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

BRIEF OF APPELLEES WENDY DAVIS, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

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QUESTIONS PRESENTED

Whether a three-judge panel in the United States District Court for the Western District of Texas properly implemented an interim plan so that the voters of Texas could elect candidates to the State Senate in 2012, where – as a result of the State's own delay – no preclearance decision under Section 5 of the Voting Rights Act had yet been made with respect to the State's legislatively enacted plan by the time the election process was beginning.

Whether, in implementing that interim plan, the panel properly refused to adopt wholesale the State's legislatively enacted State Senate plan and instead implemented a plan in which it restored to its original configuration the Senate district that was the focus of the preclearance proceedings in the United States District Court for the District of Columbia.

LIST OF PARTIES

Appellants in Case No. 11-714 regarding the State Senate plan are Rick Perry, Governor of Texas; Hope Andrade, Secretary for the State of Texas; Boyd Richie, Chair of the Texas Democratic Party; Steve Munisteri, Chair of the Texas Republican Party; the Texas Democratic Party; and the State of Texas. Appellees in Case No. 11-714 regarding the State Senate plan are Wendy Davis; Marc Veasey; Roy Brooks; Vicki Bargas; Pat Pangburn; Frances De Leon; Dorothy DeBose; Sarah Joyner; and the League of United Latin American Citizens.

CORPORATE DISCLOSURE STATEMENT

Appellees are individuals, with the exception of Appellee League of United Latin American Citizens ("LULAC"), a 501(c)(3) organization. LULAC has no parent company and issues no stock.

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OPINIONS BELOW

The District Court's opinion and order implementing an interim State Senate redistricting plan in *Davis v. Perry*, Case No. 5:11-CV-788-OLG-JES-XR (W.D. Tex. filed Sept. 23, 2011) was issued on November 23, 2011, and is reprinted at pages 406 to 409 of the Joint Appendix ("J.A."). The District Court's opinion and order and amended opinion and order denying the State of Texas's motion for a stay were issued on November 25 and 26, 2011, respectively, and are reprinted at pages 392 to 405 of the J.A.

JURISDICTION

The three-judge District Court's opinion and order issuing an interim map was entered on November 23, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Rights Act is attached hereto in Davis App.

INTRODUCTION

Appellees Wendy Davis, Marc Veasey, Roy Brooks, Vicki Bargas, Pat Pangburn, Frances De Leon, Dorothy DeBose, Sarah Joyner (the "Davis Appellees") and the League of United Latin American Citizens ("Appellee LULAC") file this brief in support of the interim map for the State Senate drawn by the three-judge panel in *Davis v. Perry*, Case No. 5:11-cv-00788-OLG-JES-XR, currently pending in the Western District of Texas.

Because the legislatively enacted Senate map was not precleared as required under Section 5 of the Voting Rights Act by the time the 2012 election process was beginning, the three-judge panel had an obligation to provide an interim district map that would allow voters in Texas to choose their elected state senators in 2012. The panel was precluded by law from simply authorizing the State to use its legislatively enacted map prior to preclearance. The panel therefore decided to impose an interim map that (1) reflected the policy choices of the State Legislature in its enacted Senate plan in most of the State, but (2) relied on the benchmark 2001 plan in drawing the district in the Tarrant County area that was the subject of the Section 5 preclearance proceedings pending in the United States District Court for the District of Columbia. These rulings are unimpeachably correct.

That the three-judge panel was put in a position where it had to impose an interim map at all is entirely the fault of the State of Texas. The State waited until the very end of the 2011 legislative

session to take up redistricting, delayed the submission of its redistricting plans for preclearance, deliberately chose to bypass the more expeditious alternative of administrative preclearance and instead initiated a declaratory judgment action in the United States District Court for the District of Columbia, and then failed to take any action to expedite the preclearance proceedings. In fact, the State affirmatively caused delays in those proceedings. For example, it refused the D.C. District Court's offer of an early trial date, choosing instead to move ahead with a motion for summary judgment on a record that was replete with genuine issues of material disputed fact about the State's discriminatory intent in enacting its redistricting plans. Given that the redistricting plan at issue is infected with racially discriminatory purpose and has retrogressive, discriminatory effects, it was hardly capable of summary disposition.

The State nonetheless claims that the district court erred by not simply ordering into effect the very plan that was the subject of the preclearance proceedings in the D.C. District Court. But to do so would have been to contravene decades of precedent from this Court and to render the Section 5 preclearance process a nullity. Nothing in *Upham v. Seamon* – the case upon which the State places such great reliance – changes this analysis. In sum, the court below did exactly what it was supposed to do when put in the difficult situation that Texas itself created.

STATEMENT OF THE CASE

The State of Texas is no stranger to this Court when it comes to problems with its redistricting process. Indeed, just a few years ago, this Court noted the "long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process" in Texas. *LULAC v. Perry*, 548 U.S. 399, 439 (2006) (internal quotation marks omitted). And this Court found that Texas had continued that discrimination by taking away a Latino opportunity district just as Latinos were about to exercise their political power to elect a candidate of choice. *See id.* at 440. The Court observed that such an action "bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.*

Here we are again. Apparently paying no heed to anything this Court said in *LULAC v. Perry*, Texas has adopted redistricting plans that bear every mark of intentional discrimination. The State Senate plan deliberately and systematically dismantles an effective majority minority district – Senate District 10 – and fractures its population such that it is subsumed into four districts controlled by Anglos. Texas has submitted that deeply flawed plan to the United States District Court for the District of Columbia for preclearance and the court thus far has refused preclearance, denying the State's motion for summary judgment and finding that the State used the wrong standard or methodology to determine which districts afford

minority voters the ability to elect their preferred candidates of choice. A trial will soon begin in the D.C. District Court, and for the reasons set forth herein, it is entirely possible that the State Senate map will never receive preclearance. But as the Texas court below recognized, that preclearance determination was not its to make.

I. The Dismantling of Senate District 10 in the 2011 Senate Plan

In the benchmark 2001 plan, Senate District 10 combines almost every African-American and Hispanic neighborhood in the City of Fort Worth, along with some nearby predominantly minority suburbs. In its 2001 filing with the Department of Justice seeking preclearance of the 2001 Senate district map, Texas justified the configuration of District 10 as follows:

> District[] 10 contain[s] significant minority communities that are essentially kept intact within [the] district. The voting strength of these minority communities in the future will depend on the cohesion within and between Black and Hispanic voters and the ability of such voters to form coalitions with other racial or ethnic groups in support of their preferred candidates.

Tex. 2001 Preclearance Submission at 18, J.A. 451.

By the time of the 2008 elections, the voters of District 10 formed just the kind of effective coalition that the State had predicted. African-American and Hispanic leaders decided to make a concerted effort

to elect a preferred candidate and settled on Appellee Wendy Davis. *See* Cmsr. Brooks Decl. ¶¶ 3-5, J.A. 467; Rep. Veasey Decl. ¶¶ 6-8, J.A. 461-63; Chairman Richie Aff. at 2-3, J.A. 474-75; Sen. Davis Decl. ¶ 3, J.A. 497-98 (¶ 15). Davis was able to win the Democratic primary and eventually won election to the Texas Senate, garnering the vast majority of votes cast by African-Americans and Hispanics, but only a small fraction of votes cast by Anglo voters. This reality was documented in the expert report of Dr. Allan Lichtman, which was filed with the San Antonio district court that ultimately drew the district map at issue in this appeal. *See* Lichtman Report at 2-3, 5-6; J.A. 477-78, 480-81.

