No. 11-713, 11-714, 11-715

IN THE

Supreme Court of the United States

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,
Appellants,

v.

SHANNON PEREZ, ET AL.,
Appellees.

v.

WENDY DAVIS, ET AL.,
Appellees.

v.

SHANNON PEREZ, ET AL.,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF APPELLEES' THE TEXAS STATE CONFERENCE OF NAACP BRANCHES, ET AL., AND CONGRESSPERSONS EDDIE BERNICE JOHNSON, SHEILA JACKSON-LEE, AND ALEXANDER GREEN

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QUESTIONS PRESENTED

1. Where the legislature failed to enact and obtain preclearance for redistricting plans in time for upcoming elections, did the trial court properly order the use of interim plans that preserve the status quo to the extent possible while also complying with applicable constitutional and statutory provisions in federal and state law governing redistricting?

2. Do the interim plans ordered by the court below comply with the Equal Protection Clause of the Constitution by not allowing race to predominate without a compelling interest and being narrowly tailored?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, the Texas State Conference of NAACP Branches states that it is an affiliation of local branches of the National Association for the Advancement of Colored People, Inc. (NAACP). The NAACP is a not-for-profit corporation organized under the laws of New York and does not issue shares to the public.

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STATEMENT OF THE CASE

This case arises from challenges to the 2011 Congressional, State Senate, and State House Redistricting plans enacted by the State of Texas. Prior to the development of the court-drawn interim plans for these offices, there were no legally enforceable plans in place to govern the 2012 elections when the filing period for that election was about to open. This situation compelled the three-judge court in the Western District of Texas, empaneled in San Antonio, to draw interim plans. The fact that these plans were interim, and not remedial in nature placed the court in an even more difficult position.

In the last decade the State of Texas experienced enormous population growth, and it is undisputed that increases in minority population accounted for most of this growth. On May 2, 2011, Texas' 82nd legislature enacted House Bill 150, which established a new plan for the election of members of the Texas State House of Representatives. That bill was signed into law on June 17, 2011. JA 167. The Texas legislature enacted Senate Bill 4, a new plan for the election of the Texas delegation to the United States House of Representatives, in a special session on June 24, 2011, and the bill was signed into law on July 18, 2011. JA 134. Texas, a state with a long history of racial discrimination, is covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c), and was thus required to obtain federal approval of these redistricting plans. Rather than submitting the plans to the Department of Justice, the State filed a declaratory judgment action for preclearance of all the plans in the District Court for the District of Columbia on July 19, 2011, over two and a half months after the legislature had passed the State House redistricting plan. JA 167.

On July 6, 2011, the San Antonio panel consolidated a number of lawsuits challenging—under Section 2 of the Voting Rights Act, on intentional discrimination grounds, and alleging violations of the one-person, one vote principle—the State House and Congressional plans enacted by the state of Texas. JA 134; JA 167. In a two-week trial beginning on September 6, 2011, the court below was presented with an abundance of evidence on these claims. Despite pushing the parties to complete trial as quickly as possible, the lower court recognized that it could not rule on the merits of these challenges until there was a ruling on preclearance from the court in the District of Columbia. JA 100.

During the course of that two-week trial, however, the three-judge lower court was presented with a plethora of evidence demonstrating that the Congressional and State House plans were drawn intentionally to discriminate against racial minority voters and violated Section 2 of the Voting Rights Act. The court heard testimony from experts who analyzed both plans and concluded that some of the ways the lines were drawn could only be explained on the basis of impermissible racial discrimination. JA 749; JA 649-50. They heard testimony from the three African-American Congresspersons about the way the state's Congressional plan undermined the ability of minority voters to have the opportunity to elect the candidates of their choice. Witnesses testified that the plan undermined that ability in such a way that the only logical conclusion was that it was done intentionally. JA 767; JA 777-79; JA 783-86. Finally, the Court heard compelling evidence documenting political cohesion amongst black and Latino voters in specific areas of the state—particularly in the larger Dallas-Fort Worth metroplex region, in the

Houston region, and in Bell County. JA 729-30; JA 737; JA 814-19; JA 822-24; JA 825-27; JA 830-31; JA 846-47; JA 853-60; JA 868-70; JA 918-20; JA 837-39; JA 844.

While the trial in Texas was proceeding on the constitutional and statutory challenges to the Congressional and State House maps, the declaratory judgment action in the D.C. District Court was also progressing. The State of Texas filed a motion for summary judgment in *Texas v. United States,* 1:11-cv-01301-RMC-TBG-BAH [Dkt. #41]. In a September 21 telephonic hearing before Judge Rosemary Collyer, District Court Judge for the District of Columbia, the State of Texas was given the option of withdrawing its motion for summary judgment and instead proceeding more rapidly to a trial. This option was relevant in light of the fact that the United States Department of Justice was opposing preclearance for the Congressional and State House plans, both on grounds of retrogressive effect and intentional discrimination. The state declined that option. JA 921-24. Instead, the parties began briefing the summary judgment issue, and the argument on the motion for summary judgment was scheduled for November 2, 2011. *Id.*

Parties in the Section 5 case submitted to the D.C. court hundreds of pages of briefing and exhibits relating to the motion for summary judgment and argued the issue extensively before that court. The results of those proceedings were a denial of the state's motion for summary judgment, on November 8, 2011, and an unequivocal ruling from the D.C. District Court that the state had "used an improper standard or methodology to determine" if its maps would be retrogressive. JA 550. Moreover, the D.C. court then instructed the San Antonio

court that it should proceed with drawing an interim plan to put in place for the 2012 elections. *Id.*

