Nos. 11-713, 11-714 and 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.

RICK PERRY, in his official capacity as Governor of Texas, et al.,

Appellants,

v.

WENDY DAVIS, et al.,

Appellees.

RICK PERRY, in his official capacity as Governor of Texas, et al.,

Appellants,

v.

SHANNON PEREZ, et al.,

Appellees.

On Appeal From The United States District Court For The Western District of Texas

BRIEF FOR APPELLEES TEXAS LATINO REDISTRICTING TASK FORCE, ET AL., MEXICAN AMERICAN LEGISLATIVE CAUCUS AND SHANNON PEREZ, ET AL.

NINA PERALES
Counsel of Record
Appellees Texas Latino Redistricting Task Force, et al.
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
110 Broadway Street, #300
San Antonio, TX 78205
Tel: (210) 224-5476
nperales@maldef.org

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

JOSE GARZA
Counsel for Appellee MALC
LAW OFFICE OF JOSE GARZA
7414 Robin Rest Drive
San Antonio, TX 78209
Tel: (210) 392-2856
garzpalm@aol.com

PAMELA KARLAN
Counsel for Appellee MALC
559 Nathan Abbott Way
Stanford, CA 94305
Tel: (650) 725-4851
karlan@stanford.edu

JOAQUIN G. AVILA
Counsel for Appellee MALC
P.O. Box 33687
Seattle, WA 98133
Tel: (206) 724-3731
avilaj@seattleu.edu

RICHARD E. GRAY, III
Counsel for Appellees Perez, et al.
GRAY & BECKER, P.C.
900 West Avenue
Austin, TX 78701
Tel: (512) 482-0061
rick.gray@graybecker.com

DAVID RICHARDS
Counsel for Appellees Perez, et al.
RICHARDS, RODRIGUEZ & SKEITH LLP
816 Congress Avenue, Suite 1200
Austin, TX 78701
Tel: (512) 476-0005
davidr@rrsfirm.com

QUESTIONS PRESENTED

1. Whether, in light of Texas's failure to have precleared plans for its congressional and state legislative districts in place in time for the 2012 elections, the three-judge court properly implemented interim judicially drawn plans.

2. Whether the three-judge court's interim redistricting plans complied with the relevant legal requirements.

LIST OF PARTIES

The following appellees were plaintiffs and plaintiff-intervenors below:

Shannon Perez, Harold Dutton, Jr., Gregory Tamez, Sergio Salinas, Carmen Rodriguez, Rudolfo Ortiz, Nancy Hall, Dorothy Debose

Mexican American Legislative Caucus, Texas House of Representatives

Texas Latino Redistricting Task Force, Rudolfo Ortiz, Armando Cortez, Socorro Ramos, Gregorio Benito Palomino, Florinda Chavez, Cynthia Valadez, Cesar Eduardo Yevenes, Sergio Coronado, Gilberto Torres, Renato De Los Santos, Joe Cardenas, Alex Jimenez, Emelda Menendez, Tomacita Olivares, Jose Olivares, Alejandro Ortiz and Rebecca Ortiz

Intervenors National League of United Latin American Citizens, Gabriel Y. Rosales, Belen Robles, Ray Velarde, Johnny Villastrigo, Bertha Urteaga, Baldomero Garza, Marcelo Tafolla, Raul Villastrigo, Asenet T. Armadillo, Elvira Rios, and Patricia Mancha

Intervenors Texas Democratic Party and Boyd Richie

Intervenor Congressman Henry Cuellar

Margarita V. Quesada, Romeo Munoz, Marc Veasey, Jane Hamilton, Lyman King, John Jenkins, Kathleen Maria Shaw, Debbie Allen, Jamaal R. Smith, and Sandra Puente

Intervenors Texas NAACP, Howard Jefferson, Rev. Bill Lawson, and Juanita Wallace

LIST OF PARTIES – Continued

Intervenors Congresswoman Eddie Bernice Johnson, Congresswoman Sheila Jackson Lee, and Congressman Al Green

Eddie Rodriguez, Milton Gerard Washington, Bruce Elfant, Balakumar Pandian, Alex Serna, Sandra Serna, Betty F. Lopez, David Gonzalez, Beatrice Saloma, Lionor Sorola-Pohlman, Eliza Alvarado, Juanita Valdez-Cox, Josephine Martinez, Nina Jo Baker, City of Austin, Travis County

The following appellants were defendants below:

Rick Perry, in his official capacity as Governor of Texas

Hope Andrade, in her official capacity as Secretary of State

State of Texas

CORPORATE DISCLOSURE STATEMENT

The Mexican American Legislative Caucus, Texas House of Representatives (MALC) is an official caucus of the Texas House of Representatives. MALC is also incorporated as a non-profit, non-partisan 501c (6) corporation titled Mexican American Legislative Policy Council. MALC has no parent corporation or publicly held company owning 10% or more of the corporation's stock.

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BRIEF FOR APPELLEES TEXAS LATINO REDISTRICTING TASK FORCE, *ET AL.*, MEXICAN AMERICAN LEGISLATIVE CAUCUS AND SHANNON PEREZ, *ET AL.*

Appellees Texas Latino Redistricting Task Force, Texas Mexican American Legislative Caucus, and Shannon Perez, *et al.*, respectfully request that this Court affirm the judgment of the United States District Court for the Western District of Texas.

OPINIONS BELOW

The order of the United States District Court for the Western District of Texas imposing an interim plan for Texas's Congressional districts (Joint Appendix ("J.A.") xx) is unreported. The order of the United States District Court for the Western District of Texas imposing an interim plan for Texas's State House districts (J.A. xx) is unreported.

JURISDICTION

The three-judge district court entered its order imposing the interim State House plan on November 23, 2011 and its order imposing the interim Congressional plan on November 26, 2011. Appellants filed applications for a stay of those orders on November 28, 2011 and November 30, 2011, respectively. On December 9, 2011, this Court issued an order granting the applications for a stay, treating the applications

as jurisdictional statements, and noting probable jurisdiction. J.A. xx. The jurisdiction of this Court rests on 42 U.S.C. § 1973c(a) and 28 U.S.C. § 1253.

RELEVANT STATUTORY PROVISION

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c provides:

> **Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates**
>
> (a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the

prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative

indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

STATEMENT OF THE CASE

Based on the 2010 Census, Texas received four additional seats in Congress. In addition, population shifts rendered the existing configuration of congressional and state legislative districts unconstitutional as a matter of one person, one vote. Texas therefore could not use its preexisting maps in the 2012 election and was required to redistrict. As a covered jurisdiction under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, Texas is required to obtain preclearance before using a new apportionment. Rather than availing itself of the opportunity provided by section 5 to obtain an administrative determination of preclearance within sixty days, the State chose to file an action for declaratory judgment in the United States District Court for the District of Columbia. That court determined, after briefing and oral argument, that the State was not entitled to summary judgment and it has set a trial date of January 17, 2012.

When it became clear that Texas would not receive preclearance by December 12, 2011 – the deadline set by Texas law for candidates to file for a place on the primary election ballot – the United States District Court for the Western District of Texas, which had before it a number of lawsuits challenging both the existing districts and the Legislature's 2011 plan, drew interim plans for the State's 36 Congressional districts and 150 State House districts.[1] Objecting to the boundaries of 8 of these 186 districts, the Governor and other state officials have appealed to this Court.

1. The 2010 Census revealed that Texas had grown dramatically over the past decade. From 2000 to 2010, the population increased by 4.29 million – more than any other state. As a result of this population growth, Texas gained 4 Congressional seats in the decennial apportionment.

Texas's growth was primarily attributable to an increase in its Latino population. Over the past decade, Latinos represented 65% of the total population growth in Texas. *See* Expert Report of Dr. Susan Gonzalez Baker at 3, *Perez v. Perry*,[2] Trial Ex. E-9, Trial Tr. 166:15-22 [hereinafter Gonzalez Baker

[1] The Western District of Texas also drew an interim redistricting plan for the Texas Senate. Appellants did not challenge the Texas Senate plan and take no position with respect to the interim redistricting plan for the Texas Senate.

