No. 11A536

IN THE
SUPREME COURT OF THE UNITED STATES

RICK PERRY, in his official capacity as Governor of Texas, *et al.*,
Applicants-Appellants,

vs.

SHANNON PEREZ, *et al.*,
Respondents-Appellees.

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

JOINT RESPONSE OF RODRIGUEZ RESPONDENTS, QUESADA RESPONDENTS, LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), AND TEXAS STATE CONFERENCE OF NAACP BRANCHES IN OPPOSITION TO TEXAS'S EMERGENCY APPLICATION FOR STAY AND INJUNCTION

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

Spanning less than seven pages of the U.S. Reports, *Upham v. Seamon*, 456 U.S. 37 (1982), is a fairly short opinion. Yet the State of Texas seems to presume that the Court will not read it, premising its entire argument on a misrepresentation of the case. According to the State, *Upham* requires that courts imposing interim redistricting plans defer to an unprecleared, legislatively enacted map. After all, the State reasons, *Upham* required such deference to a map that had been *denied* preclearance. "It cannot be," the State exclaims, "that a State is entitled to less deference while judicial preclearance is pending than after administrative preclearance has been denied." Emergency App. at 12.

Upham, however, stands for no such thing. In *Upham*, the Attorney General had made an affirmative finding that 25 out of the 27 congressional districts at issue complied with Section 5, and the State's only objection was that the district court's interim map

redrew 4 of the 25 districts the Attorney General had found compliant. *Upham* thus stands only for the proposition that courts must defer to those portions of a legislatively-enacted map that the Attorney General has found compliant with Section 5, not that courts must defer to unprecleared plans.

Upham by no means represents the worst case scenario for a state seeking preclearance of a redistricting plan. In fact, an *Upham*-type ruling here, pinpointing two districts as retrogressive while approving the rest, would have been a significant victory for the State. Instead, Texas is faced with a plan that not only has received no approval—even in part—but also has garnered broad opposition from multiple parties, including the Attorney General, and a ruling from the D.C. district court that the State applied the wrong Section 5 standard altogether in drawing congressional district lines. *Upham* provides no basis for deference in these circumstances. With the State's faulty legal premise removed, its stay application is left without a leg to stand on.

Moreover, the State's characterization of the interim congressional plan as not being "within any reasonable conception of the district court's power," Emergency App. at 21, is at odds not only with the details of the interim congressional plan and the law governing such plans, but also with the opinion of the dissenting judge, who, even after an abrupt change of position, still viewed the plan as "an honest and diligent effort to achieve what an interim plan should do." *Perez v. Perry*, No. 5:11-cv-360-OLG-JES-XR (W.D. Tex. Nov. 26, 2011), Dkt.#544 ("Congressional Order") at 18.

Finally, though the State claims to seek a "stay," the relief it wants—halting an election process that is already underway and delaying statutory election deadlines—is available only by injunction. Texas has not even attempted to meet, and could not meet,

this Court's standard for injunctive relief. Even if the State's request could properly be classified as seeking a stay, the State has utterly failed to meet its burden to justify such relief. Texas has shown neither a likelihood of success on the merits nor irreparable injury, and granting its request would severely harm other parties and the public interest, not only by short circuiting the Section 5 preclearance process, but also by throwing Texas congressional elections into disarray after they have already begun. After dragging its feet on the congressional redistricting and preclearance process, the State's last-minute request for judicial extrication from its own failed strategies must be rejected. The State's congressional elections for 2012 then can continue to completion under the lawful interim plan the district court was compelled to develop.

In short, Texas misrepresents the law governing its claim, the facts about the map it challenges, and the nature of the relief it seeks. The Court should deny its application without hesitation.

I. Background and Procedural History

Due almost entirely to the increase in the state's minority population, Texas gained four additional seats in Congress in the decennial reapportionment. Faced with the pressing need to add the four new districts, attend to minority voting rights, equalize population among the thirty-two existing districts, and obtain preclearance of the final plan, the Texas Legislature nonetheless dawdled on congressional redistricting. It did not even conduct a committee hearing on the subject, much less pass legislation, during its five-month regular session.[1] The first congressional redistricting bill was not filed until

[1] The inaction was not due to partisan impasse. Republicans held a 101-49 majority in the Texas House and a 19-12 majority in the Texas Senate. Republicans also held the offices of Governor and Lieutenant Governor.

May 31, 2011, the day after adjournment of the regular session. After a congressional redistricting bill was finally passed nearly a month later, the Governor waited almost another month before signing the bill on July 18, 2011. All the while, the State was aware that it had set candidate qualifying to open three weeks earlier—on November 14—than in past years, *see* S. 100, 82nd Leg., Reg. Sess., ch. 1318 (Tex. 2011), and that it had to obtain Section 5 preclearance of its congressional plan in advance of that date. The State's insistence that it "aggressively pursued" judicial preclearance of its congressional plan, Consolidated Reply (Dec. 2, 2011) at 2, conveniently ignores how long it took the Legislature and Governor to enact a plan in the first place.

