No. 11A-520

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.

SHANNON PEREZ, *et al.*,

Respondents.

RESPONDENTS' TEXAS LATINO REDISTRICTING TASK FORCE AND MEXICAN AMERICAN LEGISLATIVE CAUCUS (MALC) JOINT BRIEF IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY OF INTERLOCUTORY ORDER DIRECTING IMPLEMENTATION OF INTERIM CONGRESSIONAL REDISTRICTING PLAN PENDING APPEAL TO THE UNITED STATES SUPREME COURT

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INTRODUCTION

Five years after this Court's ruling in *LULAC v.* Perry, 548 U.S. 399 (2006), the State of Texas once again attempts to strip Latino voters in Congressional District 23 of the opportunity to elect their candidate of choice. Systematically swapping precincts in and out of the district based on race, Texas redistricters created a "sham" district with a numerical majority of Latinos that will, according to the State, elect the Latino preferred

candidate in only one of ten elections. Tr. at 966:6-25 (Sept. 9) (App. 29);[1] *id.* at 1457:21-25 (Sept. 12) (App. 30); Trial Ex.[2] J-61-I at 94:11-19 (Aug. 2) (App. 14); Trial Ex. Pl-293 (App. 22).

This Court found in 2006 that by dismantling the same Congressional District 23, Texas "took away Latinos' opportunity because Latinos were about to exercise it" in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. *LULAC*, 548 U.S. at 440. The Court further found that the race-based redistricting apparent in Congressional District 23 "bears the mark of intentional discrimination that could give rise to an equal protection claim." *Id.*

Following the court-drawn remedy in 2006 that restored CD 23 as a Latino opportunity district, Latino voters elected their candidate of choice in 2006 and 2008. Trial Ex. Pl-392 at 27-28 (App. 13). However, when an Anglo-preferred candidate was elected in 2010, Texas deliberately set out to change the district to bolster the re-election chances of the incumbent who was not the choice of Latino voters. Even the State's expert witness agreed that, with respect to the State's changes to Congressional District 23 "[t]here are some obvious parallels between what happened previously and what happened this time" and "we feel like we are all having déjà vu[.]" Tr. at 1875:2-9, 1929:18-21 (Sept. 14) (App. 32).

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[1] All references to "Tr." refer to the transcripts for *Perez v. Perry*, No. 5:11-cv-00360 (W.D. Tex. Sept. 6-16, 2011).

[2] All documents designated "Trial Ex." refer to the matter *Perez v. Perry*, No. 5:11-cv-00360 (W.D. Tex. 2011).

The State of Texas, unable to secure implementation of its flawed Congressional redistricting plan from either of two federal panels, asks this Court to impose an extraordinary order to halt the election cycle already underway in Texas. A three-judge panel of the U.S. District Court for the Western District of Texas faced the "unwelcome obligation" of crafting an interim Congressional redistricting plan when the State, as a result of its own delay tactics, failed to obtain section 5 preclearance of its legislatively-enacted plan prior to the start of the 2012 election cycle. 42 U.S.C. 1973c; Order, *Texas v. United States*,[3] Dkt. 106 [hereinafter "Order Den. Summ. J."], at 1-2 (D.D.C. Nov. 8, 2011) (App. 1); Order, *Perez v. Perry*,[4] Dkt. 544 [hereinafter "Interim Congressional Order"], at 5 (W.D. Tex. Nov. 26, 2011) (App. 16). The interim Congressional redistricting plan will allow the primary election to go forward and maintain the status quo pending resolution of the State's appeal.

A stay in this situation is unnecessary and extreme. Six federal judges have concluded unanimously that the Texas Congressional redistricting plan cannot be implemented for the 2012 election cycle. The State's request for a stay sweeps aside these considerations, and the Voting Rights Act itself, in a last-ditch attempt to force its plan on the Texas electorate in the upcoming election.

At this stage of the litigation, the Texas panel is empowered neither to adopt the State's Congressional plan nor usurp the authority of the U.S. District Court for the

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[3] All citations to "*Texas v. United States*" refer to Case No. 1:11-cv-01303 in the District Court for the District of Columbia unless otherwise cited.
[4] All citations to "*Perez v. Perry*" refer to Case No. 5:11-cv-00360 in the Western District of Texas.

District of Columbia by undertaking a section 5 review of the State's Congressional plan. *See Lopez v. Monterey Cnty.*, 519 U.S. 9, 20-22 (1996) (citing *Clark v. Roemer*, 500 U.S. 646 (1991) (holding that the lower court erred in ordering an unprecleared plan into effect) and *Connor v. Waller*, 421 U.S. 656, 656 (1975) ("[Unprecleared] Acts are not now and will not be effective as laws until and unless cleared pursuant to § 5.")).

With election deadlines looming, the Texas panel correctly created a Congressional redistricting plan to serve as an interim measure for the 2012 election cycle. Texas challenges the interim map because it does not mirror the State's map in every respect. However the State is unwilling to acknowledge that its plan cannot be implemented without section 5 preclearance and, furthermore, five federal judges identified constitutional and Voting Rights Act concerns with the State's plan that prevent its adoption by the district court.

Section 5 of the Voting Rights Act is working here as it should. The State's argument boils down to a complaint that the Texas panel did not adopt wholesale the State's enacted plan. In order to force implementation of its plan, the State seeks a ruling from this Court that would weaken section 5's preclearance requirement so that any jurisdiction that fails to secure preclearance can insist on deference to its unprecleared plan in an interim remedy. This attempt to short-circuit section 5 finds no support in legal precedent or logic.

In order to accommodate the State's delays in seeking preclearance, the district court already has modified the early deadlines in the 2012 election cycle. Candidate filing for Congress has now commenced, candidates have filed for office under the

interim plan and Texas's 254 counties are preparing to hold the primary election under the interim map. The Texas Secretary of State advised the Texas panel that mid-December is the latest that candidate filing can close in order to allow the counties sufficient time to prepare ballots and conduct the March 6 primary election. Tr. of Hr'g on Proposed Interim Plans, Vol. I, *Perez v. Perry*¸ at 46-48 (W.D. Tex. Oct. 31, 2011) (App. 4).

A stay will leave Texas without a Congressional plan, force the counties to abandon their efforts to hold the March 6 primary election for Congress and halt the campaign of every candidate. A stay will require the primary election to be held on an irregular date months after the March 6 primary, force counties to spend their limited resources on holding two primary elections and force voters to appear twice at the polls. Such extraordinary and disruptive relief is unwarranted here.

BACKGROUND AND PROCEDURAL HISTORY

The 2011 Texas redistricting process was characterized by delays and mis-steps from the start. When the Texas Legislature was unable to agree on a congressional redistricting plan in the regular session, Governor Rick Perry called the members back into special session in the summer. Interim Congressional Order at 2 (App. 16).

