Nos. 22-____

IN THE

Supreme Court of the United States

ROY BROOKS, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

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

JURISDICTIONAL STATEMENT

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August 8, 2022

QUESTIONS PRESENTED

1. Did the district court err by importing the racial predominance standard that governs racial gerrymandering claims into its *Arlington Heights* intentional discrimination analysis?

2. Did the district court err by concluding, without record evidence in support, that the delayed release of Census data fully explained the legislature's numerous procedural irregularities during the redistricting process?

3. Did the district court err by dismissing the evidentiary value of Plaintiffs' alternative maps, which showed that a legislature motivated purely by partisanship would have made different districting decisions?

4. Did the district court err by concluding that a legislature it found to have been untruthful and acted in bad faith may still be entitled to a presumption of good faith because there was not *direct* evidence of invidious racial intent?

5. Did the district court err in its analysis of the *Purcell* principle, and what is the scope and meaning of the *Purcell* principle?

PARTIES TO THE PROCEEDING

The following were parties in the court below:
Consolidated Plaintiffs:

League of United Latin American Citizens; Southwest Voter Registration Education Project; Mi Familia Vota; American GI Forum of Texas; La Union del Pueblo Entero; Mexican American Bar Association of Texas; Texas Hispanics Organized for Political Education; William C. Velasquez Institute; Fiel Houston, Incorporated; Texas Association of Latino Administrators and Superintendents; Emelda Menendez; Gilberto Menendez; Jose Olivares; Florinda Chavez; Joey Cardenas; Sandra Puente; Jose R. Reyes; Shirley Anna Fleming; Louie Minor, Jr.; Norma Cavazos; Proyecto Azteca; Reform Immigration for Texas Alliance; Workers Defense Project; Paulita Sanchez; Jo Ann Acevedo; David Lopez; Diana Martinez Alexander; Jeandra Ortiz; Luz Moreno; Maria Montes; Lydia Alcahan; Martin Saenz; Damon James Wilson; Roy Charles Brooks; Akilah Bacy; Orlando Flores; Marilena Garza; Cecilia Gonzales; Agustin Loredo; Cinia Montoya; Ana Ramon; Jana Lynne Sanchez; Jerry Shafer; Debbie Lynn Solis; Angel Ulloa; Mary Uribe; Mexican American Legislative Caucus; Rosalinda Ramos Abuabara; Felipe Gutierrez; Phyllis Goines; Eva Bonilla; Clara Faulkner; Deborah Spell; Beverly Powell; Texas State Conference of the NAACP; Fair Maps Texas Action Committee; OCA-Greater Houston;

North Texas Chapter of the Asian Pacific Islander American Public Affairs Association; Emgage; Turner Khanay; Angela Rainey; Austin Ruiz; Aya Eneli; Sofia Sheikh; Jennifer Cazares; Niloufar Hafizi; Lakshmi Ramakrishnan; Amatulla Contractor; Deborah Chen; Arthur Resa; Sumita Ghosh; Anand Krishnaswamy; Voto Latino; United States of America; Trey Martinez Fischer; Sergio Mora; Bobbie Garza-Hernandez; Peter Johnson; Zahra Syed; Chandrashekar Benakatti; Dona Murphey; Chetan Reddy; Sankar Muthukrishnan; Christina Lu; Jason Zhang; Chris Leal; Ashley Washington; Sarika Maheshwari.

Intervenor Plaintiffs:

Shelia Jackson Lee; Alexander Green; Jasmine Crockett; Eddie Bernice Johnson.

Defendants:

Greg Abbott; Jose A. Esparza; State of Texas; Texas Speaker Dade Phelan; Texas Lieutenant Gov. Dan Patrick; Secretary of State John Scott.

Third Party Defendant:

Chris Gober; The Gober Group.

Consolidated Respondent:

Thomas Bryan; Eric Wienckowski

Movant:

Texas House Members Ryan Guillen, Brooks Landgraf, and John Lujan; Texas House Members and Employees Rep. Todd Hunter, Rep. Daniel Huberty, Rep. Jacey Jetton, Rep. J.M. Lozano, Rep. Andrew Murr, Adam Foltz, Angie Flores, Jay Dyer, Colleen Garcia, and Mark Bell; Speaker of the Texas House of Representatives, General Counsel to the House, House Parliamentarian Speaker Dade Phelan, General Counsel Margo Cardwell, House Parliamentarian Sharon Carter; Senator Joan Huffman

Neutral:

Texas Legislative Council

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INTRODUCTION

In 2018, this Court held that the Texas legislature could not have intentionally discriminated in its 2013 redistricting because it had adopted "court-approved" interim plans that it had "good reason to believe . . . were legally sound." *Abbott v. Perez*, 138 S. Ct. 2305, 2328 (2018). One of the court-approved plans adopted by the 2013 legislature returned Senate District 10 ("SD10") to its pre-2011 configuration centered in Fort Worth in Tarrant County. A three-judge federal court had ruled that the 2011 legislature acted with discriminatory purpose by dismantling SD10 and cracking its substantial minority population apart into separate districts.

Fresh off defending itself in this Court as nondiscriminatory for adopting these court-approved plans, the Texas legislature reversed course during the 2021 decennial redistricting process and redrew SD10 "along similar lines" to the 2011 plan previously invalidated as intentionally discriminatory. App.-44. The legislature cleaved apart SD10's minority communities (again). And it appended Anglo voters from six rural counties to the formerly urban, compact district.

As Republican Senator Kel Seliger, who chaired the 2011 and 2013 senate redistricting committees and whose testimony this Court credited in its *Perez* decision, 138 S. Ct. at 2317, 2329, testified below, "it was obvious to me that the renewed effort to dismantle SD10 violated the Voting Rights Act and the U.S. Constitution." PEX 1 ¶ 12.

The district court correctly concluded under

Arlington Heights that the discriminatory effects and recent history of redistricting with respect to SD10 supported an inference of intentional discrimination, and it correctly concluded that the public justifications offered by the legislature to explain the renewed dismantling of SD10 were untrue, disingenuous, and offered in bad faith. But it erred in its conclusions with respect to the remainder of its intent analysis, application of the presumption of good faith, and the *Purcell* principle.

The Court should note probable jurisdiction and vacate or reverse.

OPINION BELOW

The three-judge district court's opinion and order denying Plaintiffs' motion for a preliminary injunction is available at *LULAC v. Abbott*, No. 3:21-CV-259-DCG-JES-JVB, 2022 WL 1410729 (W.D. Tex. May 4, 2022) (three-judge court) and is reproduced at App.-1. An earlier order denying the motion and announcing that an opinion and order would be forthcoming was issued on February 1, 2022, and is reproduced at App.-87.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1253, which provides that "any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

On February 1, 2022, the three-judge district court entered an order denying Plaintiffs' motion for a preliminary injunction and noting that an opinion would be forthcoming. The district court issued that opinion and order three months later on May 4, 2022. Plaintiffs filed a timely notice of appeal on June 2, 2022. App.-91.

On July 27, 2022, Plaintiffs filed an unopposed application with Justice Alito for a 120-day (or saving that, a 60-day) extension of time to file this jurisdictional statement in light of the trial scheduled to begin September 28, 2022. *See Brooks v. Abbott*, No. 22A83 (U.S. July 27, 2022). Justice Alito instead granted a 7-day extension, fixing the deadline to file this jurisdictional statement as August 8, 2022. *See Brooks v. Abbott*, No. 22A83 (U.S. Aug. 1, 2022).