Rather than take the more expeditious route of administrative preclearance through the United States Department of Justice, the State exercised its right to pursue the slower route of judicial preclearance. After filing a declaratory judgment action in D.C. district court, the State then chose to forgo setting a quick trial date and insisted on pursuing summary judgment as the sole avenue for resolution of the Section 5 issues.[2]

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[2] The State declined the D.C. district court's invitation to seek an expedited trial date. "If the State of Texas, hearing everybody's objections and the position of the United States, now thinks, 'Well, our motion for summary judgment needs to be augmented, rethought, reargued,' why then we can say, 'Okay, we won't do this by motions, we'll do it by trial,' . . . But at the moment it's Texas' lawsuit and Texas' motion for summary judgment, and that's what we're scheduling." *Texas v. United States*, No. 1:11cv1303 (D.D.C.), Tr. of Tel. Conf. of Sept. 21, 2011) at 32:25-33:13 (Judge Collyer). Judge Collyer followed up by asking the State's counsel "whether in light of all the responses you've gotten, you would rather say, 'Okay, let's just go to trial and get this done['] instead of try summary judgment[.]" *Id.* at 33:15-21. The State persisted in taking the summary judgment route. Only after the D.C. district court denied the State's summary judgment motion did the State request a trial date, and then, too, it sought to begin a 5-8 day trial within just a few weeks, well aware that it would be unrealistic for multiple parties and three federal judges, two of them district judges with full dockets, to clear their calendars for trial on such short notice. Contrary to the State's suggestion, Consolidated Reply at 2, an "aggressive[] pursu[it]" of judicial preclearance would have warranted requesting a trial in September, not at the end of November only after its initial strategy failed.

The Attorney General and Defendant-Intervenors filed briefs opposing the State's motion seeking summary judgment preclearance of its congressional plan. The Attorney General maintained that the congressional plan as a whole was retrogressive based on a statewide measure of voting opportunity. In addition, he identified two districts—CDs 23 and 27—as violating Section 5's prohibition against retrogressive effect, which would require redrawing most of the congressional map in South and West Texas. Finally, the Attorney General argued that the plan had been enacted with a racially discriminatory purpose, undermining the legislative policy choices that drove the State's drawing of congressional district lines. Intervenors, meanwhile, not only buttressed the claims advanced by the Attorney General but also argued and offered evidence of additional Section 5 violations, including the reduction in the absolute number of minority opportunity districts statewide.

After "extensive briefing" and "lengthy oral argument," *Texas v. United States*, No. 1:11cv1303 (D.D.C. Nov. 8, 2011), Dkt. #106 at 1, the D.C. district court unanimously denied the State's summary judgment motion, *id.* at 2. The court determined that the State "used an improper standard or methodology to determine which districts afford minority voters the ability to elect their preferred candidates of choice." *Id.* In the absence of preclearance, the D.C. district court announced that "[t]he District Court for the Western District of Texas must designate a substitute interim plan for the 2012 election cycle by the end of November." *Id.*

Thus, the State was left with no precleared congressional plan, no trial date, and, based on the D.C. district court's determination that the State applied the wrong standard in protecting minority voting rights, a large Section 5 cloud hanging overhead.

The Texas district court, meanwhile, had prepared for the prospect that it would be left with the unwelcome obligation of drawing an interim map. In an effort to keep the primary election on track, the court established a schedule for hearings and development of an interim congressional plan, allowing the parties to submit proposals for interim plans, comment on or object to the proposals, and make their case at interim plan hearings conducted between October 31 and November 4, 2011. Contrary to the State's current assertion that it "has not asked that its entire plan be adopted wholesale without any consideration as to whether any portion of that plan is substantially likely to be found statutorily or constitutionally infirm," Emergency App. at 15, in its filing before the Texas district court the State specifically urged that its unprecleared plan is "appropriate for interim designation." *Perez v. Perry*, No. 5:11-cv-360-OLG-JES-XR (W.D. Tex. filed Oct. 17, 2011), Dkt.#436 at 3. Although the State now disavows its previous request, its efforts before the Texas district court and this Court remain the same: to obtain a "pass" on Section 5 compliance.

Toward the end of the interim plan hearings, the court asked the parties to suggest revisions to the statutory election schedule. The State acquiesced in a revised election schedule, which, among other things, shortened the candidate qualifying period, moving its opening from November 14 to November 28, and pushing the closing date back three days, to December 15. *Perez v. Perry*, No. 5:11-cv-360-OLG-JES-XR (W.D. Tex. Nov. 7, 2011), Dkt. #489. The court stated that, except as revised in the order, "the 2012 elections for federal, state, county and local officers shall proceed as required under state and federal law." *Id.* at 6.

After concluding the interim plan hearings, the Texas district court spent the next two and a half weeks crafting the interim plans. On November 23, the court unanimously published its proposed congressional plan and invited comments and objections. On November 26—the Saturday before the opening of candidate qualifying—the court, with Judge Smith now dissenting in favor of a different plan (but not the enacted one), adopted Plan C220 as the interim plan. The next day, the court denied the State's stay request. Congressional elections opened the next day with candidate qualifying. As anticipated in the court's prior orders, on December 2 the court issued a supplemental order further explaining the governing case law and its approach to the interim plan. *Perez v. Perry*, No. 5:11-cv-360-OLG-JES-XR (W.D. Tex. Dec. 2, 2011), Dkt. #549 ("Supp. Op.").