[2] All citations to *Perez v. Perry* refer to *Perez v. Perry*, No. 5:11-cv-00360 (W.D. Tex. 2011).

Report]. In 2010, persons of Hispanic or Latino origin constituted 37.6% of the population of Texas. U.S. Census QuickFacts at 994, *Perez v. Perry*, Trial Pl. Ex. 294, Trial Tr. 2019:2-6. Non-Hispanic whites (Anglos) constituted 45.3% of the population. *Id.*

Parallel demographic changes occurred in the major cities in Texas. For example, in Harris County, where the City of Houston is located, the Anglo population decreased by 82,618 and the Latino population increased by 551,789. Latinos constituted 80% of the intercensal growth of Harris County. Gonzalez Baker Report at 3-5. Latinos, African Americans and Asian Americans/Others taken together accounted for all of the total intercensal population growth in Harris County. Expert Report of Richard Murray at 27, *Perez v. Perry*, Trial Ex. E-4, Trial Tr. 166:15-22 [hereinafter Murray Report].

Similarly, in Dallas County, the Latino population increased by 243,211, the African American population increased by 73,016 and the Anglo population decreased by 198,624 people. *Id.* at 32. Thus, Latino growth compensated for the entire loss of Anglo population in Dallas County and fueled additional population growth from 2000 to 2010. Gonzalez Baker Report at 5.

Latinos now comprise 25% of the citizen voting age population of Texas. Over the past decade, Latino citizen voting age population increased by 701,812.

By contrast, Anglo citizen voting age population increased by only 487,207.[3]

Moreover, the population growth was not uniform across the state. Some jurisdictions lost population over the decade, others remained stable, and still others experienced dramatic growth. In particular, the 6 majority-Latino Congressional districts located in South and West Texas increased by enough population to constitute three-fourths of an additional congressional district within the same geographic area. In 83 of Texas's 254 counties, the substantial growth in Latino population masked the fact that the Anglo population actually *declined*.

The growth and shift in population meant that the state's existing congressional and legislative districts, which were based on 2000 census data, were now unconstitutionally malapportioned. J.A. xx.

2. The Texas House of Representatives consists of 150 members, elected from single member districts. After the 2010 census, the ideal district population is 167,637. But the existing districts come nowhere near compliance: the existing districts have a top to bottom deviation of 109.4% between the least and most populous districts and a mean deviation of 14.8%. J.A. xx.

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[3] *Compare* 2000 CVAP data from U.S. Census Bureau, Census 2000, Summary File 4, Table PCT 44, *available at* factfinder.census.gov *with* 2010 CVAP data from Department of Justice Special Tab, *available at* http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html.

With respect to the State's Congressional districts, not only did the 2010 census render the existing 32 districts malapportioned, but it also required redistricting because the State was awarded an additional four districts. After the 2010 census, the ideal congressional district population is 698,488.

Following release of detailed census figures in February 2011, the Texas Legislature redrew the State's Congressional, State Senate, and State House districts. (The plans were embodied in separate bills. The State House plan is known colloquially as H283; the Congressional plan as C185.)

a. Under the benchmark plan in effect at the time redistricting began,[4] the Texas House of Representatives contained 33 Latino-opportunity districts.[5] The Legislature's plan for the State House: reduced the number of Latino-opportunity districts; drew oddly shaped districts in areas with concentrated Latino populations that impaired Latino voters' ability to elect the candidates of their choice; refused

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[4] The Texas House plan was the product of a plan enacted by the Texas Legislative Redistricting Board in 2001 and revised slightly following a section 5 objection interposed by the U.S. Department of Justice. *See Balderas v. Texas*, No. 6:01-cv-00158 (E.D. Tex. Nov. 28, 2001).

[5] Appellees use the term "Latino-opportunity districts" to describe districts in which Latinos constitute at least 50% of the voting age population and in which Latinos nominate and elect their preferred candidate in a majority of reaggregated, racially-contested, statewide elections from 2006 to the present.

to draw majority-Latino districts in areas with significant increases in the Latino population; and employed population deviations to the disadvantage of Latino voters.

Reduction in the number of Latino-opportunity districts. The pre-existing 2001 State House plan contained 33 Latino-opportunity districts. But despite the dramatic growth of the Latino population in Texas, the Legislature's redistricting reduced the number of Latino-opportunity districts by two.

The State eliminated House District 33 (HD 33) in Nueces County, a majority-Latino county in South Texas where Latino population growth was substantial. J.A. xx. In the benchmark plan, HD 33 is located inside the City of Corpus Christi and contains 55% Spanish-surnamed voter registration. The Legislature's plan relocates HD 33 to Rockwall and Collin counties in North Texas. In the Legislature's plan, HD 33 now contains 6.5% Spanish-surnamed voter registration and is not a Latino-opportunity district.

Disadvantageous boundaries in areas with substantial Latino populations. In addition to reducing the number of districts with majority-Latino electorates, the Legislature also drew districts in areas with substantial Latino populations in ways that minimized Latino voters' opportunity to elect their preferred candidates.

In El Paso County, which is 80% Latino, the State re-drew House District 78 (HD 78) into a bizarre shape that maximized the number of Anglo

voters in the district. J.A. xx. As a result, although the remaining House districts in El Paso County have an average of 74% Spanish-surnamed registered voters, HD 78 in the Legislature's plan contains 47% Spanish-surnamed registered voters. J.A. xx. The Legislature's reconfiguration of HD 78 splits 15 voting precincts, and does not follow geographic features. J.A. xx.

The State also reconfigured House District 117 (HD 117) in majority-Latino Bexar County, where the Latino population over the last decade increased by 250,000. J.A. xx; *see also* Gonzalez Baker Report at Table 4. The State pulled the boundaries of HD 117 out of precincts in Southwest San Antonio and extended the district into rural areas of the county, including the town of Somerset, Texas. The incumbent of HD 117, who is not the Latino-preferred candidate, testified that he advocated extending the boundaries of his district "as far north" as possible in order to gain voters that "were more Anglo and more conservative." J.A. xx. As a result, HD 117 is no longer a Latino-opportunity district. *See* Trial Pl. Ex. 201, Trial Tr. 2019:2-6.

Refusal to draw majority-Latino districts in areas with significant growth in Latino population. Along the U.S.-Mexico border, the population increase in

Cameron and Hidalgo counties between 2000 and 2010 was large enough to create an entirely new State House district. Cameron and Hidalgo counties are adjacent to each other and Latinos constitute more than 88% of the population of both counties. Gonzalez Baker Report at Table 3. Given that over 99% of the population growth over the decade was Latino, such a district would inevitably have been majority-Latino. *Id.* at Table 4. The Legislature nonetheless refused to draw such a district, ostensibly on the grounds that such a district would violate the Texas Constitution's "county line rule." The Chair of the House Redistricting Committee, Rep. Burt Solomons, went so far as to say he would elevate the "county line rule" over the Voting Rights Act. J.A. xx.

The Legislature made a similar decision with respect to Harris County (Houston). There, the minority population accounted for *more than 100%* of the overall population growth in the county, since the Anglo population decreased by 82,618 and the Latino population increased by 551,789. Nevertheless, the State created no additional majority-Latino districts when it revised the district boundaries to adjust for malapportionment. J.A. xx; *see also* Gonzalez Baker Report at 3-5.

Employment of population deviations to the disadvantage of the minority community. The State's House plan systematically overpopulates majority-Latino districts while frequently underpopulating

majority-Anglo districts. Declaration of Professor J. Morgan Kousser at 64, *Perez v. Perry*, Trial Ex. Ex-2, Trial Tr. 166:15-22 [hereinafter Kousser Report]. Of the 80 Anglo-majority districts in the Texas House plan, 34 are overpopulated and 46 are underpopulated. *Id.* By contrast, of the 37 majority-Latino districts, 22 are overpopulated and 15 are underpopulated. *Id.*; *see also* J.A. xx.

