IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

ALFRED BONE SHIRT, et al., Plaintiffs, v. JOYCE HAZELTINE, et al., Defendants.	Civil Action No. 01-3032

BRIEF OF THE UNITED STATES
AS AMICUS CURIAE

I. INTRODUCTION

The United States respectfully submits this brief as amicus curiae in this action to address the important issues raised in this case with regard to the enforcement of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c ("Section 5"). The Attorney General of the United States has primary responsibility for enforcing Section 5. See 42 U.S.C. 1973c; 28 C.F.R., Part 51.

Jurisdictions subject to Section 5 may not implement a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless and until the voting change first receives federal preclearance either from the Attorney General or from the United States District Court for the District of Columbia. 42 U.S.C. 1973c. Changes that have not received the requisite preclearance are unenforceable. Clark v. Roemer, 500 U.S. 646, 652 (1991).

The State of South Dakota, not itself covered by Section 5, enacted a legislative redistricting plan in 2001 and seeks to enforce that plan in Shannon and Todd Counties, which are subject to Section 5, without first obtaining the required preclearance.

Plaintiffs filed this action alleging violations of Sections 2 and 5 of the Voting Rights Act, and seek declaratory and injunctive relief. This brief addresses plaintiffs' claim under Section 5. Plaintiffs allege that defendants are implementing an unprecleared voting change in violation of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. Defendants assert that plaintiffs' Section 5 claim should be dismissed because the State of South Dakota is not a proper party for this litigation, and that, in any event, preclearance is not required because the only change to the relevant district is the loss of uninhabited land.

The United States maintains that defendants are implementing a voting change in covered counties in violation of Section 5, and submits this brief in support of plaintiffs' request for declaratory and injunctive relief.

II. DISCUSSION

On September 17, 2001, prior to the adoption of the redistricting plan, the Attorney General received from the state information concerning a possible plan. The state asked for expedited Section 5 review of the plan. At that time, the plan was not final; it had not been adopted by the state legislature or

signed by the governor. The Attorney General declined to make a determination at that time because the plan was not ripe for review. See Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. 51.22(a), 51.35. The Attorney General notified the state of that decision on October 3, 2001, and stated that preclearance should be sought when the redistricting plan was finally enacted. See Letter to Mr. James Fry, Director, Legislative Research Council (October 3, 2001).

On November 1, 2001 the governor of the State of South Dakota signed Senate Bill 1, providing for the decennial reapportionment of the South Dakota House and Senate. By enacting Senate Bill 1, the state formally adopted its 2001 redistricting plan, making it ripe for Section 5 review. The plan divides the state into thirty-five senatorial districts. Senate District 27 includes both Shannon and Todd Counties. Although the plan was passed by the legislature and signed into law by the governor on November 1, 2001, the state did not submit the final plan for preclearance, despite the fact that it had previously submitted a plan never formally adopted. On January 14, 2002, the Attorney General informed the state that it was implementing an unprecleared voting change and requested that the state submit its 2001 redistricting

plan for Section 5 review.[1] The state persists in its refusal to seek preclearance of its redistricting plan.

In its opposition to plaintiffs' motion for a preliminary injunction, the state argues that plaintiffs' Section 5 claim should be dismissed because it is the counties, not the state, that should seek preclearance, if preclearance is required at all. Defendants also argue that Section 5 preclearance is not required because the only change to the relevant district, District 27, is the loss of an acre and a half of uninhabited land.

Defendants' positions are inconsistent with well-established Section 5 principles. Specifically, South Dakota's November 1 redistricting plan is a voting change subject to the preclearance requirements of Section 5, and this Court should enjoin the State of South Dakota from implementing an unprecleared voting change in Shannon and Todd Counties.

A. The State of South Dakota is the Appropriate Party for this Section 5 Enforcement Action

The state first asks the Court to dismiss plaintiffs' Section 5 claim on the basis that it is the individual counties, not the state, that are obligated to seek preclearance, if preclearance is required at all.

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[1] Copies of the January 14 letter, as well as the earlier October 3 letter, were faxed to the Court and counsel on January 14.

