

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RICK PERRY, GOVERNOR OF TEXAS, :

4 ET AL., :

5 Appellants : No. 11-713

6 v. :

7 SHANNON PEREZ, ET AL. :

8 - - - - -x

9 and

10 - - - - -x

11 RICK PERRY, GOVERNOR OF TEXAS, :

12 ET AL., :

13 Appellants : No. 11-714

14 v. :

15 WENDY DAVIS, ET AL. :

16 - - - - -x

17 and

18 - - - - -x

19 RICK PERRY, GOVERNOR OF TEXAS, :

20 ET AL., :

21 Appellants : No. 11-715

22 v. :

23 SHANNON PEREZ, ET AL. :

24 - - - - -x

25 Washington, D.C.

Monday, January 9, 2012

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Washington, D.C.; for Appellants.

SRI SRINIVASAN, ESQ., Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting affirmance in part and vacatur in part.

JOSE GARZA, ESQ., San Antonio, Texas; for Appellees.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next today in Case 11-713, Perry v. Perez, and the consolidated cases.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE APPELLANTS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

The judicial maps drawn here are truly remarkable. They reflect the reality that the district court below lost sight of first principles. The court repeatedly invoked the principle that these were only interim maps and not remedial maps, but that obscures the reality that a court has the authority to draw an election map, surely one of the most powerful judicial tools in the judicial arsenal, only if it is identifying specific statutory or constitutional violations or a substantial likelihood thereof.

JUSTICE SOTOMAYOR: Mr. Clement, section 5 says you can't draw new maps unless they've been precleared. You can't put them into effect.

MR. CLEMENT: But --

JUSTICE SOTOMAYOR: So, the only thing that

1 exists is old maps until you get the preclearance.

2 I don't see how we can give deference to an
3 enacted new map, if section 5 says don't give it effect
4 until it's been precleared.

5 MR. CLEMENT: Well, Justice Sotomayor,
6 obviously, section 5 is clear that the new map drawn by
7 the Texas legislature, the new maps drawn by the Texas
8 legislature, cannot take effect of their own force. But
9 that doesn't answer the question of whether a judge,
10 when having to impose a remedial map to address what all
11 concede is a one-person, one-vote problem with the
12 benchmark maps, can look to the new maps which also
13 remedy that same one-person, one-vote problem, for
14 guidance. And this Court in its --

15 JUSTICE SOTOMAYOR: But you're asking for
16 more than for guidance. You're asking for deference.
17 You're saying they have to start with the new map even
18 though that map hasn't been approved.

19 MR. CLEMENT: That's right, Your Honor. We
20 think they --

21 JUSTICE SOTOMAYOR: Instead of starting, as
22 the court below did, with the old map which had been
23 approved.

24 MR. CLEMENT: Right. We are -- in fairness,
25 we're asking for it to be used as the starting point for

1 drawing the new map, but that's because --

2 JUSTICE SOTOMAYOR: Doesn't that turn
3 section 5 on its head?

4 MR. CLEMENT: No, I don't think so, Your
5 Honor, for a number of reasons. One is that the
6 obligation to go to the preclearance court or to go to
7 the Attorney General remains fully in place. So, the
8 only question is, what is going to inform the district
9 court in Texas's exercise of remedial authority to
10 remedy the one-person, one-vote problem with the
11 remedial plans -- with the benchmark plans, rather?

12 Now, this Court from the very beginning of
13 its reapportionment cases has emphasized the need to
14 look for legislative guidance in order to inform the
15 judicial exercise of solving that reapportionment
16 problem. And the need to look to the new maps I think
17 is most acute, of course, with the congressional maps
18 because the benchmark is -- is a fine map, but it's a
19 map for 32 seats. And Congress here -- the legislature
20 of Texas has spoken as to how it would like to divide
21 the new 36-seat allocation up. And it seems to be quite
22 odd that the court would simply ignore that judgment
23 when it could look to that as the starting point.

24 JUSTICE GINSBURG: It didn't -- it didn't
25 ignore it. It took it into account along with other

1 plans. My -- Mr. Clement, suppose the D.C. court that
2 has exclusive authority over preclearance in
3 mid-February denies preclearance. And suppose --
4 suppose we accept your position. You prevail in -- in
5 this proceeding. And then the three-judge district
6 court says this -- this plan -- these plans do not meet
7 the section 5 requirement; we deny preclearance. What
8 happens if we use the Texas plan that has not been
9 precleared as the interim plan?

10 MR. CLEMENT: Well, Justice Ginsburg, as a
11 practical matter, I suppose at that point Appellees
12 would go to the court in Texas and say you need to
13 revise your interim maps once again.

14 Now, I think, since the premise for the
15 court drawing its interim maps is that time is of the
16 essence, it can't wait any longer, the Texas court may
17 deny that motion or it may grant that motion. I mean, I
18 don't -- I don't really have a crystal ball to take that
19 into account.

20 But what I do think is particularly
21 anomalous is let's suppose that the D.C. court does deny
22 preclearance. At that point, it's common ground that
23 the plan, the legislatively enacted plan, even though
24 it's denied preclearance, would be something that the
25 Texas court would have to defer to. That's basically

1 Upham.

2 So, it's the oddity of the other side's
3 position --

4 JUSTICE GINSBURG: I don't see how it's
5 basically Upham. That was a plan -- there were two
6 contiguous districts. There was a problem with them.
7 The Attorney General said the rest of it was okay. Here
8 the entire plan -- the plans are -- are opposed.

9 MR. CLEMENT: Well, Justice Ginsburg, I mean
10 it's true that the Justice Department does raise a
11 purpose objection to the plans as a whole, but of course
12 even that takes its force from the way particular
13 districts are being drawn. It seems to me quite likely
14 that -- you know, obviously, our position is that the
15 D.C. court is most likely to grant preclearance. But if
16 they were to deny it, it seems quite likely that they
17 would deny it as to particular districts. And then
18 Upham would make clear that you would give -- that the
19 Texas court would give deference to the legislative
20 plan.

21 And the anomaly of the other side's position
22 is you give less deference to a plan when preclearance
23 is pending than you do when preclearance is denied.

24 JUSTICE ALITO: Can I ask you a question
25 about timing? Let's suppose that the district court in

1 Washington moves expeditiously and issues a decision in
2 mid-February. Are there insuperable problems with
3 postponing the Texas primary so that the plan that is to
4 be used can -- doesn't have to be formulated until after
5 the district court in Washington has ruled?

6 Texas has a very early primary. Some States
7 have them for congressional races in -- in the fall, and
8 the latest presidential primary I think is at the end of
9 June. So, why can't this all be pushed back, and
10 wouldn't that eliminate a lot of the problems that we
11 are grappling with in this case?

12 MR. CLEMENT: Well, Justice Alito, two --
13 two answers: One is, as a practical matter, all of the
14 affected, you know, entities in Texas have gotten
15 together, and they've agreed on the ability to move the
16 primary back to April, given -- on the assumption that a
17 map could be in place by February 1st.

18 Now, you know, the primary has been moved
19 from March to April already. So, I can't tell you that
20 it's impossible to move it again, but it's also quite,
21 you know, in a sense -- I mean, the question becomes --
22 I mean, Texas has made its own determination that it
23 wants to have a relatively early primary. That's not
24 something it cocked up for this set of elections. It's
25 had that in place since at least 1988. And so, the

1 question is how much do you want to interfere with that
2 judgment?

3 JUSTICE ALITO: Well, if we have a binary
4 choice, if it's either the plan enacted by the Texas
5 legislature or the plan that's already been drawn up by
6 the court, yes, that could be presumably resolved rather
7 quickly. But what if neither of those is fully
8 acceptable? Then is it -- is it practicable to have the
9 primary on the date that's been agreed on? And if not,
10 then wouldn't -- would you just prefer to limit us to
11 those two possibilities or would Texas entertain the
12 possibility of moving the primary back?

13 MR. CLEMENT: Well, look, Texas wants the
14 Court to have the opportunity to get this right. We
15 think the decision below is profoundly wrong. We think
16 it's important for this Court to send a clear signal to
17 the courts that would provide relief not just in this
18 case but to future situations where this arose.

19 JUSTICE KENNEDY: Just one more question.

20 MR. CLEMENT: Sure.

21 JUSTICE KENNEDY: Background question about
22 preclearance. Assume that the court of appeals -- that
23 the three-judge district court in Columbia in the
24 preclearance proceeding finds some problems with two or
25 three of the districts, say, in the congressional plan.

1 Does it just say we -- there are problems with these
2 districts, we therefore deny preclearance; or does it
3 then give guidance and say we would give preclearance if
4 you made the following changes? Does it -- in other
5 words, does it give you a road map? How do these
6 decisions work? That's what I'm asking.

7 MR. CLEMENT: Well, I don't think there's a
8 road map for the extent to which they give a road map.
9 I think there are two things that are crystal clear.
10 One is that when the D.C. authority, be it the Attorney
11 General or the court, denies preclearance, it denies
12 preclearance. The plan is not precleared. There's no
13 such thing as preclearance in part or partial
14 preclearance. As the Justice Department puts it, it
15 doesn't work like a line item veto.

