Nos. 11-713, 11-714, 11-715

In the Supreme Court of the United States

RICK PERRY, in his official capacity as Governor of Texas, ET AL., APPELLANTS,

v.

SHANNON PEREZ, ET AL., APPELLEES

RICK PERRY, in his official capacity as Governor of Texas, ET AL., APPELLANTS

v.

WENDY DAVIS, ET AL., APPELLEES

RICK PERRY, in his official capacity as Governor of Texas, ET AL., APPELLANTS

v.

SHANNON PEREZ, ET AL., APPELLEES

On appeal from the United States District Court for the Western District of Texas

BRIEF OF ALABAMA, VIRGINIA, FLORIDA, SOUTH CAROLINA, ARIZONA, GEORGIA, MICHIGAN, AND LOUISIANA AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

While a jurisdiction covered by Section 5 of the Voting Rights Act seeks preclearance of its own redistricting plans, may a three-judge district court order the use of interim electoral maps that give no deference to the covered jurisdiction's maps and are not premised on any actual or likely violation of federal law?

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The amici curiae are States subject in whole or in part to the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and they bear the significant burdens imposed by that requirement. Some of the amici have argued elsewhere that Section 5 is unconstitutional, but the amici take no position on that question in this case. Instead, the amici merely request that the Court apply Section 5 in a way that, in Justice Breyer's words, "use[s] a little common sense." Transcript of Oral Arg. at 36:12-15, *Riley v. Kennedy*, 553 U.S. 406 (2008) (No. 07-77).

Redistricting litigation affects all States and localities, but its impact falls disproportionately on the covered jurisdictions. All States and localities must redistrict after the decennial census. But the covered jurisdictions bear the added burden of securing their plans' preclearance from Washington D.C. When that preclearance is not forthcoming and an election is looming, a local court may be called upon by private litigants to enforce an interim Section 5 remedy. This Court has held that the remedial court's Section 5 remedy should defer to the State's own apportionment plan. The interim remedy imposed in this case is not consistent with this Court's guidance.

Although there are two pending lawsuits in two different courts, neither court has found that any of Texas's new districts are likely to violate federal law. The lower court did not find that the composition of any district is likely to violate any provision of the

Voting Rights Act, and the District Court for the District of Columbia has not denied preclearance. There is, in short, every indication and presumption that Texas's new legislative districts are "entirely harmonious with federal law." *Riley v. Kennedy*, 553 U.S. 406, 427 (2008).

The lower court's decision to throw out the Legislature's plan thus considerably raises the federalism stakes of Section 5 and threatens to push Section 5 toward the outer limits of congressional authority. It is one thing to hold, as in the usual Section 5 case, "that a state law may not be enforced if it conflicts with federal law." *Id.* at 427. But it is a federalism problem of a different order of magnitude to impose an electoral map generated at the whim of a federal court without any finding that there has been, or is likely to be, a violation of federal law.

Contrary to the decision below, the amici believe Section 5 should be given an application that both works and minimizes the constitutional concerns that this Court has often recognized. The lower court should have strongly deferred to the Texas Legislature's own redistricting plan in crafting an interim Section 5 remedy.

SUMMARY OF ARGUMENT

On the facts of this case, the common sense solution is to defer to the State's plan except to the extent it needs to be modified for likely violations of federal law. That rule makes practical sense in light of the federal courts' well-established reluctance to draw apportionment plans from scratch and the timing and burdens of the preclearance process. As

evidenced by this case and recent examples from Alabama, securing preclearance for a state-wide change is time and resource intensive. If the lower court's decision stands, adverse parties will have new incentives to drag out the preclearance process, leading to more Section 5 gamesmanship and litigation. These and other pragmatic concerns justify giving deference to the State's plan while it is pending preclearance.

