NOS. 11-713, 11-714, 11-715

In the Supreme Court of the United States

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

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

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

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

BRIEF FOR APPELLANTS

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QUESTION PRESENTED

The Texas Legislature enacted new electoral maps for the Texas House, Texas Senate, and U.S. House of Representatives in light of population changes in the 2010 census. Texas is actively seeking judicial preclearance of those maps under Section 5 of the Voting Rights Act.

The question presented is whether, while preclearance remains pending, another district court may order the use of judicially drawn "interim" electoral maps that give no deference to the State's duly-enacted maps, are not premised on any actual or likely violation of law, and are based on nothing more than the court's own notion of sound public policy and "the collective public good."

LIST OF PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, appellants include Hope Andrade, Steve Munisteri; and the State of Texas.

In addition to the parties named in the caption, appellees include Harold Dutton, Jr.; Gregory Tamez; Nancy Hall; Sergio Salinas; Dorothy Debose; Margarita V. Quesada; Romeo Munoz; Jane Hamilton; Lyman King; John Jenkins; Joey Cardenas; Alex Jimenez; Emelda Menendez; Marc Veasey; Tomacita and Jose Olivares; Alejandro and Rebecca Ortiz; Alex Serna; Beatrice Saloma; Betty F. Lopez; Constable Bruce Elfant; David Gonzalez; Eddie Rodriguez; Milton Gerard Washington; Sandra Serna; Balakumar Pandian; Eliza Alvarado; Jose Martinez; Juanita Valdez-Cox; Lionor Sorola-Pohlman; Nina Jo Baker; John T. Morris, *pro se*; the Texas Latino Redistricting Task Force; the City of Austin, Travis County; and Mexican American Legislative Caucus (MALC).

Intervenors-appellees include Henry Cuellar; Eddie Bernice Johnson; Sheila Jackson-Lee; Alexander Green; Howard Jefferson; Bill Lawson; Juanita Wallace; Anita Sue Earls; The League of United Latin American Citizens (LULAC); the Texas State Conference for National Association for the Advancement of Colored People (NAACP) Branches; the Texas Legislative Black Caucus; Boyd Richie; and the Texas Democratic Party.

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JURISDICTION

This is an appeal from a three-judge district court's entry of three orders directing Texas to implement interim redistricting plans for the 2012 elections for the Texas House, Texas Senate, and U.S. House of Representatives. The district court issued its interim redistricting orders for the Texas House and Texas Senate on November 23, 2011, and for the U.S. House on November 26, 2011. On December 9, 2011, this Court granted a stay of those orders and noted probable jurisdiction. This Court has jurisdiction under 28 U.S.C. § 1253.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Voting Rights Act ("VRA") and the regulations promulgated thereunder are reproduced in the appendix to this brief.

STATEMENT

Texas experienced remarkable population growth in the first decade of this century. As a result, Texas will have four additional

Representatives in the United States Congress beginning with the 2012 congressional elections. Those four new seats necessitated the redrawing of the electoral map for the U.S. House of Representatives. The population growth also rendered the existing electoral map for the U.S. House, the Texas Senate, and the Texas House of Representatives inconsistent with one-person-one-vote principles. As a consequence, the Texas Legislature redrew all three maps.

Texas remains a "covered jurisdiction" under Section 5 of the VRA. Accordingly, before any voting change may be enforced, Texas must obtain "preclearance." The VRA gives covered jurisdictions two alternatives for preclearing voting changes. They may either file a declaratory judgment action in the United States District Court for the District of Columbia or seek administrative preclearance from the Department of Justice ("DOJ"). Texas pursued the former route and filed a declaratory judgment action the day after the last of the three maps was signed into law. The duly-enacted maps were also challenged in federal district court in Texas by a number of individuals and groups who alleged that the new plans were unlawful under the VRA and the Equal Protection Clause.

Consistent with the customary practice under the VRA, the Texas court refrained from awarding relief while the preclearance litigation in the District of Columbia went forward. A number of the plaintiffs in the Texas action intervened in the preclearance action and that litigation became bogged down. At the plaintiffs' request, the district court in Texas then announced its intention to draw

"interim" maps to govern the 2012 election cycle while the issue of permanent preclearance remained pending before the D.C. court. At the summary judgment hearing in the preclearance action, the court asked whether a speedy preclearance decision remained necessary in light of the Texas court's eagerness to drawn interim maps. Only Texas urged the D.C. court to move forward expeditiously. The court denied summary judgment but withheld a final ruling on preclearance.

The Texas court, rather than employing the duly-enacted legislative maps as the interim maps, or making any finding of a likely statutory or constitutional violation and tailoring equitable relief accordingly, redrew all three electoral maps. The Texas court not only declined to defer to the duly-enacted legislative maps, but also expressed its belief that it could not even use the legislative maps as a starting point because doing so would be tantamount to allowing the voting changes to take effect without preclearance. The court was unpersuaded by the fact that whatever relief it gave was only interim, and that the issue of preclearance remained very much pending before the D.C. court. Having rejected the duly-enacted legislative maps as the appropriate starting point for its analysis, the Texas court proceeded to draw maps governed by its own sense of appropriate public policy. In doing so, the Texas court made numerous highly controversial policy judgments about where to respect county boundaries, where to try to create "coalition districts," and how to distribute the four new congressional seats.

The questions presented here boil down to two: 1) whether the Texas court's approach is consistent with the deference traditionally given States, equitable principles, and the proper, and properly limited, role of the courts, and 2) if not, what is the proper resolution of this case given the looming deadlines for the 2012 primary elections.

A. The Voting Rights Act

This case arises from the interplay of two key provisions of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. § 1973 *et seq*.

Section 2 of the VRA broadly prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgment of the right . . . to vote on account of race or color," or on the account of a person's membership in a "language minority group." 42 U.S.C. § 1973(a); *id.* § 1973b(f)(2). This provision "was designed as a means of eradicating voting practices that 'minimize or cancel out the voting strength and political effectiveness of minority groups.'" *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997) (citation omitted). Section 2 operates nationwide and respects the normal presumption that duly-enacted state laws take immediate effect. The burden is on the plaintiff to bring suit and seek and obtain injunctive relief to stop a duly-enacted law from taking operative effect. Likewise, a presumption of good faith and validity attaches to the State's maps at all stages of the Section 2 proceeding. *See Miller v. Johnson*, 515 U.S. 900, 915-16 (1995).

Section 5 of the VRA, by contrast, applies only to "covered jurisdictions," and reverses the normal rule that a duly-enacted law takes immediate effect by requiring those jurisdictions to obtain preclearance before an enacted voting change may be enforced. The statute directs covered jurisdictions seeking preclearance to file a declaratory judgment action in federal district court in Washington, D.C. *See* 42 U.S.C. § 1973c(a). As an alternative, the statute also provides covered jurisdictions the option of seeking administrative preclearance from the Department of Justice. *Id.* For covered jurisdictions, like Texas, Section 5 "suspend[s] all changes in state election procedure" until they are "submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S.Ct. 2504, 2509 (2009). The standard governing preclearance is whether the change neither "has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a).

Nothing in the text of the VRA directly addresses the need for "interim" relief or how to resolve the dilemma created when the State's pre-existing election rule cannot be employed, but the new rule is subject to pending preclearance proceedings. Since Section 5 addresses only changes to existing voting laws, the normal presumption is that the pre-existing rule will continue in effect until the new change is precleared. But that presumption is inapplicable when new congressional seats are created or pre-existing maps fail to conform to one-person-one-vote principles in light of new census

data. While the statute does not directly address this dilemma, regulations promulgated by the Justice Department under the VRA expressly acknowledge the possibility that a court may allow "emergency interim use without preclearance of a voting change." 28 C.F.R. § 51.18(d) (2011). The regulations make clear that such an interim use of a legislatively enacted redistricting plan while preclearance is pending is not the same thing as preclearance and in no way excuses the jurisdiction from obtaining preclearance before the plan may take effect on a permanent basis. *See id.*

While the VRA does not address what happens when a State entitled to additional seats in the U.S. House of Representatives does not have an operative map in place before the next election, Congress has addressed this issue in a different statute. In 1941, Congress enacted 2 U.S.C. § 2a(c), which provides that "[u]ntil a State is redistricted in the manner provided by the law thereof . . . if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State." Congress subsequently limited the operation of § 2a(c) by making clear that, wherever possible, Representatives "shall be elected only from districts." *Id.* § 2c. In short, 2 U.S.C. § 2a(c), read in light of § 2c, "function[s] . . . as a last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one." *Branch v. Smith*, 538 U.S. 254, 275 (2003) (plurality op.).

B. The Texas Legislature's Redistricting Process

Between 2000 and 2010, Texas enjoyed remarkable population growth. The federal decennial census, released in December 2010, revealed that Texas' total population had grown by nearly 4.3 million people, to 25,145,561. Based on that increase, Texas was apportioned four additional seats in the U.S. House of Representatives, for a total of 36 seats.

The four new seats necessitated the redrawing of the congressional map. The substantial population growth also required the Texas Legislature to create new electoral maps for the Texas House and the Texas Senate to conform with one-person-one-vote principles. Accordingly, the Texas Legislature faced the challenge of redrawing all three maps, as well as the State Board of Education map. The Texas Legislature began the process of developing its redistricting plans almost a year before the maps were finally enacted, and before the 82nd Legislative Session was convened. In particular, the Texas House and Senate conducted numerous hearings throughout the State before convening the legislative session in January 2011. The House Committee on Redistricting also created an e-mail contact database to notify interested members of the public—including community leaders, advocacy groups, and elected officials—about upcoming legislative hearings.

While the Legislature and its committees worked diligently to lay the groundwork for redistricting, more concrete efforts needed to await

the release of block-level population data by the United States Census Bureau. Once the data were released on February 17, 2011, the Texas Legislature moved quickly to pass new redistricting plans. Leaders from both houses promptly sought additional input from the public and elected officials to ensure that the final plans fairly represented the relevant interests at stake. That process featured numerous committee hearings and meetings with legislators from both houses, and included organizations that represent the interests of minority groups.

Pursuant to House and Senate rules, every legislative hearing notice, every proposed redistricting plan submitted by the public, and every proposed amendment were posted on the Texas Legislative Council's redistricting website.[1] All public plans and amendments were also accessible through the "DistrictViewer," which is an internet-based application that displays all public maps and reports in an interactive format. The Texas Legislative Council also maintained two computer terminals that offered public access to district modeling software.