16 Now, that's not to say -- and here's the second
17 point. That's not to say that the court doesn't provide
18 reasoning for its decision, or the Attorney General.
19 And that's why in Upham, for example, that the Court --
20 this Court knew that the objections were to two
21 particular districts, even though the effect in Upham
22 was to not preclear the whole plan. And it seems to me
23 the mistake of the district court is it effectively
24 treats the un-precleared plan as a nullity. And that's
25 the exact word that Judge Johnson used in the lower

1 court opinion in Upham.

2 And this Court reversed because it said no,
3 you don't ignore that, but on the other hand, what you
4 do is you take into account the judgment of the Attorney
5 General in that case; but other than that, you take the
6 plan into account notwithstanding the fact that it
7 hasn't been precleared.

8 JUSTICE KAGAN: But we've said over and
9 over, Mr. Clement, that it's the Attorney General and
10 the district court in D.C. that have exclusive
11 jurisdiction over this set of questions and that we
12 don't want courts in other part of the country to try to
13 mimic what those -- what that court and the Attorney
14 General are supposed to do.

15 And you're essentially asking for the
16 district court in the State of Texas to try to predict
17 what they're going to do and to mimic what they're going
18 to do. And that's why Justice Alito suggests, well,
19 look, if we've said that only the district court in D.C.
20 and the Attorney General should do this, let's wait
21 until they do it and go from there.

22 MR. CLEMENT: Well, Justice Kagan, here's
23 why we're -- we're not asking the regional court to
24 mimic the D.C. court's function. We're asking it to
25 perform correctly the one -- one of the roles that this

1 Court has always made clear the regional court retains.
2 And that's to provide temporary relief.

3 If you look at this Court's decisions that
4 essentially warn off a regional court from arrogating to
5 itself the final preclearance decision -- I'm thinking,
6 for example, of Connor v. Waller -- those same decisions
7 say: But this is not with prejudice to your ability to
8 provide temporary relief.

9 Now, our position is quite simple. If we're
10 in a situation where the regional court has to provide
11 temporary relief, then it should apply the same
12 standards that always apply everywhere to courts issuing
13 temporary relief.

14 JUSTICE KAGAN: But you're not taking into
15 account the fact that, as Justice Sotomayor said,
16 section 5 itself operates as an injunction. And it's an
17 injunction against the use of an un-precleared plan.

18 MR. CLEMENT: Justice Kagan, I think we are
19 taking that into account. I mean -- and I think that's
20 at the heart of what's going on here. You have to ask
21 yourself the question: What is the remedy that the
22 Texas court in this case was trying -- what is the
23 violation, rather, that the Texas court was trying to
24 remedy? The Appellees proceed and I think your question
25 proceeds on the assumption as if the violation is a

1 section 5 violation. But that's not what motivated the
2 court's opinion, and you can -- I mean, look at page 96
3 of the Joint Appendix, where the court specifically
4 says: Look, Texas has always been clear. They need to
5 get preclearance. So, this is not about enjoining them
6 from implementing the plan.

7 The constitutional violation that's being
8 remedied here and the only thing that gave the Texas
9 court any authority is the one person, one vote
10 violation with the old plans. And so, the --

11 JUSTICE BREYER: That's what they said
12 they're doing. I mean, I count in the -- about eight
13 times in the house plan, the State house plan, and
14 several times in the senate plan where it's clear, and I
15 think it's fairly clear in the U.S. House plan, they say
16 things like: "The court began by considering the
17 uncontested districts from the enacted plan that
18 embraced neutral districting principles, although it
19 wasn't required to give any deference." And you say
20 they're wrong about that. "The court attempted to
21 embrace as many of the uncontested districts as
22 possible."

23 So, after I got finished reading their
24 opinions, I thought, well, there may be a difference
25 between what you say and they say, but I'm not sure that

1 there is a difference that's reflected in the maps.

2 And so, it's now January 9th. We have to
3 have something in effect by February 1st. They said
4 that they're paying attention to what the legislature
5 did. And when I looked at the maps, as far as I can
6 tell, they include -- some more, some less, most in the
7 State senate -- but they include a lot of the State's
8 changes.

9 So, what am I supposed to do? I mean, I
10 can't tell whether you're right or wrong without looking
11 district by district by district by district. What am I
12 supposed to do on January 9th?

13 MR. CLEMENT: Well, I think on January 9th,
14 Justice Breyer, you should take another look at El Paso
15 County. Because I think if you look at El Paso
16 County --

17 JUSTICE BREYER: In which -- in which --

18 MR. CLEMENT: In either the congressional
19 map or the house map. I think if you look at El Paso
20 County, what you cannot conclude is that all ---

21 JUSTICE SOTOMAYOR: What map is that?

22 MR. CLEMENT: What's that?

23 JUSTICE SOTOMAYOR: What district is that?

24 MR. CLEMENT: Well, it depends. If we're
25 looking at the congressional map, I believe it's

1 district 16 or 17. And that's -- those maps start on
2 page 1.

3 JUSTICE BREYER: Okay. El Paso County in
4 the original plan I guess was -- like number 16. I've
5 got it in front of me. And they split it, and it was
6 split somewhat differently or not. Okay.

7 MR. CLEMENT: Well, I mean, I think you're
8 understating it. I mean, on the benchmark plan --

9 JUSTICE BREYER: No, no, right. It's a
10 whole --

11 MR. CLEMENT: -- that was a straight line.

12 JUSTICE BREYER: Yes.

13 MR. CLEMENT: On the enacted plan, it was a
14 different straight line.

15 JUSTICE BREYER: Yes. Correct.

16 MR. CLEMENT: And in the court's plan --

17 JUSTICE BREYER: So -- all right. All
18 right. Now, why was that wrong? Why is that wrong?
19 Tell me why it's wrong for them to do that.

20 MR. CLEMENT: I want to -- I want to say two
21 reasons why it's wrong, but first I think that really
22 does answer your premise, which is that all the court
23 was doing was remedying one person, one vote.

24 JUSTICE BREYER: No, no, I didn't say that.
25 I said, in their way of thinking, they are taking the

1 map into account. Now, to sit -- the enacted one. If I
2 disagree with that, I can't disagree at the level of
3 principle; I have to disagree at the level of particular
4 districts. That's why I asked you the question. So,
5 you point to district 16, and I say, very well, tell me
6 what they did wrong and why? Because, remember, they
7 are facing a challenge that's based on section 5, part
8 purpose.

9 And the district court there said, in the
10 D.C., you don't survive -- I can't give you a summary
11 judgment on that; purpose here may have been violated.

12 All right. Now, you tell me what's wrong
13 with district 16, which I guess is your strongest case.
14 That would be helpful.

15 MR. CLEMENT: No, what I'm -- I'm not saying
16 it's my strongest case. I'm saying it's illustrative of
17 the problem. Another thing that's illustrative of the
18 problem --

19 JUSTICE SOTOMAYOR: But what's was the
20 problem?

21 JUSTICE BREYER: Tell me -- tell me what's
22 the problem?

23 MR. CLEMENT: The problem is that the court
24 lost sight of what it was supposed to be doing. It was
25 supposed to be --

1 JUSTICE BREYER: What they said they were
2 doing. They couldn't have lost sight at the level of
3 generality because at the level of generality they said
4 we're trying to take into account the map. I'm just
5 repeating myself.

6 I want to know what is wrong with the
7 drawing of district 16, what they did, given that
8 there's a section 5 challenge based on purpose?

9 MR. CLEMENT: And what's wrong with it is
10 because they neither started with the old benchmark plan
11 and said we're going to solve a one person, one vote
12 problem, nor did they start with the new legislative
13 plan and say is. There some violation that allows us to
14 change that plan? They instead, as they told you, said
15 that they were on their own drawing an independent map.

16 JUSTICE SOTOMAYOR: I'm sorry. That's --
17 that's incomplete.

18 CHIEF JUSTICE ROBERTS: You can finish your
19 -- finish your answer, please, if you can.

20 MR. CLEMENT: What I was hoping to say is
21 that they -- they told you they were drawing an
22 independent map, and what they told you is that they
23 thought that they were under an affirmative obligation
24 not to defer to the legislative enactment because it
25 hadn't been precleared. And the oddity of this -- I

1 mean, look, you're right. In certain places, they then
2 turn around and say: But we deferred where we could.

3 But the oddity of their position is their
4 first premise, which is the one thing we can't do in
5 drawing these maps, is look at that -- look at that
6 un-precleared map. There's no explanation for why -- if
7 that premise was right, why would it be even a good
8 thing that they were pointing to the other map.

9 JUSTICE SOTOMAYOR: Counsel, I'm not sure
10 how I understand that, okay? As I looked at one of the
11 El Paso maps, the enacted map created a antler-type
12 district, a head and two unconnected antlers on top,
13 nothing tying them together.