There is uncertainty about the trial schedule. The Fifth Circuit recently stayed a discovery order while it considers two interlocutory appeals. Even if the trial proceeds as scheduled, there is no guarantee that the trial court will reach a decision, nor that any subsequent appeals will be resolved, before the as-yet unknown *Purcell* deadline for the 2024 elections. This proceeding is necessary to ensure resolution before the 2024 election.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are reproduced at App.-95.

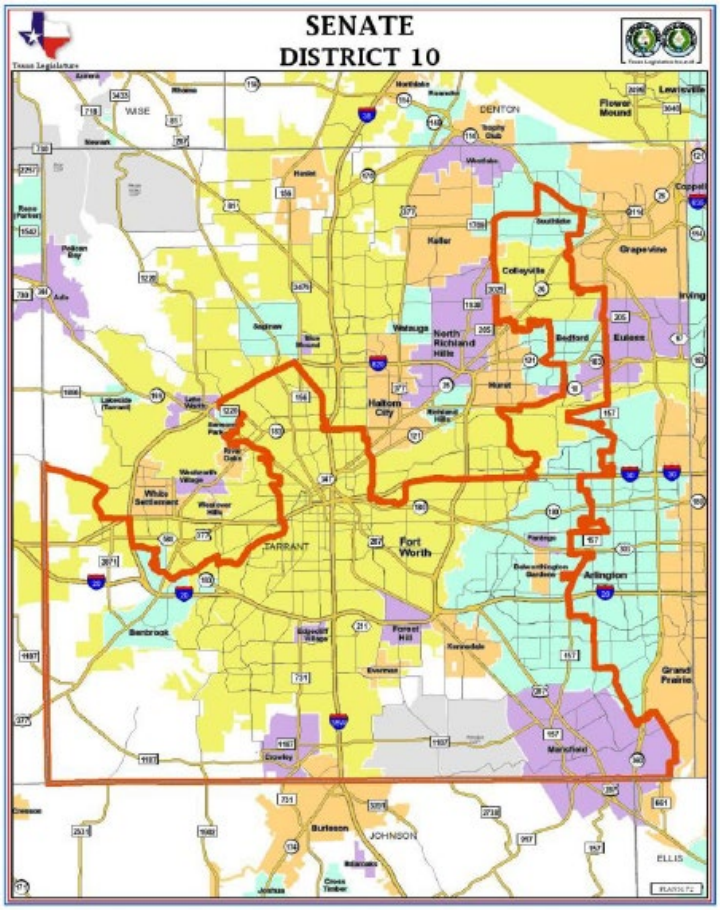
STATEMENT OF THE CASE

A. Prior to the 2021 Texas redistricting, SD10

was majority minority (56.1% minority) by voting-age population ("VAP"). App-7. The 2015-2019 American Community Survey ("ACS") estimates from the Census Bureau showed the district to be just shy of a majority minority (46.1%) by citizen voting age population ("CVAP"), but those estimates are centered on 2017 surveys. App.-7. Electorally, the district functioned as an effective "crossover"[1] district for minority voters, who have succeeded in electing their candidates of choice. App.-16.

The district—in its "benchmark" configuration (prior to the 2021 redistricting—is shown below.

[1] A "crossover" district is one in which minority voters, with the assistance of a portion of Anglo voters, succeed in electing their candidates of choice. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality op.).



App.-4.

SD10 has existed in essentially the same configuration for two decades but not without litigation. In 2011, the district was not yet majority minority by VAP and its Anglo CVAP was 62.7%, but minority voters had succeeded in electing their preferred candidate in the 2008 election. In response, the legislature sought to dismantle the district, cracking apart its minority communities among

neighboring districts. App.-9-10. At the time, Texas was subject to the preclearance requirements of Section 5 of the Voting Rights Act, and the State sought preclearance from a three-judge D.C. court. App.-9.

The D.C. court unanimously denied preclearance in 2012, concluding that "the Senate Plan was enacted with discriminatory purpose as to SD 10." *Texas v. United States*, 887 F. Supp. 2d 133, 166 (D.D.C. 2012), *vacated on other grounds*, 133 S. Ct. 2885 (2013) (Mem.). The court explained that SD10 was "a geographically compact district located entirely within Tarrant County" that was "comprised of almost all the traditional and growing minority neighborhoods of Tarrant County." *Id.* at 224-26 (citation omitted). The court found that the district was "well within the population deviation accepted for redistricting" and that there was "no evidence [that population deviation] played any part in redrawing the district." *Id.* at 226. Instead, the court found that the legislature engaged in intentional race discrimination when it cracked the district's minority communities into "three other districts that share few, if any, common interests with the existing District's minority coalition." *Id.* at 228.

The D.C. court reached that conclusion by applying the factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), finding that the secretive process, the exclusion of input from senators from majority-minority districts, the plan to "'precook[]' the committee report" before the hearing, the disparate

effect on minority voters, and the procedural departures that characterized the process all supported a finding of intentional discrimination. *Texas*, 887 F. 2d at 164-66. The 2011 legislature's treatment of SD10's minorities was consistent with its treatment of Dallas/Fort-Worth ("DFW") minorities in the congressional plan, which a three-judge court found was the product of intentional discrimination. *See Perez v. Abbott*, 253 F. Supp. 3d 864, 961-62 (W.D. Tex. 2017); *see id.* at 986 (Smith, J., dissenting) (dissenting on other grounds but agreeing that the DFW districts were intentionally discriminatory and that "[r]elatively little about the 2011 Congressional redistricting passes the smell test as to DFW," including the "unusual appendages added [in Tarrant County districts] from an adjoining, but demographically dissimilar, neighboring county").

After SD10 was denied preclearance, then-Attorney General Abbott advised the legislature that it had "the obligation to remove the specter of discrimination" by "adopt[ing] the court-drawn interim plans as the State's permanent redistricting map." Plaintiffs' Exhibit ("PEX") 33. In the senate, Republican Senator Kel Seliger—who had chaired the senate redistricting committee for the 2011 process—led the committee process to adopt the court-drawn interim SD10 as the permanent plan. PEX 1 ¶ 6. As Senator Seliger testified below, the 2013 committee members "discussed the federal court's ruling that the dismantling of SD10 was racially discriminatory" and "[t]he committee members all knew that it was necessary to restore SD10 to its benchmark configuration in order to comply with the Voting

Rights Act and the U.S. Constitution, which prohibit racial discrimination." *Id.* ¶¶ 7-8. Senator Seliger further testified that "[t]he committee members also knew that voting in Texas and Tarrant County is racially polarized." *Id.* ¶ 9. The senate unanimously passed the bill to restore SD10 to its benchmark configuration. PEX 38 at 2.

B. Republican Senator Joan Huffman, who served on both the 2011 and 2013 senate redistricting committees, PEX 1 ¶ 6, chaired the 2021 senate redistricting committee. App.-11. In February 2020, her staff met with the staff of Senator Beverly Powell, a Democrat who currently represents SD10. PEX 3 ¶ 3. Senator Powell's staffer took notes, and transcribed a statement by Sen. Huffman's top committee staffer, Sean Opperman, saying "very little change would be necessary for you all being you're close to ideal size. I wouldn't anticipate much movement for you, other than slightly tweaking your district." PEX 23.

