Nos. 11-713, 11-714, 11-715

IN THE

Supreme Court of the United States

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,
Appellants,
v.
SHANNON PEREZ, ET AL.
Appellees.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,
Appellants,
v.
WENDY DAVIS, ET AL.
Appellees.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,
Appellants,
v.
SHANNON PEREZ, ET AL.
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF OF APPELLEES' THE TEXAS STATE CONFERENCE OF NAACP BRANCHES, ET AL., AND CONGRESSPERSONS EDDIE BERNICE JOHNSON, SHEILA JACKSON-LEE, AND ALEXANDER GREEN

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I. SUMMARY OF ARGUMENT

The State of Texas seeks an order implementing unprecleared redistricting plans for the 2012 elections. There is no justification for this end run around Congress' mandated protection of the rights of minority voters on nothing more than the State's assertion that it is entitled to have its plans used in the 2012 elections because it is currently in the process of seeking preclearance of those plans. The alternative they oppose is the use of constitutional, lawful, interim redistricting plans that would be fair to minority voters in Texas. As it has done for many years, even as recently as last decade, Texas continues to misunderstand the Voting Rights Act and what that law, as well as the federal constitution, requires of it in the redistricting process.

The court below followed the guidelines issued by this Court for the construction of interim redistricting plans, and it applied those principles in a neutral way, complying also with Constitutional and Voting Rights Act requirements. Under clear precedent from this Court, the lower court was not required to afford the State's enacted and unprecleared redistricting plans any deference. However, the court below did respect the legislature's prerogative in areas where the constitutional rights of minority voters would not be harmed by the legislature's choices. The end result—court-drawn interim plans that do not disproportionately advantage Anglo voters because of the color of their skin—make even more evident the intentional discrimination that infects almost every aspect of the State's enacted redistricting plans.

The remedy requested by the Appellant in its opening brief—the use of the State's redistricting plans, without regard to their unprecleared status and the vast amount of evidence before the lower court on the constitutional and statutory violations in those plans—is not appropriate given this Court's previous rulings on the legal unenforceability of unprecleared plans. It is also not appropriate because it would, in effect, nullify Section 5 of the Voting Rights Act.

II. ARGUMENT

A. The Lower Court Applied the Correct Standard for Drawing Interim Maps

1. The Lower Court Correctly Interpreted this Court's Precedent Regarding Interim Redistricting Plans

A situation such as the one that Texas currently faces—no usable earlier plans and no preclearance decision on the newly enacted plans—arises only, as the State admits, infrequently. Appellants' Br. 52. Nevertheless, Texas is determined to shoehorn this unique procedural situation into a framework that does not fit. Appellants' Br. 41. The constraints under which the lower court operated—including being precluded from making determinations on Section 5 compliance of the enacted plans and from making determinations on Section 2 and Equal Protection challenges to the enacted plans until after preclearance has been obtained—differentiate this situation from that of a simple case of a preliminary injunction, appropriate only upon a showing of plaintiffs' likelihood of success on the merits. Given the unique procedural positioning of

this case and the clear guidance from this Court on what district courts can and cannot do in this situation, the court below correctly interpreted this Court's precedent and ordered the use of an independent interim plan that preserved the status quo to the extent possible pending the outcomes of the Section 5 litigation in the District of Columbia and the Section 2 and Equal Protection challenges in the lower court.

a. The Lower Court Correctly Read the *Lopez* Line of Cases

In misinterpreting this Court's precedent regarding interim redistricting plans, one of the State's clearest errors is the rampant conflation of different legal issues involved in the preclearance process. The State continues to misunderstand the principles espoused in *Lopez v. Monterey County*, 519 U.S. 9 (1996), and the cases cited in that decision—*Clark v. Roemer*, 500 U.S. 646 (1991), and *McDaniel v. Sanchez*, 452 U.S. 130 (1981). The State characterizes these cases as being entirely about jurisdictions refusing to submit changes for preclearance (Appellants' Br. 48-49), when the true issue is the legal enforceability of plans that have not received preclearance. JA 91-92. The lower court's independent map, derisively referenced in the State's brief, was, in fact, based on the last legally enforceable and precleared maps, which, in this case, are the benchmark plans. JA 139; JA 173. This much is clear from Section 5 cases—voting changes such as redistricting plans are not legally enforceable until and unless they are precleared.

First, the State distinguishes its situation from the ones in *Lopez*, *Clark*, and *McDaniel*, on the basis that

the jurisdictions in those cases were being "recalcitrant." Appellants' Br. 48-50. This is not an accurate reading of these cases. In *Lopez*, the county was involved in years of litigation seeking to implement a non-retrogressive plan to elect judges. 519 U.S. at 15-18. They were, as is Texas, in the process of complying with the Act. In *Clark*, there were questions in the lower court as to whether the Attorney General had precleared earlier changes (additional judgeships) when he precleared subsequent additional increases in the number of judgeships. 500 U.S. at 650-51. In *McDaniel*, the question presented to this Court was "whether the preclearance requirement of § 5 of the Voting Rights Act applies to a reapportionment plan submitted to a Federal District Court by the legislative body of a covered jurisdiction." 452 U.S. at 131.

