IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARC VEASEY, *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants.	Civil Action No. 2:13-cv-193 (NGR)
UNITED STATES OF AMERICA, Plaintiff, TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND, *et al.*, Plaintiff-Intervenors, TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS, *et al.*, Plaintiff-Intervenors, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 2:13-cv-263 (NGR)

TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Plaintiffs, v. NANDITA BERRY, *et al.*, Defendants.	Civil Action No. 2:13-cv-291 (NGR)
BELINDA ORTIZ, *et al.*, Plaintiffs, v. STATE OF TEXAS, *et al.*, Defendants	Civil Action No. 2:13-cv-348 (NGR)

JOINT BRIEF BY ALL PRIVATE PLAINTIFFS AND PLAINTIFF-INTERVENORS IN OPPOSITION TO THIRD PARTY LEGISLATORS' MOTION TO QUASH SUBPOENAS OF CURRENT AND FORMER LEGISLATORS

This brief is submitted on behalf of the non-United States Plaintiffs and Plaintiff-Intervenors (hereinafter "Plaintiffs")[1] in opposition to Third Party Legislators' ("the Legislators") Motion to Quash Subpoenas of Current and Former Legislators (ECF No. 251-1).

[1] The Plaintiffs joining in this brief are the Texas State Conference of NAACP Branches, the Mexican American Legislative Caucus of the Texas House of Representatives, the Texas Association of Hispanic County Judges and County Commissioners, Hidalgo County, the Texas League of Young Voters Education Fund, Imani Clark, Michelle Bessiake, Estela Garcia Espinosa, Lionel Estrada, Roxsanne Hernandez, La Union Del Pueblo Entero, Inc., Lydia Lara, Margarito Martinez Lara, Maximina Martinez Lara, Eulalio Mendez, Jr., Belinda Ortiz, Lenard Taylor, Marc Veasey, Floyd James Carrier, Anna Burns, Michael Montez, Penny Pope, Jane Hamilton, Sergio DeLeon, Oscar Ortiz, Koby Ozias, John Mellor-Crummey, Jane Doe, James Doe, the League of United Latin American Citizens ("LULAC") and Dallas County, Texas.

The Legislators' motion is based on a series of objections that fail to recognize the substance of the claims in these consolidated cases. First, the Legislators argue that only those legislators whose documents were subpoenaed in the prior Section 5 litigation can be subpoenaed in this litigation, ignoring that the issues in this case are much broader and that, in any event, there is no rule, case law or logic that defines the scope of discovery in one case by the scope of discovery of a previous case. Second, the Legislators rail against the discovery of campaign communications as unnecessarily abridging their qualified legislative privilege, while tacitly conceding that legislative privilege cannot possibly apply to what are admittedly "personal" communications. Finally, the Legislators make a series of challenges going to the relevance of the documents sought by the subpoenas, disregarding the specific claims made in this litigation. For the following reasons and for those set forth in the brief of the United States, with which Plaintiffs join, the motion to quash should be denied.

1. It is irrelevant that some of the Legislators were not the subject of discovery in the Section 5 case. The Legislators object to the subpoenas issued to nine of the 13 legislators whose documents have been subpoenaed, on the ground that none were "the subject of discovery requests during the preclearance lawsuit." (Leg. Br. at 3). The scope of discovery in the Section 5 case does not set the standard for the scope of discovery in this case.[2] At the most basic level, the time for discovery in the Section 5 litigation was even more circumscribed than in this litigation (90 days compared to 210 days), so it is reasonable to expect the parties now are engaging in more extensive discovery. Second, unlike in the Section 5 litigation where the burden of proof was on Texas, the burden of proof in this litigation is on the Plaintiffs and the

[2] Indeed, were that the standard, discovery requested by Texas in this case would need to be automatically stricken, as the State has propounded more extensive discovery requests in this litigation than in the Section 5 case.