The doctrine of constitutional avoidance provides an additional reason for the Court to take a deferential and pragmatic approach. The federalism costs of the lower court's decision are greater here than in the typical Section 5 remedial dispute. In this case, unlike in other Section 5 cases, the lower court held that Section 5 required it to create a completely *new* state voting practice, not merely compel the State to use a pre-existing one. The lower court's new practice is in an area of uniquely local concern, and the Constitution expressly places the responsibility for congressional apportionment on state legislatures. Finally, because the lower court did not find any likely violations of federal law, the effect of the lower court's decision is to elevate the unsubstantiated allegations of private litigants over the plans adopted by a majority of the Texas Legislature. An interim remedy that defers to the State's own apportionment plan will at least mitigate, in this case, the constitutional concerns that this Court has recognized.

ARGUMENT

I. It makes pragmatic sense for the court to defer to the legislature's redistricting plan under these circumstances.

Common sense says that when a covered Section 5 jurisdiction has pursued preclearance of a redistricting plan, but no final preclearance decision has yet occurred, the interim remedy should defer to the jurisdiction's own redistricting plan except to the extent necessary to remedy any *likely* violations of federal law. That is by far the soundest and the easiest resolution to these kinds of disputes. The alternative – for the federal court to make up a plan of its own – is not a good one.

A. Courts are not good at legislative apportionment, but are well-suited to modify existing plans for violations of federal law.

This Court's decisions consistently favor redistricting plans that come from state legislatures over plans that come from the judiciary because "reapportionment is primarily a matter for legislative consideration and determination." *White v. Weiser*, 412 U.S. 783, 794 (1973) (citations and internal quotation marks omitted). Even in the context of Voting Rights Act remedies, the Court has held that lower courts should use legislative plans as the starting point, changing them only to remedy violations of federal law. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415-416 (2006)("a lawful, legislatively enacted plan should be

preferable to one drawn by the courts"); *Upham v. Seamon*, 456 U.S. 37, 40-41 (1982) ("a court must defer to the legislative judgments the plans reflect, even under circumstances in which a court order is required to effect an interim legislative apportionment plan").

The reason for this Court's preference for legislative plans is simple: Courts may be competent to alter district lines to account for violations of federal law, but they are ill-suited to draw such lines from scratch. The process of legislative apportionment requires drawing sometimes arbitrary, "inconsistent, illogical, and ad hoc" lines between groups of voters. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). *Accord id.* at 306-307 (Kennedy, J., concurring in the judgment) (noting "lack of comprehensive and neutral principles for drawing electoral boundaries"). Line-drawers must give subjective weight to considerations like incumbency, population traits, and history. Courts that take on that task "risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* at 307 (Kennedy, J., concurring in the judgment).

The pragmatic rationale for the presumption in favor of legislature-produced apportionment plans is borne out by the facts of this case. The timing of the redistricting decision was such that the lower court could hardly make reasoned, litigated determinations about where to draw particular lines. The lower court majority expressly recognized as much. *See* JA 99 ("[I]n cases where a court drawn interim plan is required . . .the maps will always be drawn under time intensive conditions"). And,

despite two attempts, the lower court could not give a persuasive rationale for each of the numerous decisions it made.

An even greater problem is that, in its haste to create its own plan, the lower court shirked the institutional role in which the federal courts specialize—"say[ing] what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Although courts are not well-suited to create their own redistricting plans, they are well-suited to determine whether any particular aspect of the proposed plan is likely to violate federal law. Here, the lower court drew its lines without finding any likelihood that the Legislature's plans violated the VRA. Given courts' institutional competencies it makes sense for actual federal law violations, not other considerations, to drive an interim Section 5 remedy. *See, e.g., Upham*, 456 U.S. at 43 ("whether a remedy is required must be determined on the basis of the substantive legal standards applicable to the State's submission").

B. Deference makes sense given the burdens and timing of the Section 5 preclearance process, whether administrative or judicial.

