Nos. 17-586, 626

In the Supreme Court of the United States

GREG ABBOTT, Governor of Texas, *et al.*,
Appellants,

v.

SHANNON PEREZ, *et al.*,
Appellees.

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

BRIEF FOR LOUISIANA, ALABAMA, MISSOURI, OHIO, SOUTH CAROLINA, AND WISCONSIN AS *AMICI CURIAE* SUPPORTING APPELLANTS

Jeff Landry
Attorney General

Elizabeth B. Murrill
Solicitor General
Counsel of Record
State of Louisiana
Department of Justice
1885 North Third Street
Baton Rouge, LA 70802
Tel: (225) 326-6766
Fax: (225) 326-6773
murrille@ag.louisiana.gov

Counsel for Amici Curiae

[Additional counsel listed on signature page]

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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STATEMENT OF INTEREST

Amici curiae are the States of Louisiana, Alabama, Missouri, Ohio, South Carolina, and Wisconsin. The States have a vital interest in the law regarding redistricting, since redistricting is inherently a State function, and each of the States have an interest in holding free and fair elections in an efficient manner. The district court's ruling, challenging the sovereignty of States to hold their own elections and destabilizing elections throughout the State of Texas, has widespread implications for States entering the 2018 election cycle and the coming 2020 redistricting cycle, potentially injecting chaos into the democratic system in all States. Additionally, the district court's ruling undermines the ability of States to rely in good faith on the plain language of a district court opinion.[1]

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, nor made a monetary contribution specifically for the preparation or submission of this brief. The State of Louisiana paid for this brief. *Amicus curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of *amicus curiae's* intention to file this brief.

SUMMARY OF ARGUMENT

Appellants have asked this Court, *inter alia*, whether a federal court can find discriminatory intent when adopting a district court's *own remedial plan*. We echo Texas' request that this Court should reverse the lower court's orders that invalidated legally valid reapportionment legislation on multiple grounds. *First,* a state legislature is permitted to rely on economic efficiency and the desire to halt extensive litigation as an appropriate factor when enacting legislation. *Second*, the district court's holding effectively eviscerates long standing principles of state sovereignty. *Third*, the district court issued advisory opinions on the 2011[2] plans because any litigation against the 2011 plans was moot after the 2013 plans were passed.

The district court's decisions below would invalidate decades of precedent from this Court recognizing that States—not unelected judges—have the primary duty of deciding the political question of legislative boundaries, so long as those boundaries comply with the United States Constitution and the Voting Rights Act ("VRA"). States have many responsibilities, only one of which is deciding on the "Times, Places, and Manner of holding elections." *See* U.S. Const. art I, § IV. A State's rational choice to conserve its limited fiscal and temporal resources by enacting a presumptively valid map does not and cannot possibly

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[2] The district court subsequently relied on the 2011 advisory opinions to shift the burden of proof to the State thereby failing to apply the proper test under *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

create the discriminatory intent the district court below found. The district court goes so far as to hold that the Texas Legislature's level of inquiry and legislative debate as to the merits of the *court* map was insufficient when measured against some unnamed quantitative or qualitative standard. Rather than requiring a State to prove that the district court's *own map* contained no discriminatory intent adverse to the Constitution and the VRA, a federal court should, under this Court's precedents, approach a validly drawn and enacted map with the presumption of constitutionality. In ruling against the 2013 Plan, the district court has flipped the longstanding presumption of validity on its head by assuming that *the court-drawn plan* contains impermissible discriminatory intent. Additionally, the district court ignored the precedent of this Court and of the Fifth Circuit by failing to declare all legal actions against the 2011 plans as moot upon the Texas Legislature's adoption of the court's plan as its own.

