

Nos. 11-A520, 11-A521

**IN THE
SUPREME COURT OF THE UNITED STATES**

RICK PERRY, in his official capacity as Governor of Texas, HOPE ANDRADE, in
her official capacity as Secretary of State, and the STATE OF TEXAS,

Applicants,

v.

SHANNON PEREZ, *et al.*,

Respondents.

RICK PERRY, in his official capacity as Governor of Texas, HOPE ANDRADE, in
her official capacity as Secretary of State, and the STATE OF TEXAS,

Applicants,

v.

WENDY DAVIS, *et al.*,

Respondents.

**SUPPLEMENTAL APPENDIX IN SUPPORT OF CONSOLIDATED REPLY
TO EMERGENCY APPLICATIONS FOR STAY
OF INTERLOCUTORY ORDERS DIRECTING IMPLEMENTATION OF
INTERIM REDISTRICTING PLANS**

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3. Letter from Timothy Mellett to the Hon. Rosemary Collyer dated Nov. 7, 2011.

Dated: December 2, 2011

Respectfully submitted,

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Exhibit 1

Transcript of Telephonic Conference

Texas v. United States, et al., No. 1:11-cv-1303 (D.D.C. Sept. 21, 2011)

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

STATE OF TEXAS,	.	Case No. 1:11-CV-01303
	.	(RMC/TBG/BAH)
Plaintiff,	.	
	.	Washington, D.C.
v.	.	September 21, 2011
	.	
UNITED STATES OF AMERICA,	.	
	.	
ET AL.,	.	
	.	
Defendants.	.	
.	

TELEPHONIC CONFERENCE
BEFORE THE HONORABLE ROSEMARY M. COLLYER
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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--	---

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1 think that jurisdictions should go about evaluating
2 whether or not a district is retrogressive -- has
3 retrogressive affect or not.

4 THE COURT: Okay.

5 I assume, for present purposes, Mr. Schenck,
6 that you think no discovery is necessary.

7 MR. SCHENCK: You are correct, Your Honor.

8 THE COURT: Okay.

9 Well, let me go on to the other Intervenors,
10 just for the sake of getting it all laid out here, and
11 then I'll let you respond.

12 Is that all right with you?

13 MR. SCHENCK: Of course.

14 THE COURT: All right.

15 Mr. Hebert, other than the nature of
16 discovery that's proposed by Mr. Mellitt, what do you
17 think, if any, discovery that you need for your
18 clients?

19 MR. HEBERT: Well, Your Honor, in addition to
20 what the United States has laid out, we are going to
21 contend that the State Senate Map, just like the
22 Congressional and the House Maps, were enacted with
23 racially discriminatory intent, and an intent to
24 retrogress. So there will be the same discovery
25 inquiry with regard to the enactment of a Senate Map.

1 And I would call Your Honor's attention to
2 the fact that down in the Texas litigation, which
3 involved many of us on this phone call, just concluded
4 a two-week trial, the State Senate Map was not at issue
5 at all in any of those proceedings, and so there hasn't
6 been (unintelligible) discovery on the State Senate
7 Map.

8 So, in addition to the racially
9 discriminatory purpose, we also will get into how the
10 dismantling of one district in north Texas was
11 retrogressive, and in that regard we would go into the
12 same kind of statistical analysis that Mr. Mellitt just
13 outlined from Johnson v. DeGrandy.

14 THE COURT: Okay.

15 MR. HEBERT: That would be reconstituted
16 election returns, and the like, and --

17 THE COURT: Right. Right. So that -- Okay.
18 Let me just proceed. I understand your point. Let me
19 just continue.

20 Mr. Posner, is there anything, in addition --
21 Since you're going to be litigating the Congressional
22 and Texas House Plans, is there anything in addition to
23 what Mr. Mellitt kind of laid out, that you think you
24 need for your clients?

25 MR. POSNER: Well, I need -- we basically

1 agree with the presentation that Mr. Mellitt made.