II. Texas Misrepresents or Misunderstands the Law

Texas's entire argument relies on misrepresenting this Court's decision in *Upham*, 456 U.S. 37. In *Upham*, after Texas submitted its congressional redistricting plan to the Department of Justice for preclearance, DOJ issued a finding "that the State 'has satisfied its burden of demonstrating that the submitted plan is nondiscriminatory in purpose and effect' with respect to" 25 of the plan's 27 districts, but DOJ denied preclearance because of "object[ions] to the lines drawn for two contiguous districts in south Texas, Districts 15 and 27." *Id.* at 38. A Texas district court then adopted an interim map that not only redrew districts 15 and 27, but also redrew four districts in Dallas County, districts that were among those as to which DOJ had affirmatively found no Section 5 violation. *Id.* at 39-40. Texas appealed to this Court *not* as to districts 15 and 27, but rather as to the Dallas County districts. *Id.* at 38 ("The court devised its own districts for Dallas County, and it is that part of the District Court's judgment that is on appeal here."). Thus, *Upham* involved a court deviating from portions of a state-enacted plan where the body charged

with reviewing the plan under Section 5—the Attorney General—had affirmatively found those portions of the plan compliant.

Properly understood, then, *Upham* is fundamentally different from the situation here. In this case, Texas did not ask the Attorney General to preclear its plan, instead seeking preclearance from the D.C. district court. And the D.C. court has not only refused to find any part of the plan compliant, but also has held that "the State of Texas used an improper standard or methodology to determine" whether its plan has retrogressive effects. *Texas v. United States*, No. 1:11cv1303 (D.D.C. Nov. 8, 2011), Dkt. #106 at 2. Thus, unlike in *Upham*, the Section 5 decisionmaker (here the D.C. district court) has made no finding that any part of Texas's plan complies with Section 5. Rather, the court—in the face of objections to Texas's entire congressional redistricting plan from DOJ and other plaintiffs—has declined to grant preclearance to date and has identified a significant obstacle to preclearance by finding that Texas applied an incorrect standard.

In these circumstances, this Court's decisions make clear that it would have been reversible error for the district court to adopt or defer to Texas's non-precleared plan. The basic rule, of course, is that electoral changes in covered jurisdictions have no effect and deserve no deference until precleared. *See, e.g.*, *Clark v. Roemer*, 500 U.S. 646, 652 (1991); *see also Wise v. Lipscomb*, 437 U.S. 535, 542 (1978) (holding state redistricting plan not "effective as law" until it was "submitted *and* received preclearance under § 5") (emphasis added). Although *Upham* created a narrow exception requiring judicial deference as to districts where the Attorney General specifically found "that the State 'has satisfied its burden of demonstrating that the submitted plan is nondiscriminatory in

purpose and effect,'" 456 U.S. at 38, it did not alter the basic Section 5 rule. This Court's unanimous decision in *Lopez v. Monterey County*, 519 U.S. 9 (1996), makes this plain.

In *Lopez*, Monterey County had failed to obtain preclearance for several changes to its system for electing judges. The district court decided to adopt on an interim basis Monterey County's unprecleared system. This Court unanimously reversed. The Court first noted that "[a] jurisdiction subject to § 5's requirements must obtain either judicial or administrative preclearance before implementing a voting change. No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance." *Id.* at 20. As Texas argues here, California argued "that there is a difference between a district court's failing to enjoin an unprecleared election scheme . . . and its ordering, pursuant to its equitable remedial authority, an election under an unprecleared plan." *Id.* at 22. The Court rejected that argument, holding that "where a court adopts a proposal 'reflecting the policy choices . . . of the people [in a covered jurisdiction] . . . the preclearance requirement of the Voting Rights Act is applicable.'" *Id.* (quoting *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981)) (alterations in original). Because the "system under which the District Court ordered the County to conduct elections . . . was the same system that the County had adopted in the first place," it was "error for the District Court to order elections under that system before it had been precleared by either the Attorney General or the United States District Court for the District of Columbia." *Id.*

Lopez is directly controlling here. Texas argues that the district court should have deferred to the congressional redistricting plan enacted by the Legislature. But Texas has not obtained preclearance of the plan, and ordering its use as an interim measure would

effectively sidestep the preclearance requirement. It would, therefore, be "error for the District Court to order elections under that system before it had been precleared." *Id.* Allowing Texas to circumvent Section 5 in this manner would be particularly troubling given that "Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process." *LULAC v. Perry*, 548 U.S. 399, 439-440 (2006).

Texas suggests that *Lopez*'s holding applies only where a state has failed to seek preclearance at all, but *Lopez* did not say or even hint that greater deference would have been appropriate if the State had merely submitted its plan for preclearance—in fact, in *Lopez* the State had filed a declaratory judgment action seeking preclearance of its plan in the D.C. district court but later voluntarily dismissed the action. 519 U.S. at 16. As *Lopez* makes clear, it is approval of a voting change, not mere submission, that requires deference. *Id.* at 22 ("It was, therefore, error for the District Court to order elections under that system before it had been *precleared* by either the Attorney General or the United States District Court for the District of Columbia.") (emphasis added).

