UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, et.al.	)	
	)	
Plaintiffs	)	
	)	CIVIL ACTION NO.
v.	)	11-CA-360-OLG-JES-XR
	)	
	)	
	)	
STATE OF TEXAS, et. al.	)	
	)	
Defendants	)	

SUPPLEMENTAL OPINION

The State of Texas has appealed the Court orders implementing the court drawn plans for the districts to be used to elect members in the Texas House of Representatives (Dkt. No. 528) and the United States House of Representatives (Dkt. No. 544). The Court previously indicated, in its order implementing the plan for the Texas House, that "[a] more comprehensive opinion addressing additional legal issues will follow."[1] Dkt. No. 528. This supplemental opinion serves to further clarify the legal issues discussed in the Court's prior two orders, which were released under severe time restraints. Because the Court has not ruled on the merits of any claims herein and the State's appeal is interlocutory in nature, this Court has not lost jurisdiction over this matter and this Supplemental Opinion should be filed in this consolidated action and considered for all purposes.[2]

---

[1]The dissent criticizes the issuance of this supplemental opinion as having "the smell of a brief on appeal." The Court's prior order expressly stated that a supplemental opinion would follow because the Court was unable to issue a full opinion under the severe time constraints. The sole purpose of this opinion is to provide a detailed explanation for how the Court drafted the interim House plan for the benefit of the parties, the Supreme Court, and future redistricting panels.

[2]The State brought its appeal under 28 U.S.C. §1253, which applies to interlocutory orders determined by a three judge district court. Section 1253 is analogous to section 1292(a)(1), which

The Court requests that the parties ensure that this Supplemental Opinion be filed with the U.S. Supreme Court.

Despite rhetoric of a "runaway plan," the Court's plan gave as much consideration to the State's enacted map as possible without rubberstamping the districts that were the subject of legal challenges; this consideration was given to the enacted plans even though, as discussed below, a finding that a three judge court is required to apply *Upham* deference prior to a preclearance determination defies the plain language of the Voting Rights Act, the legislative intent behind Section 5, existing Supreme Court precedent, and a myriad of practical realities. Those practical realities include the Court's obligation to ensure that the interim map does not contain split VTDs so that it is capable of being implemented under severe time constraints. This prevents the Court from adopting even the unchallenged districts from the enacted plan wholesale. Moreover, the Court is prevented from making Section 5 determinations not only because it lacks jurisdiction to do so, but also because as a practical reality, the three judge panel has not heard evidence regarding Section 5; nor could it hear that evidence and make those determinations without wasting an enormous amount of judicial resources and potentially reaching a result that would later be inconsistent with a D.C. Court ruling.

I.

Legal Standard

The State and dissent argue that there is a tension between the two leading Supreme Court cases addressing court drawn maps– *Upham v. Seamon*, 456 U.S. 37 (1982) and *Lopez v. Monterey*

---

gives the courts of appeals jurisdiction to hear appeals from interlocutory orders in other cases. *See Goldstein v. Cox*, 396 U.S. 471, 475 (1970).

County, 519 U.S. 9 (1996). Specifically, it is argued that *Upham* directs remedial courts to always defer to state policy decisions, while *Lopez* directs remedial courts to not implement maps reflecting state policy choices that have not been precleared. They therefore advocate that this Court defer to the legislative choices of the State of Texas represented by the enacted House plan and Congressional maps by applying a preliminary injunction standard to evaluate whether the state plan violates federal law.

As explained in our prior orders, the Court disagrees with this analysis. The Court does not read *Lopez* and *Upham* as being in tension with one another; to the contrary, the Court believes that they outline the different legal standards applicable to cases where there are official objections by the Attorney General, as opposed to cases where there is no enacted plan or where preclearance is pending. As such, we believe that deferring to the enacted plans is improper because doing so would interfere with the preclearance process in the D.C. Court.

This result is consistent with the plain language of Section 5 and the legislative history of the Voting Rights Act. Section 5 provides that "*unless and until* the [the United States District Court for the District of Columbia enters a judgment] no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure." 42 U.S.C. § 1973c (emphasis added). Thus, by the statute's plain terms, a voting change cannot be implemented until the D.C. Court has issued a judgment.

The legislative history is similarly supportive of the Court's position. In 1975, when Congress adopted amendments to the Act, the Senate Committee issued its Report on S. 1279, which addressed the appropriate role of remedial courts. First, the Committee cited favorably to the Supreme Court's decision in *Connor v. Waller*, 421 U.S. 656 (1975). There, the Court ruled that even when a governmental body adopts a plan that is patterned after a court-drawn plan, it still must

submit the plan for Section 5 preclearance. *Id*. at 656-57. The Court further concluded that federal courts should not make determinations regarding constitutional questions until all Section 5 challenges have been resolved. The Committee concluded that this result "is consistent with the Committee's objective to utilize a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or the District of Columbia District Court." S. Rep. No. 94-295, p. 18 (1975) (hereinafter "Senate Report").

