No. _____

In the Supreme Court of the United States

GREG ABBOTT, in his official capacity as Governor of Texas; ROLANDO PABLOS, in his official capacity as Texas Secretary of State; and the STATE OF TEXAS,
Applicants,

v.

SHANNON PEREZ, et al.,
Respondents.

EMERGENCY APPLICATION FOR STAY OR INJUNCTIVE RELIEF PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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

Five years ago, this Court stayed and vacated a problematic order of the three-judge district court at issue here and ordered that court "to draw interim maps" for the State of Texas' 2012 congressional elections "that do not violate the Constitution or the Voting Rights Act." *Perry v. Perez*, 565 U.S. 388, 396 (2012) (per curiam). Five years later, that same district court (again over a dissent) has issued an order that once again has thrown the electoral process in Texas into disarray. But this is not déjà vu all over again. While in *Perry* the constitutional dispute emanated from electoral maps drawn by the Legislature without judicial guidance (and which could not take effect without preclearance), this time around the map found wanting by the district court is the district's court own remedial map subsequently enacted into law by the Legislature (a map that has governed the last three elections). The same map the three-judge court thought sufficient to comply with the Constitution and the VRA when adopted by the court as a remedial map has now been declared unconstitutional when subsequently enacted into law by the branch of government responsible for redistricting under our Constitution. That is both remarkable and unprecedented.

When this Court directed the district court to draw remedial maps that complied with the Constitution and the VRA, the court assiduously abided by that command, adopting (with a few minor modifications) a remedial plan that had been proposed by one group of plaintiffs who were challenging the State's legislatively enacted maps. The court issued a detailed opinion explaining why, in the court's view, its remedial plan addressed any potential statutory or constitutional deficiencies the

State's initial map may have contained. While that decision laid to rest the question of what map would govern the 2012 congressional elections, the State certainly could have continued to defend its duly enacted (and, in the State's view, constitutionally valid and VRA-compliant) 2011 map and fight for the right to use it in subsequent elections. The State instead chose a more conciliatory approach: In 2013, it repealed its original 2011 map and adopted the district court's remedial map as its own.

At that point, one would have thought this litigation would come to an end. The 2011 map that precipitated the litigation was permanently mothballed without ever actually having been deployed in an election. Subsequent elections would be governed by a remedial map adopted by the court and now bearing the imprimatur of the Legislature. Surely, the one safe course for a legislature interested in ending costly redistricting litigation and moving on to other legislative priorities is to adopt a court-ordered remedial map as its own.

Think again. Five years and three election cycles after *ordering* Texas to use the map known as Plan C235, that very same court has now held that the Legislature engaged in intentional discrimination and racial gerrymandering when it enacted legislation adopting Plan C235 as its own. Worse still, after taking *half a decade* to decide that the same plan it deemed sufficient to satisfy this Court's mandate back in 2012 somehow became intentionally discriminatory when enacted by the Legislature, and after deeming that plan discriminatory in large part because the Legislature purportedly failed to engage in sufficient "deliberative process" before adopting it, the court gave the Governor *three days* to make a choice: convene a special

legislative session to draw a new congressional map, or show up in court three weeks later on September 5 with experts, mapdrawers, legislative staff, and proposed remedial maps in tow—all to the end of hastily drawing the court's *own* map (for a remarkable third time in the life of this litigation, and once again without allowing adequate time for orderly Supreme Court review) before the October 1 deadline by which the congressional map must be set to allow the 2018 primary elections to proceed as scheduled.[1]

That extraordinary series of events has left the State in an impossible position. After years of deliberation, the district court waited until a mere seven weeks before the October 1 deadline before declaring that the remedial map that was ordered by the court and governed the last three elections had latent statutory and constitutional defects (at least when embraced by the Legislature). And while, in what can only be an effort to frustrate timely appellate review, the district court refuses to acknowledge that it has enjoined the State from using Plan C235 in the 2018 elections, the only conceivable explanation for putting the Governor on a 72-hour deadline to recall the Legislature and forcing the parties and their respective experts

[1] Yesterday, the district court pulled the same maneuver by holding that the 2013 Legislature engaged in intentional racial discrimination when it adopted virtually all of the 2012 court-imposed redistricting plan for the Texas House of Representatives. *See* Order on Plan H358 at 80, *Perez v. Abbott*, No. 5:11-cv-360 (W.D. Tex. Aug. 24, 2017), ECF No. 1540. Again giving the Governor only three days to convene a special session of the Legislature, the district court this time ordered the parties to appear in less than two weeks—on September 6, one day after the September 5 hearing it ordered for redrawing the congressional map—for another hearing on a court-drawn remedial map for the Texas House. *Id.* at 81-82. The State similarly will seek a stay of that order in this Court if the district court does not stay its order pending appeal.

and mapdrawers to show up in court on the day after Labor Day is that the court has determined that the 2018 elections cannot proceed under Plan C235 and intends to draw its own map before the October 1 deadline. The court thus plainly seeks to deny the State an immediate appeal of its merits ruling invalidating the map that has governed the last three elections, and plans to impose a new map on a timetable that will deny this Court an opportunity for orderly review of both the court's novel constitutional-for-the-courts-but-not-for-the-Legislature theory and its new remedial map.

Although it might be possible for the State to endure the September 5 hearing and all the confusion that will result when the court imposes new district lines only to have the State seek this Court's intervention on an emergency basis, the far better course would be for this Court to intervene now to protect its appellate jurisdiction and orderly appellate processes. This will avoid the uncertainty and confusion engendered by drawing new remedial maps on the eve of the October 1 deadline.

There is certainly the requisite "fair prospect" that the Court will ultimately note probable jurisdiction and reverse, as the decision below is not just wrong, but egregiously so. Whatever intent the 2011 Legislature may have had when it enacted the congressional map that was never employed and long ago abandoned, the 2013 Legislature enacted Plan C235 for a different reason entirely: because it believed that its best chance of complying with federal law and bringing this litigation to an end was adopting the district court's remedial map as its own. To be sure, the remedial map did not alter every single line that the 2011 map contained, and the specific

districts at issue appeared in both maps. But the district court can hardly accuse the Legislature of intentional discrimination for failing to "cure" the "taint" that supposedly infected anything Plan C235 carried over from the 2011 map when the court itself *ordered* the State to use Plan C235 notwithstanding that carryover. Simply put, the same map cannot be perfectly permissible when imposed by a court, but become intentionally discriminatory when adopted by the branch of government actually tasked with drawing maps. Nor, when the proper presumptions of validity and burdens of proof are applied to the actions of the 2013 Legislature, is there anything problematic about the two districts specifically invalidated. Both districts were constitutional when they appeared in the district court's 2012 remedial map, and they remained constitutional when they appeared unchanged in the 2013 legislation adopting the remedial map.

It is equally clear that the State stands to suffer irreparable injury absent immediate relief from this Court. The district court has held that the 2013 map is unconstitutional and invalid. It is thus already clear that the district court will not allow that duly enacted map to govern the 2018 elections. It is equally clear that the district court is intent on having its own judicial maps govern the 2018 elections. Having given the Governor a mere 72 hours to drop everything and decide whether to recall the Legislature, and, with that absurd deadline passed, having ordered the parties to show up with mapdrawers and proposed maps in hand, there is no question that the district court will impose a new remedial plan on the eve of the October 1 deadline. Thus, absent intervention by this Court, the State will suffer irreparable

harm in the form of diverting its resources to formulate another proposed remedial map, preparing election officials and voters for the prospect of redrawn lines and the possibility of deferred election deadlines as in 2012, all to be followed by a last-minute run up to this Court to avoid further irreparable injury. Not only will that endeavor prove an enormous waste of scarce state resources should this Court reverse; the creation of a competing court-drawn map will inevitably cause precisely the sort of voter confusion that courts are supposed to guard against. *See Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006) (per curiam).