The legislative process for each of the redistricting plans proceeded as follows:

Texas House. The House Committee on Redistricting and the Speaker of the House's staff conducted a proactive outreach effort to ensure that interested parties had an opportunity to participate

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[1] *See* http://www.tlc.state.tx.us/redist/redist.html.

fully in the redistricting process. Leadership and staff held several meetings with House members from both parties, and with groups that represent minority interests, such as the Mexican American Legal Defense and Education Fund (MALDEF) and the Mexican American Legislative Caucus (MALC). Several of MALDEF's recommended changes were incorporated into the plan that was ultimately passed and signed into law. On the House floor, the Committee Chairman repeatedly encouraged members from various regions of the State to work collaboratively to submit consensus regional redistricting proposals. The committee took all of these regional proposals into consideration while crafting the new House plan.

On March 24, 2011, the Redistricting Committee held a public hearing to solicit input from the public about the upcoming reapportionment of Texas House districts. On April 13, 2011, the Committee Chairman released an initial plan (H113) for public and legislative consideration. The Committee held multiple public hearings on the Chairman's proposal. On April 19, 2011, the committee considered several amendments before approving an amended map and sending it to the House floor. That plan passed the House by a vote of 92 to 54 on April 27, 2011, and the bill passed in the Senate on May 17, 2011, by a vote of 24 to 7.

Texas Senate. The Senate Redistricting Committee also conducted proactive outreach with interested parties, including Senators, staff, and outside groups. The Committee Chairman released his statewide proposal on May 11, 2011, and the Redistricting Committee held two public hearings

shortly thereafter. On May 17, 2011, the Senate passed the bill by a near-unanimous vote of 29 to 2, and the House passed it four days later by a vote of 96 to 47.

U.S. House of Representatives. The House Committee on Redistricting conducted a public hearing on April 7, 2011 to solicit input from the public on congressional redistricting. The 82nd Legislature adjourned on May 30 without passing legislation reapportioning the districts for the U.S. House of Representatives, but the Governor called a special legislative session in part to address congressional redistricting.

The Senate Select Committee on Redistricting held a public hearing on June 3 to consider a proposed congressional redistricting plan. Later that day, after hearing testimony from interested members of the public, the Plan was voted out of committee. The full Senate considered the Plan on June 6 and passed it by a vote of 18 to 12. The House passed it on June 15 by a vote of 93 to 47.

C. The Preclearance Proceedings in D.C. District Court

As a covered jurisdiction under Section 5 of the VRA, Texas recognized the need to obtain preclearance for the new electoral maps. To that end, Texas began assembling the necessary materials for preclearance even before the Governor signed the maps into law. Once the Governor signed into law the state House and Senate plans (and the Board of Education plan, not at issue here), Texas worked to compile all of the election data, demographic information, and other materials

typically required by the Department of Justice ("DOJ") for administrative preclearance. *See* 28 C.F.R. § 51.27. The congressional plan was signed into law on July 18, 2011, and the very next day, the State sent DOJ a complete, informal administrative preclearance submission for each of the newly enacted electoral maps.

The same day, Texas formally sought judicial preclearance from the district court in the District of Columbia, as permitted by Section 5. *See Texas v. United States*, No. 1:11-cv-01303 (D.D.C. July 19, 2011). The State anticipated that its informal preclearance submission to DOJ would streamline the judicial proceedings and reduce or eliminate the need for time-consuming discovery. To that same end, during the pre-answer period Texas voluntarily provided (at DOJ's request) tens of thousands of pages of additional information and coordinated numerous interviews of state officials, all outside the court's normal discovery process.

Despite Texas' best efforts to facilitate an early answer from DOJ, DOJ declined to file an early answer, and thus Texas filed a motion to expedite the proceedings. The court denied Texas' motion. *See* Minute Order, No. 1:11-cv-01303 (D.D.C. Aug. 17, 2011). Over Texas' objections, the Court gave DOJ the full 60 days to file its answer, but granted the State's request for permission to file its motion for summary judgment *before* DOJ filed its answer. *See id*.

In the meantime, two dozen parties—many of whom also filed actions in the Texas court and are parties here—intervened in the Section 5 case. The

intervenors designated 11 expert witnesses and requested extensive discovery in an effort to block preclearance of the State's legislatively enacted maps. After DOJ filed its answer and Texas filed its motion for summary judgment, DOJ and intervenors obtained—again over Texas' objection—a delay of their response to the motion for summary judgment in order to seek additional discovery. JA 71–72, 922–24. At the same time, as explained below, the Texas court actively considered the possibility of interim relief.

Rather than viewing the possibility of interim relief as something to be avoided if possible, the D.C. court seemed to view that parallel action as *reducing* the need for expedited action. At the summary judgment hearing on November 2, 2011, the court observed that, from the outset, "there was great anxiety on the part of Texas that this case be decided by the 18th of November, 19th of November . . . . and it seems to me that the Western District of Texas is well ahead of us and so maybe that doesn't matter any more." Transcript at 110–11, No. 1:11-cv-1303 (D.D.C. Nov. 2, 2011). And at the conclusion of the summary judgment hearing, Texas was alone in urging that a prompt decision was necessary in light of the interim-map hearings taking place in the Western District of Texas. *See id.*; *see also* Letter from David J. Schenck to the Hon. Rosemary Collyer (Doc. 105), No. 1:11-cv-01303 (Nov. 3, 2011).

After the court denied summary judgment, Texas pressed for a prompt trial during the second week of December. *See* Plaintiff's Response to Court's Inquiries (Doc. 107), No. 1:11-cv-01303 (D.D.C. Nov. 22, 2011). DOJ and the intervenors, by

contrast, moved to abate the Section 5 proceeding entirely. *See* United States' and Intervenors' Motion to Hold Case in Abeyance (Doc. 108), No. 1:11-cv-01303 (D.D.C. Nov. 25, 2011). After this Court's stay order, however, the court set a trial date in the preclearance case for January 17, 2012, with closing arguments currently scheduled for February 3, 2012.

D. The Western District of Texas Litigation

1. As Texas was actively seeking preclearance of its new electoral maps in D.C. court, it also faced parallel litigation in the Texas court.

On May 9, 2011—before the Legislature had even passed its new redistricting plans—two individual plaintiffs filed suit in U.S. District Court for the Western District of Texas, asserting that Texas' existing electoral maps were unlawful, and that the court should, "[i]f need be, adopt an interim electoral plan for 2012 elections." *See* Complaint at 4, *Perez v. Texas*, No. 5:11-cv-0360 (W.D. Tex. May 9, 2011). Pursuant to 28 U.S.C. § 2284, the case was assigned to a three-judge panel consisting of District Judges Orlando Garcia and Xavier Rodriguez, and Fifth Circuit Judge Jerry Smith. The Texas State Conference of NAACP Branches and three individual plaintiffs intervened. Eddie Bernice Johnson, Sheila Jackson-Lee, and Al Green—representatives of Texas' 30th, 18th, and 9th congressional districts, respectively—were also permitted to intervene.

The Mexican American Legislative Caucus (MALC) filed a separate suit in the Western District of Texas, which was assigned to the same three-judge panel presiding over the *Perez* case. *See*

Mexican American Legislative Caucus v. Texas, No. 5:11-cv-361. A number of parties intervened in that case, including the League of United Latin American Citizens (LULAC), Congressman Henry Cuellar (the current representative of Texas' 28th Congressional District), the Texas Democratic Party, and various individuals. Several other groups also filed similar suits.[2]

2. The Plaintiffs in those cases attack the Texas House and congressional plans (but not the Senate plans) on a number of grounds, including claims of vote dilution under Section 2 of the Voting Rights Act, intentional discrimination under the Fourteenth and Fifteenth Amendments,[3] unconstitutional population deviation among districts, and unlawful racial or political gerrymandering. The district court consolidated all of the individual cases and designated *Perez* as the lead case. While the Texas

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[2] Eddie Rodriguez, Travis County, the City of Austin, and other individuals (the "Rodriguez Plaintiffs") filed suit in the Western District of Texas on May 30, 2011. *See Rodriguez v. Texas*, No. 1:11-cv-451. The Texas Latino Redistricting Task Force and several individuals (the "Task Force Plaintiffs") filed suit in the Western District of Texas on June 17, 2011. *Texas Latino Redistricting Task Force v. Perry*, No. 5:11-cv-490. Margarita Quesada and other individuals (the "Quesada Plaintiffs") filed suit on July 15, 2011. *See Quesada v. Perry*, No. 5:11-cv-592. And John Morris challenged Texas' congressional redistricting plan in a *pro se* lawsuit filed in the Southern District of Texas on June 15, 2011. *See Morris v. Texas*, No. 4:11-cv-2244.

[3] The district court granted Texas' summary judgment motion with respect to the Plaintiffs' Fifteenth Amendment claims. *See* JA 259.

court generally recognized that a final resolution of the Section 2 and constitutional claims on the merits would need to await the resolution of the preclearance litigation in the D.C. court, *see* JA 279, it moved forward with the Section 2 and constitutional claims to the extent of gathering evidence in a trial in the consolidated cases, which began on September 6 and concluded on September 16, 2011.

3. Six days after that proceeding concluded, Senator Wendy Davis—an intervenor in the Section 5 case and one of only two state senators to vote against the Senate map—brought a new suit challenging the Senate redistricting plan. *See Davis v. Perry*, No. 5:11-cv-788 (W.D. Tex.). That suit alleged that the Senate plan violated Section 2 of the VRA and the Fourteenth and Fifteenth Amendments. The district court initially planned to gather evidence on that challenge at a trial scheduled for November 14, 2011. *Davis* (Doc. 7).

On October 17, 2011, LULAC filed a virtually identical lawsuit challenging Texas' Senate redistricting plan, *see LULAC v. Perry*, No. 5:11-cv-855 (W.D. Tex.), which the court consolidated with the *Davis* case. Texas filed a motion to dismiss the *LULAC* complaint and a motion for judgment on the pleadings in *Davis* on October 21, 2011. Texas moved for summary judgment on November 5, 2011. The court has not ruled on either motion.

