NOS. 11-713, 11-714, 11-715

In the Supreme Court of the United States

PERRY, GOVERNOR OF TEXAS, ET AL.,
Appellants,
v.
SHANNON PEREZ, ET AL.,

PERRY, GOVERNOR OF TEXAS, ET AL.,
Appellants,
v.
WENDY DAVIS, ET AL.,

PERRY, GOVERNOR OF TEXAS, ET AL.,
Appellants,
v.
SHANNON PEREZ, ET AL.,

On Appeal from the United States District Court for the Western District of Texas

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

Despite the parties' sharply different bottom lines, there is a surprising amount of common ground. That is because Appellees dedicate much of their briefing to attacking arguments Texas does not advance. For example, Appellees insist that Texas' new legislatively enacted election maps cannot take effect without preclearance. Texas has never argued to the contrary. Appellees likewise emphasize that the Texas court could not decide the Section 2 and Equal Protection claims on the merits until the preclearance proceedings had run their course. Texas agrees. Finally, Appellees argue that when the pre-existing map cannot be used and the new maps have not been precleared, a court must order an interim solution. Once again, on that basic point Texas heartily concurs. But as to the nature of that interim solution and the extent to which the court must defer to a sovereign State's duly-enacted redistricting maps and make findings of likely defects before redrawing them, there is sharp disagreement.

Appellees' briefs leave no doubt where the district court's errors originated. Appellees repeatedly insist that the Texas court proceeded "exactly" as it should have and was "unimpeachably correct." Rodriguez Br. 21; Davis Br. 2. But Appellees' briefs also leave no doubt that the Texas court's approach was fundamentally misguided. They continue to argue that a jurisdiction that has enacted new maps and promptly submitted those maps for preclearance should be treated no differently from a recalcitrant jurisdiction or one where the legislature has failed to discharge its

responsibility to draw new maps. But a jurisdiction actively seeking preclearance does not need to be incentivized to seek preclearance, and a court drawing a map after a legislative deadlock has nothing to which it can defer.

Appellees complain that any deference to the legislative map in drawing an interim map will circumvent the preclearance process. But that ignores the critical point that an "*interim*" map is just that. Unlike a map drawn by a court after legislative deadlock, an interim map will be used for only one election cycle and in no way obviates the preclearance obligation. Appellees also suggest that an inquiry into the likelihood of success intrudes on the D.C. court's jurisdiction, but it is hornbook law that a likelihood of success inquiry is different from, and does not prejudge, the merits. Moreover, the Texas court's unwillingness to consider the likely merits of Appellees' Voting Rights Act ("VRA") and Equal Protection claims makes even less sense in light of the acknowledged need for any judicial map to consider VRA and Equal Protection limits.

Finally, Appellees' efforts to defend the Texas court's maps only underscore the standardless nature of that court's undertaking. Appellees applaud the judicially drawn maps for avoiding the Section 2 and Equal Protection problems they allege, without acknowledging that, as a consequence, the court's maps were based on mere *allegations*, rather than on findings of a demonstrated likelihood of success. Appellees emphasize that the judicial maps actually respected the legislative maps in certain respects without explaining why that is laudable or even permissible under their view of the Texas

court's function. The Department of Justice ("DOJ") for its part recognizes that the judicially drawn Texas House and congressional maps are problematic and that a remand is in order, but its explanation borders on the incoherent. For example, DOJ correctly faults the Texas court for its mistaken and unexplained belief that two new opportunity-to-elect districts needed to be drawn in the congressional map, but given DOJ's view of the Texas court's considerable discretion to redraw a map *without* assessing likely defects in the duly-enacted plan, it is not clear why any explanation was necessary.

In the end, the Texas court's role cannot be as standardless and unconstrained as Appellees contend. Such a role risks embroiling courts in unnecessary racial line-drawing and can hardly be described as judicial. And nothing compels such a role when the state political process has not deadlocked and preclearance is being actively pursued. Under those circumstances, the use of the legislative plan as the interim plan subject to the well-defined preliminary injunction standard is clearly the preferable course and ensures that any judicial consideration of race is both necessary and fully consistent with the Constitution. This Court should "say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than a federal court." *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

Here, the Texas legislature has faithfully discharged the State's "duty and responsibility." Given the exigencies of time and the Texas court's

profound misunderstanding of the governing legal principles, a remand to that court would provide no assurance of a timely and legally appropriate resolution to Texas's predicament. Accordingly, this Court should order the use of the State's duly-enacted maps as the interim plans for the 2012 elections, while Texas continues to pursue preclearance before the D.C. court.

ARGUMENT

I. APPELLEES' RENEWED EFFORT TO BLAME TEXAS FOR THE EXIGENCY IS FUNDAMENTALLY MISTAKEN

As they did in their papers opposing a stay, Appellees once again suggest that delays in the redistricting process are "entirely the fault of the State of Texas." Davis Br. 2. Appellees simultaneously complain that the redistricting process was not deliberate enough. Appellees cannot have it both ways. In reality, given the significant population changes in Texas, the need to redraw four different statewide maps, and the nearly unprecedented responsibility to accommodate four new congressional seats, Texas moved with remarkable dispatch, while using the latest technologies to ensure public participation.

At bottom, Appellees' real complaint is that Texas chose judicial preclearance, rather than administrative preclearance, and then had the temerity to move for summary judgment. But a covered jurisdiction cannot be faulted for pursuing judicial preclearance. Indeed, if as a practical matter judicial preclearance is unavailable and a covered jurisdiction must seek preclearance from an

executive branch official before its duly-enacted law can take effect, then Section 5's intrusion into state sovereignty is even greater than previously understood.

A. Appellees Mischaracterize the Process Through Which Texas' New Plans Were Enacted

1. Appellees complain that the legislative redistricting process was "cloaked in secrecy," Rodriguez Br. 4, but, in reality, nearly every aspect of the process was documented publicly on the internet, *see* Texas Br. 8. Pursuant to House and Senate rules, all legislative hearing notices, proposed redistricting plans, and proposed amendments were posted on the website of the Texas Legislative Council. *Id.* All proposed districting plans and amendments were accessible through "DistrictViewer," a publicly available internet-based application. The Texas Legislative Council also maintained two terminals that offered public access to the State's district modeling software.

Moreover, as Texas explained at length, both the House and Senate held numerous public hearings on redistricting, both before and after the release of the critical census data on February 17, 2011. *See* Texas Br. 7–10. Even before the 82nd Legislature convened its regular session, the House committees responsible for redistricting held a total of 14 public hearings in 12 different cities throughout the State.[1]

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[1] *See* House Committee on Redistricting 2010 Hearing Calendar, http://www.capitol.state.tx.us/Committees/Meetings

Similarly, the Senate committee held seven public hearings on the upcoming redistricting process in seven different cities before the regular session.[2] Both the House and Senate also held public hearings and public floor debates on each districting plan before enactment. *See* Texas Br. 8–10.

2. Appellees also mistakenly contend that the legislature "completely shut out minority legislators," from the redistricting process. Davis Br. 8; Rodriguez Br. 3–8. In the first place, it should be emphasized that in a diverse state like Texas, there are "minority legislators" in both parties.[3] Thus, Appellees' real complaint is the extent to which their

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[2] *See* Senate Committee on Redistricting 2010 Hearing Calendar, http://www.capitol.state.tx.us/Committees/MeetingsByCmte.aspx?Leg=81&Chamber=S&CmteCode=C625 (last visited Jan. 2, 2012).

[3] *See Johnson v. DeGrandy*, 512 U.S. 997, 1027 (1994) (Kennedy, J., concurring in part) (noting that the "assumption that majority-minority districts elect only minority representatives, or that majority-white districts elect only white representatives" is "false as an empirical matter," and "reflects the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens"); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (rejecting assumption, implicit in much race-based districting, that "members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls").

preferred *political party* was involved in the legislative process. And even then, Appellees' contentions are mistaken.

For example, in the Senate—where Appellee Senator Wendy Davis (who is not a minority) complains she was excluded from the process, *see* Davis Br. 8—the Senate leadership and staff made clear that they were willing to meet with *any* Senator who requested a meeting. *See* 2SJA 41–42.[4] Indeed, perhaps no legislator participated in the redistricting process *more* than Senator Davis. She testified at a public hearing on redistricting, met personally with the Chairman of the Senate redistricting committee, and offered several different proposals and amendments. 2SJA 41–42. Some of Senator Davis's proposals—such as keeping District 10 within Tarrant County—were incorporated into the final map. 2SJA 41. Senator Davis may not be happy with *every* aspect of the legislatively enacted map, but she cannot remotely claim that she was "shut out" of that process.

Other Appellees, too, not only participated in the redistricting process, but achieved some of their objectives. For instance, MALC and MALDEF participated directly in the redistricting process by meeting with House leadership and staff. Several of MALDEF's recommended changes to the proposed

[4] 2SJA refers to the Second Supplemental Joint Appendix. JA refers to the Joint Appendix. MJA refers to volume 5 of the Joint Appendix, which contains the electoral maps and accompanying data.

