No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICK PERRY, in his official capacity as Governor of Texas, HOPE ANDRADE, in her official capacity as Secretary of State, and the STATE OF TEXAS,

Applicants,

v.

SHANNON PEREZ, *et al.*,

Respondents.

EMERGENCY APPLICATION FOR STAY OF INTERLOCUTORY ORDER DIRECTING IMPLEMENTATION OF INTERIM TEXAS CONGRESSIONAL REDISTRICTING PLAN PENDING APPEAL TO THE UNITED STATES SUPREME COURT

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TO THE HONORABLE ANTONIN SCALIA, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

This application arises from an ongoing consolidated redistricting controversy currently pending before a three-judge panel in the Western District of Texas. *Perez, et al. v. Perry, et al.*, Case No. 5:11-cv-360-OLG-JES-XR (W.D. Tex. filed May 9, 2011). That proceeding involves dozens of challenges to the Texas Legislature's redistricting plans for the United States House of Representatives and Texas House of Representatives under Section 2 of the Voting Rights Act (42 U.S.C. § 1973) and the U.S. Constitution. This application concerns the court-drawn map for the United States House of Representatives. That map shares the same basic defects as the court-drawn maps for the Texas House and Senate, and demands the same

remedy: a stay followed by summary reversal, or a stay followed by expedited briefing and argument.

In a divided decision on November 26, 2011, District Judges Orlando Garcia and Xavier Rodriguez imposed their own interim redistricting plan for the 2012 United States Congressional elections in Texas. *See* Order (Doc. 544), *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Nov. 26, 2011), Appendix Exhibit 1 [hereinafter Interim Congressional Order]. This new map is entirely a judicial creation. As with the Texas House and Senate maps, the one lodestar that guided the majority below was a belief, based on a misreading of this Court's precedents that it could not give any weight to the duly enacted legislative map, lest it give effect to an unprecleared legislative map. *See* Order (Doc. 546) at 2, *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Nov. 27, 2011), Appendix Exhibit 2 [hereinafter Order Denying Stay] (citing *Lopez v. Monterey County*, 519 U.S. 9 (1996)). The court was not swayed by the facts that preclearance proceedings remain pending before the District Court in the District of Columbia, that what is at issue here is an interim map for a single election (not a permanent alternative to preclearance), and that courts are required to give deference to a legislative map even when preclearance is *denied*. *See Upham v. Seamon*, 456 U.S. 37, 43 (1982). Once the majority disclaimed the legislatively drawn map as verboten, it was left entirely to its own devices to draw a map in what looks like anything but an exercise of the judicial power.

As Circuit Judge Jerry Smith highlighted in his dissent, the results were remarkable: "Although the Department of Justice objected [under Section 5 of the Voting Rights Act] to only two districts in the State's enacted plan, [the interim plan] changes all thirty-six districts from their configuration" in the State's legislatively enacted plan. Interim Congressional Order at 18 (Smith, J., dissenting) (Appx. Ex. 1). If preclearance were to be denied based on the DOJ's objection to two districts, the rest of the map would be entitled to deference under *Upham*. But in the majority's topsy-turvy world where *Upham* does not apply because this is an interim map and not a remedial map, *see* Order Denying Stay at 2 (Appx. Ex. 2), the court believed itself free (indeed, compelled) to chart its own course and redraw the entire map based on its own assessment of "state political policy." Interim Congressional Order at 6 (Appx. Ex. 1).

The failure to give due deference to lines drawn by politically-accountable actors was conscious. The court felt compelled to do so based on its (mis)reading of *Lopez v. Monterey County*, 519 U.S. 9 (1996), a readily distinguishable case involving a covered jurisdiction that sought to bypass preclearance permanently and had defied an earlier court order to seek preclearance. Order Denying Stay at 2 (Appx. Ex. 2). Here, by contrast, Texas has actively sought preclearance. The majority dismissed that distinction as immaterial, *see id.* at 3–4 ("[T]here was no preclearance in *Lopez* and there is no preclearance in this case. At the end of the day, no preclearance means no preclearance . . . ."), and faulted Texas for bypassing administrative preclearance and exercising its statutory option to file an action in

court. *Id.* at 2. But it cannot be right that Texas can be punished and its legislatively enacted map disregarded simply because it exercised its statutory option to seek a judicial remedy. Section 5 intrudes deeply enough on state sovereignty even with the alternative of judicial preclearance. More to the point, if the judicial preclearance process has been bogged down, the remedy lies in the District Court for the District of Columbia, which can expedite proceedings and issue a decision. And, even if that court refused to grant preclearance for certain districts, the legislatively drawn map would still be entitled to deference in the remaining districts. The notion that the proper way to proceed in these circumstances is for a different District Court to issue an entirely-judicially drawn map that remedies no violation or likely violation (because it is "interim" not "remedial") with no deference to the State cannot be right.

As Judge Smith has pointed out, because these issues typically arise only once a decade, there is a critical need for this Court's guidance. But even once a decade is too frequent for States to sacrifice their sovereignty in this way or for courts to be put in the untenable position of drawing political lines from scratch.