Although the Texas Legislature enacted S.B. 4 on June 24, 2011 during the special session, Governor Rick Perry delayed for almost a month before signing the bill into law on July 18, 2011. *Id.*

Instead of seeking expedited section 5 review with the U.S. Department of Justice, the State chose the much slower route of filing a preclearance lawsuit in the U.S. District

Court for the District of Columbia.[5] There, despite an offer from the U.S. Department of Justice to agree to a speedy trial date on October 17, 2011, the State of Texas moved for summary judgment on preclearance on September 14, 2011. Letter from Thomas E. Perez, U.S. Dep't of Justice, to Greg Abbot, Atty. Gen. of Tex. (Dec. 1, 2011), at 1 (App. 20). The State's decision to forego a speedy trial and seek summary judgment on the fact-intensive issues of racially discriminatory intent and effect delayed the litigation significantly. *See Hunt v. Cromartie*, 526 U.S. 541, 553-54 & n.9 (1999) (holding unanimously that the issue of racially discriminatory intent in redistricting is rarely if ever appropriate for resolution on summary judgment).

In the D.C. court, despite repeated suggestions from the court that the State could secure a faster decision by proceeding directly to trial, the State persisted in pursuing the summary judgment motion.

On September 21, in a status conference in the D.C. Court, Judge Collyer twice suggested that the State reconsider its decision to pursue summary judgment because it might result in a slower resolution of the case. Tr. of Telephonic Conference, *Texas v. United States*, at 33-34 (Sept. 21, 2011) (App. 8). Judge Collyer stated: "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,',

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[5] The State's decision to file preclearance litigation, instead of seeking faster administrative review, was widely recognized as a cause of delay. The Texas panel noted that the choice to seek preclearance through a lawsuit, although "legally permissible . . . likely has delayed a final decision on preclearance, possibly causing delays in the 2012 electoral process." Am. Order, *Perez v. Perry*, Dkt. 391, at 4 (W.D. Tex. Oct. 4, 2011) (App. 3).

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." *Id.* at 32:25-33:13. Judge Collyer emphasized her suggestion by asking counsel for the State "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 and have somebody say, 'Well, I can't really decide on this record', which I'm not anticipating, but which is, with summary judgment, always a risk." *Id*. at 33:15-21. In response, the State insisted it would pursue its summary judgment motion. *Id.* at 34:3-18.

The District Court in Washington D.C. Denied the State's Summary Judgment Motion for Preclearance

The D.C. Court held lengthy oral argument on the State's Motion for Summary Judgment on November 2, 2011. Order Den. Summ. J. at 1 (App. 1). The D.C. court based its ruling on the arguments presented at the hearing as well as hundreds of pages of briefing and statements of facts in dispute and thousands of pages of exhibits.

On November 8, 2011, the D.C. court unanimously denied summary judgment. Noting that a more detailed opinion would follow, the D.C. court held that "there are material issues of fact in dispute that prevent this Court from entering declaratory judgment that the three redistricting plans meet the requirements of section 5 of the Voting Rights Act." *Id.* at 2. The D.C. court further found that "the State of Texas used an improper standard or methodology to determine which districts afford minority voters the ability to elect their preferred candidates of choice." *Id.*

Texas Took Steps to Implement Its Redistricting Plans Without Section 5 Preclearance

As the State pursued the slowest route possible towards preclearance, it took affirmative steps to implement its unprecleared redistricting plans in an attempted end-run around section 5. The U.S. District Court for the Western District of Texas, presiding over consolidated challenges to the Texas redistricting plans, issued an order on September 29, 2011 enjoining implementation of the Texas House and Congressional redistricting plans pending section 5 preclearance. The Texas panel explained that because the plans "have not been precleared pursuant to section 5 of the Voting Rights Act, the plans may not be implemented." Order Enjoining the Implementation of Voter Changes, *Perez v. Perry*, Dkt. 380, at 4 (W.D. Tex. Sept. 29, 2011) (App. 17).

The following day, the State sent an email to the election administrators of all 254 counties urging them to revise their precinct boundaries to conform them to the unprecleared plans. In the correspondence, the State explained that its redistricting plans were enjoined by a federal court but stated that the injunction was only because its plans "have yet to be precleared" and instructed the counties to: "proceed in a manner in which the county thinks is most efficient and places your county in a position to be able finalize county election precinct lines when a final preclearance decision becomes available." Email from Elizabeth Winn to Barbara Strain, *et al*. (Sept. 29, 2011) (App. 18), cited in Tr. of Hr'g on Proposed Interim Plan, Vol. III, *Perez v. Perry*, at 715:19-717:24 (W.D. Tex. Nov. 4, 2011) (App. 5).

In early November, upon learning of the State's actions, the Texas court immediately directed the State to clarify to the counties that they could not implement the unprecleared plans. Judge Rodriguez stated from the bench:

> [s]peaking individually, not on behalf of the panel, it should be very clear by now that [neither] the Secretary of State's Office nor the Attorney General's Office should be encouraging the county officials to continue work on those lines. The continued publicity coming from the Attorney General's Office is that everything is going to be fine. The maps are going to be precleared. I heard that again from the Attorney General's PR person on NPR this morning, and it should be very clear to the Attorney General's Office now that -- and everybody, I think, in this room acknowledges, that the maps are not going to be precleared in time. There are going to be interim maps, and so I am not sure why this continued PR campaign takes place, which is giving a misleading impression to county election officials to continue work which is going to be all for naught.

Id. at 718:15-719:5.

The District Court was Required to Create an Interim Redistricting Plan

When the D.C. court ruled that Texas had not shown that its House and Congressional redistricting plans are entitled to preclearance at the summary judgment stage of the case, the responsibility moved back to the Texas panel to adopt an interim Congressional plan to ensure that the 2012 elections could proceed. The D.C. court acknowledged that the responsibility to create an interim plan rested with the Texas district court: "If any one of the plans is not precleared by this Court at this stage in the proceedings, the District Court for the Western District of Texas must designate a substitute interim plan for the 2012 election cycle by the end of November." Order Den. Summ. J. at 1-2 (App. 1).

In September, following the close of the section 2 trial on the Texas House and Congressional redistricting plans, the Texas district court, concerned that the State's redistricting plans had not yet received preclearance, established a schedule to prepare to draw interim plans if it became necessary. Amended Order, *Perez v. Perry*, Dkt. 391, at 5 (W.D. Tex. Oct. 4, 2011) (App. 3). The Texas district court asked the parties to provide briefing on the applicable legal standards for court-drawn maps, to submit proposed orders to modify election deadlines, to submit proposed interim redistricting plans and to respond to the redistricting plans proposed by other parties. *Id.* at 5-7.

The Texas district court issued an order delaying the start of the candidate filing period from the middle of November to November 28, 2011. Amended Order, *Perez v. Perry*, Dkt. 489, at 4-6 (W.D. Tex. Nov. 7, 2011) (App. 37). The court also moved the close of the filing period from December 12, 2011 to December 15, 2011. *Id.* at 4. Based on submissions of the parties and the testimony of the Texas Secretary of State, the court concluded that "the filing period could not be delayed any further without serious disruptions to the 2012 election cycle." Supplemental Opinion, *Perez v. Perry*, Dkt. 549 [hereinafter "Supplemental Opinion"], at 9 n.6 (W.D. Tex. Dec. 2, 2011) (App. 21).

