Nos. 11-713, 11-714 and 11-715

In the Supreme Court of the United States

RICK PERRY, GOVERNOR, ET AL., APPELLANTS
v.
SHANNON PEREZ, ET AL.

RICK PERRY, GOVERNOR, ET AL., APPELLANTS
v.
WENDY DAVIS, ET AL.

RICK PERRY, GOVERNOR, ET AL., APPELLANTS
v.
SHANNON PEREZ, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE IN PART AND VACATUR IN PART

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the district court properly enjoined the State of Texas's proposed redistricting plans "unless and until" those plans are precleared pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether, having enjoined the State's unprecleared redistricting plans pursuant to Section 5, the district court should then have ordered those same redistricting plans into effect as "interim" plans.

3. Whether the district court adequately justified the ways in which its interim plans modify the plans currently in effect.

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INTEREST OF THE UNITED STATES

This case presents questions regarding interim redistricting plans that a court may adopt when a State has failed to obtain preclearance for its districting plans under Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973c. The United States has primary responsibility for enforcing Section 5. *Ibid.*; 42 U.S.C. 1973j(d). In parallel litigation, the United States is opposing appellant Texas's request for judicial preclearance of the state House and congressional plans. The United States also submitted statements of interest in the proceedings below.

STATEMENT

1. Section 5 of the VRA prohibits a covered jurisdiction from implementing a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining either judicial or administrative preclearance. 42 U.S.C. 1973c(a). A jurisdiction may seek judicial preclearance by bringing a declaratory-judgment action before a three-judge district court in the District of Columbia. Or it may obtain administrative preclearance from the Attorney General. 42 U.S.C. 1973c(a). A jurisdiction may also simultaneously seek both administrative and judicial preclearance. See App., *infra*, 1a-3a.

Under either procedure, the jurisdiction has the burden of demonstrating that the voting change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of" a prohibited ground. 42 U.S.C. 1973c(a). The "effect" prong precludes preclearance of voting changes that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral

franchise," measured against the jurisdiction's existing—or "benchmark"—practice. *Beer* v. *United States*, 425 U.S. 130, 141 (1976); see *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997). Subsections 5(b) and (d) make it clear that the retrogression prong is meant to prohibit changes from the benchmark plan that will, because of race, color, or membership in a language minority, "diminish[] the ability * * * to elect their preferred candidates of choice." 42 U.S.C. 1973c(b). The "purpose" prong precludes preclearance of voting changes motivated by "any discriminatory purpose." 42 U.S.C. 1973c(c).

Administrative preclearance is time-limited and designed for more expeditious processing. Private parties may submit information to the Attorney General concerning a submission, but are not participants in the administrative process. The Attorney General must object within 60 days after the submission of a proposed change (provided the submission contains sufficient information), or else the change is precleared automatically. 42 U.S.C. 1973c(a).[1] The Attorney General's decision to interpose no objection is unreviewable. *Morris* v. *Gressette*, 432 U.S. 491, 501-505 (1977). If the Attorney General objects, however, the jurisdiction may still seek judicial preclearance.

In a judicial preclearance action, private parties can intervene and may oppose voting changes that the Attorney General does not oppose. See *City of Richmond* v. *United States*, 422 U.S. 358, 366 (1975) (district court refused to preclear a plan submitted to the court by City

[1] If the submission does not contain sufficient information, the Attorney General may request additional information, but must then make a determination within 60 days after receiving complete information. 28 C.F.R. 51.37.

and Attorney General as a consent judgment, but opposed by an intervenor). With respect to either method of preclearance, "unless and until" a voting change is precleared, Section 5 bars the jurisdiction from implementing the change. 42 U.S.C. 1973c(a).

2. a. Texas has been covered by Section 5 since 1975. 28 C.F.R. Pt. 51 App. As this Court recently explained, "Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process." *LULAC* v. *Perry*, 548 U.S. 399, 439 (2006) (internal quotation marks omitted).

The 2010 Census showed that Texas's population had increased by nearly 4.3 million since 2000. Minorities accounted for the vast majority of the growth: the Latino population increased by 2,791,255, the African-American population by 522,570, and the white population by fewer than 465,000. The population changes required Texas to redraw its legislative and congressional districts and also entitled it to four new congressional seats, for a total of 36. J.A. 133-134.

b. Texas received redistricting data from the Census Bureau on February 17, 2011. Appellants' Br. 8. The Texas Legislature passed a redistricting plan for the state House of Representatives on May 2, 2011, and a plan for the state Senate on May 17, 2011. On June 17, 2011, one month after the Legislature passed the Senate plan, the Governor signed both bills. J.A. 167, 417. The State did not submit either plan for preclearance at that time. The Legislature passed a plan for Texas's congressional districts on June 24, 2011, and the Governor signed that bill on July 18, 2011. J.A. 134. The Legisla-

ture also enacted a plan for the State Board of Education (BOE).

Texas did not submit any of the four plans to the Attorney General for administrative preclearance. Instead, on July 19, 2011, more than a month after the Governor signed the redistricting plans for the Legislature, Texas sought judicial preclearance for all four plans. *Texas* v. *United States*, No. 11-cv-1303 (D.D.C.) (*Texas*). Texas "filed under the assumption that Section 5 complies with the United States Constitution," *Texas*, Docket entry No. 1, at 1, and has not challenged the constitutionality of Section 5.

The United States answered the complaint on September 19, 2011, the same day by which it would have responded to an administrative-preclearance submission. J.A. 637-647. The United States admitted that the State was entitled to preclearance of the BOE and Senate plans, but opposed preclearance of the House and congressional plans. J.A. 646. Additional defendants intervened, and some intervenors opposed preclearance of the Senate plan. *E.g.*, J.A. 630-631. Because no party opposed the BOE plan, the court precleared it. J.A. 549 n.1.

c. Early in the litigation, the United States suggested an expedited trial date on or after October 17, 2011. Texas initially suggested an even earlier trial date. See *Texas*, Docket entry No. 10, at 2 n.2 (Aug. 11, 2011). But the proceedings were diverted when Texas filed a summary-judgment motion on September 14.

In opposing Texas's motion, the United States contended that the House and congressional plans are discriminatory in both purpose and effect. J.A. 552-606. On the effect prong, the government's evidence showed that the House plan was retrogressive because it dis-

mantled several districts in which Hispanics were able to elect their candidates of choice, and reduced the number of minority ability-to-elect districts from 50 to at most 46. J.A. 561-575. The congressional plan resulted in nearly 500,000 fewer Hispanic voters living in ability-to-elect districts. J.A. 576-585. And both plans bore indicia of discriminatory purpose. J.A. 590-598. For instance, precincts were carefully split so that districts would include certain voters and exclude others; the *only* basis for distinguishing among voters at that level of intra-precinct detail was race, because political-performance data do not exist at that level. J.A. 592. And the redistricting process excluded minority representatives from participation. J.A. 594-595.

