SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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GREG ABBOTT, GOVERNOR OF TEXAS,)
ET AL.,)
Appellants,)
v.) No. 17-586
SHANNON PEREZ, ET AL.,)
Appellees,)

GREG ABBOTT, GOVERNOR OF TEXAS,)
ET AL.,)
v.) No. 17-626
SHANNON PEREZ, ET AL.,)
Appellees.)

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GREG ABBOTT, GOVERNOR OF TEXAS, ET AL., Appellants, v. SHANNON PEREZ, ET AL., Appellees,) No. 17-586

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL., Appellants, v. SHANNON PEREZ, ET AL., Appellees.) No. 17-626

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Washington, D.C.

Tuesday, April 24, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:20 a.m.

APPEARANCES:
SCOTT A. KELLER, Solicitor General of Texas,
Austin, Texas; on behalf of the Appellants.
EDWIN S. KNEEDLER, Deputy Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of Appellee United States, in
support of the Appellants.
MAX RENEA HICKS, ESQ., Austin, Texas; on behalf
of the Appellees in No. 17-586.
ALLISON J. RIGGS, ESQ., Durham, North Carolina;
on behalf of the Appellees in No. 17-626.

C O N T E N T S

P R O C E E D I N G S

(10:20 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-586, Abbott versus Perez, and the consolidated case.

General Keller.

ORAL ARGUMENT OF SCOTT A. KELLER

ON BEHALF OF THE APPELLANTS

MR. KELLER: Thank you, Mr. Chief Justice, and may it please the Court:

The Texas legislature did not have a racially discriminatory purpose when it adopted the entire court-ordered congressional remedial plan and virtually all of the remedial state house plan.

This Court told the district court to order districts that do not violate the Constitution or the VRA, and on remand in 2012, the district court itself said it obeyed this Court's remand and fixed all plausible legal defects under even the low Section 5 standard. And, indeed, today, with nine groups of plaintiffs here, we cannot draw a single additional performing majority/minority district, even though plaintiffs have tried for

years under those plans.

JUSTICE SOTOMAYOR: General Keller, I know you want to get to the merits, but I don't want to leave the jurisdiction question. And this last point raises it for me in stark relief, which is your -- you just said you can't draw this map. The court below said you can.

By not waiting for the remedy in this case, we are not in a position to be fully informed on that question. And so I still don't understand how you distinguish Gunn, that said that in these cases, unless a district court has made clear that it is issuing an injunction or prohibiting you from using your map or some portion of your map, that you can't appeal.

So could you address the -- our jurisdiction first?

MR. KELLER: Sure. As an initial matter, the district court did not say that we could, in fact, draw additional performing majority/minority districts. But I'll take Gunn on jurisdiction first.

JUSTICE SOTOMAYOR: Well, it did at

least in one of the challenges, when there were --

MR. KELLER: Not -- not a performing district. This would be the Nueces County state house district. In fact, there, the plaintiff MALC's own expert testified if we had drawn that additional performing -- if we had drawn that additional majority/minority district, then neither of the districts in Nueces County would have performed. We would have faced vote dilution cracking claims there.

JUSTICE SOTOMAYOR: I think that's subject to dispute by your adversary, so let -- let's -- but the point still remains, which is every time you're ordered to change one district, it affects other districts.

And in the end, the court, in drawing maps, may find that something it concluded initially is proven wrong by the map drawing. So that goes to why finality requires us to often wait for a remedy --

MR. KELLER: Well --

JUSTICE SOTOMAYOR: -- before we permit appeal. So tell me why that's not true -- why that's not the case under Gunn.

MR. KELLER: Well, first of all, in Gunn, what the district court did is it expressly stayed its own ruling, and then, months later, it issued no further order.

Here, in quite stark contrast, a mere 21 and 13 days after the district court entered its order, it was ordering the state to appear for expedited court-drawn redistricting.

JUSTICE SOTOMAYOR: No. It asked the legislator to tell it whether it intended to do redrawing. It didn't order it to do it. It just said, do you intend to? And it hadn't even started the process. But that goes only to one prong of effectively final.

The other prong is, could you have gotten relief at the end of this process? You were granted a stay within less than two weeks of your filing -- filing a motion. So even if you had gone through the remedial stage, you still would have had time to use your maps for the next election.

MR. KELLER: Well, not in orderly appellate review. And, here, we're in the same practical position as Cooper and as in Gill, where what happened was district courts

invalidated districts and then told the states you had to redistrict, but those courts did not impose remedial maps. And yet, there was appellate jurisdiction. Here --

JUSTICE BREYER: Yeah. Go ahead. I mean, that's --

MR. KELLER: And, moreover, here --

JUSTICE BREYER: Yeah.

MR. KELLER: -- what distinguishes this case from virtually all other cases that the Court has had is we were ordered to do expedited redistricting on the eve of election deadlines. We had told --

JUSTICE BREYER: You weren't ordered. I mean, that's the problem. When I became a judge in 1981, one of the first things that I was told by the preexisting -- Lee Kemp, he said when you get an appeal, they are appealing from a piece of paper called a judgment, or they are appealing from a piece of paper that says injunction motion denied or possibly granted.

What does the piece of paper say here? It seems to me the piece of paper says come to court. Now, if we're going to call that a

grant of an injunction, we're going to hear 50,000 appeals from the 93 -- however many three-judge courts there are. And it also says, when you come to court, have a plan.

Now I grant you there won't be 90,000 appeals; there will only be 40,000. But -- but, still, you see the point. What is the order, the sentence, the piece of paper that says injunction denied or says injunction granted from which there is an appeal?

MR. KELLER: Well, there is no magic word "injunction" used in these orders, but under Carson --

JUSTICE BREYER: I didn't say magic word. I said, what is the piece of paper, the order? Read it to me. It probably only has four words, and it is in effect saying -- is it the one that says stay denied? Stay granted? Produce some papers? You see what I'm driving at?

MR. KELLER: Sure. For instance, CJS Appendix 118a, the court said the violations "now require remedy" and "must be remedied either by the Texas legislature or this court." The court ordered us -- if the governor was not

going to call a special session, the legislature was not in session within 72 hours, then we were ordered to take immediate steps to consult with experts and mapdrawers, prepare statewide congressional plans, we were meeting --

JUSTICE BREYER: That's it. It is the order. You are ordered to consult with mapdrawers. All right? That is an injunction.

Now, if that's an injunction, that's my concern. If you're going to call that an injunction, you are ordered to consult with mapdrawers, unless some other thing happens. All right?

Now why won't that open the door to you are ordered to be in court tomorrow morning? You are ordered to produce a witness? Okay? That's what I'm worried about.

MR. KELLER: Well, because the practical effect of that order here was blocking us from using the maps in the 2018 elections. And plaintiffs do not seriously say that we could somehow have used the maps in the 2018 elections.

JUSTICE KAGAN: Well, General, I think

that might well be true, but I think it's -- it's also true in pretty much all of these districting cases. In other words, in all of these districting cases, once there's a liability finding, there's a finding that a particular district is -- is drawn or more than one district is drawn in a way that violates the Constitution. The upshot of that is that you're not going to be allowed to use those district lines.

But still there's a remedial process that takes place, where people argue about what the proper remedy is, and only at the end of that process, customarily, or at least it happened this way here, is there an injunction put in place saying don't use this map, instead use that map.

And what I'm concerned about is that if you're right, we're going to be hearing all of these districting cases not after the remedial stage but, instead, straight away after the liability stage.

MR. KELLER: Well, first of all, as an initial matter, many of these cases would come to the court in a preliminary injunction

posture. Here, of course, we're seven years into the case after three trials and two appeals to this Court.

But, more importantly, we would have faced contempt if we would have told the district court, no, we are not going to engage in the redistricting that you have ordered on an expedited basis. And what distinguishes this case from virtually any --

JUSTICE SOTOMAYOR: Well, that's quite -- that's quite odd. You always had the choice of not participating and simply letting the court draw the map.

MR. KELLER: No. We -- we did not. Here, we were ordered to not only appear but to bring our own Texas Legislative Council employees with us for the court to do expedited map drawing.

JUSTICE SOTOMAYOR: You still -- well, it hasn't happened, but you could have had a -- an appeal from that. My point --

MR. KELLER: That's what --

JUSTICE SOTOMAYOR: My point goes back to --

MR. KELLER: We are taking an appeal

from that today.