Indeed, Texas's proposed rule—that states receive an "A for effort" and automatic deference through mere submission of a plan—borders on incoherent and would create backwards incentives for states. It makes no sense for *submission* of a plan to trigger deference when the whole point of submission is to allow a *decision* on preclearance. This Court has been crystal clear that "[i]f a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change." *Id.* at 20. No decision of any court, and no principle of logic, suggests that this rule changes as soon as a jurisdiction submits a proposed change. Were that the rule,

jurisdictions would have perverse incentives to drag their feet in obtaining preclearance; so long as their submission is merely pending, it deserves deference, but an actual preclearance decision might end that deference. In such circumstances, a jurisdiction would be better off constantly changing and resubmitting its voting rules than it would be actually trying to see any through to preclearance, but the whole purpose of Section 5 was to prevent such gamesmanship.

Texas also suggests that the Texas district court should conduct its own evaluation of the legality of Texas's plan and defer to every portion where it finds no legal violation. That is exactly backwards, ignores the plain text of Section 5, and conflicts with decades of this Court's precedent. The Texas district court has no jurisdiction to decide whether Texas has violated Section 5, for Congress gave "exclusive authority to pass on the discriminatory effect or purpose of an election change to the Attorney General and to the District Court for the District of Columbia." *Id.* at 23. "This congressional choice in favor of specialized review necessarily constrains the role of the three-judge district court," which "lacks authority to consider the discriminatory purpose or nature of the changes." *Id. See also United States 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."). As the Texas district court observed: "[T]he 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." Supp. Op. at 2. Indeed, had the Texas district court made a finding of likely retrogression and used that as a basis to justify interim relief pending the D.C. district court's decision, Texas surely would have protested loudly to this Court while citing the cases above.

Texas not only argues that the district court should have conducted a Section 5 analysis plainly outside its jurisdiction, but also that the court should have applied the wrong standard in doing so. Texas cites *Miller v. Johnson*, 515 U.S. 900 (1995), for the proposition that "courts are obliged to defer to the States' decisions and to apply a presumption of good faith and legality at all stages of litigation," Emergency App. at 11, suggesting that the district court should have given Texas the benefit of the doubt as to Section 5 compliance. But this Court has held innumerable times that in seeking Section 5 preclearance, "the plaintiff State has the burden of proof." *Georgia v. United States*, 411 U.S. 526, 538 (1973); *see also, e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461, 471 (2003) (same); *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 332 (2000) (same). *Miller* certainly did not change that rule; indeed, it is not even a preclearance case. In *Miller*, the plaintiffs filed a claim alleging that the State had engaged in intentional racial gerrymandering, and it was in that context that the Court said that "until a claimant makes a showing sufficient to support that allegation [of race-based decisionmaking,] the good faith of a state legislature must be presumed." *Miller*, 515 U.S. at 915. But "[t]he very effect of section 5 was to shift the burden of proof with respect to racial discrimination in voting" as to covered jurisdictions. *Georgia*, 411 U.S. at 538 n.9. Thus, even if it were

within the Texas district court's power to consider whether Texas's plan complies with Section 5, the burden would have been on Texas to establish compliance.

As for Texas's suggestion that the district court erred by declining to rule on other challenges to Texas's plan—such as those brought under Section 2 and constitutional principles—this Court has made clear that it is error for a district court to consider such challenges before a plan is precleared. "[U]ntil clearance has been obtained," courts should not "address the constitutionality of the new measure." *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978); *see also Connor v. Waller*, 421 U.S. 656, 656 (1975) (holding that district court erred in considering racial discrimination claims as to Mississippi laws because "[t]hose Acts are not now and will not be effective as laws until and unless cleared pursuant to § 5").

In short, the approach Texas urges would have required the Texas district court to flatly ignore the law. It is understandable for Texas to demand as much, for that is the only way it can achieve the result it wants, but it is no basis for a stay or reversal.

III. The Court's Interim Map Adheres to the Standard for Court-Drawn Maps and Honors Legislative Policy Choices Where Possible

The unprecleared status of the State's enacted congressional map left the district court no choice: it was legally compelled to fashion an interim map for the onrushing 2012 election season. The State's rhetorical attack on the district court's effort to meet its obligation, loaded with accusations that the court acted outside "any reasonable conception" of judicial power and "fail[ed] to tether its map to politically-accountable judgments," Emergency App. at 11, 21, is belied by even a cursory review of the court's interim map and Congressional Order. Even the dissent conceded the interim congressional plan to be "an honest and diligent effort to achieve what an interim plan

should do." Congressional Order at 18. This acknowledgement is hardly surprising, since the dissenting judge had joined with the majority in proposing the very same plan only three days earlier.

As set forth above, the district court could not simply adopt the State's plan as an interim map. Under *McDaniel* and *Lopez*, that would have subjected the court-ordered plan to preclearance, putting the whole process back to square one and forcing indefinite postponement of congressional elections. Nor could the district court adopt the map that the dissent ultimately endorsed, Plan C216, which was essentially a rehash of the State's enacted plan. Congressional Order at 15 ("[T]he map drawer for C216 testified that he used the state's unprecleared map as a template" for C216); *see also id.* ("Plan C216 is a thinly disguised version of the State's unprecleared plan, which is challenged as being discriminatory in both purpose and effect."). Because the State's enacted plan is at the core of Plan C216, adoption of C216 would have triggered the preclearance requirement and thrown the elections into disarray. *Lopez*, 519 U.S. at 22.

