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,	)	CIVIL ACTION NO. L-03-113
Defendants.	)	

PLAINTIFFS' SUBMISSION TO THE COURT

Plaintiffs respectfully submit for the Court's information a copy of a letter sent by the State of Texas to the United States Department of Justice ("DOJ") on August 15, 2003. The letter urges the Department of Justice to grant expedited preclearance of the voting changes occasioned by the State's decision to abandon the 2/3 Rule for congressional redistricting litigation in the event that DOJ disagrees with the State's contentions that the abandonment of the 2/3 Rule is not subject to Section 5's preclearance requirements.

The State did not inform the Court about this submission when it filed its motion to dismiss plaintiffs' complaint on the same day it made this submission to DOJ. We attach the letter (without attachments) here, for the Court's information and reference.

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Geoffrey S. Connor
ASSISTANT SECRETARY OF STATE
State of Texas

Mr. Joseph D. Rich
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Voting Section, 1800G
Washington, D.C. 20530

Re: Applicability of Section 5 of Voting Rights Act

Dear Mr. Rich:

The State of Texas seeks clarification pursuant to 28 C.F.R. §51.35 as to whether a discretionary decision by the Texas Lieutenant Governor not to (1) attempt to place a so-called "blocker bill" ahead of other legislation or (2) otherwise require a two-thirds supermajority vote to take up congressional redistricting legislation on the floor of the Senate during this Second or any subsequent Called Session is a change "with respect to voting" that requires preclearance under Section 5 of the Voting Rights Act of 1965, as amended. As discussed herein, the State of Texas does not believe that any such parliamentary and operational decision—one that concerns the internal, day-to-day workings of the Texas Senate—is subject to Section 5 preclearance.[1] In short, there is no "two-thirds rule," the Senate practice has not changed, and, in any event, the procedures are not "with respect to voting." However, should the United States Department of Justice disagree, then please accept this letter as the State's written request for expedited administrative preclearance, pursuant to 28 C.F.R. §51.34.

Facts

Texas Governor Rick Perry convened a Second Called Session of the Texas Legislature commencing on July 28, 2003, for the purpose of considering legislation relating to: (1) congressional redistricting; (2) certain transportation-related issues; (3) state finance issues, including adjustments to school district fiscal matters; (4) certain election-related issues; and (5)

[1] Of course, the State of Texas does not dispute that in the event a redistricting plan is passed by the Legislature, the actual redistricting plan itself would be subject to preclearance and would be submitted.

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reorganization and reform measures applicable to state government. This Second Called Session ends by law on August 26, 2003.

During this Second Called Session, Lieutenant Governor David Dewhurst—the President and presiding officer of the Texas Senate—has declared that he will not attempt to place a "blocker bill" ahead of other legislation. Under ordinary Texas Senate rules, Senators consider bills on the Senate floor in the order they emerge from committee. *See* TEX. S. RULE 5.12 (Texas Senate Rules, at Attachment A). That is the Senate's regular order of business. To debate a bill "out of its regular calendar order," the rules require that two-thirds of the Senators present must agree to suspend Rule 5.12 in order to consider the bill. *See* TEX. S. RULE 5.13. In the past, an inconsequential bill has often—though not always—been filed by a Senator early in the legislative session. The Lieutenant Governor may then quickly refer it to a committee, so that it can be voted out by that committee and placed atop the Senate's intent calendar, which determines its order of business on the floor. Because the Senate Rules determine the order of business, and provide that bills will be placed on the order of business in the order in which they are voted out of committee, having such a bill at the top of the intent calendar forces lawmakers either (1) to vote out or otherwise dispose of the purported "blocker bill" or (2) to obtain support from two-thirds of the Chamber to suspend the regular order of business and take up another bill first. This bill is often referred to as a "blocker bill" because it blocks any other legislation from being debated unless two-thirds of the Senators present support doing so.

