Cty + Panel

ORIGINAL

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL 24 2002
CLERK, U.S. DISTRICT COURT
By
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LUZ A. VILLEGAS AND ROBERTO VELA,	§	
	§	
Plaintiffs	§	
	§	
V.	§	**CIVIL ACTION NO. 3-02CV-858-R**
	§	
DALLAS INDEPENDENT SCHOOL DISTRICT AND BRUCE SHERBET, DALLAS COUNTY ELECTIONS ADMINISTRATOR,	§	
	§	
Defendants	§	

BRIEF IN SUPPORT OF DALLAS INDEPENDENT SCHOOL DISTRICT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

C. ROBERT HEATH
DAVID MÉNDEZ
MYRA A. McDANIEL
BICKERSTAFF, HEATH, SMILEY, POLLAN, KEVER & McDANIEL, L.L.P.
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443
Telephone: (512) 472-8021
Facsimile: (512) 320-5638

ERIC V. MOYÉ
DAWN KAHLE DOHERTY
VIAL, HAMILTON, KOCH & KNOX, L.L.P.
1717 Main Street, Suite 4400
Dallas, Texas 75201
Telephone: (214) 712-4400
Facsimile: (214) 712-4402

ATTORNEYS FOR DEFENDANTS

29

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

CASES

RULES

STATUTES

Page

OTHER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LUZ A. VILLEGAS AND ROBERTO VELA,	§	
	§	
Plaintiffs	§	
	§	
V.	§	**CIVIL ACTION NO. 3-02CV-858-R**
	§	
DALLAS INDEPENDENT SCHOOL DISTRICT AND BRUCE SHERBET, DALLAS COUNTY ELECTIONS ADMINISTRATOR,	§	
	§	
Defendants	§	

BRIEF IN SUPPORT OF DALLAS INDEPENDENT SCHOOL DISTRICT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

For the following reasons, this court should grant the Motion to Dismiss the First Amended Complaint.

I. This court has no jurisdiction to consider the section 2 claim.

This court was convened under section 5 of the Voting Rights Act. 42 U.S.C. § 1973c. Section 5 is designed so that all cases are heard before three-judge district courts, and jurisdiction over substantive issues resides exclusively in the district court of the District of Columbia.[1] *Perkins v. Matthews*, 400 U.S. 379, 385 (1971). Cases, such as this one, may be brought outside the District

[1]Section 5 provides an administrative alternative for a jurisdiction seeking preclearance for changes in election practices, standards, or procedures. Instead of bringing a declaratory judgment action in the district court in the District of Columbia, the governmental body may ask the Attorney General of the United States to review the proposed change. 42 U.S.C. § 1973c. If the Attorney General does not object, the change is precleared. *Id.* Thus, the statute vests all substantive review under the Act, whether judicial or administrative, in the District of Columbia.

of Columbia by private citizens alleging that a change in an election practice has not been precleared as required by section 5. These actions are often referred to as section 5 coverage cases or enforcement actions, and the courts hearing them have a very narrow jurisdiction. In fact, a section 5 court sitting outside the District of Columbia is limited to considering only three issues—(1) whether the election change at issue requires section 5 preclearance, (2) whether preclearance was obtained, and (3) if not, what temporary remedy is appropriate to ensure that the change is precleared. *E.g., Lopez v. Monterey County, Cal.*, 519 U.S. 9, 23 (1996). The court has no jurisdiction to consider dilution and voter discrimination claims such as those raised under section 2 of the Voting Rights Act. *E.g., United States v. Board of Supervisors of Warren County, Miss.*, 429 U.S. 642, 646-47 (1977) (section 5 court exceeded its jurisdiction by considering Fifteenth Amendment vote dilution and Fourteenth Amendment one person-one vote claims); *Connor v. Waller,* 421 U.S. 656 (1975) (section 5 court "erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination"); *Perkins v. Matthews,* 400 U.S. at 383 (section 5 court misperceived the "permissible scope of its inquiry" when it considered the alleged discriminatory effect of the election change rather than simply the section 5 coverage issues).