2 The data that Texas has laid out in its
3 summary judgment motion is certainly relevant, but it's
4 really only the starting point for conducting what is
5 often referred to as a "functional analysis" of
6 electoral opportunity in the various districts. So
7 Texas has suggested that as the starting point and the
8 ending point.

9 I think it is clear from DOJ citings
10 (phonetic), as well as cases such as this Court's
11 review of the Georgia redistricting plan, in the case
12 of -- in the Ashcroft case, Ashcroft v. Georgia, that
13 additional analysis will be necessary.

14 So, we think that limited discovery with
15 regard to the House and Congress can also -- For
16 example, there may be expert discovery, in terms of any
17 expert that the State of Texas would be putting
18 forward.

19 THE COURT: Whoa. Experts. Okay.

20 But the nature of your discovery would be in
21 line with the kind of discovery that Mr. Mellitt was
22 laying out anyway?

23 MR. POSNER: Yes, Your Honor.

24 THE COURT: All right.

25 Mr. Devaney, you too -- you said that you

1 wanted to challenge only the U.S. Congressional Plan,
2 as I read -- my notes indicate.

3 Will your discovery similarly be in pace with
4 that laid out by Mr. Mellitt for the United States?

5 MR. DEVANEY: Your Honor, John Devaney.

6 Yes, that is correct, with the addition, of
7 course, of any expert depositions that might be
8 necessary.

9 THE COURT: Okay. Hold on. All right.

10 Mr. Tanner, you wanted to challenge the State
11 Senate as well as the State House and the Congressional
12 numbers.

13 Along with your predecessors, are you
14 comfortable with the outline of discovery to date?

15 MR. TANNER: Your Honor, yes, we are. We
16 have the (unintelligible) identified by the United
17 States, that they're speaking (unintelligible) by now.

18 THE COURT: Okay. Thank you.

19 Ms. Perales, do you agree?

20 MS. PERALES: Yes, Your Honor, and with the
21 additional note that in the Section 2 case that we just
22 finished trying, because we had a very compressed
23 period of preparation, and because of the nature of our
24 Section 2 claim, we limited a lot of our discovery to
25 only a few districts, for example, in the State House

1 Plan.

2 Here, under Section 5, there are about 30
3 districts in play, in terms of the analysis, and we
4 would need to conduct the type of discovery laid out by
5 DOJ in order to prepare our case.

6 THE COURT: So you think you need discovery
7 concerning all 30 house districts.

8 Those are state districts or congressional
9 districts?

10 MR. PERALES: With respect to the State
11 House, Your Honor, although there are 150 districts in
12 the State House Plan, there are approximately 30 to 34
13 that are considered either Latino opportunity districts
14 in the benchmark, or in the state proposed plan, and so
15 we would need to broaden our presentation, as compared
16 to the case that we just finished trying, and we would
17 need the type of discovery laid out by DOJ in order to
18 do that.

19 THE COURT: All right.

20 I have looked only at the Complaint in the
21 case that was just litigated, and it seems to me that
22 while some of that might have relevance and bearing on
23 the discovery here, it's really an entirely different
24 lawsuit.

25 Is there anybody who disagrees?

1 (No audible response.)

2 THE COURT: Oh, how good, we can agree on
3 something.

4 MR. SCHENCK: Your Honor?

5 THE COURT: Yes.

6 MR. SCHENCK: We would disagree to this
7 extent, that --

8 THE COURT: And who is "We"?

9 MR. SCHENCK: I'm sorry?

10 THE COURT: I said, "Who is 'We'?"

11 MR. SCHENCK: The State of Texas, Your Honor.
12 David Schenck here.

13 THE COURT: Thank you.

14 MR. SCHENCK: (Unintelligible) what we're
15 talking about data which has been fully explored and
16 discovered through experts and otherwise, with respect
17 to both the House and the Congressional Plans.

