Nos. 17-586 and 17-626

In the Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL., APPELLANTS

v.

SHANNON PEREZ, ET AL.

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

REPLY BRIEF FOR THE UNITED STATES

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Plaintiffs do not meaningfully dispute that the district court's analysis of the intentional-vote-dilution claims rested on erroneous legal premises. Instead of asking whether plaintiffs had proven that the 2013 Legislature enacted the 2013 plans for the purpose of harming minority voters, the court presumed that discriminatory motives of a prior legislature would "carry over" to invalidate future legislative action—the substance of which that same court had already provisionally approved—unless the State established it had affirmatively "removed" the "taint" of prior discrimination. C.J.S. App. 46a. As our opening brief explains, that notion of persistent discriminatory intent is directly contrary to the strong presumption of good faith that should apply when a State adopts remedial plans that a court has reviewed and, after adversarial testing, provisionally found to be lawful.

The district court's treatment of Congressional District 35 (CD35) similarly rested on flawed legal prem-

ises. Because racial-gerrymandering claims are addressed "holistic[ally]" at the "district" level, *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 800 (2017), the absence of racially polarized voting in Travis County—part of which constitutes, in turn, part of CD35—does not demonstrate that the 2013 Legislature lacked a sound basis to conclude that CD35 satisfied Section 2 of the Voting Rights Act (VRA). On the contrary, the court's own 2012 decision provisionally rejecting plaintiffs' claims was itself sufficient to give the State "good reasons" to believe in 2013 that CD35 was lawful. *Id.* at 795. Plaintiffs' arguments do not show otherwise.

I. THIS COURT MAY EXERCISE JURISDICTION OVER THESE APPEALS

A. Under 28 U.S.C. 1253, this Court possesses appellate jurisdiction over orders granting or denying interlocutory or permanent injunctions in three-judge district court actions brought under 28 U.S.C. 2284(a). As previously explained (U.S. Br. 20-23),[1] the district court's August 15 and August 24, 2017 orders are properly understood to have enjoined future use of the State's 2013 congressional and State House plans and are therefore appealable.

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[1] "U.S. Br." refers to the United States' opening brief; "Texas Br." refers to Appellants' opening brief; "Cong. Br." refers to plaintiffs' response brief in No. 17-586; and "House Br." refers to plaintiffs' response brief in No. 17-626. See U.S. Br. 1 n.1 (explaining other abbreviations).

As noted by plaintiffs (Cong. Br. 26), the district court did not expressly style its orders as injunctions.[2] But that consideration is not dispositive. As this Court held in interpreting 28 U.S.C. 1292(a)(1)—an analogous statute allowing for immediate appellate review of injunctions—even an order not styled as the grant or denial of an injunction is nonetheless appealable if the order has the "practical effect" of granting or denying injunctive relief; "might have a 'serious, perhaps irreparable, consequence'"; and "can be 'effectually challenged' only by immediate appeal." *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981) (citation omitted).

The district court's orders meet those standards. See U.S. Br. 20-23. The court found that the 2013 congressional and State House plans contained "statutory and constitutional violations" that "must be remedied by either the Texas Legislature or this Court." C.J.S. App. 118a; H.J.S. App. 84a-85a (similar). The court then gave the Governor only *three days* to decide whether to call the Legislature into special session to enact new redistricting plans, or instead leave the drawing of new maps to the court in highly expedited proceedings. Those rulings left little doubt that Texas would be forbidden from using its 2013 plans for the 2018 elections. Had the State been required to wait until the court entered an express injunction, that order would likely have come too late for

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[2] Several plaintiffs had requested immediate injunctive relief. See, *e.g.*, D. Ct. Doc. 1525, at 42 (July 31, 2017) (plaintiff MALC) ("[T]he plans containing these defects must be enjoined and their defects must be remedied."); D. Ct. Doc. 1527-1, at 2 (July 31, 2017) (Quesada plaintiffs) ("The Court should enter judgment permanently enjoining further use of Plan C235."); D. Ct. Doc. 1529-1, at 1 (July 31, 2017) (NAACP plaintiff-intervenors) ("If [the court] finds that such unconstitutional intent existed, it must enter an immediate and permanent injunction.").

appellate review before deadlines associated with the 2018 election cycle. Under these unusual circumstances, a State whose existing legislative apportionment plans are invalidated in litigation under 28 U.S.C. 2284(a), and whose Governor is given such an ultimatum concerning the State's legislative process, need not await entry of an express injunction before obtaining appellate review of the district court's order.

