No. 17-586

IN THE

Supreme Court of the United States

GREG ABBOTT, in his official capacity as Governor of Texas, *et al.*,

Appellants,

v.

SHANNON PEREZ, *et al.*,

Appellees.

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

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The district court found that two congressional districts created by the Texas Legislature in 2011, and subsequently retained by the legislature in 2013, are legally infirm: District 35, as an unconstitutional racial gerrymander; and District 27, as an intentional and effective dilution of Latino voting rights under § 2 of the Voting Rights Act and the Fourteenth Amendment. Texas appealed and obtained a stay before the court-scheduled remedy hearing.

1. Does the Court have jurisdiction under 28 U.S.C. § 1253 to hear the State's appeal prior to entry of injunctive relief?
2. Did the district court commit clear error in carefully considering the substantial factual record of racial predominance in the drawing of District 35, or in concluding no narrowly tailored or compelling justification supported such racial predominance?
3. Did the district court properly find that District 27 violates the Fourteenth Amendment and § 2 of the Voting Rights Act by diluting Latino voting rights?

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MOTION TO DISMISS OR AFFIRM

The core of this case is not what the district court did in 2012 or whether Texas merely followed orders. The 2012 interim ruling on its face was preliminary, and Texas willfully disregarded the court's plain words. At the core of this case, instead, are the district-specific rulings in the appealed order.

Of the thirty-six congressional districts in Texas's Plan C235, the district court invalidated only two: District 27 (with Nueces County at its southern end) and District 35 (with Travis County at its northern end). The court found that District 35 is racially gerrymandered and that District 27 intentionally and in effect dilutes Latino voting rights in violation of the Fourteenth Amendment and § 2 of the Voting Rights Act ("VRA").

The crux of the ruling was that the Texas Legislature had made an illegal trade of the very sort invalidated in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).[1] Racially polarized voting is significant in Nueces County but insignificant in Travis County. Disregarding this crucial difference, the State used race as a tool to gain political advantage and minimize Latino voting strength throughout the region. To protect an incumbent preferred by Anglo voters but not Latinos, Texas traded away the § 2 rights of Nueces County Latinos, stranding them in a new Anglo-dominated District 27. It then used race to create a majority-minority district (District 35) that included 150,000 Travis County

[1] Jurisdictional Statement Appendix ("App") 112a. "[T]he State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right." App. 181a, quoting 548 U.S. at 430.

Latinos—Latinos without § 2 rights because voting in Travis County is not racially polarized. Despite the absence of this critical *Gingles* factor, the legislature claimed District 35 satisfied its obligation to create a new § 2 district in light of minority population growth. This approach allowed the legislature to achieve a twofer political goal: eliminating the Austin-based crossover district and protecting the Anglo-preferred incumbent in Nueces County. But it required sacrificing the § 2 rights of Nueces County Latinos.

The configurations of Districts 27 and 35 were established in 2011, in Plan C185—and have remained unaltered since. Contrary to the State's position, the district court's 2012 interim plan incorporating the 2011-drawn districts does not immunize them and their origins from judicial review. Districts 27 and 35 are *legislative* creations of the State that have remained constant. When the Texas Legislature embarked on the congressional redistricting task in 2011, it meticulously assigned populations to these districts—census block by census block—in a statute necessitated by the explosive growth of Texas's minority population and the resulting post-census apportionment of four new congressional seats. Exactly half of Texas's thirty-six congressional districts, including Districts 27 and 35, were created in their current form by the 2011 statute. Neither the 2012 interim map nor the 2013 legislative ratification affected them.[2] Far from being "defunct" and "never-employed," J.S. 2, the 2011 congressional redistricting statute has governed

[2] Ten of the thirty-six districts, including District 35, have the same census block assignments in the 2012 interim plan and the 2011 State-enacted plan. Another eight, including District 27, have the same assignment of populated census blocks in 2011 and 2012. Stips. 7-8, June 28, 2017 (ECF No. 1442).

half of the state in every congressional election since its adoption—including the two districts at issue here.

Texas's main argument relies on a mischaracterization of the substantive and procedural origins of the districts under review. The district court's adoption of the interim plan for the 2012 congressional elections was more judicial acquiescence than judicial order. The State itself worked behind the scenes to craft the compromise deal and then helped orchestrate its presentation to the court for adoption—leaving Districts 27 and 35 exactly as created in 2011.

The 2012 interim order was not a get-out-of-jail-free card for the State. The district court forewarned that the plan was not a final adjudication of the merits of the plaintiffs' claims, repeatedly cautioning that the State could not, and should not, treat the interim plan as the definitive word on disputed issues. This ruling was not judicial absolution to the State for legal sins buried in the plan. From the moment the court published Plan C235, Texas knew that unearthing those legal sins awaited a full trial. Two full trials later, Texas's plan has been found wanting in two districts—a result the district court warned was possible specifically with respect to Districts 27 and 35.

While Texas takes umbrage at the district court's examination of the State's discriminatory intent in drawing district lines in 2011, the court's order does not hinge on its intent finding. Rather, Districts 27 and 35 remain invalid regardless of the State's intentional violation of the constitutional and statutory rights of Latino voters—the former as a discriminatory result in violation of § 2 and the latter as a racial gerrymander in violation of the Equal Protection Clause. Texas's failure to confront—let alone dispute—

the district court's detailed factual findings with respect to these infirmities is fatal to its appeal.

The Court's jurisdiction over Texas's appeal at this stage is doubtful. But, if the Court exercises jurisdiction, it should summarily affirm the district court's declaration that Texas has violated the Constitution and the VRA in its configuration of Districts 27 and 35, then remand to the district court in time for implementation of a remedy for the 2018 election cycle.[3]

OPINIONS BELOW

Appellants acknowledge that the district court's Order on Plan C235 "incorporated the district court's prior findings of fact and order on the 2011 map," J.S. 3. Their appendix includes the district court's Order on Plan C185, *Perez v. Abbott*, 2017 WL 1787454 (May 2, 2017), *see* App. C, but omits the 742 Findings of Fact accompanying it. These findings are included in Appellees' Supplemental Appendix ("Supp.App.").

