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

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

Defendants.	)	
_____	)	
	)	
JOHN T. MORRIS,	)	CIVL 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.	)	

PLAINTIFF-INTERVENORS NAACP AND CONGRESSPERSONS EDDIE BERNICE JOHNSON, ALEXANDER GREEN, AND SHEILA JACKSON-LEE JOINT ADVISORY BRIEFING

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff-Intervenors NAACP and the African-American Congressional Intervenors Eddie Bernice Johnson, Sheila Jackson Lee and Alexander Green, file this Joint Advisory Briefing, and in connection therewith, would respectfully show the Court the following.

I.

BACKGROUND

There are many matters to consider in regards to what this court may or may not do in regards to interim relief that we submit is clearly needed. The State chose not to seek preclearance from the Department of Justice and instead waited until the deadline had nearly expired to file in federal district court in Washington, D.C. And as we know, the unofficial courtesy submission from the State of Texas to the Justice Department has led DOJ to conclude that the State's House of Representatives and Congressional Maps are indeed retrogressive for a variety of reasons. This of course is something the court must consider when deciding what interim relief should be provided. There are many other issues that the court must also consider which include but are not necessarily limited to the following:

(a) Residency for candidates for House of Representatives seats;

(b) Familiarity with areas recently joined to others that many candidates might lack;

(c) How fundraising will be impacted and as a result the viability of minority voters' candidates of choice;

(d) Whether the configurations of a district are appropriate in light of the intensely racial response of the white community (described as the "Obama effect" by Prof. Murray) from the 2010 election cycle or whether the 2010 election cycle was simply an aberration;

(e) The need to identify election officials for different precincts because of impending precinct changes that might pair election officials;

(f) The likelihood that if a violation is ultimately found by this court or the court in

D.C. the fact remains that 36 persons under an interim map would all of a sudden become incumbents and have certain advantages against those who will run from newly created districts--even though the law precludes a temporary plan from being considered a benchmark;

(g) The need to ensure as suggested by traditional redistricting principles that communities of interest are kept intact, political subdivision cuts are minimized, and districts are drawn compactly.

II.

EVIDENCE HAS BEEN SUBMITTED THAT WOULD PERMIT THE COURT TO DETERMINE ON A PRELIMINARY BASIS THAT PLAINTIFF'S WOULD BE PREVAILING PARTIES

Though this matter is not before the court under a preliminary injunction analysis we think it important for the court to undertake an analysis using the law in this area and the applicable standards. Generally, a preliminary injunction may be granted if the following is shown:

i. a substantial likelihood of success on the merits;

ii. a substantial threat of irreparable harm if the injunction were not granted;

iii. the threatened harm to plaintiffs outweighs the harm an injunction may cause the defendants; and

iv. the public interest will not be disserved by a preliminary injunction.

See e.g. Church *v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994). In this case we believe the evidence has been overwhelming as we have indicated in our post trial brief filed separately today to substantiate the claims and allegations made by racial and ethnic minorities in this litigation. Add to this the decision by the United States Department of Justice that the proposed State House and Congressional maps are retrogressive in violation of §5 of the V.R.A. Even the State's expert, Prof. Allford, indicated that the State's proposed new plan provided for only 7 Latino opportunity districts and 3 African-American ones. That testimony taken in conjunction with Prof. Allford's testimony acknowledging that if a district has 35 percent African-American voting age population the African-American candidate would likely win along with Prof. Murray's testimony that African-American electoral success is consistently found in districts as low 30% African-American voting age population, establishes that the Texas Legislatures act of not drawing any additional minority opportunity districts with the expansion of four Congressional seats when the growth in the state which garnered those four seats was 89% attributed to minority growth was nothing but intentional racial discrimination. As Prof. Murray testified, it is like a monkey sitting at a typewriter and writing King Lear: this clearly wasn't happenstance. When we look at this number in light of the evidence regarding additional coalition opportunity districts the court can further see how it might consider such districts in any remedial plans. Add to this the clear concern for the viability of such districts when minority candidates of choice may be required to run against those with incumbency status and the Court can understand the real need to implement such a proposed interim plan now. Further, with the rules

regarding seniority in Congress being so important, any Representatives of any such district should not be hampered by losing a full term in the United States Congress. This would greatly and irreparably harm the minority community. In summary the court has Section 2 evidence before it and can take notice of what is occurring in the Section 5 proceeding to clearly understand that it is more likely than not that the State has violated the V.R.A. and/or the U.S. Constitution in fashioning the State House and Congressional Districts plans in Texas (H283 and C185).

III.

AN ASSORTMENT OF REVENANT CASES

The Standard for Courts to utilize in fashioning interim plans requires equity.