On November 8, 2011, the court ordered the parties to advise the court whether it should proceed with trial on the 14th. *Davis* (Doc. 68). Plaintiffs, the State, and the Texas Democratic Party filed

briefs advising the court that trial should be continued pending a ruling on preclearance. *Davis* (Docs. 70, 71, 72). On November 10, 2011, the court issued an order continuing trial indefinitely, with Judge Smith dissenting. *Davis* (Doc. 81).

E. The District Court's Interim Maps

Even before it became clear that the D.C. court would not issue a final decision on preclearance in time for the start of the 2012 election cycle, the plaintiffs began pushing the Texas court to order the use of interim maps while preclearance was pending.

On September 20, 2011, MALC notified the Texas court that DOJ had opposed preclearance of the Texas House and congressional redistricting plans. *Perez* (Doc. 358). Shortly thereafter, MALC and the Texas Latino Redistricting Task Force (hereinafter "Task Force") filed a motion for temporary restraining order to prevent implementation of those plans. *Perez (*Doc. 375). On September 29, 2011, the district court granted the motion, subject to further order of the court. *Perez* (Doc. 380).

MALC and the Task Force then urged the court to implement a schedule for the creation of interim redistricting plans. *Perez* (Doc. 383). The court directed the parties to file briefs and proposed interim plans, and appointed two employees of the Texas Legislative Council, as "independent technical advisors" to assist in drawing interim plans.

On October 7, Texas filed a pleading arguing that the Legislature's enacted plans should be implemented on an interim basis while preclearance

was pending. JA 280. Each group of plaintiffs and intervenors submitted their own proposed interim redistricting plans. Texas filed objections to all of the plaintiffs' and intervenors' proposed interim plans. JA 292. MALC, the Task Force Plaintiffs, the Rodriguez Plaintiffs, the Quesada Plaintiffs, the NAACP Plaintiffs, the African-American members of Congress, and Congressman Cuellar filed objections to some or all of the plans proposed by other plaintiffs and intervenors.

The court held a three-day hearing on the proposed interim redistricting plans.

1. The Interim House Order

On November 17, 2011, the district court issued two proposed interim maps for the Texas House: Plan H298, drawn by Judges Garcia and Rodriguez; and Plan H299, offered by Judge Smith in dissent. JA 207. The court ordered the parties to file comments and objections to the proposed interim plans by noon the following day. On November 23, 2011, the district court ordered the implementation of Plan H302 as the interim redistricting plan for the Texas House of Representatives, over Judge Smith's dissent. JA 166.

The starting point for the majority's analysis was that, because Texas had not yet received a final decision on its pending preclearance request, the Texas court could not give "any deference to the Legislature's enacted plan." JA 171. Freed from the need to defer to the legislative maps or to tailor its remedy to likely violations, the majority drew an entirely "independent map" based on its own notions of the "collective public good" and "neutral

principles" that "place the interests of the citizens of Texas first." JA 170. In doing so, the majority did not view its role as limited to remedying likely statutory or constitutional violations. Instead, the majority repeatedly emphasized that consideration of the merits was premature, and that its maps were "interim," not "remedial." JA 181. But, somewhat paradoxically, the majority redrew the maps to avoid any violations should the allegations ultimately prove meritorious and thus effectively treated plaintiffs' allegations as if they were meritorious. *See* JA 173 (noting that, for the districts that were "*challenged* as unconstitutional," the court "attempted to return them to their original configuration in the benchmark") (emphasis added).

In its "independent" interim map, the district court ordered sweeping changes to the legislatively enacted map. Even though the vast majority of districts for the Texas House had not even been *challenged* by DOJ in the preclearance proceeding or by the plaintiffs in this case, the majority's interim plan redrew the boundaries of 128 of the 150 House districts.

The majority's plan disregards countless carefully considered policy choices reflected in the legislatively enacted plan. For example, the court's map divides The Woodlands, a city north of Houston with more than 90,000 residents—splitting school districts and neighborhoods in the process—and creates a House district that one cannot drive across without crossing into another district. *See* JA 335. Similarly, the Court's plan divides the city of Frisco (population 116,000), a rapidly growing Dallas suburb whose residents had asked to be contained in

a single district. *Id.* Neither of these changes serves any apparent remedial purpose.

Moreover, the majority created three "coalition districts"—House Districts 26, 54, and 149—that join African-American, Hispanic, and Asian populations in what appears to be a concerted effort to reach a 50% threshold of minority citizen voting age population. The court offered no legal or factual justification for its creation of those apparently race-based districts.

The court's interim House plan also changes every single district in Dallas, Harris, and Tarrant Counties, despite the fact that most of these districts were not challenged by DOJ or the plaintiffs.[4] The only apparent purpose of the comprehensive reconfiguration of these counties is to minimize population deviations among districts—even though Texas' enacted plan was well within the ten percent threshold traditionally afforded state legislative redistricting plans. *See*, *e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842 (1983). Nevertheless, since the majority was expressly not deferring to the legislative map, and was drawing its own "interim" map, it assumed that more demanding standards applied to the judicial map. The majority also found it "apparent from these proceedings that the Legislature started from the presumption that it

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[4] The court's across-the-board disregard for carefully negotiated urban district lines caused particular consternation among legislators, including among the Texas Legislative Black Caucus. *See*, *e.g.*, http://blog.chron.com/texaspolitics/2011/12/african-american-lawmakers-dont-like-legislative-map/.

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." JA 180.

Judge Smith dissented, asserting that the majority "produced a runaway plan that imposes an extreme redistricting scheme for the Texas House of Representatives, untethered to the applicable case law." JA 183. Unlike the majority, Judge Smith emphasized that district courts must "follow the policies and preferences of the States, as expressed in . . . the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution." JA 185–86 (quoting *White v. Weiser*, 412 U.S. 783, 795 (1973)).

Judge Smith recognized that a court "should not act as a rubber stamp for the State where its enacted plan has not been precleared," but "must give due regard to the will of the Legislature unless the [Voting Rights Act] or Constitution requires otherwise." JA 186–87. He emphasized that the court must "consider seriously the plaintiffs' claims and the status of the action pending in the D.C. Court," and take a "cautious and restrained" approach. JA 190.

Judge Smith further emphasized that "[i]n 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." *Id.* The result was "a redistricting scheme that [rewards] 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." JA 191.

Judge Smith would have imposed a less intrusive interim map targeted at remedying what he believed to be four specific instances in which the plaintiffs had alleged "colorable claims of statutory or constitutional infirmity." JA 191–94. The majority, however, went far beyond those changes and, "as though sitting as a mini-legislature, engraft[ed] its policy preferences statewide despite the fact that no such extreme modifications [were] required by the caselaw or by the facts that are before this court." JA 194.

Texas moved the district court to stay implementation of its interim House plan pending appeal. JA 342. The district court denied that motion on November 25, 2011, over a dissent by Judge Smith. JA 156.

2. The Interim Senate Order

On November 17, 2011, the district court proposed Plan S163 as an interim redistricting plan for the Texas Senate and ordered the parties to file comments and objections to the proposed interim plan by noon the following day. JA 410. On November 23, 2011, the court ordered implementation of Plan S164 as the interim redistricting plan for the Texas Senate. JA 406.

Even though the DOJ conceded in the preclearance lawsuit that Texas' legislatively enacted Senate redistricting plan was entitled to preclearance, the Texas court nonetheless redrew Senate District 10 and four adjacent districts. Those alterations were based solely on the *allegations* of the Davis and LULAC plaintiffs, without any finding that those claims were likely to succeed. Indeed, all of the evidence before the district court showed that District 10 was, at most, a "crossover" district that was not protected by Section 2 or Section 5 of the Voting Rights Act. *See Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).

Texas moved to stay the interim Senate redistricting plan pending appeal, and the court denied the motion on November 25, over Judge Smith's dissent. JA 392, 402.

3. The Interim Congressional Order

On November 23, 2011, the district court proposed Plan C220 as the interim redistricting plan for Texas' U.S. congressional districts, and directed the parties to file comments and objections. JA 205. On November 26, the court entered an order adopting that plan as the interim congressional redistricting map, over Judge Smith's dissent. *See* JA 132.

The majority's interim congressional plan alters the boundaries of *every single one* of the 36 congressional districts.[5] Indeed, several of the court-

[5] The DOJ's objection to the legislative map for congressional districts is that, while by DOJ's count the legislative plan

drawn districts reassign 50% or more of the population from Texas' enacted plan. For example, Districts 20 and 35 in the court's interim plan maintain only 50% and 35% of their respective populations compared to the legislatively enacted plan. *See* Addendum at 9a, 10a (showing changes to Districts 20 and 35); MJA 23–24.

The majority's interim plan also disregards innumerable policy choices reflected in the legislatively enacted plan. For example, by dividing Nueces County, the court's plan frustrates the desire expressed by the public and legislators from both political parties that Nueces County and Cameron County serve as anchor counties in separate congressional districts.[6] The court's plan also divides the City of Arlington into three different congressional districts. JA 154.

Moreover, although District 25 was not the subject of the DOJ's opposition to preclearance in the D.C. court, the majority deliberately "preserved [D]istrict 25 as a crossover district" in order to "maintain[] the status quo and comply[] with Section

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maintained the total number of Hispanic and African-American "ability districts," it nevertheless retrogressed because whereas Hispanics in 2010 had ability districts in 7 of 32 seats, in the legislative map this number was 7 of 36. JA 580–81. This Court's decision in *Abrams v. Johnson*, 521 U.S. 74, 97-98 (1997), forecloses the DOJ's position, and this issue remains pending in the D.C. court. *Cf.* JA 581.

[6] *See* Trial Tr. at 1022:10–4; *see also* Trial Exhibit J-58, at 90:10–21; Trial Tr. at 1022:17–18; Trial Tr. at 1461:25–1462:7; Trial Exhibit J-61, at 113:20–22.

5." JA 144–45 n.24. The majority acknowledged that Section 2 of the VRA did not *require* the Texas Legislature to preserve crossover districts; however, it contended that its independent decision to preserve District 25 as a Democratic-leaning crossover district was "certainly permissible." *Id.*

In its effort to maintain District 25 as a crossover district, the majority significantly weakened District 35, a Latino-majority district created by the Legislature based on input from MALDEF and several Hispanic Democratic legislators from the San Antonio area. *See* Trial Tr. at 915:17-919:22. Under Texas' plan, that district would likely elect the Latino candidate of choice in ten out of ten elections, but that probability falls to six out of ten under the court's plan.[7]

The majority, moreover, deliberately created District 33 in Tarrant County as a coalition district in which African-American and Hispanic citizens combine to make up 50.5% of the citizen voting age population. JA 147 n.27. The court consciously created this coalition district not to remedy any legal violation, but simply "[b]ecause much of the growth that occurred in the Dallas-Fort Worth metroplex was attributable to minorities," JA 146,—*i.e.*, to attain proportional representation.