When Senate District 10 was drawn in the 2001 redistricting cycle, it was a majority Anglo district: 56.6% Anglo, 16.7% African American and 22.9% Hispanic. *See* Compl. ¶ 32, J.A. 419. But throughout the last decade, the minority population in the District grew dramatically, while the Anglo population significantly decreased as a percentage of the District. Between 2000 and 2010, the total Anglo population in Dallas and Tarrant counties declined by more than 156,000, whereas the Latino population in that two-county area grew by more than 440,000, and the African-American population in that area grew by more than 152,000. *See id.* ¶ 33, J.A. 420. By the end of the decade, Senate District 10's minority population had increased by 9 percentage points and its Anglo population percentage had fallen by 9 percentage points. *See id.*

Thus, following the 2010 census, Anglos no longer comprised a majority of Senate District 10's total population. *See id.* That census recorded the population of the district as 28.9% Latino, 19.2% African-American, and 47.6% Anglo.

In drawing the Senate plan based on the 2010 Census data, state legislative leaders knew that Senate District 10 had become majority-minority in population, acknowledged that Senator Davis was minority voters' candidate of choice in 2008, and were warned that dismantling Senate District 10 would harm minority voting rights. *See, e.g.*, Letter from Sen. Davis to Sen. Seliger (May 10, 2011), J.A. 532-35; Statement of Democratic Senators (May 17, 2011), J.A. 536-38; *see also* Sen. West Decl. ¶ 2, J.A. 522-23; Sen. Zaffirini Decl. ¶ 7, J.A. 519. In the face of all this, they adopted a plan that intentionally eliminated Senate District 10 as a minority opportunity district, dramatically changing the District's demographic makeup and fracturing its minority population into districts scattered across North Texas.

The new plan added 58,846 Anglos to the District, while removing 61,562 African-Americans and Hispanics, raising the Anglo percentage to 54.4% (from the benchmark of 47.6%), lowering the African-American voting age population from 17.9% to 13.4%, and lowering the Hispanic voting age population from 24.8% to 22.1%. *See* Compl. ¶ 37, J.A. 421. Thus, the State's Senate plan was drawn to ensure that minority population gains from 2000 to

2010 in the Dallas-Tarrant County region of North Texas would not result in minority electoral gains.

That plan was created as a result of a legislative process that completely shut out minority legislators and was infected with discriminatory intent. *See* Lichtman Report at 9-14, J.A. 484-92. The twelve senators representing minority opportunity districts – including those serving on the Redistricting Committee – were not even *shown* the proposed configuration of their *own districts* until the plan was finalized, despite repeated requests. *See* Sen. West Decl. ¶ 3, J.A. 523; Sen. Zaffirini Decl. ¶ 5, J.A. 519; Sen. Ellis Decl.¶ 8, J.A. 529; Sen. Davis Decl. ¶¶ 9-13, J.A. 500, 502 (¶¶ 21, 25). In stark contrast, State leaders provided senators who represented majority Anglo districts with "open and continued access to the redistricting process for weeks leading up to the formal consideration of the map." *See* Sen. Zaffirini Decl. ¶5, J.A. 519; *see also* Sen. West Decl. ¶ 3, J.A. 523. That kind of differential treatment led Senator Judith Zaffirini, a Latina representing a majority minority district, to describe the process as "the least collaborative and most exclusive of any [she] ha[d] experienced" in her 25 years of service. *See* Sen. Zaffirini Decl. ¶¶ 2-3, J.A. 518. And it leaves little doubt that State leaders purposefully prevented senators who represented majority minority districts from having any meaningful input into the creation of the Senate plan. *See* Sen. Zaffirini Decl. ¶¶ 5-6, J.A. 519; *see also* Sen. West Decl.¶ 3, J.A. 523; Sen. Ellis Decl. ¶¶ 3-8, 11, J.A. 527-30.

The senators representing minority opportunity districts repeatedly raised concerns both about this discriminatory process, as well as the retrogressive proposal that was its result. *See, e.g.*, Letter from Sen. Davis to Sen. Seliger (May 10, 2011), J.A. 532-35; Statement of Democratic Senators (May 17, 2011), J.A. 536-38; *see also* Sen. West Decl. ¶ 2, J.A. 522-23; Sen. Zaffirini Decl. ¶ 7, J.A. 519. Those concerns were ignored as senators representing Anglo districts performed their redistricting work behind closed doors.[1]

Despite being effectively shut out of the process, minority senators nonetheless attempted to present several non-retrogressive alternative maps that would not have dismantled District 10. With little notice before committee hearings were held, and without an adequate opportunity to review the proposed map, minority members of the Senate and House redistricting committees offered alternative plans both during committee hearings and on the Senate and House floors. *See, e.g.*, Lichtman Report at 7-8, J.A. 483; *see also* Sen. Zaffirini Decl. ¶ 7, J.A. 519; Statement of Democratic Senators (May 17,

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[1] Contrary to previous procedure, State officials also effectively excluded the public from the process. They held a single public hearing covering the Senate plan, but they failed to provide adequate advance notice to the public. They also did not hold any public hearings outside of the State Capitol in Austin, as they had done in prior years. *Compare* Sen. Zaffirini Decl. ¶ 4, J.A. 518-19; Lichtman Report at 13, J.A. 491 (describing process used in adopting the 2011 plan) *with* Tex. 2001 Preclearance Submission at 4-5, J.A. 444-46 (describing process used in adopting benchmark 2001 plan).

2011), J.A. 536-38. In each instance, the alternative plans received overwhelming support from members who represented minority opportunity districts. And in each instance, these alternatives were rejected by the Anglo majority.

This discriminatory process resulted in a retrogressive map that intentionally fractures and dismantles the coalition of African-American and Hispanic voters in Senate District 10. Even though State leaders in 2001 held up Senate District 10 as a district that would present minority voters with an opportunity to elect their candidate of choice by the end of the decade, they chose to dismantle it as soon as minority voters had succeeded in electing their preferred candidate. *Compare* Tex. 2001 Preclearance Submission at 18, J.A. 451, *and* Sen. Davis Decl. ¶¶ 17-23, J.A. 504-06 (¶¶ 29-35); Rep. Veasey Decl. ¶¶11-13, J.A. 464-65; Cmsr. Brooks Decl. ¶10, J.A. 469; Chairman Richie Aff. at 3, J.A. 475; Racial Shading Map of Plan S100 (Benchmark), M.J.A. 74;[2] Racial Shading Map of Plan S148, M.J.A. 78; Map Comparing Changes to Senate District 10, M.J.A. 75.

The State's map divides the minority communities that were the cornerstone of District 10 and, in many instances, had remained together in a Senate District for generations, joining them with predominantly Anglo rural, suburban, and exurban populations. *See* Sen. Davis Decl. ¶¶ 17-23, J.A. 504-

[2] The Map Joint Appendix ("M.J.A.") is the oversized volume of the Joint Appendix containing maps presented in this proceeding.