In 1982 another 3 Judge panel was confronted with a similar question regarding Texas. *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982). On October 29, 1991 the Texas Legislative Redistricting Board adopted a House Plan after the Legislature had failed to adopt the plan during the regular session. On the 27th the Board had adopted a State Senate plan for the same reason. On November 30, 1991 the Secretary of State of the State of Texas submitted the LRB plans for pre clearance. Notably, in their submission the Republican Secretary of State David Dean indicated that the plans may have been retrogressive in his opinion. After the Department of Justice agreed temporarily with the decision, the State asked for an opportunity to present more data on the 19th of February 1982. Since Texas law did not permit the Legislature to act outside of the regular session to adopt such a plan and the time for the Texas Legislative

Redistricting Board had expired, the court indicated that the Texas plans were rendered legally unenforceable. The Court changed the filing deadline from March 1st to March 19th which was the latest date possible for the deadline to be if the primary election were to be held on time. Later the Court changed the deadline to March 12th.

On March 1st and 2nd the Court held a hearing on the proposed alternative plans and modifications, etc. Hours before the court was to release its decision on March 4th, the Department of Justice amended its objections to only complain about Dallas, Bexar and El Paso Counties in the House Plan and Bexar and Harris Counties in the Senate Plan. The Court adopted the MALDEF plans for the House of Representatives and the LRB plans for both the House and the Senate.

The panel said that its decision was based on several considerations, some of which were legal in nature and others that were equitable. The Court said that as mandated in Reynolds v. Sims, they had an obligation to choose the most equitable plan. *Reynolds v. Sims*, 377 U.S. at 587, 84 S.Ct. at 1394. In its analysis the 3 Judge panel said that the MALDEF and Senate Plaintiff proposals went too far in addressing the concerns raised by the Department of Justice. And the court said that the tendered plans had problems of their own. The Court stated:

> "Based upon all the evidence, this Court finds that the election in Dallas County could not be properly and timely held under any of the alternative plans. This Court has weighed the relative increase in minority voting strength that would occur upon adoption of the alternative plans with the detrimental effects to minorities and others that would occur if the elections were postponed, and this

Court is of the opinion that the election should proceed in Dallas County under the LRB's House plan."

The Court went on to hold, "we have considered the proximity of the forthcoming primaries and the mechanics and complexities of the State's election laws and processes, and we have endeavored to avoid a disruption of the electoral process, an event which would materially adversely affect racial and language minorities. We have attempted to adhere to the legislative configurations to the maximum extent possible. We have treated the remaining Section 9 objections by the Department of Justice as "givens" and have addressed those objections and, where possible, remediated them."

The Court went on to hold that their decisions were racially fair and equitable. Of course this was in regards to a situation where the number of seats was the same as under the old redistricting plan so there was great emphasis on Section 5. In this case there are 4 new districts and serious issues that have been raised under Section 2 and we do not have any language embracing the other parts of the State's plan that comes from the Department of Justice.

Similarly, in *White v. City of Belzoni, Miss*., 854 F. 2d 75 (5th Cir. 1988) a city alderman plan failed preclearance, and the district court fashioned its own interim plan (actually adopting plaintiffs' plan). The Fifth Circuit approved this approach. 854 F.2d at 76.

Yet another such case is *Terrazas v. Slagle*, 821 F. Supp. 1154 (W.D. Tex. 1992), where the three-judge panel fashioned its own interim plan for both the Texas House and Senate

The Court in *Reynolds v. Sims*, 377 U.S. 533 (1964) held the following:

"It is enough to say that once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the forthcoming election and the mechanics and complexities of state election laws, and should not rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a state in adjusting to the requirements of the court's decree."

IV.

LIMITATIONS ON THE USE OF PLANS THAT HAVE NOT BEEN PRE-CLEARED OR THAT HAVE BEEN REJECTED BY THE DEPARTMENT OF JUSTICE OR COURTS

The United States Court of Appeals for the 5th Circuit held that there are only

limited circumstances where the government's plan that has not been pre cleared may be adopted for use. *Campos v. City of Houston*, 968 F.2d 446 (5th Cir. 1992). The District Court in that case ordered that a plan objected to by the Department of Justice be used for elections even though there was another plan that had been approved. The 5th Circuit held that under those circumstances the District Court abused its discretion in adopting such a plan to be used. It held that only under exigent circumstances may a court adopt a plan that has been objected to by the Department of Justice. Citing *Clark v. Roemer*, 111 S.Ct. 2096 (1991). In this case the 5th Circuit pointed out that the pre-cleared plan or another drawn by the Court were viable alternatives. *Clark* held squarely that it was inappropriate to utilize a non-pre cleared plan from the State and it was not appropriate to try and construe pre-clearance for some seats to indicate the Department of Justice had no objections to the others. In this case, we believe the Department's decision to object to the House and Congressional Plans from Texas and oppose the State in litigation in federal court in D.C. should be given similar consideration or deference by this 3 Judge Court. As the Supreme Court noted in Sims, constitutional violations should be addressed in an interim plan. *Sim*, supra at 377 U.S. 533, 585. There is no reasonable basis that any Voting Rights Act violations should be treated differently.