It is clear, and defendants do not dispute, that Section 5 "preclearance requirements apply to measures mandated by a partially covered State to the extent that these measures will effect a voting change in a covered county." Lopez v. Monterey County, 525 U.S. 266, 269 (1999); Lopez v. Monterey County, 519 U.S. 9, 20 (1996); Clark, 500 U.S. at 652-53. South Dakota seeks to implement its 2001 redistricting plan in the state's two covered counties. This plan therefore is unenforceable in the covered counties unless and until it receives preclearance, and plaintiffs are entitled to an injunction prohibiting its further implementation. See Roemer, 500 U.S. at 652-53.

In support of its argument that the State of South Dakota is not an appropriate defendant in this action, defendants rely on language in Lopez, 525 U.S. 266, ordering a covered county in a partially-covered state to seek preclearance for changes imposed by a state-wide statute. However, this outcome does not support defendants' position. The question before the Court in Lopez was whether the preclearance requirements apply to state enactments by partially-covered states to the extent such enactments effected a voting change in a covered county, even where the covered county itself could not exercise independent discretion in implementing the enactments. Lopez, 525 U.S. at 269, 701. The Court held that such changes did require preclearance under Section 5. Nothing in Lopez suggests that partially-covered

states cannot be enjoined from implementing state acts to the extent those acts would be implemented in a covered jurisdiction.[2]

Indeed, South Dakota itself has previously been ordered to comply with Section 5's preclearance requirements to the extent a state law affected Shannon and Todd Counties. In 1980, this Court enjoined the implementation of the Unorganized Counties Act, a state law, until such time as preclearance was sought and obtained pursuant to Section 5. See Order, attached as Exhibit A. In that case, United States v. South Dakota, Civil Action No. 79-3039, this Court found that the Unorganized Counties Act was a voting change subject to Section 5, and enjoined the state from implementing the unprecleared state act. Indeed, the Court enjoined not only the state, but Tripp and Fall River Counties (the counties to which Shannon and Todd Counties were "attached") even though neither the state nor the two defendant counties are themselves covered by Section 5. In that case, it was the state, along with Tripp and Fall River Counties that were seeking to

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[2] Lopez involved the conduct of judicial elections under a municipal court system that was the result of changes adopted at the county as well as the state level. An injunction to prevent the conduct of elections under the challenged system would have been appropriately carried out at the county level. Moreover, because the county was involved in enacting the changes to its judicial system, it was in a position to present the changes to the Attorney General for preclearance. There was no need for the Court to consider whether to enjoin the state separately or in addition to the county, and that issue apparently was not raised.

implement an unprecleared voting change in counties that are subject to Section 5.[3]

Moreover, although the State now maintains that it is not required to submit its 2001 redistricting plan, it has assumed Section 5 responsibilities in the past, submitting, for example, its 1991 plan for preclearance. In fact, South Dakota's Office of the Attorney General has previously expressed its opinion that state officials are responsible for making Section 5 submissions of state laws, including redistrictings, that have application in the covered counties.[4]

Similarly, numerous other courts have assumed that state officials in partially-covered states have obligations under Section 5 with respect to changes the state seeks to implement in covered counties within the state. See Lopez, 525 U.S. at 279-81; United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 148-49 (1977) (stating that when state-instituted bail-out litigation failed, "it became necessary for New York to secure

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[3] The state then instituted a declaratory judgment action in 1980 in the District of Columbia District Court for preclearance of its Unorganized Counties Act. In this case, styled State of South Dakota v. United States, Civil Action No. 80-1976 (D.D.C.), neither the parties nor the court raised any issue regarding whether the state had standing to bring the action.

[4] In an official opinion, the Attorney General advised the Secretary of State that there were two methods by which preclearance could be obtained for state laws: "[t]he state may file a declaratory judgment action" or "[t]he state may submit the change to the United States Attorney General." 1977 S.D. Op. Atty. Gen. 175, 1977 WL 36011.

the approval of the Attorney General ... for its 1972 reapportionment statute insofar as that statute concerned Kings, New York, and Bronx Counties"). In fact, other courts have enjoined partially-covered states from implementing state laws that effect voting changes in covered counties. See, e.g., Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985) (enjoining election of superior court judges pursuant to changes in state law in case brought against state defendants).