The Texas district court held hearings on proposed interim plans on October 31, November 3, and November 4, 2011. After drafting interim plans and circulating them for comment by the parties, the Texas district court ordered its Congressional plan into effect on November 26, 2011. Order, *Perez v. Perry*, Dkt. 526, at 1 (W.D. Tex. Nov. 23, 2011) (App. 36); Interim Congressional Plan at 1 (App. 16).

Although one judge wrote in dissent because he did not fully support the interim Congressional redistricting plan, the panel was unanimous that the State's unprecleared Congressional map cannot be adopted. *See infra* Section I.B.

ARGUMENT

At the outset, it is important to note that the granting of an emergency stay by the Supreme Court in a voting rights case should be done only in the extraordinary case. *Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) ("[A] single Justice will grant a stay only in extraordinary circumstances." (quoting *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975)); *see Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). The applicant must show not only that the denial of the stay is erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment or court order is not stayed. *Whalen*, 423 U.S. at 1316. This Court has described this burden as heavy, extraordinary, and that a stay is "[a] remedy that should not be granted in the ordinary case, much less awarded as of right." *Nken v. Holder*, 556 U.S. 418, 438 (2009).

The Applicants must demonstrate (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). In appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other

parties or to the public. *See Times-Picayune Publ'g Corp*. v. *Schulingkamp,* 419 U.S. 1301, 1306 (1974) (Powell J., in chambers).

I. Texas Cannot Demonstrate That the Interim Plan is Improper

A. In Crafting an Interim Congressional Plan, the District Court Could Neither Adopt the State's Enactment nor Could the District Court Determine the Validity of the State's Plan Under the Voting Rights Act and the U.S. Constitution

In covered jurisdictions, state redistricting plans are unenforceable until precleared by the D.C. court.[6] 42 U.S.C. § 1973c(a) ("[U]nless and until the [D.C.] court enters . . . a judgment [of preclearance], no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure."); *Branch v. Smith*, 538 U.S. 254, 265 (2003) (holding that the district court properly enjoined Mississippi's plans from going into effect because the plans lacked preclearance); *Connor v. Waller*, 421 U.S. 656, 656 (1975) ("Those Acts are not now and will not be effective as laws until and unless cleared pursuant to § 5."); *Georgia v. United States*, 411 U.S. 526, 529 (1973).

This court repeatedly reverses decisions allowing unprecleared plans to take effect. *Lopez v. Monterey Cnty.*, 519 U.S. 9, 20-22 (1996) (citing *Clark v. Roemer*, 500 U.S. 646 (1991) (holding that the lower court erred in ordering an unprecleared plan into effect), and *Connor v. Waller*, 421 U.S. 656, 656 (reversing a three-judge panel's implementation of unprecleared plans because "[unprecleared] Acts are not now and will not be effective as laws until and unless cleared pursuant to § 5")).

[6] Of course, preclearance also may be achieved through the faster administrative process. 42 U.S.C. § 1973c(a).

The State argues that *Lopez* is easily distinguished from the situation here because the State has acknowledged its obligation pursuant to Section 5 and is making an effort to secure preclearance. Emergency Application for Stay of Interlocutory Order Directing Implementation of Interim Texas Congressional Redistricting Pending Appeal to the United States Supreme Court, *Perry v. Perez,* No. 11A-520 [hereinafter "Application"], at 3 (Nov. 30, 2011). In other words, the State argues, submission not preclearance is the operative event that not only allows but requires the district court to use the State's unprecleared enactment as the court's plan. *Id*. at 2. Yet the Court's unambiguous language forbids the use of the unprecleared plan: "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." *Lopez*, 519 U.S. at 22 (emphasis added). Moreover, use of the State's unprecleared plan, as advocated by the State, would require the implementation of the State's policy choices and thus require preclearance of the court's plan. *McDaniel v. Sanchez,* 452 U.S. 130, 153 & n.35 (1981) ("As we construe the congressional mandate, it requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people – no matter what constraints have limited the choices available to them – the preclearance requirement of the Voting Rights Acts is applicable.").

In addition, the district court may not usurp the authority of the D.C. panel to determine whether the State's Congressional plan is retrogressive under section 5 or which parts of the plan may legally be implemented. *See United States v. Bd. of Sup'rs of*

Warren Cnty., 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.'" (quoting *Perkins v. Matthews*, 400 U.S. 379, 385 (1971))); *Smith v. Clark*, 189 F. Supp. 2d 529, 534 (S.D. Miss. 2002); *Mississippi v. Smith*, 541 F. Supp. 1329, 1332 (D.D.C. 1982) ("[The local panel] lacks jurisdiction to consider the constitutionality of the plan before it has been precleared pursuant to section 5."). As the district court pointed out in its Supplemental Opinion, to undertake a section 5 analysis of the State's Congressional redistricting plan "could lead to inconsistent factual findings and determinations regarding Section 5 legal standards, undermining the purpose of consolidating Section 5 cases in the D.C. Court." Supplemental Opinion at 8 (App. 21).

Similarly, the district court may not adjudicate the constitutionality of an unprecleared redistricting plan, or decide whether the plan violates section 2 of the Voting Rights Act. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 265-66 (2003) (holding that district court could not determine that unprecleared redistricting plan was unconstitutional); *McDaniel v. Sanchez*, 452 U.S. 130, 146 (1981) ("Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure." (quoting *Wise v. Lipscomb*, 437 U.S. 535 (1978))); *Wise*, 437 U.S. at 542 (holding that a court cannot address constitutional issues until the act in question has been precleared); *Connor v. Waller*, 421 U.S. 656, 656 (1975) ("The District Court accordingly also erred in deciding the constitutional challenges to the Acts

based upon claims of racial discrimination."); *Hughley v. Adams*, 667 F.2d 25, 26 (11th Cir. 1982) (holding that the court would "decline, for reasons of ripeness, to consider plaintiffs' remaining objections to the plan before it has received preclearance").

The district court correctly recognized that it cannot decide the merits of any challenges to an unprecleared plan before the D.C. court issues a decision on preclearance. Supplemental Opinion at 4-5 ("Thus, the Court must draw independent redistricting plans without ruling on the merits of the pending legal challenges to the State's unprecleared plans.") (App. 21); *id.* at 7 ("Because preclearance must be determined before any other issues are ripe for this Court's consideration, the Supreme Court has forbidden remedial district courts from making any determination on the merits of the State's enacted plans until *after* preclearance." (emphasis in original) (citing *Connor v. Waller*, 421 U.S. at 656-57, and *Smith v. Clark*, 189 F. Supp. 2d at 534)).

B. ***Upham v. Seamon*** **Does Not Require the Court to Adopt the State's Congressional Plan**

Although divided on some issues, the district court unanimously recognized that *Upham v. Seamon*, 456 U.S. 37 (1982), is not controlling precedent where a plan has not received a ruling on preclearance. Order, *Perez v. Perry*, Dkt. 528 [hereinafter "Interim House Order"], at 3 & n.5, 12-13 (majority), 17 (Smith, J., dissenting) (W.D.Tex. Nov. 23, 2011) (App. 2).

