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

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

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

Amici are the States of Louisiana, Alabama, Michigan, Missouri, Ohio, South Carolina, and Wisconsin. The States have a vital interest in the law regarding redistricting, because redistricting is inherently a State function. The District Court's ruling, throwing elections into disarray, has widespread implications for states entering the 2018 election cycle and the coming 2020 redistricting cycle, destabilizing the democratic system in all states. Additionally, the District Court's ruling undermines the ability of states to rely in good faith on the validity of a District Court's precedent, which can lead to endless challenges and expense for a state in its efforts to comply with the Voting Rights Act ("VRA").

SUMMARY OF ARGUMENT

The State of Texas has requested that this Court should note probable jurisdiction or summarily reverse the District Court's decision to invalidate the State's Plan H358 ("2013 Plan") determining the boundaries of State legislative districts. The 2013 Plan incorporated all but a few districts from Plan H309 ("2012 Plan"). The 2012 Plan was a court-ordered, *court-drawn* remedial plan to remedy supposed violations contained in a 2011 plan that was never used in a single

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[1] Pursuant to Sup. Ct. R. 37.6, *amici* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, nor made a monetary contribution specifically for the preparation or submission of this brief. The State of Louisiana paid for this brief. All parties received timely notice of *amici curiae's* intention to file this brief.

legislative election. Now, the very same District Court that *drew and ordered* the use of the 2012 Plan has found that the 2013 Plan, which copied nearly all of the district boundaries from the Court's own 2012 Plan, "purposefully maintain[s] the intentional discrimination" from the 2011 plan. *See* J.S. App. 6a. That conclusion is as absurd as it is illogical. As the legislative history demonstrates, the Texas Legislature adopted a 2013 Plan, largely mimicking the Court's own 2012 Plan, for the express purpose of avoiding VRA violations. Unless the Court's own 2012 Plan contained districts in violation of the VRA–a possibility it expressly disclaimed in its opinion adopting the Plan–then the 2013 Plan *cannot* violate the VRA. Moreover, as described below, the specific districts questioned by the District Court do not violate the VRA as HD90 was not an impermissible gerrymander, nor was it possible to draw an additional performing Hispanic opportunity district in Nueces County. For the foregoing reasons, this Court should note probable jurisdiction or summarily reverse the District Court's decision.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY IMPUTED A FINDING OF UNLAWFUL INTENT FROM A PRIOR LEGISLATIVE ACT.

The District Court concluded the Texas Legislature possessed a racially discriminatory purpose in violation of § 2 and the Fourteenth Amendment by maintaining the 2012 plan, which had been drawn in large part and ordered to be implemented by that very court. Specifically, the District Court stated that the Legislature "purposefully maintained the intentional

discrimination contained in [the 2011 Plan]" because certain districts where the Court found violations "remain unchanged or substantially unchanged" in the 2013 Plan. *Perez v. Abbott*, 2017 U.S. Dist. Lexis 136226, *18, 2017 WL 3668115 (W.D.T.X. 2017). The District Court reached this conclusion by reasoning that it found violations in the 2011 Plan, drew and ordered the Legislature to adopt the 2013 Plan that it now proclaims did not remedy those violations, and that the Legislature did not pursue sufficient changes to the 2013 Plan beyond what was ordered.

The District Court's conclusion rests on circular reasoning and clearly erroneous speculation. The Court glosses over the fact that the 2013 Plan, regardless of whether it shares some district lines with the 2011 Plan, was found by *that same court* to expressly comply with the standards set forth by the Supreme Court in *Perry v. Perez*, 565 U.S. 388 (2012), § 2, and the Fourteenth Amendment. *United States Dist. Court v. Texas*, 2012 U.S. Dist. LEXIS 190609, *67-69 (W.D.T.X. 2012) (hereinafter "Opinion Explaining Plan H309"). In drawing and ordering the adoption of the 2013 Plan, the District Court went to great lengths to emphasize it was aware of the guidance set forth by the Supreme Court's ruling in *Perry v. Perez* and that the plan complied therewith. Opinion Explaining Plan H309 at *53, *67.