[3] Texas redistricting rulings followed this pattern in 1996 and 2006. This Court's rulings in the middle of an election year were followed soon after by district court remedial orders issued in time for that year's elections. *See LULAC v. Perry*, 548 U.S. 399 (invalidating districts); *LULAC v. Perry*, 2006 WL 3069542 (E.D. Tex. Aug. 4, 2006) (remedy); *Bush v. Vera*, 517 U.S. 952 (1996) (invalidating districts); *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996) (remedy).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Omitted from the jurisdictional statement are texts, linked below,[4] of two "statutes . . . involved in the case" under Supreme Court Rule 14.1(f): Texas's 2011 and 2013 congressional redistricting statutes. *See* Act of June 20, 2011, 82nd Leg., 1st C.S. ch. 1, 2011 Tex. Gen. Laws 5091-5180, *and* Act of June 21, 2013, 83rd Leg., 1st C.S., ch. 3, 2013 Tex. Gen. Laws 5005-5006.

STATEMENT OF THE CASE

A. An essential precondition for a viable claim under § 2 of the VRA is a pattern of racial bloc voting. *See generally Thornburg v. Gingles*, 478 U.S. 30 (1986). It is undisputed that as a general rule voting in Texas is "strongly racially polarized." App. 151a, 273a. But racial bloc voting patterns are not uniform. They differ from county to county. This is especially evident for the two districts (27 and 35) and counties (Nueces and Travis) at the center of the State's appeal. In Nueces County, voting is racially polarized, significantly so. *Id*. 111a-112a, 183a-184a. Not so in Travis County, the one place in Texas where legally significant racially polarized voting is *not* present. Supp.App. 308a, 340a, 470a (FF374, 424, 694); App. 110a, 175a, 181a. Anglos vote cohesively in every county in the state except Travis. Supp.App. 475a (FF707).

B. The 2010 census reported that Texas's population had increased by 4.2 million over the past decade. Supp.App. 457a (FF666). Minorities accounted for

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[4] 2011: http://www.capitol.state.tx.us/tlodocs/821/billtext/pdf/SB00004F.pdf#navpanes=0.

2013: http://www.capitol.state.tx.us/tlodocs/831/billtext/pdf/SB00004F.pdf#navpanes=0.

nearly 90% of the growth, 65% of it Latino. *Id*. Citizen voting age population ("CVAP") also grew significantly, while the Anglo CVAP share declined. *Id*. 459a-460a (FF671-672). Because of the growth, Texas gained four new congressional seats, increasing its delegation to 36 seats. *Id*. 34a (FF62).

C. In 2011, race was at the center of the Texas Legislature's redistricting work. The Republican-controlled legislature equated minority opportunity districts under § 2 with Democratic districts, Supp.App. 438a (FF623), was "hostile to the creation of any minority districts," and was willing to provide minority opportunities "only if they felt it was required by the VRA," *id*. 476a (FF710). The increase in districts was due to minority population growth, but the legislature decided to draw three new Anglo-controlled districts and only one new minority opportunity district. App. 326a; Supp.App. 439a (FF624).

The legislative process itself was contentious. Minority lawmakers were excluded from the redistricting process. Supp.App. 193a (FF187(B)). Their substantive amendments were tabled, while even the most minor changes requested for Anglo congressional incumbents were adopted. *Id*. 195a-197a (FF187(C)-(E)). "[N]umerous proposals . . . included a minority district in [Dallas-Fort Worth (DFW)]," but were rejected because mapdrawers considered it a "Democrat district." *Id*. 286a (FF330).

D. The statewide congressional map drawn in 2011 evidenced across-the-board efforts to minimize minority voting strength. In West Texas, mapdrawers focused yet again on micro-designing District 23, invalidated in *LULAC v. Perry*, to undermine the ability of Latino voters to elect their candidates of choice. App. 144a-146a (discussing use of "nudge

factor"). In the DFW region, the minority population was manipulated to "decrease current and future minority voting strength," and district lines "pulled strangely-shaped minority population areas out of certain districts in order to submerge them in larger Anglo populations and to reduce minority voting strength." *Id*. 400a. Mapdrawers drew these contorted districts using racial data. *Id*. 286a.

While the mapdrawers understood that the VRA compelled them to raise the number of Latino-opportunity districts from six to seven by *adding* one in the South and West Texas envelope,[5] *id*. 127a; Supp.App. 229a (FF225), they were unwilling to risk the incumbencies of two non-Latino preferred candidates, Canseco and Farenthold, App. 148a, 191a, who had unexpectedly won the 2010 election in Latino-opportunity districts in the envelope. Supp.App. 25a-26a (FF51, 52), 291a (FF341), 344a (FF435). Canseco and Farenthold were not expected to win again in their districts, which, if unaltered, would remain Latino-opportunity districts. App. 144a; Supp.App. 299a (FF356). So the mapdrawers devised a strategy to protect the new Anglo-preferred incumbents in existing Districts 23 and 27 while simultaneously adding a new Latino-opportunity district. App. 112a.

In District 23, the mapdrawers painstakingly identified precincts with high Latino presence and low Latino turnout, and then artfully manipulated district lines to increase HCVAP percentage while

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[5] The "envelope" is "the large triangular area contained by a line starting in Nueces County, running south to Cameron County, then along the Rio Grande River to El Paso County, then from El Paso County to Bexar County, then northeast to the Hays/Travis County line, and back to Nueces County." Supp.App. 294a (FF354).

excluding high turnout Latino precincts from the district. App. 106a, 145a; Supp.App. 391a (FF518). They then classified it as a Latino-opportunity district, even though it was specifically drawn to ensure that the Latino-preferred candidate would *not* win. App. 146a ("facade" of an opportunity district).

In District 27, such machinations would be insufficient to protect the Anglo-preferred incumbent. To be re-elected, he had to be switched to a district of clear Anglo dominance. Since this would eliminate a Latino-opportunity district rather than add one, the mapdrawers decided they needed to make a trade.