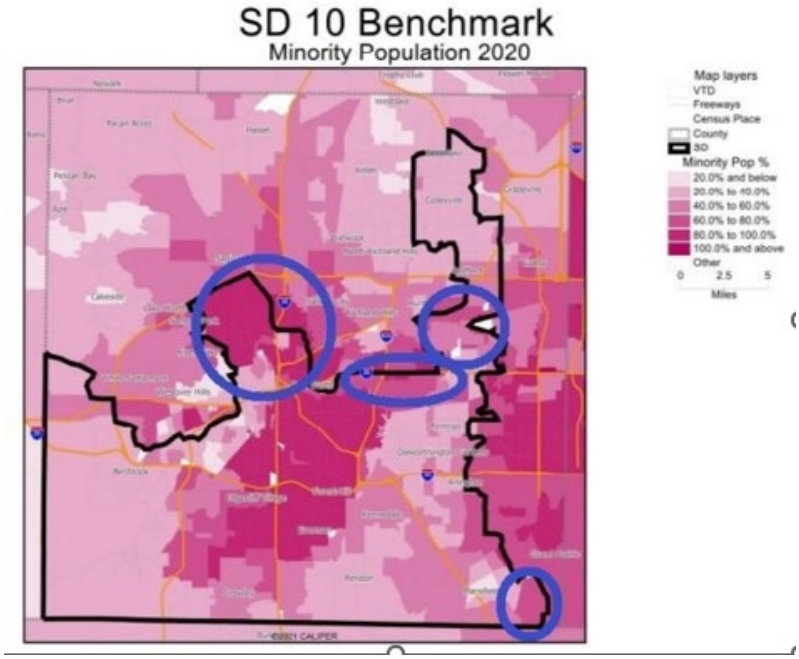
Senator Huffman, Senator Powell, and a staffer for each, including Mr. Opperman, then met in November 2020. PEX. 3 ¶ 7. At that meeting, either Sen. Huffman or Mr. Opperman verbally acknowledged that SD10 was majority minority. PEX 3 ¶ 8. At both meetings, Sen. Powell and her staff were provided with large maps of the district displaying its racial demographic data. PEX 3 ¶ 7; PEX 7 & 9.

These and other maps displaying the racial demographic makeup of the senate districts were again provided by Mr. Opperman to senate offices in August 2021. PEX 8-10. Among the information

provided on these maps from Senator Huffman's staff was the fact that SD10's Anglo population had grown just 0.2% since 2013 while its minority population had grown by 17.1% in that time. PEX 9 & 10.

A final meeting between Senator Huffman and Senator Powell occurred on September 14, 2021, when Senator Huffman revealed her redrawn version of SD10. App.-12. Present were Senator Powell and her chief of staff, along with Senator Huffman, Mr. Opperman, and Anna Mackin—an aide to Senator Huffman who previously served as counsel of record for Texas in the *Perez* litigation. App.-12. At that meeting, Sen. Huffman demonstrated her intent to cleave off the minority population from the northern part of SD10 in Fort Worth and replace it with rural Anglo counties. App.-12; PEX 2 ¶ 10. Senator Powell then provided Senator Huffman with maps of SD10 showing the location of the district's minority population, reading the headers as Senator Huffman looked at the maps, which they both then initialed. App.-12; PEX 2 at 2-3. Senator Powell likewise provided Senator Huffman excerpts from the D.C. Court's 2012 decision concluding that the similar tactic was unlawful discrimination. *Id.*

After that meeting, Senator Powell sent all senators a letter explaining her concerns and displaying, in the body of an email, a map showing the racial distribution of SD10 in dark pink and the areas the draft map would crack apart circled in blue. PEX 2, 11, 13. That map is shown below:



PEX 13.

In a response to her emails and letters, Mr. Opperman (Senator Huffman's top staffer) replied that he "briefly opened these documents and they appear to contain racial data, so I closed out of them right away." App.-13; PEX 12. As Senator Powell's chief of staff testified, "I found Mr. Opperman's email odd, given that the Committee staff had provided *us* with maps in prior meetings containing racial data, and had just a month earlier posted maps . . . which they encouraged all senate staff to review, that prominently displayed the racial data for each senate district, along with the percentage increase or decrease by race." Ex. 6 ¶ 24.

Senator Huffman publicly released her proposed

plan and then on the eve of the first public hearing released an amended version that substantially increased the rural territory added to SD10. PEX 52 at 10. Senator Huffman opened the hearing by reading from a script, stating:

> My goals and priorities in developing these proposed plans include first and foremost abiding by all applicable law, equalizing population across districts, preserving political subdivisions and communities of interest when possible, avoiding pairing incumbents when possible, and accommodating incumbent priorities also when possible.

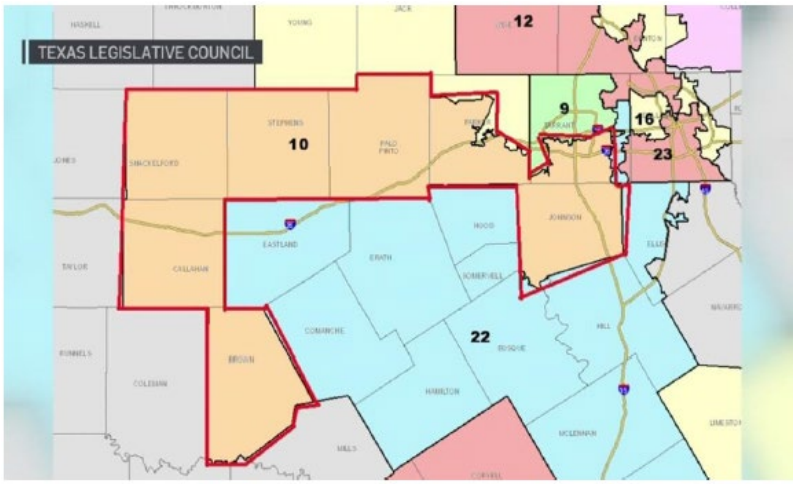
Defendants' Exhibit ("DEX") 58 at 4-5. At this and a subsequent hearing, "many members of the public testified, including prominent individuals from benchmark SD10 who complained of the reduction in minority voting strength." App.-14.

On September 28, 2021, the senate committee met again to consider amendments and vote out the bill. PEX 16. Reading from a script, Senator Huffman restated her redistricting priorities, but this time (and only this time) she announced that "partisan considerations" were also a priority. *Id.* at 5. Senator Huffman then opposed an amendment to restore SD10 to its benchmark configuration, explaining that she believed her configuration was necessary to balance the nearby districts' population deviations. *Id.* at 11-12.