B. 1. Plaintiffs fail to explain why the district court's orders do not satisfy *Carson*'s elements. They instead argue (Cong. Br. 26; House Br. 30) that *Carson* is inapposite to Section 1253. But Section 1253 contains language materially similar to that of Section 1292(a)(1), and plaintiffs offer no sound reason why the two statutes should not be interpreted consistently. Compare 28 U.S.C. 1253 (allowing "appeal * * * from an order granting or denying * * * an interlocutory or permanent injunction"), with 28 U.S.C. 1292(a)(1) (allowing "appeal[] from * * * [i]nterlocutory orders * * * granting, * * * refusing or dissolving injunctions").

In opposing *Carson*'s application, plaintiffs urge that Section 1253 "is to be narrowly construed." House Br. 29 (quoting *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970)). But *Carson* said the same about Section 1292(a)(1). See *Carson*, 450 U.S. at 84 ("Because § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly."); cf. *Switzerland Cheese Ass'n* v. *E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966) (similar). And plaintiffs' assertion (House Br. 30) that this Court "squarely refused to create a 'practical effect' exception" in *Gunn* v. *University Committee To End The War In Viet Nam*, 399 U.S. 383 (1970) and *Goldstein* v. *Cox*, *supra*, overlooks that those decisions

predated *Carson* and that in neither did the Court discuss and reject a practical-effect test.[3]

Plaintiffs also suggest (Cong. Br. 27) that the *Carson* framework should apply only when an injunction is effectively denied, and not when one is effectively granted. But this Court has stated that Section 1292(a)(1) "provide[s] appellate jurisdiction over orders that * * * have the practical effect of *granting or denying* injunctions and have 'serious, perhaps irreparable, consequence.'" *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 287-288 (1988) (emphasis added; citation omitted).

An order granting an injunction is, of course, subject to procedural requirements under Federal Rule of Civil Procedure 65(d) that do not apply to denials of injunctions. See *Gunn*, 399 U.S. at 388. But this Court has recognized that an order may amount to an injunction under 28 U.S.C. 1253 even if it fails to comply with the Federal Rules of Civil Procedure. See *Schmidt* v. *Lessard*, 414 U.S. 473, 477 (1974) (per curiam). Moreover, whatever the precise contours of the "remedy" the district court might ultimately have entered (Cong. Br. 27), it was clear from the court's orders that the State's existing maps could not be used. And this Court has reviewed injunctions barring use of existing apportionment plans even though replacement plans had not yet

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[3] In *Goldstein*, the plaintiffs sought to appeal the district court's denial of their summary-judgment motion. Although their complaint had "pray[ed] for preliminary as well as permanent injunctive relief," the plaintiffs had "t[aken] no practical step toward obtaining such relief," and the court's order thus did not constitute the denial of an injunction. 396 U.S. at 478-479. In *Gunn*, the defendants sought to appeal an interlocutory order concluding that a state statute was unconstitutional. But the defendants there acknowledged that the order was "no more than 'an advisory opinion'" inasmuch as no injunction had yet been entered. 399 U.S. at 389.

been drawn. See, *e.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455 (2017); *Sixty-Seventh Minn. State Senate* v. *Beens*, 406 U.S. 187, 190-191, 194-195 (1972) (per curiam).

Plaintiffs fault the United States (House Br. 32) for failing to distill the *Carson* framework to a simpler rule that would better "guide future litigants" in assessing appealability. But *Carson* requires consideration of whether the order will have a "'serious, perhaps irreparable, consequence'" and whether it "can be 'effectually challenged' only by immediate appeal." 450 U.S. at 84 (citation omitted). Those determinations require case-specific analysis, including consideration of real-world deadlines or other exigencies confronting the appellant. See, *e.g.*, *Stovall* v. *City of Cocoa*, 117 F.3d 1238, 1241 (11th Cir. 1997) (court's effective denial of injunction was immediately appealable because "trial in the district court [may not] conclude in time to affect the next election").

