No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

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

Applicants,

v.

SHANNON PEREZ, *et al.*,

Respondents.

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

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

This application arises from an ongoing consolidated redistricting controversy currently pending before a three-judge panel in the Western District of Texas consisting of U.S. District Judges Orlando Garcia and Xavier Rodriguez and Circuit Judge Jerry Smith of the Fifth Circuit. *Perez, et al. v. Perry, et al.*, Case No. 5:11-cv-360-OLG-JES-XR (W.D. Tex. filed May 9, 2011). That proceeding involves dozens of challenges to the Texas Legislature's redistricting plans for the Texas House of Representatives and the State's congressional districts under Section 2 of the Voting Rights Act (42 U.S.C. § 1973) and the U.S. Constitution.

In a divided decision on November 23, 2010, Judges Garcia and Rodriguez imposed their own interim redistricting plan for the 2012 elections in the Texas

House of Representatives. This new map is entirely a judicial creation with no regard for the lines drawn through the political process. As Judge Smith aptly described it in his dissent, urging immediate review by this Court, it is "a runaway plan that imposes an extreme redistricting scheme for the Texas House of Representatives." Order (Doc. 528) at 14 (Smith, J., dissenting), *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Nov. 23, 2011), Appendix Exhibit 1 [hereinafter Interim House Order].

The failure to give any deference to lines drawn by politically-accountable actors was conscious. The court went out of its way to give no weight whatsoever to the duly-enacted election map enacted by the Texas Legislature on the ground that preclearance proceedings remain pending before a three-judge court in the District of Columbia. Simply put, the majority determined that it was "not required to give ***any*** deference to the Legislature's enacted plan." *Id.* at 5 (emphasis added).[1] The majority thought this extreme "zero-deference" approach was required by *Lopez v. Monterey County*, 519 U.S. 9 (1996), a readily-distinguishable case involving a covered jurisdiction that sought to bypass preclearance permanently and had defied an earlier court order to seek preclearance. Here, by contrast, Texas has actively sought preclearance. The majority below steadfastly refused to recognize that distinction as material. Order (Doc. 543) at 3–4, *Perez, et al. v. Perry, et al.*, No.

[1] Despite operating under a legal standard that required no deference to the democratically enacted plan, even the majority apparently understood that it could not totally disregard the legislative will. Twenty-two of 150 districts in the majority's plan are identical to districts in the Legislature's plan, and fifty other districts are substantially similar when the two plans are compared. Nevertheless, over half the districts in the majority's plan represent dramatic departures from the enacted plan, and the majority's redrawing of the these districts was admittedly guided by nothing more than two judges' personal notion of what would "advance the interest of the collective public good." Interim House Order (Appx. Ex. 1) at 4.

5:11-cv-360 (W.D. Tex. Nov. 25, 2011), Appendix Exhibit 2 [hereinafter Order Denying Stay] ("[T]here was no preclearance in *Lopez* and there is no preclearance in this case. At the end of the day, no preclearance means no preclearance . . . ."). The absurdity of giving no weight to the duly-enacted map in these circumstances is well-illustrated by *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam). *Upham* makes clear that even after preclearance is denied, judicial modifications to legislatively enacted redistricting maps must be limited to "those necessary to cure any constitutional or statutory defect" in the enacted maps. *Id.* at 43. *Upham* is consistent with this Court's instruction in *Miller v. Johnson*, 515 U.S. 900, 916 (1995), that courts must always start with the presumption of good faith for the state's duly-enacted plan. This case should be *a fortiori* relative to *Upham*. Nonetheless, the court below gave less deference to the Legislature while preclearance is pending, than this Court's precedents demand after preclearance is denied.