Whenever a District Court is faced with entering an interim reapportionment order that will allow elections to go forward, it is faced with the problem of reconciling the requirements of the Constitution with the goals of State political policy. An appropriate reconciliation of these two goals can be reached if the district court’s modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect.

Upham v. Seamon, 456 U. S. 37 (1982).

In 2002 in Mississippi a 3 Judge District Court decided to adopt its own plan when it believed that pre-clearance would not be obtained prior to the March 1st candidate qualification deadline. *Branch v. Smith*, 538 U.S. 254, 123 S.Ct. 1429 (2003). The Court expressed these doubts in January of 2002 and actually promulgated a plan on February 4, 2002. The *Branch* Court said that the District Court was authorized to draw districts when timely pre-clearance had not been obtained and that state proposals, even those from state courts, were required to be pre-cleared. Any proposal enacted by the state or that was to be administered by the State is required to be pre-cleared. Importantly we might note that the Court in *Clark* wanted to know 7 weeks before the beginning of the filing period if the State had a plan in place that had been precleared and the State's failure to do so prompted them to devise its own plan. *Smith v. Clark*, 189 F.Supp. 2d 502 (S.D. Miss. 2001). In this regard it is our contention that State hybrids of H-283 or C-185 would be problematic. We can view how another Court handled this to put this point in perspective:

"Although a federal court's authorization of the emergency, interim use of a court-created election plan does not normally require preclearance, see 28 C.F.R. § 51.18(c), such preclearance is required when the covered jurisdiction submits a proposal reflecting its policy choices irrespective of what constraints have limited the choices available to it. *McDaniel v. Sanchez*, 452 U.S. 130, 101 S.Ct. 2224, 68 L.Ed.2d 724 (1981). Since the court-ordered plan here is based upon a proposal submitted by the County, the County may be statutorily required to seek preclearance of the plan, even though it is only an

interim, court-directed plan." *Lopez v. Monterey County, Cal.,* 871 F. Supp. 1254, 1261 (N.D. Cal. 1994), rev'd on other grounds, 519 U.S. 9 (1996) and 525 U.S. 266. This would seem to limit the Court's ability to adopt a State propounded plan though the State would be permitted input into the adoption of such a plan.

The U.S. Supreme Court stated:

"We have recognized, at least in cases raising claims under the Fourteenth Amendment, that §5 preclearance requirements may not apply where a district court independently crafts a remedial plan." *Lopez v. Monterey County, Cal*., 519 U.S. 9, 22 (19

Other Courts have rendered holdings that support this analysis:

"Local Federal District Courts may, on occasion, be called upon to devise 'interim' plans in exigent circumstances, but the 'interim' plans they adopt should not put into effect the very plans being substituted which have failed of preclearance by the Attorney General or are awaiting a preclearance decision by this Court." *State of S.C. v. U.S*., 589 F. Supp. 757, 759 (D.C.D.C 1984).

It is important to note that court ordered plans must be free from discrimination and meet special standards of racial fairness. *Upham v. Seamon*, 456 U.S. 37, 39, 102 S. Ct. 1518 (1982).

V.

CONSIDERATION FOR DEVELOPING AN INTERIM PLAN

This court should consider the Section 2 and Section 5 problems that it is permitted to utilize in drawing an interim map and use the State's plan for white

dominated districts for the other districts as a starting point. By following this procedure the court will avoid causing irreparable harm to minority citizens in the fashioning of an interim plan and give deference to the State in regards to parts of the plans that were not objected to, *Upham v. Seamon*, supra. The court generally discourages changing the applicable deadlines so it is important that maps already before it be used as extensively as possible in this process.

VI.

PRECEDENT FOR COURT'S IMPLEMENTATION OF LEGISLATIVELY ADOPTED PLAN AS AN INTERIM PLAN?

With respect to this question, the case law indicates the contrary.

"Local federal district courts may, on occasion, be called upon to devise 'interim' plans in exigent circumst, but the 'interim' plans they adopt should not put into effect the very plans being substituted which have failed of preclearance by the Attorney General or are awaiting a preclearance decision by this Court." *State of S.C. v. U.S.*, supra, at 759.

What is clear is that an interim plan that implemented the legislative plan would require preclearance, whereas an interim plan fashioned by the Court would almost certainly not face this time-consuming hurdle.

VII.

CONCLUSION

Largely the Plaintiff's parties are in agreement with many problematic aspects of

the State's plan. In that regard, it would appear that a hearing to address an interim pan should last approximately 2 to 2.5 days.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2011, I electronically filed the foregoing document with the Clerk of the United States District Court, Western District of Texas, San Antonio Division, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means as listed below.

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