Judge Smith dissented from the court's interim congressional order. He would have ordered an

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[7] *Compare* Trial Exhibit D-2, Plan C185, District 35, Racially Polarized Voting Analysis, at 821–32; *with* Exhibit C, Plan C220, District 35, Racially Polarized Voting Analysis.

interim map based on Plan C216, a bipartisan plan submitted by Republican Congressman Francisco Canseco and Democratic Congressman Henry Cuellar. Judge Smith further identified ten specific instances in which the majority's interim map made unwarranted alterations to Texas' legislatively enacted map. JA 152–54.

On November 27, Texas moved the district court to stay implementation of its interim congressional plan pending appeal. The court denied the motion on the same day, over a dissent by Judge Smith.

4. The District Court's Supplemental Opinion

On December 2, after Texas had filed its emergency stay applications in this Court, the district court issued a 24-page "Supplemental Opinion" to "further clarify the legal issues discussed in the Court's prior two orders." JA 90. That supplemental opinion underscored the majority's belief that it could not defer to the duly-enacted legislative plans because doing so would be tantamount to circumventing the pending preclearance proceedings. JA 91–98. Instead, the majority accepted plaintiffs' argument that a jurisdiction actively seeking preclearance is treated no differently from a jurisdiction that has steadfastly refused even to seek preclearance. *Id.* The supplemental opinion likewise reiterated the majority's belief that its "interim" maps were different from "remedial" maps, and thus the normal rules limiting courts' remedial discretion did not apply. JA 96–100.

Judge Smith again dissented, asserting that "the order is already in the good hands of the Supreme Court," and that "[t]he majority's newly-revealed zeal to press for sweeping relief at this interim stage of the case is unseemly at best and downright alarming at worst." JA 120–21. He further noted that "[t]his 'Supplemental Opinion' has the smell of a brief on appeal," and that he "[could not] recall ever seeing an unsolicited 'supplemental opinion' come flying over the transom from a district judge desperate to lend further support for a shaky decision." JA 121.

F. The Upcoming Primary Elections

After this Court stayed the interim redistricting orders, the Texas court conducted a full-day hearing on December 13, 2011 regarding the timing of Texas' primary elections, which had been scheduled for March 6, 2012. In consultation with the Texas Secretary of State's Office and election officials from major Texas counties, the two major political parties reached an agreement—which the district court approved—to postpone all of Texas' primary elections until April 3, 2012. JA 85.

That agreement, however, is expressly contingent on there being usable maps in place by February 1, 2012. JA 80–81. If no usable maps are in place by that date, the political parties' carefully crafted agreement will be discarded, and some or all primary elections will be further delayed.

SUMMARY OF ARGUMENT

The procedural history of the parallel proceedings in the District of Columbia and Texas is long and tortuous, but the errors embedded in the orders under review are clear and straightforward. Despite the district court's confusion, the drawing of "interim" relief is very much an exercise of equitable and remedial discretion. Its entire legitimacy depends on it being so. Likewise, the pendency of preclearance does not deprive a legislative map of all claims to deference. Indeed, the fact that preclearance is pending and being actively pursued is precisely what distinguishes this case from prior cases involving recalcitrant jurisdictions, on which the Texas court mistakenly relied. Thus, the remarkable proceedings below bear no resemblance to the straightforward and proper course—treating the legislative maps as the presumptive "interim" maps and altering them only when necessary to remedy a likely statutory or constitutional violation. This Court should clarify as much so this kind of error is never replicated. The only real question is what to do now that the need for an "interim" map to govern the 2012 elections has become exigent.

I.A. The Texas court clearly erred by refusing to grant *any* deference to Texas' legislatively enacted districting maps. The drawing of legislative districts is a core function of state government that requires a complex balancing of countless different interests, and like all actions of state officials it enjoys a presumption of good faith. The sole exception is when officials in a covered jurisdiction have failed even to seek preclearance. But when a jurisdiction actively pursues preclearance, there is no reason to

relax the traditional presumption of good faith. Indeed, even when certain portions of a State's map are found to be unlawful, courts must still defer to the enacted map to the greatest extent possible, and must ensure that any alterations of the map are narrowly tailored to remedying the violation.

B. Federal courts are charged with resolving cases or controversies, which occasionally requires them to discharge the delicate responsibility of enjoining duly-enacted state and federal statutes. Well-established principles govern that sensitive judicial role. The court below freed itself of all of those constraints by labeling its role as "interim," not remedial. The order that resulted is more akin to a legislative act than a judicial one. Without making any finding of an actual or likely violation of law, the court simply redrew Texas' election maps based on its own notions of "neutral principles," the "collective public good," and "fairness and impartiality." JA 170–71. But those are not standards that courts can meaningfully apply. Redistricting is an inherently political process, and—in the absence of some violation of statutory or constitutional law—it is wholly committed to the discretion of state legislatures.

C. The Texas court's approach disregarded longstanding and well-settled principles of equity jurisprudence. The court was profoundly wrong to view its so-called "interim" orders as something other than a form of preliminary equitable relief governed by well-established rules. This Court has made clear that such relief is available only after the party challenging government action demonstrates a likelihood of success on the merits. *See Winter v.*

Natural Res. Def. Council, 555 U.S. 7, 32–33 (2008). The district court seemed to think that the normal rules of equity do not apply in light of the pending Section 5 proceedings. But the fact that any relief, including the use of the duly-enacted legislative map, is "interim" and that *permanent* changes must await preclearance is sufficient to accommodate Section 5. Any "interim" relief that goes further and alters the map based on alleged statutory or constitutional violations must comply with traditional equitable principles. Moreover, any equitable decree—interim or otherwise—must be narrowly tailored to remedying an actual or likely violation of law. The district court was flatly wrong to suggest that it "may not simply fix the problematic parts of the enacted map," but must instead create a new map out of whole cloth. Indeed, the requirement that equitable relief be narrowly tailored applies with even *greater* force in cases, such as this one, in which the equitable decree is explicitly race-conscious.

D. The practical effect of the district court's methodology is to punish Texas for delays in the preclearance process it did not cause and to create incentives for gamesmanship that exacerbate Section 5's already substantial intrusion on state sovereignty. Texas was saddled with the district court's far-reaching interim orders, not because its plans were found likely unlawful, but simply because the preclearance process was taking too long. And those delays are at least in part the result of intervention, discovery requests, and extension requests from the very same parties that are the plaintiffs in this case. The resulting potential for

gamesmanship is obvious: opponents of a legislatively enacted plan can effectively win the case without any ruling on the merits if they delay the preclearance proceeding as long as possible, and simultaneously file far-reaching claims of constitutional and statutory violations in another district court.

E. The Texas court erroneously relied on cases involving recalcitrant jurisdictions that declined even to seek preclearance. When the failure to seek preclearance is the problem, a remedy that incentivizes a covered jurisdiction to seek preclearance makes sense. But when a covered jurisdiction is already actively seeking preclearance, such remedies are wholly out of place.

II. The process the district court *should* have followed is straightforward: Texas' legislatively enacted map, which is entitled to a presumption of good faith, must be used as the "interim" map while preclearance is pending, unless the court makes a finding that some aspect of that plan is likely to violate the VRA or the Constitution. And, consistent with equitable principles, any interim alteration or modification of Texas' map must be narrowly tailored to remedying that likely violation of law.

This properly restrained approach to interim relief is entirely consistent with Section 5 of the VRA. Allowing an election to go forward on an interim basis is not the same thing as granting preclearance, nor does it eliminate the requirement that Texas obtain preclearance before it may use its new maps on a *permanent* basis. To the contrary, DOJ's own regulations make clear that "interim"

relief is just that, and does not obviate the need for preclearance before a voting change may take permanent effect. But that is the only way in which "interim" orders are distinct. They remain remedial orders subject to the normal rules governing equitable remedies.

III.A. The proper approach to "interim" relief is straightforward, and it is critical for this Court to correct the district court's errors so that this scenario is not replicated in future cases. The appropriate relief at this juncture—with Texas' already-delayed 2012 elections rapidly approaching, and candidates, voters, political parties, and state officials in desperate need of guidance about the precise contours of the districts under which those elections will be held—is less straightforward. Indeed, usable maps must be in place by February 1, 2012 even in order for the *delayed* primary elections to go forward under the agreement struck by the two major political parties and adopted by the district court. It is not at all clear that these exigencies of timing allow for a remand for the Texas court to apply the proper remedial standard and to craft yet another batch of interim maps for the upcoming elections.

In light of these exigencies, this Court should vacate the interim orders and remand to the district court with instructions to impose Texas' legislatively enacted map as the interim plan while preclearance is pending. Federal courts have authority to authorize the emergency interim use of a State's legislatively enacted plan without first obtaining preclearance, *cf.* 28 C.F.R. § 51.18(d), and the Court should exercise that authority here. Nothing in that order would relieve Texas of its undisputed

obligation to obtain preclearance before implementing its new maps on a permanent basis.

B. At a minimum, this Court should provide additional guidance for the district court to ensure that it does not make the same errors on remand. In addition to clarifying that the deference owed duly-enacted statutes and traditional equitable standards are both fully applicable, this Court should clarify several other points. *First*, the Court should reiterate that nothing in the VRA requires proportional representation on the basis of race, and that a State's failure to maximize the voting strength of minority groups does not violate the VRA. *Second*, the Court should hold that nothing in the VRA requires a State to draw "coalition districts," in which multiple minority groups are a combined majority of the population. The district court created a number of coalition districts in its interim orders, even though it was plainly permissible for the Texas Legislature to choose not to create those districts. *Third*, the Court should make clear that the district court may not depart from traditional districting principles, such as the Texas "county line rule," unless that departure is the only way to address an actual or likely violation of law. *Fourth*, the Court should clarify that the district court cannot seek to equalize population among state legislative districts unless the population deviations in the legislatively enacted map violate the law.