But the impracticability of adopting the enacted map did not foreclose judicial consideration of it. The district court considered all plans, including the State's enacted map, in developing the interim map. Congressional Order at 5-6. In fact, as reflected in the underlying data, the court's interim plan "gave as much consideration to the state's enacted map as possible without rubberstamping" it. Supp. Op. at 2. Thirty of the thirty-six districts in the interim map contain 60% or more of the population of the enacted map's corresponding districts.[3] As to the other six districts, the interim plan includes

[3] These data are reported on the Texas Legislative Council's public redistricting website in a report denominated "Red-340," comparing Plan C220 (interim plan) to Plan C185 (enacted plan). http://www.tlc.state.tx.us/redist/pdf/congress/PlanC220_Report_Package_Expanded.pdf. District 34 in Plan C220 corresponds to District 27 in Plan C185 since the two districts substantially

60% or more of the population from the benchmark plan, which itself was a state legislative product (as modified following this Court's decision in *LULAC v. Perry*, 548 U.S. 399 (2006)).[4]

The court's objective in drawing the interim map was to "maintain the status quo" pending conclusion of the preclearance process while complying with constitutional and Voting Rights Act requirements. Congressional Order at 6. In addition, the court drew its map with attention to neutral redistricting principles, including "compactness, contiguity, respecting county and municipal boundaries, and preserving whole VTDs [voting tabulation districts]." *Id.* The interim map's departures from the enacted plan in this regard were largely driven by the practical necessity of implementing the interim plan in short order. Thus, in contrast to the enacted plan, which had 520 precinct cuts and 518 VTD cuts, the court's interim plan contained only ten precinct cuts and three VTD cuts. Supp. Op. at 21 n.24.[5] By preserving precinct and VTD boundaries, the interim map minimizes disruptions in local election administration, decreases implementation costs and, most important, ensures that the elections will meet the schedule that the State itself established. *Id.* at 2 (minimizing VTD splits allows interim map to be "implemented under severe time constraints").

In its Congressional Order, the district court provides a detailed explanation of the map's creation, repudiating the State's claim that the map reflects nothing more than the

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mirror each other, and the numbers assigned them are merely artifacts of the district number assignment process.

[4] These data are drawn from the Red-340 report comparing the interim plan to Plan C100 (the benchmark plan). http://www.tlc.state.tx.us/redist/pdf/congress/PlanC220_Report_Package_Expanded.pdf.

[5] The map the dissent ultimately endorsed contained over 500 precinct cuts. Congressional Order at 17 n.33.

court's policy preferences. The court explains, for example, that to ensure Section 5 compliance, it "aimed to maintain the current minority opportunity districts from" the benchmark plan. Congressional Order at 7. In the Houston area, this meant modifying the three extant opportunity districts (9, 18, and 29) only to correct for population equality. *Id.* at 7. Then, to avoid disrupting these districts and impinging on Section 5 concerns, the court rejected various plaintiffs' efforts to draw a new minority opportunity district there and, instead, drew two new districts (34 and 36) around the greater Houston area. These two new districts—neither of which is a minority opportunity district or criticized by the State—are generally configured as under the enacted plan. Congressional Order at 7-8.

By drawing District 34 as it did, the court was able to achieve the critical Section 5 objective of ensuring that District 27 would remain a minority opportunity district, as it is under the benchmark plan (Plan C100). *Id.* at 8-9. The State's enacted plan tore that district apart, moving several hundred thousand Hispanics into an Anglo-majority district and eliminating District 27 as a minority opportunity district. Not surprisingly, this transparent act of retrogression features prominently in the United States' legal challenge to the State's enacted plan. *See, e.g.*, *Texas v. United States*, No. 1:11cv1303 (D.D.C. filed Oct. 25, 2011), Dkt. #79-2 at 20-21 (Attorney General challenging District 27 under Section 5). Thus, even under the State's misapprehension of *Upham*'s reach, District 27 would have required interim reconfiguration. Presented with the challenge of having to create an interim map that complies with the Voting Rights Act, the district court had no realistic choice but to reinstate District 27 as a minority opportunity district.

The requirements of Section 5 similarly shaped the district court's decisions relating to districts in South and West Texas and resulted in preserving existing minority opportunity districts in those regions. Congressional Order at 9. These districts include District 23, which was a focal point of the two-week trial in Texas and of the objections to Plan C185 leveled by the Attorney General and intervenors in the pending Section 5 proceeding. *See, e.g.*, *Texas v. United States*, No. 1:11cv1303 (D.D.C. filed Oct. 25, 2011), Dkt. #79-2 at 20, 24-26, 39-40 (Attorney General challenging District 23 as having retrogressive effect and discriminatory purpose). In fact, the State's own expert conceded during the Texas trial that, despite the State's assertions to the contrary, the Legislature had failed to draw District 23 as a minority opportunity district in the enacted plan, stating that "if I was advising the legislature on drawing the 23rd, I would not have done what was done to the 23rd." *Perez v.* Perry, Trial Tr. at 1838-39; *see also id.* at 1840 ("[D]on't mess with the [benchmark] 23rd."). Consistent with the Voting Rights Act, the district court redrew District 23 "to maintain its demography and electoral performance at the benchmark levels in keeping with the principle of maintaining the status quo." Congressional Order at 10.