This tradition has not always been followed in the Texas Senate and, in fact, there have been numerous occasions when various Lieutenant Governors have declined to use a "blocker bill" during a Called Session. It should be noted that the "blocker bill" is not grounded in, much less mandated by, any constitutional or statutory provisions or rules enacted by the Texas Senate, nor is it used by the Texas House. It is purely a legislative calendar-management tool utilized through the discretion of the Lieutenant Governor, committee members, and other Senators to control the flow of legislation to the Senate floor and to manage the day-to-day affairs of the Senate. No one party alone may control the use of a blocker bill: its use depends on (1) a Senator's introducing a bill intended to be used as a blocker; (2) the Lieutenant Governor's quick referral of the bill to committee; (3) the committee's quick reporting of the bill; and (4) the Lieutenant Governor's and Senate's ongoing decision not to take up the "blocker bill" for a vote.

Blocker bills have been used inconsistently by the Texas Senate. Legislation has been passed many times without the use of either a blocker bill or a two-thirds supermajority vote both before and after November 1, 1972. *See* Affidavit of Patsy Spaw, Secretary of the Senate (Attachment B).

On August 11, 2003, 11 of the State's 31 Senators ("the Laredo plaintiffs") filed a Section 5 enforcement claim in federal district court in Laredo, Texas on the erroneous assumption that the Texas Lieutenant Governor's decision not to utilize a "blocker bill" or otherwise require a two-thirds supermajority vote before taking up congressional redistricting legislation on the floor of the Senate during this Second Called Session violates Section 5 of the Voting Rights Act of 1965, 42 U.S.C.

§ 1973c, *et seq.*[2] The State of Texas believes that this decision is not subject to preclearance under Section 5.

Argument

Senate Procedures Are No Different than Those in Place on November 1, 1972

Section 5 of the Voting Rights Act requires preclearance of any "voting qualification, or prerequisite to voting, or standard, practice or procedure with respect to voting," that is "different from that in force or effect on November 1, 1972." 42 U.S.C. § 1973c. Preclearance is not necessary in this case, because Senate rules and procedures affecting the use of so-called "blocker bills" have not changed since 1972.

Under Senate Rule 5.12, bills are considered on second reading "in the order in which the committee reports on them." Under Rule 5.13, bills may be taken out of order when "the regular order is suspended by a vote of two-thirds of the members present." A bill may be described as a "blocker bill" when it (1) is the first bill voted out of committee and therefore first on the regular order of business, and (2) is informally understood by the Senate and the Lieutenant Governor as a bill on which no action is to be taken. In that case, the Senate must suspend the regular order of business in order to bring subsequent bills to the floor.

The Senate used "blocker bills" on occasion before 1972, but has never *required* that a "blocker bill" be used. *See* Affidavit of Patsy Spaw, Secretary of the Senate (Attachment B). For example, prior to 1972, "blocker bills" were not used in the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature. *Id.* In those Sessions, the Senate did not recognize a "blocker bill" and therefore did not suspend the regular order of business by a two-thirds vote. Bills were considered consecutively in the order in which they were voted out of committee. *Id.* Even when a "blocker bill" may have been used, a failure to get a two-thirds majority to suspend the regular order has not precluded the Senate from disposing of "blocker bills" so that the desired bill could be taken up on a simple majority vote. As noted in the affidavit, in 1968, under Lieutenant Governor Preston Smith, "an attempt was made to suspend the regular order of business to bring up H.B. 2, a tax bill, on second reading." When the motion to suspend failed 14 to 16, the bill was still brought up on a subsequent day "without a two-thirds suspension vote." *Id.* Similarly, bills that might otherwise have served as "blocker bills" were disposed of in 1961 to allow passage of legislation relating to the Texas Liquor Control Act to be taken up without a two-thirds vote.

The same intermittent use of "blocker bills" existed after 1972. *Id.* No blocker bills were used in the Third Called Session of the 72nd Legislature, the First Called Session of the 65th Legislature, or the First Called Session of the 63rd Legislature, and no two-thirds vote to suspend

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[2] Civil Action No. L:03CV113; *Barrientos v. State of Texas*; In the United States District Court for the Southern District of Texas, Laredo Division (Attachment C).

the order of business was taken. *Id.* Consequently, it appears that the use of "blocker bills" was allowed, but not required, under Senate Rules prior to 1972 and is allowed, but not required, under the Senate Rules at this time.