2. Plaintiffs also err in suggesting (House Br. 32 & n.12) that the circumstances here are "nearly identical" to those of *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). In *Whitcomb*, the plaintiffs filed suit in January 1969; the district court issued its liability determination in late July 1969; and that court "ga[ve] the State until October 1, 1969"—several months later—"to enact legislation remedying" the violations. *Id.* at 131, 137-138. When the legislature opted not to act, the court entered its injunctive orders in December 1969. See *id.* at 139; 307 F. Supp. 1362 (S.D. Ind. 1969); see also 396 U.S. 1055 (1970) (granting stay); 397 U.S. 984 (1970) (noting probable jurisdiction).

The chronology here was very different. Although plaintiffs promptly brought their relevant claims in 2013, the district court declined to adjudicate them immediately. It instead allowed the 2013 plans to be used—

over plaintiffs' repeated objections—for both the 2014 and 2016 elections. And in August 2017, when the court ultimately found the 2013 plans to be invalid, it gave the Governor just three days to decide whether to pursue enactment of a legislative plan. C.J.S. App. 118a; H.J.S. App. 86a. It simultaneously scheduled judicial remedial hearings for September 5 and 6, 2017—mere weeks before the State's October 1, 2017 deadline for finalizing districts for the 2018 election cycle, and likely too close to that deadline to afford adequate time for appellate review. *Ibid.*[4]

II. PLAINTIFFS HAVE FAILED TO ESTABLISH THAT THE 2013 LEGISLATURE ENGAGED IN INTENTIONAL VOTE DILUTION

A. Plaintiffs Bear The Heavy Burden Of Proving That The 2013 Legislature Acted With A Discriminatory Racial Purpose In Permanently Adopting The 2012 Court-Ordered Interim Plans

1. As explained in our opening brief (at 24-29), a legislative redistricting plan may be invalidated on grounds of intentional vote dilution only if a plaintiff shows that the legislature adopted that plan for a discriminatory purpose. In analyzing such a claim, a court must accord a "presumption of good faith [to] legislative enactments," *Hunt* v. *Cromartie*, 526 U.S. 541, 553 (1999) (citation

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[4] Both plaintiffs and the district court acknowledged the significance of the October 1, 2017 deadline for the timing of further litigation. See, *e.g.*, D. Ct. Doc. 1389, at 1 (May 1, 2017) ("The Court is aware of the condensed schedule that must be implemented in light of the 2018 election deadlines."); D. Ct. Doc. 1372, at 3 (Apr. 24, 2017) (NAACP plaintiffs) (requesting expeditious resolution because "[t]he first steps in the 2018 election process begin early this fall"); D. Ct. Doc. 1375, at 2 (Apr. 24, 2017) (African-American Congressperson plaintiffs) (similar).

omitted), and the burden of proof rests on the plaintiff, see *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997). Moreover, although an enactment's "impact" and "historical background" are both relevant, *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-267 (1977), courts must not infer discriminatory *intent* solely from disparate *effects*, see U.S. Br. 27-28, and a finding of *past* intentional discrimination alone ordinarily cannot sustain an inference of *present* discrimination, see *id.* at 28.

As also explained (U.S. Br. 29-31), this Court's cases suggest the further principle that a court should afford particular weight in the discriminatory-purpose assessment to a state legislature's enactment undertaken in reliance on a court-ordered remedial plan. When a court has found in a reasoned decision that a court-ordered interim redistricting plan redresses all likely violations of law, and when the legislature permanently adopts that plan to replace its original enactment, the normal presumption of good faith accorded to legislative enactments is heightened by the State's acceptance of the judicially approved plan. It is appropriate for plaintiffs to bear a heavy burden in establishing that a state legislature's adoption of a court-ordered plan was intentionally discriminatory.

2. Plaintiffs' response briefs do not dispute that the district court's legal analysis was inconsistent with the foregoing principles. Plaintiffs instead argue (House Br. 35-40; Cong. Br. 27-34) that those principles should not be applied in this particular case. Those arguments are unpersuasive.

