No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

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

Applicants,

v.

WENDY DAVIS, *et al.*,

Respondents.

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

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TO THE HONORABLE ANTONIN SCALIA, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

This application arises from an ongoing redistricting controversy currently pending before a three-judge panel in the Western District of Texas consisting of U.S. District Judges Orlando Garcia and Xavier Rodriguez and U.S. Circuit Judge Jerry Smith of the Fifth Circuit. *Davis, et al. v. Perry, et al.*, Case No. 5:11-cv-788-OLG-JES-XR (W.D. Tex. filed Sept. 22, 2011). That proceeding involves challenges under the United States Constitution and Section 2 of the Voting Rights Act (42 U.S.C. § 1973) directed at the redistricting map enacted by the 82nd Texas Legislature for election of the Texas Senate.

The three-judge court's interim order as to the Senate map is less sweeping than the court's wholesale redrawing of the House map, but it suffers from the same fatal flaw: a willingness to redraw an election map without a finding of any substantial likelihood of a statutory or constitutional violation. Indeed, the error is particularly stark with respect to the Senate map, because the pending Section 5 challenge is nothing more than the meritless objection of a directly affected state senator. The order below substitutes the mere pendency of a Section 5 challenge for a finding that there is a substantial likelihood of a statutory violation and redraws the Senate map accordingly. That decision should be stayed and reversed with appropriate instructions.

The three-judge order alters five of thirty-one legislatively enacted Texas Senate districts without concluding that any aspect of the Legislature's Senate map is likely to be found to violate the law. The court's order cannot be reconciled with this Court's clear instruction that even after preclearance is rejected, interim judicial modifications to legislatively enacted maps must be limited to "those necessary to cure any constitutional or statutory defect." *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam). The courts simply cannot have greater latitude to ignore the legislature when preclearance remains pending than when it has been rejected. Because no court has found a probable violation of law in the Senate plan—and because no such violation exists—the district court had no legal authority to redraw the legislatively enacted map. This Court should stay the district court's interim Senate plan and order the court to make the requisite

inquiry. In light of the nature of the Section 5 challenge and the Department of Justice's failure to object to the Senate plan, any redrawing of the Senate map would not be justified applying the correct legal standard.

In a three-page order, the district court concludes that it cannot make the entire legislatively enacted plan the interim plan for the 2012 elections because judicial preclearance proceedings in the U.S. District Court for the District of Columbia have not concluded. *See* Order (Doc. 89) at 3, *Davis, et al. v. Perry, et al.*, No. 5:11-cv-788 (W.D. Tex. Nov. 23, 2011), Appendix Exhibit 1 [hereinafter "Interim Senate Order"]. The Department of Justice, however, has already concluded that the legislatively enacted Texas Senate plan does not violate Section 5 of the Voting Rights Act.[1] The only reason the Senate plan has not been precleared is that the D.C. District Court has allowed the intervention of a single disgruntled Texas Senator to delay preclearance despite the DOJ's admission that the Senate map is entitled to preclearance. The three-judge court apparently felt compelled to alter the legislatively enacted Senate plan solely because the State has not secured a final order in the preclearance lawsuit. *See* Interim Senate Order (Appx. Ex. 1) at 3.

The district court altered Senate District 10—the district currently held by the intervening senator—and four surrounding districts without any finding to support its implied conclusion that the State and the DOJ are likely wrong about District 10's legality. According to well-established principles of equity, a plaintiff

[1] *See* Answer (Doc. 45) ¶ 28, *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Sept. 19, 2011), Appendix Exhibit 2 ("Defendants admit that the proposed Senate plan complies with Section 5 of the Voting Rights Act.").

seeking preliminary relief "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted). "[A] major departure from the long tradition of equity practice should not be lightly implied." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (internal citations and quotation marks omitted).

