No. 17-626

IN THE

Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.,
Appellants,

v.

SHANNON PEREZ, ET AL.,
Appellees.

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

BRIEF FOR APPELLEES OTHER THAN THE UNITED STATES (STATE HOUSE DISTRICTS)

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the present appeal.

2. Whether, if this Court has jurisdiction, it should affirm the district court's ruling that Texas violated the Fourteenth Amendment and Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, when its Legislature intentionally minimized minority voting strength in drawing seven Texas House of Representatives districts in Nueces, Bell, and Dallas Counties.

3. Whether, if this Court has jurisdiction, it should affirm the district court's ruling that Texas violated the results standard in Section 2 of the Voting Rights Act, 52 U.S.C. § 10301(b), with respect to the Texas House of Representatives districts drawn in Nueces County.

4. Whether, if this Court has jurisdiction, it should affirm the district court's ruling that Texas's use of race in crafting the boundaries of Texas House of Representatives District 90 in Tarrant County violated the Fourteenth Amendment.

RULE 29.6 STATEMENT

The Mexican American Legislative Caucus, Texas House of Representatives (MALC) is an official caucus of the Texas House of Representatives. MALC is also incorporated as a nonprofit, nonpartisan 501(c)(6) corporation titled Mexican American Legislative Policy Council. MALC has no parent corporation or publicly held company owning 10% or more of the corporation's stock.

The League of United Latin American Citizens (LULAC) is a 501(c)(3) organization. LULAC has no parent company and issues no stock.

The Texas State Conference of NAACP Branches is a nongovernmental corporation. It has no parent corporations and no stock.

The Texas Latino Redistricting Task Force is an unincorporated association. The Texas Latino Redistricting Task Force has no parent corporations and no stock.

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BRIEF FOR APPELLEES

Appellees (other than the United States) in the above-captioned case respectfully request that the Court dismiss this appeal for lack of jurisdiction under 28 U.S.C. § 1253 or, alternatively, that the Court affirm the district court's order.

JURISDICTION

Appellants invoke this Court's jurisdiction under 28 U.S.C. § 1253. Brief for Appellants ("Texas Br.") 3. As explained below, this Court lacks jurisdiction at this time. *See infra* pages. 29-34.

INTRODUCTION

Appellants ("Texas" or the "State") and the United States profoundly mischaracterize what this case is about. They would have this Court regard the Texas House of Representatives ("state house") districts at issue here as "court-drawn" or "court imposed," Texas Br. i, 9, 28, 32, 33, 34, 35, 39, 41, 45, 64, or part of a court's "own" plan, Brief for the United States as Appellee in Support of Appellants ("U.S. Br.") 24. To the contrary: As Texas itself insisted the last time this dispute came to the Court, these districts reflect the State's "choices"—not any court's, Br. for Appellants at 18, *Perry v. Perez*, 565 U.S. 388 (2012) (Nos. 11-713 et al.).

Six of the districts—HD32 and HD34 in Nueces County; HD54 and HD55 in Bell County; and HD104 and HD105 in Dallas County—were drawn by the Texas Legislature in 2011 without any judicial involvement and were reenacted, without change, by the Legislature in 2013. The district court's preliminary decision in 2012 to leave those districts in

place when it drew interim remedial districts elsewhere in the State did nothing to change those districts' fundamental character. A seventh district, HD103 in Dallas County, was drawn by the Legislature in 2011 without any judicial involvement, was left unchanged by the district court in 2012, and was reenacted in 2013 with immaterial changes proposed by a legislator, H.J.S. App. 23a. And even the State admits that the eighth district at issue, HD90 in Tarrant County, is of Texas's own devising. *See* Texas Br. 64, 68.[1]

The court below found that both the original enactment and the reenactment of the districts at issue here was infected by purposeful racial discrimination. But the court has not yet enjoined Texas from using the districts. Texas filed this appeal before the court could hold a remedial hearing. Nothing in 28 U.S.C. § 1253 gives this Court power to hear this premature appeal. But if this Court does reach the merits, it should reject Texas's attempt to cement discriminatory districts into place.

STATEMENT OF THE CASE

Based on a "voluminous record," J.A. 117a (Order Denying Motion for Entry of Judgment under Rule 54(b) (Jan. 5, 2017)), the court below issued a series of lengthy opinions and orders setting forth detailed

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[1] "H.J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 17-626. "C.J.S. App." refers to the appendix to the Jurisdictional Statement in No. 17-586. "M.D.A. App." refers to the Appendix to the Motion to Dismiss or Affirm of Appellees Mexican American Legislative Caucus, et al., in No. 17-626. "Task Force M.D.A. App." refers to the Appendix to the Motion to Dismiss or Affirm as to House District 90 in No. 17-626.

findings of fact concerning what happened in the relevant time period—the biennium from 2011 to 2013.

Redistricting after the 2010 census

The 2010 census showed that Texas's population had grown by over four million since 2000. *Perry v. Perez*, 565 U.S. 388, 390 (2012) (per curiam). That growth was not evenly distributed around the State. *See* M.D.A. App. 2a. Thus, to comply with one person, one vote, Texas had to redraw the districts from which state representatives are elected. *Perry*, 565 U.S. at 390.

The district court described the context in which the Legislature undertook the post-2010 round of redistricting as one "of strong racial tension and heated debate about Latinos, Spanish-speaking people, undocumented immigration and sanctuary cities, and the contentious voter ID law." C.J.S. App. 302a. In all four counties relevant here, members of racial or ethnic minority groups accounted for most or all of the population growth. In Nueces County, the growth "was attributable to Hispanics, as both African-American and Anglo population declined." M.D.A. App. 91a. In Bell County, "more than 70% of the growth" was attributable to an increase in the minority population. *Id.* 278a. In Dallas County, the minority population grew by 350,000, while the Anglo population "decreased by over 198,000." *Id.* 222a. And in Tarrant County, "almost 89% of the growth was non-Anglo." *Id.* 257a, 266a.

Nonetheless, Republican legislators "were very resistant to creating any new minority opportunity districts." M.D.A. App. 4a-5a. They worried any such

districts would likely elect Democrats. *Id.* As a result, "[d]espite the massive minority population growth," the Legislature "not only failed to create any new minority opportunity districts, it *reduced* the number of minority opportunity districts." H.J.S. App. 191a. Its plan, enacted into law as 2011 Tex. Sess. Law Serv. ch. 1271 (H.B. 150), is known as Plan H283.

2011: Designing the challenged districts in Nueces, Bell and Dallas Counties

The configuration of each of the challenged districts in Nueces, Bell, and Dallas Counties has remained unchanged (with the exception of an immaterial change to one district in Dallas County) since they were first drawn by the Legislature in Plan H283. The district court made extensive findings regarding the districts' configurations, the legislative intent behind those configurations, and the consequences of those configurations for the voting power of minority citizens.

1. *Nueces County*. "In both 2000 and 2010, Nueces County was majority Hispanic [in total] population and majority HCVAP [Hispanic citizen voting-age population]." M.D.A. App. 91a. Under the plan in effect prior to 2011, the county (whose largest city is Corpus Christi) elected representatives from three districts—two located completely within the county and one shared with adjoining counties. *Id.* 89a-90a. It was "undisputed that Nueces County had two benchmark Latino opportunity districts" under the pre-2011 plan. H.J.S. App. 126a. Although those districts had previously elected Latino voters' candidates of choice, they had elected candidates opposed by a majority of Latino voters in 2010. *See* M.D.A. App. 90a-91a.

Because Nueces County's population grew relatively slowly between 2000 and 2010 compared to the rest of Texas, it became possible during the 2011 redistricting to place the entire population of the county within two districts, rather than giving it a share of three. M.D.A. App. 89a, 91a. Early in 2010, a staff member of the Texas Legislative Council wrote to the chief of staff to the Speaker of the state house: "Corpus—Two seats only; three R's. And worse[,] one of the seats will probably have to be more Hispanic than the other and probably elect a D." *Id.* 92a. With respect to the two benchmark districts that were majority-Latino, the Speaker mentioned to potential Latino candidates that "one of their seats was not going to be there for the next session." *Id.* 91a-92a.

The district court found that it would in fact have been possible to draw two majority HCVAP districts entirely within Nueces County. *See* H.J.S. App. 44a (pointing to a plan with districts that were 55.2% and 59.9% HCVAP). But "[r]ather than exploring" this possibility, the Legislature instead "drew one safe district for Hispanics and one safe district" for an Anglo incumbent, *id.* 59a. Along the way, the mapdrawers justified their refusal to draw a second Latino opportunity district by invoking a different measure of Hispanic population "*because* [that measure] was lower [than HCVAP] (and lower than 50%)," *id.* at 134a (emphasis added), thus making it seem as if the Latino community could not satisfy the

first precondition for creating an opportunity district under *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).[2]

As compared to the number of residents who would be included in two ideally populated districts, Nueces County was overpopulated by roughly 5000 people. But rather than splitting the excess population between the county's districts, the Legislature, with "[n]o explanation" for its decision, underpopulated HD32—the safe Anglo seat—by 563 people, producing a district where 46.3% of the citizens of voting age were Latino. M.D.A. App. 101a. It then overpopulated HD34—the majority Latino district—by 5,512 people, creating a district where Latinos constituted 65.9% of voting-age citizens. *Id.*[3]

In assessing why Texas had assigned so many more voters to the heavily Latino district, rather than allocating the overage more evenly between the two districts as an alternative proposal had suggested, the court below found that "[t]he only potential

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[2] The mapdrawers "felt" they could "offset" the retrogression caused by eliminating HD33, a benchmark Latino opportunity district in Nueces County, "by creating a new Hispanic opportunity district in a different part of the State." M.D.A. App. 96a. But the two districts in which they increased the Latino population provided no offset because they were "already performing for Latinos." *See id.*

[3] CVAP percentages are calculated using five-year rolling American Community Survey (ACS) data from the Census Bureau. *See* U.S. Census Bureau, *Voting Age Population by Citizenship and Race (CVAP)*, https://tinyurl.com/CVAPData (last visited Mar. 19, 2018). Using 2005-2009 data, HD32 was 44.2% HCVAP, and HD34 was 64.6% HCVAP; using 2008-2012 data, both districts' HCVAP percentages had increased, showing that Latinos formed an increasing share of Nueces County's potential electorate. *See* M.D.A. App. 101a.

explanation given by Defendants" at trial—"that mapdrawers sought to draw HD34 as a district that would perform reliably for Latino voters"—was "demonstrably *not* the reason for the population disparity." H.J.S. App. 255a n.81.

