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.

SHANNON PEREZ, *et al.,*

Respondents.

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

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[1] The district court's order included six exhibits, which have not been included in this Appendix due to their volume. The exhibits include copies of the court's interim electoral maps, detailed description of each electoral district, and selected population data. These exhibits are available on PACER and can be provided upon request.

Respectfully submitted,

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

EXHIBIT 1

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET. AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
RICK PERRY, ET. AL.	§	

ORDER

The court, by majority, adopts PLAN H302 as the interim plan for the districts used to elect members in 2012 to the Texas House of Representatives. A map showing the redrawn districts in PLAN H302 is attached to this Order as Exhibit A. The textual description in terms of census geography for PLAN H302 is attached as Exhibit B. The statistical data for PLAN H302 is attached as Exhibit C. This plan may also be 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 interim plan can be found at the following website location maintained by the TLC 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, any of the other cases consolidated with this case, or the case pending in the United States District Court for the District of Columbia

("D.C. Court").

The decennial census was conducted last year, pursuant to Article I, § 2 of the United States Constitution. After the census figures were released, it became clear that the current apportionment plan for the Texas House of Representatives violates the one person, one vote principle under the United States Constitution as a result of the dramatic population growth in the last decade. Thus, the State of Texas undertook redistricting efforts to apportion seats in the Texas House of Representatives. See U.S. CONST. ART. I, § 2; see also TEX. CONST. 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 in the Texas House and Texas Senate on May 2, 2011 and signed into law on June 17, 2011. A lawsuit for preclearance of the State's enacted plan was filed on July 19, 2011 and is currently pending in the United States District Court for the District of Columbia. In that case, the United States has stated that it believes the State's enacted House plan was "adopted with a discriminatory purpose" and "has a retrogressive effect"on the voting strength of minority voters. The D.C. Court, hearing this argument, concluded that "the State of Texas used an improper standard or methodology to determine" if its maps would adversely affect minority voters. The D.C. Court therefore denied the State's request for summary judgment, electing to conduct a trial to determine factual issues related to the alleged discrimination by the Texas Legislature.

The D.C. Court's refusal to approve the State's map places this Court in the unwelcome position of having to "designate a substitute interim plan for the 2012 election cycle by the end of November."[1] Because the current plan is malapportioned and the State's enacted plan has not been precleared, the Court prepared a court drawn plan so that the 2012 elections could proceed in a timely manner.[2] With the invaluable technical assistance of the staff at Texas Legislative Council, the Court was able to draw a redistricting plan that met with the approval of a majority of the Court.

Despite the allegations of intentional discrimination and widespread constitutional violations in the enacted House plan, the State objects to issuance of a court-drawn map and insists that this Court must adopt the enacted plan "[b]ecause unelected federal judges possess neither the constitutional power nor the political competence to make the policy choices essential to redistricting[.]" While redistricting is generally a task for legislatures, a legislature's powers are not unbounded. Here, Texas failed to receive the necessary Voting Rights Act approval for the House plan before the 2012 elections. In such cases, federal

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[1] As this Court noted in its order denying summary judgment, because the State's enacted House plan has not been precleared, it is unenforceable and cannot be implemented. *Clark v. Roemer*, 500 U.S. 653, 646 (1991) (failure to obtain either judicial or administrative preclearance renders the voting change unenforceable). Plaintiffs in this Court also have challenged the legality of the State's enacted House plan and sought to enjoin the State from implementing the plan.

[2] When an enacted plan is not in place in time for the upcoming election, the Court must step in and craft an independently drawn court plan for the upcoming election. *See Branch v. Smith*, 538 U.S. 254, 266 (2003) (upholding injunction of state court plan because "it had not been precleared and had no prospect of being precleared in time for the 2002 election"); *Lopez v. Monterey County*, 519 U.S. 9, 24 (1996) (where Section 5 preclearance requirements have not been satisfied the remedial court must determine "what remedy, if any, is appropriate.").

courts are required to step in to create a lawful map that will allow free and fair elections to go forward.[3]

In crafting an interim map, this Court may not simply fix the problematic parts of the enacted map as the State suggests.[4] Doing so would interfere with the lawsuit currently pending in the D.C. Court, a lawsuit initiated by the State of Texas. Rather, this Court is tasked with drafting an independent map that will enable elections for the 2012 election cycle. Once the D.C. Court rules, and if the State receives preclearance for its enacted plan, this Court would then remedy any constitutional defects while deferring to State policy for the rest of the map.[5] If the D.C. Court denies preclearance, the enacted plan will be null and the Legislature will be required to enact a new plan. But until that time comes, this Court's hands are tied and it must draft an interim map.

The Court's primary goal in crafting its map was to preserve the status quo as much as possible. All proposed maps, including the State's enacted map, were considered.[6] But ultimately, the Court was obliged to adopt a plan that complies with the United States Constitution and also embraces neutral principles that advance the interest of the collective public good, as opposed to

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[3] *See Lopez*, 519 U.S. at 24.

[4] Despite the State's argument that this Court should adopt the State's enacted plan wholesale, the State recently requested a trial in the D.C. Court to occur in early December, thereby implicitly acknowledging that this Court is not free to remedy defects in the enacted plans until there is a ruling from the D.C. Court.

[5] *See Upham v. Seamon*, 456 U.S. 37 (1982).

[6] *Smith v. Cobb County*, 314 F. Supp. 2d 1274 (N.D. Ga. 2002) ("That a court must not act as a rubber stamp does not mean, however, that the court cannot consider the proposed legislative plan, just as it considers any other plans submitted to it.")

the interests of any political party or particular group of people. The Court therefore declined to adopt any of the Plaintiffs' proposed plans, and has instead crafted a plan that embraces the neutral districting principles required of court-drawn plans.

In determining the standards, principles, and criteria to follow in drawing this plan, the Court carefully considered the parties' briefs, the relevant case law, and the approach taken by other district courts.[7] The legal standards and neutral redistricting criteria employed by the Court in drawing the House map are based on clearly established principles and ensure the fairness and impartiality expected in any judicially crafted redistricting plan. Those neutral principles-- including primarily compactness, contiguity, and respect for county and municipal boundaries-- place the interests of the citizens of Texas first.

In drawing the map, the Court began by considering the uncontested districts from the enacted plan that embraced neutral districting principles. Although the Court was not required to give any deference to the Legislature's enacted plan, the Court attempted to embrace as many of the uncontested districts as possible. After inserting those districts into the map, the Court

[7] When it became clear that the Court would need to craft a court-drawn plan, it sought the parties' comments on the standards that would govern its task. The State appears to completely ignore the legal standards applicable to an independent court-drawn plan. Instead, the State insists that the Court take the State's enacted plan, make only minimal changes, if any, to "cure" any "defects" in the plan, leave the rest untouched, and implement the plan as a court-drawn plan. This approach would be a clear contravention of Section 5 preclearance requirements and would require the Court to rule on the merits of the State's enacted plan, which it is not permitted to do at this juncture. *See McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981) ("But where a court adopts a proposal 'reflecting the policy choices . . . of the people [in a covered jurisdiction]' . . . the preclearance requirement of the Voting Rights Act is applicable.").

adjusted them to achieve *de minimis* population deviations.[8] When asked for comments on the proposed map, the Plaintiffs did not object to the Court's use of the enacted map for those districts.

In his dissent, Judge Smith[9] argues that the Court should have given more deference to the State's enacted plan in crafting an independent court-drawn plan. However, the Court embraced as many of the uncontested districts as possible. The myriad of significant legal challenges to the State's enacted plan under the Voting Rights Act and the United States Constitution made it impossible to give substantial deference to the State's plan as the dissent has suggested.[10] Those challenges include: Districts 26, 27, 31, 32, 33, 35, 36, 39, 40, 41, 54, 78, 90, 93, 95, 102, 103, 104, 105, 107, 112, 113, 114, 117, 137, 139, 144, 145, 146, 147, and 149. With the border-to-border challenges to the State's enacted map, the Court was forced to undertake the delicate task of creating an independent map, giving as much consideration to the State's enacted map as possible without compromising the legal standards and neutral redistricting

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[8] When a court is called upon to draw districts, it has less latitude than a legislative body might have when it comes to equality in population. "Court-ordered districts are held to higher standards of population equality than legislative ones. A court-ordered plan should 'ordinarily achieve the goal of population equality with little more than *de minimis* variation.'" *Abrams v. Johnson*, 521 U.S. 74, 98 (1997); *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975); *Connor v. Finch*, 431 U.S. 407, 414 (1977).

[9] The two undersigned judges likewise respect Judge Smith's work ethic and professionalism, and thank him for his service. Nothing in this opinion is intended to personally or professionally impugn his judgment in this case. As Judge Smith notes in his dissenting opinion, these are difficult issues and reasonable minds can disagree.

[10] *See Abrams v. Johnson*, 521 U.S. 74, 86 (1997) (stating that *Upham* deference is not appropriate where "the constitutional violation [] affects a large geographic area of the State" because 'any remedy of necessity must affect almost every district.'").

criteria that it set out to follow.

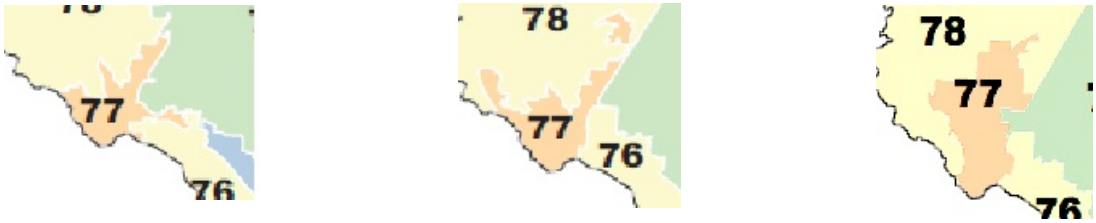
Thus, after incorporating as many of the uncontested districts as possible into the interim map, the Court turned to the districts that are challenged as unconstitutional and attempted to return them to their original configuration in the benchmark. The dissent states that in doing so the Court has made "radical alterations in the Texas political landscape." The reality is that demographics, not this Court's actions, have changed the landscape. Since the 2000 census, the population of Texas has grown by 4,293,741.[11] The vast majority of that growth is attributable to growth in the Latino and African American communities. Specifically, the Hispanic population in Texas grew by 2,791,255 and the Black population grew by 522,570, while the Anglo population increased by less than 465,000 people.[12]

Despite the population growth stated above, the challenged enacted plan reduced minority opportunity districts from 50 to 45. The Court's interim map merely restores the minority opportunity districts to their original configuration in the benchmark. The result of this restoration is a map that includes the original 50 minority districts, while "creating" three additional performing minority districts that emerged naturally once neutral districting principles were used. Indeed, the dissent's own map creates two additional minority districts– one in Tarrant County and one in Hidalgo County. The majority

[11] http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf

[12] Texas State Data Center: http://txsdc.utsa.edu/Data/Decennial/2010/Redistricting/Profiles.aspx

interim map also creates the district in Hidalgo County, but excludes the one in Tarrant County and instead adds the second one in Harris County and a third in El Paso. The district in Harris County sprang naturally from the population growth in the region. Similarly, the El Paso district had been gerrymandered in the enacted plan so that it ended up configured into the shape of a deer with antlers.