ARGUMENT

I. THE DISTRICT COURT CLEARLY ERRED BY IMPOSING INTERIM ELECTORAL MAPS THAT DISREGARD BASIC PRINCIPLES OF FEDERALISM, THE JUDICIAL ROLE, AND EQUITY JURISPRUDENCE

The district court did not mince words about what it was doing in the orders under review: even though it made no "ruling on the merits of any claims asserted by the Plaintiffs," the court nonetheless disregarded Texas' legislatively enacted maps and drew from scratch three "independent" interim maps designed to govern the 2012 election cycle for the Texas House, Texas Senate, and U.S. House of Representatives. JA 167, 169; *see also* JA 93–94 (expressing the view that it "must draw independent redistricting plans without ruling on the merits of the pending legal challenges").

The majority could not have been clearer that, in its view, it "was not required to give *any deference* to the Legislature's enacted plan." JA 171 (emphasis added); *see also* JA 103. Nor did it view its role as remedying actual or likely statutory and constitutional violations. Instead, it effectively accepted nearly all of the plaintiffs' allegations as meritorious, and redrew Texas' electoral maps to "avoid" those challenges. JA 101, 118; *see also* JA 190 (noting that in "almost every instance" the district court majority's maps accommodate the plaintiffs' claims).

Because it was drawing only an "interim" map, which it repeatedly insisted was different from a

remedial map, the district court concluded that it was not bound by traditional principles governing preliminary equitable relief, but was instead required to draw an "independent" plan. JA 96–99. The court further emphasized that it "may not simply fix the problematic parts of the enacted map," but instead "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 the interests of any political party or particular group of people." JA 170. The majority did not specify what standards or principles of law would inform its sense of "the collective public good."

The district court's judicially drawn interim maps disregard core principles of state sovereignty and equitable jurisdiction, exceed the properly restrained role of the judiciary, punish Texas for delays in *another* judicial proceeding that are beyond its control, and open the door to gamesmanship by opponents of legislatively enacted districting plans. Those errors, individually and collectively, require vacatur of the challenged orders.

A. The District Court Owed Deference to Texas' Duly Enacted Legislative Maps

It is well settled that "reapportionment is primarily the duty and responsibility of the State." *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *see White v. Weiser*, 412 U.S. 783, 794-95 (1973). Any federal-court review of districting legislation "is a serious intrusion on the most vital of local functions," and courts must accordingly "be sensitive to the complex interplay of forces that enter a legislature's

redistricting calculus." *Miller v. Johnson*, 515 U.S. 900, 915–16 (1995). In light of the inherent difficulty of assessing legislative intent, as well as the "sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Id.* at 916.

That presumption applies with full force to redistricting plans in states that are covered by Section 5 of the VRA. Section 5 is a significant intrusion into state sovereignty and reverses the normal presumption that duly-enacted state laws take immediate effect, but it does not rob covered jurisdictions of this fundamental presumption of good faith. Nor does it make the judicial task any less sensitive or difficult. This Court's precedents make this clear.

In *Upham v. Seamon*, 456 U.S. 37 (1982), Texas sought administrative preclearance for its reapportionment plan, but the Attorney General objected to two of the districts in the plan, thus rendering it "unenforceable." *Id.* at 38. In drawing a remedial interim map, the district court did not limit itself to correcting those violations of law; it also refused to accommodate so-called "political factors" reflected in the legislative plan, such as the desire to provide "safe" seats for certain representatives. *Id.* at 39–40.

This Court summarily reversed, agreeing with the petitioners and Texas that, "in the absence of any objection to the [ ] districts by the Attorney

General, and in the absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgments the plans reflect, even under circumstances in which a court order is required to effect an interim legislative apportionment plan." *Id.* at 40–41. The Court noted that any "interim reapportionment order" requires "'reconciling the requirements of the Constitution with the goals of state political policy.'" *Id.* at 43 (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)).

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*." *Id.* (emphasis added). That is, in the absence of any finding that some aspect of the challenged 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." *Id.*

Upham makes clear that, even when preclearance is *denied* with respect to certain districts, the State's legislatively enacted map remains entitled to deference, and any remedy must be narrowly tailored to correcting the legal defects in the challenged districts. It cannot be the rule that a State's legislatively enacted plan is entitled to less deference when a judicial preclearance proceeding is pending than after administrative preclearance has been denied. But that is precisely what the district court held in the challenged orders.

B. The District Court's Interim Maps Exceeded the Properly Limited Institutional Role of the Judiciary

Electoral districting "is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915. Needless to say, it is a far more difficult subject for courts, and judicial review must be narrowly focused on judicially administrable standards. Indeed, even when a federal court "declares an existing apportionment scheme unconstitutional," it is still "appropriate, wherever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). The majority below lost sight of these bedrock principles and issued an opinion that took the court beyond "'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citation omitted).

The role of the federal courts is to resolve cases or controversies, and to "provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Of course, when "actual harm" has been suffered, a court may properly "order [ ] the alteration of [the] institutional organization or procedure that cause[d] the harm." *Id.* at 350. Indeed, redressability is a core requirement of Article III. *See Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560–61 (1992). But without a finding of some actual or likely violation of law, a district court has no power whatsoever to impose a remedy. *See Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (noting that "federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the constitution or does not flow from such a violation").

The Texas court freed itself from these traditional constraints by emphasizing that it was fashioning an "interim" order and not a "remedial" one. JA 181. But that dichotomy is utterly false. A court has authority to draw an "interim" map only to the extent it is an exercise of the court's remedial authority.

Once the Texas court declared itself unbound by the constraints that govern remedial orders, the orders that emerged, not surprisingly, were far more akin to legislative acts than judicial ones. The majority emphasized that it was *not* simply "fix[ing] the problematic parts" of the enacted maps, but was drawing an entirely "independent" map based on the court's own notions of "neutral principles," the "collective public good," and "fairness and impartiality." JA 170–71. The court "attempted to avoid the division of municipal boundaries and broader communities of interest," it "tried to avoid pairing incumbents" against one another, it "tried to avoid splitting county lines," and it "attempted to adhere to the historical or benchmark configuration on the districts as much as possible." JA 101–102. None of this remotely resembles the resolution of a "case or controversy." The court's attempt to follow neutral districting principles is commendable in the

abstract, but those are simply not choices for the court to make, unless it is remedying a likely or actual violation of law.

Redistricting is an inherently political process that involves a "complex interplay of forces," many of which are far removed from the core competency of the federal judiciary. *Miller*, 515 U.S. at 915. Numerous discretionary policy decisions are required "to exercise the political judgment necessary to balance competing interests," *id.; see also Vieth v. Jubelirer*, 541 U.S. 267, 358 (2004) (Breyer, J., dissenting) ("political considerations will likely play an important, and proper, role in the drawing of district boundaries"). When a violation of the VRA or the Constitution is alleged, courts have a necessary and cabined role in assessing and remedying any violation. But even then, this Court's cases are replete with references to the need to tread lightly. *See Upham*, 456 U.S. 42–43. For a court to attempt to draw a "fair" interim map, not to remedy some likely or actual violation, but simply to further the notion of the "collective public good," leaves the court completely at sea, engaged in something other than a judicial function.

Moreover, because the district court engaged in an essentially standardless exercise, it effectively eliminated any possibility for meaningful judicial review. Normally, when a district court enters an interim equitable remedy, such as a preliminary injunction, an aggrieved party may seek immediate appellate review on the basis that: (1) there is no likely violation of law that would justify the remedy; or (2) the remedy is not narrowly tailored to that likely violation. Neither avenue is meaningfully

available here. The district court expressly disclaimed any reliance on likely violations of law, and it is entirely unclear how an appellate court would evaluate the district court's "independent" balancing of the competing interests in drawing an interim map.[8]

Nothing in Section 5 of the Voting Rights Act, which imposes the preclearance obligation, remotely sanctions this essentially unreviewable judicial takeover of a state's redistricting process just because preclearance is pending. Section 5 is already at the very outer limits of Congress' constitutional authority. *See Nw. Austin*, 129 S.Ct. at 2511-13. Its intrusion on state sovereignty would become constitutionally intolerable if it could be read as sanctioning the sweeping, standardless interim remedies imposed by the district court here.

C. The District Court's Interim Maps Violate Longstanding Principles of Equity Jurisprudence

Any judicially crafted remedy for an allegedly unlawful redistricting plan "should act and rely upon general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *see also Mahan v. Howell*, 410 U.S. 315, 332 (1973) (holding that district courts "are bound to apply equitable considerations" in applying

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[8] For example, what if the district court's interim map disrupted a carefully crafted (and entirely race-neutral) political compromise that was critical to the passage of the legislatively enacted map? It is unclear how, if at all, the state could seek appellate review of that alteration of its map.

"interim remedial techniques in voting rights cases"). Here, the district court's interim maps—the existence of which is justifiable, if at all, only as an equitable remedy—flout well-established principles of equity jurisprudence, which make clear that any equitable remedy must be premised on an actual or likely violation of law, and must be narrowly tailored to addressing that harm.

1. Any Equitable Remedy Must Be Based on an Actual or Likely Violation of Law

The Texas court's so-called "interim" electoral maps are analytically identical to a preliminary injunction, as the purpose of both remedies is to provide temporary relief to a party while litigation is pending. A preliminary injunction, of course, is available only upon a showing that, *inter alia*, the plaintiff is "likely to succeed on the merits." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *cf. Nken v. Holder*, 129 S.Ct. 1749, 1756 (2009) (interim equitable remedy of a stay order is available only if the "applicant has made a strong showing that he is likely to succeed on the merits").

Having disclaimed any need to find likely violations to justify its "interim" (not "remedial") order, the court essentially redrew Texas' legislatively enacted election maps to address the plaintiffs' *allegations* of discrimination, without making even a preliminary determination of whether any of those claims were likely to have merit. *See* JA 101 (court's interim maps "attempted to avoid the same legal challenges" advanced by the plaintiffs). As Judge Smith noted in his dissent, "[i]n

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." JA 190. The result is "a redistricting scheme that [rewards] 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." JA 191.

2. Any Equitable Remedy Must Be Narrowly Tailored to the Legal Violation Being Remedied

As this Court has explained, in "any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). Equitable relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *cf. Winter*, 129 S.Ct. at 376 (describing preliminary injunctive relief as "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief").

When "the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (citation omitted). Simply put, "appropriate consideration must be

given to principles of federalism in determining the availability and scope of equitable relief." *Id.* at 379.