ARGUMENT

I. LEGISLATIVE EFFICIENCY IS A VALID REAPPORTIONMENT CONSIDERATION.

A. The Texas Legislature's 2013 Plan Was a Valid Exercise of State Power to End This Dispute.

As described in Appellants' brief, the district court struck down the 2011 Texas Legislature's redistricting plan, holding it violated the VRA. The district court then concluded that a *different* elected body,[3] the 2013 Texas Legislature, possessed a racially discriminatory purpose in violation of § 2 and the Fourteenth Amendment by adopting the *district court's own* redistricting plan. Specifically, the district court stated that the 2013 Legislature "purposefully maintained the intentional discrimination contained in [the 2011 Plan]" because certain districts where the court found violations "remain unchanged or substantially unchanged" in the 2013 Plan. *Perez v. Abbott*, 2017 U.S. Dist. Lexis 136226, *18, 2017 WL 3668115 (W.D. Tex. 2017). The district court reached this conclusion by reasoning that it found certain violations in the 2011 Plan, but the 2013 Legislature failed to pursue sufficient changes to the 2013 Plan beyond what was identified by the district court and ordered to be changed.

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[3] The Texas Legislature meets in regular session only in every odd-numbered year. *See* Tex. Gov't Code § 301.001. By express provision of the Texas Constitution, the legislature meets for only 140 days unless a special session is called. Tex. Const. art. 3, § 24.

The weight of the legislative history in passing the 2013 Plan suggests that the 2013 Legislature focused on fixing the legal infirmities (if any) of the 2011 Plan and acted as it did to efficiently resolve the map-drawing process in good faith reliance on the district court's map. Indeed, in the apparent interest of state policy and efficiency, the Legislature approved the court-ordered plan and went on to its other business. The 2013 Legislature could not possibly achieve its stated goal of avoiding further litigation if it was adopting a plan that is rife with legal infirmities. Surely, a legislature intentionally furthering a pre-existing discriminatory purpose would not be seeking to avoid further litigation. As the United States noted, "[a]n intent to end litigation, without more, is not an intent to discriminate." United States Brief at 41.

The district court's supposition that the Legislature adopted the 2013 Plan as part of a trial strategy and for purposes of efficiency should instead stand *against* not *for* the proposition that the legislature was intentionally furthering an existent purposeful discrimination. In other words, "[w]e doubt that the constitutional line separating the legislative and judicial powers turns on" the "court's doubts about" a legislature's "unexpressed motives." *Cf. Patchak v. Zinke*, 2018 U.S. LEXIS 1515 at *20 (Feb. 27, 2018) (plurality op.). The district court improperly imputed the finding of unlawful intent from the 2011 Plan onto the 2013 Plan, thereby invalidating the court-drawn plans it drew, approved, and ordered enacted. Plainly stated, the 2013 Plans are new plans based on the district court's own 2012 Plans, cleansed of any discriminatory "taint" by the district court's earlier

finding that the 2012 Plans were free from constitutional violations and violations of the VRA.

Indeed, a court-ordered plan is subject to a far higher standard than one drawn by a legislature. *See*, *e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 541 (1978) (noting that courts lack "political authoritativeness" and must act "in a manner free from any taint of arbitrariness or discrimination" in drawing remedial districts) (quoting *Connor v. Finch*, 431 U.S. 408, 417 (1977)); *Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (noting that "a court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies"); *Favors v. Cuomo,* Docket No. 11–cv–5632, 2012 WL 928216, at *18 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified,* No. 11-cv-5632, 2012 WL 928223, at *6 (E.D.N.Y. Mar. 19, 2012); *Molina v. Cty. of Orange*, No. 13CV3018, 2013 WL 3039589, at *8 (S.D.N.Y. June 3, 2013), *supplemented,* No. 13CV3018, 2013 WL 3039741 (S.D.N.Y. June 13, 2013), *report and recommendation adopted,* No. 13 CIV. 3018 ER, 2013 WL 3009716 (S.D.N.Y. June 14, 2013); *Larios v. Cox,* 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004); *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *4 (E.D. Tex. Nov. 14, 2001). The fact that the 2013 Plans may share some lines with the 2011 Plans is of no legal significance because the district court adopted those lines as its own and, in doing so, made clear that the plan complied with the VRA and the Constitution. In

fact, the district court was required to ensure that its plans were compliant with both the VRA and the Constitution as instructed by this Court. *See Perry v. Perez*, 565 U.S. 388, 393 (2012).

