

Nos. 11-A520, 11-A521

**IN THE
SUPREME COURT OF THE UNITED STATES**

RICK PERRY, in his official capacity as Governor of Texas, HOPE ANDRADE, in
her official capacity as Secretary of State, and the STATE OF TEXAS,

Applicants,

v.

SHANNON PEREZ, *et al.*,

Respondents.

RICK PERRY, in his official capacity as Governor of Texas, HOPE ANDRADE, in
her official capacity as Secretary of State, and the STATE OF TEXAS,

Applicants,

v.

WENDY DAVIS, *et al.*,

Respondents.

**CONSOLIDATED REPLY IN SUPPORT OF EMERGENCY APPLICATIONS
FOR STAY OF INTERLOCUTORY ORDERS DIRECTING
IMPLEMENTATION OF INTERIM REDISTRICTING PLANS**

PAUL D. CLEMENT
Counsel of Record
CONOR B. DUGAN
JEFFREY M. HARRIS
Bancroft PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
Telephone: (202) 234-0090
Facsimile: (202) 234-2806
pclement@bancroftpllc.com

GREG ABBOTT
Attorney General of Texas
JONATHAN MITCHELL
Solicitor General of Texas
DAVID J. SCHENCK
JAMES D. BLACKLOCK
MATTHEW H. FREDERICK

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1700
[Fax] (512) 474-2697
david.schenck@oag.state.tx.us

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TO THE HONORABLE ANTONIN SCALIA, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Respondents try two tacks in resisting a stay of the extraordinary judicial orders redrawing the electoral maps for the Texas House of Representatives and Senate. First, they suggest that this whole situation is an exigency of Texas's own making. If only Texas had sought administrative preclearance, rather than the statutory option of judicial preclearance, and if only Texas had moved with greater dispatch in the litigation, none of this would be necessary. Second, Respondents suggest that there is nothing extraordinary at all about the orders entered below. They contend that the zero-deference approach applied by the district court is correct and well-settled and suggest that judicial drawing of election boundaries, without a finding of even a likely statutory or constitutional violation, is something covered jurisdictions will just have to get used to every ten years.

Respondents are wrong on both scores, and their two points taken together underscore the need for this Court's intervention. Texas, in fact, has proceeded expeditiously in pursuing the statutory option of judicial preclearance. However, it is in the nature of the judicial option that other litigants have an opportunity to intervene and slow the process down. Section 5 reverses the normal presumption that a duly enacted law goes into effect absent a preliminary injunction. Thus, opponents of the law, who otherwise have every incentive to act with dispatch, have the opposite incentives under Section 5. That is especially true if Respondents' view of the proper legal standard for interim relief is correct. In their view, there is no difference between a jurisdiction actively seeking judicial preclearance and a

recalcitrant jurisdiction that has ignored court orders and attempted to avoid preclearance. Either way, the State's plans are entitled to absolutely no deference, even without any finding of a likely statutory or constitutional violation. Thus, for opponents of a legislative map, delay of judicial preclearance is as good if not better than success on the merits. If Respondents are correct, then the intrusion on state sovereignty worked by Section 5 is remarkable indeed.

Texas firmly believes Respondents are wrong and that the decision below cannot be reconciled with *Miller v. Johnson*, 515 U.S. 900 (1995), and *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam). Respondents' radically different view of the proper legal test only confirms that the gulf between the parties is substantial, and that the need for this Court's review, as Judge Smith urged, is profound.

I. TEXAS HAS AGGRESSIVELY PURSUED THE STATUTORY OPTION OF JUDICIAL PRECLEARANCE

Respondents assert that the exigency here is of Texas's making because it has been dilatory in seeking preclearance under Section 5 of the Voting Rights Act. The reality is quite different. Immediately upon the Governor's signing of the state House, Senate, and Board of Education plans, the State worked to compile all the election data, demographic information, and other materials required by the Department of Justice ("DOJ") for an administrative preclearance submission. *See* 28 C.F.R. § 51.27. The Congressional plan was signed into law on July 18, 2011. One day later, on July 19, 2011, the State sent complete, informal preclearance submissions to DOJ for all four maps *in addition to* filing a judicial preclearance action in the D.C. district court. The State anticipated that providing this

information to DOJ at the outset of the case would streamline judicial proceedings and reduce or eliminate the need for time-consuming discovery.