State House Redistricting Plan

Following the D.C. District Court's denial of summary judgment, the court below, on November 23, 2011, ordered the implementation of a court-drawn plan for the Texas State House of Representatives. JA 166. In the process of map-drawing, the lower used a "cautious approach," JA 101, and crafted the interim House plan that maintained the status quo, complied with the Constitution and Voting Rights Act, and embraced "neutral principles that advance the interest of the collective public good, as opposed to the interests of any political party or particular group of people." JA 170. The court embraced as many of the uncontested districts in the state's plan as possible, and the State acknowledged that 72 districts—nearly 50%—of the court's interim House plan was substantially similar to the enacted plan. JA 114. The court below noted that despite the overwhelming growth in the state's minority population, the State House plan enacted by the state legislature reduced the number of minority opportunity districts from 50 to 45. The lower court maintained those districts in the interim plan in order to avoid retrogression. Additionally, the lower court found that when neutral redistricting criteria were used, three additional minority performing districts "naturally emerged." JA 173. Even the dissenting judge on the on the lower court panel offered a proposed interim plan that created two additional minority opportunity districts. *Id.*

The court below noted that the minority-coalition State House districts that are a part of the interim plan are not

based on any merit determinations as to whether coalition districts are required under the Voting Rights Act, but rather, "naturally" resulted from restoring minority opportunity districts to their "baseline configuration" and then taking into account population shifts. JA 178. The lower court's position was that the incorporation of the state's bizarrely-shaped districts, despite alleged constitutional defects, would amount to an improper merits determination on the validity of those allegations. JA 180. The court held that it could neither adopt wholesale the challenged districts nor affirmatively reject the state's choices because either would have required prohibited interference with the D.C. District Court's sole jurisdiction to determine Section 5 compliance or a determination of the merits of the Section 2 trial, which is also prohibited prior to a Section 5 determination. JA 97.

However, the lower court's interim House map did defer to the state's policy determinations in a number of ways. For example, in Harris County, the court deferred to the state legislative decision to reduce the Harris County delegation to 24, despite the benchmark plan having 25 Harris County districts. JA 104. In the interim House plan, the court below focused on maintaining the status quo, neutrally accounted for demographic changes, and adopted unchallenged aspects of the state plan

Congressional Redistricting Plan

On November 26, 2011, the court ordered the implementation of a court-drawn Congressional plan for the state of Texas. JA 132. In order to maintain the status quo and to avoid retrogression in violation of Section 5, the lower court drew the three existing African-American

congressional opportunity districts—Congressional Districts 9, 18, and 30—in a way that maintained the cores of the districts and met the benchmark population numbers, making changes only as necessary to account for population inequality. JA 139; JA 146. As the State did in its congressional plan, the court below anchored one of the new congressional districts in Bexar County, and drew the Latino opportunity district moving northward along the I-35 corridor. JA 142. The court placed another of Texas' four new congressional districts, Congressional District 33, in the Dallas-Fort Worth metroplex (entirely contained within Tarrant County)—the same area in which the state's plan located the new Congressional District 33. In the interim plan CD 33, African Americans and Latinos comprise 60.7% of district's voting age population and 50.5% of the citizen voting age population of the district. JA 147. Additionally, the lower court noted that, where it could, it adopted a number of districts that were substantially similar to the enacted plan—nine of the thirty-six districts (25%) were practically identical to those in the state's plan. JA 147-48.

The State of Texas applied to this Court for a stay of the interlocutory order directing implementation of these plans, as well as the court-drawn plan for the Texas State Senate. JA 89. On Friday, December 9, 2011, the Supreme Court granted the applications for a stay, treated the stay applications as jurisdictional statements, and noted probable jurisdiction.

SUMMARY OF ARGUMENT

Where no newly enacted and precleared redistricting plan was available, and the prior redistricting plans were grossly malapportioned because of dramatic population

growth, the three-judge panel in the District Court for the Western District of Texas followed the proper legal standard in constructing interim redistricting plans for the Texas State House and Congressional districts, to be used in the 2012 elections. The court below preserved the cores of existing districts to the extent possible, created only *de minimis* population deviations, and was careful to comply with the requirements of the Voting Rights Act reasonably based on sound evidence already before the court.

The application of that standard also recognized the limitations placed on a district court when no Section 5 preclearance determination has been made. A preliminary injunction standard would not be appropriately applied to the plans constructed by the court below, as they were entirely interim, not remedial, in nature. Complete or extreme deference to the State's enacted plans would have, in essence, nullified Section 5. Instead, the lower court properly relied on neutral redistricting criteria in an attempt to maintain the status quo pending resolution of the Section 5 proceedings in the District Court for the District of Columbia and pending subsequent resolution of the Section 2 and Equal Protection claims brought in the Western District of Texas.

The plans crafted by the court below were not racial gerrymanders—race did not predominate over traditional redistricting criteria. And, even had race been a dominant factor, the Texas court was in possession of enough evidence and testimony to assess compliance of its interim maps with Section 2 of the Voting Rights Act, a compelling interest and, indeed, a legal requirement. Finally, even if greater deference to the state's enacted plans were required, the potential irreparable harm to

millions of minority voters caused by conducting elections under constitutionally-infirm plans that dilute minority voting strength cannot be tolerated.

