No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICK PERRY, in his official capacity as Governor of Texas, HOPE ANDRADE, in her official capacity as Secretary of State, and the STATE OF TEXAS,

Applicants,

v.

WENDY DAVIS, *et al.,*

Respondents.

APPENDIX TO EMERGENCY APPLICATION FOR STAY OF INTERLOCUTORY ORDER DIRECTING IMPLEMENTATION OF INTERIM TEXAS SENATE REDISTRICTING PLAN PENDING APPEAL TO THE UNITED STATES SUPREME COURT

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[1] The district court's order included three exhibits, which have not been included in this Appendix due to their volume. The exhibits include copies of the court's interim electoral maps, detailed description of each electoral district, and selected population data. These exhibits are available on PACER and can be provided upon request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Appendix to Applicant's Emergency Application for Stay Pending Appeal to the United States Supreme Court has been sent via electronic mail and Federal Express on November 28, 2011 to:

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICK PERRY, in his official capacity as Governor of Texas, HOPE ANDRADE, in her official capacity as Secretary of State, and the STATE OF TEXAS,

Applicants,

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WENDY DAVIS, *et al.*,

Respondents.

EMERGENCY APPLICATION FOR STAY OF INTERLOCUTORY ORDER DIRECTING IMPLEMENTATION OF INTERIM TEXAS SENATE REDISTRICTING PLAN PENDING APPEAL TO THE UNITED STATES SUPREME COURT

EXHIBIT 1

In the United States District Court
for the
Western District of Texas

WENDY DAVIS, ET AL.	§	
	§	
v.	§	SA-11-CV-788
	§	
RICK PERRY, ET.AL.	§	

ORDER

The court adopts PLAN S164 as the interim plan for the districts used to elect members in 2012 to the Texas Senate. A map showing the redrawn districts in PLAN S164 is attached to this Order as Exhibit A. The textual description in terms of census geography for PLAN S164 is attached as Exhibit B. The statistical data for PLAN S164 is attached as Exhibit C. This plan may be also viewed on the DistrictViewer website operated by the Texas Legislative Council (http://gis1.tlc.state.tx.us/) under the category "Court-ordered interim plans." Additional data on the Court's interim plan can be found at the following website location maintained by the Texas Legislative Council under the "Announcements" banner: http://www.tlc.state.tx.us/redist/redist.htm.

This interim map is not a ruling on the merits of any claims asserted by the Plaintiffs in this case or the case pending before the three-judge panel in the United States District Court for the District of Columbia.

In drawing a Senate map, the court was faced with factual and legal concerns very different from those faced in regard to the Congressional and State House maps. Thus, the manner in which the State Senate map is drawn is quite different from the manner in which the Congressional and State House maps are drawn, and any comparison would be misleading and unfounded.

In drawing this map, all proposed maps, including the State's enacted map, were considered. The only objections raised to the State's enacted map in this litigation concerned Senate District 10, and no other portions of the map were objected to. Further, the Department of Justice has asserted no objection to the plan before the three-judge panel in the United States District Court for the District of Columbia. As a result, the Court concluded that the appropriate exercise of "equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy,"[1] was to maintain the status quo from the benchmark plan with regard to Senate District 10 pending resolution of the litigation in the District of Columbia but otherwise to use the enacted map as much as possible.[2]

---

[1] *Connor v. Finch*, 431 U.S. 407, 414 (1977). Although *Connor* and other Supreme Court opinions require population equality in court-drawn maps, the Court notes that Plaintiffs have not raised an equal protection challenge to the population deviations in the Legislature's enacted map. Thus, insofar as the Court is utilizing the Legislature's enacted map, it is using the portions of the map to which no party or the DOJ has objected in order not to disturb legislative choices any more than necessary. This was not possible in the State House and Congressional maps, given the numerous challenges to the State's enacted House map and the mandate to achieve *de minimis* population deviation in the Congressional map.

[2] Five districts (9, 10, 12, 22, and 30) are different from the enacted map, but changes to districts 9, 12, 22, and 30 are the result of keeping district 10 the same as in the benchmark.