The Committee then went on to note that when a court adopts a plan proposed by the State during litigation, that plan also must be submitted for Section 5 preclearance. The Committee noted that "[t]he one exception where section 5 review would not ordinarily be available is where the court because of exigent circumstances actually fashions the plan itself instead of relying on a plan presented by a litigant." *Id*. at 19. In such cases, "the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." *Id.*

The Supreme Court has noted that "[t]he view expressed by the Committee is consistent with the basic purposes of the statute and with the well-settled rule that § 5 is to be given a broad construction. The preclearance procedure is designed to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process. The federal interest in preventing local jurisdictions from making changes that adversely affect the rights of minority voters is the same whether a change is required to remedy a constitutional violation or is merely the product of a community's perception of the desirability of responding to new social patterns." *McDaniel v. Sanchez*, 452 U.S. 130, 149-50 (1981) (citations and footnotes omitted).

Thus, the Court must draw independent redistricting plans without ruling on the merits of the

pending legal challenges to the State's unprecleared plans. *Connor*, 421 U.S. at 656-67 (because the Act would not be effective until precleared under § 5, the district court erred in deciding the constitutional challenges to the Act based on claims of racial discrimination); *Mississippi v. Smith*, 541 F. Supp. 1329, 1332 (D.D.C. 1982) (the remedial court "lacks jurisdiction to consider the constitutionality of the plan before it has been precleared pursuant to section 5"). The United States and many intervenors have denied that the State is entitled to preclearance and they have challenged the Texas House and Congressional plans under Section 5 of the Voting Rights Act, claiming: (1) that the plans (and not simply specific districts therein) were drawn with discriminatory intent; (2) the plans have the purpose and effect of denying or abridging minorities' right to vote; and (3) the plans are retrogressive because minorities have the opportunity to elect their candidate of choice in proportionally fewer districts when compared with the benchmark plan. *See* Dkt. Nos. 53, 79, filed in *State of Texas v. United States*, Civil Action No. 11-CV-1303, in the United States District Court for the District of Columbia.

The United States has stated that the evidentiary basis for its claim of discriminatory intent "is not limited to any particular district or districts but rather extends to the kinds of direct and circumstantial evidence that the Supreme Court identified as probative of discriminatory purpose in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)." Dkt. No. 53, p. 7, filed in *State of Texas v. United States*, Civil Action No. 11-CV-1303, in the District Court for the District of Columbia. The intervenors also assert that while certain districts exhibit characteristics that are indicative of discriminatory purpose, they are challenging the plans in their entirety. *See id.*, Dkt. No. 53, pp. 16-17 (MALC); p. 18 (Gonzales); p. 23 (Texas Latino Redistricting Task Force). The United States has asserted that when the State is requesting preclearance of a statewide plan, analysis of retrogression should be conducted on a statewide basis.

Georgia v. Ashcroft, 539 U.S. 461, 479 (2003); *City of Lockhart v. United States*, 60 U.S. 125 (1983). *See* Dkt. No. 79, United States' Memorandum in Support of its Opposition to the State's Motion for Summary Judgment, p. 10, filed in *State of Texas v. United States*, Civil Action No. 11-CV-1303, in the District Court for the District of Columbia.

The Section 5 challenges are not the only pending legal challenges to the State's enacted plans. Plaintiffs and intervenors in this case have challenged the Texas House and Congressional plans under the Fourteenth Amendment as "racial gerrymanders" that intentionally discriminate against minorities and violate the one person, one vote principle. They also assert that the unprecleared plans dilute the voting strength of minority voters in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.[3] The Court has heard evidence on the parties' legal challenges, but the Court has not reached any determination on the merits of those challenges and, as noted above, is precluded from doing so unless or until the State's enacted plan has been precleared.

II.

A Preliminary Injunction Standard is Inappropriate

As noted above, the State and dissent advocate for the use of a preliminary injunction standard in this case. There are obvious reasons why the Court cannot do so. First, there is no motion for preliminary injunction pending before the Court, nor has one ever been filed. Unless a motion for preliminary injunction is filed, there is no legal basis for the application of preliminary injunction standards. If the State in this case had been trying to implement an unenforceable plan,

---

[3] *See* Quesada plaintiffs' first amended complaint, Dkt. No. 105; MALC's second amended complaint, Dkt. No. 50; Latino Redistricting Task Force's second amended complaint, Dkt. No. 68; Perez plaintiffs' third amended complaint, Dkt. No. 53; Rodriguez plaintiffs' first amended complaint, Dkt. No. 23, filed in Cause No. 11-CA-635, prior to consolidation; LULAC's first amended and supplemental complaint, Dkt. No. 78; NAACP' s amended complaint, Dkt. No. 69.

such as the benchmark plan or the unprecleared plan, the plaintiffs could have moved for injunctive relief and they clearly would have been entitled to such relief.[4] However, the State has agreed since the inception of this case that its enacted plans are unenforceable unless or until precleared and it has not tried to implement its plans. There has been no need for affirmative injunctive relief in this case. Even if there had been a need for injunctive relief, and the Court had been required to enjoin the State from implementing its unprecleared plans, there would be no legal basis for applying a traditional preliminary injunction standard in drawing an independent court-ordered plan.