14 The district court went back to the
15 benchmark and said this is the benchmark district; now
16 I'm going to draw the districts around it that fall
17 naturally, trying to stay within neutral principles of
18 not dividing up the city more than I have to. And it
19 came out with another district.

20 I don't understand what principle, what
21 legal principle, the district court was violating that
22 makes what it did with that particular county wrong.
23 You're saying they should have given deference to an
24 oddly shaped district that changed a prior benchmark
25 that's been challenged as having been created

1 specifically to minimize the Latino vote.

2 All of the challenges that relate to El Paso
3 are very significant. The district court has already
4 denied summary judgment on that. Tell me what legal
5 principle they violated, other than the deference
6 principle that you're relying upon?

7 MR. CLEMENT: The basic principle they
8 violated is they drew an interim order that they thought
9 wasn't a remedial order without it being based on any
10 finding of substantial likelihood of a violation.

11 JUSTICE SOTOMAYOR: That's your second --

12 MR. CLEMENT: You may be right. You may be
13 right. There may be a problem with those maps in El
14 Paso. I don't think so, and I'd like to talk about
15 that.

16 But if the district court had said, you
17 know, there's a problem with this because the two - the
18 two antler -- the deer with two antlers, that violates
19 -- that's a substantial likelihood of violating the
20 Constitution. We're going to remedy that. If that's
21 what they did, this would be a very different case.

22 Now, I do want to talk about the deer with
23 two antlers, because what that ignores is that in the
24 benchmark plan, the deer had one antler and an antenna.
25 And so, the district court -- the map the district court

1 drew doesn't look anything like the benchmark, and
2 actually the map that the legislature drew looks very
3 much like the benchmark.

4 And so, I think that just shows that what
5 was going on here by the district court was something
6 very different from either remedying a one-person,
7 one-vote problem with the benchmark or from correcting
8 specific identified problems with the legislative map.

9 JUSTICE SCALIA: I had thought, Mr. Clement,
10 that -- that one of your objections was that in deciding
11 whether they're using the benchmark or the -- the
12 legislature's proposed new plan, whichever one they're
13 using, they -- in drawing up their own plan, they
14 assumed the validity of all of the challenges.

15 Is -- is that not the case?

16 MR. CLEMENT: Well, that is the case, Your
17 Honor, and that is one of the many problems with the way
18 that the court proceeded here. Because once you lose
19 sight of the fact that, look, we only have remedial
20 authority if we're remedying substantial likelihood of
21 violations that are identifiable and particular, well,
22 then what are you going to do?

23 What this district court did, after he
24 started where Justice Breyer suggested, is that the
25 district court judges then said, look, we want to avoid

1 the challenges that are brought by the plaintiffs. And
2 what they mean by "avoid" is they basically take all the
3 allegations at face value and then redraw the district
4 to avoid this.

5 JUSTICE KENNEDY: At face value. But you
6 don't have any problem -- if I'm a district judge and I
7 think there is a substantial likelihood that a
8 particular challenge will succeed, you don't have any
9 problem with my drawing an interim plan to avoid that
10 likelihood.

11 MR. CLEMENT: Absolutely no problem at
12 all --

13 JUSTICE KENNEDY: Thank you.

14 MR. CLEMENT: -- Justice Kennedy. And the
15 great thing about that is that gives the district court
16 a familiar role to play applying familiar standards, and
17 it gives this Court something to review.

18 JUSTICE GINSBURG: But the district court in
19 that -- in that scenario is projecting what the D.C.
20 court that has exclusive authority is going to do. And
21 that's why I find your -- your position troublesome.
22 You're asking one court to make its best guess at what
23 another court is likely to do, and that other court has
24 exclusive jurisdiction.

25 MR. CLEMENT: Can I -- can I respond to

1 that, Justice Ginsburg, as follows? Which is, I had
2 assumed that Justice Kennedy's question was not specific
3 to section 5 and could just as well be a section 2
4 problem --

5 JUSTICE KENNEDY: Section 2.

6 MR. CLEMENT: -- or an equal protection
7 under the Constitution problem. And in this case, there
8 is no problem. All the court is doing is making a
9 substantial likelihood determination of an issue that
10 it's ultimately going to confront.

11 JUSTICE KAGAN: But haven't we also said
12 that, with respect to section 2 and constitutional
13 violations, that those allegations would be unripe in
14 the -- prior to the district court or the Attorney
15 General clearing a plan?

16 MR. CLEMENT: Absolutely, Justice Kagan.
17 But I think it's important to understand that to the
18 extent that the district court in this remedial phase
19 should take section 5 into account, it's just in
20 considering whether or not the remedial plan is
21 consistent with section 5 principles. And that's what
22 the judges did in this case with respect to their own
23 plan. So, we're not asking them to do something with
24 section 5 that they otherwise wouldn't do.

25 And, again, I think if you come back to the

1 particular question of what are they trying to remedy --
2 I mean, they're trying to remedy the one person, one
3 vote problem. So, if that's what they're trying to
4 remedy, why wouldn't they take into account the
5 legislative policy judgments reflected in the
6 un-precleared plan if that's -- if that's the state
7 we're in, if that's the snapshot we're in.

8 I mean, keep in mind, this Court has
9 throughout --

10 JUSTICE KAGAN: Well, just because section 5
11 says that there's no presumption of regularity attached
12 to that plan and, indeed, that it's unlawful to put that
13 plan into effect without the proper approvals.

14 MR. CLEMENT: Two things, Justice Kagan:
15 One, I would beg to differ that what section 5 says is
16 that there's no presumption of regularity. And I think
17 that's -- it's not just a quibble because I think if
18 what section 5 says is that there's no presumption of
19 regularity or no presumption of good faith, then section
20 5 I think is closer to the constitutional edge than this
21 Court said in Northwest Austin. I think all it says --

22 JUSTICE KAGAN: Section 5 says somebody has
23 to clear it before it can go into effect.

24 MR. CLEMENT: Absolutely. But I don't think
25 that means that the assumption is that the legislature

1 didn't act in good faith in enacting the provision. And
2 that brings me to my second point --

3 JUSTICE KAGAN: Nobody said the opposite.
4 The question just is, does somebody have to clear it?
5 Here, it wasn't cleared.

6 MR. CLEMENT: Okay. I agree, but then the
7 question is, if there's not a presumption of bad faith,
8 then why wouldn't the court take that legislative
9 judgment into account in drawing its remedy for the one
10 person, one vote violation in the remedial district?

11 If I could add my second point, which is the
12 other thing to keep in mind is the preclearance
13 obligation is not driven by congressional judgment that
14 these covered jurisdictions are particularly bad at
15 remedying one person, one vote problems.

16 Obviously, section 5 is driven by concerns
17 about racial discrimination. So, in that sense, it's
18 particularly odd, given that what's at issue here is a
19 remedy for a one person, one vote problem, that you
20 would assume that you're not going to take into account
21 the legislature's judgment as reflected in an
22 un-precleared plan.

23 JUSTICE KAGAN: No, I don't think that
24 that's --

25 CHIEF JUSTICE ROBERTS: Counsel, I think

1 there -- I see two different problems, and I'm not quite
2 sure how to come out. One, you cannot assume that the
3 legislature's plan should be treated as if it were
4 precleared. The district court in Texas cannot assume
5 or presume what the district court here in D.C. is going
6 to do.

7 But, on the other hand, it can't presume it
8 the other way. In other words, it can't draw its
9 interim plan assuming that there are going to be these
10 section 5 violations because that's presuming what the
11 court's going to do the other way.

12 So, how do we decide between those two --
13 you have two wrong choices. How do we end up?

14 MR. CLEMENT: Well, I think you try to split
15 the difference by trying to apply the preliminary
16 injunction standards. And I think if you do that, then
17 what you're going to do is that you're going to ensure
18 that the remedy that the district court draws for -- as
19 an interim matter for the one person, one vote problem,
20 which is not the same thing as preclearance, that remedy
21 is both consistent with the legislative policy judgments
22 but also with section 2, with the Equal Protection
23 Clause.

24 And I suppose if this Court wants to, it can
25 say that for purposes of interim temporary relief, the

1 Court can look at section 5 directly. I would think the
2 better answer is, no, you just focus it on section 2,
3 the Equal Protection Clause, and then you ensure that
4 the judicial plan is consistent with section 5
5 principles, because that's the test that the Court's
6 going to apply in any event.

7 JUSTICE KENNEDY: Can you -- can you tell me
8 with reference to the two districts, other than the
9 senate district, congressional and State house
10 districts, did Judge Smith defer or use the -- the Texas
11 legislature's 2011 plan as a benchmark to some extent?

12 MR. CLEMENT: I -- I don't think Judge
13 Smith -- if I can answer your question, I think this
14 does: I don't think Judge Smith did this the way that
15 we think he should or focused on the benchmark. If you
16 look at the congressional plan, what he did is he just
17 basically picked one of the proposals that was a
18 bipartisan proposal, so-called C216.

