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

In the Supreme Court of the United States

PERRY, GOVERNOR OF TEXAS, ET AL.,
Appellants,
v.
SHANNON PEREZ, ET AL.,

PERRY, GOVERNOR OF TEXAS, ET AL.,
Appellants,
v.
WENDY DAVIS, ET AL.,

PERRY, GOVERNOR OF TEXAS, ET AL.,
Appellants,
v.
SHANNON PEREZ, ET AL.

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

JOINT APPENDIX, Vol. 2 of 5

JOSE GARZA
Counsel of Record
LAW OFFICE OF
JOSE GARZA
7414 Robin Rest Drive
San Antonio, Texas 78209
(210) 392-2856
garzpalm@aol.com

Counsel for the Mexican American Legislative Caucus

PAUL D. CLEMENT
Counsel of Record
CONOR B. DUGAN
BANCROFT PLLC
1919 M St. N.W.
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Appellants

December 21, 2011 (Counsel continued on inside cover)

11-713, 11-714, 11-715, Appeal Docketed December 12, 2011
11-713, 11-714, 11-715, Probable Jurisdiction Noted December 9, 2011

NINA PERALES
MEXICAN AMERICAN LEGAL DEFENSE And EDUCATION FUND
110 Broadway, Suite 300
San Antonio, Texas 78205
(210) 224-5476
(210) 224-5382 fax
nperales@maldef.org

Counsel for Texas Latino Redistricting Task Force

CHAD W. DUNN
BRAZIL & DUNN
4201 FM 1960 West, Suite 530
Houston, Texas 77068
(281) 580-6310
(281) 580-6362 fax
chad@brazilanddunn.com

Counsel for Texas Democratic Party

LUIS ROBERTO VERA, JR.
LAW OFFICES OF LUIS ROBERTO VERA, JR. & ASSOCIATES
1325 Riverview Towers
111 Soledad
San Antonio, Texas 78205-2260
(210) 225-3300
irvlaw@sbcglobal.net

Counsel for LULAC

MAX RENEA HICKS
LAW OFFICE OF MAX RENEA HICKS
101 West Sixth Street, Suite 504
Austin, Texas 78701
(512) 480-8231
(512) 480-9105 fax
rhicks@renea-hicks.com

Counsel for the Rodriguez Appellees

GREG ABBOTT
Attorney General of Texas
JONATHAN MITCHELL
Solicitor General of Texas
DAVID J. SCHENCK
JAMES D. BLACKLOCK
MATTHEW H. FREDERICK
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

Counsel for Appellants

TABLE OF CONTENTS

VOLUME 1

VOLUME 2

VOLUME 3

VOLUME 4

VOLUME 5

Congress

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 11-CA-360-OLG-JES-XR
[Lead case]

SHANNON PEREZ, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

FILED: 08/31/11
Document 275

ORDER

Pending before the Court is Defendants' Motion for Partial Summary Judgment and supporting memorandum of law (Dkt. # 210). Plaintiffs have filed responses thereto (Dkt. # 226, 229, 230, 232, 233,236,237,239 and 242). Defendants have also filed a reply Dkt. #25 1). After reviewing the record and the applicable law, the Court finds that Defendants' motion should be granted in part on the Fifteenth Amendment claims, but otherwise denied.

I.

Statement of the case

This is a voting rights case arising out of recently enacted legislative redistricting plans. The decennial census was conducted last year, pursuant

to Article I, 2 of the U. S. Constitution. After the census figures were released, the State of Texas undertook redistricting efforts to apportion seats in the U. S. House of Representatives and the Texas House of Representatives. See U.S. CONST. Art. I, 2; see also TEX. C0NST. Art. III, § 26.

The 82nd Texas Legislature enacted House Bill 150 ("H.B. 150"), which established a new redistricting plan for the Texas House of Representatives. ("Plan H283"). House Bill 150 was signed into law on or about June 17, 2011. The legislature also enacted Senate Bill 4 ("S.B. 4"), which established a new congressional redistricting plan for the State of Texas. ("Plan C185"). Senate Bill 4, as amended, was signed into law on or about July 18, 2011. A lawsuit for judicial preclearance of both plans has been filed and is currently pending in the U.S. District Court for the District of Columbia. The plaintiffs herein challenge the legality of the new redistricting plans and seek to enjoin Defendants from implementing the plans.

II.

The parties' claims and defenses

There are numerous parties to this consolidated action, and most of the pleadings have been amended since the inception of the lawsuit. The live pleadings, and the claims and defenses asserted therein, may be summarized as follows:

A. The Quesada plaintiffs:[1]

These plaintiffs include Margarita Quesada, Romeo Munoz, Marc Veasey, Jane Hamilton, Lyman King, John Jenkins, Kathleen Maria Shaw, Debbie Allen, Jamaal R. Smith, and Sandra Puente. They describe themselves as Hispanic and African-American citizens and registered voters that reside in current congressional districts 6, 9, 18, 20, 24, 26, 29, 30 and 33.

The Quesada plaintiffs challenge the legality of Plan C185, the congressional redistricting plan. They allege that the plan clearly dilutes the voting strength of African-American and Hispanic voters. They claim that the districts in Plan C185 are "racial gerrymanders" and the plan intentionally discriminates against Hispanic and African-American persons, in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. They also assert that Plan C185 is a "blatant partisan gerrymander," in violation of Article I, Sections 2 and 4 of the U.S. Constitution, and the First and Fourteenth Amendments to the U.S. Constitution. The Quesada plaintiffs allege that Plan C185 violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because minority voters are denied an equal opportunity to effectively participate in the political process and will not have any meaningful influence in elections for Members of congress in Texas. Finally, they assert that Plan C185 cannot be implemented because S.B. 4, as amended, has not been precleared

[1] The Quesada plaintiffs' live pleading is their first amended complaint, Dkt. # 105.

pursuant to Section 5 of the Voting Rights Act. The Quesada plaintiffs request declaratory and injunctive relief and seek recovery of their costs and attorneys fees.

The Quesada plaintiffs name Rick Perry, Governor of the State of Texas, and Hope Andrade, the Texas Secretary of State, as Defendants. They have filed an answer, generally denying the allegations and specifically asserting the following defenses: standing; immunity under the Eleventh Amendment; and, the cause of action under Section 5 of the Voting Rights Act is not justiciable.[2]

B. The MALC plaintiffs:[3]

The Mexican American Legislative Caucus ("MALC") is described as a non-profit organization established to serve members of the Texas House of Representatives that are elected from and represent constituencies in Latino majority districts. Many of the representatives elected to serve the districts are also Latino. Members of MALC are also registered voters in Texas, and participate in state and local elections.

MALC challenges the legality of Plan C185, the congressional redistricting plan, and Plan H283, the Texas House of Representatives redistricting plan. MALC claims that both plans far exceed permissible deviation limits and cannot be justified by legitimate state redistricting interests. MALC alleges that the

---

[2] The Defendants' answer to the Quesada plaintiffs' first amended complaint is Dkt. # 195.

[3] The MALC plaintiffs' live pleading is their second amended complaint, Dkt. # 50.

Texas legislature employed racial gerrymandering techniques to dilute the voting strength of Hispanics and limit the number of districts in which Hispanics can elect candidates of their choice. MALC asserts a cause of action under 42 U.S.C. § 1983 for intentional discrimination and "discriminatory effect" in violation of the Fourteenth and Fifteenth Amendments to the U.S. Constitution. MALC also brings an equal protection claim under 42 U.S.C. 1983 for violations of the "one person, one vote" principle. MALC asserts a cause of action under Section 2 of the Voting Rights Act, 42 U.S.C. 1973, alleging that Defendants used racial gerrymandering to dilute Hispanic voting strength and avoid drawing minority opportunity districts when such districts were clearly justified under the circumstances. Finally, MALC contends neither plan can be implemented because they have not been precleared pursuant to Section 5 of the Voting Rights Act. MALC requests declaratory and injunctive relief, and seeks recovery of all costs and fees.

The named Defendants in MALC's complaint are: the State of Texas; Rick Perry, the Governor of the State of Texas; David Dewhurst, Lieutenant Governor for the State of Texas; and Joe Straus, Speaker of the Texas House of Representatives. They have filed an answer, generally denying the allegations and specifically asserting the following defenses: standing; immunity under the Eleventh Amendment; and, ripeness.[4]

---

[4] Defendants' answer to MALC's second amended complaint is Dkt. # 110.

C. The Latino Redistricting Task Force:[5]

The Latino Redistricting Task Force ("LRTF") describes itself as an unincorporated association of individuals and organizations committed to securing fair redistricting plans for Texas. The organizational members include Hispanics Organized for Political Education (HOPE), the Mexican American Bar Association, the National Organization for Mexican American Rights, the Southwest Voter Registration Education Project, the William C. Velasquez Institute, and the Southwest Workers' Union. The individual members are described as Latino registered voters who have been adversely affected by the dilution of Latino voting strength in the newly enacted redistricting plans.

The LRTF challenges the legality of Plan C185, the congressional redistricting plan, Plan H283, the Texas House of Representatives redistricting plan. As a result of the dramatic increase in the Latino population, which is geographically compact and politically cohesive, the creation of Latino-majority districts appeared axiomatic. However, the 821 Legislature allegedly packed and fractured Latino voters into districts that ensured a loss in voting strength. The LRTF claims that both plans discriminate against them, in violation of the Fourteenth and Fifteenth Amendments to the U.S. Constitution. The LRTF asserts that both plans have the effect of "canceling out or minimizing" their voting strength as minorities and result in a denial or abridgement of their right to vote, in violation of

---

[5] The Latino Redistricting Task Force plaintiffs' live pleading is their second amended complaint, Dkt. # 68.

Section 2 of the Voting Rights Act, 42 U.S.C. 1973. The LRTF also asserts that the plans cannot be implemented until they have received preclearance under Section 5 of the Voting Rights Act, 42 U.S,C. 1973c. The LRTF requests declaratory and injunctive relief, and seeks recovery of their costs and fees.

The LRTF names Rick Perry, Governor of the State of Texas, and Hope Andrade, Secretary of State for the State of Texas, as Defendants. They have filed an answer, generally denying the allegations and specifically asserting the following defenses: standing and Eleventh Amendment immunity.[6]

D. The Perez plaintiffs:[7]

The Perez plaintiffs are individuals who reside and vote in various counties in the State of Texas and have been adversely affected by the newly enacted redistricting plans. The Perez plaintiffs challenge the legality of Plan C185, the congressional redistricting plan, and Plan H283, the Texas House of Representatives redistricting plan. They assert that the minority populations in many counties have been packed and/or fragmented for the purpose of diluting their voting strength. They claim that the plans are the result of racial and political gerrymandering and include population deviations well above constitutionally acceptable norms. They

---

[6] Defendants' answer to the Latino Redistricting Task Force's second amended complaint is Dkt. # 132.

[7] The Perez plaintiffs' live pleading is their third amended complaint, Dkt. # 53.

also claim that the misapplication of the prison population resulted in even more dramatic population deviations. The Perez plaintiffs claim that these actions by the State violate Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the U.S. Constitution. They seek declaratory and injunctive relief and recovery of their costs and fees.

The Perez plaintiffs name Rick Perry, Governor of the State of Texas; David Dewhurst, Lieutenant Governor of the State of Texas; Joe Straus, Speaker of the Texas House of Representatives; and, Hope Andrade, Secretary of State for the State of Texas, as Defendants. They filed answer, generally denying most of the allegations, and specifically assert the following defenses: (1) the classification of prisoners for purposes of redistricting is a nonjusticiable political question, which falls outside the Court's jurisdiction; (2) "political gerrymandering" is a nonjusticiable political question; (3) the Perez plaintiffs lack standing to challenge the classification of prisoners for purposes of redistricting; (4) the challenge to the classification of prisoners fails to state a claim upon which relief may be granted; (5) the Perez plaintiffs fail to state a claim against lieutenant Governor Dewhurst and Speaker Straus for which relief may be granted because they do not have the authority to alter the redistricting plan and/or prevent an election from going forward; and (6) Eleventh Amendment immunity.[8]

---

[8] Defendants' answer to the Perez plaintiffs' third amended complaint is Dkt. # 131.

E. The Rodriguez plaintiffs:[9]

The Rodriguez plaintiffs include about twelve individuals who reside and vote in current congressional districts 10, 12, 15, 16, 18, 20, 21,25. All of the Rodriguez plaintiffs are minorities. The plaintiffs also include Travis County, Texas and the City of Austin, Texas.

The Rodriguez plaintiffs challenge the legality of Plan C185, the congressional redistricting plan. They claim that there were several areas of Texas in which majority-minority districts could have been created, based on the 2010 census data. Yet the Texas Legislature engaged in purposeful, race-based discrimination to ensure that the voting power of minority voters was diminished. They also assert that the Texas Legislature deliberately fractured the tri-ethnic coalition enjoyed by voters in Travis County and the City of Austin, and the legislature's blatant racial gerrymandering will effectively prevent minority voters from having any meaningful impact on congressional elections for the next ten years.

The Rodriguez plaintiffs bring causes of action under Section 2 of the Voting Rights Act, as well as the Fourteenth and Fifteenth Amendments to the U.S. Constitution. They further assert that Plan Cl 85 cannot be implemented until precleared, pursuant to Section 5 of the Voting Rights Act. They

---

[9] The Rodriguez plaintiffs' live pleading is their first amended complaint, filed as Dkt. # 23 in Cause No. 11-CA-635 prior to consolidation.

seek declaratory and injunctive relief, and recovery of their costs and fees.

The Rodriguez plaintiffs name the following persons and entities as Defendants: Rick Perry, Governor of the State of Texas; David Dewhurst, Lieutenant Governor of the State of Texas;Joe Straus, Speaker of the Texas House of Representatives; Hope Andrade, Secretary of State for the State of Texas; Boyd Richie, Chair of the Texas Democratic Party; and, Steve Munisteri, Chair of the Republican Party of Texas. The Defendants have filed an answer, generally denying most of the allegations and specifically asserting the following defenses: (1) the individual plaintiffs do not live in congressional district 27; thus, they lack standing to challenge the constitutionality of that district under Plan C185; (2) the Section 2 challenge to congressional districts that include Tarrant and Travis counties fails to state a claim upon which relief may be granted; (3) the Rodriguez plaintiffs cannot prove actual intent to discriminate based on race or ethnicity; (4) the Fifteenth Amendment claim must fail because the Rodriguez plaintiffs cannot prove that minorities are prevented from voting in congressional elections; (5) the Rodriguez plaintiffs lack standing to assert claims against Lieutenant Governor Dewhurst and Speaker Straus because their injuries are not traceable to them and neither the Lieutenant Governor nor the Speaker have the authority to take the corrective action being sought; and, (6) the Section 5 claim is nonjusticiable, as

Defendants do not intend to implement the Plan until preclearance is granted.[10]

F. Mr. John Morris. individually:[11]

Mr. Morris sued individually, on behalf of himself only. He describes himself as a resident and registered voter in the 2nd congressional district, which includes Harris County, Texas.

Mr. Morris challenges the legality of Plan C185, the congressional redistricting plan. He claims that the congressional district in which he resides was drastically changed as the result of partisan gerrymandering, effectively depriving him of his right to vote for the candidate of his choice. Plaintiff Morris asserts causes of action for violations of Article I, Section 2 of the U.S. Constitution and the Fourteenth Amendment to the U.S. Constitution. He seeks declaratory and injunctive relief, and recovery of any costs incurred herein.

Plaintiff Morris names Rick Perry, Governor of the State of Texas; David Dewhurst, Lieutenant Governor of the State of Texas; Joe Straus, Speaker of the Texas House of Representatives; and, Hope Andrade, Secretary of State for the State of Texas, as Defendants. They have filed an answer, generally denying the allegations and specifically asserting the defenses of standing and Eleventh Amendment immunity.

---

[10] Defendants' answer to the Rodriguez plaintiffs' first amended complaint is Dkt. # 133.

[11] Plaintiff Morris' live pleading is his amended complaint, filed as Dkt. #7 in Cause No. 11-CA- 615 prior to consolidation.

G. Intervenor-plaintiff LULAC:[12]

LULAC is described as the oldest and largest national Hispanic civil rights organization, with a history of promoting voting rights on behalf of Hispanics and other minorities. Gabriel Rosales and others, who are individually named along with LULAC, are members of the organization. They are also registered voters in the State of Texas. They are collectively referred to as LULAC.

LULAC challenges the legality of Plan C185, the congressional redistricting plan, and Plan H283, the Texas House of Representatives redistricting plan. LULAC asserts that Hispanic growth exploded during the last ten years, as reflected in the 2010 census results. As a direct result of that growth, Texas was apportioned four new congressional districts. However, the Texas Legislature used racial gerrymandering to ensure that Hispanics would not be able to elect the candidate of their choice in any of the new districts. Plan H283 actually reduces the number of minority opportunity districts. LULAC claims that the plans dilute the voting strength of Hispanic and other minority voters, in violation of Section 2 of the Voting Rights Act. LULAC also claims that the State failed to accommodate the "undercount" of the Hispanic population in the census, further resulting in diminished voting strength in the Hispanic community. LULAC contends the plans contain substantial population disparities, in violation of the Fourteenth

---

[12] LULAC's live pleading is its first amended and supplemental complaint, Dkt. # 78.

Amendment's equal protection clause and the one person, one vote principle.

LULAC brings its claims under 42 U.S.C. § 1983 for violations of the Fourteenth and Fifteenth Amendments, based on allegations of intentional discrimination, discriminatory effect, and violations of the one person, one vote principle. LULAC also brings a cause of action under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, for dilution of minority voting strength. LULAC further contends that implementation of the plans prior to preclearance would violate Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. LULAC requests declaratory and injunctive relief and seeks recovery of its costs and fees.

LULAC names as Defendants: the State of Texas; Rick Perry, Governor of the State of Texas; David Dewhurst, Lieutenant Governor of the State of Texas; and, Joe Straus, Speaker of the Texas House of Representatives. They have filed an answer, generally denying the allegations and specifically asserting the following defenses: (1) Eleventh Amendment immunity; (2) the claim under Section 5 of the Voting Rights Act is not justiciable; and, (3) LULAC "lacks standing" to pursue its claims against the Lieutenant Governor and Speaker of the House.[13]

---

[13] The Defendants' answer to Plaintiff-Intervenor LULAC's first amended and supplemental complaint is Dkt. # 188.

H. Plaintiff-intervenor NAACP:[14]

The NAACP Plaintiff-intervenors include the Texas State Conference of NAACP Branches and individually named members and registered voters, including Howard Jefferson, Juanita Wallace, and Rev. Bill Lawson. They are referred to collectively as the NAACP plaintiff-intervenors.

The NAACP plaintiff-intervenors challenge the legality of Plan C185, the congressional redistricting plan, and Plan H283, the Texas House of Representatives redistricting plan. They contend that both plans dilute the voting strength of African-American voters. The 821 Texas Legislature was presented with plans that did not dilute minority voting strength, but rejected them. Instead, the Legislature enacted redistricting plans that split the minority voting bloc and preventing them from effectively participating in the political process. The NAACP plaintiff-intervenors allege that the newly-enacted plans were developed with the intent to disadvantage African-American and other minority voters. They alleged that the plans exceed permissible population variances, and clearly violate the one person, one vote principle. They also assert that the plans cannot be implemented until precleared, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

The NAACP plaintiff-intervenors assert a cause of action under 42 U.S.C. § 1983 for intentional discrimination and violations of the one person, one

---

[14] Plaintiff-Intervenor NAACP's live pleading is its amended complaint, Dkt. # 69.

vote principle embodied within the Fourteenth Amendment to the U.S. Constitution. They also assert a cause of action under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, based on the dilution of minority voting strength. They also note that the plans cannot be implemented prior to preclearance, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The NAACP plaintiff-intervenors request declaratory and injunctive relief, and seek recovery of their costs and fees.

The NAACP plaintiff-intervenors name as Defendants: the State of Texas; Rick Perry, Governor of the State of Texas; David Dewhurst, Lieutenant Governor of the State of Texas; Joe Straus, Speaker of the Texas House of Representatives; and, Hope Andrade, Secretary of State for the State of Texas. They have filed an answer, generally denying the allegations in the complaint and specifically asserting the following defenses: lack of standing and failure to state a claim against the Lieutenant Governor and Speaker of the House.[15]

---

[15] Defendants' answer to the NAACP plaintiff-intervenors' amended complaint is Dkt. # 194.

I. Congresspersons Eddie Bernice Johnson. Sheila Jackson-Lee. Alexander Green, and Henry Cuellar, appearing as Plaintiff-intervenors:[16]

a. Congresspersons Johnson, Jackson-Lee and Green:

These are Texas African-American voters and members of Congress who reside, vote in and represent the districts affected by the newly enacted congressional redistricting plans. Congresspersons Johnson, Jackson-Lee, and Green challenge the legality of C185, the congressional redistricting plan. They allege that the plan dilutes the voting strength of African-American voters and they will not have an equal opportunity to elect candidates of their choice to Congress. The Congresspersons contend the plan unnecessarily splits politically cohesive minority groups, and is designed to minimize or cancel out minority voting strength, both now and in the future. They claim that Plan C185 is the result, in whole or in part, of intentional discrimination.

Congresspersons Johnson, Jackson-Lee and Green assert a cause of action under Section 2 of the Voting Rights Act. They also assert a cause of action under 42 U.S.C. 1983, based on allegations of intentional discrimination and violations of the one person, one vote principle embodied within the Fourteenth Amendment to the U.S. Constitution. They also state that Plan C185, like the other plans, cannot be implemented until precleared, pursuant to

---

[16] The Congresspersons' live pleadings are their original complaints, Dkt. # 71 and Dkt. # 222.

Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The Congresspersons seek declaratory and injunctive relief, and the recovery of fees and costs.

Congresspersons Johnson, Jackson-Lee and Green name the following as Defendants: the State of Texas; Rick Perry, Governor of the State of Texas; David Dewhurst, Lieutenant Governor of the State of Texas; Joe Straus, Speaker of the Texas House of Representatives; and Hope Andrade, Secretary of State for the State of Texas. Defendants have filed an answer, generally denying most of the allegations and specifically asserting that the Congresspersons "lack standing" to pursue claims against the Lieutenant Governor and Speaker of the House.[17]

b. Congressman Henry Cuellar:

Congressman Cuellar is a Latino voter from Webb County, and serves as a member of Congress. He challenges the legality of Plan C185, the congressional redistricting plan. He claims that the 2010 census data severely undercounts Latinos and using such data undervalues the vote of Texas Latinos. He asserts that the population disparities far exceed the allowable deviation under the U.S. Constitution, and violate the one person, one vote principle. Congressman Cuellar alleges that Latinos and African Americans vote as a group and are politically cohesive, but their voting strength will be diluted under the newly enacted redistricting plan. He claims that Plan C185 violates the rights of Latino voters under Section 2 of the Voting Rights

[17] The Defendants' answer to the Congresspersons' original complaint is Dkt. # 193.

Act, as well as the Fourteenth and Fifteenth Amendments to the U.S. Constitution. He seeks declaratory and injunctive relief, and the recovery of his fees and costs.

Congressman Cuellar names as Defendants: the State of Texas; Rick Perry, Governor of the State of Texas; David Dewhurst, Lieutenant Governor of the State of Texas; and, Joe Straus, Speaker of the Texas House of Representatives. Defendants have not yet filed an answer to Congressman Cuellar's complaint.

J. Intervenor/Cross-claimants Texas Democratic Party and Mr. Boyd Richie:[18]

The Texas Democratic Party (TDP) and its chairman, Boyd Richie, have intervened and have also filed a cross claim herein. They challenge the legality of Plan C185, the congressional redistricting plan, and Plan H283, the Texas House of Representatives redistricting plan. The TDP and Richie claim that the plans are blatant partisan gerrymanders that thwart majority rule. The plans were drawn in an invidious manner, and have no legitimate legislative objective. They allege that the plans violate the First and Fourteenth Amendments, and Article I, Sections 2 and 4 of the U.S. Constitution. They also note that the plans cannot be implemented until precleared under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. They seek declaratory and injunctive relief and the recovery of costs and fees.

---

[18] The TDP and Boyd Richie's Crossclaim is Dkt. # 55.

The TDP and Mr. Richie name Rick Perry, Governor of the State of Texas, and Hope Andrade, Secretary of State for the State of Texas, as Cross-Defendants. They have filed an answer to the cross claim, generally denying most of the allegations and specifically asserting the following defenses: (1) Eleventh Amendment immunity; (2) political gerrymandering is a nonjusticiable political question; (2) the Cross-claimants fail to state a claim for violations of the First Amendment; and, (3) any claim under Section 5 is nonjusticiable.[19]

III.

Grounds asserted for partial summary judgment

Defendants have moved for partial summary judgment on the following grounds:

1. All Fifteenth Amendment claims fail as a matter of law because none of the plaintiffs have been denied the right to vote;
2. Summary judgment should be granted on all Fourteenth and Fifteenth Amendment claims because there is no evidence of intent to discriminate;
3. Summary judgment should be granted on the Section 2 challenges to the congressional redistricting plan because Plaintiffs cannot meet the Gingles requirements; and
4. Summary judgment should be granted on the Section 2 claims to the extent the claim is based on census undercount.