JUSTICE SOTOMAYOR: What you're now saying to us is we have an appeal after the preliminary injunction. Every time a law is declared unconstitutional -- a map is declared unconstitutional, we have an appeal.

And then we have a third appeal at the end of a remedy. So automatically, because I don't see how to distinguish this from Gunn still, and I still don't know how to distinguish it from the millions of others -- not millions, I'm exaggerating greatly -- from the hundreds of these that we have received where a court has said something's unconstitutional and we have said that doesn't end the case.

What ends the case is the final injunction that imposed -- that stops you from doing something and requires you to do something else.

MR. KELLER: Well, but we were in the same posture as Cooper and Gill and there were not remedial maps there. And here, unlike in Gunn --

JUSTICE SOTOMAYOR: That's in 1291.

I'm talking about 1253. What you're saying is automatically -- you're not giving me any way to distinguish any three-court decision on my ability that doesn't result in an immediate appeal.

You're basically saying every single one of them, where a court says even one district was drawn wrong, that that's immediately appealable.

MR. KELLER: Well, but that would have been Cooper and Gill. And I think this highlights that redistricting itself is different. When a court is not only declaring certain districts invalid but then telling the state you must redistrict, that itself, particularly in this case when we were ordered 21 and 13 days later to come with Texas Legislative Council employees to engage in expedited redistricting --

JUSTICE SOTOMAYOR: But that goes back to Justice Breyer's question. I don't think that ever ordering someone to come to court and give an explanation has been considered a final order.

What is considered a final order is a

contempt finding, something else that happens as a result of your failure to act, not the request for you to come to court.

MR. KELLER: Well, but unlike in Gunn, for instance, here -- in Gunn, the district court stayed its own order and took no additional action for months. If the district court here, when we moved for a stay in the district court, clarified, state, you can use your maps for the 2018 elections, that would be a very different case. But instead it did the exact opposite.

JUSTICE SOTOMAYOR: But we don't know that, right?

JUSTICE KAGAN: General, if -- if I could --

JUSTICE ALITO: What would have happened if you had told the district court, well, fine, you've issued an opinion, but we're going ahead and we're going to conduct elections under the map that was adopted by the state legislature?

MR. KELLER: We --

JUSTICE ALITO: What would have happened?

MR. KELLER: We would have been held in contempt for not obeying this order. And we didn't have to suffer the threat of contempt to be able to appeal.

And when we moved for a stay in this Court, we informed the Court that we needed to know by October 1, 2017 what the status of our districts were.

And we told the Court, grant us a stay by then, grant us a stay earlier, treat our stay motion as a petition for a writ of mandamus. We were very clear about the status of this case, and the Court granted a stay.

And even then, when the circuit justice issued a temporary stay in this case, the district court issued an advisory informing the parties they could voluntarily comply so that redistricting could resume expeditiously, to use the district court's words.

If I can turn from the jurisdictional issue now to the merits.

JUSTICE KAGAN: General, if I could -- I'm sorry. But I guess I -- you -- you were saying before you were interrupted, you said what distinguishes this case, and I guess I do

want to know what does distinguish this case, or if -- if in finding that there's jurisdiction here, are we going to be finding that there is jurisdiction after the liability stage at all redistricting cases?

MR. KELLER: Not -- no, Justice Kagan. If a court simply says -- declares districts invalid and then issues no other injunction and says the state doesn't have to redistrict, that is a different case. But when the court goes ahead and says the state must redistrict, and here on an expedited basis on the eve of election deadlines that all the parties conceded existed, that's the practical effect of an injunction.

CHIEF JUSTICE ROBERTS: Counsel --

JUSTICE KENNEDY: One more question and then you have to get to the merits. Suppose there had been a 45-day window. Would that have been a practical effect of an injunction? We can play the game between 3 and 45.

MR. KELLER: Sure. Justice Kennedy, I think so, because this Court's precedent, Wise versus Lipscomb, says that there must be a

reasonable opportunity for the legislature to have to correct any deficiencies in the map, when a part-time legislature is out of session and a court is putting the state's -- the sovereign authority of use it or lose it only within 45 days, I -- I think that would still be practically an injunction, but, again, here, it was nothing close to 45 days.

It was within three days the governor had to call a special session. That's certainly not a reasonable opportunity.

CHIEF JUSTICE ROBERTS: I have a question on the merits.

You put a lot of weight on the adoption in 2013 of the court-drawn 20 -- what, 2012, 2011?

MR. KELLER: 2012.

CHIEF JUSTICE ROBERTS: 2012 plan. And I -- I think a concern, though, is that the district court plan was not comprehensive. It -- it was put in quickly based -- it was preliminary, as opposed to permanent.

And I wonder if that undermines the weight you can place on it?

MR. KELLER: Well, I don't think so,

Mr. Chief Justice, for three reasons: First of all, there was plenty of process in the court in 2011 and 2012. This was not actually a preliminary injunction posture. Preliminary injunctions had been granted in 2011.

The only reason that a lower standard was being used here is because there were collateral Section 5 proceedings because this was the unique posture where Section 5 preclearance proceedings were ongoing. And, here, the procedure in the district court, we had discovery. There were dispositive motions.

We had two weeks of trial. There was an appeal to this Court with its Perry decision. There was extensive briefing both before and after this Court's decision in Perry. There was the Section 5 briefing before the district of D.C. There were two more days of argument on remand.

And then, at that point, the district court in 2012 issued tens of pages of written findings and conclusions imposing those maps that actually change nine congressional districts and 28 state house districts.

In that context, particularly after

this Court said six different times to the district court it was under a mandate to draw lawful districts, and then, when the district court expressly said it obeyed that mandate, and in its own words, it fixed all plausible legal defects, even -- even if there was an issue where a claim was not insubstantial under Section 5, the district court fixed those districts. It said it was fixing those districts. And it even said that its map "does not incorporate any portion of the state map that is allegedly tainted" --

JUSTICE SOTOMAYOR: Mr. General --

MR. KELLER: -- "by discriminatory purpose."

JUSTICE SOTOMAYOR: General, one of the things in this recitation that you forget is that it wasn't just that court opining on these maps. It was also in August of 2012 the D.C. district court who -- who found these maps and the districts that were left untouched suspicious and who found intentional discrimination with respect to some, that found questionable some of the claims and reasons that were given by the legislature for these

districts.

There were serious questions raised by the D.C. circuit court. So the -- this Court basically said when it ruled: This is tentative. It's been done hurriedly. You can't rely on these findings until we have a -- a full hearing.

But the D.C. district court made findings contrary to your position. So should -- wouldn't -- aren't we obligated to look at the full picture, not just the picture you want us -- the piece of the picture you want us to look at?

MR. KELLER: The D.C. court, though, did not find issues with the districts that had been validated. Indeed, in 2011, plaintiff's counsel MALDEF told the legislature that the court-ordered maps, the 2012 court-ordered maps from the district court in San Antonio fixed every district where even Section 5 preclearance was denied. This is at CJS Appendix 436-8 to 439-8. Plaintiffs do not dispute that.

So what the evidence that the legislature heard in 2013 was that the maps had

been fixed even beyond the analysis that the court performed, also, to address plaintiff's argument that somehow the process was rushed in 2013. That is clearly erroneous.

Here, in 2013, the House and Senate committees heard nearly 33 hours of debate over 11 public hearings. That produced 1,355 transcript pages. That was just the committee process. Then there were the floor debates. That resulted in over 1,000 pages of transcript in the House and Senate journals.

In that context, the legislature in 2013 engaged in a deliberative process. It adopted wholesale the entire congressional map. It didn't even tinker around with the districts that had, in fact, been changed. And there were nine districts that had been changed.

There were a couple congressional districts that were left in place that plaintiffs were challenging, but the district court in 2012 issued seven pages and six pages, respectively, of analysis that CD 35 and CD 27 were valid.

If that is not a basis on which a legislature can rely on a federal court's

opinion, I'm not sure there's any breathing space left --

JUSTICE KAGAN: Well --

MR. KELLER: -- for legislatures engaging in redistricting --

JUSTICE KAGAN: -- but it --

MR. KELLER: -- to honor both their constitutional and VRA obligations.

JUSTICE KAGAN: It seems as though that that's a -- you're essentially saying that this PI opinion was a safe harbor for the state. And that seems an odd thing to say.

