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JOSEPH HAAS  
Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

ALFRED BONE SHIRT, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 JOYCE HAZELTINE, et al., )  
 )  
 Defendants. )

Civil Action No. CIV 01-3032

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR  
MOTION FOR A PRELIMINARY INJUNCTION  
UNDER SECTION 5 OF THE VOTING RIGHTS ACT

The plaintiffs submit this brief in support of their motion for a preliminary injunction prohibiting the defendants from implementing South Dakota's 2001 legislative redistricting plan in Shannon and Todd counties, and in all other counties which may be affected by this litigation, until the defendants have complied with the preclearance requirement of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

I. BACKGROUND

Article III, Section 5 of the South Dakota Constitution requires the South Dakota Legislature to reapportion its membership "every ten years after 1991." The Legislature met for this purpose in a special session held in October 2001. The Legislature enacted

a redistricting plan on October 24, 2001, and the Governor signed it into law on November 1, 2001. See An Act to provide for the decennial redistricting of the State Legislature, \_\_\_\_ S.D. Laws \_\_\_\_\_. In the absence of an injunction, the State will officially begin implementing the 2001 legislative redistricting plan no later than January 1, 2002, which is the beginning of South Dakota's 2002 election cycle. See S.D.C.L. §§ 12-6-4.1 and 12-7-1.1.

Because Shannon and Todd counties in South Dakota are covered by Section 5 of the Voting Rights Act, see 28 C.F.R. Part 51 App. (List of Covered Jurisdictions), no "standard, practice, or procedure with respect to voting different from that in force and effect on . . . November 1, 1972" that affects those counties is enforceable unless and until it has been precleared in compliance with that Section. 42 U.S.C. § 1973c; Lopez v. Monterey County, 519 U.S. 9, 20 (1996) ("No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance."). A covered jurisdiction may preclear a voting change in one of two ways: it may obtain a declaratory judgment in the United States District Court for the District of Columbia, or it may submit the change to the Attorney General of the United States for approval. See 42 U.S.C. § 1973c. If the Attorney

General approves the change, or fails to register an objection to the change within 60 days, the change is precleared.<sup>1</sup> See id.

Using either preclearance method, the covered jurisdiction has the burden of proving that its proposed changed "does not have the

the effect of denying or abridging the

## II. DISCUSSION

Compliance with the preclearance provisions of the Voting Rights Act is enforceable by the Attorney General and by private litigants in an action before a local three-judge district court. See 42 U.S.C. §§ 1973c and 1973j(d); Allen v. State Bd. of Elections, 393 U.S. 544, 555-58 (1969). However, because Congress has reserved for consideration by the Attorney General or the District Court for the District of Columbia the duty to determine whether a change covered by the Voting Rights Act has the purpose or effect of "denying or abridging the right to vote on account of race or color," see 42 U.S.C. § 1973c, the role of the local three-judge court is limited. See Allen, 393 U.S. at 555-56; Perkins v. Matthews, 400 U.S. 379, 383-85 (1971). The only issues properly before a local three-judge court are "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy [is] appropriate." City of Lockhart v. United States, 460 U.S. 125, 129 n.3 (1983).

### A. South Dakota's Redistricting Plan is Covered by Section 5.

Section 5 applies in a covered jurisdiction to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or

effect on . . . November 1, 1972." 42 U.S.C. § 1973c. A Department of Justice regulation listing some examples of voting changes covered by the Act includes "redistricting, annexation, deannexation, incorporation, [and] reapportionment...." 28 C.F.R. § 51.13(e). Indeed, a redistricting plan is one of the quintessential voting changes covered by the Act. See, e.g., United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977).

The South Dakota Legislature itself has recognized the need to preclear the new plan as it affects Shannon and Todd counties, both of which are included in District 27. For example, the Legislative Redistricting Committee attempted to preclear the configuration of District 27 before the rest of the plan had been drawn and considered by the Legislature as a whole. See ex. B at 2. The Department of Justice refused to act upon the submission on the ground that it had not yet been enacted into law and was thus premature. See id.; see also 28 C.F.R. § 51.22 (regarding premature submissions).

Furthermore, the mere fact that the boundaries of District 27 under the 2001 plan are the same as those under the 1991 plan does not mean that the new plan is not subject to preclearance and cannot be discriminatory. For example, the demographic composition of District 27 has changed substantially. Native Americans were

87% of the total population and 82% of the voting-age population of District 27 under the 1991 plan, and the district as a whole was underpopulated by 4.1% -- making it one of the most underpopulated districts in the State. Under the 2001 plan, Native Americans are 90% of the total population and 86% of the voting-age population of District 27, and the district as a whole is overpopulated by 4% -- making it one of the most overpopulated districts in the State. In light of these changing demographics, the District 27 enacted in 2001 is plainly a "standard, practice, or procedure with respect to voting different from" the District 27 enacted in 1991 and is thus subject to preclearance.<sup>2</sup>

In addition, even if the 2001 plan were identical to the 1991 plan in both boundary lines and demographic composition, it would still be subject to the discriminatory purpose analysis required by

United States, for example. the court held

that a legislative redistricting plan, even if identical in all respects to the pre-existing plan, was still subject to preclearance because the two plans "differ in the way they were enacted." 785 F. Supp. 201, 206 (D.D.C. 1992). According to the

court, "We cannot conclude, as a matter of law, that the purposes behind S.B.1 . . . were nondiscriminatory simply because the attorney general determined that the purposes behind the . . . [prior] plan were not discriminatory." Id. The plan at issue in this case and the prior plan similarly differ in the way they were enacted. That difference requires the State of South Dakota to submit the plan for a discriminatory purpose analysis under Section 5.

There can be no doubt that the 2001 legislative redistricting plan enacted by the Legislature is subject to the preclearance requirement.

B. South Dakota's Redistricting Plan  
Has Not Been Precleared

As of this writing, South Dakota has made no attempt to preclear the 2001 legislative redistricting plan. Indeed, the minutes cited above indicate that it has no intention of doing so. The question, however, is not whether the State has submitted the plan but whether the plan has been precleared. Clearly, it has not.

C. The Appropriate Remedy is an Injunction

The proper remedy for noncompliance with Section 5 is clear:

No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance. If a voting change subject to § 5 has not been precleared,

§ 5 plaintiffs are entitled to an injunction prohibiting implementation of the change.

Lopez v. Monterey County, 519 U.S. at 20 (citations omitted); accord Clark v. Roemer, 500 U.S. 646, 652-53 (1991); Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969). Failure to obtain preclearance renders a voting change "unenforceable." Hathorn v. Lovorn, 457 U.S. 255, 269 (1982). Because South Dakota has not obtained preclearance for the 2001 legislative redistricting plan, the plaintiffs are entitled to an injunction prohibiting its implementation in Shannon and Todd counties, and in all other counties which may be affected by this litigation.

### III. CONCLUSION

This Court should grant the plaintiff's motion for a preliminary injunction.

Respectfully submitted,



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