---

[19] The Cross-Defendants' answer to the TDP and Richie's Crossclaim is Dkt. # 167.

IV.

Claims under the Fifteenth Amendment

The Fifteenth Amendment to the United States Constitution provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV. The Fifteenth Amendment "establishes a national policy. . . not to be discriminated against as voters in elections to determine public governmental policies or to select public officials, national, state, or local." Terry v. Adams, 345 U.S. 461, 467 (1953). However, "the Supreme Court has rejected application of the Fifteenth Amendment to vote dilution causes of action" because "[w]hen a legislative body is apportioned into districts, every citizen retains equal rights to vote for the same number of representatives, even if not for all of them, and every citizen's ballot is equally weighed." Prejean Foster, 227 F.3d 504, 519 (5th Cir. 2000) (citing Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 334 n.3 (2000)). Plaintiffs herein claim that their voting strength has been diluted not that Defendants have prevented them from voting. Because the law does not recognize a claim under the Fifteenth Amendment for vote dilution, Plaintiffs' claims should be dismissed as a matter of law.

V.

Intentional discrimination under the Fourteenth Amendment; Section 2 challenge to the congressional redistricting plan; Section 2 claims based on census undercount

The Court has reviewed the record and the applicable law on the remaining issues raised in Defendants' motion. However, the Court finds that summary judgment would be improper at this juncture because the newly enacted redistricting plans that form the basis of this lawsuit are not yet precleared. Until preclearance is obtained, the redistricting plans are unenforceable and cannot be implemented. Lopez v. Monterey County, 519 U.S. 9, 20 (1996). Thus, a ruling on the merits of any claim challenging the plans would be premature and inappropriate at this stage of the proceedings.

It is therefore ORDERED that Defendants' Motion for Partial Summary Judgment and supporting memorandum of law (Dkt. # 210) is GRANTED in part on the Fifteenth Amendment claims, and such claims are DISMISSED as a matter of law. The motion is otherwise DENIED, and the remaining claims shall proceed to trial.

SIGNED this 31st day of August, 2011.

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

And on behalf of

Jerry E. Smith
United States Circuit Judge
U.S. Court of Appeals, Fifth Circuit

-and-

Xavier Rodriguez
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF TEXAS

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 11-CA-360-OLG-JES-XR
[Lead case]

SHANNON PEREZ, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

FILED: 10/07/11
Document 405

DEFENDANTS' ADVISORY REGARDING INTERIM REAPPORTIONMENT

Defendants Rick Perry, in his official capacity as Governor, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas (collectively, "Defendants") respectfully file this Advisory in response to the Court's Order of September 30, 2011.

As a prefatory matter, the Defendants recognize, as the Court does, that "preclearance is

not a function of this Court," but respectfully take issue with the Court's suggestion that promptly filing a declaratory judgment proceeding before the United States District Court for the District of Columbia (instead of administratively before the Department of Justice), was, somehow, a less

streamlined and efficient method for seeking preclearance. In fact, having just observed the Justice Department interpose vague, unsupported objections to the House and Congressional plans in its sixtieth-day Answer before the D.C. District Court (which court orders have since twice required it to supplement for clarity), the State of Texas obviously chose the fastest route to preclearance. Indeed, from both its pleadings and its arguments before that court, the Justice Department appears to have determined to use the proceeding as a test case for novel – and previously-rejected – legal theories.

Moreover, waiting for Attorney General Holder's administrative response would have required a declaratory judgment to challenge it, which, in its best case, only now would have been in its first days.[1] Instead, the Section 5 three-judge panel has already set a hearing on the State's motion for summary judgment. The D.C. court has made clear that its focus, like this Court's, is on expedient resolution of the matters before it, so that the election process may proceed apace.

This Court has requested that the parties advise it regarding the appropriate action to take should it be required to implement an interim apportionment plan. While certain plaintiffs cited the Court to the multimember redistricting cases of Chapman v.

---

[1] The Justice Department is also authorized to reserve its decision, and instead request "additional information," which it did on the sixtieth day of its consideration of changes to the voter identification laws enacted by the Texas Legislature. 42 U.S.C. § 1973c(a). Had it done so in this instance, even further delay would have ensued.

Meier, 420 U.S. 1 (1975), and McDaniel v. Sanchez, 452 U.S. 130 (1981), they unfortunately omitted the controlling case – and the Supreme Court decision most closely on point to the facts at bar – Upham v. Seamon, 456U.S. 37 (1982).[2] There, in a matter involving the 1981 Texas congressional plan, the Court rejected the notion that a district court may ignore the political decisions embodied in a legislative map that has not yet garnered preclearance. (The situation there was slightly different from the present one, in that the actual determination of preclearance will be made, in the first instance, by the D.C. District Court). The Upham three-judge panel had altered the two districts based on which preclearance had been denied, but also fixed a problem it perceived in the Dallas County apportionment. This was error, as it greatly exceeded the authority of a court already apprised of the legislative intent of the map-drawers. "In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'" Id. at 41-42 (citing *White v. Weiser*, 412 U.S. 783, 795 (1973)). In its brief opinion, the Upham Court examined the preceding decade's opinions on related subjects, and distilled a three-judge panel's interim map methodology into a single paragraph:

> Whenever a district court is faced with entering an interim reapportionment order

---

[2] Indeed, the Supreme Court severely limited the scope of McDaniel a dozen years ago in *Lopez v. Monterey County*, 525 U.S. 266, 287 (1999).

> that will allow elections to go forward it is faced with the problem of "reconciling the requirements of the Constitution with the goals of state political policy." An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the Dallas County reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas Legislature.

456 U.S. at 43 (citing *Connor v. Finch*, 431 U.S. 407, 414 (1977)).

The Supreme Court then noted that it had previously permitted district courts to order elections to go forward based on interim, apportionment maps that had legal, and "even constitutional" infirmities, and remanded so that the district court could determine the best remedy. Id. at 44 (citing Bullock v. Weiser, 404 U.S. 1065 (1972); Whitcomb v. Chavis, 396 U.S. 1055 (1970)).

Bullock and Whitcomb provide a window into the propriety of using the legislatively adopted plan, on an interim basis, until a final plan is implemented. In Whitcomb, the district court essentially enjoined conduct of any elections for Indiana State Senate or State Representative, and instead directed use of a map that it had approved. The Supreme Court stayed enforcement of the order,

thus allowing elections based on the map the district court determined was unconstitutional, and upon which probable Court jurisdiction had already been noted. Whitcomb v. Chavis, 307 F. Supp. 1364 (S.D. Ind. 1969), jurisdiction noted, 397 U.S. 984, stayed, 396 U.S. 1055 (1970), rev'd and remanded, 403 U.S. 124, 140 (1971). Indeed, notwithstanding the district court's correct finding of unconstitutionality, it "erred in so broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so." 403 U.S. at 161.

The other case Upham cited favorably, Bullock v. Weiser, resulted in the 1972 Texas congressional elections being held pursuant to a plan that the Northern District of Texas had held to be unconstitutional. Once more, the Supreme Court stayed an injunction against the election, and once more, the Court eventually agreed with the district court that the plan was unconstitutional, but that its remedy was patently at odds with lawful, legislative state goals. White v. Weiser, 412 U.S. 783, 789, 797 (1973).

The compressed time often associated with redistricting, as well as the state-law limitations in convening legislatures, led Upham to note that "[n]ecessity has been the motivating factor in these situations." Applying that principle, the Upham Court afforded the Eastern District of Texas the odd choice (based on its local expertise) of once more re-drawing the plans, or of letting the elections go forward as planned, on the then-current maps. Needless to say, it did so in spite of the reversible error the Court had just adjudicated regarding those maps. 456 U.S. at 44.

The manner in which the Eastern District of Texas approached the "unwelcome obligation" of an interim solution to the 2001 Texas Senate and congressional maps in Balderas v. State, is extremely instructive. 2001 WL 34104833 & 34104836 (E.D. Tex.). There, the court had already held a Section 2 trial, much as this Court did, with -- as here -- the initial response from the United States coming the business day following the close of trial.3 (There, it was an administrative preclearance of the Senate plan, but a denial of preclearance of the congressional map. Here, similarly, the United States has interposed no objection to the Senate plan in its Answer -- although Section 5 intervenors have -- but has objected to certain congressional districts, which it claims indicate either discriminatory purpose or retrogressive effect.) While the Balderas maps were drawn by the Legislative Redistricting Board of Texas, rather than bythe Legislature, they were properly treated as legislative acts by the court.

The Balderas district court explained that it was required by Upham to limit its decision "to correcting the federal constitutional and statutory defects in the LRB House plan, including the concerns raised in the objection of the Justice Department." For purposes of the present action, the standard is the same, except that the dispositive determination regarding Section 5 preclearance will have been rendered by the D.C. District Court rather

---

[3] Significantly, the Balderas trial did not begin until mid-November, 2001, and the Section 5 administrative preclearance determination was not rendered until November 16. This Court finds itself far ahead of that time sequence.

than the Justice Department, by the time this Court undertakes its reapportionment analysis. If, as the Defendants expect, the three-judge panel grants the State relief, the maps will have been precleared and only the remaining Section 2 issues, if any, will require redress. If not, then the Court will need to address the court's objections, but will be "limited to those necessary to cure any constitutional or statutory defect." Balderas (citing Upham, 456 U.S. at 43).

Applying that standard, the Eastern District of Texas implemented its changes by making discrete changes to the districts identified by the Justice Department in its preclearance objections, and leaving the rest of the map (save for districts slightly affected by bordering on the objected-to districts) alone. In Martinez v. Bush, the Southern District of Florida did precisely the same thing, adopting a proposed remedial map which had as few changes as possible. 234 F. Supp. 2d 1275, 1288 n.12 (S.D. Fl. 2002).

Other courts have addressed the exigency of interim relief in various ways. The Southern District of Georgia, in a three-judge decision related to Miller v. Johnson, 500 U.S. 900 (1995), issued a brief Order Granting Preliminary Injunction and Releasing Interim Redistricting Plan, so that elections could go forward, and followed it with a longer Order and Opinion about a month later. The court only addressed in its injunctive order the interim map, and, in it, effected changes only to districts that were conceded to be unconstitutional, or, as it explained in the Opinion, for which "Plaintiffs have made a showing of a substantial likelihood of prevailing on

the merits of their claim that those districts are unconstitutional." Johnson v. Miller, 929 F. Supp. 1529, 1542 n.33 (S.D. Ga. 1996) (citation omitted); Order, No. CV-194-40, dated April 30, 1996 (S.D. Ga.)(available at http://georgiainfo.galileo.usg.edu/ga-96dis.htm).

In Smith v. Clark, a three-judge panel, recognizing that no input had been received from the Department of Justice (rather, additional information had been requested, in a manner that would have pushed the congressional elections past their announced dates), drew its own map on an interim basis. The court expressly afforded no deference to legislative intent on the facts before it. Judge Jolly explained,

> The principle announced in Upham and White, and applied in Terrazas and Burton, does not apply in this case. This is true because, as of this date, no part of the plan adopted by the Chancery Court has been approved by the Attorney General. We think that, for purposes of deference, it is important to note that the plan adopted by the Chancery Court was drafted by the Intervenors (plaintiffs in Chancery Court), not by the Chancery Court, and not by the Mississippi Legislature, which failed to enact a congressional redistricting plan. Accordingly, there is no expression, certainly no clear expression, of state policy on congressional redistricting to which we must defer.

Smith v. Clark, 189 F. Supp. 2d 529, 533-34 (S.D. Miss. 2002)(citing Terrazas v. Clements, 537 F. Supp. 514 (N.D. Tex. 1982); Burton v. Hobbie, 543 F. Supp. 235 (M.D. Ala.), aff'd, 459 U.S. 961 (1982); Burton v. Hobbie, 561 F. Supp. 1029, 1034 (M.D. Ala. 1983)), aff'd sub nom. Branch v. Smith, 538 U.S. 254 (2003)). Here, of course, the Legislature has spoken, and even the Department of Justice, as a litigant, has circumscribed the limits of its potential concerns in the Answer it filed as defendant in the Section 5 proceeding.

To the extent there is a difference between interim and remedial map-drawing, Upham identified it. Absent a patent one-person, one-vote failing or other manifest constitutional error, this Court is wholly permitted to use the legislature's lawfully-enacted map as its interim plan, unless the Section 5 three-judge panel expressly denies preclearance of the map. At present, the Justice Department's objections are of a different variety than those it would announce administratively; it has simply filed an unsupported Answer in a lawsuit that has yet to be adjudicated, and thus, on an interim basis, the map is well-suited to meet a temporary need. Such pleadings are entitled to no deference by this, or any, Court. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988); Gossett, David M., Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes, 64 U. Chi. L. Rev. 681, 691 & n.49 (1997) ("Arguments that an agency makes in the course of litigation are a classic example of a type of 'interpretation' that does not receive deference under Chevron."). The principle is especially apt in the instant action, given

that the Department of Justice has still to articulate the substantive bases of its averments. In that light, the wary approach that courts have long used in venturing into matters more properly the province of legislatures, will best be implemented by using the legislatively-enacted map as its interim.

Finally, to the extent the Court determines a need to generate interim plans, the experience of the State of Texas, based in no small part on the acknowledged expertise of the Texas Legislative Council and its RedAppl software, is that the actual process could be undertaken in less than two days, once the Court has received submissions and heard the testimony of the parties. Generously assuming that a hearing on the matter could be conducted in no more than three days, the Court can reasonably expect that the entire process could be done in a week's time.

The State Defendants remain confident that the Section 5 proceeding will conclude well prior to the dates by which finalized maps will be necessary for implementation, and will continue to keep the Court apprised of the status of that litigation.

Dated: October 7, 2011

Respectfully Submitted,

GREG ABBOTT
Attorney General of Texas

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 11-CA-360-OLG-JES-XR
[Lead case]

SHANNON PEREZ, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

FILED: 10/17/11
Document 436

DEFENDANTS' ADVISORY REGARDING INTERIM MAPS

Defendants Rick Perry, in his official capacity as Governor, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas (collectively, "Defendants") respectfully file this Advisory in response to the Court's Amended Order of October 4, 2011.

For the reasons set forth in the Defendants' Advisory filed October 7, 2011, they propose using the legislatively-enacted State House and Congressional maps as the bases for any relief that this Court may deem necessary on an interim basis. Those maps are the only legislatively approved memorialization of the intent of the State of Texas, which is due great deference when the judiciary

intercedes in the province of the legislative branch. As noted in the earlier Defendants' Advisory, such maps are appropriate for interim designation, having neither been formally objected to by the Department of Justice nor the subject of a United States District Court for the District of Columbia order rejecting them.

Moreover, the Defendants remain confident that the Section 5 proceeding will conclude well prior to the dates by which finalized maps will be necessary for implementation, and will continue to keep the Court apprised of the status of that litigation.

Dated: October 17, 2011

Respectfully Submitted,

GREG ABBOTT
Attorney General of Texas

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 11-CA-360-OLG-JES-XR
[Lead case]

SHANNON PEREZ, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

FILED: 10/24/11
Document 468

DEFENDANTS' OBJECTSION TO PROPOSED INTERIM PLANS

Defendants Rick Perry, in his official capacity as Governor, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas (collectively, "Defendants") respectfully file these Objections to the interim redistricting plans proposed by Plaintiffs. Defendants have reviewed Plaintiffs' proposals in as much depth as possible in the limited time available and reserve their right to raise additional objections if necessary.

I. Introduction

Plaintiffs' proposed interim plans are obviously not tailored to correct the supposed constitutional and statutory violations alleged in their complaints. Rather than creating plans designed to actually

resolve statutory and constitutional infirmities, Plaintiffs have created plans designed to effect political outcomes they were unable to accomplish during the legislative session. This conflicts directly with the Supreme Court's command in Connor v. Finch and Upham v. Seamon that an interim plan must "reconcil[e] the requirements of the Constitution with the goals of state political policy." Upham v. Seamon, 456 U.S. 37, 43 (1982) (quoting Connor v. Finch, 431 U.S. 407, 414 (1977)). The political goals of the State of Texas are embodied in the Legislature's duly enacted redistricting plans. These are the only political goals that may be advanced in an interim redistricting order, and they are entitled to substantial deference. The "unwelcome" obligation to impose an interim redistricting plan is not an occasion for third-party interest groups and outvoted members of the Legislature to accomplish their own political goals through litigation. Plaintiffs' clear attempt to do so, like their contention that the Court may start from a "blank slate," is utterly baseless.

II. In Drawing an Interim Plan, the Court Must Not Alter the Legislatively Enacted Plan Unless Necessary to Cure a Violation of the Constitution or the Voting Rights Act.

Plaintiffs advise the Court that it is not only free but required to disregard the political choices of the Texas Legislature in an interim reapportionment order. Plaintiffs' position is directly contrary to the Supreme Court's clear instruction in Upham v. Seamon and relies on cases that are legally and factually distinguishable. In fashioning an interim

redistricting order, a district court is not free to disregard a state's legislative determinations unless necessary to (a) cure a constitutional violation, (b) cure a federal statutory violation.

In Upham v. Seamon, the Supreme Court held that court-drawn interim redistricting plans must conform to legislatively enacted plans except as necessary to "cure any constitutional or statutory defect." Upham, 456 U.S. at 42. In Upham, a three-judge court in the Northern District of Texas was compelled to impose an interim congressional reapportionment plan after the U.S. Attorney General objected to the Legislature's enacted plan. The Attorney General's objection identified only two congressional districts and concluded that the State "had satisfied its burden of demonstrating that the submitted plan is nondiscriminatory in purpose and effect" with respect to all other districts. *Id.* at 38. Nevertheless, the Attorney General's objection rendered the entire plan unenforceable. *See id.* at 38 n.1. The district court ordered an interim reapportionment plan that altered congressional districts 15 and 27 in South Texas—the two districts to which the Attorney General had objected—and made additional changes to four districts in and around Dallas County. *See id.* at 38–40; *see* also Seamon v. Upham, 536 F. Supp. 931, 959–961 (E.D. Tex. 1982) (describing each district in the court's interim plan).

On appeal, the Supreme Court held that the district court's alteration of the Dallas-area congressional districts was erroneous, even though the plan had not been precleared, because the court altered the legislatively enacted plan without finding

a constitutional or statutory violation. The court recognized the fundamental principle that "[i]n fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'" Upham, 456 U.S. at 41–42 (citing White v. Weiser, 412 U.S. 783, 795 (1973)). The Court provided clear guidelines for interim redistricting orders:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of "reconciling the requirements of the Constitution with the goals of state political policy." An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the . . . reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas Legislature.[1]

Id. at 43 (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)).

Contrary to Plaintiffs' suggestion, Balderas v. Texas did not depart from this rule. Rather, it recognized the well-established limitation on a

---

[1] *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam) (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)).

district court's discretion in providing an interim remedy when a state's redistricting plan has been submitted for preclearance but not approved by the Department of Justice or the U.S. District Court for the District of Columbia. In its remedial order creating an interim plan for the Texas House of Representatives, the Balderas court expressly recognized the limits on its discretion:

> Our decision here is limited to correcting the federal constitutional and statutory defects in the LRB House plan, including the concerns raised in the objection of the Justice Department. That approach is dictated by the Supreme Court's decision in Upham v. Seamon.

Balderas v. Texas, 2001 WL 34104833, at *2 (E.D. Tex. Nov. 28, 2001) (footnotes omitted). Thus Balderas does not support the Task Force Plaintiffs' contention that a district court starts "from a blank slate"—i.e., ignores the legislatively enacted plan—whenever it draws an interim redistricting plan. Their citation to the congressional redistricting claims in Balderas is inapposite because the Legislature did not pass a congressional plan in 2001. *See*, e.g., LULAC v. Perry, 538 U.S. 399, 411 (2006). To the extent the court started from a "blank slate," it did so because there was no legislative enactment to consider.

Plaintiffs' reliance on Lopez v. Monterey County, 519 U.S. 9 (1996), is misplaced. Lopez involved a section 5 enforcement action brought to challenge county ordinances that had been in place for several years but were never submitted for

preclearance, even after the court ordered the county to do so. *See id.* at 14–15, 17–18. Rather than *seek* preclearance, the county attempted to implement a permanent remedial plan in the pending litigation in the hopes of avoiding section 5 preclearance altogether. *See id.* at 16–19. The district court eventually ordered county-wide, at-large elections as a remedy, thus reinstating the previously enjoined electoral practice without any preclearance review. *See id.* at 18–19. Reversing, the Supreme Court emphasized that the district court failed to accomplish "the goal of a three-judge district court facing a § 5 challenge," which is "to ensure that the covered jurisdiction submits its election plan to the appropriate federal authorities for preclearance as expeditiously as possible." Id. at 24. Because Lopez involved a permanent remedial plan rather than an interim plan, the Court did not rely on the authorities governing such plans, including Upham.[2]

The harm to be avoided in Lopez was that covered jurisdictions might avoid preclearance altogether. The risk of circumventing preclearance was also present in McDaniel v. Sanchez, 452 U.S. 130 (1981), in which the Court held that redistricting plans submitted to courts by covered jurisdictions after legislative plans are held to be unconstitutional are subject to preclearance. The Court warned that

---

[2] Moreover, nothing in Lopez suggests that the Court intended to overrule Upham. If it had, it would have done so without discussion, thus silently reversing its position on a fundamental aspect of reapportionment law. Given the distinction between the cases, and Lopez's cf. citation to Upham, see 519 U.S. at 24, there is no reason to believe that it did.

> if covered jurisdictions could avoid the normal preclearance procedure by awaiting litigation challenging a refusal to redistrict after a census is completed, the statute might have the unintended effect of actually encouraging delay in making obviously needed changes in district boundaries.

Id. at 151. The same danger of circumventing preclearance review is not present when, as in Upham and this case, the submitting jurisdiction has already initiated preclearance before the district court considers an interim plan.

In this case, as in Upham, the Texas Legislature has enacted a redistricting plan; the State has submitted the plan for preclearance; the U.S. Attorney General has raised objections to the plan, though they have not been resolved; the plan has not been precleared; and the Court faces the task of ordering an interim plan for upcoming elections.[3] The only potential distinction between this case and Upham is the State's choice in this case to seek judicial preclearance, rather than administrative preclearance as in Upham. If anything, that distinction counsels increased deference to the policy judgments expressed in the State's legislatively enacted redistricting plans. Whereas administrative

---

[3] This case resembles Upham for the further reason that in both cases, private parties challenged the Legislature's redistricting plan under the Constitution and section 2 of the Voting Rights Act. See Upham, 456 U.S. at 38 (noting that a lawsuit asserting constitutional and section 2 challenges was filed in the Northern District of Texas while preclearance was pending).

preclearance would result in an administrative determination by the Justice Department, the Justice Department's only statements in the pending judicial preclearance proceeding are the unsupported allegations in its answer, which are entitled to no deference. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988).

III. Objections to Proposed Congressional Plans

A. Plaintiffs' Proposed Congressional Redistricting Plans Fail to Create Additional Majority-Minority Districts Without Subordinating Traditional Redistricting Principles to the Goal of Maximizing Race-Based Districts.

In drawing an interim redistricting plan, the Court must defer to the State's policy choices, as reflected in its legislatively enacted plans, except where necessary to remedy a violation of federal law. See, e.g., Upham v. Seamon, 456 U.S. 37 (1982). Any court-drawn plan must, of course, comply with federal law, including both section 2 and section 5 of the VRA and the Constitution. See, e.g., Johnson v. Miller, 929 F. Supp. 1529, 1562 (S.D. Ga. 1996) (citing cases). In order to justify the creation of an additional "majority-minority" district in an interim redistricting plan, the Court must identify a violation of section 2 of the VRA which would require such a district as a remedy. Plaintiffs must first prove that the Legislature could have drawn additional geographically compact congressional districts where a politically cohesive minority group would constitute the majority of eligible voters

without violating generally applicable law or subordinating traditional redistricting principles. See, e.g., Bartlett v. Strickland, 129 S. Ct. 1231, 1242–45 (2009). If section 2 would not compel the State to draw a district in the first place, it is not properly implemented as part of a court-drawn interim plan. Moreover, a court-drawn plan must comply with the Constitution; thus, an interim plan may not create districts based predominantly on race. See, e.g., Abrams v. Johnson, 521 U.S. 74, 91 (1997) (approving the district court's finding that creating "a second majority-black district in Georgia would require subordinating Georgia's traditional districting policies and allowing race to predominate").

Plaintiffs ask the Court to issue an interim reapportionment order creating additional districts in which Latinos, a combination of Latinos and African-Americans, or, in one case, a "tri-ethnic coalition" of Latinos, African-Americans, and Anglos would constitute a majority or super-majority capable of controlling the outcome of elections. Each and every one of Plaintiffs' proposed interim plans suffers from one or both of the following defects: (1) Plaintiffs cannot establish the facts required to support the first Gingles factor—that a minority group is sufficiently large and geographically compact to constitute a majority in a single member district, see Exhibit B; and (2) each district proposed by Plaintiffs is drawn predominantly on the basis of race in violation of the Fourteenth Amendment. Further, as explained in the Defendants' posttrial briefs, the evidence at trial shows that Plaintiffs cannot satisfy the remaining elements of a section 2

vote-dilution claim in any region of the State, nor have they established a constitutional violation in the congressional or House redistricting plans. Because Plaintiffs cannot identify a constitutional or statutory violation in the State's redistricting plans, they are not entitled to interim relief.