There is a far better way. The district court has already waited too long for this Court to review its novel ruling that a map that is constitutional when drawn by a court becomes unconstitutional when adopted by the Legislature, let alone to review its remedial maps, in the ordinary course. This Court thus will inevitably face a choice between allowing the 2018 elections to proceed either under maps that the district court adopted in 2012, that the Legislature endorsed in 2013, and that have governed for the past three elections, or under a new remedial map adopted without this Court's review (or reviewed only on a remarkably truncated schedule that will still throw the Texas election deadlines into chaos for the second time this decade). The far better course is to intervene now and make clear that the 2018 elections will be the fourth to occur under the 2012 maps and stay the proceedings in the district court. In either event, this Court will then be able to review the merits of this dispute in the ordinary course based on a standard appellate schedule.

On the other side of the balance, allowing the State to continue to use Plan C235 for the 2018 elections will impose little harm. If the plaintiffs ultimately prevail before this Court on appeal, a new map could still be drawn in time for the 2020 elections. And all that will have happened in the meantime is one more election under a map that a federal court not only deemed sufficient to satisfy this Court's mandate "to draw interim maps that do not violate the Constitution or the Voting Rights Act," *Perez*, 565 U.S. at 396, but then left in place for *five years and three election cycles* while it allowed the plaintiffs to pursue an ultimately fruitless effort to use moot 2011 maps to try to "bail" Texas back into VRA preclearance. The same plan that the district court was content to leave in place for half a decade can hardly now be so offensive to the VRA and the Constitution that it must be wiped from the books immediately, before the State can even pursue a direct appeal.

In short, there is at the very least the requisite "fair prospect" that this Court will note probable jurisdiction and reverse the decision below, and the State will suffer clear and irreparable injury absent an order allowing it to continue to use Plan C235 pending appeal. Accordingly, the State respectfully requests that the Court issue an order staying the district court's September 5 map-drawing hearing and authorizing the State to continue to use Plan C235 for the 2018 election cycle—as it has for every election cycle in this decade.

DECISION UNDER REVIEW

Applicants the State of Texas, Governor Greg Abbott, and Texas Secretary of State Rolando B. Pablos seek a stay or injunction pending appeal of the three-judge

district court's August 15, 2017 Order on Plan C235, *Perez v. Abbott*, No. 5:11-cv-360 (W.D. Tex. Aug. 15, 2017), ECF No. 1535. The order is attached as Appendix A.

BACKGROUND

A. In 2011, the Texas Legislature enacted reapportionment plans for Texas state legislative and congressional districts.[2] Before the Legislature even enacted these redistricting plans, however, the plaintiffs filed this lawsuit raising claims against the State under the Constitution and VRA §2, 52 U.S.C. §10301, and the Chief Judge of the Fifth Circuit constituted a three-judge district court under 28 U.S.C. §2284.[3]

VRA §5 was still operative and had prevented the 2011 plans from taking legal effect until they were precleared. *See* 52 U.S.C. §10304. Unless and until preclearance was granted, claims against the 2011 plans under the Constitution and VRA §2 remained unripe, leaving the district court here without subject-matter jurisdiction to rule on the merits of claims against the 2011 plans. The 2011 plans were never precleared.[4]

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[2] Tex. H.B. 150, Act of May 21, 2011, 82d Leg., R.S., ch. 1271, 2013 Gen. Laws 3435; Tex. S.B. 4, Act of June 20, 2011, 82d Leg., 1st C.S., ch. 1, 2013 Gen. Laws 5091.

[3] *See* Plaintiffs' Original Complaint, *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. May 9, 2011), ECF No. 1; Order Constituting Three-Judge Court, *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. May 11, 2011), ECF No. 4.

[4] On July 19, 2011, Texas filed a complaint seeking judicial preclearance in the United States District Court for the District of Columbia. *See Texas v. United States*, 887 F. Supp. 2d 133, 138 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013) (mem.). The district court denied the State's motion for summary judgment on November 8, 2011, and conducted a trial in January 2012. *Id.* at 139. The district court denied preclearance on August 28, 2012.

B. While the D.C. VRA §5 preclearance lawsuit was pending, the Texas three-judge district court here conducted a two-week trial beginning on September 6, 2011 on the constitutional and VRA §2 claims against the 2011 maps. But since a final judgment in the preclearance litigation seemed unlikely, the district court ordered the parties to submit proposed interim plans for the 2012 elections.[5] In November 2011, by a 2-1 vote with Judge Smith dissenting, the district court ordered the 2012 congressional elections to be conducted under a court-drawn plan (C220).[6] Concluding that it "was not required to give any deference to the Legislature's enacted plan," the district court announced that it had drawn an "independent map" based on "neutral principles that advance the interest of the collective public good." *Perez*, 565 U.S. at 396.

Texas moved to stay the interim plans pending appeal. On December 9, 2011, this Court granted the State's motion to stay, noted probable jurisdiction, issued an expedited briefing schedule, and set oral argument for January 9, 2012. *Perry v. Perez*, 565 U.S. 1090 (2011) (mem.). On January 20, 2012, the Court vacated the district court's order in a unanimous opinion. *Perez*, 565 U.S. at 399. The Court held that "the District Court exceeded its mission to draw interim maps that do not violate the Constitution or the Voting Rights Act, and substituted its own concept of 'the

[5] The plans used to conduct elections in 2010 could not be used because they were malapportioned based on the 2010 Census, *see, e.g.*, *Perez*, 565 U.S. at 391-92, and in the case of congressional elections, because the existing districts did not account for the State's increase from 32 to 36 seats. *See* App. C at 31.

[6] Order, *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. Nov. 26, 2011), ECF No. 544.

collective public good' for the Texas Legislature's determination of which policies serve 'the interests of the citizens of Texas.'" *Id.* at 396.

This Court emphasized that the district court's mission was remedial—not a freewheeling mandate to pursue the collective good—and gave the court specific instructions—six separate times—to implement plans that complied with the Constitution and the VRA:

- "'[F]aced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" *Id.* at 393 (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)).

- "[T]he state plan serves as a starting point for the district court. It provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court's own preferences." *Id.* at 394.

- "A district court making such use of a State's plan must, of course, take care not to incorporate into the interim plan any legal defects in the state plan." *Id.* (citing *Abrams*, 521 U.S. at 85-86; *White v. Weiser*, 412 U.S. 783, 797 (1973)).

- "[A] district court should still be guided by [the State's] plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits." *Id.*

- The district court should "take guidance from the lawful policies incorporated in such a[n unprecleared] plan." *Id.* at 395.

- The district court's "mission [is] to draw interim maps that do not violate the Constitution or the Voting Rights Act." *Id.* at 396.

C. On remand, the three-judge district court below adopted Plan C235 as an interim congressional redistricting plan. App. D. Plan C235 reconfigured nine

challenged districts from the Legislature's 2011 plan.[7] But Plan C235 retained without reconfiguration CD 27, a district around Corpus Christi, and CD 35, a district between Austin and San Antonio, both of which had been in the 2011 plan. The district court concluded that Plan C235 "sufficiently resolves the 'not insubstantial' § 5 claims and that no § 2 or Fourteenth Amendment claims preclude its acceptance under a preliminary injunction standard." *Id.* at 29. And the court provided six pages of analysis explaining that CD 27 did not intentionally dilute minority voting strength, and another seven pages explaining that CD 35 was not a racial gerrymander. *See id.* at 41-47, 49-55.

D. After the D.C. district court denied preclearance to the 2011 plans, the State appealed that ruling to this Court.[8] The Texas district court denied a motion by the plaintiffs to modify the court-ordered Plan C235 based on the D.C. court's

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[7] The district court restored CD 23 to benchmark levels of performance to address a not-insubstantial §5 retrogression claim (affecting adjacent CD 20). App. D at 32. It addressed the United States' claim of statewide retrogression by ensuring that the plan included at least 11 minority ability-to-elect districts. *Id.* at 32-33. It addressed not-insubstantial §5 claims in Dallas and Tarrant County by creating CD 33, *id.* at 36-37, and by reducing the minority population of CD 30 to address claims of "packing," *id.* at 37, thereby resolving the plaintiffs' constitutional claims in the Dallas-Fort Worth region, *id.* at 38-39. The court noted that changes to CD 33 "potentially offset the loss of African American voting strength in CD 25." *Id.* at 49. The court also modified CD 9, CD 18, and CD 30 to address not-insubstantial §5 claims that "map drawers removed economic engines from these districts and had drawn members' offices out of each of their districts." *Id.* at 39. The court specifically stated that "C235 is not purposefully discriminatory," *id.* at 41, and it concluded that "C235 adequately addresses Plaintiffs' § 2 claims," *id.* at 55.