In each of these cases, there were principled, articulated questions of coverage or whether preclearance had already been obtained. These were jurisdictions trying to ascertain the reach of Section 5, not avoid it. These jurisdictions were not "attempting to shirk [their] obligations under Section 5," as described by the State. Appellants' Br. 50. And here, the State has acknowledged that its enacted redistricting plans must be submitted for preclearance, thus negating Texas' "incentive" explanation for the *Lopez* line of cases.

The main principle, though, that emerges from the *Lopez* line of decisions is that no new voting practice, including a new redistricting plan, is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance. *Clark* v. *Roemer*, 500 U.S. at 652-653; *Conner* v. *Waller*, 421 U.S. 656, 656 (1975) (per curiam). This is true regardless of whether the jurisdiction is in

the process of seeking preclearance. Additionally, given that preclearance requirements may not apply where a district court independently crafts a remedial electoral plan, *McDaniel*, 452 U.S. at 148-150 (quoting S. Rep. No. 94-295, pp. 18-19), this Court has acknowledged that this fact cannot be turned around to unfairly benefit the jurisdiction. This Court has held that where a court adopts a proposal "reflecting the policy choices … of the people [in a covered jurisdiction] … the preclearance requirement of the Voting Rights Act is applicable." 452 U.S. at 153.

And, more generally, there is a fundamental flaw in the way that the State interprets Section 5 of the Voting Rights Act. Section 5 is not a punitive law. It is not applied only to jurisdictions that try to avoid its reaches. The purpose behind the law is to protect the gains made by minority voters by shifting the burden of proof from those voters to the jurisdiction proposing a voting change. The prohibitions on retrogression and discriminatory intent are focused on the end result and the process by which the change was enacted, respectively, not the process by which the jurisdiction did or did not seek preclearance. Thus, under Section 5, a plan that makes it more difficult for minority voters to be able to elect their candidates of choice, will not receive preclearance—regardless of whether the jurisdiction voluntarily submitted the plan. Congress designed the preclearance procedure "to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process," *McDaniel*, 452 U.S. at 149 (footnote omitted), not to punish jurisdictions who balk at submitting to the preclearance procedures. The State creates a false dichotomy between a "jurisdiction actively seeking preclearance" and a "jurisdiction that has steadfastly

refused even to seek preclearance." Appellants' Br. 25. This is a distinction without significance for the fundamental rule that an unprecleared change cannot be implemented.

There is absolutely no support for the state's contention that the results in *Lopez*, *Clark* and *McDaniel* are part of an attempt to "incentivize[] a covered jurisdiction to seek preclearance." Appellants' Br. 30, 49. Remedies such as the one employed by the *Lopez* Court are not "wholly out of place," *id.* at 30, because the purpose of Section 5 is to prevent retrogressive or discriminatory changes to voting practices from being implemented, not to punish jurisdictions who do not seek preclearance. As support for its incentives theory, the State cites this sentence from *Lopez*: "The 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." Appellants' Br. 50; *Lopez*, 519 U.S. at 24. With that sentence, though, this Court was merely reaffirming what it held in *Perkins* v. *Matthews,* 400 U.S. 379 (1971)—that a district court other than the District Court for the District Columbia was limited to questions of coverage and did not have jurisdiction to decide the merits of Section 5 cases. *Id.* at 385 ("What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General--the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color'"). Thus, the purpose of Section 5, and the sometimes resulting need for the crafting of interim redistricting plans, is not to incentivize the timely submission of voting

changes for preclearance. The purpose is to make sure unprecleared plans do not go into effect until the Attorney General or the D.C. District Court has been assured that those plans do not have a retrogressive effect and were not drawn with discriminatory purpose.

The State also continues to misunderstand the obligations of a court in crafting any plan, be it remedial or interim in nature. The State commented on the House interim order: "[b]ut, somewhat paradoxically, the majority redrew the maps to avoid any violations should the allegations ultimately prove meritorious." Appellants' Br. 18. This is in fact exactly what the State says the lower court should have done—identified violations. The court below had to comply with the Voting Rights Act and the Equal Protection Clause of the 14th Amendment, regardless of the merits of plaintiffs' claims. This Court has quite clearly admonished that in the crafting of court-drawn plans, district courts should draw those plans "in a manner free from any taint of arbitrariness and discrimination." *Connor v. Finch*, 431 U.S. 407, 415 (1977). The court below must comply with these statutory and constitutional provisions even if no lawsuits alleging violations have been filed.