Moreover, during the pre-answer period the State voluntarily provided (at DOJ's request) tens of thousands of pages of information and coordinated numerous interviews of state officials, all outside the normal discovery process. In the meantime, two dozen parties intervened in the case, designated 11 experts, and demanded discovery of their own in an effort to block preclearance of the State's legislatively enacted maps.

When DOJ and the State were unable to agree to shorten the answer deadline or accept the State's proposed trial date of October 10, 2011, the State filed a motion to expedite the proceedings and requested a telephone conference with the court. *See* Motion to Expedite (Doc. 10), *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Aug. 11, 2011). The court declined to expedite and—over Texas's opposition—gave DOJ 60 days to file its answer. *See* Minute Order, *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Aug. 17, 2011). The court also granted the State's request for permission to file its motion for summary judgment *before* the due date for DOJ's Answer. *See id.*

After DOJ filed its answer, DOJ and Intervenors obtained—again over Texas's objection—a delay of their response to the motion for summary judgment in order to seek additional discovery. Transcript of Telephonic Conference at 19–24, *Texas v. United States, et al.*, No. 1:11-cv-1303 (D.D.C. Sept. 21, 2011),

Supplemental Appendix Exhibit 1.¹ At the November 2, 2011, summary judgment hearing, the court observed that from the outset “there was great anxiety on the part of Texas that this case be decided by the 18th of November, 19th of November something like that. I can’t remember the exact, and it seems to me that the Western District of Texas is well ahead of us and so maybe that doesn’t matter any more.” Transcript of Motion for Summary Judgment Hearing at 110–11, *Texas v. United States, et al.*, No. 1:11-cv-1303 (D.D.C. Nov. 2, 2011), Supplemental Appendix Exhibit 2. At the summary judgment hearing, Texas was alone in urging that a prompt decision was necessary in light of the interim-map hearings taking place in the Western District of Texas. *See id.*; *see also* Letter from David J. Schenck to the Hon. Rosemary Collyer (Doc. 105), *Texas v. United States, et al.*, No. 1:11-cv-01303 (Nov. 3, 2011). DOJ and the intervenors, however, responded by asking the court to take its time. *See* Letter from Timothy Mellett to the Hon. Rosemary Collyer dated Nov. 7, 2011, Supplemental Appendix Exhibit 3.

After the court denied summary judgment, Texas pressed for a prompt trial. *See* Plaintiff’s Response to Court’s Inquiries of November 15, 2011 (Doc. 107), *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Nov. 22, 2011) (requesting trial the second week of December). DOJ and the intervenors then moved to abate the

¹ Even at this stage, the Court was expressing concern about holding even a hearing on summary judgment on the schedule Texas was demanding. *See* Trans. of Tel. Conf. at 27 (Supp. Appx. Ex. 1) (“This looks like it’s a really tough schedule to meet I’m not sure that my colleagues will all agree to that kind of a schedule, but it seems to me that we should push ahead and see if we can get it [summary judgment] done in that time.”). When the Court later discussed the possibility of a trial on the merits, it correctly observed the state’s position that such a trial should follow immediately after any denial of summary judgment. *Id.* at 33–34. The Court itself never suggested that discovery could be completed and trial conducted in November without resolution of the questions surrounding the controlling standards.

Section 5 proceeding entirely. *See* United States’ and Intervenors’ Motion to Hold Case in Abeyance and Memorandum in Support (Doc. 108), *Texas v. United States, et al.*, No. 1:11-cv-01303 (D.D.C. Nov. 8, 2011). Respondents’ story that Texas is responsible for the delay does not hold up.

This is presumably not the first time this Court has heard parties dispute which side is responsible for a delay. What makes this case different is that the parties on one side of this dispute—the Respondents—have an undeniable incentive to delay, especially if they are correct about the legal standard governing interim relief. If the consequence of delayed judicial preclearance is that the jurisdiction seeking preclearance is treated no differently from a recalcitrant jurisdiction—and, in turn, its duly enacted map is given zero deference—then opponents of a legislative plan would have to be angels not to intervene and then delay the Section 5 proceeding. Indeed, the incentive for delay combined with the greater respect given to jurisdictions that seek *administrative* preclearance would all but eliminate the statutory option of *judicial* preclearance as a practical matter.