Benchmark (Plan H100) Enacted (Plan H283) Interim Plan (H302)

While the dissent includes this deer-shaped district despite allegations that it was unconstitutional, the interim map merely restores the district to its original configuration while making adjustments for population growth. The ultimate inclusion of one additional minority district compared to the dissent hardly seems like "radical alterations in the Texas political landscape." Indeed, it is the dissent's Tarrant County district that is the result of an intentional effort to create a minority district, unlike the Court's attempt to merely maintain the status quo.

Likewise, although acknowledging that neither this Court nor the D.C. Court has made any rulings regarding the merits of the cases, and that this Court is precluded from making such rulings until the D.C. Court rules on the

Section 5 claims,[13] the dissent proceeds to conclude that the plaintiffs have failed to demonstrate a substantial likelihood of success on the merits and that accordingly the Legislature's judgments should be respected.

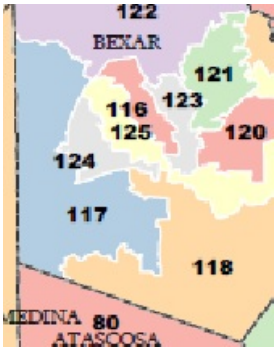
The dissent argues that "the majority seems to take the plaintiffs' complaints as true for purposes of interim relief on every colorable claim." The dissent apparently ignores the fact that it interprets many of the Plaintiffs' and Department of Justice's objections as baseless. The dissent does so while simultaneously acknowledging that "the Legislature created substantial population disparities in Dallas and Harris Counties in a manner that may raise concerns of racial or partisan gerrymandering in violation of *Larios v. Cox*." Remarkably, after that concession, the dissent states: "Nothing in the State's enacted plan will hinder, in the slightest, Hispanic opportunity to register and vote in greater numbers than before." The dissent further discounts that the D.C. Court concluded that the State "used an improper standard or methodology to determine" if its map would adversely affect minority voters.

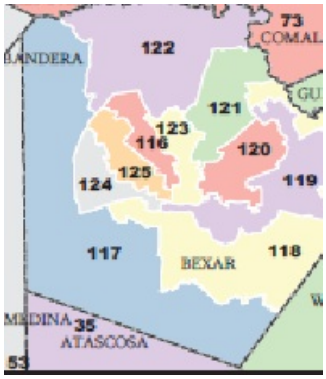
An excellent example of the dissent's interference with the D.C. Court's preclearance proceedings is seen in House District 117, which is located in the southwest corner of Bexar County. In the D.C. Court, the Department of Justice has alleged that HD117 was intentionally reconfigured by the State in an effort to trade out mobilized Hispanic voters who regularly vote for Hispanic voters who do not regularly vote. The dissent simply tosses this issue aside as being

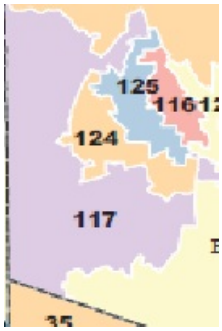
[13] *See Lopez*, 519 U.S. at 24.

"without foundation," and adopts HD117 into the dissenting map. However by doing so, the dissent has done "[w]hat is foreclosed" to this Court because "Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'"[14]

The Court's map in contrast merely returns HD117 to its original configuration in the benchmark in order to maintain the status quo until the D.C. Court rules. When viewed in the images below, this hardly seems like the "radical alterations in the Texas political landscape" alleged by the dissent:







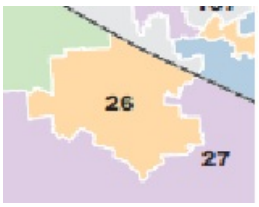
Benchmark (Plan H100) Enacted (Plan H283) Interim Plan (H302)

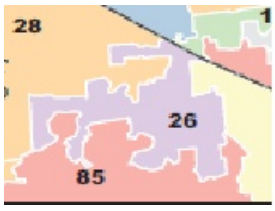
The dissent also wrongly alleges that the interim map "creates" coalition districts that are not required by the Voting Rights Act. Once again, the dissent misstates the Court's approach to drawing the interim map. This Court has not

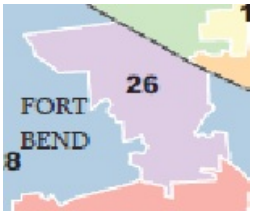
[14] *U.S. v. Board of Sup'rs of Warren County, Miss.*, 429 U.S. 642, 645 (1977); *see also Smith v. Clark*, 189 F. Supp. 2d 529, 534 (S.D. Miss. 2002) ("A three-judge court does not have jurisdiction to determine whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'").

made any merits determinations as to whether coalition districts are required under the Voting Rights Act. Rather, like the minority opportunity districts discussed above, when these districts were restored to their baseline configuration and population shifts were taken into account, these districts resulted quite naturally.

For example, House District 26, situated in Fort Bend County to the southwest of Houston, increased from 44 percent minority population to 60.6 percent minority in 2010. The image below shows that the enacted plan substantially reconfigured HD26 in a way that made it irregularly shaped. Evidence presented at trial indicates that this reconfiguration may have been an attempt by the State to intentionally dismantle an emerging minority district. As the images below demonstrate, the interim plan attempts to take this district back to its original configuration in the benchmark while making slight adjustments for population changes.







Benchmark (Plan H100) Enacted (Plan H283) Interim Plan (H302)

The dissent's incorporation of the State's bizarrely shaped House District 26, despite alleged constitutional violations, constitutes an improper merits determination regarding the validity of that claim. In contrast, the Court's decision to return the challenged district to its original configuration is simply

a method of preserving the status quo until the D.C. Court has made a preclearance determination.

The State's objections to the Court's interim map suffer from even greater flaws. During the course of these proceedings the State has acknowledged that it separated a number of Latino and African American communities from their benchmark districts. It was also apparent from these proceedings that the Legislature started from the presumption that it could have population deviations as high as ten percent, and from that presumption it began to gerrymander districts to meet its goal of creating or maintaining as many Republican districts as possible. The State insists that it did not engage in racial gerrymandering, but rather only engaged in these actions to make various districts more Republican. Accordingly, the State argues that any discrimination by the Legislature was directed against Democrats, not minorities. The State argued to the D.C. Court that it was entitled to summary judgment in that case, but the D.C. Court found that a fact issue existed as to whether the State engaged in racial discrimination. Having failed to secure preclearance from the D.C. Court, the State fails to comprehend that this Court undertakes an interim map process, not a remedial map process. It is clear the State fails to understand the difference when it has statements such as "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." This Court is precluded from making any rulings on the merits at this juncture. When it became apparent that the Court would be

required to draw an interim map, the Court provided all parties (including the State) an opportunity to submit a proposed map. The State refused to do so, arguing that the Court was required to adopt its non-precleared map in its entirety. For the reasons stated above, the Court cannot adopt the State's unprecleared map. After arguing throughout these proceedings that its entire map was legal, the State then proceeds to attack the Court for failing to merely correct any "perceived legal defects in the recently-adopted redistricting plan," without detailing what "limited" legal defects should have been corrected.

In sum, the Court's map simply maintains the status quo as to the challenged districts pending resolution of the preclearance litigation, while giving effect to as much of the policy judgments in the Legislature's enacted map as possible. Not everyone will get what they want from the Court's interim map. But, the Court concludes by stating expressly what is implicit in the Court's explanation of how it drafted the interim map: the plan was developed without regard to political considerations or the interests of particular groups of people.

The Legislature's enacted plan is by the State's own admission a radical partisan gerrymander. By asking the Court to adopt it, the State is asking the Court to conspire with the Legislature to enact a partisan agenda. This a court cannot do. As Judge Higgenbotham noted in *Balderas*:

> political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a [] redistricting map. Even at the hands of a legislative body, political gerrymandering is much a bloodfeud, in which revenge is exacted by the majority against its rival. We have left it to the political arena, as we must and wisely should. We do so because our role is limited and not because we see gerrymandering as other than what it is: an abuse

> of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good.[15]

A more comprehensive opinion addressing additional legal issues will follow.

SIGNED this 23rd 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:

When a three-judge court is forced into the unwanted position of fashioning interim redistricting plans, the focus should be on practicality, balance, and moderation, albeit with unbending adherence to the Voting Rights Act ("VRA") and the Constitution. 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

[15] *Balderas v. State of Texas*, No. 6:01cv158, 2001 U.S. Dist. LEXIS 25740, at *19-20 (E.D. Tex. Nov. 14, 2001) (*per curiam*), *summarily aff'd,* 536 U.S. 919 (2002).

applicable caselaw. The practical effect is to award judgment on the pleadings in favor of one side––a slam-dunk victory for the plaintiffs[1]––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.[2]

Unless the Supreme Court enters the fray at once to force a stay or a revision, this litigation is, for most practical purposes, at an end. This three-judge court is at the point of having to draw interim maps now because the Texas Election Code sets extremely early deadlines to file for office; this panel has extended the dates so that filing for office begins November 28 and ends December 15, subject to further extension by this court or the Supreme Court. The sweeping decision by this panel majority affects most of the State map and will result in the election of new incumbents in 2012. The 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.[3] This reality warrants caution in

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[1] The majority's plan creates more minority or coalition districts than the Latino Taskforce plan (H292), as many as the NAACP plan (H202), and only slightly fewer than the MALC (H295) and Perez Plaintiffs (H297) plans. After the court published the draft plan on November 17, directing the parties to respond, the comments were predictable. The plaintiffs know a win when they see it: The Perez plaintiffs and Mexican American Legislative Caucus, for example, advised that "the majority's H298 should be adopted as the Court's interim court ordered plan for the 2012 Texas election cycle." It opined that "the plan offered by the Court majority [ ] offers the best overall approach to meeting the Court's obligations for Court ordered interim plans."

[2] Nothing I say here is intended as personal or professional criticism of my two panel colleagues, who serve this court and this country with integrity, dedication, and skill. These are difficult and complex issues, and the caselaw is not always as helpful as we might hope, so substantial disagreement as to the result should not be surprising.

