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

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

JOINT APPELLEES' REPLY BRIEF AS TO INTERIM CONGRESSIONAL PLAN

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Texas seeks to enlist this Court in its scheme to impose an illegal and racially discriminatory redistricting plan. To achieve this indefensible result, the State asks the Court to ignore the record, disregard statutory text, cast aside decades of precedent, and allow the State to pull a classic bait and switch by demanding a remedy it previously disclaimed. The Court should reject Texas's invitation.

The facts are stark. After a delayed and abbreviated legislative process that excluded minority citizens and representatives at every turn, Texas enacted a congressional redistricting plan that reduced minority political opportunity even though Texas is now a majority-minority state and the state's massive minority population growth was the reason Texas gained four seats in Congress. Texas then sought judicial rather than administrative preclearance and chose to seek summary judgment rather than trial. These tactical choices, combined with the many legal flaws in Texas's plan, left the State unable to gain preclearance before its election process started, forcing the Texas district court to adopt an interim plan for the 2012 election.

Texas concedes that—faced with impending elections under the State's own schedule and an insurmountable one-person, one-vote problem in the preexisting plan—the district court had to adopt an interim plan, but argues that the court erred in crafting its own plan because there was no legal violation to remedy in the enacted plan. But there was an obvious—indeed, undisputed—legal violation: the State's plan had not been precleared.

See, e.g., *Lopez v. Monterey Cnty.*, 519 U.S. 9, 20 (1996) ("No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance."). This meant not only that the district court could not use the enacted map as an interim map, but also that Appellees were entitled to an injunction *prohibiting* its use pending preclearance. *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991) ("If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes.").

Appellees alleged many other legal violations as well—including racial gerrymandering, intentional discrimination, and violations of Section 2 of the Voting Rights Act—but the district court was prohibited from ruling on those claims under this Court's precedent. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 283 (2003) (Kennedy, J., concurring) ("Where state reapportionment enactments have not been precleared in accordance with § 5, the district court 'err[s] in deciding the constitutional challenges' to these acts.") (quoting *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam)); *Lopez*, 519 U.S. at 23 ("The three-judge district court may determine only 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.").

Texas argues, however, that rather than following this Court's Section 5 precedent, the district court should have followed rules governing other requests for injunctive relief, "treating the legislative maps as the presumptive 'interim' maps and altering them only when necessary to remedy a likely statutory or constitutional violation." Texas

Br. at 27. But Texas elsewhere admits, as it must, that "Section 5 . . . reverses the normal rule that a duly-enacted law takes immediate effect by requiring [covered] jurisdictions to obtain preclearance before an enacted voting change may be enforced." *Id.* at 5. Here, at least, Texas is correct. *See, e.g.*, *Clark*, 500 U.S. at 652 ("A voting change in a covered jurisdiction 'will not be effective as la[w] until and unless cleared.'") (quoting *Connor*, 421 U.S. at 656). Once a plaintiff shows that a change has not been precleared, it must be enjoined without any further showing, and the court may not rule on other challenges to the plan until preclearance is obtained. *See, e.g.*, *Lopez*, 519 U.S. at 23.

Even if the district court had ignored this Court's instructions and followed Texas's proposed rule, the resulting map would have been no more like Texas's enacted map than is the interim map the court adopted. As explained in Appellees' opening briefs, Texas's enacted plan is rife with "likely violations of law," Texas Br. at 28, reflecting extreme racial gerrymandering, numerous Section 2 violations, and discriminatory purpose and effect in violation of Section 5. Indeed, though the district court was prohibited from ruling on these claims, its unanimous refusal to adopt Texas's enacted congressional map reflects, at a minimum, deep skepticism about the map's lawfulness—a skepticism steeped in two weeks of trial evidence.

Having enacted a discriminatory map and failed to obtain preclearance, Texas now asks this Court, Section 5 notwithstanding, to force implementation of its biased plan, demanding illegal and unconscionable relief. Texas's request is illegal because, as this Court has unanimously held, "where a court adopts a proposal 'reflecting

the policy choices . . . of the people [in a covered jurisdiction] . . . the preclearance requirement of the Voting Rights Act is applicable.'" *Lopez*, 519 U.S. at 22 (quoting *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981)). It is unconscionable because no court has yet had the opportunity to rule on the many legal flaws in Texas's plan beyond its failure to obtain preclearance. Those flaws are severe, and allowing even one election to proceed under an illegal, discriminatory plan would irreparably harm Texas voters. As Texas itself argued just a few weeks ago: "A special harm . . . arises when an election is permitted to go forward based on an unlawful redistricting plan." Emergency Application for Stay of Interlocutory Order Directing Implementation of Interim Texas Congressional Redistricting Plan Pending Appeal to the United States Supreme Court at 25, *Perry v. Perez*, No. 11A536 (Nov. 30, 2011) ("Congressional Stay App.").

Texas's request is also a bait and switch of the first order. In its stay application, Texas specifically disclaimed a request for wholesale adoption of its enacted plan, *id.* at 15, but Texas now urges the Court to do just that. Texas also claimed that a prompt ruling from this Court would allow for a remand to the district court, *id.* at 28-29, but Texas now says there is no time for that, even though the district court has since postponed Texas's primary election. Finally, Texas's request is inconsistent even with its own proposed legal rule; if it were not clear enough already, the D.C. district court's recent opinion denying summary judgment for Texas brought home again that Texas's enacted plan is full of "likely violations of law."

Given that Texas's plan is illegal and discriminatory, that the district court did precisely

what it has been instructed to do, and that even if the district court did what Texas requested, the resulting map would be little (if any) different, this Court should affirm. Alternatively, given that Texas has now reversed course on fundamental aspects of its stay application, this Court could simply vacate the stay, allow the case to proceed below, and review the district court's ruling on a normal schedule after final judgment. Texas has no right to ignore Section 5, nor to demand that this Court issue a rushed decision based on Texas's repeated misrepresentations.

II. ARGUMENT

A. Texas's "Facts" Ignore the Record

Texas's rosy description of its redistricting process makes for a compelling read, portraying a model of interracial collaboration and good faith effort aimed at common goals of fairness and inclusion. Like many great stories, however, it is largely imagined. Noticeably absent from the State's recounting of the legislative process is a single record citation. *See* Texas Br. at 7-10. The Court is left to take Texas at its word, despite the State's "long, well-documented history of discrimination." *LULAC v. Perry*, 548 U.S. 399, 439 (2006).