The court drew District 35, a new minority opportunity district anchored in Bexar County and extending northeast along the I-35 corridor, to reflect the massive population growth in the area. *Id.* at 9-10. The district's orientation and composition as an opportunity district are patterned after the State's enacted plan. *Id.* Despite the court's recognition of the enacted plan's policies, the State nonetheless criticizes the district court for failing to identify "any legal violation" to justify the "dismantling" of the enacted plan's District 35. Emergency App. at 23-24. Yet again, the State ignores the

challenges lodged by its own experts with regard to its enacted map. Two state experts testified that enacted District 35 was not reasonably compact, as it linked South San Antonio to *north* Austin only by a 3-mile wide strip running nearly 50 miles along Interstate 35. *See Perez v. Perry*, No. 5:11-cv-360-OLG-JES-XR (W.D. Tex.), Trial Ex. J-2 at 33 (T. Giberson depo. testimony); Trial Ex. J-43 at 43-44 (J. Alford depo. testimony) (enacted District 35 is "definitely not a compact district"); *id.* at 97 (enacted District 35 is "not a district I would be proud of"). The State's principal expert further saw it as an effort to add a new, non-compact opportunity district in one part of the state to make up for the elimination of an opportunity district in another part of the state. *Perez v. Perry*, Trial Tr. at 1831-33, 1838, 1840. In light of the record evidence, the court honored the general direction the Legislature had taken by creating a new Hispanic opportunity district in the I-35 corridor anchored in Bexar County, while reconfiguring the district to render it substantially more compact, cutting fewer precincts in the process.

The State further attacks the district court's decision to maintain District 25 as a crossover district as it was in the benchmark plan.[6] This district had consistently elected minority voters' candidate of choice in Travis County since its reformation in 2006 in the *LULAC v. Perry* remand proceedings.[7] According to the State, "the VRA does not . . . permit a court to maintain a crossover district such as District 25, absent a determination of intentional racial discrimination." Emergency App. at 24. But the large population

[6] This Court has defined a crossover district as one "in which the minority makes up less than a majority of the voting-age population, but is large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate." *Bartlett v. Strickland*, 129 S. Ct. 1231, 1236 (2009). The State has conceded that benchmark District 25 was a crossover district. *See* Emergency App. at 24; *Perez v. Perry*, No. SA:11-cv-00360-OLG-JES-XR (W.D. Tex. filed Oct. 21, 2011), Dkt. #457 at 18.

[7] The district court on remand specifically determined that it was drawing District 25 to make it a "compact Austin-based district." *LULAC v. Perry*, 457 F.Supp.2d 716, 719 (E.D. Tex. 2006).

growth in the Travis and Hays County portions of benchmark District 25 necessitated that it be anchored more firmly in those two counties, as the 2006 remand court had intended. Congressional Order at 11. And while the district court appropriately made no ruling on the constitutional issues associated with crossover districts, *id.* at 11 n.24, the *destruction* of such a district—as in the Legislature's enacted plan—would "raise serious questions under both the Fourteenth and Fifteenth Amendments," *Bartlett*, 109 S. Ct. at 1249, as well as Section 5 of the Voting Rights Act, H. Rep. No. 109-478, at 71 (2006) ("Voting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5."). The district court's choice, therefore, avoided a constitutionally problematic legislative action while honoring the Voting Rights Act.

The State also decries interim District 33's creation, suggesting that the court was motivated by illegal race-based considerations. Emergency App. at 18-19. But this allegation ignores that Tarrant County's population growth was overwhelmingly comprised of minority population growth. District 33 became a coalition district not because of illegal race-based line drawing, but rather because 77% of Tarrant County's growth during the decade was attributable to minority population growth. Congressional Order at 13-14. The State's criticism of interim District 33 rests on the assumption that any time a district is created that happens to be a coalition district, the underlying reason must be race-conscious line-drawing; the corresponding assumption is that only White-dominated districts can avoid the charge of race-consciousness in line-drawing.[8] That

[8] The dissent's criticism of the interim plan's District 33 is not directed at its creation as an urban-based district located entirely in Tarrant County. Rather, the criticism is that it is not a valid coalition district because Hispanics and Blacks do not vote cohesively in the Democratic primary.

cannot be the law. Indeed, the State's convoluted effort to avoid drawing District 33 as a coalition district was a subject of significant challenge during the Texas trial, and calls into question whether the enacted plan was motivated by a discriminatory purpose.

As shown by this summary and the district court's thorough explanation, the court strictly adhered to the law governing interim plans. It considered, but did not adopt, the State's enacted plan, and it worked to ensure compliance with the Voting Rights Act and neutral redistricting principles established by decades of jurisprudence. This is precisely what a court is supposed to do when it is in the unenviable position of having to create a map because of legislative delay and non-compliance with the law.

IV. Texas Misrepresents the Relief Sought and Cannot Meet its Burden

Though Texas styles its brief to this Court an "Emergency Application for Stay," the relief the State demands—including that this Court alter Texas's statutory election schedule—is available only by injunction. Texas cannot meet the heavy burden for obtaining injunctive relief from this Court, and, indeed, has not even attempted to make the necessary showing. Nor can Texas meet the onerous requirements for a stay.