I compliment, as well, all of the attorneys from both sides. They have shown an exemplary level of cooperation, candor, flexibility, and hard work in presenting, orally and in writing, the legal and factual issues that this court must consider. They have made the court's work easier with the quality of their submissions.

[3] *See Mississippi v. United States*, 490 F. Supp. 569, 582 (D.D.C.1979), *aff'd*, 444 U.S. 1050 (1980). *But see White v. City of Belzoni*, 854 F.2d 75, 76 (5th Cir. 1988).

drawing an interim map and especially in creating new minority opportunity districts at this early stage.

There has been no determination by the three-judge court in the District of Columbia (the "D.C. Court") that is considering the issues arising under section 5 of the VRA. Nor has this court formally taken under submission any issues with the enacted plan regarding the Constitution or section 2 of the VRA. Depending on what the D.C. Court decides, this court will need to conduct extensive evidentiary hearings on the remedial stage of this litigation. Only then will it be appropriate for us to determine, as a final matter, whether the enacted redistricting plans violate the VRA or the Constitution.

Whenever a district court engages in the unwelcome obligation of drawing a reapportionment plan, the starting point is always the recognition that "reapportionment is primarily a matter for legislative consideration and determination." *White v. Weiser*, 412 U.S. 783, 794 (1973) (citations omitted). Accordingly, district courts are bound to "follow the policies and preferences of the State, as expressed in statutory and constitutional provisions *or in the reapportionment plans proposed by the state legislature*, whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *Id.* at 795 (emphasis added). The aim of giving such due regard to plans proposed by the State is so the court will "not pre-empt the legislative task nor intrude upon state policy any more than necessary." *Id.* (citation and internal quotation marks omitted).

The parties sharply disagree about how much deference should be given to the maps validly enacted by the Legislature and that are pending preclearance before the D.C. Court. At one end, the State argues that, under *Upham v. Seamon*, 456 U.S. 37 (1982), this court is bound to defer to the enacted plan except in geographical areas where the court makes a specific finding of statutory or constitutional violation. At the other extreme, the plaintiffs argue that, under *Lopez v. Monterey County*, 519 U.S. 9 (1996), we should give no deference whatsoever to the legislative plans, not even considering them in

drawing an interim map, because there has been no final ruling on preclearance.

Because we are not in a circumstance squarely controlled by either *Seamon* or *Lopez*, this court should take a moderate route between the two extremes in crafting an interim map. Unlike the court in *Seamon*, we are not in a position to defer blindly to the State's map, because there has been no valid determination of which districts have been precleared. *See Seamon*, 456 U.S. at 38. And unlike the court in *Lopez*, we are not faced with a situation in which the State has deliberately obstructed and tried to circumvent the preclearance process. *See Lopez*, 519 U.S. at 24. Therefore, recognizing that under *Lopez* we should not act as a rubber stamp for the State where its enacted plan has not been precleared, but also cognizant that, under *White* and *Seamon*, we must give due regard to the will of the Legislature unless the VRA or Constitution requires otherwise, the correct approach for an interim map involves respecting legislative choices while seriously evaluating the plaintiffs' alleged violations.

The exigent circumstances in formulating an interim plan preclude this court from plenary review of all the legal issues. In view of these considerations, a proper interim map should begin with drawing, as the State enacted them, the districts that have not been specifically challenged in this court or the D.C. Court.[4] That respects the myriad political choices reflected in the legislative plan instead of substituting the court's preferences for the Legislature's.[5]

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[4] Although it is true that plaintiffs have alleged that the entire map was drawn with a discriminatory purpose, no plaintiff can substantially show that the rural and suburban districts in north and east Texas themselves were drawn with a discriminatory intent or are evidence of discriminatory intent.

[5] Creating an interim map is an art, not a science. It is a chore unfortunately required because of the impending deadlines of the Election Code and the necessity of drawing lines that can be used for the 2012 elections, which must proceed under some sort of plan. Because it is to be used only in the short term, before the pertinent legal and constitutional questions are formally decided, and because the court has only a brief time in which to fashion the complex plan, an interim plan must be somewhat indeterminate as compared to what a legislature, or on the other hand a court devising a final remedial plan, would issue.

In that sense, an interim map is like the sheet of plywood a merchant puts over his storefront the morning after a damaging storm: It is not especially pretty, but it keeps the (continued...)

The plaintiffs and, apparently, the majority rely on *Balderas v. Texas* to justify an approach that gives no consideration to the legislatively enacted plan.[6] First of all, the applicability of *Balderas* is questionable, because it involved a district court's drawing a new interim map from a *tabula rasa* on account of the legislature's *failing* to pass any reapportionment plan and further in light of the parties' having conceded that the existing scheme was unconstitutional. But even assuming its applicability, *Balderas* accorded substantially more deference to the State's legislative decisions, and assessed the plaintiffs' claims more critically, than does the majority here. For example, the *Balderas* court took the following approach to drawing an interim congressional map:

> Once the panel had left majority-minority districts in place and followed neutral principles traditionally used in Texas . . . *the drawing ceased*, leaving the map free of further change except to conform it to one-person, one-vote . . . . The results of this court's plan did ameliorate the gerrymander and placed the two districts gained by Texas in the census count; however, *doing more necessarily would have taken the court into each judge's own notion of fairness*. The practical effect of this effort was to leave the 1991 Democratic Party gerrymander largely in place as a "legal" plan.[7]

And when confronted with requests that more minority opportunity districts be drawn, *Balderas*, rather than taking the majority's approach of merely acquiescing to virtually all those requests, evaluated whether section 2 *required* those districts be drawn, employing the full totality-of-the-circumstances test. *Balderas*, No. 6:01-CV-158, at *10-*16. The *Balderas* court

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[5] (...continued)
rain out and allows the store to stay open for business until better repairs can be made. "*Le mieux est l'ennemi du bien*," "The perfect is the enemy of the good." Voltaire, *Dictionnaire Philosophique*.

[6] *See Balderas v. Texas*, No. 6:01-CV-158 (E.D. Tex., Nov. 14, 2001) (per curiam), *aff'd*, 536 U.S. 919 (2002).

[7] *Henderson v. Perry*, 399 F. Supp. 2d 756, 768 (E.D. Tex. 2005) (emphasis added). Because the *Henderson* court consisted of two of the same judges as did the *Balderas* court, *Henderson* provides us "the benefit of their candid comments concerning the redistricting approach taken in the *Balderas* litigation." *LULAC v. Perry*, 548 U.S. 399, 412 (2006).

ultimately rejected those requests, reasoning,

> The matter of creating such a permissive district is one for the legislature. As we have explained, such an effort would require that we abandon our quest for neutrality in favor of a raw political choice. . . . Such arranging of voting presents a large and complex decision with profound social and political consequences. . . . We have no warrant to impose our vision of "proper" restraints upon the political process beyond the constraints imposed by the Constitution or the Voting Rights Act.

Id. at *13-*14 (citation omitted). *Balderas* quoted the Supreme Court's explanation of the three-judge district court's role: "[T]he federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law." *Id.* at *14 (quoting *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993)).

This court's next step, then, should be to consider seriously the plaintiffs' claims and the status of the action pending in the D.C. Court and, taking a cautious and restrained approach, to modify the State's districts where plaintiffs have shown a substantial likelihood of success on the merits, rather than ratifying the plaintiffs' requests merely because they have alleged violations. In challenged districts where the plaintiffs' case is relatively weak, the Legislature's judgments should again be respected.

Under these standards, the interim phase is not the time for this court to impose the radical alterations in the Texas political landscape that the majority has now mandated. In almost every instance in which one or more plaintiffs ask for a substantial change that would upset a legislative choice, the majority has elected to order that revision, immediately, in the interim redistricting plans that are effective for the 2012 elections. The majority makes no apparent effort to decide which, if any, violations are most likely to be found on plenary consideration after full hearing and the benefit of a ruling from the D.C. Court. Instead, the majority enacts an ambitious and aggressive redistricting plan that mimics what the plaintiffs have requested in almost every significant respect.

There is a much more moderate and fair way to draw interim districts for

the 2012 elections while adhering to the VRA and the Constitution. In our role as a statutory three-judge court, we are empowered to make certain policy decisions, in the absence of an enforceable legislative plan, that resemble choices a legislature might make. But those rulings by an unelected court should be grounded in recognition of a reasonable chance of success on the merits by plaintiffs as to specific claims.

Instead, the majority seems to take the plaintiffs' complaints as true for purposes of interim relief on every colorable claim. At almost every turn, where a decision is to be made as to whether to disturb a settled district in favor of one asked for by plaintiffs, the majority chooses the latter. The result is a redistricting scheme that awards the plaintiffs for their assertive pleadings and grants no meaningful recognition to the legitimate, nondiscriminatory choices that are a part of any comprehensive redistricting process.

There is a balanced way to satisfy our obligation––given the current impasse––to produce interim plans with an order that is much more evenhanded than what the majority has announced. I have identified specific areas of the State as to which the plaintiffs have presented colorable claims of statutory or constitutional infirmity in the plans enacted by the Legislature. As to those, it can fairly be argued that plaintiffs can show a likelihood of success on the merits, although any final decision must await a full hearing after a decision by the D.C. Court. Also where needed, in the process of fashioning those changes, I have made adjustments to reduce population disparities among districts.

The map I offer, Plan H299[8], which I have prepared with the invaluable and untiring expert assistance of the Texas Legislative Council, addresses a limited number of concerns that are the only ones appropriate for tentative adjustment at this preliminary, interim stage, because they show a substantial

[8] A map showing the redrawn districts in PLAN H299 is attached as Exhibit D. The textual description in terms of census geography for PLAN H299 is attached as Exhibit E. The statistical data for PLAN H299 is attached as Exhibit F. This plan may also be viewed on the DistrictViewer website operated by the Texas Legislative Council (http://gis1.tlc.state.tx.us/) under the category "Exhibits for Perez, et. al."

chance of success. Given the considerable latitude afforded this court at the interim stage, I recognize the propriety of correcting those potential violations for the 2012 elections.

First, in an effort to reward and protect an Hispanic legislator in the Rio Grande Valley (Hidalgo County) who changed from Democrat to Republican after being re-elected in 2010, the Republican-dominated Legislature moved well over 90% of the constituents out of his district (District 41) and added, for him, a more reliable voter base, accomplished by an extreme gerrymander and palpable population disparities with neighboring districts. The result is ripe for a viable challenge as offending the one-person-one-vote principle of the Equal Protection Clause. The problem is easily corrected without upheaval of other parts of the State, and I have fixed that, by a change in a few adjoining districts, in the interest of fairness and to avoid any legal deficiencies.