It is clear why Texas fails to cite the record, as even a cursory glance at the documented facts undermines Texas's claims. Contrary to the State's claim about a process that "featured . . . meetings with legislators from both houses, and included organizations that represent the interests of minority groups," Texas Br. at 8, the record reveals that not a single Hispanic or African-American legislator was allowed to participate in crafting

Texas's congressional districts. JA 709-12; Texas Senate Journal for the Eighty-Second Legislature, First Called Session (June 6, 2011) at A-12, *available at* http://www.journals.senate.state.tx.us/sjrnl/821/pdf/82S106-06-FA.pdf. While Texas vaguely asserts that legislative leaders "sought . . . input from the public and elected officials to ensure that the final plans fairly represented the relevant interests at stake," Texas Br. at 8, the process was characterized by minority legislators as "the least collaborative and most exclusive of any experienced," JA 518; *see also* Transcript of Bench Trial at 796-97, *Perez v. Perry*, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Sep. 8, 2011), and even independent counsel for the Senate Redistricting Committee testified that, in marked contrast to redistricting procedures followed in prior decades, the 2011 process left no time for debate and little opportunity for public deliberation, Testimony of Michael Morrison, Hearing of Senate Select Committee on Redistricting (June 3, 2011), *available at* http://www.senate.state.tx.us/75r/senate/commit/c625/c625.htm, at 4:51-52.

This inequitable and discriminatory process resulted in an inequitable and discriminatory congressional plan, which, among other things, dismantled several minority opportunity districts, *see, e.g.*, SA 33-34 (describing Texas's elimination of a crossover district in District 25); *id.* at 40-41 (describing Texas's reconfiguration of District 23 to render it a non-performing district), redrew district lines with no respect for minority members of Congress, *see* JA 769, 929-30, 932-33 (noting that every African-American member of the Texas congressional delegation as well as the Chair of the Congressional Hispanic Caucus had their district offices drawn out of their districts), and garnered criticism even from the State's own expert and

advisors, *see, e.g.*, JA 678 (State's expert testifying: "I would not have done what was done to the 23rd"); JA 981 (counsel to Republican congressional delegation noting that District 23 as enacted "put[s] a neon sign on it telling the court to redraw it"); JA 982-83 (district director to Rep. Joe Barton noting legal vulnerability of the enacted congressional plan due to its failure to acknowledge minority population growth in North Texas).

Tellingly, although Texas makes broad claims about its fair and inclusive redistricting process, its recounting of the procedures unique to the congressional plan is barebones compared to its description of the redistricting process for state legislative seats. While Texas asserts—without citation—that the redistricting committees conducted "proactive outreach" efforts to ensure participation from "interested parties" in formulating the House and Senate plans, including consultation with minority organizations and other "outside groups," Texas Br. at 8, 9, it does not even pretend such discussions occurred in the congressional redistricting process, *see id.* at 10. There is simply no way for Texas to conceal the secretive and discriminatory nature of the process by which it enacted the congressional plan. *See also Texas v. United States*, 1:11-cv-01303-RMC-TBG-BAH (D.D.C. Dec. 22, 2011), Dkt. No. 115 ("D.D.C. Op.") at 43 ("Texas has not disputed many of the Intervenors' specific allegations of discriminatory intent.").

Texas's depiction of its own diligence in seeking preclearance also falls short of the facts. Although Republicans dominated both houses of the Legislature and the governorship, eliminating the risk of partisan gridlock, and although the Legislature spent no time reaching out to minority

legislators or members of the public, the Legislature chose to wait until after the regular legislative session to so much as propose, much less pass, a congressional redistricting plan. The Governor waited almost another month before signing the bill. Texas then chose to pursue exclusively the slower route of judicial preclearance (foregoing the option of also seeking administrative preclearance) and to opt for summary judgment instead of accepting the D.C. district court's invitation to set a trial date to address the numerous factual issues raised by the Attorney General and intervenors, including whether the Legislature had engaged in intentional discrimination. JA 923; *see also* D.D.C. Op. at 42 ("Such an intensely fact-driven inquiry is typically difficult to resolve at the summary judgment stage.").

Texas raises a hue and cry that the court gave the Attorney General "the full 60 days" to file an answer, but Department of Justice regulations provide at least that much time for the Attorney General to gather the necessary facts and assess the voting change at issue before interposing an objection. *See* 28 C.F.R. § 51.9(a); *id.* § 51.39(a) (extending review period up to 120 days in certain circumstances). Texas further complains that the Attorney General and intervenors requested a short period of discovery to prepare for summary judgment briefing. Texas Br. at 12; *cf.* D.D.C. Op. at 3 ("The parties engaged in swift discovery[.]"). But Texas's gripes amount to nothing more than dissatisfaction with the ordinary rules of the judicial process. While administrative preclearance "'gives the covered State a rapid method of rendering a new state election law enforceable,'" *McCain v. Lybrand*, 465 U.S. 236, 247 (1984) (quoting *Allen v. State Bd. of Elections*, 393 U.S.

544, 549 (1969)), judicial preclearance necessarily allows for intervenors, *compare* 28 C.F.R. § 51.29 (allowing informal submission of comments to Attorney General as part of administrative preclearance process) *with* Fed. R. Civ. P. 24 (non-parties must file motions to intervene to participate in judicial action), discovery, *see* Fed. R. Civ. P. 26, and a less certain timeline. Texas can hardly complain about the delays inherent in litigation when it *chose* to incur those delays by foregoing the "'speedy alternative method of compliance.'" *McCain*, 465 U.S. at 246 (quoting *Morris v. Gressette*, 432 U.S. 491, 503 (1977)).

An unvarnished review of the record reveals an agenda-driven redistricting and preclearance procedure aimed at excluding minority voices, suppressing minority voting rights, and delaying federal review of the flawed congressional plan to avoid the inevitable—a resolution adverse to Texas.