During the floor debate, Senator Huffman again announced her redistricting priorities, without

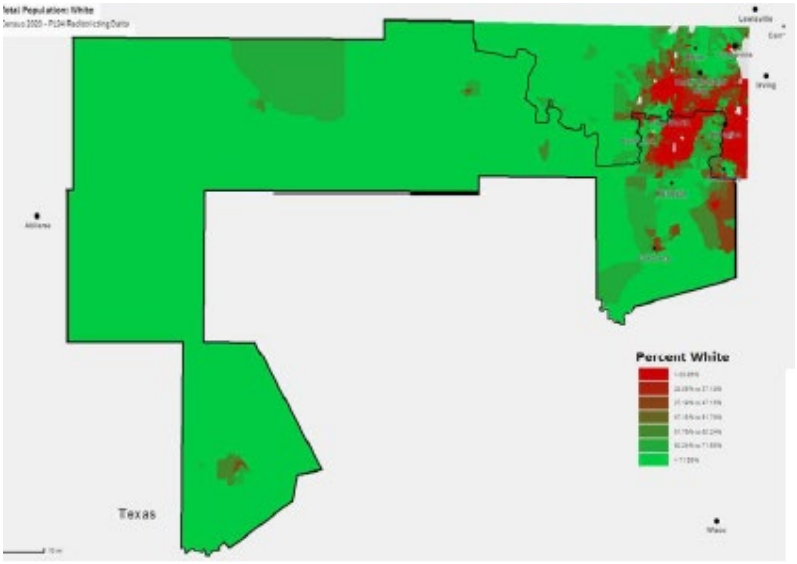
mentioning any partisan goals. App.-13-14. When asked why SD10 was changed despite only being roughly 5,000 people over ideal population, Senator Huffman responded "[w]e believed you needed population." PEX 41 at 15. But "SD 10 did not need population, and Senator Huffman smirked as she claimed it did." App.-67. When asked which of her redistricting criteria were advanced by the dismantling of SD10, Senator Huffman "evasively (and unconvincingly) answered, "All of them." App.-66; PEX 41 at 16.

The version of SD10 that was ultimately adopted by the senate is shown below.



App.-5. With this radical geographic change came a commensurate demographic change. SD10's minority VAP was reduced by nearly ten points, from 56.1% minority to 46.7% minority. PEX 82 at 4, 6. Its minority CVAP fell from 46.1% to 37.8%. *Id.* The map below illustrates the cracked minority population

(shown in red) and the appended rural Anglo population (shown in green).



App.-9. The plan shifted nearly three-quarters of a million people to achieve this outcome; benchmark SD10 was just 5,318 people above ideal population. PEX 44.

Senator Powell offered a floor amendment to return SD10 to its benchmark configuration, but at Senator Huffman's behest the bill failed. PEX 41 at 53-54. All senate Democrats and one Republican, Senator Seliger, voted to restore SD10 to its benchmark configuration. DEX 40. Senator Seliger—who chaired the 2011 and 2013 senate redistricting processes and whose testimony this Court credited in declining to find the 2013 process discriminatory, *see Abbott v. Perez*, 138 S. Ct. at 2317, 2329—testified that "the 2021 senate redistricting process saw untrue, pretextual explanations given for why the

lines were drawn the way they were." PEX 1 ¶ 10. This was so, Senator Seliger said, with respect to Senator Huffman's explanations for changing SD10. *Id.* ¶ 11. Senator Seliger testified that:

> I voted in favor of an amendment offered by Senator Powell to restore SD10 to its benchmark configuration. Having participated in the 2011 and 2013 Senate Select Redistricting Committee proceedings, and having read the prior federal court decision regarding SD10, it was obvious to me that the renewed effort to dismantle SD10 violated the Voting Rights Act and the U.S. Constitution.

Id. ¶ 12.

Senator Powell sent all 150 house members the same letter, racial shading maps, and the D.C. court decision excerpts that she had sent all senators. PEX 6 ¶ 30-31. Representative Todd Hunter chaired the house redistricting committee. App.-56. As Representative Chris Turner, who served on the committee, testified, Representative Hunter denied requests for members to invite expert witnesses unlimited by the 3-minute rule and declined to permit resource witnesses from, *e.g.*, the Office of the Attorney General or the Texas Legislative Council, to be available at the committee hearing. R. 5 at 71-72. When asked if this had "ever happened before in your tenure in the House of Representatives," Representative Turner testified: "No. Never that I can recall." *Id.* at 71-72.

After having received Sen. Powell's

correspondence, maps showing the cracked minority community, and the D.C. court decision regarding SD10, Representative Hunter began the committee hearing on the senate plan by saying: "I'm going to always be positive, and I'm going to always be constructive. They've put in their work. They have put in their analysis, and we have received their bill. And I'm going to presume they followed their procedures and done everything they are supposed to do." R. 5 at 34.

At the beginning of the house committee hearing, Representative Hunter stated: "If you have an amendment, please let us know," and then added: "But we do plan to vote today. So if you are going to, I'll ask that you try to do that today." *Id.* This was the first that Representative Turner was informed that the committee would be voting that same day. *Id.* at 42. This was "atypical" Representative Turner explained: "[T]ypically, we hear a bill in committee and the Chair typically leaves the bill pending to allow the committee members to absorb the testimony they have heard and consider whether they want to propose amendments or a committee substitute bill." *Id.*

As Representative Turner testified, there "absolutely" was "time in the 30-day special session to spend more than one day in the House committee hearing on the Senate plan," and Chairman Hunter never suggested that there was insufficient time to allow for further consideration and debate in committee. *Id.* at 69-70.

Representative Hunter opened the floor debate by

repeating Senator Huffman's priorities—again reading the version that excluded any mention of partisanship. App.-56. Prior to the debate, Representative Turner had placed maps illustrating SD10's cracked minority population on the desks of all 150 members, as well as on the easel in the chamber. R. 5 at 50. Representative Turner spoke at length about the dismantling of SD10 as a performing crossover district. PEX 24 ¶ 11. Nevertheless, the house adopted the senate-approved plan, and the Governor signed the bill into law on October 25, 2021.

C. Multiple suits were filed challenging the redistricting plans, and those cases were consolidated. App.-15. Only the Brooks Plaintiffs, Appellants here, sought a preliminary injunction. App.-16. Appellants sought preliminary relief on their claims that the dismantling of SD10 was the product of intentional discrimination in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act ("VRA"), as well as their claim that the redrawn SD10 was a racial gerrymander. Appellants' motion was filed on November 24, 2021, and the district court initially held it in abeyance, but subsequently set a hearing to be conducted two months later, on January 25, 2022. App.-16-17.

The district court considered the *Arlington Heights* factors in assessing the intentional discrimination claims. App.-31. First, the court concluded that the new senate plan "bears more heavily on one race than another." App.-43-44 (quoting *Arlington Heights*, 429 U.S. at 266). The court found that "the redrawing of SD10 results not

just in an incremental diminishment in minority voting strength but also in the loss of a seat in which minorities were able to elect candidates they preferred." App.-44. The court thus "conclude[d] that Plaintiffs will likely be able to demonstrate a discriminatory effect, strengthening an inference of discriminatory intent." App.-44.

Next, the court considered the historical context of the redrawing of SD10. The court noted that federal courts have found Texas to have violated the VRA every decade since the law was adopted. App.-45. "That includes the most recent redistricting cycle and, most damningly, the 2012 decision holding that, among other violations, Texas had engaged in intentional vote dilution by redrawing SD10 in a manner similar to that adopted in [the 2021 plan]." App.-45. Rejecting Texas's argument that the 2011 plan was irrelevant because it was a different map passed by different legislators, the court reasoned that "Senator Huffman was on the 2011 redistricting committee (and Senator Seliger chaired it), suggesting that principal personalities were not entirely different then" and that "Anna Mackin, a staffer for Senator Huffman who played a key role in redrawing SD 10, served as counsel for the defendants in the previous round of redistricting litigation." App.-46. The court concluded that "in terms of proximity and comparability" of the 2011 and 2021 redraws of SD10, "it is a close match" and thus "Plaintiffs will likely show that historical evidence weighs in favor of an inference of discriminatory intent." App.-46-47.