18 THE COURT: Well, to the extent that
19 something has been "done" in the existing litigation,
20 we should not have to redo it. That's a waste of your
21 time and your clients' money. Unfortunately, it is not
22 a waste of my time, but it is a waste of your time and
23 your clients' money, and they shouldn't redo it, and if
24 somebody wants to redo it, in part, part of what has
25 already been done, they're going to have to have a very

1 judgment motion, as well as Defendant/Intervenors'
2 response to the summary judgment motion also be on the
3 twenty-fifth.

4 THE COURT: And what is the date, the drop-
5 dead date, for Texas, on the candidate qualification
6 deadline in November?

7 MR. SCHENCK: November 12th, Your Honor,
8 (unintelligible).

9 MR. MELLITT: And this is Tim Mellitt for the
10 United States.

11 I believe that closing is December 11th; is
12 that right, David?

13 MR. SCHENCK: Yes, sir.

14 UNIDENTIFIED SPEAKER: December 12th.

15 MR. MELLITT: December 12th, sorry.

16 THE COURT: Oh, you know, this is -- I just
17 love lawyers.

18 This looks like it's a really tough schedule
19 to meet, but at least you have 'til 10/25, and we have
20 'til what, 12 -- 'til 12/11.

21 Who. Who. Who. Can you hear me panting?

22 I'm not sure that my colleagues will all
23 agree to that kind of a schedule, but it seems to me
24 that we should push ahead and see if we can get it done
25 in that time. At least if there's going to be a

1 everybody's objections and the position of the United
2 States, now thinks, "Well, our motion for summary
3 judgment needs to be augmented, rethought, reargued,"
4 whatever, why then we can say, "Okay, we won't do this
5 by motions, we'll do it by trial," and everybody will
6 do their discovery and we'll set a trial date, and
7 people can come forward to Washington with, as you
8 suggest, mostly documentation and things, and very few
9 witnesses, we'll develop a record, and then the Court
10 will decide it on the basis of that trial record.

11 But at the moment it's Texas' lawsuit and
12 Texas' motion for summary judgment, and that's what
13 we're scheduling.

14 I don't know, Mr. Schenck, we didn't pursue
15 that, Mr. Posner's point with you, as to whether in
16 light of all the responses you've gotten, you would
17 rather say, "Okay, let's just go to trial and get this
18 done, instead of try summary judgment", and have
19 somebody say, "Well, I can't really decide on this
20 record", which I'm not anticipating, but which is, with
21 summary judgment, always a risk.

22 MR. SCHENCK: Well, Your Honor, David Schenck
23 for the State.

24 My hope is somewhere in between that --

25 THE COURT: You want both, all in the space

1 of ten days.

2 Okay, keep going.

3 MR. SCHENCK: I filed a motion for summary
4 judgment. I was hoping that we might identify and
5 eliminate non-genuine or material fact disputes from
6 the case by having the parties, in their summary
7 judgment responses, either identify the legal standard
8 so we know what it is that we're said to be discovering
9 as we go forward in the case, and also at the same
10 time, to the extent additional discovery or affidavits
11 are necessary under Rule 56(f), they will identify
12 that.

13 If we're comfortable that we believe, on the
14 appropriate legal standard, we're entitled to summary
15 judgment in this case, we would really like
16 (unintelligible) notwithstanding the DOJ's guidelines
17 that they believe the law is here, and we think the
18 Court would benefit from knowing that, as well.

19 So --

20 THE COURT: Well, I thought that Mr. Mellitt
21 said that he sent something to you all that laid out
22 what the United States thought was the standard, and
23 how it applied, and that I was actually going to ask
24 him to send me a copy. He didn't have to file it, per
25 se, unless you guys wanted him to, so the whole world

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings
in the above-entitled matter.

