No. 17A225

In the Supreme Court of the United States

GREG ABBOTT, in his official capacity as Governor of Texas; ROLANDO PABLOS, in his official capacity as Texas Secretary of State; and the STATE OF TEXAS,
Applicants,

v.

SHANNON PEREZ, et al.,
Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OR INJUNCTIVE RELIEF PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rule

Other Authority

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

The plaintiffs' response confirms that the relevant question is not whether this Court will review the district court's counterintuitive conclusion that the Texas Legislature engaged in intentional racial discrimination when it adopted the district court's remedial maps as its own. The only questions are *when* this Court will review that extraordinary ruling and under what time pressures. Plaintiffs would have this Court wait several weeks for the district court to draw its third set of judicial remedial maps this decade and then have the parties seek expedited judicial review of both the invalidation of the Legislature's 2013 map and the validity of the newly drawn 2017 judicial map on a timetable that would guarantee disruption of the electoral and appellate processes. There is a better way. This Court can make clear that the 2018 elections should take place under the same map that has governed the last three congressional election cycles. This Court can then engage in orderly review in the ordinary course. If, as seems overwhelmingly likely, the district court's perception of intentional racial discrimination in the Legislature's adoption of a judicial remedial map is overturned, massive disruption to the normal electoral and appellate processes will be avoided. And in the unlikely event that the decision is affirmed after plenary review in the ordinary course, the 2018 election will still have proceeded under a judicially-approved map (albeit one approved in 2012, rather than in late 2017), and a refined remedial map can be put in place well in advance of the next election cycle without the need for imposing 72-hour deadlines on the State.

Plaintiffs suggest that the time pressures are artificial, but their attempts to denigrate the Secretary of State's October 1 deadline are baseless. The State has steadfastly apprised the district court of that deadline (without objection from plaintiffs), and the district court has recognized the reality of this deadline by putting the Governor on a 72-hour deadline to recall the Legislature and urging the parties to continue preparations for new maps despite this Court's temporary stay. Plaintiffs' disregard for the October 1 deadline reflects their broader lack of concern for the State's sovereignty and the difficult and time-consuming tasks required of local officials who bear most of the responsibility for running elections. Plaintiffs cannot deny that the need for appellate review can disrupt the election cycle, as it did when this Court's emergency review was needed to vacate the district court's first attempt at drawing maps in 2012. Nor can they deny the reality that if this Court does not order relief now, disruption of both the electoral process and the ordinary appellate process is virtually guaranteed. The parties will be back here in a few weeks under much tighter deadlines, and the root cause of the problem will still be the district court's erroneous invalidation of the 2013 Legislative map, which will still need to be reviewed (and will likely be reversed) by this Court.

Plaintiffs resolutely ignore the true cause of the current dilemma: The district court took four years to issue an advisory opinion on 2011 redistricting plans that never took legal effect. The State consistently urged the district court to move on to claims against plans that were actually used to conduct elections. The district court repeatedly refused. When the district court finally got around to addressing the

judicially crafted, legislatively endorsed plans that have governed the last three election cycles, the court reached an erroneous conclusion on a timetable that forced it to impose absurd 72-hour deadlines on the Governor and that will inevitably create massive disruption absent this Court's timely intervention.

ARGUMENT

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL NOTE PROBABLE JURISDICTION.

It is now abundantly clear that the district court has not only invalidated the Legislature's 2013 enactment of the court's remedial maps, but has precluded their use in the 2018 elections, and intends to enter its third set of court-ordered redistricting plans this decade on a schedule that will frustrate this Court's appellate review. The district court is so intent on moving forward with drawing its own maps for the 2018 elections that, quite remarkably, less than two hours after the Circuit Justice issued a temporary stay based on this application, the district court issued the following *sua sponte* "Advisory":

> This Court recognizes the effect of the temporary stay entered by the Circuit Justice, but sees nothing in the order that would prohibit the parties from voluntarily exchanging their proposed remedial maps, conferring, and attempting to reach an agreement or understanding on certain aspects of the remedial maps so that in the event the stay is vacated by the Supreme Court this matter may be resumed expeditiously.

App. Q.