B. Texas Ignores the Law

Texas's legal argument is most remarkable for what it does not include: in thirty pages of argument, the State never once quotes Section 5, the statute at the heart of this case. Texas also glosses over or ignores altogether countless decisions of this Court applying Section 5. It is only by ignoring these authorities that Texas can cobble together its argument. Much as it would like to, however, Texas cannot override this Court's decisions or Section 5. The law, as written by Congress and applied by this Court, should prevail.

1. Texas Ignores the Statute's Text

Texas's legal argument reads as though Section 5 of the Voting Rights Act were never

enacted. While Texas might prefer to live in such a world, Texas cannot nullify Section 5 merely by wishing it away.

Texas repeatedly claims that nothing in the Voting Rights Act's text addresses the situation here, because this case deals only with "interim" relief. Texas Br. at 5, 52. While Section 5 may never use the word "interim," however, it makes very clear that an unprecleared law, like Texas's redistricting plans here, cannot take effect, even on an interim basis.

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) (emphasis added). "[U]nless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such" change. *Id.*

Texas would read an exception into the statute, arguing that once a state has applied for preclearance, it may administer a voting change on an interim basis unless a district court finds the plan illegal on other grounds. That is not what Section 5 says. The law requires preclearance of "any" change in voting practices, without exception. "Read naturally, the word 'any' has an expansive meaning," and where "Congress did not add any language limiting the breadth of that word, . . . we must read [the statute] as referring to all" of the items referenced. *United States v. Gonzales*, 520 U.S. 1, 5 (1997). Texas unwittingly concedes the

point, noting that: "For covered jurisdictions, like Texas, Section 5 'suspend[s] *all* changes in state election procedure' until they are 'submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General.'" Texas Br. at 5 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2509 (2009)) (emphasis added). There is no "interim" exception, even where the law is clearly nondiscriminatory or otherwise "innocuous." *See, e.g.*, *Nw. Austin*, 129 S. Ct. at 2511 ("Section 5 . . . suspend[s] *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C."); *Branch*, 538 U.S. at 262 ("The Act requires preclearance of *all* voting changes.").

2. Texas Ignores Section 5 Precedent

Because of the many flaws in Texas's argument, the State's position has morphed as the case has progressed and flaws have been exposed. In the district court, Texas asked the court simply to adopt "the Legislature's enacted plans." Texas Br. at 16. In its stay application, Texas argued that the district court should have drawn the congressional map to "narrowly address likely legal errors while respecting the lines actually drawn by the legislature wherever possible." Congressional Stay App. at 5. Now, Texas reverses course once again, first pushing for wholesale adoption of its enacted plan, but also proposing a new test, saying that the district court should have "treat[ed] the legislative maps as the presumptive 'interim' maps and alter[ed] them only when necessary to remedy a likely statutory or constitutional violation." Texas Br. at 27. None of these options can be reconciled with this Court's precedent.

Adopting Texas's plan was not an option open to the district court, and should not be considered by this Court. This Court has repeatedly and unanimously held that if a court adopts a covered jurisdiction's own proposal, even on an interim basis, the plan must obtain preclearance before taking effect. *See, e.g.*, *Lopez*, 519 U.S. at 22 ("[W]here a court adopts a proposal 'reflecting the policy choices . . . of the people [in a covered jurisdiction] . . . the preclearance requirement of the Voting Rights Act is applicable.'") (quoting *McDaniel*, 452 U.S. at 153) (alterations in original); *Abrams v. Johnson*, 521 U.S. 74, 95 (1997) (noting that preclearance requirement applies when a court adopts a "plan[] submitted to the court by the legislature of a covered jurisdiction"). Had the district court done what Texas asked, summary reversal would have been warranted.

Texas's alternative proposals fare no better. Texas now argues that a district court faced with an unprecleared redistricting plan and an impending election should "treat[] the legislative maps as the presumptive 'interim' maps and alter[] them only when necessary to remedy a likely statutory or constitutional violation." Texas Br. at 27. This Court has made very clear, however, that a district court presented with an unprecleared redistricting plan is not allowed to assess "likely statutory or constitutional violation[s]" in the plan. *Id.*

District courts lack jurisdiction to decide whether enacted plans comply with Section 5 because Congress gave "exclusive authority to pass on the discriminatory effect or purpose of an election change to the Attorney General and to the District Court for the District of Columbia." *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 such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the determination whether a covered change does or does not have the purpose or effect of denying or abridging the right to vote on account of race or color.") (internal quotation marks and citation omitted).

Texas suggests that a district court may still conduct a "preliminary assessment" of Section 5 issues. Texas cites no case in support of this proposition, and there is none, for even a "preliminary assessment" would mean that the local district court—not the D.C. district court or Attorney General—would decide whether a change could take effect, precisely what Section 5 forbids. There are, unsurprisingly, many cases rejecting Texas's view. *See, e.g.*, *Lopez*, 519 U.S. at 23 ("On a complaint alleging failure to preclear election changes under § 5, that court lacks authority to consider the discriminatory purpose or nature of the changes."); *McDaniel*, 452 U.S. at 150 n.31 ("[A] District Court's conclusion that a reapportionment plan proposed by a covered jurisdiction complies with constitutional requirements is not a substitute for § 5 review.").

This Court has also repeatedly made clear that a district court should not address other legal challenges to a plan until preclearance is granted. *See, e.g.*, *Lopez*, 519 U.S. at 23 ("The three-judge district court may determine only 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."); *McDaniel*, 452 U.S. at 150 n.31 (holding that "it was error for the

District Court to determine the constitutional validity of the county's plan . . . rather than limiting its inquiry . . . to the question whether the county had complied with § 5"); *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978) ("[U]ntil clearance has been obtained," courts should not "address the constitutionality of the new measure."); *Connor*, 421 U.S. at 656 (holding that district court erred in considering racial discrimination claims as to Mississippi laws because "[t]hose Acts are not now and will not be effective as laws until and unless cleared pursuant to § 5").

