

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION**

GONZALO BARRIENTOS,)
 RODNEY ELLIS, MARIO GALLEGOS, JR.,)
 JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR.,)
 FRANK L. MADLA, ELIOT SHAPLEIGH,)
 LETICIA VAN DE PUTTE, ROYCE WEST,)
 JOHN WHITMIRE, and JUDITH ZAFFIRINI,)

Plaintiffs,)

v.)

STATE OF TEXAS;)
 RICK PERRY, In His Official Capacity)
 As Governor Of The State of Texas;)
 DAVID DEWHURST, In His Official Capacity)
 As Lieutenant Governor and Presiding Officer)
 Of the Texas Senate,)

Defendants.)

**United States District Court
Southern District of Texas
FILED**

AUG 15 2003

**Michael N. Milby, Clerk
Laredo Division**

CIVIL ACTION NO. L-03-113

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

1. Plaintiffs respectfully move, pursuant to Rule 65, Federal Rules of Civil Procedure, for a preliminary injunction enjoining the defendants, their agents and employees, and all persons acting in concert or participation with them, from implementing the following changes with respect to voting "standards, practices or procedures" unless and until Section 5 preclearance is obtained for said changes pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973c: 1) The defendants' exercise of discretion to change its redistricting practices and procedures by conducting state-wide congressional redistricting in mid-decade, absent either a court order to do so or a determination that the current map is unlawful or unconstitutional; and 2) The defendants' administration of a new practice or procedure in the Texas Senate that would

change the current supermajority requirement (the so-called “2/3 Rule”) to a simple majority with respect to congressional redistricting legislation.

2. Congress designed the preclearance requirements of Section 5 with one purpose in mind: to suspend any voting or election related “standard, practice, or procedure” pending review by either the United States Attorney General or a special three-judge court in the District of Columbia. See *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). Congress did so because “some of the states had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.” *Id.*; at 335 (footnote omitted). This case involves an effort by the State of Texas and State officials to resort to an “extraordinary stratagem of contriving new rules” and procedures for how congressional redistricting will be done in Texas. These new procedures will have the purpose and effect of discriminating against minority voters and their elected senators. This Court should enjoin them pending preclearance.

3. Plaintiffs are 11 registered voters and duly elected members of the Texas Senate who have brought this action, *inter alia*, to enforce the preclearance provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Plaintiffs submit this Motion for Preliminary Injunction, a supporting memorandum, and the exhibits attached hereto requesting that defendants be enjoined from undertaking congressional redistricting in mid-decade and from altering redistricting practices and procedures in the Texas Senate for consideration of congressional redistricting legislation unless and until section 5 preclearance is obtained. Plaintiffs assert that these changes must be enjoined because

they have not received the requisite preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and thus are legally unenforceable.

I. Factual Background

4. On July 28, 2003, Governor Rick Perry issued a proclamation calling a second special session to take up the issue of congressional redistricting. Exhibit 13 (Governor's Proclamation). This action is unprecedented. Never before has the State of Texas exercised its discretion to enact a congressional redistricting plan in the middle of a decade absent a federal court order to do so, or in the absence of a finding that the current districts are malapportioned as shown by official census data. By exercising their discretion¹ to enact a congressional redistricting in the middle of the decade in these circumstances, the defendants are seeking to enact or administer a new voting "standard, practice or procedure" within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. Redistricting plans fall within the scope of Section of the Voting Rights Act. *Georgia v. United States*, 411 U.S. 526 (1973). The exercise of discretion with regard to new redistricting procedures is a change within the scope of section 5. See *Foreman v. Dallas County, Texas*, 521 U.S. 979 (1997) (exercising discretion regarding the formula for appointing election judges held to be a change within the meaning of Section 5).

