012:

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