The Decision to Utilize a So-Called "Blocker Bill" Concerns Only Internal Operating Procedures

The Supreme Court of the United States has stated that Section 5 "is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting. It does not." *See Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1992). In *Presley*, the Court held that changes that concern only the routine, internal operations of an elected body and the distribution of power among officials are not subject to Section 5 because such changes have no direct relation to, or impact on, voting. *See id.* at 506. In light of this on-point ruling, it is beyond serious dispute that the decision not to utilize a "blocker bill" is not a covered change that falls under Section 5, and therefore does not require preclearance.

The obvious impact of the Lieutenant Governor's discretionary decision not to attempt to place a "blocker bill" ahead of other legislation in the Texas Senate is that a bill may be passed, pursuant to the Senate Rules, by a simple majority of 16 Senators instead of a two-thirds supermajority of 21 Senators.

The Laredo plaintiffs' arguments are fundamentally flawed because, *inter alia*, they ignore the requirement that changes be "with respect to voting." As *Presley* explained, Section 5 is triggered by changes in standards, practices or procedures that actually pass, *i.e.*, that are formally adopted by a Legislature or other governmental body. That is because the Voting Rights Act protects *voters*, and the ability of voters to actually vote. And only those changes that pass are able to affect the ability of voters (as opposed to legislators) to vote. Until something passes, Section 5 is not triggered because the rights of voters are not affected. There are a myriad of legislative decisions— which Senators are named committee chairs, to which committees bills are referred, which Senators are recognized on the floor, which parliamentary procedures are employed to advance or hinder a bill's passage—that are carried out daily in every legislature, but they do not trigger Section 5 because, under *Presley*, they affect merely the internal governance of the elected body, not the rights of individual voters.

Other federal court decisions make it clear that an internal distribution of power among an elected body's officials is not covered by Section 5. *See Holley v. City of Roanoke*, 149 F. Supp.2d 1310, 1313 (M.D. Ala. 2001) (change in city council's decision-making process for appointing school board members did not require preclearance); *Bonilla v. City Council of City of Chicago*, 809 F. Supp. 590, 597 (N.D. Ill. 1992) (city's requirement that at least ten aldermen support a proposed redistricting ordinance before it can be submitted for voter approval is not a standard, practice or procedure under §2 of the Voting Rights Act). Indeed, in reaching its decision, the *Bonilla* court stated the following:

> Since legislatures operate under majority rule principles, requiring a majority of legislators to approve a particular redistricting plan is clearly permissible under the Voting Rights Act. Indeed, the Bonilla Plaintiffs do not even suggest that they could challenge a statutory procedure which allowed a majority of the City Council to approve a redistricting ordinance.

See id. at 596.

Similarly, in *DeJulio v. Georgia*, 127 F. Supp. 2d 1274 (N.D. Ga. 2001), *aff'd in part, rev'd in part on other grounds*, 276 F.3d 1244 (2001), the court held that Section 5 did not apply to changes in internal rules and procedures by which the Georgia State Legislature enacted local legislation. *See id.* at 1300-02. In so doing, the court opined that:

> Based on the precedent of *Presley*, this Court must conclude that preclearance was not required in this case. It is true that changes in the various legislative delegations' rules might affect the distribution of power among officials and certain officials might have more or less authority after the change. It is also true that the value of a citizen's vote may be diminished when his elected representative has less authority. Nevertheless, the Supreme Court has *clearly, unmistakably and explicitly* held that such changes in internal rules and procedures do not raise a Voting Rights Act preclearance issue.

See id. at 1301-02 (emphasis added).

Moreover, the court recognized that principles of federalism dictate this logical result:

> Furthermore, the Voting Rights Act has never been interpreted as giving the Department of Justice broad supervisory authority over the internal operation of state legislatures. "If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments."

See id. at 1302 (quoting *Presley*, 502 U.S. at 510).

The unrestrained construction of Section 5 urged in the Laredo lawsuit would radically overhaul the operating procedures of an elected governmental body, in essence mandating that the President of the Texas Senate (the Lieutenant Governor of Texas) cede to federal authorities near-complete control over the daily, internal workings of the Senate, no matter what the governing Senate Rules say. Such an overbroad reading would allow federal law to seriously encroach on the internal governing procedures of a sovereign State and dictate how the Senate calendar and daily flow of legislation through the Chamber is conducted. It is hard to imagine processes more

fundamental to the sovereignty of States than the ongoing legislative decisions of which bills to introduce, and when, and which bills to pass, and when.

