No. 11-A520

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.

WENDY DAVIS AND LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

Respondents.

RESPONSE OF DAVIS PLAINTIFFS AND LULAC PLAINTIFFS IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY OF INTERLOCUTORY ORDER DIRECTING IMPLEMENTATION OF INTERIM TEXAS SENATE REDISTRICTING PLAN PENDING APPEAL TO THE UNITED STATES SUPREME COURT

PAUL M. SMITH
Counsel of Record
MICHAEL B. DESANCTIS
JESSICA RING AMUNSON
CAROLINE D. LOPEZ
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Washington, DC 20001
(202) 639-6000
psmith@jenner.com
mdesanctis@jenner.com
jamunson@jenner.com
clopez@jenner.com

J. GERALD HEBERT
J. GERALD HEBERT, P.C.
191 Somervelle St., #405
Alexandria, VA 22304
(703) 628-4673
hebert@voterlaw.com

Counsel for Davis Respondents

DAVID RICHARDS
RICHARDS, RODRIGUEZ & SKEITH LLP
816 Congress Avenue, Suite 1200
Austin, TX 78701
(512) 476-0005
davidr@rrsfirm.com

Counsel for Davis Respondents

LUIS ROBERTO VERA, JR.
LULAC NATIONAL GENERAL COUNSEL
1325 Riverview Towers
111 Soledad
San Antonio, TX 78205-2260
(210) 225-3300
lrvlaw@sbcglobal.net

Counsel for Respondent LULAC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Respondents Senator Wendy Davis and the League of United Latin American Citizens ("LULAC") herein oppose the relief requested by Applicants. Applicants come to this Court requesting the extraordinary remedy of an emergency stay when the emergency is entirely of their own making. Applicants failed to enact a redistricting plan for the Texas State Senate in a timely manner, failed to expeditiously seek preclearance of that plan under Section 5 of the Voting Rights Act, failed to choose the more efficient process of administrative preclearance through the Department of Justice for their plan, and failed to expedite the judicial preclearance process in the District Court for the District of Columbia once it finally got underway. Thus, it is the actions of Applicants that left the three-judge court below with no choice but to accept the unwelcome obligation of implementing an interim plan for the 2012 elections for the Texas State Senate.

In implementing that interim plan, the court below carefully redrew only the Senate district that was at issue in the preclearance proceedings – Senate District 10 – and those districts surrounding it, leaving the remainder of the State's plan intact. Moreover, it redrew Senate District 10 and the four surrounding districts in the configuration of the current benchmark plan, which is the only valid, precleared, legislatively enacted plan currently in existence. In doing so, the court was merely following decades of this Court's precedent. Because Applicants have not met their burden of showing that four Justices of this Court are likely to note probable jurisdiction, that a majority of this Court is likely to reverse the decision

below, and that they will suffer irreparable injury absent a stay, their application should be denied.

BACKGROUND AND PROCEDURAL HISTORY

Applicants have pursued a flawed and dilatory preclearance strategy, and now seek to be rewarded for the fact they failed to obtain timely preclearance. The State of Texas deliberately delayed enacting a State Senate map during its legislative session, then engaged in several misguided strategies and delay tactics that resulted in the plan not receiving the necessary preclearance in time for the candidate qualifying deadlines for the 2012 elections.

Though the legislative session started in January 2011 and ran through the end of May 2011, the State Senate redistricting plan was not taken up by the Legislature until May 2011 and a State Senate redistricting plan was not finally enacted by the Texas Legislature until May 23, 2011.[1] Governor Perry then waited nearly a month, until June 17, 2011, to sign the State Senate plan into law.[2] State

---

[1] Though the State claims that only two state senators voted against the State Senate plan, Stay App. at 13, in fact, *all* of the minority senators and all of the Democratic senators in the Texas Senate issued a public statement before final passage opposing the State's plan. *See* Exs. C & F (sworn declarations of Senators Ellis and Zaffirini); Ex. G (Official Statement from the Democratic Senators regarding SB 31). These senators were forced to vote for the plan to prevent a legislative deadlock on the State Senate map, which would have resulted in the map being drawn by an all-white, highly partisan, five-member body (the Legislative Redistricting Board) appointed under State law. As African-American State Senator Rodney Ellis explained: "[m]any Senators feared, with justification, that this harshly partisan body of statewide elected officials would dismantle not only District 10 but other minority opportunity districts as well." Ex. C (Ellis Declaration ¶5).