5. Furthermore, Lieutenant Governor Dewhurst has indicated that in the second special session, he has decided as presiding officer to change the procedures in the senate for enacting a congressional map. Dewhurst has said he will not permit the use of a "blocker" bill, the long-standing practice of the Texas Senate that empowers the

¹Exhibit 13A is an April 23, 2003, opinion of the Texas Attorney General stating that the Texas Legislature is not required to perform congressional redistricting in 2003.

chamber's minority by requiring a supermajority (2/3) vote to open debate on legislation. See Exhibit 14 (Compilation of news articles quoting defendant Dewhurst).² The decision to disallow the supermajority (2/3) requirement is only being applied to congressional redistricting legislation.

6. There are 31 members of the Texas Senate: twelve Democrats (of which nine are minority group members) and nineteen Republicans (of which none are minority). If the 2/3 Rule is in place, 11 members of the Texas Senate can join together and block a redistricting bill from being enacted. The plaintiffs are 11 senators who wish to avail themselves of the protections of the supermajority (2/3) Rule. See Exhibits 1-11 (Sworn Declarations of the 11 plaintiffs-senators). The supermajority requirement has been a practice or procedure that has been employed in congressional redistricting cycles in 1971, 1991, 2001 and 2003. Even in 1981, congressional redistricting legislation was taken up with near unanimous consent, although the 2/3 Rule does not appear to have been employed in that session. See Exhibit 15 (Sworn Declaration of Brian Graham).

7. The 2/3 Rule is a traditional practice of the Texas Senate that protects a minority group: racial, political or otherwise. The 11 Senators who have brought this action comprise both a racial group and a political group who wish to avail themselves of the protections of the supermajority (2/3) Rule. Nine of the plaintiffs-senators are minority group members of the Texas Senate, and all nine are Democrats. The other two

² In the Senate, a 2/3 vote is ordinarily necessary to take up a bill out of order. Consequently, it has been the practice in the Texas Senate for a Member to file a bill, known as "a blocker bill", as the first piece of legislation in the session. The presence of a blocker bill has the effect of requiring 2/3 of the Senate to vote to take up a bill out of order and to consider it ahead of the blocker bill. In the 31 Member Senate, eleven Senators can effectively prevent a bill from reaching the floor as a result of the 2/3 Rule. On July 14, 2003, Republican Senator Bill Ratliff announced that he would join with at least 10 other Democrats to prevent congressional redistricting from reaching the Senate floor. See Exhibit 12 (Statement of Senator Bill Ratliff).

plaintiffs-senators are Anglo Democrats who represent majority-minority districts. Collectively, these 11 plaintiffs-senators represent the only minority group members of the Texas Senate, 11 of the 12 Democrats in the Texas Senate; and the 11 most heavily minority districts in the entire State.³

8. Furthermore, these 11 Senate Democrats have left the State and their absence has deprived the Texas Senate of a quorum during the second special session. These 11 senators have indicated that they would return if the supermajority (2/3) Rule is restored and each has executed a sworn Declaration stating that their constituents' interests will be harmed if the protections of the 2/3 Rule are not available in any special sessions in 2003 or 2004. See Exhibits 1-11. These 11 senators have also stated that the defendants' decision to abandon the 2/3 Rule is intended to have, and will in fact have, a discriminatory result on minority voters and officeholders on account of their race, color, or membership in a language minority group. *Ibid.* Thus, the defendant Dewhurst's decision to abandon the supermajority (2/3) Rule has the "potential for racial discrimination" See *Perkins v. Matthews*, 400 U.S. 379, 388-89 (1969); *Dougherty County Board of Education v. White*, 439 U.S. 32, 42 (1978); and *Morse v. Republican Party of Virginia*, 517 U.S. 186, 217 (1996).

9. If these eleven senators could avail themselves of the protections afforded by the supermajority (2/3) Rule, minority voters and their elected senators could be protected from the harmful effects of a new congressional plan and discriminatory procedures that have been employed in the Texas Legislature thus far to produce such a

³ Exhibits 20 and 20A are printouts from the website of the Texas Legislative Council (an agency of the State of Texas) reporting the names and senate district numbers for each state senator (Exhibit 20), as well as the racial and ethnic composition of the senate districts (Exhibit 20-A).

plan. Any majority of Senators would be required to compromise and negotiate with the 9 minority members and two Anglo members who represent majority-minority districts of the Senate in order to enact any redistricting legislation.