When the plaintiffs brought this case, the crux of their complaint was that the school district's new redistricting plan, which at the time was pending before the Attorney General of the United States, had not yet been precleared. Shortly after the case was filed, however, the Attorney General announced that he did not object to the redistricting. The parties agree that, at that time, at least some of the case became moot. The plaintiffs, however, assert that they continue to have some viable section 5 claims. Indeed, while the amended complaint drops some of the original section 5 issues, it brings others forward and even adds a new section 5 allegation. The posture of the case

puts the court in an untenable jurisdictional posture. The plaintiffs' decision to maintain their section 5 claims requires that this court be constituted as a section 5 three-judge court and dramatically limits its jurisdiction. When the plaintiffs added a section 2 claim in this case, it was a claim that this particular court is without jurisdiction to hear. Thus, the court should dismiss the section 2 claim. Dismissal would be without prejudice to the ability of the plaintiffs to file the section 2 claim in a court with jurisdiction to hear it.

II. The section 5 claims should be dismissed as moot or because they fail to state a claim on which relief can be based.

A. This court has no jurisdiction to grant much of the relief sought under the plaintiffs' section 5 claims.

Although the plaintiffs bring this case under section 5 of the Voting Rights Act, a section 5 court has no jurisdiction to grant much of the relief prayed for. Specifically, the plaintiffs ask this court to:

- Order that the trustee election be held on November 7, 2002,[2] rather than on July 27 as ordered by the state district court and precleared by the Attorney General of the United States. First Amended Complaint, ¶ 21.A.
- Void the adoption and administration of the redistricting plan adopted by the board of trustees on March 20, 2002, and precleared by the Attorney General of the United States on May 9, 2002. First Amended Complaint, ¶ 21.B.
- Require the adoption of a plan and election schedule that presumably is different than the one precleared by the Attorney General of the United States on May 9, 2002. First Amended Complaint, ¶ 21.C.

Essentially, the plaintiffs are using this section 5 coverage suit to seek a particular substantive result—*i.e.*, a different redistricting plan and a different election date. Section 5, however, is

[2]Presumably the plaintiffs intended to ask that the election be held on November 5, which is the date for the general election.

explicitly designed to take all substantive issues out of the hands of the local courts and to place them exclusively in forums sitting in the District of Columbia. *Perkins*, 400 U.S. at 385. Section 5 courts sitting outside the District of Columbia simply do not have the authority to grant such relief. *Lopez v. Monterey County, Cal.*, 519 U.S. at 24 (section 5 coverage court erred by ordering "the parties to submit to it an election plan that complied both with § 5's substantive requirements and with state law," and by doing so "it interposed itself into the § 5 approval process in a way that the statute does not contemplate."); *United States v. Board of Supervisors of Warren County, Miss.*, 429 U.S. at 646-47 (section 5 court erred in proceeding on the premise that it could institute its own plan to remedy constitutional violations in the existing plan). The relief the plaintiffs are seeking cannot be granted by this court. Therefore, the section 5 claims should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be based.

B. Contrary to the plaintiffs' claim, the "cancellation" of the May 4 election has been precleared.

The plaintiffs claim that DISD violated section 5 "by cancelling the May 4, 2002 School District Board of Trustees election without obtaining the pre-clearance required by 42 U.S.C. § 1973c." First Amended Complaint at ¶ 6. There is no question, however, that the decision not to hold the May 4 election was submitted to the Attorney General and that it was precleared.

The decision to change the election date was made by the state district court which "ORDER[ED] that the general election of DISD trustees that would have been held in May of 2002 shall instead take place on July 27, 2002 . . .." *Garza v. Dallas Ind. Sch. Dist.*, No. 01-8448-J (191st Dist. Ct., Dallas County, Tex., Feb. 28, 2002). Appendix at 7. The school district submitted the state court order to the Attorney General for preclearance, noting that the board "proposes to hold

its general election on a court-ordered date instead of the scheduled May 4, 2002 date." Appendix at 8. In its preclearance letter, the Attorney General indicated that he did not have any objection to "the change in the 2002 election date." Appendix at 25. There is simply no question that the decision not to hold an election on May 4 was presented to the Attorney General or that the Attorney General precleared that decision. The plaintiffs have no claim regarding the "cancellation" of the May 4 election.

