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.

RESPONSE IN OPPOSITION TO 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 ii

STATEMENT OF THE CASE 2

ARGUMENT 12

I. This Court Lacks Jurisdiction to Entertain Texas's Stay Application and Appeal Because the District Court Has Not Issued Injunctive Relief. 12

A. This Court Has No Jurisdiction under the Three-Judge Court Act to Entertain Texas's Premature Appeal and Stay Application. 12

B. The All Writs Act Does Not Provide this Court Jurisdiction for an Immediate Appeal and Does Not Permit This Court to Block the District Court from Entering Final Judgment and Injunctive Relief. 18

II. Texas Cannot Satisfy All the Requisite Elements to Entitle It to a Stay Pending Appeal 21

A. Texas Cannot Accord Final Preclusive Effect to Its Preliminary Injunction Victory by Repealing and Re-Enacting its Districting Statute Mid-Litigation 23

B. The District Court's Ruling on the Districts' Unlawful Discriminatory *Effects* is Unaddressed by Texas's Stay Application and Unlikely to Be Reversed. 29

1. The District Court's Conclusion that CD 35 Is an Impermissible Racial Gerrymander Does Not Depend Upon Discriminatory Intent. 29

2. Texas's Attack on the District Court's Intent Finding Does Not Implicate the Court's § 2 Results Violation Ruling Regarding CD 27 32

C. This Court Is Unlikely to Reverse the District Court's Finding of Intentional Discrimination. 34

D. Texas Has Not Shown Irreparable Harm, and the Balance of Equities Requires Denial of the Stay Application. 35

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

A.J. Canfield Co. v. Vess Beverages, Inc., 859 F.2d 36 (7th Cir. 1988) 24

Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) 31, 36

Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301 (1991) 23

Bd. of Regents v. New Left Educ. Project, 404 U.S. 541 (1972) 12

Brown v. Gilmore, 533 U.S. 1301 (2001) 19, 20, 21

Carson v. Am. Brands, Inc., 450 U.S. 79 (1981) 14

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) 35

Clinton v. Goldsmith, 526 U.S. 529 (1999) 19

Conkright v. Frommert, 556 U.S. 1401 (2009) 22

Cooper v. Harris, 137 S. Ct. 1455 (2017) 26, 27, 28, 30, 31

Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998) 35

Dietz v. Bouldin, 136 S. Ct. 1885 (2016 16

Gill v. Whitford, 137 S. Ct. 2289 (2017) 14

Goldstein v. Cox, 396 U.S. 471 (1970) 12, 13, 15

Graves v. Barnes, 405 U.S. 1201 (1972) 22, 38

Growe v. Emison, 507 U.S. 25 (1993) 17, 36

Gunn v. Univ. Comm. to End War, 399 U.S. 383 (1970) 13, 14, 20

Heckler v. Redbud Hospital Dist., 473 U.S. 1308 (1985) 22

Hollingsworth v. Perry, 558 U.S. 183 (2010) 22

Hunter v. Underwood, 471 US. 222 (1985) 35

Ind. State Police Pension Trust v. Chrysler LLC, 556 U.S. 960 (2009) 22

Karcher v. Daggett, 455 U.S. 1303 (1982) 14

League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) 33

Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) 13

Lucas v. Townsend, 486 U.S. 1301 (1988) 22

Mahan v. Howell, 404 U.S. 1201 (1971) 23

Mazurek v. Armstrong, 520 U.S. 968 (1997) 23, 24
McCrory v. Harris, 136 S. Ct. 1001 (2016) 38
Miller v. Johnson, 515 U.S. 900 (1995) 30
Munaf v. Geren, 553 U.S. 674 (2009) 23, 26
Nken v. Holder, 556 U.S. 418 (2009) 22
North Carolina v. Covington, 137 S. Ct. 2211 (2017) 25
Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312 (1986) 19
Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34 (1985) 19, 20
Perry v. Perez, 565 U.S. 388 (2012) 3
Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) 34-35
Purcell v. Gonzalez, 549 U.S. 1 (2006) 37
Reynolds v. Sims, 377 U.S. 533 (1964) 25
Shaw v. Reno, 509 U.S. 630 (1993) 30
Sherley v. Sebelius, 689 F.3d 776 (D.C. Cir. 2012) 24
Sole v. Wyner, 551 U.S. 74 (2007) 29
Stephenson v. Bartlett, 545 U.S. 1301 (2002) 38
Texas v. United States, 887 F. Supp. 2d 133 (D.D.C. 2012) 4
Univ. of Texas v. Camenisch, 451 U.S. 390 (1981) 24, 26, 27
Winston-Salem/Forsyth Cty. Bd. of Educ. v. Scott, 404 U.S. 1221 (1971) 21-22
Wittman v. Personhuballah, 136 S. Ct. 998 (2016) 38

Statutes

28 U.S.C. § 1253 ..... 1, 12
28 U.S.C. § 1292 ..... 14, 15
28 U.S.C. § 1651 ..... 18, 19
28 U.S.C. § 2284 20
Tex. S.B. 4, Act of July 19, 2011, 82d Tex. Leg. 26
Tex. S.B. 4, Act of June 26, 2013, 83d Tex. Leg. 5

Other Authorities

Proclamation by the Governor, No. 41-3324 (May 27, 2013) 4

Rules

Sup. Ct. R. 20.1 .... 18, 19

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

This Court does not have jurisdiction to entertain the State of Texas's premature stay application because there is nothing to stay. The three-judge court below has neither enjoined the state's current redistricting plan nor entered any remedial order. Under the Three Judge Court Act, 28 U.S.C. § 1253, this Court does not have jurisdiction over the proceedings until the court below enters such an injunction. At this point, the three-judge court has found that one of Texas's congressional districts is an impermissible racial gerrymander, and that another violates Section 2 of the Voting Rights Act in intent and results. The court therefore set the date of September 5, 2017 for a remedial hearing. Following the remedial hearing, the three-judge court would have promptly entered an order from which Texas could appeal.

But now is not the time for an appeal. There is no "emergency" warranting this Court's intervention prior to the district court's entry of judgment. The October 1, 2017 "deadline" that Texas claims is no deadline at all. This alleged "deadline" is simply the date that Texas claims is required to permit local officials *two months' time to coordinate with third-party vendors* to print and mail voter registration certificate cards.

If the Court finds that this is an "emergency" warranting taking the extraordinary step of exercising jurisdiction over the three-judge court's interlocutory order, then virtually every interlocutory order from a three-judge court in a redistricting case will now be appealable. Because the Court does not yet have jurisdiction to hear this appeal, the temporary stay should be immediately dissolved and

the three-judge court permitted to decide how and when to remedy the constitutional and statutory violations in the current redistricting plan.

Even if this Court finds it has jurisdiction to entertain this extraordinary stay application, the application should be denied. Texas has not shown that there is a "reasonable probability" that four Justices will consider the issues here sufficiently meritorious to note probable jurisdiction, nor a fair prospect that a majority of the Court will vote to reverse the judgment below. Moreover, while Texas will not suffer any irreparable harm from the denial of a stay, the grant of a stay will force the citizens of Texas to vote yet again in unconstitutional congressional districts. The Court should not countenance Texas's attempts to introduce further delay and multiply the proceedings in this Court in an attempt to run out the clock.