[2] http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB31.

officials then waited more than another month, until July 19, 2011, to seek preclearance of the State Senate plan (and the House and Congressional plans).[3]

When the State finally got around to seeking preclearance in mid-July, the State deliberately bypassed the more "expeditious alternative" of seeking administrative preclearance from the United States Attorney General.[4] Instead, the State filed for judicial preclearance in the United States District Court for the District of Columbia ("D.D.C."). The State then did absolutely nothing to expedite the D.D.C.'s handling of the case. It neither filed a motion to shorten the time for the United States Department of Justice to answer its Complaint, nor moved for the setting of an abbreviated discovery schedule or expedited trial date.

A number of the plaintiffs in this case immediately sought to intervene as defendants in the D.D.C. preclearance litigation to protect their voting rights and interests under Section 5 of the Voting Rights Act. The D.D.C. promptly granted intervention. Although Applicants claim that the only person opposed to the State Senate redistricting plan is "a single disgruntled Texas Senator," Stay App. at 3, in

---

[3] Though Applicants assert that they sought preclearance of the State Senate plan just one day after Governor Perry signed the Congressional plan into law, Stay App. at 6, what Applicants fail to inform the Court is that the State of Texas waited nearly *sixty days* after enactment of the State Senate plan to seek preclearance.

[4] *See Morris v. Gressette*, 432 U.S. 491, 504 (1977) (Congress established the administrative preclearance process through the Department of Justice in order to provide "an expeditious alternative to declaratory judgment actions" in the District Court for the District of Columbia); *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969) (noting that the alternative procedure of submission to the Attorney General "gives the covered State a rapid method of rendering a new state election law enforceable").

fact, a number of parties opposed preclearance of the State Senate plan in the D.D.C., including the Texas State NAACP, the State Legislative Black Caucus, and the League of United Latin American Citizens (LULAC). LULAC, a plaintiff below, also joins Senator Davis in this opposition to the stay request.

Despite Applicants' insinuations otherwise, the intervenors did nothing to slow the pace of the litigation in the preclearance process. Rather, Applicants are the ones who slowed things down. On September 14, 2011, five days *before* the Department of Justice filed its answer to the State's Complaint in the D.D.C., and before any discovery could be undertaken in the case, the State filed a motion for summary judgment. The State claimed in that motion that all of its statewide plans (Congress, State Senate, State House, and State Board of Education) were free of a racially discriminatory purpose and effect. This was another ill-advised step by the State of Texas. Instead of seeking a quick trial date, the State instead sought summary judgment on the fact-intensive issues of racially discriminatory intent and effect. And it did so despite a unanimous holding from this Court that in the redistricting context, the issue of racially discriminatory intent is rarely if ever appropriate for resolution on summary judgment. *See Hunt v. Cromartie*, 526 U.S. 541, 553-54 & n.9 (1999).