Though the State objects to the configuration of Senate District 10 and contends that there is no legal justification for the Court's configuration of that district because there is no legal wrong requiring a remedy, the Court notes that this is not a remedial map. The Court's configuration of Senate District 10 is not a merits determination on the challenges raised in this case or the case before the three-judge panel in the United States District Court for the District of Columbia. As this Court noted in its order denying summary judgment, the fact remains that the Legislature's enacted map has not been precleared by the three-judge panel in the United States District Court for the District of Columbia and thus may not be implemented, nor may this Court consider the merits of the challenges brought in this litigation.[3] Using the State's unprecleared map in its entirety would improperly bypass the preclearance proceedings in the United States District Court for the District of Columbia. Thus, the Court's map, as an interim map, simply maintains the status quo as to the challenged district pending resolution of the preclearance litigation, while giving effect to as much of the policy judgments in the Legislature's enacted map as possible.

SIGNED on behalf of the panel this 23rd day of November, 2011.

_____/s/_____

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

[3] *Lopez v. Monterey County*, 519 U.S. 9, 20 (1996).

No. _____

IN THE
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EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendants.	Civil Action No. 1:11-cv-1303 (RMC-TBG-BAH) Three-Judge Court

ANSWER

Defendants Eric H. Holder, Jr., Attorney General of the United States, and the United States of America hereby answer each paragraph of the Complaint as follows:

In response to the un-numbered first paragraph in the Complaint, Defendants admit that Plaintiff is seeking a declaratory judgment in this action that four statewide redistricting plans comply with Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Defendants admit that Plaintiff is entitled to a declaratory judgment under Section 5 of the Voting Rights Act with respect to the proposed State Board of Education (SBOE) plan and the proposed Senate plan. Defendants deny that Plaintiff is entitled to a declaratory judgment under Section 5 of the Voting Rights Act with respect to the proposed House plan and the proposed Congressional plan. Defendants lack knowledge or information sufficient to form a belief about what assumptions under which Plaintiff brings its claims, and about what claims that Plaintiff reserves, and therefore deny the same. Defendants aver that Section 5 is constitutional.

1. Defendants admit that Texas is a state and is subject to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Defendants lack knowledge or information sufficient to form a

belief about the truth of whether Texas brings this action on behalf of itself and its citizens and therefore deny the same.

2. Defendants admit the allegations in Paragraph 2.

3. In response to the allegations in Paragraph 3, Defendants admit that this action is brought pursuant to Section 5 of the Voting Rights Act, that this Court is authorized to issue a declaration as to whether Plaintiff's redistricting plans comply with Section 5 of the Voting Rights Act, and that this Court has subject matter jurisdiction under 28 U.S.C. § 1331. Defendants deny that Plaintiff is entitled to a determination that the proposed House plan and proposed Congressional plan comply with Section 5 of the Voting Rights Act.

4. Defendants admit the allegation in Paragraph 4.

5. Defendants admit the allegations in Paragraph 5.

6. Defendants admit the allegations in Paragraph 6.

7. Defendants admit the allegations in Paragraph 7 insofar as they merely contend that the Texas Legislature has enacted proposed redistricting plans for the SBOE, Texas House of Representatives, Texas Senate, and Texas Congressional delegation.

8. Defendants admit the allegations in Paragraph 8.

9. Defendants admit the allegations in Paragraph 9 only insofar as Defendants have received information from Plaintiff regarding the four redistricting plans that are the subject of this declaratory judgment action. Plaintiff has not filed a request with the Attorney General seeking administrative preclearance for the four redistricting plans pursuant to Section 5 of the Voting Rights Act. Defendants deny that Plaintiff's "informal" submission is complete, in that it does not contain all information necessary for Defendants to

determine whether the redistricting plans at issue in this litigation comply with Section 5 of the Voting Rights Act. Defendants further deny that the "informal" submission tracks and mirrors the DOJ's administrative preclearance process.

10. Defendants admit the allegations in Paragraph 10.

11. Defendants admit the allegations in Paragraph 11.

12. Defendants admit the allegations in Paragraph 12, except to the extent that Plaintiff alleges that the proposed SBOE plan became effective on August 29, 2011, which allegation is denied. The proposed SBOE plan has no force or effect unless and until this Court determines that the plan meets the requirements of Section 5 of the Voting Rights Act.

13. Defendants admit the allegations in Paragraph 13, to the extent that Plaintiff provided the Attorney General with documents and data on July 19, 2011, and that Plaintiff attached those materials to the Complaint. Defendants deny that these documents and data constitute all materials necessary for the Attorney General to determine whether the proposed SBOE plan complies with Section 5 of the Voting Rights Act.