In *Upham*, this Court held that, in devising an interim remedial plan, a district court's changes to a legislatively enacted plan should be limited "by the nature and scope of the violation." 456 U.S. at 42. Where the Attorney General has objected to only one

part of a plan and has found the remainder unobjectionable, a court should adopt a plan that permits the unobjectionable portion to go into effect. *Id.* at 43.

Upham thus applies to that limited set of cases in which a court has a ruling on preclearance and thus can identify and adopt "the unoffending parts" of an unprecleared plan. *South Carolina v. United States*, 589 F. Supp. 757, 759 (D.D.C. 1984) (citing *Upham*, 456 U.S. 37 (1982)). Under such circumstances, "*Upham* requires the court to minimize violence to those legislative policies embodied in the plan by changing it only to the extent necessary to cure its cognizable flaws." *Cook v. Luckett*, 735 F.2d 912, 918 (5th Cir. 1984).

For example, in *Jordan v. Winter*, the Attorney General objected that the drawing of certain district lines diluted the African American vote. 541 F. Supp. 1135, 1143 (N.D. Miss. 1982). The district court was able to "accept that decision" while drawing a map that embodied many of the legitimate political decisions made by the legislature. *Id.* Similarly, in *Terrazas v. Slagle*, 789 F. Supp. 828, 837 (W.D. Tex. 1991), *aff'd sub. nom. Richards v. Terrazas*, 505 U.S. 1214 (1992), the Attorney General had interposed an objection to a Texas House statewide redistricting plan only with respect to some regions. Accordingly, the court was able to "fashion a remedial plan yet remain loyal to" state policy in other portions of the state that were not the subject of an objection. *Id.* And, in *Balderas v. Texas*, No. 6:01-cv-158, 2001 WL 34104833 at *1 (E.D. Tex. Nov. 28, 2001),[7] the Attorney General had objected to the dilution of Hispanic voting strength only

[7] Trial Ex. 299, *Perez v. Perry*, Dkt. 320-2 at 78-87 (W.D. Tex. filed Sept. 15, 2011) (App. 38).

in certain regions of Texas. Accordingly, the court was able to fashion a plan that addressed the areas subject to objection while preserving that part of the legislative map to which no objection had been issued. *Id.* at *3.

This case does not fall within the narrow exception established by *Upham*. *Upham* applies only where there is an administrative objection from the Attorney General or ruling from the D.C. court that specifies certain districts and permits a court to identify and deter to "the unoffending parts." *South Carolina v. United States*, 589 F. Supp. 757, 759 (D.D.C. 1984) (citing *Upham*, 456 U.S. 37 (1982)). Here, by contrast, there is no administrative determination from the Attorney General at all, because the State has chosen to seek judicial preclearance exclusively through a district court proceeding. While this choice is the State's prerogative, *see* 42 U.S.C. § 1973c(a), the result is that the Attorney General has not pronounced, and could not pronounce, any parts of the plan as compliant with section 5, as occurred in *Upham* and its progeny.[8] Moreover, some other litigants have opposed preclearance based on claims different than those of the United States, and it ultimately will be the D.C. court that determines how much, if any, of the enacted plans comply with Section 5.

Because here the D.C. court has not yet made a determination with respect to preclearance, the difference between this case and *Upham* is significant: in the current

[8] The DOJ is a party in *Texas v. United States*, No. 1:11-cv-01303 (D.D.C.), and has not interposed an objection to the Texas Congressional plan -- nor could it. The State's suggestion that the district court must ignore the preclearance process in the D.C. court by enacting a plan that "fixes" what the DOJ as a litigant complains about in its filings in the D.C. court does not hold water.

procedural posture, the Texas panel is without jurisdiction to decide the question of retrogression or where in the State's map violations may occur.

The dissent acknowledges that *Upham* does not yet apply: "Unlike the court in *Seamon*, [this court is] not in a position to defer blindly to the State's map, because there has been no valid determination of which districts have been precleared." Interim House Order at 17 (Smith, J., dissenting) (App. 2).

The district court, noting that its case was not yet in the same procedural posture as *Upham*, was guided by more applicable precedent. The district court followed *Branch v. Smith*, 538 U.S. 254 (2003), and *Lopez v. Monterey Cnty.*, 519 U.S. 9 (1996), in determining that it had the power—indeed the duty—to "craft an independently drawn court plan for the upcoming election." Interim House Order at 3 n.2 (App. 2). The district court cited *Smith v. Cobb Cnty.*, 314 F. Supp. 1274 (N.D. Ga. 2002), as an example of a court considering, but not adopting wholesale, a legislatively-enacted plan where there is no determination with respect to preclearance. Interim House Order at 4 n.6 (App. 2). The district court relied on *McDaniel v. Sanchez*, 452 U.S. 130 (1981), for the proposition that it must not adopt wholesale a proposal "reflecting the policy choices . . . of the people [in a covered jurisdiction]." Interim House Order at 5 n.7 (quoting *McDaniel*, 452 U.S. at 153) (App. 2).

1. *The State Seeks to Short-Circuit Section 5 Review and Render the Statute Irrelevant*

Applying *Upham* in this context, where the district court is prohibited from determining the constitutional and legal validity of the Congressional plan, and is also

prohibited from usurping the role of the D.C. court to decide the question of retrogression, would dictate one result: the mandatory adoption of the State's Congressional plan in its entirety. It is disingenuous at best for the State to contend that the district court must determine how the unprecleared plan violates federal law where the court issuing the interim plan is barred from making those very determinations. All three judges on the Texas panel recognize this. Interim House Order at 4 (majority); *id.* at 17 (Smith, J. dissenting) (App. 2).

Without a section 5 determination by the D.C. court, the district court is unable to determine how much the legislative map should change, where those modifications might occur and the degree to which the rest of the map will have to change as a consequence of the "ripple effect" of redrawing districts. The State's assertion that it is "almost certain to prevail on the merits" based on the holding in *Upham* is untenable. Application at 13.

2. *The State's Reading of Upham Would Reward Jurisdictions for Dilatory Conduct in Seeking Preclearance*

Furthermore, as interpreted by the State, *Upham* would allow any covered jurisdiction to circumvent section 5's preclearance requirement by "slow-walking" a preclearance lawsuit, as Texas did here, and then, while preclearance is pending, demand that a federal district court adopt the unprecleared plan. As recognized by the district court, the State's position in its Application "would allow legislatures to intentionally enact voting changes at the last minute in order to obtain a preliminary ruling by a local federal court that would potentially allow the change to take effect, thereby completely

circumventing the Section 5 preclearance process." Supplemental Opinion at 8 (App. 21). This is not what Congress intended.

