No. 17A245

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

Once again, the State of Texas has made a premature and therefore untimely application for an emergency stay over which this Court has no jurisdiction. The situation presented here could not be more different from the procedural posture of this case in 2012, when this Court considered the first set of post-2010 census interim redistricting maps for Congress and State House. As in its Application relating to the congressional plan, filed on August 25, 2017, Texas again asks the Court to act prematurely and issue a stay to halt remedial proceedings where there is no lower court injunction to stay. This Court does not have jurisdiction to review a redistricting case from a three-judge panel where neither an injunction nor final judgment has been entered.

No emergency warrants such unprecedented and consequential intervention. The district court plainly intends to conduct remedial proceedings and enter final judgment quickly. The deadline that Texas asserts creates the emergency here—needing a redistricting plan in place by October 1 to allow two months to print voter registration certificates—is one established for convenience and not by statute. When that administrative deadline has been pushed back in the past, as it has many times, it has never impeded the conduction of elections. Texas' attempt to unnecessarily involve this Court prematurely and create an unprecedented extension of the Court's jurisdiction is simply an improper dilatory strategy and wastes this Court's judicial resources. If the Court were to assert jurisdiction at

this stage, then the appeal of interlocutory orders to this Court would become virtually obligatory and threaten to overwhelm the Court's docket. Congress intentionally limited this Court's jurisdiction in appeals from a three-judge court to protect the Court from that very impractical situation.

This time, unlike in 2011 when it had to act quickly to fill a legal vacuum, the district court held a full trial on the merits of all of Plaintiffs' claims, and upon a full evidentiary record and time to consider the complex legal issues involved—including the three racial gerrymandering decisions this Supreme Court has issued during the pendency of this litigation—the district court has made extensive fact-finding and issued a considered, restrained ruling on the 2011 and 2013 State House redistricting plans. Texas is asking this court, in the extraordinary and rushed context of an Emergency Stay Application, to disregard that fact-finding, based on the district court's close review of weeks of live testimony, and address the merits of a case in which neither an injunction nor final judgment has been entered. Despite the State's hyperbolic assertions to the contrary, the district court's ruling is unlikely to be reversed on its appeal. Texas will suffer no irreparable injury should the stay be denied and the standard appellate procedures be allowed to proceed. Voters in Texas have been subjected to unconstitutional and illegal State House Districts for three out of this decade's five election cycles, and a stay here would ensure that yet another election cycle passes without remedy. Even if the substantial jurisdictional hurdle could be overcome, the Application should be denied because Texas has not satisfied the requirements for an emergency stay.

STATEMENT OF THE CASE

Texas experienced significant population growth from 2000 to 2010—and eighty-nine percent of the state's growth was attributable to residents of color. App. C (Case No. 17A225) at 411.[1] Despite this population increase, Texas revised the State House of Representatives' 150 districts to *reduce* the number of minority opportunity districts. *See, e.g., Texas v. United States*, 887 F. Supp. 2d 133, 166 (D.D.C. 2012), *vacated on other grounds*, 133 S. Ct. 2885 (2013). The state Legislature adopted that new redistricting plan—H283—on June 17, 2011, and several groups of plaintiffs promptly 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"), violations of the *Shaw* doctrine, and further asserting that the enacted plan had not and likely would not receive preclearance under then-extant Section 5. *See, e.g.*, Amended Complaint, *Perez v. Perry*, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Jun. 7, 2011), ECF No. 6. The next month, Texas initiated a declaratory judgment action in 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. The United States and many of the San Antonio litigants and the United States Department of Justice opposed preclearance of the plan. App. D at 2.

[1] The district court indicated that its opinions on the State House plans were intended to be read in conjunction with the district court's opinions and fact-finding on the congressional plans. *See, e.g.*, App. B at 1. As such, references will be made to those documents, which are in the appendices submitted with the concurrent Emergency Stay Application on the congressional ruling, Case No. 17A225.

In September 2011, the three-judge panel in San Antonio conducted a preliminary evidentiary hearing because it had become clear that Texas would not receive preclearance in time to implement H283 for the 2012 elections, and thus the "unwelcome obligation" of devising an interim plan fell to the San Antonio court. App. D at 2 (citing *Connor v. Finch*, 431 U.S. 407, 415 (1977)). Based on the initial, and limited, evidence it had received in September, the district court in this case issued an interim plan for State House elections on November 23, 2011, and Texas appealed to this Court. App. O at 45-46.

In *Perry v. Perez*, this Court established a new standard for district courts tasked with devising interim plans when Section 5 preclearance proceedings were under way, but unresolved. 565 U.S. 388, 394-95 (2012) (per curiam). Recognizing the difficulty with requiring the district court in Texas to avoid interference with the D.C. district court's exclusive Section 5 preclearance jurisdiction, the Court instructed the San Antonio court to assess whether any parts of the State's plan "stand a reasonable probability of failing to gain § 5 preclearance"—that is, "that the § 5 challenge is not insubstantial"—and make modifications to correct those elements but otherwise defer to the State's policy preferences. *Id*. at 395. With respect to challenges under the Fourteenth Amendment and Section 2 of the Voting Rights Act, this Court directed the trial court to apply a preliminary injunction standard and modify the legislatively enacted plan only where it determined that Plaintiffs had demonstrated a likelihood of success on the merits. *Id*. at 394. The Court vacated the first interim plan order and, on January 20, 2012, remanded to

the San Antonio court to devise another interim plan applying these new standards. *Id*. at 399.

Just over a month later, on February 28, 2012, the San Antonio court ordered the use of H309 for the 2012 elections. App. O at 56. In its March 19, 2012 opinion justifying the plan's interim use, the district court noted the "preliminary and temporary nature of the interim plan, ordered in adherence to the standard set forth by the Supreme Court." App. D at 12. It applied these new standards quickly, "mindful of the exigent circumstances created by the need for 2012 primaries and general elections in Texas." *Id*. The San Antonio court repeatedly emphasized that "[n]othing in this opinion" should be taken to "represent[] a final judgment on the merits as to any claim or defense in this case." *Id*.