STATEMENT OF THE CASE

A. Following the 2010 Census, Texas gained four congressional seats because of its substantial population growth—eighty-nine percent of which was attributable to growth in the minority community. App. C at 411. In response, the Texas Legislature enacted a congressional reapportionment plan in 2011 that added three more Anglo-majority districts. App. C at 394. Plaintiffs filed suit in the Western District of Texas, San Antonio Division, alleging purposeful vote dilution, violations of Section 2 of the Voting Rights Act ("VRA"), *Shaw* violations, and further asserting that the enacted plan had not and likely would not receive preclearance under then-extant Section 5. *See, e.g.*, Complaint, ECF No. 1. Shortly thereafter, Texas initiated a declaratory judgment action seeking judicial preclearance from the U.S. District Court for the District of

Columbia. *See* Complaint, *Texas v. United States*, No. 1:11-cv-01303-RMC-TBG-BAH (D.D.C. July 19, 2011), ECF No. 1. Because it was apparent that a preclearance decision would not be reached in time for the 2012 primary elections, it "fell to the District Court in Texas to devise interim plans for the State's 2012 primaries and elections." *Perry v. Perez*, 565 U.S. 388, 391-92 (2012) (per curiam). The San Antonio court imposed an interim plan, and Texas appealed to this Court.

In *Perez*, this Court announced a new standard to govern a local district court's imposition of an interim plan while a preclearance case is pending. For challenges under the Constitution and Section 2, the Court announced that the local court should be guided by the state's enacted 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. *Perez*, 565 U.S. at 394. With respect to Section 5 challenges, this Court explained that the local court should take "guidance from a State's policy judgments unless they reflect aspects" for which "the § 5 challenge is not insubstantial." *Id.* at 395. This Court thus vacated the San Antonio court's interim plan and, on January 20, 2012, remanded to permit the court to apply these newly announced standards.

Five weeks later, on February 28, 2012, the district court imposed Plan C235 as the interim congressional plan to be used for the 2012 elections. ECF No. 681. In a March 19, 2012 opinion explaining its decision, the court emphasized that "[t]his interim map is not a final ruling on the merits of any claims asserted by the Plaintiffs in this case or any of the other cases consolidated with this case." App. D at 1. Moreover, the district court explained that:

> both the trial on these complex issues and the Court's analysis has been necessarily expedited and curtailed, rendering such a standard even more difficult to apply. The Court has attempted to apply the standards set forth in *Perry v. Perez*, but emphasizes that it has been able to make only preliminary conclusions that *may be revised upon full analysis*.

Id. at 2 (emphasis added). In light of the exigency of the calendar, the district court ordered the parties to confer and adopted a compromise plan (with minor technical corrections) submitted by a subset of litigants. *Id.*

B. On August 28, 2012, the D.C. court issued final judgment denying Texas preclearance of its congressional plan, 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. Our silence on other arguments the parties raised . . . reflects only this, and not our views on the merits of these additional claims." *Id.* at 161 n.32.

Texas appealed the D.C. court's judgment to this Court, but while that appeal was pending, then-Attorney General Greg Abbott urged repeal of the state's enacted plan and adoption of the 2012 interim plan. App. A at 6. Then-Governor Rick Perry called a special session of the Legislature confined to that sole purpose.[1] 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." App. A at 34-35; *see id.* at 37-38. That litigation strategy was an attempt to

[1] Proclamation by the Governor, No. 41-3324 (May 27, 2013).

evade 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 the cloak of the district court's (preliminary) approval of the newly enacted plan to insulate the state from further liability, *id.* at 37-39.

The Legislature's own attorney, Jeff Archer, warned ahead of time about the dangers of this strategy. During the redistricting committee hearings about adopting the interim plan, Mr. Archer advised that the Legislature could not rely upon the district court's March 2012 order imposing the interim plan as proof the plan complied with the VRA and Constitution. App. A at 36-37. Mr. Archer advised that the district court's caveats were "as if to say this is the best we can do now. We haven't gotten to the bottom of things" and that the court had "essentially made it explicitly clear that this was an interim plan to address basically first impression of voting rights issues." *Id.* (quotation marks omitted). Mr. Archer also advised the Legislature that adopting the interim plan would not end the litigation—that plaintiffs' challenges would continue with respect to claims unaddressed by the interim plan, and that the court may agree with them on final review. *Id.* at 37 n.43, 38 n.45.

Despite Mr. Archer's warnings that the interim order did not establish Plan C235's legality, and despite the testimony of minority legislators and members of the public about the plan's legal deficiencies, the Legislature "willfully ignored those who pointed out deficiencies," App. A at 38 n.45, and enacted as permanent Plan C235.[2]

[2] *See* Tex. S.B. 4, Act of June 26, 2013, 83d Tex. Leg., 1st C.S., ch. 3, § 2, 2013 Gen. Laws 5005.

C. Nevertheless, relying on plaintiffs' amended complaints seeking preclearance bail-in relief under § 3(c) of the VRA, and this Court's well-settled precedent that "repeal of a challenged law does not render a case moot if there is a reasonable possibility that the government would reenact the law if the proceedings were dismissed," the district court declined to dismiss as moot the claims against the 2011 plan. Order at 13, ECF No. 886.

Following additional discovery, including disclosure by Texas of previously-withheld emails and draft redistricting plans, the district court held a trial on the merits of the 2011 congressional plan in August 2014. The district court issued an Opinion and Findings of Fact on March 10, 2017. The court's 165-page Opinion, accompanied by 443 pages of fact findings, *see* Apps. B & C, concluded that the 2011 plan ("Plan C185") was enacted with discriminatory intent in violation of the Constitution, contained impermissibly racially gerrymandered districts, and violated both the intent and results prongs of Section 2 of the VRA. The court explained that "the evidence shows that mapdrawers were more than just 'aware of' race; they often referred to race in discussing the drawing of districts, they often paid close attention to the racial makeup of all districts, and they engaged in discussions about how to gain political advantage by disadvantaging Hispanic voters through use of the 'nudge factor.'"[3] App. B at 126. The mapdrawers, the court concluded, intentionally took steps "to undermine minority

[3] The "nudge factor" was how Texas's mapdrawers described their plan to include lower turnout Hispanics in CD 23 but simultaneously exclude higher turnout Hispanics, so as to create the façade of a Hispanic opportunity district, knowing it would not actually perform as such. *E.g.*, *id.* at 20-22.

voting strength to obtain partisan advantage." *Id.* at 145. The court found violations with respect to multiple congressional districts, including CDs 27 and 35.

With respect to CD 35, the district court found that the evidence of racial predominance was "ample." *Id.* at 35.[4] The mapdrawer, Ryan Downton, admitted that the number one criteria, which could not be compromised, was keeping the Hispanic Citizen Voting Age Population ("HCVAP") of CD 35 above 50 percent. *Id.* at 35-36. Mr. Downton also admitted, among other things, to using "racial shading . . . to find the concentrated Hispanic populations," *id.* at 37 (internal quotation marks omitted), to draw them in to get over the 50 percent benchmark," *id.* (internal quotation marks and citation omitted), and to including a "squiggle" in the northern part of CD 35 because "racial shading confirmed that this area was 90-100% Hispanic," *id.*

Applying strict scrutiny, the district court concluded "the third *Gingles* precondition is not present in a significant portion of the district." *Id.* at 43. As a result—and having found an absence of Anglo bloc voting sufficient to satisfy *Gingles*'s third prong in Travis County, *id.* at 43-44—the court concluded that "there was no

[4] The court noted that its conclusion differed from its analysis in its interim plan order—an outcome the court had explicitly warned was possible when it issued its interim order. *See* App. D at 1. Initially, "[t]he Court did not find Plaintiffs likely to prevail on this claim because Plaintiffs had not convinced the Court at [that] stage that district lines in CD 35 were manipulated to such an extreme degree that race predominated." App. B at 35 (internal quotation marks and citation omitted). After a full review of the evidence, the court reached a different conclusion. "The Court now finds that its preliminary finding—made without the benefit of a full examination of the evidence—was in error. A careful review of the evidence shows that CD35 was drawn in such a manner that race predominated. Further, the Court finds that CD35 does not survive strict scrutiny." *Id.*

strong basis in evidence to include Travis County Hispanic voters in a racially gerrymandered district because they had no § 2 right to remedy." *Id.* at 43.