Texas again suggests that district courts may make preliminary assessments of these legal issues, but again cites no case supporting that approach. On the contrary, the cases cited above make clear that district courts should avoid ruling on other issues at all while preclearance is pending, for at least two reasons. First, such rulings are premature because "[t]he proposed changes are not capable of implementation, and the constitutional objections may be resolved through the preclearance process." *Branch*, 538 U.S. at 284 (Kennedy, J., concurring). Second, such rulings "force[] the federal courts to undertake unnecessary review of complex constitutional issues in advance of an Executive determination and so risk[] frustrating the mechanism established by the Voting Rights Act." *Id.*

Unable to respond to these authorities, Texas simply ignores them. Indeed, Texas never even attempts to explain how its proposed approach is reconcilable with Section 5's text or this Court's many cases explaining how a district court should proceed in this situation. This Court "will not overrule a precedent absent a 'special justification.'" *Harris v. United States*, 536 U.S.

545, 557 (2002) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). Instead of demonstrating "special justification," Texas offers no justification at all.

While Texas never addresses the cases rejecting its approach, it does discuss one Section 5 case: *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam). As Appellees and the United States have already explained, however, *Upham* does not control here. The district court in *Upham* altered districts that the Attorney General had found compliant with Section 5. *Id.* at 40-41. Nothing remotely similar has occurred here. In the case at bar, the Attorney General and Intervenors challenge the entirety of Texas's congressional redistricting plan in the D.C. district court proceedings, that court has denied Texas's request for summary judgment and found that "Texas used an improper standard and/or methodology to determine which districts afford minority voters the ability to elect their candidates of choice," and "Texas has not disputed many of the Intervenors' specific allegations of discriminatory intent." D.D.C. Op. at 2, 43. Texas rests its entire argument on *Upham*, but *Upham* is inapposite.

3. Texas Requests a Novel Rule Based on Irrelevant Cases

While Texas largely ignores Section 5 and the cases applying it, the State spends a great deal of time arguing for a new rule based on preliminary injunction cases from other areas of law. Texas concedes that the district court's approach was "[c]onsistent with the customary practice under the VRA," Texas Br. at 2, but argues for a new rule: district courts should "treat[] the legislative maps as the presumptive 'interim' maps and alter[] them

only when necessary to remedy a likely statutory or constitutional violation." Texas Br. at 27. Texas's argument fails.

To begin with, the State's argument assumes that when a district court faces a situation like the one here—an unprecleared change in voting law and an upcoming election—the court should treat the law like it would any other state law a plaintiff seeks to enjoin. But as Texas concedes in its Statement of the Case, Section 5 "reverses the normal rule" that a law takes immediate effect and instead requires covered jurisdictions "to obtain preclearance before an enacted voting change may be enforced." Texas Br. at 5. "For covered jurisdictions, like Texas, Section 5 'suspend[s] all changes in state election procedure' until they are 'submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General.'" *Id.* (quoting *Nw. Austin*, 129 S. Ct. at 2509). Thus, a state law covered by Section 5 is not like other state laws, for it "will not be effective as la[w] until and unless cleared." *Clark*, 500 U.S. at 652 (internal quotation marks omitted).

Second, Texas labors under the misimpression that the district court erred because it redrew Texas's congressional districts "[w]ithout making any finding of an actual or likely violation of law." Texas Br. at 28. But the district court did find serious legal violations: the preexisting plan violated one-person, one-vote principles and had to be replaced, and Texas's enacted plan had not received preclearance. The latter violation required enjoining Texas's enacted plan without any further showing. *See, e.g.*, *Lopez*, 519 U.S. at 20 ("If a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the

change."); *Clark*, 500 U.S. at 652-53 ("If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes.").

These flaws in Texas's reasoning infect its whole argument. For example, Texas repeatedly claims that the district court should have started with its proposed plan, but the lack of "preclearance 'renders the [plan] unenforceable.'" *Clark*, 500 U.S. at 652 (quoting *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982)). Thus, the district court properly started from the last legally enforceable plan, not Texas's enacted plan. *See, e.g.*, *Abrams*, 521 U.S. at 96 (holding that a plan denied preclearance "could not operate as a benchmark").

Similarly, Texas repeatedly suggests that the district court was only authorized to alter districts in the enacted plan as to which it found a legal violation, and it found no violation here. But the relevant legal violation was lack of preclearance, not substantive violations of Section 2, the Constitution, or Section 5's retrogression standard. That violation required enjoining Texas's plan without any further showing. *See, e.g.*, *Lopez*, 519 U.S. at 20; *Clark*, 500 U.S. at 652-53. And, as already explained, the district court was not allowed to make findings on any issues beyond whether Texas's plan had been precleared.

In short, while Texas has proposed a creative new approach to Section 5 cases, it is an approach that conflicts with Section 5's text and purpose, not to mention countless decisions of this Court. It could be the stuff of a law review article, or even legislative action, but it should not be the stuff of a Supreme Court opinion.

C. Texas Misrepresents the District Court Ruling and Proposes Illegal, Unconscionable, and Nonsensical Remedies

While the relief Texas seeks is plainly illegal under Section 5 and the Court's precedent, the district court's approach in this case was correct, and certainly within its equitable discretion. This Court should therefore affirm.

The Court should not, and under Section 5 cannot, mandate implementation of Texas's illegal, discriminatory, and unprecleared plan. Using Texas's plan despite these flaws "would place the burdens of inertia and litigation delay on those whom [Section 5] was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election." *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers).

The Court also should not remand the congressional plan based on Texas's proposed "guidance" to the district court. Two of Texas's four proposals do not even relate to the congressional plan, and the other two amount to an attack on one district—District 33—based on a misrepresentation of what the district court actually said and did. Texas provides no meaningful guidance because no precedent supports its claim that the district court erred.

Finally, if the Court believes affirmance inappropriate for any reason, it should simply vacate the stay, allow the case to proceed to final judgment, and review the district court's decision then. Texas misrepresented the facts, the district court decision, and its proposed remedies in its stay

application, and the Court should not reward this behavior by rushing to grant Texas relief from its own misguided tactical choices. The protections contained in the Voting Rights Act and the Constitution deserve better than a rushed decision reversing decades of this Court's precedent.