Even more remarkably, the two-judge majority promulgated its interim map and disregarded the Legislature's map without any finding that the plaintiffs were likely to succeed in their constitutional and Section 2 challenges to the Legislature's map, and without any finding that a Section 5 challenge either was likely to succeed or that, if successful, a complete judicial rewriting of the map would be appropriate and consistent with *Upham*. Once again, the court's actions were conscious. In denying a stay, the majority criticized the dissent for failing "to appreciate that the Court has drawn an independent redistricting plan without ruling on any of the

various legal challenges." Order Denying Stay (Appx. Ex. 2) at 4. In this regard, the court's remedy is both unprecedented and truly extraordinary: two federal judges have employed the remarkable remedy of a judicially-drawn election map without finding even a likelihood of any constitutional or statutory violation, let alone that total disregard of the Legislature's map would be appropriate in remedying any violation.

The court appeared to elevate concerns that a legislative map not go into effect without preclearance over first principles about the proper role of the judiciary. But Texas is not asking that its map go into effect absent preclearance; it is actively seeking preclearance and expects a decision before any elections would have to take place. Imposing a judicially-drawn map at this juncture cannot be justified by the observation that preclearance has not yet been given. It has to be supported by some finding of a likely violation.

To be sure, the fact that the three-judge court in the District of Columbia has not acted with greater dispatch in resolving the preclearance issue puts everyone, including the court below, in a difficult position. That delay was caused by interventions and discovery opposed by the State of Texas and the difficulty that the court in the District of Columbia has encountered in articulating the proper Section 5 standards in light of recent Congressional action. The court below properly put its consideration of plaintiffs' statutory and constitutional challenges on hold pending the resolution of proceedings in the District of Columbia. But neither that action nor the requirement that Texas' new map be precleared before

going into effect could remotely justify redrawing the election map with no regard for the Legislature's determination—particularly without a finding of both a substantial likelihood of a constitutional or statutory violation and an application of the kind of respect for legislative judgments that *Upham* requires. Moreover, to the extent the majority redrew the map along racial lines without any findings that would justify such an extraordinary remedy, the interim map is not just inappropriate, but an equal protection violation of its own. *See United States v. Paradise*, 480 U.S. 149 (1987) (applying strict scrutiny to court's race-based remedial order); *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) (holding that "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny").

Judge Smith's dissent correctly explains the many legal infirmities of the majority's approach. *See* Interim House Order (Appx. Ex. 1) at 14–29 (Smith, J., dissenting). He acknowledges the difficult position the court is put in by the pending proceedings in the District of Columbia, but also recognizes that the zero-deference, "runaway" approach of the majority is deeply flawed. Rather than tethering the decision to some legislative judgment, as Judge Smith would have done, the majority affirmatively disclaims giving any weight to the as-yet-unprecleared map. Judge Smith also criticizes the majority for identifying no known or probable legal deficiencies in the State's duly enacted redistricting law that must be corrected. The majority responds by chiding Judge Smith for proceeding as if what was at issue was a remedial order, rather than an interim

order. But with all respect, it is the majority that is mistaken. There is nothing "interim" or minor about the extraordinary order issued below. As Judge Smith recognizes in dissent, "[u]nless the Supreme Court enters the fray at once to force a stay or a revision, this litigation is, for all practical purposes, at an end." *Id*. at 15 (Smith, J., dissenting). Elections will be conducted based on a judicially-drawn map in the absence of any finding—or even felt need to make a finding—that would justify such an extraordinary judicial remedy. That is profoundly wrong.

This Court should stay the effect of the extraordinary order below and remand this case with instructions for the court below not to draw its own legislative map absent a finding of a substantial likelihood of a statutory or constitutional violation. And even if such a finding is made, the court must go further and construct an interim remedy that narrowly addresses likely legal errors while respecting the lines actually drawn by the legislature wherever possible. That would provide direction for the court below that would produce a decision that could be tested in this Court. The alternative approach employed in the decision below has nothing to recommend it.

The court below purported to draw a map that best "embraces neutral principles that advance the interest of the collective public good," Interim House Order (Appx. Ex. 1) at 4, while giving no weight for the branch of government we generally trust to express "the collective public good." Unless this Court wants to get in the business of reviewing such free-wheeling judicial exercises, this Court

should stay the decision and direct the court below to hold off on redrawing an election map unless and until it makes the requisite findings.