Instead, the evidence showed that the mapdrawers—"including specifically" Todd Hunter, an Anglo incumbent from Nueces County—drew the districts in that county to "undermine Latino voting strength." H.J.S. App. 136a. The "convoluted line" between HD32 and HD34, *id.* 132a (quoting the United States's post-trial brief), included ten split precincts. This "indicat[ed] that mapdrawers were likely using race to assign population since accurate political data is not available below the precinct level." *Id.* 136a. That "jagged boundary line" included a "strategic" boot-shaped "extension" that resulted in the safe Anglo district's capturing a Latino area that was "low-performing" with "low turnout." M.D.A. App. 102a. Meanwhile, the extension "removed [from the safe Anglo district] two potential Hispanic rivals" who had legislative experience—one of whom was a Republican. M.D.A. App. 102a; *see id.* 90a. In short, the Legislature "intentionally packed Hispanic voters" into a safe Latino district "to minimize their number and influence" in Nueces County's other district. H.J.S. App. 136a.

The district court also found that the configuration of HD32 and HD34 violated the "results"

test of Section 2 of the Voting Rights Act. *See* H.J.S. App. 44a-61a.[4]

As already described, the district court found it was possible to draw two majority-Latino districts, *see* H.J.S. App. 44a, thus satisfying the first precondition for a "results" claim under the framework established in *Gingles*, 478 at 50-51. The district court also found the second and third requirements to be met, given the "high levels of racially polarized voting in Nueces County." H.J.S. App. 48a-49a. And turning to the totality-of-the-circumstances inquiry, the district court emphasized Texas's "long history" of voting-related discrimination, including "intentional vote dilution in the Legislature's enactment of the 2011 plan," *id.* 51a, and the "continuing pattern of disadvantage" suffered by Latinos in Nueces County that hindered their ability to participate effectively in the political process, *id.* 52a-53a.

The district court expressly left open the question of an appropriate remedy. H.J.S. App. 61a. With respect to the Section 2 "results" violation, it pointed to the potential tradeoff this Court had identified in *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003), between fewer but safer districts on the one hand and more, but more competitive, districts on the other. H.J.S. App. 60a. It then advised appellees to consider whether they would press their claim for a second opportunity district if the two districts had to be drawn

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[4] Regardless of the intent with which a jurisdiction apportions its seats, an apportionment plan violates Section 2's "results" test "if, based on the totality of circumstances," minority citizens show that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

entirely within Nueces County (rather than crossing county lines to create districts with a higher percentage of HCVAP, as appellees were seeking to have the court order). *Id.* 60a-61a.

2. *Bell County*. Killeen, Bell County's largest city, has a diverse, and growing, majority-minority population. M.D.A. 283a; *see* H.J.S. App. 181a-82a. Under the pre-2011 apportionment, the entire city, save a "minuscule, 200-resident split," was located within HD54. *Id.* 270a. The pre-2011 HD54 also contained all of Burnet and Lampasas Counties. M.D.A. App. 277a.

After the 2010 census, HD54 was overpopulated by nearly 29,000 people. M.D.A. App. 278a. "Minority population growth [had] accounted for more than 70% of the growth in Bell and Lampasas Counties" since 2000. *Id.* Because Bell and Burnet Counties were now too populous to share a district, Plan H283 removed Burnet County and its 42,000 residents from HD54. *Id.*; H.J.S. App. 270a.

To make up for the removed population, the Legislature needed to add 13,000 people to HD54. H.J.S. App. 270a. Minority members of the Legislature introduced plans "that would have kept [Killeen] more whole" than did Plan H283, "but they were rejected." *Id.* 19a. "[I]nstead of adding voters to the existing core of HD54, which already contained almost the entire City of Killeen," *id.* 179a, the Legislature "removed *more* population from HD54"—splitting off more than 30,000 Killeen residents, "about two-thirds of whom were minorities," and assigning them to "already heavily Anglo HD55." *Id.* 270a-71a. To compensate for that change, legislators moved "47,000 mostly Anglo persons [in] southwest Bell County" from HD55 to

HD54. *Id.* 270a. The upshot was that voters of color in Killeen found themselves split between two majority-Anglo CVAP districts (HD54 and HD55). *See id.* 183a.

The primary architect of the lines in Bell County was HD54 incumbent Representative Jimmie Don Aycock, an Anglo. *See* M.D.A. App. 277a-78a. In his testimony at the 2014 trial, Aycock claimed that the lines were the result of a political compromise with the incumbent in HD55, who was also an Anglo. *See id.* 278a. He also attempted to explain why the Legislature had rejected alternative plans that would have kept Killeen together in one district. *See* H.J.S. App. 182-83a. For example, he objected to one such plan (Plan H201) "because it had a 'land bridge.'" *Id.* The court found this objection "pretextual" in light of the fact that Aycock had voted for Plan H283, which itself has land bridges elsewhere. *Id.* Aycock also admitted that he tried to avoid creating a majority-minority coalition district because it "would have probably got me unelected." M.D.A. App. 279a.

Ultimately, the court rejected Aycock's explanations for splitting Killeen as "not credible," M.D.A. App. 283a, as well as "unconvincing and pretextual," H.J.S. App. 19a. It found that "the decision to split Killeen and the minority community within it (removing minorities from HD54 and moving in Anglos) was to ensure that HD54 and HD55 remained Anglo-majority and to make HD54 less likely to perform for minority voters." *Id.* Accordingly, the court concluded that in adopting Plan H283, the Legislature engaged in "intentional vote dilution in Bell County." *Id.* 183a.

The court also found that the new configurations of HD54 and HD55 "exacerbated the existing

population deviations" between the districts. H.J.S. App. 271a. And the State offered no legitimate explanation for doing so. *See id.* Rather, the deviations were "exceedingly political and racial": Legislators "intentionally used race in a way that would overwhelm the remaining Latino voters of HD54 with the new influx of Anglo voters while also stranding a large portion of Killeen's minority voters in the already heavily Anglo HD55," diluting the minority community's potential political strength. *Id.* The population deviations were thus another way the Legislature illegitimately reduced minority political strength. *See id.*

3. *Dallas County*. Although the minority population in Dallas County had increased by almost 350,000 in the decade from 2000 to 2010, its Anglo population had decreased by almost 200,000, and the county had "lost population relative to the state as a whole." M.D.A. App. 222a. As a result, Dallas County was allocated fourteen state house seats rather than the sixteen it had held under the benchmark plan. *Id.*

Under the benchmark plan, there had been two Latino opportunity districts in the county: HD103 and HD104. H.J.S. App. 166a-67a. A third district, HD105, was among those "on track to provide minority opportunity." *Id.* 166a. In 2008, it came within 19 votes of electing the minority-preferred candidate to the state house, and in seven of nine statewide elections that year, the minority's preferred candidate received a majority of the vote within HD105. *See* M.D.A. App. 220a-21a.

Although the county's minority population had substantially increased relative to the Anglo population, the Legislature drew no new minority

opportunity districts within the county in 2011. M.D.A. App. 222a. Instead, it rejected a number of proposals that would have created districts without Anglo majorities. *See id.* 237a-40a. And it redrew HD105 to ensure that the district would not perform for minorities. *See* H.J.S. App. 170a. As a result, under Plan H283, Anglos controlled nearly 60% of Dallas County's house seats with only one-third of its population. *Id.* 166a.

With respect to the northeastern part of the county, the district court found insufficient proof that the Legislature had acted for racially discriminatory (rather than partisan) reasons. H.J.S. App. 169a-70a. But the court concluded that in western Dallas County, the district lines for HD103, HD104, and HD105 were drawn "in a racially discriminatory manner to intentionally dilute minority voting strength." *Id.* 170a.

The district court based this finding on considerable evidence. First, HD103 and HD104—the county's only majority-Latino opportunity districts under Plan H283—were two of the most overpopulated districts in the county. M.D.A. App. 43a; H.J.S. App. 261a. Ryan Downton, who assisted the Legislature in drawing the districts in Dallas County, did not address Representative Anchia's objection that his district (HD103) was unnecessarily overpopulated, and Downton did not confer with Representative Alonzo of HD104 at all. H.J.S. App. 170a, 263a.

Second, the "bizarre configuration" of district lines for all three districts, M.D.A. App. 244a-45a; *see also* J.A. 454-58, suggested that minorities had been taken from HD105 and packed into HD103 and HD104. HD103 and HD104 had two of the lowest perimeter-to-

area compactness scores in the 2011 plan. M.D.A. App. 244a. HD105's design was also "a drastic change from the benchmark." H.J.S. App. 262a. The court noted an "HD103 arm" reaching west into HD105, scooping up heavily concentrated Latino populations in Irving. M.D.A. App. 228a-29a. It also described a "jagged, bizarrely shaped" protrusion extending from HD105 into HD104, which took "disproportionately Anglo" populations from HD104 and added them to HD105. *Id.* 230a-31a; *see also* H.J.S. App. 262a (describing HD105's protrusion into HD104 as "the least Hispanic channel that could have been drawn").