II. THE DISTRICT COURT’S DECISION DISREGARDS IMPORTANT PRINCIPLES OF FEDERALISM AND THE WELL-ESTABLISHED STANDARDS FOR GRANTING PRELIMINARY OR INTERIM RELIEF

In the end, the question of who is responsible for the delay is less important than the question of what is the proper legal standard when delay in judicial preclearance occurs and another court seeks to issue an interim map. As long as certain jurisdictions must get federal approval before implementing their election laws, delay is inevitable in some percentage of cases even if all involved work to

facilitate prompt review. The responses to Texas’s stay applications underscore that the parties could not be farther apart on the question of what rules apply when a district court orders an interim redistricting plan while preclearance is pending. While Texas obviously believes its position is the only one consistent with this Court’s precedents, not to mention basic notions of sovereignty, the complete disconnect between the parties only underscores Judge Smith’s point that this Court’s review is urgently needed. Whatever the legal standard, no amount of delay could justify the district court’s grant of injunctive relief without any consideration of the limits on its equitable powers.

Without making any findings about whether the plaintiffs’ claims were likely to succeed on the merits, the district court entered a sweeping interim remedy that disregarded the Texas Legislature’s carefully drawn redistricting maps. The district court stated quite clearly that it was “not required to give *any* deference to the Legislature’s enacted plan,” and that the judicially drawn “independent map” was based on the court’s own notion of what would “advance the interest of the collective public good.” Order (Doc. 528) at 4–5, *Perez, et al. v. Perry, et al.*, No. 5:11-cv-360 (W.D. Tex. Nov. 23, 2011) [hereinafter Interim House Order] (emphasis added).

Respondents make no apologies for this zero-deference approach and suggest it is consistent with well-settled law. Respondents insist that no deference is owed to a legislatively enacted redistricting plan unless and until that plan has been granted preclearance under Section 5 of the Voting Rights Act. For these purposes,

they contend that there is no material difference between a jurisdiction actively seeking judicial preclearance and a recalcitrant jurisdiction like that in *Lopez v. Monterey County*, 525 U.S. 266 (1999). That is not the law.

Even when preclearance is *denied* with respect to certain districts, a court may modify the state's districting plan only to the extent necessary "to cure any constitutional or statutory defect." *Upham*, 456 U.S. at 43. In the absence of "a finding that the . . . reapportionment plan offended either the Constitution or the Voting Rights Act," a district court is "not free, and certainly [is] not required, to disregard the political programs of the [state legislature]." *Id.* Respondents essentially try to limit *Upham* to its facts and certainly would confine it to administrative preclearance. But it makes no sense to treat a plan for which administrative preclearance has been denied more favorably than one for which judicial preclearance is being actively pursued. Doing so not only fails to respect the sovereignty of states actively pursuing preclearance, but would eliminate judicial preclearance as a viable option.

Respondents assert throughout their briefs that Texas is seeking to have its legislatively enacted plan adopted "wholesale, even absent preclearance." *See* Texas Latino Redistricting Task Force Br. at 10-11, 19. But that is not the case. Texas fully understands its continuing need to pursue preclearance vigilantly and expeditiously, and has never disputed that an interim map would be appropriate if and when there is a finding that some portion of the legislatively enacted map

involves a likely statutory or constitutional violation.² But the fact that a judicially drawn map is an interim, not remedial, map does not authorize a court to pursue the “collective public good” without a finding of any likely defect with a plan and a remedy that undermines legislative judgments no more than necessary.

The district court’s decision and Respondents’ view of the law invite gamesmanship. If the district court’s rule is allowed to stand, then opponents of a legislatively enacted redistricting plan need not shoulder the burden of showing a likely statutory or constitutional violation, they need only delay judicial preclearance. The normal rules of judicial proceedings provide manifold opportunities for such delay. After intervening in the preclearance case, those parties can raise additional legal and factual claims, seek extensive discovery, and file their own dispositive motions—which is precisely what the Respondents have done in the Texas preclearance case, *see supra* at 3-4.