Based in its preliminary analysis, the court in ordering H309 made some changes to the 2011 enacted plan, App. D at 11-12, but with admittedly little time and only a preliminary analysis, the court found that Plaintiffs were not likely to succeed on the merits of their claims of constitutional or Voting Rights Act violations in their challenges in Dallas, Tarrant, Nueces and Bell counties, among others. *Id*. at 3. It reiterated, though, that its findings in that regard were only preliminary and did not constitute a final judgment. *Id*. Statewide, 122 districts were completely untouched in the new interim plan, and seven districts were only minimally altered. *Id*. at 12.

On August 28, 2012, the D.C. court issued final judgment denying Texas preclearance of its State House plan, unanimously concluding that the plan could

not be precleared because it would have a retrogressive effect on the ability of minority voters to elect their candidates of choice. *Texas v. United States*, 887 F. Supp. 2d at 166. The three federal judges "conclude[d] that the enacted plan will have the effect of abridging minority voting rights in four ability districts — HDs 33, 35, 117, and 149 — and that Texas did not create any new ability districts to offset those losses," and because of that the plan violated Section 5. *Id*. Because the court found retrogressive effect, it did not reach the merits of the discriminatory purpose claims, but noted an overwhelming amount of "record evidence [that] may support a finding of discriminatory purpose in enacting the State House Plan," and that "at minimum, the full record strongly suggests that the retrogressive effect we have found may not have been accidental." *Id*. at 178.

Texas appealed the D.C. court's judgment to this Court. App. A (Case No. 17A225) at 6. In the spring of 2013, while that appeal was pending and after this Court had heard arguments in *Shelby County v. Holder*, Attorney General Greg Abbott (now Governor Abbott and an applicant in this case) sent letters to legislative leaders urging them to enact the interim maps into law to "avoid further interventions from federal judges in the Texas redistricting plans." App. G. Accordingly, in the early summer of 2013, Texas Governor Rick Perry called a special session for the state Legislature to adopt redistricting plans for Congress and the state Legislature. The call to session was described as being for the purpose of adopting H309, the court-ordered plan. App. A at 2. But as the district court found: "[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 (Case No. 17A225) at 34. That litigation strategy was to avoid further findings of discriminatory intent, as had already been made by the D.C. court, and to instead cloak itself in the San Antonio court's preliminary injunction ruling to insulate the state from further liability. *Id*. at 37-39.

Just like with the congressional plan adoption, when the Legislature convened in May 2013, the Legislature's attorney, Jeff Archer, advised at the time that the Legislature could not rely upon the interim plan as proof that the plan complied with the VRA and Constitution. Mr. Archer explained that the district court's admonitions that the interim plan represented only a preliminary ruling were "as if to say this is the best we can do now. We haven't gotten to the bottom of things." App. A (Case No. 17A225) at 36-37; *see also id*. ("[T]his was an interim plan to address basically first impression of voting rights issues."). Finally, he advised that adopting the interim plans would not end the litigation because there were challenges pending that were left unaddressed by that plan. *Id*. at 38 n.45.

The Legislature did not, unlike in the Congressional case, adopt the court-ordered plan wholesale. Ignoring Mr. Archer's warnings, and the testimony of minority legislators and members of the public about the interim plan's legal deficiencies, the House plan as adopted made small changes in only four counties, and House Redistricting Committee Chairman Drew Darby explained that these changes "don't have any implications with regard to Section 2 of the Voting Rights Act." App. A at 2-3.

After the enactment of the 2013 plan and the decision by this Court in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), Plaintiffs sought leave to amend their complaints, all additionally seeking relief under Section 3(c) of the Voting Rights Act for the discriminatory intent motivating the 2011 plan and persisting in the 2013 plan, and some Plaintiffs seeking to additionally challenge the 2013 plan. Order, *Perez*, ECF No. 886 at 8-10. The court rejected Texas' claim that the challenges to the 2011 plan were moot, holding that the case was not moot because Plaintiffs were entitled to additional relief (bail-in under the VRA), and relying on this Court's well-settled precedent that voluntary cessation of illegal activity does not render a case moot. *Id*. at 13-15. After conducting further discovery on the 2011 plan, including the production of emails and draft maps not available to the court in its 2011 preliminary hearing, the parties went to trial on the merits of the 2011 plan in July 2014. App. A (Case No. 17A225) at 11; *see also* App. O at 103-04.

On April 20, 2017, the district court issued a 171-page opinion and 151 pages of findings of fact. App. B; App. C. These findings included extensive assessments of the credibility of the state's mapdrawers, as well as evaluation of the justifications given by the state's mapdrawers for their line-drawing. Finding key elements of the mapdrawers' explanations implausible, incredible, or contradictory, the district court concluded that the 2011 plan ("Plan H283") was enacted with discriminatory intent in violation of the Constitution and Section 2 of the VRA and contained racial gerrymanders and malapportioned districts. The court explained that, "[P]lan H283 not only failed to create any new minority opportunity districts,

it *reduced* the number of minority opportunity districts." App. B at 84 (emphasis in original). As a result of intentional dilution of minority voting strength, "[t]he impact of the plan was certainly to reduce minority voting opportunity statewide, resulting in even less proportional representation for minority voters." *Id*.

Additionally, after a full trial on the merits and adequate time to consider the complex law and facts in this case, the San Antonio court concluded that Plaintiffs had, in fact, proven their claims on districts for which the court had not been able to make that same conclusion on preliminary review. Specifically, the court explained that it reached a different conclusion upon full review of the facts and law, and it found intentional vote dilution or other constitutional flaws in Dallas, Tarrant, Bell and Nueces counties. App. B at 153. The court below noted that these invalid districts in Nueces and Bell counties were unchanged in 2013, and the districts in Dallas and Tarrant counties had only superficial, or further invalid, adjustments in that new plan. App. A at 17, 20, 73-74.