19 With respect to the house plan, I think he
20 got it -- the Texas house plan -- I think he got it
21 closer to right. But I don't think he applied the right
22 standard. And I would ask you to look at Joint Appendix
23 193, and particularly his consideration of house
24 district 33, because there what Judge Smith did is said,
25 well, you know, there's these allegations, and I find

1 this -- he said the State has persuasive responses, but
2 out of an abundance of caution I'm going to redraw the
3 district.

4 That doesn't seem quite right. I mean, if
5 the State really does have persuasive responses, that
6 ought to be enough to not redraw the district.

7 JUSTICE KENNEDY: So, you would fault his
8 solution for giving insufficient deference to the State
9 of Texas 2011 plan?

10 MR. CLEMENT: That's right, but it's -- it's
11 certainly a fair improvement over what the district
12 court majority did.

13 If I could reserve the balance of my time.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Clement.

16 Mr. Srinivasan.

17 ORAL ARGUMENT OF SRI SRINIVASAN

18 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
19 SUPPORTING AFFIRMANCE IN PART AND VACATUR IN PART

20 MR. SRINIVASAN: Thank you,
21 Mr. Chief Justice, and may it please the Court:

22 The fundamental flaw with Texas's approach
23 is that it directly inverts the burden established by
24 section 5 of the Voting Rights Act. Section 5 places
25 the burden on a covered jurisdiction to show that a

1 proposed voting change is nondiscriminatory in purpose
2 and effect, and the change can't go into effect unless
3 and until the State carries its burden in that regard.

4 JUSTICE KENNEDY: Let me ask you this:
5 Suppose that this -- all the facts are the same except
6 that this is in a State that is not subject to section
7 5.

8 Would there be a problem in your view with
9 what the district -- with what the district court did,
10 with Judge Smith -- with what Judge Smith did?

11 MR. SRINIVASAN: Well, with Judge -- with
12 what Judge Smith did, I guess in that context,
13 Justice Kennedy, there wouldn't be a section 5 issue at
14 all.

15 JUSTICE KENNEDY: Right.

16 MR. SRINIVASAN: And all you'd be dealing
17 with is section 2 or the Equal Protection Clause.

18 JUSTICE KENNEDY: And then we could -- then
19 there would be no problem with using Texas as a
20 benchmark, the Texas 2011 as benchmark, as a starting
21 point?

22 MR. SRINIVASAN: Well, I --

23 JUSTICE KENNEDY: As a starting point?

24 MR. SRINIVASAN: Yes. Well, I guess what I
25 would say is this, that in the malapportionment context

1 what this Court typically has said the district court
2 should do is to start with a plan that's already in
3 effect and then modify it according to neutral
4 districting principles to remove the malapportionment
5 issue. And that's --

6 JUSTICE ALITO: Well, what are neutral
7 districting principles? Anybody who draws a map faces
8 at the outset certain legal constraints, constitutional
9 constraints, restrictions that are imposed by the Voting
10 Rights Act, maybe some State law restrictions to the
11 extent they're not inconsistent with Federal law. Once
12 you've gotten beyond that point, all you have left is
13 districting policy.

14 They're policy choices, and there are many
15 factors that can be taken into account in drawing a map:
16 how compact you want the districts to be, to what extent
17 are you going to respect zones of common economic
18 interests, to what extent are you going to try to
19 preserve old districts, what about incumbents, what
20 about party registration? Are you going to try to have
21 balance or are you going to try to favor one party or
22 the other? That's all -- those are all questions of
23 policy.

24 And the question is, whose -- who makes
25 those policy decisions? Are they going to be the policy

1 decisions that were made by the legislature, or are they
2 going to be the policy decisions made by the district
3 court? And to say they're going to apply neutral
4 districting principles is a subterfuge. There is no
5 such thing.

6 MR. SRINIVASAN: Well, I guess I would
7 disagree with you, Justice Alito. I want to make two
8 preliminary observations on what a district court is
9 supposed to do in this regard, and then I'll try to walk
10 through the principles that should guide this inquiry.

11 The first preliminary observation is what a
12 district court is not supposed to do, and what a
13 district court is not supposed to do is to take the
14 un-precleared plan as a given, because section 5
15 forecloses it.

16 Now, what's a district court supposed to do?
17 It's not at sea, contrary to the underpinning of some of
18 the arguments made today, because the district court
19 starts with the last legally enforceable plan, which
20 after all is the last manifestation of State policies
21 and priorities. So, you have that as a starting point.
22 And then it has to modify that plan, of course, to deal
23 with malapportionment issues and to comply with section
24 2 and section 5 --

25 JUSTICE ALITO: Well, I don't want to

1 interrupt you too much, but even if you do that, even if
2 you start with the old plan and then you modify it to
3 the extent necessary to comply with the Constitution and
4 statutes, there are still -- I'm sure our computer could
5 shoot out dozens and dozens of possible maps, and
6 somebody has to choose among them. Now, what criteria
7 does a district judge -- does a district court use in
8 making that choice?

9 MR. SRINIVASAN: There is discretion in the
10 inquiry, Justice Alito. I'm not going to -- I'm not
11 going to disagree with that. What it looks to is the
12 districting criteria that had been applied by this
13 jurisdiction in the past. And, for example, in this
14 case --

15 JUSTICE SCALIA: It's not just discretion.
16 It's political discretion. That's what's troublesome
17 about it. And you -- it seems to me the Government
18 makes -- takes an absolutist approach to the proposition
19 that you cannot use an un-precleared plan for any
20 purpose. All the law says is that you cannot apply a
21 precleared plan. The plan being applied here is not the
22 Texas legislature's plan; it's the plan -- a remedial
23 plan adopted by Federal judges.

24 And to say that they cannot use in drawing
25 up that plan the legislature's last political decisions

1 seems to me not required by the mere prohibition against
2 implementing that plan as the plan of the legislature.

3 What would you do if -- if the district
4 court in Washington and the district court in Texas --
5 neither one of them acts in time, and it's too late?
6 It's too late to have any -- any primaries anymore.
7 What -- what would happen?

8 MR. SRINIVASAN: Well, I guess --

9 JUSTICE SCALIA: What would happen? You
10 can't use the old plan. You have this absolute rule
11 against using the new plan. What happens? You
12 disenfranchise every voter in Texas --

13 MR. SRINIVASAN: No, I don't think you could
14 do that.

15 JUSTICE SCALIA: -- because there may be
16 some voters in Texas, may be, some who will be
17 prejudiced by using the current plan? I suggest in that
18 situation there's nothing to do but use the Texas plan.

19 MR. SRINIVASAN: Well, I don't -- not in the
20 context of section 5, Your Honor. It's -- that's one
21 option, but the other option would be to use a
22 malapportioned plan, which this Court has suggested
23 would be something the courts could do. Now, that's not
24 a preferred option, to be sure.

25 But we're not in that situation here,

1 because what you have is interim maps that have been
2 developed. We're not in the kind of emergency situation
3 that you're positing.

4 JUSTICE SCALIA: You acknowledge that there
5 are some situations in which you can use the very plan
6 that the Texas legislature adopted, even though it's not
7 been precleared?

8 MR. SRINIVASAN: Only if there's no time for
9 a district court to adopt a different plan. But --

10 JUSTICE SCALIA: So, it's no longer an
11 absolute rule. So, the question is whether this is
12 another reasonable exception to a non-absolute rule.

13 MR. SRINIVASAN: There is an emergency
14 exception, as there is with all sorts of legal rules.
15 But that's so far as we would go.

16 Now, I would like to address the proposition
17 that what the Court would be doing here under Texas's
18 view is just a standard application of substantial
19 likelihood of success principles, because it's not.
20 It's decidedly different from standard operation of
21 substantial likelihood of success principles in three
22 fundamental respects.

23 The first goes to the burden,
24 Justice Kennedy, and I think you alluded to this in your
25 question. The burden in a preliminary injunction

1 context stays with the same party at the preliminary
2 injunction stage as at the merits stage. And so, when
3 in a preliminary injunction context the court is asking
4 has there been a substantial likelihood of success on
5 the merits, the same party has to make that showing as
6 has to make that showing at the merits stage.

7 Here Texas would turn that upside down,
8 because at the merits stage, which is the preclearance
9 proceeding --

10 JUSTICE KAGAN: Well, would it be okay if we
11 just said, well, Texas has to make the showing?

12 MR. SRINIVASAN: That would certainly be
13 better. I think that would improve things quite a bit.
14 But that's not what Texas -- the approach that Texas
15 proposes today.

16 But it's different in two other respects
17 from a standard preliminary injunction context as well.
18 And one is what Justice Ginsburg alluded to, which is
19 here you don't have a situation in which the same court
20 that's going to forecast its ultimate adjudication of
21 the merits is also deciding what it's going to do at the
22 preliminary injunction stage.