This flagrant usurpation of the Legislature's proper role in the redistricting process must be immediately stayed and reversed. If this Court does not wish to stay and reverse for the court below to apply the proper standard for imposing interim relief, then the Court should stay the decision below, treat this stay application as a jurisdictional statement, note probable jurisdiction, and set the case for expedited briefing and argument. As Judge Smith made clear in his dissent from the denial of Texas' stay request, the proper standard for imposing this sort of drastic "interim" relief is only the most obvious problem raised by the decision below. There are numerous other issues on which this Court's guidance is urgently needed. In all events, the extraordinary order issued below should not be allowed to stand. With the candidate filing period beginning today, November 28, 2011, the need for an immediate stay is particularly acute to prevent the election process from proceeding under the panel majority's improperly constructed map.

Applicants Perry, Andrade, and the State of Texas (Applicants) therefore respectfully move to stay the district court's order pending expeditious consideration of this appeal. Applicants further request a prompt remand directing the district court to comply with *Upham* by conforming its interim redistricting order to the State's legislatively enacted plan except to the extent necessary to remedy a specifically identified violation of federal law. In the alternative,

applicants request that the Court stay the decision below and set this case for expedited briefing and argument.

PROCEDURAL HISTORY

The Texas Legislature enacted redistricting plans for the Texas House of Representatives and the Texas Senate on May 23, 2011 and for the State's congressional districts on June 24, 2011. Because it is a covered jurisdiction, Texas is compelled to seek preclearance of any redistricting plan under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.[2] Texas sought preclearance on July 19, 2011, the day after its congressional plan was signed into law, by simultaneously filing suit in the U.S. District Court for the District of Columbia and informally submitting to the Department of Justice (DOJ) the information and data that would have been required in the administrative preclearance process Section 5 provides as an alternative to judicial declaratory relief.

The DOJ filed its answer 60 days later. *See* Answer (Doc. 45), *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Sept. 19, 2011). The DOJ's answer denied that the Texas House plan complied with Section 5 but did not object to any specific district. *See id.* ¶ 21. In a subsequent court-ordered filing, the DOJ identified 5 districts as potentially retrogressive and concluded that the remaining 145 House districts would not have a retrogressive effect on minority voting rights.[3]

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

[3] *See* United States and Defendant-Intervenors' Identification of Issues (Doc. 53) at 3, *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Sept. 23, 2011), Appendix Exhibit 3 ("The retrogression from the benchmark to the proposed plan stems from changes to as many as five

The DOJ also pressed the State for proof that Texas did not have a discriminatory purpose in passing its House plan. The Section 5 court denied the State's motion for summary judgment on November 8, 2011. *See* Order (Doc. 106), *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Nov. 8, 2011). The State has requested a trial for the week of December 12. *See* Plaintiff's Response to Court's Inquiries of November 15, 2011 (Doc. 107), *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Nov. 22, 2011).

The three-judge court in the Western District of Texas conducted a two-week trial in September 2011 on Section 2 issues and constitutional issues related to the state House and congressional plans. Because the State's maps had not yet been precleared, the Western District panel solicited interim map proposals from the parties in a three-day hearing conducted the week of October 31, 2011. On November 17, 2011, the court issued proposed interim maps for the Texas House.[4] *See* Order (Doc. 517), *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Nov. 17, 2011), Appendix Exhibit 4. The court ordered the parties to file comments and objections to the proposed interim plans by noon the following day. On November 23, 2011, the district court ordered the implementation of interim maps for the Texas House of Representatives. *See* Interim House Order (Appx. Ex. 1). Judge Smith dissented from the court's state House order and proffered an interim map of his own. *See id.* at 15.

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districts: 33, 35, 41, 117, and 149."); *id.* at 4 ("The United States contends that the proposed House plan will not change the ability of any citizens, on account of race, color or membership in a language minority group, to elect their preferred candidates of choice in any of the remaining 145 districts.").

[4] The District Court issued two proposed House maps—one offered by United States District Judges Orlando Garcia and Xavier Rodriguez, the other by United States Circuit Judge Jerry Smith.