A court confronted with the task of reapportionment exercises equitable discretion and therefore must make specific findings if its reapportionment order departs from a legislatively enacted plan. *Upham*, 456 U.S. at 43. The court below ignores *Upham* and makes a major departure from traditional equity practice when it imposes interim relief without first finding that (1) the legal claims against the Senate plan are likely to succeed on the merits, (2) the remedy would be consistent with the respect owed to the legislative map under *Upham,* and (3) the balance of equities tips in favor of plaintiffs. As noted in the Application for a stay of the order redrawing of the map for the Texas House of Representatives filed simultaneously with this Application, the failure to make these findings was not an oversight. The court below affirmatively disclaimed any need to make findings of a likely violation and any need to give weight to the duly-enacted legislative plan based on the profoundly misguided view that the pendency of preclearance proceedings gave the court a free hand to draw its own map. Interim Senate Order (Appx. Ex. 1) at 3.

The district court has effectively concluded that a self-interested legislator, without even demonstrating a likelihood of success on her claims, can block enactment of a legislatively enacted redistricting plan simply by *alleging* that the plan violates the law. This result violates the principles articulated by this Court in *Upham* and similar cases. It must be corrected immediately so that the 2012 Texas Senate elections can proceed on the legal map duly enacted through the State's democratic process.

If a stay is not expeditiously granted and the decision below reversed, the State will have little choice but to conduct elections on an *ultra vires*, court-imposed map that elevates the political self-interest of a single state legislator over the democratically expressed will of the People of Texas. This would result in permanent, irreparable harm. *See Lucas v. Townsend*, 486 U.S. 1301, 1304 (Kennedy, J., Circuit Justice 1988) ("Even if the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive."). Accordingly, the Court should grant this stay and summarily reverse the decision below with instructions for the court to apply the appropriate standards. In the alternative, the Court should grant the stay, convert this Application into a jurisdictional statement, note probable jurisdiction, and schedule the case for expedited briefing and argument.

BACKGROUND

Because it is covered by Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, Texas is compelled to seek preclearance of all redistricting plans by filing suit for

declaratory relief in the U.S. District Court for the District of Columbia or by seeking administrative preclearance from the DOJ. Texas filed suit for judicial preclearance on July 19, 2011, the day after the Governor signed the State's congressional redistricting plan into law. In an effort to expedite that proceeding, the State also simultaneously submitted to the DOJ the information and data that would have been required in the administrative preclearance process Section 5 provides as an alternative to judicial declaratory relief. The State also provided the DOJ access to individuals involved in the redistricting process and responded to multiple requests from DOJ for supplemental data and documentation.

The DOJ filed its answer 60 days later. It objected to the State's congressional and State House redistricting plans, but it registered no objections to the State Senate plan. Preclearance of the Senate plan is opposed only by a group of private parties led by Senator Wendy Davis, who intervened in the Section 5 case on July 21, 2011. Senator Davis contends that the Legislature should not have altered her district, in which Anglos make up the majority of voting age and citizen voting age population, because it was allegedly on the verge of developing into a protected Voting Rights Act district.[2] Despite the DOJ's formal admission that the Senate map was not enacted with a discriminatory purpose and will not have a retrogressive effect, the D.C. District Court denied the State's motion for summary judgment on November 8, 2011. *See* Order (Doc. 106), *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Nov. 8, 2011). The State has requested a trial the week

[2] *See, e.g.*, Motion for Leave to Intervene as Defendants (Doc. 5) ¶10, *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. July 21, 2011).

of December 12. *See* Plaintiff's Response to Court's Inquiries of November 15, 2011 (Doc. 107), *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Nov. 22, 2011).

This appeal arises from the district court's November 23, 2011 order imposing a court-drawn interim redistricting plan for the Texas Senate. The Texas Senate plan was not at issue in the Section 2 proceedings until Senator Davis filed a lawsuit on September 22, 2011—almost a week *after* the district court concluded a two-week trial, preceded by extensive discovery, on the State House and congressional plans. No trial has been conducted regarding the Senate map.

On November 17, 2011, the court issued proposed interim maps for the Texas House, *see* Order (Doc. 517), *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Nov. 17, 2011), and the Texas Senate, *see* Order (Doc. 86), *Davis, et al. v. Perry, et al.*, No. 5:11-cv-788 (W.D. Tex. Nov. 17, 2011), Appendix Exhibit 3. The court ordered the parties to file comments and objections to the proposed interim plans by noon the following day.