I mean, a PI opinion is just a PI opinion. It's preliminary. And this Court said multiple times that they're -- that it had not got -- gone through all the evidence, that it had not gone through all the facts, that this was just the best it could do at the stage it was at now.

And so, to turn that around and to say this is a safe harbor for the state, isn't it essentially to stop every case at the preliminary injunction stage?

MR. KELLER: Justice Kagan, our position is not that somehow this was a

categorical safe harbor, that the 2011 legislature's actions could not be examined. But what can't happen is that only 2011 is examined in isolation. This case did not end in 2011.

Indeed, what happened in 2012 with all that court process, and in 2013 with the legislative process adopting a court-ordered remedial district, is very good evidence that the legislature was acting in good faith. And you would need very persuasive evidence to overcome the strong presumption of good faith, the extraordinary caution that would apply when charging a legislature with an illicit purpose.

And, here, essentially nothing changed between 2012 and 2014. Plaintiffs point to almost no new evidence that came in even on retrial compared to what the district court was aware of in 2012 when it had the entire 2011 legislative record before it.

In that context, with or without a presumption of good faith, there is no basis to find that the Texas legislature was somehow invidiously racially discriminatory when what it did is it adopted the entire congressional

map and virtually all the state house map that it had been ordered to use.

JUSTICE KAGAN: General, what would you think -- let's put aside the court order for a second. Just pretend it doesn't exist, which I realize is -- you know, that's an important feature of the case for you, but let's just pretend.

MR. KELLER: It is.

(Laughter.)

JUSTICE KAGAN: Suppose there's one map and -- and -- and then there's a second map, and the one map is later found to have all kinds of evidence of discriminatory intent surrounding it. There are e-mails. There's everything.

The second map, nothing. But the second map is exactly the same. What should a court do with respect to the second map?

MR. KELLER: Justice Kagan --

JUSTICE KAGAN: Should it just say there's no e-mails?

MR. KELLER: No, I -- I believe that's a very different case --

JUSTICE KAGAN: I know it is.

MR. KELLER: -- precisely because -- and -- and under Arlington Heights, the court could consider all of that evidence, and in doing that analysis of the sequence of events, the court could take cognizance of the fact that the 2013 legislature there may not have been doing anything at all, and that could possibly go to the purpose.

But here, when we have a court-ordered remedial plan and we have wholesale acceptance on the congressional side and virtually wholesale acceptance on the state house side, this was not the legislature trying to pull a fast one on anyone. And there is absolutely no evidence in plaintiffs' briefs that somehow the legislature was trying to lock in discriminatory districts.

Mr. Chief Justice, if I may reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER
ON BEHALF OF APPELLEE UNITED STATES
IN SUPPORT OF THE APPELLANTS

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

I do want to address the merits, but if I could make a -- a few points about jurisdiction at the outset to show why this case is different from other cases that may arise. And there are a number of distinguishing factors.

In this case, what the district court did was say that the current plans, which had been in place since 2012, three elections had been held under those plans, may not be -- may not be used. They -- there must be a remedy.

Then the court gave only three days to the state legislature, which is not -- which is far from sufficient time to allow a sovereign state to engage in the critical act of deciding whether to reapportion the legislature.

JUSTICE KAGAN: Mr. -- Mr. Kneedler, that might be true. It might have been a terrible decision to give only three days, but suppose that the court had given three weeks.

Why would that have made a difference for this question of whether something is an injunction or has the practical effect of an injunction?

MR. KNEEDLER: I -- I think the urgency or time limit is -- is a very important consideration and, in fact, a very important limitation on what we are proposing here.

October 1 was a -- a deadline that the parties and the court in this case accepted, when -- when preliminary measures had to be taken to institute the election. This was only 45 -- about 45 days away from the district court's opinion.

JUSTICE SOTOMAYOR: Mr. Kneedler, what do -- what rule do we set to know how much time is enough time? Meaning, in all of these election cases, it seems to me that every single one of them, even if it's decided today, I'm going to hear that in eight months they have to do something. In three months after that, they have to do something else. In this amount of time after that, they have to do something else. Until it's clear that a district court tells a state you can't use your map at all, even within 24 hours, this Court

could intervene if need be.

So I'm not sure in what other setting time constraints are a reason for immediate appeal --

MR. KNEEDLER: Again --

JUSTICE SOTOMAYOR: -- if -- if it's not permitted generally under the law.

MR. KNEEDLER: But -- but I think under the practical effect test, one of the practical effects is if the state is facing a deadline in only three days -- if I could use an example which I think this -- brings -- brings this home and would express a federal interest in this. 2284 was enacted to accord special deference to redistricting by three-judge courts. That includes the apportionment of Congress.

If a district court held that a federal apportionment statute or something in the census was defective and the district court said perhaps two weeks before the President was to report the apportionment to the House of Representatives, you may not -- this is defective, you will not be able to use this, and the states will not be able to rely upon it

in an upcoming election, I think it would be very important for the federal government, for the nation as a whole --

JUSTICE BREYER: Yes, but there's a way. What's bothering me here, as I said, is not this case, but there are appeals and injunctions in millions of cases.

So the judge says: I've written an opinion which says just what you say. The lawyer for the state says: Your Honor, we respectfully disagree with that opinion. We are going to go ahead and have the election, unless you enter an order, an injunction, which I think you shouldn't do, but you enter an order, an injunction forbidding us from doing so.

Now, when that piece of paper is entered, at that point, of course, there is an appeal. Now, once you say the practical effects test, I haven't found a case with that. Not even Carson. There was an injunction in Carson in the settlement plan.

I found no case. Now maybe you'll tell us some. People have used the word "practical effects," but suddenly, when we stop

that without an injunction and adopt that, what happens to the 4 million cases in the U.S. courts?

MR. KNEEDLER: Well, let me make one final important point, and then I do want to move on to -- on to the merits. I -- there is a -- there is a big difference between redistricting, particularly, again, here, this is -- the court was saying the state could not use a plan that it had used for three elections, that -- that the representatives and the electorate had come to rely upon.

But another important distinction between this and other cases and particularly Gunn is, in -- in Gunn, the state could go without the statute that was enjoined in that case. In a redistricting case, there has to be a districting of the legislature. The case just can't go on with nothing further being done.

And so, in a redistricting case, when a court says you may not use this -- this plan and gives the state foreign --

JUSTICE SOTOMAYOR: Mr. Kneedler --

CHIEF JUSTICE ROBERTS: Mr. Kneedler,

you have about five minutes left. Could you move to the merits?

MR. KNEEDLER: Yes. I -- I'd like to. And -- and the -- for us, the critical point to be made here is that the question of whether the 2013 plan enacted by the state legislature was impermissibly discriminatory turns on the intent of the legislature in 2013.

And this Court has said repeatedly that there is a presumption of good faith with respect to a legislative enactment, and that is true even if a prior legislative enactment had been found to be impermissibly discriminatory.

Here, the presumption of good faith is particularly strong because, as has been discussed, the district court in this case, following this Court's careful instructions, examined the 2011 plan and determined which ones did not pass the not insubstantial test that this Court articulated or there was not a likelihood of success. And this Court said to leave the other ones in place.

The court had extensive proceedings at -- at that stage. And that in our view gave -- would have reinforced the proposition that the

state legislature could rely upon that, and it -- it -- it certainly doesn't suggest any -- any impermissible intent on the part of the state legislature.

JUSTICE SOTOMAYOR: So how --

JUSTICE KAGAN: But, Mr. Kneedler, in -- in your briefs, you acknowledge two things. You acknowledge, first, that when there are two maps and they're exactly the same, that evidence of intent as to the first map is probative of -- of -- of intent as to the second map. The question is always intent as to the second map, but if two maps are exactly the same, there's all kinds of evidence of bad intent as to the first map, surely that's probative.

And I think you acknowledge that. Don't you think?

MR. KNEEDLER: Again, depending on -- depending on the circumstances, but --

JUSTICE KAGAN: Of course. Everything depends on the circumstances. The -- the -- the facts, which, you know, this Court is the -- has principal authority over.

The second thing that you acknowledge

in your brief is that these court orders, especially at this preliminary stage, are not safe harbors. Don't you think?

MR. KNEEDLER: We absolutely agree they are not safe harbors. They could try to prove a -- a intentional discrimination claim. The results test under the Voting Rights Act remains available as well, and that, in fact, is the principal vehicle for challenging redistricting.