Finally, the State never addresses this Court's clear precedent that the district court is precluded from ruling on the merits of the Section 2 and Equal Protection claims. In *Conner v. Waller*, this Court, in reference to unprecleared laws, stated: "Those Acts are not now and will not be effective as laws until and unless cleared pursuant to § 5. The District Court accordingly also erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination." 421 U.S. at

656 (*internal citations omitted*). Thus, the court below was merely following *Conner* and the guidance offered by this Court in that decision on deciding challenges to a law prior to preclearance.

b. Preclearance is Unlikely to Be Granted and, As Such, the Lower Court Was Correct in Limiting Deference to the State's Enacted Plan

The fact that the Texas' Congressional and State House plans are unlikely to receive preclearance is relevant to the issues before this Court. With the recent release of its memorandum opinion explaining the denial of summary judgment, the D.C. District Court outlined some of the substantial problems with how the State of Texas had approached compliance with Section 5. *Texas v. United States*, No. 11-cv-1303 (D.D.C.) ("*Texas*"), 2011 WL 6440006, at *24, 28, 34 (Dec. 22, 2011). Texas itself acknowledged that voting changes may not be enforced without preclearance, and that this "reverses the normal rule that a duly-enacted law takes immediate effect." Appellants' Br. 5. Given the myriad of Section 5 legal issues that Texas got wrong, deference to an unprecleared plan constructed on such misunderstandings is even more out of line with the directives of the Voting Rights Act. The opinion of the D.C. court strongly undermines the State's claims that the majority, if not all, of the districts in their enacted plans comply with Section 5 and are owed any deference.

On November 8, 2011, the D.C. District Court denied Texas' motion for summary judgment in the preclearance action. JA 549. On December 22, 2011, the D.C. District

Court released its unanimous memorandum opinion in support of that denial. *Texas*, 2011 WL 6440006. That opinion provides ample justification for concluding that it is highly unlikely that the State's plans will either receive preclearance or only be found in violation of Section 5 in discrete areas of the state. The memorandum identified a number of ways in which the State approached Section 5 compliance in the wrong manner, and the opinion also identified strong evidence of discriminatory intent behind the plans as a whole.

The first problem identified with Texas' understanding of its Section 5 obligations relates to measuring retrogressive effect. Texas relied solely on voting age population demographics to determine whether districts had an ability to elect in the benchmark and the enacted plan, and during the summary judgment proceedings, the State urged the D.C. District Court to adopt this as the standard for measuring retrogressive effect. *Texas*, 2011 WL 6440006, at *12. The Department of Justice, along with Intervenors, instead argued for a multi-factor "functional" analysis that begins with an examination of voting-age population data but also examines a number of other factors. *Id.* at *13. The D.C. District Court agreed with the Defendants, finding that, "Texas misjudged which districts offer its minority citizens the ability to elect their preferred candidates in both its benchmark and proposed Plans." *Id.* at *24. This finding calls into question districts across the entire state—if Texas was improperly determining which districts provided an ability to elect under both the benchmarks and the proposed plans, they likely drew plans that ultimately will be held to be retrogressive.

Second, Texas flatly denied that coalition districts could be protected under Section 5 of the Voting Rights Act. *Texas*, 2011 WL 6440006, at *15. They acknowledged dismantling such districts because they did not believe them to be protected by Section 5. On the other hand, Defendants urged the D.C. court to object to the plans because they did not account for the loss of coalition districts. *Id.* To answer that question, the D.C. District Court looked to language in the House Report that accompanied the 2006 Amendments. *Id.* That language stated: "[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5." H.R. Rep. No. 109-478, at 46. The D.C. District Court held that "Congress never found that coalition districts could not provide minority citizens with the ability to elect." *Texas*, 2011 WL 6440006, at *35. That court also noted that "coalition districts for Section 5 purposes are those in which the candidate voted into office by the coalition is the minority-preferred candidate, whether that candidate is a member of the minority or not." *Id.* at *35 n. 30

Moreover, the D.C. District Court also found that "freedom from an obligation to create a crossover district under Section 2 does not equate to freedom to ignore the reality of an existing crossover district in which minority citizens are able to elect their chosen candidates under Section 5." *Texas*, 2011 WL 6440006, at *36. Thus, the D.C. Court concluded that because coalition and crossover districts provide minority groups the ability to elect a preferred candidate, they must be recognized as ability districts in a retrogression analysis. *Id.*

Finally, the D.C. court noted that while a failure to increase the number of minority districts when minority population was responsible for the allocation of additional districts was not, per se, retrogressive, it was probative evidence of discriminatory intent. *Texas*, 2011 WL 6440006, at *40. Given all these problems identified by the D.C. District Court, it is extremely reasonable to conclude that preclearance will not be granted and that a high level of deference to the State's enacted plans would result in substantial injury to minority voters. Such deference would not be in accord with this Court's consistent upholding of Section 5 and the protections it provides.