The court held over disposition on Section 2 challenges to districts that remained unchanged in H358 until the merits trial on the 2013 plan. App. B. at 5, 60, 69, 72, 79, 152 (identifying challenges to districts in Fort Bend, Dallas, Harris, McClennan, Lubbock, Nueces and Midland/Ector counties). After a status conference on April 27, 2017 to discuss the best timing for a trial of remaining issues and avoiding interference with the elections schedule for 2018 (where counsel for Texas suggested that trial could not occur prior to August 2017, *see* App. M (Case No. 17A225) at 75, 78, 83 (April 27, 2017 Tr.)), the court scheduled trial for

the week of July 10, 2017. After six days of trial, the court took the matter under advisement and issued its ruling on August 24, 2017.

The unanimous[2] panel ruled that district boundaries in Nueces County violated Section 2, noting "Hispanic voters in Nueces County have a § 2 right to an additional district." App. A at 51. It further concluded that Texas' 2013 modifications to one district in Tarrant County "were dictated solely by race. [The mapdrawers] methodically scanned the western border of the district, cutting out majority-Anglo areas precisely because they were Anglo and drawing in majority-Hispanic areas precisely because they were Hispanic." *Id*. at 73. Beyond that, every statutory and constitutional violation the Court identified was one found in the 2011 plan and uncorrected in the 2013 plan. The district court declined to find any violations in additional areas challenged by Plaintiffs, including in Houston, South Texas and West Texas. *Id*. at 80. As with the congressional plan, the district court again explained that it did not enjoin H358 at that point, and invited the Legislature voluntarily to take up the issue in a special session. *Id*. at 81-82. Texas moved for a stay pending appeal, and the district court denied the motion because it had not entered an injunction. *See* Aug. 28, 2017 Text Order, App. O at 138. Texas then filed its Emergency Stay Application.

Because of Texas' representation that "unmovable" election deadlines were rapidly approaching, the district court advised the parties that, notwithstanding the

[2] Although Judge Smith dissented with respect to the district court's opinion on the 2011 House plan, he joined in the panel's decision on the 2013 House plan. App. A at 83.

filing of an Emergency Stay Application, it would be advantageous for the parties to continue working on the development of proposed remedial House plans. Advisory, *Perez*, ECF No. 1548. After Justice Alito entered a temporary stay pending a response and further order of the Court, the district court also promptly canceled the House remedial hearing scheduled for September 6, 2017. Text Order, *Perez*, ECF No. 1553.

ARGUMENT

I. This Court Lacks Jurisdiction to Act on the Stay Application and Appeal Because the District Court Has Not Yet Issued Any Injunctive or Final Relief

A. The Three-Judge Court Act Does Not Create Jurisdiction for this Court to Hear Texas' Untimely Stay Application and Stay Application

This Court has no jurisdiction to entertain Texas' stay application and premature appeal because the district court has not entered any type of injunctive relief or final judgment. The applicable statute governing this Court's jurisdiction over appeals from three-judge panels—28 U.S.C. § 1253—is unequivocal: appeals to this Court may only be made "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction." The district court made clear that its ruling on H358 is interlocutory and enjoins nothing. *See* App. O at 138 (Aug. 28, 2017 Text Order) ("Although the Court found violations in Plan H358, the Court has not enjoined its use for any upcoming elections."). Both the explicit language of the ruling and its practical effect make clear that, as of this date, there

is no injunction and no final judgment. Therefore, the plain text of the Three-Judge Court Act does not establish jurisdiction here.

On multiple occasions, this Court has explained that § 1253 should be narrowly construed to limit its application. *See Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("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 now confines our appellate docket.") (alterations in original) (internal quotation marks omitted); *Bd. of Regents v. New Left Educ. Project*, 404 U.S. 541, 545 (1972) (repeating the "oft-repeated admonition that the three-judge court statute is to be strictly construed").

In fact, in a case squarely on point here, the Court held that it lacked jurisdiction to consider an appeal from liability order from a three-judge court when that did not grant any injunctive relief. *Gunn v. Univ. Comm. to End War*, 399 U.S. 383, 390 (1970). In *Gunn*, plaintiffs had challenged a state statute defining "disturbing the peace" criminal charges. The three-judge panel there found that the law was unconstitutional but deferred entering injunctive relief in order to give Texas a chance to revise the law to make it constitutionally compliant.[3] *Id.* at 386. Although the lower court had concluded that "Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against enforcement of

[3] When *Gunn* was filed, a three-judge court was empaneled any time plaintiffs brought federal constitutional challenges to a state statute. In 1976, Congress narrowed the category of cases required to be heard by three-judge district courts. *See* Pub. L. 94-381, 90 Stat. 1119 (1976).

[the statute] as now worded," the Supreme Court dismissed the appeal for lack of jurisdiction. *Id*. The Court noted that "[t]he 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 Supreme Court explained that without understanding the scope of potential injunctive relief, the appeal and the Court's examination of the merits would be made implausible. *Id*. at 388. Because of that, and because of the Court's historical reticence to interpret the statute broadly, the Court concluded that it had "no power under § 1253 either to remand to the court below or deal with the merits of the case in any way at all." *Id*. at 390 (internal quotation marks omitted).

Gunn answers the jurisdictional question raised by this Application. The court below found that H358, the House redistricting plan enacted in 2013, violates Section 2 and the Fourteenth Amendment, but it has declined to enter an injunction yet. *See* App. O at 138 (Aug. 28, 2017 Text Order). The district court, in carefully respecting Texas' sovereignty, has invited the State to offer a remedy. Likewise, without yet understanding what injunctive relief, if any, is necessary to remedy the violations identified by the court below, this Court's review of the merits of this case would be largely undeveloped and ineffectual. Just as this Court found that in *Gunn* it had "no power" to "deal with the merits of this case in any way at all" until the court enters an injunction, 399 U.S. at 390, so too must the Court here deny the

stay and dismiss the premature appeal for want of jurisdiction. *Gunn* plainly controls here.