The State moved the district court to stay implementation of its interim House plan pending appeal. The district court denied that motion on November 25, 2011, over a dissent by Judge Smith. *See* Order Denying Stay (Appx. Ex. 2). Because the period for candidate filing begins on November 28 and ends shortly thereafter on December 15, the State submits its application for stay of the court's interim plan electronically. Needless to say, once filing statements are made, candidates need to know the contours of the district and the identity of their relevant electorate. Immediate submission of the State's application is necessary to avoid irreversible steps toward holding the 2012 elections under a legally flawed redistricting plan.

ARGUMENT AND AUTHORITIES

As Judge Smith's dissent recognizes, the majority's decision to fabricate its own plan from whole cloth—rather than make targeted changes to the democratically enacted plan to remedy likely violations of law—amounts to a "runaway plan that imposes an extreme redistricting scheme, untethered to the applicable caselaw." Interim House Order (Appx. Ex. 1) at 14–15 (Smith, J., dissenting). Under *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam), courts imposing interim judicial redistricting plans, even after preclearance is denied, must respect the unprecleared, legislatively enacted plans unless departure from the legislative will is necessary to remedy a likely violation of law. *Id.* at 43. That is particularly true in a context like this where population changes render the earlier map unusable. The court's interim order utterly abandons the instruction of

Upham or any pretense of tethering its map to politically-accountable judgments and draws a completely new map based on a two-judge majority's notion of what will "advance the interest of the collective public good." Interim House Order (Appx. Ex. 1) at 4. The court's interim order should be immediately stayed, and the case should be remanded with instructions to withhold interim relief unless some likely violation of law is found and to defer to the legislatively enacted map as required by this Court's precedents. *See Upham*, 456 U.S. at 43–44 (remanding with instructions).

This Court has repeatedly stressed that the Constitution assigns primary responsibility for redistricting to the states. *E.g., Growe v. Emison,* 507 U.S. 25 (1993). Because redistricting decisions reflect a myriad of complex and inter-related political compromises and legal judgments, the courts are obliged to defer to the States' decisions and to apply a presumption of good faith and legality *at all stages of litigation*. *Miller v. Johnson*, 515 U.S. 900 (1995). The pendency of a Section 5 determination does nothing to change this. To the contrary, a legislatively enacted plan is still entitled to great deference even after preclearance is denied through the administrative process, as in *Upham*. 456 U.S. at 42 (citing *White v. Weiser*, 412 U.S. 783, 797 (1973)). It cannot be that a State is entitled to less deference when a judicial preclearance proceeding is pending than after administrative preclearance has been denied. But that is precisely what the majority below held. The court's failure to distinguish between the disregard of a court order to seek preclearance and active ongoing efforts to seek preclearance is an obvious error.

Without a stay, the 2012 elections to the Texas House will proceed under unlawful redistricting plans that replace the policy choices of the Texas Legislature with the political preferences of two federal district judges. This extraordinary judicial remedy will not reflect any likely violation, let alone a violation that would necessitate a complete disregard of the legislative map, but only that preclearance remains pending. This would inflict permanent, irreparable harm on the citizens of Texas. *See Lucas v. Townsend*, 486 U.S. 1301, 1304 (Kennedy, J., Circuit Justice 1988) ("Even if the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive.").

* * *

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

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

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

I. APPLICANTS WILL LIKELY PREVAIL ON THE MERITS.

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

Applicants are almost certain to prevail on the merits. The order below, which imposes a judicially drawn election map without any regard for the legislative map and without any finding of any legal violation, and instead is premised solely on the mere pendency of preclearance, cannot be sustained. Under *Upham v. Seamon*, court-drawn interim redistricting plans must adhere to the policy judgments reflected in a legislatively enacted plan unless the court is compelled to remedy a likely constitutional or statutory violation:

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

456 U.S. at 43 (emphasis added) (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)); *cf. Weiser*, 412 U.S. at 797 (holding that the district court should have employed the plan "which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements"). In *Upham*, preclearance had been ***denied***. Here, no preclearance decisions have been reached (despite the State's best efforts to achieve preclearance). As a result, no court has concluded that the State's House map violates Section 5, Section 2, or the U.S.