The D.C. district court unanimously denied the State's motion on November 8, 2011, six days after the motion hearing. The court concluded that the State had used an improper methodology to determine which districts afford minority voters the ability to elect their candidates of choice, precluding summary judgment on the plans' retrogressive effect. J.A. 550-551; see *Texas*, 2011 WL 6440006, at *12-*15 (Dec. 22, 2011). The court also denied summary judgment on purpose grounds, concluding that "Texas ha[d] failed to demonstrate that the Plans do not have the purpose of 'denying or abridging the right to vote on account of race or color.'" *Id.* at *21. Indeed, "Texas has not disputed many of the Intervenors' specific allegations of discriminatory intent." *Id.* at *22.

Trial is scheduled for January 17-26, 2012, with closing arguments on February 3, 2012.

3. The instant litigation consolidates numerous actions brought in the Western District of Texas that challenge Texas's redistricting plans under Section 2 of the

VRA, 42 U.S.C. 1973, and the Constitution. See J.A. 134-135. The district court held a trial on those claims, but indicated that it will not adjudicate them while the plans remain unprecleared. J.A. 95-96. The court has enjoined the State from implementing the plans until they have been precleared. J.A. 222-224; see J.A. 66.

On October 4, 2011, the court below ordered the parties to propose redistricting plans in the event it became necessary to adopt interim plans. J.A. 215-222. The State responded by urging the court to order the unprecleared plans into effect, unmodified. J.A. 280-291. On November 23 and 26, after receiving comments, the court adopted interim House, Senate, and congressional plans. J.A. 132-155, 166-204, 406-410. Judge Smith dissented from the House and congressional plans.

SUMMARY OF ARGUMENT

The fundamental object of Section 5 is to require a covered jurisdiction to obtain preclearance before a voting change may take effect. Appellants nonetheless seek immediate implementation of the enacted redistricting plans to govern the upcoming elections, even though those plans have yet to gain preclearance through the judicial-preclearance proceedings Texas opted to pursue. The terms of the statute, and this Court's decisions, foreclose appellants' argument.

I. Section 5 expressly bars implementation of a voting change "unless and until" the covered jurisdiction obtains administrative or judicial preclearance. When a local district court encounters a covered jurisdiction seeking to administer an unprecleared change, the court does not examine the likelihood that preclearance will be granted or assess the strength of the arguments for or against preclearance; nor does it leap forward to ad-

dress any non-Section 5 challenges to the proposed change before it is precleared. Instead, as long as the change is subject to Section 5 and has yet to gain preclearance, the local district court must enjoin it. That straightforward rule, this Court has explained, vindicates Congress's decision to make centralized, consistent review in the D.C. district court (or by the Attorney General) the exclusive method of determining the validity of a voting change under Section 5.

Here, accordingly, the district court properly enjoined Texas's plans pending preclearance. Appellants insist that the court should first have found a likely violation of law, but allowing the unprecleared maps to take effect would have violated Section 5 (and allowing the preexisting maps to remain in effect would have violated the Constitution's one-person-one-vote principle). Contrary to appellants' view, the court was not required to—indeed, was forbidden to—evaluate the merits of the competing positions in the pending preclearance proceeding. And that is true regardless of whether the State is actively pursuing preclearance or acting in good faith. A highly indeterminate test turning on the extent to which the State may be actively pursuing preclearance finds no support in the statute. Rather, Section 5 prescribes a bright-line rule: a voting change cannot take effect "unless and until" it is precleared.

II. Appellants cannot avoid the clear dictates of Section 5 by contending that the unprecleared plans should go into effect on an interim basis. There is no basis for allowing any temporary circumvention of the preclearance requirement, much less one of the magnitude appellants seek. Indeed, had the district court attempted to order the use of the unprecleared plans as the interim plans, its order would have been clearly reversible error

under this Court's decisions. *E.g.*, *Lopez* v. *Monterey County*, 519 U.S. 9, 22 (1996).

Appellants err in arguing to the contrary based on *Upham* v. *Seamon*, 456 U.S. 37 (1982) (per curiam). In that case, the Attorney General determined that the State had satisfied its burden under Section 5, except as to two districts. In that context, this Court held, a local district court's interim plan should not have disregarded aspects of the State's plan as to which the Attorney General determined the State had met its burden. Here, by contrast, Texas has yet to carry its burden, even in part. To the contrary, the D.C. district court before which Texas elected to proceed has found triable evidence of a violation of Section 5—including evidence that the plans as a whole reflect a discriminatory purpose.

Any requirement that courts implement unprecleared plans as interim plans would distort Section 5's incentive structure, which encourages prompt submission by precluding enforcement of unprecleared changes. Nor is appellants' rule necessary to discourage intervenors from delaying the preclearance process: there is no necessary reason that parties would always have an incentive to favor interim maps, and the preclearance process in any event includes built-in means of expedition. Those means include the time-limited process of administrative preclearance, which the State here chose to forgo altogether. Moreover, the State certainly is entitled to schedule the Nation's earliest 2012 congressional primary, to take the time it requires to consider and enact redistricting plans, and to seek summary judgment in the judicial-preclearance proceeding; but those choices—foreseeably—diminish the likelihood of a Section 5 determination before the scheduled elec-

tions, and thus heighten the need for court-created interim maps.

III. Because the district court was not required to use the State's unprecleared maps as the basis for the interim maps, it properly exercised its discretion in formulating interim plans. While the plans in substantial measure are justified by the need to avoid violations of the VRA while respecting State districting principles, the court should have further explained certain aspects of its interim House and congressional plans. As to the House plan, because the court's addition of three new ability-to-elect districts enabled it to avoid retrogression without also restoring all 50 of the preexisting minority ability-to-elect districts, it should have further explained its decision to do so. As to the congressional plan, the court should have given additional explanation of its reasons for drawing two of the State's four new seats as ability-to-elect districts while also restoring all of the preexisting ability-to-elect districts. Finally, while appellants are wrong in suggesting that coalition districts are categorically unprotected by the VRA, the district court failed to make the necessary predicate findings of cohesion among minority groups before including coalition districts in its plans. A remand to address these issues would be appropriate.

