ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

Let this be filed
RM Collyer
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November 3, 2011

Honorable Rosemary M. Collyer *Via Email: Chashawn_White@dcd.uscourts.gov*
United States District Judge
United States District Court for the District of Columbia
333 Constitution Avenue N.W.
Washington D.C. 20001

RE: Case No. 11-01303 RMC; *State of Texas v. United States of America and Eric H. Holder, Jr.et al.*, in the United States District Court for the District of Columbia

Dear Judge Collyer:

At the close of yesterday's hearing you asked whether there was still an urgent need, in light of the ongoing interim hearings in San Antonio, for an immediate decision in this proceeding. The State indicated that we thought an expedited ruling was necessary. The Department of Justice urged otherwise, suggesting that the Court could not--or perhaps should not--preclear any of the plans at issue (or parts thereof) because the Western District of Texas is considering potential interim plans. The Department's position appears to rest on the claim that a discriminatory purpose somehow infected the entirety of the State's plans.

However, a significant issue in the Section 2 case is whether the San Antonio panel can--or by exercising its equity power may--impose changes to the State's plans despite the absence of a legal determination that the plans are unlawful. This issue is informed by *Upham v. Seamon*, 456 U.S. 37 (1982), which authorizes the Section 2 court to make *only* those interim alterations which are necessary to cure specific districts' constitutional or statutory defects.

Despite *Upham*, plaintiffs in the Section 2 proceeding (interveners here) have argued that the Section 2 court must, because of the lack of an order from this Court, draft "clean slate" plans that are not representative of the intent of the Texas Legislature. This issue could be avoided by a prompt decision pre-clearing plans or portions of plans as to which there are no viable challenges. *Id.* At 40-41 ("[Appellants] argue that in the absence of any objection to the Dallas County districts by the Attorney General, and in the absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgments the plans reflect, even under circumstances in which a court order is required to effect an interim legislative apportionment plan. We agree and, therefore, summarily reverse." (citations and notes omitted)).

As *Upham* and its progeny suggest, the presence of contested districts does not bar partial summary judgment identifying districts that are beyond genuine dispute. This is so, notwithstanding the possible necessary changes to borders of districts contiguous to contested ones, as was suggested during the colloquy with the Department of Justice. Rather, the Section 2

court is empowered to make such discrete changes as will avoid statutory or constitutional violations.

With respect to the Department's discriminatory purpose objections, the State does not believe that any of the evidence cited by any of the parties in this proceeding could reasonably support the inference that both chambers of the Texas Legislature acted with the purpose of harming voters on account of race--an inference that is necessary for this Court to find that the State acted with a "discriminatory purpose." Rather, the evidence, viewed in any light, confirms that partisanship and preference for maintaining incumbency are what drove the redistricting plans at issue. *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999); *see also Walsh v. Ford Motor Co.,* 807 F.2d 1000, 1010 (D.C. Cir. 1986) ("Statements by individual legislators should generally be given little weight when searching for the intent of the entire legislative body."). Any alleged factual dispute on the issue of legislative intent is not "genuine" so as to defeat summary judgment.

Thus the Court is left only with the retrogression claims. With respect to the Texas Senate, the Court is confronted the objections of two interveners who, without agreement of the DOJ, seek to pioneer the creation of new forms of purported section 5 districts. With respect to the Congressional plan, the DOJ does not contend that Texas has reduced the number of protected districts--no matter how one approaches that calculation. Rather, the DOJ contends that the State failed to add more protected congressional districts. But that claim rests on a question of law--not fact--and that legal claim has already been addressed by the Supreme Court in *Abrams v. Johnson,* 521 U.S. 74, 97 (1997).

The State recognizes that the Texas House of Representatives map is potentially more complex and because the question whether genuine factual questions exist may hinge upon the retrogression standard adopted by this Court. To be sure, if the State has proffered the correct retrogression standard, final judgment would be proper. Further, even to the extent there are factual questions that this court must address, *Upham* counsels that undisputed districts should be speedily pre-cleared. Once that happens, the Section 2 Court in San Antonio will be left to determine whether equity requires any changes to the districts for which there is a genuine legal dispute.

The State therefore urges this Court to consider issuing at least partial summary judgment as to: (1) the Congressional and Senate plans in full; (2) all House districts that are not subject to bona fide retrogression contentions, if possible, by the November 18 date we had initially discussed.

Respectfully,

Signed by Permission
DAVID J. SCHENCK
Deputy Attorney General for Legal Counsel
(512) 936-1342 / (512) 936-0545 (fax)

DJS/apw
cc: All Counsel of Record *Via Email*