B. Defendants' Objections to Proposed Congressional Redistricting Plans

1. Plan C211 (MALC)

Defendants object to proposed Plan C211 on the grounds that it fails to create more Latino opportunity districts than Plan C185, it contains coalition districts that are not required by section 2, and it disregards the political choices of the Texas Legislature for no reason other than to advance MALC's own political objectives. Plan C211 does not remedy any alleged constitutional or statutory violation in Plan C185.

Plan C211, proposed by MALC, deviates from the State's plan in order to create additional majority-minority districts. In particular, it purports to create the following 9 Latino opportunity districts: (1) District 15 with 70.0% HCVAP; (2) District 16 with 67.4% HCVAP; (3) District 20 with 60.0% HCVAP; (4) District 23 with 60.1% HCVAP; (5) District 27 with 70.5% HCVAP; (6) District 28 with 52.2% HCVAP; (7) District 29 with 56.3% HCVAP; (8) District 33 with 52.9% HCVAP; and (9) District 34 with 56.5% HCVAP.

Although MALC's proposed plan appears to create one more Latino-majority district than Plan C185, Plan C212 contains two districts that are

plainly not required by section 2 of the VRA, and that largely mirror the one district the Supreme Court found not to qualify as a section 2 district in LULAC v. Perry. Specifically, CD 28 and CD 33 both begin at the Texas-Mexico border, in Webb and Hidalgo County, respectively, and travel north in narrow strips to Travis County. These districts are not reasonably compact, and they combine communities across more than 300 miles that have little in common except Latino residents, suggesting that they were drawn predominantly on the basis of race. In any event, these districts are plainly not required by or consistent with section 2. With these problematic districts eliminated, Plan C211 creates two fewer Latino opportunity districts than Plan C185. Assuming that the two districts could be combined or altered to create a single Latino opportunity district, Plan C211 would still create fewer Latino opportunity districts than the State's plan.

Plan C211 also attempts to create District 34, which runs from Travis County to Bexar County. The creation of District 34 reduces the HCVAP strength in District 20 to 60.0% as compared to the 62.9% in District 20 in Plan C185. Further, MALC claims that Plan C211 creates two additional minority opportunity districts in Dallas-Fort Worth, but these are only coalition districts. District 25 has 15.2% HCVAP and 35.9% BVAP, and District 32 has 45.5% HCVAP. District 32 also suffers from compactness scores that are higher than any of the districts in Plan C185. See Exhibit A, Declaration of Todd Giberson ¶ 7. Neither district is required to be created under section 2. Plan C211 is also

problematic in that Nueces County is split between Districts 10 and 27. This decision ignores the Legislature's political choice to keep Nueces County whole and allow it to be the anchor of its own congressional seat. See Trial Tr. at 1022:10–14, 1022:17–18, 1461:25–1462:7; see also Exhibit J-58, Deposition of Doug Davis, at 90:10–21; Exhibit J-61, Deposition of Gerardo Interiano I, at 113:20–22.

2. Plan C213 (Texas Latino Redistricting Task Force)

Defendants object to Plan C213 because, while it is offered as ostensibly justified on racial grounds under section 2, it actually fails to create more Latino opportunity districts than Plan C185; it transforms an existing Latino opportunity district into a coalition district solely to pursue the Task Force Plaintiffs' political objective of creating a Latino-majority district in a different area of the State; and it creates a coalition district in Dallas and Tarrant County that is not only not required by section 2 but also gives rise to a strong inference that it was created predominantly on the basis of race in violation of the Fourteenth Amendment.

Plan C213 was proposed by the Latino Task Force for the purpose of creating 8 Latino opportunity districts: (1) District 15 with 69.6% HCVAP; (2) District 16 with 73.2% HCVAP; (3) District 20 with 63.0% HCVAP; (4) District 23 with 66.6% HCVAP; (5) District 27 with 65.9% HCVAP; (6) District 28 with 69.6% HCVAP; (7) District 35 with 52.1% HCVAP; and (8) District 36 with 50.1% HCVAP. For instance, it creates District 36 in Harris County, but it accomplishes this by dismantling

current District 29, which is a Latino opportunity district held by Congressman Gene Green. Finally, any claim that Plan C213 creates a minority opportunity district in Dallas-Fort Worth is not true. District 34 has only 45.0% HCVAP and is, at most, a coalition district that is not required under section 2. Even if such a district were arguably required, District 34 is less compact than any district in Plan C185 and has one of the highest compactness scores of all Dallas-Fort Worth congressional districts in Plaintiffs' proposed interim plans. See Exhibit A, Giberson Declaration ¶ 10.

3. Plan C166 (Rodriguez Plaintiffs)

Defendants object to Plan C166 on the grounds that it actually creates fewer Latino opportunity districts than Plan C185, and it purports to create coalition districts that are not required by section 2.

Plan C166 was proposed by the Rodriguez Plaintiffs and purports to create the following 7 Latino opportunity districts: (1) District 15 with 66.1% HCVAP; (2) District 16 with 76.5% HCVAP; (3) District 20 with 64.9% HCVAP; (4) District 23 with 57.9% HCVAP; (5) District 27 with 69.2% HCVAP; (6) District 28 with 57.5% HCVAP; and (7) District 33 with 63.3% HCVAP. The State objects to this plan because it creates one less Latino opportunity district than Plan C185. Additionally, Plan C166 attempts to create coalition districts in both Dallas-Fort Worth and Harris County. Neither District 35 nor District 36 has a majority citizenship voting age population of any single racial or ethnic group. Additionally, District 35 is less compact than any district in Plan C185. See Exhibit A, Giberson

Declaration ¶ 9. Plan C166's goal appears to be the preservation of District 25, which Plaintiffs concede is a crossover district with no lawful claim to protection under section 2. As discussed in Defendants' post-trial briefs, the State is not required to create such a district under Bartlett and is under no heightened obligation to preserve such a district absent a showing of intentional racial discrimination. See Bartlett, 129 S. Ct. at 1249. For these reasons, the State objects to Plan C166.

4. Plans C204 and C205 (Quesada Plaintiffs)

Plans C204 and C205 were proposed by the Quesada Plaintiffs for the purpose of creating additional minority-majority districts. Plan C204 purports to create the following 8 Latino opportunity districts: (1) District 15 with 67.7% HCVAP; (2) District 16 with 74.8% HCVAP; (3) District 20 with 58.1% HCVAP; (4) District 23 with 70.8% HCVAP; (5) District 27 with 71.6% HCVAP; (6) District 28 with 70.5% HCVAP; (7) District 29 with 57.1% HCVAP; and (8) District 33 with 56.2% HCVAP. The State objects to Plan C204 because it does not create any more Latino opportunity districts than Plan C185, it proposes changes that merely effect political choices different from those made by the Legislature, and it seeks to establish coalition districts in certain regions of the state. For instance, Plaintiffs' claim that District 34 is a Latino opportunity district is incorrect. District 34 has only 44.8% HCVAP, 11.4% BVAP, and 21.1% AVAP, and is thus a coalition district. District 34 is also less compact than any district in Plan C185. See Exhibit A, Giberson Declaration ¶ 8. Plaintiffs also claim that Plan C204

creates an additional African-American district, but District 35 is not a majority-minority district given that it has 15.2% HCVAP, 35.9% BVAP, and 33.9% AVAP. Crossover or coalition districts, like Districts 34 and 35, are not protected under section 2 of the VRA. See Bartlett, 129 S.Ct. at 1248.

Plan C205 is nearly identical to Plan C204 and purports to create the following 8 Latino opportunity districts: (1) District 15 with 67.7% HCVAP; (2) District 16 with 74.8% HCVAP; (3) District 20 with 58.1% HCVAP; (4) District 23 with 70.8% HCVAP; (5) District 27 with 71.6% HCVAP; (6) District 28 with 70.5% HCVAP; (7) District 29 with 57.1% HCVAP; and (8) District 33 with 56.2% HCVAP. The State objects to this plan for the same reasons set forth above. Once again, District 34 and District 35 are not majority-minority districts. Instead, District 34 has only 37.2% HCVAP, 12.4% BVAP, and 26.4% AVAP. District 35 has only 16.2% HCVAP, 36.3% BVAP, and 30.7% AVAP.

5. Plan C193 (NAACP and Congressional Intervenors)

Plan C193, proposed by the NAACP Plaintiffs and Congressional Intervenors, is a partial statewide map. The State objects to this plan because, although it is racially motivated, it creates fewer minority opportunity districts than Plan C185. For instance, Plan C193 purports to create a minority opportunity district in Dallas-Fort Worth, but Districts 34 and 35 are both coalition districts. District 34 has 15.8% HCVAP and 32.6% BVAP. District 35 has 44.6% HCVAP and 32.6% BVAP, and it suffers from having the highest compactness score

out of all the districts in Plaintiffs' proposed interim plans. See Exhibit A, Giberson Declaration ¶ 11. Plan C193 also fails to create a Latino opportunity district in Central Texas like Plan C185. Instead, Plan C193 creates District 28, which has only 48.2% HCVAP. Finally, Plaintiffs state that they endorse the Travis County configuration as set forth in Plan C164. The State objects to such a configuration because Plaintiffs merely make different political choices than the Legislature and have failed to show that District 25 is legally protected. Furthermore, Plan C164's configuration for Travis County fails to take into account the significant population growth that occurred in the region between Travis County and Bexar County.

6. Plans C206, C207, C208, and C214 (LULAC Plaintiffs)

Plans C206, C207, and C208 were proposed by the LULAC Plaintiffs. Plan C208 is one of the statewide plans proposed by LULAC and seeks to create the following 7 Latino districts: (1) District 15 with 66.2% HCVAP; (2) District 16 with 72.6% HCVAP; (3) District 20 with 66.2% HCVAP; (4) District 23 with 67.1% HCVAP; (5) District 27 with 59.4% HCVAP; (6) District 28 with 62.4% HCVAP; and (7) District 35 with 61.7% HCVAP. The State objects to this Plan because, although it is based predominantly on race, it creates fewer Latino opportunity districts than Plan C185, does not have a zero percent population deviation, and creates several problematic districts.

First and foremost, unlike Plan C185, Plan C208 fails to create a new district in Central Texas that

reflects the significant population growth in this region. Instead, Plan C208 appears to create two new districts in Dallas-Fort Worth and Harris County, but neither of these districts satisfies the first precondition of Gingles. District 36 in Plan C208 in Harris County is not a Latino opportunity district because it has only 45.4% HCVAP. This proposed district is nothing more than a coalition district, which the State is not required to create under section 2. Further, Plaintiffs were only able to create District 36 by dismantling a protected Latino opportunity district—District 29 in Plan C100—which is currently held by Congressman Gene Green. Likewise, although Plan C208 seeks to create District 33 in Dallas-Fort Worth, this is also a coalition district given that it has only 38.6% HCVAP and 14.6% BVAP.

Additionally, other districts in Plan C208 do not satisfy the requirements of Gingles. District 27 runs all the way from Cameron County in the Rio Grande Valley, snakes around Nueces County to include only the coastal portion, and then continues up to Caldwell County in Central Texas. This district is similar to the one the Supreme Court struck down in LULAC v. Perry in that it purports to connect communities across several hundred miles that have little in common but for the fact that Latinos live in each region. Furthermore, District 27 has compactness scores that are more than two times higher than the compactness scores of Plan C185's District 27. See Exhibit A, Giberson Declaration ¶ 6. Finally, Plan C208 seeks to correct alleged violations of the Fourteenth Amendment through, among other things, a new configuration for District 26. This

Court should reject such proposed changes because Plaintiffs have not demonstrated that the Legislature drew any districts with the intent to discriminate on the basis of race.

Plan C214 is another statewide plan proposed by LULAC and seeks to create the following 7 Latino opportunity districts: (1) District 15 with 65.2% HCVAP; (2) District 16 with 72.6% HCVAP; (3) District 20 with 65.9% HCVAP; (4) District 23 with 67.4% HCVAP; (5) District 27 with 59.4% HCVAP; (6) District 28 with 63.2% HCVAP; and (7) District 35 with 61.7% HCVAP. The State objects to this plan because it creates fewer Latino opportunity districts than Plan C185, and the districts it proposes fail to satisfy Gingles. Similar to Plan C208, Plan C214 dismantles District 29 in Harris County, which is a protected Latino opportunity district, in order to create a coalition district. The plan also creates a similar noncompact District 27 that covers several hundred miles and connects communities in different regions of the state that have little in common. See Exhibit A, Giberson Declaration ¶ 6.

Plans C206 and C207 are partial statewide plans that purport to create a new congressional district in Dallas-Fort Worth. However, District 35 in Plan C207 and District 33 in Plan C206 are not required by section 2 because they are coalition districts. District 35 has only 40.4% HCVAP and 12.6% BVAP. District 33 has only 39.3% HCVAP and 14.9% BVAP. The State therefore objects to Plan C206 and C207.

7. Partial Plan Proposed by Congressman Henry Cuellar

Congressman Cuellar has proposed a partial plan that outlines his proposal for District 28 and South Texas. Because this plan has not been uploaded to RedAppl, the State does not have the necessary data to fully analyze this plan. Nevertheless, based on the information available, the State objects to his plan because it makes changes to District 23 that would not adhere to traditional redistricting principles by protecting the incumbent, Francisco Canseco. This plan also purports to create District 33 as a new Latino opportunity district, but does so by splitting up Nueces County. As discussed above, see supra at 10, such a split ignores the request by Texas legislators and the public that Nueces County anchor a congressional seat.

8. Plans C209 and C212 (Congressman Francisco Canseco)

Plans C209 and C212 have been proposed by Congressman Canseco. Plan C209 appears to create the following 7 Latino opportunity districts: (1) District 15 with 71.0% HCVAP; (2) District 16 with 72.7% HCVAP; (3) District 20 with 61.9% HCVAP; (4) District 23 with 59.3% HCVAP; (5) District 27 with 73.7% HCVAP; (6) District 28 with 71.0% HCVAP; and (7) District 29 with 56.3% HCVAP. The State objects to Plan C209 because it creates one less Latino opportunity district than Plan C185, and the changes it makes merely reflect political choices. Plan C209 fails to create a Latino opportunity in Central Texas that reflects the significant population growth in this region of the State. Instead, Plan C209 seeks to create District 35, which is anchored in Travis County instead of Bexar County, and has

only 48.3% HCVAP. As configured in Plan C209, District 35 is less compact than any proposed district in Plan C185, including the State's proposed District 35. See Exhibit A, Giberson Declaration ¶ 5.

Furthermore, Plan C209 does not create a new minority opportunity district in DallasFort Worth, but only a coalition district (District 33) which has 39.5% HCVAP and 17.8% BVAP. Using the perimeter-to-area measure, the boundary of District 33 is more convoluted than any of the districts in Plan C185. See Exhibit A, Giberson Declaration ¶ 5. The State objects to District 33 because section 2 does not require the creation of coalition districts. Finally, in South Texas, Plan C209 creates District 27, but in order to create this Latino opportunity district, it divides Nueces County. As discussed above, the split in Nueces County is inconsistent with testimony from the public during the interim and requests by legislators that Nueces County serve as an anchor for a congressional district.

Plan C212 purports to create the following 7 Latino opportunity districts: (1) District 15 with 71.0% HCVAP; (2) District 16 with 72.7% HCVAP; (3) District 20 with 61.9% HCVAP; (4) District 23 with 59.3% HCVAP; (5) District 27 with 73.7% HCVAP; (6) District 28 with 72.0% HCVAP; and (7) District 29 with 56.3% HCVAP. The State objects to Plan C212 because it creates fewer Latino opportunity districts than Plan C185. District 33 is a coalition district in Dallas-Fort Worth that is not required by section 2 and suffers from high compactness scores. See Exhibit A, Giberson Declaration ¶ 5. Plan C212 creates new congressional District 35, which runs from Austin to

San Antonio, and is similar to District 35 in Plan C185. However, Plan C212's District 35 appears to be anchored in Travis County and is not a Latino opportunity district given that it has only 48.3% HCVAP. District 35 also has compactness scores that are higher than any of the districts in Plan C185. Exhibit A, Giberson Declaration ¶ 5. Accordingly, the State objects to Plan C212 on the ground that it does not remedy any alleged constitutional or statutory violation.

IV. Objections to Proposed Interim House Redistricting Plans

The State objects to Plaintiffs' proposed interim plans for the Texas House because all three make changes statewide that are not confined to areas in which they have alleged constitutional or statutory violations. Plaintiffs are not attempting to cure legal defects in the map as much as they are attempting to substitute their political preferences for those of the Legislature. For example, there was no testimony during the Section 2 trial related to Travis County, yet all three proposed interim plans make changes to Travis County's House districts. Since no legal defects have been identified in the Travis County House districts, Plaintiffs' remedial plans for the county merely replace the Legislature's political choices with their own.

Further, all three proposed interim plans violate the county-line rule in Article III, § 26 of the Texas Constitution in more counties than necessary to comply with the Equal Protection Clause's one-person one-vote mandate, confirming that race predominates over traditional redistricting

principles. Plan H295 is the most egregious example of illegally dividing counties into multiple House districts in order to create race-based districts. Finally, although Plaintiffs complain about the alleged high deviation in Plan H283, citing it as evidence of intent to disadvantage minority voters, the population variations in the proposed plans are not significantly better. Indeed, in order to achieve a lower deviation, Plan H295 had to violate the county-line rule 15 times. Similarly, Plan H296 has 5 county line violations and only manages to reduce the total deviation to 9.72%. Plan H292 contains 7 county line violations and has a larger deviation than Plan H283.

A. Plan H292 (Texas Latino Redistricting Task Force)

Defendants object to Plan H292 on the ground that it violates a traditional redistricting principle—the Texas Constitution's county-line rule—for the sole purpose of creating additional race-based districts. Plan H292 purports to create 34 Latino opportunity districts; however, only 32 districts exceed 50% HCVAP or SSVR. To create a second HCVAP majority district in Nueces County, Plan H292 removes 6% of the population (18,970 people, 14,147 of whom are Anglo) and adds them to HD 30. The unnecessary removal of Nueces County population into a district based outside the county violates the county-line rule and demonstrates that Plan H292's treatment of Nueces County is motivated predominantly by the goal of creating race-based districts. Plan H292 also creates District 32 by joining surplus population from Cameron County and Hidalgo County. District 32 violates the

county-line rule because it forces unnecessary divisions in other areas of the State and because it unnecessarily divides Cameron County among four districts by dividing its surplus population into District 32 and District 43. Districts 51 and 103, neither of which reaches 50% HCVAP or SSVR, are coalition districts at best and thus not required by section 2.

B. Plan H295 (MALC)

Plan H295 purports to create 33 districts with over 50% HCVAP as compared to 30 such districts in Plan H283. Plaintiffs also claim that Plan H295 is superior to the State's plan because it has a total deviation of 6.87%. The State objects to Plan H295 because the changes Plaintiffs propose in Plan H295 make modifications to portions of the State in which no statutory or constitutional violation has been alleged. Plaintiffs basically use Plan H295 as a wish list to make different political choices than those made by the Legislature.

Plaintiffs admit that Plan H295 "cut[s] 31 county lines" in violation of the Texas Constitution. Although Plaintiffs contend that Plan H283 has 16 county-line cuts, this is incorrect. Plan H283 divides only one county (Henderson) for a reason other than allocating surplus population. This violation of the county-line rule is justified in order to comply with the one person, one vote requirement of the Fourteenth Amendment. The "cuts" that Plaintiffs identify relate to the removal of part of a county to assign surplus population, which are not prohibited by Article III, § 26 of the Texas Constitution. Thus, Plan H283 clearly adheres to the county-line rule.

Significantly, even though Plaintiffs completely disregard the county-line rule, they fail to equalize population among all House districts. This demonstrates that Plaintiffs violate the Texas Constitution in their plan only to make political choices that would favor Democratic candidates. This is evident in Plan H295's decision to create three districts in Nueces County, even though the population of the county only entitles it to two seats, and its creation of a districtin Cameron and Hidalgo County despite the resulting county-line violations in other regions of the state. Finally, the State objects to Plan H295 because it does not respect the Legislature's goal of protecting incumbents and, as a result, is much less fair to incumbents—particularly Republican incumbents. All of Plan H295's pairings result in a Republican losing to a Democrat or two Republicans being paired. Plan H295 does not pair any Democrats.

C. Plan H296 (Perez Plaintiffs)

Plan H296 is similar to Plan H295. It purports to create 33 Latino opportunity districts with over 50% HCVAP as compared to 30 such districts in Plan H283. The State objects to Plan H296 because it has 5 county-line violations. Additionally, Plan H296 makes the same member pairings as in Plan H295, all of which clearly favor Democratic incumbents at the expense of Republicans. The State objects to this plan for the same reasons it objects to Plan H295.

V. Objections to Proposed Interim Senate Redistricting Plans

The United States has not objected to the State's Senate redistricting plan. In fact, the Answer filed in the judicial preclearance suit admits that the State is entitled to a declaratory judgment that the Senate plan complies with section 5 of the VRA. See Answer (Doc. 45) ¶¶ 21, 35, Civil Action No. 1:11-cv-01303 (D.D.C. Sept. 19, 2011) ("Defendants admit that Plaintiff is entitled to a declaratory judgment that the proposed Senate plan complies with Section 5 of the Voting Rights Act."). Pending a contrary decision from the district court, the State's enacted Senate redistricting plan is therefore properly implemented as an interim plan except to the extent it must be altered to cure constitutional or statutory defects. Plaintiffs have identified no such defects in the Senate plan.

A. Plan S156 (Davis Plaintiffs)

Plan S156 was submitted by the Davis Plaintiffs in Davis v. Perry, No. 5:11-cv-788-OLG-JES-XR (W.D. Tex). Plan S156 combines 12% of Dallas County's population with 29% of Tarrant County's population to create a proposed SD 10 with 32.6% HCVAP and 26.0% BCVAP. In addition, the plan makes changes to other state-enacted districts which are not the subject of litigation, specifically Senate Districts 2, 8, 9, 12, 16, 22, 23, and 30. Finally, the creation of SD 10 in S156 reduces BCVAP in Senate District 23, a district in which African Americans currently elect the candidate of their choice, from 48.3% in the benchmark plan to 45.2% in S156.

The State objects to Plan S156 on the ground that its proposed SD 10 is not necessary to cure a statutory or constitutional violation; therefore, it is not properly imposed in a court-drawn interim redistricting plan. While it is offered as an ostensible race-based remedy for a section 2 violation, SD 10 does not meet the Gingles I requirement that a minority citizen voting age population be sufficiently large and geographically compact to constitute the majority in a single district. It is neither a majority Latino district nor a majority African-American district. The State's decision not to create this Senate district does not violate section 2 of the VRA.

The State objects further to Plan S156 on the ground that it purports to alter districts that have not been challenged by Plaintiffs. Plaintiffs' attempt to create these districts through a court order invades the province of the Texas Legislature and asks the Court to exceed its authority because Plan S156 merely seeks to enact the Plaintiffs' policy preferences outside of the legislative process.

B. Plan S155 (LULAC Plaintiffs)

Plan S155 was submitted by the LULAC Plaintiffs in LULAC v. Perry, No. 5:11-cv-855-OLG-JES-XR (W.D. Tex) (Consolidated). Plan S155 is a partial plan that makes changes to two senate districts in Tarrant and Dallas County. Plan S155 combines 20% of Dallas County's population with 19% of Tarrant County's population to create SD 10. This configuration does not exist in either the benchmark plan or the State's enacted plan. The proposed SD 10 contains 38.0% HCVAP and 16.3% BCVAP. It increases the BCVAP in SD 23 from

48.3% in the benchmark plan to 49.9% in Plan S155, while reducing the HCVAP in SD 23 from 24.3% in the benchmark plan to 17.7% in Plan S155.

Defendants object to Plan S155 on the ground that it does not cure any alleged violation of federal law and is therefore improper in a court-ordered interim plan. Like the Davis Plaintiffs' Plan S156, LULAC's plan makes changes to districts in Tarrant and Dallas Counties in order to form a district that does not satisfy the first Gingles precondition and is therefore not compelled by the VRA. Because the proposed districts are not compelled by the VRA, they constitute discretionary political choices that only the Texas Legislature has the authority to make. The State objects further to Plan S157 on the ground that it is not a complete map; therefore, its impact on other districts is unknown.

C. Plan S157 (LULAC Plaintiffs)

Plan S157 is the second partial plan submitted by LULAC Plaintiffs in LULAC v. Perry, No. 5:11-cv-855-OLG-JES-XR (W.D. Tex) (Consolidated). Plan S157 creates three senate districts in Dallas, Tarrant, and Ellis County. Under Plan S157, SD 30 combines 33% of Dallas County's population with 17% of Ellis County's population, a configuration not found in either the benchmark plan or the State's enacted plan. The proposed SD30 would contain 14.7% HCVAP and 44.1% BCVAP. SD 33 contains 35.9% HCVAP and 21.1% BCVAP. Finally, SD 34 contains 21.1% HCVAP and 23.6% BCVAP.