The district court then considered CD 27, particularly in Nueces County where there *is* extensive racially polarized voting. *Id.* at 48-49. The court carefully assessed the three *Gingles* preconditions and the totality of the circumstances, *id.* at 47-57, and concluded that "Plaintiffs have amply demonstrated that Nueces County Hispanics have a § 2 right that has not been remedied . . . but could be remedied without the loss of a § 2 remedy for others (and without the Equal Protection Clause violation that exists in CD35 . . . .)," *id.* at 57.[5]

D. After an April 27, 2017 status conference, the district court set trial on the 2013 plan starting the week of July 10, 2017.[6] The district court held a six-day trial and issued an opinion on August 15, 2017.[7] The unanimous[8] three-judge court concluded,

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[5] In its interim order, the district court did not conclude that plaintiffs were likely to succeed on their § 2 claims with respect to CD 27, but it specifically caveated its analysis based upon the preliminary nature of the analysis: "Although these claims are not without merit, based on the analysis conducted *thus far*, the Court does not find *at this time* that Plaintiffs have a likelihood of success on the merits of their claim sufficient to warrant changes to the enacted map *for an interim plan*." App. D at 51 (emphasis added).

[6] At the status conference, counsel for plaintiffs requested that the court hold trial in June 2017, *see e.g.*, App. M at 38, but counsel for Texas suggested that trial could not occur prior to August, *see id.* at 75, 78, 83.

[7] During the trial, counsel for Texas specifically requested that, should plaintiffs prevail, a remedial hearing be held in late August or early September: "I think late August or early September would be, you know, something that we would advocate for if this Court wanted additional proceedings." App. N at 1820.

[8] Although Judge Smith dissented with respect to the district court's opinion on the 2011 plan, he joined the three-judge district court's opinion on the 2013 plan. Texas contends that was merely on law-of-the-case grounds. While that may be so with respect to CDs 27 and 35 in particular, that does not explain his decision to join the

"[w]ith regard to those areas in Plan C185 . . . where the Court found that district lines were drawn with impermissible motive and those lines remain unchanged in Plan C235 . . . such that discrimination continues to have its intended effect, *Hunter* [*v. Underwood*] indicates that those portions of the plans remain unlawful." App. A at 29.

The district court carefully considered Texas's contention that the Legislature enacted the court's interim plans in order to comply with the law, but found as a matter of fact that complying with the law was *not* the Legislature's purpose:

> The decision to adopt the interim plans was not a change of heart concerning the validity of any of Plaintiffs' claims in either this litigation or the D.C. Court litigation and was not an attempt to adopt plans that fully complied with the VRA and Constitution—it was a litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities. The letter from then-Attorney General Abbott to Speaker Joe Straus makes the strategy clear: Abbott advised that the "best way to avoid further intervention from federal judges in the Texas redistricting plans" and "insulate the State's redistricting plans from further legal challenge" was to adopt the interim maps. Thus, Defendants sought to avoid any liability for the 2011 plans by arguing that they were moot, and sought to ensure that any legal infirmities that remained in the 2013 plans were immune from any intentional discrimination and *Shaw*-type racial gerrymandering claims.

Id. at 35-36 (citations and footnotes omitted).

The court found, as a factual matter, that the Legislature intended to deploy the court's interim order as a shield in the litigation, knowing it could not actually rely upon it as evidence of the interim plan's compliance with the VRA and the Constitution. "By

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opinion with respect to the court's factual and legal analysis regarding the 2013 Legislature's intent, including its enactment of the interim plan as a litigation strategy to avoid liability, rather than for the purpose of adopting a plan compliant with the VRA and Constitution. *See* App. A at 35-39. That fact-finding and legal analysis is new, and did not depend upon law-of-the-case grounds. Notably, Judge Smith agreed that the Dallas-Fort Worth districts in the 2011 plan were drawn with a racially discriminatory purpose. *See* App. B at 187.

arguing that there may have been intent but no effect in 2011 and there may have been effect but not intent in 2013, despite the fact that there is unquestionably both intent and ongoing effect, [Texas's] actions in 2013 were attempting to prevent Plaintiffs from obtaining relief for purposeful racial discrimination." *Id.* at 37-38. The court explained that "[i]n [Texas's] view, Plaintiffs could obtain no relief for the Legislature's past discrimination in 2011, and any discriminatory intent and effects remaining in the 2013 plans, however harmful, would be safe from challenge. This strategy is discriminatory at its heart and should not insulate either plan from review." *Id.* at 38 (footnote omitted).

Nonetheless, the court declined to find any violations in several areas challenged by Plaintiffs, including in the Dallas-Fort Worth area, in CD 23, and in Houston area districts. Instead, the district court found only two districts infirm—those that remained unchanged from the 2011 enactment in which they were impermissibly drawn—CDs 27 and 35. *Id.* at 106-07.

With respect to CD 35, the court noted that Texas contends that "there is no unconstitutional racial gerrymander in Plan C235 because the Legislature 'did not draw the boundaries of any district' and 'did not make a decision to place a significant number of voters within or without a particular district.'" *Id.* at 103 (internal quotation marks omitted). The court rejected this contention, explaining that

> [a]lthough 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 a district under *Shaw*. Otherwise, a Legislature could always insulate itself from a *Shaw*-type challenge simply by re-enacting its plan and claiming it made no decisions about who to include in the district at the time of re-enactment.

Id. With respect to CD 27, the court found a § 2 violation both in results and intent, *id.* at 100, concluded that Nueces County Hispanic voters were "intentionally deprived of their opportunity to elect candidates of their choice," and found that

> their rights were essentially traded to Hispanics in Travis County without a § 2 right. There is no evidence that the Legislature engaged in any meaningful deliberation in 2013 to cleanse away such discriminatory intent, and in fact they intended to maintain any such discrimination, purposefully intending to deprive plaintiffs of any remedy.

Id. at 104.

E. The court explicitly noted that "[b]ecause this order only partially addresses the issues herein—the violations in C235—it is interlocutory." *Id.* at 107. The court requested the Attorney General's Office to notify the court whether the Legislature intended to enact a new plan, and ordered the parties to prepare for and attend a remedial hearing on September 5, 2017. *Id.* at 106. On August 18, 2017, Texas informed the court that Governor Abbott would not call a special session and moved for a stay pending appeal. ECF No. 1538 at 4. The three-judge court denied the motion to stay, stating that "[a]lthough the Court found violations in Plan C235, the Court has not enjoined its use for any upcoming elections" and "[t]he parties are ordered to proceed with preparations for the remedial hearing as previously directed." *See* Aug. 18, 2017 Text Order, App. L at 136-37. Texas then filed its Emergency Stay Application in this Court, which Justice Alito temporarily granted pending a response and further order of the Court.

ARGUMENT

I. This Court Lacks Jurisdiction to Entertain Texas's Stay Application and Appeal Because the District Court Has Not Issued Injunctive Relief.

A. This Court Has No Jurisdiction under the Three-Judge Court Act to Entertain Texas's Premature Appeal and Stay Application.