Applying those principles, this Court has repeatedly vacated equitable decrees that swept more broadly than the harms they were intended to remedy—particularly where, as here, the remedial orders in question interfered with core prerogatives of state or local governments. In *Whitcomb v. Chavis*, 403 U.S. 124, 160–61 (1971), the district court entered an order eliminating every multi-member electoral district in Indiana based solely on a finding of discrimination in one inner-city area. This Court vacated the order, holding that "the District Court erred in so broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so." *Id.* at 161.

In *Milliken v. Bradley*, 418 U.S. 717 (1974), the district court imposed a desegregation plan for the Detroit public school system that extended far beyond the city limits to 53 neighboring school districts, without any consideration of whether those districts had engaged in discriminatory practices. *Id.* at 733. This Court vacated that order, emphasizing that, "[b]efore the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district." *Id.* at 744–45. Without "an interdistrict violation and interdistrict effect, there is no

constitutional wrong calling for an interdistrict remedy." *Id.* at 745.

Similarly, in *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413, 418 (1977), the court of appeals imposed a sweeping, system-wide remedy on a school district, based solely on "three separate although relatively isolated" instances of racial discrimination. This Court reversed, faulting the court of appeals for "impos[ing] a remedy which . . . is entirely out of proportion to the constitutional violations found by the District Court," rather than "tailoring a remedy commensurate to the three specific violations." *Id.* at 417–18; *see also Lewis v. Casey*, 518 U.S. 343, 357–59 (1996) (holding that two instances in which prison inmates were denied access to a law library "were a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief").

If anything, the interim redistricting maps drawn by the district court in this case are even more overbroad than the equitable decrees that this Court vacated in the cases cited above. In those cases, there was at least *some* finding of a constitutional violation, albeit not one that would justify a sweeping structural remedy. Here, in contrast, the district court redrew Texas' legislatively enacted electoral maps even though it expressly *declined* to make even a preliminary ruling on the merits of the plaintiffs' claims. *See* JA 93–94, 167, 169. At the very least, deeply rooted jurisprudential principles required the district court to ensure that its equitable remedy was narrowly tailored to likely violations of law. The district court was flatly wrong to suggest that its authority

extended beyond "simply fix[ing] the problematic parts of the enacted map." JA 169.

3. Any Race-Conscious Remedy Must Be Narrowly Tailored

Those basic equitable principles apply with even greater force where, as here, a judicially imposed remedy is based on racial considerations. The guarantee of Equal Protection governs all government actions, including those of the judicial branch. *See, e.g., United States v. Paradise*, 480 U.S. 149, 166–67 (1987) (plurality op.) (applying strict scrutiny to court's race-based remedial order); *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) (holding that "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny"). While courts sometimes issue race-based remedies, they generally do so to remedy actual, proven racial discrimination, in which case the remedies are both justified by a compelling interest and narrowly tailored. *See, e.g., Paradise*, 480 U.S. at 166–67 (plurality op.). A judicial order that takes race into account, but expressly disclaims any intent to remedy a likely constitutional or statutory violation, thus raises grave constitutional concerns.

Here, the district court clearly took race into account in drawing its interim maps. In particular, the court deliberately created a number of "coalition" districts, in which multiple minority groups represent a combined majority of voters in a district. *See supra* at 19, 24. Indeed, by the court's own account, one such district was created solely

"[b]ecause much of the growth that occurred in the Dallas-Fort Worth metroplex was attributable to minorities." JA 146. In the absence of some finding that creation of those race-based districts was absolutely necessary to correct an actual or likely violation of law, the district court's actions were not only improper but unconstitutional.

D. The District Court's Interim Maps Improperly Punish Texas for Delays in the Preclearance Process Beyond Texas' Control

In addition to the legal errors described above, the practical effect of the interim orders is to punish Texas for delays that are entirely beyond the State's control. Texas filed its preclearance request the day after its congressional map was signed into law, and has done everything in its power to expedite and facilitate the preclearance process. *See supra* at 10–13. Yet Texas is subject to these far-reaching interim orders, not because its legislatively enacted maps have been found unlawful, but because the D.C. court has yet to rule on Texas' preclearance claims. Those delays were in many ways caused by the same parties who have challenged Texas' electoral maps in this case. *See id.*

Under the court-drawn interim maps, the challengers to Texas' map have effectively prevailed on the merits, even though there has been no finding that a single aspect of Texas' plan violates, or is even likely to violate federal law. The absurdity of the district court's approach is well illustrated by the court-drawn interim map for the upcoming Texas Senate elections. That map was supported by all but

two Texas Senators and a strong majority of the Texas House, and the Department of Justice has "asserted no objection to the plan" in the pending preclearance proceeding. JA 407. Nonetheless, solely because "the Legislature's enacted map has not been precleared," the Texas court found it necessary to alter the lines of five different Senate districts in order to restore the single challenged district to its prior configuration. JA 407–08 & n.2.

Put differently, the mere fact that one of only two Texas Senators to oppose the map self-servingly *alleged* that the district she represents was unlawfully redrawn—and intervened in the Section 5 proceeding—was enough for the district court to redraw five districts. And the court's interim congressional map alters *every single district* in Texas' plan, with no finding of any likely violation of law. *See* JA 152.

The resulting potential for gamesmanship is obvious. Opponents of a legislatively enacted plan can effectively win the case simply by alleging a violation and delaying the preclearance proceeding. That is exactly what has happened here. Two dozen parties—including many of the plaintiffs from the Texas case—have intervened in the preclearance proceeding. Those intervenors subsequently designated eleven expert witnesses, requested extensive discovery, and successfully obtained an extension of their response to Texas' motion for summary judgment, resulting in significant delays.

As long as the preclearance case remains pending, the plaintiffs have effectively won the case, as elections will be conducted under the highly

favorable, judicially drawn interim maps. And, once one round of elections is conducted under the judicially drawn interim maps, plaintiffs will have every incentive to argue (erroneously) that *that map*, rather than Texas' enacted map, should be treated as the benchmark against which future redistricting changes are assessed. *See* JA 184–85 (Judge Smith noting that, after winning interim maps, "[t]he plaintiffs then predictably will claim that the interim map ratchets in their favor by constituting a new benchmark for preclearance"). If this gambit succeeds here, it will become standard operating procedure for anyone who is dissatisfied with a legislatively drawn map, including legislators who were not successful in the lawmaking process. In practical effect, it will eliminate judicial preclearance as a viable option, even though it is one of two statutory avenues for discharging the onerous preclearance requirement.

E. Cases in which a Covered Jurisdiction Has Sought To Evade Its Preclearance Obligations Altogether Are Inapposite

Plaintiffs and the district court have argued throughout this proceeding that the district court properly drew its own "independent" interim maps—while giving no deference to the legislatively enacted maps—because Texas has not yet received preclearance of its new redistricting plans. In support of that argument, plaintiffs rely heavily on *Lopez v. Monterey County*, 519 U.S. 9, 21 (1996), *Clark v. Roemer*, 500 U.S. 646 (1991), and *McDaniel v. Sanchez*, 452 U.S. 130 (1981).

Those cases are inapposite, as they involved situations in which recalcitrant jurisdictions had attempted to avoid their preclearance obligations altogether. In *Clark*, this Court held that Section 5's "prohibition against implementation of unprecleared changes" required the District Court to enjoin an upcoming judicial election where "Louisiana had with consistency ignored the mandate of § 5." 500 U.S. at 654-55.

Relying on *Clark*, this Court held in *Lopez* that a covered jurisdiction may not hold elections under an unprecleared plan where it "did not preclear the ordinances as required by § 5," even though it had been on notice for "several years" that preclearance was required. 519 U.S. at 321; *see also id.* at 24 ("The County dismissed its declaratory judgment action before the District Court for the District of Columbia made any findings, and it has never submitted the consolidation ordinances to the Attorney General for review."). Similarly, in *McDaniel*, the Court held that the district court erred by adopting a county's permanent remedial plan "before it had been submitted to the Attorney General or the United States District Court for the District of Columbia." 452 U.S. at 153.

When a covered jurisdiction is clearly trying to evade the preclearance process altogether, a judicial remedy designed to incentivize that jurisdiction to seek preclearance makes perfect sense. But, when a jurisdiction is already actively pursuing preclearance, such a remedy is a *non sequitur*. Here, Texas, unlike the covered jurisdictions in *Clark*, *Lopez*, and *McDaniel*, filed a suit for judicial preclearance one day after its final redistricting map

was signed into law, and it has diligently litigated those claims before the D.C. court.

This Court emphasized in *Lopez* that "[t]he goal of a three-judge district court facing a § 5 challenge must be to ensure that the covered jurisdiction *submits its election plan to the appropriate federal authorities* for preclearance as expeditiously as possible." 519 U.S. at 24 (emphasis added). That has happened here. Accordingly, there is no basis for treating Texas the same as a jurisdiction that is attempting to shirk its obligations under Section 5.

II. DEFERENCE TO TEXAS' MAP AND APPLICATION OF TRADITIONAL EQUITABLE REQUIREMENTS ARE FULLY CONSISTENT WITH THE PRECLEARANCE PROCESS

A. Preliminary Likelihood-of-Success Rulings Would Not Interfere with the D.C. Court's Jurisdiction or Prejudice the Judicial Preclearance Action

Relying on *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977), and *Conner v. Waller*, 421 U.S. 656 (1975), the Texas court concluded that it was prohibited from giving any consideration to the merits of the plaintiffs' claims before redrawing Texas' electoral maps. *See* JA 96–99, 176. But that gets matters backwards. It cannot be that courts are free to impose sweeping injunctive relief, but cannot consider even the likelihood of success on the merits. Those cases simply hold that only the D.C. court may make a final determination

of whether a covered jurisdiction is eligible for preclearance.[9] Nothing in *Conner* or *Warren County* suggests that a district court is barred from making even a *preliminary* assessment of the plaintiffs' claims before rewriting a legislative map. Such a rule would be absurd—and flatly contrary to settled principles of equitable relief.

The district court also asserted that there would be a risk of "inconsistent factual findings and determinations" if it were required to evaluate the plaintiffs' likelihood of success on the merits while the preclearance proceeding remained pending. JA 98. But just as the "interim" map does not obviate the need for judicial preclearance, the determination concerning a likely violation is different from and does not displace the ultimate decision whether preclearance should be granted (or denied) on a permanent basis.