ARGUMENT

I. The Trial Court Applied the Proper Standard for Interim Plans

The three-judge trial court applied the proper standard in constructing interim plans for the 2012 elections for the Texas State House of Representatives and the Texas members of the United States House of Representatives. That standard involved starting from the benchmark plans in drawing the interim plans and maintaining the status quo pending resolution of the Section 5 litigation. The standard governing the construction of interim plans requires compliance with the Constitution and Voting Rights Act and a commitment to neutral and traditional redistricting criteria, such as compactness, contiguity and respecting political subdivisions.

As an initial matter, a district court such as the one empaneled in San Antonio does not have jurisdiction to determine issues arising under Section 5 of the Voting Rights Act, including issues of retrogressive effect and discriminatory purpose. In *U.S. v. Bd. of Sup'rs of Warren County*, 429 U.S. 642 (1977), this Court held that, "[w]hat is foreclosed to such a district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the determination whether a covered change does or does not have the purpose or effect of denying or abridging the right to vote on account of race or color." *Id.* at 645.

Additionally, this Court has clearly held that a district court may not rule on the merits of any challenges to a redistricting plan until after a preclearance determination has been reached by the Attorney General or the D.C. District Court. *Connor v. Waller*, 421 U.S. 656, 656-67 (1975); *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991). These two factors effectively rendered the lower court unable to make any determinations on the validity of the state's enacted plans. Finally, a court-drawn plan must assure the public that the court has acted fairly and did not favor a particular political party, geographic area or race: "the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner free of any taint of arbitrariness or discrimination." *Connor v. Finch*, 431 U.S. 407, 414-15 (1977).

A. The Trial Court Preserved the Status Quo, Making Adjustments Necessary to Comply with State and Federal Law

The lower court correctly outlined the appropriate standard governing the construction of an interim redistricting plan where no constitutional or statutory violations have been formally ruled upon, but where evidence relating to those claims has been squarely placed before the court. In its own words, what the court below did was seek "to create a plan that maintains the status quo pending resolution of the preclearance litigation to the extent possible, complies with the United States Constitution and the Voting Rights Act, and embraces neutral principles such as compactness, continuity, respecting county and municipal boundaries, and preserving whole VTD's. The court also sought to balance these considerations with the goals of the state political policy." JA 137-38.

The summary judgment proceedings before the three-judge court in the District of Columbia were key in informing the lower court's determination of the standard to be employed in crafting an interim plan and its analysis of the extent to which it should defer to Texas' legislatively drawn Congressional and State House plan. The D.C. District Court found that Texas applied the incorrect standard for determining whether there is retrogression. JA 136-37. Because the State was incorrectly assessing which districts in the benchmark plan provided minority voters an opportunity to elect their candidate of choice, their entire statewide analysis of retrogression is necessarily called into serious question. *Id.* Thus, despite the fact that there has yet to be a finding of a retrogressive effect or discriminatory intent, the lower court was faced with the inescapable conclusion that a retrogressive effect could be widespread across the Texas map.

The court below crafted the interim plans following the guidance issued by this Court for such situations. In *McDaniel v. Sanchez*, this Court held that, "in fashioning a plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." 452 U.S. 130, 149 (1981) (quoting S. Rep. No. 94-295 at 19, reprinted in 1975 USCCAN 774, 785) (internal quotations omitted). In addition, this Court has encouraged the use of traditional redistricting criteria, including compactness, contiguity, respect for political subdivision boundaries, maintaining the core of districts, respecting communities of interest, and separation of incumbents. *Shaw v. Reno*, 507 U.S. 630, 642, 647 (1993); *Bush v. Vera*, 517 U.S. 952, 958-65, 977 (1996).

Balancing the pendency of the Section 5 determination against the strong indication that there could be significant Section 5 problems with the map, the court below could not substantially defer to the state's entire plans. Maintaining the status quo until the statutory and constitutional violations could be determined was the only reasonable option open to the court. The interim maps produced by the lower court represent the court's "primary goal…to preserve the status quo as much as possible," as well as compliance with the United States and Texas Constitutions and the Voting Rights Act. JA 170. As one would expect, a commitment to preserving the status quo for a redistricting plan in a state that has experienced dramatic population growth will have some political consequences, but those are driven by population, not the determination of a court. The court below noted that, "[t]he dissent states that…the Court has made 'radical alterations in the Texas political landscape.' The reality is that demographics, not this Court's actions, have changed the landscape." JA 173.

Maintaining the status quo in the interim plan means maintaining the cores of pre-existing districts—a traditional and neutral redistricting criteria. This element of the status quo approach has particular significance in Texas in terms of participation by and voter education for minority citizens. Voter education, of course, includes information concerning the various districts to which voters are assigned, the candidates in those districts, changes in polling places, information regarding rides to the polls, and similar activities. Disruption of precincts invites voter confusion and frustration.

Another startlingly beneficial aspect to the status quo approach used by the lower court is that it avoids splitting, on a temporary basis, the "astronomical number" of precincts and VTDs that were split in the state's enacted House and Congressional plans. JA 116. A "VTD" is a voter tabulation district, and is the functional equivalent of a voting precinct. JA 138.