Third, the manner in which the districts were drawn also defied traditional, nonracial districting criteria. The boundary of HD105, for instance, "breaks up numerous communities of interest," dividing the cities of Grand Prairie and Irving. M.D.A. App. 230a. The district lines also split a significant number of precincts, including ten in HD103's arm into HD105 and seven that diverted Latino populations in Grand Prairie into HD104. *Id.* 228a, 241a. Residents of split precincts excluded from HD105 were "disproportionately Hispanic"; those included in HD105 were "disproportionately Anglo." *Id.* 231a.

Downton, the principal architect of the Dallas County districts, admitted at trial that he "drew lines and split precincts based on race to put Anglos in HD105" and to "put Latinos in HD103 and HD104." M.D.A. App. 255a. And the fact that western Dallas County had so many split precincts led the Court to conclude that the mapdrawers were relying on race to manipulate district lines and enhance the political performance of the districts for Anglos. H.J.S. App.

171a; *see id.* 136a (explaining that "accurate political data is not available below the precinct level").[5]

Downton claimed to have packed minority voters into HD103 and HD104 to comply with the Voting Rights Act, but the district court deemed Downton's statement "not credible." H.J.S. App. 171a-72a. The court noted in particular that "there [was] no indication that any election analysis was done" to see whether HD103 and HD104 needed additional minority population in order to remain opportunity districts. *Id.* 172a. In light of the other evidence, the court determined that Downton's reliance on the Voting Rights Act was "superficial" and "in bad faith." *Id.* 171a-72a. It found that "the true motive" of the district configurations "was to dilute Latino voting strength in west Dallas County by unnecessarily placing Latinos in HD103 and HD104"—that is, packing them into those districts to "waste Latino votes"—"while simultaneously making HD105 more Anglo." *Id.* 172a. Based on this "compelling" evidence, *id.* 263a, the court ruled that HD103, HD104, and HD105 had been intentionally designed to dilute Latino voting strength.

2012: The interim remedy

1. Because Texas was then a jurisdiction covered by the preclearance obligation of Section 5 of the Voting Rights Act, 52 U.S.C. § 10304, Texas could not immediately implement the legislative apportionment embodied in Plan H283. It sought preclearance from

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[5] As the United States argued at trial, splitting precincts also disproportionately depresses voter turnout among minority voters. *See* U.S. Proposed Findings of Fact and Conclusions of Law ¶ 119 (Oct. 30, 2014) (ECF No. 1278).

the U.S. District Court for the District of Columbia. *See Texas v. United States,* 887 F. Supp. 2d 133, 138 (D.D.C. 2012) (three-judge court), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013).

At roughly the same time, a number of plaintiffs—including appellees here—filed suit in the U.S. District Court for the Western District of Texas challenging Plan H283 on a variety of constitutional and statutory grounds. The district court held off adjudicating their claims, awaiting decision from the D.D.C. on the State's preclearance request. *See* H.J.S. App. 318a. When it became clear that the D.D.C. would not preclear Plan H283 in time for the beginning of the 2012 election cycle, the district court had to "implement[] an interim plan so that the 2012 elections [could] go forward." *Id.* 302a. To meet that obligation, in the fall of 2011 the district court "dr[e]w an 'independent map' following 'neutral principles that advance the interest of the collective public good.'" *See Perry*, 565 U.S. at 396 (quoting the district court). That map was known as Plan H302.

2. That independent, court-drawn map no longer has anything to do with this case. Texas immediately challenged Plan H302. In its appeal to this Court, Texas argued that the district court should instead have deferred, to the maximum extent possible, to the policy decisions embodied in the Legislature's Plan H283.

This Court agreed. It held that the district court had erred in drawing its own plan. *Perry*, 565 U.S. at 392, 396. The Court remanded the case to the district court and ordered that court to defer to "the State's policy judgments" and to "take guidance from the State's recently enacted plan"—that is, from

Plan H283—"in drafting an interim plan." *Id.* at 393. With respect to Fourteenth Amendment or Section 2 infirmities, the district court could depart from the Legislature's Plan H283 only where the challengers had demonstrated a likelihood of success on the merits. *Id.* at 394.

3. This Court issued its decision on January 20, 2012, at which point the district court had just over a month to respond before the 2012 election cycle got underway. Adhering to this Court's directive, the district court abandoned its independently drawn map. After submissions from the parties, the court adopted an interim remedy, denominated Plan H309. Order at 1 (Feb. 28, 2012) (ECF No. 682). The court emphasized that the "interim plan is not a final ruling on the merits of any claims asserted by the Plaintiffs in this case or any of the other cases consolidated with this case." *Id.* at 1-2. Three weeks later, on March 19, 2012, the court issued a twelve-page opinion "explain[ing] that plan." H.J.S. App. 301a.

Even on the preliminary record then before it, the district court found sufficient evidence of racial discrimination that it needed to "substantially" alter 21 of the 150 state house districts in Plan H283. H.J.S. App. 314a.[6]

Here are some examples of districts the court found it necessary to alter: HD117 in southwestern San Antonio had "target[ed] low-turnout Latino precincts" to aid an incumbent who "wanted to get more Anglo numbers." H.J.S. App.307a; *see also Texas*, 887 F. Supp. 2d at 172 (describing how "Texas

[6] It made "minimal[]" alterations to an additional seven districts. H.J.S. App. 314a.

tried to draw a district that would look Hispanic, but perform for Anglos"). HD149 in Harris County had been 62% minority CVAP in the benchmark plan. *See* H.J.S. App. 312a. But the Legislature "chose to dismantle" this diverse, multiracial district that was electing the State's "first and only Vietnamese-American legislator." *Id.* 311a. And in El Paso County, the district court found that the line drawn between HD77 and HD78 was "bizarre, even for a legislative district." H.J.S. App. 313a. HD77 sported a set of "'deer antler' protrusions" designed to "grab predominantly Latino neighborhoods," *id.*, thereby protecting the incumbent in HD78 who was not the choice of the Latino community.

The 2012 opinion disposed of nearly all appellees' other claims—including those concerning the districts now before this Court— in a single sentence, reciting that the court had "preliminarily" found no likelihood of success on appellees' remaining "Section 2 and constitutional challenges," H.J.S. App. 303a. With respect to Nueces County, the court offered an additional one-sentence explanation of why the State could eliminate one of the benchmark Latino opportunity districts: "Because Nueces County does not have a majority [Spanish surname voter registration ("SSVR")] as a whole, the choice to remove one district required the elimination of one of the Hispanic ability districts." *Id.* 308a.[7]

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[7] The district court later explained that the State's earlier "insist[ence]," H.J.S. App. 134a, on using SSVR—rather than on CVAP, with respect to which Nueces County *was* majority Hispanic—as the exclusive measure of potential Latino voting strength reinforced the court's finding of discriminatory purpose. *See infra* pages 38-39.

The result of the preliminary ruling was that every one of the districts currently at issue in Nueces, Bell, or Dallas Counties was "left undisturbed from the enacted plan" and "configure[d]" in an "identical manner" to its configuration in the Legislature's Plan H283. *See* H.J.S. App. 303a & n.4 (capitalization altered). The only reason these districts needed to be included in the court's interim remedial order was that because they had not yet been precleared, only a federal court order could allow them to go into effect.

The district court took pains to "emphasize the preliminary and temporary nature" of its interim order, stressing that "except for the fact that PLAN H309 sets the districts for the 2012 elections, nothing in this opinion reflects this Court's final determination of any legal or factual matters." H.J.S. App. 303a, 314a. As the court later explained, it had been clear from the outset that its "analysis had been expedited and curtailed" and that its conclusions could "be revised upon full analysis." *Id.* 319a.

Six months after the court issued the order adopting interim Plan H309, the D.D.C. held that Plan H283 was retrogressive. *Texas*, 887 F. Supp. 2d at 166. Accordingly, that court did not then resolve the question whether the plan was also purposefully discriminatory. But it pointed to "record evidence that cause[d] concern" and "strongly suggest[ed]" that the retrogression "may not have been accidental." *Id.* at 177-78.

2013: Enacting the current state house apportionment

1. In 2013, in the wake of the decisions by the court below and the D.D.C. and while Texas's appeal

of the denial of preclearance was still pending, the Governor called a special session of the Legislature "to adopt the [district court's] interim map" as a permanent apportionment. H.J.S App. 5a.

It is important to remember that the "interim map" involved two distinct classes of districts. First, the court below had redrawn 28 of Plan H283's districts, 21 of them "substantially," in light of its preliminary finding that the existing configurations violated federal law. H.J.S App. 313a-14a. Those districts—*none* of which is now before this Court—can fairly be described as court-drawn or court-imposed. Second, the court had left 122 districts "exactly the same as those in the enacted plan"—that is, identical to the districts the Legislature had drawn in 2011 as part of Plan H283. *Id.* 314a. As to these districts, the court had simply "defer[red]" to "the legislative choices and district lines" made in Plan H283. *Id.* 356a n.42.[8]

The district court found that the Legislature was aware that pending challenges to the districts that had originated in Plan H283 and had remained unchanged since 2011 were likely to continue. H.J.S. App. 356a. It emphasized that "[t]he Legislature's own attorney, Jeff Archer, advised them" of this probability. *Id.*; *see also id.* 358a & n.45.

The district court found that the decision nevertheless to retain the original configuration of these "undisturbed" districts, H.J.S. App. 303a, "was not an attempt to adopt plans that fully complied with the VRA and the Constitution"; rather, "it was a

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[8] The district court's findings "concerning the intent of the 2013 Legislature" are laid out in its order on Plan C235. *See* H.J.S. App. 6a.

litigation strategy designed to insulate" the districts "from further challenge, regardless of their legal infirmities." *Id.* 355a. The Legislature hoped that by repealing the 2011 plan, the State could somehow wipe out the evidentiary significance of any findings of discriminatory intent in the initial design of the districts because it could then argue that that evidence applied only to a plan that no longer existed. *Id.* 357a-58a. The Legislature could then immediately reenact *exactly the same districts*—this time without discussion or debate or consideration of alternatives—and then argue that the silence provided no evidence to support a claim that the districts had been drawn for discriminatory reasons. This would enable Texas to "maintain the benefit of [the prior] discrimination." *Id.* 358a. The district court found this strategy "discriminatory at its heart." *Id.* 359a.