Indeed, to state the relief sought by the Laredo plaintiffs is to realize its overbreadth. If a court were to rule in their favor, the court would presumably issue an injunction that the Texas Senate may not consider redistricting legislation unless: (1) a Senator first introduces separate legislation, a "blocker bill," (2) the Lieutenant Governor immediately refers it to committee, (3) the committee passes the bill before any other legislation is passed, and (4) the Senate refrains from passing the "blocker bill" once it comes to the floor. The process would be nothing short of a federal court's writing and imposing procedural rules for a state legislature governing the introduction and passage of legislation and requiring a two-thirds vote before redistricting legislation can ever be voted on. A federal injunctive order that intruded into the sovereignty of a State to that level, and that in effect commandeered the machinery of state government in such a manner, would raise very serious constitutional problems that could threaten the Voting Rights Act itself. *See Printz v. United States*, 521 U.S. 898, 912 (1997) ("We have held . . . that state legislatures are *not* subject to federal direction." (emphasis in the original)); *New York v. United States*, 505 U.S. 144, 179 (1992) ("No . . . constitutional provision authorizes Congress to command state legislatures to legislate."); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) (noting the "serious federalism costs already implicated by §5").

The informal agreement to place a "blocker bill" atop the Senate calendar is simply that—an informal agreement—sometimes used, sometimes not. But any determination that this internal operational arrangement somehow implicates Section 5 would depart drastically from governing precedent and slide down a slippery slope that would empower federal officials with almost limitless authority to micromanage a range of what are quintessentially state legislative judgments.

The United States Supreme Court has considered similar arguments before—though none quite so remarkable as those suggested in the Laredo lawsuit—and roundly rejected them. Whether the presiding officer of the Texas Senate chooses to use a "blocker bill" as an internal parliamentary tool to manage the Senate calendar is plainly not a change "with respect to voting" covered by Section 5. A wealth of on-point precedent demonstrates that this parliamentary decision—which concerns "the internal operations of an elected body," *Presley*, 502 U.S. at 503, *not* Texas election law writ large (or small)—in no way triggers scrutiny under the Act.

Covered changes must bear a direct relation to voting itself, and Section 5's coverage simply does not reach a state senate's "internal operating procedures." *Id.* at 504. Section 5 is unambiguous, and the Supreme Court has rejected claims that urge an unconstrained interpretation. The governing law is clear: changes "with respect to voting" are covered and require preclearance; changes "with respect to governance" are not. Finding otherwise would represent federal control over the most core, internal state legislative matters. Since the requirements of Section 5 are inapplicable in this case, the State of Texas requests that the United States Department of Justice confirm in writing that no preclearance is required in this matter.

Alternative Request for Administrative Preclearance

In the unlikely event that the Department believes that the aforementioned decision by the Texas Lieutenant Governor is in fact covered by Section 5,[3] then the State of Texas contends that preclearance should be granted because the decision (1) does not have a racially discriminatory purpose, (2) will not make minority voters worse off than they were prior to the decision (*i.e.*, the decision is not retrogressive), and (3) does not deny or abridge the right to vote on account of race, color, or membership in a language minority group.

As mentioned previously, the current Second Called Session expires on August 26, 2003. Because time is of the essence, this request is appropriate for expedited treatment, pursuant to 28 C.F.R. §51.34. We have attached the absent Senators' complaint (Attachment C). We are not able to attach any documentation to support their claim of a change to a "2/3 Rule"; as noted above, there is no "2/3 Rule," but only an informal agreement about whether and which legislation to introduce and when to pass or not pass that legislation, sometimes observed and sometimes not. The absence of any text of a rule or rule change underlines why this issue is not subject to preclearance.

Should you have any questions regarding this matter, please contact Don Willett, Deputy Attorney General for Legal Counsel at the Office of the Texas Attorney General, at (512) 463-2191.

Very truly yours,

Geoffrey S. Connor

[3] Submission of this letter is in no way a waiver of the rights of the State of Texas—and the State expressly preserves its rights—to contest judicially whether the internal procedures of the Texas Senate are subject to Section 5 preclearance.