Constitution. Yet the court below showed less deference to the State's House map than was shown in *Upham* to a map that had been denied preclearance. The decision below cannot be reconciled with *Upham*.

The majority below contends that it is not bound by *Upham* because no decision has been made on preclearance. It maintains that this case is analogous to *Lopez v. Monterey County*, 519 U.S. 9, 15 (1996), and similar cases in which covered jurisdictions failed to submit plans for preclearance. *See Clark v. Roemer*, 500 U.S. 646, 649 (1991) (holding that the district court erred in authorizing elections under a decades-old, unprecleared electoral scheme after "Louisiana had with consistency ignored the mandate of § 5"); *McDaniel v. Sanchez*, 452 U.S. 130, 134-36 (1981) (holding that the district court erred in adopting a permanent remedial plan submitted after a previous plan was held to be unconstitutional, explaining that the court should not have acted on the plan before it had been submitted for preclearance). The majority insists that the State "has persisted in trying to avoid preclearance altogether by demanding that its unprecleared plan be adopted by the Court." *See* Order Denying Stay (Appx. Ex. 2) at 3. This is plainly not the case. Unlike the jurisdictions in *Lopez*, *Clark*, and *McDaniel*, the State actively has pursued preclearance of the Legislature's House plan. The State has not asked that its entire plan be adopted wholesale without any considerations as to whether any portion of that plan is substantially likely to be found statutorily or constitutionally infirm. To the contrary, Texas is seeking to take the steps necessary to obtain preclearance and hold an election under the new, precleared map. If the State

ultimately fails preclearance, the legislatively-enacted map will not be implemented on a permanent basis. It is the court that has altered that process by ordering the interim map, and it should not be allowed to do so without some finding of a likely statutory or constitutional violation.[5]

Upham controls this case, and under *Upham*, when a federal court is forced to order an interim redistricting plan, it must respect the state legislature's policy judgments wherever possible. Even if *Upham* is not directly controlling because no preclearance decision has been reached, Judge Smith's dissent nevertheless identifies the proper approach that the three-judge panel should have employed here. Courts should only "modify the State's districts where plaintiffs have shown a substantial likelihood of success on the merits, rather than ratifying the plaintiffs' requests merely because they have alleged violations." Interim House Order (Appx. Ex. 1) at 19 (Smith, J., dissenting).[6]

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[5] This is not an attempt to reverse the Section 5 burden of proof. The pending Section 5 proceedings in the District of Columbia will proceed with the applicable burdens of proof. If such proceedings result in a decision adverse to the State, the three-judge court would still defer to the State's plan to the greatest extent possible under *Upham*. If the three-judge court in the Western District of Texas is going to order interim relief it remains obliged by this Court's decisions, including *Miller v. Johnson*, 515 U.S. 900, 915 (1995), to presume the good faith and legality of the State's enacted plan. More precisely, the court cannot order interim relief without some finding of a likely constitutional or statutory violation and cannot redraw the map without providing the same kind of deference that *Upham* would command in the event of a denial of preclearance. The extreme remedy of a wholesale rewriting of the voting map misperceives the governing presumptions and does needless violence to the delicate federal/state balance in this area. At the very least, the three-judge court should have anchored its changes to some finding that all or part of the State's plan was likely to be denied pre-clearance—giving this Court some standard by which to judge its decision.