Second, and more importantly, is the intrusion on the preclearance process. As discussed above, there are statewide Section 5 challenges to both the Texas House and Congressional plans pending preclearance. The Court does not have jurisdiction to determine those issues, preliminarily or otherwise. *U.S. v. Bd. of Sup'rs of Warren County.*, 429 U.S. 642, 645 (1977) ("What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General – the determination whether a covered change does or does not have the purpose or effect of denying or abridging the right to vote on account of race or color."). Because preclearance must be determined before any other issues are ripe for this Court's consideration, the Supreme Court has forbidden remedial district courts from making any determination on the merits of the State's enacted plans until *after* preclearance. *Conner v. Waller*, 421 U.S. at 656-57; *Smith v. Clark*, 189 F. Supp. 2d at 534. This clearly includes any preliminary determination as to whether plaintiffs are "likely to succeed" on the merits of their claims, regardless of whether those claims arise under the Voting Rights Act or the U.S. Constitution.

Moreover, if a three judge panel was required to apply a preliminary injunction standard in the interim map stage, it would be forced to hear evidence regarding Section 5 and to make

---

[4] "If a voting change subject to § 5 has not been precleared, §5 plaintiffs are entitled to an injunction prohibiting implementation of the change." *Lopez*, 519 U.S. at 20.

determinations regarding the applicable legal standards for Section 5 claims. *See Texas v. United States*, 785 F. Supp. 201, 205 (D.D.C. 1992) (Section 5 determinations "require [the court] to conduct some kind of hearing . . . [and] is not an issue that can be resolved as a matter of law."). This could lead to inconsistent factual findings and determinations regarding Section 5 legal standards, undermining the purpose of consolidating Section 5 cases in the D.C. Court. Additionally, if a preliminary injunction standard were used, it would allow legislatures to intentionally enact voting changes at the last minute in order to obtain a preliminary ruling by a local federal court that would potentially allow the change to take effect, thereby completely circumventing the Section 5 preclearance process.[5]

Finally, a preliminary injunction standard is not a manageable standard for a three judge panel attempting to draw an interim map. Determining violations of the Voting Rights Act is a complex and fact intensive exercise that requires courts to assess discriminatory motives on the one hand and complex data regarding discriminatory effect on the other. *See Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 488 (1997) ("[A]ssessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a sensitive inquiry into such circumstantial and direct evidence as may be available."); *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966) ("The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant").

In cases where a court-drawn interim map is required because a state has submitted a redistricting plan for preclearance, but no preclearance decision has been issued, the maps will

---

[5]Indeed, the 1975 Senate Committee on the Voting Rights Act extension noted that the Voting Rights Act was enacted because Congress was presented with "evidence of the great lengths to which certain jurisdictions would go in order to circumvent the guarantees of the 15th Amendment." Senate Report at 15. Thus, Congress created the Section 5 preclearance requirement to "insure that any future practices of these jurisdictions [would] be free of both discriminatory purpose and effect." *Id.*

always be drawn under time intensive conditions. This is true even in cases such as this, where a lawsuit was filed seven months in advance of the filing period for candidates. The reason is the Supreme Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993). In *Growe*, the Supreme Court held that "absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id*. at 34. A three judge panel, therefore, has no choice but to wait as long as possible before implementing an interim map, in the hopes that a preclearance decision will be rendered.[6]

While waiting, it is entirely reasonable for the three judge panel to hold hearings and take evidence. Indeed, the Court in this case held a two week trial in September and a second three day hearing in October/November. However, it would be a waste of judicial resources for the three judge panel to begin the complicated merits analysis required of Voting Rights Act claims before it becomes likely that an interim map will actually be necessary. This is especially true for the two district judges on the panel who must manage full dockets, including criminal dockets with speedy trial requirements, with only two law clerks. In this case, there are close to fifty separate challenges to three different electoral maps. The analysis required to make legal findings on those challenges, even preliminarily, would be intensive and unfeasible in the time provided without otherwise negatively affecting the remainder of the Court's docket. It would not be an efficient use of judicial resources to consider the myriad of complex legal and factual issues involved in the merits analysis, when all of those issues would become moot if preclearance were to be granted or denied as to the whole map.

[6]In the instant case, the Court pushed back the election filing period from the middle of November to November 28, 2011. The Court then adjusted the close of the filing period from December 12, 2011 to December 15, 2011. However, the filing period could not be delayed any further without serious disruptions to the 2012 election cycle.

III.