As with the judicial redrawing of the Texas House and Senate maps, this Court should promptly stay the effect of the extraordinary order below and remand this case with instructions for the district court not to draw its own legislative map absent a finding of a substantial likelihood of a statutory or constitutional violation. This Court should further clarify that, even if such a finding is made, *Upham* and broader principles of respect for duly enacted state maps, *see, e.g., Miller v.*

Johnson, 515 U.S. 900, 915 (1995), are fully applicable to interim maps, and that any interim remedy must narrowly address likely legal errors while respecting the lines actually drawn by the legislature wherever possible. That would provide direction for the court below that would produce a decision that could be tested in this Court. The alternative approach employed in the decision below has nothing to recommend it. With the candidate filing period having begun two days ago, November 28, 2011, there is an acute and immediate need for a stay to prevent the election process from proceeding under the panel majority's improperly constructed map.

Alternatively, the Court should stay the decision below, treat this stay application as a jurisdictional statement, note probable jurisdiction, and set the case for expedited briefing and argument. As Judge Smith made clear in his dissent from the denial of Texas' stay request, the proper standard for imposing this sort of drastic "interim" relief is only the most obvious problem raised by the decision below. There are also numerous other issues on which this Court's guidance is urgently needed as the 2012 election cycle rapidly approaches. In all events, the extraordinary order issued below should not be allowed to stand.

PROCEDURAL HISTORY

The Texas Legislature enacted redistricting plans for the Texas House of Representatives and the Texas Senate on May 23, 2011, and for the State's Congressional districts on June 24, 2011. Because it is a covered jurisdiction, Texas is compelled to seek preclearance of any redistricting plan under Section 5 of the

Voting Rights Act, 42 U.S.C. § 1973c.[1] Texas sought preclearance on July 19, 2011, the day after its Congressional plan was signed into law, by simultaneously filing suit in the U.S. District Court for the District of Columbia and informally submitting to the Department of Justice (DOJ) the information and data that would have been required in the administrative preclearance process Section 5 provides as an alternative to judicial declaratory relief.

In its answer, filed 60 days later, the DOJ denied that the Texas Congressional plan complied with Section 5 but did not explain the basis for its position. *See* Answer (Doc. 45) ¶ 35, *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Sept. 19, 2011). In a subsequent court-ordered filing, the DOJ stated that both the benchmark and proposed plans contain ten districts in which Latino and African-American citizens have the ability to elect their preferred candidates of choice.[2] United States and Defendant-Intervenors' Identification of Issues (Doc. 53) at 9, *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Sept. 23, 2011), Appendix Exhibit 3 [hereinafter Identification of Issues]. The DOJ nevertheless claimed that the plan has a retrogressive effect. *Id*. According to the DOJ, the plan retrogresses—even though it contains the same number of minority "ability to elect" districts as the benchmark—because the overall percentage of districts in which

[1] A fourth redistricting plan, for the Texas State Board of Education, was precleared by the District Court for the District of Columbia on September 22, 2011. *See* Minute Order, *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Sept. 22, 2011).

[2] The DOJ stated that Latino voters had the ability to elect their preferred candidates of choice in districts 15, 16, 20, 23, 27, 28, and 29 under the benchmark plan and would have the ability to elect in districts 15, 16, 20, 28, 29, 34, and 35 under the proposed plan. The DOJ concluded that African-American voters had the ability to elect their preferred candidates of choice in districts 9, 18, and 30 under the benchmark and proposed plans. *See* Identification of Issues at 9 (Appx. Ex. 3).

minorities have the ability to elect their preferred candidates has decreased from 31.3% (10 of 32) to 27.7% (10 of 36), and the percentage of districts in which Latino voters have the ability to elect their preferred candidates has decreased from 21.9% (7 of 32) to 19.4% (7 of 36).[3] *See* Memorandum in Opposition to Motion for Summary Judgment (Doc. 79-2) at 22, *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Oct. 25, 2011). The DOJ specifically alleged that just two of the thirty-six Congressional districts, District 23 and District 27, have a retrogressive effect. *Id.* at 20-21. Claiming that it lacked sufficient information to make a determination, the DOJ also alleged that "the proposed plan may have a prohibited purpose," but it did not identify any specific district that showed a discriminatory purpose. Identification of Issues at 12 (Appx. Ex. 3).[4] The Section 5 court denied the State's motion for summary judgment on November 8, 2011. *See* Order (Doc. 106), *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Nov. 8, 2011). The State has requested a trial for the week of December 12. *See* Plaintiff's Response to Court's Inquiries of November 15, 2011 (Doc. 107), *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Nov. 22, 2011).

[3] The DOJ's position that retrogression occurs when there are ten ability-to-elect districts in both the benchmark and the enacted plan appears to conflict with this Court's decision in *Abrams v. Johnson*, 521 U.S. 74, 97-98 (1997) (holding that Section 5 does not require an increase in the number of ability-to-elect districts simply because there is an increase in the total number of districts).

[4] *See* Identification of Issues at 10 (Appx. Ex. 3) ("The evidentiary basis for this contention is not limited to any particular district or districts but rather extends to the kinds of direct and circumstantial evidence that the Supreme Court identified as probative of discriminatory purpose in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).").