But the court concluded that the remaining

Arlington Heights factors, the sequence of events, procedural and substantive departures, and legislative history did not indicate discriminatory intent. App.-49, 53, 57. The court concluded that Senator Huffman's claim that she "'blinded [her]self' to race" in drawing the maps was not contradicted by the evidence that she had in fact been "exposed to racial data on SD 10." App.-49. The court reasoned that "even if Senator Huffman and her staff were fully aware of race in their redistricting, that in itself does not merit any nefarious inference," citing this Court's precedent from the distinct racial gerrymandering context requiring proof of racial predominance. App.-49-50.

With respect to procedural and substantive departures, the court reasoned that the COVID-19 pandemic justified the procedural departures, and that while the process "may have been atypical," that "suggests a legislature pressed for time." App.-53.

Addressing the legislative history, the court noted that Senator Huffman's statements and answers during the floor debate "were often evasive. For instance, she repeatedly stated that 'all' of the redistricting criteria had informed various decisions," and "at one point [stated] that she believe SD 10 'needed population.' But SD 10 was slightly overpopulated, and Senator Huffman smiled as she claimed otherwise." App.-55. The court found that the redrawing of SD 10 was "not consistent with principles such as core retention, geographic compactness, or combining communities of interest," and that "it certainly is not true that the district

'needed population,' and Senator Huffman's smirk suggests that she may well have known as much." App.-57. While the court noted that "partisan considerations" were generally mentioned only once, it nevertheless concluded that the legislative history indicated that partisanship, not racial discrimination, motivated the redrawing of SD10. App.-59.

The court next concluded that the alternative maps Plaintiffs proffered did not create an inference of racial intent. App.-62. Plaintiffs' alternative maps showed that, by following prior judicial decisions approving partisan gerrymandering in the Austin area but disapproving racial discrimination in DFW (including decisions from cases in which the mapdrawer was counsel of record), the legislature could have exceeded the potential Republican performance of the plan compared to the enacted version. App.-60; PEX 45, 92-99, 101. The court rejected the evidentiary value of the alternative maps, "hypothesiz[ing]" reasons that the legislature might not have followed the alternative maps' approach. App.-63.

The court also addressed the presumption of good faith this Court has attributed to state legislative action. App.-65. The court explained that

> Plaintiffs have put forth substantial evidence that Senator Huffman was particularly less than forthright in explaining why she had redrawn SD 10 as she had. Defendants now insist that partisanship was a major part of her motivation, but Senator Huffman did not give that impression on the senate floor.

App.-66. The court "interpret[ed] Senator Huffman's reticence as strengthening the inference that her previously stated reasons for redrawing SD 10 were, at best, highly incomplete and, at worse, disingenuous." App.-67-68. Although the court concluded Senator Huffman's behavior "may constitute 'bad faith' in a colloquial sense," App.-69, it ruled that Plaintiffs had probably not overcome the presumption of good faith by proving Senator Huffman's bad faith because there was not "direct[] [evidence] that Senator Huffman and her colleagues acted from *racial* motives," as opposed to partisan motives. App.-68.

Finally, while the court concluded that Plaintiffs had shown irreparable harm, it found that this Court's *Purcell* doctrine counseled in favor of denying Plaintiffs' motion. App.-76.

REASONS TO NOTE PROBABLE JURISDICTION

I. The district court applied the wrong legal standard by importing the *Shaw* "racial predominance" standard into its intentional discrimination analysis.

The district court applied the wrong legal standard by importing the *Shaw* "racial predominance" standard into its intentional discrimination analysis. Intentional vote dilution claims and racial gerrymandering claims are "analytically distinct." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quotation marks omitted). "Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful

device 'to minimize or cancel out the voting potential of racial or ethnic minorities," a racial gerrymandering claim alleges that race predominated in the sorting of voters—even absent a nefarious purpose. *Id.*

No amount of desire to minimize the voting strength of minorities is acceptable, and thus plaintiffs claiming intentional discrimination need not "prove that the challenged action rested solely on racially discriminatory purposes" or that racial vote dilution was "the 'dominant' or 'primary'" purpose. *Arlington Heights*, 429 U.S. at 265; *see also Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016) (*en banc*) (explaining that "'racial discrimination need only be one purpose, and not even the primary purpose' of an official action for a violation to occur"). Rather, racial vote dilution is unlawful if it "was *a* motivating factor." *Arlington Heights*, 429 U.S. at 265 (emphasis added).

Although discriminatory purpose "implies more than intent as volition or intent as awareness of consequences," *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979), this Court has explained that "the inevitability or foreseeability of consequences . . . bear[s] upon the existence of discriminatory intent," *id.* at 279 n.25. Where "the adverse consequences of a law upon an identifiable group" are clear, "a strong inference that the adverse effects were desired can reasonably be drawn." *Id.*

Courts assess the presence of intentional vote dilution under the *Arlington Heights* framework, and "discriminatory intent need not be proved by direct

evidence." *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). Moreover, this Court has explained that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality).

By contrast, a racial gerrymander need not entail any nefarious motivation—indeed, a mistaken belief that race must be excessively considered to *avoid* racial vote dilution can trigger liability. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017). Because the use of race in this manner is not motivated by invidious intent and given that "[a] legislature 'will almost always be aware of racial demographics' during redistricting," *id.* at 1487 (quoting *Miller*, 515 U.S. at 916), a plaintiff claiming a racial gerrymander must show that race was "the *predominant* factor motivating the legislature's districting decision," such that the legislature "subordinated other factors . . . to racial considerations." *Id.* at 1464 (internal quotation marks omitted) (emphasis in original).

Here, the district court conflated these distinct legal claims. In its assessment of the "sequence of events" *Arlington Heights* factor, the court acknowledged the extensive knowledge and consideration of racial data regarding SD10 among the legislators. In particular, the court found that the mapdrawers—Senator Huffman and her staffers Mr. Opperman and Ms. Mackin—"might well have been"

"fully aware of race in their redistricting" of SD10. App.-49.

> Racial data can remain "fixed in [a mapdrawer's] head" even when they are not present on a computer screen, and Senator Huffman and her staff are knowledgeable civil servants who doubtless have some awareness of the state's demographics. Indeed, as noted previously, one member of Senator Huffman's staff was counsel in previous litigation where the racial demographics of Tarrant County were at issue.

App.-49-50.

Moreover, the court found that Senator Huffman and her staff repeatedly provided Senator Powell and her staff with maps displaying racial data about SD10 in the lead up to redistricting. App.-48. Those maps included data about the increase in the district's minority population over the past decade. PEX 9 & 10. Senator Huffman already knew about SD10's minority population; she served on the 2011 committee whose dismantling of SD10 was invalidated by a federal court, and she served on the 2013 committee that redrew SD10 to its benchmark configuration. App.-46; PEX 1 ¶ 4. As Senator Seliger testified, Senator Huffman knew of the 2012 court decision, the minority population in SD10, and the presence of racially polarized voting in the district. PEX 1 ¶¶ 6-9. It was "obvious" to him that the proposal to repeat the 2011 scheme was unlawful. *Id.* ¶ 12.

