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

REPLY BRIEF OF APPELLEES WENDY DAVIS, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

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INTRODUCTION

As has become clear from the parties' opening briefs, the dispute before the Court is quite narrow. The State concedes that it is required under Section 5 of the Voting Rights Act to obtain preclearance of any redistricting plan before it goes into effect. State Br. 2. The State likewise concedes that it is "customary practice" under the Voting Rights Act for a court hearing Section 2 and constitutional challenges to a redistricting plan to "refrain from awarding relief while the preclearance litigation" remains pending. *Id.* Finally, the State concedes that the three-judge panel was required to implement interim redistricting plans given the impending election schedule, *id.* at 27, and, moreover, the State does not dispute that the panel acted properly in departing from the enacted maps in order to avoid any likely violation of law, *id.* Given these concessions, the *only* issues in this appeal are (1) whether that three-judge panel was required to defer to the State's enacted redistricting plans and depart from those plans only after making findings that they likely would violate the law; and (2) whether the panel's interim plans should remain in place for the rapidly approaching Texas primary elections.

As to the first question, in drawing the interim redistricting plans, the panel below followed a sensible approach, relying in part on the existing "benchmark" districts that were precleared a decade ago, but also deferring to the newly enacted districts where it could, without prematurely and improperly

addressing the merits of the statutory and constitutional challenges to the newly enacted districts that are still pending before the courts in both the District of Columbia and Texas. That approach was entirely consistent with this Court's precedent. The State's alternative approach – starting with the enacted districts in all instances and making specific findings and conclusions about the legality of those unprecleared districts – would have been not only improper (because it would have required the panel to make findings that were either unripe or outside of its jurisdiction), but also impractical.

As to the second question, it has become even more obvious in the time since the opening briefs were filed that the Texas court's interim redistricting plans are the only viable plans that can be used for the impending elections, unless there is to be considerable delay in the election schedule. In a memorandum opinion issued just days ago, the District Court for the District of Columbia set forth its reasons for denying summary judgment to the State. In so doing, it made clear that the State faces an uphill battle to obtain preclearance of its redistricting plans, which would then also face substantial challenges under Section 2 of the Voting Rights Act and under the Equal Protection Clause in the Texas District Court. These realities are an insuperable legal barrier to the State's request for permission to use the enacted plans this year.

Even leaving aside the legal barrier, the State's argument that "this Court should order [the

legislatively enacted] plans to go into effect on an immediate, interim basis," State Br. 55, makes little practical sense. Because of the number of precinct changes required by the State's enacted maps – precinct changes that have not been made, let alone precleared – it would now take months to prepare to hold primary elections using the enacted maps. By contrast, the interim maps have been designed to avoid precinct changes wherever possible. In order to switch to the enacted maps at this late stage, the State would have to delay the primaries even more than they have already been delayed. That would make no sense at all. The better course, if this Court decides to vacate the court-ordered interim plans, would be to remand the case to the Texas court – which is in the best position to address nuances of Texas election law and the deadlines of the election calendar – for that court to take into account the upcoming decision of the D.C. District Court on preclearance and consider the issues anew in light of further guidance from this Court.

COUNTERSTATEMENT OF FACTS

Appellees' opening brief sets forth a complete statement of facts. But in order to correct certain misstatements and mischaracterizations of the events leading up to the enactment of the redistricting plans and the subsequent litigation in the District of Columbia and the Western District of Texas, Appellees herein provide a brief counterstatement of the facts that were set forth in Appellants' brief.

I. The Enactment of the Senate Plan

Without a single citation to a single piece of record evidence to support its claims, the State asserts that it "worked diligently" and "moved quickly to pass new redistricting plans." State Br. 7-8. The State offers no explanation for why it waited until May to begin the redistricting process when census data was available as early as February, nor why it did not immediately submit its House and Senate Plans for preclearance. One party controls the Texas House, the Texas Senate and the executive branch, so the majority did not have to contend with partisan obstructionism to enact redistricting plans. Yet despite holding complete control of both the timing and the process to address redistricting, the State neither "worked diligently" nor "moved quickly" in its redistricting process, which is particularly troubling given that the Legislature knew all the while that it had some of the earliest primaries in the country.

The State also claims that when it finally got around to releasing redistricting plans, it "promptly sought additional input from the public and elected officials to ensure that the final plans fairly represented the relevant interests at stake." *Id.* at 8. If "promptly [seeking] additional input from the public and elected officials to ensure that the final plans fairly represented the relevant interests at stake," *id.*, means that the State sprung plans on minority legislators and the public at the last possible minute – leaving little time to analyze those plans – and subsequently ignored the concerns

raised about those plans, then the State's characterization of events is correct.

The only "elected officials" consulted about the redistricting plans were those representing majority Anglo districts. As was recounted in Appellees' opening brief, legislators representing minority districts were completely shut out of the process. *See* Davis and LULAC Appellees Br. 8 (citing Sen. West Decl. ¶ 3, J.A. 523; Sen. Zaffirini Decl. ¶¶ 2-3, 5-6, J.A. 518-19; Sen. Ellis Decl. ¶¶ 3-8, J.A. 527-30; Sen. Davis Decl. ¶¶ 9-13, J.A. 500, 502 (¶¶ 21, 25)). The Anglo majority in the Legislature crafted and finalized the Senate Plan behind closed doors and then presented it as a *fait accompli* at perfunctory hearings.

Moreover, "input from the public" was virtually non-existent. In previous redistricting cycles, state officials traveled throughout Texas holding advertised, open hearings for the public. *See, e.g.*, Sen. Zaffirini Decl. ¶ 4, J.A. 518-19; Lichtman Report 13, J.A. 491. In stark contrast, with respect to the 2011 State Senate Plan, the State held a single public hearing in Austin with just two days notice to the public. Sen. Zaffirini Decl. ¶ 4, J.A. 518-19.

As for purportedly "ensur[ing] that the final plans fairly represented the relevant interests at stake," State Br. 8, the timeline of events is particularly instructive. The State released its Senate Plan at 5:00 p.m. on May 10, 2011, and announced that a public hearing would be held on the plan beginning at 9:00 a.m. on May 12, 2011. *See* Davis-Veasey Pls.' Exs., *Davis v. Perry*, No. 5:11-

cv-00788, Ex. 32 [Dkt. 63] (W.D. Tex. Nov. 4, 2011), S.A. 1a;[1] Sen. Zaffirini Decl. ¶ 4, J.A. 518-19. This simply was not a good faith attempt to provide sufficient notice to citizens throughout the State of Texas to travel to Austin, much less to do so with enough time to review and respond to the maps. *See id.* Of the 32 people who were able to attend the hearing on such short notice, 30 testified to voice their strong opposition to the proposed Senate Plan. *See* S.A. 1a. In the face of this opposition, Chairman Seliger gave legislators opposing the Senate Plan until 5:00 p.m. that same day to file any amendments. *See id.* The next day, over the objections of every minority senator to the dismantling of Senate District 10, the Senate Redistricting Committee passed the Senate Plan and sent it to the Senate floor. *See id.* Senator Davis offered two amendments on the Senate floor that provided alternatives to dismantling Senate District 10. Both were tabled on party lines, and the Senate Plan passed on May 17, 2011. *See id.* at 2a. The Senate allowed less than a week between releasing the statewide proposal on May 11, 2011 and passing the bill.