Before the Legislature had enacted a single plan, redistricting litigation was underway in Texas. The first lawsuit in the Western District of Texas[5] was filed on May 9, 2011 by Shannon Perez, a citizen and registered voter in Bexar County, Texas, and Harold Dutton, Jr., a member of the Texas House of Representatives. *See Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. May 9, 2011). This was followed immediately by the Mexican American Legislative Caucus (MALC), an official caucus of the Texas House of Representatives. *See Mexican American Legislative Caucus v. Texas, et al.*, No. 5:11-cv-361 (W.D. Tex. May 9, 2011). Both cases were assigned to Judge Garcia, who immediately requested appointment of a three-judge court pursuant to 28 U.S.C. § 2284. A total of six cases, involving dozens of individual and associational plaintiffs and intervenors, were eventually consolidated before the three-judge court in the Western District of Texas, with *Perez v. Perry* as the lead case.[6]

The plaintiffs asserted claims against the enacted Congressional redistricting plan under the Fourteenth Amendment, the Fifteenth Amendment, and Section 2 of the Voting Rights Act. They alleged that the Legislature engaged in political

[5] The first lawsuit in the current redistricting cycle was filed on February 10, 2011, in the Sherman Division of the Eastern District of Texas. *See Teuber, et al. v. State of Texas, et al.*, No. 4:11-cv-59 (E.D. Tex. Feb. 10, 2011). The *Teuber* plaintiffs alleged that the use of unadjusted Census population data diluted their votes by creating districts with fewer eligible voters in areas of the State with high populations of undocumented immigrants. A three-judge court was not constituted until July 6, 2011, whereupon the case was transferred *sua sponte* to the San Antonio Division of the Western District of Texas. The court below granted the *Teuber* plaintiffs' motion to dismiss on July 26, 2011. *See* Order Granting Plaintiffs' Motion to Dismiss (Doc. 68), *Teuber, et al. v. Texas, et al.*, 5:11-cv-572 (W.D. Tex. July 26, 2011).

[6] In addition to *Perez v. Perry* and *MALC v. Texas*, the court consolidated *Texas Latino Redistricting Task Force, et al. v. Perry*, No. 5:11-cv-490 (W.D. Tex. June 17, 2011), *Quesada, et al. v. Perry, et al.*, No. 5:11-cv-592 (W.D. Tex. July 15, 2011), *Morris v. Perry, et al.*, No. 4:11-cv-2244 (S.D. Tex. June 15, 2011), and *Rodriguez, et al. v. Perry, et al.*, 1:11-cv-451 (W.D. Tex. May 30, 2011).

gerrymandering, that the Congressional plan diluted Latino and African-American votes, that the use of unadjusted Census data undercounted Latino residents, that the State engaged in intentional discrimination, and that the classification of prisoners as residents of their places of incarceration diluted the votes of citizens in urban counties. Shortly before trial, the district court granted the State's motion for partial summary judgment as to all Fifteenth Amendment claims. *See* Order Granting in Part and Denying in Part Defendants' Motion for Partial Summary Judgment (Doc. 275) at 17, *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Aug. 31, 2011). The court also granted Defendants' motion for judgment on the pleadings as to all political gerrymandering claims and the claim challenging the State's classification of prisoners. *See* Order Granting in Part and Denying in Part Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and, in the Alternative, Motion for Judgment on the Pleadings (Doc. 285) at 19–22, 24–25, *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Sept. 2, 2011).

The three-judge court in the Western District of Texas conducted a two-week trial in September 2011 on Section 2 and constitutional issues related to the state House and Congressional plans. Because the State's maps had not yet been precleared, the Western District panel solicited interim map proposals from the parties in a three-day hearing conducted the week of October 31, 2011. On November 23, 2011, the court issued proposed interim maps for the Texas Congressional districts. *See* Order (Doc. 526), *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Nov. 23, 2011), Appendix Exhibit 4. The court ordered the parties

to file comments and objections to the proposed interim plans, which the State did on November 25, 2011. *See* Defendants' Objections to the Court's Proposed Congressional Plans (Doc. 534), *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Nov. 25, 2011), Appendix Exhibit 5 [hereinafter Defendants' Objections]. On November 26, 2011, the district court ordered the implementation of interim maps for the Texas Congressional districts. *See* Interim Congressional Order (Appx. Ex. 1). Judge Smith dissented from the court's interim Congressional order and would have endorsed what he described as a bipartisan compromise plan. *See id*. at 18 (Smith, J., dissenting).

The State moved the district court to stay implementation of its interim Congressional plan pending appeal. The district court denied that motion on November 27, 2011, over a dissent by Judge Smith. *See* Order Denying Stay (Appx. Ex. 2). Because the period for candidate filing began on November 28 and is currently scheduled to end on December 15, the State submits its application for stay of the court's interim plan electronically. Needless to say, as filing statements are made, candidates need to know the contours of the district and the identity of their relevant electorate. Immediate submission of the State's application is necessary to avoid irreversible steps toward holding the 2012 elections under a legally flawed redistricting plan.