A. Texas Seeks an Injunction, Not a Stay

Texas's 2012 election process has begun. Candidate qualifying for offices from constable to President, and for Congress, has been going on for a week. At least twelve candidates have already filed for congressional seats under the interim plan.[9]

Moreover, because of deadlines in the Military and Overseas Voters Empowerment ("MOVE") Act of 2009, 42 U.S.C. § 1973ff, *et seq.*, candidate qualifying

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Congressional Order at 19. While this might be an issue for a Section 2 liability determination, it has no bearing on the legality of the interim map.

[9] The Democratic and Republican party websites, last visited December 3, 2011, identify candidates who have already filed, and are identified on the first page of the affidavit attached as Exhibit 1 to the Texas Democratic Party's stay opposition, filed December 1.

cannot end any later than the current deadline of December 15th if the Texas primary, set by statute for March 6, 2012, is to proceed as scheduled. Emergency App. at 28 ("Because of the MOVE Act's deadlines, the candidate filing period for 2012 primary elections must end by mid-December, 2011 in order for primary elections to be held as scheduled.").

Given these facts, the State's emergency "stay" application has to be recognized for what it really is: a request that the Court issue an injunction to stop the Texas election process and to reschedule the congressional primary for a date later than the one set by state law. Of course, it is the substance, not the title, of the State's filing that determines how it should be treated, and here the State plainly seeks to alter, not preserve, the status quo. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in-chambers).

The State, at least indirectly, recognizes that it seeks an injunction when it asks the Court to delay Texas's primary election for Congress. Emergency App. at 28. It couches this as an alternative (saying "if" delay is necessary), but in reality, as the State recognizes, *id.* at 28-29, granting Texas's request and ordering the district court to revise the interim maps would require severing congressional primaries and conducting them two months or more later than the state, local, and Presidential primary. The State frames this as a "request[] that the Court *stay* the Congressional primary elections," *id.* at 28 (emphasis added), but that is Orwellian double speak. Crucially, Texas's primary date is set by statute, and the Texas district court *has not changed it*; the only change the court made to Texas's election schedule was to delay filing deadlines to give the State more time to seek preclearance, a change the State acquiesced in and has not appealed. *Perez*

v. Perry, No. 5:11-cv-360-OLG-JES-XR (W.D. Tex. Nov. 29, 2011), Dkt.#548 at 2. Thus, in asking this Court to change the election date, Texas requests an injunction, not a stay.

B. Texas Cannot Satisfy its Burden for Injunctive Relief

The standard for obtaining a stay from this Court is high. *See, e.g., Edwards v. Hope Medical Group for Women*, 512 U.S. 1302 (1994) (Scalia, J., in-chambers). The standard for an injunction is even higher.

"The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue an injunction," and it is a power "to be used sparingly." *Turner Broad.*, 507 U.S. at 1303. Moreover, the legal rights of the party demanding injunctive relief must be "indisputably clear." *Id.*; *see also Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in-chambers) (power to be exercised "only in the most critical and exigent circumstances"); Supreme Court Rule 20.1.

The State has not even bothered to try to satisfy the standard for the relief it seeks, which alone calls for rejecting its request. *See, e.g., Ohio Citizens*, 479 U.S. at 1313 (refusing to consider request effectively seeking injunctive relief because party "neither specifically requested it nor addressed the peculiar requirements for its issuance"). Had it tried, the State never could have met its burden.

Most obviously, the State's right to relief is the opposite of "indisputably clear." *Id.* The State has no legal right to demand that the district court adopt its unprecleared plan; indeed, the law is indisputably clear that an unprecleared plan is not to be used in an election. *See, e.g., Lopez*, 519 U.S. at 20 ("No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance."). To the extent the State's demand is that the Texas district court conduct its own assessment of whether

Texas's unprecleared plan complies with Section 5, Section 2, and other legal requirements, it is asking the court to exert authority it does not have. *See, e.g.*, *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."); *Lipscomb*, 437 U.S. at 542 (holding that "until clearance has been obtained," courts should not "address the constitutionality of the new measure"). And to the extent the State's claim is that the district court's interim plan shows insufficient deference to the State's enacted plan under *Upham*, the State's argument again fails, for as explained above, *Upham* is inapplicable here given the absence of any finding by the D.C. district court that any part of Texas's plan complies with Section 5.

Indeed, even what the State is asking for is unclear. The State offers only a vague plea for greater "deference" to the enacted plan. But instructing the district court to show greater deference to the enacted map when the same court has already thoroughly considered that map does not clarify the standards it is to use in any meaningful way. It certainly doesn't clarify them in a way that the district court could incorporate in a new interim map in time for the elections now underway. An alternative approach—detailed instructions about how to draw individual districts differently—is similarly unfeasible, as this Court has neither a record to review nor the time to review it if there are to be congressional elections in Texas in 2012. This leaves only the State's true goal: interim adoption of the unprecleared enacted map, an option plainly foreclosed by *Lopez*.