/s/ _____

October 13, 2011

STEPHEN C. BOWLES

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Exhibit 2

Transcript of Motion for Summary Judgment Hearing
Texas v. United States, et al., No. 1:11-cv-1303 (D.D.C. Nov. 2, 2011)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, :
 :
 Plaintiff, :
 vs. : Docket No. CA 11-1303
 :
 UNITED STATES OF AMERICA, : Washington, D.C.
 ET AL., : Wednesday, November 2, 2011
 : 10:20 a.m.
 Defendants. :
----- x

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE THOMAS B. GRIFFITH
UNITED STATES CIRCUIT JUDGE and
HONORABLES ROSEMARY M. COLLYER and BERYL A. HOWELL
UNITED STATES DISTRICT JUDGES

APPEARANCES:

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Court Reporter:

CRYSTAL M. PILGRIM, RPR
Official Court Reporter
United States District Court
District of Columbia
333 Constitution Avenue, NW
Washington, DC 20001

Proceedings recorded by machine shorthand, transcript produced
by computer-aided transcription.

1 the first time there was great anxiety on the part of Texas
2 that this case be decided by the 18th of November, 19th of
3 November, something like that. I can't quite remember that
4 date, and it seems to me that the Western District of Texas is
5 well ahead of us and so maybe that doesn't matter any more.

6 MR. GARZA: Your Honor, Jose Garza for the Mexican
7 American Legislative Caucus.

8 I think that's exactly correct. The problem now is that
9 the election process has in fact commenced. And the filing
10 period begins on November 12th and it ends on December 12th.

11 JUDGE COLLYER: Believe me that, I understand that
12 there is a major problem here. I only got the last briefs
13 yesterday. So don't blame me for the fact that Judge Griffith
14 and Judge Howell and I haven't decided yet. You haven't even
15 finished arguing as far as I can see, hold on.

16 Mr. Schenck, what is the position of the state on this?
17 If the Western District proceeds and adopts an election map of
18 some kind that's different from the one that the legislature
19 adopted, do you need a decision from us by the 18th of November
20 or not?

21 MR. SCHENCK: I feel duty bound in two ways to urge
22 the answer to be yes because the Court in San Antonio has been
23 very clear with us that they want to avoid making a final
24 decision on an interim map if they're able to do so. They are
25 looking for an answer from this Court. That's why we filed our

1 motion summary judgment before the DOJ's answer, why we pushed
2 at answers to summary judgment, et cetera.

3 JUDGE HOWELL: But when you say that the Court is
4 looking for an answer from this Court, are you saying that the
5 answer is we deny summary judgment or the answer is we deny
6 summary judgment if that's what we decide to do and here's the
7 appropriate standard? Or we're going to --

8 MR. SCHENCK: The people in this room are looking for
9 a standard if we get through summary judgment and we're
10 proceeding. I'm hoping that we don't have to do that.

11 In San Antonio what they're looking for is the filing
12 districts are precleared, move on.

13 The argument being pushed there is whether this Court
14 can in fact simply use the existing legislatively adopted plans
15 pending any determination that any districts on them are
16 illegal in any way or whether they are going to start drawing
17 new maps on their own.

18 JUDGE COLLYER: That raises the question. If this
19 Court were not to agree with the standard that Texas has used,
20 are any of the districts subject to preclearance?

21 I don't know the answer to that and your statement makes
22 that immediately relevant. I know and I understand that the
23 United States has only focused on some districts. What does
24 that mean if the argument is the standard itself?

25 MR. SCHENCK: Well, as I pointed out in our argument.

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CERTIFICATE

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the stenographic notes provided to me by the United States District Court, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

/S/Crystal M. Pilgrim, RPR

Date: November 21, 2011

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Exhibit 3

Letter from Timothy Mellett to the Hon. Rosemary Collyer dated Nov.
7, 2011

U.S. Department of Justice

Civil Rights Division

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

November 7, 2011

Via Email: Chashawn White@dcd.uscourts.gov
Honorable Rosemary M. Collyer
United States District Judge
United States District Court for the District of Columbia
333 Constitution Avenue N.W.
Washington D.C. 20001

RE: *Texas v. United States*, No. 1:11-cv-01303 (RMC-TBG-BAH)

Dear Judge Collyer:

The United States is writing in response to the State of Texas' letter to this Court dated November 3, 2011. We reiterate the position that we expressed at oral argument; this Court should take the time it needs to reach a conclusion regarding whether summary judgment would be appropriate.