On September 19, 2011, the Department of Justice filed its Answer in the D.D.C. stating that while the Department would not oppose preclearance of the State Senate plan or State Board of Education plan, it would oppose preclearance of the Congressional and State House plans. Though Applicants make much of the

fact that the Department did not oppose preclearance of the State Senate plan in its Answer in the D.D.C., it is important to note that the Answer was filed before any discovery was undertaken, and thus before Respondents developed ample evidence during discovery that the State Senate plan was drawn with a racially discriminatory purpose and effect. Indeed, the evidence Respondents put before the D.D.C. showed that the State Senate plan was drawn by Anglo senators who deliberately excluded racial and language minority senators from their deliberations. Sworn declarations from minority members of the legislative redistricting committees demonstrated that minority legislators were excluded from any meaningful participation in the development of the State Senate plan and that the process was "intentionally discriminatory." *See* Exs. D, E & F (sworn declarations of Senators Zaffirini and West and Representative Veasey). Moreover, the evidence showed that the fracturing of minority population in Senate District 10 effectively eliminated the ability of minority voters to elect their preferred candidate of choice. *See* Exs. B, C, D, E & F (sworn declarations of Senators Ellis, Zaffirini, West, and Davis, Representative Veasey, and Commissioner Brooks).

Given the genuine issues of material fact with respect to whether the State Senate plan was purposefully discriminatory and retrogressed minority voting strength, the D.D.C. three-judge court denied the State's motion for summary judgment on November 8, 2011. *See* Ex. H. Had the D.D.C. given the same conclusive weight to the Department of Justice's failure to object to the State Senate plan that Applicants would accord it, the D.D.C. would have simply granted

summary judgment and permitted the plan to be precleared. However, the court denied summary judgment despite the Department of Justice's failure to object. The D.D.C. found "that the State of Texas used an improper standard or methodology to determine which districts afford minority voters the ability to elect their preferred candidates of choice and that there are material issues of fact in dispute that prevent this Court from entering declaratory judgment that the three redistricting plans meet the requirements of Section 5 of the Voting Rights Act." *Id.* at 2. The D.D.C. further stated that because the plan had not been "precleared by this Court at this stage in the proceedings, the District Court for the Western District of Texas *must designate a substitute interim plan for the 2012 election cycle by the end of November*." *Id.* at 1-2 (emphasis added).

Given the D.D.C.'s denial of summary judgment and pursuant to the D.D.C.'s order, the three-judge court in Texas was left with the "unwelcome obligation," *Connor v. Finch*, 431 U.S. 407, 415 (1977), of implementing an interim State Senate map in time for the candidate qualifying deadlines for the 2012 elections. Though the candidate qualifying date was originally set for November 14, 2011, the three-judge court in Texas delayed the opening of candidate qualifying (with the agreement of all parties, including the State of Texas) until November 28, 2011.[5]

[5] Moreover, under Texas law, local election officials were required to complete the redrawing of voter precinct lines by October 1, 2011, but the Texas court suspended that deadline so that local election officials would have the benefit of voting districts for congressional and state legislative offices before they redrew precinct boundaries. The district court did this so that local officials would not have to redraw the voting precinct boundaries a second time after the congressional and state legislative lines were released.

With the November 28, 2011, deadline looming and no preclearance determination from the D.D.C., the three-judge court in Texas adopted its interim plan on November 23, 2011. *See* Stay App. Ex. 1.

The interim plan was unanimously adopted by all three members of the panel in Texas. The panel stated that in "drawing a Senate map, the court was faced with factual and legal concerns very different from those faced in regard to the Congressional and State House maps. Thus, the manner in which the State Senate map is drawn is quite different from the manner in which the Congressional and State House maps are drawn." *Id.* at 2. The panel further observed that the "only objections raised to the State's enacted map in this litigation concerned Senate District 10." *Id.* As a result, the panel concluded that the "appropriate exercise of 'equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy' was to maintain the status quo from the benchmark plan with regard to Senate District 10 pending resolution of the litigation in the District of Columbia but otherwise to use the enacted map as much as possible." *Id.* (footnote omitted).