Plaintiffs' chief submission is that the principles set forth in our opening brief are irrelevant because this case does not involve a "court-drawn" or "judicial[ly]"

created plan. House Br. 1, 19, 27, 39-40; see Cong. Br. 1, 24. Plaintiffs emphasize that most districts at issue here were first drawn in the State's 2011 legislative plans, not in the 2012 interim plans.[5] But our argument rests on the fact that the interim plans were "judicially approved" and "court-ordered" (U.S. Br. 18, 30), not on the mistaken understanding that the districts were "court-drawn" in the first instance. What matters is that the court evaluated the particular plans at issue; provisionally found them to be lawful; and ordered their use for future elections. Once a court has made such determinations, it is appropriate to presume that a state legislature acts in good faith if it then adopts the judicially approved districts in permanent redistricting plans.

Plaintiffs also emphasize (House Br. 37-39; Cong. Br. 1-2, 32-33) that the district court's approval of the 2012 interim plans was "provisional" and not a final determination of whether they sufficiently redressed asserted constitutional and VRA violations in the Legislature's 2011 plans. As already explained (U.S. Br. 38-39, 42-43), however, that does not preclude application of a strong presumption of good faith to the Legislature's subsequent incorporation of the court-ordered districts in its enactment of the *2013 plans*. A state legislature could quite reasonably conclude that a federal court's approval of an interim map provides, at a minimum, highly probative evidence that the map complies with federal law. Indeed, here, the court itself believed that its interim determinations were sufficiently reliable to justify use of the at-issue districts not only for the 2012 elections, but for the 2014 and 2016 elections as well. See U.S. Br. 10-13.

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[5] As plaintiffs note, State House District 103 was adjusted in immaterial respects in 2013. See House Br. 2.

To recognize the force of the 2012 interim decisions is not, as plaintiffs suggest, to grant the State a "safe harbor" from further liability. House Br. 37. The district court's provisional approval of particular aspects of the 2011 plans did not preclude the court from ultimately reaching a contrary final determination regarding the 2011 plans. See *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981) (rulings at preliminary-injunction stage "are not binding at trial on the merits"). In these appeals, however, the question is not whether the legislative plans adopted in 2011 would ultimately have been found lawful, or whether the court's 2012 interim plans would ultimately have been found sufficient to redress any violations in the 2011 plans, but rather whether the revised plans enacted by the Legislature in 2013 were lawful. And as relevant to plaintiffs' intentional-vote-dilution claims, the question is whether the Legislature acted with a *discriminatory purpose* in enacting those 2013 plans. That question must be resolved by looking to the intent of the 2013 Legislature—an issue that could not have been adjudicated in 2012.

Plaintiffs' argument also overlooks that the 2012 interim plans were the product of the unique analytical framework mandated by *Perry* v. *Perez*, 565 U.S. 388 (2012) (per curiam). In *Perry*, this Court invalidated the district court's prior remedial plans, which had rested on that court's "own concept of the 'collective public good,'" and ordered the court to devise new interim plans for the 2012 elections that paid appropriate heed to the State's policy goals. *Id.* at 396. The Court ordered that, as to those districts in the 2011 plans challenged under Section 2 of the VRA or the Fourteenth Amendment, the district court should retain those districts in its interim

plans unless plaintiffs satisfied the "likelihood of success" preliminary-injunction standard. *Id.* at 394. As to challenges asserted under Section 5 of the VRA in the separately pending preclearance litigation, however, the Court established a "different," more plaintiff-friendly, standard. *Ibid.* As to those claims, the Court instructed the district court to "tak[e] guidance from [the] State's policy judgments" only to the extent that the State's districts "[did not] stand a reasonable probability of failing to gain § 5 preclearance." *Id.* at 395. If a "not insubstantial" claim existed that a challenged district "'[]either ha[d] the purpose []or * * * the effect of denying or abridging the right to vote on account of race or color,'" the court was required to reject that district rather than incorporate it into the interim plan. *Id.* at 391 (quoting 42 U.S.C. 1973c(a) (2012)), 395.