1. The District Court Did What It Was Supposed To Do

The district court did exactly what it was required to—nothing more, nothing less. Contrary to Texas's contention that the district court drew congressional districts "from scratch," gave no deference to the Legislature's enacted plan, and engaged in an "essentially standardless exercise," Texas Br. at 33, 39, the district court's 17-page order clearly establishes its restrained approach: (1) start from Texas's last precleared map; (2) incorporate the new districts and correct population imbalances to comply with one-person, one-vote principles; (3) preserve benchmark minority opportunity districts so as not to violate Section 5; (4) minimize split voting tabulation districts ("VTDs") to allow for quick implementation of the interim plan; and (5) "utilize[] portions of the enacted map where it could do so," JA 150. The State's misrepresentation of the district court's plan is itself "fundamentally unmoored" from any reasonable reading of the Congressional Order. Reply in Support of Emergency Application for Stay of Interlocutory Order Directing Implementation of Interim Congressional Redistricting Plan at 6, *Perry v. Perez*, No. 11A536 (Dec. 5, 2011) ("Congressional Stay Reply").

As already explained, the district court could not adopt Texas's proposed plan or use it as the benchmark because it had not received Section 5

approval. *See, e.g.*, *Lopez*, 519 U.S. at 22; *Abrams*, 521 U.S. at 96; *Clark*, 500 U.S. at 652. Instead, the district court started from the precleared benchmark plan and began by making the changes necessary to comply with one-person, one-vote requirements. JA 139. In making these changes, the district court recognized that it could not itself violate Section 5 by causing "retrogression in [minority] voting strength," so it maintained districts in the benchmark plan that allowed minority voters to elect their candidates of choice. JA 138-39 (quoting *Abrams*, 521 U.S. at 96 ("[I]n fashioning the plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases.")). Starting from the last precleared plan and preserving existing minority opportunity districts explains much of the difference between the interim map and Texas's enacted map. *See, e.g.*, JA 140 (describing the "difference between the Court's plan and the enacted plan" as primarily "attributable to maintaining district 29 as in the benchmark to avoid retrogression and maintain the status quo").

In addition to complying with Section 5, the district court had to minimize split VTDs in the interim map because the "evidence at trial and in the interim plan hearing" made "clear that cutting VTDs would create enormous administrative and financial difficulties for local governments preparing for an election at the eleventh hour." JA 102; *see also Vera v. Bush*, 933 F. Supp. 1341, 1347 (S.D. Tex. 1996) (discussing the problems with split VTDs). Avoiding split VTDs led to many (often small) variations from Texas's proposed plan (which split over 400 VTDs), but the "practical realities" inherent to the district court's task required these changes. JA 90. Thus, it is

disingenuous for Texas to gripe that the "interim congressional plan alters the boundaries of *every single one* of the 36 congressional districts," Texas Br. at 22; many of these changes were minor and merely reflected the need for the interim plan to be implemented quickly. Texas's argument is especially misguided because these changes would have been required even if the court had otherwise adopted Texas's enacted congressional map. JA 103 ("[E]ven if the Court was required to give *Upham* deference to the interim maps, the Court would still have needed to make the changes to the uncontested districts to correct cuts in the VTDs that would have impeded implementation of the plan under intense time constraints."); JA 90 ("[T]he Court's obligation to ensure that the interim map does not contain split VTDs so that it is capable of being implemented under severe time constraints . . . prevents the Court from adopting even the unchallenged districts from the enacted plan wholesale.").

Though the district court could not adopt Texas's proposed map for the reasons already stated, it "gave as much consideration to the State's enacted map as possible." JA 90. Indeed, "after maintaining current minority districts and adding in the new districts, [the district court] inserted a number of districts with minimal change from the enacted plan where possible." JA 147. As a result, in the interim plan:

> District 1 has a 97.2% population overlap with district 1 in the enacted plan. District 3 has a 97.8% population overlap with the enacted plan. District 4 has a 96.5% population overlap with the enacted plan. District 5 has a 94% population

> overlap with the enacted plan. District 8 has a 92.7% population overlap with the enacted plan. District 11 has a 96.7% population overlap with the enacted plan. District 13 has a 98.6% population overlap with the enacted plan. District 14 has a 97.2% overlap with the enacted plan. District 19 has a 99.2% population overlap with the enacted plan.

JA 147-48 n.30; *see also* JA 140 (district court drew "districts 2, 22, and 14 similar to the enacted plan"); *id.* at 142 (district court drew District 35 "consistent with the Legislature's choice to create a new Latino opportunity district and with its general choice of location in the enacted plan"). These substantial areas of overlap refute Texas's repeated claims that the district court "disregard[ed]" the enacted map. *See, e.g.*, Texas Br. at 18, 23, 33. On the contrary, the court "deferred" to Texas's map where it could without risking a violation of Section 5. Even the dissent below initially joined in proposing the interim congressional plan and called it "an honest and diligent effort to achieve what an interim plan should do." JA 151.

Comparing the interim congressional map to the interim state Senate map further confirms that the district court deferred to the enacted plans where it could. In the Section 5 proceedings as to Texas's state Senate plan, only one district was challenged as violating Section 5. JA 407. Therefore, with that map, the district court "maintain[ed] the status quo from the benchmark plan" with regard to the single challenged Senate district "but otherwise [used] the enacted map as much as possible." JA 408. Here, by contrast, every

part of Texas's congressional redistricting plan has been challenged in the Section 5 proceeding. *See, e.g.*, JA 94 (confirming that the Attorney General's challenges were not "limited to any particular district or districts" (internal quotation marks omitted)); *see also* JA 95 ("The intervenors also assert that while certain districts exhibit characteristics that are indicative of discriminatory purpose, they are challenging the plans in their entirety."). There was thus no basis for *Upham* deference to any part of Texas's plan here. The difference in the district court's approaches to the two plans illustrates the court's understanding of Section 5 and this Court's precedents and its efforts to defer to Texas's policy choices wherever these authorities allowed it to do so. It also confirms that in adopting an interim congressional map, the district court carefully complied with the law.

In short, the district court followed this Court's guidance in implementing an interim congressional plan. Its decision should be affirmed.

2. This Court Cannot Adopt Texas's Plan

Texas now asks this Court to order the use of its unprecleared, illegal, and discriminatory plan. That would be an error of historic dimensions.

This Court has repeatedly held that courts cannot order even interim use of a state's unprecleared voting change. *See, e.g.*, *Lopez*, 519 U.S. at 22; *McDaniel*, 452 U.S. at 153. This is the correct rule because allowing an unprecleared change to take effect not only violates the plain language of Section 5, but also would place the burdens of delay on those whom the statute was intended to protect. *Lucas*, 486 U.S. at 1305

(Kennedy, J., in chambers). This Court should not reverse course and exempt Texas from its precedent and Section 5's text.