[8] This Court vacated and remanded for further proceedings in light of *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and the suggestion of mootness by certain appellees. 133 S. Ct. 2885. The district court then dismissed the case as moot. App. A at 7.

preclearance decision.[9] This Court then denied an application from some plaintiffs to stay Plan C235. *LULAC v. Perry*, 133 S. Ct. 96 (2012) (mem.). The State's 2012 congressional elections were conducted under the district-court-ordered Plan C235.

E. While the State's appeal in the preclearance case was pending, the Texas Attorney General encouraged the Legislature to adopt the district-court-ordered remedial Plan C235 as the State's permanent reapportionment plan. App. G. On May 27, 2013, the Governor called the Legislature into a special session "[t]o consider legislation which ratifies and adopts the interim redistricting plans ordered by the federal district court as the permanent plans for districts used to elect members of the Texas House of Representatives, Texas Senate and United States House of Representatives."[10]

The 2013 Legislature formally repealed the 2011 redistricting plans and adopted verbatim the court-ordered Plan C235 on June 24, 2013. The next day, this Court held VRA §4(b)'s coverage formula unconstitutional, so it could "no longer be used as a basis for subjecting jurisdictions to preclearance." *Shelby County*, 133 S. Ct. at 2631. A day later, the Texas Governor signed into law the bill adopting Plan C235.[11]

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[9] Order, *Perez v. Perry*, 5:11-cv-360 (W.D. Tex. Sept. 7, 2012), ECF No. 718.

[10] Proclamation by the Governor, No. 41-3324 (May 27, 2013).

[11] *See* Tex. S.B. 4, Act of June 26, 2013, 83d Leg., 1st C.S., ch. 3, § 2, 2013 Gen. Laws 5005.

F. After the Legislature repealed the 2011 plans, the State moved to dismiss the claims against those 2011 plans as moot. The district court summarily denied the motion without a response from the plaintiffs. The district court then granted the plaintiffs leave to amend their complaints to assert claims against the plans enacted in 2013. But the court also allowed the plaintiffs to continue challenging the repealed 2011 plans, permitting plaintiffs to amend their pending claims to seek preclearance bail-in under VRA §3—once again rejecting the State's argument that the underlying claims against the 2011 maps were moot. App. L at 78. The district court also granted a motion to intervene by the United States, which did not assert any claims against Plan C235. *Id.* at 80.

The district court set all claims, against both the 2011 and 2013 plans, for trial on July 14, 2014. *Id.* at 81. The district court modified the scheduling order, however, and determined that the first two segments of trial would be limited to the repealed 2011 plans for the Texas House of Representatives and Congress. *Id.* at 93. Trial on these repealed 2011 plans proceeded, and the parties completed post-trial briefing in December 2014. *Id.* at 115.

G. More than two years later, on March 10, 2017, the district court held by a 2-1 vote that the claims against the repealed 2011 plans were not moot. App. B. The majority found various violations, including intentional vote dilution in CD 27 and racial gerrymandering in CD 35. *Id.* at 164-65. Judge Smith dissented, finding these claims moot because the 2011 maps had been repealed and were never in effect. *Id.* at 165-66. Judge Smith's reasoning already had been adopted by the Fifth Circuit in

a related case involving the State's 2011 redistricting plan for the Texas Senate. *See Davis v. Abbott*, 781 F.3d 207, 220 (5th Cir.), *cert. denied*, 136 S. Ct. 534 (2015) (holding that Texas "repealed the 2011 plan and adopted the district court's interim plan in its place, thus mooting Plaintiffs' lawsuit" and depriving the district court of jurisdiction to vacate its preliminary injunction). Judge Smith also would have upheld CD 27 and CD 35. App. B at 181, 185-87.

H. Although the State had repeatedly told the district court that its congressional districts must be determined by October 1, 2017, to avoid disruption of deadlines for the November 2018 elections,[12] trial on the operative 2013 maps (*i.e.*, Plan C235) did not occur until July 10-15, 2017. Then, on August 15, 2017, the district court issued a divided decision invalidating Plan C235.[13] App. A. Notwithstanding the fact that the court itself had ordered the State to use Plan C235 five years earlier, and notwithstanding that the 2013 plan was adopted by a different Legislature with a different purpose (ending the litigation by embracing the court's remedial plan as its own), the court concluded that the State engaged in intentional vote dilution because the remedial plan preserved CD 27 in the same form as the 2011 map, and engaged in racial gerrymandering because the remedial plan preserved CD 35. The

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[12] The State's congressional districts must be set by October 1, 2017, to provide templates for voter-registration certificates to election officials in each of the State's 254 counties and leave sufficient time to prepare and mail the certificates to individual voters between November 15 and December 6, as required by Texas Election Code §14.001. *See* App. J.

[13] Judge Smith joined the court's order only on the basis that he found he was bound by "law of the case" to honor the court's March 10, 2017 (advisory) opinion on claims regarding the State's repealed 2011 plan. App. A at 11 n.13.

court then gave the Governor 72 hours to either order a special session of the Legislature or consult with the State's experts, prepare remedial map proposals, and appear at a hearing on September 5, 2017, to redraw Texas's congressional districts on an expedited basis. *Id.* at 105-06.[14]

Texas filed a notice of appeal of the district court's August 15 order. App. K. Texas moved for a stay of that order in the district court on August 18, and the court denied the motion the same day. App. L at 136-37.

ARGUMENT

A stay pending direct appeal is a well-established remedy in redistricting cases. *See, e.g.*, *Gill v. Whitford*, 137 S. Ct. 2289 (2017); *Perry v. Perez*, 565 U.S. 1090; *Miller v. Johnson*, 512 U.S. 1283 (1994); *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers); *Bullock v. Weiser*, 404 U.S. 1065 (1972) (stay pending appeal in *White v. Weiser*, 412 U.S. at 789); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970). A stay is appropriate when there is (1) "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction;" (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous;" and (3) "a demonstration that irreparable harm is likely to result from the denial of a stay." *Rostker v. Goldberg*, 448 U.S. 1306, 1308

[14] The order directs that "the parties must take immediate steps to consult with their experts and mapdrawers and prepare statewide congressional plans that remedy the violations found in CD35 and CD27," and "the parties must confer" in an attempt to "agree upon a remedial plan." App. A at 106. "If the parties cannot agree, they should be prepared to offer, support, and defend their proposed remedial plan(s) at the hearing." *Id.* The State even has been ordered to make "Texas Legislative Council staff be present at the remedial hearing." *Id.* at 107.

(1980) (Brennan, J., in chambers); *see Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). "[I]n a close case it may be appropriate to 'balance the equities'– to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker*, 448 U.S. at 1308. All of these elements are satisfied here.

This Court also has jurisdiction under the All Writs Act, 28 U.S.C. §1651, to grant injunctive or mandamus relief as necessary to preserve its own jurisdiction and authority to provide meaningful relief. *See, e.g.*, *U.S. Alkali Export Ass'n v. United States*, 325 U.S. 196, 201-02 (1945). Because this case falls within the Court's mandatory appellate jurisdiction, 28 U.S.C. §1253, injunctive or mandamus relief pending appeal would be "in aid of [this Court's] jurisdiction," and "cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1. This case also readily presents the kind of "exceptional circumstances" that make such relief appropriate, *id.*, as the State unquestionably will suffer irreparable injury absent an order from this Court authorizing continued use of Plan C235 for the 2018 election cycle. Indeed, absent relief by October 1, this Court will effectively lose appellate jurisdiction over claims regarding the State's 2018 congressional districts.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL NOTE PROBABLE JURISDICTION.

The Court has already noted probable jurisdiction once in this case. *Perry v. Perez*, 565 U.S. 1090. There is a reasonable probability that it will do so again because the district court's order contravenes this Court's precedents by invalidating two Texas congressional districts.