In accordance with the guidance from the Supreme Court, the District Court reviewed the State's valid political considerations and independently drew the 2013 Plan. Opinion Explaining Plan H309 at *67-68. The Court stated in express terms that the 2013 Plan corrected perceived defects and ordered the Legislature

to adopt it. *Id*. This represents a careful expression by the Court that it drew a plan free from the illegality present in the 2011 Plan. The Legislature relied on this expression and adopted the Court's plan almost exactly as put forth by the Court.[2]

This is not a case where a legislature intentionally adopted a discriminatory plan, as the District Court indicates. Rather, the Legislature merely adopted a plan that was judicially drawn and judicially approved as free from legal defect and discriminatory intent. It would *seem* that no sounder basis would exist upon which the Legislature could rely in believing the districts would meet judicial scrutiny on this point. For the Legislature in this case to be furthering preexisting intentional discrimination, *the District Court* would have to possess discriminatory intent in drawing and approving the plan, despite its clear statement that the plan eliminated underlying legal defects. Indeed, a court-drawn map, such as the 2013 Plan, is subject to a far higher standard than one drawn by a legislature. *See*, *e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 541 (1978) (noting that courts lack "political authoritativeness" and must act "in a manner free from any taint of arbitrariness or discrimination" in drawing remedial districts) (quoting *Connor v. Finch*, 431 U.S. 408, 417 (1977)); *Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the

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[2] The sole exception being HD90, which was clearly amended because a Plaintiff, the Mexican American Legal Defense & Educational Fund, advocated for that amendment. The fact that such an amendment was pursued at the request of a Plaintiff should cut *against* a finding of intentional discrimination. Any other result is clearly erroneous and based on pure speculation.

protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (noting that "a court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies"); *Favors v. Cuomo,* Docket No. 11–cv–5632, 2012 WL 928216, at *18 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified,* No. 11-cv-5632, 2012 WL 928223, at *6 (E.D.N.Y Mar. 19, 2012); *Molina v. Cty. of Orange*, No. 13CV3018, 2013 WL 3039589, at *8 (S.D.N.Y. June 3, 2013), *supplemented,* No. 13CV3018, 2013 WL 3039741 (S.D.N.Y. June 13, 2013), *report and recommendation adopted,* No. 13 CIV. 3018 ER, 2013 WL 3009716 (S.D.N.Y. June 14, 2013); *Larios v. Cox,* 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004); *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *4 (E.D. Tex. Nov. 14, 2001). The fact that the 2013 Plan may share some lines with the 2011 Plan is of no legal significance because the District Court adopted those lines as its own.

Given the clear, express conclusion of the District Court in 2012, paired with the guidance from the Supreme Court in *Perry v. Perez*, it was reasonable and indeed necessary for portions of the 2011 Plan to remain in the 2013 Plan and for the Legislature to adopt it almost entirely without change. The discriminatory intent the Court found in the 2011 Plan cannot logically or legally be said to have carried over to the 2013 Plan merely because some portions of the 2011 Plan are encompassed therein. Undeniably, the Supreme Court *instructed* the District Court and Legislature to look to the legal portions of the 2011

Plan in building a new plan and the District Court clearly and expressly found that the 2013 Plan complied with the Supreme Court's standards. Opinion Explaining Plan H309 at *53, *67-69. Simply put, the 2013 Plan is a new plan, cleansed of any underlying discriminatory purpose or intent from the 2011 Plan because the District Court's findings and orders in 2012 necessarily removed any taint. *See* string cite, *supra* at 4-5.

With the presumption of constitutionality afforded to legislative acts, none of the District Court findings aid in its conclusion that the Texas Legislature intentionally furthered pre-existing discriminatory purpose in enacting the 2013 Plan. On the contrary, the District Court's findings as to intent serve only to undercut its own conclusions. As the District Court notes, the Legislature adopted the 2013 Plan and, in an apparent effort to avoid risk of further litigation and "potential VRA problem[s]," permitted only minor amendments. *Perez v. Abbott*, 2017 U.S. Dist. Lexis at *16-17, *107. The Legislature could not wish to avoid further litigation and VRA violations if it was *intentionally* adopting a plan it knew to be rife with legal infirmities. The District Court's findings actually stand *against* the proposition that the Legislature was intentionally furthering an existing purposeful discrimination.