In Harris County for example, the State reduced the Latino population in an emerging majority-Latino district (HD 144) to make it safer for the Anglo incumbent, substantially underpopulating the district. At the same time, and as a result of underpopulating the Anglo district, adjacent majority-minority districts (HD 145 and 147) were substantially overpopulated. J.A. xx. Similarly, in Dallas County, the Legislature's plan overpopulated the two majority-Latino districts (Districts 103 and 104) by over 13,000 persons, while underpopulating adjacent Anglo-majority districts (Districts 108 and 115) by more than 5,000 persons.

In Hidalgo County, where incumbency protection was specifically referenced as a reason for the population variances by an incumbent who had switched parties after his election,[6] the Legislature not only severely underpopulated HD 41, but also dramatically and unnecessarily altered its constituency. J.A.

[6] Following his re-election to the Texas House as a Democrat, Mr. Pena changed his party affiliation to Republican.

xx. At the same time, the adjacent districts, HD 39 and 40, held by incumbent Latino representatives, were also drastically altered in geography and constituency while being substantially overpopulated. Kousser Report at 92-95; J.A. xx ("Q. District 36 in Hidalgo County is over 4,000 overpopulated. District 39 in Hidalgo County is over 7,700 overpopulated. District 40 in Hidalgo County is over 5,800 overpopulated. And the district that you drew for Mr. Pena, District 41, is 7,399 underpopulated. **Was that intentional? A. Yes, sir.**") (emphasis added).

The Texas Legislature was aware of the systematic overpopulation of Latino and majority-minority districts since the Chairman of the Texas House Redistricting Committee was confronted during floor debate on the State House plan regarding that issue. Kousser Report at 66.

b. The benchmark plan for Congressional districts was in part the result of this Court's decision in *LULAC v. Perry*, 548 U.S. 399 (2006), that Texas's attempt to re-draw its Congressional map in 2003 had been tainted by racial discrimination against Latino voters. Pursuant to a court order, a three-judge court re-drew districts in South and West Texas to remedy the section 2 violation found by this Court. The resulting benchmark plan contained 7 Latino-opportunity districts.

With respect to the state's Congressional districts, the Legislature had to choose where to locate

the state's newly acquired four seats as well as redraw the existing districts to bring their population back into compliance with federal law.

Despite the fact that Latinos constituted 65% of the State's overall population growth, and that population growth was therefore the leading reason Texas gained 4 new congressional seats, the State created no new Latino-opportunity districts in its Congressional redistricting plan. Furthermore, with respect to the existing congressional districts, the Legislature redrew two majority-Latino congressional districts to reduce Latino political strength.

First, the Legislature significantly redrew the boundaries of Congressional District ("CD") 23. J.A. xx. (This was the district re-drawn in 2006 in response to this Court's holding in *LULAC v. Perry*). While he was drawing CD 23 using the Texas Legislative Council's computer software, the Legislature's chief Congressional mapper turned on the color shading for election results and Spanish-surnamed voter registration. J.A. xx. This meant that he could see the effects on election results and on Latino voter registration of every change he made the instant he made it. He moved precincts into and out of CD 23 for the purpose of strengthening the district for an incumbent who is not the Latino candidate of choice. J.A. xx. In particular, he "swapped out" precincts where Latino registered voters were more likely to turn out to vote and "swapped in" precincts with lower

Latino turnout. According to the Legislature's internal analysis, in achieving the correct population for CD 23, the Legislature's plan disproportionately reduced the Latino electorate.[7] The analysis shows that when compared to the benchmark, the Legislature's version of CD 23 reduces the average number of Anglo voters by 8,635 and reduces the average number of Latino voters by 11,820. The bottom line is that while new CD 23 may have a slightly higher Latino voter registration than its predecessor, it has fewer Latino voters and will produce dramatically lower election returns for Latino-preferred candidates. *See* J.A. xx.

The Legislature's chief mapper performed statistical analysis on its new CD 23 to verify that Latinos would be unable to oust the Anglo-preferred incumbent. The counsel to the House Speaker also used reaggregated elections to confirm that CD 23 in the Legislature's plan is projected to elect the Latino-preferred candidate in only one out of ten racially contested general elections. *See* J.A. xx. Indeed, the State's own expert testified that "I think [CD 23] is probably less likely to perform than it was, and so I certainly wouldn't and don't [and] haven't counted

[7] Racially Polarized Voting Analysis, Estimated Votes by Race and Ethnicity in Voter Tabulation Tables (VTDs) – CD 23 – Plan C185 at 10-13, *Texas v. United States*, No. 1:11-cv-01303, Dkt. 79-19 (D.D.C. 2011).

the 23rd as an effective minority district in the newly adopted plan." J.A. xx. He further stated, "I don't count 23 as one of the seven performing districts when I evaluate C-185." J.A. xx.[8]

The State's expert further testified, with respect to the Legislature's changes to CD 23 in the first redistricting following this Court's decision in *LULAC v. Perry* that "[t]here are some obvious parallels between what happened previously and what happened this time" and "we feel like we are all having déjà vu[.]". J.A. xx.

The Legislature also drastically redrew Congressional District 27 in a way that diminished Latino voting strength. CD 27 was created by the Texas

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[8] Alluding to this Court's decision in *LULAC v. Perry*, he also testified:

> "If I [were] advising the legislature on drawing the 23rd, I would not have done what was done to the 23rd." J.A. xx. He further testified:
>
> [M]y first advice to the legislature would be just – you know, in simple – with a slight memory of history, do as little as possible to the 23rd as you can. It really has been a difficult – it was a difficult district for the Court to draw. It was a difficult district for the legislature to draw. But, basically, enough is enough, right? Don't make this hard on yourself . . . Don't mess with the 23rd. That would be my first rule for drawing the districts.

J.A. xx.

Legislature in 1981 and that district and its successors after the 1990 and 2000 censuses elected the Latino candidate of choice until 2010, when an Anglo-preferred candidate won by 775 votes. J.A. xx. In the preexisting benchmark version of the district, Nueces County is the northern anchor of CD 27 and Nueces County voters constitute the majority of registered voters in CD 27. *See* J.A. xx; RED-701 Report at 5, Ex. C13 to Trial Ex. J-62-II, *Perez v. Perry*, Trial Tr. 1746:18-1747:2; J.A. xx.

In the Legislature's new plan, the 206,293 Latino residents of Nueces County, historically accustomed to the opportunity to elect the Latino candidate of choice, are cut away and stranded in an Anglo-majority district to the north. J.A. xx; *see* Gonzalez Baker Report at 15. According to the Legislature's chief mapper, CD 27 in the benchmark and CD 27 in the Legislature's plan are "totally different districts." J.A. xx. The State's expert witness testified that CD 27 in the Legislature's plan "has flipped, in almost exactly the same way [CD] 23 was flipped previously [in the 2003 redistricting that this Court disapproved], so it is CD-27 this time that is flipped into being a majority . . . Anglo district." J.A. xx.

The State admitted that it pulled Nueces County out of its historic location in a majority-Latino South Texas Congressional district and placed it in an Anglo-majority district to improve the electoral

chances of Congressman Blake Farenthold because he would have a difficult time being reelected in the benchmark Congressional District 27. *See* J.A. xx. The State admits that CD 27 in its plan no longer offers Latinos the opportunity to elect their candidate of choice. *See* J.A. xx.

3. Appellant Governor Rick Perry signed the State House redistricting plan into law on June 17, 2011 and the Congressional plan into law on July 18, 2011. As a covered jurisdiction under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, Texas is required to obtain preclearance before using the new districts for an election cycle. In order to obtain preclearance, the State is required to show both that the districts have not been drawn for a discriminatory purpose and that they will not have a retrogressive effect on minority voting strength.