C. The Amended Complaint does not state a valid claim against Bruce Sherbet, the County Elections Administrator.

1. The plaintiffs misunderstand the role of the Elections Administrator.

The Amended Complaint charges that Mr. Sherbet violated section 5 when he "fail[ed] to hold the May 4, 2002 School District Board of Trustees election" and when he "refus[ed] to hold the May 4, 2002 election" without first obtaining preclearance. Amended Complaint, ¶ 7. Mr. Sherbet, however, does not decide whether to hold the election. The decision to call or not to call an election is vested by law in the school district board of trustees, not the elections administrator. TEX. ELEC. CODE ANN., § 3.004(a)(3) (Vernon Supp. 2002). As a county official, he has no role in conducting the school district elections except to the extent that the school district contracts with him to perform election services. TEX. ELEC. CODE ANN., §§ 31.093-.094 (Vernon 1986). If the election is not called, there is no contract, and he has no duties to perform.

Here the school board never called the May 4 election, and the state district court ordered that the election be held in July rather than on May 4. As a matter of law, Mr. Sherbet was never in a position to "fail" or "refuse" to conduct an election that was never called. Since he cannot and did

not make a decision whether to hold the May 4 election, the plaintiffs have not pled a claim against Mr. Sherbet on which relief can be granted.

2. The only connection Mr. Sherbet had with choosing an election date is that he responded to questions in the state district court on the logistics of conducting the election on various dates. Testimony in a judicial proceeding is not required to be precleared under section 5.

The plaintiffs claim that Mr. "Sherbet adopted and applied criteria setting [*sic*] for the presence of non-partisan races on the same ballot as partisan races and for the length of the ballot [and that these] criteria resulted in his decision not to hold the next DISD trustee election on November 7 [*sic*], 2002, the next available date under state law for a school district election." Amended Complaint, ¶ 15. Of course, as discussed above, Mr. Sherbet did not and could not decide the date of the trustee election. That decision was made by the state district judge.

What the plaintiffs are careful to obscure is the fact that the extent of his role in the decision-making process that resulted in the choice of the July 27 election date is that he testified in the state court proceeding and, in the course of that testimony, responded to questions on the practical effect of conducting the school board election in conjunction with the November general election. The district court unquestionably relied on that testimony in making her decision. *Garza v. Dallas Ind. Sch. Dist.*, No. 01-8448-J, 191st District Court, Dallas County, Texas; Order on Motion for Additional Remedy (Feb. 28, 2002), slip op. at 4-6, Appendix at 4-6. While the court order changing the election date is admittedly subject to section 5 preclearance, and was in fact precleared, the testimony in the case is not an election practice, standard, or procedure within the contemplation of section 5. The plaintiffs' attempt to require the testimony to be precleared does not state a valid section 5 claim.

D. The school district's redistricting plan, including all the preliminary decisions and considerations that went into the final adoption of the plan, has been precleared.

1. When a redistricting plan is precleared, it is not necessary to separately preclear preliminary decisions and considerations that led to the final adoption of the plan.

Much of the First Amended Complaint is devoted to the plaintiffs' contention that the "whole precinct standard" and the "Hispanic citizenship requirement" were distinct changes in election practices, standards, or procedures that were required to be precleared separately from the redistricting plan. First Amended Complaint, ¶¶ 8-14. What the plaintiffs denominate as "standards," however, are merely preliminary decisions or considerations that led to the final redistricting plan. The only impact either had on voting was in the way they affected the contours of the ultimate redistricting plan. The Attorney General or the District Court of the District of Columbia looks at the final plan and not at every preliminary decision the school board made in reaching that final decision. Indeed, the Attorney General specifically says as much in his regulations governing submissions under section 5:

> The Attorney General will not consider on the merits: (a) Any proposal for a change affecting voting submitted prior to final enactment or administrative decision or (b) Any proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance.

28 C.F.R. § 51.22 (2001).

The school district does not dispute that the decision to use whole election precincts is required to be precleared. The only issue is when and in what form. The plaintiffs would cut the process up into various components and require each to be precleared separately. It is important to recognize the practical consequence of the plaintiffs' argument. Under section 5, a change in an

election standard may not be implemented until it is precleared. 42 U.S.C.A. § 1973c (West 1994). Thus, if adoption of a whole-precinct criterion is a change in an election standard, then the school board would have to submit that criterion for preclearance and then await the decision of the Department of Justice before it could take the next step.