Applicants rely upon *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981), to argue that the district court's opinion is "in effect" an injunction, thus triggering this Court's jurisdiction. Stay App. at 3, 19. But *Carson* is not relevant here because it involved an entirely different statutory grant of jurisdiction. *Carson* was an employment discrimination case where the trial court denied the parties' joint motion to enter a consent decree resolving the case. 450 U.S. at 80-81. When the plaintiffs appealed the denial of that motion, the appeals court dismissed the appeal for lack of jurisdiction under § 1292. *Id.* at 81-82. This Court reversed unanimously. *Id.* at 80. The Court in *Carson* created a framework for appealing orders under U.S.C. § 1292, not § 1295. But § 1292 governs appeals to the circuit courts, whose capacity to entertain direct appeals is far greater than this Court's. Moreover, there is neither the congressional intent nor the Supreme Court precedent requiring a narrow construction of § 1292. For these reasons, it makes no sense to apply *Carson*'s § 1292 framework to a case proceeding under § 1295, and this Court should reject Texas' invitation to abandon its longstanding commitment to narrowly construe § 1295.

Additionally, even if the Court's interpretation under § 1292 were applicable here, and it is not, Applicants still fail. They do not satisfy the standard set forth in *Carson*, which held that a non-injunctive order with the "practical effect" of injunction could be appealed only if the applicant demonstrated that (1) the

interlocutory order "might have a serious, perhaps irreparable, consequence" and (2) that the order can be "effectually challenged" only by an expedited, immediate appeal. *Carson*, 450 U.S. at 83-84 (internal quotation marks omitted).

First, the district court's order does not have the practical effect of creating an injunction. Texas relies on the district court's instructions that the violations "must be remedied." Stay App. at 18. But that is indistinguishable from *Gunn*, where the district court explicitly stated that plaintiffs were entitled to an "injunction," and the Supreme Court still found that no injunctive relief had been entered to trigger the Court's jurisdiction under § 1253. Texas also suggests that because the district court asked the State to advise it on its intentions regarding a special session for redistricting and instructed all parties to begin consulting with experts and mapdrawers regarding a potential remedy, that the district court's ruling thus has a practical injunctive effect. Stay App. at 18. That argument is illogical. Those actions fall well short of enjoining the conduct of the State or operation of a statute. Instead, those are simply examples of the district court employing its "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). Interpreting the court's actions in seeking to move the parties efficiently toward a remedial process as anything other than standard case management activities would likely make appealable a host of case management orders and inundate this Court with requests for review anytime attorneys were ordered to appear in court. Thus, the district court's ruling and actions to date do

not have the "practical effect" of an injunction, and Texas cannot satisfy that element of the *Carson* framework.

Texas fares even worse when it comes to satisfying the next two *Carson* requirements. Texas claims that because it would be compelled to participate in judicial proceedings to redraw a small number of House districts in only four out of Texas' 254 counties, it would thus be subject to "serious, perhaps irreparable consequences." This is absurd. Texas is free to appeal the district court's final judgment when it is entered, but being required to appear in a brief court proceeding necessary for the court to arrive at final judgment can be no more injurious that requiring the State to appear at any status conference.

Finally, Texas' claim that the district court's order can only be "effectually challenged" with this immediate appeal is likewise irrational. The district court has made clear that it plans to enter a final judgment by October 1, more than thirteen months before the next election. *See* App. N (Case No. 17A225) at 1820. Indeed, the district court explicitly stated it is moving swiftly in order for Texas to pursue appeals, if it so desires, before the 2018 elections. *See* Order, *Perez*, 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 the war of attrition that Texas redistricting has sadly become, Applicants have used every possible procedural roadblock to needlessly disrupt the remedial process in an attempt to run out the clock. No doubt, when Applicants do seek to stay a final judgment, they will claim that the district court entered its final judgment too late for

implementation in 2018. If this Court rejects Texas' foot-dragging and allows the district court to promptly conduct the proceedings necessary to enter final judgment, there is ample time for the State to seek this Court's review without serious effect to the 2018 elections, as seen by the 2011-2012 appellate schedule in this same case. Based on these facts, the Court should decline to apply the *Carson* framework to appeals under § 1253, and should further conclude that it has no jurisdiction under § 1253 to entertain the application for stay and the premature appeal.

B. The All Writs Act Also Does Not Provide the Supreme Court with Jurisdiction to Hear an Immediate Appeal or Prevent the District Court From Entering Injunctive Relief and Final Judgment

Faced with the fact that Texas plainly lacks statutory jurisdiction to trigger this Court's review, Applicants then suggest that this Court may issue injunctive or mandamus relief pursuant to the All Writs Act, 28 U.S.C. § 1651, to keep the district court from moving remedial proceedings along in a timely enough fashion to avoid disruption to the 2018 election schedule and to inappropriately jump-start appellate proceedings. Stay App. at 17, 39. Furthermore, Applicants wrongly suggest that this Court will lose jurisdiction if it does not intervene by October 1. *Id*. at 17. Texas' representations grossly misinterpret the All Writs Act and, indeed, basic appellate procedures. This Court's intervention under the All Writs Act is not appropriate.

The All Writs Act simply states 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). The Act does not confer upon the court any 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."). Instead, "[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by a 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). Moreover, the Act "does not authorize [the Court] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.* at 43.

"[I]njuctive 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, 1303 (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)). Where a statutory framework for appeals, replete with ample precedent outlining the ways under the statute to timely and appropriately pursue such appeals, exists, use of the All Writs Act in the manner suggested by Applicants is plainly inappropriate. *See, e.g.*, S. Ct. R. 20 ("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."); *see also Brown*, 533 U.S. at 1301 ("Such an injunction is appropriate only if the legal rights at issue are indisputably clear.") (internal quotation marks and citation omitted).

As a primary matter, Applicants' suggestion that this Court will effectively lose appellate jurisdiction if Applicants have not been granted relief by October 1 is absurd. By that logic, this Court would have not been able to grant Texas relief in January 2012, as it did in *Perry v. Perez*, 565 U.S. at 399. But even more importantly, the October 1 deadline is merely aspirational, not statutory. Having a plan in place by October 1 simply allows the counties two months to arrange for third-party vendors to print and mail voter registration cards. Counties have accomplished that task in much shorter periods of time in other situations. *See, e.g.*, Amended Order, *Perez*, ECF No. 689 (Mar. 19, 2012). The next deadline, although statutory, is clerical in nature, requiring voter registration cards to be mailed to voters by December 6, 2017. This deadline is still eleven months before the election, and is the type of election deadline easily within the district court's authority to alter with negligible effect on voters. *See id*.

