

guidelines established in *Perry v. Perez*, 132 S. Ct. 934 (2012) (per curiam), and *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam). As the Supreme Court explained in *Perry v. Perez*, “the state plan serves as a starting point for the district court” in drawing an interim plan. 132 S. Ct. at 941. Any interim redistricting plan issued by this Court must therefore incorporate the policy choices reflected in the legislatively enacted plans to the extent those choices do not conflict with the Constitution or the Voting Rights Act. *Id.* Likewise, in the event that the denial of preclearance regarding of the legislatively enacted redistricting plans becomes final and this Court is tasked with fashioning remedial redistricting plans, it must defer to the 2011 legislatively enacted plans and limit any modifications to the State’s plans “to those necessary to cure any constitutional or statutory defect.” *Upham*, 456 U.S. at 43.

Federal courts have consistently rejected the argument Plaintiffs advance in their advisories, especially where, as here, the interim relief in question expires by its own terms after one election. *See, e.g., White v. City of Belzoni*, 854 F.2d 75, 76 (5th Cir. 1988) (“The court’s interim plan, by its own terms, governed only the aldermanic elections.”); *Johnson v. Miller*, 929 F. Supp. 1529, 1562 (S.D. Ga. 1996) (“The interim nature of the remedial plan that we put into place has a number of important consequences, not the least of which is that the plan cannot be used as a benchmark against which to measure any future plan for nonretrogression.”); *see also United States v. Mississippi*, 444 U.S. 1050, 1052 (1980) (mem.) (Stevens, J., concurring) (“Thus, in practical terms, the court-ordered plan was never more than

a backup. To use such a plan as a benchmark for judging the effect of the statutory plan on voting rights seems to me to be logically indefensible.”).

II. The Findings of the D.C. Court in the Section 5 Proceeding Do Not Have Preclusive Effect.

The advisories filed by the Quesada Plaintiffs, Perez Plaintiffs, Rodriguez Plaintiffs, LULAC Plaintiffs, NAACP Plaintiffs, African-American Congressional Plaintiffs, and MALC urge that the doctrine of offensive collateral estoppel precludes Defendants from relitigating any issue addressed by the D.C. Court. *See* Joint Advisory (Doc. 738) at 14; MALC’s Advisory (Doc. 734) at 2. Plaintiffs are mistaken. Because this case involves different claims and a different burden of proof than the Section 5 proceeding, the D.C. Court’s factual determinations have no preclusive effect.¹

Federal courts have recognized that a shift or change in the burden of proof can render the issues in two different proceedings non-identical, and thereby make the application of collateral estoppel inappropriate. *See Cobb v. Pozzi*, 363 F.3d 89, 113 (2d Cir. 2004); *see also Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1322 (9th Cir. 1992) (“[C]ollateral estoppel does not preclude claims that have a different burden of proof than previously decided claims[.]”); *Guenther v. Holmgreen*, 738 F.2d 879, 888 (7th Cir. 1984) (“It is, of course, well established that issue preclusion may be defeated by shifts in the burden of persuasion or by changes in the degree of

¹ MALC suggests that the doctrine of *res judicata* or claim preclusion would prevent this Court from reaching a different result than the D.C. Court. *See* MALC’s Advisory (Doc. 734) at 2. *Res judicata*, however, applies where “(1) the parties are identical in the two actions; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) there was a final judgment on the merits; and (4) the same claim or cause of action is involved in both cases.” *Oreck Direct, LLC v. Dyson, Inc.*, 560 F.3d 398, 401 (5th Cir. 2009). Because this case involves different claims than the Section 5 proceeding, *res judicata* does not apply.

persuasion required.”) (citation omitted)); *see generally* CHARLES ALAN WRIGHT, ET AL., 18 FEDERAL PRACTICE AND PROCEDURE § 4422 (2d ed. 2002) (“Failure of one party to carry the burden of persuasion on an issue should not establish the issue in favor of an adversary who otherwise would have the burden of persuasion on that issue in later litigation.”); JAMES WM. MOORE, ET AL., 18 MOORE’S FEDERAL PRACTICE § 132.02[4][e] (3d ed. 1997) (noting that “issue preclusion does not apply when the party seeking to benefit from preclusion has a significantly heavier burden in the subsequent action than in the prior action”); RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982) (“[R]elitigation of the issue in a subsequent action between the parties is not precluded . . . [where] [t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; . . . or the adversary has a significantly heavier burden than he had in the first action.”). “To apply issue preclusion [when the burden of proof is different in the second litigation] would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden [been] imposed.” RESTATEMENT (SECOND) OF JUDGMENTS § 28, cmt. f (1982). Even if the legal and factual issues were identical, the D.C. Court’s determination that the State failed to prove a negative under Section 5 could not relieve the Plaintiffs of their affirmative burden of proof under Section 2 and the Constitution.

III. This Court Must Defer To The Legislature For A Reasonable Time Before Issuing A Permanent Remedial Plan.

As Defendants stated in their advisory filed on March 23, 2013, four redistricting bills have been filed in the current legislative session. It is well settled that “reapportionment is primarily the duty and responsibility of the State.” *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *see, e.g., Voinovich v. Quilter*, 507 U.S. 146, 156-157 (1993) (“Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place.”). MALC’s portrayal of pending redistricting bills as an attempt “to circumvent the judicial process through legislation” turns this fundamental precept of reapportionment on its head. *See* MALC’s Advisory (Doc. 743) at 4.

The Legislature’s prerogative to redistrict is beyond question. Intervention by federal courts “represents a serious intrusion on the most vital of local functions,” *Miller v. Johnson*, 515 U.S. 900, 915 (1995), and should be avoided whenever possible. *See, e.g., Growe v. Emison*, 507 U.S. 25, 34 (1993) (“[A] federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.”). Although a “last-minute federal court rescue” is sometimes unavoidable, a court should never “race to beat [the State] to the finish line.” *Id.* at 37.

IV. No Further Proceedings Are Necessary To Determine The Boundaries of Electoral Districts for the 2014 Elections.

When considering the legality of the 2011 legislatively enacted plans, it is neither necessary nor appropriate for this Court to consider data from the latest American Community Survey (“ACS”) or the 2012 elections because this data were not used by the Legislature. The consideration of census data that was not used by the Legislature would turn redistricting into an ongoing task, forcing the courts to reopen cases every time new census data becomes available. This would have the impermissible effect of taking the responsibility of redistricting away from the Legislature and turning the federal courts into the primary forum for redistricting. Moreover, because the interim plans do not change the “benchmark,” the performance of an interim district cannot inform this Court’s consideration of Section 5 in fashioning a remedial or successive interim plan. Accordingly, the record does not need to be supplemented or amended with additional evidence.

V. Specific Districts Identified By The Plaintiffs

Defendants have previously submitted briefing regarding how the Court’s interim plan fully remedies the D.C. Court’s finding of retrogression. Rather than repeat these arguments, Defendants incorporate by reference the arguments raised in their prior briefs.²

² Specifically, Defendants incorporate by reference the arguments in the following filings from this case: Defendants’ Advisory Regarding Interim Redistricting Plans (Doc. 119) and Defendants’ Advisory on Issues Relating to Interim Redistricting Plans (Doc. 163). Further, Defendants incorporate by reference the arguments in the following filings from *Perez v. Perry*, SA-11-CA-360-OLG-JES-XR (W.D. Tex.): Defendants’ Advisory Regarding Interim Redistricting Plans (Doc. 728) and Defendant’s Response Brief on Issues Relating to Interim Redistricting Plans (Doc. 645).

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