The court-crafted interim House plan contains only 19 precinct cuts, as compared with the 422 precincts cut in the state's enacted House plan. The court-drawn plan also cuts only 8 VTDs, while the state's plan cut 412. The interim Congressional plan cut only 10 precincts, while the state's Congressional plan cut 520 precincts. Similarly, the interim Congressional plan cut merely 3 VTD's, while the state's Congressional plan cut 518 VTDs. *Id.* This is no idle concern. In *Bush v. Vera*, the Supreme Court noted that the "utter disregard of…local election precincts, and voter tabulation district lines has caused a severe disruption of traditional forms of political activity and created administrative headaches for local election officials." 517 U.S. 952, 974 (1996). The trial court in that case, whose decision the Supreme Court affirmed, had noted that the "splitting of VTD's…was an electoral nightmare," that "[v]oters were thrust into new and unfamiliar precinct alignments," and that "voters were confused and frustrated." *Vera v. Richards*, 861 F. Supp. 1304, 1325, 1340 (S.D. Tex. 1994). The lower court heard evidence on such problems created by splitting precincts at trial and in the interim plan hearing. JA 102. Thus, by minimizing the number of split precincts and VTDs, the court below was following guidance from this Court on minimizing voter confusion.

Given that the lower court had to comply with all federal and state law governing redistricting, it is also worth noting that the court's plans did as well, if not better, than the state's plan in complying with the Texas Constitutional requirement to minimize county cuts. The interim House plan cut 24 county lines, the same number cut by the state's enacted plan. The interim Congressional plan contained 23 county line cuts, compared to the 33 county lines cut in the state's enacted plan. JA 116.

The lower court also had to comply with the Equal Protection Clause of the 14th Amendment by not intentionally discriminating on the basis of race in the process of crafting interim maps. In both the trial conducted in September in San Antonio, and in preclearance proceedings in the District of Columbia, challenges based on intentional racial discrimination were significant and widespread for both the State House and Congressional maps. *See, e.g.*, JA 749; JA 767; JA 777-79; JA 783-86; JA 832-34; JA 875-80; JA 885; JA 897-902; JA 94. In many of those instances, the claims centered around the fracturing of minority populations that could only be explained by impermissible intentional discrimination. In drawing the interim plans, the lower court commented that it:

> drew the districts as reasonably compact as possible, rather than fracturing them. In applying these principles, it was relatively easy to preserve the existing minority districts and avoid the challenges that had been made to the State's enacted map. In fact, it became clear that a map drawer must go out of his way to fracture some of the districts in the manner reflected in the State's enacted map.

JA 118. Thus, the court below, by not inexplicably fracturing those districts, was able to comply with its constitutional obligation not to intentionally discriminate on the basis of race.

In Texas, it historically has been all too common for the legislature to craft a racially discriminatory plan. Indeed, this Court's ruling in *LULAC v. Perry* confirmed this fact. 548 U.S. at 440 (noting that the configuration of Congressional 23 "bears the mark of intentional discrimination that could give rise to an equal protection violation.") The standard applied by the court below, including deference to the benchmark plan and a goal of maintaining the status quo, was proper, and application of that standard resulted in interim plans that are above reproach.

The status quo approach, balanced with compliance with federal and state law, is perhaps best explained with concrete examples. A prime example of the lower court acting to maintain the status quo and avoid retrogression is found in State House District 149. The state's plan dismantled Harris County District 149, which was a minority district represented by the only Asian-American member of the State House. The plaintiffs in the Section 2 case complained of this action, and the Department of Justice is actively opposing it in the D.C. District Court as retrogressive under Section 5. JA 104. Thus, in order to maintain the status quo and avoid potential retrogression, the San Antonio court maintained that district as a majority-minority district with only minor changes from its previous configuration.

B. *Upham* Deference to the Choices of the Legislature Does Not Apply Here

Much of the conflict this Court is currently being asked to resolve relates to deciding to what extent, if at all, the decision in *Upham v. Seaman*, 456 U.S. 37 (1982), applies to a court-drawn interim plan where a decision on Section 5 preclearance is still pending. The deference urged in *Upham* is not applicable in this situation. The vital difference between this case and the facts in *Upham* is that in *Upham*, the Attorney General had interposed an objection and identified the specific two districts to which he objected, thereby signifying that the rest of the plan was not in violation of Section 5, either in effect or intent. *Id.* at 38. The district court in *Upham* redrew those two districts and additionally redrew districts in Dallas County—an area in which the Attorney General had not identified Section 5 problems. Additionally, the district court in *Upham* had conducted only a hearing in the case, not a trial on Section 2 and intentional discrimination claims. *Id.*

In this instance, there has been no objection. Thus, it is impossible for the court below to defer to the parts of the state's plans that have been deemed in compliance with Section 5 of the Voting Rights Act. The lower court has heard an enormous amount of evidence of intentional discrimination in violation of the Equal Protection Clause, and about where minority populations are politically cohesive. *See also*, JA 729-30; JA 749; JA 814-19; JA 822-24; JA 825-27; JA 830-31; JA 846-47; JA 853-60; JA 868-70; JA 918-20. These procedural differences substantially distinguish *Upham*.