The court below thus kept intact 26 of 31 districts in the State's enacted plan and redrew only Senate District 10 and the surrounding four districts to restore the District to its pre-existing configuration in the only currently valid, precleared, legislatively enacted map. The minor changes required to restore Senate District 10 to its benchmark configuration did not significantly alter the geographic base or political behavior of the adjoining four districts. In restoring Senate District 10 to

its benchmark status, the Court's interim plan respected the policy choices of elected representatives in Texas as they were reflected in the Senate plan that was adopted in 2001 and precleared by the Department of Justice. In sum, the three-judge district court below crafted a narrowly tailored interim plan, one that was consistent with the Voting Rights Act and this Court's precedents, and one that would not interfere with the issues being litigated in the D.D.C. preclearance action. Applicants sought a stay of the interim plan with the panel, which denied their request, and subsequently filed this emergency motion with the Court.

ARGUMENT

Nowhere in their motion do Applicants mention the proper standard to obtain a stay in this Court of the three-judge panel's interim plan.[6] The relief that Applicants seek here is granted "only in extraordinary circumstances." *Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (Rehnquist, C.J., in chambers) (quotation marks omitted). To warrant such relief, Applicants must demonstrate (1) "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) a likelihood that "irreparable harm [will] result from the denial of a stay." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). In

[6] Applicants quote this Court's decision in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), as setting forth the proper factors for a stay. *See* Stay App. at 11. But *Hilton* was discussing the stay standards applicable to "district courts and courts of appeals." 481 U.S. at 776. This Court has its own requirements for issuing a stay pending appeal, which the Applicants do not even attempt to address.

addition, "in a close case it may be appropriate to 'balance the equities' – to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* In evaluating all of these factors, "[t]he judgment of the court below is presumed to be valid, and absent unusual circumstances [this Court] defers to the decision of that court not to stay its judgment." *Wise v. Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers).

I. There Is No Reasonable Probability That Four Justices Will Consider These Issues Sufficiently Meritorious To Note Probable Jurisdiction.

Applicants have not met their burden of showing a reasonable probability that four Justices will consider these issues sufficiently meritorious to note probable jurisdiction. Indeed, Applicants do not even mention this standard in their motion. *See supra* n.6. This Court's review is not warranted because the three-judge panel below did exactly what it was required to do in implementing an interim plan for the State Senate elections to take place in 2012. Given the State of Texas's dilatory tactics, the candidate qualifying deadline for the 2012 elections was days away and there was no precleared plan in place. Thus, the three-judge court complied with decades of this Court's precedent in implementing an interim plan to permit the 2012 elections to go forward. The court acted cautiously and respected the legislative judgment of the State, redrawing only the objected-to Senate District and its surrounding districts to restore the configuration to the benchmark plan that is the only valid, precleared, legislatively enacted plan currently in existence.

Numerous decisions from this Court have made clear that unprecleared redistricting plans are legally unenforceable unless and until precleared. *See Lopez*

v. Monterey Cty., 519 U.S. 9, 20 (1996) ("A jurisdiction subject to §5's requirements must obtain either judicial or administrative preclearance before implementing a voting change. No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance."); *McDaniel v. Sanchez,* 452 U.S. 130, 146 (1981) ("A new reapportionment plan enacted by a State, including one purportedly adopted in response to invalidation of the prior plan by a federal court, will not be considered 'effective as law,' … until it has been submitted and has received clearance under § 5." (quotation marks omitted)); *Connor v. Waller,* 421 U.S. 656, 656 (1975) (per curiam) ("Those Acts are not now and will not be effective as laws until and unless cleared pursuant to § 5."); *Georgia v. United States*, 411 U.S. 526, 538 n.9 (1973) ("States subject to § 5 [are] required to obtain prior clearance before proposed changes could be put into effect."). Yet in the face of this precedent, Texas argues that it was error for the three-judge court below not to permit the State to use the unprecleared State Senate plan in the 2012 elections. Four Justices of this Court would have to disregard decades of precedent to accept the State's argument.