If the District Court is allowed to improperly attribute the intent of the Legislature when enacting the 2011 Plan onto an entirely separate legislative act (the 2013 Plan), the consequences flow well beyond this case. The District Court's holding essentially stands for the proposition that any legislative enactment once

found to have been motivated by discriminatory intent, could *never* be cured – even when the new maps rely upon a court order. If this circular logic stands, it will work extreme unfairness to states by calling into question the finality and legality of judgments in redistricting and other cases. States will never be sure if orders are valid or reliable and therefore risk years of ongoing litigation. Moreover, such reasoning would require legislatures similarly situated to scrap existing maps and redraw *all* of their electoral districts. A comprehensive redraw would occur at enormous cost to taxpayers and would slow the legislative process to a needless crawl.

The District Court improperly imputed the finding of unlawful intent from the 2011 Plan onto the 2013 Plan, thereby invaliding the plan that it drew, approved, and ordered enacted. Plainly stated, the 2013 Plan is a new plan, cleansed of any discriminatory influence of prior plans by the District Court's earlier finding that the plan was free from legal defects.

II. HOUSE DISTRICT 90 WAS NOT A RACIAL GERRYMANDER BECAUSE THE TEXAS LEGISLATURE HAD "GOOD REASONS TO BELIEVE" THAT THE VOTING RIGHTS ACT REQUIRED AN INCREASE IN MINORITY POPULATION.

In the VRA context, race-based qualifications must be narrowly tailored to further a compelling state interest. *Bush v. Vera*, 517 U.S. 952, 959, 976 (1996). Compliance with the VRA has been presumed to be a compelling state interest. *See Bethune-Hill v. Va. State Bd. Of Elections,* 137 S. Ct. 788, 801 (2017) ("[T]he Court assumes, without deciding, that the State's

interest in complying with the Voting Rights Act [is] compelling."). "[T]he narrow tailoring requirement insists only that the legislature have a strong basis in evidence to support the (race based) choice that it has made." *Id*.; (quoting *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015)). This Court has determined that a strong basis in evidence exists as long as the "legislature has '*good reasons* to believe' it must use race to satisfy the Voting Rights Act." *Bethune-Hill*, 137 S. Ct. at 801 (2017) (emphasis in original). "[*G*]*ood reasons* to believe" is enough *even if* a court later finds the actions were *not necessary* to comply with the VRA. *Id*.

In *Bethune-Hill*, the district court found the Virginia Legislature allowed race to predominate the decision on the number of minority voters within a district.[3] *Id*. at 796-97. Since race was allowed to predominate in the creation of this district, the Legislature's action was subject to strict scrutiny. *Id*. at 801. On appeal, this Court determined the Virginia Legislature had "good reasons to believe" its actions were necessary with respect to District 75, a majority-minority district. *Id*. (This Court affirmed the District Court's analysis as to District 75, which found that

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[3] The district court found that race did not predominate as to 11 of the 12 challenged districts. *Bethune-Hill v. Va. State Bd. Of Elections*, 141 F. Supp. 3d 505 (2015). This Court reversed and remanded for a determination of 11 of the 12 Virginia districts. *Bethune-Hill,* 137 S. Ct. at 802. However, this Court affirmed the decision of the district court that upheld the 12th district, District 75. *Id*. The trial on remand was held in October of 2017, but as of the date of this filing no order or opinion has been issued. *Bethune-Hill v. Va. State Bd. Of Elections*, No. 3:14cv852 (E.D. Va. filed Dec. 22, 2014).

even though race predominated, Virginia met its burden under strict scrutiny). Virginia's "good reasons to believe" that a certain percentage of black voting age population (BVAP) was necessary in District 12 included evidence of: 1) extensive meetings with the delegate from District 75; 2) discussions with incumbents of other majority-minority districts; and 3) recent election results and voter turnout rates. *Id.* at 801. This Court considered these factors important as a reflection of "the good faith efforts" of the Legislature. *Id*. (discussing the functional analysis that the Department of Justice required under Section 5).