This Court has no jurisdiction to entertain Texas's stay application and its premature appeal because the district court has not entered injunctive relief—either interlocutory or final. Under 28 U.S.C. § 1253, appeals to this Court from three-judge district courts may only occur "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction." There has been no such injunction here, as the district court made clear in both its August 15, 2017 Order, *see* App A. at 107 ("Because this order only partially addresses the issues herein—the violations in C235—it is interlocutory."), and in its subsequent order denying Texas's motion for a stay pending appeal, *see* Aug. 18, 2017 Text Order, App. L at 136-37 ("Although the Court found violations in Plan C235, *the Court has not enjoined its use for any upcoming elections*.") (emphasis added). Under the plain text of § 1253, this Court lacks jurisdiction.

"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." *See Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (alterations in original) (internal quotation marks omitted); *see also Bd. of Regents v. New Left Educ. Project*, 404 U.S. 541, 545 (1972) (noting "oft-repeated admonition that the three-judge court statute is to be strictly construed"). That is especially so where

appeal from an interlocutory order is sought. "That canon of construction must be applied with redoubled vigor when the action sought to be reviewed . . . is an interlocutory order of a trial court. In the absence of clear and explicit authorization by Congress, piecemeal appellate review is not favored." *Goldstein*, 396 U.S. at 478.

Indeed, this Court has specifically held that it lacks jurisdiction to hear an appeal from a three-judge district court order declaring liability if that order does not grant or deny an injunction—even where the order specifically affirms entitlement to injunctive relief. In *Gunn v. University Committee to End War*, 399 U.S. 383 (1970), a three-judge court declared a Texas statute unconstitutional and concluded that "Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against enforcement of [the statute] as now worded," *id.* at 386, but the district court decided to withhold entry of the injunction, instead retaining jurisdiction to permit the Legislature a chance to remedy the violation, *id.* Texas appealed to this Court, relying on 28 U.S.C. § 1253, but this Court dismissed the appeal for want of jurisdiction. "The statute is . . . explicit in authorizing a direct appeal to this Court only from an order of a three-judge district court 'granting or denying . . . an interlocutory or permanent injunction.'" *Id.* at 386-87 (quoting 28 U.S.C. § 1253). The plain text of § 1253 thus precluded this Court's exercise of jurisdiction. "[B]ecause 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." *Id.* at 390 (internal quotation marks omitted); *cf. Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-44 (1976) (holding that liability determination without injunctive relief is not appealable under 28 U.S.C. §§ 1291 or 1292(a)(1)).

The same is true here. The district court has declared that Texas's congressional plan violates Section 2 of the VRA and the Constitution, and it has indicated that those violations must be remedied, but it has explicitly declined to enter an injunction at this time. *See* App. A at 107. Indeed, just as in *Gunn*, the district court here stayed its hand in part to permit the Legislature a chance to cure the violations. *See id.* at 105. And just as in *Gunn*, this Court has no power to "deal with the merits in this case in any way at all" until the district court enters an injunction. 399 U.S. at 390. *Gunn* controls this case and requires the denial of Texas's stay application and the immediate dissolution of the temporary stay.[9]

Texas contends that the district court's August 15, 2017 Order has the practical effect of an injunction, and therefore under *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981), this Court has jurisdiction. Stay App. at 18. In *Carson*, this Court interpreted 28 U.S.C. § 1292(a)(1), which permits interlocutory appeal of orders granting or denying injunctive relief in cases appealed to the circuit courts of appeals. The Court held that where an order has the "practical effect" of an injunction, it may be appealed pursuant to § 1292(a)(1) if the appellant also shows the interlocutory order "might have serious, perhaps irreparable, consequence" and that the order can be "effectually challenged only by immediate appeal." *Carson*, 450 U.S. at 83 (internal quotation marks omitted). Texas's reliance on *Carson* and its progeny is misplaced.

[9] Texas's reliance on *Gill v. Whitford*, 137 S. Ct. 2289 (2017), and *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers), *see* Stay App. at 19, is misplaced because in both cases the district court explicitly enjoined the existing districting plans.

First, this Court interprets § 1253 especially strictly, particularly with respect to interlocutory orders. *Carson*'s framework was designed for appeals pursuant to § 1292(a) to the circuit courts—courts whose function is solely to entertain direct appeals and who have greater capacity to do so. Congress intended—and this Court has repeatedly held—that the Supreme Court's appellate docket must be "narrow[ly] confine[d]," *Goldstein*, 396 U.S. at 478, because of its other, primary duties. It makes little sense, therefore, to apply *Carson*'s framework to § 1253.

Second, even if *Carson* did apply to appeals pursuant to § 1253, its requirements are not satisfied here. Texas contends that the district court's August 15, 2017 Order has the practical effect of an injunction because the district court noted that the violations "must be remedied." Stay App. at 17 (quotation marks omitted) (emphasis omitted). But that is no different than the order in *Gunn* that this Court found insufficient to trigger jurisdiction under § 1253. Moreover, this just repeats a truism: constitutional and statutory violations require a remedy. But until they actually *are* remedied, there is no injunction to stay or appeal.

Texas likewise contends that the Order has the practical effect of an injunction because the court ordered counsel for Texas to inform the court whether the Legislature intended to consider redistricting legislation and because it "also ordered the parties to consult with mapdrawing experts, confer on the possibility of agreeing to a remedial plan, and to come prepared to offer proposed remedial plans at a September

5 hearing to redraw Texas's congressional map." Stay App. at 17.[10] Texas offers no explanation for how any of this has the practical effect of an *injunction*. Ordering a party's *counsel* to update the district court as to the legislative agenda and to prepare for and attend a court hearing is hardly the same as enjoining a *party* from engaging in unlawful conduct or enjoining entirely the operation of a statute. Rather, ordering counsel to update the court and attend a hearing 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). If Texas were correct, routine scheduling orders would become immediately appealable injunctions. Contemplating injunctive relief and ordering it are distinct legal events.

Texas's argument that the additional two *Carson* requirements are satisfied here likewise fails. The Order has "serious, perhaps irreparable, consequences," Texas says, "because it invalidated two congressional districts and compels the State to participate in expedited judicial proceedings to redraw the congressional map." Stay App. at 20. But there is not yet any injunction actually invalidating the two congressional districts and participation in a judicial proceeding designed to arrive at that injunctive relief is not a serious, irreparable consequence. Texas is free to appeal, and seek a stay of, any ensuing injunction. It is entirely foreign to our federal court system to contend that the

[10] Texas must not feel too compelled to act by the district court's Order. Counsel for Texas has informed counsel for plaintiffs that the State intended to show up at the remedial hearing empty-handed.

"risk" of an injunction represents a serious, irreparable harm warranting piecemeal appeal. That turns everything upside down.

Similarly, Texas contends that the district court's Order can only be effectively challenged with an immediate appeal in the absence of a judgment "because appellate review from a final judgment after the imposition of remedial maps would come too late to prevent the irreparable harm of being forced to use those maps for the 2018 election cycle." Stay App. at 20. But the general election is over a year away. The district court has indicated that it intends to swiftly issue a final judgment in this case. Indeed, the district court has expressly stated that it is moving quickly in order to *permit* Texas time to appeal. *See* Order, *Perez v. Abbott*, No. 11-360 (W.D. Tex. Apr. 5, 2017), ECF No. 1352 (asking for "appropriate and necessary schedule for conducting the remaining trials and any appeals in time for the 2018 election cycle"). In any event, the possibility that appellate review will be incomplete in time for the election does not constitute irreparable harm. *See Growe v. Emison*, 507 U.S. 25, 35 (1993) (noting that the Court "fail[s] to see the relevance of the speed of appellate review" of districting plan and that the Court's precedent "does not require appellate review of the plan prior to the election").