23 CHIEF JUSTICE ROBERTS: Well, that's exactly
24 right, but you see it only on one side of the problem.
25 You say, well, you can't treat it as if it's been

1 precleared --

2 MR. SRINIVASAN: That's right.

3 CHIEF JUSTICE ROBERTS: -- because that
4 would be prejudging what the court in D.C. is going to
5 do. But you have no trouble with them saying --
6 assuming that there are going to be these section 5
7 violations and drawing additional majority-minority
8 districts, which is just assuming on the other -- the
9 other way what the court here in D.C. is going to do.

10 MR. SRINIVASAN: Well --

11 CHIEF JUSTICE ROBERTS: I don't know how you
12 -- you lean one way and say, well, it's horrible, you
13 can't use it because it hasn't been precleared; but it's
14 all right in drawing the interim plan to treat it as
15 there -- as if preclearance has been denied.

16 MR. SRINIVASAN: No, I don't -- I don't know
17 about that, because I think what a district court is
18 supposed to do when preclearance is pending is not
19 accept all the challenges. What it's supposed to do is
20 to apply traditional districting criteria to the
21 benchmark. So, I guess --

22 JUSTICE KAGAN: So, do you contest the view
23 that this district court did essentially accept the
24 challenges, did sort of say, well, look, there are these
25 challenges; so, we have to make sure that we don't do

1 anything that cuts against them?

2 MR. SRINIVASAN: Well, there is some
3 language in the opinions to -- to that effect,
4 Justice Kennedy. I have to say the district court
5 opinions here are not a model of clarity. In some
6 respects, they seem to outline the right inquiry. If
7 you look at Joint Appendix 137 to 138, I think what the
8 district court said it was doing was starting with the
9 status quo, which is the benchmark, and then modifying
10 it.

11 CHIEF JUSTICE ROBERTS: And if you look --
12 and if you look at Joint Appendix 146 --

13 MR. SRINIVASAN: That's right.

14 CHIEF JUSTICE ROBERTS: -- to 147, it looks
15 the exact opposite. It looks like they're drawing
16 minority coalition opportunity districts to draw them
17 because they have anticipated how they think the
18 district court in D.C. is going to come out.

19 MR. SRINIVASAN: Well, that's -- that's
20 right, Mr. Chief Justice, and I think we point to that
21 in our brief as an area in which the district court
22 could give further explanation on remand.

23 CHIEF JUSTICE ROBERTS: You do.

24 JUSTICE KENNEDY: Isn't it odd that this is
25 a section 2 suit, and yet section 5 seems to be driving

1 that -- driving it. That's the problem with this
2 litigation, it seems to me.

3 MR. SRINIVASAN: Well, I think section 5
4 can't help but drive --

5 JUSTICE KENNEDY: And section 5 applies only
6 to -- to some States and not others. Texas is at a
7 tremendous disadvantage here in defending the section 2
8 suit and in drawing -- and in having -- and the
9 judiciary is at a disadvantage in -- in framing a remedy
10 for a likely -- a likely section 2 violation in some of
11 the districts.

12 MR. SRINIVASAN: Well, of course, Your
13 Honor, Texas is in a different position precisely
14 because it's a covered jurisdiction. And when you have
15 a section 5 case, section 5 can't help but take
16 precedence in some respects, precisely because a
17 proposed change can't go into effect unless and until
18 the covered jurisdiction shows that it's
19 nondiscriminatory in purpose and effect. But I do think
20 it's important --

21 JUSTICE KENNEDY: Well, I wonder if it
22 should take precedence in a section 2 suit. That's all
23 this court -- this is the primary obligation of the
24 Texas district court, is to address section 2
25 violations.

1 MR. SRINIVASAN: That -- that may be, Your
2 Honor, but I think then if -- if it can't address the
3 section 5 issue at all, then the one thing that
4 shouldn't happen is that the section 2 court gives
5 effect to the un-precleared plan, because that's
6 something that the D.C. district court is supposed to
7 do.

8 JUSTICE KENNEDY: Well, it's not giving
9 effect to the uncleared plan. It's giving effect to a
10 legislative judgment as to what is workable for all the
11 factors and criteria that Justice Alito referred to,
12 county lines, et cetera.

13 CHIEF JUSTICE ROBERTS: We -- we'll let you
14 go on for a little longer. We may have a few more
15 questions.

16 MR. SRINIVASAN: Okay. Thank you,
17 Mr. Chief Justice. I appreciate that.

18 I guess what I would say, Justice Kennedy,
19 is, if you use the un-precleared plan as the starting
20 point, which is what Texas proposes, you are giving
21 effect to that, notwithstanding the preclearance
22 requirement of section 5. And with a covered
23 jurisdiction, that's something that section 5 doesn't
24 allow.

25 Now, I do think it's important to consider

1 Texas's preclearance submission in the context of the
2 other statewide preclearance submissions that have been
3 submitted in this election cycle. If you look at the
4 Government's brief at pages 1a to 3a, I think what that
5 bears out is that there's not a fundamental problem with
6 section 5 or the way section 5 operates. The problem,
7 insofar as it -- as it exists, is with respect to the
8 particular submissions that Texas has made, because
9 there were 20 submissions of statewide plans for
10 administrative preclearance. In all 20 cases, the
11 Attorney General precleared them. In 19 of the
12 20 cases, the Attorney General precleared it within the
13 initial 60-day window. Now --

14 CHIEF JUSTICE ROBERTS: Counsel, I have --
15 your position -- I understand you're straddling a
16 position. That's why you're sitting in the back rather
17 than the front row between the two parties. But it's a
18 little unsatisfying because what you say we should do
19 when we are all under the gun of very strict time
20 limitations is we should send it back to the district
21 court so it can give a greater explanation of what it's
22 done.

23 Isn't that going to be very wasteful? I
24 mean, it's kind of an odd order from this Court to send
25 to a district court saying, you know, tell us more.

1 MR. SRINIVASAN: Well, I don't know that it
2 is, Your Honor, and I have two -- two responses in that
3 respect.

4 First -- and this goes to a question that
5 Justice Alito asked earlier. What is this Court
6 supposed to do in this situation? And I think one thing
7 that could absolutely happen is if there were a remand,
8 the D.C. district court could complete its preclearance
9 proceeding, which would be very illuminating for the
10 what the Texas district court is supposed to do.

11 JUSTICE BREYER: Do you have an idea of
12 when?

13 MR. SRINIVASAN. And by way of guidance on
14 that, what I would --

15 JUSTICE BREYER: Do you have -- what is that
16 based on?

17 MR. SRINIVASAN: What I would say is this:
18 The D.C. district court has scheduled trial to begin on
19 January 17th. It's supposed to last 8 days. Closing
20 argument is on February 3rd. If you look at what
21 happened at the summary judgment stage, Justice Breyer,
22 they had summary judgment arguments on one day; 6
23 days later, they --

24 JUSTICE BREYER: Yes, I read -- I read -- I
25 read the opinion and what she said on the phone and so

1 forth.

2 MR. SRINIVASAN: No, not that.

3 JUSTICE BREYER: It seems to me that it's a
4 complicated case. Let's suppose you're completely right
5 on your time schedule. Then they'll decide something.
6 How could any human being redraw maps in 5 days or 10
7 days where you'll have different -- six different
8 positions? I mean, I think it's impossible. How can
9 you -- I don't see how you could do it.

10 MR. SRINIVASAN: Well, of course, if
11 preclearance is granted, we -- we won't have an issue
12 with drawing maps.

13 JUSTICE BREYER: Well, I think there's -- it
14 seemed to me from reading it, I -- I didn't think that
15 the judge there is ready to grant preclearance.

16 MR. SRINIVASAN: And we --

17 JUSTICE BREYER: But the other thing in
18 sending it back, I read the brief, and then I read the
19 opinions. I don't think I have -- I'm not being too
20 generous to the opinions, but I thought what they were
21 saying throughout is we didn't try to draw extra
22 coalition or extra opportunity districts; they emerged.
23 They say "emerged" about seven times. They emerged as
24 we tried to apply equal vote principles. And it's
25 hardly surprising that it would, considering that the

1 population growth is primarily due to the minority
2 expansion.

3 So, they didn't seem to me -- now, why do
4 you want us to send it back to get more explanation when
5 that seems to be the explanation, and to me at first
6 blush, it seems like a perfectly good explanation.

7 CHIEF JUSTICE ROBERTS: Maybe a brief
8 answer. Thank you.

9 MR. SRINIVASAN: Yes. Sure. I think it's
10 if -- insofar as the coalition districts and ability-to
11 districts emerge from natural growth, there's nothing
12 suspect about them. The one example I point to is
13 district 33. If you look at Joint Appendix, pages 146
14 to 147, it's not clear what the -- what the district
15 court was doing in that regard.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Mr. Garza.

18 ORAL ARGUMENT OF JOSE GARZA
19 ON BEHALF OF THE APPELLEES

20 MR. GARZA: Mr. Chief Judge, and may it
21 please the Court:

22 There seems to be general consensus on at
23 least three points that we've talked about today.
24 First, that the un-precleared plan cannot take effect.
25 The second, that the district court is foreclosed from

1 entering and engaging in an analysis of the issues that
2 are pending before the three-judge court in the --
3 Washington, D.C., and that at this point, a
4 court-ordered plan must be implemented on an interim
5 basis.