The plaintiffs implicitly concede—as they must—that the district court has not only invalidated Plan C235 but precluded its use in the upcoming election cycle, and that the foregone conclusion of the remedial hearing is a redrawn congressional map

and a final order later this year from which Texas could appeal. *See, e.g.*, Resp. 1, 17. Indeed, there is absolutely no reason for the district court to rush to redraw maps (to the point of giving the Governor just 72 hours to recall the Legislature and issuing an "Advisory" inviting the parties to ignore this Court's temporary stay) unless the district court is set on blocking the State from using its existing maps for the 2018 elections. After all, if the district court were not blocking the State from using the existing maps for 2018 elections, then it would be required by this Court's precedent to give the Legislature a decent interval to fix any possible defects before the district court imposed the third court-ordered map this decade. *See Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978) (principal op.). But the district court gave the Governor only 72 hours to decide whether to call the Legislature into a special session, eliminating all doubt that the court will be drawing its own maps with the intent that they, and not the 2013 map enacted by the Legislature, will govern the 2018 elections.

There is thus no question that this Court will review the issues presented by the district court's order invalidating the 2013 map on direct appeal; the only questions are when and under what time pressures. The plaintiffs contend that this Court is powerless to order relief allowing orderly review because the district court did not use the magic word "injunction" when invalidating the maps and ordering an expedited judicial redrawing of the State's maps. Resp. 12. But as *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981), instructs, magic words are not a prerequisite to this Court's jurisdiction. Instead, this Court's appellate jurisdiction turns on the "practical effect" of the lower court's order. And here the district court's order has the

undeniable effect of an injunction precluding the use of Plan C235 in the upcoming election cycle, as it invalidates two congressional districts, states that these violations "*must* be remedied," and sets an expedited remedial hearing at which the court will redraw Texas's congressional map. App. A. at 105-06.[1]

The practical effect of the district court's order is indistinguishable from that of the orders stayed in *Gill v. Whitford*, 137 S. Ct. 2289 (2017), and *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers)), both of which invalidated existing maps and ordered the legislature to create new ones. The plaintiffs tellingly do not even attempt to identify anything that differentiates those orders from this one; instead, they try to dismiss those cases as involving "explicit" injunctions. Resp. 14, n.9. But that just resists *Carson*'s conclusion that there is no magic-words test. What matters is the practical effect of an order, and the practical effect of this order is no different from the practical effect of numerous orders that this Court has treated as appealable (and stayed) in the redistricting context.

Unable to answer these on-point redistricting precedents, the plaintiffs resort to analogizing the district court's order to one in a pre-*Carson*, non-redistricting case that this Court dismissed for lack of jurisdiction. Resp. 15 (citing *Gunn v. Univ. Comm. to End War in Vietnam*, 399 U.S. 383 (1970)). But the starkly different facts and reasoning in *Gunn* only underscore why the district court's order *is* appealable

[1] Whether or not the district court's directive to prepare for remedial hearings is itself an appealable injunction, *see* Resp. 15-16, that directive demonstrates that the district court has already precluded the use of C235 in the upcoming election. The plaintiffs' hyperbolic contention that "routine scheduling orders would become immediately appealable injunctions" under the State's view, Resp. 16, is incorrect.

here. *Gunn* reasoned that "[o]ne of the basic reasons for the limit in 28 U.S.C. § 1253 upon [the Court's] power of review is that until a district court issues an injunction, or enters an order denying one, it is simply not possible to know with any certainty what the court has decided—a state of affairs that [was] conspicuously evident" in that case because the order appealed from was unclear as to what "was to be enjoined," "against whom" the injunction would run, and whether "all the provisions of the statute" were to be enjoined. *Gunn*, 399 U.S. at 388. Here, by contrast, the district court's August 15, 2017 order could not have more clearly answered these questions: it blocks the State of Texas from using the legislatively-enacted Plan C235 in the 2018 congressional elections.[2] The exact contours of the latest judicially imposed remedial map that will replace the legislatively endorsed 2013 map have little bearing on the reality that the district court has definitively invalidated Plan C235 and foreclosed Texas from using it in the 2018 election cycle.

