ORIGINAL

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.
Dallas Independent School District and Bruce Sherbert, Dallas County Elections Administrator, defendants.	*	3-02CV-858-R

PLAINTIFFS' OPPOSITION TO DISD'S MOTION
TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Plaintiffs oppose DISD's motion to dismiss the First Amended Complaint. Plaintiffs' response is set out under the heading of each count in DISD's motion to dismiss.

DISD motion to dismiss count 1. The 1973c court has no jurisdiction to hear the 42 U.S.C. § 1973 claims.

If a single case combines counts that require a three judge court with counts that require only a single judge, then the three judge court decides the issues for which the multiple judges are required and the single judge decides the remaining counts. *Robertson v. Bartels*, 148 F. Supp. 2d 443, 460-461 (D.C. N.J. 2001). This is the procedure followed by the United States Court of Appeals for the Fifth Circuit in *United States v. Landry*, 601 F.2d 859, 865 (5th Cir. 1979). The Court upheld the dismissal of the Section 5, 42 U.S.C. § 1973c, claims but reversed the dismissal of the single judge court jurisdictional claims brought under 42 U.S.C. § § 1971(a) and 1973. Another alternative would be to sever the counts for separate trials by the three judge court and by the single judge. Fed. R. Civ. P. 42(b). Even if the single judge counts were filed as a separate lawsuit, the cases would still involve not only the same plaintiffs and defendants but also many of the same common transactions and facts.

DISD motion to dismiss count 2. The 1973c court has no jurisdiction to order adoption of a different plan and a different election date.

Plaintiffs' Section 5 prayer for relief states:

Prayer for relief for Section 5 counts

21. Plaintiff requests the following relief:

A. a preliminary and permanent injunction requiring DISD and defendant Sherbert to hold single member trustee elections for all nine single member districts on November 7, 2002.

B. a preliminary and permanent injunction voiding DISD's actions adopting the March 20, 2002 single-member district plan and administering the pre-election schedule for the July 27, 2002 election using the March 20, 2002 election plan or any unprecleared plan and enjoining DISD from enacting and implementing election dates and single member district plans until DISD first obtains the pre-clearance required by 42 U.S.C. § 1973c for the election schedule, plans, and criteria used in choosing those schedules and plans,

C. an injunction requiring DISD to adopt and implement a redistricting plan and election schedule in compliance with 42 U.S.C. § 1973c,

D. a declaratory judgment that the administration of the DISD's enacted changes to the criteria for single member district plans, the single member district plan enacted, the cancellation of the May 4th election date and the related filing and early voting deadlines and administration of these changes without the pre-clearance required by 42 U.S.C. § 1973c violates 42 U.S.C. § 1973c,

The general standard for relief for implementation of unprecleared changes requires the adoption of a remedy that in all the circumstances of the case implements the mandate of Section 5 in the most equitable and practicable manner and with the least offense to its provisions.*Clark v. Roemer*, 500 U.S. 646, 659-660 (1991). This standard generally requires an injunction against implementation of the change while allowing the jurisdiction a reasonable opportunity to seek

Section 5 preclearance from the U.S. Attorney General for the changes with the subsequent relief dependent upon the outcome of the preclearance process. *NAACP*, 470 U.S. at 182-183.

The relief sought in B., C., and D., are clearly authorized by the equitable authority to enforce Section 5 referred to in *Clark* and *NAACP*: enjoining un-precleared changes and ordering compliance, preclearance, for those changes. The relief sought in A., a November 5, 2002 election under either the new plan or the old plan, is the remedy for the unprecleared changes affecting the cancellation of the May election that does "the least offense to" the provisions of Section 5. *Clark*, 500 U.S. at 659-660.

DISD motion to dismiss count 3. The portion of the complaint claiming that the May 4 cancellation was not precleared should be dismissed. The cancellation was submitted and precleared.

Preclearance of the July 27th election date does not moot the need for a remedy for DISD's undisputed cancellation of the May 4th election without preclearance and before preclearance of the July 27th election date. *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 182-183, 183 n. 36 (1985).

DISD motion to dismiss count 4. Bruce Sherbert's only action was as a witness and that does not constitute an election practice, standard, or procedure within section 5.

Mr. Sherbert is the election administrator for Dallas County and conducts DISD's elections through a contract. It was his refusal to place the DISD election on the Novermber 5, 2002 election date that was used to justify the midsummer election. DISD original motion to dismiss Appendix. 3-7. Mr. Sherbert claimed that the November ballot was full and there would be no place for even a single-member district election on the ballot. Mr. Sherbert is applying a new standard affecting voting in this position. There is neither statutory nor regulatory authority for him to limit the length of the ballot. There is neither statutory nor regulatory authority for him to refuse to hold a DISD election on the election date set by state law for such an election. Mr. Sherbert has not submitted either his ballot length standard or his practice of refusing to honor state mandated election dates for Section 5 approval.