The State objects to Plan S157 on the ground that it does not cure any alleged violation of federal law and is therefore improper in a court-ordered

interim plan. Like S155 and S156, none of the proposed districts in S157 are compelled by the Voting Rights Act and therefore constitute discretionary districts that only the Texas Legislature has the policy-making authority to create. Further, the State objects to Plan S157 on the ground that it is not a complete map; therefore, its impact on other districts is unknown.

CONCLUSION & PRAYER

For the foregoing reasons, Defendants respectfully request that the Court sustain its objections to the Plaintiffs' proposed interim reapportionment plans and order that the Texas Legislature's duly enacted redistricting plans for Congress and the Texas House of Representatives be employed, on an interim basis, for the 2012 elections.

Dated: October 24, 2011

Respectfully Submitted,

GREG ABBOTT
Attorney General of Texas

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 11-CA-360-OLG-JES-XR
[Lead case]

SHANNON PEREZ, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

FILED: 11/10/11
Document 508

DEFENDANTS' ADVISORY TO THE COURT REGARDING DEVIATION FROM EQUALIZED DISTRICT POPULATION IN INTERIM REDISTRICITNG PLANS

Defendants Rick Perry, in his official capacity as Governor, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas (collectively "Defendants"), submit this advisory memorandum to clarify the standards that apply to interim reapportionment orders, specifically the degree to which a court-drawn interim plan may deviate from absolute population equality in state legislative districts when redistricting plans have been enacted by the legislature but not precleared.

INTRODUCTION

During the recent hearings on interim redistricting plans, the Court questioned whether interim Texas House and Senate plans could incorporate unequally populated districts from the enacted plans given the stricter standards of population equality that apply to court-drawn plans. Courts that have considered this question have demonstrated that the strict standard of map-wide population equality applies only when the court must create an entirely new redistricting plan due to the legislature's failure to act. When the legislature has enacted redistricting plans, the court's power extends only to remedying specific constitutional and statutory defects in thoseplans. In the context of state legislative redistricting plans, de minimis population deviations are not legal defects in the enacted plans and therefore should not be addressed in any interim redistricting plans.

LEGAL AUTHORITY

The Supreme Court has held that when the legislature's failure to reapportion forces a federal court to create a redistricting plan, the court's plan "must ordinarily achieve the goal of population equality with little more than de minimis variation." Chapman v. Meier, 420 U.S. 1, 27 (1975) (vacating a state legislative redistricting plan, drawn by a federal district court after the legislature failed to act, which had a total population deviation of 20.14%)[1]; see also Connor v. Finch, 431 U.S. 407, 415

[1] It is important to note that the Supreme Court stopped short of mandating precise population equality for state legislative districts created by federal courts. See Chapman, 420 U.S. at

(1977) (noting that plans drawn to remedy the legislature's failure to redistrict are subject to stricter standards because courts "possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name"). When the legislature has enacted a redistricting plan, however, the court's lack of authority to override legitimate legislative decisions prevents it from modifying the legislature's plan unless necessary to remedy specific violations of federal law:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of "reconciling the requirements of the Constitution with the goals of state political policy." . . . An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect.

---

27 n.19 ("This is not to say, however, that court-ordered reapportionment of a state legislature must attain the mathematical preciseness required for congressional redistricting . . . ."). Chapman is therefore consistent with the ten percent threshold generally permitted in state legislative redistricting plans. See, e.g., *Brown v. Thomson*, 462 U.S. 835, 842 (1983) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.").

Upham v. Seamon, 456 U.S. 37, 43 (1982) (per curiam) (quoting Connor v. Finch, 431 U.S. at 414); cf. White v. Weiser, 412 U.S. 783, 797 (1973) (holding that the district court erred because "in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state proposed plan"). This limitation on the court's remedial authority applies even if the legislature's plan has not yet been precleared. See Upham 456 U.S. at 43 ("We have 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.").[2]

Although Upham recognized the "stricter standards" that apply to court-ordered redistricting plans, the Supreme Court explained that those strict standards apply only to parts of a plan that are actually drawn by a court to remedy specific legal violations:

> This stricter standard applies, however, only to remedies required by the nature and

---

[2] In Upham, the DOJ made an administrative determination denying preclearance. In this case, there has been no preclearance determination, but the DOJ has identified specific districts that it argues do not satisfy section 5 of the VRA. To the extent this distinction makes any difference, it would seem to require greater deference to the State's plans in this case, which have not been denied preclearance, than to the plan in Upham, which had been denied. Put differently, it would be nonsensical to give greater deference to a map for which preclearance has been affirmatively denied than to a map for which preclearance is still pending.

> scope of the violation: "The remedial powers of an equity court must be adequate to the task, but they are not unlimited." . . . We have 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. There may be reasons for rejecting other parts of the State's proposal, but those reasons must be something other than the limits on the court's remedial actions. Those limits do not come into play until and unless a remedy is required; whether a remedy is required must be determined on the basis of the substantive legal standards applicable to the State's submission.

Upham, 456 U.S. at 42–43 (quoting Whitcomb v. Chavis, 403 U.S. 124, 161 (1971)) (internal citation and footnote omitted). The fact that a court must modify part of a legislatively enacted map does not mean that the entire map is subject to the stricter standards that apply to courtdrawn districts. In other words, while this Court may attempt to minimize population deviations in any district it chooses to modify, it has no legal authority to override the Legislature's legitimate policy decisions in order to achieve absolute population equality in every legislative district across the State—including districts that comply with federal law.

The three-judge court in Balderas v. Texas, 2001 WL 34104833 (E.D. Tex. Nov. 28, 2001), applied these principles to the Texas House redistricting

plan passed by the Legislative Redistricting Board (LRB) in 2001. In Balderas, the Department of Justice objected to the LRB's House plan shortly after the district court concluded an evidentiary hearing on claims under the Constitution and section 2 of the Voting Rights Act. Because the LRB-drawn plan had not been precleared, the district court had to implement its own plan, but the court expressly limited its modifications to districts in the enacted plan that violated federal law:

> Our decision here is limited to correcting the federal constitutional and statutory defects in the LRB House plan, including the concerns raised in the objection of the Justice Department. That approach is dictated by the Supreme Court's decision in Upham v. Seamon.

Balderas, 2001 WL 34104833 at *2 (footnotes omitted). Following the rule expressed in Upham, the Balderas court incorporated the majority of the LRB's House plan and made changes only where necessary to address the DOJ's objections. In other words, the court based its plan on the unprecleared LRB plan—not the benchmark plan based on the 1990 Census. Significantly, contemporary reports from the Texas Legislative Council show that the Balderas court's plan included deviations from ideal district population, even in large urban counties with multiple whole districts. See Texas Legislative Council, Plan 1369H Red-M100 Report (Nov. 26,

2001), attached as Exhibit 1.[3] The Texas House plan implemented by the three-judge court in Balderas v. Texas is the appropriate guide for this Court's interim House and Senate plans.[4]

The district court in Terrazas v. Clements, 537 F. Supp. 514 (N.D. Tex.), stay denied, 456 U.S. 902 (1982), took a similar approach. The court adopted unprecleared LRB plans on an interim basis, modifying the State's plans only as necessary to address the DOJ's objections. Significantly, in that case the district court expressly rejected the argument, based on Chapman, that it was required

---

[3] The Texas Legislative Council report shows that Plan 1369H had a total deviation of 9.74% and an average deviation of 2.65%.

[4] This case, like Upham, Balderas, and *Johnson v. Miller*, infra, is unlike cases in which district courts implemented legislative plans that had not been submitted for preclearance review. See *Lopez v. Monterey County*, 519 U.S. 9 (1996) (holding, in a section 5 enforcement case, that the district court erred by implementing the same redistricting plan that the county had failed to submit for preclearance); *Clark v. Roemer*, 500 U.S. 646 (1991) (holding that the district court erred in authorizing elections under a plan that the state had failed to submit for preclearance); *McDaniel v. Sanchez*, 452 U.S. 130 (1981) (holding that the district court erred in adopting a permanent remedial plan submitted to the court by a covered jurisdiction after its previous plan was held to be unconstitutional, explaining that the court should not have acted on the plan before it had been submitted for preclearance). Those cases presented a risk that covered jurisdictions could circumvent preclearance by refusing to enact a redistricting plan, then submitting a plan to a court for implementation as a remedy for the legislature's failure to redistrict. That risk is not present in this case, where all of the plans at issue have been submitted for preclearance.

to eliminate population deviations in the LRB's plan. *See id.* at 546–47; cf. Burton v. Hobbie, 543 F. Supp. 235, 239 (M.D. Ala.), aff'd, 459 U.S. 961 (1982) (implementing an unprecleared state legislative plan on an interim basis, with limited modifications in response to DOJ objections, relying on White v. Weiser, Upham v. Seamon, and Terrazas v. Clements).

Similarly, the district court in *Johnson v. Miller*, 929 F. Supp. 1529, 1562 (S.D. Ga. 1996), incorporated unprecleared, legislatively enacted Georgia House and Senate districts into an interim plan despite their deviation from strict population equality. The Georgia Legislature had enacted mid-decade redistricting plans in 1995 because it anticipated, correctly, that its 1992 plans were unconstitutional under *Shaw v. Reno*, 509 U.S. 630 (1993). After the 1992 plans were challenged, the district court entered a preliminary injunction against their use in further elections. Because the DOJ objected to Georgia's 1995 plans, however, the district court had to adopt interim plans. The parties agreed that the majority of the 1995 plans should be used on an interim basis, but three Senate districts and seven House districts remained in dispute. Despite the lack of preclearance, the district court adopted the 1995 plans on an interim basis and modified only three districts in response to DOJ objections. *See id.* at 1566–67.

Significantly, the three-judge court in Johnson held that a total population deviation of approximately ten percent did not preclude the 1995 plans from being used as court-ordered interim plans. The district court recognized that court-

ordered plans generally must maintain equal population among districts, but it explained that Upham required it to adhere to the Legislature's judgment:

> We realize that absent "persuasive justification," a court-ordered reapportionment plan to remedy a violation of the one-person one-vote principle must ordinarily achieve the goal of population equality with little more than de minimis deviation. *Connor v. Finch*, 431 U.S. at 414 . . . . However, our plan is not one drawn to remedy a one-person one-vote violation, and our "persuasive justification" is that we are constrained by the holding in *Upham v. Seamon* . . . to use so much of the State legislative plan as is not violative of the Constitution or federal statutes. Complying with the Upham rule requires that we accept and work within the range of deviations from ideal population that are contained in the State plan from which we borrow district configurations.

Id. at 1563 n.84. The court held that "[i]t does not violate the one-person one-vote principle for us to use in an interim remedy plan districts from a legislatively enacted plan that does not itself violate that principle." Id. at 1563. Defendants are not aware of any authority to the contrary.

CONCLUSION

For the reasons stated above, Defendants respectfully submit that, in the event this Court orders interim district maps that deviate from the

legislatively enacted Texas House and Senate plans, the Court should not eliminate population deviations that would otherwise be permissible in a legislatively enacted plan, and should make only such changes to the legislatively enacted plans as it deems necessary to remedy specific violations of federal law.

Dated: November 10, 2011

Respectfully Submitted,

GREG ABBOTT
Attorney General of Texas

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 11-CA-360-OLG-JES-XR
[Lead case]

SHANNON PEREZ, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

FILED: 11/18/11
Document 521

DEFENDANTS' OBJECTIONS TO THE COURT'S PROPOSED INTERIM HOUSE PLANS

Defendants Rick Perry, in his official capacity as Governor, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas (collectively, "Defendants") respectfully file these objections in response to the Court's Order of November 17, 2011 (Doc. 517). In support, Defendants state as follows:

A court's job is to apply the law, not to make policy. A federal court lacks constitutional authority to interfere with the expressed will of the State Legislature unless it is compelled to remedy a specific, identifiable violation of law. Contrary to this basic principle of federalism, the proposed interim

redistricting plan consistently overturns the Legislature's will where no probability of a legal wrong has been identified. Worse, the court-proposed plan even alters legislatively enacted districts that were not subject to any legal challenge by the plaintiffs or disputed in the section 5 case. By imposing remedies where no wrongs exist, and where no wrongs were even alleged, the Court has exceeded its mandate and actively engaged in policymaking. But the Court is not competent to engage in lawmaking, and its unauthorized foray into territory constitutionally reserved for the Legislature has resulted in a proposed map that ignores countless policy choices hammered out through the legislative process over the course of the 2011 session. Indeed, even in the very short time allowed for comments, a bipartisan group of at least twenty legislators have objected to the unilateral policy decisions imposed by the Court's maps.[1]

While the Court has not identified any particular Voting Rights Act (VRA) or constitutional violation that would provide a compelling or narrowly tailored explanation for the proposed revisions, it is apparent from the revisions that the Court has:

---

[1] Upon receipt of the Court's Order, a message soliciting comments from all members of the Legislature was sent to the membership on behalf of the Office of the Attorney General by the Office of the Speaker of the House. The Office of the Attorney General received numerous comments, including certain messages from legislators who are plaintiffs in this case. Their comments are attached unedited. With respect to legislators who are plaintiffs in this case, no further communications were conducted with them.

• Created coalition districts across the State when such districts have never been construed by the U.S. Supreme Court as required under either section 2 or section 5 of the VRA;

• Split Nueces County into 3 House districts, 2 of them partial, in clear violation of the Texas Constitution, without any overriding requirement to do so under the Constitution or laws of the United States;

• Reduced the deviation in district population in the Texas House in derogation of the discretion accorded to the State under governing law;

• Reduced the number of African-American voting age majority districts in the House from three to one; and

• Failed to honor historical lines, existing political boundaries, and communities of interest.

A. The Court's Remedial Power Does Not Authorize It to Displace Lawful Policy Choices by the Legislature.

Because unelected federal judges possess neither the constitutional power nor the political competence to make the policy choices essential to redistricting, the Supreme Court has prohibited lower courts from disregarding the legislature's intention as expressed in an enacted redistricting plan, unless it is necessary to avoid a constitutional or statutory violation:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of "reconciling the

> requirements of the Constitution with the goals of state political policy." . . . An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the . . . reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature.

Upham v. Seamon, 456 U.S. 37, 43 (1982) (per curiam) (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)); cf. W*hite v. Weiser*, 412 U.S. 783, 797 (1973) (holding that the district court erred because "in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state proposed plan"). In other words, when a federal court is forced to order an interim redistricting plan, it must respect the State Legislature's considered judgments whenever possible.

B. The Proposed Plans Disregard the Legislature's Policy Choices Without Justification.

The redistricting plans proposed by the Court, H298 and H299, systematically disregard the policy choices of the Texas Legislature. Those choices reflect more than the preferences of individual legislators. The legislatively enacted plans incorporate constituents' concerns about

communities of interest and proper representation that were received during the extensive redistricting hearings held in the legislative interim. Thus the Court's departure from the expressed will of the Legislature not only undermines the democratic process, it ignores the voice of the citizenry.

To take a glaring example, plan H298 disregards the interests of the African-American community by reducing the number of majority-African-American districts from three to one and ignoring traditional African-American communities of interest, potentially jeopardizing their representation in the future. As Representative Senfronia Thompson (D-Houston) explains, the Court's decision to substitute its political judgment for that of the Texas Legislature destroys African-American coalitions that have taken years to build, removes core constituencies from districts, and separates voters that have shared representation for years. Statement of Representative Senfronia Thompson, Attachment at 7. The whole point of Upham's direction to follow the enacted policy of a state as expressed in a legislatively enacted map is to prevent courts from doing exactly what this Court has done in its proposed interim plan. As explained by Representative Harold Dutton (D-Houston): "The residents in District 142 are treated far better under the Legislature's approved map than they are under the Court drawn map. The traditional communities of interest, which have existed since 1972, are destroyed under the Court['s] plan." Statement of Representative Harold Dutton, Attachment at 15.

The Court's pervasive departure from the legislatively enacted House plan harms communities

of interest across the State. The Court's proposed changes to HD 15, for example, cross natural borders, divide The Woodlands (splitting school districts and neighborhoods in the process), and create a House district that one cannot drive across without crossing into another district. See Statement of Representative Rob Eissler, Attachment at 1. Similarly, the Court's proposed changes to Collin County divides the city of Frisco, whose residents asked to be contained in a single district. But the changes do not serve any apparent remedial purpose, as they do not affect the demographics of any affected district. See Statement of Representative Jerry Madden, Attachment at 13. Whatever purpose may be served by splitting these communities, it is not enforcement of the Constitution or the VRA. Comments received from the Legislature show that the Court's comprehensive revision of district lines has disrupted communities of interest all over the State. See Attachment.

The Court's plans also pair Republican and Democratic incumbents, including Representatives Rodney Anderson and Helen Giddings, thus overriding the Legislature's deliberate decision to avoid cross-party pairings in order to give paired incumbents a reasonable chance to be re-elected. The Court's plans also pair different incumbents than the Legislature's enacted plan, reversing without justification the difficult policy determinations made by the Legislature. The Court is simply not legally authorized—nor is it competent—to make these kinds of purely political decisions.

C. The Proposed Plans Change Lawful Population Deviations for No Apparent Purpose and With No Apparent Benefit.

The proposed redistricting plans further undermine the Legislature's policy choices by altering every House district in large urban counties for no apparent reason other than to reduce the difference in total population among districts. These changes are not within the Court's power because the legislatively enacted population deviations do not violate federal law. The Supreme Court has made clear that a total deviation of less than 10% is consistent with the principle of one-person, one-vote, *Brown v. Thomson*, 462 U.S. 835, 842 (1983), and it has expressly based that determination on the fact that policy choices are necessary not only to enact a plan but to ensure effective representation. See *Gaffney v. Cummings*, 412 U.S. 735 (1973). Changing legislatively enacted districts for which there is no section 2, section 5, or constitutional violation alleged—much less a demonstrated likelihood that such a challenge would succeed on the merits—is beyond the Court's power. In addition, such unwarranted changes mark a clear departure from the consistent practice of previous courts in Texas redistricting cases.[2] Although courts are

---

[2] See Balderas v. Texas, 2001 WL 34104833 (E.D. Tex. Nov. 28, 2001) (incorporating the majority of the unprecleared LRB House plan into a court-drawn redistricting plan, including deviations in large urban counties with multiple whole districts); Terrazas v. Clements, 537 F. Supp. 514, 546–47 (N.D. Tex. 1982) (rejecting the argument that the court was required to eliminate population deviations when incorporating districts from an unprecleared LRB redistricting plan); accord

generally subject to a stricter standard of population deviation than state legislatures in drawing electoral districts,

> [t]his stricter standard applies . . . only to remedies required by the nature and scope of the violation . . . . There may be reasons for rejecting other parts of the State's proposal, but those reasons must be something other than the limits on the court's remedial actions. Those limits do not come into play until and unless a remedy is required; whether a remedy is required must be determined on the basis of the substantive legal standards applicable to the State's submission.

Upham, 456 U.S. at 42–43 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971)) (internal citation and footnote omitted); see also *Connor v. Finch*, 431 U.S. 407, 415 (1977) (noting that plans drawn to remedy the legislature's failure to redistrict are subject to stricter standards because courts "possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name").

Johnson v. Miller, 929 F. Supp. 1529, 1563 (S.D. Ga. 1996) ("It doesnot violate the one-person one-vote principle for us to use in an interim remedy plan districts from a legislatively enacted plan that does not itself violate that principle."); cf. Burton v. Hobbie, 543 F. Supp. 235, 239 (M.D. Ala.) (implementing an unprecleared state legislative plan on an interim basis, with limited modifications in response to DOJ objections, relying on White v. Weiser, Upham v. Seamon, and Terrazas v. Clements), aff'd, 459 U.S. 961 (1982).

The Court's apparent attempt to minimize—but not equalize—population across districts creates the very entanglement that the Supreme Court has warned against since the beginning of its involvement in reapportionment. The Court long ago cautioned that reducing constitutional population deviations in state legislative plans results in excessive interference with the legislative process with minimal constitutional returns:

> Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population-equality standard.
>
> The point is, that such involvements should never begin. We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it. Their work should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved.

Gaffney v. Cummings, 412 U.S. 735, 750–51 (1973).

D. The Proposed Plans Create and Maintain Coalition Districts that Are Not Compelled by the Voting Rights Act.

Plan H298 further overturns the Legislature's judgment by creating two House districts—District 26 and District 54—in which three distinct minority groups are combined in what appears to be a

deliberate effort to meet a 50% minority population benchmark. See Plan H298, Red 106 (District 26 contains 14.5% Hispanic CVAP, 15.6% Black CVAP, and 23.8% Asian CVAP); id. (District 54 contains 17.8% Hispanic CVAP, 28.8% Black CVAP, and 3.1% Asian CVAP). Section 2 of the Voting Rights Act does not require the State—or permit the Court—to create multi-racial coalition districts when no single, geographically compact minority group is large enough to make up the majority in a district. See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1243 (2009) ("Nothing in § 2 grants special protection to a minority group's right to form political coalitions."). Even if section 2 could be construed to require coalition districts in some instances, the Supreme Court has emphasized that such districts could be compelled only upon a heightened showing of voting cohesion between members of each group. See *Growe v. Emison*, 507 U.S. 25, 41, 42 (1993); cf. *Session v. Perry*, 298 F. Supp. 2d 451,483–84 (E.D. Tex. 2004) ("Properly confined, the [VRA] implements the fundamentals of factions. Unconfined it reaches into the political market and supports persons joined, not by race, but by common view. Serious constitutional questions loom at that juncture."), aff'd in part, rev'd in part on other grounds, vacated in part sub. nom. *LULAC v. Perry*, 548 U.S. 399 (2006). No evidence before this Court demonstrates any voting cohesion—let alone heightened voting cohesion—among Latino, African-American, and Asian minority groups in District 26 and District 54. Nor is there any evidence in the record that members of these minority groups have been effectively excluded from the political process. The same is true of HD

149, which has been redrawn in Harris County for no apparent reason other than to protect an alleged political coalition. Just as section 2 does not require the Court to create coalition districts, it does not permit the Court to maintain a coalition district against the Legislature's will unless the elimination of such a district is shownto be a manifestation of intentional racial discrimination. No such showing has been made in this case. As a result, this Court's proposal to create and maintain such coalition districts is not justified by the need to remedy a legal harm.

E. The Proposed Plans Violate the Texas Constitution for a Solely Race-Based Purpose.

Furthermore, the proposed House Plan (H298) violates the Texas Constitution's county line rule, see TEX. CONST. art. III, § 26, because it contains an unnecessary county cut, while the State's enacted plan contains none. This county-line rule violation evidences the Court's decision to elevate race over traditional redistricting principles in violation of the United States Constitution. The Supreme Court, however, has repeatedly found that the Constitution and Voting Rights Act incorporate, and therefore cannot conflict with, traditional redistricting principles like the county-line rule. See, e.g., *Bush v. Vera,* 517 U. S. 952, 963 (1996). The Voting Rights Act does not require, and the Constitution does not allow, the Court to reject traditional redistricting principles solely to create majority Hispanic or African-American districts. See, e.g., *Abrams v. Johnson*, 521 U.S. 74, 92 (1997).

CONCLUSION

The ultra vires decisions embodied in the Court's proposed interim plan eviscerate countless legitimate, considered judgments of the Texas Legislature. Indeed, the Court's proposal denies the Legislature the presumption of good faith and legality to which it is entitled. Moreover, it does so without any explanation, much less a compelling and narrowly tailored justification for the race-based "remedy" it imposes. The Court's proposal appears to reflect the policy choices of unelected federal judges, rejecting without explanation or justification the will of the people of the State of Texas as reflected in the plans enacted by their duly elected representatives.

Dated: November 18, 2011

Respectfully Submitted,

GREG ABBOTT
Attorney General of Texas

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

Civil Action No. 11-CA-360-OLG-JES-XR
[Lead case]

SHANNON PEREZ, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

FILED: 11/23/11
Document 529

DEFENDANTS' MOTION TO STAY IMPLEMENTATION OF INTERIM HOUSE REDISTRICTING PLAN PENDING APPEAL

Defendants Rick Perry, in his official capacity as Governor, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas (collectively, the "State Defendants") respectfully ask the Court to stay pending appeal its interlocutory order dated November 23, 2011, which directs implementation of an interim redistricting plan for the Texas House of Representatives. State Defendants also request further relief described below.

ARGUMENT AND AUTHORITIES

As Judge Smith recognized, "[u]nless the Supreme Court enters the fray at once to force a stay

or a revision [to the Court's House map], this litigation is, for all practical purposes, at an end." This Court should itself grant the stay envisioned by Judge Smith, which would give the Supreme Court time to review this Court's actions before the election process moves forward under a legally flawed Texas House map. As Judge Smith recognized, if a stay is not granted, the democratically enacted will of the People of Texas will effectively be cast aside and replaced by the will of two unelected federal judges.