In all events, whether the district court's invalidation of Plan C235 is appealable right now is ultimately beside the point, as there is no dispute that it will be appealable to this Court at some point. For purposes of this application, that is all that matters, as this application is about *interim* relief pending orderly appellate

[2] The plaintiffs contend based on *Gunn* that *Carson*'s practical effect test does not apply to appeals under §1253. Resp. 13-14. But that argument is easily disposed of: *Gunn* has nothing to say about the applicability of *Carson* to §1253 because it was decided *before Carson* and did not involve a district court order that was the functional equivalent of an injunction. Similarly, the plaintiffs' argument that *Carson* does not apply because "jurisdiction under the Three-Judge Court Act is to be narrowly construed," Resp. 12 (quoting *Goldstein v. Cox*, 396 U.S. 471, 478 (1970)), is easily dismissed given that *Carson* itself addressed a statute (§1292(a)(1)) that must be "construed . . . narrowly," *Carson*, 450 U.S. at 84.

review on the merits, and the Court plainly has the power under the All Writs Act, 28 U.S.C. §1651, to enter interim relief to preserve its appellate jurisdiction regardless of whether that jurisdiction has been perfected at this point. Sup. Ct. R. 20.1 (the Court may issue orders "in aid of [its] jurisdiction"). The need for the Court to exercise that power here is equally plain. Absent interim relief, the State will suffer irreparable injury before this Court can review the district court's decision on the merits, and this Court will effectively be deprived of the ability to remedy the harm that the decision stands to inflict on the 2018 elections. Just as the Circuit Justice unquestionably had authority to temporarily stay the district court's order pending full briefing to preserve this Court's ability to review the State's application in an orderly fashion, Order, No. 17A225 (Aug. 28, 2017) (mem.), the All Writs Act unquestionably provides the Court with authority to grant interim relief to ensure that the State will not suffer irreparable injury before this Court can conduct its appellate review of the underlying order in the ordinary course.

The plaintiffs do not and cannot deny that the All Writs Act gives the Court the power to enter interim relief to preserve its appellate jurisdiction and prevent irreparable injury pending appeal. Instead, they argue that the All Writs Act does not give the Court the power to entertain a "premature appeal." Resp. 20. That misses the point. The State has not invoked the All Writs Act as an alternative source of jurisdiction for entertaining *an appeal*. It has invoked the All Writs Act as an alternative source of jurisdiction for *entering interim relief pending* the appeal over which the plaintiffs do not deny this Court ultimately will have jurisdiction. The

plaintiffs' repeated contention that this Court cannot enjoin the district court from entering a final judgment is equally wide of the mark. The State is not asking this Court to prohibit the district court from entering final judgment; to the contrary, the State believes the district court has already issued a final appealable order, and it would not object to the district court taking further action to make clear its ruling is final. What the State is asking this Court to do is to enter interim relief permitting the State to continue using Plan C235 for the 2018 election pending appeal of the district court's order. To the extent further steps need to be taken to render that order final, the district court is free to take them; but those steps should be taken on the understanding and on the timetable that any redrawn maps will not govern the 2018 elections and will not take effect unless and until this Court, after review in the ordinary course, affirms the district court's dubious ruling that the 2013 Legislature's endorsement of a judicially imposed remedial map ran afoul of the Constitution and the Voting Rights Act.

Finally, the plaintiffs' insistence (at 16-18, 21) that the district court's order lacks "serious, perhaps irreparable, consequences" and can be challenged just as effectively after the court enters a final judgment lays bare their lack of respect for the State's sovereignty, as well as their lack of appreciation for the massive confusion and inconvenience that would follow from a district court order imposing judicially drawn maps on the eve of October 1. Repeating the mantra that "there is no 'October 1 deadline,'" Resp. 18, does not make it so. The reality is that elections are a difficult and time-consuming sovereign function that require months of careful planning and

preparation. Even the district court has never questioned that the State must have maps in place by October 1 if the 2018 elections are to proceed as scheduled. To the contrary, the court has made plain its intention to ensure that its *own* maps are in place by that deadline—while simultaneously ensuring that those court-drawn maps will be imposed too late in the day to allow for orderly appellate review by this Court. Accordingly, if this Court does not intervene now to make clear that Plan C235 will continue to govern the 2018 elections, there is a virtual guarantee of disruption to the election process and the appellate process, even assuming highly expedited review by this Court at a later date. Not only does that underscore that the district court's order has the practical effect of an injunction, it also confirms the need for this Court to exercise its power to enter interim relief now, before it is too late to undo the injury that the order inflicts.