Summary of the process used by the Court
in drawing the House plan[7]

As discussed in the Court's prior order entered on November 23, 2011, the Court drew its plan for the Texas House after considering all of the parties' proposed plans. For many districts, the Court considered the configuration in the State's enacted plan, and for others the Court attempted to stay true to benchmark configuration, at least as much as possible. The Court was mindful of the various legal challenges to the State's enacted plan and attempted to avoid the same legal challenges to the court drawn map. The Court took a cautious approach to drawing the map, ensuring that the existing minority opportunity districts were preserved to avoid Section 2 and/or Section 5 violations. The tremendous population growth caused many changes in district lines. In drawing the lines, the Court tried to avoid splitting county lines unless those concerns were trumped by constitutional concerns. *See Reynolds v. Sims*, 377 U.S. 533, 584 84 S.Ct. 1362 (1964)("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls"). The Court ensured that all districts were contiguous and reasonably compact. It also attempted to avoid the division of municipal boundaries and broader communities of interest. The Court tried to avoid pairing incumbents – out of 150 House districts, incumbents were paired in seven (7) districts, assuming those representatives wish to run for re-election. And finally, the Court attempted to adhere to the historical or benchmark configuration of the districts as much as possible. These neutral criteria served the Court well in drawing up a plan that may not be perfect but certainly conforms to all legal requirements.

The Court was also concerned with not splitting "VTDs." A VTD is a voter tabulation

[7] The Court's order dated November 26, 2011 adequately explains the process used in drawing the Congressional plan, so the Court limits this part of its opinion to the Texas House plan.

district and is the functional equivalent of a voting precinct. After hearing evidence at trial and in the interim plan hearing, it became clear that cutting VTDs would create enormous administrative and financial difficulties for local governments preparing for an election at the eleventh hour. *See Vera v. Bush*, 933 F. Supp. 1341, 1347 (S.D. Tex. 1996) ("Moreover, the Court's remedial plan addresses the single most troubling and realistic hurdle, the potential splitting of voter tabulation districts ('VTD's'), by avoiding that consequence in all but a small handful of voting precincts."). Specifically, the Court was informed that voters must be assigned to a precinct in order to get new registration cards and that precincts must be drawn before voters can be assigned. If counties are able to use the existing VTDs, nothing else needs to be done. Also, by not changing the VTDs, the county may not have to submit any voting changes to the Department of Justice for preclearance. The Court therefore endeavored to avoid as many VTD cuts as possible, and ultimately was able to craft a House plan with only 8 VTD cuts. In contrast, the enacted plan appears to have 412 VTD cuts, and the dissent plan appears to have 179 VTD cuts.

The State has consistently criticized the Court's plan for making "unnecessary" changes to uncontested districts without finding any legal violations. As explained above, the Court does not believe that it was required to provide any deference to the enacted maps. However, even if the Court was required to give *Upham* deference to the interim maps, the Court would still have needed to make the changes to the uncontested districts to correct cuts in the VTDs that would have impeded implementation of the plan under intense time constraints.

As discussed in the Court's November 23, 2011 order, the Court began by considering the uncontested districts from the enacted plan that embraced neutral districting principles. Although the Court was not required to give any deference to the Legislature's enacted plan, the Court attempted to embrace as many of the uncontested districts as possible. After inserting those districts

into the map, the Court adjusted them to avoid VTD cuts and to achieve *de minimis* population deviations.

After incorporating as many of the uncontested districts as possible into the interim map, the Court turned to the districts that are challenged as unconstitutional and attempted to return them to their original configuration in the benchmark, while giving consideration to any apparently neutral districting principles in the enacted plan. Harris County was the subject of numerous objections by Plaintiffs and the Department of Justice in both this Court and the D.C. Court.[8] In drawing the districts for Harris County, the Court first had to determine how many districts to allot it. Based purely on population, Harris County is entitled to 24.4 districts; but, in the benchmark Harris County had 25 districts, which was purportedly the result of a legislative compromise to allow for greater minority representation. The enacted plan reduced the number of districts to 24, but the Plaintiffs encouraged the Court to maintain 25 districts in Harris County. Ultimately, the Court decided to reduce it to 24 districts because basing the number of districts on population was the most neutral principle available. In addition, the Court was informed that the incumbent in District 136 would be retiring, which would allow the Court to reduce the number of districts without unseating any representatives.

Next, the Court had to determine which districts would remain in Harris County and how they would be configured. In deciding which district to eliminate, the Legislature had removed District 149 from Harris County, which was a minority district represented by one of the only Asian members of the House. The removal of District 149 led to a Section 5 objection by the Department of Justice in the D.C. Court and a Section 2 objection by the Plaintiffs in this case. In accordance

---

[8]Specifically, there were Section 5 challenges to Districts 144, 146, and 149; Section 2 challenges to Districts 137, 144, and 149; and Fourteenth Amendment challenges to Districts 137, 145, and 147.

with the goal of maintaining the status quo and avoiding retrogression, the Court and the dissent decided to defer to the benchmark plan and placed District 149 back in Harris County. The Court then removed District 136 from Harris County, which as noted above had a retiring incumbent.