Indeed, because the Applicants failed to obtain Section 5 preclearance of the State Senate plan, Respondents "are entitled to an injunction prohibiting implementation of the change." *Lopez*, 519 U.S. at 20 (citing *Clark v. Roemer,* 500 U.S. 646, 652-53 (1991)); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969). Since Respondents were entitled to an injunction barring implementation of the State Senate plan (because it has not been precleared), it stands to reason that the three-judge court in Texas had not only the authority but the obligation to

order an interim plan into place. To have adopted the State's proposed unprecleared plan as an interim plan, as Applicants now urge in seeking a stay, the three-judge court below not only would have violated the numerous precedents set forth above, but also would have violated Section 5, which permits only the D.D.C. or the Department of Justice to decide whether proposed redistricting plans may become effective law as a result of preclearance. *See* 42 U.S.C. § 1973c.

This Court made clear decades ago that Section 5 of the Voting Rights Act "essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that a proposed change is without discriminatory purpose or effect." *Georgia v. United States*, 411 U.S. at 538. The three-judge panel's order is plainly consistent with this Court's precedents regarding how Section 5 freezes the status quo. The interim plan correctly froze the district lines for Senate District 10 as they existed in the prior plan so the D.D.C. (where preclearance remains pending) can make the requisite preclearance determination under Section 5. Applicants simply disagree with settled law and the reach of Section 5, but they are unlikely to convince four Justices of this Court that the 2012 elections can take place under a plan that has not been precleared.

II. There Is No Fair Prospect That a Majority of the Court Will Conclude That the Decision Below Was Erroneous.

Applicants have likewise failed to show that a majority of this Court will conclude that the decision below was erroneous. Applicants repeatedly fault the district court for failing to identify any constitutional or statutory deficiencies in

their proposed State Senate plan. They state, for example, "[t]he court's order identifies no need to correct any known or probable legal deficiency in the Senate map." Stay App. at 7. Indeed, such a contention by Applicants permeates their stay application. *See id.* at 2-4, 7, 12-14. But what Applicants fail to recognize is that the district court below is *legally precluded* from ruling on the merits of the State's plan unless and until that plan is precleared.

Under this Court's precedent, the three-judge court in Texas is *prohibited* from deciding the constitutionality of the State's redistricting plans or their compliance with Section 2 of the Voting Rights Act while a preclearance determination is pending before the D.D.C. This Court has directed that "until clearance has been obtained," courts should not "address the constitutionality of the new measure." *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978); *see also Connor*, 421 U.S. at 656 (holding that district court erred in adjudicating constitutionality of Mississippi acts based on claims of racial discrimination because "[t]hose Acts are not now and will not be effective as laws until and unless cleared pursuant to s 5"); *Branch v. Smith*, 538 U.S. 254, 265-66 (2003) (affirmance of federal district court's injunction against enforcement of state's congressional redistricting plan on ground that plan had not been timely precleared under Voting Rights Act required vacatur on ripeness grounds of district court's holding, as alternate ground for injunction, that plan was unconstitutional); *Hughley v. Adams*, 667 F.2d 25, 26 (11th Cir. 1982) (holding that the court would "decline, for reasons of ripeness, to consider plaintiffs' remaining objections to the plan before it has received preclearance").

This practice follows from the plain language and structure of the Voting Rights Act, which itself contemplates that Section 5 proceedings will precede consideration of challenges based on Section 2 or on the Constitution. *See* 42 U.S.C. § 1973c (providing that the Attorney General's failure to object to a proposed voting change – such as a new redistricting plan – shall not "bar a *subsequent* action to enjoin enforcement of" the plan (emphasis added)); *see also McDaniel*, 452 U.S. at 146 ("Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure"). Thus, Applicants' claims that the dismantling of Senate District 10 does not violate Section 2 of the Voting Rights Act cannot be finally adjudicated until *after* the State obtains preclearance.