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

> In fashioning a temporary interim redistricting plan, how much deference should a court give to state-enacted legislative plans where a determination for preclearance has been submitted but is pending in: (1) districts that have not been specifically challenged; (2) districts

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

Once the court below freed itself of any obligation to tether its map to lines drawn by politically-accountable state officials, it usurped a role for which Article III judges are ill-suited and drew lines to accomplish a number of questionable objectives. The court's interim order appears to have purposefully created a number of "coalition districts" that join African-American, Hispanic, and Asian populations in an effort to form multi-ethnic minority-controlled districts. The court created two House districts—Districts 26 and 54—and recreated a third—District 149—in which three distinct minority groups are combined in what appears to be a concerted effort to meet a 50% threshold of minority population.[7] Whether Section 2 of the Voting Rights Act can ever require the State—or permit a court—to create multi-racial coalition districts is unsettled, at best. *See Bartlett v. Strickland*, 129 S. Ct. 1231, 1243 (2009) ("Nothing in § 2 grants special protection to a minority group's right to form political coalitions."). Such districts would require, at the very least, a heightened showing of voting cohesion between members of each group. *See Growe v. Emison*, 507 U.S. 25, 41 (1993). The majority makes no such findings to

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> that have been challenged under novel legal theories; (3) districts that have been challenged but as to which the challenges are unlikely to succeed on the merits; and (4) districts that have been challenged where the claims have a likelihood of success on the merits?

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

[7] District 26 contains 14.5% Hispanic Citizen Voting Age Population ("CVAP"), 15.6% Black CVAP, and 23.8% Asian CVAP. District 54 contains 17.8% Hispanic CVAP, 28.8% Black CVAP, and 3.1% Asian CVAP. District 149, which was drawn to recreate a benchmark district, contains 16.8% Hispanic CVAP, 27.4% Black CVAP, and 13.8% Asian CVAP. *See* Plan H302, Red 106 Report, *available at* http://www.tlc.state.tx.us/redist/pdf/house/PlanH302_Report_Package_Expanded.pdf.

justify its departure from the Legislature's duly enacted plan. And, the court's efforts to create coalition districts actually results in a decrease in the number of majority African-American districts from 3 to 1.

The court's interim order should be remanded with instructions that a court's role in fashioning an interim plan is very modest and cannot extend to a desire to create minority "coalition districts." Such a desire cannot form the basis for judicial deviations from the legislatively enacted map.

C. Adherence to the Governing Legal Standard Would Have Prevented the Court from Subordinating Traditional Redistricting Principles to Race.

The district court's creation of "coalition districts" demonstrates not only its misinterpretation of Section 2, but also its inappropriate focus on creating race-based districts. Had the court followed the Legislature's judgments, it would not have engaged in conscious race-based decisionmaking throughout the interim plan. The court's undue focus on race, and drawing race-based lines in the absence of any finding of even a likely statutory or constitutional violation, raises serious Equal Protection Clause concerns. *Shaw v. Hunt*, 517 U.S. 899, 906-07 (1996) (citation omitted).

The predominant influence of race on the interim plan is evident in Nueces County, which the court divided among three House districts solely to create an additional Latino-majority district. The Texas Constitution's "county-line rule" provides that House seats must be apportioned by county so as to avoid crossing county lines except where necessary to apportion excess population from one county

into a neighboring county. TEX. CONST. art. III, § 26. Some version of this rule has governed Texas longer than Texas has governed itself.[8] Had the court applied the county-line rule in a consistent and race-neutral manner, like the Legislature, it would have apportioned two House seats to Nueces County.[9] Instead, the district court chose to violate the county-line rule in order to maintain two Latino-majority districts in Nueces County despite the county's loss of population, or to create a new district south of Nueces County that "pushed" excess population north and required a county to be divided to maintain constitutional population deviations.[10] In either case, the county-line-rule violation was caused by the court's creation of a district on the basis of race.

This Court has repeatedly cautioned that such subordination of traditional redistricting principles to race is clear error. *See, e.g.*, *Miller v. Johnson,* 515 U.S. 900, 915-16 (1995). Traditional, race-neutral state redistricting rules are to be *harmonized* with the Voting Rights Act, not discarded whenever necessary to create a race-based district. *See Bush v. Vera*, 517 U.S. 952, 963 (1996). Had the district court deferred to the Legislature's consistent application of race-neutral redistricting principles such as the county-line rule, it would have had no occasion to draw districts predominantly on the basis of race.