Even though the court in San Antonio did not have the full opinion from the D.C. District Court outlining the retrogression standard and other elements of the Section 5 analysis at the time it drafted the interim plans, the D.C. court's opinion backs up the cautious approach to avoiding retrogression taken by the San Antonio court. The court below avoided dismantling coalition and crossover districts because that could cause retrogression—the D.C. Court confirmed that the loss of those types of districts could be retrogressive. Additionally, the D.C. court recognized that the failure to add minority districts when minority population growth was responsible for the gaining of additional seats could be evidence probative of discriminatory intent. This aspect of that opinion supports the reasonableness to the lower court's decision to add a new minority Congressional seat and not dismantle naturally-arising minority State House districts.

c. The Lower Court Could Not Engage in Intentional Discrimination in the Construction of Interim Plans

Finally, the court below purposefully refrained from the intentionally discriminatory gerrymanders that it identified on initial examination, without making final determinations on the merits, in multiple places throughout the State's redistricting plans. JA 174; JA 175; JA 178. All the Plaintiffs challenging the State's enacted plans have alleged that the plans were drafted with the intent of diluting and minimizing the voting strength of minority voters. JA 95. Such evidence was also presented to the lower court in the two-week trial on those issues. JA 749; JA 649-50; JA 767; JA 777-79; JA 783-86. The Department of Justice, in the Section 5 declaratory judgment action, has taken the position that discriminatory intent was not limited to any particular district or districts, and Intervenors in that action challenge the plans in their entirety because of that discriminatory intent. JA 94-95. Even the D.C. District Court acknowledged that evidence that no new minority districts were created in spite of the fact that minority population growth was the reason for the apportionment to Texas of additional Congressional seats could be "probative" evidence of intentional discrimination, noting that a "redistricting plan that does not increase a minority group's voting power, despite a significant growth in that minority group's population, may provide circumstantial evidence that the plan was enacted with the purpose of denying or abridging that community's right to vote." *Texas*, 2011 WL 6440006, at *40. Moreover, the court in D.C. noted that Texas did not even dispute much of the Defendants' evidence of intentional discrimination. *Id.* at

22. Given all of this evidence, and the opinion of the D.C. District Court, the lower court rightfully concluded that it could not do as the state did, and act intentionally to limit minority voting strength. As the D.C. District Court noted, the amended purpose prong of Section 5 cannot tolerate such actions. During the reauthorization process, Congress noted:

> Voting changes that "purposefully" keep minority groups "in their place" have no role in our electoral process and are precisely the types of changes Section 5 is intended to bar. To allow otherwise would be contrary to the protections afforded by the 14th and 15th [A] mendment[s] and the VRA.

H.R. Rep. No. 109-478 at 43. An order implementing the state's plan, with the substantial taint of intentional discrimination, would be a mark against the fairness of the federal judiciary system. Not only must courts be above reproach, avoiding discrimination and arbitrariness, but they must also avoid rubberstamping and legitimizing unconstitutional and unlawful acts by state legislatures.

d. In the Urban County Districts, Subject to Significant Legal Challenge in the Section 5, and in the Section 2 and Equal Protection Cases, the Lower Court Had to Achieve *De Minimis* Population Variances in the House Plan

In order to comply with Texas' county line rule and minimize the number of county lines cut, in the large urban counties such as Dallas, Tarrant, Harris and

Bexar counties, the population of the county is divided by the ideal population size for a State House District. The redistricting plans for these counties are then considered "drop-in" plans—that is, those plans are independent of the districts in the surrounding counties. In Dallas and Harris counties, the lower court deferred to the state's decision to remove two seats from the Dallas county delegation and one seat from the Harris county delegation. JA 107; JA 104.

Texas asks this Court to "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." Appellants' Br. 32. The State misreads *Upham v. Seamon*, 456 U.S. 37 (1982), on this point. *Upham* involved the redrawing of Congressional districts, so allowable population deviations were not even an issue. 456 U.S. at 38. Second, the violation that was "missing" from *Upham* in order to justify the redrawing of the district in question was, at that point in the litigation process, a finding by the Attorney General that the district violated Section 5 of the Voting Rights Act. *Upham* is easily distinguished in this instance, as well, because in that case, the Attorney General had explicitly found no Section 5 violation with the district in question that the court redrew. That is simply not the situation here. The Attorney General challenges the compliance of at least one House District in almost every major urban county in Texas. JA 612-14.