IV. Appellants argue that there is no time for a remand and this Court therefore should designate the unprecleared maps as the interim maps. Insofar as this Court is required to choose between either the State's unprecleared plans or the interim plans drawn below, it should select the latter. Even if the court-drawn plans may—pending further explanation—insufficiently adhere to state redistricting principles in certain respects, those plans are preferable to ones whose very use would

contravene Section 5's preclearance regime and whose content violates Section 5 in purpose and effect.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ENJOINED THE UNPRECLEARED PLANS AND DREW INTERIM PLANS

A. A Covered Jurisdiction May Not Enforce A Redistricting Plan Until That Plan Receives Preclearance

1. Section 5's fundamental object is to require covered jurisdictions to obtain judicial or administrative preclearance before enforcing voting changes. 42 U.S.C. 1973c(a). "A voting change in a covered jurisdiction 'will not be effective as la[w] until and unless cleared' pursuant to one of these two methods." *Clark* v. *Roemer*, 500 U.S. 646, 652 (1991) (brackets in original) (quoting *Connor* v. *Waller*, 421 U.S. 656, 656 (1975) (per curiam)).

Accordingly, "unless and until" a voting change is precleared, 42 U.S.C. 1973c(a), either the United States or an appropriate private plaintiff is "entitled to an injunction prohibiting implementation of the change." *Lopez* v. *Monterey County*, 519 U.S. 9, 20 (1996); *Clark*, 500 U.S. at 652-653; *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 572 (1969). Such an injunctive action is brought in the local district court, whereas a preclearance action may be brought only in the D.C. district court. See *id.* at 557-560.

When a plaintiff seeks to enjoin a change that has not been precleared, the local district court does not ask whether the change is likely to be precleared, or what the basis of a Section 5 objection might be; as this Court has repeatedly recognized, Congress has expressly denied local district courts jurisdiction to decide preclearance matters. 42 U.S.C. 1973*l*(b); see *Lopez*, 519 U.S. at 23-24; *McDaniel* v. *Sanchez*, 452 U.S. 130, 150-151 &

n.31 (1981); *United States* v. *Board of Supervisors*, 429 U.S. 642, 646 (1977) (per curiam); *Perkins* v. *Matthews*, 400 U.S. 379, 385-386 (1971). Indeed, until a change is precleared, any constitutional or other challenge to the merits of that change is premature. *Branch* v. *Smith*, 538 U.S. 254, 265-266 (2003) (vacating district court's alternative ruling that unprecleared plan was legally flawed); *id.* at 283-284 (Kennedy, J., concurring); *Connor* v. *Waller*, 421 U.S. at 656. Rather, the local district court is "limited to the determination whether a [voting] requirement is covered by § 5, but has not been subjected to the required federal scrutiny." *Board of Supervisors*, 429 U.S. at 645-646 (alteration in original; citation and internal quotation marks omitted). Until that "federal scrutiny" results in a preclearance determination, the change simply may not take effect, and the local district court must enjoin it.

2. The statute expressly provides that merely *submitting* a change for preclearance does not entitle the jurisdiction to put the change into effect. A covered jurisdiction seeking to implement a change may "institute an action" in the D.C. district court, but the change may not be implemented "unless and until the court enters * * * judgment" granting preclearance. 42 U.S.C. 1973c(a). Or the change may be "submitted * * * to the Attorney General," but it may not "be enforced" unless "the Attorney General has not interposed an objection within sixty days after such submission" or "affirmatively indicate[s] that such objection will not be made." *Ibid.* Indeed, the very purpose of the preclearance requirement is to "preserv[e] the status quo until the Attorney General or the courts have an opportunity to evaluate a proposed change." *Young* v. *Fordice*, 520 U.S. 273, 285 (1997).

Thus, if a change has not been precleared, it may not take effect—whether preclearance has been denied, is pending, or was never sought at all. See, *e.g.*, *Branch*, 538 U.S. at 265-266 (affirming injunction issued after State sought preclearance). Local district courts asked to enjoin an uncleared plan are not to adjudicate constitutional or VRA challenges to the plan, because the plan may never take effect and because premature review of its merits in a local district court risks improperly interfering with the preclearance process in the D.C. district court. *Ibid.* As Justice Kennedy has explained:

> To be consistent with the statutory scheme, the district courts should not entertain constitutional challenges to nonprecleared voting changes and in this way anticipate a ruling not yet made by the Executive. The proposed changes are not capable of implementation, and the constitutional objections may be resolved through the preclearance process.

Id. at 283-284 (Kennedy, J., concurring); see *Board of Supervisors*, 429 U.S. at 646-647.

3. Appellants therefore err in asserting (Br. 48-50) that an injunction pending preclearance may issue only if the jurisdiction has been "recalcitrant." Section 5 makes no such subjective distinctions. See *Branch*, 538 U.S. at 265-266 (affirming injunction against change that was promptly submitted for preclearance).[2] The obligation to obtain preclearance before enforcing a voting change does not turn on the purity of the State's motives or the substance of the change. See *Young*, 520 U.S. at 284-285.

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[2] Even *Lopez*, on which appellants rely, did not turn on the jurisdiction's recalcitrance. See, *e.g.*, 519 U.S. at 24 (local district court bore partial responsibility).

Appellants nonetheless repeatedly assert (Br. 4, 27-28, 30, 35) that they are entitled to a "presumption of good faith," but they pull that phrase from a case that did not involve Section 5. *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995). Under Section 5, a covered jurisdiction seeking preclearance must *affirmatively establish* that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote" protected by the VRA. 42 U.S.C. 1973c(a); see, *e.g.*, *Georgia* v. *Ashcroft*, 539 U.S. 461, 471 (2003); *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 469 (1987). Seeking preclearance is a necessary first step in that determination, but is only a first step.

Moreover, appellants' suggestion (Br. 49, 52) that state law take effect "on an interim basis" based on how "actively" the jurisdiction is litigating is unworkable. Merely seeking preclearance plainly is not enough; even the jurisdiction in *Lopez* filed a preclearance action, but later abandoned it, 519 U.S. 15-16, behavior appellants (Br. 49) call "recalcitrant." Nor would it make sense for the enforceability of state law to vary from day to day, based on federal judges' assessment of how fast a jurisdiction's lawyers answer interrogatories or produce documents. Section 5 itself provides no explicit timeframe for seeking preclearance precisely because a change cannot be enforced unless and until it is precleared. Section 5's text prescribes a readily administrable, bright-line rule: either a voting change has been precleared, or it has not.

B. Pending An Enforceable State Redistricting Plan, Federal Courts May Draw An Interim Plan To Effectuate The Constitutional "One Person, One Vote" Guarantee

Legislative districts must be adjusted following the decennial census to comply with the constitutional rule of "one person, one vote." See, *e.g.*, *Georgia*, 539 U.S. at 488 n.2. When (for example) a covered jurisdiction fails to obtain preclearance for new districts, the duty of adopting an interim remedy for the one-person-one-vote violation falls to the federal courts. See, *e.g.*, *Branch*, 538 U.S. at 261-262; *LULAC* v. *Perry*, 548 U.S. 399, 415 (2006) (opinion of Kennedy, J.); see also *Growe* v. *Emison*, 507 U.S. 25, 36-37 (1993).