This Court has jurisdiction to review that order right now because the three-judge district court's order constitutes an interlocutory injunction, and federal law authorizes a direct appeal to this Court. 28 U.S.C. §1253. And even if the order were not immediately appealable, the Court will inevitably note probable jurisdiction over the validity of the 2013 maps, and this Court has jurisdiction now under the All Writs Act to protect its appellate jurisdiction. The Court has "no discretion to refuse adjudication of the case on its merits" when an appeal is brought under §1253. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014).

The district court's order constitutes an appealable injunction because it prevents the State from conducting congressional elections under its duly enacted redistricting plan. The district court held that the "Plan C235 configurations of CD35 and Nueces County/CD27 violate § 2 and the Fourteenth Amendment," App. A at 105, that the violations "*must* be remedied," *id.* (emphasis added), and that if the Legislature does not redraw the districts, the district court will, *id.* at 105-06. The court made the need (and the urgency) for redrawing maps crystal clear by giving the Governor a mere 72 hours to call the Legislature into special session. The court has also ordered the parties to consult with mapdrawing experts, confer on the possibility of agreeing to a remedial plan, and to come prepared to offer proposed remedial plans at a September 5 hearing to redraw Texas's congressional map. *Id.* at 106. The order thus alters the status quo and disrupts the State's election procedures by forbidding Texas to use Plan C235—the map used in the previous three election cycles—and requiring the State to participate in judicial reapportionment.

Despite all these orders and activities directed at the immediate redrawing of maps, the district court claimed in its denial of the State's stay motion that it "has not enjoined [Plan C235's] use for any upcoming elections." App. L at 136-37. But as this Court has made clear, appellate jurisdiction over appeals turns on the "practical effect" of the lower court's order, not its form or use of magic words. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (interpreting 28 U.S.C. §1292(a)). Interpreting *Carson*, lower courts have correctly and consistently held that "[e]ven if an order does not by its terms grant or deny a specific request for an injunction . . . the order may still be appealable if it has the 'practical effect' of doing so." *Salazar ex rel. Salazar v. Dist. of Columbia*, 671 F.3d 1258, 1261-62 (D.C. Cir. 2012); *see also, e.g.*, *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 384 (5th Cir. 2014); *Etuk v. Slattery*, 936 F.2d 1433, 1440 (2d Cir. 1991).

No matter what the district court may choose to label its order, it is plainly an injunction in substance. If the order were not intended to block the State from using Plan C235 in the 2018 elections, there would be no reason to put the Governor under a 72-hour deadline or to order the parties to propose new maps and rush to redraw districts a mere 21 days after declaring CD 27 and CD 35 invalid—especially when this Court's precedent requires "afford[ing] a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal op.). The district court's August 15,

2017 order is therefore an injunction of Plan C235 regardless of the label affixed by the court.

The Court's recent stay in *Gill v. Whitford*, 137 S. Ct. 2289, confirms the Court's jurisdiction and the propriety of a stay. There, the district court blocked the State from using its existing districts and ordered the legislature to create new maps. *Whitford v. Gill*, No. 15-cv-421-BBC, 2017 WL 383360, at *3 (W.D. Wis. Jan. 27, 2017), *amended*, No. 15-cv-421-BBC, 2017 WL 2623104 (W.D. Wis. Feb. 22, 2017). Here, the district court's order had the same effect but imposed a much shorter timeline, giving the Governor only three days to decide whether the Legislature would take up redistricting, and setting a hearing to redraw congressional districts in 21 days if the Legislature did not. *See* App. A at 105-06. Similarly, in *Karcher v. Daggett*, Justice Brennan granted a stay pending appeal after a three-judge district court declared New Jersey's congressional districting plan unconstitutional and ordered the legislature to "either adopt an alternative redistricting plan" within the month "or face the prospect that the District Court will implement its own redistricting plan." 455 U.S. at 1306-07 (Brennan, J., in chambers). Texas is in exactly the same position here.

The practical effect of the district court's order also suffices to establish this Court's jurisdiction now, rather than awaiting a final judgment after the district court has settled on a remedial map. The order "affect[s] predominantly all of the merits," *Salazar*, 671 F.3d at 1262, and alters the status quo, *see Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 137 F.3d 1420, 1422 n.2 (9th Cir. 1998); *Cohen v. Bd. of Trs. of the*

Univ. of Med. & Dentistry of N.J., 867 F.2d 1455, 1466 (3d Cir. 1989) (en banc). The order is certain to have a "serious, perhaps irreparable, consequence," *Carson*, 450 U.S. at 84, because it invalidated two congressional districts and compels the State to participate in expedited judicial proceedings to redraw the congressional map. And the order can be "'effectually challenged' only by immediate appeal," *id.*, because appellate review from a final judgment after the imposition of remedial maps would come too late to prevent the irreparable harm of being forced to use those maps for the 2018 election cycle.

In all events, even if the district court's order does not constitute an immediately appealable injunction, the Court undoubtedly will have appellate jurisdiction over the district court's invalidation of the 2013 map and its adoption of an alternative remedial map. And the Court will be just as likely to note probable jurisdiction at that juncture as it will be if it considers the order appealable right now; the only difference will be that waiting until that happens may force the Court to act on the remedial map under the constraints of an emergency timeline. Accordingly, for the same reason that the first stay factor is readily satisfied, relief pending appeal also would be "in aid of [this Court's] jurisdiction." Sup. Ct. R. 20.1.

II. THERE IS A FAIR PROSPECT THAT A MAJORITY OF THE COURT WILL VOTE TO REVERSE THE DISTRICT COURT'S DEEPLY FLAWED DECISION.

The district court held that the 2013 Legislature had an unlawful racial purpose when it enacted the same redistricting plan that the district court itself imposed in 2012. The court reasoned that the 2013 Legislature failed to remove the "taint" of discrimination that supposedly lingered from the repealed 2011 plan—even

though that is precisely what the district court's 2012 remedial plan was supposed to accomplish under this Court's mandate in *Perry v. Perez*. Moreover, the district court did not find this purportedly lingering "taint" until 2017, when it finally issued an advisory opinion on moot claims against the repealed 2011 redistricting plan—which had never taken effect and had been repealed almost four years earlier. App. A at 33, 39. And then the court improperly carried over the views it formed of two districts during the moot litigation over the 2011 maps to the 2013 map enacted by a different Legislature with an intervening motive to end the litigation by adopting the court-ordered remedial map as its own. There is a fair prospect that a majority of this Court will vote to reverse that remarkable decision.

A. The District Court Clearly Erred in Finding That the State Enacted the District Court's Maps with an Unlawful Purpose.

1. The district court ignored "the presumption of good faith" and failed to "exercise extraordinary caution."

In declaring Plan C235 unlawful, the district court failed to acknowledge, let alone apply, "the presumption of good faith that must be accorded legislative enactments."[15] *Miller v. Johnson*, 515 U.S. 900, 916 (1995). And it failed to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Id.* On this basis alone, the Court should reverse. The presumption of good faith accorded to legislative enactments means that plaintiffs bear the burden

[15] The presumption carries particular weight in the context of redistricting legislation because "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915.

of untangling permissible and impermissible motivation, and any doubt must be resolved in favor of the Legislature. *Id.*

Contrary to those well-established principles, the district court applied a presumption of *invalidity* and resolved every doubt against the Legislature, reasoning that the 2013 Legislature's enactment of an entire remedial plan imposed by the district court itself was somehow "taint[ed]" with discriminatory intent. *See, e.g.*, App. A at 32-33 (articulating factors for assessing whether "the taint of discriminatory intent" had been "removed" from the 2013 plan); *id.* at 37 (faulting the State for failing to "cleanse the plans of continuing discriminatory intent or legal defect"). That is truly extraordinary. When the Legislature acted in 2013, it had the benefit of judicial guidance unavailable in 2011. It also had a keen sense of the costs of continuing litigation and a seemingly obvious mechanism to bring this litigation to a close. Rather than fight to the end over the 2011 map, the Legislature acceded to the remedial map as to both the lines that changed and the lines that the court did not find a basis to change. That action, particularly when viewed through the lens of the presumption of validity is conciliatory, not unconstitutional. The district court's failure to presume the validity of the Legislature's duly enacted plan—a plan the court itself ordered the State to use in 2012—was legal error.