With these "drop-in" county plans, a problem with one district may necessitate changes to every district within the county to accommodate corrections to the "problem" district. And the State's enacted House plan

is rife with problems in urban counties. In the Section 5 case, the United States alleges that the drawing of House District 117 in Bexar County and the removal of House District 149 in Harris County will have a retrogressive effect on minority voters. JA 612-13. The United States further argues that the drawing of House District 93 in Tarrant County, House District 105 in Dallas County, House District 117 in Bexar County, and the removal of House District 149 in Harris County are evidence of impermissible discriminatory intent on the basis of race. JA 614. Even more urban districts were challenged by Defendant-Intervenors in the Section 5 case, and by plaintiffs in the Section 2 and Equal Protection case heard before the lower court. These are all districts in urban counties, and the redrawing of these districts to bring them into constitutional and statutory compliance will have an effect on other districts in those county drop-ins. Given this fact, the lower court's decision to minimize population deviation was proper and in line with guidance from this Court.

Finally, it is significant to note that the State does not even discuss *Cox v. Larios*¸ 542 U.S. 947 (2004). In *Cox*, this Court refused to adopt a 10% safe harbor for population deviations in state legislative plans and summarily affirmed the lower court's decision striking down, on one-person, one-vote grounds, a state legislative plan that had a less than 10% overall deviation. *Id.* 542 U.S. at 949. The State instead relies on *Brown v. Thomson*¸ 462 U.S. 835 (1982), decided earlier, for the proposition that state legislative plans with deviations no greater than 10% are presumptively valid. In spite of any presumption of validity for a plan with less than 10% overall deviation, the court below was appropriately sensitive to *Cox v. Larios*,

and the admonition there that "the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength." 542 U.S. at 949-950. The court below appropriately sought to achieve *de minimis* population variances in county "drop-in" plans where districts were being challenged as Section 5 violations by the Attorney General.

2. The Lower Court Correctly Applied The Law Governing Interim Plans

Not only did the lower court correctly interpret the cases from this Court that offer guidance on the creation of interim redistricting plans, but the Congressional and House interim plans ordered into implementation by the lower court reflect the conversion of that interpretation into appropriate actual plans. The cases from this Court related to this issue have involved redistricting plans with significantly fewer flaws and thus, the lower court's application of interim redistricting plan principles is bound to look different than in other cases. Despite this fact, the lower court balanced a myriad of complicating issues and produced plans that are fair, defer to the state's legislative policies in an appropriate manner, and will not result in the violation of the rights of minority voters in Texas.

a. The Lower Court Afforded the Enacted Plan As Much Deference as Was Allowable and Appropriate

The State ignores the fact that despite not being compelled by law to defer to the state's enacted plans given their status in preclearance litigation, the court's

interim plans did, in fact, afford a significant level of deference to those plans. Despite saying so in a number of places, Appellants' Br. 27, 33, it is simply untrue that the court below refused "to grant any deference to Texas' legislatively enacted districting maps." *Id.* at 27. The lower court deferred to legislative decisions relating to the number of House seats allocated to "drop in" county delegations. JA 107; JA 104. In the lower court's State House interim plan, 72 districts (nearly 50%) were practically identical to districts in the state's enacted plan. JA 114. In the lower court's Congressional interim plan, 9 districts (25%) were identical to districts in the state's enacted plan. JA 147-48. Given the magnitude of the constitutional and statutory infirmities identified during the Section 5 process, the lower court, despite substantially deferring to the state's enacted plans in a number of ways, could do no more without ratifying those infirmities.

Moreover, the State's argument that the lower court did not appropriately defer to "carefully negotiated urban district lines" is without merit, as it is clear that those lines were not so negotiated. Appellants' Br. 19. The State mischaracterizes the position of the Texas Legislative Black Caucus with regard to the legislative maps, particularly the ones enacted by the state. While the Legislative Black Caucus did announce objections to the interim House plan, the Caucus also intervened as a plaintiff in the litigation before the court below, alleging that the enacted State House plan violates Section 2 and the Equal Protection Clause of the 14th Amendment. *Perez, et al., v. Perry*, et al., No. 5:11-cv-00360 (W.D. Tex.), Docket # 60, 70, 73. The Caucus voluntarily dismissed their complaint in intervention because they thought that other parties involved in the litigation could adequately

protect the rights of Texas voters in that setting. *Perez, et al., v. Perry*, et al., No. 5:11-cv-00360 (W.D. Tex.), Docket # 111. But the Caucus is still a party in the Section 5 litigation, arguing that the state's "carefully negotiated urban district lines," Appellants' Br. 19, were drawn with discriminatory intent and have a retrogressive effect on black voters. Members of the Caucus also testified during the trial in San Antonio that they were left out of all of these alleged "careful" negotiations. JA 885; JA 897-902; JA 875-80. This is also an example that rebuts the State's claims that the majority of the court below simply bowed to every one of the Plaintiffs' claims. Appellants' Br. 18. That is not what happened because the lower court did not adopt any plan proposed by Plaintiffs or by the Texas Legislative Black Caucus.