The district court faithfully applied those standards on remand. It concluded that plaintiffs had not established a likelihood of success on their claims that CD27 and CD35 violated Section 2 of the VRA or the Fourteenth Amendment. C.J.S. App. 408a-415a, 417a-423a. The court further ruled that various congressional and State House districts from the 2011 plans would not be included in the interim 2012 plans because plaintiffs had met the "low 'not insubstantial' standard" applicable to Section 5 challenges. H.J.S. App. 313a; see *id.* at 305a, 307a, 312a, 313a; C.J.S. App. 397a-408a. The court explained with respect to the congressional plan that it had "reviewed the post-trial briefing" from the preclearance litigation, C.J.S. App. 380a, and concluded that the interim plans sufficiently "resolve[d] the 'not insubstantial' § 5 claims," *id.* at 396a. And with respect to the State House plan, the court stated that "[t]o the extent that legal challenges are levied against any of th[e] [unchanged

State House] districts, we preliminarily find that * * * any Section 5 challenges are insubstantial." H.J.S. App. 303a.[6] The 2013 Legislature was aware that the district court in 2012 had applied the framework established by this Court's *Perry* decision, see, *e.g.*, Texas Br. 35a (legislative findings), and the court's announcement that it had made all necessary changes to satisfy that framework further underscores the presumptive reasonableness of the Legislature's decision to rely on the court's orders in enacting permanent redistricting plans.

3. Plaintiffs' remaining arguments rest on inapt legal principles. Like the district court (C.J.S. App. 34a-39a), plaintiffs place heavy reliance on *Hunter* v. *Underwood*, 471 U.S. 222, 223 (1985), in which this Court invalidated an extant provision of the 1901 Alabama Constitution because it had been adopted for the purpose of disenfranchising black voters. Cf. Cong. Br. 30 (asserting *Hunter* to be "indistinguishable"); House Br. 44-45 (similar). But as already explained (U.S. Br. 33-34), *Hunter* did not involve a subsequent legislative enactment, and the Court

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[6] Among the areas discussed in post-trial briefing in the preclearance litigation were Nueces County (containing CD27, HD32, and HD34); Bell County (containing HD54 and HD55); and Dallas County (containing HD103, HD104, and HD105). See, *e.g.*, 11-cv-1303 Docket entry (Docket entry) No. 207, at 5, 20-22 (Feb. 7, 2012) (challenging CD27 as retrogressive); Docket entry No. 206, at 4-5 (Feb. 17, 2012) (asserting that elimination of HD33 from Nueces County was evidence of intentional discrimination); Docket entry No. 198, at 20-21 (Feb. 6, 2012) (asserting that Legislature's decision to "split the city [of Killeen] between [House] Districts 54 and 55" was "motivated by intent to discriminate against" the "growing minority population"); Docket entry No. 195, at 6-7 (Feb. 6, 2012) (asserting that the "extremely contorted district boundaries" of, *inter alia*, HD103, HD104, and HD105 reflected State's effort to "cancel out [the] minority's ability to elect").

contemplated that the challenged constitutional provision might have been valid "if enacted today without any impermissible motivation." 471 U.S. at 233. That is because the determination whether a particular enactment was intentionally discriminatory ultimately turns on the intent of the enacting legislature, not that of prior legislatures.

Plaintiffs evidence a similar misunderstanding in urging that "repeal and reenactment" of a statute ordinarily does not change a statute's meaning or interrupt its effectiveness. House Br. 40; see Cong. Br. 29, 31 n.17. Here, the question is not how to interpret the "substantive provisions" of the 2013 plans (Cong. Br. 29), but whether the Legislature enacted those plans for the purpose of harming minority voters. Although the meaning of a statute's text is ordinarily presumed to remain consistent when reenacted "without change," *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), the law recognizes no similar presumption or canon that the subjective intent of a prior legislature "remains legally operative" until some affirmative contrary showing is made, *Johnson* v. *Governor*, 405 F.3d 1214, 1223 (11th Cir.) (en banc), cert. denied, 546 U.S. 1015 (2005).

Plaintiffs and their amici also err in relying on the unique remedial principles governing desegregation of public schools. See House Br. 46-47; Common Cause Amicus Br. 28-29; Campaign Legal Ctr. Amicus Br. 4-5, 17-18. In most contexts, the burden of proof rests on the party alleging a violation of federal law. *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005); see U.S. Br. 26. In "the special context of school desegregation cases," however, this Court concluded that "'fairness' and 'policy' require state authorities to bear the burden of explaining ac-

tions or conditions which appear to be racially motivated." *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 208-209 (1973). That atypical "allocation of the burden of proof," *id.* at 209, reflects this Court's earlier judgment that school districts are "charged with [an] *affirmative duty* to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437-438 (1968) (emphasis added); see *United States* v. *Fordice*, 505 U.S. 717, 731 (1992) (State bore "burden of proving that it has dismantled its prior system."). This Court has never suggested that the special remedial framework it developed for desegregation cases should apply to legislative redistricting. To the contrary, the Court has recognized that the plaintiff bears the burden of proving intentional discrimination in voting cases, see *Bossier Parish*, 520 U.S. at 481, and that burden remains on the plaintiff in litigation challenging a State's legislative adoption of a remedial plan in response to a prior judicial order, see, *e.g.*, *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (principal opinion); U.S. Br. 28-29 (citing other authorities).

