October 15, 2024

VIA CM/ECF

The Honorables Judge Smith, Judge Brown, and Judge Guaderrama
United States District Court for the Western District of Texas
El Paso Division
262 West Nueva Street, Room 1-400
San Antonio, Texas 78207

Re: Letter Brief of Fair Maps Plaintiffs responding to Order of the Court, ECF No. 810, in *League of United Latin American Citizens, et al.* v. *Abbott*, Lead Case No. EP-21-CV-00259-DCG-JES-JVB (W.D. Tex.)

Dear Judge Smith, Judge Brown, and Judge Guaderrama,

We write on behalf of Fair Maps Plaintiffs[1] in response to the Court's September 30, 2024 order ("Order") directing parties to submit letter briefs addressing the applicability of No. 23-40582, *Petteway* v. *Galveston Cnty.*, 111 F.4th 596 (5th Cir. 2024), to claims that the redistricting plans enacted by Texas following the 2020 census violate Section 2 of the Voting Rights Act ("VRA") and the United States Constitution. The Court need not reach the issue of *Petteway*'s applicability at this time, and there is good reason not to, as set forth below. Should the Court do so, however, Plaintiffs respectfully submit that *Petteway* incorrectly decided an issue that the Supreme Court of the United States has not yet resolved, and that the decision does not provide a basis to dismiss Fair Maps Plaintiffs' Section 2 claims in their entirety.

A. The Application of Petteway *to this Case Can and Should be Addressed as this Case Proceeds to Trial.*

Fair Maps Plaintiffs acknowledge that the Fifth Circuit held in *Petteway* that "Section 2 of the Voting Rights Act does not authorize separately protected minority groups to aggregate their populations for purposes of a vote dilution claim." 111 F.4th at 603. Fair Maps Plaintiffs respectfully submit that this Court need not decide, at this juncture, whether that holding forecloses any of Fair Maps Plaintiffs' Section 2 "coalition" claims, for several reasons.

There is no ripe, procedurally proper motion pending that requires this Court to consider Fair Maps Plaintiffs' VRA Section 2 coalition claims at this time. As the Court's Order recognizes, Defendants moved to dismiss the Fair Maps Plaintiffs' "*Supplemental* Complaint[]" on May 28, 2024. ECF No. 810 at 1 (emphasis added). But Fair Maps Plaintiffs' Supplemental Complaint did not add any new coalition claims; it pleaded only a limited number of new facts related to procedural actions taken by the 88th Texas Legislature that occurred *after* the filing of Fair Maps Plaintiffs' Second Amended Complaint. ECF No.

[1] Plaintiffs in the consolidated action *Fair Maps Texas Action Committee v. Abbott*, No. 3:21-cv-01038 (W.D. Tex.).

788 at 1–2. Defendants did not identify in their motion anything about those new facts that provides a basis for dismissal of Fair Maps Plaintiffs' Section 2 vote dilution claims. Indeed, in over thirteen pages of briefing arguing why Fair Maps Plaintiffs' Section 2 claims should fail as a matter of *law*, Defendants did not cite to a single allegation in Fair Maps Plaintiffs' Supplemental Complaint. *See* ECF No. 779 at 7–20. Instead, Defendants used the filing of Fair Maps Plaintiffs' Supplemental Complaint as a pretext for relaunching legal challenges to the validity of Section 2 coalition claims that this Court had already rejected. *See id.* at 7 n.1. In response, Fair Maps Plaintiffs acknowledged that this Court would be (and, of course, is) free to revisit its prior ruling at any time but urged the Court not to expend its resources on an issue it had already decided. ECF No. 788 at 9–10.

There is still no reason for this Court to revisit its prior decision denying Defendants' motion to dismiss Fair Maps Plaintiffs' Section 2 vote dilution claims. Defendants will have the opportunity to raise their legal challenge to Fair Maps Plaintiffs' Section 2 vote dilution claims at later stages of this case, including and up to post-trial briefing. And reserving judgment on Fair Maps Plaintiffs' Section 2 vote dilution claims to a later date will not prejudice Defendants or result in manifest injustice, *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988), because much of the discovery concerning those claims has already been disclosed and because Fair Maps Plaintiffs can and will advance alternative theories at trial explaining why the same districts are unlawful and must be redrawn. *See* ECF No. 502 ¶¶ 183, 186–87 (alleging intentional discrimination); ECF No. 777 ¶ 23 (incorporating enumerated claims by reference).