After resolving those issues, a number of the remaining districts were still the subject of objections. The Court attempted to draw Harris County as close to the benchmark as possible, while giving consideration wherever possible to the enacted map. However, because of the removal of District 136 and the Court's effort to not break VTDs, it was not possible to completely restore Harris County to its original configuration. Nevertheless, the Court was able to keep most districts in roughly their same position as the benchmark.[9]

The Court has been criticized for allegedly "creating" an additional Black opportunity district in Harris County (District 144). However, the Court did not strive to create any Section 2 districts. District 144 arose naturally from the changing demographics in Harris County. Over the past 10 years, minority growth in Harris County has increased by over 700,000, while Anglo population decreased by more than 82,000.[10] Thus, over 89% of the population growth in Harris County was due to minority growth. Because of the significant minority growth in Harris County, it is inevitable that a neutral approach could produce an additional minority district, especially since the combined

---

[9]Indeed, drawing the Harris County portion of the House map was probably the most challenging task this Court undertook in crafting the interim maps. But with the invaluable assistance of the Texas Legislative Council, nine districts in Harris County retained more than 70% of its population from the benchmark, and an additional eight districts retained more than 50% of their original population. The Court's map also bears similar resemblance to the enacted plans– nine of the Harris County districts contain more than 70% of their population in the enacted plans, and eleven districts contain more than 50% of the same population as the enacted plan.

[10]Census data can be viewed at http://factfinder.census.gov. Specifically, the Court's calculations indicate that in Harris County the Black population increased by 146,873; the Latino population increased by 551,789; and the Asian population grew by 78,406. In contrast, the Court calculates that Anglo population decreased by 82,618.

minority population is in excess of 65%.[11]

In Dallas County the Plaintiffs objected to all of the districts on one-person one-vote grounds. Specifically, it is alleged that the State intentionally manipulated Districts 103, 104 and 105 in order to overpopulate minority districts.[12] In addition, because Dallas County did not grow in population at the same rate as the rest of the state, Dallas County lost two House seats. In determining which two districts to remove, the Court first ensured that minority districts were preserved to avoid any Voting Rights Act issues. The Court then looked to the enacted plan and noted that the Legislature removed two Anglo districts– Districts 101 and 106. After considering the Constitutional and Voting Rights Act issues, the Court gave consideration to the State's enacted plan and also removed Districts 101 and 106 from Dallas County. The Court then attempted to restore as much of Dallas County to the benchmark configuration as possible, while giving consideration whenever possible to the enacted maps.[13] Once again this was a difficult task because the loss of two districts inevitably required that changes be made to the remaining districts.

The dissent criticizes the Court for allegedly "creating" a new coalition minority district

---

[11]According to census data, Anglos only make up 33% of the population in Harris County. See http://factfinder.census.gov.

[12]Specifically, Plaintiffs allege that District 105 in the enacted plan was drawn to try and put a Republican in office and as a result was overpopulated by 8,091 because large amounts of Hispanic populations were taken out by fingers that protrude into it from District 103 (splitting approximately 10 precincts). The removed Hispanic population was then allegedly replaced with exceedingly large amounts of Anglo population from a finger that runs south, overpopulating District 105 by Anglos, and thereby diluting the voting strength of the minorities in District 105. Plaintiffs further allege that another byproduct of this endeavor is that Latino opportunity District 103 became the most overpopulated district in the county.

[13]Out of the thirteen districts in Dallas County, four of the Court's Dallas districts contain more than 70% of their original population from the benchmark, and an additional four districts contain more than 50% of their original population. Compared to the enacted plan, eight districts contain more than 70% of the enacted population, and one additional district contains more than 50% of the enacted population.

(District 107). However, as discussed above, the Court has not intentionally created any minority districts. Rather, any additional minority districts resulted from the use of neutral districting principles and demographic changes. The 2010 census demonstrates that the black population in Dallas County increased by more than 97,000 and the Latino population increased by more than 243,000, while the Anglo population declined by almost 200,000.[14] Thus, as in Harris County, it is inevitable that a neutral approach could produce additional minority districts, especially since, once again, the combined minority population is in excess of 65%.[15]

Three districts in Tarrant County are challenged under Section 2, Section 5, and one-person one-vote. With regard to one-person one-vote, the Plaintiffs allege that Districts 90 and 95 have bizarre configurations as a result of packing minorities into already effective minority districts, which was allegedly done to prevent the creation of another minority opportunity district in District 96, and thereby preserve the Republican incumbent in District 96. In addition, all the districts in Tarrant County, but especially Districts 90, 93, and 95, are alleged by the intervenors in the D.C. Court to violate Section 5 because of the alleged intentional fragmentation of minorities resulting in exceptionally and unnecessarily contorted districts.

In drafting the districts for Tarrant County, the Court first determined that because of population growth, the County received an additional district. The Court decided to place the new district, which is numbered District 101 in the Court map and District 93 in the enacted map,[16] in the

---

[14]Census data can be viewed at http://factfinder.census.gov. Specifically, the Court's calculations indicate that in Dallas County the Black population increased by 97,584 and the Latino population increased by 243,211. In contrast, the Court calculates that Anglo population decreased by 198,624.

[15]According to census data, Anglos only make up 33.1% of the population in Dallas County. See http://factfinder.census.gov.

[16]The Court gave the new district the new number (101), while the State gave the new district an old number (93). The Court kept District 93 as it was in the benchmark plan– along the eastern

same location as the State– along the southeast border of the County. Next the Court attempted to return the districts to their configuration in the benchmark, while giving appropriate consideration to any neutral policy choices apparent in the enacted plans.[17] In doing so, the Court ensured that there were no VTD cuts.