Finally, plaintiffs are wrong to suggest (Cong. Br. 28) that the district court's approach is necessary to ensure that legislatures do not engage in opportunistic behavior. The strong presumption of good faith advocated by the United States applies when a state legislature enacts a plan ordered by a district court after determining that it satisfies (or likely satisfies) constitutional and statutory requirements, not any time that a legislature "reenact[s]" a statute. *Ibid.* Moreover, our approach does not dictate a result as a matter of law. If a plaintiff shows that a legislature permanently adopted a judicially approved plan not because it legitimately believed that plan

to be lawful, but rather because it sought to preserve discrimination that somehow escaped judicial invalidation, a plaintiff can succeed in establishing its claim of intentional vote dilution. See U.S. Br. 30-31. A court is not required to "take at face value" (Cong. Br. 2) a State's assertion that its reenacted plan is lawful. But plaintiffs bear a heavy burden in establishing that a state legislature's adoption of a court-ordered plan was intentionally discriminatory.

B. Plaintiffs Have Not Identified Facts Sufficient To Rebut The Presumption Of Good Faith

As previously explained (U.S. Br. 31-37), it was only by relying on the flawed assumption that discriminatory intent "carr[ies] over" from one plan to the next, C.J.S. App. 46a, unless and until a State proves it has "cured [the] taint," *id.* at 40a, that the district court reached its ultimate conclusion that the 2013 plans were intentionally discriminatory. The court did not point to any evidence sufficient to rebut the strong presumption of good faith that applies in these circumstances. Nor do plaintiffs make any real effort to do so before this Court.

Plaintiffs in the congressional case consign their response to a single footnote, asserting that "[e]ven were the Court to determine that the proper focus of the questions of motive, intent, and purpose is the action of the 2013 Legislature instead of the 2011 Legislature, * * * [the district court's] findings are not clearly erroneous and should not be overturned by the Court." Cong. Br. 34 n.20. The other plaintiffs similarly ask this Court to ignore the district court's errors of law by invoking the "deferential clear-error standard." House Br. 41. As this Court has long recognized, however, the clear-error standard does not apply to "a finding of fact that is predicated on a misunderstanding of the governing rule of

law." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984); cf. *Cooper*, 137 S. Ct. at 1474 ("[W]e review a district court's finding as to racial predominance only for clear error, except when the court made a legal mistake.").

Instead of identifying record evidence that demonstrates discriminatory intent by the 2013 Legislature, plaintiffs reiterate the conclusory statements in the district court's opinions. For example, plaintiffs recite that the court "found that the State stuck with its original districts because it 'intended' to 'maintain[]' the discriminatory 'taint' that had originally motivated the districts." House Br. 41 (quoting H.J.S. App. 359a) (brackets in original). But the cited page of the court's decision refers to no evidence, and instead expounds upon the court's legal premise that the "racially discriminatory intent and effects that [the court] previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged." H.J.S. App. 359a.

Similarly, plaintiffs echo the district court's purported "f[inding]" that the 2013 Legislature "'did not adopt the Court's plans with the intent to adopt legally compliant plans free from discriminatory taint, but as part of a litigation strategy.'" Cong. Br. 20 (quoting C.J.S. App. 40a); see House Br. 19-20, 43. As noted (U.S. Br. 41), a State's decision to accept a judicially vetted remedial plan presumptively furthers—not frustrates—Congress's goals of preventing and redressing unlawful discrimination. And plaintiffs point to nothing in the trial record showing that the State's "litigation strategy" was a pernicious one designed to reinforce existing discrimination, as opposed to an effort to enact a lawful redistricting plan. Plaintiffs' assertion that "Texas wanted to bring this litigation to an end in order to keep in place

the districts its Legislature had drawn in 2011 for discriminatory reasons," House Br. 45 (emphasis omitted), appears to rest only on speculation, not on evidence.