House plan are reflected in the legislatively enacted plans. *See*, *e.g.,* 2SJA 38.

The enacted plans also reflect the input of numerous other minority representatives. For instance, the ten-member Bexar County delegation, which includes eight minority representatives (and seven Democrats), worked together to produce a proposed map for the county's Texas House districts. *See* 2SJA 48. That map was endorsed by 9 of the 10 Bexar County representatives and was included in the legislatively enacted plan. *Id.* Similarly, the El Paso County and Travis County delegations—both of which include several minority representatives—unanimously endorsed maps for their counties, which were included in the final enacted map. 2SJA 49. And the basic structure of congressional district 35 as passed by the legislature was originally proposed by MALDEF and was supported by San Antonio state house representatives Mike Villareal and Joaquin Castro. *See* Tr. 916:23–917:1.

3. At the same time they assail the process for being insufficiently deliberative, Appellees also renew their complaint that the redistricting process was unduly "delayed," *see* Rodriguez Br. 4; Task Force Br. 42; Davis Br. 13–14. But that simply ignores the magnitude of the task before the Texas legislature. All parties agree that the population growth and shifts in Texas were nearly unprecedented, and necessitated the redrawing of four different statewide electoral maps.[5] The task

[5] The new map for the Texas State Board of Education was not challenged, and has received preclearance from the D.C. court.

for the congressional map was even more daunting, as four new districts needed to be accommodated. Democracy takes time, and the legislature wanted to ensure public participation, as discussed above.

Although Appellees seem to ignore the practical difficulties facing the legislature, this Court has recognized "the reality that States must often redistrict in the most exigent circumstances—during the brief interval between completion of the decennial census and the primary season for the general elections in the next even-numbered year." *Growe v. Emison*, 507 U.S. 25, 35 (1993). Given the task before it, Texas acted with admirable dispatch, finishing its process on July 18, 2011, approximately five months after the release of the necessary census data. The State submitted its new plans to the D.C. court for preclearance one day later.

That process compares favorably to the redistricting timetables in other covered jurisdictions, despite the greater complexity of Texas' task. For instance, North Carolina passed new redistricting plans on July 27, 2011, and submitted those plans for preclearance on September 2, 2011.[6] Georgia's legislature passed its three new redistricting plans in late August and September, 2011, and submitted those plans for preclearance on October 24, 2011.[7] The independent commission

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[6] *See* Justin Levitt, *All About Redistricting: North Carolina*, http://redistricting.lls.edu/states-NC.php.

[7] *See* Justin Levitt, *All About Redistricting: Georgia*, http://redistricting.lls.edu/states-GA.php.

that conducts redistricting in California approved final plans for the state house, state senate, and U.S. House on August 15, 2011, and the state submitted those changes for preclearance on November 15, 2011.[8]

Texas' timetable also compares favorably with redistricting efforts in previous cycles that eventually made their way to this Court. For example, the initial Georgia congressional redistricting plan that—after several efforts to accommodate objections from DOJ—culminated in *Miller v. Johnson,* was not enacted until August 1991, and not submitted for preclearance until October 1, 1991. *See* 515 U.S. 900, 906 (1995).[9]

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[8] *See* Justin Levitt, *All About Redistricting: California*, http://redistricting.lls.edu/states-CA.php.

[9] To the extent Appellees fault Texas for its relatively early primaries, *see* Davis Br. 13–14, their complaint is both misguided and misdirected. It is misguided because in a competition between Texas' sovereign prerogative to set election deadlines and the procedural deadlines for preclearance, the latter should not dictate the former. It is also misdirected because much of the time pressure is the result of the federal statute that furthers the admirable goal of ensuring that members of the military serving abroad are given a full opportunity to vote. *See* 42 U.S.C. § 1973ff, *et seq*.

B. Texas Cannot Be Faulted for Pursuing the Statutory Mechanism of Judicial Preclearance or Summary Judgment

1. Judicial Preclearance Is Not a Disfavored Option

Appellees and the United States fault Texas for pursuing judicial preclearance rather than administrative preclearance. *See* United States Br. 23–26; Task Force Br. 42–43; Davis Br. 14–15. But, while it is certainly understandable that DOJ would prefer that covered jurisdictions seek preclearance from DOJ in the first instance, it would be profoundly wrong to view judicial preclearance as a mechanism for delay rather than a clear and necessary option for covered jurisdictions.

Texas was under no obligation to seek administrative preclearance. Judicial preclearance is expressly authorized by the VRA. *See* 42 U.S.C. § 1973c(a). Yet Appellees' view, in which covered jurisdictions are faulted for seeking judicial preclearance and then punished through the imposition of interim maps giving zero deference to the legislatively enacted maps, would effectively eliminate judicial preclearance as a viable option.

That position is not only antithetical to the statutory scheme, but profoundly problematic as a constitutional matter. This Court has recognized that Section 5's intrusion on state sovereignty raises serious constitutional questions. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009). While reversing the normal presumption that duly-enacted laws take immediate effect and forcing covered jurisdictions to go to court and obtain

a favorable declaratory judgment is already a remarkable imposition, it at least guarantees the State a neutral judicial forum. Forcing States to go before *executive branch* officials would be an even greater intrusion on the "integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

That is particularly true since experience has demonstrated that administrative preclearance can sometimes be the source of constitutional difficulties, rather the solution. *See, e.g., Miller*, 515 U.S. at 917–27. If administrative preclearance is simply an option available for the convenience of covered jurisdictions, then it ameliorates the inherent burdens of Section 5. *See Morris v. Gressette*, 432 U.S. 491, 504 (1977) (noting that the purpose of the administrative preclearance option is to reduce the "potential severity" of the "extraordinary federal remedy" of preclearance). But if, as Appellees and the United States suggest, administrative preclearance is the *only* practical option for covered jurisdictions and seeking judicial preclearance is deemed a delay tactic, then the constitutional difficulties of Section 5 are exacerbated, not ameliorated.

In all events, Appellees and the United States vastly overstate the expedition provided by administrative preclearance. As the State *amici* explain at length based on firsthand experience, the administrative preclearance process is itself quite burdensome. *See* Alabama Br. 6–13. Before even seeking administrative preclearance, a covered jurisdiction must compile and submit extensive information about both the old and new voting

practices, and how those practices will affect minority voters. *See* 28 C.F.R. § 51.27. Those submissions "may take weeks or even months to prepare." Alabama Br. 8. The burdens of that process are well illustrated by the substantial time between enactment of a new plan and submission of that plan for preclearance in the covered jurisdictions discussed above. *See supra* 9–10. North Carolina and Georgia both needed a month to prepare their administrative submissions, and California took three months.

Even after that burdensome process is finished, DOJ may still request that the jurisdiction supplement its filing with additional materials. 28 C.F.R. § 51.37(a). After that information is submitted, the clock resets and DOJ has 60 *more* days to approve or deny preclearance. *Id.* In sum, even "largely innocuous" changes that are submitted for administrative preclearance can require months of preparation and review. *See* Alabama Br. 8–10.[10]

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[10] Texas' decision to seek administrative preclearance of its recently enacted voter identification law further illustrates this point. Texas sought administrative preclearance from DOJ on July 25, 2011, less than a week after filing its judicial preclearance action for its redistricting maps. On September 23, 2011, at the very end of the 60-day review period, DOJ requested additional information. Nearly two months after that, on November 16, 2011, DOJ asserted that the State's submission was insufficient. Over 160 days have now elapsed since Texas submitted its Voter ID law for preclearance, and DOJ still has not made a final decision about whether it will interpose objections.

Indeed, given that DOJ has objected to Texas' state house and congressional redistricting plan in D.C. court, it is a near certainty that the process would have been slower had Texas sought administrative preclearance first. If Texas had taken the administrative route, DOJ would have interposed objections, at the earliest, 60 days after Texas' initial submission, on September 16, 2011. That date would have been postponed even further if DOJ requested additional information. Thus, if Texas had pursued the administrative option first, it would have likely delayed matters by several months, if not longer. The United States suggests that Texas should have pursued both options simultaneously, *see* United States Br. 23–24, but the D.C. court would have almost certainly held the judicial proceedings in abeyance and awaited the outcome of the administrative process.

Finally, as the experience of Georgia in *Miller v. Johnson* dramatically demonstrates, seeking and obtaining administrative preclearance is not necessarily expeditious, and can give rise to collateral litigation over whether changes required by DOJ are consistent with the Constitution. *See* 515 U.S. at 917–27. For all of these reasons, it is profoundly misguided to fault Texas for exercising its statutory right to seek judicial preclearance.