C. Because Preclearance is Granted or Denied to Entire Plans, the District Court was Correct to Refrain From Attempting to Address the Section 5 Validity of Individual Districts

The State further misinterprets section 5 by suggesting that preclearance is denied to districts, as opposed to plans. Application at 4 (contemplating that the D.C. court would "refuse[] to grant preclearance for certain districts."). On the contrary, when a plan is not precleared, it is because overall the plan violates section 5. In statewide redistricting, retrogression is measured statewide. *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003) ("[I]n examining whether the new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole."); *see also City of Lockhart v. United States*, 460 U.S. 125, 131-32 (1983). The diminution of ability to elect in one area can be offset by the jurisdiction in other areas of the state. *Georgia v. Ashcroft*, 539 U.S. at 479 ("[W]hile the diminution of a minority group's effective exercise of the electoral franchise in one or two districts may be sufficient to show a violation of § 5, it is only sufficient if the covered jurisdiction cannot show that the gains in the plan as a whole offset the loss in a particular district.").

II. The Interim Remedy is a Reasonable Approach to Ensuring that the 2012 Elections can Move Forward

The Texas court applied neutral criteria and a conservative approach to creating its interim plan. In a nutshell, the requirements for court-ordered interim plans are: population equality; compliance with sections 2 and 5 of the Voting Rights Act; and

effectuating neutral State policies as expressed by previous districting plans. *See, e.g.*, *Smith v. Cobb Cnty.*, 314 F. Supp. 2d 1274, 1284, 1299, 1301-02 (N.D. Ga. 2002) (noting the need to comply with one person, one vote, § 5, and § 2); *see also Vera v. Bush*, 933 F. Supp. 1341, 1347 (S.D. Tex. 1996) (same, regarding an interim remedial plan); *Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (quoting and citing *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975)); *Connor v. Finch*, 431 U.S. 407, 414 (1977).[9]

With a total overall deviation of 0.02%, the district court's interim Congressional plan complies with the Constitution's one-person, one-vote requirement. Supplemental Opinion at 21 n.24 (App. 21). The district court noted that its *de minimis* population deviations were necessitated by the need to avoid splitting VTDs. Interim Congressional Order at 6 n.12 ("[A]ll population shifts were done in terms of VTD's. . . . The court minimized splits to VTD's and precincts as much as possible.") (App. 16); *see also* Supplemental Opinion at 11 "[I]t became clear that cutting VTDs would create enormous administrative and financial difficulties for local governments preparing for an election at the eleventh hour.") (App. 21).[10] The district court's interim Congressional plan contains

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[9] The Texas panel expressly "sought to create a plan that maintains the status quo pending [a final decision on preclearance], complies with the United States Constitution and the Voting Rights Act, and embraces neutral principles such as compactness, contiguity, respecting county and municipal boundaries, and preserving whole VTDs." Interim Congressional Order at 6 (App. 16).

[10] *Vera v. Bush* cautions that preserving whole VTDs is essential to the implementation of an interim plan. 933 F. Supp. at 1347 ("Moreover, the Court's remedial plan addresses the single most troubling and realistic hurdle, the potential splitting of voter tabulation districts ('VTD's'), by avoiding that consequence in all but a small handful of voting precincts.").

only three VTD cuts, compared with 518 in the State's plan. Supplemental Opinion at 21 n.24 (App. 21).

The district court avoided retrogression and preserved existing minority opportunity districts. *See, e.g.*, Interim Congressional Order at 7, 9 (App. 16). The district court applied neutral redistricting criteria by placing the four new districts in areas of high growth and respecting county, city and precinct boundaries.

A. The District Court's Plan Adheres to State Policy in the Benchmark and State's Enacted Plan

The district court's interim plan preserves an average of 80.32% of the geography of the districts in the benchmark.[11] The State's newly-enacted plan is a greater departure from the benchmark, preserving an average of 72.10% of the geography of the districts in the benchmark plan. Report RED-340 to Plan C220, Tex. Leg. Council, http://www.tlc.state.tx.us/redist/redist.htm (last accessed Dec. 3, 2011) (App. 7) (incorporated by Interim Congressional Order at 1 (App. 16)); Trial Ex. J-8 (C185 RED-340) at 1-3 (App. 9); App. 10.

Similarly, the district court's interim plan respects jurisdictional lines and would not force the counties to undertake dramatic revisions to their precinct geography so close to the upcoming primary election. The Texas panel's interim plan cuts only twenty-three county lines, ten precincts and three VTDs. By contrast, the State's newly-enacted plan

[11] The congressional benchmark is a court-ordered plan created following the remand of *LULAC v. Perry*, 548 U.S. 399 (2006), and includes departures from State policy only to correct the violation of section 2.

cuts thirty-three county lines, 520 precincts and 518 VTDs. Supplemental Opinion at 21 n.24 (App. 21).

In its adherence to the benchmark plan, the district court's interim plan defers to state policy as expressed in the 2003 Texas legislative enactment. In addition, the district court's interim plan incorporates nine of the thirty-six districts (25% of the districts) from the State's 2011 enacted plan. Interim Congressional Order at 14 ("[A]fter maintaining current minority districts and adding in the new districts, [the Texas court] inserted a number of districts with minimal change from the enacted plan where possible. These include districts 1, 3, 4, 5, 8, 11, 13, 14, and 19.") (App. 16).

B. The Benchmark is the 2006-2010 Texas Congressional Plan, not the State's Unprecleared Enacted Plan of 2011

Vaulting its unprecleared plan to the status of a legal plan already entitled to implementation, the State characterizes the district court's interim plan as an inappropriate departure from what the State claims is essentially the new benchmark.

For example, the State asserts that the district court, when maintaining benchmark districts in the interim plan, "dramatically changed District 27 from the State's enacted plan" and made "unwarranted modifications to District 23." Application at 21-23.

The State describes any differences between the interim map and the legislatively-enacted map as improper judicial alternations of a legal baseline plan. *See*, *e.g.*, *id.* at 24-25 ("[B]ecause the district court did not identify a single instance in which the legislatively enacted Congressional map likely violated federal law, it was clear error for

the court to alter every district in that map on an interim basis pending preclearance."); *see also, e.g.*, *id.* at 19 ("[C]ourt's wholesale revision" of the legislatively-enacted plan).

The State maintains that even when a redistricting plan is not precleared, "courts are obliged to defer to the State's decisions." *Id.* at 11. Not only is this interpretation without legal foundation, it renders section 5 review meaningless by presuming that any plan submitted for preclearance is the legal benchmark for an interim plan drawn by a court. This interpretation of section 5 is particularly disingenuous in light of the fact that the State sought the slowest means possible to obtain section 5 review and took affirmative steps to implement its unprecleared redistricting plans even when a federal court order had enjoined the plans.

C. Intentional Discrimination in the State's Congressional Plan Prevented the District Court from Deferring to the State's CD 23 and CD 27

The State's congressional plan purposefully minimizes Latino electoral strength despite the dramatic increase in Latino population in Texas since 2000.[12] There is no requirement for the district court to defer to an intentionally discriminatory plan enacted by the State. *Abrams v. Johnson*, 521 U.S. 74, 85 ("*Upham* called on courts to correct -- not follow -- constitutional defects in districting plans." (citing *Upham,* 456 U.S. 37, 43 (1982))).