Senator Powell ensured that every member of the senate and house was on notice of the legal background of the district, where its minority population was concentrated, and how the proposal cracked apart that population. PEX 6 ¶¶ 25, 30, 31; PEX 11. Indeed, it was only *after* Senator Powell made clear her objections that Senator Huffman and her staff suddenly claimed that they had never looked at any racial data, App.-13—despite having repeatedly disseminated maps of SD10 displaying its racial makeup.

Furthermore, Senator Huffman acknowledged during cross examination that she was unaware of any instance where partisanship was offered as a justification for SD10's redraw during the legislative debate. R. 7 at 20. But the racial consequences dominated the house and senate debates. The court found that "Senator Huffman did not give th[e] impression on the senate floor" that "partisanship was a major part of her motivation." App.-66. And, the *only* information house members had about the dismantling of SD10 was its ramifications on minority voting strength and the federal court's prior invalidation of the same scheme. App.-56; PEX 24 ¶¶ 10-11.

The district court erred in its legal analysis of this evidence. The court reasoned that no inference of discrimination could be drawn from evidence of "full[] aware[ness] of race in the[] redistricting" of SD10 because this Court in *Miller* explained that "[r]edistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow

that race predominates in the redistricting process." App.-50 (quoting *Miller*, 515 U.S. at 916). But *Miller* was a racial gerrymandering case, and *predominance* is not the relevant question in an intentional discrimination inquiry. In the context of intentional discrimination, the court's task is not to deploy *Arlington Heights* to determine if race predominated, but rather to determine whether the sequence of events and other factors create an inference that racial vote dilution "was *a* motivating factor," regardless of whether it was a "dominant or primary" purpose. *Arlington Heights*, 429 U.S. at 265 (internal quotation marks omitted) (emphasis added).

Moreover, this Court has explained that where "the adverse consequences of a law upon an identifiable group" are clear, "a *strong inference* that the adverse effects were desired can reasonably be drawn. *Feeney*, 442 U.S. at 279 n.25 (emphasis added). It is difficult to conceive of a case in which the adverse consequences of legislative action on minorities could be more clear. The same scheme was invalidated last decade. Senator Huffman and the mapdrawer were both intimately involved then and now. The district's demographics were no secret. Senator Powell corresponded with all 181 Texas legislators, imbedding a map of the cracked minority population in the first paragraph of her email. PEX 6 ¶ 25. Instead of drawing the "strong inference" that the clear "adverse effects were desired," *Feeney*, 442 U.S. at 279 n.25—even if as just one of several motivating factors—the district court concluded that such an inference could not be drawn unless race "predominates in the redistricting process." App.-50.

This legal error infected the district court's holistic weighing of the *Arlington Heights* factors.

II. The district court clearly erred in attributing the legislature's procedural departures to COVID.

The district clearly erred in attributing the legislature's procedural departures solely to COVID-caused Census data delays. "Departures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267.

The district court concluded that the legislature "rush[ed] the redistricting process," and that the house "spent just one day considering the senate plan, providing significantly less opportunity for public discussion and amendments than would usually be the case." App.-53. But the court reasoned that the delayed release of Census data caused by COVID made it "unavoidable that the legislature would depart from its ordinary procedures during the 2021 redistricting, for reasons that had nothing to do with discriminatory intent." App.-52. In so concluding, the court cited this Court's *Perez* decision regarding the 2013 Texas redistricting plans, noting this Court's view that "the legislature 'had good reason to believe that' [the 2013 plans] 'were sound,' because those plans had been issued by a court. That innocuous and plausible alternative explanation meant that no nefarious inference could be drawn from the legislature's rush." App.-50-51 (quoting *Perez*, 138 S. Ct. at 2329) (internal citations omitted).

Perez does not support the district court's

conclusion. Here, the legislature dismantled benchmark SD10—the exact court-approved interim plan the 2013 Legislature had enacted to remedy the judicial finding of intentional discrimination—and reverted to the 2011 approach of cracking apart Tarrant County's minority population. In doing so, the legislature *ignored*—rather than implemented—multiple federal court rulings regarding SD10 specifically and Tarrant County redistricting generally. If *adopting* a court-ordered plan aimed at remedying intentional discrimination suggests the absence of discriminatory intent, then surely *rejecting* that same plan in favor of the scheme held to be intentionally discriminatory in the first place "naturally gives rise to . . . .inferences regarding the [discriminatory] intent of the [2021] Legislature." *Perez*, 138 S. Ct. at 2327.[2]

Moreover, doing so in an atypically rushed process worsens that inference, particularly because Representative Hunter and all house members received from Senator Powell maps, analysis, and data showing the discriminatory cracking of SD10's minority population before the house began its consideration of senate plan. PEX 6 ¶¶ 30-31. Armed with that information, Representative Hunter did nothing to respond or engage with it; he instead opened the house hearing by saying "I'm going to

[2] Unlike *Perez*, this "*is* a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature." *Id.* at 2325 (emphasis added). And reenacted (in close though not exact form) by a legislature that *knows* the original law was discriminatory, and indeed by the same primary actors involved in the original discriminatory process.

always be positive, and I'm going to always be constructive. . . . And I'm going to presume [the senate] followed their procedure and done everything they are supposed to do." R. 5 at 34. Then he announced for the first time the bill would clear the committee that same day so amendments (including any in response to the day's public testimony) would have to be submitted that day. R. 5 at 40.

The district court clearly erred by concluding that COVID fully explained the procedural irregularities. App.-51. First, the legislature enacted a law providing for "several different scenarios" with adjusted candidate filing deadlines and primary election dates in the event multiple special sessions were needed to complete the redistricting process. R. 5 at 68-69; Tex. Elec. Code § 41.0075. Contrary to the district court's conclusion, the legislature itself ensured it would not be "pressed for time" and required to resort to procedural shortcuts because of COVID-delayed Census data. App.-53. But once the attention on SD10 sharpened, the legislature abandoned the timeline it had prepared and instead rushed the process. Second, there is no record evidence that the COVID-related Census delay actually explained the procedural departures. For example, Representative Turner offered unrebutted testimony there was time in the special session for more than one day of house consideration of the senate plan. R. 5 at 69. And there is no record evidence to suggest that COVID delays explained the refusal to permit resource or expert witnesses to testify.

The district court clearly erred in its

consideration of the procedural departures by crediting *post hoc* litigation explanations unsupported by the record evidence and by inverting the reasoning of this Court's *Perez* decision.

III. The district court erred in assessing the evidentiary value of plaintiffs' alternative maps.

The district court erred in assessing the evidentiary value of the alternative maps plaintiffs proffered. In *Cooper*, this Court held that although evidence of an alternative districting plan is not required to demonstrate that race rather than politics explains line drawing decisions, such a plan is powerful evidence.

> [A]n alternative districting plan . . . can serve as *key evidence* in a race-versus-politics dispute. One, often *highly persuasive* way to disprove a State's contention that politics drove a district's lines is to show that the legislature had the capacity to accomplish all its partisan goals without moving so many members of a minority group into the district. If you were *really* sorting by political behavior instead of skin color (so the argument goes) you would have done—or, at least, could just as well have done—*this*. Such would-have, could-have, and (to round out the set) should-have arguments are a familiar means of undermining a claim than an action was based on a permissible, rather than a prohibited, ground.