2. Texas Is Not Responsible for Delays in the Preclearance Process

Appellees also distort the record in blaming Texas for delays in the preclearance process. *See* Davis Br. 16–22. As Texas explained, it sought judicial preclearance one day after its final map was

signed into law, and has taken numerous steps to expedite that process. *See* Texas Br. 10–13. For example, Texas made extensive informal submissions of information to DOJ to avoid the need for protracted discovery; voluntarily provided additional information (at DOJ's request) and arranged for interviews of state officials; filed a motion to expedite; sought permission to file an early motion for summary judgment; and pressed for a prompt trial date. *Id.*

In contrast, DOJ declined the opportunity to file an early answer and refused to accept Texas' proposal for an early trial date of October 10, 2011. *Id.* Similarly, Appellees contributed to the delays by intervening in the preclearance proceeding, designating their own expert witnesses, and requesting extensive discovery.

3. Neither Texas' Motion for Summary Judgment Nor the D.C. Court's Denial of That Motion Is Relevant

Appellees cannot seriously dispute Texas' multiple efforts to expedite the judicial preclearance proceedings. Instead, they fault Texas for pursuing a motion for summary judgment rather than moving immediately to trial, and attempt to place great weight on the D.C. court's denial of that motion. But there is certainly nothing sinister in Texas' effort to pursue summary judgment. Had that motion succeeded, it would have expedited matters

considerably.[11] As it is, the motion served to clarify the D.C. court's view of the governing legal standards prior to trial. In any event, Section 5's judicial preclearance option is designed to provide an expeditious route to a declaratory judgment. A trial should not be inevitable.

Appellees attempt to make much of the D.C. court's denial of Texas' motion, and repeatedly cite the court's reference to Texas using an "improper standard." *See* Task Force Br. 21; Davis Br. 21; NAACP Br. 3–4, 17–18; Rodriguez Br. 16. But all the D.C. court has decided is that summary judgment is not appropriate. In doing so, the D.C. court rejected the standard Texas had proposed to judge whether its redistricting plans violate Section 5—namely, a bright-line rule that only districts with a certain minority citizen voting age population were protected by Section 5. *See* Task Force Addendum 30A–35A. Texas should not be faulted for proposing a simple bright-line test that, unlike the standard embraced by the D.C. court, does *not* make a trial all but inevitable.

In any event, the D.C. court's denial of the motion for summary judgment has no relevance to the propriety of either Texas' redistricting or the Texas court's interim maps. In rejecting the standard Texas proposed in its motion for summary judgment, the D.C. court did not find that Texas

[11] Indeed, that is precisely what happened with Texas' map for the Board of Education, which the D.C. court precleared on September 22, 2011.

used an improper standard or methodology in *drawing the new redistricting maps*. Rather, the court simply declined to accept the standard proffered in Texas' motion for summary judgment. Nothing in the court's ruling casts doubt on the legal merits of the maps themselves or provides any justification for the remarkable interim maps drawn by the Texas court.

II. A PROPERLY RESTRAINED APPROACH TO INTERIM RELIEF IS COMPELLED BY THIS COURT'S PRECEDENTS AND IS FULLY CONSISTENT WITH SECTION 5

A. Texas Has Never Disputed That It May Not Permanently Implement Its New Maps Until It Receives Preclearance

Appellees and the United States spend a substantial portion of their briefs arguing a point that Texas has never disputed—namely, that Texas' legislatively enacted plan is "legally unenforceable unless and until precleared." *See* Davis Br. 29–33; Rodriguez Br. 23–25; Task Force Br. 36–38, 44–45; United States Br. 11–13. Not once in this proceeding has Texas argued otherwise, as the Texas court acknowledged. *See* JA 124 ("[S]ince the inception of this lawsuit, the State has admitted that its enacted plan must be precleared prior to implementation.").

Appellees and the United States also go to great lengths to establish another point that Texas does not dispute—namely, that since population growth has rendered the previous plans unusable and the preclearance proceedings have bogged down, the Texas court must impose interim maps while preclearance is pending. But the fact that an

interim plan must be ordered is only the beginning, not the end, of the inquiry.[12] The question presented here is what standards govern the entry of such interim maps. Appellees' notion that any deference to the enacted plan in constructing interim plans is tantamount to circumventing the preclearance process is fundamentally misguided. Interim remedial maps are just that, and do not obviate the need for preclearance. But they remain quintessential remedial orders subject to the normal rules of deference and equitable relief.

When faced with the contingency of rapidly approaching elections but no final decision on preclearance of the State's new plans, the district court should have taken a restrained approach to interim relief that was cognizant of the deference owed to duly-enacted state laws, the proper role of the judiciary, and basic principles governing equitable relief. *See* Texas Br. 33–46. Applying those principles, the legislatively enacted maps should serve as the starting point for any interim electoral maps. This Court's consistent emphasis that judicial intervention is "unwelcome," that "the primary locus of responsibility" lies with the legislature, *LULAC v. Perry*, 548 U.S. 399, 415–16 (2006), and that courts "should be guided by

[12] For most voting changes subject to Section 5, the need for an "interim" remedy simply does not arise: the assumption is that, until the voting change receives preclearance, the pre-existing (or "benchmark") policy will continue to govern. In this case, however, that is not an option because of significant population growth and the addition of four new congressional districts.

legislative policies" whenever possible, *Abrams v. Johnson*, 527 U.S. 74, 79 (1997), would seem to compel as much.

Using the enacted maps as the starting point for interim relief neither constitutes preclearance nor interferes with the preclearance process in D.C. court. Instead, it simply recognizes that the "presumption of good faith that must be accorded legislative enactments," *Miller*, 515 U.S. at 916, fully attaches to the legislative maps, even though preclearance remains pending. The district court is accordingly bound to "follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *White v. Weiser*, 412 U.S. 783, 795 (1973).

The legislatively enacted maps are only the starting point, and the district court may alter or modify those maps, but only if it makes at least a preliminary finding that such alteration or modification is needed to prevent a likely violation of law. *See Upham v. Seamon*, 456 U.S. 37, 43 (1982) (holding that "the district court's modifications of a state plan" must be "limited to those necessary to cure any constitutional or statutory defect"). And, even if the district court makes such a finding, any alteration or modification must be narrowly tailored to addressing that likely violation of law. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (equitable relief "should be no more burdensome to the defendant than necessary to provide complete

relief to the plaintiffs"); *Whitcomb v. Chavis*, 403 U.S. 124, 160–61 (1971) (vacating remedial order that "broadly brush[ed] aside state apportionment policy without solid constitutional or equitable grounds for doing so").

B. *Upham*, not *Lopez* and *McDaniel*, Is Controlling

In *Upham*, this Court held that an "interim reapportionment order" in a redistricting case requires "'reconciling the requirements of the Constitution with the goals of state political policy.'" 456 U.S. at 43 (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)). The Court stated in no uncertain terms that 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*." *Id.* at 43 (emphasis added). That is, in the absence of any finding that some aspect of the challenged 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." *Id.* The Court accordingly vacated an interim redistricting order that altered the boundaries of districts in an unprecleared plan that had not been found unlawful under the VRA or the Constitution.

Like the district court, *see* JA 186, Appellees seek to distinguish *Upham* on the ground that the Attorney General had objected to only two districts in the redistricting plan at issue, thereby signifying that the remaining districts were in compliance with

Section 5.[13] *See* Task Force Br. 45–47; NAACP Br. 15–16; Rodriguez Br. 26–28; Davis Br. 39–41. But that ignores the critical fact that the legislative plan to which this Court demanded deference in *Upham* had *not* been precleared; indeed, unlike this case, preclearance had actually been *denied*.

Appellees attempt to skirt that reality by emphasizing that the balance of the map in *Upham* "*had been precleared*." Task Force Br. 46 (emphasis in original). But preclearance does not work that way; it is an all-or-nothing determination. As DOJ itself made clear in the D.C. court proceeding, it "disagrees with the assertion . . . that [the D.C. court] could preclear only part of a redistricting plan." 2SJA 70. As DOJ has explained, "Section 5 preclearance does not function like a line-item veto where parts of the redistricting plan are approved for implementation." *Id.*

To be sure, the denial of preclearance in *Upham* did focus on particular districts, and thus the regional court could rely on DOJ's denial in fashioning an interim map. But it is DOJ's own position that any denial of preclearance is tantamount to a wholesale denial of preclearance. Indeed, DOJ's denial of preclearance is what necessitated an interim map in *Upham*. Moreover,

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[13] In the pending preclearance case, DOJ did not object to the Texas Senate plan at all. *See* JA 407. Thus, even under Appellees' cramped reading of *Upham*—which turns on whether DOJ has objected to the State's plan in the preclearance process—the district court's modifications to the State's Senate plan were impermissible.

the fact that DOJ's denial focused on only two districts hardly suggests that—in the absence of any denial—a regional district court is freed from the obligation to modify the State's legislatively enacted maps only to the extent "necessary to cure any constitutional or statutory defect." *Upham*, 456 U.S. at 40–41. Once again, *Upham* makes clear that—far from being a nullity—even an unprecleared plan is a valid statement of state policy that should form the starting point for an interim map.