First, they "almost completely reconfigured" District 27 from its historic southern orientation to a northwestern one. Supp.App. 293a (FF345). This converted District 27 into an Anglo-dominated district that left the more than 200,000 Nueces County Latinos stranded without an effective voice in congressional elections. App. 110a; Supp.App. 155a-156a, 294a (FF169, 347). Next, after adding a compensatory South Texas district (new District 34, south of Nueces) to keep from losing a Latino-opportunity district in the envelope, Supp.App. 156a (FF169), the mapdrawers had to look elsewhere in the envelope to add a district so they could claim compliance with the VRA. App. 114a.

Their solution was to turn to Travis County and eliminate the existing crossover district anchored there (benchmark District 25) in which minority voters, with the help of crossover Anglo voters, were electing their congressional candidate of choice. Supp.App. 340a (FF 425). To do this, the mapdrawers split "the African American community in East Austin . . . 'to create a conduit to pick up the rest of the Hispanic population in the northwest part of 35.'" App. 168a. They then created a new Latino-opportunity district,

District 35, by roping in sizeable pockets of Latinos in Travis County—where voting is *not* polarized—and linking them along a long, narrow strip of interstate highway with other pockets of heavily Latino population on the south side of Bexar County. *Id*. 171a-174a & n.39 ("they used race as their tool"). They fractured historic minority communities in Travis County despite proposed alternatives that would have added a new Latino-opportunity district without significant divisions of Travis County. Supp.App. 329a-331a (FF406-410).

E. With § 5 of the VRA still operative and Texas a covered jurisdiction, Texas had to obtain preclearance of Plan C185. In July 2011, it filed a preclearance suit in the District of Columbia. Supp.App. 229a (FF225). Plan C185 was simultaneously under challenge in San Antonio—the court below—for infirmities alleged under the Fourteenth Amendment and § 2 of the VRA. *Id*. 148a (FF153).

These challenges were tried in September 2011, but as the 2012 election cycle opened with no preclearance ruling, the San Antonio court was forced to develop an interim plan. In November 2011, the court ordered an interim plan for the 2012 congressional elections. Texas appealed, and this Court invalidated the plan in *Perry v. Perez*, 565 U.S. 388 (2012), announcing a new standard to govern imposition of an interim plan while preclearance is pending. After *Perry*, in evaluating challenges under the Constitution and § 2, the district court had to adhere to state policies embodied in a redistricting plan "except to the extent those legal challenges are shown to have a likelihood of success on the merits," the standard applicable to preliminary injunctions, *id.* at 394, or, with respect to § 5, except to the extent there was a "not insubstantial" chance

aspects of the plan would fail to gain preclearance. *Id.* at 394-95. This Court remanded for the district court to apply this new standard.

F. The Court recognized the "exigencies caused by the impending election," *Perry*, 565 U.S. at 398, and by the time of remand, Texas was already well into its 2012 election cycle. Circumstances compelled the district court to act quickly to apply the *Perry* standards and get a new election schedule *and* interim congressional plan in place. The court pressed the parties to quickly work out a compromise on a new interim map so elections could get underway. A subset of plaintiffs negotiated a compromise with the State on an interim map, and it was presented to the district court less than a month after the *Perry* remand. App. 6a.[6] The compromise's principal changes were creation of a new district in the DFW area and an increase in District 23's HCVAP. The compromise repaired only such obvious, low-hanging fruit in the deeply flawed plan as the District 26 "'lightning bolt' extending into CD 12. *Id*. 400a.

No changes were made to Districts 27 and 35, even though they were part and parcel of the 2011 map's minimization of minority voting strength.

The State itself acknowledged the map's imperfections and limited purpose—admitting the plan is "far from perfect"—but supported it anyway as "adequate for [its] intended purpose" of allowing the 2012 elections to move forward. State Advisory at 4. It

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[6] Besides the State, the main proponents of the compromise plan were the Texas Latino Redistricting Task Force plaintiff group and Congressman Cuellar. Defendants' Advisory Regarding Interim Redistricting Plans, Feb. 6, 2012 (ECF No. 605) ["State Advisory"] at 3.

argued that "Texas voters are better served, *in the short term*, by a reasonable resolution that allows elections to go forward." *Id*. at 20 (emphasis added).

Barely a month after *Perry*'s remand, over objections from most plaintiffs, the court "accept[ed] the compromise plan," modified it for purely technical reasons, and issued Plan C235 as the interim plan for the 2012 elections. App. 368a. Districts 27 and 35 still were exactly the same as the State drew them in 2011. *Id*. 113a.

The district court expressly warned the parties that the "compromise plan" was by no means a definitive resolution of the issues, telling them that Plan C235 was only interim, "not a final ruling on the merits of any claims," and reflects only "preliminary determinations" that "may be revised upon full analysis." *Id.* 367a-368a. In allowing District 35 to remain unchanged "at this time," *id*. 415a, the court reiterated that whether it was a racial gerrymander was a "close call," *id*. 409a. The court was equally wary of its preliminary ruling on District 27, noting that the § 2 challenges were "not without merit" and that its ruling allowing District 27's interim use was only effective "at this time." *Id*. 419a. In short, Texas was on notice that the "preliminary" conclusions about Plan C235 were not the court's final word on Appellees' constitutional and § 2 claims, particularly with respect to Districts 27 and 35. *Id*. 6a (quoting 2012 interim order).

G. On August 28, 2012, the D.C. court issued final judgment on preclearance of Plan C185, unanimously concluding that "the plan was enacted with a discriminatory purpose." *Texas v. United States*, 887 F. Supp. 2d 133, 159 (D.D.C. 2012), *vacated on other grounds*, 133 S. Ct. 2885 (2013). Pointedly, the court explained that "[t]he parties have provided more evidence of

discriminatory intent than we have space, or need, to address here," *id.* at 161 n.32, and that it was "persuaded by the totality of the evidence that the plan was enacted with discriminatory intent," *id*. at 161.[7] The court further determined that Texas had violated § 5 by dismantling benchmark District 25, which, anchored in Travis County, was home to a "tri-ethnic crossover coalition" where minority voters had an opportunity to elect their congressional candidate of choice. *Id*. at 184, 190. Texas appealed.