That is a difficult and "unwelcome obligation," *Connor* v. *Finch*, 431 U.S. 407, 414-415 (1977), but the federal courts undertake it to ensure that elections will go forward in compliance with the Constitution. See *Branch*, 538 U.S. at 272. Indeed, they do so only once it becomes clear that no state-enacted map will take effect in time. *Growe*, 507 U.S. at 34. And any court-drawn map is superseded if a state-drawn map is later adopted and precleared. *LULAC*, 548 U.S. at 416 (opinion of Kennedy, J.).

C. The District Court Properly Enjoined The State's Plans Pending Preclearance And Prepared Interim Plans In Case The State's Plans Are Not Precleared In Time

None of the three enacted plans in this case has been precleared. As a result, enforcing those plans would violate Section 5, and the district court was required to enjoin them. J.A. 66, 222-224.

With the State's plans not yet enforceable, the districts from the previous decade remain on the books. Because of variable population growth, those districts

violate the constitutional one-person-one-vote principle. Accordingly, it was the local district court's "unwelcome" responsibility to prepare interim plans.

Appellants contend repeatedly that the district court should not have diverged from the State's proposed—but unprecleared—maps without finding a likely violation of federal law. But the court *did* act to prevent both a VRA violation and a constitutional violation: allowing the State's unprecleared maps to take effect would violate Section 5, and holding the 2012 elections in last decade's malapportioned districts would violate the Constitution. Under numerous decisions of this Court, the local district court was required to enjoin the unprecleared plans without purporting to predict whether the changes will eventually pass muster under Section 5 or any other provision. See pp. 11-14, *supra*.

Appellants contend (Br. 50-51) that it would be "absurd" for district courts to enjoin unprecleared voting changes and to adopt interim relief while preclearance is pending, without making at least a "*preliminary* assessment" of the voting change's alleged flaws. But Section 5, by requiring that *every* change secure preclearance and by dividing enforcement responsibility between local and D.C. district courts, precludes local courts from denying injunctive relief based on a prediction—"preliminary" or otherwise—about what the D.C. district court or the Attorney General will, or should, do. "[O]nly the [D.C. district court] has jurisdiction to consider the issue of whether a proposed change actually discriminates on account of race" in violation of Section 5. *Board of Supervisors*, 429 U.S. at 646. And Congress had sound reasons for confining the jurisdictional grant to that court: providing "centralized review" to ensure "that recurring problems will be re-

solved in a consistent and expeditious way." *Lopez*, 519 U.S. at 23 (quoting *McDaniel*, 452 U.S. at 151).

Thus, in *Branch*, the local district court enjoined a state plan that had been submitted for preclearance and drew its own plan. This Court affirmed, purely on the "ground that the state-court plan had not been precleared and had no prospect of being precleared in time for" the filing deadline. 538 U.S. at 265; see *id.* at 258. On appellants' theory, the injunction was improper unless the private plaintiffs in the local district court had demonstrated some likely legal flaw in that plan. That is not what the Court held. To the contrary, it *vacated* the district court's alternative ruling that the state plan was constitutionally flawed. *Id.* at 265-266.

Furthermore, requiring private plaintiffs seeking a Section 5 injunction in a local district court to show that *the Attorney General* will likely succeed on the merits in the D.C. district court—where those plaintiffs may not even be parties—hardly fits with the standard principles of equity that appellants seek to invoke, much less with Section 5. Indeed, as four Members of the Court pointed out in *Branch*, the constitutional flaws of an unprecleared plan "could not cause [private plaintiffs] injury" until the plan is precleared. 538 U.S. at 284 (Kennedy, J., concurring). Instead, the only injury that plaintiffs need establish is that a covered jurisdiction is seeking to enforce a voting change without obtaining preclearance.

II. THE DISTRICT COURT WAS NOT REQUIRED TO ADOPT THE STATE'S UNPRECLEARED PLANS

While Texas's plans therefore cannot go into full effect until they are precleared, appellants urge (Br. 54-55) that the district court should have adopted Texas's plans on an "interim" basis. And they urge this Court to

order the unprecleared districts into effect, *in toto*, despite the substantial Section 5 objections already raised by the Attorney General and appellees. That contention is unprecedented, and it is wrong. *Pre*-clearance comes before effectiveness, not after. Only after the preclearance question has been adjudicated does "deference" to the State's enacted plan come into play. If the State carries its burden and gains preclearance, the State's plan takes effect; if the State carries its burden only as to some parts of the plan, those parts may be incorporated into a remedial plan that corrects the identified Section 5 violation; if, as here, the State has yet to carry its burden either in whole or in part, its plan remains unenforceable.[3]

A. When Preclearance Is Pending, The State May Not Demand That The Court Order Its Plan Into Effect On An Interim Basis

Section 5's preclearance requirement applies whether the voting change is temporary or permanent. See 42 U.S.C. 1973c(a); *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 501 (1992) ("[A]ll changes in voting must be precleared"); *Young*, 520 U.S. at 283-285. A State may not circumvent the preclearance requirement by claiming that it wants to change the election rules only temporarily. Here, moreover, the magnitude of the proposed voting change—even if temporary in duration—bears emphasis. Texas seeks temporarily to avert preclear-

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[3] Because the district court was not required to defer to the State's maps, it also was not required to defer to the State's desired population deviations between districts, as appellants argue (Br. 61-62). When drawing a districting plan, federal courts are required to achieve de minimis population deviations. *Chapman* v. *Meier*, 420 U.S. 1, 23, 27 (1975).

ance of three statewide redistricting plans covering elections to over 200 federal and state legislative seats, each potentially involving party primaries and runoffs. And needless to say, the results of those elections can have profound and lasting implications for the makeup of the State's legislative delegations and the content of the State's laws.

At any rate, any voting change by a covered jurisdiction, regardless of its significance, may not be given effect—on an interim basis or otherwise—unless and until it is precleared. Accordingly, this Court has held that a covered jurisdiction cannot put its voting change temporarily into effect by securing a court order from a local district court. Although a remedial order crafted by a federal district court need not be precleared, *Connor* v. *Johnson*, 402 U.S. 690, 691 (1971) (per curiam), a voting change crafted by the jurisdiction and entered by the court remains the jurisdiction's handiwork and, as such, is unenforceable unless precleared. *Lopez*, 519 U.S. at 22; *McDaniel*, 452 U.S. at 153; 28 C.F.R. 51.18(a). A jurisdiction "seek[s] to administer" a voting change and thus triggers Section 5, 42 U.S.C. 1973c(a), when it asks a court to order the change. *McDaniel*, 452 U.S. at 146; accord *Hathorn* v. *Lovorn*, 457 U.S. 255, 265 n.16 (1982); cf. *Branch*, 538 U.S. at 264-265. The Court adopted that reading of Section 5 in light of the "basic purposes of the statute"—to prevent covered jurisdictions from putting changes into effect until after "specialized review." *McDaniel*, 452 U.S. at 147-149, 151.