A stay pending appeal is entirely appropriate pending expeditious appellate review of important issues such as those presented by this Court's interim order. Indeed, the Supreme Court has itself routinely granted stays of interim redistricting plans pending its consideration of orders similar to this Court's interim order. *McDaniel v. Sanchez*, 448 U.S. 1318 (1980) (Powell, J., in chambers); *Bullock v. Weiser*, 404 U.S. 1065 (1972) (stay order), rev'd on substantive grounds sub nom. *White v. Weiser*, 412U.S. 783, 789 (1973); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970) (stay order), rev'd on substantive grounds and remanded, 403 U.S. 124 (1971).

This Court's interim order is akin to a preliminary injunction, and a preliminary injunction of any sort is an "extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 676 (2008). A court will stay its injunction pending appeal where, as here, the moving party can demonstrate: (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable injury if the stay were not granted; (3) that granting the stay would not substantially harm the other parties; and (4) that granting the stay would serve the public interest.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). In this Circuit, it is well established that a stay pending appeal is warranted by a showing of "a substantial case on the merits when a serious legal question is involved" and by a showing that "the balance of the equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 556 (5th Cir. 1981). Id. See also *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) ("The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay.").

First, this Court's interim order violates *Upham v. Seamon*, and will likely be reversed on appeal. Upham clearly requires a district court enacting an interim redistricting plan to defer to a legislatively enacted map unless the court is required to remedy a probable constitutional or statutory violation. This Court's interimredistricting plan, however, substantially alters districtsenacted by the Texas Legislature where no constitutional or statutory violation exists. The Court apparently takes its mandate to impose these sweeping changes from the fact that section 5 proceedings remain pending. That approach converts the already constitutionally fragile section 5 mechanism into a mandate for wholesale rejection of the state's plan and forced implementation of a court-drawn plan. Indeed, in many cases, the interim plan changes districts that are not even alleged—either in these consolidated cases or in the judicial preclearance case currently pending in the United States District Court for the District of Columbia—to violate either constitutional or federal law.

Second, implementation of the interim redistricting plan drawn by this Court will cause substantial and irreparable harm to the State of Texas and its citizens. Specifically, even the temporary invalidation of a statute irreparably injures the State; by itself, it constitutes sufficient grounds for stay. See N*ew Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined."). But more troubling is the injury that will result from allowing the 2012 Texas House elections to go forward on an unlawfully composed redistricting plan. Once done, the harm caused to the State and its citizens by those elections cannot be undone even if the elections are later invalidated, because the results of the election would be irreversible. See *Lucas v. Townsend*, 486 U.S. 1301, 1304 (Kennedy, J., in chambers).

Third, the injuries caused to the State and its citizens strongly outweigh any harm caused to the plaintiffs in this case. Plaintiffs suffer little—if any harm—by a stay of the Court's interim redistricting plan pending appeal. In contrast, the harm caused to the state and all its citizens when an election takes place under an illegally drawn redistricting plan is both substantial and irreparable.

Finally, the public interest is clearly best served by a stay of this Court's interim redistricting plan.

I. STATE DEFENDANTS WILL LIKELY PREVAIL ON THE MERITS IN THE UNITED STATES SUPREME COURT.

As correctly explained in the dissent by Judge Smith:

> "The judges in the majority, with the purest of intentions, have instead produced a runaway plan that imposes an extreme redistricting scheme for the Texas House of Representatives, untethered to the applicable case law. The practical effect is to award judgment on the pleadings in favor of one side --a slam-dunk victory for the plaintiffs--at the expense of the redistricting plan enacted by the Legislature, before key decisions have been made on binding questions of law. Because this is grave error at the preliminary, interim stage of the redistricting process, I respectfully dissent."

Because the Court's interim redistricting plan for the House supplants the State's legislatively enacted plan without legal justification and thus "presents grave error," the Court should stay its order pending review by the United States Supreme Court. As explained below, the Court's plan is contrary to Supreme Court precedent governing the constitutionally permissible role of race in redistricting and the equitable jurisdiction afforded to courts faced with the need to draw interim plans. *Upham v. Seamon*, 456 U.S. 37 (1982). The Supreme Court is thus likely to conclude that this Court went beyond its authority in altering districts beyond

those necessary to remedy statutory or constitutional defects.

A. The Interim Redistricting Plan Alters Districts Beyond Those Necessary to Remedy Constitutional or Voting Rights Act Violations.

The Supreme Court has unambiguously prohibited lower courts issuing interim redistricting maps from deviating from the legislature's intention in an enacted redistricting plan, except where doing so is necessary to avoid a constitutional or statutory violation:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of "reconciling the requirements of the Constitution with the goals of state political policy." . . . An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the . . . reapportionment plan offended either thConstitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature.

Upham v. Seamon, 456 U.S. 37, 43 (1982) (per curiam) (emphasis added) (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)); cf. *White v. Weiser*, 412 U.S. 783, 797 (1973) (holding that the district court

erred because "in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state proposed plan"). In Upham, preclearance had been denied. Here, no preclearance decisions have been reached due to the Section 5 court's understandable confusion about the applicable legal standards and the Department of Justice's dilatory litigation tactics.[1] As a result, no court has concluded that the State's House map violates Section 5, Section 2, or the U.S. Constitution. Yet this Court shows less deference to the State's House map than was showed in Upham to a map that had been **denied** preclearance. It defies all logic to conclude that a map that has been adjudged to violate Section 5 should be shown more deference than a map for which preclearance is currently being sought and may ultimately be granted. Upham plainly controls this case, and under Upham, when a federal court is forced to order an interim redistricting plan, it must respect the state legislature's policy judgments wherever possible.

Furthermore, the Texas House interim redistricting plan undermines the Legislature's policy choices by altering every House district in large urban counties for no apparent reason other than to reduce the difference in total population among districts These changes are not within the Court's power because the legislatively enacted

---

[1] For example, the Department of Justice moved earlier this week to abate the Section 5 proceeding in the D.C. District Court. The State, by contrast, requested a mid-December trial following the D.C. court's denial of the State's motion for summary judgment.

population deviations do not violate federal law. The Supreme Court has made clear that a total deviation of less than 10% is consistent with the principle of one-person, one-vote. See *Brown v. Thomson*, 462 U.S. 835, 842 (1983). Further, the House Plan includes changes to many districts that have never been alleged to violate the Voting Rights Act. This conflicts with the Supreme Court's holding that an interim plan must "reconcil[e] the requirements of the Constitution with the goals of state political policy." Upham, 456 U.S. at 43 (quoting Connor, 431 U.S. at 414). Changing legislatively enacted districts for which there is no section 2, section 5, or constitutional violation alleged—much less a demonstrated likelihood that such a challenge would succeed on the merits—is contrary to clearly established precedent.

B. The Interim Redistricting Plan Creates and Maintains Coalition Districts That Are Not Compelled By the Voting Rights Act.

The interim redistricting plan for the Texas House undermines the Legislature's judgment by creating House districts in which minority groups must be combined in order to meet the 50% citizen voting age population benchmark. See, e.g., Plan H298, Red 106 (House District 26 contains 14.5% Hispanic CVAP, 15.6% Black CVAP, and 23.8% Asian CVAP); id. (House District 54 contains 17.8% Hispanic CVAP, 28.8% Black CVAP, and 3.1% Asian CVAP). Section 2 of the Voting Rights Act does not require the State—or permit the Court—to create multi-racial coalition districts when no single, geographically compact minority group is large

enough to make up the majority in a district. *See Bartlett v. Strickland*, 129 S. Ct. 1231, 1243 (2009) ("Nothing in § 2 grants special protection to a minority group's right to form political coalitions."). Even if section 2 could be construed to require coalition districts in some instances, the Supreme Court has emphasized that such districts could be compelled only upon a heightened showing of voting cohesion between members of each group. *See Growe v. Emison*, 507 U.S. 25, 41, 42 (1993). No evidence before this Court demonstrates any voting cohesion—let alone heightened voting cohesion—among Latino, African-American, and Asian minority groups in House District 26 and House District 54.

The same is true of House District 149, which has been redrawn for no obvious reason other than to protect alleged political coalitions. Just as section 2 does not require the Court to create coalition or crossover districts, it does not permit the Court to maintain a coalition district against the Legislature's will unless the elimination of such a district is shown to be a manifestation of intentional racial discrimination. See Bartlett, 129 S.Ct. at 1246. No such showing has been made in this case.

C. The Interim House Plan Violates the Texas Constitution for a Solely Race-Based Purpose.

The interim House plan violates the Texas Constitution's county line rule, see TEX.CONST. art. III, § 26, because it contains an unnecessary county cut in Nueces County. The State's enacted plan, by contrast, contained no such unnecessary cut and

complied with the State Constitution. The Court's county-line rule violation evidences the Court's decision to elevate race over traditional redistricting principles in violation of the United States Constitution. The Supreme Court, however, has repeatedly found that the Constitution and Voting Rights Act incorporate, and therefore cannot conflict with, traditional redistricting principles like the county-line rule. *See, e.g., Bush v. Vera*, 517 U. S. 952, 963 (1996). The Voting Rights Act does not require, and the Constitution does not allow, the Court to reject traditional redistricting principles solely to create majority Latino or African-American districts. *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 92 (1997). Accordingly, the Supreme Court is therefore likely to conclude that the interim redistricting plan is unlawful.

II. STATE DEFENDANTS WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.

The immediate implementation of the Court's interim Texas House plan would prevent the State from enforcing a law enacted by the Texas Legislature. House Bill 150 passed with overwhelming majorities in both Houses of the Legislature. Blocking this legislation, as the Court has done, unquestionably causes irreparable harm to the State, its officers, and most importantly its citizens. As the Supreme Court has stated, even the temporary invalidation of a state statute irreparably injures the government and itself constitutes sufficient grounds to enter a stay. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating

statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.").

Beyond the harm inherent in blocking implementation of state law, a special harm arises when an election is permitted to go forward based on an illegal, court-drawn redistricting plan. As Judge Smith recognized, if a stay is not granted to allow for appellate review, this case will essentially be over, and the State's elections will be conducted on a legally flawed map. The candidate filing period will begin under the court's legally flawed, unreviewed map on Monday, STATE November 28, and absent a stay from this Court or the Supreme Court there will soon be little alternative other than to continue with elections on an improper map. The irreparable harm such a result would inflict on our democratic process and on all Texas voters requires no explanation. For these reasons, the Supreme Court has frequently stayed unlawful court-drawn plans in similar instances. *McDaniel v. Sanchez*, 448 U.S. 1318 (1980) (Powell, J., in chambers); *Bullock v. Weiser*, 404 U.S. 1065 (1972) (stay pending appeal in *White v. Weiser*, 412 U.S. 783, 789 (1973)); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970) (stay order).

III. STATE DEFENDANTS' IRREPARABLE INJURIES STRONGLY OUTWEIGH ANY HARM

TO PLAINTIFFS.

Plaintiffs will suffer little, if any, harm should the Court stay its order implementing the interim redistricting plan pending appeal. Any party that benefits from an improper interim redistricting map suffers no cognizable injury from a stay pending appellate review. In any case, Plaintiffs' right to vote and to participate equally in the political process will not be abridged by a mere delay in the final determination of electoral districts for the 2012 election. By contrast, refusing to issue a stay of an improper interim map will cause irreparable harm to the people of Texas. The election of an entirely new legislature under a plan other than the one enacted by the duly elected representatives of this State would be irreversible. See *Lucas v. Townsend,* 486 U.S. 1301, 1304 (Kennedy, J., in chambers) ("Even if the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive.").

IV. A STAY PENDING APPEAL IS—BY DEFINITION—IN THE PUBLIC INTEREST.

A stay of the preliminary injunction would allow State Defendants to carry out the statutory policy of the Legislature, which "is in itself a declaration of the public interest which should be persuasive." *Virginian Ry. Co. v. Sys. Fed'n* No. 40, 300 U.S. 515, 552 (1937); *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.,* 157 F.3d 500, 503 (7th Cir. 1998) ("When Sthe opposing party is the representative of the political branches of a government the court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance.").

CONCLUSION & PRAYER

State Defendants respectfully request that the Court stay its order imposing an interim redistricting plan for the Texas House of Representatives pending appeal. The State further requests that this Court stay the candidate filing and qualification deadlines for the Texas House of Representatives (as prescribed by State law and modified by order of this Court).

Further, the State recognizes that in order to preserve the Supreme Court's jurisdiction and provide the Supreme Court with adequate time to correct this Court's errors, it may become necessary to delay the primary elections for the Texas House of Representatives. While all unaffected primary elections will continue as scheduled on March 6, 2012, the State is prepared to delay its Texas House of Representatives primary elections in order to ensure that it is not forced to conduct elections using a legally flawed map. By delaying the primary elections pending appeal—if that should become necessary—the State can ensure that its citizens will have the opportunity to vote in elections under a redistricting plan determined to be lawful by the U.S. Supreme Court.

To that end, the State requests any and all relief the Court deems necessary to effectuate the Supreme Court's appellate jurisdiction, including but not limited to a stay of the primary election dates for the Texas House of Representatives.

Dated: November 23, 2011

Respectfully Submitted,

GREG ABBOTT
Attorney General of Texas

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 11-CA-360-OLG-JES-XR
[Lead case]

SHANNON PEREZ, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

FILED: 11/25/11
Document 534

DEFENDANTS' OBJECTIONS TO THE COURT'S PROPOSED INTERIM CONGRESSIONAL PLANS

Defendants Rick Perry, in his official capacity as Governor, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas (collectively, "Defendants") respectfully file these objections in response to the Court's Order of November 23, 2011 (Doc. 526). In support, Defendants state as follows:

A court's job is to apply the law, not to make policy. A federal court lacks constitutional authority to interfere with the expressed will of the State Legislature unless it is compelled to remedy a specific, identifiable violation of law. *Upham v. Seamon*, 456 U.S. 37, 43-44 (1982) (per curiam).

Contrary to this basic principle of federalism, the proposed interim redistricting plan for Texas' United States House of Representatives districts consistently disregards the Legislature's will where no probability of a legal wrong has been identified or demonstrated. This Court is without power to supplant the Texas Legislature's policy choices even if it considers itself to be a better judge of the public interest than the Legislature.

In crafting the proposed interim congressional redistricting plan (Plan C220), the Court clearly arrogates to itself the power to set State policy. Although the Department of Justice (DOJ) identifies only two objectionable districts in the State's enacted plan (Plan C185), the Court's plan redraws all 36 congressional districts. See Identification of Issues, Civil Action No. 1:11-cv-01303, at 8-10 (Doc. 53) (identifying Districts 23 and 27). By so doing, the Court "broadly brush[es] aside state apportionment policy without solid constitutional or equitable grounds for doing so." *Whitcomb v. Chavis*, 403 U. S. 124, 160-161 (1971).

While the Court has not identified any particular Voting Rights Act (VRA) or constitutional violation that would provide a compelling or narrowly tailored explanation for the proposed revisions, it is apparent from the revisions that the Court has:

• Created a coalition district in Tarrant County when such districts have never been construed by the Supreme Court as required under either section 2 or section 5 of the VRA;

• Preserved a crossover district in Central Texas although the Supreme Court has expressly rejected the proposition that section 2 of the VRA requires the creation or preservation of such districts absent a finding of intentional discrimination;

• Reconfigured District 35 from Plan C185 so that the performance of the Latino candidate of choice in reconstituted election analysis decreases significantly;

• Reconfigured District 27 so that Nueces County is no longer the anchor of its own congressional district, thereby rejecting an express policy choice of the Texas Legislature;

• Reduced the number of African-American plurality voting age population districts in Congress from three to two;[1]

• Created population deviations between districts where the State plan contained none; and

• Failed to honor historical lines, existing political boundaries, and communities of interest.

A. The Court's Remedial Power Does Not Authorize It to Displace Lawful Policy Choices by the Legislature.

Because unelected federal judges possess neither the constitutional power nor the political competence to make the policy choices essential to redistricting, the Supreme Court has prohibited lower courts from disregarding the legislature's

[1] A plurality African-American district is one in which African-American voters make up the largest single bloc of voters in the district, but do not consist of a majority.

intention as expressed in an enacted redistricting plan, unless it is necessary to avoid a constitutional or statutory violation:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of "reconciling the requirements of the Constitution with the goals of state political policy." . . . An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the . . . reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature.

Upham, 456 U.S. at 43 (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)); cf. *White v. Weiser*, 412 U.S. 783, 797 (1973) (holding that the district court erred because "in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state proposed plan"). In other words, when a federal court is forced to order an interim redistricting plan, it must respect the state legislature's considered judgments whenever possible.

Citing this principle, federal courts have consistently adopted legislatively enacted plans with minimal changes notwithstanding the fact that these

plans had not received preclearance. See *Balderas v. Texas,* No. Civ.A. 6:01CV158, 2001 WL 34104833, at *3 (E.D. Tex. Nov. 28, 2001); *Terrazas v. Clements*, 537 F. Supp. 514, 546–47 (N.D. Tex. 1982); accord *Johnson v. Miller,* 929 F. Supp. 1529, 1563 (S.D. Ga. 1996); cf. *Burton v. Hobbie*, 543 F. Supp. 235, 239 (M.D. Ala.) (implementing an unprecleared state legislative plan on an interim basis, with limited modifications in response to DOJ objections, relying on *White v. Weiser*, *Upham v. Seamon*, and *Terrazas v. Clements*), aff'd, 459 U.S. 961 (1982). Balderas provides an illustrative and recent example. There, plaintiffs brought challenges against the State's congressional, House, and Senate plans. *Balderas v. Texas*, 2001 WL 34104833, at *1. For the congressional plan, the "the 77th State Legislature failed to adopt a redistricting plan." *Session v. Perry*, 298 F. Supp. 2d 451, 458, (E.D. Tex. 2004), aff'd in part, rev'd in part on other grounds, vacated in part sub. nom. *LULAC v. Perry*, 548 U.S. 399 (2006). Only "when . . . state court efforts failed, [did the federal court] recognize[] that the State's existing congressional districts were unconstitutionally malapportioned and reluctantly accept[] the duty to prepare a new, constitutional plan." Id. Without a state congressional plan to which it could defer, the Balderas court started from a blank slate in drawing its plan. However, for the House and Senate plan, where the State Legislative Redistricting Board had acted, the Court properly deferred to the State policies. See *Balderas v. Texas,* 2001 WL 34104833, at *3; *Balderas v. Texas,* No. Civ.A. 6:01CV158, 2001 WL 34104836, at *1-3 (E.D. Tex. Nov. 28, 2001). DOJ's objections to the LRB House Plan in Balderas

dictated changes to four districts. See *Balderas v. Texas*, 2001 WL 34104833, at *3.

Because the Court changed all 36 congressional districts, it is clear that the Court has showed no deference to the congressional redistricting plan enacted by the Texas Legislature.[2] But no material distinction separates Plan C185 from the plans properly accorded deference in Upham and Balderas. Indeed, if anything, more deference is owed to Plan C185 than to either of the plans at issue in Upham or Balderas. In each of those cases, the legislatively enacted plans had been denied preclearance. Here, Plan C185, currently the subject of a judicial preclearance action, may very well achieve preclearance.[3] This Court's quixotic interim congressional plan is based on the absurd premise that a legislatively enacted map that has been denied preclearance is accorded more deference than one where preclearance may likely still be achieved. That cannot be the case.

---

[2] Indeed, this Court has already explicitly stated that it is "not required to give any deference to the Legislature's enacted plan," at least with respect to the legislatively enacted redistricting plan for the Texas House of Representatives. Order Adopting Plan H302, at 5.

[3] Unlike administrative preclearance, where the DOJ controls the outcome, the DOJ is a mere party to the judicial preclearance here. Thus, the Court must ascertain the universe of the DOJ's potential Section 5 objections to C185 from the pleadings rather than an objection letter. That the Court must look to pleadings instead of a letter denying preclearance as guidance does not empower the Court, in the name of equity, to alter dozens of districts that no party challenges.

B. The Proposed Plan Creates a Coalition District that is Not Compelled by the Voting Rights Act.

Plan C220 overturns the Legislature's will by creating a coalition district—District 33—in north Texas. Without identifying any violation of constitutional or federal law, the Court combined two distinct minority groups in what appears to be a deliberate effort to meet a 50% multi-racial minority population benchmark. See Plan C220, Red 106 (District 33 contains 21.1% HCVAP, 29.1% BCVAP, 44.2 Anglo CVAP, and 4.0% Asian CVAP). Section 2 of the Voting Rights Act does not require the State—or permit the Court—to create multi-racial coalition districts when no single, geographically compact minority group is large enough to make up the majority in a district. See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1243 (2009) ("Nothing in § 2 grants special protection to a minority group's right to form political coalitions."). Even if section 2 could be construed to require coalition districts in some instances, the Supreme Court has emphasized that such districts could be compelled only upon a heightened showing of voting cohesion between members of each group. See *Growe v. Emison*, 507 U.S. 25, 41, 42 (1993); cf. *Session v. Perry*, 298 F. Supp. 2d 451,483–84 (E.D. Tex. 2004) ("Properly confined, the [VRA] implements the fundamentals of factions. Unconfined it reaches into the political market and supports persons joined, not by race, but by common view. Serious constitutional questions loom at that juncture."), aff'd in part, rev'd in part on other grounds, vacated in part sub. nom. *LULAC v. Perry*, 548 U.S. 399 (2006). No evidence before this

Court demonstrates any voting cohesion—let alone heightened voting cohesion—among Latino, African-American, and Asian minority groups in District 33. Nor is there any evidence in the record that members of these minority groups have been effectively excluded from the political process.

The Court's proposed interim plan evidently displaces the Legislature's judgment for the purpose of allocating political control of congressional seats to racial and ethnic minority groups in proportion to their share of the State's population.[4] But proportionality cannot justify the Court's creation of coalition districts because section2 of the Voting Rights Act expressly rejects any right to proportional representation. See 42 U.S.C. § 1973(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

Despite the express textual rejection of proportionality, this Court repeatedly implied that the State's congressional plan was legally deficient because it failed to account for Latino population growth by creating new Latino opportunity districts. See Trial Tr. at 2204:12–17; see also Trial Tr. at 2222:16–18 ("But if that's the case and you're only—by your argument, only creating one new Latino opportunity district, where's the equality in that?"); Trial Tr. at 1841:15–19 ("Are you surprised that given the minority growth in Texas, which counts for 66 percent of the growth, that Texas—that the

[4] The Court's proposed plan contains eight Hispanic citizen voting age population districts, which is the same number created in the State's enacted plan.

legislature did not draw more than one minority opportunity district?"). The Court's apparent insistence that the State is required to achieve racially proportional representation through the creation of coalition districts is directly contrary to section 2. By acting on that mistaken reading of the VRA, this Court has exceeded its equitable authority to cure any alleged legal defects in the State's enacted plan.

C. The Proposed Plan Disregard the Legislature's Policy Choices Without Justification.

By altering every district in Plan C185, the redistricting plan proposed by the Court pays no deference to the choices of the Texas Legislature. Those choices reflect more than the preferences of individual legislators. The legislatively enacted plans incorporate constituents' concerns about communities of interest and proper representation that were received during the extensive redistricting hearings held in the legislative interim. See Exhibit A (letters from Congresspersons and Legislators objecting to the Court's proposed interim plan as not respecting communities of interest). Thus the Court's departure from the expressed will of the Legislature not only undermines the democratic process, it ignores the voice of the citizenry.

To take an obvious example, Plan C220 reconfigures District 27 so that it encompasses both Nueces County and Cameron County. This configuration directly disregards requests from the public and legislators that Nueces County and Cameron County serve as anchor counties in

separate congressional districts. At trial, the principal map drawer for the congressional plan, Ryan Downton, testified that the Legislature had two goals with respect to District 27 and District 34: (1) create a congressional district anchored in Cameron County; and (2) create a district in which Representative Farenthold could be re-elected. Trial Tr. at 1022:10–4 (testimony of Ryan Downton); see also Trial Exhibit J-58, Deposition of Doug Davis at 90:10–21 (stating that Legislature's goals were to create a Nueces County-based district for Congressman Farenthold and to "have the Valley be able to elect another Congressman"). The Legislature's initiative was supported by Senator Lucio (D-Brownsville) and Representative Oliveira (D-Brownsville)—Democratic legislators from Cameron County—both of whom specifically requested a congressional district anchored in Cameron County. Trial Tr. at 1022:17–18 (testimony of Ryan Downton). Likewise, evidence at trial confirmed that Nueces County was placed into a new congressional district based on requests from local officials that their county anchor a congressional district separate from the counties to its south. Trial Tr. at 1461:25–1462:7 (testimony of Gerardo Interiano); see also Trial Exhibit J-61, Deposition of Gerardo Interiano I, at 113:20–22. The Legislature's enacted congressional plan accomplishes all of these lawful and legitimate policy goals; theCourt's plan fulfills none of them.