06 (¶¶ 29-35); Rep. Veasey Decl.¶¶ 11-13, J.A. 464-65; Cmsr. Brooks Decl. ¶ 10, J.A. 469; Chairman Richie Aff. at 3, J.A. 475. The large African-American neighborhoods in District 10 comprise the third largest concentration of African-Americans in Texas. *See* Rep. Veasey Decl. ¶ 3, J.A. 460; Letter from Sen. Davis to Sen. Seliger (May 10, 2011) at 1, J.A. 532. Yet these historical communities of interest were attached as a northern appendage to rural-based District 22, which extends more than 100 miles south and is dominated by rural Anglo voters who have no shared interests with African-Americans in Fort Worth or any part of Tarrant County. *See* Plan S148 Map, M.J.A. 72; Racial Shading Map of Plan S148, M.J.A. 79. While the Senate official who drew the State's Senate map claimed that one of the State's criteria was the protection of communities of interest, the State plainly violated this principle in splitting defined communities of interest to redraw Senate District 10. *See* Doug Davis Tr. (Oct. 18, 2011) at 27:11-34:17, J.A. 507-17.

Thus, the legislature subsumed minority communities into surrounding Anglo communities to ensure that minority voters would be unable to elect a candidate of choice anywhere in the Fort Worth area. *Compare* Racial Shading Map of Plan S100 (Benchmark), M.J.A. 78 *and* Racial Shading Map of Plan S148, M.J.A. 79; *see also* Sen. Davis Decl. ¶¶17-23, J.A. 504-06 (¶¶29-35); Rep. Veasey Decl. ¶¶ 11-13, J.A. 464-65; Cmsr. Brooks Decl. ¶ 10, J.A. 469; Chairman Richie Aff. at 3, J.A. 475. Instead, the growing minority population in the Tarrant County

area is likely to be represented by senators who, in the past, have been "outright hostile" on issues of particular concern to minority citizens. *See* Constable De Leon Decl. ¶ 9, J.A. 458. The direct impact of these changes on minority voters is evident from the contrast between the positions Senator Davis has taken on issues that are critical to the minority voters in District 10 and the positions taken by the Senators representing the districts into which those minority voters have been submerged in the legislature's plan. *See* Sen. Davis Decl. ¶¶ 7, 21, J.A. 499-500, 505-06 (¶¶ 19, 33). For example, Senator Davis has taken an active leadership role in opposing cuts to funding in public schools, efforts to end payday lending, and blocking a Voter Photo ID bill. *Id.* ¶ 7, J.A. 499-500 (¶ 19). In contrast, the Anglo senators representing the surrounding districts in which minority neighborhoods from District 10 were reassigned supported the opposite positions. *Id.*, J.A. 499-500 (¶ 19); *see also id.* ¶ 21, J.A. 505-06 (¶ 33).

Given the intentionally discriminatory process and the discriminatory effects of the new map for minority communities, *all* of the minority senators and *all* of the Democratic senators in the Texas Senate issued a public statement opposing the State's Senate plan before its final passage. *See* Statement of Democratic Senators (May 17, 2011), J.A. 536-38. Though many of these Senators ultimately voted for the Senate plan, they did so under protest and only to prevent a legislative deadlock on the State Senate map that would have resulted in the map being drawn by an all-Anglo, highly partisan five-member body (the Legislative

Redistricting Board) appointed under State law. As African-American State Senator Rodney Ellis explained: "[m]any Senators feared, with justification, that this harshly partisan body of statewide elected officials would dismantle not only District 10 but other minority opportunity districts as well." Sen. Ellis Decl.¶ 5, J.A. 528. Thus, the Senate map was enacted under protest on May 23, 2011.

II. The State's Choice to Slow the Preclearance Process in the District Court for the District of Columbia

That the Senate plan was not enacted until May 23, 2011 was surprising. The State of Texas convened its legislative session in January 2011, and received redistricting data from the United States Census Bureau in February 2011. Yet, the State Legislature delayed consideration of redistricting until the very end of the session. This delay was not the result of partisan gridlock because any redistricting plan was assured passage since the State of Texas has unified Republican control of both houses of the State Legislature and the governorship.

Indeed, the delay is inexplicable given that State Legislature knew all the while that Texas has some of the earliest candidate qualifying deadlines and primaries in the country. In fact, due to new requirements to process and mail military ballots well in advance of the primary election date, the Legislature considered moving the Texas primary from March 6, 2012 to a later date in April. The

State's leadership, however, rejected this option and retained the early primary date, moving up the candidate qualifying deadlines from December to November 2011.

Even more inexplicable is the fact that the Senate map, once enacted, then sat on Governor Perry's desk for almost another month after passage. The Governor finally signed the Senate plan into law on June 17, 2011. Then, yet another month passed before the State decided to submit the Senate plan (along with the House and Congressional plans) for preclearance on July 19, 2011.

In submitting its redistricting plans for preclearance, the State of Texas faced three choices:

First, it could have chosen to submit its plans to the Department of Justice for administrative preclearance. Upon submission, the Department would have had 60 days to object to the plans. If no objection was made, the plans would have become law. This Court has described administrative preclearance with the Department as the more "expeditious alternative." *Morris v. Gressette*, 432 U.S. 491, 504 (1977) (Congress established the administrative preclearance process through the Department of Justice in order to provide "an expeditious alternative to declaratory judgment actions" in the District Court for the District of Columbia); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969) (noting that the alternative procedure of submission to the Attorney General "gives the covered State a rapid method of rendering a new state election law enforceable"). Texas

deliberately chose not to take the more expeditious alternative.

Second, Texas could have chosen to submit its plans to the Department of Justice, while simultaneously initiating a declaratory judgment action in the District Court for the District of Columbia. Under this option, if the Department of Justice precleared the plans within 60 days, the declaratory judgment action would have become moot; if the Department objected, the District Court could still preclear the plans and would have already begun its work. Indeed, this is the option North Carolina, Louisiana, and other states pursued in 2011 with respect to their recently enacted redistricting plans. In all of these cases, the Department precleared the plans within the 60-day statutory window. Texas deliberately chose not to take this more expeditious alternative either.

The third option is the one Texas chose: initiating a declaratory judgment action in the District Court for the District of Columbia, without any attempt to obtain preclearance from the Department of Justice. The only explanation for such a choice is that Texas knew that it could not possibly obtain preclearance on its House, Senate, and Congressional plans from the Department of Justice. It was therefore rolling the dice that it would get a panel in the D.C. District Court that would rubberstamp its plans over a Department of Justice objection, or perhaps hoping that the passage of time might allow it to avoid preclearance altogether if this Court or another court held Section

5 constitutionally infirm. But Texas's gamble has not paid off.

In any event, it is clear that since initiating the declaratory judgment action in the D.C. District Court, Texas has made every effort to slow down the process. It filed its complaint without seeking to shorten the time (60 days) for the Department of Justice to file its answer; it never moved for an abbreviated discovery schedule; and it did not request an expedited trial date or otherwise seek to expedite the proceedings upon filing its complaint. Indeed, the State waited 23 days after filing its complaint before even asking the D.C. District Court to schedule a status conference.