Section 5 gives covered jurisdictions the option of seeking expedited, administrative preclearance from the Attorney General of the United States. Unless the Attorney General objects within 60 days – a period that can be extended, at most, by only an additional 60 days, *see* 28 C.F.R. § 51.37 – a submitted change is deemed precleared and can go into effect. Thus, had Texas timely sought administrative preclearance, the State would have known no later than sometime in mid-fall – in time for the date on which its election

machinery begins to gear up for the 2012 elections – whether its 2011 plans passed muster.

Instead, the State chose a decidedly slower route for obtaining preclearance, filing suit for a declaratory judgment before a three-judge court in the United States District Court for the District of Columbia. That case, captioned *State of Texas v. United States*, Civil Action No. 11-1303 (RMC-TBG-BAH), is now pending before a court consisting of Circuit Judge Thomas B. Griffith and District Judges Rosemary M. Collyer and Beryl A. Howell.

The United States, the principal defendant in the D.D.C. proceeding, offered to go to trial on October 17, 2011, which could have enabled a ruling on preclearance in time for the 2012 election cycle. *See* J.A. xx. The State declined that offer, choosing instead to file a motion for summary judgment.

The State persisted in seeking summary judgment despite repeated suggestions from the court that the State could secure a faster decision by proceeding directly to trial. *See, e.g.,* J.A. xx (asking counsel for the State "whether in light of all the responses you've gotten, you would rather say, 'Okay, let's just go to trial and get this done['] instead of try summary judgment and have somebody say, 'Well, I can't really decide on this record', which I'm not anticipating, but which is, with summary judgment, always a risk.").

After full briefing with thousands of pages of exhibits and extensive oral argument on November 2, 2011, the three-judge court in the D.D.C. unanimously denied the State's motion for summary judgment. Noting that a more detailed opinion would follow, the court 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." J.A. xx. In light of that flaw and the evidence and arguments presented by the United States and by various defendant-intervenors, the D.D.C. held 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." J.A. xx. After a status conference and discussion with the parties, the D.D.C. set a trial date of January 17, 2012. As of now, Texas's plans thus have not been precleared.

4. Appellees Shannon Perez, Gregory Tamez, Sergio Salinas, Carmen Rodriguez, Rudolfo Ortiz, Nancy Hall, and Dorothy Debose (Perez Appellees) are registered voters of Texas. In May 2011, the Perez appellees filed suit in the United States District Court for the Western District of Texas. Their third amended complaint, filed after Governor Perry signed the Legislature's redistricting plans into law alleged, among other things, that the districts drawn by the

Legislature for the State House and for Congress violated section 2 of the Voting Rights Act as amended, 42 U.S.C. § 1973, and the Fourteenth Amendment both with respect to the deliberate dilution of Latino voting strength and with respect to manipulation of one person, one vote in ways that diluted Latino voting strength. The Perez appellees also sought to enjoin use of the plan pending the results of the preclearance process.

Appellee Mexican American Legislative Caucus of the Texas House of Representatives (MALC) is the nation's oldest and largest Latino legislative caucus. Many of its members are elected from, and represent, majority-Latino districts and many of its members are Latino. In May 2011, concerned by the Legislature's proposed plans, MALC filed suit in the United States District Court for the Western District of Texas. Its second amended complaint, filed after Governor Perry signed the Legislative plans into law alleged, among other things, that the plans for the State House and for Congress violated section 2 of the Voting Rights Act as amended, 42 U.S.C. § 1973 and the Fourteenth Amendment both with respect to deliberate dilution of Latino voting strength and with respect to manipulation of one person, one vote in ways that diluted Latino voting strength. It also sought to enjoin use of the plan pending the results of the preclearance process.

Appellee Texas Latino Redistricting Task Force (Task Force) is a coalition of statewide Latino organizations that formed prior to the 2011 legislative session to protect Latino electoral opportunity in the redistricting process and secure fair redistricting plans for Texas. Its membership includes, among others, the Mexican American Bar Association of Texas, Southwest Voter Registration Education Project, and Texas H.O.P.E. In June 2011, in response to the Legislature's proposed plans, the Task Force and individual Latino voters of Texas filed suit in the United States District Court for the Western District of Texas alleging that the State House and Congressional plans violated section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth Amendment, and seeking to have the plans enjoined under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, because they had not received preclearance.

The Perez, MALC and Task Force complaints were consolidated along with two other lawsuits (and the claims of five sets of intervenors) before a three-judge court in the United States District Court for the Western District of Texas. The lead case is captioned *Perez v. Texas*, Civil Action No. 11-CA-360-OLG-JES-XR (2011). That three-judge court consists of Circuit Judge Jerry E. Smith and District Judges Orlando L. Garcia and Xavier Rodriguez.

The parties to the Texas litigation undertook discovery on their section 2 and constitutional claims

during the summer of 2011 and the *Perez* court conducted a trial from September 6 to September 16, 2011. During that trial, the Perez, MALC, and Task Force appellees, and the other appellees, presented evidence that voting in Texas continues to be racially polarized, with Anglos and Latinos consistently preferring different candidates in primary and general elections. Appellees also showed that the Latino population had grown sufficiently to comprise the majority of the citizen voting age population in additional compact State House and Congressional districts and that Latinos still experience disparate rates of voter registration and voting as a result of the long, well-documented history of discrimination in Texas that has touched upon the rights of African Americans and Latinos to register and vote. Finally, appellees presented significant evidence of intentional racial discrimination in the Legislature's plans, including systematic population deviations in the State House plan and race-based line-drawing in both plans intended to dilute Latino voting strength.

Because the preclearance process has not yet been completed, the *Perez* court has not yet issued a decision on the merits of the appellees' section 2 and constitutional claims. Such a decision would be premature: if preclearance is ultimately denied, the 2011 plan will never go into effect and several aspects of appellees' section 2 and constitutional claims may well become moot.

In light of the undisputed fact that the 2011 plans had not been precleared, on September 29, 2011, the *Perez* court issued an order enjoining implementation of the Texas House and Congressional redistricting plans, explaining that because the plans "have not been precleared pursuant to section 5 of the Voting Rights Act, the plans may not be implemented." J.A. xx.

5. Both the three-judge court in Texas and the three-judge court in the District of Columbia were aware that if preclearance was not obtained in time – which, given the Texas law regarding candidate qualifying and primary elections, meant by mid-November 2011 – then the three-judge court in Texas would be responsible for developing an interim plan to enable the 2012 election to proceed. *See* J.A. xx ("If any one of the plans is not 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."). Accordingly, in September 2011, following the close of the section 2 trial, the *Perez* court established a schedule to con sider interim plans if necessary. J.A. xx. It asked the parties to provide briefing on the applicable legal standards for court-drawn maps, to submit proposed orders to modify election deadlines, to submit proposed interim redistricting plans, and to respond to

the redistricting plans proposed by other parties. J.A. xx.

Trying to avoid the need for a court-drawn plan, the *Perez* panel issued an order delaying the start of the candidate filing period from the middle of November to November 28, 2011, J.A. xx, and moving the close of the filing period as well. Based on submissions of the parties and the testimony of the Texas Secretary of State, the court concluded that "the filing period could not be delayed any further without serious disruptions to the 2012 election cycle." J.A. xx.

The three-judge court held hearings on proposed interim plans on October 31, November 3, and November 4, 2011. After drafting interim plans and circulating them for comment by the parties, the court ordered interim, judicially drawn plans for the State House and Congress into effect on November 23 and 26, 2011, respectively. J.A. xx.

a. In its interim Congressional plan, the three-judge court expressly "sought to create a plan that maintains the status quo pending [a final decision on preclearance], complies with the United States Constitution and the Voting Rights Act, and embraces neutral principles such as compactness, contiguity, respecting county and municipal boundaries, and

preserving whole VTDs [voter tabulation districts]."[9] J.A. xx.