If the district court had done what appellants asked—enter the redistricting plans drawn by the Texas Legislature as interim remedial plans—that order would have been clearly reversible error under *Lopez* and

McDaniel. The district court thus plainly did not abuse its discretion by declining to do so.

B. Deference To Texas's Unprecleared Plans Is Unwarranted Until Texas Carries Its Burden Under Section 5, At Least In Part

For the proposition that the district court was *required* to base its interim plans on Texas's unprecleared plans, appellants rely (Br. 34-40) almost entirely on *Upham* v. *Seamon*, 456 U.S. 37 (1982) (per curiam). *Upham* has no application here.

1. *Upham* involved Texas's 1981 reapportionment of congressional districts. Texas submitted its enacted plan to the Attorney General for administrative preclearance, and the Attorney General interposed an objection. 456 U.S. at 38; see App., *infra*, 4a-7a. The objection was based solely on the configuration of two contiguous districts in south Texas; the Attorney General specifically concluded that the State had otherwise "satisfied its burden of demonstrating that the submitted plan is nondiscriminatory in purpose and effect." 456 U.S. at 38 (quoting App., *infra*, 5a)).

The plan remained unenforceable based on the Attorney General's objection. A local district court adopted an interim plan, based on the State's enacted plan in all but two respects: the court remedied the Attorney General's concerns about the south Texas districts, and it also redrew districts in Dallas County to which the Attorney General had raised no objection. 456 U.S. at 38.

This Court reversed. It explained that courts drawing districts must "defer[] to state apportionment policy" to the extent consistent with the Constitution and federal statutes. 456 U.S. at 41-43. In the context of preclearance, the Court held, "[w]e have never said that

the entry of an objection by the Attorney General to any part of a state plan grants a district court the authority to disregard aspects of the legislative plan not objected to by the Attorney General." *Id.* at 43. The Court concluded that, "in the absence of any objection to the Dallas County districts by the Attorney General," or any other finding of a "constitutional or statutory violation with respect to those districts," the district court should not have "disregard[ed] the political program of the Texas State Legislature." *Ibid.*

The Attorney General's conclusion that Texas had satisfied its Section 5 burden in substantial part was central to this Court's decision. The Court confirmed that the district court properly refused to defer to the portions of the State's plan to which the Attorney General objected. See 456 U.S. at 40-41, 43, 44. But because the Attorney General concluded that Texas had satisfied its burden with regard to Dallas County, there was nothing to remedy, and the scope of the district court's remedial discretion was irrelevant. *Id.* at 43.

2. Here, by contrast, Texas has not been found to carry its burden under Section 5, even in part. Because Texas elected to forgo administrative preclearance, the Attorney General has not been given the opportunity to object (whether to certain districts, as in *Upham*, or more broadly). And the D.C. district court has not held in Texas's favor on either prong of Section 5. To the contrary, the D.C. district court has unanimously *denied* Texas's motion for summary judgment and found sufficient evidence of invidious purpose and retrogressive effect to warrant a trial. See p. 6, *supra*.

The evidence of invidious purpose (see p. 6, *supra*) is particularly significant. The State acted in ways consistent with a focus on race, and the outcome of that race-

focused process was a significantly discriminatory effect on minority voters—not just in particular districts, but as a whole. Compare *Upham*, 456 U.S. at 40 (requiring deference only as to particular districts as to which there was no "constitutional or statutory violation"). For instance, while minorities accounted for most of Texas's population growth, *none* of Texas's new congressional seats was drawn in a way that could augment minorities' voting power. The D.C. district court agreed that the government's evidence to that effect could "provide significant circumstantial evidence" of discriminatory purpose. *Texas*, 2011 WL 6440006, at *21.

3. The district court's map is an interim plan, and the district court remains able to modify it as circumstances warrant. In considering such modifications, the court could defer under *Upham* to the extent the D.C. district court makes the requisite findings—*e.g.*, that Texas's plans are not infected by discriminatory purpose, and that at least in part, they are not retrogressive in effect.

C. Allowing State Plans To Take Effect Without Preclearance Would Create An Incentive To Stall Section 5 Proceedings

Allowing the State to demand deference *before* it carries its Section 5 burden would fundamentally distort the incentive structure of Section 5. Permitting the interim use of an unprecleared change "would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election." *Lucas* v. *Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers). If changes could be ordered into effect without preclearance, cov-

ered jurisdictions would lose much of their incentive to cooperate with the preclearance process and bring it to prompt resolution.

Appellants get this point precisely backwards. They argue (Br. 47-48) that Texas should be able to implement its map while preclearance is pending, to discourage intervenors from slowing down the preclearance process. But intervenors will not inexorably prefer a court-imposed interim plan—they may instead favor an expeditious outcome in the preclearance process in different circumstances. In any event, the preclearance process already provides for sufficient expedition, and in this case, any conflict between the D.C. district court's schedule and the Texas filing deadline is attributable in certain measure to Texas's own choices.

1. The preclearance process includes built-in means of expedition

Covered jurisdictions have the "expeditious" option of administrative preclearance. *Morris* v. *Gressette*, 432 U.S. 491, 504 (1977); see *Branch*, 538 U.S. at 283 (Kennedy, J., concurring). The Attorney General's review is limited to 60 days, with only a single extension permitted when more information is needed. *Branch*, 538 U.S. at 263-264. Covered jurisdictions also may request expedited consideration, 28 C.F.R. 51.34, and nonparties cannot extend the deadlines. This year alone, the Attorney General has precleared 20 statewide redistricting plans; in only one case did he require more than the initial 60-day period. See App., *infra*, 1a-3a.

Second, even if covered jurisdictions opt for judicial preclearance, they can seek administrative preclearance simultaneously. See App., *infra*, 1a-3a (States sought both forms of preclearance for 14 statewide redistricting

plans this year, and all were administratively precleared). Indeed, Texas appended to its preclearance complaint materials consistent with a Section 5 submission. But because Texas did not actually submit the plans administratively, the Attorney General could not grant administrative preclearance. See *McCain* v. *Lybrand*, 465 U.S. 236, 249 (1984); 28 C.F.R. 51.26(d).

Third, even in judicial-only preclearance proceedings, and even if multiple parties intervene, the D.C. district court has ample authority to ensure that the case proceeds and the necessary fact development takes place with appropriate dispatch. See, *e.g.*, Fed. R. Civ. P. 16(b)(3), 26(a)(1)(C), (a)(2)(D), (b)(2), (d) and (f).