The lower court erroneously concluded that it could not impose a remedy based on the Texas Legislature's plans without "mak[ing] the preclearance process meaningless." JA 157. Whatever the technical status of Texas's pending judicial preclearance action, however, the process has not been meaningless. DOJ has had ample

opportunity to review evidence and, in fact, has identified what it believes to be the retrogressive aspects of the redistricting plans. The federal courts can evaluate those concerns and, if they are valid, can alter the Legislature's plans accordingly. This result is no different from the equivalent result in *Upham v. Seamon*, which came after a final administrative preclearance determination had already been made.

1. The lower court's ruling reflects fundamental misconceptions about the burdens, processes, and end result of preclearance. The administrative preclearance process can be quick and easy for some changes such as moving a polling place. But securing preclearance of a significant change like a state-wide redistricting takes considerable resources and time, whether that preclearance is judicial or administrative.

a. To be clear, the preclearance process imposes a massive burden on covered jurisdictions. After they identify a potential voting change, the State and its political subdivisions bear the burden of proving a negative. They must prove to DOJ or the D.C. District Court that the change does not have a retrogressive effect on minorities. 42 U.S.C. §1973c; *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997); *see also* 28 C.F.R. §§ 51.1-51.67 (preclearance guidelines).

To file for administrative preclearance, therefore, the State must compile and submit no fewer than 16 pieces of information. 28 C.F.R. § 51.27. In a nutshell, the States must (1) detail the old and new practices and the difference between the two, (2) detail the preclearance and litigation history of the

old practices, (3) explain why the State wants to make the change, and (4) explain how the change impacts minority voters. *Id.* DOJ may also request supplemental information, *see* 28 C.F.R. § 51.37(a), ranging anywhere from transcripts and DVDs of the state's deliberative process to the name and race of every state legislator for the past 25 years. DOJ also considers outside comments and suggestions as part of its final consideration. 28 C.F.R. § 51.53. Then, DOJ may continue to request additional information or "conduct any investigation or other inquiry that is deemed appropriate in making a determination." 28 C.F.R. § 51.38(a).

b. Submission times vary. The States can generate routine preclearance submissions, such as setting a special election to fill a legislative vacancy, within hours. Other submissions, like the state-wide redistricting plans at issue in this case, may take weeks or even months to prepare.

For example, in 2007, Alabama updated and unified the law governing its county commissions, and, among other things, established a state-wide, one-year residency requirement for all candidates seeking a county commission seat. *See* Ala. Act No. 2007-488. Even though the law was innocuous, preclearance imposed a heavy burden. To generate an application for administrative preclearance, Alabama had to research and chart the legislative, preclearance, and litigation histories of the benchmark practices in all of Alabama's 67 counties, *see* 28 C.F.R. § 51.27, which required collecting information through a multi-page questionnaire distributed to each county. The last of the State's three preclearance submissions, which encompassed

the work on the residency requirement, exceeded 1,700 pages, including voluminous exhibits and a 103-page appendix summarizing information for all 67 counties. *See* DOJ File Nos. 2008-427, 2008-1576, 2008-3861, 2008-5601. DOJ ultimately allowed the Act to take full effect—but not until 18 months after it was signed into law. *See id.*

c. The administrative preclearance process can be drawn out. Even after the State generates a request for preclearance, the back-and-forth between the State and DOJ can easily take 120 days or more. DOJ has 60 days to formulate an initial response to the request, and, when DOJ requests supplemental information, it triggers a new 60-day period that runs from its *receipt* of the supplement. 28 C.F.R. § 51.37.

Again, a recent example. In 2006, Alabama updated its election procedures, and, again, the changes were largely innocuous. *See* Ala. Act No. 2006-570. On July 13, 2007, Alabama filed a 44-page preclearance submission that included 21 exhibits, a roadmap setting out the changes, and a 33-page chart detailing the preclearance history of the various state statutes and regulations that the new act affected. *See* DOJ File No. 2007-3488. On August 21, DOJ nonetheless wrote that it was rejecting Alabama's submission for failing to describe the changes with requisite clarity because it did not "include a united table or listing" of the changes. *Id.* So Alabama developed and submitted a unified 193-page chart setting out the old and new statutes, side-by-side. *Id.*