Such an order would be especially inappropriate here because of the many illegally discriminatory aspects of Texas's plan, aspects that do not merit this Court's stamp of approval. Texas asks the Court to impose a plan in which the State has again manipulated District 23 in virtually the same way this Court rejected just five years ago. Yet again, "the State took away the Latinos' opportunity because Latinos were about to exercise it," which "bears the mark of intentional discrimination." *LULAC*, 548 U.S. at 440. Texas asks the Court to impose a plan in which Texas intentionally dismantled an acknowledged crossover district in District 25, ignoring this Court's statement that if "a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Bartlett*, 129 S. Ct. at 1249. Texas asks the Court to approve the State's racial gerrymandering efforts in Districts 12 and 26.

Texas Congressional District 12
as passed by the 2011 Texas Legislature (Plan C185)

Quite simply, adopting Texas's enacted plan, even on an interim basis, would not only violate this Court's longstanding precedent, it would force upon Texas voters an illegally discriminatory plan.

Against this precedent, statutory text, and legally flawed plan, Texas offers a misreading of one federal regulation, arguing that 28 C.F.R. § 51.18(d) allows courts to authorize interim use of unprecleared plans. Again, however, Texas ignores the text. 28 C.F.R. § 51.18(d) provides that "[a] Federal court's authorization of the emergency interim use without preclearance of a voting change does not exempt from section 5 review any use of that practice not explicitly authorized by the court."

Thus, § 51.18(d) does not tell courts when they may allow emergency use of a plan without preclearance, it merely specifies that if a court does so, that plan still has to be precleared for any other use. It is this Court's decisions—not the C.F.R.—that specify when emergency interim use might be allowed, and it is a standard nowhere near met here: "'An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the [covered jurisdiction] until the eve of the election and there are equitable principles that justify allowing the election to proceed.'" *Lopez*, 519 U.S. at 21 (quoting *Clark*, 500 U.S. at 654-55) (alterations in original). The Court has yet to find such circumstances present, and they certainly are not present here, where Texas has long been aware of the need to preclear its redistricting plans and the district court has already adopted an interim plan to be used pending preclearance.

It is also worth noting that even in the case on which Texas rests much of its argument, *Upham*, this Court did not simply adopt the State's proposed plan even after summarily reversing the district court. There, even though the Attorney General had affirmatively found the districts at issue compliant with Section 5 and there were no other pending challenges to those districts—important factors in favor of an enacted plan not present here—this Court remanded to the district court for it to decide how to proceed, saying: "Although the District Court erred, it does not necessarily follow that its plan should not serve as an interim plan governing the forthcoming congressional elections." *Upham*, 456 U.S. at 44. Because the district court was more familiar with the pending election deadlines "and the legal and practical factors" relevant to choosing an interim

plan, this Court simply "vacate[d] the District Court judgment and remand[ed] the case to that court for further proceedings." *Id.* The Court certainly should not grant greater relief here, where serious legal challenges to Texas's proposed plan remain pending in the district court and even the dissent below was unwilling to adopt Texas's proposed plan in light of its legal flaws. Indeed, even a "precleared plan is not owed *Upham* deference to the extent the plan subordinated traditional districting principles to racial considerations," as here. *Abrams*, 521 U.S. at 85. "*Upham* called on courts to correct—not follow—constitutional defects in districting plans." *Id.*

In short, countless cases reject Texas's proposed approach, and none support it. There is no basis for the Court to override Section 5's text and decades of precedent by implementing Texas's illegal, discriminatory plan. And even if Texas were correct that there is no time for remand, the Court would have to choose between two options: (1) adopt the enacted plans, which necessarily violate Section 5 and likely violate Section 2 and the Constitution; or (2) affirm the interim plans drawn by a neutral court based on a logical reading of this Court's precedent, the benchmark plan, and (where possible) the enacted plan. The choice is clear. Even if the Court disagrees with the second option for whatever reason, the best option left would be, as explained below, to vacate the stay and allow the case to proceed to final judgment below.

3. Texas's Proposed "Guidance" On Remand Provides No Guidance

In the alternative, Texas asks the Court to remand and offer "guidance in at least four respects" to the district court. Texas Br. at 56. But

Texas's proposed "guidance" has little bearing on the interim congressional plan, amounting to an attack on only one district—District 33. Even there, however, Texas can identify no legal violation in the district court's approach, as neutral redistricting principles and minority population growth were what led to the district court's creation of a district that happened to be majority-minority. If every new district that happens to be majority-minority constituted an illegal "flaw" in a reapportionment plan, it would be impossible to attain a society in which "citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett*, 129 S. Ct. at 1249 (plurality op.). Texas's inability to articulate a standard on remand that would necessitate redrawing any congressional districts confirms that the district court got it right the first time.

Two of Texas's proposed points of guidance—regarding the Texas Constitution's "county-line rule" and population equality across legislative districts—have no bearing whatsoever on the congressional plan. *See* Tex. Const. art. III, § 26; Texas Br. at 60, 61. They thus obviously provide no basis for remanding that plan and will not be addressed here.

Though Texas fails to acknowledge the limited scope of its other two points of "guidance," they only affect a single district in the district court's interim congressional plan—District 33. Texas's first point of guidance attacks District 33 by name as an improper effort to achieve proportional racial representation. Texas Br. at 56-57. Its next point of guidance suggests that the district court improperly created a coalition district "[i]n addition to District 33." *Id.* at 57. Texas never

specifies what district this is, but its description of the district—as a "new congressional district in North Texas in which African-Americans (29.1%), Latinos (21%), and Asians (6%) constitute a combined majority of the voting-age citizens," *id.*—makes plain that it is again referring to District 33, for no other district remotely approximates this description. *See* Plan C220, Red 106 Report, *available at* http://www.tlc.state.tx.us/redist/redist.htm (District 33's citizen voting-age population is 29.1% African-American, 21.1% Hispanic, and 4.0% Asian).