II. THERE IS A FAIR PROSPECT THAT A MAJORITY OF THIS COURT WILL VOTE TO REVERSE THE JUDGEMENT BELOW.

As the State demonstrated in its application, there is at a minimum the requisite "fair prospect" that a majority of this Court will vote to reverse the decision below and its remarkable conclusion that the Legislature engaged in intentional discrimination by adopting as its own the same remedial maps that the district court *ordered* the State to use in the 2012 elections. The plaintiffs' application does not come close to demonstrating otherwise.

A. The Plaintiffs' Attack on the 2013 Legislature's Purpose in Enacting the Court-Ordered Plan Demonstrates the District Court's Error.

Much of the plaintiffs' argument on the merits is devoted to defeating the straw man that the Legislature's decision to adopt the remedial maps as its own does not insulate those maps from all challenge. The State has not argued otherwise. But the ultimate question in this case is whether the Legislature engaged in *intentional racial discrimination* when it enacted Plan C235. The answer to that question must turn on why *the 2013 Legislature* enacted that plan, not why the 2011 Legislature drew certain lines that the district court agreed to carry over into its remedial maps after concluding that they did not present any likely or not-insubstantial legal problem. Here, the motivations of the 2013 Legislature are plain as day: It believed that embracing maps that had been blessed by the district court was its best shot at achieving ready compliance with the VRA and the Constitution without long drawn-out litigation.

To be sure, it is at least conceivable that those maps might unwittingly have carried over some discriminatory *effects*. But it is it simply not plausible to conclude that the Legislature engaged in *intentional* racial discrimination by adopting as its own maps that a district court had found likely complied with all applicable laws. The 2013 Legislature's acceptance of the court-ordered congressional plan was not an act of "gamesmanship," Resp. 23; it was a good-faith effort to comply with federal law, resolve this litigation, and provide stability for Texas voters. Not only is the plaintiffs' contrary contention irreconcilable with the history of this case, their insistence on

assuming the worst and placing the burden of disproving discriminatory intent on the State also completely ignores *Miller v. Johnson*'s presumption of good faith.

Moreover, the plaintiffs' convoluted story of "victory" by "gamesmanship" is revisionist history. At the outset, the 2012 remedial order imposing court-ordered maps was hardly a "victory" for the State, as it meant that the legislatively enacted 2011 maps never took effect. *See* Resp. 23. To be sure, the 2012 remedial maps were better than the first maps drawn by the district court, which were invalidated by this Court in *Perry v. Perez*, 565 U.S. 388 (2012) (per curiam), for completing disregarding the Legislature's role. But the 2012 maps were hardly a victory for the State. They were instead judicially drawn remedial maps that followed this Court's direction to remedy likely defects under the Constitution and possible defects under the VRA. By adopting those remedial maps as its own, the Legislature did not execute the final move in some elaborate preconceived master plan that involved passing a discriminatory 2011 plan knowing preclearance would be denied (despite Texas's best efforts to obtain it) and knowing the district court would draw improper remedial maps (over Texas's objection) confident that this Court would reverse the district court and order the maps be redrawn on a timetable that would cause the district court to fail to identify some of the problematic lines in the 2011 map. In reality, the motivations of the 2013 Legislature were far more straightforward. By adopting the judicially imposed remedial map as its own, the Legislature had the modest hope of complying with judicial guidance and bringing this litigation to an early end. That

hope turned out to be misplaced, but it is the furthest thing from a discriminatory intent.

The plaintiffs also misstate the standards that the district court applied. Under this Court's decision in *Perry v. Perez*, pending §5 objections were subject to the "not insubstantial" standard. That set a low bar, not a "high hurdle." Resp. 26. The district court was authorized to provide a remedy unless the §5 objection had "no reasonable probability of success." App. D at 12 (quoting *Perez*, 565 U.S. at 395). The district court relied on the low not-insubstantial standard to redraw CD 23 in West Texas, *id.* at 30; CDs 6, 12, 26, 30, and 33 in Dallas-Fort Worth, *id.* at 36; and CDs 9 and 18 in Houston, *id.* at 40-41[3]; *cf. id.* at 21 (noting §5 objection to CD 27).