JUSTICE KAGAN: So, given that the district court has so much better understanding of the facts than we do, what do you think went wrong here? I'm trying to find the legal principle that went wrong.

MR. KNEEDLER: The -- the legal principle that went wrong is the court basically said that the taint that it found in -- with respect to certain districts in 2011 carried forward to 2013. And it was the state's obligation, A, in the state legislature to engage in a deliberative process to make sure that that taint, which had not yet been found by the district court, was eliminated.

JUSTICE KAGAN: But I don't think that

it did that. And I -- I recognize that there are some sentences which can be read either way. But if I understand you correctly, you're suggesting that there was a shift in the burden of proof. And that would be a legal error.

MR. KNEEDLER: That's -- that's the way we do -- we do read the opinion. And this Court has --

JUSTICE KAGAN: But -- but -- but here is what they said, the district court said: "The plaintiffs can establish their claim by showing that the legislature adopted the 2013 plans with a discriminatory purpose, maintained the district lines with a discriminatory purpose, or intentionally furthered preexisting intentional discrimination."

So it's talking about here is the way the plaintiffs can establish their claim. What happened in 2013?

MR. KNEEDLER: Yes, but -- but if -- if you read that whole section of the district court's opinion, it puts great weight on -- on its perception that the -- the state legislature was required to engage in a -- a deliberative process to make sure it was

undoing prior taint.

And as we have said, there is no presumption of taint just because a legislature was previously found -- and, by the way, those findings come in --

JUSTICE KAGAN: Well, that might be right, Mr. Kneedler, that there's no presumption that comes from, but -- but it's -- it's surely evidence that one can take into account that the legislature didn't engage in any kind of deliberative process --

MR. KNEEDLER: But --

JUSTICE KAGAN: -- after having done a map that's tainted with all kinds of discriminatory intent.

MR. KNEEDLER: Right. But this Court -- this Court has said that there is a -- a presumption of good faith that is a demanding test, whether to establish racial discrimination, and there is no taint. That -- that requires the plaintiffs to come forward with significant evidence bearing directly on 2013.

And, here, we think that the district courts -- that's basically a record. The

district court's opinion, even though preliminary, was -- was a record --

JUSTICE SOTOMAYOR: I'm sorry, I thought the --

MR. KNEEDLER: -- before the -- before the legislature.

JUSTICE SOTOMAYOR: -- I thought the legislature had its own attorney tell it that the findings of the district court were tentative, preliminary only, and that what -- and went through what the plaintiffs claim and told them that what they were doing would not address the constitutional issues that were raised by plaintiffs. So --

CHIEF JUSTICE ROBERTS: Why don't you take an extra couple of minutes.

MR. KNEEDLER: Okay. Well, yes, the -- the legislative counsel said this will not resolve -- this will not end the litigation, and, obviously, it hasn't.

JUSTICE SOTOMAYOR: No, I think he said more. This won't resolve the taint that -- I believe he said it won't resolve the --

MR. KNEEDLER: No, I don't -- I don't -- I don't believe that's what he said. I

think he was just giving them advice that the district court's decision was preliminary and there -- and there could be -- there could be further litigation.

But one of the primary motivations here was to end the litigation. And the -- and the plaintiffs suggest that there's something pernicious about ending litigation, but, to the contrary, the state legislature's acknowledging that there was prior discrimination, accepting what the district court did as a remedy, even though preliminary for that -- for that and enacting a -- a new law, that's something to be commended when a state legislature proceeds in that manner --

JUSTICE SOTOMAYOR: I -- I -- I --

MR. KNEEDLER: -- on the basis of an independent review that was conducted by an Article III court.

JUSTICE SOTOMAYOR: But may I ask something? There's end of litigation. Are you ending a litigation, or are you ending the possibility of a court stopping you from discriminating?

Meaning, if there is a basis, and --

and you're aware that there are claims that you intentionally discriminated, there are findings not just by the 2012 court but by the D.C. circuit court -- district court, that you have intentionally discriminated in drawing a number of lines, intentionally or in results, and you're now saying I don't really care, I want to get the court outside of messing even with my discriminatory lines.

MR. KNEEDLER: I --

JUSTICE SOTOMAYOR: It --

CHIEF JUSTICE ROBERTS: Why don't you answer, Mr. Kneedler. Then we'll let you sit down.

MR. KNEEDLER: Okay.

(Laughter.)

MR. KNEEDLER: I -- I -- I don't think that's a fair account of what the -- of what the record shows. And -- and if there are -- first of all, if there are -- if there are -- if there's indications going both ways, the presumption of good faith, and the -- and there's no continuing taint, should cut in the -- should cut in the state's favor.

But the important point is that the --

the -- it's the intent in 2013 and the desire to -- to accept what the district court did so that the state could move on.

It didn't end the litigation, but so that the state could move on is, again, something that is to be encouraged when a district court has found this, and to adopt that rather than to continue to resist it.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Hicks.

ORAL ARGUMENT OF MAX RENEA HICKS ON BEHALF OF THE APPELLEES IN NO. 17-586

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

I hadn't anticipated doing this, but I'm going to start with the jurisdictional question, which, of course, is what you all start with.

Justice Breyer asked a key question, I think, of -- of -- of the other side in this. He said, show me the language. Show me where they entered an injunction.

The closest they can come, there -- and everybody agrees there was no remedy

ordered, so the only question becomes was there an injunction against the 2018 elections for Congress -- I'm speaking of Congress -- going forward under the existing plan.

The closest they can come to an -- language that says there is an injunction, is the language that says these violations that we've just found and declared must be remedied. But that's not an injunction.

It doesn't say when, how. It gives no details. If you want language that addresses the injunction question, the language is in the court's order and in its response to --

JUSTICE KENNEDY: Could -- could Texas have -- have used the current maps for the 2018 elections?

MR. HICKS: Yes, in the absence -- unfortunately, as far as we're concerned, but yes, in the absence of --

JUSTICE KENNEDY: I mean insofar as the court's order was concerned.

MR. HICKS: Yes. I don't think there's any question about it. If -- if they say we would have been held in contempt if we had gone forward, it would have been impossible

to hold them in contempt because the court itself said: We have not enjoined use of the plan for any -- for the upcoming elections. So --

CHIEF JUSTICE ROBERTS: Well, but the judge -- the court gave the -- the governor three days --

JUSTICE BREYER: Three days.

CHIEF JUSTICE ROBERTS: -- to call the election. And, I mean, if you were the governor, would you think, well, maybe we're not going to be able to use the 2018 plans?

MR. HICKS: No, I would not at all. First of all, that three-day window was a -- a chance for the -- the legislature -- the governor to come back and say, I will call the legislature in special session. It wasn't about when he would call them into session.

We had asked -- the court had, rather, had said two different times in the spring of 2017 to the Texas Attorney General's Office, you should consider having the legislature -- the first time it was in special -- in regular session -- you should consider having them address the -- the problems that have cropped

up so far in the districts that didn't change between 2011 and 2013.

No response. Silence from the state. Then, about two or three weeks later, after this Court's decision in Cooper came down, the court again said: Hey, kind of the handwriting's on the wall here for problems with your districts that didn't change. You should consider calling a special session. Will you?

This was in the spring. And they didn't do it. In fact, at that time, they got a definite answer: No, we won't do it.

So, when the time came in the August order that said we find violations, we've gotten to the point now after all these years and we find violations in these two districts, the court did not say you can't conduct the elections. The court did not say that you only have three days to call a special session.

It said you have three days to let us know. And the pump had been primed.

JUSTICE GINSBURG: If you're -- if you're -- if you're right about the jurisdiction, that there is no injunction, what

happens next?

MR. HICKS: Well, I can tell you what we hope happens next. If -- if the Court dismisses this case for lack of jurisdiction, and I have not consulted with every one of the nine groups, but if -- if for our group, if the Court says no jurisdiction and sends it back, we're going to ask the court to set up a remedy hearing and see if we might be able to get relief in time for the 2018 elections.

There is a very good chance, I think a pretty strong chance, the court, the district court is not going to let us do that. We went to the district court three different times, Your Honor, asking for an injunction after the trials. In 2015, we asked for an injunction before the 2016 elections while the case was pending, got a no.

In the -- in the -- in -- after the March order on the old plan came down in -- in 2017, we went to the court and said: Will you give us an injunction as to the districts that are the same between the old plan and the new plan? The court said no.