14. Defendants admit the allegation in Paragraph 14, only to the extent that the informal submission explains Plaintiff's view of the SBOE plan. Defendants deny that Plaintiff's informal submission establishes these facts standing alone. Defendants admit that the SBOE plan complies with Section 5 of the Voting Rights Act.

15. Defendants admit the allegations in Paragraph 15. Defendants deny that Plaintiff's informal submission established these facts standing alone.

16. Defendants admit the allegation in Paragraph 16.

17. Defendants admit the allegation in Paragraph 17.

18. Defendants admit the allegations in Paragraph 18, except to the extent that Plaintiff alleges that H.B. 150 is enforceable, which allegation is denied. The proposed House plan has no force or effect unless and until this Court determines that the plan meets the requirements of Section 5 of the Voting Rights Act.
19. Defendants deny the allegation in Paragraph 19. The proposed House plan has no force or effect unless and until this Court determines that the plan meets the requirements of Section 5 of the Voting Rights Act.
20. Defendants admit the allegations in Paragraph 20, to the extent that Plaintiff provided the Attorney General with documents and data on July 19, 2011, and that Plaintiff attached those materials to the Complaint. Defendants deny that these documents and data constitute all materials necessary for the Attorney General to determine whether the proposed House plan complies with Section 5 of the Voting Rights Act.
21. Defendants admit the allegation in Paragraph 21, only to the extent that the informal submission explains Plaintiff's view of the proposed House plan. Defendants deny that Plaintiff's informal submission establishes these facts standing alone. Defendants deny that the proposed House plan, as compared with the benchmark, maintains or increases the ability of minority voters to elect their candidate of choice in each district protected by Section 5. Defendants deny that the proposed House plan complies with Section 5 of the Voting Rights Act.
22. Defendants deny the allegations in Paragraph 22.
23. Defendants admit the allegation in Paragraph 23.
24. Defendants admit the allegation in Paragraph 24.

25. Defendants admit the allegations in Paragraph 25, except to the extent that Plaintiff alleges that S.B. 31 is enforceable, which allegation is denied. The proposed Senate plan has no force or effect unless and until this Court determines that the plan meets the requirements of Section 5 of the Voting Rights Act.
26. Defendants deny the allegation in Paragraph 26. The proposed Senate plan has no force or effect unless and until this Court determines that the plan meets the requirements of Section 5 of the Voting Rights Act.
27. Defendants admit the allegations in Paragraph 27, to the extent that Plaintiff provided the Attorney General with documents and data on July 19, 2011, and that Plaintiff attached those materials to the Complaint. Defendants deny that these documents and data constitute all materials necessary for the Attorney General to determine whether the proposed Senate plan complies with Section 5 of the Voting Rights Act.
28. Defendants admit the allegation in Paragraph 28, only to the extent that the informal submission explains Plaintiff's view of the proposed Senate plan. Defendants deny that Plaintiff's informal submission establishes these facts standing alone. Defendants admit that the proposed Senate plan complies with Section 5 of the Voting Rights Act.
29. Defendants admit the allegations in Paragraph 29, except to the extent that Plaintiff alleges a causal or legal connection between maintenance of specific population thresholds and the continued ability of minority voters to elect their candidates of choice or that the nine districts that meet these numerical thresholds are the only districts in which minority voters have the ability to elect their candidate of choice under the benchmark Senate plan or the proposed Senate plan, which allegations are denied.
30. Defendants admit the allegations in Paragraph 30.

31. Defendants admit the allegations in Paragraph 31.

32. Defendants admit the allegation in Paragraph 32.

33. Defendants admit the allegations in Paragraph 33, except to the extent that Plaintiff alleges that S.B. 4 is enforceable, which allegation is denied. The proposed Congressional plan has no force or effect unless and until this Court determines that the plan meets the requirements of Section 5 of the Voting Rights Act.

34. Defendants admit the allegations in Paragraph 34, to the extent that Plaintiff provided the Attorney General with documents and data on July 19, 2011, and that Plaintiff attached those materials to the Complaint. Defendants deny that these documents and data constitute all materials necessary for the Attorney General to determine whether the proposed Congressional plan complies with Section 5 of the Voting Rights Act.