The supposed "public" hearing in the Texas House of Representatives was even more of a sham. On May 18, 2011, there was an announcement on the House floor that there would be a "public" hearing on the proposed Senate Plan at 11:00 a.m. *that same day. See id.* Moreover, that hearing was held in the

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[1] The S.A. designation refers to the supplemental appendix accompanying this brief.

Agriculture Museum, which unlike legislative committee rooms, does not contain any video or audio recording capabilities, thereby denying the broader public any access to the meeting at all. *See id.* Two minority representatives offered amendments at the hearing to remedy the problems with dismantling Senate District 10. *See id.* at 2a-3a. Once again, the amendments were defeated. The House voted for the bill along party lines just three days later on May 21, 2011, over the objection of minority representatives. *See id.* at 4a.

Finally, the State's characterization of the adoption of the Senate Plan as "near-unanimous," State Br. 10, ignores the fact that the Senate Plan was opposed by every minority legislator. As explained in Appellees' opening brief, these legislators ultimately voted for the bill only because the alternative would have been even worse. *See* Davis and LULAC Appellees Br. 12-13 (citing Sen. Ellis Decl. ¶ 5, J.A. 528).

Thus, the reality of the redistricting process in Texas is far different from the picture the State attempts to paint in its brief.

II. The D.C. Preclearance Litigation

The State's characterization of the preclearance litigation in the D.C. District Court is similarly inaccurate. The State attempts to shift the blame to the United States, Intervenors, and the D.C. District Court for the delays in the litigation, but the reality is that the failure to obtain preclearance is entirely due to bad strategic choices made by the State.

As an initial matter, the State fails to explain why a redistricting plan passed in May was not submitted for preclearance until July. The State also fails to explain why it chose to file a declaratory action in the D.C. District Court without at least simultaneously pursuing the more "expeditious alternative" of administrative preclearance, as have several other states in 2011. *Morris v. Gressette*, 432 U.S. 491, 503-04 (1977). As the United States explained in its brief, six other states submitted their statewide redistricting plans simultaneously for administrative and judicial preclearance, and in every single case, the plans were administratively precleared within 60 days. *See* United States Amicus Br. 1a-3a; *see also id.* at 23-24 (discussing the ways in which seeking administrative preclearance would have prevented the issues of which Texas now complains). Instead, having made the choice to delay pursuing preclearance at all, and then to pursue only judicial preclearance, the State now complains that the judicial process is too slow.

Primarily, the State takes issue with the United States' and Intervenors' insistence on having discovery and an adequate trial. Under the State's logic, anything short of rubberstamping the Legislature's plans is undue delay. But this approach is fundamentally at odds with the structure of Section 5, which places the weight of demonstrating that the plans are not retrogressive on the State to "'shift the advantage of time and inertia from the perpetrators of the evil to its victim.'" *Beer v. United States*, 425 U.S. 130, 140

(1976) (quoting H.R. Rep. No. 94-196, at 57-58 (1970)).

The State's attempts to shift the blame for its own choices also are based on misrepresentations of the procedural history. Contrary to the State's assertions that the D.C. District Court "denied Texas' motion" to expedite, State Br. 11, the court actually granted the only relief the State requested in its motion, which was to "schedule a telephonic status conference to resolve outstanding the [sic] scheduling issues as soon as practicable." Tex. Mot. to Expedite, *Texas v. United States*, No. 11-cv-01303, at 3-4 [Dkt. # 10] (D.D.C. Aug. 11, 2011). The Court held that status conference promptly and issued a preliminary schedule *granting* Texas the right to file an early summary judgment motion. Minute Order, *Texas v. United States*, No. 11-cv-01303 [Dkt. # 17] (D.D.C. Aug. 17, 2011).

Similarly, contrary to its representations, the State has been far from "alone in urging that a prompt decision was necessary" in the D.C. District Court. State Br. 12. Given the exigencies of the situation, the United States initially offered to begin trial as early as October 17, 2011, to facilitate a prompt decision from the D.C. District Court. Tex. Mot. to Expedite, *Texas v. United States*, No. 11-cv-01303, at 2 n.2 [Dkt. # 10] (D.D.C. Aug. 11, 2011). However, the State insisted that no trial was necessary and chose instead to move for summary judgment. Even after the State's motion was filed and it became clear that issues of discriminatory intent could not be resolved on summary judgment,

the State still stubbornly pursued its flawed legal strategy, declining the D.C. District Court's invitation to the State to withdraw its motion and instead move forward with an immediate trial. *See* Davis and LULAC Appellees Br. 18-19. Given its choices, the State cannot now be heard to complain that the preclearance process is not yet complete.

Though the State suggests otherwise, there is nothing sinister in the United States' or Intervenors' oppositions to a motion for summary judgment based on an incomplete record in which discriminatory intent is a major issue. Questions of whether a state had an impermissible motive in enacting its redistricting plan are not susceptible to summary disposition. *See Hunt v. Cromartie*, 526 U.S. 541, 553-54 & n.9 (1999). Thus, opposing summary judgment is not "gamesmanship," State Br. 47, it is good sense. And the D.C. District Court's recent opinion denying summary judgment to the State amply demonstrates that the opposition to summary judgment was neither frivolous nor unfounded.

Indeed, glaringly absent from the State's recitation of the "facts" regarding the preclearance litigation is any discussion of the fact that the D.C. District Court *denied* summary judgment to the State. The State barely mentions this. *See* State Br. 12. But the D.C. District Court decided on November 8, 2011 (just days after oral argument on the motion for summary judgment) that there were "material issues of fact in dispute that prevent[ed] th[e] Court from entering declaratory judgment that the three redistricting plans meet the requirements of Section

5 of the Voting Rights Act" and further held 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." Order, *Texas v. United States*, No. 1:11-cv-01303, at 1-2 [Dkt. # 106] (D.D.C. Nov. 8, 2011), J.A. 550-51.

On December 22, 2011, the D.C. District Court issued a memorandum opinion further explaining its rationale for denying summary judgment. First, the Court found that "Texas misjudged which districts offer its minority citizens the ability to elect their preferred candidates in both its benchmark and proposed Plans." Mem. Op., *Texas v. United States*, No. 1:11-cv-01303, at 24 [Dkt. #115] (D.D.C. Dec. 22, 2011), Texas Latino Redistricting Task Force Addendum 30a (hereinafter "Add."). It thus held that "[s]ince Texas used the wrong standard, there are material facts in dispute about which districts are minority ability districts in the benchmark and proposed Plans." *Id.*

Second, the court found that "[i]n counting ability [to elect] districts, Texas ignored those in which coalitions of minority voters and coalitions of minority and White voters formed to support the minority-preferred candidate." *Id.* at 43a. As the court recognized, however, "Section 5 requires such consideration in determining whether minorities have the ability to elect preferred candidates" and the "statute states no preference for how the minority group is able to elect its preferred candidate, whether by cohesive voting by a single

minority group or by coalitions made up of different groups." *Id.* at 43a-44a. With particular salience for Senate District 10, the D.C. District Court found that the "freedom from an obligation to create a crossover district under Section 2 does not equate to freedom to ignore the reality of an existing crossover district in which minority citizens are able to elect their chosen candidates under Section 5." *Id.* at 46a-47a.