So we have tried. And we also went at

the end of 2016 and said: Please give us an injunction to stop the 2018 elections from going forward. The court said: No.

So we have knocked on the door three times and the court had said no.

Then it came to the final -- it finally got to the -- to the nub of the liability issue and the declaratory relief issue and we -- we didn't even get a chance to say please enter an injunction. They said schedule a --

JUSTICE GORSUCH: Counsel, are you suggesting you're not going to seek an injunction?

MR. HICKS: No. I -- as I said, I can't speak for every one of the plaintiff groups because we didn't consult with them as -- before we walked in here today.

JUSTICE GORSUCH: But -- but it's your intention to seek an injunction on the basis of your --

MR. HICKS: For the Rodriguez plaintiffs, I believe we will ask --

JUSTICE GORSUCH: Counsel -- counsel, the question is --

MR. HICKS: Yes. We do.

JUSTICE GORSUCH: -- if I might. If I might.

MR. HICK: We -- yes.

JUSTICE GORSUCH: You intend to seek an injunction on the basis of the order presently before us?

MR. HICKS: Yes.

JUSTICE GORSUCH: Okay.

MR. HICKS: But -- but I emphasize there is -- there was pretty strong indication that we aren't going to be successful in getting it for the 2018 elections. I don't know if it's just from this Court and what it might say from the district court because it has been very reluctant to interfere with the election process. It's been very slow to do that.

I want to churn -- turn if I may -- let me just mention one other thing about jurisdiction. The kinds of orders they say constitute an injunction -- injunctive relief, they're case processing orders. They're schedule -- case scheduling orders. You know, show -- please show up on June 3 or whatever

day for a hearing. Or send the Legislative Council people in to help us draw maps -- to help us draw the maps that day.

If those things are injunctions, the issue is very different. Was it a -- an abuse of discretion for the court to order Legislative Council to show up? It's not the merits of the case here.

JUSTICE ALITO: Do you think we lack jurisdiction if the order doesn't contain the word "injunction" or "order" but has the practical effect of doing that?

MR. HICKS: I -- I'll do a two-level answer. The first answer is yes, I believe you do not have jurisdiction unless it has an injunction in it in so many words. I believe that's true.

If the practical effects test that the Court has applied in Carson Brands, which I emphasize is only as to the denial of an injunction, not to the grant, which has to be much more specific, but if that practical effects test is applied, there has to be something that indicates there is injunctive relief forthcoming. That is -- not

forthcoming; rather, there is injunctive relief embedded in this. This Court knows to how to look at something and tell if it's an injunction or not.

JUSTICE GINSBURG: Has -- has the practical effects been applied in the 1253 context as distinguished from 1292?

MR. HICKS: It never has. And I think the Gunn case suggests if -- if that principle is followed, it wouldn't be applied. We have to remember in the -- in the Carson Brands test, calling it the -- the practical effects test, is really ultimately a misnomer because, if you look at it, in Carson Brands, what had happened was the district court had refused to enter a consent decree. One piece of the consent decree was specific -- would have specifically been an injunction. That would have been the consent decree. And the court denied the entry of the consent decree, and this Court said that has the practical effect of denying that particular injunction that would have been entered --

CHIEF JUSTICE ROBERTS: Counsel --

MR. HICKS: -- under Appendix B or

whatever.

CHIEF JUSTICE ROBERTS: Counsel, you were the one who said you wanted to have one more word on the jurisdictional issue. But on the --

(Laughter.)

MR. HICKS: Sorry.

CHIEF JUSTICE ROBERTS: On the -- on the merits, it seems a strong argument, which you dismiss as just sort of wanting to end the litigation, which is usually a good thing, for the legislature to say: Okay, this is the plan -- I understand it's preliminary and all that -- but to move things along, this is the plan the district court drew. That's what we're going to go with.

It does seem to me that at the very least -- and I understand this to be the point on the other side -- that ought to give them some presumption of good faith moving forward, which is significant on the determination of their intent to discriminate.

MR. HICKS: Right. That isn't what gave them the presumption of good faith. They always have a presumption of good faith when

the legislature acts. That's the first step, is presume good faith. And the district court proceeded from that. But in this particular instance, the district court did not in 2012 draw a map. It did not draw a map.

For the two districts that are before you now, Districts 25 and -- I mean 35 and 27, it didn't touch them.

CHIEF JUSTICE ROBERTS: Well, they were not changed, but that -- surely, the district court could draw a map; you don't have to change every single district when you're -- you're looking at what you think is an appropriate map for two -- two elections to go forward under.

MR. HICKS: I understand that, but in this one, there were -- half of the Texas congressional districts were not touched in the interim map, not touched at all, including the --

CHIEF JUSTICE ROBERTS: Is your answer different if they did alter every single district in Texas?

MR. HICKS: Well, my answer is it would then be a court-drawn map in the

districts, and it would be court-drawn. But these two districts were not court-drawn, as well as 16 other districts there were not court-drawn.

CHIEF JUSTICE ROBERTS: How -- how -- how many of the Texas districts were redrawn, were altered?

MR. HICKS: There were -- there are 36 districts; 18 of them were altered in some way and 18 of them were untouched. So it's half and half. And I -- and though the 18 that were untouched, you go look at the 2011 legislation that drew them, and you find the block descriptions of what they look like, the geographic description. It's the statute is there in 2011. And so --

JUSTICE ALITO: Well, as to the district -- as to the congressional districts that are at issue here to start, did the district court simply rubber-stamp what had been presented to it, or did it engage in a pretty thorough, thoughtful analysis of the legality of those districts?

MR. HICKS: It did as thorough an analysis, I believe, as it could under the

constraints. And that is not a thorough analysis.

The court itself said it's not thorough. If Your Honors recall, this case returned to them, and it isn't as though the court on remand had a choice. There was a gap. At that time, preclearance -- the preclearance regime was in place and operative, and there had to be a map in place.

There could not be one. This Court had already postponed -- the district court had already postponed elections two or three -- scheduled two or three times. And the district court in D.C. had not yet acted on the state's preclearance request. So there was a gap.

And it had to go forward. And the -- and to talk about the analysis, the district court -- and the Texas Legislative Council's lawyer did tell the legislature this -- the district court, it's hard to find a more hedged opinion about the outcome of a case.

They said it's a close question. I don't know how many times they said it's a close question. It's for this time only. And the state, when it came up here before you on a

state request by LULAC in -- in 2016, I think it was, the state told you: Hey, it's just a one-time deal, that map. It's just a one-time deal. We quote that in our brief.

And so it is -- it is not what I would call a thorough analysis. There were things that changed, substantial things that changed between the 2012 map and the 2013 legislative action, which they used the term "ratify" the map. They didn't even say they have considered and drawn the map. They say they ratified the map.

But there were several things that changed. One, as Justice Sotomayor said, there was the district court in D.C. decision which said there is, essentially, more intentional discrimination in this congressional map than you can shake a stick at. We -- we have had evidence on that. They said there is a preexisting crossover district in the Travis County area that the district court in San Antonio had not found existed yet. They said there is a crossover district where people -- minority voters' rights are being exercised.

Also, in between, the -- the United

States had intervened in a different posture back then. The United States had intervened and opposed the map in D.C., and that evidence had been introduced. That was all new evidence that didn't exist in 2012.

JUSTICE ALITO: Why don't you talk about one of the districts. Why don't we talk about Congressional District 35 and some of the points that the district court made when it initially analyzed this.

Is it not true that this -- the concept of this district was recommended by the Mexican-American Legal Defense and Education Fund and supported by the Latino Redistricting Task Force?

MR. HICKS: The concept was one of two alternatives. It was April 11 testimony, April 11, 2011, transcript -- Exhibit 591, if I recall correctly. MALDEF goes in early in the session and says: We have two maps. One is a concept similar to this, and the other one is an alternative map that does what we think should happen. And they say we don't have a choice between them. And they offered no --

JUSTICE ALITO: But they recommended

this as one of the alternatives, right?

MR. HICKS: It is, but there was --

JUSTICE ALITO: They're linking -- linking San Antonio and -- and Austin, and they said there was a community of interest. And the district court said that in its initial opinion, did it not?

MR. HICKS: It said it didn't know for sure whether there was a community of interest. But the important thing about this is there was no evidence -- under a racial gerrymandering test, they have to survive strict scrutiny. And so, on the strict scrutiny side, the Texas legislature had nothing -- nothing in front of it that suggested that there was problem with racially polarized voting that would require the creation of this district. They didn't have -- it isn't that they didn't have -- whether they had strong evidence or not; they had no evidence.