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[8] A form of the Rule appears as early as the Constitution of the State of Coahuila and Texas (1827). Art. I, Appx. § 106. The Rule itself has been in the current Texas Constitution, without alteration or amendment, since that constitution's enactment in 1876.

[9] Dividing Nueces County's 2010 Census population of 340,223 by the ideal district population of 167,637, results in 2.02 districts. *See* Trial Tr. at 1429:17–21, Appendix Exhibit 5.

[10] The principal drafter of the House plan testified at trial that that it was not possible to create an additional Latino opportunity district in Nueces County or the Rio Grande Valley without violating the county-line rule. *See* Trial Tr. (Appx. Ex. 5) at 1428:14–1429:8.

D. Application of the Proper Legal Standard Would Have Precluded the Court from Reducing Population Deviations Without Finding a Probable Violation of One Person One Vote.

The district court altered dozens of urban House districts despite the fact that only a small percentage of these districts were challenged by plaintiffs or the Department of Justice.[11] The court's wholesale revision reflects no conceivable purpose other than to reduce the differences in total population among these districts. The population deviations in the House plan, however, are no greater than 10% and are therefore presumptively consistent with the Equal Protection Clause's one-person, one-vote mandate. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983). Without even a preliminary finding that the Legislature's population deviations violated the law, the court had no authority to alter districts on this basis.

The court's indiscriminate modification of unchallenged House districts cannot be justified by the limits on federal courts' redistricting power. Although courts are generally subject to a stricter standard of population deviation than state legislatures when courts draw electoral districts on a blank slate, *see, e.g.*, *Chapman v. Meier*, 420 U.S. 1, 27 (1975), this Court has rejected the contention that limitations on federal courts' map-drawing authority can justify the rejection of legislative policy decisions:

> It is true that this Court has held that court-ordered reapportionment plans are subject in some respects to stricter standards than are plans developed by a state legislature. . . . This stricter standard applies . . . only to remedies required by the nature and scope of the violation . . . .

[11] While the majority's interim map alters nearly every urban district in the State, the dissent's proposed map alters every district in Harris and Dallas County. Both the majority and the dissent err in this regard because neither identifies the kind of systematic constitutional violation necessary to justify such county-wide revisions.

> There may be reasons for rejecting other parts of the State's proposal, but those reasons must be something other than the limits on the court's remedial actions. ***Those limits do not come into play until and unless a remedy is required***; whether a remedy is required must be determined on the basis of the substantive legal standards applicable to the State's submission.

Upham, 456 U.S. at 42–43 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971)) (emphasis added, internal citations and footnote omitted). Population deviations that are constitutional in a legislatively enacted plan do not become unconstitutional when that plan (or some fraction thereof) is implemented on an interim basis by court order. Absent a finding of pervasive one-person, one-vote violations, *see, e.g.*, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 942 (2004), the district court had no power to nullify the Legislature's considered policy judgments by tinkering with dozens of urban districts throughout the State.

E. The Court's Wholesale Revision of State House Districts Cannot Be Justified by Alleged Intentional Discrimination.

The court's disregard of the Legislature's intent cannot be justified as a necessary remedy for intentional discrimination because the court did not make even a preliminary finding that the Legislature acted with the purpose of discriminating against minority voters on the basis of their race. This Court has held that racially discriminatory purpose

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

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

* * *

Because the district court did not identify an instance in which the legislatively enacted Texas House map likely violated federal law, it should not have altered the map on an interim basis pending preclearance. In any event, the majority's interim order fundamentally misunderstands the role of courts at this stage of the redistricting process. After a stay is granted, the court's order should be reversed, and the case should be remanded with instruction to afford appropriate deference to the Legislature's enacted map. In the alternative, the Court should

stay the order, convert this stay request into a jurisdictional statement, note probable jurisdiction, and schedule this case for expedited briefing and argument. *See*, *e.g.*, *Harris v. McRae*, 444 U.S. 1069 (1980); *Nken v. Mukasey,* 129 S.Ct. 622 (2008).