Mr. Sherbert's policy choices were implemented by the state court. The policy choices, even if ordered by a federal court, must be precleared. jurisdiction.*Foreman v. Dallas County*, 521 U.S. 979, 980-981 (1997);. Even changes made in an effort to comply with the Voting Rights Act must be precleared under Section 5. *Young v. Fordice*, 520 U.S. 273, 284-285 (1997). The change must be pre-cleared even if made to comply with federal court decisions ordering remedial efforts following a finding of voting discrimination. *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981); 28 CFR § 51.18(a). The key element to whether a change that is being made in conformity to a change in applicable law must be precleared is whether the actual change is "a proposal reflecting the policy choices of the elected representatives of the people - no matter what constraints have limited the choices available to them - . . ." *Id.* Changes that are necessitated by a court-ordered change but are decided upon by the jurisdiction are subject to preclearance. 28 CFR § 51.18(b). Even one-time changes must be precleared. 28 CFR § 51.17(a), (b).

Mr. Sherbert is also a necessary party to implement any relief granted involving new or additional elections.

DISD motion to dismiss count 5. The redistricting plan has been precleared under Section 5. The preclearance encompasses any preliminary decisions leading up to the plan. The complaint that the preliminary decisions and considerations should have been separately submitted and precleared should be dismissed.

DISD does not cite any authority for its argument that the challenged standards were precleared by being subsumed in the preclearance of the final redistricting plan. This argument is the preclearance by implication theory that has consistently been rejected by Section 5 courts. *U.S. v. State of Louisiana*, 952 F. Supp. 1151, 1169 (W.D. La. 1997), affirmed 521 U.S. 1101 (1997). The same arguments in closely analogous situations were rejected by the U.S. Supreme Court in *McCain v. Lybrand*, 465 U.S. 236 (1984) and in *Clark v. Roemer*, 500 U.S. 646 (1991). The law is clear. The submission pertains only to identified changes. Any ambiguity in whether the submission identified the changes in question must be resolved against the submitting

authority. *Clark*, 500 U.S. at 656.

The mere fact of preclearance of the statute requiring that no school district lines split voting precincts did not exempt DISD's use of the statute to require only the use of whole precincts in the redistricting process. A local administrative effort to comply with a state-wide statute that has already received preclearance requires separate preclearance if it is a change by the local jurisdiction. *Foreman*, 521 U.S. at 980-981; *Young*, 520 U.S. at 284 (1997); 28 CFR § 51.15.

DISD included only the "no objection" letter on the submission of the "whole precinct" statute. It did not include the text in or the exhibits to the submission of the "whole precinct" statute. Without the submission it is impossible to even determine if the statute was precleared for the purpose and use claimed by DISD. If neither the statute nor the submission identifies the practice claimed to be required by that statute, the submission of the statute does not operate to preclear the specific application by a local jurisdiction. *Foreman*, 531 U.S. at 981; *Louisiana*, 952 F. Supp. at 1169-1171.

6. A mistake by an election official in not following the correct plan does not state a Section 5 claim.

The cases cited by DISD are based on a claim that deviations from state law were Section 5 violations. Plaintiffs do not allege that there was a violation of state law or fraud. Rather, plaintiffs claim that, during the period for candidates to file for the at that time unprecleared July 27, 2002 election, the Dallas County Elections Department was implementing an unprecleared DISD plan. The specific plan being implemented was the October, 2001 plan adopted by DISD. The Election Department was implementing that unprecleared plan by providing the map of the plan and printouts of the voting precincts by the single-member districts in that plan. The Election Department was further implementing that unprecleared plan by assigning voters to the single-member districts in that plan. DISD makes the unsupported allegation that it was an accident. Whether or not "accident" is a defense to a Section 5 claim, the threefold administration

of the unprecleared plan - distribution of maps, distribution of election precinct and voter registration data, and assignment of voters to the unprecleared single-member districts does not as a matter of law establish "mistake."

The Election Department had to pick a map to distribute, program the computer to assign the county voting precincts by the single-member districts in that map, and then assign hundreds or thousands of voters to the single-member districts drawn in that map. These actions were taken not by individual precinct judges as in *St. Landry*, but by the Election Department responsible for the conduct of the DISD elections. "Mistake" would be a new exemption from Section 5, one that might prove irresistible to election administrators already chafing under the statute.

Respectfully Submitted,

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Certificate of Service

I certify that a true and correct copy of the above document was served upon counsel for the defendants by being placed in the U.S. mail, first class postage prepaid, on the 6th day of August, 2002.

_____
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