Finally, the D.C. District Court noted that a "redistricting plan that does not increase a minority group's voting power, despite a significant growth in that minority group's population, may provide significant circumstantial evidence that the plan was enacted with the purpose of denying or abridging that community's right to vote." *Id.* at 51a. The court found that there were "genuine issues of material fact regarding whether the Plans were enacted with discriminatory intent," *id.* at 54a, and further remarked that Texas had not even "disputed many of the Intervenors' specific allegations of discriminatory intent," *id.* at 56a.

Whether the State's enacted plans will ever be precleared is highly doubtful, but will be determined only after a trial in the D.C. District Court that is scheduled to begin imminently. What is clear, however, is that although the State attempts to point the finger at everyone else for the delays in the preclearance process, the fault lies with no one but the State.

III. The Texas Litigation

Even as Texas criticizes the D.C. District Court for moving too slowly, it also casts aspersions on the

Texas District Court for moving too fast and beginning the time-consuming process of drawing interim plans "[e]ven before it became clear that the D.C. court would not issue a final decision on preclearance in time for the start of the 2012 election cycle." State Br. 16.

The Texas court, however, merely observed that "because a resolution of the Section 5 preclearance issues prior to the upcoming election deadlines [was] becoming more unlikely," the court had "an obligation to the public to consider other available options so that the 2012 election process may move forward." J.A. 216. In light of the "tremendous amount of work" required to implement an interim plan, the Texas Court asked for the full cooperation of the parties to propose interim plans. The court also appointed two employees of the Texas Legislative Council to assist it in its task. *See id.*

The State did not object to the court beginning the process of interim map drawing prior to the summary judgment disposition in the D.C. District Court. Indeed, the State encouraged the Texas court to move forward with proceedings so that interim maps could be in place if necessary. *See* Resp. in Opp. to Mot. to Stay, *Perez, et al. v. Perry*, No. 5:11-cv-00360, at 5-6 [Dkt. # 179] (W.D. Tex. Aug. 11, 2011) (urging the Texas court to "consider evidence and argument on the alleged defects in the plans so that it may enter a judgment or draw a remedial plan, as the case may be, in time for the 2012 elections to proceed"). Nor did the State object to the appointment of state employees as technical advisors

to the court, or the schedule proposed by the court for implementing interim maps. Instead, the State simply argued that the court should use its enacted, unprecleared plans as the interim maps. *See id.* For the reasons explained in Appellees' opening brief and below, that was not a viable option for the Texas court. Thus, although the State now complains that the Texas court imposed interim maps, the State not only did not object to the process below, it actually urged the court to move forward with the interim map drawing process. *See id.* at 7 (instructing the Texas court that "as a practical matter, the need to have a plan in place for the upcoming elections will require this Court to create an interim plan if preclearance is delayed or denied").

IV. The Interim Senate Order

The State devotes a total of three paragraphs in its 63-page brief to its discussion of the interim Senate Order. *See* State Br. 21-22. No doubt that is because any discussion of the court's interim Senate Plan would significantly undercut the State's argument in the remainder of its brief that the Texas court was insufficiently deferential to the State's enacted plans.

The Texas court originally proposed Plan S163 as the interim Senate plan on November 17, 2011. The court's proposal was *not* the plan proposed by Appellees, but rather one devised independently by the court assisted by its technical advisors. In its initial proposal, the court attempted to achieve minimal population deviations, with every district deviating from the ideal population by less than 1%.

Davis v. Perry, No. 5:11-cv-00788 [Dkt. # 86] (W.D. Tex. Nov. 17, 2011), J.A. 410. The State objected to this attempt to achieve population equality across all districts given that "Plaintiffs' only challenge relates to Senate District 10." J.A. 438. As to the court's redrawing of Senate District 10, the State "agree[d] with the Court's refusal to redraw Senate District 10 as requested by Plaintiffs" and acknowledged that all the court had done was to "return[] Senate 10 to its prior configuration." J.A. 442. The State also conceded that the court's plan was "in many ways based roughly on the legislatively enacted plan." J.A. 437.

The Texas court responded to the State's criticisms by abandoning its attempt to achieve minimal population deviations. In the final version of the interim plan, ordered into effect on November 23, 2011, the court kept completely intact 26 of the State's 31 legislatively enacted districts and restored Senate District 10 to exactly the same configuration that it had in the benchmark 2001 plan. Indeed, Senate District 10 in the court's interim map is completely identical – down to the block level – to Senate District 10 in the benchmark plan. *Compare* Plan S100 (Benchmark) Map, M.J.A. 74, *with* Court-ordered Interim Map, M.J.A. 73; *see also* Map Comparing Changes to Senate District 10, M.J.A. 75. Thus, as the court noted, its interim map simply "maintain[s] the status quo from the benchmark plan with regard to Senate District 10 pending resolution of the litigation in the District of Columbia but

otherwise ... use[s] the enacted map as much as possible." J.A. 408.[2]

Given the court's statement, as well as the State's own concession that the court's interim map was based on the State's legislatively enacted plan, the State's repeated mantra throughout its brief that the Texas court accorded "no deference to the State's duly-enacted maps," State Br. i; *see also id.* at 3, 27, 48, is flat-out wrong. The Texas court's interim Senate Plan uses 26 of the 31 legislatively enacted districts *exactly* as the Legislature drew them in 2011. Moreover, the configuration of District 10 is *exactly* as the Legislature drew it in 2001, and the remaining four districts are as close to the State's enacted plan as possible after adjusting for the reconfiguration of District 10. That is hardly "no deference."

SUMMARY OF ARGUMENT

1. The State's position before this Court is supported by neither law nor logic. The State acknowledges that it failed to obtain preclearance of its redistricting plans in time for the 2012 elections, but asks that it be permitted to use them nonetheless. This would render Section 5 of the Voting Rights Act effectively meaningless.

Longstanding precedent from this Court requires that an interim map must be put into place when

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[2] The court noted that while "[f]ive districts (9, 10, 12, 22, and 30) are different from the enacted map," the "changes to districts 9, 12, 22, and 30 are the result of keeping district 10 the same as in the benchmark." J.A. 408 n.2.

elections are imminent and the State has no legal map. That is exactly the situation here. Without preclearance, the State's legislatively enacted plans were not legally in effect. And the only plans that had been precleared and put into effect – the 2001 plans – were, by the time of the 2010 census, wildly malapportioned. The court below therefore acted in accord with this Court's precedent to prevent both the statutory violation that would occur if it were to permit the unprecleared plans to take effect, and the constitutional violation that would occur if it were to permit the malapportioned 2001 plans to remain in place. Though the State contends the court exceeded its remedial powers in implementing interim plans that differed from the State's enacted plans without making findings that the State's enacted plans violated the law, the State is addressing the wrong remedy.

As demonstrated in Appellees' opening briefs and herein, it would have been premature for the court below to address the proper remedy for the enacted plans' violations of Section 2 or the Constitution, because those claims were not yet ripe. And it would have been improper for the court below to address the proper remedy for violations of Section 5 because Section 5 determinations are committed to the exclusive jurisdiction of the D.C. District Court and the Attorney General. The Texas court therefore addressed only the issues that were properly before it, in keeping with well-established principles from this Court.

The State's insistence that the Texas court was required to defer in all instances to the State's enacted maps is flatly inconsistent with the requirements of Section 5. Moreover, the State's position is untenable as a practical matter. Had the court below simply ordered the State's plans into effect, preclearance still would have been required, which would recreate exactly the problem the court below was trying to remedy – impending elections with no precleared, properly apportioned map. The Texas court therefore did exactly what it was supposed to do, drawing its own interim maps that deferred to the State's enacted plans to a substantial degree, but also relying on the benchmark districts where deference was not possible.