Moving on to the specific application of the All Writs Act requested by Texas, this application is plainly not the only way that Texas could obtain adequate relief, if it were entitled to any relief at all. With fourteen months left until the next federal and state legislative elections, Texas may appeal the district court's final judgment, when entered, pursuant to 28 U.S.C. § 1253.

And that is the second reason that application of the All Writs Act is inappropriate: there is a specific statute that establishes this Court's appellate jurisdiction. Applicants are not free to ignore that fact because complying with the statutory procedures is "inconvenient." *Pa. Bureau*, 474 U.S. at 43. *Pennsylvania Bureau* plainly instructs that "where a statute specifically addresses the issue at hand," that statute controls and use of the All Writs Act is not justified. *Id*. Indeed, in the sole case cited by Applicants in support of their contention that the All Writs Act authorizes this Court's intervention at this stage, *U.S. Alkali Export Association v. United States*, this Court clearly stated: "[t]he writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews." 325 U.S. 196, 203 (1945). Thus, allowing use of the All Writs Act here would contravene this Court's holdings that require a narrow construction of § 1253.

Finally, it is unclear from Texas' Application how an injunction or writ of mandamus ordering the district court to desist in its remedial proceedings would be "in aid of [this Court's] jurisdiction." Stay App. at 17. In fact, action under the All Writs Act here would impede the only event that triggers the Court's jurisdiction: entry of an injunction. The district court, cognizant of the need to settle election-related disputes as early as possible, is moving expeditiously to reach final

judgment and enter a remedial injunctive order. The Court should not use the All Writs Act in an unprecedented way to interrupt efficient judicial proceedings.

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This Court does not have jurisdiction to entertain Texas' premature appeal and stay application. The temporary stay should be immediately dissolved and the district court allowed to complete its proceedings and enter an injunction or final appealable judgment. Any decision to the contrary would open the floodgates to interlocutory appeals from three-judge panels and would be inconsistent with this Court's narrow construction of 28 U.S.C. § 1253.

II. Applicants Have Not Shown that It is Likely that Five Justices of This Court Will Reverse the Ruling Below

The stay application should be denied even if this Court finds it has jurisdiction to entertain the stay application. Emergency stay applications pending appeal are forms of "extraordinary relief," *Winston-Salem/ Forsyth Cty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 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). In fact, "[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*. When a party seeks to stay such a presumptively better-informed ruling, that party bears a "heavy burden," and the emergency stay will be only "rarely granted." *Heckler v. Redbud Hosp. 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) ("[d]enial of such in-chambers stay applications is the

norm."). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Ind. State Police Pension Trust v. Chrysler LLC*, 129 S. Ct. 2275, 2276 (2009) (citing *Nken v. Holder*, 556 U.S. 418, 433 (2009)).

To satisfy that "heavy burden," the party seeking the stay 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)). 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) that 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. With the first two factors, it "is not enough that the chance of success on the merits be 'better than negligible,'" it must be "likely." *Nken*, 556 U.S. at 434. Even where Applicants could satisfy these prongs—and here they cannot—"[t]he 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). As in the instant Application, 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 Inappropriately Seeks to Accord Final Preclusive Relief to the District Court's Preliminary Injunction Ruling

Just as happened with the congressional case, in 2012, Texas essentially won on the preliminary injunction considerations of claims in Bell, Dallas, Tarrant and Nueces counties, but it cannot convert that into preclusive final victory on the merits by repealing and adopting, with minimal changes, the same district boundaries in the middle of litigation. Texas' argument to the contrary would turn this Court's precedent on the non-binding nature of preliminary injunctions on its head, and would open the floodgates to litigants engaging in the gamesmanship that Texas attempts here.

A preliminary injunction is, of course, an "extraordinary and drastic remedy," and is "never awarded as of right." *Munaf v. Green*, 553 U.S. 674, 689-90 (2009) (internal quotation marks and citation omitted). It is only awarded where the plaintiff "*by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quotation marks omitted) (emphasis in original). That showing is even more difficult where the case involves "a claim of improper legislative purpose," for which "the requirement of substantial proof is much higher" during the preliminary injunction stage than in cases where legislative intent is not implicated. *Id*.

Indeed, because "the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," the decision to grant or deny a preliminary injunction is "customarily granted on the basis of procedures that are less formal and evidence that is less complete than

in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Because of that fact, a plaintiff "is not required to prove his case in full at a preliminary-injunction hearing," and "the findings of fact and conclusions of law made by a court in 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 far from uncommon for plaintiffs to lose their motion for preliminary relief but ultimately prevail 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) (unanimously affirming lower court's conclusion on final judgment that each challenged district was an unconstitutional racial gerrymander); *Reynolds v. Sims*, 377 U.S. 533, 542 (1964) (noting denial of plaintiffs' preliminary injunction motion), *with id.* at 568 (affirming ruling on final review that districts were unconstitutionally apportioned).

Where this Court has been clear that the burden of proving legislative discrimination is higher at the preliminary injunction stage than at trial, it cannot be the law that after winning at the preliminary injunction stage, a state can re-enact the challenged law and wipe the slate clean. Adopting Texas' theory would, contrary to this Court's holding in *Camenisch*, require plaintiffs to "prove [their] case in full at a preliminary-injunction hearing," 451 U.S. at 395, to stand any chance of winning the case at the end. This could have two significant and unintended consequences: the number of litigants seeking to appeal denials of preliminary injunctions would likely skyrocket, taxing limited judicial resources; and district courts, to prevent gamesmanship of the sort seen here, might be inclined to accept less evidence before granting a preliminary injunction in order to prevent plaintiffs from being unfairly bound by a cautious preliminary injunction ruling. This Court should reject Texas' arguments and, consistent with its longstanding precedent, not make the district court's ruling at the preliminary injunction stage the law of the case.