On October 29, 2007, DOJ precleared most of the act, but requested supplemental information on one

of the changes. After conducting additional investigation, Alabama gave notice in December of its intent to withdraw that part of its submission rather than respond to DOJ's burdensome request for supplemental information. DOJ acted on the notice on January 29, 2008, concluding the process roughly 200 days after Alabama's initial submission. (Coincidentally, Alabama's administrative-preclearance saga—from initial submission to final DOJ action—mirrors the same July-to-January timeframe in Texas's judicial preclearance action.)

d. At the end of the administrative preclearance process, the covered jurisdiction receives a letter stating the views of DOJ. 28 C.F.R. § 51.41. If the letter grants preclearance, then the covered jurisdiction can enforce its law without threat of a Section 5 challenge. If the letter denies preclearance, the submitting jurisdiction may ask the Attorney General to reconsider it, and the Attorney General then has another 60 days to act on that request. 28 C.F.R. § 51.48(a). After a denial, the covered jurisdiction can challenge DOJ's determination in D.C. District Court. 28 C.F.R. § 51.44(c).

2. Importantly, it is outside the State's power to move preclearance proceedings to a conclusion, whether administrative or judicial. Although DOJ is supposed to rule on an administrative preclearance request within 60 days, the process may be delayed if DOJ rejects the request as noncompliant or requests supplemental evidence. Requests for supplemental information for preclearance of state-wide changes, like the ones at issue here, may themselves require many more weeks of work by the States to prepare.

See 28 C.F.R. § 51.28 (describing common types of supplemental information requested).

The only timing that the State can control is when the State *submits* its changes for preclearance after they become final. *See* 28 C.F.R. § 51.22(a)(1) (noting that DOJ does not accept submissions "prior to final enactment"). That Texas promptly filed its judicial action for preclearance thus distinguishes this case from *Lopez v. Monterey County,* 519 U.S. 9 (1996), and similar cases. In *Lopez*, there was a determination that the covered jurisdiction had flouted federal law by failing to submit its plans for preclearance, and a federal court had to draw new plans in light of that failure. Specifically, this Court explained that the covered jurisdiction had "not discharged its obligation [under federal law] to *submit* its voting changes to either of the forums designated by Congress." *Id.* at 25 (emphasis added). *Accord id.* at 24 ("The goal of a three-judge district court facing a § 5 challenge must be to ensure that the covered jurisdiction *submits* its election plan to the appropriate federal authorities for preclearance as expeditiously as possible." (emphasis added)). Here, Texas has already done the only thing in its power to do; it has submitted its plans for preclearance.

Finally, given the vagaries of the preclearance process, any contention that preclearance proceedings would be over had Texas pursued administrative preclearance instead of judicial preclearance is speculation. *See* JA 157("Had the State chosen the path of administrative preclearance through the Department of Justice, we would perhaps be in the remedial phase right now."). In

fact, because of the burden of preparing a timely preclearance request and the early date of the Texas elections, localities in Texas that submitted their redistricting plans for *administrative* preclearance in the fall may face the same timing dilemma as the State. *See Petteway v. Henry*, No. 3:11-cv-511 (Doc. 32), 2011 WL 6148674, *2 (S.D. Tex. Dec. 9, 2011) (declining to create judicial plan while Galveston County's redistricting plan waits for administrative preclearance); Joint Response to Court Inquiries, (Doc. 36) No. 3:11-cv-511 (S.D. Tex. Dec. 21, 2011) (reporting that, on sixtieth day, DOJ requested supplemental information that may delay a final preclearance decision until March 1, 2012).