35. Defendants admit the allegation in Paragraph 35, only to the extent that the informal submission explains Plaintiff's view of the proposed Congressional plan. Defendants deny that Plaintiff's informal submission establishes these facts standing alone. Defendants deny that the proposed Congressional plan, as compared with the benchmark, maintains or increases the ability of minority voters to elect their candidate of choice in each district protected by Section 5. Defendants deny that the proposed Congressional plan complies with Section 5 of the Voting Rights Act.

36. Defendants admit the allegations in Paragraph 36, except to the extent that Plaintiff alleges that districts with a certain percentage of Black voting-age population (BVAP) necessarily either provide or do not provide Black voters with the ability to elect their candidate of choice, which allegations are denied.

37. Defendants admit the allegations in Paragraph 37, except to the extent that Plaintiff alleges that districts with a certain percentage of Hispanic voting-age population (HVAP) necessarily either provide or do not provide Hispanic voters with the ability to elect their candidate of choice, which allegations are denied.
38. Defendants' responses to Paragraphs 1-15 above are incorporated by reference in response to Paragraph 38.
39. Defendants admit the allegations in Paragraph 39.
40. In response to the allegations in Paragraph 40, Defendants admit that Plaintiff is entitled to a declaratory judgment that the proposed SBOE plan complies with Section 5 of the Voting Rights Act. Defendants aver that the Court will have to make its own determination as to whether the proposed SBOE plan complies with Section 5 of the Voting Rights Act before the plan may be implemented.
41. Defendants' responses to Paragraphs 1-9 and 16-22 above are incorporated by reference in response to Paragraph 41.
42. Defendants deny the allegation in Paragraph 42.
43. Defendants deny the allegation in Paragraph 43.
44. Defendants' responses to Paragraphs 1-9 and 23-29 above are incorporated by reference in response to Paragraph 44.
45. Defendants admit the allegations in Paragraph 45.
46. In response to the allegations in Paragraph 46, Defendants admit that Plaintiff is entitled to a declaratory judgment that the proposed Senate plan complies with Section 5 of the Voting Rights Act. Defendants aver that the Court will have to make its own

determination as to whether the proposed Senate plan complies with Section 5 of the Voting Rights Act before the plan may be implemented.

47. Defendants' responses to Paragraphs 1-9 and 30-37 above are incorporated by reference in response to Paragraph 47.

48. Defendants deny the allegations in Paragraph 48.

49. Defendants deny the allegations in Paragraph 49.

In response to Plaintiff's Demand for Judgment, Defendants answer as follows:

A. Defendants admit that a three-judge court is necessary to hear this action under 42 U.S.C. § 1973c.

B. Defendants admit that Plaintiff is entitled to a declaratory judgment on the proposed SBOE plan and the proposed Senate plan, deny that Plaintiff is entitled to a declaratory judgment on the proposed House plan, and deny that Plaintiff is entitled to a declaratory judgment on the proposed Congressional plan.

C. Defendants admit that Plaintiff is entitled to a declaratory judgment on the proposed SBOE plan and the proposed Senate plan, deny that Plaintiff is entitled to a declaratory judgment on the proposed House plan, and deny that Plaintiff is entitled to a declaratory judgment on the proposed Congressional plan.

D. Defendants deny that Plaintiff is entitled to any other and further relief.

Any and all allegations not specifically admitted herein are denied.

Defendants believe that the scope of the issues between the parties can be substantially narrowed. In order to establish the districts that remain at issue in this litigation, Defendants will present proposed stipulations to Plaintiff and to the Defendant-Intervenors on or before September 20, 2011.

Date: September 19, 2011

Respectfully submitted,

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United States Attorney
District of Columbia

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

/s/ Daniel J. Freeman
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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2011, I served a true and correct copy of the foregoing via the Court's ECF filing system on the following counsel of record:

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No. _____

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Respondents.

EMERGENCY APPLICATION FOR STAY OF INTERLOCUTORY ORDER DIRECTING IMPLEMENTATION OF INTERIM TEXAS SENATE REDISTRICTING PLAN PENDING APPEAL TO THE UNITED STATES SUPREME COURT

EXHIBIT 3

In the United States District Court
for the
Western District of Texas

WENDY DAVIS, ET AL.	§	
	§	
v.	§	SA-11-CV-788
	§	
RICK PERRY, ET.AL.	§	

ORDER

The court may issue PLAN 163 as the interim plan for the districts used to elect members in 2012 to the Texas Senate. This plan may be viewed on the DistrictViewer website operated by the Texas Legislative Council (http://gis1.tlc.state.tx.us/) under the category "Exhibits for Davis v. Perry. "

The parties are ordered to access this proposed interim plan and file any comments and/or objections via CM/ECF to the proposed interim plans no later than noon, Friday, November 18 2011.