In sum, if Appellees were correct that an unprecleared plan is a nullity or that a regional three-judge court undermines Section 5 by viewing an unprecleared plan as a valid statement of state policy, then *Upham* would have come out the other way. Appellees' reading of *Upham* would also lead to the anomalous result that a State's legislatively enacted plan is entitled to less deference when a judicial preclearance proceeding is pending than after administrative preclearance has been *denied*.

Appellees continue to rely heavily on *Lopez v. Monterey County*, 519 U.S. 9 (1996), a case that is readily distinguishable. This Court held in *Lopez* that a covered jurisdiction may not hold elections under an unprecleared plan where it "did not preclear the ordinances as required by § 5," even though it had been on notice for "several years" that preclearance was required. 519 U.S. at 21; *see also id.* at 24 ("The County dismissed its declaratory judgment action before the District Court for the District of Columbia made any findings, and it has never submitted the consolidation ordinances to the Attorney General for review.").

The critical fact in *Lopez* was that the covered jurisdiction had "not discharged its obligation [under federal law] to submit its voting changes to either of the forums designated by Congress." *Id.* at 25. The Court emphasized that "[t]he goal of a three-judge district court facing a § 5 challenge must be to ensure that the covered jurisdiction *submits its election plan to the appropriate federal authorities* for preclearance as expeditiously as possible." *Id.* at 24 (emphasis added). That has already happened here, and Texas has always recognized its obligation to seek preclearance before its plan can take permanent effect. Unlike the case of a recalcitrant jurisdiction, there is no need to order Texas to seek preclearance. And unlike the situation in *Lopez* where the regional district court was addressing a longstanding stalemate created by the covered jurisdiction's efforts to *permanently* implement its plans without preclearance, there is no question here that the interim order is truly interim and that preclearance proceedings will run their course.

Indeed, *Lopez* affirmatively supports Texas' position, as it makes clear that the drawing of an interim map does not interfere with the jurisdiction of the D.C. court and is analytically distinct from the question whether the plan has been precleared. As the Court explained, when a three-judge district court is faced with claims of a Section 5 violation, the Court "may determine only whether § 5 covers a contested change, whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, *what temporary remedy, if any, is appropriate*." *Lopez*, 519 U.S. at 23 (emphasis added).

Appellees' reliance on *McDaniel v. Sanchez*, 452 U.S. 130 (1981), is equally misplaced. That case says nothing about the standards for interim relief while preclearance is pending. It instead addressed the different question of whether a districting plan passed by a state legislature in response to a court order finding the prior plan unlawful must be submitted for preclearance. The Court answered that question in the affirmative, holding that the district court erred by adopting a county's permanent remedial plan "before it had been submitted to the Attorney General or the United States District Court for the District of Columbia." *Id.* at 153. The Court reiterated that the preclearance requirement is "applicable" to all voting changes "reflecting the policy choices of the elected representatives of the people," even if enacted in response to a judicial decision. *Id.* That principle has no direct application here. Indeed, as explained above, Texas has never disputed that the preclearance requirement is "applicable." This case involves the distinct question of what *interim* relief is appropriate when a State has not received its preclearance determination in time for an upcoming election. *McDaniel* is entirely silent on that issue.

C. Nothing in Section 5 or this Court's Precedents Barred the District Court from Making Preliminary Findings About the Appellees' Likelihood of Success on the Merits

1. Appellees and the United States contend that the Texas court was prohibited from making any findings about Appellees' likelihood of success on the merits before redrawing Texas' legislatively enacted

electoral maps. *See* Task Force Br. 38–41; NAACP Br. 21; Davis Br. 36–39; United States Br. 16–17; Rodriguez Br. 28–31.[14] As Texas explained, those arguments are misplaced. *See* Texas Br. 50–52.

Like the Texas court, the Appellees rely heavily on *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977), and *Connor v. Waller*, 421 U.S. 656 (1975). But those cases merely hold that the D.C. court has exclusive jurisdiction to make a final determination of whether a covered jurisdiction is eligible for preclearance. In *Warren County*, a district court in Mississippi expressly concluded that the state's enacted districting plan "will not lessen the opportunity of black citizens of Warren County to participate in the political process." 429 U.S. at 646.

Similarly, in *Connor*, the district court "erred in *deciding the constitutional challenges* to the Acts based upon claims of racial discrimination." 421 U.S. at 656 (emphasis added); *see also McDaniel*, 452 U.S. at 150 n.31 (noting that the district court in *Warren County* impermissibly determined that "a reapportionment plan proposed by a covered jurisdiction complies with constitutional

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[14] The Rodriguez Appellees mischaracterize Texas' argument by suggesting that, under the State's position, the district court must conduct a "full analysis" under "Section 5, Section 2, and the Constitution." Rodriguez Br. 28. Texas has never taken that position. It has argued only that the court must make a preliminary finding of a *likelihood* of success on the merits, akin to the finding that a court must make prior to entering a preliminary injunction.

requirements"). Indeed, the Court's brief per curiam opinion in *Connor* specifically left open the possibility that the three-judge court could issue an interim order governing the upcoming election cycle, without remotely suggesting that doing so would interfere with preclearance or that such an order would be exempt from the normal rules governing equitable relief. *See* 421 U.S. at 656.[15]

Justice Kennedy's concurrence in *Branch v. Smith*, 538 U.S. 254 (2003), is to the same effect. That opinion cited *Connor* for the settled proposition that "[w]here state reapportionment enactments have not been precleared in accordance with § 5, the district court 'err[s] in deciding the constitutional challenges' to those acts." *Id.* at 283 (Kennedy, J., concurring) (quoting *Connor*, 421 U.S. at 656). Justice Kennedy further explained that even an alternative holding on a constitutional question—such as that reached by the lower court in *Branch*—could interfere with the preclearance process. *Id.* at 284. Indeed, the district court's alternative holding in *Branch* led DOJ to discontinue the preclearance process. *Id.*

These concerns are not remotely implicated by a *preliminary* finding regarding the plaintiffs'

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[15] The Task Force also relies on Section 14(b) of the VRA, 42 U.S.C. § 1973*l*(b), which provides that "[n]o court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment" pursuant to Section 5. Task Force Br. 38–39. Texas, of course, is not seeking a declaratory judgment from the Texas court with respect to the merits of its preclearance claims.

likelihood of success on their VRA and constitutional claims as part of the process of awarding interim relief. This Court has made clear that a regional three-judge court does not interfere with the preclearance process by considering "what temporary remedy, if any, is appropriate," while preclearance is pending. *Lopez*, 519 U.S. at 23; *see Connor*, 421 U.S. at 656. If such a preliminary finding is not required, it is difficult to imagine what, if any, standard would apply to govern the "unwelcome" judicial obligation of crafting an interim plan, or what metric this Court might apply in reviewing it. *See Ballard v. Commissioner of Internal Revenue,* 544 U.S. 40, 61–62 (2005) (emphasizing need for transparency in lower court decisions to effectuate appellate review).

Moreover, it is well established that a "likelihood of success" finding made in connection with an award of preliminary relief is not a final ruling on the merits. A party "is not required to prove his case in full at a preliminary-injunction hearing," and "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Community Nutrition Inst. v. Block*, 749 F.2d 50, 56 (D.C. Cir. 1984) (Scalia, J.) (noting that a court's "tentative assessment made to support the issuance of a preliminary injunction pending resolution of the issue" is "not a final determination" of that issue and "is not even law of the case").

Requiring the district court to make a preliminary finding of a likelihood of success on the merits prior to ordering the alteration of the State's

maps is thus consistent with this Court's precedent, and does not intrude upon the D.C. court's exclusive jurisdiction to enter final rulings on preclearance claims. In assessing whether to enter preliminary equitable relief, district courts routinely make preliminary findings before engaging in a full assessment of the merits—indeed, they are *required* to do so. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). There is no reason why interim redistricting plans—which are temporary equitable remedies that apply only for a single election cycle—should be treated any differently.

2. Requiring the district court to ground any alterations of the State's plan on a likelihood of success on the merits also serves the vital and constitutionally necessary role of ensuring that race is taken into account no more than necessary to remedy likely violations of law. As Texas explained, any race-conscious remedy—such as the creation of "minority opportunity districts" or "coalition districts"—must be narrowly tailored to remedying actual, proven racial discrimination. *See* Texas Br. 45–46; *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Those constitutional principles are fully applicable to judicially drawn maps or maps drawn in response to a court order. *See Miller*, 515 U.S. at 920–23.