3. Practically speaking, the most important parts of the preclearance process have already happened in this case. Here, as in the administrative preclearance process, DOJ has reviewed reams of evidentiary materials, conducted witness interviews, and identified certain elements of the State's plans that it contests and many more that it does not contest. *See* United States and Defendant-Intervenors Identification of Issues (Doc. 53), No. 1:11-cv-01303 (D.D.C. Sept. 23, 2011) at 2-6 (alleging retrogression in five house districts), at 8-12 (alleging retrogression in congressional Districts 23 and 27); Answer of United States (Doc. 45), No. 1:11-cv-01303 (D.D.C. Sept. 19, 2011) at 1 (agreeing to judicial preclearance of the entire Senate plan). Given the advance of the preclearance process thus far, it does not offend that process to use the submitted plans as the starting point for the Section 5 interim remedy any more than it offended Section 5 to use the State's

plans as the starting point for the final remedy in *Upham v. Seamon*.

C. The lower court's rule will lead to anomalous and unintended consequences.

The lower court's decision provides a different rule for redistricting plans that have been submitted for preclearance and acted on and those that have been submitted for preclearance and have not been acted on. This rule is likely to lead to more litigation and gamesmanship in this case and others.

1. The lower court's decision provides additional opportunities for gamesmanship and conflict in Texas's judicial preclearance action. Because of the lower court's decision and DOJ's litigation positions, it is possible that there will never be a judicial determination of whether the Texas Legislature's current plan is retrogressive when compared to Texas's previous districts. Instead, DOJ has moved to abate the judicial preclearance action on the basis of the lower court's interim remedy. *See* United States' and Intervenors' Motion to Hold Case in Abeyance (Doc. 108), No. 1:11-cv-01303 (D.D.C. Nov. 25, 2011). DOJ has also taken the position that the lower court's new plan will become the Section 5 benchmark from which the State's present and future legislative apportionment plans will be judged for retrogression. *See Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7470 (Feb. 9, 2011) (advising that a new benchmark is set when "a Federal Court has drawn a new plan and ordered it into effect").

Without conceding that DOJ's litigation position is correct or that its Guidance is a lawful exercise of its authority, DOJ's present tactics provide a good example of the opportunities for gamesmanship if the lower court's decision stands.

But even if the proceedings in the D.C. District Court eventually reach a final preclearance determination, this litigation will not be over. The parties will continue to fight about whether that precleared plan should go into effect before the next round of elections, what is the baseline plan for the purpose of judging retrogression of future plans, and other things. There is no easy answer to those questions. But, if the lower court had minimized the differences between the interim plans and the submitted plans, these future disputes would take on much less importance. As it is, the interim remedy kicks the can down the road and guarantees additional litigation in the lower court regardless of what happens in the D.C. District Court.

Finally, the more the interim plan deviates from the plan adopted by the majority of the Texas Legislature the more likely it is that the Texas Legislature will respond with another plan in the future, spawning another round of federal litigation. This is essentially what happened the last time Texas attempted to redistrict. In 2000, the Texas Legislature failed to adopt a congressional apportionment plan, which resulted in a court-ordered apportionment plan that gave an advantage to the Democratic Party. The Republican-controlled Texas Legislature responded by adopting a new apportionment plan in 2003, thus setting off a new round of litigation that made it to this Court at least

twice. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 412-13 (2006) (recounting this history). If the lower court here had accepted the majority of the Legislature's plan, modified only for violations of federal law, it would have at least limited the likelihood of sparking another round of apportionment, preclearance, and litigation.

2. The lower court's decision also gives Section 5 litigants the wrong incentives in the future. The lower court held that, because preclearance proceedings were still pending in the D.C. District Court, it had *carte blanche* authority to remake the districts without regard to the Texas Legislature's democratically-enacted redistricting plan. But the lower court admittedly would not have had that authority had the preclearance process been completed, regardless of whether certain districts were found to be retrogressive. *See Upham v. Seamon*, 456 U.S. 37, 40-41 (1982).

Under the lower court's rule, a covered jurisdiction will often be better off with a partial preclearance *rejection* than a pending preclearance submission. If the plan at issue here had been rejected, the lower court's obligation to defer to its unchallenged parts would not reasonably be subject to question. And, even if the plan had been rejected in part, the State would have been on surer footing when it came time to litigate private plaintiffs' Section 2 challenges.