Pursuing this repeal-and-reenact strategy, the Legislature "pushed the [2013] redistricting bills through quickly." H.J.S. App. 354a. There was no "deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." *Id.* 353a. Instead, "the Legislature continued its steadfast refusal" to consider creating additional minority opportunity districts, *id.*, rejecting out of hand amendments proposed by Latino legislators, *see, e.g.*, *id.* 61a-62; Trial Tr. at 281 (July 14, 2017) (ECF No. 1546). But the Legislature did agree to an amendment proposed by an Anglo legislator that redrew one of the challenged districts in a way that introduced new constitutional infirmities. *See infra* pages 23-25.

In contrast to the bill enacting districts for the U.S. House of Representatives, which expressly "ratified and adopted" the "interim redistricting plan"

that had been "ordered" by the district court, Texas Br. Stat. App. 34a-35a, the bill enacting the new state house districts made no mention of the 2012 preliminary order. It simply listed the census tracts contained within each district. *See id.* 1a-32a.

The Legislature's 2013 apportionment is known as Plan H358. The district court described the plan as "heavily derived from the 2011 plans." Order at 13 (Sept. 6, 2013) (ECF No. 886). With respect to the districts in Nueces, Bell, and Dallas Counties now before this Court, that is an understatement. Six are identical to the districts initially drawn by the legislature in 2011: HD32 and HD 34 in Nueces County; HD54 and HD55 in Bell County; and HD104 and HD105 in Dallas County. A seventh, HD103 in Dallas County, was changed only slightly through a population swap with HD115. H.J.S. App. 23a.[9] The eighth district, HD90 in Tarrant County, was redrawn by the Legislature. *Id.* 70a.

2. The district court made clear that its general findings regarding the purpose behind the enactment of Plan H358 applied to the districts at issue in Nueces, Bell, and Dallas Counties.

With respect to the Nueces County districts, the court acknowledged that it had "not alter[ed] the districts in [its interim 2012] Plan H309." H.J.S. App. 28a. But it explained that it had then "lacked the benefit of the full record in making its preliminary determinations." *Id.* For example, in 2012, the court had "focused on" SSVR, the State's proffered measure of Hispanic population—a measure under which "it

[9] No party has challenged that swap. H.J.S. App. 23a.

was mathematically impossible to draw two Hispanic districts wholly within" Nueces County. *Id.* 27a-28a. But a "review of the full record" revealed that the State *knew* that under a different, more commonly used measure, "the HCVAP of Nueces County was comfortably above 50%," making two Hispanic-majority districts possible. *Id.* 28a n.19. And yet the State "did not look into whether two majority-HCVAP Latino opportunity districts could be maintained." *Id.* 27a.

Based on the full record, the court found both that the Legislature had drawn the Nueces County districts in 2011 for discriminatory purposes and that because the tainted district lines "remain[ed] unchanged" in the 2013 plan, H.J.S. App. 30a, "that discrimination was purposefully maintained in Plan H358," *id.* 60a.

With respect to the Bell County districts, the court made a similar finding. There, too, the lines drawn by the Legislature in 2011 were carried forward into Plan H358 "unchanged." H.J.S. App. 20a. The court had earlier found that in configuring the Bell County districts, Representative Aycock had deliberately "divided the growing minority City of Killeen to protect his incumbency." M.D.A. App. 289a. The district court found that "the 2013 Legislature intended to continue the intentional discrimination found in Plan H283" with respect to the partition of Killeen. H.J.S. App. 22a. Thus, the racially discriminatory "intent and harm remain in Plan H358." *Id.*

Finally, the court found that the State's unlawful intent to minimize minority voting strength in western Dallas County remained unchanged in reenacting substantially identical districts in Plan H358. H.J.S.

App. 26a. HD 105's configuration had been designed to ensure that Latino voters, nearing the ability to unseat a representative who did not reflect their values, were frustrated in that political effort. *Id.* 167a. Nothing in the new plan "remove[d] or remed[ied] the intentional discrimination" inflicted in that part of the County. *Id.* 26a.

3. Unlike the other districts now before this Court, HD90 in Tarrant County (the home of Fort Worth) was given its current configuration in 2013. H.J.S. App. 70a. In 2011, rejecting a proposal by Anglo incumbent Lon Burnham that would have lowered the HCVAP of the district to 43.2%, *see* M.D.A. App. 12a, 259a-60a, the Legislature had adopted a configuration that was 49.7% HCVAP and 50.1% SSVR, *id.* 266a.

In 2012, Burnam very narrowly defeated a Latino opponent in the Democratic primary. Voting was racially polarized; Burnam's Latino opponent received 70.6% of the Latino vote while Burnam received the majority of Anglo and African-American votes. H.J.S. App. 72a. So in 2013, Burnam sought to revamp the district's boundaries to bring the Como community back into HD90. That community (which is heavily non-Latino) "had consistently and overwhelmingly supported him" in the past. *Id.* 83a. At the same time, Burnam strove to ensure that HD90 remained nominally a majority-Latino district with respect to SSVR, *id.* 73a, because the Chairman of the House Redistricting Committee, Drew Darby, was "fixated" on that figure, *id.* 82a.

To accomplish both goals, Burnam and his chief of staff, Conor Kenney, made unabashed use of race. Burnam directed Kenney to split precincts and swap census blocks to add Latino population and exclude

Anglo population in order to counterbalance the addition of Como. He admitted that "we really made some ugly lines" and "got rid of every white voter near the western boundary of the district to keep the Hispanic vote over 50 percent, but to get Como back into the district." H.J.S. App. 73a. Kenney "started by swapping whole precincts between the districts, but quickly began trading populations at the block level, using racial shading and [Hispanic voting-age population] as a proxy for SSVR." *Id.* Burnam testified that concern about population deviations got "lost in the process" because "we had to deal with taking as many white folks out as we could." *Id.* 74a.

During the floor debate on the redistricting bill, Burnam explained his amendment to the other legislators this way: it would "take the African American and Hispanic population out of Representative Geren's district and put[] some of my Anglo population into his district." H.J.S. App. 75a. Chairman Darby then urged the members to approve the amendment, stating that Burnam's final proposal "br[ought] the numbers back over 50%." *Id.* 81a. The amendment passed.

The district court found that while HD90 did not intentionally dilute Latino voting strength—as it happened, a Latino challenger defeated Burnam in the 2014 primary, H.J.S. App. 76a—the district was an unconstitutional racial gerrymander under the standard laid out by this Court in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny. *See* H.J.S. App. 71a-84a. The court pointed to the "strong direct evidence" in Burnam and Kenney's testimony "explicitly acknowledging the use of race in their method" as well as Burnam's testimony "speaking candidly about there

being 'too many white people' in HD90." *Id.* 77a. The court termed Burnam's floor statements about "as naked a confession as there can be to moving voters into and out of districts purely on the basis of race." *Id.* 81a.

Applying strict scrutiny, the district court ruled that the State's "use of race in drawing HD90 was not narrowly tailored to achieve a compelling government interest." H.J.S. App. 82a-83a. The court saw no evidence that anyone considered the racial target "in terms of compliance with the VRA." *Id.* 82a. In particular, none of the witnesses provided "any meaningful testimony as to the potential significance of a 50% SSVR threshold." *Id.* Based on this evidence, and its evaluation of the witnesses' credibility, the court found that the State's invocation at trial of Voting Rights Act compliance to justify its focus on race lacked a "strong basis in evidence." *Id.* 81a.

Proceedings below

1. In response to Plan H358's enactment, a number of the plaintiffs (appellees here) received leave to amend their complaints (which had originally challenged the 2011 legislative apportionment in Plan H283). *See* H.J.S. App. 324a-25a.

One set of amendments related to appellees' claims against Plan H283: Because this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), had released Texas from preclearance, appellees sought relief under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c), seeking to reimpose

a preclearance requirement on the State. H.J.S. App. 324a.[10]

A second set of amendments brought challenges to Plan 358 under Section 2 of the Voting Rights Act and various strands of the Fourteenth Amendment. H.J.S. App. 325a.

2. In 2017, after a lengthy multipart trial, the district court issued a voluminous set of opinions. It upheld many districts that one or another plaintiff had challenged. *See, e.g.*, H.J.S. App. 11a-12a, 17a-18a, 67a-68a, 85a. But with respect to the districts now before this Court, the district court found intentional discrimination that violated the Fourteenth Amendment and Section 2 of the Voting Rights Act. (It also found that the Nueces County districts violated Section 2's "results" test.)

The district court held that the discrimination had to be "remedied." H.J.S. App. 85a. And it ordered the State to tell it whether the Legislature would "take up redistricting in an effort to cure these violations and, if so, when the matter will be considered." *Id.* 86a. Finally, it laid out a schedule for the court to analyze remedial possibilities in the absence of legislative action. *Id.*

3. Instead of responding to the district court, the State sought relief from this Court. On September 12,

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[10] In *Shelby County*, this Court struck down the coverage formula in Section 4(b) of the Act, 52 U.S.C. § 10303(b). *See* 133 S. Ct. at 2631. Section 3(c) of the Act authorizes a court that finds constitutional violations to order that a jurisdiction seek preclearance of any future changes to its voting laws "for such period as [the court] may deem appropriate." 52 U.S.C. § 10302(c).

2017, this Court granted a stay of the district court's order. *Abbott v. Perez*, No. 17A245. In January of this year, it set the case for argument, postponing decision on the question of jurisdiction.

SUMMARY OF ARGUMENT

Texas seeks to preempt, rather than appeal from, an order granting or denying injunctive relief. Its appeal is thus premature, and this Court lacks jurisdiction to hear it.