[12] Latinos constituted 65% of the total population growth in Texas from 2000 to 2010. *See* Trial Ex. E-9, Report of Susan Gonzalez Baker, *Perez v. Perry*, Dkt. 149-3, at 3 (W.D. Tex. filed Aug. 8, 2011) (App. 15).

1. *Congressional District 23*

The benchmark CD 23 has a Hispanic citizen voting age population of 58.4%. The district court based its interim CD 23 on the benchmark, included a Hispanic citizen voting age population of 57.3% and ensured that it offered Latino voters the same ability to elect their preferred candidates as the benchmark CD 23. Report RED-206 to Plan C220, Tex. Leg. Council, http://www.tlc.state.tx.us/redist/redist.htm (last accessed Dec. 3, 2011) (App. 7) (incorporated by Interim Congressional Order at 1 (App. 16)); RED-206 Reports for C100, Trial Exs. Pl-239, Pl-240, Pl-241 (traditionally filed) (App. Exs. 39, 40, 41).

The State radically revised CD 23 so that, according to the State's analysis, CD 23 will elect the Latino-preferred candidate in only one of ten racially-contested elections. *See* Tr. at 1457:21-25 (App. 30); Trial Ex. J-61-I, at 94:11-19 (App. 14); s*ee also* Application at 22 n.11 ("The reconstituted election analysis for District 23 . . . [u]nder the State's plan [shows] the Latino candidate of choice will likely be elected in 1 out of 10 contested general elections in District 23."). The State changed CD 23 in order to ensure the re-election of a candidate who was not Latino-preferred and who faced a serious challenge to his reelection in the benchmark Latino-majority district. *See* Trial Ex. J-59, at 14:6-10 (Sept. 1) (App. 33). The chief architect of the State's Congressional plan testified that he changed the district to protect the incumbency of U.S. Rep. Francisco Canseco even though he was aware that Mr. Canseco was not the Latino candidate of choice. *See* Tr. at 966:3-5 (App. 29); Trial Ex. J-62-I, at 29:6-30:1; 37:10-13, 90:9-11 (Aug. 12) (App. 35).

At trial, the State's expert testified: "I think [CD 23] is probably less likely to perform than it was, and so I certainly wouldn't and don't [and] haven't counted the 23rd as an effective minority district in the newly adopted plan." Tr. at 1839:3-7 (App. 32). He further stated, "I don't count 23 as one of the seven performing districts when I evaluate C-185." *Id.* at 1878:5-6.

The State's dramatic alteration of CD 23, to bolster the re-election of an incumbent who is not preferred by Latino voters, was a cynical exercise in racial gerrymandering. The State made drastic, unnecessary changes to CD 23 to serve two goals: (1) to protect the incumbent whom it knew was not the candidate of choice of Latinos, and (2) to put enough Latinos into CD 23 to give the impression, but not the reality, of a Latino opportunity district. Trial Ex. J-62-I, at 73:18-74:2, 90:9-15 (App. 35); Tr. at 966:3-5 (App. 29).

While he was drawing CD 23 using the Texas Legislative Council's computer software, the State's chief congressional mapper turned on the color shading for election results and Spanish surnamed voter registration when drawing the maps. *See* Tr. at 954:4-8 (App. 29); Trial Ex. J-62-I, at 41:15-17, 56:15-57:8 (App. 35). This meant that he could see the effects on election results and Latino voter registration of every change he made the instant he made the change. He moved precincts into and out of CD23 with the dual goals of strengthening the district for Mr. Canseco and maintaining or increasing the Latino voter registration. *See* Tr. at 1454:23-1455:3 (App. 30); Trial Ex. J-61-I, at 102:5-11 (App. 14). As a result, the CD 23 created by the State has a slightly higher Latino registration, but dramatically lower election returns for Latino-preferred

candidates. *See* Tr. at 452-453 (Sept. 7) (App. 6); Trial Exs. Pl-395, Pl-396, Pl-397, Pl-398 (App. Exs. 24, 25, 26, 27).

The State's chief mapper performed statistical analysis on its new CD 23 to verify that Latinos would be unable to oust the Anglo-preferred incumbent. The counsel to the House Speaker also used re-aggregated elections to confirm that CD 23 in the State's plan elects the Latino preferred candidate in one out of ten racially contested general elections. *See* Tr. at 1457:21-25 (App. 30); Trial Ex. J-61-I, at 94:11-19 (App. 14).

The State accomplished its changes to CD 23 by "swapping out" precincts where Latino registered voters were more likely to turn out to vote and "swapping in" precincts where Latino registered voters were less likely to turn out to vote. According to the State's internal analysis, the State's Congressional plan reduces Latino voter turnout in CD 23 by over 10,000. *Compare* Trial Ex. J-1, at 10 (App. 19), *with* Trial Ex. J-8, at 9 (App. 28) (showing that when compared to the benchmark, the State's version of CD 23 reduces the turnout by 8,731 Latino voters in 2010, 13,617 Latino voters in 2008 and 10,921 Latino voters in 2006).

Ultimately, with respect to CD 23 in the State's new plan, Dr. Alford testified that "If I [were] advising the legislature on drawing the 23rd, I would not have done what was done to the 23rd." Tr. at 1838 9:21 (App. 32). He further testified:

> [M]y first advice to the legislature would be just -- you know, in simple -- with a slight memory of history, do as little as possible to the 23rd as you can. It really has been a difficult -- it was a difficult district for the Court to draw. It was a difficult district for the legislature to draw. But, basically, enough is enough, right? Don't make this hard on yourself. . .

> Don't mess with the 23rd. That would be my first rule for drawing the districts.

Id. at 1840:8-22.

The district court, in creating its interim congressional plan, sought to maintain CD 23 at its benchmark status as a Latino opportunity district. However, because the district court did not adopt the State's radical revision of CD 23, the State claims that the district court's version of CD 23 is "not within any reasonable conception of the district court's power." Application at 21. The State offers no critique of the district court's CD 23 other than that it differs from the State's attempt to disenfranchise Latino voters.

The dissent complains that the district court's interim plan "does not meaningfully improve the performance for Latino candidates" in CD 23 without explaining how maintaining CD 23 as it was drawn in the benchmark (by the district court on remand in *LULAC v. Perry*) is improper.[13] Interim Congressional Order at 19 (Smith, J., dissenting) (App. 16). The dissent's complaint is particularly incongruous in light of the fact that it recommends an alternative plan (C216) that reduces the ability of Latino voters to elect their preferred candidate in CD 23 when compared to the benchmark and the district

[13] The dissent, which objected vigorously to the reliance on reaggregated election results to evaluate proposed districts with respect to the House interim plan, relies on reaggregated election results it its opinion with respect to the Congressional plan. *Compare* Interim House Order at 23 (Smith, J., dissenting) ("We should not use, as the majority apparently does, past elections as a crystal ball to predict how future elections will turn out, for this court is prevented from making such complex political predictions tied to race-based assumptions.") (App. 2) *with* Interim Congressional Order at 19-20 (Smith, J., dissenting) ("The proposed District 23 in C220 does not meaningfully improve the performance for Latino candidates: The Latino candidate of choice will be elected in only two of ten elections. The only permissible justification for a radical redrawing of District 23 would be to improve electoral chances . . . .") (App. 16).

court's interim plan. Additionally, there is simply no evidence to suggest that the district court engaged in partisan gerrymandering in its configuration of CD 23[14] and it has maintained CD 23's Latino demographics and performance for Latino-preferred candidates as they exist in the benchmark. Rather, it appears that the dissent objects to the district court's declining to adopt the State's unprecleared revisions to CD 23 which would have reduced the number of Latino voters in the district in order to bolster the reelection chances of an incumbent who is not Latino-preferred.

