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

UNITED STATES' RESPONSE TO INTERVENORS' MOTION FOR LEAVE TO FILE AMENDED ANSWER AND CROSS-CLAIM

The State of Texas filed this declaratory judgment action against the United States and Attorney General Eric H. Holder, Jr. (collectively "the United States") seeking preclearance—pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c—of its 2011 redistricting plans. A group of Defendant-Intervenors now seek leave to amend their answers and to assert a counterclaim against Texas. For the reasons that follow, the United States avers that the three-judge court convened to hear *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex.), is the better venue to address Defendant-Intervenors' request for relief.

I. Background

On July 19, 2011, the State of Texas filed a complaint in this Court seeking Section 5 review of recently-enacted redistricting plans for the Texas delegation to the U.S. Congress, the Texas Senate, the Texas House of Representatives, and the Texas State Board of Education. *See* Compl. ¶¶ 39-49 (Dkt. No. 1). On September 22, this Court granted preclearance to the State Board of Education plan. *See* Minute Order (Sept. 22, 2011); *see also Texas v. United States*, 887 F. Supp. 2d 133, 138 n.1 (D.D.C. 2012), *vacated*, 570 U.S. ___, 2013 WL 3213539 (U.S. June 27, 2013). On August 28, 2012, after having conducted a two-week bench trial, this Court denied preclearance of the Congressional, Senate, and House Plans (collectively "the 2011 Plans") and specifically concluded that the State had failed to carry its burden to establish the absence of discriminatory intent regarding the Congressional and Senate plans. *See Texas v. United States*, 887 F. Supp. 2d at 138, 159-65. After entry of judgment, Texas appealed the denial of preclearance to the U.S. Supreme Court. *See* Notice of Appeal (Dkt. No. 234).

On June 25, 2013, the U.S. Supreme Court announced its decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In *Shelby County*, the Supreme Court held that the coverage formula in Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), as reauthorized by the

Voting Rights Act Reauthorization and Amendments Act of 2006, is unconstitutional and can no longer be used as a basis for determining that particular jurisdictions need to submit voting changes to the Attorney General or to this Court for Section 5 review. *See* 133 S. Ct. at 2631. The Court did not address the constitutionality of Section 5 itself. *See id.* On June 27, 2013, the Supreme Court entered an order vacating the judgment of this Court and remanding for further consideration in light of *Shelby County* and "the suggestion of mootness" made in a filing concerning the 2011 plans. *Texas v. United States*, 570 U.S. ___, 2013 WL 3213539 (U.S. June 27, 2013).

On July 3, several groups of Defendant-Intervenors filed the motion for leave now at issue. Defendant-Intervenors have requested leave to file an amended answer, including "a counterclaim against the [S]tate of Texas pursuant to Section 3(c) of the Voting Rights Act," 42 U.S.C. § 1973a(c). Mot. for Leave to Amend at 1 (Dkt. No. 241). Defendant-Intervenors contend that the decision in *Shelby County* constitutes good cause for leave to amend their pleading, *see id.* at 6, and that the "'broad remedial purpose' that motivated Section 3(c)" places them within the set of litigants who may advance a Section 3(c) claim. *Id.* at 11 (quoting *Jeffers v. Clinton*, 740 F. Supp. 585, 592 (E.D. Ark. 1990) (three-judge court), *appeal dismissed*, 498 U.S. 1129 (1991)).

II. The *Perez* Court Is the Better Venue to Address Section 3(c) Relief.

After the deadline for amendment of pleadings has passed, Rule 16(b) governs motions for leave to amend a complaint or answer. *See Brooks v. Clinton*, 841 F. Supp. 2d 287, 296-97 (D.D.C. 2012); *Lurie v. Mid-Atl.Permanente Med. Grp., P.C.*, 589 F. Supp. 2d 21, 22-23 (D.D.C. 2008) (collecting cases). Although the Scheduling Order entered by this Court did not expressly set a deadline by which pleadings could be amended, the Order required the parties to finalize

the scope of their dispute by no later than September 23, 2011. *See* Scheduling Order ¶ 1 (Dkt. No. 51). Under Federal Rule of Civil Procedure 16(b)(4), a "schedule may be modified only for good cause and with the judge's consent."[1]