SIGNED on behalf of the panel this 17th day of November, 2011.

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICK PERRY, in his official capacity as Governor of Texas, HOPE ANDRADE, in her official capacity as Secretary of State, and the STATE OF TEXAS,

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Respondents.

EMERGENCY APPLICATION FOR STAY OF INTERLOCUTORY ORDER DIRECTING IMPLEMENTATION OF INTERIM TEXAS SENATE REDISTRICTING PLAN PENDING APPEAL TO THE UNITED STATES SUPREME COURT

EXHIBIT 4

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-788
	§	
RICK PERRY, ET AL.	§	

AMENDED ORDER

Defendants' motion to stay implementation of the court-drawn interim senate redistricting plan pending appeal (Dkt. No. 90) is DENIED for the reasons given in this Court's Order dated November 23, 2011. As stated in that Order, when there is no other legally enforceable plan in effect, this Court is required to craft an independent court-drawn interim map. The State has misinterpreted the applicable case since the inception of the interim court plan process. The State insists that the Court must simply adopt its enacted unprecleared plan, making only minimal changes, if any, to "remedy" any constitutional or statutory violations. The State continues to rely on *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518 (1982), which is clearly inapposite to the situation that the Court faces herein. In *Upham*, the district court was faced

with drawing a remedial plan after preclearance of the State's enacted plan had been denied. In the remedial phase, under *Upham*, the district court's task would be limited to remedying the portions of the map known to be retrogressive or otherwise violating the Voting Rights Act or the U.S. Constitution. Had the State chosen the path of administrative preclearance through the Department of Justice, we would perhaps be in the remedial phase right now. However, the State chose to file a lawsuit in the United States District Court in the District of Columbia, which is still pending, and we are not in the remedial phase. Instead, we are in an interim phase where the Court has been placed in the position of crafting an independent court drawn plan that complies with the U.S. Constitution and Sections 2 and 5 of the Voting Rights Act. In doing so, the Court is precluded from simply adopting the State's enacted plan or deferring to the challenged plan, as doing so would make the preclearance process meaningless and constitute a de facto ruling on the merits of the various legal challenges to the State's plan. *See Lopez v. Monterey County*, 519 U.S. 9, 117 S.Ct. 340 (1996)(district court erred when it failed to independently craft an electoral plan and instead adopted the County's proposal, which required preclearance); *see also McDaniel v. Sanchez*, 452 U.S. 130, 101 S.Ct. 2224 (1981)(district court erred in adopting the County's plan, which required preclearance). It is undisputed that the "failure to obtain either judicial or administrative

preclearance renders the [voting] change unenforceable," *Clark v. Roemer*, 500 U.S. 653, 111 S.Ct. 2096, 2101 (1991), and the Court cannot simply adopt an unprecleared redistricting plan, in whole or in part, with the signatures of a few judges sitting in Texas.

Further, the Court's order is not akin to a preliminary injunction as the State suggests. The only request for injunctive relief that has been raised in this lawsuit is the plaintiffs' request that the State's enacted plan be enjoined from implementation because it has not been precleared. *See Clark*, 111 S.Ct. at 2101 (if there has been no preclearance, plaintiffs are entitled to an injunction prohibiting the State from implementing the changes). However, since the inception of this lawsuit, the State has admitted that its enacted plan must be precleared prior to implementation. Yet it has persisted in trying to avoid preclearance altogether by demanding that its unprecleared plan be adopted by the Court as an interim court drawn plan. Again, the dictates of the U.S. Supreme Court preclude this Court from doing so.