B. Boundless Litigation, Despite the Clear Validity of Texas' Adoption of the Court-Ordered Plans, has an Inherently Destabilizing Effect on Elections at Great Expense to Taxpayers.

Free and fair elections is a foundational tenet of democracy and this objective must be pursued to a satisfactory conclusion. However, the prior decisions of this Court dictate that due process requires consideration of distinct factors, including the Government's interest in implementing additional fiscal and administrative burdens. *See Mathews v. Eldridge*, 424 U.S. 335 (1976). Texas has been required to expend tremendous taxpayer resources in pursuit of this litigation, including for the half-decade since the 2013 Legislature sought to remedy constitutional and VRA deficiencies by passing a court-ordered map. The 2013 Legislature considered that map to be free of any leftover "taint" of discrimination, given its imprimatur of acceptability issued expressly by the district court.

This Court should now recognize that the time for redundant and destabilizing litigation over this map has ended, and the voters of Texas should be able to rely on the determination of their representatives and the courts. For seven years now, the citizens of every Texas legislative and congressional district have had little certainty as to who would continue to represent them, or whether a different representative would represent their interests. The effect of that uncertainty

is destabilizes the election process in the State, with the potential for similar situations across the country. Despite the presence of clear guidance from this Court regarding the requirements of the VRA—and importantly, that the law does *not* require a state to engage in seemingly boundless litigation over moot plans—a single lower court has thrown into further chaos the long-pending Texas legislative redistricting process. *See*, *e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (describing the review process for a district under the VRA).

If the district court is allowed to impute the intent of the 2011 Legislature when enacting the 2011 Plans onto a different Legislature altogether when enacting the court-ordered 2013 Plans, the potential ramifications will flow well beyond this case. Taken literally, the district court's holding means that any prior legislation found impermissible by a court could never be cured by a subsequent legislature. Such a result is nonsensical. Indeed, in this case, the district court relies on the fact that the 2013 Legislature enacted the court-ordered plans, which were redrawn to avoid a discriminatory purpose, to hold that the 2013 Legislature acted with discriminatory purpose. If this circular logic stands, it will work extreme unfairness to State litigants by calling into question the finality of judgments. States will be unable to be sure if court orders are valid or reliable and therefore may only adopt them at the risk of years of ongoing litigation. Moreover, such reasoning could require similarly situated legislatures to scrap existing maps and redraw all of their electoral districts. A comprehensive redraw would occur at enormous cost to taxpayers, would further destabilize the bond between a representative

and her constituent, and would slow the legislative process to an unnecessary crawl.[4]

II. THE DISTRICT COURT'S HOLDINGS EVISCERATE PRINCIPLES OF STATE SOVEREIGNTY.

A. The District Court Was Wrong to Impose Upon the Texas Legislature Any Modifications to its Constitutional Deliberative Process.

The District Court erred by imposing a new extra-constitutional requirement on the Texas Legislature when it required a sufficiently robust deliberative process. *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 129982, *49-50 (Aug. 15, 2017) ("[T]he Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans."). First, no such deliberative process is required by federal or Texas state law. Second, assuming *arguendo* that such a process is required, the Texas Legislature fulfilled the requirement by enacting the district courts map.

As explained more fully *infra*, when reviewing a lawfully enacted statute by a state legislature, the court must start from a position of presumed constitutionality, rather than suspicion. *See Miller v.*

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[4] Nothing in this brief should be read to advance an argument that constitutional deficiencies in a law should be ignored in favor of cost considerations. Rather, a State should be able to presume reliance on a decision of district court expressly charged with drawing a map designed to cure constitutional and VRA issues. Without such reliance, the likely outcome is endless litigation in pursuit of endlessly moving goalposts.

