UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, et al., Plaintiffs, v. STATE OF TEXAS, et al., Defendants.	§	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), Plaintiffs, v. STATE OF TEXAS, et al., Defendants.	§	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]
TEXAS LATINO REDISTRICTING TASK FORCE, et al., Plaintiffs, v. RICK PERRY, Defendant.	§	CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated case]
MARAGARITA V. QUESADA, et al., Plaintiffs, v. RICK PERRY, et al., Defendants.	§	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

JOHN T. MORRIS,	§	CIVIL ACTION NO.
	§	SA-11-CA-615-OLG-JES-XR
Plaintiff,	§	[Consolidated case]
	§	
v.	§	
	§	
STATE OF TEXAS, et al.,	§	
	§	
Defendants.	§	
_____	§	
	§	
EDDIE RODRIGUEZ, et al.,	§	CIVIL ACTION NO.
	§	SA-11-CA-635-OLG-JES-XR
Plaintiffs,	§	[Consolidated case]
	§	
v.	§	
	§	
RICK PERRY, et al.,	§	
	§	
Defendants.	§	

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STATEMENT OF INTEREST OF THE UNITED STATES
UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

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INTEREST OF THE UNITED STATES

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit.

This case presents important questions regarding Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, which precludes covered jurisdictions from implementing voting changes without receiving "preclearance" for those changes. The Attorney General has primary responsibility for enforcing this preclearance requirement. *See* 42 U.S.C. § 1973c(a), 1973j(d). At issue here, where the State of Texas has not received preclearance for its enacted redistricting plans that would govern the election of its U.S. Congressional delegation and State House of Representatives, is whether the State may nevertheless implement the plans on an "interim" basis as it litigates the plans' substantive compliance with Section 5. The United States has a strong interest in maintaining the settled rule that no such implementation of an unprecleared change is permissible under the Voting Rights Act.

Moreover, the United States has a particular interest in the redistricting plans at issue in this case. It currently is defending the related declaratory judgment action filed by the State of Texas in the District Court for the District of Columbia seeking judicial preclearance under Section 5 for those plans. *See Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed July 19, 2011). In the Section 5 declaratory judgment action, the United States has answered Texas's complaint by denying that the State's proposed Congressional and State House redistricting plans comply with Section 5 of the Voting Rights Act. *See* Answer at 2, Texas v. United States, No. 1:11-cv-1303 (D.D.C., filed Sept. 19, 2011); *see also* United States' Memorandum of Points and Authorities in Support of its Opposition to Plaintiff's Motion for Summary Judgment, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed Oct. 25, 2011), ECF No. 79-2 (Attachment A).

SUMMARY OF ARGUMENT

The United States submits this brief to advise this Court regarding principles for fashioning redistricting plans to govern Texas Congressional and State House elections as a remedy for the State's failure to receive Section 5 preclearance. While Texas suggests that its enacted plans substantively comply with Section 5 and eventually will receive preclearance from the D.C. district court, in addition to being incorrect, this argument is also irrelevant because this Court lacks authority to rule on the merits of the plans' compliance with Section 5 or the likelihood that Texas will prevail in its declaratory judgment action. Rather, this Court's task is simply to order a remedy for the State's failure to secure preclearance for its enacted plans, to be enforced unless and until the plans at issue obtain preclearance or the State enacts alternative plans that do so. *See Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983).[1]

This Court must reject Texas's request that it order implementation on an "interim" basis of the very legislative plans that have failed to receive preclearance. Texas's proposal contravenes the settled rule that a covered jurisdiction may not implement an unprecleared redistricting plan, as an "interim" plan or otherwise. Moreover, this is not a situation where the Court can excise the problematic parts of a plan to which an objection has been interposed, as in *Upham v. Seamon*, 456 U.S. 37 (1981). Rather, this Court must set aside the unprecleared plans and either draw up its own or accept one of the specific remedial proposals offered by the plaintiffs.

[1] As Texas observes in its filings, this task would become unnecessary if the enacted plans were to receive preclearance from the D.C. district court. The United States disagrees with Texas as to the likelihood that the plans will receive preclearance.