2. The district court erroneously used its March 2017 advisory opinion on the repealed 2011 plan to shift the burden of proof to the State.

To prevail on either an intentional-vote-dilution or a racial-gerrymandering claim, the plaintiffs had a significant burden of proof. *See, e.g.*, *Shaw v. Reno*, 509

U.S. 630, 641 (1993) (intentional vote dilution); *Miller*, 515 U.S. at 916 (racial gerrymandering). Unless and until the plaintiffs proved that the 2013 Legislature had an unlawful purpose—and they did not—the defendants had no burden to prove anything. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

But instead of asking whether the 2013 Legislature acted for the purpose of harming minority voters or assigning them to districts because of their race when it enacted the court's own remedial plan—the answer to which is clearly "no"—the district court framed the question as whether the State affirmatively proved that "the taint of discriminatory intent" was "removed" in the Legislature's adoption of the court-imposed Plan C235. App. A at 32-33. The reversal of burdens of proof—and even chronology—could hardly be more obvious. The court did not explain why *the court* could impose Plan C235 without engaging in intentional discrimination, but *the Legislature* could not do the same. Nor did it explain how the 2013 Legislature was supposed to know that it needed to remove the purportedly lingering "taint" when the court did not reveal that taint until 2017. Nevertheless, it concluded that the Legislature engaged in intentional discrimination by failing to "cleanse the plans of continuing discriminatory intent or legal defect," *id.* at 37—even though that is precisely what the district court's 2012 remedial Plan C235 was supposed to accomplish (and what the court said it accomplished) under this Court's mandate in *Perry v. Perez*.

The district court therefore used its improper March 2017 advisory opinion on the 2011 congressional plan as a predicate to effectively shift the burden of proof to the State. Almost four years after the 2013 Legislature adopted Plan C235, the court by a 2-1 vote opined that the 2011 Legislature engaged in unconstitutional vote-dilution and racial gerrymandering when it enacted a different congressional plan. But the 2011 plan never affected any voter because it was never precleared, it never took legal effect, and it was never used in an election. *See, e.g.*, *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam) (holding that challenged acts "are not now and will not be effective as laws until and unless cleared pursuant to § 5"); *Branch v. Smith*, 538 U.S. 254, 283-84 (2003) (Kennedy, J., concurring). The district court had no jurisdiction to enter judgment on claims against the defunct 2011 plan because that plan never took effect, and indeed was repealed in 2013. *See, e.g., Waller*, 421 U.S. at 656 (holding, where laws had not been precleared, that the district court "erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination"), *quoted in Branch*, 538 U.S. at 283 (Kennedy, J., concurring) ("Where state reapportionment enactments have not been precleared in accordance with § 5, the district court 'err[s] in deciding the constitutional challenges' to these acts.").

The district court plainly issued its advisory opinion on the 2011 plan solely to lay the predicate for its unprecedented conclusion that a plan imposed by the court itself was somehow infected with intentional discrimination that the Legislature (but not the court) was obligated to "cure."

3. The district court's finding that the 2013 Legislature intended to perpetuate a supposed discriminatory taint by enacting the entire court-ordered 2012 remedial map is manifestly erroneous.

The district court clearly erred in finding that the 2013 Legislature's enactment of the court-ordered remedial plan was itself proof of purposeful discrimination—in the district court's words, an act that "intentionally furthered and continued any discrimination that *might be found* in the 2011 plans and incorporated into the 2013 plans." App. A at 34 (emphasis added). The 2013 Legislature had no way to know what "might be found," but what it did know is that the district court in 2012 had affirmatively concluded that "C235 is not purposefully discriminatory," and that "C235 adequately addresses Plaintiffs' § 2 claims." App. D at 41, 55. The 2013 Legislature also knew that many of those who were challenging the 2011 maps agreed. For instance, MALDEF, an organization representing plaintiffs in this case, provided written testimony to the 2013 House Select Committee and Senate Select Committee that explained exactly how Plan C235 fixed every element of the 2011 plan that raised statutory or constitutional concerns.[16] *See* App. F. The 2013 Legislature relied on the best available legal guidance, and even though the State

[16] MALDEF informed the committee that Plan C235 addressed the D.C. court's concern about intentional discrimination in CD 23 by restoring it to benchmark performance levels. App. F at 2, 5. In Dallas-Fort Worth, Plan C235 remedied claims of intentional discrimination by curing "the fracturing of minority voters in DFW." *Id.* Plan C235 addressed claims of intentional discrimination in districts represented by African-American and Latino incumbents by ensuring that incumbents' homes and district offices were located in their districts. *Id.* Finally, MALDEF explained that Plan C235 addressed retrogression by restoring CD 23's performance and creating CD 33, as a result of which "[t]he court's interim plan contains 12 minority ability to elect districts." *Id.*

had no burden to provide affirmative evidence, the record confirms that the Legislature's intent in adopting a map imposed by the district court and approved by some of the very same plaintiffs who initiated this litigation was to adopt maps that complied with the VRA and the Constitution. App. H (collecting examples from the legislative record).

The district court nonetheless concluded that the 2013 Legislature engaged in intentional discrimination because it failed to "cleanse" Plan C235 of the supposed "taint" that purportedly carried over from the 2011 plan. Setting aside the fact that this is exactly what the district court was supposed to accomplish under this Court's mandate in *Perry v. Perez* before it imposed Plan C235 on the State for the 2012 elections, that confuses discriminatory *intent* with discriminatory *effect*. Admittedly, discriminatory *effect* can be carried over (whether intentionally or unwittingly) from one version of law to another. But discriminatory *intent* does not attach to the law itself; it is instead a *motive* question that turns on *why* the Legislature enacted the law. If the 2013 Legislature enacted Plan C235 because it genuinely believed that a plan imposed by a federal district court under a mandate from this Court "to draw interim maps that do not violate the Constitution or the Voting Rights Act," *Perez*, 565 U.S. at 396, was its best chance at complying with the Constitution and the VRA, then whether that plan contained lines drawn by some other legislature for some other reason is entirely beside the point. The question is whether *the 2013 Legislature* adopted Plan C235 in an intentional effort to dilute the voting strength of minorities, or to sort voters into districts on the basis of race alone—not whether discrete pieces

of the 2011 map that Plan C235 preserved were originally drawn with some impermissible motive in mind.

Tellingly, the district court never explained how the 2013 Legislature could have "cleansed" the plan of the "taint" that purportedly infected it. Instead, the court faulted the Legislature for failing to "engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." App. A at 33. The suggestion that the Legislature had a duty to engage in an unspecified "deliberative process"—as opposed to moving quickly to adopt the remedial plan as its own and move on to other legislative priorities—shows how the court improperly shifted the burden of proof. No such duty exists in any case: the Constitution does not "require States engaged in redistricting to compile a comprehensive administrative record." *Bush v. Vera*, 517 U.S. 952, 966 (1996) (plurality op.); *accord id.* at 1026 (Stevens, J., dissenting).

Even if did, moreover, the 2013 Legislature *did* engage in a deliberative process—and one that "cured" any "taint" in the most definitive of ways: it repealed the 2011 plans entirely, and replaced them with a plan that had received the blessing of a federal district court. If repealing a purportedly discriminatory law in its entirety and replacing it with a law that has received the imprimatur of a federal court does not suffice to remove any lingering "taint," then it is difficult to imagine what could. Moreover, the Legislature did not need to engage in its own de novo deliberation because substantial deliberation went into the district court's adoption of Plan C235. That plan made extensive substantive changes to the 2011 plan and resulted from a

protracted deliberative process in court involving multiple groups of plaintiffs with weeks of district-court proceedings, and from this Court's intervening decision in *Perry v. Perez*, which instructed the district court to create a lawful redistricting plan removing any possible taint from prior discriminatory purpose or effect. If the Legislature had altered the remedial plan, it may have engaged in additional deliberation, but the decision to adopt the court's remedial plan unaltered and move on was a straightforward one.