Johnson, 515 U.S. 900, 916 (1995). Here, the district court failed to give deference to the legislature or binding precedent. In fact, the district court, at every turn, seemed to presume ill intent on behalf of the Texas Legislature, which is especially evident by improperly carrying over claims and evidence against the 2011 Plans to the 2013 Plans. *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, *19-20 (W.D. Tex. March 10, 2017). *Perez v. Abbott*, 2017 U.S. Dist. LEXIS 129982 (W.D. Tex. Aug. 15, 2017); *Perez v. Abbott*, 250 F. Supp. 3d 123, 226 (W.D. Tex. April 20, 2017) (Smith, CJ dissenting).

The Court cannot impose a deliberative process on a legislature. "The Constitution does not and cannot guarantee that legislators will carefully scrutinize legislation and deliberate before acting. In a democracy it is the electorate that holds the legislators accountable for the wisdom of their choices." *INS v. Chadha*, 462 U.S. 919, 997 (1983) (White, J., dissenting). Some State legislatures can, and do, place floors on their own deliberative processes to ensure a basic level of debate, for instance "three-reading" rules in Massachusetts and Minnesota, and timing provisions related to the introduction of new legislation found in a majority of the states.

For the court to now ignore these principles of self-rule, pierce through inherent differences in the political makeup of diverse sovereign states, and impose judicially-created debate standards would not only be rife with federalism problems but would also be impractical. Such an approach to state legislative procedures would open the floodgates to a new cause of action by which to attack legislative districts,

unsupported by any federal law. *See generally Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981) (holding that where legislation "imposes congressional power on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority" and refusing to impose mandatory obligations on the States where Congress nowhere stated its intent to do so); *see also Gregory v. Ashcroft*, 501 U.S. 452 (1991) (where congressional intent is ambiguous, Court will not attribute an intent to intrude on State governmental functions). The district court, now, is attempting to supplant the 2013 Texas Legislature's discretion for its own as to what constitutes sufficient deliberation. This is wholly inappropriate.

Fundamentally, the role of the judiciary is to apply the law, not to decide what law and in what manner it would rather have applied it. "The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). No such sensitivity is shown here. Instead, presuming ill intent by adopting the *court's own plan*, the district court placed the plaintiffs' policy choices ahead of those elected for that task.

> [The court's] role is not to determine whether the procedural choices made by the legislature were the best among a range of options, whether the legislative action had to reflect the testimony received at the public hearings, or whether the legislature was required to consider that

> testimony or input during its redistricting deliberations. [The court's] task, instead, is to determine whether the legislature's actions violated federal law."

Martinez v. Bush, 234 F. Supp. 2d 1275, 1298 (S.D. Fla. 2002).

The deference afforded State legislatures does not just apply to the laws they pass but also applies to the process the States adopt to pass laws. On matters of policy and fact-finding generally, this Court has also long extended significant deference to State legislatures. "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979) and citing *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952) and *Henderson Co. v. Thompson*, 300 U.S. 258, 264-65 (1937)). So long as there is "evidence before the legislature reasonably supporting the classification," a duly enacted piece of legislation should not be invalidated even if a challenger could "tender[] evidence in court that the legislature was mistaken" *Id.*; *see also* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, Faculty Scholarship, Paper 74 (2005), available at http://scholarship.law.upenn.edu/faculty_scholarship/74. Based on the record below the Legislature had ample evidence that (1) the plans fully complied with

all requirements of the Constitution and the VRA; and (2) the legislature, relying on the court's judgment to that effect, enacted the new plans to dispose of future litigation.