10. The Texas Legislature has considered congressional redistricting in nine regular and special sessions since 1971 (the decade when the preclearance requirements of the Voting Rights Act took effect in Texas (November 1, 1972)): the 1971 regular session, the 1981 regular session, the 1981 special session; the 1991 regular session, the 1991 special session; the 1997 regular session; the 2001 regular session; the 2003 regular session; and the first 2003 special session. In each of these instances, except the 1981 session, a supermajority Rule (of 2/3 or better) has been used and respected whenever the Texas Senate has considered congressional redistricting. See Exhibit 15 (Graham Declaration). The decision to disallow the supermajority (2/3) Rule in 2003 will harm minority voters and the ability of their elected representatives to protect their voting rights in the congressional redistricting process. The process of allowing senators to decide whether a supermajority will govern is now replaced by the Lieutenant Governor's unilateral decision to allow congressional redistricting legislation to be considered absent a supermajority vote.

11. As a result of the State's decision to abandon its traditional practices and procedures of having a supermajority requirement, the 11 plaintiffs-senators, as well as their constituents, are being deprived of the protections that the supermajority (2/3) Rule has afforded other legislators in prior sessions when congressional redistricting legislation was considered. Changing or abandoning the traditional practice or procedure of a supermajority (2/3) Rule will mean that these Senators do not have the

protection of a practice or procedure used in the past by Anglo Senators to require consensus, compromise and negotiation in considering any congressional redistricting legislation. It will also render ineffective the representation that these Senators can provide to their constituents on congressional redistricting legislation.

12. By changing its redistricting practices and procedures, and no longer permitting members of the Texas Senate to avail themselves of the protections afforded by the 2/3 Rule, the defendants are “seek[ing] to enact or administer” a new voting “standard, practice and procedure” within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. Such changes directly impact voters’ abilities to affect the congressional districts in any redistricting plan that is considered or which may eventually pass the Senate. Changes in redistricting procedures thus effectuate changes in voting constituencies, which in turn can affect the ability of candidates “to become or remain holders of elective office.” 28 C.F.R. §51.13(g) (Regulations of the United States Department of Justice Under Section 5 of the Voting Rights Act Listing Examples of Covered Changes). Because sponsors of redistricting legislation in the Texas House and Senate in 2003 have made clear that the aim of their redistricting legislation is to replace Democratic officeholders with Republicans (Exhibit 16),⁴ changes in redistricting procedures will have a profound effect on the ability of candidates “to become or remain holders of elective office.”

13. The reason that changes in the redistricting process are subject to Section 5’s preclearance requirements are obvious. Redistricting is a process by which state officials

⁴ Exhibit 16 contains several news articles wherein state Senator and House members sponsoring congressional redistricting plans said that the main purpose of their map was to replace Democratic congressmen with Republicans.

alter voting constituencies and impacts the voters' ability to elect candidates of their choice to office. The redistricting process involves voting because it inevitably will affect the ability of voters to cast ballots, as well as the opportunity for them and their elected representative to express their views on the configuration of the districts.

14. The State of Texas has made the policy decision to create a redistricting "practice or procedure" by which new lines will be formed, and this "practice or procedure" goes back at least a few decades. See Exhibit 17 (State's Submission Letters to the Department of Justice in 1981 and 1991, providing details about redistricting process and public input). For example, State legislators usually start the redistricting process by soliciting public input on redistricting and these legislators and other state officials have stated that they take this information and public testimony into account in deciding where the new lines will be drawn. See Exhibits 18-18D (Compilation of excerpts from various public redistricting hearings held in recent years wherein state senators or state officials acknowledged the "essential" the redistricting process was to the ultimate formulation of a new redistricting map). Where, as here, the State has made the redistricting process a determining factor in how the lines will be drawn and where the voters will be placed or reformed into new voting constituencies, it follows that changes to this process will directly affect voting rights. That is why the exercise of discretion to do redistricting in mid-decade, absent a court order to do so, is a change that affects voters and must be precleared. Similarly, the abandonment of the supermajority (2/3) requirement is another important change in the redistricting process because it directly affects minority voters and their elected senators' ability to protect themselves against the discriminatory aspects of the redistricting process and stopping a

discriminatory plan before it is enacted.