But if this Court concludes otherwise, its task is a straightforward one. Texas and the United States stake their arguments on the proposition that the challenged districts in Nueces, Bell, and Dallas Counties are "court-drawn," "court-imposed," or part of a court's "own plan." That premise is untrue. Once this Court recognizes that the challenged districts are legislatively drawn, first and last, the argument that this Court should accord Texas's decision a "particularly strong" "presumption of good faith," U.S. Br. 24, collapses.

Moreover, because the districts in Nueces, Bell, and Dallas Counties were crafted by the Texas Legislature in 2011 and carried forward essentially unchanged into the current apportionment statute, the district court was correct to look at the Legislature's intent in both 2011 and 2013. Texas offers only perfunctory responses to the district court's factual findings with respect to the discriminatory genesis of the challenged districts. The district court's detailed findings of fact, with respect to both the discriminatory intent with which the districts were drawn in 2011 and the discriminatory intent with which those district lines were carried forward in

2013, should be affirmed under the standard set out in Rule 52(a) of the Federal Rules of Civil Procedure and applied consistently by this Court in redistricting cases. This Court should not permit Texas to launder its tainted districts by passing them through a district court decision that did nothing more than decline to enter a preliminary injunction against them.

Texas is also wrong to claim that a district drawn with racially discriminatory intent cannot violate the Fourteenth Amendment or Section 2 of the Voting Rights Act unless plaintiffs satisfy the threshold requirements for establishing a Section 2 "results" claim. To the contrary: As long as a purposefully discriminatory apportionment has a discernible discriminatory effect, it violates the Constitution and Section 2 regardless whether it would be possible to draw additional majority-nonwhite districts. And with respect to the Nueces County Section 2 "results" claim, Texas's arguments go only to the question of remedy, not the question of liability.

Finally, with respect to HD90, the State does not contest the district court's finding that race was the predominant motive for how the lines were drawn in 2013. Nor could it. It claims only that the district survives strict scrutiny because the Legislature had a "strong basis" for considering race in order to comply with Section 2. Texas Br. 68. The district court rejected that claim because it found "no evidence that any legislator or staffer" considered the "effect on Latino voting ability in HD90" when drawing the district's boundaries. H.J.S. App. 81a-82a. Thus, as with the districts in the other three counties, the State simply repeats its version of the facts, completely ignoring the

district court's contrary factual findings and the applicable standard of review in this Court.

ARGUMENT

I. The Court should dismiss this appeal for lack of jurisdiction.

The time it takes to litigate redistricting cases is frustrating to everyone, appellees most of all. Under the best-case scenario, a majority of the elections this decade will have been held under a plan that violates the Constitution and the Voting Rights Act. But that devastating fact cannot confer jurisdiction on this Court to hear Texas's appeal. If this Court were to buy Texas's jurisdictional argument, the upshot would be many more cases in which justice is delayed.

1. Texas blows by the plain language of 28 U.S.C. § 1253, which gives this Court jurisdiction to hear appeals from three-judge district courts only with respect to "order[s] granting or denying . . . an interlocutory or permanent injunction." Section 1253 does not give this Court appellate jurisdiction over other sorts of orders, no matter how important those orders might be to the parties. This is so even with respect to orders that conclusively determine the unconstitutionality of a statute, *Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 388-91 (1970), or grant declaratory relief, *White v. Regester*, 412 U.S. 755, 760-61 (1973); *Mitchell v. Donovan*, 398 U.S. 427, 430-31 (1970) (per curiam). Thus, in *Goldstein v. Cox*, 396 U.S. 471 (1970), the Court emphasized "that its jurisdiction under the Three-Judge Court Act is to be narrowly construed" because "this Court above all others must limit its review of interlocutory orders." *Id.* at 478.

2. Ignoring that directive, the United States and Texas seek to borrow a construction of 28 U.S.C. § 1292(a)(1)—the jurisdictional statute applicable to the courts of appeals—that permits those courts to entertain interlocutory appeals beyond the "limited exception to the final-judgment rule" provided by the section itself, *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). In exceptional circumstances, a party can appeal even absent the grant or denial of an injunction if a district court's order has the "practical effect" of an injunction. *See* Texas Br. 19 (quoting *Carson*, 450 U.S. at 83); *see also* U.S. Br. 20.

Neither Texas nor the United States cites a single case in which this Court has adopted that loose construction with respect to Section 1253. Indeed, such a relaxation would directly contravene this Court's declaration in *Goldstein*.

In fact, this Court has squarely refused to create a "practical effect" exception to Section 1253's textual limitation. In *Gunn*, for example, a three-judge court struck down a provision of the Texas Penal Code. 399 U.S. at 384-86. Like the district court below, the court in *Gunn* gave the state legislature an opportunity to cure the defect rather than immediately enjoining the provision. *Id.* at 386. Under the theory the State has pressed here, one would expect this Court to have entertained the appeal in *Gunn* because the district court's legal ruling, together with its suggestion that the state remedy the defect, "put[] the state on the clock" to amend its law or face remedial proceedings, Texas Br. 23.

But this Court held that it lacked jurisdiction. That was not because the Court overlooked the practical effect of the district court's ruling. The Court

recognized that a state official "confronted" with a federal court opinion holding a statute unconstitutional "would no doubt hesitate long before disregarding it." *Gunn*, 399 U.S. at 390. Nevertheless, this Court saw "no power" to "deal with the merits of th[e] case in any way at all" because no injunction had been granted or denied. *Id.* This principle applies with equal force in the context of redistricting. In *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Court rejected an initial appeal filed after the three-judge court ruled that a state legislative district was unconstitutional; the Court lacked jurisdiction because "no injunction had been granted or denied." *Id.* at 138 n.19.

Texas makes no effort to address *Gunn* or *Whitcomb*. Instead, it tries to deflect attention by claiming that the order here has "the exact same practical effect" as the orders underlying this Court's exercise of jurisdiction in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), and *Gill v. Whitford*, No. 16-1161 (U.S.). Texas Br. 22.

But the orders from which the parties appealed in those two cases satisfied the textual requirement of Section 1253. In both cases, the district court had expressly enjoined state officials from conducting any future elections under the challenged plan.[11] Thus, the officials in those cases, unlike the officials here, were

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[11] *See Whitford v. Gill*, No. 3:15-cv-00421-bbc, 2017 WL 2623104, at *1 (W.D. Wis. Feb. 22, 2017) (three-judge court) ("defendants are enjoined from using the [challenged] districting plan . . . in all future elections"); *Harris v. McCrory*, No. 1:13-cv-00949-WO-JEP, at 1 (M.D.N.C. Feb. 5, 2016) (three-judge court) (ECF No. 143) (state officials are "enjoined from conducting any elections for the office of U.S. Representative until a new redistricting plan is in place").

subject to "an extraordinary writ, enforceable by the power of contempt," *Gunn*, 399 U.S. at 389. And it was absolutely clear that no further elections would take place under the challenged plans.

The United States at least acknowledges the force of *Gunn* and *Whitcomb*. U.S. Br. 23. And it pointedly does not embrace Texas's expansive claim that *any* finding of liability combined with the tautological observation that there needs to be a remedy once a violation is found entitles a state to invoke Section 1253. But the United States then suggests that somehow the "timing pressures present here" transform an otherwise unappealable order into an injunction. U.S. Br. 23. It offers no explanation of exactly *how* that transformation occurs, or any standards to guide future litigants in knowing when an unappealable order becomes appealable. And on the facts, the timeframes in *Whitcomb* and this case are nearly identical.[12] The Court should reject this jury-rigged rule.

3. Adhering to the text of Section 1253 is not an exercise in arid formalism. Allowing premature appeals threatens unnecessary and excessive litigation.

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[12] In *Whitcomb*, the district court issued an opinion in July 1969, *see* 403 U.S. at 131, for an election cycle that was set to begin in earnest right after the New Year, *see Chavis v. Whitcomb*, 307 F. Supp. 1362, 1366 (S.D. Ind. 1969) (three-judge court), and ultimately issued a remedy in October, *see Whitcomb*, 403 U.S. at 139. Here, the district court issued its opinion in August 2017 with the next election cycle set to begin shortly after the New Year. Had Texas complied with the district court's order, a remedy could have been in place by October.

If Texas is right about when states can invoke this Court's appellate jurisdiction, then states will be free to appeal whenever a three-judge court issues even a partial summary judgment in a multiparty, multiclaim apportionment lawsuit. It is a truism that the law must furnish a remedy for the violation of a right. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). But that hardly transforms every declaration of a violation into a *de facto* injunction.

Texas's claim that interlocutory appellate jurisdiction is necessary to avoid the problem of "extremely expedited" review, Texas Br. 23, fares no better. That argument attempts to convert timing pressures *caused by* this appeal into justifications *in favor of* the appeal itself. Rewarding the State's efforts would produce a dangerous precedent for purposes of Section 1253. Given that primary and general elections occur on a two-year cycle and taking into account the calendar on which this Court operates, one party or another will nearly always be able to assert that an election deadline is impending and therefore justifies this Court's immediate review. Exigency is without doubt a necessary condition for Section 1292(a)(1)-style review, *see Carson*, 450 U.S. at 84, but it is not a sufficient one, and it cannot overcome the fact that nothing in the order below operates as an injunction.

Texas strays even further afield when it claims that it should be allowed to appeal in the absence of an injunction because this would somehow "even[] the playing field" between itself and appellees. Texas Br. 23. To be sure, if appellees' claims "had been definitively rejected," *id.*, appellees could have appealed. But that is because their request for

injunctive relief would necessarily have been denied, bringing them squarely within the terms of Section 1253. As the case stands, however, no one can "definitively" say in what ways the State might be forced to depart from the district lines its Legislature drew. Far from leveling the playing field, endorsing Texas's proffered "[p]ractical considerations" as justification for its appeal would unjustifiably tip the scales in the State's favor.