Defendant-Intervenors have requested leave of this Court "to assert a counterclaim against the [S]tate of Texas pursuant to Section 3(c) of the Voting Rights Act." Mot. for Leave to Amend at 1. However, Section 3(c) relief may be granted only in a "proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any state or political subdivision." 42 U.S.C. § 1973a(c). As Defendant-Intervenors acknowledge, this action "was not 'initiated,' per se, by the Attorney General or aggrieved individuals." Mot. for Leave to Amend at 11. Instead, this action was brought by the State of Texas to obtain preclearance of voting changes—not by a party seeking to enforce the voting guarantees of the fourteenth or fifteenth amendment.

Many of the Defendant-Intervenors—as well as other individuals represented by Defendant-Intervenors' counsel—have also requested Section 3(c) relief from a three-judge court of the U.S. District Court for the Western District of Texas convened to hear *Perez v. Perry*, litigation including Section 2 and constitutional claims regarding the 2011 Plans. *See* MALC Br. on Section 3(c), *Perez v. Perry*, 5:11-cv-360 (W.D. Tex. July 22, 2013) (Dkt. No. 787); Pl. Joint Br. on Section 3(c), *Perez v. Perry*, 5:11-cv-360 (W.D. Tex. July 22, 2013) (Dkt. No. 788); Texas Latino Redistricting Task Force Br. on Section 3(c), *Perez v. Perry*, 5:11-cv-360 (W.D. Tex. July 22, 2013) (Dkt. No. 823). The *Perez* court is also considering documentary evidence

[1] The United States does not contend that the motion is untimely. Defendant-Intervenors have brought the counterclaim as soon as was practicable after the decision in *Shelby County* declared the coverage formula in Section 4(b) unconstitutional as a basis for subjecting jurisdictions to the preclearance requirement of Section 5.

from the trial proceedings in this matter.[2] Consideration of Section 3(c) relief in *Perez* does not raise the statutory construction concern described above because Defendant-Intervenors and others instituted the *Perez* proceeding. *See, e.g.*, 3d Am. Compl., *Perez v. Perry*, 5:11-cv-360 (W.D. Tex. July 19, 2011) (Dkt. No. 53).

On July 25, 2013, the United States filed a statement of interest in *Perez* arguing that Section 3(c) relief is warranted because evidence from this proceeding, the *Perez* proceeding, and past proceedings establishes intentional voting discrimination and overwhelming evidence of constitutional violations in and by the State. *See* U.S. Statement of Interest at 6-22, *Perez v. Perry*, 5:11-cv-360 (W.D. Tex. July 25, 2013) (Dkt. No. 827). A copy of that statement of interest is attached hereto as Exhibit 1. Specifically, the United States has urged the *Perez* court to order that all voting changes by the State of Texas be subject to Section 3(c) preclearance review for at least a ten-year period.

Moreover, the Attorney General has separately filed today a response in this Court advising that he does not oppose the State's motion for voluntary dismissal in this action. *See* U.S. Response to Tex. Mot. to Dismiss (Dkt. No. 247). Because of this, and the fact that there is another federal court of competent jurisdiction to hear the Section 3(c) claim, there is no need to reach the statutory construction issue that would be presented by litigation of Defendant-Intervenors' proposed counterclaim. *See, e.g.*, *LaShawn A. v. Kelly*, 990 F.2d 1319, 1324 (D.C. Cir. 1993).

III. Conclusion

Because the *Perez* court in the Western District of Texas is the better venue for

[2] *See* Order at 2, *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. July 1, 2013) (Dkt. No. 772). The *Perez* court has not yet ruled whether to allow specific documents because the parties have until August 5, 2013 to lodge objections to individual documents. *See id.*; *see also id.* (informing the parties that the court will not entertain global objections to supplementation of the *Perez* record).

addressing Defendant-Intervenors' requests for relief, we believe that the better exercise of this Court's discretion is to deny Defendant-Intervenors' request for leave to amend their answers.

Date: July 25, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2013, I served a true and correct copy of the foregoing via the Court's ECF system on the following counsel of record:

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