2. Unable to persuade the Texas court to order its plans into effect without preclearance, the State now asks this Court to do just that. But this Court may not – consistent with the Voting Rights Act and the Constitution – order into effect a redistricting plan that has not been precleared and is subject to other significant legal challenges. Even assuming that the Court concludes that the Texas court acted prematurely or was insufficiently deferential when it put in place the interim plans, the remedy cannot be to direct use of maps that likely violate not only Section 5, but also Section 2 and the Fourteenth Amendment. And that is especially true given that use of the enacted maps now would itself require considerable delay and confusion as jurisdictions all over Texas undertake the very revisions of precincts (and preclearance thereof) that the Texas court

sought to avoid with the way it drew the interim plans.

If the Court does not affirm the orders below outright, there are two other options. First, the Court could remand to allow the preclearance process to play itself out. There will be a trial in the D.C. court this month, likely resulting in preclearance rulings in early February. At that point, the Texas court could devise new maps that repair any Section 5 violations found by the D.C. court (which are likely to be considerable), and in so doing, avoid any likely violations of Section 2 and the Constitution that the Texas court might find based on evidence that already has been adduced. Under that scenario, the State would get precisely what it purports to want – court orders tied to likely (or actual) violations of law.

The second alternative is to rule that even if the Texas court's interim map orders were improper in some way, the interim maps should still be used for the 2012 elections. This would allow the elections to move forward much more expeditiously, with much less delay, than any other alternative. Though in this scenario, the Court may conclude that the interim maps in some way intruded on the sovereign interests of the State, the court's interim maps still have the virtue that no one claims they deny the voters of Texas their rights under the Voting Rights Act and the Fourteenth Amendment. The same cannot be said of the State's enacted maps. Especially given that this unprecedented situation has been largely the fault of the State delaying its

preclearance efforts, the Court should not permit the State to use that delay to get a pass for 2012 on its obligations to respect the voting rights of its citizens.

Finally, to the extent the Court decides to remand rather than uphold the orders imposing the interim plans, the Court should not accept the State's invitation to decide now, without a full record and full argument, the merits of how the Voting Rights Act applies to the maps that Texas chose to enact in 2011, particularly with respect to coalition districts.

ARGUMENT

I. The District Court Acted Correctly in Drawing Its Own Map Based on Multiple Sources of Guidance, Including the Enacted Map.

A. Appellants Mischaracterize the Issues By Acting as if the Court Was Adjudicating a Challenge to the Enacted Map.

A central theme of the State's presentation is the notion that the Texas District Court was not acting as a court of law because, in drawing the interim maps, it was not attempting to remedy any violation of law. *See, e.g.,* State Br. 37-45. This is flatly wrong. The violation of law that the court was remedying was the State's failure to have available for use, at the start of the election process, district maps that were drawn using the data from the 2010 Census.

"When the decennial census numbers are released, States *must* redistrict to account for any changes or shifts in population.... And if the State

has not redistricted in response to the new census figures, a federal court will ensure that the districts comply with the one-person, one-vote mandate before the next election." *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003) (emphasis added) (citing *Branch v. Smith*, 538 U.S. 254 (2003); *Lawyer v. Dep't of Justice*, 521 U.S. 567 (1997); *Growe v. Emison*, 507 U.S. 25 (1993)). That is all the Texas court was doing. Under clear and well-established law, the interim maps were necessary to prevent the State from violating the constitutional rights of its voters by requiring them to vote using malapportioned districts.

The situation is no different in principle from that which arose in 2001, when the Texas legislature failed altogether to enact a new congressional map, and a federal district court was required to draw one itself in order to have available the right number equally populated districts. *See Balderas v. Texas*, No. 6:01cv158, 2001 U.S. Dist. LEXIS 25740 (W.D. Tex. Nov. 14, 2001), *summarily aff'd*, 536 U.S. 919 (2002). To be sure, the equitable principles governing how a court should draw an interim map may differ depending on whether the legislature has simply failed to pass a map, or has passed a map but failed to get a decision on preclearance. But there is no basis for the State's inflated rhetoric that the District Court was not acting like a court resolving a case or controversy. *See* State Br. at 37-40. The District Court was remedying a threatened constitutional violation caused by the State's failure to have a constitutional map available for use, and thus was playing a quintessentially judicial role.

See, e.g., McDaniel v. Sanchez, 452 U.S. 130, 153 n.35 (1981) ("The district courts ... have ample power to fashion interim remedies to avoid problems [caused by malapportionment of districts].").

For that reason, it is also wrong for the State to argue that the Texas court, if it was to retain a judicial role, had to convene a preliminary injunction hearing and make findings and conclusions about the likely legality of the enacted plans before taking any action. *See* State Br. 50-52. That misunderstands the nature of the legal claim the court was addressing and remedying. The court was forestalling the State's looming constitutional violation of the requirement of one-person one-vote as a result of its failure to have new maps ready to use. It was not addressing the legality of any maps that might emerge successfully from the preclearance process, because that issue was not yet presented. Indeed, it would have been "premature, given th[e] statutory scheme [under the Voting Rights Act], for the court to consider" any question other than whether the "state reapportionment enactments have ... been precleared in accordance with § 5." *Branch v. Smith*, 538 U.S. 254, 283 (2003) (Kennedy, J., concurring); *see also Connor v. Waller*, 421 U.S. 656 (1975) (*per curiam*); *United States v. Board of Supervisors of Warren Cnty.*, 429 U.S. 642, 646-47 (1977) (*per curiam*); *Connor v. Finch*, 431 U.S. 407, 412 (1977); *Wise v. Lipscomb*, 437 U.S. 535, 541-42 (1978) (opinion of White, J.). Once the court concluded that the State's maps would not be precleared in time for the election, it was left with the unwelcome obligation of crafting its own maps.

B. Because the Enacted Maps Were Not Legally in Effect, the District Court Was Correct That it Was Not Required to Accord Them Deference.

In deciding how to draw interim maps to address the State's failure to have legal maps ready for use in the 2012 primary election, the Texas court was correct that it was not required to defer to the enacted plans. The State's central argument – that its new maps had to be treated as presumptively lawful, and therefore had to be used as the interim maps except to the extent the Texas court found specific features to be likely violations of law – is erroneous. As a matter of law, the new maps are not legally in effect until precleared. That means – contrary to the State's claims – that they are not presumed to be lawful.

Section 5 mandates that election changes made by covered jurisdictions are not effective as law until the jurisdiction *proves* that its proposed change has neither the purpose nor the effect of denying or abridging the right to vote on account of race or language minority status. Section 5 thus reverses the usual presumption that a State law is valid unless proven otherwise. *See, e.g.*, *Georgia v. Ashcroft*, 539 U.S. at 471 (noting that the state "bears the burden of proof" in Section 5 actions) (citing *Pleasant Grove v. United States*, 479 U.S. 462 (1987)); *Beer*, 425 U.S. at 140 (Section 5 "shift[s] the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes

can be shown to be nondiscriminatory'") (quoting H.R. Rep. No. 94-196, at 57-58 (1970)); *Georgia v. United States*, 411 U.S. 526, 538 (1973) (same); *Young v. Fordice*, 520 U.S. 273, 285 (1997) (recognizing that the purpose of Section 5 is to "preserv[e] the status quo until the Attorney General or the courts have an opportunity to evaluate a proposed change"); *see also* United States Amicus Br. 13-14. The central flaw in the State's entire presentation is its refusal to accept this fundamental feature of Section 5. Unless and until preclearance of an election change in a covered jurisdiction has been granted, courts *cannot* presume that the State acted lawfully. *See* 42 U.S.C. § 1973c(a).