6 JUSTICE SCALIA: Exclude me from the second.
7 I'm not sure that -- that I've gone along on that, as
8 you phrased it. The way you phrase it, you say they
9 cannot even make the kind of preliminary inquiry that --
10 that your friend suggests.

11 MR. GARZA: I think we're dealing with a
12 matter of semantics, Your Honor, because the question
13 is, did the court give the -- the State's plan
14 deference? But it itself said that it began, as it
15 should, as it has been directed by this Court, with the
16 historical or benchmark configurations and then
17 respected the State's plan.

18 JUSTICE KAGAN: But you know what I don't
19 understand about your briefs, Mr. Garza, is if the State
20 can't -- if the plan has not been precleared, you should
21 be saying the State can't look at the plan. But on the
22 one hand, you're saying, well, isn't it great because
23 the court did look at the plan, and on the one hand --
24 on the other hand you're saying the court can't look at
25 the plan. So, which is it? Because there's a real

1 tension. On one page, you say isn't it great the court
2 looked at the Texas plan. And then you say the court
3 can't look at the Texas plan.

4 MR. GARZA: We don't say that the court
5 can't look at the Texas plan. What we say is that the
6 -- the court can't implement the Texas plan, and it
7 certainly can't implement the Texas plan if there is any
8 suspect of discrimination. And what it did was exactly
9 the right measure.

10 JUSTICE SOTOMAYOR: Then you're saying the
11 court should look at the merits.

12 MR. GARZA: I think that the court did the
13 appropriate thing by looking at the -- at those maps.

14 JUSTICE SOTOMAYOR: No. Let -- let's go to
15 -- something Justice Scalia asked was what does a court
16 do with frivolous claims? Does it assume under your
17 theory that those frivolous claims are valid? And if
18 you say no, it shouldn't assume that, then what level of
19 inquiry should the court engage in before it accepts or
20 deviates from the enacted plan?

21 MR. GARZA: I think that the court should
22 look at -- first of all, should not start with the
23 State's plan. It should look at where there have been
24 objections made. And the role of the district court in
25 the District of Columbia is where the question of

1 whether there are frivolous claims have been made. And
2 there have been no motions to dismiss any of the claims
3 in Washington, D.C., based on frivolity.

4 JUSTICE SOTOMAYOR: So, the Texas court
5 cannot -- should automatically accept all -- that every
6 district that a challenge has been raised in the D.C.
7 circuit court is --

8 MR. GARZA: It should --

9 JUSTICE SOTOMAYOR: -- court is okay?

10 MR. GARZA: It should not accept any of the
11 districts that have been challenged. But I think the
12 difference in terms of --

13 CHIEF JUSTICE ROBERTS: I'm sorry. I'm
14 not -- I didn't --

15 MR. GARZA: -- is it assuming a violation --

16 CHIEF JUSTICE ROBERTS: I don't mean to
17 interrupt, but I didn't follow that. So long as a
18 district has been challenged in D.C., the court in Texas
19 should not accept it?

20 MR. GARZA: It shouldn't make a
21 determination either way, and it didn't, because in
22 those districts, it didn't adopt the plans that were put
23 forward by the plaintiffs or the challengers in
24 Washington, D.C.; it looked at the benchmark plan as a
25 starting point.

1 JUSTICE KENNEDY: But could it -- could it
2 look at the district and say, well, it respects county
3 lines; it follows a river; it's got urban and rural.
4 Could it look at it for that reason?

5 MR. GARZA: What it --

6 JUSTICE KENNEDY: And rely on the
7 legislative judgment as making a sound judgment that the
8 river runs through here, and the county line is there
9 and so forth? That's -- that's what seems to me the
10 difficulty with saying, oh, you can't look at the plan.

11 MR. GARZA: I think the problem with that,
12 Your Honor, is that then it would be assuming that the
13 State is correct, that it doesn't violate section 5.
14 That is -- that is an inquiry that's reserved to the
15 district court in the District of Columbia. And --

16 CHIEF JUSTICE ROBERTS: And that's right,
17 but -- but it goes the other way when you say they can't
18 approve something that's been challenged. Aren't you
19 assuming that the plaintiffs are right?

20 MR. GARZA: No.

21 CHIEF JUSTICE ROBERTS: And that's an
22 inquiry that belongs to the district court in D.C.

23 MR. GARZA: No, because what the court did
24 is it didn't accept as a remedy what the plaintiffs
25 proposed there. It reverted to State policy, which is

1 what it's directed to do by this Court. It -- it went
2 back to State policy, and it looked at the benchmark
3 plan, and it started with the benchmark plan. Even with
4 the congressional plan, where there are four new
5 districts, and there is no comparable district in the
6 benchmark, it looked to the legislatively enacted plan
7 to determine where it would place those districts.

8 JUSTICE SCALIA: But that is not the current
9 State policy. The benchmark plan is gone. It's old.
10 The Texas legislature now has a different policy, and
11 that, you say, should be ignored.

12 MR. GARZA: That policy cannot be deferred
13 to. It is incorporated in the court's plan by -- in the
14 manner in which it did review the plans. That is --

15 JUSTICE SCALIA: Now, what's -- there's a
16 presumption of its invalidity. You can't presume it
17 valid, but you can presume it invalid.

18 MR. GARZA: Either way. And, in fact, what
19 the court did is --

20 JUSTICE SCALIA: Well, not either way.
21 You're presuming it invalid.

22 MR. GARZA: It -- you -- you're not
23 presuming it is invalid. You're -- you're suggesting
24 that -- you're reverting to the next State policy.
25 You're not incorporating it, but you're not -- you're

1 not making any decisions. And the way you sort of walk
2 that tightrope is you go to what the State policy was
3 before the enacted plan.

4 JUSTICE ALITO: Well, let's say -- let's say
5 a legislature says we have a new policy, and that is
6 that once we've satisfied our constitutional obligations
7 and our obligations under the Voting Rights Act, the
8 only thing we're going to do is try to draw the
9 districts that are the most compact possible,
10 compactness over everything else.

11 They draw up a plan that embodies that
12 policy, and it's challenged under section 5. Now, can
13 the district court just say, well, that's -- the State's
14 policy is compactness over everything else, but we don't
15 agree with that, because we have other neutral
16 principles that advance the interest of the collective
17 public good, which is the term that this -- the words
18 that this court used. Can they do that?

19 MR. GARZA: I don't believe they can, and
20 this court didn't. The court, in fact --

21 JUSTICE ALITO: Well, if they can't do that,
22 then you're saying that they are constrained by State
23 policy, except to the extent the Constitution or the
24 Voting Rights Act requires otherwise.

25 MR. GARZA: And in this case, part of the

1 Voting Rights Act is section 5, and in those areas and
2 in those districts where there have been challenges --
3 and by the way the district court has -- in the District
4 of Columbia has determined that those challenges are
5 substantial because they've denied preclearance, and, in
6 fact, they've said that Texas has not disputed --

7 JUSTICE GINSBURG: They denied summary
8 judgment. They didn't deny preclearance.

9 MR. GARZA: I'm sorry?

10 JUSTICE GINSBURG: They denied summary
11 judgment.

12 MR. GARZA: They denied summary judgment,
13 but they went even further. They -- they said Texas has
14 not disputed many of the intervenors' specific
15 allegations of discriminatory intent. So, it's -- it's
16 -- and under the summary judgment standard, they have to
17 find that the challenges that are being made are
18 substantial.

19 The district court in Texas was not free to
20 incorporate discriminatory districts in its interim
21 plan, and it didn't. But it first went to the State's
22 plan, the benchmark plan, to begin its process on how it
23 was drawing those districts.

24 And there's a good reason why Texas is
25 covered under the Voting Rights Act. As this Court

1 indicated in -- in LULAC v. Perry, there's a terrible
2 history of historical discrimination in Texas, including
3 discrimination in 2006.

4 CHIEF JUSTICE ROBERTS: The
5 constitutionality of the Voting Rights Act isn't at
6 issue here, right?

7 MR. GARZA: That's not.

8 CHIEF JUSTICE ROBERTS: Okay. Maybe you
9 could turn for a moment to the issue that I see on Joint
10 Appendix 146 and 147. They don't say a minority
11 coalition opportunity district just happened to emerge.
12 It said that district 33 was drawn as a minority
13 coalition opportunity district. And we've never held
14 that it is appropriate or even permissible to draw a
15 district where you're putting in together two
16 minorities, two different minority groups. And it seems
17 to me that that raises all sorts of different concerns.

18 It's one thing under the Voting Rights Act
19 to say that this group votes as a bloc and has been
20 discriminated against in its ability to elect
21 representatives of its choice. It's another thing to
22 say that two different minority groups are put together
23 because they share some particular view so that one
24 candidate is going to be each of theirs candidate --
25 candidates of choice. That goes quite a step further

1 from what we've upheld under the Voting Rights Act. And
2 here you have the district court creating that in the
3 absence of any State expression of a desire to create
4 that type of -- of district.

