

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

SHANNON PEREZ, et al.,)	
)	
Plaintiffs)	
)	
and)	CIVIL ACTION NO:
)	SA-11-CA-360-OLG-JES-XR
)	(consolidated, lead case)
MEXICAN AMERICAN LEGISLATIVE)	
CAUCUS, TEXAS HOUSE OF)	
REPRESENTATIVES (MALC))	
)	
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 of the State of Texas; JOE)	
STRAUS, in his official capacity as)	
Speaker of the Texas House of)	
Representatives)	
Defendants)	

**PLAINTIFF MALC'S BRIEF PURSUANT TO THIS COURT'S ORDER
REGARDING STANDARDS AND PROCESS FOR RELIEF UNDER
SECTION 3(c) OF THE VOTING RIGHTS ACT, 42 U.S.C. § 1973a(c)**

On July 1, 2013, this Court ordered (Dkt. 772) the parties submit briefs regarding Section 3(c) of the Voting Rights Act and its potential impact on this case. Plaintiff MALC submits this brief in response to this Court's order. Until recently, Texas was a covered jurisdiction within the meaning of Section 5 of the Voting Rights Act, as amended, 42 U.S.C. § 1973c. Under Section 5, political subdivisions must secure approval from the United States Attorney General or the United States District Court for the District of Columbia, any change in practice or procedure affecting voting. Failure to secure this approval or preclearance renders the voting change

unenforceable as a matter of law. Moreover, under Section 5 the jurisdiction has the burden of showing that the voting change does not have a discriminatory effect and was not adopted with a discriminatory intent.

However, Section 4 of the Act, providing the coverage formula for Section 5 preclearance, was determined to be unconstitutional by the United States Supreme Court. *Shelby County, Alabama v. Holder*, ___ U.S. ___, (June 25, 2013). With the Supreme Court's determination, that the Section 5 requirements cannot be applied to any jurisdiction unless or until, the Congress adopts a different coverage mechanism, Texas would no longer be obligated to seek and secure approval from the DOJ or any court of its voting changes. However, in light of the unique history of Texas in suppressing minority voters, the VRA provides an additional remedial provision with similar protections from discriminatory voting procedures and practices, Section 3(c), which this Court may impose. Therefore, Plaintiff MALC and others requested on July 1, 2013, the opportunity to present through motion, argument, and evidence a motion for this Court to review in this cause and determine that based on the totality of the history of voting discrimination against minorities in Texas that this Court should evaluate whether the adoption of the 2011 Texas House and Texas Congressional redistricting plans were tainted with the intent of minimizing minority electoral opportunities, and to require the State of Texas to pre-clear, either through the United States Department of Justice or through this Court, any new election change, in accordance with the requirements of Section 3(c) of the Act.

SECTION 3(c) of the VRA

Section 3(c) of the Voting Rights Act, the statute that provides for judicial preclearance reads as follows:

(c) If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting

guarantees of the *fourteenth* or *fifteenth amendment* in any State or political subdivision the court finds that violations of the *fourteenth* or *fifteenth amendment* justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the [**4] court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in *section 1973b(f)(2)* of this title: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

42 U.S.C. § 1973a(c).

Designed to trigger coverage in “pockets of discrimination”¹ missed by section 5’s formula, section 3 was included in the original Voting Rights Act.² Thus, since a majority of actions brought to enforce the protections of the 14th and 15th Amendments regarding voting rights discrimination have been litigated in covered jurisdiction, few cases have raised the issues and protections afforded under Section 3 (c) of the VRA. Therefore, legal interpretations of the requirements of the provision are few.

Commonly called the bail-in mechanism, section 3 authorizes federal courts to place states and political subdivisions that have violated the 14th or 15th Amendments under preclearance. In order to invoke the protections provided by Section 3(c), a party must have an

¹ H.R. Rep. No. 89-439, at 13 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2444.

² Pub. L. No. 89-110, § 3(c), 79 Stat. 437, 437-38 (1965).

independent voting rights challenge. *See Webber v. White*, 422 F. Supp. 416 (N.D. Tex., 1976). Thus, Section 3(c) would be an appropriate request for relief in a claim of intentional discrimination in voting, but does not appear to provide an independent cause of action. Put simply, section 3 (c) authorizes courts to impose preclearance in response to violations of the 14th and 15th Amendments.

In addition, its application must be linked to a finding of intentional discrimination in voting that is current rather than a violation of a past discrimination that has been remedied by judicial decree or by remoteness. *Jeffers v. Clinton*, 740 F. Supp. 585, 600-602 (E.D. Ark. 1990). *But see Sanchez v. Anaya*, No. 82-0067M, slip op. ¶ 8 (D.N.M. Dec. 17, 1984) (consent decree)(approving the imposition of preclearance for an illegal redistricting plan found to have violated Section 2, but with no finding of unconstitutionality).