There are sound jurisprudential reasons why this Court should not rush to dismiss Fair Maps Plaintiffs' Section 2 vote dilution claims following *Petteway*. As Fair Maps Plaintiffs noted in their opposition to Defendants' motion to dismiss, it is an open question whether this Court is even bound by *Petteway*. ECF No. 788 at 10. Although some three-judge district courts have held that they are bound by circuit precedent, *e.g.*, *Russell* v. *Hathaway*, 423 F. Supp. 833, 835 (N.D. Tex. 1976), others disagree, *e.g.*, *Jehovah's Witnesses in Wash.* v. *King Cty. Hosp.*, 278 F. Supp. 488, 504-05 (W.D. Wash. 1967), and several have noted the open question, *e.g.*, *Poe* v. *Werner*, 386 F. Supp. 1014, 1016–17 (M.D. Pa. 1974). The leading academic work on the subject concludes that three-judge district courts are *not* bound by circuit precedent because the doctrine of *stare decisis* commands that lower courts follow the precedent of courts who review their decisions, and the decisions of this Court are reviewable only by the Supreme Court. Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 Geo. L.J. 413, 440–41 (2019) (citing *Parker* v. *Ohio*, 263 F. Supp. 2d 1100, 1112 n.3 (S.D. Ohio 2003) (Gwin, J., concurring)); *see also id.* at 445–48 ("This brings us to the ultimate question: is a three-judge district court inferior to a circuit court? From a formal hierarchical standpoint, the answer is no. In the federal court hierarchy, the only court that sits 'above' the three-judge district court is the Supreme Court."); *id.* at 454 ("[P]rior circuit court decisions may be highly persuasive, but they are not and should not be formally binding.").

Whether or not *Petteway* binds this Court is thus an open question, and there is no compelling reason for this Court to decide that question now, nor any need to mechanically—and *immediately*—apply *Petteway* to this case. And restraint may prove a virtue. We still do not know, for example, whether *Petteway* will be reviewed by the Supreme Court and, if so, how

the high court would rule. Dismissing Fair Maps Plaintiffs' Section 2 vote dilution claims now, on the pleadings, raises the prospect that those claims would have to be retried if *Petteway* were to be reversed. By contrast, waiting to resolve Fair Maps Plaintiffs' Section 2 vote dilution claims based on a full factual record (applying *Petteway* or not) would likely eliminate the need for further proceedings later on, regardless of the outcome of any Supreme Court review of the ruling in *Petteway*. The Court should reserve its ruling on Fair Maps Plaintiffs' Section 2 claims and deny Defendants' motion to dismiss those claims, for now, without prejudice or, in the alternative, defer a ruling on the motion until trial as permitted by rule. *See* Fed. R. Civ. P. 12(i) (a court may ruling on a Rule 12(b)(6) motion until trial). Courts may exercise their discretion to defer ruling on Rule 12 motions until trial where, as here, doing so would allow for the development of a more complete record in a novel area of law. *See, e.g.*, *Democracy N. Carolina v. Hirsch*, No. 1:23-CV-878, 2024 WL 1415113, at *9–10 (M.D.N.C. Apr. 2, 2024) (citing Rule 12(i) to hold that "there is good reason to avoid wading into this novel area of law at this preliminary stage . . . [T]he court therefore elects to exercise its discretion to defer ruling on Defendants' motions regarding this claim until trial").

B. Petteway *Is Wrongly Decided and Does Not Require Dismissal of Plaintiffs' Section 2 Claims in Their Entirety.*

Applying *Petteway* to dismiss Fair Maps Plaintiffs' Section 2 effects claims would be error, because *Petteway* is wrongly decided for all the reasons set forth in Fair Maps Plaintiffs' opposition to Defendants' motion to dismiss, *see* ECF No. 788 at 9–20, and explained at length in the dissenting opinions of the minority of the Fifth Circuit, 111 F.4th at 615–37 (Douglas, J., dissenting). Fair Maps Plaintiffs will not repeat those arguments at length here. It suffices to say that *Petteway* is "atextual and ahistorical," *id.* at 615, and situates the Fifth Circuit against the weight of authority of its sister circuits. *See Pope* v. *Cnty. of Albany*, 687 F.3d 565 (2d Cir. 2012); *Badillo* v. *City of Stockton*, 956 F.2d 884 (9th Cir. 1992); *Concerned Citizens* v. *Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524 (11th Cir. 1990). *But see Nixon* v. *Kent*, 76 F.3d 1381, 1393 (6th Cir. 1996).