15. Thus, in Texas, redistricting is not just a simple act that takes place when a bill is passed in the Legislature. Rather, it is a process that culminates in shaping the bill and how the lines will be drawn. Changes to that redistricting process, such as when it will take place, the ability of voters to have input on redistricting plans, the ability of the public to have an opportunity during the process to define communities of interest to their elected representatives, are the types of changes that will directly affect voters and their rights to cast ballots under the redistricting plan that will eventually be enacted. The redistricting process leads to new lines that inevitably will affect the effectiveness of voters' ballots. When the State changes its redistricting procedures and exercises its discretion to perform congressional redistricting, it affects the voters' ability to impact the plan that ultimately is adopted and their ability to elect candidates of choice under it.

16. The defendants have not obtained the requisite preclearance of the changes in its redistricting process from either the Attorney General of the United States or from the United States District Court for the District of Columbia, pursuant to Section 5 of the Voting Rights Act, as amended, 42 U.S.C. §1973c. See Exhibit 19 (Sworn Declaration of Robert S. Berman, Deputy Chief, Voting Section, Civil Rights Division, United States Department of Justice).

II. Legal Basis for Injunctive Relief

17. In the context of a Section 5 preclearance violation, courts have found that plaintiffs must meet a two-pronged test to secure injunctive relief. *Lopez v. Monterey County, California*, 519 U.S. 9 (1996); *United States v. Louisiana*, 952 F. Supp. 1151 (W. D. Louisiana, 1997) *aff'd*, 521 U.S. 1101 (1997). The inquiry consists of determining:

(1) whether a change was covered by Section 5; and (2) if the change was covered, whether Section 5 approval was secured. *Id.* If voting change has been implemented without the requisite approval, it must be enjoined. *United States v. Louisiana*, 952 F. Supp. at 1161. As described above and in more detail in the memorandum in support of this motion, the covered changes are being administered (42 U.S.C. 1973c) and they are subject to the preclearance requirements of Section 5. Moreover, the United States Attorney General has stated that there is no record of these defendants having obtained Section 5 preclearance of these changes. See Exhibit 19. Therefore, a Section 5 injunction must issue. *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991), and *Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969).

18. A proposed Order and a Memorandum in Support of this Motion for a Preliminary Injunction are attached for the Court's consideration.

III. Conclusion

19. This Motion is based upon Plaintiffs' Complaint, the Memorandum in Support of Motion for Preliminary Injunction, and the exhibits and other evidence to be offered at a hearing on this motion. Plaintiffs therefore, ask this Court to enjoin the defendants from enacting or administering a congressional redistricting plan in mid-decade absent either a court order or in the absence of a release of official census data showing the current congressional districts to be unconstitutionally malapportioned. Further, plaintiffs ask this Court also to enjoin the defendants from eliminating the supermajority (2/3) Rule in the consideration of any congressional redistricting legislation by the Texas Senate.

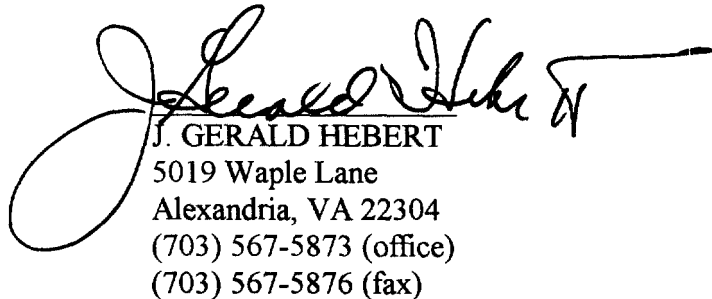
WHEREFORE, plaintiffs pray that a preliminary injunction will issue.

Respectfully submitted,


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