Second, this panel is unanimous in leaving untouched the Legislature's decision to reduce the number of Harris County representatives from 25 to 24, adhering to Texas's well-respected and neutral County Line Rule and to the fact that plain arithmetic shows Harris County is entitled to only 24 districts. In deciding which district to eliminate from the county, the Legislature deleted a coalition district (District 149) whose incumbent is the only Asian member of the House, and it paired that Democrat incumbent with a Democrat in abutting District 137. That raises possible section 5 concerns and potentially reeks of racial gerrymandering. Because of the fortuitous retirement of a Republican incumbent in Harris County, the problem is handily repaired by restoring the district of the Asian member and disbursing into nearby districts the population of the district that now has no incumbent.

Third, the Legislature dismantled a minority opportunity district in Nueces County, raising possible concerns under section 5. The State has persuasive justifications: Nueces County grew more slowly than did the rest of the State as a whole and now has only enough population to support 2.02 districts. Instead of violating the Texas Constitution by cutting the county line

twice, the State drew two districts wholly contained within Nueces County, requiring the elimination of one minority opportunity district. Still, in an abundance of caution because of a possible section 5 retrogression claim, I have restored the minority opportunity district in Nueces County, though that unfortunately requires splitting the county three ways.

Fourth, the Legislature created substantial population disparities in Dallas and Harris Counties in a manner that may raise concerns of racial or partisan gerrymandering in violation of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004). The map I have proffered largely evens out the variations and reduces the number of precinct cuts.

In fairness, I should mention that the majority, also, addresses these four concerns in the adjustments it has made. Not content, however, with making these justified changes, the majority ventures into other areas of the State and, as though sitting as a mini-legislature, engrafts its policy preferences statewide despite the fact that no such extreme modifications are required by the caselaw or by the facts that are before this court at this early stage before preclearance and remedial hearings.

For example, the majority changes the districts in Bexar County, where the Hispanic Citizen Voting Age Population ("HCVAP") is high enough in all the protected districts that there is no cognizable violation of the law. The entire bipartisan legislative delegation from that county approved the lines, constituting what is commonly known as a "drop in" plan affecting only the districts in that county. Any purported challenge to the Bexar County districts is without foundation.

Though the plaintiffs claim that the State impermissibly reduced the "performance" of House District 117 in Bexar County, there is no caselaw supporting the notion that what matters is election performance instead of opportunity to elect. Rather, "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994).

Similarly, in *LULAC v. Perry*, 548 U.S. 399, 428 (2006), the Court applied the *De Grandy* quotation, saying, "Furthermore, to the extent the District Court suggested that District 23 was not a Latino opportunity district in 2002 simply because Bonilla [a Republican] prevailed, it was incorrect. The circumstance that a group does not win elections does not resolve the issue of vote dilution." Instead, in order that courts and legislatures can operate on the basis of clear, predictable standards, the Supreme Court has adopted a bright-line rule of defining a *Gingles* district as one with a majority-minority of eligible voters. *See Bartlett v. Strickland*, 556 U.S. 1, __, 129 S. Ct. 1231, 1244-45 (2009).

We should not use, as the majority apparently does, past elections as a crystal ball to predict how future elections will turn out, for this court is prevented from making such complex political predictions tied to race-based assumptions. *Id*. Nothing in the State's enacted plan will hinder, in the slightest, Hispanic opportunity to register and vote in greater numbers than before. Election performance in this context is relevant only if plaintiffs can show that the State is causing lower turnout by some electoral device that violates the VRA, then packing those low-turnout voters into a VRA-protected district.

The plaintiffs make no such showing. The question is thus whether the State is causing minorities not to elect candidate of their choice, or whether instead that is caused by other factors unrelated to state action. Even if election performance were relevant to a VRA claim, any such relevance would be a novel interpretation of the VRA that would be inappropriate during this interim stage.

The VRA therefore does not prevent this court from adopting the State's proposal for District 117, because nothing in that enactment would mean that Hispanics "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986).

The majority repeats its Bexar County mistake in El Paso County, another "drop in" county, as to which no member of the El Paso delegation––which is 80%

Democrat and 80% Hispanic––raised any objection before enactment. The enacted plan maintains the *status quo* in El Paso: five minority opportunity districts, with one of them likely to elect a Republican. The worst that can be said of the enacted El Paso County districts is that they are possibly the result of partisan gerrymandering—a questionable claim given *Vieth v. Jubelirer*, 541 U.S. 467 (2004)—but the HCVAP in all five El Paso County districts is high enough to escape meaningful challenge under the VRA.

Additionally, the majority equalizes the populations of the districts in Tarrant County, where the plaintiffs had offered no evidence that the slight population deviations were the result of racial gerrymandering. The only challenge to the Tarrant County map is a vague allegation of packing, with no evidence to support it. Indeed, the majority took minority voters away where it matters most: As a result of the majority's evening out of the populations, the new coalition district that the State had enacted in Tarrant County contains fewer minority voters in the majority's plan. If the Legislature used population deviation to racially gerrymander the county, it did not do so to favor whites. This claim was not likely to succeed and does not merit a radical redrawing of Tarrant County.

Additionally, the majority creates a new coalition minority opportunity district in Dallas County (District 107). Even leaving aside the question whether courts can ever mandate minority "coalition" districts, the majority seems to draw this district merely because it *can* be drawn. But no such district is required under section 2, and the State's plan creates no retrogression under section 5. Thus, the majority's meddlings in Dallas County stem solely from the majority's policy preferences, which are not an appropriate justification for judicial action.

Contrary to what seems to be the majority's approach, merely because the plaintiffs can satisfy the *Gingles* factors (which require a showing that a compact majority-minority district can be drawn and that voter polarization exists), section 2 requires the drawing of new minority opportunity districts in only the

most limited circumstances. Such districts are permitted only where the totality of the circumstances shows that minorities have less of an opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice *absent the drawing of that new district*. *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986). Courts are forbidden from drawing new minority opportunity districts without that type of section 2 finding. *Voinovich*, 507 U.S. at 156.

Indeed, the majority's general approach of maximizing the drawing of minority opportunity districts that satisfy the *Gingles* preconditions was specifically rejected in *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994):

> It may be that the significance of the facts under § 2 was obscured by the rule of thumb apparently adopted by the District Court, that anything short of the maximum number of majority-minority districts consistent with the *Gingles* conditions would violate § 2, at least where societal discrimination against the minority had occurred and continued to occur. But reading the first *Gingles* condition in effect to define dilution as a failure to maximize in the face of bloc voting (plus some other incidents of societal bias to be expected where bloc voting occurs) causes its own dangers, and they are not to be courted.
>
> . . . [R]eading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast. . . . Failure to maximize cannot be the measure of § 2.

Given the fact-intensive analysis required to find a section 2 violation and the sensitive and constitutionally questionable judgments involved in drawing––as the majority does––a new district based primarily on race, the creation of such a district should be left to the Legislature (or, some would argue, to a three-judge court at the remedial stage after full consideration of the evidence). In no event is such a district justified by court order as part of an interim plan.

The majority creates a new Hispanic opportunity district (District 144) in Harris County. For the same reasons as with District 107 in Dallas County, that

district should await, at least, the remedial phase or a future legislative session. Nevertheless, the plaintiffs argue that the State's alterations to District 144 were intended to dismantle an "emerging" minority opportunity district. Although it is true that states are forbidden from modifying districts in which minorities are poised to elect the candidate of their choice because of natural population growth, *LULAC v. Perry*, 548 U.S. 399, 440-42 (2006), District 144 is nowhere near that point. Eastern Harris County is not an area of particularly rapid growth, and Hispanics represent less than 35% of the citizen voting age population—a stark contrast with *LULAC v. Perry*, where the challenged district had already reached majority HCVAP under the benchmark plan and was located in a rapidly growing area. Thus, at this interim stage, the court is not justified in creating a new Hispanic opportunity district in Harris County, nor can it be said that it has restored an "emerging" one.[9]

The majority creates a new coalition district, also, in Fort Bend County (District 26). Even if a court could validly require the drawing of coalition districts, this particular district is impermissible, because it fails to meet the *Gingles* preconditions. As proposed, it has a combined HCVAP and BCVAP of only 30.2%, meaning that the sizeable Asian community (with a CVAP of 24.1%) would need to vote cohesively with blacks and Hispanics to elect their candidate of choice. *LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc). But the plaintiffs have presented scant hard statistical evidence that Asians in Texas reliably vote cohesively with other minorities. That lack of cohesion is supported by the fact that new District 26 elects the minority candidate of choice in only a few reconstituted elections. Thus the majority, in an honest attempt to comply with section 2, instead engages in unconstitutional racial gerrymandering without section 2 as an even colorable legal justification. If a "coalition district" in District 26 is a good idea, but not required, it must be implemented by the

[9] The majority's insertion of the new opportunity district also forces changes in myriad other districts in Harris County, producing unintended consequences, in those districts, unrelated to the VRA or the Constitution.

legitimate policymakers and not the courts.

The same is true in Bell County, where the majority fashions a new minority coalition district out of whole cloth (District 54). Again, this district relies on a sizeable (albeit smaller) Asian community to raise minority CVAP levels over 50%, but also again there is little to no hard statistical evidence that cohesion exists among Asians and blacks and Hispanics, and reconstituted election analyses show that minorities will only sometimes elect their candidate of choice in this new district. There is no legal requirement to create coalition districts (and certainly not one like this), even for the Legislature, and it is surely not appropriate for a court that is fashioning only interim relief.

And finally, even in uncontested rural areas, such as those in Northwest and East Texas, as to which no plaintiffs have brought specific challenges, the majority meddles with the enacted plan. This affront to the many small political judgments made by the Legislature in drawing the details of those districts cannot be justified by anything in the VRA or by slight reductions in population deviation, which are required only in a remedial stage after a court has formally found definite violations of federal law. *See Seamon*, 456 U.S. at 42-43.

In summary, it is difficult to overstate what the majority––with the purest of intentions––has wrought in ordaining its ambitious scheme. Its plan is far-reaching and extreme. It expands the role of a three-judge interim court well beyond what is legal, practical, or fair.

The majority should also consider the long-term implications of its interim plan and, in particular, the down-the-road political effects of drawing a map that casts aside legislative will. Once the D.C. Court and this court have ruled on the VRA and constitutional issues, we are bound by *Upham* to defer to the legislatively-enacted plan for districts that are found to comport with federal law. Thus, in all likelihood, Texas will eventually conduct elections under the State's enacted plan for the vast majority of its districts.