Moreover, the State's interpretation of how *Upham* applies to this case is untenable and in direct conflict with this Court's decision in *Lopez v. Monterrey County*, 519 U.S. 9 (1996). In *Lopez*, a three-judge district court had "authorized Monterey County to conduct judicial elections under an election plan that has not received federal approval pursuant to § 5 of the Voting Rights Act." *Id.* at 11. This Court reversed, holding that the district court had erred by implementing a plan that had not received preclearance from the Attorney General or the D.C. District Court. *Id.* at 22. There the state argued that the district court was not implementing an unprecleared plan, but rather, under its equitable remedial authority, was imposing a remedy plan—a plan that happened to be a plan proposed by the county. *Id.* This is quite similar to what Texas urges in the instant case.

In its stay application, Texas attempts to distinguish *Lopez* as different because the county withdrew its preclearance submission and made no further attempts to obtain federal approval. However, the language used by the *Lopez* Court does not turn on the fact that Monterrey County refused to acknowledge its obligation to obtain preclearance under Section 5—the Court explicitly spoke in terms of the error of a court implementing the policy choices of the county absent preclearance from the Attorney General or the D.C. District Court. The Court wrote,

> But where a court adopts a proposal "reflecting the policy choices … of the people [in a covered jurisdiction] … the preclearance requirement of the Voting Rights Act is applicable." The at-large, countywide system under which the

> District Court ordered the County to conduct elections undoubtedly "reflect[ed] the policy choices" of the County; it was the same system that the County had adopted in the first place. It was, therefore, error for the District Court to order elections under that system before it had been precleared by either the Attorney General or the United States District Court for the District of Columbia.

Id. at 22 (internal citations omitted). The Court clearly rejected "reflect[ing] the policy choices" of the legislative body as an option for a district court when the legislatively-enacted plan had not yet been precleared. *Id.* This is a decision that post-dates *Upham*, and the Court was unambiguous in its ruling.

Additionally, the level of deference afforded by the Court in *Upham* is not applicable or appropriate in the current situation because of the nature of the Attorney General's objections to the plan and the nature of the constitutional claims brought by plaintiffs in the San Antonio case. In *Abrams v. Johnson*, 521 U.S. 74 (1997), this Court noted that substantial deference to a state's plan in a court-drawn remedial plan is not appropriate where "the constitutional violation[] affects a large geographic area of the State" because "any remedy of necessity must affect almost every district." *Id.* at 86. Of course, because the court was drawing an interim plan, not a remedial plan, there, by definition, have been no findings of violations. But the court below had heard weeks of testimony and evidence relating to constitutional and statutory violations across the entire state of Texas, and the D.C. court held that Texas had used the wrong retrogression standard,

which would have affected districts across the state. The mere fact that Texas definitively used the wrong standard for determining retrogression would alone demand that the lower court not defer to the state's plan. Ultimately, the history of redistricting in Texas, including intentional acts of discrimination, the large number of districts being challenged, and the known fact that Texas did not properly analyze potential retrogression all give ample ground for the lower court drawing an interim plan to exercise caution in deferring to the Legislature's judgments. Thus, under *Abrams*, substantial deference would not have been appropriate under these factual circumstances.

Despite not being in a position where *Upham* deference to the state legislative plan was allowable, the court below did give "as much consideration ot the State's enacted map as possible without rubberstamping the districts that were the subject of legal challenges." JA 90. The court below certainly did not adopt of any of the maps offered by the Plaintiffs during the process of development of the interim maps. Any more deference to the state's enacted plan would have contravened this Court's ruling in *Lopez*.

C. The Trial Court Correctly Applied a *De Minimis* Population Deviation Standard

Although there are a limited number of cases dealing court-drawn interim redistricting plans, one element of jurisprudence relating to this issue is crystal clear—court-drawn state legislative plans must meet a higher standard of population equality than plans drawn by a legislature. In *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975), this Court unequivocally instructed that a court-drawn plan must "achieve the goal of population equality with

little more than *de minimis* variation," and, on this front, "must be held to higher standards than a State's own plan." Furthermore, the Court noted that any deviation from this *de minimis* population variance standard must be justified by "enunciation of historically significant state policy or unique features." *Id.* at 26.

Even the dissenting judge on the court below acknowledged that "the Legislature created substantial population disparities in Dallas and Harris Counties in a manner that may raise concerns of racial or partisan gerrymandering in violation of *Larios v. Cox*." JA 175-76. In *Larios v. Cox*, 542 U.S. 947 (2004), this Court summarily affirmed a lower court's striking down of Georgia state legislative plans on one person, one vote grounds. That decision stands for the proposition that there is no ten percent safe harbor any longer—state and local redistricting plans can be struck down even if the deviations are under ten percent, particular where impermissible intent is perceived. *Id.* at 950. One of the primary sources of difference between the interim State House plan and the enacted State House plan was the lower court's inability to tolerate deviations as high as ten percent. The State House plan enacted by the Texas legislature had a deviation of 9.92%. JA MJA 25. The interim House plan, on the other hand, has an average deviation of 1.81%, and the population variances are the result of the Court's state goal of avoiding cutting county lines, precincts and VTDs. JA 116. Thus, the kind of deference to legislatively enacted plans urged by the State of Texas is in direct contradiction to well-established guidance from this Court for court-drawn interim plans. The court below correctly drew plans with *de minimis* population variations which necessitated

different configurations from the plans enacted by the Texas legislature, particularly as seen in urban Dallas and Harris counties.