On November 23, 2011, the district court ordered implementation of interim maps for the Texas House and Texas Senate. The court's unanimous opinion implementing an interim Senate map essentially concludes that the court was required by the pendency of Section 5 proceedings to make some kind of change to the legislatively enacted map. *See* Interim Senate Order (Appx. Ex. 1) at 3. The court's order identifies no need to correct any known or probable legal deficiency in the Senate map. To the contrary, the court observes that its own interim map reflects no "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." *Id.* at 1. The court's order leaves 26 of 31 Senate districts intact, but with respect to the geographic area in and around District 10, the court has imposed its own plan in open disregard for the State's legislative program and in the absence of any established or probable showing of an actionable legal defect in the State's map.

The State moved the district court to stay implementation of its interim Senate plan pending appellate review. The district court denied the motion to stay on November 25, 2011, over a dissent by Judge Smith. *See* Order (Doc. 91), *Davis, et al. v. Perry, et al.*, No. 5:11-cv-788 (W.D. Tex. Nov. 25, 2011), Appendix Exhibit 4 [hereinafter "Order Denying Stay"]. Because the period for candidate filing begins today, on November 28, and ends shortly thereafter on December 15, the State submits its application for stay of the court's interim plan electronically. Needless to say, once filing statements are made, candidates need to know the contours of the district and the identity of their relevant electorate. Immediate submission of the State's application is necessary to avoid irreversible steps toward holding the 2012 elections under a legally flawed redistricting plan.

ARGUMENT AND AUTHORITIES

Under *Upham*, the local court crafting an interim redistricting plan can make only those revisions to an unprecleared state plan that are necessary to remedy demonstrated violations of federal law. No such violation exists here because Senate District 10 as drawn by the Texas Legislature complies with Section 2,

Section 5, and the Constitution. Therefore, *Upham* forecloses any changes to the State's enacted plan despite the fact that preclearance has not yet been obtained.

This Court has repeatedly stressed that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison,* 507 U.S. 25, 34 (1993) (citing U.S. CONST., art. I, § 2). Because redistricting plans reflect a myriad of complex and inter-related political compromises and legal judgments, the courts are obliged to defer to the states' decisions and to apply a presumption of good faith and legality at all stages of litigation. *Miller v. Johnson*, 515 U.S. 900, 915–16 (1995). The pendency of a Section 5 determination does nothing to change this. On the contrary, a state plan is still entitled to the greatest deference possible even after an objection as to Section 5 is interposed by the Attorney General, as in *Upham*. Here, preclearance proceedings are ongoing, and the Department of Justice has concluded that the Senate plan should be precleared. Yet the court below showed the legislatively enacted Senate plan less deference than was shown in *Upham* to a plan that had been ***denied*** preclearance.

The court reached that conclusion based on the misguided notion that a pending Section 5 proceeding precludes a court from giving deference to the legislatively-enacted plan. The court relied on cases in which covered jurisdictions failed to submit plans for preclearance, creating the risk that implementation of the plans by a local federal court would allow the jurisdictions to bypass preclearance entirely. *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). Texas has not attempted to 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. The Senate plan has been properly submitted for preclearance, and the DOJ has admitted that it complies with Section 5 of the Voting Rights Act. Despite these obvious differences, the court below treated *Lopez*, which involved the disregard of a court order to seek preclearance, as controlling. *See* Order Denying Stay (Appx. Ex. 4) at 4 ("no preclearance means no preclearance").

Applicants Perry, Andrade and the State of Texas (Applicants) therefore respectfully move to stay the district court's order pending expeditious consideration of this appeal, and for a prompt summary reversal and remand directing the district court to comply with *Upham* by conforming its interim redistricting order to the State's legislatively enacted Senate plan unless deviating from that plan is necessary to remedy a specifically identified violation of federal

law. In the alternative, the Court should grant the stay and schedule the case for expedited briefing and argument.