ARGUMENT

I. This Court May Not Order the Unprecleared Plans Into Effect

This Court should reject Texas's proposal that it order implemented on an "interim" basis the very legislative plans that have failed to receive preclearance.[2] Section 5 requires a covered jurisdiction such as Texas to obtain preclearance before implementing any new voting changes. Unless and until the State obtains such preclearance, its redistricting plans cannot be implemented, except under very exceptional circumstances, none of which are present here. Nor does this case present a situation, as in *Upham v. Seamon*, 456 U.S. 37 (1981), where the Attorney General's objection to a redistricting plan specifies a defect in only part of the plan such that it may be cured by a court and the remainder of the plan enforced.

Section 5 requires covered States to obtain judicial or administrative preclearance before enforcing a voting change. 42 U.S.C. § 1973c(a). "A voting change in a covered jurisdiction 'will not be effective as law until and unless cleared' pursuant to one of these two methods." *Clark v. Roemer*, 500 U.S. 646, 662 (1991) (quoting *Connor v. Waller*, 421 U.S. 656, 656 (1975) (*per curiam*)). "Failure to obtain either judicial or administrative preclearance 'renders the change unenforceable.'" *Id.* (quoting *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982)).

Not only is a covered jurisdiction barred from enforcing its unprecleared plan, but a federal court may not order that jurisdiction to hold elections in which unprecleared voting changes will be implemented. *See, e.g.*,*Clark*, 500 U.S. at 654 ("§ 5's prohibition against

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[2] There is nothing necessarily "interim" about the plan this Court must fashion. The plan will be in effect until Texas obtains preclearance for a legislatively enacted redistricting plan or the Court orders a different plan into effect. Accordingly, unless the already enacted plan is precleared by the district court in the District of Columbia, the plan devised here will govern Texas elections unless and until Texas passes another plan that is precleared or until the next redistricting cycle.

implementation of unprecleared changes required the District Court to enjoin the election"); *Lopez v. Monterey County*, 519 U.S. 9, 22 (1996) (holding that it was error for district court to "order elections under that system before it had been precleared"). This rule does not give way simply because a district court is put to the "unwelcome obligation" of devising an alternative redistricting plan. *See Jordan v. Winter*, 541 F. Supp. 1135, 1141 (N.D. Miss.) (three-judge panel), *vacated and remanded on other grounds*, 461 U.S. 921 (1982). Rather, the law is clear that, in such situations, courts "should not put into effect the very plans … which have failed of preclearance by the Attorney General or are awaiting a pre-clearance decision by [the District of Columbia court]." *South Carolina v. United States*, 589 F. Supp. 757, 759 (D.D.C. 1984) (three-judge panel). Were it otherwise, State officials could "evade the preclearance process by proposing the disputed plan or its suspect parts as a legally permissible 'interim' alternative." *Id.* So long as the Court is presented with other alternatives, as it is here, it would be "both inappropriate and unseemly" to "implement on a temporary basis the plan which those proceedings seek to preclear." *Jordan*, 541 F. Supp. at 1142.

While Section 5 does not by its terms cover orders by federal district courts, it does preclude a covered jurisdiction such as Texas from submitting an unprecleared plan to a court as a means of avoiding Section 5 review – including as a proposed remedy for violations of other laws, such as Section 2 of the Voting Rights Act.[3] *McDaniel v. Sanchez*, 452 U.S. 130, 137 (1982); *see also Campos v. City of Baytown*, 840 F.2d 1240, 1250 (5th Cir.), *rehearing denied*, 849 F.2d 943 (1988) (holding the district court erred by adopting an unprecleared legislative plan

[3] There is no basis for Texas's assertion that the Supreme Court "severely limited the scope of *McDaniel*" in *Lopez v. Monterey County*, 525 U.S. 266 (1999). *See* Defendants' Advisory Regarding Interim Reapportionment at 4 n.2. To the extent that *Lopez* is inconsistent with *McDaniel*, it strengthens the general rule requiring preclearance by clarifying that only "wholly court-developed plans" are exempted. *See* 525 U.S. at 287.

proposed by the City). Preclearance is required "whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people," including when the proposal is submitted to a federal court as a proposed remedy. *McDaniel*, 452 U.S. at 153; *see* 28 C.F.R. § 51.18(a) ("Changes affecting voting for which approval by a Federal court is required, or that are ordered by a Federal court, are exempt from section 5 review only where the Federal court prepared the change and the change has not been subsequently adopted or modified by the relevant governmental body.").