b. The Inclusion of Coalition and Crossover Districts in the Interim Plans Reflected the Lower Court's Caution in Dismantling Such Districts, But Were Also Justified by Evidence in the Record

In the interim Congressional and State House plans, the lower court explained that it refrained from deconstructing coalition and crossover districts in order to avoid violations of Section 5. JA 178; JA 104-05; JA 144 n. 24. The State attacks those coalition districts in the interim House and Congressional plans because of what "appears to be a concerted effort to reach a 50% threshold of minority citizen voting age population." Appellants' Br. 19. The State's assertion that the court below offered "no legal or factual justification for its creation" of those coalition districts is patently false. *Id*. The lower court never averred that it was required to create coalition

districts. Rather, that court was explicitly clear in its explanation that coalition districts "naturally" arose by the application of neutral redistricting principles and a decision not to consciously dismantle such districts.

For example, the State finds fault with Congressional District 33 in the interim plan. The lower court put this district in the Dallas-Fort Worth metroplex, as did the State in its enacted plan. This decision was based on population growth in that area, as was the State's same decision to do so. JA 146. But, because the population growth in that area was attributable to minority population growth, the interim Congressional District 33 reflected that, in a way that was more respectful of traditional redistricting criteria. The interim plan drew Congressional District 33 in a more compact way than did the state, and the interim plan's district was entirely contained within Tarrant County, unlike Congressional District 33 in the State's plan, which sprawled across numerous counties. Rather than intentionally create a coalition district, the lower court refrained from intentionally fragmenting this cohesive community of minority voters, and this was amply explained in the lower court's order on the interim plan. JA 146-47. To hold that the lower court impermissibly created a coalition district by following traditional, race-neutral redistricting principles rather than violate those traditional principles in the creation of white majority districts, like the State did, would result in turning the Voting Rights Act and the 14th Amendment protections on their head.

Likewise, with House Districts 26, 54 and 149, the lower court found that these coalition districts existed in the benchmark plan. The lower court found that the

minority population in House District 26 had increased from 44 percent in 2000 to 60.6 percent in 2010. JA 178. Thus, House District 26 was a coalition district in the benchmark plan. The lower court found that the State's plan reconfigured that district to make it "irregularly" shaped and that evidence had been presented at trial that this was an attempt to "intentionally dismantle an emerging minority district." *Id.* Likewise, House District 54 was 51.5 percent minority in the benchmark plan, and one fewer county line could be cut by not dismantling this district. JA 110-11. Finally, House District 149, which elects the only Vietnamese-American to the Texas State House of Representatives, was approximately 63 percent minority citizen voting age population in the benchmark plan. JA 104; H100 Red-106 Report, *available at* http://gis1.tlc.state.tx.us/. The State removed that district from Harris County, when evidence showed that its population was growing, rather than removing one of several white majority districts in eastern Harris County that evidence showed had all been consistently losing population over the decade. *Perez, et al., v. Perry*, et al., No. 5:11-cv-00360 (W.D. Tex.), Docket # 137 (Report of Dr. Richard Murray) at 27. In contrast, and in order to avoid retrogression, the lower court followed the benchmark plan and retained House District 149. JA 105. None of these instances are intentional creations of coalition districts—they are simply situations in which the lower court acted to avoid retrogression and refrained from intentionally breaking up geographically-compact communities on the basis of race.

The State asserts that there is no evidence that Latino, African-American and Asian citizens are cohesive in voting patterns, citing to the dissenting judge's opinion

for that proposition. Appellants' Br. 58. But the majority of the court below made no such ruling, purposefully and appropriately refraining from ruling on the merits of Plaintiffs' claims. Moreover, as indicated in the opening round of briefing in this matter, there was an abundance of evidence in the record of political cohesion amongst these groups in certain areas of the state, and this evidence justified the drawing of those districts even had the lower court decided that such districts were compelled by Section 2 of the Voting Rights Act.

The lower court also tread carefully when it came to crossover districts—the court did not "create" them, but did not feel that it could deconstruct them without running afoul of Section 5. Specifically, in the Congressional interim redistricting plan, the court below refrained from fragmenting the cohesive minority population in Congressional District 25 in order to achieve "the goals of maintaining the status quo and complying with Section 5." JA 144-45 n.24. The subsequent memorandum opinion of the D.C. District Court takes the same position that this is correct and compliant with Section 5 of the Voting Rights Act. *Texas*, 2011 WL 6440006, at *34-37.