* * *

Whether this Court should stay the three-judge panel's order implementing an its interim redistricting plan pending appeal turns on four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). A stay pending direct appeal is a well-established remedy for a three-judge district court's improper interim redistricting order. *McDaniel v. Sanchez*, 448 U.S. 1318 (Powell, J., Circuit Justice 1980); *Bullock v. Weiser,* 404 U.S. 1065 (1972) (stay order pending appeal in *White v. Weiser*, 412 U.S. 783 (1973)); *Whitcomb v. Chavis,* 396 U.S. 1055 (1970) (stay order). All four factors favor a stay in this case.

I. APPLICANTS WILL LIKELY PREVAIL ON THE MERITS.

A. The Court had no power to order changes to the legislatively enacted Senate map without finding a probable legal violation.

The Supreme Court has unambiguously prohibited lower courts from disregarding the legislative will expressed in an enacted redistricting plan except to the extent necessary to avoid a demonstrated 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 (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 by failing to implement the plan "which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements").

The district court acknowledged that the Department of Justice lodged no objections at all to the legislatively enacted Senate map. Further, the Court apparently agreed with the State that the heavily Democratic "coalition district" requested by the plaintiffs should not be drawn. Nevertheless, the Court thwarted the will of the people of Texas by changing five Senate districts without articulating any reason for its actions other than that Section 5 preclearance has not yet been obtained. Neither a constitutional nor a statutory infirmity was found—or even found to be likely—in the Senate plan. Nor was there any felt need for such a finding because "this is not a remedial map." Interim Senate Order (Appx. Ex. 1) at 3. The closest to an explanation for the redrawing of the Senate map was the *non sequitur* that in light of the pending Section 5 proceedings, it could not use the legislatively-enacted map in its entirety because to do so would allow Texas "to

bypass the preclearance proceedings."[3] *Id.* In sum, the court below felt compelled not to follow the duly-enacted map, but did not feel constrained by the need to make findings of a likely violation of law or anything else.

The Court's apparent deference to one Senator's unproven *allegations* ignores the fact that 29 out of 31 Senators voted for the map, a strong majority of the House similarly approved it, and the Governor signed it into law. The phrase "tyranny of the minority" takes on new meaning if the three-judge court's order is allowed to stand. Under the district court's reasoning, whenever a single dissenter holds up Section 5 preclearance, a court *must* change the State's legislatively enacted map before it can be used. That effectively gives that dissenting legislator more relief for simply lodging an objection than she would have been entitled to if her Section 5 suit had succeeded (since at that point the court would recognize that it was issuing "a remedial map" as to which *Upham* would apply). Thus the democratic process will be undermined completely if one legislator, unhappy with the majority-approved redistricting plan, files a lawsuit at the eleventh hour claiming a violation of the Voting Rights Act—even when no one else, including the Department of Justice, believes that claim has merit. The district court should not have fallen prey to this tactic, and its order should be stayed and summarily reversed.

Section 5 already imposes enormous federalism costs by compelling the State to prove the lack of discriminatory purpose to the satisfaction of the Department of

[3] The court suggests that if it were to adopt the legislatively enacted map on an interim basis, the preclearance proceeding before the D.C. district court would be a nullity. This is incorrect. The district court's order is an *interim* order for the 2012 elections. The preclearance process, which will determine whether the State's maps are viable on a *permanent* basis, remains both ripe and necessary.

Justice before it may implement a duly enacted statute. *See, e.g., Reno v. Bossier Parish Sch. Bd,* 528 U.S. 320, 321–22 (2000). Those costs are unjustifiable when the Department of Justice—which has the statutory authority to enforce Section 5—finds no legal defect in the State's plan, but a single state legislator—who has no such authority—achieves with a single vote in court what she could not achieve in the legislative process.