In this case, the State of Texas similarly has "good reasons to believe" that its actions were justified to avoid racial gerrymandering.[4] First, the District Court approved of the original HD90 as a court-ordered plan (Plan H283). JA 84a-85a. Second, the Texas Legislature changed HD90 in order to, 1) attempt to protect an incumbent—a traditional districting criteria, *see e.g. Ala. Legis. Black Caucus*, 135 S. Ct. at 1270*; Vera*, 517 U.S. at 964, 968 (a racial gerrymandering case also involving the Texas legislature)—by including the Como Neighborhood, and 2) maintain the district as a Hispanic opportunity district at the request of the Mexican American Legislative Caucus, a Plaintiff-Appellee in this case. JA 83a-84a, 72a, 75a. Texas' stated reason for increasing Spanish-surname voter registration (SSVR) in HD90 was to protect the state from VRA litigation. JA 81a.

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[4] *Amici* assumes, *arguendo*, that HD90 is subject to strict scrutiny in the first instance.

In the VRA context, it is a truism that race-based determinations are unavoidable. *See generally Bethune-Hill*, 137 S. Ct. 788; *Ala. Legis. Black Caucus*, 135 S. Ct. 1257; *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952, 958 (1996) (redistricting performed with the "consciousness" of race is permissible and not subject to strict scrutiny). Certainly. then, making modest changes to an already court-approved district for the purpose of incumbent protection and avoiding liability under the VRA, must be, at the very least, a "*good reason*." *Id*. This is especially true when the Legislature was urged to make those changes by Plaintiff (Mexican American Legislative Caucus) because the Spanish surname voter registration was deemed by the Plaintiffs to be too low.[5] J.S. App. 72a. If traditional districting criteria and deference to the very minority group affected by the districting decision is not a strong basis in evidence then it is impossible to think of what else would be.

III. THE TEXAS LEGISLATURE DID NOT DILUTE MINORITY VOTING STRENGTH IN NUECES COUNTY BECAUSE IT WAS IMPOSSIBLE TO DRAW AN ADDITIONAL PERFORMING HISPANIC OPPORTUNITY DISTRICT.

Impermissible vote dilution has the "effect of diluting minority voting strength." *Shaw v. Reno*, 509

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[5] The Mexican American Caucus is a Plaintiff-Appellee in this litigation; however, it does not specifically challenge HD90. However, the fact that the Texas legislature changed a map with input from one Hispanic group only to have that change challenged by another Hispanic group further points to the fact that the VRA places states with nearly impossible choices.

U.S. 630, 640 (1993). As this Court has stated, "a 'minority group' must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district." *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017) (emphasis added) (citing and quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)) (internal citations omitted). "Where an election district could be drawn in which minority voters form a majority but such a district is not drawn . . . then—assuming the other *Gingles* factors are also satisfied—denial of the *opportunity* to elect a candidate of choice is a present and discernible wrong . . . ." *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) (emphasis added). "[A] functional working majority" is a consideration in the VRA context. *Bethune-Hill*, 137 S. Ct. at 802 (explaining that in § 5 cases reducing minority voting strength to the level of non-performance could rise to the level of a violation even if the minority voting age population remained above 50%).

Nueces County *lost* population as of the 2010 census. J.S. App. 27a. The two minority opportunity districts that existed previously could no longer "be maintained in their benchmark configurations due to population loss." *Id*. at 59a. The Appellees have never shown how the State could draw more than one performing Hispanic opportunity district in Nueces County, which is what the current plan has. *See Id*. 54a-55a. There are two proposed plaintiff plans. *Id.* at 55a. One plan requires the State to subordinate the County Line Rule—a traditional redistricting criteria—to racial considerations. *See* Tex. Const. art. III, § 26 ("[W]henever a single county has sufficient population to be entitled to a Representative, such

county shall be formed into a separate Representative District . . . and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county.")[6]; *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981). The District Court properly rejected this plan. J.S. App. 54a. ("The Court finds that the County Line Rule is a legitimate and important traditional districting principle in Texas."). Appellees other plan draws two districts wholly within the county, but the District Court concluded those districts would not perform. J.S. App. 55a.[7] There is also significant electoral history in Appellees proposed HD32 and 34 indicating there is no real "opportunity to elect a candidate of choice" while maintaining two Hispanic opportunity districts in Nueces County. *See Strickland,* 556 U.S. at 19-20; J.S. App. 44a.

