

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

LEAGUE OF UNITED LATIN AMERICAN

CITIZENS, *et al.*

Plaintiffs

V.

No. 2:03-CV-354

RICK PERRY, *et. al*

Defendants

(This Filing Applies to: All Consolidated Actions)

**PARTY HENDERSON'S REMEDIAL PROPOSAL
AND BRIEF ON REMAND FROM
THE UNITED STATES SUPREME COURT**

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW Frenchie Henderson, a Party to the District Court's Judgment in the above captioned and numbered cause and, pursuant to the Federal Rules of Civil Procedure, and in accordance with the Order of this Honorable Court issued June 29, 2006 (Doc. 290), files this his Remedial Proposal and Brief on Remand from the Supreme Court of the United States, and in this connection would respectfully show unto the Court as follows:

I.

Apart from its consideration of the various remedial redistricting plans that may be presented by the Parties herein, it appears to Plaintiff Henderson that the District Court

is confronted with essentially four options with respect to its decision on how best to proceed in this matter, in view of the approaching November 7, 2006, congressional election. First, the Court could devise its own remedial plan, giving appropriate deference, where legally possible, to the policy preferences manifested by the Defendants in Plan 1374C. Second, the Court could order a return, pending further legislative action, to congressional districting Plan 1151C. Third, with certain undesirable administrative consequences, the Court could adopt a Plan presented by the Defendants. And fourth, as will be discussed in more detail herein, should the Defendants be found unable timely to implement any remedial plan in time for the November 2006 congressional election, whether the plan to be implemented is judicially drafted or otherwise, the District Court could find itself required, under Title II, U.S.C. § 2a (c), to order statewide congressional elections “at large.” For the reasons set out below, Plaintiff Henderson would urge the Court to order the Defendants to revert to and use the congressional districts judicially established in Plan 1151C for the November 7, 2006 congressional election; or, in the alternative, order that the congressional election on November 7, 2006, be conducted statewide and “at large” using the existing congressional districts provided in Plan 1374C.

II.

Plaintiff opposes the Court’s election of the first option identified above, *i.e.*, adoption of a new remedial plan by the Court, for the reason that with barely 90 days until Election Day, the dramatic alterations of congressional districts that will likely be necessary in order for the Court to bring Plan 1374C into compliance with federal law

(the “ripple effect”),¹ will surely result in substantial voter confusion. Moreover, completing such a task, and implementation of such a new plan, may present an administrative task that is simply impossible for the Defendant Texas Secretary of State, and his local agencies, to timely accomplish before the November 2006 election.

The Court may recall that when confronted with substantially the identical situation as this during trial on merits of the case, the Court, on December 17, 2003, asked the Parties how the Court should proceed in the event it determined CD23 to be illegal under federal law. Plaintiff Henderson, in response to the Court’s inquiry, filed a brief on this issue the following day, December 18, 2003.² After the Court reviewed the foregoing brief submitted by Plaintiff Henderson, the Court, to the best of Plaintiff Henderson’s recollection, conceded that, in light of the imminent approach of the 2004 election cycle, the Court would be, in its own words, “painted into a corner,” and would be required to order use of Plan 1151C should CD23 be found illegal. At that time, December 18, 2003, the question presented to the Court was in part whether the Defendant Secretary of State could timely implement judicial modifications to Plan 1374C in time for the March, 2004, primary.

III.

The Court’s second option, *i.e.*, a return to Plan 1151C for the November 2006 election, would not present any great administrative burden on the Defendants, in light of the fact that Plan 1151C is a valid plan that has previously been used, and the fact that the Defendants presumably still have the data and information necessary for conducting an

¹ See, *League of Latin American Citizens v. Perry*, slip op. at 36, 548 U.S. ___, 2006 WL 1749637 (June 28, 2006), citing *Session v. Perry*, 298 F.Supp. 2d 451, 528 (E.D. Tex. 2004)(Ward, J., concurring in part and dissenting in part)..