Make no mistake: Allowing states to appeal after a liability finding but before any injunction virtually guarantees that this Court will see recurrent appeals in redistricting cases. This would flout the well-settled principle that "piecemeal appellate review is not favored," particularly under Section 1253. *Goldstein*, 396 U.S. at 478. A state will have every incentive to appeal after a finding of liability without waiting to see whether a district court will in fact enjoin an upcoming election and without there being any potential remedy in place. If it loses, it will no doubt file a second appeal if the district court rejects its proffered remedy (if it even proffers one). And of course if a district court accepts the state's proposed remedy, or imposes its own, disappointed plaintiffs will then appeal. The consequence will be more litigation, and more delay in resolving redistricting cases.

In short, the district court has neither granted nor denied injunctive relief of any kind. That alone should dispose of this appeal. This Court should reject Texas's efforts to bend Section 1253 into a statute permitting appeals any time a state objects to a ruling in a redistricting case.

II. In the alternative, this Court should affirm the district court's finding that Plan H358 intentionally dilutes minority voting strength.

If this Court decides that it has jurisdiction over Texas's appeal, then it should accept the district court's finding that the Legislature adopted and maintained the configurations of the districts at issue in Nueces, Bell, and Dallas Counties for racially discriminatory purposes and hold that the districts violate both Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and the Fourteenth Amendment. Texas's and the United States's arguments against doing so distort the facts, ignore the standard of review, and misread this Court's precedents.

A. The challenged districts originated in 2011 legislation that was tainted by discriminatory motivations and not in a court-imposed remedy.

1. Texas does very little to challenge the district court's finding that the 2011 process that produced Plan H283 was tainted by purposeful racial discrimination. (Indeed, Texas implicitly acquiesced in that finding when it abandoned any attempt to defend the 21 districts the three-judge court "reconfigured," H.J.S. App. 307a, after its preliminary ruling regarding the districts' likely unconstitutionality.) And the United States actually intervened in this case as a plaintiff to assert both that Plan H283 "had been adopted with racially discriminatory intent in violation of Section 2 and that Section 3(c) relief was warranted." U.S. Br. 13.

Instead, Texas claims that that finding, and the district court's detailed findings with respect to the

discriminatory intent that infected the creation of individual districts, is "legally irrelevant," Texas Br. 41, because in Plan H358 the Legislature "adopted unchanged districts that the court itself *ordered* the State to use in 2012," *id.* at 24.

The United States at least acknowledges that under this Court's precedents, the district court could properly "consider[] the 'historical background of' and 'sequence of events leading up to' enactment of the 2013 redistricting plans, including whether the 2011 Legislature acted with discriminatory intent." U.S. Br. 32 n.12 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)). But it too asserts that the challenged districts were "adopted . . . without change from the court's own 2012 interim plan[]." U.S. Br. 24. Indeed, the United States goes on to propose that the "normal presumption" of constitutionality afforded to legislative enactments be "heightened by the State's acceptance of the judicial plan." *Id.* at 30. The United States repeatedly invokes that newfound, and "particularly strong," presumption, *id.* at 24, 32 n.12, 38, 40; *see also id.* at 37 (arguing that appellees should have to "adduce particularly persuasive evidence"), presumably because it thinks the presumption is indispensable to upholding the challenged districts.

Texas and the United States have gotten things exactly backwards. The district court—at this Court's direction, *see Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam)—adopted the *Legislature*'s plan with regard to these districts; the Legislature did not adopt the *court*'s plan. The configurations of the challenged districts are entirely a product of lines drawn by the Legislature in Plan H283—as the district court

unanimously recognized. Order at 13 (Sept. 6, 2013) (ECF No. 886). The most accurate way to characterize the record is to say that the Legislature drew the districts in 2011 and that the district court permitted those unprecleared districts to go into effect for the 2012 election. Indeed, Texas's prior appeal to this Court was designed to achieve precisely that goal. Having successfully argued in 2012 that the court below should be required to implement Texas's plan to the maximum extent possible, Texas should not now be permitted to turn around and claim that the resulting plan was in fact the court's idea.

2. In any event, the district court's 2012 interim order could not provide Texas with a safe harbor.

The district court's 2012 order was avowedly "preliminary," H.J.S. App. 303a, 314a, and explicitly disclaimed any "final determination of any legal or factual matters," *id.* 303a. And as Texas itself acknowledged at the time, it is "well established" that any finding "made in connection with an award of preliminary relief is not a final ruling on the merits." Reply Br. for Appellants at 27, *Perry v. Perez*, 565 U.S. 388 (2012) (Nos. 11-713 et al.). Indeed, it has long been blackletter law that "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395 (1981); *see also Community Nutrition Inst. v. Block,* 749 F.2d 50, 56 (D.C. Cir. 1984) (Scalia, J.) (noting that a court's "tentative assessment made to support the issuance of a preliminary injunction" is "not a final determination" and "is not even law of the case"); 18A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* §4445, at 301 (2d ed. 2002) (a "[g]rant or

denial of interlocutory injunctions clearly does not foreclose further litigation in the same proceeding, so long as [the] decision rested on mere preliminary estimates of the merits or discretionary remedial grounds").

Given this well-established rule and this Court's unanimous "agree[ment]" that "a preliminary injunction holds no sway once fuller consideration yields rejection of the provisional order's legal or factual underpinnings," *Sole v. Wyner*, 551 U.S. 74, 78 (2007), Texas was on notice that there could be no assurance that the districts in Plan H283 would survive a full trial. No reasonable legislature could have thought that the 2012 decision was anything other than what it proclaimed itself to be: an "interim" order, H.J.S. App. 301a, that indicated "[n]othing" about the ultimate "merits as to any claim or defense in this case," *id.* 315a.

This case shows the wisdom of the principle this Court articulated in *Camenisch* and *Sole*: After a full trial, the district court made findings based on evidence that was unavailable at the time it ruled preliminarily on an interim plan for the 2012 elections. For example, in 2012, the district court did not realize that the State was emphasizing SSVR majorities in Nueces County because it was possible to draw two majority HCVAP districts. *See* H.J.S. App. 134a. Nor had it yet had the opportunity to hear from, and judge the credibility, of the legislator from Bell County who was instrumental in splitting the city of Killeen to fracture a large community of color between two Anglo districts. Nor had it heard from the architect of the challenged districts in western Dallas County, whose

explanations the court found to be "superficial" and "in bad faith." *See id.* 171a-72a.

3. If anything, the district court's 2012 remedial order actually was an early indicator that Plan H283 was tainted by purposeful racial discrimination. This Court has long recognized "the well-settled evidentiary principle" that "a finding of illicit intent as to a meaningful portion of the item under consideration has substantial probative value on the question of illicit intent as to the remainder." *Keyes v. Denver Sch. Dist. No. 1*, 413 U.S. 189, 207-08 (1973) (citing 2 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law 301-02 (3d ed. 1940)). The fact that even on a preliminary record the district court had found it necessary to "reconfigure[]," "restore[],"and "retract" portions of Plan H258, H.J.S. App. 307a, 314a, made it unreasonable for Texas to view the district court's interim order as an imprimatur on the remainder of its districts.

4. Because most of the challenged districts' boundaries in (legislatively drawn) Plan H283 in 2011 and their boundaries in (legislatively drawn) Plan H358 in 2013 were identical, the district court's expressly provisional acquiescence for the State to use those boundaries in 2012 does nothing to vitiate their status as purely legislative plans. So even if this Court were to agree with the United States's proposal to create a "heightened" presumption of constitutionality

when a state "accept[s]" a "judicial plan," U.S. Br. 30, that presumption would have no bearing on this case.[13]

Instead, with respect to the districts carried forward unchanged from Plan H283 to Plan H358, the 2013 simultaneous repeal and reenactment is nothing more than a legal fiction. As this Court long ago explained, when a statutory provision is replaced by one that is "almost identical," then "[n]otwithstanding" any "formal repeal," it is "entirely correct to say that the new act should be construed as a continuation of the old." *Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 164 U.S. 1, 11 (1896); *see also Oneida County v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 246 n.18 (1985); 73 Am. Jur. 2d Statutes § 271 (West 2018); *see also Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993) (treating an ordinance that was repealed and essentially reenacted as being continuously in effect).

B. The Legislature's 2013 reenactment of the challenged districts was purposefully discriminatory.

Plan H358 was drawn by "a substantially similar Legislature with the same leadership only two years after the original enactment" of Plan H285. H.J.S. App. 352a n.37. Texas argued before the district court that the reason it preserved the challenged districts unchanged (save for an immaterial modification of HD105) was that it believed that those districts had

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[13] The State did not just "accept" the interim plan; it changed a district (HD90 in Tarrant County) in ways that introduced new constitutional infirmities. *See supra* pages 23-25.

been approved by the district court and that retaining them would "avoid protracted litigation," Texas Br. 1.

Texas's reason for reenacting the districts, like all "determination[s] of a legislature's motivation," is "ultimately an issue of fact," as the United States forthrightly acknowledges. U.S. Br. 25 (citing *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999)). And as an issue of fact, it is one where the district court's resolution is entitled to great weight.

Here, the district court heard Texas's witnesses, found their proffered explanations pretextual, and ultimately rejected Texas's explanation on factual grounds. *See* H.J.S. App. 345a-46a, 348a, 353a-59a; *supra* pages 18-23. Instead, the district court found that the State stuck with its original districts because it "intended" to "maintain[]" the discriminatory "taint" that had originally motivated the districts while being "safe from remedy" through the ruse of repeal-and-reenact. H.J.S. App. 359a.