The dissent criticizes the Court's approach to Tarrant County, arguing that "the plaintiffs had offered no evidence that the slight population deviations were the result of racial gerrymandering." Dkt No. 528, at 24. The dissent completely ignores the fact that there is a Section 5 challenge to the entire county, with special emphasis placed on Districts 90, 93, and 95. By rubberstamping the State's configuration for Tarrant County, the dissent is making a *de facto* ruling on a Section 5 issue. Finally, by failing to remove the State's VTD cuts, the dissent incorporates 31 VTD cuts, a number that is unmanageable given the current time constraints.

In Nueces County, the Department of Justice objected to the alleged intentional dismantling of Latino dominated District 33. In order to maintain the status quo and avoid any potential Section 5 issues, both the Court plan and the dissent plan restored the minority opportunity district in Nueces County. In doing so, the Court configured the districts such that they would avoid incumbent pairings. However, at least one pairing was inevitable; so, the Court drew District 33 in a way that paired the same incumbents that were paired in the enacted plan.

In Bell County, District 54 was challenged under Section 2 and Section 5 of the Voting Rights Act. The Plaintiffs argue that under Section 2 a compact coalition district could be created in Bell County with fewer county line cuts than the State's enacted map. Further, the Intervenors

---

Tarrant County line.

[17]Of the 10 original districts in Tarrant County, seven districts in the Court's map contain more than 80% of their population in the benchmark, two contain more than 70%, and one contains more than 50%. Compared to the enacted plan, nine of the Court's districts contain more than 70% of the enacted population.

in the D.C. Court argue that in the benchmark plan, District 54 changed from a 55.4 percent Anglo majority in 2000 to a 51.5 percent minority majority in 2010, but that the State split the minority population of the City of Killeen with district 55 (which increased over five percentage points from 2000 to 2010) rather than unite Killeen into a single district.

As it did with the other challenged districts, the Court went back to the benchmark and noted that District 54 included all of rural Lampasas and Burnett Counties, but then had a county line cut into Bell County to allow a tail from District 54 to pick up most of the City of Killeen. Since 2010, Lampasas and Burnett Counties have experienced significantly less population growth compared to the rest of the State.[18] Bell County in contrast experienced 30.4% growth, with Killeen experiencing 47.2% growth, which is more than 56% of the entire population growth in Bell County.[19] Further, according to the Court's calculations, Killeen had 4 times the population growth of Burnett County and Lampasas County combined.

In order to comply with Texas's county-line rule, the Court determined that given the population growth in Bell County, the county-line cut was now unnecessary. Thus, using neutral districting principles, the Court created a district wholly within Bell County where the population growth had primarily occurred, turning what had been a tail coming out of benchmark District 54 into its own district, also numbered District 54. Because the vast majority of the population in benchmark District 54 had come from Killeen, the Court's District 54 includes 80.2% of the same population as the benchmark District 54.[20] Bell County and Lampasas were then united in District

---

[18]Census data indicates that Lampasas County grew from 17,762 to 19,677 and Burnett County grew from 34,147 to 42,750.

[19]Census data indicates that Bell County grew from 237,974 to 310,235, and that the City of Killeen in particular grew from 86,911 to 127,921.

[20]In terms of population, this is not radically different from the enacted plan. The Court's District 54 includes 72% of the same population as the enacted plan.

55 and Burnett County was pulled into District 20, consistent with the State's enacted map.

The dissent criticizes the Court's configuration of District 54, alleging that the Court "created" a coalition district. However, District 54 is not even a performing minority district. Under the criteria used by the United States' expert, Dr. Handley, the minority candidate of choice would be elected 1 out of 5 times using the Department of Justice index. Under an additional index calculated by the office of the Attorney General, the minority candidate of choice would be elected 2 out of 10. Once again, the Court did not intentionally create a minority district, rather the district resulted from demographic changes. The bulk of the growth in Bell County occurred in the City of Killeen, and 80% of that growth was Black or Latino.[21] But under the dissent's theory, the district should not have been created even though it arose naturally because it is primarily minority and allegedly not required under the Voting Rights Act.

In Hidalgo County, the Plaintiffs in this Court object to the configuration of the districts under one-person one-vote and Section 2. In addition, the Department of Justice objected to District 41 in Hidalgo as violating Section 5. In Hidalgo, the State attempted to protect a Republican representative in District 41 by moving over 90% of his constituents out of his district, and under-populating the new District 41 by 7,399 persons, while adjoining Districts 36 and 40 were respectively overpopulated by 4,368 and 5,856. District 39 also is over 7,700 overpopulated in the enacted plan. In addition to the population deviations, the Department of Justice alleges that the substantially reconfigured District 41 no longer allows Latinos the ability to elect the candidate of their choice and therefore causes retrogression. Thus, both the Court map and the dissent map returned Hidalgo County to its configuration in the benchmark with as few changes as possible,

---

[21]Census data can be viewed at http://factfinder.census.gov. Specifically, the Latino population in Killeen increased by 13,876 and the Black population increased by 19,339, while Anglo population decreased by 17,903.

shedding any new population into the new District 35.