United States, a factor which again affects the scope and extent of discovery. Third, the issues in this case are broader than those in the Section 5 case. Section 2 of the Voting Rights Act explicitly calls for a "totality of the circumstances" analysis of whether SB 14 results in a discriminatory denial of the right to vote. 42 U.S.C. §1973(b). The Section 2 claims, as well as the various claims brought under the 14th and 15th Amendments, are based not only on the enactment of SB 14, but also on the way the statute is being implemented. The Legislators do not argue that they lack relevant information, only that they cannot be subpoenaed now because they were not subpoenaed before. This argument should be flatly rejected.

2. The Legislators tacitly admit that documents pertaining to campaign communications are not subject to legislative privilege. The Legislators assert that the qualified legislative privilege precludes production of any campaign communications. However, their argument actually proves that such communications are not privileged whatsoever, because they are personal documents. First, they support their legislative privilege defense against the discovery of campaign communications with the curious assertions that "[f]or many legislators, such documents would predate their taking the oath of office for the first time, be irrelevant to the case, and remain highly personal." (Leg. Br. at 9). By definition, therefore, these documents would not be subject to an assertion of legislative privilege and are subject to subpoena. Similarly, the Legislators state, "And many legislators would rightfully expect that private documents created in their personal capacity as candidates for office would not be subject to disclosure in a lawsuit brought against their official capacity." (Leg. Br. at 9).[3] Again, the Legislators' admission that the campaign documents were "created in [the Legislators'] personal

[3] Plaintiffs do not understand precisely what the Legislators mean by their being subject to a "lawsuit brought in their official capacity," but this seems to be at odds with the position taken by their counsel, who in their role as counsel for Defendants, has taken the position that the Legislature is not a party in this case, thus forcing this third-party subpoena process.

capacity" clearly takes those documents out of the realm of legislative privilege, and therefore they are subject to subpoena.

3. The documents sought may lead to the discovery of relevant evidence. The Legislators object to three categories of documents sought: (1) those dealing with proposed voter ID laws considered and voted upon in the Texas Legislature prior to the enactment of SB 14; (2) those dealing with the analysis and implementation of SB 14 post-enactment; and (3) those dealing with immigration legislation.

a. Pre-enactment voter ID legislation: The claims in this litigation concerning discriminatory purpose specifically refer, *inter alia*, to the Legislature's previous attempts to pass a photo ID law, stressing that those previous attempts were merely chapters of one ongoing process to adopt photo ID legislation, beginning in the 2005 legislative session, and culminating in the passage of SB 14 in the 2011 legislative session. (*See, e.g.*, Texas NAACP/MALC Compl. ¶¶ 54-57.) For example, as the legislative record establishes, photo ID legislation throughout these legislative sessions became increasingly restrictive with respect to permissible forms of photo ID, notwithstanding that there was no evidence from 2005 through 2011 suggesting that voter impersonation is a concern, much less that it might be an increasing concern that would merit an increasingly stringent response. Consequently, documents relating to proposed photo ID legislation in these previous sessions of the Legislature are directly relevant to the issue of whether SB 14 was enacted with a discriminatory purpose. *See Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 267-68 (1977)

("legislative or administrative history" and the "historical background of the [legislative] decision" are relevant to the determination of discriminatory purpose because the "specific sequence of events leading up the challenged decision" may "shed some light on the decisionmaker's purposes").

b. Post-enactment analysis and implementation: While the Section 5 claim was adjudicated solely on the record as it stood at the time of enactment of SB 14, the Section 2 claim takes into consideration not only pre-enactment facts, but post-enactment facts, including facts concerning the implementation of SB 14. Thus, some claims speak directly to how SB 14 is being implemented in a discriminatory and arbitrary manner. (*See, e.g.*, Veasey Compl. ¶¶ 22-28.)

c. Immigration related legislation: Some of the claims in this action speak to the pervasive history in Texas of racial discrimination against African American and Hispanics. (*See, e.g.*, Texas Hispanic Judges Compl. ¶ 66.) The record in the Section 5 litigation included evidence that there were connections between anti-immigration political rhetoric and passage of SB 14.

In sum, the Legislators have provided no cogent basis to resist this discovery, and Plaintiffs respectfully request that this Court deny the Legislators' motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2014, I served a true and correct copy of the foregoing via the Court's ECF system on all counsel of record.

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