1. The district court's findings of fact with respect to the Legislature's intent in both 2011 and 2013 are entitled to significant deference. Last Term, this Court reiterated its longstanding recognition that a district court's "assessment" of the purposes behind a legislative apportionment plan "warrants significant deference on appeal to this Court." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). That is because the question whether a state's apportionment plan was adopted or maintained for a racially discriminatory purpose is a question of fact to be reviewed under Rule 52(a)'s deferential clear-error standard. *See Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) ("a finding of intentional discrimination is a

finding of fact"). So too is the question whether racial considerations predominated in a state's redistricting decisions. *Cooper*, 137 S. Ct. at 1465.

In fact-intensive redistricting litigation, a district court's assessment requires "particular familiarity with the indigenous political reality" and "'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (first quoting *Rogers*, 458 U.S. at 622, and then quoting *White v. Regester,* 412 U.S. 755, 769-70 (1973)). Still greater deference is required when those findings turn on the credibility of competing witnesses. This Court "give[s] singular deference to a trial court's judgments about the credibility of witnesses" because "the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record." *Cooper*, 137 S. Ct. at 1474 (quoting *Anderson*, 470 U.S. at 575). The district court lived with this case for many years, through several trials at which it observed numerous witnesses. Its findings cannot be ignored, much as the State would like this Court to do so.

Under Rule 52(a), a reviewing court may not reverse the factfinder merely because it "would have decided the case differently." *Anderson*, 470 U.S. at 573. And "[w]here there are two permissible views of the evidence, the factfinder's choice between them" must control. *Id.* at 574; *accord Cooper*, 137 S. Ct. at 1465 ("A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern."). Rule 52(a) thus guarantees that the merits trial remains the "main event" rather than merely a

"tryout on the road" to appellate review. *Anderson*, 470 U.S. at 575 (citation omitted).

2. In the joint trial on the 2013 congressional and state house plans conducted during the summer of 2017, the district court heard extensive testimony with respect to the legislative process in 2013—evidence that provided direct support for its conclusion that the Legislature acted with a discriminatory motive. The district court properly relied on the guidance this Court provided in *Arlington Heights*, 429 U.S. at 264-68, for inquiring into legislative intent. *See* H.J.S. App. 340a.

The district court found that the Legislature did not actually believe that "passing the interim maps would end the litigation." H.J.S. App. 358 n.45. It pointed out that legislative leaders had made self-contradictory statements about the rationale for the reenactment and that the Legislature's own legal advisor had explained to legislators that reenacting the maps was unlikely to resolve the litigation. *Id.*

Additionally, the court found that the Legislature "pushed the [2013] redistricting bills through quickly" with no real discussion of district configurations. H.J.S. App. 354a. It further found that "'[t]his hurried pace, of course, strongly suggests an attempt to avoid in-depth scrutiny.'" C.J.S. App. 304a (quoting *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 228 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017)). Finally, the court found that the purported legislative findings regarding the 2013 plan were in fact produced ahead of time by the Texas Attorney General to provide cover for the Legislature's retention of the existing districts. H.J.S. App. 355a n.41.

One of the primary concerns of incumbents in Nueces, Bell, and Dallas Counties was to check the growing power of minority communities that could get them "unelected," M.D.A. App. 279a; *see supra* pages 4-7, 10-11. That incentive to dilute minority voting strength remained just as powerful in 2013 as it had been two years before. And as this Court recognized with respect to Texas's *last* round of reapportionment, shoring up an incumbent's district in the face of "diminishing electoral support" from a growing minority community "bears the mark of intentional discrimination that could give rise to an equal protection violation." *LULAC v. Perry*, 548 U.S. 399, 440 (2006).

Given all this evidence, the district court did not err in its ultimate finding of fact: that the 2013 Legislature's intent was to preserve the districts the Legislature had drawn in 2011 that had not already been struck down by the district court.

3. Texas is simply wrong to argue that any consideration of the intent behind Plan H283 is somehow a "once-bitten-forever-damned mentality," Texas Br. 34. Leaving aside that this case hardly involves "once" and "forever," this Court has consistently declared that courts adjudicating intentional discrimination claims can look at the historical evidence.

When a provision's "original enactment was motivated by a desire to discriminate . . . on account of race," and it "continues to this day" to have a discriminatory effect, then the provision "violates equal protection under *Arlington Heights*." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Evidence of past discrimination, as this Court explained in *Rogers v.*

Lodge, "is relevant to drawing an inference of purposeful discrimination, particularly in cases" where prior purposefully discriminatory enactments are "replaced by laws and practices which, though neutral on their face, served to maintain the status quo." 458 U.S. at 625. In particular, the fact that "[s]ome of the more blatantly discriminatory [provisions in a law]" have already been "struck down by the courts" in no way "legitimate[s]" the remaining provisions. *Hunter*, 471 U.S. at 233. Those principles bear directly on this case.

Texas is not telling the whole truth when it claims that it enacted Plan H358 because it "wanted to bring the litigation to an end." Texas Br. 2. The complete truth is that Texas wanted to bring this litigation to an end *in order to keep in place the districts its Legislature had drawn in 2011 for discriminatory reasons*.

If Texas had wanted to bring this litigation to an end correctly, it had two options. First, it could have drawn a new apportionment plan that neither intentionally nor unintentionally diluted minority voting strength. Had it done so, appellees would not have continued to challenge the districts. Second, Texas could have defended the merits of its districts and brought the litigation to an end by winning the case. What Texas cannot do is end the litigation by leaving the court at halftime and asking the referees to declare it the winner.

By deciding to retain the districts it had drawn in 2011, Texas retained both the assets *and the liabilities* of those districts. One of those liabilities is that the challenged districts in Nueces, Bell, and Dallas

Counties were the product of intentional efforts to dilute minority voting strength.

The district court was entitled to infer that when "a substantially similar Legislature with the same leadership" drew *exactly* the same districts "only two years after" it first created them, H.J.S. App. 352a n.37, it did so for the same reasons. That inference is particularly defensible when the reenactment was "pushed . . . through quickly," *id.* 354a, with no discussion or debate over concerns raised by minority legislators.

Under the circumstances, the district court was presented with only two explanations for the repeal-and-reenactment strategy: The State claimed it kept the 2011 lines in place in the challenged districts because it thought that the district court had somehow blessed them in 2012, and that the court would therefore rule in its favor on the merits; appellees claimed that the State kept the 2011 lines in place for the same reason it had adopted them—to dilute minority voting strength. The district court's decision to resolve this dispute against the State is the quintessential factfinding entitled to deference from this Court. The United States is wrong to label this an improper "presumption of persistent discrimination." U.S. Br. 32. The district court simply followed the evidence where it led.

Put another way, the finding of past discrimination here shows that the United States's argument about a "particularly strong" presumption in favor of Texas's Plan H358 has gotten things exactly backwards. As Justice Thomas explained in *United States v. Fordice*, 505 U.S. 717 (1992), when a state keeps in place a system originally adopted for

discriminatory reasons, that original intent remains relevant "both because the State has created the dispute through its own prior unlawful conduct and because discriminatory intent does tend to persist through time." *Id.* at 746-47 (Thomas, J., concurring) (citing *Keyes*, 413 U.S. at 209-10, and *Hazelwood Sch. Dist. v. United States,* 433 U.S. 299, 309-10 (1977)).

The district court, in considering evidence from 2011 in adjudicating the legality of the 2013 plan, did not commit legal error. Indeed, ignoring that evidence would have been flatly inconsistent with this Court's precedent.

C. Plaintiffs in intentional vote dilution cases need not prove that it would be possible to draw additional majority-minority districts.

Texas's final argument with respect to the district court's findings of intentional discrimination rests on the premise that "to establish the effects prong of an intentional-vote-dilution claim, a plaintiff must prove that there is 'the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of [the minority group's] choice.'" Texas Br. 49 (first quoting *LULAC*, 548 U.S. at 430, and then quoting *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)).

Texas is wrong. Neither of the cases it cites were resolved as intentional vote dilution claims. Applying the correct standard for assessing effects with respect to such claims under either Section 2 or the Fourteenth Amendment, this Court should reject Texas's argument that there was no "vote-dilutive

effect" in Nueces, Bell, and Dallas Counties, *see* Texas Br. 53-54, 58-59, 60-61.

1. Requiring plaintiffs to show the possibility of creating additional majority-minority districts is an artifact of a particular kind of claim: vote dilution under the "results" test of Section 2. As this Court explained in *Gingles*, this requirement is essential when the injury the plaintiffs assert is the state's failure to draw such a district. *See* 478 U.S. at 49-51. By definition, if such a district cannot be drawn, the state's failure to draw it cannot be the basis for liability. *See id.* at 50.

But as this Court has repeatedly recognized, an apportionment adopted for discriminatory reasons cannot be upheld even if its effect "was, standing alone, perfectly legal." *City of Pleasant Grove v. United States*, 479 U.S. 462, 471 n.11 (1987). To the contrary, "[a]n official action" when "taken for the purpose of discriminating" on account of race "has *no legitimacy at all* under our Constitution." *Id.* (emphasis added) (quoting *City of Richmond v. United States*, 422 U.S. 358, 378 (1975)). Legislative apportionments violate the Fourteenth Amendment if "'conceived or operated as purposeful devices to further racial discrimination' by *minimizing*, cancelling out *or* diluting the voting strength of racial elements in the voting population." *Rogers*, 458 U.S. at 617 (emphasis added) (citation omitted).

To be sure, *absent* discriminatory purpose, a jurisdiction does not violate federal law simply by not drawing districts that would have increased a small minority group's voting strength. *Bartlett v. Strickland*, 556 U.S. 1, 14-20 (2009) (plurality opinion). But the limitation says nothing about

circumstances like those in the present case, in which a state *has* acted with a discriminatory purpose. To the contrary, Justice Kennedy's plurality opinion in *Bartlett* expressly stated that the *Gingles* precondition of showing that "the minority population in the potential election district is greater than 50 percent" simply "does not apply to cases in which there is intentional discrimination against a racial minority." *Id.* at 20.