In Bexar County, District 117 is objected to by the Department of Justice in the D.C. Court as violating Section 5. The Department alleges that the State intentionally reconfigured the district in an effort to trade out mobilized Hispanic voters for Hispanic voters who do not regularly vote. The Department of Justice argues that as a result of the swap, the performance of statewide candidates preferred by Hispanic voters decreases from 60 percent in District 117 in the benchmark plan to 33 percent in the enacted plan. As explained in the Court's November 23, 2011 order, the Court's map returns District 117 to its original performance under the benchmark in order to maintain the status quo until the D.C. Court rules. Further, because District 117 was the only challenged district in Bexar County, the Court endeavored to alter as few of the uncontested surrounding districts as possible.

The dissent argues that this Court improperly used election analysis "as a crystal ball to predict how future elections will turn out," when Section 2 only requires "equality of opportunity, not a guarantee of electoral success." Dkt No. 528, at 22-23. However there is no Section 2 challenge to District 117, only a Section 5 challenge in the D.C. Court. It is not for this Court to determine whether election retrogression analysis is an appropriate legal standard under Section 5; rather, the D.C. Court has exclusive jurisdiction over that issue. *U.S. v. Bd. of Sup'rs of Warren County*, 429 U.S. at 645 ("What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General-the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'").

The remaining challenged districts are District 26 in Fort Bend and District 77 in El Paso. The Court provided an explanation for how it drafted those districts in its November 23, 2011 order.

In sum, the Court crafted a map that gave effect to as much of the policy judgments in the Legislature's enacted map as possible.[22] Although the Court believes that the application of *Upham* deference prior to preclearance defies the plain language of the Voting Rights Act, the legislative intent behind Section 5, existing Supreme Court precedent, and numerous practical realities, the Court concludes that even if *Upham* deference was required at this stage of the proceedings, the Court provided as much deference as possible without making merits determinations that are beyond the Court's jurisdiction.[23]

IV.

Compliance with the Fourteenth Amendment

Both the State and the dissent have argued that the Court, in crafting a court drawn map, should not take any steps above and beyond what the Legislature took in trying to equalize population. However, there were numerous one-person one-vote challenges to the enacted map.[23] Moreover, as noted above, exigent circumstances required that the Court make changes to uncontested districts in order to ensure whole VTDs.

The Supreme Court has "tolerated" somewhat greater population deviation in a legislatively drawn plan than it would in a court drawn plan. *McDaniel v. Sanchez*, 452 U.S. at 138. Unless there

---

[22]By the State's own admission, 72 of the districts in the Court plan are substantially similar to the enacted plan. Sup. Ct. Emergency App. at 2, n. 1.

[23]Even if three judge courts were required to give Upham deference in some cases involving interim maps, under the Supreme Court's decision in Abrams v. Johnson that deference is still not appropriate in cases such as this, where "the constitutional violation [] affects a large geographic area of the State because any remedy of necessity must affect almost every district." 521 U.S. 74, 86 (internal quotations omitted).

[23]The following parties have asserted one person, one vote challenges to the State's enacted House plan (not merely certain districts therein), as reflected in their pleadings: (1) MALC (second amended complaint, Dkt. No. 50); (2) Perez plaintiffs (third amended complaint, Dkt. No. 53); (3) LULAC (first amended and supplemental complaint, Dkt. No. 78); and (4) NAACP (amended complaint, Dkt. No. 69).

are persuasive justifications, a court drawn plan "must ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Connor v. Finch*, 431 U.S. 407, 414 (1977) (quoting *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975)). Thus, this Court strived to achieve *de minimis* population deviation in its independent court drawn plans in order to comply with the one person, one vote principle embodied in the Equal Protection Clause of the Fourteenth Amendment. The population variations that remain in the Texas House plan are the result of the Court's goal of avoiding cuts in county lines, precincts and VTD's.[24]

IV.

Compliance with the Voting Rights Act

Court drawn redistricting plans must comply with Section 2 of the Voting Rights Act, which prohibits any voting procedure that results in a denial or abridgement of the voting rights of any citizen on account of race, color, or membership in a language minority. 42 U.S.C. § 1973(a). "A violation of § 2 is established by showing that 'based on the totality of the circumstances,' members of a protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Smith v. Clark*, 189 F. Supp. 2d at 534.

---

[24]Based on information provided by the Texas Legislative Council:

In plan H302, the Texas House plan, the average deviation is 1.81% and there are 24 county line cuts (compared with 24 county line cuts in the State's enacted plan); 19 precinct cuts (compared with 422 precinct cuts in the State's enacted plan); and eight VTD cuts (compared with 412 VTD cuts in the State's enacted plan).

In plan C220, the court-drawn congressional plan, the average deviation is .02%. The court drawn plan contains 23 county line cuts (compared with 33 county lines cuts in the State's enacted plan); ten precinct cuts (compared with 520 precinct cuts in the State's enacted plan), and three VTD cuts (compared with 518 VTD cuts in the State's enacted plan).

