IN THE 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. 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-11-361-OLG-JES-XR [Consolidated case]
TEXAS LATINO REDISTRICTING TASK FORCE, et. al. *Plaintiffs,* v. RICK PERRY, et al. *Defendants.*	)	CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated case]
MARGARITA 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 *Plaintiff,* v. STATE OF TEXAS, et al. *Defendants.*	)	CIVIL ACTION NO. SA-11-CA-615-OLG-JES-XR [Consolidated case]
EDDIE RODRIGUEZ, et al. *Plaintiffs,* v. RICK PERRY, et al. *Defendants.*	)	CIVIL ACTION NO. SA-11-CA-635 [Consolidated case]

QUESADA PLAINTIFFS' RESPONSE TO STATE OF TEXAS' PROPOSED INTERIM REMEDIAL PLAN AND PLANS OFFERED BY OTHER PLAINTIFFS

Pursuant to this Court's Order of October 3, 2011, the Quesada Plaintiffs respectfully submit this response regarding the State of Texas' proposed remedial plans, as well as plans submitted for the Court's consideration by other plaintiffs. Although the Quesada plaintiffs only challenge the congressional plan in this action, the points made in this response would apply to the state house and state senate plans as well.

DISCUSSION

The State of Texas proposes to use the plans enacted in 2011, which the State of Texas concedes have not yet received preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, as interim plans for the 2012 election cycle. According to the state, the legislatively-enacted maps are "the only legislatively-approved memorialization of the intent of the State of Texas, which is due great deference when the judiciary intercedes in the province of the legislative branch." The State of Texas also expresses the view that "the Defendants remain confident that the Section 5 proceeding will

conclude well prior to the dates by which finalized maps will be necessary for implementation[.]"

1. The State of Texas' Proposal To Use The Legislative-Enacted, Unprecleared Plans as Interim Plans for the 2012 Elections

A new reapportionment plan enacted by a State will not be considered "'effective as law,' until it has been submitted and has received clearance under § 5." *Connor v. Finch*, 431 U.S. 407, 412 (1977). See also *Connor v. Waller*, 421 U.S. 656 (1975), and *McDaniel v. Sanchez*, 452 U.S. 130, 146 (1981). Furthermore, as *McDaniel v. Sanchez* makes clear, federal courts cannot approve plans enacted by State or local governments (whether permanent or on an interim basis) that are subject to the preclearance requirements of Section 5 of the Voting Rights Act because such plans, "reflect[ ] the policy choices of the elected representatives of the people." *Id*. at 153. The Court's later decision in *Lopez v. Monterey County*, 519 U.S. 9 (1996), confirms *McDaniel*, holding that it was error for a district court to order an election under a proposed legislative plan before that plan was precleared.

In *Balderas v. State of Texas*, Civ. Action No. 6:01CV158 (E.D. Tex., Nov. 14, 2001) *(per curiam), summarily aff'd*, 536 U.S. 919 (2002), the three-judge federal court was "left with the 'unwelcome obligation of performing in the legislature's stead'" when the State failed to enact a congressional plan in 2001. The *Balderas* court noted that "although a court must defer to legislative judgments on reapportionment as much as possible, it is forbidden to do so when the legislative plan would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans." *Balderas*, slip opinion at 4-5 (quoting *Upham v. Seamon*, 456 U.S. 37, 39 (1982) (*per curiam*)). The *Balderas* court was forced to draw a plan when the Legislature failed

to do so. Here, the Legislature has acted but its' plans have not been precleared. Because unprecleared plans have no effect as law unless and until precleared, there is no duty on this Court to defer to the legislative enacted plans. Indeed, Congress has concluded in enacting Section 5 of the Voting Rights Act that the legislative judgment of the covered jurisdictions is not entitled to the deference normally afforded to state and local authorities. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Under Section 5, the legislative judgment of the State of Texas (and other jurisdictions subject to Section 5 preclearance requirements) is subject to special scrutiny to ensure that any redistricting plan adopted is free of a racially discriminatory purpose and effect. *City of Rome v. United States*, 446 U.S. 156 (1980). Further, to allow unprecleared plans to go into effect would not only permit evasion of the Section 5 preclearance standards, it would encourage circumvention of Section 5. Covered jurisdictions would delay seeking preclearance review as long as possible in the hopes of having a court approve their legislatively-enacted, unprecleared plans, and then claim exigent circumstances or the necessity of an approaching election justify use of an unprecleared plan.