H. With the preclearance appeal pending, the Governor called a special legislative session for the express purpose of repealing Plan C185 and adopting Plan C235. Supp.App. 231a (FF231); App. 40a. As the district court found, however, "[t]he 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." *Id*. That litigation strategy was predicated on attempting to avoid the same findings of discriminatory intent and VRA liability in the San Antonio court that had already been made by the D.C. court, and to claim a cloak of protection from the district court's preliminary approval of the interim plan to insulate the State from further liability. *Id*. 44a (State "attempting to prevent . . . relief for purposeful racial discrimination").

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[7] Such evidence included emails between mapdrawers identifying ways to create the appearance of a Latino-opportunity district without having it actually perform that way, the troubling removal of economic engines and district offices from districts represented by African-American congresspersons, and the deliberate evisceration of performing crossover District 25. *Id.* at 155-56, 160-61, 183-84.

The legislature's own attorney publicly echoed the district court's earlier warnings and advised that the legislature could not rely upon the district court's 2012 interim plan order as proof the plan complied with the VRA and Constitution. The district court, he said, had been "in a little bit [of a] tricky [position] because [it] had not made full determinations, . . . had not made fact findings on every issue, had not thoroughly analyzed all the evidence but they had to make some best case guesses . . . ." App. 43a. "[W]illfully ignor[ing] those who pointed out deficiencies," *id*. 45a n.46, including its own attorney, the legislature ratified Plan C235 on June 24, 2013.

I. The district court subsequently conducted two week-long trials, on Plan C185 in 2014, then on Plan C235 in 2017. In both, the issues as to Districts 27 and 35 were the same, because the "exact same configuration of CD35 and CD27 remains in Plan C235" as in Plan C185. App. 113a. The district court's March 2017 ruling on Plan C185 established that intentional discrimination infected the 2011 redistricting plan, describing the intentional fracturing of communities of color and race-based line drawing across the state. *See, e.g.*, *id*. 289a (in the DFW area "race was used as a proxy for political affiliation, and that this was done intentionally to dilute minority strength").

The court's August 2017 ruling on Plan C235 effectively upheld the interim map's compromise changes to District 23 and the DFW-area districts, rejecting further § 2 challenges there. But the court found differently for Districts 27 and 35, recognizing that they were integral elements of the overall discriminatory strategy employed in the 2011 plan that the district court had not had time to identify

upon preliminary review. In the appealed ruling, the district court sustained the challenges lodged since the case's beginning in 2011, summarizing the linkage of the two districts:

> Including all or most of the population of Nueces County in a southern district and in "the envelope" increases the Hispanic population available in the envelope to draw Latino opportunity districts, and makes it easier to draw HCVAP-majority districts CD20, CD23, and CD35. Including the population of Nueces County in the envelope makes it easier to draw seven Latino opportunity districts under § 2 without including Travis County.

Supp.App. 300a (FF359). In finding that the legislature's "offset" Latino-opportunity district, District 35, was an unconstitutional racial gerrymander, the court found that District 35's location "was not to address § 2 concerns, but to intentionally destroy an existing district [benchmark District 25] with significant minority population." App. 110a.

The court struck down District 35 as a racial gerrymander in both plans. *See* App. 115a ("Although Plan C235 was enacted in 2013, the decision as to which voters to include within CD35 was made in 2011, and that remains the proper time for evaluating the district."). The court found that the core black community in Austin was divided from historical communities of interest and "effectively neutered" by grouping it with a distant metropolitan area with which it did not share interests. Supp.App. 335a (FF414). It concluded that "race subordinated other redistricting principles" in Travis County, *id*. 339a, 342a (FF421, 428), where minority populations were

"fractured" and Latino voters carved out for inclusion in a new majority-minority district without any VRA justification because Anglo bloc voting in opposition to minority voter preferences is absent, *id*. 334a, 340a (FF413, 424).

As to District 27, the court found that it had been converted from a Latino-opportunity district into one where "Latino voters have no opportunity to elect their preferred candidates." App. 190a. The effect was to dilute the voting strength of the more than 200,000 Nueces County Latinos stranded in the district. *Id*. 191a. And the choice was purposeful, made "to protect an incumbent who was not the candidate of choice of those Latino voters." *Id*. After the Plan C235 trial, the court found that this discriminatory intent "carr[ied] over" to the 2013 adoption of identical district lines, "purposefully . . . depriv[ing] plaintiffs of any remedy." *Id*. 46a, 116a.

ARGUMENT

I. THE COURT DOES NOT HAVE JURISDICTION OVER THE STATE'S APPEAL UNDER 28 U.S.C. § 1253.

This Court has no jurisdiction to entertain Texas's premature appeal because the district court has not ordered injunctive relief. Under 28 U.S.C. § 1253, appeals to this Court from three-judge district courts may only occur "from an order granting or denying . . . an interlocutory or permanent injunction." There has been no such injunction here, as made clear in both the order on appeal, *see* App. 119a, and the court's subsequent order denying Texas's motion for stay pending appeal, *see* Text Order, Aug. 18, 2017) (ECF No. 1538).

"This Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be

narrowly construed since any loose construction of the requirements of (the Act) would defeat the purposes of Congress to keep within narrow confines our appellate docket." *Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (citation and internal quotation marks omitted); *see also Bd. of Regents of the Univ. of Texas Sys. v. New Left Educ. Project*, 404 U.S. 541, 545 (1972) (reiterating that § 1253 "is to be strictly construed"). "That canon of construction must be applied with redoubled vigor when," as here, "the action sought to be reviewed . . . is an interlocutory order of a trial court. In the absence of clear and explicit authorization from Congress, piece-meal appellate review is not favored." *Goldstein*, 396 U.S. at 478.