Applicants rely heavily on *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam), to argue that the court below erred in failing to make specific findings of a violation before ordering an interim plan. But that reliance is completely misplaced. *Upham* involved a situation in which a plan was submitted for preclearance to the United States Attorney General and he interposed a timely objection to two contiguous districts in South Texas. The Attorney General's objection letter *expressly stated* that, with respect to the other 25 districts, the state had "satisfied its burden" under Section 5 of demonstrating that the plan was non-discriminatory in both purpose and effect. *Upham,* 456 U.S. at 38 (quoting from the Department of Justice objection letter). That is far different from the situation here. Unlike the situation here, in *Upham* the State already had satisfied its preclearance burden for 25 of the 27 districts. Where the three-judge court in

Upham erred was that it proceeded to alter not only the two districts that had been objected to, but also other areas of the State that had already been found to satisfy their preclearance burden, without making a finding that there were statutory or constitutional violations as to these other areas.

In this case, by contrast, there has been no preclearance determination yet and, as explained above, the three-judge court in Texas was precluded from finding statutory or constitutional violations in a plan that had not yet been precleared. The three-judge court thus had no authority and no need to opine on the likely success of the plaintiffs who were bringing non-Section 5 challenges to the new State Senate map. It drew an interim map to avoid the violation of Section 5 that would otherwise occur if the legislatively passed map were put into place without being precleared. Indeed, Respondents alleged as Count III of their Complaint in the Texas court that "[t]he State's proposed state senate redistricting plan cannot be administered because S148 has not been precleared pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c," and they asked the court below to implement a new map absent preclearance. Ex. A. That is not only precisely what the district court did here, it is entirely consistent with this Court's precedents under Section 5 that bar enforcement of unprecleared redistricting plans. Thus, there is no fair prospect that a majority of this Court will conclude that the decision below was erroneous.

III. Applicants Will Not Suffer Irreparable Injury Absent a Stay and the Equities Weigh in Favor of Respondents.

Applicants have not met their "burden of advancing persuasive reasons why failure to grant could lead to irreparable harm." *Wise*, 434 U.S. at 1333. Applicants argue that such injury arises because the "immediate implementation of the panel's interim Senate redistricting plan would needlessly interfere with the will of the Texas Legislature without justification." Stay App. at 16. But as explained above, the panel respected the will of the Texas Legislature as much as it possibly could have, given the constraints of federal law. The panel's interim State Senate plan leaves intact 26 of the 31 districts enacted by the legislature and alters only those districts that are at issue in the D.D.C. Section 5 litigation. The interim plan returns Senate District 10 to its original configuration in the benchmark plan, which is as of now the only valid, precleared, legislatively enacted plan.

Moreover, to the extent that Applicants complain they will suffer harm because "[a]bsent a stay from this Court, there will soon be little alternative to conducting the 2012 Texas Senate elections on an improper map," Stay App. at 17, that is a harm entirely of their own making. This Court should have no interest in protecting parties from injuries they inflict upon themselves. *Cf. Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) ("Further, although an injunction would doubtless place certain burdens on respondents, such burdens can fairly be ascribed to the respondents' own failure to seek preclearance sufficiently in advance of the date chosen for the election."); *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) ("[S]elf-inflicted wounds are not

irreparable injury. Only the injury inflicted by one's adversary counts for this purpose."). It is no one's fault but the State's that the three-judge court in Texas found itself on the eve of the candidate qualifying deadline with no precleared plan in place. The panel had no choice but to implement an interim map and now the State has no choice but to proceed with elections under that interim map unless and until they can obtain preclearance.