2. *Congressional District 27*

In its congressional plan, the State radically altered CD 27 so that it is no longer a Latino majority district. CD 27 was created by the Texas Legislature in 1981 and elected the Latino candidate of choice until 2010, when an Anglo-preferred candidate won by 775 votes. Tr. at 1828-29 (App. 32). In the benchmark, Nueces County, a large majority-Latino county in South Texas, is the northern anchor of CD 27 and Nueces County voters constitute the majority of registered voters in CD 27. *See* Trial Ex. J-62-I,

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[14] The dissent asserts, incorrectly, that the district court used partisan preference as a surrogate for Latino candidate preference in its configuration of CD 23. *See* Interim Congressional Order at 19-20 (claiming without basis that the district court relied "on . . . probability of electing a Democrat" to gauge whether a district could elect the Latino preferred candidate) (App. 16). This is another of the dissent's red herrings. Latino voters in Texas prefer Republican and Democratic candidates, depending on the candidate and the election. The evidence at trial regarding candidate preference was based on the plaintiffs' and the State's racially polarized voting analysis, employing statistical regression and the ecological inference method, which determined the Latino-preferred candidate (regardless of political party) in each election in order to evaluate Latino electoral opportunity in proposed congressional districts. Trial Ex. 392, Engstrom Corr. Rebuttal, at 2 (App. 13); Trial Ex. D-2, *Perez v. Perry*, No. 5:11-cv-00360 (W.D. Tex.) (App. 43). The district court relied on "reports run by the Texas Legislative Council [to] demonstrate that district 23 maintains its benchmark performance level." Interim Congressional Order at 10 (App. 16).

at 65:11-19 (App. 35); Tr. at 458:5-13 (App. 6); *id.* at 971:23-972:2 (App. 29); Trial Ex. J-62-II, at 51:6-11 (Aug. 31) (App. 35); Ex. C13 to Trial Ex. J-62-II, at 5 (App. 12); C100 RED-202 Report, *supra*, at 10 (App. 19); Trial Ex. J-1 at 9 (App. 28).

In the State's newly-enacted congressional plan, the 206,293 Latino residents of Nueces County, historically accustomed to the opportunity to elect the Latino candidate of choice, are cut away and stranded in an Anglo-majority district to the north. *See* Tr. at 458:24-459:7 (App. 6); *see* Trial Ex. E-9 (App. 42).[15] According to the State's chief mapper, CD 27 in the benchmark and CD 27 in the State's plan are "totally different districts." Tr. at 971:5-8 (App. 29); Trial Ex. J-62-II, at 48:19-21 (App. 35). The State's expert witness testified that CD27 in the State's plan C185 "has flipped, in almost exactly the same way 23 was flipped previously, so it is CD-27 this time that is flipped into being a majority . . . Anglo district." Tr. at 1829:11-1830:4 (App. 32).

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[15] The State claims without support that "there was extensive evidence in the record showing that the State's map was designed to ensure that Nueces County and Cameron County would serve as anchor counties in separate Congressional districts." Application at 22. The record demonstrates the State's goal was never to make Nueces County the anchor of a congressional district. On the contrary, Texas redistricters said the goal of reconfiguring CD 27 in the State's plan was to preserve the incumbency of Rep. Farenthold by pulling Latino-majority Nueces County into an Anglo-majority district. The State's chief mapper testified: "So our dual goals with 27 and 34 were to create that district [34], anchor it in Cameron--that was controlled by Cameron, not Nueces--and also to create a district for Congressman Farenthold who lived in Nueces where he would be elected as a Republican." Trial Tr. Vol. IV, at 1022:10-14 (App. 29). State mappers did no analysis to determine whether Nueces County would be the anchor of the new congressional district in which is was placed, Trial Tr. Vol. VI, at 1462:10-18, and the record makes clear that Nueces County has less influence in the new Anglo-majority district than in benchmark CD 27 where Nueces County voters constituted the majority of the voters in the district. RED-701 Report to Trial Ex. J-62-II, at 5 (App. 12); RED-202 Report for Plan C100, Trial Ex. J-1, at 10 (W.D. Tex.) (App. 19).

The State admitted that it pulled Nueces County out of its historic location in a Latino-majority South Texas congressional district and placed it in an Anglo-majority district to improve the electoral chances of Congressman Farenthold because he would have a difficult time being reelected in the benchmark Congressional District 27. *See* Tr. at 1462:19-1463:1 (App. 30).

The State admits that CD 27 in its plan no longer offers Latinos the opportunity to elect their candidate of choice. *See id.* at 971:14-19 (App. 29); Trial Ex. J-62-I, at 31:24-32:3, 66:13-15 (App. 35). Whether or not the State's attempt to offset the loss of CD 27 with the creation of CD 34 will justify its dismantling of CD 27 is not an issue to be resolved by the district court when drawing its interim map.

Nevertheless, the State complains that "the district court's reconfiguration of District 27 . . . ignores the policy judgments made by the Legislature" because the interim plan maintains CD 27's benchmark configuration. Application at 22. However, the district court's decision to maintain the benchmark CD 27 pending a ruling on preclearance is not improper and follows traditional redistricting criteria. The dissent is similarly unable to point to any legal or constitutional problem with the district court's decision to maintain Nueces County in its historical location in CD 27. Interim Congressional Order at 18-19 (Smith, J., dissenting) (App. 16).

This Court has held that the State cannot pursue incumbency protection at the expense of Latino electoral strength. *LULAC v. Perry* 548 U.S. 399, 441 (2006) ("If . . . incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder,

not the voters. By purposely redrawing lines around those who opposed [the incumbent], the state legislature took the latter course. This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters." (citing *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986))).

D. The State and Dissent are Unable to Identify Legal Deficiencies in Racially Diverse Districts in the Interim Plan

The State, aside from suggesting that the district court's interim congressional plan completely rejects the State's enacted plan,[16] points to little in the district court's plan that it claims is improper.[17]

1. *Congressional District 25*

The State concedes that the district court relied on the benchmark to create CD 25 in the interim plan, but complains that "preservation of the former District 25 [is] in direct contravention of the State's legislative and political objectives." Application at 24. The State further argues that what it characterizes as a "crossover district" cannot be included in an interim plan "absent a demonstration of intentional racial discrimination." *Id.* at 20.

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[16] The State asserts, but never demonstrates, that the district court "redr[e]w the entire map," the court drew "political lines from scratch" and "disregard[ed] the Legislature's intent," that the map is "entirely a judicial creation" and the map is the result of a belief that the district court should "chart its own course." Application at 2-3, 19.