There is no merit to Texas's argument that, notwithstanding this general rule, this Court should order into effect all or part of the same redistricting plan that has failed to receive preclearance. Texas misreads *Upham v. Seamon*, 456 U.S. 37 (1981), a case that establishes an exception to the general rule outlined above for circumstances in which the Attorney General's objection identified only part of a plan as problematic. This case is not among those to which *Upham* applies.

In *Upham*, Texas submitted its redistricting plan to the Attorney General for preclearance. The Attorney General interposed an objection that identified two districts as raising concerns under Section 5. With regard to the remainder, the Attorney General noted that the State had satisfied its burden of demonstrating that the plan was nondiscriminatory in purpose and effect. A local district court, hearing a constitutional challenge to the redistricting plan, remedied the concerns specified in those two districts to which the Attorney General had objected. It also redrew the districts in the area of Dallas County, to which the Attorney General had not objected. *See Upham*, 456 U.S. at 38.

In a *per curiam* opinion, the Supreme Court reversed with respect to the court's modification of the Dallas County districts. It held that, in devising an interim plan, a district

court's changes to a legislatively enacted plan should be limited "by the nature and scope of the violation." *Id.* at 42. Where the Attorney General has objected to only one part of a plan and has found the remainder unobjectionable, a court should adopt a plan that permits the unobjectionable portion to go into effect. *Id.* at 43.

Upham thus applies to that limited set of cases in which a court can identify and adopt "the unoffending parts" of an unprecleared plan. *South Carolina*, 589 F. Supp. at 759 (citing *Upham*). Under such circumstances, "*Upham* requires the court to minimize violence to those legislative policies embodied in the plan by changing it only to the extent necessary to cure its cognizable flaws." *Cook v. Luckett*, 735 F.2d 912, 918 (5th Cir. 1984).

For example, in *Jordan v. Winter*, the Attorney General objected that the drawing of certain district lines diluted the black vote. 541 F. Supp. at 1143. The district court was able to "accept that decision" while drawing a map that embodied many of the legitimate political decisions made by the legislature. *Id.* Similarly, in *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991), *aff'd sub. nom. Richards v. Terrazas*, 505 U.S. 1214 (1992), the Attorney General had interposed objections to a Texas House of Representatives statewide redistricting plan only with respect to some regions. Accordingly, the court was able to "fashion a remedial plan yet remain loyal to those portions of the state in which no DOJ objections were lodged." *Id.* at 837. And in *Balderas v. State*, No. 6:01-cv-158, 2001 WL 34104833 (E.D. Tex. Nov. 28, 2001), the Attorney General had objected to the dilution of Hispanic voting strength only in certain regions of Texas. Accordingly, the court was able to fashion a remedy that "address[ed] all of [the

Attorney General's] concerns" while preserving that part of the legislative map to which no objection had been issued. *Id.*, 2001 WL 34104833 at *3.[4]

This case does not fall within the narrow exception established by *Upham* for several reasons. First, *Upham* applies only where there is an administrative objection from the Attorney General that specifies certain districts and permits a court to identify and implement "the unoffending parts." Here, by contrast, there is no administrative determination from the Attorney General at all, because the State has chosen to seek judicial preclearance exclusively through a district court proceeding. While this choice is the State's prerogative, *see* 42 U.S.C. § 1973c(a), the result is that the Attorney General has not pronounced, and could not pronounce, any parts of the plan as compliant with Section 5, as occurred in *Upham* and its progeny. Moreover, some other litigants have opposed preclearance based on claims different than those of the United States, and it ultimately will be the D.C. court that determines how much, if any, of the enacted plans comply with Section 5.

The State concedes that its choice to have the district court decide whether its plans meet the Section 5 standard makes this situation "slightly different," *see* Defendants' Advisory Regarding Interim Reapportionment at 4, but it misunderstands the significance of that difference. The State observes, correctly, that the Attorney General, rather than lodging a formal objection that has binding legal effect, has simply filed an answer "in a lawsuit that has yet to be adjudicated." *Id.* at 8. But that does not mean, as the State argues, that this Court may implement the enacted plan until such time as the D.C. court "expressly denies preclearance."