This Court has emphasized that "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Miller*, 515 U.S. at 921; *see also id.* (noting that compliance with the VRA cannot justify race-based districts where those districts were "not required by the Act"). Thus,

using race to draw interim maps that merely further the general ends of the VRA or "avoid" *alleged* statutory violations is not only unjustified or unwise, but unconstitutional. To the extent race-based districts are *ever* permissible, it can only be to remedy actual or likely violations of the VRA or the Constitution. There can surely be no compelling justification for a race-based remedy when the district court expressly *refuses* to make any such finding. Application of settled equitable principles to judicially drawn interim maps thus ensures that considerations of race will be limited to those few situations in which race-based remedies are constitutionally permissible.

D. The Fact That a Judicially Drawn Plan is "Interim" Does Not Alter Basic Principles Governing Equitable Relief

Some, but not all, of the Appellees attempt to defend the Texas court's conclusion that, because its maps were "interim" rather than "remedial," the court was freed from customary principles of equitable relief and could instead draw "independent" maps. *See* JA 96–99, 181; NAACP Br. 7, 20–21. That is clearly mistaken. Interim maps are "interim" in the sense that they govern only a single election; they do not in any way obviate the need for a covered jurisdiction to pursue preclearance. But interim remedial orders remain remedial orders, subject to the settled principles that govern equitable relief. *See* Texas Br. 40–46. The district court clearly erred in concluding otherwise.

An "interim" order is simply one type of "remedial" order, and is subject to the normal rules

that govern all such orders. This Court has referred to such orders as an "interim remedy," *see Chapman*, 420 U.S. at 18, without suggesting that the term was an oxymoron. Interim remedial orders are distinct because of their short duration, not because they are governed by wholly different principles. The district court's "interim" orders are analytically identical to other interim equitable remedies, such as *preliminary* injunctions, *temporary* restraining orders, and stay orders *pending appeal*. All of these remedies are "interim," yet all remain bound by longstanding principles of equitable relief—such as the requirements that the court find a likelihood of success on the merits and narrowly tailor any interim relief to the harm sought to be averted. *See*, *e.g.*, *Winter*, 555 U.S. at 20; *Nken v. Holder*, 129 S. Ct. 1749, 1756 (2009). As *Upham* makes clear, those principles apply with full force to interim relief in cases involving jurisdictions covered by Section 5. *See Upham*, 456 U.S. at 43 (holding that "the district court's modifications of a state plan" must be "limited to those necessary to cure any constitutional or statutory defect").

In that regard, it is important to distinguish between the "interim" maps here, and situations where legislative gridlock has prevented the political process from producing any legislative map at all. In the latter situation, there is no legislative map to which to defer, and courts must draw a map knowing it will govern until the stalemate ends. *See Chapman*, 420 U.S. at 19 (noting that, for court-ordered plans, "there often is no state policy . . . which might deserve respect or deference"). That is not the circumstance here. Texas' political process

produced maps, and Texas has actively sought preclearance. If preclearance is forthcoming, those maps will take effect. If preclearance is denied, there is no obvious obstacle to the legislature producing new maps. Thus, the interim maps are truly *interim* remedies, and there is no reason not to use the legislative maps as the starting point and modify them only to the extent consistent with traditional equitable principles.

E. Use of the Legislatively Enacted Plan on an Emergency Interim Basis Would Not Require Preclearance

Appellees further contend that if the Texas court had ordered the legislatively enacted plan to be used as the interim plan—or had granted any deference to the political goals embodied in that plan—then that ruling would itself have been subject to the preclearance requirement. *See* Davis Br. 33–34; Rodriguez Br. 38–39; Task Force Br. 45; United States Br. 18–20. That mistake is at the heart of the Texas court's erroneous maps. The Texas court did not just fail to give the legislative maps sufficient deference, it affirmatively believed that Section 5 compelled it to give zero deference to the unprecleared map, lest its own maps reflect the political position of Texas and require preclearance. Section 5 does not compel such a curious result.

Appellees' position makes no sense as either a practical or doctrinal matter. As a practical matter, the need for an interim plan arises only when the preclearance process is taking too long, so it would

make no sense to require an interim plan to be submitted for preclearance as well.[16]

That position is also contrary to DOJ's own regulations implementing the VRA, which contemplate that "[a] Federal court" may authorize "the emergency *interim* use without preclearance of a voting change." 28 C.F.R. § 51.18(d) (emphasis added). This regulation makes perfect sense, as it recognizes that using an unprecleared voting change on an interim basis neither requires preclearance nor obviates the need for preclearance.

The United States attempts to discount the force of its own regulation, arguing that this provision "does not come into play because [Texas] did not succeed in asking the court below to exempt their map from preclearance." United States Br. 28. But Texas did not need to seek an "exemption" for the court's interim map because it was not subject to preclearance in the first place. The regulation does not speak in terms of exemptions, but rather assumes that "Federal court[s]" may authorize the use of an unprecleared change on an interim basis. And, even under the government's interpretation, this Court could remand to the district court with instructions to order the emergency interim use of the legislatively enacted plan, as Texas has requested. *See* Texas Br. 54–55.

The United States also asserts that there is no "emergency" because it was "entirely foreseeable"

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[16] Would the district court then need to devise an interim-interim plan while preclearance of the interim plan is pending?

that the preclearance proceeding would not be completed in time for Texas' 2012 election cycle. United States Br. 29. But the United States has previously emphasized to this Court that "emergencies" include *any* "condition of urgent need for action or assistance," even if the urgency was foreseeable.[17] For example, "[i]f a cardiac patient fails to take his heart medicine," the resulting medical crisis "is no less an 'emergency' requiring immediate attention simply because it was foreseeable or the patient may have contributed to its cause." *Id.* Here, since election cycles are relatively predictable but the pace of preclearance is unpredictable, it is hard to see how this is anything but a paradigmatic emergency situation covered by the regulation.

Finally, while the possibility that some interim relief might become necessary was foreseeable, the Texas court's radical departure from ordinary equitable principles was not. And that departure is what creates the exigency now. Had the district court entered interim orders that gave due deference to the State's legislatively enacted maps and followed longstanding principles governing equitable remedies, there would have been no need for "emergency" relief, from this Court or otherwise. It is the need to correct those errors, combined with the

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[17] *See* Br. for United States at 24–25, *Winter v. Natural Res. Def. Council*, No. 07-1239 (filed Aug. 7, 2008) (addressing the meaning of "emergency" under regulations authorizing alternative arrangements to compliance with the National Environmental Policy Act).

rapidly approaching (and already-delayed) primary elections, that gives rise to the exigency.

F. Texas' Position Does Not Undermine Section 5 or Distort the Incentives of Covered Jurisdictions

Finally, Appellees are wrong to suggest that Texas is seeking to have its plan "rubber-stamped," and their rhetoric about "writ[ing] Section 5 out of the U.S. Code," is overblown. *See* Rodriguez Br. 23; Davis Br. 33–34; NAACP Br. 24. Texas has never disputed that a narrowly tailored alteration of its plans would be appropriate if and when there is some legitimate finding of a likely violation of law. Nor has Texas disputed that its plan is subject to the preclearance requirement, and that it must obtain preclearance from the D.C. court before implementing its legislatively enacted maps on a permanent basis. But, absent some finding that its enacted plan is likely to violate federal law, there is no basis for a district court to draw an entirely "independent" map based on the court's own conception of "the collective public good." JA 170.

The United States is similarly wrong to suggest that Texas' position would "fundamentally distort the incentive structure of Section 5" by diminishing covered jurisdictions' "incentive to cooperate with the preclearance process and bring it to prompt resolution." United States Br. 22–23. Indeed, the United States has it exactly backwards. No sovereign State would lightly decide to drag out the preclearance process while its duly-enacted map remains suspended so that it could try its luck at getting a three-judge court to issue a favorable

interim map for one election cycle. The continuing need for preclearance and the ability of the D.C. court to sanction dilatory tactics are ample incentives for States to seek a prompt decision.

By contrast, if opponents of a legislative map can procure an interim map drawn to "avoid' their far-reaching allegations just by intervening before the preclearance court and taking their time, then the prospects for gamesmanship are nearly unlimited. Those incentives are magnified further if the interim map becomes the new benchmark.[18] The Court has appropriately taken such incentives into account in fashioning its redistricting jurisprudence. *See*, *e.g.*, *LULAC*, 548 U.S. at 420 (rejecting a test that would give "opposition legislators . . . every

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[18] As Texas explained, once Appellees obtain a favorable interim map, they are likely to argue that the purportedly "interim" map should be used as the benchmark for evaluating future electoral changes. *See* Texas Br. 47–48. This scenario was not at all hypothetical, as it is precisely the position that both Appellees *and* DOJ took before the D.C. court. *See* United States and Intervenors' Motion to Hold Case in Abeyance at 2 (Doc. 108), No. 1:11-cv-1303 (D.D.C. Nov. 22, 2011) (arguing that "the [Texas] court's new interim redistricting plans for the House, Senate, and Congress become the new benchmark for comparison in determining whether the legislature's three redistricting plans are retrogressive"). Without even acknowledging its prior position before the D.C. court, DOJ has now made a complete about-face, asserting that the interim orders would *not* "become the benchmark for Section 5 purposes." United States Br. 26–27. While Texas welcomes DOJ's change in position, that hardly prevents Appellees from continuing to insist that the interim plans should become the new benchmark.

incentive to prevent passage of a legislative plan and try their luck with a court that might give them a better deal").