JUSTICE ALITO: I thought there was evidence that there was racially polarized voting in the district as a whole.

MR. HICKS: There is -- the state offered no evidence at all on that. The state

offered no evidence. We offered evidence.

JUSTICE ALITO: You offered evidence about Travis County.

MR. HICKS: Yes. We offered evidence about Travis County. They offered no evidence about racially polarized voting. And the more important thing because Bethune-Hill, if Your Honor recalls, says -- I think Justice Kennedy wrote that opinion, who said you don't get to do post-hoc investigation of whether there's a problem; you look at it at the time the legislature acted.

At the time the legislature acted, it had nothing in front of it about this. It had alternative maps that show you didn't have to come into Travis County. And this is crucial.

JUSTICE ALITO: At the time it acted, it had the district court's opinion, did it not?

MR. HICKS: At the time in 2013?

JUSTICE ALITO: Isn't what we're looking at?

MR. HICKS: At the time it acted in 20 -- yes, it did, and the district court said we need more facts. That's specifically what it

said. And in the meantime, facts had come in that showed that race, better than party, explained the divisions in Travis County. But the most important fact, Your Honor, the most important fact the legislature had in front of it in 2013 that it didn't have in 2011 was that the elections had occurred under that map, and what did the legislature know in 2013 that it didn't know in 2011, that what it had intended to do -- what it had intended to do had, in fact, happened.

They had achieved everything they wanted with this map with respect to these districts, with regard to the racial -- the -- the tamping down of racial voting rights and so on. That's the most important factor that they had.

And the effects part of this under Arlington Heights is the most important thing to note. In 2013, they knew they had succeeded. They had succeeded. Just briefly, Your Honor.

CHIEF JUSTICE ROBERTS: You've got a couple more minutes too.

MR. HICKS: Okay. Just briefly on

this point I would like to wrap up with this in -- in -- in -- on this very point. In -- about a week ago, in the Dimaya case, this Court repeated a quip -- I guess you can call it a quip -- from Justice Scalia, and it said insanity is doing the same thing over and over again and expecting a different result.

Well, the Texas legislature is not insane. It knows -- it -- it knows how to do redistricting maps and we believe it knows how to do them, too, fairly well with respect to diminishing minority voting rights.

So I would ask the Court to look at it this way: If you've done it in 2011 and you know the outcome of it, discrimination is doing the same thing over and over again and expecting and achieving exactly the same results.

And that's what happened here, Your Honor. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Riggs.

ORAL ARGUMENT OF ALLISON J. RIGGS
ON BEHALF OF THE APPELLEES IN NO. 17-626

MS. RIGGS: Mr. Chief Justice, and may it please the Court:

This Court does not have jurisdiction to hear this appeal, but if it proceeds to the merits, the district court properly applied the Arlington Heights framework to analyze the intent of the 2013 legislature in reenacting some of the same state house districts it had deliberately designed in 2011 to cancel out or minimize the voting strength of black and Latino voters in Texas.

And using that correct legal standard, the district court concluded that the intent of the legislature in 2013 was, in fact, to maintain and perpetuate its ill-gotten and racially discriminatory 2011 gains. Those findings cannot be deemed clearly erroneous on the grounds of this entire record, which is quite voluminous.

The jurisdictional question has been discussed quite a bit. There's one gloss I'd like to add to what's already been mentioned.

First is that the rule in Gunn, which

is -- is restrictive and doesn't create any exceptions, has been applied in a redistricting case in Whitcomb. So there's precedent for -- for Gunn being read as we urge it to be read.

And then there's the practical consequence of not affording a restrictive reading to 1253. All redistricting cases involve timing and all election deadlines start at different times.

This invites manipulation to create exceptions in -- under 1253 and in redistricting cases, and the exception would eat the rule.

Then turning to the merits. I think it's helpful to look at the district court's analysis of what the evidence in 2013 and all of the evidence in front of it as falling into buckets that match up with the Arlington Heights framework. And I submit to you that if you look at the district court's opinion, there's three obvious buckets of evidence that it identifies.

One relates to the 2011 redistricting plans for state house. Another is the -- an analysis of the actual motivation of the

legislature compared to its proffered -- offered justification. And third is process problems with respect to 2013 that could give rise to an inference of discriminatory intent.

I want to start with that 2011 bucket because it provides several pieces of relevant information under the Arlington Heights framework. First, the effect of a redistricting plan is, under Arlington Heights, an important place to start. And the district court made extensive findings about the discriminatory effect that the 2011 House plan would have.

And, as Mr. Hicks mentioned, the legislature knew in 2013 that the intended effect had, in fact, manifested. The -- the 2011 process and facts also provide historical evidence of discrimination, not historical evidence 10 years ago, 15 years ago.

JUSTICE ALITO: Well, has there -- has there ever been appellate review of the district court's determination -- findings as to the 2011 plan? Do you -- do you think that we should just accept those findings as givens? If you're going to place a lot of weight on

them, would we not have to review those?

MS. RIGGS: They would be subject to a clearly erroneous standard. As I understand it, Texas challenges that the review of the 2011 plans was moot. It should have never happened. But doesn't seriously contest the actual factual findings made by the district court, which were quite extensive.

And on the basis of --

JUSTICE ALITO: Well, we can ask General Keller that on rebuttal, but I didn't understand them to say that we agree that all of the findings that were made as to the 2011 plan were correct, and we don't wish to -- we -- we -- we accept them all.

MS. RIGGS: I'm certain they don't accept them. But based on 300 pages of factual findings with respect to the intent and effect of the challenged 2011 House districts, it would be very hard to challenge those findings as clearly erroneous.

I also think the 2011 evidence is properly conceived of as part of the -- the sequence of events that led up to the 2013 challenged legislation; that is, the same

people doing the same thing in 2011 as they did in 2013 can be viewed as part of the same process.

The -- the district court didn't have to issue a separate opinion with respect to the 2011 plan. They could have combined that all together as one process, and the 2011 findings -- so the 2011 findings fall under numerous Arlington Heights frameworks.

I want to spend a few minutes talking about specific districts, though, because what the district court sussed out was a troubling pattern that repeats what this Court saw last redistricting cycle from Texas. It's LULAC v. Perry all over again.

In House District 105 in Dallas County, Latino voters were 19 votes shy from electing their candidate of choice in the district. And the legislature in 2011 went to extreme lengths to protect that Anglo incumbent from being held accountable to the growing Latino population in that district. The -- the legislature carved up precincts, pulled every Anglo voter in western Dallas that it could find to pack into 105 and protect the Anglo

incumbent, and carving those same precincts pulled out every Latino and black voter from House District 105.

JUSTICE SOTOMAYOR: I'm sorry, there's -- there's a difference between pulling out Republicans and pulling out Democrats. What shows -- in protecting an incumbent, because, presumably, our law would say you can protect and incumbent if it's race -- if it's based on party lines, but if you're using just race, what findings are there to show that this was race-based as opposed to incumbency-based?

MS. RIGGS: The district court's findings were based on the fact that precincts were split. You don't have political data at the sub-precinct level, so when the legislature -- when the legislature was drawing those lines, it was only grabbing Anglo voters. It was not grabbing what it knew to be Republican voters. It was using -- it may have been using race as a proxy for partisanship, but that's certainly not acceptable either.

Likewise --

CHIEF JUSTICE ROBERTS: I'm sorry, I've lost track of the -- which districting are

you talking about with respect to 105? Was it 20 -- the 2011 or 20 --

MS. RIGGS: 2011.

CHIEF JUSTICE ROBERTS: Okay. Sorry.

MS. RIGGS: And -- and, likewise, in Nueces County, importantly, the district court didn't have all of the -- I'm sorry, I meant to say Bell County, House District 54 in Bell County. Likewise, the district court when it was making its interim ruling in 2012 didn't have all of the relevant evidence in front of it.

It had yet to hear the live testimony of Representative Jimmie Don Aycock, who drew the district in House District -- who drew House District 54 and who stated that if he had kept Killeen whole, as it had been kept whole in numerous versions of the districts before, because the population growth in Killeen had been so explosive amongst minority voters, if he left that district whole, it would be a naturally occurring minority coalition district and it would have got him unelected.