B. No finding justifies the Court's presumption that Senate District 10 violates federal law.

The court's disregard of the Legislature's intent cannot be justified as a necessary remedy for a probable violation of federal law because the district court made no such determination, nor would the plaintiffs' allegations support such a finding. Senate District 10 is, at most, a crossover district in which combined minority groups make up less than 50% of voters. This Court has rejected crossover district claims under Section 2 of the Voting Rights Act:

> Recognizing a § 2 claim in this circumstance would grant minority voters a right to preserve their strength for the purposes of forging an advantageous political alliance. Nothing in § 2 grants special protection to a minority group's right to form political coalitions.

Bartlett v. Strickland, 129 S. Ct. 1231, 1243 (2009) (internal quotation marks and citations omitted). Even if different minority voters in Senate District 10 could reach the 50% threshold—making it a so-called coalition district—there is no evidence to support the necessary finding of heightened voting cohesion between members of each group. *See Growe* at 41–42. The district court made no such findings in any event.

Nor can the alteration of Senate District 10 be explained as a remedy for intentional discrimination because the court did not make even a preliminary finding that the Legislature acted with the purpose of discriminating against minority voters on the basis of their race. This Court has held that racially discriminatory purpose

> implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (citations, notes omitted). Even taken at face value, the claims of intentional discrimination in the Texas Senate plan prove nothing more than that the Republican-controlled Texas Legislature pursued partisan goals with knowledge that those goals would impact minority voters who favored Democratic candidates. This is plainly insufficient to prove intentional discrimination on the basis of race. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact."); *cf. Easley v. Cromartie*, 532 U.S. 234, 258 (2001) ("[W]here racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles.").

In sum, the lower court's interim Texas Senate redistricting plan undermines the Legislature's policy choices by altering five Senate districts that have not been found to violate the Voting Rights Act or the Constitution. The panel's approach to interim map-drawing conflicts with the rule announced in *Upham* and encourages parties who do not get their way in the political process to game the judicial system to block implementation of the will of the people of a sovereign State. The State is overwhelmingly likely to succeed on appeal, and a stay should be granted.

II. APPLICANTS WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.

The immediate implementation of the panel's interim Senate redistricting plan would needlessly interfere with the will of the Texas Legislature without justification. Senate Bill 31 passed with overwhelming majorities in both houses of the Legislature. To be sure, the new Senate map cannot be implemented without preclearance, but in light of the Justice Department's failure to object, preclearance is likely before any election would need to be held. By imposing a different judicially-crafted map without any predicate finding of a likely statutory or constitutional violation, the court below has needlessly interfered with the electoral process in Texas. Indeed, the court has done so without justifying its actions and while disclaiming any need to do so beyond pointing to the pending preclearance proceedings in Washington. Blocking the popular will without justification, as the court below has done, unquestionably causes irreparable harm to the State, its officers, and most importantly its citizens. Even the temporary displacement of the judgments of the political process 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 (Rehnquist, J., Circuit Justice 1977) ("[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."); *Coal. 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 supplanting the legislative will, 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 map, if a stay is not granted to allow for appellate review of the district court's decisions, this case will essentially be over. *See* Order (Doc. 528) at 15, *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Nov. 23, 2011) (Smith, J., dissenting).[4] The candidate filing period will begin under the lower court's legally flawed, unreviewed map on Monday, November 28. Absent a stay from this Court, there will soon be little alternative to conducting the 2012 Texas Senate 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 (Powell, J., Circuit Justice

[4] Judge Smith presciently noted that, "[t]he plaintiffs then predictably will claim that the interim map ratchets in their favor by constituting a new benchmark for preclearance by the D.C. Court, remedial action by this court, or future action by the Legislature." Interim House Order at 15 (Smith, J., dissenting) (citations omitted). Indeed, they have done precisely so, in a joint motion with the United States to abate the Section 5 proceeding. *See* United States' and Intervenors' Motion to Hold Case in Abeyance (Doc. 108), *Texas v. United States, et. al.*, No. 1:11-CV-01303 (D.D.C. Nov. 22, 2011).

1980); *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).