Here the plaintiffs identify only two preliminary "decisions"[3] that they contend require separate preclearance. If, however, we take the conceptual step of dividing a redistricting plan into multiple, separately preclearable, preliminary decisions, then there is no principled reason for identifying these two and not the scores of other preliminary decisions that are a part of the adoption of any plan. For example, the "whole precinct" criterion was one of nine formally adopted criteria. *See* Appendix at 26-27. What test are the plaintiffs asking the court to apply to determine that the whole precinct criterion, but none of the other eight criteria, requires separate preclearance? Similarly, the importance of considering citizenship data may have been the most vigorously debated issue during the process, but there were many other implicit or explicit considerations that were part of the final decision. If we do not limit ourselves to the final plan as the decision requiring preclearance, how do we identify the points in the process where the school board must stop and seek approval before proceeding to the next step in the redistricting process? The Department of Justice has established a procedure that requires formal adoption of a change—here, a redistricting plan—before it may be considered for preclearance and that encourages consideration of all relevant

[3]Although the plaintiffs refer to the board's "requirement" that districts contain a Hispanic citizen-voting-age-population majority, *see, e.g.,* First Amended Complaint at ¶¶ 10 and 12, there was never a formally adopted requirement or mandate. The citizen-voting-age population level of districts was unquestionably a major consideration that was vigorously and extensively debated when the board analyzed the plans to determine which best met legal requirements; however, it was never a formal standard or decision except to the extent that it was reflected in the final plan.

changes at the same time. *E.g.*, 28 C.F.R. § 51.22 (changes may not be submitted prior to final enactment and related changes will be considered together); *c.f.*, 28 C.F.R. § 51.61(b) (2001) (all of a jurisdiction's unprecleared annexations will be considered together). Here, when the school board adopted its final plan, that plan was composed of whole voting precincts and was chosen after considering citizen-voting-age-population data. A decision to give careful attention to citizenship levels or to use whole voting precincts as the basic building block is wrapped up in that finally adopted plan. Whatever effect either of those factors will have on the contours of the plan can be determined by looking at the final plan. Indeed, it is *only* by looking at the final plan that the effect can be truly gauged. Here, the change in the election standard that requires section 5 review is the adoption of the plan, not the preliminary decisions that led to the final decision.

Everything the plaintiffs urge was required to be precleared was, in fact, precleared. The preclearance, however, came when the plan, which was drawn on the basis of whole voting precincts and which considered Hispanic citizen voting age population, was submitted to the Attorney General. There was never any requirement to have a serial, one-step-at-a-time preclearance process so that every preliminary decision would have to be precleared in sequence before the school board could advance to the next step in the plan adoption process.

2. The use of whole voting precincts in drawing a plan is mandated by state statute, and that statute has been precleared.

Even if it were necessary that the Attorney General preclear criteria for redistricting before those criteria could be used, the requirement that large school districts, such as Dallas I.S.D., use whole voting precincts in redistricting has, in fact, been precleared. The relevant statute, section 11.052(f) (Vernon Supp. 2002) of the Texas Education Code, provides that in a district with at least

150,000 students in average daily attendance,[4] the boundary of a trustee district may not cross a county election precinct boundary. The statute was originally enacted as House Bill 2106 in 1987. Acts 1987, 70th Legis., R.S., ch. 636, p. 2425, § 1. That statute was precleared by the Attorney General of the United States on November 16, 1987. A copy of the preclearance letter is found in the Appendix at 28-29. Thus, even if it were necessary to preclear any requirement that whole voting precincts be used as the basis of a redistricting plan, in this case the requirement was satisfied in 1987.

E. The "New Section 5 Count" is not cognizable.

The plaintiffs' "new section 5 count" alleges that the County Elections Department was providing information to the public on a plan other than the March 20 plan that was precleared by the Attorney General. First Amended Complaint, ¶¶ 16-19. What the claim boils down to is that, for a period of time, the incorrect plan was posted on the Dallas County Election Department's website. An election official's failure to follow the law—in this case, the apparently inadvertent[5] posting of the wrong plan—does not raise a section 5 issue.

The Fifth Circuit teaches as much in an opinion by Judge Goldberg upholding a single judge's conclusion that an alleged section 5 claim was "wholly insubstantial" and "completely without merit." *United States v. Saint Landry Parish Sch. Bd.*, 601 F.2d 859, 865 (5th Cir. 1979). In that case, the government claimed that the local election officials were implementing a change in voting practices since they were using a procedure for assisting voters that was different from the

[4]The current (2001-2002) average daily attendance of Dallas I.S.D. exceeds 150,000.