ARGUMENT

The majority's decision to create its own "independent plan" that alters all 36 Congressional districts—most of them significantly—rather than make targeted

changes to remedy likely violations of law violates the core principles articulated in *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam). Under *Upham*, courts imposing interim judicial redistricting plans, even after preclearance is denied, must respect the unprecleared, legislatively enacted plans unless departure from the legislative will is necessary to "cure any constitutional or statutory defect" in the enacted maps. *Id.* at 43. That is particularly true in a context like this where population changes render the previous benchmark plan—*i.e.*, the map enacted after the 2000 Census—unusable. The court's interim order abandons the instruction of *Upham* and fails to tether its map to politically-accountable judgments. Indeed, even the majority concedes that only nine of the 36 districts in its interim map are substantially similar to the legislative-enacted plan. The court's interim order should be immediately stayed, and the case should be remanded with instructions to withhold interim relief unless some likely violation of law is found and to defer to the legislatively enacted map as required by this Court's precedents. *See Upham*, 456 U.S. at 43–44 (remanding with instructions).

This Court has repeatedly stressed that the Constitution assigns primary responsibility for redistricting to the states. *E.g., Growe v. Emison,* 507 U.S. 25 (1993) (citing *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). Because redistricting decisions reflect a myriad of complex and inter-related political compromises and legal judgments, the courts are obliged to defer to the States' decisions and to apply a presumption of good faith and legality *at all stages of litigation*. *Miller v. Johnson*, 515 U.S. 900, 915 (1995). The pendency of a Section 5 determination does

nothing to change this. To the contrary, a legislatively enacted plan is still entitled to great deference even after preclearance is denied through the administrative process, as in *Upham*. *See* 456 U.S. at 42 (citing *White v. Weiser*, 412 U.S. 783, 797 (1973)). It cannot be that a State is entitled to less deference while judicial preclearance is pending than after administrative preclearance has been denied. But that is precisely what the majority below held.

Without a stay, the 2012 Congressional elections in Texas will proceed under an unlawful redistricting plan that disregards the policy choices of the Texas Legislature. This extraordinary judicial remedy will not reflect any likely statutory or constitutional violation, let alone a violation that would necessitate a complete disregard of the legislative map, but only the fact that preclearance remains pending. This would inflict permanent, irreparable harm on the citizens of Texas. *See Lucas v. Townsend*, 486 U.S. 1301, 1304 (Kennedy, J., Circuit Justice 1988) ("Even if the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive.").

* * *

Whether this Court should stay the district court's order implementing its interim redistricting plan pending appeal turns on four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (citations omitted). A stay pending direct appeal is a well-established remedy for a three-judge district court's improper interim redistricting order. *McDaniel v. Sanchez*, 448 U.S. 1318 (Powell, J., Circuit Justice 1980); *Bullock v. Weiser,* 404 U.S. 1065 (1972) (stay pending appeal in *White v. Weiser*, 412 U.S. 783 (1973)); *Whitcomb v. Chavis,* 396 U.S. 1055 (1970) (stay order). All four factors favor a stay in this case.

I. APPLICANTS WILL LIKELY PREVAIL ON THE MERITS.

A. The District Court Majority Erred by Refusing to Defer to the Legislature's Enacted Plan.

Applicants are almost certain to prevail on the merits. The order below, which imposes a judicially drawn election map without regard for the legislative map and without any finding of a likely legal violation cannot be sustained.

Under *Upham v. Seamon*, court-drawn interim redistricting plans must adhere to the policy judgments reflected in a legislatively enacted plan unless the court is compelled to remedy a likely constitutional or statutory violation:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of "reconciling the requirements of the Constitution with the goals of state political policy." . . . An appropriate reconciliation of these two goals ***can only be reached*** if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the . . . reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature.

456 U.S. at 43 (emphasis added) (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)); *cf. Weiser*, 412 U.S. at 797 (holding that the district court should have

employed the plan "which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements"). Here, despite "utiliz[ing]" portions of the state plan, the district court failed to limit its "modifications" of the state plan to "those necessary to cure any constitutional or statutory defect." *Upham*, 456 U.S. at 43. Indeed, the court below made no findings as to the likelihood of any constitutional or statutory violation. In *Upham*, preclearance had been ***denied***. Here, no preclearance decisions have been reached, despite the State's best efforts to achieve preclearance. As a result, no court has concluded that the State's Congressional map violates Section 5, Section 2, or the U.S. Constitution. Yet the court below showed less deference to the State's redistricting plan than was shown in *Upham* to a map that had been *denied* preclearance.

The majority below contends that it "has taken on the 'unwelcome obligation' of drawing this interim plan solely because the State has failed to obtain the necessary preclearance of its enacted plan." Interim Congressional Order at 16 (Appx. Ex. 1). As it did in the case involving the Texas State House redistricting, the court incorrectly concluded that it is not bound by *Upham* because no decision has been made on preclearance. The district court held that "[u]ntil a legislative plan obtains . . . preclearance, it cannot be effective as law and cannot be implemented." *Id.* at 4; *see also id.* at 6 n.13 ("[T]his Court is not permitted to simply implement the Legislature's enacted plan because it has not received preclearance."). It reasoned, *see id.* at 3–4; Order Denying Stay at 2–3 (Appx. Ex.