Moreover, the exigency here is of the State's own making. As explained above, the State dawdled in enacting a congressional redistricting plan, and by seeking preclearance in the D.C. district court and making dilatory litigation choices, the State delayed matters further. The State had a legal right to proceed as it did, but it cannot invoke exigency as a factor favoring equitable relief where its own actions led to this situation. *See, e.g.*, *Lucas v. Townsend*, 486 U.S. 1301, 1303 (1988) (Kennedy, J., in-chambers) (discounting burdens to covered jurisdiction because those "burdens can fairly be ascribed to the [jurisdiction's] own failure to seek preclearance sufficiently in advance of the date chosen for the election"). Moreover, this Court has been hostile to claims of exigency arising out of a need to comply with Section 5. In *Lopez*, the Court considered whether exigency might ever "allow a covered jurisdiction to conduct an election under an unprecleared voting plan." 519 U.S. at 21. The Court "suggested that '[a]n extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the [covered jurisdiction] until the eve of the election.'" *Id.* (quoting *Clark v. Roemer*, 500 U.S. 646, 654-55 (1991)). The Court "found no such exigency to exist" in *Lopez*, *id.* at 22, and none is present here, as Texas has long known of its Section 5 obligations and election schedule.

In short, the State has utterly failed to meet the standard for the relief it seeks.

C. The State Also Cannot Satisfy the Requirements for a Stay

Even if the State's request could properly be characterized as seeking a stay, the State still could not meet its burden. This Court will grant a stay "only in extraordinary circumstances." *Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (Rehnquist, C.J., in chambers) (quotation marks omitted). The State glosses over this requirement by citing the stay standard mentioned in *Hilton v. Braunskill*, 481 U.S. 770 (1987), but that case

dealt with the stay standard for "district courts and courts of appeals." *Id.* at 776. Beyond "extraordinary circumstances," the State must show (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) a likelihood that "irreparable harm [will] result from the denial of a stay." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). "[I]n a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* "The judgment of the court below is presumed to be valid, and absent unusual circumstances [this Court] defers to the decision of that court not to stay its judgment." *Wise v. Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers).

As already explained, Texas has not shown that this Court is likely to note jurisdiction and reverse, as the district court's decision properly applied long-settled legal principles. Moreover, Texas's claim of irreparable injury is exactly backwards. The State argues that it is suffering an irreparable injury because the district court has imposed an unlawful map. Emergency App. at 25. In reality, this Court's decisions make clear that the irreparable injury would have occurred if the court had adopted Texas's plan absent preclearance. *See, e.g.*, *Lopez*, 519 U.S. at 20 ("If a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change.").

Issuance of a stay would also substantially injure the other parties interested in this proceeding. "Congress designed the preclearance procedure 'to forestall the danger

that local decisions to modify voting practices will impair minority access to the electoral process.'" *Id.* at 23 (quoting *McDaniel*, 452 U.S. at 149). The State asks this Court to short circuit that process and direct the district court to adopt Texas's unprecleared plan, even though the only legal determination yet made as to that plan is that "the State of Texas used an improper standard or methodology to determine" whether it has retrogressive effects. *Texas v. United States*, No. 1:11cv1303 (D.D.C. Nov. 8, 2011), Dkt. #106 at 2. Ordering adoption of or deference to such a plan would deprive plaintiffs/appellees of the very rights Section 5 is designed to protect.

Finally, the public interest plainly lies in denying Texas's request. Beyond the fundamental harm to the public interest in sidestepping Section 5 and allowing Texas to use a map when it "used an improper standard or methodology to determine" whether it has retrogressive effects, *id.*, Texas's request would disrupt an ongoing election process and impose huge burdens by rearranging Texas's congressional election schedule.

Seven years ago, Texas saw the same circumstances present here quite differently. In successfully opposing a stay of the district court ruling approving the 2003 Texas congressional plan, the State said: "Since the District Court's . . . decision, candidates have begun filing and announcing their candidacies under the new district map. So, too, some candidates have withdrawn from other positions so that they can run under the new map. And candidates across the State have begun aggressively campaigning in their new districts, raising public expectations that the new district lines will be used. The emergency relief requested by Applicants would therefore do more harm than good, and it would disserve the public interest." State Defendants' Opposition to Stay and to Emergency Injunction, *Jackson v. Perry*, No. 03A581 (Jan. 14, 2004), at 4. The only

thing different here is which side of the case Texas is on. Seven years ago, this Court denied the stay request; it should do the same here.

Granting Texas's request would impose costs beyond even those it has previously acknowledged. Putting the congressional primary on the same day as the run-off for other offices, as Texas requests, will add untold expenses for counties across Texas that would otherwise not have to administer elections that day (i.e., counties where no run-off occurs). Even in counties that have run-offs, some will have them only in certain precincts. Moreover, some of the rescheduled congressional primaries would surely result in run-offs, forcing many areas to conduct a second primary run-off just for congressional seats. Given the dire financial straits of many Texas jurisdictions, these burdens cannot be taken lightly.

A host of other problems would also flow from granting the State's request. If the same amount of time is allowed between the special congressional primary and its special run-off as is allowed between the regular primary and its run-off—a time period largely dictated by the requirements of the MOVE Act—then the congressional primary run-off would come in August, *after* the state party conventions, and possibly so late as to interfere with the MOVE Act's requirements for the general election. Plus, the disjointed and constantly changing election process Texas proposes would surely lead to voter confusion and reduced participation.

In short, even if Texas's injunction request could properly be characterized as seeking a stay, the State has not met the demanding burden required to justify that relief.

Respectfully submitted,

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