

## Preclearance Required for Reduction in Polling Locations

*Miguel Hernandez Chapter of the American GI Forum  
v. Bexar County (Royal Furgeson, 5:03-cv-816)  
and American GI Forum v. Bexar County  
(Fred Biery, No. 5:04-cv-181) (W.D. Tex.)*

A federal complaint challenged a reduction in early-voting locations without preclearance pursuant to section 5 of the Voting Rights Act. The district judge issued a temporary restraining order requiring additional voting locations, and the county opened several more. A suit by the same plaintiff and others about seven months later respecting a primary election for political-party chairs resulted in a temporary restraining order from a different district judge ordering only one polling place reopened, but preclearance arrived later that day, and the judge dismissed the action except for jurisdiction to enforce the temporary restraining order. The court of appeals stayed the temporary restraining order pending appeal, and the appeal was voluntarily dismissed after the election.

*Subject:* Absentee and early voting. *Topics:* Poll locations; section 5 preclearance; early voting; primary election; ballot measure; attorney fees.

An interest group filed a federal complaint<sup>1</sup> in the Western District of Texas on August 26, 2003, alleging that the dearth of early-voting polling places in Bexar County—the county that includes San Antonio—for a September 13 constitutional-amendment election<sup>2</sup> violated both section 2<sup>3</sup> and section 5<sup>4</sup> of the Voting Rights Act. With its complaint, the group filed a motion for a temporary restraining order.<sup>5</sup>

In 2001, there were twenty early-voting sites; for 2003, eleven were planned, and none was to be located on San Antonio’s west side.<sup>6</sup> Preclearance of the reduction in polling locations was pending.<sup>7</sup> Following an August 27

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1. Complaint, *Miguel Hernandez Chapter of the Am. GI Forum v. Bexar County*, No. 5:03-cv-816 (W.D. Tex. Aug. 26, 2003), D.E. 1.

2. “The election will cover 22 proposed state constitutional amendments ranging from funds for veteran housing to limitations on damages in civil lawsuits.” Opinion at 2–3, *id.* (Aug. 28, 2003), D.E. 3 [hereinafter 2003 *Am. GI Forum* Opinion].

3. Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10301.

4. *Id.*, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

5. Docket Sheet, *Am. GI Forum*, No. 5:03-cv-816 (W.D. Tex. Aug. 26, 2003) [hereinafter 2003 *Am. GI Forum* Docket Sheet] (D.E. 2).

6. 2003 *Am. GI Forum* Opinion, *supra* note 2, at 2.

7. *Id.*

hearing, Judge Royal Furgeson issued a temporary restraining order on August 28.<sup>8</sup> “In the absence of preclearance, Defendants have no legal authority—statutory or decisional—to implement the voting changes . . . .”<sup>9</sup>

Instead, Defendants are to resort to the previously-cleared early-voting polling places used during the November 6, 2001 Constitutional Amendment Election. . . . The Court recognizes that some of these locations are no longer available. As such, the Court will require Defendants to locate early-voting polling places in buildings adjacent to or very near the previous locations, or in the alternative, to erect mobile voting units in the vicinity of the old locations.<sup>10</sup>

At a compliance hearing held on August 29, Judge Furgeson and the parties were satisfied that the county had established eighteen early-voting sites<sup>11</sup> and granted a voluntary dismissal on November 14.<sup>12</sup>

On March 3, 2004, the plaintiff, four voters, and another interest group filed a federal complaint and a motion for a temporary restraining order in the Western District against Bexar County election officials alleging again that consolidation and change in polling places violated section 5, this time in a March 9 primary election for political-party chairs.<sup>13</sup> Judge Fred Biery set the case for hearing on March 5.<sup>14</sup>

At the hearing, Judge Biery ordered one traditional polling place reopened, and he ordered notices posted at other closed polls instructing voters where the new polls were.<sup>15</sup> “After the conclusion of the hearing, the Court received by facsimile transmission official word from the Department of Justice indicating preclearance has been granted.”<sup>16</sup> So on March 8, Judge Biery dismissed the action without prejudice, “save and except for retention of jurisdiction to enforce the temporary restraining order.”<sup>17</sup>

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8. *Id.* at 6–7.

Judge Furgeson retired on May 31, 2013. Federal Judicial Center Biographical Directory of Article III Federal Judges, [www.fjc.gov/history/judges](http://www.fjc.gov/history/judges).

9. 2003 *Am. GI Forum* Opinion, *supra* note 2, at 5.

10. *Id.* at 6.

11. 2003 *Am. GI Forum* Docket Sheet, *supra* note 5 (D.E. 5); *see* 2003 *Am. GI Forum* Opinion, *supra* note 2, at 7; *see* Tom Bower, *Three More Polling Sites Opened*, San Antonio Express-News, Aug. 30, 2003, at 4B.

12. Order, Miguel Hernandez Chapter of the Am. GI Forum v. Bexar County, No. 5:03-cv-816 (W.D. Tex. Nov. 14, 2003), D.E. 8.

13. Complaint, Am. GI Forum v. Bexar County, No. 5:04-cv-181 (W.D. Tex. Mar. 3, 2004), D.E. 1; Docket Sheet, *id.* (Mar. 3, 2004) (D.E. 2); *see* Guillermo Contreras, *Minority Groups Sue in Pursuit of More Bexar Polling Places*, San Antonio Express-News, Mar. 4, 2004, at 2B.

14. Order, *Am. GI Forum*, No. 5:04-cv-181 (W.D. Tex. Mar. 3, 2004), D.E. 3.

15. Opinion at 2, *id.* (Mar. 8, 2004), D.E. 9 [hereinafter 2004 *Am. GI Forum* Opinion]; *see* Guillermo Contreras, *Judge: Reopen East Side Poll Site*, San Antonio Express-News, Mar. 6, 2004, at 3B.

16. 2004 *Am. GI Forum* Opinion, *supra* note 15, at 3.

17. *Id.*

The county appealed,<sup>18</sup> and on March 8, the court of appeals granted the county a stay pending appeal.<sup>19</sup> The court of appeals accepted a voluntary dismissal of the appeal on March 30.<sup>20</sup> On January 26, 2005, Judge Biery denied the plaintiffs attorney fees.<sup>21</sup>

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18. Notice of Appeal, *Am. GI Forum*, No. 5:04-cv-181 (W.D. Tex. Mar. 8, 2004), D.E. 10.

19. Order, *Am. GI Forum v. Bexar County*, No. 04-50221 (5th Cir. Mar. 8, 2004), *filed as* Order, *Am. GI Forum*, No. 5:04-cv-181 (W.D. Tex. Mar. 8, 2004), D.E. 11; *see* Order, *Am. GI Forum*, No. 04-50221 (5th Cir. Mar. 9, 2004), *filed as* Order, *Am. GI Forum*, No. 5:04-cv-181 (W.D. Tex. Mar. 9, 2004), D.E. 12 (denying the plaintiff's motion to lift the stay); *see also* Guillermo Contreras, *Appeals Court Blocks Order on Opening Polling Place*, *San Antonio Express-News*, Mar. 9, 2004, at 5B (reporting that the court of appeals "temporarily halted a dispute over whether county cost-saving measures closed too many polling sites and moved others to places less accessible to elderly or minority voters").

20. Order, *Am. GI Forum*, No. 04-50221 (5th Cir. Mar. 30, 2004), *filed as* Order, *Am. GI Forum*, No. 5:04-cv-181 (W.D. Tex. Apr. 5, 2004), D.E. 19.

21. Opinion, *Am. GI Forum*, No. 5:04-cv-181 (W.D. Tex. Jan. 26, 2005), D.E. 22.