137 S. Ct. at 1479 (first and second emphasis added);

id. at 1481 (noting that such an alternative map "could carry the day" even where other evidence was "meager"). The dissenting justices would have *required* the proffer of an alternative map (in racial gerrymandering cases) where voting was racially polarized. Justice Alito characterized the proffer of an alternative map as "a logical response to the difficult problem of distinguishing between racial and political motivations when race and political party preference closely correlate." *Id.* at 1489-90. Moreover, the dissent explained that the proffer of an alternative map was a "sound" approach for plaintiffs to overcome their "burdens of production and persuasion," and the "presumption that the plan was drawn for constitutionally permissible reasons." *Id.* at 141.

Plaintiffs proffered such alternative maps here. App.-59; PEX 45, 70-99, 101. Those maps show how a legislature motivated by partisan gain would have targeted SD14 by splitting Austin into five strongly Republican senate districts rather than targeting SD10. Indeed, the *Perez* three-judge court explicitly blessed this path in 2017: "The Legislature could have simply divided Travis County and Austin Democrats among five Republican districts." *Perez*, 253 F. Supp. 3d at 897; *id.* at 985-86 (Smith, J., dissenting) (noting that "fragmenting Travis County into relatively harmless parts" was permissible partisan gerrymandering that stands in "stark contrast" to "packing and cracking" minorities in DFW); *id.* at 986 (Smith, J., dissenting) ("In terms of what redistricting law requires, the differences between DFW and Travis County[] are dramatic."). The 2021 senate mapdrawer—Anna Mackin—was counsel of record for

Texas in the *Perez* case in which the court made those statements. App.-46.

Like the enacted plan, Plaintiffs' alternative maps contain nineteen safe Republican seats (of a total of thirty-one). PEX 45 at 4-5. Indeed, Plaintiffs' alternative maps *improve* on Republican performance by retaining a competitive seat (SD10) in addition to the nineteen safe Republican seats. *Id*. In addition, the alternative plans "ensure that the weakest Republican seat is slightly safer" than in the enacted plan. App.-60. The alternative maps satisfy Senator Huffman's stated goal of achieving an overall population deviation below 6% (beating the enacted plan on that score). *E.g.*, PEX 93. And the alternative maps largely follow the remainder of the enacted plan's boundaries, with the median district retaining 91.9% of the population assigned to it in the enacted plan. PEX 98. Plaintiffs' alternative plans are thus "comparably consistent with traditional districting principles," *Cooper*, 137 S. Ct. at 1480 (quoting *Easley v. Cromartie*, 532 U.S. 234, 258 (2001)), to the enacted plan, except without replicating the discriminatory scheme to dismantle SD10.

The district court erred in dismissing this evidence. The court reasoned that "SD 14 itself is 51.9% minority by total population, less than the 61.5% of benchmark SD 10, but still enough that cracking the district would produce about as clear a discriminatory effect." App.-62. From this, the court concluded that if "cracking SD 14 would have fulfilled Defendants' partisan goals just as well as cracking SD 10, then surely they would have cracked *both*

districts." App.-62-63 (emphasis in original). Likewise, the court reasoned that "a racially motivated legislature might also have cracked both SD 14 and SD 10." App.-63.

The court additionally noted that "it is easy to hypothesize countless legally innocuous reasons why the Texas Legislature might have preserved SD 14," including that SD10's "partisan reversals might have made it a more obvious target," the legislature "might have wanted SD 14 to function as a vote sink," the legislature "might have feared political fallout from destroying a longstanding Democratic bastion," and saving SD 14 may even have respected traditional districting criteria—Plaintiffs' version of that district is about as unnaturally shaped as is the current SD 10." App.-63. For these reasons, the court concluded that it was "reluctant to draw any inference of discriminatory intent from Plaintiff's alternative maps." App.-63. The court's logic is wrong at each step.

First, the point of the exercise is to test what a legislature *not* considering race would do. If Senator Huffman and her staff were not considering race, they would be unaware of SD14's demographic profile. But they *would* be aware of the federal court orders—which they personally received as either a lawyer in the litigation or a redistricting committee member—approving of the cracking of Austin as a partisan gerrymander and disapproving of dismantling SD10 and cracking DFW minorities. The court's analysis thus begins from a flawed premise.

Second, the court's supposition that both a

partisan- and racially-motivated legislature "surely would have cracked both districts," App.-62-63, has no basis in the record evidence. There is nothing in the record to suggest that it is *possible* to crack both SD10 and SD14 while still retaining Republican performance in the surrounding districts, complying with the VRA in neighboring districts, and satisfying the legislature's other redistricting objectives. Defendants offered no evidence, nor argued to the court below, that both districts could actually be cracked; this was a supposition of the district court's making. A comparison of Plaintiffs' alternative maps and the enacted map illustrates the flaw in the court's logic: converting SD14 to a Republican district requires assigning counties to the Austin-based districts (SDs 5, 14, 18, 24, and 25) that overlap with counties the legislature assigned to either SD10 or neighboring districts to facilitate its dismantling of SD10. *Compare, e.g.*, PEX 56 *with* PEX 92. The court's conclusion is not "'plausible' in light of the full record" and is thus clear error. *Cooper*, 137 S. Ct. at 1465.

Third, the district court cited no record evidence to support its hypothesized explanations, and its reasons are divorced from the legal context discussed above. Moreover, the court's various conclusions cannot be reconciled. The court's overarching conclusion in the case is that the legislature cracked SD10 for partisan reasons. App.-59. Yet the court dismissed Plaintiffs' alternative maps because it concluded that a partisan-motivated legislature would have cracked both SD14 and SD10—something the legislature did not do. App.-62-63. And if that contradiction were not enough, the court also

concluded that the legislature may have avoided cracking SD14 out of fear of being accused of partisan gerrymandering. App.-63. The court's reasoning is at war with itself.

Finally, the court's observation that Plaintiffs' alternative version of SD14 is similar in shape to the legislature's enacted version of SD10 *bolsters* the evidentiary value of the alternative maps. Plaintiffs' task was to produce maps with "comparably consistent" adherence to traditional districting principles as the enacted plan. *Cooper*, 137 S. Ct. at 1480 (quotation marks and citation omitted). The court's contrary conclusion from the maps' similarity—based upon an unsupported supposition that the legislature had some special concern about compactness of SD14 that it did not share with respect to SD10—is legally erroneous.

The court's analysis of Plaintiffs' alternative maps—premised upon supposition and hypothesis with no record basis—is legally and factually erroneous.[3]

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[3] Although the district court thought it "implausible" that the legislature wished to "thumb its nose at the federal judiciary," App.-64, Texas has not hidden its disdain for Section 5 or the preclearance trial that resulted in the invalidation of its 2011 effort to dismantle SD10. Had Texas—a state whose inclusion in Section 4(b)'s coverage formula no one can credibly claim was outdated—remained subject to preclearance in 2021, its dismantling of SD10 indisputably would have been blocked as retrogressive. Having gained unearned freedom from Section 5's substantive retrogression prohibition (let alone federal oversight), *see Shelby County v. Holder*, 570 U.S. 529 (2013), the legislature brazenly dismantled SD10 in the precise manner the

IV. The district court erred by concluding that the presumption of good faith applies to a legislature it found to have acted in bad faith.

