No. 11-A536

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.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF INTERLOCUTORY ORDER DIRECTING IMPLEMENTATION OF INTERIM CONGRESSIONAL REDISTRICTING PLAN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

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

Respondents' papers underscore the need for this Court's guidance. In respondents' world, judicial preclearance is not a realistic option. Unless and until judicial preclearance runs its course, the State is treated no different from a recalcitrant jurisdiction that refused to seek preclearance. And as long as intervenors can draw out the judicial preclearance process, the map for the post-decennial election will be drawn by judges, not legislators. In respondents' view, judges are not constrained by the need to find a likely statutory or constitutional violation or the need to tailor the remedy so that judicial interference with the legislative role is kept to a minimum. Indeed, as respondents see things, the court is categorically forbidden from considering even the possibility of a Section 5 violation (not before it) or a Section 2 violation (premature), but must instead just draw the map itself guided by its own wisdom. Texas believes all of this to be fundamentally inconsistent with this Court's precedents, state sovereignty, and any sensible construction of the judicial role. Respondents suggest that this is unobjectionable and standard operating procedure. Clarification is needed.

Respondents also contend that Texas has created the exigency, that the district court's extraordinary supplemental opinion strengthens their hand, and that Texas really seeks an injunction, not a stay. Respondents are wrong on all three counts, but even if they are right, none of their arguments counsel against this Court's review. Unless States forego judicial preclearance altogether, this issue will recur. The supplemental opinion only underscores the need for review, and the

facts support a stay or an injunction. This Court's intervention is sorely needed and needed now.

I. THE RESPONDENTS' VIEW OF *UPHAM* AND *LOPEZ* UNDERSCORES THE NEED FOR THIS COURT'S INTERVENTION

Respondents argue that "Texas's entire argument relies" on a misreading of *Upham v. Seamon*, 456 U.S. 37 (1982) and *Lopez v. Monterey County*, 525 U.S. 266 (1999). *See* Joint Response at 7. This much is clear: Respondents and Texas are worlds apart when it comes to the proper reading of this Court's precedents. And if Respondents are correct, judicial preclearance is a false option. If a State seeks administrative preclearance and is denied, it gets the benefit of *Upham*, even, one presumes, if it then files a declaratory judgment action challenging the DOJ's decision. But any State that goes straight to court is treated like a scofflaw until those proceedings run their course. That seems irreconcilable with *Upham*, not to mention state sovereignty, but if Respondents are really correct, this Court should make that point clear so States can recognize that the statutory option of judicial preclearance is, in fact, a mirage.

Respondents suggest that their view has to be correct because the three-judge court hearing the Section 2 complaint does not have jurisdiction over the Section 5 action and cannot resolve the Section 2 action until the Section 5 court acts. They are mistaken. To be sure, the court below could not definitively resolve the claims before it, let alone the Section 5 case in Washington, D.C. But that does not mean that the Section 2 panel therefore can impose an interim map without a finding of any likely violation. That would leave a court entirely to its own devices and sense

of proper public policy, as the decision below amply demonstrates. If a court has any authority to draw an interim map, it is only as mechanism for addressing *likely* violations. And it is hornbook law that such preliminary relief is not a definitive resolution of the merits. Thus, an interim map simply does not—and could not—usurp the role of the Section 5 court or violate exhaustion principles. *See, e.g., Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).[1]

Any other rule would be inconsistent with respect for state sovereigns and the proper judicial role. As this Court made clear in *Miller v. Johnson*, 515 U.S. 900, 915 (1995): "Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests. . . . [U]ntil a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed." When state legislators take on this "difficult subject," the result can be criticized in the rough and tumble of the political process and challenged in the courts. If challenged, a court finding a likely violation can issue a meaningful remedial order. But when courts draw lines in pursuit of judges' view of sound policy, and not based on a circumscribed remedial role, they are subjected to the kind of criticism that normally is reserved for the political branches. *See*, *e.g.*, Joe Holley, *African-American Lawmakers Don't Like Legislative Map*, Texas Politics Blog, Houston Chron. (Dec. 5, 2011), http://blog.chron.com/texaspolitics/2011/12/african-american-lawmakers-dont-like-legislative-map/ (stating that four Democratic African-

[1] Notably, in *Smith v. Cobb County Board of Comm'rs*, a case relied upon by both the majority below and respondents, the district court freely examined the Section 5 questions before it. 314 F. Supp. 2d 1274, 1293 (N.D. Ga. 2002).

American lawmakers "voiced their objections to the interim [Texas house] legislative map a three-judge panel drew last week.").

II. TEXAS HAS AGGRESSIVELY PURSUED THE STATUTORY OPTION OF JUDICIAL PRECLEARANCE

Respondents assert that Texas has been dilatory in seeking preclearance under Section 5 of the Voting Rights Act. Joint Response at 3–7. Texas has already answered this point in its reply in support of its Applications concerning the State House and Senate maps. *See* Consolidated Reply at 2–5. But the case for delay on the congressional map is weaker still. The Congressional plan was signed into law on July 18, 2011. The very next day, on July 19, 2011, the State sent complete, informal preclearance submissions to DOJ *in addition to* filing a judicial preclearance action in the D.C. district court.

The delay from that point forward cannot be attributed to Texas. Texas is fully aware that its legislative map cannot take permanent effect until it receives preclearance. Texas thus had every incentive to expedite proceedings and has done so. Intervenors, by contrast, had every incentive to slow things down, especially in light of their view that *Lopez* and not *Upham* governs until the judicial proceedings run their course. And they did so. But this Court need not fix blame for the delay. It is enough to recognize that Respondents' view of the law creates an undeniable incentive for parties who dislike a legislative map to intervene and delay. If Respondents are correct, then judicial preclearance is a trap for unwary States. If Respondents are wrong, the decision below is indefensible. Either way, the Court should intervene and provide much needed guidance. *See* Order Denying Stay (Doc.