Indeed, this Court has specifically held that it lacks jurisdiction where three-judge courts acknowledge a party's eventual entitlement to injunctive relief but delay its entry. *See Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383, 390 (1970) ("Because the District Court has issued neither an injunction, nor an order granting or denying one, . . . we have no power under § 1253 either to remand to the court below or deal with the merits of this case in any way at all.") (internal quotation marks omitted).

Here, the district court declared that Texas's congressional plan violates § 2 of the VRA and the Constitution, and indicated that those violations must be remedied, while declining to enter an injunction. App. 118a. As in *Gunn*, this Court has no power to "deal with the merits of this case in any way at all" until the district court enters an injunction. 399 U.S. at 390. Recognizing a right to relief and granting relief fall on opposite sides of § 1253's jurisdictional divide.

Texas's Jurisdictional Statement does not cite, much less discuss, a single § 1253 opinion. Instead,

Texas seeks refuge in a different provision—28 U.S.C. § 1292(a)(1)—which governs appeals from grants or denials of injunctive relief to circuit courts. Texas's only jurisdictional argument is that § 1253 should be given the same interpretive gloss for finding the *grant* of an injunction that *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), gave § 1292(a)(1) for finding the *denial* of an injunction. Texas's § 1292(a)(1)-based argument fails on several fronts.

First, § 1292(a)(1) by its own terms does not apply to instances where "direct review may be had in the Supreme Court." The strict construction rule applicable to the Court's jurisdiction under § 1253 has never applied to orders appealed to circuit courts under § 1292(a)(1). While circuit courts' sole function is to entertain direct appeals, Congress intended that the Supreme Court's appellate docket must be "narrow[ly] confine[d]" because of the Court's other, primary duties. *Goldstein*, 396 U.S. at 478. It makes little sense, therefore, to extend *Carson*'s framework to § 1253.

Second, even if *Carson* did apply to appeals pursuant to § 1253, its requirements are not satisfied. Texas contends that the order below has the "practical effect" of "preventing the State from conducting congressional elections under its duly enacted redistricting plan" because it noted that the violations "must be remedied," ordered Texas's counsel to provide notice of whether the legislature will be called into session to cure the violations (and, if so, when), and set a hearing to consider remedial maps if the State declined the legislative remedy option. J.S. 12-13. But setting a hearing to determine when and how to remedy violations falls squarely within the district court's "inherent authority to manage [its] dockets and

courtrooms with a view toward the efficient and expedient resolution of cases." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016). Even a request for submission of proposed remedial plans is not an appealable injunction under § 1292(a)(1). *See* 16 Wright & Miller, Federal Practice and Procedure § 3922.2 (3d ed. 2012) ("orders that the parties prepare plans for injunctive relief" ordinarily not appealable under § 1292(a)(1)).[8]

Texas's suggestion, moreover, that a remedial hearing is equivalent to an injunction ignores all-important details about the nature, scope, and timing of the remedy. Indeed, the question of *when* a remedy should take effect is a point of recurring contention in the remedy phase of election cases. *See, e.g.*, *North Carolina v. Covington*, 137 S. Ct. 1624 (2017); *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006). Remedy proceedings precede remedy orders precisely to consider these critical issues. As things stood after the August order (and as they stand now after this Court's stay), the "practical effect" of the liability ruling is unknown and unknowable.

Texas's argument that the additional two *Carson* requirements are satisfied likewise fails. The order has "serious, perhaps irreparable, consequences," Texas says, "because it invalidates two congressional districts and compels the State to redraw the congressional map." J.S. 14. The first point is nothing more than a claim that § 1253 gives the Court jurisdiction over appeals from liability rulings—a claim this Court has

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[8] These principles undoubtedly are the basis for the Court's reiteration of the limits of appellate jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1) in the voting rights context: "We have long held that an order resolving liability without addressing a plaintiff's request for relief is not final." *Riley v. Kennedy*, 553 U.S. 406, 409 (2008).

expressly rejected. The second point simply reflects the truism that constitutional and statutory violations require a remedy. That fact on its own—absent an actual remedy—hardly satisfies *Carson*'s standard for § 1292(a)(1) jurisdiction.

Exercising jurisdiction over the State's appeal cannot be squared with the historical understanding of § 1253's limits. The Court should dismiss the appeal as promptly as reasonably possible and allow the district court to proceed to the remedial phase.

II. THE DISTRICT COURT'S PRELIMINARY RULING DOES NOT CLOAK THE STATE WITH LEGAL IMMUNITY FOR 2011 ACTIONS REPEATED IN ITS 2013 LEGISLATION.

The district court's invalidation of Districts 27 and 35 in Plan C235 was based on extensive factual findings regarding those same districts in Plan C185. App. 14a n.13. Rather than dispute those findings, Texas sidesteps them entirely, relying on a carefully-staged disappearing act. It argues that what the legislature actually did—and intended to do—when it drew those districts in 2011 is of no consequence because of subsequent events in 2013. J.S. 15-25. But the only action the legislature took in 2013 with respect to Districts 27 and 35 was to reaffirm and ratify the illegal lines it drew two years earlier.

Texas's defense is unprecedented, boiling down to this putative rule: a legislature that successfully masks its discriminatory motives during preliminary injunction proceedings can forever preclude the court from finding liability by simply repealing and

reenacting its law—shifting the responsibility for its creation from the legislature to the court.

Ample authority shows the opposite to be true. The Court only recently explained the characteristics of preliminary rulings in terms contradicting Texas's argument:

> Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents. *The purpose of such interim equitable relief is not to conclusively determine the rights of the parties*, but to balance the equities as the litigation moves forward.

Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (emphasis added) (citations omitted). This echoes decades of precedent establishing that a preliminary injunction ruling has limited significance for the ultimate disposition of a claim.

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.

Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (citations omitted); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985) ("any conclusions reached at the preliminary injunction stage are subject to revision"). Texas's gambit of claiming safe harbor in the district court's preliminary ruling "improperly equates 'likelihood of success' with 'success,' and . . . more important . . . ignores the significant procedural differences between preliminary and permanent injunctions." *Camenisch*, 451 U.S. at 394.