The dissent has somewhat embraced the State's arguments, and also relies on *Upham*, even though this Court has not arrived at the remedial stage of these proceedings. Likewise, the dissent tries to distinguish *Lopez* based on the procedural posture of the preclearance proceedings in this matter. However, there was no preclearance in *Lopez* and there is no preclearance in this case. At

the end of the day, no preclearance means no preclearance, and no enforceable plan. The dissent also fails to appreciate that the Court has drawn an independent redistricting plan without ruling on any of the various legal challenges, and it has considered the parties' legal challenges only for the purpose of avoiding the same legal challenges to the court drawn map. *See Conner v. Waller*, 421 U.S. 657, 95 S.Ct. 2003 (1975)(the district court cannot decide the constitutional challenges to the challenged, unprecleared plan). The Court's Senate plan clearly rises above the myriad of challenges to the State's enacted plan and allows a free and fair election in 2012.

In conclusion, the State claims that it will be irreparably injured if a stay is not granted. However, the individuals who would suffer irreparable injury if the stay were granted are the citizens of Texas, by being deprived of the opportunity to vote in the upcoming election under the schedule currently in place.

SIGNED this 25th day of November, 2011.

_____/s/_____

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

_____/s/_____

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

JERRY E. SMITH, Circuit Judge, dissenting:

Because a stay of the orders implementing interim plans for the 2012 elections is needed to allow orderly review and clarification of critical legal issues, and because a stay will not harm any party, I respectfully dissent from the denial of a stay. In its order announcing an interim redistricting plan for the Texas House of Representatives, the majority acknowledged that "these are difficult issues and reasonable minds can disagree." It is therefore puzzling that the majority is unwilling to stay its order so that those difficult issues can be addressed on appeal before the announced interim plans are implemented.

There are myriad issues to be decided regarding interim, court-ordered redistricting plans. Because these matters are usually raised only in the wake of the decennial census, the caselaw is somewhat sparse and often murky. Questions that are not addressed now, before any part of these interim plans are implemented, might not be answered for yet another ten years or more. That is why the more orderly course is for this court to stay its proceedings, before filing

for office begins in Texas on November 28, so that the Supreme Court will have sufficient time to address the complex legal issues that apply to interim plans.

Here are the issues most begging for resolution or explication:

1. In fashioning a temporary interim redistricting plan, how much deference should a court give to state-enacted legislative plans where a determination for preclearance has been submitted but is pending in: (1) districts that have not been specifically challenged; (2) districts that have been challenged under novel legal theories; (3) districts that have been challenged but as to which the challenges are unlikely to succeed on the merits; and (4) districts that have been challenged where the claims have a likelihood of success on the merits? In *Upham v. Seamon*, 456 U.S. 37 (1982), the Court directed lower courts to modify a state's legislative plans only where absolutely required by law in a situation in which a determination on preclearance had been made and two of the districts in the State's plan had failed preclearance. *See also White v. Weiser*, 412 U.S. 783, 794-95 (1973). In contrast, the Court in *Lopez v. Monterey County*, 519 U.S. 9 (1996), rejected a lower court's wholesale implementation of a county's plan as an interim plan where the county had failed even to submit the plan for preclearance, defying a court order and despite being on notice for five years.

The instant case falls somewhere in between the situations in *Seamon* and

Lopez: The State of Texas here has not attempted to frustrate or obviate the preclearance process but instead has timely submitted its maps to the D.C. District Court (unlike the county in *Lopez*), but the D.C. court has not yet ruled on preclearance (unlike the Department of Justice in *Seamon*, which had ruled on preclearance). Although the majority, as to the Texas House of Representatives, contends that the many challenges to the State's plan makes it "impossible to give substantial deference to the State's plan," the very existence of my proffered alternative plan, H299, shows that it is possible to give more deference than the majority did while still taking the plaintiffs' challenges seriously. It would be of greater assistance for the Supreme Court to provide guidance on this issue.

2. In a court-ordered interim plan, how much population deviation is permissible in districts unchallenged by the plaintiffs or districts without meaningful one-person one-vote issues? The majority, relying on *Connor v. Finch*, 431 U.S. 407, 414 (1977), modified the State's enacted districts to bring them into *de minimis* deviation, even in districts unchallenged by the plaintiffs.

In contrast, my map left the unchallenged districts, which had population deviations within the legally permissible range for legislatures (but were not *de minimis*), intact, in accordance with the guidance given in *Seamon*, which held that the stricter *Connor* standard cannot be the sole basis for modifying a state's

redistricting, but instead is applicable only where a specific violation was found and a remedial district was being drawn. *Seamon*, 465 U.S. at 43.