² See, *Cherokee County Plaintiffs’ Brief in Opposition to Remedial Judicial Action* (Doc. 159).

election under that plan. The Plaintiff concedes that use of Plan 1151C would have the undesirable effect of dispensing with a new primary election, and would require resort to a general “Louisiana style” election, but those defects will be unavoidable, with one exception noted below, regardless of how the Court proceeds. Plaintiff Henderson would respectfully urge the Court to order use of Plan 1151C in the November 7, 2006, congressional election.

IV.

The third option noted above, wherein the Court would adopt a plan submitted by the Defendants, would plainly not be an option, legally or practically. Under this option, pre-clearance would be required before such a plan could be used, pending a trial on the merits of the legality of the Defendants’ proposed plan. With the November election only 90 days away, it is very unlikely that either a trial on the merits, or pre-clearance, could be obtained for such a plan in time for the November election.

V.

Finally, should the Court determine that the Defendant Texas Secretary of State does not have enough time to implement any new plan drawn by the District Court in time for the November 2006 election, the Plaintiff believes the District Court is required to order an election wherein all 32 congressional races would be voted “at large” in accordance with the “stop-gap” provisions of Title II U.S.C. § 2a (c). As explained by Justice Scalia in his plurality opinion in *Branch v. Smith*:

“Thus, § 2a(c) is inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict pursuant to § 2c. How long is a court to await that redistricting before determining that § 2 (c) governs a forthcoming election? Until, we think, the election is so imminent that no entity competent to complete redistricting pursuant to state law (including the mandate of § 2c) is able to do so without

disrupting the election process. Only then may § 2a(c)'s stopgap provisions be invoked. Thus, § 2a(c) cannot be properly applied — neither by a legislature nor a court — as long as it is feasible for federal courts to effect the redistricting mandated by § 2c. So interpreted, § 2a(c) continues to function as it always has, as a last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one.”³

Should the Court determine that implementation of a remedial plan cannot “feasibly” occur in time for the November 7, 2006 congressional election, Plaintiff Henderson moves the District court to order that the November 7, 2006 election be conducted under a system whereby all 32 congressional races, using the districts enacted under Plan 1374C, are voted “at large” in accordance with the “stop-gap” provisions of Title II U.S.C. § 2a (c). In this regard, the Plaintiff would note that this method of congressional election is not only constitutional, and in accordance with the statutory mandate of Title II U.S.C. § 2a (c), it is the process used by the State of Maryland in its first congressional election after ratification of the Federal Constitution.⁴ Although Plaintiff Henderson has opposed throughout this litigation the Defendants’ ill-advised argument for statewide “majority rule” in the election of congressional representatives, Plaintiff Henderson now says, at least with respect to the coming November 7, 2006 election, “let ‘em have it.”

³ 538 U.S. 254, 275 (2003)(plurality opinion)(Scalia, J., joined by Rehnquist, Kennedy and Ginsburg, JJ.).

⁴ See Exhibit “A” attached hereto, *An Address to the Legislature and the people of the State of Connecticut, on the Subject of Dividing the State into Districts for the Election of Representatives in Congress*, 32 (New Haven, Con., 1791)(Evans, No. 23165). One historian has attributed this pamphlet to Roger Sherman, a delegate to the Federal Constitutional Convention of 1787. *Griffith, The Rise and Development of the Gerrymander*, 109 n. 2 (1907, Arno Press reprint, 1974).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff Henderson prays the Court will either order that the congressional election for the State of Texas set for November 7, 2006, be conducted using Plan 1151C; or, in the alternative, order that the November 7, 2006 election be conducted under a system wherein all 32 congressional races, using the districts enacted under Plan 1374C, are voted “at large” in accordance with the “stop-gap” provisions of Title II U.S.C. § 2a (c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by e-mail, and by U.S. mail, on the Attorney-in-Charge for the Defendants, Mr. Ted Cruz, at P.O. Box 12548 (MC-059), Austin, Texas 78711. Further certification is hereby made that all Plaintiffs, Intervenors and Amicus have been served by electronic mail, through their respective Attorneys-in-Charge, as listed below:

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SIGNED this 14th day of July, 2006.

_____/s/_____
Richard Gladden