Pursuant to Federal Rule of Civil Procedure 24, a number of individual voters and groups (including the Davis Appellees, Appellee LULAC, the Texas State NAACP, and the State Legislative Black Caucus) intervened as defendants in the D.C. District Court preclearance litigation to protect their voting rights and interests under Section 5 of the Voting Rights Act.[3] Although the State has

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[3]Private parties are routinely permitted to intervene in Section 5 preclearance cases brought by covered jurisdictions against the United States, so long as they have relevant interests that may not be adequately protected by the federal government. As this Court put it in *Georgia v. Ashcroft*:

> Here, the District Court granted the motion to intervene because it found that the intervenors' "analysis of the . . . Senate redistricting pla[n] identifies interests that are not adequately represented by the existing parties." . . . Private parties may intervene in § 5 actions assuming they

suggested otherwise, these interventions in the preclearance action did not slow the pace of the litigation one bit. Rather, the State continued to slow the pace.

On September 14, 2011, five days *before* the Department of Justice filed its answer to the State's complaint in the D.C. District Court, and before any discovery could be undertaken in the case, the State filed a motion for summary judgment. Mot. S.J., *Texas v. United States*, No. 11-cv-01303 [Dkt. # 41] (D.D.C. Sept. 14, 2011). The State claimed in that motion that all of its statewide plans (Congress, State Senate, State House, and State Board of Education) were free of a racially discriminatory purpose and effect. This was an ill-advised step by the State of Texas that caused further delay. Instead of seeking a quick trial date, the State instead sought summary judgment on the fact-intensive issues of racially discriminatory intent and effect. And it did so despite a unanimous holding from this Court that in the redistricting context, the issue of racially discriminatory intent is rarely (if ever) appropriate for resolution on summary judgment. *See Hunt v. Cromartie*, 526 U.S. 541, 553-54 & n.9 (1999).

> meet the requirements of [Fed. R. Civ. P.] 24, and the District Court did not abuse its discretion in granting the motion to intervene in this case.

539 U.S. 461, 477 (2003) (citing *NAACP v. New York*, 413 U.S. 345, 367 (1973); first two alterations in original).

On September 19, 2011, the Department of Justice filed its answer in the D.C. District Court. The Department stated that while it would oppose preclearance of the Congressional and State House plans, it would not oppose preclearance of the Senate and Board of Education plans. It is important to note, however, that the answer was filed before any discovery was undertaken, and thus before Appellees developed ample evidence that the State Senate plan was drawn with a racially discriminatory purpose and effect. *See infra* 20 (sworn declarations demonstrating that Senate plan was drawn by Anglo senators who deliberately excluded racial and language minority senators from their deliberations and that process was "intentionally discriminatory"). Moreover, the evidence showed that the fracturing of the minority population in Senate District 10 effectively eliminated the ability of minority voters to elect their preferred candidate of choice. *See infra* 21-22 (sworn declarations of Senators Ellis, Zaffirini, West, and Davis, and Representative Veasey; Report of Lichtman).

In light of the Department of Justice's answer, which included allegations of discriminatory intent, Judge Collyer (who is serving as the managing judge for the preclearance litigation) twice suggested that the State reconsider its decision to pursue summary judgment because it might result in a slower resolution of the case. *Transcript of Telephonic Conference, Texas v. United States*, No. 1:11-cv-01303 at 33-34 [Dkt. # 71] (D.D.C. Sept. 21, 2011).

Judge Collyer stated: "If the State of Texas, hearing everybody's objections and the position of the United States, now thinks, 'Well, our motion for summary judgment needs to be augmented, rethought, reargued,' why then we can say, 'Okay, we won't do this by motions, we'll do it by trial,' . . . But at the moment it's Texas' lawsuit and Texas' motion for summary judgment, and that's what we're scheduling." *Id.* at 32:25-33:13. Judge Collyer emphasized her suggestion by asking counsel for the State "whether in light of all the responses you've gotten, you would rather say, 'Okay, let's just go to trial and get this done[,] instead of try summary judgment and have somebody say, 'Well, I can't really decide on this record,' which I'm not anticipating, but which is, with summary judgment, always a risk." *Id.* at 33:15-21. Despite Judge Collyer's sage advice that the issue of racially discriminatory intent was perhaps not capable of summary disposition, and the offer of an early trial date, the State declined the D.C. Court's invitation to expedite the proceedings and instead insisted that it would pursue its summary judgment motion. *Id.* at 34:3-18.

The oppositions to summary judgment demonstrated in great detail that there were significant factual questions to be resolved about the State's discriminatory intent in enacting its redistricting plans, as well as the discriminatory and retrogressive effects of the enacted plans. Intervenors described the secretive maneuverings by members representing Anglo districts to push through the Senate map without any meaningful

consultation with the public or with members who represented majority minority districts. *See* Davis Mem. in Opp'n to Mot. for S.J. at 9-13 [Dkt. # 76-1] (D.D.C. Oct. 25, 2011) (hereinafter "Davis Opp'n"); Davis Statement of Genuine Issues and Disputed Material Facts ¶¶ 14-22 [Dkt. # 76-2] (D.D.C. Oct. 25, 2011) (hereinafter "Davis Statement"); Texas Legislative Black Caucus et al. Statement of Genuine Issues and Disputed Material Facts at 6 [Dkt. # 80] (D.D.C. Oct. 25, 2011) (hereinafter "TLBC Statement"). Sworn declarations from minority members of the legislative redistricting committees supported these allegations and showed the process was "intentionally discriminatory." *See* Exs. 4, 10, 11 to Davis Opp'n [Dkt. ## 76-7, 13, 14] (sworn declarations of Senators Zaffirini and West and Representative Veasey).

Intervenors also raised significant factual questions as to the discriminatory effect of the enacted plans. *See* Davis Opp'n at 5-9; Davis Statement ¶¶ 3-12, 25-31; TBLC Statement at 8. First, they demonstrated that Senate District 10 in the benchmark map was an effective minority opportunity district. *See* Davis Statement ¶¶ 3-12; Lichtman Rept. Second, they showed that the legislature dismantled this district in the face of ample evidence of its effectiveness. *See* Davis Statement ¶ 25. Sworn declarations showed that the State effectively eliminated the ability of minority voters to elect their preferred candidate of choice in the Fort Worth area. *See* Exs. 3-5, 8, 10-11, 13 to Davis Opp'n [Dkt. ## 76-6-8, 11, 13-14, 16] (sworn declarations of Senators Ellis, Zaffirini, West, and

Davis, and Representative Veasey, Commissioner Brooks, Constable De Leon). Moreover, evidence presented by Intervenors indicated that even Anglo Republican members were concerned that the map would not be precleared under the Voting Rights Act. See Ex. 8 to Davis Opp'n [Dkt. # 76-11] (sworn declaration of Senator Davis). Thus, Intervenors cast substantial doubt on the viability of the legislature's plan under Section 5.

Following briefing of the summary judgment motion and a full day of oral argument on November 2, 2011, the D.C. District Court unsurprisingly concluded that this was not a case that could be resolved on a motion for summary judgment. As the court held, there were "material issues of fact in dispute that prevent[ed] th[e] Court from entering declaratory judgment that the three redistricting plans meet the requirements of Section 5 of the Voting Rights Act. *See* 42 U.S.C. 1973c." Order, *Texas v. United States*, No. 1:11-cv-01303 at 2 [Dkt. # 106] (D.D.C. Nov. 8, 2011), J.A. 550-51. The Court further found that as to all three redistricting plans, "the State of Texas used an improper standard or methodology to determine which districts afford minority voters the ability to elect their preferred candidates of choice." *Id.* at 1, J.A. 550.

