IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SUE EVENWEL AND EDWARD PFENNINGER,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	**CAUSE NO. 1:14-CV-00335-LY-CH-MHS**
	§	
RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; AND NANDITA BERRY, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE	§	
	§	
Defendants.	§	

REPLY BY PROPOSED DEFENDANT-INTERVENORS THE TEXAS SENATE HISPANIC CAUCUS, ARMANDO GARZA, FRANCISCO GUAJARDO, REYNALDO GUERRA, EVELYN JONES, SOFIA REYES MCDERMOTT AND CASSANDRA CHROSTOWSKI, A MINOR IN SUPPORT OF THEIR MOTION TO INTERVENE

The Texas Senate Hispanic Caucus, Armando Garza, Francisco Guajardo, Reynaldo Guerra, Evelyn Jones, Sofia Reyes McDermott and Sandra Chrostowski on behalf of Cassandra Chrostowski, a minor, hereby file this reply pursuant to Local Rule CV-7(f) in support of their Motion seeking intervention as of right under FED. R. CIV. P. 24(a), or, alternatively, by permission under FED. R. CIV. P. 24(b)

ARGUMENT

Movants are entitled to intervention as of right in this case because of the interests they have in its outcome and because Defendants Rick Perry and Nandita Berry (herein, "State

Defendants") will not adequately represent Movants' interests. Movants have shown not only that they have a direct, protectable interest based in substantive law that cannot be adequately represented by State Defendants, they have also pointed to examples of similar grants of intervention in past political access cases. *See* Dkt. 25 at 13. Plaintiffs' arguments that Movants' interests are too speculative and can be sufficiently represented by State Defendants misconstrue and misapply well-established standards allowing for intervention to Movants' request to intervene.[1] Indeed, Plaintiffs somehow argue that they have an interest in changing the method of apportionment supported by case law yet Defendant-Intervenors have no interest in preserving the method under existing case law.

I. Movants Have Shown A Legally Protected Interest For Intervention Purposes

A. Movants' Interest In Preventing Reapportionment According to Total Population Is Sufficient for Rule 24 Purposes

Plaintiffs take issue with Movants' ability to meet the second requirement of Rule 24(a)(2), which is that "the applicant must have an interest relating to the property or transaction that is the subject of the action." *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne (LULAC v. Boerne)*, 659 F.3d 421, 434 (5th Cir. 2011) (*citing Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994)). Plaintiffs argue that because Movants are concerned with the results of a legislative reapportionment that has not yet occurred, Movants' expressed interests in loss of political power and access are not sufficiently direct. *See* Dkt. 28 at 3 – 5. In fact, Plaintiffs' argument is premised on the purported expert analysis that has neither been offered into evidence nor subjected to cross-examination. Relying on their expert analysis that has yet to be scrutinized, Plaintiffs conclude that the Court should grant injunctive relief against further

[1] As to the remaining arguments set forth in Plaintiffs' Opposition, Proposed Defendant-Intervenors stand on their brief supporting their motion to intervene. *See generally* Dkt. 25.

elections under the current plans and order reapportionment of Senate Districts based on their preferred method.

Movants seek the maintenance of the status quo in terms of reapportionment being based on total population rather than CVAP. In *LULAC v. Boerne*, the Fifth Circuit granted intervention when it treated a consent decree as "the property or transaction that is the subject of the action." *LULAC v. Boerne*, 659 F.3d at 434 (5th Cir. 2011). That consent decree would have abrogated the ability of the intervenor's right to "vote in elections to choose all five city council members." *Id*. The Fifth Circuit held that the intervenor had a sufficient interest to satisfy Rule 24(a)(2) because the intervenor had an "'interest relating to' the modified consent decree because" he sought to "protect his right to vote in elections to choose all five city council members." *Id.* at 434 – 435.

While Plaintiffs argue in their Opposition that Movants' interests are based on a redrawing of districts that has not occurred, it is apparent that Plaintiffs seek relief that would trigger the end of one set of maps and the creation of another. It is true that Plaintiffs' Complaint calls for "an order requiring Texas to establish constitutionally valid state senatorial districts prior to the next scheduled state senatorial election," without specifying CVAP as the basis. *Complaint* at 13. While they do not expressly call for apportionment by CVAP, Plaintiffs' interpretation of "constitutionally valid state senatorial districts" includes apportionment by the "number of electors," or CVAP. *See* Complaint at ¶ 40 – 42 ("Texas could have apportioned its Senate districts to safeguard the principle of an equally weighted vote without departing from the goal of equalizing total population, but chose not to do so."). If successful, Plaintiffs' lawsuit would diminish Movants' power to elect Senators in minority opportunity districts. As for

Intervenor Senate Hispanic Caucus, Plaintiffs' lawsuit, if successful, would likely lead to the dismantling of their districts properly apportioned under state law and the U.S. Constitution.