With the astronomical number of precinct and VTD cuts in the State's enacted plan (and thus, by implication, the dissent's proposed plan), the dissent's assertion that the court drawn plans, rather than the State's enacted plans, will escalate costs and result in delays in the redrawing of precinct lines doesn't hold water.

The Court's plans must also comply with Section 5 of the Voting Rights Act, which means that the plan cannot diminish the ability of minority voters to elect their preferred candidate of choice. 42 U.S.C. 1973c(b). The core question under the Voting Rights Act is whether minority voters are worse off under the new plan, in comparison with the benchmark plan. *Beer v. United States*, 425 U.S. 130, 140-42 (1976). Under the court drawn plans H302 and C220, the Court is confident that the answer is "No."

The Court has explained how it drew the Congressional districts, and will not digress into the same discussion about C220. *See* Dkt. No. 544. However, the dissent seems concerned that the majority somehow did "too much" in the Texas House plan in an effort to comply with the Voting Rights Act, so the Court will discuss the Texas House map in more detail.

As previously mentioned, the Court set out to preserve all fifty (50) minority opportunity districts as they existed in the benchmark plan for the Texas House of Representatives. The Court also sought to avoid the legal challenges that had been made to the State's enacted plan. In drawing the map to meet these goals, the Court stayed as close to benchmark configuration as possible, while accounting for population growth. The Court drew the districts as reasonably compact as possible, rather than fracturing them. In applying these principles, it was relatively easy to preserve the existing minority districts and avoid the challenges that had been made to the State's enacted map. In fact, it became clear that a map drawer must go out of his way to fracture some of the districts in the manner reflected in the State's enacted map. *See* Dkt. No. 528, p. 8 (illustrations of HD 77 - the "antlers") and p. 11 (illustrations of HD 26 - the "faucet"). By keeping the districts reasonably compact, respecting the population in the districts, and keeping them close to benchmark, the Court was able to draw a map that rose above the type of challenges lodged against the State's enacted map.

After the entire map had been drawn, the Court did not know how many minority opportunity districts existed in its map. With the assistance of staff at Texas Legislative Council (TLC), the Court reviewed the relevant REDAPPL reports, including but not limited to the RED 202 report, which reflects voter registration and turnout, and an additional report prepared specially for the Court, which reflects citizen voting age population by race and ethnicity. To the extent possible, and with the assistance of TLC, the Court also analyzed the districts in its map under the criteria used by the United States' expert, Dr. Handley and an additional index calculated by the office of the Attorney General. *See* Dkt. No. 79, Dr. Lisa Handley's House Analysis, Exh. 4, filed in *State of Texas v. United States*, Civil Action No. 11-CV-1303, in the District Court for the District of Columbia. With this analysis, the Court was able to confirm that it had preserved the 50 pre-existing minority opportunity districts, which included 33 Hispanic majority minority districts, 12 African-American majority minority districts, and five coalition districts. *See id.*. The Court was also able to confirm, with relative certainty, that three additional districts would likely perform as minority opportunity districts. Those districts included House District 78 in El Paso County, a Hispanic majority minority district; District 144 in Harris County, an African-American majority minority district, and District 107 in Dallas County, which may be described as a coalition district. There is nothing to support a finding that minority voters in Districts 26, 54 and 149 will have the ability to elect their candidate of choice, and those districts cannot be described as minority opportunity districts. Thus, with 50 pre-existing minority opportunity districts and three additional districts that can be described as minority opportunity districts, the majority's court drawn plan includes 53 minority opportunity districts (one more than the dissent's proposed map). The Court can comfortably conclude that minorities are not worse off under the court drawn plan for the Texas House of Representatives, and it has successfully complied with Sections 2 and 5 of the Voting

Rights Act.

Conclusion

This Court cannot predict or control the outcome of any elections, nor can it control or predict how the D.C. Court may rule on any preclearance issues. The Court's authority at this juncture is limited to drawing a court-ordered redistricting plan, and the Court has been very constrained in exercising that authority.

SIGNED by the majority of the Court this 2nd day of December, 2011.

_______________/s/__________________
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

_______________/s/__________________
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

JERRY E. SMITH, Circuit Judge, dissenting:

For the reasons given in my dissent, I continue respectfully to disagree with the majority's ill-advised, though well-intentioned, imposition of an interim redistricting plan for the Texas House of Representatives.

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. The majority concedes that its order implementing the plan is on appeal. Its statement in the now-appealed order, to the effect that it would file a supplemental opinion, does not change the fact that the order is already in the good hands of the Supreme Court.

This "Supplemental Opinion" has the smell of a brief on appeal. That is not the role of a trial

court. It would be equally inappropriate for me now to point out the flaws in this latest submission. The talented attorneys on each side are fully capable of explicating the legal issues that will be considered, and if the Supreme Court needs further explanation from this three-judge district court, it will ask. If the majority feels insecure in the justification it gave in its initial offering, that is the stuff of appellate briefing by the parties' attorneys, not judges and their law clerks.

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.