B. The District Court's Ruling on Unlawful Discriminatory Effect in the 2013 Plan, Afforded Only Cursory Discussion in the Application, Is Not Based on Any Intent Findings and Is Unlikely to Be Reversed

1. The District Court Correctly Found a Section 2 Effects Violation in Nueces County

The district court's conclusion that Nueces County Latino voters have a Section 2 right to a second opportunity district, reached after trial, is independent grounds for Applicants' failure to demonstrate that the decision below is likely to be

reversed. In 2011, Nueces County had, in whole or part, three State House districts. App. C at 45. Two of these districts were majority Hispanic Citizen Voting Age Population (HCVAP)—HDs 33 and 34. App. A at 24; App. C at 45. Nueces County's population also grew more slowly than the state as whole, meaning that it would be required to lose one of its legislative seats. App. C at 45-46. Instead of protecting both minority opportunity districts, Texas choose to "eliminate one of the Latino opportunity districts (HD33) and draw two districts wholly within Nueces County—one strongly Latino (HD34) and one a safe Anglo Republican seat (HD32) to protect incumbent Hunter." App. A at 25.

Nueces County is majority Latino.[4] It is undisputed in the record that it is possible to draw two majority Latino CVAP districts in Nueces County. App. A at 56. And it is beyond dispute that voting in Nueces County is racially polarized. App. A at 49. The district court made extensive findings regarding the additional factors that support the conclusion that, under the totality of circumstances, the Texas House redistricting plan had the effect of diluting Latino voting strength. App. A at 47-52; App. C at 53-55. The district court also described the lengths to which Texas went to draw the boundaries of a safe Anglo majority district in Nueces County. App. B at 39-40; App. C at 50. Texas made the same arguments to the district court that it makes in its Application, and the court unanimously in its August 24, 2017 ruling rejected each one. The court unanimously found that even

[4] Latinos are an overwhelming majority of the citizen voting age population in this County (Latino CVAP is 57.5%, while Anglo CVAP is only 36.4% based on the 2011 ACS data). App. K at 019.

though requiring a second majority-minority district in the county would result in some over-representation for Latinos in Nueces County, it was not possible to achieve exact proportionality and the lack of statewide proportionality outweighed this factor. App. B at 25, n.17.

The district court likewise rejected Texas' argument that because it could not draw two Hispanic-majority districts in Nueces County that could be **guaranteed** to perform, it was excused from needing to draw two majority districts in the county. Stay App. at 33; App. A at 56. The district court restated this Court's well established principle that the "ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success." App. A at 56 (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) ("*LULAC*")). The district court thus concluded that "Hispanic voters in Nueces County have a § 2 right to an additional district," and that remedy would be determined during the remedial proceedings. App. A at 51, 57. This decision, based heavily on this Court's most recent Section 2 litigation out of Texas from just last decade, is not likely to be reversed, and review of this decision before the district court has even had a chance to consider possible remedies for the violation is premature and unjustified.

2. The District Court's Determination that HD 90 Was an Unconstitutional Racial Gerrymander Does Not Depend on Discriminatory Intent and Is Unlikely to be Reversed

Texas does not contest the district court's well-supported conclusion that in Tarrant County race predominated in the Legislature's 2013 alterations to HD 90. Moreover, Texas' claim that it was forced to racially gerrymander HD 90 in

order to protect Latino electoral opportunity was properly rejected by the district court following its review of the evidence at trial.

With respect to the *Shaw* challenge to HD 90, the district court examined 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 race predominated, whether Texas proved that its race-based sorting of voters served a "compelling interest" and was "narrowly tailored" to that end. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (citing *Miller v. Johnson*, 515 U.S. 900 (1995)) (internal quotations omitted). If the compelling interest is compliance with the Voting Rights Act, the Legislature must have "*good reasons* to believe" it must use race in order to satisfy the Voting Rights Act, "even if a court does not find that the actions were necessary for statutory compliance." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) (emphasis in original).

In the district court's interim House plan, used in the 2012 elections, HD 90 was a majority Latino district in both citizen voting age population and voter registration. App. C at 130. In 2013, HD 90's Anglo incumbent sought to shore up his chances of re-election by adding a non-Latino neighborhood to the district. App. A at 72-73. The Legislature then used race as a predominant factor to increase the Latino population of HD 90 to meet a mechanical target. App. A at 75-76.

In concluding that Texas assigned voters into and out of HD 90 because of their race, without narrowly tailoring to meet the interest of complying with the VRA, the district court relied on the testimony of the mapdrawers themselves,

including one statement that there were "too many white people" in the district, and other statements that "explicitly acknowledged the use of race in their method." App. A at 73. The court further noted that the mapdrawers "methodically scanned the western part of [HD 90], cutting out majority-Anglo areas precisely because they were Anglo and drawing in majority-Hispanic areas precisely because they were Hispanic." See *id*. Texas contests neither this evidence nor the district court's conclusion that race was the "predominant factor motivating the legislature's decision to place a significant number of voters within or without" HD 90. *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015).

The district court properly dismissed Texas' articulation of "avoid[ing] a VRA problem," App. A at 77, as too vague to form the "strong basis in evidence in support of the (race-based) choice," particularly when there was no evidence that lawmakers or staffers considered information relating to Latino voters' ability to elect candidates of their choice, such as relative turnout rates or racially polarized voting, or that legislators offered an explanation of how their numerical target for HD 90 related to VRA compliance. *See Bethune-Hill*, 137 S. Ct. at 801-02 (finding strong basis for use of fixed numerical goal for VRA compliance purposes where legislator considered turnout results, recent election results, and socioeconomic data); App. A at 77.

Similarly, Texas cannot argue that it had a "strong basis" for its race-based actions because it faced threats of Section 2 litigation. Even assuming that talk of litigation from minority legislators or advocates could serve as a "strong basis in

evidence" for the predominant use of race, no such talk was present here. Neither a statement that some Latino legislators would not be inclined to support a bill, nor a pre-existing challenge to the 2011 redistricting plans by Plaintiffs, comes close to the evidence needed for Texas to properly conclude that it needed to make predominant use of race to comply with the VRA in HD 90.