2), that this case is analogous to *Lopez v. Monterey County*, 519 U.S. 9 (1996), and similar cases in which covered jurisdictions failed to submit plans for preclearance *at all*. *See Clark v. Roemer*, 500 U.S. 646, 649 (1991); *McDaniel v. Sanchez*, 452 U.S. 130, 134-36 (1981). Those cases are inapposite, as—unlike the jurisdictions in *Lopez*, *Clark*, and *McDaniel*—the State has actively pursued preclearance of its legislatively enacted map.

The majority is equally wrong to suggest that the State "has persisted in trying to avoid preclearance altogether by demanding that its unprecleared plan be adopted by the Court." Order Denying Stay at 3 (Appx. Ex. 2). The State has not asked that its entire plan be adopted wholesale without any consideration as to whether any portion of that plan is substantially likely to be found statutorily or constitutionally infirm. Nor is Texas suggesting its map should be permanently adopted and preclearance proceedings suspended. To the contrary, Texas is seeking to take the steps necessary to obtain preclearance and hold an election under the new, precleared map. If preclearance is denied, the legislatively enacted Congressional map will not be implemented on a permanent basis to the extent it violates Section 5. But, even then, the Section 5 remedy would have to give appropriate deference to the duly enacted map. Any interim map should have to afford at least as much respect for the legislatively enacted map and be narrowly tailored to address a likely statutory or constitutional violation.[7]

[7] This is not an attempt to reverse the Section 5 burden of proof. The pending Section 5 proceedings in the District of Columbia district court will proceed with the applicable burdens of proof. If such proceedings result in a decision adverse to the State, the three-judge court must still defer to the State's plan to the greatest extent possible under *Upham*. If the three-judge court in the Western

The district court majority makes much of the fact that what is being sought now is interim as opposed to remedial relief. That distinction is material, but the court got the significance of the distinction exactly backwards. Under the majority's understanding, a remedial order following a finding of a definitive statutory or constitutional violation after a full hearing on the merits must give *greater* deference to a state's invalid plan than an interim order in which no findings of even likely invalidity have been made. Stating the principle demonstrates its absurdity.

Upham controls this case, and under *Upham*, when a federal court is forced to order an interim redistricting plan, it must respect the state legislature's policy judgments wherever possible. Even if *Upham* is not directly controlling because no preclearance decision has been reached, Judge Smith's dissent in the related Texas House case nevertheless identifies the proper approach that the three-judge panel should have employed here. Courts should only "modify the State's districts where plaintiffs have shown a substantial likelihood of success on the merits, rather than ratifying the plaintiffs' requests merely because they have alleged violations."

District is going to order interim relief, it remains obliged by this Court's decisions, including *Miller v. Johnson*, 515 U.S. 900, 915 (1995), to presume the good faith and legality of the State's enacted plan. More precisely, the court cannot order interim relief without some finding of a likely constitutional or statutory violation, and cannot redraw the map without providing the same kind of deference that *Upham* would command in the event of a denial of preclearance. The extreme remedy of a wholesale judicial rewriting of the voting map misperceives the governing presumptions. At the very least, the three-judge court should have anchored its changes to some finding that all or part of the State's plan was likely to be denied pre-clearance—giving this Court some standard by which to judge its decision.

Order (Doc. 528) at 19 (Smith, J., dissenting), *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (Nov. 23, 2011).[8]

B. Deference to the Legislature's Judgment Would Have Prevented the Creation of a "Coalition District" in the Interim Plan.

Once the court freed itself of any obligation to tether its map to lines drawn by politically-accountable state officials, it usurped a role for which Article III judges are ill-suited and drew lines to accomplish a number of questionable objectives.

In particular, the court's interim order appears to have purposefully created a "coalition district" in North Texas that joins African-American, Latino, and Asian populations in an effort to form a multi-ethnic minority-controlled district. Without identifying any violation of constitutional or federal law, the district court combined three distinct minority groups in what appears to be a deliberate effort to meet a 50% multi-racial minority population benchmark. *See* Tex. Leg. Council, Plan C220, Red 106 Report (District 33 contains 21.1% Hispanic Citizen Voting Age

[8] Indeed, Judge Smith's dissent from the court's denial of the State's stay motion notes the significant questions that were glossed over by the court's decision:

> In fashioning a temporary interim redistricting plan, how much deference should a court give to state-enacted legislative plans where a determination for preclearance has been submitted but is pending in: (1) districts that have not been specifically challenged; (2) districts that have been challenged under novel legal theories; (3) districts that have been challenged but as to which the challenges are unlikely to succeed on the merits; and (4) districts that have been challenged where the claims have a likelihood of success on the merits?

See Order Denying Stay at 6 (Smith, J., dissenting) (Appx. Ex. 2).

