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

WENDY DAVIS, *et al.*,	)	
	)	CIVIL ACTION NO.
Plaintiffs,	)	SA-11-CVA-788
	)	[Consolidated case]
v.	)	
	)	
RICK PERRY, *et al.*,	)	
	)	
Defendants.	)	
	)	

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

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

ARGUMENT AND AUTHORITIES

A stay pending appeal is entirely appropriate pending expeditious appellate review of important issues such as those presented by this Court's interim order. Indeed, the Supreme Court has itself routinely granted stays of interim redistricting plans pending its consideration of orders similar to this Court's interim order. *McDaniel v. Sanchez*, 448 U.S. 1318 (1980) (Powell, J., in chambers); *Bullock v. Weiser,* 404 U.S. 1065 (1972) (stay order), *rev'd 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 regarding the Texas Senate is akin to a preliminary injunction, and a preliminary injunction of any sort is an "extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 676 (2008). A court will stay its injunction pending appeal where, as here, the moving party can demonstrate: (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable injury if the stay were not granted; (3) that granting the stay would not substantially harm the other parties; and (4) that granting the stay would serve the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Under *Ruiz v. Estelle*, that test is flexible, and a movant can obtain a stay pending appeal by showing "a substantial case on the merits when a serious legal question is involved" and by showing that "the balance of the equities weighs heavily in favor of granting the stay." 650 F.2d 555, 556 (5th Cir. 1981). *See also Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) ("The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay.").

First, this Court's interim order blatantly violates *Upham v. Seamon*, and will likely be reversed on appeal. *Upham* requires a district court enacting interim redistricting plans to defer to legislatively enacted maps unless the court is required to remedy a constitutional or statutory violation. Nevertheless, this Court's interim redistricting plan for the Texas Senate alters districts enacted by the Texas Legislature despite the Court's failure to identify a legal deficiency in the legislatively enacted plan.

Second, implementation of the interim redistricting plan will cause substantial and irreparable harm to the State of Texas and its citizens. Specifically, even the temporary

invalidation of a statute irreparably injures the State; by itself, it constitutes sufficient grounds for a stay. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *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 Senate elections to go forward on improperly constructed redistricting plan. Once done, the harm caused to the State and its citizens by legally flawed elections cannot be undone even if the elections are later invalidated, because the results of the election would be irreversible. *See Lucas v. Townsend*, 486 U.S. 1301, 1304 (Kennedy, J., in chambers).

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

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

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

The Court's interim plan for the Senate ignores the legislatively enacted map in Senate district 10 in Tarrant County without any finding of any violation of federal law. The Court does this despite acknowledging the fact that the *Department of Justice* lodged no objections at all to the legislatively enacted Senate map. The Court agreed with the State that the heavily Democrat

"coalition district" requested by the plaintiffs should not be drawn. Nevertheless, the Court thwarted the will of the people of Texas by changing five Senate districts without articulating any reason for its actions other than that Section 5 preclearance has not yet been obtained. But the lack of preclearance is only because one Senator objected to the map as an intervenor in the Section 5 court. This Court's apparent deference to one Senator's unproven allegations ignores the fact that 29 out of 31 Senators voted for the map. The phrase "tyranny of the minority" takes on new meaning in the Court's plan. All that must be done to defeat democracy is for one Senator, whose district is drawn in a way she dislikes, to file a lawsuit at the eleventh hour claiming a violation of the Voting Rights Act—even when no one else, including the Department of Justice, believes there is a violation. Under the Court's reasoning, because that lone dissenter has held up Section 5 preclearance, the State's map must be judicially redrawn. The Court should not have fallen prey to this tactic. It should stay its order to allow the Supreme Court to consider this error.

The Court gives no reasoned justification for its actions, but explains, "Thus, insofar as the Court is utilizing the Legislature's enacted map, it is using the portions of the map to which no party or the DOJ has objected in order not to disturb legislative choices any more than necessary." Yet the Court provides no legal finding, preliminary or otherwise, of any reason to disturb Senate District 10. In reality, there is no reason to disturb the legislature's valid decision with respect to this district. The Court simply assumes a Section 5 violation where none exists, despite the DOJ's decision that nothing in the Senate map violates Section 5. If this Court does not immediately remedy this error, it should stay its decision.

The Supreme Court has unambiguously prohibited lower courts from disregarding the legislature's intention in an enacted redistricting plan unless it is necessary to avoid a constitutional or statutory violation:

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

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

In sum, the Texas Senate interim redistricting plan undermines the Legislature's policy choices by altering five Senate districts that do not 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). As a result, the State is likely to succeed on appeal to the Supreme Court.

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

The immediate implementation of the interim redistricting plan would prevent the State from enforcing a law duly enacted by the Texas Legislature. Senate Bill 31 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 in his dissent related to the Texas House maps, if a stay is not granted to allow for appellate review of this Court's decisions, this case will essentially be over. If that happens, the State's elections will be conducted on improper maps. 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 harm should the Court stay its orders implementing the interim redistricting plans pending appeal. Any party that benefits from an improper interim redistricting map suffers no cognizable injury from a stay pending appellate review. In any case, Plaintiffs' right to vote and to participate equally in the political process will not be abridged by a mere delay in the final determination of electoral districts for the 2010 election. By contrast, refusing to issue a stay of an improper interim map will cause irreparable harm to the people of Texas. The election of an entirely new legislature under a plan other than the one enacted by the duly elected representatives of this State would be irreversible. *See Lucas v. Townsend*, 486 U.S. 1301, 1304 (Kennedy, J., in chambers) ("Even if the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive.").

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

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

CONCLUSION & PRAYER

State Defendants respectfully request that the Court stay its order imposing an interim redistricting plan for the Texas Senate pending appeal. State Defendants also request that the Court issue an immediate administrative stay of its preliminary injunction order to allow time for

orderly litigation of this request for a stay pending appeal both before this Court, and if this Court were to deny the stay, before the United States Supreme Court pursuant to 28 U.S.C. § 1253.

The State further requests that this Court stay the candidate filing and qualification deadlines for the Texas Senate (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 Senate. While all unaffected primary elections will continue as scheduled on March 6, 2012, the State is prepared to delay its Texas Senate primary elections in order to ensure that it is not forced to conduct elections using a legally flawed map. By delaying the primary elections pending appeal—if that should become necessary—the State can ensure that its citizens will have the opportunity to vote in elections under redistricting plans determined to be lawful by the 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 Senate.

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
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SAN ANTONIO DIVISION

WENDY DAVIS, *et al.*,	)	
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	)	[Consolidated case]
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	)	
RICK PERRY, *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER STAYING IMPLEMENTATION
OF INTERIM SENATE 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 its interlocutory order dated November 23, 2011, which directs implementation of an interim redistricting plan for the Texas Senates finds that the motion is meritorious. It is hereby

ORDERED that the Court's order imposing an interim redistricting plan for the Texas Senate is stayed pending appeal. It is further

ORDERED that the candidate filing and qualification deadlines for the Texas Senate (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 it may become necessary to delay the primary elections

for the Texas Senate. The Court will, as becomes necessary, stay the primary election dates for the Texas Senate.

SIGNED this ___ day of November 23, 2011

_______________/s/__________________

ORLANDO L. GARCIA

UNITED STATES DISTRICT JUDGE