C. The District Court's Ruling on Discriminatory Intent Carrying Forward from the 2011 Plan Is Legally Sound

The district court's considered conclusion that several districts in the 2013 House plan were intentionally racially discriminatory is well in line with this Court's pronouncement in a similar case, *Hunter v. Underwood*, 471 U.S. 222 (1985). Discriminatory purpose can exist in the original enactment of legislation, but it can also exist when the legislature "reaffirm[s]" a law motivated by discrimination. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). In *Hunter*, 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 U.S. at 232-33; *see also Chen v. City of Houston*, 206 F.3d 502, 518 (5th Cir. 2000); *Cotton v. Fordice*, 157 F.3d 388, 391-92 (5th Cir. 1998). Accordingly, for example, the court below correctly concluded that Texas could hardly claim to have cleansed its racially discriminatory line-drawing in western Dallas when it did

not deliberate anew in 2013 or make any changes to the configuration of the districts. App. A at 4, 24. Following this Court's longstanding precedent in *Hunter*, the district court's ruling, buttressed by extensive fact-finding on the topic, is unlikely to be reversed.

D. The District Court's Determination that Certain District Configurations were Tainted with Discriminatory Intent, Based on Intensive Fact-Finding and Credibility Determinations, Is Unlikely to be Disturbed

In four counties, the district court—based on days of testimony from live witnesses, including the primary mapdrawers, and thousands of pages of documentary evidence—concluded that district lines were drawn to forestall voters of color who were poised to exercise political power, and that such deliberate actions ran afoul of the Fourteenth Amendment and intent prohibition of Section 2. *See, e.g.*, *LULAC*, 548 U.S. at 440 ("Against this background, the Latinos' diminishing electoral support for [the incumbent] indicates their belief he was unresponsive to the particularized needs of the members of the minority group. In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation.") (internal quotation marks omitted). Moreover, the district court's "[f]indings of fact" are treated deferentially, and "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed. R. Civ. P. 52(a). Under this well-established standard, appellate courts will not disturb even questionable factual findings unless, based on a review of the entire record, the court is "left with

the definite and firm conviction that a mistake has been committed." *Pullman-Standard v. Swint*, 456 U.S. 273, 284-85 n.14 (1982). This Court does not have access to the entire record, and regardless, is not likely to disrupt the factual findings based on the district court's judgment of the credibility of the mapdrawers.

Turning then to those findings, Dallas is a prime example of Texas' strategies in *LULAC* back in use again this decade. In 2008, a Latino-preferred challenger lost to the HD 105 incumbent by only 19 votes. App. C at 108. Because Latinos in HD 105 were about to exercise their political power in that district, to the detriment of the Anglo Republican incumbent, the state moved Latinos out of that district and into neighboring, already-performing Latino districts. Ryan Downton, who drew the district lines, testified that he used racial shading at the census block level and split precincts to remove Latino voters from HD 105 and place them into HDs 103 and 104, which were already electing Latino-preferred candidates. App. B at 68. He did that despite advice from experienced staff at Texas Legislative Council that neither district needed to have the Latino population augmented in order to provide electoral opportunities for Latino voters. *Id*. Based on the testimony of the State's own witness, the district court arrived at a nearly identical conclusion to this Court's in *LULAC*—in order to protect an incumbent from a minority population poised to exercise political power in the district, Latino voters were moved out of the district and Anglo voters were moved in. *Id*. at 66-69. Texas has not, because it cannot, identify any of the district's factual findings that were clearly erroneous, and as such, that ruling is unlikely to be reversed.

Likewise, in HD 54 in Bell County, the minority population in Killeen was increasing significantly. Maintaining the City of Killeen nearly whole within the district, as it had been in the benchmark plan, would have cost the Anglo incumbent his seat. In reaching its conclusion on intent, the district court relied upon the 2014 trial testimony of incumbent Rep. Jimmie Don Aycock, who recognized Killeen as a community of interest and claimed to prioritize communities of interest in the construction of the district, but who nevertheless split the City of Killeen between HDs 54 and 55. App. C at 138. The district court also relied on Aycock's own testimony that keeping Killeen whole would inevitably produce a minority coalition district in which he could not be re-elected, and that he thus split the city between the county's two districts. App. B at 77. The court rejected Aycock's other justifications for the district configuration as not credible. *Id*. The court thus concluded that "splitting the minority community was an effective way to dilute the minority vote and ensure that the bloc-voting Anglo majority would defeat minority-preferred candidates." *Id*. at 78. The 2013 plan made no changes to the 2011 configuration. App. A at 17. Texas has not even suggested that these findings are clearly erroneous.

Similarly, in Tarrant County, the district court concluded that Texas raised the SSVR of HD 90 above 50% in order to justify and claim an offset for the elimination of a Latino opportunity district in another part of the State (HD 33 in Nueces County). App. A at 64-66; *see also* App. B at 71 ("Defendants ignored DOJ guidance that ability to elect was not measured simply by a demographic criterion .

. . increasing the SSVR of an existing ability district above 50%, even though they knew this did not create a new ability district."). The district court also found that the State used the increase in HD 90's Latino population to "shore up the Anglo population of HD 93." App. A at 66; App. B at 70-71. Although the State made changes to HD 90 in the 2013 session, modifying the District Court's interim plan,[5] those changes were improperly racially motivated and could not serve to remedy the intentional discrimination in the original configuration. App. A at 80.

Finally, in Nueces County, the district court was again correct to conclude, based on its fact-finding, that the district configurations ran afoul of the Fourteenth Amendment. The district reviewed a host of evidence it concluded demonstrated intentional vote dilution in the decision to eliminate a Latino opportunity district, HD 33, from Nueces County. App. B at 36-40. Among many other facts, as just one example, the district court noted that mapdrawers split precincts along the border between the districts to assign Latino voters to HD 34, thus driving the HCVAP in the district substantially above the county-wide average Latino population, and packing the Latino-majority district with Hispanic voters "to minimize their number and influence" in the neighboring Anglo-controlled district. App. B at 39-40. This, and other evidence informed by the district court's assessments of witness credibility and other record evidence, led it to conclude that the lines were intentionally drawn to undermine Latino voting strength.