Texas can hardly feign surprise that preliminary court rulings cannot be used to estop constitutional claims. Not only did the legislature's own lawyer caution against this shell-game strategy for hiding the State's unconstitutional conduct in 2013,[9] but also the district court expressly told Texas that its interim ruling was "not a final ruling on the merits of any claims asserted by the Plaintiffs in this case." App. 367a. Texas's boast that it simply "took the district court at its word," J.S. 11, is an empty one. The district court's "word" to Texas was that the interim plan ruling contained only "preliminary determinations" for one election cycle that "may be revised upon full analysis." App. 367a-368a. The State paid no heed.

Hunter v. Underwood, 471 U.S. 222 (1985), further undercuts the State's effort to make the 2011 creation of Districts 27 and 35 disappear behind the 2013 legislative curtain. In *Hunter*, plaintiffs challenged

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[9] Texas makes the unsupported assertion that the 2013 legislature continued to use some Plan C185 districts "only because" of the district court's preliminary 2012 ruling that they likely were not illegal. J.S. 18. The district court made no such finding. Rather, it found that the 2013 ratification was a litigation strategy, not deference to the court. App. 40a.

a 1901 Alabama constitutional provision as racially discriminatory. Alabama argued that the amendment's original invidiousness had been diluted over subsequent decades to the point that it was no longer intentionally discriminatory. *Id*. at 232-33. The Court unequivocally rejected that argument and struck down the law on equal protection grounds, explaining that the provision's "original enactment was motivated by a desire to discriminate against blacks on account of race and . . . continues to this day to have that effect." *Id*.

This case is indistinguishable. At the beginning of the decade, Texas enacted a redistricting plan riddled with discriminatory intent. While judicial intervention mitigated *some* of the discriminatory effect flowing from that improper intent, acquiescing to that limited and preliminary judicial intervention by enacting Plan C235 does not erase the intent with which Districts 27 and 35 were enacted or do anything to correct how that intent continued to produce the same effect in those districts in 2013 and beyond.

Technical canons of statutory construction buttress *Hunter*'s application. Districts 27 and 35 are, after all, *statutory* provisions, originally included as Sections 27 and 35 in Article II of the State's 2011 congressional redistricting bill. *Supra* n.4. Plan C235's ratification in 2013 effectively re-adopted these original sections of the 2011 legislation, embedding them in the 2013 statute. "Where there is . . . a repeal and a re-enactment of a portion of [an existing statute], the re-enactment neutralizes the repeal so far as the old law continued in force. It operates without interruption where the re-enactment takes effect at the same time." 1 J.G. Sutherland, Statutes and Statutory

Construction § 238 (2d ed. 1908) (cited with approval, *Hassett v. Welch*, 303 U.S. 303, 314 & n.17 (1938)).

Texas's insinuation that the 2011 configurations of Districts 27 and 35 "no longer existed" once they became part of Plan C235, J.S. 27, is transparently wrong. They have been used in Texas elections continuously since their adoption in 2011. A challenged statute does not become moot just because it is voluntarily repealed (and reenacted, unchanged) in the middle of a lawsuit. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 n.10 (1982). Here, the legislature not only left open the possibility that it *might* re-enact the 2011 redistricting statute, it effectively *did* re-enact that statute with respect to Districts 27 and 35.

In short, the Court should not sanction Texas's gaming of the judicial process. When the legislature decided to re-enact Districts 27 and 35 in 2013, aware that they had only been approved under a preliminary injunction standard, it assumed the risk that the districts might not withstand full scrutiny.

III. THE DISTRICT COURT'S FINDING OF INTENTIONAL DISCRIMINATION IS NOT ERRONEOUS.

Unable to hide behind its 2013 ratification of identical district lines, Texas's argument against the district court's finding of intentional vote dilution in District 27 all but evaporates.

Nueces County has 206,000 Latinos, 133,370 of them eligible to vote. Supp.App. 294a (FF347). Voting there is highly racially polarized. *Id.* 300a (FF358). The district court found that Texas intentionally diluted the voting rights of Nueces County Latinos when it stranded all of them in reconfigured District 27 for the specific purpose of ensuring that they would

be in an Anglo-dominated district where they would "have no opportunity to elect their preferred candidates." App. 190a. The court meticulously worked through the extensive trial evidence, Supp.App. 287a-300a (FF335-359), to determine that the legislative flip of District 27 from Latino-opportunity to Anglo-dominated meant that the more than 200,000 Latinos in Nueces County "who had been in an opportunity district were no longer in such a district." *Id*. 299a-300a (FF357). The court found that this was by legislative design and happened not because the legislature wanted these Latino voters to have influence in District 27 or because their rights could not be accommodated without sacrificing other voters' § 2 rights, but because they would not vote for the newly elected Anglo Republican incumbent. App. 111a. This, the court found, "intentionally deprived [Nueces County Latino voters] of their opportunity to elect a candidate of their choice." *Id*. 116a. The 2013 ratification continued the violation, "purposefully intending to deprive plaintiffs" of their § 2 rights. *Id*. In short, by leaving District 27 intact in 2013, the legislature ratified its previous purposeful vote dilution on racial grounds.