Nor do considerations of judicial economy support the Texas court's approach. In crafting its "independent" interim maps, the Texas court held a two-week trial and a three-day hearing and compiled a massive evidentiary record. JA 100. Indeed, under a properly restrained approach, the district court is likely to *save* resources because its inquiry is

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[9] In *Warren County*, a district court in Mississippi expressly concluded that the challenged districting plan "will not lessen the opportunity of black citizens of Warren County to participate in the political process." 429 U.S. at 646. Similarly, in *Connor*, the district court "erred in *deciding the constitutional challenges* to the Acts based upon claims of racial discrimination." 421 U.S. at 656 (emphasis added).

a narrowly focused and quintessentially judicial one. It need not conscript legislative resources to draw independent maps or assess "the collective public good." Instead, it need only focus on whether the familiar four-factor test for preliminary injunctive relief is satisfied.

B. A Properly Restrained Approach to Interim Relief is Consistent with Section 5

The proper procedures for interim relief described above are entirely consistent with Section 5 and its reversal of the normal presumption that legislative changes take immediate effect. Allowing an election to go forward on an interim basis while preclearance is pending is not the same as *granting* preclearance, and in no way eliminates the requirement that the State obtain preclearance. Texas has never disputed that it must obtain preclearance from the D.C. court before implementing its legislatively enacted maps on a *permanent* basis.

For most voting changes subject to Section 5, the need for an interim remedy simply does not arise: the assumption is that, absent preclearance, the pre-existing policy will continue to govern. The need for an "interim" order only arises when the pre-existing policy or map is unusable and the proposed change has not yet been precleared. This situation arises infrequently, and the VRA does not expressly address such "interim" orders. But the regulations promulgated by DOJ under the VRA expressly recognize that federal courts may need to authorize the "emergency interim use without preclearance of

a voting change." 28 C.F.R. § 51.18(d). At the same time, that provision makes clear that judicial imposition of an unprecleared plan on an interim basis does not obviate the need for preclearance to use that change on a permanent basis. *See id.* (noting that interim use of an unprecleared change "does not exempt from § 5 review any use of that practice not explicitly authorized by the court"). Thus, there is no conflict between Section 5's preclearance requirement and the use of the legislative map only as an "interim" map.[10]

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[10] While the VRA does not expressly address what happens when a pre-existing practice is unusable and a new change has not been precleared, Congress has addressed the situation in which a State is allocated additional seats and an election must take place before a new congressional map can be drawn. While Congress has directed that districted elections take place wherever possible, *see* 2 U.S.C. § 2c, in a true exigency, Congress has provided that the new seats should be filled through an at-large election. *See id.* § 2a(c); *Branch*, 538 U.S. at 275 (plurality op.). *Branch* reconciled those provisions by concluding that they governed judicial as well as legislative redistricting. That conclusion depended on the assumption that judicial redistricting is conducted in the manner provided by state law—*i.e.*, that judicial redistricting is governed by the "'policies and preferences of the State, as expressed in,'" among other things, "'the reapportionment plans proposed by the state legislature,'" except to the extent the latter is unconstitutional.'" *Id.* (quoting *White v. Weiser*, 412 U.S. at 795). The Texas court's decision to draw an independent map that disregarded the legislative plan without a finding of any constitutional difficulty conflicts with this basic assumption of *Branch*.

III. THIS COURT SHOULD ORDER THE INTERIM USE OF THE LEGISLATIVELY ENACTED PLAN OR, AT A MINIMUM, PROVIDE ADDITIONAL GUIDANCE TO THE DISTRICT COURT ON REMAND

A. This Court Should Order the Use of Texas' Legislatively Enacted Map as the Interim Map While Preclearance is Pending

Texas' 2012 elections have already been delayed by agreement of the two major political parties. JA 80–81. Even the deadlines contained in that carefully crafted agreement, however, are rapidly approaching. Candidates for office need to know the borders of the districts in which they will be running. Voters need to know who their candidates will be. Election officials need to print and mail absentee and overseas ballots. And, in order for the primaries to go forward on April 6, 2012, as agreed to by the political parties, usable redistricting maps must be in place by February 1, 2012. JA 80–81, 85. Especially for the presidential primaries, any further delays will significantly diminish the role of the nation's second-largest State in choosing the parties' presidential candidates.

In light of these exigencies, there simply does not appear to be enough time to remand the case and allow the district court to craft yet another batch of interim maps for the upcoming elections. Accordingly, this Court should vacate the interim orders and remand to the district court with instructions to impose Texas' legislatively enacted

plan as the interim plan while preclearance is pending.

As explained above, a federal court clearly has authority to authorize the emergency interim use of a State's legislatively enacted redistricting plan without first obtaining preclearance. *See* 28 C.F.R. § 51.18(d); *Johnson v. Mortham*, 926 F. Supp. 1460, 1494 (N.D. Fla. 1996) (authorizing use of an unprecleared plan "on an emergency interim basis for the 1996 congressional elections," although "[t]he Florida legislature will be required to obtain Section 5 preclearance for the use of such a plan for any elections after 1996").

Texas' already-delayed 2012 primary elections are rapidly approaching, and the State desperately needs clear guidance about the maps under which those elections will be conducted. And, despite months of litigation in two different district courts, there has been no finding that any aspect of Texas' legislatively enacted districting plans violates, or is likely to violate, federal law. Accordingly, this Court should order those plans to go into effect on an immediate, interim basis. That order, of course, would not relieve Texas of its obligation to seek and obtain preclearance before implementing its new maps on a permanent basis.

B. At a Minimum, This Court Should Provide Additional Guidance for the District Court on Remand

If this Court does not order the use of Texas' legislatively enacted plan as an interim map while preclearance is pending, it should not only underscore that the legislative map is the

appropriate starting point to be modified only if and to the extent that traditional equitable principles are satisfied, but also provide additional guidance to the district court so that the court does not repeat the same errors on remand. *See* JA 204 (Judge Smith expressing "hope that, on appeal, the Supreme Court will provide appropriate and immediate guidance"). In addition to the broad methodological errors described above, if the district court is required to craft another round of interim maps on remand, it is clearly in need of this Court's guidance in at least four respects.

1. The District Court Improperly Allocated Additional Congressional Seats in Proportion to Race

In the interim congressional order, the district court modified the legislatively enacted map to add an entirely new "minority coalition opportunity district" (District 33) because "much of the growth that occurred in the Dallas-Fort Worth metroplex was attributable to minorities." JA 146–47. The court also complained that the number of "minority opportunity districts" in the legislatively enacted Texas House plan did not reflect statewide Hispanic population growth. JA 173. The court apparently believed that Texas had an obligation to draw a certain number of minority opportunity districts in proportion to each racial group's share of the increase in population.

But proportionality cannot justify this alteration of the electoral map, as the VRA explicitly rejects any right to proportional representation. *See* 42 U.S.C. § 1973(b) ("[N]othing in this section

establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."). And, of course, a State's failure to *maximize* minority voting strength does not violate the VRA. "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." *Johnson v. DeGrandy*, 512 U.S. 997, 1017 (1994).

This Court should clarify on remand that a district court drawing an interim map while preclearance remains pending may not alter the legislatively enacted districting plan based on proportional-representation concerns or to maximize minority voting strength.

2. The District Court Incorrectly Believed It Was Required To Create Coalition Districts

In addition to District 33, the Texas court also purposefully created a number of additional "coalition districts," in which multiple minority groups are combined in an effort to form multi-ethnic, minority-controlled districts. For example, the court created a new congressional district in North Texas in which African-Americans (29.1%), Latinos (21%), and Asians (6%) constitute a combined majority of voting-age citizens. *See* Tex. Leg. Council, Plan C220, Red 106 Report. Similarly, the interim House order created two House districts (Districts 26 and 54) and re-created a third (District 149), in which three minority groups are a combined majority of voters. *See* JA 104–05, 200–01.

It is well established, however, that the VRA requires creation of a majority-minority district only when, *inter alia*, the minority group claiming vote dilution is "sufficiently large and geographically compact to create a majority in a single-member district," and is "*politically cohesive*." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (emphasis added); *cf. Bartlett v. Strickland*, 129 S.Ct. 1231, 1243 (2009) (noting that nothing in § 2 of the VRA "grants special protection to a minority group's right to form political coalitions"). Even assuming Section 2 could *ever* require the creation of a coalition district, there is simply no evidence in the record suggesting that African-American, Latino, and Asian citizens form the kind of sufficiently cohesive voting blocs this Court required in *Gingles*. *See* JA 152.[11] Indeed, even the plaintiffs' evidence conclusively points to

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[11] It is far from clear that minority coalition districts could ever meet the first *Gingles* requirement that the minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50-51. *Gingles* was clearly addressing a situation in which a State diluted the vote of a *single* minority group. This Court held in *Bartlett* that Section 2 does not require the creation of "crossover" districts, in which minority groups are able to elect their candidate of choice with assistance from some majority voters. 129 S.Ct. at 1242-46. The Court had no occasion to address coalition districts in *Bartlett*, *id.* at 1243, but its reasoning strongly suggests that coalition districts, like crossover districts, are not required by the VRA, *see id.* at 1244 (noting that recognition of claims for refusal to create crossover districts "would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions").

the opposite conclusion—that those citizens do not vote cohesively.[12]

This Court should make clear that, particularly in the absence of a strong showing of political cohesiveness, a district court may not alter the lines of a legislatively enacted redistricting plan to create additional "coalition" districts. As this Court has explained, "Section 5 gives States the flexibility to choose" whether to accommodate minority voters through coalition districts or more traditional majority-minority districts. *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003). Indeed, the district court's efforts to increase the number of coalition districts in the Interim House Order actually *decreased* the number of majority African-American districts, from three to one. Creation of coalition districts may be sound as a matter of policy, *see id.* at 481, but the proper locus of such policymaking is in state legislatures, not federal courts.

3. The District Court Improperly Disregarded the Texas Constitution's County Line Rule

The Texas court's interim maps also subordinate traditional districting principles to racial considerations. For example, the Texas

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[12] *See* Trial Tr. at 265:15-18 (plaintiffs' expert Dr. Morgan Kousser stating Latinos and African Americans are not cohesive in the Democratic primary elections); *id.* at 506:3-508:5 (plaintiffs' expert Dr. Richard Engstrom stating African-Americans are the "least likely group to support Latinos in a Democratic primary").