First, the interim plan achieved population equality among the new districts, with a total overall deviation of 0.02%. J.A. xx . The court explained the *de minimis* population deviations in the plan as necessary to avoid splitting VTDs. J.A. xx ("[A]ll population shifts were done in terms of VTD's. . . . The court minimized splits to VTD's and precincts as much as possible."); *see also* J.A. xx ("[I]t became clear that cutting VTDs would create enormous administrative and financial difficulties for local governments preparing for an election at the eleventh hour.").

Second, the interim plan avoided retrogression in minority voting strength. J.A. xx (Although plans drawn by federal courts do not require preclearance, this Court has emphasized that "in fashioning the plan, the court should follow the appropriate Section 5 standards." *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981); *Abrams v. Johnson*, 521 U.S. 74, 95-96

[9] *Vera v. Bush* cautions that preserving whole VTDs is essential to the implementation of an interim plan. 933 F. Supp. 1341, 1347 (S.D. Tex. 1996) ("Moreover, the Court's remedial plan addresses the single most troubling and realistic hurdle, the potential splitting of voter tabulation districts ('VTD's'), by avoiding that consequence in all but a small handful of voting precincts.").

(1997)). Thus, with respect to Congressional District 23 – the district that was re-drawn after this Court's decision in *LULAC v. Perry* holding that the district initially drawn by the State diluted Latino voting strength – the court based its interim district on the benchmark, which had a Hispanic citizen voting age population of 58.4%, creating a district with a Hispanic citizen voting age population of 57.3% that provided Latino voters the same ability to elect their preferred candidates as the benchmark district had given them. *Compare* J.A. xx (Interim Congressional Order – RED-206 for C220) *with* RED-206 Reports for C100, *Perez v. Perry*, Trial Pl. Ex. 239, 240, 241, Trial Tr. 2091:2-6.

Third, in developing its interim plan, the court deferred to the extent possible to the State's policies. It did so by basing the plan in significant part on the pre-existing benchmark plan from 2006, J.A. xx – an expression of the people's will. The interim plan preserves an average of 80.32% of the geography of the districts in the benchmark.[10] Similarly, the district court's interim plan respects jurisdictional lines and would not force the counties to undertake dramatic revisions to their precinct geography so close to

[10] The congressional benchmark is a court-ordered plan created following the remand of *LULAC v. Perry*, 548 U.S. 399 (2006), that included departures from State policy only to correct the violation of section 2.

the upcoming primary election. The Texas panel's interim plan cuts only 23 county lines, 10 precincts and 3 VTDs. J.A. xx.

Fourth, with respect to the four new seats as to which no benchmark districts existed, the court's interim plan applied neutral redistricting criteria by placing the 4 new districts in areas of high growth. While doing so, it also respected county, city, and precinct boundaries to the extent possible. J.A. xx.

Finally, "[a]fter maintaining current minority districts and adding in the new districts," the district court's interim plan "inserted a number of districts with minimal change from the enacted plan where possible. These include districts 1, 3, 4, 5, 8, 11, 13, 14, and 19." J.A. xx. Thus, one-quarter of the congressional districts in the interim plan mirrored the districts the Legislature had adopted.

b. With respect to the State House of Representatives, the district court followed a similar path – adhering to principles of one person, one vote; complying with the substantive requirements of the Voting Rights Act; and respecting state policy to the extent possible.

The average population deviation in the district court's interim plan is only 1.81%. J.A. xx. The district court endeavored to avoid precinct

cuts.[11] In addition, the district court complied wherever possible with the Texas constitutional requirement to build districts out of whole counties. The district court crafted a State House plan with only 8 VTD cuts, used whole counties as building blocks wherever possible and equalized population in multi-district counties. As a result, the interim plan has an overall population deviation of 8.9%. *Id.*; *see also* J.A. xx (noting "the [Legislature's] enacted plan appears to have 412 VTD cuts[.]"). The district court's State House interim plan for Harris County features an average deviation of 1.72%; no House district has greater than 2.49% deviation. In Dallas County, the district court's interim plan features an average deviation of 0.9%.

Second, with respect to ensuring that its plan complied with the substantive requirements of the Voting Rights Act, the court began with the benchmark plan – the 2001 plan enacted by the Texas Legislative Redistricting Board and revised slightly following a section 5 objection interposed by the U.S. Department of Justice. *See Balderas v. Texas*, No. 6:01-cv-00158 (E.D. Tex. Nov. 28, 2001).

The interim plan created 35 Latino-opportunity districts. Among these were 33 districts that were successors to Latino-opportunity districts in the 2001

[11] Census voter tabulation districts (VTDs) correspond largely to county voting precincts. *See* J.A. xx.

benchmark plan. For example, the district court relied on majority-Latino benchmark districts in El Paso, Bexar, and Nueces Counties as the basis for drawing successor districts that also provided the Latino communities in these counties with an opportunity to elect candidates of their choice. Similarly, the court maintained House District 149 in Harris County as a majority-minority district.

In drawing the interim house plan, the district court was required also to take into account uneven population growth in several areas of the state, particularly the border area and Harris and Dallas counties. Neutral districting principles in these areas of high growth, with most of the growth attributable to an increase in the Latino population, produced 2 additional majority-Latino districts.

In South Texas, the court created an additional majority-Latino House district in an area of high population growth in the Rio Grande Valley. Since 2000, Cameron and Hidalgo counties together had grown in population by the size of a State House District. The interim plan's House District 35 is located entirely within, and encompasses the population growth between, Cameron and Hidalgo counties.

In Harris County, the district court created House District 144 as a majority-Latino district that "sprang naturally from the population growth in the region." J.A. xx. In the benchmark, HD 144 contained many heavily Latino neighborhoods and had a Latino voting age population of 50.3%. Since 2000 the Latino

population had increased by over half a million in Harris County. In the interim plan, HD 144 remained in the same geographic area as its predecessor, and, reflecting some of the Latino population growth experienced by Harris County, contained a Latino voting age population of 70.6%.

In Dallas County, the panel started with the 2001 benchmark districts but then adjusted the lines to bring the districts back into compliance with one person, one vote while ensuring that the plan was not retrogressive. *Id.* at 6-7. The district court was also required to eliminate two House districts in Dallas County, because the county grew less quickly than other parts of the state.

In Dallas County, there are now 198,624 fewer Anglos and 346,529 more non-Anglos (including 243,211 Latinos) than there were in 2000. J.A. xx; *see also* Gonzalez Baker Report at 3-5.

The district court eliminated the same two Dallas County House districts that were eliminated by the Legislature in its plan – House Districts 101 and 106. The district court's changes to the remaining districts, drawn from the benchmark plan and using traditional redistricting principles, increased the combined minority voting age population of House Districts 107 and 115 to over 50% and increased the Anglo voting age population in House Districts 102 and 113 to over 50%. J.A. xx.

c. Judge Smith dissented in part from the majority's interim plans. He agreed that the court was required to adopt interim plans. And he did not dispute the basic principles on which the majority relied. He elaborated on the reasons why the three-judge court could not adopt the State's plans wholesale, both in light of the fact that the plan had not received preclearance and in light of flaws he found in the State House plan ranging from a district that "potentially reeks of racial gerrymandering," J.A. xx, to other districts that "may raise concerns of racial or partisan gerrymandering in violation of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004)," J.A. xx, to still other districts that created an "extreme gerrymander and palpable population disparities with neighboring districts. . . ." J.A. xx.

Nevertheless, Judge Smith disagreed with the panel's configuration of 12 of 186 districts.

6. On November 28, 2011, and November 30, 2011, appellants sought a stay of the court's orders imposing interim plans. On December 9, 2011, this Court issued an order granting the applications for a stay, treating the applications as jurisdictional statements, and noting probable jurisdiction.