The district court's findings of intentional racial discrimination in District 27 must be accepted unless clearly erroneous. *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982). All Texas offers is the assertion that the district court reached its finding of purposeful discrimination by doing nothing more than "infer[]" intent from the "mere fact" that the legislature knew it was moving District 27 out of the opportunity district column. J.S. 30. But the court did much more than that. It marched through the facts, demonstrating that the deliberate choice from the beginning was

to isolate Nueces County Latinos in a congressional district where they had no meaningful electoral say—all the while seeking cover in the intentional racial carve-up of Travis County to help create District 35.[10]

Texas's argument provides nothing to show how this conclusion was erroneous, much less clearly so. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) ("A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern.") (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). This longstanding rule of deference is surely applicable here, where the district court's ultimate conclusion of discriminatory intent came after it heard weeks of testimony and made credibility determinations of multiple decisionmakers central to the design of the challenged districts. *See id.* at 1478 ("A choice to believe 'one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence,' can 'virtually never be clear error.'") (quoting *Anderson*,

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[10] The court found that District 35's location "was not to address § 2 concerns, but to intentionally destroy an existing district with significant minority population." App. 110a. The dismantled crossover district, benchmark District 25, was created by the district court in 2006 on remand from *LULAC v. Perry*. Supp.App. 426a, 428a (FF 583, 593). Plaintiffs challenged the destruction of benchmark District 25 based on the plurality opinion in *Bartlett v. Strickland*, 556 U.S. 1 (2009), which warned that redistricting lines purposefully drawn to "destroy otherwise effective crossover districts" would raise serious Fourteenth Amendment concerns. *Id*. at 24. Because it found that District 35 is a racial gerrymander, the court did not reach the *Bartlett* intentional vote dilution claim. App. 110a-111a n.83. But the intentional destruction of this crossover district was intertwined with the District 35 racial gerrymander. *Id*. 172a n.38 (State used District 35 to "justify its destruction" of benchmark District 25).

470 U.S. at 575). The finding of intentional vote dilution as to District 27 should stand.

IV. REGARDLESS OF DISCRIMINATORY INTENT, DISTRICTS 27 AND 35 ARE UNLAWFUL.

While Texas challenges the notion that its 2011 intent in drawing Districts 27 and 35 bears on its 2013 reenactment of those identical districts, it admits that "discriminatory *effect* may be carried over (whether intentionally or unwittingly) from one version of a law to another." J.S. 17. This concession is damning given the district court's express finding that the "the racially discriminatory intent *and effects* that it previously found in the 2011 plan[] carry over into the 2013 plan[] where those district lines remain unchanged." App. 117a (emphasis added). Even were the State's discriminatory intent filtered out by the adoption of a different bill number effectuating identical district lines, Districts 35 and 27 are still invalid based on the district court's detailed findings with respect to their ongoing discriminatory effects.

In the Plan C185 order, the district court determined that "Defendants' decision to place Nueces County Hispanic voters in an Anglo district [District 27] *had the effect* and was intended to dilute their opportunity to elect their candidate of choice" in violation of § 2 of the VRA. App. 194a (emphasis added). It further found that District 35 is a racial gerrymander in violation of the Equal Protection Clause, as "Defendants' decision to place majority-HCVAP CD35 in Travis County" was effectuated through race-based means and not justified by a compelling state interest. *Id.* As a result, "[t]he configurations of . . . CD27[] and CD35 in Plan C185 are . . . invalid." *Id.* 195a. Regardless of Texas's

discriminatory intent in drawing these districts in 2011 or its continued embrace of them in 2013, those "exact same configuration[s]" remain in place, *id*. 113a—and remain invalid—in Plan C235.

A. District 35 Remains a Racial Gerrymander.

The district court found that race predominated over traditional districting principles in "the drawing of district lines and selection of district population" in District 35 under Plan C185. App. 166a; Supp.App. 328a-329a (FF405). Those "district lines" remain unchanged in Plan C235, and the same "district population" suffers from the State's unjustified race-based classification. App. 164a n.31 ("The harm flows from being 'personally . . . subjected to [a] racial classification,' not from vote dilution or intentional discrimination.") (quoting *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015)). The district court's assessment of District 35 is owed "significant deference." *Cooper*, 137 S. Ct. at 1464.

The district court's racial gerrymandering finding, moreover, did not hinge on the State's discriminatory intent. The district court correctly noted that "[d]iscriminatory purpose is not an element of a *Shaw* type claim." App. 37a n.36 (referring to *Shaw v. Reno*, 509 U.S. 630 (1993)). *See Covington v. North Carolina*, 316 F.R.D. 117, 124 n.1 (M.D.N.C. 2016) ("In reaching this conclusion [that race predominated], we make no finding that the General Assembly acted in bad faith or with discriminatory intent in drawing the challenged districts."), *aff'd* 137 S. Ct. 2211 (2017). That analysis comports with this Court's articulation of the racial predominance standard as one which examines the use of race in the placement of voters in various districts. *Alabama*, 135 S. Ct. at 1271 ("[T]he

'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominantly uses race as opposed to other, 'traditional' factors when doing so."); *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995). It is the race-based placement of voters without a strong basis in evidence for doing so, rather than any intent to discriminate through vote dilution, that defines a *Shaw* claim.

The district court's conclusion that race predominated in the drawing of District 35 rests on undisputed evidence about the ways mapdrawers *effectuated* their intent to destroy an existing crossover district by creating a majority-Latino district snaking its way through Travis County to capture Latino voters. For instance, the district court highlighted several egregious precinct splits, "including the Precinct 433 split to divide St. Edward's University to place the dorms (with large Hispanic student population) into CD35, while placing the administration building in CD21, and the Precinct 440 split to include an arrowhead shape containing the Riverside apartments (a more Hispanic population) within CD35." App. 167a. Because only racial data, not political data, is available below the precinct level, Supp.App. 486a (FF732), this evidence establishes that race predominated over politics in drawing District 35. *See Bush v. Vera*, 517 U.S. 952, 970-71 (1996) (highlighting "split[] voter tabulation districts" in light of the fact that "the districting software used by the State provided only racial data at the block-by-block level" as "objective evidence" of racial predominance). The district court further found that the "squiggle" at the northern part of District 35 grabbed population that is 90-100% Latino. App. 167a. Indeed, "[t]he CD35 district lines in Travis County do not match up with any

city boundaries, with House districts, or with any recognizable communities of interest other than race." *Id.* 168a. The southern portion of the district, moreover, consistently includes "areas with high percentages of Hispanic residents and voters and exclude[s] less Hispanic areas." *Id.* 168a. The end result of this race-based carving of voters from north central Austin to south San Antonio is a district that remains the least compact congressional district in the state. *Id*. 110a n.83, 162a.[11]

These are objective, undisputed facts about the placement of "a significant number of voters within or without" District 35 under Plan C185, *Miller*, 515 U.S. at 916, and the same placement of voters within and without District 35 under Plan C235. Texas does not even attempt an argument that race did not predominate in the drawing of District 35 or that the district court's factual findings are clear error.