D. The Standard Articulated by the State Is a Remedial Standard, Not an Interim Standard

As mentioned above, unequivocal precedent from this Court prevented the court below from in any way ruling on the merits of the Section 5 case or the Section 2 and Equal Protection claims tried before it. Thus, the court could not do what the *Upham* court was instructed to do—correct only the statutory violations in the plan. The Department of Justice alleged that intentional discrimination infected the entire plan. JA 94. There was no mechanism by which the San Antonio court could identify violations without intruding on the jurisdiction of the D.C. Court.

Additionally, practical constraints distinguish an interim plan from a remedial plan. For an interim plan, a court must also draw a plan that actually can be implemented in the time. In *Ely v. Klahr*, 403 U.S. 108 (1971), for example, the this Court affirmed a district court's decision not to adopt the plaintiff-appellant's plan "since it was based on census tracts, rather than the existing precinct boundaries, and the necessary reconstruction of the election precincts could not be accomplished in time to serve the 1970 election, whose preliminary preparations were to begin in a few weeks." *Id.* at 111-12 (quoting the district court opinion). The court below, after hearing evidence at trial and in the interim plan hearing, was convinced that cutting VTDs would "create enormous administrative and financial difficulties for local governments preparing for an election at the eleventh hour." JA 102. The lower court heard

testimony that if the interim plan used existing VTDs, voters would not have to be reassigned and issued new voter registration cards. Additionally, by not changing the VTDs, counties could potentially avoid having to submit any voting changes to the Department of Justice for preclearance. *Id.* Had the court below even tried to make as many VTD cuts as the state did in its enacted plans, there would have been no way to implement the plans under intense the time constraints that exist here. *Id.*

II. Here, the Likelihood of Success on the Merits is Irrelevant Because Some Plan Needed to Be Used and the Trial Court Could Not Use Earlier Plans or the Newly Enacted Plan

In the stay applications relating to the Congressional and State House Plans, the State of Texas argued that a preliminary injunction standard should govern the lower court's decision to draw interim plans—that the court should have determined the likelihood of success of claims that the state plans violated federal law before it made any changes to the legislatively-drawn districts. JA 96-98. As discussed above, that would have required interference with the Section 5 preclearance process in the District of Columbia and a determination of non-Section 5 challenges prior to a preclearance determination. Neither of those options was available to the San Antonio Court. Moreover, some plan needed to be put in place for the beginning of the rapidly approaching 2012 election cycle.

Ultimately, the need for an interim plan in this situation is an emergency of the state's own creation. If the State had submitted the House and Congressional plans to the Department of Justice for review, the Section

5 issues would have been undoubtedly resolved long ago. If the State had withdrawn its motion for summary judgment, the Section 5 issues would have likely been resolved by now. Other states covered by Section 5 of the Voting Rights Act obtained preclearance for their legislative redistricting plans in a timely fashion, and Texas has offered no explanation for its delay that would justify upsetting elections.

A. Using the Malapportioned Existing Plans, Especially In Light of Such Dramatic Population Changes, Would Prejudice Millions of Voters

In some situations where redistricting plans need to be put in place rapidly before an election, this Court has authorized the use of the benchmark plan even though it is indisputable that they are in violation of the "one person, one vote" requirements derived from the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court recently affirmed a decision by a three-judge court in Mississippi to continue using a malapportioned state legislative redistricting scheme because the Legislature could not agree on redistricting plans in time for 2011 legislative elections. *Miss. State Conf. of the NAACP v. Barbour*, 2011 U.S. LEXIS 7807 (U.S., Oct. 31, 2011).

This patently was not an option for the Texas congressional redistricting plan, where reapportionment after the 2010 Census resulted in the awarding of four additional congressional seats to Texas. Moreover, given the dramatic population growth in the state, that option used in either plan would have resulted in prejudice to millions of voters. The 2010 Census showed that the

State of Texas grew from a population of 20,851,820 in 2000 to a population of 25,145,561 in 2010—a population increase of approximately 20.6%. JA 133. Of that growth, the Latino population grew by 2,791,255, the African-American population grew by 522,570, and the Anglo population grew by fewer than 465,000. *Id.* On a smaller scale, the minority population in Harris County grew by over 700,000, while the Anglo population dropped by more than 82,000. JA 106. Thus, a new plan needed to be crafted for interim use.

B. To Order the Enacted Plan Implemented as the Interim Plan Would Nullify Section 5 of the Voting Rights Act

Had the court below ordered the plans passed by the state to be used as the interim plans, this not only would be in direct contradiction to the holding in *Lopez v. Monterey County*, but it also would have effectively nullified Section 5 of the Voting Rights Act. The State of Texas cannot be allowed to use delay of its own making as a back-door evasion of Section 5. The State could have sought preclearance for the State House plan after it was signed into law—it did not need to wait two and a half months until the congressional plan was passed. The State could have withdrawn its motion for summary judgment when it became clear that the Department of Justice opposed preclearance and found evidence of intentional discrimination. In a case such as this one, involving allegations of intentional discrimination and disputed facts relating to those allegations, summary judgment is a high hurdle. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Had the State withdrawn its motion for summary judgment when offered that option by Judge

Collyer in late September, it is possible that a trial and decision would have already resulted.