Thus, the lower court's decision means that litigants who want to prevent a redistricting plan from taking effect do not have to win before DOJ or any federal district court. Instead, they need only delay. They can do so by intervening in judicial

preclearance actions, as they have done here, or by submitting comments to DOJ during the administrative-preclearance process. Creating additional incentives to delay the preclearance process threatens to turn Section 5 into little more than a partisan tool to defeat non-retrogressive voting changes.

II. The lower court's interim remedy exacerbates the federalism costs of Section 5.

A pragmatic application of Section 5 must account for the constitutional concerns that this Court has long recognized. Section 5's preclearance mechanism, as this Court and its individual members have repeatedly stated, is "an extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992); *accord, e.g., Miller v. Johnson*, 515 U.S. 900, 926 (1995); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 48 (1978) (Powell, J., dissenting) (collecting citations). Just two terms ago, this Court questioned "[w]hether conditions continue to justify" this "extraordinary legislation otherwise unfamiliar to our federal system." *NW. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 129 S.Ct. 2504, 2516 (2009) ("*NAMUDNO*"). The doctrine of constitutional avoidance thus provides a powerful reason to adopt the common-sense solution and defer to the State Legislature's redistricting plan.

To be clear, the constitutional questions about Section 5 are greater in this case than the run-of-the-mill Section 5 remedial dispute. In at least three respects, the lower court's interim Section 5 remedy threatens to "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about §5's . . . constitutionality." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (quoting *Lopez*, 525 U.S. at 282).

A. The Legislature's plans are the only politically-accountable benchmarks.

There is a powerful difference between (1) in the typical Section 5 scenario, forcing a State to keep a practice it adopted but now wants to change; and (2) here, forcing a State to adopt an entirely new practice that it never chose in the first place.

In the usual case, a Section 5 interim remedy requires a covered jurisdiction that has enacted a new law to stay enforcement of the new law, and to continue operating under the old law until there is a determination on preclearance. *See N.A.A.C.P. v. Hampton County Election Comm'n*, 470 U.S. 166, 182-833 (1985); *Berry v. Doles*, 438 U.S. 190, 192-93 (1978). Although that result certainly infringes on State prerogatives, the federal court is not really *choosing* the practice for the State. The State at one point had the right to choose for itself and chose to be governed by the benchmark practice at that time.

The Section 5 remedial inquiry is different here. Because of one-person one-vote, there are no legislative districts to which Texas can revert

pending preclearance of its new districts. As the lower court recognized, the choice in this case is not between a politically-accountable benchmark practice and a new politically-accountable practice. Instead, since there is no viable benchmark, the question is *who* comes up with the interim practice: the state legislature or a federal court? The lower court chose option 2—the creation of a new plan that has never been adopted by *any* democratically-accountable state actor.

Setting to one side whether district line-drawing is the proper task for a federal *judge*, *see Vieth* 541 U.S. at 278, the district court's decision raises the federalism stakes considerably. It effectively allows the federal government to dictate the substance of state law *in the first instance* and comes perilously close -- if it does not go all the way -- to authorizing precisely the sort of "commandeering" of state governmental processes that the Constitution condemns. *See Printz v. United States*, 521 U.S. 898, 925 (1997); *New York v. United States*, 505 U.S. 144, 161 (1992). There is little difference between a federal law that requires a State legislature to "enact" or "enforce" particular laws in the first instance (plainly forbidden by *New York* and *Printz*) and the lower court's interpretation of Section 5 as a law that allows a federal court to create a new state voting practice out of whole cloth.

B. Redistricting is mandated by the federal constitution and is the constitutional responsibility of state and local governments.

This Court explained in *NAMUDNO* that the reenacted Section 5 continues to "differentiate[] between the States" even though "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance." *NAMUDNO*, 129 S. Ct. at 2512. For example, the Court noted that "[t]he statute's coverage formula is based on data that is now more than 35 years old" and "the racial gap in voter registration and turnout is [now] lower in the States originally covered by § 5 than it is nationwide." *Id.* It is an open question whether such evidence, even in the mine run of Section 5 cases, can override "our historic tradition that all the States enjoy equal sovereignty." *Id.* (citations and internal quotation marks omitted).