If this court had chosen substantially to respect the state-enacted plan in drawing an interim map, there would have been great continuity between the

2012 elections and those that will take place for the rest of the decade. To the contrary, however, the majority's approach of readily accepting the plaintiffs' allegations yields the result that only a handful of the 150 districts in the Texas House of Representatives will remain the same between the 2012 elections and those that follow. Instead of requiring only a few districts to change, the majority has forced the State to move the lines of scores of districts twice in only four years, creating large administrative costs, forcing incumbents to campaign in new, unfamiliar areas, preventing long-term relationships between representatives and their constituents, and reducing political accountability.

In the end, my proposed map does not create any section 2 or section 5 problems, and it is true to the Fourteenth Amendment. And, under my approach, the plaintiffs by no means go away empty-handed. In addition to creating a new minority opportunity district in Tarrant County, as did the State, my map restores a minority opportunity district in Nueces County and another in western Harris County, for a total of fifty-two minority opportunity districts. Additionally, a new Hispanic district is created wholly within Hidalgo County, and another Hidalgo County district is restored to its previous configuration, as the plaintiffs request.

In the plan I present, both average and top-to-bottom population deviations are under 10%, and, in response to the plaintiffs' allegations of discrimination in Dallas and Harris Counties, I eliminate any deviations correlated with partisan or racial demographics. The County Line Rule is respected unless federal law dictates otherwise, and, as a pragmatic concern, many precincts that were split in the enacted plan have been restored. My plan also pairs ten fewer incumbents into the same district than does the majority's. All this is accomplished without unnecessary intrusions into legislative enactments, unlike the majority's scheme, which, among other things, draws many districts not mandated by section 2 and does so using race as a primary motivating factor.

Justice Samuel Alito, in a recent debate discussing "activist judges,"

explained that judges are not theorists or social reformers. "Judging is a craft," he said. "It's not a science. It cannot be reduced to an algorithm."[10] That sentiment could not be more true for a three-judge court necessarily thrust into the role of issuing an interim redistricting plan.[11] At the present stage of this complex litigation, this panel should be modest and restrained in doing justice and should engage in the "craft" of fashioning an interim plan that, instead of baldly adopting the allegations in the complaints, does justice by taking into account all the considerations I have described.

I have offered a moderate approach that recognizes and remedies the most potent claims brought against the legislative plan while leaving any more ambitious tinkering to a later judicial phase or to future legislative enactments. Because the conscientious and well-intentioned majority has ventured far beyond its proper role in announcing an interim redistricting plan for the Texas House of Representatives, I respectfully dissent, and I offer this alternate plan in response, in the hope that on appeal, the Supreme Court will provide appropriate and immediate guidance.

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[10] *The Star-Ledger*, Nov. 15, 2011, available at http://blog.nj.com/ledgerupdates_impact/-print.html?entry=/2011/11/us_supreme_court_justice_to_ru.html.

[11] *See* note 5, *supra*.

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.

SHANNON PEREZ, *et al.*,

Respondents.

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

EXHIBIT 2

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
RICK PERRY, ET AL.	§	

ORDER

Defendants' motion to stay implementation of the court-drawn interim house redistricting plan pending appeal (Dkt. No. 529) 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 House 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 "impossible to give substantial deference to the State's plan," 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 "performance" 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 "perform" 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 "coalition" districts in an interim plan, and, if so, under what circumstances? Though the Court in *Bartlett* rejected the contention that "cross-over" districts are covered by

section 2, some of its language calls into question whether "coalition" 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 "coalition," despite the lack of evidence showing cohesion between Asians and Blacks or Hispanics in voting.

Though the majority contends these new coalition districts arose "naturally" 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.

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.

SHANNON PEREZ, *et al.*,

Respondents.

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

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendants, WENDY DAVIS *et al.*, Defendant-Intervenors, MEXICAN AMERICAN LEGISLATIVE CAUCUS, Defendant-Intervenor, GREG GONZALES *et al.*, Defendant-Intervenors, TEXAS LEGISLATIVE BLACK CAUCUS, Defendant-Intervenor, TEXAS LATINO REDISTRICTING TASK FORCE, Defendant-Intervenor, TEXAS STATE CONFERENCE OF NAACP BRANCHES *et al.*, Defendant-Intervenors.	Civil Action No. 1:11-cv-1303 (RMC-TBG-BAH) Three-Judge Court

UNITED STATES AND DEFENDANT-INTERVENORS IDENTIFICATION OF ISSUES

Pursuant to the Court's Order dated September 22, 2011, the United States, Defendant Eric H. Holder, Jr., Attorney General of the United States ("the Attorney General"), and Defendant-Intervenors hereby identify those aspects of the proposed redistricting plans for the Texas House of Representatives and Texas Congressional delegation that the Defendants and Defendant-Intervenors contend violate of Section 5 of the Voting Rights Act.

I. Position of the United States

A. State House Plan

On November 28, 2001, in *Balderas v. Texas*, 2001 WL 34104833, Civ. No. 6:01CV158 (E.D. Tex. Nov. 28, 2001) (per curiam), a three-judge district court adopted a court-ordered redistricting plan for the Texas House of Representatives, based on the 2000 Census. As a court-ordered plan, that plan was not subject to preclearance under Section 5 of the Voting Rights Act. That plan was the last plan in force or effect and is therefore the benchmark plan for purposes of this case. Ten years later, the Texas Legislature passed House Bill 150, containing a new redistricting plan for the Texas House of Representatives, based on the 2010 Census, and the Governor signed it on June 17, 2011. Under Texas law, that plan was to become effective on August 29, 2011. The plan contained in House Bill 150 is the proposed plan for purposes of this case.

The proposed redistricting plan for the Texas House of Representatives is a "standard, practice, or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c. The United States contends that the Plaintiff's proposed redistricting plan for the Texas State House of Representatives has a purpose and will have a retrogressive effect that is prohibited by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c(a).

1. Effect

When compared to the benchmark plan, the proposed House plan will have a retrogressive effect that violates Section 5 of the Voting Rights Act in that it will diminish the ability of citizens of the United States, on account of race, color or membership in a language minority group, to elect their preferred candidates of choice to the Texas House of Representatives. See Department of Justice's Guidance Concerning Redistricting under Section 5 of the Voting Rights Act, 76 Federal Register 7470 (February 9, 2011); Department of Justice's Revision of Procedures for Administration of Section 5 of the Voting Rights Act of 1965, 76 Fed. Reg. 21239 (April 15, 2011). The United States will address the legal standard concerning retrogressive effect in its brief in opposition to the State of Texas' Motion for Summary Judgment [Docket #41]. The retrogression from the benchmark to the proposed plan stems from changes to as many as five districts: 33, 35, 41, 117, and 149.

Hispanic citizens have the ability to elect their preferred candidates of choice to the Texas House of Representatives in the following 33 benchmark districts: 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 51, 74, 75, 76, 77, 79, 80, 90, 103, 104, 116, 117, 118, 119, 123, 124, 125, 140, 143, 145, and 148. Black citizens have the ability to elect their preferred candidates of choice to the Texas House of Representatives in the following 12 benchmark districts: 22, 95, 100, 109, 110, 111, 131, 139, 141, 142, 146, and 147. Minority citizens (black and/or Hispanic) have the ability to elect their preferred candidates of choice to the Texas House of Representatives in the following four benchmark districts: 27, 46, 120, and 137. No further determination is necessary with respect to these districts because these districts are not at issue. Minority citizens may also have the ability to elect their preferred candidates of choice to the Texas House of Representatives in 149, but as noted below, our analysis has not been completed. In total, there

are 50 districts in the benchmark plan in which minority citizens have or may have the ability to elect their preferred candidates of choice to the Texas House of Representatives.

Hispanic citizens will have the ability to elect their preferred candidates of choice to the Texas House of Representatives in the following 29 proposed districts: 31, 34, 36, 37, 38, 39, 40, 42, 43, 51, 74, 75, 76, 77, 79, 80, 90, 103, 104, 116, 118, 119, 123, 124, 125, 140, 143, 145, and 148. Black citizens will have the ability to elect their preferred candidates of choice to the Texas House of Representatives in the following 13 proposed districts: 22, 27, 95, 100, 109, 110, 111, 131, 139, 141, 142, 146, and 147. Minority citizens (black and/or Hispanic) will have the ability to elect their preferred candidates of choice to the Texas House of Representatives in the following three proposed districts: 46, 120, and 137. No further determination is necessary with respect to these districts because these districts are not at issue. In total, there are 45 districts in the proposed plan in which minority citizens will have the ability to elect their preferred candidates of choice to the Texas House of Representatives.

The United States contends that the proposed House plan will not change the ability of any citizens, on account of race, color or membership in a language minority group, to elect their preferred candidates of choice in any of the remaining 145 districts. To the extent that such citizens in those districts have the ability to elect under the existing plan, they will have the ability to do so under the proposed plan. To the extent that such citizens in those districts do not have the ability to elect under the existing plan, they will not have the ability to do so under the proposed plan.

Regarding the five districts at issue, the United States claims the following:

House District 33: Under the existing plan, House District 33 is located in Nueces County and encompasses most of Corpus Christi, Texas. Hispanic citizens are currently able to elect

their preferred candidate of choice to the House in this district despite the presence of racially polarized voting. Under the proposed plan, House District 33 will be moved to Collin and Rockwall counties near Dallas, and most of the existing district's population will be reallocated to proposed House District 32. Hispanic citizens will not be able to elect candidates of their choice in proposed House District 32 or proposed House District 33 because of the persistence of racially polarized voting. This will result in a net loss of Hispanic citizens' ability to elect one candidate of choice to the House.

House District 35: Under the existing plan, House District 35 is located in south Texas and includes all of Atascosa, Bee, Goliad, Jim Wells, Karnes, Live Oak, and McMullen counties. Hispanic citizens are currently able to elect their preferred candidates of choice to the House in this district despite the presence of racially polarized voting. Under the proposed plan, House District 35 will be substantially reconfigured to remove Goliad, Jim Wells and Karnes counties and to add Duval, La Salle, and San Patricio counties. Hispanic citizens who will remain in proposed House District 35 will not be able to elect candidates of their choice because of the persistence of racially polarized voting. This will result in a net loss of Hispanic citizens' ability to elect one candidate of choice to the House.