II. APPLICANTS WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.

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

A special harm, however, arises when an election is permitted to go forward based on an unlawful redistricting plan. As Judge Smith recognized in dissent, if a stay is not granted to allow for appellate review of the lower court's decisions, this case will essentially be over. *See* Interim House Order (Appx. Ex. 1) at 15 (Smith, J., dissenting).[12] If that happens, the Texas House elections will be conducted on a legally flawed map. The candidate filing period will begin under the majority's

[12] Judge Smith further presciently noted that, "[t]he plaintiffs then predictably will claim that the interim map ratchets in their favor by constituting a new benchmark for preclearance by the D.C. Court, remedial action by this court, or future action by the Legislature." Interim House Order (Appx. Ex. 1) at 15 (Smith, J., dissenting) (citations omitted). Indeed, they have done precisely so, in a joint motion with the United States to abate the Section 5 proceeding. *See* United States' and Intervenors' Motion to Hold Case in Abeyance (Doc. 108) at 2, No. 1:11-cv-01303 (D.D.C. Nov. 22, 2011).

improper, unreviewed map on Monday, November 28, and absent a stay from this Court there will soon be little alternative other than to continue with elections on an improper map. The irreparable harm such a result would inflict on our democratic process and on all Texas voters is self-evident. This Court has stayed unlawful court-drawn plans in similar instances. *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (Powell, J., Circuit Justice 1980); *Bullock v. Weiser,* 404 U.S. 1065 (1972)(stay pending appeal in *White v. Weiser*, 412 U.S. 783, 789 (1973)); *Whitcomb v. Chavis,* 396 U.S. 1055 (1970) (stay order).

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

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

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

A stay of the preliminary injunction would allow Applicants to carry out the statutory policy of the Legislature, which "is in itself a declaration of the public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). Rarely can the public be better served than by permitting it to elect its own representatives

on its own terms, or worse disserved than by requiring it to comply with a representational scheme not at all of its own choosing.

One segment of the public requires special solicitude: overseas voters, including, especially, citizens of Texas currently serving in the armed forces. The deadlines for this election cycle were materially moved up to comply with the Military and Overseas Voters Empowerment Act of 2009**,** 42 U.S.C. § 1973ff, *et seq*., and compliance with that Act will require special treatment for overseas voters during the primary election cycle. Because of the MOVE Act's deadlines, the candidate filing period for 2012 primary elections must *end* by mid-December, 2011 in order for primary elections to be held as scheduled on March 6, 2012. Candidates cannot file confidently until a redistricting map is in place. An *immediate* remand order from this Court, accompanied by instructions requiring the three-judge court to act expeditiously, could allow the Texas House primary elections to go forward as planned.

This Court need not feel constrained by this emergency timetable, however. If delaying primary elections for the Texas House is necessary to preserve this Court's jurisdiction and allow for thorough appellate review, the State respectfully requests that the Court stay the primary elections for the Texas House. In past cases, the Court has remanded improperly crafted interim redistricting plans on an expedited timeline. *See Upham,* 456 U.S. at 37 (Notice of Appeal docketed, Feb. 27, 1982; case determined *per curiam*, Apr. 1, 1982; remand decided Apr. 6, 1982). Following a similar schedule in this case—while in the meantime staying all

deadlines and timetables associated with the Texas House primary elections—would allow the State to conduct its Texas House primary elections in compliance with the MOVE Act on a date in May that is already scheduled as the primary-runoff election date. (All unaffected primary elections, including but not limited to presidential and U.S. Senate primaries, will in all events be held as scheduled on March 6, 2012.) Thus, with minimal disruption to the State's electoral infrastructure, the Court's jurisdiction can be preserved and the error below can be corrected on a reasonable schedule.

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

CONCLUSION

The district court's order directing implementation of an unlawful Texas House redistricting plan should be stayed, and this case should be remanded with instructions requiring the court below to show proper deference to the legislatively enacted Texas House plan. *See Upham v. Seamon,* 456 U.S. 37 (1982) (per curiam).

Respectfully submitted,

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