Population ("HCVAP"), 29.1% Black Citizen Voting Age Population ("BCVAP"), 44.2% Anglo CVAP, and 4.0% Asian CVAP).[9]

It is well established, however, that Section 2 of the Voting Rights Act does not require the State—or permit a court—to create multi-racial coalition districts when no single, geographically compact minority group is large enough to make up the majority in a district. As this Court explained in *Bartlett v. Strickland*, 129 S. Ct. 1231, 1243 (2009), "[n]othing in § 2 grants special protection to a minority group's right to form political coalitions." Such a district requires, at the very least, a heightened showing of voting cohesion between members of each group. *See Growe v. Emison*, 507 U.S. 25, 41 (1993). There was no evidence before the district court demonstrating any voting cohesion at all—let alone *heightened* voting cohesion—among Latino, African-American, and Asian minority groups in District 33. *See* Interim Congressional Order at 19 (Smith, J., dissenting) (Appx. Ex. 1) ("Latinos and Blacks do not vote cohesively in the Democratic primaries in the area of proposed District 33.").

Moreover, far from being necessary to remedy a likely violation of law, the district court's interim plan has the apparent goal of allocating control of Congressional seats to racial and ethnic minority groups in proportion to their share of population growth. *See id.* at 13–14. But proportionality cannot justify the district court's creation of a coalition district because Section 2 of the Voting Rights Act ("VRA") expressly rejects any right to proportional representation. *See* 42 U.S.C. § 1973(b) ("[N]othing in this section establishes a right to have members of a

[9] *Available at* www.tlc.state.tx.us/redist/pdf/congress/PlanC220_Report_Package_Expanded.pdf.

protected class elected in numbers equal to their proportion in the population."). The lower court's apparent insistence that the State must achieve racially proportional representation through the creation of a coalition district is directly contrary to Section 2.

Furthermore, the district court's creation of a "coalition district" demonstrates not only its misinterpretation of Section 2, but also its inappropriate focus on creating race-based districts. The court's undue focus on race, and its drawing of race-based lines in the absence of any finding of even a likely statutory or constitutional violation, raises grave Equal Protection Clause concerns. *See Shaw v. Hunt*, 517 U.S. 899, 906–07 (1996) (holding that race-based redistricting plan violated the Equal Protection Clause because it was not narrowly tailored to addressing a compelling state interest); *United States v. Paradise*, 480 U.S. 149, 166–67 (1987) (applying strict scrutiny to court's race-based remedial order); *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) (holding that "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny").

C. The Court's Wholesale Revision of the State's Congressional Districts Cannot Be Justified by Alleged Intentional Discrimination.

The court's disregard of the Legislature's intent cannot be justified as a necessary remedy for intentional discrimination because the court did not make even a preliminary finding that the Legislature acted with the purpose of

discriminating against minority voters on the basis of their race. This Court has held that racially discriminatory purpose

> implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (citations, notes omitted). To justify its interim map as a remedy for intentional discrimination, the district court would have had to find more than that the Republican-controlled Texas Legislature pursued partisan goals with knowledge that those goals would impact minority voters who favored Democratic candidates. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.")(emphasis in original); *cf. Easley v. Cromartie*, 532 U.S. 234, 258 (2001) ("[W]here racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles."). No such finding has been made, and no such finding would be supported by the record.

D. The Interim Order Reflects Multiple Other Errors.

1. The district court's interim plan further disregards the Legislature's will by making unwarranted modifications to District 23. The Legislature's plan maintained District 23's status as a majority-Latino citizen voting age population ("CVAP") and Spanish surname voter registration district. The only changes made to District 23 in the new legislative map were minor ones to protect the incumbent, Congressman Francisco Canseco, by including Republican-leaning areas. The district court's plan nonetheless modifies District 23 by placing Maverick County wholly within this district, thus decreasing the HCVAP from 58.5% in the State's plan to 57.3%. *Compare* Tex. Leg. Council, Plan C185, Red 106 Report, Appendix Exhibit 6 *with* Tex. Leg. Council, Plan C220, Red 106 Report.[10]

These changes were not within any reasonable conception of the district court's power. Plaintiffs have not demonstrated vote dilution in District 23, given that the State plan preserves, and in fact *improves* (by increasing Latino CVAP relative to the benchmark), Latino voters' opportunity to elect their candidate of choice. This Court has emphasized that "the ultimate right of § 2 is *equality of opportunity, not a guarantee of electoral success* for minority-preferred candidates of whatever race." *LULAC v. Perry*, 548 U.S. 399, 428 (2006) (emphasis supplied) (internal citations omitted). Section 2 is about ensuring equal opportunity, not guaranteeing electoral results, and "minority voters are not immune from the obligation to pull, haul, and trade to find [the] common political ground" necessary

[10] *Available at* www.tlc.state.tx.us/redist/pdf/congress/PlanC220_Report_Package_Expanded.pdf.

to elect their preferred candidates. *Johnson v. De Grandy,* 512 U.S. 997, 1020 (1997).