Charging the Legislature with "gamesmanship" because it enacted the court-ordered plan "mid-litigation"—after the court had held a trial and issued an opinion explaining that the districts it ordered were valid—turns reality, and redistricting law, on its head. Plaintiffs imply that the Legislature improperly disrupted ongoing litigation by replacing the 2011 plans before the district court could issue a final judgment. This denies the most basic principle of redistricting: "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman v. Meier*, 420 U.S. 1, 27 (1975). Plaintiffs' concern about "distortion of the proper progression of redistricting

[3] Changes to CDs 9, 18, and 30 were based on "not insubstantial" claims that the Legislature deliberately targeted African-American members of Congress by removing "economic engines" from their districts but not their Anglo colleagues. Those claims were later disproven and rejected by the district court. *See* App. B at 163-64.

litigation," Resp. 27, is therefore profoundly misguided. It would be bizarre indeed to insist that legislatures must to continue to defend challenged maps in litigation rather than try to compromise by adopting a new maps that they have a good-faith basis to believe will address any legal flaw because they mirror interim judicial relief.

The district court's decision reflects the same flawed premise—that the Legislature somehow interfered with the court's review of the never-in-effect 2011 plan. This gets the role of the Legislature and the courts completely backwards, while ignoring basic Article III jurisdictional principles. "The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise*, 437 U.S. at 539. The district court's evident frustration that the Legislature attempted to "avoid any liability for the 2011 plans," App. A at 35, by repealing and replacing them (before implementation) with court-ordered plans shows that it exceeded its Article III jurisdiction, all while condemning the Legislature for attempting to carry out its primary duty to enact lawful redistricting plans.[4]

[4] The suggestion that the Legislature deprived the court of the opportunity to "revise[]" its 2012 order "upon full analysis," Resp. 4 (quoting App. D at 2), reflects a similar error. Under VRA §5, the denial of preclearance meant that claims against the 2011 plans were never ripe, so the district court would not have conducted a "full analysis" on the merits. *See, e.g.*, *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam). In any event, the district court was obligated to give the Legislature the first opportunity to provide a remedy. *E.g.*, *White v. Weiser*, 412 U.S. 783, 794-95 (1973). Unless the Legislature disregarded the district court's order entirely and pressed on in its defense of the 2011 plans—which it certainly had no legal obligation to do—the district court had no Article III jurisdiction to revisit the claims.

Plaintiffs' convoluted story of "victory" by "gamesmanship" distracts from the ultimate question: Did the 2013 Legislature enact Plan C235 with a predominant racial motive or for the purpose of harming minority voters on account of their race? The answer is clearly no, but this Court does not have to decide that question now. The immediate question before this Court is when and how to answer the ultimate question. The plaintiffs would disrupt the status quo and proceed on districts hastily redrawn by the district court to be followed by highly expedited litigation in this Court. The better option is to ensure orderly review of the district court's order and allow the 2018 elections to proceed under the same maps ordered by the district court in 2012.

B. CD 35 Was Not a Racial Gerrymander.

The plaintiffs attempt to defend the district court's decision that CD 35 was a racial gerrymander by claiming that even if the court's *intent* finding was wrong, the court still correctly found that the district "had unlawful discriminatory effects." Resp. 29. That reflects a fundamental misunderstanding of equal protection claims under *Shaw*, which require a racially motivated decision—"that the State has used race as a basis for separating voters into districts," *Miller v. Johnson*, 515 U.S. 900, 911 (1995)—not just a discriminatory effect (which does not exist in CD 35). The plaintiffs' charge that the State's stay application left "simply unaddressed" the district court's findings with respect to the purported effects of CD 35, Resp. 29, is thus not only dead wrong (the State actually explained in detail why that analysis was flawed, *see* Stay Appl. 36-37), but legally irrelevant.

As the State explained in its application, a racial motive did not predominate in the 2013 Legislature's adoption of CD 35 because the Legislature's clear intent was simply to enact the district-court-ordered map in full. *See* Stay Appl. 34-35. Indeed, the district court expressly found that "the 2013 Legislature did not draw the challenged districts in Plan C235." App. A at 28-29. The 2013 Legislature did not adjust any district lines or make any determinations about which voters to place "within or without a particular district." *Miller*, 515 U.S. at 916; *see* App. A at 103 ("There is no evidence that the Legislature again considered in 2013 which persons to include within CD35 . . . ."). If the 2013 Legislature "did not draw" CD 35, as the district court correctly found, it did not have a predominantly racial motive in the "sorting of voters."[5]

The plaintiffs are equally wrong to contend that the State did not "even offer a compelling interest for the original creation of CD 35 to which the district lines were narrowly tailored." Resp. 32. As explained in the stay application, Stay Appl. 36, the 2011 Legislature had a strong basis in evidence to believe that VRA §2 required a Latino opportunity district in that part of the State—the district court said exactly that when it imposed the map in 2012. The plaintiffs never dispute this. Resp. 32.