The Court's plan also disregards the interests of the African-American community by reducing the number of African-American plurality districts, as measured by voting age population, from three to

two. Specifically, Plan C220 decreases the BVAP percentage in District 9 from 37.6% in Plan C185 to 37.0%. Compare Plan C220, Red 202 (District 9 contains 37.0% BVAP and 38.0% HVAP) with Plan C185, Red 202 (District 9 contains 37.0% BVAP and 35.8% HVAP). As African-Americans and Latinos approach equilibrium in District 9, Congresspersons Al Green and Eddie Bernice Johnson have cautioned the Court that "tension" will follow. See Trial Tr. at 1367:2-8 ("When equilibrium exists, then it could easily be the case that each party wants to have the same opportunity. So that's when you have unnecessary tension."); Trial Tr. at 1290:16-20 ("[W]hen you have a large number of people and you unfairly pile them together, then it creates tension, because everybody wants representation."). The Court's proposed plan produces a so-called "tension" district in District 9 as it creates an opportunity district that has elected an African-American to Congress since 2005 where Latinos now comprise a higher percentage of the voting age population than African-Americans. In the remaining plurality African-American, Districts 18 and 30, the Court's plan reduces BVAP in each district as compared to Plan C185. Compare Plan C220, Red 202 (District 18 contains 38.3% BVAP and District 30 contains 42.8% BVAP) with Plan C185, Red 202 (District 18 contains 40.5% BVAP and District 30 contains 46.5% BVAP).

D. The Proposed Plan Alters District 23 Even Though There Is No Demonstrated Section 2 or Section 5 Violation.

Plan C220 disregards the Legislature's will by making modifications to District 23 where no

probability of a legal wrong has been demonstrated. The Legislature maintained District 23's status as a majority-Latino CVAP and SSVR district by increasing these measures. The only difference between District 23 in Plan C185 and the benchmark plan is the Legislature's decision to protect the incumbent, Congressman Francisco Canseco, by including Republican-leaning areas. The Court's plan modifies District 23 by placing Maverick County wholly within this district and decreases the Hispanic citizen voting age population from 58.5% in Plan C185 to 57.3%. Compare Plan C185, Red 106 with Plan C220, Red 106. And if the Court redrew District 23 in order to make it "perform" better, it failed to do so. The reconstituted election analysis for the Court's proposed District 23 shows that the Latino candidate of choice will be elected in only 2 out of 10 elections. Exhibit B, Plan C220, District 23, Racially Polarized Voting Analysis.[5]

These changes are not within the Court's power. Plaintiffs have not demonstrated vote dilution in District 23 given that Plan C185 preserves and in fact improves Latino voters' opportunity—if they vote cohesively for a candidate—to elect that candidate regardless of how the Anglo minority votes. The Supreme Court has conclusively

---

[5] Notably, the Court's proposed plan actually decreases the HCVAP percentages in District 23 from 58.4%in the benchmark to 57.3% in Plan C220. Compare Plan C100, Red 106 with Plan C220, Red 106. The reconstituted election analysis for benchmark District 23 also performs better than the Court's proposed district with the Latino candidate of choice being elected in 3 out of 10 elections.

established that "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *LULAC v. Perry*, 548 U.S. 399, 428 (2006) (emphasis supplied) (internal citations omitted). Because Section 2 is about ensuring equal opportunity, not guaranteeing electoral results, the Court has made clear that "minority voters are not immune from the obligation to pull, haul, and trade to find [the] common political ground" necessary to elect their preferred candidates. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1997). The Legislature's configuration of District 23 provides Latino voters with at least an equal "opportunity" to elect the candidate of their choice.

Likewise, nothing about the Legislature's decision to split Maverick County between Districts 28 and 23 in Plan C185 demonstrates that race predominated in drawing district boundaries or that the Legislature intended to harm Latinos. Maverick County is 95% Latino, and there is no evidence in the record that any precinct splits that resulted in the Legislature's decision to split the County corresponded to race. As a result, the Court's decision to redraw District 23 in the utter absence of a violation of the Constitution or the VRA is improper.

While no changes to District 23 were necessary to remedy a legal harm, Defendants agree with the Court's refusal to redraw District 23 as requested by Plaintiffs and the DOJ. The Court's configuration of District 23 rejects Plaintiffs' efforts to transform the district into a district in which Democratic candidates are virtually guaranteed to win elections.

E. The Court's Plan Destroys District 35 In An Effort To Preserve A Crossover District That Is Not Protected By Section 2.

The Court's radical reconfiguration of District 35 destroys a community of interest that the Legislature found to exist between Latino voters in Travis and Bexar Counties. In the State's enacted plan, District 35 contains 58.3% HVAP, 51.9% HCVAP, and 45.0% Spanish surname voter registration. Plan C185, Red 109 Report. The reconstituted election analysis shows that this district is likely to elect the Latino candidate of choice ten out of ten elections. Trial Exhibit D-2, Plan C185, District 35, Racially Polarized Voting Analysis, at 821-32. By contrast, Plan C220 severs Travis County from District 35 and reduces the Hispanic citizen voting age population from 51.9% to 50.9%. Plan C220, Red 106. The Court's reconfiguration of District 35 also results in a district that will only elect the Latino candidate of choice in only 6 out of 10 elections. Exhibit C, Plan C220, District 35, Racially Polarized Voting Analysis.

The Court's plan disregards the policy choices the Legislature made in creating District 35, and as a result, harms communities of interest in this region of the State. The growth in the Latino community was so significant in Central Texas that the Legislature concluded the Latino population was sufficiently large and geographically compact such that it could support the creation of a new congressional district. See Trial Tr. at 915:17-22; see also D-43. Former Texas Senator Joe Bernal testified

on behalf of the Latino Task Force Plaintiffs that Southeast Austin and the Southside and Westside of San Antonio—all of which are major urban areas included in District 35—share common interests that would allow the two areas to be combined in a congressional district. Trial Tr. at 557:7-559:3. Further, Mr. Downton's testimony showed that it is not unusual for areas in San Antonio and Austin to be combined in a congressional district. Trial Tr. at 944:11-22; see also Trial Exhibits 305 and 306. Additionally, Mr. Downton testified that certain areas in Travis and Bexar Counties were included within District 35 in order to keep Latino communities of interest together. See Trial Exhibit J-62, Deposition of Ryan Downton at 114-25-116:7, 118:13-119:4, 121:22-25.

While the Court fails to identify the legal violation that justifies the dismantling of District 35 in the State's enacted plan, the only possible justification appears to be the preservation of District 25. In the benchmark plan, District 25 is best defined as a crossover district given that it is comprised of a majority Anglo population and a combination of the African-American and Latino populations forms less than a majority of the citizen voting age population. See Plan C185 (District 25 contains 25.3% HCVAP, 9.0% BCVAP, 53.1% Anglo CVAP). The Court's plan maintains the crossover nature of District 25. See Plan C220, Red 106 (District 25 contains 24.3% HCVAP, 9.8% BCVAP, and 61.9% Anglo CVAP). It is well established that the Voting Rights Act does not require the State—or permit the Court—to create crossover districts or, more importantly, maintain such districts absent a

demonstration of intentional racial discrimination under the Fourteenth Amendment. See Bartlett, 129 S.Ct. at 1246. There is no evidence that the Legislature's treatment of District 25 resulted from actual intent to harm the voters of that district because of their race or ethnicity. The "tri-ethnic coalition" that allegedly inhabits District 25 is, by definition, united by a single non-racial characteristic that this Court has decided to preserve: preference for Democratic candidates. Accordingly, there is no plausible justification under the Fourteenth Amendment for this Court's decision to maintain District 25.

F. The Proposed Plan Contains Unlawful Population Deviations.

Plan C220 contains population deviations that violate the strict population equality standards for congressional districts. *See Mahan v. Howell*, 410 U.S. 315, 322 (1973); see also Plan C220, Red 100. The Supreme Court has recognized "no excuse for the failure to meet the objective of equal representation for equal numbers of people in congressional districting other than the practical impossibility of drawing equal districts with mathematical precision." Mahan, 410 U.S. at 322. Plan C185 proves the possibility of drawing equal districts with mathematical precision. The small deviations in Plan C220 therefore appear to be the inevitable consequence of balancing competing policy concerns among different districts. But "federal courts . . . possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Connor v. Finch*, 431 U.S. 407, 415 (1977). They

therefore lack the equitable power to impose congressional plans that deviate from perfect population equality.

CONCLUSION

The *ultra vires* decisions embodied in the Court's proposed interim plan eviscerate countless legitimate, considered judgments of the Texas Legislature. Indeed, the Court's proposal denies the Legislature the presumption of good faith and legality to which it is entitled. Moreover, it does so without any explanation, much less a compelling and narrowly tailored justification for the remedy it imposes. The Court's proposal appears to reflect the policy choices of unelected federal judges, rejecting without explanation or justification the will of the people of the State of Texas as reflected in the plans enacted by their duly elected representatives.

Dated: November 25, 2011

Respectfully Submitted,

GREG ABBOTT
Attorney General of Texas

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 11-CA-360-OLG-JES-XR
[Lead case]

SHANNON PEREZ, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

FILED: 11/27/11
Document 545

DEFENDANTS' MOTION TO STAY IMPLEMENTATION OF INTERIM CONGRESSIONAL REDISTRICTING PLAN PENDING APPEAL

Defendants Rick Perry, in his official capacity as Governor, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas (collectively, the "State Defendants") respectfully ask the Court to stay pending appeal its order dated November 26, 2011, which directs implementation of an interim redistricting plan for Texas' United States House of Representatives districts. State Defendants also request further relief described below.

Judge Smith's dissent correctly identifies the fundamental flaw in the majority's approach to

crafting an interim congressional redistricting plan: "Although the Department of Justice objected to only two districts in the State's enacted plan, C220 changes all thirty-six districts from their configuration in C185." See Order Implementing Interim Congressional Plan at 18 (Doc. 544) (dated Nov. 26, 2011) (Smith, J., dissenting). Even if preclearance were to be denied based on the DOJ's objection to two districts, the rest of the map would be entitled to deference under *Upham v. Seamon*, 456 U.S. 37 (1982). The majority, however, showed less deference to a map on which preclearance is pending than must be shown to a map on which preclearance has been denied. Despite the lack of any finding that the Legislature's plan likely violates the law, the majority took it upon itself to completely redraw the entire map. It did so even though the vast majority of congressional districts in the Legislature's plan were not even alleged to be unlawful by the Department of Justice in Section 5 proceedings or by plaintiffs in this case.

The majority's order imposing an interim congressional plan should be immediately stayed to allow the Supreme Court to clarify the level of deference owed to legislatively enacted redistricting maps for which preclearance is pending. As Judge Smith recognized in his dissent from the denial of a stay of interim Texas House and Texas Senate maps, a stay is the only way to ensure that "the Supreme Court will have sufficient time to address the complex legal issues that apply to interim plans." Order Denying Motion to Stay Implementation of Interim Texas House Plan at 6 (No. 543) (dated Nov. 25, 2011) (Smith, J., dissenting) (identifying four,

independent legal issues on which guidance from the Supreme Court is essential).

ARGUMENT AND AUTHORITIES

A stay pending appeal is entirely appropriate pending expeditious appellate review of important issues such as those presented by this Court's interim order. Indeed, the Supreme Court has itself routinely granted stays of interim redistricting plans pending its consideration of orders similar to this Court's interim order. *McDaniel v. Sanchez*, 448 U.S. 1318 (1980) (Powell, J., in chambers); *Bullock v. Weiser*, 404 U.S. 1065 (1972) (stay order), rev'd onsubstantive grounds sub nom. *White v. Weiser*, 412 U.S. 783, 789 (1973); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970) (stay order), rev'd on substantive grounds and remanded, 403 U.S. 124 (1971).

This Court's interim order regarding Texas' congressional districts is akin to a preliminary injunction, and a preliminary injunction of any sort is an "extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 676 (2008). A court will stay its injunction pending appeal where, as here, the moving party can demonstrate: (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable injury if the stay were not granted; (3) that granting the stay would not substantially harm the other parties; and (4) that granting the stay would serve the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Under *Ruiz v. Estelle*, the preceding test is flexible, and a movant can obtain a stay pending appeal by showing "a substantial case on the merits when a serious legal question is involved" and by showing that "the balance of the

equities weighs heavily in favor of granting the stay." 650 F.2d 555, 556 (5th Cir. 1981); see also *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) ("The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay.").

First, this Court's interim order violates *Upham v. Seamon*, 456 U.S. 37 (1982), and will likely be reversed on appeal. Upham requires a district court enacting interim redistricting plans to defer to legislatively enacted maps unless the court is required to address a likely constitutional or statutory violation. *Id.* at 44. Nevertheless, as noted by Judge Smith in dissent, although the Department of Justice ("DOJ") objected to only two districts in the State's enacted plan, the Court's interim congressional plan alters all 36 districts, including many districts where no constitutional or statutory violation was even alleged, much less shown to be likely. *See* Order Implementing Interim Congressional Plan, at 18 (Doc. 544) (dated Nov. 26, 2011) (Smith, J., dissenting).

Second, implementation of the interim redistricting plan will cause substantial and irreparable harm to the State of Texas and its citizens. Specifically, even the temporary invalidation of a statute irreparably injures the State; by itself, it constitutes sufficient grounds for a stay. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of

irreparable injury."). But more troubling is the injury that will result from allowing the 2012 Texas congressional elections to go forward on an improperly constructed redistricting plan. Once done, the harm caused to the State and its citizens by legally flawed elections cannot be undone even if the elections are later invalidated, because the results of the election would be irreversible. *See Lucas v. Townsend*, 486 U.S. 1301, 1304 (Kennedy, J., in chambers). As Judge Smith recognizes, "[t]hat is why the more orderly course is for this court to stay its proceedings, before filing for office begins in Texas on November 28, so that the Supreme Court will have sufficient time to address the complex legal issues that apply to interim plans." Order Denying Motion to Stay Implementation of Interim Texas House Plan, at 5-6 (No. 543) (dated Nov. 25, 2011) (Smith, J., dissenting).

Third, the injury the court's order inflicts on the State and its citizens outweighs any harm that would be caused to the plaintiffs by a stay. Plaintiffs would suffer little—if any—harm from a stay of the Court's interim redistricting plans pending appeal. In contrast, the harm caused to the State and all its citizens when an election takes place under a legally flawed redistricting plan is both substantial and irreversible.

Finally, the public interest is clearly best served by a stay of this Court's interim redistricting plan.

I. STATE DEFENDANTS WILL LIKELY PREVAIL ON THE MERITS IN THE UNITED STATES SUPREME COURT.

Because the Court's interim redistricting plan for Congress completely supplants the State's legislatively enacted plan without legal justification, the Court should stay its order pending review by the United States Supreme Court. As explained below, the Court's plan is contrary to Supreme Court precedent governing the constitutionally permissible role of race in redistricting and exceeds the equitable jurisdiction afforded to courts faced with the need to draw interim plans. *Upham v. Seamon,* 456 U.S. 37 (1982). The Supreme Court is likely to conclude that this Court went beyond its authority in altering districts beyond those necessary to remedy statutory or constitutional defects.

A. The Interim Redistricting Plan Alters Districts Beyond Those Necessary to Remedy Constitutional or Voting Rights Act Violations.

The Supreme Court has unambiguously prohibited lower courts from issuing interim redistricting maps that deviate from the legislature's intention in an enacted redistricting plan, except where doing so is necessary to avoid a constitutional or statutory violation:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of "reconciling the requirements of the Constitution with the goals of state political policy." . . . An

> appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the . . . reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature.

Upham v. Seamon, 456 U.S. 37, 43 (1982) (per curiam) (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)); cf. *White v. Weiser*, 412 U.S. 783, 797 (1973) (holding that the district court erred because "in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state proposed plan"). In Upham, preclearance had been ***denied***. Here, no preclearance decisions have been reached due to the Section 5 court's understandable confusion about the applicable legal standards and the DOJ's dilatory litigation tactics. As a result, no court has concluded that the State's maps violate section 5, section 2, or the U.S. Constitution. Yet this Court shows less deference to the State's enacted congressional plan than was shown in Upham to a map that had been ***denied*** preclearance. It defies logic to conclude that a map adjudged to violate section 5 should receive more deference than a map for which preclearance is currently being sought and may ultimately be granted. The Court is obliged on the contrary to presume the validity of the map and, at a minimum, was obliged before making changes to the map to

find a legal basis for those changes—i.e., some basis for concluding that the maps will not be precleared before the general election and making changes only in those districts likely to be affected. Upham plainly controls this case, and under Upham, when a federal court is forced to order an interim redistricting plan, it must respect the state legislature's policy judgments wherever possible.

The interim congressional redistricting plan undermines the Legislature's policy choices by altering all 36 congressional districts in the State's enacted plan. The Court's interim plan includes changes to many districts that have never been alleged to violate the Voting Rights Act. This conflicts with the Supreme Court's holding that an interim plan must "reconcil[e] the requirements of the Constitution with the goals of state political policy." Upham, 456 U.S. at 43 (quoting Connor, 431 U.S. at 414). Changing legislatively enacted districts for which there is no section 2, section 5, or constitutional violation alleged—much less a demonstrated likelihood that such a challenge would succeed on the merits—was clear error that is likely to be reversed on appeal.

B. The Interim Redistricting Plan Creates Coalition Districts That Are Not Compelled By the Voting Rights Act.

The interim redistricting plan overturns the Legislature's will by creating a coalition district in north Texas in which minority groups must be combined in order to meet the 50% citizen voting age population benchmark. Without identifying any violation of constitutional or federal law, the Court

combined two distinct minority groups in what appears to be a deliberate effort to meet a 50% multi-racial minority population benchmark. See Plan C220, Red 106 (District 33 contains 21.1% HCVAP, 29.1% BCVAP, 44.2% Anglo CVAP, and 4.0% Asian CVAP). Section 2 of the Voting Rights Act does not require the State—or permit the Court—to create multi-racial coalition districts when no single, geographically compact minority group is large enough to make up the majority in a district. *See Bartlett v. Strickland,* 129 S. Ct. 1231, 1243 (2009) ("Nothing in § 2 grants special protection to a minority group's right to form political coalitions.").

Even if section 2 could be construed to require coalition districts in some instances, the Supreme Court has emphasized that such districts could be compelled only upon a heightened showing of voting cohesion between members of each group. *See Growe v. Emison*, 507 U.S. 25, 41, 42 (1993); cf. *Session v. Perry*, 298 F. Supp. 2d 451,483–84 (E.D. Tex. 2004) ("Properly confined, the [VRA] implements the fundamentals of factions. Unconfined it reaches into the political market and supports persons joined, not by race, but by common view. Serious constitutional questions loom at that juncture."), aff'd in part, rev'd in part on other grounds, vacated in part sub. nom. *LULAC v. Perry*, 548 U.S. 399 (2006). There is no evidence beforethis Court demonstrating any voting cohesion—let alone heightened voting cohesion—among Latino, African-American, and Asian minority groups in District 33. See Order Implementing Interim Congressional Plan, at 19 ("Latinos and Blacks do not vote cohesively in the

Democratic primaries in the area of proposed District 33.") (Smith, J., dissenting).

The Court's interim plan displaces the Legislature's judgment with the apparent goal of allocating control of congressional seats to racial and ethnic minority groups in proportion to their share of the State's population. See Order Implementing Interim Congressional Plan, at 13-14 (Smith, J., dissenting). But proportionality cannot justify the Court's creation of coalition districts because section 2 of the Voting Rights Act expressly rejects any right to proportional representation. See 42 U.S.C. § 1973(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."). The Court's apparent insistence that the State is required to achieve racially proportional representation through the creation of coalition districts is directly contrary to section 2. By acting on that mistaken reading of the VRA, this Court has exceeded its authority to cure legal defects in the State's enacted plan.

C. The Interim Plan Alters District 23 and District 27 Even Though There Is No Demonstrated Section 2 or Section 5 Violation.

The Court's interim plan disregards the Legislature's will by making modifications to District 23 and District 27 where no probability of a legal wrong has been demonstrated. The Legislature maintained District 23's status as a majority-Latino CVAP and Spanish surname voter registration district by increasing these measures. The only

difference between District 23 in Plan C185 and the benchmark plan is the Legislature's decision to protect the incumbent, Congressman Francisco Canseco, by including Republican-leaning areas. The Court's plan modifies District 23 by placing Maverick County wholly within this district and decreases the Hispanic citizen voting age population from 58.5% in Plan C185 to 57.3%. Compare Plan C185, Red 106 with Plan C220, Red 106.

These changes are not within the Court's power. Plaintiffs have not demonstrated vote dilution in District 23 given that Plan C185 preserves, and in fact improves, Latino voters' opportunity—if they vote cohesively for a candidate—to elect that candidate regardless of how the Anglo minority votes. The Supreme Court has conclusively established that "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *LULAC v. Perry*, 548 U.S. 399, 428 (2006) (emphasis supplied) (internal citations omitted). Because section 2 is about ensuring equal opportunity, not guaranteeing electoral results, the Court has made clear that "minority voters are not immune from the obligation to pull, haul, and trade to find [the] common political ground" necessary to elect their preferred candidates. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1997).

The Legislature's configuration of District 23 provides Latino voters with at least an equal "opportunity" to elect the candidate of their choice. While the Court apparently agreed with the State that a heavily packed Latino district should not be created in order to guarantee Democratic candidates

a victory, the Court nevertheless thwarted the will of the people of Texas by changing District 23. The only possible justification for the court's redrawing of District 23 would be to improve the electoral chances of Latino candidates in this district. Yet the Court's plan does not improve the performance of Latino candidates in District 23 as compared to the State's enacted plan, as the Latino candidate of choice will be elected in only two of ten reconstituted elections.

Similarly, the Court's reconfiguration of District 27, despite the lack of any plausible constitutional or statutory violation, ignores the policy judgments made by the Legislature. The Court's plan disregards requests from the public and legislators that Nueces County and Cameron County serve as anchor counties in separate congressional districts. District 27 is changed dramatically from the State's enacted plan "such that Nueces County will be the largest county in Texas that does not control its own congressional district." Order Implementing Interim Congressional Plan, at 18-19 (Smith, J., dissenting). The Legislature's enacted congressional plan accomplishes the Legislature's lawful and legitimate policy goals; the Court's plan rejects them.

D. The Court's Plan Destroys District 35 In An Effort To Preserve A Crossover District That Is Not Protected By Section 2.

The Court's radical reconfiguration of District 35 destroys a community of interest that the Legislature found to exist between Latino voters in Travis and Bexar Counties. In the State's enacted plan, District 35 contains 58.3% HVAP, 51.9%

HCVAP, and 45.0% Spanish surname voter registration. Plan C185, Red 109 Report. The reconstituted election analysis shows that this district is likely to consistently elect the Latino candidate of choice. By contrast, the Court's plan severs Travis County from District 35 and reduces the Hispanic citizen voting age population from 51.9% to 50.9%. Plan C220, Red 106. The Court's reconfiguration of District 35 also results in a district that will less consistently elect the Latino candidate of choice.

While the Court fails to identify the legal violation that justifies the dismantling of District 35 in the State's enacted plan, the only justification appears to be the preservation of the former District 25, in direct contravention of the State's legislative and political program. Nevertheless, the VRA does not require the State or permit the Court to maintain a crossover district absent a demonstration of intentional racial discrimination under the Fourteenth Amendment. *See Bartlett*, 129 S.Ct. at 1246; *see also LULAC v. Perry*, 548 US 399, 444 (2006) ("In short, that Anglo Democrats control [Martin Frost's former minority influence] district is, 2according to the District Court, the most rational conclusion.") (internal quotation marks and citations omitted). No such showing has been made in this case. The Court's decision to preserve this crossover district is even more troubling given that the DOJ did not challenge District 25 under section 5.

II. STATE DEFENDANTS WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.

The immediate implementation of the interim redistricting plan would prevent the State from enforcing a legislative plan that was enacted by the Texas Legislature. The enacted congressional redistricting plan passed with overwhelming majorities in both houses of the Legislature. Enjoining this legislation, as the Court has done, unquestionably causes irreparable harm to the State and its citizens. As the Supreme Court has stated, even the temporary invalidation of a state statute irreparably injures the government and itself constitutes sufficient grounds to enter a stay. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.").

Beyond the harm inherent in blocking implementation of state law, a special harm arises when an election is permitted to go forward based on an illegal, court-drawn redistricting plan. As Judge Smith recognized in his dissent related to the Texas House maps, if a stay is not granted to allow for appellate review of this Court's decisions, this case will essentially be over. See Order at 15, dated Nov. 23, 2011 (No. 528) (Smith, J., dissenting). If that happens, the State's elections will be conducted on improperly constructed maps. The candidate filing

period will begin under the Court's legally flawed, unreviewed map on Monday, November 28, and absent a stay there will soon be no alternative other than to continue with elections on an improper map. The irreparable harm such a result would inflict on our democratic process and on all Texas voters requires no explanation. For these reasons, the Supreme Court has frequently stayed unlawful court-drawn plans in similar instances. *McDaniel v. Sanchez*, 448 U.S. 1318

1980) (Powell, J., in chambers); *Bullock v. Weiser*, 404 U.S. 1065 (1972) (stay pending appeal in *White v. Weiser*, 412 U.S. 783, 789 (1973)); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970) (stay order).