546) at 5–6 (Smith, J., dissenting), *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Nov. 25, 2011) ("There are myriad issues to be decided regarding interim, court-ordered redistricting plans. Because these matters are usually raised only in the wake of the decennial census, the caselaw is somewhat sparse and often murky. Questions that are not addressed now, before any part of these interim plans are implemented, might not be answered for yet another ten years or more. That is why the more orderly course is for this court to stay its proceedings . . . so that the Supreme Court will have sufficient time to address the complex legal issues that apply to interim plans."); *see also* House Order (Doc. 528) at 29 (Smith, J., dissenting), *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Nov. 23, 2011) (asking the Supreme Court to "provide appropriate and immediate guidance").

III. RESPONDENTS' RELIANCE UPON THE DISTRICT COURT'S SUPPLEMENTAL OPINION ONLY SERVES TO HIGHLIGHT THE PROBLEMATIC NATURE OF THE DISTRICT COURT'S ACTIONS

Respondents rely not only on the district court's original order, but also on the court's supplemental opinion issued on December 2, 2011. *See* Joint Response at 7, 12, 14, 15 (citing Supp. Op.), *Perez v. Perry*, No. 5:11-cv-360-OLG-JES-XR (W.D. Tex. Dec. 2, 2011) ("Joint Response"). As Judge Smith observed in dissent, the supplemental opinion is profoundly problematic. "The majority's newly-revealed zeal to press for sweeping relief at this interim stage of the case is unseemly at best and downright alarming at worst." *See* Supplemental Opinion at 24 (Smith, J., dissenting) (Doc. 549), *Perez v. Perry*, No. 5:11-cv-360-OLG-JES-XR (W.D. Tex. Dec. 2, 2011) ("Supp. Op"). It "has the smell of a brief on appeal." *Id.*

"In my almost twenty-four years as a judge on the court of appeals, I cannot recall ever seeing an unsolicited 'supplemental opinion' come flying over the transom from a district judge desperate to lend further support for a shaky decision. We are judges, not advocates." *Id.* at 25.

But the propriety of the extraordinary supplemental order aside, its content does not assist Respondents. To the contrary, the court's further elaboration of how the map was drawn only showcases how fundamentally unmoored the district court's order was from any properly constrained judicial inquiry or any discernible legal standard. To take just one example, the supplemental order details how it endeavored to avoid splitting voter tabulation districts or VTDs. Supp. Op. at 10–11. But a decision on splitting VTDs should be made by the sovereign state of Texas, not by judges who have failed to find even a likely Voting Rights Act or constitutional violation.

IV. TEXAS PROPERLY SOUGHT A STAY AND CONCRETE RELIEF

Respondents spill much ink in claiming that what Applicants are really seeking is an injunction, not a stay. *See* Joint Response at 20–24. But that is incorrect. The problem with this argument is that what the order below imposes is a map, and that map is what Texas seeks to stay. To be sure, if a stay is granted, the confluence of the current legislatively-determined primary dates and the timing obligations of the MOVE Act may necessitate additional judicial relief (from this Court or the district court on remand) to clarify that the primary dates can be adjusted to accommodate the federal deadlines of the MOVE Act and the practical necessities of this Court's review. As Texas noted in its Application, that

adjustment would eliminate a false dichotomy between respecting the rights of our military serving abroad and providing an orderly opportunity for this Court's review. See Congressional Stay Application at 27–29. But that subsequent, ancillary relief is not directly before the Court, and does not convert this stay application into a request for an injunction pending appeal. The bottom line remains that Texas seeks to restore the status quo ante before the order entered below, which is the classic definition of a stay. *See Nken v. Holder*, 129 S. Ct. 1749, 1758 (2009) ("A stay simply suspend[s] judicial alteration of the status quo, while injunctive relief grants judicial intervention that has been withheld by lower courts.") (internal quotation marks omitted). Texas is the defendant in this action and seeks to stay the court's imposition of the interim map, not to obtain an injunction denied by the court below. That is why Judge Smith would have granted a stay, and not an injunction. The fact that correcting the errors below and honoring the MOVE Act may require adjustment of statutory deadlines as an ancillary matter does not convert this stay request into an injunction. *See* Joint Response at 21.[2]

Respondents also complain that the relief Texas is seeking is "unclear" and that the "State offers only a vague plea for greater 'deference' to the enacted plan." Joint Response at 23. This simply is not the case. Texas believes that the decision below is so clearly incompatible with this Court's precedents, state sovereignty and

[2] In all events, even if the Applicants' request is construed to be an application for injunctive relief, the Applicants satisfy the requirements for such relief. Indeed, Respondents themselves describe both as extraordinary remedies, and the truly extraordinary order below amply justifies either remedy.

the judicial role that a stay followed by summary reversal would be appropriate. Barring that, a stay followed by expedited briefing and argument is appropriate. Either way, both the nature of Texas's request and the need for this Court's intervention are clear.

CONCLUSION

For all the foregoing reasons, and those stated in the previous brief in support of this Application and the Applications in Nos. 11-A520 and 11-A521, the district court's extraordinary order imposing a judicially drawn map for the Texas congressional elections should be stayed, and this Court should either summarily reverse or 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).

Respectfully submitted,

/s/ Paul D. Clement

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