

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

SHANNON PEREZ, <i>et al.</i> ,)	
	)	CIVIL ACTION NO.
<i>Plaintiffs,</i>	)	SA-11-CA-360-OLG-JES-XR
	)	[Lead case]
v.)	
)	
STATE OF TEXAS, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
_____)	
)	
MEXICAN AMERICAN LEGISLATIVE	)	CIVIL ACTION NO.
CAUCUS, TEXAS HOUSE OF	)	SA-11-CA-361-OLG-JES-XR
REPRESENTATIVES (MALC),	)	[Consolidated case]
)	
<i>Plaintiffs,</i>)	
)	
v.)	
)	
STATE OF TEXAS, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
_____)	
)	
TEXAS LATINO REDISTRICTING TASK	)	CIVIL ACTION NO.
FORCE, <i>et al.</i>,	)	SA-11-CA-490-OLG-JES-XR
	)	[Consolidated case]
)	
<i>Plaintiffs,</i>)	
)	
v.)	
)	
RICK PERRY,)	
)	
<i>Defendant.</i>)	
_____)	

MARGARITA V. QUESADA, <i>et al.</i>,	)	CIVIL ACTION NO.
<i>Plaintiffs,</i>	)	SA-11-CA-592-OLG-JES-XR
	)	[Consolidated case]
)	
v.)	
)	
RICK PERRY, <i>et al.</i> ,)	
<i>Defendants.</i>)	
_____)	
)	
)	
EDDIE RODRIGUEZ, <i>et al.</i>,	)	CIVIL ACTION NO.
<i>Plaintiffs,</i>	)	SA-11-CA-635-OLG-JES-XR
	)	[Consolidated case]
)	
v.)	
)	
RICK PERRY, <i>et al.</i> ,)	
<i>Defendants.</i>)	

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

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

ARGUMENT AND AUTHORITIES

As Judge Smith recognized, “[u]nless the Supreme Court enters the fray at once to force a stay or a revision [to the Court’s House map], this litigation is, for all practical purposes, at an end.” This Court should itself grant the stay envisioned by Judge Smith, which would give the Supreme Court time to review this Court’s actions before the election process moves forward

under a legally flawed Texas House map. As Judge Smith recognized, if a stay is not granted, the democratically enacted will of the People of Texas will effectively be cast aside and replaced by the will of two unelected federal judges.

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

This Court's interim order is akin to a preliminary injunction, and a preliminary injunction of any sort is an "extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 676 (2008). A court will stay its injunction pending appeal where, as here, the moving party can demonstrate: (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable injury if the stay were not granted; (3) that granting the stay would not substantially harm the other parties; and (4) that granting the stay would serve the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). In this Circuit, it is well established that a stay pending appeal is warranted by a showing of "a substantial case on the merits when a serious legal question is involved" and by a showing that "the balance of the equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 556 (5th Cir. 1981). *Id.* See also *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) ("The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay.").

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

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

because the results of the election would be irreversible. *See Lucas v. Townsend*, 486 U.S. 1301, 1304 (Kennedy, J., in chambers).

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

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

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

As correctly explained in the dissent by Judge Smith:

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

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

Court is thus likely to conclude that this Court went beyond its authority in altering districts beyond those necessary to remedy statutory or constitutional defects.

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

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

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

Upham v. Seamon, 456 U.S. 37, 43 (1982) (*per curiam*) (emphasis added) (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)); *cf. White v. Weiser*, 412 U.S. 783, 797 (1973) (holding that the district court erred because "in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state proposed plan"). In *Upham*, preclearance had been **denied**. Here, no preclearance decisions have been reached due to the Section 5 court's understandable confusion about the applicable legal standards and the Department of Justice's dilatory litigation tactics.¹ As a result, no court has concluded that the State's House map violates Section 5, Section 2, or the U.S. Constitution. Yet this Court shows less deference to the State's House map than was showed in *Upham* to a map that had been **denied** preclearance. It defies all logic to conclude that a map that has been adjudged to violate

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

Section 5 should be shown more deference than a map for which preclearance is currently being sought and may ultimately be granted. *Upham* plainly controls this case, and under *Upham*, when a federal court is forced to order an interim redistricting plan, it must respect the state legislature's policy judgments wherever possible.

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

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

The interim redistricting plan for the Texas House undermines the Legislature's judgment by creating House districts in which minority groups must be combined in order to meet the 50% citizen voting age population benchmark. *See, e.g.*, Plan H298, Red 106 (House District 26 contains 14.5% Hispanic CVAP, 15.6% Black CVAP, and 23.8% Asian CVAP); *id.* (House District 54 contains 17.8% Hispanic CVAP, 28.8% Black CVAP, and 3.1% Asian CVAP).

Section 2 of the Voting Rights Act does not require the State—or permit the Court—to create multi-racial coalition districts when no single, geographically compact minority group is large enough to make up the majority in a district. *See Bartlett v. Strickland*, 129 S. Ct. 1231, 1243 (2009) (“Nothing in § 2 grants special protection to a minority group’s right to form political coalitions.”). Even if section 2 could be construed to require coalition districts in some instances, the Supreme Court has emphasized that such districts could be compelled only upon a heightened showing of voting cohesion between members of each group. *See Growe v. Emison*, 507 U.S. 25, 41, 42 (1993). No evidence before this Court demonstrates any voting cohesion—let alone *heightened* voting cohesion—among Latino, African-American, and Asian minority groups in House District 26 and House District 54.