Because Plaintiffs seek to alter the rights of Movants to vote in and represent the current Senate Districts and Movants seek to protect those interests, Movants have satisfied the requisite interest for the purpose of Rule 24 intervention.

B. Movants' Interests Are Protected By The Voting Rights Act

Movants' protected interest does not have "to be of a legal nature identical to that of the claims asserted in the main action." *Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970). Indeed, "[a]ll that is required by the terms of the rule is an interest in . . . [the] rights that are at issue, provided the other elements of intervention are present." *Id.* The intervention inquiry should be "flexible," "focuse[d] on the particular facts and circumstances surrounding each application," and "measured by a practical rather than a technical yardstick." *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996); *see also Ross v. Marshall*, 426 F.3d 745, 757 (5th Cir. 2005) ("[T]he interest 'test' is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.") (internal quotation marks omitted).

Plaintiffs argue that Movants have not properly shown that there is a right under constitutional law that will be protected by their intervention. However, Movants have extensively described their electoral and representational rights that are protected under the Voting Rights Act and U.S. Constitution. *See generally* Dkt. 25. Plaintiffs argue that "access" to representation is not a constitutional right. However, it is well established that access by minority voters to the political process is an integral part of the Voting Rights Act. *See Thornburg v. Gingles*, 478 U.S. 30, 73 (1986) ("Amended § 2 asks […]whether minorities have equal access to the process of electing their representatives" (internal citation omitted)); *see also*

Zimmer v. McKeithen, 485 F.2d 1297, 1303 (5th Cir. 1973) *aff'd sub nom. E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) *rev'd and remanded sub nom. Marshall v. Edwards*, 582 F.2d 927 (5th Cir. 1978) ("access to the political process and not population was the barometer of dilution of minority voting strength"). Because access to the political process is a part of the Voting Rights Act and voting protections under the Constitution, Movants' interests are legally protectable for the purpose of intervention.

C. State Defendants Do Not Adequately Represent Movants' Interests

It is widely known that governments represent the broad public interest as opposed to the interests and concerns of individuals. *See Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) ("government must represent the broad public interest, not just the concerns" of an individual corporation). State Defendants in their official capacity represent the State of Texas and likely will not represent their interests as the representation of Latinos, the pending disenfranchisement of young future voters or the ability of the Movant Senators to represent those constituents. In *American Traffic Solutions*, as here, the defendant was a public entity. *See American Traffic Solutions, Inc.*, 668 F.3d at 294. Despite the presumption of a good faith defense for public representation, the Fifth Circuit still found in favor of intervention because of doubts about the government's "motives and conduct in its defense of the litigation." *See id.* The Court found that the intervenors in that case only had to show that their interests "'may be' inadequately represented." *See id.* (*citing Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

Movants' interests would not only be inadequately represented by Defendants, but they also do not align with those of Defendants in this case. Movants have an interest in preserving minority opportunity districts while State Defendants have not articulated such an interest and

have a much broader public interest at stake. Furthermore, Movants' examination of Plaintiffs' witnesses and experts would likely diverge from that of Defendants, as would Movants' presentation of evidence in support of their defense. Movants' evidence and cross-examination of Plaintiffs and their witnesses would assist the Court in rendering a decision on a more complete record. Movants, who come from Senate Districts with low CVAP, stand to benefit not simply from the Senate Districts in and of themselves, but from the way that Senate Districts will be reapportioned depending on this case's outcome. If the Court denied the motion to intervene and Plaintiffs prevailed, the Court would look to Plaintiffs and Defendants to shape the relief. Apportionment based on CVAP, which could result without intervention by Movants, would make it more difficult for Latino and others living in Movants' senate districts to elect candidates of their choice.

II. Movants Request the Court Permit Intervention If Not Granted Of Right

Plaintiffs' only argument against Rule 24 permissive intervention is that Movants have not defined a legally cognizable interest. As expressed above, this is not the case. If the Court decides that intervention is not warranted of right, then Movants' respectfully urge the Court to permit intervention under Rule 24(b). Although Plaintiffs baldly assert that Movants' intervention would harm them or cause undue delay, they present no evidence in support of their contention.

CONCLUSION

For all the reasons stated herein, and in the Motion to Intervene of the Texas Senate Hispanic Caucus, Armando Garza, Francisco Guajardo, Reynaldo Guerra, Evelyn Jones, Sofia Reyes McDermott and Cassandra Chrostowski; Movants respectfully request that this Court grant their Motion to Intervene.

Dated: July 24, 2014

Respectfully Submitted,

MEXICAN AMERICAN LEGAL DEFENSE
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of July, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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