[5]While the posting of the wrong plan on the Internet was presumably a mistake, the legal analysis would be the same even if the incorrect posting were deliberate.

one set out in state statute.[6] While the court agreed that the election officials' actions would constitute actions of the state for some purposes, it did not believe that a governmental body

> 'enacts or administers' a new voting procedure [so as to trigger section 5 preclearance requirements] every time a state official deviates from the state's required procedures. . . . Surely Congress did not intend the Attorney General and the district court for the District of Columbia to waste their time considering voting procedures that a state does not wish to enact or administer.

Saint Landry Parish, 601 F.2d at 864. *See also Montgomery v. Leflore County Republican Executive Comm.*, 776 F. Supp. 1142, 1145 (N.D. Miss. 1991) (political parties' treatment of absentee ballots in a manner other than that required by state law "represents an ordinary, garden-variety election dispute; plaintiff's attempt to convert it into a voting rights claim under § 5 is 'completely without merit.'") (quoting *Saint Landry Parish*, 601 F.2d at 863); *Miller v. Daniels*, 509 F. Supp. 400, 406 (S.D. N.Y. 1981) ("the present situation is one in which defendants have purportedly acted in violation of precleared election laws that remain in full force. The alleged misconduct of these local election officials does not constitute a 'change' for purposes of section 5.").

If a claim that an election official's purposeful departure from precleared state law represents a change in an election practice within the contemplation of section 5 is "wholly insubstantial and

---

[6]The election at issue featured a contest for school board between an African-American and a white candidate. Allegedly, the poll officials went into the voting booth with African-American voters to assist them in casting their ballot without regard to the voter's ability to vote without assistance. If the African-American voter cast a vote for the white candidate, who was the one preferred by the election officials, the election official gave the voter a token to be redeemed for money by persons employed by the white candidate. In effect, the poll officials corruptly deviated from the statutorily required and previously precleared procedures for assisting voters in order to participate in a vote-buying scheme.

completely without merit,"[7] then it is impossible to imagine how the plaintiffs' claim that putting the wrong plan on the website poses *any* section 5 issue.

CONCLUSION

The court has no jurisdiction to hear the section 2 claim or to grant much of the relief the plaintiffs seek under section 5. The claims the plaintiffs pose are not ones for which relief can be granted. The court should accordingly dismiss this case. The dismissal of the section 2 claims would be without prejudice to refiling in a court with jurisdiction to hear them.

Respectfully submitted,

BICKERSTAFF, HEATH, SMILEY, POLLAN,
KEVER & McDANIEL, L.L.P.
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443
Telephone: (512) 472-8021
Facsimile: (512) 320-5638

By: _____
C. ROBERT HEATH
State Bar No. 09347500

DAVID MÉNDEZ
State Bar No. 13932575

MYRA A. McDANIEL
State Bar No. 13520300

[7] In *Saint Landry Parish*, *Montgomery*, and *Miller*, the section 5 claim was dismissed by a single judge without requesting that a three-judge court be convened. In order for a single judge court to make that determination, he must conclude that the section 5 claim is "wholly insubstantial or completely without merit." *Saint Landry Parish*, 601 F.2d at 863, n.6. All three courts used that test.

ERIC V. MOYÉ
State Bar No. 14611300
DAWN KAHLE DOHERTY
State Bar No. 00793625
VIAL, HAMILTON, KOCH & KNOX, L.L.P.
1717 Main Street, Suite 4400
Dallas, Texas 75201
Telephone: (214) 712-4400
Facsimile: (214) 712-4402

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Support of Dallas Independent School District's Motion to Dismiss the First Amended Complaint has been sent to the below listed counsel of record by United States mail, certified, return receipt requested, on this 23rd day of July, 2002:

Michael M. Daniel
Laura B. Beshara
Michael M. Daniel, P.C.
3301 Elm Street
Dallas, Texas 75226-1637

Joel David Vera
Joel David Vera, PLLC
238 West 12th Street, Suite F
Dallas, Texas 75208

Peter L. Harlan
Assistant District Attorney
Dallas County
Frank Crowley Courts Building
133 N. Industrial Blvd., LB 19
Dallas, Texas 75207-3691

C. ROBERT HEATH

Redistricting\Dallas ISD-Villegas-brief in support of mtn to dismiss-crh wpd