A federal court simply cannot impose a one-size-fits-all deliberative requirement on state legislatures. State legislatures vary widely in their rules regarding the deliberation of an action, as well as the amount of time they are in session. Some are full-time, and some are part-time. The Texas Legislature, for instance, only holds a regular session every other year. Some have aggressive policy agendas based on the political turbulence of a given moment, and some have far greater stability due to a multi-term governor or single-party control. Deliberation, by its very nature, cannot even be measured in simplistic objective terms such as days or hours. Imposing some standard for deliberation would be unfounded in federal law or the Constitution and would also be in direct violation of this Court's holdings in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) in which the Court described a "fundamental principle of equal sovereignty" among the States. The Court, therefore, cannot impose a single set of deliberative requirements on a multitude of sovereign states.

B. Texas' Lawful Legislative Enactments are Deserving of Judicial Deference and a Presumption of Constitutionality.

Drawing districts is "primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *see also Shelby Co. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Perry*,

565 U.S. at 392). Unless reapportionment choices contravene federal requirements, the federal courts are bound to respect the States' apportionment choices because the "States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law." *Voinovich*, 507 U.S. at 156 (internal citations omitted); *see also* U.S. Const. art I, § IV (delegating the "Times, Places, and Manner of holding Elections" to the State legislatures); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 593 (N.D. Ill. 2011) (refusing to replace a State legislature's enacted plan "with one that . . . advance[s] the objectives of the minority political party at the time of redistricting.").

The district court all but ignored this Court's well-established presumption of good faith accorded to legislative enactments. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). ("the presumption of good faith that must be accorded legislative enactments,") Here, the district court failed to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race," and instead chose to declare the 2013 Plans unlawful by applying a presumption of invalidity when the Texas Legislature acted on the basis of the district court's own ruling. *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at 16 (W.D. Tex. March 10, 2017) (outlining the district court's concern that the legislature had not conceded illegality of the 2011 Plan and there was "no indication that the Legislature would not engage in the same conduct" in the future). The presumption of constitutionality of legislative enactments necessarily means that *plaintiffs*, *not the legislature*, bear the "demanding"

burden of showing impermissible motivation behind the legislative enactment at issue. *Miller,* 515 U.S. at 928 (O'Connor, J. concurring). Despite the district court's analysis showing otherwise, any doubt or failure to carry that burden must be resolved in favor of the State. *Id.* at 916.

The district court eviscerated the presumption of good faith when it decided that the State's action in adopting the court's own plans were unconstitutional. This leaves nothing left of the long-standing presumption of validity afforded to state legislative enactments and usurps one of the most basic political functions of state legislatures. The federal courts have an affirmative duty to always assess the "the intrusive potential of judicial intervention into the legislative realm." *See id. at* 916-17. The district court absolutely failed to do that here.

Needless to say, the potential implications of the district court's actions are enormous. Time and again this Court has held that where legitimate motives exist, government action is presumed valid and a court may not automatically infer an unlawful purpose. *See, e.g., U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (beginning the inquiry by "noting the heavy presumption of constitutionality to which a carefully considered decision of a coequal and representative branch of our Government is entitled."); *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (refraining from inferring discriminatory purpose where the state had legitimate reasons to adopt and maintain capital punishment); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (presumption of regularity and proper discharge of official duties absent clear evidence

to the contrary); *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918) (good faith and validity of actions presumed). If the district court's ruling is permitted to stand, there is nothing left to bar the federal judiciary's "serious intrusion on the most vital of local functions," *Miller,* 515 U.S. at 915 (1995), and likewise, nothing left of the mandate that federal courts must "exercise extraordinary caution" in redistricting cases and afford states a presumption of constitutionality and good faith. *Id.* at 916.