[17] The district court noted in its opinion that the interim congressional plan was unanimous at the time of its release by the court but that one member of the panel chose to dissent after receiving "public comments." Interim Congressional Order at 14-15 (App. 16).

The dissent complains that maintaining CD 25 as it exists in the benchmark renders the interim remedy "infirm." Interim Congressional Order at 18, 20 (Smith, J., dissenting) (App. 16). Committing the same error as the State in assuming that the district court was required to dismantle CD 25 because the State's enacted plan dismantles it, the dissent writes: "Plan C220 protects District 25, without justification in voting rights law." *Id.*

CD 25 is an Anglo-majority district in the benchmark and remains so in the district court's plan.[18] CD 25 is no different demographically than benchmark Congressional Districts 2 (Poe –R), 22 (Olson – R) and 24 (Marchant – R) which were also preserved in the district court's interim congressional plan and have Anglo citizen voting age majorities of 64.5%, 58.4% and 65% respectively. Trial Ex. J-1, at 12 (App. 19); Trial Ex. J-8, at 11 (App. 28). Congressmen Poe, Olson and Marchant would no doubt be surprised to learn that the State believes their districts are unconstitutionally race-based because the districts are not compelled by the Voting Rights Act.

There is simply no legal infirmity in preserving an existing district in an interim plan pending preclearance of the State's plan. To suggest further that the district court must dismantle an Anglo-majority benchmark district because it is not compelled by the Voting Rights Act borders on the ridiculous.

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[18] Anglos constitute 63% of the citizen voting age population (CVAP) of CD 25 in the benchmark congressional plan. In the district court's interim plan, Anglos constitute 62% of the CVAP of CD 25. RED-106 for Plan C100, Trial Ex. J-1, at 12 (App. 19); RED-106 for Plan C220, Tex. Leg. Council, http://www.tlc.state.tx.us/redist/redist.htm (last accessed Dec. 3, 2011) (App. 7).

2. *Congressional District 33*

The dissent complains that CD 33 is improper unless its boundaries are compelled by the Voting Rights Act. However, as pointed out by the district court, it created CD 33 to accommodate significant population growth in Tarrant County. Interim Congressional Order at 13 (App. 16). Because most of the intercensal growth in Tarrant County was Latino and African American, it is unsurprising that CD 33 in the district court's interim plan is racially diverse. In the district court's CD 33, 44% of the CVAP is Anglo, 29% is African American and 21% is Latino. RED-106 for Plan C220, Tex. Leg. Council, http://www.tlc.state.tx.us/redist/redist.htm (last accessed Dec. 3, 2011) (App. 7).

U.S. Representative Lamar Smith, redistricting spokesperson for the Texas Republican Congressional delegation, submitted a Congressional plan to Texas redistricters during the legislative session that also included a majority-minority CD 33 in the Dallas-Fort Worth area. *See* Tr. at 444:1-8 (App. 6); *id.* at 1580:18-23, 1610:6-15 (Sept. 13) (App. 31); Trial Ex. J-60, at 110:8-112:2 (Aug. 31) (App. 34). The dissent's preferred Congressional plan contains Chairman Smith's majority-minority CD33 in Dallas-Ft. Worth. Interim Congressional Order at 18 (Smith, J., dissenting) (App. 16); Trial Ex. Pl-311, at Congress021-027 (App. 23).

The State characterizes the majority's creation of a racially-diverse CD 33 as unconstitutionally "race-based" even when the district court explained that it followed the State's decision to locate CD 33 in Tarrant County, followed traditional redistricting criteria such as compactness, and that Tarrant County is an area of rapidly-growing minority population. Application at 19; Interim Congressional Order at 13-14 (App. 16).

The State argues that any racially diverse district, even one like CD 33 with a plurality of Anglo CVAP, is forbidden in a court-drawn redistricting plan, even in areas of heavy minority concentration. Thus, according to the State, majority-minority districts that follow traditional redistricting criteria are automatically the result of improper "race-based" considerations unless they are compelled by section 2. Application at 19.

In the State's view, a court must take steps to identify and *fracture* minority populations in urban areas in order to avoid inadvertently creating majority-minority districts that follow traditional redistricting criteria. Every majority-minority district in the plan must be supported by a finding that a "single, geographically compact minority group is large enough to make up the majority in a district" because "Section 2 of the Voting Rights Act does not . . . permit a court [] to create multi-racial coalition districts." Application at 18.

On the contrary, the district court did not err in following traditional redistricting criteria, even when those criteria yielded, in one instance out of thirty-six, a district with a combined minority population of just over 50%.

III. Issuing a Stay Will Substantially Injure Texas Voters and Is not in the Public Interest

Although the State characterizes its request as a stay to preserve the status quo, a stay in this case will disrupt the Texas election process and throw the upcoming primary election into disarray.[19] In a last-ditch attempt to secure implementation of its

[19] The State also "requests that the Court stay the Congressional primary elections." Application at 28. But this is not simply a request for a stay. It is requesting the court enjoin the currently

redistricting plan, the State is willing to force two separate primary election schedules where some elections are held on March 6, 2012 and others are held on a future date not yet determined. The State's requested relief will confuse candidates, election officials and voters, shorten the time available for candidates to campaign for the general election, waste scarce resources of counties and decrease voter turnout.

It is not in the interest of Texas voters to derail the election schedule long-established by the Texas Legislature and to force citizens to vote in two separate primaries held months apart.

Texas can articulate no irreparable harm that will occur if the interim plans are used for one election cycle. If the interim congressional redistricting plan is changed for the subsequent election, as a result of either court action or a new legislatively-enacted redistricting plan, candidates and voters will have a new opportunity to run and vote in the new districts. The State's claim that voters are harmed by voting in a "legally flawed" redistricting plan that does not "allow [the State] to carry out the statutory policy of the Legislature" is circular and unavailing. Application at 29. The public interest is

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scheduled primary elections from occurring. "What the applicant would require in order to achieve the substantive relief that it seeks is an original writ of injunction, pursuant to the All-Writs Act, 28 U.S.C. § 1651(a), and this Court's Rule 44.1." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers). "A Circuit Justice's issuance of such a writ … demands a significantly higher justification" than simply the stay factors enumerated here. *Id*. "The Circuit Justice's injunctive power is to be used 'sparingly and only in the most critical and exigent circumstances' . . . and only where the legal rights at issue are 'indisputably clear.'" *Id*. (citations omitted). The State has made no attempt to satisfy this heightened burden and its request should be summarily denied.

best served by allowing the election process to continue and for Texas to hold its primary on March 6, 2012.

CONCLUSION

For the forgoing reasons, as well as those set forth in the briefing of the other Respondents, which are incorporated herein by reference, the Texas Latino Redistricting Task Force, *et al*. and the Mexican American Legislative Caucus respectfully request that the Court deny the Emergency Application for Stay of Interlocutory Order Directing Implementation of Interim Texas Congressional Redistricting Plan Pending Appeal to the United States Supreme Court.

Respectfully submitted,

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