There is still time for this Court to stay the instant redistricting plan and remand to the district court to correct its obvious and material errors. *See Upham*, 456 U.S. at 37 (Notice of Appeal docketed, Feb. 27, 1982; Case determined *per curiam*, Apr. 1, 1982; Remand decided Apr. 6, 1982)). Indeed, under the circumstances here, this Court could grant the stay and summarily reverse the decision below. In the alternative, the Court could grant the stay, convert this Application into a jurisdictional statement, note probable jurisdiction, and expedite briefing and oral argument. *See, e.g., Harris v. McRae*, 444 U.S. 1069 (1980); *cf. Nken v. Mukasey,* 129 S.Ct. 622 (2008).

III. ISSUING A STAY WILL NOT SUBSTANTIALLY INJURE OTHER PARTIES INTERESTED IN THE LITIGATION.

The parties that may benefit from an improperly constructed map can suffer no legally cognizable injury from its abatement pending appellate review. This Court is faced with a straightforward legal question: did the lower court abuse its limited authority under *Upham* in altering five Texas Senate districts for which no probable violation of law has been shown? If it did, then a stay and immediate remand with instructions is necessary to protect *all* Texas voters from undue federal judicial interference in the lawful activities of the State.

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

A stay of the preliminary injunction would allow Applicants to carry out the statutory policy of the Legislature, which "is in itself a declaration of the public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). Rarely, can the public be better served than by permitting it to elect its own representatives according to law, or worse disserved than by requiring it to comply with a representational scheme not at all of its own choosing.

One segment of the public does require special solicitude: overseas voters, including, especially, citizens of Texas currently serving in the armed forces. The deadlines for this election cycle were materially moved up to comply with the Military and Overseas Voters Empowerment Act of 2009**,** 42 U.S.C. § 1973ff, *et seq.*, and compliance with that Act will require special treatment for overseas voters during the primary election cycle. Because of the MOVE Act's deadlines, the candidate filing period for 2012 primary elections must *end* by mid-December, 2011 in order for primary elections to be held as scheduled on March 6, 2012. Candidates cannot file confidently until a redistricting map is in place. An *immediate* remand order from this Court, accompanied by instructions requiring the three-judge panel to act expeditiously, could allow the Texas Senate primary elections to go forward as planned.

This Court need not feel constrained by this emergency timetable, however. If delaying primary elections for the Texas Senate is necessary to preserve this Court's jurisdiction and allow for thorough appellate review, the State respectfully

requests that the Court stay the primary elections for the Texas Senate. In past cases, the Court has remanded improperly crafted interim redistricting plans on an expedited timeline. *See Upham*, 456 U.S. at 37 (Notice of Appeal docketed, Feb. 27, 1982; Case determined *per curiam*, Apr. 1, 1982; Remand decided Apr. 6, 1982)). Employing a similar timeline in this case—while in the meantime staying all deadlines and timetables associated with the Texas Senate primary elections—would allow the State to conduct its Texas Senate primary elections in compliance with the MOVE Act on a date in May that is already scheduled as the primary-runoff election date. (All unaffected primary elections, including but not limited to presidential and U.S. Senate primaries, will in all events be held as scheduled on March 6, 2012.) Thus, with minimal disruption to the State's electoral infrastructure, the Court's jurisdiction can be preserved and the error below can be corrected on a reasonable schedule.

Legal, delayed elections are preferable to legally flawed, timely elections. The Court should take the time it needs to rectify the errors below and should stay the Texas Senate primary elections if necessary.

CONCLUSION

The district court's order directing implementation of an unlawful interim redistricting plan for the Texas Senate should be stayed, pending expeditious appellate consideration of the plan's compliance with this Court's holding in *Upham v. Seamon,* 456 U.S. 37 (1982) (per curiam). Because the district court declined to make even a preliminary determination that the legislatively enacted Texas Senate

plan violates the law, it had no legal basis for its refusal to implement the legislatively enacted plan in its entirety on an interim basis pending a preclearance decision. Applicants respectfully request that this Court stay the district court's order pending appeal, reverse, and remand with instructions to justify any modification of the Legislature's plan with a specific finding of a probable violation of federal law.

Respectfully submitted,

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

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