As the Fifth Circuit recognized long ago, there is simply "nothing in the law that prevents plaintiffs from identifying the protected aggrieved minority" for purposes of a Section 2 vote dilution claim "to include both Blacks and Hispanics." *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), *overruled in part by Petteway*, 111 F.4th at 599. Should this Court conclude that it is *not* bound by *Petteway*, it should adhere to the far more persuasive interpretation of Section 2 advanced in *Campos* and reaffirm its prior ruling that Fair Maps Plaintiffs may assert Section 2 vote dilution claims on behalf of a coalition of minority voters. ECF No. 307 at 40, 42 (reiterating that "'coalitions can satisfy the first *Gingles* condition' under *Campos*" (quoting ECF No. 144).

In any event, *Petteway* does not require dismissal of Fair Maps Plaintiffs' Section 2 claims in their entirety, even if this Court holds that the decision does foreclose Fair Maps Plaintiffs' vote dilution claims. "[I]ndependent" of a Section 2 vote dilution claim, "[a]n election practice violates Section 2 and the Fourteenth and Fifteenth Amendments if it is undertaken and maintained for a discriminatory purpose." *Fusilier* v. *Landry*, 963 F.3d 447, 463 (5th Cir. 2020). Fair Maps Plaintiffs have alleged such Section 2 "purpose" claims here. *See* ECF No. 502 ¶ 179 (alleging Section 2 violation "in intention and effect").

* * *

For the foregoing reasons, Fair Maps Plaintiffs respectfully submit that the Court need not address the applicability of *Petteway* to Fair Maps Plaintiffs' Section 2 vote dilution claims at this time, and that *Petteway*, even if applied to the facts of this case, does not require the dismissal of Fair Maps Plaintiffs' purpose-based Section 2 claims.

October 15, 2024

Respectfully Submitted,

/s/ Hilary Harris Klein

Hilary Harris Klein*
NC. State Bar No. 53711
Mitchell Brown*
NC. State Bar No. 56122
Southern Coalition for Social Justice
5517 Durham Chapel Hill Blvd.
Durham, NC 27707
Telephone: 919-323-3380
Fax: 919-323-3942
hilaryhklein@scsj.org
mitchellbrown@scsj.org

David A. Donatti
TX Bar No. 24097612
Ashley Harris
Texas Bar No. 24078344
Thomas Buser-Clancy
Texas Bar No. 24123238
ACLU Foundation of Texas, Inc.
PO Box 8306
Houston, TX 77288
Tel: (713) 942-8146
Fax: (713) 942-8966
ddonnati@aclutx.org
aharris@aclutx.org
tbuser-clancy@aclutx.org

Yurij Rudensky*
NY State Bar No. 5798210
Brennan Center for Justice at NYU School of Law
120 Broadway, Suite 1750
New York, NY 10271
Tel: (646) 292-8310
Fax: (212) 463-7308
rudenskyy@brennan.law.nyu.edu

Patrick Stegemoeller*
NY State Bar No. 5819982
Asian American Legal Defense and Education Fund
99 Hudson Street, 12th Floor
New York, NY 10013
jvattamala@aaldef.org
slorenzo-giguere@aaldef.org
pstegemoeller@aaldef.org

Paul D. Brachman*
Paul, Weiss, Rifkind, Wharton & Garrison LLP
2001 K Street NW
Washington, DC 20006
pbrachman@paulweiss.com
202-223-7440

**Admitted pro hac vice*
Attorneys for Fair Maps Plaintiffs

CERTIFICATE OF SERVICE

I certify that on October 15, 2024, the foregoing document was served on counsel of record via the Court's CM/ECF system.

/s/ Hilary Harris Klein
Hilary Harris Klein