In the case before this Court, the fact that the State has not received preclearance of three statewide plans (congressional, state senate or state house) in a timely way is a problem of the State's own making. After all, the State made the policy choice to take up redistricting of the state senate and state house at the end of the legislative session (in May 2011). It failed to take up congressional redistricting until a special session in June 2011. The state senate and house redistricting plans were finally enacted by the Texas Legislature in the latter half of May,[1] but Defendant Governor Rick Perry waited a

[1] http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB31; http://www.legis.state.tx.us/BillLookup/history.aspx?LegSess=82R&Bill=HB150

nearly a month, until June 17, 2011, to sign those plans into law.[2] And state officials waited more than a month, until July 19, 2011, to seek preclearance of all three plans,[3] and when they finally did, they sought preclearance from a three-judge district court in Washington, DC rather than pursuing the "speedy alternative" of administrative preclearance from the United States Attorney General. See *Morris v. Gressette*, 432 U.S. 491, 503 (1977). In the DC litigation, the State has done nothing to expedite the case, failing to ask the D.C. court to shorten the time for the United States to file an Answer to the complaint and failing to ask for an expedited trial. In fact, the state has moved the DC Court for summary judgment in what it concedes is a fact bound case, making summary judgment highly unlikely, especially given the fact-intensive issues of racially discriminatory purpose and effect.

Further, a letter from the Department of Justice details substantial objections to the reapportionment plans enacted by the State. With regard to the congressional plan, for example, DOJ has informed the State: "In the particular circumstances presented here, even if the total number of districts in which minority voters can elect a candidate of choice remains the same in the proposed and benchmark plans, when combined with the changes in Districts 23 and 27 and the addition of four new seats to expand the overall

---

[2] *Ibid.*

[3] Moreover, even if preclearance was obtained, the redistricting plans at issue in this case violate Section 2 of the Voting Rights Act, 42 U.S.C. §1973, and the Fourteenth Amendment to the United States Constitution. In the unlikely event of timely preclearance, this Court would be duty bound to impose a remedy that fully cures those violations. In *White v. Weiser*, 412 U.S. 783, 794-795 (1973), the Supreme Court noted that in fashioning a remedy in redistricting cases, adherence to state policy choices should not prevent or constrain federal courts from affording relief to redress fully the violations of the Constitution or federal law. The Court noted: "Of course, the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge. The District Court should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified." 412 U.S. at 797.

size of the congressional delegation, that has resulted in diminishment of minority voters' effective exercise of the electoral franchise." Given DOJ's position, there simply is no basis for confidence that the State's plans will gain preclearance at all, much less in time to meet the 2012 election schedule.[4]

Given the state's own delay in seeking preclearance, and in view of the fact that there remains enough time for this Court to impose a new remedial plan (and to move any election deadlines), there are no exigent circumstances present in this case that could possibly justify allowing the State's unprecleared plans to go into effect on an interim basis.[5]

2. The Proposed Remedial Congressional Redistricting Plans of Other Plaintiffs

While Plaintiffs in these consolidated cases offer a number of different remedial congressional plans for the Court's consideration, the proposals show significant agreement among plaintiffs on key elements of a plan. These remedial proposals of plaintiffs not only respect the minority population growth in Texas that is responsible for Texas gaining four new congressional seats, but these proposed plans remedy the Voting Rights Act and constitutional violations within the State's proposed Plan C185.