House District 41: Under the existing plan, House District 41 is located in Hidalgo County in south Texas. Hispanic citizens are currently able to elect their preferred candidates of choice to the House in this district despite the presence of racially polarized voting. Under the proposed plan, House District 41 will remain in Hidalgo County but will be substantially reconfigured. The proposed district has a large number of VTD splits, which has an impact on the accuracy of election results allocated to the proposed district. Hispanic citizens who will remain in proposed House District 41 will not be able to elect candidates of their choice because

of the persistence of racially polarized voting. This will result in a net loss of Hispanic citizens' ability to elect one candidate of choice to the House.

House District 117: Under the existing plan, House District 117 is located in western Bexar County near San Antonio, Texas. Hispanic citizens are currently able to elect their preferred candidates of choice to the House in this district despite the presence of racially polarized voting. Under the proposed plan, House District 117 will be reconfigured only moderately, but enough to change the district's performance. Hispanic citizens who remain in proposed House District 117 will not be able to elect candidates of their choice because of the persistence of racially polarized voting. This will result in a net loss of Hispanic citizens' ability to elect one candidate of choice to the House.

House District 149: Under the existing plan, House District 149 is located in Harris County and encompasses the Alief community in the City of Houston, Texas. The district has a combined minority-citizen voting-age population of 61.3 percent and has elected a Vietnamese-American legislator, Hubert Vo, since 2004 despite the presence of racially polarized voting. In the proposed plan, House District 149 will move to Williamson County in central Texas, and it will have a combined minority-citizen voting-age population of less than 23 percent.

The United States has not yet reached any conclusion about this district's performance, and its investigation is on-going. As a result, District 149 remains at issue, and there is the potential for a net loss of the ability to elect one additional candidate of choice to the House on account of race or color or membership in a language minority group.

2. Purpose

The proposed House plan has a prohibited purpose that violates Section 5 of the Voting Rights Act in that it was adopted, at least in part, for the purpose of diminishing the ability of

citizens of the United States, on account of race, color, or membership in a language minority group, to elect their preferred candidates of choice to the Texas House of Representatives. *See* Department of Justice's Guidance Concerning Redistricting under Section 5 of the Voting Rights Act, 76 Federal Register 7470 (February 9, 2011); Department of Justice's Revision of Procedures for Administration of Section 5 of the Voting Rights Act of 1965, 76 Fed. Reg. 21239 (April 15, 2011). The United States disagrees with the legal standard proposed by the State of Texas and will address the proper standard in its brief in opposition to the State of Texas' Motion for Summary Judgment [Docket #41]. The evidentiary basis for this contention is not limited to any particular district or districts but rather extends to the kinds of direct and circumstantial evidence that the Supreme Court identified as probative of discriminatory purpose in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp*., 429 U.S. 252 (1977). The United States has, however, identified the boundaries of proposed House Districts 32, 41, 93, 105, 117, and the elimination of Districts 33 and 149 in the benchmark as among the areas of particular concern. In addition, the United States has not yet determined whether the proposed plan has any other areas of concern or any other purpose or purposes that are prohibited by Section 5, and its investigation is on-going.

B. Congressional Plan

The United States House of Representatives consists of 435 members apportioned among the States according to population after each decennial census. After the 2000 Census, the State of Texas was entitled to 32 representatives, and federal law then required the State to redistrict. On August 4, 2006, a three-judge district court, in *LULAC v. Perry*, 2006 WL 3069542, Civ. No. 2:03-CV-354 (E.D. Tex. Aug. 4, 2006) (per curiam), adopted a redistricting plan for Texas' congressional delegation, based on the 2000 Census. As a court-ordered plan, that plan was not

subject to preclearance under Section 5 of the Voting Rights Act. That plan was the last plan in force or effect and is therefore the benchmark plan for purposes of this case.

After the 2010 Census, the State of Texas was entitled to four new representatives in Congress, for a total of 36 representatives, and federal law once again required the State to redistrict. The Texas Legislature then passed Senate Bill 4, containing a new congressional redistricting plan, based on the 2010 Census, and the Governor signed it on July 18, 2011. The plan contained in Senate Bill 4 is the proposed plan for purposes of this case.

The proposed redistricting plan for the Texas delegation to the United States House of Representatives is a "standard, practice, or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c. The United States contends that the Plaintiff's proposed redistricting plan for the United States House of Representatives (Congressional plan) will have an effect that is prohibited by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c(a). The United States does not have sufficient knowledge to make a determination whether the proposed Congressional plan was enacted with a discriminatory purpose in violation of Section 5, and thus seeks discovery concerning this issue.

1. Effect

When compared to the existing plan, the proposed Congressional plan will have a retrogressive effect in that it will diminish the ability of citizens of the United States, on account of race, color or membership in a language minority group, to elect their preferred candidates of choice to the United States House of Representatives. The United States will address the legal standard in its brief in opposition to the State of Texas' Motion for Summary Judgment [Docket #41]. The retrogression from the benchmark to the proposed plan stems in part from changes to Districts 23 and 27, which provide Hispanic citizens with the ability to elect candidates of their

choice in the benchmark plan but not the proposed; and the addition of new Districts 34 and 35 as districts in which Hispanic citizens have the ability to elect candidates of their choice, in light of the increase in the total number of Texas Congressional districts following the release of the 2010 Census.

Hispanic citizens have the ability to elect their preferred candidates of choice to the United States House of Representatives in the following seven benchmark districts: 15, 16, 20, 23, 27, 28, and 29. Black citizens have the ability to elect their preferred candidates of choice to the United States House of Representatives in the following three benchmark districts: 9, 18 and 30.

Hispanic citizens will have the ability to elect their preferred candidates of choice to the United States House of Representatives in the following seven proposed districts: 15, 16, 20, 28, 29, 34 and 35. Black citizens will have the ability to elect their preferred candidates of choice to the United States House of Representatives in the following three proposed districts: 9, 18 and 30.

The United States contends that the proposed Congressional plan will not change the ability of any citizens, on account of race, color or membership in a language minority, to elect their preferred candidates of choice in any of the remaining 30 benchmark districts, with the exception of Districts 23 and 27 as discussed below. To the extent that such citizens in those districts have the ability to elect under the existing plan, they will have the ability to do so under the proposed plan. To the extent that such citizens in those districts do not have the ability to elect under the existing plan, they will not have the ability to do so under the proposed plan. With regard to new districts in the proposed plan, as indicated, new Districts 34 and 35 in the proposed plan are districts in which Hispanic citizens have the ability to elect candidates of their

choice. New Districts 33 and 36 in the proposed plan are districts in which minority citizens do not have the ability to elect their preferred candidates of choice.

The United States believes that benchmark Congressional District 23 may also be the subject of dispute. Under the existing plan, Congressional District 23 is located in southwest Texas and encompasses seventeen whole counties and parts of three other counties. Hispanic citizens are currently able to elect their preferred candidate of choice to Congress in Congressional District 23 despite the presence of racially polarized voting. Under the proposed plan, Congressional District 23, while located in the same general area in Texas, will encompass twenty-five whole counties and parts of five other counties. Hispanic citizens will not be able to elect candidates of their choice in proposed Congressional District 23 because of the persistence of racially polarized voting.

Based on information currently available to the United States, the State's position is unclear concerning whether benchmark District 23 is a district in which Hispanic citizens have or do not have the ability to elect candidates of their choice. On page 6 of the State's Memorandum in Support of its Motion for Summary Judgment filed September 14, 2011 [Docket #41], the State indicates that benchmark District 23 is an "Hispanic opportunity district." This appears inconsistent with the expert report of the State's own expert in the *Perez v. Perry* redistricting litigation recently tried in the United States District Court for the Western District of Texas (C.A. No. Sa-11-CA-360-OLG-JES-XR), in which Dr. John Alford wrote that benchmark District 23 is not an opportunity district for Hispanic voters. In deposition and at trial, Dr. Alford's opinion is more equivocal about the performance of District 23 in the benchmark, noting that the district elected a Hispanic candidate of choice in 2006 and 2008, and he states that District 23 in the proposed plan performs worse than in the benchmark plan. Thus, there remains an issue between

the United States and the State concerning District 23, and whether the State's changes to this District in the proposed plan result in a loss of Hispanic citizens' ability to elect one candidate of choice to Congress.

The United States believes that benchmark Congressional District 27 may also be the subject of dispute. Under the existing plan, Congressional District 27 is located in extreme southeast Texas, bordering on both Mexico and the Gulf of Mexico. It includes all of Kenedy, Kleberg, Nueces and Willacy counties, and parts of Cameron and San Patricio counties. Hispanic citizens are currently able to elect their preferred candidates of choice to Congress in this District despite the presence of racially polarized voting. Under the proposed plan, House District 27 will be substantially reconfigured and moved north to remove Kenedy, Kleberg and Willacy counties, as well as its previous Cameron County population, and to add the whole counties of Aransas, Calhoun, Jackson. Lavaca, Matagorda, Refugio, Victoria and Wharton, and parts of Bastrop, Caldwell and Gonzales counties. All of Nueces County and a slightly larger portion of San Patricio County remain in proposed District 27. Hispanic citizens will not be able to elect candidates of their choice in proposed District 27 because of the persistence of racially polarized voting.

Based on information currently available to the United States, the State's position is unclear concerning whether benchmark District 27 is a district in which Hispanic citizens have or do not have the ability to elect candidates of their choice. On page 6 of the State's Memorandum in Support of its Motion for Summary Judgment filed September 14, 2011 [Docket #41], the State indicates that benchmark District 27 is an "Hispanic opportunity district." This appears inconsistent with the expert report of the State's own expert in the *Perez v. Perry* redistricting litigation recently tried in the United States District Court for the Western District of Texas (C.A.

No. Sa-11-CA-360-OLG-JES-XR), in which Dr. John Alford wrote that benchmark District 27 is not an opportunity district for Hispanic voters. At deposition and trial, Dr. Alford counts District 27 in the benchmark as an opportunity district, and he stated that the proposed District 27 does not provide that opportunity because it has flipped from majority Hispanic to majority Anglo. Thus, there remains an issue between the United States and the State concerning District 27, and whether the State's changes to this District in the proposed plan result in a loss of Hispanic citizens' ability to elect one candidate of choice to Congress.