When, as here, race predominates, the burden shifts to the State to demonstrate that the district's configuration was narrowly tailored to a compelling government interest. *Cooper*, 137 S. Ct. at 1464. Texas falls well short of its strict scrutiny burden here.

Texas's principal substantive argument in defense of District 35's race-based configuration is that the district court's interim map did not alter it. J.S. 33-34. But as set forth above, *supra* Part II, the district court specifically warned the State *not* to rely on its "preliminary determinations." The abundant caveats accompanying the interim plan provided Texas no legal *or* factual basis, let alone a "strong basis in

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[11] While it did not reach the question, the district court was "inclined to find that CD35 is not compact for § 2 purposes." App. 175a.

evidence," *Alabama*, 135 S. Ct. at 1274, to believe that § 2 required District 35's configuration.

Texas also seeks refuge in the district court's conclusion that § 2 required the creation of seven Latino-opportunity districts in South/West Texas. But just as in 2011, while the 2013 legislature "may have had a strong basis in evidence for believing" this undisputed fact, it "had no basis in evidence to believe that the *Gingles* preconditions were satisfied in Travis County such that a race-based majority-Hispanic district should be drawn there." App. 176a. As the district court found—and Texas does not dispute—"Travis County does not have Anglo bloc voting and thus does not meet the third *Gingles* precondition, *which mapdrawers knew*[.]" *Id*. 110a (emphasis added). Like the district court, this Court should reject Texas' invitation to bless its drawing of any old race-based district in any old configuration in purported service of § 2. While § 2 certainly mandates the creation of at least seven majority-minority districts in South/West Texas, Texas had no basis to believe—either in 2011 or in 2013—that § 2 mandated the creation of this particular version of District 35.

The district court was clear that "passage of time or the re-enactment of a plan including the identical district does not typically change any facts concerning which voters were placed within or without the district when it was drawn, unlike discriminatory intent, which can change over time." App. 38a n.36. The race-based placement of voters in District 35 has remained since 2011, and those voters continue to suffer constitutional injury with every ballot cast regardless of Texas's intent in the intervening years.

B. CD27 Violates the § 2 Results Test.

The district court expressly found that "the Legislature violated § 2 *in both result and intent*" in its configuration of District 27. App. 112a (emphasis added). With respect to Plan C185, the court found that "Plaintiffs demonstrated that approximately 200,000 Hispanic voters in Nueces County (a majority-HCVAP county) had a § 2 right that could be remedied but was not." *Id*. 181a. Those voters' § 2 right did not disappear by 2013. Those same Nueces County Latinos still have a § 2 right unremedied by Plan C235. *Id*. 117a. Thus, regardless of the motivation of either the 2011 or 2013 legislatures, the discriminatory impact on Latino voters in Nueces County who have been unlawfully deprived of the equal opportunity to elect their candidates of choice is still present in District 27.

Texas argues that the district court erred in finding a § 2 effects-based violation in District 27 and Nueces County. J.S. 29-30. According to Texas, since no more than seven Latino-opportunity districts could be created in the South and West Texas envelope, and since Plan C235 creates seven Latino-opportunity districts there, the first prong of the *Gingles* § 2 test has not been satisfied. *Id*. Appellees and the district court both agreed that seven Latino-opportunity districts are required in the area. App. 112a. But that conclusion is the beginning, not the end, of the § 2 inquiry.

Texas's argument falters because it fails to account for the invalid racial gerrymander of District 35. Once that constitutional violation is unraveled, removing the Travis County Latinos that were gerrymandered into the district, a Latino-opportunity district still must be established somewhere in the envelope to

replace it. This means that Nueces County and its large Latino population must be pulled back into the envelope in order to meet the State's § 2 obligation of having seven Latino-opportunity districts there. *See* Supp.App. 300a (FF359) ("Including the population of Nueces County in the envelope makes it easier to draw seven Latino opportunity districts under § 2 without including Travis County.").

This is the very thing Texas chose *not* to do when it designed Districts 27 and 35. It took Nueces County Latinos who had a § 2 right and put them in an Anglo-dominated district where their rights could not be exercised. In exchange, Texas carved up Travis County racially, placing nearly 150,000 Travis County Latinos in District 35, even though they did not have a § 2 right. In short, it engineered a trade that took § 2 rights from those having them and gave those § 2 rights to those who did not have them. *LULAC v. Perry* holds that such a trade is itself a § 2 violation.

> The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others. . . . [T]hese conflicting concerns are resolved by allowing the State to use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated.

548 U.S. at 429.[12] "Simply put, the State's creation of an opportunity district for those without a § 2 right

[12] The State's own expert equated Plan C235's treatment of Nueces County Latinos in District 27 with the treatment of

offers no excuse for its failure to provide an opportunity district for those with a § 2 right." *Id.* at 430. Yet, this is the very thing the district court found that the State did. App. 190a (finding *Gingles* factors satisfied in challenge to District 27).

Even though the district court's invalidation of District 27 expressly relied on *LULAC v. Perry*'s disapproval of unbalanced § 2 trade-offs, App. 181a, Texas does not cite *LULAC* in its defense of District 27, or so much as address the issue of trading off § 2 rights. Texas's failure to confront—let alone dispute—the basis for the district court's § 2 effects ruling is fatal to its appeal of the § 2 invalidation of District 27. "Under § 2, the State must be held accountable for the *effect* of [its] choices in denying equal opportunity to Latino voters." *LULAC*, 548 U.S. at 441-42 (emphasis added).

Webb County Latinos in District 23 in the plan invalidated in *LULAC v. Perry*. App. 182a.

CONCLUSION

The Court should dismiss the appeal for lack of jurisdiction or summarily affirm the Plan C235 order. It then should lift the stay and remand to the district court for further proceedings.

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