3. For purposes of section 2 and section 5 of the Voting Rights Act, is election "performance" relevant or, or instead is the relevant measure the percentage of citizen voting age population? The majority redrew Districts 77 (in El Paso County) and 117 (in Bexar County) because, under, the State's plan, the district does not "perform" often enough (*i.e.,* it was likely to elect a Republican) despite Hispanics' comprising an overwhelming majority of the citizen voting age population in those districts (73% and 63%, respectively). In contrast, I read the section 2 caselaw to say that performance is not a relevant measure, *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994), but rather the relevant measure is the majority-minority requirement, *Barlett v. Strickland*, 556 U.S. 1, __, 129 S. Ct. 1231, 1244-45 (2009).

I have not found, nor has the majority cited, any caselaw to the contrary. That said, there is little to no guidance about whether a court should consider performance in a section 5 retrogression or discriminatory intent analysis, so it would be helpful for the Supreme Court to provide clarity on this question.

4. May a court order the creation of minority "coalition" districts in an interim plan, and, if so, under what circumstances? Though the Court in *Bartlett* rejected the contention that "cross-over" districts are covered by

section 2, some of its language calls into question whether "coalition" districts are similarly covered (although the Court did expressly reserve the question). The majority created such coalition districts in Dallas County (HD 107), Fort Bend County (HD 26), and Bell County (HD 54). Districts 26 and 54 relied on Asian votes to form a "coalition," despite the lack of evidence showing cohesion between Asians and Blacks or Hispanics in voting.

Though the majority contends these new coalition districts arose "naturally" from a restoration to the *status quo*, it is hard to see how that could be the case: For example, HD 107 was substantially reconfigured from the *status quo* (composed of less than 40% of HD 107 in the benchmark plan) to exclude Anglo voters and include minority voters, reducing the Anglo citizen proportion by 33%. Similarly, Districts 26 and 54 were altered from the *status quo* by removing almost exclusively white populations instead of reducing the population in a race-neutral manner. Although my proposed alternate plan creates a new coalition district in Tarrant County, it is the identical new district created by the State (and dismantled by the majority), and the State has unquestionable latitude to create such districts so long as it does not subordinate traditional redistricting principles to race.

The lack of clarity regarding coalition districts is evidenced by a circuit split on whether they may ever be required. The Fifth Circuit has treated the

question as one of fact, holding that it is not clearly erroneous for a district court to find the first Gingles requirement satisfied by aggregating minority groups to reach the 50% threshold. *See Campos v. City of Baytown, Tex.*, 840 F.2d 1240 (5th Cir. 1988). The Sixth Circuit, however, has held that the text of the VRA does not allow its application to coalitions of minority groups. *See Nixon v. Kent Cnty.*, 76 F.3d 1381 (6th Cir. 1996). This issue cries out for clarification.

In its motion for stay, the State concedes that it may become necessary to delay the primary elections pending appellate review of issues regarding the interim plans. Indeed, Texas has some of the earliest primaries––perhaps the very earliest––in the United States. A delay of even a few weeks would still provide ample time for orderly primaries and runoffs well in advance of the November elections. But long before any such adjustment might become necessary, the first step should be for entry of a stay of this court's orders imposing interim redistricting plans for the Texas House of Representatives and the Texas Senate and, once this court imposes an interim Congressional plan, a stay of that order as well. Likewise, a temporary stay should be entered of candidate filing and qualifications deadlines for all elective offices so that filing does not begin on November 28.

The majority's refusal to enter a stay under these compelling circumstances is error. I therefore respectfully dissent.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICK PERRY, in his official capacity as Governor of Texas, HOPE ANDRADE, in her official capacity as Secretary of State, and the STATE OF TEXAS,

Applicants,

v.

WENDY DAVIS, *et al.*,

Respondents.

EMERGENCY APPLICATION FOR STAY OF INTERLOCUTORY ORDER DIRECTING IMPLEMENTATION OF INTERIM TEXAS SENATE REDISTRICTING PLAN PENDING APPEAL TO THE UNITED STATES SUPREME COURT

EXHIBIT 5

SECTION 2 OF THE VOTING RIGHTS ACT
42 U.S.C. § 1973

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

SECTION 5 OF THE VOTING RIGHTS ACT
42 U.S.C. §1973c

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this

title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.