SUMMARY OF ARGUMENT

For decades, the law governing a case like this has been clear. A covered jurisdiction, like Texas, must obtain preclearance of legislatively drawn redistricting plans before those plans can go into effect. Faced with a complaint alleging that the State has not obtained preclearance of its plans, a local federal district court, like the Western District of Texas in this case, has only two responsibilities: first, to enjoin use of the plans until they have been precleared and, second, if it concludes that the preclearance process will not reach a determination in time to conduct upcoming elections, to draw interim plans that comply with federal law. The three-judge court in this case properly carried out both these responsibilities.

First, the three-judge court properly enjoined Texas's 2011 legislative redistricting plans. The plain language of section 5 along with an unbroken line of this Court's precedents required such a result. Moreover, both the plain language of the Act and this Court's decisions foreclosed the three-judge court in this case both from determining whether preclearance should ultimately be granted and from adjudicating appellees' other constitutional and statutory claims before the preclearance process has been completed.

Given the State's decisions about when to enact its plans and how to pursue preclearance, there was not even a remote possibility that preclearance could

be obtained in time to use the State's new plans for the March 6, 2012 primary election. At the same time, it is impossible to continue using the existing benchmark plans, which no longer comply with the requirements of one person, one vote. Thus, under this Court's long-established precedents, the only course open to the district court here was to develop and implement its own interim plans for the 2012 election cycle.

Second, the three-judge court's interim plans comply with the requirements this Court has laid down for court-drawn plans. They satisfy one person, one vote, deviating only where necessary to enable the elections to proceed or to accommodate state policies regarding county lines. They avoid retrogression in minority voting strength in compliance with the requirements of the Voting Rights Act. Using neutral redistricting criteria, they respond appropriately to demographic changes revealed by the 2010 census, in some places creating majority-Latino districts reflective of that population growth.

The State's objections to the plans are misplaced. The State's complaint that the three-judge court did not appropriately defer to the policies embodied in the 2011 legislative plans get things exactly backwards: the plain language of section 5 and decades of this Court's decisions establish that court-drawn plans cannot adopt the deferential approach the State demands. Indeed, had the three-judge court done as the State demands, the court's own plans would themselves have required preclearance, thus defeating the

entire point of having an interim plan in place pending the results of preclearance.

The State's complaint that the interim plans are excessively race-conscious is equally meritless. The sole basis for the State's claim is the fact that the interim plans created a few additional majority-Latino districts. But the very nature of the intercensal population growth in Texas – 65 percent attributable to an increase in the Latino population – means that virtually *any* neutrally drawn plan will produce at least a few additional majority-Latino districts, as the interim plans did. Those additional districts are a measure of the plans' virtues, not flaws.

ARGUMENT

I. In Light of Texas's Failure to Obtain Timely Preclearance of its 2011 Legislative Redistricting, the Three-Judge Court was Required to Implement Judicially Drawn Interim Plans

In *Lopez v. Monterey Cnty.*, 519 U.S. 9 (1996), this Court unanimously laid out the proper role for a district court like the three-judge court in this case: "On a complaint alleging failure to preclear election changes under § 5, that court lacks authority to consider the discriminatory purpose or nature of the changes. . . . The three-judge district court may determine only whether § 5 covers a contested change,

whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate." *Id.* at 23 (citing *Perkins v. Matthews*, 400 U.S. 379, 385 (1971); *City of Lockhart v. United States*, 460 U.S. 125, 129, n. 3 (1983); *United States v. Bd. of Supervisors of Warren Cnty.*, 429 U.S. 642, 645-47 (1977) (per curiam); and *Allen v. State Bd. of Elections*, 393 U.S. 544, 558-59 (1969)). In enjoining the use of the unprecleared 2011 Legislative plans; declining to address the other constitutional and federal statutory issues raised by the plans; and deciding to impose interim, judicially crafted plans, the three-judge court followed this Court's directives in every respect.

1. The three-judge court in this case was required to enjoin use of the 2011 plans drawn by the Texas Legislature. The plain language of section 5, repeatedly interpreted by this Court, clearly forbids use of the 2011 legislative redistricting plan. In every decennial redistricting cycle begun since the Act's passage, this Court has treated redistricting as a change with respect to a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c(a). *See, e.g.*, *Georgia v. United States*, 411 U.S. 526, 531-36 (1973); *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981); *Abrams v. Johnson*, 521 U.S. 74, 80 (1997); *Branch v. Smith*, 538 U.S. 254, 262 (2003).

Section 5 expressly directs that a redistricting plan cannot be implemented "unless and until" the redistricting plan is submitted to the Attorney General of

the United States and he does not "interpose[ ] an objection" within sixty days, or the United States District Court for the District of Columbia enters a declaratory judgment that the redistricting plan "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race. . . ." 42 U.S.C. § 1973c; *see, e.g., Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam) (holding, with respect to a Mississippi decennial redistricting that the enactments "are not now and will not be effective as laws until and unless cleared pursuant to § 5."). Accordingly, this Court has repeatedly, and unanimously, held that district courts confronted with suits seeking to enjoin use of unprecleared voting changes *must* enjoin their use. *See, e.g., Lopez*, 519 U.S. at 20-22; *Clark v. Roemer*, 500 U.S. 646, 652 (1991); *Connor v. Waller*, 421 U.S. at 656. Thus, the court in this case was required to enjoin use of the 2011 legislative plans.

2. The plain language of the Voting Rights Act foreclosed the three-judge court in this case from determining whether the Legislature's 2011 plans complied with section 5's substantive requirements and from determining, for the time being, whether the Legislature's plans complied with other aspects of federal law including the Fourteenth Amendment and section 2 of the Voting Rights Act.

Section 14(b) of the Voting Rights Act squarely states that "[n]o court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment pursuant to section

. . . 1973c of this title." As this Court explained in *Hathorn v. Lovorn*, 457 U.S. 255, 267 (1982), section 14(b) governs all actions seeking "approv[al of] proposed changes in voting procedure." Other courts, such as the three-judge court in this case, may decide only "the distinct question of whether a proposed change is subject to the Act." *Id.* (citing *Allen v. State Bd. of Elections*, 393 U.S. at 557-60; *McDaniel v. Sanchez*, 452 U.S. 130 (1981)). This Court reaffirmed this rule in *Lopez v. Monterey Cnty.* when it stated that "Congress chose to accomplish" its purposes in section 5 "by giving exclusive authority to pass on the discriminatory effect or purpose of an election change to the Attorney General and to the District Court for the District of Columbia." 519 U.S. at 23. Thus, the three-judge court in this case was not permitted to determine whether the 2011 plan complied with section 5's requirement that it have neither a discriminatory purpose nor a retrogressive effect. It was authorized only to determine, as it did in its September 29, 2011 order, that the plans had not been precleared and therefore had to be enjoined. J.A. xx; *see also Perkins v. Matthews*, 400 U.S. 379, 385 (1971) ("What is foreclosed to such 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'"); *United States v. Bd. of Supervisors of Warren Cnty.*, 429 U.S. 642, 645 (1977) (same).

Moreover, this Court has repeatedly directed courts in the position of the three-judge court here to hold off on deciding whether an unprecleared plan complies with other provisions of federal law. In *Connor v. Waller*, 421 U.S. at 656, this Court held that because the redistricting acts before the district court had not been precleared, the district court "erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination." This Court has repeatedly reaffirmed this principle. *See, e.g., McDaniel*, 452 U.S. at 146; *Wise v. Lipscomb*, 437 U.S. 535, 541-42 (1978). Most recently, in *Branch v. Smith*, Justice Kennedy explained that under the "rule prescribed by *Connor*," once a court has "found no preclearance, it [is] premature, given this statutory scheme, for the court to consider the constitutional question." 538 U.S. 254, 283 (2003). Because "[t]he proposed changes are not capable of implementation, and the constitutional objections may be resolved through the preclearance process," the court entertaining those claims should await the outcome of the section 5 proceedings. *Id.* at 283-84 (Kennedy, J., joined by Stevens, Souter, and Breyer, JJ., concurring); *see also id.* at 292 (O'Connor, J., joined by Thomas, J., concurring in part and dissenting in part) (reiterating "our decisions holding that federal courts should not rule on a constitutional challenge to a nonprecleared voting change when the change is not yet capable of implementation"). The same principle holds true for decisions regarding federal statutory claims, such as allegations of vote dilution under section 2 of the Voting Rights Act.