Finally, the equities weigh in favor of Respondents. Staying the three-judge court's interim plan would inflict certain harm on the voters far in excess of any harm on Applicants. Voters would be left in limbo as the three-judge panel below is forced to comply with the State's vague request that this Court should remand to the three-judge panel "with instructions to justify any modification of the Legislature's plan with a specific finding of a probable violation of federal law." Stay App. at 21. Thus, voters would be subject to yet another delay in the electoral process caused by the State of Texas. Moreover, should the Court stay the interim plan, ongoing election preparations would be disrupted and voter confusion is sure to result. Candidates are currently already filing and campaigning under the interim map. A stay would simply throw all of this into turmoil.[7]

---

[7] The State also requests "that the Court stay the primary elections for the Texas Senate." Stay App. 19-20. But this is not simply a request for a stay. It is requesting the court enjoin the currently scheduled primary elections from occurring. "What the applicant would require in order to achieve the substantive relief that it seeks is an original writ of injunction, pursuant to the All-Writs Act, 28 U.S.C. § 1651(a), and this Court's Rule 44.1." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers). "A Circuit Justice's issuance of such a writ … demands a significantly higher justification" than simply the stay factors enumerated here. *Id.* "The

CONCLUSION

For the foregoing reasons, as well as those set forth in the briefing of the other Respondents, which are incorporated herein by reference, Respondents Wendy Davis, et al., and LULAC respectfully request that the Court deny the Emergency Application for Stay of Interlocutory Order Directing Implementation of Interim Texas Senate Redistricting Plan Pending Appeal to the United States Supreme Court.

Circuit Justice's injunctive power is to be used 'sparingly and only in the most critical and exigent circumstances' ... and only where the legal rights at issue are 'indisputably clear.'" *Id.* (citations omitted). The State has made no attempt to satisfy this heightened burden and its request should be summarily denied.

December 1, 2011

Respectfully submitted:

/s/ Paul M. Smith
PAUL M. SMITH
Counsel of Record
MICHAEL B. DESANCTIS
JESSICA RING AMUNSON
CAROLINE D. LOPEZ
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Washington, DC 20001
(202) 639-6000
psmith@jenner.com
mdesanctis@jenner.com
jamunson@jenner.com
clopez@jenner.com

J. GERALD HEBERT
J. GERALD HEBERT, P.C.
191 Somervelle St., #405
Alexandria, VA 22304
(703) 628-4673
hebert@voterlaw.com

DAVID RICHARDS
RICHARDS, RODRIGUEZ & SKEITH LLP
816 Congress Avenue, Suite 1200
Austin, TX 78701
(512) 476-0005
davidr@rrsfirm.com

Counsel for Davis Respondents

LUIS ROBERTO VERA, JR.
LULAC NATIONAL GENERAL COUNSEL
1325 Riverview Towers
111 Soledad
San Antonio, Texas 78205-2260
(210) 225-3300
lrvlaw@sbcglobal.net

Counsel for Respondent LULAC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Response Of Davis Plaintiffs And LULAC Plaintiffs In Opposition To Emergency Application For Stay Of Interlocutory Order Directing Implementation Of Interim Texas Senate Redistricting Plan Pending Appeal To The United States Supreme Court and the Appendix thereto have been served via electronic mail and two copies via overnight mail on December 1, 2011 on the following:

PAUL D. CLEMENT
Bancroft PLLC
1919 M Street. N.W., Suite 470
Washington, DC 20036
Telephone: (202) 234-0090
Facsimile: (202) 234-2806
pclement@bancroftpllc.com

GREG ABBOTT
Attorney General of Texas
JONATHAN MITCHELL
Solicitor General of Texas
DAVID J. SCHENCK
JAMES D. BLACKLOCK
MATTHEW H. FREDERICK
OFFICE OF THE ATTORNEY GENERAL
Price Daniel Building
209 West 14th St., 7th Floor
Austin, Texas 78701
[Tel.] (512) 936-1700
[Fax] (512) 474-2697
david.schenck@oag.state.tx.us

Dated: December 1, 2011

Respectfully submitted,

/s/ Paul M. Smith
PAUL M. SMITH
Counsel of Record
Jenner & Block LLP
1099 New York Ave., NW
Washington, D.C. 20001
202-639-6000

Counsel for Davis Respondents