Plaintiffs also posit that the district court "heard Texas's witnesses [and] found their proffered explanations pretextual." House Br. 41 (citing H.J.S. App. 345a-346a, 348a, 353a-359a); cf. C.J.S. App. 32a-46a (containing same passages). But the cited pages do not reference any testimony that the court found "pretextual" or otherwise not credible. Instead, those pages contain discussion articulating the court's legal theory, H.J.S. App. 345a-348a, and explaining its conclusion that the 2013 Legislature failed to "engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans," *id.* at 353a; see *id.* at 353a-359a. The sole witness for the State whose testimony the court described at any length was Jeff Archer, the Legislature's chief counsel. See H.J.S. App. 356a-358a & nn.43, 45; C.J.S. App. 43a-45a & nn.43, 45. But the court credited that testimony: Archer testified, and the court agreed, that the 2013 Legislature was aware that the interim plans were based on provisional rulings rather than "final determinations," C.J.S. App. 43a, and that enacting the 2013 plans would likely not moot the litigation because "Plaintiffs would pursue claims against the interim maps," *id.* at 44a n.45.

It is true that the 2013 plans were enacted by "a substantially similar Legislature with the same leadership" as existed in 2011. House Br. 46 (quoting H.J.S. App. 352a n.37). Contrary to plaintiffs' assumption, however, a court is not "entitled to infer" (*ibid.*) that a later legislature has acted with discriminatory intent solely because a prior legislature was found to have done so. "[P]ast discrimination cannot, in the manner of original

sin, condemn governmental action that is not itself unlawful." *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion). If the existence of past misconduct were sufficient, standing alone, to sustain a finding of present misconduct, the presumption of legislative good faith would have no meaning. U.S. Br. 28.

Plaintiffs suggest that the Legislature enacted the 2013 plans "with no discussion or debate over concerns raised by minority legislators." House Br. 46. Plaintiffs do not identify evidence in the trial record that they believe supports that observation. In any event, plaintiffs fail to explain why the appropriate inference to be drawn from the Legislature's adoption of the interim plans largely without amendment was that the Legislature was motivated by intentional discrimination, as opposed to an interest in enacting lawful plans likely to survive further challenge. Indeed, the Legislature may have been concerned that if it engaged in race-conscious revisions of the interim plans, it could later face claims that it engaged in impermissible racial gerrymandering by drawing majority-minority districts that the court itself had previously determined were likely not required by the VRA. Cf. *id.* at 52 (arguing that legislative revisions to HD90 in 2013 caused it to become a "deliberate racial gerrymander").

Finally, plaintiffs seek to treat as evidence of discrimination the fact that the challenged districts in the 2013 plans were "*exactly* the same" as the corresponding districts in the 2011 plans. House Br. 46; see Cong. Br. 1, 18, 24, 28. But those districts were identical precisely because the district court, consistent with this Court's directives in *Perry*, had allowed their continued use in 2012 after finding that plaintiffs' challenges to

those districts were unlikely to succeed or were insubstantial. The very facts that render a legislative action entitled to the strong presumption of good faith cannot simultaneously rebut that presumption.

III. CONGRESSIONAL DISTRICT 35 IS NOT AN UNCONSTITUTIONAL RACIAL GERRYMANDER

A. The district court also erred in concluding that CD35 was an unconstitutional racial gerrymander. See U.S. Br. 44-48. As an initial matter, the circumstances of the Legislature's action indicate that race did not predominate in CD35's enactment in 2013 because the Legislature enacted the 2013 congressional plan so that all of its districts would match precisely the districts provisionally found to be lawful in 2012. Cf. Texas Br. 34a-36a (text of 2013 enactment "adopt[ing]" court's interim redistricting plan "as the [State's] permanent plan").

In any event, CD35 would survive strict scrutiny because the State had "good reasons" to believe that the VRA required it to draw CD35 in 2011 and to maintain it in 2013. *Cooper*, 137 S. Ct. at 1464 (citation omitted). Indeed, in 2011, a subset of plaintiffs proposed and supported the creation of CD35 as "an appropriate § 2" Latino opportunity district. C.J.S. App. 174a. And in 2012, the district court itself provisionally concluded that CD35 was a valid Section 2 district. *Id.* at 409a-415a. Those considerations provided, at a minimum, sufficient "breathing room" for the State to reasonably conclude in 2013 that CD35 addressed a VRA need and that maintaining it would not violate the Equal Protection Clause. *Cooper*, 137 S. Ct. at 1464 (citation omitted).