2. The *Bartlett* plurality's reliance on *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *see Bartlett*, 556 U.S. at 20, supports the following proposition: When there has been a showing of intentional discrimination, liability under the Fourteenth Amendment or Section 2 is established whenever the challenged district makes it harder for the minority community to participate effectively in the political process.

In this case, the district court found that the challenged districts had exactly that effect.

Start with Nueces County. Because much of the Latino population there was deliberately "packed" into one district to buttress the prospects of an Anglo legislator in another district, those Latinos left behind in the overwhelmingly Anglo district were "marginalized." M.D.A. App. 102a. Similarly, in Bell County, the Legislature's decision to split Killeen minimized the voting strength of a multi-minority coalition. H.J.S. App. 19a-22a. And in Dallas County, the district court found that the Legislature had "unnecessarily plac[ed] Latinos in HD103 and HD104 while simultaneously making HD105 more Anglo in order to protect the Anglo" incumbent and to minimize Latino political power. *See id.* 172a.

Given the adverse consequences for those counties' minority citizens, the district court correctly held that appellees had proved a violation of Section 2 and the Fourteenth Amendment. What the remedy should be can be determined on remand.[14]

III. The configuration of the districts in Nueces County violates Section 2's "results" test.

In addition to holding that the configuration of HD32 and HD34 violated federal law because the Legislature's adoption of those districts was the product of intentional racial discrimination, the district court held that the configuration violated Section 2's "results" test "insofar as two compact HCVAP-majority opportunity districts could be drawn within Nueces County." H.J.S. App. 85a. This Court need not address that alternative holding if, as appellees have urged, it affirms the district court's findings with regard to appellees' intentional discrimination-based claims. But if the Court does reach that holding, it should affirm.

Contrary to the State's assertion, Texas Br. 65, the district court did *not* conclude that it was impossible to draw two minority opportunity districts within Nueces County. While there was some uncertainty over how well Latino voters would fare if the Section 2 remedy involved doing nothing beyond reconfiguring the two districts wholly within Nueces County, *see* H.J.S. App. 50a, 58a-59a, the court found that a Latino voting population that "continues to climb" would over

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[14] The fact that the remedy for the State's intentional discrimination has not yet been adjudicated reinforces the conclusion that this Court lacks jurisdiction over the State's premature appeal. *See supra* pages 29-34.

time give Latino voters "a significant advantage in house district elections" in both districts; indeed, "they could easily control elections." *Id.* 55a, 57a-58a. Thus, after extensive discussion, the court explained that while two such districts might not offer "the best configuration for minority success," *id.* 59a, they would arguably provide an "opportunity to win elections," *see id.* 56a (emphasis omitted).

Texas's claim that the district court "recognized" that a second majority-Latino district in Nueces County would produce an "over-representation" of Latino voters in the county, Texas Br. 67 (quoting H.J.S. App. 51a), rips a phrase out of context. The district court's remark came in the course of pointing out, as part of its totality-of-the-circumstances analysis, that making both districts in Nueces County majority-Latino should *not* undermine finding a Section 2 violation, given that even with two majority-Latino districts in Nueces County, Latinos "statewide would still be under-represented." H.J.S. App. 51a.

Texas has not challenged the district court's findings regarding the demographics of past, present, and potential districts within Nueces County. Nor has it challenged the district court's findings regarding racial polarization and socioeconomic disparities affecting Latino political participation within the county. Given that appellees have satisfied all the *Gingles* preconditions, *see supra* pages 7-8—and in light of the fact that the district court has not yet decided whether it will require a remedy that creates two majority-Latino districts within Nueces County, H.J.S. App. 60a-61a—this Court should affirm the district court's ruling with respect to the Section 2 results claim against HD32 and HD34.

IV. HD90 in Tarrant County is an unconstitutional racial gerrymander.

Under *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny, an electoral district violates the equal protection clause when: "(1) race is the 'dominant and controlling' or 'predominant' consideration in deciding 'to place a significant number of voters within or without a particular district," and (2) "the use of race is not 'narrowly tailored to serve a compelling state interest.'" *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1264 (2015) (first quoting *Miller v. Johnson,* 515 U.S. 900, 913, 916 (1995), and then quoting *Shaw v. Hunt*, 517 U.S. 899, 902 (1996)).

Texas does not contest the district court's finding that race was the predominant factor "motivating the decision of which individuals to place within and without HD90" when its boundaries were reconfigured by the Legislature in 2013, H.J.S. App. 77a. The district court, which observed the witnesses' testimony, deemed the explanation for the HD90's boundaries given by the legislator and staff member who drew it "as naked a confession as there can be to moving voters into and out of districts purely on the basis of race." *Id.* 81a. Thus, the district properly subjected HD90 to strict scrutiny.

Texas's sole defense is that the State was entitled to engage in this deliberate racial gerrymander in order to comply with a Voting Rights Act mandate to "maintain[] HD90 as a majority-Hispanic district." Texas Br. 69. That defense is meritless. The 2013 changes made to HD90 involved neither a genuine compelling government interest nor narrow tailoring. And because "HD90 actually was redrawn by the 2013 Legislature," *id.* at 34, it undermines the State's

refrain that in 2013, the State "enacted a House plan that made only minor changes" to the legislatively drawn districts that had been left intact under the district court's 2012 interim remedy, *id.* at 26.

1. When strict scrutiny applies, as it does here, the question is whether the government's "actual purpose[]" in relying on a suspect classification is a compelling one, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)—not whether the government can proffer an "hypothesized or invented *post hoc*" justification "in response to litigation," *United States v. Virginia*, 518 U.S. 515, 533 (1996). Here, the district court concluded that the real motivation for the 2013 reconfiguration of HD90 had nothing to do with ensuring compliance with the Voting Rights Act. H.J.S. App. 81a-83a. As appellees have already explained, *see supra* pages 41-43, in reviewing that factual finding, this Court must "give singular deference" to the trial court's credibility determinations. *Cooper v. Harris*, 137 S. Ct. 1455, 1476 (2017). That deference is warranted here. In addition, the record more than supports the district court's findings.

To begin, HD90 as configured in 2011 was majority-Latino in HCVAP using 2008-2010 ACS data, and majority SSVR. M.D.A. App. 266a. The Texas Attorney General urged the Legislature to retain that configuration as part of the 2013 apportionment legislation. *See* H.J.S. App. 440a. Thus, rather than suggesting that the Voting Rights Act required the use of race to redraw HD90's boundaries, the State's chief lawyer recommended retaining the existing boundaries. Had the Legislature followed that advice—as it did with respect to essentially all the

other districts that had not been altered by the 2012 interim remedy—HD90 would have remained a majority Hispanic district with no need to deliberately and surgically move voters into and out of the district based on their race. There would have been no *Shaw* claim.

As Texas acknowledges, the impetus for the 2013 boundary manipulations was the incumbent's desire to recapture a pocket of non-Latino supporters who had not been included within HD90 under the 2011 plan. Texas Br. 69-70. It was the discretionary decision to add this non-Latino population to the district that necessitated removing other non-Latino residents in order to retain the district's demographic character.

Discussion of redrawing HD90 to comply with the Voting Rights Act appears nowhere in the 2013 legislative record. On the state house floor, Representative Burnam, the amendment's author, stated only that the new boundaries for HD90 restored the Como precinct to HD90 and also moved Anglos out of HD90 and minority voters into HD90. *See* H.J.S. App. 80a-81a. At trial, Burnam testified that his staffer did not track election results while making changes to HD90 because "[i]t was purely a demographic exercise." Task Force M.D.A. App. 5a. The district court concluded, after reviewing all the evidence, that "no one considered the legal significance of the [demographic] target in terms of compliance with the VRA." H.J.S. App. 81a-82a.

In addition to the dearth of evidence showing that Texas considered the impact of its changes on Latino voters' opportunity to elect, the sequence of district configurations belies the State's claim that the deliberate focus on race was undertaken for Voting

Rights Act compliance. In the usual successful defense to a *Shaw* claim, a state shows that the Voting Rights Act requires use of race because the elements of a vote dilution claim are present. *See*, *e.g., Cooper*, 137 S. Ct. at 1470 ("If a state has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district."). Here, however, the State's changes to HD90 were not spurred by a desire to *create* a Latino opportunity district in compliance with the Voting Rights Act. HD90 was *already* a majority-Latino district before Burnam proposed redrawing it. That the redrawn district actually "decrease[d]" the share of Spanish-surnamed registered voters in the district, H.J.S. App. 73a, further gives the lie to the State's rationalizations: It is difficult to imagine how the Voting Rights Act would require predominant use of race to *lower* the electoral strength of Latinos in an existing Latino opportunity district.[15]

2. Nor, under the circumstances, was the use of race in modifying HD90 narrowly tailored to comply with the Voting Rights Act.

Even if the district court had found that Texas had a strong basis in evidence to conclude that the Voting

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[15] The Court should reject Texas's attempt to use an expression of concern about this decrease made by MALC's counsel as evidence that compliance with the Voting Rights Act motivated the Legislature's reliance on race. *See* Texas Br. 70. That concern was expressed in the context of an initial proposal by Burnam and Kenney to modify HD90 that would have reduced the number of Latino registered voters in HD90. J.A. 399a. That concern would never have needed to be expressed had the State maintained the 2011 configuration of HD90.

Rights Act required it to maintain the existing SSVR level in HD90, the narrowly tailored solution would have been to refrain from moving a heavily non-Latino precinct into HD90 and then splitting ten other precincts to move voters into and out of the district based on race.

The State's race-based redistricting of HD90 cannot survive strict scrutiny, regardless whether the Voting Rights Act required maintaining the district's existing SSVR, because it was eminently possible to meet that target without making predominant use of race. Texas had already met that goal in 2011.

CONCLUSION

For the foregoing reasons, this Court should dismiss for lack of jurisdiction or, alternatively, affirm the order of the district court.

Respectfully submitted,

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