Remarkably, instead of recognizing the 2013 Legislature's actions for what they were—an effort to cure, not perpetuate, any discrimination in the 2011 plans—the district court deemed the very decision to adopt the remedial maps as its own "discriminatory at its heart," and accused the Legislature of adopting those maps in some sort of effort to "insulate" both the 2011 and the 2013 plans "from review." App. A at 34. That is a gross mischaracterization of the defendants' position in this case. Defendants have never argued that the Legislature's adoption of Plan C235 "insulates" that plan from all judicial review. They have argued only that the plaintiffs' discriminatory intent accusations *fail* because Plan C235 was enacted in order to cure any potential defects in the 2011 plans, not to purposefully discriminate. As for the 2011 plans, while the repeal of those plans should have rendered the challenges to them moot, there is nothing remotely nefarious about "insulating" a law from judicial review by repealing it; indeed, courts should welcome legislatures taking the eminently reasonable step of eliminating laws that are spawning protracted litigation.

The district court even went so far as to attribute racially discriminatory intent to the 2013 Legislature simply because the State continued to defend the 2011 Legislature's enacted redistricting plans in litigation after they failed to gain preclearance: "Defendants did not accept [the §5 court's rulings] and instead appealed to the Supreme Court." App. A at 34-35. But whether the State initially defended the 2011 plans is irrelevant because, again, the Legislature ultimately *repealed* those plans and replaced them with Plan C235. And it did so precisely because a federal court had found (and groups challenging the 2011 plan had agreed) that Plan C235 sufficed to cure any potential deficiencies in the 2011 plan—even under VRA §5's stricter retrogression standard. *See supra* p.26 n.16. In all events, the notion that *defending* itself against charges of intentional discrimination is itself evidence of intentional discrimination turns the presumption of good faith due to the actions of sovereign States on its head.

At bottom, the district court's discussion of discriminatory purpose provides no clue as to what the State could have done to eliminate the supposed taint from its congressional districts. The 2013 Legislature repealed the 2011 plans; it replaced them with court-ordered plans that substantially reconfigured nine congressional districts challenged by the plaintiffs (and several adjacent districts). Yet under the district court's standard, the Legislature's decision to accede to the remedial map and move on, rather than fight onward, only provided further evidence of discriminatory intent. The only path that the district court even suggests might plausibly "cure" the "taint" is confession of error, which implies that a subsequent legislature can *never*

reenact a law that a previous legislature enacted for discriminatory purposes—even if that law does not actually have a discriminatory effect. *See* App. A at 35 (citing failure to prove "a change of heart concerning the validity of any of Plaintiffs' claims"). That cannot possibly be the law, and it would raise significant constitutional concerns if it were.

B. The District Court's Conclusion That the Texas Legislature Engaged in Intentional Vote Dilution When It Enacted CD 27 Is Baseless.

1. Even accepting the district court's mistaken premise that the 2013 Legislature could be charged with discriminatory intent for failing to "cure" the purported "taint" in the 2011 maps, the court's finding of intentional vote dilution in CD 27 is still legally infirm. A claim of intentional vote dilution requires proof of not only discriminatory intent but also vote-dilutive effect.[17] If an additional compact minority opportunity district cannot be drawn, then there is no VRA §2 vote dilution. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) (plurality op.) (requiring at least 50% minority-citizen-voting-age-population in a compact area to require a VRA §2 opportunity district).

That alone suffices to defeat the court's finding as to CD 27 because the court itself found that Plan C235 did *not* dilute Hispanic voting strength in the region. The court recognized that CD 27 does "not diminish Hispanic voter opportunity for § 2

[17] Plaintiffs had to prove (1) that the 2013 Legislature enacted Plan C235 for the specific purpose of denying or abridging voting rights on account of race and (2) that the plan had the intended effect. Redistricting plans "violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength." *Shaw*, 509 U.S. at 641.

effects purposes" because relocating "Nueces County Hispanics" to another South Texas district would not lead to the creation of an additional Hispanic opportunity district. App. A at 101. Without proof of actual vote dilution, the district court had no legal basis to find *any* vote dilution—let alone *intentional* vote dilution.

2. Even if there had been evidence of a vote-dilutive effect in CD 27, and even if the motivations of the 2011 Legislature were somehow relevant to the actions of the 2013 Legislature in passing the district-court-ordered remedial maps, the district court's order fails for the additional reason that the 2011 Legislature's drawing of CD 27 had nothing to do with purposeful racial discrimination.

The district court made a plain legal error when it inferred intentional racial discrimination—that Nueces County Hispanic voters "were intentionally deprived of their opportunity to elect candidates of their choice"—from the 2011 Legislature's knowledge that CD 27 would no longer be a Hispanic opportunity district. App. A at 104; *see also* App. B at 54-55. Awareness that CD 27 would not be a Hispanic opportunity district does not imply that any legislator, let alone the Legislature as a body, intentionally targeted Hispanic voters in Nueces County on account of their race. Neither the Constitution nor VRA §2 requires States to lock-in and retain all previously existing minority opportunity districts.[18]

[18] VRA §5's defunct retrogression standard could come closer to imposing something analogous to, but still short of, that rigid requirement. Even then, the D.C. district court hearing the VRA §5 claims here found no problem with CD 27. 887 F. Supp. 2d at 153 (explaining how the creation of CD 34 offset changes to CD 27).

It was also clear error for the district court to find intentional discrimination from the fact that the 2013 Legislature "did not substantially address the § 2 violation" that the court in 2017 found in CD 27 under the repealed 2011 plan. App. A at 100-01. The 2013 Legislature was obviously unaware of the district court's 2017 finding because it was made almost four years after the Legislature enacted Plan C235. *See* App. B. In contrast, the information that the Legislature actually had in 2013 was the district court's 2012 order adopting Plan C235.[19] And the court's 2012 order expressly concluded that the plaintiffs had not demonstrated a likelihood of success on their CD 27 intentional-vote-dilution claim:

> Nor is the Court able to conclude that Plaintiffs have established a substantial likelihood of success on their claim that the Legislature's decision to exclude Nueces County from a § 2 district was intentionally racially discriminatory. Downton testified that there were "dual goals with 27 and 34" to create a district controlled by Cameron County and to create a district for Congressman Farenthold, who lived in Nueces County, to be elected as a Republican. The State elicited testimony that the State House and State Senate representatives from Cameron County (all three Latino Democrats) expressed a desire for a congressional district to be anchored in Cameron County, rather than, as was the case in benchmark CD 27, a district weighted on both ends by the competing ports of Brownsville and Corpus Christi. Further, Gerardo Interiano testified that Nueces County was placed in CD 27 based on a request to be put in a district going north, or at least to be the anchor of a district.

[19] If the 2013 Legislature had altered CD 27 to shift the Nueces County Hispanic population to the adjacent CD 34 minority opportunity district anchored by Brownsville, the State probably would have faced *packing* (or racial gerrymandering) claims for putting more minorities in CD 34 than were necessary to elect their preferred candidate. *Cf. Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015).

> . . . Plaintiffs have not demonstrated a likelihood of success on their claim that a racially discriminatory purpose lay behind the decision.

App. D at 54-55.

To be sure, the district court's analysis was necessarily preliminary because the 2011 map had not been precleared, so the court lacked jurisdiction to finally resolve the plaintiffs' claims. *See supra* p.24. But the question is not whether the district court got it right in 2012; it is whether the Legislature can be charged with *intentional discrimination* for following the district court's lead. It cannot. The court's decision was the only analysis available to the 2013 Legislature, and it provided at a minimum a good-faith basis for the Legislature to believe that adopting CD 27 as it was configured in the court-ordered Plan C235 was its best hope at complying with the VRA and the Constitution. Particularly given the "presumption of good faith" and the "extraordinary caution" required in this context, *Miller*, 515 U.S. at 916, the Legislature cannot plausibly be found to have acted with discriminatory intent for taking a federal district court at its word.

C. The District Court's Conclusion That the State Engaged in Racial Gerrymandering When It Enacted CD 35 Is Contrary to Established Legal Standards and the Record.