2. Appellants are not free from responsibility for the timing of the proceedings in the D.C. district court

a. The facts of this case illustrate why appellants are incorrect in contending that delays in obtaining preclearance justify *excusing* the need for preclearance, at least temporarily. Appellants contend that using a court-drawn map for state Senate elections is an "absurdity" (Br. 46-47), largely because the Attorney General (unlike appellees) does not object to the State's map, *e.g.*, J.A. 553 n.1. But Texas never submitted the Senate plan for administrative preclearance—which would have ensured preclearance if the Attorney General did not object.

Texas insisted on seeking preclearance *only* in the D.C. district court. If Texas wanted to preserve its option to seek judicial preclearance, it could have pursued both preclearance avenues simultaneously, as numerous other States have done this year alone; the judicial-preclearance action becomes moot when the Attorney General does not interpose an objection and the plan is

precleared. See App., *infra*, 1a-3a. But by seeking *only* judicial preclearance, Texas assumed the risk that the time necessary to obtain a judgment would exceed the time remaining before the scheduled filing deadlines.

b. Texas's own choices have contributed to the tight gap between the preclearance action and the deadlines for candidates to file. The State received the necessary census data in February 2011, but did not pass the first of the three plans until May 2011 (and the last until June 2011). The Governor then waited six weeks to sign the House plan into law and a month to sign the Senate plan. The State did not begin seeking preclearance for another month, after the Governor signed the congressional plan. By that point it was mid-July, only a few months ahead of the filing deadline.

As Judge Smith noted, J.A. 130, 184, Texas holds "extremely early" primaries—the earliest 2012 primaries in the Nation, as originally set. See Roll Call, *Primary Calendar for 2012 House and Senate Races*, http://innovation.cq.com/pub/table/index.php?id=87 (last visited Dec. 23, 2011) (*Calendar*). Filing was to begin in mid-November 2011, nearly a year before the general election. J.A. 99 n.6. Hoping to avoid the need to implement an interim plan, the district court first extended the filing deadline, J.A. 211, and has now postponed the primary and primary runoff elections as well, J.A. 82-87. But even as postponed, Texas's runoff elections will occur on June 5, 2012, J.A. 87; more than half of the States—and 11 of the 15 other covered States—hold their primaries *after* that date. See *Calendar*, *supra*.

Moreover, once Texas filed its judicial-preclearance action, it backed away from its initial proposal to hold a trial in October. See p. 5, *supra*. Instead, it sought summary judgment on all four plans. The government

answered and, *inter alia*, took the position that the House plan had (and the congressional plan appeared to have) a prohibited purpose, J.A. 613, 620, an issue very difficult to resolve on summary judgment, as this Court has explained. See *Hunt* v. *Cromartie*, 526 U.S. 541, 552-553 (1999).[4] The court then inquired whether Texas might therefore consider withdrawing its summary-judgment motion and proceeding directly to trial. J.A. 922-923. Texas declined, and predictably, the court denied summary judgment, in part because "Texas ha[d] failed to demonstrate that the Plans do not have the purpose of 'denying or abridging the right to vote on [prohibited grounds].'" *Texas*, 2011 WL 6440006, at *21; see J.A. 549-551.

3. Any concern that the interim plan would become the benchmark in the preclearance proceedings is unfounded

Appellants suggest (Br. 47-48) that litigants will stall preclearance in the hopes that a local district court will impose an interim plan and then make that plan the new benchmark in the preclearance proceeding. That concern is unfounded.

Retrogression, for purposes of Section 5, measures a voting change against the "benchmark" practice currently in force or effect, generally the last practice precleared under Section 5 or a practice imposed by a court's remedial order. *City of Lockhart* v. *United States*, 460 U.S. 125, 132-133 (1983); 28 C.F.R. 51.54(c). This Court has yet to consider whether or when an *in-*

[4] Out of the 24 statewide plans the government has addressed in administrative or judicial proceedings since the 2010 census, the government has raised a challenge only to the Texas House and congressional plans. App., *infra*, 1a-3a.

terim districting plan ordered by a federal court while preclearance is pending may become the benchmark for Section 5 purposes. On the facts of this case, it would not.

The D.C. district court has set the preclearance case for trial on the assumption that the baselines are the plans Texas used in the last election cycle. *Texas*, Docket entry No. 114, at 5 (Dec. 12, 2011). And the local district court's plan, in any event, is no longer in effect in light of this Court's stay. At this point, on the eve of trial, the D.C. district court is fully justified in closing the record and providing that the baseline has been set.

Nor would a court-ordered, interim plan generally become the baseline against which *future* legislative plans would be judged under Section 5, at least insofar as the plan in fact remains an "interim" plan rather than one intended to remain in force indefinitely. In this case, the district court expressly noted that its plans were "interim" plans designed to last only until the State's plans come out of the preclearance process, or to govern the 2012 elections if those plans are not precleared in time. J.A. 99, 123, 157. Courts have sufficient discretion when fashioning an equitable remedy to ensure that their issuance of an interim plan brings about no essential unfairness with respect to pending or future preclearance proceedings. See, *e.g.*, *Johnson* v. *Miller*, 929 F. Supp. 1529, 1562 (S.D. Ga. 1996) (ordering interim districting plan and stating that "plan cannot be used as a benchmark against which to measure any future plan for nonretrogression"); accord *White* v. *City of Belzoni*, 854 F.2d 75, 76 (5th Cir. 1988). Accordingly, fears about the benchmark afford no justification for disregarding Section 5 and ordering the State's unprecleared plan into effect.

D. Appellants Cannot Justify Adopting The Unprecleared Plans As "Emergency" Measures

Appellants contend that a regulation implementing the VRA authorizes the interim use of its plan without preclearance. The pertinent regulation states:

> *In emergencies*. A Federal court's authorization of the emergency interim use without preclearance of a voting change does not exempt from section 5 review any use of that practice not explicitly authorized by the court.

28 C.F.R. 51.18(d). That regulation is of no help to appellants, for two reasons.

First, the regulation does not itself exempt *anything* from Section 5 review; it states only that, when a court purports to do so, that authorization will be read as narrowly as possible. And the regulation is not addressed to redistricting plans in particular; rather, it applies to a court-ordered "emergency interim use" of voting changes generally. Here, the regulation does not come into play because appellants did not succeed in asking the court below to exempt their map from preclearance; and nothing in the regulation suggests that a district court is ever *required* to enter the type of order about which appellants speculate.[5]

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[5] The sole case appellants cite, *Johnson* v. *Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996), does not advance appellants' position. In that case, the district court, having found one Florida congressional district unconstitutional, directed the Florida Legislature to revise the district boundaries by a date certain. The court said that it would review the plan for compliance with Section 5 and, if satisfied, order the plan into effect without preclearance. *Id.* at 1494. The court never did so, however: after the legislature enacted a new plan, the Attorney General precleared it, and then the district court, properly, found the con-

Second, the regulation by its terms applies to "emergencies." But the conflict between the preclearance proceeding and the Texas filing deadline was entirely foreseeable, and in fact foreseen. The district court prepared for it by soliciting the input of interested parties and nonparties. The availability of an alternative (indeed, numerous alternatives) *not* drawn by the State, and thus not requiring preclearance, forecloses appellants' "emergency" argument. Cf. *Clark*, 500 U.S. at 654-655 (declining to decide whether a court could ever permissibly "allow an election for an unprecleared seat to go forward," but observing that an "extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed").[6]

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stitutional violation remedied. *Johnson* v. *Mortham*, No. 4:94-CV-40-025, 1996 WL 297280, at *1 (N.D. Fla. May 31, 1996).