Finally, because the question whether the Legislature's plans should receive preclearance is pending before the United States District Court for the District of Columbia in a separate proceeding and the United States District Court for the Western District of Texas has not yet addressed the compliance of the Legislature's plans with the Fourteenth Amendment or section 2 of the Voting Rights Act, those issues are not properly before this Court either.

3. Under the circumstances of this case, the sole appropriate course for the three-judge court to take was, first, to enjoin use of the Legislature's 2011 plans unless and until they obtained preclearance and second, once it became clear that preclearance would not occur in time to allow the plans to be used in the 2012 election cycle, "to entertain a proceeding to require the conduct of the [upcoming] elections pursuant to a court-ordered reapportionment plan." *Connor v. Waller*, 421 U.S. at 657. The three-judge court properly understood its obligations. *See* J.A. xx ("Thus, the Court must draw independent redistricting plans without ruling on the merits of the pending legal challenges to the State's unprecleared plans."); *id.* at xx (7) ("Because preclearance must be determined before any other issues are ripe for this Court's consideration, the Supreme Court has forbidden remedial district courts from making any determination on the merits of the State's enacted plans until *after* preclearance." (emphasis in original) (citing *Connor v. Waller*, 421 U.S. at 656-57)).

Under Texas's existing election laws, the 2012 election cycle for congressional and state legislative offices began on November 12, 2011, when the candidate filing period for the primary election, scheduled for March 6, 2012, opened. Given that that period was set to close on December 12, 2011 and the requirement immediately following this date that the counties prepare ballots and print them for mailing to overseas military personnel by January 21, 2012, the three-judge court properly concluded that to avoid "serious disruptions to the 2012 election cycle," redistricting plans had to be in place by late November. J.A. xx.

The State itself is responsible for its inability to have precleared plans in place. First, although the State was provided with the requisite census data in February of 2011, the Legislature waited to enact its State House plan until May 2, 2011 and the Governor did not sign the bill into law until June 17, 2011. The Legislature failed to enact any congressional plans at all during the regular legislative session ending on May 30, 2011. Not until mid-summer did the Legislature enact, and the Governor sign into law, plans for the State's Congressional districts.

The State then eschewed seeking preclearance of its new plan from the Attorney General, despite the fact that section 5's administrative route "is designed to giv[e] the covered State a rapid method of rendering a new state election law enforceable." *Branch v. Smith*, 538 U.S. at 283 (quoting *Georgia v. United States,* 411 U.S. 526, 538 (1973)). Instead, it decided to

pursue a declaratory judgment action before the United States District Court for the District of Columbia. And there, despite an offer for an early trial from the United States and the three-judge court's strong suggestion that a trial would be the fastest way of obtaining an adjudication, the State persisted in prosecuting a summary judgment motion that rested on a novel legal theory to meet the State's burden of showing nonretrogression. Having deliberately chosen a path for preclearance that requires a trial in the winter of 2012, significantly after the beginning of its 2012 election cycle, the State should not now be heard to complain that its plan must be enjoined and that the three-judge court in this case must now craft a plan to allow the election to proceed.

II. The Three-Judge Court Applied the Proper Legal Standards in Developing its Interim Redistricting Plans

Over the decades, it has often become "the 'unwelcome obligation' of the federal court[s] to devise and impose a reapportionment plan" when states fail to put legal plans into place in time for upcoming elections. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal opinion) (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)). As a result, this Court has laid out clear principles for federal courts to follow in crafting such plans. In this case, the three-judge court followed those principles faithfully. Indeed, the State

challenges only a handful of the district lines drawn by the three-judge court, and those challenges lack merit.

1. In cases involving covered jurisdictions whose benchmark plans cannot be used because an intervening census reveals unconstitutional levels of malapportionment, section 5 itself imposes a clear rule: the court-drawn plan cannot incorporate wholesale an unprecleared state-sponsored plan. Put simply, section 5 forecloses deference to unprecleared state policy.

First, the whole purpose of section 5 would be subverted by permitting local district courts to implement plans that have not yet been precleared. As Justice Kennedy explained for a unanimous Court in *Clark v. Roemer*, "[i]f voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes," 500 U.S. 646, 652-53 (1991) (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969)). It would defy common sense for a local three-judge court to grant an injunction with one hand and then effectively vacate that injunction with the other.

Second, since the purpose of devising and imposing a court-ordered plan is to permit elections to go forward on schedule, adopting an unprecleared state-proposed plan would be counterproductive. As this Court reaffirmed unanimously in *Lopez v. Monterey Cnty.*, although section 5 preclearance is not required, and thus an interim plan can go into effect immediately "where a district court *independently* crafts a

remedial electoral plan," the same is not true "where a court adopts a proposal 'reflecting the policy choices . . . of the people [in a covered jurisdiction].'" 519 U.S. 9, 22 (1996) (emphasis added) (quoting *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981)). When the district court defers to the policy choices of a covered jurisdiction, "the preclearance requirement of the Voting Rights Act is applicable." *Lopez*, 519 U.S. at 22 (quoting *McDaniel*, 452 U.S. at 153). It would therefore be "error for the District Court to order elections under [a] system before it had been precleared by either the Attorney General or the United States District Court for the District of Columbia." *Id.*; *see also Hathorn v. Lovorn*, 457 U.S. 255, 266 (1982) (explaining that "the presence of a court decree does not exempt the contested change from § 5," which "applies to any change 'reflecting the policy choices of the elected representatives of the people,' even if a judicial decree constrains those choices." (quoting *McDaniel*, 452 U.S. at 153)).

Put simply, if the three-judge court in this case had deferred to the State to the extent the State seems to demand, then plaintiffs would have been entitled to a *second* injunction precluding the judicial plan from going into effect until *it* had been precleared. The State's position thus sets the courts on a path of infinite regress.

This Court's decision in *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam), is not to the contrary. There is a critical difference between the situation in *Upham* and the situation here. In *Upham*, Texas had

completed the preclearance process before the district court imposed the interim plan at issue. After administrative review of the State's Congressional redistricting plan, the Attorney General entered an objection "to the lines drawn for two contiguous districts in south Texas," but otherwise concluded that the State had "'satisfied its burden of demonstrating that the submitted plan is nondiscriminatory in purpose and effect' with respect to [the remaining districts]." *Id.* at 38 (quoting the Attorney General's letter). Thus, with two exceptions, the State's districts *had been precleared* and were thus presumptively valid unless and until successfully challenged as violative of some other federal or state law. It was under those circumstances – namely, "in the absence of any objection to the . . . districts by the Attorney General, and in the absence of any finding of a constitutional or statutory violation with respect to those districts – that this Court agreed that "a court must defer to the legislative judgments the [state's] plans reflect, even under circumstances in which a court order is required to effect an interim legislative apportionment plan." *Id.* at 40-41.