Attempting to paper over this problem, the State asserts that Section 5 "does not rob covered jurisdictions of [the] fundamental presumption of good faith." State Br. at 35. But Section 5 does exactly that. Section 5 "was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory." *Beer*, 425 U.S. at 140 (internal quotation marks omitted). Section 5 reversed that state of affairs, placing the burden of proving that a new voting law was not discriminatory on the State, and requiring the State to make that showing before the law could go into effect. The State's reliance on *Miller v. Johnson*, 515

U.S. 900 (1995), and *Upham v. Seamon*, 456 U.S. 37 (1982), in support of its position that it is entitled to a "presumption of good faith" in making that showing is completely misplaced. *See* State Br. 34-36.

The State takes the "presumption of good faith" language from *Miller* completely out of context. *Miller* was not a Section 5 case and had nothing at all to say about the presumptions that apply in the context of Section 5. Instead, the Court in *Miller* was adjudicating a claim of racial gerrymandering under *Shaw v. Reno*, 509 U.S. 630 (1993), mounted against a district map that had already been precleared. In that context, the Court simply observed that "[a]lthough race-based decisionmaking is inherently suspect until a claimant makes a showing sufficient to support that allegation, the good faith of a state legislature must be presumed." *Miller*, 515 U.S. at 915 (internal citations omitted). Thus, when bringing a racial gerrymandering claim, a plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 916. *Miller* is entirely inapposite to the situation presented here. Under Section 5, there is no presumption of good faith accorded to legislative enactments. Rather, Section 5 places the burden squarely on the covered jurisdiction to *prove* that its enactments are lawful. In fact, as this Court has held, whether or not a legislative enactment was made in "good faith" by a covered jurisdiction is entirely irrelevant. All that matters is that the change must receive preclearance

before it can be implemented. *See NAACP v. Hampton Cnty. Election Comm'n,* 470 U.S. 166, 180 (1985) (rejecting appellees' position that "the changes here at issue did not require preclearance because they were undertaken in good faith").

Nor does *Upham v. Seamon* support the State's claim that unprecleared district maps warrant deference and a presumption of good faith. *Upham* involved a court's failure to defer to the portions of a district map that *had* been approved by the Attorney General in the preclearance process. *See* Davis and LULAC Appellees Br. 39-42. The Court simply held that when a court is remedying violations of Section 5 identified by the Attorney General, it should not simultaneously change unrelated parts of the map that have been found to satisfy their burden under Section 5. *See id.* Here, by contrast, no part of any map has been precleared or denied preclearance. The State still bears the burden of proving that all aspects of its maps are consistent with the requirements of Section 5.

This reversal of the usual presumptions is reflected in the fact that preclearance is still required even when a court adopts a previously enacted map as its own by court order. *See Lopez v. Monterey Cnty.*, 519 U.S. 9, 22 (1996) ("[W]here a [federal] court adopts a proposal 'reflecting the policy choices ... of the people [in a covered jurisdiction] ... the preclearance requirement of the Voting Rights Act is applicable.'" (citation omitted; alterations in original)); *see also McDaniel*, 452 U.S. at 153. Even a federal court's order implementing a covered

jurisdiction's voting change does not suffice to create a presumption of validity or eliminate the need for preclearance, because Congress mandated that there be Section 5 review of *every* election change originating in the legislature of a covered jurisdiction. It was therefore both proper and eminently practical for the Texas court to draw its *own* interim maps and to do so without using the enacted maps as the starting point in every instance. Only by drawing its own interim maps could the Texas court avoid the need for preclearance.

Concerning this point, the State's only answer is to suggest that an unprecleared but judicially approved enacted plan could be used for the 2012 elections and precleared thereafter. State Br. 52-53. It cites for this proposition a Justice Department regulation – 28 C.F.R. § 51.18(d). But that regulation says nothing about the circumstances in which a federal court may properly authorize emergency use of an unprecleared change in election law enacted by a covered jurisdiction. It simply provides that *if* a court does authorize such an emergency use, doing so "does not exempt from section 5 review any use of that practice not explicitly authorized by the court." *Id.*; *see also* United States Amicus Br. 28. Moreover, even assuming that the regulation did authorize emergency exemptions from preclearance, it is of no help here to the State for two reasons.

First, no authority comes close to supporting the proposition that there is an emergency sufficiently serious to justify use of an unprecleared election

change ten months before the general election. To the contrary, this Court's precedent has demanded preclearance in similar circumstances. For example, in *Branch v. Smith*, 538 U.S. 254, 261-64 (2003), this Court unanimously upheld a federal district court's substitution of its own interim redistricting plan for one drawn by a state court, where the latter had not received preclearance. The substitution occurred in February of the first election year after the 2000 Census. No one even suggested that the federal court erred by not excusing the State from the preclearance requirement in such a factual setting.[3]

Second, even if this could be deemed an emergency, the State's argument is not so confined. It argues that a federal court must *always* defer to state policy choices reflected in election laws, even if those laws are unprecleared. That claim simply cannot be squared with the principle that a federal judicial blessing of an election change made by covered jurisdiction in no way eliminates the preclearance requirement. The State clearly is implicitly asking this Court to say that federal courts have plenary power to exempt state actions from the preclearance requirement. But such a ruling would be legally indefensible.

Finally, as the United States points out, the State's argument that a covered jurisdiction should receive a presumption of good faith if it is actively

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[3] *Johnson v. Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996), does not support Appellants' interpretation of this regulation. The district court in that case never ordered into effect an unprecleared redistricting plan.

seeking preclearance is both unsupported by the text of Section 5 and practically unworkable. *See* United States Amicus Br. 14. As a textual matter, Section 5 distinguishes solely between those plans that have *completed* the preclearance process and those that have not. And as a practical matter, there is no principled standard by which courts can determine how actively a state is pursuing preclearance. The State's proposed rule is legally indefensible and practically unworkable.

C. Although Deference Was Not Legally Mandated, the District Court Did Give Due Consideration to What the Legislature Had Passed.

Despite the principle that Section 5 reverses the usual presumption of validity, and despite the need for the Texas court's interim maps to deviate from the enacted plans in order to avoid retriggering the preclearance requirement, the Texas court did not totally disregard the enacted maps as the State repeatedly claims. Instead, the court below understood that it made sense to utilize those maps as a source of guidance because they were the most recent expression of the policy preferences of the elected representatives of the people of Texas. It therefore chose to model its districts on the Legislature's recent policy choices where it could do so without making either (1) Section 5 determinations that were jurisdictionally barred because committed to the D.C. District Court, or (2) Section 2 and constitutional determinations that

were prudentially barred as unripe until the preclearance process is complete.

That effort to defer where possible is particularly obvious in the court-ordered interim Senate Plan. For the most part, the State assiduously avoids discussion of the interim Senate Plan in its brief because any analysis of that plan would reveal that the State's claim that the Texas court "refus[ed] to grant *any* deference to Texas' legislatively enacted districting maps," State Br. 27 (emphasis in original), is demonstrably false.