[6] Appellants also err in relying on 2 U.S.C. 2a(c). That statute provides default rules for electing Members of Congress "[u]ntil a State is redistricted in the manner provided by the law thereof." 2 U.S.C. 2a(c). In *Branch*, a plurality read that condition to be satisfied when a federal court redistricts the State. 538 U.S. at 274-275. Contrary to appellants' suggestion (Br. 53 n.10), the *Branch* plurality did not presume that federal courts would adopt state plans wholesale—indeed, the order affirmed in *Branch* did not do so. Rather, federal courts' interim plans will be based on the "policies and preferences of the State" consistent with the Constitution and federal law, 538 U.S. at 274 (citation omitted), just as the interim plans in this case are based on plans originally adopted by the Texas Legislature and Legislative Redistricting Board, as modified by federal courts. See J.A. 101, 103-104, 139, 147-148; Task Force Br. 9, 14.

III. THE DISTRICT COURT PROPERLY EXERCISED DISCRETION IN DRAWING AN INTERIM PLAN, BUT SHOULD HAVE EXPLAINED CERTAIN CHOICES

Because the district court was not required to adopt Texas's enacted plan as the basis for its interim remedy, the court had substantial discretion in formulating its own plan. This Court has laid out several principles to guide that discretion. See, *e.g.*, *Connor* v. *Finch*, 431 U.S. at 414-415. Although, as appellants emphasize, deference to well-established state districting criteria is one such principle, that consideration must be balanced against the need to ensure that the court's plan complies with Sections 2 and 5 of the VRA. Those sections justify many of the district court's line-drawing choices to which appellants object. Certain aspects of the House and congressional plans, however, warrant a more detailed explanation and merit a remand. With respect to the Senate plan, because appellants raise no specific challenges except their overarching argument for deference to an unprecleared plan, the district court's ruling should be affirmed.

A. The District Court Did Not Adequately Explain The Addition Of New Minority Ability-To-Elect Districts

The district court's House plan restored all 50 minority ability-to-elect districts from the benchmark plan and also added three new minority ability-to-elect districts. J.A. 119, 173. The court, however, disclaimed reliance on Section 2, J.A. 107, stating that it drew the three new ability-to-elect districts based purely on the locations of population growth. But because the court added those three new districts, it could have avoided retrogression without restoring all 50 of the benchmark's ability-to-elect districts. The court should have

explained in greater detail why, in light of traditional state districting criteria and shifts in population, it restored all 50 of the ability-to-elect districts from the benchmark plan, particularly given appellants' objection (Br. 59-60) that restoring those districts resulted in a breach of Texas's race-neutral requirement to respect county lines.

With respect to the congressional plan, the district court appears to have concluded that Section 5 required at least two of Texas's four new seats to be ability-to-elect districts. J.A. 150 n.32; see J.A. 142, 146. That reasoning was inadequate. The government has contended in the judicial-preclearance action that facts unique to this redistricting cycle in Texas—in which the State actually *decreased* in absolute terms the number of minorities who live in ability-to-elect congressional districts notwithstanding the substantial (and disproportionate) growth in the minority population—warrant finding Texas's plan retrogressive even if it contains the same bare number of ability-to-elect districts as the benchmark. J.A. 578-585. The D.C. district court has held, however, that the record does not establish that the congressional plan is retrogressive in effect (though the same facts remain relevant to the purpose inquiry). *Texas*, 2011 WL 6440006, at *20-*21. And the district court here did not explain the basis for its apparent belief that Section 5 required it to draw two new ability-to-elect districts *and* to restore all the existing ability-to-elect districts.

The district court also did not justify the new districts based on the need to comply with Section 2. When appropriate findings are made, that provision may require a court-drawn plan to include a new district giving minorities the opportunity to elect candidates of their

choice. See *Abrams* v. *Johnson*, 521 U.S. 74, 90-91 (1997).

Because the district court may be able to justify its actions with more detailed findings, a remand on these issues is appropriate.

B. The District Court Did Not Lay A Sufficient Foundation For The Use Of Coalition Districts

Contrary to appellants' arguments (Br. 58-59), the district court correctly concluded that under certain circumstances, the VRA protects "coalition districts" in which two racial-minority groups together would form a numerical majority in a district. The court, however, did not lay the necessary foundation for drawing coalition districts.

The text of Section 5 makes no distinction between discrimination on the basis of one race or two. Indeed, when Congress extended Section 5 in 1975 to cover Texas (and other jurisdictions), it noted the State's history of discriminating against *both* African-Americans and Hispanics. S. Rep. No. 295, 94th Cong., 1st Sess. 25-28 (1975). Thus, there is no reason to think that Congress would have considered a coalition ability-district to be unprotected by Section 5.

On this point, appellants say nothing about Section 5 but assert (Br. 58 n.11) that this Court's cases "suggest[]" that Section 2 does not protect coalition districts. That is incorrect. This Court in *LULAC* recognized "the long history of discrimination against Latinos and Blacks in Texas," including "an all-white primary system." 548 U.S. at 439 (citation omitted). A coalition of African-American and Hispanic citizens of Texas could have challenged such practices as a group. By the same token, if a districting plan dilutes the voting strength of

non-Anglo citizens, those citizens may challenge the plan together.[7]

That is not to say, of course, that any coalition of different minority groups living in proximity is entitled under Section 2 to join forces in creating a minority-opportunity district. A coalition of minorities must demonstrate that they are "politically cohesive" and that Anglo citizens "vote[] sufficiently as a bloc" to defeat their unified choice. *Thornburg* v. *Gingles*, 478 U.S. 30, 49-51 (1986). Here, the district court made no findings establishing that the conditions for treating minorities as a single coalition have been met. Thus, insofar as the district court ordered coalition districts for the purpose of complying with Section 2 or Section 5—rather than simply drawing a district based on population growth that happens to be multiethnic—its analysis was inadequate.