III. STATE DEFENDANTS' IRREPARABLE INJURIES OUTWEIGH ANY HARM TO PLAINTIFFS.

Plaintiffs will suffer no harm should the Court stay its order implementing the interim redistricting plan pending appeal. Any party that benefits from an improper interim redistricting map suffers no cognizable injury from a stay pending appellate review. In any case, Plaintiffs' right to vote and to participate equally in the political process will not be abridged by a mere delay in the final determination of electoral districts for the 2010 election. By contrast, refusing to issue a stay of an improper interim map will cause irreparable harm to the people of Texas. The election of an entirely new legislature under a plan other than the one enacted by the duly elected representatives of this State would be irreversible. *See Lucas v. Townsend*, 486 U.S. 1301, 1304 (Kennedy, J., in chambers) ("Even if

the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive.").

IV. A STAY PENDING APPEAL IS—BY DEFINITION—IN THE PUBLIC INTEREST.

A stay of the preliminary injunction would allow State Defendants to carry out the statutory policy of the Legislature, which "is in itself a declaration of the public interest which should be persuasive." *Virginian Ry. Co. v. Sys. Fed'n* No. 40, 300 U.S. 515, 552 (1937); *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 157 F.3d 500, 503 (7th Cir. 1998) ("When the opposing party is the representative of the political branches of a government the court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance.").

CONCLUSION & PRAYER

State Defendants respectfully request that the Court stay its order imposing an interim redistricting plan for Texas' United States House of Representatives districts pending appeal. The State further requests that, pending appeal, this Court stay the candidate filing and qualification deadlines for Texas' United States House of Representatives districts (as prescribed

by State law and modified by order of this Court).

Further, the State recognizes that in order to preserve the Supreme Court's jurisdiction and provide the Supreme Court with adequate time to correct this Court's errors, it may become necessary

to delay the primary elections for the Texas' United States House of Representatives districts. While all unaffected primary elections will continue as scheduled on March 6, 2012, the State is prepared to delay its congressional primary elections in order to ensure that it is not forced to conduct elections using a legally flawed map. By delaying the primary elections pending appeal—if that should become necessary—the State can ensure that its citizens will have the opportunity to vote in elections under redistricting plans determined to be lawful by the United States Supreme Court.

To that end, the State requests any and all relief the Court deems necessary to effectuate the Supreme Court's appellate jurisdiction, including but not limited to a stay of the primary election dates for Texas' United States House of Representatives districts.

Dated: November 27, 2011

Respectfully Submitted,

GREG ABBOTT
Attorney General of Texa

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

No. SA: 11-CV-360

SHANNON PEREZ, ET AL,

Plaintiffs,

v.

RICK PERRY, ET AL.,

Defendants.

FILED: 11/29/11
Document 548

AMENDED NOTICE OF APPEAL

Notice is hereby given that Defendants Rick Perry, in his official capacity as Governor, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas, Defendants in the above-named case, hereby appeal to the United States Supreme Court, pursuant to 28 U.S.C. § 1253, this Court's interlocutory order of November 23, 2011 (Doc. 528), directing implementation of PLAN H302 as an interim plan for districts used to elect members of the Texas House of Representatives in 2012, and this Court's interlocutory order of November 26, 2011 (Doc. 544), directing implementation of PLAN C220 as an interim plan for districts used to elect

members of the United States House of Representatives in 2012.

Dated: November 29, 2011

Respectfully Submitted,

GREG ABBOTT

Attorney General of Texas

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. SA-11-CV-788

WENDY DAVIS, et al.,

Plaintiffs,

v.

RICK PERRY, et al.,

Defendants.

FILED: 11/25/11
Document 92

AMENDED ORDER

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

plan after preclearance of the State's enacted plan had been denied. In the remedial phase, under *Upham*, the district court's task would be limited to remedying the portions of the map known to be retrogressive or otherwise violating the Voting Rights Act or the U.S. Constitution. Had the State chosen the path of administrative preclearance through the Department of Justice, we would perhaps be in the remedial phase right now. However, the State chose to file a lawsuit in the United States District Court in the District of Columbia, which is still pending, and we are not in the remedial phase. Instead, we are in an interim phase where the Court has been placed in the position of crafting an independent court drawn plan that complies with the U.S. Constitution and Sections 2 and 5 of the Voting Rights Act. In doing so, the Court is precluded from simply adopting the State's enacted plan or deferring to the challenged plan, as doing so would make the preclearance process meaningless and constitute a de facto ruling on the merits of the various legal challenges to the State's plan. *See Lopez v. Monterey County*, 519 U.S. 9, 117 S.Ct. 340(1996)(district court erred when it failed to independently craft an electoral plan and instead adopted the County's proposal, which required preclearance); *see also McDaniel v. Sanchez*, 452 U.S. 130, 101 S.Ct. 2224 (1981)(district courterred in adopting the County's plan, which required preclearance). It is undisputed that the "failure to obtain either judicial or administrative preclearance renders the [voting] change unenforceable," *Clark v. Roemer*, 500U.S. 653, 111 S.Ct. 2096, 2101 (1991), and the Court cannot simply

adopt an unprecleared redistricting plan, in whole or in part, with the signatures of a few judges sitting in Texas.

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

The dissent has somewhat embraced the State's arguments, and also relies on *Upham*, even though this Court has not arrived at the remedial stage of these proceedings. Likewise, the dissent tries to distinguish *Lopez* based on the procedural posture of the preclearance proceedings in this matter. However, there was no preclearance in *Lopez* and there is no preclearance in this case. At the end of the day, no preclearance means no preclearance, and no enforceable plan. The dissent also fails to appreciate that the Court has drawn an independent redistricting plan without ruling on any of the various legal challenges, and it has considered the parties' legal challenges only for the purpose of

avoiding the same legal challenges to the court drawn map. *See Conner v. Waller*, 421 U.S. 657, 95 S.Ct. 2003 (1975)(the district court cannot decide the constitutional challenges to the challenged, unprecleared plan). The Court's Senate plan clearly rises above the myriad of challenges to the State's enacted plan and allows a free and fair election in 2012.

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

SIGNED this 25th day of November, 2011.

/s/

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

/s/

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

JERRY E. SMITH, Circuit Judge, dissenting:

Because a stay of the orders implementing interim plans for the 2012 elections is needed to allow orderly review and clarification of critical legal issues, and because a stay will not harm any party, I respectfully dissent from the denial of a stay. In its order announcing an interim redistricting plan for the Texas House of Representatives, the majority acknowledged that these are difficult issues and

reasonable minds can disagree. It is therefore puzzling that the majority is unwilling to stay its order so that those difficult issues can be addressed on appeal before the announced interim plans are implemented.

There are myriad issues to be decided regarding interim, court-ordered redistricting plans. Because these matters are usually raised only in the wake of the decennial census, the caselaw is somewhat sparse and often murky. Questions that are not addressed now, before any part of these interim plans are implemented, might not be answered for yet another ten years or more. That is why the more orderly course is for this court to stay its proceedings, before filing for office begins in Texas on November 28, so that the Supreme Court will have sufficient time to address the complex legal issues that apply to interim plans.

Here are the issues most begging for resolution or explication:

1. In fashioning a temporary interim redistricting plan, how much deference should a court give to state-enacted legislative plans where a determination for preclearance has been submitted but is pending in: (1) districts that have not been specifically challenged; (2) districts that have been challenged under novel legal theories; (3) districts that have been challenged but as to which the challenges are unlikely to succeed on the merits; and (4) districts that have been challenged where the claims have a likelihood of success on the merits? In *Upham v. Seamon*, 456 U.S. 37 (1982), the Court directed lower courts to modify a state's legislative

plans only where absolutely required by law in a situation in which a determination on preclearance had been made and two of the districts in the State's plan had failed preclearance. *See also White v. Weiser*, 412 U.S. 783, 794-95 (1973). In contrast, the Court in *Lopez v. Monterey County*, 519 U.S. 9 (1996), rejected a lower court's wholesale implementation of a county's plan as an interim plan where the county had failed even to submit the plan for preclearance, defying a court order and despite being on notice for five years.

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

2. In a court-ordered interim plan, how much population deviation is permissible in districts unchallenged by the plaintiffs or districts without meaningful one-person one-vote issues? The majority, relying on *Connor v. Finch*, 431 U.S. 407,

414 (1977), modified the State's enacted districts to bring them into *de minimis* deviation, even in districts unchallenged by the plaintiffs.

In contrast, my map left the unchallenged districts, which had population deviations within the legally permissible range for legislatures (but were not *de minimis*), intact, in accordance with the guidance given in *Seamon*, which held that the stricter *Connor* standard cannot be the sole basis for modifying a state's redistricting, but instead is applicable only where a specific violation was found and a remedial district was being drawn. *Seamon*, 465 U.S. at 43.

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

I have not found, nor has the majority cited, any caselaw to the contrary. That said, there is little to no guidance about whether a court should consider

performance in a section 5 retrogression or discriminatory intent analysis, so it would be helpful for the Supreme Court to provide clarity on this question.

4. May a court order the creation of minority ìcoalitionî districts in an interim plan, and, if so, under what circumstances? Though the Court in *Bartlett* rejected the contention that ìcross-overî districts are covered by section 2, some of its language calls into question whether ìcoalitionî districts are similarly covered (although the Court did expressly reserve the question). The majority created such coalition districts in Dallas County (HD 107), Fort Bend County (HD 26), and Bell County (HD 54). Districts 26 and 54 relied on Asian votes to form a ìcoalition,î despite the lack of evidence showing cohesion between Asians and Blacks or Hispanics in voting.

Though the majority contends these new coalition districts arose ìnaturallyî from a restoration to the *status quo*, it is hard to see how that could be the case: For example, HD 107 was substantially reconfigured from the *status quo* (composed of less than 40% of HD 107 in the benchmark plan) to exclude Anglo voters and include minority voters, reducing the Anglo citizen proportion by 33%. Similarly, Districts 26 and 54 were altered from the *status quo* by removing almost exclusively white populations instead of reducing the population in a race-neutral manner. Although my proposed alternate plan creates a new coalition district in Tarrant County, it is the identical new district created by the State (and dismantled by the majority), and the State has unquestionable latitude

to create such districts so long as it does not subordinate traditional redistricting principles to race.

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

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

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

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. SA-11-CV-788

WENDY DAVIS, et al.,

Plaintiffs,

v.

RICK PERRY, et al.,

Defendants.

FILED: 11/25/11
Document 91

ORDER

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

plan after preclearance of the State's enacted plan had been denied. In the remedial phase, under *Upham*, the district court's task would be limited to remedying the portions of the map known to be retrogressive or otherwise violating the Voting Rights Act or the U.S. Constitution. Had the State chosen the path of administrative preclearance through the Department of Justice, we would perhaps be in the remedial phase right now. However, the State chose to file a lawsuit in the United States District Court in the District of Columbia, which is still pending, and we are not in the remedial phase. Instead, we are in an interim phase where the Court has been placed in the position of crafting an independent court drawn plan that complies with the U.S. Constitution and Sections 2 and 5 of the Voting Rights Act. In doing so, the Court is precluded from simply adopting the State's enacted plan or deferring to the challenged plan, as doing so would make the preclearance process meaningless and constitute a de facto ruling on the merits of the various legal challenges to the State's plan. See Lopez v. Monterey County, 519 U.S. 9, 117 S.Ct. 340 (1996)(district court erred when it failed to independently craft an electoral plan and instead adopted the County's proposal, which required preclearance); *see also McDaniel v. Sanchez*, 452 U.S. 130, 101 S.Ct. 2224 (1981)(district court erred in adopting the County's plan, which required preclearance). It is undisputed that the "failure to obtain either judicial or administrative preclearance renders the [voting] change unenforceable," *Clark v. Roemer*, 500 U.S. 653, 111 S.Ct. 2096, 2101 (1991), and the Court cannot simply

adopt an unprecleared redistricting plan, in whole or in part, with the signatures of a few judges sitting in Texas.

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

The dissent has somewhat embraced the State's arguments, and also relies on *Upham*, even though this Court has not arrived at the remedial stage of these proceedings. Likewise, the dissent tries to distinguish *Lopez* based on the procedural posture of the preclearance proceedings in this matter. However, there was no preclearance in *Lopez* and there is no preclearance in this case. At the end of the day, no preclearance means no preclearance, and no enforceable plan. The dissent also fails to appreciate that the Court has drawn an independent redistricting plan without ruling on any of the various legal challenges, and it has considered the parties' legal challenges only for the purpose of

avoiding the same legal challenges to the court drawn map. *See Conner v. Waller*, 421 U.S. 657, 95 S.Ct. 2003 (1975)(the district court cannot decide the constitutional challenges to the challenged, unprecleared plan). The Court's Senate plan clearly rises above the myriad of challenges to the State's enacted plan and allows a free and fair election in 2012.

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

SIGNED this 25th day of November, 2011.

/s/

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. SA-11-CV-788

WENDY DAVIS, et al.,

Plaintiffs,

v.

RICK PERRY, et al.,

Defendants.

FILED: 11/23/11
Document 89

ORDER

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

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

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

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

---

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

maintain the status quo from the benchmark plan with regard to Senate District 10 pending resolution of the litigation in the District of Columbia but otherwise to use the enacted map as much as possible.[2]

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

---

Congressional maps, given the numerous challenges to the State's enacted House map and the mandate to achieve *de minimis* population deviation in the Congressional map.

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

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

maintains the status quo as to the challenged district pending resolution of the preclearance litigation, while giving effect to as much of the policy judgments in the Legislature's enacted map as possible.

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

_____/s/_____
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. SA-11-CV-788

WENDY DAVIS, et al.,

Plaintiffs,

v.

RICK PERRY, et al.,

Defendants.

FILED: 11/17/11
Document 86

ORDER

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

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

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

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. SA-11-CV-788

WENDY DAVIS, et al.,

Plaintiffs,

v.

RICK PERRY, et al.,

Defendants.

FILED: 09/22/11
Document 1

COMPLAINT

Plaintiffs, WENDY DAVIS, MARC VEASEY, ROY BROOKS, VICKY BARGAS, PAT PANGBURN, FRANCES DELEON, DOROTHY DEBOSE, and SARAH JOYNER ("Plaintiffs") allege:

1. Plaintiffs bring this action to enforce their voting rights guaranteed by the United States Constitution and federal law. As registered voters in the State of Texas, Plaintiffs have exercised, and wish to continue exercising, their right to vote for their preferred candidate to the Texas State Senate from Senate Districts 8, 10, 12 and 25, both in primary elections and general elections. As registered voters in the State of Texas, Plaintiffs have exercised, and wish to continue exercising their right to vote for their preferred candidate to the Texas State Senate from Senate Districts 8, 10, 12, and 25 both in primary elections and general

elections. As recently released census data demonstrate, however, population shifts during the last decade have now diluted Plaintiffs' voting strength and have rendered Texas' state senate districting plan unconstitutional under the rule of "one person, one vote."

2. Plaintiffs also bring this action to enforce their voting rights guaranteed by the Voting Rights Act of 1965, as amended, 42 U.S.C. §§1973 and 1973c. In May 2011, the State enacted a new state senate plan (Plan S148) but that plan has not and likely will not receive the requisite preclearance under Section 5 of the Voting Rights Act, 42 U.S.C §1973c. Even in the unlikely event that Plan S148 receives Section 5 preclearance, the state's proposed state senate redistricting plan cannot be administered because Plan S148 dilutes the voting strength of minority voters in the Dallas and Tarrant area of North Texas in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973.

3. The State's proposed state senate plan was drawn with the purpose, and has the effect, of minimizing and reducing the voting strength of minority populations in the Tarrant and Dallas counties area of North Texas. The intentional fracturing and dismantling of the coalition of minority voters in Senate District 10 constitutes unlawful vote dilution and discrimination in violation of Section 2 of the Voting Rights Act, as well as the Fourteenth and Fifteenth Amendments to the United States Constitution.

PARTIES

4. Plaintiff WENDY DAVIS resides at 2737 Calder Court, in Fort Worth, Texas. Plaintiff MARC VEASEY resides at 8224 Longfellow, in Fort Worth, Texas. Plaintiff ROY BROOKS resides at 5032 Highland Meadow Drive in Fort Worth, Texas, VICKY BARGAS resides at 3301 East Drew Street in Fort Worth, Texas. Plaintiffs DAVIS, VEASEY, BROOKS and BARGAS are registered voters who live in Senate District 10.

5. Plaintiff PAT PANGBURN resides at 4620 Redwood Court in Irving, Texas. Plaintiffs PANGBURN is a registered voter who lives in Senate District 8.

6. Plaintiff FRANCES DELEON resides at 4521 Diaz Avenue in Fort Worth, Texas. Plaintiff DOROTHY DEBOSE resides at 5713 Humbert Avenue in Fort Worth, Texas. Plaintiffs DELEON and DEBOSE are registered voters who live in Senate District 12.

7. Plaintiff SARAH JOYNER resides at 9201 Brody Lane, #4302, in Austin, Texas 78748. Plaintiff JOYNER is a registered voter who lives in Senate District 25.

8. Defendants are Texas State officials who have duties under the laws of Texas to draw state senate boundaries in Texas following the release of population data from each federal decennial census and then to conduct elections under those districts. Governor Rick Perry is the Governor of Texas. Hope Andrade is the Secretary of State and oversees Texas' electoral process. Defendant BOYD RICHIE is the Chair of the Texas Democratic Party. Defendant STEVE MUNISTERI is Chair of the

Texas Republican Party. All Defendants are sued in their official capacities.

JURISDICTION AND VENUE

9. This case is brought pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1973c. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§1331, 1343(a)(3), 1343(a)(4), 1357, 2201, 2202, 2284, and 42 U.S.C. §1973j(d). Venue is proper in this district under 28 U.S.C. 1391(b).

BASIS OF CLAIMS

10. The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution prohibits any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." This provision creates a guarantee of "one person, one vote" – requiring a state's senate districts to achieve population equality as nearly as is practicable.

11. On December 21, 2010, the Secretary of Commerce reported to the President of the United States the tabulation of population for each of the fifty states, including the State of Texas. Those population figures show Texas' total population to be 25,145,561. The ideal population for each of the 31 state senate districts using this figure is 811,147 (25,145,561 divided by 31).

12. The official 2010 federal decennial census figures for Texas show that population shifts during the last decade have generated substantial inequality among Texas' thirty one state senate districts, whose populations now range from a low of 641,007 (for State Senate District 16) to a high of 1,

015,027 (State Senate District 7). Thus, the total deviation is now 374,020 persons.

13. According to the 2010 federal decennial census figures for Texas, State Senate District 10 contains population from fast growing Tarrant County, and has significantly increased its population over the last decade and now contains 834,265 persons. These official census figures show that State Senate District 10 exceeds by 23,118 the ideal population figure of 811,147 for each state senate district in Texas. State Senate District 10 is overpopulated relative to other state senate districts in the State of Texas.

14. The existing malapportionment of state senate districts in Texas dilutes the voting strength of Plaintiffs DAVIS, VEASEY, BROOKS and BARGAS in overpopulated State Senate District 10, as the weight or value of plaintiffs DAVIS', VEASEY's and BROOKS' vote is less than that of other voters residing in underpopulated districts state senate districts.

15. State Senate District 8 contains population from fast growing Collin County as well as Dallas County, and has significantly increased its population over the last decade and now contains 940,963 persons. These official census figures show that state senate District 8 exceeds by 129,816 the ideal population figure of 811,147 for each state senate district in Texas. State Senate District 8 is overpopulated relative to other state senate districts in the State of Texas.

16. The existing malapportionment of state senate districts in Texas dilutes the voting strength

of Plaintiff PANGBURN in overpopulated State Senate District 8, as the weight or value of Plaintiff PANGBURN's vote is less than that of other voters residing in underpopulated districts state senate districts.

17. According to the 2010 federal decennial census figures for Texas, State senate District 12 contains population from fast growing Tarrant and Denton Counties, has significantly increased its population over the last decade and now contains 1,013,641 persons. These official census figures show that State Senate District 12 exceeds by 202,494 the ideal population figure of 811,147 for each state senate district in Texas. State Senate District 12 is overpopulated relative to other state senate districts in the State of Texas.

18. The existing malapportionment of state senate districts in Texas dilutes the voting strength of Plaintiffs DELEON and DEBOSE in overpopulated State Senate District 12, as the weight or value of plaintiffs DELEON's and DEBOSE's vote is less than that of other voters residing in underpopulated districts state senate districts.

19. According to the 2010 federal decennial census figures for Texas, State Senate District 25 contains population from the fast growing region of Bexar, Travis, Hays, Guadalupe, Kendall and Comal Counties, and has significantly increased its population over the last decade and now contains 984,664 persons. These official census figures show that State Senate District 25 exceeds by 173,517 the ideal population figure of 811,147 for each state

senate district in Texas. State Senate District 25 is overpopulated relative to other state senate districts in the State of Texas.

20. The existing malapportionment of state senate districts in Texas dilutes the voting strength of Plaintiff JOYNER in overpopulated State Senate District 25, as the weight or value of plaintiff JOYNER's vote is less than that of other voters residing in underpopulated districts state senate districts.

21. The Texas Legislature adopted a new state senate redistricting plan, Plan S148, on or about May 17, 2011. Defendant Governor Perry, however, did not sign the senate redistricting bill until June 17, 2011. State officials then delayed another month, until July 19, 2011, to submit the state senate redistricting plan to federal authorities under Section 5 of the Voting Rights Act, 42 U.S.C §1973c.

22. In addition to waiting more than 60 days to submit the legislatively-enacted state senate redistricting plan for Section 5 preclearance, State officials also submitted the new state senate plan to a three-judge district court in the District of Columbia for judicial preclearance, rather than choosing the speedier alternative of administratively submitting the plan to the United States Attorney General. On September 19, 2011, the United States Attorney General filed his Answer to the State's complaint in the D.C. preclearance lawsuit. In his answer, the United States Attorney General took the position that the proposed state senate redistricting plan met the requirements of Section 5 of the Voting Rights Act. Plaintiffs DAVIS and VEASEY, among

others including the NAACP and LULAC and the Texas Legislative Black Caucus, have intervened in the D.C. Court case and will vigorously oppose preclearance of the state senate map. A trial in that D.C. judicial preclearance case is not expected until November 2011, at the earliest.

23. A redistricting plan is not legally enforceable unless and until it receives the requisite preclearance under Section 5 of the Voting Rights Act of 1965, as amended. See 42 U.S.C. §1973c. It is unlikely that the State of Texas will have a legally enforceable state senate redistricting plan when candidate qualifying opens later this year because it does not meet the requirements of the Voting Rights Act. This Court's intervention is thus necessary to remedy the existing constitutional violation of Plaintiffs' rights and to protect their rights to cast an undiluted vote for the state senate.

CLAIM I

24. Plaintiffs reallege the facts set forth in paragraphs 1-23 above.

25. The facts alleged herein constitute a denial to the plaintiffs of the equal protection of the laws as guaranteed to them by the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM II

26. Plaintiffs reallege the facts set forth in paragraphs 1-23 above.

27. The facts alleged herein constitute an abridgement of the privileges and immunities of citizenship guaranteed to Plaintiffs by the Privileges

and Immunities Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM III

28. Plaintiffs reallege the facts set forth in paragraphs 1-23, above.

29. The State's proposed state senate redistricting plan cannot be administered because S148 has not been precleared pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c.

CLAIM IV

30. Plaintiffs reallege the facts set forth in paragraphs 1-23, above.

31. The State's proposed state senate plan violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by minimizing and diluting the opportunities for African-American and Hispanic voters to participate in the political process, and to elect a candidate of their choice to the Texas Senate.

32. When Senate District 10 was drawn in the 2001 redistricting cycle, it was 56.6 percent Anglo, 16.7 percent African American and 22.9 percent Hispanic. In its 2001 Section 5 submission to the Department of Justice for Voting Rights Act preclearance, State of Texas acknowledged that the minority population in District 10 was growing and justified its configuration of the district by stating:

> District 10 contain[s] significant minority communities that are essentially kept intact within [the] district. The voting strength of

> these minority communities in the future will depend on the cohesion within and between Black and Hispanic voters and the ability of such voters to form coalitions with other racial or ethnic groups in support of their preferred candidates. (State of Texas Section 5 Preclearance submission, August 2001).

33. DOJ precleared the senate map referenced in paragraph 21, above, in 2001. Throughout the last decade, the minority population in the DFW metroplex in general and in Senate District 10 in particular, grew dramatically while the Anglo population significantly shrunk as a percentage of the district. For example, between 2000 and 2010, the total Anglo population in Dallas and Tarrant counties decreased by more than 156,000, whereas the Latino population in that two county area grew by more than 440,000 and the black population in that area grew by more than 152,000. By the end of the decade, Senate District 10's minority population had increased by 9 percent and its Anglo population percentage had fallen by 9 percent. By the time of the 2010 census, Anglos no longer comprised a majority of Senate District 10's total population.

34. Minority voters in Senate District 10 realized the potential predicted by the State's 2001 DOJ preclearance submission in 2008 when they elected their preferred candidate of choice to the State Senate, Wendy Davis. Minority leaders in Tarrant County were leaders in the coalition that recruited and supported Wendy Davis in her 2008 campaign in Senate District 10.