To the extent there has been delay, Texas has introduced it. Although Texas now faults the district court for waiting until July to hold trial, *see* Stay App. at 14, when plaintiffs requested a June trial date, Texas countered that trial could not occur until August. *See supra* n.6. And counsel for Texas specifically requested that any remedial hearing be held in late August or early September. *See supra* n.7. Now Texas has unnecessarily disrupted the remedial process, and multiplied the proceedings, with a

stay application and premature appeal that this Court lacks jurisdiction to entertain. If the remedial proceeding had taken place as planned on September 5, Texas likely would have been able to appeal to this Court in mere weeks.

In any event, there is no "October 1 deadline," as Texas repeatedly contends in its Stay Application. *See* Stay App. at 3, 4, 5, 14, 16, 38, 39, 41. Texas has explained that having a decision by October 1 would provide local officials with two months to hire third-party vendors to print and mail voter registration certificates in advance of a ministerial state statutory deadline of December 6. *See* App. J at 2.[11] That is not an "emergency" warranting an extra-statutory exercise of jurisdiction in this case. If it were, it is difficult to imagine what would *not* constitute an "emergency" warranting this Court's intervention to assume jurisdiction over an interlocutory order in a redistricting appeal.

This Court does not have jurisdiction under § 1253 to entertain Texas's premature appeal and stay application.

B. The All Writs Act Does Not Provide this Court Jurisdiction for an Immediate Appeal and Does Not Permit This Court to Block the District Court from Entering Final Judgment and Injunctive Relief.

Texas also suggests this Court can issue an injunction or mandamus relief pursuant to the All Writs Act, 28 U.S.C. § 1651, to block the district court from holding a remedial hearing and entering final judgment. Stay App. at 16. Texas claims that *preventing* the district court from entering final judgment would be "in aid of [this

[11] The December deadline—like all others—can be modified by the courts as necessary. Indeed, it is far more important to have congressional districts that are not constitutionally infirm than it is to meet these ministerial deadlines.

Court's] jurisdiction," Stay App. at 16 (quoting Sup. Ct. R. 20.1), and that "absent relief by October 1, this Court will effectively lose appellate jurisdiction over claims regarding the State's 2018 congressional districts," *id.* Texas is wrong on both the law and the facts.

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law." 28 U.S.C. § 1651(a). This Court has long held that "[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). The Act is not an independent source of jurisdiction. *See Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999) ("[T]he express terms of the Act confine the power of the [courts] to issuing process 'in aid of' [their] existing statutory jurisdiction; the Act does not enlarge that jurisdiction."). Moreover, although the Act authorizes the Court to fashion remedies, "it does not authorize [the Court] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pa. Bureau of Corr.*, 474 U.S. at 43. "[I]njunctive relief under the All Writs Act is to be used 'sparingly and only in the most critical and exigent circumstances.'" *Brown v. Gilmore*, 533 U.S. 1301, 1301 (2001) (Rehnquist, C.J., in chambers) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers) (internal quotation marks omitted)). As Chief Justice Rehnquist explained, "[s]uch an injunction is appropriate only if the legal rights

at issue are indisputably clear." *Id.* (internal quotation marks omitted); Sup. Ct. R. 20.1 ("To justify the granting of any such writ, the petition must show . . . that exceptional circumstances warrant exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."). Enjoining the district court from holding a remedial hearing and entering final judgment would be a wholly inappropriate use of the All Writs Act.

First, there is a specific statute that resolves the question of this Court's appellate jurisdiction, § 1253, and it provides that there cannot be an appeal until the district court enters an injunction, *Gunn*, 399 U.S. at 390. Another statute, 28 U.S.C. § 2284, authorizes three-judge district courts in reapportionment cases to "hear and *determine* the action or proceeding," *id.* § 2284(b)(1) (emphasis added), including by entering "a preliminary or permanent injunction . . . or enter[ing] judgment on the merits," *id.* § 2284(b)(3). It would make scant sense to narrowly construe these statutes while simultaneously permitting Texas to evade a final judgment and skip ahead to this Court pursuant to the All Writs Act. Because there is "a statute [that] specifically addresses the issue at hand," *Pa. Bureau of Corr.*, 474 U.S. at 43, that statute, not the All Writs Act, controls. And that statute precludes Texas's premature appeal and stay application. *See Gunn*, 399 U.S. at 390.

Second, Texas cannot plausibly contend that an injunction or writ of mandamus ordering the district court to desist from fashioning final judgment and injunctive relief somehow aids this Court's jurisdiction. Entry of final judgment by the district court triggers this Court's jurisdiction; it does not threaten it. Where a district court is responsibly deciding the case before it and proceeding to final judgment, as the district

court is here, it would radically depart from this Court's precedent and practice to employ the All Writs Act to derail that process and usurp jurisdiction from the lower court.[12]

Third, resort to the All Writs Act is not necessary here. Texas will be able to appeal the district court's final judgment and any injunctive relief in due course (likely in less than one month's time—although its premature stay application will cause some delay).

Fourth, use of the All Writs Act is not appropriate here because Texas's position on the merits is not "indisputably clear." *Brown*, 533 U.S. at 1301. As demonstrated below, plaintiffs are likely to prevail on appeal.

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This Court has no jurisdiction to entertain Texas's premature appeal and stay application. The temporary stay issued by the Circuit Justice should be immediately dissolved and Texas's stay application immediately denied to permit the district court to complete its proceedings and enter a final, appealable judgment.

II. Texas Cannot Satisfy All the Requisite Elements to Entitle It to a Stay Pending Appeal

Even if this Court finds it has jurisdiction to entertain the stay application, it should be denied. Emergency stay applications pending appeal are forms of "extraordinary relief," *Winston-Salem/Forsyth Cty. Bd. of Educ. v. Scott*, 404 U.S. 1221,

[12] Texas might have an argument if the district court were ignoring the case and declining to proceed to final judgment, as doing so might threaten this Court's appellate jurisdiction. That is not this case. Texas claims there is a judicial emergency because the district court is doing exactly what it is supposed to be doing—proceeding to final judgment.

1231 (1971) (Burger, C.J., in chambers), and are "granted only in extraordinary circumstances," *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). Moreover, "[a] lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity." *Id.* Any party seeking a stay of such a presumptively-valid ruling bears a "heavy burden," and, accordingly, an emergency stay pending appeal "is rarely granted." *Heckler v. Redbud Hospital Dist.*, 473 U.S. 1308, 1311-12 (1985) (Rehnquist, J., in chambers); *see also*, *Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers) ("Denial of such in-chambers stay applications is the norm."). Indeed, "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Ind. State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960 (2009) (citing *Nken v. Holder*, 556 U.S. 418, 433 (2009)).

In order for a party to succeed in carrying that "heavy" burden, that party must make a four-part showing. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers)). Thus, in this case, Applicants must show: (1) a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to note probable jurisdiction; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; (3) a likelihood that irreparable harm will result from the denial of a stay; and, (4) the weighing of the "relative harms to the applicant and to the respondent," as well as the public at large, in close cases, warrants a stay. *Hollingsworth*, 558 U.S. at 190. The first two factors are particularly critical—it "is not enough that the chance of success on the merits be better than negligible." *Nken*, 556 U.S. at 434 (internal quotation marks and citation omitted). The chance of reversal must be "likely." *See id.* And even where

Applicants could satisfy these prongs—and here they cannot—"the conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (emphasis added). Finally, where "the facts are complicated" and "the case is difficult," this Court has been even more reluctant to grant a stay pending appeal. *Mahan v. Howell*, 404 U.S. 1201, 1203 (1971) (Black, J., in chambers) (declining to stay a court-imposed remedy map).

A. Texas Cannot Accord Final Preclusive Effect to Its Preliminary Injunction Victory by Repealing and Re-Enacting its Districting Statute Mid-Litigation.