Importantly, it is Appellees, not Texas, that assert that normal equitable principles do not constrain the interim maps. If the district court finds that some aspect of the State's plan is likely to violate federal law, then this defect will be addressed through a narrowly tailored "interim" electoral plan that will apply while preclearance is pending. If no such finding is made, then there is little risk of harm to Appellees (and the United States) if the State's enacted plan is used as the interim plan. Either way, the State will continue to have every incentive to obtain an expeditious determination on preclearance so that it may implement its plan on a permanent basis.

If any argument in this case is "extreme," NAACP Br. 24, or "absurd," Rodriguez Br. 28, it is Appellees' argument (fully endorsed by the Texas court) that a district court has carte blanche to rewrite a duly enacted state law—and order elections to be conducted under that judicially drawn map—solely because the preclearance process is taking too long, without any finding that those alterations are necessary to remedy a likely violation of law and narrowly tailored to do so. If that is really what Section 5 requires, then the doubts about its constitutionality are even graver than this Court feared in *Northwest Austin*.

III. IF THIS COURT REMANDS, IT SHOULD CORRECT THE MOST EGREGIOUS ERRORS IN THE DISTRICT COURT'S INTERIM MAPS

Given the need for certainty in light of the rapidly approaching (and already delayed) primary elections and the district court's refusal to find any probable statutory or constitutional violation in the legislative plans, the most appropriate course at this juncture is for this Court to vacate the interim orders and remand with instructions to order the interim use of the State's legislatively enacted plan while preclearance is pending. *See* Texas Br. 54–55. Even though Texas has faced a host of claims in two different venues for more than six months, there has been no finding by any court that a single aspect of Texas' enacted plans is likely to violate federal law. Particularly in light of the district court's profound misunderstanding of the governing legal standards, an open-ended remand would only result in additional delay, leading to further chaos in the 2012 election cycle.

If the Court nonetheless opts to remand to allow the Texas court to impose new interim maps, it should provide substantial guidance regarding the legal standards to be employed in the court's likelihood-of-success inquiry. *See* JA 159–64 (Judge Smith listing four legal issues "most begging for resolution or explication" by the Supreme Court). That guidance should begin with the correction of several discrete errors in the challenged orders. These errors were intimately related to the Texas court's failure to defer to the duly-enacted maps. Indeed, these erroneous legal assumptions amount

to a recipe for ignoring the legislative maps and forcing courts to draw wholly "independent" maps.[19] Thus, if the Court remands, it should provide additional guidance to ensure the district court does not repeat its errors.

A. The District Court Was Not Permitted to Equalize Population Across Districts

Appellees argue that the district court's interim plan for the Texas House appropriately reduced population deviations across districts to *de minimis* levels. *See* NAACP Br. 18–20; Task Force Br. 48; JA 170–72. But by contending that all judicial maps, including interims ones, must apply a much more stringent standard of population deviations than legislatures need apply, Appellees would make it impossible for a court to defer to a legislative map in

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[19] While Appellees seek to downplay the extent of the district court's redrawing of Texas' maps, there can be no real dispute that the changes were significant. For example, the Rodriguez Appellees cite a limited number of districts in which there is substantial (but not complete) overlap between the State's congressional plan and the district court's interim plan. *See* Rodriguez Br. 40–41. But that same report demonstrates the true extent of the district court's modification of the State's plan. In particular, in congressional districts 10, 12, 20, 21, 23, 25, and 35, the population overlap between the interim plan and the enacted plan is 43.3%, 45.0%, 50.9%, 59.9%, 49.4%, 25.6%, and 35.7%, respectively. *See* MJA 22–24. Any suggestion that the district court "gave as much consideration to the State's enacted map as possible," JA 90, does not withstand scrutiny. In any event, given Appellees' broader position, it is not clear why they find the Texas court's purported effort to give the legislatively enacted maps as much consideration as possible to be laudable or even permissible.

fashioning an interim map. In other words, Appellees' view would require a court to adjust *perfectly lawful* population deviations in a legislative map.

Nothing in this Court's precedents supports this recipe for judicial rewriting of legislative maps. To be sure, this Court has suggested that a district court must apply a stricter standard for population deviations when the State's political process has deadlocked and the court is forced to issue its own map to remedy a one-person-one-vote violation, with no legislative map to which to defer. *See*, *e.g.*, *Chapman*, 420 U.S. at 26. But this Court has not suggested that the same principles would govern interim relief when the legislature has drawn a map with presumptively acceptable population deviations, and the only reason for interim relief is delay in the preclearance process. In that context, both common sense and the general presumption of good faith require courts to apply the more forgiving standard for legislative maps, and to modify the maps only if there is a likely violation of those standards. This Court has held that "an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations" that are presumptively reasonable. *Brown v. Thompson*, 462 U.S. 835, 842 (1983). Applying that standard, there was no basis for the district court to modify Texas' legislative maps solely to equalize population across districts.

Cox v. Larios, 542 U.S. 947 (2004), is not to the contrary. That case stands for the unremarkable proposition that even in those plans in which there are minor population deviations—*i.e.*, under 10%

total deviation—a plaintiff can rebut the presumption that such a plan is constitutional. *See Larios v. Cox*, 300 F. Supp. 2d. 1320, 1341 (N.D. Ga. 2004) (holding that where legislative plans' total population deviation was under 10% the plans were "presumptively constitutional, and the burden [fell] on the plaintiffs to rebut that presumption.").[20] Thus, in litigating their Section 2 claims, Appellees could attempt to rebut the presumption that the legislatively enacted plan comports with one-person, one-vote principles. But, absent a finding of a likely violation, there is no basis for rewriting the legislative maps to reduce the already *de minimis* variations even further solely to comply with the more stringent standard for judicial maps that remedy one-person-one-vote violations when the political process has deadlocked.

B. The District Court Was Not Permitted To Adjust the Legislatively Enacted Map to Maintain Voter Tabulation Districts

Appellees contend that the administrative difficulties of drawing new lines for Voter Tabulation Districts ("VTDs")—*i.e.*, voting precincts—compelled the district court to fashion the interim maps as it did. *See* Rodriguez Br. 39–40; NAACP Br. 12–13; *see also* JA 102–03 (district court "endeavored to avoid as many VTD cuts as possible" in the interim maps).

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[20] *See also Moore v. Itawamba Cnty.*, 431 F.3d 257, 259 (5th Cir. 2005) ("Population deviation less than ten percent . . . is not *per se* nondiscriminatory and is not an absolute bar to a claim of vote dilution.").

But this is yet another recipe for refusing to defer to legislative maps. Legislatures have every right to redraw precinct boundaries and create new VTDs accordingly. Texas election law specifically provides for the redrawing of county precinct boundaries to give effect to a redistricting plan. *See* Tex. Election Code Ann. § 42.032 (West 2011) (providing that, if "changes in county election precinct boundaries are necessary to give effect to a redistricting plan," then the county commissioners courts "shall order" those changes).

There is nothing sacrosanct about existing VTDs or anything inherently problematic about altering them. And the Texas court certainly did not find that the Texas legislature violated any provision of the VRA by splitting VTDs. In acting to preserve existing VTDs without a finding of any likely statutory or constitutional violation, the Texas court got things exactly backwards—instead of deferring to the legislature's new *maps*, it deferred to pre-existing VTDs.

In support of their position, Appellees rely on this Court's opinion in *Bush v. Vera*, 517 U.S. 952 (1996), and the lower court decisions in that case, *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), and *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996). Far from supporting the district court's actions in this case, the *Vera* decisions simply hold that where districts are "formed in utter disregard for traditional redistricting criteria" and such districts "are ultimately unexplainable on grounds other than the racial quotas established for those districts," a court is justified in holding that "they are the product of [presumptively] unconstitutional

racial gerrymandering." 517 U.S. at 976 (quoting *Richards*, 861 F. Supp. at 1341). In *Vera*, the numerous split VTDs in the State's plan—plus many other factors raising red flags—provided evidence of an unlawful motivation in enacting redistricting plan. *See id.* at 974–75. But nothing in that decision suggests that a district court *must* avoid splitting VTDs whenever it imposes an interim map. To do so would make it impossible for a court to defer to the legislatively enacted plan, despite this Court's clear instruction to do just that absent a showing of a likely violation.