JUSTICE GORSUCH: Well --

CHIEF JUSTICE ROBERTS: Are these --

JUSTICE GORSUCH: -- what -- what are we -- sorry, go ahead.

CHIEF JUSTICE ROBERTS: Are -- are these districts that the district court in entering its preliminary map looked at? Is that your -- is that where I am on this, is that these are things that the district court changed but didn't have this additional information before it?

MS. RIGGS: The district court didn't change these districts in the 2012 interim plan, but the house interim order was only 12 pages long. It didn't get into any detail.

And, importantly, these are hard questions. It requires a delicate sussing out of the evidence to determine whether race or party predominated. And the district court didn't have all of the evidence, and that's a -- I agree with General -- it was either General Keller or Mr. Kneedler, that it is a serious thing to find that a legislature acted with invidious discrimination.

This district court was acting very carefully to make sure that it had done that proper sussing out. And, in fact, in many

places, it found that district lines were drawn for political reasons, not racial reasons. So it -- this district court knows how to do that very delicate analysis. It did it. But it followed the evidence where the evidence led it.

CHIEF JUSTICE ROBERTS: It did it -- it did it when? In the 2012 order?

MS. RIGGS: It -- it did it when it issued the 2011 opinion.

CHIEF JUSTICE ROBERTS: Okay.

MS. RIGGS: It -- between the remand to this Court on January 20th, 2012, and when the plan needed to be -- was constructed, February 28th, I don't think the court had the time or all of the evidence to do this very delicate balancing.

CHIEF JUSTICE ROBERTS: But if you're the Attorney General or -- or the -- the legislature in Texas and you want to take your best shot at a plan that will be accepted by the district court, wouldn't you take the plan that the district court drafted?

MS. RIGGS: You might take that as a starting point. And that was the advice the

Texas legislature's counsel gave it during committee meeting.

But the district court really had -- had the question before it, that, did legislature adopt the interim plan for race-neutral reasons or did it use the adoption of that interim plan as a mask for the discriminatory intent that had manifested itself just two years ago?

CHIEF JUSTICE ROBERTS: Well, who was doing the masking? The district court when it drew up the preliminary plan?

MS. RIGGS: No, the legislature in -- in invoking the adoption of the 2012 interim plan as having been a safe harbor, essentially, is the one masking. And this -- the district court is the -- is the body that is well poised to sniff out pretext and to sniff out real justification.

And a unanimous three-judge panel concluded that, in fact, the -- you know, wanting to end the litigation and adopting the interim plan was, indeed, a mask for discrimination.

CHIEF JUSTICE ROBERTS: But that's --

JUSTICE GORSUCH: Counsel, what do we do -- I'm sorry.

CHIEF JUSTICE ROBERTS: Go ahead. No, I'm done. Okay.

JUSTICE GORSUCH: All right. You -- a lot of complaints have to do with vote dilution, and that's what you've been focused on in a number of districts. But what do we do about House District 90, for example, where when the legislature sought to take into consideration some concerns along those lines, it -- it then gets attacked from the other direction as -- as discriminating on the basis of race in violation of the Fourteenth Amendment.

How is it -- how is a state supposed to balance its Section 2 obligations against the Fourteenth Amendment obligations? It seems like you're -- you're catching them on a bit of a horns of a dilemma. Is there the way through the thicket?

MS. RIGGS: There is and I think this Court's provided that guidance in recent cases as well, but -- consistent with instruction dating as far back as the '90s. To answer your

question, though, the district court found as a matter of fact that the legislature did not create House District 90 with VRA compliance in mind. They found as a matter of fact that House District 90 employed a mechanical racial target. Those are findings that are not clearly erroneous and do -- and -- and then must be affirmed.

The state -- the state can protect itself by doing the types of Voting Rights Act inquiries that this Court has seen in previous cases and in making sure that when it does use race in a predominant fashion, it does it in a narrowly tailored sense.

JUSTICE ALITO: But what is your evidence that the state adopted the plan previously approved by the court for an invidious reason?

MS. RIGGS: The evidence that the district court looked at in -- in arriving at that conclusion and -- and drawing the inference from the evidence in front of it was multi- -- multifaceted.

One was that the -- the district court -- the legislature ignored the explicit

warnings of the district court that its ruling was preliminary; it wasn't done looking. The next was that the -- it -- it had in front of it the ruling from the D.C. district court.

Now, the D.C. district court ruling didn't reach discriminatory purpose with respect to the state house case, but it noted that the -- this -- it listed a bunch of record evidence that it said would support a finding of discriminatory purpose.

It also noted that the legislature had had the advice of counsel during the legislative committee meetings and floor meetings. And -- and there I would point --

JUSTICE ALITO: The advice -- the advice of what, that it was preliminary? The original opinion was preliminary?

MS. RIGGS: So that's the particular piece of advice from that exhibit that the district court cited, but that exhibit, Joint Exhibit 15.3, contains other advice from legislative counsel, Mr. Archer, in which he explains to members of the committee that House District 54, where minority voters had been fractured, cut in half, and stranded in two

Anglo districts, might have a target on its back, and that the legislature, if it wanted to avoid being found guilty of intentional discrimination, ought to consider reuniting that -- that district.

So this is the evidence that they had in front of them. As late as May of 2013, we had a status conference in the San Antonio court, where we discussed the need for further evidence. That status conference was discussed in -- during the legislative proceedings. This is the -- the evidence before the district court in concluding that the actual motivation was, in fact, an intent to discriminate.

JUSTICE BREYER: What is the law on the -- what is the law, in your opinion, not the facts, if you assume the following: One, there is an old plan and a state legislature thinks, you know, this old plan might really have been discriminatory; I wasn't here then, I didn't do it, but I see the point.

Two, there is a judge who says this is okay, but, remember, I haven't seen all the evidence, I might change my mind, please a thousand cautions. And then we have bishops

who look into the heart of the new legislature and they discover that the reason they passed it really was because it's our best shot. You see?

Now, imagine those three facts. What's the law?

MS. RIGGS: The law is still Arlington Heights and that even though the bishops determined that there may be a motivating -- a factor that --

JUSTICE BREYER: No, they determined that's the real reason. They all voted because it's our best shot. It's our best shot to get the old plan through. See? Or some version thereof. That's it. Just thought it's the best shot. Got the fact? That's the assumption.

Now what's the law?

MS. RIGGS: So the law that I would point Your Honors to is the Guinn and Lane line of cases where when a statute is enacted and -- and struck down for being unconstitutional and then reenacted the next year, if it partakes too much of the initial constitutional infirmity, it cannot stand under the

Constitution.

I would also add, though, that wanting to end the litigation even if it's coming from a --- a good place doesn't end the constitutional scrutiny. Racial discrimination needs to be only one of the factors, not the only or sole or dominant motivating factor.

And -- and litigation strategy, wanting to win, doesn't end the constitutional inquiry. If we -- if it did, we wouldn't need Batson challenges. But more importantly, it's not that they wanted to -- it doesn't matter whether they wanted to end the litigation or not; it matters how they wanted to end the litigation. And they wanted to end the litigation by maintaining the discrimination against black and Latino voters, muffling their growing political voice in a state where black and Latino voters' population is exploding. They're poised to take over in all of these districts.

It was that intent that they wanted to muffle.

CHIEF JUSTICE ROBERTS: And that -- and that -- don't you have to suggest that that

was the intent that the district court had when it imposed the interim plan? Because keep in mind, this -- this evil intent that you're attributing comes from adopting the plan that the district court adopted and let the elections go forward under for two cycles.

MS. RIGGS: Well, the intent doesn't have to encompass any racial animus. I think the district court did the best it could with the time it had and the evidence it had.

CHIEF JUSTICE ROBERTS: Yeah, but the intent doesn't have to encompass any racial animus?

MS. RIGGS: No. Discrimination -- just -- the discrimination that would fall under the prohibitions of the Fourteenth Amendment doesn't have to come from a deep hateful place. It has --

CHIEF JUSTICE ROBERTS: Not a deep hateful place. It has to be -- doesn't it have to be racial -- intentional racial discrimination? Which sounds pretty deep and hateful.

MS. RIGGS: I -- I -- intentional racial discrimination certainly attaches where

there's a purposeful intent to keep a cohesive minority group from exercising the opportunity to elect their candidate of choice where they might otherwise have it, absent that intervention, but I don't think that's the same thing as racial animus.