The district court erred by concluding that the presumption of good faith may apply despite concluding that the legislature acted in bad faith. The district court concluded that Senator Huffman's "stated reasons for redrawing SD 10 were, at best, highly incomplete and, at worst, disingenuous." App.-68. It observed that Senator Huffman "insisted that SD10 had to be redrawn because '[the committee] believed [it] needed population," but that "SD 10 did not need population, and Senator Huffman smirked as she claimed it did." App.-67; *see also* App.-57 ("It certainly is not true that the district itself 'needed population,' and Senator Huffman's smirk suggests that she may well have known as much."). The court noted that "Defendants now insist that partisanship was a major part of her motivation, but Senator Huffman did not give that impression on the senate floor. Of the three times she listed her redistricting criteria, partisanship made the list only once." App.-66. Moreover, the court explained that when asked by Senator Powell to explain which redistricting criteria "led to the extension of SD 10 into several rural counties, Senator Huffman evasively (and unconvincingly) answered, 'All of them.'" App.-66.

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federal judiciary blocked it from doing ten years ago. While the legislature has most obviously "thumb[ed] its nose" at Tarrant County's minority voters, it is unmistakable that it has done so to Congress and the federal judiciary as well.

Having watched the videos of Senator Huffman's answers and demeanor during the legislative debate, and having observed her answers and demeanor at during her testimony in court, the district court concluded that her conduct "may constitute 'bad faith' in the colloquial sense." App.-69. Yet, the court concluded that the presumption of good faith may not be overcome without "direct[] support[] [for] the proposition that Senator Huffman and her colleagues acted from *racial* motives." App.-68 (emphasis in original). The court erred in two ways.

First, "direct" evidence of racially discriminatory intent is not required to *prove* the claim, let alone to rebut the presumption of good faith. *See Rogers*, 458 U.S. at 618. Indeed, as Justice Alito explained in his *Cooper* dissent—a point on which the majority did not disagree—alternative maps like those proffered by Plaintiffs are a "sound" way to "overcome the strong presumption that the plan was drawn for constitutionally permissible reasons." 137 S. Ct. at 1491 (Alito, J., dissenting).

Second, when a redistricting plan's sponsor is found to advance "disingenuous," "highly incomplete, and "certainly [] not true" explanations for her actions—delivered with a "smirk"—such that her conduct constitutes "bad faith in the colloquial sense," then—at the very least—her good faith should no longer be presumed.

A contrary rule would be dangerous. Twice in the past decade this Court has issued landmark decisions shrinking available legal protections related to redistricting. First, in *Shelby County*, the Court

facially invalidated the Section 5 coverage formula, while simultaneously emphasizing that the decision "in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2," 570 U.S. at 557, and that "injunctive relief is available in appropriate cases to block voting laws from going into effect," *id.* at 537. Second, this Court closed its doors to partisan gerrymandering claims in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), while noting that claims against plans that "discriminate on the basis of race" remain justiciable, *id.* at 2497.

The practical effect of these two decisions in states like Texas where voting is racially polarized is that the legislature is now incentivized to dilute minority voting strength and defend itself as motivated by partisanship. Twin judge-made rules—the presumption of legislative good faith and legislative privilege—work in tandem to further insulate states from liability for discrimination.

If this Court's promise that racial discrimination remains unlawful is to have any practical meaning, then a legislature that openly lies about its motivation for a law cannot be presumed to have acted in good faith. Especially not when it changes its story in court to conveniently match the one motivation—partisan gerrymandering—for which this Court has closed the courthouse doors. At the very least, given the incentive structure created by this Court's decisions coupled with reality of racially polarized voting and the legislative privilege, a legislature must be required to *actually and openly assert* a partisan gerrymandering purpose when its districting plan is

being adopted—and not falsely assert reliance on neutral considerations—if it wishes to benefit from a presumption of good faith, rather than unveiling a purported partisan motivation for the first time as a defense in court.[4]

A contrary rule renders protections against intentional racial vote dilution entirely hollow.

V. The *Purcell* principle needs to be defined in a case heard on the merits.

This Court has "put little meat on the bones of what has become known as the *Purcell* doctrine. Perhaps we can say at this point that *Purcell* and its progeny establish a presumption against judicial intervention close in time to an election. . . . But how near? As to what types of changes? Overcome by what showing? These and other questions remain unanswered." *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 644 (7th Cir. 2020) (Rovner, J.,

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[4] Defendants struggled to even settle on their litigation story. Asked by her own lawyer at the preliminary injunction hearing whether she recalled being asked at her deposition (mere days earlier) whether she had engaged in partisan gerrymandering, Senator Huffman responded yes—but that she *could not remember what answer she had given*. R. 7 at 38. This bizarre exchange followed: "Q. Perhaps I can refresh your recollection?" A. "I wish you would." Q. I'm going to end that line of questioning prematurely." *Id.* Perhaps her counsel decided against displaying the transcript of her deposition because it would reveal that defense counsel had to be asked to stop emphatically nodding his head yes and no—and remarkably refused—as Senator Huffman was asked whether she had engaged in partisan gerrymandering. *See* ECF No. 164-1 at 26. This episode aptly illustrates the absurdity of applying a presumption of good faith in this case.

dissenting); *see also* Wilfred U. Codrington III, Purcell *in Pandemic*, 96 N.Y.U. L. Rev. 941, 984 (2020) ("*Purcell* . . . is problematic for its lack of clarity and the perverse incentives it creates.").

This Court frequently applies the doctrine in emergency applications on the Court's "shadow docket," with limited explanation of its parameters, and with seemingly contradictory outcomes. *Compare, e.g.*, *Wisc. Legislature v. Wisc. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (reasoning that 139 days prior to an election is "sufficient time to adopt [new] maps"), *with Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022) (Mem.) (Kavanaugh, J., concurring) (reasoning that 106 days prior to election was insufficient to implement new maps), *with Republican Nat'l Comm. v. Democratic Nat't Comm.*, 140 S. Ct. 1205, 1208 (2020) (staying district court injunction and altering election rules 1 day prior to election), *with Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (Mem.) (Sotomayor, J., dissenting) (criticizing Court's refusal to vacate stay order "upend[ing] the legal status quo" just 19 days before registration deadline).

In this case, Plaintiffs agreed that by the time the district court held its hearing in late January 2022—two months after the preliminary injunction motion was filed—it was too late to change district lines for the March 2022 primary elections. R. 9 at 31-32. But Plaintiffs cited precedent in which a court had dealt with that issue by ordering a November jungle primary and (if necessary) runoff election in the new, constitutionally designed districts. *Id.*; *see Vera v. Bush*, 933 F. Supp. 1341, 1347 (S.D. Tex. 1996). It may

now be too late for that option, and Plaintiffs file this appeal to ensure that resolution prior to the *2024* election is possible. Trial is currently scheduled to begin September 28, 2022, but there are pending interlocutory appeals on discovery issues that could affect that schedule, *LULAC v. Abbott*, No. 22-50407 (5th Cir.). If past is prologue, a final judgment may take years. For example, a decision after trial on 2011 redistricting plans took three years. *See Perez v. Abbott*, 253 F. Supp. 3d at 864 (decision in May 2017 for a trial held in 2014).

Given the complexity of redistricting litigation and the length of time final adjudication can take, the *Purcell* principle should not be a basis to outright *deny* relief, as the district court concluded was the case here. App.-82. In election cases where the harm recurs with every election, *Purcell* should at most inform when relief becomes effective, not serve as a basis to deny an injunction. And this Court should note probable jurisdiction so the *Purcell* principle—an issue "capable of repetition, yet evading review," *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007), can be fully briefed and defined on the Court's merits docket.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction and vacate or reverse.

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