The Legislature's configuration of District 23 provides Latino voters with at least an equal "opportunity" to elect the candidate of their choice. While the district court apparently agreed with the State that a heavily packed Latino district should not be created simply to guarantee Democratic candidates a victory, the district court nevertheless altered the lines of District 23. That alteration was plainly unrelated to any actual or likely violation of Section 2, given that the district court's plan does not materially improve the expected performance at the polls of Latino-preferred candidates in District 23 as compared to the State's plan. *See* Exhibit B to Defendants' Objections (Appx. Ex. 5); Racially Polarized Voting Analysis for District 23 in Plan C185, Appendix Exhibit 7.[11]

2. Similarly, the district court's reconfiguration of District 27, despite the lack of any plausible constitutional or statutory violation, ignores the policy judgments made by the Legislature. There was extensive evidence in the record showing that the State's map was designed to ensure that Nueces County and Cameron County would serve as anchor counties in separate Congressional districts. *See* Trial Tr. 1022:10–4, 17–18, *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (Sept. 9, 2011), Appendix Exhibit 10; Trial Tr. at 1461:25–1462:7 (Sept. 12, 2011), Appendix Exhibit 11. The district court nonetheless dramatically changed

[11] The reconstituted election analysis for District 23 in the majority's plan shows that the Latino candidate of choice will likely be elected in only 2 out of 10 contested general elections. Under the State's plan, the Latino candidate of choice will likely be elected in 1 out of 10 contested general elections in District 23.

District 27 from the State's enacted plan, "such that Nueces County will be the largest county in Texas that does not control its own Congressional district." Interim Congressional Order at 18–19 (Smith, J., dissenting) (Appx. Ex. 1). The district court's plan thus disregards the careful balance of competing interests—such as the need to preserve the integrity of individual counties—that was embodied in the Legislature's map.

3. Finally, the district court's radical reconfiguration of District 35 destroys a community of interest that the Legislature found to exist between Latino voters in Travis and Bexar Counties. *See* Trial Tr. at 557:7–559:3 (Sept. 7, 2011), Appendix Exhibit 9; Trial Tr. At 915:17–22, 944:11–22 (Appx. Ex. 10). In the State's enacted plan, District 35 contains 58.3% Hispanic Voting Age Population ("HVAP"), 51.9% HCVAP, and 45.0% Spanish surname voter registration. *See* Tex. Leg. Council, Plan C185, Red 109 Report, Appendix Exhibit 8. The reconstituted election analysis shows that this district is consistently likely to elect the Latino candidate of choice. By contrast, the district court's plan severs Travis County from District 35 and reduces the Hispanic citizen voting age population from 51.9% to 50.9%. *See* Tex. Leg. Council, Plan C220, Red 106 Report.[12] The lower court's reconfiguration of District 35 also results in a district that will less consistently elect the Latino candidate of choice. *See* Exhibit B to Defendants' Objections (Appx.

[12] *Available at* www.tlc.state.tx.us/redist/pdf/congress/PlanC220_Report_Package_Expanded.pdf.

Ex. 5); Racially Polarized Voting Analysis for District 35 in Plan C185 (Appx. Ex. 7).[13]

The district court fails to identify any legal violation that would justify the dismantling of District 35. Indeed, the only justification appears to be the preservation of the former District 25, in direct contravention of the State's legislative and political objectives. But the VRA does not require the State or permit a court to maintain a crossover district[14] such as District 25, absent a demonstration of intentional racial discrimination. *See Bartlett*, 129 S.Ct. at 1246; *see also LULAC v. Perry*, 548 U.S. 399, 444 (2006) ("In short, that Anglo Democrats control [Martin Frost's former minority influence] district is, according to the District Court, the most rational conclusion.") (internal quotation marks and citations omitted). No such showing has been made in this case. The district court's decision to preserve this crossover district is even more troubling given that even the DOJ did not challenge District 25 under Section 5.

* * *

In sum, because the district court did not identify a single instance in which the legislatively enacted Congressional map likely violated federal law, it was clear

[13] The reconstituted election analysis for District 35 in the majority's plan shows that the Latino candidate of choice will likely be elected in only 6 out of 10 contested general elections. Under the State's plan, the Latino candidate of choice will likely be elected in 10 out of 10 contested general elections in District 35.

[14] This Court has defined a crossover district as a voting district "in which the minority makes up less than a majority of the voting-age population, but is large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate." *Bartlett v. Strickland*, 129 S. Ct. 1231, 1236 (2009).

error for the court to alter every district in that map on an interim basis pending preclearance. The court's interim order fundamentally misunderstands the role of courts at this stage of the redistricting process.

II. APPLICANTS WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.

Failure to stay implementation of an unlawful map will irreparably harm the people of Texas. A general harm, of course, inures whenever the legislative will is undone by an act of judicial intrusion. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, J., Circuit Justice 1977) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.").

A special harm, however, arises when an election is permitted to go forward based on an unlawful redistricting plan. If that happens, Texas' Congressional elections will be conducted on a legally flawed map. The candidate filing period has begun under the majority's improper, unreviewed map, and absent a stay from this Court there will soon be little alternative other than to continue with elections on an improper map. The irreparable harm such a result would inflict on our democratic process and on all Texas voters is self-evident.[15]

[15] In addition to the harm inherent in being forced to conduct elections based on an *ultra vires*, judicially imposed map, "[t]he plaintiffs then predictably will claim that the interim map ratchets in their favor by constituting a new benchmark for preclearance by the D.C. Court, remedial action by this court, or future action by the Legislature." Order (Doc. 528) at 14 (Smith, J., dissenting), *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Nov. 23, 2011) (citations omitted). As Judge Smith predicted they have done precisely so, in a joint motion with the United States to abate the Section 5

This Court has stayed court-drawn plans in similar instances. *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (Powell, J., Circuit Justice 1980); *Bullock v. Weiser,* 404 U.S. 1065 (1972) (stay pending appeal in *White v. Weiser*, 412 U.S. 783, 789 (1973)); *Whitcomb v. Chavis,* 396 U.S. 1055 (1970) (stay order). Here, too, the State and its voters will be irreparably harmed if a court-drawn plan is allowed to go into effect without even a finding that the court's plan is necessary to prevent an *actual or likely* violation of federal law.