In North Texas, for example, there is general agreement among nearly all plaintiffs that two new minority opportunity districts be created. Dallas and Tarrant Counties contain over 2.1 million African Americans and Hispanics, yet under the State's proposed plan C185 the entire North Texas region contains only one minority opportunity district (District 30, Eddie Bernice Johnson). The Hispanic and African American populations in the two counties combined increased by 593,723 persons over the past

[4] The DOJ letter is attached hereto as Exhibit 1.

decade while the Anglo population declined by 156,742 persons.[6] Tarrant County contains the third largest concentration of African Americans in Texas. Dallas and Tarrant combined contain the third largest urban Hispanic population in Texas. Under the State's Plan, 594,810 African American and Hispanic residents are packed into District 30, while 1,575,361 are cracked among 8 Anglo-controlled districts wholly or partially contained within Dallas and Tarrant counties.[7]

Many plaintiffs or plaintiff groups have filed proposed remedial congressional plans that include a new African American opportunity district in addition to a new Hispanic opportunity district in North Texas. These include: the Quesada Plaintiffs (Plan C205), MALC Plaintiffs (Plan C211), LULAC Plaintiffs (Plan C208), NAACP Plaintiffs (Plan C193) and Rodriguez Plaintiffs (Plan C205 is cited as a supported plan by the Rodriguez plaintiffs in addition to Plan C166). Indeed, the plaintiffs in these consolidated cases have near consensus that any remedial congressional plan ordered by this Court should include 9 or 10 Hispanic Opportunity Districts; 4 African American opportunity districts; and 1 Travis County based majority-minority coalition district. Such results are fully consistent with the three-judge court's observations in *Balderas supra*, that any court-ordered plan must abide by the principle of "racial fairness". See

[6] 2000 Census and 2010 Census (Note: these calculations only include African American's classified as "Not Hispanic or Latino; Population of one race; Black or African American alone" and do not include the many multi-raced persons who are included in the Texas Legislative Council classification of African Americans.

[7] The Quesada Plaintiffs' proposed remedial Plan C205 demonstrates that a new viable, reasonably compact Hispanic opportunity district **and** a new viable, reasonably compact African American opportunity district can be drawn in North Texas without diminishing the effectiveness of existing African American opportunity District 30 (currently represented by Rep. Eddie Bernice Johnson). Further, Plan C205 does not pair any incumbent anywhere in the region or in the State while retaining the core geographic base of all existing districts.

Balderas, slip opinion at 4-5 (quoting *Upham v. Seamon*, 456 U.S. 37, 39 (1982) (*per curiam*)).

Respectfully submitted,

/s/ J. Gerald Hebert
191 Somervelle Street, #405
Alexandria, VA 22304
(703) 628-4673

Gerald Harris Goldstein
Donald H. Flanary, III
GOLDSTEIN, GOLDSTEIN & HILLEY
Tower Life Building
310 S. St. Mary's, 29th Floor
San Antonio, TX 78205
(210) 226-1463
Fax: (210) 226-8367

COUNSEL FOR PLAINTIFFS MARGARITA V. QUESADA, MARC VEASEY, ROMEO MUNOZ, JANE HAMILTON, JOHN JENKINS, AND LYMAN KING

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2011, a copy of the foregoing was served on all counsel of record, by filing this Response of the Quesada Plaintiffs Regarding Interim Remedial Plans in the ECF filing system of the Western District of Texas, as well as on those attorneys who have not registered with ECF system in the Western District of Texas and who do not receive service via ECF filing via first-class mail.

/s/ J. Gerald Hebert
J. GERALD HEBERT

U.S. Department of Justice
Civil Rights Division

Voting Section - NWB
950 Pennsylvania Ave, NW
Washington, DC 20530

EXHIBIT 1

September 28, 2011

By electronic mail
Bruce Cohen
Special Assistant to the Attorney General
Office of the Attorney General
209 West 14th Street, 8th Floor
Austin, Texas 78701

Re: *Texas v. United States*, No. 1:11-cv-1303 (D.D.C.)

Dear Mr. Cohen:

This responds to your letter of September 26, 2011, requesting additional information beyond that provided in the Identification of Issues that the Department of Justice filed with the Court and provided to the parties in this case on September 23, 2011 (Docket #53). Your letter contains a number of misstatements about the Department's position.

The Department stands by its September 23 filing and believes that it is fully responsive to the Court's Order. The Department's Identification of Issues specifies in some detail the districts the Department believes to be at issue, the districts the Department believes not to be at issue, and the Department's concerns about discriminatory purpose and effect regarding the proposed redistricting plans for the Texas House of Representatives and for the Texas delegation to the United States House of Representatives. Our view is that the Department's filing significantly illuminates and narrows the issues before the Court.