C. The District Court's Interim Maps Reflect an Impermissible Focus on Race and Proportionality

The Texas court clearly took race into account in drawing its interim maps. *See* Texas Br. 45–46, 56–57. In particular, the Texas court seemed to believe that it was required to add minority opportunity districts to the congressional and state house plans in proportion to each racial group's share of population growth. *See* JA 146–47 (adding new "minority coalition opportunity district" in Dallas-Fort Worth because much of the population growth in that area was "attributable to minorities"); JA 150 & n.32 (new minority coalition district in Tarrant County was "based on the significant minority population growth occurring in the area"). Appellees continue to press this argument, asserting that the creation of additional minority opportunity districts was necessary in order to "reflect the substantial population growth" of minority groups. Task Force Br. 49–52; *see* NAACP Br. 25–28. This argument is

mistaken, and even DOJ has found this aspect of the plans problematic.

The VRA explicitly rejects any right to proportional representation. *See* 42 U.S.C. § 1973(b); Texas Br. 56–57. And this Court has made clear that a State's failure to *maximize* minority voting strength does not violate the VRA. *See Johnson v. DeGrandy*, 512 U.S. 997, 1017 (1994); *see also Abrams*, 521 U.S. at 97–98.

As the United States concedes, the district court's opinion is in tension with these principles. For example, the government notes that "the district court appears to have concluded that Section 5 required at least two of Texas' four new [congressional] seats to be ability-to-elect districts," and that the court's rationale for creating these new districts was "inadequate." United States Br. 31. Similarly, with respect to the Texas House map, the United States notes that the district court failed adequately to justify its decision both to maintain the 50 minority districts from the benchmark plan *and* to create three new ability-to-elect districts. *Id.* at 30–31. The need to avoid "retrogression" in minority voting strength cannot possibly justify the creation of *additional* minority districts compared to the benchmark plan. Indeed, drawing additional minority districts based on race that are not required by the VRA would have violated the Equal Protection Clause if Texas had done it. *See Miller*, 515 U.S. at 921 (noting that compliance with the VRA cannot justify race-based districts where those districts were "not required by the Act").

If this Court remands for further proceedings, it should instruct the Texas court that it is not permitted to make any alterations to Texas' legislatively enacted maps based on concerns about proportional representation or maximization of minority voting strength. Of course, as noted above, *see supra* 28–29, the best way to ensure that the Texas court does not unduly consider racial factors is to reinforce that traditional equitable principles are fully applicable to "interim" remedial orders. Absent a showing that a judicial modification is necessary to remedy a likely statutory or constitutional violation, race need not—indeed, cannot—be taken into account.

D. The District Court Did Not Adequately Justify Creation of Multiple Coalition Districts

In addition to its improper pursuit of proportionality, the district court's interim maps created several race-based "coalition" districts. Appellees attempt to defend these districts on the ground that "what the court below did was simply refrain from intentionally dismantling naturally arising coalition districts." NAACP Br. 28; *see* Rodriguez Br. 46. But, as Judge Smith explained, that contention is not plausible. For example, the new coalition districts created in the district court's interim House plan were substantially reconfigured from the benchmark plan in order to "exclude Anglo voters and include minority voters." JA 129; *see also id.* (noting that two other coalition districts were created "by removing almost exclusively white populations instead of reducing the population in a

race-neutral manner"). These districts were made, not found.

Assuming that the VRA could ever require the creation of coalition districts—which it does not, *see* Texas Br. 58–59 & n.11—Appellees would have to make some showing of political cohesion between the minority groups comprising the "coalition." *See Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). As the government concedes, the district court made no such findings here, and thus its "analysis was inadequate" to justify the creation of such districts. *See* United States Br. 33 (noting that "the district court made no findings establishing that the conditions for treating minorities as a single coalition have been met"). Indeed, Appellees' own evidence showed that African-American, Asian, and Latino citizens *do not* vote as a cohesive bloc. *See* Texas Br. 58–59 & n.12.

Moreover, whatever role coalition districts might play in a judicial map necessitated by a legislative deadlock, they should play no role in interim maps like the ones at issue here. The exigent circumstances that give rise to this kind of interim map, and the assurance that it will govern for one election cycle only, should make courts extremely wary of embarking on an enterprise as fraught with constitutional difficulties as this. It was clear error for the district court to create multiple coalition districts in the interim districting plans.

IV. APPELLEES' ARGUMENTS ABOUT THE MERITS OF THEIR CLAIMS ARE NOT PROPERLY PRESENTED HERE AND, IN ANY EVENT, ARE MERITLESS

A. The Merits of Appellees' Claims Are Not At Issue before this Court

The district court expressly declined to base its significant alterations of Texas' legislatively enacted electoral maps on any finding that those maps violated, or were likely to violate, the VRA or the Constitution. *See* JA 93–94, 167, 169. Nonetheless, Appellees spend substantial portions of their briefs before this Court arguing the merits of their various challenges to Texas' plans. *See* Task Force Br. 8–19; Rodriguez Br. 3–16; NAACP Br. 2–3; Davis Br. 4–13. Texas, of course, has vigorously disputed each of the Appellees' allegations.

Indeed, the great irony of Appellees' presentation is that their view of the appropriate standard for interim maps renders their extensive discussion of the merits utterly irrelevant. *See* NAACP Br. 21 (describing merits as "irrelevant"). In Appellees' view, a district court has the same unbounded discretion to draw an independent map whether the unprecleared map is fraught with difficulty or a paradigm of fairness. Texas, by contrast, contends that the extent of the legislative map's compliance with the VRA and Constitution are highly relevant: the legislative maps should be modified in the interim maps to the extent necessary to address likely statutory or constitutional violations, but only to that extent.

B. Appellees' Claims Fail on the Merits

Despite their enthusiasm for pressing the merits of claims the Texas court refused to reach, Appellees conspicuously avoid the question at the heart of their Section 2 claims—whether voting patterns in Texas are caused by racial bias or political preference. In fact, Appellees' own experts found that voting patterns in Texas general elections are determined by partisan preferences, *not* racial considerations. Appellees' Section 2 claims thus fail as a matter of law and cannot form the basis of any interim alterations to the legislatively enacted maps.

To prove vote dilution under Section 2, a plaintiff must prove, among other elements, racial bloc voting. *See, e.g.*, *Gingles*, 478 U.S. at 50–51. Racial bloc voting exists where "racial politics . . . dominate the electoral process" or "race is the predominant determinant of political preference." S. Rep. 97-417 at 28, *reprinted in* 1982 U.S.C.C.A.N. 177, 211 (1982). When voting preferences are determined by race, and where minority voters are outnumbered by a cohesive majority, a voting standard may "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). To prevail on a Section 2 vote-dilution claim, a plaintiff must accordingly prove that voting patterns are *caused* by racial considerations.[21]

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[21] *See, e.g.*, *LULAC v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc) ("Unless the tendency among minorities and whites to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race,

Expert testimony at trial before the Texas court proved beyond question that partisan preference, not race, is the predominant factor in Texas general elections. The experts found that Anglo voters support Republican candidates at essentially the same rate regardless of the candidate's race. Conversely, the experts agreed that Latino voters support Democratic candidates at the same rate regardless of race, even when Anglo Democrats face Latino Republicans. *See*, *e.g.,* Trial Exh. E-2, Report of J. Morgan Kousser, at 1 ("Latino voters in Texas overwhelmingly favor Democratic nominees, even when Republican nominees have Spanish surnames.").

In other words, however one looks at the data, one thing is clear: Texas voters do not base their electoral decisions upon a candidate's race; voters base their decisions on a candidate's political party. *See*, *e.g.,* Trial Tr. at 1790:22–25 (Testimony of John Alford) ("where there's a choice between partisanship and race or ethnicity, there simply isn't any discernible impact left for ethnicity in general election voting."); *see generally* Defendants' Response to Plaintiffs' Post-Trial Briefs [Doc. 457] at 7–9, *Perez v. Perry* (W.D. Tex. Oct. 21, 2011) (citing

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. . . plaintiffs' attempt to establish legally significant white bloc voting, and thus their vote dilution claim under § 2, must fail."); *see also Uno v. City of Holyoke*, 72 F.3d 973, 980–81 (1st Cir. 1995); *Nipper v. Smith*, 39 F.3d 1494, 1524–26 (11th Cir. 1994) (en banc); *cf. United States v. Charleston County*, 365 F.3d 341, 347–48 (4th Cir. 2004) (holding that the cause of racially polarized voting is relevant to the totality-of-circumstances inquiry).

testimony of Plaintiffs' experts). Because the expert testimony uniformly undermined Appellees' Section 2 claims, those claims have no likelihood of success and cannot form the basis for deviations from the legislatively enacted maps.

While Appellees' failure to demonstrate racially polarized voting dooms their Section 2 claims as a matter of law, their claims of intentional discrimination are likewise unsupported by the record.