The district court's ruling that CD 35 was a racial gerrymander likewise lacks any foundation in law or the record. Not only is there no basis whatsoever to conclude that the *2013 Legislature* intended to racially gerrymander CD 35 when it adopted the court-imposed interim map; there is not even any evidence to support a finding that the *2011 Legislature* intended to accomplish a racial gerrymander.

To prevail on a *Shaw* racial-gerrymandering claim, the plaintiff must prove that race was "the 'predominant factor' motivating the legislature's districting decision." *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999). So "race for its own sake" must be "the overriding reason" for the decision to adopt a particular district. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). In other words, the plaintiffs must demonstrate that "the legislature 'subordinated' other factors . . . to 'racial considerations,'" *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (quoting *Miller*, 515 U.S. at 916), such that "'[r]ace was the criterion that, in the State's view, could not be compromised,'" *Bethune-Hill*, 137 S. Ct. 788 at 798 (quoting *Shaw v. Hunt*, 517 U.S. 899, 907 (1996)). But even if a plaintiff proves that race was the predominant motive in drawing a district, that does not mean the district violates the Constitution—just that strict scrutiny applies. *Cooper*, 137 S. Ct. at 1464. And strict scrutiny is satisfied in this context if the State had a "strong basis in evidence"—that is, "good reasons"—to believe that the VRA required it to draw an additional minority opportunity district. *Id.*

Crucially, the district court affirmatively found that "the 2013 Legislature did not draw the challenged districts in Plan C235." App. A at 28-29. That bears repeating: The 2013 Legislature was not adjusting any district lines or making any determinations about which voters to place "within or without a particular district." *Miller*, 515 U.S. at 916; *see* App. A at 103 ("There is no evidence that the Legislature again considered in 2013 which persons to include within CD35 . . . ."). Rather, the 2013 Legislature adopted wholesale the map imposed in 2012 by the district court

(Plan C235). So the 2013 Legislature could not have "used race as a basis for separating voters into districts," as the Legislature was not making any "decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 911. There is no cognizable racial-gerrymandering claim here. The district court should have rejected the plaintiffs' racial gerrymandering claim against CD 35 for that reason alone.

But even assuming the 2013 Legislature (but not the district court) could be charged with the same motivations as the 2011 Legislature when it adopted Plan C235 as its own, CD 35 was never a racial gerrymander in the first place. CD 35 links Austin, in Travis County, and San Antonio, in Bexar County. The district court found it "undisputed that much of Texas's overall population growth occurred in Bexar County and Travis County and areas along the I-35 corridor." App. D at 41. The district court therefore found it "unsurprising" that the 2011 Legislature "placed a new district in that area—CD 35." *Id.*; *see also* Joel Kotkin, *America's Next Great Metropolis Is Taking Shape In Texas*, Forbes (Oct. 13, 2016), https://perma.cc/VLM7-KMV8 (noting that the region between Austin and San Antonio is "a growth corridor that is expanding more rapidly than any other in the nation," and that "no regional economy . . . has more momentum than the one that straddles the 74 miles between San Antonio and Austin").[20]

[20] CD 35 is nothing like the District 25 that the Court invalidated in *LULAC v. Perry*, 548 U.S. 399 (2006). District 25 was "a long, narrow strip that winds its way from McAllen and the Mexican-border towns in the south to Austin, in the center of the State and 300 miles away," and "[t]he Latino communities at the opposite ends of District 25 have divergent 'needs and interests.'" *Id.* at 424. CD 35, by contrast,

Moreover, even if race had predominated in the creation of CD 35, the district court erred in its application of the strict-scrutiny "strong basis in evidence" standard. "[T]he requisite strong basis in evidence exists when the legislature has '*good reasons* to believe' it must use race in order to satisfy the Voting Rights Act." *Bethune-Hill*, 137 S. Ct. at 801 (quoting *Ala. Legis.*, 135 S. Ct. at 1274). Consequently, "[t]hat 'strong basis' (or 'good reasons') standard gives States 'breathing room' to adopt reasonable compliance measures that may prove, *in perfect hindsight*, *not to have been needed*." *Cooper*, 137 S. Ct. 1464 (quoting *Bethune-Hill*, 137 S. Ct. at 802) (emphasis added).

The 2013 Legislature had the best possible basis in evidence to believe that it needed to readopt CD 35 as a minority opportunity district: the district court's 2012 opinion explained Plan C235 addressed the plaintiffs' claim that VRA §2 required "7 Latino opportunity districts in South/Central/West Texas" by creating seven such districts, including CD 35.[21] App. D at 42, 55. And just because the district court in

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stretches only from Austin to San Antonio, less than 80 miles away, and is entirely within the growth corridor of Central Texas.

[21] In 2017—four years after the 2013 Legislature adopted the court-ordered Plan C235—the district court reasoned that because there is not racial bloc voting in Travis County and CD 35 covers part of Travis County, there could not be racial bloc voting to justify drawing CD 35 as an opportunity district encompassing any part of Travis County. App. A at 99. This "hindsight" analysis cannot override the 2013 Legislature's "strong basis in evidence" of the district court's 2012 opinion finding that CD 35 was in fact a justifiable and performing minority opportunity district that satisfied the plaintiffs' claim under VRA §2. *Cooper*, 137 S. Ct. at 1464; *see Bethune-Hill*, 137 S. Ct. at 801. Regardless, the district court should have asked whether the *entire* territory covered by CD 35 *as drawn*—and not a county-specific inquiry when part of the county is not in the drawn district at issue—had racial bloc voting. *See Bethune-Hill*, 137 S. Ct. at 800 ("The ultimate object of the inquiry . . . is . . . the district as a whole.").

2017 changed its conclusion from 2012 and found racial gerrymandering in CD 35, this conclusion made in "hindsight" says nothing about the evidence the 2013 Legislature actually had.[22] *Cooper*, 137 S. Ct. at 1464; *see Bethune-Hill*, 137 S. Ct. at 801. The 2013 Legislature had new evidence (the 2012 district court opinion) confirming that VRA §2 required seven Hispanic-opportunity districts in the region, that CD 35 was one of those districts, and that CD 35 was not an unconstitutional racial gerrymander. This was not impermissible race-based decisionmaking.[23]

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[22] District 1 at issue in *Cooper v. Harris* is thus distinguishable from CD 35 in multiple ways. First, CD 35 is a new minority opportunity district created in the fastest growing area in the Nation; *Cooper*'s District 1, in contrast, was a longstanding district that had been electing minority preferred candidates with just under 50% minority-voting-age-population for years. *Cooper*, 137 S. Ct. at 1470. Second, whereas this Court concluded that VRA §2 did not require *Cooper*'s District 1 to have 50% minority-voting-age population, the district court agreed with the plaintiffs that the VRA required the State to draw seven minority opportunity districts in South and West Texas, and CD 35 is a performing minority opportunity district. *See* App. A at 98-100. Third, there is no allegation here that minority voters were "packed" into CD 35, whereas *Cooper*'s District 1 involved a claim that additional minority voters did not have to be added to that district to elect the minority-preferred candidate. *Cooper*, 137 S. Ct. at 1470.

[23] The district court noted that a portion of CD 35 covered some territory in Travis County around Austin that had been in the old CD 25. The old CD 25 was a crossover district (a district where white voters join with minority voters to elect the minority-preferred candidate) that was eliminated by the Legislature in 2011 and the district court's Plan C235 in 2012. The district court's August 15, 2017 order, though, did not hold that CD 35 was invalid on the basis that the Legislature had eliminated this old CD 25 previous crossover district. *See* App. A at 99 n.83.