What is truly extraordinary is that the district court wholly failed to acknowledge its own reasoning and analysis in support of the validity of the court-drawn plans as a good faith basis for Texas' 2013 enactment. In so doing, the Court repudiates its own findings and the lawfulness of its own order. Even without additional justification, the simple fact is that when the district court entered an order directing Texas to adopt Plan C235 and H358,[5] this order alone constituted a legitimate, good faith basis for the enactment of the legislation. The record lacks any basis on which to infer that the 2013 Legislature had an improper purpose in adopting the Plans. Under a proper application of this Court's precedent and the presumption of good faith and constitutionality, the District Court's ruling must be overturned.

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[5] It is important to note that while, Plan C235 was adopted wholesale by the Texas Legislature, Plan H358 was slightly modified for a few districts. However, this does not change the fact that the district court completely dismissed its own reasons for adopting the interim plans as well as the Texas Legislature's good faith reliance on those reasons.

The district court erred in two separate and distinct ways as it failed to apply the *Arlington Heights* factors. *See Cooper v. Harris*, 137 S. Ct. 1455, 1479-80 (2017) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (standards offered "a varied and non-exhaustive list of 'subjects' of proper inquiry in determining whether racially discriminatory intent existed'" while also reaffirming that the Court has "often held" the burden of proof on the plaintiff to prove race, not politics, "is demanding." (citations omitted)). Despite the legislature basing its action on the valid remedy of the district court, the district court still faulted it with a finding of discriminatory intent. The historical background of the action, the specific sequence of events leading up to the action, and the legislative history of the action all can be directly traced to the action of the district court itself. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68. A legislature adopting a federal district court plan as its own is hardly a substantive departure from the norm. *See id.*

The *Arlington Heights* framework guides how federal courts should go about finding whether a governmental entity acted with discriminatory purpose. Nowhere within that framework do federal courts have a blank check to arbitrarily find constitutional violations on the sole basis that they disagree with States' chosen policies and internal democratic processes. *Arlington Heights* states that, while the impact of the official action may provide "an important starting point," impact alone "is not determinative and the court must look to other evidence." *Id.* at 266. Particularly, "the specific sequence of events leading up to the challenged

decision also may shed light on the decisionmaker's purposes." *Id.* at 267 (citations omitted). The district court here struck four different State legislative actions, including the extraordinary measure of the Legislature's acquiescence to Plan C235 precisely as drawn by the district court. For the district court, apparently nothing the Texas legislature could do would remedy the alleged violations. If a district court can hold a State legislature acted unconstitutionally in adopting a court-ordered plan, absolutely nothing stops other federal courts from inserting themselves into state deliberative processes and holding States hostage to this type of litigation in perpetuity. The precedent established by the district court, that the judiciary can hold a State in such a damned-if-you-do damned-if-you-don't situation, is a wholly inappropriate overreach by the judiciary into the realm of State sovereign interests. This Court has held that "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915. The presumption of good faith carries particular weight in the context of redistricting legislation, and yet Texas was plainly not afforded such a presumption. This Court must refuse to allow the district court its exercise of such unlimited discretion, particularly in this case affecting the most vital of state functions, and which profoundly implicate state sovereign interests and their individual citizens' interests in representative democracy.

C. The District Court Should Have Dismissed All Claims Against the 2011 Plans for Lack of Jurisdiction After Those Plans Were Repealed.

A key concern of *amici* is the extraordinary resources litigation of this type will impose upon the States if allowed to stand. Any action against the 2011 Plans should have been moot under long standing principles of Fifth Circuit and this Court's precedent. In point of fact, the claims against those plans ought to have been declared moot by the district court nearly *5 years* ago. By using as its basis plans that were no longer in effect and ignoring basic principles of this Court's mootness doctrine, the parties have been forced to endure years of litigation. This is time and resources that could have obviously been spent on far more productive endeavors.