Your assertion that there is no standard for assessing retrogression is without merit. On numerous occasions, and in our court filing, we have advised the State that the Department's view regarding retrogression is contained in the "Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act." 76 Fed. Reg. 7470 (Feb. 9, 2011). "A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' 'effective exercise of the electoral franchise' when compared to the benchmark plan. *Beer v. United States* at 141." 76 Fed. Reg. at 7471. In accord with the language of Section 5 itself, the Guidance is clear that the standard is whether the minority group's ability to elect its preferred candidate of choice is diminished. *Id.*

The Department has followed that Guidance in stating its position in this case. Assessing whether the ability to elect exists "requires a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.* While the Department began with the comparison of census data in the benchmark and proposed redistricting plans, that data alone did not provide "sufficient indicia of electoral behavior to make the requisite determination." *Id.* In

accord with the Guidance, the Department examined "election history and voting patterns within the jurisdiction, voter registration and turnout information." *Id.* In this instance, most of the electoral history information the Department has considered so far came from the State itself. This includes, but is not limited to, the racial bloc voting analyses conducted by Texas as well as reconstituted election analysis. We have also reviewed the expert reports filed in the *Perez v. Perry* litigation.

We have never stated that the Department departed from the principle in our Guidance that "comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any Section 5 analysis...." *Id.* What we have stated is our view that the *per se* standard Texas articulates - that any district that includes more than 40 percent black voting age population, or more than 50 percent Hispanic citizen voting age population, means there is an ability to elect - is not supported by the law. *See, e.g., Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 79 (D.D.C. 2002) (three-judge court) ("The legal standard is not total population, voting age population, voting age citizen population or registration, but the ability to elect. The Supreme Court repeatedly has declined to elevate any of these factual measures to a magical parameter.") (internal quotations and citations omitted), *vacated*, 539 U.S. 461 (2003). *See also* 76 Fed. Reg. at 7471 ("In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment.") The Department thus believes that the fixed measure used by Texas to evaluate its proposed redistricting plans is erroneous. In claiming that the Department does not follow any standard, you are misrepresenting what we have said.

You have requested that we disclose all elections examined by our expert and the Department, the analysis and findings of the expert and the Department, and an explanation of the analysis. As I noted in my email to you on September 24, the Court has established a schedule for expert discovery. We will disclose the expert we have retained on October 8, and we will provide the expert report on a mutually agreeable date after October 8. While our expert has been analyzing the plan, we do not have an expert report at this time, nor do we read the Court's request for identification of issues in the case to require us to turn over the expert's work up to our September 23 filing. The Department also does not believe that the request for identification of issues required us to turn over the work product of attorneys or persons working under their direction. Fed. R. Civ. P. 26(b)(3). The Department stated in the September 23 filing that there are still some issues being analyzed, such as the status of District 149 in the State House.

You have raised two new requests in your September 26 letter. First, you have asked the Department's view on whether elimination of an existing district in which it can be demonstrated that minority voters together vote cohesively, e.g., black and Hispanic voters, such that they have the ability to elect a candidate of choice, could be considered retrogressive under Section 5. The Department's view is that elimination of such an existing ability to elect district can be retrogressive. At this time, however, we have not yet determined whether, in fact, this specific circumstance exists in this case. We will address that issue, if necessary, in our response to your summary judgment.

Second, you have asked the Department's view on whether the addition of four new congressional districts has an impact on the analysis of retrogression in a statewide plan. The Department's view is that statewide redistricting plans must be analyzed on a statewide basis, and that this analysis can be impacted both by changes in existing seats as well as the addition and design of new seats. In the particular circumstances presented here, even if the total number of districts in which minority voters can elect a candidate of choice remains the same in the proposed and benchmark plans, when combined with the changes in Districts 23 and 27 and the addition of four new seats to expand the overall size of the congressional delegation, that has resulted in diminishment of minority voters' effective exercise of the electoral franchise. The Department will address the legal issue in response to your summary judgment motion.

Let me know if you would like to engage in any additional discussions regarding this matter.

Sincerely,

Tim Mellett
Deputy Chief, Voting Section