The D.C. District Court was cognizant of the fact that the filing deadlines for candidates in Texas were fast approaching[4] and the primary elections were

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[4] Though the candidate qualifying date was originally set for November 14, 2011, the three-judge court in Texas delayed the

only four months away. The D.C. Court concluded that it was the responsibility of the Texas federal court to impose maps that would allow voters in the State to exercise their right to vote despite the State's failure to obtain preclearance of newly enacted maps reflecting the current census data. Thus, the court declared: "If any one of the plans is not precleared by this Court at this stage in the proceedings, the District Court for the Western District of Texas must designate a substitute interim plan for the 2012 election cycle by the end of November. *See Perez v. Texas*, No. 11-360, Am. Order [Dkt. # 391] (W.D. Tex. Oct. 4, 2011) (consolidated action)." *Id.* at 1-2, J.A. 550.

The preclearance proceedings in the D.C. District Court are still underway, and an eight-day trial is set to begin in that court on January 17, 2012. *Texas v. United States*, No. 11-cv-01303 [Dkt. # 112] (D.D.C. Dec. 13, 2011).

III. The Proceedings on the State Senate Map in the Western District of Texas

On September 22, 2011, while the preclearance proceedings were moving forward in the D.C. District Court, the Davis Appellees filed the Western District of Texas action currently on appeal to this Court involving the State Senate redistricting plan – *Davis v. Perry*. Suing the Governor of Texas and various officials charged with administering elections, the Davis Appellees alleged that the Senate map, even if

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opening of candidate qualifying (with the agreement of all parties, including the State of Texas) until November 28, 2011.

precleared, would violate the Fourteenth Amendment and Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because the changes made to District 10 were the product of an intent to harm minority voters and had the effect of harming those voters. Compl., Prayer ¶¶ 4-5, J.A. 424. The Davis Appellees also asked the three-judge panel to enforce Section 5 by preventing the State from implementing the new map unless and until it was precleared. Compl., Prayer ¶ 6, J.A. 424. Appellee LULAC filed a similar suit shortly thereafter pursuing similar claims with respect to the State Senate plan, and the two cases were consolidated.

Appellees' challenge to the State Senate plan was similar to prior lawsuits (also on appeal here) filed in the same court challenging the legality of the new Texas congressional district map and the new map for the Texas House. In those two earlier cases, but not in this Senate case, the district court held a trial on the claims at issue, withholding ruling on the merits until after a preclearance decision by the D.C. District Court with respect to the maps.

Once the D.C. District Court issued its decision denying summary judgment for the State and instead requiring a trial to determine whether preclearance should be granted, it was clear that the Western District of Texas panel would have to implement interim maps in order for the 2012 elections to take place. Accordingly, the court below held a day-long evidentiary hearing at which it took evidence and considered proposed plans from all parties. With regard to the Senate map, the Davis

Appellees presented evidence showing that the State intentionally discriminated against minority voters under the factors developed in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977), and that the resulting plan also was discriminatory in effect. *See, e.g.*, *supra* 8-13. The Davis Appellees also presented evidence demonstrating that the coalition of minority voters in Senate District 10 was protected by Section 2 under the guiding precedent of *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1985), and *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988). *See, e.g.*, Lichtman Report at 3, 7, J.A. 477-78, 483; Plan S156 Map, M.J.A. 77; Racial Shading Map of S156, M.J.A. 80.

The Davis Appellees presented the court below with proposed interim Senate maps that demonstrated that District 10 could be drawn to comply with Sections 2 and 5 of the Voting Rights Act and the Fourteenth Amendment. After hearing this evidence, and viewing the proposed interim maps presented by the parties, the three-judge court promulgated its own interim plan for the State Senate on November 23, 2011. The panel did not simply adopt one of the Davis or LULAC Appellees' proposals, but rather took a more modest approach to redrawing Senate District 10. *Compare* Plan S156 Map, M.J.A. 77, *and* Court-Ordered Interim Map, M.J.A. 73. The resulting interim plan was unanimously adopted by all three members of the panel in Texas.

In its order implementing the map, the panel stated that in "drawing a Senate map, the court was faced with factual and legal concerns very different from those faced in regard to the Congressional and State House maps. Thus, the manner in which the State Senate [interim] map is drawn is quite different from the manner in which the Congressional and State House [interim] maps are drawn." J.A. 407. The panel further observed that the "only objections raised to the State's enacted map in this litigation concerned Senate District 10." *Id.* As a result, the panel concluded that the "appropriate exercise of 'equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy' was to maintain the status quo from the benchmark plan with regard to Senate District 10 pending resolution of the litigation in the District of Columbia but otherwise to use the enacted map as much as possible." *Id.* at 407-08 (footnote omitted).

The court below thus kept intact 26 of 31 districts in the State's 2011 enacted plan. It redrew only Senate District 10 and the surrounding four districts to restore District 10 to its pre-existing configuration in the only currently precleared, legislatively enacted map – the 2001 plan. *Compare* Plan S100 (Benchmark) Map, M.J.A. 74, *and* Court-ordered Interim Map, M.J.A. 73; *see also* Map Comparing Changes to Senate District 10, M.J.A. 75. The minor changes required to restore Senate District 10 to its benchmark configuration did not significantly alter the geographic base or predicted political behavior of the adjoining four districts. In

fact, the court's interim plan for the State Senate is very unlikely to alter the partisan makeup of the Texas Senate at all. Under the benchmark plan, Republican candidates are favored election in 19 Districts, and Democratic candidates are favored in 12 districts. The three-judge court's interim plan will almost certainly result in the same partisan makeup of the Senate, and, like the benchmark plan, will give minority voters the opportunity to elect their candidate of choice in the 12 Democratic-leaning districts. In restoring Senate District 10 to its benchmark status, the Court's interim plan respected the policy choices of elected representatives in Texas as they were reflected in the Senate plan that was adopted in 2001 and precleared by the Department of Justice. And the remaining districts adhered to the State's policy choices in its 2011 plan. Thus, all 31 of the State Senate districts in the three-judge court's interim plan reflect policy choices made at some point by the Texas Legislature.

The State sought to stay the court's implementation of the interim map. Relying exclusively on this Court's *per curiam* opinion in *Upham v. Seamon*, 456 U.S. 37 (1982), the State argued that the court had erred because it was "require[d] … to defer to legislatively enacted maps" when putting an interim map into place." J.A. 376. In essence, the State asked the three-judge panel to order its enacted Senate map into place even though the map had not been precleared, as Section 5 requires.

Over a dissent from Judge Smith, the court refused to stay implementation of the interim Senate map. As the panel majority observed, "when there is no other legally enforceable plan in effect, this Court is required to craft an independent court-drawn interim map." J.A. 402. The panel correctly recognized that under this Court's precedent, "the Court is precluded from simply adopting the State's enacted plan or deferring to the challenged plan, as doing so would make the preclearance process meaningless and constitute a de facto ruling on the merits of the various legal challenges to the State's plan." *Id.* at 2, J.A. 403.

The State then filed an emergency application for a stay with this Court. On December 9, 2011, this Court granted the stay, treated the applications for stay as jurisdictional statements, and noted probable jurisdiction.