It is a special constitutional problem, however, for Section 5 to differentiate between States as they redistrict congressional and legislative seats. The constitutional concerns are exacerbated because the Constitution expressly "leaves with the States primary responsibility for apportionment" of their federal congressional districts. *Growe v. Emison*, 507 U.S. 25, 34 (1993); *see also Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body"). Likewise, the Equal Protection Clause affirmatively requires that "a State make an honest and good faith effort to construct districts, in both houses of its legislature,

as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The delegation of these tasks to state legislatures is not happenstance; the task of legislative apportionment is a uniquely local responsibility. It is at the very heart of sovereignty for a local population to determine *who* can stand for election to represent them. *See Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991); *see also Alden v. Maine*, 527 U.S. 706, 751 (1999).

In light these federal constitutional obligations, the trial court's decision that it need not defer to the Texas legislature's plans poses heightened constitutional problems. The Texas Legislature did not decide, of its own initiative, to reapportion its congressional and state legislative districts in light of population growth. Instead, the redistricting plans are the Texas Legislature's good faith effort to fulfill its obligations under Article I, Section Four and the Equal Protection Clause of the federal constitution. *Compare Balderas v. Texas*, No. 6:01-cv-158 (Doc. 413) (E.D. Tex., Nov. 14, 2001) (per curiam), *summarily aff'd*, 536 U.S. 919 (2002) (addressing failure to legislature to enact any congressional redistricting plan). And, although the Constitution imposes on *all State legislatures* an obligation to redistrict, only the covered jurisdictions can find themselves in this predicament. Only they can be told that their legislatively enacted plans can be disregarded because they have not, yet, been precleared. A rule that requires deference to the apportionment plans of all State legislatures, including Section 5 States, will not eliminate the constitutional obstacles to Section 5 that this Court

recognized in *NAMUDNO*, but it will at least mitigate them.

C. The lower court allowed private litigants to write the redistricting plan.

Finally, the lower court's line-drawing is particularly problematic because it elevated the unsubstantiated complaints of private parties over the will of the Texas Legislature. Federal law trumps state law; there is no doubt. But a private party's unproven *allegations* of violations of federal law cannot form the basis for a redistricting plan that varies from the plan enacted by the State's legislative body. This Court has "never said that the entry of an objection by the Attorney General to any part of a state plan grants a district court the authority to disregard aspects of the legislative plan not objected to by the Attorney General." *Upham*, 456 U.S. at 43.

This problem is particularly acute in the lower court's changes to the Senate plan. There is no contention by DOJ that any part of the Senate plan is retrogressive in either purpose or effect under Section 5. The *only* reason the lower court could have given for changing the plan was to account for private parties' allegations of violations of other federal laws.

To craft an apportionment plan that accounts for the complaints of private parties without any determination that they are valid gives private litigants more control over redistricting than the

majority of the State. "If the principle of representative government" has any meaning, it requires that "the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Alden v. Maine*, 527 U.S. 706, 751 (1999). Prudence cautions against any interpretation of Section 5 that puts it at odds with the constitutional guarantee of "a republican form of government." *Riley v. Kennedy*, No. 07-77, Oral Arg. Trans. at 48:17-18 (question of Justice Scalia).

Although private litigants have alleged that the Texas Legislature's plans violate federal law, Texas has complied with Section 5's preclearance procedure. *Compare Lopez,* 519 U.S. at 25 (noting that the jurisdiction had "not discharged its obligation [under federal law] to submit its voting changes to either of the forums designated by Congress."). Without a finding of some substantive violation of federal law, the lower court was wrong to disregard the will of a majority of the Texas Legislature. And the lower court's conclusion that Section 5 itself warrants this result is an insupportable exercise of federal power.

CONCLUSION

The Court should reverse the lower court.

Respectfully submitted,

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