[5] The States' position would not, as the plaintiffs argue, allow legislatures to insulate districts against racial gerrymandering claims any time they merely reenact them unchanged. This argument wholly ignores the fact that the district court had ordered the map later adopted by the legislature because it found no fault with CD 35. The Texas Legislature reenacted CD 35 as part of a statewide plan after the district court provided pages of analysis reasoning that the district was valid.

C. CD 27 Does Not Violate VRA §2.

The plaintiffs are also dead wrong in their assertion that "Texas does not mention, let alone challenge, the district court's conclusion that CD 27 has discriminatory *effects*." Resp. 29. The State's application specifically argues that the lack of a discriminatory effect "alone suffices to defeat the court's finding as to CD 27." Stay Appl. 30-31. The State does not "sidestep" the district court's conclusion, Resp. 33. It responds directly that the conclusion cannot be reconciled with the uncontested finding that the "220,000 Nueces County Hispanics [that] are stranded in CD 27" are not sufficient to form a majority in a single-member district, App. A at 102,[6] because a prerequisite to discriminatory effect under this Court's precedents is that "the racial group" at issue be "sufficiently large and geographically compact to constitute a majority in a single-member district," *LULAC v. Perry*, 548 U.S. 399, 425 (2006). Whether CD 27 has a discriminatory effect is squarely controlled by precedent. Nueces County Hispanic voters cannot satisfy the first *Gingles* requirement, *see Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), so they have no §2 right, no matter how many times the district court and the plaintiffs say they do.[7]

Additionally, it is telling that the plaintiffs do not specifically rebut any of the State's arguments that the 2011 Legislature's drawing of CD 27 had nothing to do with purposeful racial discrimination or that the State cannot be faulted for failing

[6] App. C at 31 (the ideal population of a Texas congressional district is 698,488).

[7] Because there is no discriminatory effect in CD 27, the State's concession that discriminatory effect *can* be carried over from one version of law to another is not "damning," *cf.* Resp. 34; it is beside the point.

to address in 2013 the purported §2 violation in CD 27 that was not identified until 2017. *See* Stay Appl. 31-33. These errors themselves require reversal of the district court's intentional-vote-dilution findings.

III. IRREPARABLE HARM TO THE STATE AND THE BALANCE OF THE EQUITIES COUNSEL STRONGLY IN FAVOR OF A STAY.

The plaintiffs' arguments on irreparable harm and the balance of the equities are flimsy at best. They do not acknowledge, much less dispute, the State's argument that the invalidation of the State's maps is itself irreparable harm. *See* Stay Appl. 39. Instead, they maintain only that there is no need to remedy that harm now because the State "faces no 'October 1 deadline.'" Resp. 36. Notably, this is the very first time the plaintiffs have ever made that claim, even though the State has repeatedly raised this deadline in the district court without challenge from the plaintiffs—or from the district court, which has clearly structured its own proceedings around that deadline. *See, e.g.*, App. J at 1. In fact, the plaintiffs acknowledged without dispute the October 1 deadline at a scheduling hearing earlier this year, App. O at 2; *id*. at 3, and at trial, App. P. at 5.[8] It is far too late to dispute the existence of that deadline now.

The plaintiffs noticeably do not actually dispute that changing the October 1 deadline would disrupt the State's standard election process; they simply argue that missing the deadline would not be a significant imposition on the State. *See* Resp. 36-37. That argument disregards the difficult and time-consuming process of preparing

[8] The Bexar County Election Administrator, a neutral witness who is not aligned with either party, App. O at 4-5, was invited to testify about "the relevant critical deadlines for this next election cycle," *id*. at 5. The administrator acknowledged the October 1 deadline, but asserted that may be stretched by two weeks. *Id*. at 5.

for and conducting timely and orderly elections. *See* App. J. Moreover, the plaintiffs' cavalier contention that the election deadline is not important, Resp. 36-37, fails to accord the State due respect for the exercise of its sovereign duty.