When state-adopted, state-wide redistricting plans are at issue, it is especially appropriate to require the state to comply with the requirements of Section 5, and enjoin implementation of such a plan if those requirements are not met. The State of South Dakota bears the sole responsibility for the adoption of a legislative redistricting plan. See S.D. Const. art. 3 § 5; In re Certification of a Question of Law, 615 N.W.2d 590 (S.D. 2000). State officials are in the best position to make the submission of such plans. Much of the information the Attorney General would require in order to review the redistricting plan is uniquely within the knowledge and control of state officials.[5] Moreover, only state officials would have

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[5] These items include, for example, a statement of reasons for the change, 28 C.F.R. 51.27(m); a statement of anticipated effect on members of minority groups, § 51.27(n); a statement identifying past or pending litigation, § 51.27 (o); demographic information for affected area before and after the change, § 51.28(a); maps containing prior and new boundaries, § 51.28(b); (continued...)

the authority to make changes to a state's redistricting plan in order to overcome any objection the Attorney General might interpose.

In fact, the Attorney General has never received for Section 5 review a state-wide redistricting plan from a covered county in a partially-covered state. Rather, the Attorney General regularly receives such submissions from the partially-covered states themselves.

B. Redistricting Plans Effect Changes to Election Law Regardless of How Minor the Resulting Boundary Changes and Require Preclearance under Section 5

South Dakota's 2001 redistricting plan is a "change affecting voting" that must be precleared before being implemented in the Section 5 covered counties - Shannon and Todd. Section 5 reaches "any state enactment which alter[s] the election law of a covered State in even a minor way." Allen v. State Bd. of Elections, 393 U.S. 544 (1969). The preclearance requirements apply to "all changes, no matter how small." Allen, 393 U.S. at 568. Despite the fact that it has previously

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[5] (...continued)
evidence of public notice, of the opportunity for the public to be heard, and of the opportunity for interested parties to participate in the decision to adopt the proposed change and an account of the extent to which such participation, especially by minority group members, in fact took place, § 51.28(f); minutes or accounts of public hearings, § 51.28(f)(3); statements and public communications concerning the proposed change, § 51.28(f)(4); copies of comments from the general public, § 51.28(f)(5).

submitted redistricting plans for Section 5 review, South Dakota here appears to argue that its 2001 redistricting plan is not a covered voting change.

There is no doubt that redistricting plans are changes directly related to voting and must be submitted for preclearance. United Jewish Orgs. v. Carey, 430 U.S. 144; Georgia v. United States, 411 U.S. 526 (1973). The fact that South Dakota perceives the impact of its redistricting plan to be inconsequential is not relevant to whether the plan must be subject to Section 5 preclearance. 28 C.F.R. 51.12 (stating that a change affecting voting must be submitted "even though it appears to be minor or indirect, returns to a prior practice or procedure, [or] ostensibly expands voting rights"); see also Allen, 393 U.S. at 568 (noting Congress's intent that "all changes, no matter how small, be subjected to § 5 scrutiny"). The state asks this Court to make a determination that has specifically been foreclosed to three-judge district courts in enforcement actions -- that the voting change at issue "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of" race, color, or membership in a language minority group. 42 U.S.C. 1973c. That determination is "expressly reserved" for the Attorney General or the District Court for the District of Columbia. See Lopez, 519 U.S. at 23 (quoting Perkins v. Matthews, 400 U.S. 379, 385

(1971)). This Court "lacks authority to consider the discriminatory purpose or nature of the changes." Lopez, 519 U.S. at 23.

Defendants assert that because the only change to the relevant district is the loss of an acre and a half of unpopulated, non-residential property, the redistricting plan is not subject to Section 5 review. The state, relying on the Supreme Court's opinion in a case addressing the application of Section 5 to annexations, City of Pleasant Grove v. United States, 479 U.S. 462 (1987), argues that as a matter of law, its plan does not require preclearance because annexation or loss of uninhabited land does not require preclearance. Specifically, defendants suggest that because no preclearance is required when a jurisdiction annexes uninhabited land not intended for residential development,[6] it follows that no preclearance is required when a district loses through redistricting a parcel of uninhabited land not intended for residential development.