Texas cannot transform its victory in defeating a preliminary injunction request with respect to CDs 27 and 35 into a preclusive final victory on the merits—immune from judicial review—simply by repealing and re-enacting, unchanged, those districts' boundaries mid-litigation. Texas's contrary suggestion upends this Court's precedent about the non-binding nature of preliminary injunction determinations and, if endorsed, would telegraph a blueprint for states and localities to avoid liability for discriminatory laws through judicial and legislative gamesmanship. It would threaten to convert preliminary injunction rulings in favor of states into *de facto* final judgments.

It is a "basic[]" principle that "[a] preliminary injunction is an extraordinary and drastic remedy" that "is never awarded as of right," *Munaf v. Geren*, 553 U.S. 674, 689-90 (2009) (internal quotation marks and citation omitted), but rather "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion," *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quotation marks omitted) (emphasis in

original). Such a showing is particularly difficult for plaintiffs to make where the suit involves "a claim of improper legislative purpose," for which "the requirement of substantial proof is much higher" at the preliminary injunction stage than in other types of cases. *Id.*

Moreover, preliminary proceedings occur under exigent circumstances and relief is particularly difficult to obtain where claims involve the determination of fact-intensive issues. "[G]iven the haste that is often necessary" in preliminary relief proceedings, "a preliminary injunction is customarily granted [or denied] on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). For these reasons, "[a] party is not required to prove his case in full at a preliminary-injunction hearing," and importantly, "the findings of fact and conclusions of law made by a court granting [or denying] a preliminary injunction *are not binding at the trial on the merits*." *Id.* (emphasis added); *see also Sherley v. Sebelius*, 689 F.3d 776, 781 (D.C. Cir. 2012) ("[T]he decision of a trial or appellate court whether to grant or deny a preliminary injunction does not constitute law of the case for the purpose of further proceedings and does not limit or preclude the parties from litigating the merits." (quotation marks omitted)); *A.J. Canfield Co. v. Vess Beverages, Inc.*, 859 F.2d 36, 38 (7th Cir. 1988) ("In general, rulings in connection with grants or denials of preliminary relief will not be given preclusive effect.").

Because a preliminary injunction is such an extraordinary remedy, it is common for plaintiffs to lose their request for preliminary relief but ultimately prevail on final judgment after a full trial on the merits, particularly in redistricting cases. *Compare*,

e.g., Order, *Covington v. North Carolina*, No. 1:15-cv-00399 (M.D.N.C. Nov. 25, 2015), ECF No. 39 (order denying plaintiffs' motion for preliminary injunction regarding racial gerrymandering claims), *with North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (summarily affirming lower court's conclusion on final judgment that each challenged district was unconstitutional racial gerrymander); *Reynolds v. Sims*, 377 U.S. 533, 542 (1964) (noting denial of plaintiffs' preliminary injunction motion), *with id.* at 542 (affirming ruling on final review that districts were unconstitutionally apportioned).

Texas asks this Court to disregard these basic principles of law and instead hold that the district court committed an "egregious[]" wrong, Stay App. at 4, simply because its final determination following trial differed from its preliminary determination with respect to CDs 27 and 35. That is so, Texas contends, because of an intervening event: the Legislature's decision, mid-litigation, to repeal and simultaneously re-enact—with no change whatsoever—the boundaries of CDs 27 and 35. In Texas's view, this act shifted the responsibility for the choice of line-drawing from the Legislature to the district court, and thereby locked in place the district court's hasty preliminary determination, precluding the court from altering its conclusion on final judgment and foreclosing plaintiffs' ability to prevail at trial—regardless of what the ultimate evidence showed. Texas is wrong for a number of reasons.

First, the factual premise upon which Texas builds its entire argument is flawed. The district court did not draw CDs 27 or 35, nor did it "order" Texas to adopt their configuration, at least not in the traditional sense of that word. *Contra* Stay App. at 5. The 2011 Legislature deliberately chose the boundaries of those districts, and the

district court *declined to order* any alteration to them because it concluded that plaintiffs had failed, at that preliminary stage, to demonstrate they were entitled to the "extraordinary and drastic remedy," *Munaf*, 553 U.S. at 689, of a preliminary injunction with respect to CDs 27 and 35, *see* App. D at 41-55.[13] The entirety of Texas's argument flows from its flawed characterization of who chose the boundaries of CDs 27 and 35.

Second, Texas's position is irreconcilable with the settled principle that "the findings of fact and conclusions of law made by a court granting [or denying] a preliminary injunction are not binding at the trial on the merits." *Camenisch*, 451 U.S. at 395. The mere act of repealing and re-enacting a law—in exact form—in the time between a preliminary hearing and a trial cannot plausibly alter this principle. The principle would be meaningless were it otherwise. And such a rule would result in a host of negative consequences and perverse incentives.

As discussed above, plaintiffs alleging vote dilution and racial gerrymandering face a high hurdle at the preliminary injunction stage because of the fact-intensive nature of the claims. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017) (characterizing racial gerrymander case is "special challenge for a trial court" because of necessity of "sensitive inquiry" (internal quotation marks omitted)). States are thus

[13] It makes little sense to characterize the district court as "ordering" Texas to adopt district boundaries identical to those the Legislature had already enacted. Although the district court ordered Texas to alter districts in the Dallas-Fort Worth area and CD 23, the simple fact that it then fit those alterations into a statewide map does not mean the undisturbed districts resulted from a court order, rather than from the Legislature's own line-drawing. The 2011 redistricting statute specifically describes CDs 27 and 35 by census blocks. *See* Tex. S.B. 4, Act of July 19, 2011, 82d Tex. Leg., Art. II, §§ 27, 35. These statutory descriptions still precisely described the two districts in the 2013 legislation. A court that invalidates portions of a statute in a preliminary injunction decision has not "ordered" into place the unaffected portions.

more likely than not to defeat requests for preliminary relief—even in cases in which plaintiffs ultimately prevail. If Texas were correct—if a state can convert its preliminary victory into a preclusive final victory by merely repealing and re-enacting the same districting legislation mid-litigation—*every* state legislature facing such a challenge would take this path, effectively foreclosing relief in racial gerrymandering and vote dilution cases.[14] This natural result of Texas's position would lead to further distorting effects. First, contrary to this Court's holding in *Camenisch*, it would require plaintiffs to "prove [their] case in full at a preliminary-injunction hearing," 451 U.S. at 395, in order to have any chance at ultimate success. Second, district courts, aware of the incentive for gamesmanship such a rule would engender, would likely in turn ratchet-down the quantum of evidence necessary to obtain a preliminary injunction in such cases. Third, Texas's position, if adopted, would cause the number of litigants seeking to appeal preliminary injunction denials to skyrocket, taxing judicial resources already stretched thin. Texas's contention is wrong on the law and would lead distortion of the proper progression of redistricting litigation. Texas has offered no justification for carving out this giant and harmful exception to the settled law.

Third, Texas's contention that the Legislature was entitled to convert the district's court's denial of preliminary relief into a preclusive final victory because it was

[14] This Court's recent decision in *Covington*, 137 S. Ct. 2211, offers a perfect example. After North Carolina defeated plaintiffs' motion for a preliminary injunction, according to Texas's argument, the State could have ended the case and claimed victory by simply repealing its districting plan and simultaneously re-enacting it in exact form, pointing to the district court's preliminary injunction analysis. A number of racial gerrymanders later found by the district court after full trial—a ruling summarily affirmed by this Court—would thus go uncorrected.

relying on the district court's "legal advice" is belied by the district court's fact-finding in this case—determinations to which this Court must defer unless clearly erroneous. *See Cooper*, 137 S. Ct. at 1465. The district court's unanimous fact-finding showed that the Legislature did not think the interim order established the plan's legality, but rather that adopting it would aid its litigation strategy. The court noted correspondence from the Attorney General opining that enacting the interim plan would "insulate the State's redistricting plans from further legal challenge."[15] Moreover, the court cited the trial testimony of the bill's sponsor, Rep. Drew Darby, that the legislation originated in the Attorney General's office, including the "legislative fact findings accompanying the plans," before the Legislature had even taken up the bills, App. A at 35 n.41, and the hearing testimony of the Legislature's own attorney, Jeff Archer, advising that the Legislature could not rely upon the interim order as legal support for enacting the interim plan, *see id.* at 36-37, 38 n.45.