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[6] The county has special importance as it is the principal local government entity in Texas. *See* The University of Texas, *The Texas Politics Project*, available at: https://texaspolitics.utexas.edu/educational-resources/local-government-texas-constitution; *see also* Texas Association of Counties, *Texas County Government*, available at: https://www.county.org/texas-county-government/Pages/default.aspx (explaining that Texas county governments are a "functional arm of state government," which provides significant services to the citizens of the county.) In Louisiana, parishes operate similarly.

[7] This is strictly in terms of Hispanic citizen voting age population based on citizenship estimates. Countywide Spanish Surname Voter Registration is less than 50% of the population in Nueces County, which is the data available to the Legislature at the time of the redistricting. J.S. App. 27a.

Plaintiff-Appellees offered map H400, which draws "two majority-HCVAP districts . . . wholly within Nueces County." J.S. App. 44a. However, according to Appellees' expert, both districts performance in exogenous elections is "so low as to indicate a *lack of real electoral opportunity in both districts*." *Id*. (emphasis added) ("HD32 performed in 7/35 statewide elections[8] . . . and HD34 performed in 0/35 statewide elections between 2010 and 2016."). In fact, HD32 *only* performs in presidential election years. *Id*. HD34 *never* performs in *any* year. *Id*. The District Court found that the Appellees "demonstrated that an additional compact minority district could be drawn in Nueces County." *Id*. at 54a. This is despite all the evidence to the contrary and the fact that "Plaintiffs have not adequately demonstrated that they lack equal opportunity in a configuration" that does not break county lines." J.S. App. 55a. "A majority-minority district must provide '*real electoral opportunity*' to the minority group in order for § 2 to be fulfilled." *Id*. at 417a (emphasis added) (quoting *LULAC v. Perry*, 548 U.S. 399, 428 (2006)). The District Court is also correct when it points out that "real opportunity" does not equal a guarantee of success. *Id*. However, in this instance, it is not that there is a *low probability* of electoral success in Nueces County, it is that there appears to be *no* opportunity for electoral success, at least where HD34 is concerned. *See* J.S. App. 44a. It

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[8] This performance analysis assumes the candidate of choice is always a democrat. J.S. App. 44a ("Democrats . . . [are] presumed to be the minority preferred candidate."). This presumption has several methodological flaws. However, *Amici* assume for the purposes of this argument, that Appellees' expert methodology is sound.

cannot be the case that a state is compelled to draw a minority opportunity district that has almost no chance of ever granting the minority population any opportunity. Any conclusion otherwise "afford[s] state legislatures too little breathing room." *Bethune-Hill*, 137 S. Ct. at 802.

Furthermore, the simple fact that the Appellees failed to carry their burden should end the inquiry with a finding of no vote dilutive effect. *See Strickland*, 556 U.S. at 19-20; *see also Gonzalez v. Harris County*, 601 Fed. Appx. 255, 258 (5th Cir. 2015). It is impossible that a second performing Hispanic opportunity district is required or even possible in Nueces County. Therefore, the District Court erred in finding two Hispanic opportunity districts were required within Nueces County to avoid impermissibly diluting minority voting strength, and this Court should note jurisdiction or summarily reverse to correct the District Court's error.

CONCLUSION

In finding that the 2013 Plan violated the VRA because the Legislature did not pursue extensive changes to the District Court's own map, the District Court upended the basic presumption of constitutionality afforded to legislative acts. The 2013 Plan, containing only minor changes from the 2012 map drawn *by the District Court* for the express purpose of complying with the Constitution and VRA represented the Legislature's effort to draw a compliant district by largely copying what the District Court provided. The 2013 Plan is fully compliant with the VRA, as HD90 is not an impermissible racial gerrymander, nor was it possible to draw an additional

performing Hispanic opportunity district in Nueces County. However, even if the 2011 Plan was infected with perceived discriminatory taint, the District Court's own redrawing of the map in 2012, which provided the basis for the 2013 Plan, necessarily cured any traces of VRA violations. Accordingly, *amici curiae* respectfully urge this Court to note probable jurisdiction or summarily reverse the District Court's decision.

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