5 MR. GARZA: I think -- I think that the
6 statement that the court made is a correct statement.
7 It did create a coalition district in Dallas. But
8 that's not describing how it reached that -- that
9 district.

10 CHIEF JUSTICE ROBERTS: Oh, it is. It
11 says --

12 MR. GARZA: Where it describes how it
13 reached that district is in a number of other places;
14 however, as discussed above, the court has not
15 intentionally created any minority districts.

16 CHIEF JUSTICE ROBERTS: New district 33 was
17 drawn as a minority coalition opportunity district. I
18 don't see how that can be read any way other than
19 saying -- saying when we sat down and drew it, we drew
20 this one as a minority coalition opportunity district.

21 MR. GARZA: Of course, it can be read
22 differently than Your Honor's interpretation of this,
23 because the court has said over and over again we did
24 not attempt to create coalition districts; we did not
25 attempt to draw minority majority --

1 CHIEF JUSTICE ROBERTS: I'm sorry. When you
2 say something can be read differently than that and say
3 because they said something else somewhere else, that's
4 not responsive.

5 MR. GARZA: What I'm -- what I'm suggesting
6 is what he's saying is that this is the result of what
7 they've done. That sentence can also be interpreted as
8 saying this is the result of what we -- we've done. We
9 have created a minority opportunity --

10 JUSTICE SCALIA: Drawn as? Drawn as --

11 MR. GARZA: Yes.

12 JUSTICE SCALIA: -- a coalition?

13 MR. GARZA: Yes.

14 JUSTICE BREYER: What he says two sentences
15 before, if I can be helpful to read it, the fourth new
16 district, district 33, was drawn in the Dallas-Fort
17 Worth Metroplex "to reflect population growth in that
18 area." All right?

19 JUSTICE SCALIA: All right.

20 JUSTICE BREYER: Then he goes on to say just
21 what Justice Scalia says.

22 And I -- I did read that as saying, well,
23 when you apply -- I read it consistent what they've said
24 in -- elsewhere, which is that what they're doing is
25 population grows; you have to have one person, one vote;

1 the legislature itself in the new plan did create a
2 minority, whatever you -- the opportunity district here;
3 so, we're following what they did; we're taking into
4 account population, and it turns out to be, and we do
5 create it as -- in which case there is some ambiguity
6 here.

7 MR. GARZA: Precisely. And there's no
8 independent evidence that this was a racial gerrymander.
9 What do courts look at for evidence of racial
10 gerrymanders? Split-voting precincts where you go out
11 and carve and bring in minority voters. This district
12 maintains voting precincts intact. It is entirely
13 within one county. It is a compact district, especially
14 when you compare it to the district in that part of the
15 State --

16 CHIEF JUSTICE ROBERTS: I'm sorry. Why --
17 why do you care -- why do they care then that it was
18 drawn as a minority coalition opportunity district?
19 You're saying they didn't do that at all. They just
20 followed precinct lines and everything else. Why would
21 they say something?

22 MR. GARZA: I believe it's describing what
23 the result of their map drawing is, and I think that's
24 perfectly legitimate.

25 JUSTICE KENNEDY: Can we infer from either

1 the ambiguity or -- or the other reading of the sentence
2 that the Chief Justice suggested that, in the court's
3 view, it was desirable to have a minority coalition
4 district? I draw that inference.

5 MR. GARZA: I think -- I think it is
6 desirable to have a minority district there.

7 JUSTICE KENNEDY: A minority coalition
8 district?

9 MR. GARZA: A minority coalition district.
10 Moreover, I think the court is --

11 JUSTICE KENNEDY: All right. So, you would
12 defend the plan on the ground that this is a sound
13 result?

14 MR. GARZA: I believe that the plan that was
15 drawn by the court is fair. Is it the optimum plan that
16 the plaintiffs wanted? It is not.

17 JUSTICE SCALIA: One of -- one of the basic
18 rules that -- that was followed in drawing up the court
19 plan was not to divide any voting districts, right?

20 MR. GARZA: That's one of the principles.

21 JUSTICE SCALIA: Why? Why did the -- that
22 certainly is not a principle that the Texas legislature
23 agrees with.

24 MR. GARZA: There's two reasons, Your Honor.
25 One is --

1 JUSTICE SCALIA: So, the court just made it
2 up?

3 MR. GARZA: No. There are two reasons why
4 the court saw maintaining voting precincts as important.
5 One is because that is what it's been directed by this
6 Court in Bush v. Vera. In Bush v. Vera, the Court said
7 we have an interim election or a -- or an impending
8 election, and it's important for elections
9 administrators in -- in order to be able to -- to
10 implement without -- without interference a legitimate
11 election process, to have whole precincts because whole
12 precincts makes a big difference in terms of how the
13 election is -- is administrated.

14 The second reason is that this court didn't
15 adopt this plan without any inquiry into the standards
16 and proposals from the parties. It was very deliberate.
17 It was very cautious, and it was very open. We had 3
18 days of hearings on what these plans should look like
19 and what the standards ought to be, including testimony
20 from elections administrators and from the Texas
21 Secretary of State.

22 And in every instance, those administrators
23 and that representative from the Secretary of State said
24 the most important thing that the court should consider,
25 if it's going to order us to start conducting elections

1 under a different plan, is maintain voting precincts
2 because that is the most cumbersome part.

3 JUSTICE ALITO: Well, if Texas says we don't
4 care about maintaining voting precincts; this is -- this
5 is a matter of -- of administrative burden and expense,
6 and we're willing to bear that, so disregard that, the
7 district court can say, well, we think -- we disagree
8 with you; in order to make it more convenient to hold
9 the election and less expensive for Texas, we're going
10 to respect voting districts. They can do that?

11 MR. GARZA: The State didn't do that in this
12 instance, number one.

13 JUSTICE ALITO: But could they do that?

14 MR. GARZA: And --

15 JUSTICE ALITO: Could the district court do
16 that? That's my question.

17 MR. GARZA: It -- yes, I think they could
18 because there's still the authority of this Court in
19 Bush v. Vera that directs courts, in drawing interim
20 plans for impending elections, to -- to be cautious
21 about that, number one. And, number two, if in fact in
22 order to get an appropriate map, you must split a number
23 of precincts, which means then that you can't conduct
24 the election on April 3rd, we still have time. As -- as
25 the Government's attorney indicated, the -- there are

1 States that conduct primaries as late as June 26th. The
2 drop-dead deadline is not April 3rd; it's November 6th.

3 So, if this Court disagrees with our
4 position and is determined to send this back to the
5 district court, then it should consider this: The
6 district court in the District of Columbia is about
7 30 days away from rendering a complete decision in the
8 section 5 case. That would place the court in Texas in
9 exactly the Upham circumstance. In that circumstance --
10 and the court is poised to move. It can move with all
11 due diligence. It had 2 weeks of trial in which it
12 heard testimony on the plaintiffs' claims. It's -- it
13 is -- it is ready.

14 Once the district court in the District of
15 Columbia tells us these are the problems with the
16 State's plan, the court in Texas is primed to make its
17 decision on the plaintiffs' claims under section 2 and
18 the Constitution. In that circumstance --

19 JUSTICE SOTOMAYOR: Mr. Garza, what's the
20 real drop-dead date? It's not November 6th because
21 that's the day of the general election. What's the
22 latest election -- primary election that any State has?
23 June 26th?

24 MR. GARZA: June 26th, Your Honor.

25 JUSTICE SOTOMAYOR: All right. So, working

1 backwards, what's the last --

2 JUSTICE ALITO: Well, that's for
3 presidential primaries, isn't it? I don't want to
4 interrupt, but isn't that the date of the last
5 presidential primary rather than congressional?

6 MR. GARZA: That's correct.

7 JUSTICE SOTOMAYOR: Yes.

8 MR. GARZA: So, Utah is the last -- is the
9 State with the last primary in which it conducts both
10 the State's primary and the presidential. There are in
11 -- in fact, States that conduct primaries as late as
12 September that have no presidential primary at all.

13 JUSTICE SOTOMAYOR: So, how many days before
14 that election do -- does the voting mechanism or
15 apparatus need to set up the voting booths, et cetera?

16 MR. GARZA: The -- the critical date is
17 45 days from the election in order to ensure -- sending
18 out a ballot to overseas voters, including the military.
19 So, if you -- if you go back 45 days and then you give
20 the jurisdiction sufficient time to develop a ballot,
21 because you need a ballot to send to the -- to the
22 soldiers, then that's about what they've -- what the
23 testimony was, is that takes about 90 days, I believe,
24 is what they testified. So, 45 days plus 90 days, and
25 that's the drop-dead deadline.