B. Plaintiffs' responses identify no sound basis for concluding otherwise. Plaintiffs assert that the district court was correct to find racial predominance because "nearly

every traditional districting principle in CD35 was subordinated to race." Cong. Br. 36. But that argument improperly focuses on 2011, when CD35 was first drawn, rather than on 2013, when the operative congressional plan was enacted in accordance with the district boundaries that the court provisionally found lawful in 2012.

Plaintiffs' discussion of strict scrutiny repeats the district court's errors. Plaintiffs note that "[t]he district court found * * * that 'the third *Gingles* precondition is not present in a significant portion of the district'" because "Travis County Anglos lack cohesion and split their vote." Cong. Br. 38 (citation omitted); cf. *Thornburg* v. *Gingles*, 478 U.S. 30, 51 (1986) (requiring that the "majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate"). But as this Court has explained, "the basic unit of analysis for racial gerrymandering claims * * * is the district," and a court should not focus on "particular portions [of the district] in isolation." *Bethune-Hill*, 137 S. Ct. at 800. The district court here failed to address whether voting patterns were racially polarized across CD35 as a whole. And had it performed the required "holistic analysis," *ibid.*, the court necessarily would have concluded that racially polarized voting existed in CD35. See U.S. Br. 47-48.

Plaintiffs also theorize (Cong. Br. 39) that the State cannot "seek refuge in § 2" because the creation of CD35 was not contemporaneously "informed by" an "inquiry into § 2 requirements." But as already noted, a group of plaintiffs themselves urged the Legislature to draw CD35 in 2011 precisely because they believed the district to be required by Section 2. See C.J.S. App. 174a; C.J.S. Supp. App. 152a, 158a, 315a-317a, 319a-320a. All agreed in 2011 that at least seven Latino opportunity districts

needed to be drawn in South and West Texas in order to comply with the VRA, see C.J.S. App. 112a & n.85, 126a-127a, 176a, and CD35 extended within that region. Moreover, this Court's racial-gerrymandering precedents do not require a State, in drawing a Section 2 district, to develop the full factual record that it could later marshal in subsequent litigation. To survive strict scrutiny, it suffices that the State's "actual purpose" was compliance with the VRA and that it had a "strong basis in evidence to support that justification," even if that basis in evidence was not contemporaneously memorialized in exhaustive detail. *Shaw* v. *Hunt*, 517 U.S. 899, 908 n.4 (1996). And when the Legislature enacted the 2013 plan containing CD35, the district court's 2012 decision itself furnished a strong basis in evidence.

Finally, plaintiffs suggest that CD35 cannot survive strict scrutiny because the Legislature's "'actual purpose'" in drawing CD35 was to "dismantle[] the existing crossover district there" (*i.e.*, former CD25). Cong. Br. 39 (citation omitted); cf. U.S. Br. 10 n.5 (defining "'crossover' district"). But the district court made no such finding. Indeed, plaintiffs sought to press the same argument about CD25 as a freestanding claim of intentional racial discrimination, but the district court expressly declined to reach that claim. See C.J.S. App. 111a n.83, 172a n.38. And when the court earlier addressed that claim in the context of the 2012 interim plans, it was "unable to conclude" that the "dismantling of CD 25 was motivated by a discriminatory purpose as opposed to partisan politics." *Id.* at 415a.[7] Plaintiffs thus

[7] The United States argued in the preclearance litigation that CD25 was not a "protected crossover district" and that its dismantlement therefore was not unlawful. *Texas* v. *United States*, 887 F. Supp. 2d

fail in their effort to indirectly challenge the elimination of former CD25 by recasting it as a racial-gerrymandering challenge to CD35.

* * * * *

For the foregoing reasons and those stated in our opening brief, the Court should reject the bases for the district court's findings of intentional discrimination as to eight unchanged districts, and it should reverse the finding of a racial gerrymander as to CD35.

Respectfully submitted.

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133, 179 & n.1 (D.D.C. 2012) (separate opinion for the Court by Howell, J.), vacated and remanded, 570 U.S. 928 (2013).