35. In the 2008 election, African-American and Hispanic voters in Senate District 10 united and voted cohesively to provide overwhelming support to candidate Wendy Davis and she was elected to office.

36. In electing their candidate of choice to the state senate in 2008, African-American and Hispanic voters in Senate District 10 overcame the opposing bloc vote of Anglos who voted against the candidate of choice of minority voters.

37. Plan S148 dramatically changes the demographic makeup of Senate District 10. The State's plan adds 58,846 Anglos to the District while removing 61,562 African Americans and Hispanics. This raises the Anglo percentage to 54.4 percent (from the benchmark of 47.6 percent). The State's plan also lowers the African American voting age population from 17.9 percent to 13.4 percent and lowers the Hispanic voting age population from 24.8 percent to 22.1 percent.

38. Plan S148 destroys the coalition of minority voters who elected their preferred candidate of choice in Senate District 10 in 2008, which is majority-minority in total population (52.4% combined Hispanic, Black and Other) according to the 2010 census. The State's proposed state senate plan both lowers the minority percentage and eliminates minority voters' ability to elect their candidate of choice and their ability to participate effectively in the political process.

39. The State's proposed state senate plan was drawn to insure that population gains in minority communities from 2000 to 2010 in the Dallas-

Tarrant counties region of North Texas were not reflected in the proposed state senate plan.

40. The reconfiguration of Senate District 10 in the 2011 state senate redistricting plan was not free of a racially discriminatory purpose and harms plaintiffs' rights. The redrawing of Senate District 10 was a cynical and intentional cleaving of an effective concentration of minority voter neighborhoods into disparate pieces that will now have no political impact on any of the districts they are placed within. State legislative leaders knew Senate District 10 was majority minority in population at the time of redistricting, they acknowledged that Senator Davis was the minority voters' candidate of choice in 2008 when minority voters elected her, and they were warned that dismantling Senate District 10 would harm minority voting rights. In the face of this evidence, they intentionally eliminated Senate District 10 as a minority opportunity district.

41. The State's proposed state senate plan was drawn with the purpose, and has the effect, of minimizing and reducing the voting strength of minority populations in the Tarrant and Dallas counties area of North Texas. The fracturing and dismantling of Senate District 10 harms plaintiffs herein and constitutes unlawful vote dilution and discrimination in violation of Section 2 of the Voting Rights Act, as well as the Fourteenth and Fifteenth Amendments to the United States Constitution.

42. The minority population in the Dallas-Tarrant County area of North Texas (Black, Hispanic, and Other) is sufficiently large and geographically compact to comprise the majority of

citizen voting age persons in at least two state senate districts. Dallas and Tarrant Counties contain over 2.1 million African American and Hispanic residents. Since the 2000 census, the Anglo population in the two counties combined has decreased while the both African American and Hispanic populations have increased. Yet, under the State's plan, the entire north Texas region contains only one district SD23 that allows minority citizens the opportunity to elect their candidate of choice.

43. Minority voters in Tarrant and Dallas Counties are sufficiently politically cohesive that they can elect two candidates of choice to the state senate in the Dallas and Tarrant counties region of North Texas.

44. Anglos vote sufficiently as a bloc to enable them usually to defeat the minority voters' preferred candidates in Texas, including the areas in which two majority-minority, citizen voting age population state senate districts can be drawn.

45. In addition to being malapportioned, the current and proposed Texas state senate redistricting plans operate to dilute the voting strength of minority voters in the Dallas and Tarrant area of North Texas in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Assume jurisdiction of this action and immediately convene a three-judge district court pursuant to 28 U.S.C. §2284;

2. Issue a declaratory judgment, that the existing state senate districting plan presently in effect in Texas violates Plaintiffs' rights under the aforesaid provisions of the United States Constitution and federal law;

3. Issue a declaratory judgment finding that the current Texas state senate redistricting plans are malapportioned, in violation of the Fourteenth Amendment to the United States Constitution;

4. In the unlikely event that Section 5 preclearance is obtained, issue a declaratory judgment finding that the 2011 proposed state senate redistricting plan illegally dilutes the voting rights of minority voters (African Americans and Latinos) in the Dallas and Tarrant counties region of North Texas in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973;

5. In the unlikely event that Section 5 preclearance is obtained, issue a declaratory judgment finding that the 2011 proposed state senate redistricting plan was enacted with a racially discriminatory purpose in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution;

6. Enjoin permanently the Defendants, their agents, employees, and those persons acting in concert with them, from enforcing or giving any effect to the proposed state senate plan S148 because that plan that has not received the requisite preclearance approval under Section 5 of the Voting Rights Act;

7. Enjoin permanently the Defendants, their officers, agents, employees attorneys, successors in office, and all persons acting in concert or participation with them, from conducting primary, general or special elections using the existing state senate districting plan, or any other state senate plan that violates the United States Constitution and federal law;

8. Order into effect a new state senate redistricting plan that meets the requirements of the United States Constitution and federal and state law;

9. Make all further orders as are just, necessary, and proper to ensure complete fulfillment of this Court's declaratory and injunctive orders in this case;

10. Issue an order requiring Defendants to pay Plaintiffs' costs, litigation expenses and reasonable attorneys' fees incurred in the prosecution of this action; and

11. Grant such other and further relief as it deems is proper and just.

Respectfully submitted,
/s/ David Richards
DAVID RICHARDS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. SA-11-CV-788

WENDY DAVIS, et al.,

Plaintiffs,

v.

RICK PERRY, et al.,

Defendants.

FILED: 10/07/11
Document 17

DEFENDANTS' ADVISORY REGARDING INTERIM APPORTIONMENT

Defendants Rick Perry, in his official capacity as Governor and Hope Andrade, in her official capacity as Secretary of State (collectively, "Defendants") respectfully file this Advisory in response to the Court's Amended Order of October 4, 2011.

As a prefatory matter, the Defendants recognize, as the Court does, that "preclearance is not a function of this Court," but respectfully take issue with the Court's suggestion that promptly filing a declaratory judgment proceeding before the United States District Court for the District of Columbia (instead of administratively before the Department of Justice), was, somehow, a less streamlined and efficient method for seeking preclearance. The Department of Justice took the full sixty days to answer in the D.C. proceeding; the Defendants are

pleased, but not surprised, that Attorney General Holder found no basis to object to the Senate Plan. The Department has, however, refused to convert the unofficial filing into an official one (which would be entitled to preclearance), given the objection and intervention of Senator Davis and others in the D.C. proceeding. The D.C. court has precleared the State Board of Education map, and would have likewise done so for the Senate, but for the presence of Senate-map intervenors.[1] Thus, put simply, were it not for the *Plaintiffs* in this action, this Court could immediately address the putative merits of the Plaintiffs' claim.

Moreover, the Defendants were, in fact, expeditious in their filing of a joint action before the D.C. court. Having just observed the Justice Department interpose vague, unsupported objections to the House and Congressional plans in its sixtieth-day Answer before the D.C. District Court (which court orders have since *twice* required it to supplement for clarity), the State of Texas obviously chose the ***fastest*** route to preclearance. Indeed, from both its pleadings and its arguments before that court, the Justice Department appears to have determined to use the proceeding as a test case for novel – and previously-rejected – legal theories.

---

[1] As far as Defendants are aware, this is a unique situation; they know of no precedent in which intervenors have been permitted to proceed on Section 5 objections to a *different* plan than one to which the United States has objected, in an instance in which the U.S. Attorney General has no objections to the plan at issue. The statutory and Eleventh Amendment issues raised by the question are, as yet, neither fully briefed nor currently before, the D.C. District Court.

In any event, the Section 5 three-judge panel has already set a hearing on the State's motion for summary judgment as to all maps, including the Senate plan. The D.C. court has made clear that its focus, like this Court's, is on expedient resolution of the matters before it, so that the election process may proceed apace.

This Court has requested that the parties advise it regarding the appropriate action to take should it be required to implement an interim apportionment plan. While certain plaintiffs cited the Court to the multimember redistricting cases of *Chapman v. Meier*, 420 U.S. 1 (1975), and *McDaniel v. Sanchez*, 452 U.S. 130 (1981), they unfortunately omitted the controlling case – and the Supreme Court decision most closely on point to the facts at bar – *Upham v. Seamon*, 456 U.S. 37 (1982).[2] There, in a matter involving the 1981 Texas congressional plan, the Court rejected the notion that a district court may ignore the political decisions embodied in a legislative map that has not yet garnered preclearance. (The situation there was slightly different from the present one, in that the actual determination of preclearance will be made, in the first instance, by the D.C. District Court). The *Upham* three-judge panel had altered the two districts based on which preclearance had been denied, but also fixed a problem it perceived in the Dallas County apportionment. This was error, as it greatly exceeded the authority of a court already apprised of the legislative intent of the map-drawers.

---

[2] Indeed, the Supreme Court severely limited the scope of *McDaniel* a dozen years ago in *Lopez v. Monterey County*, 525 U.S. 266, 287 (1999).

"In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'" *Id.* at 41-42 (citing *White v. Weiser*, 412 U.S. 783, 795 (1973)). In its brief opinion, the *Upham* Court examined the preceding decade's opinions on related subjects, and distilled a three-judge panel's interim map methodology into a single paragraph:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of "reconciling the requirements of the Constitution with the goals of state political policy." An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the Dallas County reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas Legislature.

456 U.S. at 43 (citing *Connor v. Finch*, 431 U.S. 407, 414 (1977)).

The Supreme Court then noted that it had previously permitted district courts to order elections to go forward based on interim, apportionment maps that had legal, and "even constitutional" infirmities, and remanded so that the

district court could determine the best remedy. *Id.* at 44 (citing *Bullock v. Weiser*, 404 U.S. 1065 (1972); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970)).

Bullock and *Whitcomb* provide a window into the propriety of using the legislatively adopted plan, on an interim basis, until a final plan is implemented. In *Whitcomb*, the district court essentially enjoined conduct of any elections for Indiana State Senate or State Representative, and instead directed use of a map that it had approved. The Supreme Court stayed enforcement of the order, thus allowing elections based on the map the district court determined was unconstitutional, and upon which probable Court jurisdiction had already been noted. *Whitcomb v. Chavis,* 307 F. Supp. 1364 (S.D. Ind. 1969), *jurisdiction noted,* 397 U.S. 984, *stayed,* 396 U.S. 1055 (1970), *rev'd and remanded,* 403 U.S. 124, 140 (1971). Indeed, notwithstanding the district court's correct finding of unconstitutionality, it "erred in so broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so." 403 U.S. at 161.

The other case *Upham* cited favorably, *Bullock v. Weiser*, resulted in the 1972 Texas congressional elections being held pursuant to a plan that the Northern District of Texas had held to be unconstitutional. Once more, the Supreme Court stayed an injunction against the election, and once more, the Court eventually agreed with the district court that the plan *was* unconstitutional, but that its remedy was patently at odds with lawful, legislative state goals. *White v. Weiser*, 412 U.S. 783, 789, 797 (1973).

The compressed time often associated with redistricting, as well as the state-law limitations in convening legislatures, led *Upham* to note that "[n]ecessity has been the motivating factor in these situations." Applying that principle, the *Upham* Court afforded the Eastern District of Texas the odd choice (based on its local expertise) of once more re-drawing the plans, or of letting the elections go forward as planned, on the then-current maps. Needless to say, it did so in spite of the reversible error the Court had just adjudicated regarding those maps. 456 U.S. at 44.

The manner in which the Eastern District of Texas approached the "unwelcome obligation" of an interim solution to the 2001 Texas Senate and congressional maps in *Balderas v. State*, is extremely instructive. 2001 WL 34104833 & 34104836 (E.D. Tex.). There, the court had already held a Section 2 trial, much as this Court did, with -- as here -- the initial response from the United States coming the business day following the close of trial.[3] (There, it was an administrative preclearance of the Senate plan, but a denial of preclearance of the congressional map. Here, similarly, the United States has interposed no objection to the Senate plan in its Answer -- although Section 5 intervenors have -- but has objected to certain congressional districts, which it claims indicate either discriminatory purpose or retrogressive effect.) While the *Balderas* maps were drawn by the Legislative Redistricting

[3] Significantly, the *Balderas* trial did not begin until mid-November, 2001, and the Section 5 administrative preclearance determination was not rendered until November 16. This Court finds itself far ahead of that time sequence.

Board of Texas, rather than by the Legislature, they were properly treated as legislative acts by the court.

The *Balderas* district court explained that it was required by *Upham* to limit its decision "to correcting the federal constitutional and statutory defects in the LRB House plan, including the concerns raised in the objection of the Justice Department." For purposes of the present action, the standard is the same, except that the dispositive determination regarding Section 5 preclearance will have been rendered by the D.C. District Court rather than the Justice Department, by the time this Court undertakes its reapportionment analysis. If, as the Defendants expect, the three-judge panel grants the State relief, the maps will have been precleared and only the remaining Section 2 issues, if any, will require redress. If not, then the Court will need to address the court's objections, but will be "limited to those necessary to cure any constitutional or statutory defect." *Balderas* (citing *Upham*, 456 U.S. at 43).

Applying that standard, the Eastern District of Texas implemented its changes by making discrete changes to the districts identified by the Justice Department in its preclearance objections, and leaving the rest of the map (save for districts slightly affected by bordering on the objected-to districts) alone. In *Martinez v. Bush*, the Southern District of Florida did precisely the same thing, adopting a proposed remedial map which had as few changes as possible. 234 F. Supp. 2d 1275, 1288 n.12 (S.D. Fl. 2002).

Other courts have addressed the exigency of interim relief in various ways. The Southern District of Georgia, in a three-judge decision related to *Miller v. Johnson*, 500 U.S. 900 (1995), issued a brief Order Granting Preliminary Injunction and Releasing Interim Redistricting Plan, so that elections could go forward, and followed it with a longer Order and Opinion about a month later. The court only addressed in its injunctive order the interim map, and, in it, effected changes only to districts that were conceded to be unconstitutional, or, as it explained in the Opinion, for which "Plaintiffs have made a showing of a substantial likelihood of prevailing on the merits of their claim that those districts are unconstitutional." *Johnson v. Miller*, 929 F. Supp. 1529, 1542 n.33 (S.D. Ga. 1996) (citation omitted); Order, No. CV-194-40, dated April 30, 1996 (S.D. Ga.)(available at http://georgiainfo.galileo.usg.edu /ga-96dis.htm).

In *Smith v. Clark,* a three-judge panel, recognizing that *no* input had been received from the Department of Justice (rather, additional information had been requested, in a manner that would have pushed the congressional elections past their announced dates), drew its own map on an interim basis. The court expressly afforded no deference to legislative intent on the facts before it. Judge Jolly explained,

> The principle announced in *Upham* and *White,* and applied in *Terrazas* and *Burton,* does not apply in this case. This is true because, as of this date, no part of the plan adopted by the Chancery Court has been approved by the Attorney General. We think

> that, for purposes of deference, it is important to note that the plan adopted by the Chancery Court was drafted by the Intervenors (plaintiffs in Chancery Court), not by the Chancery Court, and not by the Mississippi Legislature, which failed to enact a congressional redistricting plan. Accordingly, there is no expression, certainly no clear expression, of state policy on congressional redistricting to which we must defer.

Smith v. Clark, 189 F. Supp. 2d 529, 533-34 (S.D. Miss. 2002)(citing *Terrazas v. Clements,* 537 F. Supp. 514 (N.D. Tex. 1982); *Burton v. Hobbie,* 543 F. Supp. 235 (M.D. Ala.), *aff'd,* 459 U.S. 961 (1982); *Burton v. Hobbie,* 561 F. Supp. 1029, 1034 (M.D. Ala. 1983)), *aff'd sub nom. Branch v. Smith,* 538 U.S. 254 (2003)). Here, of course, the Legislature *has* spoken, and so has the Department of Justice, as a litigant, has formally said it has ***no*** objection to the Senate plan, as pleaded in its Answer of September 19, 2011 in the Section 5 proceeding.

To the extent there is a difference between interim and remedial map-drawing, *Upham* identified it. Absent a patent one-person, one-vote failing or other manifest constitutional error, this Court is wholly permitted to use the legislature's lawfully-enacted map as its interim plan, unless the Section 5 three-judge panel expressly denies preclearance of the map. Given that the United States has affirmatively stated it has no Section 5 objection to the Senate plan (and, thus, the State's strong likelihood of success in that proceeding, this

Court would be well served by using the legislatively-enacted map as its interim.

Finally, to the extent the Court determines a need to generate interim plans, the experience of the State of Texas, based in no small part on the acknowledged expertise of the Texas Legislative Council and its RedAppl software, is that the actual process for adjudicating interim relief regarding a single Senate district would require less than a day, including testimony of the parties. Indeed, the parties to this action are in agreement that the substantive *trial* of this matter can be conducted in less than two court days, given the expansive record already generated, and the parties' agreement to use of materials from it in this case. In any event, because only a single district is at issue, the Court can reasonably expect that the entire process could be done in very little time.

The State Defendants remain confident that the Section 5 proceeding will conclude well prior to the dates by which finalized maps will be necessary for implementation, and will continue to keep the Court apprised of the status of that litigation.

Dated: October 7, 2011

Respectfully Submitted,

GREG ABBOTT
Attorney General of Texas

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. SA-11-CV-788

WENDY DAVIS, et al.,

Plaintiffs,

v.

RICK PERRY, et al.,

Defendants.

FILED: 11/18/11
Document 88

DEFENDANTS' OBJECTIONS TO THE COURT'S PROPOSED INTERIM SENATE PLANS

Defendants Rick Perry, in his official capacity as Governor, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas (collectively, "Defendants") respectfully file these objections in response to the Court's Order of November 17, 2011 (Doc. 86). In support, Defendants state as follows:

The Court has erred in its attempt to impose equipopulous districts in the Texas Senate. Whether because of a mistaken policy belief that population equalization is an inherent necessity in the plan, or because of a supposed legal constraint that would require it to ignore the lawful deviations utilized by the Legislature in devising its plan, the Court exceeded its authority.

A federal court lacks constitutional authority to interfere with the expressed will of the state legislature unless it is compelled to remedy a specific, identifiable violation of law. Contrary to this basic principle of federalism, the proposed interim Senate redistricting plan— while it is in many ways based roughly on the legislatively enacted plan—in other ways completely overturns the legislative will where no probability of a legal wrong has been identified. By imposing remedies where no wrongs exist, the Court has exceeded its authority and intruded on the Legislature's constitutional prerogative to make the considered policy judgments necessary to formulate a redistricting plan.

Because federal courts possess neither the constitutional power nor the political authority to make the policy choices essential to redistricting, they cannot disregard the legislature's intention in an enacted redistricting plan unless it is necessary to avoid a constitutional or statutory violation:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of "reconciling the requirements of the Constitution with the goals of state political policy." . . .
>
> An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the . . . reapportionment plan offended either the

> Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature.

Upham v. Seamon, 456 U.S. 37, 43 (1982) (per curiam) (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)); *cf. White v. Weiser*, 412 U.S. 783, 797 (1973) (holding that the district court erred because "in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state proposed plan"). When a federal court is forced to order an interim redistricting plan, it must respect the state legislature's policy judgments.

The Court's proposed Senate plan, Plan S163, disregards the Texas Legislature's will by modifying all but three Senate districts for no apparent reason other than to reduce the difference in total population among districts. There is no legal justification for such drastic changes to nearly all the Senate districts when the Department of Justice has not objected to Plan S148 and Plaintiffs' only challenge relates to Senate District 10. The Court's changes are not within its power because the legislatively drawn districts do not violate federal law. The Supreme Court has concluded that a total deviation of less than 10% is consistent with the principle of one person, one-vote. The Supreme Court's decision reflects the need for courts to defer to the political judgments that are necessary to enact a plan. *Brown v. Thomson*, 462 U.S. 835, 842 (1983). Not only are these changes beyond the Court's power, they also mark a clear break from the consistent practice of previous courts in Texas

redistricting cases.[1] Although courts are generally subject to a stricter standard than state legislatures in drawing electoral districts,

> [t]his stricter standard applies . . . only to remedies required by the nature and scope of the violation . . . . There may be reasons for rejecting other parts of the State's proposal, but those reasons must be something other than the limits on the court's remedial actions. Those limits do not come into play until and unless a remedy is required; whether a remedy is required must be determined on the basis of the substantive legal standards applicable to the State's submission.

Upham, 456 U.S. at 42–43 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971)) (internal citation and footnote omitted); *see also Connor v. Finch*, 431

---

[1] *See Balderas v. Texas*, 2001 WL 34104833 (E.D. Tex. Nov. 28, 2001) (incorporating the majority of the unprecleared LRB House plan into a court-drawn redistricting plan, including deviations in large urban counties with multiple whole districts); *Terrazas v. Clements*, 537 F. Supp. 514, 546–47 (N.D. Tex. 1982) (rejecting the argument that the court was required to eliminate population deviations when incorporating districts from an unprecleared LRB redistricting plan); *accord Johnson v. Miller*, 929 F. Supp. 1529, 1563 (S.D. Ga. 1996) ("It does not violate the one-person one-vote principle for us to use in an interim remedy plan districts from a legislatively enacted plan that does not itself violate that principle."); *cf. Burton v. Hobbie*, 543 F. Supp. 235, 239 (M.D. Ala.), *aff'd*, 459 U.S. 961 (1982) (implementing an unprecleared state legislative plan on an interim basis, with limited modifications in response to DOJ objections, relying on *White v. Weiser*, *Upham v. Seamon*, and *Terrazas v. Clements*).

U.S. 407, 415 (1977) (noting that plans drawn to remedy the legislature's failure to redistrict are subject to stricter standards because courts "possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name").

The Court's apparent attempt to minimize—but not equalize—population across districts creates the very entanglement that the Supreme Court has warned against since the beginning of its involvement in reapportionment. The Court long ago cautioned that reducing constitutional population deviations in state legislative plans results in excessive interference with the legislative process with minimal constitutional returns:

> Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population-equality standard. . . .
>
> The point is, that such involvements should never begin. We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it. Their work should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved.

Gaffney v. Cummings, 412 U.S. 735, 750–51 (1973).

Plan S163 further rejects the Legislature's carefully considered judgments by breaking up communities of interest in the map. *See, e.g.*, Exhibit 1 at 3 (letter from Senator Jane Nelson identifying how the Court's plan divides communities of interest); 4 (letter from Senator Robert Nichols identifying how the Court's plan divides communities of interest and ignores public input); 6 (letter from Senator Glenn Hager objecting to the Court's plan because it divides communities of interest); 10-11 (letter from Senator Chuy Hinojosa objecting to the Court's plan because it divides communities of interest). For example, Plan S148 as passed by the Legislature ensured that the City of Arlington was contained in a single district. *See* Exhibit 1 at 8 (letter from Senator Chris Harris), 13-12 (email from Representative Rodney Anderson's office). As the seventh largest city in Texas with a population of approximately 400,000, the City of Arlington qualifies as a major community of interest. *See id.* Plan S148 keeps the majority of the City of Arlington within Senate District 9. *See id.* Ignoring this policy judgment considered by the Legislature, the Court's plan reverses that correction and continues to split the City of Arlington. *See id.*

The Court's decision to change the configuration of Senate District 10 is also not justified by the need to remedy a legal harm. In the benchmark plan, Senate District 10 is best defined as a crossover district given that it is comprised of a majority Anglo population and a combination of the African-American and Latino populations forms less than a majority of the citizen voting age population. *See* Plan S100, Red 106 (District 10 has 15.1% Hispanic

CVAP, 18.3% Black CVAP, and 62.7% Anglo CVAP). The Court's plan maintains the crossover nature of Senate District 10. *See* Plan S163, Red 106 (District 10 has 15.2% Hispanic CVAP, 18.1 Black CVAP, and 62.8% Anglo CVAP). It is well-established that the Voting Rights Act does not require the State—or permit the Court—to create crossover districts or, more importantly, maintain such districts absent a demonstration of intentional racial discrimination under the Fourteenth Amendment. *See Bartlett v. Strickland*, 129 S.Ct. 1231, 1246 (2009). Neither Plaintiffs nor the Court have identified any plausible justification for maintaining Senate District 10 as it existed in the benchmark plan.

Nevertheless, while Defendants disagree that any changes to Senate District 10 were necessary to remedy a legal harm, they agree with the Court's refusal to redraw Senate District 10 as requested by Plaintiffs. Indeed, by returning Senate 10 to its prior configuration, the Court rejects Plaintiffs' efforts to transform this district into a "performing" minority coalition district.

Finally, Defendants object to the Court's plan because it appears that it fails to adhere to the traditional redistricting principle of creating contiguous districts. In San Antonio, a few blocks along Loop 410 are enclosed by Senate District 26, but they are assigned to Senate District 25. *See* Exhibit 2.

CONCLUSION

Defendants object to the Court's plan because it exceeds the Court's authority to the extent it attempts to equalize population among the districts

denying the Legislature the presumption of good faith and legality to which it is entitled.

Dated: November 18, 2011

Respectfully Submitted,

GREG ABBOTT
Attorney General of Texas

Blank Page