As to the Senate Plan, because the "only objections raised to the State's enacted map in this litigation concerned Senate District 10," the Texas court concluded that the "appropriate exercise of 'equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy' was to maintain the status quo from the benchmark plan with regard to Senate District 10 pending resolution of the litigation in the District of Columbia but *otherwise to use the enacted map as much as possible*." J.A. 407-08 (footnote omitted; emphasis added). The court below thus kept intact 26 of 31 districts in the State's 2011 enacted plan. It redrew only Senate District 10 and the surrounding four districts to restore District 10 precisely to its pre-existing configuration in the only currently precleared, legislatively enacted map – the 2001 plan. *Compare* Plan S100 (Benchmark) Map, M.J.A. 74, *with* Court-ordered Interim Map, M.J.A. 73; *see also* Map Comparing Changes to Senate District 10, M.J.A. 75.

In restoring Senate District 10 to the exact same district as existed in the benchmark map, the Texas court's interim plan completely respected the policy choices of elected representatives in Texas as they were reflected in the Senate plan that was adopted in 2001 and precleared by the Department of Justice. And the remaining districts adhered to the State's policy choices in its 2011 plan. Thus, all 31 of the Senate districts in the three-judge court's interim plan reflect policy choices made at some point by the Texas Legislature. In fact, the Texas court's deference to the enacted Senate Plan was so complete outside of the Dallas area that it risked violating the principle that court-drawn maps reflecting state policy choices themselves require preclearance.

The claim that the Texas court failed to defer to the enacted maps is also untrue as to the other maps at issue, although the circumstances surrounding those maps imposed greater limitations on the court's ability to defer. With regard to the Congressional map, for example, the court was faced with an enacted map that was the product of a concerted effort to prevent any increases in the number of districts controlled by minority voters, despite the fact that the State gained four new seats only as a result of an increase in minority population. As a result, in D.C. and Texas, there are pending specific challenges to district configurations almost everywhere that minority population exists. Moreover, the Texas court knew that there was a "statewide" challenge to the overall reduction in the proportion of districts in which minority voters had

an opportunity to elect candidates of choice, as a result of the effort to prevent any net increase in the number of those districts as the State moved from 32 to 36 seats in Congress. In this situation, in order to avoid prejudging the merits of pending claims and produce a map that could fairly be seen as a judicial product not warranting preclearance review, the court needed to draw an interim map that departed much more substantially from the enacted plan than did the interim Senate map. The court also wanted to avoid splitting precincts so that the map caused fewer election administration difficulties and could be used expeditiously. But the Texas court still followed the Legislature's enacted map to a significant extent – for example in the Houston area, J.A. 140, between Houston and Austin, J.A. 141, and between San Antonio and Austin, J.A. 142.

The cases that the State relies upon for its argument that the district court's interim plans swept more broadly than necessary are entirely inapposite. *See* State Br. 43-44 (relying on *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971) and *Milliken v. Bradley*, 418 U.S. 717 (1974)). This is not a case where the court remedied problems that were strictly isolated in one area by also seeking to alter unrelated districts. Rather, the nature of the violation itself required adjustments to be made to avoid simply implementing the challenged plan and triggering a preclearance requirement, while also avoiding premature rulings on the challenges to the enacted plans.

Given the legal and practical constraints it was facing, there is no basis for faulting the District Court's decision to draw maps that reflected the lines both in the benchmark maps and in the recently enacted maps, while avoiding a premature ruling on the merits of particular claims pending in the D.C. and Texas litigation challenging the enacted maps. The State complains that this effectively meant that the court was granting relief to the challengers on all of their claims without ruling on the merits of those claims. State Br. 41-42. But the alternative – that the court should have adjudicated the merits of all of those claims, under Section 5, Section 2 and the Constitution – was simply not an option for the Texas court.

The State's suggested approach ignores the jurisdictional bar to courts outside D.C. adjudicating Section 5 claims, as well as the well-established principle that courts should not adjudicate other legal challenges to election changes until they have been precleared. *See* Davis and LULAC Appellees Br. 36-39. The State seems to think that these prohibitions do not apply as long as the court confines itself to making "preliminary" findings about the "likely" legality or illegality of enacted but unprecleared plans. *See* State Br. 50-51. But it cites no authority for that proposition and it makes no sense. If the court in Texas lacked jurisdiction to adjudicate Section 5 claims, it is hard to see how it can have jurisdiction to address those claims in a preliminary injunction proceeding – particularly when the same claims were already pending in a D.C. court.

Such a scheme would be flatly inconsistent with the concept of exclusive jurisdiction. In other contexts, where Congress has committed exclusive jurisdiction over statutory matters to one court, other courts have consistently found that they lack the authority to adjudicate preliminary injunction proceedings related to that exclusive grant of authority. *See, e.g., Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967-68 (D.C. Cir. 1982) (holding with regard to contract dispute actions against the United States committed to the exclusive jurisdiction of the Court of Federal Claims and Boards of Contract Appeals that "a district court has no power to grant injunctive relief in such a case"); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (holding with regard to FCC actions committed to the District of Columbia Circuit that "a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute"). There is no reason the rule should be any different here.

The State's argument also ignores the practical constraints facing the court below. Many of the challengers' claims involved fact-intensive allegations of intentional discrimination. *See Hunt*, 526 U.S. at 553-54 & n.9. Others involved novel questions of interpretation of Section 5 that the D.C. District Court was in the process of addressing for the first time. The Texas court had very limited time – given the looming candidate filing deadlines that already had been pushed back once – in which to develop interim plans that differed enough from the enacted plans that they would not themselves

require preclearance. Given the circumstances, the court adopted a practical approach of looking to several sources of guidance, deferring to the enacted plans where it could, but also maintaining the status quo of the benchmark plans to a substantial extent. This Court should not second-guess district courts and tie the hands of judges who have a duty to remedy constitutional one-person, one-vote violations by imposing temporary plans in the face of multi-jurisdiction lawsuits, numerous pending claims, complex factual circumstances and looming state law election deadlines.

In any event, the State's claim that the Texas court effectively accepted all of the challengers' arguments is also overstated. *See* State Br. 46-48. Concerning the Senate map, for example, Appellees argued not only (1) that the elimination of Senate District 10 was intentionally discriminatory and retrogressive, but also (2) that Section 2 of the Voting Rights Act required the creation of a new, compact district in which minority voters would constitute more that 50% of the citizens of voting age. *See* Statewide Map of Davis Plaintiffs' Proposed Senate Districts, M.J.A. 77. But the District Court did not draw such a district. It chose instead to take a more modest approach, simply restoring the *status quo ante*. *Compare id. with* Statewide Map of Court-Drawn Interim Texas Senate Districts, M.J.A. 73.

II. As Both a Legal and a Practical Matter, the State's Enacted Plans May Not Be Used for the 2012 Elections Unless and Until They Are Precleared.