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[4] The State's reliance on *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) is misplaced. *See* Defendants' Advisory Regarding Interim Reapportionment at 7. The redistricting plan in that case received preclearance from the Attorney General before the drawing of a remedial map. *See Martinez*, 234 F. Supp. 2d at 1287.

Id. Rather, it means that the plan may not go into effect until that court expressly *grants* preclearance. *See* 42 U.S.C. § 1973c(a) (barring a covered jurisdiction from putting change into effect "unless and until the court enters such judgment"); 28 C.F.R. § 51.1(a)(1) (prohibiting "the enforcement" of covered law until a "declaratory judgment is obtained").

Second, even if the Attorney General's filings in the D.C. district court could limit the preclearance controversy in the same fashion as an administrative objection, the issues identified by the Attorney General encompass the entire plans. In particular, the United States has taken the position that both the Congressional and State House plans were drawn with discriminatory purpose. Additionally, the United States takes the position that both plans have retrogressive effects in that they diminish the ability of minority voters in the state as a whole to elect their preferred candidates of choice. *See, e.g.*, United States' Memorandum of Points and Authorities in Support of its Opposition to Plaintiff's Motion for Summary Judgment, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed Oct. 25, 2011), ECF No. 79-2. Accordingly, there is no "unoffending part[]" of either plan.

Finally, Texas asks this Court to order into effect the *entirety* of its redistricting plans, including those districts specifically identified by the Attorney General's answer as contributing to a retrogressive effect. Unsurprisingly, the State can cite to no cases under Section 5 endorsing such an approach. Instead, it relies heavily on decisions not involving Section 5's preclearance requirements, such as *Bullock v. Weiser*, 404 U.S. 1065 (1972), and *Whitcomb v. Chavis*, 396 U.S. 1055 (1970). *See* Defendants' Advisory Regarding Interim Reapportionment at 5. To the extent either of those cases is relevant here, they support the general principle that, where possible, a court should permit only the "unoffending parts" of a legislative redistricting plan to

go into effect.[5] They certainly do not support Texas's proposal to implement the entirety of its redistricting plans.

Texas's proposal that this Court order into effect the State's unprecleared redistricting plans is specifically foreclosed by the Voting Rights Act and settled caselaw. Because the narrow exception set out in *Upham* does not apply here, there is no basis for the Court to deviate from this settled rule.

II. Adopted Plans Must Comply with Section 2 and Section 5

The Court will need to ensure that any plans it adopts comply with both Section 2 and Section 5 of the Voting Rights Act. *See Abrams v. Johnson*, 521 U.S. 74, 90, 96 (1997); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 631 (D.S.C. 2002). The United States has attached its filings to the three-judge court in the United States District Court for the District of Columbia regarding the appropriate standard to consider when making the Section 5 inquiry. *See* United States' Statement of Genuine Issues, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed Oct. 25, 2011), ECF No. 79-1 (Attachment B); United States' Memorandum of Points and Authorities in Support of its Opposition to Plaintiff's Motion for Summary

[5] *Bullock* involved a challenge to Texas's redistricting following the 1970 census, before Texas was covered by Section 5's preclearance requirements. A district court found the redistricting plan to violate one-person, one-vote principles and ordered the State to use an alternative plan for the 1972 election. The Supreme Court stayed this order in early 1972, thus permitting the legislatively enacted plan to be used on an interim basis. The Court eventually affirmed the district court's finding as to the enacted plan's unconstitutionality, but found that the district court should have chosen an alternative plan that cured the enacted plan's constitutional deficiencies while more closely conforming to the State's political choices. *See White v. Weiser*, 412 U.S. 783, 794-97 (1973). In *Whitcomb*, the court rejected on the merits a challenge to an Indiana redistricting plan that was alleged to be dilutive. It observed in dicta that, even had the district court been correct in finding the plan unconstitutional, it should have struck down the plan only with respect to the areas where the violation was alleged and permitted the remainder of the plan to go into effect. *See* 396 U.S. at 160-61.

Judgment, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C., filed Oct. 25, 2011), ECF No. 79-2 (Attachment A).

CONCLUSION

This Court should not implement Texas's unprecleared plan, on an interim basis or otherwise.

Date: October 28, 2011

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