The federal judiciary is confined to the decision of "Cases" or "Controversies." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *see also* U.S. Const. art. III § 2. Specifically, "[m]ootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue through its existence (mootness).'" *Id*. at n.22 (citing and quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). Mootness goes to the heart of this Court's subject-matter jurisdiction. *Flast v. Cohen*, 392 U.S. 83, 95 (1968) ("no justiciable controversy is presented…when the question sought to be adjudicated has been mooted by subsequent developments") (footnote omitted). Subject-matter jurisdiction "cannot be forfeited or waived and should

be considered when fairly in doubt." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009). This Court has "an obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *See Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514 (2006). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

Plainly, the district court should have respected the Texas Legislatures prerogative to enact new electoral districts by accepting the 2013 Plans as the governing law and therefore moving on to consider *only* the claims against those plans. Two specific instances where the district court erred must be addressed. First, the district court erred by applying the "voluntary cessation" exception to the mootness doctrine to the adoption of the 2013 Plans. Second, the district court failed to heed the ruling of the Fifth Circuit in *Davis* that resulted in another Texas 2011 redistricting plan case becoming moot due to the exact same facts.

D. The Voluntary Cessation Doctrine is a Very Limited Exception that was Misapplied by the District Court to the Adoption of the 2013 Plans.

In general, "[s]uits regarding the constitutionality of statutes become moot once the statute is repealed." *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004); *see also Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414-15 (1972). Put another way, in the context of mootness, the courts are to review a "statute as it now stands, not as it once did." *Hall v. Beals*, 396 U.S. 45, 48 (1969); *see also e.g. Thorpe v. Housing Authority,* 393 U.S. 268, 281-282 (1969). There are several limited

exceptions to the mootness doctrine, one of which is the voluntary cessation exception. It was this exception the district court relied upon when denying the original motion to dismiss this action as moot. *See Perez v. Perry*, 26 F. Supp. 3d 612 (2014).

The voluntary cessation exception to the mootness doctrine arises when "there is evidence . . . that the state will reenact the statute or one that is substantially similar." *Id*.; *see also United States v. W.T. Grant Co*., 345 U.S. 629, 632-33 (1953). The mere ability of the State legislature to reenact a statute after the lawsuit is dismissed is not enough to satisfy the exception. *See Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006). Typically, the exception applies only in "situations where it is virtually certain that the repealed law will be reenacted." *Id*. Essentially, the exception is a rule out of necessity, to avoid that rare instance where the legislature is intent on avoiding judicial review with the clear intent to reinstate the challenged law.

This was the precise issue the Court was faced with in *Aladdin's Castle*. In that case, this Court found that the "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" when the jurisdiction is "not precluded from reenacting precisely that same provision." *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). It is not simply the *possibility* that the challenged statute may be reenacted; rather the relevant inquiry is an evaluation of "the likelihood that the challenged action will recur." *Id*. at 296 (White, J. concurring in part and dissenting in part); *see also Id*. at 289. In *Aladdin's Castle*, the jurisdiction

in question intended to reenact the repealed language upon vacatur of the district court's judgment. *Id*. at 289, n.11. In this context, the voluntary cessation exception is simply a species of the capability-of repetition-but-evading-review exception.

Given the general contours of the exception, it plainly applied to the adoption of the 2013 Plans.

The 2011 Plans were adopted over six years ago and were enjoined shortly thereafter. *Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at 249. The district court, having found constitutional violations, drew interim plans. *Id*. Meanwhile, parallel litigation was pending over Section 5 preclearance under the VRA for the original 2011 Plans. After this Court's holding in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), Texas repealed the 2011 Plans and adopted the district court's remedial plans. *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at 250 (W.D. Tex. March 10, 2017) (Smith, J. dissenting). The new Plans were subsequently signed into law by then-Governor Rick Perry. *Id*. Texas has operated under the 2013 Plans for the last three election cycles. There is no evidence Texas was engaged in some sort of legislative attempt to subvert the litigation or the district court in some effort to *re-adopt* the 2011 Plans. Instead, the majority of the district court refused to moot this case because, *inter alia*, "[1] there is no indication that the Legislature would not engage in the same conduct that Plaintiffs assert violated their rights in upcoming redistricting cycles; [and 2] because Texas refused to concede the illegality of any conduct, a dispute remains over the legality of the challenged practices and there is no assurance that the conduct will not recur . . . ." *Id*.

at 16. This impermissibly shifts the burden to the legislature to prove its actions were not illegal, which is of course contrary to the great weight of this Court's precedent.