Having presented a fallacious legal challenge to the Texas court's approach to interim mapping, the State then "goes for a home run," asking the Court to order the use of the enacted plans as the interim plans for 2012 rather than remand for application of whatever legal principles this Court decides the lower court misunderstood. *See* State Br. 54-55 (arguing that "this Court should vacate the interim orders and remand to the district court with instructions to impose Texas' legislatively enacted plan as the interim plan"). That would be both illogical and unjustified. First, as a practical matter, if primary elections are not going to be delayed, the only maps that can be used are the interim maps. Second, if primaries are going to be delayed, the only sensible approach is to allow the preclearance trial to proceed to a quick judgment, and then ask the Texas court to impose interim replacements for any maps not precleared, and to adjudicate pending challenges to any maps that are precleared. The alternative of allowing the State to use maps that are subject to very substantial legal challenges, just because it deliberately avoided a quick preclearance decision last summer, would be indefensible.

A. The State's Request to Be Allowed to Use the Enacted Maps Gets All the Practical Considerations Wrong.

It would make no practical sense for this Court to mandate use of the enacted plans on the theory that there is insufficient time for any other choice. In fact, use of the enacted plans would require a great deal of delay. Election officials are already extremely anxious about the proposed schedule for primary elections. *See* Texas Municipal League Correspondence to the Court, *Perez, et al. v. Perry*, No. 11-cv-360 [Dkt #567] (W.D. Tex. Dec. 22, 2011), 2 S.J.A. 23-26 (discussing difficulties for election officials in scheduling); Texas Conference of Urban Counties Joint Advisory Mem., *Perez, et al. v. Perry*, No. 11-cv-360 [Dkt. #565] (W.D. Tex. Dec. 21, 2011), 2 S.J.A. 16-22 (same); Texas Conference of Urban Counties Supp. Joint Advisory Mem., *Perez et al. v. Perry*, No. 11-cv-360 [Dkt. #571] (W.D. Tex. Dec. 29, 2011), 2 S.J.A. 1-15 (same). Ordering into effect the State's plans would merely heighten this anxiety given the great number of precinct changes that would be required to implement these plans. In contrast, the Texas court was fully aware of the burdens on election officials in drawing its interim plans and acted to minimize those burdens wherever possible.

The State's plans resulted in significant departures from the organization of electoral units in the benchmark plan, in particular by fragmenting minority voters into new districts throughout the State. In so doing, the State's plans split

substantially more precincts – or voter tabulation districts ("VTDs") – than the interim plans. *See* J.A. 116 n.24; *see also id.* at 102-03. Splitting VTDs is "'the single most troubling and realistic hurdle'" in implementing a new plan because it causes "enormous administrative and financial difficulties for local governments preparing for an election at the eleventh hour." *See id.* at 102 (quoting *Vera v. Bush*, 933 F. Supp. 1341, 1347 (S.D. Tex. 1996)). Thus, the Texas court was particularly mindful of its "obligation to ensure that the interim map does not contain split VTDs so that it is capable of being implemented under severe time constraints." *Id.* at 90. With respect to the House plan, the Texas court's interim map contains just 8 split VTDs in the entire state, while the State's enacted plan contains 412 split VTDs. *See id.* at 102-03. Similarly, the Texas court's interim congressional map contains just 3 split VTDs in the entire state, while the State's enacted plan contains 518 split VTDs. *See id.* at 116 n. 24. And the Texas court's interim Senate plan hews more closely to the benchmark plan, including by creating fewer splits to Tarrant County, thereby necessitating fewer changes. *Compare* M.J.A. 72, 73, 74, and 78; *see also* M.J.A. 75. Plainly the court's plans are more easily capable of implementation than are the State's.

In sum, there is not only no valid legal reason for the Court to order the State's legislatively enacted plans into effect, there is also no valid practical reason. On the basis of practicality alone, this Court should lift its stay and order the Texas court's interim plans into place.

B. Under No Circumstances Should the Court Mandate Use of Plans Subject to Substantial Legal and Constitutional Challenges.

Even assuming that the Texas District Court erred in promulgating its interim maps at the time it did so or was insufficiently deferential to the State's maps, there can be no legal justification for allowing the State to utilize the enacted maps for 2012 without first adjudicating the Section 5, Section 2 and constitutional challenges to the enacted maps that were properly filed by Appellees months ago. With ten months to go before the 2012 general elections, there is still time to assure that the people of Texas are not required to elect their representatives using maps that violate the Constitution and/or the Voting Rights Act.

As the D.C. District Court recently made clear, there are significant issues with the State's enacted maps. *See supra* pp. 11-12. Given that it is highly doubtful that the State's enacted plans will ever receive preclearance, as well as the serious Section 2 and constitutional challenges that remain pending in the Texas court, this Court cannot simply order the State's enacted plans into place for the 2012 elections.

The notion that it is simply too late to adjudicate the legality of the Texas maps and then repair any flaws cannot be squared with this Court's precedent generally forbidding the use of unconstitutional redistricting plans. As this Court held in *Reynolds v. Sims*, 377 U.S. 533 (1964): "[O]nce a State's

legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a Court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." 377 U.S. at 585. The Court elaborated on these principles in *Wise v. Lipscomb*, 437 U.S. 535 (1978), when it observed that "[l]egislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election make it impractical for them to do so, it becomes the 'unwelcome obligation,' ... of the federal court to devise and impose a reapportionment plan pending later legislative action." 437 U.S. at 540.

The State's claim that it is simply too late to do anything other than order the enacted plans into place for the 2012 elections is further belied by the events in Texas in 1996 when a three-judge court ruled in August that the congressional election that year would be conducted using a court-drawn interim map remedying a prior map that included racial gerrymandering, even though doing so would result in changes to the election schedule. *See Vera v. Bush,* 933 F. Supp. 1341, 1347 (S.D. Tex. 1996). If August of an election year is not too late to remedy legal flaws in redistricting maps, January certainly is not too late.

Nor does the regulation cited by the State provide a legal basis for avoiding adjudication of the pending claims. *See* State Br. at 55 (citing 28 C.F.R. § 51.18(d)). Even assuming that the regulation could

properly be read to say that it would be consistent with Section 5 for the Texas court to order use of an unprecleared legislatively enacted plan for the 2012 elections, *but see supra* p. 27, the regulation does not purport to authorize courts to disregard substantial challenges to redistricting plans brought under the Constitution or Section 2. It simply does not address that issue. Nor would the Department of Justice have any right to grant such an authorization. Such matters are within the province of the courts, not the Department of Justice.

Rather than authorizing the State of Texas to conduct elections using maps that potentially violate the law, the Court has two other options if it concludes interim map orders were premature or otherwise unsound. First, it can remand to allow the adjudication process to go forward. We now know (as the Court did not when it noted probable jurisdiction) that there will be a trial in the preclearance case this month, culminating in likely rulings early in February. At that point, the Texas court could devise maps that remedy any violations of Section 5 that are found by the D.C. court, as well as remedy any likely violations of Section 2 and the Equal Protection Clause. The evidence needed for the latter rulings is all, or nearly all, in the Texas record. If the process is allowed to go forward in this normal way, Texas will have received exactly what it purports to want – orders changing the enacted maps that are tied to specific findings of illegality.

Alternatively, if the time is too short as the State now claims, the only feasible and lawful other choice

is to direct that the elections be conducted using the interim maps. Even if the Court concludes that these maps came too soon or departed too much from the State's enacted maps, no one is now claiming that they violate anyone's voting rights. The same obviously cannot be said about the maps that the Texas Legislature chose to pass last year. "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds*, 377 U.S. at 562. If this Court concludes its only choice is between using maps with serious alleged infringements citizens' voting rights and using maps without such allegations, the answer is obvious. *See also, e.g.,* United States Amicus Br. 33-34.