If extreme deference to the state's legislatively enacted plan was required, as urged by the State, Section 5 would have no role in guaranteeing federal protections against governmental bodies with a long and recent history of racial discrimination. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439 (2006). The vital protections for minority populations offered by Section 5 could simply be avoided by forcing a district court to adopt the enacted, unprecleared plan as an interim plan. There are then two considerations that follow. First, this Court's decision on the standard used for the Texas interim plans will have widely-reverberating ramifications on all Section 5 jurisdictions. If this Court compels district courts drawing interim plans to merely rubberstamp the legislatively-enacted plans prior to preclearance being obtained or the constitutionality of the plans being determined, other covered jurisdictions will have a roadmap around Section 5. A jurisdiction seeking to get a new plan in place without federal oversight would only need to delay obtaining preclearance long enough to necessitate interim judicial action. The effects will spread far beyond the borders of the electoral districts of Texas.

Second, there was an extensive legislative record justifying Congress' reauthorization of Section 5 of the Voting Rights Act five years ago, and Texas is a prime example of why its protections continue to be necessary. The Department of Justice continues to interpose objections to retrogressive voting changes in Texas. JA 731-35. Governmental bodies in Texas unfortunately continue to act in a way that, if not checked, will disenfranchise minority voters. *Id.;* JA 808-11; JA 883-

84. Evidence from the Section 2 trial in San Antonio in this matter demonstrated beyond any doubt that racially polarized voting is still rampant across the state. JA 745-48; JA 841-43. To require the court below to impose Texas' enacted but unprecleared redistricting plans as an interim remedy would effectively repeal Section 5 of the Voting Rights Act and deny its protections to hundreds of thousands of minority voters.

III. The Trial Court Plans' Districts Are Not Unconstitutional Racial Gerrymanders

A. Race Did Not Predominate Over Traditional Redistricting Principles

Race was not a predominating factor in the drawing of any new minority opportunity districts in the court-drawn interim plans. In fact, in crafting the plans, the court below asserts that any minority opportunity districts were naturally arising, explaining that, "the Court has not intentionally created any minority districts. Rather, any additional minority districts resulted from the use of neutral districting principles and demographic changes." JA 107. For example, House District 26, in Fort Bend County just outside of Houston, had become 60.6 percent minority in the benchmark plan. JA 178. The state's plan "substantially reconfigured HD 26 in a way that made it irregularly shaped. Evidence presented at trial indicates that this reconfiguration may have been an attempt by the State to intentionally dismantle an emerging minority district." *Id.* Thus, in the interim plan, a minority district was created by subordinating race to traditional redistricting criteria—the state's plan was the plan in which racial considerations predominated over all other traditional criteria, including compactness.

Likewise, the minority coalition House District 54 was a result of subordinating race to the state constitutional admonition to minimize county cuts and the traditional redistricting criteria of respecting political subdivisions. In the benchmark plan, District 54 included a part of Bell County, necessitating a county cut and splitting the city of Killeen. Because of explosive minority population growth in Bell County, it was no longer necessary to cut Bell County and Killeen, and District 54 could be drawn wholly within that county. JA 111.

House District 107, a new minority district in Dallas County, was an unintentional result of the minority population growth in the county. JA 107-08. In Dallas County, the African-American population increased by over 97,000 and the Latino population increased by more than 243,000. The Anglo population, on the other hand, decreased by nearly 200,000. JA 108. The interim plan deferred to the state's enacted plan by removing two house districts from the county's delegation. JA 107. In the state's plan, the Latino districts in Dallas County were significantly overpopulated when compared to the ideal population. JA 106. The interim plan more closely adheres to the equal population principle than does the state's plan—given this fact, in a county where the minority population is over 65%, an additional minority opportunity district was unavoidable unless the district court purposely attempted to fragment the minority population. JA 108. Again, this is a situation in which the court below prioritized traditional redistricting criteria over race, and because of huge minority population growth, additional minority districts were the natural result.

Congressional District 33, the new congressional district added in the Dallas-Fort Worth metroplex in the interim plan, is prime example of a place where traditional redistricting criteria clearly predominated. The state's congressional plan also added a new district in the region, and also designated it as Congressional District 33. The version of Congressional District 33 drawn by the court is substantially more compact than the Congressional District 33 in the state's plan. JA 146. The interim plan district 33 is also contained wholly within Tarrant County, respecting political subdivisions, whereas the state's district 33 spans Tarrant, Parker, and Wise counties. JA 146-47. The interim plan Congressional District 33 is majority-minority, but it respects more traditional redistricting criteria than the version of that district in the state's plan.

The interim plan's configuration of Congressional Districts 35 and 25 are substantially more compact and less susceptible to racial gerrymandering charges than what the state did in its enacted plan. The Congressional District 35 constructed in the interim plan defers to the state's enacted plan in that it is a new Latino opportunity district anchored in Bexar County and stretching along Interstate-35. JA 142. The interim plan's Congressional District 35, is also a Latino opportunity district, but it is significantly more compact than the version in the state's plan, which, by visual examination, certainly raised questions of racial gerrymandering. JA MJA 1. Moreover, the interim plan's construction of district 35 did not require the dismantling of the crossover Congressional District 25 in Austin. The state's enacted plan dismantled this district, dividing a historic African American community in the process. JA 897-902; JA 903-05. In addition to the questions of intentional discrimination

surrounding the destruction of that district, the court below acknowledged that the dismantling of that district could cause retrogression problems. *LULAC v. Perry*, 548 U.S. at 446 (Kennedy, J.) (recognizing that the existence of districts "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process" is relevant in a Section 5 analysis.) JA 144. Maintaining Congressional District 25 also minimized the districts between which the city of Austin was split—another traditional redistricting criterion. Thus, the interim plan creates a compact new minority opportunity district and maintains a minority crossover district while being more respectful of compactness and political subdivisions than the state's enacted plan.