Faithful application of this Court’s precedents, by contrast, gets the incentives right and provides ample opportunities for opponents of a legislative plan to get relief if they can show a likely statutory or constitutional violation. Section 5 already imposes extraordinary “federalism costs” by reversing the normal rule that

² The Texas Latino Redistricting Task Force asserts that the district court did, in fact, find that “meritorious claims of discrimination” justified the interim map. *See Texas Latino Redistricting Task Force’s Response to Emergency Application for Stay* at 19–21, No. 11-A520 (Dec. 1, 2011). To the contrary, the district court majority emphasized that its interim map “is *not a ruling on the merits* of any claims asserted by the Plaintiffs.” Interim House Order at 1 (emphasis added). Similarly, Judge Smith merely noted that the legislatively enacted plan raised “a limited number of concerns.” *Id.* at 20 (Smith, J., dissenting). Neither the majority nor the dissent applied the well-established criteria that are required for entry of a temporary restraining order or preliminary injunction.

duly enacted state laws take immediate effect. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2511 (2009). The intrusion on state sovereignty becomes intolerable if opponents of the law are given artificial incentives to delay those proceedings. Moreover, opponents will still retain multiple options to prevent an invalid map from going into effect either by participating in expedited Section 5 proceedings or by showing some likely violation of federal law. But the mere fact that a preclearance action remains pending does not excuse a *different* court adjudicating *different* claims from complying with the well-settled standards for entry of preliminary relief. *See* Interim House Order at 19 (Smith, J., dissenting) (court has authority to “modify the State’s districts” only where “plaintiffs have shown a substantial likelihood of success on the merits”); *cf. Winter v. Natural Res. Def. Council, Inc.* 555 U.S. 7, 20 (2008) (listing factors required for entry of preliminary injunction).³

³ The Davis and LULAC Plaintiffs contend that Texas does not “even attempt to address” this Court’s requirements for entering a stay. *See* Response of Davis Plaintiffs and LULAC Plaintiffs in Opposition to Emergency Application for Stay at 8–9, No. 11-A520 (Dec. 1, 2011). To the contrary, Texas cited several of this Court’s decisions making clear that a stay pending direct appeal is a well-established remedy for a three-judge district court’s improper interim redistricting order. In any event, there is little doubt that this Court would note probable jurisdiction over the three-judge court’s injunctive order in the normal course. Nor, for all the reasons articulated above and in the Application, is there any doubt but that the Court would correct the erroneous legal standard applied by the district court. The only reason then not to note jurisdiction would be the exigencies of time. But as amply demonstrated in the Application, the fact that the district court imposed elections under a judicially drawn map without a finding of a likely or statutory violation inflicts a grave and irreparable injury on Texas.

CONCLUSION

As Judge Smith emphasized in his dissenting opinion, “[u]nless the Supreme Court enters the fray at once to force a stay or a revision, this litigation, is for all practical purposes, at an end.” Interim House Order at 15 (Smith, J., dissenting). The sharp disconnect between the parties on the applicable standard only underscores his point that clarity from this Court is desperately needed. Absent this Court’s intervention, the upcoming elections—for which candidate registration began on November 28th—will be conducted under a purely judicially drawn map that significantly departs from the Legislature’s actual plan, without a finding that a single aspect of the plan violates (or is likely to violate) federal law.

The district court’s extraordinary orders imposing judicially drawn maps for the Texas House and Senate elections should be stayed, and this case should be remanded with instructions requiring the court below to show proper deference to the legislatively enacted Congressional redistricting plan. In the alternative, the Court should stay the order, convert this stay request into a jurisdictional statement, note probable jurisdiction, and schedule this case for expedited briefing and argument. *See, e.g., Harris v. McRae*, 444 U.S. 1069 (1980); *Nken v. Mukasey*, 129 S. Ct. 622 (2008).

Respectfully submitted,

/s/ Paul D. Clement

PAUL D. CLEMENT
CONOR B. DUGAN
JEFFREY M. HARRIS
Bancroft PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
Telephone: (202) 234-0090
Facsimile: (202) 234-2806
pclement@bancroftpllc.com

GREG ABBOTT
Attorney General of Texas
JONATHAN MITCHELL
Solicitor General of Texas
DAVID J. SCHENCK
JAMES D. BLACKLOCK
MATTHEW H. FREDERICK
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1700
[Fax] (512) 474-2697
david.schenck@oag.state.tx.us

COUNSEL FOR APPLICANTS