We have been here before. In 2011, the district court's misguided, eleventh-hour remedial map-drawing necessitated emergency intervention by this Court and an expedited appellate process to avoid further disruption of the upcoming elections. *See Perry v. Perez*, 565 U.S. 1090 (2011) (granting stay); *Perry v. Perez*, 565 U.S. at 399 (vacating the district court's remedial plan). If the Court does not intervene now to make clear that the current map will continue to govern the 2018 election cycle, there is a virtual guarantee that history will repeat and the 2018 elections will be disrupted, even with highly expedited review by this Court.

The plaintiffs also do not dispute that without a stay the State will suffer irreparable harm from having to divert its scarce resources to formulate another proposed remedial map, prepare election officials and voters for the prospect of redrawn lines and the possibility of deferred election deadlines as in 2012, and seek further expedited relief from this Court to avoid further irreparable injury. *See* Stay App. 5-6, 39. Instead they just contend that the State was on notice that the district court intended to draw remedial maps before the 2018 election cycle. Resp. 36-37. But that is entirely beside the point. Even if the State knew the district court might draw remedial maps, there was nothing the State could do until the district court blocked

its congressional plan.[9] And even now, the plaintiffs *still* contend that there is nothing the State can do about it. The State's stay application cannot simultaneously be both too late and too early.

At any rate, the issue is delay, not surprise. It bears repeating that the district court created the exigency, not the State. The court waited *four years* to rule on claims against the 2013 maps but gave the Governor only *three days* to drop everything and summon the part-time Legislature into a special session to draw new maps, and then insisted on drawing its own maps for the 2018 elections mere weeks before the October 1 deadline. The need for immediate relief is thus entirely a product of the district court's own making.

The plaintiffs also mischaracterize the State's position with respect to the timing of a remedial hearing, erroneously suggesting that the State wanted the district court to impose a remedial plan before October 1. *See* Resp. 36. At the end of trial in July, Judge Garcia stated, "We need to start looking at future dates to convene," and instructed the parties to "provide us a range or timeframe when we might reconvene again or should reconvene again." App. P. at 2. The plaintiffs acknowledged the October deadline, but contended that election deadlines could yield for the district court to draw remedial maps. *See, e.g.*, *id*. at 3-4. The State's request to hold any remedial hearings before October 1 was merely an attempt to minimize

[9] Indeed, the State requested permission to file a discretionary interlocutory appeal on the district court's order on the 2011 maps, but was denied the opportunity by the district court. *See* App. L at 122 (ECF No. 1358) (motion); *id*. at 125 (ECF No. 1385) (order denying motion to file interlocutory appeal).

the disruption. It was certainly a less-harmful alternative to the plaintiffs' suggestion of delaying election deadlines to accommodate remedial hearings. *See id*. at 6. Judge Rodriguez acknowledged the problem with pushing back election deadlines to draw remedial maps: "I'd hate to alter the election calendar, ruin everybody's election schedules, then the Supreme Court, just hypothetically now speaking, issues a stay and that was all for n[augh]t." *Id*. at 4. The State never argued that the district court should impose remedial maps before the 2018 election cycle; it was simply attempting to limit the damage that such a remedial proceeding might have on the election process. The plaintiffs are therefore wrong to argue that the State wants it "both ways" in seeking a stay. *See* Resp. 37-38.[10]

The State seeks what the Constitution and this Court's precedent promise: the opportunity to conduct orderly elections, the chance to obtain timely review of the district court's order invalidating duly enacted district plans, and a realistic opportunity to address any flaws that this Court may ultimately find in the enacted maps. As the plaintiffs' response confirms, the State will suffer irreparable harm absent a stay, and the balance of the equities and the public interest heavily favor the State. Indeed, the plaintiffs do not dispute that a stay would not have any practical impact on their voting rights; they argue only that holding another election under the current maps is unjustified. *See* Resp. 36. But there is certainly nothing

[10] Also, the plaintiffs' contention that the Court's "practice" is to deny stay applications of this kind, Resp. 38, wholly ignores the Court's long history of staying district court injunctions of legislatively enacted district maps pending appeal. *See* Stay Appl. 15 (collecting cases).

unjustified about allowing the State to at least proceed through one layer of orderly appellate review before being forced to discard—at the eleventh hour, no less—maps that were initially imposed by the district court itself and have governed every election since the last Census.

CONCLUSION

The application for a stay should be granted.

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Respectfully submitted.

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