Despite Texas' claims to the contrary, it is not "plainly permissible for the Texas Legislature to choose not to create those districts." Appellants' Br. 32. Coalition and crossover districts enable minority voters to elect the candidates of their choice. *Texas*, 2011 WL 6440006, at *36. Thus, it is appropriate to evaluate the loss of those districts in a retrogression analysis. *Id.* Finally, the intentional fragmenting of minority groups, on the basis of race, so that they will not be able to elect a candidate of their choice is a clear violation of the Equal Protection

Clause and the intentional discrimination bar in Section 2 of the Voting Rights Act.

c. The Interim Plans Were Not Racial Gerrymanders Under Any Reasonable Understanding of the Term

The State's assertions that the lower court's interim plans were racial gerrymanders are not consistent with this Court's rulings on what constitute impermissible uses of race in redistricting. The lower court has justified the addition of minority districts on the basis of minority population growth, which is undeniably true. JA 146; JA 178; JA 105-06; JA110. Given that fact, this Court has identified ways to demonstrate that race predominated in drawing electoral districts (and thus warrants the application of strict scrutiny). First, strict scrutiny may be appropriate where the district is so bizarrely shaped that no other reason besides race can explain the shape. *Shaw v. Reno*, 509 U.S. 630, 658 (1993). Similarly, other evidence may prove that race was the predominant factor in drawing the district lines. *See Miller v. Johnson*, 515 U.S. 900, 920 (1995). However, this Court has stated that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race… For strict scrutiny to apply, the plaintiffs must prove that other legitimate districting principles were 'subordinated' to race." *Bush v. Vera*, 517 U.S. 952, 958-59 (1996). Thus, racial gerrymanders are districts that are bizarrely shaped or districts that otherwise subordinate traditional redistricting criteria to race. The lower court's interim plans do neither.

The State's criticisms of the interim plans as subordinating traditional redistricting principles to

race are disingenuous at best, and often misleading. The interim plans are as respectful of traditional criteria as the State's plan, and, in certain situations, more respectful of traditional districting criteria. Contrary to the State's telling of the story, the county line rule is far from the only traditional districting principle. Appellants' Br. 59-60. But, even if that is considered the ultimate traditional districting criteria in Texas, the State's argument is still fatally flawed. The lower court's interim congressional plan cuts *fewer* county lines than did the State's congressional plan (the interim plan cut 23 counties, while the state's plan cut 33 counties). The lower court's interim house plan cut the same number of counties as the state's enacted House plan (24 county lines cut). JA 116 n. 24. Thus, arguments that the lower court's plans were less respectful of the Texas Constitutional county line rule are meritless.

Additionally, with regard to other traditional principles, such as respect for political subdivisions and compactness, the lower court's plans are again as respectful or more respectful of those principles, but not less. The State criticized the interim congressional plan for dividing the city of Arlington in Congressional District 33. Appellants' Br. 23. While Congressional District 33 in the enacted plan contains all of Arlington, it also contains portions of three different counties. Congressional District 33 in the interim plan is wholly contained within Tarrant County. MJA 2; MJA 1. Thus, the interim plan is more respectful of county political subdivisions, and the enacted plan, is, in that one instance, more respectful of city political subdivisions. However, turning to the city of Austin, it becomes clear that respect for city political subdivisions was not a guiding principle used by the state legislature. The State's enacted congressional plan splits

Austin into 6 different districts (Congressional Districts 25, 35, 21, 10, 17, and 31), while the interim plan only splits the city into 3 districts (Congressional Districts 25, 10, and 21). MJA 2; MJA 1.

In a number of problematic districts, the lower court noted that the districts drawn by the State were non-compact and irregularly shaped. The districts that the lower court drew were more compact. JA 146; JA 175; JA 178; JA 108. The simple truth is that the lower court's interim plans did not, in any way, subordinate traditional districting principles to race, and this is conclusively proven by comparison to the plans that the State enacted.

Also, Texas asks this Court to ignore its Supremacy Clause rulings and rule that "traditional, race-neutral redistricting principles such as Texas' constitutional county-line rule should never be subordinated to race-based considerations." State's Brief 60. This position directly contradicts this Court's decision in *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009), where it was assumed that compliance with Section 2 of the Voting Rights Act would justify violating North Carolina's state constitutional whole county provision. *Id.* at 1239. Adopting the position urged by Texas would be a radical departure from well-established Supremacy Clause rulings and is unsupported by this Court's precedents.

Finally, the State notes that there is no statutory or constitutional guarantee of proportional representation on the basis of race. Appellants' Br. 56. This is true, but when minority population growth accounted for nearly 90 percent of all population growth in the state over the prior decade, and no net additional minority districts

were created despite the apportionment of four new additional congressional districts to the state based on that minority population growth, this creates vote dilution and is evidence of intentional discrimination, both of which are legally prohibited. *Texas*, 2011 WL 6440006, at *39-40. It is indicative of keeping minority voters "in their place," and that is prohibited under the purpose prong of Section 5 of the Voting Rights Act. H.R. REP. NO. 109-478, at 43. The addition of new minority districts in this situation, rather than being racial gerrymandering, is a natural result of that population growth. For example, the placing of Congressional District 33 in Tarrant County was in response to the enormous population growth in that area, a large percentage of which happened to be minority population growth. JA 146. Again, this is not remarkable in a state where nearly 90% of the population growth in the last decade was growth in minority population. JA 133. It takes a conscious race-based effort to keep minority representation that artificially depressed and disproportionate to population demographics like those. The only redistricting plans that can credibly be charged with being racial gerrymanders are those drawn by the State—plans that subordinate traditional redistricting principles in order to draw districts to advantage Anglo voters.