Texas does not even acknowledge—let alone challenge—the district court's fact-finding in this regard, or the record evidence supporting those findings. It does not explain how any of these factual findings were clearly erroneous, or why this Court should depart from precedent and "take it upon [itself] to weigh the trial evidence as if [it] were the first to hear it." *See Cooper*, 137 S. Ct. at 1478. Texas assumed the risk, when the Legislature purported to rely on a preliminary injunction analysis, that it

[15] In its Stay Application, Texas remarkably chastises the district court for committing a "gross mischaracterization" because "[Texas] has never argued that the Legislature's adoption of Plan C235 'insulates' that plan from all judicial review." Stay App. at 28. Evidence in the then-Attorney General's own words show the converse is true.

might ultimately have "[won] a battle but los[t] the war." *Sole v. Wyner*, 551 U.S. 74, 86 (2007) (quotation marks omitted) (brackets in original).

Texas cannot transform the denial of plaintiffs' request for preliminary relief with respect to CDs 27 and 35 into a preclusive final victory through legislative gamesmanship. This Court should reject such gamesmanship, defer to the district court's well-supported fact findings, and recognize, consistent with its own precedent, that the district court's preliminary ruling, under particularly rushed circumstances, was just that—preliminary and subject to revision.

B. The District Court's Ruling on the Districts' Unlawful Discriminatory *Effects* is Unaddressed by Texas's Stay Application and Unlikely to Be Reversed.

The district court, in rulings independent of its intent finding, also concluded that CDs 27 and 35 had unlawful discriminatory effects—a finding unchallenged by Texas in its Stay Application and unlikely to be reversed on appeal. The district court's conclusion that race predominated in the drawing of CD 35 does not depend upon its finding of intentional discrimination, and is thus simply unaddressed by Texas's arguments. Likewise, Texas does not mention, let alone challenge, the district court's conclusion that CD 27 has discriminatory *effects*, in violation of VRA § 2, apart from any intent finding. Texas's single-minded attack on the district court's intent finding is thus a red herring that cannot support its requested stay.

1. The District Court's Conclusion That CD 35 Is an Impermissible Racial Gerrymander Does Not Depend Upon Discriminatory Intent.

The district court's ruling that CD 35 is an impermissible racial gerrymander does not rest on the district court's discriminatory intent finding, the sole subject of

Texas's Stay Application. The district court's conclusion regarding CD 35 is based on a wealth of evidence that easily supports its fact findings. Texas offers no explanation for why this Court should not defer to those findings or how they are possibly clearly erroneous—an omission fatal to its stay application.

As this Court has explained, racial gerrymander claims are

> analytically distinct from a vote dilution claim. Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities, an action disadvantaging voters of a particular race, the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts.

Miller v. Johnson, 515 U.S. 900, 911 (1995) (internal quotation marks and citations omitted). It is the mere predominance of racial considerations without a strong basis in evidence for doing so, rather than any intent to discriminate on the basis of race, that violates the Equal Protection Clause. *See Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.") (internal quotation marks and citation omitted).

Courts considering racial gerrymander claims must engage in a two-step analysis, first asking whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," and if so, asking second whether the State has satisfied its burden to prove that the "race-based sorting of voters serves a compelling interest and is narrowly tailored to that end." *Cooper*, 137 S. Ct. at 1463-64 (internal quotation marks and citation omitted). "A district court's assessment of a districting plan, in accordance

with the two-step inquiry just described, warrants significant deference on appeal to this Court. . . . [T]he court's findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error." *Id.* at 1465.

The district court carefully analyzed the evidence and concluded that race predominated in the decision of which voters to include and exclude from CD 35, and that the race-based decision-making did not survive strict scrutiny. *See* App. A at 98-104; App. B at 32-46; App. C at 264-303. For example, the district court highlighted several egregious precinct splits, such as dividing St. Edwards University to place the largely Hispanic dormitories in CD 35 while excluding the administration building, and a precinct split in the shape of an arrowhead to include a Hispanic-dominated apartment complex in CD 35. App. B at 37. Because only racial data—not political data—is available below the precinct level, this evidence firmly establishes that race predominated in the drawing of CD 35. Moreover, the court found that "[t]he CD35 district lines in Travis County do not match up with any city boundaries, with House districts, or with any recognizable community of interest other than race." *Id.* at 38.

Texas does not even confront this evidence in its Stay Application, let alone explain why this Court is likely to rule that the district court clearly erred in its findings. Rather, Texas contends "CD 35 was never a racial gerrymander in the first place," Stay App. at 35, citing a single newspaper article about population growth. *See Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015) ("[A]n equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates'").

Nor does Texas even offer a compelling interest for the original creation of CD 35 to which the district lines were narrowly tailored. Texas does not contest the district court's finding that § 2 of the VRA could not have required the district because the third *Gingles* precondition was not met. *See* App. B at 43. Rather, Texas merely contends that CD 35 is one of seven required Latino opportunity districts in South/West Texas. Stay App. at 36. But while the VRA certainly required that number of districts, Texas offers no reason to conclude the district court erred in determining it had no strong basis in evidence to create this particular version of CD 35. And the fact that the 2013 Legislature repealed and re-enacted CD 35—without change—cannot suffice to rectify the impermissible sorting of voters on the basis of race at the time the lines were drawn.

Texas's Stay Application falls *far* short of a showing that the district court's racial gerrymandering conclusion with respect to CD 35 is likely to be reversed.

2. Texas's Attack on the District Court's Intent Finding Does Not Implicate the Court's § 2 Results Violation Ruling Regarding CD 27.

Texas contends that the district court's § 2 *intent* finding with respect to CD 27 is "baseless." Stay App. at 30. Yet by aiming its fire at the district court's intent-based finding, Texas ignores that the district court expressly found that "the Legislature violation § 2 in *both result and intent*" in its configuration of CD 27. App. A at 100 (emphasis added).

With respect to the 2011 plan, the district 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." App. B

at 47. Those voters' § 2 right did not disappear by 2013. On the contrary, those Nueces County Hispanics still have a § 2 right that is not remedied under Plan C235. 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 CD 27.

Texas tries to sidestep this unambiguous finding of a § 2 effects violation, arguing that no such violation could exist unless relocating those Nueces County Latino voters to another South Texas district would lead to the creation of an additional Hispanic opportunity district. Stay App. 31. But Texas misunderstands—and misrepresents—the district court's holding in this regard. Latino voters in South/West Texas (but not Travis County) had—and continue to have—a § 2 right to seven Latino opportunity districts. Texas failed to effectuate this § 2 right for Nueces County Latinos, instead engineering a racial gerrymander in CD 35 that roped in Travis County Latinos without a compelling § 2 justification.[16] *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006) (holding that state cannot trade § 2 rights of some members of a racial group against the rights of others). While the district court further found that "the Legislature intentionally did not substantially address the § 2 violation" for Nueces County Latinos, App. A at 100-01, that § 2 effects violation remains in place irrespective of the Legislature's intent. In short, even if the Legislature "genuinely believed" that Plan C235's configuration of CD 27 satisfied its § 2 obligations, Stay App. 26, it did not. Not in 2011, and not in 2013.