Texas not only misleads the Court about the scope of its attack on the interim congressional plan, it also attempts to mislead the Court about what the district court actually did. The district court made clear that interim District 33 ended up as a majority-minority district in the interim plan "[b]ecause much of the growth that occurred in the Dallas-Forth Worth metroplex was attributable to minorities." JA 146-47. In other words, because the population growth in that area was overwhelmingly comprised of minorities—with the Hispanic population jumping by 440,898, the African-American population growing by 152,825, and the Anglo population falling by 156,742, U.S. Census Bureau, http://factfinder.census.gov—interim District 33 includes a high percentage of minorities. The district court's explanation is simple.

Bizarrely, Texas concludes from the district court's description of District 33 that "[t]he court apparently believed that Texas had an obligation to draw a certain number of minority opportunity districts in proportion to each racial group's share of the increase in population." Texas Br. at 56. Texas then launches into a legal argument against proportional representation and demands that this

Court instruct the district court that it "may not alter the legislatively enacted districting plan based on proportional-representation concerns or to maximize minority voting strength." *Id.* at 57. Texas's misinterpretation of the plain language of the district court's order is striking. Refusing to take the district court's description at face value—i.e., that large minority population growth naturally yielded a district with a large percentage of minorities—Texas invents a hidden motive on behalf of the district court. Texas thus demands that its own actions receive a presumption of "good faith," *id.* at 27, while refusing to give that same presumption to the district court.

Texas similarly attacks District 33 on the basis that Section 2 of the Voting Rights Act does not require the creation of a coalition district. But the district court never said or even implied that it based the shape of District 33 on Section 2 concerns. And Texas certainly cannot point to authority *prohibiting* creation of a majority-minority district where it results from neutral redistricting principles.

At bottom, Texas's criticism of District 33 rests on the assumption that any time a minority opportunity district is created, the underlying reason must be race-conscious line-drawing that is either intended to remedy a legal violation or presumed unconstitutional. *See, e.g.*, Texas Br. at 45 ("Here, the district court clearly took race into account in drawing its interim maps. In particular, the court deliberately created a number of 'coalition' districts . . . . In the absence of some finding that creation of those race-based districts was absolutely necessary to correct an actual or likely violation of law, the district court's actions were not only improper but unconstitutional."). The

corresponding assumption is that Anglo-dominated districts are necessarily race neutral and, therefore, presumed constitutional. According to Texas, this assumption remains in effect even where the minority population in an area outnumbers the Anglo population. That simply cannot be the law. Indeed, Texas's presumption that any district in which minorities are a majority is inherently suspect says more about its own discriminatory motives than it does about the legality of the interim congressional plan.

The United States, in an analysis that otherwise confirms the wrongheadedness of Texas's approach, also misapprehends the basis of interim District 33. The United States accurately points out that "the district court made no findings establishing that the conditions for treating minorities as a single coalition have been met." Brief for the United States as Amicus Curiae Supporting Affirmance in Part and Vacatur in Part at 33, *Perry v. Perez*, Nos. 11-713, 11-714 and 11-715 (Dec. 28, 2011) ("U.S. Br."). But rather than accepting the district court's explanation of interim District 33 at face value, the United States generally asserts that "insofar as the district court ordered coalition districts for the purpose of complying with Section 2 or Section 5—rather than simply drawing a district based on population growth that happens to be multiethnic—its analysis is inadequate." *Id.* While this general proposition may be true, it has no bearing on interim congressional District 33, which, as the district court explained, *was* "simply draw[n] . . . based on population growth that happens to be multiethnic." *See* JA 146-47. At no point did the district court indicate it drew District 33 in an effort to comply with Section 2 or Section 5 of the Voting Rights Act. Indeed, where compliance with

the Act drove the district court's decisions, it clearly said so. *See, e.g.*, JA 139 ("[T]o comply with Section 5 by ensuring that no minority voters suffer a retrogression in their voting strength as compared to the benchmark . . . , the Court aimed to maintain the current minority opportunity districts from the benchmark plan."); JA 144-45 n.24 ("In keeping with the goals of maintaining the status quo and complying with Section 5 in drawing this map, the Court has preserved District 25 as a crossover district."). Rather, the district court made clear that the minority coalition district found in interim District 33 resulted solely from the substantial minority population growth in that area. JA 146-47. A remand requiring the district court to reiterate the same would only result in further delay, yielding no change in the interim congressional plan.*

In fact, had the district court adopted Texas's approach to District 33 and the Dallas-Fort Worth area, it would have amounted to an

* The United States also says that "the district court appears to have concluded that Section 5 required at least two of Texas's four new districts to be ability-to-elect districts," and that greater explanation is required as to these districts. U.S. Br. at 31. But one of those new districts is District 33, which, as already explained, was not created to comply with Section 5, but rather because of neutral redistricting principles and minority population growth. And the other new majority-minority district—District 35—was also not created based on Section 5 concerns. Rather, as the district court explained, interim District 35 was an example of where the court largely deferred to the State's proposed plan, drawing District 35 "consistent with the Legislature's choice to create a new Latino opportunity district and with its general choice of location in the enacted plan." JA 142. Thus, the United States' critique also provides no reason to remand.

unconstitutional racial gerrymander, as the court would have had to draw contorted district boundaries in order to *avoid* creating a majority-minority district given the new minority population in North Texas. Texas's enacted District 33, which is overwhelmingly Anglo, snakes around Tarrant County, heading west and north into rural areas, avoiding the urban areas where the bulk of the state's population growth occurred. *See* JA 146 ("The fourth new district—district 33—was drawn in the Dallas-Fort Worth metroplex to reflect population growth in that area. That is also generally where the Legislature added its new district 33, but the Court's new district 33 is more compact and located within Tarrant County, where the growth in urban population occurred."). Part of enacted District 33's looping move westward through Tarrant County is to accommodate enacted District 26, the Anglo-dominated district which extends a "lightning bolt" into the heart of Tarrant County and the City of Fort Worth to carve out several of the most significant concentrations of minority population in the area. *See* Jt. Appellees' Br. as to Congressional Plan at 12-13. The district court aimed to create interim District 33 in the same general vicinity as enacted District 33, JA 146, but it did not—and legally could not—include the Legislature's race-based lightning bolt. Instead, since much of the growth in the Dallas-Fort Worth area was attributable to minority population growth, the court adhered to neutral principles to create a minority coalition district.