1 JUSTICE SCALIA: Go back from June 26th.
2 Where does -- where does that leave us?

3 MR. GARZA: If you go back from June 26th --

4 JUSTICE SCALIA: June, May, April. It's the
5 end of March. Right?

6 MR. GARZA: You could develop a plan by the
7 end of March. And we could conduct an election in June,
8 in late June.

9 JUSTICE SCALIA: And when do you expect the
10 D.C. court to finish?

11 MR. GARZA: I would expect it to finish
12 by -- within 30 days of today because we have closing
13 arguments on -- on the 3rd of February, and if the court
14 has -- will act with the sort of diligence that it did
15 on summary judgment, which was a complicated record and
16 a large record -- 6 days later, it made its
17 determination. It didn't issue its memorandum opinion,
18 but it gave us something that we could run with.

19 CHIEF JUSTICE ROBERTS: When -- so, when do
20 you --

21 MR. GARZA: So, that would be --

22 CHIEF JUSTICE ROBERTS: And when do you
23 expect our decision on the appeal from the district
24 court in D.C.?

25 (Laughter.)

1 MR. GARZA: Later this afternoon.

2 (Laughter.)

3 JUSTICE GINSBURG: They did write in a -- in
4 their summary judgment opinion, they made it sound like
5 it's very complicated.

6 MR. GARZA: Yes.

7 JUSTICE GINSBURG: And so, that's why I'm --
8 I have some doubts about how swiftly they're going to
9 render their decision after -- what is the date? The
10 trial will end on February 3rd?

11 MR. GARZA: That will be closing arguments.
12 Yes, Your Honor.

13 JUSTICE KENNEDY: Is there anything in the
14 opinion from the three-judge court in the District of
15 Columbia that indicates that there are some likely
16 potential violations that are section 2 violations as
17 well as section 5 violations?

18 MR. GARZA: From the -- from the --

19 JUSTICE KENNEDY: And -- and I can amend
20 that to -- and in the submission of the parties?

21 MR. GARZA: In the District of Columbia?

22 JUSTICE KENNEDY: Yes.

23 MR. GARZA: Well, I believe that the -- that
24 the court has found that the -- the plaintiffs have made
25 substantial claims with regard to retrogression and

1 intentional discrimination. And, of course, intentional
2 discrimination --

3 JUSTICE KENNEDY: The second -- the second
4 being section 2 violations as well.

5 MR. GARZA: Intentional discrimination is a
6 component of section 2. Yes, Your Honor.

7 And it -- and I think it's important to note
8 that Judge Smith in Texas used, in a manner of speaking,
9 the preliminary injunction standard that's being
10 advocated by the State, and they would not be able to
11 meet that standard because, generally, Judge Smith
12 determined that the plaintiffs had presented colorable
13 claims of statutory or constitutional infirmity, ruled
14 that the plan was an extreme gerrymander, ruled that
15 elimination of district 149 presented section 5
16 problems, ruled that the legislature dismantled a
17 minority district in Nueces County that presented
18 section 5 --

19 JUSTICE KENNEDY: Do you have substantive
20 objections to the plans suggested by Judge Smith in the
21 house and congressional districts?

22 MR. GARZA: Yes, Your Honor. We believe
23 that there are section 5 claims with regard to Harris
24 County. Judge Smith addressed the constitutional --

25 JUSTICE KENNEDY: Oh -- no, do you have some

1 section 2 objections? Well, that doesn't quite work.
2 You have to talk about retrogression, I suppose.

3 MR. GARZA: Right. And in -- in district --
4 in Harris County, the court did equalize population per
5 the failure of the State to justify the sorts of
6 deviations that are contained in that district but
7 didn't provide, in our opinion, additional remedies.

8 But Judge Smith's proposed plan for the
9 State house is in fact very similar to the plan that was
10 proposed by the majority. It -- it differs by only one
11 minority district. That is, one additional minority
12 district is contained in the interim plan than is
13 contained in Judge Smith's plan.

14 JUSTICE KAGAN: Mr. Garza, what would you
15 think of a system in which the court could start with
16 the Texas plan and say -- the new Texas plan and say
17 anything that's consistent with statutes and the
18 Constitution can go forward, but it's Texas that has to
19 show that consistency? So, flipping the burden of proof
20 in the way that Mr. Srinivasan was suggesting? In a way
21 that makes it more consistent --

22 MR. GARZA: Right. Right.

23 JUSTICE KAGAN: -- with section 5's burden.

24 MR. GARZA: Well, I -- I think that our
25 position is that section 5 is clear that this court

1 should not start with the interim plan, but if the Court
2 disagrees with me, I think that that's a much more
3 reasonable approach than the one offered by the State,
4 for the same reason argued by the United States. That
5 is, that in the State's argument, you really turn
6 section 5 on its head because one of the principal
7 benefits for the minority community in having section 5
8 is it alters of the burden of proof. And if you
9 maintain the burden of proof on the State before it can
10 implement any portion of its newly adopted but
11 un-precleared plan, that's far more preferable than
12 shifting the burden, which would be inconsistent with
13 section 5 in its intent.

14 I don't think I have anything else.

15 (Laughter.)

16 MR. GARZA: Thank you.

17 CHIEF JUSTICE ROBERTS: I don't think we do,
18 either. Thank you, counsel.

19 Mr. Clement, you have 3 minutes remaining.

20 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

21 ON BEHALF OF THE APPELLANTS

22 MR. CLEMENT: Thank you, Mr. Chief Justice.

23 Just a few points in rebuttal. As one of
24 Justice Alito's questions highlighted, one of the things
25 that makes remedying a one person, one vote problem

1 particularly unique is there's literally an infinite
2 number of ways to solve the problem. And for that
3 reason, this Court has always looked wherever it could
4 to legislative guidance, so much so that in *White v.*
5 *Weiser*, this Court looked for legislative guidance to a
6 plan that had been declared unconstitutional for failing
7 to accommodate one person, one vote problems, but yet
8 this Court still said that the district court erred in
9 not taking that into account to the extent that it
10 could.

11 As to the hard choice, if it comes to that,
12 of using either the legislative plan that reflects the
13 legislative will or the judicial plan that even the
14 United States concedes is flawed, I think this Court has
15 faced even more difficult choices in the past: *Bullock*
16 *v. Weiser* and in *Whitcomb*. And in both of those cases,
17 this Court chose between an adjudicatedly
18 unconstitutional State plan and a judicial remedy that
19 it determined was flawed. And in both cases, it ordered
20 the election to take place under the flawed
21 constitutionally adjudicated imperfect plan.

22 Compared to that, simply saying that an
23 election should go forward under a plan that hasn't been
24 precleared is a far less serious step.

25 Now, there was a reference made to the 3

1 days of hearings. But the problem is, 3 days of
2 hearings with an unadministrable standard is worse than
3 1 day of hearing with an unadministrable standard. And
4 what we ask is for a preliminary injunction standard
5 that's familiar to everybody, everybody understands, and
6 everybody can apply.

7 JUSTICE SCALIA: Why -- why shouldn't it be
8 inverted the way your friend suggests?

9 MR. CLEMENT: Well, I'll join everybody in
10 saying that that's -- that's better than the -- than the
11 worst alternative I face, which is to say it's better
12 than the district court's opinion.

13 But here's why it shouldn't: That actually
14 further intrudes on the D.C. court because the question
15 that the remedial court should not be asking is, geez,
16 do I really think -- you know, what are the odds that
17 the D.C. court is going to preclear? It shouldn't ask
18 that question at all. It should ask the questions that
19 are before it. Is there a section 2 violation? Is
20 there an equal protection violation? If there aren't
21 those and I use the State's plan, does that create a
22 section 5 violation?

23 That's different from the preclearance
24 question. And on that section 5 question, the burden is
25 not logically on the State. And that's the same section

1 5 question that the court considered on its own motion,
2 because it understands that even when it takes a plan,
3 it has to be consistent with section 5 principles.

4 Now, Justice Kennedy, you've asked the
5 question, what if we take section 5 out of this, what
6 happens? Then it's an easy case. Then it's the
7 preliminary injunction standard. Now, the objection to
8 that, of course, is, well, but how can you take section
9 5 out of it? But there's not interference with section
10 5 because Texas still understands it needs to get
11 preclearance. Before its changes can take permanent
12 effect, it absolutely, positively needs preclearance.
13 It's never wavered from that recognition. So, you go
14 back -- I'll --

15 CHIEF JUSTICE ROBERTS: Finish the sentence.

16 MR. CLEMENT: Okay. Well, I was simply
17 going to say if you go back, the default problem here is
18 that there's an infinite number of solutions. It's
19 particularly a problem with respect to the congressional
20 map, where there's now four new seats. There's nothing
21 else to defer to than the judgment of the legislature
22 reflected in this plan, notwithstanding that it hasn't
23 been precleared.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 All counsel, I appreciate the extraordinary
2 efforts you had over the holiday season. Thank you very
3 much.

4 The case is submitted.

5 (Whereupon, at 2:08 p.m., the case in the
6 above-entitled matter was submitted.)

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