Furthermore, the district court had clear evidence of mootness for any action against the 2011 Plans. During the pendency of this action, the United States Court of Appeals for the Fifth Circuit effectively held that the "claims involving the 2011 Texas Senate plan were moot" and in so doing overwhelmingly indicated that the remainder of lawsuits pending on the various 2011 Plans were also moot. *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at 249-51 (W.D. Tex. March 10, 2017) (Smith, CJ. dissenting); *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015). As noted by the Judge Smith's dissent, "[a] precedential decision by a circuit court binds all district courts in the circuit. That command is absolute." *Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at 249-51 (W.D. Tex. March 10, 2017) (Smith, J. dissenting).

Finally, a newly released decision of this Court further buttresses the position that any proceeding addressing the 2011 plans should be dismissed as moot. As a plurality of this Court recently stated in *Patchak*: "Under this Court's precedents, Congress has the power to 'apply newly enacted, outcome-altering legislation in pending civil cases,' even when the legislation governs one or a very small number of specific subjects." *Patchak,* 2018 U.S. LEXIS 1515 (Feb. 27, 2018) (citing and quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1325 (2016)) (internal alterations and cross citations omitted).

As a preliminary matter, the Constitution's Elections Clause provides that "[t]he Times, Places and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof" unless "Congress" should "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. The Elections Clause vests authority over congressional elections in the State legislature and Congress. There is no express grant of authority given to the federal courts. While, *Patchak* specifically addresses Congress' power to moot pending litigation, similar reasoning applies here, especially when a State legislature is acting under an express grant of authority from the United States Constitution. *See* U.S. Const. art. I, § IV. *Patchak* further implies that the voluntary cessation exception does not apply to legislative enactments that moot litigation outside exceptional circumstances not found here.

Any and all actions against the 2011 Plans were mooted by the actions of the Texas Legislature when it adopted the court-ordered plans as its own. Any reliance on finding of improper purpose or discriminatory intent carried over from those plans was improper and should have been wholly disregarded by the district court.

CONCLUSION

States cannot efficiently hold free and fair elections where a district court can issue an order, cause states and voters to act in reliance on that order, and then simply change its mind on the eve of a deadline to redraw district maps for the 2018 elections. Such actions result in tremendous cost and have destabilizing consequences for the States. Moreover, the district court's arbitrary approach to the Texas

Legislature's actions disregards the deference afforded States on this fundamental question of State sovereignty. Accordingly, *amicus curiae* respectfully urge this Court to reverse the district court's orders that would invalidate districts in the 2013 Plan.

Respectfully submitted,

Jeff Landry
Attorney General

Elizabeth B. Murrill
Solicitor General
Counsel of Record
State of Louisiana
Department of Justice
1885 North Third Street
Baton Rouge, LA 70802
Tel: (225) 326-6766
Fax: (225) 326-6773
murrille@ag.louisiana.gov

Counsel for Amici Curiae

Counsel for Additional *Amici*

Steven T. Marshall
Alabama Attorney General
501 Washington Ave.
Montgomery, AL 36104
(334)353-1018

Josh Hawley
Missouri Attorney General
207 W. High Street
Jefferson City, MO 65102
(573) 751-3321

Michael DeWine
Ohio Attorney General
30 E. Broad Street, 17th Floor
Columbus, OH 43215
(614)466-4986

Alan Wilson
South Carolina Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201

Brad D. Schimel
Wisconsin Attorney General
17 W. Main Street
Madison, WI 53707
(608)266-1221