In short, what the court below did was simply refrain from intentionally dismantling naturally-arising coalition districts. House District 107 is an example of this. The lower court also refrained from drawing bizarrely shaped districts fragmenting fast-growing Latino and African-American populations. House District 26 and Congressional District 33 are examples of this. Finally, the court below, in an attempt to maintain the status quo, refrained from intentionally dismantling performing crossover, influence, and coalition districts in which substantial minority populations were electing candidates responsive to their needs. House District 149 and Congressional District 25 are examples of this. All of these approaches were more respectful of traditional redistricting criteria than were the state's enacted plans, and none of these approaches came close to prioritizing race over traditional redistricting criteria. The lower court did not go beyond what is required by the Voting Rights Act.

B. Districts Are Narrowly Tailored to Comply with the Voting Rights Act

However, even if they were drawn intentionally as coalition districts, the district court would be justified in doing so based upon the statutory constraints applied to court-drawn plans. In a drawing an interim plan, a district court should comply with Section 2 of the Voting Rights Act. In *Abrams v. Johnson*, this Court noted that, "[o]n its face, § 2 does not apply to a court-ordered remedial redistricting plan, but we will assume courts should comply with the section when exercising their equitable powers to redistrict." 521 U.S. at 90. Thus, regardless of any finding of a Section 2 violation in the state's enacted plan, a court drawing an interim plan must comply with Section 2. If that court knows that there is a district that can be drawn to be over fifty percent combined African-American and Latino citizen voting age population and that the two groups are politically cohesive in that region, the court would be compelled to draw that district in order to comply with Section 2 of the Voting Rights Act.

In compliance with the first prong of the threshold test described in *Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986), for determining where Section 2 compels the drawing of new minority districts, all the districts drawn in the interim plan are reasonably compact. The court below specifically noted that all the districts in the interim State House plan are reasonably compact. JA 118. Two minority districts in the interim plan—Congressional Districts 35 and 33—are significantly more compact than their counterparts in the state's Congressional plan. JA MJA 1; JA MJA 2.

The "additional" minority districts challenged by the State in its stay applications—House Districts 26, 54, and 149, and Congressional District 33—are all above 50% in minority citizen voting age population. JA 350; JA 381. Moreover, the lower court had before it of evidence of racially polarized voting across the state, with white voters, when in the majority, consistently voting to defeat minority-preferred candidates. JA 745-48; JA 841-43. Finally, in each of the areas in which a coalition district was drawn, the court below had ample evidence of the political cohesion of minority groups in that area to justify the drawing of those districts. As it relates to Congressional District 33 and House District 107, evidence was presented at trial on the political and electoral coalition between Latino and African-American voters in the Dallas-Fort Worth region. JA 753-54; JA 765-66; JA 822-24; JA 825-27; JA 830-31; JA 846-47: JA 918-920. As it relates to House District 149, evidence was presented at trial on the coalition between African-American, Latino and Asian Americans in Harris County. JA 844; JA 779-80. As it relates to House District 26, all the testimony on African American and Latino coalition in the greater Houston area supported the drawing of that district. JA 779-80; JA 782-83; JA 814-819. Likewise, the court also had evidence of minority electoral cohesion in Bell County. JA 837-39.

Thus, even had the court below affirmatively drawn the additional minority opportunity districts in the interim Congressional and State House plans because it believed them to be compelled by Section 2 of the Voting Rights Act, these districts would have been narrowly construed, respecting traditional redistricting criteria, to achieve a compelling governmental interest.

V. It Is Important that Voters Not Be Subjected to the Irreparable Harm of an Unconstitutional, Racially-Discriminatory Plan, Motivated by Discriminatory Intent and Dilutive of Minority Voting Strength

A deferral to the state's redistricting plans, and their implementation for use in the 2012 elections creates the very likely potential that unconstitutional plans will determine who is elected to represent the voters of Texas in the State House and the United States House of Representatives. The dilution of minority voting strength, even in just one election cycle, has lasting implications and causes irreparable injury. *Reynolds v. Sims*, 377 U.S. 533, 562, 565 (1964). Using the enacted, unprecleared plans as an interim remedy would result in an irreparable harm to the millions of minority voters in the state, and would be a stain on Texas, further cementing its reputation as a state where racial discrimination is, to this day, a commonplace approach to governance.

In addition to the devastating harm to voters, conducting the 2012 elections under an unconstitutional scheme should also be avoided because it would undermine the credibility and integrity of those elections, and the legitimacy of those elected to office under those plans. Given the state's "long history of racial discrimination," *LULAC v. Perry*, 548 U.S. at 439, the court below was right to err on the side of preserving the status quo in order to avoid even further detriment to these historically-disadvantaged populations.

CONCLUSION

Appellees respectfully request that this Court lift the stay on the implementation of interim plans ordered by the District Court in the Western District of Texas and affirm that the lower court applied the correct legal standards in its crafting of the interim plans.

Respectfully submitted,

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