Defendant's reliance on Pleasant Grove is misplaced. Pleasant Grove involved questions concerning annexations, not redistricting. The Court in Pleasant Grove quotes a statement in

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[6] The United States disputes defendants' sweeping reading of the Court's opinion in Pleasant Grove. Redistricting plans are entirely distinct from annexations and so clearly require preclearance that this brief does not directly address defendant's understanding of whether annexations of uninhabited land require preclearance.

a footnote of the United State's Brief suggesting that a narrow class of annexations may not be voting changes, and thus do not require preclearance under Section 5. See City of Pleasant Grove, 479 U.S. at 468 n.8. The same cannot be said of redistrictings. Redistricting plans are inherently changes in a state's election law; such plans determine the boundaries of districts and the composition of electorates. There is nothing in the Court's Pleasant Grove opinion that supports a finding that a redistricting plan might, under any circumstances, not be a change in voting. There is no practical or legal justification for extending the limited language in the footnote of the Pleasant Grove opinion to redistricting plans.

In fact, the law is quite clear that changes in voting must be submitted even when they are minimal or meant to be ameliorative. See, e.g., Young v. Fordice, 520 U.S. 273, 285 (1997) ("Nor does it matter for the preclearance requirement whether the change works in favor of, works against, or is neutral in its impact upon the ability of minorities to vote."). The narrow reference in the footnote in Pleasant Grove delineated a very unique situation in which an annexation might not implicate voting at all; it was not a statement about voting changes that a jurisdiction perceived to be minor. No court has held or suggested that redistricting plans are not voting changes if they include only minor boundary changes.

Defendants also suggest that "it makes no sense to require preclearance" when a change "has nothing to do with 'backsliding'." See Defendants' Brief in Opposition to Motion for a Preliminary Injunction at 8. Such an argument collapses the threshold question of whether a change is covered by Section 5 with the substantive inquiry into whether the change is retrogressive. Section 5 preclearance is required for all state enactments that effect a voting change. Under Section 5, it is for the Attorney General, or the United States District Court for the District of Columbia, to determine whether retrogression, or "backsliding," has occurred. It is not up to jurisdictions to make a determination that their plan could not possibly be retrogressive and therefore does not need to be submitted.

The affidavits and maps offered by defendants to explain the nature of the change and its likely impact are matters for the Attorney General or the District Court for the District of Columbia to consider in making a determination regarding whether the plan is free of discriminatory purpose or effect within the meaning of Section 5. In a Section 5 enforcement action, the only issue is whether "a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny." Allen, 393 U.S. at 561; see also United States v. Board of Supervisors of Warren County, 429 U.S. 642, 645-646 (1977); Perkins v. Matthews, 400 U.S. 379, 383-387 (1971). Thus, in this case the

Court is authorized to determine only: (1) whether the State of South Dakota has enacted or administered a change affecting voting which is covered by Section 5; (2) if the change is covered, whether South Dakota has obtained preclearance; and (3) if the preclearance requirements have not been satisfied, what remedy is appropriate. Lopez, 519 U.S. 9, 23-24; City of Lockhart v. United States, 460 U.S. 125, 129 n.3 (1983).

The State of South Dakota admits that it has enacted a redistricting plan for the state legislature, including the realignment of a district that encompasses the state's two covered counties. The state further concedes that it has not obtained preclearance for the redistricting plan. Therefore, the United States submits that plaintiffs are entitled to an injunction prohibiting the state from further implementation of its 2001 redistricting plan in the covered counties. Lopez, 519 U.S. at 20; Clark, 500 U.S. at 652-53; Allen, 393 U.S. at 571-72.[7]

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[7] The United States also believes it would be within the Court's authority to order the State of South Dakota to seek preclearance of its 2001 legislative redistricting plan. See Lopez v. Monterey County, 519 U.S. at 24 (stating that the goal of a three-judge district court in a Section 5 enforcement action is to ensure that the challenged plan is submitted for federal preclearance "as expeditiously as possible"); see also Berry v. Doles, 438 U.S. 190, 192-93 (1978).

III. CONCLUSION

For the foregoing reasons, the United States believes it would be appropriate for the Court to grant plaintiffs' requested Section 5 relief.

Respectfully submitted,

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