Very briefly, I would like to note that regardless of what this Court does on the questions of intent, in the House case we have two districts, two claims that are independent of any intent. And one is House District 90, which I already spoke with -- about with Justice Gorsuch.

The other is the Section 2 effects claim in a Nueces County. And there the dispute boils down to a very narrow question. There's no dispute that there is racially-polarized voting and that under a totality of the circumstances Latino voters in Nueces County have been less likely -- less able to elect their candidate of choice.

The dispute comes down to under the first prong of Gingles, which just requires plaintiffs show that you can draw an additional majority Latino district, the state wants to

import an additional requirement into the first prong of Gingles that requires plaintiffs to also prove that the district is performing.

And I -- that is not consistent with this Court's recent ruling in Bartlett v. Strickland. This Court set a bright line because a bright line is helpful to the states and helpful to plaintiffs. And the plaintiffs presented a demonstrative map that had one district at 55.2 percent Hispanic citizen voting age population, and one at 59.9 percent.

JUSTICE ALITO: Well, this would be very important going forward. You want us to hold that a -- A state can satisfy its Voting Rights Act obligations by creating a district where there is a mathematical majority but that district would not perform for the election of the minority preferred candidate? Do you want us to hold that?

MS. RIGGS: No. I think what the --

JUSTICE ALITO: I thought that's what you were just saying.

MS. RIGGS: No. I think liability under Section 2, the effects test has been

proven when it has been shown that it is possible to draw two majority Latino districts.

JUSTICE ALITO: Yeah, and did the district court find that? I thought the district court did not find that you can create two performing districts in Nueces County.

MS. RIGGS: It said there was some question about whether they were actually going to be performing. It was using exogenous elections that didn't have Latino candidates in it. But this goes to the jurisdictional question, in fact.

That's an issue that still needed -- needs to be determined, and this Court can't resolve that at this stage in the case. Thank you.

CHIEF JUSTICE ROBERTS: You can have another minute if you'd like.

MS. RIGGS: The -- the only thing I would add to that, Justice Alito, is that the court said that the -- this was just the liability stage. So proving a majority Hispanic citizen voting age population at the liability stage is what gets you to the next stage.

JUSTICE ALITO: Yeah and to --
MS. RIGGS: And if you --
JUSTICE ALITO: -- and to establish liability is it not necessary to show that you could create another performing district?
MS. RIGGS: Yes. And --
JUSTICE ALITO: And did the district court find that you could do that, and is it not true that one of the plaintiff's experts found that one of these districts, if you split Nueces County in half, would not perform one time in 35 elections and the other one -- in the other, it would perform seven times in 35 elections?
MS. RIGGS: I misspoke earlier. The -- the -- proving liability is just the additional majority district. It's not performing.
Plaintiffs do believe they can draw up performing districts. They just haven't had the opportunity to present those maps yet. They -- the liability maps are something different. And a state can -- can understand that there's Section 2 liability and then engage in a meaningful debate about drawing

performing districts.

JUSTICE SOTOMAYOR: I'm sorry.

CHIEF JUSTICE ROBERTS: Thank -- please.

JUSTICE SOTOMAYOR: Was 90 a Gingles test or was it an intentional discrimination finding?

MS. RIGGS: Neither, Your Honor. It was a racial gerrymandering, a Shaw finding.

JUSTICE SOTOMAYOR: And I don't think we need to prove that fact of -- of whether you create a -- a majority or minority; is that correct?

MS. RIGGS: Right, Your Honor, just that race predominated without a compelling interest and race was not used in a narrowly tailored fashion.

JUSTICE SOTOMAYOR: So, I guess --

CHIEF JUSTICE ROBERTS: Thank -- I'm sorry. Thank you, counsel.

General, you have four minutes remaining.

REBUTTAL ARGUMENT OF SCOTT A. KELLER

ON BEHALF OF THE APPELLANTS

MR. KELLER: I'll start very briefly

with jurisdiction. You have heard plaintiffs say that they want to now modify the districts for 2018. We have already had our primary elections. And that is precisely why this Court should note jurisdiction now and resolve these issues.

I want to start and back up a bit to higher level points. There were three significant major legal errors here made by the district court. First, there was no presumption of good faith applied. You heard plaintiffs said that there was. There is no mention of a presumption of good faith. There is not even a mention of presumption of good faith in their congressional red brief.

The second major legal error was the Feeney well-accepted standard that to show intentional discrimination you must show that a legislature acted because of race with an intent to harm minorities and minority voting power.

That was not the standard applied, and this brings me to my third major legal error, which was the test applied was the wrong question. It was, was taint removed even

though there had been no finding of taint by the district court at that time.

JUSTICE SOTOMAYOR: So, why don't we remand --

MR. KELLER: And also that reversed the burden --

JUSTICE SOTOMAYOR: -- then all of this just proves to me that at best all you get is a vacate this order and send it back under the right legal test.

MR. KELLER: Well, in addition to those three major legal errors, there is also the fact that these findings were clearly erroneous.

First of all, there is no evidence, and you heard no evidence whatsoever today, that somehow the 2013 legislature was trying to mask an invidious intent that it had either carried over or not.

JUSTICE SOTOMAYOR: It's a very simple argument. You know that what you wanted to do, which was to block Hispanic voters or other voters, and -- and get certain candidates elected, that your own counsel is telling you that in those -- in certain of those districts

that's exactly what you got, and you say we want to get the district court not to change these maps, that that's enough for the three-judge panel to conclude that you wanted to put in place the discriminatory intent and effect.

That's the simple argument.

MR. KELLER: But that -- that -- that hinges completely on one Texas legislative council member, Jeff Archer. And Jeff Archer simply testified that there were preliminary findings. He said, and this is JX 15.3 at 42: "I don't think that you can say that Section 2 requires that district." That was referring to the quote my friend gave.

Jeff Archer was simply saying this case, yes, litigation will not end. And even here this is a -- it would be passing strange to find intentional discrimination in this case where there is no discriminatory effect. The only place that we could draw an additional majority/minority district is that Nueces County state house map. And you heard counsel say that they don't know if it can perform.

The maps that they presented to the

Court, their own expert, plaintiff's expert, MALC, testified and conceded that they --

JUSTICE SOTOMAYOR: Well, I have --

MR. KELLER: -- offered a map --

JUSTICE SOTOMAYOR: I have two questions. On racial gerrymandering, I don't think we've ever required a proof of effect. We have only required that you've intentionally gerrymandered --

MR. KELLER: But --

JUSTICE SOTOMAYOR: -- on the basis of race, is that correct?

MR. KELLER: And I'm referring to Nueces County. And that was a vote dilution effect claim. I'll turn to H -- I will turn to HD90 --

JUSTICE SOTOMAYOR: All right, but then -- but then just answer my question. On racial gerrymandering you don't have to prove it?

MR. KELLER: That's right, and I'll turn to racial gerrymandering in HD90, that would be the one district we did change. And, by the way, if we had changed other districts, then we would have been subjected to all sorts

of additional legal challenges which is exactly why the legislature acted in good faith in adopting the Congressional map wholesale and virtually all the State House map.

In HD90 we had the best of reasons to believe that we had a valid VRA compliance defense. In 2011 MALDEF told the legislature the district had to be drawn as majority Hispanic. In 2012 the district court adopted the previous version as majority Hispanic.

In 2013 MALC's counsel told the legislature it had to be adopted as majority Hispanic. That's JA 403 to 404a. There were title actions after that where the Hispanic candidate narrowly lost and narrowly won.

JUSTICE GORSUCH: So what room --

MR. KELLER: And in this case --

JUSTICE GORSUCH: What room is left between our VRA jurisprudence under Section 2 and the Fourteenth Amendment? What space is there?

MR. KELLER: Well, and -- and the breathing space that must be accorded is we -- we only need good reasons. And, Mr. Chief Justice, if I may answer?

CHIEF JUSTICE ROBERTS: Sure.

MR. KELLER: We do not have to have a perfect analysis ahead of time. We just need good reasons that we were trying to comply with the VRA. And take Congressional District 35, for instance.

There we had the best of reasons possible to believe that that had to be a majority/minority district because that's precisely what the district court imposed in 2012, saying that that was a valid Section 2 district. And here we are now seven years later, three trials, and two appeals to this Court.

We would ask this Court to find that the challenged districts are valid and reverse.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:38 a.m., the case was submitted.)

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