1. Congressional Plan

Based on the unusual shapes of congressional Districts 12 and 26, Appellees contend that the legislature intentionally sought to break up minority groups to prevent them from forming effective coalitions. Rodriguez Br. 11–13. But Appellees entirely ignore the fact that the unusual shape of these districts mirrors a similar feature in the benchmark plan. MJA 1, 3. Appellees also ignore testimony from Texas' cartographer that his goal was to capture Democrat-leaning areas while *maintaining* minority communities of interest. *See* 2SJA 30–36. When drawing District 26, race was only considered in the course of resolving complaints that certain segments of the Hispanic population had been split. *See id.*

Appellees further assert that the legislature's congressional plan "gerrymandered [District] 23 to leave it a nominal Latino opportunity district while ensuring that it would almost never elect the Latino preferred candidate." Rodriguez Br. 6; Task Force Br. 15–17. To the contrary, the legislature's goal in drawing the new District 23 was to protect the

Republican incumbent—Congressman Francisco "Quico" Canseco, who is Latino—while also maintaining the district's minority population to avoid a VRA challenge.

Appellees' attempt to compare the new District 23 with the district found unlawful in *LULAC v. Perry*, 548 U.S. 399 (2006), lacks any basis in fact. The plan at issue in *LULAC* reduced the Hispanic Citizen Voting Age Population and Spanish Surname Voter Registration of District 23 by more than ten percentage points, bringing both below fifty percent. *See* 2SJA 51. A federal court redrew District 23 in 2006 as a Latino opportunity district, bringing both numbers back above fifty percent. The legislatively enacted plan *increases* District 23's Hispanic Citizen Voting Age Population and Spanish Surname Voter Registration percentages compared to the benchmark. *See id.*[22]

The Rodriguez Appellees further contend that the State's plan "break[s] apart" District 25, which they describe as a crossover district in which minority voters were able to elect their candidates of choice. This Court has suggested that a State's intentionally discriminatory disruption of an effective crossover district would implicate the Fourteenth Amendment. *See Bartlett v. Strickland,*

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[22] The court's interim plan, by contrast, actually reduces District 23's Hispanic Citizen Voting Age Population from its benchmark level. *See* Texas Legislative Council, Hispanic Population Profile (RED 109), Congressional Plans--Plan C220, *available at* http://www.tlc.state.tx.us/redist/pdf/congress/PlanC220_Report_Package_Expanded.pdf.

129 S. Ct. 1231, 1249 (2009). But that was not the legislature's purpose here. The legislature's goal was to oust an incumbent congressman who, in the months leading up to the 2011 legislative session, had championed federal legislation that had the effect of temporarily depriving the State's financially strapped government of more than $800 million in education funding. *See* 2SJA 46. Of course, political motivations for a districting decision are entirely permissible. *See*, *e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("[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."). Moreover, District 25 is not a crossover (or coalition) district because there is racially polarized voting in Democratic primaries. *See* Trial Tr. at 265:15–18 (plaintiffs' expert Dr. Morgan Kousser stating Latinos and African Americans are not cohesive in the Democratic primary elections); *id.* at 506:3–508:5 (plaintiffs' expert Dr. Richard Engstrom stating African-Americans are the "least likely group to support Latinos in a Democratic primary").[23]

Appellees assert that the legislature "drastically redrew [District] 27 in a way that diminished Latino

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[23] *See also Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y. 2004), *aff'd* 543 U.S. 997 (2004) (noting that where "the two minority groups are generally affiliated/registered with the same party (Democratic) and vote for that party's candidates at high rates, primary elections for that party's candidate are by far the most probative evidence of cohesion").

voting strength." Task Force Br. at 17–19. But the new contours of that district reflect nothing more than the legislature's concerted effort to accommodate the requests of public officials in Nueces and Cameron Counties. Nueces County officials had asked for their county to serve as the anchor for its own congressional district. *See* Trial Tr. 1461:25-1462:7. Similarly, Latino Democrat legislators in South Texas had requested that Nueces and Cameron Counties be placed in separate congressional districts. *Id.* at 1022:17–18. The legislature's decision to accommodate those requests was entirely race-neutral. Appellees also fail to mention that District 34, a newly created congressional district, is a Latino opportunity district that closely resembles the former District 27. *See* MJA 1, 3.

2. State House Plan

The Task Force contends that the State's plan improperly eliminated House District 33, which was a majority-Latino district in Nueces County. Task Force Br. 10, 49. But population demographics required the legislature to reduce the number of House districts in the Nueces County from three to two. Because Nueces County's total Spanish Surname Voter Registration was only 49.5%, it was impossible to draw both of those districts as majority-minority districts. *See* Trial Tr. at 1449:19–23. The alternative plans offered by Appellees could not create an additional Latino opportunity district without violating Texas' county-line rule, which would have implicated the Fourteenth Amendment by elevating racial considerations above traditional redistricting

principles. *See id.* at 1987:12–16; *Shaw*, 509 U.S. at 646–47.

Appellees also criticize the contours of District 117 in the new Texas House plan. *See* Task Force Br. 11, 49. But even Appellees concede that this district was drawn to protect the incumbent.[24] *Id.* Moreover, District 117, which is located in Bexar County, was part of a county-wide plan approved and submitted by the Bexar County delegation, which includes seven Latino representatives (out of ten total). *See* 2SJA 48–49.

Finally, Appellees contend that the new District 144 violates Section 2 because the legislature reconfigured and underpopulated the district to prevent its emergence as a Latino opportunity district. *See* Task Force Br. 11. Appellees, however, ignore the fact that this district did not have a majority Hispanic Citizen Voting Age Population and, in any event, was not a "performing" district under the benchmark plan. *See* JA 199, 610–11. Moreover, Appellees fail to mention the D.C. court's ruling, which held that there is no obligation under the VRA to protect "emerging" districts. *See* Task Force Addendum 42A ("[T]his Court finds that evidence of preventing an emerging ability to elect from crystallizing will not support the contention that a plan has an impermissible retrogressive effect

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[24] Appellees assert, with no apparent irony, that the current representative for District 117—who is Latino—"is not the Latino-preferred candidate." Task Force Br. 49. "It is a sordid business, this divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part).

under Section 5."). There was accordingly no basis to claim retrogression or vote dilution.

3. State Senate Plan

DOJ raised no objection to the legislatively enacted state senate plan in the preclearance proceeding in D.C. court. *See* JA 407. That plan was nonetheless challenged by Wendy Davis—the incumbent senator from District 10, and one of only two senators to vote against the State's plan—and LULAC, who contend that the State's plan impermissibly "dismantled" District 10. But the fatal flaw in this argument is that District 10 was never entitled to protection under the VRA.

In fact, District 10 was not a "coalition district" at all. The combined Black and Hispanic Citizen Voting Age Population in benchmark District 10 was only 33.4%. JA 441–42. In 2008, District 10 happened to elect a Democrat by a narrow margin in an unusually good year for Democrats. The legislature's decision to redraw District 10 in a way that reduces the incumbent Anglo Democrat's chances at reelection had nothing to do with race and has no VRA implications. DOJ agrees, and one disgruntled state senator's mere *allegations* should not be allowed to block implementation of the State's duly enacted redistricting plan.

CONCLUSION

Although the parties start with some common premises, such as the continuing need for preclearance and the necessity of some "interim" map, they could hardly be farther apart when it comes to a district court's role in imposing such

"interim" maps. Appellees view the district court's role as no different from the unwelcome task of redistricting when the legislature has deadlocked and failed to produce *any* map to which a court could defer. In their view, not only can the court not use the duly-enacted plan as a starting point, but any deference to the political judgments therein would trigger a preclearance obligation for the judicial map. And the court must ignore the legislative map and draw its own map, subject to the heightened standard for population deviations that govern judicial maps drawn after deadlock.

Texas, by contrast, suggests that courts should not shoulder the unwelcome burden of drawing an independent map needlessly. Consistent with this Court's repeated emphasis that "reapportionment is primarily the duty and responsibility of the State through its legislative body, rather than of a federal court," *Chapman*, 420 U.S. at 27, Texas respectfully submits that a court should defer to the legislative map unless "necessary to cure any constitutional or statutory defect," *Upham*, 456 U.S. at 40–41.

The United States suggests that, given a choice between a concededly flawed judicial map and allowing a duly-enacted legislative map to serve as the interim map pending ongoing preclearance proceedings, it would choose the former. *See* United States Br. 33–34. Texas begs to differ. In a world where redistricting is primarily the duty and responsibility of the legislature and remedying likely or actual violations of federal law is primarily the duty and responsibility of the judiciary, the choice is clear: an independent judicial map that gives no

deference to the duly-enacted legislative map cannot be allowed to stand.

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The district court's interim orders should be vacated, and the case remanded with instructions that the district court order the use of Texas' legislatively enacted districting maps as the interim plans while preclearance is pending.

Respectfully submitted,

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