Regardless, there was no legal violation from eliminating the previous crossover district in old CD 25. Under *Bartlett*, a State has no obligation to draw a crossover district. 556 U.S. at 14-15. A single sentence in dicta in *Bartlett* suggested the possibility of intentional race-based vote dilution if a State eliminated a crossover district. *Id.* at 24 (citing *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-82 (1997)). But the district court was wise not to sustain such a claim here, because the Travis County Hispanic population in the previous crossover district was placed into the new Hispanic opportunity district, CD 35. And CD 35 even elected the *same representative*

III. IRREPARABLE HARM WILL RESULT ABSENT THIS COURT'S INTERVENTION.

Applicants will suffer irreparable harm absent a stay or injunction pending appeal. As discussed, *see supra* p.14, the State must have a congressional map in place by October 1 to allow the 2018 elections to proceed as scheduled. And the district court has made crystal clear its intention to impose its own map for the 2018 elections in the coming weeks. The court stated explicitly that the State must either immediately initiate a special legislative session to "cure the[] violations" found by the district court (thereby effectively waiving an appeal), or else the court will redraw the State's congressional districts itself on an expedited basis. Accordingly, absent an order from this Court permitting the State to continue to use Plan C235 for the 2018 election cycle (as it has for every election this decade), any relief the State may obtain on appeal will come too late to save the 2018 elections from disruption.

To be sure, this Court could wait until the district court has imposed its remedial map to decide whether to issue relief for the 2018 elections (or at least it could wait on the condition that the district court actually imposes its remedy in time for this Court to review another stay request before the October 1 deadline). But that course has little to recommend it, as further delay will only further constrain this Court's ability to meaningfully review the lengthy opinions and extensive proceedings below before deciding whether the State should be permitted to continue using its duly enacted 2013 map in the upcoming election cycle. One way or another, this Court

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(Rep. Doggett) that the previous crossover district CD 25 had elected. So there could not possibly be any vote dilution for the Travis County Hispanic voters moved from the former CD 25 into the existing CD 35.

will have to confront that question before October 1, and it makes far more sense for the Court to do so now than to let the district court drag things out until the eleventh hour. There is certainly nothing that precludes the Court from granting interim relief right now, as the Court has the power to issue orders "in aid of its jurisdiction" over the ultimate appeal in this case, Sup. Ct. R. 20.1; 28 U.S.C. §1651, even if it does not consider the district court's order appealable at this juncture.

Allowing the district court to proceed with its plan to hale the parties, their mapdrawers, and a host of others into court on September 5 to facilitate its intent to wrest from the Legislature the task of drawing maps will also exacerbate the injury to the State and its people. Of course, "*any time* a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (emphasis added) (Roberts, C.J., in chambers); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). But the injury is all the more acute when blocking the State's law will "result in voter confusion." *Purcell*, 549 U.S. at 4-5. That is precisely what will happen if the district court is allowed to proceed with its plan of imposing a competing map mere weeks (or even days) before the process of informing voters of their districts and precincts must begin. And that is to say nothing of the immense waste of scarce resources that will result from having unnecessarily drawn a remedial map should the State ultimately prevail. *See Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986).

This Court has not hesitated to find irreparable injury when States were put under comparable ultimatums to either draw maps immediately or relinquish that constitutionally assigned responsibility to a federal court. *See, e.g.*, *Karcher*, 455 U.S. at 1306-07 (Brennan, J., in chambers). In *Karcher*, Justice Brennan concluded that under a nearly identical ultimatum given by a district court, "applicants would plainly suffer irreparable harm were the stay not granted." *Id.* at 1306. The same is true here. It took the district court five years to declare its own court-imposed map unconstitutional, but the court then gave the State only *three days* to commit to drawing a new redistricting plan or facing the prospect of having a court hastily draw its own maps in a matter of mere weeks. App. A at 105-06. That itself is an affront to the State's sovereignty that should not be permitted to stand.

A stay is also particularly appropriate because the urgency of this request, and the extremely expedited nature of the remedial proceedings the district court intends to hold, are entirely a product of that court's own making. The plaintiffs' challenges to Plan C235 have been pending for *four years*. The district court originally scheduled trial on those claims for the summer of 2014. But rather than proceed directly to live claims against the existing plans, the court canceled that trial and decided instead—over repeated protests by the State—to hold a (second) trial on the State's 2011 redistricting plans. Those plans never received preclearance; they never took legal effect; they were never used in a single election; and they were repealed in 2013. Yet the court not only held *two* trials on them, but then waited another *two and a half years*—until March 2017—to issue its divided advisory opinion on the moot maps.

It was not until the summer of 2017 that the court finally turned its attention to the plans that it ordered the State to use in 2012 and that the Legislature had enacted in 2013. And it was not until August 15, 2017—less than seven weeks before the October 1 deadline of which the court was aware for finalizing maps for the 2018 elections—that the district court issued its decision on Plan C235. In other words, the district court waited more than five years to reverse itself, invalidate its own plan, and find that the Legislature engaged in purposeful racial discrimination when it enacted the court-ordered plan in 2013. Yet after taking five years to rule that its own plan was unconstitutional, the court gave the Governor just *three days* to say whether he would call a special session to redraw the congressional districts on an expedited basis—and thus effectively waive the State's appeal.

Accordingly, to the extent this Court is unable to consider an appeal of the district court's decision in the ordinary course in time to affect the 2018 elections, that is owing to the inexplicable delay of the district court—not anything the State could control. To allow the district court's delay tactics to deprive the State of a remedy for the 2018 elections thus would add insult to irreparable injury.

IV. THE BALANCE OF THE EQUITIES HEAVILY FAVORS THE STATE.

This is not a close case, so balancing the equities is not necessary for a stay or an injunction. Nevertheless, the balance of the equities tips decidedly in favor of the State. In granting a stay under nearly identical circumstances in *Karcher*, Justice Brennan concluded that "the balance of the equities" favored the state applicants because "this Court has repeatedly emphasized that legislative apportionment plans

created by the legislature are to be preferred to judicially constructed plans." *Karcher*, 455 U.S. at 1307. That reasoning applies with added force here as the Legislature seeks to use a plan previously adopted as a remedial plan by the court below and that has governed the last three elections.

In contrast, a stay pending appeal will not harm the plaintiffs. The plaintiffs have voted under Plan C235 for three consecutive congressional elections, all while their lawsuit was pending, and all with the blessing of the district court. Moreover, CD 27 and CD 35 do not dilute minority voting strength. All plaintiffs agree that CD 35 provides minority voters with the opportunity to elect their candidate of choice. And for CD 27, the district court recognized that "failure to place Nueces County Hispanics in a South Texas district did not diminish Hispanic voter opportunity for § 2 effects purposes." App. A at 101. But even if there is some deficiency in the 2013 plan, there will be plenty of time to draw a new map before the 2020 election cycle. A stay thus would not deprive the plaintiffs of any remedy to which they ultimately may be entitled; it would just require them to wait until at least one court has had the chance to review the district court's decision before subjecting the State to a remedy that cannot be undone.

Interim relief is also in the public interest. Plan C235 reflects the statutory policy of the Legislature, which "is in itself a declaration of [the] public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). And a stay will promote the public interest in having the Legislature, not a federal court, draw the State's congressional districts: "The Court has repeatedly held that redistricting and

reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise*, 437 U.S. at 539 (principal op.).

Finally, interim relief will prevent disruption of the 2018 congressional elections, allowing them to be conducted under the same districts that have been used in every Texas congressional election held in this decade. The threat of disruption of the 2018 election calendar is wholly attributable to delays in the resolution of this case that resulted from the plaintiffs' demand for—and the district court's acquiescence to—a trial on the 2011 plans, which never took effect and were never used to conduct a single election. *See supra* p.24. The public interest counsels heavily against saddling Texas voters with the consequences of these avoidable delays.

CONCLUSION

The district court's August 15, 2017 order invalidating Texas's Congressional Districts 27 and 35 and requiring the parties to confer and appear on September 5 for remedial map redrawing proceedings should be stayed pending appeal of the order and any final judgment on all claims. Alternatively, the Court should issue an injunction making clear that, whatever the final disposition of the challenge to the 2013 maps on the merits (and whatever relief may ultimately be appropriate for subsequent elections), the 2018 elections should take place under the 2013 maps. As a final alternative, after granting a stay or an injunction, the Court should convert this application into a jurisdictional statement, note probable jurisdiction, and reverse the district court's holding that Congressional Districts 27 and 35 are invalid. *See, e.g.*, *Perry v. Perez*, 565 U.S. 1090.

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Respectfully submitted.

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