The case now before the Court is entirely different. Here, there has been no preclearance. Indeed, the United States District Court for the District of Columbia, before which the State's request for preclearance is now pending, denied the State's request for summary judgment on preclearance in the face of substantial arguments by the United States and defendant-intervenors that preclearance should be denied because the plans were both intentionally

discriminatory and retrogressive. *See* J.A. xx. For the time being, then, if the State were to use these districts, there *would* be a statutory violation, at the very least of section 5. Moreover, the substantial arguments that the 2011 plans violate section 2 of the Voting Rights Act and the Fourteenth Amendment have not yet been addressed here, in contrast to the situation in *Upham* where there was no then-pending claim that the parts of the plan that had been precleared violated federal law. This case would resemble *Upham* only if this Court were to have held there that the district court should have used the two districts to which the Attorney General objected, which of course it did not do. To the contrary, the district court here properly used its independent judgment in crafting an interim plan. J.A. xx ("Unlike the court in *Seamon*, [this court is] not in a position to defer blindly to the State's map, because there has been no valid determination of which districts have been precleared.").

2. Court-drawn plans must also comply with one person, one vote; satisfy the nonretrogression standard of section 5; and avoid diluting minority voting strength in violation of section 2 of the Voting Rights Act as amended.

The State has never contended that the interim plans in this case ran afoul of any of these requirements. Nor, indeed, could it.

a. The interim Congressional plan achieves near population equality, with a total overall deviation of 0.02%. J.A. xx. That tiny deviation was necessary, in an interim plan imposed "at the eleventh hour" because it was the only way to avoid splitting VTDs. J.A. xx. Similarly, the interim State House plan had a total overall deviation of 8.9% and spits only 8 VTDs. J.A. xx.

This Court has repeatedly held that judicially crafted plans "must be held to higher standards than a State's own plan" with respect to population deviations. *Chapman v. Meier*, 420 U.S. 1, 26 (1975); *see also, e.g., Connor v. Finch*, 431 U.S. 407, 417-19 (1977). Thus, the district court was not free, in crafting a court-drawn plan, to adopt the level of deviation – 9.9 percent – that the State adopted in its 2011 legislative plans. Indeed, as appellees have already explained, had the court here adopted a plan with such deviations, its plan would have constituted a "legislative" plan within the meaning of *McDaniel v. Sanchez* and would have required preclearance. The three-judge court properly avoided falling into that trap by adopting a plan that equalized population in multi-district counties and avoided excessive population deviations while also respecting precinct and county boundaries.

b. The interim plans avoided retrogression in Latino voting strength. Although court-drawn plans are not subject to the procedural requirement of

preclearance, this Court has repeatedly held that in fashioning their plans, federal courts drawing districts to govern elections in covered jurisdictions should comply with the nonretrogression principle embodied in section 5. *See, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 95-96 (1997); *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981). The interim judicial plans here comply with that principle. The district court's interim State House plan relies on the benchmark boundaries of House Districts 33 and 117 to preserve Latino voters' opportunity to elect their candidate of choice in those districts. J.A. xx. By contrast, the Legislature's State House plan eliminated HD 33 entirely and purposefully reconfigured the boundaries of HD 117 to seek out Anglo voters to protect an incumbent who is not the Latino-preferred candidate. In the interim Congressional plan, the district court followed the benchmark configurations of Congressional Districts 23 and 27 in order to preserve Latino voters' ability to elect their preferred candidates in those districts. J.A. xx.

c. The interim plans created additional Latino-opportunity Congressional and State House districts in compliance with section 2 of the Voting Rights Act as amended, 42 U.S.C. § 1973. In each instance, the new Latino-opportunity districts are compact and located in geographic areas of high population growth that already contain majority-Latino populations. J.A. xx. The district court's interim State House plan locates House District 35 in Cameron and Hidalgo counties to reflect the substantial population growth,

almost all of it Latino, in the Rio Grande Valley. J.A. xx. The interim plan's HD 78, in 80% Latino El Paso County, contains a majority of Latino registered voters and also provides Latino voters an opportunity to elect their preferred candidate. J.A. xx. In Harris County, where the Latino population grew by more than half a million, the interim plan includes an HD 144 in which Latinos comprise the majority of registered voters and have the opportunity to elect their preferred candidate. J.A. xx. Similarly, the district court's interim Congressional plan follows the lead of the Legislature and places one of Texas's new Congressional districts in South-Central Texas to alleviate the overpopulation of all six existing majority-Latino Congressional districts in this region and to provide Latino voters a new majority-Latino district. J.A. xx.

3. In its arguments to the district court and to this Court in its stay application, the State offered substantive objections to only a few districts in the court's interim plan. The basis for one objection is a claim that these districts reflect excessive race-consciousness on the part of the three-judge court. That objection is meritless.

Put simply, the State seems to suggest that every creation of a majority-non-Anglo district by a court crafting an interim plan is somehow suspect. That cannot be the law. To be sure, a court crafting an interim plan – like legislatures themselves – will normally be "*aware* of race when it draws district

lines." *Shaw v. Reno*, 509 U.S. 630, 646 (1993). But as long as the districts it draws comply with traditional districting principles such as equal population, compactness, contiguity, respect for subdivision boundaries and other preexisting lines, and with the dictates of the Voting Rights Act, the demographic composition of those districts should occasion no concern. In this case, the substantial intercensal growth in Latino population made it natural that a neutral, judicially crafted interim plan would contain at least a few new Latino districts. Indeed, given that 65% of the State's overall population growth is attributable to increases in the Latino population and that in some of the fastest growing regions in the State the population is overwhelmingly Latino, it would have been suspicious had the court's plan *not* resulted in the creation of some such districts.

In fact, as a result of this dramatic growth, to avoid developing districts with significant minority population concentrations would have required unnatural and suspicious district boundaries, like the ones found throughout both the State's Congressional plan and the Texas House plan. For example, the State's Congressional lines in Tarrant County and Dallas County demonstrate the contortions the State had to employ to avoid the natural consequences of the dramatic population growth within the Latino community of Texas. *See* J.A. xx. The record in the district court showed that the odd configuration of these districts involved an intentional attempt to

capture Latino and African American population and remove it into majority-Anglo districts. Kousser Report at 120-27.

Put simply, the question before this Court is not whether the Legislature's 2011 plans comply with federal law. One critical aspect of that question is now before the United States District Court for the District of Columbia in a separate lawsuit, and is therefore not properly presented by the case now before this Court. The remaining aspects of that question have not yet been adjudicated by the trial court and are therefore not properly before this Court in this case at this time. Nor is the question before this Court whether the State's 2011 plans do a better job of achieving the State's political policies than does the interim plan. An unbroken line of this Court's decisions precluded the three-judge court from mechanically implementing those policies in light of the current status of the 2011 legislative plans. The only question now before this Court is whether the interim court-drawn plan complies with federal constitutional and statutory requirements. It does.

CONCLUSION

For the foregoing reasons, the judgments of the United States District Court for the Western District of Texas should be affirmed.

Respectfully submitted,

NINA PERALES
Counsel of Record
Appellees Texas Latino Redistricting Task Force, et al.
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
110 Broadway Street, #300
San Antonio, TX 78205
Tel: (210) 224-5476
nperales@maldef.org

PAMELA KARLAN
Counsel for Appellee MALC
559 Nathan Abbott Way
Stanford, CA 94305
Tel: (650) 725-4851
karlan@stanford.edu

JOAQUIN G. AVILA
Counsel for Appellee MALC
P.O. Box 33687
Seattle, WA 98133
Tel: (206) 724-3731
avilaj@seattleu.edu

RICHARD E. GRAY, III
Counsel for Appellees Perez, et al.
GRAY & BECKER, P.C.
900 West Avenue
Austin, TX 78701
Tel: (512) 482-0061
rick.gray@graybecker.com

JOSE GARZA
Counsel for Appellee MALC
LAW OFFICE OF JOSE GARZA
7414 Robin Rest Drive
San Antonio, TX 78209
Tel: (210) 392-2856
garzpalm@aol.com

DAVID RICHARDS
Counsel for Appellees Perez, et al.
RICHARDS, RODRIGUEZ & SKEITH LLP
816 Congress Avenue, Suite 1200
Austin, TX 78701
Tel: (512) 476-0005
davidr@rrsfirm.com