Constitution's "county-line rule" provides that districts for the Texas House must be apportioned by county so as to avoid crossing county lines, except where necessary to apportion excess population from one county into a neighboring county. TEX. CONST., art. III, § 26. This rule has been in the Texas constitution, without alteration or amendment, since its enactment in 1876.

Had the district court followed this rule, it would have apportioned two House seats to Nueces County, which could have accommodated two seats within the county lines. *See* Trial Tr. at 1429:17-21. Yet the district court disregarded the county-line rule in an apparent attempt to create two new Latino-majority districts.

This Court has repeatedly cautioned that such subordination of traditional redistricting considerations to racial considerations raises grave constitutional concerns under the Equal Protection Clause. *See*, *e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 906-07 (1996) (holding that race-based redistricting plan violated the Equal Protection Clause because it was not narrowly tailored to addressing a compelling state interest). Those concerns apply with even greater force here, where the district court imposed an explicitly race-based remedy without any finding that this remedy was necessary to address an actual or likely violation of law. This Court should make clear that traditional, race-neutral redistricting principles such as Texas' constitutional county-line rule should never be subordinated to race-based considerations, particularly when district courts engage in the delicate task of imposing interim redistricting plans.

4. The District Court Improperly Equalized Population Across Districts

Finally, the Texas court's wholesale revisions of the Texas House map often reflect no conceivable purpose other than to reduce the differences in total population across districts. JA 170–72. But the population deviations in the enacted plans are no greater than 10%, and are thus presumptively consistent with one-person-one-vote requirements. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983). Small population deviations, such as these, "may be necessary to permit the States to pursue other legitimate objectives such as 'maintain[ing] the integrity of various political subdivisions' and 'provid[ing] for compact districts of contiguous territory.'" *Id.* (citation omitted).

The district court held that court-drawn plans, unlike legislatively enacted plans, may include only *de minimis* variations from absolute population equality. JA 115–16. It is true that courts are generally subject to a stricter standard of population equality when they draw electoral districts on a blank slate. *See Chapman v. Meier*, 420 U.S. 1, 27 (1975). But this Court has emphasized that the stricter standard applies "only to the remedies *required by the nature and scope of the violation*," and does not "come into play" at all "until and unless a remedy is required." *Upham*, 456 U.S. at 42 (emphasis added). Here, of course, the district court made no finding that imposition of greater population equality was "required" in order to remedy an actual or potential violation of the one-person-one-vote doctrine—and no such finding would

have been justified given the presumptively valid population deviations in the legislatively enacted plans.

CONCLUSION

The district court's interim orders should be vacated, and the case remanded with instructions that the district court order the use of Texas' legislatively enacted districting maps as the interim plans while preclearance is pending.

Respectfully submitted,

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APPENDIX

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U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or

military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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.

28 C.F.R. § 51.18
Court-ordered changes.

(a) In general. Changes affecting voting for which approval by a Federal court is required, or that are ordered by a Federal court, are exempt from section 5 review only where the Federal court prepared the change and the change has not been subsequently adopted or modified by the relevant governmental body. *McDaniel v. Sanchez*, 452 U.S. 130 (1981). (See also § 51.22.)

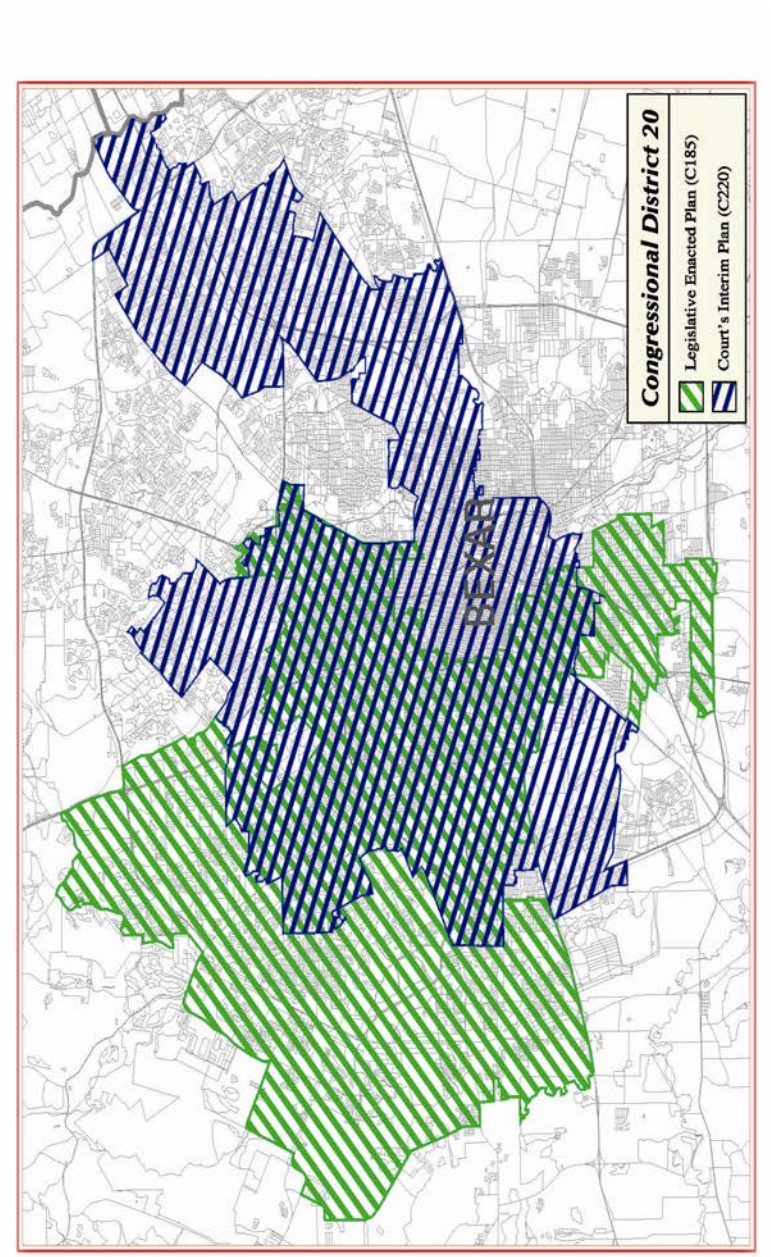
(b) Subsequent changes. Where a Federal court-ordered change is not itself subject to the preclearance requirement, subsequent changes necessitated by the court order but decided upon by the jurisdiction remain subject to preclearance. For example, voting precinct and polling changes made necessary by a court-ordered redistricting plan are subject to section 5 review.

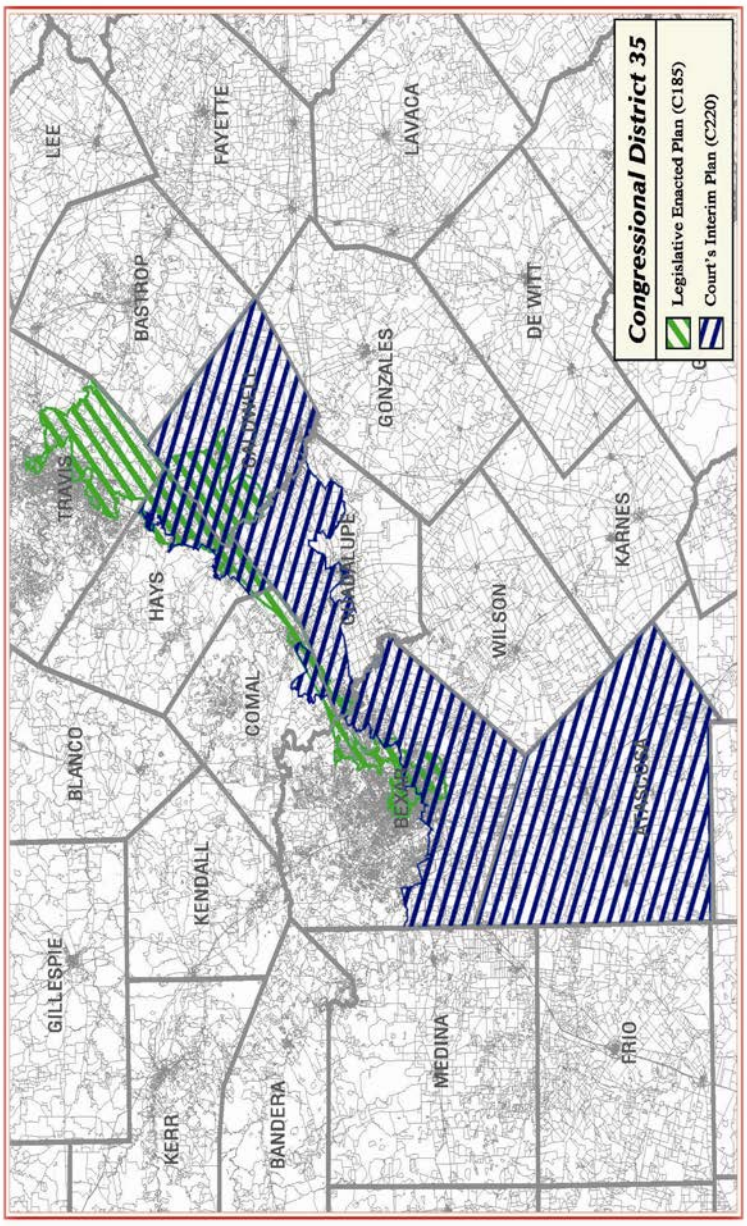
(c) Alteration in section 5 status. Where a Federal court-ordered change at its inception is not subject to review under section 5, a subsequent action by the submitting authority demonstrating that the change reflects its policy choices (e.g., adoption or ratification of the change, or implementation in a manner not explicitly authorized by the court) will render the change subject to review under section 5 with regard to any future implementation.

(d) In emergencies. A Federal court's authorization of the emergency interim use without preclearance of a voting change does not exempt from section 5 review any use of that practice not explicitly authorized by the court.

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.


Congressional District 20
Legislative Enacted Plan (C185)
Court's Interim Plan (C220)
BEXAR


Congressional District 35
Legislative Enacted Plan (C185)
Court's Interim Plan (C220)
LEE
FAYETTE
LAVACA
BASTROP
DE WITT
GONZALES
TRAVIS
CALDWELL
HAYS
GUADALUPE
KARNES
WILSON
BLANCO
COMAL
BEXAR
ATASCOSA
GILLESPIE
KENDALL
KERR
BANDERA
MEDINA
FRIO