SUMMARY OF ARGUMENT

The three-judge district court in Texas complied with decades of this Court's precedents in implementing an interim plan to permit the 2012 elections to go forward. The court acted cautiously and respected the legislative judgment of the State, redrawing only the objected-to Senate District and its surrounding districts to restore the configuration to the benchmark plan that is the only precleared, legislatively enacted plan currently in existence. The court properly refused to simply adopt the State's enacted plan as its interim plan because to do so would render meaningless the exclusive jurisdiction that Congress bestowed on the Department of

Justice and the District Court for the District of Columbia to make preclearance determinations. The court likewise properly refused to rule on the merits of the various statutory and constitutional challenges to the State's enacted plans as it was forbidden from doing so unless and until those plans were precleared.

The State relies on a single *per curiam* opinion of this Court to urge that district courts are required to defer to the legislatively enacted plan when drawing an interim map. But the case upon which the State relies – *Upham v. Seamon* – says no such thing. In fact, this Court's precedent actually mandates that anytime a federal court adopts a plan that reflects the policy choices of the State's legislature, that plan requires preclearance. Obviously, adopting the State's plan as its interim plan was not an option for the court below and no opinion of this Court suggests otherwise.

ARGUMENT

I. The District Court's Imposition of an Interim Senate Map Was Required By Numerous Decisions of this Court.

1. As demonstrated above, the actions of the State of Texas in delaying the passage of its redistricting plans, delaying the submission of its plans for preclearance, forgoing the more expeditious alternative of administrative preclearance, and refusing the D.C. District Court's offer of an early trial date in the still-pending preclearance proceedings, left the panel in the Western District of Texas in a difficult position. Given the situation it

was facing – the absence of a precleared district map and the denial of summary judgment in the D.C. District Court – the three-judge panel below acted fully in accordance with decades of this Court's precedent in imposing an interim map.

Numerous decisions from this Court have made clear that unprecleared redistricting plans are legally unenforceable unless and until precleared. Indeed, no change to *any* electoral practice in a covered jurisdiction can take place until precleared. As this Court recently held, "Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law – however innocuous – until they have been precleared by federal authorities in Washington, D.C." *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. 2504, 2511 (2009) (emphasis in original); *see also Lopez v. Monterey Cty.,* 519 U.S. 9, 20 (1996) ("A jurisdiction subject to § 5's requirements must obtain either judicial or administrative preclearance before implementing a voting change. No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance."); *McDaniel v. Sanchez,* 452 U.S. 130, 146 (1981) ("A new reapportionment plan enacted by a State, including one purportedly adopted in response to invalidation of the prior plan by a federal court, will not be considered 'effective as law,' … until it has been submitted and has received clearance under § 5." (quotation marks omitted)); *Connor v. Waller,* 421 U.S. 656, 656 (1975) (*per curiam*) ("Those Acts are not now and will not be effective as laws until and unless cleared pursuant to

§ 5."); *Georgia v. United States*, 411 U.S. 526, 538 n.9 (1973) ("States subject to § 5 [are] required to obtain prior clearance before proposed changes could be put into effect.").

This rule is based on the plain language and purpose of Section 5. Section 5 requires that "[w]henever a [covered] State or political subdivision … enact[s] or seek[s] to administer any [new] voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," that State or subdivision must either (1) submit the proposed change to the Attorney General of the United States Department of Justice who shall have 60 days to object to the proposed change and if there is no objection it shall go into effect; or (2) institute a declaratory judgment action in the United States District Court for the District of Columbia seeking a declaration that the proposed 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. Thus, a covered jurisdiction can take either the "expeditious alternative" of submission to the Department of Justice, or the longer path through the District Court for the District of Columbia. *Morris*, 432 U.S. at 504.

As this Court has recognized, Congress adopted Section 5 "to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process." *See McDaniel*, 452 U.S. at 149. It did so by providing two – and only two – entities with the authority to make preclearance determinations. This was intentional. *See* S. Rep.

No. 94-295, at 18 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 784 (noting that the "Committee's objective [was] to utilize a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia District Court"). "This congressional choice in favor of specialized review necessarily constrains the role of the three-judge district court," which "lacks authority to consider the discriminatory purpose or nature of the changes." *Lopez*, 519 U.S. at 23; *see also United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645 (1977) ("What is foreclosed to [the] 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."). Allowing a covered jurisdiction to circumvent this congressionally designed process by seeking what is in effect a preclearance determination from another court would be directly contrary to the procedures Congress specified in Section 5.

These procedures are in place to prevent "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). Under the congressionally mandated design, it is the State's burden to prove non-retrogression. In Section 5, Congress chose "'to shift the advantage

of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.'" *Id.* at 140 (quoting H.R. Rep. No. 94-196, at 57-58 (1970)). Thus, in the declaratory judgment proceeding Texas chose to institute in the D.C. District Court, the onus is on Texas to demonstrate that its proposed redistricting plans are not discriminatory in purpose or effect.

Here, Texas has thus far failed to satisfy its Section 5 burden. The D.C. District Court has denied summary judgment to Texas, finding that as to the Senate plan, there are "material issues of fact in dispute that prevent[ed] th[e] Court from entering declaratory judgment that [it] meet[s] the requirements of Section 5 of the Voting Rights Act." J.A. 550-51. While no final preclearance determination has yet been made, the result of the State's dilatory and flawed strategy for preclearance was that there was no new Senate district map legally in effect as of the time when state law prescribed that the election process should begin.

With no new map legally in effect, the only other district map in existence was the one enacted in 2001. But that map, based as it was on the 2000 census, was severely malapportioned, thus violating the one-person, one-vote requirement in the Equal Protection Clause of the Fourteenth Amendment. Because a failure to make available a constitutionally compliant map would itself be a violation of the Constitution, the three-judge panel

needed to step in to provide an interim map to remedy the problem.

The authority and responsibility of federal courts to step in when the State has not obtained preclearance in a timely manner has long been recognized by this Court. Indeed, when this issue arose in the last cycle of redistricting, this Court upheld the procedure of a three-judge panel implementing an interim map because the redistricting plan at issue "had not been precleared and had no prospect of being precleared in time for the [next] election." *Branch v. Smith*, 538 U.S. 254, 265 (2003). In *Branch v. Smith*, this Court held it was the responsibility of district courts to fashion an interim redistricting plan for impending elections to "remedy[] a state legislature's failure to redistrict constitutionally" by obtaining timely preclearance. *Id.* at 273. As the Court observed: "When the State, through its legislature or other authorized body, cannot produce the needed decision, then federal courts are 'left to embark on [the] delicate task' of redistricting." *Id.* at 278 (alteration in original). The three-judge panel below was acting fully in accordance with this Court's precedent in implementing an interim map.

2. Despite the State's contentions otherwise, in undertaking this task, the panel simply did not have the option of rubberstamping the State's 2011 enacted plan and ordering it into effect as the interim plan. This Court has held multiple times that if a map reflects the policy choices of elected leaders in a covered jurisdiction, then that map still

must be precleared, even if adopted by a federal court. In *Lopez v. Monterey County*, 519 U.S. 9 (1996), this Court expressly held that "where a [federal] 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.'" *Id.* at 22 (citation omitted; alteration in original); *see also McDaniel*, 452 U.S. at 153. Obviously, had the court below adopted a map that still needed to be submitted for preclearance, this would have left the parties in exactly the same predicament – impending elections with no enforceable map.