[16] The Court found Anglo bloc voting sufficient to defeat minority-preferred candidates in Nueces County, but not Travis County.

In the end, Texas "[a]dmit[s]" that "discriminatory *effect* can be carried over (whether intentionally or unwittingly) from one version of law to another." Stay App. 26 (emphasis in original). This concession is damning to Texas's stay request in light of the district court's express finding that "the racially discriminatory intent *and effects* that it previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged." App. A at 39, 104 (emphasis added).

Regardless of Texas's assertions of intervening good will toward minority voters, the effects of the unjustified race-based configuration of CD 35 and the effects of vote dilution on Latinos in South/West Texas are just as real and just as damaging today as they were on the day those districts were first enacted in 2011, and Texas has not even attempted to show that any of the district court's fact findings were clearly erroneous.

C. This Court is Unlikely to Reverse the District Court's Finding of Intentional Discrimination.

In light of the district court's discriminatory effects rulings, *see supra* Part II.B, this Court need not even consider Texas's lengthy argument regarding the district court's finding of discriminatory intent. By Texas's own admission, *see* Stay App. at 26, this alone warrants denial of its stay application.

But the district court's finding that the intentional discrimination from the 2011 plan remains present in the 2013 plan is fully supported by this Court's precedent. Discriminatory purpose can exist in the original enactment of legislation and when a legislature "reaffirms" a law motivated by discrimination.[17] *Personnel Administrator of*

[17] Texas is wrong to contend that the Legislature cannot be liable for failing to eliminate the discriminatory taint in 2013 because the district court's ruling on the 2011 plan was

Mass. v. Feeney, 442 U.S. 256, 279 (1979). In *Hunter v. Underwood*, this Court held that a state constitutional felon disenfranchisement provision was originally enacted with discriminatory intent in 1901, and despite the fact that "[s]ome of the more blatantly discriminatory selections . . . have been struck down by the courts," the provision's "original enactment was motivated by a desire to discriminate against blacks on account of race and the sections continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*." 471 US. 222, 232-33 (1985); s*ee also Chen v. City of Houston*, 206 F.3d 502, 518 (5th Cir. 2000) (holding that in VRA suits, evidence of discriminatory intent in original enactment may persist to taint later enactment); *Cotton v. Fordice*, 157 F.3d 388, 391-92 (5th Cir. 1998) (holding that deliberative legislative process can overcome discriminatory intent in original enactment).

The district court's intent finding is firmly supported by *Hunter* and unlikely to be reversed, but is in any event not necessary to the district court's decision to invalidate CDs 27 and 35. Texas's stay application—based entirely on that intent finding—must therefore necessarily fail.

D. Texas Has Not Shown Irreparable Harm, and the Balance of Equities Requires Denial of the Stay Application.

Texas has not shown that it faces irreparable harm, and the equities require denial of its stay application. Three election cycles—2012, 2014, and 2016—have now been conducted with a racially gerrymandered district and a district that violates § 2 in

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not released until 2017. *See* Stay App. at 23. Discrimination, and the failure to remedy discrimination, triggers liability when it happens, not when a court *finds* it present. In any event, when the Legislature enacted the interim plan in 2013, it was certainly aware that the D.C. court had determined the 2011 plan was enacted with discriminatory intent. *See, e.g.*, App. A at 37.

results and intent. Only two election cycles remain before the next round of post-Census redistricting. Yet Texas remarkably contends that the long duration of this unremedied violation supports *further delay*, such that *one* election cycle—at the decade's end—would occur in constitutional and legal districts. Stay App. at 42. Texas gets it backwards. Texas also contends that the harm from CD 35's racial gerrymander is less worthy of prompt remedy because that violation is not vote dilutive. *Id.* This Court has held otherwise. *See Alabama*, 135 S. Ct. at 1265.

Texas likewise faces no "October 1 deadline," Stay App. at 38, as discussed above. Voters in CDs 27 and 35 should not have their rights to constitutionally-constructed districts delayed because Texas prefers to offer local officials two months to coordinate off-site printing and mailing. If the choice is addressing those voters' ongoing harm before the 2018 election, and delaying the various pre-election deadlines, the right to legal districts prevails. And in any event, Texas is not entitled to delay remedying districts declared legally infirm simply because it intends to appeal that decision. *See Growe*, 507 U.S. at 35 (noting that the Court "fail[s] to see the relevance of the speed of appellate review" and that the Court's precedent "does not require appellate review of the plan prior to the election").

Nor has the district court sprung the possibility of remedial plans on Texas at the last minute, as misrepresented in the Application. *See* Stay App. at 39. During trial, Texas *specifically requested* that any remedial hearing be conducted in late August or early September. App. N at 1820. Texas cannot now credibly object that the district court set the schedule the state itself requested. Moreover, Texas was certainly placed on first notice of the need to redistrict in March of this year when the district court

invalidated CDs 27 and 35 in the 2011 plan—configurations that still exist today. App. B at 57-58. Texas was again given notice when on May 22, 2017, the court invited the Legislature to voluntarily redistrict in light of this Court's decision in *Cooper*, which plainly establishes the invalidity of CD 35. ECF No. 1395. Texas refused. ECF No. 1397. Finally, at the conclusion of the trial on July 15, the district court told the litigants that should it find liability, it would be seeking to conduct remedial proceedings in August or early September. App. N at 1820. Texas has not been caught unaware, and it has repeatedly signaled it has no intention to voluntarily correct the flaws in its congressional map.

Desperate to make the requisite showing of irreparable harm, Texas then appeals to alleged *Purcell* concerns as a basis for halting the remedial proceedings. The facts of this case simply do not implicate any concerns as those seen in *Purcell v. Gonzalez*, 549 U.S. 1 (2006). In *Purcell*, this Court was concerned about voter confusion because the rules governing an election were changing based on *conflicting* court orders mere weeks before the election was conducted. 549 U.S. at 4-5. There are no conflicting orders in this case. Furthermore, *Purcell* had nothing to do with redistricting, and certainly not with as generous a timeframe as in this case. *Id.* at 2-3. Here, the state has assured the court that as long as the remedial plan is approved by October 1, well over a year in advance of the next general election, no election deadlines will have to be modified, and voters will experience no change in their voting experience. *See* App. J. The three-judge court has acted carefully and quickly to avoid triggering any *Purcell* concerns. Applicants cannot have it both ways by arguing that

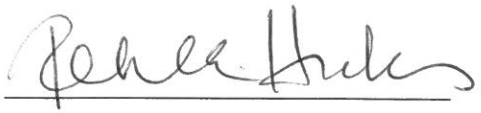
they have not been afforded enough time to redistrict, but also that the relief is not being established soon enough.

Finally, this Court should follow its practice of denying a stay of remedial redistricting plans pending appeal. *See, e.g.*, *McCrory v. Harris*, 136 S. Ct. 1001 (2016); *Wittman v. Personhuballah*, 136 S. Ct. 998 (2016); *Stephenson v. Bartlett*, 545 U.S. 1301 (2002) (Rehnquist, C.J., in chambers); *Graves*, 405 U.S. at 1204. Texas is not harmed by remedying constitutional and statutory violations. Plaintiffs and hundreds of thousands of other voters in Texas are irreparably harmed by its failure to do so.

CONCLUSION

For the forgoing reasons, the stay application should be denied. The Court does not have jurisdiction to entertain Texas's premature appeal and there is nothing yet to stay. Further, Applicants have not shown they would suffer any irreparable harm absent the stay, that the balance of equities weighs in the favor of a stay, or that a majority of Justices will reverse the decision below.

Respectfully submitted,



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