2. Purpose

The United States has not yet determined whether the proposed plan has any purpose or purposes that are prohibited by Section 5, and its investigation is on-going. Based on our preliminary investigation, it appears that the proposed plan may have a prohibited purpose in that it was adopted, at least in part, for the purpose of diminishing the ability of citizens of the United States, on account of race, color, or membership in a language minority group, to elect their preferred candidates of choice to Congress. The evidentiary basis for this contention is not limited to any particular district or districts but rather extends to the kinds of direct and circumstantial evidence that the Supreme Court identified as probative of discriminatory purpose in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

II. Positions of Defendant-Intervenors

A. Davis Intervenors

The closed redistricting process through which state legislative leaders in Texas shut out input from minority communities and the leaders who represent them, including but not limited to the failure to adopt proposed alternatives that would have reflected the rapid and concentrated

growth in minority communities, resulted in a discriminatory (retrogressive) effect and also evidence a discriminatory purpose in violation of Section 5. See 28 C.F.R. §§ 51.54 (referencing the Arlington Heights factors to determine discriminatory purpose and the Beer standard to determine discriminatory effect) 51.57 (applying the Arlington Heights framework among other factors to determine discriminatory purpose), 51.59 (laying out a multi-factor test for whether a plan is retrogressive); DOJ Redistricting Guidance at 7471-72 (same). Like the Department of Justice, the Davis-Veasey Defendant-Intervenors believe that the changes made to existing congressional districts 23 and 27 will retrogress minority voting strength in violation of Section 5, and further take the position that these changes, and Plan C185, were adopted with a racially discriminatory purpose. The Davis-Veasey Intervenors also challenge the state's rejection of alternative plans that created two new minority opportunity congressional districts in the Dallas-Fort Worth area, where the state has "packed" minority population into district 30 and otherwise "cracked" or fragmented minority voters among six Anglo-controlled districts. Such alternatives would have more fairly reflected the dramatic growth in minority population that resulted in the state's additional congressional seats in the Dallas and Tarrant County region of North Texas and in South Texas.1 Given the dramatic minority population growth over the last decade, the Texas Congressional redistricting plan should have included approximately 14 districts (out of 36) in which minority voters could have elected the candidate of their choice and effectively participated in the political process: three in the Dallas and Tarrant County region;

[1] Dallas and Tarrant Counties contain over 2.1 million African-American and Hispanic residents, yet only one of the 8 congressional districts that enter the two counties provide minority voters with an opportunity to elect their candidate of choice. Over the decade, the Anglo population in Dallas and Tarrant counties combined fell by 156,472 while the African-American population increased by 152,825 and the Hispanic population increased by 440,898.

three in Harris County region; and eight in the area that extends from Travis County to and including South and West Texas.

The failure to create any new minority opportunity congressional districts in the 2011 proposed plan despite rapid growth in minority communities and the addition of four Congressional seats retrogresses racial and language minorities with respect to their effective exercise of the electoral franchise. In the 2006 Amendments, Congress intended to prohibit covered jurisdictions from keeping minority voters "in their place" by perpetuating unconstitutional conditions or making them worse, H. Rep. No. 109-478, at 68 (2006); see also S. Rep. No. 109-295, at 16 (2006). The failure to do so is a factor in the discriminatory purpose test and also is clearly relevant to the discriminatory effect test. See 28 C.F.R. §§ 51.54, 51.59(b), 51.57(e). In Texas, minority voters had realistic opportunities to effectively participate and elect candidates of choice in eleven districts (CD 9, 15, 16, 18, 20, 23, 25, 27, 28, 29, 30) under the benchmark map (out of 32 districts, or 34.4%), and under the State's proposed 2011 plan (C185), minority voters have realistic opportunities to elect candidates of choice in only 10 congressional districts (Districts 9, 15, 16, 18, 20, 28, 29, 30, 34, 35) (out of 36 districts, or 27.8%). Thus, the proposed plan reduces the number of congressional districts where minority voters have an effective opportunity to participate in the political process and to elect candidates of their choice from 11 to 10, even though the congressional delegation has been expanded from 32 to 36. That Texas state legislators chose to decrease the number of effective minority districts even though the minority share of the population increased relative to that of Anglos evidences discriminatory intent, among other factors.

B. Mexican American Legislative Caucus Intervenors

As stated in the September 21, 2011 status conference, MALC will focus its participation in this litigation on opposing the State of Texas' request for Section 5 preclearance of the redistricting plans for the state House and the United States Congress. MALC further will principally focus on the purpose and effect of these two plans insofar as they relate to the electoral opportunities of the Hispanic citizens of the State of Texas.

MALC agrees with the United States' identification of the benchmark and proposed plans for the state House and Congress, and the United States' statement that redistricting plans constitute a covered voting change within the meaning of Section 5. Like the United States, MALC will set forth the governing Section 5 legal standards as to discriminatory purpose and discriminatory effect in its brief in opposition to Texas' Motion for Summary Judgment.

1. State House Plan

a. Effect

As to the state House plan's impermissible retrogressive effect, MALC agrees with the United States' statement as to the state House districts at issue with the following qualifications.

First, MALC notes that the retrogression analysis ultimately rests on a determination of whether the electoral opportunity provided by the proposed plan as a whole is less than, the same as, or more than the electoral opportunity provided by the existing plan as a whole. As the United States indicates, this necessarily requires an evaluation of the electoral opportunities in specific House districts, but the ultimate retrogression determination is made on a plan-wide basis, not a district-by-district basis.

Second, it is MALC's position that, in evaluating whether the proposed House plan is retrogressive, the losses of minority opportunity districts identified by the United States, and the

additional loss set forth below, are not compensated for in the proposed House plan by any new House districts in which Hispanic citizens will have the opportunity to elect candidates of choice.

Third, as to the district-specific analysis provided by the United States, MALC sets forth the following additional district at issue:

District 144: The United States' position is that Hispanic citizens do not have an opportunity to elect a candidate of choice in either existing District 144 or proposed District 144. District 144 is located in Harris County. MALC contends that, in the context of polarized voting, Hispanic citizens in existing District 144 have been steadily gaining electoral strength such that this district is one in which Hispanic citizens are nearing the opportunity to elect their preferred candidate. Proposed District 144 has been significantly reconfigured to eliminate the emerging Hispanic electoral opportunity in this district, which will result a loss of Hispanic citizens' opportunity to elect candidates of choice to the House.

b. Purpose

MALC agrees with the United States that the state House plan was enacted with a prohibited discriminatory purpose. MALC's purpose analysis will focus on the manipulation of district boundaries to fragment minority population concentrations and unnecessarily pack other minority voters into particular districts. The analysis will encompass, in part, the districts identified by the United States and MALC with regard to the discriminatory effect analysis. In addition, the manipulation of other district boundaries is relevant to the purpose analysis, and this includes the proposed alterations to existing Districts 32, 40, 77, 78, 90, 93, 104, 105, 137, 144, and 148. Furthermore, the proposed plan manipulates population variances between districts to advance the State's goal of minimizing the electoral opportunity of Hispanic citizens, which also constitutes indicia of the State's discriminatory purpose in enacting the proposed House plan.

2. Congressional Plan

a. Effect

As to the congressional plan's impermissible retrogressive effect, MALC agrees with the United States' statement as to the congressional districts at issue with the following qualifications.

MALC again notes that the retrogression determination turns on a plan-wide comparison of the existing and proposed plans. In this regard, a circumstance that must be taken into account is that the proposed plan includes four more total districts (36) than the existing plan (32). Thus, while MALC's position is that both the proposed plan and the existing plan include seven districts in which Hispanic citizens have the opportunity to elect candidates of choice, MALC asserts that Hispanic citizens' opportunity to elect candidates of choice in seven districts in the proposed 36-district plan is significantly less than the opportunity to elect candidates of choice in seven districts in the existing 32-district plan, thus rendering the proposed plan retrogressive, in violation of Section 5.

b. Purpose

MALC contends that the proposed congressional redistricting plan was enacted with a discriminatory purpose, in violation of Section 5. MALC contends that, in particular, the configurations selected for existing Districts 6, 12, 23, 26, 27, and 33 exhibit characteristics indicative of discriminatory purpose (including fragmentation of minority population concentrations and packing of other minority citizens into particular districts).

C. Gonzales Intervenors

The Gonzalez Intervenors contend that Hispanic citizens have the ability to elect their preferred candidates of choice to the United States House of Representatives in benchmark

Congressional District 25 in addition to the seven benchmark districts identified by the United States as districts in which Hispanic citizens have the ability to elect their preferred candidates of choice. Hispanic citizens will not be able to elect candidates of their choice in proposed Congressional District 25 because of the State's fracturing of the benchmark district's minority and Anglo voters who collectively enabled Hispanic citizens to elect candidates of their choice.

The Gonzalez Intervenors concur with the United States that districts 23 and 27 are also the subject of dispute. The Gonzalez Intervenors further contend that the State's proposed Congressional Plan demonstrates statewide retrogression based on both the number and the percentage of districts in which minority citizens have the ability to elect their preferred candidates of choice in the benchmark versus the proposed plan.

The Gonzalez Intervenors further contend that the State's proposed Congressional Plan has a prohibited purpose in that it was adopted for the purpose of diminishing the ability of citizens of the United States, on account of race, color, or membership in a language minority group, to elect their preferred candidates of choice to Congress. The evidentiary basis for this contention is not limited to any particular district or districts but rather extends to the kinds of direct and circumstantial evidence that the Supreme Court identified as probative of discriminatory purpose in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

The Gonzalez Intervenors' allegations regarding retrogression within and among specific districts, statewide retrogression, and discriminatory purpose are subject to modification based on additional discovery.

The Gonzalez Intervenors take no position with respect to the Texas House of Representatives, Texas Senate, or Texas State Board of Education districts.

D. The Texas Legislative Black Caucus, the NAACP, and League of United Latin American Citizens (LULAC-proposed defendant intervenor)

The above Defendant-Intervenors would add that the Voting Rights Act protects minority voters from retrogression of voting practices and procedures involving districts in which minority voters have an established record of winning office, but also voting practices and procedures that will inhibit future minority political success, that diminish gains in electoral influence achieved by minority voters, and changes that add disproportionate burdens to minority participation generally. Like the United States, we will elaborate on legal issues in response to plaintiff's Motion for Summary Judgment.

The existing districts currently disputed by these Intervenors are described below.

1. Congress

Like the Department of Justice, the above Defendant-Intervenors take issue with the manner in which existing congressional districts 23 and 27 were redrawn, and believe that these changes are retrogressive and were adopted with a racially discriminatory purpose. These Intervenors also challenge the state's rejection of alternative plans that created two new minority congressional districts in the Dallas-Fort Worth area, where the state has "packed" minority population into district 30 and otherwise "cracked" or fragmented minority voters among six Anglo controlled districts. Such alternatives would have more fairly reflected the dramatic growth in minority population that resulted in the state's additional congressional seats. As it is, under the proposed plan the minority proportion of seats in the expanded Texas congressional delegation is reduced from its current proportion. The state also rejected an alternative that would have maintained and enhanced the growing minority population in existing district 2 in the oil refinery areas of the southeastern corner of the state. In addition, we note that, in light of the testimony of plaintiffs' expert (Dr. Alford) and its fragmentation of existing political alliances and cohesive neighborhoods, district 35 (Austin-San Antonio) should not be seen as an additional minority district for purposes of the Voting Rights Act.