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

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

The interim House plan violates the Texas Constitution’s county line rule, *see* TEX. CONST. art. III, § 26, because it contains an unnecessary county cut in Nueces County. The State’s enacted plan, by contrast, contained no such unnecessary cut and complied with the State Constitution. The Court’s county-line rule violation evidences the Court’s decision to elevate race over traditional redistricting principles in violation of the United States Constitution. The Supreme Court, however, has repeatedly found that the Constitution and Voting Rights Act

incorporate, and therefore cannot conflict with, traditional redistricting principles like the county-line rule. *See, e.g., Bush v. Vera*, 517 U. S. 952, 963 (1996). The Voting Rights Act does not require, and the Constitution does not allow, the Court to reject traditional redistricting principles solely to create majority Latino or African-American districts. *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 92 (1997). Accordingly, the Supreme Court is therefore likely to conclude that the interim redistricting plan is unlawful.

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

The immediate implementation of the Court's interim Texas House plan would prevent the State from enforcing a law enacted by the Texas Legislature. House Bill 150 passed with overwhelming majorities in both Houses of the Legislature. Blocking this legislation, as the Court has done, unquestionably causes irreparable harm to the State, its officers, and most importantly its citizens. As the Supreme Court has stated, even the temporary invalidation of a state statute irreparably injures the government and itself constitutes sufficient grounds to enter a stay. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (“[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (“[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.”).

Beyond the harm inherent in blocking implementation of state law, a special harm arises when an election is permitted to go forward based on an illegal, court-drawn redistricting plan. As Judge Smith recognized, if a stay is not granted to allow for appellate review, this case will essentially be over, and the State's elections will be conducted on a legally flawed map. The candidate filing period will begin under the court's legally flawed, unreviewed map on Monday,

November 28, and absent a stay from this Court or the Supreme Court there will soon be little alternative other than to continue with elections on an improper map. The irreparable harm such a result would inflict on our democratic process and on all Texas voters requires no explanation. For these reasons, the Supreme Court has frequently stayed unlawful court-drawn plans in similar instances. *McDaniel v. Sanchez*, 448 U.S. 1318 (1980) (Powell, J., in chambers); *Bullock v. Weiser*, 404 U.S. 1065 (1972) (stay pending appeal in *White v. Weiser*, 412 U.S. 783, 789 (1973)); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970) (stay order).

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

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

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

A stay of the preliminary injunction would allow State Defendants to carry out the statutory policy of the Legislature, which "is in itself a declaration of the public interest which should be persuasive." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937); *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 157 F.3d 500, 503 (7th Cir. 1998) ("When

the opposing party is the representative of the political branches of a government the court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance.”).

CONCLUSION & PRAYER

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

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

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

Dated: November 23, 2011

Respectfully Submitted,

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I hereby certify that a true and correct copy of this filing was sent via the Court's electronic notification system and/or email to the following counsel of record on November 23, 2011 to:

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

SHANNON PEREZ, <i>et al.</i> ,)	
	)	CIVIL ACTION NO.
<i>Plaintiffs,</i>	)	SA-11-CA-360-OLG-JES-XR
	)	[Lead case]
v.)	
)	
STATE OF TEXAS, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
_____)	
)	
MEXICAN AMERICAN LEGISLATIVE	)	CIVIL ACTION NO.
CAUCUS, TEXAS HOUSE OF	)	SA-11-CA-361-OLG-JES-XR
REPRESENTATIVES (MALC),	)	[Consolidated case]
)	
<i>Plaintiffs,</i>)	
)	
v.)	
)	
STATE OF TEXAS, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
_____)	
)	
TEXAS LATINO REDISTRICTING TASK	)	CIVIL ACTION NO.
FORCE, <i>et al.</i>,	)	SA-11-CA-490-OLG-JES-XR
	)	[Consolidated case]
)	
<i>Plaintiffs,</i>)	
)	
v.)	
)	
RICK PERRY,)	
)	
<i>Defendant.</i>)	
_____)	

MARGARITA V. QUESADA, <i>et al.</i>,	)	CIVIL ACTION NO.
<i>Plaintiffs,</i>	)	SA-11-CA-592-OLG-JES-XR
	)	[Consolidated case]
)	
v.)	
)	
RICK PERRY, <i>et al.</i> ,)	
<i>Defendants.</i>)	
_____)	
)	
)	
EDDIE RODRIGUEZ, <i>et al.</i>,	)	CIVIL ACTION NO.
<i>Plaintiffs,</i>	)	SA-11-CA-635-OLG-JES-XR
	)	[Consolidated case]
)	
v.)	
)	
RICK PERRY, <i>et al.</i> ,)	
<i>Defendants.</i>)	

**ORDER STAYING IMPLEMENTATION
OF INTERIM HOUSE REDISTRICTING PLAN PENDING APPEAL**

The Court having considered the motion of Defendants Rick Perry, in his official capacity as Governor, Hope Andrade, in her official capacity as Secretary of State, and the State of Texas (collectively, the “State Defendants”) to stay pending appeal the Court’s interlocutory order dated November 23, 2011, which directs implementation of an interim redistricting plan for the Texas House of Representatives, finds that the motion is meritorious. It is hereby

ORDERED that the Court’s order imposing an interim redistricting plan for the Texas House of Representatives is stayed pending appeal to the Supreme Court. It is further

ORDERED that the candidate filing and qualification deadlines for the Texas House of Representatives (as prescribed by State law and modified by order of this Court) are stayed until further order of the court.

In order to preserve the Supreme Court's jurisdiction and provide the Supreme Court with adequate time to review this matter, the Court will, as becomes necessary, stay the primary election dates for the Texas House of Representatives.

SIGNED this ____ day of November 23, 2011

_____/s/_____

ORLANDO L. GARCIA

UNITED STATES DISTRICT JUDGE