Moreover, as a practical matter, the local jurisdictions in Texas have made clear that they are much more prepared to conduct primary elections using these maps than any others. *See* Texas Municipal League Correspondence to the Court, *Perez, et al. v. Perry*, No. 11-cv-360 [Dkt #567] (W.D. Tex. Dec. 22, 2011), 2 S.J.A. 23-26 (discussing difficulties for election officials in scheduling); Texas Conference of Urban Counties Joint Advisory Mem., *Perez, et al. v. Perry*, No. 11-cv-360 [Dkt. #565] (W.D. Tex. Dec. 21, 2011), 2 S.J.A. 16-22 (same); Texas Conference of Urban Counties Supp. Joint Advisory Mem., *Perez et al. v. Perry*, No. 11-cv-360 [Dkt. #571] (W.D. Tex. Dec. 29, 2011), 2 S.J.A. 1-15 (same). For ease of implementation, the court's maps are clearly superior to the State's.

C. To the Extent Any Remand Is Necessary, the Court Should Not Adopt the State's Invitation to Reject Protection of Coalition Districts Under the Voting Rights Act.

The State's final effort to avoid fair adjudication of the pending claims is a set of requests for "guidance" on remand that misstate the nature of the issues pending below. *See* State Br. 55-62. In particular, the State demands that this Court make certain pronouncements about the inapplicability of Sections 2 and Section 5 of the Voting Rights Act to coalition and crossover districts. *See id.* at 57-59. In the State's view, such districts – like Senate District 10 – simply are not protected at all under the Voting Rights Act. *See id.* at 22.[4] But this contention distorts the holding of *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009). In *Bartlett*, this Court expressly reserved the question of whether coalition districts, in which minority voters coalesce to elect their candidates of choice, are cognizable under Section 2. *Id.* at 1242. Moreover, *Bartlett* held that, "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Id.* at 1249. That is precisely one of the claims in this case.

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[4] Although the State argues that certain coalition districts created in the interim Congressional plan do not suffice for political cohesiveness under the *Gingles* factors, *see* State Br. 57-59, the State makes no such argument with respect to Senate District 10.

In accordance with this Court's statement in *Bartlett*, the D.C. District Court correctly held that "freedom from an obligation to *create* a crossover district under Section 2 does not equate to freedom to *ignore* the reality of an existing crossover district in which minority citizens are able to elect their chosen candidates under Section 5." Add. 46a-47a (emphasis in original). Yet, that is just what the State did in dismantling Senate District 10, and the lower courts should be free to adjudicate this issue.

Thus, to the extent this Court provides "guidance" to the Texas court on remand, it should reiterate that the Voting Rights Act prohibits a State from dismantling an effective crossover or coalition district in which minority citizens are able to elect their candidates of choice. That is not only consistent with this Court's decision in *Bartlett*, but also with longstanding Fifth Circuit precedent recognizing the viability of coalition districts as a protected method by which minority voters can elect candidates of choice. *See, e.g.*, *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988).

Though the United States as *amicus curiae* disagrees with Texas that coalition districts are unprotected under the Voting Rights Act, it partially supports the State's position that a remand may be in order for the Texas court to "lay a sufficient foundation for the use of coalition districts." United States Amicus Br. 32.[5] But it is unclear why the

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[5] The United States agrees with Appellees that no remand is necessary as to the Senate Plan and that the Texas court's

Texas court should be required to provide further explanation for drawing *any* coalition districts. It is curious, to say the least, that in a majority-minority state like Texas, majority-minority districts (including coalition districts) require some special justification whereas Anglo-majority districts do not. Such a position presumes that Anglo districts are the norm and anything else is the exception. But the demographics of Texas strongly suggest that no such presumption should apply. For this reason, the Texas court should not be required to provide any further explanation for its use of coalition districts in the interim plans.

CONCLUSION

The decision of the United States District Court for the Western District of Texas ordering into effect an interim district plan for the Texas Senate should be affirmed.

January 3, 2012 Respectfully submitted:

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order with respect to the Senate Plan should be affirmed. *See* United States Amicus Br. 30.

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Supplemental Appendix

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EXHIBIT 32

Senate Redistricting Timeline - 2011

Senate Committee Action

5/10/11 - Notice given of hearing on Senate Redistricting to be held on 5/12 at 9am

- o Map finally released to the public after 5:00PM same day

5/12/11 – Hearing on Senate map

- o Insufficient public notice hampered effective public participation
- o Of the 32 people from the entire state who testified for or against the proposed map – 30 (94%) testified strongly against the proposed senate map
- o Chairman Seliger gave committee members a 5:00 PM deadline of 5/12 to submit any amendments to the map. This was done to purposefully limit any attempts to improve the map from a minority voting rights perspective and to limit the ability of minority voters and their elected representatives from effectively participating in the political process

5/13/11 – Redistricting Committee Meeting

- o No public participation or testimony was permitted
- o Committee passes the senate map over objections to SD 10 by every minority state senator

Senate Floor Action
5/16/11 - Bill placed on Senate Intent Calendar

5/17/11 - Bill taken up on Senate floor and voted out

- Senator Davis offers 2 amendments as alternatives to District 10; both are tabled along party lines (19-12)

5/17/11 - Bill is passed out of Senate, sent to the House, referred to House Redistricting Committee all in the same day

House Committee Action
5/18/11 – announcement from house floor that the redistricting committee will meet at 11:00 am that same day. This was inadequate notice of a hearing

5/18/11- House Redistricting Committee Convenes at 11:00 in the Agriculture Museum.

o Committee meets in the Agriculture Museum, which unlike actual committee facilities has no video or audio recording capabilities, thereby denying public viewing or inspection of any maps.

o Chairman Solomon states that he does not want any amendments to the Senate map.

o African American Rep. Marc Veasey and Hispanic Rep. Roberto Alonzo offered amendments which would have remedied the significant retrogressive

features in the proposed senate plan. Their amendments were rejected with all but one of the Members who represent effective minority districts voting in support of the Veasey and Alonzo amendments.

o Committee passes the Senate map without any amendments, again with all Members who represent effective minority districts voting no, except one. The lone minority member to support the plan was Representative Aaron Pena who switched parties to become a Republican AFTER the 2010 election, when he was re-elected as a Democrat.

House Floor Action

5/18/11 - Bill is considered in House Calendars Committee for placement on a House floor calendar

5/20/11 - Bill is placed on the House Major State Calendar

- This is the most important House calendar and takes precedence over other calendars

5/20/11 - Bill is brought up on the House floor and is voted out on second reading

- Rep. Alonzo offers amendment to create Hispanic opportunity district for Senate District 10; amendment is voted down along party lines (98-46)

- Rep. Martinez Fischer offers amendment to create minority opportunity districts in both SD 10 and SD 17 (Sen. Huffman); amendment is tabled along party lines (99-44)
- Rep. Veasey offers same amendment he offered in committee; Rep. Solomons (redistricting chair) moves to table; amendment is tabled along party lines (96-42)
- Rep. Veasey offers amendment which is alternative Senate map for the entire state; Rep. Solomons moves to table; amendment is tabled along party lines (98-44)
- Rep. Turner offers amendment on behalf of Legislative Black Caucus; amendment is tabled (Rep. Solomons' motion) along party lines (93-48)
- Bill is voted on 2nd reading along party lines (92-48)

5/21/11 - Bill is passed on 3rd reading along party lines (96-47)