Existing district 25 in Travis County (Austin) involves a rare but effective and long-standing cross-coalition between minority voters and like-minded Anglo voters. Minority voters have enjoyed decisive influence in this district. The state plan fragments this coalition and

separates the Travis County Anglo voters from minority voters with whom they might coalesce into separate districts. The plan reorients the district completely so that it runs northward to the fringe of Fort Worth, and reduces the minority percentage of total population from 50.2 percent to 29.7 percent. The change is retrogressive and was adopted with a racial purpose.

2. Senate

Senate District 10 in Tarrant County, (Fort Worth) was identified by the State in 2001 as a district which would increase in minority population and in time offer minority voters an opportunity to elect a senator of their choice. The minority percentage in the district increased from 43.4 percent to 52.4 percent, and minority voters were able to elect a candidate of their choice in 2008. The proposed plan lowers the minority population to 45.5 percent. In doing so the plan most notably removes an 80.2 percent minority area and submerges it in district 22 (38.6% minority), and moves a large part of an established minority community in northwest Fort Worth to district 12 (38.9% minority). The plan replaces these areas with heavily Anglo areas. The plan disrupts long-established and cohesive minority political communities and under the new plan minority voters will no longer be able to elect a representative of their choice. Alternatives were available that enhanced the minority share of district population, but these were rejected by the state. The change is retrogressive and was adopted with a racially discriminatory purpose.

In District 15 in Harris County (Houston), the black and Hispanic percentage of total population dropped from 72.3 percent to only 66.7 percent, a level which the experience of other Texas districts is tenuous at best for minority voters. There was no need for such a reduction, as shown by a plan supported by the TLBC with a 71.5 percent black/Hispanic district 15. The reduction in minority voting strength flowed from the State's choice of transferring an Anglo area from adjacent district 13 in Harris County, in which was under-populated (needed to add rather than remove population) and increasing the combined minority percentage to over 90 percent of the total. The change will have a retrogressive effect and it was adopted with a racial purpose.

3. House

These Intervenors challenge the House districts noted by the Department of Justice. LULAC also objects to the districts to which MALC objected. Finally, TLBC, NAACP, and LULAC also object to these following additional districts:

Bell County

Existing district 54 in Bell, Burnet and Lampasas Counties changed from a 55.4 percent Anglo majority in 2000 to a 51.5 percent minority majority in 2010. The district split the minority population of the City of Killeen with district 55 (which increased over five percentage points from 2000 to 2010). Rather than unite Killeen into a single district consistent with its guidelines, the state chose to continue the fragmentation with altered lines within Killeen. The state rejected a compact alternative district centered on Killeen with a minority population over 60 percent for a racially discriminatory purpose.

Dallas County

Dallas County had increased from 54.2 percent minority in 2000 to 65.5 percent minority in 2010. The state plan packs the bulk of the minority population into districts ranging up to 91 percent minority, and fragments the remainder among Anglo-controlled districts so that. The plan also creates bizarrely shaped districts, fragments a large number of minority voting precincts, unnecessarily alters existing district boundaries, and breaks up existing get-out-the-vote and other political arrangements. These changes will increase costs to minority candidates and organizations and will have a depressing effect on overall minority participation in elections beyond the districts at issue in this case. The most egregious examples of such districts include proposed districts 103, 104, 105, 110, and 111.

Existing district 101 in eastern Dallas County was one of two districts eliminated in the state plan. The district was only 2.41 percent below the ideal population. The minority population had increased from 36 percent in 2000 to 59.7 percent minority in 2010, and minority voters came close to electing a candidate of their choice in 2008. The state selected district 101 as one of two Dallas County districts to eliminate. Alternative plans maintained district 101

virtually intact, and eliminated instead two predominantly Anglo districts that were badly under-populated (-24.49% and (-15.97%).

Existing district 106 in western Dallas County was the second of two districts eliminated in the state plan. The district was only 4.73 percent below the ideal population. The minority population had increased from 51.9 percent in 2000 to 70.0 percent in 2010. The state selected district 106 as one of two Dallas County districts to eliminate. Alternative plans maintained district 101 substantially untouched and with a 67.7 percent minority population and eliminated instead two districts predominantly Anglo districts that were badly under-populated. The elimination of this district is retrogressive and infected with a racially discriminatory purpose.

The north-northeastern area of Dallas County (existing districts 102, 107, 112) divides a growing minority concentration. The state's plan further fragments the concentration among proposed Anglo dominated districts 102, 107, 112, 113 and 114. The state rejected alternative plans that avoided this fragmentation and create a district in which minority voters would have an opportunity to elect a representative of their choice from that area.

Fort Bend County

Existing district 26, situated in Fort Bend County to the southwest of Houston, increased from 44 percent minority in 2010 to 60.6 percent minority in 2010; the Asian American population increased from 22.6 percent to 33.6 percent during that period. The proposed plan reduced the minority percentage to 54.7 percent and the Asian percentage to27.5 percent. The state rejected available alternative plan that would avoid that retrogression with a racially discriminatory purpose.

Harris County

Like Dallas County, Harris County increased significantly in minority population. In a change from the formula for district assignments used in 2000, the state removed one district in Harris County. The state selected district 149 (89.3% minority in total population in 2010 with a black plurality) as discussed by the United States. As in Dallas County, the state packed minority districts beyond levels necessary to maintain existing minority districts up to 92.3

percent minority and fragmented the remaining minority areas and submerged them in Anglo-controlled districts. Similarly, the state unnecessarily reconfigured and contorted minority districts with the negative effects on minority districts discussed in Dallas County. See especially districts 139, 145 and 146. The Intervenors challenge this state's action as retrogressive and racially motivated.

Existing district 144 in eastern Harris County increased from 48.5 percent minority n total population in 2000 to 69.3 percent minority in 2010. The proposed plan lowers the minority percentage by six percentage points and retrogresses minority opportunities. Predominantly minority precincts are adjacent to district 144 whose inclusion in the district would have avoided retrogression.

Tarrant County

Tarrant County increased substantially in minority population between 2000 and 2010, and gained one house seat. Tarrant County has been marked by exceptionally and unnecessarily contorted districts as the state systematically fragmented minority concentrations. See especially congressional districts 6, 12, 26, and 33; senate districts 9, 10, 12 and 22; and house districts 90, 93 and 95. The unnecessary redrawing of minority districts and the layered fragmentation of minority concentrations combine seriously to undermine minority political opportunities and participation by minority citizens in the electoral process, as discussed above in reference to Dallas County.

E. Texas Latino Redistricting Task Force Intervenors

The Latino Task Force Defendant Intervenors join the United States and add as follows: the State House plan, H238, and the congressional plan, C185, intentionally discriminate against Latino voters in violation of Section 5 of the Voting Rights Act of 1965.

Date: September 23, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2011, I served a true and correct copy of the foregoing via the Court's ECF filing system on the following counsel of record:

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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.

SHANNON PEREZ, *et al.*,

Respondents.

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

EXHIBIT 4

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET. AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
RICK PERRY, ET. AL.	§	

ORDER

Judges Garcia and Rodriguez may offer plan H298 as the proposed interim plan for the districts used to elect members in 2012 to the Texas House of Representatives. Judge Smith may offer plan H299 as an alternative in dissent.

These plans may be viewed on the DistrictViewer website operated by the Texas Legislative Council (http://gis1.tlc.state.tx.us/) under the category "Exhibits for Perez et al."

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

SIGNED this 17th day of November, 2011.

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

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.

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

EXHIBIT 5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, ET AL, Plaintiffs,
vs.
RICK PERRY, ET AL, Defendants.

No. SA:11-CV-360

San Antonio, Texas
September 12, 2011

VOLUME 6

TRANSCRIPT OF BENCH TRIAL

BEFORE THE HONORABLE ORLANDO L. GARCIA,
THE HONORABLE XAVIER RODRIGUEZ,
UNITED STATES DISTRICT JUDGES,
AND THE HONORABLE JERRY E. SMITH,
UNITED STATES CIRCUIT JUDGE

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each member the opportunity to be reelected. How was that accomplished with respect to District 41 and Representative Pena?
A. In District 41 we tried to increase the Republican performance of District 41 to give Representative Pena the best chance to be reelected.
Q. And how does one increase the Republican performance of the district?
A. We searched for precincts that had a higher Republican performance than what he had previously.
Q. So it would be fair to say that District 41, based upon election data, was drawn in an effort to give Representative Pena the opportunity to be reelected?
A. Yes, sir, that's correct.
Q. Now, if you zoom out a little bit from those two counties there's been some discussion that there would be excess population in Cameron and Hidalgo County that could have been placed together into an additional district within Hidalgo/Cameron County. In your view would that have been constitutional in the Texas Constitution?
A. That alone, yes. I think that you can take the two surpluses and combine them together. And it's something that I spent a great deal of time attempting to do. We tried to take the surplus of Cameron and the surplus of Hidalgo and put them together, but the problem that we faced is that when you went further up north on the map you were forced to split a county.

At no point did anybody bring me any proposal even though, you know, we requested it from MALDEF, we requested it from MALC. We visited with different organizations and asked them to show us how to do that without causing a county split and no one was able to give us a proposal that did that. Inevitably when you take the population of Cameron and Hidalgo out of the rest of the districts going north you're forced to have a county cut almost always around Nueces County.

Q. And in your view would that be an unnecessary cut in violation of the Texas constitution?

A. Yes, sir.

Q. Let's move up slightly north to Nueces County. How is Nueces County, the districts there, drawn?

A. Nueces County was given to us by the Nueces County delegation.

Q. And how many districts was Nueces County entitled to?

A. It was entitled to two. Similar to Harris County, we took the population of Nueces County, divided the ideal district size into it and we got 2.02, which to me means they get two districts. And that .02 can easily be redistributed amongst those two districts.

Q. So would that be -- we've heard testimony or characterization of the drop-in districts. Would that be one of the drop-in districts where the members of the House created it and it was just dropped into a map?

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.

SHANNON PEREZ, *et al.*,

Respondents.

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

EXHIBIT 6

SECTION 2 OF THE VOTING RIGHTS ACT
42 U.S.C. § 1973

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

SECTION 5 OF THE VOTING RIGHTS ACT
42 U.S.C. §1973c

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this

title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

TEX. CONST. art. III, § 26

Sec. 26. APPORTIONMENT OF MEMBERS OF HOUSE OF REPRESENTATIVES. The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.