III. ISSUING A STAY WILL NOT SUBSTANTIALLY INJURE OTHER PARTIES INTERESTED IN THE LITIGATION.

Parties that would benefit from an improperly constructed map can suffer no legally cognizable injury from the map's abatement pending appellate review. The Court is faced with a straightforward legal question: did the lower court abuse its limited authority under *Upham* in drawing an interim Congressional redistricting map from whole cloth despite the existence of a duly enacted Congressional redistricting plan? If it did, then a stay and immediate remand with instructions is necessary to protect *all* Texas voters from undue judicial interference in the lawful activities of the State.

And, of course, if the Legislature's plan is ultimately found to violate Section 2 or Section 5, then a court may make appropriately narrow modifications of that plan. But—especially in light of the well-established presumption of good faith for state officials, *see Miller v. Johnson*, 515 U.S. 900, 916 (1995)—the balance of

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proceeding. *See* United States' and Intervenors' Motion to Hold Case in Abeyance (Doc. 108) at 2, No. 1:11-cv-01303 (D.D.C. Nov. 22, 2011).

equities strongly supports staying the application of any such judicial modifications unless and until a court finds that the plan is unlawful.

IV. A STAY PENDING APPEAL IS BY DEFINITION IN THE PUBLIC INTEREST.

A stay of the preliminary injunction would allow Applicants to carry out the statutory policy of the Legislature, which "is in itself a declaration of the public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). Rarely can the public be better served than by permitting it to elect its own representatives on its own terms, or worse disserved than by requiring it to comply with a representational scheme not at all of its own choosing. The public interest will also be served by clarifying the proper role of the courts in cases like this. The court below was placed in an admittedly difficult position by the confluence of the invalidity of the prior legislatively drawn maps due to population growth and the pace of preclearance proceeding in the District of Columbia District Court. But the orders that have emerged, redrawing political maps not to remedy likely statutory or constitutional violations but to reflect the judges' view of "state political policy," Interim Congressional Order at 6, raise serious separation of powers concerns. Clarifying the proper, and properly limited, role of the judiciary in these circumstances will greatly serve the public interest.

One segment of the public requires special solicitude: overseas voters, including, especially, citizens of Texas currently serving in the armed forces. The deadlines for this election cycle were materially moved up to comply with the Military and Overseas Voters Empowerment Act of 2009**,** 42 U.S.C. § 1973ff, *et seq.*,

and compliance with that Act will require special treatment for overseas voters during the primary election cycle. Because of the MOVE Act's deadlines, the candidate filing period for 2012 primary elections must *end* by mid-December, 2011 in order for primary elections to be held as scheduled on March 6, 2012. Congressional candidates cannot file confidently until a redistricting map is in place. A *stay* and *prompt* remand order from this Court, accompanied by instructions requiring the three-judge court to act expeditiously, could allow the Texas Congressional primary elections to go forward as planned.

This Court need not feel constrained by this emergency timetable, however. If delaying primary elections in Texas's Congressional races is necessary to preserve this Court's jurisdiction and allow for thorough appellate review, the State respectfully requests that the Court stay the Congressional primary elections. In past cases, the Court has remanded improperly crafted interim redistricting plans on an expedited timeline. *See Upham,* 456 U.S. at 37 (Notice of Appeal docketed, Feb. 27, 1982; case determined *per curiam*, Apr. 1, 1982; remand decided Apr. 6, 1982). Following a similar schedule in this case—while in the meantime staying all deadlines and timetables associated with the Congressional primary elections—would allow the State to conduct its Congressional primary elections in compliance with the MOVE Act on a date in May that is already scheduled as the primary-runoff election date. (All unaffected primary elections, including but not limited to presidential and U.S. Senate primaries, will in all events be held as scheduled on March 6, 2012.) Thus, with minimal disruption to the State's electoral

infrastructure, the Court's jurisdiction can be preserved and the error below can be corrected on a reasonable schedule.

Legal, delayed elections are preferable to legally flawed, timely elections. The Court should take the time it needs to rectify the errors below and should stay the Texas House of Representatives primary elections if necessary.

CONCLUSION

The district court's order directing implementation of an unlawful Congressional redistricting plan should be stayed, and this case should be remanded with instructions requiring the court below to show proper deference to the legislatively enacted Congressional redistricting plan. *See Upham v. Seamon,* 456 U.S. 37 (1982) (per curiam). In the alternative, the Court should stay the order, convert this stay request into a jurisdictional statement, note probable jurisdiction, and schedule this case for expedited briefing and argument. *See*, *e.g.*, *Harris v. McRae*, 444 U.S. 1069 (1980); *Nken v. Mukasey,* 129 S.Ct. 622 (2008).

Respectfully submitted,

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