Contrary to the State's suggestion in its letter, the United States has never argued that the pendency of interim-plan proceedings in *Perez v. Perry* (W.D. Tex.) prohibits this Court from judicially preclearing the Congressional and State House redistricting plans. Rather, the United States has argued that this Court should not judicially preclear those plans because there are genuine disputes of material fact as to their discriminatory purpose and retrogressive effect.

The *Perez* court has jurisdiction to craft interim plans to be used for upcoming elections if the State's proposed plans are not precleared under Section 5 in time for those elections to proceed in an orderly fashion. *Branch v. Smith*, 538 U.S. 254, 268-72 (2003). The *Perez* court in fact held hearings last week regarding potential interim plans for this purpose, and issued an order on Friday, November 4, setting out an election schedule, with candidate qualifying beginning on November 28. Once this Court determines whether the State is entitled to summary judgment, a brief order to that effect might assist the *Perez* court regarding implementation of interim plans.

The United States disagrees with the assertion in the State's post-argument letter that this Court could preclear only part of a redistricting plan. Section 5 preclearance does not function like a line-item veto where parts of the redistricting plan are approved for implementation. *See Pitts v. Busbee*, 511 F.2d 126, 129 n.2 (5th Cir. 1975) (holding that unobjectionable portion of law does not receive preclearance and the entire law is not enforceable); *see also* 28 C.F.R. § 51.59 (setting out the Attorney General's method of "determining whether a submitted redistricting plan has a prohibited purpose or effect" rather than addressing submitted districts). If there is discriminatory purpose, the entire plan is infected, and no portion may be precleared. *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975) (holding that a change affecting voting

adopted with a discriminatory purpose violates Section 5 even though there is no discriminatory effect); *Busbee v. Smith*, 549 F. Supp. 494, 517-518 (D.D.C. 1982) (three-judge court) (finding that the political process did not function in a nondiscriminatory manner, and the whole plan was invalid even though one district increased in minority voting strength). Likewise, if any part of a redistricting plan is retrogressive, the entire plan is null and void. See *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 94 (D.D.C. 2002) (three-judge court) (denying declaratory judgment for redistricting plan because three districts diminished the ability of black voters to elect candidates of choice), *vacated*, 539 U.S. 461 (2003). As alluded to at oral argument, remedying a finding of retrogressive effect in some districts could require changes in some or all of the other districts in the plan, thus making it impossible to preclear a redistricting plan only in part.

Upham v. Seamon, 456 U.S. 37 (1982), does not stand for the proposition that the State can receive a declaratory judgment that particular districts in a redistricting plan meet Section 5 standards. As explained in our brief filed with the *Perez* court (attached), the Attorney General had interposed an objection to the plan at issue in *Upham* on the basis that in two districts, minority voters' ability to elect was diminished. Because there was a final administrative determination under Section 5, the *Upham* court could seek to cure the objection by drawing a remedial plan that corrected the specifically identified Section 5 deficiencies that had resulted in the objection. Here, there is no decision on Section 5 preclearance, and 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 United States District Court for the District of Columbia]." *South Carolina v. United States*, 589 F. Supp. 757, 759 (D.D.C. 1984) (three-judge court).

We do not believe that it is appropriate to re-argue in a letter to the Court the retrogression and intent standards. If the Court would like supplemental briefing on any issue, we would be happy to submit additional argument.

Sincerely,



Timothy Mellett
Deputy Chief, Voting Section

cc: All counsel of record via email