Citing *Lopez*, the court below correctly held that it was "precluded from simply adopting the State's enacted plan or deferring to the challenged plan, as doing so would make the preclearance process meaningless and constitute a de facto ruling on the merits of the various legal challenges to the State's plan." J.A. 393. Congress entrusted preclearance determinations to one of two bodies: either the Attorney General of the United States, or the District Court for the District of Columbia, not the Western District of Texas. Thus, as the court below observed, it "cannot simply adopt an unprecleared redistricting plan, in whole or in part, with the signatures of a few judges sitting in Texas." J.A. 403-04.

The court then did exactly what it was supposed to do. It went as far as it legally could to reflect the policy choices of the State Legislature in its Senate map. The panel adopted 26 of the 31 districts exactly

as drawn by the legislature in its 2011 State Senate map, reshaping only Senate District 10, which is the District at issue in the preclearance proceedings, and its four adjoining districts. Moreover, the three-judge panel merely restored District 10 to its benchmark status, largely following the lines as drawn by the State legislature in its 2001 Senate plan. In restoring Senate District 10 to its benchmark configuration, the panel did not significantly alter the geographic base or political behavior of the adjoining four districts. *See* J.A. 408 n.2.

To have gone even further in deferring to the legislature would have been legally indefensible. This Court made clear decades ago that Section 5 of the Voting Rights Act "essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that a proposed change is without discriminatory purpose or effect." *Georgia v. United States*, 411 U.S. at 538. The three-judge panel's order is plainly consistent with this Court's precedents regarding how Section 5 preserves the status quo. The interim plan correctly froze the district lines for Senate District 10 as they existed in the prior plan so the D.C. District Court (where preclearance remains pending) can make the requisite preclearance determination under Section 5.

To adopt the State's proposed rule that a court is required to defer to the unprecleared, legislatively enacted map and simply adopt it when election

deadlines are looming would incentivize exactly the bad faith behavior that the State of Texas has engaged in here. It would encourage covered jurisdictions to delay as long as possible in enacting redistricting plans and submitting them for preclearance, ensure that covered jurisdictions engage in maneuvers designed to slow the process, and then reward these jurisdictions by allowing their plans to go into effect without the review that Congress required from the Department of Justice or the D.C. District Court. This would render Section 5 nearly meaningless.

3. Similarly misguided is the State of Texas's contention that the panel below erred in redrawing Senate District 10 without making a determination as to the merits of Appellees' pending Section 2 and constitutional challenges to the enacted version of the District. In issuing its interim map, the three-judge panel drew "an independent redistricting plan without ruling on any of the various legal challenges, and it … considered the parties' legal challenges only for the purpose of avoiding the same legal challenges to the court drawn map." J.A. 404-05. It was entirely proper for the district court to refuse to base its narrow modifications to the enacted plan on conclusions about whether that plan violated the Fourteenth Amendment or the Voting Rights Act. The court is *legally precluded* from issuing a decision on the merits of the State's plan unless and until that plan is precleared.

Under this Court's rulings, the three-judge court in Texas is *prohibited* from deciding the

constitutionality of the State's redistricting plans or their compliance with Section 2 of the Voting Rights Act while a preclearance determination is pending before the D.C. District Court. This Court has directed that "until clearance has been obtained," courts should not "address the constitutionality of the new measure." *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978); *see also Connor*, 421 U.S. at 656 (holding that district court erred in adjudicating constitutionality of Mississippi acts based on claims of racial discrimination because "[t]hose Acts are not now and will not be effective as laws until and unless cleared pursuant to s 5"). Thus, "[w]here state reapportionment enactments have not been precleared in accordance with § 5, the district court 'err[s] in deciding the constitutional challenges' to these acts." *Branch v. Smith*, 538 U.S. 254, 283 (2003) (Kennedy, J., concurring).

Indeed, while a preclearance determination is pending, the court's only role is to determine "whether § 5 covers a contested change, whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate." *Lopez*, 519 U.S. at 23. Thus, the court below properly determined that (1) Section 5 covered the contested redistricting plan; (2) Section 5's requirements had not been satisfied; and (3) an appropriate temporary remedy would be to order an interim Senate plan that deferred to the State's legislative judgment as much as possible and otherwise used the benchmark map where the State's legislative judgment was contested.

This practice of waiting for preclearance before opining on other challenges to the plans likewise follows from the plain language and structure of the Voting Rights Act, which contemplates that Section 5 proceedings will precede consideration of challenges based on Section 2 or on the Constitution. *See* 42 U.S.C. § 1973c (providing that the Attorney General's failure to object to a proposed voting change – such as a new redistricting plan – shall not "bar a *subsequent* action to enjoin enforcement of" the plan (emphasis added)); *see also McDaniel*, 452 U.S. at 146 ("Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure") (quotation marks omitted). Thus, Appellants' claims that the dismantling of Senate District 10 does not violate Section 2 of the Voting Rights Act cannot be finally adjudicated until *after* the State obtains preclearance.

In this instance as well, the legislative history further supports the prevailing rule. In 1975, when Congress adopted amendments to the Voting Rights Act, the Senate Committee addressed the appropriate role of remedial courts. The Committee concluded that federal courts should not make determinations regarding constitutional questions until all Section 5 challenges have been resolved. Such a result, the Committee stated, was "consistent with the Committee's objective to utilize a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia

District Court." S. Rep. 94-295, at 18, *reprinted in* 1975 U.S.C.C.A.N. at 784.

In sum, it is hard to find any basis for criticizing the decision of the three-judge panel in Texas to issue an interim map and to do so in a manner that only slightly departed from the enacted but unprecleared map. To do what Appellants ask here – reverse the district court's interim plan and allow the State's unprecleared plan to go into effect – would directly contravene the dictates of Congress and numerous rulings of this Court.

II. The State's Reliance on *Upham* Is Based on a Misreading of that Case.

1. The State's argument – that the three-judge panel should have simply ordered into effect the unprecleared enacted plan – relies entirely on this Court's brief *per curiam* opinion in *Upham v. Seamon*. That reliance is completely misplaced. *Upham* involved a situation in which a plan was submitted for preclearance to the United States Attorney General and he interposed a timely objection to two contiguous districts in South Texas. The Attorney General's objection letter *expressly stated* that, with respect to the other 25 districts, the state had "satisfied its burden" under Section 5 of demonstrating that the plan was non-discriminatory in both purpose and effect. *Upham,* 456 U.S. at 38 (quoting from the Department of Justice objection letter). That is far different from the situation here.