IV. IF EXIGENT CIRCUMSTANCES PRECLUDE A REMAND, THE ORDERS SHOULD BE AFFIRMED

Appellants contend that the exigencies of timing demand that Texas's maps be designated the interim maps forthwith. But no such exigencies—especially exigencies that result in part from Texas's own choices—could justify giving effect to uncleared maps in contravention of Section 5. Whereas appellants have *not* shown that the district court's interim maps would violate Section 5, Section 2, or the Constitution, Texas's House and congressional maps violate Section 5 in both purpose and effect. The House and congressional maps also appear to violate Section 2; the congressional map dismantles

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[7] *Bartlett* v. *Strickland*, 129 S. Ct. 1231 (2009), reserved this question. *Id.* at 1242-1243 (plurality opinion). *Bartlett* considered whether minority voters can form a cognizable coalition with *white* voters.

former District 23 and denies Hispanic voters the opportunity they previously enjoyed, as a result of this Court's decision in *LULAC*, to elect a candidate in that district.

Appellants seek (Br. 54-55) to put this Court to a binary choice: the State's maps, or the district court's. If the choice is between an unprecleared map that actually violates the VRA, and a map drawn by federal judges that may (pending further explanation) be insufficiently sensitive to state redistricting principles, the choice is clear: Section 5 exists precisely to ensure that discriminatory, retrogressive voting changes—like the Texas House and congressional plans—are caught before they ever go into effect.

CONCLUSION

In No. 11-714, the order of the district court should be affirmed. In Nos. 11-713 and 11-715, the orders of the district court should be vacated and the cases should be remanded for further proceedings. In the alternative, the orders should be affirmed.

Respectfully submitted.

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DECEMBER 2011

APPENDIX A

Status of requests for preclearance of statewide redistricting plans, 2011

1. Administrative preclearance

(* indicates jurisdiction contemporaneously filed declaratory-judgment action)

State	Body	Administrative review		
		Submitted	Completed	Outcome
Alabama	Congressional*	09/21/11	11/21/11	No objection
	Board of education*	09/21/11	11/21/11	No objection
Alaska	Senate	08/09/11	10/11/11	No objection
	House of Representatives	08/09/11	10/11/11	No objection
California	Congressional	11/16/11	Under review	Pending
	Senate	11/16/11	Under review	Pending
	Assembly	11/16/11	Under review	Pending
	Board of Equalization	11/16/11	Under review	Pending

Georgia	Congressional*	10/24/11	12/23/11	No objection
	Senate*	10/24/11	12/23/11	No objection
	House of Representatives*	10/24/11	12/23/11	No objection
Louisiana	Congressional	06/02/11	08/01/11	No objection
	Senate	04/28/11	06/28/11	No objection
	House of Representatives*	04/21/11	06/20/11	No objection
	School board	06/07/11	08/08/11	No objection
	Public Service Commission	05/31/11	08/01/11	No objection
North Carolina	Congressional*	09/02/11	11/01/11	No objection
	Senate*	09/02/11	11/01/11	No objection
	House of Representatives*	09/02/11	110/01/11	No objection
South Carolina	Congressional*	08/31/11	10/28/11	No objection
	Senate*	07/27/11	11/14/11	No objection
	House of Representatives*	08/09/11	10/11/11	No objection

South Dakota	Senate	11/22/11	Under review	Pending
	House	11/22/11	Under review	Pending
Virginia	Senate*	05/11/11	06/17/11	No objection
	House of Delegates*	05/11/11	06/17/11	No objection

2. Declaratory-judgment actions

(without submission for administrative preclearance)

State	**Body**	**Declaratory-judgment action**		
		Filed	Decision	Outcome
Michigan	Congressional	11/03/11		Pending
	Senate	11/03/11		Pending
	House of Representatives	11/03/11		Pending
Texas	Congressional	07/19/11		Pending
	Senate	07/19/11		Pending
	House of Representatives	07/19/11		Pending
	Board of Education	07/19/11	09/22/11	Granted

APPENDIX B

[Seal Omitted]

U.S. Department of Justice
Civil Rights Division

Washington, D.C. 20530

Office of the Assistant Attorney General

WBR:GWJ:CWJ:PFH:ELG:bhq
DJ 166-012-3
E0840

[29 JAN 1982]

Honorable David Dean
Secretary of State
Elections Division
P.O. Box 12887
Austin, Texas 78711

Dear Mr. Secretary:

This is in reference to Senate Bill No. 1 (1981) which provides for the Congressional Districts for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was completed on December 7, 1981.

We have given careful consideration to the information provided by you, data available from the Bureau of the Census, and comments and information from interested third parties. We have also considered information relating to the issues raised in *Seamon* v. *Upham*, Civil Action No. P-81-49-CA (E.D. Tex.), a lawsuit involving the Congressional reapportionment.

As you are aware, under Section 5 the submitting authority has the burden of proving that a submitted plan does not have a discriminatory purpose or effect. See, *e.g.*, *Georgia* v. *United States*, 411 U.S. 526 (1973); see also Section 51.39(e) of the Procedures for the Administration of Section 5 (46 Fed. Reg. 878). Our analysis has revealed that, for the most part, the state has satisfied its burden of demonstrating that the submitted plan is nondiscriminatory in purpose and effect. Concerns remain, however, over the manner in which the congressional district lines were drawn in a portion of south Texas. For that reason I must, on behalf of the Attorney General, interpose a Section 5 objection to the plan because of the manner in which it affects the districts described below.

The area of concern is the area comprising proposed Districts 15 and 27. This portion of South Texas experienced substantial growth during the past decade and the 1980 Census reveals that 67 percent of the persons residing in this area are Mexican Americans. Under the plan as drawn, however, this very significant Mexican-American concentration and growth area seems to be proportioned inequitably between these two districts so that while proposed District 15 is 80.4 percent Mexican American, proposed District 27 is only 52.9 percent Mexican American. We have received allegations that this method of dividing the area dilutes the voting strength of the Mexican-American community as it exists in this area; we are also aware that numerous alternate plans were presented which would not have this effect and that such alternatives were rejected. We are particularly troubled by information indicating that the future population growth in this area (a heavy majority of which likely will continue to be Mexican-American) is projected primarily in Hiladgo and Cameron counties. Thus the inclusion of

both of these counties into District 15 may exacerbate the alleged "packing" of Mexican Americans into this district and effectively preclude Mexican-Americans from realizing their potential voting strength in District 27.

For these reasons, therefore, I am persuaded that Section 5 requires an objection. However, we will reconsider the objection if the state can present information demonstrating that our concerns are not well-founded. Likewise, we are available to give prompt attention to the matter if the State alters the plan to remedy the concerns described.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the described changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. However, until the objection is withdrawn or a judgment from the District of Columbia court is obtained, the effect of this objection is to render the implementation of the provisions of Senate Bill No. 1 (1981) legally unenforceable, because of the manner in which the Bill affects Districts 15 and 27.

If you have any questions concerning this letter, please call Carl Gabel (202-724-8388), Director of the Section 5 Unit of the Voting Section.

Sincerely,

/s/ WM. BRADFORD REYNOLDS
WM. BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division