Finally, although Texas's stay application attacked multiple districts in the interim congressional plan, *see, e.g.*, Congressional Stay App. at 21-24, Texas's proposed "guidance" upon remand challenges only a single congressional district—and that, too, based on a misreading of

the district court's order. Noticeably absent from Texas's opening brief is any mention of interim Districts 23 and 27. *Compare* Congressional Stay App. at 21-23. While Texas does mention interim District 25 as part of its general claim that the interim plan "disregards innumerable policy choices," including the State's choice to dismantle a crossover district, Texas Br. at 23-24, the State offers no guidance on remand on how to redraw the district to cure any alleged legal violation.

The State's inability to explain why these districts should be modified confirms that the district court made no legal error in drawing the interim districts. Moreover, it indicates that even under Texas's novel standard, these districts could not be adopted from Texas's plan because of the many "likely violation[s] of law" in Texas's approach to these districts. Indeed, as to District 25, the D.C. district court has confirmed that Texas violated Section 5 if—as the State has already conceded multiple times, *see, e.g.*, *Perez v. Perry*, No. SA:11-cv-00360-OLG-JES-XR, Dkt. No. 457 (W.D. Tex. Oct. 21, 2011) at 18 & n.9; Congressional Stay App. at 24 & n.14; Texas Br. at 23-24—it eliminated a viable crossover district. *See* D.D.C. Op. at 36 ("[F]reedom from an obligation to create a crossover district under Section 2 does not equate to freedom to *ignore* the reality of an existing crossover district in which minority citizens are able to elect their chosen candidates under Section 5. Since coalition and crossover districts provide minority groups the ability to elect a preferred candidate, they must be recognized as ability districts in a Section 5 analysis of a benchmark plan."); *see also Bartlett*, 129 S. Ct. at 1249 (plurality op.) ("[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that

would raise serious questions under both the Fourteenth and Fifteenth Amendments.").

In short, Texas irrationally clings to its baseless claim that the Court should adopt the enacted plan despite its legal flaws and lack of preclearance. But once that argument falls away, Texas can only feebly challenge a single congressional district in the interim plan. Despite its best efforts, even Texas has failed to devise a standard that would redraw any portion—let alone a substantial portion—of the interim congressional plan. The district court can hardly be said to have committed legal error where Texas can point to no viable remedy on remand.

4. Texas Has Pulled a Bait and Switch

Texas's stay application was premised on several claims it has now abandoned or conceded were wrong. Given that the State's justifications for a stay have now fallen away, and that simply adopting Texas's plan is neither a legal nor a conscionable alternative, the Court—if it chooses not to affirm—should simply vacate the stay, allow the case to proceed to final judgment below, and review the case on appeal in the ordinary course.

Texas's misrepresentations began with the relief it was seeking. In its stay application, Texas specifically disclaimed a request "that its entire plan be adopted wholesale." Congressional Stay App. at 15. Instead, Texas claimed that a prompt ruling from this Court would allow for a remand to the district court. *Id.* at 28-29. Now, however, even though the district court has since postponed Texas's primary election, Texas says there is no

time to remand, so its map must be adopted as is. Texas Br. at 54.

In its stay application, Texas also exaggerated the scope of the alleged flaws in the district court's approach. Texas's stay application specifically attacked five districts in the interim congressional plan: Districts 23, 25, 27, 33, and 35. Congressional Stay App. at 17-24. Here, however, Texas's proposed "guidance" on remand quibbles only with District 33. *See* supra. The reason? Texas realizes that even under its proposed standard—in which the district court would modify districts only after finding "likely violations of law," Texas Br. at 28—none of these districts could have survived as enacted. As explained in our opening brief, Texas's enacted District 23 amounted to a racial gerrymander designed to eliminate a Latino opportunity district, *see LULAC*, 548 U.S. at 440, its enacted District 27 had both the intent and effect of reducing Latino political opportunity in Texas, and its enacted District 35 was based on destroying prior District 25, a district the state acknowledged as a performing crossover district in which minority voters were able to elect their candidate of choice. *See Bartlett*, 129 S. Ct. at 1249 (holding that if "a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments"); D.D.C. Op. at 36 (finding that Texas violated Section 5 if, as the State has already conceded, District 25 was a performing crossover district). And, as already explained, Texas's attack on interim District 33 is baseless, relying on an inaccurate description of the district court's opinion and a troubling view that majority-minority districts can never be justified unless required by law, even where the majority of the population of

an area is composed of racial minorities. More generally, Texas also now concedes that, contrary to its earlier claim that the district court's approach was "fundamentally unmoored" from "any properly constrained judicial inquiry," Congressional Stay Reply at 6, in reality the district court's approach was "[c]onsistent with the customary practice under the VRA," Texas Br. at 2, and it is Texas that seeks invention of a new rule.

Despite these misrepresentations in its stay application, Texas now asks this Court to override Section 5's text and decades of precedent by ordering into effect Texas's unprecleared, discriminatory plan. Alternatively, Texas asks this Court to develop, within just weeks of hearing argument in this case, a new "likely-violations-of-law" approach to Section 5 cases, breaking from decades of precedent. The Court should follow neither approach. If the Court would prefer not to affirm for any reason, the best approach would be to vacate the stay, allow the case to proceed to final judgment below, and then review the district court's decision in the ordinary course. That approach would clarify and likely narrow the issues in the case, would give the Court time to consider whether and how it might wish to provide additional guidance to district courts facing the difficult situation the district court faced here, and would ensure that the Court does not order into effect a map that violates the Constitution and Voting Rights Act.

III. CONCLUSION

As this Court well knows, "Texas has a 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." *LULAC*, 548 U.S. at 439. Texas's 2011 congressional redistricting plan unfortunately continued that tradition, confirming that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes." *Bartlett*, 129 S. Ct. at 1249 (plurality op.). Texas now seeks to make this Court a part of its discriminatory endeavor, asking the Court to ignore Section 5's text and decades of precedent and order into effect its unprecleared, illegal plan. That approach cannot be allowed, for it "would place the burdens of inertia and litigation delay on those whom [Section 5] was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election." *Lucas*, 486 U.S. at 1305 (1988) (Kennedy, J., in chambers). The Court should either affirm the district court's interim congressional plan or vacate the stay.

Respectfully submitted,

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