[5] The District Court's interim plan made no modifications, based on its preliminary injunction standard, to the State's 2011 configuration of Tarrant County. App. A at 66.

In conclusion, Texas continued the same pattern of bad action with respect to minority voting rights seen in the mid-2000 redistricting process and struck down by this Court in *LULAC*. *See* 548 U.S. at 440. The district court's legal conclusion was based on its fact-finding, including assessing the credibility of the state's primary mapdrawer. As such, the district court's fact-bound decision is due significant deference and is unlikely to be reversed.

E. Applicants Cannot Demonstrate the Requisite Irreparable Harm and, Indeed, the Balance of Equities Weighs in Favor of Denying the Stay

For six election cycles—a majority of State House elections conducted during this decade—Respondents and tens of thousands of voters of color in Texas have been sorted into districts that unconstitutionally divide them by race and dilute their voting strength. This substantial harm stands finally ready to be remedied, yet Texas requests that this Court further delay the remedy that justice requires. Applicants have not carried their heavy burden of demonstrating that the speculative and remote injuries of which they complain outweigh the injury to Respondents and the public at large by continuing to subject millions of voters to racially discriminatory election districts.

And while Plaintiffs and the public at large will suffer substantial harms if the stay is issued, there will not be significant or irreparable harm to Applicants, particularly when viewed in light of the balancing of equities, should this Court deny the stay. First, this Court should consider the district court's denial of the Applicants' stay motion in the lower court. "Justices have also weighed heavily the

fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of the enforcement of its judgment in the interim." *Graves*, 405 U.S. at 1203-04. This Court generally considers this factor deferentially because "[t]he case received careful attention by the three-judge court, the members of which were 'on the scene' and more familiar with the situation than the Justices of this Court; and the opinions attest to a conscientious application of principles enunciated by this Court." *Id*. at 1204. That is, lower courts may be better suited to appreciate whether the state will, in fact, be irreparably harmed than a court less familiar with the record and the on-the-ground realities.

Second, this Court's precedents, particularly in redistricting cases, have never required that the appeals process be exhausted before a remedy can be implemented. In *Growe v. Emison*, this Court dismissed a district court's urgency in entering a judgment without allowing time for the state court also reviewing the redistricting case to issue its ruling. 507 U.S. 25, 35 (1993). While the district court had defended its actions by pointing to the need to have the appellate process finished before the next election, this Court said:

> We fail to see the relevance of the speed of appellate review. *Germano* requires only that the state agencies adopted a constitutional plan 'within ample time . . . to be utilized in the [upcoming] election.' It does not require appellate review of the plan prior to the election, and such a requirement would ignore the reality that States must often redistrict in the most exigent circumstances.

Id. (internal citation omitted). The same principle applies here to Texas' argument—there is simply no irreparable harm inflicted on the state should the appeals process not be completed by the time an interim or remedial plan is used.

Third, Applicants disingenuously portray the district court's actions as abrupt, giving the State little time to weigh its options and exercise its right to devise remedial plans itself. *See* Stay App. at 2 ("the district court again gave the Governor of Texas only three business days to drop everything and decide whether to call the Legislature into special session"); *id*. at 15 ("The court's order gave the Governor three business days to either order a special session of the Legislature or consult with experts, prepare remedial map proposals, and appear at a hearing on September 6, 2017, to redraw Texas's House districts on an expedited basis."). This depiction misrepresents the actual timeline in this case.

The State was first put on notice that it would likely need to consider remedial action when the Court ruled on the 2011 House plan in April of this year, and noted that many of the legal infirmities persist unchanged in the 2013 plan. App. B. Then, on May 22, 2017, after the *Cooper v. Harris* decision came down, the district court invited "Defendants' counsel to confer with their client(s) about whether the State wishes to voluntarily undertake redistricting in a special session in light of the *Cooper* opinion." App. O at 126 (ECF No. 1395 at 1-2). The State declined that invitation on May 25, 2017, but was certainly on notice then that it would likely have to consider remedial action. App. O at 126 (ECF No. 1397). Finally, when the district court did enter its order finding discrimination in certain

districts in H358 (the 2013 redistricting plan) on Tuesday, August 22, 2017, it simply requested that the State notify the court within three days as to "whether the Legislature intends to take up redistricting in an effort to cure these violations and, if so, when the matter will be considered." App. A at 81. Texas has had ample opportunity to develop remedial maps if it so chose.

In fact, Applicants' next argument is logically inconsistent with the previous one. The State complains that changing election districts now would cause voter confusion. Yet Texas wants to slow down the remedial process in a manner that would only create voter confusion that does not exist. Contrary to Applicants' assertions, the facts of this case do not implicate any concerns raised in *Purcell v. Gonzalez*, 549 U.S. 1 (2006). In *Purcell*, this Court addressed the voter confusion that was likely to ensue when the rules governing an election were changing based on *conflicting* court orders just weeks before the election. 549 U.S. 1, 4-5 (2006). *Purcell* had nothing to do with redistricting, and the concerns implicated by confusion over whether a voter will need to produce identification do not apply. *Id.* at 2-3. Here, there is a much more generous timeframe and no conflicting orders. The State has urged the district court to enter any remedy by October 1, assuring the district court that no election deadlines would then have to be modified. *See* App. N (Case No. 17A225) at 1820. The three-judge court has acted carefully and quickly in accordance with that guidance. Applicants' contradictory arguments—that they have not been afforded enough time to redistrict, and also that the relief is

not being established soon enough—are just further evidence of the tenuousness of their irreparable harm claims.

Because Applicants have not proven that they will suffer concrete and irreparable harm, or that a balancing of equities justifies the stay, the stay should be denied.

CONCLUSION

For these reasons, the stay application should be denied because the Court does not have jurisdiction to decide on the stay, and because Applicants have not shown that a majority of Justices are likely to reverse the decision below, that they will suffer any irreparable harm absent a stay, or that the balance of equities weighs in favor of a stay.

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