In discussing the burden on a Plaintiff and the type of evidence that would be relevant in its inquiry, the District Court in *Jeffers* stated:

It need only be one of the motivating factors but for which the action would not have been taken. In addition, there will rarely be direct proof of the forbidden motive. Courts must be sensitive to circumstantial evidence from which a reasonable inference of discriminatory intent may be drawn. That a given action has a disparate impact, and that State officials knew that it would, can in a proper case, depending on the other proof in the record, be an important part of such circumstantial evidence -- especially if there is no reasonable nondiscriminatory justification for what has been done. Finally, we should not allow a natural reluctance to attribute illicit motives to high State officials to deter us from our duty. The burden of proof is not artificially high. It is only the ordinary civil burden of a preponderance of the evidence.

Jeffers, 740 F. Supp. at 589.

The burden of showing intentional discrimination for purposes of securing judicial preclearance does not require a presumption of legal motive but rather may be proven through circumstantial evidence through the ordinary civil burden of a preponderance of the evidence. *Id.*

Courts have provided that judicial preclearance would provide a remedy specifically targeted to potential future election changes dealing with the type of change found to have been adopted and implemented for a discriminatory purpose at issue in the case at hand. *Jeffers*, 740 F. Supp. at 601-2. (requiring preclearance of changes to at-large voting systems). However, courts have approved more general preclearance requirements as well. *See e.g. Kirkie v. Buffalo County*, No. 03-CV-3011, 2004 U.S. Dist. LEXIS 30960, 30966-7 (D.S.D. Feb. 12, 2004) (consent decree) (consent decree orders the county to submit all voting changes for preclearance); *Blackmoon v. Charles Mix County*, No. 05-4017, slip op. ¶ 2 (D.S.D. Dec. 4, 2007) (consent decree) (Charles Mix County required to submit all changes.).

Courts also have discretion on the duration of the preclearance obligation. *See e.g. Sanchez v. Anaya*, No. 82-0067M (D.N.M. Dec. 17, 1984) (consent decree), slip op. ¶ 8 (mandating preclearance of legislative redistricting plans for a decade); *Blackmoon v. Charles Mix County*, No. 05-4017, slip op. ¶ 2 (D.S.D. Dec. 4, 2007) (consent decree) (Charles Mix County required to submit all changes through 2024.).

Finally, Section 3 (c) has been an effective tool in blocking discriminatory election changes through preclearance. *See e.g.* Letter from Grace Chung Becker, Acting Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Sara Frankenstein, Att’y for Charles Mix County, Grunderson Palmer Goodsell & Nelson, LLP (Feb. 11, 2008)(available at: http://www.justice.gov/crt/voting/sec_5/sd_obj2.php) (Submitting its change of increase in size of governing board from 3 to 5, County was unable to show change was not motivated by

discriminatory intent.); Letter from John R. Dunne, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Manny M. Aragon, N.M. Senate President Pro Tempore, and Raymond G. Sanchez, N.M. House of Representatives Speaker (Dec. 10, 1991), *printed in* Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 1620-21 (2005)(Attorney General objected to the state senate plan, finding that New Mexico had failed to demonstrate that the plan was not motivated by a discriminatory purpose.). Moreover, Civil rights advocates have advocated its use in non-coverage areas as well. *See* Laughlin McDonald, *Expanding Coverage of Section 5 in Indian Country*, published in *THE FUTURE OF THE VOTING RIGHTS ACT*, at 163, 170 (David L. Epstein et al. eds., 2006) (noting the use of a consent decree to bail-in the county in response to discrimination against Native Americans). Indeed, prior to *Shelby*, Section 3 (c) was discussed as an alternative approach, with some modification, for continued Section 5 review in anticipation of its demise. *See* Note, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, *Yale Law Journal* 1992, 2027-38 (2010). In light of Texas’ sordid history with regard to minority voting rights; in light of the fact that Texas has again in 2011 and 2013 enacted voting laws that are meant to limit minority voter access to the political process; and in light of the decision in *Shelby County*, it is now appropriate for this Court and for these litigants to weigh the possibility of invoking the protections of Section 3 (c).

CONCLUSION

It is clear from the text of Section 3 (c), from *Jeffers*, and from the several consent decrees that have required preclearance of jurisdictions, that a voting rights plaintiffs, such as MALC, would be justified in seeking judicially-ordered preclearance of future voting changes, within the scope of a cause challenging an election practice, such as a redistricting plan, as a

Fax: (210) 822-1151
rcedillo@lawdcm.com
mkiehne@lawdcm.com

**ATTORNEYS FOR MEXICAN
AMERICAN LEGISLATIVE
CAUCUS, TEXAS HOUSE OF
REP. (MALC)**

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2013, I electronically served the foregoing via ECF on all other parties in this litigation.

/s/ Jose Garza