Here, the D.C. District Court denied the State's motion for summary judgment, finding that the State has not yet satisfied its burden under Section 5 with

respect to *any* of the districts in the Senate's plan. In contrast, in *Upham,* the State already had satisfied its preclearance burden for 25 of the 27 districts and the court was thus in remedial proceedings in which it was required to remedy the Attorney General's stated objections. *Id.* Where the three-judge court in *Upham* erred was that it proceeded to alter not only the two districts that had been objected to, but also other areas of the State that had already been found to satisfy preclearance requirements. The court altered these additional districts as to which the Attorney General found no Section 5 problems without making an independent finding that there were other statutory or constitutional violations as to these additional areas that necessitated the redrawing. *See id.*

In this case, by contrast, there has been no preclearance determination yet and, as explained above, the three-judge court in Texas was precluded by this Court's precedent from finding statutory or constitutional violations in a plan that had not yet been precleared. The three-judge court thus had neither the authority nor the need to opine on the likely success of the plaintiffs who were bringing non-Section 5 challenges to the new State Senate map. It simply drew an interim map to allow elections to go forward while avoiding the violation of Section 5 that would otherwise occur if the legislatively enacted map were put into place without being precleared. Indeed, Appellees alleged as Count III of their Complaint in the Texas court that "[t]he State's proposed state senate redistricting plan cannot be administered because S148 has not

been precleared pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c," and they asked the court below to implement a new map absent preclearance. Compl. ¶¶ 28-29, J.A. 419 That not only is precisely what the district court did here, it is entirely consistent with this Court's precedents under Section 5 that bar enforcement of unprecleared redistricting plans.

Moreover, even if *Upham* is read to suggest that in implementing *any* interim redistricting plan – and not just remedial plans following a denial of preclearance – a "district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect," *Upham*, 456 U.S. at 43, then the interim Senate plan at issue here meets that standard. The modifications made to the plan were necessary to avoid the violation of Section 5 that would occur if the panel simply ordered an unprecleared plan into place. *See Lopez*, 519 U.S. at 22.

The State seems to suggest that *Upham* stands for the proposition that even the submission of a plan for preclearance is enough to trigger mandatory deference and that the only time a court is not required to defer to the State's plan in its entirety is where the jurisdiction did not submit its plan for preclearance. But numerous decisions of this Court refute that position. The plans in *Warren County* had been submitted to the Attorney General, yet when the district court adopted one of the submitted but unprecleared plans, this Court unanimously reversed, holding: "No new voting practice or

procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object to a proposal submitted to him." 429 U.S. at 645 (emphasis added).

Were it the rule that submission alone is enough to trigger deference, covered jurisdictions would do just what Texas has done here – wait until the last possible minute to submit a plan for preclearance, and then delay the process as much as possible once it gets underway. It would create perverse incentives if so long as a submission is merely pending, it deserves deference, but an actual preclearance decision could end that deference. Indeed, this Court has already observed that "if covered jurisdictions could avoid the normal preclearance procedure by awaiting litigation challenging a refusal to redistrict after a census is completed, the statute might have the unintended effect of actually encouraging delay." *McDaniel*, 452 U.S. at 151 (refusing to allow changes adopted by covered jurisdictions in response to court orders to take effect without preclearance).

2. That the Department of Justice did not object to the Senate plan in its answer filed in the D.C. District Court does not change the analysis at all. As an initial matter, that answer was filed before discovery showed that the redistricting plan was infected with racially discriminatory intent. *See supra* 19-21. But more importantly, the State of Texas chose to pursue preclearance from the D.C. District Court and thus it is the D.C. District Court's

determination that matters, not the Department of Justice's failure to object.

Though Texas makes much of the Department's failure to object to the Senate plan, it ignores that this failure is of no legal force and effect given that Texas chose to pursue preclearance in the D.C. District Court. As discussed above, the plain language of Section 5 makes clear that when a plan is submitted to the D.C. District Court, only a ruling by the court will permit a change to take effect. Section 5 provides that whenever a covered jurisdiction "shall enact or seek to administer any" change in voting practices, the jurisdiction "may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such . . . [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). The statute further provides that "*unless and until the court enters such judgment* no person shall be denied the right to vote for failure to comply with such" change. *Id.* (emphasis added).

In contrast, in the administrative process, a change can take effect upon a failure to object by the Department of Justice and thus silence could "constitute[] consent." *McCain v. Lybrand*, 465 U.S. 236, 247 (1984). Texas would have this Court ignore the statutory distinction between the two procedures and place conclusive weight on the Department's failure to object to the State Senate map. But this Court may not. The only Section 5 determination

that is currently of any import is the D.C. District Court's determination that it could not preclear the State Senate plan because the State used the wrong standards and methodology to determine minority ability to elect a candidate of choice. Unless and until the D.C. District Court preclears the State Senate map, it may not take effect.

III. The State's Objections to Compliance with Section 5 are Unfounded.

Explicit in some of its prior briefing and implicit in its position before this Court is the State of Texas's objection to being subjected at all to the requirements of Section 5 of the Voting Rights Act. But Section 5 remains critically important in the political landscape of Texas, particularly now that Texas has become a majority-minority state. Section 5's preclearance procedures remain vitally necessary to secure the franchise for all Texans, especially racial and language minorities.

In the first six years after Texas became a covered jurisdiction under Section 5 in 1975, "Texas received more letters of objection than any state covered under Section 5 for 16 years." *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 1877 (1981) (prepared statement of Vilma S. Martinez, President and General Counsel, Mexican American Legal Defense and Educational Fund). Moreover, "[b]etween the time Texas was brought under section 5 coverage in 1975 and December 1990, the Justice Department interposed 131 objections to voting

procedures in the state," with many of these objections being raised with respect to "multiple infractions of voting law within a single jurisdiction." QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994). These infractions "embraced the spectrum of illegal procedures: racial gerrymandering, discriminatory purges of registered voters, imposition of numbered posts and the majority runoff requirement, annexations that diluted minority votes, a faulty bilingual oral assistance program, reduction in the number of elected officials, transfer of duties from one official to another, and unfair changes in election dates." *Id.* In all, the Department of Justice has issued 201 Section 5 objections to proposed electoral changes in Texas, more than half of which occurred after 1982. *See* Nina Perales, Luis Figueroa & Criselda G. Rivas, ReviewtheVRA.org, VOTING RIGHTS IN TEXAS 1982-2006 at 15-16 (June 2006); *see also To Examine the Impact and Effectiveness of the Voting Rights Act: Hearings Before the Subcomm. on Const. of the H. Comm. on the Judiciary*, 109th Cong. 18 (2005) (prepared statement of Ann Marie Tallman, President and General Counsel, Mexican American Legal Defense and Educational Fund) (describing successful Section 5 challenges in Texas by MALDEF to protect Latino voters in 2001).

Section 5 is particularly necessary in the context of redistricting. As this Court is aware, Texas's redistricting plans have frequently been subject to challenge before this Court. Most recently, this Court found that Texas had violated Section 2 of the

Voting Rights Act, citing "evidence suggesting that the State intentionally drew" a district to dilute the voting strength of the Latino population and finding that Texas must be "held accountable for the effect of [its] choices in denying equal opportunity to Latino voters." *LULAC*, 548 U.S. at 441-42.

The long history of election-related discrimination in Texas, as well as the frequent necessity of applying of Section 5's protective measures in Texas even as compared to other covered jurisdictions, all support the conclusion that Section 5 is as pertinent as ever to the State, particularly in the context of redistricting. Texas's complaints that it should not be subject to these requirements and its demand that the lower court render Section 5 a nullity by implementing a plan without preclearance should not be countenanced by this Court.

CONCLUSION

The decision of the United States District Court for the Western District of Texas ordering into effect an interim district plan for the Texas Senate should be affirmed.

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APPENDIX

42 U.S.C. § 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

(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.