B. Ordering the Implementation of the State's Maps is Inconsistent with this Court's Prior Rulings and with the Intent of the Voting Rights Act

Finally, the implementation of the State's enacted plans, even on an interim basis, would be fundamentally unjust and inconsistent with the intent of the Voting Rights Act. Texas is the party seeking an end run around voting

rights protections. And given this Court's recognition of Texas' "long history of racial discrimination against Latinos and Blacks," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439 (2006), it is simply inadequate to assume that the State's enacted plans ensure that minority voting rights will not be diluted or diminished. The Voting Rights Act exists because such assumptions in the past resulted in severe and longstanding discriminatory voting practices.

Texas has not been able to obtain preclearance for its enacted redistricting plans in a timely fashion, and the burden is on it to do so. Blaming Intervenors in the preclearance action for this delay is distracting and inaccurate. Appellants' Br. 11. Notably absent from the State's recounting of events is the point at which it flatly turned down a more expedited path to trial in favoring of pursuing a motion for summary judgment on factually-sensitive issues and in the face of opposition from the Department of Justice and Intervenors. JA 922. Judge Collyer offered the State a more expedited route by asking if, after receiving the answer of the Department of Justice and noting that the Attorney General opposed preclearance on both purpose and effect grounds, if the State would not "rather say, 'Okay, let's just go to trial and get this done, instead of try summary judgment.'" JA 923. The State declined to just "get this done." The blame for any delay in the preclearance process can only be laid squarely on the doorstep of the State.

Additionally, Texas' position is logically inconsistent on a number of levels, and this indicates that the State's primary concern is not a just result. The State argues that a preliminary injunction standard should apply, and

that changes should only have been made to the enacted plan insofar as those changes were directed to remedying identified constitutional or statutory problems with the enacted plan. Appellants' Br. 42. But if that position is correct, that is exactly what the dissenting judge—Judge Smith—did. For example, Judge Smith identified four places in the enacted House plan where the plaintiffs alleged "colorable claims of statutory or constitutional infirmity." JA 191-194.[1] Yet Texas does not urge this Court to order the adoption of Judge Smith's map. Texas wants its enacted map, in spite of all its substantial problems, to be used in the upcoming elections, even on an interim basis. This inconsistency all but proves that Texas is most interested in avoiding any interference from the Voting Rights Act.

The implementation of the state's legislatively enacted redistricting plans, with all the accompanying constitutional and statutory infirmities, will cause enormous and permanent damage to minority voters across the state. Texas' arguments that such a resolution would only be interim and would not affect the preclearance process for permanent changes are flimsy. Appellants' Br. 54. Elections matter—the conducting of even one election cycle under a unlawful plan would have lasting implications and causes irreparable injury to one of the most precious rights in this country—the right to vote. *Reynolds v. Sims*, 377 U.S. 533, 562, 565 (1964)

1. Additionally, as the NAACP Plaintiffs demonstrated in their opening brief, that there was enough evidence of Section 2 violations and intentional discrimination before the lower court such that the court could reasonably meet that preliminary injunction standard of likelihood of success on the merits. NAACP Merits Br. 29-31.

Should this Court decide that some further guidance is necessary in crafting the interim plan, there is no reason to think that the court below cannot follow such instructions and rapidly put into place an electoral system for the next election. Imposition of the State's enacted plans, in flagrant avoidance of the Section 5 protections for minority voters, cannot be predicated solely on the baseless assumption that the lower court cannot follow this Court's instructions in a timely manner. Appellants' Br. 31.

The State itself acknowledged that an "interim reapportionment order requires reconciling the requirements of the Constitutional with the goals of state political policy. Appellants' Br. 36 (internal quotations omitted). That is what this Court has instructed. *Connor*, 431 U.S. at 414. Yet, what the State asks for is complete deferral to the State's enacted plan. Appellants' Br. 54. This result would be fundamentally contrary to this Court's prior rulings and to the history and purpose of the Voting Rights Act, which is to protect the rights of minority voters from jurisdictions with a long history of discrimination—to protect them from Texas.

III. CONCLUSION

In conclusion, the NAACP and Congresspersons Appellees respectfully request that this Court lift the stay on the implementation of interim plans crafted by the District Court in the Western District of Texas and affirm that court's holding as to the standards that apply to the crafting of such plans.

Dated: January 3, 2012

Respectfully submitted,

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